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"Indonesia Clean of Corruption in 2020"

"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"

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TABLE OF CONTENTS

Front Page ..............................................................................................................   i
Information of the International Seminar .................................................................  ii
Committee Composition..........................................................................................   iii
Preface...................................................................................................................   iv
Greeting From The Dean Faculty of Law ................................................................. vi

INDONESIA’S KPK AND NSW’S ICAC: COMPARISONS AND CONTRASTS
Prof. Simon Butt .................................................................................................  1

CAN INDONESIA FREE ITSELF FROM CORRUPTION IN 2020?
Prof. Dr. Hikmahanto.,S.H.,LLM .................................................................  4

AN ACT TO ESTABLISH THE ANTI-CORRUPTION AGENCY, TO VEST POWERS ON OFFICERS
OF THE AGENCY AND TO MAKE PROVISIONS CONNECTED THEREWITH.
Rohimi Shapiee.......................................................................................................  7

STRATEGY TO CREATE INDONESIA FREE CORRUPTION IN 2020
Dr. Jawade Hafidz, S.H., M.H ........................................................................... 11

THE NETHERLANDS IN GLOBAL CORRUPTION
Siti Malikah Marlou Feer, M.A. ........................................................................... 28

ROBUST YET FRAGILE: EFFORTS IN COMBATING CORRUPTION IN INDONESIA
Laras Susanti.,S.H., LLM..................................................................................... 33

LEGAL STATUS OF AKTOR’S FOR CORRUPTION
(In the Perspective of Islamic Law)
Sumarwoto Umar.................................................................................................. 37

THE ROLE OF LAW IN THE POVERTY REDUCTION STRATEGY
Lantik Kusuma Aji.................................................................................................. 46

THE INDEPENDENCY OF THE INSTITUTION FOR THE PROTECTION
AND THE ESTABLISHMENT OF HUMAN RIGHTS TOWARDS
THE GLOBALIZATION ERA 2020
Khalid .................................................................................................................... 55

THE URGENCY OF ANTI CORRUPTION EDUCATION
FOR COLLEGES IN INDONESIA
Siska Diana Sari.................................................................................................... 62

THE PROBLEMS OF DIVORCE IN CUMULATION AT THE RELIGIOUS COURTS BASED ON THE
PRINCIPLES OF SIMPLE, FAST AND LOW COST
Elis Rahmahwati................................................................................................... 78

DISPARITIES DECISION RELATED TO INTERPRETATION
OF ARTICLE 2 AND 3 CORRUPTION ERADICATION ACT
Agung Widodo...................................................................................................... 87

DIVERSITY ADULT AGE LIMITS POSITIVE LAW IN INDONESIA
(Studies in Multidisciplinary Perspective)
Muhammad Andri .................................................................................................. 102

“Comparative Law System of Procurement of Goods
and Services around Countries in Asia, Australia and Europe”
<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>THE APPLICATION OF BALANCE IDEA IN SETTLEMENT</td>
<td></td>
</tr>
<tr>
<td>OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION</td>
<td>111</td>
</tr>
<tr>
<td>Yati Nurhayati</td>
<td></td>
</tr>
<tr>
<td>MODERNIZATION LAW AS A CRIME CORRUPTION VERY EXCEPTIONAL</td>
<td>118</td>
</tr>
<tr>
<td>THROUGH ENFORCEMENT OF ETHICS</td>
<td></td>
</tr>
<tr>
<td>Dr. Sukresno, SH, M.Hum</td>
<td></td>
</tr>
<tr>
<td>CORRUPTION POTENCIES IN LAND USE POLICY</td>
<td>126</td>
</tr>
<tr>
<td>(A Case Study in Kuningan Regency)</td>
<td></td>
</tr>
<tr>
<td>Haris Budiman</td>
<td></td>
</tr>
<tr>
<td>CORRUPTION PREVENTION AND CONTROLS</td>
<td>133</td>
</tr>
<tr>
<td>INP Budiartih</td>
<td></td>
</tr>
<tr>
<td>ISLAMIC LAW VALUES TRANSFORMATION IN THE RECONSTRUCTION</td>
<td>145</td>
</tr>
<tr>
<td>OF THE LEGALITY PRINCIPLE OF INDONESIAN CRIMINAL CODE</td>
<td></td>
</tr>
<tr>
<td>Sri Endah Wahyuningsih</td>
<td></td>
</tr>
<tr>
<td>JUSTICE AND CHARITY IN JAKARTA’S NORTH COAST RECLAMATION PROCESS</td>
<td>155</td>
</tr>
<tr>
<td>THAT WILL LEAD TO INDONESIA CLEAN OF CORRUPTION</td>
<td></td>
</tr>
<tr>
<td>Untoro</td>
<td></td>
</tr>
<tr>
<td>CORRUPTION CRIMINAL SANCTIONS WITH VALUES OF JUSTICE-BASED</td>
<td>162</td>
</tr>
<tr>
<td>Zulfiani</td>
<td></td>
</tr>
<tr>
<td>THE REFLECTION OF ISLAMIC BANKING IN THEORY AND PRACTICE</td>
<td>171</td>
</tr>
<tr>
<td>Anis Mashdurohatun</td>
<td></td>
</tr>
<tr>
<td>THE IMPLEMENTATION OF LOCAL WISDOM SIRI’NA PACCE AS AN EFFORT OF</td>
<td>181</td>
</tr>
<tr>
<td>CORRUPTION ERADICATION IN INDONESIA</td>
<td></td>
</tr>
<tr>
<td>Muh. Afif Mahfud</td>
<td></td>
</tr>
<tr>
<td>DISCOURSE POLITICAL LAW IN INDONESIA</td>
<td>189</td>
</tr>
<tr>
<td>ON A COMPLETION OF PLATO PHILOSOPHY</td>
<td></td>
</tr>
<tr>
<td>Adrianus M. Nggoro, SH, M.Pd</td>
<td></td>
</tr>
<tr>
<td>STUDY OF INDONESIA’S PARTICIPATION IN ICSID</td>
<td>202</td>
</tr>
<tr>
<td>Agus Saiful Abib</td>
<td></td>
</tr>
<tr>
<td>NOTARY ROLE IN THE IMPLEMENTATION OF EXECUTION PROCUREMENT OF</td>
<td>211</td>
</tr>
<tr>
<td>GOODS AND SERVICES ARE FREE OF CORRUPTION BASED ON THE PRINCIPLE OF</td>
<td></td>
</tr>
<tr>
<td>GOOD GOVERNANCE</td>
<td></td>
</tr>
<tr>
<td>Aris Yulia</td>
<td></td>
</tr>
<tr>
<td>ANALYSIS WIRETAPPING AUTHORITY UPPER KPK LAW ENFORCEMENT IN THE</td>
<td>221</td>
</tr>
<tr>
<td>PERSPECTIVE OF HUMAN RIGHTS</td>
<td></td>
</tr>
<tr>
<td>Ariyanto, SH, MH</td>
<td></td>
</tr>
<tr>
<td>SOCIAL WORKING PENALTY AS SOLUTION IN ERADICATING CORRUPTION IN</td>
<td>232</td>
</tr>
<tr>
<td>INDONESIA</td>
<td></td>
</tr>
<tr>
<td>Desy Maryani</td>
<td></td>
</tr>
<tr>
<td>LEGAL POLITICES OF EMPLOYMENT IN TERM OF PART OF TASK HANDBOVER TO</td>
<td>244</td>
</tr>
<tr>
<td>OTHER COMPANIES IN INDONESIA</td>
<td></td>
</tr>
<tr>
<td>Endah Pujianti</td>
<td></td>
</tr>
<tr>
<td>Title</td>
<td>Author</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>RESOLUTION OF DISPUTES OF OUTSOURCING WORK FORCE IN THE COMPANY EMPLOYING OUTSOURCING SERVICE</td>
<td>Pupu Sriwulan Sumaya</td>
</tr>
<tr>
<td>THE APPLICATION OF CORRUPTION LAW TO WARD CRIMINAL ACT IN THE FIELD OF FORESTRY</td>
<td>Ifrani</td>
</tr>
<tr>
<td>THE EFFORTS OF ERADICAT ION OF CORRUPTION THROUGH INSTRUMENTS OF MONEY LAUNDER ING LAW AND RETURN ACTORS’ ASSETS</td>
<td>Yasmirah Mandasari Saragih</td>
</tr>
<tr>
<td>AFFIRM ROLE OF EXISTEN CE RECHTSVERWERKING TO ACHIEVING LEGAL CERTA INTY IN LAND REG ISTRAT ION</td>
<td>Rofiq Iaksamani, Setiono, I Gusti Ayu Ketut Rachmi Handayani, Oloan Sitorus</td>
</tr>
<tr>
<td>ANTI-CORRUPTION EDUCAT ION AT AN EARLY AGE AS A STRATEG IC MOVE TO PREVENT CORRUPTION IN INDONES IA</td>
<td>Ida Musofiana</td>
</tr>
<tr>
<td>FREED INDONES IA’S CORRUPTION BETWEEN HOPE AND REAL ITY</td>
<td>Dr. Tongat, SH., MHum., Said Noor Prasetyo, SH., MH</td>
</tr>
<tr>
<td>UTILIZAT ION OF INDONES IA MARINE RESOUR CES IN AN EFFORT TO REAL IZE INDONES IA TO WARDS THE SHAFT OF THE MARITIME WORLD</td>
<td>Dr. Lathifah Hanimi, SH.M.Hum., M.Kn. and Letkol (mar) MS. Noorman, S. Sos., M.Opsla</td>
</tr>
<tr>
<td>POTENT IAL CORRUPTION IN THE VALIDAT ION POLICIES ON ACQUISITION TA X OF LAND AND OR BUILDING</td>
<td>Lilik Warsito</td>
</tr>
<tr>
<td>THE EFFORT OF LAW ENFORCEMENT IN COMBAT ING CORRUPTION IN SOUTH SUMATERA</td>
<td>Sri Suatmiati</td>
</tr>
<tr>
<td>ETHICAL PERS PECTI VE AND THE MAPPING OF NORM IN CORRUPTION ACT</td>
<td>Siti Zulaekkah</td>
</tr>
<tr>
<td>AN EXPANSION OF CONCEPT THE STATE ECONOMIC LOSS IN CORRUPTION IN INDONESIA</td>
<td>Supriyanto, Hartwiningsih, Supanto</td>
</tr>
<tr>
<td>JURIDICAL STUD IES ON SUBSTAN CE AND PRO CEDURE OF THE DISMISSAL OF THE PRES IDENT AND/OR VICE-PRES IDENT AFTER THE REFORMAT ION</td>
<td>Siti Rodhiyah Dwi Istinah</td>
</tr>
<tr>
<td>THE ROLE OF THE SHARIA SUPERVISORY BOARD IN THE FRAMEWORK ENFORCING SHARIA PRINCIPLES AT THE INST ITUTE OF ISLAMIC BAN KING IN SEMARANG</td>
<td>Aryani Witasari</td>
</tr>
<tr>
<td>SEMARANG CITY GOVERNMENT ROLE IN CONSERVATION AND ENVIRONMENTAL PROTECTION TO THE CAPITAL OF THE NATIONAL HERITAGE IN INDONESIA</td>
<td>Achmad J Pamungkas (Indonesia), Carlito Da Costa (Timor Leste)</td>
</tr>
</tbody>
</table>
STUDYING THE WISDOM OF ZAKAT
Moch. Gatot Koco (Indonesia), Basuki R Suratno (Australia) .................................................. 398

HOMOLOGATION RECONSTRUCTION IN BANKRUPTCY THAT IS BASED ON
DIGNIFIED JUSTICE
Agus Winoto ............................................................................................................................... 410

RECONSTRUCTION OF EXECUTIVE AND LEGISLATIVE AUTHORITY
IN MAKING GOOD GOVERNANCE (GOOD GOVERNANCE) VALUES BASED ON
WELFARE
Mohamad Khamim ..................................................................................................................... 420

THE TASK RECONSTRUCTION AND BPKP’S AUTHORITY IN THE CASE
OF JUSTICE VAUE BASED CORRUPTION
Sarbudin Panjaitan ...................................................................................................................... 429

THE RECONSTRUCTION OF MADLIYAH AND IDDAH MAINTENANCE
AND MUT’AH IN DIVORCE CASE FOR JUSTICE AND WELFARE
Mustar ........................................................................................................................................ 438

JURIDICAL ANALYSIS OF THE ALLEGED CRIMINAL OFFENSE TO MANUFACTURE
A NOTARY DEED
Subiyanto .................................................................................................................................. 446

REVITALIZATION DEAL IN AKAD HYBRIDS IN SHARIA BANKING VALUE BASED
ISLAMIC JUSTICE
Masduqi ....................................................................................................................................... 452

RECONSTRUCTION OF LEGAL PROTECTION DISTRICT HEAD IN THE ELECTION
IMPLEMENTATION OF VALUE-BASED JUSTICE
Kukuh Sudarmanto Alugoro ........................................................................................................ 462

ABUSE OF AUTHORITY OFFENSE THEOLOGICAL RECONSTRUCTION LAW
ERADICATION OF CORRUPTION (LAW NUMBER 31 OF 1999
JO. LAW NUMBER 20 OF 2001) BASED ON VALUE OF JUSTICE
As’adi M. Al-ma’ruf .................................................................................................................... 472

RECONSTRUCTION OF THE DAILY PAID WORK AGREEMENT IN THE EMPLOYMENT
LAW BASED ON JUSTICE
Christina N M Tobing .................................................................................................................. 479

THE LAW AND THE IMPACT OF MARRIAGE SIRRI
Sahal Afhami ............................................................................................................................... 489

CRIMES AGAINST CHILDREN AS ACTORS
Muhammad Cholil ...................................................................................................................... 503

RECONSTRUCTION OF CRIMINAL PROCEDURAL LAW
(KUHAP) ABOUT THE DETENTION
Muhammad Khambali ................................................................................................................ 512
BASED ON JUSTICE
PROBLEMS OF DISPUTE RESOLUTION REGIONAL CHIEF ELECTION (GOVERNOR, REGENTS AND MAYOR)
Esti Ningrum .................................................................................................................. 520

RECONSTRUCTION REGIONAL MINIMUM WAGE (UMR) IN RENEWAL OF EMPLOYMENT LEGAL REMEDIES BASED INDONESIA THE VALUE JUSTICE PANCASILA
Urip Giyono .................................................................................................................. 531

IMPLEMENTATION OF LAW AS TO MAINTAIN SECURITY IN THE CONTEXT OF PROFESSIONAL POLICE POLMAS (CASE STUDY IN LAMPUNG POLICE)
Muhammad Yaman ........................................................................................................ 539

RECONSTRUCTION OF CRIMINAL SANCTIONS PENAL CODE ACTORS ON ABORTION CRIME BASED ON THE VALUE OF JUSTICE
Hanuring Ayu Ardhani Putri .......................................................................................... 549

REGISTRATION FIDUCIARY GUARANTEE REALIZE LEGAL PROTECTION OF CREDITORS AND DEBTOR
Ansharullah Ida ............................................................................................................. 556

RECONSTRUCTION OF LEGAL DISPUTES MEDIATION IN HEALTH CARE FOR PATIENTS HOSPITAL BASED ON THE VALUE OF JUSTICE
Teguh Anindito ............................................................................................................. 569

RECONSTRUCTION OF CRIMINAL SANCTIONS AGAINST CRIME OF ACTORS AND MURDER MURDER IN PLAN BASED ON VALUE OF JUSTICE CRIMINAL CODE
Maria Marghareta Titiek Pudji Angesti Rahayu Teguh Anindito ........................................ 579

IMPLEMENTATION OF PENAL MEDIATION IN CRIMINAL LAW
Aji Sudarmaji ................................................................................................................. 587

FAIR SETTLEMENT RECONSTRUCTION OF PROBLEMATIC CREDIT DISPUTE AT BANK RAKYAT INDONESIA (STUDY CASE AT MEDAN-SINGAMANGARAJA BRI BRANCH OFFICE)
Bachtiar Simatupang ...................................................................................................... 594

RECONSTRUCTION OF THE WASTE MANAGEMENT LAW BASED ON WELFARE VALUE
M. Hasyim Muallim ....................................................................................................... 616

RECONSTRUCTION LAW OF PUNISHMENT AGAINST CHILDREN NARCOTICS ABUSE-BASED PROGRESSIVE LAW
Salomo Ginting .............................................................................................................. 625

LEGAL PROTECTION PROBLEM OF WIFE AND CHILDREN OF POLYGAMY SIRRI IN INDONESIA
Muhasil ......................................................................................................................... 639
IDEAL RECONSTRUCTION OF REHABILITATION PUNISHMENT FOR NARCOTICS ADDICTS AND ABUSER'S VICTIMS JUSTIFIED BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NO. 35 YEAR 2009 (CASE STUDY IN SUMATERA UTARA PROVINCE) Ahmad Zaini ................................................................. 648

IMPLEMENTATION OF ACCELERATION SYSTEMATIC LAND REGISTRATION FULL IN HUMBANG HASUNDUTAN DISTRICT Ruslan ................................................................. 658

RECONSTRUCTION OF STATUS AND AUTHORITY OF THE SHARIA COURT IN THE NATIONAL JUDICIAL SYSTEM BASED ON JUSTICE Jufri Ghalib ................................................................. 667

RECONSTRUCTION OF LIABILITY NOTARY PUBLIC OFFICERS TO ACT AS A VALUE-BASED JUSTICE Elpina ................................................................. 679

RECONSTRUCTION OF CONSUMER PROTECTION LAW IN MAKING THE BALANCE BUSINESS BASED BUSINESS AND CONSUMER VALUE OF JUSTICE Ramon Nofrial ................................................................. 693

RECONSTRUCTION OF LAND USED RIGHT EIGENDOM VALUES BASED ON JUSTICE AND LEGAL CERTAINTY Hakim Tua Harahap ................................................................. 706

RECONSTRUCTION OF DIVERSION CONCEPT IN CHILD PROTECTION OF CONFLICT WITH THE LAWS BASED ON THE VALUE OF JUSTICE Ulina Marbun ................................................................. 726

RECONSTRUCTION OF PARATE EXECUTION MORTGAGE RIGHTS TO LAND BASED ON THE VALUE OF JUSTICE Zaenal Arifin ................................................................. 740

THE RECONSTRUCTION OF DIVORCE DUE TO MARITAL STATUS UNDER THE UNAUTHORIZED GUARDIAN AS VALUE OF JUSTICE Abdul Kholiq ................................................................. 751

THE RECONSTRUCTION OF LEGAL AID LAW FOR CHILDREN WHO GET CONFLICT WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON THE VALUE OF PANCASILA Adi Mansar ................................................................. 767

MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE SETTLEMENT OF DECLINE IN THE COURTS BASED ON THE VALUE OF JUSTICE (Study at the Simalungun District Court) Mariah S.M. Purba ................................................................. 778

LAW ENFORCEMENT AGAINST CORRUPTION
IN PERSPECTIVE OF HUMAN RIGHTS IN INDONESIA
Sekhroni .......................................................................................................................... 798

THE PRINCIPLE OF NATURAL JUSTICE AND HUMAN’S RIGHT PROTECTION FOR
CITIZENS IN ERADICATION OF CORRUPTION IN INDONESIA
Indriyana Dwi Mustikarini ............................................................................................... 809

PREVENTING LAND MAFIA USING POSITIVE LAND
REGISTRY SYSTEM
Bambang Sulistyo Widjanarko ........................................................................................ 816

UNRULY PASSENGER IN AVIATION:
THE REGULATIONS AND CASES IN INDONESIA
Adya Paramita Prabandari .............................................................................................. 826

EDUCATION ANTI-CORRUPTION IN INDONESIA: PROBLEMS, CHALLENGES AND
SOLUTIONS
Alwan Hadiyanto ........................................................................................................... 839

SPIRITUAL URGENCY OF RELIGIOUS AND EXPENSES OF EVIDENCE IN COMBATING
CORRUPTION IN INDONESIA
Sulistyowati ...................................................................................................................... 852

SUE FOR THE STATE ADMINISTRATION OF JUSTICE IN INDONESIA
Sarjiyati .................................................................................................................................. 863

CONSISTENCY MODEL OF COURT DESIGNATION TO
FOSTER PARENT RIGHTS AUTHORITY
DUE TO DIVORCE ON CHILDREN
Erna Trimartini .................................................................................................................... 873

AN INVESTIGATION AUTHORITY OF CRIMINAL ACT ON CORRUPTION IN CRIMINAL
JUSTICE SYSTEM IN INDONESIA
Sukmareni ........................................................................................................................... 885

PRO CONS THE EXISTENCE OF DEATH PENALTY IN CORRUPTION ACT OF 1999 IN
INDONESIA
Anis Rifai ............................................................................................................................... 903

PENAL MEDIATION IN SOLVING MEDICAL MALPRACTICE CASES AS AN ALTERNATIVE
OF PENAL SANCTIONS BASED ON LOCAL WISDOM
Sri Setiawati ......................................................................................................................... 913

SPECIAL PROTECTION OF CHILDREN IN CRIMINAL JUSTICE SYSTEM
Achmad Sulchan ..................................................................................................................... 922

MORAL REFORM BUREAUCRACY AS PREVENTION OF ILLEGAL PAYMENTS TO
INDONESIA CLEAN OF CORRUPTION
Herwin Sulistyowati ............................................................................................................ 932

STANCE AND AUTHORITY OF PEOPLE’S CONSULTATIVE ASSEMBLY DURING
REFORMATION ERA 1945
Ahmad Mujib Rohmat ........................................................................................................ 944
TAXES AND ALMS SEEN FROM ISLAMIC LAW
Mohammad Solekhan ................................................................. 954

DIVERSION IN COURT (Case Studies in Karanganyar District Court)
Anita Zulfiani ........................................................................... 964

International Seminar
Photos.................................................................................. 971
THE APPLICATION OF BALANCE IDEA IN SETTLEMENT OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION

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ABSTRACT

The current criminal acts of malpractice in the criminal justice system in Indonesia in its enforcement ignores the rights of victims of the crime in the criminal case handling process and the effect to be borne by the victims of the crime because of the legal protection for the victims of the crime does not receive adequate recognition. Based on this understanding the author made two formulations of the problem. First, how is the fulfillment of the rights of victims of doctor malpractice in the criminal justice system in Indonesia? Second, how is the implementation of balance idea in settling disputes of doctor malpractice through penal mediation? This research used normative juridical method. It can be concluded that first, the criminal justice system in Indonesia ignores the rights of victims of doctor malpractice and prioritize more on how to penalize the perpetrators of the malpractice. Second, the principle of balance idea in crime can be applied in resolving malpractice criminal cases through penal mediation where a doctor can be released from criminal penalties, subject to treat and recover the victims. Through the penal mediation the victims’ protection and fulfillment of their rights are preferred and the responsibilities to treat the victims are burdened the doctors.

Keywords: Malpractice, penal mediation.

A. Introduction

The criminal justice system implies that criminal law instruments are less able to oversee the material criminal law enforcement. There are very few chapters under the Criminal Code Procedure that discuss about the victim. This can be seen from the multiplicity of terms used in appointing a victim. Victims of crime which are basically the most suffered in a criminal act did not receive as much protection as provided by the law to the perpetrators or offenders of the crime. As a result, when an offender has been sentenced criminal sanctions by the court, the conditions of the victims as such are ignored altogether.

Under the positive criminal law currently in force, the protection of victims is more in the form of abstract protection or indirect protection. This due to offenses under positive criminal law is not seen as an act of attacking / violating the legal interests of a person (victim), personally and concretely, but it is only seen as a violation of norms / rule of law in

abstracto. As a result, the protection of the victims is neither direct nor in concreto, but only in abstracto.⁴

In this paper the author focuses on the victims of medical malpractice and efforts to comply with their rights in the criminal system in Indonesia. The Health Act did not include the notion of malpractice, however, it is set in the Criminal Provisions of Chapter XX in Article 190, which read:

1. Heads of care facilities and / or health professionals who practice or work at health care facilities who intentionally do not provide first aid to patients in an emergency situation as referred to in Article 32 section (2) or Article 85 section (2) shall be punished with imprisonment of up to 2 (two) years and a maximum fine of Rp. 200,000,000 (two hundred million rupiah).

2. If the act referred to in section (1) results in disability or death, the head of the health care facilities and / or the health professionals shall be punished by imprisonment of up to ten (10) years and a maximum fine of one billion rupiah.

Article 63 of Law No. 36 of 2009 clearly set the healing efforts of the disease and efforts for the health recovery as a benchmark for malpractice actions under the criminal provisions mentioned in Article 190 above. From the articles mention previously, the criminal settlement focuses more on the offenders while victims are ignored and their rights are not being fulfilled.

B. Formulation of Problem

1. How is the fulfillment of the rights of victims of doctor malpractice in the criminal justice system in Indonesia?

2. How is the implementation of the idea of balance in settling disputes of doctor malpractice through penal mediation?

C. Discussion

Malpractice is composed of two syllables e.g. mal and practice. Mal is derived from the Greek word, which means bad. Practice or the practice of acts means running in theory or performing work (profession). So, malpractice means running a poor; improper quality of work. Medical malpractice can be defined as negligence or failure of a doctor or medical

personnel to use the level of skills and knowledge that is commonly used in treating patients or those injured by the standard in the same environment. 5

In a narrow sense, it is also known as a criminal malpractice. An act is said a criminal malpractice if it meets the following criteria 6:

1. The existence of an element of negligence
2. The existence of a certain act form
3. The existence of serious injury or death to other people
4. The existence of a causal relationship between the form of the act with the death of someone else's.

Sampai sekarang, hukum kedokteran di Indonesia belum dapat dirumuskan secara mandiri sehingga batasan – batasan mengenai malpraktik belum bisa dirumuskan, sehingga isi pengertian dan batasan – batasan malpraktik kedokteran belum seragam bergantung pada sisi mana orang memandangnya. UU No 29 tahun 2004 tentang Praktik Kedokteran juga tidak memuat tentang ketentuan malpraktik kedokteran. Pasal 66 ayat (1) mengandung kalimat yang mengarah pada kesalahan praktik dokter yaitu:

Until now, medical law in Indonesia can not be formulated independently so that the limits on malpractice has not been formulated, hence the contents of the understanding and limits of medical malpractice is not uniform depending on which side one looks at. 7 Law No. 29 of 2004 regarding Medical Practice also does not contain provisions on medical malpractice. Article 66 section (1) contains a sentence that leads to errors in medical practice, namely:

“every person who knows or whose interests have been harmed by the actions of doctors or dentists in conducting medical practice can complain in writing to the chairman of the Indonesian Medical Disciplinary Honorary Council”

Hukum pidana digunakan apabila timbul akibat berupa kematian atau cacatnya seseorang. Hukum pidana berperan sebagai hukum sanksi (sanctierecht). Apabila terjadi suatu kematian atau cacat setelah suatu perawatan oleh dokter atau tenaga medis lainnya, untuk membuktikan sejauh mana terjadi kesalahan maka harus dibuktikan melalui hukum

6 Adami Chazawi, Kejahatan Terhadap Tubuh dan Nyawa, PT Raja Grafindo Persada, Jakarta, 2000, page 125
pidana. Pelaksanaan pelayanan kesehatan kepada masyarakat menggunakan norma hukum kesehatan, sedangkan terhadap penyimpangannya digunakan hukum pidana dalam bidang kesehatan.

The criminal law is used when the result arouse is in the form of death or disability of a person. The criminal law serves as a legal sanction (sanctierecht). In the event of a death or disability after treatment by a physician or other medical personnel, to prove the extent to which an error occurred, it must be proven through the criminal law. Implementation of health care services to the community using the health legal norms, while for the deviation the criminal law in the field of health is applied.

The compensation is mentioned in Article 55 section (1) of the Health Law, which read: "Everyone is entitled to a compensation as a result of errors or negligence done by health professionals." It also explained that granting the right to compensation is an attempt to provide protection for every person on a result that arises, both physically and nonphysically, for the errors or the negligence of the health personnel.

In essence, the doctor-patient relationship is based on trust from the patient to the doctor, according to Guwandi, the trust relationship between doctors and patients are as follows:

a. Patients believe that doctors have the medical knowledge that can be used for healing effort for them.

b. Patients believe that doctors are capable and skilled in the application of their knowledge in order to try to cure them.

c. Patients believe that doctors will act in careful and thorough manner, both in diagnosis and in determining therapy.

d. Patients believe that doctors will perform the work based on medical professional standards set by the profession association.

Such great trust from patients certainly brings quite serious consequences that should be carefully considered by a doctor and should not be tainted by less accountability deeds.

The renewal of criminal law by replacing the old Criminal Code with the new Criminal Code is intended to ensure that the criminal law in force is in accordance with the system of values held by the Indonesian nation. In this regard, the reform of the criminal law was done be revisited and re-establishment of criminal law in accordance with the central values of socio-political, socio-philosophical and socio-cultural values of Indonesian

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9 Ibid.
community. In accordance with the character of the Indonesian nation that puts the interests of the individual and the social in balance, therefore, the monodualism balance underlying the arrangement of the crime act, liability, crime and punishment.

The enforcement of malpractice case has put more emphasis on the punishment of the perpetrators and the rights of the victims of malpractice have been ignored. The ccompensations procedures are very cumbersome and time consuming, meanwhile the victims need immediate treatment.

The attention of the international community concerning the rights of victims in obtaining justice is expressed in a declaration called the Declaration of Basic Principles of Justice for Victim of Crime and Abuse of Power, 1985. The issuance of the declaration did not escape the influence of the victim movement internationally, especially from European countries. The international victim movement has arouse the awareness of the international community and the international institution, the United Nations, issued a resolution on victims of crime and victims of abuse of power. The publication of the declaration means that member states have a moral obligation to include the contents of the declaration into their national law, which means the issue of victims which was originally in the form of demands on political, moral and social internationally, has now shifted to the lawsuit (criminal).

In modern criminal law, the attention to victims of crime not only accentuated the process of criminalization, but also closely related to sentencing guidelines, the concept of criminal responsibility and effort to include compensation as criminal sanctions. Analysis of the victims of crime is increasingly important to determine the most appropriate criminal politics in the framework of crime prevention.

Dalam penanganan perkara pidana, kepentingan korban sudah saatnya untuk diberikan perhatian khusus, selain sebagai saksi yang mengetahui terjadinya suatu kejahatan juga karena kedudukan korban sebagai subjek hukum yang memiliki kedudukan sederajat di depan hukum (equality before the law).

In the handling of criminal cases, it is now the time to give special attention to the victims; both victims as the witnesses who knew the occurrence of a crime as well as the

\[10\] Mudzakkir, Viktimologi (Studi Kasus di Indonesia), *Penataran Hukum Pidana dan Kriminologi*, Surabaya, 14-15 Maret 2005, page 18.

position of the victims as the legal subject which have equal standing before the law (equality before the law).  

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If the concept of crime is considered as a conflict between the offender and the state, the question is who is the victim of a crime then? An action said as a crime (breaking the law) because of the victim, it can not be regarded as a crime if it does not cause harm to the victim. 13 Implementation of criminal justice puts the state function as the dominant in the form of rationalization of the distribution of revenge against the offenders. 14

In the current development of criminal law there are a lot of researches that offer the concept of penal mediation in the resolution of the case. Penal mediation is an alternative solution for criminal cases outside the penal track. If the resolution of a criminal case is obtained through the penal track there is usually sentences by the judges against the perpetrator. It is, philosophically, sometimes does not satisfy all parties, therefore it is necessary to reconsider the settlement of the criminal case through ADR (Alternative Dispute Resolution) with the intention to resolve the conflict between the perpetrator and the victim. 15


It seems that this penal mediation could also be applied in cases of malpractice. It is considered to give more justice and the fulfillment of the rights of the victim since the penal mediation offers the concept that malpractice actors are required to provide medical recovery services to victims to recover. All financing and other expenses paid by the offender. The perpetrator in this case can be exempted from criminal provisions of malpractice. This penal mediation certainly has the condition that is the offender can be freed from criminal penalties by providing compensation to the victims or providing care to victims recovery. However, penal mediation does not apply if the victim had died.

14 Ibid.
C. Conclusion

The criminal justice system that relies on retaliation was not able to function optimally to control crime. The ideal goal formulated by retributive justice do not seem contribute significant impact in its function as a control against crime.

The idea of balance in malpractice cases through penal mediation provides an opportunity for victims to be rehabilitated and given compensation by the offender provided that the victim had not died. In contrast, the offender can also be exempted from punishment since in cases of malpractice negligence is more often the reason of the doctor malpractice.

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