Model of Criminal Case Settlement of Doctor Malpractice Based on the Value of Local Wisdom

Muhammad Dzikirullah H. Noho[1], Budi Santoso[2], ParamitaPrananingtyas[3], Aga Natalis[4]

[1]Doctoral Student Diponegoro University and Lecturer HasyimAsy'ariTebuireng University, Indonesia,[2]Professors Diponegoro University, Indonesia,[3]Associate Professor Diponegoro University, Indonesia,[4]Associate Professor Semarang University, Indonesia

Abstract

Introduction: Recently, the malpractice problem in medical service has been widely talked about in the society of different groups of people, which often leads to the criminalization of doctors.

Purpose of Research: This research aims to acknowledge and analyze the formulation of malpractice criminal act regulation in the criminal law system in Indonesia and the model of criminal case settlement of doctor malpractice based on the value of local wisdom in Mojokparak village.

Research Methodology: This research was conducted in Mojokparak Village with qualitative methods and research specifications on legal pluralism.

Discussion: The criminal provisions for doctor malpractice are regulated in Article 190 of Law Number 36 Year 2009 concerning Health. Articles in the Criminal Code that are relevant to criminal liability related to medical malpractice are Articles 359, 360, and 361. Mojokparak village is dependable on Islamic values that are developed through Islamic boarding school. In this regard, the normative values of religion in the Islamic boarding school community cannot be separated from the discourse and practical movements of daily life, especially in the settlement of doctor malpractice criminal cases. The settlement of that case is done by the value of deliberation and consensus to find real justice.

Keywords: *Criminal Case Settlement; Malpractice; Local Wisdom*

Introduction

Recently, the malpractice problem in medical service has been widely talked about in the society of different groups of people[1]. This matter is shown by the number of malpractice case reports that are submitted by the people towards doctors that had been considered to disadvantage the patient while getting treatment. The increasing number of complaints proves that the public is starting to become aware of their rights in the effort to protect themselves from the actions of other parties that harm them. By using the service of lawyers, the people become more daring to sue doctors that are suspectedly committed malpractice, which often leads to the criminalization of doctors.

One of the malpractice cases is the case of malpractice by Doctor DewaAyuSasiaryPrawani. Ayu, who was still a student in the Specialist Doctor Education Program, was convicted of causing the patient, Julia FransiskaMaketey, to die. Fellow doctor colleagues did a strike to protest the act that they called the criminalization of doctors[2].

Corresponding Authors:
Muhammad Dzikirullah H. Noho,
HasyimAsy'ariTebuireng University, Irian JayaStreet, Jombang City, Indonesia.
Email: mdzikirullah@gmail.com

In the Criminal Code, doctor malpractice is included in the formulation of actions that cause another person to be seriously injured or die, which is carried out accidentally as regulated in Articles 359 and 360. The death was not wished by the defendant; however, the death was the result of the defendant's carelessness or negligence (offense culpa), for example, a driver drove too fast and hit someone to death or someone plays with a gun, due to the carelessness, it is fired and shot someone to death and so on. In the doctor malpractice, for example, a doctor with negligence wrongly cut someone's finger, wrong blood transfusion, wrong injection, and wrong diagnosis which resulted in death. With the regulation of Law Number 36 Year 2009 concerning Health, therefore, the threat of punishment for mistakes or negligence committed by the doctor which results in the patient suffering from disabilities or injuries is no longer referring to the provisions of Articles 359,360, and 361 of the Criminal Code, because the law concerning health has formulated its punishment.

All this time, the case of doctor malpractice has only been resolved through the mechanism of formal judicial, thus causing the law to no longer be integrated with people's lives and no longer a complete institution. This non-compliance is sometimes demonstrated by the dissatisfaction with the legal means of resolving problems, one of them is the settlement of the criminal case that is considered unable to provide justice both for the victims and perpetrators. The settlement of criminal cases in classical theory requires legal certainty that is systematically arranged and is contained in written criminal law and penalties are retributive (punishment should fit the crime) and implemented in equal justice. In determining the type and proportion of conviction, the judge's freedom will be limited resulting in a very rigid definite sentence system[3].

In the context of praxis, it can be seen that the role of the criminal settlement system is not always successful and is seen as the only legal instrument that can maintain public order and security. Moreover, criminal law instruments also inflict new problems or prolonged social conflicts and not the end of legal solutions. It is not uncommon for criminal cases such as murders to occur as a result of inter-tribal conflicts in Papua, for example, are resolved properly using a customary law approach. From the weaknesses of the classic criminal system, a new model has emerged, namely restorative justice, which is a criminal case settlement that does not only refer to the law, but is also linked to the aspects of morals, society, economy, religion, and local customs, along with other considerations. Thus, based on the concept of restorative justice, there is a possibility of settlement of the criminal case of doctor malpractice based on local wisdom. Criminal case settlement based on local wisdom is an innovation in the criminal law reform because it is closely related to restorative justice[4].

Indonesian people, which in this case the people of Mojokparak village, still rely on local wisdoms which is core on the cultural approach that utilizes values and local culture of the community. This matter indicates that people who live together undervalues will complete their rules with several cultured local policies. The aim is certainly to anticipate various problems caused by the relationship between individuals, individuals, and community, communities in human interaction as social beings. Therefore, it is necessary to research the criminal case settlement of doctor malpractice based on local wisdom.

Based on previous problem statements, therefore the purpose of this research is to acknowledge and analyze the formulation of malpractice criminal act regulation in the Indonesian criminal law system dan the model of criminal case settlement of doctor malpractice based on the value of local wisdom in Mojokparak village.

Research Methodology

This research is conducted in Mojokparak village, East Java by using a qualitative method which aims to comprehend how a community or individuals accept certain legal issues, which in this case is doctor malpractice, therefore, it is important for the researchers that use the qualitative method to ensure the quality of the research process because those researchers will interpret the data obtained. Based on the problem formulation and the research purpose, therefore the approached method used in this research is the legal pluralism approach method. This approach is used to understand law in its context, namely the context of society, and also from

the aspects of natural law (moral ethics and religion). Brian Z. Tamanaha said that law in society has a frame called "The Law-society framework" which has certain relationship characteristics. This relationship is aimed at two basic components[5]. The first component consists of two main themes, states that the law is the reflection of society and the idea that the function of law is to maintain the "social order", the second component consists of three elements, namely: custom, morality, and positive law.

Discussion

Policy on the Formulation of Doctor Malpractice Criminal Action in the Criminal Law System in Indonesia

Talking about malpractice, the word "mal" means bad. While the word "practice" means an action or practice. Therefore, it can be defined as a bad medical action or practice done by a doctor in their relationship with a patient[6]. In Indonesia, the term malpractice which is very well known by health workers is only a form of medical malpractice, namely medical negligence which in Indonesia is called "*kelalaianmedik"*[7]. According to Gonzales in his book "Legal Medical Pathology and Toxicology" states that malpractice is the term applied to the wrongful or improper practice of medicine, which results in injury to the patient[8].

According to MunirFuady, malpractice has a meaning, which is any medical action performed by a doctor or people under their supervision, or a health service provider that is carried out on their patient, both in terms of diagnosis, therapeutic and disease management which is done in violation of law, propriety, decency, and professional principles whether done intentionally or due to inadvertence that causes wrongdoing of pain, injury, disability, bodily damage, death, and other losses that cause a doctor or nurse to be responsible both administratively, civil and criminal[9].

HermienHadiatiKoeswadji, quoting John D. Blum's opinion, stated that medical malpractice is a form of professional negligence in which patients can ask for compensation if injuries or disabilities happen that are directly caused by doctors in carrying out measurable professional actions[10]. In the Indonesian legal system where one of the components is a substantive law, among the positive laws that apply, there is no known term as malpractice, for example in Law Number 29 of 2004 concerning Medical Practice, the meaning of implied malpractice in Article 84 is said to be a violation of medical discipline.

In-Law Number 29 of 2004 concerning Medical Practice, it is known that the Indonesian Medical Discipline Honorary Council (MKDKI) accepts complaints and has the authority to examine and decide whether or not there are mistakes committed by doctors for violating the application of medical discipline and applying sanctions. If it turns out that violations of medical ethics are found, then MKDKI will forward the complaint to the Indonesian Doctors Association (IDI), then the IDI will take action against the doctor. It's just that the sanctions given by MKDKI are only in the form of administrative sanctions such as giving written warnings, recommendations for revoking registration certificates or practice licenses, and/or the obligation to attend education or training at medical education institutions. It does not rule out the possibility of civil or criminal prosecution from the patient or the patient's family[11].

Indonesian health law in this case is Law Number 36 of 2009 concerning Health, which does not mention malpractice formally. But it only mentions mistakes or negligence in carrying out the profession (listed in Articles 54 and 55). Therefore, the term malpractice is a legal term used in Articles 54 and 55 mentioned above. Mistakes or negligence in carrying out the profession is listed in Articles 54 and 55 of Law Number 36 of 2009 concerning health, that health workers who make mistakes or negligence in carrying out their profession can be the subject to disciplinary action. The determination whether or not there is a mistake or negligence will be determined by Health Personnel Disciplinary Council. The provisions concerning the formation, duties, functions, and working procedure of the Health Personnel Disciplinary Council are set by the court. For the mistakes or negligence act, therefore every patient is entitled to compensation because of the mistakes or negligence by the health workers. Compensation is carried out following the prevailing Laws and Regulations.

From the Articles 54 and 55 above, thus it can be acknowledged that the sanction towards medical malpractice is charging with disciplinary action which is determined by the Health Personnel Disciplinary Council to doctors, who according to council judgment, have performed negligence. Meanwhile, regarding the compensation that must be fulfilled by the doctor concerned, it is carried out following the prevailing laws and regulations. The applicable laws and regulations regulating compensation can refer to the Civil Code[12].

Civil charges filed can be in the form of default claims based on contractual liability and/or illegal acts (onrechtmatigedaad). As the doctrine described above, if a doctor is an individual private practice doctor, he will be personally sued, including being responsible for the actions of medical personnel who are under his command[13]. If working in a team, therefore the liability will be based on how big their responsibility is in the team. Likewise, a hospital can be drawn as a defendant for all actions taken by all its employees (both medical and non-medical), even against private doctors who are given a place to practice in the hospital.

Related to the provisions of criminal malpractice, Law Number 36 of 2009 concerning Health in Article 90 regulates that the Head of health service facility and/or health workers that perform the practice or work in a health service facility that deliberately fails to provide first aid to a patient in an emergency will be punished with imprisonment of up to 2 (two) years and a maximum fine of Rp.200,000,000.00 (two hundred million rupiah). If the act as referred to in paragraph (1) results in disability or death, the head of the health service facility and/or health worker shall be sentenced to imprisonment for a maximum of 10 (ten) years and a maximum fine of Rp1,000,000,000.00 (one billion rupiah)[14].

Articles in the Criminal Code that are relevant to the criminal liability concerning malpractice are Article 359, 360, and 361. Negligence that causes death is regulated in Article 359 Criminal Code that states: "Anyone who because of his fault (negligence) causes another person to die, is punished by a maximum imprisonment of five years or a maximum confinement of one year". Article 359 of the Criminal Code can accommodate all acts committed that result in death, where the death is not intended or wished. In this matter, there should be another three elements that are the details of "causes another person to die", which are: There must be a certain form of act; The result is death; There is a causal verband between the form of action and the result of death.

These three elements are no different from the element of the act of taking a life away from murder as regulated in Article 338 of the Criminal Code. The difference from murder is only in the element of the mistake, which in Article 359, the mistake is in the form of carelessness. Negligence resulting in injury is regulated in Article 360 of the Criminal Code Paragraph (1), that anyone because of his mistake (negligence) resulting someone is getting serious injuries, shall be punished by a maximum imprisonment of five years or a maximum confinement of one year. Paragraph (2), that anyone because of his mistake (negligence) resulting someone in getting an injury that causes illness or obstruction in performing works or finding income for a specified period, shall be punished by a maximum imprisonment of nine months or a maximum confinement of six months or a maximum fine of four thousand five hundred rupiah. There are two kinds of criminal acts according to Article 360. From the formulation of Article 360 Paragraph (1), the elements that exist can be specified, namely: Negligence; There is a form of action, and the existence of serious injuries; There is a causal relationship between serious injuries and forms of action. The formula for paragraph (2) contains the following elements: negligence; There is a form of action; There is a result of wounds that cause illness and wounds that obstruct to perform works or finding income for a specified period; and the existence of a causal relationship between actions and consequences.

According to Article 90 of the Criminal Code, serious physical injury denotes illness or injury, which does not leave any prospect for a complete recovery or through which danger of life exists; continuous incompetence for performing official and professional activities; loss of the use of a sense organ; paralysis; disturbance of the intellectual capabilities which lasted for more than four weeks; removal or death of the womb of a woman. As an alternative, a wound that causes disease is a wound that becomes an obstacle to perform official and professional

activities. The parameter of this type of injury is not in the disease, but in the difficulty of performing official and professional works. The easier parameter is the disruption of work supported by a doctor's letter stating that the person needs to rest because of his organs function condition due to the injury he suffered. Rest is needed because of these injuries.

Even though a doctor may deliberately cause injuries, for example performing a tooth extraction and giving an injection, the regulation in Article 351 of the Criminal Code states that they cannot be convicted because there is a beroepsrecht excuse or basis of forgiveness, which is the right that comes from their occupation. This excuse or the basis for forgiveness applies not only to doctors but also to pharmacists and midwives. Article 361 of the Criminal Code states: "If the crimes described in this chapter are committed to exercising an office or profession, the sentence may be enhanced with one third, deprivation of the exercise of the profession in which the crime has been committed may be pronounced, and the judge may order the publication of his verdict."

Article 361 of the Criminal Code is a criminal weighting article applicable to the perpetrator who performs official and professional activities commits the crime referred to in Article 359 and Article 360 of the Criminal Code. The parties that can be subject to this article are doctors, midwives, and medical experts, each of whom is deemed to have to be more careful in performing their works. For a doctor who has caused a dysfunction or death related to his work, position, or occupation, Article 361 of the Criminal Code provides a heavier punishment. Besides that, the judge can impose a sentence in the form of revocation of the right to perform the work used to commit the crime and order to announce the decision.

Model of Criminal Case Settlement of Doctor Malpractice Based on The Value of Local Wisdom in Mojokparak Village

The settlement of medical malpractice criminal cases in the future can follow the method of the people of Mojokparak Village in resolving the cases. The people of East Java, especially in Mojokparak Village, hold on tightly to the Islamic values developed through Islamic boarding schools. In this regard, in essence, the normative values of religion in the Islamic boarding school community cannot be separated from the discourse and practical actions of people's everyday life, especially in every settlement of doctor malpractice criminal cases because the dynamics of society are inseparable from the religious dynamics it develops. The religious tradition developed by the Islamic boarding school community relies on aswaja (ahlusunnahwaljamaah). This doctrine originates from two core role models, they are Al Aryari and Al Maturidi, following one of the four schools of fiqih and following the methods set by Junaidi al Baghadi in tariqa and tasawwuf (Sufism).

The naqli law for the narrative law source reference is Al Quran and the Sunnah of the Prophet which are the references in any dispute resolution in society. The aqli law is a dispute resolution in which legal source is based on logical reasoning (ijtihad). Also, two things are considered as the legal source from the opinion of the ulama (Islamic scholars), they are ijtima 'and qiyas after a reference is made so that an appropriate dispute resolution is obtained. Besides the four sources of law mentioned above, there are other values which are the fatwas of the ulama which refer to the main objectives of the sharia, it is the five principles of human rights that must be upheld called Uhul al Khamsah. The people of Mojokparak village hold all of these values in resolving disputes, especially those related to criminal cases.

Moreover, the people of Mojokparak Village are obedient towards the community leaders as key persons in dispute resolution, in this case, community leaders or religious leaders who are considered to have neutrality and have a major influence on dispute resolution. As it is known, Javanese culture is still heavily characterized by feudalism, which is public figures whose opinions are highly respected and obeyed. Moreover, if these community leaders come from neutral religious figures, they are highly valued by the local community because the people of Mojokparak Village characteristics are very religious. Religiosity and obedience to religious figures are internalized by local communities with certain cultures known as local wisdom.

The people of Mojokparak Village also have gotongroyong or neighborly help culture (collectivity)

which acts as tolerance in society. There is an East Javanese proverb, "Siroyoingsun, ingsunyosiro" (you are me and I am you), that acts as a form of empathy as the basis of tolerance in society. The internalized proverb in everyday life which even becomes a culture is included as a local wisdom. The three potencies of local wisdom above can be used as an alternative to solving criminal cases based on the culture of a society.

In some countries, such as Japan, the Netherlands, the United Kingdom, the United States, and Poland, a dispute between its citizens can be resolved through informal procedures. Japanese society is a society that prefers the settlement of disputes or conflicts out of court, namely through chotei (mediation) and jidan institutions. These two mediation institutions have similarities, however, by many parties, the chotei institution is viewed as more oriented towards the interests of the perpetrator and not the victim; while the jidan institution is an informal mediation institution that seeks to produce restitution agreements between victims and perpetrators of violations for material and emotional harm in both criminal and civil cases. The results of the agreement between the perpetrator and the victim can affect the formal justice process, such as stopping the case or reducing the sentence for the perpetrator, by taking into account evidence in the form of a "letter of forgiveness" from the victim to be presented in the court. From this description, in fact, in the settlement of cases in Mojokparak, the "letter of forgiveness" model can be applied, as according to Mahrus Ali the use of patterns of criminal cases settlement through peace which is achieved through deliberation in a friendly manner is seen as the right approach method in the context of cases in society. Starting from his research, the settlement of criminal cases is a requirement with the values and cultural sentiments of the community which can only be resolved effectively by a settlement pattern based on the values of local wisdom of the local community.

According to NatangsaSurbakti, by starting from the settlement of cases through peace (deliberation) in a friendly manner, it is lawful that case settlement patterns that can provide a sense of justice between victims and perpetrators can be accommodated in constitutional policies. Reforming the law and criminal justice system that is based on the socio-cultural values of Indonesian people is a necessity, which is a reflection of the values of life philosophy based on Pancasila and global development, by reflecting respect for the values of local wisdom[15].

The character of the Mojokparak people is a community that holds on tightly to the law of its religion (Islam) and is obedient to the four figures: father and mother, teachers, and government leaders. Culture and other characteristics that are inherent and become one with the Javanese are their Islamic soul, as expressed by "abantalsyahadat, asapoiman, apayung Allah" (in their lives they wear the creed as a head covering, their faith as the blanket, and take refuge in Allah to be saved). If the character is associated with Islamic law in imposing it on murder cases, namely: "qishaash (taking the same retaliation)" or "diat (paying a fair compensation) as stated in the Qur'an verse (178) below.

"O you who believe (who are âmenû)! The Law of Retaliation (of Equality in punishment, Al-Qisâs) is prescribed for you in the matter of the murdered: the free for the free and the slave for the slave, and the female for the female. But if any remission is made to anyone by his (aggrieved) brother, then prosecution (for the blood wit) should be made according to custom, and payment should be made to him in fairness; this is an alleviation from your Lord and a mercy; so whoever exceeds the limit after this, then for him there is a painful torment."

Based on the character of the community, the settlement of doctor malpractice criminal cases in Mojokprak Village is done by way of deliberation and consensus. The results of the deliberations are considered satisfactory for the parties in litigation because the results of the deliberations are true justice that can be felt by those seeking justice and not just formal justice. The main requirement for settlement through deliberation is assertion from both the perpetrator and the victim as well as the agreement of the perpetrator and his family and victims to resolve the doctor malpractice case by deliberation.

To facilitate the settlement of criminal cases in Mojokparak Village, PoskoSambung Rasa (Sambung Rasa Post) was formed. The settlement of medical

malpractice crimes in PoskoSambung Rasa must have an impact on the public order and the manifestation of the community justice value. This is the manifestation of Posner's theory of legal efficiency. The use of sanctions in the form of additional penalties in addition to compensation for collective agreement, all can be considered effective as deterrence because of the negative stigma on the perpetrator so that socially it does not cause personal injury.

Settlement of medical malpractice criminal cases in PoskoSambung Rasa must meet these requirements:

1. Not a repeated action (the action was done for the first time);

2. The perpetrators and victims who have been injured are willing to make peace;

3. The role of paralegals and mediators can facilitate/mediate the settlement peacefully in a friendly manner and still consider the victim's right to justice;

4. The period of reporting follow-up is determined based on an agreement between the reporter and the paralegal or mediator; and

5. All efforts or productive steps must be following the rules of criminal procedure law.

The model of case assistance gives the authorized post to provide direction for the process, both for its resolution from the level of the Investigator (Police), the Attorney General, and the Investigation at Court. If the crime is serious as stated in the Criminal Code with a sentence of more than 7 years, it cannot be resolved amicably (by mediation) because it is against the law. If the reporter is a victim, after the post receives the report, the paralegal or companion can directly accompany the reporter to the center for special services in the regional police station and strive to provide legal protection for the rights of the victim as regulated by law.

If the reporter is a perpetrator who has committed a serious crime, then after the post receives the report, the Paralegal provides directions and explanations about the investigation process from the Police to the trial at the Court and the rights of the perpetrator (defendant or suspect) and may ask for the assistance of legal advisors. Finally, all efforts or productive steps must be following the rules of criminal procedure law.

Conclusion

Policy on the formulation of doctor malpractice criminal action in the criminal law system in Indonesia is that any medical action performed by a doctor or people under their supervision, or a health service provider that is carried out on their patient, both in terms of diagnosis, therapeutic and disease management which is done in violation of law, propriety, decency, and professional principles whether done intentionally or due to inadvertence that causes wrongdoing of pain, injury, disability, bodily damage, death and other losses that cause a doctor or nurse to be responsible both administratively, civil and criminal. The criminal provisions for doctor malpractice are regulated in Article 190 of Law Number 36 Year 2009. Negligence that causes death is regulated in Article 359 Criminal Code, while the negligence resulting in injury is regulated in Article 360 of the Criminal Code. Crimes committed while carrying out a position or job are regulated in Article 361 of the Criminal Code.

The model of criminal case settlement of doctor malpractice based on the value of local wisdom in Mojokparak Village is that The people of Mojokparak Village hold on tightly to the Islamic values developed through Islamic boarding schools. In this regard, in essence, the normative values of religion in the Islamic boarding school community cannot be separated from the discourse and practical actions of people's everyday life, especially in every settlement of doctor malpractice criminal cases. To facilitate the settlement of criminal cases in Mojokparak Village, PoskoSambung Rasa (Sambung Rasa Post) was formed. Settlement of medical malpractice criminal cases must meet these requirements: Not a repeated action (the action was done for the first time); The perpetrators and victims who have been injured are willing to make peace; The role of paralegals and mediators can facilitate/mediate the settlement peacefully in a friendly manner and still consider the victim's right of justice; The period of reporting follow-up is determined based on an agreement between the reporter and the paralegal or mediator, and all efforts or productive steps must be following the rules of criminal

procedure law.

Ethical Clearance: Yes.

Conflict of Interest: No

Source of Funding: Authors

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