

Implementation Of The Ultimum Remedium Principle In Resolving Unsuccessful Medical Disputes With Mediation

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Abstract

Medical malpractice is an increasingly frequent issue in Indonesia. Medical malpractice can develop into a medical dispute when there is dissatisfaction or loss felt by the patient or his or her family due to alleged medical negligence or communication failures in health services. Medical dispute resolution can be done through non-litigation channels or litigation channels. The non-litigation route that is often used in resolving medical disputes is the mediation route. This study aims to analyze the application of the ultimum remedium principle in resolving medical disputes that fail to be resolved through mediation. The method used is a normative legal approach with secondary legal data analysis. The discussion shows that mediation, as an alternative form of dispute resolution, offers excess efficiency, confidentiality, and maintenance of relationships, but often fails due to weak understanding, regulation, or good faith of the parties. The litigation route is the last option in resolving medical disputes due to the factors of long time, cost, and risk of overcriminalization of medical personnel. Therefore, the application of the principle of ultimum remedium which places criminal law as a last resort, prioritizes non-litigation channels such as mediation, in order to maintain a balance in the protection of patient rights and prevent the criminalization of medical personnel. Implementation of these principles requires broad education, clear regulatory support, and cross-stakeholder collaboration to improve the fairness and effectiveness of medical dispute resolution.

Keywords: *Ultimum Remedium Principle, Medical Disputes, Mediation*

INTRODUCTION

Medical malpractice is an increasingly frequent issue in Indonesia. Based on data from the Ministry of Health, in 2020 there were 370 cases of malpractice that occurred in one year (Sherly, 2023). A study that analyzed malpractice cases in the Directory of Decisions of the Supreme Court of the Republic of Indonesia over a period of 10 years (2011-2021) obtained 30 decisions related to malpractice cases, with 24 cases occurring in hospitals. Based on the type

of incident category, there were 8 cases (33.3%) of adverse events that caused injury, 9 cases (37.5%) of events that caused permanent disability, 5 cases (20.8%) of events that caused death, and 2 cases (8.3%) of others.

Medical malpractice can develop into a medical dispute when there is dissatisfaction or loss felt by the patient or the patient's family while receiving health services. Medical disputes can be triggered either due to alleged medical negligence, procedural errors, or communication failures between patients and medical personnel. In the legal system in Indonesia, medical dispute resolution can be done through non-litigation (outside the court) or through litigation (through the court) (Siska Elvandari, 2015). Each dispute resolution has its advantages and disadvantages. Dispute resolution through non-litigation is usually relatively faster, costs less, but cannot be forced to implement it because it depends on the will and good faith of the parties to the dispute. Meanwhile, dispute resolution through litigation usually takes a long time because it has to follow formal requirements and procedures, incurs large costs, but has an executory nature in the sense that the implementation of the judgment can be imposed by the authorized institution.

Law Number 17 of 2023 concerning Health in Article 306 paragraph (3) states that medical personnel or health workers who are suspected of criminal acts, law enforcement officials prioritize dispute resolution with a restorative justice mechanism. Furthermore, Article 310 also states that in the event that medical personnel or health workers are suspected of making mistakes in carrying out their profession that cause losses to patients, disputes arising from such mistakes shall be resolved first through alternative dispute resolution outside the court.

Alternative dispute resolution outside the court is known in several forms, namely mediation, negotiation, conciliation and arbitration which are philosophically based on resolving disputes by peaceful means and consensus results directed towards a win-win solution. Mediation in medical dispute resolution is often the first choice because the process is relatively faster, does not require large costs, and can provide justice for both parties to the dispute. In addition, mediation is closed to the public, so that everything disclosed in the examination is not known to the public with the intention of maintaining the reputation of the disputing parties. This can also prevent a decrease in public trust in the medical profession (Triana, 2019).

However, it is not uncommon in the implementation of mediation efforts to fail to reach an agreement. This failure is caused by various factors, such as the parties' lack of understanding of the mediation mechanism, weak regulatory support, or emotional attitudes that prevent the agreement from being reached. As a result, many cases of medical disputes have finally been continued to the litigation route. For example, a medical dispute case occurred in Pontianak, West Kalimantan in 2022. The medical dispute was caused by a doctor's medical negligence that caused burns to the penis of a 9-year-old boy while being circumcised. Damage occurs in the part of the patient's urethra that causes urination disorders. This case was mediated by the Regional Child Protection Commission of Pontianak City and the Indonesian Doctors Association of Pontianak City Branch. However, mediation failed, because the victim's parents asked for Rp 300 million in damages, but the doctor was unable to accept it. Finally, the family reported the case to the Pontianak Police on April 1, 2023 (Hendra Cipta & Ardi Priyatno Utomo, 2023).

In this case, the principle of *ultimum remedium* becomes relevant to apply. The principle of *ultimum remedium* emphasizes that criminal efforts must be used as the last resort in resolving a dispute, after other efforts such as mediation do not reach an agreement. The application of this principle is expected to minimize the use of litigation channels in resolving medical disputes, as well as encourage the parties to resolve disputes through alternative mechanisms for more cooperative dispute resolution. The application of the *ultimum remedium*

principle in medical disputes aims to protect the medical profession from excessive criminalization, while safeguarding patients' rights to obtain justice.

Based on the above background, it is important to explore the application of the *ultimum remedium* principle in medical dispute resolution. Therefore, this study aims to analyze the application of the principle of *ultimum remedium* in resolving failed medical disputes through mediation.

RESEARCH METHOD

The type of research used by the author in this study is a normative legal research method, namely researching the law as what is written in laws and regulations. Law is conceptualized as a rule or norm that is a guideline for human behavior that is considered appropriate. Therefore, the data source used in this study comes from secondary legal data, which consists of primary legal materials, secondary legal materials or tertiary data. The analysis of legal materials carried out qualitatively for drawing conclusions, aims to determine the application of the principle of *ultimum remedium* in resolving failed medical disputes through mediation.

DISCUSS AND ANALYSIS

Medical Disputes

A medical dispute can be interpreted as a conflict between the patient and the doctor and/or hospital, caused by one party who is dissatisfied or violated by the other party. The violation of a person's rights by other parties in the provision of health efforts can be interpreted as a violation of the patient's rights when carrying out professional obligations carried out by doctors and/or health service facilities that do not protect patient safety properly, resulting in a Patient Safety Incident (Yussy A Mannas & Siska Elvandari, 2022). Arrangements regarding patient safety have been regulated in Government Regulation Number 28 of 2024 concerning Implementing Regulations of Law Number 17 of 2023 concerning Health. In Article 888 paragraph (2), it is stated that the definition of Patient Safety Incident is any event that is related or not directly related to the service, which can result in losses or potential injuries to patients and can be prevented. Patient Safety Incident is basically negligence committed by health workers in carrying out professional obligations, which in the wider community is better known as malpractice.

The types of malpractice that doctors may commit when carrying out the medical profession can be divided into two forms, namely ethical malpractice and juridical malpractice (administrative malpractice, civil malpractice and criminal malpractice) (Lintang, Kastania, Hasnati, 2021). Meanwhile, the grouping of malpractices based on the severity of the malpractice ranges from mild to severe: Error of judgment, Slight negligence, Gross negligence, Intentional wrong doing or criminal intent. Malpractice is often the trigger for medical disputes between patients and health workers or hospitals.

The characteristics of medical disputes are the existence of a doctor-patient relationship, negligence/error, objects in the form of healing efforts, and the patient is the aggrieved party. Factors that cause medical disputes include (Sinaga, 2021):

1. Doing what the agreement says shouldn't be done;
2. Doing what is agreed upon obligatory but late or not on time;
3. Doing what is agreed upon is mandatory but imperfect or not done;
4. Lack of information communication;
5. Differences in perception between doctors and patients;
6. Differences of interest;

7. Gaps in expectations and outcomes;
8. The party who feels aggrieved has expressed his dissatisfaction either directly to the party considered to be the cause of the loss or to another party. These dissatisfaction cannot be resolved properly or *slow to respond*;
9. Developments in society can occur due to the influence of invalid information from social media;
10. Fading/neglecting of ethical values;
11. Competition between peers; and
12. Weak patient trust in doctors.

Medical dispute resolution in Indonesia can be done through professional or non-professional institutions. Settlement through medical professional institutions is carried out through the Honorary Council of Medical Ethics and the Honorary Council of Indonesian Medical Disciplines. Meanwhile, settlement through non-professional institutions is carried out through non-litigation and litigation channels. Medical dispute resolution through non-litigation channels has been regulated in Article 1 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which states that alternative dispute resolution outside the court can be carried out by means of consultation, negotiation, mediation, conciliation or expert assessment.

Mediation as an Alternative to Medical Dispute Resolution

Law Number 17 of 2023 concerning Health in Article 306 paragraph (3) states that medical personnel or health workers who are suspected of criminal acts, law enforcement officials prioritize dispute resolution with a restorative justice mechanism. Furthermore, Article 310 also states that in the event that medical personnel or health workers are suspected of making mistakes in carrying out their profession that cause losses to patients, disputes arising from such mistakes shall be resolved first through alternative dispute resolution outside the court. Through this provision, the Health Law encourages a restorative justice approach in the event that there is an alleged violation of the law in health-related disputes. In addition, this new approach is intended to speed up the dispute resolution process while still ensuring fairness and equality.

It has been explained previously that dispute resolution outside the court can be done by means of consultation, negotiation, mediation, conciliation or expert assessment. Mediation is the most widely used out-of-court dispute resolution route for medical dispute resolution.

The regulation on mediation as one of the channels in dispute resolution has been contained in the Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Court. In Article 1, it is explained that the definition of mediation is a way of resolving disputes through a negotiation process to obtain an agreement between the parties with the help of a mediator. Mediation emphasizes dialogue and mutual agreement between the parties to the dispute. Elements contained in the definition of mediation (Gunawan Widjaja & M. Hafiz Aini, 2022):

- a. Mediation based on the principle of voluntariness through a consultation;
- b. The mediator only helps the parties to find a solution;
- c. The mediator must be accepted by the disputing parties;
- d. The mediator does not have the authority to make a decision;
- e. The goal is to produce an agreement that can be accepted by the parties.

In dispute resolution, especially in medical disputes, mediation has several advantages, including (Risma Situmorang, 2023):

1. Time and cost efficiency. Dispute resolution through mediation tends to take a faster time because it does not follow standard requirements and procedures. The costs incurred are also cheaper than the litigation process.
2. A more harmonious relationship. Mediation aims to create a win-win solution for both parties to the dispute, so that the relationship between patients and medical personnel can be maintained.
3. Concealment. The mediation process is closed, thus protecting the privacy of patients and medical personnel.

The mediation process will require a mediator. It is explained in PERMA No. 1 of 2016 that a mediator is a judge or other party who has a mediator certificate as a neutral party who assists the parties in the negotiation process to find various possibilities for resolving disputes without using the method of deciding or forcing a settlement. The mediator in carrying out its function has the purpose of helping the parties involved in the dispute in an equal and fair manner, not being indifferent, and involving themselves with the parties to identify the interests of each party to the dispute. Mediators also need to create effective communication for the parties to the conflict.

In medical disputes, the mediator should be a person who has medical and legal knowledge, because the dispute to be resolved is related to medicolegal, which means combining legal and medical aspects. Mediators will certainly provide a deeper and broader perspective if they have a background that is in accordance with their professional practice, namely doctors or the health worker profession. Doctors, based on their profession, are expected to be able to bridge the gap between the parties to the dispute. The role of doctors as mediators in medical dispute cases is expected to be able to translate and convey medical points of view to patients, and at the same time translate points of view and alternative dispute resolution to all parties, so that the mediation process can run better and have outputs as expected by the parties to the dispute (Jauhani et al., 2023).

To be able to mediate well, a mediator must have the ability to (Sinaga, 2021):

1. Master all stages well;
2. Have the ability to bring together the desires and interests of the parties. Finding the common ground/middle ground;
3. Able to formulate sentences concisely and simply so that they are easy to understand;
4. Able to apply applicable legal principles by explaining the legal basis;
5. Lay out deals clearly, concisely and simply.

Dispute resolution through mediation is very beneficial, because the parties have reached an agreement that ends their dispute fairly and mutually beneficial. Even in failed mediation, where the parties have not reached an agreement, the benefits have actually been felt. The willingness of the parties to meet in a mediation process has at least been able to clarify the root of the dispute and narrow the dispute between them. This shows that there is a desire of the parties to resolve the dispute, but they have not found the right format that can be agreed upon by both parties (Benny H. L Situmorang, 2019).

As an implementation of the Health Law, the government has established the Indonesian Medical and Health Mediation and Arbitration Institute /LMAMKI on August 15, 2023. This institution serves as a specialized platform for resolving medical disputes outside of the conventional court system. LMAMKI operates with a commitment to neutrality, integrity, and the principle of achieving a win-win solution, in accordance with the objectives referred to in Article 310 of the Health Law. With the existence of this special health dispute resolution institution, it is hoped that each party can resolve their disputes with the help of neutral parties who are also experts in the health sector (Valentino Revol Korompis & Dinda Roossa Prasetya, 2023).

However, in practice, mediation of medical disputes in Indonesia often encounters obstacles, such as: lack of understanding of the parties to the purpose and mechanism of mediation, high emotional attitude of the patient or the patient's family, making it difficult to accept the mediation results, lack of mediation facilitators who have a deep understanding of medical and legal issues, and the absence of binding sanctions against parties who do not comply with the mediation results. In addition, there are also several factors that can cause mediation failure, including (Wahyudi Ikhsan, 2014):

- 1) The time given is very short.
 - The parties to the dispute from the beginning have a mindset that they are right. It takes enough time to change this mindset, that there are other people who disagree with their mindset. The parties must not stick to a positional mindset, but must be open and look for alternatives to solving problems together.
 - The parties cannot always be present at the mediation within the specified time. This can happen from an element of intention or not. For example, the parties do not want to resolve the dispute through mediation, so they tend to play with the mediation session schedule. Likewise, sometimes they are constrained by a long distance from the residence of the parties, or are also hindered because of work that does not give permission for hearing/leave.
 - Sometimes the busy mediator does not have enough time to lead the mediation in a limited time.
- 2) There are cases that must be decided legally.
- 3) There is an assumption from the public that the decision to win the case is part of a person's prestige.
- 4) Mediators are less able to encourage a peace agreement.

The Principle of *Ultimum Remedium* in Criminal Law

Ultimum remedium is a Latin term that means: effort or last resort. It means something that is used as a last resort or possibility. In practice, the term is widely used as a term in criminal law, which means that criminal law is only used as a last resort (Yoserwan, 2021).

In Indonesian legal literature, the term *ultimum remedium* is used with the same concept. Wirjono Projodikoro, for example, translates with the ultimate (last) effort. He said:

"Norms or rules in constitutional law and administrative law must be solely responded to with administrative sanctions, as well as norms in civil law must first be responded to with civil sanctions. Only if these administrative sanctions and civil sanctions are not enough, to achieve the goal of straightening the social balance, then criminal sanctions will also be held as the ultimate (last) or ultimate *remedium* (Yoserwan, 2021)."

Meanwhile, according to Sudikno Mertokusumo, *ultimum remedium* is one of the principles contained in Indonesian criminal law, which says that criminal law should be used as a last resort in law enforcement and it is considered that there is still an alternative solution other than applying a criminal law rule (Sudikno Mertokusumo, 2014).

The principle of *ultimum remedium* is a principle that places criminal law as the last resort in solving a problem. *Ultimum remedium* as a term or concept, is used in criminal law to show the character of criminal law, namely criminal law must be used, applied or implemented as a last resort to overcome community problems. Especially against acts or actions that are detrimental to the community, especially criminal acts. In its development, the doctrine of *ultimum remedium* is not only a basic concept in criminalizing an act or deed, but also in the formation of criminal law, namely whether there are other sanctions other than criminal sanctions before the application of criminal sanctions. Furthermore, the doctrine is also interpreted in the imposition of criminal penalties (Yoserwan, 2021).

The principle of *ultimum remedium* aims to prevent overcriminalization, because criminal law is considered a repressive tool and can have a significant social impact (Elwi Danil, 2020). The application of the principle of *ultimum remedium* in the context of criminal law enforcement in Indonesia is very important for the following reasons (Moh Puji Sulistyono, 2024):

1. Protection of Human Rights.

The principle of *ultimum remedium* places the protection of human rights as a priority in the enforcement of criminal law. By ensuring that state power is used as a last resort after other alternatives have been considered, this principle helps prevent abuse of state power that could violate the human rights of the accused, such as the right to liberty, dignity, and fair treatment in the criminal justice process.

2. Fairness and proportionality.

The principle of *ultimum remedium* also supports the aspect of justice in law enforcement. By considering alternatives such as mediation before imposing criminal sanctions, this principle ensures that the punishment given is in accordance with the crime committed and does not exceed the permissible limit. This helps prevent excessive or disproportionate enforcement of the law against violators.

3. Effectiveness of law enforcement.

The principle of *ultimum remedium* also plays a role in increasing the effectiveness of criminal law enforcement by taking into account factors such as rehabilitation, prevention, or reconciliation as alternatives in dealing with crime. This holistic approach helps address the root causes of crime, not just addressing the symptoms, so that it has a more sustainable impact on crime prevention and control efforts.

4. Encouraging innovation in law enforcement.

The principle of *ultimum remedium* encourages the development of innovation in criminal law enforcement by considering new alternatives in dealing with violations of the law. This can give birth to rehabilitation, mediation, or other alternatives that are more effective in dealing with crime, as well as increase the efficiency and effectiveness of the criminal justice system.

5. Strengthening legal certainty.

The principle of *ultimum remedium* also contributes to the strengthening of legal certainty by ensuring that enforcement actions are carried out in accordance with a clear and predictable legal framework. Thus, this principle helps strengthen the integrity and legitimacy of the criminal justice system, as well as build public trust in justice upheld by the state.

The principle of *ultimum remedium* is an important foundation for the upholding of justice, human rights, and the effectiveness of criminal law enforcement in Indonesia. The application of this principle is very important to realize a fair and equal legal system for all Indonesian citizens.

Implementation of the *Ultimum Remedium* Principle in Medical Dispute Cases

The implementation of the *ultimum remedium* principle in medical disputes serves to maintain a balance between the protection of patient rights and the protection of medical personnel from unnecessary criminalization. Criminalization of medical personnel can not only harm individual perpetrators, but can also create a negative deterrent effect that makes medical personnel reluctant to take risks in handling patients (defensive medicine). Therefore, the application of this principle requires careful consideration and is only used when all other settlement efforts, such as mediation, have proven to be unsuccessful.

The application of the *ultimum remedium* principle in medical dispute resolution still faces various challenges, including:

1. Lack of Clear Legal Guidelines

There is no firm legal guidance on how and when the *ultimum remedium* principle should be applied in medical disputes. This often makes law enforcement officials immediately process patient reports as criminal offenses without considering other settlement routes.

2. Public and Media Pressure

In some cases of medical disputes, pressure from the public and sensational media coverage often encourage the criminalization of medical personnel, although the case can still be resolved through non-litigation mechanisms.

3. Lack of Education on the *Ultimum Remedium* Principle

Both medical personnel, patients, and law enforcement officials often do not understand the importance of this principle. As a result, criminal law is often used as the first step.

In the resolution of unsuccessful medical disputes by mediation, the principle of *ultimum remedium* can be applied in several ways. First, it encourages the parties to seek alternative dispute resolution alternatives to litigation, such as arbitration or conciliation. This is in line with Article 4 paragraph (1) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which states that disputes or differences of civil opinion can be resolved by the parties through alternative dispute resolution based on good faith by setting aside litigation settlement in the District Court.

Second, encourage the use of internal mechanisms within health institutions, such as ethics committees or professional honorary assemblies, to resolve medical disputes. This mechanism can be an alternative before taking the litigation route, because it is considered better able to understand the complexity of medical problems and prioritize a more cooperative approach.

Third, applying the principle of *ultimum remedium* in the law enforcement process. In this case, law enforcement must ensure that criminal remedies are truly the last resort taken, after other efforts such as mediation, arbitration, or internal mechanisms of health institutions have been unsuccessful. Law enforcers must also consider the proportionality aspect in the imposition of criminal sanctions, so that overcriminalization does not occur.

CLOSURE

Conclusion

The application of the principle of *ultimum remedium* in medical dispute resolution is an important step to maintain a balance between the protection of the rights of patients and medical personnel. The application of this principle in medical dispute resolution aims to minimize the use of litigation channels and encourage dispute resolution through alternative mechanisms that prioritize peace. Its implementation can be carried out by encouraging the use of alternative dispute resolution other than litigation, optimizing the internal mechanism of health institutions, and applying the principle of *ultimum remedium* in the law enforcement process. However, the implementation of this principle in Indonesia still faces various obstacles, ranging from lack of regulation to lack of education to the public. For this reason, coordinated and comprehensive efforts involving various stakeholders (government, health institutions, and law enforcement), and supported by adequate regulations, are needed so that medical disputes can be resolved more fairly and constructively.

Suggestion

1. Government

- Develop clear regulations and guidelines regarding the handling of medical disputes that prioritize non-litigation mechanisms (such as mediation or arbitration) before applying criminal law;

- Establish an independent medical dispute resolution agency to handle medical disputes professionally and quickly, involving medical and legal experts;
 - Educating the public about the rights and obligations of patients and the mechanism for resolving medical disputes.
2. Health profession organizations
- Improving the professionalism of health workers by conducting ongoing training on legal aspects in medical practice;
 - Strengthen ethics and legal committees in each health profession organization to handle medical dispute complaints in a fair and transparent manner;
 - Encourage internal dispute resolution through mediation involving professional organizations.
3. Law Enforcement
- Prioritizing non-litigation avenues in medical dispute resolution.

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