

## **Analysis of Judge's Decision in Case of Sexual Harassment by Doctor Against Patient**

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**Abstract.** *This study aims to determine and analyze the basis for the judge's considerations in passing a verdict on a case of sexual harassment by a doctor against a patient in decision Number 114/Pid.Sus/2021/PN.Idi, the weaknesses of the judge's decision in the case of a criminal act of sexual harassment by a doctor against a patient in decision Number 114/Pid.Sus/2021/PN Idi, and analyze the judge's decision in the crime of sexual harassment by a doctor against a patient in the future. This study uses a normative legal approach method. The research specifications are descriptive analytical, the type of data used is secondary data. The data analysis method used is qualitative. The theories used in this study are the theory of punishment, the theory of the legal system and the theory of legal certainty. Based on the results of the study, it can be concluded that the basis for the judge's considerations in passing a verdict on a case of sexual harassment by a doctor against a patient in decision Number 114/Pid.Sus/2021/PN.Idi is correct, namely the fulfillment of the charges and linked to the available evidence so that there is no element of unlawfulness, because the action was carried out for the benefit of examining the patient. The weaknesses of the judge's decision in the case of a doctor's sexual harassment crime against a patient in decision Number 114/Pid.Sus/2021/PN Idi are the absence of a Medical Ethics Honorary Council (MKEK) hearing, the absence of coordination between law enforcement officers and investigators, the absence of expert witnesses from forensic doctors, and the absence of a complaint from the victim to the MKDKI regarding the doctor's harassment against the victim. The judge's decision in the case of a doctor's sexual harassment crime against a patient in the future is expected to provide justice and protection for victims with legal certainty.*

**Keywords:** *Decision; Harassment; Sexual.*

## 1. Introduction

Indonesia is a country based on law, as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI), the consequence of which is that all forms of decisions, actions of state apparatus, all attitudes, behavior and actions of society must have legal legitimacy.<sup>1</sup>The characteristics of a state based on law are (a) Supremacy of law, (b) Equality before the law and (c) Due process of law.<sup>2</sup> The rule of law in question is not just about preventing violations of the law and taking action against those who break the law, but is broader than that.<sup>3</sup> The rule of law here means "Welfare State". In this concept, there is an obligation for the government to realize the goals of the state through development including the enforcement of criminal law.<sup>4</sup>

One of the crimes that has received attention is sexual harassment, which can occur anywhere, both in public places such as hospitals, and in private places.<sup>5</sup>In the Criminal Code, indecent acts are referred to as regulated in Articles 289 to 296 of the Criminal Code. Sexual harassment carried out by doctors is regulated in Article 294 paragraph (2) 2 of the Criminal Code with a maximum prison sentence of 7 years. One example of a case of sexual harassment experienced by an 18-year-old woman is suspected of being carried out by a doctor who practices at a clinic in the Cikupa area, Tangerang Regency.<sup>6</sup>Another case example is sexual harassment by a doctor against a patient at a hospital in Aceh.<sup>7</sup>

The enforcement of criminal law on harassment by doctors is not free from several problems, which if not appropriate or there is a lack of evidence will affect the judge's decision.<sup>8</sup>which in the end the judge issued an acquittal. This is what happened in one of the cases of sexual harassment by a doctor against a patient in Decision Number 114/Pid.Sus/2021/PN.Idi, which was decided to be acquitted (onslagh).

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<sup>1</sup>Muhammad Adiel Aristo, Umar Ma'ruf, Criminal Law Police Against Actor of Criminal Performance Persecution, *Jurnal Daulat Hukum*, Volume 3 Number 1, 2020, p. 139.

<sup>2</sup>Hisyam Arib Herli U and Aji Sudarmaji, Legal Analysis of Judge's Decisions Against Perpetrators of Revenge Porn Crimes on Social Media (Study of Judge's Decision Number 555/Pid.B/2022/PN Jkt.Brt), *Sultan Agung Scientific Journal*, Sultan Agung University, Semarang, March 2023.

<sup>3</sup>Ismail Saleh, 1984, *The Period of Legal Authority: An Introduction*, Directorate of Legal Counseling, Department of Justice, Jakarta, p. 17

<sup>4</sup>Mulyana W Kusuma, 2002, *Upholding the Supremacy of Law (Trapped Between Choosing Law and Democracy)*, PT. Remadja Rosdakarya, Bandung, p. 3.

<sup>5</sup>Munawwarah and Eko Soponyono, Sexual Harassment Criminal Law Policy In Criminal Law Revision Of Indonesian, *Jurnal Daulat Hukum*, Volume 2 Issue 3, September 2019, p. 422

<sup>6</sup>Adrial Akbar, Woman in Tangerang harassed by doctor while changing clinic, police investigate, <https://news.detik.com>, accessed December 20, 2023.

<sup>7</sup>Agus Setiyadi, Prison Sentence for Aceh Doctor Allegedly Inserting Finger into Patient's Intimate Organs, <https://news.detik.com>, accessed December 20, 2023.

<sup>8</sup>Rusli Muhammad, 2011, *Indonesian Criminal Justice System, Complete with 4 Laws in the Field of Criminal Justice System*, UII Press, Yogyakarta, p. 13

The decision was based on the consideration that there were stages that were not carried out during the investigation process, namely the absence of a medical code of ethics hearing, so that the act was considered to have existed but it was still doubtful whether this was a criminal act or not considering that there was no decision from the medical code of ethics hearing. This shows that there are still weaknesses in the enforcement of criminal law against criminal acts of sexual harassment by doctors against patients.

This study aims to determine and analyze the basis for the judge's considerations in issuing a verdict in a case of sexual harassment by a doctor against a patient in verdict Number 114/Pid.Sus/2021/PN.Idi, the weaknesses of the judge's verdict in the case of a criminal act of sexual harassment by a doctor against a patient in verdict Number 114/Pid.Sus/2021/PN Idi, as well as the judge's verdict in the criminal act of sexual harassment by a doctor against a patient in the future.

## **2. Research methods**

This research uses a normative legal approach method, namely legal research conducted by examining library materials.<sup>9</sup> The research specification is descriptive analytical, the type of data uses secondary data with the data collection method is a literature study. The data analysis method uses qualitative analysis.

## **3. Results and Discussion**

### **3.1. The Judge's Consideration in Handing Down a Decision on the Case of Sexual Harassment by a Doctor Against a Patient in Decision Number 114/pid.Sus/2021/PN Idi**

The judge's consideration was correct, namely the judge considered the fulfillment of the elements of the crime in the first alternative charge, namely the fulfillment of the elements in Article 294 paragraph (2) 2 of the Criminal Code, namely the element of whoever; the element of administrator, doctor, teacher, employee, supervisor or assistant in a Community Institution, Educational Institution, orphanage, hospital, mental hospital or social institution; and the element of committing indecent acts with people who are admitted therein. Thus, the defendant was proven to have committed the act as charged. However, in this case the judge also concluded that the defendant's actions were not a criminal act, because what the defendant did was an examination of a patient based on a diagnosis and in accordance with his authority as a doctor.

Based on the visum et repertum, where the results of the visum between HM and NJ are no different, while it is known that HM is not married and NJ has been married for 8 years. This is a doubt for the judge, because the results of the visum between witnesses who are married and those who are not married are the same.

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<sup>9</sup>Soerjono Soekanto and Sri Mamuji, 1995, Normative Legal Research, A Brief Review, Raja Grafindo, Jakarta, p. 15.

While in this case, the public prosecutor did not present the doctor who made the *visum et repertum*.

In this case, the basis for the judge's consideration was that based on the testimony of a criminal law expert presented by the defendant's legal counsel at the trial, the expert was of the opinion that the defendant's actions in examining a patient without being accompanied by a nurse at the hospital were not a criminal act, but rather tended towards a violation of the procedures set by the hospital. This could not be directly processed through legal proceedings, but had to be examined first by the medical ethics council (MKEK). Therefore, the panel of judges was of the opinion that the defendant's actions in conducting the examination without being accompanied by a third party were a violation of the Indonesian medical code of ethics which was the authority of (MKEK) to examine and impose ethical sanctions on the defendant.

The acquittal decision is in accordance with the provisions of Article 191 paragraph (2) of the Criminal Procedure Code which states that, if the court is of the opinion that the act charged against the defendant has been proven, but the act does not constitute a criminal act, then the defendant is acquitted of all legal charges. Thus, the decision to acquit all legal charges is based on the following criteria:

- a. It is proven that what was charged to the defendant is valid and convincing.
- b. Even though it was proven, the judge was of the opinion that the alleged act could not be considered a criminal act.

### **3.2. Weaknesses of the Judge's Decision in the Case of Sexual Harassment by a Doctor Against a Patient in Decision Number 114/Pid.Sus/2021/PN Idi**

Based on the description of the judge's considerations in decision Number 114/Pid.Sus/2021/PN Idi, it can be seen that there are weaknesses in the decision, namely:

- a. The Medical Ethics Honorary Council (MKEK) hearing was not held

A doctor who is suspected of violating the code of medical ethics in this case committing a criminal act of molestation against a patient, will be summoned and tried by the IDI Medical Ethics Honorary Council (MKEK) to be held accountable (ethics and professional discipline). The MKEK trial aims to maintain accountability, professionalism and the nobility of the profession. Currently, MKEK is the only professional council that hears cases of alleged violations of ethics and/or professional discipline in the medical community. In the future, the Indonesian Medical Discipline Honorary Council (MKDKI), an institution mandated to be established by Law No. 29/2004, will be the council that hears cases of alleged violations of medical professional discipline.<sup>10</sup>

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<sup>10</sup>Endrio Firaldo Dandel, Veibe V. Sumilat, Roy R. Lembong, Legal Aspects of Violation of the Code of Ethics Concerning Medical Confidentiality, *Lex Crimen*, Vol. X No. 12, November 2021, p. 37

MKDKI aims to enforce the discipline of doctors / dentists in the implementation of medical practice. The domain or jurisdiction of MKDKI is professional discipline, namely problems that arise as a result of a professional's violation of the internal regulations of his profession, which deviate from what is expected to be done by people (professionals) with average knowledge and skills. If MKDKI in its hearing finds a violation of ethics, then MKDKI will forward the case to MKEK.<sup>11</sup>

In the decision of case Number 114/Pid.Sus/2021/PN Idi, it was known that there was no MKEK hearing, thus raising doubts for the judge whether the defendant could be blamed for his actions or not. This also shows a lack of coordination between investigators and the MKEK in resolving the case. As a result, the judge did not have confidence that the defendant's actions were a criminal act, so that in the end the defendant was acquitted.

b. Investigators did not include the results of the Medical Ethics Honorary Council (MKEK) trial as evidence.

In case Number 114/Pid.Sus/2021/PN Idi, it is known that the investigator did not include (attach) the results of the Medical Ethics Honorary Council (MKEK) hearing. To find out whether a doctor violates the code of ethics or not, it is determined in the decision of the MKEK Hearing.<sup>12</sup>

Legally, if a doctor commits an indecent act, it can be brought to court as a professional error, and if it is proven that the doctor did not deviate from the standards of the medical profession and has fulfilled the informed consent, then the doctor cannot be punished or declared free. The doctor is declared free based on the proof of the standards of the medical profession and informed consent and what was done in accordance with the SOP.<sup>13</sup>

In the case of decision Number 114/Pid.Sus/2021/PN Idi, there is no attachment regarding the results of the MKEK trial that can be used as a consideration for the judge. The absence of the results of the MKEK trial made the judge hesitate, so that even though the actions charged to the defendant were proven, the actions did not constitute a criminal act. This is because based on the medical records, what was done by the defendant was solely in the context of examining the patient based on the complaints submitted by the patient. Therefore, the defendant was found to be free from all legal charges.

c. Lack of coordination between law enforcement officers and the IDI, in this case the MKEK/MKDI and expert witnesses in the form of forensic doctors

In decision Number 114/Pid.Sus/2021/PN Idi, it was discovered that there were two victims of sexual harassment, where one of the victims (NJ) was married, while the other (MD) was not married. The visum et repertum on both victims

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<sup>11</sup>Ibid.

<sup>12</sup>28 Things That Are Included in Violations of Medical Discipline, <https://idi-jaksel.org>, accessed August 29, 2024,

<sup>13</sup>Fano Franklin Singa, Doctor's Errors and Sanctions, Lex Privatum, Vol. IV/No. 6/July/2016, p. 16.

turned out to be the same, namely that the hymen had a complete tear clockwise to the base due to a blunt object. This certainly made the judge hesitate, because the visum between the married victim and the unmarried victim were the same, even though one of the victims was not married.

In this case, the judge considered the testimony of the forensic doctor expert witness presented by the defendant, who provided information regarding the differences between old wounds and new wounds in the post-mortem results for victims of sexual crimes, namely in old wounds, if there is a tear in the hymen, the color of the wound is the same as the color of the surrounding skin or there is abdominal tissue, there is no redness or bleeding in the torn wound, while in new wounds if there is a tear in the hymen, the wound is reddish and can bleed and even be accompanied by abrasions and bruises.

In this case, the public prosecutor did not present a forensic expert witness who made the visum et repertum who could provide information related to the results of the examination explaining the condition of the torn wound on the victim's hymen and did not mention when the tear was estimated to have occurred so that it could not be ascertained whether the tear in the victim HM's hymen had occurred first or not. In this case, the Public Prosecutor also did not present a forensic expert who made and signed the Visum Et Repertum to be able to explain accurately and correctly the matters contained in the two visums and could be asked for information as an expert based on his knowledge, whether a finger inserted into the vagina could tear the hymen in the entire clockwise direction to the base and what caused the condition of the hymen of the two victims to be the same even though the victim HM had never been married. This resulted in the Panel of Judges not being convinced that the tearing of the witness's hymen was due to the defendant's actions. The judge's doubts ultimately became the judge's consideration in deciding to acquit the defendant.

d. The victim did not report the defendant's actions to the MKDKI/MKEK

In case No. 114/Pid.Sus/2021/PN Idi, it is known that the victim did not report his complaint to the MKDKI but directly reported it to the police. Mistakes that often occur in carrying out reporting or complaint procedures by patients (victims) where if a violation occurs by a doctor, the patient concerned must first report it to the MKDKI (Indonesian Medical Disciplinary Honorary Council) and MKEK (Medical Ethics Honorary Council). Only then will the MKDKI and MKEK determine the results of the examination after a disciplinary hearing has been held and the case will be handed over to the investigator (police). This is because the victims do not know the complaint procedure if they receive inappropriate treatment by a doctor in medical practice. Likewise, the investigators did not coordinate with the MKDKI to request an MKEK hearing in the case.

In this case, it is known that to determine whether the doctor is proven to have violated the code of professional ethics or not is determined in the MKEK trial and is not the authority of the court. Therefore, because there was no complaint from

the victim to the MKDKI, the MKEK trial was not carried out, so that investigators did not have evidence in the form of trial results that could strengthen the judge's belief that there was an unlawful element in the case.

### **3.3. Judge's Verdict In Criminal Case Of Sexual Harassment By Doctor Against Patient In The Future**

A decision is considered a crown that reflects the ethics, mentality, and morality of the judge who makes the decision. Judges are required to adjudicate cases based on national principles and laws, but are also required to adjudicate based on the sense of justice of the community.<sup>14</sup>

Sexual harassment cases by doctors towards patients are also a problem in several countries around the world. The most massive sexual harassment was carried out by Doctor David Mata from Oregon with 140 victims, but he only admitted to six cases. In this case, Doctor David was never tried and was only placed under house arrest. In several cases, it seems that there was an attempt to cover up by the hospitals where the doctors worked. Usually, the doctors are given sanctions by the disciplinary board, including having their practice licenses revoked. However, after that, the doctors may apply for a training permit again so that their practice rights can be restored.<sup>15</sup>

One of the cases of sexual abuse that occurred in the United States was sexual abuse by a gymnastics team doctor named Larry Nassar in the United States. In this case, there were 156 women who testified about the sexual abuse they experienced at a very young age. In the trial of the Ingham County Court, Michigan, United States, doctor Larry Nassar was proven to have committed a crime of sexual abuse and was sentenced to 175 years in prison.<sup>16</sup>

Another sexual harassment case occurred in Singapore, where the Court of Appeal in Singapore acquitted a doctor of raping, sexually harassing and abusing a female patient, after successfully proving that he had erectile dysfunction, including at the time of the alleged incident five years ago.<sup>17</sup>

Based on several examples of cases of sexual harassment by doctors against patients in several countries, it can be seen that in cases where the perpetrators were proven to have committed a mistake, they were sentenced to prison and paid a fine, but there were also those who were not tried and were only placed

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<sup>14</sup>Roland Aldini Hutahaean, et al, Legal Study of the Decision of Acquittal from All Legal Charges in the Criminal Act of Forgery of Documents (Study of the Decision of the Padang District Court Number 341/Pid.B/2017/PN Pdg), Rectum Journal, Vol. 5, No. 1, January 2023, p. 809

<sup>15</sup>Silviana Dharma, Sexual Harassment Scandal of 2,400 Doctors with Their Patients, <https://news.okezone.com>, accessed October 2, 2024.

<sup>16</sup>Larry Nassar case: 156 women confronted a predator, <https://www.bbc.com>, accessed October 2, 2024.

<sup>17</sup>Proven erectile dysfunction, Singapore doctor cleared of raping patient, <https://international.sindonews.com>, accessed October 2, 2024.

under house arrest. In the case of Singapore, a doctor was acquitted of all charges because he was proven to have erectile dysfunction.

In the examination of case No. 114/Pid.Sus/2021/PN IDi in the criminal act of sexual harassment by a doctor against a patient, there were several weaknesses so that the judge decided that the defendant was free from legal charges. In the criminal act of sexual harassment committed by a doctor against a patient, it will be very difficult to prove if it is not accompanied by strong and accurate evidence. This is because the actions of doctors in medical practice are always related to examining the patient's body, so even though the doctor is guilty of committing a crime, he can be free from legal charges if in the court examination process it cannot be proven that the defendant has committed a legal act by molesting the patient.

Based on several cases, both cases in other countries and cases in case number 114/Pid.Sus/2021/PN Idi, in the future, in the criminal justice process for cases of sexual harassment by doctors towards patients, the following matters should be considered:

a. It is necessary to hold a hearing of the Medical Ethics Honorary Council (MKEK) In criminal cases where the alleged perpetrator is a doctor, the doctor will be summoned and tried by the IDI Medical Ethics Honorary Council (MKEK) to be held accountable (ethics and professional discipline). The MKEK trial aims to maintain accountability, professionalism and the nobility of the profession.<sup>18</sup>

The decision made in the ethics and disciplinary panel hearing is based on evidence that is considered strong enough. Indeed, the evidence does not need to meet the same standard of evidence as in criminal law, which is as high as beyond reasonable doubt, but it is also not as low as in civil law, which is preponderance of evidence. According to many experts, the level of certainty in ethics and disciplinary matters depends on the type of problem. The level of certainty required is directly correlated with the severity of the alleged violation committed. The types of cases that can be decided in this panel are very diverse.<sup>19</sup>

The MKEK decision is not intended for the benefit of the trial, therefore it cannot be used as evidence in court, except by court order in the form of a request for expert testimony. Although the MKEK decision is not intended for the benefit of the trial, however, with the MKEK trial, the court requests testimony from expert witnesses who are directly involved in the MKEK trial to provide information related to the course of the trial and the results of the trial.

Article 132 paragraph (1) of the Criminal Procedure Code regulates the role of expert testimony in examinations at trial, including in the case of receiving a

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<sup>18</sup>Asep Sukohar, Novita Carolia, The Role of the Indonesian Medical Ethics Honorary Council (MKEK) in the Prevention and Resolution of Medical Malpractice JK Unila, Volume 1, Number 2, October 2016, p. 363

<sup>19</sup>Ibid.



complaint about a letter or writing that is fake or falsified or suspected to be fake by the investigator, then for the purposes of the investigation, the investigator can request information regarding this matter from an expert. Furthermore, Article 179 paragraph (1) of the Criminal Procedure Code states that anyone who is asked for their opinion as a forensic medicine expert or doctor or other expert is required to provide expert testimony for the sake of justice. Meanwhile, Article 180 paragraph (1) of the Criminal Procedure Code states that if it is necessary to clarify the facts of the matter that arise in court, the presiding judge may request expert testimony.

Based on the provisions of the Criminal Procedure Code above, the judge should be able to request information from the forensic expert who has prepared and signed the *visum et repertum* to clarify the examination matters outlined in the *visum et repertum*.

b. There needs to be coordination between law enforcement officials (investigators/prosecutors and IDI)

In the trial process involving doctors, the investigator should coordinate with the IDI to conduct an MKEK trial, or ask for information from the IDI that can explain whether or not there is an unlawful element in the crime of indecent assault. With information from the IDI, it can be used as a consideration for the judge, so that the judge has confidence in the existence of an unlawful element in the case being tried.

c. The need to present expert witnesses, including forensic doctors, in investigative examinations/trials.

The Public Prosecutor should present forensic expert witnesses involved in making the *visum et repertum* in the trial examination. This is to provide more detailed information related to the making of the *visum* which is the responsibility of the forensic doctor. With the information from expert witnesses, it can provide confidence for the judge in making the fairest decision and can provide protection for victims of sexual abuse.

In criminal law, a person's fault/negligence is measured by whether the perpetrator of the crime is able to take responsibility, and his actions are determined by 3 (three) factors, namely: 1) The mental state of the perpetrator of the crime. 2) The existence of a mental relationship between the perpetrator of the crime and the act he committed, which can be in the form of intent (*dolus*); negligence/negligence (*culpa*); and the absence of a reason for forgiveness. If the proof of the presence or absence of these three factors in the perpetrator of the crime is related to the above, then the perpetrator of the crime can only be sentenced if the act can be proven with evidence according to the law, namely those mentioned in Article 184 of the Criminal Procedure Code, namely witness statements; expert statements; Letters; instructions; Defendant's statement.

The principle of negative proof in criminal law is a principle adopted by Indonesia, which means that to declare someone proven to have committed a mistake is not

enough just based on valid evidence according to the law cumulatively, but must still be accompanied by the conviction of the judge. If associated with the case of molestation by a doctor to a patient, then expert testimony can also be given during the examination by the investigator or public prosecutor which is stated in one form of report. Furthermore, during the trial examination, expert witnesses can be asked to provide testimony under oath. Based on the description above, it is hoped that the judge's decision in the case of sexual harassment by a doctor against a patient can truly fulfill the victim's sense of justice.

#### **4. Conclusion**

The basis for the judge's consideration in issuing an acquittal in the case of sexual harassment by a doctor against a patient in decision Number 114/Pid.Sus/2021/PN.Idi is that the unlawful element has not been fulfilled, this is due to the lack of readiness of law enforcement officers, both investigators and prosecutors, in preparing the investigation and prosecution examination files. The judge's decision in the criminal act of sexual harassment by a doctor against a patient in the future is expected to provide justice and protection for victims with legal certainty.

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