Juridical Analysis of Legal Gaps in The Istitha'ah Health Policy Post-Tragedy of 418 Hajj Pilgrims in 2025

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ABSTRACT

The 2025 Hajj pilgrimage witnessed a tragic paradox marked by a high mortality rate among Indonesian pilgrims, reaching 418 deaths, despite the implementation of stricter health istitha'ah (ability) standards through the Minister of Health Decree No. HK.01.07/Menkes/508/2024. This study conducts a juridical-normative analysis to identify the causes of this failure. Using a pure normative legal research method, the research compares the de jure legal framework (Law No. 8/2019, PP No. 8/2022, Kepmenkes 508/2024) with the de facto situation, including official findings by the DPR RI Timwas. The analysis concludes that the catastrophe was not due to weak substantive norms, but rather a massive implementation failure enabled by fundamental legal gaps in the Legal Structure. These gaps are identified as: (1) an Accountability Gap, due to the absence of explicit sanction clauses; (2) a Coordination Gap, characterized by a vertical normative vacuum in PP No. 8/2022, which fails to grant imperative-binding veto power to the Ministry of Health over the Ministry of Religion's administrative process; and (3) a Hierarchy Gap, concerning the use of a juridically weak instrument (KMK) to restrict fundamental rights. This structural failure creates profound Legal Uncertainty, violating the constitutional right under UUD 1945 Art. 28D(1). The state's failure to provide a legally certain regulation constitutes an omission that opens the door for Onrechtmatige Overheidsdaad claims. Recommendations focus on: adding a sanctions chapter to Law No. 8/2019, elevating eliminative criteria to the PP level, and transforming the screening from a single-point filter to a longitudinal periodic monitoring system.

Key words: Accountability gap, Coordination gap, Hajj management, Health istitha'ah, Legal certainty

INTRODUCTION

Republic of Indonesia, based on the constitutional mandate, guarantees the freedom of every resident to embrace their respective religion, of which the Hajj pilgrimage is an integral

part. This implementation is a state public service obligation explicitly stated in Undang-Undang No. 8 of 2019 (UU 8/2019), which mandates the state to provide guidance, services, and protection for Hajj pilgrims, with health protection being the most crucial aspect (Republik Indonesia, 2019). Given that the Hajj demands prime physical endurance (istitha'ah), and following years of high morbidity and mortality rates (averaging over 2 per mille from 2017-2023), the Ministry of Health (Kemenkes) issued a new, stricter technical regulation, Keputusan Menteri Kesehatan No. HK.01.07/Menkes/508/2024 (Kepmenkes 508/2024), effective March 20, 2024 (Menteri Kesehatan RI, 2024). This regulation was enacted with the explicit aim (ratio legis) of "identifying and controlling health risk factors" (Menteri Kesehatan RI, 2024).

However, the 1446 H / 2025 M Hajj season, the first year of the full implementation of Kepmenkes 508/2024, was marked by a tragic paradox. The mortality rate for Indonesian Hajj pilgrims once again recorded a very high number, reaching 418 deaths as of June 30, 2025 (Kementerian Kesehatan RI, 2025a). This figure drew sharp criticism, including an "alarm bell" from Saudi Arabian authorities (Kementerian Kesehatan RI, 2025a). Crucially, the Hajj Supervisory Team (Timwas) of the House of Representatives (DPR RI) officially reported findings that "Hajj pilgrims who departed [were] not in accordance with the health istitha'ah provisions" (Tirto.id, 2025). This fundamental legal fact confirmed suspicions of "leniency" in the health examination process (Lombok Post, 2025), demonstrating a significant gap between the strict ideal norms (das sollen) in Kepmenkes 508/2024 and the factual situation (das sein), indicating that the problem lies not in the substance of the medical norms, but rather in the legal structure that implements them (Soekanto, 2007).

Therefore, this research is urgently needed to dissect the legal framework and conduct a comprehensive juridical-normative analysis of the failure. The primary aim is to precisely identify whether the tragedy was caused by a normative vacuum, norm inconsistency, or an implementation gap enabled by fundamental legal gaps concerning inter-institutional coordination, supervision, and sanction accountability. This study is focused on answering three fundamental juridical questions:

1. How can the de jure legal framework for Hajj health istitha'ah be mapped after Kepmenkes 508/2024?
2. What legal gaps, norm inconsistencies, or normative vacuums are identified from the juridical analysis between the fact of the 418 Hajj pilgrim deaths and the prevailing legal framework?
3. What are the policy recommendations (legal prescriptions) to reconstruct and strengthen the Hajj health legal norms to ensure effectiveness, legal certainty, and accountability in future implementations?

MATERIALS AND METHODS

Type and Nature of Research

This study is normative legal research (juridical-normative), also known as doctrinal research (Sonata, 2015). It focuses purely on the analysis of secondary data (library research) to find truth based on the scientific logic of law from its normative side. The nature of this research is descriptive-analytical (describing and mapping applicable laws) and prescriptive (offering concrete policy recommendations/legal prescriptions).

Research Approach

This study uses a combination of the Statute Approach (examining all relevant legal products from Laws to Ministerial Decrees to understand hierarchy and consistency) and the Case Approach (using the event of the 418 Indonesian Hajj pilgrim deaths and the official findings of the DPR RI Timwas (Tirto.id, 2025) as a non-litigation legal case to test the effectiveness of norm application).

Sources of Legal Materials

Legal materials consist of Primary Legal Materials (Laws, Government Regulations, and Ministerial Decrees), Secondary Legal Materials (scientific journals, textbooks on State Administrative Law, Health Law, and comparative Hajj management), and Tertiary Legal Materials (credible mass media reports and official statements).

Literature Review and Theoretical Grounding

Research on Hajj health implementation has previously criticized the single, front- loaded examination model of the old Permenkes No. 15/2016 as ineffective due to the long waiting period (Syah et al., 2024). Comparative studies, such as the Malaysian Tabung Haji model, emphasize a long-term health monitoring approach with a non-negotiable, binding health veto (Hashim, Md. Saw and Al-Banna, 2021; Ismail, Taha and Che-Hamid, 2018).

To conduct the analysis, this study employs the Legal Effectiveness Theory (Soekanto, 2007) which dictates that the failure of law is often due to issues in its Legal Structure or Legal Culture, not merely its Legal Substance. The analysis further utilizes the Theory of Authority and Coordination (Marbun, 2012) and the Theory of Legal Certainty (Rechtszekerheid) (Mertokusumo, 2007) to dissect the nature of legal relationship between the Ministry of Health and the Ministry of Religion, identifying whether the health determination acts as an imperative or facultative norm. Finally, the State Liability Theory (Hadjon, 1993; Ridwan HR, 2016) is used as the juridical basis for establishing state accountability for systemic failures (onrechtmatige overheidsdaad).

Legal Material Analysis Technique

The analysis is conducted qualitatively using established legal interpretation methods (Indrati, 2007) in three stages:

1. Norm Identification (das sollen) via Grammatical and Ratio Legis Interpretation;
2. Fact Identification (das sein) from official reports;
3. Gap Analysis (comparing das sollen and das sein using Systematic Interpretation and Theoretical Analysis).

The core theoretical frameworks—Legal Effectiveness, Legal Certainty, and State Liability—are applied in the discussion to test the effectiveness of the legal structure against the factual tragedy.

RESULT AND DISCUSSION

Analysis of the Hierarchy of Health Istitha'ah Norms and Implementation

The de jure framework is anchored by Law 8/2019 (Republik Indonesia, 2019), which mandates health service and protection. Technical standards are in Kepmenkes 508/2024 (Menteri Kesehatan RI, 2024). The Juridical Conclusion of Das Sollen is that the substantive medical norms in Kepmenkes 508/2024 are already very strict, detailed, and adequate, confirmed by a grammatical interpretation (Indrati, 2007). The requirements are firm, covering specific quantitative conditions such as LVEF <35\%, FEV1<50\%, and a Barthel Index score □60%. This clarity and detail leave no room for alternative readings, indicating the legal substance itself is robust.

The catastrophe was, therefore, an implementation failure (non-compliance) enabled by fundamental legal gaps, aligning with the failure of the Legal Structure element of the Legal Effectiveness Theory (Soekanto, 2007), proven by the Fact of Supervision from the DPR Timwas (Tirto.id, 2025) that pilgrims departed not in accordance with istitha'ah provisions.

The core problem lies in the structural breakdown between the Legal Substance (Kepmenkes 508/2024) and the Legal Structure (Implementation Institutions), exacerbated by Legal Culture (Policy Goal Conflict). This systemic failure can be visualized using Friedman's model:

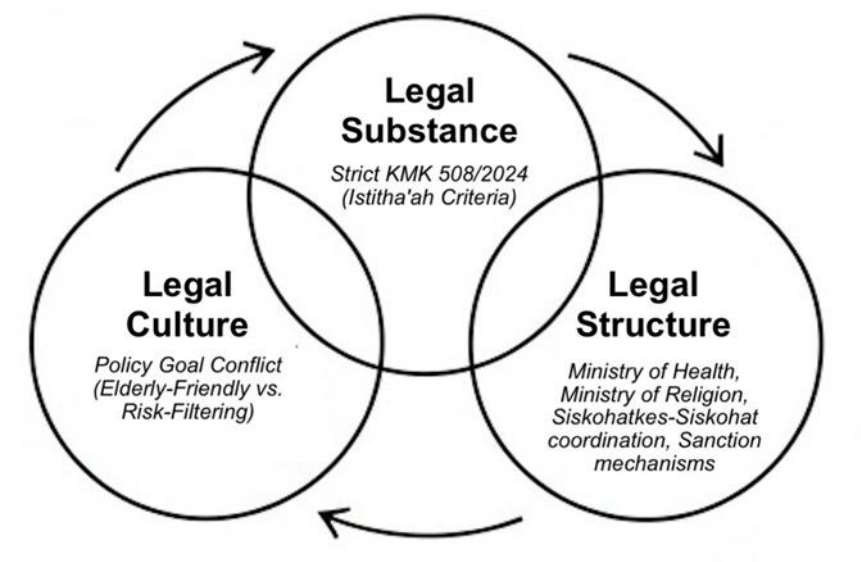

Figure 1. Friedman's Legal System Model

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1. Gap 1: Implementation Failure (Norm Compliance Failure)

   This refers to the massive non-compliance with the strict medical standards at the entry-point (Regency/City Health Teams), allowing ineligible pilgrims to depart, thereby directly contradicting the ratio legis of Kepmenkes 508/2024. The official findings of "leniency" in the regional health examination process (Lombok Post, 2025) confirm a wide-scale failure of the executive apparatus to adhere to the mandate of the technical regulation, which is the direct cause of high-risk pilgrims entering the Hajj journey.
2. Gap 2: Accountability Gap - Norms as Lex Imperfecta

A detailed statutory analysis reveals a total absence of explicit administrative or criminal sanction clauses within Law 8/2019, PP 8/2022, or Kepmenkes 508/2024 that target officials or medical personnel who violate the requirements standards. This lack of enforcement teeth renders the istitha'ah norm an imperfect law (lex imperfecta) (Moeljatno, 2015). The absence of a deterrent mechanism is a critical structural failure that shields implementers from liability and encourages non-compliance, thus systemic improvement cannot be enforced directly through law.

3. Gap 3: Coordination Gap - Vertical Normative Vacuum

The fact that pilgrims' requirements could depart despite medical disqualification proves the Ministry of Health's requirements status input into Siskohatkes did not automatically and imperatively lock the payment status in Siskohat (Ministry of Religion). Applying the Theory of Authority and Coordination (Marbun, 2012), the core legal problem is a vertical normative vacuum in PP No. 8/2022 (Republik Indonesia, 2022). As the superior regulation to the Kepmenkes, the PP should have contained a norm providing an imperative- binding mandate for the Ministry of Health's medical determination. Because the PP 8/2022 is silent on this binding power, the Ministry of Health's decision is reduced to a mere facultative recommendation, allowing the Ministry of Religion (Kemenag) to proceed with administrative processes (Bipih payment) based on other, potentially conflicting, priorities. This lack of binding authority can be illustrated as a breakdown in the inter-ministerial chain of command:

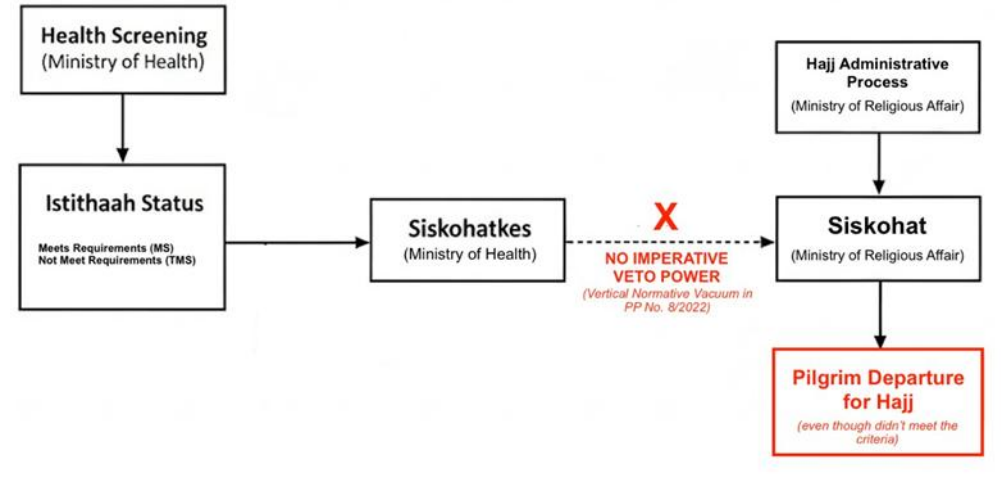

Figure 2. Vertical-Coordinative Gap Model

4. Gap 4: Hierarchy and Legal Uncertainty (Rechtsonzekerheid)

The restriction of a fundamental right (the right to depart for Hajj) guaranteed by Law 8/2019 is executed through a juridically weak instrument, a Ministerial Decree (KMK). Applying the Theory of Legal Certainty (Mertokusumo, 2007), regulating the material content of a right restriction at the lowest level of regulation creates profound Legal Uncertainty (rechtsonzekerheid). This weak legal instrument is easier to challenge and circumvent, undermining the strict intent of the rule-maker and enabling administrative discretion that should otherwise be clearly bound by superior norms.

Regulatory Aspect	Old Regulation (Permenkes No. 15/2016) (Kementerian Kesehatan RI, 2016a)	New Regulation (KMK No. HK.01.07/MENKES/508/2024 jo. 2118/2023) (Menteri Kesehatan RI, 2024; Kementerian Kesehatan Republik Indonesia, 2023)	Juridical Implication / Identification of Gaps
Legal Force	Ministerial Regulation (Permen). *Regeling* (regulatory) nature.	Ministerial Decree (KMK). *Beleidsregel* (policy rule/technical) nature.	Gap 5 (Hierarchy): A degradation of legal force occurred. Restriction of pilgrims' fundamental rights (failure to depart) is regulated by a weak instrument (KMK), creating legal uncertainty.
Substance of Criteria	Regulates categories (Meets Requirements, High-Risk, Postponed, Does Not Meet) generally.	Very detailed, quantitative, and strict. (e.g., HbA1c > 8%, Stage 3 Hypertension, Anemia < 8.5 g/dL, Dementia).	The new, highly restrictive criteria become the legal basis for departure denial. This changes the "rules of the game" suddenly for pilgrims already in the queue.

Table 1. Comparative Analysis of Hajj Health Istitha'ah Norms

5. Gap 5: The Constitutional Dimension

These interconnected legal gaps (Coordination, Accountability, and Hierarchy) transcend mere administrative failure and constitute a violation of pilgrims' fundamental constitutional rights. The state's failure to create a clear, non- conflicting, and binding norm in PP No. 8/2022 (the vertical normative vacuum) is a direct violation of the constitutional guarantee for "fair legal certainty" under UUD 1945 Article 28D(1) (Asshiddiqie, 2005). This failure in certainty, in turn, led to the failure of the state to fulfill its statutory function of protection as mandated by Law 8/2019 (Republik Indonesia, 2019).

Implication of State Liability and Policy Goal Conflict

The systemic failure opens the door for potential civil lawsuits based on Onrechtmatige Overheidsdaad (Unlawful Act by the Government) (Hadjon, 1993; Ridwan HR, 2016). Applying the State Liability Theory, the claim relies on the state's omission (failure to amend the weak PP No. 8/2022, caused by Gap 3) to fulfill its legal duty of protection. Using the Conditio Sine Qua Non theory, this omission (the legal gap) was a necessary condition for the damage (death) (Simanjuntak, 2017): If the PP had contained a binding veto, the pilgrims who didn't met the requirement would not have departed, and the 418 deaths could have been prevented.

Furthermore, this structural failure was exacerbated by a flawed Legal Culture (Soekanto, 2007), specifically the deep-seated Policy Goal Conflict between the populist "Elderly-Friendly Hajj" (Political Goals of Kemenag) and the risk-based "Elderly-Filter" (Technocratic Governance of Kemenkes). This conflict causes the technical, safety-oriented rationale to be subordinated to political expediency (Nugroho, 2014). The gravity of the implementation failure is highlighted by the scale of the tragedy:

Metric	Data	Source	Juridical Implication
Total Deaths (as of 30 Jun 2025)	418 Pilgrims	Kemenkes (2025a)	Demonstrates failure of the screening system (*das sein* contradicts *das sollen*).
Cause of Death Dominance	Cardiovascular Disease	Kemenkes (2025b)	Indicates high-risk, non-istitha'ah patients were passed (Cardio criteria: LVEF <35\%).
Official Finding	Pilgrims departed *not* in accordance with *istitha'ah* provisions.	DPR RI Timwas (Tirto.id, 2025)	Confirms Gap 1 (Implementation Failure) and the structural failure to enforce the veto (Gap 3).
Policy Response	Demand for total evaluation & revision of Law 8/2019.	DPR RI (2025)	Acknowledges structural weaknesses require legislative intervention, not just technical fixes.

Table 2. Juridical Facts and Normative Gaps in the 2025 Hajj Implementation

CONCLUSION & RECOMMENDATION

Conclusion

The tragedy of 418 Indonesian pilgrim deaths in 2025 was caused by a massive implementation failure with the already strict medical standards, systemically enabled by critical legal gaps in the Legal Structure. These gaps include: (a) a Gap 2: Accountability Gap (absence of sanctions, making the norm lex imperfecta); (b) a Gap 3: Coordination Gap (a vertical normative vacuum in PP 8/2022, failing to provide an imperative-binding mandate to the Ministry of Health); and (c) a Gap 4: Hierarchy Gap (using a KMK to restrict constitutional rights). This structural failure violates the constitutional right to Legal Certainty (UUD 1945 Art. 28D(1)) and constitutes a state omission that carries potential legal liability (onrechtmatige overheidsdaad).

Policy Recommendation

1. Legislative Recommendation (Accountability Gap): Law No. 8 of 2019 must be revised to include a dedicated Chapter on Administrative Sanctions (primum remedium) for non-compliance, with Criminal Provisions (ultimum remedium) narrowly tailored to target fraud (dolus).
2. Regulatory Recommendation (Coordination & Certainty Gap): PP No. 8 of 2022 must be immediately revised to explicitly state that the Ministry of Health's

requirement determination is final and binding for all stakeholders, legally nullifying the pilgrim's right to make the Hajj Travel Cost (Bipih) payment for the current year.

3. Regulatory Recommendation (Hierarchy Gap): Eliminative health istitha'ah criteria must be elevated and regulated limitatively within the Government Regulation (PP) to ensure legal certainty.
4. Implementative Recommendation (Transforming to Periodic Monitoring): The single-point filter must be transformed into a longitudinal (periodic) health monitoring system, requiring annual basic checks to enable targeted health intervention and align with international best practices.
5. Regulatory Recommendation (Policy Harmonization): The tagline "Elderly-Friendly Hajj" must be juridically redefined as "providing priority in services and intensification of health guidance," not "loosening safety requirements".

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