

## *Penal Mediation for Medical Dispute Settlement in Indonesia Perspective*

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### **Abstract**

In Indonesia, most of medical malpractices which were submitted before the court brought loss to the patients. Besides having high degree of difficulty, medical malpractice vindication usually needs more extra effort, particularly by employing the Law on Medical Practice. Therefore, the proposed main question is whether the medical doctor or professional medical staffs in hospital are couldn't be touched by law and justice. In Indonesia, the plausibility of Alternative Dispute Resolution to be included into criminal justice system in Indonesia. Indonesia actually has already have a settlement procedure out of the court through MKDKI (Board of Medical Discipline). In fact, the Indonesian are tent to choose the settlement on medical practice to the court because MKDKI is a non well-known institution in Indonesia society. Moreover, the MKDKI settlement couldn't give a compensation to the victim. This paper is a normative research and the methodology employed based on library research. Data will be analyzed investigation after conducting the investigation honestly and in accordance to the professional medical code of ethics on medical malpractice cases as undertaken by Indonesian Medical Honorary Assembly. Medical dispute settlement shall be in accordance to legal norms that live in society, which based on collective values or dealing with collective achievement (sinngebungen) to whom the protection on interests is going to be conducted on the basis of virtue since it is worth to achieve. Restorative models of mediation is the most appropriate alternative at this time because it involves a special mediator who indeed has been specially trained by an accredited institution. Although mediation is not yet up to the level of the criminal justice system, but the description of disputed and needs what is desired by both parties to the dispute.

Keywords. Medical dispute settlement, criminal justice system and social justice

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## Introduction

Since the Law number 29 of year 2004 on Medical Practice was enacted, data of medical omission or medical malpractice<sup>1</sup> increasing. The total of medical malpractice cases in 2013, as collected by The Indonesia Board of Medical Discipline (*Majelis Kehormatan Disiplin Kedokteran Indonesia*) were 20 cases. Meanwhile, during 2006-2012, the data of medical malpractice had reached 183 cases in number.<sup>2</sup> Legal enforcement on medical malpractice which was committed by medical doctor or professional medical staffs is less plausibly conducted. Most of medical malpractices which were submitted before the court brought loss to the patients. Besides having high degree of difficulty, medical malpractice vindication usually needs more extra effort, particularly by employing the Law number 29 of year 2004 on Medical Practice. Therefore, the proposed main question is weather the medical doctor or professional medical staffs in hospital are couldn't be touched by law and justice. In the case that involved the case "centered on a caesarean practice performed by Ayu, Hendry and another doctor, Hendy Siagian, on 25-year-old Julia Fransiska Makatey at Kandou Hospital in the North Sulawesi capital of Manado in 2010. Julia was referred to the hospital from a primary health care centre due to delay in delivery that could have endangered her baby's life. Twenty minutes after the delivery, the baby was alive but the mother died. From the autopsy report, the forensic expert concluded that Julia died due to air embolism, rather than a failure in the delivery process. This condition is unpredictable, which was why the Manado District Court acquitted the three doctors. Before the trial, the Medical Ethics Council stated the three doctors were not guilty.<sup>3</sup> Ayu, Hendy and Hendry, who were residents at the time, were charged with negligence resulting in death. A local court in Manado dismissed the charges, freeing the three to continue their work. In 2012 the case was reopened on an appeal at the Supreme Court, where a panel of judges overturned the prior verdict and sentenced the doctors to 10 months in prison, finding them guilty of negligence. But by the time the Supreme Court issued the new verdict, Ayu, Hendy and Hendry had disappeared. The three were ordered to report to prison and serve their sentence by prosecutors, who sent the doctors an official letter, shortly after the Supreme Court trial concluded. The notice was ignored and the three were placed on a fugitive list, where they remained until two weeks ago. Ayu was found hiding out in Balikpapan, working in the maternity ward at Permata Hati Hospital. She was detained on Nov. 8 and remanded to police custody. Both Hendy and Hendry remain at large. The Supreme Court took a different view on the case, finding, on Sept. 18, 2012, that three doctors were guilty of malpractice over the April 2010 death of Julia Fransiska Makatey during a routine caesarian section. The mother died of heart failure caused by a gas embolism — a pocket of air in her vascular system — after her child was delivered by staff at Manado's Rumah Sakit Umum Pusat Prof. Dr. R.D Kandou

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<sup>1</sup> Medical malpractice is defined as *A doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances*. Bryan A. Garner. 1999. Blacks Law Dictionary. St.Paul, Minn, p. 971

<sup>2</sup> Data was collected during January 2006 until April 2013, <http://www.republika.co.id/berita/nasional/umum/13/04/13/ml6i4y-masyarakat-diminta-tak-takut-laporkan-malpraktik> *see* <http://dokterindonesiaonline.wordpress.com/2013/12/02/malpraktek-medis-terheboh-di-dunia/> *see*

<http://www.tempo.co/read/news/2013/03/25/058469172/Sampai-Akhir-2012-Terjadi-182-Kasus-Malpraktek>

<sup>3</sup> <http://www.thejakartaglobe.com/news/obgyns-strike-over-gynecologist-arrest/>

government facility.<sup>4</sup> Finally, The Supreme Court (MA) has issued a ruling granting a case review request filed by three doctors who were sent to prison on malpractice charges. The panel ordered that the three doctors be freed from prison. “The panel found the doctors had violated none of the regulations while performing the operation [in question]. Therefore, the panel’s ruling has cancelled out an earlier ruling made by the appeal panel. The Supreme Court panel was led by judge M. Saleh and four other members, namely Maruap Dohmatiga Pasaribu, Surya Jaya, Syarifuddin and Margono. Judge Surya Jaya had filed dissenting opinion.”<sup>5</sup>

Those data also were supported by the result of investigation after conducting the investigation honestly and in accordance to the professional medical code of ethics on hundreds of reported medical malpractice cases as undertaken by Indonesian Medical Honorary Assembly. It showed that 99 percent of medical malpractice cases were failed to be proved.<sup>6</sup> The term of medical malpractice actually was unknown by law.<sup>7</sup> It is merely an expression that refers to the medical doctor who has been definitely proved committing omission when undertaking his/her job or doing certain activity which is out of his/her competence.

The above data indicate a failure in solving the medical occur during this time in Indonesia. This issue will not occur, if used in the completion of restorative models of penal mediation which emphasizes the description of disputed and needs what is desired by both parties to the dispute. Criminal sanction in jail is not the only way out in case of medical negligence.

### **Problem Statement**

1. How is medical dispute resolution mechanism through restorative models for penal mediation in Indonesia perspective?
2. How is the legal relationship between doctor and patient in Indonesian law?

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<sup>4</sup> <http://www.thejakartapost.com/news/2013/11/28/malpractice-and-criminalization-doctors.html>

<sup>5</sup> <http://www.thejakartapost.com/news/2014/02/08/ma-grants-reviewmedical-malpractice-case.html>

<sup>6</sup> <http://www.surabayapagi.com/index.php?read=Tubuh-Bocah-Waru-Melepuh;3b1ca0a43b79bdfd9f9305b8129829621fc50417a91a837566f28afeb5d6958> The obvious example can be found at hospital RSAB Prima Husada Waru Hospital: Sumaji (35) dan Sutiah (30), resident of jalan Kolonel Sugiono 38 Waru, who found that their daughter Husnul Khotimah (9) having terrible cough attempted to cure her illness by bringing her to RSAB Prima Husada Waru Hospital. However, the outcome of their attempt was a big failure for their daughter got terrible skin blister on her entire body after receiving treatment from the hospital. Husnul Khotimah was not the sole victim of hospital treatment, some patients of RSAB Prima Husada Waru also experienced similar blister. Unfortunately, the patients who submitted this case to the court was defeated during the trial. The judge argued that the patient was failed to prove their damages. See Harian Surabaya Pagi Online 1/7/2010 Tubuh Bocah Waru Melepuh,

<sup>7</sup> See KUHP or Law number 29 of years 2004 in Medical Practice, Law number 36 of years 2009 on Healthcare

## Literature Review

Regarding to the issue of medical malpractice, there is an argument which assumes that medical malpractice and medical dispute are different matters.<sup>8</sup> The main reason is it is part of consented (or non-consented) therapeutic contract which later producing disappointment from the patient or his/her family, for example on the case of disheartened patient/family by the result of medical treatment from medical doctor or the hospital which later on causing the patient submit report or complaint to mass media. On such illustrated case, some argue that not all the entire medical failure is the consequence of medical malpractice, since it should be categorized as medical dispute.<sup>9</sup>

Aside from the controversy on the term, the article 29 of Law number 36 of years 2009<sup>10</sup> on mediation provide is a solution which is expected to bring “win-win solution” for both disputed parties.

Mediation<sup>11</sup> is one of settlement model/mechanisms through ADR (Alternative Dispute Resolution).<sup>12</sup>

ADR basically was developed by business community that demands fast dispute settlement mechanism and at the same time it is also able to produce “win-win solution”. Such mechanism is “alternative” procedure through the court. This procedure is definitely an alternative from of conservative civil proceedings law which two (or more) parties having dispute on case of civil and business law.<sup>13</sup>

The concept of penal mediation was actually acknowledged within the criminal law concept since a long time ago, even though it utilized different term. Ilyssa Wellikoff, for example, employed the term of *Victim-offender mediation* that derived from concept of *Restorative Justice*.<sup>14</sup> Moreover, she argued that it is applicable for non-serious criminal act, such as juvenile delinquency case, crime that involving the property and other kind of petty offence.<sup>15</sup> Some scholars prefer the term of *Mediation practice in the Criminal Justice System* which is defined as:

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<sup>8</sup> Made Kornia Karkata. *Malpraktik atau Sengketa Medik?*

<http://www.balipost.co.id/balipostcetak/2004/10/13/o2.htm>Article.

<sup>9</sup> Ibid

<sup>10</sup> Article 29 of Law number 36 of years 2009: When the professional medical staff is allegedly committing omission in undertaking his/her job, such omission shall be settled through mediation beforehand

<sup>11</sup> Mediation is a process by involving third party as advisor in settling the dispute. See Kamus Umum Bahasa Indonesia. Departemen Pendidikan dan Kebudayaan. 1988. Balai Pustaka: Jakarta, p. 569

<sup>12</sup> Elizabeth Plapinger and Donna Stienstra. 1996. *ADR and Settlement in the federal District Courts (a sourcebook for Judges and Lawyer)*. Federal Judicial Centre and the CPR Institute for dispute resolution, p. 4 **See also** *Guide to Judicial Management of Cases in ADR*. 2001. Federal Judicial Centre, p. 102, it stated that the ADR process in US, as example, is in the format of mediation, arbitration, *Early neutral evaluation* (ENE), *summary jury trial* and *Minitrial*.

<sup>13</sup> Mardjono Reksodiputro. 2009. *ADR dikaitkan dengan sistem hukum pidana Indonesia*. Menyelaraskan Pembaruan Hukum. Komisi Hukum Nasional: Jakarta, p. 73

<sup>14</sup> Ilyssa Wellikoff. 2004. *Victim-Offender Mediation and violent crimes: On the way to Justice*.

Cardozo Online Journal <http://cardozojcr.com/issues/volume-5-1/note-1/>

<sup>15</sup> Ibid

*Is a process of finalizing a criminal matter by placing an emphasis on the wills of a victim and offender who are parties of a criminal matter.*<sup>16</sup>

The term of *médiation pénale* is used in French, it includes the research report which was performed by Jacques Faget<sup>17</sup> on the successfulness of penal mediation in settling the case that hit the percentage 76%.<sup>18</sup>

North America employed the term penal mediation since 70's, as followed by Great Britain (England), French, and Scandinavian countries on 80's and later the entire Europe. The objective of penal mediation concept has one common similarity: "*better consideration of victims' problems, making offenders feel more responsible, giving the community a greater role in conflict regulation.*"<sup>19</sup>

Penal mediation in Spain is applied for juvenile delinquency case which is popular with the term "*Juvenile Penal Mediation.*"<sup>20</sup> Meanwhile, Belgium introduced Penal Mediation term in their criminal justice system since 1994.<sup>21</sup> Penal mediation was enforced in Belgium due to several scandals that affected Belgium Police legitimation within Belgium's criminal justice system.<sup>22</sup>

Penal mediation term was also introduced in Argentina explicitly since 1990's on corruption case as *a pilot project in penal mediation.*<sup>23</sup> It is because of people's trust on judicial system that getting worsened besides public negative assumption on prison that was not enough since it was fully occupied by corruptors.<sup>24</sup>

In Indonesia, Prof. Mardjono Reksodiputro proposed an interesting statement that questioning the plausibility of ADR to be included into criminal justice system in Indonesia<sup>25</sup>. He argued that mediation as inseparable part of ADR in criminal law is possible, but its characteristic has to be distinct from the ADR in the field of civil and business law since one party has been represented by police and general attorney. Therefore, the victim is not independent in deciding the mechanism of dispute settlement. Such duty is carried out by the police and general attorney literally in relative sense since it depends on report from the victim that triggers the trial of criminal proceeding. It means there is alternative choice for the victim to back off

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<sup>16</sup> Cumhur Sahin.2009. *Mediation Practice in The Criminal Justice System*.New Horizons:UNDP Turkey Monthly Newslette

<sup>17</sup> Jacques Faget. 2005. *The double life of victim-offender mediation.* ADR Bulletin, Volume 7, number 10, p. 2

<sup>18</sup> Ibid. The research was conducted on 1200 cases in French court during 1998-1999 (juvenile delinquency crime case, crime involving property, fraud, robbery and crime that deals with profession)

<sup>19</sup> Jacques Faget. 2004. *Mediation and Domestic Violence.* Quoted from [champpenal.revues.org/356](http://champpenal.revues.org/356)

<sup>20</sup> Anna Mestitz and Simona Ghetti. 2006. *Victim-Offender Mediation with Youth Offenders in Europe An Overview and Comparison of 15 Countries.* Department of Justice of the Autonomous Government Of Catalonia, Spain

<sup>21</sup> Anne Lemonne. 2000. *Development of Restorative Justice: The Case of Penal Mediation in Belgium* In. Kriminalisk Arbog.

<sup>22</sup> Ibid

<sup>23</sup> The victim and the offender are contacted beforehand by facilitator in separated forum. Later on, they discuss the substance of dispute, including their expected outcome from the process and predicting the thoughts or reaction of opposed party. See *Restorative Justice Online*, October 2001.

<sup>24</sup> Ibid

<sup>25</sup> Ibid hal. 75

from filed the lawsuit to the court.<sup>26</sup> In the case of domestic violence in Malaysia, for example, the victim is represented by Polis diRaja Malaysia and the Jabatan Kebajikan Masyarakat in the format of IPO (*Interim protection Order*) and PO (*Protection Order*).<sup>27</sup>

### **Medical Dispute Resolution Mechanism Through Restorative Models For Penal Mediation In Indonesia Perspective**

Mediation penal developed it rests on the idea and principle of work (working principle) Consist of:

#### 1. Conflict Handling

The task of the mediator is to make the parties to forget the legal framework and encourage those involved in the communication process. This is based on the idea that a crime has provoked interpersonal conflict. Conflict that is intended by the mediation process.

#### 2. Process Orientation

Penal mediation is more oriented to the quality of the process rather than outcomes, namely: realize criminal of his guilt, unresolved conflicts and tranquility needs of victims of fear.

#### 3. Informal Proceeding

Penal Mediation is an informal process, not bureaucratic, avoiding legal procedures ketat`

#### 4. Active and Autonomous Participation

The parties (perpetrator and victim) is not seen as an object of criminal law procedure, but rather as a subject who has a personal responsibility and ability to act. They are expected to do on his own.<sup>28</sup>

Issues of mediation in criminal cases has been on the agenda at international level, namely the Congress of the United Nations 9/1995 of Crime and the Treatment of Offenders and Penal Reform International Conference, 1999.

International Meeting was to encourage the emergence of three international documents related to the issue of restorative justice and mediation in criminal cases, namely :

1. The Recommendation of the Council of Europe 1999 No. R (99) 19 tentang Mediation in Penal Matters
2. The EU Framework Decision 2001, the Standing of Victims in Criminal Proceedings
3. The UN Principles 2002 (draft Ecosoc), Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

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<sup>26</sup> Ibid hal. 73

<sup>27</sup> See Domestic Violent Act (Akta Keganasan Rumah Tangga Malaysia) 521 of years 1994

<sup>28</sup> Stefanie Trankle, The Tension between Judicial Control and Autonomy in Victim-Offender Mediation-a Microsociological Study of a Paradoxical Procedure based on Examples of the Mediation Process in Germany and France, [http://www.iuscrim.mpg.de/forsch/krim/traenkle\\_e.html](http://www.iuscrim.mpg.de/forsch/krim/traenkle_e.html).

The background idea of penal reform, among others, the idea of protection of victims, the idea of harmonization, the idea of restorative justice, particularly to find other alternatives of criminal imprisonment<sup>29</sup>

The Recommendation of the Council of Europe 1999 No. R (99) 19, Mediation in Penal Matters stated that:

The idea of mediation unites those who want to reconstruct long foregone modes of conflict resolution, those who want to strengthen the position of victims, those who seek alternatives to punishment, and those who want to reduce the expenditure for and workload of the criminal justice system more effective and efficient.<sup>30</sup>

Jacques Faget categorized penal mediation into two model, they are *legal mediation model* and *restorative mediation model*. On legal mediation model, the dispute settlement is applicable to any criminal case. The mediation is determined by the court or place which has been determined by court. The victim and the offender who are involved into mediation process are facilitated by third party (not all mediator is accredited one). The time allocation for mediation forum process is even relatively fast and brief.

On the other hand, restorative mediation model involves special mediator that has been trained by certain accredited institution. Such mediation model has not reached criminal juridical system level yet, the main topic of discussion in mediation process is not limited only on vindication, but also on the description of disputed matter as well as the interests of both disputed parties. The allocated time for mediation process is relatively long, which brings better solution than legal mediation model since the disputed parties has to uphold several meetings during the mediation process happens.

Both models are described on following simple table:

**Atributes legal vs restorative models of Mediation<sup>31</sup>**

<b>Atributes</b>	<b>Legal model</b>	<b>Restorative model</b>
<b>Place</b>	Centres for Justice and Law Court	Local Associations
<b>Mediators</b>	<ul style="list-style-type: none"> <li>- Individuals or associations Men</li> <li>- Sessional employees</li> <li>- Legally trained</li> <li>- No specific training in mediation</li> <li>- No Supervision</li> </ul>	<ul style="list-style-type: none"> <li>- Associations Gender Balance</li> <li>- Professionals or volunteers</li> <li>- Trained in the social sciences</li> <li>- Specific training in mediation</li> <li>- Analysis of practice</li> </ul>
<b>Process</b>	Offender/victim Short period of time	Complainant/offender Median or long period of time

<sup>29</sup> Barda Nawawi Arief.2012. Mediasi Penal, penyelesaian perkara di luar pengadilan. Pustaka Magister, Semarang

<sup>30</sup> Recommendation No. R (99) 19 by the committee of Ministers of The Council of Europe, Mediation in Penal Matters, <http://sfm.jura.uni-sb.de/archives/images/mediation>

<sup>31</sup> Jacques Faget. The Double Life...Loc cit

	One meeting	available
	Significant % of agreement	One or more meetings Average % of agreements

Restorative mediation model has been performed in French since long time ago, specifically on Juvenile delinquency cases, cases of ownership upon property and any case that deals with professional dispute.<sup>32</sup> Most of mediation on medical dispute/malpractice in French, practically, is performed by dividing both disputed parties into different caucus and into separated room. Each caucus is attended by mediator in separate sessions. Afterwards, the mediator will describe the advantage and weakness points of each disputed party. If the agreement is reached (*joint meeting*), the draft of agreement between both disputed party is compiled and endorsed.<sup>33</sup>

Up to this time Indonesia have no single standard of medical procedure. The medical procedure which is exist are different between one and another area. Not all of the Hospital in Indonesia have the same standard because of the different in hospital capability and technology.<sup>34</sup>

One of the obstacles that occur in Indonesia because it has a very wide area so that standard hospital facilities have criteria based on the type of the hospital itself. Each region has a different standard. For example between Yogyakarta and East Nusa Tenggara. So in case of negligence in medical practice will also consider the geography of the region. Moreover, each hospital has a Standard Operating Procedure (SOP), which vary, depending on facilities owned by the hospital. So that the demands of malpractice must be seen case by case basis. Can not be generalized things like what the malpractice, and which are not.

For example in the case of doctors Setianingrum in Pati in 1979. The incident was caused by injections of streptomycin 1 cc in patients who can not tolerate the drug. Having asked to see a doctor, the patient explained that he never went to another doctor and injected streptomycin. Doctors believe, after the injection is done, it turns out the patient died. In this case there is clearly a role of a patient on his death. By Pati District Court and the High Court declared one of Semarang doctor for negligence that caused the death of people. But the Supreme Court level the doctor found not guilty. The consideration is that although the defendant as a new doctor who experienced four years of serving in government clinics all limited ingredients. Setianingrum so doctors can not perform medical measures to prevent death, for example, the injection of adrenaline straight to the heart or intravenous fluids, administration of acidic substances and other actions that require complex means.<sup>35</sup>

Nonetheless, this case opened up opportunities for debate among legal persons. Does this act into the act of medical negligence or not. However, the terms of the inner attitude of doctors is part of the malpractice. Eg circumcision Javendra Case (2006) can be categorized as negligence. Doctors gave her a general anesthetic that caused

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<sup>32</sup> Ibid

<sup>33</sup> Ibid

<sup>34</sup> <http://www.beritasatu.com/kesehatan/152342-indonesia-belum-punya-standar-pelayanan-medis.html>

<sup>35</sup> Putusan Mahkamah Agung (Supreme Court) Number 600/K/Pid/1983, 27 July 1984

the death of the patient. Supposedly, doctors thought about the harmful effects of a general anesthetic because it is more risky than local anesthesia.<sup>36</sup>

As consideration, if it is viewed from the perspective of article 29 of Law number 36 of years 2009 on Healthcare, the alternative mediation is an introduction settlement effort outside the court if medical dispute happens. Mediation process of one of the obstacles that occur in Indonesia because it has a very wide area so that standard hospital facilities have criteria based on the type of the hospital itself. Each region has a different standard. For example between Yogyakarta and East Nusa Tenggara. So in case of negligence in medical practice will also consider the geography of the region. Moreover, each hospital has a Standard Operating Procedure (SOP), which vary, depending on facilities owned by the hospital. So that the demands of malpractice must be seen case by case basis. Can not be generalized things like what the malpractice, and which are not.

Mediation process can be chosen through MKDKI or Police. The Indonesia Board of Medical Discipline (Majelis Kehormatan Disiplin Kedokteran Indonesia/MKDKI) (see article 66 of Law number 29 of years 2004),<sup>37</sup> or the Police may appoint an accredited mediator. As the result, public owns choice of process which is considered brief and simple. Therefore, even though the police has received the report or complaint, the case is not automatically proceeded through criminal proceeding system. However, if the consent fails to be reached, criminal judicial proceeding system is performed. Regarding to the draft of mediation which has been approved by both disputed parties, the Police/MKDKI may submit it to the court for gaining endorsement.

The possibility of alleged medical malpractice in Indonesia consist of three steps. First, The Board of Medical Ethic which analyses the implementation of medical ethic by the MD. This board will give the ethic sanction to those who proved omitting the ethic. Second, The Board of Medical Discipline (MKDKI) which determine the medicine implementation. The Board of Medical Discipline have 3 kinds of sanctions: written warning, obliged the MD/hospital staff to join the re-education program, abolition the registration letter permanently or temporary. Third, compliance to the law, it means that the patient could proposed a complaint to the court through penal or private procedure using the basis on Law on Medical Practice or Penal Code especially on the article of intention and negligence. Restorative models of mediation is an alternative that is most appropriate at this time because it involves a special mediator who indeed has been specially trained by an accredited institution. Although mediation is not yet up to the level of the criminal justice system, but the description of disputed and needs what is desired by both parties to the dispute. The time provided in the resolution is quite long, so that the number of meetings conducted by the parties to the dispute would be to produce a solution that is much better than the model of judicial procedure in court.

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<sup>36</sup> Adam Chazawi. 2012. Malpraktik Kedokteran. Bayu Media: Malang, p.93

<sup>37</sup> Article 66: Whoever find out or whoever the interests is damaged by action of doctor or dentist when undertaking medical practice duties may propose complaint in written form to The Indonesia Honorary Medical Discipline Assembly (Majelis Kehormatan Disiplin Kedokteran Indonesia/MKDKI)

## **The Legal Relationship Between Doctor And Patient In Indonesia Law**

Although the position of medical doctor and patient is supposedly balance since both of them are dependent, the fact shows opposite result. Commonly the patient is on weaker side if the medical dispute occurs. It occurs due to several assumptions:

*First*, from the perspective of legal relation, the form of agreement between medical doctor-patient in juridical aspect belongs to “ best effort agreement” (*inspanningsverbintenis*). Therefore, there is an assumption that doctor cannot give maximum guarantee on the success of his/her effort in curing the illness of the patient, because the result of medication depends on some related factors (age, degree of seriousness of the illness, the type of illness, complication, etc).

*Second*, there is assumption which claimed that the standard and medical procedure are not fixed matter since in a certain period evaluation has to be performed in order to play catch up with rapid development of science and technology. The standard and medical procedure which possesses relative characteristic ultimately bears result on imbalance legal standing between the medical doctor and patient.

*Third*, which party is liable if there is allegation on medical malpractice? Regarding to the consumer protection, the party which liable on the damage is business actor, including the doctor and hospital. In the consumer protection perspective, the consumer have no obligation to prove weather any business actor fault or not because the consumer protection applied the legal burden of prove. However, in fact, if the omission occurs, there is no legal certainty for the patient who stands on the position of consumer.

Specifically, the article 29 of Law number 36 of year 2009 on Healthcare that replaces Law number 23 of year 1992 provides dispute settlement effort through mediation mechanism. Mediation is performed in case that involving professional medical staff who allegedly committing omission when undertaking his/her job. Such omission shall be settled through mediation beforehand.

Mediation concept in the Law number 36 of year 2009 is an effort to settle any dispute between medical staff and the patient as consumer of healthcare service. Such mediation has purpose to settle dispute outside the court by employing a mediator who has been chosen and agreed by both disputed parties.

The main concern is, considering the legal standing between professional medical staffs and the patient is imbalance, on appropriate model of mediation that is able to facilitate the conflicting interests from both parties diametrically.

Nevertheless, due to their knowledge on illness and medical technology, medical staff (doctor, nurse, midwife, physician) legal standing is more superior to the patient. The patient's knowledge on illness and medical science is much limited compared to healthcare service provider. If it is viewed from the consumer protection perspective, the patient as consumer of healthcare service is the party which supposedly shall be protected. Therefore, the mediation model needs to be reviewed carefully in order to find the appropriate one if the medical dispute/ medical malpractice occurs.

The special feature of the medical profession, among others, are autonomous, have a certain identity, has a certain value system, have specific binding kemunitas physician behavior both among colleagues and members of the community. Professional standards in Indonesia are determined among doctors themselves. A profession that is autonomous, ie, all the provisions concerning the implementation of the work profession determined by professional groups. In Indonesia set in law the practice of medicine and health Act which requires doctors to follow professional standards and operational standards in their profession.

Until now Indonesia has not had a medical professional standards that apply nationally. The absence of professional standards is due to the circumstances of each hospital in a different area because of the constraints of geography that are difficult to reach with transport and the limited number of physicians treating patients. When enacted uniform standards will make a difference in the treatment of patients.

Furthermore, Informed consent is the standard protocol for protecting the interests of patients and doctors from the beginning. In Indonesia, informed consent stipulated in Law No. 29 of 2004 on medical practice, informed consent is consent given by patients or their families on the basis of a description of the medical procedure to be performed on these patients.

According to article 45, paragraph (3) of Law No. 29, 2004, informed consent can be:

- a. Diagnosis and procedure of medical action
- b. The purpose of medical action undertaken
- c. Another action alternatives and risks
- d. Risks and complications that may occur
- e. Prognosis for their actions

Informed consent dual function. For doctors, it can make sense in running a medical procedure on a patient, and can be used as a defense against possible claims or demands of patients and their families when arising from unintended. For patients, informed consent is an appreciation of their rights by a doctor and can be used as a reason for a lawsuit against a doctor in case of deviation from the mean doctor's office gave approval service.

Informed consent must be made in writing to the medical treatment is a high risk, such as injury, disability or death are carried out in a hospital or clinic and must make a medical record.

People are entitled to give informed consent is essentially the patients themselves. However, if the patient is in forgiveness, can be provided by the next of kin. However, if the patient was unconscious or in conditions allowing immediate explanation is given then made approval,

Although legally known who is responsible if there is suspicion of negligence / malpractice, but in fact the position of the doctor and the patient is balanced because both need each other, because the principle of the informed consent incorporated into the class of "covenant best efforts" (inspanningsverbintenis), standards and

procedures medical is relative and who is responsible if there is suspicion of negligence / malpractice.

## **Conclusion And Recommendation**

Indonesia actually has already have a settlement procedure out of the court through MKDKI (Board of Medical Discipline) based on Law Number 29 Year 2004 on Medical Practice. In fact, the Indonesian are tent to choose the settlement on medical practice to the court because MKDKI is a non well-known institution in Indonesia society. Moreover, the MKDKI settlement couldn't give a compensation to the victim.

The problem is Indonesia have no single standard of medical procedure therefore medical malpractice cases were failed to be proved.

Connected with penal mediation on medical dispute, the settlement of medical dispute shall be performed based on good faith from both disputed parties in order to reach fair dispute settlement.<sup>38</sup> Jurgen Habermas, a German philosopher, even commented that good communication between disputed parties is worthwhile for it represents a good will to provide space for communication by considering moral rights, human rights and sincerity from both parties.<sup>39</sup> Moreover, medical dispute settlement shall be in accordance to legal norms that live in society, which based on collective values or dealing with collective achievement (*sinngebungen*) to whom the protection on interests is going to be conducted on the basis of virtue since it is worth to achieve.<sup>40</sup> However, in terms of knowledge about diseases and medical technology, patient position inferior to medical health professionals (doctors, nurses, midwives, paramedics). Knowledge of the disease and medicine from the patient's side is more limited than on knowledge of health service providers. considering the position of the parties between medical health workers and patients who were not balanced it needs a lot of rethinking the right model to bridge the interests diametrically opposite.

Restorative models of mediation is an alternative that is most appropriate at this time because it involves a special mediator who indeed has been specially trained by an accredited institution. Although mediation is not yet up to the level of the criminal justice system, but the description of disputed and needs what is desired by both parties to the dispute. The time provided in the resolution is quite long, so that the number of meetings conducted by the parties to the dispute would be to produce a solution that is much better than the model of judicial procedure in court. But there are principles that need to be considered, such as: standard disease management protocols, the capacity of physicians who treat patients in accordance with medical standards or not. Medical risks have been delivered or not patients and families. Each region has a different standard, because the geographic areas of Indonesia are vast territory.

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<sup>38</sup> Hon Robert L. Harris. 2003. *Mediation: Better Resolution of Medical Malpractice Clai*me. McCammon Group: USA

<sup>39</sup> Donal O'Reardon. 2010. *Mediation and Philosophy*. Sullivan University, dikutip dari Mediate.com

<sup>40</sup> Jan Rimmelink.2004. *Hukum pidana*. Gramedia pustaka utama, p. 3

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