

The Existence Of Non-Litigation Mediation In Indonesia

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Abstract: Law No. 36 Year 2009 on Health and the Supreme Court Regulation No. 1 Year 2008 confirm the importance of mediation in the settlement of disputes, in this case the medical dispute. But both these regulations do not explicitly emphasize the type of non-litigation mediation as the best means of medical dispute resolution. Non-litigation mediation or mediation outside of the court is capable of creating peace and restore good relations between doctors and patients.

Index Terms : Medical Disputes, Mediation, Non-Litigation Mediation

1 INTRODUCTION

The goal of the national development of Indonesia as it is contained in the Preamble to the 1945 Constitution of Indonesia is to protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice. The development objective is then sought to be achieved through all areas, including health development. The Government through the Ministry of Health stipulates that health development should be able to improve the health of the community, through community empowerment, including the private sector and civil society, to protect public health by ensuring the availability of plenary, prevalent, high-quality and fair health efforts, and by ensuring the availability and equitable distribution of health resources (Ministry of Health of Indonesia, accessed from <http://www.depkes.go.id/article/view/13010100001/profil-visi-dan-misi.html>, November 28th, 2014) [1]. In order to improve the health development, it requires the participation of all stakeholders, including health care (doctors, nurses, hospital), government, and society. One of the roles of health care is the medical action. In the Article 1 point 1 of the Minister of Health Regulation No. 290 / Menkes / Per / III / 2008 on Approval of Medical Action states that the approval of medical action is an approval given by the patient or its closest family member after receiving a full description of the medical or dental actions to be performed on patients. It can be interpreted that without the approval of the patient, a medical action which has a high risk for a patient's life cannot be performed. In practice, there are often misunderstandings or disagreements between the doctor and the patient or the patient's family regarding the implementation of the approval of medical action. It is very important since any malpractice cases occurred after the medical action had been implemented, will be accounted to the concerned doctor. According to Munir Fuady, Malpractice is any medical action undertaken by any physician or person under supervision or to the patient's health care provider, both in terms of diagnosis, therapeutic and disease management, which is carried out in violation of the law of propriety, decency

and principles of professional, both intentionally and inadvertently that cause inappropriateness, pain, injury, disability, damage to the body, death and other losses which causes the doctor or nurse should be responsible either administratively, civilly or criminally (Munir Fuady, 2005) [2]. From many medical disputes occurred, the solution is always done through the litigation or court. There is a desire to "beat each other" between the patient and doctor which is initially there was a relationship of Therapeutic Contract between them (Inspanningsverbintennis), which is a relationship that exists in terms of agreement on the utilization of services / health care by a physician and also a relationship based on trust (fiduciary relationship), which is now turned into a tension between the doctor and the patient. In accordance to the medical disputes, the Article 29 of Law No. 36 of 2009 on Health, confirms that in terms of health personnel who is suspected to have a negligence in carrying out his profession, must be resolved firstly through a mediation. In the explanation of Article 29, it is then elaborated that the mediation is done when a dispute arises between the health worker with the patient's health provider as the recipient of health services. The purpose of mediation to resolve the disputes outside of court by a mediator agreed by both of the parties. Similarly, related to the mediation, Article 60 of Law Number 44 of 2009 on the Hospital asserts that one of the tasks of the Supervisory Board of the Provincial Hospital is to receive complaints and conduct the solution of the dispute in the way of mediation. Both law formulations above illustrate that mediation is an obligation for both parties to solve the medical disputes that occurred between them. In other words, the Law requires the physician and patient to mediate beforehand if there is a medical dispute. Although it has been regulated in the legislation but the normative order only regulates the mediation of litigation or mediation through the court. Based on the normative research found that none of the regulations concern on the non-litigation mediation. This leads to the peace which is the goal of mediation is not achieved. Therefore, this journal tries to reveal the existence of non-litigation mediation in Indonesia.

RESEARCH METHOD

It is a juridical-normative study which examines the problem of law from the aspect of the legislation. The data collected through literature documentation, i.e. documentation of the legislation, which is then fitted with other literature sources related to the problem examined. The data is then analyzed qualitatively to be concluded as a result of this study.

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DISCUSSION

1. Review of Mediation

Mediation is a way of resolving the disputes through negotiation process to obtain the agreement of the parties with the assistance of a mediator. Mediation can be done through the court or out of court by using a mediator who already has a certificate of mediator. The mediator is a neutral party who helps the parties in the negotiation process for various possibilities for resolving the disputes without resorting to decide or enforce a solution. It can be said that the mediator as a third party seeks to approach the disputing parties to reach an agreement which is a win-win solution. Regarding to mediation, since a long time ago, mediation was required in resolving the disputes in Indonesia. Article 130 HIR and or Article 154 Rbg encourage the disputing parties to take the reconciliation process through the integration of mediation into the procedural law at the court of first instance. Furthermore, the Regulation of the Supreme Court of Republic of Indonesia (Perma) No. 2 of 2003 on Mediation Procedure at the Court set up the same thing. In 2008 the Perma No. 1 of 2008 was set on Mediation Procedure at the Court, which confirmed that the court is not only the duty and authority to examine, hear and resolve the cases it receives, but also the obligation to seek the reconciliation between the litigants. The court which has an impression of being the law and justice enforcement institution, now appears as an institution which is finding a reconciliation solution between the disputing parties. The preamble of Perma No. 1 of 2008 states that the mediation is one of the dispute resolution processes which is faster and cheaper, and can provide greater access to the parties in finding a satisfactory resolution and sense of justice. It also states that the integration of mediation into the proceedings at the court may be one of the effective instruments to address the problem accumulation of cases in the courts and to strengthen and maximize the function of the courts in resolving disputes in addition to the formal court process which is deciding (adjudicative). According to H. Sudarto and Zaeny Ashadie (2004) [3], mediation is a negotiation process to resolve a problem when the third party is impartial and neutral in working with the disputing parties to help them finding an agreement. Regarding to this, Christopher W. Moore (1996) [4] states that mediation is *the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision—making power but who assist the involved parties in voluntary reaching a mutually acceptable settlement of issues in dispute*. The definition shows that mediation is an intervention by the third party in a negotiation, in which the third party has a limited authority or even has no authority at all in making a decision, since the third party is only helping the disputing parties to resolve the dispute. Then, Laurence Boulle (1996) [5] states that mediation is a decision-making process in which the parties are assisted by third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent. The third party who is called as mediator is a neutral party who helps the disputing party in a negotiation process in order to find any possibilities in resolving the disputes without deciding or enforcing a reconciliation (Dedi Affandi, 2009) [6]. Regarding to the positions and roles of the mediator, Cecilia Ong (“Medical Mediation: Bringing Everyone to the Table”, accessed from <http://bulletin.facs.org/tag/medical-liability-system/>, July 14,

2014) [7] states that: Mediators do not dictate an outcome; rather, they help both parties understand their motivations and elucidate the events and influences leading up to the incident. They help parties develop and evaluate new options for resolving the issues at hand, tailoring the solution to the specific needs of both parties, and broadening the possible outcomes beyond the linear constraints of the litigation process. The position of mediator above is in accordance with the etymological definition of mediation itself. Syahrizal Abbas (2009) [8] states that: *Etymologically, the term mediation is derived from the Latin "mediare" which means in the middle*. It refers to the role of the third party as a mediator displayed in their duty to mediate and resolve the dispute between the parties. "Being in the middle" also means that the mediator must be neutral and impartial in resolving the dispute. He should be able to keep the interests of the disputing parties fairly and equally, so that it can grow the trust from the disputing parties. The agreement resulted from a mediation process that is created in the form of writing, shall be final and binding on the parties. Moreover, it also must be registered in the District Court within a period of 30 days since the signing. The agreement shall be implemented within 30 days since the registration (YLBHI dan PSHK, 2007) [9]. From the explanation above, it is known that mediation can be done in the court and outside the court. Both in- and outside the court, the implementation of the mediation (particularly in the case of medical disputes) is a requirement of the Act, which is a must and shall be imperative, as it is emphasized in Article 29 of Law No. 36 of 2009 on Health which states that in the case of health personnel suspected to have a negligence in carrying out his profession, the omission must be resolved firstly through a mediation. Dedi Afandi (2009) [6] notes that at least there are 3 (three) basic aspects about mediation, they are: Aspect of Urgency / Motivation: Urgency and motivation of mediation is in order that the disputing parties reach a reconciliation and discontinue their case to the court. If there is any sticking point to the problems, then it should be solved amicably by consensus. The main purpose of mediation is to achieve a reconciliation between the disputing parties. The disputing parties usually find some difficult to reach an agreement if they met by themselves. The difficult in finding the agreement can usually be solved if there is a unfier. Then, mediation is a medium to bring together the disputing parties facilitated by one or more mediators to filter the problems in order to be clear and the disputing parties gain awareness of the importance of reconciliation between them. Aspect of Principle: In law, mediation is listed in Article 2 of paragraph (2) of Perma No. 1 of 2008 which requires every judge, mediator and the disputing party to follow the procedures for resolving the disputes through mediation. If it does not go through a mediation procedure, according to Perma, it is a violation of Article 130 HIR and or Article 154 Rbg which resulted in null and void decision. It means that all cases which go to the court of first instance will not miss the mediation. Because, when it occurs it will have a fatal risk. Aspects of Substance: Mediation is a series of processes that must be passed to any civil case that goes to the court. Mediation substance is a process that must be followed seriously to achieve a reconciliation. Therefore, it is given for its own time to carry out a mediation before the case is examined. Mediation is not just to meet the formal legality requirements, but also as a serious earnest effort which has to be made by the parties to achieve a reconciliation. Mediation is an attempt of the disputing parties

to make a reconciliation for the sake of themselves and not of the justice or the judge, or even of the interests of the mediator. Thus, any cost arising from the mediation process is borne by the disputing parties. The aspects above illustrate the urgency and the importance of mediation in resolving a dispute. Regarding to this, Edward A. Dauer and Leonard J. Marcus (1997) [10] state that: *Mediation, when properly employed, can be private, integrative, safe, nonjudgmental, and flexible in scope, process, and outcome. It can be a safe harbor with therapeutic potential and can offer its participants the opportunity to address the source as well as the consequence of the immediate problem. Mediation, may in short, offer a process whose traditional attributes are consistent with, rather than antithetical to, the requisites of quality improvement.*

2. The Existence of Non-Litigation Mediation in Medical Disputes

As we know, both the Law No. 36 of 2009 on Health and Perma No. 1 of 2008, only regulate the mediation through the court, in which the judge is the mediator. According to the author, the setting of both regulations lead to the orientation of the patient / patient's family and the doctor directed to the court. This has led to resentment that persists between the patient and the doctor. A reconciliation becomes something utopian and is difficult to achieve since even in the litigation mediation, the nuance of win-lose situation becomes very pronounced. There is a disparity or distance created between the doctor and patient which increases the hatred between the two of them. The author argues that this is a weakness of both regulations, in which non-litigation mediation is not emphasized clearly and definitely (*clare et distinct*). To overcome this problem, the proposal of non-litigation mediation or mediation outside the court is urgently required. The existence of non-litigation mediation or mediation outside the court can be approached from several following aspects, as follows:

a. Theory of Conflict Resolution

Theory of Conflict Resolution is a process of analysis and problem solving which considers the needs of individuals and groups such as identity and recognition, as well as institutional changes required to fulfill the needs. This theory is part of the ways of conflict resolution offered by Simon Fisher, namely (1) the prevention of conflict; This pattern aims at preventing the violence in conflict, (2) conflict resolution; aims at settling the violence through the reconciliation agreements, (3) conflict management; aims at limiting or avoiding the violence or pushing the changes through the involved parties to behave positively; (4) the resolution of the conflict; aims at addressing the causes of conflict, and trying to build a new relationship which can last a relatively long time between the disputing groups, (5) the transformation of the conflict; aims at addressing the sources of the wider social and political conflicts, by diverting the negative power of the differences to the positive power sources (Simon Fisher, 2001) [11]. There are ten strategies to resolve a conflict as a basis of conflict resolution, they are; abandoning or leaving the conflict, avoiding, dominating, obliging, getting help, humor or behaving in humor and relax, postponing, compromise, integrating, and problem solving (Simon Fisher, 2001) [11]. According to the author, in accordance to the medical disputes, the presence of non-litigation mediation can be approached from the position of compromise, *integrating*,

problem solving, but it is conducted in a relaxed or in a kinship situation. Through those situation, the tense and resentment situations between the patient and doctor can be avoided. In accordance with this case, it requires a mediator who knows the doctor and the patient intimately, through an intensive family approach. This will not be found if the mediation is done through the litigation since the litigation mediation, as defined in the Health Law and Perma, the mediator is the judge, an independent party who is not intimately familiar both with the patient and the doctor.

b. Familial Value and Culture

Familial value is an Identity of Indonesian culture. In the context of familial value, peace is the key. This is in line with the philosophy of the goal of mediation which is not only to meet formal legality requirements, but also as a serious effort which has to be made by the parties to achieve a reconciliation. Mediation is an attempt of the disputing parties to make a reconciliation in the interest of themselves and not of the court or the judge, or even of the mediator. In other words, the direction of mediation is the reconciliation between the parties. This way, according to the author, is a win-win situation, it can only be achieved through a non-litigation mediation. Non-litigation Mediation places the disputing parties into 2 (two) equal positions. Non-litigation or outside the court mediation, according to the author, creates a harmonious kinship relationship between the patient and the doctor, damp the resentment, and bring back the relationship between the doctor and the patient to the former situation (*integratio*).

CONCLUSIONS

In any medical dispute, mediation is a way of resolving which is required by the Health Law and Perma No. 1 of 2008. However, both regulations have not given the confirmation of the non-litigation mediation or mediation outside the court. Non-litigation mediation or mediation outside the court is the best way to achieve a reconciliation between the doctor and the patient. Therefore, it takes a reformulation of both regulations to assert the existence of non-litigation mediation as the best way out for medical dispute resolution in accordance with the familial culture of Indonesian society.

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