

## The Concept of Resolving Medical Crimes Based on a Restorative Justice Perspective in the Criminal Justice System in Indonesia

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### Abstract

*Medical crimes are a complex issue in the criminal justice system in Indonesia. The concept of resolving medical crimes needs to be seen from a Restorative Justice perspective to create a more holistic and fair approach. Restorative Justice emphasizes the restoration of damaged relationships, not just punishment of the perpetrator. In this context, this research explores the application of Restorative Justice principles in resolving medical crimes. This research uses normative and empirical legal research methods to analyze the development and implementation of Restorative Justice in handling medical crimes in Indonesia. Findings indicate the need for reform in the criminal justice system to integrate Restorative Justice approaches. Implementation of this concept can improve justice, victim satisfaction, and rehabilitation of perpetrators of medical crimes. The results of this research are expected to contribute to further understanding of the effectiveness of Restorative Justice in dealing with medical crimes in Indonesia. The practical implication is the need to improve regulations and increase awareness of actors in the criminal justice system to ensure that justice and recovery are the main focus in handling medical crimes.*

**Keywords** Medical Criminal, resortative justice, criminal justice system

### INTRODUCTION

Dilemmas in providing medical services which ultimately lead to things that are detrimental to patients. Even Indonesia, as a developing country, certainly has a multitude of problems in the field of medical services. There are differences in people's backgrounds in terms of social, cultural, customs and systems which are the reasons why this can happen.

The emergence of various cases involving patients and doctors that have reached the realm of law has given rise to problems because it is very difficult to differentiate between what constitutes malpractice and what constitutes negligence, accidents or failures committed by doctors or other health workers. In general, patients assume that the doctor has committed malpractice so that they feel disadvantaged, while on the other hand the doctor does not feel that he has done so. This condition is then made worse by the lack of public access to professional standards and standard medical services. Also, understanding of health law has not been developed, especially the existence of Law No. 29 of 2004 concerning Medical Practice, which has not yet been realized.

The world of medical law in Indonesia currently does not have clear legal provisions regarding malpractice. Many assumptions then emerged regarding the content, meaning and rules relating to malpractice in the world of medicine. The Indonesian legal system is a substantive legal system, which regulates not just one but many legal rules, namely administrative law, criminal law and civil law. However, unfortunately, these three legal systems do not recognize systematic malpractice. The most important and fundamental legal rules in the health legal system in Indonesia are Health Law Number 23 of 1992, where Articles 54 and 55 mention errors or negligence in carrying out the medical profession.



This article pays attention to the resolution of medical crimes through restorative justice as a new method for resolving criminal acts related to the health sector.

Proportional law enforcement efforts against doctors who commit medical malpractice must be carried out in order to provide legal protection for the community as a form of human rights protection provided by the constitution. The bitter reality that must be faced today is that there are still obstacles to bringing malpractice cases to the realm of law. This happens because there is no legal umbrella that regulates malpractice and special legal studies regarding medical malpractice that can be used as guidelines for medical malpractice problems in Indonesia.

Restorative Justice (RJ) offers an innovative approach based on restoring disturbed relationships in resolving medical disputes. This concept emphasizes the importance of reconciliation, accountability and active participation of all parties involved, including patients, families and health workers. In the context of medical dispute resolution.

The definition of medical risk is not formulated explicitly in existing laws and regulations. However, medical risks are implicitly mentioned in several statements regarding the risks of medical procedures. The risks involved in carrying out medical services are highly unpredictable because medical staff can only do their best to provide medical treatment. Even though it can be predicted what medical risks may occur, it is still not certain which risks the patient will suffer from the treatment of the medical staff. It is not uncommon for medical risks that occur to result in death, so medical personnel, in this case doctors, are suspected of making mistakes or negligence that caused someone's death.

Based on the description above, the legal issue that can be raised is what legal politics will look like in the future in regulating malpractice as a reform of medical criminal law. The following is a list of issues discussed in this study based on this context:

1. What is the criminal responsibility for perpetrators of medical crimes in Indonesia?
2. What is the urgency of resolving medical crimes through restorative justice?

## METHOD

The research is normative legal research, or legal research that uses law as a normative basis. The standard framework in question is related to standards, laws and regulations and guidelines, court options, regulations and principles (lessons).

This study looked at crimes that are written into the law and whose actions should be considered health services. In the context of medical procedures in the field of aesthetics and beauty which result in the victim experiencing blindness as a result of the medical procedure, these legal rules can be in the form of legal principles, currently applicable laws, and statutory regulations (positive law).

The research material for this study consists of secondary data. Legal regulations in the field of beauty aesthetics related to medical criminal acts committed by medical personnel are primary legal material, namely legal material that is binding in nature, including Law no. 29 of 2004 concerning Medical Practice, Criminal Code, Law no. 36 of 2009 concerning health. While primary legal materials include books on medical crimes, journals, seminar results, papers and articles related to research themes, and articles from the

internet, secondary legal materials are legal materials that provide explanations of primary legal materials.

## RESULTS AND DISCUSSION

### **Criminal Responsibility for Perpetrators of Medical Crimes in Indonesia**

In layman's terms, patients are in a weak position, this weakness is caused by, firstly, medical actions which as the substance of the object of correlation between doctors and patients are scientifically known only to doctors. The party who can choose whether medical action must be carried out or not is the doctor. Second, even though patients receive information from the doctor before taking medical action, and the patient has the right to autonomy to determine his fate, the patient is still very dependent on the doctor, regarding the doctor's honesty in conveying this information. Third, the weakness of patients when dealing with doctors in a professional manner also using regulatory bodies that are active in the health sector, bearing in mind that in the event of a dispute, a patient will have difficulty showing elements of error or negligence that have been committed by the doctor or dentist. Because it is very common for concurrency to occur, for the evidentiary process in court an exception must be made for patients, namely with a reverse burden of proof.

Recognition of the right to health in the 1945 Constitution, second amendment, in Article 28H paragraph (1), and specifically the patient's rights in the international instrument, "The Universal Declaration of Human Rights 1948", one of which is the patient's autonomous power, recognition of the patient's rights This is an acknowledgment that patient rights are actually human rights that originate from basic individual rights in the health sector, the right of self-determination, however, the regulation of patient rights as users of beauty clinics is still weak and cannot be protected optimally. If we relate it to the theory of law enforcement, even though regulations do not merely mean the implementation of legislation, disruption of law enforcement can also mean that a law is imperfect. the causes of which are: a) failure to follow the principles of law enforcement; b) there are no implementing regulations that are really needed to implement the law, and; c) unclear meaning of terms in the law which causes confusion in its interpretation and application.

The incomplete regulation of patient rights in beauty clinic settings could potentially be the reason why law enforcement cannot be aphoristic. The importance of regulatory certainty is because regulatory certainty is needed for legal protection. Legal certainty is also a justifiable protection against arbitrary actions, which means that a person will obtain something that is needed in certain circumstances, namely the existence of order which is realized from the existence of legal certainty.

As a result, arrangements for collaborating with patients still refer to the Medical Practice Law. Perkonsil No.75/2020 is a guide in producing specialist doctors who have academic and professional skills to provide reconstructive and aesthetic plastic surgery services. It should be able to be used as a source of values that can be accommodated, including being a reference source for guidelines for the implementation of beauty and beauty clinics. -The existing standard values can be the origin of the regulatory values for running an aesthetic beauty clinic.



A doctor and dentist in carrying out medical practice must have high ethics and morals, expertise and authority. Continuous quality improvement is carried out through education and training, certification, registration, licensing and training, supervision and monitoring in order to carry out medical practice in accordance with the demands of science and technology.

Including the implementation of quality aesthetic beauty clinics, professionals who provide protection for the people need training to improve the quality of aesthetic beauty clinic services, as well as protect residents. so that there is a guarantee of legal certainty regarding the medical services/actions received by residents, doctors at aesthetic beauty clinics. Lack of appreciation for basic human values is the origin of current ethical and regulatory problems. Providing health services to individuals/patients, families or communities requires health ethics, this is an order based on philosophy that directs essential moral responsibilities in the implementation of medical practice and health services, which are basically human rights and dignity. Therefore, the focus of health ethics is aimed at human nature which has its own behavioral values. The primary principle in improving the quality and performance of health services is concern for customers (patients) which is the goal of service.

Clear regulations in terms of ethics and regulations will certainly provide clear certainty of authority for aesthetic doctors to provide clarity in aesthetic beauty clinic services. Competence issues can be the most important issues in the field of aesthetic medicine, especially those related to authority. The many fields of science that can be involved in aesthetic medicine have the potential to cause medical practice to be carried out outside of their authority (competence).

The existence of this regulation makes it easier for the government to take firm action against parties who practice medical aesthetics without having the competence or authority. This will prevent cases of malpractice due to unsafe provision of medical beauty services. No less important is the regulation and supervision of medical beauty services and facilities according to certain standards. The use of medical aesthetic equipment and medicines without meeting medical standards can be dangerous for patients. Any action that imposes one's own will on another person is considered a violation of the rules.

## **What is the Urgency of Resolving Medical Crimes Through Restorative Justice**

### ***a. Problems and proof of the elements of medical crime***

Sentencing to perpetrators who commit crimes is known to use the principle of no crime without fault. The principles in question are rules that are not written but are applied to the people and apply to the criminal law book (Criminal Law Book), for example Article 44 of the Criminal Code does not impose punishment for acts committed by people who are unable to take responsibility, Article 48 of the Criminal Code does not convey criminal threats for perpetrators who commit criminal acts because of coercive power, therefore, in order for an offense to be punished which can be interpreted as criminal law responsibility, it must fulfill 3 elements:

- a) The perpetrator must have the ability to be responsible, the mental condition of the perpetrator must be normal.
- b) There is a principle of kinship between the perpetrator and the victim which can be intentional or negligent.
- c) The reason for erasing mistakes and forgiving reasons does not apply:

#### 1. Intentional (dolus)

An action is carried out by someone because of an element of intention. Deliberation is what is meant here is that the perpetrator knew the impact of the action he had committed. If we look closely at this intentionality in the literature, there are 2 theories:

- a) According to the will, the actor already knows what he is going to do and it is the perpetrator's will.
- b) Based on knowledge, this theory states that the perpetrator already knows the intent and consequences of the action.

The case contained in the Supreme Court decision uses Supreme Court Decision number: 233 K/PID.SUS/2021, if seen from the element of intent if a doctor in his practice deliberately makes a mistake with the motive of seeking his own profit. This means that the medical procedure was carried out deliberately and the doctor intended to cause blindness in the victim's left eye. Based on this definition of intentionality, the element of intentionality in the medical treatment experienced by the victim in the process of proof is still unclear because the causality of the offense is not fully proven, in the judge's consideration in Makassar District Court decision number: 1441/Pid.Sus/2019/PN MKS, in terms of the element of proof intentional (dolus), namely the element of deliberately not fulfilling the obligation to provide medical services in accordance with professional standards and standard operational procedures and medical needs of patients in carrying out medical practice. What is meant by deliberate in this element is deliberate provision of medical services that are not in accordance with professional standards and standard operational procedures in carrying out medical practice. This is a weakness in the reference for the implementation of medical practice which only refers to Law No. 29 of 2004.

#### 2. Negligence (culpa)

Negligence means a form of error that is not intentional, meaning not being thorough and careful. The attitude of the perpetrator is that he does not want or does not agree with the occurrence of the forbidden thing. In negligence there is no evil intention from within the perpetrator. However, acts in the form of negligence that endanger the security and safety of other people and cause harm to other people must still be punished. Negligence contains 2 (two) conditions, namely the absence of presumptive reasons and the absence of due care as required by existing regulations.

Makassar District Court Decision number: 1441/Pid.Sus/2019/PN MKS Jo. Supreme Court decision number: 233 K/PID.SUS/2021 and the results of the IDI Makassar Branch Medical Ethics Honorary Council (MKEK) session which essentially both concluded that the Defendant should be suspected of committing negligence in the form of not providing



written informed consent (submission of procedures and approval of actions medical) because the adverse consequences that may arise may be milder or non-existent. This can be called conscious negligence.

A criminal act is an act that is claimed to be against the rules and this act has a penalty. conditions/requirements of criminal events:

- a) The action originates from the perpetrator.
- b) The actions carried out by the perpetrator must be written down in legal law.
- c) There is a mistake made by the perpetrator and it violates the law. And the perpetrator must be held accountable for these actions.
- d) There are sanctions for actions taken by perpetrators.

Based on the criminal act above, the juridical elements of medical malpractice are (a) there is action (committing) or not doing/ignoring); (b) performed by a doctor or other health professional; (c) in performing diagnostic, therapeutic, or medical management; (d) towards patients; (e) use violates the law, propriety, decency, professional standards.

The focus of the definition of malpractice in the literature generally refers to malpractice committed by doctors or other health professionals, not hospital malpractice. The forms or elements of malpractice revealed by these experts only have regulatory consequences if they can be interpreted as the original form of error or negligence in medical services as regulated in Article 29 and Article 58 of the UUK. Outside of malpractice, there is the term medical risk, namely the risk that is likely to arise in medical procedures outside of errors or negligence by health professionals. These medical risks can occur due to disease complications, side effects of drugs, or limitations in the development of medical science for medical treatment. there is not a single article in the health law.

Indonesia, which regulates malpractice in medical procedures in the field of beauty, only has provisions regarding patient rights to health services (Article 4-8 UUK; Article 52 UUPK), obligations of health service facilities, including hospitals (Article 31-34 UUK), one of the elements of malpractice stated above includes, every act that violates the law, decency, decency, professional standards, then violations of patient rights as regulated in the regulations (UUK, UUPK) can be included as an element of malpractice.

Based on the medical malpractice provisions above, there are still political weaknesses in health law regarding malpractice, especially malpractice in medical procedures in the field of aesthetics, namely: (1) the form of malpractice is limited; (two) patients can sue criminally, but there is not a single article in the UUK and UUPK that provides criminal sanctions for providers of beauty and aesthetic services for negligence in health services; (3) responsibility for malpractice in aesthetic medical procedures is only a dispensation, namely for forms of error or negligence in certain health services, such as the prohibition on organ transplants (Article 192 of the UUK), and the prohibition of asynchronous abortions using the Law (Article 194 of the UUK ).

### ***b. The urgency of resolving medical crimes based on restorative justice***

Restorative justice is an approach to justice based on the values of responsibility, transparency, trust, hope for healing, focusing on restoration of losses resulting from a crime.

Apart from trying to encourage perpetrators to be responsible for their actions, it also provides opportunities for the parties, namely victims, perpetrators and the community directly affected by crime, to seek and pay attention to their needs after the crime occurs, and look for a solution in the form of healing, restoration and final renewal to prevent further losses. Restorative Justice aims to restore the condition of crime victims, perpetrators and the community through a case resolution process that does not only focus on trying and punishing perpetrators.

If you look at the regulations in force in Indonesia relating to health, namely Law No. 36 of 2009 concerning Health, Law 29 of 2004 concerning Medical Practices, and Law 44 of 2009 concerning Hospitals, it is clear that not a single article mentions health workers, including Doctors who commit negligence can be punished. Regarding negligence committed by doctors, based on Article 46 of Law Number 44 of 2009 concerning Hospitals, it is explained that hospitals are also responsible for the actions of health workers, including doctors who work at the hospital, which result in harm to patients caused by negligence. This is emphasized again that for negligence committed by doctors there is no provision for punishment, the mechanism is in the form of compensation.

In the development of criminal law reform in various countries, there is a strong tendency to use mediation as an alternative solution to problems in the field of criminal law. If we look at the regulations regarding Restorative Justice as an effort to resolve criminal cases, this has been recognized internationally. This concept is also in accordance with the laws that exist in Indonesian society (customary law). In Indonesia itself, the concept of Restorative Justice has actually been practiced for a long time in Indonesian society, such as people in Papua, Bali Toraja, Minangkabau, Kalimantan, Central Java and other communities that still strongly adhere to their culture. The practice of Restorative Justice is that resolution is carried out through a meeting or consensus discussion attended by community leaders, the perpetrator, the victim, and the perpetrator's parents/family to reach an agreement to correct the mistake. This is actually a value of the characteristics of the philosophy of the Indonesian nation stated in the fourth principle of Pancasila, namely deliberation and consensus, thus, Restorative Justice is actually not something new for Indonesian society. Restorative Justice in handling criminal acts is only seen from a legal perspective, but is also linked to moral, social, economic, religious and local customs aspects as well as various other considerations. Apart from that, in the current development of criminal law, mediation is also known. The practice of law enforcement in Indonesia in criminal cases is resolved outside of court through the discretion of law enforcement officials, which then causes demands for positive forms of settlement of cases outside of court to become stronger.

One of the ideas of using the concept of Restorative Justice in resolving medical dispute cases is to avoid the accumulation of more and more cases and providing less justice for victims of society and the environment. Penal mediation is a form of implementing Restorative Justice, namely rehabilitation, resocialization, restitution, reparation and compensation in resolving a medical practice criminal case and viewing crimes or criminal acts as not just a matter between the perpetrator of the crime (doctor) and the state



representing the victim ( patient), and leaving the resolution process only to the perpetrator (doctor) and the state (public prosecutor)

The application of the concept of Restorative Justice in resolving medical disputes is a legal, clear and firm order to carry out mediation in accordance with Article 29 of Law Number 36 of 2009 concerning Health which states that, "In the event that a health worker is suspected of committing negligence in carrying out his profession, the negligence must be resolved. first through mediation". It is also expressly stated that in the case of health workers, in this case doctors, who are suspected of committing negligence in carrying out their profession, then this negligence must be resolved first through mediation. The explanation of the article states that mediation is carried out if a dispute arises between health workers providing health services and patients as recipients of health services. The current Health Law is seen as giving preferential treatment to doctors and other health workers.

The body that handles ethical issues is the Honorary Council for Medical Ethics (MKEK) or the Honorary Council for Dental Ethics (MKEKG), and the body that handles medical disciplinary issues is the Indonesian Medical Discipline Honor Council (MKDKI). Restorative Justice as the application of a resolution pattern must look at all stages of resolving medical disputes, including enforcement of ethical and professional codes by MKDKI or MKEK. According to the author, an institution is needed that introduces a form of resolving criminal acts through a mediation program, especially in handling medical disputes. Mediation can be carried out by referral from the Police, Prosecutor's Office and Judiciary designed to facilitate dialogue between victims and perpetrators, for serious victims and for the perpetrators. If there are indications that there has been an unlawful act, a Restorative Justice solution can be applied first. Restorative Justice can be constructed by holding a meeting of all interested stakeholders such as the hospital director, IDI chairman, patient's family, concerned doctor, community leaders, police, witnesses and so on to sit together and deliberate in order to reach an agreement. If compensation is required, the amount of compensation can be discussed directly together and realized proportionally. As a form of reconciliation as a recovery effort if a mistake occurs in the form of payment as compensation.

## **CONCLUSION**

Based on the presentation and analysis in the description above, the conclusions in this research consist of 2 (two) points, namely:

- 1) The implementation of medical procedures has weaknesses in health law policy so that it cannot prevent and deal with malpractice optimally, namely the lack of completeness and lack of clarity regarding the formulation of malpractice and its strict sanctions, as well as a deviation towards unlawful acts and medical action for malpractice committed by doctors or staff. medical.
- 2) The application of the concept of Restorative Justice in resolving medical disputes is a legal, clear and firm order for mediation to be carried out in accordance with Article 29 of Law Number 36 of 2009 concerning Health. The explanation of the article states that mediation is carried out if a dispute arises between health workers providing health



services and patients as recipients. health services. The current Health Law is seen as giving preferential treatment to doctors and other health workers.

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