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Maladministration as Doctor Medical Malpractice: A Health Law Perspective in Indonesia

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Abstract

Research over the past two decades has demonstrated that malpractice, especially malpractice in therapeutic transactions between doctors and patients as well as maladministration cases, increased as a problem that discussed by many people. However, in such a complex field, there are many ways to categorize the different issues in the health field. The research is a socio-legal research. The approach used is philosophical as a means to discover, examine and arrange the data necessary for an explanation of the health philosophy. The results show that licensing either private practice license or in hospital, in terms of legal aspects of administration has not operate optimally. Inconsistencies of sanction for unauthorized doctors and the complexity of procedures taken in obtaining license (Registration Certificate and Practice License) are the reasons. The administrative sanctions of doctors in medical services have not been executed consistently. In fact, there are still many hospital cases and doctors who do not have STR and SIP to use properly. The threat of imprisonment of a doctor who does not has a practice license is no longer valid through the Constitutional Court' Decision Number 04/PUU-V/2007 because it is considered disproportionate, unconstitutional and contrary to Article 28G Paragraph (1) of the 1945 Constitution. Thus, to doctors and dentists who do not have a registration certificate or practice license can still be threatened with a fine penalty.

Keywords: Maladministration, Malpractice, Medicine, Health Law

Introduction

Health law is an incredibly broad, diverse and dynamic field of law.[1] Research over the past two decades has demonstrated that malpractice, especially malpractice in therapeutic transactions between doctors and patients as well as maladministration cases, increased as a problem that discussed by many people. Maladministration is defined as a behavior or act against the law and ethics in a process of public service administration, which includes abuse of authority/position, negligence in action and decision making, neglect of legal obligations, undertake procrastination, discriminatory acts, reward requests and others that can be assessed similar with the mistake.

Several examples of maladministration such as: procrastination, abuses of authority and procedural, neglect of legal obligations, non-transparency in tariffs, discrimination, unprofessional, obscure information, and mismanagement. If we flashback a few decades before, assuming many people, doctors are professionals who are less able to be touched by the law over their profession.[2]

In order to provide protection and legal certainty to the public, disciplinary offenses that not related to doctor-patient relationships need to be monitored and evaluated in a continuous medical practice. However, in recent years, the relationship of doctors and/or hospital with patients face challenges because some complaints or allegations to doctors and/or hospitals have made health efforts in health services or known as malpractice, often published in the mass media. Malpractice itself occurs not only in patients with doctors but sometimes patients with hospitals, this gives a picture that the public as *health receiver* has now demanded their rights, they have dared to assess and even criticize the quality of health service.

Lack of good communication between doctors and patients are cause of many complaints with disciplinary offenses (the public called it malpractice) by doctors and dentists. As a result, although doctors have performed their duties in accordance with standards of service, professional and procedure operational, but sometime patients still harmed because the results of therapy is not appropriate as expected.

[1] Burris, S. (2011). From health care law to the social determinants of health: A public health law research perspective. *University of Pennsylvania Law Review*, *159*(6), 1649-1667.

[2] Muninjaya, A.A.G. (2004). *Manajemen Kesehatan*, Jakarta: Penerbit Buku Kedokteran, p. 14; Compare to Dewi, A.I. (2008). *Etika dan Hukum Kesehatan*, Yogyakarta: Pustaka Book Publisher, pp 166-220

According to the Indonesian Medical Discipline Honor Board,[1] until March 2011, it has handled 127 complaints of disciplinary offenses committed by doctors or dentists. Of that number, about 80 percent is due to a lack of communication between doctors and patients, if detailing reported discipline, the most are medical doctor (48 cases), surgeons (33 cases), obstetricians and midwives (20 cases), pediatrics (11 cases), internist (10 cases), lung specialist (4 cases), neurologist (4 cases), anesthesiologist (4 cases), ophthalmologist (3 cases), cardiologist (3 cases), radiologist (2 cases), and one case each by psychiatrist, otolaryngologist and dermatologist and dentists (10 cases). Based on complaint source as reported by the community are 119 cases, followed by the ministry of health/Health Office 4 cases, health workers 2 cases and each one case of service institutions and insurers.

In Act No. 29 of 2004 on Medical Practice that the license of practice is a written evidence given by the government to doctors and dentists who will commit medical practice after licensing regulated in the law of state administration has a relationship with the emergence of administrative malpractice. Every doctor/dentist and specialist/dentist specialist who commits medical practice must have a registration certificate and through an evaluation process that includes administrative and competency evaluations in accordance with applicable laws and regulations.

Supposedly, maladministration of health services resulting in the death of one person from Pathuk, Gunung Kidul. The results of initial investigation that conducted by *Ombudsman Republik Indonesia* (ORI) representative DIY, Thursday (2/2/2017), found a fact that the Public Health Center of Dlingo has made a fatal procedural mistake that does not provide referral letters to patients to certain hospitals. As a result, without the referral letter, the patient does not even consider applying for a delivery facility to a referral hospital using adequate ambulances and paramedics.[2]

Another case was reported to *Ombudsman Republik Indonesia*, a file of presumed fraud committed by Grestelina Hospital of Makassar at office of Ombudsman Republik Indonesia, Makassar, South Sulawesi, Friday (8/1). Grestelina Hospital of Makassar is presumed commits maladministration because it is not transparent in terms of hospital costs to patients i.e cost paid higher than previously shown.[3]

All health services to patients have been given by the personnel. The ombudsman concludes that there is a maladministration that has been done by the Jiwa Hospital causing a patient to be the victim of persecution and died. The government is also obliged to carry out development in various fields in order to realize the national welfare, especially in the field of health. In this regard, the government issued Act No.36 of 2009 on Health to regulate the duties of health personnel and how commit their duties and sanctions given in violation (malpractice and maladministration).

On the one hand, there may also be an administrative ethical dilemma, if occur compulsion to open secrecy for a cause, and on the other hand a moral duty to guard it. The issue of administrative ethics may also occur, if the informed consent[4] is not carried out as appropriate, i.e, a consent given voluntarily by the competent patient to the doctor to perform certain medical actions on him/her, once he/she is given complete and understandable information about all the effects and risks may occur as a result of that action or as a result of not taking such action. This paper will seek synchronization of the legal substance of medical profession accountability, the form of maladministration, and how the legal protection of doctor profession against maladministration as a form of doctor medical malpractice in the perspective of health law in Indonesia.

2. Method of Research

The research is a socio-legal research.[5] A legal research serves to see the law in a real sense and examine how the legal work in the community. This research studying people in living relationships in society then the method of empirical-legal research can be regarded as a sociological legal research. The approach used is philosophical as a means to discover, examine and arrange the data necessary for an explanation of the health philosophy. Case approach to investigate phenomena in real-life contexts can be both qualitative and quantitative and the targets can be individual or group, even to the wider community.

[1] Sources: Publikasi Data dan Informasi - The Ministry of Health of the Republic of Indonesia. Available online at: http://www.depkes.go.id/article/print/1519/dugaan-pelanagaran-disiplin-terbanyak-akibat-kurangnya-komunikasi-dokter-dan-pasien.html, accessed on 22 November 2016.

[2] Harian Jogja. Available online at: http://print.harianjogja.com. Accessed on 3 February 2017.

[3] Medan Bisnis Daily. Sources: http://www.medanbisnisdaily.com./mdn.biz.id/n/208965.

[4] Syafruddin, S., & Anand, G. (2015). Urgensi Informed Consent terhadap Perlindungan Hak-hak Pasien. *Hasanuddin Law Review, 1*(2), 164-177. doi: http://dx.doi.org/10.20956/halrev.v1n2.89

[5] Irianto, S., and Sidharta. (2009). *Metode Penelitian Hukum: Konsistensi dan Refleksi,* Jakarta: Yayasan Pustaka Obor Indonesia, p. 142

2. Relation of Legal Protection and Public Service

Legal protection is to provide guidance to human rights that are harmed by others. Such protection is provided to the public so that they can enjoy all the rights granted by law. In other words, the legal protection is various legal remedies that must be given by law enforcers to provide a sense of security, both mind and physical from various threats of any party.

According to Fitzgerald,[1] the emergence of legal protection theory is derived from the theory of natural law or natural law school. According to the natural law school that the law is sourced from God that is universal and eternal and between law and morals should not be separated. The followers of this school view that law and morals are a reflection and the internal and external rules of human life embodied by law and morals.

Administrative action, as action to realizing what is stipulated in legislation, government in achieving public welfare as the objective of the State, prioritizing the public interest rather than individual interests.[2] Therefore, in administrative actions, the wisdom (*doelmatig*) factor is very important role. Nevertheless, it is endeavored that the wisdom does not deviate from the prevailing legal rule (*doelmatig the rechtmatig*).

Literally, in the context of public service, the word *service* as result of servant who serve.[3] The activities of servants are called *service*. A sense of *service* is an effort to serve others' needs while *serving* is to help prepare what is needed by someone. Thus, the service is defined as a process of person or group activities to provide optimal assistance to other parties requiring either requested or not, it can be seen the main feature of service is a series of activities of interaction involving a person or group provided by an organizing agency service in solving problems that receive services. The purpose of law is to ensure legal certainty in society. In addition, the law is to regulate the people to act orderly in the interaction of living peacefully, to keep the people from acting in anarchy and guaranteeing justice for everyone as their rights so as to create an orderly, happy and peaceful society.

The government is also obliged to carry out development in various fields in order to realize the national welfare,[4] especially in the field of health. In this regard, the government issued Act No.36 of 2009 on Health in which the duties of health personnel and how to commit their duties and sanctions given in if conduct violation (malpractice and maladministration) and Act No.29 of 2004 on Medical Practice described how doctors in practice. It aims to realize the optimal health status, having a doctor registration letter and practice license, this is to minimize the occurrence of maladministration. Also, regulates provisions of the law provided if doctors conduct violation in their practice.

This profession only gained appreciation for its efforts in curing the patient. But on the other hand, there is a big risk faced when in an attempt to cure the patient, either because of fate or negligence (*human error*). Moreover, if the action is considered as maladministration and/or medical malpractice, so he/she must face the demands, whether civil or criminal. This also raises fears for physicians in perform their profession, since they are ordinary human beings who at one time did not escape from wrong.

The right of patient to information becomes the duty of the health worker to fulfill it. Health workers, especially medical personnel and nursing personnel dealing with patients must provide an explanation of everything related to the condition of the patient. Explanations shall be given in a language understood by the patient, and not in a medical language that uses technical terms. Patients are sometimes afraid to ask questions and discontinue treatment when something unexplained happens. This is obviously very harmful to the patient and his family.[5]

In order not to damage the relationship between health workers, the right of second opinion can be given objectively, without unnecessary comments. The condition of patient when he/she asked for a second opinion may be different from the condition when he/she got information about his illness. This difference obviously greatly affects the second opinion to be given. The potential for subsequent administrative ethics issues is about privacy. Privacy concerns confidential matters about the patient, such as personal secrets, disorders or illness, financial, and the assurance of patient from the disruption to seclusion which is his/her right. It is an ethical duty of the hospital to safeguard and protect the privacy and confidentiality of patients.

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[1] Irwansyah & Marlang, A. (2011). *Pengantar Hukum Indonesia*. Learning Book of Law Faculty of Hasanuddin University: Makassar.

[2] Satjipto Raharjo, *Ilmu Hukum,* PT. Citra Aditya Bakti, Bandung, 2000, Page. 53.

[3] Indonesia' Big Dictionary (KBBI) Offline., p. 571

[4] Irwansyah, Hakim, W., & Yunus, A. (2017). "Environmental Audit as Instrument for Environmental Protection and Management", *The Business and Management Review 9* (2), 228-232

[5] For example, if patient stops tuberculosis therapy because the urine is red after drinking drugs, then the disease will continue to proceed, and he remains a source of contagion for those around him. It is also important to explain the possibility of allergies (not resistant) to certain drugs. Allergic forms vary greatly, ranging from itching to anaphylactic shock which can lead to death.

Regarding the right of patient to give consent is something to be understood, such as whether a patient who has come to a health facility and told his/her condition, then he has agreed to what will be done to him/her? In law, there is the sense that consent can be granted silently. For example, the police signaled to the biker to stop. Without saying anything, the biker stopped and stepping aside. His attitude was a silent agreement. However, for medical treatment, especially those with high risk, consent should be given in writing, after the patient is given information as clearly as possible. This combined right of patients (the right to information and the right to give consent) is known as the informed consent. In essence, the patient gives consent to a medical action against him/her, after obtaining clear information from health providers.

There can also be an administrative ethical dilemma, in the event of a compulsion to open secrecy for a cause on the one hand to a moral obligation to guard it. The issue of administrative ethics may also occur if the informed consent is not carried out as appropriate, such the consent voluntarily given by the competent patient to the physician to perform certain medical actions on him, once he/she is given complete and understandable information on all the effects and risks may occur as a result of that action or as a result of not taking such action.

4. Reality of Doctors Do not Have a Practice License: Malpractice or Maladministration?

Malpractice is a very common problem and does not always have a juridical connotation. Literally "*mal*" means "wrong" while "*practice*" means "execution" or "action", so malpractice means "wrong execution or action."[1] Elements of malpractice or juridical malpractice are divided into categories according to the violated law, namely *criminal malpractice*, *civil malpractice*, and *administrative malpractice.*

According to Black's Law Dictionary, malpractice is an instance of negligence or incompetence on the part of a professional. Also termed professional negligence. Medical malpractice, a doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances.

Differ with maladministration in which people understand "maladministration" as a trivial matter. Whereas according to Article 1 No. 3 of Act No. 37 of 2008 on *Ombudsman Republik Indonesia*, the definition of maladministration is very broad and includes many things that can cause material and immaterial losses and situations of injustice that harm the citizen' rights.

In Indonesia's positive law, there are 9 (nine) criteria as maladministration categories:

1) Behavior and action against the law
2) Behavior and action beyond authority
3) Use authority for any other purpose of the purpose of such authority
4) Negligence
5) Neglect of legal obligations
6) In the implementation of public services
7) Conducted by the State organizer and the government
8) Arise material and/or immaterial losses
9) For public community and individual

In principle, health laws are all legal provisions that relate directly to health services and their application. This means that health law is a written rule on the relationship between the health care provider and the community or the health services provider with the community or community members. By itself the health law regulates rights and obligations of each service provider and service receiver or community. Health law is still relatively young when compared with other laws.

Historically, the development of medical law began since in 1967, namely the holding of "*Word Congress on Medical Law*" in Belgium in 1967.[2] In Indonesia, the development of health law began with the formation of study groups for medical law of Indonesia University and Ciptomangunkusumo Hospital in Jakarta, 1982. This means, almost 15 years after the World Congress on Medical Law in Belgium. The study group of medical law was finally in 1983 developed into Perhimpunan Hukum Kesehatan Indonesia (PERHUKI/Associate).

Legal relation will occur when a patient comes to a private health facility for treatment. The legal relation between doctors, patients, and private health care facilities is in the form of an engagement commitment to do something, known as a health service. This legal relationship always places mutual rights and obligations,

[1] Yunanto, A., et al. (2009). *Hukum Pidana Malpraktik Medik*. Yogyakarta: ANDI Publisher, pp. 27-28
[2] Notoatmojo, S. (2010). *Etika dan Hukum Kesehatan,* Jakarta: Rineka Cipta, pp 43-44

meaning the right of one legal subject to another, and vice versa. Legal relation in the field of civil law is known as engagement (*verbintenis*).

The relationship between doctors and patients other than medical is also formed legal relations. In medical relation, the relationship between doctors and patient is an unbalanced relationship, in the sense that the patient is a layperson and the doctor is a healthy person who knows more about medical. However, in law there is a balanced relationship, the right of patient becomes an obligation of the doctor and the right of doctor becomes an obligation of the patient and both are the subject of law.

The legal relation between doctors and patient may take the form of an engagement as result of agreement and may take the form of an engagement as result of legislation. An example, the relationship between doctor and patient as result of agreement is when a patient comes to the doctors' office, who offers a health service by placing a signboard. In the sense that the patient receives an offer from a doctor, a contract formed as result of agreement.

Medical services in hospitals must not be separated from the standard procedures that apply in each hospital so that doctors or health workers are required in providing health services to patients should not be separated from the standards that have been set, but in reality in the field are often doctors or the health worker in performing his/her duties is negligent and not infrequently resulting in the condition of the patient may become sicker or die due to such negligence which result in lawsuit. Therefore, in some cases that often appear in the public has warned that health workers in performing their duties must be more careful and responsible in order to avoid mistakes or omissions, and resulting in lawsuits.

General medical neglect has not been widely known among the public. Medical neglect is one of the medical acts which in providing health services are not in accordance with applicable standard of procedure, while it can be said medical neglect is an act of doctors that is not really or not provide health services to patients with various reasons related to health care system.

In order to assess how human contributions in an error and its effects, it is necessary to understand the difference between active errors and latent errors. Active errors occur at the front-line operator level and its effect is immediately felt, while latent errors tend to be beyond the control of front-line operators, such as bad design, improper installation, poor maintenance, wrong management decisions, and poor organizational structure.

Latent error is a great threat to safety in a complex system, because it is often undetectable and can lead to various types of active errors. For example, the specialist education systems of doctor are expensive, doctors are employed in many hospitals, the absence of systems that maintain professional accountability are latent errors that do not seem to be error, but are actually the root of management misconduct that has led to unsafe conditions in the practice of medicine in the field. If at any time unsafe conditions are met with an unsafe act (active error), then there is an accident. In this case, we need to understand that the cause of an accident is not a single factor but multiple factors.

Generally, we respond an error by focusing on its active error by giving punishment to the individual perpetrator, retraining and others aimed at preventing the recurrence of active errors. Although punishment is often useful in certain cases (on mistakes arising from intent), it is not actually effective enough. Focusing attention on active errors will allow latent errors to remain in the system, or may accumulate, so that the system is more likely to fail in the future.

Normatively, the obligation of doctors is an administrative legal obligation appointed to the criminal law because the violation of the obligation is punishable by the criminal. The punishment of imprisonment against a doctor or dentist who does not has a register letter[1] and a penitentiary threat against a doctor or dentist who does not has a practice license.[2] However, in relation to the reading of the Constitutional Court' decision No. 04/PUU-V/2007 dated 19 June 2007 on the petition for Judicial Review of Act No. 29 of 2004 on Medical Practice, the criminal threat is abolished because it is not proportional to the violation so that it is not in line with Article 28 G Paragraph (1) of the 1945 Constitution.

However, doctors and dentists who do not have a registration certificate or do not have a practice license, it can still be threatened with a fine and it is affirmed by Article 85 and 86 of Act No. 36 of 2014 that if health workers deliberately practice without a registration certificate practice license shall be punished with a maximum fine of Rp. 100.000.000 (one hundred million rupiah). The breach of doctor practice in terms of administrative aspects: does not have a registration certificate (STR) and practice license (SIP) and does not make medical records when practicing medicine.

In practice, the most commonly found violation is a doctor who practices without license, because he/she has not

[1] Article 75 paragraph (1) Act No. 29 of 2004 on Medical Practice
[2] Article 76 Act No. 29 of 2004 on Medical Practice

received a recommendation of IOI, he/she has not passed the competency test, not have a registration certificate or already has a license but has expired. Impacts that may result when a medical practice without such STR or SIP results in adverse health effects of the physical or mental or life of the patient. Although the malpractice practice are not contrary to professional standards and procedures and carried out on informed consent. Informed consent is an agreement of patient given in conscious, free, and rational after he/she has received the information and understands their illness from the doctor.[1]

As violation of administrative legal obligations are as a preventive effort to prevent doctors or dentists commits medical malpractice and also to prevent victims from medical malpractice. Cases of doctors who practice this without license are directly handled by the Health Office and Professional Organization, because in cases that only include ethic malpractice, the doctor will not be handled by the court, but simply by "Majelis Kehormatan Etik Kedokteran" (MKEK). If MKEK cannot handle this case, it will be forwarded to "Panitia Pertimbangan dan Pembinaan Etik Kedokteran" (P3EK) and coordinates and collaborates with Health Office in terms of regulation, licensing and competence.

The author conducted interviews at the Hospital, Ministry of Health, Ombudsman, National Commission of Human Rights, Honorary Council of Indonesian Medical Discipline, Indonesian Medical Council, Indonesian Medical Ethics Council, House of Representatives Commission IX, Attorney and Police for reporting or handling of administrative malpractice cases.

In the prosecution of a doctor who does not has a practice license, there are obstacles that are quite inhibiting, such as: the doctor ignores the guidance of the Professional Organization, collision time, doctor is less likely to respond to the explanation of the license rules, not meeting the mediation call, the doctor is not or has not been a member of professional organization (Indonesian Doctors Association), doctors continue to practice secretly.

5. Conclusion

Licensing either private practice license or in hospital, in terms of legal aspects of administration has not operate optimally. Inconsistencies of sanction for unauthorized doctors and the complexity of procedures taken in obtaining license (Registration Certificate and Practice License) are the reasons. The administrative sanctions of doctors in medical services have not been executed consistently. In fact, there are still many hospital cases and doctors who do not have STR and SIP to use properly. The threat of imprisonment of a doctor who does not has a practice license is no longer valid through the Constitutional Court' Decision No. 04/PUU-V/2007 because it is considered disproportionate, unconstitutional and contrary to Article 28G Paragraph (1) of the 1945 Constitution. Thus, to doctors and dentists who do not have a registration certificate or practice license can still be threatened with a fine penalty.

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