MEDICAL MALPRACTICE IN THE PERSPECTIVE OF ISLAMIC LAW

By
Ichsan M
Faculty of Law, Universitas Muhammadiyah Yogyakarta
Jl. Lingkar Selatan Taman Tirto, Kasihan Bantul Yogyakarta Indonesia 55183
drichsan65@yahoo.com / +62 813 2829 9898

ABSTRACT

This paper aims at exploring how the Islamic law deals with medical malpractice, employing a descriptive-analytical method to achieve this goal. It is found out that Islam as a comprehensive religion has specified rules on medical malpractice. According to the Islamic law such misconduct is not only a matter of breaking the ethics; it exemplifies a type of crime referred to as *jarīmah qiṣāṣ wa diyah,* i.e. crime against life and the body whether intentionally or unintentionally. The perpetrator is subject to an appropriate punishment to fulfill the rights of the victim and their family and to uphold justice in the society. Furthermore, the Kingdom of Saudi Arabia has proven that the Islamic law on medical malpractice can be implemented in this modern era.

Keywords: medical malpractice, *jarīmah, qiṣāṣ*, *diyah,* Islamic law.

Introduction

Islam is a comprehensive religion, which means its law covers all aspects of life. Every area of human affairs, be it politics, economy, social-culture, healthcare, or other matters, is dealt with and regulated by Islam as it serves as the *hudan* or guidance for mankind in order to achieve happiness in both the now and the afterlife.

As mentioned above, among the areas of which practice is guided and regulated in Islam is healthcare. Islam values life safety and physical well-being highly given that only when the two are present in one's self that a person can have the freedom to move and to perform activities. Islam therefore provides some instructions in order to keep the body healthy and life safe, such as by maintaining good and healthy eating and lifestyle; consuming *ḥalāl* and nourishing food; abstaining from alcohol, drugs, and other forbidden substances; doing exercises regularly; not hurting self nor anyone else; not committing suicide nor killing other people; and seeking treatment from a competent party in times of illness.

Islam's appreciation for health automatically means the same for the medical field and practitioners. In fact Islam considers the medical field a necessary area of profession for Muslims to get involved. A principle says, *mā lā yatimm al-wājib illā bihī fahuwa wājib,* which can be understood as because the Muslim community's well-being will much depend on it (especially in the existence of sickness), the medical field becomes an obligatory service amidst the society and, as such, medical practitioners are greatly respected and held in high regard.

It is very unfortunate, however, to see the medical field recently gain considerable media coverage for the wrong reasons. Some practitioners are suffering a certain extent of damage to their names because of medical errors, which involve, among other things, medical malpractice. From time to time, medical malpractice

occurs in different Indonesian regions and the mass media will always make sure the report reaches the people.

As a result of medical malpractice, many victims suffer damage, both physical, psychological, and material. They who initially seek recovery from an illness in fact go from bad to worse. Some are left with a defect for the rest of their life and some die, and all of these bring about trauma as well as increase the financial burden.

In addition, doctors and hospitals are losing the community's faith. People will understandably refrain from seeing doctors and going to hospitals that have a bad reputation due to a medical malpractice history. This could lead to a severe decline in income for both doctors and hospital administrators.

Considering that there is an increasing number of cases from time to time, this paper is written to explore the essential issue of medical malpractice. Does it belong to the ethical or the criminal domain? If it is a criminal conduct, what is such crime called and what is the punishment for the perpetrator according to Islam? Can the Islamic law concerning malpractice be applied in a modern society as ours today? These are the subjects of our discussion herein, with a hope that we will all attain enlightenment.

Discussion

Medical malpractice seems to occur more frequently of late. It has become an alarming phenomenon, especially for both medical practitioners and patients. The mass media continuously reports medical malpractice cases in the capital city of Jakarta as well as different other regions in Indonesia.

Many such a case is made public but actually most of them are presumptive. The latest case of medical malpractice brought to court is the 2013 case involving doctor Ayu and her two colleagues. The Supreme Court sentenced gynecologists Dewa Ayu Sasiary Prawani, Hendry Simanjuntak, and Hendy Siagian to 10 months of prison for committing malpractice by failing to follow the applicable procedure in handling a caesarean section on Julia Fransiska Makatey, also known as Siska, on 10 April 2010. Siska's mother Yulin Mahengken said, the doctors left her daughter dying for 12 hours at the Prof. Cr. Kandou Malalayang Hospital in Manado until she finally died (Kusumadewi, Tanjung, and Laras, 2013).

The world has changed now, and so have the people of Indonesia. In the past they would accept any treatment done to them or any medicine given by their doctor as well as whatever the results might be. Now, after the repeated public reports by the mass media and as people better understand and are becoming increasingly aware of the law, they will pursue legal justice for any medical error to their detriment.

This situation obviously worries many medical practitioners who may feel at risk of being criminalized whenever they practice their profession. So when carrying out a medical treatment, they may not only think about the patient's life. They may also be concerned about their own safety from possible legal actions against them in case of medical malpractice.

On one hand, it seems this is a good thing because medical practitioners would be more careful for the sake of the patient's safety. On the other hand, however, it puts them in distress. They would be anxious about the risk of what they do to the patient turning against them instead. Medical practitioners somehow are not faultless. They are mere human beings who are prone to error sometimes despite their best effort to avoid any misfortune.

Even if their patient has a very high hope of recovering from an illness, medical practitioners cannot guarantee anything but making the best effort. And because their capacity is limited only to that extent, treatment results cannot be certain. Consequently, if they fail—meaning that the patient remains in the initial condition, gets worse, or even dies—the responsibility should be shared between the patient and the healthcare professional in charge.

Medical errors and medical malpractices need to be disclosed to the public for good reasons, such as to promote public trust, to prevent further harm to the patient and other patients, to respect personal autonomy, to support the principle of justice, to improve the safety of medical practice, and to be develop trust in the physicians and the healthcare system (Ware (ed.), 2015:68).

Definitions of medical malpractice

Before we examine further how the Islamic law deals with medical malpractice, it needs to be clarified what medical malpractice means. Researchers have defined it in different ways and below are some of them.

According to an online medical dictionary, medical malpractice means "Mistreatment of a patient through ignorance, carelessness, neglect, or criminal intent." (Anonymous, no year of publication).

The medical dictionary provides another definition of medical malpractice as "Modern medicine failure to provide professional services with the skill usually exhibited by responsible and careful members of a profession, resulting in injury, loss, or damage to the party contracting those services." (Anonymous, no year of publication).

Meanwhile, according to the Chairman of the Association of Indonesian Doctors (Ikatan Dokter Indonesia/IDI), Prof. Dr. I Oetama Marsis, SpOG (K), "malpractice means any practice not conforming to the modern medical operational procedure" (Ikatan Dokter Indonesia, 2016).

And according to the World Medical Association (WMA), medical malpractice "involves the physician's failure to conform to the standard of care for treatment of the patient's condition, or a lack of skill, or negligence in providing care to the patient, which is the direct cause of an injury to the patient" (World Medical Association, 2005).

All the above definitions, although different in the wording, can be combined to complement one another and form a definition of medical malpractice closest to its essence: **"any wrongful conduct committed by a medical practitioner in his professional capacity that is incompliant with the applicable professional standards, professional service standard and standard operational procedure to the extent that it causes damage to the patient."**

It can be made clear here that "wrongful conduct" in the above definition may be a performance of something that should be avoided or negligence of something that should be performed either intentional or unintentional (i.e. due to carelessness or neglect). "Medical practitioner" means anyone involved in the medical treatment of the patient, including the doctor, the nurse, the hospital management, and other parties. "Professional standards" means the professional standards for medical professionals such as doctors, nurses, and so on. Each of these professions certainly has a set of professional standards that must be complied as an occupational guideline. "Professional service standard" means guideline followed by medical practitioner in exercising healthcare services. "Standard operational procedure" or "SOP" means the commonly accepted procedure for each profession. The SOP must be observed as it

serves as an instruction for practicing the related profession. Lastly, "damage to the patient" means any damage, either material or non-material, suffered by the patient as a result of the wrongful conduct, such as improperly lengthy treatment, abnormally high treatment costs, trauma, deteriorating illness, defect, or even death.

Based on the above definition, medical malpractice comprises four elements:

1. There is a medical error.
2. The medical error is committed by the medical practitioner in charge, be it the doctor, the nurse, the hospital management, or other parties.
3. The medical error happens because the medical practitioner fails to conform to the professional standards and the standard operational procedure (SOP) either intentionally or unintentionally.
4. The medical error results in damage to the patient either material or non-material. In other words, the damage is caused by the wrongful conduct.

Therefore, if a medical error occurs but it is not done by the medical practitioner, or if it is done by the medical practitioner who follows the professional standards and the SOP, or if it is done by the medical practitioner but not causing any damage to the patient, such medical error cannot be categorized as a medical malpractice.

It is necessary to make clear that a medical error by a medical practitioner who follows the professional standards and the SOP cannot be considered a medical malpractice and the practitioners cannot be held accountable. This is in accordance with the statement of the World Medical Association: "An injury occurring in the course of medical treatment which could not be foreseen and was not the result of any lack of skill or knowledge on the part of the treating physician is an untoward result, for which the physician should not bear any liability" (World Medical Association, 2005).

It is also in line with the following hadith:

عَنْ عَمْرِو بْنِ شُعَيْبٍ ، عَنْ أَبِيهِ ، عَنْ جَدِّهِ ، قَالَ : قَالَ رَسُولُ اللهِ صَلَّى الله عَلَيْهِ وسَلَّمَ : مَنْ تَطَبَّبَ ، وَلَمْ يُعْلَمْ مِنْهُ طِبٌّ قَبْلَ ذَلِكَ ، فَهُوَ ضَامِنٌ.)) رواه ابن ماجة والنسائي

From ʿAmr bin Shuʿayb [as narrated] from his father from his grandfather: The Prophet PBUH said: "Whoever performs a medical treatment while he is not known to be a medical expert, he will be responsible" (Narrated by Ibn Mājah and an-Nasāī). (Ibn Mājah, no year of publication: 4/519, and An-Nasāī, 1986:8/52)

The hadith implies that a person conducting a medical practice despite his not having the expertise and never studying medicine will be responsible for any result of his action. And consistent with the above elements of medical malpractice, such person cannot be considered to have perpetrated a medical malpractice because he is not a medical practitioner, but he will be judged to have committed a crime if his action causes damage to the patient. The question, then, is that if the one giving a medical treatment is a medical practitioner and he causes damage to the patient, will he be responsible? If he follows the proper professional standards and SOP, he will not be. On the contrary, if he fails to follow them, he will bear the responsibility as if he is non-medical practitioner.

Does medical malpractice belong to the domain of ethics or law?

Some authors categorize medical malpractice into the ethical domain while others put it in the realm of law. When a medical malpractice occurs, it is necessary to determine whether it is simply an ethical problem or it stands within the legal domain as well.

Doctor Rudy Dewantara wrote in an article of his: "In every profession, including medical, apply ethical norms and legal norms. Thus when an error is believed to have occurred in practice, it should be viewed from the perspective of both norms. An error from the perspective of ethics is called ethical malpractice and from the perspective of law it is called legal malpractice. This needs to be understood given that both ethical and legal norms apply in the medical profession, so when an error occurs in practice, it is necessary to see which domain is violated. Because there are fundamental differences in terms of substance, authority, objective, and sanction between ethics and law, the normative measures to determine ethical malpractice or legal malpractice are inevitably different as well" (Dewantara, 2008).

In the same piece, the doctor also quoted Lord Chief Justice: "What is clear, not every ethical malpractice constitutes a legal malpractice, but any form of legal malpractice constitutes an ethical malpractice" (Dewantara, 2008).

The categorization of medical malpractice into ethical malpractice and legal malpractice represents the Western way of looking at the matter. Western scholars differentiate the two because they do not recognize ethical considerations within law. Ethics are identical and inseparable from religion and they do not want to involve religion in legal affairs.

Within Islam, however, there is no differentiation and distinction between ethical malpractice and legal malpractice because ethical affairs belong to the legal domain. Prof. Omar Hasan Kasule wrote: "In Islamic Law, ethics is included within the Law. This is because Islamic Law is comprehensive and is a combination of moral and positive laws. Strictly speaking we should not talk about ethics when we use Islamic law because ethical issues are encompassed within the law" (Kasule, 2007).

Furthermore he said: "Secularized European law is in essence a denial of moral considerations in law because morality is associated with 'religion'. Law and ethics therefore can be viewed as separate disciplines in the European tradition. In the European secular perspective the law has only positive laws and has to exclude ethics that are based on moral considerations that are essentially religious in nature" (Kasule, 2007).

Based on this understanding, it can be said that from Muslim scholars' point of view, medical malpractice counts as a criminal conduct, whether it is intentional or unintentional due to negligence, carelessness, or dereliction. As long as it causes damage to the patient, a medical malpractice can be put within a special domain of criminal law termed *jarīmah qiṣāṣ wa diyah.*

Jarīmah qiṣāṣ wa diyah

According to al-Māwardī, *jarīmah* or crime in general means: "A forbidden conduct that is subject to a *ḥadd* or *taʿzīr* punishment according to Allah's ruling" (Al-Māwardī, no year of publication: 192).

"Forbidden conduct" in the above definition refers to either committing a forbidden conduct or failing to carry out an instructed act. The association with Allah's ruling (*sharia*) indicates that it is forbidden by the Islamic law. Therefore, *jarīmah* means the performance of a religiously forbidden act or the failure to carry out an act of which abandonment is religiously forbidden—and both are subject to a sanction. To put it simply, *jarīmah* means conducting a religiously forbidden conduct or neglecting a religiously instructed conduct, upon which the Islamic law has stipulated a punishment.

The word *ḥadd* in the above definition denotes the *ḥudūd* punishment, which is a type of punishment already specified in the Islamic law and it is the right of Allah

or the general public. As for *taʿzīr*, it means the *taʿzīr* punishment, i.e. the legal sanctions for criminal acts that are not yet specified under the Islamic law. In other words, the right to specify and determine this kind of punishment is mandated by the Islamic law to the authorized judge.

Based on the severity of the punishment, crime in Islam can be put into three general groups: ***jarīmah ḥudūd***, ***jarīmah taʿzīr***, and ***jarīmah qiṣāṣ wa diyah.***

Jarīmah ḥudūd refers to a crime that is subject to a punishment already specified in the Islamic law that is the right of Allah. *Ḥudūd* is the plural form of *ḥadd*, which means a punishment mandated under the Islamic law that is the right of Allah. This sort of crime is already specified by Allah and His Prophet in terms of form, extent, and punishment, so judges will simply have to pass the appropriate sentence. They do not have the authority to reduce, increase, or cancel the punishment. *Jarīmah ḥudūd* includes seven crimes: fornicating, *qadzaf* (accusing other people of fornicating), drinking alcohol, stealing, robbing, rebelling, and *murtad* (converting to another faith from Islam).

Jarīmah taʿzīr refers to a crime that is subject to one or more forms of *taʿzīr* punishment (as determined at discretion of the judge). A *taʿzīr* punishment can be understood as *ta'dīb* or instilling a proper behavior in a person. In other words, it means teaching a lesson for sinful acts that are not covered in the *ḥudūd* category, or a punishment for a crime that is not specified under the Islamic law.

As for ***jarīmah qiṣāṣ wa diyah***, it refers to a crime that is subject to a *qiṣāṣ* or *diyah* punishment. According to the *qiṣāṣ* law, a criminal must be awarded a punishment that is the same as their crime. They must be killed if they kill somebody and likewise they must be injured if they injure somebody. *Diyah,* on the other hand, means the payment of a remedy for a crime that causes loss of one's life or damage to one's health, which is equivalent to 100 camels if it is full *diyah*.

There are two types of crime under the *jarīmah qiṣāṣ wa diyah* category, i.e. crime against life and crime against the body. Crime against life means killing somebody, while crime against the body means injuring or maltreating somebody. The crime of killing comprises three sub-categories: Intentional Killing, Intentional-like Killing, and Unintentional Killing (Accidental Killing). The crime of injuring can also be distinguished into two sub-categories: Intentional Injuring and Unintentional Injuring (Accidental Injuring). And these two types of crime against the body can further be categorized into five based on their consequences, which include causing loss of a body part, causing loss of a bodily function, injuring the head and the face, injuring other body parts, and other forms of injuring not covered by these categories.

Therefore, broadly speaking, there are five types of *jarīmah qiṣāṣ wa diyah*:

1. Intentional Killing *(Qatl al-ʻamd)*;
2. Intentional-like Killing *(Qatl shibh al-ʻamd);*
3. Accidental Killing *(Qatl al-khaṭa');*
4. Intentional Injuring/Maltreatment *(Al-Jināyah ʿalā mā dūn an-nafs ʿamdan);*
5. Accidental Injuring/Maltreatment *(Al-Jināyah ʿalā mā dūn an-nafs khaṭa an).*

Intentional Killing means the act of causing a person's life lost in a deliberate way (Ar-Ramlī, no year of publication: 7/235). The taking of the victim's life is done intentionally by the perpetrator. Thus, the victim's death is what the perpetrator wants. It could be committed with bare hands or with tools such as a sharp object, firearm, and so on.

Intentional-like Killing means an act intentionally carried out to a person that unintentionally kills the person (Ibn Qudāmah, no year of publication: 9/320). Meaning, the act is not deliberately planned for causing death. For example, one hits a person on purpose with a bare hand or a tool that is usually not deadly or not used for killing, such as a whip or a cane, but it causes death.

Accidental Killing means a killing that takes place without any intention for either the act or the consequence (Ar-Ramlī, no year of publication: 7/235 and Ibn Qudāmah, no year of publication: 9/320). For example, one is intending to shoot a bird but his bullet hits a person and kills him. Or one accidentally hits a person with a vehicle and the person is consequently killed.

Intentional Injuring means the perpetrator does have the intention to injure the victim or to give a detrimental impact on his health (ʿAwdah, 1992:2/208). It is a deliberate act of injuring a person without the person being killed, such as hitting, cutting, or hurting one's body part.

Accidental Injuring means the act of injuring one's body part that is unintentional and not causing death. (ʿAwdah, 1992:2/211).

From the above explanation and by looking at the essence of the matter, we can see that medical malpractice belongs to the category of *jarīmah qiṣāṣ wa diyah* because it is or is related to a wrongful act to the human body or life, regardless of its being intentional or otherwise.

Accordingly, the categorization of a medical malpractice into one of the five forms of *jarīmah qiṣāṣ wa diyah* will depend on the type of the act committed by the medical practitioner to the patient, whether it has the specific elements or not, as detailed below: (ʿAwdah, 1992:2/12-211).

It is considered an Intentional Killing if the act has the elements of Intentional Killing: (1) the victim is previously a living human; (2) it results in the victim's death; and (3) the perpetrator intentionally causes the death.

It is considered an Intentional-like Killing if the act has the elements of Intentional-like Killing: (1) the perpetrator commits the act that causes the victim's death; (2) the perpetrator commits the act with an intention to cause injury instead of death; (3) it has a causative correlation with the death, meaning that the act is the direct cause of the death.

It is considered an Accidental Killing if the act has the elements of Accidental Killing: (1) the act causing the death may be intentional or unintentional, but it happens out of the perpetrator's negligence; (2) the killing happens because of an error on the perpetrator's part, and it is considered an error as long as the act of doing or failing to do something, either directly or indirectly, brings about a consequence unwanted by the perpetrator regardless of whether they are intentional or otherwise but to the extent that the death-causing act takes place due to their carelessness or violation to the Islamic legal texts, the professional standards, or the SOP; and (3) there is a causative correlation between the error and the death.

It is considered an Intentional Injuring if the act has the elements of Intentional Injuring as follows: (1) the act injures the victim or gives a detrimental impact on their health and (2) the act is intentional in nature.

It is considered an Accidental Injuring if the act has the elements of Accidental Injuring, which are similar to those of Intentional Killing but the act in this category does not cause death.

Punishments for *jarīmah qiṣāṣ wa diyah*

Below are some explanations on the punishment for each *jarīmah* type according to Muslim scholars: (ʿAwdah, 1992:2/113-291).

1. Punishment for Intentional Killing.

The principal punishment for an Intentional Killing is *qiṣāṣ*. *Qiṣāṣ* holds that the perpetrator be sentenced to death in case of homicide or to injury in case of injuring. If *qiṣāṣ* is not applicable for certain reasons, there must be a substitute punishment in the form of *diyah* (100 camels, if full *diyah*), *taʿzīr* (determined at the judge's and the ruler's discretion), or *kaffārah* (determined according to the opinion of Islamic scholars). In a *kaffārah* punishment, the perpetrator is required to free a slave, give alms in an amount of a slave, or fast for two consecutive months. There is also an additional punishment, which is the annulment of the perpetrator's rights to their family's inheritance and will.

2. Punishment for Intentional-like Killing.

The principal punishment for an Intentional-like Killing is *diyah* and *kaffārah*, and the substitute punishment is *taʿzīr* for the *diyah* or fasting for two consecutive months for the *kaffārah* (in case it is not possible to free a slave or give alms in an amount of a slave). The additional punishment is the annulment of the perpetrator's rights to their family's inheritance and will.

3. Punishment for Accidental Killing.

The principal punishment may be *diyah* or *kaffārah*, while the substitute punishment is *taʿzīr* and fasting for two consecutive months respectively. The additional punishment is the annulment of the perpetrator's rights to their family's inheritance and will.

4. Punishment for Intentional Injuring/Maltreatment.

The principal punishment for an Intentional Injuring is *qiṣāṣ*. If a *qiṣāṣ* punishment is not applicable because of certain reasons, it can be substituted with the alternative punishments, *diyah* and *taʿzīr*.

5. Punishment for Accidental Injuring/Maltreatment.

The punishment for an Accidental Injuring is *diyah*, and if necessary, it can be augmented with *taʿzīr*. The amount of the *diyah* is equivalent to that for an Intentional Injuring.

Furthermore, Intentional Injuring and Accidental Injuring can be differentiated into five sub-categories along with their respective punishment: (ʿAwdah, 1992:2/204-207).

a. Causing loss of a body part.

The body consists of many parts: (1) single-piece parts such as nose, tongue, penis, skin, hair, beard, backbone, urethra, anus; (2) two-piece parts such as hands, feet, eyes, ears, lips, eyebrows, breasts, testicles, labia; (3) four-piece parts such as eyelids and eyelashes; and (4) ten-piece parts such as fingers and toes. The punishment for this kind of consequence is *qiṣāṣ* or *diyah*.

Note: For single-piece body parts, the *diyah* is full (100 camels). For two-piece body parts, such as the eyes, the *diyah* is full if both eyes are damaged and a half if only one eye is damaged. For four-piece body parts, each damaged piece is equivalent to one-fourth of *diyah*. And there is special *diyah* for damaged teeth: five camels for each tooth.

b. Causing loss of a bodily function.

Bodily functions here include thinking, seeing, tasting, hearing, smelling, having sex, giving birth, walking, and talking. The punishment is *qiṣāṣ* or full *diyah*.

c. Injuring the head and the face

There are ten kinds of head and facial injuries: (1) *Khārişah:* injuries that cut the outer skin without causing bleeding; (2) *Bāḍiʿah:* injuries that cut the skin and cause a little bleeding; (3) *Dāmiyah/dāmighah:* injuries that cut the skin down to the outer layer of the flesh; (4) *Mutalāḥimah:* injuries that reach the inner layer of the flesh; (5) *Simḥāq:* injuries cut deeply down to the flesh close to the bone without revealing the bone; (6) *Muwaḍḍiḥah:* injuries that cut deeply and reveal the bone; (7) *Hāshimah:* injuries that cause a bone fracture; (8) *Munaqqilah:* injuries that reveal the bone and cause a fracture or a dislocation; (9) *Āmmah/Maʾmūmah:* injuries that reach the layer of tissue enclosing the brain; (10) *Jāifah:* injuries that cut through the layer of tissue enclosing the brain.

Note: The types of injury before number (6) *Muwaḍḍiḥah* do not entail any *diyah* punishment but the perpetrator is responsible for the treatment costs. for a *Muwaḍḍiḥah* case, a *qiṣāṣ* punishment is imposed if intentional, or one twelfth of *diyah* if accidental (5 camels). For a *Hāshimah* case, it is one tenth of *diyah* (10 camels). For *Munaqqilah*, 15 camels. For *Āmmah/Maʾmūmah,* one third of *diyah.* And for *Jāifah,* also one third of *diyah.*

d. Injuring other body parts

A *qiṣāṣ* punishment shall be imposed if possible. This type of injuring can be differentiated into two: 1. *Jāifah* (injuries that extend to the body cavity of the stomach, the back, or the chest). The punishment is one third of *diyah.* 2. *Ghayr Jāifah* (injuries that do not extend to the body cavity). The punishment shall be *ḥukūmah* (unspecified *diyah*).

e. Other forms of injuring

This type of injuring does not cause loss of any body part or its function and does not damage the head, face, or any other body parts. Included in this category are all kinds of injuring that do not leave any marks or leave some mark but cannot be considered an injury. There is no *qiṣāṣ* if there is no mark left. So the punishment shall be *ḥukūmah* (unspecified *diyah*).

It needs to be noted here that although medical malpractice belongs to the *jarīmah qiṣāṣ wa diyah* category and is subject to the *qiṣāṣ wa diyah* punishment, the punishment is already specified and it is the victim's right. "Already specified" means the *qiṣāṣ wa diyah* punishment only has one reference so there is no lightest nor heaviest limits to the punishment. "The victim's right" suggests that the victim or their heir reserves the right to determine the punishment. They may demand the perpetrator to be punished, forgive them and require them to pay *diyah,* or even forgive them without demanding any payment. If the victim decides to pardon the act, the punishment will be revoked.

Besides, the judge's authority in the *jarīmah qiṣāṣ wa diyah* is limited to passing sentence after the action is proven. A *qiṣāṣ* punishment is imposed when the victim or their heir refuses to forgive the perpetrator. If the victim or their heir demands it, the judge must pass a *diyah* punishment. However, if the right to demand such *diyah* punishment is released by the victim or their heir, the judge may impose a *taʿzīr* sentence on the perpetrator as a lesson (*taʾdīb*) and as a substitute to the two released punishments. The determination of this *taʿzīr* punishment is mandated to the judge's discretion, so it can be lighter or heavier than the substituted punishments, although it is usually lighter (Ichsan and Susila, 2008:94-95).

And prior to imposing a punishment, the judge must hold a hearing for health experts' explanation to ensure and to clear up any doubts that what the medical practitioner does to the patient really is a medical malpractice and that he or she can

be held responsible. Experts' explanation is very important and necessary because they have more authority over the matter of healthcare.

The punishing of a person for medical malpractice based on the Islamic law is implemented in, for example, the Kingdom of Saudi Arabia. However, the court of the Kingdom of Saudi Arabia has not been transparent enough to allow full access to information regarding the proceeding of medical malpractice cases. Information on this matter can be found instead in studies conducted in the country such as the following.

"The tendency with damage awards has been for the courts not to award significant (by western standards) awards over and above the statutory Diyah and remedy levels. Diyah is the remedy prescribed for wrongful death; Arsh is compensation prescribed for loss of an organ or bodily injury. Diyah payment is presently set by statute and the maximum is SAR 300,000. Arsh is similarly payable based on injury to or the loss of a specific body part which depends on the seriousness of the loss/injury up to a maximum which is below the level of Diyah. The current blood money amount is SAR 300,000 (USD 80,000) for a male Muslim, though this may be doubled during the pilgrimage (hajj). The limit for female Muslims is 50% of this figure, and persons of all other religions 25%.

Unfortunately, as judgments are not published, it is difficult to accurately gauge trends in awards. However, we set out below a few examples of awards which have been made publicly available:

- Two doctors were found guilty for causing death of a child and fined SAR 112,000;
- A doctor was found guilty for causing defects for 6 children during circumcision and fined SAR 100,000 in addition to 6 months in jail and cancelation of the license;
- Two doctors found guilty for death of a baby and fined SAR 330,000;
- 3 doctors were found guilty and fined SAR 150,000 for causing death of a child; and
- A doctor was found guilty for causing total disability to a child and fined SAR 1.6 million." (Jones, Karim, and McDonald, 2014)

This data shows that medical malpractice occurs in the Kingdom of Saudi Arabia and the number of cases grows from time to time. The Kingdom's laws and regulations punish medical malpractice with a *diyah* sentence if it causes death and an *ʿarsh* if it causes injury or loss of any body parts. A full *diyah,* which in the past was equivalent to 100 camels, is now valued at SAR 300,000 (around IDR 1,200,000,000) whereas an *ʿarsh* is worth less. In practice, however, the amount is often not strictly as specified. It depends on the case and the damage suffered by the patient.

The camel-based calculation of remedy used by the Prophet PBUH and his companions 15 centuries ago remains valid and acceptable until today. It proves that the Islamic law, especially the rules concerning medical malpractice, can be applied to today's modern world. Moreover, it also presents evidence that the Islamic law pays great attention to the rights of and justice for medical malpractice victims and their family.

Maximum efforts need to be made to also implement the Islamic law—particularly the rules concerning medical malpractice—in Muslim-majority countries like Indonesia so as to restore people's belief in the medical practitioners, to avoid medical errors due to malpractice, and to uphold the principles of justice in the society.

Conclusion

As a comprehensive religion, Islam also touches the issue of medical malpractice. Here the term *medical malpractice* means "any misconduct by a medical practitioner in their professional capacity that violates the applicable professional standards and standard operational procedure and causes damage to the patient." According to the Islamic law, medical malpractice is more than an ethical issue. It belongs to a crime category called *jarīmah qiṣāṣ wa diyah* in which the perpetrator is subject to an appropriate punishment to fulfill the rights of the victim and their family and to uphold justice in the society. Related to this, the Kingdom of Saudi Arabia has proven that such Islamic law on medical malpractice can be implemented in this modern era.

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