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## **Maqasid al-Sharia in Court-Mediation Reform: A Study on Efficiency and Social Justice in Medical Disputes**

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### **Abstract:**

Islam prioritises peace as a means of resolving disputes. Peace between parties can be achieved in various ways, one of which is mediation. Despite creating social justice, the effectiveness of mediation in resolving various complex civil cases is still questionable. This article aims to analyse the efficiency of resolving medical disputes through mediation based on the principles of Islamic law. This article is based on the results of normative juridical research with a statutory approach and a conceptual approach. The results of this study found that the implementation of facilitative mediation by the mediator in medical dispute resolution helps improve its efficiency. Furthermore, before mediating conflicts, judge-mediators need to take a more proactive position, improve their communication skills, and have sufficient knowledge of health law. A well-informed mediator is likely to provide social justice for doctors and patients.

**Keywords:** mediation; medical disputes; social justice; court.

### **Introduction**

Medical disputes are still a concern for legal scholars in Indonesia. The significant difference in perspectives between doctors and patients leads to conflicts in court.<sup>1</sup> Most medical disputes occur due to alleged malpractice.<sup>2</sup> In 2023, Nani Darham, salah satu aktris Indonesia, died due to liposuction surgery.<sup>3</sup> Another case

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<sup>1</sup> Muh Nasser, "Medical Dispute in Indonesia Health," in *Legal and Forensic Medicine*, ed. Roy G. Beran (Berlin, Heidelberg: Springer, 2013), 12, [https://doi.org/10.1007/978-3-642-32338-6\\_137](https://doi.org/10.1007/978-3-642-32338-6_137).

<sup>2</sup> Cheol Won Hyeon et al., "Prevention of Medical Malpractice and Disputes through Analysis of Lawsuits Related to Coronary Angiography and Intervention," *The Korean Journal of Internal Medicine* 35, no. 3 (May 2020): 605–18, <https://doi.org/10.3904/kjim.2018.365>.

<sup>3</sup> Dzakki Nur Cahyo and Irfan Maullana, "Kronologi Meninggalnya Nanie Darham, Diduga akibat Malapraktik Klinik Sedot Lemak," KOMPAS.com, November 25, 2023,

involved a mother who was paralyzed after a caesarean procedure,<sup>4</sup> and a child suffering from brain stem death after a tonsillectomy.<sup>5</sup> Medical disputes can cause great physical, mental and reputational damage to physicians and hospitals, and bring losses and adverse social influences due to negative media coverage. For hospitals, their operations such as diagnosis and treatment are disrupted and hospital staff, equipment and facilities are at risk.<sup>6</sup>

Under Indonesian law, the legal relationship between medical practitioners and patients is known as *inspanning verbintenis*—a relationship to provide the best service and not based on the result.<sup>7</sup> Therefore, in case medical negligence or malpractice occurs, patients can file a claim against the health practitioners and hospitals following a breach of contract.<sup>8</sup> Medical disputes are different from commercial or family disputes. The characteristic of medical disputes includes physical and emotional well-being, needing fast and precise resolution.<sup>9</sup> Article 310 of Law No. 17 of 2023 concerning Health (the Health Law) stipulates medical disputes must first be resolved through mediation before they can enter legal proceedings. In practice, the mediator is usually retained or employed by the hospital, where this reduces impartiality and there is a tendency to be not neutral or independent.<sup>10</sup> Usually, the mediation takes place in the hospital, and the mediator cannot control the environment with parties who are generally under so much pressure triggered by the dispute.<sup>11</sup>

The issue of medical dispute mediation has attracted significant attention among researchers. Widiastuti et al argue that the occurrence of medical disputes is often caused by the lack of effective communication in following up on patient dissatisfaction with the medical service or treatment they receive.<sup>12</sup> Arif Dian Santosa et al, discovered that mediators in medical disputes frequently fall short of being effective facilitators, resulting from the mediators' lack of encouragement toward both doctors and patients. The patients do not feel that their need is well

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<https://megapolitan.kompas.com/read/2023/11/25/07433361/kronologi-meninggalnya-nanie-darham-diduga-akibat-malpraktik-klinik>.

<sup>4</sup> Tim detikcom, "Ibu Lumpuh Usai Caesar Adukan Dugaan Malpraktik RS Di Ciputat Ke Kemenkes," *detikNews*, March 2, 2023, <https://news.detik.com/berita/d-6597169/ibu-lumpuh-usai-caesar-adukan-dugaan-malpraktik-rs-di-ciputat-ke-kemenkes>.

<sup>5</sup> Tim detikcom, "Dinkes Jabar Panggil RS Di Bekasi Terkait Bocah Mati Otak Usai Operasi," *detikNews*, October 5, 2023, <https://news.detik.com/berita/d-6966431/dinkes-jabar-panggil-rs-di-bekasi-terkait-bocah-mati-otak-usai-operasi>.

<sup>6</sup> Mengxiao Wang, et al., "The Role of Mediation in Solving Medical Disputes in China," *BMC Health Services Research* 20 (2020): 2.

<sup>7</sup> Mengxiao Wang et al., "The Role of Mediation in Solving Medical Disputes in China," *BMC Health Services Research* 20, no. 1 (March 18, 2020): 225, <https://doi.org/10.1186/s12913-020-5044-7>.

<sup>8</sup> Ukilah Supriyatin, "Hubungan Hukum Antara Pasien Dengan Tenaga Medis (Dokter) Dalam Pelayanan Kesehatan," *Jurnal Ilmiah Galuh Justisi* 6 (2018): 191.

<sup>9</sup> Mahsun Ismail, "Perlindungan Hukum Bagi Dokter Dalam Menangani Keadaan Medis Darurat Berdasarkan Implied Consent," *Islamadina : Jurnal Pemikiran Islam* 20, no. 1 (July 2, 2019): 53, <https://doi.org/10.30595/islamadina.v0i0.4380>.

<sup>10</sup> Muhammad Afiful Jauhani, *Dilema Kapabilitas Dan Imparsialitas Dokter Sebagai Mediator Sengketa Medis* (Sleman: Scopindo Media Pustaka, 2020).

<sup>11</sup> Ismail, "Perlindungan Hukum Bagi Dokter."

<sup>12</sup> Setiati Widiastuti, Sri Hartini, and Eny Kusdarini, "Mediasi Dalam Penyelesaian Sengketa Kesehatan Di Jogja Mediation Centre," *SOCLA: Jurnal Ilmu-Ilmu Sosial* 14 (Mei 2017): 15.



represented in the mediation process.<sup>13</sup> Kusumaningrum claims that using mediation to settle medical disputes during the COVID-19 epidemic has increased efficiency by lowering costs and saving time, protecting parties' privacy, and empowering medical professionals and hospitals to confidently offer care. It goes on to contend that in order for mediators in medical disputes to assist the parties in reaching a resolution, they must possess expertise in both medicine and pertinent health-related law.<sup>14</sup> None of the previously referenced studies examine the question from a social justice standpoint.

In many countries, including Indonesia, governments have undergone civil justice reform by increasing the usage of mediation as a means of improving judicial performance.<sup>15</sup> While court mediation has been implemented since 2003, questions remain regarding its efficacy, especially in resolving complex civil cases including medical disputes. Health care, including medical services, is a highly complex practice. It involves ethics, medical science and legal issues.<sup>16</sup> Thus, traditional court mediation currently applied in court is not compatible. If the problem is left unaddressed, there is a potential that court mediation may worsen the patient and doctor relationship and erode the patient's rights.<sup>17</sup> To deal with medical disputes, the Indonesian judiciary should make some reforms to the practice of court mediation.

Peace is a fundamental teaching in Islam. Solving problems through mediation is a manifestation of maqashid al syariah because mediation is important in Jalbu al-Mashalih wa Dar'u al Mafasid (to materialize benefit and avoid damage). Inappropriate handling of legal problems will leave the relationship among society members spoiled.<sup>18</sup> In keeping with the maqashid, Article 29 of Law No. 36 of 2009 concerning Health requires patients and doctors as well as health providers to first mediate differences. The primary goal is to uphold their positive rapport and mutual trust to facilitate a friendly and peaceful resolution of the conflict. Mediation is deemed important because the use of mediation can be compatible with the pursuit of social justice. Social justice means achieving relative equality of conditions between all groups or classes within the society.<sup>19</sup> Wherever a system perpetuates inequalities between groups based on wealth, race, religion, ethnicity,

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<sup>13</sup> Arif Dian Santosa, Isharyanto, and Adi Sulistiyono, "Penyelesaian Sengketa Medik Melalui Mediasi Oleh Majelis Kehormatan Disiplin Kedokteran Indonesia (MKDKI) Untuk Dapat Menjamin Keadilan Dalam Hubungan Dokter Dan Pasien," *Jurnal Pasca Sarjana Hukum UNS 7* (2019): 31.

<sup>14</sup> Anggraeni Endah Kusumaningrum, "Utilization of Mediation in Medical Dispute Settlement During COVID-19 Pandemic," *Diponegoro Law Review 7* (2022): 146.

<sup>15</sup> Shahla F. Ali, *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice* (Cheltenham: Edward Elgar Publishing Limited, 2018).

<sup>16</sup> Gunawan Wijaya, "Mediation as Toll to Settle Medical Disputes: Indonesian Case, Proceedings of the Arbitration and ADR International Conference (ADRIC 2019)," *Advances in Social Science, Education and Humanities Research 472* (2020): 1.

<sup>17</sup> Rita Lowery Gitchell and Andrew Plattner, "Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases," *DePaul J. Health Care L.* 2 (1999): 445.

<sup>18</sup> Moh Toriquddin, "Teori Maqashid Syariah Perspektif Al-Syatibi," *De Jure: Jurnal Hukum Dan Syariah 6* (2014): 46.

<sup>19</sup> Robert A. Baruch Bush, "Mediation and Social Justice: Risks and Opportunities," *Ohio State Journal on Dispute Resolution 27* (2012): 5.



gender, profession, or the like, the resulting inequality represents social injustice. When measures are taken to alleviate such inequality and are successful, social justice is advanced. Social justice can be improved or worsened by a variety of choices of policy and actions, including those among different dispute resolution processes.<sup>20</sup>

How social justice is affected by the use of mediation depends on the mediators and the parties. The mediator is accountable for substantive fairness, balancing the power between the parties. The social justice mediation model emphasizes the important role the party's identity plays in conflict.<sup>21</sup> Mediation helps to strengthen and increase the understanding of both party agency and interparty to enhance overall societal civility. That can be done by applying party-driven practices crucial for avoiding injustice to more vulnerable parties.<sup>22</sup> This research examines the efficiency and the association between court mediation structure and the perception of social justice for medical disputes. It will look into the spectrum from a facilitative model, transformative or evaluative model. In addition, this research will also analyze how court mediation should focus its attention whether to focus on the objective, rather than determining questions of legal right, and what the judge as mediator must do to be able to facilitate medical disputes of which they have no knowledge. Court mediation does not give proper attention to medical disputes.

Therefore, this research will provide a significant contribution to how court mediation in medical disputes should be conducted. Public trust in medical practitioners is very important to ensure the health of the community.<sup>23</sup> Thus, mediation is an important method to achieve social justice which doctors and patients can confidently use. The purpose of this study is to reconstruct the court mediation to improve the chance of success in mediating medical disputes to avoid prolonged litigation. This is because the current court mediation system is not well-structured to support medical disputes. The system usually employs judges who have limited knowledge of medical issues. This research aims to analyze the type of mediation and what role should the mediator judge play in mediating medical disputes to advance social justice so that the merit of all mankind can be achieved. How does the rule on current court mediation need to be reformed to be able to provide an efficient mediation process congruous with the concept of *Sulh* in Islam

## Method

This study employs a normative method<sup>24</sup> and conducts a literature review on

<sup>20</sup> Robert A. Baruch Bush, "Mediation and Social Justice: Risks and Opportunities," *Ohio State Journal on Dispute Resolution* 27 (2012): 3.

<sup>21</sup> Elli Nagai-Rothe, "Challenging Neutrality, Examining Privilege and Encouraging Practitioner Self-Reflexivity: A Social Justice Approach to ADR," accessed March 26, 2023, <https://mediate.com/challenging-neutrality-examining-privilege-and-encouraging-practitioner-self-reflexivity-a-social-justice-approach-to-adr/>.

<sup>22</sup> Robert A. Baruch Bush, "Mediation and Social Justice: Risks and Opportunities," 2012.

<sup>23</sup> Muhammad Afiful Jauhani, *Dilema Kapabilitas Dan Imparsialitas Dokter Sebagai Mediator Sengketa Medis*.

<sup>24</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: Raja Grafindo Persada, 2004).



the prevailing laws and regulations on health care and medical services in Indonesia.<sup>25</sup> The legal materials include primary legal materials; such as Law concerning Arbitration and Alternative Dispute Resolution, Law concerning Medical, Law concerning Hospital, Supreme Court Regulation on court-annexed mediation; as well as secondary legal materials garnered from relevant books and journal articles.

## Result and Discussion

### Medical dispute mediation and the role of mediators in achieving social justice

In the event of a dispute, Al-Quran and Hadist offer two types of settlement namely through adjudication and amicable settlement (*sulh*). *Sulh* is a dispute settlement mechanism in which the disputing parties agree to resolve the case between them through amicable settlement like mediation.<sup>26</sup> *Sulh* means "ending a dispute," according to Imam An-Nawawi. The phrase is derived from the Arabic word "صلح," which means "to be good, righteous, or suitable," from which the term "maslaha" (مصالحة) originates, signifying harmony, discourse, agreement, or resolution. Another way to think of *sulh* is as the simple act of resolving a disagreement amicably.<sup>27</sup> Mediation as one type of *Sulh* enables patients to get fair settlements for their medical disputes and therefore increases access to justice.<sup>28</sup> It provides an opportunity for patients and health practitioners to have the capacity to make their own decisions. Thus, the decision is compatible with the needs and interests of the parties. Using mediation will eliminate the risks of litigation such as power imbalances, inequities, and unfairness.<sup>29</sup> When faced with a problem, mediation provides a way for disputing parties to communicate. This is because human beings have the capacity for empathy and understanding each other, while these qualities do not exist in litigation.<sup>30</sup>

In essence, proper and professional mediation offers a more effective and affordable process.<sup>31</sup> The effectiveness of mediation can overcome the relatively slow litigation.<sup>32</sup> In general, medical disputes involve complicated processes. Consequently, medical mediation needs to be treated differently from other

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<sup>25</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1986).

<sup>26</sup> Muhammad Z. Sunarto, "Mediasi Dalam Perspektif Maqashid Syariah: Studi Tentang Perceraian Di Pengadilan Agama," *Jurnal Studi Keislaman* 6 (2019): 102.

<sup>27</sup> Nur Syasya Binti Rossiman, "The Significance of Sulh in the Syariah Court," *Yudisia: Jurnal Pemikiran Hukum Dan Islam* 11 (June 2020): 142.

<sup>28</sup> Robert A. Baruch Bush, "Mediation and Social Justice: Risks and Opportunities," *Ohio State Journal on Dispute Resolution* 27 (2012): 48.

<sup>29</sup> Ibid

<sup>30</sup> Robert A. Baruch Bush, "Mediation and Social Justice: Risks and Opportunities," *Ohio State Journal on Dispute Resolution* 27 (2012): 49.

<sup>31</sup> "Effectiveness of Mediation," *Expert Evidence* (blog), accessed March 26, 2023, <https://expert-evidence.com/effectiveness-of-mediation/>.

<sup>32</sup> Wiwin Yuli Triana and Sulistyorini, "The Effectiveness of Medication as an Alternative on Medical Dispute Resolution: A Systematic Review," *STRADA Jurnal Ilmiah Kesehatan* 10 (2021): 1051.



disputes<sup>33</sup> to ensure justice for the patients.<sup>34</sup> Unfortunately, the current court mediation is not yet effective due to several reasons: (1) the registered court mediator, be it professional or judge, has no knowledge of health issues; (2) there are no clear rules and procedures in court mediation; and (3) there is a lack of institutional support for conducting medical mediation in court or out of court. Therefore, reform of mediation in medical disputes is needed.

The problem with court mediation practice in Indonesia is that it applies one method for all disputes. Given the highly contextual nature of medical disputes, the implementation of mediation programs for general civil claims is not suitable. Studies identify that the success of mediation is largely dependent on multiple factors including the functioning of the civil litigation system, the capacities of the mediators, safeguards against bias, participant education, and cultural and institutional support.<sup>35</sup> The Supreme Court Regulation states that judges serving as mediators in a dispute are allowed to play a further role in the case. This rule needs to be reformed because the perception of impartiality on the part of the judges has often been compromised by reasons of the private and confidential communications which mediators often undertake in the course of a mediation.

### The Roles of Judges as Mediators in Medical Dispute

Mediation can offer physicians and patients the chance to talk, negotiate and apologize, which may also improve the quality of the doctor-patient relationship. Medical disputes possess several causes and multiple factors:<sup>36</sup> inadequate environments and opportunities for dialogue or interactive communication between medical practitioners and patients; the utilization of informed consent forms to serve as evidence that medical professionals have provided information, along with refusal forms for patients declining the information; the lack of risk management; and the failure of management to clearly define health-related responsibilities. With a configuration distinct from typical agreements (performance commitment or *inspanning verbintenis*), medical disputes necessitate a unique approach due to their uniqueness as well. Among other alternative methods, mediation offers integrative dispute resolution because it has a suitable configuration for the uniqueness of medical disputes. To address the unique characteristics of medical disputes, a judge mediator must actively play roles by possessing good communication skills to facilitate the discussion between doctors-hospital with the patients.

Theoretically, a mediator must demonstrate at least the following 4 (four) scopes: impartiality, capability, conflict of interest, and confidentiality.<sup>37</sup> The absence of any element is likely to lead to settlement agreement failure. This condition explains why patients are often reluctant to conduct medical disputes in

<sup>33</sup> Solmaz Khodapanahandeh and Siti Naaishah Hambali, "Efficiency of Using 'Alternative Dispute Resolution' Method in Medical Negligence Claims," *Advances in Natural and Applied Science* 8 (2014): 3.

<sup>34</sup> Danny D. H. Lee and Paul B. S. Lai, "The Practice of Mediation to Resolve Clinical, Bioethical, and Medical Malpractice Disputes," *Hong Kong Medical Journal* 21 (2015): 560.

<sup>35</sup> Shahla F. Ali, *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice*.

<sup>36</sup> Anggraeni Endah Kusumaningrum, "Utilization of Mediation in Medical Dispute Settlement During COVID-19 Pandemic," *Diponegoro Law Review* 7 (2022): 141–142.

<sup>37</sup> Mahsun Ismail, "Perlindungan Hukum Bagi Dokter Dalam Menangani Keadaan Medis Darurat Berdasarkan Implied Consent," *Islamadina: Jurnal Pemikiran Islam* 20 (March 2019): 2.



hospitals. Even if they do, mediation does not successfully reach an agreement. As a last resort, the aggrieved patients file a lawsuit in district court, where they have to go through mediation once again.<sup>38</sup> Unfortunately, the majority of court mediation uses judges as the mediators. The problem is that the selection and training of judges is based on the skills required to identify the relevant law and apply that law to the facts. The skills that are required for successful mediation are quite distinct from those required for trial determination of a dispute, thus explaining why mediating medical dispute in court is ineffective.

Mediation constitutes several principles: voluntary principle; principle of self-determination; confidentiality principle; good faith principle; ground rules principle; and principle of private meetings,<sup>39</sup> all of which are not automatically embedded in the mediation process and the parties. Honesty, truth, trust and willingness to cooperate in dispute settlement need to be encouraged among the parties involved. A mediator must be able to persuade parties to do so to guarantee fruitful mediation. Medical disputes, with their inherent complexities and high stakes, often intersect with broader social justice concerns.<sup>40</sup> In such cases, mediation emerges as a powerful tool that not only facilitates conflict resolution but also serves as a conduit for achieving social justice within the healthcare domain. Given this situation, Health Law No. 36 of 2009 requires individuals who perceive themselves as having suffered due to suspected medical negligence to initially seek resolution through the process of mediation. Furthermore, those who consider themselves affected also have the option to bring a legal case to the court, with the subsequent endeavour to prioritize resolution through mediation, as mandated by the Supreme Court Regulation No. 1 of 2016, which pertains to the settlement of civil cases within the judicial system. The resolution of health-related disputes via mediation is widely regarded as the optimal approach due to its confidential and undisclosed nature.<sup>41</sup> This characteristic ensures a sense of comfort and security for the involved parties, alleviating concerns about the exposure of private information and reputational integrity.<sup>42</sup>

In a doctor/hospital relationship with patients, often patients are in an inferior position. These imbalances need to be addressed and acknowledged by the mediator. A mediator usually does not have a sensitivity to this kind of issue because in litigation both parties are deemed equal before the law. Mediation is different since the superior party may dominate the process. This is therefore important for mediators to have more empathy for patients, yet at the same time maintain their

<sup>38</sup> Uly Purnama Nasution, "Efektivitas Mediasi Dalam Penyelesaian Sengketa Medis (Studi Lapangan Rumah Sakit PKU Muhammadiyah Gamping Sleman)," *Jurnal Widaya Pranata Hukum* 2 (September 2020): 94.

<sup>39</sup> Anggraeni Endah Kusumaningrum, "Utilization of Mediation in Medical Dispute Settlement During COVID-19 Pandemic," *Diponegoro Law Review* 7 (2022): 145.

<sup>40</sup> Yulianti Wulandari and Faisal Santiago, "The Use of Mediation to Resolve Dispute on Health Services as a Legal Protection for Nurse," *Proceedings of the 1st International Conference on Law, Social Science, Economics, and Education*, March 2021, 7.

<sup>41</sup> Muhammad Afiful Jauhani, et al., "Kepastian Hukum Penyelesaian Sengketa Medis Melalui Mediasi Di Luar Pengadilan," *Welfare State* 1 (2022): 49.

<sup>42</sup> Enrico Adhitya Rinaldi and Laksanto Utomo, "Juridic Aspect of Improving Hospital Health Services and Dispute Resolution between Hospitals and Patients," *International Journal of Science and Research* 9 (2020): 18.



independence and fairness. Medical mediation should improve patient safety, encourage information-sharing and learning from mistakes. Separate strategies are required to improve patient safety and to resolve medical disputes through mediation. To achieve those objectives, a mediating judge shall have sufficient knowledge and understanding of health-related issues on hand. They must enrich and empower themselves by researching the issues.

### Types of Mediation

There are 3 (three) mediation models; (1) facilitative mediation; (2) evaluative mediation; and (3) transformative mediation. Facilitative mediation is designed to empower the parties to resolve their differences and reach agreements that work for them.<sup>43</sup> The mediator's job is to provide an atmosphere of safety and open communication so that the parties can communicate their problems, interests, and viewpoints.<sup>44</sup> This type of mediation focuses on interest-based negotiation, which values self-determination and aims to offer both parties a participatory justice forum.<sup>45</sup> Facilitative mediation is useful when: all parties can negotiate fairly but have encountered difficulties in starting the process or have reached a deadlock during negotiations; the parties want to keep their professional or personal relationship intact even after the dispute is resolved; There is a possibility for creative and forward-thinking solutions that satisfy the needs and preferences of the parties; There are numerous complex disputes including both legal and non-legal elements.<sup>46</sup>

The next type is evaluative mediation. In evaluative mediation, in addition to fostering dialogue and directing the negotiating process, the mediator also offers professional judgments and assessments regarding the advantages and disadvantages of each party's legal positions and possible results.<sup>47</sup> The mediator takes on a more active role in shaping the discussions by offering insights, analyses, and predictions on how the dispute shall be settled. This type of mediation can be particularly useful in situations where parties are primarily focused on legal rights and entitlements. With the active role of a mediator, this type of mediation may be seen as an adversarial mediation.<sup>48</sup>

The last type is transformative mediation. The empowerment of disputing parties and the improvement of their relationships are key components of the transformative mediation approach to conflict resolution. Additionally, this kind of mediation is dependent on restorative justice, relationship healing, and reconciliation.<sup>49</sup> It focuses on addressing the possibility for parties to improve communication and strengthen relationships through the resolution process as well

<sup>43</sup> Scott H. Hughes, "Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One," *The Alabama Lawyer* 59 (1998): 246.

<sup>44</sup> Nadja Alexander, "The Mediation Meta-Model: The Realities of Mediation Practice," *ADR Bulletin* 12 (2011): 128.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, 129.

<sup>47</sup> Scott H. Hughes, "Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One."

<sup>48</sup> *Ibid.*

<sup>49</sup> Nadja Alexander, "The Mediation Meta-Model: The Realities of Mediation Practice," *ADR Bulletin* 12 (2011): 130.





as the conflict itself.<sup>50</sup> To determine whether the settlement would be centred on the past, present, or future, it also considers the interests of both parties. This kind of mediation enables both parties to learn about the problems and their development.<sup>51</sup>

When mediating medical conflicts to advance social justice, the mediator's role, whether possessing a legal or medical background, must be meticulously balanced to ensure an equitable and morally upright resolution.<sup>52</sup> The mediator must adhere to impartiality, signifying the necessity for the mediator to remain unbiased and refrain from displaying favouritism towards any party.<sup>53</sup> The significance of maintaining impartiality lies in guaranteeing an equitable and unbiased process.<sup>54</sup> Moreover, the mediator can also undertake the role of an agent that empowers the disputing parties, which includes both patients and medical professionals, by facilitating open conversations.<sup>55</sup> Proactively, the mediator becomes an attentive listener to the emotional, psychological, and societal dimensions of the dispute. In this context, the mediator needs to possess a grasp of the medical domain, enabling them to employ an evaluative mediation approach. This involves the mediator taking an active role not only in facilitating the mediation process but also in offering their expertise. This expertise goes beyond mediation skills and extends to providing informed opinions to both parties involved in the dispute.

In addition to the previous elaboration, a facilitative model may also be suitable to settle medical disputes, particularly based on the mediation process. Facilitative mediation relies on the complex emotional needs and interests of the injured patient along with his/her family.<sup>56</sup> Furthermore, the utilization of facilitative mediation, characterized by its pronounced emphasis on an interests-based configuration, provides a fertile ground for both parties involved to navigate their negotiation process with heightened flexibility. This approach encourages and empowers the parties to openly articulate their emotional perspectives, thereby fostering an atmosphere conducive to the shaping of outcomes that intricately align with the distinct aspirations of each party.<sup>57</sup> Through this framework, the participatory dynamics of facilitative mediation effectively nurtures an environment wherein the amalgamation of emotional expression and interests-based negotiation culminates in the realization of mutually desired resolutions. This approach, by harmonizing the emotional dimensions and pragmatic interests, showcases the innate potential of facilitative mediation in orchestrating outcomes that resonate harmoniously with the unique desires of the disputing entities. The characteristics

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<sup>50</sup> Ibid.

<sup>51</sup> Joseph P. Folger, "Transformative Mediation: Preserving the Unique Potential of Mediation Across Dispute Settings," *Revista de Mediación* 1 (2001): 8.

<sup>52</sup> Caitlin McClay, "Mediation in Medical Treatment: A More Effective Way to Manage Disputes," *Catholic University Law Review* 68 (2019): 544.

<sup>53</sup> Ibid, 545.

<sup>54</sup> Antoni Benedikt, et al., "Mediation as an Alternative Method of Conflict Resolution: A Practical Approach," *Family Medicine & Primary Care Review* 22 (2020): 236.

<sup>55</sup> Caitlin McClay, "Mediation in Medical Treatment: A More Effective Way to Manage Disputes," 2019.

<sup>56</sup> Tony Bogdanoski, "Medical Negligence Dispute Resolution: A Role for Facilitative Mediation and Principled Negotiation?," *Australian Dispute Resolution Journal* 20 (2009): 81.

<sup>57</sup> Ibid.



of facilitative mediation explained above are in line with the principles employed by the Prophet Muhammad when resolving conflicts. The Prophet would emphasize tolerance, patience, forgiveness, peace, harmony, and mercy, allowing for amicable dispute resolution. Promoting conflict competency in healthcare settings necessitates grasping internal organizational conflicts and responding impartially to environmental considerations. Transformative mediation centres its attention on interactions between conflicting parties, aiming to enhance relationships and cultivate insights, respect, knowledge, communication, and problem-solving proficiencies.<sup>58</sup> Comprehending the backdrop of the dispute and the elements fostering adversarial relationships, coupled with fostering professionalism and accountability, contributes to the positive context often found in intricate and health-focused healthcare environments.<sup>59</sup>

### **Mediation Reform As a Means of Creating Effective Medical Dispute Resolution**

Sulh is one of the dispute settlement processes, or more specifically, Alternative Dispute settlement (ADR). Since the introduction of Islam, Sulh has been practised widely. This is not a new concept. Mediation and peacemaking, or sulh, were customs that existed before Islam. Chieftains (sheikhs), soothsayers, healers (kuhhān), and powerful noblemen were essential facilitators in all disputes within or between competing tribes within the framework of tribal Arab culture. To provide a more effective and cooperative means of settling conflicts, the court system's mediation process is an essential alternative to litigation. The necessity of an efficient mediation procedure is made even more pressing when it comes to medical issues since people's lives and well-being are on the line. The settlement of medical disputes through court-ordered mediation has enormous potential to produce fair results and enhance social justice in healthcare. However, there is an urgent need to improve the effectiveness of the current judicial mediation system and bring it more into line with social justice ideals. Significant modifications are needed to handle the difficulties of healthcare-related disputes to ensure an effective mediation process. This section examines important areas for change while upholding the values of justice, transparency and patient-centeredness can improve the effectiveness of court mediation in medical conflicts.

The purposeful selection and meticulous training of mediators who have a deep understanding of both the legal and medical fields form a key tenet of the reform initiatives. These mediators must demonstrate a high level of expertise in medical ethics, the complexities of malpractice law, and the complex web of healthcare protocols.<sup>60</sup> With mediators equipped with such specialized expertise, the engaged parties are poised to immerse themselves in dialogues that are underpinned by an informed understanding of the multifaceted issues at hand.<sup>61</sup>

<sup>58</sup> Alan L. Nager, "Mediation in a Healthcare Setting: Strategies and Implementation," *Journal of Hospital Administration* 9 (2020): 35.

<sup>59</sup> Tony Bogdanoski, "Medical Negligence Dispute Resolution: A Role for Facilitative Mediation and Principled Negotiation?," *Australian Dispute Resolution Journal* 20 (2009): 82.

<sup>60</sup> Caitlin McClay, "Mediation in Medical Treatment: A More Effective Way to Manage Disputes," *Catholic University Law Review* 68 (2019): 546.

<sup>61</sup> *Ibid*, 547.



This well-informed discussion is essential to creating the kind of atmosphere that allows for the confident generation of fair and equitable answers. In the context of medical dispute resolution, the combination of medical and legal expertise within mediators essentially serves as a beacon illuminating the route toward outcomes that exemplify justice and fairness.

The ambiguous rules of the existing judicial mediation process are another problem. It is essential to create specialized guidelines that are expressly created to handle the complexities involved in medical conflicts. This makes sure that the particular and frequently complicated nature of conflicts originating in healthcare contexts is considered during the mediation process.<sup>62</sup> These guidelines serve as a framework that encourages openness and builds trust among all parties involved in the dispute resolution process by carefully outlining well-defined protocols for the sharing of medical records, obtaining patient consent, and addressing other nuances particular to the medical field. This transparency is crucial because it fosters open and honest communication as well as laying the groundwork for credibility,<sup>63</sup> thereby contributing to the creation of an environment conducive to constructive mediation discussions.<sup>64</sup> The establishment of such tailored guidelines demonstrates a proactive commitment to addressing the distinctive needs of medical disputes, ultimately enhancing the overall efficacy and fairness of the mediation process in the healthcare domain.

The mediation process must actively involve medical specialists if medical disagreements are to be resolved effectively. These medical experts' participation provides a wealth of priceless insights into the complex medical aspects of the case, substantially enhancing everyone's understanding and assisting in wise decision-making.<sup>65</sup> This heightened level of expert participation naturally goes beyond the limits of medical specialization and melds with the process of gathering and genuinely appreciating information that is inextricably linked to the particulars of the case at hand. A multidimensional and thorough grasp of the underlying complexities of the disagreement is created because of the harmonic amalgamation of these expert observations and practical case data. This comprehensive understanding serves as a solid basis for informed discussions to take place, especially in the dynamic environment of joint and caucus sessions. The discussions can then result in resolutions that more harmoniously align with the various concerns and interests of the disputing parties. This combination of expert opinion and factual analysis exemplifies the power of a synergistic strategy, in which medical knowledge is combined with empirical investigation to shed light on.<sup>66</sup> Through their involvement, these panels imbue the process with a heightened sense

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<sup>62</sup> Risfa Anesa, et al., "Penyelesaian Sengketa Medis Antara Dokter Gigi Dan Pasien Di Kota Pekanbaru Berdasarkan Undang-Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran," *Journal of Science and Social Research* 4 (2022): 348.

<sup>63</sup> Alan L. Nager, "Mediation in a Healthcare Setting: Strategies and Implementation."

<sup>64</sup> Carolina Kuntardjo, et al., "Transparency Principle to Realize Justice in Health Service," *Malaysian Journal of Medicine and Health Science* 19 (2023): 46.

<sup>65</sup> Arti Sharma, "Role of ADR in the Healthcare Sector on Resolving Medical Malpractice Disputes," *International Journal of Law Management & Humanities* 4 (2021): 1023.

<sup>66</sup> Caitlin McClay, "Mediation in Medical Treatment: A More Effective Way to Manage Disputes," *Catholic University Law Review* 68 (2019): 541.



of credibility, transparency, and impartiality, ultimately culminating in resolutions that are not only legally satisfactory but also ethically sound and aligned with the principles of social justice.

The absence of institutional support for conducting medical mediation outside the courtroom presents a significant barrier to effectively addressing medical disputes.<sup>67</sup> The potential for effective and fair remedies in situations where patients and healthcare providers find themselves involved in complicated conflicts is hampered by the lack of enabling structures and resources. The presence of medical professionals can act as a lighthouse of understanding within the context of medical mediation, illuminating the way forward by offering parties insights that go beyond the area of legalities and truly explore the medical substance of the conflict.<sup>68</sup> These experts, through their wealth of knowledge, can decipher complex terminology, elucidate medical procedures, and shed light on potential medical errors or complications that may have fueled the dispute. By collaborating closely with these experts, mediators can foster an environment in which parties become equipped with the requisite insights to make choices that are well-informed, equitable, and aligned with the complexities of the healthcare landscape.

Moreover, the lack of institutional support hinders the potential for efficient, patient-centered resolutions.<sup>69</sup> To address this critical issue, comprehensive reforms are essential. These reforms should encompass specialized training for mediators, improved access to medical experts, transparent guidelines, confidentiality safeguards, technological integration, and a commitment to quality assurance. By instituting these reforms, the mediation process for medical disputes can be fortified, ensuring fair, efficient, and compassionate resolutions that uphold the rights and well-being of patients and healthcare providers alike.

## Conclusion

The type of mediation that advances social justice for the welfare of mankind is facilitative mediation. Facilitative mediation contains principles employed by the Prophet Muhammad such as tolerance, forgiveness, peace, harmony, and mercy. In the hope that their choices would be the most appropriate and thereby most sustainable, parties to a dispute are assisted in making their own decisions through facilitative mediation. The mediator provides the parties with a methodical approach to utilize to their fullest potential in their pursuit of amicable resolutions. To run a facilitative mediator, the mediator judge should foster a cooperative atmosphere, look into the interests of the parties rather than pushing one viewpoint, aim to improve understanding between the parties and assist the parties in coming up with a solution that is specific to their circumstances. By doing so, the mediation process is likely to advance social justice so that the merit of mankind can be achieved. As for the judge-mediator, they must play more active roles, improve

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<sup>67</sup> Hanna Ambaras Khan, et al., "Mediation as a Suitable Dispute Resolution Method in Medical Negligence Cases: Special Reference to the Malaysian Position," *Pertanika Journal Social Science & Humanities* 28 (2020): 2311.

<sup>68</sup> Caitlin McClay, "Mediation in Medical Treatment: A More Effective Way to Manage Disputes," *Catholic University Law Review* 68 (2019): 547.

<sup>69</sup> Rossi Suparman, "Perlindungan Hukum Dan Tanggung Jawab Rumah Sakit Terhadap Dokter Dalam Sengketa Medis," *Syar'iah Hukum Jurnal Ilmu Hukum* 17 (2020): 206.



communication skills, and equip themselves with sufficient knowledge of the substance of the dispute prior to mediation.

The rule on current court mediation needs to be reformed to allow for an efficient mediation process that suits the concept of *Sulh* in Islam. The use of mediation in medical conflicts has the potential to completely alter how social justice is achieved since it provides a special and efficient method that considers the complexity of the healthcare industry. In addition to providing fast and cost-effective peaceful conflict settlement, mediation also acts as a catalyst for improving patient access to justice. The current judicial mediation procedures must be changed to achieve justice in medical conflicts. Significant obstacles to medical mediation include a lack of mediators with medical expertise, ambiguous rules and processes, and a lack of institutional backing. Mediation should be modified to explicitly handle medical disputes, take into account their special causes and determinants, and incorporate a social justice perspective to mend these gaps.

To achieve quick and fair outcomes, preserve patient-medical professional relationships, and uphold the integrity of the healthcare system, efficiency in medical dispute resolution is essential. To provide efficient and just results, the current court mediation procedure needs to be changed to accommodate the dynamics of medical conflicts. The court mediation procedure can successfully negotiate the complexities of medical conflicts by providing experienced mediators, clear instructions, improved communication, and post-resolution safeguards. These changes respect the values of justice, openness, and patient-centeredness, eventually ensuring that healthcare disputes are settled as quickly as possible and with consideration for both the needs of patients and healthcare professionals. There may be limitations to this study. The research's proposed mediation reform for medical disputes is predicated on the idea that consumers and physicians share the desire to avoid going to court. No matter which mediation technique is used, it is unlikely to be successful if one or both parties insist on going to court. Future studies should concentrate on identifying a mediation model in which one of the parties refuses to cooperate and insists on going to court instead.

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