

# The importance of the restorative justice approach in the resolution of medical disputes



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## Abstract

*This research aims to elucidate the imperative nature of employing restorative justice as a viable solution for addressing medical offenses. Within the framework of the Indonesian legal system, medical crimes are classified as criminal offenses that are committed within the scope of the medical profession. Specific laws and regulations prosecute these offenses. This document is the outcome of a normative legal investigation. The study's findings indicate that the law enforcement issue for medical crimes stems from the ambiguous legal provisions outlined in Law 36/2009 about health. Consequently, the enforcement of medical crimes is subject to the provisions of the Criminal Procedure Code. Consequently, it can be argued that the distinction between medical crimes and ordinary crimes in the Indonesian context remains unchanged. Moreover, it is crucial to contemplate the implementation of restorative justice as an alternative approach to addressing medical crimes, taking into account the suffering and material damages endured by victims due to the actions of others.*

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## 1. Introduction

Health is an integral component of human rights and welfare that must be actualized in alignment with the stipulations outlined in the 1945 Constitution. This constitution guarantees that every individual is entitled to experience both physical and spiritual well-being, lead a quality life, acquire a favorable and salubrious environment, and avail themselves of healthcare services.<sup>1</sup> The state governs these provisions as a fundamental human right, as stipulated in Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia. This article guarantees that every individual has the entitlement to access and benefit from healthcare services. Article 34, paragraph (3) of the 1945 Constitution also mandates that the state ensure adequate healthcare services. Medical

<sup>1</sup> Rian Saputra, M Zaid, and Devi Triasari, 'Executability of the Constitutional Court ' s Formal Testing Decision : Indonesia ' s Omnibus Law Review', *Journal of Law, Environmental and Justice*, 1.3 (2023), 244–58 <<https://doi.org/10.62264/jlej.v1i3.18>>.

establishments and government healthcare facilities.<sup>2</sup>

The Law of the Republic of Indonesia Number 36 of 2009 concerning Health further confirms the entitlement to health services. It stipulates that health development should focus on enhancing the community's awareness, willingness, and capacity to lead a healthy life to the utmost extent. This is seen as an investment in developing socially and economically productive human resources. This legislation affirms that the government has several obligations, encompassing the duty to strategize, govern, coordinate, promote, and oversee the execution of health initiatives that are fair and accessible to the populace. Furthermore, it is worth noting that the Government of the Republic of Indonesia is among the state parties that have committed to comply with the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the international community. Law No. 11/2005 on the Ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) has officially approved the treaty. According to Article 12 of Law No. 11/2005, it is acknowledged by state parties to this convention that individuals possess the entitlement to experience the utmost achievable level of physical and mental well-being.<sup>3</sup>

In light of the significance of delivering high-quality healthcare services to the populace, the government has undertaken many initiatives to improve healthcare provisions. Aside from delivering healthcare services, the government is also accountable for enhancing and promoting the community's active participation in diverse health services. Physicians and individuals seeking medical care are two distinct legal entities establishing medical and legal associations. Health maintenance or health services encompass doctors' and patients' medical and legal relationships. Within this healthcare connection, the rights and obligations between doctors and patients give rise to their respective legal responsibilities. These responsibilities are the foundation for a more detailed doctor-patient agreement in a therapeutic transaction.<sup>4</sup>

In essence, a doctor's practice refers to delivering personalized medical care by physicians to patients. When an individual seeks medical care from a healthcare professional, a legal association is established between the healthcare provider and the patient, sometimes referred to as a therapeutic transaction. The legal relationship referred to as *inspannings verbintenis*, which does not guarantee a cure or death, distinguishes itself from the typical legal relationship in general agreements that promise

<sup>2</sup> Muhammad Khalif, FX Hastowo Broto Laksito, and Andriamalala Laurent, 'Role and Position of Indonesian Medical Disciplinary Honour Council: Fair Medical Dispute Resolution', *Journal of Law, Environmental and Justice*, 1.3 (2023), 185–201 <<https://doi.org/10.62264/jlej.v1i3.15>>.

<sup>3</sup> Anggraeni Endah Kusumaningrum, 'Mediasi Dalam Penyelesaian Sengketa Medis Sebagai Upaya Perlindungan Pasien', *Hukum Dan Dinamika Masyarakat*, 14.1 (2016), 70–78 <<https://doi.org/10.36356/hdm.v14i1.445>>.

<sup>4</sup> Riska Andi Fitriano, Budi Setyanto, and Rehnalemken Ginting, 'Penegakan Hukum Malpraktik Melalui Pendekatan Mediasi Penal', *Yustisia Jurnal Hukum*, 5.1 (2016), 101–2 <<https://doi.org/10.20961/yustisia.v5i1.8724>>.

a specific outcome (risikoverbentenis/resultaatsverbentenis). In the field of medical services, there exists a legal association between doctors and patients known as a professional connection. This relationship can manifest in many situations and result in the establishment of rights and responsibilities through agreements entered into by the involved parties.<sup>5</sup>

The legal association between physicians and patients is characterized by an effort agreement, also known as inspanning verbintenis. This agreement entails that physicians exert their utmost effort in delivering treatment services to patients while acknowledging that doctors cannot guarantee their consistent success in providing such services. In the context of therapeutic transactions, the legal relationship between doctors and patients has transformed. Previously, the patient's role as a dependent party in deciding the healing process (therapy) has been altered to that of an equal party to the doctor. The physician must now consider the patient's perspective while determining the appropriate course of therapy, which may involve assessing the necessity of surgical intervention. In the therapeutic contract, the doctor holds a position of superiority over the patient due to "professional power," which impacts the patient's psychological and physical well-being. However, the patient's protection is established by adhering to the principles of vulnerability. An individual's vulnerable classification is based on various criteria, including biological, economic, cultural, and other factors. This vulnerability can arise due to factors such as handicaps, environmental issues, societal inequity, gender disparities, and imbalanced relationships, resulting in an individual's inability to protect themselves without constraint.<sup>6</sup>

Moreover, the role of patients in patient health services is outlined in Article 4 of Law Number 36 of 2009 about Health, which affirms that every individual has the entitlement to health. Moreover, according to Article 5 of the Law, all individuals own equal entitlements when acquiring resources within the health sector. The legal implications of these rules extend to three interconnected patient rights, including informed consent, the right to medical data, and medical confidentiality. The necessity of this action lies in its adherence to the principles of human dignity, which uphold individuals' inherent freedom and autonomous rights. For instance, the patient's consent to medical intervention following the doctor's provision of information or explanation regarding the intended medical procedure. The idea of informed consent safeguards the autonomy and integrity of individuals, granting them the freedom to make their own decisions regarding

<sup>5</sup> Nurul Ummah, Fifik Wiryani, and Mokhammad Najih, 'Mediasi Dalam Penyelesaian Sengketa Medik Dokter Dengan Pasien (Analisis Putusan Pn No. 38/Pdt.G/2016/Pn.Bna Dan Putusan Mahkamah Agung No. 1550 K/Pdt/2016)', *Legality: Jurnal Ilmiah Hukum*, 27.2 (2019), 205–21 <<https://doi.org/10.22219/ljih.v27i2.10158>>.

<sup>6</sup> Syamsul Rijal Muhlis, Indar Nambung, and Sabir Alwy, 'Kekuatan Hukum Penyelesaian Sengketa Medik Pasien Dengan Rumah Sakit Melalui Jalur Mediasi', *Jurnal Ilmiah Dunia Hukum*, 5.1 (2020), 31–40.

the treatment their doctors or medical workers will administer.<sup>7</sup>

The process of obtaining informed permission is frequently neglected due to the prevailing belief among doctors that all medical interventions performed on patients do not inherently carry risks. If they do, the doctor possesses the necessary expertise to manage such risks. This behavior needs to be circumvented and lacks justification, even though emergency medical intervention might be administered without obtaining informed consent.<sup>8</sup> In addition to this, in the context of medical and criminal crimes, it typically arises when the outcomes of a physician's treatment fail to meet the patient's expectations and subsequently result in the patient's demise or impairment, hence prompting the patient to file a claim against the physician. Ultimately, this circumstance gives rise to a medical conflict between the physician and the patient. The patient has reported an incident of malpractice, leading to a complaint and subsequent reporting to the police. The patient's family has also initiated a legal case against the doctor, alleging negligence. Widodo Trenso Novianto's dissertation states that medical conflicts originate from patient unhappiness due to doctors failing to provide their promised service. Consequently, patients or their family members seek to identify the root reason for their displeasure. The dissatisfaction arises from a breach that constitutes a tort in the execution of the medical profession, resulting in harm to the patient. This occurs when the doctor misinterprets or violates the terms outlined in the therapeutic agreement (therapeutic contract).<sup>9</sup>

The surge in public complaints and lawsuits is commonly regarded as a manifestation of medical practitioners' shortcomings. However, it is worth noting that the rise in lawsuits against doctors and hospitals reflects a favorable outlook, indicating a growing awareness among the public regarding their entitlements within the healthcare domain. The grievances stem from the doctors' negligence in executing their professional duties. However, substantiating the occurrence of a medical criminal act perpetrated by a physician against a patient poses considerable challenges, as highlighted by Nova Riyanti Yusuf, Deputy Chairperson of Commission IX of the House of Representatives (DPR). Yusuf emphasizes the complexity involved in evaluating the presence of a medical, criminal act committed by a doctor, as it necessitates individuals with a comprehensive understanding of the subject matter. The fundamental inquiry is whether law

<sup>7</sup> Chieh-feng Chen and others, 'Potential Media Influence on the High Incidence of Medical Disputes from the Perspective of Plastic Surgeons', *Journal of the Formosan Medical Association*, 116.8 (2017), 634–41 <<https://doi.org/10.1016/j.jfma.2017.01.011>>.

<sup>8</sup> Oksana MELENKO, 'Mediation as an Alternative Form of Dispute Resolution: Comparative-Legal Analysis', *European Journal of Law and Public Administration*, 7.2 (2021), 46–63 <<https://doi.org/10.18662/eljpa/7.2/126>>.

<sup>9</sup> Tania Sourdin, Bin Li, and Donna Marie McNamara, 'Court Innovations and Access to Justice in Times of Crisis', *Health Policy and Technology*, 9.4 (2020), 447–53 <<https://doi.org/https://doi.org/10.1016/j.hlpt.2020.08.020>>.

enforcement officers can evaluate a medical offense.<sup>10</sup>

Upon closer examination, it becomes evident that just two medical offenses have been subjected to legal proceedings, while the remaining cases mostly pertain to intentionally engaging in medical practice without possessing a valid practice permit. The author provides a summary of various medical criminal charges that have been adjudicated in the past, encompassing The Supreme Court Cassation Decision Number 365 K/Pid/2012, convicted three resident doctors, Dr. Dewa Ayu Sasiary Prawani SpOG, Dr. Hendry Simanjuntak SpOG, and Dr. Hendy Siagian, SpOG, to 10-month imprisonment each. The court found them legally and convincingly guilty of committing a criminal offense for negligently causing the death of patient Julia Siska Makatey in Manado, North Sulawesi. This decision has both advantages and disadvantages. The Indonesian Medical Association and other medical organizations have evaluated the activities of the three doctors to comply with established norms. This is because evaluating a doctor's acts in the legal context is challenging for medical practitioners. Furthermore, the legal matter involving doctor Dewa Ayu Sasiary Prawani and her colleagues, Hendy Siagian and Hendy Simanjuntak, as outlined in Decision Number 365 K/Pid/2012, established that the defendant's negligent conduct resulted in the unfortunate demise of another individual, leading to their respective imprisonment for ten months.<sup>11</sup> Only these two examples have garnered attention in medical criminal offenses. At the same time, other cases solely pertain to illegal acts performed for "intentionally practicing medicine without a practice permit." Hence, it can be inferred that India faces challenges in resolving medical criminal crimes.

Theoretically, a criminal case can be legally closed, and the prosecution can be halted through restorative justice if certain criteria are satisfied. These criteria include: firstly, the suspect must be a first-time offender; secondly, the criminal offense must be punishable by a fine or imprisonment of no more than five years; and thirdly, the criminal offense must involve evidence or losses not exceeding Rp. 2,500,000.00. According to Moeljatno (year), a *criminal offense* can be defined as an act that has negative consequences for society since it undermines or obstructs the establishment of a just and equitable social structure and is considered antisocial. Criminal law, as a form of public legislation, governs the penalties imposed on individuals who commit criminal activities, serving as a means of retribution for offenses that undermine the welfare of society. Imprisonment is one of the penalties for criminal offenses. Within the framework of retributive justice, Imprisonment represents a state of suffering for the wrongdoer, serving as both a form of retribution and the underlying objective of criminal law. Punishment refers to the act of subjecting someone to torture or suffering, and it is

<sup>10</sup> Mabarroh Azizah, 'Peran Negara Dalam Perlindungan Konsumen Muslim Di Indonesia', *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 4.2 (2021), 153–65 <<https://doi.org/10.24090/volksgeist.v4i2.5738>>.

<sup>11</sup> Naomi Jesica Hartanto, Arlene Agustina, and Klarika Permana, 'Criminal Violations of the Medical Ethics Code by Dr. Bimanesh', *FIAT JUSTISIA: Jurnal Ilmu Hukum*, 12.4 (2018), 329 <<https://doi.org/10.25041/fiatjustisia.v12no4.1378>>.



considered the primary characteristic and component of criminal law.<sup>12</sup>

The introduction of restorative justice can be attributed to the recognition that incarceration does not yield the anticipated outcomes, specifically transforming individuals into better individuals. The occurrence is called the criminal cycle, wherein incarceration does not transform inmates into exemplary citizens. In certain instances, they may even enhance their proficiency in perpetrating offenses. The concept of restorative justice does not yield positive outcomes for victims, even considering its impact. The notion above of criminal law is primarily aimed at minimizing its impact by emphasizing supporting victims and doing initiatives to improve the well-being of crime victims.<sup>13</sup>

Restorative justice is a method of resolving criminal cases that involves the participation of offenders, victims, their families, and other relevant parties. The goal is to collaboratively find a just solution that focuses on restoring the original state of affairs rather than seeking revenge. Restorative justice is a coherent and interrelated subsystem of punishment that aims to create positive outcomes.<sup>14</sup> Restorative justice is based on providing victims with reparation for their losses, fostering peace, and reaching agreements that can effectively restore the victim's well-being. Transitioning from a retributive justice approach to a restorative justice approach is a complex task that necessitates careful consideration of societal circumstances.<sup>15</sup> Examining Indonesia's diverse political, economic, and socio-cultural circumstances is crucial while formulating the criminal justice system. Implementing material and formal legislation that upholds restorative justice principles is necessary to ensure that the punitive system is aligned with the best interests of offenders, victims, and society. Restorative justice does not include the eradication of incarceration but rather aims to redirect the case toward a resolution outside the judicial process, namely fostering peace.

## 2. Research Method

This study focuses on normative legal research, specifically examining the concept of

<sup>12</sup> Nila Kasuma, Armasastra Bahar, and Hilaire Tegan, 'Law and Medical Disciplinary Sanctions: Enhancing Medical Practice and Health Quality in Indonesia', *Journal of Legal, Ethical and Regulatory Issues*, 21.4 (2018), 1–9.

<sup>13</sup> Januar Rahadian and Silas Oghenemaro, 'Monodualistic and Pluralistic Punishment Politics in Criminal Code Reform: Lessons from Indonesia', *Journal of Law, Environmental and Justice*, 1.3 (2023), 225–43 <<https://doi.org/10.62264/jlej.v1i3.17>>.

<sup>14</sup> Brian G Sellers and Bruce A Arrigo, 'The Narrative Framework of Psychological Jurisprudence: Virtue Ethics as Criminal Justice Practice', *Aggression and Violent Behavior*, 63 (2022), 101671 <<https://doi.org/https://doi.org/10.1016/j.avb.2021.101671>>.

<sup>15</sup> Muhammad Fatahillah Akbar, 'The Urgency of Law Reforms on Economic Crimes in Indonesia', *Cogent Social Sciences*, 9.1 (2023) <<https://doi.org/10.1080/23311886.2023.2175487>>.

"positive legal norms within the legislative system."<sup>16</sup> The findings of this study have substantiated that the methodologies employed in legal research encompass the statute, comparative, and conceptual approaches.<sup>17</sup> The research employed a data collection methodology involving document analysis and interviews. *Document analysis* is a method employed to gather secondary data derived from various scholarly sources such as laws, rules, international agreements, books, journals, articles, reports by previous researchers, and other pertinent documents about the subject matter under investigation.

### 3. Results and Discussion

#### Restorative Justice's importance in Indonesian medical offence settlement.

In Indonesia, law enforcement for medical criminal offenses follows the same rules as general criminal offenses. This means the Criminal Procedure Code (KUHAP) and the Criminal Code (CB) are used. The provisions for medical criminal offenses are the same as those for other criminal offenses like theft and murder. However, medicine or medicine is a specialized branch of science that may be challenging for ordinary people, particularly law enforcement officers who lack complex knowledge about medical matters. In addition, the Indonesian health law, specifically Law Number 36 of 2009 (hence referred to as Law 36/2009), does not explicitly encompass the concept of malpractice (medical violation). However, it solely addresses mistakes or exclusions in the performance of the occupation, as outlined in Articles 54 and 55. "misconduct" is the legal terminology employed in Articles 54 and 55. The errors or omissions in the practice of the profession, as outlined in Articles 54 and 55 of Law 36/ on health, are as follows:

According to Article 54, health workers who engage in errors or negligence while performing their professional duties may face disciplinary measures. The Health Workers Disciplinary Panel determines whether an error or negligence has occurred, as mentioned in paragraph (1). The court decision establishes the provisions about the establishment, duties, functions, and procedures of the Health Workers Disciplinary Panel. Article 55 states that individuals have the right to receive compensation for mistakes or failures made by healthcare professionals. The implementation of this compensation must comply with the relevant laws and regulations. According to provisions in Law 36/2009, there is still a lack of legal regulation regarding medical criminal acts in Indonesia. When considering criminal law enforcement in a policy process, it can be seen as policy enforcement that occurs in three stages. The first stage is the formulation stage, which involves lawmakers enacting laws in a general sense. The subsequent phase entails the application or judicial stage, wherein law enforcement personnel, encompassing the police and the courts, apply criminal law. The final stage involves the practical execution of criminal law by criminal or prosecution officials upon

<sup>16</sup> Agung Basuki and others, 'Establishing Ecological Justice in the Governance of Land Inventory , Ownership , and Utilisation in Indonesia', *Journal of Law, Environmental and Justice*, 18.2 (2023), 137–54 <<https://doi.org/10.62264/jlej.v1i2.12>>.

<sup>17</sup> Satryo Sasono, Isharyanto Isharyanto, and Delasari Krisda, 'Child and Women Domestic Abuse Victims ' Social Health Insurance Protection : An Affirmative Justice Perspective', *Journal of Law, Environmental and Justice*, 1.2 (2023), 105–21 <<https://doi.org/10.62264/jlej.v1i2.8>>.

individuals found guilty of criminal offenses or violating the law.

In this subsequent phase, there are additional challenges. As mentioned, the author highlights that law enforcement for medical crimes typically adheres to the same regulations as general crimes, specifically the Criminal Procedure and Criminal Code. This poses a problem in aligning the evidentiary model for medical crimes with general crimes, even though these two crimes possess distinct characteristics that necessitate different approaches. One illustration is the weight of proof.<sup>18</sup> It is widely acknowledged that the evidentiary standards in criminal proceedings differ from those in civil cases. In criminal cases, the objective of proof is to ascertain material truth, which refers to the actual truth. Conversely, in civil cases, the objective of proof is to establish formal truth, wherein the judge is bound by the boundaries set forth by the parties involved in the litigation. If a criminal judge aims to ascertain the material truth of a case, it is necessary to establish the event as established beyond a reasonable doubt.<sup>19</sup>

The problem of proof holds significant importance and is a crucial aspect, particularly in medical malpractice trials. In Indonesia, instances of medical malpractice are occasionally unresolved, and clinicians encounter significant challenges in substantiating their culpability under criminal law. According to Darwan Prints, evidence substantiates that a criminal incident has occurred and the offender is culpable for it, hence establishing their responsibility. The purpose of gathering evidence is to establish the veracity of an event or action perpetrated by an individual, enabling the court to utilize the evidence as a foundation for a ruling. The challenge of establishing evidence in malpractice lawsuits results in instances where bringing such matters to court is arduous, leading to their resolution primarily through police reports.<sup>20</sup>

The approach employed for presenting evidence in malpractice proceedings in Indonesia adheres to the regulations outlined in the criminal procedure legislation. The KUHAP employs a methodology or theory of proof grounded in negative law, often known as "negatief wettelijk," to establish evidence. According to Article 183 of the Criminal Procedure Code, it is mandated that a judge is prohibited from imposing a sentence on an individual unless they possess a minimum of two valid forms of evidence that establish the occurrence of a criminal offense and the culpability of the defendant in its commission. Wirjono Prodjodikoro argues that negative statutory proof should be upheld for two reasons. Firstly, a judge must believe in the defendant's guilt to impose a criminal sentence. This prevents the judge from being compelled to convict someone without certainty. Secondly, it is beneficial to have rules that guide the judge in formulating their belief, providing specific standards that must be adhered

<sup>18</sup> Natasha Mulvihill, 'Professional Authority and Sexual Coercion: A Paradigmatic Case Study of Doctor Abuse', *Social Science and Medicine*, 305:February (2022), 115093 <<https://doi.org/10.1016/j.socscimed.2022.115093>>.

<sup>19</sup> Gjalte de Graaf, Leo Huberts, and Tebbine Strüwer, 'Integrity Violations and Corruption in Western Public Governance: Empirical Evidence and Reflection from the Netherlands', *Public Integrity*, 20.2 (2018), 131–49 <<https://doi.org/10.1080/1099922.2017.1350796>>.

<sup>20</sup> Bruce Zucker and Monica Her, 'The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System', *University of San Francisco Law Review. University of San Francisco. School of Law*, 37.2 (2003), 2.



to when administering justice.<sup>21</sup>

Judges must adhere to admissible evidence, limiting their decision-making to evidence established by legal standards. Article 184 paragraph (1) of the Criminal Procedure Code outlines the types of legal evidence that can be presented, including witness testimony, expert testimony, letters, clues, and statements made by the defendant. Hints: e. Defendant's Statement. By legal principles, it is imperative to comply with the stipulations outlined in Article 184, Paragraph (1) of the Criminal Procedure Code. Therefore, it is imperative to uphold the principles and values of a legal state, ensuring that they remain unaffected by transient demands, circumstances, or personal opinions. The supreme governing body is the law within a legal framework, sometimes called the "Rule of Law." One of its fundamental components is the presumption of innocence, as Article 66 of the Criminal Procedure Code outlines. This principle ensures that the burden of proof does not rest upon the suspect or defendant. According to J. Guwandi, Medical Malpractice is a distinct category of cases characterized by disparities between medical expertise or science and the legal science possessed by law enforcement professionals. Consequently, numerous diverse and unanticipated conditions may arise in such cases.<sup>22</sup>

Restorative justice assumes significance in resolving medical offenses in Indonesia, given the limited scope for addressing medical violations using standard procedures outlined in the Criminal Procedure Code. Restorative justice aims to resolve medical crime situations by engaging the offender, victim, family, and other relevant parties in a collaborative effort to achieve a just resolution that prioritizes the restoration of the original condition rather than retaliation.<sup>23</sup> Incorporating the restorative justice notion should be regarded as a component of the broader punishment framework, wherein various interconnected subsystems collaborate to attain advantageous outcomes. The fundamental tenet of restorative justice is to provide victims with reparation for the harm they have endured, abolish peace, and reach agreements that can effectively restore the victim's state.

The statement above aligns with the principle of Pancasila justice, as articulated in Article 2 of Law No. 12/2011, which asserts that Pancasila serves as the fundamental basis for all components of state legislation. The dispute around Pancasila justice is ongoing, but a perspective asserts that the attributes of Pancasila justice when examined through the lens of John Rawls' Theory of Justice, bear resemblances to Aristotle's viewpoint. This opinion shares the commonality that justice should be comprehended as equality. As social beings, humans must achieve legal equality or equal access to justice. Rawls posits the notion of a state of equality and uniformity among all individuals within a given community. There is no

<sup>21</sup> Muh Endriyo Susila, 'The Use Of Amicable Settlement For Resolving Medical Malpractice Disputes In Indonesia', *Medicine, Law & Society*, 14.1 (2021), 119–34 <<https://doi.org/10.18690/mls.14.1.119-134.2021>>.

<sup>22</sup> Ahmad Syaufi, Diana Haiti, and Mursidah, 'Application of Restorative Justice Values in Settling Medical Malpractice Cases', *International Journal of Criminology and Sociology*, 10.0511 (2021), 103–10 <<https://doi.org/10.6000/1929-4409.2021.10.14>>.

<sup>23</sup> Rian Saputra and others, 'Reconstruction of Chemical Castration Sanctions Implementation Based on the Medical Ethics Code (Comparison with Russia and South Korea)', *Lex Scientia Law Review*, 7.1 (2023), 61–118 <<https://doi.org/10.15294/lesrev.v7i1.64143>>.

differentiation based on status, position, or superiority amongst individuals, allowing for a fair and equitable agreement between all parties involved. Rawls' perspective is influenced by Plato's doctrine of using law as a mechanism for dispensing justice, which diverges from his idealistic notion of an "ideal state" wherein all individuals are afforded equal opportunities to attain justice, ensuring equal rights for all.<sup>24</sup>

According to Rawls, the principles of justice can be ascertained through a consensus-building process among individuals within a society, considering several factors such as human cooperation, minimal morality, a feeling of fairness, rational decision-making, and the concept of primary goods. Rawls' analysis leads him to the conclusion that society will unanimously agree on two principles of justice. Firstly, everyone should be entitled to a comprehensive system of fundamental liberties. Secondly, social and economic disparities should be structured in a manner that a) maximizes the advantages for those in the most advantageous position and b) is connected to positions and opportunities that are accessible to all based on equal opportunity.<sup>25</sup>

According to the author's description, using the evidentiary approach regulated by KUHP in the enforcement of medical crimes poses challenges for law enforcement in resolving medical malpractice cases. This can undoubtedly result in injustice for suspects and victims, as it restricts their access to justice. The poor understanding of medical science among law enforcement officers poses challenges in resolving medical malpractice cases. Medical crime cases are unavoidable in Anglo-Saxon countries, such as the United States. However, unlike in Indonesia, instances of reported malpractice cases can be handled in court due to the utilization of reverse evidence, which facilitates the resolution of medical crime cases. The author will provide a more comprehensive analysis of evidence addressing medical offenses in the United States. The United States, as an illustration, employs the idea of *res ipsa loquitur* (the object speaks for itself) in the resolution of medical malpractice lawsuits. This doctrine is closely associated with the burden of proof. The legal doctrine of "Res ipsa loquitur" is characterized by its lack of evidentiary value since it just presents a restricted opportunity to transfer the burden of proof from the plaintiff to the defendant. This doctrine is not universally applicable but rather limited to specific instances where an individual's culpability is readily apparent and readily identifiable. The theory cannot be employed in cases where the determination of negligence is contingent upon a relative factor.<sup>26</sup>

The doctor's negligence is readily apparent in specific instances, rendering proof unnecessary. Even a non-expert can perceive negligence, thereby obviating the need for additional evidence from expert witnesses. This doctrine is applicable in such cases where the burden of proof lies with the doctor to demonstrate their lack of negligence. This process

<sup>24</sup> Linda Gröning and others, 'Remodelling Criminal Insanity: Exploring Philosophical, Legal, and Medical Premises of the Medical Model Used in Norwegian Law', *International Journal of Law and Psychiatry*, 81 (2022), 101776 <<https://doi.org/https://doi.org/10.1016/j.ijlp.2022.101776>>.

<sup>25</sup> Marie Claire Van Hout and others, 'Judicialisation of the Mentally Ill and/or Mentally Incapacitated in the Malawi Criminal Justice System: Gaps and Flaws of Human Rights Protection', *Forensic Science International: Mind and Law*, 4 (2023), 100121 <<https://doi.org/https://doi.org/10.1016/j.fsimpl.2023.100121>>.

<sup>26</sup> Ummah, Wiryani, and Najih.

is referred to as reverse proof. In Anglo-Saxon countries, the standard burden of proof is threefold: a. By a preponderance of evidence, which requires evidence that has a greater strength of truth (more than 50%); b. Clear and convincing evidence refers to the level of evidence that would give the jury a clear impression of the truth of the plaintiff's statement; c. Beyond a reasonable doubt requires evidence to support the plaintiff's claim clearly, leaving no room for doubt regarding the defendant's defense. This standard is employed in delinquent proceedings. America is a prominent method Anglo-Saxon countries use to handle medical malpractice issues effectively. In the United States, the reverse proof is employed. In contrast, in countries that follow the continental European system, like Indonesia, there is an initial argument that reverse proof contradicts the principle of presumption of innocence. However, it is important to note that the application of reverse proof can indeed facilitate justice for both suspects and victims. This is due to the unique nature of the medical field, which, as argued by the author, cannot be accurately predicted.<sup>27</sup>

In Anglo-Saxon countries, the principle of reverse proof is employed when even a non-expert knows the doctor's negligence is responsible. This was exemplified in the case of *Ybarra V. Spangard* in California in 1944. In this case, a patient underwent an appendectomy, resulting in paralysis of the shoulder. The judge invoked the doctrine of "Res Ipsa Loquitur," which involves shifting the burden of proof to the individuals involved in the surgery to determine whether they were negligent or if the occurrence was a medical hazard. Recognizing the reversal of the burden of proof in the Corruption Act and Money Laundering Act in Indonesia signifies a shift in the evidence paradigm that challenges the presumption of innocence. Reversed evidence is now employed to combat injustice and address urgent matters that the government lacks the authority to handle. Indonesia can potentially adopt the practice of utilizing reverse evidence for medical crimes, drawing insights from the United States experiences in this domain.

### **Indonesian medical dispute resolution and restorative justice legal construction.**

The author presents arguments regarding the challenges faced in enforcing medical crimes in Indonesia. These challenges stem from the absence of regulations about medical crimes in Law 36/2009, which includes medical crimes as ordinary crimes within the criminal procedure code in Indonesia. In light of this, the author aims to emphasize the significance of alternative approaches to enforcing medical crimes, specifically through the lens of Restorative Justice. Restorative justice is a victim-centered approach to crime that enables victims, perpetrators, families, and communities to address the harm caused by criminal crimes. Muladi also stated the same viewpoint, stating that when it comes to the regulatory framework for safeguarding victims of criminal acts, the primary factor to be taken into account is the fundamental nature of the damages experienced by the victims. The crux of the

<sup>27</sup> Lynette Feder and Samantha Angel, '11 - Criminal Justice Research: Incorporating a Public Health Approach', in *Three Facets of Public Health and Paths to Improvements*, ed. by Beth Ann Fiedler (Academic Press, 2020), pp. 295–316 <<https://doi.org/https://doi.org/10.1016/B978-0-12-819008-1.00011-0>>.

loss encompasses not only tangible or corporeal anguish but also psychological distress.<sup>28</sup>

The rise and recognition of human rights (HAM) have permeated the realm of law, a methodology that originated in the 1970s to address criminal cases. This approach diverges from the standard criminal justice system by focusing on the active involvement of criminals, victims, and the community in resolving criminal cases. Notwithstanding the ongoing theoretical debate around this method, it has emerged and exerted a significant impact on legal policy and practice across numerous nations. Restorative Justice is widely embraced as a viable alternative to criminal crimes in various regions due to its thorough and efficacious approach. Restorative justice endeavors to empower victims, perpetrators, families, and communities to rectify an illicit act, employing consciousness and conviction as the foundation for enhancing societal well-being. Restorative justice refers to the resolution of criminal cases within and outside the court system that focuses on the careful consideration and active involvement of offenders, victims, and the community. The goal is to restore the situation to its original state, thereby promoting recovery. Dispute resolution procedures grounded in restorative justice rely on careful consideration and agreement, wherein parties are encouraged to make concessions to achieve a mutually acceptable conclusion. Every member is expected to yield and prioritize the community's interests over personal ones to sustain mutual peace. Deliberation has demonstrated more efficacy in settling societal problems in the face of the state and courts' failure to deliver justice.<sup>29</sup>

Wright elucidates that the notion of restorative justice is fundamentally straightforward. The concept of justice has shifted away from seeking retribution from the victim to the perpetrator, whether through physical, psychological, or punitive means. Instead, it now emphasizes the healing process of the hurtful act by offering support to the victim and holding the perpetrator accountable, with the assistance of family and community when needed. The parallelism between restorative justice and local procedures (adat) confers a notable advantage, as it tends to garner greater acceptance and adoption within the broader community. Furthermore, various additional benefits are associated with implementing restorative justice. These include: a. Restorative justice prioritizes justice for the victim based on their desires and interests rather than being determined by the state; b. Facilitates healing for all parties involved; c. Enforces accountability for the perpetrator's actions.<sup>30</sup>

Restorative justice focuses on restoring connections following a criminal offense rather than worsening the division between the offender, victim, and society that is typical of the contemporary criminal justice system. *Restorative justice* is a crime response approach that prioritizes the needs and experiences of victims, offenders, families, and community representatives. It encourages them to redress the suffering caused by the crime actively. The

<sup>28</sup> Hamdani Abubakar, 'Kedudukan Audit Medis Dalam Penegakan Hukum Tindak Pidana Di Bidang Medis', *Jurnal Lex Renaissance*, 3.2 (2018), 263–83 <<https://doi.org/10.20885/jlr.vol3.iss2.art2>>.

<sup>29</sup> Hyeun Kyoo Shin and others, 'Medical Dispute Cases Involving Traditional Korean Medical Doctors: A Survey', *European Journal of Integrative Medicine*, 6.4 (2014), 497–501 <<https://doi.org/10.1016/j.eujim.2014.05.004>>.

<sup>30</sup> Belengar Francis Maïnkade, 'Corporate Human Rights Obligations of Investors in Recent Investment Agreements: The Progressive Hardening Process of CSR Clauses', *Heliyon*, 9.4 (2023), e15120 <<https://doi.org/https://doi.org/10.1016/j.heliyon.2023.e15120>>.

focus is on reparation, restoring damage and loss caused by crime, and initiating and facilitating peace. The objective is to substitute and shift away from determining the victor or defeat through an adversarial system. Restorative justice aims to promote open communication among the several stakeholders impacted by the crime, such as victims, offenders, families, and the community.<sup>31</sup>

The fundamental cornerstone and paramount aspect of implementing restorative justice is the interactive exchange between the criminal and the victim, as emphasized in diverse ideas and models of this justice approach.<sup>32</sup> Engaging in direct communication between the offender and the victim facilitates the victim's ability to articulate their emotions and aspirations for realizing their rights and desires through the resolution of a criminal case. Dialogue serves as a means to push the perpetrator to engage in self-correction, acknowledge their errors, and assume accountability for the criminal act they have perpetrated while fully cognizant of its consequences. Through this method of communication, the community can actively engage in achieving the agreement's outcomes and overseeing its execution. Restorative justice, commonly called case resolution through mediation (penal mediation), is essentially the same concept.<sup>33</sup>

Considering these factors, it is important to acknowledge that enforcing medical crime law in Indonesia is challenging due to the absence of regulation in Law 36/2009. This lack of regulation affects the inclusion of medical crime as a regular crime, which falls under the Criminal Procedure Code in Indonesia. However, adopting a restorative justice approach is crucial when dealing with medical crimes. This approach aims to reduce victims' harm and ensure their access to justice. The significance of incorporating the restorative justice method in the settlement process is underscored by the unique circumstances experienced by victims of medical crimes, who are not only marginalized but also encounter challenges in obtaining justice. According to Muladi, victims can be defined as individuals or groups who have experienced various forms of injury, such as physical or mental, emotional, economic, or significant infringement upon their fundamental rights. These harms result from actions that contravene each respective country's criminal laws, including instances of power abuse.

Furthermore, it is crucial to acknowledge the significance of international issues and the factors above. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, formulated by the United Nations during the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, Italy, in September 1985, highlights the significant emphasis placed on safeguarding victims of crime. One of the recommendations asserted by the source is: "*Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or*

<sup>31</sup> Toshimi Nakanishi, 'New Communication Model in Medical Dispute Resolution in Japan', *Yamagata Med J*, 31.1 (2013), 1–8.

<sup>32</sup> Julio Ríos-Figueroa, *Institutions for Constitutional Justice in Latin America, Courts in Latin America* (New York: Cambridge University Press, 2011) <<https://doi.org/10.1017/CBO9780511976520.002>>.

<sup>33</sup> Yasir Khan, 'Peacekeeping', in *Encyclopedia of Violence, Peace, & Conflict (Third Edition)*, ed. by Lester R Kurtz, Third Edit (Oxford: Academic Press, 2022), pp. 652–68 <<https://doi.org/https://doi.org/10.1016/B978-0-12-820195-4.00270-3>>.



*dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights*".<sup>34</sup>

This implies that individuals who do an illegal act must offer compensation to the victim, their family, or legal guardian. Restitution refers to returning property rights or compensating for losses incurred by the victim, as well as covering the costs resulting from negligence that caused harm to the victims. It is a legal requirement that serves as a means of providing service and enforcing rights. In the realm of medical crime victims, the notion of restorative justice pertains to the grievances and material detriments endured by victims due to criminal activities perpetrated by others. It is deemed suitable for the offender to offer reparation. In my perspective, if a concept leads to fatalities, it should be disregarded. However, it is important to acknowledge the challenges associated with enforcing and substantiating the law in such cases, as medical crimes differ from conventional crimes that fall under the purview of the Criminal Procedure Code.<sup>35</sup>

Hence, it is crucial to examine the foundation of restorative justice in enforcing medical crimes, given the challenges associated with enforcing such offenses. This is particularly relevant in the Indonesian context, where the definition of medical crimes is not explicitly defined in the Criminal Procedure Code and Law 36/2009. Furthermore, it is worth noting that only two cases exclusively address medical crimes. When medical criminal offenses are not governed by the Criminal Procedure Code, such as when the investigation or inquiry process is conducted by individuals with expertise in the health sector, the utilization of restorative justice may be excluded to ensure legal certainty.<sup>36</sup> The application of restorative justice is contingent upon the involvement of both victims and perpetrators. Suppose medical crimes in the future are exempt from the Criminal Procedure Code, meaning that health experts investigate or pursue medical crimes. In that case, it will yield at least two advantages. Firstly, it will ensure that victims of medical crimes have sufficient access to justice. Secondly, it will enhance the medical profession's vigilance in delivering medical services, thereby preventing malpractice and establishing a legal safeguard for the health of the medical profession. According to Satjipto Rahardjo, legal protection aims to safeguard human rights that others have violated. This protection is extended to the community, enabling them to exercise all the rights protected by the law fully.<sup>37</sup>

Similarly, the law functions accordingly compared to Sudikno Mertokusumo's perspective, which asserts that legal protection serves the objective of safeguarding human interests. The law's primary objective is establishing a methodical society, fostering a sense of order and equilibrium. It is anticipated that the establishment of societal order will lead to the

<sup>34</sup> *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*

<sup>35</sup> Jacqueline Nolan-Haley, 'Mediation: The New Arbitration', *Harvard Negotiation Law Review*, 17 (2012), 61–95.

<sup>36</sup> W. B Rubenstein, 'Why Enable Litigation: A Positive Externalities Theory of the Small Claims Class Action', *UMKC L. Rev.*, 74 (2005), 709.

<sup>37</sup> Eko Mukminto and Awaludin Marwan, 'Pluralisme Hukum Progresif: Memberi Ruang Keadilan Bagi Yang Liyan', *Masalah-Masalah Hukum*, 48.1 (2019), 13 <<https://doi.org/10.14710/mmh.48.1.2019.13-24>>.

safeguarding of human interests. The law is responsible for the attainment of its objectives, which involve the allocation of rights and responsibilities among individuals within a community, the distribution of authority, the regulation of legal dispute resolution, and the preservation of legal certainty. Nevertheless, the author reiterates that in the absence of a corresponding legal intervention (where the enforcement of medical criminal offenses remains governed by the KUHAP procedural framework), it is advisable to consistently contemplate the notion of restorative justice to ensure justice for victims. This is particularly crucial in situations where the potential for perpetrators to be penalized is limited, as is the case with the existing arrangements for enforcing medical criminal offenses.

#### 4. Conclusion

According to the author's research, the need for implementing restorative justice in enforcing medical crimes arises from several factors. Firstly, the lack of clear provisions regarding health in Law 36/2009 has led to the enforcement of medical crimes being governed by the provisions of the Criminal Procedure Code. Consequently, the Indonesian context tends to treat medical crimes and ordinary crimes as synonymous, even though medical or medicine, it is crucial to evaluate the alternative of medical crime enforcement based on restorative justice, particularly in terms of the suffering or material losses (such as light and non-fatal disabilities) suffered by victims due to criminal activities done by others. Nevertheless, as per the author's assertion, in cases where the loss leads to the demise of another individual, it is imperative to dismiss this notion. However, the enforcement and substantiation of such a concept prove to be exceedingly challenging due to the distinct nature of medical crimes, which diverge from conventional offenses falling under the purview of the Criminal Procedure Code.

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