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# Alternative Settlement of Medical Malpractice Cases in The Perspective of Legal Sociology

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***Abstract.*** *Medical malpractice always gets the spotlight or complaints and catches the law enforcement officials as a mistake made by doctors, midwives, nurses, pharmacists or hospitals. In fact, it is not uncommon for cases like this to be exposed in the mass media and other social media, as if the suspect suspected of committing malpractice had indeed committed the act (Media as a Pre-Court). In addition to requiring proof and the opinion of experts in their field, a health practitioner is a noble occupation, so good name is also valuable in carrying out their activities as health practitioners. Cases of suspected medical malpractice are rarely examined in terms of causality (cause and effect), whereas reviewing other actions as a cause and effect of the alleged malpractice is important, which is why it is necessary to use Restorative Justice before taking action, especially in cases of medical malpractice. This paper describes the existence of the Restorative System in the Indonesian judicial system as a concept that is very relevant if used to resolve cases related to health practitioners and good name in carrying out their profession. This paper is conceptual with descriptive analysis method. It can be concluded that the Restorative system in the settlement of Malpractice cases is a way out of the problems and trauma faced by health practitioners as a win-win solution in the face of claims or demands against them.*

***Keywords:*** *Alternative; Law; Malpractice; Sociology.*

## 1. INTRODUCTION

Cases that are currently hot in Indonesia are religious practitioners and health practitioners who are caught in the law with allegations of having committed an act that can be criminalized, even though there is a legal system in Indonesia, namely the presumption of innocence, and in legal sociology they are human figures who have noble professions, but because of a presumption of committing an act that can be criminalized, the law enforcement apparatus and the media seem to generalize cases like this with cases committed by other people or other practitioners, even though there are no regulations or laws governing this issue.

The system of law and procedure in policing in Indonesia still looks rigid and unprofessional, for example, cases of malpractice committed by a doctor or immoral crimes committed by a religious figure reported by the public to the police. These two figures of the human profession, sociologically, are honorable practitioners in the eyes of society and ethically.

The treatment of suspects by these two professions should be slightly different, especially since Indonesia has a *presumption of innocence* system.

This is *a* principle that applies in our criminal procedure law, namely the presumption of innocence. Every person who is suspected, arrested, detained, prosecuted and or brought before the court shall be presumed innocent before a court decision declaring his guilt and obtaining permanent legal force[1] .

In other words, this is the provision that must be adhered to by law enforcement officials in treating suspects or defendants as innocent human beings until a final judicial verdict. Actually, the presumption of innocence is not a pure concept of a principle that originated and is only owned by Indonesia, but it belongs to the world or is applied in various aspects of life in various countries, this is as explained by Oemar Seno Adji.[2] Some examples of the presumption of innocence in practice can be found in the 1984 UN *Universal Declaration of Human Rights, the* 1960 *European Convention on Human Rights,* and the 1966 *International Covenant on Civil and Political Rights*.[3]

But for special cases involving people who have professions as people who are considered as "saviors", there are exceptions, because if proven guilty or innocent, this is considered a big disgrace which results in psychologically making their performance in the eyes of the community will fall. It is common, in our tradition of 999, for a person's good deeds not to be seen in light of a single mistake he has made, meaning that there is no good deed with only one mistake.

This solution has actually begun to be understood by the Police with the existence of the *Restorative Justice* process, which is a form of *win-win solution* before reaching the making of the report (BAP). The meaning of restorative justice is an alternative case resolution with a mechanism that focuses on punishment which is changed to a dialog and mediation process involving all relevant parties. The basic principle of restorative justice is the recovery of victims who have suffered from crimes by providing compensation to victims, peace, perpetrators doing social work and other agreements. (Article 1 letter 3 of Police Regulation Number 8 of 2021) The requirements for the implementation of restorative justice are contained in Attorney General Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice and Police Regulation Number 8 of 2021 concerning Handling Crimes based on Restorative Justice.

Restorative justice is one of the principles of law enforcement in resolving criminal cases. Restorative justice can be used as an instrument of recovery and has been implemented by the Police, Prosecutor's Office and Supreme Court (MA) in the form of policy implementation.

## 2. RESEARCH METHODS

### Alternative Case Resolution

The settlement of cases that occur in the community often takes the form of family settlements or using alternative settlements so as not to reach the realm of the police,

[1] Article 8 of Law No. 14/1970 on the basic principles of judicial power yuntoUUD RIS 1949 article 14, UUDS 1950 article 14 and then Law No. 19/1964 (Basic Judicial Law) article 5.
[2] Ikhsan Mardji Eko Putro. (1985). *Asas Praduga Tidak Bersalah dan Hak-hak Asasi Manusia di Dalam Kuhap. Penerbit Pascasarjana UI*. Jakarta. P. 7.
[3] Triyanto. (2013). Regulasi Perlindungan Hak Asasi Manusia Tingkat Internasional. *Jurnal PPKN* vol 1 No 1. P. 4.

let alone go to court. This term is often referred to as *Non Litigation* Settlement, although it has the term outside the court, but even this out-of-court settlement system is recognized by law.[4]

The Arbitration Law No. 30 Year 1999, shows us that the law also emphasizes alternative dispute resolution in the form of mediation (and the use of experts). It does not even rule out the possibility of dispute resolution through other forms of alternatives. This alternative resolution is mentioned in the Arbitration and Alternative Dispute Resolution Law No. 30/1999.[5]

Now other alternatives known in Indonesia are negotiation, consultation, mediation, conciliation and expert judgment in their fields. Even according to Frans Winarta, the dispute resolution institution consists of :

a. **Consultation:** a "personal" action between a certain party (client) and another party who is a consultant, where the consultant gives his opinion to the client according to the needs and needs of the client.
b. **Negotiation:** an effort to resolve the parties' dispute without going through litigation with the aim of reaching a mutual agreement on the basis of more harmonious and creative cooperation.
c. **Mediation:** A way of resolving disputes through a negotiation process to reach an agreement between the parties with the assistance of a mediator.
d. **Conciliation:** the mediator will act as a conciliator with the agreement of the parties by seeking an acceptable solution.
e. **Expert judgment:** the opinion of experts on a technical matter and in accordance with their field of expertise.[6]

In the settlement of civil cases, it is called Arbitration as an alternative settlement institution.[7]

Currently, alternative solutions are increasingly popular, especially with the strengthening of *statements* from the National Police Chief and the Attorney General's Office with the term *Restorative Justice*. This term is called "If the police desk can solve legal problems fairly, why go to court". There are several alternative methods that can be used in resolving malpractice cases, namely;

a. ADR (Alternative Dispute Resolution)
b. BANI (Indonesian National Arbitration Board)
c. LPSK (Lembaga Penyelesaian Sengketa Konsumen)
d. RJ (Restorative Justice)

[4] The Explanation of Article 3 of Law No. 14/1970 on the Basic Provisions of Judicial Power states "Settlement of cases outside the court, on the basis of peace or through a referee (arbitration) is still allowed.
[5] Munir Fuady, (2000), *Arbitrase Nasional, Alternatif Penyelesaian Sengketa Bisnis*, Citra Aditya Bakti, Bandung, p. 3.
[6] Frans Hendra Winarta. (2012). *Hukum Penyelesaian Sengketa*. Jakarta: Sinar Grafika. P. 7.
[7] Arbitration, according to Law No. 30 of 1999, is a method of resolving a civil dispute outside the public courts based on an arbitration agreement made in writing by the parties to the dispute.

In this paper, the author tries to focus the discussion only on the Restorative Justice alternative resolution system. Restorative Justice (RJ) is commonly used with the legal language that develops as Restorative Justis, this is another term used by legal practitioners to replace the term case settlement with Non Litigation Efforts, or in other words to term the settlement by means of peace.

However, the terms that have been built with a very polite language style are sometimes damaged by the news published by print and non-print media through news covered by journalists of each media. Whereas law enforcement officers themselves have upheld the values or principles contained in procedural law, namely the presumption of innocence, although in the process of arresting law enforcement officers must have evidence that is considered accurate (not authentic) to summon or arrest a suspect. For example, news in the media (print or online), which reports on a case usually seems as if the news conveyed is an act that is wrong and can be punished, even though Indonesia has a legal system of presumption of innocence. This means that anyone who has committed an act that is suspected of having committed a mistake that can be criminalized, with the news in the media, it is as if the suspects have been convicted by the media.

Moreover, a religious figure or a doctor who is arrested by the police for a case that is suspected of having committed an act that violates the law, then the media without being obstructed by the police let cover the case and then expose it to the general public in general who do not understand the principle of presumption of innocence in the legal system in Indonesia.

The definition of *restorative justice* is an effort to provide a restoration of relationships and redemption of mistakes that the perpetrator of the crime (his family) wants to make to the victim of the crime (his family) ( peace efforts) outside the court with the intention and purpose that legal problems arising from the occurrence of criminal acts can be resolved properly by reaching agreement and agreement between the parties[8] . In 2020 the Court Institutions in Indonesia have implemented the Restorative system even though it is only at the level of the Attorney General's regulation, and in 2021 the Indonesian National Police issued the Indonesian National Police Regulation on Restorative which will be applied in certain cases against suspects who have committed an act that is suspected of being a criminal act.

Restorative justice in the perspective of Police regulations is the resolution of criminal acts by involving perpetrators, victims, families of perpetrators, families of victims, community leaders, religious leaders, traditional leaders, or stakeholders to jointly seek a fair settlement through peace by emphasizing the selection of a return to the original state[9] .

The restorative resolution in the police perspective is a bit unique, because it involves community, religious and traditional leaders who are an important part of the sociology cycle to achieve benefits in social life.

[8] Hanafi Arief, dkk, (2018), Penerapan Prinsip *Restorative Justice* dalam Sistem Peradilan Pidana Di Indonesia,*Jurnal Al'Adl*, Volume X Nomor 2, p. 1.
[9] Indonesian Police Regulation No. 1 of 2020 concerning Handling Criminal Offenses Based on Restorative Justice. Article 1 Letter 3.

However, in contrast to the perspective of the prosecutor's regulation in understanding and implementing Restorative Justice, Restorative Justice is the resolution of criminal cases by involving perpetrators, victims, families of perpetrators / victims, and other related parties to jointly seek a fair solution by emphasizing recovery back to its original state, and not retaliation[10] .

The prosecutor's regulation shows that peaceful settlements only involve the victim's family and other relevant parties without the involvement of community, traditional and religious leaders.

There is another restorative view from another regulation, namely the Juvenile Justice law, "Restorative Justice is the settlement of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair settlement by emphasizing recovery back to its original state, and not retaliation."[11] The perspective of this law emphasizes the involvement of the family and other related parties with the aim of recovery.

The meaning of restorative justice is an alternative case resolution with a mechanism that focuses on punishment which is changed to a dialog and mediation process involving all relevant parties. The basic principle of restorative justice is the recovery of victims who suffer from crime by providing compensation to victims, peace, perpetrators doing social work and other agreements. In the implementation of restorative justice, the offender has the opportunity to be involved in restoration, the community plays a role in preserving peace, and the court plays a role in maintaining public order.

Restorative case resolution should not use mediators at the police station or prosecutor's office, nor should it involve police or prosecutor's office officials, but it can use other institutions or other institutions or mediators using other people who are considered to fulfill the elements of justice. Although restorative settlements are not part of litigation, in order for the settlement to be considered as evidence of good faith using restorative means, the agreement must be contained on stamped paper, signed by both parties and witnesses**.**

## 3. RESULT AND DISCUSSION

### 3.1 Medical Malpractice

Malpractice, is a term given to a doctor who performs an act of treatment, but the patient experiences adverse physical or psychological effects.

There are several terms in the medical world that can be categorized as an act of malpractice, namely:

a. *Negligence* (negligence of health practitioners)
b. *Informed Consent*.
c. Liability *of Hospital*
d. *Prudent Patient Test (*patients are used as test material*)*

[10] Regulation of the Indonesian Prosecutor's Office No. 15 of 2020 concerning Discontinuation of Prosecution Based on Restorative. Article 1 Paragraph 1.
[11] Law No. 11 of 2012 on the Juvenile Criminal Justice System. Article 1 point 6

In addition to wrongful assumptions made by health practitioners, patients can also make fatal mistakes that result in death or worsening of the disease, this term is referred to as *Contributory Negligence Patient.*

In this paper, the author does not discuss the issue of malpractice in detail, but what is discussed in this paper is the judgment of the public if there is a presumption that a doctor or health practitioner has made a mistake against him or his family which results in a presumption of malpractice. What action will be taken by the patient or family, whether using litigation or non-litigation.

Because there is no assistance to patients who feel harmed, so that their own interpretation of an act committed by a health practitioner appears that the act was deliberately committed by a health practitioner.

Sometimes the patient's family, who are not well-versed in the law, immediately report the actions taken by the health practitioner to the police station and report that the health practitioner has committed malpractice.

In fact, there are many things that cause the actions or actions of health practitioners so that they result in deliberate actions by health practitioners who have committed malpractice.

The failure of a practitioner to take a medical action is not only caused by the ability of the practitioner, or the lack of medical equipment in a hospital, or the carelessness of the practitioner in taking medical action.

There are other things that can cause the failure of health practitioners to save patients who are in critical condition, for example:

a. Negligence by the patient towards the abstinence from the disease they have been suffering from.
b. The patient's environment has been polluted by a factory that does not use EIA in waste management, so the effects of the waste make the condition of the community around the factory experience chronic diseases.
c. Or there is an element of causality, namely that the patient experiences a worsening illness and even causes death due to non-standard medical equipment sold by the procurer of medical equipment to the hospital.

To solve complex problems like this, a win-win solution is needed, in a way that has begun to be recognized and applied in Indonesia, namely *Restorative Justice* (RJ).

The background of the idea of *"penal mediation"* includes the idea of victim protection, the idea of harmonization, the idea of *restorative justive, the idea of* overcoming rigidity / formality in the prevailing system, the idea of avoiding the negative impression of the Court system and the system in the existing criminal law, especially in finding alternatives *to imprisonment (alternative to custody)* and so on. The background of *pragmatism is,* among other things, to reduce the stagnation or accumulation of cases, to simplify the court process and so on[12] . Sometimes it can be

[12] Barda Nawawi Arief, (2007), *Penal Mediation* in the Settlement of Banking Disputes / Problems with Criminal Aspects outside the Court, *Kapita Selekta* Hukum *(Welcoming the 50th Anniversary of the Faculty of Law UNDIP)*, Publisher of the Faculty of *Law* UNDIP, Semarang, p. 14.

said that the motivation for utilizing alternative dispute resolution is referred to as the principle of solving problems by working together. It is also said that alternative dispute resolution can achieve better results than the judicial system.

With many business activities, it is impossible to avoid the occurrence of *disputes (dispute/difference)* between the parties involved, where the settlement is carried out through the process of court mechanisms *(litigation)*. This process takes a long time, therefore this settlement model is not accepted in the business world because it is not in accordance with the demands of its development.

The reasons that often arise for choosing alternative solutions are because they want to cut case bureaucracy, costs and time so that they are relatively faster at relatively lower costs, more able to maintain *social harmony* by developing a culture of deliberation and a non-confrontational culture. Through this path, it is hoped that there will not be a *lose-win* principle but a *win-win* principle, the parties feel victorious so as to avoid the occurrence of *hard feelings* and *loosing face*[13] .

On the other hand, the doctor's profession is an honorable and respected profession, RJ is a solution to help resolve problems that occur between patients and health practitioners, so that the honor and dignity of doctors are maintained by the RJ media.

Not to mention the duties of a doctor, for example a surgeon who has a schedule of operating on patients in several hospitals. If cases of alleged malpractice are reported to the police and the doctor is arrested and imprisoned for a certain period of time, it will have fatal consequences for patients who will be operated on by the doctor.

RJ, is the best solution in helping to resolve cases of alleged malpractice committed by health practitioners.

Ultimately, it is the community that decides whether to use alternative means of consultation with the doctor, health practitioner or hospital, or to use litigation in resolving cases of alleged malpractice.

There is another side that is often forgotten when there is an assumption that a doctor or health practitioner has committed an act that is considered malpractice, namely the existence of a causal relationship between the occurrence of the act and the outside medical world, this term is called the Principle of Causality[14] .

This principle is rarely put forward by law enforcement officials, especially in cases related to the medical world, doctors, midwives, nurses and hospitals.

For example, a person has heart disease, and the doctor's restriction is to drink coffee, then on another occasion, this person drinks coffee at a coffee shop or café, for some reason his heart feels an attack, then immediately goes to the hospital, after the doctor takes medical action, this person dies. Because they did not accept this problem, the family disputed the hospital or doctor who had committed malpractice. Whereas the real cause was the coffee concoction made by the coffee shop/café that the person drank and resulted in his heart disease and death.

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[13] Muhammad Djumana, (199), *Aspek Hukum Perjanjian Desain Industri Indonesia*, Penerbit Citra Aditya Bakti, Indonesia, p. 98.

[14] Eva Achjani Zulfa, (2015), *Hukum Pidana Materil & Formil: Kausalitas, USAID-The Asia Foundation-kemitraan Partnership*, Jakarta, p.160.

The cause of death was not when the doctor took medical action, but the coffee that this patient drank and caused his heart disease to flare up to a serious condition and death.

The author also does not discuss causality in this article, as a reference to understand that the study of causal issues must also be addressed in cases such as an act of a health practitioner that is considered an act of malpractice.

### 3.2 Honorable Profession

The author tries to bring this paper towards the view of Legal Sociology, where community involvement in the implementation of law and law enforcement is also influenced by the social strata that live in society.

Sociology of law is a study whose object is legal phenomena, but uses social science optics and sociological theories so that it is often misinterpreted not only by non-law circles, but also from the law itself. The approach used in the study of legal sociology is different from the approach used by legal sciences, such as criminal law, civil law, procedural law. The similarity is only that both the science of law and legal sociology, the object is law. So even though the object is the same, namely the law, but because of the different "glasses" used in looking at the object, it is different also the vision of the object[15] .

Even Curzon explains the study of legal *sociology* or the term *legal sociology* as follows: "*The learn 'legal sociology' has been used in some texts to refer to a specific study of situations in which the rules of law operate, and of behavior resulting from the operation of those rules*"[16] So, Curzon apparently sees the use of the term *legal sociology* also to indicate a specific study of situations *in* which the rules of law are implemented, and the behavior resulting from the implementation of the rules of law.

From here it is clear that the difference between (normative) legal sciences such as criminal law, state law and procedural law, with the sociology of criminal law, sociology of state law, sociology of procedural law is that normative legal science emphasizes the study of *law in books,* law as it should be, and therefore is in the world of *sollen*.

In contrast, legal sociology emphasizes the study of *law in actions,* law in its implementation, law in reality, law in human behavior, which means in the world of *sein.* Legal sociology uses an empirical approach that is descriptive in nature, whereas legal science uses a normative approach that is prescriptive.

In legal science, the law as its object is seen from within the law itself. Conversely, legal sociology also places law as its object, but by looking at it from outside the law using the concepts of various social sciences. This is in line with what Samuel Mermin stated that: *"The life of Law has not been logic; it has been experience"*[17] So, the law for empiricists is seen not just as something logical, but more importantly the law is something that is experienced in real life.

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[15] Achmad Ali. (2012). *Menjelahi Kajian Empiris Terhadap Hukum.* Kencana Prenada Media Grup. Jakarta. P. 73.
[16] Curzon, L.B. (1979), *Jurisprudence.* M & E Handbook, pp. 137
[17] Samuel Mermin. (1982). *Law and the Legal System: An Introduction*. Paperback. P. 3

Social status is usually based on various elements of human interests in social life, namely occupational status, status in the kinship system, position status and religious status, caste, property and throne. With status, a person can interact well with others, even many in everyday life do not know other people individually, but only know their status[18] .

In our society in Indonesia, there are levels of professions, hence the term elite professions or high social status. The formation of this social status is not made up, but it is a habit that has existed in the legal society.

The author categorizes these elite professions or high social status as health practitioners (doctors, thabibs, fracture healers, traditional birth attendants, herbalists, midwives, village orderlies etc.) and the second is religious practitioners (kyai, Abuya, ustadz, Quran teachers, kadi masters, priests, priests, monks etc.).

In this discussion, the author relates this social status to the application or enforcement of law, in this case the alleged malpractice committed by a doctor. The settlement carried out in the event of alleged wrongdoing using alternative problem solving, namely Restorative Justice.

## 4. CONCLUSION

An allegation of illegal or unlawful acts committed by any individual is not considered guilty because there is a presumption of innocence, so that without a court decision, before the law the suspects are not considered guilty. With the existence of a win-win solution, as the incarnation of a non-litigation court, the face of law enforcement in Indonesia began to shine. The existence of alternative solutions is a philosophy "if at the police table the problem can be solved, why should it come to the court table". The purpose of law enforcement is to achieve justice and benefit, not just the application of the law. Finally, people who have a respectable and respected social status will feel comfortable undergoing case settlement with a win-win solution.

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