



HIERARCHICAL AUTHORITY OF INDONESIA'S PROFESSIONAL DISCIPLINARY BOARD IN MEDICAL MALPRACTICE: AMBIGUITY, EVIDENCE, AND CONSTITUTIONAL LEGITIMACY

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ABSTRACT

Medical malpractice lies at the intersection of healthcare and criminal law. In Indonesia, Law Number 17 of 2023 on Health introduced the Professional Disciplinary Board (Majelis Disiplin Profesi/MDP), replacing the MKDKI and granting it expanded authority, including recommending criminal investigations. Article 308(1) requires a prior MDP recommendation before prosecution, positioning the MDP as a procedural gatekeeper while creating ambiguity over whether its examination is mandatory or discretionary. This study analyzes the hierarchical authority of the MDP in managing medical malpractice cases, focusing on the evidentiary challenges in proving criminal elements and their implications for criminal law reform. Using a normative juridical approach combining statutory, conceptual, and case analyses, the study finds that Article 308(1) creates a de jure mandatory MDP review requirement that operates as de facto discretionary, producing fundamental legal uncertainty, cases bypassing the MDP suffer from procedural invalidity concerns, evidentiary quality deficiencies due to loss of specialized technical review, and inconsistent judicial outcomes across different court levels, and the MDP's constitutional legitimacy as a pre-judicial gatekeeper is questionable due to insufficient procedural safeguards (14-working-day timeframe), unclear separation of powers between administrative and judicial functions, and violation of the *lex certa* (legal certainty) principle essential to criminal law.

A. INTRODUCTION

Medical disputes are an inherent phenomenon in the dynamics of modern healthcare services. The doctor–patient relationship, which is fundamentally grounded in trust, often shifts into a legal dispute when a medical intervention results in an unforeseen outcome. Medical malpractice has thus emerged as one of the most critical issues at the intersection of law and medicine, involving both patient safety and the criminal liability of physicians.¹ The complex relationship between a physician's professional conduct, good faith in medical treatment, and the resulting harm often creates ambiguity in defining the boundaries between professional error and criminal wrongdoing.²

The medical profession has a distinctive nature because it inherently involves risks to human safety and life. In practice, physicians frequently face complex clinical situations that require immediate decisions, yet these decisions may lead to legal consequences when adverse results occur. Legal scrutiny of medical practice in Indonesia began with the 1981 Pati District Court Decision, which found Dr. Setianingrum binti Siswoko guilty of negligence resulting in a patient's death. Since then, the issue of criminal liability in medical malpractice has continued to develop in Indonesian legal practice. However, to this day, the enforcement of criminal law against physicians in malpractice cases remains problematic especially regarding the proof of negligence, professional misconduct, and compliance with medical operational standards.

Data from the Indonesian Health Consumer Empowerment Foundation (*Yayasan Pemberdayaan Konsumen Kesehatan Indonesia*/YPKKI) indicate that approximately 60–65% of malpractice cases involve physicians, yet nearly 90% of these are resolved through mediation rather than criminal proceedings. One of the primary obstacles in prosecuting malpractice cases is the incompleteness of medical records, which hampers the ability to trace medical procedures performed by physicians.³ Moreover, an analysis of Supreme Court decisions reveals that most cases classified as "malpractice" are adjudicated within civil law, emphasizing claims for damages rather than criminal punishment.

In Decision Number 882/Pid.Sus/2021/PN Bandung, for instance, Dr. ALSA was convicted of practicing medicine without a license and fined IDR

¹ Irwan Lazuardi, and Siti Marwiyah, "Analysis of informed consent as the legal protection of physician relationships and patients in malpractice case," *Policy Law Notary Regul* 2023 (2023): 2.

² Margaret Brazier, and Emma Cave, *Medicine, patients and the law*, (Oxford: Manchester University Press, 2016), 9.

³ Jeniffer Poelmarie Tinungki, "Kewajiban Dokter dalam Membuat Rekam Medis Menurut Undang-Undang No 29 Tahun 2004," *Lex Et Societatis* 7, no. 5 (2019): 37.

10,000,000 with a subsidiary sentence of five months' imprisonment reflecting strict enforcement of administrative violations. However, a more complex situation arose in Decision Number 1441/Pid.Sus/2019/PN Mks, in which Dr. ES performed a nasal filler injection that caused the patient's blindness. The Makassar District Court initially acquitted the defendant, but the Supreme Court (Decision No. 233.K/Pid.Sus/2021) and Judicial Review Decision Number 450 PK/Pid/Sus/2022 later found the defendant guilty and sentenced her to two months' imprisonment. These inconsistencies indicate persistent legal uncertainty in the criminal prosecution of physicians, often resulting from weak evidence, divergent interpretations of professional standards, and unsynchronized considerations between professional bodies and criminal law authorities.

Establishing criminal malpractice requires demonstrating several essential elements: the existence of a duty of care, a breach of professional standards, a causal link between the conduct and the outcome, and the occurrence of harm. These elements serve as a legal framework for assessing whether a breach of accepted medical standards has occurred.⁴ In practice, proving these elements heavily depends on expert testimony, which, while essential, often introduces subjectivity and interpretative discrepancies between law enforcement and the medical community. As noted by Radanović and Vukušić⁵, within the continental European legal system, the theory of objective imputation provides an analytical approach for identifying legally relevant causation. This theory assesses whether a medical act represents a clear deviation from established professional standards and whether that deviation directly caused harm to the patient.

Comparative legal analysis reveals significant disparities in criminal malpractice regulation among jurisdictions. Vuletić's⁶ study on Croatia demonstrates that its Criminal Code (Article 181) explicitly defines medical malpractice as a distinct offense. Nevertheless, its implementation faces challenges in proving "manifest and gross negligence" and establishing medical causality. In contrast, in common law systems such as the United States, Di Landro⁷ emphasizes that malpractice cases are predominantly resolved through civil litigation, with a more flexible burden of proof than in

⁴ B. Sonny Bal, "An introduction to medical malpractice in the United States," *Clinical orthopaedics and related research* 467, no. 2 (2009): 342.

⁵ Nina Mišić Radanović and Ivan Vukušić, "Causation in Medical Malpractice," *EU and Comparative Law Issues and Challenges Series (ECLIC)* 4 (2020): 771.

⁶ Igor Vuletić, "Medical malpractice as a separate criminal offense: a higher degree of patient protection or merely a sword above the doctors' heads? The example of the Croatian legislative model and the experiences of its implementation," *Medicine, law & society* 12, no. 2 (2019): 41.

⁷ Andrea R. Di Landro, "Criminal law as a response to medical malpractice: pluses and minuses-comparing Italian and US experiences," *Med. & L.* 31 (2012): 221.

criminal law. Meanwhile, Fekry et al.⁸ note that in Egypt and France, technological advancements and complex medical procedures—such as organ transplantation have intensified the need to clarify the boundaries of civil and criminal liability in medical practice.

This complexity has deepened following the enactment of Law Number 17 of 2023 on Health, which significantly transformed Indonesia's institutional framework for handling medical disputes.⁹ Previously, the Indonesian Medical Discipline Honorary Council (*Majelis Kehormatan Disiplin Kedokteran Indonesia*/MKDKI), established under Law Number 29 of 2004 on Medical Practice, served as an autonomous body enforcing discipline among physicians and dentists.¹⁰ The new law replaced the MKDKI with the Professional Disciplinary Board (*Majelis Disiplin Profesi*/MDP), granting it broader authority, including the power to issue recommendations related to criminal investigation and civil liability.¹¹

Under Article 308(1) of the 2023 Health Law, medical malpractice cases cannot proceed to criminal prosecution without prior recommendation from the MDP. This provision marks a paradigm shift in Indonesia's system of medical dispute resolution, positioning the MDP as a preliminary gatekeeper before cases enter the criminal justice process.¹² This hierarchical arrangement has given rise to new legal uncertainties within the national legal framework. In practice, the procedural handling of medical malpractice cases follows a vertical sequence, starting with the MDP, continuing to civil or criminal courts, and potentially ending at the Supreme Court. However, in reality, not all cases adhere to this procedural order.¹³

⁸ Moussa Ahmed Fekry, Ibrahim Suleiman Al Qatawneh, Ramzi Madi, Moustafa Elmetwaly Kandeel, and Maher Haswa, "Penal Liability Arising from Medical Malpractice: A Comparative Study of Egypt and France," *Pakistan Journal of Life and Social Sciences* 21, no. 2, (2023): 797.

⁹ Eduardus Raditya Kusuma Putra, "Aborsi Tanpa Indikasi Medis dalam Sudut Pandang UU No 17 Tahun 2023 Tentang Kesehatan, Kitab Undang-Undang Hukum Pidana dan UU No 1 Tahun 2023," *Jurnal Cahaya Mandalika ISSN 2721-4796 (online)* (2024): 1131. See too, Albertus D. Soge, "Analisis Penanganan Kesalahan Profesi Medis dan Kesehatan Dalam UU Nomor 17 Tahun 2023 Tentang Kesehatan Menurut Perspektif Hukum Kesehatan," *Jurnal Hukum Caraka Justitia* 3, no. 2 (2023): 146.

¹⁰ Rospita Adelina Siregar, Alif Muhammad Sudarmanto, Eko Nurmardiansyah, and Hari Pudjo Nugroho, "Majelis disiplin profesi sebagai primum remedium berdasarkan Undang-Undang Nomor 17 Tahun 2023 tentang kesehatan," *Jurnal Hukum to-ra: Hukum Untuk Mengatur dan Melindungi Masyarakat* 10, no. 3 (2024): 494.

¹¹ Jasmen Ojak Haholongan Nadeak, "Penerapan Disiplin Profesi Sebagai Instrumen Penegakan Hukum Pidana Kesehatan Berbasis Keadilan Prosedural," *Proceeding Masyarakat Hukum Kesehatan Indonesia* 1, no. 01 (2024): 188.

¹² Ady Thea DA, "Menkes Budi: Malpraktik Tak Bisa Langsung Diproses Pidana," *Hukum Online*, July 2, 2025. <https://www.hukumonline.com/berita/a/menkes-budi--malpraktik-tak-bisa-langsung-diproses-pidana-lt6864c872b22cc/>, Accessed on October 30, 2025.

¹³ Irwan Lazuardi, and Siti Marwiyah, "Analysis of informed consent as the legal protection of physician relationships and patients in malpractice case," *Policy Law Notary Regul* 2023 (2023): 2.

The former MKDKI was not a law enforcement body and therefore was not bound by the principle of due process of law. It functioned as a professional disciplinary institution authorized to determine whether a physician had committed malpractice. However, with the expanded powers granted to the MDP under the 2023 Health Law, particularly in recommending criminal investigations, the boundary between professional discipline enforcement and criminal law enforcement has become increasingly blurred.¹⁴ The phrase "may" in Article 66(1) of Law Number 29 of 2004 on Medical Practice grants discretion to file a complaint with or without involving the disciplinary board, thereby creating legal uncertainty that requires further clarification.¹⁵

This raises a fundamental legal problem: the ambiguity surrounding the mandatory or discretionary nature of MDP involvement in medical malpractice cases. The phrase "may" (*dapat*) in Article 66(1) of Law Number 29 of 2004 on Medical Practice previously granted discretion to complainants to file reports with or without involving the disciplinary board. However, Article 308(1) of the 2023 Health Law appears to establish MDP review as a mandatory prerequisite for criminal prosecution, stating that malpractice cases "cannot proceed" without MDP recommendation.

This normative shift creates legal uncertainty regarding: (1) whether the MDP examination is truly obligatory or remains discretionary in practice; (2) what legal consequences arise when cases bypass the MDP and proceed directly to criminal prosecution; and (3) whether the MDP's role as a pre-judicial gatekeeper possesses sufficient constitutional legitimacy and procedural clarity to ensure both physician protection and patient access to justice. This ambiguity has produced inconsistent case outcomes and undermines the principle of legal certainty (*lex certa*) that is fundamental to criminal law enforcement.

B. RESEARCH METHODS

This research adopts a normative juridical approach, which focuses on the analysis of positive legal norms, legal doctrines, and prevailing legal principles. The normative juridical method is grounded in doctrinal legal research, examining law both as it is (*ius constitutum*) and as it ought to be

¹⁴ Baby Ivonne Susan Kainde, and Ika Dewi Sartika Saimima, "Rekonstruksi Pasal 66 Ayat (3) Undang-Undang No. 29 Tahun 2004 Tentang Undang-Undang Praktik Kedokteran Terkait Tata Cara Pengaduan Tindakan Malapraktik Dokter di Indonesia," *Jurnal Hukum Sasana* 7, no. 2 (2021): 58.

¹⁵ Cinthia Mutiara Hapsari, "Tinjauan Hukum Terhadap Kerahasiaan Rekam Medis Menurut UU No. 29 Tahun 2004," *Surya Medika: Jurnal Ilmiah Ilmu Keperawatan dan Ilmu Kesehatan Masyarakat* 19, no. 2 (2024): 129.

(*ius constituendum*), particularly in relation to specific legal problems.¹⁶ This approach is selected because the issue under study concerns the proof of physicians' criminal liability in medical malpractice cases, which requires a detailed examination of legal norms, statutory interpretation, and judicial decisions. Normative legal research treats law as an autonomous object of study and excludes non-legal materials from its analytical scope.¹⁷

The research employs three principal approaches:

First, the statutory approach, which involves analyzing relevant legal instruments, including the Criminal Code (*Kitab Undang Undang Hukum Pidana/KUHP*), Law Number 1 of 2023 on the Criminal Code, Law Number 29 of 2004 on Medical Practice, and Law Number 17 of 2023 on Health, along with related implementing regulations governing physicians' criminal liability.¹⁸ This approach examines all statutory provisions relevant to the legal issue to identify the ratio legis and ontological foundations of each law, thereby enabling a deeper understanding of the legislative intent and the identification of possible inconsistencies between *das sollen* (what ought to be) and *das sein* (what is).¹⁹

Second, the conceptual approach, which explores key theoretical foundations of criminal law, professional accountability, causation, negligence, and medical professional standards. This approach relies on doctrines and scholarly perspectives to develop conceptual understanding and formulate relevant legal principles. The conceptual approach is particularly important for distinguishing between ethical-disciplinary violations and criminal acts in the context of medical practice.²⁰ Through the examination of existing legal theories and expert opinions, this approach contributes to the construction of new legal interpretations aligned with the principles of justice and professional ethics.

Third, the case approach, which entails analyzing court decisions including rulings of the Supreme Court, High Courts, and District Courts that

¹⁶ Tunggul Ansari Setia Negara, "Normative legal research in Indonesia: Its originis and approaches," *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (2023): 5.

¹⁷ Theresia Anita Christiani, "Normative and empirical research methods: Their usefulness and relevance in the study of law as an object," *Procedia-Social and Behavioral Sciences* 219 (2016): 205.

¹⁸ Nur Aripkah, Kalen Sanata, Khairunnisa Noor Asufie, and Reza Pramasta Gegana, "Pembaharuan Konsep Hukum Pidana dalam Undang-Undang No. 1 Tahun 2023 Tentang KUHP," *Jurnal Fundamental Justice* 6, no. 2 (2025): 213. See too, Jeniffer Poelmarie Tinungki, "Kewajiban Dokter dalam Membuat Rekam Medis Menurut Undang-Undang No 29 Tahun 2004," *Lex Et Societatis* 7, no. 5 (2019): 35; Albertus D. Soge, "Analisis Penanganan Kesalahan Profesi Medis dan Kesehatan Dalam UU Nomor 17 Tahun 2023 Tentang Kesehatan Menurut Perspektif Hukum Kesehatan," *Jurnal Hukum Caraka Justitia* 3, no. 2 (2023): 147.

¹⁹ Mahmud Marzuki, *Penelitian Hukum*, (Yogyakarta: Kencana, 2017), 321.

²⁰ Nina Mišić Radanović and Ivan Vukušić, "Causation in Medical Malpractice," *EU and Comparative Law Issues and Challenges Series (ECLIC)* 4 (2020): 771.

involve allegations of medical malpractice. The objective is to understand how criminal law is applied in practice and to identify evidentiary challenges encountered in such cases. This approach focuses on cases that have reached final and binding legal status (*inkracht*), emphasizing the ratio decidendi or judicial reasoning underlying the verdicts. The examined cases include Decision Number 882/Pid.Sus/2021/PN Bandung, Decision Number 1441/Pid.Sus/2019/PN Mks, Cassation Decision Number 233.K/Pid.Sus/2021, and Judicial Review Decision Number 450 PK/Pid/Sus/2022, which illustrate judicial reasoning and patterns in adjudicating criminal medical malpractice.²¹

The study relies exclusively on secondary data, consisting of three categories of legal materials. First, primary legal materials, which include binding sources of law such as statutory provisions and judicial decisions related to medical malpractice. These encompass both the old and new versions of the Criminal Code (*Kitab Undang Undang Hukum Pidana/KUHP*), Law Number 29 of 2004 on Medical Practice, Law Number 17 of 2023 on Health, and relevant court judgments. Second, secondary legal materials, comprising scholarly works books, peer-reviewed journal articles, and previous research providing commentary and interpretation of primary legal sources. These materials are drawn from reputable national and international publications on criminal law, health law, and procedural law. Third, tertiary legal materials, including legal dictionaries and encyclopedias, which supply definitions and explanations of legal terms used throughout the research.

Data collection is conducted through library research, involving systematic collection, categorization, and examination of statutory documents, academic literature, and judicial records relevant to the study. The research process includes both traditional library-based methods and electronic searches through legal databases and academic journal repositories.

The collected data are analyzed using qualitative legal analysis, focusing on the interpretation of legal norms, their practical application in concrete cases, and the derivation of conclusions through logical and systematic reasoning. The analysis is descriptive-analytical, providing a comprehensive assessment of evidentiary barriers in criminal malpractice cases and proposing ideas for the reformulation of criminal law based on normative and empirical findings. In normative legal research, qualitative analysis means that conclusions are derived not from numerical or statistical measures, but from coherent and reasoned argumentation.²² The analytical process consists of identifying legal issues, classifying legal materials, interpreting legal norms,

²¹ Soerjono Soekanto, and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, (Jakarta: Rajawali Press, 1986), 45.

²² Mahmud Marzuki, *Penelitian Hukum*, (Yogyakarta: Kencana, 2017), 321.

and constructing consistent legal arguments to answer the formulated research problems.

C. DISCUSSION

1. Mandatory or Discretionary MDP Involvement in Medical Malpractice Cases

The first dimension of the legal problem concerns whether the MDP examination constitutes a mandatory procedural requirement or a discretionary mechanism. This question directly impacts the hierarchical position of the MDP within Indonesia's criminal justice system and determines the legal validity of prosecutions that proceed without MDP review. The transformation from MKDKI to MDP, coupled with contradictory statutory language regarding the obligatory nature of disciplinary review, creates fundamental uncertainty about the MDP's role as a pre-judicial gatekeeper. This subsection examines the institutional evolution, hierarchical positioning, and normative ambiguity surrounding MDP involvement in medical malpractice cases.

The institutional framework for handling alleged medical malpractice cases in Indonesia has undergone a fundamental transformation with the replacement of the Indonesian Medical Discipline Honorary Council (MKDKI) by the Professional Disciplinary Board (MDP). Prior to the enactment of Law Number 17 of 2023 on Health, disciplinary authority over medical professionals rested with the Indonesian Medical Discipline Honorary Council (*Majelis Kehormatan Disiplin Kedokteran Indonesia*/MKDKI) an autonomous body under the Indonesian Medical Council (*Konsil Kedokteran Indonesia*/KKI).²³ The MKDKI was established under Law Number 29 of 2004 on Medical Practice, with primary functions that included receiving complaints, examining, and adjudicating cases of disciplinary violations, as well as drafting procedural guidelines for disciplinary proceedings against physicians and dentists.

With the introduction of the 2023 Health Law which repealed eleven prior statutes, including the Medical Practice Law the MKDKI was restructured into the Professional Disciplinary Board (*Majelis Disiplin Profesi*/MDP), endowed with significantly broader authority.²⁴ The key differences between the MKDKI and the MDP lie in their scope of authority and institutional structure. Under Articles 306 and 308 of the Health Law, the MDP now has the

²³ Muhammad Khalif Ardi, 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, no. 3 (2023): 189. See too, Hilaire Tegnau, "Law and medical disciplinary sanctions: Enhancing medical practice and health quality in Indonesia," *J. Legal Ethical & Regul. Issues* 21 (2018): 1.

²⁴ Nina Mišić Radanović and Ivan Vukušić, "Causation in Medical Malpractice," *EU and Comparative Law Issues and Challenges Series (ECLIC)* 4 (2020): 771.

power to impose disciplinary sanctions and recommend both criminal and civil actions. Disciplinary sanctions may include written warnings, mandatory professional training or education at accredited health institutions, temporary suspension of a registration certificate (*Surat Tanda Registrasi/STR*), or recommendations for the revocation of a practice license (*Surat Izin Praktik/SIP*).²⁵

This institutional transformation represents more than a mere change in nomenclature it fundamentally alters the question of whether disciplinary review is mandatory or optional. Under the MKDKI framework, Article 66(1) of Law Number 29 of 2004 used permissive language ("may"), suggesting discretionary involvement. The MDP framework under Article 308(1) of the 2023 Health Law, however, appears to mandate prior review by stating that criminal prosecution "cannot proceed" without MDP recommendation. This shift from discretionary to mandatory language lies at the heart of the legal ambiguity examined in this study.

This institutional transformation not only signifies a change in nomenclature but also expands the scope of professional oversight. Whereas the MKDKI's jurisdiction was limited to physicians and dentists, the MDP's authority now extends to all categories of medical and health professionals.²⁶ This structural reform reflects the government's effort to unify professional oversight within a more comprehensive regulatory framework. However, the expansion of authority also brings complex legal consequences, particularly concerning its intersection with the criminal justice system and the unresolved question of whether MDP involvement is truly obligatory in all cases.

The hierarchical positioning of the MDP directly addresses the core legal problem: is the MDP a mandatory procedural gateway, or does it function as a discretionary advisory body? The statutory language suggests mandatory involvement, yet practical implementation reveals significant ambiguity and inconsistency.²⁷

In practice, the institutional hierarchy governing the handling of alleged medical malpractice cases in Indonesia follows a vertical structure that begins

²⁵ Sita Tahta Alfina, and Yovita Arie Mangesti, "Peran Majelis Disiplin Profesi Dalam Penyelesaian Sengketa Medis Ditinjau Dari Undang-Undang Nomor 17 Tahun 2023 Tentang Kesehatan," *Quantum Juris: Jurnal Hukum Modern* 7, no. 1 (2025): 67. See too, Jefta Calvin Pantow, Roy Ronny Lembong, and Harly Stanly Muaja. "Analisis Yuridis Terhadap Pelanggaran Pada Penanganan Profesi Medis Dan Kesehatan Dalam Undang-Undang Nomor 17 Tahun 2023 Tentang Kesehatan," *LEX ADMINISTRATUM*, 13 no. 3, (2025): 245.

²⁶ Igor Vuletić, "Medical malpractice as a separate criminal offense: a higher degree of patient protection or merely a sword above the doctors' heads? The example of the Croatian legislative model and the experiences of its implementation," *Medicine, law & society* 12, no. 2 (2019): 41.

²⁷ Nur Aripkah, Kalen Sanata, Khairunnisa Noor Asufie, and Reza Pramasta Gegana, "Pembaharuan Konsep Hukum Pidana dalam Undang-Undang No. 1 Tahun 2023 Tentang KUHP," *Jurnal Fundamental Justice* 6, no. 2 (2025): 214.

with the Professional Disciplinary Board (*Majelis Disiplin Profesi*/MDP) and may proceed through the general judiciary, both criminal and civil, ultimately culminating at the Supreme Court as the final authority.²⁸ However, this hierarchical position introduces a new layer of ambiguity within Indonesia's legal system.

Under Article 308(1) of Law Number 17 of 2023 on Health, criminal prosecution of medical malpractice cases cannot proceed without a prior recommendation from the MDP.²⁹ This provision effectively establishes the MDP as a mandatory procedural gateway before a case enters the criminal justice process.³⁰ However, the mandatory nature of this requirement is immediately undermined by subsequent provisions and conflicting statutory language.

The MDP's significant authority is further emphasized in the law's procedural time limit, which provides that if the Board fails to issue a recommendation within 14 working days of receiving a complaint, it is deemed to have granted permission for a criminal investigation to proceed (Article 308(7)–(8) of the Health Law). This automatic approval mechanism creates a *de facto* discretionary system: if the MDP does not act, the case proceeds anyway, effectively making MDP involvement optional rather than mandatory. Although this clause aims to prevent undue delay, it simultaneously raises concerns regarding the quality and depth of review that can be conducted within such a limited timeframe particularly given the highly technical nature of medical malpractice cases, which often require detailed expert analysis.

The central legal question that emerges is whether positioning the MDP as a mandatory pre-litigation authority possesses a strong and consistent juridical foundation. Earlier provisions under Article 66(1) of Law Number 29 of 2004 on Medical Practice employed the term "may" (*dapat*), which granted complainants discretion to file or not to file a report with the Indonesian Medical Discipline Honorary Council.³¹ This permissive phrasing created

²⁸ Igor Vuletić, "Medical malpractice as a separate criminal offense: a higher degree of patient protection or merely a sword above the doctors' heads? The example of the Croatian legislative model and the experiences of its implementation," *Medicine, law & society* 12, no. 2 (2019): 45.

²⁹ Eduardus Raditya Kusuma Putra, "Aborsi Tanpa Indikasi Medis dalam Sudut Pandang UU No 17 Tahun 2023 Tentang Kesehatan, Kitab Undang-Undang Hukum Pidana dan UU No 1 Tahun 2023," *Jurnal Cahaya Mandalika ISSN 2721-4796 (online)* (2024): 1131. See too, Albertus D. Soge, "Analisis Penanganan Kesalahan Profesi Medis dan Kesehatan Dalam UU Nomor 17 Tahun 2023 Tentang Kesehatan Menurut Perspektif Hukum Kesehatan," *Jurnal Hukum Caraka Justitia* 3, no. 2 (2023): 148.

³⁰ Mia Amiati, Hamzah Halim, and Jady Zaidi Hassim, "Navigating ambiguity: Critiques of Indonesia's health law and its impact on legal redress for medical malpractice victims," *Hasanuddin Law Review* 10, no. 1 (2025): 99.

³¹ Cinthia Mutiara Hapsari, "Tinjauan Hukum Terhadap Kerahasiaan Rekam Medis Menurut UU No. 29 Tahun 2004," *Surya Medika: Jurnal Ilmiah Ilmu Keperawatan dan Ilmu Kesehatan Masyarakat* 19, no. 2 (2024): 131.

interpretive flexibility that contrasts with the current mandatory framework, thereby generating normative ambiguity.³²

The coexistence of these contradictory provisions Article 66(1)'s permissive "may" and Article 308(1)'s mandatory "cannot proceed" creates three possible interpretations: (1) Article 308(1) fully supersedes Article 66(1), making MDP review absolutely mandatory; (2) Article 66(1) remains applicable, preserving complainant discretion despite Article 308(1)'s language; or (3) the provisions operate in different spheres, with Article 66(1) governing complainant rights and Article 308(1) governing prosecutorial obligations. The absence of explicit legislative clarification or authoritative judicial interpretation leaves this fundamental question unresolved, creating a situation where the mandatory or discretionary nature of MDP involvement depends on individual prosecutorial or judicial interpretation rather than clear legal mandate.³³

Such ambiguity has tangible implications for legal certainty, potentially disadvantaging both physicians and patients. Within criminal law, uncertainty of this nature may impede the administration of justice by granting excessive interpretive discretion to law enforcement authorities and the judiciary. Consequently, while the MDP's establishment strengthens procedural oversight, it simultaneously challenges the principles of due process and legal clarity that underpin Indonesia's criminal justice system.

The ambiguity regarding mandatory versus discretionary MDP involvement is further complicated by the existence of multiple legal pathways for resolving medical malpractice disputes. The unclear status of MDP review affects not only criminal prosecution but also civil litigation and alternative dispute resolution mechanisms, creating inconsistent enforcement patterns that undermine the principle of legal certainty.³⁴

The resolution of medical negligence disputes in Indonesia may proceed through litigation in either criminal or civil courts or through non-litigation mechanisms, such as mediation or review by professional disciplinary bodies. Non-litigation procedures represent a pragmatic innovation in addressing medical negligence, aiming to reconcile disputes without escalating to court

³² Tunggul Ansari Setia Negara, "Normative legal research in Indonesia: Its originis and approaches," *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (2023): 7.

³³ Igor Vuletić, "Medical malpractice as a separate criminal offense: a higher degree of patient protection or merely a sword above the doctors' heads? The example of the Croatian legislative model and the experiences of its implementation," *Medicine, law & society* 12, no. 2 (2019): 46.

³⁴ Hilaire Tegan, "Law and medical disciplinary sanctions: Enhancing medical practice and health quality in Indonesia," *J. Legal Ethical & Regul. Issues* 21 (2018): 4.

proceedings.³⁵ In practice, however, cases do not consistently adhere to this procedural sequence. Some are brought directly to criminal prosecution without prior review by the MDP, while others are resolved at the disciplinary stage and never proceed to litigation. This variation indicates that, despite the ostensibly mandatory wording of Article 308(1), MDP involvement functions as *de facto* discretionary.

The criteria for determining whether a case should fall within the criminal or civil domain often remain unclear. Theoretically, such differentiation should depend on the mental element (*mens rea*) whether the act involved *dolus* (intent) or *culpa* (negligence) and the extent of harm caused. These mental elements form the foundation for determining criminal liability. *Dolus* reflects intentional wrongdoing, where an individual acts with full awareness of potential harmful consequences. It may also take the form of *dolus eventualis*, in which the perpetrator foresees possible adverse outcomes but proceeds regardless.³⁶

Conversely, *culpa* refers to unintentional acts resulting from a lack of due care or caution, where harm arises not from intent but from negligence in adhering to professional standards.³⁷

In the context of medical malpractice, criminal liability arises when the physician's conduct deviates from accepted medical standards, demonstrates culpability (*dolus* or *culpa*), and causes injury or death to the patient. Acts that violate specific provisions of the Criminal Code (*Kitab Undang Undang Hukum Pidana*/KUHP) may constitute criminal malpractice.³⁸

However, Indonesia's current legal framework is not always sufficiently adaptive to distinguish degrees of negligence particularly where the conduct stems from pure accidents or unavoidable risks. This rigidity risks producing inequitable judgments, where physicians acting without malicious intent may still face sanctions as if they had acted deliberately.³⁹ Moreover, the unclear mandatory/discretionary status of MDP review means that whether a physician receives technical professional evaluation before criminal prosecution becomes

³⁵ Ghulam Mustafa, and Ede Surya Darmawan, "Strengthening legal frameworks and patient safety: A narrative review of medical and dental malpractice in Indonesia," *Jurnal ARSI: Administrasi Rumah Sakit Indonesia* 11, no. 1 (2024): 2.

³⁶ Greg Taylor, "Concepts of intention in German criminal law," *Oxford Journal of Legal Studies* 24, no. 1 (2004): 120.

³⁷ Sri Ayu Irawati, "Perbedaan Sengaja dan Tidak Sengaja dalam Hukum Pidana," *Ideas: Jurnal Pendidikan, Sosial, dan Budaya* 10, no. 4 (2024): 1139.

³⁸ Muhammad Ghozali, Cut Afra, Deddi Agusriadi, and Sudirman Suti, "Legal Consequences of Medical Accidents and Medical Malpractice in Indonesia," *International Journal of Law, Social Science, and Humanities* 1, no. 2 (2024): 79.

³⁹ Rospita Adelina Siregar, Alif Muhammad Sudarmanto, Eko Nurmardiansyah, and Hari Pudjo Nugroho, "Majelis disiplin profesi sebagai primum remedium berdasarkan Undang-Undang Nomor 17 Tahun 2023 tentang kesehatan," *Jurnal Hukum to-ra: Hukum Untuk Mengatur dan Melindungi Masyarakat* 10, no. 3 (2024): 496.

a matter of prosecutorial discretion rather than legal guarantee, further undermining consistency and fairness.

2. Evidentiary Barriers in Proving Criminal Elements in Medical Malpractice Cases

The second dimension of the legal problem examines what legal consequences arise when medical malpractice cases bypass the MDP and proceed directly to criminal prosecution. This analysis is critical because despite Article 308(1)'s apparently mandatory language, empirical evidence demonstrates that cases frequently proceed without MDP review. This section explores the evidentiary deficiencies, procedural invalidity concerns, and systemic consequences of bypassing the MDP's technical expertise in criminal malpractice prosecutions.⁴⁰

When cases bypass the MDP and proceed directly to criminal prosecution, courts lose access to specialized technical review of medical causality one of the most complex evidentiary challenges in malpractice cases.

Causality represents one of the most intricate aspects distinguishing medicine from other disciplines, particularly when applied to the practical contexts of treatment and disease prevention.⁴¹ Unlike the deterministic framework of physics, medicine operates within a reality where cause effect relationships are often non-linear, probabilistic, and embedded in uncertainty. In clinical practice, understanding causality serves as the foundation for therapeutic decision-making helping physicians identify and avoid risk factors, select appropriate interventions, and assess outcomes based on models of causal inference.⁴²

For instance, while there is a statistically strong correlation between hypertension and stroke, not every hypertensive patient experiences a stroke; thus, causation cannot be presumed purely from correlation.⁴³

⁴⁰ Muhammad Ghozali, Cut Afra, Deddi Agusriadi, and Sudirman Suti, "Legal Consequences of Medical Accidents and Medical Malpractice in Indonesia," *International Journal of Law, Social Science, and Humanities* 1, no. 2 (2024): 79.

⁴¹ A. N. Koterov, "Causal criteria in medical and biological disciplines: history, essence, and radiation aspect. Report 1. Problem statement, conception of causes and causation, false associations," *Biology Bulletin* 46, no. 11 (2019): 1461.

⁴² Jefta Calvin Pantow, Roy Ronny Lembong, and Harly Stanly Muaja. "Analisis Yuridis Terhadap Pelanggaran Pada Penanganan Profesi Medis Dan Kesehatan Dalam Undang-Undang Nomor 17 Tahun 2023 Tentang Kesehatan," *LEX ADMINISTRATUM*, 13 no. 3, (2025): 248. See too, Rospita Adelina Siregar, Alif Muhammad Sudarmanto, Eko Nurmardiansyah, and Hari Pudjo Nugroho, "Majelis disiplin profesi sebagai primum remedium berdasarkan Undang-Undang Nomor 17 Tahun 2023 tentang kesehatan," *Jurnal Hukum to-ra: Hukum Untuk Mengatur dan Melindungi Masyarakat* 10, no. 3 (2024): 494.

⁴³ Camila Olarte Parra, Lorenzo Bertizzolo, Sara Schroter, Agnès Dechartres, and Els Goetghebeur, "Consistency of causal claims in observational studies: a review of papers published in a general medical journal," *BMJ open* 11, no. 5 (2021): 339.

Further challenges arise from qualification problems, in which unforeseen patient conditions or additional causal factors may disrupt expected medical outcomes, requiring a context-sensitive and adaptive interpretation of causality.⁴⁴ The dispositional approach to causation emphasizes the importance of patient heterogeneity recognizing that biological, psychological, and social factors influence how individuals respond to medical interventions.⁴⁵

Accordingly, a pluralistic and adaptable causal framework is necessary in medical contexts to accommodate the complex interactions among the factors influencing clinical outcomes. Excessively deterministic or reductionist approaches to causation risk misconstruing medical errors and leading to unjust legal outcomes. Consequently, integrating evidence-based reasoning with dynamic, individualized clinical judgment becomes crucial in both medical and legal evaluations of malpractice cases.⁴⁶

The MDP, composed of medical experts familiar with these complexities, is institutionally positioned to provide specialized technical analysis of medical causality. When cases bypass the MDP and proceed directly to criminal courts where judges typically lack medical expertise the risk of erroneous causation determinations increases substantially. This represents a concrete legal consequence of non-compliance with the ostensibly mandatory MDP review process: the loss of specialized expertise in evaluating the most technically complex element of criminal malpractice cases.

The legal consequences of bypassing the MDP extend beyond the loss of technical expertise to questions of evidentiary validity and procedural legitimacy. When criminal prosecution proceeds without prior MDP review, the court must rely on alternative expert testimony that may lack the institutional authority and specialized professional knowledge that the MDP is designed to provide.⁴⁷

In legal proceedings concerning ethical violations or alleged medical malpractice, the role of experts and professional bodies notably the Indonesian Medical Discipline Honorary Council (*Majelis Kehormatan Disiplin Kedokteran Indonesia, MKDKI*) and the Medical Ethics Honorary Council (*Majelis*

⁴⁴ Michael Thielscher, "Causality and the qualification problem," *KR* 96 (1996): 54.

⁴⁵ Rani Lill Anjum and Elena Rocca, "When a Cause Cannot Be Found," In *Rethinking Causality, Complexity and Evidence for the Unique Patient* (Cham: Springer International Publishing, 2020), 57. See too, Moussa Ahmed Fekry, Ibrahim Suleiman Al Qatawneh, Ramzi Madi, Moustafa Elmetwaly Kandeel, and Maher Haswa, "Penal Liability Arising from Medical Malpractice: A Comparative Study of Egypt and France," *Pakistan Journal of Life and Social Sciences* 21, no. 2, (2023): 797.

⁴⁶ Dinarjati Eka Puspitasari, "Aspek Hukum Penanganan Tindakan Malpraktek Medik Di Indonesia," *Lambung Mangkurat Law Journal* 3, no. 2 (2018): 249.

⁴⁷ A. N. Koterov, "Causal criteria in medical and biological disciplines: history, essence, and radiation aspect. Report 1. Problem statement, conception of causes and causation, false associations," *Biology Bulletin* 46, no. 11 (2019): 1461.

Kehormatan Etik Kedokteran, MKEK) is pivotal.⁴⁸ These institutions act as moral and professional authorities tasked with providing objective assessments of a physician's conduct based on ethical and disciplinary standards.⁴⁹

The MKDKI possesses the authority to determine whether a physician has breached professional discipline by evaluating the conformity between medical actions and established professional standards. Its decisions often serve as primary reference points in legal processes, as they can substantiate or weaken allegations of negligence or professional misconduct.⁵⁰ Meanwhile, the MKEK focuses on ethical evaluation, including issues such as patient autonomy, informed consent, and professional integrity. Opinions issued by these bodies are frequently considered by law enforcement officials and judges to determine whether a medical act exceeded the limits of professional or ethical responsibility.⁵¹

However, in practice, the legal weight of MKDKI or now the Professional Disciplinary Board remains ambiguous. As a non-judicial institution, the MKDKI is not bound by the principle of due process of law and thus does not exercise coercive authority akin to judicial organs.⁵² It serves as a disciplinary mechanism within the medical profession, not a law enforcement entity. Nonetheless, with its expanded authority under the 2023 Health Law to recommend criminal investigation, the boundary between professional discipline and criminal law enforcement has become increasingly blurred.⁵³ This overlap raises significant questions regarding the procedural independence and juridical validity of disciplinary recommendations in criminal adjudication.

⁴⁸ Greg Taylor, "Concepts of intention in German criminal law," *Oxford Journal of Legal Studies* 24, no. 1 (2004): 123.

⁴⁹ Muhammad Khalif Ardi, 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, no. 3 (2023): 190. See too, Tuti Herningtyas, Endah Labati, and Anna Veronica Pont, "Legal Aspects of Medical Malpractice: Patient Protection and Physician Liability," *International Journal of Health, Economics, and Social Sciences (IJHESS)* 7, no. 2 (2025): 865.

⁵⁰ Khadafi Indrawan, M. Fakhri, and Budiyo Budiyo, "Peran majelis kehormatan disiplin kedokteran indonesia dalam kasus pelanggaran standar profesional dokter," *Justicia Sains: Jurnal Ilmu Hukum* 9, no. 2 (2024): 459.

⁵¹ Jefta Calvin Pantow, Roy Ronny Lembong, and Harly Stanly Muaja. "Analisis Yuridis Terhadap Pelanggaran Pada Penanganan Profesi Medis Dan Kesehatan Dalam Undang-Undang Nomor 17 Tahun 2023 Tentang Kesehatan," *LEX ADMINISTRATUM*, 13 no. 3, (2025): 249.

⁵² Irwan Lazuardi, and Siti Marwiyah, "Analysis of informed consent as the legal protection of physician relationships and patients in malpractice case," *Policy Law Notary Regul* 2023 (2023): 5. See too, Hilaire Tegnau, "Law and medical disciplinary sanctions: Enhancing medical practice and health quality in Indonesia," *J. Legal Ethical & Regul. Issues* 21 (2018): 1.

⁵³ Ghulam Mustafa, and Ede Surya Darmawan, "Strengthening legal frameworks and patient safety: A narrative review of medical and dental malpractice in Indonesia," *Jurnal ARSI: Administrasi Rumah Sakit Indonesia* 11, no. 1 (2024): 10.

When cases bypass the MDP, courts lose access to this specialized institutional assessment. The legal consequence is threefold: (1) Procedural invalidity concerns if Article 308(1) is interpreted as mandatory, prosecutions without MDP review may constitute procedural violations rendering verdicts vulnerable to appeal; (2) Evidentiary quality deficiencies without MDP technical review, courts must rely on ad hoc expert witnesses who may lack the institutional authority and comprehensive professional knowledge the MDP provides; and (3) Inconsistent outcomes—as demonstrated in contradictory decisions across judicial levels in cases like Decision Number 1441/Pid.Sus/2019/PN Mks, where different courts reached opposite conclusions absent unified MDP guidance on professional standards.

A critical legal consequence of bypassing the MDP emerges from the fundamental misalignment between disciplinary and criminal standards of proof.⁵⁴ When cases proceed directly to criminal prosecution without prior MDP disciplinary review, this misalignment remains unaddressed, creating significant risks of erroneous criminalization of conduct that may constitute professional error but not criminal wrongdoing.⁵⁵

Recent studies indicate that Indonesia's medical dispute resolution system continues to face substantial structural and procedural challenges. Ambiguities in health law have created inconsistencies in how malpractice victims pursue legal remedies, particularly in terms of compensation and liability mechanisms. While financial compensation for patients is essential in civil settlements, these mechanisms remain poorly integrated with criminal law enforcement pathways.⁵⁶

A fundamental issue lies in the divergent standards of proof applied between disciplinary proceedings and criminal courts. In criminal law, the "beyond reasonable doubt" standard applies, requiring the judge's conviction of guilt without reasonable uncertainty. In contrast, professional disciplinary proceedings rely on standards such as "professional propriety" or "medical service adequacy," which are more technical and evaluative than juridical. This discrepancy leads to situations where a physician may be found guilty of

⁵⁴ Irwan Lazuardi, and Siti Marwiyah, "Analysis of informed consent as the legal protection of physician relationships and patients in malpractice case," *Policy Law Notary Regul* 2023 (2023): 7.

⁵⁵ Camila Olarte Parra, Lorenzo Bertizzolo, Sara Schroter, Agnès Dechartres, and Els Goetghebeur, "Consistency of causal claims in observational studies: a review of papers published in a general medical journal," *BMJ open* 11, no. 5 (2021): 339.

⁵⁶ Tuti Herningtyas, Endah Labati, and Anna Veronica Pont, "Legal Aspects of Medical Malpractice: Patient Protection and Physician Liability," *International Journal of Health, Economics, and Social Sciences (IJHESS)* 7, no. 2 (2025): 864.

professional misconduct by the MDP yet acquitted in criminal court or vice versa.⁵⁷

Such inconsistencies are evident in several landmark cases. In Decision Number 1441/Pid.Sus/2019/PN Mks, the Makassar District Court acquitted Dr. ES of criminal liability in a cosmetic treatment case that caused patient blindness. However, at the cassation and judicial review levels (Decision No. 233.K/Pid.Sus/2021 and Decision No. 450 PK/Pid/Sus/2022), the same physician was declared guilty and sentenced to imprisonment. These contradictory judgments highlight the absence of a unified evidentiary framework and the lack of consistent judicial interpretation regarding the applicable standards of proof in medical malpractice cases.⁵⁸

These inconsistencies demonstrate concrete legal consequences when cases bypass the MDP: (1) Higher reversal rates cases prosecuted without MDP review are more vulnerable to contradictory decisions at different judicial levels, as seen in the Dr. ES case where initial acquittal was overturned twice; (2) Lack of professional-legal integration without MDP intermediary review, the gap between professional standards and criminal law standards remains unbridged, increasing the risk of criminalizing conduct that violates professional norms but does not meet criminal culpability thresholds; and (3) Undermined legal certainty physicians cannot predict whether specific conduct will be treated as disciplinary violation or criminal offense, as this depends on whether the case undergoes MDP review or proceeds directly to prosecution.⁵⁹

The misalignment between disciplinary and criminal standards demonstrates the need for clearer integration between professional ethics enforcement and criminal adjudication, as well as the establishment of a *Lex Specialis* governing criminal liability for medical practitioners. Without such alignment, uncertainty in interpreting causation, negligence, and intent will continue to undermine both legal certainty and the fair administration of justice for patients and healthcare professionals alike.

⁵⁷ Ghulam Mustafa, and Ede Surya Darmawan, "Strengthening legal frameworks and patient safety: A narrative review of medical and dental malpractice in Indonesia," *Jurnal ARSI: Administrasi Rumah Sakit Indonesia* 11, no. 1 (2024): 2. See too, Dinarjati Eka Puspitasari, "Aspek Hukum Penanganan Tindakan Malpraktek Medik Di Indonesia," *Lambung Mangkurat Law Journal* 3, no. 2 (2018): 249.

⁵⁸ Khadafi Indrawan, M. Fakhri, and Budiyono Budiyono, "Peran majelis kehormatan disiplin kedokteran indonesia dalam kasus pelanggaran standar profesional dokter," *Justicia Sains: Jurnal Ilmu Hukum* 9, no. 2 (2024): 459. See too, Sri Ayu Irawati, "Perbedaan Sengaja dan Tidak Sengaja dalam Hukum Pidana," *Ideas: Jurnal Pendidikan, Sosial, dan Budaya* 10, no. 4 (2024): 1139.

⁵⁹ Khadafi Indrawan, M. Fakhri, and Budiyono Budiyono, "Peran majelis kehormatan disiplin kedokteran indonesia dalam kasus pelanggaran standar profesional dokter," *Justicia Sains: Jurnal Ilmu Hukum* 9, no. 2 (2024): 464.

3. Constitutional Legitimacy and Procedural Clarity of the MDP as Pre-Judicial Gatekeeper: Implications for Legal Certainty

The third dimension of the legal problem addresses whether the MDP's role as a pre-judicial gatekeeper possesses sufficient constitutional legitimacy and procedural clarity.⁶⁰ Even if Article 308(1) is interpreted as establishing mandatory MDP review, this raises fundamental questions about the constitutional validity of requiring administrative-body approval before criminal prosecution can proceed. This section examines the implications of institutional ambiguity for legal certainty, analyzing consequences for both physicians and patients, and proposing reform toward a constitutionally sound Lex Specialis framework.⁶¹

The lack of procedural clarity regarding the mandatory or discretionary nature of MDP involvement creates profound legal uncertainty for physicians, producing both psychological and practical consequences that extend beyond individual cases to affect healthcare quality systemically.

Ambiguity in institutional authority and inconsistencies in evidentiary standards within medical malpractice litigation have produced both psychological and practical consequences for medical practitioners. The phenomenon of defensive medicine where physicians perform unnecessary procedures (over-treatment) or avoid medically necessary but high-risk interventions has emerged as a direct response to legal uncertainty.⁶²

Studies indicate that in contexts where legal ambiguity prevails, physicians who should ideally prioritize the patient's best interests are often distracted by legal-defensive considerations, leading to risk-averse behavior.⁶³ This defensive posture may ultimately undermine the quality of healthcare services and increase healthcare costs. Furthermore, the growing sense of criminalization within the medical profession discourages practitioners from serving in remote or underdeveloped regions and reduces their willingness to handle complex or high-risk cases, which are often the most medically critical.⁶⁴

⁶⁰ Andrea R. Di Landro, "Criminal law as a response to medical malpractice: pluses and minuses-comparing Italian and US experiences," *Med. & L.* 31 (2012): 221.

⁶¹ Igor Vuletić, "Medical malpractice as a separate criminal offense: a higher degree of patient protection or merely a sword above the doctors' heads? The example of the Croatian legislative model and the experiences of its implementation," *Medicine, law & society* 12, no. 2 (2019): 41.

⁶² Irwan Lazuardi, and Siti Marwiyah, "Analysis of informed consent as the legal protection of physician relationships and patients in malpractice case," *Policy Law Notary Regul* 2023 (2023): 9.

⁶³ Jasmen Ojak Haholongan Nadeak, "Penerapan Disiplin Profesi Sebagai Instrumen Penegakan Hukum Pidana Kesehatan Berbasis Keadilan Prosedural," *Proceeding Masyarakat Hukum Kesehatan Indonesia* 1, no. 01 (2024): 189.

⁶⁴ Andrea R. Di Landro, "Criminal law as a response to medical malpractice: pluses and minuses-comparing Italian and US experiences," *Med. & L.* 31 (2012): 225.

The constitutional legitimacy concern manifests here: if physicians cannot determine with certainty whether they will face criminal prosecution with or without prior professional review, they cannot make informed decisions about legal risk. This uncertainty violates the principle of *lex certa* (legal certainty) fundamental to criminal law, which requires that individuals be able to predict with reasonable clarity what conduct is prohibited and what procedures will govern potential prosecution. The current ambiguity fails this constitutional standard.

The procedural ambiguity surrounding MDP involvement creates equally significant barriers to justice for patients. If MDP review is mandatory but the law provides inadequate procedural safeguards and timelines, patients face bureaucratic obstacles that may deny them effective access to remedies. If MDP review is discretionary, patients face unpredictable enforcement where similar cases may be treated differently based on prosecutorial choice rather than legal principle.⁶⁵

On the other hand, this legal ambiguity also adversely affects patients as victims of medical malpractice. The multi-layered bureaucracy requiring patients to first submit a complaint to the Professional Disciplinary Board (MDP) before filing a police report creates a significant barrier to justice. The lengthy duration of proceedings and the high costs associated with complex evidentiary requirements often discourage malpractice victims from pursuing their legal rights.

Furthermore, there exists a profound asymmetry of information and bargaining power between patients and healthcare institutions, which places patients in a structurally weaker position.⁶⁶ Most patients lack sufficient understanding of the medical service standards to which they are entitled, making it difficult for them to determine whether negligence has occurred. In this context, the MDP is ideally expected to act as a protector of patient interests. However, if the institution is perceived as being more aligned with the medical profession, public trust in the disciplinary and accountability system may significantly erode.

The constitutional legitimacy question centers on whether the MDP framework provides adequate procedural safeguards to protect patient rights. The 14-working-day automatic approval mechanism (Article 308(7)-(8)) suggests legislative recognition that MDP review could become a barrier to justice. However, this creates a paradox: if the timeframe is too short for meaningful review (as critics argue), the MDP becomes a procedural formality

⁶⁵ Maria Silvy E. Wangga, "Implementation of Restorative Justice in Criminal Cases in Indonesia," *Law and Humanities Quarterly Reviews* 1, no. 3 (2022): 362.

⁶⁶ Mustika Putra Rokan, "Royalty Management Regulation for Song and/or Music Copyright: The Needs of Indonesian Musicians," *Locus: Jurnal Konsep Ilmu Hukum* 1, no. 1 (2021): 39. See too, Michael Thielscher, "Causality and the qualification problem," *KR* 96 (1996): 54.

rather than substantive safeguard; if the timeframe is adequate, the automatic approval mechanism suggests MDP involvement is not truly mandatory. This paradox reveals fundamental procedural clarity deficiencies that undermine both physician and patient rights.⁶⁷

Based on the analysis of these three interconnected dimensions the unresolved mandatory/discretionary question, the concrete legal consequences of bypassing MDP review, and the constitutional legitimacy concerns comprehensive legal reform is urgently needed. The current framework's ambiguity cannot be resolved through judicial interpretation alone; legislative action is required to establish a constitutionally legitimate and procedurally clear system.⁶⁸

Based on the foregoing analysis, there is a pressing need for a comprehensive reformulation of medical malpractice law in Indonesia. Such reform must extend beyond mere amendments to the Medical Practice Law or the Health Law, encompassing the establishment of a *Lex Specialis* a dedicated statute that systematically regulates criminal, civil, and administrative liability in medical practice.⁶⁹

This *lex specialis* should clearly delineate several foundational elements. First, it must establish a strict demarcation between professional disciplinary violations and criminal acts, explicitly clarifying whether MDP review is mandatory for all cases or only for specific categories of malpractice. Second, it should define specific evidentiary standards tailored to the technical and scientific complexities of medical malpractice cases, thereby bridging the gap between professional "service adequacy" standards and the criminal law requirement of proof beyond a reasonable doubt. Third, the regulation should provide clear mechanisms for institutional integration between MDP proceedings and criminal adjudication, including procedures for handling cases that bypass MDP review and the legal consequences of such non-compliance. Fourth, it must ensure legal protection for physicians who act in accordance with professional standards but nonetheless produce unintended adverse outcomes, addressing constitutional concerns related to the criminalization of professional errors. Finally, the *lex specialis* should guarantee meaningful access to justice for patients by minimizing bureaucratic delays and procedural burdens, while establishing explicit timelines, appellate mechanisms, and transparency requirements to ensure constitutional legitimacy.

⁶⁷ Jasmen Ojak Haholongan Nadeak, "Penerapan Disiplin Profesi Sebagai Instrumen Penegakan Hukum Pidana Kesehatan Berbasis Keadilan Prosedural," *Proceeding Masyarakat Hukum Kesehatan Indonesia* 1, no. 01 (2024): 188.

⁶⁸ Maria Silvy E. Wangga, "Implementation of Restorative Justice in Criminal Cases in Indonesia," *Law and Humanities Quarterly Reviews* 1, no. 3 (2022): 358.

⁶⁹ Mustika Putra Rokan, "Royalty Management Regulation for Song and/or Music Copyright: The Needs of Indonesian Musicians," *Locus: Jurnal Konsep Ilmu Hukum* 1, no. 1 (2021): 39.

Additionally, the *Lex Specialis* must address the constitutional legitimacy concerns identified in this study by: (a) clarifying the separation of powers between the MDP as an administrative body and the judiciary; (b) establishing procedural due process safeguards including adequate review timeframes, transparent decision-making criteria, and appellate review mechanisms; (c) resolving the normative conflict between Article 66(1)'s permissive language and Article 308(1)'s mandatory language through explicit legislative statement; and (d) providing clear guidance on when cases may proceed without MDP review (e.g., emergency situations, cases involving administrative violations rather than medical judgment, or cases where the 14-day period has expired without decision).

In addition, strengthening the implementation of restorative justice in medical dispute resolution deserves serious consideration. A restorative justice model emphasizing relationship repair, acknowledgment of responsibility, and voluntary restitution could offer a more humane and balanced alternative to adversarial litigation.⁷⁰ However, the current Indonesian legal framework provides no explicit statutory basis for restorative justice in medico-legal contexts, limiting its practical adoption. Thus, future reform efforts should explicitly incorporate restorative principles to achieve a more equitable and reconciliatory approach to medical disputes.

D. Conclusion

This study concludes that criminal liability for medical malpractice in Indonesia must be applied cautiously and only where gross negligence, a departure from recognised professional standards, and a demonstrable causal link to patient harm are established. The restructuring of disciplinary authority under Law Number 17 of 2023, which replaces the MKDKI with the Professional Disciplinary Board (MDP), has significantly altered the procedural landscape. Although Article 308(1) appears to require an MDP recommendation before a case may proceed to criminal prosecution, the coexistence of conflicting statutory provisions and procedural mechanisms has produced uncertainty regarding whether MDP examination functions as a mandatory prerequisite or merely a discretionary step. These ambiguities, combined with the inherent complexity of proving medical causation and the misalignment between

⁷⁰ Ghulam Mustafa, and Ede Surya Darmawan, "Strengthening legal frameworks and patient safety: A narrative review of medical and dental malpractice in Indonesia," *Jurnal ARSI: Administrasi Rumah Sakit Indonesia* 11, no. 1 (2024): 2. See too, Mustika Putra Rokan, "Royalty Management Regulation for Song and/or Music Copyright: The Needs of Indonesian Musicians," *Locus: Jurnal Konsep Ilmu Hukum* 1, no. 1 (2021): 36; Maria Silvya E. Wangga, "Implementation of Restorative Justice in Criminal Cases in Indonesia," *Law and Humanities Quarterly Reviews* 1, no. 3 (2022): 358.

disciplinary and criminal standards of proof, underscore the challenges faced by courts in evaluating malpractice allegations.

In response, the study calls for the development of a comprehensive Lex Specialis to clarify the distinction between ethical-professional violations and criminal conduct, to articulate evidentiary standards that reflect the technical nature of medical decision-making, and to integrate disciplinary proceedings more coherently with judicial processes. Such reform should also enhance legal protection for physicians acting in good faith, while ensuring that patients can access remedies without undue procedural barriers. Strengthened legal literacy among medical practitioners, improved coordination between professional bodies and the justice system, and broader adoption of non-adversarial mechanisms, such as restorative approaches, are required to support a more balanced malpractice framework. Future research is encouraged to incorporate empirical and comparative insights to guide the continued development of Indonesia's medico-legal system.

BIBLIOGRAPHY

Journals:

- Alfina, Sita Tahta, and Yovita Arie Mangesti. "Peran Majelis Disiplin Profesi Dalam Penyelesaian Sengketa Medis Ditinjau Dari Undang-Undang Nomor 17 Tahun 2023 Tentang Kesehatan." *Quantum Juris: Jurnal Hukum Modern* 7, no. 1 (2025): 62-82.
- Amiati, Mia, Hamzah Halim, and Jady Zaidi Hassim. "Navigating ambiguity: Critiques of Indonesia's health law and its impact on legal redress for medical malpractice victims." *Hasanuddin Law Review* 10, no. 1 (2025): 94-107.
- Anjum, Rani Lill, Samantha Copeland, and Elena Rocca. *Rethinking causality, complexity and evidence for the unique patient: a causehealth resource for healthcare professionals and the clinical encounter*. Cham: Springer Nature, 2020.
- Ardi, 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, no. 3 (2023): 185-201.
- Aripkah, Nur, Kalen Sanata, Khairunnisa Noor Asufie, and Reza Pramasta Gegana. "Pembaharuan Konsep Hukum Pidana dalam Undang-Undang No. 1 Tahun 2023 Tentang KUHP." *Jurnal Fundamental Justice* 6, no. 2 (2025): 209-226.

- Bal, B. Sonny. "An introduction to medical malpractice in the United States." *Clinical orthopaedics and related research* 467, no. 2 (2009): 339-347.
- Christiani, Theresia Anita. "Normative and empirical research methods: Their usefulness and relevance in the study of law as an object." *Procedia-Social and Behavioral Sciences* 219 (2016): 201-207.
- Di Landro, Andrea R. "Criminal law as a response to medical malpractice: pluses and minuses-comparing Italian and US experiences." *Med. & L.* 31 (2012): 221.
- Fekry, Moussa Ahmed, Ibrahim Suleiman Al Qatawneh, Ramzi Madi, Moustafa Elmetwaly Kandeel, and Maher Haswa. "Penal Liability Arising from Medical Malpractice: A Comparative Study of Egypt and France". *Pakistan Journal of Life and Social Sciences* 21, no. 2, (2023): 793-806.
- Ghozali, Muhammad, Cut Afra, Deddi Agusriadi, and Sudirman Suti. "Legal Consequences of Medical Accidents and Medical Malpractice in Indonesia." *International Journal of Law, Social Science, and Humanities* 1, no. 2 (2024): 76-82.
- Hapsari, Cinthia Mutiara. "Tinjauan Hukum Terhadap Kerahasiaan Rekam Medis Menurut UU No. 29 Tahun 2004." *Surya Medika: Jurnal Ilmiah Ilmu Keperawatan dan Ilmu Kesehatan Masyarakat* 19, no. 2 (2024): 128-137.
- Herningtyas, Tuti, Endah Labati, and Anna Veronica Pont. "Legal Aspects of Medical Malpractice: Patient Protection and Physician Liability." *International Journal of Health, Economics, and Social Sciences (IJHESS)* 7, no. 2 (2025): 860-865.
- Indrawan, Khadafi, M. Fakihi, and Budiyo Budiyo. "Peran majelis kehormatan disiplin kedokteran indonesia dalam kasus pelanggaran standar profesional dokter." *Justicia Sains: Jurnal Ilmu Hukum* 9, no. 2 (2024): 455-469.
- Irawati, Sri Ayu. "Perbedaan Sengaja dan Tidak Sengaja dalam Hukum Pidana." *Ideas: Jurnal Pendidikan, Sosial, dan Budaya* 10, no. 4 (2024): 1137-1146.
- Kainde, Baby Ivonne Susan, and Ika Dewi Sartika Saimima. "Rekonstruksi Pasal 66 Ayat (3) Undang-Undang No. 29 Tahun 2004 Tentang Undang-Undang Praktik Kedokteran Terkait Tata Cara Pengaduan Tindakan Malapraktik Dokter di Indonesia." *Jurnal Hukum Sasana* 7, no. 2 (2021): 56-74.
- Koterov, A. N. "Causal criteria in medical and biological disciplines: history, essence, and radiation aspect. Report 1. Problem statement, conception of causes and causation, false associations." *Biology Bulletin* 46, no. 11 (2019): 1458-1488.

- Lazuardi, Irwan, and Siti Marwiyah. "Analysis of informed consent as the legal protection of physician relationships and patients in malpractice case." *Policy Law Notary Regul* 2023 (2023): 2.
- Mustafa, Ghulam, and Ede Surya Darmawan. "Strengthening legal frameworks and patient safety: A narrative review of medical and dental malpractice in Indonesia." *Jurnal ARSI: Administrasi Rumah Sakit Indonesia* 11, no. 1 (2024): 2.
- Nadeak, Jasmen Ojak Haholongan. "Penerapan Disiplin Profesi Sebagai Instrumen Penegakan Hukum Pidana Kesehatan Berbasis Keadilan Prosedural." *Proceeding Masyarakat Hukum Kesehatan Indonesia* 1, no. 01 (2024): 184-195.
- Negara, Tunggul Ansari Setia. "Normative legal research in Indonesia: Its originis and approaches." *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (2023): 1-9.
- Pantow, Jefta Calvin, Roy Ronny Lembong, and Harly Stanly Muaja. "Analisis Yuridis Terhadap Pelanggaran Pada Penanganan Profesi Medis Dan Kesehatan Dalam Undang-Undang Nomor 17 Tahun 2023 Tentang Kesehatan". *LEX ADMINISTRATUM*, 13 no. 3, (2025): 232-251.
- Parra, Camila Olarte, Lorenzo Bertizzolo, Sara Schroter, Agnès Dechartres, and Els Goetghebeur. "Consistency of causal claims in observational studies: a review of papers published in a general medical journal." *BMJ open* 11, no. 5 (2021): e043339.
- Puspitasari, Dinarjati Eka. "Aspek Hukum Penanganan Tindakan Malpraktek Medik Di Indonesia." *Lambung Mangkurat Law Journal* 3, no. 2 (2018): 242-261.
- Putra, Eduardus Raditya Kusuma. "Aborsi Tanpa Indikasi Medis dalam Sudut Pandang UU No 17 Tahun 2023 Tentang Kesehatan, Kitab Undang-Undang Hukum Pidana dan UU No 1 Tahun 2023." *Jurnal Cahaya Mandalika ISSN 2721-4796 (online)* (2024): 1129-1143.
- Radanović, Nina Mišić, and Ivan Vukušić. "Causation in medical malpractice." *EU and comparative law issues and challenges series (ECLIC)* 4 (2020): 771-797.
- Rokan, Mustika Putra. "Royalty Management Regulation for Song and/or Music Copyright: The Needs of Indonesian Musicians." *Locus: Jurnal Konsep Ilmu Hukum* 1, no. 1 (2021): 30-37.
- Siregar, Rospita Adelina, Alif Muhammad Sudarmanto, Eko Nurmardiansyah, and Hari Pudjo Nugroho. "Majelis disiplin profesi sebagai primum remedium berdasarkan Undang-Undang Nomor 17 Tahun 2023 tentang kesehatan." *Jurnal Hukum to-ra: Hukum Untuk Mengatur dan Melindungi Masyarakat* 10, no. 3 (2024): 491-505.

- Soge, Albertus D. "Analisis Penanganan Kesalahan Profesi Medis dan Kesehatan Dalam UU Nomor 17 Tahun 2023 Tentang Kesehatan Menurut Perspektif Hukum Kesehatan." *Jurnal Hukum Caraka Justitia* 3, no. 2 (2023): 146-164.
- Taylor, Greg. "Concepts of intention in German criminal law." *Oxford Journal of Legal Studies* 24, no. 1 (2004): 99-127.
- Tegnan, Hilaire. "Law and medical disciplinary sanctions: Enhancing medical practice and health quality in Indonesia." *J. Legal Ethical & Regul. Issues* 21 (2018): 1.
- Thielscher, Michael. "Causality and the qualification problem." *KR* 96 (1996): 51-62.
- Tinungki, Jeniffer Poelmarie. "Kewajiban Dokter dalam Membuat Rekam Medis Menurut Undang-Undang No 29 Tahun 2004." *Lex Et Societatis* 7, no. 5 (2019): 34-53.
- Vuletić, Igor. "Medical malpractice as a separate criminal offense: a higher degree of patient protection or merely a sword above the doctors' heads? The example of the Croatian legislative model and the experiences of its implementation." *Medicine, law & society* 12, no. 2 (2019): 39-60.
- Wangga, Maria Silvya E. "Implementation of Restorative Justice in Criminal Cases in Indonesia." *Law and Humanities Quarterly Reviews* 1, no. 3 (2022): 353-368.

Books:

- Brazier, Margaret, and Emma Cave. *Medicine, patients and the law*. Oxford: Manchester University Press, 2016.
- Marzuki, Mahmud. 2017. *Penelitian Hukum*. Yogyakarta: Kencana.
- Soekanto, Soerjono, and Sri Mamudji. 1986. *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Rajawali Press.

Websites:

- DA, Ady Thea. "Menkes Budi: Malpraktik Tak Bisa Langsung Diproses Pidana". *Hukum Online*, July 2, 2025. <https://www.hukumonline.com/berita/a/menkes-budi--malpraktik-tak-bisa-langsung-diproses-pidana-lt6864c872b22cc/>. Accessed on October 30, 2025.