IUS POENALE

Volume 5 Issue 2, July 2024: pp.101-112.
Faculty of Law, Universitas Lampung, Bandar Lampung, Indonesia.
http://jurnal.fh.unila.ac.id/index.php/ip
P-ISSN: 2723-2638 E-ISSN: 2745-9314

Depenalization of Medical Personnel Practicing Without a Practice License After the Enactment of the 2023 Health Law

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Submitted: Oktober 21, 2024; Reviewed: Desember 2, 2024; Accepted: Desember 27, 2024

Article's Information

keywords:

Medical personel, Depenalization, Practice license, Health Law

DOI :
https://doi.org/10.25041/ip.v5i2.3599

Abstract

The background of this research is that a doctor, as a medical professional, plays a crucial role in the healing process of patients based on knowledge and competence. The issue of doctors practicing without a valid practice license (SIP) has often been heard before the enactment of Law Number 17 of 2023 concerning Health, where the regulation on criminal sanctions for doctors practicing without an SIP was found in Law Number 29 of 2004 concerning Medical Practice. However, after the enactment of Law Number 17 of 2023 concerning Health, the regulation on criminal sanctions has been removed, leaving only administrative sanctions in effect. This research aims to explore the concept of depenalization for medical personnel practicing without a valid practice license after the enactment of Law Number 17 of 2023 concerning Health. The type of research used in this study was normative research, employing both a statutory approach and a conceptual approach. The findings of the study indicate that if the actions of the doctor can be proven in a factual judgment (judex facti), the concept of depenalization with the imposition of criminal

sanctions should be considered, while setting aside the principle of economic deterrence.

A. Introduction

One of the fundamental human needs is the preservation of health. This is safeguarded by law in terms of its fulfillment.[1] The right of citizens to health is stated in "Article 28H paragraph (1) of the 1945 Constitution that Everyone has the right to live a prosperous life in birth and mind, to live, and to get a good and healthy living environment and the right to receive health services". The state as duty bearer plays a role in terms of fulfilling and protecting the right to health for its citizens. Therefore, improving health services is an investment in human resources to achieve a prosperous society.[2]

Law Number 17 of 2023 concerning Health (hereinafter referred to as the Health Law) defines "health services as all forms of service activities provided directly to individuals and the community to maintain and improve the degree of public health in the form of promotive, preventive, curative, rehabilitative, and palliative." Health services aim to prevent and treat disease, including providing individual medical services to patients who need treatment. These health services can also be performed through proper enforcement, therapy, and medical actions carried out in accordance with medical service standards to help patients recover.[3]

Doctors as medical personnel have an important role in efforts to cure disease for patients based on their knowledge, abilities, and competencies.[4] In an effort to heal, there must be approval from the patient for information at the hospital, and medical actions carried out by doctors are certainly not without risk, so the doctor who will perform medical action must first provide information about the action to be taken, the benefits, the risks, alternative treatments (if any), and the possibility that will occur if medical action is not taken. This is stated in informed consent, which can be interpreted as consent given by the patient's family based on information and explanation of the medical action performed on the patient.

Medical actions taken by doctors on patients must be in accordance with the authority of competencies obtained while pursuing education.[5] In this case, the author gives an example that a dentist should not exceed his authority to examine and perform actions on patients with conditions that require oral surgery. To be able to practice in hospitals or health facilities, doctors must have a Practice License (SIP) and a Registration Certificate (STR) in the Health Law regulated in Articles 263 to 266. It is also contained in Circular Letter Number HK.02.01-Menkes-6-2024 concerning the Implementation of Licensing for Medical and Health Workers After the Issuance of Law Number 17 of 2023 concerning Health.

The cases of medical personnel who perform health services without STR and SIP are still quite common in big cities. The case of doctors who practice without STR and SIP mentions a number of reasons, one of which is that the doctor did not pass the competency exam, there was no time to take care of SIP and STR due to practice schedule that was too tight, not realizing that SIP and STR were no longer valid, besides that cases of practicing doctors without SIP can also be found in the Tanjung Redep District Court Decision Number 287/Pid.Sus/2020/PN.

[1] Mikho Ardinata, "Tanggung Jawab Negara Terhadap Jaminan Kesehatan Dalam Perspektif Hak Asasi Manusia," *Jurnal Ham* 11, no. 2 (2020): 319–32.

[2] Andros Timon, "Tanggung Jawab Negara Hukum Demokrasi Dalam Penyelenggaraan Pelayanan Kesehatan," *Soumatera Law Review* 3, no. 1 (2020): 18–29.

[3] Rahmania Ambarika and Lingga Kusuma Wardani, "Analisis Hubungan Perilaku Caring Dengan Tingkat Kepuasan Pelayanan Kesehatan," *The Indonesian Journal of Health Science* 13, no. 1 (2021): 53–60.

[4] Dwi Sandry Resky Dzulhizza, Darwis Anatami, and Ramon Nofrial, "Aspek Yuridis Dalam Pertanggungjawaban Hukum Profesi Dokter Pada Perspektif Pelayanan Informed Consent Untuk Mewujudkan Perlindungan Hukum," *Jurnal Kajian Ilmiah* 23, no. 1 (2023): 43–50.

[5] Ricky Ricky, "Aspek Hukum Peraktik Kedokteran Melakukan Tindakan Medis Yang Bukan Kewenangan Kompetensi Profesinya," *Lex Renaissance* 5, no. 2 (2020): 403–19.

MR. Tnr, Supreme Court Decision No. 1110K/Pid.Sus/2012 and North Jakarta Court Decision Number 450/Pid.Sus/2020/PN. Jkt. Utr.[6]

The chronology of the case in Decision No. 1110K/Pid.Sus/2012 involves a medical practitioner who carried out medical procedures without a valid practice license. The individual performed a tumor surgery to remove and excise it, as well as an intestinal resection directly on the victim. This action was carried out without a team of specialized doctors. Post-surgery, the patient continued to experience pain and was referred to R.K.Z Hospital, where initial treatment was provided in the ICU, and the patient was further referred for surgery by a team of specialists.

The first surgery involved evacuating approximately one liter of fecal fluid and yellowish pus-like fluid that had contaminated and infected the abdominal cavity, followed by washing the abdominal cavity with saline solution.

The second surgery was performed to address the leakage at the site of the intestinal anastomosis, a complication resulting from the initial surgery performed by the defendant. The medical team discovered black stitching thread left behind in the leaking section of the colon.

Eight months after the surgery, the patient passed away. The verdict sentenced the defendant to 1 year and 6 months in prison and ordered them to pay court costs at all levels of the judicial process, including a nominal fee of IDR 2,500.

The prohibition of practicing without STR and SIP for medical personnel and health workers is "regulated in Law Number 39 of 2009 concerning health and Law Number 29 of 2004 concerning Medical Practice (hereinafter referred to as the Medical Practice Act)." The author makes a comparison related to the regulation of SIP after the enactment of the 2023 Health Law with corporation as its legal subjects and the regulation of SIP with medical personnel as its legal subjects and is described as follows:

1. Practice License (SIP) arrangement with the legal subject of the corporation
   a) **Medical Practice Act**
      - Article 42 states that *"Leaders of health service facilities are prohibited from allowing doctors or dentists who do not have a practice medicine in such health service facilities."*
      - Article 80 paragraph (1) states *"Every person who intentionally employs a doctor or dentist as referred to in Article 42, shall be sentenced to imprisonment for a maximum of 10 (ten) years or a maximum fine of Rp. 300,000,000.00 (three hundred million rupiah). (2) In the event that the criminal act as intended in paragraph (1) is committed by a corporation, the penalty imposed is a fine as intended in paragraph (1) plus one-third or an additional penalty in the form of revocation of the license.*"
   b) **Health Law**
      Article 442 states "*Every person who employs Medical Personnel and/or Health Workers who do not have a Practice License (SIP) as referred to in Article 312 letter c shall be sentenced to imprisonment for a maximum of 5 years or a maximum fine of Rp. 500 million*"
2. Practice License (SIP) arrangement with the legal subject of Medical Personnel
   a) **Medical Practice Act**
      Article 76 states that "*Any doctor or dentist who deliberately practices medicine without having a Practice License is threatened with imprisonment for a maximum of 3 years or a maximum fine of Rp. 100 million*" (once tested to the Constitutional Court).
   b) **Health Law**
   - Article 312 letter c "*everyone is prohibited from practicing as a health worker without*

[6] Mega Orceka Depera Senja Belantar and Yeni Triana, "Kewajiban Surat Izin Praktik Bagi Dokter Dalam Pelayanan Kesehatan Berdasarkan Undang-Undang Nomor 17 Tahun 2023 Tentang Kesehatan," *Jurnal Kesehatan Tambusai* 5, no. 1 (2024).

having an STR and SIP".

- There are no criminal sanctions if medical personnel practice without SIP but there are administrative sanctions.

Based on a comparison between Law Number 39 of 2009 concerning Health and the Medical Practice Law after the enactment of the Health Law 2023, it can be understood that, from the *das sollen* perspective, medical personnel and healthcare workers practicing without a valid practice license (SIP) and registration certificate (STR) should be subject to penalties as stipulated in the Medical Practice Law and the Health Law 2009 in order to protect the public from unauthorized and high-risk practices. However, from the *das sein* perspective there are still medical personnel and healthcare workers practicing without an SIP or STR, but with the provisions of the Health Law 2023, criminal sanctions are no longer applied. This highlights a lack of effective supervision or law enforcement.

In this study, the author presents a comparative analysis of previous research, specifically:

1. The study was undertaken by April Hidayat, Hasnati and Sandra Dewi from Lancang Kuning University with the research title "Juridical Analysis of Unlicensed Medical Practice in Indonesia" focuses more on the legal provisions on the license of doctors based on Law Number 29 of 2004 concerning medical practice, with the results of the research showing that the provisions governing the license of the medical profession are regulated in Article 36 of Law Number 29 of 2004 about Medical Practice that every doctor and dentist who practices medicine in Indonesia is required to have a practice license.[7] The difference with this study is that it focuses more on the concept of depenalization after the enactment of Law Number 17 of 2023 concerning Health.
2. The research conducted by Nining Yurista, and Anisa Dewi from Pelita Bangsa University with the research title "Juridical Analysis of Clinics Employing Foreign Doctors Without Temporary Registration Certificates and Practice Licenses" focuses more on criminal sanctions against clinics that employ foreign doctors without temporary registration certificates and practice licenses. The results of the study show that foreign doctors who do not have a temporary registration certificate and a practice license violate Law Number 29 of 2004 concerning Medical Practice and Regulation of the Minister of Health Number 6 of 2023.[8] The difference with this study is that it focuses more on the elimination of criminal sanctions against practicing doctors without SIP after the enactment of Law Number 17 of 2023.

Considering the aforementioned background, the issue addressed in this research is to explore how the concept of depenalization can be applied to medical personnel who practice without a valid practice license, in accordance with the enactment of Law Number 17 of 2023 concerning Health. The objective of this study is to examine the concept of depenalization for medical personnel practicing without a valid license following the enactment of Law Number 17 of 2023 concerning Health. This research employs a normative legal approach, utilizing both the statute approach and the conceptual approach. The study specifically focuses on the legislative framework provided by Law Number 17 of 2023 concerning Health. To achieve this, the research employs secondary data collection methods, encompassing primary, secondary, and tertiary legal sources, to address the research questions. The findings of this study will undergo qualitative analysis and will be presented in a descriptive manner.

[7] April Hidayat, Hasnati Hasnati, and Sandra Dewi, "Analisis Yuridis Terhadap Praktik Kedokteran Tanpa Izin Di Indonesia," *Innovative: Journal of Social Science Research* 3, no. 2 (2023): 12181–89.

[8] Nining Yurista Prawitasari and Anisa Dewi Ariani, "Analisa Yuridis Terhadap Klinik Yang Mempekerjakan Dokter Asing Tanpa Surat Tanda Registrasi Sementara Dan Surat Izin Praktek," *Jurnal Hukum Pelita* 5, no. 1 (2024): 76–86.

P-ISSN 2723-2638
E-ISSN2745-9314

B. Discussion

Depenalization is the elimination of criminal threats for prohibited acts and replaced with other threats, such as compensation or administrative sanctions. This concept leads to the goal that negative sanctions that are criminal in nature are eliminated from a behavior that is threatened with a criminal offense. In this case, only the criminal qualification is eliminated, while the nature of defiance or violation of the law is still retained.[9] In the process of depenalization, the punishment is the *ultimum remidium*. *Ultimum remedium* is a principle in criminal law that restricts the use of criminal sanctions as a last resort in resolving legal cases which means that in resolving cases as much as possible it is resolved using other legal instruments, such as Civil Law, Administrative Law, and others.[10] Therefore, certain behaviors that are still considered against or violate the law are subject to negative non-criminal sanctions which if ineffective will end with criminal sanctions as a last resort where criminal sanctions are positioned as an emergency law (*noodrecht*).[11]

Licensing is a form of implementation of regulatory functions and a form of government control over activities carried out by the community.[12] In the relationship to health services, doctors must have a registration certificate (STR) and a practice license (SIP), as medical personnel who maintain the health of patients. In the Health Law, the Registration Certificate is written evidence given to medical personnel and health workers who have been registered." This is regulated in Article 1 Number 27 of the Health Law, while the "Practice License is written evidence given to medical personnel and health workers as granting authority to carry out practice." The pertinent regulation is set forth in Article 1, Number 29 of the Health Law. Furthermore, The Ministry of Health issued a circular related to the implementation of licensing for medical personnel and health workers after the issuance of the Health Law, the implementation of medical personnel licensing issued by the district/city government with the following provisions:

a. Applications and extensions of SIP for medical personnel and health workers who apply for the issuance of SIP or extension of SIP that has expired can submit an application for SIP issuance to the head of the Regency/City Health Office or the Head of the Investment and One-Stop Integrated Services Office in the district/city where medical personnel and health workers carry out their practice.
b. Medical personnel or health workers who apply for the issuance of SIP for the first time with an STR that has been issued and is still valid before Law Number 17 of 2023 concerning Health is promulgated must attach an STR and a certificate of practice.
c. Medical personnel and health workers who apply for the issuance of SIP for the first time with an STR valid for life for medical personnel and health workers who have graduated less than five years before Law Number 17 of 2023 concerning Health is promulgated attach an STR and a certificate of practice.
d. Medical personnel and health workers who have a lifetime STR but have never practiced for more than five years since before Law Number 17 of 2023 concerning Health was promulgated and will apply for the issuance of a SIP, must attach an STR, a certificate of place of practice, and proof of competency fulfillment.

Prior to the enactment of the 2023 Health Law, the norms governing the obligation for medical personnel to practice medicine were one of them to have a SIP and the norms governing the provisions for criminal acts related to SIP were regulated in the Medical Practice Law. The

[9] Gregorius Cristison Bertholomeus et al., *Hukum Kriminologi* (Padang: CV. Gita Lentera, 2024).
[10] Angelos Gogo Siregar, "Implementasi Asas Ultimum Remedium Terhadap Penerapan Sanksi Pidana Dalam Undang-Undang Administratif," *Innovative: Journal Of Social Science Research* 3, no. 4 (2023): 10271–85.
[11] Moh Dulkiah, *Sosiologi Kriminal* (Bandung: UIN Sunan Gunung Djati, 2020).
[12] Rinaldi Syahputra, "Kebijakan Penerbitan Surat Izin Praktik Dokter Di Indonesia," *Jurnal Hukum Positum* 7, no. 1 (2022): 67–82.

obligations of medical personnel related to SIP ownership are regulated in Article 36 of the Medical Practice Law. In relation to the article related to the criminal provisions for medical personnel who practice without SIP, namely Article 76 of the Medical Practice Law was submitted for judicial review to the Constitutional Court (MK) in 2007, in addition to Article 76 there are several articles in the Medical Practice Law that are submitted for material test or judicial review and the submission was decided on June 19, 2009 with decision No. 4/PUU-V/2007, in *a quo case* which is the basis for the consideration of the panel of judges of the Constitutional Court who examined and decided the case related to the criminal provisions against medical practice that does not have a SIP as stated in Article 76 of the Medical Practice Law can be justified (*gerechtvaardigd, justified).*

According to the Constitutional Court panel, if viewed from the perspective of criminal law theory, where the offense is an act that endangers the community, it is considered an act of *mala prohibita*. Theoretically related to the conception of crime, the principle of *mala prohibita* is an act considered a crime because it violates laws and regulations,[13] an act is only declared as a criminal act if the act is prohibited (*prohibitum*) which if associated with the criminal threat regulated in the article is a consequence of a violation of an obligation for medical personnel to have STR and SIP where practicing medical personnel are required to have an STR this is a formal arrangement (*formele bevoegdheid)* while SIP regulates material ability (*materiele bevoegdheid*). Thus, medical personnel to be able to carry out medical actions in health service efforts must first show proof of ability (*bevoegdheid*) both in the formal and material sense.[14] From the perspective of criminal law theory, an act to be punished must at least meet two conditions, namely wrong (*schuld*) and unlawful (*onrechtmatigedaad/wederechtelijk*). The existence of an unlawful act must meet four elements:[15]

1. There must have been an act done
2. The act must be against the law (*die daad moet onrechtmatige zijn*),
3. That act must have caused harm to another than
4. The deed is due to a mistake that can be blamed on him (*die daad moet aan schuld zijn te wijten),*

So that the application of the formulation of criminal provisions contained in Article 76 of the Medical Practice Law from the perspective of criminal law theory can be justified (*gerechtvaardigd, justified*).

Furthermore, The Constitutional Court has determined that the use of criminal threats is inappropriate in instances where alternative methods that are equally effective but cause less harm and loss can be employed to achieve the same goal. Furthermore, the potential consequences of such threats must be weighed against the criminal act itself to determine whether the latter outweighs the former. Criminal threats must be rational, and they must be consistent with the principles of order, legality, and competence. Furthermore, criminal threats must be consistent with the principles of public protection, honesty, procedural justice, and substantive justice. Criminal threats in Article 76 are not in line with the provisions of Article 28G Paragraph (1) of the 1945 Constitution and cause threats and fear to medical personnel in carrying out medical practice in providing health services to the community. Therefore, the threat of imprisonment and imprisonment regulated in Article 76 of the Medical Practice Law is contrary to the 1945 Constitution so that in the Constitutional Court's decision granting part of the application, it states that Article 76 is contrary to the 1945 Constitution and has no legal force. A simple interpretation based on the consideration of the panel of judges to decide *a quo* cases is only a phrase related to criminal threats that does not have legal force, but medical

[13] Sumiaty Adelina Hutabarat, "Kajian Kebijakan Hukum Pidana Terhadap Kejahatan Di Media Sosial," *Judge: Jurnal Hukum* 5, no. 01 (2024): 12–15.
[14] Ibid.
[15] Indah Sari, "Perbuatan Melawan Hukum (PMH) Dalam Hukum Pidana Dan Hukum Perdata," *Jurnal Ilmiah Hukum Dirgantara* 11, no. 1 (2021).

P-ISSN 2723-2638
E-ISSN2745-9314

personnel who practice without SIP are violations that should have sanctions as legal consequences for violations.

With the enactment of the 2023 Health Law, the formation of which applies the omnibus law method so that several health-related regulations with different substance arrangements are formed into one regulation, the enactment of the Health Law also amends, repeals, and/or changes several regulations, including the Medical Practice Law. The regulation of norms related to the obligation to have a SIP for medical personnel whose practice is regulated in Article 263 of the Health Law, namely certain types of medical personnel and health workers in carrying out their professional practice, are required to have a SIP issued by the local government or the minister under certain conditions and reaffirmed in the next article 312 letter c states "*everyone is prohibited from practicing as a health worker without having an STR and SIP*" While the criminal provisions if medical personnel practice without having a SIP there is no criminal threat, the Health Law regulates administrative sanctions for medical personnel who practice without having a SIP as stated in Article 313 in the form of administrative fines..

An interesting thing is related to the provisions of obligations and even the prohibition for medical personnel to practice without a SIP. Criminal provisions for corporations that employ medical personnel to practice but do not have a SIP as stipulated in 440 "*Every person who employs Medical Personnel and/or Health Workers who do not have a Practice License (SIP) as referred to in Article 312 letter c shall be sentenced to imprisonment for a maximum of 5 years or a maximum fine of Rp. 500 million*".

The question is the justification and basis for lawmakers to distinguish in the norm of something that is prohibited from "practicing without SIP" which if carried out by medical personnel, the sanction is only an administrative fine, but if it is done by a corporation in terms of employing medical personnel without SIP, it is threatened with an alternative crime, namely 5 years imprisonment or a fine. For medical personnel who practice without SIP reviewed in the Health Law is not a criminal offense, because the condition for an act to be categorized as a criminal act according to Article 11 of the Criminal Code is that the act is prohibited and accompanied by criminal sanctions. This means that from these two articles, there is confusion and inconsistency between the articles where if interpreted simply if medical personnel who practice medicine without SIP or violate the provisions of article 312 are not a criminal offense because there is no criminal threat against them, but if hiring medical personnel without SIP becomes a criminal offense because the elements of the act are prohibited and there are criminal sanctions met.

The author argues that the depenalization of medical personnel who practice without SIP where it is clear that the act is prohibited by the Health Law, namely the absence of criminal sanctions for acts that are clearly prohibited and required by the Law only in the form of administrative sanctions, *the* lawmakers are consistent in norming the prohibition of practicing without SIP both for medical personnel/health workers and for corporations or health service facilities that employ similar norms should also be implemented in Article 440. The inconsistency of the normative provision of criminal provisions by lawmakers (*de wetgever)* causes the principle of legal certainty in its application to not be met.

Quoting from the basis of legal considerations of the panel of judges of the Constitutional Court case No.4/PUU-V/2007 where 9 constitutional judges there are 3 people have *dissenting opinions* and several expert opinions in *a quo cases*, especially related to practice without STR and SIP, which basically the majority of judges are of the opinion that the act of practicing without SIP and/or STR is indeed desired and known (*willen en weten*) by medical personnel and/or health workers, thus against them can be held accountable for such acts, of course, indirectly this will cause losses to patients, from the point of view of criminal law theory, the formulation of criminal provisions can be justified (*gerechtvaardigd, justified*), but related to

the criminal provisions of the formulation of Article 76 with the provision of criminal sanctions is considered inhumane. SIP and STR are clinging to administrative arrangements, do not have STR and/or SIP violate administrative provisions.

Practicing without permission cannot be declared a criminal act because it does not contain elements of unlawful nature, the use of criminal law as the *ultimate remedium* which emphasizes that if a goal can be achieved with sanctions that are not criminal law, then such sanctions will be used and not criminal law.[16] The use of criminal law must also be avoided if the side effect is greater and the enforcement is ineffective. Against the practice without SIP and/or STR, even though the act is against the rules that have been set, the administrative rules are not criminal, so they should be threatened with administrative sanctions.

Regarding the Constitutional Court's Decision which is final and must be implemented so that it affects the norms in the Health Law, if it is correlated with the Health Law, especially the norms that regulate the prohibition of practicing without SIP and employing medical personnel without SIP in order to ensure the consistency of norms by the lawmakers so that there is no confusion and inconsistency between article one and other that are related to each other, it is appropriate if the prohibited acts are categorized criminal acts, the criminal sanctions imposed on it are also related to the administration of the sanction is an administrative sanction. Empirical facts exist in the prohibited acts if the subject is medical personnel, then depenalization occurs, while if the subject is a corporation, it is threatened with criminal sanctions. The foresight and precision of lawmakers in applying norms is not only for the articles submitted for judicial review that have been amended but also for other articles whose substance has correlations, revised and adjusted so that there is no *inconsistency* of rules in the regulations.

The case of medical personnel who practice without a practice license is a problem that is still a phenomenon in the community to this day.[17] Violations of administrative laws in the field of medicine are known to be subject to criminal sanctions but are not included in the category of medical malpractice. However, previous research has stated that administrative violations have the potential to lead to medical malpractice especially if the doctor's medical actions cause harm to the patient either physically, health, or the patient's life.[18] One of the cases of administrative violations of medical personnel in health services can be found in the Madiun Court Decision Number: 1110K/Pid.Sus/2012, in the case of medical malpractice. dr. B.S (defendant) is a surgeon who then on October 25, 2007, carried out medical procedures at the Level IV Hospital of the Army Health Service (RS D.K.T) Madiun City by deliberately practicing medicine without having a practice permit. The defendant opened a practice on Jl. Major General Sungkono Madiun, on December 12, 2006 and submitted an application for a doctor's practice permit at the Madiun City Health Office to practice at the Level IV Hospital of the Army Health Service (RS D.K.T) Madiun City and has fulfilled the requirements in accordance with the Regulation of the Minister of Health No.512/Menkes/Per/IV.2007 and the Regional Regulation of Madiun City No.13 of 2003, However, the defendant as the applicant did not pay the levy fee of Rp. 300,000,000.00 (three hundred and rupiah) so that the doctor's practice permit was not issued by the Madiun City Health Office.

On October 27, 2007, in the operating room of Level IV Hospital Madiun (D.K.T Hospital), the defendant performed surgery to remove the tumor and connect the intestines to the patient JTH. However, JTH felt continuous pain because of the leakage of the colon connection as a result of the first surgery. On November 14, 2007, JTH underwent a second surgery and a team

[16] Siregar, "Implementasi Asas Ultimum Remedium Terhadap Penerapan Sanksi Pidana Dalam Undang-Undang Administratif."

[17] Hidayat, Hasnati, and Dewi, "Analisis Yuridis Terhadap Praktik Kedokteran Tanpa Izin Di Indonesia."

[18] Sabrina Difa Amallia, Guritno Adi Nugroho, and Adelina Damayanti Anggarini, "Akibat Hukum Dokter Malapraktik Dan Keluarga Pasien Yang Membiarkan Keluarganya Ditangani Oleh Dokter Tanpa SIP," *Multidisciplinary Indonesian Center Journal (MICJO)* 1, no. 2 (2024): 1020–26.

P-ISSN 2723-2638
E-ISSN2745-9314

of experts from Mitra Keluarga Hospital Surabaya found a black thread left in the leaking colon. Then on July 20, 2008, JHT passed away. As a result of this case, in accordance with the Madiun District Court Decision Number 1110K/Pid.Sus/2012, the defendant was found guilty of deliberately committing a criminal offense. They had practiced medicine without a license to do so and had failed to provide medical services according to the established procedure. As a result, the defendant was sentenced to one year and six months in prison.

Doctors who practice without SIP can have an impact that is detrimental to the patient's life and is contrary to the ethics of medical personnel. The medical personnel code of ethics is a set of rules and principles that govern the moral and professional behavior of health practitioners that also sets norms to avoid conflicts of interest and promote collaboration with fellow health workers. Not only does it protect the interests of patients, but it also involves broader moral and social responsibility.[19] The traditional role of the patient, which was previously one of mere receptivity to medical advice, has now evolved to become an active partner in the healing process.[20] It is imperative that medical professionals consider the patient's perspective when selecting a course of treatment, including the decision to perform surgery.[21] The implementation of healing efforts carried out by doctors can bring or cause health losses or even the patient's life; moreover, if the patient knows that the doctor who treats them does not have a SIP, then the patient can ask the doctor concerned for legal responsibility.

The principle of legal responsibility is a responsibility related to rights and obligations. In fact, this principle can be reviewed from 3 different aspects, namely civil, criminal and administrative. In this article, the author will focus more on the criminal aspect. The application of criminal liability cannot be separated from the doctrine of *strict liability* and *vicarious liability*. *Strict liability* in Law Number 1 of 2023 explains that "absolute liability, the perpetrator of a criminal act can be punished only because the elements of the criminal act of the perpetrator have been fulfilled." Meanwhile, *Vicarious liability* is a person's legal liability for wrongful acts committed by others. The two people must have a 'working relationship' and the deeds carried out are still within the scope of their work.[22]

A new criminal element can be said to exist if it meets two elements, namely subjective and objective. Subjective elements are elements that are attached to the perpetrator or that are related to the perpetrator and that are also included in the perpetrator's conscience. While the objective element is the element that has to do with the circumstances, which are in the circumstances where the action of the perpetrator must be carried out. A person can be said to have a subjective element if he satisfies:[23]

a. The ability to take responsibility of the perpetrator
b. Certain mental relationships of the perpetrator who acts, whose actions can be intentional or unintentional.
c. There is no reason to eliminate the fault or eliminate criminal liability from the perpetrator (justifying reason and excuse reason).

The form of responsibility of doctors in carrying out their duties can be held accountable if there is an element of negligence that contains two things, namely, negligence caused by doing something that is not actually done and negligence resulting from not doing something

[19] Irvani Faizzah et al., "Penegakan Kode Etik Tanggung Jawab Profesi Tenaga Kesehatan," *Jurnal Hukum Dan HAM Wara Sains* 2, no. 07 (2023): 526–31.
[20] Hudi Yusuf and Raimundus Uhe Hurint, "Pelanggaran Hukum Dalam Pelayanan Kesehatan Yang Dapat Menimbulkan Sengketa Medik," *Jurnal Intelek Dan Cendikiawan Nusantara* 1, no. 2 (2024): 2354–63.
[21] Ibid.
[22] Fitri Novia Heriani, "Memahami Pertanggungjawaban Pidana Dalam KUHP Baru," Hukum Online, 2024, https://www.hukumonline.com/berita/a/memahami-pertanggungjawaban-pidana-dalam-kuhp-baru-lt65da29d97d621/?page=all.
[23] Amallia, Nugroho, and Anggarini, "Akibat Hukum Dokter Malapraktik Dan Keluarga Pasien Yang Membiarkan Keluarganya Ditangani Oleh Dokter Tanpa SIP."

that is actually done.[24] In the case of doctors practicing without SIP, the Health Law does not regulate the criminal provisions, the author launched the statements of experts, namely:[25]

1. Dr. Sofwan Dahlan, who mentioned that the work of a doctor is a profession different from occupation, so that criminal law must really be used as *an ultimum remidium* instead *of a premium remidium*, more effectively with the application of administrative law.
2. J. Guwandi, GMC in the United Kingdom imposed sanctions on doctors in the form of a warning to cross off the register or termination of a doctor's career, it was suggested that the provisions governing criminal sanctions be abolished because the Council should regulate disciplinary violations, not criminal violations.

Decision No. 4/PUU-V/2007 contains the cancellation of the imposition of imprisonment penalties on doctors who violate their practice licenses on the basis of the Constitutional Court's consideration that criminal threats in the form of imprisonment and imprisonment are inappropriate and disproportionate actions because the provision of criminal sanctions must pay attention to the perspective of criminal law and are closely related to the code of ethics.[26] Consideration of Decision No. 4/PUU-V-2007 states:

1. Criminal threats should not be used to achieve objectives that can be achieved by other effective means with less pain and less harm.
2. Criminal threats should not be used when the consequences are more severe than the act to be punished.

Nevertheless, as the author asserts, if the doctor's conduct can be substantiated through *a judex facti*, it should be met with consequences, as there are instances where doctors who practice without SIP err, particularly when such actions result in adverse outcomes for the patient. The termination of the patient's life is a direct result of the disregard for the principle of economic deterrence, which is designed to safeguard patients' rights, particularly regarding the acquisition of health services that adhere to professional standards and operational procedure standards. The objective is to obtain effective and efficient services that will prevent patients from suffering physical and material losses.

C. Conclusion

The enactment of Law Number 17 of 2023 concerning Health has prompted a series of changes across numerous domains, including the field of medical practice. Similarly, the provisions related to registration certificates and practice licenses have also undergone a transformation, originally regulated in Law Number 29 of 2004 concerning Medical Practice and Law Number 36 of 2009 concerning Health. A notable transformation has been observed with the repeal of criminal penalties imposed upon physicians who engage in medical practice without a SIP. Despite the judicial review to the Constitutional Court concluding that the criminal sanction was disproportionate and inhumane, one of the Court Decisions (1110K/Pid.Sus/1012) saw the judge impose criminal sanctions on the defendant, who was a doctor. This illustrates the discrepancy between the Constitutional Court and the Supreme Court in implementing the results of the judicial review that abolished criminal sanctions against practicing doctors without SIP. Nevertheless, if the judge of fact can prove that the doctor acted in good faith, then the concept of depenalization with the imposition of criminal sanctions should be considered, setting aside the principle of economic deterrence, to fulfill the patient's

[24] Vicky Novriansyah, Syahruddin Pasamai, and Anzar Anzar, "Tanggung Jawab Dokter Akibat Malpraktik Medis Dalam Prespektif Hukum Perdata," *Journal of Lex Generalis (JLG)* 2, no. 3 (2021): 957–71.

[25] Agus Purwadianto, "Tinjauan Kasus Putusan Mahkamah Konstitusi (MK) Dalam Pembentukan Sanksi Pidana Pada Undang-Undang Praktik Kedokteran," in *Sistem Pemidanaan Di Indonesia* (Jakarta: Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM RI, 2007).

[26] Warih Anjari, "Penjara Terhadap Dokter Dalam Perspektif Mengikatnya Putusan Mahkamah Konstitusi Dan Pemidanaan Integratif," *Jurnal Yudisial* 10, no. 1 (2017): 59–78.

right to obtain health services by medical professional standards and avoid physical and material losses.

D. Suggestion

The suggestions that the author can offer are adjustments to regulations and legal systems that support the implementation of depenalization, including clarification on appropriate and consistent administrative sanctions and effective enforcement of violate

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