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The Urgency of Reconstructing The Regulation Of Medical Dispute Resolution As A Form Of Legal Protection For The Dental Profession In Indonesia From The Perspective Of The Philosophy Of Legal Positivism In Indonesia

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Abstract: This research explores the urgency of reconstructing the regulations on the resolution of medical disputes as a form of legal protection for dental professionals in Indonesia, viewed through the lens of legal positivism philosophy. Medical disputes present significant challenges to dental practitioners, necessitating a robust legal framework to safeguard their professional interests. The study aims to analyze the regulatory mechanisms governing medical dispute resolution, focusing on their role in protecting the rights and legal obligations of dental professionals. Utilizing a normative juridical approach, this research examines existing laws and regulations related to medical dispute resolution in Indonesia, alongside relevant literature. By elucidating the reconstruction of these regulatory frameworks, the study discusses their effectiveness in protecting the legal interests of dental professionals. These findings are expected to provide a deeper understanding of the urgency of reconstructing the regulations on medical dispute resolution in Indonesia from the perspective of legal positivism philosophy, thereby contributing to the enhancement of legal protection for dental professionals and the improvement of professional standards in dental practice.

Keyword: Reconstruction of Regulations, Medical Dispute Resolution, Legal Protection, Dentist.

INTRODUCTION

Patient safety is a primary concern for doctors in performing their duties (*aegroti salus lex suprema*), as it is an inherent obligation of physicians to treat the sick in accordance with

the Hippocratic Oath¹. Hippocrates, in his book *Epidemics*, stated: “Declare the past, diagnose the present, foretell the future. As to diseases, make a habit of two things — to help, or at least *primum non nocere* (to do no harm),” which remains the fundamental ethical principle guiding physicians to this day. Furthermore, every individual has the right to receive healthcare services. In any society, it is therefore the collective duty, carried out through the medical profession, to treat the sick — an obligation known as *Fardhu Kifayah* (a communal duty, meaning that if some doctors have fulfilled this duty, others are no longer obliged to do so)².

Essentially, medical practice represents an individualized assistance provided by a doctor to a patient in the form of medical services. When a person consults a doctor to obtain such services, a legal relationship arises between the doctor and the patient, known as a therapeutic transaction. This legal relationship does not guarantee a cure or prevent death; rather, it is referred to as *inspanningverbintenis* (an obligation of effort), which differs from general contractual obligations that ensure a specific result (*resultaatsverbintenis*)³.

This legal relationship establishes rights and obligations for both doctor and patient, creating mutual legal responsibilities. The doctor’s performance entails acting or refraining from acting in such a way as to avoid errors in medical treatment, always in the best interest of the patient’s health. This constitutes the fundamental legal duty within the doctor–patient agreement or therapeutic contract⁴.

Two legal theories support the existence of the doctor–patient relationship: the Contract Theory and the Undertaking Theory. According to the Contract Theory, if a doctor agrees to treat a person in exchange for a certain fee, a contractual arrangement is formed, accompanied by corresponding rights and liabilities⁵. According to the Undertaking Theory, if a doctor voluntarily provides medical care to someone, a professional relationship arises, along with a duty of care toward the recipient⁶. This theory provides a satisfactory basis for recognizing the doctor–patient relationship even in situations where no formal contract exists⁷.

Additionally, incidental relationships may occur — for example, when medical services are paid for by someone other than the recipient, such as in health examinations for insurance claims, employment applications, or other non-therapeutic purposes. Although in practice the doctor–patient legal relationship involves mutual rights and obligations, it is often not formalized in written form.

As a medical professional, a doctor plays an active role in providing medical services, while the patient, as the recipient, evaluates the quality and performance of the care received. This is because a doctor’s work is not merely about providing assistance, but also about fulfilling professional duties bound by a code of ethics. The patient’s role, once entirely dependent on the doctor in determining treatment methods (therapy), has evolved into a position of equality. A doctor may no longer disregard the patient’s opinions and preferences

¹ Catherine Tay Swee Kian, 2001, *Medical Negligence Get the Law on Your Side*, Singapore; Time Books International, p. 28

² Imam Al Gazali, in Azwar, 2002, *The Doctor*, Bekasi: Megapoin, p. 2

³ Leenen, *Gezondheidsrecht*, in Veronica, 2004, *Legal Aspects in Health Services*, Business Law Journal, Vol 23 No. 2, Jakarta, p. 20.

⁴ Widodo Tresno Novianto, 2017, *Medical Disputes: Legal Struggles in Determining the Elements of Medical Negligence*, Surakarta: UNS Press, p. 2.

⁵ Alton, Walter G., 1977, *Malpractice, How to Avoid How to Win*. USA: Little Brown and Company, hlm 281.

⁶ Anny Isfandyarie, 2005, *Malpractice and Medical Risks in Criminal Law Studies*, Jakarta: Prestasi Pustaka, p. 20.

⁷ *Ibid*

in choosing treatment options, including decisions about whether surgical intervention is necessary⁸.

In addition, the reality shows that technological advancements and the increasing critical awareness of society toward the medical services they receive have reduced the knowledge gap between patients and doctors, making evaluation and criticism more open. Both doctors and patients have rights and obligations protected by law, establishing a balanced relationship. For doctors, the obligation to provide medical treatment in general must comply with medical standards, professional standards, and operational procedures; thus, any violation of these professional and procedural standards constitutes one of the elements of medical malpractice⁹.

The position of the patient, which was once entirely dependent on the doctor in determining the method of treatment (therapy), has now shifted to being equal to that of the doctor. Doctors may no longer disregard the opinions and considerations of patients when choosing a course of treatment, including decisions on whether surgery is necessary. Nevertheless, the doctor's legal obligations always carry risks—for both patient and doctor. For the patient, medical treatment may result in health complications or even death, while for the doctor, accountability may range from mild to severe sanctions, from moral and social reprimands to legal consequences.

The legal responsibility in question refers to the doctor's legal liability, particularly regarding obligations arising from their professional practice. In general, legal accountability is associated with professional errors or their consequences, for which doctors must bear responsibility. However, on the other hand, a patient's failure to fulfill their obligations in this relationship—such as not following the doctor's instructions or providing false information about their illness—may affect the doctor's diagnosis and treatment. Although the doctor-patient relationship is essentially a civil legal relationship, it does not rule out the possibility that medical services performed outside professional standards may fall under criminal or administrative law.

A breach of contract (*wanprestasi*) occurs if a doctor fails to perform their medical duties properly and to the best of their ability—for instance, refusing treatment due to the patient's financial limitations or acting beyond professional and procedural standards. Meanwhile, a tort (unlawful act) in medical practice arises when an error in treatment causes harm, allowing the patient to file a lawsuit under Article 1365 of the Indonesian Civil Code (*Burgerlijk Wetboek*), which implicitly states: "Every unlawful act that causes harm to another person obliges the person who, due to their fault, caused such harm to compensate for it."

The phrase "due to their fault" (*karena salahnya*) in Article 1365 of the Civil Code may take the form of intent (*dolus*) or negligence (*culpa*) committed by a doctor during medical treatment. To establish liability for an unlawful act under Article 1365, the following elements must be proven: 1. The existence of an act (*daad*) that qualifies as an unlawful act; 2. The presence of fault (*dolus* and/or *culpa*); 2. The existence of damage (*schade*).

Improper medical treatment may thus constitute a breach of contract (*wanprestasi*) and/or an unlawful act (*onrechtmatige daad*). A doctor can only be considered to have committed an unlawful act under Article 1365 of the Civil Code if the following elements are met: (a) The act constitutes an unlawful act (*onrechtmatige daad*); (b) There is fault; (c) There is resulting harm; and (d) There is a causal relationship between the act and the harm.

In determining fault in an unlawful act, three factors are considered: (a) The mental state of the perpetrator, i.e., whether they were aware that their conduct was prohibited by

⁸ Dalmy Iskandar, 1998, *Hospitals, Health Workers and Patients*, Jakarta: Sinar Grafika Publisher, p. 86

⁹ Veronica Komalawati, 2002, *The Role of Informed Consent in Therapeutic Transactions (Consent in the Doctor-Patient Relationship) A Legal Review*, Bandung: Citra Aditya Bakti, p. 27.

law; (b) The mental connection between the actor and their conduct, whether intentional (*dolus*) or negligent (*culpa*); and (c) The absence of justification or exonerating reasons¹⁰.

Doctors, being human, can make mistakes in the course of their professional duties, whether intentional (*dolus*) or unintentional (negligence, *culpa*)¹¹. Therefore, the intent to help and heal a patient does not always lead to success, and sometimes results in disability or even death. When such incidents occur, a highly educated public tends to be more critical. Meanwhile, the general public, due to a lack of medical knowledge, often misunderstands medical outcomes and assumes that every failure in medical practice results from doctor error—labeling it as medical malpractice or negligence. Consequently, dissatisfied patients may file legal complaints or lawsuits against the doctor¹².

There are several theories that identify the sources of malpractice acts, including: (1) The Breach of Contract Theory, which states that malpractice arises when a doctor violates a contract made with the patient; (2) The Intentional Act Theory, which refers to deliberate wrongdoing that causes physical injury to another person; and (3) The Negligence Theory, which attributes malpractice to acts of negligence¹³. However, in practice, it is not easy to prove the elements of fault, whether intentional (*dolus*) or negligent (*culpa*). In cases where medical malpractice is indicated, the mental element of *culpa* in criminal malpractice must constitute *culpa lata* (gross negligence), which refers to a severe form of negligence—either a failure to exercise reasonable care or performing an act that, in principle, should not have been done, even with great caution.

In general, patients involved in medical disputes tend to report healthcare professionals to law enforcement rather than submitting complaints to professional organizations or the Indonesian Medical Discipline Honorary Council (Majelis Kehormatan Disiplin Kedokteran Indonesia, MKDKI). This occurs despite the fact that MKDKI has been designated as the competent body to handle issues related to medical ethics and professional discipline. Ideally, when a patient feels harmed by medical services, the first step should be to file a complaint with MKDKI¹⁴.

MKDKI plays an essential role in resolving medical disputes by considering ethical and disciplinary aspects of the medical profession. This process allows healthcare professionals to provide explanations, correct mistakes, and resolve issues internally. Only after the MKDKI process is completed—and if the patient remains dissatisfied with the outcome or if there is evidence of a criminal act warranting legal proceedings—should the patient proceed to report the case to law enforcement authorities to pursue criminal charges or file a civil lawsuit. Therefore, submitting a complaint to MKDKI serves as a more appropriate initial step before taking legal action, allowing for more effective resolution consistent with the principles of justice and the rule of law.

Article 305 paragraph (1) of the Health Law stipulates that:

“Patients or their families whose interests are harmed by the actions of Medical Personnel or Health Workers in providing health services may file a complaint to the council as referred to in Article 304.”

¹⁰ Wiryono Projodikoro, 2000, *Unlawful Acts*, Bandung: Mandar Maju, p. 23.

¹¹ Samsi Jacobalis, 2005, "The Development of Medical Science, Medical Ethics, and Bioethics," Jakarta:

CV. Masagung Seto, p. 128.

¹² Nusye KI Jayanti, 2009, *Legal Settlement in Medical Malpractice*, Yogyakarta: Pustaka Yustisia, p. 121

¹³ Ninik Mariyati, 1998, *Medical Malpractice from the Perspective of Criminal and Civil Law*, Jakarta: PT Bina Aksara, p. 44.

¹⁴ Takdir Rahmadi, 2010, *Mediation of Dispute Resolution Through a Consensus Approach*, Jakarta: Raja Grafindo Persada, pp. 1-2.

The use of the term “may” in Article 305(1) makes the provision appear optional, meaning that patients or their families who feel aggrieved can choose either to submit a complaint to the professional disciplinary council or to directly file a lawsuit and/or legal action against the medical or healthcare worker. The article does not explicitly require patients or their families to first file a complaint with the disciplinary council before pursuing legal action.

As a result, patients or their families who feel harmed may directly initiate civil or criminal proceedings against medical or healthcare professionals.

Considering this grey area in Article 305(1) of the Health Law, medical and healthcare professionals have expressed the need for this article to be amended to provide clearer legal protection for medical personnel. The discussion surrounding the amendment of Article 305(1) of the Health Law thus becomes an interesting and important topic of study for the author—particularly regarding whether such an amendment is feasible, and how the concept of legal protection for medical and healthcare professionals should be structured within the Indonesian legal framework.

METHOD

This research is a legal research with a normative legal research type (normative law research), which is a normative case study in the form of a product of legal behavior, such as reviewing legislation. This type of normative legal research is also often referred to as doctrinal legal research, namely the researcher examines secondary legal materials¹⁵. This research uses a statutory approach, where the research approach is to examine laws and regulations¹⁶ related to the legal issues in this study.

RESULTS AND DISCUSSION

The Urgency of Regulating the Resolution of Medical Disputes as a Form of Legal Protection for the Dental Profession in Indonesia

The urgency of legal regulation can be established based on philosophical, juridical, and sociological foundations, as a good legislative regulation must rest upon three main elements: juridical grounds (*juridische gelding*), sociological grounds (*sociologische gelding*), and philosophical grounds (*philosophical gelding*)¹⁷. Furthermore, according to one of the principles in the formation of legislation, namely the principle of enforceability, as explained in Article 5(d) of Law Number 12 of 2011 on the Formation of Legislation, every legislative regulation must take into account its effectiveness in society, whether from a philosophical, sociological, or juridical perspective. Therefore, these three foundations are essential to justify whether a regulation is necessary. In this study, these foundations serve to support the urgency of establishing a Special Court for Medical Disputes in Indonesia. The philosophical, sociological, and juridical urgencies can be explained as follows:

a. Philosophical Urgency of Medical Dispute Resolution as a Form of Legal Protection for the Dental Profession in Indonesia

According to Bagir Manan, the philosophical foundation represents the considerations or reasons that reflect the values within the ideals of law, both as an instrument for protection and as a means to realize those values in societal behavior¹⁸. Moreover, the philosophical foundation describes how a regulation embodies the

¹⁵ Roni Hanitijo Soemitro, 1988, *Legal Research Methodology and Jurimetry*, Jakarta: Ghalia Publisher, p. 10.

¹⁶ Mahmud Marzuki, 2007, *Legal Research*, Jakarta: Kencana, p. 96.

¹⁷ Italy. 2022. *Legal Basis for the Formation of Legislation*. *Legal Basis for the Formation of Legislation* (jurnalponsel.com). Accessed April 2, 2024.

¹⁸ Bagir Manan, 1992, *Basics of Indonesian Legislation*, Jakarta: Ind-Hill.Co, pp. 13-18.

worldview, consciousness, and legal ideals that include the spiritual and philosophical essence of the Indonesian nation, derived from Pancasila and the Preamble of the 1945 Constitution of the Republic of Indonesia.

The philosophical urgency in this study is based on the Preamble of the 1945¹⁹ Constitution, particularly Paragraph 4, points (1) and (2):

1. “To protect the whole people of Indonesia and the entire homeland of Indonesia”, meaning that the state bears the responsibility to protect both the nation and all its citizens, individually and collectively. This entails ensuring legal certainty to maintain public trust and security in daily life.
2. “To promote the general welfare”, meaning that the state is responsible for realizing the well-being of all Indonesian people. This includes improving public health and ensuring the protection of medical personnel as part of advancing general welfare.

Therefore, the revision of Article 305 paragraph (1) of the Health Law is expected to provide legal certainty in protecting both medical personnel and patients. Such regulation would offer a clear and professional framework for resolving medical disputes.

b. Sociological Urgency of Medical Dispute Resolution as a Form of Legal Protection for the Dental Profession in Indonesia

According to Bagir Manan, the sociological foundation refers to considerations or reasons that reflect the realities of life in society, such as needs, demands, or problems requiring solutions. It also describes how laws are formed to meet societal needs across various aspects, reflecting empirical facts about the development of social and national issues²⁰.

The sociological urgency of revising Article 305 paragraph (1) of the Health Law lies in its ability to establish a clear legal framework that ensures fair and balanced protection for both medical professionals and patients in the healthcare context. This is crucial to promote quality, ethical, and safe medical practices for all involved.

From a sociological perspective, revising Article 305 paragraph (1) of the Health Law is necessary for several reasons²¹:

1. Protection for Medical Personnel:
The article provides a clear legal framework to protect healthcare workers in carrying out their duties. Medical personnel often operate under complex circumstances with significant responsibilities for patients’ safety and health. Clear regulations help them understand their professional boundaries, rights, and obligations.
2. Enforcement of Professional Ethics:
Healthcare is a highly sensitive field deeply intertwined with ethics. Article 305 paragraph (1) strengthens professional ethics in medical practice by emphasizing legal certainty, professionalism, integrity, and quality in healthcare services.
3. Protection for Patients:
Patients also require strong legal protection within the healthcare system. The provision ensures that patients have specific rights—such as the right to proper care, transparent and honest medical information, and access to justice in cases of malpractice or unfair treatment.

¹⁹ Chapter IV (A) Attachment to Law of the Republic of Indonesia Number 12 of 2011 Concerning the Formation of Legislation, State Gazette of the Republic of Indonesia of 2011 Number 82, Supplement to State Gazette of the Republic of Indonesia Number 5234.

²⁰ Bagir Manan, *Op.cit.*

²¹ Chapter IV (B) Attachment to Law of the Republic of Indonesia Number 12 of 2011 Concerning the Formation of Legislation, State Gazette of the Republic of Indonesia 2011 Number 82 Supplement to State Gazette of the Republic of Indonesia Number 5234.

4. Provision of Legal Certainty:

Legal certainty is crucial in the healthcare sector. Article 305 paragraph (1) offers clear guidelines for all stakeholders, reducing ambiguity in legal interpretation. This clarity helps prevent conflicts and strengthens public trust in the healthcare system.

Thus, from a sociological standpoint, revising Article 305 paragraph (1) of the Health Law is an urgent necessity to ensure adequate legal protection for all parties involved in healthcare services.

c. The Legal Urgency of Medical Dispute Resolution as a Form of Legal Protection for the Dentistry Profession in Indonesia

According to M. Solly Lubis, a legal basis is a legal provision that serves as the legal basis for creating regulations, namely:

- 1) Formal provisions, namely the legal basis that authorizes the creation of certain regulations;
- 2) Material provisions, namely the legal basis for regulating certain matters.

Furthermore, a legal basis is a consideration or reason that illustrates that regulations are created to address legal problems or fill legal gaps by considering existing regulations, those to be amended, or those to be revoked to ensure legal certainty and a sense of public justice. The legal basis concerns legal issues related to the substance or material being regulated, thus necessitating the creation of new legislation. Some of these legal issues include outdated regulations, inconsistent or overlapping regulations, regulations that are subordinate to the law, thus weakening its enforceability, regulations that exist but are inadequate, or regulations that do not exist at all²².

The legal urgency of Article 305 paragraph (1) of the Health Law is to provide the necessary legal certainty for medical personnel and patients in the context of health services. This is crucial for maintaining fairness, quality, and safety in the health system, as well as for upholding the appropriate rights of both parties. Article 305 paragraph (1) of the Health Law does not mandate that patients or their families who feel they have suffered harm must file a complaint about the harm caused by medical personnel or health workers with the professional disciplinary council. This is important to avoid ambiguity or varying interpretations regarding the dispute resolution process. Thus, this article provides clarity to medical personnel regarding the standards expected of them. The adjustments to Article 305 paragraph (1) also provide a legal framework for resolving disputes that may arise between medical personnel and patients. By having clear guidelines regarding the rights and obligations of each party, the dispute resolution process can be conducted more fairly and effectively.

Thus, the legal urgency of adjusting Article 305 paragraph (1) of the Health Law highlights the importance of adopting clear and specific legislation to create an effective legal framework for handling medical disputes. This is necessary to ensure the protection of the rights and interests of all parties involved and to strengthen public trust in the Indonesian justice system.

The Concept of Medical Dispute Resolution Regulations as a Form of Legal Protection for the Dentistry Profession in Indonesia from the Perspective of Legal Positivism

Many experts adhere to the teachings of legal positivism, one of which is H.L.A. Hart, who argue that law must be concrete, and therefore must be written down. The term "written down" refers to the notion that law must be issued by a person (subject) who has the authority

²² Chapter IV (C) Attachment to Law of the Republic of Indonesia Number 12 of 2011 Concerning the Formation of Legislation, State Gazette of the Republic of Indonesia 2011 Number 82 Supplement to State Gazette of the Republic of Indonesia Number 5234.

to issue and write it down. This authority is the state. State authority is demonstrated by the attributes of the state, namely state sovereignty. Based on its sovereignty, the state has the internal authority to issue and enforce what is known as positive law. Furthermore, H.L.A. Hart states: (1) law (concretized in the form of positive law) must contain commands; (2) There is not always a necessary connection between law and morals, and it is distinguished from the law that should be created (there is no necessary connection between law and morals, or law as it ought to be)²³.

Legal positivism emphasizes the importance of law as a concrete entity manifested in the form of clear and firm legislation. This aims to avoid multiple interpretations or diverse interpretations of the law. In the context of establishing special court arrangements for medical disputes, the principles of legal positivism are closely related:

a. Embodiment in Legislation:

Legal positivism emphasizes that the law must be written down in concrete and specific legislation. Adjustments to Article 305 paragraph (1) of the Health Law must be implemented immediately to eliminate any doubt regarding the status, authority, and procedures that must be followed by patients or families of patients who have suffered harm.

b. Preventing Multiple Interpretations:

By adjusting the wording of Article 305 paragraph (1) of the Health Law in legislation, multiple interpretations or diverse interpretations of the law can be prevented. Clear and firm regulations will help ensure that the professional disciplinary panel operates in accordance with the objectives and principles established by applicable laws.

c. Legal Continuity and Consistency:

With concrete regulations in laws and regulations, complaints filed by patients or families of injured patients can create continuity and consistency in the application of the law. This will minimize the possibility of legal uncertainty and ensure that decisions made by the courts consistently comply with applicable legal principles.

Therefore, the adjustment to Article 305 paragraph (1) of the Health Law is a manifestation of the principles of legal positivism, which emphasizes the importance of law as a concrete entity outlined in clear and firm laws and regulations. This aims to ensure legal certainty, prevent multiple interpretations, and create continuity and consistency in the application of the law.

CONCLUSION

Conclusion

Adjusting Article 305 paragraph (1) of the Health Law is crucial. Philosophically, legal protection for medical personnel and patients is reflected in the legal ideals that reflect the values of Pancasila and the state's goal of protecting the entire nation and advancing public welfare. From a sociological perspective, this urgency lies in the need to provide a clear legal framework to protect and resolve medical disputes fairly and equitably for all parties involved. Legally, adjusting Article 305 paragraph (1) of the Health Law is crucial to provide legal certainty in protecting medical personnel and patients. This also strengthens the principle of the effectiveness of laws and regulations in society, in accordance with Article 5 of the Law on the Establishment of Legislation.

The conclusion from the principles of legal positivism, which emphasize the importance of law as a concrete entity manifested in the form of clear and firm laws and regulations, is that adjusting Article 305 paragraph (1) of the Health Law is crucial. This

²³ HLA's opinion was quoted by Teguh Prasetyo and Abdul Hakim Barkatullah, 2007, Legal Science and Legal Philosophy, Yogyakarta: Pustaka Pelajar, pp. 97-99.

ensures legal certainty, prevents multiple interpretations, and creates continuity and consistency in the application of the law.

Suggestion

The government, as policymaker, should conduct a more in-depth reconstruction of the articles regarding the concepts and principles of the philosophy of legal positivism. This means immediately amending Article 305 paragraph (1) of the Health Law by adjusting it to "Patients or their families must first file a complaint with the panel before filing a criminal and/or civil lawsuit (as stipulated in the Health Law).

Immediate adjustment of Article 305 paragraph (1) of the Health Law into concrete and specific legislation is an implementation of this legal positivism school. This will eliminate doubts regarding the status, authority, and procedures that must be followed by patients or families who have suffered harm, and will provide legal protection for dentists in particular.

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