ENFORCEMENT AGAINST MEDICAL MALPRACTICE CRIME
A Legal Normative Study Regarding The Enforcement on Medical Malpractice Crime After The Decision of Constitutional Court of Republic of Indonesia Number 14/PUU-XII/2014

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Nowadays, medical malpractice crime is a more common issue in Indonesia. The society awareness of such phenomenon is increasing significantly so that medical malpractice case become more and more every year. Tempo.co noted that according to the statistic data from Indonesian Assembly of Honour of Medical Disciplines (“MKDKI”), since year 2006 until 2012 there were 182 medical malpractice cases in Indonesia which were tried by MKDKI. From those 182 medical malpractice cases in Indonesia, 60 cases were committed by General Practitioners (GPs), 49 cases were committed by Surgeons, 33 cases were committed by obstetricians, 16 cases were committed by paediatrician, and the remaining 10 cases were for any other type of medical malpractice cases.¹

In 2012, there has been a quite shocking medical malpractice crime case namely the penal case of dr. Dewa Ayu Sasiary Prawani, dr. Hendry Simanjuntak, and dr. Hendry Siagian from Prof. R.D. Kandou General Hospital in Manado, Indonesia (“dr. Ayu Case”). In the appeal to Supreme Court level (Cassation level/Tingkat Kasasi), the Supreme Court Judges through its decision number 365 K/PID/2012 (“Cassation Decision 365 K/PID/2012”) have declared dr. Ayu, et al guilty for the criminal offense ruled in article 359 Indonesian Penal Code (KUHP) due to their negligence in conducting caesarian section (C-Section) so that causing air embolism in the right ventricle of heart which causing death to the patient named Siska Makatey. The Supreme Court Judges also sentenced them with 10 months imprisonment. But then in 2013, dr. Ayu, et al filed judicial review against the Cassation Decision 365 K/PID/2012, and through the judicial review decision number 79 PK/PID/2013 dated February 7, 2014 (“Judicial Review Decision 79 PK/PID/2013”), they were declared not guilty and exempted from imprisonment after serving the sentence for 4 months in prison.

The Cassation Decision 365 K/PID/2012 at that time reap many protests from various circles especially the Indonesian Doctors and Medical Associations such as Indonesian Medical Association (IDI), Indonesian Association of Obstetric and Gynaecology (POGI), Indonesian Doctor United (DIB), etc. The criminalization against dr. Ayu, et al has given rise to concerns of Indonesian doctors and causing the demonstration and strikes simultaneously at almost all over Indonesia on November 27, 2013 to protest the Cassation Decision 365 K/PID/2012.²


Indonesia, Nafsiah Mboi, in a press conference has stated that there is no doctor who intend to murder their patient. They have been under oath to perform their best to cure the patients. Even if in the case of a patient die or suffered injury after receiving a medical treatment from a doctor or dentist, then it should be proven first according to the medical science, whether the death or the injury suffered by the patient were caused by the doctor’s negligence or it is entirely an unavoidable medical risk. In fact, the prosecution against dr. Ayu, et al had been conducted without first going through the disciplinary proceedings in MKDKI to prove whether dr. Ayu et al had conducted negligence in applying the medical science or not in the implementation of medical practice.

In this article, I will not discuss about whether dr. Ayu, at al have committed medical malpractice crime or not, but more about how do the Indonesian law governs the procedure of prosecution against physician who alleged for medical malpractice crime and whether such procedure is already in actualize the purposes of Indonesian Medical Law especially after the The Decision of Constitutional Court of Republic of Indonesia Number 14/PUU-XII/2014.

THE PURPOSES OF THE LAW 29/2004 REGARDING MEDICAL PRACTICE AND ITS MANIFESTATION

INSTRUMENTS

Medical Practice has been specifically regulated in the Law Number 29 year 2004 regarding Medical Practice (“Law 29/2004”). Pursuant to the article 1 number 1 of Law 29/2004, The Medical Practice Law means a regulation or provision upon activities which are conducted by a doctor or dentist to its patient in order to provide medical service. Pursuant to that definition, it means that the Law 29/2004 should encompassed all aspects of medical practice, including the basic principles and the purposes of medical practice, authorized agencies in the field of medical practice, medical practice license and registration, medical education standardization, eligibility or competency requirement to provide medical services, implementation of medical service, patient’s rights and obligations, medical ethics, medical discipline, and legal norms including penal law provisions, civil law provisions, and administrative law provisions, and also how to impose sanction against doctor or dentist who violates any norms related to medical Practice.


5 Indonesia, Medical Practice Law, Law Number 29 year 2004, Article 1 point number 1, Law 29/2004, State Gazette of Republic of Indonesia number 116 Year 2004, Supplement to State Gazette of Republic of Indonesia number 4431.
Furthermore, the purpose of the Law 29/2004 is provided in the point c and d of the consideration part and article 3 of Law 29/2004 which reads as follows:⁶

Consideration of Law 29/2004:
   c. The implementation of medical practice, which is the core of every implementation of health effort, shall be conducted by doctor or dentist who highly uphold moral and ethics and have the ability and competency, and whose quality should be continuously developed through education and training, certification, registration, license, guidance, supervision, and monitoring, so that the implementation of the medical practice will be in accordance with the development of science and technology.
   d. In order to protect and provide legal certainty to the health care receiver, doctor, and dentist, it is necessary to have the implementation of medical practice regulated.

Article 3 of Law 29/2004:
   “The regulation on medical practice aims to:
   a. To provide protection to the patient;
   b. To maintain and improve the quality of medical service provided by a doctor or dentist; and
   c. To provide legal certainty for the society, doctor, and dentist.”

Therefore pursuant to the above-mentioned purposes, it may be concluded that generally there are 3 (three) main purposes of Law 29/2004 namely 1) protection to the patient, 2) competency of the doctor or dentist, and 3) legal certainty to the patient and the medical personnel (doctor and dentist).

To reach those purposes, then through the Law 29/2004 is established two agencies which authorized in the field of medical practice namely the Indonesian Medical Council (“KKI”), and the Indonesian Assembly of Honour of Medical Disciplines (“MKDKI”) as the authorized agency to determine whether there is a mistake made doctors and dentists in the application of the medical and dentistry science discipline, and impose sanctions.⁷ Pursuant to article 8 of Law 29/2004, KKI has the authority to:⁸
   a. Approve and reject the registration of doctor and dentist;
   b. Issue and revoke the certificate of registration of a doctor and dentist;
   c. Ratify the medical and dentistry competency standard;
   d. Assess the requirement of registration of doctor and dentist;
   e. Ratify the implementation of the branch of medical and dentistry science;
   f. Jointly with doctor and dentist to foster the implementation of medical professional ethics which has been stipulated by medical profession organization; and

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⁶ Ibid., Point C and D of Consideration Part and Article 3.
⁷ Ibid., Article 1 point number 14.
⁸ Ibid., Article 8.
g. Provide records of doctor and dentist who are sanctioned by medical profession organization or its organ due to the violation of ethics.

While pursuant to article 64 of Law 29/2004, MKDKI has the authority to:

a. Receive complaint, examine, and decide upon medical discipline violation case which conducted by a doctor or dentist;

b. Formulate guidance and procedure of handling of medical discipline violation case.

Pursuant to the above-mentioned KKI and MKDKI’s authorities, basically KKI is focuses on two activities namely 1) the registration of doctor and dentist as the requirement for the medical practices license (point a, b, d, and g) and 2) improvement of doctor and dentist’s competency by formulating medical science through the medical competency standard and medical education standard, and fostering the implementation of medical professional ethics (point c, e, and f). On the other hand, MKDKI is focuses to enforce the compliance to medical discipline of doctor and dentist in implementing the medical practice.

Furthermore, medical discipline itself has been defined in the article 1 point number 1 of KKI’s Regulation number 32 year 2015 regarding Procedure of Handling Cases of Medical and Dentistry Discipline Violation (“KKI’s Regulation 32/2015”) namely the rules and/or provisions of the implementation of science in medical practice within the scope of education, training, research, and/or medical services, including the social services which shall be complied by a doctor and dentist. As for the pursuant to article 3 of KKI’s regulation number 4 year 2011 regarding Professional Discipline of Doctor and Dentist (“KKI’s Regulation 4/2011”), the violation of professional discipline of Doctor and Dentist are consists of 28 forms namely:

a. Conduct medical practice incompetently;

b. Do not refer the patient to another doctor or dentist who have appropriate competency;

c. Delegate works to medical personnel who is incompetent to do such work;

d. Provide substitute doctor or dentist who do not have appropriate competency and authorization or do not notifying the substitution;

e. Perform medical practice in a state of physical or mental health level such a way that incompetent and may harm the patients;

f. Take no action/adequate medical care in certain situations which may endanger the patient;

g. Conduct excessive examination or medication which not in accordance with the patient’s needs;

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9 Ibid., Article 64.

10 Indonesia, Indonesian Medical Counsel Regulation Regarding Procedure of Handling Cases of Medical and Dentistry Discipline Violation, KKI’s Regulation Number 32 year 2015, Article 1 point number 1, State Gazette Number 617 Year 2015.

11 Indonesia, Indonesian Medical Counsel Regulation Regarding Medical and Dentistry Professional Discipline, KKI’s Regulation Number 4 year 2011, Article 3, State Gazette Number 304 Year 2012.
h. **Do not give a honest, ethical, and adequate information to the patient and its family in the implementation of medical practice:**

i. Conduct action/medical care without any consent from the patient, family, or its guardian;

j. Do not create or saving the medical record deliberately;

k. Conduct action with the purpose to stop pregnancy which is contrary with the applicable law;

l. Conduct action to end the patient’s life pursuant to the patient’s request or its family;

m. **Perform medical practice by implementing knowledge, skill, or technology which is not acceptable yet or beyond the proper procedure in medical practice;**

n. Conduct research within medical practice by using human as the research subject without obtaining ethical clearance from an government accredited institution;

o. **Do not do emergency aid on the basis of humanity,** whereas do not harm him, except when he is sure there are other people who is on duty and able to do so;

p. **Reject or stop doing action/medical care or medication to patient without a proper and lawful reason according to professional ethics and the applicable law;**

q. Disclose medical secret;

r. **Make medical statement that is not in accordance with the examination result which he known correctly and properly;**

s. Involve in an action which included as torture or execution of death penalty;

t. Prescribe or provide class of narcotic drugs, psychotropic, and addictive substances unlawfully and contrary with the professional ethics;

u. Commit sexual harassment, intimidation, or act of violence to the patient during the implementation of medical practice;

v. Use academic title or professional title which is not entitled to him;

w. Obtain reward as the result of referring, ordering test, or prescribing medicine or medical devices;

x. Advertise incorrect and misleading capability/service either orally or in written;

y. Addicted to narcotics, psychotropic, alcohol, and any other addictive substances;

z. Performing practice by using certificate of registration, medical practice license, and/or certificate of competency which are not legitimate or practising without medical practice license as ruled in the applicable law;

aa. **Being dishonest in determining medical services:**

bb. Do not provide information, documents, or any other evidence which required by MKDKI/MKDKI-P in order to examine complaint regarding violation of medical and dentistry professional discipline.

Pursuant to the above-mentioned forms of disciplinary violation and MKDKI’s authorities, it may be concluded that legally MKDKI is authorized to perform disciplinary proceeding to assess the obedience or compliance to the medical science of a doctor or dentist in the implementation of medical practice, which will led to the imposition of disciplinary sanction in the event of a doctor or dentist has conducted medical practice not in accordance with the medical science discipline.

Pursuant to article 47 of KKI’s Regulation 32/2015, disciplinary sanctions against a doctor or dentist itself can be in the form of 1) warning letter, 2) a recommendation of certificate of registration
revocation either temporarily or permanently, and 3) an obligation to re-participate in medical education or training or internship.\textsuperscript{12}

Latter, in order to provide protection to the patient, the Law 29/2004 has also provided penal provisions which may be imposed to doctor and dentist or any person in relation to the implementation of medical practice namely:

a. Penal provision against doctor or dentist (both foreign and local) who deliberately conducting medical practices without certificate of registration (see article 75 Law 29/2004);

b. Penal provision against doctor or dentist who deliberately conducting medical practice without medical practice license (see article 76 Law 29/2004);

c. Penal provision against whosoever deliberately using the identity in the form of a degree or other form that causes impression to the public as if the person is a doctor or dentist who has obtained the certificate of registration or medical practice license (see article 77 Law 29/2004);

d. Penal provision against whosoever deliberately using tools, method, or other form in providing medical services that causes impression to the public as if the person is a doctor or dentist who has obtained the certificate of registration or certificate of medical license (see article 78 Law 29/2004);

e. Penal provision against doctor or dentist who deliberately does not put up signboards as ruled in article 41 paragraph (1), make medical records as ruled in article 46 paragraph (1), and fulfilled its obligations as ruled in article 51 point a, b, c, d or e (see article 79 Law 29/2004).

f. Penal provision against whosoever deliberately employing doctor or dentist who does not have medical practice license as ruled in article 42 Law 29/2004.

MEDICAL MALPRACTICE CRIME AND ITS PROSECUTION PROCEDURE

On October 17, 2014, Indonesia has enacted the Law number 36 year 2014 regarding Health Personnel (\textit{“Law 36/2014”}). Pursuant to the article 11 of Law 36/2014, the provisions of the Law 36/2014 are also apply to medical personnel namely doctor, dentist, medical specialist, and dental specialist. However, pursuant to the article 91 of the Law 36/2014, it is stated that all laws which regulating about health personnel still remains prevail as long as it does not contrary with the provisions of the Law 36/2014. Therefore for the medical practice issue, the Law 29/2004 still remains prevail.

Both the Law 29/2004 and the Law 36/2014 do not specifically regulate about the definition of medical malpractice and therefore, the definition of medical malpractice shall refer to doctrine and expert’s opinion which prevalently acceptable within legal practice in Indonesia. As for the definition of medical malpractice according to the doctrine and expert’s opinion are as follow:\textsuperscript{13}

\textsuperscript{12} Op. Cit., Article 47 of KKI’s Regulation Number 32 Year 2015.

a. Valentin v. Society se Bienfaisance de Los Angeles, California, 1956
Malpractice means a negligence of a doctor to apply the level of skills and knowledge in providing medical treatment and health care services to a patient, which prevalently applied in treating and caring for the sick or injured in the same conditions and area.

b. Coughlin's Dictionary of Law
Malpractice means a wrongful professional conduct which carried out by a professionals such as physician, lawyer, accountant, dentist, veterinarians. Malpractice may be caused due to indifferent attitude, negligence, or lack of skills or prudence in implementing the professional obligations; deliberate wrongdoing or unethical practices.

c. Black's Law Dictionary
Malpractice means every wrongful conduct, lack of capability in an unreasonable level. This terminology is prevalently used for the action of a doctor, lawyer, and accountant. A failure in provide services professionally and in the reasonable level of capability which is prevalent in the society and most of the colleagues from that profession, which results injury, lost, or damages against the health care receiver who put their trust on them. Also including every wrongful professional conduct, unreasonable lack of capability or prudence, bad or illegal practices or immoral acts.

Regarding the provision of medical malpractice crime, before the promulgation of Law 36/2014, the enforcement of medical malpractice crime was using the article 359, 360, and 361 of Indonesian Penal Code (KUHP) regarding the penal provisions for causing death or serious injury by negligence as follow:14

Article 359 KUHP:

“Whosoever by whose negligence causing death to other person, threatened with punishment of imprisonment for maximum five years or a confinement for maximum one year.”

Article 360 KUHP:

“(1) Whosoever by whose negligence causing serious injury to other people, threatened with punishment of imprisonment for maximum five years or a confinement for maximum one year.”

(2) Whosoever by whose negligence is caused serious physical injury to another person such a way that arise an illness or obstacle in exercising his official or professional activities for a certain period, threatened with punishment of imprisonment for maximum nine months or a confinement for maximum six months or a fine maximum in amount of three hundred rupiahs.”

14 Indonesian Penal Code, translated by Moeljatno, (Jakarta: Bumi Akasara, 2007), Article 359, Article 360, and Article 361.
Article 361 KUHP:

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

After the promulgation of the Law 36/2014, medical malpractice crime has been regulated in the article 84 of Law 36/2014 as follows:¹⁵

“(1) Every health personnel who conduct a gross negligence which resulting in serious injury to the health care receiver, shall be punished by a maximum imprisonment for 3 (three) years;
(2) If such gross negligence as referred to in paragraph (1) resulting in death, every health personnel shall be punished by a maximum imprisonment for 5 (five) years.”

Pursuant to the above-mentioned malpractice definitions and penal provisions, I found that basically medical malpractice is both intentional and negligent wrongful professional conduct which caused by an indifferent attitude, lack of capability, or lack of prudence in the implementation of medical practice. In assessing a wrongful element of such professional conduct, certainly there should be a clear and certain standard or guidance as the measure or benchmark which then embodied within the applicable law.

In proving an allegation of medical malpractice, the standard which should be used as the measure in assessing the professional conduct is surely the medical science, which then pursuant to the article 66 paragraph (1) of Law 36/2014 ¹⁶ in conjunction with the article 44 and 50 of Law 29/2004 ¹⁷, is embodied within the Medical Professional Standard, Medical Service Standard, and Standard Operating Procedure which shall be complied by the doctor and dentist. If we relate the definition of medical malpractice with the definition of medical discipline and its forms of violation, it can be concluded that medical malpractice is actually a violation of medical science and therefore must also contains medical discipline violation.

Regarding the procedure of prosecution against medical malpractice crime, the article 78 of Law 36/2014 has ruled as follows:¹⁸

“In case of a Health Personnel is alleged for conducting negligence in implementing its profession which causes damage to the health care receiver, the disputes arising from the negligence should

¹⁵ Indonesia, Health Personnel Law, Law Number 36 year 2014, Article 84, State Gazette of Republic of Indonesia Number 298 Year 2014, Supplement to State Gazette of Republic of Indonesia Number 5607.

¹⁶ Ibid. Article 66 paragraph (1).


¹⁸ Indonesia, Op.Cit., Article 78 of Law 36 Year 2014
be resolved first through the dispute resolution out of the **court in accordance with the applicable law.**"

Pursuant to the above-mentioned provisions, it means that in the case of doctor and dentist’s negligence, then the Law 36/2014 has referred to the provisions in the Law 29/2004. Furthermore, the article 66 of Law 29/2004 has ruled as follows: 19

“(1) **Every person who knows or whose interests being harmed by a doctor or dentist’s act in conducting medical practice may file complaint in written to the chairman Indonesian Assembly of Honour of Medical Disciplines:**

(2) **Complaint shall contains at least:**
   a. Complainant’s identity;
   b. Name and the address where the medical or dentistry practice located and the time when the medical action conducted;
   c. The basis of the complaint.

(3) **Complaint as referred to in paragraph (1) and (2) does not eliminate the right of every person to file the allegation of criminal act to the authorized agency and/or file civil lawsuit to claim for damages to the court.**"

I found that there is several important points in the provision of article 66 paragraph (1) and (3) of Law 29/2004 which should be underlined in relation to the prosecution against medical malpractice crime. **First,** the article 66 paragraph (1) means that the detrimental medical practice as referred to in this article is limited to of which included as violation against medical discipline and therefore it can be complained only to MKDKI. **Second,** the phrase of **‘Complaint as referred to in paragraph (1) and (2)’** in paragraph (3) means that the complaint filed is regarding a violation of medical discipline as referred to in paragraph (1). **Third,** the phrase of **‘does not eliminate the right of every person to file the allegation of criminal act to the authorized agency and/or file civil lawsuit to claim for damages to the court’** means the aggrieved party is still able to file police report or civil lawsuit against the allegation of medical discipline violation after the doctor or dentist has been declared guilty for conducting medical discipline violation by MKDKI. Therefore, I found that in the case of medical malpractice crime, it should be proven first whether the doctor or dentist has conduct medical discipline violation or not.

However, in its implementation, **the article 66 paragraph (3) Law 29/2004 actually has created legal uncertainty and negated the legal protection for doctor and dentist in implementing the medical practice.** The article 66 paragraph (3) Law 29/2004 has diminished the role of MKDKI because the provision of article 66 paragraph (3) of Law 29/2004 has been interpreted by the law enforcers that to initiate investigation or civil proceeding against the detrimental medical practice, the disciplinary proceeding is not compulsary. This means that the article 6 paragraph (3) of Law 29/2004 has allowed the person whose interest is being harmed by doctor or dentist’s act to not basing their police report or lawsuit on the MKDKI’s decision. **Whereas, it is clear that the criminal allegation**

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and the civil lawsuit as referred to in article 66 paragraph (3) is regarding the medical discipline violation as referred to in article 66 paragraph (1) and therefore it should be and will be more appropriate if it is proven first whether there is a medical discipline violation or not.

Therefore, even a doctor or dentist has provided their best effort and clinical judgement, but at the end arises an unavoidable medical risk which occurring adverse effect to the patient, by law it will be possible for the aggrieved party to file police report or lawsuit with allegation of medical malpractice against their doctor without basing their complaint on MKDKI’s decision. Whereas, it is supposed to be proven first whether the adverse effect is caused by the doctor’s negligence or purely an avoidable risk according to medical science. Moreover, even if there has been MKDKI’s decision which declare that there is no negligence conducted by the doctor or dentist, in fact still the law enforcers are not binded to the decision and may decide differently from the MKDKI’s decision.


The provisions in article 66 paragraph (3) Law 29/2004 itself has ever been tested in the Constitutional Court of Republic of Indonesia, and through the decision of the Constitutional Court of Republic of Indonesia Number 14/PUU-XII/2014 dated April 20, 2015 (“Constitutional Court Decision Number 14/PUU-XII/2014”), unfortunately the Constitutional Court has corroborated the provision of the article 66 paragraph (3) Law 29/2004 by rejecting the petitioner’s petition. Hereunder is the summary of the parties’ argument and the legal considerations of the Constitutional Court Decision Number 14/PUU-XII/2014:

Petitioner’s arguments:
1. Provisions as ruled in article 66 paragraph (3) Law 29/2004 is contradicting with provisions in the Constitution of Republic of Indonesia 1945 namely:
   a. Article 28D of The Constitution of Republic of Indonesia 1945: Every person shall have the rights of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law;
   b. Article 28G of The Constitution of Republic of Indonesia 1945: Every person shall have the right to protection of his/ herself, family, honour, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right.
2. Provision as ruled in article 66 paragraph (3) Law 29/2004 potentially to give rise legal uncertainty, absence of the sense of security, and fear to the Petitioners (Indonesian Doctors) in doing medical practices.
3. The legal uncertainty arises when a doctor has been examined and declared not guilty for conducting disciplinary violation by MKDKI, but declared guilty by the criminal court and/or civil court.
4. Pursuant to the articles which ruled the 28 forms of violation of Professional Discipline by Doctor and Dentist [Indonesian Medical Council Regulation Number 4 year 2011 regarding Professional Discipline For Doctor and Dentist, article 3 paragraph (2)], it is ruled that every
criminal conduct and/or unlawful act which give rise to damages related to the medical and
dental profession, definitely is a violation of professional discipline of the medical and dental
profession as well.

5. In the other side there is no provision which obliges every substance of the report of
allegation of criminal offenses to the authorized agency and/or lawsuit to the civil court to
be examined first by MKDKI whether there is a violation of professional discipline conducted
by the doctor or not.

6. Therefore, it is possible that a doctor or dentist is declared not guilty for the allegation for
professional discipline violation by MKDKI, but declared guilty for conducting criminal
offense and/or unlawful act by the Court. Or it is also possible that a doctor or dentist is
declared guilty for a criminal offense and/or unlawful act by the Court without first going
through the disciplinary proceeding in MKDKI.

7. The Petitioners were also raising the issue of dr. Ayu, et al case who have sentenced for 10
months imprisonment by the Supreme Court through the Cassation Decision 365
K/PID/2012.

Petitioner’s petition:

- To declare the provision in article 66 paragraph (3) Law 29/2004 is contradicting with the
  Constitution of Republic of Indonesia 1945 and does not have binding legal force to the
  extent of the non-fulfillment of requirement that the report of allegation of criminal
  offenses and/or civil lawsuit to the Court shall first reported, examined, and decided by
  MKDKI with a decision which declared the reported party is guilty for conducting violation of
  professional discipline of the medical or dental profession, which contains deliberateness
  (dolus/opzet) or gross negligence (culpa lata) and/or give rise to a civil damages.

President’s arguments:

- The provision in article 66 paragraph (3) Law 29/2004 was made in order to maintain the
  balances between the doctor and patient so that doctor in a doing its duty always in
  accordance with the applicable medical practices prespective. In the other side, the society
  also should be protected by receiving medical services in accordance with the applicable
  Standard Operating Procedure (SOP). Regarding the dr. Ayu Case, the President argued that
dr. Ayu Case was more about faulty implementation of the law and not a constitutionl issue.

People’s Representative Assembly’s (DPR) argument:

- The provision in article 66 Law 29/2004 was made to guarantee every people will obtain an
  excelenl and accountable medical services which in accordance with the medical science. If
  the patient is harmed by the medical services, then the patient may file complaint to MKDKI,
  and not even rule out the patient’s right to file report for any allegation of criminal offenses.
  Therefore, such provisions are in confirmity with the article 28D and 28G of Constitution of
  Republic of Indonesia 1945.
MKDKI’s Arguments:
1. Since the promulgation of the Law 29/2004, there are 3 types of enforcement which is related to medical practices namely enforcement of medical ethics, enforcement of medical disciplines by MKDKI which using medical science as the measure, and law enforcement as being ruled in article 66 paragraph (3) Law 29/2004 (enforcement by criminal law and civil law).
2. Basically, there are 4 (four) types violation may be conducted by a doctor namely:
   1. Deliberately or intend to kill or to cause disability to the patient. This matter is purely a criminal act and can not be catagorized as malpractice;
   2. **Misconduct or not comply to the standard, guidance, and the value of medical practices**;
   3. **Being negligent in conducting medical practice and causing death or disability to its patient**; and
   4. Conducting violation due to lack of or exceeding its competency according to the medical science.
3. The provision in article 359 Indonesian Penal Code (KUHP) rules that whosoever due to its negligence has caused death to other person, shall be punished by a maximum imprisonment for 5 years or a maximum confinement for 1 year. This provision shows that if a negligence is purely a violation of the law, so the law enforcement will be prevailed. But if such negligence is a kind of fault which requires evidentiary phase under the medical discipline first, therefore the fault element should be proven first by MKDKI. Having proved the existence of the fault, then it can be brought to the law enforcement in order to prove whether such fault, which has been proven under the medical science, may also be legally processed either under the criminal or civil law.

IDI’s Argument:
1. Pursuant to article 51 Law 29/2004, in conducting medical practice a doctor is obliged to:
   a. Provide medical services in accordance with the medical professional standard, **Standard Operating Procedure**, and patient’s medical needs;
   b. Refer the patient to other doctor who have a better skill or ability if the doctor is unable to conduct an examination or treatment;
   c. Conceal everything he knows about his patient, and even after the patient passed away;
   d. Provide medical aid in an emergency situation or for the sake of humanity, except he believes there is another person in charge who have the ability to provide the medical aid;
   e. Enhance knowledge and follow the development of medical science.
2. Pursuant to the medical sciences, a doctor will never be able to guarantee the certainty of healing or recovery without any defect as the result of a medical treatment. There is always a possibility for defect or even death as the result of medical treatment. All possibilities are depend on the severity of illness, patient’s condition, and the availability reliable medical facilities, tools, and medicines. But even facing such uncertainty and even the patient is in the worst condition or in a very tiny possibility to be cured, by law a doctor is still obliged to provide medical services in accordance with the medical professional standard, **Standard
Operating Procedure, and patient’s medical needs. This dilematic condition is compounded with the society’s hope and perception which assume a doctor as a healing angel and able to cure any illness of the patient.

3. The government is supposed to provide legal protection to every profession which is necessary to the society but facing a dilematic condition just like a medical profession. But the fact is that the provision in article 66 paragraph (3) Law 29/2004 has created a big opportunities for easily prosecute, sue and/or complain against a doctor and moreover through the enforcement of medical ethics, enforcement of medical disciplines, or law enforcement both in criminal and civil law at the same time.

4. This condition may lead a doctor to perform the “defensive medicine” and give rise to anxiety and doubts in conducting medical services. Defensive medicine can be describe as a condition where a doctor

KKI’s Argument:

1. The main duty of Indonesian Medical Counsel (KKI) is to protect the society from unprofessional medical and dentistry practitioner through the certificate of registration and fostering. Any doctor or dentist whose certificate of registration is revoked by KKI, will not be able to conduct medical practices. It means that only them who are competent and have a professional manner may be permitted to carry out the medical practice in Indonesia. On the other hand, in fostering, KKI also rules about ‘how to enter the medical profession’ and ‘how to be expelled from the medical profession’, which then such expulsion will be conducted based on the examination and decision of MKDKI as one of the KKI’s organ for discipline enforcement.

2. There are three main aspects in medical practices which are related with the legal aspect, namely:
   a. Clinical judgement;
   b. Ability or skills in doing medical action; and
   c. Attitude or professional manner of the medical personnel in dealing with the patient.

3. Related to the clinical judgement, in many countries, a clinical judgement can not be criminalized or convicted because it is deemed will be detrimental to the society. If a clinical judgement could be criminalized or convicted, therefore according to the ‘non-self incrimination’ principle the medical personnel has the right not to discredit himself by not doing any medical action. In this case, it is the society who are gaining the disadvantages because they will lose the best professional decision of a doctor.

Constitutional Court Judges’ Legal Considerations:

1. The Constitutional Court opined that the regulator has firmly accommodated or ruled about the ethic as a part of the legal norms which in this case is the Law 29/2004. Such matter can be seen in the provision of article 30 paragraph (2) letter e and article 51 letter a Law 29/2004. In relation to the violation against ethics, professional discipline, and legal norms which may be committed by a doctor or dentist, the Law 29/2004 has classified/categorized as follow:
a. Kind of violation may be committed by a doctor or dentist can be in a form of i) violation of ethics, ii) violation of professional discipline, and/or iii) violation of legal norms;
b. Complaint against a violation of professional discipline is examined and decided by MKDKI (see article 64 and 67 Law 29/2004);
c. Complaint against violation of ethics will be forwarded by MKDKI to the professional organization (see article 68 Law 29/2004);
d. Violation of criminal law norms may be reported to the Police or Attorney General Office (see article 66 paragraph (3));
e. Violation of the civil law norms may be sued to the Court (see article 66 paragraph (3)).

2. The inclusion of the ethics and professional discipline within the Law 29/2004 shall be understood that the regulator is giving emphasis about how important the norms of ethics and discipline to be enforced as a code of conduct for a doctor and dentist. The most important thing to be understood is the inclusion of the norms of ethics and discipline within the regulation can not be deemed that the violation of ethics and/or discipline have the same legal consequence with the violation of the legal norms. If the norms of ethics and discipline within the regulation (Law 29/2004) are given the same binding force with the legal norms, therefore as the consequence, against the violation of the norms of ethics and the discipline shall be subject to the legal norm’s sanction especially penal sanction and/or civil sanction, whereas the violation of ethics and discipline are only subject to the ethical sanction and/or administrative sanction. Therefore, even the norms of ethics, norms of discipline, and legal norms are regulated within the same regulation/law, but normatively all of them may not eliminates or negates each other.

3. Related to the medical professional discipline, The Court opined that as a regulation or provision regarding the application of medical science in medical practices, the medical discipline shall be deemed as a standardization of medical science procedure which should be applied by a doctor or dentist in conducting medical practices. However, since the doctor or dentist in conducting medical services shall be subject to such scientific procedure which set forth in the norm of discipline, therefore to determine whether a medical treatment which has been done by a doctor or dentist is right or wrong in the point of view of the medical science, it is supposedly and appropriate for the medical discipline enforcement to become a filter in qualifying or determining whether a medical action which has been done by a doctor or dentist may be included as violation of the criminal law and/or give rise to civil damages as well.

4. In the relation to the basic difference between the professional ethics and professional discipline in one side, and the legal norms in the other side, the Constitutional Court opined that the professional ethics, professional discipline, and the legal norms have its own sanction and all of them are also regulated in the same regulation (Law 29/2004). However, the imposition of those sanction against one medical act at the same time is not a double jeopardy because each norm has a different dimension or scope.

5. The constitutional court also understands that the penal sanctions against the medical and dentistry profession in the Law 29/2004 are actually intended to protect the medical/dentistry personnel, the patient, and any other stake holder in the context of:
- To prevent any parties who are not eligible and/or competent to conduct medical treatment like a doctor or dentist;
- To grant license (legality) to doctor and dentist to conduct medical practices;
- To prevent the doctor or dentist’s ability for not being used in order to deliberately harming the patient;
- To provide sense of security for the doctor or dentist and the patient by showing the existence and the concerns of the government upon the medical practices.

6. Both criminal court and the civil court, as long it is related to a medical profession (doctor and dentist), shall be conducted according to the scope of the medical profession. It means that a medical treatment conducted by a doctor or dentist may not be judged under the legal norm’s perspective only such as Indonesian Penal Code or Indonesian Civil Court in general, but the judgement should be pursuant to the disciplinary standard of the medical profession which is created or formulated by a legal authority according to the prevailing law. This opinion is strongly related to the idiosyncrasy of the medical profession and medical science which are very close to the risk of harming human’s life which is also regulated within the domain of penal law and civil law. The Law has allowed the medical profession and science to deal with or take action against human body. Therefore, it should be followed with a different legal consequences than them who are not allowed by law to conduct such act. The law enforcers and the Court shall refer to the medical discipline provisions as the main reference in conducting either investigation, prosecution, or examination before the Court.

7. Pursuant to the above-mentioned considerations, the Constitutional Court opined that contextually, the article 66 paragraph (3) Law 29/2004 does not have any other meaning except to make the medical science especially medical ethics and discipline as one of the reference in conduction investigation, prosecution, and the examination before the Court. The law enforcer may refer to the medical science by hearing medical expert’s testimony during the law enforcement process against any doctor or dentist who are alleged for medical malpractice. That matter have already limit the risk which should be borne by the doctor or dentist and will prevent imposition of penal or civil sanction against a doctor or dentist whose medical treatment by MKDKI has been declared not violating the medical discipline. The provision regarding the prosecution under penal law and lawsuit under civil law are still needed solely to protect the patient’s right and any other stakeholders from doctor or dentist’s act which beyond or outside the medical discipline domain, or to protect the patient’s right when the doctor or dentist’s act has been declared violating the medical discipline by MKDKI and in fact has given rise to civil damages as well for the patient.

8. The concerns about “defensive medicine” is no longer relevant to be considered.

Constitutional Court Judges’ Decision:
9. Reject the Petitioner’s Petition.
THE OUTCOME OF THE CONSTITUTIONAL COURT DECISION NUMBER 14/PUU-XII/2014

The article 60 of Law number 24 year 2003 as amended by Law number 8 year 2011 regarding Constitutional Court have ruled as follow:\(^{20}\)

“(1) Against the substance of paragraphs, articles, and / or sections in the Law that have been tested, can not be petitioned back.

(2) The provisions referred to in paragraph (1) may be waived if the substance of the Constitution of the Republic of Indonesia Year 1945 that formed the basis of tests is different.”

Therefore, as the result of the Constitutional Court Decision number 14/PUU-XII/2014, now the provision on article 66 paragraph (3) Law 29/2004 has been declared constitutional and there will be a less opportunity to re-test the provision on article 66 paragraph (3) Law 29/2004, given that a constitutional court decision is a final and binding decision.

It is very regrettable about this decision because due to this Constitutional Court decision, now a doctor and dentist are potentially to completely lose the legal protection and legal certainty in implementing medical practice as aspired by the Law 29/2004. I found that the constitutional court judges’ considerations in the Constitutional Court decision number 14/PUU-XII/2014 were less relevant with what was being questioned by the petitioner. If we look at the petitioner’s argument, I found that the main idea of the petition is no more doctor or dentist will be prosecuted or tried before the Court upon suspicion of medical malpractice without first being tried in the disciplinary proceedings by MKDKI. In this case I am agree with the petitioner’s standpoint because given that the definition of medical malpractice is negligence of a doctor to apply the level of skills and knowledge in providing medical treatment and health care services to a patient, which prevalently applied in treating and caring for the sick or injured in the same conditions and area.\(^{21}\) Such negligence might be caused by an indifferent attitude, lack of capability, or lack of prudence in the implementation of medical practice. Therefore, medical malpractice must contain medical discipline violation.

However, the fact was the Constitutional Court Judges were only considering that the norm of medical discipline and the legal norms (penal law and civil law provisions) within the Law 29/2004 are have different domain and consequences, and therefore may not eliminate each other. Moreover, the constitutional court also stated that the concerns about defensive medicine is irrelevant to this issue.

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\(^{20}\) Indonesia, Constitutional Court Law, Law Number 24 year 2003 as amended Law Number 8 Year 2011, Article 60, State Gazette of Republic of Indonesia Number 70 Year 2011, Supplement to State Gazette of Republic of Indonesia Number 5226.

The background of this petition is because factually there are several cases (for example: dr. Ayu et al. Case) in which a doctor had been convicted for medical malpractice without first being examined in disciplinary proceeding. Consequently, it is feared that this condition may give rise to doubts and an exaggerated cautious attitude among the doctors and dentists in order to reduce the exposure to malpractice liability. I believe this problem will continuously occur as long as the article 66 paragraph (3) of Law 29/2004 is not amended, given that pursuant to article 66 paragraph (3) the aggrieved party who file the police report or civil lawsuit upon suspicion of medical malpractice, is not obliged to base their report or lawsuit on MKDKI’s decision.

By that condition, it is impossible to provide legal certainty for doctor and dentist as aspired by the Law 29/2004 because the reported/complained party and the law enforcers such as police, prosecutor, and court judges are not bonded with the disciplinary proceeding’s decision. The law enforcers based on its discretion may exercise investigation and prosecution against a doctor or dentist upon the medical malpractice allegation without basing it on the MKDKI’s decision. As the consequences, there will be no legal protection to doctor and dentist because when a doctor and dentist do a medical treatment, which then arises an adverse effect even the doctor has given its best effort and clinical judgement, then the doctor still may be prosecuted or sued. Moreover, with the provision of article 66 paragraph (3) of Law 29/2004, it means by Law it has been allowed for a doctor to be prosecuted and tried by a ‘medical scientifically incompetent’ authority such as Police, Prosecutor, and Court Judges.

The consequences of this condition is the increasing propensity of a doctor and dentist to conduct ‘defensive medicine’ in the implementation of medical practice. Pursuant to OTA’s (Office of Technology Assessment of Congress of the United States) book titled ‘Defensive Medicine and Medical Malpractice’, the definition of defensive medicine is as follows: 22

“Defensive medicine occurs when doctors order tests, procedures, or visits, or avoid high risk patients or procedures, primarily (but not necessarily solely) to reduce their exposure to malpractice liability. When physicians do extra test or procedures primarily to reduce malpractice liability, they are practising positive defensive medicine. When they avoid certain patients or procedures, they are practising negative defensive medicine.”

OTA also stated as follows:23

“When the medical consequences of being wrong are severe, as in the case of a life-threatening or debilitating disease for which early diagnosis would mean better and more effective treatment, then the desire for certainty, and the test that can increase it, undoubtedly grows. Thus the frequency of test ordering of any given probability of diseases should be higher in patient suspected of having diseases that are more serious.


23 Ibid., Page 26
Roughly 25 to 30 percent of all malpractice cases allege missed or delayed diagnosis. Thus when the medical consequences of being wrong are severe, so too are the consequences for malpractice. ...

In certain cases, concern about liability might decrease physicians’ tolerance for uncertainty and cause them to order tests more frequently when the probability of disease is very low or very high. When the probability of disease is very low, the physician may want to “rule out” its possibility. **When the probability of disease is very high, the physician may be concerned about documentation of the condition for protection against potential claims of misdiagnosis.** At more intermediate probabilities, the effect of malpractice liability on physicians’ test ordering might not be so great, since uncertainty is already high. **Again, one might expect defensive medicine to be most pronounced when the probability of a positive test is very low but the consequences of not finding the disease are catastrophic.”**

Pursuant to the above-mentioned OTA’s opinion, it can be concluded that a doctor or dentist will be more tend to conduct defensive medicine due to their fear or anxiety against the uncertainty of legal system which might be imposed in relation to the probability of medical malpractice liability. When they provide medical treatment, they will more tend to order either necessary or (maybe) unnecessary test to reduce the probability of malpractice liability to the lowest level. It is feared that the doctor and dentist will have the set of mind that when they are going to either penal or civil trial, they will be required to prove their clinical judgement before the panel of judges whom they know are have no expertise on medical science. During the investigation and prosecution process, they will face the officers who have no expertise on medical science, and coupled with the risk of arrest and detention. So that to avoid such risk and liability, defensive medicine becomes a logical option.

As the result of the defensive medicine practice, the medical practice will lose its efficiency and effectiveness because it takes more time to conduct more test and surely will be more costly for the patient. As stated by OTA, 25-30% malpractice cases alleged delayed diagnosis. 24 So at the end, the defensive medicine practice will not reduce the exposure of medical malpractice liability, but only increasing the health care cost without being accompanied by improvement of quality of health care. Therefore, the disciplinary proceeding is very indispensable because it is the only forum which surely have the expertise on medical science to decide whether a doctor or dentist have done violation against the medical science or not in the implementation of medical practices.

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24 Ibid.
THE ABSENCE OF MEDICAL PROFESSIONAL STANDARDS HAS EXACERBATED THE LEGAL PROTECTION AND CERTAINTY TO DOCTOR AND DENTIST

The article 57 point a of Law 36/2014 in conjunction with article 44 and 50 of Law 29/2004 have ruled as follow:

Article 57 point a of Law 36/2014:25

"Health personnel in implementing its practice has the right to obtain legal protection as long as they carry out duties in accordance with the professional standard, professional service standard, and standard operating procedure."

Article 44 of Law 29/2004:26

"Doctor and dentist in implementing medical practice shall comply to the medical or dentistry service standard."

Article 50 of Law 29/2004:27

"Doctor or dentist in implementing medical practice has the right to obtain legal protection as long as they carry out duties in accordance with the professional standard and standard operating procedure."

As for the pursuant to elucidation of article 44 of Law 29/2004, service standard means guidance which should be complied by a doctor and dentist in implementing medical service. Furthermore, pursuant to article 50 of Law 29/2004 the definition of professional standard is the minimum level of capability (knowledge, skill, personal attitude), which shall be mastered by an individuals to be able to independently perform a professional conduct to the society, which created by a professional organization. Whereas standard operating procedure means a set of instruction or steps which have been standardized in order to complete a certain routine work process. The standard operating procedure provides the best and the most proper steps pursuant to mutual consensus to carry out various activities and service function which made by health care facilities based on the professional standards. Therefore it can be concluded that by law, a doctor and dentist shall comply to three standards in implementing medical practice namely 1) Medical Service Standard, 2) Medical Professional Standard, and 3) Standard Operating Procedure ("Medical Standards").

In this case, the problem is how can a doctor or dentist obtain legal protection in performing medical practice while those three medical standards as mandated by the article 57 point a of Law 36/2014 and article 44 and 50 of Law 29/2004 are not completely provided within the applicable law? Pursuant to the Indonesian prevailing law which are related to medical practice filed, factually

27 Ibid., Article 50.
Indonesia does not have either Medical Professional Standard or Dentistry Professional Standard yet as mandated by the article 50 of Law 29/2004. Furthermore, Indonesia has already had the Medical Service Standard which pursuant to article 3 of the Regulation of the Minister of Health of Republic of Indonesia number 1438/MENKES/PER/IX/2010 regarding Medical Service Standard (“MoH’s Regulation 1438/2010”) is consist of National Guidance For Medical Service (“PNPK”) and the Standard Operating Procedure (“SPO”). Indonesia has had PNPK which formulated based of the type of disease such as PNPK for Tuberculosis, PNPK for mental disorder/psychiatry, PNPK for HIV/AIDS, etc but still has not covered all kind of diseases. Also regarding the Standard Operating Procedure, its formulation is handed over to each health care facilities and therefore there is still no standardization among the health care facilities.

The absence of medical professional standard is very closely related with the enforcement against medical malpractice crime. As has been elaborated above, in proving medical malpractice, it is necessary to assess the existence of ‘wrongful professional conduct’ in the medical treatment provided by a doctor or dentist. Such assessment of course should be constructed based on a clear and complete measure which embodied in an applicable law, so that would create a certainty about which one is a proper practice and which one is wrongful conduct. However, by the absence of medical professional standard in Indonesian prevailing medical practice law, it means that there has been no complete standard for judging whether a medical professional conduct is wrongful or not, so that the assessment should be returned to the medical science to fill this juridical vacuum.

Referring to this condition, I found that it will be fairer and more appropriate if the allegation of medical malpractice is examined and tried first in the disciplinary proceeding. As long Indonesia does not has ‘the complete set’ of medical standards as mandated by the article 44 and 55 of Law 29/2004 as the measure to decide whether a medical practice is wrongful or not, it will be more appropriate if the allegation of malpractice is examined first by MKDKI which is medical scientifically competent to conduct assessment against a medical practice. Therefore, at least the examination against a doctor and dentist may satisfy the sense of justice and provide legal certainty for the doctor and dentist, also given that the doctor and dentist are the main actor in the provision of health services anyway.

Therefore, as long as the provision in article 66 paragraph (3) of Law 29/2004 is not amended, it means that the Law not only has allowed the ‘medical scientifically incompetent’ authority such as Police, Prosecutor, and Court Judges to assess whether a medical practice is wrongful or not, but also has allowed the doctor and dentist to be tried without any certain and complete medical standards. Pursuant to this condition, it will be impossible to provide legal protection and legal certainty for a doctor and dentist because by law they are only deserves legal protection as long as they have done medical practice in accordance with the medical standards, but in the other hand...
the Law does not provide those required medical standards completely. So at the end the law enforcement against medical malpractice cases, especially in which does not examined beforehand by MKDKI, will bring forth to judicial decision that do not satisfy the sense of justice because the law enforcers do not provided with a clear and complete guidance or measure to examine the element of negligence within a medical practice which conducted by a doctor or dentist.

CONCLUSIONS AND RECOMMENDATIONS

Pursuant to the above-mentioned arguments, it can be concluded that the Law 29/2004 has 3 (three) main purposes namely 1) to provide protection to the patient, 2) to maintain and improve the competency of the doctor or dentist, and 3) to provide legal certainty to the patient and the medical personnel (doctor and dentist). The first two purposes then being manifested within the Law 29/2004 through several instruments including the establishment of KKI and MKDKI, and also the penal provisions. Pursuant to article 8 of Law 29/2004, essentially KKI has the authority provide registration of doctor and dentist, and formulating medical science to improve the doctor and dentist’s competency through the medical competency standard and medical education standard. While pursuant to article 64 of Law 29/2004, MKDKI has the authority to enforce the compliance to medical discipline of doctor and dentist in implementing the medical practice.

In practice, it turns out that there are many law enforcement practice against doctor who alleged for medical malpractice crime that do not satisfy the sense of justice. In this case, I take dr. Ayu et al case as the example in which they had been convicted for 10 months imprisonment due to their medical treatment against patient named Siska Maketey, without first being examined before the disciplinary proceeding. Such law enforcement against doctor as was happened in dr. Ayu et al case can occur because the article 66 paragraph (3) of Law 29/2004 has indirectly allowed the prosecution and conviction against medical malpractice crime without preceded by disciplinary proceeding by MKDKI to prove whether the reported doctor has conducted medical discipline violation or not. Whereas, medical malpractice itself means a negligence of a doctor to apply the level of skills and knowledge in providing medical treatment and health care services to a patient which prevalently applied in treating and caring for the sick or injured in the same conditions and area which caused by an indifferent attitude, lack of capability, or lack of prudence in the implementation of medical practice. Therefore, it is clear that medical malpractice must contain medical discipline violation. So it is supposed to be proven first about the ‘wrongful conduct’ or the ‘misapplication of medical standards’ to fulfil the element of negligence in the allegation of medical malpractice crime.

However, factually the article 66 paragraph (3) of Law 29/2004 does not oblige the aggrieved party, who file police report or lawsuit against doctor or dentist, to base their report or lawsuit on the disciplinary proceeding decision. Therefore, it means the Law has indirectly grant the power to the aggrieved party to waived the disciplinary proceeding and allowed the law enforcers (such as police, prosecutor and court judges), which are medical scientifically incompetent, to examine and prove the misapplication of medical standards in the allegation of medical malpractice crime. This
condition has created legal uncertainty and negate the legal protection against doctors and dentists in implementing medical practice.

The article 66 paragraph (3) of Law 29/2004 itself has ever been tested in the Constitutional Court of Republic of Indonesia, and through the Constitutional Court Decision Number 14/PUU-XII/2014, the article 66 paragraph (3) of Law 29/2004 has been declared constitutional and corroborated by the Constitutional Court Judges. The Constitutional Judges considered that the norm of medical discipline and the legal norms (penal law and civil law provisions) within the Law 29/2004 are have different domain and consequences, and therefore may not eliminate each other.

The legal uncertainty and negation of legal protection against doctor and dentist have also exacerbated by conditions as follow:

1. Indonesian prevailing laws especially for which is related to medical practice do not provide a certain definition of medical malpractice. This condition has created a big room for interpretation based on the law enforcer’s discretion and limited knowledge in medical science. Therefore, the law enforcer’s lack of knowledge in medical science has created a condition where against every adverse effect resulted from a medical treatment, it would be deemed as the result of a malpractice conduct.

2. Indonesian prevailing laws has not yet provided the medical professional standard as mandated by the provision of article 50 of Law 29/2004. The article 44 and article 50 of Law 29/2004 have ruled that a doctor and dentist deserves legal protection as long as they have done medical practice in accordance with the medical standards. The absence of medical professional standard shows that there is no clear and complete guidance for the doctor and dentist to obtain legal protection, and also for the law enforcer to examine and prove the misapplication medical standards in proving an allegation of medical malpractice. Moreover, by the article 66 paragraph (3) of Law 29/2004, the disciplinary proceeding has become not compulsory. Therefore at this moment I found that it will be impossible to provide legal protection and legal certainty for Indonesian doctor and dentist due to the absence of medical professional standard as one of the mandatory requirements to obtain legal protection in the implementation of medical practice.

The consequences of this condition is the increasing propensity of a doctor and dentist to conduct defensive medicine in the implementation of medical practice. Doctor and dentist will be more tend to conduct defensive medicine due to their fear or anxiety against the uncertainty of legal system which might be imposed in relation to the probability of medical malpractice liability. As the result, the medical practice will lose its efficiency and effectiveness because it takes more time to conduct more test and surely will be more costly for the patient. So at the end, the defensive medicine practice will not reduce the exposure of medical malpractice liability, but only increasing the health care cost without being accompanied by improvement of quality of health care. Therefore, the disciplinary proceeding is very indispensable because it is the only forum which surely have the expertise on medical science to decide whether a doctor or dentist have done violation against the medical science or not in the implementation of medical practices. So at the end, I found that the provision in article 66 paragraph (3) of Law 29/2004 will only results homicide for both the patient
and the doctor because the patient will bear higher and higher health cost and obtain inefficient medical treatment. While at the same time, the doctor and dentist will deal with a larger exposure to medical malpractice liability due to the not-mandatory disciplinary proceeding, law enforcer’s lack of competency in medical science, and the absence of medical professional standard.

Pursuant to the above-mentioned argumentation and facts about Indonesian Medical Practice law, hereunder are my recommendations:

1. The State should amend the article 66 paragraph (3) of Law 29/2004 by requiring the aggrieved party, who file police report or lawsuit with allegation of medical malpractice, to base their report or lawsuit on the disciplinary proceeding decision. Related to the penal law enforcement process against medical malpractice crime allegation, if the MKDKI’s decision has stated that there is no medical discipline violation or misapplication of medical standards conducted by the reported doctor or dentist, then by law the law enforcer shall declare the element of negligence in medical malpractice allegation is not fulfilled and cease the prosecution process.

2. The prevailing law which related to medical practice shall provide a certain definition of medical malpractice. Therefore, there will be no more room for interpretation which based on the law enforcer’s discretion.

3. The State shall provide the medical professional standard as mandated in the article 50 of Law 29/2004, so there will be a clear and complete medical standards as the guidance for the doctor and dentist to obtain legal protection in implementing medical practice.
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