Synthesis of Indonesian health law progressivism: medical cases paradigmatic therapy in judicial process

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ABSTRACT
The achievements of the judiciary in medical cases are not only physically damaged, but also due to a less progressive way of thinking. Medical cases often have to deal with or are more accurately hindered by the use of certain principles and doctrines that fall within the realm of science and theory. The struggle against medical cases is often not defeated by struggles in the physical realm (evidence) but in the realm of the mind, which is symbolized by science and theory. Sometimes defeat is not caused by the use of principles or doctrine alone, but more painfully, sometimes "only" by mere procedural justice. Therefore, progressive law is expected as a paradigmatic therapy to deal with medical cases in the judicial process as an attempt to dive into fundamental problems in science and theory. The idea of progressive law has inspired and excited the intellectual world of law in recent years, even for the foreseeable future. The charm and law enforcement actor of progressive law is not only able to dismantle various perspectives that have not been touched and are considered established in the universe of medical legal thought, health workers law, hospital law, and health law, but also with their ability and courage to synergize various opinions of legal schools with contemporary scientific developments. Progressive law is not only an important vocabulary that must be quoted and discussed when talking about our various legal issues in the present and current era, but progressive law appears as an alternative offer for how medical law should try to overcome various problems and problems of the nation (doctors, health workers, hospitals, and patients).

Keywords: Indonesian health law, judicial process, medical cases, paradigmatic therapy, synthesis progressivism.

1 INTRODUCTION
1.1 BACKGROUND
In building an ideal model of the effectiveness of progressive legal paradigmatic therapy with substantive justice for medical cases, in order to dissect patients’ claims for medical disputes in courts which often fail, it is interesting in this paper as the main problem (core problem), is the opinion of Satjipto Rahardjo (2008:84) which states that the issue of legal certainty is not merely a matter of law, but rather a matter of human behavior. If legal certainty is linked absolutely to statutory regulations, then what appears is actually "regulatory certainty", not or not yet legal certainty, then legal certainty requires effort and does not come suddenly with the issuance of the regulation.
Legal certainty has become a big problem since the law was written. Previously, for thousands of years, when we talked about law, we talked more about justice. Since the civilization of law entered the civilization of written law, that person could simply turn away from what was written down, or worse, we have been stuck there. It would be great, if we say, "stuck in the written law."

The entanglement of the written law can be seen in the normative problem of the provisions of Article 32 letter q of Law Number 44 of 2009 concerning Hospitals which reads: "Every patient has the right to sue and/or sue the hospital if the hospital is suspected of providing services that are not in accordance with the provisions of the law. standards, whether civil or criminal", is contained in the norm of consequences which refers to “allegations of non-standard services” as a condition for carrying out civil and/or criminal lawsuits. The existence of adequate norms can be interpreted in two ways. First, if the patient sues, the patient must prove his claim regarding the existence of non-standard health services, in accordance with the principle of actore in cumbit probatio, namely the plaintiff (patient) must prove his claim. This is impossible to do, because only the hospital is able to prove the existence of non-standard health services, as in the case of Sita Dewati Darmoko, (South Jakarta District Court Decision Number: 1809/Pdt.G/2006/PN. Jak.Sel. dated August 30, 2007 in conjunction with the decision of the Jakarta High Court Number: 218/Pdt/2008/PT DKI dated November 27, 2008 in conjunction with the decision of the Supreme Court of the Republic of Indonesia Number: 1563 K/Pdt/2009 dated December 29, 2009 in conjunction with the decision of the Supreme Court of the Republic of Indonesia Number: 515 PK/Pdt/2011 dated February 2, 2012 which has permanent legal force (inkracht van gewijde), in which the patient is not given the results of the medical record by the doctor who first treated him, resulting in the patient's cancer having entered stage four.

Second, that health services that are not in accordance with the standards have been regulated as a legal consequence in the provisions of Article 29 paragraph (2) of Law Number 44 of 2009 concerning Hospitals which reads: "Violations of the obligations as referred to in paragraph (1) are subject to administrative sanctions. in the form of: (a) a warning; (b) written warning; or (c) fines and revocation of hospital permits.”

Therefore, the adequate norm essentially hinders access to lawsuits to achieve the provisions of Article 46 of Law Number 44 of 2009 concerning Hospitals which states: "The hospital is legally responsible for all losses incurred due to negligence committed by health workers in hospitals," namely compensation due to doctor's negligence/error, because only “services that are not up to standard” can be sued, while “errors/omissions that harm the patient” cannot be sued.

Medical/health service actions by doctors/health workers/hospitals that can cause malpractice are carried out with the patient's informed consent, which the patient should be aware of all the risks, because medical action is only an attempt to cure the patient. This is what makes it difficult to prove actore in
cumbit probatio, because achievements in the form of medical services have been carried out by doctors, health workers and hospitals, meaning that the defendants (doctors, health workers and hospitals) have not formally defaulted (Article 1239 and 1243 of the Civil Code), because the form of achievement in the form of medical action has been agreed upon by the patient regardless of the consequences.

The problem then is related to the negligence of the doctor/health worker/hospital which, according to the plaintiff (the patient) caused disability or death to the patient. In fact, the provisions of Article 77 of Law Number 36 of 2014 concerning Health Workers states: "Any recipient of health services who are harmed due to errors or negligence of health workers can ask for compensation under the provisions of the legislation."

Proof of this is not an ordinary fact disclosure, because medical/health action is a professional action based on medical/health science, not on ordinary logic. As stated in the provisions of article 66 paragraph (1) of Law Number 36 of 2014 concerning Health Workers which reads: "Every health worker in carrying out his practice is obliged to comply with Professional Standards, Professional Service Standards, and Standard Operating Procedures." This causes the plaintiff (patient) to be unable to prove standard or non-standard medical/health actions, because there is no competence to assess medical/health service standards. It is as if the service standards intended by the legislators at that time were general standards as outlined in the articles concerning the obligations of doctors, health workers and hospitals in the law, and the juridical implications only resulted in a warning to doctors, health workers, and hospitals, because it is a matter of mere administrative requirements, without any civil or criminal sanctions.

We have started to dare to talk about extra-ordinary crime and extra-ordinary measures which all refer to extraordinary situations. One more thing that apparently still needs to be encouraged is the courage to think extraordinary. Extraordinary actions will not appear, if it does not start from a willingness to think extraordinary.

The extraordinary method of law that is questioned in this study is the importance of "rule breaking" in the law enforcement system in Indonesia.

What lessons can we draw from processes outside the law, but ultimately change the course of the law by acting “creatively” and “jumping”? Jumping here in the sense of not following or being bound by past habits, or commonly called jurisprudence, but coming out with new decisions altogether. If the legalistic, positive-analytical method of law is referred to as "rule making," creative and intuitive thinking is called "rule breaking." Both in the Lindenbaum case against Cohen, as well as the Shanti Marina case against Doctor Wardhani and the Puri Cinere Cibinong Hospital, we see the flashing of humans, not legal machines, whether they are state, civil, or otherwise. Without including human factors and roles we cannot explain extralegal events.
This study underscores Julius Stone's (1966:81) statement that legal issues cannot be included or boxed into a standard scheme or formula. Law has its uniqueness, so leave the legal affairs to humans and let machines do their own work, said Stone.

Surrendered to humans, means allowing the law to be able to make decisions that are full of choices. In the current state, it is humans who are able to complete the work full of these choices. This is also supported by the opinion of Danah Zohar and Ian Marshall (2000:47), that humans have the ability to think that is not only logical, mechanical, and serial, but also creative and rule breaking. Rahardjo (2008:99) argues, that the machine has not been able to do the latter.

The law can never serve humans if it does not work with feelings and care (compassionate). To be able to serve humans well, the law cannot only count and spell out the articles of the law, but also work with empathy and truth (dare) and machines are not capable of doing that.

If the formulation of justice is as contained in Law Number 29 of 2004 concerning Medical Practice, Law Number 36 of 2009 concerning Health, Law Number 44 of 2009 concerning Hospitals, and Law Number 36 of 2014 concerning Health Workers, we compare with the level of rule-breaking (legal breakthroughs) will obtain substantial justice - Werner Menski (2006:209) mentions perfect justice - which is manifested and implemented in the novelty of the following research.

The ideal new formula model for the concept of judge justice in resolving medical disputes in progressive law-based courts is as follows:

a) Contemplation of historical morality: substantial justice.
b) The authority of progressive law enforcement: law improvisation (rule-breaking).
c) Progressive law: representing the people's voice.
d) Progressive judge's decision (landmark decision): a sense of historical life.

If the formula is interpreted, developed, and visualized, it will look like the image below.
Figure 1: Ideal Model of Progressive Judges' Justice Concept in Resolving Medical Cases in Court

Source: Processed from the results of research conducted by the author (2020)

Oliver Wendell Holmes (1963:251), a scholar and Supreme Court Justice who is well-known in the United States with his famous Holmes dictum, "The life of the law has not been logic, but experience." With these words, Holmes places himself in the ranks of legal thinkers who do not depart from the creed of "rules and logic," but, as he puts it, "experience."

Experience is not a text, the law does not depart from the reading of what is written in the regulations. Rules provide a framework, but within it, humans are at play. He is faced with many choices and demands and desires that are raised in society. Gustav Radbruch (1973:263) calls it justice and usefulness for life (utility, reasonableness). Logic becomes a symbol of regulation and rational implementation, while experience is how humans (judges) provide social and humanitarian content (Rahardjo, 2008: 100).

An interesting problem in this research is the search for deeper legal meanings related to ontological, epistemological, and axiological aspects to carry out rule breaking, according to the characteristics of progressive law. Rule breaking can be divided into two camps, rule breaking as an idea (idealism) and as a reality (materialism). The dialectic of both shows an ontological syncretism between idealism and materialism, called dualism.
The formula model for the effectiveness of the work of progressive law on medical disputes in court in substantive justice in order to achieve the goals of progressive law when interpreted, developed, and visualized, will look like the picture below.

Figure 2: Ideal Model of Effectiveness of Progressive Legal Paradigmatic Therapy with Substantive Justice for Medical Cases in Court

Based on the description above, the law never works in a straight line, but is full of turmoil. It does not run at the level of rule making (making and running) as a reflection of order, but also rule breaking (breakthroughs). Actually, from the very beginning, the legislator himself realized he made the law based on the assumption of a normal situation. To anticipate the occurrence of a situation that is always normal, the law has actually provided doors to get out of the emergency. An example of "emergency doors" is where the law makes a breakthrough against its own regulations, doctrines, etc.
1.2 PROBLEM

Based on the above background, it can be briefly formulated a formula that seeks to find the answer in this research, namely: how is the effectiveness model of the work of progressive law on medical cases in court in achieving substantive justice by using an analytical knife of the ideal model of progressive legal paradigmatic therapy which is suitable for future?

1.3 RESEARCH OBJECTIVES

This study aims to describe the characteristics of progressive legal paradigmatic therapy and analyze how effective progressive legal paradigmatic therapy works for the future in courts of medical/health cases in the context of substantial justice from both ethical and medicolegal aspects.

2 RESEARCH METHOD

The research for this paper can be broadly grouped into the realm of the socio-legal approach. The socio-legal approach by Wheeler and Thomas states that socio-legal studies basically go deep into the substance of the law as the law is written in a statutory regulation and others. Then, socio-legal also developed new methods as a result of the marriage between legal methods and social sciences such as socio-legal qualitative (Ziegert, 2005) and socio-legal ethnography (Flood, 2005). In addition, as done by Thomas Scheffer who uses actor network theory to describe the performance of judges and lawyers through micro-historical legal discourse (Scheffer, 2005). Anne Griffiths also did the same thing by using field research among the Bakwena people in Africa to explain the experience of "judging" the community in daily life and in responding to the ideas of Western Law (Sulistyowati Irianto, 2012: 6). The legal figures above have given new nuances in examining legal issues with the help of social science, considering "ubi societas ubi ius," where there is a community there is law.

Reviewing the application of socio-legal studies carried out by legal figures (such as Wheeler, Thomas, Ziegert, Flood, Scheffer, and Anne Griffiths) to resolve the legal problems faced has opened our eyes, that in fact the presence of socio-legal is a door for branches of methodologies that agree to continue to develop and become the answer to the deadlock of methods and ways of thinking to solve legal problems.

The purpose of developing socio-legal is to provide a broader definition in achieving substantive justice. As we know, that in interpreting the law sometimes law enforcement officers, lecturers who are then transmitted to their students assume that the written law is the most correct like God. In fact, only by interpreting the law or other written regulations will close our eyes from the reality that is actually happening. Justice is one of the three basic legal values proposed by Radbruch (1973:263) which emphasizes that a good law must have three basic values, namely justice, legal certainty, and expediency.
What actually confirms that the purpose of the existence of law is to achieve protected justice in the form of legal certainty, so as to provide benefits for the benefit of mankind.

3 RESEARCH RESULT AND DISCUSSION

3.1 AN EXTRAORDINARY WAY OF JUDGMENT: “RULE-BREAKING”

Since humans have been relentless in their struggle with the law, in fact, in matters of law and order, we are not always faced with a straight and normal journey, but often it is full of sharp bends and quite steep ups and downs.

Laws, legislation, or regulations are generally designed based on certain assumptions. The court's design to be like this or that, for example, is based on an estimate of the average number of cases that come in. From there, the number of judges, clerks, courtrooms, and other physical facilities is determined.

However, circumstances do not always match expectations, so that extraordinary circumstances can arise that are not at all expected. However, a situation like this has also happened in the United States, following the production of cars which resulted in flooding of vehicles on the roads. In turn, there were many accidents that ended up in court. Court designs that are not ready to face the flow of incoming cases, eventually have to prepare special provisions, or face the risk of collapsing.

In history, new forms of crime have emerged that are not ready to be faced by existing legislation. The latest development is the widespread use of computers and the internet which, apart from introducing new praxis in the world of commerce, also causes cybercrime to occur.

The events described above show that at times the law is faced with extraordinary situations. Whatever happens and is faced, the law cannot stop and refuse to work, solely on the grounds that it is not prepared for these things. In such a situation, we can't help but enter the realm of extraordinary ways of law. If ordinary or normal methods are referred to as "rule making", then this extraordinary method is called "rule breaking" or breaking existing laws. According to Rahardjo, there are three ways to do rule breaking, namely: (a) using spiritual intelligence to wake up from the downturn in the law, the law gives an important message for us to dare to look for new ways (rule breaking) and not let ourselves be restrained by the old ways, implementing the law. the old and traditional ones that clearly hurt the sense of justice more; (b) the search for deeper meaning should be a new measure in carrying out the law and having a state of law. Each party involved in the law enforcement process is encouraged to always ask their conscience about the deeper meaning of the law; and (c) the law should be carried out not only according to logical principles, but with feelings, care, and involvement (compassion) for weak groups (Yusriyadi, 2006:32-33).

With this rule breaking, there is an urge to change Talcott Parsons' cybernetic theory model into an ideal model of progressive law (Satjipto Rahardjo) to be more urgent to review how far the suitability
of progressive law as an ideal model in the context of legal science that is characterized by Indonesia. The legacy of Rahardjo’s thoughts would be more than sufficient for us, who since the beginning of the founding of the Unitary State of the Republic of Indonesia, have proclaimed themselves as a democratic legal state to create an orderly, harmonious, just and prosperous society. The question is, do we want to open the eyes of our hearts and provide space and opportunity for the law to reclaim our true identity? Or are they using the law to maintain the status quo? Rulers to perpetuate their power, law enforcement officials make it a false pride, that he is the commander of the law whose every word must be followed, even though he is far from justice and has lost his conscience. This is what is interesting to be used as the main problem (core problem) in this study, namely by formulating a formula for the effectiveness of the work of law on medical disputes in court in substantial justice and not legal-formal justice in order to achieve progressive legal goals in Indonesia should be included in this area of study. Talcott Parsons’ cybernetic theory model, as shown in the juridical-sociological thinking orientation framework, then shows the configuration of doctrinal-deductive and non-doctrinal-inductive characteristics, such as starting to move towards the ideal model, namely progressive law with Indonesian characteristics (as shown in Figure 2: The Ideal Model of Working Effectiveness Paradigmatic Therapy of Progressive Law with Substantive Justice for Medical Cases in Court in this paper).

3.2 ONTOLOGICAL, EPISTEMOLOGICAL, AND AXIOLOGICAL ASPECTS OF RULE-BREAKING PROGRESSIVE LAW

An interesting problem in this research is the search for deeper legal meanings related to ontological, epistemological, and axiological aspects to carry out rule breaking, according to the characteristics of progressive law. Rule breaking can be divided into two camps, rule breaking as an idea (idealism) and as a reality (materialism). The dialectic of both shows an ontological syncretism between idealism and materialism, called dualism.

The epistemological aspect relates to the methodological steps taken during the rule breaking process. There are also two extreme points, namely intuitionism and empiricism.

The quarter circle scheme is formed by drawing two axis lines, vertical (y) and horizontal (x). The axis (y) reflects the ontological aspect of idealism, the epistemological aspect of intuitionism, and the axiological aspect of justice. Meanwhile, on the (x) axis, the ontological aspect is reflected in the form of materialism, the epistemological aspect in the form of empiricism, and the axiological aspect in the form of usefulness, as shown in the picture below to explain the relationship between the three.
The attraction between the two axes moves the pendulum of the line in the middle. The line between the y and x axes does not have to divide the space between them symmetrically. The position of the line between this is very dynamic, reflecting the resultant of certain forces in the legal system and non-legal system. Rahardjo (1995:17) and Darji Darmodiharjo & Shidarta (1999:58) also used illustrations by making and axes like this one. There are many theories that analyze these forces, for example the Parsonian Cybernetics theory, which describes the flow of information and energy flows.

The line between this shows the ontological aspect in the form of dualism (the relationship between idealism and materialism), the epistemological aspect in the form of rationalism (the relationship between intuitionism and empiricism), and the axiological aspect in the form of legal certainty (the relationship between justice and expediency). This intermediate line may in one legal context be heavy in the direction of the y-axis, but in another context it may be heavy in the direction of the x-axis. This z-axis movement pattern will be shown schematically to explain the rule breaking models. The z-axis simultaneously divides the pendulum's movement area into two zones, namely 45° at the boundary and 45° at the bottom.

In the scheme introduced in this research, it still refers to the three dimensions at once, namely the ontological, epistemological, and axiological dimensions, for the following reasons:

a. The issue of certainty and expediency refers more to epistemological and axiological aspects, so that the conceptualization is too narrow if only based on the axiological realm. The
purpose attached to positive law, first of all, is to provide certainty (according to the series of words "ponere-posui-positus" which means to put down, so that matters of justice and benefit also depend on the law that has been put in place). Even if the law is interpreted narrowly as a judge's decision, what is pursued in the first place in the judge's decision is certainty, namely ensuring which party is more justified according to the law or what kind of law determines the final word on the case (several legal principles such as: res judicata pro veritate habetur and litis finiri oportet, also remind about this certainty). In progressive law, to carry out rule breaking from the epistemological aspect of certainty (the z-axis), it is included in the realm of inclusive legal certainty governance, namely the search for deeper meaning in an inclusive manner, should be a new measure in carrying out the law and having a state of law. Each party involved in the law enforcement process is encouraged to "be smart" to always ask one's conscience about the deeper meaning of the law.

b. The purpose of expediency in law has a particular dimension (casuistic), pragmatic practical, and short-term. The judge's decision does not want to be trapped in the provision of benefits on a particular-casuistic scale, namely for the sake of satisfying the disputing parties in the courtroom. As legal bearers (functionaries), judges should not be confined to just looking at the law within the scope of their case (probleemdenken), but they must reflect the law as a system (systeemdenken) (Sudikno Mertokusumo, 1991: 54-59). The judge's decision ensures that the solution determined or a case can indeed be justified according to a systematic or problematic way of thinking. In the practice of positive law enforcement, judges are required to fulfill three domains of law enforcement which Radbruch (1973:263) calls triadism which includes three legal applications, namely philosophical, dogmatic, and sociological law enforcement. Each of these laws is based on three different basic values. The three basic values are the value of justice reflecting on the vertical y axis of the ontological aspect, the value of certainty reflecting on the inclined z axis of the epistemological aspect, and the value of utility reflecting on the horizontal x axis of the axiological aspect. The heart of Radbruch's legal philosophy consists in his teachings on legal concepts and legal ideas. Radbruch says, that "The idea of law is defined through a triad of justice, certainty, and utility" (Radbruch, 1973:263). The value of utility or usefulness arises from the analysis of the value of justice. The value of expediency is directly related to the interests of each legal subject, so that the axiological aspect on the x-axis emphasizes the protection of the interests of legal subjects whose position is weakest. In the context of progressive law, to carry out rule breaking from the axiological aspect of benefit (x axis) is included in the realm of directive benefit, namely the law should be carried out not only according to logical principles, but with feelings, care, and involvement (compassionate) to groups who weak.
c. The positioning of positive law on the z-axis also shows an irony, that the value of legal certainty is in constant need of searching. Legal certainty is precisely uncertainty because the law must find its meaning, the often quoted saying of Paul Scholten (1954:27) seems appropriate to illustrate this argument, namely, even though the law is already available, it still has to be found (Het recht is er, doch het moet worden gevonden) if legal certainty refers to the epistemological aspect, we perceive it in the realm of inclusive legal certainty governance (good behavior). The three basic legal values as reflected on the y-axis of the ontological aspect in the form of justice, the z-axis of the epistemological aspect of certainty, the x-axis of the axiological aspect of benefit, have a tension relationship (spanningsverhaling) with each other. The tension relationship in each of these axes is understandable, because all three contain different demands and have the potential to conflict with one another. If we place legal certainty as a priority value, then this legal certainty will shift the value of usefulness and the value of justice to the side, because the main thing for legal certainty is the existence of the regulation itself. Whether the regulation must be fair and have benefits for the community is beyond prioritizing the value of legal certainty. Because of these different values, the assessment of the validity of the law can vary. What is the attitude of the judge when facing a dilemmatic case as a result of the existence of spanungsverhaling, Radbruch (1973:264-265) says: "..... where statutory law is incompatible with the requirements of justice 'to an intolerable degree', or where statutory law was obviously designed in a way that deliberately negates 'the equality that is the core of all justice', statutory law must be disregarded by a judge in favor of the justice principle."

Based on Radbruch's opinion, it can be said that a judge can ignore the written law (statutory law/state law) if the written law in practice does not fulfill the sense of justice as expected by the justice-seeking community. Based on data from Indonesian Corruption Watch, the bad character of the Corruption Court is indicated by the record that in mid-2012 there were as many as 25 defendants in corruption cases who had been acquitted. One person at the Semarang Corruption District Court, 3 people at the Bandung Corruption Crime District Court, and 21 people at the Surabaya Corruption Crime District Court. This data coupled with the acquittal of 14 corruption defendants (former members of the Kutai Kartanegara Regional People's Representative Council) at the Samarinda Corruption Crime District Court, indicate that judges in deciding cases focus more on dogmatic or statutory law aspects, and often judges are only tasked with become the mouthpiece of the law (la bouche de la loi) which results in the creation of mere formal/procedural justice, often encountering a deadlock in formal legality (Suteki, 2015:93-95). In the context of progressive law to carry out rule breaking from the ontological aspect of justice (y axis) it is included in the realm of substantive justice values, namely using spiritual intelligence to wake up from adversity, the law gives an important message for us to dare to seek new paths (rule breaking).
do not allow yourself to be restrained by the old ways, carrying out the old and traditional laws which clearly hurt the sense of justice more.

Based on the description above, the law never works in a straight line, but is full of turmoil. it does not run at the level of rule making (making and running) as a reflection of order, but also rule breaking (breakthroughs). Actually, from the very beginning, the legislator himself realized, he made the law based on the assumption of a normal situation. To anticipate the occurrence of a situation that is always normal, the law has actually provided doors to get out of the emergency. An example of "emergency doors" is where the law makes a breakthrough against its own regulations, doctrines, etc.

We also learn that the law does not always contain an atmosphere full of order and order, but also disorder. Here the law is aware of its shortcomings, thus providing various mechanisms to save its existence. If this is the case, we must say, that which is orderly and that which is not regular exists and is intertwined in the law.

Regarding the extraordinary problems currently facing the law in Indonesia, it is advisable not to hesitate to take progressive steps. Progressive law is the law that frees us from “the shackles of the legal cage.” We do need the law, but don't let the law happen to shackle us (Rahardjo, 2010: 140-141).

So far, we are good students and obedient to the way of law commonly used by the nations of the world, including its principles, its doctrines. Without realizing it, we have shackled ourselves by assuming that we cannot get out of the praxis that has been perceived as universally lawful. Progressive ideas are expected to help us get out of the confines of legal ways that are considered standard. Here, progressive law frees us from the way the law has been carried out so far.

3.3 INDONESIAN HEALTH LAW NEEDS PROGRESSIVE JUSTICE: THE HUNT FOR JUSTICE

We have become increasingly immune to all criticism or negative assessments of the workings of the Indonesian legal system. Finally, when Churaswamy, the United Nations envoy, condemned our legal system as one of the worst in the world, we only had a short fuss with various comments, but after that silence returned. It seems we are resigned to a bad situation. We are sad and weep in our hearts, but hardly take any meaningful steps or actions to deal with such dire legal conditions. It was as if with a little fuss, the matter was solved already. Business then went on as usual, until later in the future the next commotion appeared.

This research tries to wake us all from such “apathy” and together tries to give a firm and clear answer to our bad legal condition. In this study, we will try to dismantle a fairly basic problem, namely the concept of justice that we have been operating in the administration of our medical law. It seems there is something that needs to be reformulated about our opinion about justice. This justice is a fundamental matter for the operation of a legal system. The legal system is actually a structure or completeness to
achieve a mutually agreed concept of justice. In this study, a paradigmatic therapeutic concept will be proposed which is referred to as "progressive justice".

In any legal system in the world, justice has always been the object of the hunt, especially through the judiciary. From the observation of the legal system in this world, almost no country is completely satisfied with the legal system it uses. Therefore, changes, changes or reforms can be seen from time to time in various countries. In fact, the United States, which is often the "champion" until now, is still anxious about wanting reform (Rahardjo, 2008:270).

Then where does the wind of renewal come from? This is because the country concerned feels that something is not right in the system it uses to seek justice. In the United States, this dissatisfaction is expressed in various dramatic expressions, such as the collapse of the American criminal justice system and the expensive failure of the American criminal trials. It turned out that the collapse was also related to an unclear focus on justice (Rahardjo, 2008:270-271).

The system or administration of medical law in Indonesia is currently in an atmosphere of collapse. The thing that is most often highlighted is the performance of our courts or justice system in medical cases which is far from satisfactory (Poll results conducted by the author in July 2020). In fact, the focus of the collapse occurred not only in the courts but more broadly than that. Based on experiences in other countries, the focus of attention would be on our concept of justice and what needs to be improved. As in the case of Van Wyk v. Lewis as follows:

To show the complexity of establishing factual relationships with seemingly simple cases of medical negligence, research conducted by Catherina E. Pienaar (2016:228) turns to locus classicus Van Wyk v. Lewis. The plaintiff (patient) came with signs and symptoms of an inflamed appendix and underwent surgery to remove the appendix. When the stomach was opened for surgery, the surgeon found that the patient's gallbladder was also affected by an obvious stomach infection. Later, the surgeon saw signs of superficial necrosis. The surgeon decided to empty the gallbladder, and made an incision into the gallbladder to drain septic matter. Surgeons struggled to suture the gallbladder because of the fragility of the organ. To increase visibility, he packed his wound with some gauze. Then the gauze is removed and the wound is closed. A gauze is maintained on the abdomen. Several months later the plaintiff (patient) evacuated a piece of gauze from the rectum, and the prosecution (patient) action was launched against the surgeon. The matter was heard in the Court of Appeal at Bloemfontein and Lordship Justice Wessels explicitly rejected the maxim res ipsa loquitur. He said that the fact the gauze was left on the patient was not conclusive of negligence. Lordship envisions cases where it would be better to suture the patient in an emergency and deal with the gauze search at a later stage. To further complicate matters, the surgeon delegated the gauze count to the nurse, who was a party to the legal action.
The majority judgment in the case of Van Wyk v. Lewis rejected the maxim res ipsa loquitur. Several South African medical writers disagree with these findings. The fact that an object was kept in the patient's abdomen during the operation (an unforeseen occurrence of the operative event) and under the control of the surgeon must make a factual conclusion of negligence based on the fact of the injury which demands an explanation from the defendant (doctor and hospital). They argued that gauze scraps were “absolute” evidence of negligence (prime facie evidence of a breach of legal obligation), and that regardless of the circumstances of the operation, surgeons should foresee the loss of gauze swab residue and should exercise caution against them (behavior that can be sacrificed). In other words, res ipsa loquitur: "the facts speak for themselves". To judge this argument, the requirements of the maxim must be tested against the facts in the case of Van Wyk v. Lewis in the medical realities discussed in this study. It is clear that at least two of the maxim requirements are not met. First, negligence must be inferred from the incident without requesting further information; and second, events must be under the surgeon's control.

In the case of negligence, based on the same facts, the plaintiff (patient) will have difficulty in proving liability. First, the plaintiff (patient) must state that the defendant (doctor and hospital) acted wrongly by violating his legal obligation to the plaintiff (patient), i.e. the surgeon left gauze swabs on the patient's abdomen, and therefore failed to treat the plaintiff (patient) accordingly to the expected standard. Second, the plaintiff (patient) must prove that the defendant (doctor and hospital) was negligent by not acting according to a hypothetical and reasonable medical professional standard under the same circumstances (victimized behavior), i.e. predicting certain complications and taking steps reasonable steps to prevent foreseeable risks. The court will also consider whether in an emergency, such as in a medical emergency, the legal obligations of the accused (doctors and hospitals) are less severe because certain medical emergencies cannot be foreseen and prevented. The way in which defendants (doctors and hospitals) manage emergencies will be investigated, given their ability to plan ahead of time. Finally, the plaintiff (patient) must prove that the wrong and negligent actions of the defendant (doctor and hospital) were the real cause of the damage, which was not so far away as to assume responsibility for the defendant (doctor and hospital). With regard to the factual cause and without remoteness of the damage, the plaintiff (patient) has the burden to prove that it was the swab (gauze) that caused continuous pain in his stomach, e.g. not sepsis caused by the contents of the spilled gallbladder and perforated appendix, which occurred not due to defendant's fault (doctors and hospitals). It would be difficult to provide evidence to show a relationship between the event and its sequel (the action was bad) and causality. I am not sure whether medical information regarding the plaintiff's (patient) proposition will be available in 1924 (Pienaar, 2016:228).
3.4 PROGRESSIVISM OF STRICT LIABILITY: CREATIVE, INNOVATIVE, AND TRANSFORMATIVE JUDGES

Judges in deciding medical disputes must dare to do rule-breaking (legal breakthroughs), meaning that judges should be careful in applying liability based on fault to doctors, health workers, hospitals, and health providers who cause losses due to errors or omissions. Although the social policy to compensate patients/health care recipients who are injured is considered a commendable act, where the basis for judging responsibility must be placed on the basis of morals and propriety (moral and fatsoen) in a system if the responsibility is based on error (liability based on fault).

Courts can actually use this strict liability not because of its inherent value, but as a means to change the situation from a liability based on fault system to a strict liability system. Absolute responsibility can be useful as a formula to dilute the rigidity of logical-rational fault-finding, when the essence of the error itself tends to decrease.

Courts should formulate specific rules and criteria for cases of medical negligence to encourage them to stay away from abuse and broadening the interpretation of liability for errors that cause confusion. Policy considerations such as doctors, hospitals, health workers and health service providers who have greater access to facts to explain injuries, unconsciousness of patients and health service recipients at the time of injury, relationships between doctors, health workers, hospitals, and/or health providers with patients and health care recipients and conspiracies of silence, which lead to the development of liability based on fault, will fully justify the exclusion of the normal principle of burden of proof and cases of “unrelated injury” or in action. against doctors, health workers, hospitals, and health providers who are ambivalent.

The shifting of the burden of proof against doctors, health workers, hospitals, and health service providers without referring to liability based on fault will at all be a clear solution and refer to other exceptions that exist for the general principle, that the burden of proof lies in for patients and recipients of health services (plaintiffs), is not at all comparable to the old system, namely on the basis of liability based on fault. This means a major step towards strict liability or other compensation systems.

In this regard, ideally there are three conditions that must be met if strict liability may be applied, namely: (1) evidence of an unexplained incident; (2) if the incident would not have occurred under normal circumstances, without any negligence/negligence on the part of doctors, health workers, hospitals, or health service providers themselves; and (3) circumstances indicate that the omission/negligence was caused by none other than doctors, health workers, hospitals, or the organizers of health service facilities themselves. If the medical error or omission is suitable for this criterion, the burden of proof shifts to the doctors, health workers, hospitals, and health service providers.
Based on three conditions that must be met if strict liability is applied in accordance with the above formula, if a patient/health service recipient sues or sues a doctor, health worker, hospital, or provider of health service facilities in this case of medical negligence, then patients/recipients of health services must find facts that meet the following criteria: (1) facts may not exist/occur if doctors, hospitals, health workers and providers of health care facilities are not negligent; (2) the fact that it occurs is indeed the responsibility of doctors, hospitals, health workers and providers of health service facilities; and (3) the fact occurs without any contribution from the patient/health care recipient.

3.5 PARADIGMATIC THERAPY OF MEDICAL CASES IN COURT

3.5.1 Case of Ntsele v. MEC for Health Gauteng Provincial Government

In the case of Ntsele v. MEC for Health Gauteng Provincial Government, the plaintiff's baby (patient) suffered severe brain damage following a considerable delay in the delivery of the baby. The plaintiff (patient) had a previous caesarean section. New pregnancies do not occur. The plaintiff (patient) attended a prenatal clinic, where all prescribed prenatal pregnancy tests were performed, which appeared to be normal. On September 7, 1996 the plaintiff (patient) experienced labor pains, she arrived at the clinic at 5 am. He was attended by two nurses who failed to monitor the fetal heart rate and labor contractions. Plaintiff (patient)'s cervix was severed to hasten delivery, no progress was made and plaintiff (patient) was transferred to hospital, it is not clear by whom and why the decision was made to transfer her to hospital at 8am. There was no doctor available to examine the plaintiff (patient) and the nurse did not provide follow-up care. The plaintiff (patient) was provided with his clinic file and instructed to register his admission. Registration takes two hours. He was then transferred to the ward. He informed the nurse at the hospital that his membranes ruptured at the clinic. A cardiotocograph (CTG) was applied to her abdomen for twenty to thirty minutes to monitor the impact of contractions on the fetal heart. Later, at an uncertain time, a doctor arrived, spoke to the nurse and examined her mother. The doctor told him to press. He "pushed" for a long time, but the birth process did not progress. The doctor decided to do an episiotomy. After an uncertain time which the plaintiff (the patient) thought seemed like an eternity, she gave birth. The plaintiff (patient) immediately realized that the baby was not crying or breathing properly. The nurses took the baby to the treatment room where he was resuscitated. It was confirmed that the baby had cerebral palsy. The baby died 20 days later. The plaintiff's case (the patient) was based on the allegation that the nursing staff at the clinic and at the hospital did not adequately monitor the condition of the unborn baby. Inadequate hospital records are available to describe circumstances during birth. This lack of evidence led the judge to conclude that the event should be interpreted as having “an unknown cause.” The defendants (doctors and hospitals) in their rebuttal denied the evidence based on cause and effect. The defendants (doctors and hospital) stated that it was possible that brain damage caused by
cerebral palsy occurred in the womb before the birth process. This alternative explanation, if accepted by the court, would lead to the conclusion that the birth process, even if it occurs without the necessary treatment, cannot cause injury to the child, as the damage occurs during pregnancy.

Allegations determining factual cause and negligence (culpa) are complex and should at least be addressed as follows: (1) The fact that doctors and nurses did not provide the required standard of care relevant to obstetric procedures. From a non-medical point of view this aspect seems obvious, but from a medical information perspective there is less information regarding previous pregnancies, management and problems during prenatal care, whether the plaintiff (patient) was full term when the membranes ruptured and labor started, whether the head was still elevated during the delay, early in labor, whether the CTG (cardiotocograph) reading was normal or indicated the baby was in distress, did the mother's cervix dilate when she was asked to push; (2) The fact that they should have been aware that prior fetal disturbances in pregnancy could reoccur; (3) The fact that they should be aware that natural delivery after a previous cesarean delivery carries a high risk of complications due to the formation of scar tissue in the uterus; (4) The fact that premature rupture of membranes carries a high risk of causing injury to the fetus; (5) The fact that fetal heart rate monitoring is very important to determine fetal status, especially with a history of previous caesarean section; (6) The fact that failure to monitor fetal heart rate is a substandard treatment, it allows the unborn baby to remain in distress without medical assistance; (7) The fact that poor progress in labor when there is a history of previous cesarean section is an indication of complications; (8) The fact that without competent, experienced and skilled personnel to perform cardiotocograph (CTG), diagnostic assistance becomes ineffective. The decelerations and accelerations seen on CTG represent cardiac reactions of the unborn baby during surgery and delivery, and should not be ignored but followed up with a medical professional; (9) The fact that inducing and thereby augmenting a natural birth, in the presence of a previous cesarean section, increases the risk of fetal compromise and the risk of uterine rupture; and (10) The fact that stimulating and augmenting the birth process, in the presence of a depressed fetus, can cause inadequate or over-stimulated uterine contractions or a compromised uterus, with a serious possibility of oxygen deprivation to the baby (birth asphyxia), which can lead to cerebral palsy baby (Pienaar, 2016:250).

The medical expert evidence mentioned above is available at the time the case is brought to court to establish factual causation and negligence. In the greater likelihood, the weight of evidence presented by the plaintiff (patient) is incomplete. The plaintiff (the patient) relied on the common assumption, that delays in treatment and failure to monitor fetal status caused injury to the infant. This is not a reliable form of reasoning, as such accusations assume a chain of causality and a general conclusion of negligence without expert medical evidence, from which it remains impossible to draw reliable legal conclusions. The court's determination must rely on an analysis of sound reasoning from expert medical evidence,
which for all purposes excludes the application of maxim res ipsa loquitur. The element of guilt is not problematic, but in order for the court to determine the element of negligence (culpa), the court must hear evidence regarding the personal behavior of nursing and physicians consider the expected standard of care. Assuming that the CTG readings do not show the baby is in distress, the initial action of the nursing personnel will be inadequate and not in accordance with accepted medical standards, but they will not be held responsible, because this action does not cause damage. Every medical aspect of this case is part of a chain of medical events that must be analyzed to determine negligence, cause and then liability (Pienaar, 2016:250).

3.5.2 Case of Buthelesi v. Ndaba

Another attempt to reintroduce the maxim res ipsa loquitur in the case of Buthelesi v. Ndaba, where the defendant (doctor and hospital) performed a total abdominal hysterectomy on the claimant (patient). About 6 weeks after surgery, the plaintiff (patient) suffered from urinary incontinence, when urine leaked from her vagina. Medical professionals determined that a vesicovaginal fistula had developed that was causing the problem. Fistulas don't develop quickly after surgery, but only about 6 weeks later. The plaintiff (patient) underwent a number of urological repair operations. Relying on the medical facts mentioned above, the plaintiff (patient) instituted legal action against the gynecological surgeon who performed the hysterectomy. Although medical experts agree that fistulas do not start spontaneously and are triggered by something that happened during a hysterectomy, they do not agree on the cause of fistulas, where experts for the plaintiff (patient) maintain that damage occurs to the blood supply of the bladder wall during bladder surgery of the bladder, uterus or when stopping blood from flowing from the vaginal vault when lifting the cervix. Medical experts for the defendant (doctors and hospital) argued that no one knew how the fistula developed, as it did 6 weeks after the operation and any reason given to the court was purely speculative. The plaintiff's (patient) case was rejected at the time of appeal.

From the medical literature that abdominal hysterectomy is the surgical removal of the uterus and cervix through an abdominal incision. The cervix is removed from the top of the vaginal vault and then the vaginal vault is sutured closed, the bladder is located in front (anterior) of the uterus and although the uterus and bladder are close, they do not share a wall. At the beginning of the operation the bladder is separated from the uterus. Previous surgery in the area, such as a cesarean section, may cause an attachment to form between the uterus and the bladder. Furthermore, the medical literature provided by Hilton and Cromwell investigated the rate of vesicovaginal fistula formation and urethrovaginal fistula formation among women undergoing hysterectomy. They found that the risk of urogenital fistula was associated with the type of hysterectomy and the indication for hysterectomy. They observed that the risk was lower immediately after hysterectomy for benign conditions in women 50 years of age or older and
increased over the further study period. Tancer (1992:175), in a retrospective study, found that total abdominal hysterectomy was the most common procedure to precede a dome fistula. A retrospective study of lower urinary tract genital fistulas revealed 91% to be postoperative. Of these, 91% occurred after gynecological procedures. Total hysterectomy was the most common antecedent procedure (n = 110), and the resulting lesion was a vault fistula. Total abdominal hysterectomy was the most frequent operation to precede a dome fistula (n = 92) and nearly 70% occurred in the absence of factors identified as placing the patient at risk for bladder injury. Such risk factors include previous uterine surgery, particularly cesarean section, endometriosis, recent cold cervical concretization and previous radiation therapy. 24 fistulas recognized at the time of hysterectomy of bladder injury and rapid repair. Thirty patients had previously failed at repair elsewhere. Three fistulas closed spontaneously. One hundred and seven fixed with the Latzko technique. There were 9 failures, each of which was successfully corrected by repeated Latzko surgery when vaginal re-epithelization was completed. Suggestions for avoiding injury to the bladder during total abdominal hysterectomy include use of a bidirectional catheter when risk factors are present, use of sharp dissection to isolate the bladder, use of extraperitoneal cystotomy when dissection is difficult, bladder filling when injury is suspected and repair of overt bladder injury only after mobilization of the injured area. A Latzko repair of the valve fistula was suggested because complications were minimal, the patient was comfortable postoperatively and the hospitalization period was 5 days or less.

It is imperative that expert medical evidence is based on the available medical literature to provide an overview of the points being discussed. In the above case, the plaintiff (patient) presented with predisposing risk factors for vesicovaginal fistula. The person is already diabetic, HIV positive, has had a previous cesarean section and has been struggling with a chronic pelvic infection at that time, all of which have an effect on the bladder wall. Agreements regarding cause and omission of factual and legal related information, such as: (1) the defendant (doctor and hospital) should be aware that the plaintiff (patient) has a high risk of vesicovaginal fistula, due to his medical history and must take steps to prevent injury the; (2) the bladder wall may be loose, as a result of predisposing factors, and special care should be taken when dissecting the bladder from the uterus; (3) a simpler operation to remove a uterus without a cervix may carry a lesser risk of vesicovaginal injury and fistula formation; (4) several alternative hypotheses exist that could be the cause of the fistula, the most obvious of which are leakage from the vaginal vault and injury to the fragile bladder wall during surgery; (5) the defendant (doctor and hospital) should be aware that the plaintiff (patient) is predisposed to developing a vesicovaginal fistula and should follow up and re-examine it with tests such as cystoscopy or sonography; and (6) although the occurrence of a fistula per se may not be an indication of negligence (culpa), the lack of follow-up care to detect the injury may indicate substandard medical care.
Undoubtedly, complex medical problems pose legal questions, the most difficult of which will be the causes of facts and laws. The injury occurred 6 weeks after medical intervention. On the one hand, assisting the plaintiff's (patient) case, the plaintiff's (patient) medical condition carries a high risk of injury, which calls for an examination of how it is managed. On the other hand, several alternative causes of injury were identified, which were calculated against the plaintiff's (patient) case; damage to the bladder wall during surgery, leakage that weakens the wall and develops later, and even the presence of HIV impairs the immunity of the plaintiff (patient), resulting in infection at the surgical site. Medical causes and effects must be based on sound medical principles. If an alternative cause of injury is suggested by the same facts and it obscures the most likely explanation for the injury it is conjecture and the plaintiff's (patient) case must fail. The plaintiff's (patient) case was dismissed on the power of Van Wyk v. Lewis, with the court holding that maxim \textit{res ipsa loquitur} rarely, if ever, finds application in cases based on alleged medical negligence. The court explained that the human body and its reactions to surgical intervention are complex. It can't just be said, because there are complications, the surgeon must be in some ways. The court ruled that it was logical that there was less room for application of the maxim \textit{res ipsa loquitur} in cases like these, where it has not even established what was wrong, where the views of the experts are all based on speculation, giving rise to the same possibilities as decent as what might have been.

3.6 SEEKING FOR VICTORY OR TRUTH?

Since modern law provides a great opportunity to play a role in procedural factors, or formalities, or procedures in the legal process, the search for justice becomes very complicated. Let's just look at the case of Iwan Setiawan against the doctor Kun Sri Wibowo and his friends and the Santa Maria Hospital Pemalang (Decision of the Pemalang District Court Number: 04/Pdt.G/2012/PN.PMI dated February 19, 2013), and the criminal case of a doctor Dewa Ayu Sasiari Prawani and friends who performed the Cito Sectio Caesaria operation at the Prof. General Hospital. Dr. RD Kandouw Malalayang Manado City (Manado District Court Decision Number: 90/Pid.B/2011/PN.Mdo dated September 22, 2011 in conjunction with the Cassation Decision of the Supreme Court of the Republic of Indonesia Number: 365 K/Pid/2012 dated September 18, 2012 in conjunction with the Judicial Review Decision Supreme Court of the Republic of Indonesia Number: 79 PK/Pid/2013 dated February 07, 2014).

Indonesia, today, is in the midst of a crisis and legal decline as well as damage and decline in seeking justice through modern law, due to game procedures that raise the question "is the court a place to seek justice or victory?" Again here the United States is used as an example, because the country's system is very "advanced" in favoring this procedure. America and England both use the adversary
system, but compared to Britain, America seems to have moved to a more extreme direction (extreme adversary system).

There is an opinion, that if O.J. Simpson (1993) was tried in England, it would not take that long and as a result Simpson might be found guilty. Another version says that Simpson has been acquitted or not guilty, but that doesn't mean he didn't commit the murder charged (not necessarily innocent).

This can all happen because of the large enough flexibility to "play" with the procedure. Simpson's defense did not seek to prove Simpson's innocence, but rather focused on the procedure for handling his case. Perhaps they knew that Simpson did in fact commit the murder as charged, and therefore the question of the procedure for handling it.

The judicial process in America is heavily proceduralized. Carrying out procedures properly is placed above all else, even above the accuracy of substance handling. Such a system provokes insinuations about trials without truth, such as the title of a book, Trials Without Truth ... Why our systems of criminal trials have become an expensive failure and what we need to do rebuild it (William T. Pizzi, 1999:30).

In fact, Indonesia has also done things that contain the ugliness of the American system, including in the current medical courts. Shall we continue such a practice? Is that really the form of legal reform and our credo of the rule of law? Are we not moving to make changes in our law enforcement system? Where is our concern for the people (patients) and nations that are suffering?

3.7 FORMULATING THE CONCEPT OF PROGRESSIVE JUSTICE

Even though Indonesian medical law is in a very bad state, at least it is still a blessing, which is to give us the opportunity to reform and overhaul medical law unmitigated. As stated above, this reform that is not half-hearted is to conceptualize justice which in turn will move our entire legal system. All of this is done within the framework of realizing a greater reform towards law enforcement or progressive law enforcement.

Formulating the paradigm of progressive justice concept therapy can be started by recognizing the opposite side (contradictio in terminis), namely the non-progressive paradigmatic therapy of justice. As described above, as a result of modern law that pays great attention to procedural aspects, we are faced with a big choice (macro) between courts that emphasize procedure or substance; between procedural justice or substantial justice.

It has been shown how the courts in America are so burdened by the necessity to prioritize procedure over justice and truth (heavily proceduralized), so the courts there lose focus when faced with the question of the purpose of the court itself. It is said that United States judges are frustrated because they have to submit the "direction of settlement" to the "war" between the prosecutor and the defense, as
a model of the "extreme adversary system". The judge loses control and is not responsible for the outcome of the court. It is this model and process of adjudicating that tends to result in "trials without justice".

Projected on the above model, the paradigmatic therapy of progressive justice is not justice that emphasizes procedures (procedural justice) but substantial justice. Practicing justice which is laden with procedural content like in America has become too expensive for Indonesia, both in terms of materiality and failure to deliver justice. We want substantial justice to be the basis of our rule of law, because it is a very good prospect to make our nation happy. The legal state of Indonesia should be a country that makes its people happy and for this reason, a paradigmatic therapy of the progressive concept of justice is chosen, which is none other than substantial justice (Rahardjo, 2008:274).

3.8 THE MEDICAL PARADIGM AND THERAPEUTIC PROGRESSIVE LAW PARADIGM ARE SIGNIFICANTLY DIFFERENT FROM MAXIM RES IPSA LOQUITUR

Paul Feyerabend states, that paradigms are based on different assumptions about their authority structure which makes it impossible to compare them in any meaningful way. Pienaar (2016) argues that the application of maxim res ipsa loquitur in medical law leads to a wrong impression, because the medical paradigm is significantly different from the legal paradigm. From the results of Pienaar's research on the maxim res ipsa loquitur in South Africa, it is assumed that the factual negligence and causality caused by res ipsa loquitur are within the scope of medical negligence litigation. Research material from South Africa consists of conflicting case law and legal arguments. This unconvincing finding resulted in the introduction of material from England and Wales seeking clarification. The cases in the UK were selected on the basis of less complicated medical principles, although this study leans towards cases where legal principles, such as causation and negligence with reference to the application of res ipsa loquitur, are demonstrated. Pienaar's thesis (proposition) (2016) discusses: (1) discussing the legal position of maxim res ipsa loquitur in South Africa and in the UK; (2) discuss the application of maxim res ipsa loquitur in cases of medical negligence in both jurisdictions; and (3) focusing largely on the medical reality of each case to determine how the English courts dealt with the elements of negligence and cause when accepting the maxim. A final inquiry is needed because courts in South Africa, unlike courts in the UK, do not allow the presumption of negligence based on lack of care/service – in the broader sense – when the unforeseen injury occurs under the control of the accused (doctors and hospital). Since 1924, courts in South Africa have ruled out applying the maxim res ipsa loquitur to medical cases. Recent cases have attempted to introduce maxims, with uncertain results. This study conducted by Pienaar (2016) explores the academic argument in favor of the application of maxim, which states that courts in South Africa should follow the example of courts in England and should allow maxim res ipsa loquitur to be summoned in all medical cases in South Africa. Pienaar's research (2016) found that under South African
law, the remaining gauze (Van Wyk v. Lewis case) is only subjective evidence of negligence in the unknowing mind, that courts in South Africa must be presented with sufficient evidence to balance action of defendants (doctors and hospitals) against globally accepted medical standards set by the medical profession itself. This study argues that the South African court's rejection of the maxim *res ipsa loquitur* in medical law is defensible. In the case of medical negligence, the elements of factual causation, legal causation and negligence can only be determined after medical principles are explained. The elements of a medical offense were ignored when a *loquitur* receipt was requested causing the plaintiff (patient) to be inadequately prepared in a medical case (Pienaar, 2016:257).

Since British law has influenced South African law, it is not surprising to see the similarities between the British system of liability law and South African offenses law. Both South African courts and British courts had problems determining the cause, namely that the *conditio sine quanon* was not a medical case. Since the element of factual causation stems from the medical chain of events described in medical reality, this idea in determining liability is a source of much confusion and confusion, especially if the plaintiff (patient) is not assisted by a medical expert. Furthermore, it seems from contemporary use of the maxim *res ipsa loquitur* in England that courts encourage the use of the maxim, but by supporting expert medical evidence in complex cases. In the case of *Ratcliffe v. Plymouth and Torbey Health Authority* (1998), where J. Brook said *that in a simple case the res ipsa loquitur might speak at the end of the layperson's evidence, and the judge would decide the case on a conclusion drawn from all the evidence. J. Hobhouse says that the plaintiff (patient) may rely on some broad-based section of negligence inference, but must add some expert medical evidence to pass the prima facie test.* Both British and South African courts appear to be of the opinion that sufficient expert medical evidence should be provided to support medical cases. Furthermore, Pienaar's (2016) thesis (proposition) argues *that it shows courts need to understand medical reality to allow prima facie tests. The legal system dictates that defendants (doctors and hospitals) must comply with the standards of care that are expected and prescribed by common law, society and the medical profession. The defendant's evidence (doctors and hospitals) is weighed against the reasonable behavior of doctors and hospitals from the same branch of the profession who performs skills, and cares in adhering to accepted standards of care, satisfactory standards of care more than skills and care. It describes safe methods or practices or standards that must be followed to avoid risks and complications in medical interventions, trials by medical experts in the context of medical principles* (Pienaar, 2016:257).

It is noteworthy to find that the legal jurisprudence governing tort law in the UK and offense law in South Africa has developed along different lines, clearly evident from the gradual changing of common law in the two countries. The aim of the UK courts to move to a more inquisitorial system in 1998 and the change in practice direction certainly allowed the courts to participate in medical fact-finding tasks,
even if it still remained dominant over hostilities in the world of legal paradigms. On the other hand, South African courts remain adversarial, revealing substantial and procedural differences in the presentation of medical negligence cases between countries. Courts in South Africa are talking about matters of fact and law, and do not enter the arena of litigation (formal procedural law). The court finally decides whether the plaintiff (the patient) has disclaimed his evidentiary responsibility on the balance of probabilities based on all elements in the offense (criminal act), namely factual and legal causes, errors and omissions. The court considers all the evidence and determines the most likely cause of harm. In South Africa, court rules allow exceptions to petitions and petitions to have the matter dismissed, where the plaintiff’s (patient) charge (lawsuit) does not have the necessary referrals to defend an action. If the South African plaintiff (patient) relies on a presumption of negligence based on the fact of the injury, then there is a great risk that the case will be dismissed, as the plaintiff (patient) alleges a proper “cause of action.” A plaintiff (patient) in the UK, using the maxim *res ipsa loquitur* (in which he presents expert medical evidence), gets a preview of the alternative causes of injury described by the defendant (doctor and hospital) before advancing to court. This objection is a reaction to the perceived lack of care – a function of the maxim – due to the unusual nature of the injuries in circumstances under the control of the accused (doctors and hospitals). Courts in the UK can appoint joint medical experts, but can also instruct them on their own for medical experts to present their cases. Although courts in the UK actively participate in pre-trial case management procedures the medical causes of these injuries are still presented independently in courts. When the maxim is applied, the court must be convinced that the defendant’s (doctors and hospital) explanations for the rebuttal of the maxim res ipsa loquitur are reasonable, but without medical expert evidence to evaluate the defendant’s evidence (doctors and hospitals), this will be very difficult. This is evident in the case of *Saunders v. Leeds Western Health Authority*, where a 4 year old boy went for hip repair surgery and suffered a heart attack. A very rare complication of paradoxical embolus was offered as an explanation in rebutting the claim of the plaintiff (patient) about his inadequate skills, treatment, and management of his medical condition. If the case is brought to a South African court, the plaintiff (patient) must provide sufficient medical evidence to demonstrate, that the defendant (doctor and hospital) must foresee certain risks and complications and take care of them. His failure to act with the skill and care aimed at – below standard – when weighed against the hypothetical (accepted standard) doctor’s actions, led to injury (Pienaar, 2016:258).

It is well known that South African courts do not accept *res ipsa loquitur* applications in *res ipsa loquitur* cases. This is different from the courts in Indonesia which have accepted and used maxim *res ipsa loquitur* for the first time in the *Shanti Marina case against dr. Wardhani, Ear, Nose and Throat Specialist and Puri Cinere Hospital Cibinong* based on the Decision of the Cibinong District Court Number: 126/Pdt. G/2003/PN. Cbn, dated July 20, 2004 in conjunction with the decision of the Bandung
High Court Number: 511/Pdt/2004/PT. Bdg dated August 18, 2005. At the Cassation level Shanti Marina's lawsuit was approved by the Supreme Court of the Republic of Indonesia which has permanent legal force (inkracht van gewijde). Usually in this case, the position of the plaintiff (patient) must be weak, because it was unable to prove that the Puri Cinere Cibinong Hospital was wrong, that's why the judge chose evidence that was difficult to refute, and he saw the evidence himself in court. During the trial where Shanti Marina was present alone, Shanti Marina's voice sounded nasal/bindeng and unclear when answering the judge's questions. The judge could not help but conclude that in this case, the most appropriate thing to apply was res ipsa loquitur, all facts speak for themselves.

In this study (2020) the author argues, in connection with the application of maxim res ipsa loquitur for the first time in 2006 in the case of Shanti Marina against dr. Wardhani, Sp. ENT and Puri Cinere Cibinong Hospital are as follows: (1) courts in Indonesia allow maxim res ipsa loquitur to prevent doctors and hospitals who know what has happened to avoid responsibility by simply choosing a doctor and the hospital does not provide medical evidence; (2) maxim res ipsa loquitur is only allowed for a lawsuit because the lack of care, skill, and the truth of the lawsuit can be determined only after considering all the facts; (3) courts should be placed as close as possible to doctors and hospitals to test negligent behavior; (4) sufficient medical information is required by the court to consider all evidence on a balance of probabilities; and (5) if the court does not have sufficient evidence of the fact of the injury to put itself in a position to ascertain whether the doctor and hospital convey the required standard of medical care, the court may ask the doctor and hospital to admit the fact of the injury as the cause of action without medical evidence which is sufficient to support this allegation, because the facts speak for themselves (Wukir Prayitno, 2020:41-42).

3.9 EQUALITY OF DOCTORS – HEALTH WORKERS – HOSPITALS – PATIENTS IN HEALTH SERVICES

Pienaar's (2016) thesis (proposition) considers the statement, that the application of the maxim res ipsa loquitur can balance the imbalance in the doctor, hospital and patient relationship resulting from the fact that patients sometimes or do not even know what is happening under the influence of anesthesia and therefore because it was harmed. Furthermore, the thesis finds that there is a relaxation of the South African court on the principles of law, causality and causality in circumstances where the element of negligence is proven and is related to the injury suffered by the plaintiff (patient) in South Africa. This shows that the court respects and recognizes a patient's constitutional right to be treated with bodily integrity in a dignified and fair manner. The South African constitution is the country's first law and is the legal basis for the rights and obligations of citizens (implicit rights and obligations of patients). It also

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defines the government's obligations towards its citizens, so that the constitution clearly has relevance to medical law.

The Constitutional Court continues to develop public law, where the court has a central role to develop public law to promote the values enshrined in the constitution, such as: (1) everyone has the right to have access to: (a) health care services including health care reproduction; (b) adequate food and water; and (c) social security, including if they are unable to support themselves and their dependents, and appropriate social assistance; (2) States should take responsible legislative and other measures, within available resources, to achieve the progressive realization of each of these rights; and (3) no one may be denied medical treatment.

In 1997 the Constitutional Court of South Africa adapted the popular belief. Constitutional rights regarding the provision of health services are limited due to limited public resources. The right to health care is now a qualifying right because of the country's economic limitations. In certain cases, for example with kidney dialysis, the state cannot help all chronic patients, even though they may be the patients most in need. This shows that the courts do not consider general principles of who will live if not everyone can or cannot be dictated by ethical decisions, but allow the state to limit those rights due to economic decisions. This is really limited for health resources has affected the law offense because the court tested the element of error against the expectations and beliefs of the community, besides the court considered the reasonableness of the restrictions in public policy with consideration of their impact on society. Finally, the Constitutional Court approved the limited rights of citizens and changed the general law regarding public policies due to limited sources of health service provision (Pienaar, 2016:271-272).

One can criticize the trial in Soobramoney v. Minister of Health (Kwazulu-Natal), for failing to distinguish between available resources and those that should be provided. For no apparent reason the court avoided examining the allocation of resources, expecting an investigation into the allocation of funds and possible misuse of funds, in ongoing mis-management and findings of fraudulent abuse of government funding. We would also expect an adequate analysis of the ethical rationale behind the set of rules adopted, as medical principles conflict with utilitarian principles. Do good policies for medical professionals have to decide on social principles? If decisions are based on utilitarian principles, one should look into doing the greatest good for the greatest number, or adopting a principle that does no harm, or making decisions about the “who will live when not everyone can” principle. If the decision is based on clinical medical principles, the patients who suffer the most should be treated first, because they are the most in need and the most urgent, and have a low recovery process. Perhaps the poor and unlucky are the worst. Does that mean wealth dictates certain rights? The questions mentioned above are some of the controversial issues one would expect to see in court reasoning, before limiting the constitutional rights of the poor. Remarkably, the Constitutional Court of South Africa opens the door to other forms of discrimination.
because it distinguishes between the poor and the rich, with respect to the right to access to medical care. One is concerned at the prospect that in the future courts may confuse limited resources with dwindling resources due to mismanagement. Soon, limited resources will equate to reduced intensive care facilities, lack of vaccinations, lack of anti-retroviral and tuberculosis drugs, lack of medical facilities and so on. Despite understanding and applying the medical standards and principles above, even if legal arguments are properly presented, certain rights may never be protected or abused against the poor, until the court reconsiders its position or the state addresses the issue of inadequate resources. (Pienaar, 2016:272).

It was debated throughout the study, that the maxim *res ipsa loquitur* was rejected, because the maxim did not fulfill all the elements of the liability offense. In view of the evolving general law of constitutional limitations on the rights of poor patients, it is clear that *res ipsa loquitur* is too simplistic a term to even cover the extent of the element of wrongdoing. Public policy considerations have been redefined and no longer support the “feeling” of common customs, because the expected right to health care/services has been limited to the eligible right to available resources. Information in this context must be provided to the court, which cannot be excluded from the application of maxim *res ipsa loquitur* (Pienaar, 2016:272-273).

As discussed earlier the South African constitution not only protects the individual against the state, it also applies to legal relations between citizens. South African courts should develop common law and customary law by promoting the spirit, intent and object of the right that all human constitutional rights must be recognized and respected. Constitutional courts are moving towards a substantive approach that incorporates aspects, such as socio-economic and even environmental conditions, when deciding whether rights have been violated. The aim of this constitutional amendment is to place an emphasis on human rights values and embrace the spirit of the constitution. In the context of medical law and maxim *res ipsa loquitur*, if for constitutional and policy considerations, South African courts must decide to abandon the established principles. The original burden of evidence reversed on doctors and hospitals to show the cause why he should not be negligent (a disprovable allegation), which in turn violated the rights of doctors and hospitals to fair and administrative justice. Such changes can also encourage litigation for the wrong reasons based on unrealistic and inappropriate expectations. Nevertheless, it is commendable to see the new constitutional approach of the South African courts in the Premier of the Western Cape v. Loots NO, Lee v. Minister for Correctional Services, and the last case of Oppelt v. Head: Health, Department of Health Provincial Administration: Western Cape. In the latter case, the court applied a more flexible approach to the principles of factual causation and ruled in favor of the plaintiff (the patient), despite the fact that the plaintiff (the patient) could not demonstrate if he was enforced in time he would not be incapacitated. Similar to the British court in the case of Chester v. Afshar, where patient rights and a lighter burden of evidence on the plaintiff (patient) are seen to fold the traditional principles of causality,
South African courts are now more willing to challenge medical opinion in cases of medical negligence (Pienaar, 2016:273).

It is interesting that the arguments of Van den Heever (2002:141) and Carstens (2002:37) are considered. They argue that: (1) maxim *res ipsa loquitur* must apply to medical cases, because the plaintiff (patient) is treated unfairly, if he is deprived of his right to use the magical maxim; (2) maxim *res ipsa loquitur* will help the plaintiff (patient) who is harmed because he does not have medical knowledge about what happened; (3) maxim *res ipsa loquitur* does not harm the defendant (doctors and hospitals), because it only asks for an explanation; (4) if the plaintiff (patient) is prohibited from using this maxim it must be seen as unfair discrimination; and (5) maxim *res ipsa loquitur* can be broadly translated into the highest attainable standard of health with reference to processes and outcomes.

The right to equality is guaranteed in the South African constitution, where everyone is entitled to legal protection and benefits. Equality includes the full and equal enjoyment of all rights and freedoms for its people. South African courts are now considering the wider context of patient rights, and where harm is caused by powerful groups (doctors and hospitals) with respect to vulnerable vulnerable groups (patients), the constitutional rights of both parties must be considered, and the fact that in practice a poor and uneducated patient rarely has a say in determining the course of his/her medical care/service. Importing other measures such as reforming South Africa's civil procedure by introducing inquisitorial elements in court procedures, allowing a greater degree of judicial inquiry or using mandatory medical court judges can help by correcting possible imbalances. In a more flexible approach by South African law the system of causality or negligence rules with respect to material inequalities as seen in the case of *Oppelt v. Head: Health, Department of Health Provincial Administration: Western Cape*; potentially following the example of the British court in the *Chesters v. Afshar* is a possibility that results in patients being properly compensated in the future, if they have suffered losses (Pienaar, 2016:281-282).

3.10 MAXIM *RES IPSA LOQUITUR*: THE PATIENT'S "HOLY MANTRA"

From the results of this study (2020), it was revealed that there are similarities with the situation in South Africa regarding the right to equality of doctors, health workers, hospitals and patients in medical services that have been guaranteed in the South African constitution, where every patient has the right to protection and protection. benefits (doelmatigheid) rather than legal validity (rechtmatigheid). Equality includes the full and equal enjoyment of all rights and freedoms for its people. This is reflected in Pienaar's (2016) research related to the mantra maxim *res ipsa loquitur*, that South African courts have now considered the wider context of these patient rights, as seen in the case of *Oppelt v. Head: Health, Department of Health Provincial Administration: Western Cape*; potentially following the example of the British court in the *Chesters v. Afshar* is that patients are really well compensated for their future, if they
suffer losses due to medical negligence as a result of the application of *res ipsa loquitur* in connection with material inequality (Pienaar, 2016:281-282; and Prosser, 1953:346). Lambert (1959:25) which states, that "The court does not hesitate to use the *res ipsa loquitur* as a deliberate policy instrument even for a balance against the conspiracy of professional individuals (conspiracy of silence) ...".

As for the situation in Indonesia, inspired by Pienaar's thesis, actually we are all waiting for the authority of the Ministry of Health of the Republic of Indonesia to issue a public policy by applying the *Freies Ermessen* principle (freedom to act on one's own initiative) in the form of regulations on cases of medical negligence with the implementation of the maxim *res ipsa loquitur* which proven to be effective in providing legal protection for patients in court, in achieving substantive justice.

Still fresh in our minds, cases of malnutrition and measles have claimed the lives of 63 children in Asmat Regency, Papua. It is sad to see that this human tragedy is still repeating itself. Cases of malnourished children in this country are reported in the media almost every year, even after the reform era. In the last ten years, cases of malnutrition have not only occurred in hard-to-reach areas, such as in Papua, but also in various areas throughout the archipelago.

As in 2005, cases of famine in Yahukimo Regency, Papua, spread in the media. Although the government at that time tried to minimize the problem, in reality 55 people died and 112 people were in a condition of severe malnutrition, some of them were children. We know that many remote areas in Indonesia are difficult to access, even on the island of Java. In the Pongkor area, Bogor Regency, West Java, for example, there are still residents who have to walk for more than an hour to reach the puskesmas. Especially in Papua, to Lolat Village, Yahukimo, at that time from Wamena people had to walk for seven days up and down hills. When the weather is good, the new helicopter can land. Likewise, the villages are currently being hit by famine and measles. From Agats, the capital of Asmat Regency, it takes three hours to cross the river by fast boat. However, infrastructure difficulties should not be the reason for falling victims, because malnutrition is not a natural disaster that comes suddenly. The process of lack of food to poor nutritional status lasts a long time and is actually still predictable. Moreover, every year the government (Ministry of Health) monitors his condition. The results of the 2016 Nutritional Status Monitoring show that 17.8 percent of children under five suffer from malnutrition. Of that number, 12.1 percent are classified as short toddlers which can lead to stunting, if there is no intervention. From monitoring in 34 provinces and 514 districts/cities, no province is free from acute nutritional problems, with the biggest problem in Eastern Indonesia. Likewise with immunization coverage. Data from the Ministry of Health stated that basic immunization coverage reached 86.8 percent in 2015-2016. What we understand is that babies and children who escape immunization have the potential to be infected and infect. They are known as missing out, so they must be addressed immediately. In this case, the government (Ministry of Health) actually has a database of malnourished areas and areas with low
immunization coverage. The question then, is the homework to overcome all these problems done? Not only malnutrition and measles, in fact extraordinary cases of diphtheria also occur almost every year. Although it is true that there has been a division of authority in regional autonomy, including education, health, and food. However, it is the duty of the central government (Ministry of Education and Culture, Ministry of Health, and Ministry of Agriculture) to monitor, check, and if necessary impose sanctions on local governments who neglect the welfare of their people. Whether in Asmat, Aceh, Serang, all Indonesian people have the same rights (Kompas, January 17, 2018:6).

But in reality the government does not want to work alone, but delegates this authority to the community through laws, such as education, health, food, and others. The tasks that must be carried out by the government and human prosperity are not limited, so that the government's tasks are dynamic, covering all matters relating to the welfare of the people. His enthusiasm is only limited to what is stated in the constitution of the Preamble to the 1945 Constitution of the Republic of Indonesia, it has an impact on the government (Ministry of Health) which does not push optimally in realizing public health degrees. The impact can be seen from the lack of funding for health in the 2016 State Budget, which only reached about 5 percent. In fact, if we compare it with health funding from other countries in Southeast Asia, for example, Singapore is 14 percent, Thailand is 13 percent, and Vietnam is 13 percent. To increase the ideal health budget, it takes 15-20 percent of budget revenues and expenditures (World Health Organization, 2014).

Judging from the budget approach, it can be stated that if only 5 percent is provided for health development in Indonesia, then this country has not been able to improve its health status. Whereas the degree of health is the main factor to realize the welfare (Welfare State). Conditions like this, make the government (Ministry of Health) criticized as a party that does not understand or as if it really does not know, that the health sector is an investment for human development (Wijaya, 2018:4).

However, it must be questioned and studied whether the concept of a welfare state that is applied has given impetus to the government (Ministry of Health) to prioritize the welfare of its people. This question becomes important when development priorities are emphasized in infrastructure programs, but the Human Development Index is low. On the basis of this question, the answers that can encourage the government (Ministry of Health) to be able to accelerate optimal health degrees are, among others, the need for setting (priority scale) on the following matters: (a) political budgets are prioritized for health development; (b) the right of every citizen to obtain health insurance; (c) the right of every citizen to obtain optimal health services; and (d) the obligation of the government (Ministry of Health) to improve the health status of the community.

By using a budget approach study, the level of public health that is still not met due to a lack of health budget is only 5 percent, which according to WHO standards should be around 15-20 percent.
Therefore, it is necessary for budget politics to prioritize development in the health sector, so that the fulfillment of health needs can be realized. With reference to the provisions of Article 66 of Law Number 36 of 2009 concerning Health, the political budget for the health sector is determined as follows: (a) the total government health budget is allocated at least 5 percent of the State Revenue and Expenditure Budget, excluding salaries; (b) the total health budget of the provincial, district/city governments is allocated 10 percent of the revenue and expenditure budget, excluding salaries; and (c) the amount of the health budget mentioned above is prioritized for the benefit of public services at least 2/3 of the State Revenue and Expenditure Budget and the Regional Revenue and Expenditure Budget.

The budget politics mentioned above, if it can no longer be maintained because it is not in accordance with the needs, even though the percentage of the health budget must be increased, taking into account UNESCO standards and comparisons to other countries that have succeeded in realizing public health status. Meanwhile, there must be an amendment to the health law to fulfill public health and also implement the goals of the welfare state (Wijaya, 2018:4-5).

Budget policies that do not focus on handling social problems and/or basic needs services in remote areas (cases of malnutrition and measles). The basis for the allocation of Indonesia's health budget has always been to the detriment of residents in remote areas. The reason is, the calculation of the allocation is always based on the number of residents. Remote areas in Papua are not included in the calculation of an ideal political budget policy for decent services for the community. Politics and budget policies in this country tend to be discriminatory, in the form of neglecting residents in remote areas. To ensure a decent and excellent service to the community in remote areas, the calculation is not just one sector, such as education or health. Remote areas must be developed in an integrated manner (integrated development for remote areas), thus requiring an adequate budget. Allocation calculations must be affirmative (Laode Ida, Kompas, January 17, 2018:6).

In the event that the maxim res ipsa loquitur can be applied to cases of medical negligence in court, the government (Ministry of Health) actually has to carry out its own investigation without waiting for the amendment of Health Law Number 36 of 2009 concerning Health by issuing policy regulations (beleidsregel), the material of which accommodates the interests of patients who have not been protected by law in the context of an application for res ipsa loquitur in cases of medical negligence. If the government (Ministry of Health) does not immediately start issuing policy regulations, on the basis of the principle of social justice, then the morality of health development in this case clearly must be challenged. The state must be reminded that it neglects to protect any patient who is harmed by medical negligence, so that some of the patients have been left on the edge of health development without the presence of the state. Imagine, this medical negligence case occurred in a country that has placed the ideals of social justice as the ultimate goal of the state. This medical negligence case shows one thing, that the basis of
the state's political philosophy, namely the realization of social justice for all people, has been injured. The state (central and local government) neglects to treat the classes of patients it cares for.

This series of incidents clearly raises the question of the lawsuit: Do the policies taken by the state, legislative and executive (Government and Ministry of Health), always neglect to touch the realm of poor patient communities? This fundamental question is important so that development projects that are always glorified do not lose their social essence and actually create gaps.

It is time for a policy taken by the state to be formulated to fill the legal vacuum, as stated by Thomas J. Aaron (1964:34): “… is the power or authority given by law to act on the basis of judgment or conscience, and moral ideas rather than laws." It is understood that existing laws and regulations will not be able to reach everyone's life. Therefore, the government through state administration officials (Ministry of Health) who carry out tasks to realize the welfare of the people, is given the authority of wisdom, namely the authority to regulate based on its own initiative (freies ermessung) on the urgent need to provide services to the community, which has not been regulated. in the law (Wijaya, 2018:5).

In connection with the legal vacuum of the law on health, which has not regulated the maxim res ipsa loquitur for medical negligence in providing legal protection for patients, the government (Ministry of Health) must base its commitment to realizing the equal rights of doctors, health workers, hospitals, and patients. This policy regulation in written form is known in the Netherlands as “Pseudowetgeving” or “Pseudo-legislation”. Referred to as pseudo legislation considering that its shape does not resemble a law, because it is not a law, but has legal force like a law. Regulatory policies as a form of exercising discretionary authority have the following characteristics: (a) policy regulations are not laws; (b) the principles of limitation and testing of laws and regulations cannot be enforced in policy rules; (c) policy clauses cannot be tested "Wetmatigheid", because there is no legal basis for enacting decisions from policy regulations; (d) regulatory policies based on “Freies Ermessen” and the absence of the relevant administrative authority to make rules in making regulations; (e) testing of policy rules is mostly left to "doelmatigheid", so the basis for testing is the principles of good governance; and (f) in practice, the format is given in various forms and types of rules, namely: decisions, instructions, circulars, announcements, etc., not even found in the form of rules (Wijaya, 2018:6). What stands out here is that the considerations focus more on "doelmatigheid" (benefits) rather than "rechtmatigheid" (legal validity).

The policy regulations that will be issued also cannot conflict with existing laws, namely Law Number 36 of 2009 concerning Health and Law Number 44 of 2009 concerning Hospitals and Law Number 36 of 2014 concerning Health Workers, but that is only only complementary. However, it is not impossible that policy regulations will become the forerunner of future legal changes. Using the authority to issue regulatory policies and responsive legal perspectives, the formulation must provide space to involve the community from the planning process to publication (William N. Dunn, 2016:52). In this case,
it is also possible for the emergence of authorities that have uncontrollable control from state administrators in implementing their authority, such as contrary to laws and regulations, abuse of authority and arbitrary actions will not occur. Opportunities will be smaller, because responsive policy regulations have qualities that meet the principles of transparency, participation and accountability which are the essence of the realization of good governance (Wijaya, 2016:10).

Responding to this condition in connection with the policy regulation of receipt *loquitur* for cases of medical negligence that can be a "holy spell" for patients, there are urgent steps that must be taken by all policy makers from the Ministry of Health, namely strengthening the capacity of the government (Ministry of Health) especially in the service sector, health. Strengthening this capacity must cover all lines, starting from the perspective on budgeting, the capacity of human resources for all health bureaucratic apparatus, and the quality of public services in the health sector. In the case of *Ntsele v. MEC for Health Gauteng Provincial Government, Buthelezi case v. Ndaba*, the case of *Oppelt v. Head: Health, Department of Health Provincial Administration: Western Cape*; potentially following the example of the British court in the *Chesters v. Afshar*. Also in the South Jakarta District Court Decision Number: 1809/Pdt. G/2006/PN. Jak. Cell. dated August 30, 2007 in conjunction with the Jakarta High Court Decision Number: 218/Pdt/2008/PT. DKI dated November 27, 2008 in conjunction with the Decision of the Supreme Court of the Republic of Indonesia Number: 1563 K/Pdt/2009 dated December 29, 2009 in conjunction with the Decision of the Supreme Court of the Republic of Indonesia Number: 515 PK/Pdt/2011 dated February 2, 2012 which has permanent legal force (*inkracht van gewijsde*) in the case of *Pitra Azmirla and Danitra Almira against Pondok Indah Hospital Jakarta and the Medical Committee of Pondok Indah Hospital Jakarta*. Decision of the Cibinong District Court Number: 126/Pdt. G/2003/PN. Cbn, dated July 20, 2004 in conjunction with the decision of the Bandung High Court Number: 511/Pdt/2004/PT. Bdg dated August 18, 2005. At the Cassation level Shanti Marina's lawsuit was approved by the Supreme Court of the Republic of Indonesia which has permanent legal force (*inkracht van gewijsde*) in the case of *Shanti Marina case against Doctor Wardhani and the Cinere Cibinong Hospital*. Pemalang District Court Decision Number : 04/Pdt. G/2012/PN. Pm. dated February 19, 2013 which has permanent legal force (*inkracht van gewijsde*) in the case of *Suwarno and Rustiatin against doctor Kun Sri Wibowo and Santa Maria Hospital Pemalang*. Palambang District Court Decision Number: 18/Pdt. G/2006/PN. Pls. dated July 4, 2006 in conjunction with the Palembang High Court Decision Number: 62/Pdt/2006/PT. Plg dated April 13, 2007 *juncto* Decision of the Supreme Court of the Republic of Indonesia Number : 1752 K/Pdt/2007 dated February 20, 2008 *juncto* Decision of the Supreme Court of the Republic of Indonesia Number : 352 PK/Pdt/2010 dated November 1, 2010 which has permanent legal force (inkracht van gewijsde ) in the case of *Abuyani bin Abdul Roni against the Mohammad Hoesein Hospital in Palembang*. Manado District Court Decision Number: 90/Pid.B/2011/PN. Mdo dated
September 22, 2011 in conjunction with the Decision of the Supreme Court of the Republic of Indonesia Number: 365 K/Pid/2012 dated September 18, 2012 in conjunction with the Decision of the Supreme Court of the Republic of Indonesia Number: 79 PK/Pid/2013 dated February 7, 2014 which has permanent legal force (inkracht van gewijsde) in the criminal case, doctor Dewa Ayu Sasiary Prawani, doctor Hendry Simanjuntak, and doctor Hendy Siagian who were charged with medical malpractice against patient Siska Makatey. Madiun District Court Decision Number: 79/Pid.Sus/2011/PN. Kd. M N. dated October 6, 2011 in conjunction with the Decision of the Supreme Court of the Republic of Indonesia Number: 1110 K/Pid. Sus/2012 dated October 30, 2013 in conjunction with the Decision of the Supreme Court of the Republic of Indonesia Number: 210 PK/Pid. Sus/2014 dated June 26, 2015 which has permanent legal force (inkracht van gewijsde) in the criminal case of doctor Bambang Suprapto intentionally practicing medicine without having a Practice License as referred to in the provisions of Article 36 of Law Number 29 of 2004 concerning Medical Practice. Langsa District Court Decision Number: 86/Pid. B/2009/PN. Lgs. dated October 26, 2009 in conjunction with the decision of the Banda Aceh High Court Number: 191/Pid/2009/PT. BNA. dated February 11, 2010 in conjunction with the Decision of the Supreme Court of the Republic of Indonesia Number: 1347 K/Pid. Sus/2010 which has permanent legal force (inkracht van gewijsde) in the criminal case of Doctor Bukhari deliberately did not make medical records as stipulated in the provisions of Article 79 letter B of Law Number 29 of 2004 concerning Medical Practice. South Jakarta District Court Decision Number: 484/Pdt.G/2013/PN. Jak. Cell. dated July 23, 2014, in conjunction with the Decision of the High Court of the Special Capital Region of Jakarta Number: 66/Pdt/2016/PT. DKI dated March 14, 2016 in conjunction with the Decision of the Supreme Court of the Republic of Indonesia Number: 1001 K/Pdt/2017 dated August 30, 2017 which has permanent legal force in the Henry Kurniawan case against the Tamtam doctor Otamar Samsudin, and the South Jakarta Metropolitan Medical Center Hospital.

The paradigm of public services in the health sector which only emphasizes the Minimum Service Standards must be shifted to the paradigm of the New Public of Health Service which places public health services as the embodiment of patient rights and is the responsibility of the government (Ministry of Health) to fulfill them. The main principle is that the patient's "holy mantra" (maxim res ipsa loquitur) as the owner of sovereignty must enjoy his basic rights and the task of the government (Ministry of Health) is to ensure optimal implementation.
3.11 SEEKING FOR JUSTICE AND HAPPINESS DOCTORS – HEALTH WORKERS – HOSPITALS – PATIENTS

In order to make substantive justice the core of the courts run in Indonesia, the Supreme Court of the Republic of Indonesia plays a very central and important role. As the pinnacle of the judiciary, he has the power to encourage the courts and judges in this country to realize this progressive justice.

On the other hand, the Supreme Court should also dare to openly judge good and give a thumbs up to judges who dare to put aside procedural matters.

Now, in the midst of efforts to restore the image of medical law in Indonesia, there is a wide and great opportunity for the Supreme Court to spearhead a progressive trial. In this regard, the Supreme Court needs to encourage and encourage judges who dare to realize such progressive justice. Let not our Supreme Court do the things that the Supreme Court of the United States of America does, which is criticized as an institution that has failed to make the courts truly a hall of justice.

It should be kept in mind that our Supreme Court judges always reflect on one of the following criticisms of the Supreme Court, “... I disagree with many Supreme Court decisions and think that the balance the Court has drawn between the defendant's right and the truth is much too heavily weighted on the defendant's side and that truth is badly undervalued in the system...” (William T. Pizzi, 1999:32).

Courts and the court system in Indonesia should take advantage of its various advantages, because it does not use an adversary system, where judges play an active role so as to avoid the various weaknesses of judges who are "frustrated by losing control" mentioned above. If the critics say that the law in America is frustrated because it loses control in realizing justice, in Indonesia the judges actually play a strong role, then the progress of the courts in this country is, in part, important to be determined by what the judges do.

Judges are an important factor in determining that the courts in Indonesia are not a game to win, but to seek truth and justice. We will be further away from the ideals of “quick, simple, and low-cost courts” if we allow the courts to be dominated by procedural “games”. We should be able to avoid an over-proceduralized situation, so that the court will shift into a game arena to seek to win (Rahardjo, 2008: 275).

The model of the judicial process called a fair trial in this country should be boldly interpreted as a court, where judges have active control in seeking the truth. We can actually learn from some of our own judges who prioritize justice above the law or above procedural. The concept of progressive justice paradigmatic therapy still has various other characteristics and details. It suffices for the time being to emphasize the zeal and commitment to seeking truth and justice above all else.

In the end, what is no less important is our own will to start. We have for too long succumbed to a tradition thought to be the only way to enforce the law. Let us unite and unite the determination to carry
out reforms and reforms that are quite large and heavy. We emphasize our position, that the law and the
court of medical cases are to seek justice and make the nation happy (doctors-health workers-hospitals-
patients).

4 CLOSING

4.1 CONCLUSIONS

a. Progressive law is one of the most interesting ideas in the current Indonesian health law reference. It is said to be interesting, because progressive law has challenged the existence (existence) of modern law which has been considered established in our law so far. Progressive law unveils the various failures of modern law which is based on this positivistic, legalistic, and linear philosophy to answer legal problems as human problems (doctors-health workers-hospitals-
patients) and humanity. Modern law that creates a gaping gap between law and humanity is shaken
by the presence of progressive law which contains the spirit of liberation, namely liberation from the conventional legalistic and linear legal tradition.

b. Progressive law is present in the midst of the collapse of the legal world in this country and tells us about the fundamental mistakes in our way of law so far. Implementing the law is not just according to the black-and-white words of the regulations, but according to the spirit and deeper meaning of the law or law. The law is not only implemented with Intellectual Quotient (IQ) and Emotional Quotient (EQ), but also with Spiritual Quotient (SQ). Carrying out the law must be with determination, empathy, dedication, and commitment to the suffering of the nation to dare to find other ways to prosper and make the people happy (doctors-health workers-hospitals-patients).

c. Progressive law was born from a long reflection on the failure of health law reform in Indonesia. Progressive law starts from a basic assumption, that law is an institution that aims to deliver humans (doctors-health workers-hospitals-patients) to a just, prosperous life and make humans (doctors-health workers-hospitals-patients) happy. Progressive law does not accept the law as an absolute and final institution, but is largely determined by its ability to serve humans (doctors-health workers-hospitals-patients). Progressive law is a correction of the weakness of the modern legal system which is full of bureaucracy and wants to free itself from the domination of a type of liberal law. Progressive law rejects the opinion that order only works through state institutions. Progressive law is aimed at protecting the people (doctors-health workers-hospitals-patients) towards the ideal of health law and rejecting the status quo, not wanting to make health law a technology that has no conscience, but a moral institution.
4.2 SUGGESTIONS

a. The Ministry of Health of the Republic of Indonesia is obliged to apply the *Freies Ermessen* principle (freedom to act on one's own initiative). Now we are all waiting, what will the authorities of the Ministry of Health of the Republic of Indonesia do with these cases of medical malpractice by implementing the maxim *res ipsa loquitur* which is proven to be able to provide legal protection for patients in court? Do we still want to deny that many patients die, because our health care system is still not managed professionally and still does not prioritize the aspect of human empathy (spiritual quotient) rather than the business aspect?

b. The Ministry of Health of the Republic of Indonesia is obliged to socialize so that doctors-health workers-hospitals provide sufficient time for patients to explain all matters relating to medical information. Doctors-health workers-hospitals need to improve communication with patients. This can prevent the majority of medical cases in court due to the fact that communication between doctors-health workers-hospitals with patients is still a problem in medical practice, considering that the number of patient complaints related to communication with doctors-health workers-hospitals ranks third after medical service standards and competence.

c. The Supreme Court of the Republic of Indonesia as the highest judicial institution needs to compile a progressive judicial index score on medical cases nationally and in each province. The steps for handling and resolving medical cases in court are more measurable and encourage all progressive law enforcement departments to continue to improve them. The progressive justice index on medical cases measures progressive law enforcement management: (i) indicators of progressive judges' decisions (landmark decisions), covering disparity in judges' decisions, empathy, determination, conscience, and the percentage of decisions that have a historical sense of life in deciding medical cases; (ii) indicators of progressive law enforcement authority, including rule-breaking in deciding medical cases; (iii) progressive legal indicators, including judges' decisions that represent the voice of the people (doctors-health workers-hospitals-patients) in deciding medical cases; and (iv) contemplation indicators of historical morality, including judges' decisions which have a substantial meaning of justice in deciding medical cases. The policy of the Supreme Court of the Republic of Indonesia and the judiciary in the regions (provinces) in deciding medical cases related to these indicators is expected to be more easily monitored and can be corrected more quickly if it slows down or worsens. On the other hand, good indicators can be retained or accelerated.
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Inspired by the nick above, although the message is too simple, it is full of contemporary meaning and dispensation. Law should be able to keep up with the times, be able to respond to changing times with all the basics in it, and be able to serve the community by relying on the morality aspect of the human resources of law enforcement itself.

Progressive law and progressive jurisprudence cannot be called a distinctive type of law and a finite scheme, but rather a flowing idea, which does not want to be trapped in the status quo, so that it becomes stagnant. Progressive law always wants to be loyal to "law is for humans." Progressive law can be likened to a guide that always warns, the law must continuously destroy, replace, free stagnant laws, because they are unable to serve a changing environment. That is why the law always flows, because human life is full of dynamics and changes from time to time. Such human life cannot be contained strictly into one chart or another which is finished and must not be changed. The chart must be open, because it is not humans for law, but on the contrary, law is for humans. Forms, solutions, theses (propositions), and theories must also flow to maintain the greatness of human life in this universe.

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