IMPLEMENTING DISPUTE RESOLUTION MECHANISMS FOR RESOLVING MEDICAL MALPRACTICE CASES IN INDONESIA: PROBLEMS AND PROSPECTS

BY

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A thesis submitted in partial fulfillment of the requirement for the degree of Doctor of Philosophy in Law

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ABSTRACT

The existing medical malpractice system in Indonesia has failed to satisfy the need of both patients and doctors. It may also endanger the society. The emphasis on the use of criminal sanction has in fact created more problems rather than giving solution. The ultimate objective of this research is to identify the inadequacies of the existing system of liability and settlement of alleged medical malpractice cases and to propose agendas for reforms. The research was done through both library-based study and field work. It is found that the existing system of liability for medical malpractice has inherent problems embracing legal substance, legal structure as well as legal culture. The absence of legislation governing medical malpractice has created confusion on what medical malpractice is and how to deal with it. Further, the Indonesian society and the law enforcement agencies tend to presume medical malpractice as criminal matter rather than civil matter. Consequently, doctors in Indonesia have become more vulnerable of criminal prosecution. The recent legal policy on the settlement of medical malpractice dispute is to resort to alternative to litigation especially mediation. Section 29 of the Health Act 2009 has made mediation mandatory in the settlement of disputes in healthcare setting, including medical malpractice dispute. Nevertheless, mediation has not been referred to as expected by the relevant parties. The implementation of mediation faces some obstacles especially the lack of the operational rule for mediating such a dispute. This study is significant as it clarifies misconception on medical malpractice and advices the right way to handle medical malpractice cases. This study also provides necessary recommendation for developing the better system of liability and settlement for medical malpractice cases in Indonesia.

خـــــلاصة البـــحث

لقد فشل نظام سوء الممارسة الطبية الحالي في إندونيسيا في تلبية حاجة كل من المرضى والأطباء. بل إنه قد يعرض المجتمع للخطر. في الواقع، إن التركيز على استخدام العقوبات الجنائية قد خلق مشاكل أكثر بدلاً من تقديم الحلول. إن الهدف الأساسي من هذا البحث هو تحديد أوجه القصور في نظام المسؤولية القائم وتسوية حالات سوء الممارسة الطبية المزعومة واقتراح برامج للإصلاحات. تمَّ إجراء البحث من خلال تحليل المحتوى والعمل الميداني. وقد وُجد أن نظام المسؤولية القائم عن سوء الممارسة الطبية يعاني من مشاكل متأصلة تتضمن مضموناً قانونياً وبنية قانونية بالإضافة إلى ثقافة قانونية. إن غياب التشريعات التي تحكم سوء الممارسة الطبية قد خلق حالة من الارتباك حول معنى سوء الممارسة الطبية وكيفية التعامل معها. علاوة على ذلك، يميل المجتمع الإندونيسي ووكالات تنفيذ القانون إلى اعتبار سوء الممارسة الطبية مسألة جنائية وليست مسألة مدنية. وبالتالي، أصبح الأطباء في إندونيسيا أكثر عرضة للملاحقة الجنائية. إن السياسة القانونية الأخيرة بشأن تسوية النزاع المتعلق بسوء الممارسة الطبية هي اللجوء إلى بديل للتقاضي وخاصة الوساطة. حيثُ جعلت المادة 29 من قانون الصحة لعام 2009م الوساطة إلزامية في تسوية النزاعات في وضع الرعاية الصحية، بما في ذلك نزاع سوء الممارسة الطبية. ومع ذلك، لم تتم إحالة الوساطة على النحو المتوقع من الأطراف المعنية. حيثُ يواجه تنفيذ الوساطة بعض العقبات، لا سيما عدم وجود قاعدة تشغيلية للتوسط في مثل هذا النزاع. هذه الدراسة مهمة لعدة أسباب. فهي توضح المفهوم الخاطئ عن سوء الممارسة الطبية وتقدم نصائح للتعامل بالطريقة الصحيحة مع حالات سوء الممارسة الطبية. كما تقدم هذه الدراسة التوصيات اللازمة لتطوير نظام أفضل للمسؤولية وتسوية حالات سوء الممارسة الطبية في إندونيسيا.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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LIST OF ABBREVIATION

ADR	Alternative Dispute Resolution
AMA	American Arbitration Association
APMF	Asia Pacific Mediation Forum
BANI	*Badan Arbitrase Nasional Indonesia* (National Arbitration Board of Indonesia)
BPRS	*Badan Pengawas Rumah Sakit* (Hospital Supervisory Body)
BPSK	*Badan Penyelesaian Sengketa Konsumen* (Consumer Dispute Tribunal)
BW	*Burgerlijk Wetboek* (Civil Code)
CPA	Consumer Protection Act
CRP	Communication and Resolution Program
ENE	Early Neutral Evaluation
FMCS	Federal Mediation and Conciliation Service
HIR	*Het Herziene Indonesische Reglement* (the Code of Civil Procedure)
HPA	Health Professional Act
ICC	International Chamber of Commerce
IDI	*Ikatan Dokter Indonesia* (Indonesian Medical Association)
IICT	International Institute for Conflict and Transformation
IOM	Institute of Medicine
JMA	Japanese Medical Association
KKI	*Konsil Kedokteran Indonesia* (Indonesian Medical Council)
KTKI	*Konsil Tenaga Kesehatan Indonesia* (Indonesian Healthcare Professional Council)
KUHAP	Kitab Undang-undang Hukum Acara Pidana (the Code of Criminal Procedure)
KUHP	*Kitab Undang-undang Hukum Pidana* (Penal Code)
KUHPer	*Kitab Undang-undang Hukum Perdata* (Civil Code)
LTCF	Long Term Care Facility
MA	*Mahkamah Agung* (Supreme Court)
MK	*Mahkamah Konstitusi* (Constitutional Court)
MKDKI	*Majelis Kehormatan Disiplin Kedokteran Indonesia* (Medical Disciplinary Tribunal)
MKEK	*Majlis Kehormatan Etika Kedokteran* (Medical Ethics Tribunal)
MKEKG	*Majlis Kehormartan Etika Kedokteran* Gigi (Dental Ethics Tribunal)
MLC	Medico Legal Committee
MPA	Medical Practice Act
MOH	Ministry of Health
NFCS	No Fault Compensation System
NGO	Non-Governmental Organization
NMI	*Nederlands Mediation Instituut* (the Dutch Mediation Institute)
NFCS	No Fault Compensation System
NPDB	National Practitioner Data Bank
PDGI	*Persatuan Dokter Gigi Indonesia* (Indonesian Dental Association)
PMN	*Pusat Mediasi Nasional* (National Mediation Center)
PN	*Pengadilan Negeri* (Court of the first instance)

PK	*Peninjauan Kembali* (Case Review)
PP	*Peraturan Pemerintah* (Government Decree)
PMH	*Perbuatan Melawan Hukum* (Tort)
Permenkes	*Peraturan Menteri Kesehatan* (Health Minister Decree)
PT	*Pengadilan Tinggi* (Court of Appeal)
RI	Republic of Indonesia
SIP	*Surat Ijin Praktik* (Practicing License)
SP	*Sertifikat Kompetensi* (Certificate of Competence)
SKP	*Satuan Kredit Profesi* (Credit Point of Profession)
STR	*Surat Tanda Registerasi* (Registration Letter)
TAMARA	Transport and Maritime Arbitration Rotterdam-Amsterdam
UK	United Kingdom
UKDI	*Ujian Kompetensi Dokter Indonesia* (National Examination of Competence)
USA	United States of America
UU	*Undang-undang* (Act)
WKKGZ	*Wet Kwaliteit, Klachten, en Geschillen Zorg* (the Health Quality, Complaints and Disputes Act)
WvS	*Wetboek van Strafrecht* (Penal Code)

TABLE OF TRANSLITERATION

ء	ʾ/a	خ	Kh	ش	sh	غ	Gh	ن	N
ب	B	د	D	ص	ṣ	ف	F	ه	H
ت	T	ذ	Dh	ض	ḍ	ق	Q	و	W
ث	Th	ر	R	ط	ṭ	ك	K	ي	Y
ج	J	ز	Z	ظ	ẓ	ل	L		
ح	ḥ	س	S	ع	ʿ	م	M		

Short vowels	Long Vowels
A	Ā
I	Ī
U	Ë

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

As one of the oldest professions, the contribution of the medical profession in improving the quality of human life is undeniable. Doctors and patients had always had a relationship based on trust and doctors have been perceived as more superior individuals compared to patients. In Indonesia, this type of relationship has been characterized as *hubungan kepercayaan* (fiduciary relationship). The giving of full trust to the doctors by the patients is due to the patients' lack of medical knowledge on the disease and treatment as well as the recognition of the doctors' professional capacity.

However, the nature of doctor-patient relationship has significantly changed in Indonesia since the increase in medical malpractice cases. In 2003, medical malpractice in Indonesia has been put in the limelight after massive publicity on alleged medical malpractice cases were made in the media. This publicity has changed the patient's perception towards the medical profession. Patients have become aware that it is possible for doctors to commit medical errors in carrying out medical treatment and they may be potential victims of medical injuries. Consequently, this situation has promoted public awareness towards patient safety issues as well as finding the appropriate legal remedies.

Due to the fact that there is no specific legislation governing medical malpractice in Indonesia, the existing legislations have been used to deal with this issue. Since the essence of medical malpractice is a form of 'negligence', therefore the rules on

negligence either in the Civil Code or in the Penal Code were applied.[1] Under the Indonesian legal system, negligence constitutes a cause of action for either civil or criminal litigation. Negligent act which results in an injury or death constitutes a tort[2] as well as a criminal offence.[3]

Majority of medical malpractice cases reported in the media involve bodily injury and many of these injured patients brought their cases under the criminal proceedings. They did so for some reasons. Some of them exercise criminal action to express their disappointment, while some who positively thought about preventing future accident, employ criminal liability for deterrence. Criminal litigations have also been opted by the medical malpractice lawyers to avoid the difficulty in proving doctor's negligence if the case is brought into civil court. The possibility of bringing medical malpractice cases to the criminal court and the fact that many victims of medical malpractice cases came to the police have stimulated the public in Indonesia to presume that medical malpractice case is of criminal matter rather than a civil matter.[4]

Only a few number of the cases brought to the police investigator reached the court, while the rest were settled outside the litigation system. Police investigator found difficulties when dealing with medical injury cases. It was not easy for the police to construct a proper allegation supported with strong evidences in such cases. As a result, in some cases the investigator discontinued a case in hand and then advised the disputing parties to bring out that case from the litigation process.[5]

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[1] It is believed that there would be no doctor who want to injure their patients. In fact, most injuries occasioned in the course of medical treatment were inflicted inadvertently or negligently. See Jean McHale and Marie Fox, *Health Care Law: Text and Materials*, 2nd edn, (London: Sweet & Maxwell, 2007), 354.

[2] Tort is governed in Article 1365 of the Indonesian Civil Code. Based on this Article, the wrongdoer is obliged to pay compensation to the injured party.

[3] Causing injury or death due to negligent act is subjected to penalties as governed in Article 359 and 360 of the Indonesian Penal Code.

[4] See Muh Endriyo Susila, "Criminal Prosecution of Doctors in Indonesia: Issues and Problems", *IIUM Law Journal*, vol. 23, no. 3 (2015): 448-449, and 453.

[5] In *Dr. Erwin's Case 2005*, the police investigator released the case in hand to be settled through negotiation among the disputing parties or probably through mediation.

There has been a global trend to shift to the non-litigation processes in dealing with medical malpractice issue. Due to the problems inherent in the medical malpractice system, many jurisdictions such as United States, United Kingdom, the Netherlands, Australia, New Zealand and Japan try to employ other ways for settling medical disputes. Alternative to litigation have been discussed and adopted in several countries. While some countries exercise Alternative Dispute Resolution (ADR) as an alternative to litigation, New Zealand,[6] on the other hand, adopted the 'no fault-based compensation scheme' to settle medical malpractice cases.

1.2 STATEMENT OF PROBLEM

Medical malpractice is a relatively new legal issue in Indonesia. The first medical malpractice case in Indonesia took place in 1980s. However, only after 2003 the issue of medical malpractice attracted public attention.[7]

In line with the development in academic discourse, the law relating to medical malpractice had also developed. It began with the enactment of the Medical Practice Act in 2004 (The MPA 2004).[8] By virtue of this Act, a medical disciplinary tribunal called *Majelis Kehormatan Disiplin Kedokteran Indonesia (MKDKI)* had been established in Jakarta. It is expected that MKDKI becomes the first gate for the settlement of the medical malpractice cases in Indonesia. MKDKI receives reports and complaints from patients and later identifies the nature of the dispute whether it includes disciplinary issue or ethical issue. If the nature of dispute is about the breach of disciplinary rule, MKDKI will call the doctor in question for investigation. While if the

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[6] See John Healy, *Medical Negligence: Common Law Perspective*, (London: Sweet & Maxwell, 1999), 235.
[7] See Muh Endriyo, 448.
[8] The official name of the mentioned Act is *Undang-undang Nomor 29 Tahun 2004 Tentang Praktik Kedokteran.*

nature of dispute is about the breach of ethical rule, MKDKI will forward that report or complaint to the medical ethic tribunal called *Majelis Kehormatan Etika Kedokteran (MKEK).*[9]

It seems that MKDKI fails to accommodate public demand as an effective mechanism for settling medical malpractice disputes in Indonesia.[10] There are at least two disadvantages when the patients want to deal with MKDKI. The first is relating to the lack of access and the second is relating to the legal remedy. Since the location of MKDKI is centered in Jakarta and having no such representative offices in other regions, MKDKI will not be accessible for those living in different cities or islands. Furthermore, if in fact under the examination of MKDKI the reported doctors were found guilty of having violated disciplinary rules, the sanction MKDKI may impose is a mere administrative sanction ranging from written probation to recommendation to admit particular medical education.[11] Section 66 (3) of the MPA 2004 allows the disputing party (normally the patient) to proceed with a legal action (either criminal or civil litigation) when it is necessary.

As already mentioned, the legal construction known as 'negligence' is a subject matter of both civil law and criminal law. Therefore, medical malpractice or medical negligence can be handled either as civil case or criminal case. Medical negligence can be brought to the criminal court only if it has resulted in injury or death as ruled in Article 359 and 360 of the Indonesian Penal Code. When a criminal action is made against the doctor, the element of *mens rea* as required in establishing criminal liability

[9] MKDKI is administered by the Indonesian Medical Council, while MKEK is administered by the Indonesian Medical Association.

[10] According to Sabir Alwi the former member of MKDKI, since established in 2006 until 2011 MKDKI received only 127 reports. See Sabir Alwi, "Masyarakat Jangan Ragu Melapor ke MKDKI," Kompas, <http://health.kompas.com/read/2011/05/21/04043264/Masyarakat.Jangan.Ragu.Melapor.ke.MKDKI> (accessed 18 August, 2015).

[11] See Section 69 (3) of the MPA 2004.

will be represented by a particular state of mind in the form of either negligence, recklessness or carelessness.[12]

Litigation process through either criminal or civil proceedings may at times be best suited for many patients. But even though litigation offers advantages; deterrence (in criminal proceedings) and compensation (in civil proceedings), nevertheless it brings about inherent problems; especially unreasonable length and unpredictable cost. All of the technicalities in litigation process have made it stressful either for patients or doctors or even for the law enforcement officers.

As a matter of fact, in civil trial, the winning patients have never been satisfied with the amount of damages granted by the judges, while the doctors who have successfully escaped from criminal liability suffers from negative publicity caused by the litigation process. The best mechanism to be used for resolving medical malpractice cases in Indonesia still becomes the subject of inquiry.

Thus, this research aims to find out the best solution for the mentioned problems. The research engages the following research questions, namely:

1. What are the existing legal mechanisms used to handle medical malpractice cases in Indonesia?
2. How effective and adequate are these mechanisms in providing compensation and upholding justice for victims of medical injuries in Indonesia?
3. Will the employment of dispute resolution mechanisms solve the problems inherent in the existing system in Indonesia?
4. What is the most recommended mechanism to be employed to resolve medical malpractice cases in Indonesia?

[12] In theory, *schuld* (Dutch term for *mens rea*) can be in the form of either *dolus* (intent) or *culpous* (culpa). Culpa covers several terms including negligence, recklessness and carelessness.

1.3 OBJECTIVES OF RESEARCH

The objectives of the research can be described as follows:

1. To identify the law governing medical malpractice in Indonesia;
2. To assess the adequacies and inadequacies of the existing legal mechanisms in handling medical malpractice issues;
3. To investigate on the alternatives to litigation that can be employed to settle medical malpractice cases in Indonesia;
4. To make a comparative study with selected countries which have employed alternatives to litigation in handling medical malpractice issues such as the United States of America, the Netherlands, and Japan; and
5. To propose recommendations on how to improve the medical malpractice system in Indonesia through the alternatives to litigation.

1.4 HYPHOTHESIS

The employment of selected methods of alternative dispute resolution will solve the inherent problems faced by relevant parties in handling medical malpractice cases in Indonesia.

1.5 METHODOLOGY

1.5.1 Type of Research

This normative legal research which employs both statutory and comparative approach. As such, this research relies on the study of the existing statutory law to address medical malpractice issue in Indonesia. In addition, a comparative study has also been made with other countries, especially the United States of America, the Netherlands and Japan.