

Legal Aid For Victims of Medical Malpractice (A Dignified Justice Perspective)

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Abstract

As a teaching of the Dignified Justice Philosophy, that the purpose of the law is to humanize human being, Legal Aid for patients, especially patients who come from socially marginalized and the poor people who are the victims of medical malpractice in the legal relationship of health services have become the legal norm in the Pancasila Legal System. Using a normative legal research method this research has found that Legal Aid is essentially the manifestation of the institution of justice. This legal institution is provided for the legal relationship of the medical-legal service has been considered as a dignified legal protection model. Since, in this legal institution the position of patients as consumers especially the poor and marginalized patients as consumers of health services who happened to be the victims of medical malpractice are made equal with doctors and nurses and hospitals in the health services. As the institution of the law, the dignified Legal Aid makes it possible for patients especially patients from the poor and marginalized society could afford justice and managed in helping those who did medical malpractice being held accountable before the law, including before the criminal court after being held ethically accountable in the court of ethics.

Keywords: *Legal aid, victim, medical malpractice, Dignified Justice theory.*

Introduction

Patients as the consumers and the users of health services of those who work as doctors can be classified as the party to the Indonesian consumer law in relation to the doctor¹ and also nurses, whether these medical professionals working under the umbrella or providing services independent of hospitals. It is a doctrine or teaching or a rule of law in the Dignified Justice theory, the name of the legal science (jurisprudence) of Indonesia. In the perspective of this Philosophy, this article describes and explains how the institution of Legal Aid functions in delivering justice in the health care or medical-legal relationship.

It has been regarded as a postulate of the Dignified Justice Jurisprudence that the protection provided for patients as consumers of health service users, especially consumers from the poor or 'the have not' on all aspects of legal relations are expressed as models of dignified legal protection because as consumers, the position of the poor and marginalized patients are raised to the level of becoming equal in conjunction with doctors, nurses, and hospitals in the health care providers business.

The law provides Legal Aid as a protection in the form of special attention for patients, especially patients from the poor and marginalized people who use health services. This characteristic of the law is having its etymological similarities with the nature of the Latin word *patients* which were meant 'to suffer'. At this junction, it is argued that the Law, from the perspective of the Dignified Justice theory, seeks to make justice humane (*nguwongke uwong*). Legal Aid is the instrument of law for those who suffer (patients) and in this study the marginalized people, or those who are classified as

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medical malpractice victims with humanized justice.

Philosophically, every legal relationship, including the legal relationship between doctors, nurses, hospitals as producers of health service providers on the one hand and consumers on the other hand, is a legal relationship that is not free from conflicts of interests. In a relationship that is occupied with the potential for conflict, special attention needs to be given to the patient as a consumer who is always in a weak position, especially if the patient comes from a group of poor and marginalized people.

The above-mentioned normative fact is based on the Dignified Justice Philosophy, which teaches Pancasila as the first and foremost source of all sources of laws in Indonesia. Pancasila dictates that just humanity and civilization must always be upheld; including in the patients-doctors and nurses also the managers of the hospital relationship. Kameo, Prasetyo (2021) stated that Pancasila believes the value that men involved in the legal relationship are humankind created by the God Almighty.²

Findings and Discussion

Legal Aid as the institution of the law is needed considering many medical malpractice cases occurred in the legal relationship between doctors, nurses, hospital managers as the provider or manufacturer of health service care for patients. According to Wibisono (2013) data on medical malpractice such as medical negligence; show a piece of hard evidence that has been perpetrated by doctors throughout Indonesia.³ This data, as hard proof shows many of the afflicted patients occupied the category of poor and marginalized people were become victims of malpractice conducted by medical professionals. Malpractice has been defined by the law as an act or practice that is wrong or deviates from standard provisions or procedures. Anwar (2009) argues that malpractice is also known in Indonesian criminal law as guilt (*schuld*) or a criminal act.⁴

Apart from empirical data, the normative data also shows that in the perspective of the Dignified Indonesian criminal law, the law does not negate the fact that doctors

and medical professionals can make criminal mistakes (*schuld*). They may do negligence, either minor or gross negligence. These forms of professional negligence are species, which has been coined as a *genus* of *schuld* and must be tried under the jurisdiction of criminal justice. Apart from it, doctors, nurses and includes hospitals as service providers at the same time, can be held accountable if malpractices occurred, within the realm or jurisdiction of the Honorary Council of Indonesian Medical Disciplinary (MKDKI), which authorities have to prosecute violations of the code of ethics.

The problem is of how patients, especially patients from the poor and marginalized people who are victims of medical malpractice must be held accountable. Similar to the finding provided by Isfanryarie (2006), this research has also found that the people, namely patients who receive health services and are classified as well-off with economic and political access can relatively easier to obtain legal services and defense from professional legal advisors (*Advocates*).⁵ However, often people who are classified as poor people and marginalized people are treated unfairly since they cannot obtain adequate legal services from legal advisers (*Advocates*). At this point, one could argue that human dignity is degraded.

In responding to the legal issue mentioned above, this normative legal research has found that Legal Aid institutions are available in the Pancasila Legal System. Legal Aid has been provided for, especially for patients who are the weaker party, and even more so for patients from the poor. Legal Aid is provided in the Pancasila Legal System so that patients especially those from the sections of poor people can be helped to fight for their rights against doctors, nurses, hospitals as service providers and are in a stronger position.

Through Legal Aid, according to Notoatmodjo (1999) patients, especially those of poor people can ask for legal responsibilities from the medical service provider before the law, including criminal law and accountability given to the medical ethics of the doctor or the health care service providers who commit malpractice.⁶ Through the help of the law (Legal

Aid), whether it is a criminal law violation or medical ethics breach all can be held accountable. Via Legal Aid, doctors who conduct medical malpractice will not merely be held accountable for their misconduct, but also be held accountable in law, for the law violations, and including in it the criminal act.

The thesis as stipulated is supported by the findings of this legal research that the Pancasila Legal System applies the principle that whether it is the code of ethics of the medical profession and the code of law, including in it the criminal law, all bear functions that can run simultaneously; provided that it is operated within the framework of the principle of supremacy of law. It must always be upheld that according to the idea of the supremacy of law, it is the rule of law that the law is higher than ethics, including medical ethics. This principle of Dignified Justice is regulated as the rule of law (*Negara Hukum*) stipulated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

Therefore, Legal Aid must be able to ensure that whether it is medical ethics or the law, including criminal law which upheld the principle of *Ultimum Remedium* exists to serve, prevent, and fix the damage in all legal relations in the society, including the legal relationship in the field of health services. The dual function of the law, reads the Legal Aid, for reforming and protection, can use both medical ethics and legal channels. Both can be run in stages so that on the one side there will be no lack of public confidence, and make the medical profession stay awake and maintained their services as the best; and on the other hand, as Winata (2011) has suggested, the function of the Legal Aid is to protect patients, especially patients from the poor and marginalized society.⁷

Through the help of the law, i.e. the Legal Aid, criminal law can be directed to provide protection and maintenance of health care services. With these arrangements in mind, Legal Aid may treat the medical malpractice as to mean the omission, done whether it is negligence, as well as gross negligence. In case of negligence, Legal Aid is administered to prove intentional

(*dolus*). It is said so since, in gross negligence, the perpetrators did his/or her action deliberately, and can be a conscious mistake. In this, the result is the purpose that the doctor knew or should have known that the act he was doing was against the law and the prevailing ethics.

This normative legal research has found examples of proving through Legal Aid cases of gross negligence as an act of crime. For example, a doctor writes a doctor's incorrect certificate. There is also another instance of gross negligence, where a doctor performs a medical action such as surgery on a patient, but the operation that the doctor did is not necessary.

Legal aid is also regulated in detail in Act No. 8 of 1999 on Consumer Protection and Law No. 36 the Year 2009 on Health. The forms of legal protection through Legal Aid as described in the statutory regulations above is a dignified justice if it is viewed from the perspective of the Dignified Justice theory. It is said so as Prasetyo (2015) suggested that it is a manifestation of the legal function recognized as the soul of the nation (*Volkgeist*) to pursue and achieve legal goals, namely justice which humanizing humans (*nguwongke uwong*).⁸ In this idea of dignified justice, includes in justice is justice itself, expediency such as order and peace in society, as well as the certainty of law. All of these functions that pursue such legal objectives are forms of legal protection that can be achieved through Legal Aid, for parties in any legal relationship, especially for patients who are among the poor and marginalized.

There is a legal justification of Legal Aid, regulated in Article 45 paragraph (1) of the Law on Consumer Protection. There, every consumer who is injured can sue a business actor through an institution in charge of resolving disputes between consumers and business actors or through different courts in the Pancasila Legal System. In this regard, Article 45 paragraph (3) recognizes the concept of settlement of disputes outside the court that does not eliminate criminal responsibility as regulated in law. Thus, it could be said that Legal Aid would not only function to seek criminal responsibility but also opportunities to bring cases against doctors

or health service providers, for example in the state administrative action. It should be mentioned here, that in general, consumers are to include patients who are the victims of medical malpractice. By Legal Aid, they may be represented by a public prosecutor to seek justice in the criminal case.

In connection with Legal Aid in cases of medical malpractice in Indonesia, there are facilities regulated in Article 66 of Law Number 29 of 2004 concerning Medical Practice. It is stated there, that patients or patients' families (especially patients from poor people) who feel disadvantaged due to medical practice that they consider inappropriate can complain about their cases through the Indonesian Medical Discipline Honorary Council (MKDKI). In addition to ethical settlement tools, Legal Aid can be used to fight for the interests of patients, especially poor patients; Law Number 29 of 2004 concerning Medical Practice also provides the possibility for patients or their families who suspect that there has been malpractice against the patient to simultaneously file a civil suit or take a criminal case against a doctor suspected of committing medical malpractice.

Taking into account the description above, Legal Aid needs to pay attention to the rules for taking ethical settlement first. If an ethical violation is found in the examination, MKDKI will forward the complaint to professional organizations (the Indonesian Doctors Association/IDI or the Indonesian Dentists Association/PDGI). The case will then be handled by the Indonesian Medical Ethics Council (MKEK) or Dentist MKEK. Both the Indonesian Medical Ethics Honorary Council (MKEK) IDI or the Dental MKEK is a professional judicial body, which is tasked with judging members of the professional association itself. If a case is suspected of medical malpractice Legal Aid could find a violation in the court of law, MKDKI will recommend that the case be brought directly to the court of law for examination.

In line with the settings in consumer protection, the Law of Consumer Protection acknowledges the settlement of Consumer Protection using out-of-court

settlements, therefore including in it the settlements via Ethical Body. It is set in Article 45 paragraph (4) of the Law on the Consumer Protection that if an out-of-court consumer dispute settlement effort has been chosen, a lawsuit through the court can only be pursued if the effort is declared unsuccessful by one of the parties or by the disputing parties. This means that the court settlement will remain open after the parties fail to resolve their dispute outside the court.

The Consumer Protection System explicitly states that the arrangement of an out-of-court settlement can be done through an independent body such as the Consumer Dispute Resolution Agency (BPSK). If a settlement is taken through BPSK, one of the parties cannot stop the case "in the middle of the road", before BPSK makes a final decision.

Forms of protection that are also available by the Law of the Republic of Indonesia are mentioned in Law No. 29 of 2004 concerning Medical Practice. This Law provides for patients, that is, anyone who conducts consultation on their health problems to obtain the necessary health services, either directly or indirectly, to a doctor or dentist.

The research also found that all the regulations as examined above do not provide a concept of the poor patients. However, turning to primary legal materials, it is found applicable law that stated Legal Aid for the poor. It was found that based on Article 28H of the 1945 Constitution of the Republic of Indonesia *jo.* UU Number 36 the Year 2009 on Health, stated that: individuals, families, and communities have the right of protection of their health. The state has to fulfill the right of healthy living for its population, including the poor.

It is also mentioned in the Act Number 13 of 2011 concerning Management of the Poor, especially Article 1 point (1) that the poor are people who have no source of livelihood and/or have sources of livelihood but cannot meet basic needs that are adequate for their own life and/or their families. Including, in this case, the poor are patients as users of health services provided or producers of health services, be they doctors and nurses

or hospitals.

Following the principles in the Dignified Justice theory, the poor are under the case and the responsibility of the state. This is stipulated in Article 34 of the Constitution of 1945. In that constitutional principle, Legal Aid for the poor patient is regarded as the party to the consumer law that regulates users of healthcare services as part of human rights.

Advocates and law enforcement agencies should carry out Legal Aid plays an important role to deliver justice. Thus, the Legal Aid for both, the rich and powerful (doctors, nurses, and hospitals that provide health services) can afford legal services professionals and the poor patients will also get free assistance to obtain justice. This is known as the implementation of the principle of equality before the law. This is also in line with the purpose of Legal Aid as a subsystem of the criminal justice system which contributed in the run to deliver a dignified fair legal process (dignified justice).

The research found that the provision of Legal Aid is regulated or recognized as the spirit of the nation (*Volkgeist*). It has been made certain by the promulgation of Law Number 16 of 2011 concerning Legal Aid. It is formulated there, that the implementation of Legal Aid aims to guarantee and fulfill the rights of the poor to get access to justice. In addition, Legal Aid is also present to realize the constitutional rights of all citizens by the principle of equality in law.

Apart from helping the poor, Nasution (2005) argued that Legal Aid is also a moral movement that fights for human rights¹⁰ (*de lege lata*) or according to the law. The right to be defended by an advocate or legal advisor and to be treated equally before the law in obtaining justice is a human right for all people, including the poor.

According to Article 1 (1) of Law Number 16 the Year 2011 on Legal Aid, Legal Aid recipients are people or groups of poor people. This is a form of State guarantee for the constitutional rights of everyone to get recognition, guarantee, protection, and legal certainty that is just and the same treatment before the law as a

means of protecting human rights.

With regards to the legality of Legal Aid, it has also been formulated in the Constitution of the Republic of Indonesia 1945 Amendment 4, a cornerstone of the constitutional State of Indonesia. It is said that Legal Aid is a form of security for the human rights of every citizen. As human rights, Legal Aid is regulated in Article 28A-28J of the 1945 Constitution of the Republic of Indonesia. One form of human rights guaranteed by the state is the right to recognition; guarantees, protection, and legal certainty that is just and equal treatment before the law (Article 28D). In the manifestation of this right, a law on Legal Aid as mentioned above was formed which regulates the rights of the poor to obtain Legal Aid.

Article 5 paragraph (1) of the Legal Aid Law stipulates that the scope of Legal Aid includes regulations regarding Legal Aid recipients who are poor people or groups of people who are unable to fulfill their basic rights properly and independently. Furthermore, in paragraph (2) it is stipulated that the basic rights as referred to in paragraph (1) include, among others, the right to health services. Additionally, in Article 8 paragraph (1) Government Regulation of the Republic of Indonesia Number 42 of 2013 concerning Requirements and Procedures for Providing Legal Aid and Distribution of Legal Aid Funds, it is stated that: "In the event that the Legal Aid Applicant does not have a certificate of poverty as referred to in Article 6 paragraph (3) letter (a), a Legal Aid applicant can attach a Public Health Insurance Card, a Poor Rice Card Direct Aid, or other documents as a substitute for a certificate of poverty".

Conclusion

The Dignified Justice theory has taught that Pancasila as the source of all sources of laws, demands legal protection to all, and including in it the patients, particularly those who come from poor people, who are victims of medical malpractice in the legal relationship of health services. Therefore with dignified Legal Aid, patients, especially patients from poor people, are promoted to an equal position in relation to doctors and nurses, and hospitals as health service providers who

previously had a stronger position. This dignified Legal Aid allows patients, especially patients from the poor, to bring medical professionals accountable for medical malpractice they did, according to the law, including the criminal law jurisdiction and ethical jurisdiction.

Ethical Clearance: Yes.

Conflict of Interest: There is no conflict of interest.

Source of Funding: Authors.

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