

**IMPLICATIONS SOCIO-JURIDICAL CRIMINAL CHARGES RELATED TO
ALLEGED MALPRACTICE MEDICAL DOCTOR**

Muh Endriyo Susila

Lecturer at Faculty of Law University of Muhammadiyah Yogyakarta

Dirwan Suryo Soularto

Lecturer at Faculty of Medicine and Health Sciences
Muhammadiyah University of Yogyakarta

ABSTRACT : The lack of legislation governing medical malpractice issue has placed doctors in Indonesia in vulnerable position. They may easily be exposed to the criminal litigation when medical treatment goes wrong. Negligence which results in injury or death amounts to criminal prosecution according to the existing law as it can be seen in Dr. Ayu's case. The infliction of criminal punishment upon three obstetricians in the late 2013 (in Dr. Ayu's case) was both controversial and phenomenal. It has stimulated the national action of strike among doctors and skepticism about law and its enforcement in Indonesia. Trembling with fear of criminal prosecution may encourage doctors in Indonesia to practice defensive medicine. This paper will make analyses on the implication of the criminal prosecution of doctors from socio-juridical perspective.

Keywords: Medical Malpractice, Medical Offence, Criminal Prosecution.

INTRODUCTION

In response to the rise of lawsuits against physicians medical malpractice cases related to John Healy¹ commented, '*it is not an easy time to be a doctor*'. The statement may be appropriate to represent the feeling among doctors in Indonesia, especially after the Supreme Court ruling No. 365 K / PID / 2012. The judges on appeal convict ten months in prison doctor Ayu and two companions for failure cesarean operation resulted in the death of the patient, Mrs. Sisca Makatay, in 2010 ago. Criminal case that was popularized by the media as the 'doctor case Ayu' is absolutely phenomenal and controversial. Criminal prosecution against the doctor has made the experience *shocked*. As a result of various demonstrations held in almost all parts of the country.²

Essentially, at the instigation of the Executive Board of the Indonesian Doctors Association among physicians nation wide strike on 27 November 2013 as the form of solidarity with the fate of the convict.

Essentially, at the instigation of the Executive Board of the Indonesian Doctors Association among physicians nation wide strike on 27 November 2013 as the form of solidarity with the

1 John Healy, *Medical Negligence: Common Law Perspectives*, London: Sweet & Maxwell, 1999 hal.1

2 *'Ini Selengkapnya Pertimbangan Hakim Kasasi Kasus Dokter Ayu'*, diunduh pada tanggal 13 Oktober 2014 dari <http://www.gresnews.com/berita/hukum/17602811-ini-pertimbang-hakim-kasasi-kasus-dr-ayu>

fate of the convict.

No doubt that criminal prosecution is a nightmare for any physician. And the absence of legislation specifically regulating medical malpractice problem in Indonesia has made a nightmare it becomes a real threat. Doctors can entangled in a criminal prosecution for various reasons, including because of alleged medical malpractice. However, the criminal charges against the doctors have an adverse impact in the field of health care, one of which is the practice of *defensive* medicine.

SCOPE OF CRIMINAL CHARGES AGAINST DOCTOR

Under the principle of '*equality before the law*' every citizen involved in a criminal act can be criminally charged before the courts, including doctors. Doctors may be liable if it is proven guilty of committing an act which is based on the legislation in force is expressed as a criminal offense.

1. Criminal Charges Under the Criminal Code

Criminal charges against the doctor can be done in the case in question committed the crime as stipulated in the Criminal Code as follows:

a. Issuing a false medical certificate

Article 267 prohibits doctors issuing false medical certificate on the presence or absence of disease in the patient's self people. Violation of this provision is punishable by a maximum imprisonment of four years. If the certificate is intended to incorporate the patient into a Mental Hospital (RSJ) or intended to be a patient in the asylum remain there, such actions are punishable by imprisonment of eight years and six months.

b. Sexual misconduct against patients

Article 294 (2) prohibits any person from sexual misconduct against people who are in her care. Violation of this provision is punishable by a maximum imprisonment of seven years. This provision also applies between doctor and patient.

c. Opening the confidential information

Article 322 prohibits any person to open any confidential information and shall be kept confidential. Violation of this provision is punishable by a maximum imprisonment of nine months or a fine of nine thousand rupiah. This provision applies to doctors open the patient confidential.

d. Doing Euthanasia

Article 344 of the Criminal Code prohibits doctors meet the patient's request to terminate the life of the patient (*mercy killing* /euthanasia). Violation of this provision is punishable by imprisonment for a period of twelve years.

e. Abortion

Article 348 (1) prohibits any person act intentionally abortion (abortion). Violation of this provision is punishable by a maximum imprisonment of five years and six months. If abortion had caused the death of pregnant women, under the provisions of Article 348 paragraph 2 of the act was punishable by a maximum imprisonment of fifteen years. If the offender acts are doctors, midwives, and pharmacists then under the provisions of Article 349 and the third aggravated sentence coupled with practice license revocation

f. The provisions of Article 351 of the persecution.

According to that provision, any person who knowingly committed abuses were threatened with a maximum imprisonment of two years and eight months. If the abuse has resulted in injuries such actions Offenses punishable by a maximum imprisonment of five years. This provision can be applied to doctors performing medical procedures without the patient's consent, because such action is equated with persecution.

g. Article 359 of the negligence that caused the death.

According to these provisions, every person whose negligence has resulted in other people died punishable by a maximum imprisonment of five years or imprisonment for a maximum of one year. This provision can be applied to doctors for their negligence has caused the patient died.

h. Article 360 of negligence causing injuries.

According to these provisions, any person because his negligence cause others suffered serious injuries threatened with a maximum imprisonment of five years or imprisonment for a maximum of one year. This provision can be applied to the doctor for negligence has caused patients to suffer serious injuries.

Associated with the provisions of Articles 359 and 360 of the judge under the provisions of Article 361 can aggravate punishment if the act was carried out in order to run the job. So status as a physician according to the provisions of Article 361 apply as an excuse ballast penalty (*aggravating factor*).

2. Demands Criminal Based on Law No. 29 of 2004 on the Medical Practice

Act No. 29 of 2004 on Medical Practice (Law on Medical Practice) have established some kind of action as a criminal offense. In this law the criminal provisions set out in Article 75 and Article 80. There are three parties who may be perpetrators of offenses under the Medical Practice Act, namely doctors / dentists, owners of health care facilities and other non-physician / dentist. The following are forms of criminal offenses set out in the Medical Practice Act:

a. Not Having a Certificate of Registration(*STR*)

According to the provisions of Article 75 of the Medical Practice Act, to practice medicine without having STR punishable by up to three years or a fine of one hundred million rupiah.

b. Do not Have Permit Practice (*SIP*)

According to the provisions of Article 76 of the Medical Practice Act, to practice medicine without having SIP punishable by a maximum imprisonment of three years or a fine of one hundred million rupiah.

c. Not Replacing Board Name Practice.

According to the provisions of Article 79 (a) of the Medical Practice Act does not signboards practice punishable by imprisonment of one year or with at most fifty million rupiah.

d. Not Creating Medical Records

According to the provisions of Article 79 (b) of the Medical Practice Act does not make medical records were threatened with imprisonment of one year or a fine of fifty million rupiah.

e. Not adhering to service standards

According to the provisions of Article 79 (c) of the Medical Practice Act does not comply with the standard of service as referred to in Article 51 (a) punishable with imprisonment of one year or a fine of fifty million rupiah.

Does not refer to another doctor who is more expert

According to the provisions of Article 79 (c) of the Medical Practice Act did not refer the patient to another doctor who is an expert in terms of not being able to handle the pain suffered by patients as referred to in Article 51 (b) punishable with imprisonment one year or a fine not to exceed fifty million rupiah.

f. Does not provide emergency relief

According to the provisions of Article 79 (c) of the Medical Practice Act does not provide emergency assistance as referred to in Article 51 (c) is threatened with imprisonment of one year or a fine of fifty million rupiah.

g. Unlock the secrets of patients

According to the provisions of Article 79 (c) of the Medical Practice Act unlock the secrets of the patients referred to in Article 51 (d) punishable with imprisonment of one year or a fine of fifty million rupiah.

h. Not increasing the knowledge and skills of medicine.

According to the provisions of Article 79 (c) of the Medical Practice Act does not improve the knowledge and skills of medicine as referred to in Article 51 (e) is threatened with imprisonment of one year or a fine of fifty million rupiah.

Noting several criminal provisions above it is clear that the Medical Practice Act has criminalized some errors of an administrative nature such as not having STR / SIP, do not make medical records, and no signboards practice. The criminalization of various administrative error on the one hand can be seen as a manifestation of the strong commitment of the legislators to provide maximum protection to the public against potential losses due to medical practices performed by parties who are not competent.

But on the other hand, the use of criminal sanctions in the form of imprisonment or confinement to errors of an administrative nature in certain things seem excessive or disproportionate. Therefore, the criminal provisions of this kind has been the object of *judicial review* in the constitutional court and was amended in 2007.

This judicial (*judicial review*) filed by Anny Isfandyarie, a specialist anesthetist³. Based on the decision of the Constitutional Court on 19 June 2007, the Medical Practice Act insofar as imprisonment and confinement threatened the offenses-offenses stipulated in Articles 75, 76, and 79 (c) has been abolished. Elimination of imprisonment and confinement does not mean a criminal act in question has been abolished (decriminalization). Criminal acts-such offenses remain in force only no longer threatened with sanctions being seizing independence, but were threatened with financial penalties.

3. Demands Criminal Based on Law No. 36 Year 2009 on Health

3 Putusan Mahkamah Konstitusi Nomor 4/PUU-V/1997 tentang Permohonan Pengujian Undang-undang Nomor 29 Tahun 2004 Tentang Praktik Kedokteran, diunduh pada tanggal 13 Oktober 2014 dari http://hukumpidana.bphn.go.id/wp-content/uploads/2012/11/Putusan-MK-No.-4_PUU_V_2007.

There are several types of offenses stipulated in the Health Law that might ensnare medical personnel, namely:

- a. Involved in the trade of organs or tissues as stipulated in article 192

Of the Health Law Article 192 determines that the organ or tissue trafficking punishable by a maximum imprisonment of ten years or a fine of one billion rupiah.

- b. Perform plastic surgery destination from forge the identity of a person as stipulated in article 193

Of the Health Law Article 193 specifies that perform plastic surgery destination from forge the identity of a person is threatened with a maximum imprisonment of ten years or a fine of one billion rupiah.

- c. Perform abortions illegally as stipulated in article 194

Of the Health Law Article 194 specifies that perform illegal abortions punishable with imprisonment of ten years or a fine of one billion rupiah.

- d. Blood, obtained as provided for in Article 195

Of the Health Law Article 195 determines that the blood trade in threatened with a maximum imprisonment of five years or a fine of five hundred million rupiah.

CRIMINAL CHARGES RELATED ISSUES OF DOCTOR IN INDONESIA

In carrying out protests against the doctor Ayu-related convictions and his two companions, the doctor demanded a halt to the criminalization of doctors. [1] They assume that the convict doctors caused by the failure to implement a medical action is a criminal injustice. Demands should not be made solely on the basis of *adverse* out comes, the treatment results are not as expected. Medical action is by its nature can not promise any conclusive results. Although the results are not as expected, all the medical action has been done according to the standard, physicians should obtain legal protection.

Jargon 'stop the criminalization of doctors' promoted among the medical profession, especially during a rally at the end of 2013 and then get a different response from the public. There can come to know it, but some are less able to accept it. Indeed, some have criticized the charges as a form of demand to receive special treatment by law (*legal privilege*).

As well as other community members, doctors have no immunity (*legal immunity*). When a doctor performs an act which, under the provisions of the applicable law is a criminal offense, the subject may be prosecuted criminally. This kind of logic in fact has been well understood by the medical profession. In fact, no one questioned the criminal charges against doctors who commit crimes such as illegal abortion or the buying and selling of organs. However, criminal charges against the doctor concerned with events that sociologically constructed as medical malpractice has caused controversy and other negative consequences.

As can be seen in the case of doctors Ayu, besides causing controversy in the midst of society, the imposition of criminal sanctions by the Supreme Court has raised a wave of protest among physicians from all over Indonesia. The highlight of the protest is done nationwide strike on November 27, 2013 in various hospitals in Indonesia. Even more surprising, the strike turned out to have the support of the Minister of Health at the time.⁴ From the standpoint of a doctor, a

4 "Kemenkes Dukung Aksi Mogok Dokter Se-Indonesia", diunduh pada tanggal 13 Oktober 2014 dari <http://nasional.news.viva.co.id/news/read/461728-kemenkes-dukung-aksi-mogok-dokter-se-indonesia>.

strike can be justified as an attempt to convey the aspirations and as an effort to fight injustice.

But from another perspective, the strike can not be accepted because they had disrupted public services. So, in addition to the controversy about the criminalization of doctors Ayu, comes a new controversy in the midst of the public related to the suitability of the strike carried out by the doctor.⁵

Within certain limits the criminal charges against the doctor seemed to create more problems than provide solutions. If criminal prosecution against the doctor Ayu and two companions intended to protect the public risks / dangers of medical malpractice, in fact it is precisely the criminal sanctions has presented another danger to the public one of which is the application of a defensive medicine. If that were the case, then the use of penal in medical malpractice cases is questionable.

As is well understood that in addressing social problems, penal should be used as a last resort. Criminal law as has the properties *ultimum remedium* so that the use of penal priority should be placed on the latter. The use of penal events that are socially constructed as medical malpractice considering there seems less proportionately more suitable means of the mechanisms of civil liability (civil liability). Generally party aggrieved patients prefer to receive compensation instead of sending a doctor who had been trying to help her to jail. Even in some cases, patients who are harmed only demanded an explanation from the hospital about what happened, some are simply demanding an apology. As a comparison, in developed countries the use of penal in medical malpractice cases are very rare. Although the medical malpractice cause the death of the patient, in many cases resolved through civil.

IMPLICATIONS SOCIO-JURIDICAL CRIMINAL CHARGES AGAINST DOCTOR

Criminal charges against the doctor in cases of alleged medical malpractice is possible but not every case of alleged medical malpractice require penal. The use of penal in cases of alleged medical malpractice should be limited indeed. The use of excessive penal could actually be counter-productive, the benefits are not balanced with social costs (*social costs*) arising. Case Ayu physicians should provide valuable lessons for law enforcement officials and the people of Indonesia. Enforcement of the law is not always parallel with justice. Law enforcement is done purely normative approach sometimes precisely create injustice.

In practice in developed countries such as the UK and Australia, the criminal charges against the doctor's alleged malpractice is limited to specific cases which qualify as '*criminal Negligence*'. Dimensions of criminality in the context of criminal Negligence based more on the aspect of fault (*mens rea*) doctor, not only to look at factors result from actions taken by the doctor. Criminal charges can be performed in cases of medical malpractice (*medical malpractice / medical Negligence*)[1] if the degree of doctor error in the category of gross negligence (*gross Negligence*). Determining whether the degree of fault qualifying gross negligence or negligence committed by the judge lightly. In the case of *R v Adamoko* House of Lords stated, "*Negligence is gross when it is so bad that it should be criminal*".⁶

Other in developed countries, others also in the country of Indonesia. In Indonesia, doctors involved in acts that sociologically constructed as medical malpractice so easily exposed to criminal prosecution. Dimensions crime of medical malpractice cases is more often based on a

5 "Aksi Mogok Dokter Bertentangan dengan Kemanusiaan", diunduh pada tanggal 13 Oktober 2014 dari <http://www.tribunnews.com/nasional/2013/11/26/aksi-mogok-dokter-bertentangan-dengan-kemanusiaan>

6 Emily Jackson, *Medical Law: Text, Cases, and Materials*, Edisi ke 2, Newyork: Oxford University Press, 2010, hal. 146

result of medical malpractice itself. If the patient suffered serious injuries, especially if the die is generally the family and the wider community to assume the incident as a criminal act. As a consequence the doctor who has led the patient suffered injuries or died feasible prosecuted criminally. That the medical action performed by a doctor begins with good intentions to help patients, and the negative consequences in the form of injury or death was not only regrettable for the patient or his family but also regretted by the concerned doctor and the hospital management as not considered.

The world view of law enforcement in Indonesia is not much different from the society in general. Throughout include negligence, provided there is due to the form of injury or death in patients with these events easily construed as a criminal offense. Article 359 and 360 of the Criminal Code became the mainstay of the apparatus to trap the doctor involved. It is true that both these provisions are normative can be used against a doctor whose negligence caused the patient suffered injuries or died. But often an element of negligence is interpreted incorrectly and proving the causal link between negligence and consequently sometimes mistaken.

In the case of doctors Ayu for example, the judges of cassation establish negligence of the convict is located between the other factors are not given adequate explanations in particular on the risk of death that may occur as a result of surgery performed *section cessaria*. Thus it can be said that there are legal defects in approval (informed consent) from the patient's family. In addition, the judges also using the wrong logic in upholding the principle of causality. That perform medical action especially high risk without the consent of patients or their families it is a mistake / omission was indeed true, but not that kind of negligence that must be associated with the death patient. You are operating approval given previously, the risk of death is still unavoidable. Similarly, if surgery is not performed because there is no consent from the family of the result stays the same, the patient will die. In addition assembly convict the judge also blamed for negligence has caused the embolism. It is true that medically believed to cause the patient's death was due to the occurrence of embolism. But the doctor to account for the occurrence of embolism is not fair because the risk factors are totally unpredictable (unforeseeable).

In addition, criminal charges against the doctor in the case of alleged medical malpractice evidently carry negative implications both socially and legally. According to the research ever conducted found at least five negative impact of criminal charges against the doctor's alleged medical malpractice, namely:

1. Opening up opportunities extortion by unscrupulous doctors and patients or lawyers..

criminal chargesslit opening *politicking* for the lawyer to handle the medical dispute. The threat of criminal charges can be exploited by unscrupulous lawyers to intimidate doctors and increase the value of the amount of compensation related bargaining proposed.⁷ Doctors who fear when sued criminally inclined will follow the will of the lawyers, and this situation makes doctors are vulnerable to extortion.

2. Opening up blackmail against the doctor by local police officers

Criminal charges also opened a loophole for unscrupulous law enforcement officials to conduct the exploitation of doctors who snagged medical malpractice case. At the level of

⁷ It was concluded from the interview with M. Luthfie Hakim, hospital legal consultant, on 30 August 2014. M. Luthfie Hakim uses the term 'capitalization' to refer to the efforts of certain parties to take advantage of adverse events experienced by the patient means to negotiate redress.

investigation conducted by the mode of exploitation abuses by unscrupulous investigators. Abuse of authority can be done in two scenarios, the first related to the determination of the status of the suspect and the related detention. Doctors who serve as a suspect, especially if followed by the arrest would have had *shocked*, severe and will most likely be asked his lawyer to negotiate the release of the suspect status or release from custody. Negotiations can not be separated from the payment of money to a related apparatus

3. Slit opening practice of *defensive medicine* by the doctors

For some doctors, medical disputes perhaps still is something unreasonable. How could in good faith to bring relief to the patient precisely keeps the doctor stuck the law court. Demands lawsuit against the doctor much less criminal charges can stimulate physicians to practice pattern *defensive medicine* where they are more concerned to do security yourself than to apply the best medical service salts patients. At criminal prosecution against the doctor Ayu some doctors are believed to have actually applying pattern of *defensive* the medicine. The practice of *defensive medicine* may burden the community with an increasingly costly medical expenses and various other risks.

4. Raises *public distrust* of the medical services

Within certain limits of criminal charges also can create *public distrust* of the medical services. Suspected cases of medical malpractice, especially processed criminal is the object of a sexy news for the media. Preaching that is massive by the mass media about the alleged cases of medical malpractice can create fear or public concern. Society could be worried that they will become the next victim of malpractice. Members of the public who fear could leave based on treatment medicine and turn to alternative medicine or traditional medicine. But they also realize that alternative medicine was also not without risk. Such a situation can reduce people's access to healthcare. Moreover, criminal charges as well as forcing doctors to confront the patient. Although the court hearing the patient's position is represented by the state, still the confrontational atmosphere can not be eliminated. Such a situation is not very conducive to the creation of a harmonious relationship between doctors and patients, but such relationships are needed for the success of therapy. It could be argued that such a state can reduce the quality of communication between doctors and patients, and it has implications for the declining quality of medical service

5. Cause confusion related to the concept of medical malpractice

Against doctors Criminal charges related to alleged medical malpractice within certain limits can also cause confusion understanding of the concept of medical malpractice. As is known to medical malpractice term is not found in the legislation and not used in the proceedings. The term medical malpractice in Indonesia is more a sociological term (*sociological term*) rather than the term juridical (*legal term*). Because there is no legislation that specifically regulate the issue of medical malpractice, then the event is perceived as medical malpractice construed under the laws that exist. The possibility to sue doctors criminally and is supported by the fact that many cases of alleged medical malpractice that are processed in the criminal has made the public at large perceives medical malpractice as a criminal act.⁸

CONCLUSION

From previous discussions can be concluded that the use of penal case of alleged medical

8 Muh Endriyo Susila dan Puteri Nemie, "The Viability of Applying ADR Methods for Resolving Medical Malpractice Disputes in Indonesia", a paper presented at the 4th International Conference on Law and Society (4th ICLAS) forum held on 10-11 May 2015 at UNISZA Terengganu Malaysia

malpractice indeed possible but should be limited. The use of excessive penal could actually be counter-productive to efforts to realize justice in the health care field. Criminal charges against the doctor in cases of alleged medical malpractice in Indonesia has so far turned out to carry a variety of negative implications both socially and legally. Criminal charges slit opening legal irregularities and various other negative implications. Practices that apply during this puts physicians in a vulnerable position. The prone position can stimulate physicians to apply the pattern of *defensive medicine* in order to anticipate the risk of lawsuits / litigation. The practice of *defensive medicine* negative in the sense that it should be avoided because it would be detrimental to patients and the wider community. The practice of *defensive medicine* can be prevented or at least reduced if the system is handling cases of alleged medical malpractice provide adequate protection against doctors, especially from criminal prosecution unnecessary (*unnecessary criminal prosecution*).

REFERENCES

Kitab Undang-undang Hukum Pidana (KUHP)

Kitab Undang-undang Hukum Perdata (KUHPer)

Undang-undang Nomor 29 Tahun 2004 Tentang Praktek Kedokteran

Undang-undang Nomor 36 Tahun 2009 Tentang Kesehatan

Putusan Mahkamah Konstitusi Nomor 4/PUU-V/1997 tentang *Permohonan Pengujian Undang-undang Nomor 29 Tahun 2004 Tentang Praktik Kedokteran, diunduh pada tanggal 13 Oktober 2014* dari http://hukumpidana.bphn.go.id/wp-content/uploads/2012/11/Putusan-MK-No.-4_PUU_V_2007.pdf

Emily Jackson, 2010, *Medical Law: Text, Cases, and Materials*, Edisi ke 2, New York: Oxford University Press.

Sofwan Dahlan, 2002, *Hukum Kesehatan: Rambu-rambu bagi Profesi Dokter: Edisi 3*, (Semarang: Badan Penerbit Universitas Diponegoro)

John Healy, 1999, *Medical Negligence: Common Law Perspectives*, London: Sweet & Maxwell.

Muh Endriyo Susila dan Puteri Nemie, “*The Viability of Applying ADR Method for Resolving Medical Malpractice Disputes in Indonesia*”, makalah dipresentasikan dalam forum the 4th International Conference on Law and Society (4th ICLAS) yang diselenggarakan pada tanggal 10-11 May 2015 di UNISZA Terengganu Malaysia.

“*Ini Selengkapnya Pertimbangan Hakim Kasasi Kasus Dokter Ayu*”, diunduh dari <http://www.gresnews.com/berita/hukum/17602811-ini-pertimbang-hakim-kasasi-kasus-dr-ayu>. Tanggal 13 October 2014.

“*Stop Kriminalisasi Dokter*”, diunduh dari <http://www.esamarinda.com/2013/11/26/stop-kriminalisasi-dokter/8785/> tanggal 13 Oktober 2014.

“*Kemenkes Dukung Aksi Mogok Dokter Se-Indonesia*”, diunduh dari <http://neasional.news.viva.co.id/news/read/461728-kemenkes-dukung-aksi-mogok-dokter-se-indonesia>, tanggal 13 Oktober 2014.

“*Aksi Mogok Dokter Bertentangan dengan Kemanusiaan*”, diunduh dari <http://www.tribunnews.com/nasional/2013/11/26/aksi-mogok-dokter-bertentangan-dengan-kemanusiaan>, tanggal 13 Oktober 2014.