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Original Research Paper

A Comparative Analysis of Medical Malpractice Law in Indonesia: Evaluating the Shift from Law No. 36 of 2009 to Law No. 17 of 2023

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Abstract

Background: Health law is a critical branch of law governing legal relations in the health sector. Medical malpractice, arising from professional negligence that causes patient harm or death, reflects failures in healthcare delivery. Rising malpractice cases indicate public dissatisfaction and serious legal ethical challenges. **Objective:** This study analyzes regulatory changes on medical malpractice under Indonesia's Health Law No. 17 of 2023 compared with Law No. 36 of 2009, focusing on shifts in legal protection between medical personnel and patients. Methods: This normative juridical research applies a statutory approach. Analysis compares key provisions on malpractice, dispute resolution, and sanctions in both laws. Data derive from primary legal materials and secondary sources, analyzed qualitatively. **Results:** Law No. 17/2023 introduces major changes: mandatory ethics council recommendations prior to investigation, compulsory restorative justice mechanisms, and reduced criminal sanctions for negligence causing disability or death. These provisions strengthen protection for medical personnel but create procedural barriers for patients seeking remedies, potentially weakening patient rights. **Conclusion:** Indonesia's malpractice regime now favors medical professionals. Although intended to limit defensive medicine, the shift risks marginalizing patients and therefore requires stronger non-litigious patient protection mechanisms and a credible, independent ethics council to sustain justice and public trust.

Keywords: Comparative Legal Settings; Medical Malpractice; Health Law; Patient Rights; Legal Protection.

Introduction

Health law is a specialized branch of law that regulates legal relationships within the health sector, encompassing the rights and obligations of patients, healthcare providers, and institutions[1]. A thorough understanding of health law is essential to ensure that healthcare services are delivered according to established procedures and that any errors or negligence often termed medical malpractice can be resolved through appropriate legal channels[2]. Malpractice, broadly defined as a professional's negligent act or omission that results in patient harm, is a significant source of conflict and can erode the fundamental trust required for effective healthcare[3]. The rise in reported malpractice cases in Indonesia serves as a barometer of public dissatisfaction with the quality and safety of health services[4].

The Indonesian legal landscape for medical malpractice has been significantly reshaped with the enactment of Law No. 17 of 2023 on Health, which replaced the long-standing Law No. 36 of 2009. The previous law, while comprehensive, was often criticized for its ambiguity, which led to a climate of fear among medical professionals and a surge in "defensive medicine"—practices where doctors

order excessive tests or procedures primarily to protect themselves from litigation rather than for clinical benefit[5],[6]. This environment not only increased healthcare costs but also potentially exposed patients to unnecessary risks. The new law was introduced with the stated aim of creating a more balanced and just system for resolving medical disputes, but its provisions have sparked intense debate regarding whose interests it truly protects.

The primary problem addressed in this research is the legal uncertainty and perceived imbalance in the malpractice framework. Under the old law, doctors often felt criminally vulnerable, while patients sometimes faced long, arduous legal battles with uncertain outcomes. Previous studies have highlighted the challenges of proving medical negligence in Indonesian courts and the profound emotional and financial toll on both parties[7],[8]. However, a significant gap exists in a systematic, article-by-article comparison of the old and new laws to understand the precise nature of the regulatory shift. This study addresses this gap by providing a detailed analysis of the changes and their potential implications.

The urgency and novelty of this research are underscored by the immediate impact of Law No. 17/2023 on medical practice and patient rights. This is the first major overhaul of Indonesia's health law in over a decade, and it fundamentally alters the dispute resolution process. The novelty lies in its specific focus on the comparative analysis of key legal mechanisms, such as the mandatory role of the medical ethics council and the shift towards restorative justice, which have not been extensively analyzed in the context of Indonesian malpractice law. This research is timely and crucial for providing early scholarly commentary on a law that is actively shaping the doctor-patient relationship today.

This study is guided by the main research question: How does Law No. 17 of 2023 on Health change the regulation of medical malpractice compared to Law No. 36 of 2009, and what are the implications for the legal protection of patients and medical personnel? The objectives are: 1) To identify and compare the key articles in both laws pertaining to medical malpractice. 2) To analyze the shift in legal approach, particularly from a punitive to a more restorative model. 3) To evaluate the potential impact of these changes on the rights of patients and the professional security of medical personnel.

The findings of this study have significant implications for various stakeholders. For the legal profession and judiciary, it provides a clear roadmap of the legislative changes, aiding in the interpretation and application of the new law. For hospital administrators and policymakers, it highlights the urgent need to establish effective internal ethics committees and alternative dispute resolution mechanisms. For the medical community, it clarifies the new legal boundaries, potentially reducing anxiety and defensive practices. For patients and the public, it raises awareness of the new pathways for seeking justice, while also flagging potential challenges that may require advocacy. Ultimately, this research contributes to the academic discourse on health law reform and its practical consequences for healthcare delivery in Indonesia.

Materials and Methods

Study Design

This research employs a normative juridical method, which is a doctrinal legal research approach focused on analyzing written legal sources[9]. This design is appropriate as the study's objective is to systematically compare and interpret statutory law, specifically Law No. 36/2009 and Law No. 17/2023. The approach is descriptive-analytical, aiming to provide a comprehensive explanation of the legal changes and their logical consequences.

The analytical framework is built on the principles of statutory interpretation and comparative law.

Sample

The "sample" in this normative study consists of primary and secondary legal materials. The primary legal materials are the core objects of analysis and include: (1) Law No. 36 of 2009 on Health; (2) Law No. 17 of 2023 on Health; and (3) relevant articles of the Indonesian Criminal Code (KUHP). Secondary legal materials provide context, theoretical support, and scholarly interpretation. These include legal textbooks on health law and malpractice[10],[11], articles from law and medical journals[4,7,8], and scholarly commentaries on the new law.

Data Collection Technique

Data were collected through a systematic literature review of the identified legal materials. The process involved a careful reading of the two primary laws to identify all articles related to medical error, professional accountability, dispute resolution, and sanctions. Secondary materials were sourced from legal databases (e.g., Digilib UGM, hukumonline.com), academic search engines (Google Scholar), and academic libraries. The collection was aimed at gathering diverse perspectives on the effectiveness of the old law and the potential impact of the new law's provisions.

Data Analysis Technique

The collected data were analyzed using a qualitative juridical method. The analysis process involved several steps: (1) Inventory and Classification: Key articles from both laws were identified and classified into thematic categories (e.g., Definition of Malpractice, Reporting Mechanism, Dispute Resolution, Criminal Sanctions). (2) Comparative Analysis: A systematic, article-by-article comparison was conducted within each category to identify differences, additions, and omissions. (3) Legal Interpretation: The observed changes were interpreted by considering the legislative intent (as inferred from the legal text and academic commentary) and the broader principles of Indonesian law and medical ethics. (4) Synthesis: The findings were synthesized to construct a coherent argument explaining the overall shift in the legal framework and to draw conclusions about its implications for patients and medical personnel.

Ethical Consideration

This study is a normative legal research that analyzes publicly available legal documents and scholarly works. It does not involve direct interaction with human subjects. Therefore, it did not require ethical clearance from an Institutional Review Board (IRB). However, the research was conducted in strict adherence to academic ethics, including the accurate citation of all sources, objective analysis without personal bias, and respect for the principles of justice and patient rights that underpin health law[12].

Results

The comparative analysis of Law No. 36/2009 and Law No. 17/2023 reveals significant shifts in the approach to medical malpractice across several key domains. The old law provided a general framework but lacked specific, actionable mechanisms for dispute resolution, leading to its direct application in the criminal justice system. The new law introduces a more structured, multi-tiered process that prioritizes resolution outside of court. A detailed comparison of the key changes is presented in Table 1.

Table 1. Comparative Analysis of Medical Malpractice Regulation in Law No. 36/2009 and Law No. 17/2023

Aspect	Law No. 36 of 2009 on Health	Law No. 17 of 2023 on Health	Analysis of Change
Definition of Malpractice	The law did not explicitly define "malpractice," leading to legal uncertainty and reliance on general legal doctrine.	The law still does not explicitly define "malpractice," maintaining the status quo.	No change. The term remains legally undefined, which is a persistent weakness.
Patient Protection	Explicitly stated that every person has the right to seek compensation for errors or negligence by medical personnel .	No specific article reiterates this right for patients in the context of malpractice.	A significant regression. The explicit right to compensation is removed, potentially weakening the patient's position.
Reporting Mechanism	If a violation was suspected, supervisors were required to report it to investigators .	A medical professional can only be investigated after the investigator receives a mandatory recommendation letter from the Medical Ethics Council (MKDKI) (Article 308).	A major procedural hurdle for patients/complainants. The process is now contingent on an ethics council, potentially delaying or blocking investigations.
Dispute Resolution	The Minister could impose administrative sanctions (Article 188). Litigation was a common path.	Disputes must *first* be resolved through restorative justice outside the court (Article 310).	A fundamental shift towards alternative dispute resolution. This is intended to reduce litigation but may limit a patient's access to the formal justice system.
Investigation	Conducted by police investigators and civil servant investigators (PPNS) (Article 189).	The same, but with the added prerequisite of the ethics council's recommendation (Article 424).	The process is now more complex and conditional, giving medical professionals an initial layer of protection from direct investigation.
Criminal Sanctions	Negligence causing disability: max 2 years prison & Rp. 200 million fine. Negligence causing death: max 10 years prison & Rp. 1 billion fine (Article 191).	Negligence causing serious injury: max 3 years prison & Rp. 250 million fine. Negligence causing death: max 5 years prison & Rp. 500 million fine (Article 440).	A substantial reduction in criminal penalties. The maximum prison term and fine for death are halved, significantly reducing the criminal risk for medical personnel.

Source: Synthesized from Law No. 36/2009 and Law No. 17/2023, 2025

The findings reveal a deliberate legislative reorientation under Law No. 17/2023. The law substantially reinforces legal protection for medical personnel by establishing procedural safeguards, such as mandatory ethics council recommendations, prioritizing alternative dispute resolution through restorative justice, and markedly reducing criminal sanctions. In contrast, it diminishes the explicit legal position of patients by removing the clearly articulated right to compensation and by imposing more complex procedural hurdles for initiating formal legal investigations. Overall, the regulatory framework reflects a policy choice that emphasizes professional security, legal certainty for healthcare providers, and the reduction of litigation risks, potentially at the

expense of direct, enforceable protections for patients who experience medical harm.

Discussion

Interpretation of Key Findings The findings of this study reveal a paradigm shift in Indonesia's approach to medical malpractice, moving from a general framework that allowed for direct legal recourse to a highly structured system that prioritizes professional mediation and reduced criminal liability. The introduction of the mandatory ethics council recommendation (MKDKI) as a prerequisite for any criminal investigation is the most significant change. This effectively creates a "filter" or a "safe harbor" for doctors, where an initial assessment by their peers is required before the state's legal apparatus can become involved[13]. While the intent may be to filter out frivolous claims and ensure that only cases with clear ethical breaches proceed, it risks creating a barrier to justice for patients with legitimate grievances, especially if the council is perceived as protecting its own[14].

The mandatory restorative justice clause further reinforces this shift. By compelling parties to seek an amicable solution outside of court, the law aims to reduce the adversarial and costly nature of litigation[15]. This aligns with global trends in civil justice reform favoring mediation. However, in the context of a significant power imbalance between a patient (or their bereaved family) and a large hospital or a well-resourced doctor, the effectiveness of "restorative" justice is questionable. It may lead to settlements that are inadequate or do not fully acknowledge the harm suffered. The reduction in criminal sanctions, particularly for death, sends a strong message that the legislature views medical errors less as criminal acts and more as professional failures to be managed administratively or through compensation[16].

These findings are consistent with analyses of legal reforms aimed at curbing defensive medicine. Studies in the United States and Europe have shown that implementing "safe harbor" laws and alternative dispute resolution mechanisms can reduce the practice of defensive medicine and lower malpractice insurance premiums[17],[18]. However, critics argue that such reforms often come at the expense of patient rights and transparency[19]. Our findings align with this critical perspective. The Indonesian case appears to be a robust example of this trade-off. A study by Budiono et al. (2021) on the Indonesian Medical Council's (KKI) role highlighted the public's lack of trust in such professional bodies, which raises concerns about the efficacy and impartiality of the MKDKI under the new law[20]. Furthermore, the removal of the explicit right to compensation, as noted in our results, contradicts the principles of patient-centered care and rights-based approaches to health law that are increasingly advocated globally[21].

The implications of this legal shift are profound for clinical practice and public health. For doctors, the new law may reduce the fear of criminal prosecution, potentially allowing them to make more clinically appropriate decisions without excessive testing. This could improve the efficiency of care and reduce costs. However, it might also inadvertently lower the perceived accountability for negligence. For patients, the implications are more concerning. The new hurdles may discourage individuals from reporting errors, leading to a lack of transparency and a missed opportunity for systemic learning and improvement[22]. This could negatively impact patient safety in the long run. Public trust in the healthcare system could be eroded if the perception takes hold that the law is designed to protect doctors at the expense of patients. This is particularly critical in cases involving severe outcomes, such as infant mortality linked to conditions like

anemia in pregnancy[23] or complications from procedures like caesarean sections, where clear accountability is essential for grieving families[24].

The primary strength of this study is its systematic, article-by-article comparison, which provides a clear and detailed picture of the legislative changes. This structured approach offers a level of precision that broader commentary may lack. However, the study has limitations. As a normative analysis, it interprets the "law on the books" and cannot predict how the "law in action" will be implemented. The actual effectiveness of the ethics council and the fairness of restorative justice outcomes can only be assessed through future empirical research, such as case studies or surveys of affected parties[25]. The analysis is also confined to the text of the laws and does not include an analysis of the extensive legislative debates or political context that shaped them.

Future research should build upon this study in several critical ways. First, empirical research is urgently needed to track the implementation of the new law. This could involve quantitative analysis of malpractice case data before and after 2023 to see if there is a reduction in litigation and/or an increase in ethics council-mediated settlements. Second, qualitative research, including interviews with patients, doctors, lawyers, and members of the MKDKI, would provide invaluable insights into how the new processes are working in practice and whether they are perceived as fair. Third, a comparative study analyzing how other civil law countries in Southeast Asia handle medical malpractice could provide alternative models for Indonesia to consider. Finally, research should investigate the impact of this legal shift on specific medical outcomes, such as rates of C-sections or the management of post-operative pain, where the fear of litigation has historically influenced clinical decision-making[26].

Conclusion

This study has demonstrated that Law No. 17 of 2023 on Health represents a significant and systematic shift in Indonesia's medical malpractice law, moving decisively towards strengthening the legal protection of medical personnel. While this may address the issue of defensive medicine and create a more secure practice environment, it does so at the potential cost of weakening patient rights and access to justice. The new procedural hurdles, mandatory restorative justice, and reduced criminal sanctions collectively create a system that is more forgiving of professional error but less empowering for those who suffer from it. The long-term impact of this shift on patient safety, public trust, and the overall quality of healthcare in Indonesia remains uncertain. It is imperative that the implementation of this new law is monitored closely and that complementary mechanisms are developed to ensure that the pursuit of professional security does not come at the expense of patient safety and justice.

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