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### Policy Formulation of Actions of a Carrier of an Infectious Virus Disease

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#### Abstract

The role of law in eradicating the spread of infectious disease viruses, especially those caused by carriers, is related to public health, but the law does not yet contain sanctions for these violations. So there needs to be a formulated policy regarding a person's actions as a carrier of an infectious disease virus. This article describes the relationship between criminal law in its function of preventing the spread of infectious disease viruses, examines the existence of positive law which regulates the prevention of the spread of infectious disease viruses; and projections of criminal law policies in preventing and dealing with viral diseases. This research is normative juridical, with conceptual, statutory and comparative approaches. Research results: It is necessary to formulate criminal provisions for perpetrators of the spread of infectious diseases by paying attention to basic principles, namely the principle of harmonizing the unity of the system, both internal and external harmonization. External harmonization: Synchronization with general rules in the Criminal Code as the parent of the entire material criminal

law system, while internal harmonization: Synchronization with special laws. So, there is a need for legal protection for people who are victims of the spread of infectious diseases from the State. The position of criminal law meets the criteria to be applied as control over infectious disease outbreaks. This appears when a disease is spread by someone who causes illness to the point of death, which indirectly gives rise to criminal liability. The element of responsibility related to public nuisance policy is an unlawful act that causes a threat to life, health, property, morality or comfort. Management of disease outbreaks carried by carriers from a criminal law perspective is a law that has special characteristics, namely sanctions. Applying Article 351 of the Criminal Code to people who deliberately spread infectious disease viruses. The spread of an infectious disease virus by someone is considered an act of persecution. Persecution is an act that causes unpleasant feelings, pain, or injury. Using Article 90 of the Health Law combined with Article 351 of the Criminal Code because the Health Law does not contain it.

**Keywords:** Policies, Actions, Carriers of Infectious Viruses

#### Introduction

The availability of policies designed for the benefit of the general public is needed to overcome situations that may or may not occur. This is important because humans will never understand and predict the possibility of the emergence of an unknown entity. In addition, these entities can also have sudden effects, often causing real surprises.<sup>1</sup> The shock caused by this entity is closely related to the phenomenon of disease in society. As this concept is based on the idea of health resilience or a health recovery program.<sup>2</sup> The existence of a subject that causes disease in living creatures, this disease, especially in humans, will undoubtedly have a negative impact. The consequences of disease have an impact on the host's physical and mental condition.<sup>3</sup> Moreover, a decrease in quality of life due to the presence of a certain entity, especially in humans, is what is called a disease.<sup>4</sup>

<sup>1</sup> Elizabeth Walter, *Cambridge Advanced Learner's Dictionary*, (Cambridge university press, 2008), h. 19

<sup>2</sup> Jennifer B. Nuzzo *dkk.*, "What Makes Health Systems Resilient Against Infectious Disease Outbreaks and Natural Hazards? Results from a Scoping Review," Springer *BMC public health*, Vol. 19, No. 1, (2019), h. 2.

<sup>3</sup> Ann Bowling, "The Effects of Illness on Quality of Life: Findings from a Survey of Households in Great Britain.," BMJ Publishing Group Ltd *Journal of Epidemiology & Community Health*, Vol. 50, No. 2, (1996), h. 49.

<sup>4</sup> Evely Boruchovitch dan Birgitte R. Mednick, "The Meaning of Health and Illness: Some Considerations for Health Psychology," *SciELO Brasil Psico-USF*, Vol. 7, No. 2, (2002), h. 175

Against the possibility of surprises in the form of disease, a health service system was introduced, as a form of response to the instinct of protection against the risk of possible surprises in the form of disease. Henry E. Sigerist interprets the function of health services as consisting of four components, namely preventive, promotive, curative and rehabilitative.<sup>5</sup> The four parts above are efforts aimed at preventing and protecting against disease.

A disease requires appropriate treatment for the disease. One of the important human abilities to have is the ability to control and prevent diseases, especially infectious diseases. The importance of controlling and preventing infectious diseases is reflected in the specialization of medical personnel in treating infectious diseases.<sup>6</sup> Prevention is carried out to overcome the increased risk of exposure to disease, on a wide scale due to disease transmission.<sup>7</sup> Appropriate policies from the government in the field of public health, and incorporating the role of law into them, are one of the appropriate ways to control and prevent infectious diseases.<sup>8</sup>

Viruses are infectious diseases that can affect the quality of life and cause disease, and can make someone a carrier. Carrier's definition was first given in the United States in 1906 in the case of Mary Mallon, who spread typhus without knowing that she was infected because of the mild symptoms she experienced.<sup>9</sup> The definition of Carrier in positive law in Indonesia was previously found in the Elucidation of Article 5 paragraph (1) letter b of Law Number 4 of 1984 concerning Infectious Disease Outbreaks (hereinafter referred to as the Infectious Disease Outbreak Law), which interprets the term Carrier as a person who appears to be healthy, but contains disease-causing agents so it can potentially transmit disease. However, the issuance of Law Number 17 of 2023 concerning Health (hereinafter referred to as the Health Law) which unites all laws and regulations regarding health, eliminates the term Carrier in it. However, the potential for someone to become a Carrier still exists.

Community non-compliance with efforts to control and prevent infectious diseases can cause outbreaks or pandemics. Efforts to prevent and eradicate disease outbreaks are regulated by Article 86, Article 87, Article 88, Article 89 and Article 90 of the Health Law. However, this

<sup>5</sup> Sanjiv Kumar dan G. S. Preetha, "Health Promotion: An Effective Tool for Global Health," Wolters Kluwer–Medknow Publications *Indian Journal of Community Medicine: Official Publication of Indian Association of Preventive & Social Medicine*, Vol. 37, No. 1, (2012), h. 5

<sup>6</sup> Daniel H. McQuillen dan Ann T. MacIntyre, "The Value That Infectious Diseases Physicians Bring to the Healthcare System," Oxford University Press *the Journal of infectious diseases*, Vol. 216, No. 5, (2017), h. 592

<sup>7</sup> Katherine F. Smith dkk., "Ecological Theory to Enhance Infectious Disease Control and Public Health Policy," Wiley Online Library *Frontiers in Ecology and the Environment*, Vol. 3, No. 1, (2005), h. 29

<sup>8</sup> Lawrence O. Gostin, Scott Burris, dan Zita Lazzarini, "The Law and The Public's Health: A Study of Infectious Disease Law in the United States," HeinOnline *Colum. L. Rev.*, Vol. 99, (1999), h. 59.

<sup>9</sup> Thomas C. Timmreck, *An Introduction to Epidemiology*, (Jones & Bartlett Learning, 2002), h. 163

law does not contain penalties for violations, especially for carriers who deliberately violate existing provisions, including not being able to cover this problem and being felt to lack coercive power. The role of law in eradicating the spread of viruses from infectious diseases, especially those caused by carriers, is closely related to public health. The role of the public health sector as the body responsible for controlling the spread of infectious diseases can be seen in the policy-making process in the health sector.<sup>10</sup>

The role of law in controlling individual behavior is a choice that can be taken by government agencies when formulating policies to control the spread of infectious disease viruses.<sup>11</sup> The potential for public non-compliance with regulations will increase the intensity of transmission of disease viruses by carriers, which in turn will cause a pandemic of infectious disease viruses. Community disobedience and indifferent attitudes are factors in disease outbreaks based on epidemiological observations.<sup>12</sup> Infectious diseases caused by certain viruses with rapid transmission can endanger the country and its people, and result in an emergency health status.<sup>13</sup> The emergency situation shows that the transmission of infectious disease viruses intentionally or unintentionally by carriers ultimately becomes a problem with governments in various countries and also international parties, in this case PHEIC (Public Health Emergency of International Concern).<sup>14</sup>

Using the rule of law to protect the population is a pure form of state intervention. The intervention referred to is the state's authority to intervene (police power) in people's lives to maintain health, safety and morals.<sup>15</sup> This becomes a reference in overcoming prevention problems related to the spread of infectious disease viruses which are related to the principles of public health science. This definition was formed because the object of control in public health is the human population. Prinsip pencegahan dalam hukum pidana secara tidak langsung menimbulkan kontroversi. Because the essence of criminal law is ultimum remedium, which according to some experts is very difficult to implement as a

<sup>10</sup> Peter O'Malley, John Rainford, dan Alison Thompson, "Transparency during public health emergencies: from rhetoric to reality," *SciELO Public Health Bulletin of the World Health Organization*, Vol. 87, (2009), h. 614

<sup>11</sup> Wendy K. Mariner, George J. Annas, dan Wendy E. Parmet, "Pandemic preparedness: a return to the rule of law," *HeinOnline Drexel L. Rev.*, Vol. 1, (2009), h. 341

<sup>12</sup> Krishna Regmi, Ruth Gilbert, dan Colin Thunhurst, "How can health systems be strengthened to control and prevent an Ebola outbreak? A narrative review," *Taylor & Francis Infection Ecology & Epidemiology*, Vol. 5, No. 1, (2015), h. 2

<sup>13</sup> Christopher Nelson dkk., "Conceptualizing and defining public health emergency preparedness," *American Public Health Association American journal of public health*, Vol. 97, No. Supplement\_1, (2007), h. 2.

<sup>14</sup> David N. Durrheim, Laurence O. Gostin, dan Keymanthri Moodley, "When does a major outbreak become a Public Health Emergency of International Concern?" *Elsevier The Lancet Infectious Diseases*, Vol. 20, No. 8, (2020), h. 887

<sup>15</sup> Larry Gostin, "The Future of Communicable Disease Control: Toward A New Concept in Public Health Law," (*JSTOR The Milbank Quarterly*, 1986), h. 79

tool to control the spread of infectious disease viruses.<sup>16</sup> One of the causes of infectious diseases is that they are carried by a person or persons. Persons are characteristics of individuals that influence their exposure or sensitivity to disease. Characteristics include genetic factors, age, gender, occupation, habits and socio-economic status so that those who are easily exposed to or sensitive to disease will easily get sick. Definition of communicable disease itself is a disease caused by the transmission of an infectious agent/toxin product from a person/reservoir to another person/susceptible host.<sup>17</sup>

Criminal law which aims to create a deterrent effect on someone is believed to complicate the situation in efforts to stem the spread of infectious disease viruses. Criminal law can also be activated as a *primum remedium* in emergencies. Repressive law enforcement efforts as part of punishment can create fear, which is seen as distorting the objectives of criminal law. The resulting effect is actually contrary to the objectives of criminal law because people will be closed off and reluctant to consult regarding their health status.<sup>18</sup> The application of criminal law is a form of realizing criminal responsibility for carriers who have transmitted diseases that cause death to other people.<sup>19</sup> The emergence of conflict in efforts to control carriers of infectious diseases gives rise to problems such as; there is a form of concern for the opposite consequences; and to comply with the status of epidemics as a threat to society giving rise to criminal liability.

This research seeks to examine criminal law formulation policies for carriers of infectious disease viruses. A formulation policy is a policy that is being created for the first time to regulate a matter relating to public policy.<sup>21</sup> In this case, the formulation policy to be studied is regarding the criminal law formulation policy regarding carriers of infectious disease viruses. Steps to overcome the spread of infectious disease viruses in society require effective and precise regulations quickly. However, in forming norms regarding the control of infectious virus carriers (Carriers) from the field of public health, it is necessary to know the extent of the role of the law.

Based on the background above, the formulation of the problem to be answered in this research includes: 1). Can criminal law function in an effort to prevent the spread of infectious disease viruses by a carrier?, 2). What is the urgency of regulating the prevention of the spread of infectious disease viruses carried out by a Carrier in Indonesia?, and 3). What is the criminal law formulation policy in an effort to prevent and overcome infectious disease viruses carried out by a Carrier?

<sup>16</sup> Bebe Loff dan Scott Burris, "Compulsory detention: limits of law," Elsevier *the Lancet*, Vol. 358, No. 9276, (2001), h. 146

<sup>17</sup> Irwan, *Epidemiologi Penyakit Menular*, (Cv. Absolute Media Yogyakarta, 2017), h.2-3

<sup>18</sup> Peter Old dan Jonathan Montgomery, "Law, coercion, and the public health.," BMJ Publishing Group *BMJ: British Medical Journal*, Vol. 304, No. 6831, (1992), h. 891

<sup>19</sup> George R. Mawhinney, "To be ill or to kill: The criminality of contagion," SAGE Publications Sage UK: London, England *the Journal of Criminal Law*, Vol. 77, No. 3, (2013), h. 202.

## Research Methods

The use of qualitative analysis techniques that combine normative and doctrinal law is the method used in this research. Normative legal research includes research on legal products, legal foundations, legal systematics, legal synchronization, both vertical and horizontal, legal comparisons, and historical research.<sup>20</sup> The problem approach in this research is legislative, conceptual and medicolegal approaches.

## Discussion

### 1. Functionalization of Criminal Law in Efforts to Prevent the Spread of Infectious Disease Viruses by a Carrier

The life of a democratic society and state highly upholds the value or right of independence and freedom in the Preamble to the 1945 Constitution, it is even emphasized that independence is the right of all nations, it is further emphasized with two basic consequences, namely Colonialism must be abolished because it is not in accordance with humanity and justice, the right to life. free nationality. The independence and freedom to be achieved is freedom in order, freedom in an orderly legal order. The legal order needs to study the object of dogmatic legal science or what is better known as Positive Law, literally the law that is formed, created and determined, the term positive in the context of positive law. L.B Curzon defines positive law as "the legal rules promulgated in formal fashion by the state and enforced Although defined sanctions" positive law is a legal regulation that is officially announced by the state and enforced through strict sanctions. Criminal provisions are all the rules/norms of criminal law, three types of criminal law rules, namely formal criminal law material and criminal implementation law.

Formulation Policy is part of criminal policy which is essentially an effort to create a legal product within the criminal scope so that it is in accordance with the conditions, time and future.<sup>21</sup> Regarding criminal law policy, in essence it is also a criminal law enforcement policy which consists of a series of policy processes, the first is the formulative policy stage or legislative policy stage, namely the stage of drafting/formulating criminal law. Second, the judicial/ applicative implementation stage, namely the implementation stage of criminal law, third, the executive/administrative policy stage, namely the implementation/execution stage of criminal law.

The position of criminal provisions in statutory regulations can be seen from two angles, firstly, from the systematic angle of the legislation concerned. Judging from the technique of drafting statutory regulations as contained in the attachment to Law No.12/2011 "criminal provisions are one of the sub-chapters of the body of statutory regulations, in the attachment to Law No.10/2004 what is meant by criminal provisions is explained "provisions contains a formulation stating criminal imposition for violations of provisions containing prohibitive norms or orders. Second

<sup>20</sup> Soerjono Soekanto dan Sri Mamudji, *Penelitian hukum normatif: Suatu tinjauan singkat*, (Raja Grafindo Persada, 2001), h. 13–14

<sup>21</sup> Barda Nawawi Arief. *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan*. (Jakarta: Kencana Media Group. 2007). h. 78-79

Angle of the entire criminal law system, which is a system of the entire main criminal law system which is still regulated in the Criminal Code, therefore it is stated "in formulating criminal provisions it is necessary to pay attention to the general principles of criminal provisions contained in Book One of the Criminal Code, because the provisions in the Book First also applies to acts that can be punished according to other laws and regulations, unless the law finds otherwise (Article 103 of the Criminal Code).

One of the criminal provisions that should be given special attention is the regulations governing human health, in this case more specifically criminal sanctions for someone who deliberately spreads disease. Health Law does not exist in the form of special regulations, but is spread across various regulations and legislation such as those in the fields of criminal law, civil law and administrative law, the application, interpretation and assessment of the facts are in the health or medical sector. The scope of Health Law includes, among others, Medical Law/Medical Law, Nursing Law, Hospital Law, Environmental Pollution Law, Occupational Health and Safety Law, Epidemic Law and various regulations that are directly related to matters that affect human health. Health law is knowledge that examines how to enforce legal rules regarding the consequences of carrying out medical/health actions carried out by parties who work as health workers which can be used as a basis for certainty of legal action in the world of health.

Based on data and analysis of criminal provisions in laws and regulations outside the Criminal Code, in general, in the preparation or creation or formulation, internal and external irregularities and disharmony are still visible and there are doubts about the attitude of law makers in determining the legal qualifications of a criminal act as a crime or violation. The formulation or regulation relating to the Prevention of the Spread of Infectious Disease Viruses by including a Carrier as the subject of a criminal offense. Most laws such as the Infectious Disease Outbreak Law and the Health Law do not contain specific provisions regarding how a Carrier can be punished for this in order to maintain public security and peace, the state needs to follow up on a carrier who intentionally or unintentionally spreads an infectious disease.

Types of sanctions in criminal law can be in the form of criminal sanctions and action sanctions, so that there is uniformity, lawmakers should create/draw up patterns for formulating types of actions based on the nature of action sanctions which are basically not a reward for the mistake of the maker but rather emphasize the person who lacking or unable to take responsibility or an evil character/spirit/inner attitude. In the formulation of criminal provisions related to perpetrators of the spread of infectious diseases or known as carriers, the basic principle or general principle that must be taken into account is the principle of harmonizing the unity of the system, both internal and external harmonization. External harmonization means synchronization or harmony with the general rules in the Criminal Code which is still the parent of the entire material criminal law system (substantial punishment system) currently in effect. Internal harmonization means synchronization or harmony with all the rules in the relevant special law. So in In this case, the Indonesian government needs to make written regulations to enforce the legality and protection of the wider community from health threats caused by spread by a carrier.

Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims states in Article 1 number 3 that a victim is "a person who experiences physical, mental suffering and/or economic loss resulting from an act criminal". Theoretically, a crime victim is defined as someone who has suffered loss as a result of a crime and/or whose sense of justice has been directly disturbed as a result of their experience as a target of crime. In the criminal justice system in Indonesia, the interests of crime victims are represented by the Public Prosecutor who is part of the state's protection of society as a logical consequence of social contract theory and social solidarity theory.<sup>22</sup>

The Public Prosecutor, as a state institution that represents crime victims and the community, should in its criminal complaints explain more about the victim's suffering as a result of criminal acts committed by the perpetrator. This is a form of protection for crime victims. With this benchmark, filing criminal charges should be based on justice viewed from the victim's perspective.<sup>23</sup> Article 5 Paragraph (1) of Law Number 31 of 2014 states that Witnesses and Victims have the right to: Obtain protection for the security of their persons, families and property, and to be free from threats relating to the testimony they will, are giving or have given; participate in the process of selecting and determining forms of security protection and support; provide information without pressure; get a translator; free from ensnaring questions; receive information regarding case developments; obtain information regarding court decisions; receive information in the event that the convict is released; identity kept secret; get a new identity; obtain temporary residence; get a new residence; obtain reimbursement for transportation costs according to needs; obtain legal advice; obtain temporary living expenses assistance until the protection period ends; and/or receive assistance. However, the rights as mentioned are given to witnesses and/or victims of criminal acts in certain cases in accordance with the Decision of the Witness and Victim Protection Agency (LPSK).

The existence of certain rules made for the benefit of society is necessary to overcome situations that can be predicted or not. The sudden appearance of an unknown entity has an impact that often causes a real surprise.<sup>24</sup> The shock given by this entity has a strong connection with the phenomenon of the emergence of disease in a society.<sup>25</sup> The existence of a subject that causes illness in living creatures, especially humans, will of course have a negative effect. The consequences of illness lead to its influence on the physical

<sup>22</sup> Marcus Priyo Gunarto, *Terorisme Dalam Prespektif Hukum Pidana dan Kriminologi* (Yogyakarta: Genta Press, 2012), h. 85

<sup>23</sup> Vivi Ariyanti, "Konsep Perlindungan Korban Dalam Sistem Peradilan Pidana Nasional dan Sistem Hukum Pidana Islam," *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol. 13, No. 1, (2019), h. 38.

<sup>24</sup> Colin McIntosh, ed., *Cambridge Advanced Learners Dictionary*, 4th ed. (Cambridge: Cambridge University Press, 2013), 1426.)

<sup>25</sup> Jennifer B. Nuzzo *et al.*, "What Makes Health Systems Resilient against Infectious Disease Outbreaks and Natural Hazards? Results from a Scoping Review," *BMC Public Health* 19, no. 1310 (2019): 2

or psychological condition of the host. The role of law in handling the spread of infectious diseases is closely related to public health. The role of the public health sector as the party responsible for controlling the spread of disease can be seen in the process of forming health policies. The function of law as a control on people's behavior is an option that can be implemented by government agencies in formulating policies to control the spread of disease.<sup>26</sup>

However, the potential for public disobedience to existing regulations could cause the intensity of infectious disease transmission to increase, which in turn could lead to infectious disease outbreaks. Disobedience or ignoring society is one of the causes of disease outbreaks because it is a factor. The occurrence of an outbreak due to inadequate control of infectious diseases can expand the area of disease spread to national and international levels as a pandemic. Pandemic influenza and the Covid-19 case are examples of situations that are more than ordinary disease outbreaks because their transmission is so fast that it can cross national borders.<sup>27</sup>

The characteristics of diseases that reduce the quality of human life to the point of causing death that spread quickly can create a public health emergency. Emergency status indicates that the transmission of infectious diseases will eventually become a public problem, reflected by the intervention of the national government and international parties. In real. The position of criminal law is increasingly meeting the criteria to be applied as an effort to control outbreaks of infectious diseases. This can be seen when the spread of disease by someone causes illness and results in the death of another person which indirectly gives rise to criminal liability.<sup>28</sup> The occurrence of conflict in the application of criminal law as an effort to control infectious disease outbreaks gives rise to a dilemma, namely: The existence of a form of concern about the opposite result; as well as fulfilling the status of the epidemic as a threat to the public which gives rise to criminal liability. Efforts to overcome the spread of infectious diseases in society require clear and effective regulations. However, in forming regulations regarding the control of infectious diseases which are included in the realm of public health, it is necessary to first understand the role of law in them.

## **2. The Urgency of Arrangements to Prevent the Spread of Infectious Disease Viruses carried out by a Carrier**

The concept of law and public health in handling infectious diseases was first formed in 1851, precisely at the world's First International Sanitation Conference held by France.<sup>29</sup> With the holding of the first international sanitation conference, the handling of infectious diseases has received attention from the world community. However, it should be

noted that the initial steps in accepting the legal concept of infectious disease outbreaks have significant challenges. The challenge that directly confronts the application of the concept of managing infectious disease outbreaks is human egoism. In 1962, Australian virologist Sir McFarland Burnett stated that after the end of the Second World War it could be said that most of the practical problems related to infectious diseases had been resolved.<sup>30</sup>

The emergence of legal relations and infectious diseases means that the legal function has an important role in it. The role of law relating to infectious diseases refers to their nature which can deeply influence health criteria, quality of life and peace which covers the entirety of public health problems. The link created by the influence of law on efforts to deal with infectious diseases means that the state can pursue legal action as a form of responsibility that can go beyond the boundaries of autonomy, privacy, freedom and individual interests as a form of community-based health protection and promotion. The legal interest to protect society collectively creates a special right to limit individual rights with the aim of protecting society.

The connection with community or public protection can state that the role of criminal law is theoretically relevant in the field of public health. This theoretical relationship is based on criminal responsibility, namely a concept which states that a person must 'pay' for the consequences of the actions he or she commits. In short, accountability occurs because there has been a criminal act or disgraceful act in the eyes of the law committed by someone. The relevance given by criminal law as public law to infectious disease outbreaks as a public health problem cannot be separated from conflicting values. One of the challenges given is the human rights perspective. The friction in values between criminal law as a government representative in interfering in individual rights for the sake of certain interests is an issue that requires certain studies related to the transmission of infectious diseases involving carriers in their spread. Epidemiologically, the condition of a person suffering from an infectious disease can be considered a carrier of the disease, which has the potential to transmit disease to people around them.

The function of law in the field of public health is to seek regulations in the interests of public health, especially when an infectious disease outbreak occurs. Criminal law as public law is a field that provides a social control function as a form of protection for society by imposing penalties on violators. So it can be said that the punishment given in the criminal realm as an effort to control the spread of infectious diseases is with sanctions so that someone can be deterred and the spread can be controlled. The form of intervention provided by criminal law in an effort to control the spread of infectious diseases has two forms, namely: The first is 'prohibitions aimed at the spread of infectious diseases', and the second is 'categorizing an action as an attack on someone'. Both forms of intervention efforts to prevent the spread of infectious diseases in the criminal realm clearly provide opportunities for implementing the function of criminal law in protecting society.

Coverage that is not comprehensive creates an area of understanding that is not comprehensive either. In fact, the

<sup>26</sup> Wendy K. Mariner, George J. Annas, and Wendy E. Parmet, "Pandemic Preparedness: A Return to the Rule of Law," *Drexel Law Review*, Vol. 341, No. 2009

<sup>27</sup> Thomas Abraham, "Lessons from the Pandemic: The Need for New Tools for Risk and Outbreak Communication," *Emerging Health Threats Journal* Vol. 4, No. 1, 2011

<sup>28</sup> George R. Mawhinney, "To Be Ill or to Kill: The Criminality of Contagion," *The Journal of Criminal Law*, Vol. 77, No. 3, 2013. h. 202

<sup>29</sup> Obijiofor Aginam, "International law and communicable diseases," *Bull World Health Organ*, Vol. 80, No. 12, 2002

<sup>30</sup> Philip S Brachman, "Infectious Diseases—Past, Present, and Future," *International Journal of Epidemiology*, Vol. 32, No.5, 2003, h. 684

criminal concept related to the spread of infectious diseases only revolves around the issue of sexually transmitted diseases (STDs). It cannot be denied that PMS is a quite serious problem with far-reaching impacts. However, the thinking underlying PMS problems still has the same scope as treating infectious diseases in general. The similarity in basic concepts shared by STDs and infectious diseases in general explains that the legal concepts governing both tend to have similarities, where the aim will also be the same, namely controlling the spread of disease. The only difference is that sexually transmitted diseases are treated which require attention to communication aspects which tend to be related to privacy.<sup>ya</sup>

The application of criminal law in handling the spread of HIV cannot be separated from challenges to the concept of human rights. The argument given from the human rights perspective is that the problem of criminalization targeted at a person can have the potential to violate various human rights values that are in the name of government power. The violation may be directed at: The right to privacy, freedom of expression, discriminatory criminal imposition, criminalization of every HIV sufferer, inaccurate understanding, and can give authority to the state to apply the law arbitrarily. The various risks of human rights violations due to the application of criminal law in efforts to control the spread of the HIV virus, which are the basis of human rights arguments, can actually be directly overcome by the nature of criminal law to limit people's rights. However, the application of human rights restrictions to people living with HIV/AIDS needs to be reconsidered when stigmatization, or inappropriate treatment of people living with HIV, becomes increasingly apparent in society. The stigmatization carried out by society towards HIV/AIDS sufferers makes upholding human rights, which can actually be limited, important. The application of human rights principles needs to be balanced when the application of criminal law is enforced, this is because stigmatization of HIV/AIDS sufferers can hinder the identification process and can expand the area of distribution and at the same time endanger various parties, especially health workers, especially medical practitioners as practitioners who are in close contact with patients in health services.

The application of the concept of criminal law to the spread of STDs with the example of HIV clearly establishes the validity of its application, this is also supported by clarity on human rights issues related to stigmatization and public fear as obstacles to the disease identification process. The application of criminal law and human rights concepts in the handling of sexually transmitted diseases raises questions related to the handling of other infectious diseases in general, which will then be explained in the case of the spread of SARS. The SARS outbreak spread internationally in early 2003, and its spread was so fast that the WHO immediately announced a warning status for the emergence of a new infectious disease one month later. SARS is a disease that is transmitted through a virus and spreads like influenza, namely when people cough, have physical contact with contaminated objects, and can also pass through waterways, which ultimately enters the human respiratory system. It is also categorized as a deadly infectious disease because it can spread even to health workers who treat it with greater attention. The characteristics of the spread of the SARS virus clearly indicate that this disease is categorized as a generally infectious disease. The

application of criminal law concepts related to handling SARS is not much different from handling HIV. However, the problem that is an obstacle to the application of criminal law is regarding knowledge of whether someone is infected or not.

A codified criminal law regulation that would have to include all laws relating to criminal activity is known as the Criminal Code or simply the Criminal Code, but this is not possible because a new act (criminal act) will inevitably emerge from time to time. to the extent permitted by the Criminal Code. As a result, through the implementation of criminal law programs containing new crimes that are not regulated by the Criminal Code, the government has established a number of statutory regulations. Responding to changes in society, new regulations as well as improved versions of existing Criminal Code provisions have been created to address legal requirements and balance the development of society. growing rapidly.

Legal policy must be viewed as an integral aspect of the national legal system within the framework of the rule of law. Since independence, Indonesia has proclaimed itself as a country based on law, not power. This means that the laws made for the Indonesian rule of law must be followed by all elements of the state's power structure and its population. This includes all of Indonesia's constitutional subsystems, its constitutional system, and its social order system.

The concept of criminal law must be in accordance with the objectives of the General Provisions of Law Number 36 of 2009 concerning Health which states that: "Health is a state of health, both physically, mentally, spiritually and socially, which enables everyone to live a productive life socially and economically. For To realize this, formal regulations for a carrier who endangers the health of other people, which is the nature of an infectious disease, can be considered to have committed an act or act of hurting another person, either intentionally or unintentionally, through the disease he or she is suffering from, this can then be categorized as a criminal act.

### **3. Formulation of Criminal Law Policy in Efforts to Prevent and Overcome Infectious Disease Viruses Committed by a Carrier**

Health is a human right and one of the elements of public welfare that must be realized by the State as stated in the Preamble to the 1945 Constitution. The role of criminal law in realizing health welfare is as a manager of public risks in the form of dangerous human behavior. People infected with infectious diseases as carriers have the potential to transmit the disease to other people intentionally or unintentionally. In order to maintain public security and peace, the state needs to follow up on carriers who intentionally or unintentionally spread infectious diseases. The application of criminal law can be used as an alternative to prevent and provide a deterrent effect for perpetrators who violate government policies regarding the protection of public health. Indonesia has a civil law-based legal system or focuses on the application of written regulations. This is also based on the nature of civil law law which focuses on fulfilling the principle of legal certainty.<sup>31</sup>

The implementation of a legal system based on written regulations makes it necessary for the Indonesian

<sup>31</sup> Fajar Nurhardianto, "Sistem Hukum Dan Posisi Hukum Di Indonesia," Tapis: *Jurnal Teropong Aspirasi Politik Islam*, Vol. 11, No. 1, 2015. h. 37

government to create certain regulatory products in writing to enforce the validity of its regulations. The need for written legislation has subsequently given rise to various legislative products, such as in criminal law, namely the Criminal Code (KUHP) and the Criminal Procedure Code (KUHAP). Efforts to deal with infectious disease outbreaks as a form of problem in Indonesia have also created a special regulation, namely the Law on Infectious Disease Outbreaks.

A violation or criminal act must be formulated in the law with the consequence that a person's actions which are not included in the law as a criminal act cannot be punished. With this principle, unwritten laws have no power to be implemented. However, it is justified to expand the application of regulations by abstracting them into legal rules which are the basis for the application of general rules to concrete actions that are not regulated in legislation, known as 'establishing regulations by analogy in order to fill gaps in the law for actions that are similar to those regulated by law. For example, the judge chooses an alternative to determine the type of punishment that is appropriate to apply to the perpetrator by considering the factors of the act, the person, the public's impression of the crime, the severity of the victim or loss, and the projected effectiveness of the punishment.

A person who commits a criminal act does not necessarily mean that person can be punished because before determining whether someone is criminalized, two things must first be determined: Whether the person's actions constitute a criminal act or not, and whether the defendant can be held accountable or not. Determining the existence of a criminal act is based on the principle of legality and determining criminal liability is based on the principle of error. Another term for the principle of error is "the principle of not being punished if there is no error", the principle of culpability, *Geen straf zonder schuld*. The principle of legality is related to criminal acts and the principle of error is related to the person who committed the act or to someone's criminal responsibility.

This criminal liability is called *toerekenbaarheid*, or criminal liability. Criminal responsibility here is intended to determine whether a suspect or defendant is responsible for a criminal act that occurred or not. Thus, for a person who commits a criminal act, in order to be punished, it must first be determined that his or her actions constitute a criminal act, and that his or her actions can be accounted for. To determine the existence of a criminal act based on the principle of legality by paying attention to the element of error or the principles of culpability and criminal responsibility. Even though in theory there is a separation between the principle of legality and the principle of culpability, these principles are related and complementary. The consequence of separating a criminal act from the person who committed the crime is that in order to impose a crime for someone's mistake, it must be completed that that person can be held accountable for all his actions.

The Health Law regulates efforts to control infectious diseases. These efforts are regulated in several articles in the Health Law as follows: Article 1 number 30, Article 86 to Article 90, Regulations regarding epidemics in Indonesia mostly contain procedures for dealing with disease outbreaks, such as procedures for reporting outbreaks, management of risky materials, as well as punishment provisions. In terms of criminal provisions, the Health Law

does not have provisions regarding carriers as subjects who can be blamed.

The absence of criminal provisions against carriers in the Health Law in Indonesia needs to be studied further by looking at other statutory provisions. There is no mention of the criminal provisions in the Health Law relating to epidemics regarding the criminalization of a Carrier as someone who has the potential to endanger public health. The absence of an article on criminal penalties for carriers in the Health Law shows that in Indonesia the handling of infectious diseases generally does not prioritize the application of criminal penalties to someone identified as a carrier. However, a review of the laws relating to epidemics as well as the provisions on criminal action criteria as written in the Criminal Code found several provisions that specifically target carriers.

The government's action to quarantine someone who is diagnosed with a contagious disease is one of the first steps to prevent the spread of the disease. On the other hand, if a Carrier does not comply with health quarantine regulations it will pose a threat to someone's health and safety and even cause death due to infection. Referring to the potential for non-compliance in the concept of criminal law, a Carrier must be followed up to provide a deterrent effect and legal certainty. Based on the provisions of the Criminal Code, Article 1 Number 1, the principle of legality states that no act can be punished except based on previously existing criminal provisions.

The Criminal Code does not clearly state the actions of a Carrier that have the potential to spread infectious diseases. The failure to convict a Carrier who has the potential to spread a contagious disease because there are no provisions governing this could be a legal loophole for spreading a disease intentionally. An example of this case can be seen from the case of Daryll Rowe who actually suffers from HIV but stated that he did not do so with the aim of having sex with his partner. An act can be said to be a criminal act if the act carried out is contrary to legal regulations which prohibit the act (causing a situation as a result of someone's behavior) so that the person who causes the incident is threatened with criminal punishment. Thus, it is necessary to have a criminal law provision which aims to protect health the public to ensnare a Carrier who causes the spread of infectious diseases.

This act of spreading infectious diseases has similar elements to the article in the Criminal Code, namely regarding persecution. Acts of abuse are included in one of the types of offenses in criminal law, namely intentional offenses, which means that an act is committed as a result of a pre-planned or unplanned intention based on one's own will or the will of another person. Damaging health is not only an act that intentionally causes another person to feel pain, but can also be interpreted as an act that worsens another person's health. Therefore, a carrier who intentionally or through his own fault spreads an infectious disease to other people, in concept, can be charged with legal sanctions for the crime of persecution. This concept of abuse, apart from the Criminal Code, also needs to be included in special regulations in the criminal provisions section, as is the case in laws related to epidemic management. This specificity is aimed at its connection with the application of the concept of public nuisance which poses a risk not only to the health of one person, but to the wider community.

Based on the division of violations and crimes or criminal acts in the Criminal Code, the act of spreading infectious disease viruses can be categorized as a crime against a person's body that is committed intentionally. This is based on an intentional intention to spread the virus to other people. So it can be said that the act of spreading a virus can be equated or analogous to a crime against a person's body that is carried out intentionally or abuse so that pain or suffering arises. Unfortunately, the Criminal Code itself does not clearly define what is meant by abuse.

There is deliberate spread of the virus to other people and this results in disruption to the health of the person infected with the virus. Likewise, on the other hand, someone who, due to ignorance, incompetence and/or helplessness, is not worthy of being criminalized in the event of disease transmission in the community or in extraordinary events. Considering the principle of criminalization, the most important thing for determining whether a person's actions are classified as criminalization is the principle of legality. Furthermore, to anticipate the weakness of criminal sanctions against the perpetrator from the perspective of Article 90 of the Health Law which does not contain legal provisions, and so that this violation or criminal act can be criminalized against the perpetrator, it must be possible to apply 'analogical regulation' to fill the gap in the law. For acts similar to those regulated by law, namely choosing alternatives to determine the type of punishment that is appropriate to be applied by considering the factors of the act, the person, the public's impression of the crime, the severity of the victim or loss and the projected effectiveness of the punishment.

Apart from these two legal policy options, namely imposing Article 351 of the Criminal Code or an analogy to Article 90 of the Health Law, a third legal policy option can be applied, namely revising the Health Law and/or the Plague Law. In this case, the revision was carried out by implicitly regulating in the law criminal offenses that can be charged against someone who intentionally or negligently spreads an infectious disease. This research considers that this third legal policy formulation or choice can better fulfill the principle of legal certainty rather than making an analogy with statutory regulations.

The discussion regarding the concept of criminal law in handling infectious diseases, as well as its application in Indonesia, concludes that the application of the concept of criminal law can be carried out on a limited basis. The limitations in the application of criminal law in handling infectious diseases are because preventive efforts need to be prioritized. Criminal law will only function when there is a problem in the public health prevention process, as exemplified by the deliberate factor of a Carrier who knows about his own infection but continues to carry out activities that have the potential to spread the infectious disease.

The application of criminal law needs to be carried out carefully to avoid stigmatization of society while still paying attention to human rights values. Laws in Indonesia do not directly regulate criminal handling of carriers, but when looking at the concept of criminal law, carriers can potentially be punished if they carry out careless actions that

endanger the general public, which basically fulfills the public nuisance concept of common law criminal law. Sufficient explanation regarding Carriers in legal regulations is needed so that the relationship between the concept of public health and law can be carried out effectively and sustainably, especially regarding the application of criminal regulations that are necessary to maintain human rights values in a Carrier.

It could be that what is meant by a disease that endangers other people is a disease that threatens the safety of other people, disrupts order, and/or disrupts public security. If the disease is a dangerous mental illness, the sufferer must receive treatment and care, not be punished. For further clarity, refer to Article 44 paragraph (1) of the Criminal Code which reads: "Anyone who commits an act for which he cannot be held responsible because his soul is disabled in development or disturbed by disease, shall not be punished."

It is further stated in Article 44 paragraph (2) of the Criminal Code that if it turns out that the perpetrator cannot be held responsible for the act because his mental development is disabled or disturbed due to illness, then the judge can order that the person be put in a mental hospital, a maximum of one year as a probationary period. Still related to the criminal responsibility of someone who has a mental disorder, in criminal law the reasons for expunging a crime are known, namely justifying reasons and forgiving reasons:

- a. Justifying reasons are reasons that eliminate the unlawful nature of a criminal act. So, the justification is seen from the perspective of the action (objective). For example, the act of 'taking life' carried out by the executioner of the shooter against a death row inmate (Article 50 of the Criminal Code).
- b. Forgiving reasons are reasons that erase the guilt of the perpetrator of a criminal act, while the action remains against the law. So, the reasons for forgiveness are seen from the perspective of the person/perpetrator (subjective). For example, because the perpetrator is insane or crazy, he cannot be held responsible for his actions (Article 44 of the Criminal Code).

Basically, every person has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy living environment and has the right to obtain health services as stated in Article 28H of the 1945 Constitution ("1945 Constitution"). Therefore, the treatment for those suffering from an illness, whether the illness is dangerous to other people or not, is by curing them through health services, not criminalizing them. In Article 13 paragraph (1) letter f of Law no. 6 of 2011 concerning Immigration ("Immigration Law") states that immigration officials refuse foreign nationals ("WNA") who enter Indonesian territory who suffer from infectious diseases that endanger public health. Criminal liability is closely related to the ability to be responsible. Theoretically, the ability to be responsible is a normal or healthy mental condition and the ability to reason in differentiating between good and bad things or in other words, being able to realize the unlawful nature of an action and in accordance with this conscience being able to determine one's will.



**Table 1:** Formulasi Kebijakan Hukum Pidana dalam Upaya Mencegah dan Menanggulangi Virus Penyakit Menular yang Dilakukan oleh seorang Carrier

S. No	Articles that can be applied	Explanation
1	Article 351 of the Criminal Code	The spread of an infectious disease virus by a Carrier is considered an act of persecution. Persecution is an act that causes unpleasant feelings, pain, or injury
2	Article 90 Health Law	Article 152 of the Health Law does not contain legal provisions, and in order for this violation or criminal act to be criminalized against the perpetrator, it must be applicable

Formulation of criminal law policies in an effort to prevent and overcome infectious disease viruses carried out by a Carrier as concluded above. Indonesian Criminal Law Policy Concerning Criminal Liability for People with Schizophrenia. An issue that is no less important in reforming the criminal law system in Indonesia is criminal responsibility. Conventionally, this principle is commonly called the principle of culpability (no crime without fault). 278 This concept certainly provides strict limits on things that have been developed by criminal law experts through their doctrine. Objective criminal liability includes the phrase "objective blame", meaning that the act was objectively against the law. Apart from that, there are subjective conditions that must be met to impose a crime on someone, namely that there must be an error in various forms (deliberate and negligent).

### Conclusion

The function of criminal law in an effort to prevent the spread of infectious diseases by a Carrier aims to create a deterrent effect on someone who is believed to complicate the situation in efforts to stem the spread of infectious disease viruses. Criminal law can also be activated as a *primum remedium* in emergencies. Repressive law enforcement efforts as part of punishment can create fear, which is seen as distorting the objectives of criminal law. The resulting effect is actually contrary to the objectives of criminal law because people will be closed off and reluctant to consult regarding their health status.

The urgency of applying criminal law against people who deliberately spread infectious disease viruses is a form of realizing criminal responsibility for carriers who have transmitted diseases that cause death to other people. The emergence of conflict in efforts to control carriers of infectious diseases gives rise to problems such as; there is a form of concern for the opposite consequences; and to comply with the status of epidemics as a threat to society giving rise to criminal liability.

In an effort to formulate criminal law against carriers of infectious disease viruses, this research offers three ideas. First, by imposing Article 351 of the Criminal Code against people who deliberately spread infectious disease viruses. The spread of an infectious disease virus by a Carrier is considered an act of persecution. Persecution is an act that causes unpleasant feelings, pain, or injury. Second, using Article 90 of the Health Law combined with Article 351 of the Criminal Code. Article 90 of the Health Law does not contain legal provisions, and in order for this violation or criminal act to be criminalized against the perpetrator, it must be possible to apply 'analogous regulation' to fill the gap in the law for acts similar to those regulated by law, namely choosing an alternative. to determine the appropriate type of punishment to be applied by considering the factors of the act, the person, the public's impression of the crime, the seriousness of the victim or loss and the projection of the effectiveness of the punishment, namely using Article 351

of the Criminal Code. Third, regulate the formulation of new articles by revising the Health Law.

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