

An Analysis of the Implementation of Diversion in Efforts to Settle Medical Disputes in Indonesia

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Abstract

Based on the legal construction contained in Article 29 of Law Number 36 the Year 2009 concerning Health, it has ordered that health workers suspected of neglecting in carrying out their profession. There is a need for a settlement preceded by the mediation stage or what is known as the settlement of disputes out of the court. The facts in the field show that the handling of medical disputes, especially for doctors who commit negligence, has not been fully implemented according to the provisions of Article 29 of the Health Law, meaning that the handling is not carried out through the first mediation stage, as in the case experienced by dr. Ayu et al. They had to be brought to court accused of committing medical malpractice because they failed to save the patient during a cito-cesarean operation. Dr. Ayu et al. at that time did not fulfill their rights to get mediation. This is because there has been no further regulation governing the procedures, procedures, and rules for implementing mediation, especially health services. Due to this fact, it becomes an obstacle to the consistency of mediation efforts as a necessity in solving medical disputes. Law No. 29 of 2004 concerning Medical Practice and Regulation of the Medical Council Number 32 of 2015 concerning procedures for handling suspected disciplinary violations of Doctors and Dentists do not regulate mediation efforts, so the implementation of mediation efforts in health services is not optimal.

Kata Kunci: *Diversion; Mediation; Medical Disputes;*

Introduction

Conflicts in the health care profession that culminate in the court for health professionals are indeed a lot related to ethical problems that have the potential to cause medical disputes by placing everyone entitled to claim compensation for health workers and/or health providers who cause losses due to errors or negligence in the health services they receive.^[1] This is due to the characteristics of the legal relationship between patient and doctor in health care, based on a therapeutic contract and the relationship due to laws and regulations.^[2] In the first relationship, it begins with an agreement (unwritten) so that the will of the two parties is assumed to be accommodated when the agreement is reached. The reached agreement, among others, is in the form of approval of medical action or even rejection of a medical

action plan.^[3] While the second relates to relationships because laws and regulations usually arise because of the obligations imposed on doctors because of their profession without the need for patient consent.

These two relationships give birth to legal responsibility, professional responsibility, and ethical responsibility. Violation of doctor or dentist discipline can be prosecuted in several courts. For example, there are civil courts, criminal courts, and administrative courts in the legal field.^[4] In addition, doctors or dentists can also be brought before the Ethics Court in professional organizations and the Professional Discipline Court by (MKDKI). The basis for a doctor's obligation is a professional contractual relationship between medical personnel and their patients, which creates general obligations and professional obligations for the medical

personnel. Professional commitments are described in the professional oath, ethical rules, various service standards, and various operational procedures.

The enactment of Law Number 36 of 2009 concerning Health is considered flexible because it can keep up with developments in science and technology in the medical field. This is based on the consideration that there are 5 (five) reasons for considering why it is necessary to establish a health law *quo*. The five primary considerations as intended include: **first**; health is a fundamental right and an element of well-being. **Second**; principles of non-discriminatory, participatory, and sustainable health activities. **Third**; health is an investment. **Fourth**; health development is the responsibility of the government and society, and **fifth** is that Health Law No. 23/1992 is no longer in line with developments, demands, and legal needs in society.^[5]

A step forward in the provisions of Article 29 of Law Number 36 the Year 2009 concerning Health states that *“If a health worker is suspected of negligence in carrying out his profession, the negligence must first be resolved through mediation”*. Referring to the article in question, the necessity to take mediation efforts is highly expected/ recommended or even obligatory if a medical dispute occurs between a patient or his family and a health worker or between a patient and a hospital/health facility in Indonesia.^[6]

However, the obligation to exercise discretion as mandated in Article 29 of the Health Law has never been achieved in practice. This is following the case that happened to dr. Ayu, which occurred in April 2010. Dr. Ayu and her colleagues, namely dr. Hendry Simanjuntak, and dr. Hendy Siagian are working with Puskesmas referral patients in the Manado area. Due to the urgent situation, dr. Ayu performed a cito-cesarean surgery. But those measures failed to save the patient. The patient’s family reported having operated without permission. At the Manado District Court (PN) trial, dr. Ayu et al. were demanded 10 (ten) months in prison. At the level of Appeal, it is decided to be Free. The Public Prosecutor (JPU) who handled the case filed a

cassation, and the Supreme Court granted a decision issued on November 18, 2012. In a legal reconsideration effort through a decision in February 2014, dr. Ayu et al. were acquitted because they were not proven to have committed malpractice. The basis for the consideration of granting the PK was that the convicts did not violate the SOP in the handling of the SESCO CICEASRIA operation so that the *judex facti* considerations at the Manado District Court were correct.

Medical dispute complaints to the police at Polsek, Polres, and Polda levels are received and processed like a criminal case. Shifting civil cases to the realm of crime, inconsistent use of articles, difficulties in proving legal facts, and limited understanding of medical insights by law enforcers at almost every level make medical disputes threatened with criminal disparities.

Aims and Objective

With the regulation of the necessity of mediation in medical disputes over the services of health workers, especially the doctors and dentists, it becomes the basis for the authors to examine this matter more deeply. This paper aims to know and analyze how the implementation and efforts of mediation as medical dispute resolution in Indonesia.

Observation and Results

1. Health Services in the Implementation of Medical Practices

Health is a human right and one of the elements of welfare that must be realized following the ideals of the Indonesian people as referred to in Pancasila and the 1945 Constitution of the Republic of Indonesia.^[7] Provisions of Law No. 36 of 2009 concerning Health, there are forms of health services, namely promotive health services, preventive health services, rehabilitative health services, curative health services, and traditional health services.^[8] As one of the main components of providing health services to the community, medical services for doctors and dentists are vital because they are directly related to providing health services and the quality of services provided.

The principles and objectives of the implementation of medical practice are the foundation based on scientific values, benefits, justice, humanity, balance as well as protection, and patient safety.^[9] In terms of health services, the profession of health workers, this case, doctors, has a lot to do with ethical problems that can potentially lead to medical disputes. Law No. 36 of 2009 concerning Health brings changes by providing more protection and legal certainty for both service providers as health workers (as stated in Article 21 to Article 29) and recipients of health services (as stated in Article 56 to Article 58), because in practice medical disputes often arise as a result of unsatisfactory results from the health service, due to lack of information from doctors or negligence arising from medical personnel themselves.^[10] This is in line with the provisions of Article 66 of Law No. 29 of 2004 concerning Medical Practice, which affirms that “patients can complain to doctors or hospitals for alleged violations to the Indonesian Indonesian Medical Disciplinary Board (MKDKI)”.

2. Mediation of Out of Court Dispute Resolution

Disputes in health worker services provide space for parties who feel aggrieved (patients) to take the path of settlement in court both in civil, criminal charges, and administration.^[11] This is reflected in Article 66 paragraph (3) of Law no. 29 of 2004 concerning Medical Practice, namely “*Complaints do not diminish the right of everyone to report suspected criminal acts to the competent authority and/or sue for civil damages to the Court*”.

In suspected disciplinary violations in health services, to uphold the principle of faster, cheaper, effective, and efficient dispute resolution by patients or patients’ families with solutions through means outside the court, it has not been used widely. Furthermore, with the increasing number of patients filing lawsuits in court, it will reduce public confidence in medical practice as the main component of health service providers to the community.

Etymologically, the term mediation comes from the Latin “*mediare*,” which means being in the middle.

^[12] This meaning refers to the role played by a third party as a mediator in carrying out its duties to mediate and resolve disputes between the parties. “Being in the middle” also means that the mediator must be in a neutral position and not take sides in resolving disputes. He must be able to protect the interests of the disputing parties fairly and equally, thus fostering the trust of the disputing parties.^[13] Settlement of disputes over suspected violations of doctor’s discipline outside the court or known as non-litigation through mediation, as one of how the effectiveness of reaching an agreement on disputes arising is based on good intention.

Several provisions of laws and regulations that regulate and implement Mediation as a dispute settlement, namely:

a. Mediation Based on Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

Based on Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, there are several provisions, namely:

a) *The provisions of Article 1 point 1 state that: “Arbitration is a way of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the disputing parties.”*

b) *Article 1 point 10 states that:*

“Alternative Dispute Resolution is a dispute resolution institution or difference of opinion through a procedure agreed upon by the parties, namely settlement outside the court through consultation, negotiation, mediation, conciliation, or expert judgment.”

The provisions above, arbitration is a way of resolving disputes chosen by the parties to help resolve the dispute and provide an opinion on a specific legal relationship. The result of the agreement is a form of agreement agreed upon by the parties on the result of a binding win-win solution. Disputes that have been settled to be resolved through arbitration will not proceed to the judiciary.^[14] The existence of Arbitration institutions in Indonesia,

known as BANI (BANI Arbitration Center), BAPMI (The Indonesian Capital Market Arbitration Board), and BASYARNAS (The Indonesian National Sharia Arbitration Board). In its application, the Arbitrator can be selected by each of the disputing parties. However, if the parties do not appoint the arbitrator themselves, they can request court assistance to appoint the arbitrator as examiner and decision-maker of the dispute case.

In line with Arbitration, Article 6 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, several matters are regulated regarding alternative dispute resolution procedures, namely:

(1) The parties can resolve disputes or civil differences of opinion through alternative dispute resolution based on the good intention by overriding the settlement by litigation in the District Court;

(2) Settlement of disputes or differences of opinion through alternative dispute resolution as referred to in paragraph (1) shall be settled in a direct meeting by the parties within a maximum period of 14 (fourteen) days. The results are stated in a written agreement;

(3) If the dispute or difference of opinion as referred to in paragraph (2) cannot be resolved, then with the written agreement of the parties, the dispute or difference of opinion is resolved through the assistance of one or more expert advisors or through a mediator;

(4) If the parties within 14 (fourteen) days with the help of one or more expert advisors or through a mediator fail to reach an agreement, or the mediator fails to bring together the two parties, the parties can contact an arbitration institution or alternative dispute resolution institution to appoint a mediator;

(5) After the appointment of a mediator by an arbitration institution or an alternative dispute resolution institution, within 7 (seven) days, the mediation effort must be initiated;

(6) Efforts to resolve disputes or differences of opinion through a mediator as referred to in paragraph (5) by upholding confidentiality, within 30 (thirty) days

an agreement must be reached in writing signed by all parties concerned;

(7) A written dispute settlement agreement or difference of opinion is final and binds the parties to be implemented in good intention and must be registered at the District Court within a maximum period of 30 (thirty) days from the signing;

(8) As referred to in paragraph (7), both parties must complete the dispute settlement agreement or difference of opinion within 30 (thirty) days from registration;

(9) Suppose both parties cannot achieve the peace effort, as mentioned in paragraph (1) to paragraph (6). In that case, the parties based on a written agreement can submit a settlement effort through an arbitration institution or ad-hoc arbitration.

b. Mediation Based on Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Courts

The preamble provisions of the Supreme Court Regulation No. 01 of 2016 concerning Mediation Procedures in Court, letter a states that: "*Mediation is a process of dispute resolution that is faster and cheaper, and can provide greater access to the parties to find a satisfactory solution and fulfill a sense of justice*". And in letter b, it is stated: "*that in the framework of reforming the bureaucracy of the Supreme Court of the Republic of Indonesia, which is oriented towards the vision of realizing a great Indonesian judicial body, one of the supporting elements is Mediation as an instrument to increase public access to justice as well as the implementation of the principles of simple, fast, and low-cost judicial administration*".

Furthermore, according to Article 1 point 1 in this Supreme Court Regulation, what is meant by mediation, namely: "*Mediation is a way of resolving disputes through the negotiation process to obtain agreement from the Parties with the assistance of a Mediator*".

The process of the mediation procedure period in the Supreme Court Regulation No. 01 of 2016 with the

following conditions:

- 1) The mediation process lasts no later than 30 days from the stipulation of the order to mediate.
- 2) Based on the Parties' agreement, the mediation period may be extended by a maximum of 30 days.
- 3) The mediator shall request an extension of the mediation period with reasons.

Supreme Court Regulation No. 1 of 2016 Article 7 regulates the obligation to carry out mediation with good intention. The parties involved in the mediation process must have good intentions to be carried out and run well with good intentions. Indicators stating that the parties did not have good intentions in carrying out the mediation, namely:

- 1) Not attending the mediation process even though he has been summoned twice in a row;
- 2) Present at the first mediation meeting, but subsequently not attending even though they have been summoned twice in a row;
- 3) Do not attend over and over again so that it interferes with the mediation schedule;
- 4) Not filing or not responding to the case resume;
- 5) Not signing a peace agreement.

The implementation of mediation when the parties do not have good intentions has a legal impact on the case examination process. In this case, it can be seen that the legal consequences of the parties who are not in good faith regarding the Plaintiff who does not have good intentions will declare that the lawsuit is not accepted (NO). Furthermore, the legal consequence of Defendant's not having good intentions resulted in the payment of mediation fees.^[15]

From the description above, the mediation efforts carried out as an alternative to the dispute resolution process outside the court have been implemented for a long time. To guarantee legal certainty and legal protection in the court in the field of civil procedural

law, it is mandatory to settle cases peacefully, apply the principles of justice that are fast, low-cost, and simple, and reduce the accumulation of cases that are occurring.^[16]

c. Mediation Based on the provisions of Law No. 36 of 2009 concerning Health

Mediation in the Health Law is stated in Article 29 of the Health Law, namely, "*If a health worker is suspected of negligence in carrying out his profession, the negligence must first be resolved through mediation*". It is further stated in the elucidation of Article 29, "*Mediation is carried out when a dispute arises between a health service provider and a patient as a health service recipient. Mediation is carried out to resolve disputes outside the court by a mediator agreed upon by the parties*".

Based on the provisions of the phrase "must" based on The Great Dictionary of the Indonesian Language of the Language Center, it means that 1/ha•rus/adv 1. appropriate; 2. mandatory; must (cannot or may not): Assign mediation steps first "must", "mandatory", taken as an effort to resolve disputes determined out of court by the mediator agreed upon by the parties.

d. Mediation Based on the Law of the Republic of Indonesia Law No. 36 of 2009 concerning Health in the Perspective of Legal Politics The New Normal

The order of community life in Indonesia is inseparable from legal provisions to create order, peace, tranquillity, happiness, and prosperity, as created in the objectives of the Indonesian state are definitively stated in the fourth paragraph of the preamble to the 1945 Constitution.^[17]

The role of law as a tool to achieve the goals of the state must also function and always be based on the four basic principles of legal ideals (*rechtsidee*), namely: ^[18]

1. Protecting all elements of the nation for the sake of integrity (integration)
2. Realizing social justice in the economic and

social fields

3. Acknowledging the sovereignty of the people (democracy) and state law (nomocracy)

4. Creating tolerance based on humanity and civility in religious life.

The four principles of legal ideals will guide the realization of the ideals and goals of the state because legal ideals are normative and constitutive belief frameworks. The ideal of law is normative. After all, it functions as an ideal base and prerequisite that underlies every positive law and is constitutive because it directs the law to the state's goals. In achieving the country's goals, as a whole, it cannot be separated from Indonesia's national legal politics. The 1945 Constitution is the basis of Indonesia's national politics. The existence of national law politics as a legal policy that has been or will be implemented nationally includes: *first*, legal development consisting of making and updating legal materials to suit current needs; *second*, implementation of existing legal provisions including affirming institutional functions and fostering law enforcers.^[19]

Emphasizing the nature of legal politics, according to Satjipto Rahardjo, is the activity of choosing and the means to be used to achieve specific social and legal goals in society. The politics of law cannot be separated from the ideals of the Welfare State in the constitution.^[20] Furthermore, according to Mochtar Kusumaadmadja, political law is a legal and statutory policy in legal reform with legal, political instruments carried out through law. The essence of legal, political thought put forward by Mochtar Kusumaadmadja is related to which laws need to be formed (renewed, changed, or replaced) and which laws need to be maintained so that gradually the goals of the state can be realized.^[21]

Based on the political nature of law in the opinion of Satjipto and Rahardjo Mochtar Kusumaadmadja about Law no. 36 of 2009 concerning Health in Article 29 regarding mediation arrangements as mandatory, because it is not further followed by implementing regulations under it. Regulations of the Minister of

Health, Regulations of the Medical Council make it challenging to apply them to the settlement of disputes that have the core of deliberation (Indonesian Medical Council Regulation No. 12 of 2015 concerning Procedures for Handling Cases of Suspected Discipline of Doctors and Dentists).

Furthermore, in the absence of any mediation procedural rules and procedures in line with Article 29 of Law No. 36 of 2009 concerning Health brings weaknesses that result in not running optimally as mandated by the Health Law, so the steps of the government to choose and the methods to be used to achieve specific social and legal goals in society through mediation efforts bring about weaknesses that arise, namely:

a) Mediation is mandatory but is not explicitly regulated in other regulations regarding the process and procedures for the mediation to be pursued;

b) The obligation to mediate for suspected health workers of negligence in carrying out their profession is not in line with Article 66 paragraph (3) of the Medical Practice Law. Will the process of mediation efforts delay the process of prosecution or claim for compensation? Considering that the processes and procedures are not regulated, are they based on Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution or based on the Regulation of the Supreme Court of the Republic of Indonesia No. 1 of 2016 concerning Mediation Procedures in Courts?

3. Inconsistency of Indonesian Medical Council Regulation No. 12 of 2015 for Not Regulating Mediation Efforts

Indonesian Medical Council Regulation No. 12 of 2015 concerning Procedures for Handling Cases of Alleged Disciplinary Violation of Doctors and Dentists was set on March 25, 2015. The stipulation of the council's regulations was long after Law No. 36 of 2009 concerning Health. The basis for consideration of the Indonesian Medical Council Regulation No. 12 of 2015 as stated in the preamble:

a. That the enforcement of Doctor and Dentist discipline is part of the effort to provide protection for Doctors and Dentists and the public;

b. Whereas the procedures for enforcing the discipline of Doctors and Dentists are regulated in the Regulation of the Indonesian Medical Council No. 20 of 2014 concerning Procedures for Handling Cases of Alleged Discipline Violation of Doctors and Dentists need to be adjusted to the application of effectiveness;

c. That is based on the considerations as referred to in letters a and b and to implement Article 70 of Law No. 29 of 2004 concerning Medical Practice. It is necessary to stipulate a Regulation of the Indonesian Medical Council concerning Procedures for Handling Cases of Alleged Disciplinary Violation of Doctors and Dentists.

Referring to the above considerations about the procedure for complaints of cases of suspected disciplinary violations by doctors and dentists, several weaknesses were found, namely:

a. Indonesian Medical Council Regulation No. 12 of 2015 concerning Procedures for Handling Cases of Alleged Disciplinary Violation of Doctors and Dentists does not refer to Law No. 36 of 2009 concerning Health has regulated Mediation (Vide Article 29), only referring to Law No. 29 of 2004 concerning Medical Practice (Vide Article 70);

b. Mediation has no legal force, is challenging to achieve, is not an effective measure in resolving suspected violations by doctors and dentists because it is not strictly regulated how the process and procedures are. This can be compared to how the process and procedures for mediation settlement as described in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution and Supreme Court Regulation No. 01 of 2016 concerning Mediation Procedures in Courts.

c. Law No. 36 of 2009 concerning Health has provided an opportunity for the necessity of resolving health service disputes through Mediation. Still, these

opportunities have not been accommodated, and there is no precise regulation, specifically a reference for complainants as stated in the Regulation of the Indonesian Medical Council Number 32 of 2015.

Conclusion

Based on all the descriptions above, it can be concluded that health services run by doctors and dentists for patients are very susceptible to medical disputes. Health Law No. 36 of 2009 has covered the legal basis for health. Conceptually, it reflects the existence of a health law principle that rests on the right to health care as a social basis (the right to health care) which is supported by 2 (two) individual fundamental rights consisting of the right to information (the right to information) and the right to determine the right of self-determination to achieve safety for patients in an optimal health degree according to the principle "*Agroti Salus Lex Suprema*" - Patient safety is the highest law.

The legal incident that befell dr. Setyaningrum, and dr. Ayu et al. will not happen again to maintain the honor of the medical and dentistry professions. They have been allowed to handle suspected disciplinary violations by doctors and dentists using mediation as mandated in Article 29 of Law No. 36 of 2009 concerning Health. With no concrete implementing regulations regarding procedures and processes of mediation in the Regulation of the Indonesian Medical Council No. 12 of 2015 concerning Procedures for Handling Cases of Alleged Disciplinary Violation of Doctors and Dentists is set on March 25, 2015, so mediation in medical dispute resolution has not run optimally.

Suggestion

The Regulation of the Indonesian Medical Council in the procedure for handling cases of suspected disciplinary violations by doctors and dentists includes a clause in the Mediation process as an obligation that must be followed as in the application of civil procedural law in force in the Court.

To realize the objectives of the Government's Political Law through legal reform, the provisions of

Article 29 of Law No. 36 of 2009 concerning Health do not only cover disciplinary violations of doctors and dentists but other health workers, hospital services. Mediation should be implemented by making Mediation guidelines to achieve effectiveness in resolving health service disputes and upholding dignity in human rights.

Ethical Clearance : Not applicable

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Conflict of Interest : Nill

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