

PENAL MEDIATION AS DISPUTE RESOLUTION ALTERNATIVE ON HEALTH DISPUTE TO PROTECT CONSUMER

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ABSTRACT

Health dispute, whether is was publicly revealed or not, can go to a long and expensive legal process if it involved health institution reputation in general. However it can be solved peacefully and without government involvement. Penal mediation can be used as a means to solve issue in the society who need fair, cheap and quick law process with the consequence that the perpetrator cannot be tried under criminal law as in penal mediation, perpetrator have the obligation to pay back the loss suffered by victim. The aim of the research is to review whether penal mediation can be a dispute resolution alternative for health dispute matter. This research use normative juridical research method. Research showed that penal mediation can be part of effort to streamline the criminal law system to be more effective, efficient, and guarantee consumer protection especially in health dispute. Penal mediation can be applied in various stages of criminal law process from investigation, prosecution, court examination, or court descision with supervision from BPSK as coordinator to oversee mediation institution from government and/or private institution as agreed by both parties. Penal mediation agreement will be put in deed of settlement by judges in district court.

Key phrases: Penal Mediation, Criminal Law System, Health Dispute, Consumer Protection

INTRODUCTION

Health as one of the basic human needs in addition to clothing, housing, food and education, and is one of the basic social rights (the right to health care) ¹ and individual rights (the right of self-determination) that shall be realized in the form of safe, good quality and affordable health services allocation for community. Therefore each activity and efforts to increase the degree of public health should be implemented based on the principle of humanity, balance, benefits, protection, respect for the rights and liabilities, equity, non-discrimination and gender and religious norms (Article 2 of Law Number 36 of 2009 on Health).

Good medication shall not be realized if not supported with good service from a health-care facility. Criteria for good service is not sufficiently characterized by the involvement of many experts, but should be based on a good system of medical services from the health-care facility. By performing query medical procedure in accordance with Standard Operating Procedure (SOP) subject with each of aspect of patient rights in order to avoid a case which subject with pre-defined SOP which can lead to health dispute.

Patient safety is a major issue for doctor in carrying out his duty (*solus aegrotis alius suprema lex*), since this is an obligation of doctor in treating the sick person, according to the Hippocratic Oath, which is used as a basic guideline for doctor until now.

Medical services is a complex system and vulnerable to accidents, that it must be done carefully by competent and sufficient authorize person. Efforts to minimize lawsuits against hospital and its staff is basically an attempt to prevent the occurrence of preventable adverse events caused by medical errors, or it means all efforts to manage risk with patient safety orientation.

Regarding medical action performed by doctor, basically always lead to two possibilities, successful and unsuccessful. Unsuccessful medical action of doctor is caused by two things, first caused by coercion (*force majeure*), second caused by doctor performing medical action that does not comply with medical profession standards.²

This can lead to conflicts between doctors and patients, which can cause disputes. But actually there are many factors that can lead to disputes other than those mentioned above, including changes in relationship pattern between doctor and patient. At first relationship between doctor and patient is paternalistic. In this relationship the patient's participation which is allowed only obedient unanimously to the doctor. Patients are considered to have no idea and do not need to know about the causes of the disease because the disease is a manifestation of God's curse.

Disputes in the health sector has two doors is the first door is the non court dispute resolution which do not cost much and often referred ao ADR (Alternative Dispute Settlement) while the other one is the court path with a longer process and requires a lot of costs because the stages are long and convoluted, and often lead to results that are considered less fair for some people. This process is often referred to litigation, litigation process is reasonably avoided if it does not involve large amounts of objects demands. It is often when people complain's, it is added with the higher cost of legal consultation. Lawyers often assume that a

¹Theo Huijbers. *Filsafat Hukum Dalam Lintasan Sejarah*. (Yogyakarta : Yayasan Kanisius, 1982). p.101-102.

² Anny Isfandyarie. *Malpraktik dan Risiko Medik (Dalam Kajian Hukum Pidana)*. (Jakarta : Prestasi Pustaka Publisher, 2005). p. 24-25.

case should always end with a judicial review as the final stage of the litigation process. Thus by passage of time many alternative solutions to resolve disputes prior to litigation. One of them is penal mediation which for some people is often used as facility for non-court dispute resolution in health sector. Quite a lot of medical cases that occur either because of negligence on the part of implementing health stakeholders or related parties in this regard the government as a facilitator and community as health service users. The dispute may be simple to complex dispute because it involves many parties. Prita's case, in which she put certain hospital name into the newspapers, became one of the cases involving health care practitioners that should be observed, then the case of DAS who submitted disputes to the court. These two cases resulted in a different decision in which in the case of Prita, Prita as consumer who gained loss was imprisoned and convicted while she already made non-court attempt correctly then the case of DAS where the hospitals was blamed and lead to a concerned action of doctors and hospitals which held a nationwide strike. From these two cases, we can conclude that the health dispute requires profound efforts in the settlement. One of them that will be discussed is penal mediation.

Settlement of a case can be made by two approaches, with litigation model (court) and non-litigation method (non court). This second approach (non litigation) is a win-win solution. In legal literature, usage of settlement mechanism that is a win-win solution refers to Alternative Dispute Settlement (Alternative Dispute Resolution /ADR). According to the provisions of Article 1 point (10) of Law 30 of 1999 on Arbitration and Alternative Dispute Settlement, the meaning of ADR are: "Alternative Dispute Settlement Institute or different opinion in a procedure which is agreed by the parties, which is non court settlement by consultation, negotiation, mediation, conciliation or expert judgment".

One form of alternative dispute resolution is mediation. Mediation term, etymologically, derived from Latin, *Mediare* means in the middle. This meaning refers to the role that the third party shows as a mediator in their duty to mediate and resolve disputes between the parties. Being in the middle also means that mediator shall be in neutral and impartial in resolving disputes. He should be able to keep the interest of the disputed parties fairly and equally, that develop the confidence of the disputed parties. There are also some literature that states mediation word comes from the English "mediation", which means dispute settlement involving third parties as an arbitrator or dispute settlement mediator. Mediation contain following element :

- Mediation is a dispute resolution process based on voluntarism through a negotiation.
- Mediator who involve in charge of helping the dispute parties to seek a settlement,
- The involving mediator must be accepted by the disputing parties.
- Mediators should not be given authority to take decisions during the negotiation.
- The purpose of mediation is to reach or obtain conclusions that can be received by the disputing parties.

Based on Comparative implementation of Penal Mediation comparison of some countries, Barda Nawawi Arief in his book, Differentiate Penal Mediation into six (6) models or forms, as follows:³

1. Informal Mediation,

This model is carried out by criminal justice personnel in its formal duties, namely:

- General Prosecutor shall invite the parties to an informal settlement with the intention not to proceed with prosecution if an agreement is reached.
- Social worker or probation officer who found that contact with the victim would have a major influence for the perpetrators of criminal acts.
- Police officials urges the family disputes that may calm the situation without making a criminal prosecution.
- The judge may also opt for out of court settlement efforts and release the case.

This kind of informal intervention is common in all legal systems.

2. Traditional Village or Tribal Moots

According to this model, the whole community shall meet to resolve crime conflicts between citizens. This model can be found in some less developed countries and in rural or inland areas. This model prefers benefits for large society. This model predates Western law and have been inspiring for many modern mediation programs. Modern mediation programs often try to introduce the benefits of tribal meeting in an adapted form adjusted to the structure of modern society and the individual rights which is recognized by law.

3. Victim-Offender Mediation

This model involves various parties met in the presence of an appointed mediator. There is many variations of this model. The mediator may come from formal official, independent mediator, or combination. Mediation can be held at any stage of the process, both at the stage of refraction of the prosecution, police discretion stage, sentencing stage or after sentencing stage. This model can be applied to all types of criminal, specially applied to children, applied to type certain crimes (eg shoplifting, robbery and violence), and there are mainly aimed at child perpetrators, beginner perpetrator, but also applied to heavy offenses and even for recidivists.

4. Reparation Negotiation Programmes

This model is solely to estimate or assess compensation or repairs to be paid by the offender to the victim, usually at the time of examination in court. This program is not related to the reconciliation between the parties, but only related to the

³Barda Nawawi Arief. *Mediasi Penal (Penyelesaian Perkara Di Luar Pengadilan)*. (Semarang : Pustaka Magister, 2008). p. 7-12.

material improvement plan. In this model, the offender is liable to a work program so he can save money to pay damages / compensation.

5. Community Panels Or Courts

This model is a program which shall deflect criminal cases from the prosecution or judicial procedures more flexible society and informal procedure and often involve an element of mediation or Negotiation. Local authorities may have the separate institution /council for Mediation.

6. Family And Community Group Conferences

This model has been developed in Australia and New Zealand, which involves community participation in the criminal justice system. Not only involves victims and perpetrators of criminal acts, but also the perpetrator's family and other community members, elected officials (such as police and judges child) and supporters of the victim. The perpetrator and his family are expected to produce a comprehensive agreement and satisfying the victims and can help to keep the offender out of further matters/issues.

Penal mediation is a new dimension that is studied from a theoretical and practical aspects. Examined from the dimensions of the practice thus penal mediation will be correlated with the achievement of world justice. By the passage of time where each day number of case volume increased in all forms and variations that go to trial, and consequently become a burden to the court in examining and deciding cases according the principles of simple, quick and low cost justice without compromising achievement of the objectives of justice which is legal certainty, expediency and fairness.

As for the ideas and principles of the Penal Mediation, are:

1. Conflict Handling

The mediator's duty is to make the parties forget the legal framework and encourage them to be involved in the communication process. It is based on the idea that the crime has caused interpersonal conflict. Conflict is target of the mediation process.

2. Process Orientation

Penal mediation is more oriented to the process quality rather than the result, namely to make the perpetrator realize his guilt, to resolved the needs of the conflict, to free victim from fear and so on.

3. Informal Proceeding

Penal Mediation is an informal process, not bureaucratic, avoiding the strict legal procedures.

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 act on his own.⁴

In the criminal law, process of settling disputes outside the courts through the mediation process is different from the process of dispute resolution by mediation outside the court process using Penal Mediation. In civil law, mediation is usually used with regard to the problem of money, whereas in criminal law the issue is more about freedom and one's life. Against the involved parties, civil mediation is usually involve direct disputing parties or two interested parties, while in criminal law mediation the involved parties is more complex, not only the perpetrators, the victims, but also the public prosecutor, as well as the larger community.

Mediation in criminal law can be defined as the process of settlement of the criminal case to bring the perpetrators to the victims to have mutual agreement relating to crimes committed by offenders and restitution for victims. Mediation shall have maximum results if it is attended by qualified mediator who come from government, NGO, and community leaders.

ISSUES FORMULATION

Can penal mediation provide alternative solution on health dispute? Which in turn can answer the need of low cost, quick legal processin health dispute that occure in litigation process.

DISCUSSION.

Medical dispute often lead to interest dualism which one side of the health agency which intend to have the matter resolved without losses either because of defamation or other losses such as the demands of the victims. On the other hand the victim demanded that his health can be restored to normal in the event of malpractice. Both of these interests are often not met and led to claiming before the court. This situation often led to dissatisfaction medical disputes from both sides. In case of Prita for example, which originally caused by high fever and headache until Prita suffered from shortness of breath which is considered due to the Omni Doctor actions which ultimately Prita are required to be isolated because otherwise suffer from infectious diseases and finally reader letters from Prita rewarded with a criminal indictment from Omni International Hospital. The criminal complaint is added to the civil claim which is the amount of money of the clarification which is made by Omni International Hospital in various media. At the district court level, Prita found guilty and also on appeal. Even more severe Prita was sentenced to pay sum of money and sentenced 6 months to 1 year probation. But in judicial review, Prita was acquitted and restored her

⁴Barda Nawawi Arief. *Mediasi Penal (Penyelesaian Perkara Di Luar Pengadilan)*. (Semarang : Pustaka Magister, 2008). p.10-12.

good name, status and position. If we did examine the case of Prita, dissatisfaction of the victims led to the delivery to readers' letters on the case of Omni Hospital, but the hospital found that it was not the best solution to put into Readers Letters because it made their good name tainted and not resolved properly, even lead to new cases of defamation. Omni Hospital lawsuit on Prita and Omni Hospital take the lead litigation process until final attempt, Judicial Review, which was just a waste of money, time and effort. Both parties are Prita and Omni Hospital was also harmed by litigation taken by Omni Hospital. Prita was imprisoned at the time of the appellate although eventually released, Omni Hospital also harmed by spreading these cases extensively both in the virtual world and also in the community. The hospital is judged as unable to settle which case need and don't need to be claimed. In turn, litigation process which is pursued by them actually makes the problem even deeper for both disputed party and they cannot find a way out. Public give a negative stigma to Omni Hospital, then even occurs massive demonstration to support Prita. Omni Hospital efforts which intend to restore the good image was not reached, even was tainted because it was considered acted arbitrarily by not resolve the case amicably but ended with violence or through legal channels. Other case is the case of malpractice in other districts, namely in the district of Manado is precisely in General Hospital in Manado. In this case, dr.DEWI ASP (DAS) has dispute with the victim named Julia Siska Makatey, victims of birth delivery in Saturday, April 10th 2010 at 22:00 pm which has been assisted by Doctor Ayu, but later the victim died. District Court declared DAS was not guilty, but supreme court declared that DAS was guilty; Later on judicial review, DAS was declared not guilty again. Thus from both cases can be concluded :

1. Litigation does not necessarily bring satisfaction to the public. In case of Prita and DAS, a long and durable process ended to the many costs incurred both sides and both sides suffered many losses, the hospitals were not able to clear it's name even show that the hospital is hiring experts who are less competent hence ended with dissatisfaction of the victims, while victims even suffered the loss of life in which DAS's victim which can not be recovered again.
2. Litigation only carries on one side an advantage for the party representing the litigants and also at the expense of the Government and the litigants.
3. Litigation process can not meet the social need that is a judicial system which capable to provide a sense of justice and away from a general fear that the case will be widely known.

From the study of these cases, there are two things that cannot be reached, namely the loss of the victim is not insurmountable and cannot be restored by the judge decision. Although DAS was imprisoned for 10 months in accordance with District and High Court Judge Decree. It is not able to satisfy the victim because in this case, victim had died. The judge in deciding a case is limited by set of norms and rules that cannot be violated, thus the decree looked like not sufficient to satisfy all parties. Hospital party, in this case General Hospital in Manado, indeed in this case are not satisfied with the involvement of two doctors and cannot cleared it's name, but has bad images in the eyes of society and has become the talk and perhaps leaving the stamp and seals as well as stigma that the hospital is less professional and impressed too protect medical personnel. Two things which become crucial is the satisfaction of the victims who are not fulfilling their demands while the health of the medical world wants their good name is maintained and not disrupted by a legal act of the victim. Penal mediation and other forms of mediation that is expected to answer the challenge. Mediation shape is expected to answer the challenge, because mediation is formed or created or also born in a shortened form, solid and cheap. And most importantly that mediation is not only able to answer these challenges but they also became the answer to the high cost of the trial. But quite unfortunately until now had just inflicted the civil case mediation and some simple criminal case. Penal Mediation in Indonesia also just be started if there is existing lawsuits or commencement of litigation. It is quite unfortunate given in another state of separate mediation process with the litigation process. So that in Indonesia, their attorneys, lawyers in particular are often become stumbling block of this penal mediation process. Penal Mediation can answer the needs of the community due to :

- 1) Mediators are not bind with terms and rules of criminal or civil law procedures, so they can guide with parties to achieve final result that they accept together. They can act good and wise. In mediation process, there is no defendant and claimant and they are equivalent so are not bind to police investigation report, pressures and evidence files which often forced to meet criminal or civil law procedures.
- 2) Real cheap cost because there are no long process from filing to prosecution submission and finally judicial review. There is only one time mediation process until it finish and the final result also has permanent legal force.

CONCLUSION

Penal Mediation is still a new Alternative Dispute Settlement Institution in Indonesia, At first, penal mediation only applied for civil law related case, but now, it also applied for criminal law related case. Research showed that penal mediation can be part of effort to streamline the criminal law system to be more effective, efficient, and guarantee consumer protection especially in health dispute. Penal mediation can be applied in various stages of criminal law process from investigation, prosecution, court examination, or court decision with supervision from BPSK as coordinator to oversee mediation institution from government and/or private institution as agreed by both parties. Penal mediation agreement will be put in deed of settlement by judges in district court.

While Penal Mediation is still new, it can becomes alternative means of solving and solution that can provide affordable litigation, with short term period and can accommodate the interests of the parties (win-win solution). This is possible because mediators are not bind to terms and rules of criminal or civil law procedures and both parties are equivalent in a mediation process. Most importantly the mediator can maintain the confidentiality of the litigants so that the society does not directly give negative stigma to the litigants as well as avoid the exposure of the case to the public.

SUGGESTION

1. Penal Mediation training at various universities shall be more empowered in order to afford more mediators are born to meet the needs of penal mediation in Indonesia.

2. Penal Mediation is very helpful efforts for Government to reduce the pile of cases at Supreme Court and Court thus it require active efforts of the government to undertake preventive measures and sanctions against the pressing legal remedies that is not begin with mediation.
3. For Asia countries, this research finding in Indonesia shows that it is possible to use penal mediation for some criminal law related case.

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