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Implementation of Mediation as an Alternative for Medical Dispute Resolution in Hospitals Based on Law No. 36 of 2009 concerning Health

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ABSTRACT: The Law on Health does not explicitly explain mediation in resolving a dispute between a doctor and a patient, so there are still many disputes that go directly to litigation, so the number of cases piles up in court. The method used in this paper uses a normative legal type method, with a statutory approach, using primary legal materials, by collecting data by literature study, then analyzed using qualitative methods. Disciplinary sanctions imposed on violations of physician discipline as stated in Law No. 29 of 2004 article 69 in the form of a written warning, revocation of the registration certificate or practice license, and the obligation to attend medical or dental education.

KEYWORDS- Mediation, Dispute Resolution, Medical Malpractice.

I. INTRODUCTION

Health is the right of every human being, which has become the main capital in achieving an optimal and prosperous life that must be realized according to the mandate of the 1945 Constitution. According to Law No. 36 of 2009 concerning Health, provides an understanding that health is a healthy state, both physically, mentally, spiritually, and socially, which allows everyone to live socially and economically productive. Therefore, public health becomes an absolute thing to be maintained, fought for, and fulfilled by every government and society itself. Every effort to maintain and improve the health status of every community is carried out based on the principles of non-discrimination, participation, and sustainability.[1] In serving the community, doctors provide services and actions according to the knowledge and competencies obtained through tiered education and a code of ethics that is serving the community, this has been regulated in Law No. 29 of 2004 concerning Medical Practice.[2] In health services provided by doctors to patients, sometimes it is unavoidable that a dispute or dispute usually arises when there is a sense of patient dissatisfaction with a health service provided by a doctor so that patients easily say that this is an act of malpractice.

Malpractice is an act that is said to be evil or bad that is carried out inappropriately or violates the law and code of ethics because it does not meet the standards set by the profession.[3] Broadly speaking, malpractice is divided into two groups: first, ethical malpractice, which is where a doctor performs an action that is contrary to applicable medical ethics, which is a set of ethical standards, principles, rules, and norms that apply in the world of medicine. The two juridical malpractices consist of several malpractices: a. Civil malpractice (Civil Malpractice), this occurs because of things that cause non-fulfillment of the contents of an agreement (default). b. Criminal malpractice (Criminal Malpractice) occurs due to negligence by a doctor or health worker against a patient while making efforts to heal, resulting in the patient's death or disability. c. Administrative

[1] Article 28 H Paragraphs (1) and (2) of the 1945 Constitution Amendments.

[2] Konsil Kedokteran Indonesia, 2006, *Standard Pendidikan Profesi Dokter*, Jakarta : Konsil Kedokteran Indonesia, hlm. 24.

[3] M. Nurdin, Perlindungan Hukum Terhadap Pasien Atas Korban Malpraktek Kedokteran, Jurnal Hukum Samudra Keadilan, Fakultas Hukum Universitas Samudra, Vol. 10, No. 01, 2015, hlm. 10.

malpractice (administrative malpractice), occurs because of a violation caused by a doctor or health worker when carrying out a practice without a permit and license.[4]

In the settlement of a medical dispute between a doctor and a patient, according to Law No. 36 of 2009 concerning Health in Article 29, it is stated that the resolution of medical disputes is prioritized first through "Mediation" which is not directly delegated to the court which will take a long time and cost a lot of money. issued. Mediation is one of the efforts to resolve disputes outside the court or arbitration, where the disputing parties negotiate with each other in solving the problem where an outside party, they do not work together between the disputing parties (neutral) to help them to reach an agreement from the results of the negotiations satisfactory to both parties.[5] Mediation is also clearly regulated in the Regulation of the Supreme Court (PERMA) No. 1 of 2008 concerning Mediation Procedures in Courts is then updated with the Regulation of the Supreme Court (PERMA) No. 1 of 2016 concerning Mediation Procedures in Courts in Article 7 which regulates the obligation to carry out mediation in good faith.

Departing from the description above, the purpose of this paper is to consider the use of mediation as an alternative to resolve medical disputes through non-litigation or outside the court that provides agreement and justice to both parties to the dispute, because the actions taken by doctors or health workers are not necessarily included malpractice. If in health disputes, mediation is the right way to resolve disputes between doctors and patients. Because in health disputes, it prioritizes the fulfillment of patient satisfaction and compensation for losses suffered.

II. PROBLEM FORMULATION

1. How is the implementation of mediation in the resolution of medical disputes in hospitals ?
2. What are the obstacles in the implementation of mediation in hospitals and how are they resolved ?

III. RESEARCH METHOD

To solve the law described above, research methods are needed to support the research. This research method uses normative legal research methods, where the law is conceptualized as what is written in the legislation (law in books) or the law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate.[6]

The approach used in this paper is statutory. In solving the problem in this research, using a method or procedure by analyzing secondary data first and then proceeding with analyzing data in the field.

There are three sources of data used in this study, including primary legal materials, secondary legal materials, and tertiary legal materials.[7]

1) Primary Legal Materials, obtained from several regulations governing mediation, including:

a) The 1945 Constitution of the Republic of Indonesia.
b) Law No. 36 of 2009 concerning Health.
c) Law No. 29 of 2004 concerning Medical Practice.
d) Law No. 44 of 2009 concerning Hospitals.
e) Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.
f) Law No. 8 of 1999 concerning Consumer Protection.
g) The Regulation of the Supreme Court (PERMA) No.1 of 2008 concerning Mediation Procedures in Courts.
h) The Regulation of the Supreme Court (PERMA) No.1 the Year 2016 concerning Mediation Procedures in Court.

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[4] Gst Agung Chandra Kumala Dewi, Made Gde Subha Karma Resen, Pertanggungjawaban Pidana Terhadap Dokter Serta Dasar Alasan Peniadaan Pidana Malpraktek Medis, Jurnal Kertha Wicara, Fakultas Hukum Universitas Udayana, Vol. 07, No. 05, 2018, hlm. 8.

[5] Gunawan Widjaja, 2005, *Seri Hukum Bisnis Alternatif Penyelesaian Sengketa,* Jakarta : PT Raja Grafindo Persada, hlm. 90.

[6] Amiruddin & Zainal asikin, 2012, *Pengantar Metode Penelitian Hukum*, Jakarta : Raja Grafindo Persada, hlm. 118.

[7] Soerjono Soekarto & Sri Mamudji, 2010, *Penelitian Hukum Normatif : Suatu Tinjauan Singkat,* Jakarta : Rajawali Press, Cetakan Ke VIII, hlm. 13.

2) Secondary Legal Materials, consisting of:

a) Books on law and non-law related to this research.

b) Scientific work.

c) Legal journals related to this research.

d) Articles obtained from the internet related to this research.

3) Tertiary Legal Materials

The source of tertiary legal material is legal material in the form of a dictionary, which provides meaningful instructions or explanations for primary legal materials and secondary legal materials.[8] Which is used as material, information, and instructions to explain the terms used in this research.

The data collection method in this study will be carried out by searching and tracing primary legal materials in the form of laws and regulations relating to the legal issues to be solved. Furthermore, it is also necessary to collect secondary legal materials in the form of books, journals related to this research.

IV. THEORETICAL FRAMEWORK

The theoretical framework is an important thing in a study, in research, there is a limitation and nature of the nature consisting of concepts, boundaries, and proportions that present a phenomenon systematically and detail the relationship between variables, goals, and predict the phenomenon.[9]

The first, the theory of dispute resolution, is a theory that examines and analyzes the categories or classifications of disputes or conflicts that arise in society, the factors that cause disputes, and the ways or strategies used to end the dispute. In this theory, there are 5 (five) classifications of dispute resolution, namely: First, *contending*, namely trying to implement a solution that is preferred by one party over the other. Second, *yielding* is lowering one's aspirations and being willing to accept the shortcomings of what is desired. Third, *problem-solving* is finding a satisfactory alternative from both parties. Fourth, *withdrawal* is choosing to leave the dispute situation, both physically and psychologically. Fifth, *in-action*, which means doing nothing.[10]

The second, the theory of justice, where the law can only be determined about justice. According to Hans Kelsen in his book *General Theory of Law and State*, the view that law as a social order can be declared fair if it can regulate human actions satisfactorily so that they can find happiness in it.[11]

V. DISCUSSION

1. Application of Mediation in Medical Dispute Resolution in Hospitals.

Mediation is a dispute resolution process with a deliberation approach between the disputing parties to reach a peace agreement to end the existing dispute with the assistance of a third party or a neutral mediator. Dispute resolution through the mediation process has been recognized in Indonesian positive law, this can be seen in the Regulation of the Supreme Court (PERMA) RI No. 1 of 2016, which explicitly states that all civil disputes must be mediated before the trial process is carried out. As with disputes in health services, Law no. 36 of 2009 concerning Health Article 29 requires that in resolving disputes in health services, it is first carried out through "Mediation".[12]

Mediation is a dispute resolution method in good faith between the disputing parties assisted by a mediator (a neutral party). This is by most Indonesian people from time to time in resolving a dispute, namely prioritizing restoring friendship and brotherhood between the two, in other terms known as a "win-win solution". The implementation of

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[8] Johnny Ibrahim, 2006, *Teori dan Metodologi Penelitian Hukum Normatif* , Malang : Bayumedia Publishing, hlm. 392.

[9] Amiruddin dan Zainal Asikin, 2004, *Pengantar Metode Penelitian Hukum*, Jakarta : Raja Grafindo Persada, hlm. 42.

[10] Dean G Pruitt & Z. Rubin, 2004, *Konflik Sosial*, Yogyakarta : Pustaka Pelajar, hlm. 4-6.

[11] Raisul Muttaqien, 2011, *Teori Umum tentang Hukum dan Negara*, Bandung : Nusa Media, hlm. 7.

[12] Quoted from "Best practice dalam Penyelesaian Sengketa Kesehatan, Created by Drg. Suryono, SH, Ph.D - Pusat Mediasi Indonesia, Yogyakarta". (Pada tanggal 02 april 2021 pukul 22.00 wib).

mediation has been regulated in Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, the Act has brought new winds for the disputing parties who wish to resolve non-litigation disputes.

The mediation process is an appropriate effort in resolving medical disputes between doctors and patients except in purely criminal proceedings such as sexual harassment, disclosure of medical secrets, abortion and gross negligence, false statements, fraud, and others. Settlement through litigation will be detrimental to both parties. Moreover, it is quite difficult to meet the four criteria for medical malpractice, namely: 1. There is a duty (obligations) that must be carried out 2. There is a dereliction/breach of that duty (deviation of obligations); 3. The occurrence of damage 4. Proven direct causal relationship between the violation of obligations with losses. Another positive effect of the mediation process is that the doctor-patient relationship will always be well maintained. Because after all, both parties need the same interests even in their respective contexts and responsibilities.

2. Obstacles in the implementation of mediation in hospitals and how to resolve them.

One of the reasons for resolving a dispute using a mediation mechanism is to reduce the accumulation of cases in court. However, it seems that the expectations of the Supreme Court have not been fully realized in practice, due to problems related to the existence of factors that hinder the occurrence of mediation, so that mediation is not effective in practice. The following are some of the factors that hinder the success of the mediation process, including:[13]

1) Absence of the parties

   In the mediation process, the presence of the parties is very decisive, because mediation will not be possible if one of the disputing parties is not present on a predetermined schedule. The presence of the parties shows the good faith of the parties in pursuing the peace process between the two so that if the parties or one of the parties are not in the scheduled meeting, it is seen that the party does not have good faith to resolve the dispute amicably.

2) Exceeded the time limit given

   Based on the Regulation of the Supreme Court (PERMA) on Mediation, in Article 13 Paragraph (4) the mediation process lasts for 40 working days after the election or appointment of a mediator. If the 40-day deadline has passed, the mediator is obliged to certify in writing that the mediation process has failed.

3) Bad faith

   The mediation process must be carried out in good faith, meaning that the parties must not smuggle bad intentions behind the ongoing mediation process. The mediation process is only shown to resolve disputes peacefully and there must be no intent or intrigue behind the will to resolve disputes. Based on Article 12 Paragraph (2) of the Regulation of the Supreme Court (PERMA) Mediation, it states that:

   "One of the parties can declare to withdraw from the mediation process if the other party takes mediation in bad faith"

   The article above states the right of the parties to withdraw from the mediation process if it is found that there is no good faith in the mediation process.

4) There are fewer parties

   The peace process in principle is a process to end a case so that the peace process must involve all parties concerned so that the results of the peace process are strengthened by a peace deed so that new disputes will not arise in the future.

5) The terms of the peace agreement are not met

   A mediator has the authority to examine the material of the peace agreement that has been made by the parties before the agreement is submitted to the Case Examining Judge to be strengthened into a peace deed. If in its contents there is a peace agreement with matters that are contrary to the law of its nature is impossible to implement through legal procedures or there is bad faith, then the mediator still has the hope to declare that the mediation has failed.

   The success of the mediation process is due to factors from the awareness of each party to make peace. A mediation process that is built-in good faith will be able to place the disputing parties to communicate with each other regarding existing problems and the solutions offered. Patients need to express their complaints and

[13] D.Y Witanto, 2011, Hukum Acara Mediasi, Bandung : Penerbit Alfabeta.

expectations regarding the problems they are experiencing, while doctors or hospitals need to hear and respond to what the patient is complaining about.

CONCLUSIONS

Mediation is one way of resolving disputes by way of peace and good faith from the disputing parties, If in health disputes mediation is the right way in resolving disputes between doctors and patients because in health disputes prioritize the fulfillment of patient satisfaction and compensation for losses who suffer. And in Law no. 36 of 2009 concerning Health Article 29 requires that in resolving disputes in health services, it is first carried out through "Mediation". Mediation has many advantages in resolving disputes because of its privacy with the result of a win-win solution. And the success of mediation is also due to the awareness factor of each party to make peace.

REFERENCES

Regulations:

1) Article 28 H Paragraphs (1) and (2) of the 1945 Constitution Amendments
2) Law No. 36 of 2009 concerning Health.
3) Law No. 29 of 2004 concerning Medical Practice.
4) Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.
5) Law No. 8 of 1999 concerning Consumer Protection.
6) The Regulation of the Supreme Court (PERMA) No.1 of 2008 concerning Mediation Procedures in Courts.
7) The Regulation of the Supreme Court (PERMA) No.1 of 2016 concerning Mediation Procedures in Court.

Book:

1) Amiruddin & Zainal asikin, 2012, *Pengantar Metode Penelitian Hukum*, Jakarta : Raja Grafindo Persada, hlm. 118.
2) Amiruddin dan Zainal Asikin, 2004, *Pengantar Metode Penelitian Hukum*, Jakarta : Raja Grafindo Persada, hlm. 42.
3) D.Y Witanto, 2011, Hukum Acara Mediasi, Bandung : Penerbit Alfabeta.
4) Dean G Pruitt & Z. Rubin, 2004, *Konflik Sosial*, Yogyakarta : Pustaka Pelajar, hlm. 4-6.
5) Gunawan Widjaja, 2005, *Seri Hukum Bisnis Alternatif Penyelesaian Sengketa*, Jakarta : PT Raja Grafindo Persada, hlm. 90.
6) Johnny Ibrahim, 2006, *Teori dan Metodologi Penelitian Hukum Normatif* , Malang : Bayumedia Publishing, hlm. 392.
7) Konsil Kedokteran Indonesia, 2006, *Standard Pendidikan Profesi Dokter*, Jakarta : Konsil Kedokteran Indonesia, hlm. 24.
8) M. Nurdin, Perlindungan Hukum Terhadap Pasien Atas Korban Malpraktek Kedokteran, Jurnal Hukum Samudra Keadilan, Fakultas Hukum Universitas Samudra, Vol. 10, No. 01, 2015, hlm. 10.
9) Raisul Muttaqien, 2011, *Teori Umum tentang Hukum dan Negara*, Bandung : Nusa Media, hlm. 7.
10) Soerjono Soekarto & Sri Mamudji, 2010, *Penelitian Hukum Normatif : Suatu Tinjauan Singkat*, Jakarta : Rajawali Press, Cetakan Ke VIII, hlm. 13.

Journals and Scientific Works:

1) Gst Agung Chandra Kumala Dewi, Made Gde Subha Karma Resen, Pertanggungjawaban Pidana Terhadap Dokter Serta Dasar Alasan Peniadaan Pidana Malpraktek Medis, Jurnal Kertha Wicara, Fakultas Hukum Universitas Udayana, Vol. 07, No. 05, 2018, hlm. 8.
2) Quoted from “Best practice dalam Penyelesaian Sengketa Kesehatan, Created by Drg. Suryono, SH, Ph.D - Pusat Mediasi Indonesia, Yogyakarta”. (Pada tanggal 02 april 2021 pukul 22.00 wib).