

The Relevance of Legal Positivism on Special Medical Situations in Indonesia's Positive Law

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Abstract

A special medical situation implies the existence of a critical condition of the patient so that it demands immediate medical action, which is closely related to the issue of the patient's life and death. There are at least three stakeholders involved in a particular medical situation, namely doctors, patients' families, and the government. The three stakeholders in the legal context must have a grounding in relation to rights and obligations that are protected fairly. While Legal Positivism substantially introduces that the true law is the law formed by state authorities and expressed in the form of legislation as positive law. Among the deepest meanings of Legal Positivism is that the law must be able to provide certainty and the power of enactment must be based on the hierarchy of legislation. An important issue that needs to be solved is whether positive law in Indonesia in the context of Legal Positivism has provided fair legal certainty for the Special Situation of Medicine.

Keywords: Legal Positivism, Special Situations in Medicine, Legal Certainty

1. Introduction

Patients in the critical category generally need intensive care to sustain life. Intensive care is usually carried out in the Intensive Care Unit (ICU) or Intensive Critical Care Unit (ICCU) which is relatively high cost. The critical condition of the patient has put the medical community in a dilemmatic position. This is further exacerbated by the response of the patient's family which often makes matters more complicated. The dilemma faced by the medical community based on medical considerations shows that the patient's life expectancy actually does not exist, but on the other hand the act of stopping life support for patients has the opportunity to lead to legal prosecution from the patient's family against doctors and hospitals. Medical dilemma this becomes more complicated because of the cost of treatment in the ICU or the relatively expensive ICCU cannot be borne by the patient's family. Decisions on patients in critical conditions whose lives are very dependent on assistive devices, are actually medically useless or futile actions because they have no life expectancy.

Medical action should be understood as a maximal effort based on science to save humans. Thus, it is inappropriate to place the blame on the medical community based on the arguments above outside of medicine. A crucial issue in Indonesia is related to medical procedures to end a patient's condition in critical condition and whose life is highly dependent on life support equipment. Article 14 and Article 15 of the Regulation of the Minister of Health of the Republic of Indonesia (Permenkes RI) Number 290 of 2008 concerning Approval of Medical Actions, regulates special situations of medical action. It is stated that withholding or discontinuing life support equipment (withdrawing life support) is a medical

and ethical decision, where before the decision is implemented, the team of doctors is obliged to explain to the patient's family about the patient's condition and the team's decision. The parameter used by medical science is if a critical patient has cerebral death or Brainstem Death (MBO), then the patient is medically declared dead. In such conditions, the normal procedure is to remove the ventilator or respirator and soon the heart and breathing will stop.

Substantially Regulation of the Minister of Health of the Republic of Indonesia (Permenkes RI) Number 290 of 2008 concerning Approval for Medical Action has given the patient's family the right to make a decision after receiving a medical explanation from the team of doctors (Indonesia, 2008). Therefore, The right to decide is always attached to the family of the patient who is faced with a special situation. Law as a complex of norms and principles related to rights and obligations in legal relations, then in the context of a special medical situation, it must be able to accommodate the various interests of stakeholders involved in a special medical situation fairly.

2. Literature Review

Special Medicine Situation

Special Situations Medicine is closely correlated with understanding the boundaries of life and death. Article 1 letter g of the Government Regulation of the Republic of Indonesia Number 18 of 1981 concerning Clinical Corpse Surgery and Anatomical Corpse Surgery and Transplantation of Human Body Devices and or Tissues states: "Death is a human condition which is believed by authorized medical experts that the function of the brain, respiration and or someone's heartbeat has stopped." Soekidjo Notoatmodjo stated that the brain is the center of

physical and social driving and controlling. Therefore, if the brain stem has died (brain stem death), it is believed that humans have died physically and socially. Death means the permanent loss of human life where the physical and social no longer function. Article 117 of the Law of the Republic of Indonesia Number 36 of 2009 concerning Health states: "A person is declared dead if the function of the heart, circulation and respiratory system is proven to have stopped permanently, or if brain stem death has been proven".

Special Medical Situations which in their implementation require medical action, the Minister of Health of the Republic of Indonesia Number 290 of 2008 concerning Approval of Medical Actions, provides the following limitations: "Approval of Medical Action is the approval given by the patient or his closest family after receiving a complete explanation of the medical action. or dentistry to be performed on the patient. Medical or dental action, hereinafter referred to as medical action, is a medical action in the form of preventive, diagnostic, therapeutic or rehabilitative treatment carried out by a doctor or dentist on a patient.

In the context of living in a state, the Special Situation of Medicine and Medical Action requires the participation of the government. It should be noted that in law, the government is the authority of order for the realization of certainty. Considering that the meaning of order is a legal function that is actually carried out by the government, the consequence is that whatever decision the government makes must be interpreted in the interests of the people in a fair manner. Therefore, the meaning of Government Regulation Republic of Indonesia Number 18 of 1981 concerning Clinical Corpse Surgery and Anatomical Corpse Surgery and Transplantation of Instruments and/or Human Tissues, which provide limits on death need to be interpreted as an authority possessed in order to protect the rights and obligations of stakeholders in Special Medical Situations. The authority possessed by the Government can be ensured to carry out activities to protect the interests of the wider community. If an individual is dissatisfied with the government's policy, proportionally the means of distribution are available, including through the State Administrative Court and institutions that are deliberately formed to accommodate complaints from the public.

3. Legal Positivism

Arief Sidharta outlines the general principles contained in in positivism as follows: (a) Only science can provide valid knowledge; (b) Only facts can be objects of knowledge; (c) The method of philosophy is no different from the method of science; (d) The task of philosophy is to discover general principles applicable to all sciences and to use these principles as guidelines for human behavior and as the basis for social organization; (e) All interpretations of the world must be based solely on experience; (f)

Starting from the natural sciences; (g) Strive to obtain a single view of the world of phenomena, both the physical world and the human world, through the application of methods and the broadening of the range of the results of the natural sciences.

Positivism observes law as only a social phenomenon, so the law known as law is positive law. Therefore, Legal Positivism only looks at the reality aspect of social life, without looking at other values such as justice, truth, wisdom that underlies the rule of law because it cannot be captured by the five senses. This is where legal positivism introduces that what is called law is law. Legal positivism argues that; (a) The law is the commandments of men; (b) There is no need for a relationship between law and morals; (c) Analysis of appropriate legal concepts must be distinguished from historical studies; (d) Law can be logically deduced from pre-existing regulations, without needing to refer to social goals, wisdom, and morality; (e) Moral judgments cannot be enforced and defended by rational reasoning, proof, or testing.

This description shows that legal positivism broadly defines the nature of law as positive norms in the statutory system. In the next course, history has proven that modern legal positivism has a strong academic foundation through the thoughts of John Austin, Hans Kelsen and HLA Hart. In general, they argue that the law is basically a mere man-made "command", although from a slightly different perspective. Austin argues that an order can be said to be law if it is based on state power. Positive law is interpreted as a rule made by a state that has full sovereignty. Austin agrees with Kelsen that law should be separated from morals. However, Kelsen does not agree that the law is an order, because the command requires a psychological element. Kelsen's view that the law is a pure norm that makes a person must behave in a certain way. Kelsen's view has given birth to an understanding that legal positivism aims at legal certainty. Kelsen argues that the validity of these man-made laws should not be questioned based on moral considerations. Positive norms will be accepted as doctrines as long as they are in accordance with the systematic rules of legal logic. Kelsen's view has given birth to the norm structure as a hierarchy based on the level of abstraction. Norms with the most basic abstractions are in the highest position and are the boundary between law and morals called Grundnorm.

In the end Hart with certain modifications combined the views of Austin and Kelsen in giving meaning to Legal Positivism. Hart argues that the law as an order must be obeyed not because of sanctions but because of behavior. In Hart's view there are two types of regulations, namely primary rules and secondary rules. Primary regulations contain rights and obligations that can only be applied to a simple society. While the secondary regulations are related to the interpretation, application, regulations and changes to the primary regulations. Secondary rules are always based on primary rules. Hart argues that

the highest legal norm is not Grundnorm but the ultimate rule of recognition as reality. Enforced orders and sanctions cannot be called laws.

4. Method

The study was conducted through a normative juridical approach by using secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials. The discussion will link between the available legal materials and the phenomena found. The nature of this study is analytical descriptive, which means that the research results will only provide an overview of the analysis of legislation and legal concepts related to the Special Situation of Medicine in their relevance to legal positivism. Secondary data in the form of legal materials that will be used in this research study are: (a) Primary Legal Materials: Law of the Republic of Indonesia Number 29 of 2004 About Medical Practice and Regulation of the Minister of Health of the Republic of Indonesia Number 290 of 2008 Concerning Medical Action Approval; (b) Secondary Legal Materials: Consists of a wide range of literature relating to health law, medical law, hospital law, and legal philosophy; (c) Tertiary Legal Materials: Consists of references in the form of dictionaries, encyclopedias, newspapers, scientific journals, and relevant and urgent instructions with the main discussion.

5. Discussion

The special situation of medicine is closely related to medical action which has an understanding base based on the development of medical science. Medical action in the context of a special situation means an action taken in a situation where the patient is in critical condition and has a slim life expectancy. The extension of the patient's life is solely due to the existence of life support equipment, being in the ICU or ICCU which requires high costs, so that sometimes the patient's family cannot afford it. The dilemmatic situation faced by doctors for patients who have no hope of life and burdens the patient's family in financing really requires a wise and comprehensive solution.

In this context, the involvement of stakeholders, especially doctors, patients' families, and the government or the state as the holder of the regulatory authority becomes very relevant. Based on the existing regulations up to now, several things can be concluded in relation to medical action, namely: (a) A team of doctors consisting of at least 3 competent people will explain clearly based on medical science the condition of the patient to the patient's family; (b) Bringing up a definition of death based on the development of medical science, namely based on the parameters of Brain Stem Death to be said to be dead; (c) The function of the government or the state as a regulatory authority is basically to ensure the creation of order in finding solutions to special medical situations and medical

treatment as fairly as possible. The direction aimed by the government, or the state is to provide protection of the rights and obligations of the parties by prioritizing the public interest.

Legal Positivism as part of a legal discipline that is very influential in the development of law, basically wants to emphasize the importance of paying attention to the following things: (a) Good law should be in the form of legislation and free from mixed norms outside the law; (b) Law in the form of legislation must be able to provide legal certainty to any citizen; (c) Laws must be established by state authorities that have strong legitimacy from the community; (d) The law must have a structure and system in the form of a statutory hierarchy, where the most abstract norm is positioned as the highest and is called the grundnorm, which has a border character with moral norms.

6. Conclusion

Special Medical Situations that require Medical Action, really require a shared understanding among stakeholders, especially the medical community, patient's family, and the government. The shared understanding must reflect the ability to accommodate the interests of protecting the rights and obligations of stakeholders in the context of legal certainty in accordance with the ultimate goal of society, namely justice.

Legal positivism basically teaches that the need for law is embodied in the form of legislation, the law has fair certainty, the law created by the state authorities

Indonesian positive law, especially with regard to the regulation of Special Medical Situations and Medical Actions, through certain modifications has been in accordance with the idea of modern legal positivism as initiated by Austin, Kelsen and Hart. This fact can be seen from the regulation on Special Situations in Medicine and Medical Action, which involves hierarchical legislation starting with the Basic Laws. Republic of Indonesia in 1945, Laws, Government Regulations, and Regulations of the Minister of Health. Placement of Grundnorm as a norm with the highest abstraction and has a moral border, then in the Indonesian context means that Grundnorm is Pancasila. With the implementation of Pancasila which is the basis of Indonesian morality as the source of all sources of law in Indonesia, positive law in Indonesia is not only inspired by Legal Positivism but is still based on the foundation of morality. Indonesia's positive law regarding the Special Situation of Medicine and Medical Action, has been in line with Legal Positivism but is still based on morality as reflected in Pancasila.

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