

## Handling of medical malpractice criminal in criminal Law policies

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### **Abstract**

*The study aims to determine (1) the applicable current criminal law policy concerning the medical malpractice. (2) the future criminal law concerning the medical malpractice, and (3) the mechanism for medical malpractice settlement. The study uses normative juridical approach that is bibliographical review to obtain the secondary data. The study reveals that: 1. The settlement of medical malpractice in the current positive law is in the articles : 267, 322, 344, 345, 349, 359, 360, 386, and 531 of the Criminal Code, and Articles : 190, 192, 193, 194, 195, and 196 of the Law No. 36 of 2009 of Health, articles 75, 76, 77, 78, 79, and 80; Law No. 29 of 2004; Indonesian positive law of either Penal Code, Law No. 36 of 2009 on Health, Law No. 29 of 2004 on Medical Practice Law, or the post-verdict of Constitutional Court has not specifically covered malpractice. 2. The future criminal law policy in the settlement of medical malpractice has to be driven from the positive law, particularly Articles 575, 576, 578, 589, 592, and 593 of Penal Code draft of 2008. 3. The mechanism of malpractice case settlement for both criminal and civil law suit between doctors and hospitals against the patients and the family or their representatives can be done either in litigation (in court) or in non-litigation (outside court).*

## **I. Introduction**

Protection and law enforcement in Indonesia in the health sector is clearly lacking. One by one there are several examples of cases where a patient did not receive proper care, the worst, and sometimes it would end in death. Criminal cases in the medical field that occur a lot and are exposed in various media are only a few cases that have evaporated, so that it can be said to be like an iceberg. The outbreak of these criminal cases is also a sign of progress in society, on awareness of rights rights relating to health and medical services.

In today's global era, medical personnel is one of the professions that has received the public's attention, because the nature of their service to society is very complex. Lately, a lot of people have focused on the performance of medical personnel, both the highlights that were conveyed directly to the Indonesian Doctors Association (IDI) as the main organization for doctors, and those that were broadcast through print and electronic media. there are many other factors beyond the control of medical personnel that can affect the results of medical efforts, such as the stage of the disease, physical condition, body resistance, quality of drugs and also patient compliance to obey the doctor's advice.

In reality, people often hear complaints about the quality of services received from hospitals. These complaints include inpatient services that are considered uncomfortable, rare/absence of visits by specialist doctors or the facilities received are not in accordance with the high costs incurred by patients. There were also complaints about the receptionist who required a down payment for the next 10 (ten) days.

Factually, officers cannot be blamed if they ask patients whether they have brought money or not, but not because they are worried that patients will not pay for treatment/care, but because there are expensive prescriptions that must be redeemed at the pharmacy. first aid has been carried out, and further action awaits the redemption of the prescription. In addition, the hospital is always to blame if bad consequences occur to the patient that occur during or after receiving treatment/care/medical action in the form of a worsening illness, injury or even death.

The problem is that if a medical professional is always held responsible if a bad consequence occurs to the patient, or does not succeed in curing the patient, then this can actually be detrimental to the patient concerned. The patient's assessment of the hospital/medical staff complained about above, of course, is not entirely correct and is subjective.

~~As an example of the malpractice case experienced by Selphie, which~~  
*Erlina: Implementation of Legal Protection of Geographical Indication of .....*

disturbed the public's view of the medical profession negatively. The case began when there was a misdiagnosis due to an error in the results of laboratory tests, then was treated but did not improve and even caused the patient's condition to worsen and finally he was referred to another hospital.

Such cases are examples that illustrate the carelessness, inaccuracy, recklessness and carelessness of medical personnel, both carried out by doctors and hospital medical staff, which is often known as medical malpractice. Malpractice actions cause both material and immaterial losses on the part of the patient or the patient's family as a victim. Existing malpractice cases often lead to patient suffering. For this reason, it is necessary to study how the formulation of laws on malpractice, especially those concerning the problem of the patient's legal relationship with the hospital, the rights and obligations of the parties, the responsibilities and aspects of law enforcement.

Medical practice is not a job that can be done by anyone, but can only be done by a group of medical professionals who are competent and meet certain standards. Theoretically, there is a social contract between the professional community and the general public. With this contract, it gives rights to the professional community to regulate professional autonomy, agreed professional standards. On the other hand, the general public (patients) have the right to receive services in accordance with the standards set by the professional society. Thus doctors have responsibility for their profession in terms of medical services to their patients.

Until now, medical law in Indonesia has not been able to be formulated independently so that the limitations regarding malpractice cannot be formulated, so that the contents of the meaning and limitations of medical malpractice are not uniform depending on which side one looks at. contains provisions on medical malpractice. Article 66 paragraph (1) contains a sentence that leads to medical practice errors, namely "Anyone who knows or has his interests harmed by the actions of a doctor or dentist in carrying out medical practice can complain in writing to the chairman of the Indonesian Medical Discipline Honorary Council. "This norm only provides a legal basis for reporting doctors to their professional organizations if there are indications of the doctor's actions causing harm, nor as a basis for demanding compensation for the doctor's actions.

Proportional law enforcement against the actions of doctors who commit medical malpractice acts in addition to providing legal protection for the public as consumers and usually having a weak position, on the other hand also for doctors who are involved in legal issues if indeed they have gone through the judicial process and are proven not to have committed any malpractice acts. can

restore his good name which is considered to have been tarnished, because the relationship between doctor and patient is not a relationship that is normal work or superior to subordinate but is of trust and confidentiality.

Claims against medical malpractice often run aground due to the difficulty of proving. In this case the doctor defends himself and defends his rights by stating reasons for his actions. Both plaintiffs, in this case patients, doctors and practitioners (judges and prosecutors) have difficulty dealing with this medical malpractice problem, especially from a technical legal point of view or the right legal formulation to use.

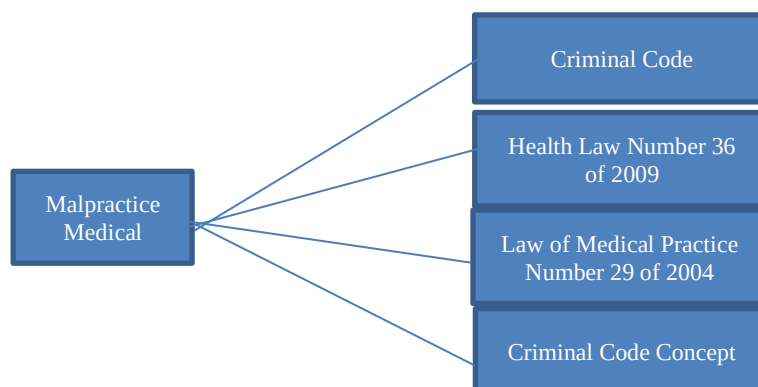
For this reason, it is necessary to discuss medical malpractice from the point of view of criminal law studies, because the study of medical malpractice from a legal perspective is very important. The issue of medical malpractice is more focused on legal issues, because medical malpractice is a medical practice that is against the law, causing fatal consequences for patients.

### **Formulation of the problem**

Based on the background above, some relevant research questions to be discussed in this study are: (a). How is the current criminal law policy in dealing with criminal acts of medical malpractice? (b) What are the future criminal law policies in dealing with medical malpractice crimes? (c) What is the mechanism for legal settlement if there is a suspicion of medical malpractice?

### **Research purposes**

The objectives of this study include: (a) to find out how the current criminal law policies are in dealing with criminal acts of medical malpractice; (b) To find out how future criminal law policies are in dealing with criminal acts of medical malpractice; (c) To find out the mechanism for legal settlement in the event of suspicion of medical malpractice.



**Figure 1.** Research Framework

## 2. Research Method

### Research design

The approach used in this research is a policy-oriented approach. This approach is a normative juridical approach or library research that relies on secondary data because the main target in this research is policy issues, namely regarding legislation in determining and formulating medical malpractice crimes.

The normative juridical approach is by studying or analyzing secondary data in the form of secondary legal materials by understanding law as a set of rules or positive norms in the applicable legislation.

### Research Specifications

The research specifications in this study include analytical descriptive, namely describing the position of a law as it is now.

### Data Types and Sources

This research includes normative legal research, so the type of data used is secondary data. The secondary data studied are as follows: 1. Primary legal materials, namely legal materials that are binding and consist of: a. Norms (basic) or basic rules, namely the Preamble to the 1945 Constitution; b. Basic Regulations, such as the Body of the 1945 Constitution, MPR Decrees c. Legislation, such as laws and regulations that are equivalent, Government Regulations and regulations that are equivalent, Presidential Decree and regulations that are equivalent, regional regulations; d. Legal materials from the colonial era which are still valid today such as the Criminal Code 2. Secondary legal materials which provide an explanation of primary legal materials such as draft laws, research results, works from legal circles, and etc. 3. Tertiary legal materials, namely materials that provide instructions and explanations of primary and secondary legal materials, such as dictionaries, encyclopedias, cumulative indexes and so on.

### Method of collecting data

Data collection in this study was carried out by conducting library research. In data collection, as much data as possible was obtained and collected regarding issues related to this research.

### Data analysis method

Data obtained from research is collected and analyzed by interpreting and constructing statements contained in documents and legislation. Normative because this research starts from the existing regulations as positive legal norms and questions whether the current law is what it should be, while qualitative means data analysis that starts with efforts to discover new principles and information related to the focus of research.

### 3. Results and Discussion

#### **Current Criminal Law Policy in Handling Medical Malpractice Crimes**

The definition of malpractice from a medical and legal perspective There are several different definitions in giving the meaning of malpractice. In the Big Indonesian Dictionary, malpractice is defined as medical practice that is done incorrectly or inappropriately, violates the law or code of ethics. Literally "mala" means "wrong" or "bad" while "practice" means "implementation" or "action", so malpractice means "wrong or bad implementation or action".

The type of medical malpractice is ethical malpractice while what is meant by ethical malpractice is a doctor taking an action that is contrary to medical ethics. While medical ethics as outlined in the KODEKI is a set of ethical standards, principles, rules or norms that apply to doctors. Juridical malpractice (Malapractice in the field of law) For legal malpractice or juridical malpractice is divided into 3 categories according to the field of law that was violated, namely criminal malpractice, civil malpractice and administrative malpractice.

The ethical aspect of ethical malpractice has different meanings when viewed from the point of view of different users of the term. For philosophers, ethics is the science or formal study of morality. Morality is matters relating to morals, and morals are systems of motivation, behavior and human actions that are considered good or bad.

Legal Aspects of Malpractice The law has 3 meanings, as a means of achieving justice, the second is as an arrangement from the authorities which regulates what actions may be carried out, prohibited, who commits them and what sanctions will be imposed (objective law): Criteria and Elements of Malpractice To overcome difficulties in assessing and proving whether an act is included in the category of malpractice or not, 4 (four) criteria are usually used, including: (a). Is the care provided by the doctor adequate (a duty of due care). In this case the standard of care provided by the health practitioner is assessed as to whether it is in accordance with what is expected (b) Is there a breach of the duty (c) Is it really a cause of injury (causation) d. There is compensation (damages)

#### **Law No. 36 of 2009 concerning Health**

The handling of malpractice cases carried out by doctors is contained in Law Number 36 of 2009 concerning Health. In the following, we will elaborate further on the new policy in Law Number 36 of 2009 relating to the policy of handling malpractice cases of doctors or health workers.

Article 29 is a new legal policy in order to resolve cases of medical disputes in terms of negligence committed by health workers so that it does not require medical disputes arising from negligence to be resolved through legal means. This

article regarding negligence is also contained in Article 54 of Law Number 23 of 1992 concerning Health. In the new Health Law, namely Law Number 36 of 2009, health law policies specifically regulate the protection of patients contained in Article 56, Article 57, Article 58 of Law Number 36 of 2009.

### **Law No. 29 of 2004 concerning Medical Practice after the Constitutional Court Decision.**

With the issuance of the Constitutional Court decision No.4/PUU/-V/2007, some of the criminal provisions in the Medical Practice Law became null. medicine feels comfortable and does not feel criminalized by the existence of these criminal provisions.

Decision of the Constitutional Court No. 4/PUU/ - V/2007 against the judicial review of Law Number 29 of 2004 stated that the petition of the Petitioners was partially granted; (a) Stating Article 75 Paragraph (1) and Article 76 all regarding the words "prison for a maximum of 3 (three) years or" and Article 79 insofar as it concerns the words "containment for a maximum of 1 (one) year or" and Article 79 letter c as far as the words "or letter e" Law Number 29 of 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia of 2004 Number 116, Supplement to the State Gazette of the Republic of Indonesia Number 4431) is contrary to the 1945 Constitution of the Republic of Indonesia; Stating Article 75 Paragraph (1) and Article 76 all regarding the words "prison for a maximum of 3 (three) years or" and Article 79 insofar as it concerns the words "containment for a maximum of 1 (one) year or" and Article 79 letter c insofar as it concerns the words "or letter e" Law Number 29 of 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia of 2004 Number 116, Supplement to the State Gazette of the Republic of Indonesia Number 4431) does not have binding legal force.

### **Handling of Medical Malpractice Crimes in the Criminal Code Concept.**

In Article 578 the concept of paragraph (1) includes *delik propria* where the subject (perpetrator of the offense) is a woman, namely a woman who aborts or kills her womb or orders other people to kill her womb. The subject of the delict is not general in nature (usually using the word whoever/everyone person) so that it cannot be applied to a person who does not meet the qualifications for this subject (a woman). This is different from paragraph (2) which is included as a *communis* offense because the subject is general in nature (every person).

Table 1. Criminal sanctions for abortion

| Criminal Code Concept                                            | Criminal Code                                                       |
|------------------------------------------------------------------|---------------------------------------------------------------------|
| Article 578 section 1                                            | Article 346                                                         |
| A woman who aborts or kills her womb or orders another person to | A woman who deliberately aborts or kills her womb or orders another |

|                                                                                                                                                                                                                              |                                                                                                                                                            |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| abort or kill the womb, shall be punished with imprisonment for a maximum of 4 (four) years or a maximum fine of category IV                                                                                                 | person to do so is punishable by a maximum imprisonment of four years                                                                                      |
| Article 578 section 2                                                                                                                                                                                                        | Article 347 section 1                                                                                                                                      |
| Any person who aborts or kills the womb of a woman without her consent shall be subject to imprisonment for a minimum of 3 (three) years and a maximum of 12 (twelve) years                                                  | Any person who with deliberate intent aborts or kills the womb of a woman without her consent, shall be punished by a maximum imprisonment of twelve years |
| Article 378 section 3                                                                                                                                                                                                        | Article 347 section 2                                                                                                                                      |
| If the actions referred to in paragraphs (1) and (2) result in the death of the woman, the person who committed the crime is punished with imprisonment for a minimum of 3 (three) years and a maximum of 15 (fifteen) years | If said act results in the death of the said woman, he shall be punished by a maximum imprisonment of fifteen years.                                       |

Abortion is sometimes a necessity for doctors to carry out in order to save the lives of mothers who suffer from certain diseases such as heart disease and pregnancy poisoning so that doctors cannot be criminally prosecuted for doing so (therapeutic abortion).

According to Anny Isfandyarie, malpractice must be distinguished from medical risk so that the public or patients can better understand whether the results of a doctor's action are malpractice or indeed have become a medical risk.

| Medical risk                                        | Malpractice                                                            |
|-----------------------------------------------------|------------------------------------------------------------------------|
| According to medical service standards Medical      | Not according to service standards                                     |
| There is anticipation or guesswork or caution       | No anticipation or predictor or observer                               |
| Not negligence or mistake                           | There is an omission or Error                                          |
| There are justifiable reasons and forgiving reasons | There is no eraser reason criminal (Article 359,360,361 Criminal Code) |

Table 3. Penalties for Negligence Causing Death and Serious Injury

| Criminal Code concept                                                                 | Criminal Code |
|---------------------------------------------------------------------------------------|---------------|
| Erlina: <i>Implementation of Legal Protection of Geographical Indication of .....</i> | 8             |

| Article 592                                                                                                                                                                                                                                                                                | Article 359                                                                                                                                                                                          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Any person who because of his negligence causes injury to another person resulting in illness or obstruction in carrying out his position, profession or livelihood for a certain time, shall be subject to imprisonment for a maximum of 2 (two) years or a maximum fine of category III. | Whoever because of his fault (negligence) causes another person to die, shall be punished by a maximum imprisonment of five years or a maximum light imprisonment of one year.                       |
| Article 593                                                                                                                                                                                                                                                                                | Article 360                                                                                                                                                                                          |
| If the crime referred to in Article 592 is committed in carrying out a position or profession, then the penalty can be added 1/3 (one third)                                                                                                                                               | Whoever because of his mistake (negligence) causes another person to receive serious injuries, shall be punished by a maximum imprisonment of five years or a maximum light imprisonment of one year |

The criminal acts in Articles 592 and 593 Concepts are similar to the criminal acts regulated in Articles 359,360 and Article 361 of the CRIMINAL CODE regarding acts causing death or injuries due to negligence. Both of them formulated their punishment alternatively.

Table 8. Criminal Sanctions for Deprivation of Life at the Victim's Request

| Criminal Code Concept                                                                                                                                                                                                                                                                                          | Criminal Code                                                                                                                                                                         |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Article 575                                                                                                                                                                                                                                                                                                    | Article 344                                                                                                                                                                           |
| Any person who seizes the life of another person at the request of the other person which is clearly stated in sincerity or at the request of his family in the event that the other person is unconscious, shall be punished with imprisonment for a minimum of 2 (two) years and a maximum of 9 (nine) years | Whoever seizes the life of another person at the request of the person himself, which is clearly stated with sincerity, is subject to imprisonment for a maximum of 12 (twelve years) |

The author sees that the criminal threat in the concept for doctors is heavier than for non doctors. The articles on crimes against life mentioned above can be linked to euthanasia, namely Articles 338, 340,344,345,359 CRIMINAL CODE when linked to the world of health as an effort to deal with malpractice crimes in

Indonesia. which confirms that both active and passive euthanasia without request is prohibited. Likewise with active euthanasia with request. This is a good form of handling medical malpractice crimes that can be used in the framework of criminal law reform in the future.

### **Mechanism for Settlement of Medical Malpractice Cases**

A civil lawsuit, in this case a dispute between a doctor and a hospital dealing with a patient and their family or their attorney, can be resolved in two ways, namely litigation (through the judicial process) and non-litigation (outside the judicial process). If settlement is chosen through a court process, then the plaintiff will submit his lawsuit to the district court in the incident area, either by using an attorney (lawyer) or not. In court proceedings, it is generally desirable to reach a decision regarding the truth of a lawsuit based on valid evidence (right based) and then a decision regarding the amount of compensation that is "appropriate" to be paid by the defendant to the plaintiff. In determining the right-false decision of an act the judge will compare the act committed with a certain norm, standard, or a certain decency, while in deciding the amount of compensation the judge will consider the socio-economic position of both parties (articles 1370-1371 of the Civil Code).

If an out-of-court process is chosen (alternative dispute resolution), then the two parties try to find an agreement on dispute resolution (mufakat). The agreement can be reached by direct talks between the two parties (conciliation or negotiation), or through facilitation, mediation, and arbitration, or a combination of methods. Facilitators and mediators do not make decisions, while arbitrators can make decisions that must be obeyed by both parties. In this consensus process, efforts are made to find solutions that tend to be based on an understanding of the interests of both parties (interest-based, win-win solution), and not right-based. Civil court judges generally offer peace before the start of the trial, and recently judges have even facilitated mediation by certain mediators.

In the event that the lawsuit is filed through the criminal law process, it is enough for the patient to report it to the investigator by showing preliminary evidence or reasons. Furthermore, it is the investigator who will carry out the investigation by carrying out actions, such as examining witnesses and suspects, examining documents (evidence of letters such as medical cards, medical records, prescriptions, informed consent, visum et repertum if any), as well as examining expert witnesses. The results of the investigator's examination are submitted to the public prosecutor so that charges can be drawn up. In the event that the investigator does not find sufficient evidence, consideration will be given to issuing SP3 or terminating the investigation.

#### 4. Conclusion

Current Criminal Law Policies in Handling Medical Malpractice Crimes  
Current criminal law policies are in the Criminal Code, Law No. 36 of 2009 concerning Health, Law No. 29 of 2004 and Post Constitutional Court Decision on judicial review of Law No. 29 2004 concerning Medical Practice, it can be concluded that the acts that have been regulated so far are related to the handling of medical malpractice crimes committed by a doctor, namely :

(a) The current positive law governing medical malpractice is a crime against falsifying a health certificate by a doctor (Article 267 CRIMINAL CODE), disclosing medical secrets without reasons justified by law (Article 322 CRIMINAL CODE), errors/negligence which causing death/serious injury (Article 359,360 CRIMINAL CODE), not providing emergency assistance to people in a state of danger (Article 531 CRIMINAL CODE, Article 190 Health Law No.36 of 2009), helping others to commit suicide on request or not (Article 344 CRIMINAL CODE), intentionally treating or ordering to treat in the hope that because of the treatment a woman's womb can be aborted (Article 299, Article 345 CRIMINAL CODE), intentionally aborting the womb without the consent of the pregnant woman concerned (Article 347 CRIMINAL CODE), deliberately abort the womb with the consent of the pregnant woman concerned (Article 348.349 CRIMINAL CODE), intentionally performs plastic and reconstructive surgery for the purpose of changing one's identity (Article 193 of Law Number 36 of 2009), deliberately performs certain medical actions on pregnant women, not based on medical indications, not in accordance with the provisions (Article 194 Law No. 36 of 2009), with the commercial aim of carrying out organ transplants, body tissues, or blood transfusions (Article 192.195 of Law No. 36 of 2009), deliberately practicing medicine without registration certificates, practice permits, not installing nameplate, not making medical records or not fulfilling obligations as a doctor (Article 75, Article 76, Article 79 of the Medical Practice Law Number 29 of 2004), deliberately using identity, tools or methods in providing services as if the person concerned is a doctor who already has a doctor's registration certificate or practice license (Article 77 of the Medical Practice Act N number 29 of 2004), intentionally employing doctors or dentists who do not have licenses to practice in health care facilities, (Article 80 of Law Number 29 of 2004);

(b) Articles governing sanctions against corporations are contained in Article 80 of the Medical Practice Act concerning violations of Practice Permits by doctors, Article 201 of the Health Act concerning sanctions against corporations that violate Article 190 paragraph (1), Article 191, Article 192, Article 196, Article 197, Article 198, Article 199, and Article 200 of the Health Act and sanctions for violations of hospital obligations are administrative sanctions as contained in Article 29 of Law Number 44 of 2009 concerning Hospitals.

Future Criminal Law Policies in Handling Medical Malpractice Future criminal law policies will originate from positive law, in this case the CRIMINAL CODE Concept, Law No. 36 of 2009 concerning Health, Law No. 29 of 2004 concerning Medical

Practice after the decision of the Constitutional Court. The policy in the CRIMINAL CODE concept is abortion (Article 578), doctors, midwives, paramedics, pharmacists who assist in carrying out abortions (Article 580), negligence results in serious injury (Article 592), negligence in carrying out a profession or position that results in seriously injured (Article 593), taking the life of another person at the request of that person (Article 575), a doctor who takes life at the request of that person (Article 576).

Mechanism for Settlement of Medical Malpractice Cases An alleged case of medical malpractice can basically be resolved by: 1) Litigation (court line) 2) Non-litigation (outside court line).

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