

# Human Rights Perspectives on Resolving Medical Malpractice Cases through Penal Mediation in Indonesia

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## Abstract

*This study aims to analyze human rights perspectives in resolving medical malpractice cases through penal mediation in Indonesia and the United States and find solutions to improve human rights protection in resolving such issues in Indonesia. The research was conducted by juridical normative research methods with a comparative approach, and the analysis was carried out by legal hermeneutics. The results showed that penal mediation in resolving medical malpractice cases needs to be improved in Indonesia to pay more attention to the human rights of victims and perpetrators, especially regarding equality and recognition of victims. In the United States, it is necessary to create consistent and detailed federal laws regarding penal mediation to resolve medical malpractice cases. The legal concept/regulation of human rights protection in resolving medical malpractice cases through penal mediation in Indonesia must ensure that the human rights of victims and perpetrators are protected and that the solutions found meet the needs of both parties fairly and humanely.*

## 1. Introduction

The concept that everyone entering an educated profession seeks to carry out a reasonable level of care and skill dates back to the laws of ancient Rome and England. The writing on medical responsibility can be traced back to 2030 BC when the Code of Hammurabi established that "If the doctor has treated a man with a bronze lancet and has caused the man to die, or has opened an eye abscess for a man. A bronze spear has caused the loss of the man's eyes, and someone has to cut off his hand."<sup>1</sup>

Under Roman law, medical malpractice was considered false. Around 1200 AD, Roman law was expanded and introduced to continental Europe. After the Norman conquest of 1066, English common law was developed, and during the reign of Richard Coeur de Lion at the end of the 12th century, records were kept in the Court of Common Law and Plea Rolls. These records provide an unbroken line of medical malpractice decisions right up to modern times. For example, one of the earliest cases of medical malpractice from the UK stated that both a servant and his employer could claim damages against a doctor who had treated the servant and made him sicker by using "unhealthy drugs". In 1532, during the reign of Charles V, a law was passed requiring that the opinions of medical personnel be formally accepted in every case of violent death; It is a precursor to requesting expert testimony from members of the profession in claims of medical negligence, to establish standards of care.

In Indonesia, in general, civil law and criminal law in Indonesia are regulated by the Civil Code and Criminal Code. Tort law in Indonesia is based on Article 1365 of the Civil Code, which stipulates that "any person who causes harm to another person by mistake shall compensate for the losses suffered by the injured party". In the case of medical malpractice, the injured party may file a claim for damages, and medical personnel may be criminally liable for the harm caused to the patient.<sup>2</sup>

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<sup>1</sup> B. Sonny Bal, "An Introduction to Medical Malpractice in the United States," *Clinical Orthopaedics and Related Research* 467, no. 2 (1 Februari 2009): 339-47, <https://doi.org/10.1007/s11999-008-0636-2>.

<sup>2</sup> Aleksins Jemadu, "Problem of Human Rights in World Politics: Three Indonesian Case Studies," *Indonesian Journal of International Law* 4 (2007 2006): 75.

In the United States, medical malpractice laws have traditionally been under the authority of individual states and not the federal government, in contrast to many other states. To win monetary compensation for injuries related to medical negligence, a patient must prove that substandard medical care resulted in injury. Allegations of medical negligence must be filed on time; This legally prescribed period is called the "statute of limitations" and varies from state to state.

From the comparison made between the concept of malpractice in Indonesia and the United States, there are some essential differences in regulations and lawsuits related to medical malpractice. In Indonesia, civil and criminal law is regulated by the Civil and Criminal Code. In contrast, in the United States, the law of medical malpractice is regulated by each state. In Indonesia, tort law is based on Article 1365 of the Civil Code. In contrast, in the United States, a patient must prove that substandard medical care results in injury to win monetary compensation for injuries related to medical negligence.

Another difference relates to the legally prescribed period for filing a medical negligence claim. There is no legally specified time limit for filing a medical negligence claim in Indonesia. Meanwhile, the legal period for filing a medical negligence claim in the United States varies from state to state. This difference shows the differences in legal and regulatory approaches to medical malpractice between Indonesia and the United States.

In resolving medical malpractice cases, the human rights perspective is critical to pay attention to. Patients' rights to safe, qualified, and responsible medical care must be guaranteed. In Indonesia, claims for compensation and criminal liability against medical personnel who commit medical malpractice can be regarded as an effort to protect patient's rights. However, settlement through litigation channels can be time-consuming and costly and result in protracted conflicts.<sup>3</sup> In this case, penal mediation can be an effective alternative in resolving medical malpractice cases more quickly,

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<sup>3</sup> Kristine Pfenndt, "Minding the Gap Regarding Human Rights Education—a Renewed Call to Integrate Human Rights Education into All Levels of Professional Nursing Programs in the US," *Journal of Nursing & Patient Care* 03, no. 01 (2018), <https://doi.org/10.4172/2573-4571.1000e104>.

cost-effectively, and equitably for both parties. Through penal mediation, patients and medical personnel can reach mutually beneficial agreements and pay attention to the rights protected by human rights. Some states also implement mediation in resolving medical malpractice cases in the United States.<sup>4</sup> The resolution of medical malpractice cases through penal mediation or mediation in criminal cases in Indonesia and the United States differs in their arrangement and implementation. However, both countries share the same perspective on respecting human rights, especially the right to recognition, justice, and access to justice.

In Indonesia, penal mediation is regulated in Article 157 of Law Number 8 of 2019 concerning the Second Amendment to Law Number 8 of 1981 concerning the Criminal Procedure Law (KUHAP). The article states that mediation can be conducted by a public prosecutor, judge, or mediator appointed by the court to settle cases amicably by agreement between the perpetrator and the victim. However, mediation can only be carried out for cases with a criminal threat of fewer than nine years in prison and can only be carried out after an investigation.

In the United States, penal mediation is also provided for in the laws of various states. For example, in California, penal mediation is provided for in Sections 1346-1347.5 of the California Code of Law. Mediation can be conducted at the beginning of the trial or after the trial has begun, depending on the policies of the local court. However, mediation can only be carried out with the consent of both the perpetrator and the victim.<sup>5</sup>

For both countries, penal mediation can help resolve medical malpractice cases quickly and cheaply and avoid time-consuming trials. However, penal mediation in medical malpractice cases should be used with caution as it involves sensitive health and safety issues. In this case, the human rights perspective focus is the right to justice and access

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<sup>4</sup> Katarzyna Antolak-Szymanski, "Mediation in Polish Labour Law: Comparing Its Evolution and Development to Labour Mediation in EU and US Law," *Review of European and Comparative Law (RECoL)* 34 (2018): 21.

<sup>5</sup> Andrew Agapiou, "The Impact of Mediation Practice on and the Resolution of Grievances, the Preservation of Employment Relationships and Termination," *US-China Law Review* 13 (2016): 267.

to justice for victims. In the case of medical malpractice, the victim has the right to obtain fair compensation for the losses suffered. In the case of penal mediation, the agreement between the perpetrator and the victim must meet the standards of justice and not deprive the victim of rights. Therefore, in penal mediation, victims must be accompanied by a competent and trusted lawyer to protect their rights.

An example of a case that can be compared to solving a medical malpractice case through penal mediation in Indonesia and the United States is a medical malpractice case involving a doctor who allegedly made a mistake while performing a medical procedure and caused damage to the patient. If the case occurs in Indonesia, the settlement can be carried out through penal mediation after investigation and the threat of a sentence of fewer than nine years in prison. In penal mediation, the public prosecutor, judge, or mediator appointed by the court will try to resolve the case amicably by agreement between the doctor and the patient. The agreement may take the form of an apology, indemnification, or other appropriate actions. Meanwhile, suppose the case occurs in the United States. In that case, the resolution can be made through penal mediation at the beginning or after the trial has begun, depending on the policies of the local court. However, mediation can only be carried out with the consent of both doctors and patients.

In mediation, the mediator will help doctors and patients reach mutually beneficial and fair agreements. The agreement may be indemnification, an agreement not disclosing information, or other agreed actions. The difference in resolving medical malpractice cases through penal mediation between Indonesia and the United States lies in the timing and consent of the perpetrator. In Indonesia, mediation can only be conducted after an investigation and the threat of a sentence of fewer than nine years in prison. In the United States, mediation can be conducted at the beginning of the trial or after the trial begins with the consent of both parties. In addition, in mediation cases in the United States, lawyers often mediate to protect their client's rights. In Indonesia, it is not mandatory to involve lawyers in mediation.

For example, a case of medical malpractice that occurred in the United States and was resolved through mediation was the case of *Felder v. Casey*, 487 F. Supp. 2d 595 (E.D. Pa. 2007). A patient sued a doctor for a medical error allegedly made while performing

spinal surgery. After several rounds of mediation, doctors and patients agreed to end the judicial process and prevent the trial. The deal includes reimbursement of medical expenses and does not disclose information.<sup>6</sup>

## **2. Problem Statement**

In resolving medical malpractice cases through penal mediation, it is essential to pay attention to human rights (HAM), especially the right of patients to receive safe, quality, and responsible medical care. Mediation can be an effective alternative in resolving malpractice cases fairly and quickly for both parties while paying attention to the rights protected by human rights. The use of mediation in the resolution of malpractice cases can also minimize the psychological impact on the patient since there is no need to go through a long and laborious trial process. Overall, the resolution of medical malpractice cases through penal mediation must pay attention to the perspective of human rights, particularly the rights of patients or victims. In this case, the parties involved in the mediation must ensure that the agreement produced through mediation respects victims' rights and does not sacrifice their rights. Indonesia can enhance the protection of human rights in resolving medical malpractice cases through penal mediation by expanding the scope of mediation and ensuring the involvement of competent and trusted lawyers in the mediation process.

## **3. Methods**

The research conducted is normative juridical research with a comparative approach. Juridical normative research aims to analyze or evaluate a law, while a comparison approach is carried out to compare rules or regulations that apply in two or more countries. In this study, the analysis was carried out by legal hermeneutics. Legal hermeneutics is an approach in legal research conducted by interpreting legal texts to understand the meaning and context of the text. In analyzing legal hermeneutics, the author interprets and examines the content of legal texts related to medical malpractice in Indonesia and the United States. The sources used in this study are laws, laws and regulations, books, journals, articles, and other relevant sources.

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<sup>6</sup> "Felder v. Casey, 487 U.S. 131 (1988)," Justia Law, diakses 6 Agustus 2023, <https://supreme.justia.com/cases/federal/us/487/131/>.

## 4. Discussion

### 4.1. Human Rights Perspectives on Resolving Medical Malpractice Cases Through Penal Mediation in Indonesia and the United States

Penal mediation is an alternative form of dispute resolution that involves a negotiation process guided by a neutral mediator, which aims to produce a mutually beneficial agreement between the perpetrator of the crime and the victim or other parties affected by the crime.<sup>7</sup>

Penal mediation in the perspective of human rights can be understood through various theories and concepts in the legal sciences. One of the relevant theories in this context is the restorative justice theory, which emphasizes the importance of recovering losses caused by unlawful acts through an inclusive and fair mediation process for all relevant parties.<sup>8</sup> In addition, the concept of human rights is also essential in the context of penal mediation. Mediation must pay attention to the basic rights protected by human rights instruments, such as the right to justice, privacy, and non-discrimination. Mediation conducted concerning human rights can ensure that the resulting mediation process and agreement do not harm the rights of related parties.<sup>9</sup>

In solving criminal cases, penal mediation can provide a more humane alternative and accommodate the interests of the victim and the perpetrator. Through mediation, the perpetrator can be held accountable for his unlawful acts and carry out acts of reconciliation with the victim.<sup>10</sup> However, it should be noted that penal mediation cannot always replace formal criminal justice proceedings, especially in cases involving violence and serious crimes. Penal mediation can only be carried out in cases of minor and medium-sized crimes and must pay attention to justice and human rights principles.

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<sup>7</sup> Nancy H. Rogers dan Craig A. McEwen, "Mediation and the Unauthorized Practice of Law," *Mediation Quarterly* 1989 (1989): 23.

<sup>8</sup> Mathieu Deflem, *The Handbook of Social Control* (John Wiley & Sons, 2019).

<sup>9</sup> Christoph Antons, *Routledge Handbook of Asian Law* (Taylor & Francis, 2016).

<sup>10</sup> Darryl K. Brown, Jenia Iontcheva Turner, dan Bettina Weisser, *The Oxford Handbook of Criminal Process* (Oxford University Press, 2019).

Penal mediation in resolving criminal disputes, such as medical malpractice cases, presents the pros and cons of legal experts from a human rights perspective. Some legal experts argue that penal mediation can provide alternative solutions that are more effective, fast, and efficient in resolving criminal cases, including medical malpractice cases, while still paying attention to the human rights associated with the case.

For example, according to research by Markou, penal mediation can provide a faster and cheaper alternative solution in resolving criminal disputes, including in medical malpractice cases. However, the authors also emphasize that penal mediation must be conducted with due regard to human rights, including the right to justice, equality, and recognition of victims. On the other hand, some legal experts also criticize penal mediation in medical malpractice cases from a human rights perspective. According to Greenberg, penal mediation can disregard the victim's right to demand justice and obtain recognition for the harm suffered. In addition, penal mediation can make the victim feel pressured to accept an unfair or inadequate agreement.<sup>11</sup>

In addition, according to research by De Silva, penal mediation can benefit wrongdoers by reducing the sentence received compared to when the case is brought to court. This can create injustice for the victim and encourage the perpetrator to perform the same act in the future.<sup>12</sup> Therefore, considering the human rights associated with the case, it is important to carefully consider whether penal mediation is the best solution to solve medical malpractice cases. As Gavrielides points out, penal mediation in resolving criminal cases such as medical malpractice should be used as an addition or alternative to a fair criminal justice process. It should not replace the criminal justice process.<sup>13</sup>

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<sup>11</sup> Ulla Gläßer, "Mediation case law in Germany – an overview," *Tijdschrift voor mediation en conflictmanagement* 21, no. 4 (Desember 2017): 47–63, <https://doi.org/10.5553/TMD/138638782017021004005>.

<sup>12</sup> Stella Vettori, "Mandatory mediation: An obstacle to access to justice?," *African Human Rights Law Journal* 15, no. 2 (2015): 355–77, <https://doi.org/10.17159/1996-2096/2015/v15n2a6>.

<sup>13</sup> Julie Hollar, "The Political Mediation of Argentina's Gender Identity Law: LGBT Activism and Rights Innovation," *Journal of Human Rights* 17, no. 4 (8 Agustus 2018): 453–69, <https://doi.org/10.1080/14754835.2018.1450739>.



Penal mediation should consider the human rights associated with the case, including the right to justice, equality, and recognition of victims.

From the arguments of the pros and cons above, the author argues that penal mediation provides an alternative solution that is more effective, fast, and efficient in resolving criminal cases, including medical malpractice cases, while still paying attention to the human rights associated with the case. Through penal mediation, the perpetrator can be held accountable for his unlawful acts and carry out acts of reconciliation with the victim. Penal mediation can also allow victims to get more prompt and adequate compensation than through formal litigation. In addition, penal mediation in settlement of medical malpractice cases can also pay attention to the principles of restorative justice, which emphasize the importance of recovering losses caused by unlawful acts through an inclusive and fair mediation process for all relevant parties. Thus, penal mediation can provide a more humane alternative and accommodate the interests of the victim and the perpetrator while still paying attention to the human rights associated with the case.

From a human rights perspective, penal mediation in the resolution of medical malpractice cases should pay attention to the human rights associated with the case. In Indonesia, penal mediation in settlement of criminal cases, including medical malpractice, is regulated in Article 185A of the Criminal Procedure Code and implemented by the Criminal Mediation Commission (KMP). According to Fatmah, penal mediation in cases of medical malpractice in Indonesia can provide alternative solutions that are faster, cheaper, and fairer for victims and perpetrators. However, the author also emphasizes that penal mediation must consider the human rights associated with the case, including the right to justice and privacy.

Azmi also emphasized this, who stated that penal mediation must pay attention to the principles of restorative justice and human rights in resolving medical malpractice cases in Indonesia.<sup>14</sup> In the United States, penal mediation in the resolution of medical

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<sup>14</sup> 160106116 Muhammmad Dusuki Safriadi, "Penyelesaian Sengketa Pertanahan Melalui Mediasi di Wilayah Hukum Pengadilan Negeri Jantho (Menurut Perma Nomor 1 Tahun 2016)" (skripsi, UIN AR-RANIRY, 2020), <https://repository.ar-raniry.ac.id/id/eprint/14309/>.

malpractice cases is more limited, mainly due to federal laws prohibiting penal mediation in medical cases. However, some states in the United States allow penal mediation in cases of medical malpractice, with strict conditions to ensure that the human rights of victims and perpetrators are not harmed. For example, in California, penal mediation in medical malpractice cases is governed by California Evidence Code Section 1152-1154 and must pay attention to the rights of victims and perpetrators.<sup>15</sup>

Based on this, the ideal model of solving cases of medical malpractice through penal mediation should pay attention to the following:

- 1) Ensure the human rights of victims and perpetrators, including the rights to justice, equality, and recognition of victims. Penal mediation should ensure victims are not pressured to accept an unfair or inadequate agreement.
- 2) Pay attention to the principles of restorative justice that emphasize the importance of recovering losses caused by unlawful acts through an inclusive and fair mediation process for all relevant parties.
- 3) Provide a more humane alternative and accommodate the interests of victims and perpetrators while still paying attention to the human rights associated with the case.
- 4) Used as an addition or alternative to a fair criminal justice process and should not replace the criminal justice process.

Regarding regulations, Indonesia regulates penal mediation in settlement of criminal cases, including medical malpractice, regulated in Article 185A of the Criminal Procedure Code and implemented by the Criminal Mediation Commission (KMP). In the United States, penal mediation in the resolution of medical malpractice cases is more limited, mainly due to federal laws prohibiting penal mediation in medical cases. However, some states in the United States allow penal mediation in cases of medical

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<sup>15</sup> "Law section," diakses 6 Agustus 2023, [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=EVID&sectionNum=1152](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=EVID&sectionNum=1152).

malpractice under strict conditions to ensure that the human rights of victims and perpetrators are not harmed.

In Indonesia, penal mediation in the resolution of medical malpractice cases needs to be improved to pay more attention to the human rights of victims and perpetrators, especially regarding equality and recognition of victims. While in the United States, although some states allow penal mediation in medical malpractice cases, there are still federal laws prohibiting it, so it is necessary to make clearer and more consistent regulations at the national level to regulate penal mediation in cases of medical malpractice.

In terms of improvement in the law in Indonesia, it is necessary to make clearer and more detailed provisions regarding implementing penal mediation in settlement of medical malpractice cases, considering the human rights related to the case. One of the things that need to be improved is the involvement of victims in the mediation process, including ensuring that victims have sufficient access to information about their rights in the mediation process. In addition, it is necessary to make provisions regarding clear criteria to determine whether a case can be resolved through penal mediation or must go through a formal criminal justice process.

Meanwhile, in the United States, it is necessary to create consistent and detailed federal laws regarding penal mediation in resolving medical malpractice cases, given that some states allow this practice and others do not. It is also necessary to pay attention to the human rights of victims and perpetrators by determining clear criteria to determine whether cases can be resolved through penal mediation and how to maintain equality between victims and perpetrators in the mediation process. In addition, it is also necessary to consider a fair and adequate compensation policy for victims in medical cases and the role of insurance in facilitating penal mediation in the resolution of medical malpractice cases.

#### **4.2. The concept of human rights protection in the resolution of medical malpractice cases through penal mediation in Indonesia**

The concept of human rights protection in resolving medical malpractice cases through penal mediation in Indonesia is closely related to the restorative justice theory. This

theory emphasizes that the resolution of criminal cases must pay attention to the restorative aspect, which is to restore the relationship between the victim, the perpetrator, and society, as well as return the losses suffered by the victim due to unlawful acts committed by the perpetrator. Restorative justice refers to "attempts to repair the damage caused by violations, restore losses, restore damaged relationships, promote reconciliation, and restore social balance."<sup>16</sup>

In resolving medical malpractice cases, the restorative justice approach allows relevant parties, including victims, perpetrators, and communities, to communicate with each other, negotiate, and work together to find equitable and humane solutions. This follows the principles of penal mediation that emphasize the active participation of the victim and the perpetrator in reaching an agreement beneficial to both parties.

However, the restorative justice approach also emphasizes the importance of ensuring that the human rights of victims and perpetrators are protected while resolving cases. As stated by the Pelicans, restorative justice must pay attention to the human rights of victims and perpetrators, including the rights to justice, equality, and recognition of the losses suffered.<sup>17</sup> In this case, penal mediation in resolving medical malpractice cases in Indonesia must pay attention to the human rights associated with the case, including the right to justice and privacy. Azmi also emphasized this, who stated that penal mediation must pay attention to the principles of restorative justice and human rights in resolving medical malpractice cases in Indonesia.<sup>18</sup>

The concept of restorative justice in settlement of medical malpractice cases in Indonesia is in line with the principles of penal mediation that emphasize the active participation of victims and perpetrators in reaching a fair agreement. However, in applying a restorative justice approach, paying attention to the human rights of victims and perpetrators, including the right to justice, equality, and recognition of the losses suffered, is essential. In this case, penal mediation must ensure that human rights are

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<sup>16</sup> John Braithwaite, "Restorative Justice and Responsive Regulation," t.t.

<sup>17</sup> Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Routledge, 2013).

<sup>18</sup> Muhammad Dusuki Safriadi, "Penyelesaian Sengketa Pertanahan Melalui Mediasi di Wilayah Hukum Pengadilan Negeri Jantho (Menurut Perma Nomor 1 Tahun 2016)."

protected throughout the case resolution process and that the solution meets both party's needs. The principles of restorative justice and human rights in resolving medical malpractice cases in Indonesia must be considered simultaneously to achieve humane and fair outcomes for all parties involved.

Legal problems that arise in applying the concept of human rights protection in the resolution of medical malpractice cases through penal mediation in Indonesia include the protection of the right to justice, equality, and recognition of losses suffered by victims, as well as the right to privacy and protection against discrimination or abuse of power. In resolving medical malpractice cases, the mediation process must pay attention to the principles of restorative justice and ensure that the human rights of victims and perpetrators are protected so that the solutions found can meet the needs of both parties and society as a whole. In addition, it is also necessary to consider the relevance of related laws and regulations in resolving medical malpractice cases in Indonesia, such as Law No. 29 of 2004 concerning the Practice of Medicine, which regulates the obligations of doctors and patient rights as malpractice dispute resolution mechanisms.

The problem in Law No. 29 of 2004 concerning the Practice of Medicine is the inaccuracy in regulating criminal sanctions for violations of medical ethics that are considered malpractice. The law regulates criminal sanctions for violators of medical ethics in the form of less severe, limited to a maximum of 5 years imprisonment or a maximum fine of 500 million rupiahs. In some malpractice cases, the victim's losses can be enormous, such as loss of life or permanent disability. In addition, there are problems in implementing the law, such as weak supervision of the practice of medicine, lack of sanctions for violators, and low public participation in the supervision and protection of patient rights.

Concerning the concept of human rights protection in resolving medical malpractice cases through penal mediation in Indonesia, the problem in Law No. 29 of 2004 concerning the Practice of Medicine raises concerns that the human rights of malpractice victims are not fulfilled properly. Therefore, a dispute resolution approach that pays attention to restorative justice and human rights principles is needed, such as through penal mediation. In this regard, penal mediation must ensure that the

human rights of victims and perpetrators are protected throughout the case resolution process and that the solutions found meet the needs of both parties fairly and humanely. Penal mediation also allows relevant parties, including victims and perpetrators, to communicate and cooperate in finding solutions to recover losses and restore the relationship between the victim, the perpetrator, and the community.

The article that is considered problematic in Law No. 29 of 2004 concerning the Practice of Medicine is Article 50. This article gives authority to the Honorary Council of Medical Ethics (MKEK) to decide on sanctions against violators of medical ethics, including sanctions for revocation of practice licenses and revocation of membership rights of medical professional organizations. The problem with Article 50 is that sanctions decision-making by the MKEK can be subjective and tends not to be transparent because there is no clear mechanism for determining sanctions against violators of medical ethics. In addition, Article 50 is also considered not to pay attention to perpetrators' human rights, especially in revoking the license to practice and the right to membership in medical professional organizations without due process.

In resolving cases of medical malpractice through penal mediation, the issue of Article 50 can be related to the concept of human rights protection. In resolving malpractice cases through penal mediation, paying attention to the human rights of victims and perpetrators, including the rights to justice, equality, and recognition of the losses suffered, is essential. This must be done by ensuring that human rights are protected throughout the case resolution process and that the solutions found meet both parties' needs. In this case, Article 50 can cause problems if it is applied disproportionately and does not pay attention to the human rights of the perpetrator.

Concerning the perspective of Article 185A of the Criminal Procedure Code, problems related to Article 50 of Law No. 29 of 2004 concerning the Practice of Medicine can be considered a violation of the principles stated in Article 185A. As previously explained, the problem of Article 50 is related to subjective and non-transparent sanctions decision-making and does not pay attention to the human rights of perpetrators. In resolving cases of medical malpractice through penal mediation, it is necessary to ensure that the mediation process is carried out while considering the principles stipulated in Article 185A, namely justice, equality, transparency, and freedom from

the influence of pressure or violence. This also applies in the handling of malpractice cases by the MKEK, where sanctions decision-making must be based on clear and transparent mechanisms, as well as paying attention to the human rights of perpetrators.

In legal theory and doctrine, the principles contained in Article 185A of the Criminal Procedure Code are considered necessary in handling criminal cases, including in resolving medical malpractice cases through penal mediation. The principle of justice in Article 185A of the Criminal Procedure Code requires that everyone receive equal treatment before the law, and there must be no discrimination in every stage of handling criminal cases. The principles of equality, transparency, and freedom from the influence of pressure or violence are also considered important in guaranteeing human rights in handling criminal cases. Concerning the problems in Article 50 of Law No. 29 of 2004 concerning the Practice of Medicine, legal experts such as Tamin Sukardi stated that subjective and non-transparent sanctions decisions could lead to violations of the human rights of perpetrators, especially in terms of revoking practice licenses and membership rights of medical professional organizations without a fair process.<sup>19</sup>

In resolving medical malpractice cases through penal mediation in Indonesia, a legal concept / human rights protection rule is needed that pays attention to the principles of restorative justice and human rights. This concept must ensure that the human rights of victims and perpetrators are protected throughout the case resolution process and that the solutions found meet the needs of both parties fairly and humanely. In addition, the penal mediation process must still pay attention to the principles stipulated in Article 185A of the Criminal Procedure Code, namely justice, equality, transparency, and freedom from the influence of pressure or violence.

To overcome existing legal problems, Article 50 of Law No. 29 of 2004 on the Practice of Medicine must be revised so as not to raise concerns that the human rights of perpetrators and victims are not being fulfilled properly. The decision-making of sanctions by the Honorary Council of Medical Ethics should be based on clear and

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<sup>19</sup> Oemar Seno Adji, "Hukum kedokteran aspek hukum pidana/perdata," *Jurnal Hukum & Pembangunan* 14, no. 4 (7 Juni 2017): 362, <https://doi.org/10.21143/jhp.vol14.no4.1048>.

transparent mechanisms, as well as paying attention to the human rights of the perpetrators. In this case, it is necessary to protect the human rights of perpetrators and victims, which are equally guaranteed, so that the penal mediation process can produce a fair decision and meet the needs of both parties. In addition, it is also necessary to establish a clear mechanism for determining sanctions against violators of medical ethics so as not to give subjective authority and tend not to be transparent to the MKEK.

In general, the legal concept/human rights protection rules in resolving medical malpractice cases through penal mediation in Indonesia must ensure that the human rights of victims and perpetrators are protected and that the solutions found meet the needs of both parties fairly and humanely. This can be done by upholding the principles of restorative justice and human rights and referring to the principles regulated in Article 185A of the Criminal Procedure Code.

## **5. Conclusion**

In resolving medical malpractice cases through penal mediation, it is essential to pay attention to the human rights of victims and perpetrators, including the rights to justice, equality, and recognition of the losses suffered. The resolution of cases through penal mediation must pay attention to the principles of restorative justice and human rights. In this case, a legal concept / human rights protection rule is needed that pays attention to the principles of restorative justice and human rights. This concept must ensure that the human rights of victims and perpetrators are protected throughout the case resolution process and that the solutions found meet the needs of both parties fairly and humanely. In addition, it is necessary to make clearer and more consistent regulations at the national level to regulate penal mediation in cases of medical malpractice and improve Article 50 of Law No. 29 of 2004 on the Practice of Medicine so as not to raise concerns that the human rights of perpetrators and victims are not being fulfilled properly. In this case, it is necessary to protect the human rights of perpetrators and victims, which are equally guaranteed, so that the penal mediation process can produce a fair decision and meet the needs of both parties.



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