

Criminal Legal Accountability on Medical Privacy Violations

Ridwan¹⁾, Isharyanto²⁾, Hari Purwadi²⁾

¹⁾Masters Program in Law, Universitas Sebelas Maret

²⁾Faculty of Law, Universitas Sebelas Maret

ABSTRACT

Background: The secret of medicine or medical secrets is the right of the patient, this secret is a moral obligation based on the norms of decency originating from Hippocratic oaths, maintaining the secret of medicine is the duty of doctors to carry out their duties and practices. This provision is regulated in Article 48 of Law Number 29 of 2004 concerning Medical Practice, if this secret is leaked it can be held liable for violators. The purpose of this study was to solve legal issues and at the same time provide a prescription regarding the need for legal sources in the form of primary legal materials and secondary legal materials.

Subjects and Method: This was a systematic review with normative juridical methods to solve legal issues.

Results: Legal liability for medical secrets in health service facilities can be applied to the Criminal Code (KUHP). Disputes that occur regarding doctors or health personnel are resolved through professional organizations. Doctors through the Indonesian Doctors Discipline Honorary Council (MKDKI) but MKDKI did not have the authority to examine Criminal cases. Violations of medical secrets or job secrets, legal liability is not regulated or not based on legislation in force in the health sector, but the legal liability of violations of medical secrets comes from the general Criminal Code (KUHP).

Conclusion: The secret of medicine is the autonomy right of patients. Maintaining the secret of medicine is the duty of doctors to health service facilities, the secret of medicine is not absolute and can be opened in certain circumstances, but this secret can be opened in accordance with the provisions of legislation. If the secret is leaked, violators can be asked for legal responsibility, especially Article 322 of the Criminal Code.

Keywords: Medical Secrets, Criminal Legal Accountability, Health Services.

Correspondence:

Ridwan. Masters Program in Law, Universitas Sebelas Maret, Jl. Ir. Sutami No. 36 A, Surakarta, Central Java 57126. Email: ridwanozil16@yahoo.com. Mobile: +6281237553434

BACKGROUND

Maintaining medical secrecy is a medical profession's obligation in the field of health services in accordance with Hippocratic vows that are the basis of oaths of doctors throughout the world (Novianto, 2017).

This obligation is not only a professional obligation but also a moral obligation based on the norms of decency which have been a guide for doctors since time immemorial who stated that "everything I saw and heard in doing my practice would be kept as a secret" (Novianto, 2017).

This obligation is a form of appreciation for confidentiality, in addition to the Hippocratic oath, the obligation to keep medical secrets is also found in: This Declaration of Geneva is a Hippocratic oath which is modernized and introduced by the Medical Association which reads: "I will respect the secrets which are confided in me, even after the patient has been edited" (Guwandi, 2010).

The secret of medicine is a human right to privacy that must be maintained as a form of respect for human dignity and

constitutional rights. In the opening of the 1945 Law firmly stated Sila, namely just and civilized Humanity. In the "Declaration of Human Rights" of the United Nations (UN, 1948) clearly formulated human rights which among others read as follows: (1) Everyone is born independent and has the same rights. They are blessed with reason and mind and their will to associate with each other in brotherhood, (2) humans are respected as human beings regardless of their origin and descendants (Hanafiah and Amir, 2017).

Obliging to keep medical secrets is the duty of a doctor in a health service facility when implementing a practice, for example, practicing independently, public health center, medical centers, hospitals and other health care facilities even after practicing, the obligation to maintain this secret is also stated, Article 48 of the Act - Law Number 29 Year 2004 concerning Medical Practice states that every doctor or dentist must keep medical secrets (Gambling, 2017).

The code of ethics in medical practice in Indonesia was adopted from the International Code of Medical Ethics, so that until now the Privacy and Confidentiality has been regulated in the Indonesian Medical Ethics code (Kusmaryanto, 2018).

Everyone has a secret that he does not want to tell anyone, this secret will be hidden so that no one knows it. The patient is willing to tell all things related to his illness because he believes that the secret will be kept by the doctor who treats or treats him (Lestari, 2013).

From the description of the patient, the doctor will know about the illness of his patient. Previously, the doctor did not know what he was suffering from. So, the origin of the medical secret is from the patient himself who tells the doctor. And it is only natural that the patient himself is considered the owner of the medical secret for

himself, not the doctor who is told and draw conclusions about the illness suffered by his patient. So what was once called the "secret of medicine" is the patient's medical secret, not the secret of his doctor (Guwandi, 2010).

The patient strongly believes in what he has told him about all the illnesses that he suffered from a doctor, whom he considers to be the most intimate secret even though the doctor will not tell another party again without the patient's permission. Medical confidentiality is the principle of respecting autonomy and the principle is not detrimental, only patients may determine who gets access to their privacy and who does not (Bertens, 2015).

What was explained earlier was the absolute medical secret of the patient because the origin of the secret was the patient who told the doctor. Because the term "medicine" is not surprising if there are still some doctors who appreciate it is the secret of their doctors (Guwandi, 2010).

The relationship between doctors and patients is based on mutual trust, on the basis of believing this is the patient entrusting the secret that he left to the doctor. By maintaining that confidentiality, the patient's trust will arise to his doctor so that a relationship of trust is established and thus will facilitate his healing service. If health care providers easily divulge that secret to others, patients will not believe in doctors even though that information is often very useful for the therapeutic process. This will result in the healing process will be difficult and the patient will not come again to the health care in question. This is where the rules regarding maintaining confidentiality emerge. (Kusmaryanto, 2018).

Lack of knowledge of some doctors about the ownership of medical secrets raises a violation of the rights of patients in health services. If the secret obligation of

medicine is violated, it certainly becomes a heavy responsibility for a doctor, both morally and legally. The legal consequences of the violations can be in the form of sharing legal sanctions for doctors who violate the obligation to hold medical secrets (Dewi, 2017).

SUBJECTS AND METHOD

In this study, the normative juridical method is used to solve legal issues and simultaneously provide prescriptions about what is needed including legal sources in the form of primary legal materials and secondary legal materials (Marzuki, 2017).

Legal sources can be distinguished into research sources in the form of primary legal materials and secondary legal material. Primary legal materials are legal materials that are autorotative, meaning that they have authority. Primary legal materials consist of legislation, official records or minutes in making laws and judicial decisions, while secondary materials in the form of all publications on law include textbooks, legal dictionaries, journals law and comments on court decisions. Once legal issues are established, researchers conduct a search to find legal materials relevant to the issue at hand, what researchers must do is to look for legislation or those concerning the issue. Legal materials collected include:

- a) The Criminal Code
- b) Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice
- c) Minister of Republic of Indonesia Regulation Number 36 of 2012 concerning Medical Secrets

The legal material analysis technique used by researchers, the method commonly used in legal reasoning is the method of deduction, the use of the deduction method originates from submitting a major premise and

then submits a minor premise. From that, then the conclusions were drawn.

RESULTS

Legal liability for violations of medical secrets by doctors and health personnel at health service facilities can be applied to the General Code of Criminal Law (KUHP) Article 322, paragraph (1) which reads, "anyone who intentionally opens a secret that must be kept because his position and livelihood, both the present and the former were threatened with imprisonment for nine months and a fine of six hundred rupiah (2) if this crime was committed against a particular person, he was only sued for that person ". (M Yusuf Hanafiah & Amri Amir, 2017).

This is because the medical or medical secrets are also secret positions, which are regulated in the Criminal Code. Disputes that occur regarding doctors or health personnel are resolved through professional organizations. Doctors through the Indonesian Medical Discipline Honorary Council (MKDKI) but MKDKI has no authority to examine Criminal cases. The duty and existence of MKDKI only receives complaints, checks and provides disciplinary sanctions against doctors who conduct violations and in accordance with the provisions of Article 66 paragraph (3) of Law Number 29 Year 2004 concerning Medical Practice, namely complaints as stipulated in paragraph (1) and paragraph (2) do not eliminate the right of every person to report suspected crimes to the competent authorities and/or sue for civil losses to the court (Novianto, 2017),

Violations of the secrets of secrecy or secret of office, legal liability is not regulated or does not originate from the laws and regulations that apply in the field of health, but the legal liability of violating medical confidential sources on the Law

Criminal Code (KUHP) general rules. Dewi (2017) also states that violations against medicine can be held accountable for criminal law, especially Article 322 for violators.

DISCUSSION

1. Violation of criminal law against the obligation to save medical secret

Criminal Law is a violation due to actions or actions that harm someone accompanied by sanctions that have been formed by the authorities, these actions or actions often occur in the community, the knowledge of the knowledge of criminal law is essentially the study of good criminal law is being applied (*ius constitutum*) and criminal law that is still aspired (*ius constitundum*) (Muntaha, 2017).

This norm or behavior is very vulnerable to the future for the victims, one can lose activities to fulfill their daily needs so that criminal sanctions have been arranged before an act occurs. Lemaire states that the Criminal Law norms that contain imperatives and prohibitions (by lawmakers) have been linked to a sanction in the form of punishment, namely a special suffering that will make people more careful in carrying out an action, and generate deterrent effects and levels of awareness for those who have violated (Muntaha, 2017).

Doctors are the spearhead of keeping the secret of someone who is burdened to him other than other health personnel, because doctors are more often and face to face with the sick and get information first about patient complaints, in carrying out their profession, every professional is obliged to keep information confidential obtained from his client. This client's information that must be kept secret is a secret position for doctors who are structural officials or doctors who work as functional and other health workers must keep

confidential information obtained from patients about the disease and recorded in the medical record. The patient's rights are protected by law and sanctions for violators in Article 322 paragraph (1) of the Criminal Code (Novianto, 2017).

Medical records were also very important elements to be kept confidential, medical records contained documents about the identity of the patient and all services that have been given both treatment, subjective and objective examinations and actions that have been given by doctors or other health personnel, this document was maintained so that it was not scattered and reached for those who were unauthorized, this breach of secrecy has consequences in the field of law, because this obligation was also stipulated in the law, in this case the legal provisions in each country were different (Bertens, 2015).

Usually, the law did not specifically talk about medical secrets but about the secrets of the profession in general. In Indonesia, telling the secret of patients by doctors can be punished based on Article 322 of the Criminal Code:

- a) Any person who intentionally opens a secret that must be kept because his position or livelihood, both current and former, is threatened with imprisonment for a maximum of nine months or a fine of at most six hundred rupiah.
- b) If this crime is committed against a particular person, then the action can only be prosecuted for the person's complaint (Bertens, 2015).

2. Opening of the Medical Secret

The secret of medicine can be opened to a certain situation, this was intended to provide benefits to the patient and the interests of other communities. The obligation to maintain patient confidentiality and protect

patient privacy was an important medical profession's obligation, but not absolute. In other words, sometimes there was a reason to open the confidential information entrusted to the doctor. With terminology that was generally accepted in ethics, it can be said that confidentiality for doctors was a prima facie obligation, meaning that this obligation was valid until there was a stronger obligation that defeated the first obligation (Bertens, 2015).

As explained earlier, the opening of medical secrets can be opened according to the provisions of the law. In Indonesia, the disclosure of medical secrets was regulated by Law Number 29 of 2004 concerning medical practice Article 48 paragraph 2: "The secret of medicine can be opened only for the health of patients, fulfilling the demands of law enforcement officials for law enforcement, patient's requests, or based on statutory provisions - invitation (Kusmaryanto, 2018).

This provision was also regulated in the Regulation of the Minister of Health of the Republic of Indonesia Number 36 of 2012 Article 5

- 1) The secret of medicine can be opened only for the health needs of the patient to fulfill the request of law enforcement officials in the context of enforcement, patient's own request, or based on legislation.
- 2) The opening of medical secrets as referred to in paragraph (1) is limited as needed (Minister of Health Regulation No. 36 of 2012)

In accordance with the above provisions, it can be concluded that the obligation to keep the secrets of medicine is not absolute can be opened for the benefit of the patients themselves and the interests of the community. Although the secret of medicine was not absolute, to open this secret must be through existing mecha-

nisms. There were number of exclusion reasons that allowed the disclosure of the patient's medical record, namely: Patient's permission, opening medical secrets from medical record sources must get permission from the patient first as the owner of the medical record, because the medical record owner has the right to whom he/she disclosed (Haryanto, 2015).

If the patient has given permission for the doctor to be released to stay, this permit can be stated clearly, both oral, written and implied. The higher public interest was sometimes a doctor (health personnel) collided with opposing interests, in this case the doctor was allowed to disclose the secret of the patient's disease as long as the reason for disclosure was regulated by law. (Haryanto, 2015).

For the sake of the interests of other parties who need access to medical secrets, they must obtain the relevant patient's permission for the opening for the patient's own interests. health financing guarantee, the opening of medical secrets to fulfill the demands of court apparatus can be done through post mortem et repertum, expert information, witness statements and/or medical summaries. In court proceedings, all medical records can be given (Hanafiah and Amir, 2017).

The opening of medical secrets can also be conducted without obtaining written or unwritten approval, which was in the interests of ethical enforcement or discipline and public interest (medical audits, threats of outbreaks), health research, education and other people's health threats). This was given at the written request of the Professional Ethics Honorary Council of the Indonesian Medical Discipline Honorary Council (MKDKI). The opening or disclosure of the secrets of medicine was carried out by the person in charge of patient care, who can refuse to disclose medical secrets if

the request was in contrary to the provisions of legislation (Hanafiah and Amir, 2017).

In the provisions of the written law of positive law in Indonesia relating to criminal provisions (KUHP) which protect doctors who were forced to violate position secrets, among others, Article 48 of the Criminal Code (*overmacht*), which stated that whoever acts because the influence of forced power is not punished; Article 50 of the Criminal Code; Whoever commits an act to implement the provisions of the law is not convicted; Article 51 paragraph (1) of the Criminal Code, whoever commits an act to carry out a position order given by the competent authority is not convicted (Novianto, 2017).

3. Legal Liability Against Violations of Medical Secrets

The obligation to maintain the secrets of medicine must be upheld by doctors and other health personnels, because this confidentiality was the right to privacy by patients and their rights to whom they would disclose. This issue of medical secrecy has a basis for unlawful acts, among others due to the obligation of concern (duty of care) from doctors to their patients. This obligation was one of the main elements of any unlawful act, so that if a doctor without a legitimate reason opened the secret of his patient, then the doctor's actions can legally be classified into an illegal act (Novianto, 2017).

Doctors and health personnels were also social beings, interacting with other community members, in carrying out their duties the legal formation of doctors and health personnels was also a legal subject, with the existence of legal sources that regulate medical law issues, the doctor violated his/her actions. The accountability of doctors here was a problem in many aspects (Is, 2015).

Because health law itself has three legal aspects, the position of the doctor in the community has a dual function, which was as a member of the community and the health care personnel of the community itself. As members of the community, the entire law (criminal, administrative and civil) applied to doctors (Is, 2015).

In addition to sanctions and legal application for violations of medical confidentiality, doctors and other health personnels also commit ethical violations which sanctions would be given by their respective professions. Violations of medical secrets were not only related to violations in the scope of medicine or health personnels, violations of medical secrets were also violations of the confidentiality of positions as stipulated in the Criminal Code Article 322 (1) anyone who intentionally discloses secrets, because of his position or livelihood either the present or the former, is threatened with imprisonment for a maximum of nine months or a fine of six hundred rupiah. (2) if this crime is committed by a certain person, this crime can only be prosecuted on the basis of the person's complaint. (Article 322 of the Criminal Code) The leak of medical secrets or secret of position was a complaint.

Provisions regarding medical secrets besides being regulated in the Criminal Code (KUHP) this provision was also regulated in a law specifically in health law, as stipulated in Article 48 of Law No. 24 of 2009 reads: paragraph (1) every doctor or dentists in conducting medical practices must keep medical secrets; paragraph (2) the secret of medicine can be opened only for the benefit of the health of patients, fulfilling the request of law enforcement officials in the context of law enforcement, patients' requests, or based on statutory provisions (Yustina, 2014).

The existence of violations of public order was the relevance to criminal offenses, sometimes doctors were called as expert witnesses in the process of investigation and judicial process in the court in which must provide information that must be kept, not convicted. This was due to the fact that the act of giving such information lose its unlawful nature, which was to prioritize the greater interests in the form of legal interests for the upholding of justice. However, the provisions of Article 48 of Law Number 29 Year 2004 did not criminalize the act of storing medical secrets, but the provisions of article 322 of the Criminal Code can still be applied to doctor's work (Novianto, 2017).

Violations of medical confidentiality in addition to violations of criminal law as well as violations of administrative law and ethical violations, administrative and ethical violations can be given by each professional organization, both the medical profession and other professional organizations, such as nurses, midwives and so on. Article 64 of Law Number 29 of 2004 explained that the duties of the Indonesian Medical Disciplinary Board include: receiving complaints, examining and deciding cases of violations of the disciplines of doctors and dentists submitted, and drafting guidelines and procedures for handling disciplinary violations doctors and dentists. This mean that the existence of the Indonesian Medical Disciplinary Board was limited to examining and deciding cases of violations of disciplines of doctors and dentists and not given the task or authority to examine and decide on criminal cases. In accordance with the provisions of Article 66 paragraph (3) of Law Number 29 of 2004 concerning Medical Practice, namely: "Complaints as stipulated in paragraph (1) and paragraph (2) do not eliminate the right of every person to report suspected

crimes to authorized parties and / or suing civil losses to the court." (Novianto, 2017).

If someone made a mistake to people and there was an element of loss to the party, of course the party who lose would ask for accountability, accountability came from the word responsibility, which mean the obligation to bear everything (if there was something, may be prosecuted, blamed, prosecuted and so on) (Novianto, 2017).

In Dutch terms, legal accountability was also known as 'aansprakelijk', which mean being bound, responsible, legally responsible for mistakes or the consequences of an act. In the sense and practical use, the term liability referred to legal liability, namely accountability due to mistakes made by legal subjects (Novianto, 2017).

In criminal provisions there was an unlawful act against someone's mistake and would be held accountable, because the consequences of someone's actions made the other party lose. Regarding acts against the law as a basis for criminal liability. Without an act that was against the law, then there was no criminal responsibility. Regarding the term 'against the law', Andi Hamzah gave his definition. "Against the law is objectively abnormal actions. If the act itself is not against the law, it is not an abnormal act. For this matter, it no longer needs the answer to the persone who made it. If his own actions are not against the law, the maker is innocent. Error is a subjective element, that is for certain makers (Muntaha, 2017).

After carrying out actions of a person that can harm to others, for the mistakes, of course various reasons arised from the perpetrator in order to defend himself, the term error (schuld) in criminal law related to accountability and the burden of accountability which referred to intentions (dolus/opzet) and negligence (culpa).

Schuld element about the condition or inner picture of the person in starting an action so that this element would always be attached to the subjective actor/maker. And this element was connected between actions and consequences and the nature of against the law of action with the servant (Novianto, 2017).

A person who committed a criminal act can be identified by assessing the mistake that he made. Seeing the position of errors in criminal acts was very important, because by determining whether there were errors that would determine also the severity of the sentence imposed on someone. It was undeniable, and it was no longer a secret that the criminal law prevailed in Indonesia from the past until now was still adhered to the doctrine of no criminal without any errors (Muntaha, 2017).

In a court ruling before giving a verdict, the judge would examine a case and interpret it related to the articles which relevant to the case and supporting evidence. Article 183 of Law Number 8 of 1981 concerning the Criminal Procedure Code did not provide a definition of proof, but only clarified that a judge might not impose a sentence for a person, unless there were at least two valid evidences. Article 183 of the Criminal Procedure Code: "a judge may not impose a sentence on someone, except with at least two valid evidences he has the conviction that a criminal act actually occurred and that the accused was guilty of doing so." (Muntaha, 2017).

Recently, there have been a number of cases, for example, the 'Mirna Case' which died allegedly due to coffee that she drunk, this case used electronic evidence. In Indonesia, valid evidence was regulated in Article 184 paragraph (1) of the Criminal Procedure Code which are (a) witness statements (b) expert information (c) letter

(d) instructions and (e) defendant's information (Effendi, 2014).

The party suspected of committing a criminal act was not necessarily the one who did it, because determining someone guilty or not required a mechanism for the judicial process that must be passed. Proof of the argumentation or argument based on the evidence presented in the case examination was the most important part of the procedural law in court. This was the party to the dispute has legal rights and even human rights. Moreover, the criminal law, a defendant charged with guilt must refer to the evidence and conviction of the judge, because it was not necessarily the defendant who did it (Asshiddiqie, 2012).

The application of law in the law enforcement process was influenced by economic, social and cultural considerations, but the essence of law and legal nature needed to be a reference. Justice was a function of judging or the process taken in seeking and finding justice (Ali, 2015).

"The eyes of eastern law enforcers "should not be closed to be able to witness and absorb the" sense of justice of the people, "able to absorb the legal values that live in the community, able to absorb the demands and aspirations of the people (Ali, 2017).

Judges in the judicial process to examine a case known as the principle of free independence, were free from outside intervention. The task of judges in general was to implement the law in concrete terms, there were demands for rights, namely actions aimed at obtaining legal protection provided by the court to prevent "eigenrechting" or self-judgmental actions. So if there were demands for concrete rights or events submitted to the judge then the judge executed the law. The law must be carried out, especially if it was violated, then the violated law must be enforced,

maintained or realized (Sulistiyono and Isharyanto, 2018).

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