

# The Regulation of Medical Malpractice in Indonesia Law System and Its Legal Implication

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## Abstract

The purpose of this study is to analyze, obtain a deep understanding, and find the form of medical malpractice in Indonesia Law System and its legal implication; the results and findings of this study can be used to increase perception and as feedback for law practitioners, patients and their family, doctors, and society. Therefore, the possibilities of medical dispute and malpractice can be minimized in the future. This study uses normative law method. The result shows that there is vacuum of norm in terms of “medical malpractice” in Indonesia due to the use of the term negligence, which actually does not have the same meaning with medical malpractice. This phenomenon has made many parties, especially law enforcers, to enter difficult situation as to judge whether a doctor has performed a medical malpractice or not. In some countries, Anglo Saxon or Continental, a special regulation about medical malpractice has been arranged in a special act.

**Keywords:** medical malpractice, civil law, liability, Indonesia

## 1. Introduction

Article 1 of the 1945 Constitution of the Republic of Indonesia states that the Republic of Indonesia is a Law State. The term Law State (*rechtsstaat*) began to be popular in Europe in the 19th century, although thoughts about that had existed since long time ago. Law State was firstly presented by Plato and then reaffirmed by Aristotle (Huijbers, 2011).

Law State of Indonesia has Indonesian special characteristic because Pancasila has been appointed as a main basic and law source; Law State of Indonesia can also be named as Law State of Pancasila. One of its main characteristics is assurance to *freedom of religion*. The next characteristic of Law State of Indonesia according to Senoadji (1985) is there is no *rigid* and absolute separation between religion and state, because they are already in harmonious relationship.

Wahjono (1989) analyzed Law State of Pancasila from the principle of Kinship listed the 1945 Constitution of the Republic of Indonesia, the most preferred in the principle of Kinship is people and dignity of human beings. Article 33 of the 1945 Constitution of the Republic of Indonesia reflects this principle characteristically. This article affirms that the most important is the prosperity of the people, not individuals.

Constitutionally, on the amendment of the 1945 Constitution of the Republic of Indonesia affirmatively states that Indonesia is a Law State. The existence of Indonesia as a Law State is marked with some main constituents, such as recognition and protection toward Human Rights, a government run based on constitution, equality before the law, and the presence of Administrative Law, and so forth.

## 2. Review of Related Literature

A refined legal technique needs to differ the liability of individuals who have anticipated the consequences of their action with others who do not. The goal of justice is to give sanction towards individuals who already anticipate their adverse action, and if those individuals have understanding that they will harm someone else with their action, or their intention proved to be bad. A consequence which is considered harmful by the constitution maker might be brought deliberately by an individual, yet that individual may have no intention to harm others. Therefore, for example, a boy might kill his very ill-father to end his father's misery. The intention of the boy to put an end to his father's life is not in a bad term (Kelsen, 2014a).

According to the law, an individual is not only considered responsible if the consequence of his action, which objectively dangerous, is brought by his bad intention, but also if that consequence has already been purposed even without bad intention, or if that consequence, undesirable, in fact, has been estimated by that individual. Those sanctions marked with the fact that offensive action is complemented with psychological condition. A certain mental condition of a criminal, when he already anticipates the dangerous consequence (called *mens rea*) of his action, is offense. This element is showed by term “fault” (*dolus or culpa*). If the sanction is only given to the offensive action which has psychological condition, people will call that as *culpability*, which has opposite meaning with *liability* (Kelsen, 2014a).

A concept related to legal obligation is a liability concept. Someone legally responsible for his certain action means he takes responsibility of a sanction if his action is violating the law. Usually, someone is responsible for his own action. In a certain case, the liability subject is identical with legal obligation subject (Kelsen, 2014b).

Civil liability points to the giving of compensation to disadvantaged party by the person who committed a fault (Article 1365 of Indonesian Civil Code) or negligence (Article 1366 Indonesian Civil Code). From Civil Law aspect, medical malpractice occurs if a doctor commits a fault in his/her effort to give medical service to the patient causing civil loss. Sometimes, this phenomenon becomes a cause for certain criminal action, as well. The physical and mental loss or death of the patient caused by the doctor performance is the essential element of medical malpractice from the point of view of Civil Law and Criminal Law. The emergence of civil loss of the patient is the basis of the formation of civil liability for the doctor (Guwandi, 2005).

### 3. Problems

#### 3.1 Philosophical Problems

Philosophical problems emerged in medical practice can be presented as follows: from the point of view of Ontology, the definition of medical practice is a professional practice performed by competent medical practitioners after taking sufficient education and an oath to devote their lives on behalf of humanity. While medical malpractice, according to *World Medical Association/WMA* is “as an activity that involves the physician’s failure to conform the standard of care for treatment of the patient’s condition, or lack of skill, or negligence in providing care to the patient, which is the direct cause of an injury to the patient”.<sup>1</sup>

From the point of view of Epistemology, a doctor, in his/her permission to perform medical practice, must meet the following requirements<sup>2</sup>:

- Competent, he/she must pass the competency test after taking 7 year-education and if they want to be a specialist, they have to take the next 4-5 year education.
- Registration Letter/*Surat Tanda Registrasi* (STR)
- License to Practice Medicine/*Surat Izin Praktik* (SIP)

From Axiology Aspect, the main task and duty of a doctor is to devote his/her life on behalf of humanity, be fair, and put the healthiness and the safety of the patient in the first place. The main problem is the nomenclature of medical malpractice is yet to be regulated in Indonesia Law System.

#### 3.2 Juridical Problem

First, there is conflict of norm between substances of Article 66 verse (1) of *UU Nomor 29 Tahun 2004 tentang Praktik Kedokteran* (Indonesian Medical Practice Act) and Article 66 verse (3) of the same Act<sup>3</sup>; between Article 29 of *UU Nomor 36 Tahun 2009 tentang Kesehatan* (Indonesian Health Act) and Article 84 of *UU Nomor 36 Tahun 2014 tentang Tenaga Kesehatan* (Indonesian Health Workers Act), and also there is incomplete of norm in Article 58 verse (2) of *UU Nomor 36 Tahun 2009 tentang Kesehatan* (Indonesian Health Act), as presented before.

Second, the term and definition of “medical malpractice” is not yet known in Indonesia Law System, so a special and specific norm regulating malpractice (*lex specialis*) is not yet available, which contains definition, type of violation, liability regulation, especially in Civil Law, degree of fault and also the sanctions for every violation done by a doctor. Therefore, there is vacuum of norm in term of “medical malpractice” in Indonesia. Malpractice has been just defined as a fault or negligence.

### 4. Materials and Methods

This study used normative law method complemented with studies about medical malpractice cases discussed many times in mass media recently, and the comparison of medical malpractice regulation in some countries.

### 5. Results and Discussion

Article 1 verse 1 of Medical Practice Act of Indonesia states that “Medical practice is a series of action done by a doctor and dentist to a patient in performing a health effort”. Article 2 mentions that “Medical practice shall be performed with Pancasila principles and based on scientific value, benefit, fairness, humanity, equality, protection and safety for the patients”. The purpose of medical practice is stated in Article 3, as follows: a) to provide protection to the patient, b) to maintain and escalate the quality of medical service given by doctor and dentist; and c) to give legal certainty towards people.

Health is one of the most important aspect of Human Rights, as stated in United Nation’s Universal Declaration of Human Rights, November the 10th 1948. In Article 25 Verse 1 of that declaration, it is stated that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family”. This right to healthy life means that the government must create a condition which gives probability for

<sup>1</sup> The definition of medical malpractice according to WMA (World Medical Association).

<sup>2</sup> Guidance issued by *Konsil Kedokteran* (Indonesian Medical Council), referring to *Undang-Undang Nomor 29 Tahun 2004 tentang Praktik Kedokteran* (Indonesian Medical Practice Act)

<sup>3</sup> In next occasion, it called *UU Praktik Kedokteran* (Indonesian Medical Practice Act)

every individuals to life healthily, with an effort to provide an adequate and affordable medical service for the people (Ramanta, 2013).

Healthiness is a healthy situation, in physical, mental, spritual, and sosial sense which gives probability for everyone to live a productive live, socially and economically” (Article 1 Verse 1 of Health Act). Thus, health is recognition of humanism. Without health, someone would not be conditionally equal. Without health, someone would not be able to acquire his/her other rights. Unhealthy people would have his/her right to life reduced, could not afford and do an appropriate job, could not enjoy his/her right to associate and get together with other people, nor to express his/her opinion, and could not get appropriate education for his/her future. In simple way, without health, someone could not enjoy his/her life as human being to the fullest (Wahid, 2013).

The importance of health as Human Rights and as a condition needed to fulfill the other rights has been recognized internationally. Rights of health involved the right to get healthy life and job, to get health service, and to get special care for mothers and children. Article 25 of Universal Declaration of Human Rights (UDHR) states:

- Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection (Sudrajat, 2011).

Health is a part of Human Rights and one of the element of welfare which must be actualized according to the future goals of Indonesian as stated in Pancasila and the Opening of Indonesian Constitution (*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*). This indicates that there is an intention to change the paradigm, an effort to create healthy life, that is replacing paradigm of sick to paradigm of health.

Therefore, it is time to see the health problems as a main factor and valuable investment executed based on the new paradigm known as paradigm of health—a paradigm which prioritizes the promotive and preventive effort without ignoring curative and rehabilitative effort. In order to implement the paradigm of health, an act on health perception, not sick perception, is needed.

Article 21 of Indonesia’s Health Act states that the government organizes plan, foundation, utilization, development, and supervision towards the quality of health workers in performing health service. The development of human resources plays an important role in creating advanced and independent Indonesian people who have the ability to compate at this globalization era. The globalization era also gives some influences for health service in Indonesia, both positive and negative. The positive influences are the entrance of new health science and technology to Indonesia and the chance for Indonesia to send its health practitioners abroad so they can improve their competency standards, welfare, and for the development of health science and technology in Indonesia.

Doctor is a noble and honorable profession. Those who ruin a doctor’s image shall be given proper punishment equal to their fault. The 1945 Constitution of the Republic of Indonesia (UUD 1945) contains a procedure to run the Republik of Indonesia so its people could get prosperity to the fullest. In order to actualize the ‘message’ in UUD 1945, an Act on a more detailed regulation about social life is needed. The Act shall be formed if it has purpose to protect and prosper the life of the people.

A physician, that is doctor and dentist, is an honorable profession, high in morality, has ethical profession and good behavior, has basic knowledge which always evolves following the latest science and technology, always maintains and improves their skill. Every doctor must do maximum effort. *UUNRI Nomor 29 Tahun 2004 tentang Praktik Kedokteran* (Indonesian Medical Practice Act) is a product of political deal between the representatives of lay persons and of medical scientists. This Act gives order to *Konsil Kedokteran* (the Medical Council) as supervisor institution so that the Act can be implemented correctly.

According to Article 1 verse (1) of *UUNRI Nomor 29 Tahun 2004 tentang Praktik Kedokteran* (Indonesian Medical Practice Act), “Medical practice is a series of action done by a doctor and dentist to a patient in performing a health effort”. The place where medical practice perfomed can be considered as medical service media.

Basically, there are two types of medical practice, that is, medical practice in personal (doctor *out*) and medical practice at hospital/doctor as an employee (doctor *in*). Firstly, Medical Practice in Personal is a doctor who opens a medical service at home, or at a rented place, at a pharmacy, at a hospital as a guest doctor not as an employee. The time could be anytime (morning, afternoon, or evening). If a medical malpractice occurs, the liability will be burdened by the doctor himself, as in civil, criminal, and administrative law. The institution where that doctor performs medical malpractice in personal (guest doctor) could not be asked for responsibility, except for administrative law, about the obligation to have a License, the installation of a nameboard, informed consent, and medical record.

Secondly, Medical Practice at a Hospital is a doctor who works as an employee. A hospital or a

company hires that doctor and the practice hour depends on the contract. In this type of medical practice, if that doctor conducts a medical malpractice, the institution or the company will take responsibility as well, especially from civil aspect (joint liability to repay loss) and administrative aspect (the repeal of business permit or pay some fine). While the criminal aspect depends on the case.

A doctor as one of the main component in giving health service to the people has a very important role as he/she gets involved directly with the health service process and the quality of the given service. Science, skill, attitude, and behaviour as competency component gained during educational period are the main basis for a doctor to be able to perform a medical action in his/her effort to implement health service.

Basically, the medical education for doctor aims to improve the quality of the people's health. WFME (World Federation of Medical Education) promotes a high standard of science and ethics, applies new studying method, new instructional media, and inovatie management toward medical education. Education for doctor, specialist, and subspecialist (consulting specialist) is an academic and profession-based education (Pozgar, 1996).

A doctor in performing his/her practice must always stick to the principle, habit, ethics, and behavior of medical world as written in Hippocrates Oath which is elaborated in *Lafal Sumpah Dokter Indonesia* (Indonesian Medical Oath). Matters summarized in this oath is nationally applicable.

The special characteristics of medical profession are having a certain identity, having a certain community, having a certain evaluation system which binds the behavior of doctors, in terms of having good relationship with colleagues and with the society. The evaluation system gives birth to Medical Ethics, while the autonomous characteristic of medical profession produces Standard of Medical Profession and Standard Operating Procedure. Those three are the guidance and give direction to medical practice so as to bind the working procedure of medical profession. Violation towards standard of profession, standar operating procedure, and ethical values could put the doctor into medical malpractice problem if it causes health loss or death to the patient. In doing his/her job, a doctor must stick to three main standards, namely, Authority, Average Skills, and Common Precision.

About Authority, there are two basis which can be distinguished as (1) Authority based on the doctor's ability/skills, which is material authority of the doctor's individuals, and (2) Authority based on the constitution (formal authority).

A doctor can perform medical practice if he/she has both of them. He/she must first graduate from medical education to get material authority, that means he/she have passed the competency test. Besides that, a doctor must have an authority based on the law. According to article 29 verse (1) of UUNRI Number 29 of 2004 on Indonesian Medical Practice, a doctor in performing medical practice must have *Surat Tanda Registrasi* (Registration or STR). Moreover, according to article 36 of the same act, a doctor must also have *Surat Izin Praktik* (License or SIP). If a doctor violates one or both of those obligations, he/she can be given sanctions.

The definition of Standard Operating Procedure can be found in article 50 of UUNRI Number 29 of 2004 on Indonesian Medical Practice Act which states that "Standard Operating Procedure is an instruction built to finish a certain routine work (diagnosing and/or treating a sickness/disease)". This standard gives the best and rightful steps based on a common consensus to execute every service activities and functions made by a health service according to standard of profession. Therefore, everytime a routine work (medical practice) is performed, the instruction on the steps that must be followed by the doctor in performing his/her medical practice should be appointed first. In its development, this standard is complemented with *Clinical Pathway* (CP).

The definition of medical malpractice from many sources at some other countries actually points the same matter, which is: "an incompetent, violation to the applicable rule, in form of constitution, standard of profession, standard operating procedure, and also ethics, appropriateness, and professionalism applied in medical field done by a doctor which causes harm/loss to the patients and/or their families".<sup>1</sup>

Professional misconduct is a deliberate action which could be done in form of violation towards ethical aspect, professional discipline, as well as administrative, civil and criminal law, like doing deliberate action which causes loss to the patient, delaying service to the patient, exposing the patient's confidentiality, ilegal abortion, euthanasia, sexual harassment, fake explanation, using a medical science and technology that has not been tested yet, performing a medical action without informed consent, performing medical practice without Surat Izin Praktik (License), performing medical practice outside his/her competency, and so forth. Those deliberate actions do not always have to cause bad result for the patient deliberately, but more importantly, it is pointing to deliberate violation (related with motivation, in form of violence) than just an error (related with information given).

There are some conditions of medical malpractice. First, a patient is not feeling better or feeling more severe than before after given a medical action from the viewpoint of standard profession, standard operating

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<sup>1</sup> See: Kamus Besar Bahasa Indonesia, Black's Law Dictionary, Coughlin's Dictionary of Law, World Medical Association (WMA) Congress, Section 3b) Medical and Health Care Liability Act of 2002 House of Representatives Republic of Philippines, United States Medical Malpractice Law.

procedure, and common medical principles. Second, patient is not feeling better or feeling more severe than before as an immediate effect (*causaal verband*) of a wrong medical action. If those conditions are met, that means the doctor has conducted a malpractice, so the patient has the right to demand a compensation because of the fault of the doctor. If the effect is more severe like death or heavy injury, the doctor must take responsibility not only paying compensation (Civil Law), but also strafbaar (criminal law).<sup>1</sup>

From the point of view of Civil Law, medical malpractice occurs if the fault done by the doctor in giving medical service to the patient causes Civil loss. Any loss in physical and mental health or even the life of the patient caused by the fault of the doctor is the essential element of medical malpractice from the point of view of civil and criminal law. This civil loss of the patient becomes the basis for the establishment of civil liability for the doctor to pay compensation.<sup>2</sup>

From the point of view of Criminal Law, every harmful effect belongs to the field of Criminal Law. Thus, if negligence of a medical action occurs and causes death or some kind of injury as regulated in Article 359 and 360 of KUHP (Indonesian Criminal Code), that medical action could be categorized as a criminal malpractice (Chazawi, 2002).

There is *conflict of norm* between the substances of Article 66 verse (1) of UUNRI Number 29 of 2004 on Indonesian Medical Practice Act and Article 66 verse (3) of the same Act<sup>3</sup>; between Article 29 of UUNRI number 36 of 2009 on Indonesian Health and Article 84 of UUNRI number 36 of 2014 on Indonesian Health Workers Act. Moreover, there is incomplete of norm in Article 58 verse (2) of UUNRI number 36 of 2009 on Indonesian Health Act, as presented before.

The term and definition of “medical malpractice” is still unknown in Indonesia Law System. Therefore, the norm, the system, and the formula organizing medical malpractice problem in specific ways (*lex specialis*) has not been regulated yet, which contains definition, type of violation, liability regulation especially in Civil Law, degree of fault and also the sanctions for every violation done by a doctor. Therefore, there is still vacuum of norm or haziness of norm in the matter of medical malpractice in Indonesia. Medical malpractice in Indonesia Law System is defined “just” as fault or negligence done by a doctor in performing his/her medical practice. Also, the definition spreads on various regulations. Article 66 verse (1) of Indonesian Medical Practice Act states “Everyone who knows that his/her interest harmed by the action of a doctor or a dentist in performing his/her medical practice can write a complaint to the Chief of Majelis Kehormatan Disiplin Kedokteran Indonesia (Indonesian Honourable Council of Medical Discipline or MKDKI)”. In verse (2), it is written “A complaint, must at least contain of: (a) identity of the complainant; (b) the name and the address of the doctor or the dentist and time of the event; and (c) the reason of complaint. However, in verse (3), it is written: “A complaint as stated in verse (1) and verse (2) does not dispel the right for everyone to report the presumption of criminal action to the authority and/or claim a civil loss to the court”.

This verse (3) should be eliminated, as it is ambiguous, unclear, and is not required. Let the MKDKI do their job first according to its duty and function. Later, MKDKI will make a decision/verdict in form of a recommendation to solve that medical malpractice case. It could be in form of mediation, civil, criminal, or administrative sanction for the guilt-considered doctor. For example, ask that doctor to take more medical education at a Medical Faculty in a certain time.

Moreover, in Article 29 of Act number 36 of 2009 on Indonesian Health, it is stated that “In case a health practitioner is suspected of doing a negligence in performing his/her job, that negligence must be solved first through mediation”. Therefore, based on the principle of preference or legal hierarchy, the existence of the verse (3) Article 66 of Indonesian Medical Practice Act is no longer relevant.

According to Article 11 Verse (1) of Act number 36 of 2014 on Indonesian Health Workers, Health Workers/Health Practitioners are grouped into thirteen types. In that article, the group at point “a” is medical practitioner. Next in Article 11 Verse (2), it is stated that “The type of health practitioner included in medical practitioner as stated in Verse (1) point “a” consists of doctors, dentists, specialists, and dentist-specialists”. The provisions listed in Article 84, are:

- Every Health Practitioner conducting heavy negligence which causes severe injury to Health Service Recipient shall be convicted with imprisonment for three years at the maximum.
- If that heavy negligence as stated in Verse (1) causes death, every health practitioners involved shall be convicted with imprisonment for five years at the maximum.

The punishment threat in Article 84 of this Act (UU Tenaga Kesehatan) is lighter than the punishment threat listed in Article 359, 360 and 361 of KUHP (The Indonesian Criminal Code). For example, Article 361 states that:

“If the crimes as referred to in this chapter are committed in exercising an office or profession, the punishment

<sup>1</sup>*Ibid*, p. 21

<sup>2</sup>*Ibid*.

<sup>3</sup> In next occasion, it is called as Indonesian Medical Practice Act

may be enhanced with one third, and the convicted person may be imposed with deprivation of right of the exercise its profession in which the crime has been committed, and and the judge may order the publication of his verdict” (“Kumpulan Kitab Undang-undang”, 2008).

In here, health practitioners are given a dispensation from punishment threat compared to practitioners on other fields. Therefore, there is different treatment toward fellow Indonesian people. This is really contradictory with Article 27 Verse (1) of the 1945 Constitution of the Republic of Indonesia which states: “Every citizen has equality before the law and the government has duty to honor that law with no exception”. Also, in Article 28D Verse (1) stated that: “Every people has the right over recognition, security, protection, fair legal certainty, and also equality before the law”.

Another thing that must be observed deeply is the substance of Article 58 of Indonesia Health Act which states:

- Everyone has the right to claim a compensation to someone, health practitioners, and/or health service providers who cause harm/loss to himself/herself because of their fault in performing health service.
- That compensation claim as stated in Verse (1) is not applicable for health practitioners who perform a medical action to save life or prevent defect of someone in emergency situation.
- The provision about procedure in filing claim as stated in Verse (1) is regulated in the Act.

Therefore, Verse (2) of Article 58 of Act number 36 of 2009 on Indonesian Health should be eliminated, and replaced with:

“(2) The compensation claim as stated in Verse (1) is also applicable for health practitioners who do not or postpone performing life saving action or preventing defect of someone in emergency situation so the patient dies”.

## 6. Conclusion

The nomenclature of medical malpractice is yet to be regulated in Indonesia Law Syetem. Regulations organized about fault or negligence are still spread out in various acts and constitutions; They have not been compiled in a spesific act (*lex specialis*). Sanctions toward medical malpractice still overlap, incomplete, and unclear in some acts.

Therefore, there is no special and integrated regulation in solving medical malpractice cases which consist of definition, classification, type, procedure to prevent medical malpractice, and sanction towards doctors who conduct medical malpractice. The regulations on sanctions towards doctors are always “just” in form of fault or negligence which cause harm or loss to the patient. Those regulations are still spread out in various acts and Ministerial Regulations, such as: *KUH Perdata* (Indonesian Civil Code), *KUH Pidana* (Indonesian Criminal Code), Indonesian Medical Practice Act, Indonesian Health Act, Indonesian Health Worker Act), Indonesian Consumer Protection Act, and Indonesian Health Ministerial Regulation about Medical Action Approval.

If only all norms regulating the “doctor’s fault” are compiled and codificated in a spesific act, then most likely the considerations and decisions of law enforcers will be different, because all norms will be integrated and actualized, so they all will be actual and trackable.

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