

## Navigating Ambiguity: Critiques of Indonesia's Health Law and its Impact on Legal Redress for Medical Malpractice Victims

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**Abstract:** In Indonesia, the fundamental right to health is enshrined in the 1945 Constitution, affirming every person's entitlement to live a safe and prosperous life with access to health services. The 2023 Health Law focuses on six pillars, including health security, funding, human resources, technology, primary care, and referral services, aiming to alleviate financial burdens through progressive financing. Particularly significant is the procedural change in protecting health workers, notably medical personnel, through the implementation of restorative justice methods. This article critically examines the implications of the 2023 Health Law on victim redress, particularly concerning medical personnel protection and the application of restorative justice in life-threatening medical error cases. However, the provision regarding the handling of medical personnel facing criminal allegations and disciplinary sanctions raises concerns regarding clarity and implementation. Ambiguities surrounding key terms and the prioritization of restorative justice mechanisms without clear guidelines may result in delays and inconsistencies in the legal process. This study sheds light on the need for clarity and refinement in legal frameworks to ensure the protection of both medical personnel and patients while promoting accountability and justice within the healthcare system.

**Keywords:** Health Law; Legal Protection; Restorative Justice; Right to Health; Victim Redress

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### 1. Introduction

Nowadays, one of the obvious instances of human rights is the right to health and public health, whose existence and deployment are a prerequisite for social life.<sup>1</sup> Health is recognized internationally as one of the human rights that needs to be upheld. Likewise in Indonesian law, where health is guaranteed in the 1945 Constitution as a constitutional right.<sup>2</sup> Health Laws encompasses laws and legal principles governing the rights and

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<sup>1</sup> Bagheri Hamed, Yousef, Mehdi Zakarian Amiri, Peyman Bolori, and Davood Hermidas Bavand. "The Right of health and public health in terms of Fundamental human rights with emphasis on UNESCO document 2030." *Medical Law Journal* 12, no. 46 (2018): 177-205.

<sup>2</sup> Setiabudhi, Donna Okthalia, Toar Neman Palilingan, and Ahsan Yunus. "Overcoming of COVID-19 Transmission: The Fulfillment of Right to Health and Education." *Indian Journal of Forensic Medicine & Toxicology* 14, no. 4 (2020): 7878-83

responsibilities impacting as well as safeguarding individual rights, especially those of healthcare professionals and victims.<sup>3</sup>

The establishment of health laws have its roots in the protection of fundamental human rights to health and by extension, right to life.<sup>4</sup> The laws prioritize the protection of patients, emphasizing their rights, safety, and well-being, creating a foundation of trust between healthcare providers and those seeking medical care. Equally important in this matter, are the facts that these laws serve as a shield for medical professionals, providing them with legal protection and guidance, which is crucial in a field where decisions can have profound consequences. Instances like practicing medicine without a license, medical fraud, and patient abuse are considered breaches of medical laws, deemed both unlawful and morally or ethically unacceptable.<sup>5</sup>

In order to ensure the fulfillment of these obligations, the government ratified Law Number 17 of 2023 on Health (hereinafter, "2023 Health Law").<sup>6</sup> The development of health policies and insights gained during the Covid-19 pandemic served as the backdrop for the formulation of the 2023 Health Law, highlighting the necessity for a comprehensive review of the Indonesian healthcare system.<sup>7</sup> This legislation was enacted following a meaningful participation process that involved gathering inputs from over 1,200 organizations and 72,000 participants.<sup>8</sup> The transformative aspects of this law are centered around six pillars, encompassing health security, funding, human resources, health technology, primary care, and referral services. The 2023 Health Law addresses preventive care, curative services, and rehabilitation, with the overarching goal of alleviating the financial burden on individuals and communities through the implementation of a progressive financing system.<sup>9</sup>

Systematically, the 2023 Health Law is composed of 20 chapters and 458 articles, covering various aspects, for instance, General Provisions, Responsibilities of the Central Government and Local Governments. Notably here, it places, as this paper argues, a significant change in procedure of the protection of health workers, particularly the protection of medical personnel through the implementation of restorative justice methods recognized in Article 306 regarding the Enforcement of Medical and Health

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<sup>3</sup> Bonnie Fremgen, *Medical Law and Ethics*, 4th ed. (Pearson Prentice Hall, 2011), 7.

<sup>4</sup> "Fact Sheet No. 31, The Right to Health," Office of the United Nations High Commissioner for Human Rights, accessed January 10, 2024, <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-31-right-health>.

<sup>5</sup> Bonnie Fremgen, *Loc. Cit.*

<sup>6</sup> Law No. 17 of 2023 concerning Health.

<sup>7</sup> Wahyu Andrianto, "Secarik Catatan untuk Undang-Undang Kesehatan," Hukumonline, accessed 11 January 2024, <https://www.hukumonline.com/berita/a/secarik-catatan-untuk-undang-undang-kesehatan-lt64fe8593cfb16/>.

<sup>8</sup> Nicholas Ryan Aditya and Novianti Setuningsih, "Terima 6.011 Masukan Publik soal RUU Kesehatan, Menkes: 75 Persen Kita Tindak Lanjuti," Kompas, accessed 5 December 2023, <https://nasional.kompas.com/read/2023/04/05/19170821/terima-6011-masukan-publik-soal-ruu-kesehatan-menkes-75-persen-kita>.

<sup>9</sup> Hard Drug Ordinance Law 419 (1949); Law No. 4 of 1984 concerning Communicable Disease Outbreaks; Law No. 44 of 2009 concerning Hospitals Law; Law No. 18 of 2014 concerning Mental Health; Law No. 38 of 2014 concerning Nursing; Law No. 6 of 2018 concerning Health Quarantine; Law No. 20 of 2013 concerning Medical Education.

Personnel Discipline and Dispute Resolution. Essentially, both articles are part of a comprehensive regulatory approach to maintain the professionalism and ethical standards of medical professionals and healthcare workers.

In this matter, the issue of medical personnel legal protection has been a continuous debate and discussions in the public realm of Indonesia.<sup>10</sup> Therefore the implementation of the 2023 Health Law is to be seen by the lawmaker as a groundbreaking answer for such concerns, as it newly reviewed the protection of medical personnel as stipulated in Article 306 of the 2023 Health Law.<sup>11</sup> While this paper acknowledges and maintains the importance of legal protection and safeguards for medical personnel, it will highlight the concerns of Article 306 (3) related to the potential limitations and hindrance on victims in seeking legal redress, the ambiguity surrounding the determination of criminal allegations, the undefined role of law enforcement agencies, and the lack of clarity in the application of restorative justice, particularly in situations where life is at risk.

The lack of clarity in the boundaries of the restorative justice mechanism is problematic considering the discrepancies of guidelines of interpretations especially in cases involving threats to someone's life where restoration may not be applicable and where in criminal cases involving threats to life, the applicability of restorative justice is questionable. The law should provide clear boundaries and guidelines for the use of restorative justice, especially when dealing with offenses that may not be reconcilable. In the present context, prior to delving into these discussions, this paper will initially present an extensive exploration of fundamental concepts intricately associated with subsequent conversations. This comprehensive exploration encompasses an examination of the overarching principles guiding the legal protection afforded to medical professionals, as well as an exploration of the multifaceted concept of restorative justice.

The legal protection of medical personnel must be balanced against the rights of potential victims of medical issues. Patients have the right to receive competent and safe medical care, and when their rights are compromised, they deserve recourse to seek justice and compensation for any harm suffered. Medical malpractice, negligence, or errors can have devastating consequences for patients and their families, ranging from physical injuries to emotional trauma and financial burdens.<sup>12</sup> Therefore, legal frameworks that protect medical personnel should also incorporate mechanisms to hold them accountable for any breaches of professional standards or duty of care. Striking this balance requires careful consideration of both the need to support healthcare professionals in their vital roles and the imperative to safeguard the rights and well-being of patients who entrust their lives to them.

Legal protection for medical professionals encompasses standards of care, professional liability insurance, and legal defenses to uphold the integrity of healthcare delivery while

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<sup>10</sup> "Perlindungan terhadap Tenaga Kesehatan Perlu Payung Hukum," Kompas, accessed 12 January 2024, <https://www.kompas.id/baca/humaniora/2023/03/15/perlindungan-terhadap-tenaga-medis-perlu-diatur-dalam-regulasi>.

<sup>11</sup> Law No. 17 of 2023 concerning Health, Art. 306.

<sup>12</sup> Farrell, Anne-Maree, Amel Alghrani, and Melinee Kazarian. "Gross negligence manslaughter in healthcare: Time for a restorative justice approach?." *Medical Law Review* 28, no. 3 (2020): 526-548.

providing avenues for redress in cases of genuine malpractice.<sup>13</sup> The paper underscores the importance of legal protection for medical professionals through two primary bases. *Firstly*, the complexity of medical practice necessitates legal safeguards that protect the intricate decision-making and nuanced judgments involved in healthcare. The complexity embedded in medical practice necessitates comprehensive legal safeguards that acknowledge the intricate and sudden nature of decision-making and nuanced judgments inherent in healthcare. Allegations of malpractice can thrust medical personnel into legal battles, potentially resulting in severe professional and personal consequences. *Secondly*, as to the importance of medical legal protection, the recognition of medical personnel as professionals, characterized by their elevated level of expertise and the moral responsibilities associated with their profession, underscores the high expectations placed on them by the public.

Moreover, the moral responsibilities inherent in their roles extend far beyond routine job obligations, reflecting a commitment to ethical standards, patient welfare, and broader societal well-being. In conclusion, the intertwining complexities of medical practice and the heightened societal expectations placed upon medical professionals collectively give rise to potential legal litigations, presenting a compelling case for the implementation of specialized legal protections.

## 2. Method

This is qualitative research using a statutory approach, comparative and conceptual approaches. The primary legal materials resulted from relevant laws and legislation, then the data were analyzed with content analysis to analyze. The approach used is observation and interpretation, which makes these phenomena observable. Those legal material collected are analysed prescriptively. This paper provides information on the latest trend in research.<sup>14</sup>

## 3. Implementation of Restorative Justice in Resolving Medical Disputes: Global Perspectives

The principles and practices of restorative justice have become a social movement in the twenty-first century, with an ever-increasing presence in and impact on the global community.<sup>15</sup> Restorative justice, although lacking a strict definition,<sup>16</sup> represents a paradigm shift within the legal system, focusing on repairing harm caused by criminal behavior and promoting reconciliation among offenders, victims, and the community. It

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<sup>13</sup> Anna Smajdor, Jonathan Herring, and Robert Wheeler, *Oxford Handbook Of Medical Ethics And Law Part 2* (Oxford University Press, 2022).

<sup>14</sup> Yunus, Ahsan. "Multilayered democracy in Papua: A comparison of "Noken" system and Electoral College system in the United States." *Hasanuddin Law Review* 6, no. 3 (2020): 232-239. DOI: <http://dx.doi.org/10.20956/halrev.v6i3.2892>

<sup>15</sup> Umbreit, Mark S., and Marilyn Peterson Armour. "Restorative justice and dialogue: Impact, opportunities, and challenges in the global community." *Washington University Journal of Law & Policy*, 36 (2011): 65.

<sup>16</sup> Carruthers, David. "Restorative justice: Lessons from the past, pointers for the future." *Waikato Law Review: Taumauri*, 20 (2012): 1-29.

operates on the premise that criminal acts not only breach the law but also cause harm to individuals and society.<sup>17</sup> In contrast, the traditional theory of retribution centers on seeking "revenge for past violations of the law" predominantly emphasizing punishment for past offenses rather than preventing future ones. Restorative justice, however, involves all parties affected by the offense, including the offender, the victim, and the affected community, aiming to address their needs and facilitating a healing process that is future-oriented.<sup>18</sup>

Restorative justice is founded in foundational principles, which include prioritizing responses to crime aimed at repairing the harm experienced by victims, ensuring offenders grasp the consequences of their actions, and asserting their responsibility for their behavior. Additionally, the approach provides victims with a platform to articulate their needs and participate in determining suitable amends, while also emphasizing the community's role in the resolution process. Such methods seek to support victims, restore relationships affected by crime, criminal behavior, cultivate responsibility among all involved parties, reduce recidivism through personal transformation, and inform crime reduction strategies by identifying contributing factors.<sup>19</sup>

Legislatively speaking, Indonesia has officially recognized and incorporated restorative justice as an alternative approach for addressing criminal cases. This recognition was initially established through Law Number 11 of 2012 concerning the Juvenile Justice System, which underscores the collaborative involvement of various stakeholders, including victims, offenders, families, and community figures, in seeking fair resolutions that prioritize recovery. Further emphasizing this recognition, three main legal departments established memoranda of understanding regarding restorative justice dated October 17, 2012, to solidify the application of restorative justice across law enforcement institutions and formalized its implementation.<sup>20</sup> Such memorandums laid the groundwork for subsequent regulations that further outlined the implementation of restorative justice owned each by the National Police<sup>21</sup>, Prosecutors<sup>22</sup>, as well as the Judiciary body.<sup>23</sup>

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<sup>17</sup> United Nations Office On Drugs And Crime, *Handbook on Restorative Justice Programmes*. (Criminal Justice Handbook Series, 2006), 6.

<sup>18</sup> Budwell, Cater. "Full Circle: Incorporating Aspects of Restorative Justice Principles from Germany into America's Juvenile Justice System." *J. Glob. Just. & Pub. Pol'y* 4 (2018): 1.

<sup>19</sup> *Ibid.*

<sup>20</sup> Memorandum of Understanding between the Chief Justice of the Supreme Court, Minister of Law and Human Rights, Attorney General, Chief of the Indonesian National Police, Number 131/KMA/SKB/X/2012; Memorandum of Understanding between the Ministry of Law and Human Rights and the Indonesian National Police, Number M.HH-07.HM.03.02/2012; Memorandum of Understanding between the Ministry of Law and Human Rights and the Attorney General, Number KEP-06/E/EJP/10/2012.

<sup>21</sup> National Police Regulation No. 8 of 2021 concerning Handling Crimes Based on Restorative Justice.

<sup>22</sup> Public Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice.

<sup>23</sup> Decree of the Director General of the General Justice Agency of the Supreme Court of the Republic of Indonesia 1691/DJU/SK/PS.00/12/2020 concerning Implementation of Guidelines for the Application of Restorative Justice.

Collectively, these legislative measures solidify Indonesia's stance on incorporating restorative justice as a viable and recognized method within its criminal justice system which also reflects a commitment to a more holistic approach to justice that prioritizes healing, reconciliation, and community involvement over punitive measures alone. While significant strides have been taken to incorporate restorative justice into Indonesia's criminal justice framework, there remains a noticeable discrepancy in its understanding and implementation, particularly concerning medical disputes. Nevertheless, scholars, both domestic and international, have acknowledged the potential advantages of applying restorative justice principles to resolve medical conflicts.<sup>24</sup> Their studies delve into the fundamental principles, structure, and critical relevance of restorative justice in such contexts. Moreover, academic research extends to exploring alternative dispute resolution mechanisms specific to medical disputes, advocating for a balanced approach that considers both litigious and non-litigious pathways, and even proposing the use of penal mediation to address cases of medical malpractice.

While the discussion primarily centers on restorative justice in Indonesia, it is nonetheless crucial to acknowledge its global significance. Restorative justice movements have emerged worldwide in response to harsh retributive practices by states.<sup>25</sup> For instance, the influence of restorative justice extends to juvenile justice systems in various countries,<sup>26</sup> like Australia, Canada, and with New Zealand being the first to significantly reorient its juvenile justice system towards a restorative justice-based approach.<sup>27</sup>

The development of restorative justice mechanisms in Common law jurisdictions, such as England, particularly in cases involving medical errors, has been a subject of evolution and debate over the years. Traditionally, the legal response to medical errors resulting in harm or death to patients has primarily focused on criminal prosecution. However, in recent years, there has been a growing recognition of the limitations of the traditional punitive approach in addressing medical errors as critics argue that the adversarial nature of the criminal justice system may not always serve the interests of justice or provide meaningful redress to victims of medical negligence. This is in the argumentation of, if the overarching goal of criminal punishment is to deter the perpetrators, can negligence be deterred?

As a result, there has been a shift towards exploring alternative approaches, including the potential application of restorative justice principles in cases of medical negligence, even to cases of Gross Negligence Manslaughter (GNM). The leading authority on GNM is the House of Lords judgment in *R v Adomako*, which established that the test for gross negligence depends on the seriousness of the breach of duty and the extent to which the

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<sup>24</sup> Darma, I Made Wirya, and Tjokorda Mirah Ary Mahadnyani. "The Restorative Justice Based Health Criminal Law Policy: Orientation and Formulation." *Pena Justisia*, 22, no. 2 (2023): 344-57.

<sup>25</sup> Clark, Janine Natalya. "The three Rs: retributive justice, restorative justice, and reconciliation." *Contemporary Justice Review* 11, no. 4 (2008): 331-350.

<sup>26</sup> Burkemper, T. Bennett, Nina Balsam, and May Yeh. "Restorative justice in Missouri's juvenile System." *Journal of Missouri Bar* 63, no. 3 (2007): 128.

<sup>27</sup> Wood, William R., and Masahiro Suzuki. "Four challenges in the future of restorative justice." *Victims & Offenders* 11, no. 1 (2016): 149-172.

defendant's conduct departed from the proper standard of care.<sup>28</sup> To further shed light on the ambiguity of the Adomako test, the Crown Prosecution Service (CPS) published legal guidance in 2019 outlining its approach to GNM. The guidance identified examples of conduct that would meet the evidential test for grossness, including a series of serious breaches, deliberately ignoring safe systems, and acting against warnings from other staff members.<sup>29</sup>

In summary, scholarly discourse has explored the potential application of Restorative Justice in medical dispute cases, despite limited real-world implementations. It is essential to perceive this mechanism as a supplementary measure rather than a replacement for the existing criminal justice system. Nonetheless, there remains a necessity for continued refinement and clarification of the legal framework governing restorative justice in medical disputes globally.

#### 4. The Potential Impediments in the Health Law 2023 on the Promptness of Victim Redress

The upcoming chapter will delve into a critical examination of the potential legal issues raised by Article 306 (3) of the new 2023 Health Law. One such concern revolves around the hindrance it poses to victims seeking legal recourse or redress. By stipulating that victims must wait until disciplinary sanctions have been imposed, the language restricts their ability to pursue other legal avenues promptly. This delay could impede the timely pursuit of justice or compensation through alternative legal channels. Moreover, ambiguity surrounds the determination of "*allegations of criminal acts*," leaving questions unanswered regarding who possesses the authority to decide such allegations. Furthermore, the vague reference to "law enforcement agencies" raises concerns about their role in prioritizing dispute resolution through proposed restorative justice methods and necessitates clarity on their involvement and decision-making processes.

Additionally, the lack of clarity regarding the boundaries of restorative justice mechanisms, particularly in cases involving threats to life, underscores the need for clear guidelines within the law to ensure appropriate application in criminal cases. Article 306 (3) reads that, medical personnel or health personnel "*who have undergone disciplinary sanctions*" as referred to in paragraph (1) charged with allegations of criminal offense, the law enforcement apparatus prioritizes the settlement of disputes with restorative justice mechanisms in accordance with the provisions of laws and regulations.<sup>30</sup>

Such provision is, in essence, related to the previous Article which addressed the same concerns, such as Article 66 (3) of Medical Practice Number 29 of 2004 states: "Complaints as referred to in paragraphs (1) and (2) do not eliminate the right of every

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<sup>28</sup> Samanta, Ash, and Jo Samanta. "Death caused by negligent medical care: Reconsidering the role of gross negligence manslaughter in the aftermath of Bawa-Garba." *Medical Law International* 21, no. 4 (2021): 293-320.

<sup>29</sup> Government of the United Kingdom, "Gross Negligence Manslaughter Legal Guidance," Crown Prosecution Service, accessed January 20, 2024, <https://www.cps.gov.uk/legal-guidance/gross-negligence-manslaughter>.

<sup>30</sup> Law No. 17 of 2023 concerning Health, Art. 306.



person to report alleged criminal acts to the competent authorities and/or to file civil claims for damages in court.”

This provision has been subject to judicial review by the Constitutional Court, which found in judgment 14/PUU-XII/2014 that it does not contradict or contravene the Indonesian Constitution, as requested by the complainants.<sup>31</sup> The crux of the matter addressed in judgment 14/PUU-XII/2014 revolves around the legal complexities arising when an individual is acquitted of a disciplinary offense by the Indonesian Medical Discipline Honorary Council (*Majelis Kehormatan Disiplin Kedokteran Indonesia*, MKDKI) yet found guilty in criminal or civil court proceedings. The Court's ruling in that very judgment underscores the distinction between the realms of MKDKI and the courts, recognizing their disparate focuses on ethics and law, respectively. While MKDKI's purview centers on ethical principles, values, and medical standards, its decisions do not automatically equate to legal violations, as its benchmarks differ. Not all breaches of medical standards translate into legal infractions; for instance, failing to wash hands before surgery, while a disciplinary violation, may not result in legal consequences if patient outcomes remain unaffected.

Victims may be compelled to wait for extended periods before their grievances are addressed, leading to prolonged suffering and psychological distress. This issue is particularly problematic given the already lengthy and costly nature of the legal process; therefore, adding another requirement appears unreasonable. Furthermore, the requirement may disproportionately impact marginalized or vulnerable individuals who lack the resources or support networks to navigate the legal system effectively.

The extensive process of demanding accountability from medical professionals is exemplified in the case of Siti Chomsatun. Before the case reached court, Leila Zenastrri, Siti Chomsatun's daughter, lodged a complaint against RS Kramat 128 with the Indonesian Medical Disciplinary Board on August 10, 2010. After a 23-month investigation, the MKDKI issued a decision on June 26, 2012, finding Dr. Tantiyo Setiyowati and Dr. Fredy Melke Komalig guilty of violating medical discipline for failing to provide adequate care in certain situations. This violation prompted Siti Chomsatun to file a Lawsuit for Wrongful Acts against RS Kramat 128 in the Central Jakarta District Court. From the complaint's initiation to the court's decision on case number 287/Pdt.G/2017/PN.Jkt.Pst, the legal process lasted over a year, underscoring the arduous and intricate nature of holding medical professionals accountable.<sup>32</sup>

Overall, the provision in Article 306 (3) introduces a potential loophole that could allow medical personnel to evade accountability by requiring disciplinary sanctions before victims can pursue legal avenues. This loophole may be exploited by unethical individuals within the medical field, undermining principles of accountability and justice. Article 306 (3) of the 2023 Health Law poses significant challenges for victims seeking redress, causing delays, creating loopholes, undermining rights, and introducing legal ambiguity.

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<sup>31</sup> Constitutional Court of Indonesia, Judgement Number 14/PUU-XII/2014, p. 66.

<sup>32</sup> LBH Jakarta and Siti Chomsatun, “Korban Malpraktik Menang Di Pengadilan, ” Bantuan Hukum, accessed 5 January 2024, <https://bantuanhukum.or.id/siti-chomsatun-korban-malpraktik-menang-di-pengadilan/>.



## 5. Ambiguity Surrounding Allegations of Criminal Acts: Decision-Making Authority and Process

The 2023 Health Law addresses Health Personnel who have faced disciplinary sanctions and are charged with criminal offenses. However, this article introduces ambiguity regarding the process of determining criminal charges, particularly concerning the relevant authority and the stage at which charges should be filed. It remains uncertain whether the authority to levy criminal charges against medical or health personnel lies within the investigative process or requires a formal trial decision, or does it extend to the decision of MKDKI? While MKDKI is assigned with upholding ethical standards and implementing disciplinary measures within the medical profession, its jurisdiction does not extend to legal matters or the determination of criminal allegations.<sup>33</sup> This lack of clarity raises significant questions about who holds the authority to initiate criminal charges and when these charges should be brought forth within the legal process.

Although, Indonesian Law Number 8 of 1981 on Criminal Procedure Law attempts to shed light on this issue, the current provision falls short in providing victims with prompt legal certainty when seeking redress. Addressing the process of determining criminal offense allegations, as delineated in Article 1 (14), the law characterizes a suspect as an individual who, based on initial evidence or circumstances, is deemed potentially involved in a criminal offense.<sup>34</sup> The Constitutional Court's decision number 21/PUU-XII/2014 offers a more precise interpretation, stipulating that identifying a suspect requires the presence of at least two pieces of evidence.<sup>35</sup> The law delineates an investigation process, involving a series of steps by the investigator to gather evidence and locate the suspect, with the investigator required to inform the public prosecutor once the investigation commences, who then evaluates if the case meets the criteria for court submission.

At this juncture, an individual is deemed a suspect solely on preliminary evidence obtained from the investigator. This reliance on preliminary evidence for suspect designation in criminal offenses leads to varied interpretations, as the definition of preliminary evidence and its quality can differ significantly among investigators, judiciary, and the defendants. Such ambiguity in Article 306 (3) raises questions regarding whether criminal allegations against medical or health personnel should be pressed during the investigation phase or necessitate a formal trial decision in reviewing the admissibility and quality of preliminary evidence, and therefore, who has the authority to decide. This lack of clarity can result in confusion and discrepancies in how allegations are addressed.

### 5.1. Uncertainty in the Role of Law Enforcement Agencies: Who are they?

The ambiguity surrounding the role of law enforcement agencies as stipulated in Article 306(3) of the Health Law 2023 raises significant concerns regarding the implementation and interpretation of the law. At the heart of this issue lies the vague definition of "law enforcement apparatus," which fails to specify the exact entities or bodies encompassed

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<sup>33</sup> Law No. 17 of 2023 concerning Health, Art. 304.

<sup>34</sup> Law No. 8 of 1981 concerning Criminal Procedure Law, Art. 1 (14).

<sup>35</sup> Bahran. "Penetapan Tersangka Menurut Hukum Acara Pidana Dalam Perspektif Hak Asasi Manusia." *Journal of Islamic and Law Studies* 5, no. 3 (2021): 303-316.

by this term. In Indonesia, there has been a lack of legal clarity regarding the identity of law enforcement agencies, leading to divergent interpretations among legal scholars and practitioners. While some argue that these agencies include the police, prosecution, judiciary, prisons, and advocates, others contend that they consist of the police, prosecutors, judges, and advocates, or even consist solely of the police, prosecutors, and judiciary.

Moreover, even if the entities encompassed by the term "law enforcement apparatus" were clearly defined, questions would remain regarding the extent to which each agency is obligated to prioritize the use of restorative justice mechanisms. The language of the article suggests that these agencies must prioritize the settlement of disputes through restorative justice in accordance with the provisions of laws and regulations. However, it is unclear whether this obligation applies to every stage of the legal process or if failure to achieve restorative justice at one stage grants the victim access to the conventional legal avenues for criminal or civil charges.

In Indonesia, law enforcement entities such as the police, prosecutors, and judiciary have come to an agreement through a memorandum of understanding on the implementation of restorative justice, each supported by their own specific regulations. Such regulations include the Police Regulation Number 8 of 2021,<sup>36</sup> Prosecutor's Regulation Number 15 of 2020,<sup>37</sup> and the Decree of the Director General of the General Justice Agency Number 1691/DJU/SK/PS.00/12/2020,<sup>38</sup> however, Article 306 lack clarity on the alignment of these three regulations. This lack of clarity poses practical challenges and potential inconsistencies in the application of the law.

If the obligation to prioritize restorative justice extends to each law enforcement agency at every stage of the legal process, it could lead to delays and inefficiencies as each entity attempts to resolve disputes through restorative means. Conversely, if failure to achieve restorative justice at one stage automatically triggers recourse to traditional legal avenues, it raises questions about the effectiveness and feasibility of restorative justice mechanisms in practice. For instance, in case of medical negligence, if law enforcement agencies are mandated to prioritize restorative justice, they would need to thoroughly investigate the matter, potentially involving mediation between the patient and medical professionals. However, if these efforts fail to reach a resolution, the case would proceed to the judiciary, where similar obligations would apply. This sequential requirement for each agency to exhaust restorative avenues could result in significant delays and inefficiencies in the legal process.

In order to address these concerns and ensure the effective implementation of Article 306 (3) of the 2023 Health Law, it is imperative to clarify which law enforcement agencies are encompassed by the term "law enforcement apparatus" and to delineate their respective roles and responsibilities in prioritizing restorative justice. Clear guidelines are

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<sup>36</sup> National Police Regulation No. 8 of 2021 concerning Handling Crimes Based on Restorative Justice.

<sup>37</sup> Public Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice.

<sup>38</sup> Decree of the Director General of the General Justice Agency of the Supreme Court of the Republic of Indonesia 1691/DJU/SK/PS.00/12/2020 concerning Implementation of Guidelines for the Application of Restorative Justice.

needed to outline the procedures for implementing restorative justice mechanisms at each stage of the legal process and to establish criteria for determining when such mechanisms have been exhausted and traditional legal avenues should be pursued.

Furthermore, efforts should be made to enhance coordination and communication among relevant stakeholders, including law enforcement agencies, legal practitioners, and policymakers, to ensure a cohesive and consistent approach to the implementation of restorative justice principles. By addressing these issues and providing clarity on the role of law enforcement agencies in prioritizing restorative justice, the legal system can promote fairness, efficiency, and accountability in addressing disputes involving medical personnel or health personnel.

## 5.2. A Need of Defining Boundaries: Restorative Justice Mechanisms

The implementation of restorative justice mechanisms as outlined in Article 306 (3) of the 2023 Health Law raises significant concerns, particularly regarding the lack of clarity in defining the boundaries of such mechanisms as well as the ambiguity surrounding the applicability of restorative justice in cases involving threats to someone's life. While restorative justice can be effective in resolving certain types of disputes, its suitability in cases where lives are at stake is questionable.

As previously noted, law enforcement agencies in Indonesia, including the police, prosecutors, and judiciary, have established a memorandum of understanding on restorative justice each with their own accompanying regulations.<sup>39</sup> However, these differing sets of rules frequently result in disparities in interpretation, especially concerning their implications within healthcare legislation. For example, memorandum of understanding number 131/KMA/SKB/X/2012 defines restorative justice as applicable solely to minor criminal cases delineated in Articles 364, 373, 379, 384, 407, and Article 482 of the Indonesian Criminal Code, with a maximum imprisonment term of three months.<sup>40</sup> This definition presents challenges when applied to instances of medical malpractice, which frequently involve more serious offenses carrying lengthier potential sentences.

Furthermore, Police Regulation Number 8 of 2021 delineates the categories of criminal offenses eligible for restorative justice. According to Article 3 of this regulation, restorative justice is limited to general and special criminal offenses with Article 5(f) explicitly excluding its application in cases involving crimes against individuals' lives. This exclusion poses significant hurdles in medical malpractice cases, where the welfare and even survival of patients may be jeopardized. Such exclusion fails to acknowledge the distinctive nature of medical offenses.

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<sup>39</sup> National Police Regulation No. 8 of 2021 concerning Handling Crimes Based on Restorative Justice; Public Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice; Decree of the Director General of the General Justice Agency of the Supreme Court of the Republic of Indonesia 1691/DJU/SK/PS.00/12/2020 concerning Implementation of Guidelines for the Application of Restorative Justice.

<sup>40</sup> Memorandum of Understanding between the Chief Justice of the Supreme Court, Minister of Law and Human Rights, Attorney General, Chief of the Indonesian National Police, Number 131/KMA/SKB/X/2012, Art. 1(1).

Moreover, Prosecutor's Regulation Number 15 of 2020 specifies the circumstances under which restorative justice may be employed. Article 5(1) outlines that criminal proceedings may be terminated based on restorative justice under specific conditions, including the offender being a first-time offender, the offense being punishable by a fine or imprisonment of up to five years, and the value of evidence or losses not exceeding Rp2,500,000.00.<sup>41</sup> However, these criteria may not adequately reflect the severity of medical offenses, which can lead to significant harm or loss of life. Additionally, applying restorative justice to cases of medical malpractice may not be appropriate due to the complexity of such offenses and their potential ramifications for public safety.

Furthermore, the prosecution regulations expand the scope of crimes eligible for restorative justice, by specifically limiting it to offenses carrying a maximum imprisonment term of five years. While seemingly tailored for cases of negligence, such as those outlined in Article 359, which addresses instances where negligence results in death and carries a maximum imprisonment of five years. This interpretation poses a contradiction with other relevant regulations. The discrepancy arises from the fact that while certain regulations acknowledge the applicability of restorative justice to cases of negligence, they fail to consider the severity of the consequences, particularly in instances where loss of life occurs.

The presence of divergent rules and interpretations surrounding the implementation of restorative justice gives rise to uncertainty regarding which regulations should take precedence and which legal entities are responsible for overseeing the matter. This ambiguity extends to determining the appropriate stage at which restorative justice should be employed within the legal process. Should it fall under the purview of the police, prosecutors, or the judiciary? Moreover, at what juncture in the legal proceedings should restorative justice be applied? In the absence of clear directives and consistent interpretation among law enforcement agencies, discerning the correct course of action becomes difficult, leading to a landscape of confusion and disparities in the application of restorative justice in cases involving medical professionals.

Furthermore, the application of restorative justice in cases of medical negligence presents challenges where the losses incurred in medical cases extend beyond financial compensation, encompassing emotional distress, loss of livelihood, and a profound impact on the quality of life for both the victim and their loved ones.<sup>42</sup> Unlike property crimes or disputes between individuals, where restitution or compensation can often be quantified and provided to victims, loss of life or permanent injury resulting from medical negligence is not easily repairable. Attempting to quantify these losses and reconcile them through restorative justice mechanisms may prove inadequate and fail to address the full extent of the harm inflicted. As a result, the application of restorative justice in cases of medical negligence must be approached with careful consideration of the unique complexities and challenges inherent in such situations.

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<sup>41</sup> Public Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, Art. 5(1).

<sup>42</sup> Anne-Maree Farrell, Amel Alghrani, and Melinee Kazarian, *Loc. Cit.*

Overall, the lack of clarity in defining the boundaries of restorative justice mechanisms poses significant challenges to its effective implementation in cases involving medical personnel. Without clear guidelines and uniform interpretation across legal enforcement bodies, the application of restorative justice remains fraught with confusion and inconsistencies, undermining its potential as a viable alternative to traditional legal avenues. Addressing these concerns is essential to ensure fairness, transparency, and efficiency in resolving disputes within the healthcare system while upholding the integrity of the legal process.

## 6. Conclusion

The 2023 Health Law represents a significant step forward in protecting medical personnel and addressing issues of accountability within the healthcare system. However, the provision regarding the handling of medical personnel facing criminal allegations and disciplinary sanctions raises concerns regarding clarity and implementation. Ambiguities surrounding key terms and the prioritization of restorative justice mechanisms without clear guidelines may result in delays and inconsistencies in the legal process. Furthermore, the prioritization of restorative justice mechanisms, while potentially beneficial, lacks specific guidelines on its application, further adding to the ambiguity and potential for delay in the legal process.

There is a need for the Indonesian government to address these concerns and provide clear, concise definitions and guidelines for the implementation of the 2023 Health Law. This will ensure that victims of medical malpractice can seek timely and effective legal redress, while also upholding the principles of justice and accountability within the healthcare system. Failure to address these issues may result in continued confusion and delays in the legal process, ultimately undermining the effectiveness of the law in protecting both medical personnel and patients.

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