CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 119/PUU-XX/2022

Concerning

Appointment of Members of the Honorary Council of Medical Discipline (Majelis Kehormatan Disiplin Kedokteran Indonesia or MKDKI) and Decisions of the MKDKI Which Can Be the Basis for Civil and Criminal Lawsuits

Petitioners	:	**Gede Eka Rusdi Antara, et al.**
Type of Case	:	Judicial review of Law Number 29 of 2004 concerning Medical Practice (Law 29/2004) against the 1945 Constitution of the Republic of Indonesia (1945 Constitution)
Subject Matter	:	Judicial review of the word “Minister” in Article 60 and the phrase “binding on doctors, dentists and the Indonesian Medical Council” in Article 69 paragraph (1) of Law 29/2004 against Article 1 paragraph (3), Article 28C paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution
Verdict	:	To dismiss the Petitioners' petition entirely
Date of Decision	:	Tuesday, January 31, 2023
Overview of Decision	:	

The Petitioners are individual Indonesian citizens who work as doctors and students of the Faculty of Medicine who believe they are harmed by the enactment of Article 60 and Article 69 paragraph (1) of Law 29/2004

Regarding the authority of the Court, whereas the Petitioners' petition is a Judicial Review of Law 29/2004 against the 1945 Constitution, the Petitioners' petition is within the authority of the Court.

Regarding the legal standing of the Petitioners, the Petitioners believe they are harmed by the enactment of the norms for the word “Minister” in Article 60 and the phrase “binding on doctors, dentists and the Indonesian Medical Council (Konsil Kedokteran Indonesia or KKI)” in Article 69 paragraph (1) of Law 29/2004 because the *a quo* norms do not provide legal certainty for the structure and position of the MKDKI towards the KKI, and do not give guarantees for fair legal certainty to obtain protection in carrying out medical practice in the event of a medical risk experienced by patients. The Court is of the opinion that there is a causal relationship (*causal verband*) between the Petitioners' presumptions regarding the loss of their constitutional rights and the enactment of norms of the law being petitioned for judicial review so that if the Petitioners' petition is granted, such loss will not or will no longer occur. Therefore, regardless of whether or not the Petitioners' arguments are proven in terms of the

unconstitutionality of the legal norms being petitioned for review, the Court is of the opinion that the Petitioners have the legal standing to act as Petitioners in the *a quo* petition.

Whereas after the Court has examined the Petitioners' petition, the constitutional issues that the Court must consider are:

1. Whether the word “Minister” in Article 60 of Law 29/2004 is contrary to the 1945 Constitution if it is not interpreted as “Indonesian Medical Council”;
2. Whether the phrase “binding on doctors, dentists and the Indonesian Medical Council” in Article 69 paragraph (1) of Law 29/2004 is contrary to the 1945 Constitution if it is not interpreted as “is a recommendation and binding on doctors, dentists after obtaining the Decision of Indonesian Medical Council, and cannot be used as a basis for filing a civil or criminal lawsuit”;

Regarding these constitutional issues, the Court gives its considerations as follows:

1. Before further considering the word “Minister” in Article 60 of Law 29/2004, the Court first quoted the Court's considerations in the Decision of the Constitutional Court Number 82/PUU-XIII/2015, p. 219, which was declared in a plenary session open to the public on 14 December 2016 and the Decision of the Constitutional Court Number 80/PUU-XVI/2018, p. 234-235, which was declared in a plenary session open to the public on 21 May 2019. In Paragraph [3.14] of the Decision of the Constitutional Court Number 82/PUU-XIII/2015, the Court stated:

   > [3.14] Considering whereas the state has made various legal efforts to provide comprehensive protection to the public as recipients of health services. Doctors and dentists as service providers have delivered many health services, but the progress of medical science and technology, which is developing very fast, is not balanced with legal developments. So far, the legal instruments governing the practice of medicine and dentistry were considered inadequate because they are still dominated by formal needs and the Government's interests, while the portion of the profession is still lacking. Therefore, to bridge the gap between both parties' interests (the medical profession and the Government) and to evaluate the objective capabilities of doctors and dentists in providing services to the public, the Indonesian Medical Council was formed, consisting of the Medical Council and the Dentistry Council as mandated in Law Number 29 of 2004 concerning Medical Practice. The Indonesian Medical Council is an independent body that carries out regulatory functions related to increasing the ability of doctors and dentists to carry out medical practice.

   Furthermore, in the legal considerations of the Decision of the Constitutional Court Number 80/PUU-XVI/2018, the Court stated:

   > “… The Court is of the opinion that what needs to be understood is that the KKI is an autonomous, non-structural and independent body that is responsible to the President, which has the duties, functions and authorities as provided in Article 7 and Article 8 of Law 29/2004, namely to register doctors and dentists, to legalize professional education standards for doctors and dentists and to supervise the implementation of medical practices carried out together with relevant institutions to improve the quality of medical services. Its authorities are to approve or disapprove applications for doctors and dentists registration, to issue and revoke certificates of registration, to validate competency standards, to conduct examinations on the requirements of

> doctors and dentists registration, to authorize the application of branches of medical and dentistry science, to conduct joint supervision for doctors and dentists regarding the implementation of professional ethics provided by professional organizations, and to record doctors and dentists who are subject to sanctions by professional organizations or their apparatus for violating professional ethics provisions."

The legal considerations of the Court in the two decisions above have explained the duties and functions of the KKI, namely as a regulator and a supervision body for the implementation of medical practice to improve the quality of medical services. Therefore, if the KKI as the regulator and the supervision body of professional members, then determines the MKDKI members as petitioned by the Petitioners (*petitum*), this will undoubtedly cause a conflict of or at least the potential conflict of interests. The reason is that, on the one hand, the KKI has the task of making regulations on professional standards. On the other hand, the KKI also appoints the MKDKI members whose job is to ensure that the professional standards set by the KKI have been appropriately implemented. Not only ensuring this matter, but the MKDKI is also responsible for adjudicating disciplinary violations committed by professional members. Thus, to avoid a conflict of interests between the duties and functions of the KKI and no *contradictio in terminis* if the KKI also appoints the MKDKI members, the legislators stipulate that the appointment of the MKDKI members is carried out by the Minister taking into account recommendations from professional organizations in accordance with the mandate of Article 60 of Law 29/2004. In addition, the MKDKI may also adjudicate doctors who are concurrently the KKI members who are still actively carrying out their profession in serving the community.

In the design of the governmental system, the appointment of the MKDKI members by the minister on recommendations from professional organizations must be placed as a part of the administration of governmental affairs as stipulated in the Preamble letter b of Law Number 39 of 2008 concerning the State Ministries which states, "Each minister leads a state ministry to carry out certain affairs in government to achieve the state objectives as mandated in the Preamble of the 1945 Constitution". Therefore, each minister has duties and responsibilities in his affairs to realize the state's goals. Concerning those affairs, the minister referred to in Article 60 of Law 29/2004 is the minister who organizes affairs in the field of health. Thus, constitutionally, under the provisions of Article 17 paragraph (1) of the 1945 Constitution, the implementation of the said affairs cannot be separated from the minister's position as the president's assistant. However, in the appointment of the MKDKI members, the minister acts based on recommendations from professional organizations. The minister cannot use his power and authority to unilaterally appoint the MKDKI members other than those recommended by professional organizations.

The construction of such appointment of members will bring the MKDKI to become an independent, autonomous institution in carrying out its duties to prevent the possibility of influence or intervention of other institutions. In addition, not appointing the MKDKI members by the KKI can be said or considered to provide fair legal certainty in handling alleged disciplinary violations. In this regard, the MKDKI can accommodate the interests of each party, especially in allowing the complained doctors or those who are complained to prove whether he has violated medical discipline. Meanwhile, those who feel prejudiced, *in casu* patients, are given their right to complain. Such a process will create fair legal certainty between

the two parties. Thus, the Petitioners' arguments that the norms of the word “Minister” in Article 60 of Law 29/2004 is contrary to the 1945 Constitution is legally unjustifiable.

2. Against the Petitioners' arguments stating that if the phrase "binding on doctors, dentists and the Indonesian Medical Council" in the norms of Article 69 paragraph (1) of Law 29/2004 is not interpreted as "is a recommendation and binding on doctors, dentists after obtaining the Decision of Indonesian Medical Council, and cannot be used as a basis for filing a civil or criminal lawsuit," then it is unconstitutional, the Court considers as follows:

Whereas regarding professional discipline issues, the Court in Sub-paragraph [3.13.2] of Constitutional Court Decision Number 14/PUU-XII/2014, p. 60, which was pronounced in a plenary session open to the public on 20 April 2015, considered as follows:

> [3.13.2] As for professional discipline, the term constitutes ethics that specifically apply to certain people or groups who practice certain professions but with a form and degree of sanctions that are stricter than general ethical sanctions, although they are still "softer" than legal sanctions. Sanctions threatened by a professional discipline are relatively harsher than general ethical sanctions because disciplinary sanctions are related to whether or not certain profession holders can continue to hold or carry out their profession. In Law 29/2004, it can be seen that the meaning of professional discipline is "rules and/or provisions for the application of knowledge in the implementation of services that doctors and dentists must follow" [vide the Elucidation of Article 55 paragraph (1) of Law 29/2004].

Based on the excerpt from the legal considerations above, it is evident that the medical profession is a particular profession that is related to humans, both their body and soul, so the medical profession is required to carry out medical practice activities carefully and under established procedures as explained in the Elucidation of Article 55 paragraph (1) of Law 29/2004. The Court also confirmed this explanation through the same Decision, namely in Paragraph [3.14], which states:

[3.14] Considering whereas the main aim of science, including general medicine and dentistry science, is to glorify human life. The position of medical science is special, at least before the law, because medical science and its practice have a significant connection with human health and life/safety. The Court agrees with the President/Government stating that the specialty or uniqueness of doctor and dentist profession is that there is "justification given by law, namely the permission of carrying out medical actions on the human body to maintain and improve health status". This privilege appears when someone who is not a doctor or dentist performs a medical action on the human body, and then such action can be classified as a crime.

Thus, a doctor obeys and complies with the code of ethics and discipline of doctors and dentists in carrying out medical practice as a standard so that the doctor acts responsibly and carefully.

Furthermore, the issue that the Court must answer is whether decisions of medical discipline enforcement cannot be used as a reference or basis for filing civil or criminal cases, as argued by the Petitioners. Regarding this issue, it is vital for the Court to first refer to Constitutional Court Decision Number 14/PUU-XII/2014, which states as follows:

[3.18] Considering whereas the Court is of the opinion that the next question is whether an action by a doctor or dentist that has been examined and decided by the MKDKI can still be filed for reporting to the authorities and/or civilly sued.

Regarding the legal considerations previously described, the Court is of the opinion that court proceedings in both criminal and civil cases, to the extent that they are related to the actions of the medical profession (doctors or dentists), must be carried out within the scope of the medical profession. This means that the standard for assessing the actions/care of doctors and dentists should not be seen solely from the point of view of the Law on criminal law or the Criminal Code (KUHP) in general but must be based on the disciplinary standards of medical profession drawn up by the official institution appointed by statutory regulations.

This is related to the privileges of the medical science and profession, which are substantially closer to the risk of causing disability and even loss of one's life. Although the actions of the medical profession and the actions of other professions both may cause or pose a risk of disability or death, and both are regulated by the same Law, for example, the Criminal Code, the legal consequences for doctors or dentists must indeed be distinguished because they are certainly allowed to perform actions on the human body, while other professions are not allowed like that.

The Court is of the opinion that these differences provide a solid basis for law enforcers, namely the police and prosecutors for criminal cases, as well as criminal and civil courts, to treat doctors and dentists differently. Such distinctions must be made or demonstrated using medical science, primarily as contained in the professional discipline regulations for doctors, as the main reference in carrying out preliminary investigations, investigations, prosecutions, and trial examinations.

[3.19] Considering, such legal considerations confirm the opinion of the Court that the meaning of justice is to treat equals equally and treat differences differently. Such a concept of justice constitutes general knowledge (tacit knowledge) which, the Court believes, all law enforcement officials, namely the police, prosecutors and courts, have had and been aware of.

In this regard, the Court is of the opinion that criminal reports and/or civil lawsuits regulated in Article 66 paragraph (3) of the *a quo* Act, contextually have no other meaning other than using medical science, particularly the ethical code and discipline of the medical profession, as a reference in carrying out preliminary investigations, investigations, prosecutions, and trial examinations. Actions of preliminary investigation, investigation, prosecution, and trial examination use the code of ethics and discipline of the medical profession as a reference by, among others, listening to opinions or expertise from parties who have competence in the medical field when law enforcement officials interpret regulations governing the actions of doctors or dentists, as well as when evaluating the activities of the doctors or dentists.

The Court believes that implementing a trial that uses medical science as a reference in adjudicating doctors and/or dentists suspected of having committed malpractice has limited the risks that doctors and/or dentists have to bear from criminal reports or civil lawsuits. This means that in such a court

process, there will be no possibility of imposing criminal and/or civil sanctions on doctors or dentists whose medical actions have been declared by the MKDKI to be appropriate or not violating the discipline of the medical profession.

As for the provisions on criminal reports and/or civil lawsuits, of course, they are still needed to protect the rights of patients and stakeholders in general from the actions of doctors or dentists that are outside the scope of the discipline of the medical profession or to protect the rights of patients when the actions of doctors or dentists declared by the MKDKI as violating the discipline of medical profession turn out to cause losses to patients.

In the context as described by the Court in the series of legal considerations above, the fear that doctors and/or dentists will be subject to criminal sanctions and/or civil sanctions if they carry out medical actions which further lead to the practice of defensive medicine in the medical community, the Court believes, is unreasonable and no longer has any relevance to be further considered.

Based on the considerations of the Constitutional Court decision above, it is evident that provisions for criminal reports and/or civil lawsuits are certainly still needed to protect the rights of patients and stakeholders in general from the actions of doctors or dentists who are outside the scope of the discipline of the medical profession or to protect patient's rights when the actions of doctors or dentists declared by the MKDKI as violating the discipline of medical profession turn out to cause losses to patients. This means that doctors who have been examined by the MKDKI can still be sued or questioned in court, both civil and criminal. Such provision was enforced because Law 29/2004 aims to protect the public, both patients as users of health services and doctors and dentists as service providers so that the norms regulated in Law 29/2004 not only provide protection for patients but also protect the constitutional rights of doctors and dentists. If the Court follows the substance petitioned by the Petitioners, then the objectives of establishing Law 29/2004 and the state's goals as set out in the Preamble to the 1945 Constitution will not be achieved. Thus, the Petitioners' argument that Article 69 of Law 29/2004 is contrary to the 1945 Constitution is legally unjustifiable.

Based on the above considerations, the Court declared that the subject of the petition was entirely legally unjustifiable. Thus the Court passes down a decision in which the verdict is to dismiss the Petitioners' petition entirely.