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Application of Restorative Justice Values in the Settlement of Medical Malpractice Cases

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ABSTRACT

The purpose of this study is to see and measure how the application of restorative justice values in the settlement of medical malpractice cases that occur in several regions, especially those in Indonesia, this becomes a very interesting study where everyone has the same right to get justice. Basically in Indonesia there are many hospitals that do not pay attention to this.

1. Introduction

Health is a human right and one of the elements of welfare that must be realized in accordance with the ideals of the Indonesian nation. Therefore, every activity and effort to improve the highest level of public health is carried out based on nondiscrimination, participatory, protection, and sustainable principles that are very important for the formation of Indonesian human resources.

General Explanation of Law No. 29/2004 on Medical Practice (Statute Book of 2004 No. 116, Supplement to Statute Book No. 4431, hereinafter abbreviated as Law No. 29/2004) explains that doctors and dentists as one of the main components of health care providers to the public have a very important role because it is directly related to the provision of health services and the quality of services provided. The main foundation for doctors and dentists to be able to perform medical actions against others is the science, technology, and competence possessed, which is obtained through education and training. His knowledge must be continuously maintained and improved in accordance with the advancement of science and technology itself. Doctors and dentists with

their scientific devices have distinctive characteristics. This peculiarity can be seen from the justification given by the law that is allowed to perform medical actions against the human body in an effort to maintain and improve the degree of health.

Hospitals as one of the health care facilities are part of the health resources that are indispensable in supporting the implementation of health efforts. The implementation of health services in hospitals has characteristics and organizations are very complex. Various types of health workers with their own scientific devices interact with each other. Medical science and technology is growing very rapidly that must be followed by health workers in order to provide quality services, making more complex problems in hospitals.

Lately lawsuits filed by patients or their families to the hospital and or their doctors are increasing in number. Such lawsuits can be either criminal or civil charges by almost always basing on the theory of negligence law. in colloquial language the behavior demanded is medical malpractice which is the term "genus" (group) of medical professional behavior groups that deviate and result in injury, death, or harm to their patients. In essence, the hospital serves as a place for disease healing and health recovery and the function has the meaning of responsibility which is the responsibility of the government in improving the welfare of the community.

Victims of malpractice in Indonesia are often difficult to find justice, the current legal system has not sided with patients. Health reforms covering a variety of substances, including malpractice are urgently needed to prevent the growing number of victims. Health reforms covering a variety of substances, especially victims of malpractice are increasing. If calculated annually from Jakarta alone cendrung increased, not to mention the area. Legal Aid Institute (LBH) Jakarta revealed, Reports of malpractice cases and the lack of rights to health tend to increase. In 2009, LBH Jakarta recorded at least 7 reports of complaints from the public. In 2010 the number increased to 10 complaints.

The law governing health problems as well as hospitals does not currently favor patients because it places evidence on victims. In this case it is the patient who must prove the occurrence of malpractice. In addition, the occurrence of gap (distance) knowledge and information between the victim and the Doctor, if this is aligned with the usual evidentiary law that daitur in criminal law will certainly not be found, even cendrung sipasien will lose, because all the evidence is held by the doctor.

Based on lbh Jakarta observations, community reports in the police related to malpractice are relatively deadlocked, even many are stopped, this is because the police always base their investigations on expert statements. What the experts say is what the police record in this case experts who give objective information what not. On the other hand the patient (victim) who asked a

doctor to be reluctant to testify there is a kind of conspiracy in the medical world, to cover up for example this doctor is protected from his mistakes.

This fact is no wonder that many people prefer to be silent rather than have to report the events that befall themselves due to poor health services, not even infrequently patients consider this as a destiny that must be accepted.

The practice of resolving criminal cases outside the court so far there is no formal legal basis, so there is often a case that informally there has been a peaceful settlement (although through the mechanism of customary law), but still processed to the court in accordance with applicable law. Based on the description, the main problem in this paper is how the application of restorative justice values in the settlement of medical malpractice?

2. Discussion

Black's Law Dictionary mentions "Malpractice is any wrong attitude of action, lack of skill in an unnatural measure". The term is commonly used against the attitudes of doctors, lawyers, and accountants. Failure to provide professional services and do so at a reasonable measure of skill and cleverness by an average colleague of his profession in the community, resulting in injury, loss or loss to service recipients who trust them, including the attitude of wrong professions, lack of unreasonable skills, violation of professional or legal obligations, very bad practice, illegal, or immoral attitudes.

Herkutanto quoted from the W*ord Medical Association Statement on Medical Malpractice* adapted from the 44th *World Medical Assembly* Marbela Spain, September 1992 stating that: "Medical malpractice is the failure of doctors to meet the standards of procedures in the treatment of patients, the existence of incompetence or negligence, thus causing direct harm to patients.

Veronica states that the term malpractice comes from *"malpractice"* which is essentially a mistake in carrying out the profession arising as a result of the obligations that doctors must perform. According to Adami Chazawi, medical malpractice is a doctor or person under his command intentionally or negligently committing an act (active or passive) in medical practice in his patients at any level that violates professional standards, standards of procedure or medical principles, or by violating the law without authority; causaal verband, physical and mental health and or the patient's life, and therefore establish legal accountability for the doctor.

According to Jusuf Hanafiah, medical malpractice is the negligence of a doctor to use the level of skill and science commonly used in treating patients or injured people according to the size of the same environment. According to Ninik Mariyanti, malpractice actually has a broad meaning, which can be described as follows:

1) In the general sense: a bad practice, which does not meet the standards set by the profession;

2) In a special sense (seen from the patient's point of view) malpractice can occur in determining diagnosis, performing surgery, during treatment, and after treatment.

Based on some understanding of medical malpractice above all scholars agreed to interpret medical malpractice as the fault of health workers who because they do not use science and skill level in accordance with professional standards that eventually result in patients injured or disabled or even died.

Malpractice itself according to Ngesti Lestari and Soedjatmiko, as quoted in Anny Isfandyarie can be distinguished in two forms, namely ethical malpractice and juridical malpractice. Every juridical malpractice is certainly an ethical malpractice, but not all ethical malpractice is a juridical malpractice. Ethical malpractice occurs when a doctor commits an act that is contrary to the medical code of ethics which is a set of ethical standards, principles, rules and norms that apply to doctors in carrying out their profession.

Soedjatmiko distinguishes juridical malpractice in three categories, namely:

1) Civil malpractice.

Civil malpractice will occur if the doctor or the hospital does not fulfill its obligations or does not provide the rights of the patient under the health care agreement, so that the doctor and or the hospital has defaulted on the agreement. Civil malpractice can also occur if the doctor or patient commits an act that causes harm to the patient so that it can be said to have committed an act against the law.

2) Criminal malpractice

Criminal malpractice occurs if there is a doctor's mistake in performing a less careful action that causes the patient to die or defect. Criminal malpractice can occur due to three things, namely: (i). because of deliberateness for example in the case of leaking medical secrets, abortion without medical indication or justifying the patient for any reason; (ii). because of carelessness that occurs because the doctor or health worker acts not in accordance with medical standards or without asking for the patient's consent; and (iii). because of the failure that occurs because of the lack of care of the doctor so as to cause death or disability in the patient. Criminal malpractice also occurs if there is an event in the form of justification and / or rejection of the patient who comes, citing the inability of the patient to pay the cost of hospital services, treatment and / or treatment, both inpatient and outpatient. This type of malpractice occurs because of the lack of fulfillment of obligations that have been determined by the law by the hospital in the form of providing assistance to patients who

should be helped, resulting in death or disability in the patient as a result of the absence of help.

3) Malpractice administration

Administrative malpractice occurs when doctors, health workers or hospitals carry out practices in violation of state administrative laws such as practicing without a permit, engaging in practices or actions that are not in accordance with their permits, or their permits have expired and / or carry out practices without making medical records. clear. There are three theories that state the source of malpractice, namely:

1) Contract Violation Theory

The first theory says that the source of malpractice is a breach of contract. This has the principle that legally a health worker has no obligation to care for someone if there is no contractual relationship between the health worker and the patient. The relationship between the health worker and the patient only occurs when there is a contract between the two parties.

In connection with the existence of a contractual relationship between a patient and a health worker, it does not mean that the relationship between the health worker and the patient always occurs with mutual agreement. In a state of unconsciousness or an emergency situation, for example, it is impossible for a sufferer to give his consent.

If such a situation occurs, the patient's health worker agreement or contract may be requested from a third party, namely the patient's family acting on behalf of and representing the patient's interests. If this is also not possible, for example because the emergency patient comes without a family and is only accompanied by another person who happens to be helping him, then in the sufferer's interest, according to the prevailing laws, a health worker is obliged to provide the best possible assistance. This act, by law, has been considered the embodiment of a health-patient contract.

2) The Theory of Deliberate Actions

The second theory that can be used by patients as a basis for suing health workers for malpractice is an intentional tort, which results in a person physically injured (assistant and battery).

3) Negligence Theory

The third theory states that the source of malpractice is negligence. The negligence that causes the source of the act which is categorized as malpractice must be proven to exist, besides that the negligence in question must be included in the category of serious negligence (culpa lata). To prove this is of course not an easy task for law enforcement officials.

Indonesia is a state based on law and not a power state, this is contained in the state constitution, the 1945 Constitution, which states that Indonesia is a state based on law (Rechstaat) and not based on mere power (Machtstaat). Based on this conception, all aspects of state life must be based on law.

According to Weber's view, law is a coercive order. It is said that because the upholding of the legal order is different from other non-legal social norms and orders, because the legal order is fully supported by the coercive power of the State.

Another perspective states that law is defined as a rule, or norm. Methods or norms, are standards or guidelines regarding appropriate human behavior. On the basis of its scope, it is usually distinguished between the rules that govern personal interests, and those that regulate interpersonal interests. Legal methods are classified as rules governing interpersonal interests. In addition, law is also defined as a legal system, the legal system is positive law.

Law is sometimes interpreted as a decision by an official, for example a judge's decision is law. In line with this, the law may be interpreted as an officer, for example the police, who according to certain people is the law.

In addition, law can be interpreted as the process of law enforcement by law enforcement officials as well as the functional relationship between the police, prosecutors and courts. Law can also be interpreted as a decision by an official, such as a ministerial decree and a regional head's decision. According to the classical school, basically the purpose of law can be viewed from ethical theory, utility theory and legalistic theory.

According to ethical theory (etische theorie), law is only intended to bring about justice. This theory was first put forward by the Greek philosopher Aristotle in his work "Ethica Nicomachea" and "Rhetoric" which states "that law has a sacred duty, namely to give everyone who is entitled to receive it.

According to the utilities theory, law aims to realize only what is useful. The aim of the law is to guarantee as much happiness as possible to as many people as possible. This theory was taught by Jeremy Bentham (1748-1832) a legal expert from England in his book "Introduction to the morals an legislation". Bentham is a leader of the "expediency" school of thought. According to Bentham, the purpose of law is to give as much happiness as possible to the greatest number (the greatest happiness for the greatest number). Meanwhile, Rudolf von Ihering, stated that the purpose of law is as a tool to maintain a balance between individual interests and community interests (balance of interest).

Legalistic theory considers that the purpose of law is solely to achieve legal certainty.

The theory which is a mixture of ethical theory and utility theory is put forward by the following scholars. Bellefroid in his book "Inleiding tot de rechtswetenschap in Nederland", states that the content of law must be determined by two principles, namely justice and benefit. Furthermore, Van Apeldorn in his book "Inleiding tot de studie van her Nederlands Rechts" said that:

the purpose of law is to regulate life in a peaceful relationship. The law calls for peace. Peace between humans is maintained by law by protecting certain human interests, namely honor, freedom, life, property and so on against those that harm it. The interests of individuals and those of human groups are always at odds with one another. This conflict of interests will always cause conflict and confusion with each other if it is not regulated by law to create peace. The law maintains peace by balancing between the protected interests, where everyone must get as much as possible what is their right.

This is in accordance with Gustav Radbruch, who said that there are 3 (three) principles of law, namely justice, utility, and certainty (positiviteis). The relationship between the three (aspects) is relative, sometimes utility overcomes justice and sometimes certainty overcomes utility, depending on the political system adopted by the State concerned. In a state the police tend to place use as the most important element; natural law theorists prioritize justice; whereas positivism adherents place certainty as the most important element.

The concept of solving both medical malpractice cases contained in Law no. 29/2004, Law Number 36 of 2009 concerning Health (State Gazette of 2009 Number 144, Supplement to the State Gazette Number 5063, hereinafter abbreviated to Law Number 36/2009), as well as Law Number 44 of 2009 concerning Hospitals (State Gazette of 2009 Number 153, Supplement to State Gazette Number 5072, hereinafter abbreviated to Law No. 44/2009) further regulates case settlement in the realm of civil law. Meanwhile, medical malpractice cases that contain elements of criminal law are directly submitted to the police to carry out the investigation process as stated in Article 186 of Law No. 36/2009 which reads:

"If the results of the examination indicate an allegation or should reasonably be suspected of violating the law in the health sector, the supervisor is obliged to report it to the investigator in accordance with the provisions of the legislation."

Arrangements for the resolution of cases / disputes of medical malpractice through civil law channels can be seen in Article 29 of Law no. 36/2009 which states that:

"In the event that a health worker is suspected of negligence in carrying out his profession, the negligence must first be resolved through mediation".

Furthermore, in the explanation of the article it is stated that:

"Mediation is carried out when a dispute arises between health workers providing health services and patients as recipients of health services. Mediation is carried out with the aim of resolving disputes outside the court by a mediator as agreed by the parties ".

Likewise in Law no. 44/2009, namely in Article 60 letter f it says that:

"The Provincial Hospital Supervisory Agency as it is tasked with receiving complaints and making efforts to resolve disputes by means of mediation".

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In addition to the just desert model, there is also another model, namely the Restorative Justice Model which is often faced with the Retributive Justice Model and is a development of the Restitutive Justice Model.

Van Ness stated that the foundation of restorative justice theory can be summarized in the following characteristics:

1. Crime is primarily conflict between individuals resulting in injuries to victims, communities and the offenders themselves, only secondary is it lawbreaking. (Free translation: Crime according to its basic / primary nature is a conflict between individuals which results in injury to the victim, society and the perpetrator himself, while the definition of crime as something that violates the law is only secondary)

2. The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crimes.

3. (free translation: The overall objective of the criminal justice process must be to reconcile the parties in conflict / dispute, as well as repair the wounds caused by crimes)

4. The criminal justice process should facilitate active participation by victims, offenders and their communities. A should not be dominated by government to the exclusion of others.

5. (Free translation: The criminal justice process must facilitate the active participation of the victim, the perpetrator and the community (society). This should not be dominated by the government to the exclusion of other people or other matters).

The restorative justice model is proposed by abolitionists who reject coercive means in the form of litigative means and are replaced by reparative (non-litigation) means. The abolitionist concept considers the criminal justice system to contain structural problems or defects so that realistically the basic structure of the system must be changed. In the context of the criminal sanction system, the values that underlie abolitionist ideas still make sense to seek alternative sanctions that are more feasible and effective than institutions such as prisons.

The restorative justice model to be built by abolitionists can be seen in detail the comparison of the existing system (which abolitionists call retributive justice) and the system proposed by abolitionists under the name restorative justice, as follows:

Table 1. Comparation system

RETRIBUTIVE JUSTICE	RESTORATIVE JUSTICE
1. the crime is formulated as a violation of the State	1. a crime is formulated as one's transgression against another person
2. Attention is directed to determining past errors	2. Points of concern on problem solving, liability and future liabilities
3. The relationship of the parties that are resistance, through an orderly and normative process	3. Normative nature is built on the basis of dialogue and negotiation

4. Application of suffering for taming and prevention	4. Restitution as a means of improvement of the parties, reconciliation and restoration as the main objectives
5. Justice is formulated by willfulness and process	5. Justice is formulated as rights relationships, judged on the basis of the results of
6. The nature of conflict from evil is obscured and suppressed	6. Crime is recognized as conflict
7. Social disadvantages of one being replaced by another	7. Target attention to social loss improvement
8. People are on the sidelines displayed abstractly by the state	8. The community is a facilitator in the restorative process
9. Promote competitive and individualistic values	9. Promote reciprocal assistance
10. Action directed from the state to the perpetrators of criminal acts: passive victims	10. The role of victims and perpetrators of criminal acts is recognized, both in the problem and the settlement of the rights and needs of victims, perpetrators of criminal acts are encouraged to be responsible
11. The responsibility of the perpetrator of the crime is formulated in the framework of criminalization	11. The perpetrator's liability is formulated as the impact of the application on the act and to help decide the best
12. Criminal acts are formulated in theoretical and pure legal terminology, without having moral, social and economic dimensions	12. Criminal acts are understood in a thorough, moral, social and economic context
13. Sin or debt given to the State and msayarakat abstractly	13. Sin or debt and accountability to the victim is recognized
14. Reactions and responses are focused on the actions of the perpetrators of crimes that have occurred	14. Reactions and responses are focused on the consequences of the perpetrator's actions
15. The stigma of evil cannot be eliminated	15. Stigma can be removed through restorative action
16. There is no motivation to repent and forgive	16. There are possibilities that are helpful
17. Attention is directed to the debate between freedom of will*(free will)*and socio-psychological determinism within the power of evil	17. Attention is directed to accountability for the consequences of

Restorative justice places a higher value in the direct involvement of the parties. Victims are able to restore the element of control, while perpetrators are encouraged to assume responsibility as a step in correcting mistakes caused by crime and in building their social value system. Community engagement actively strengthens the community itself and binds the community to values of respect and mutual love. The role of the government is substantially reduced in monopolizing the current judicial process. *Restorative justice* requires cooperative efforts from the community and the government to create a condition where victims and perpetrators can reconcile conflicts between the two sides and repair the wounds of both sides.

This is in accordance with the sound of the 4th Precept of Pancasila which reads"Populism Led by Wisdom wisdom in Consultative /Representative", with the following details:

1. As citizens and citizens, every Indonesian has the same position, rights and obligations.

2. It is not permissible to impose will on others.

3. Prioritize deliberation in making decisions for the common good.

4. Deliberation to reach consensus is covered by the spirit of family.

5. Respect and uphold every decision reached as a result of deliberation.

6. With i'tikad good and a sense of responsibility to accept and carry out the results of deliberation decisions.

7. In deliberations, mutual interests are preferred over personal and class interests.

8. Deliberation is conducted with common sense and in accordance with a noble conscience.

9. Decisions taken must be morally accountable to God Almighty, upholding human dignity and dignity, the values of truth and justice put unity and unity first for the common good.

10. Give confidence to the representatives entrusted to carry out the deliberations.

The essence of makna Sila 4 Pancasila above in relation to Restorative justice

is the principle of consensus deliberation in every decision making in order to resolve medical malpractice cases conducted by doctors. . Consensus deliberation is the process of discussing the issue in a joint sitting by involving the relevant parties in order to reach a mutual agreement. Consensus deliberations are conducted as a way to obtain decisions that are equally

beneficial to both parties so that no party is harmed. With consensus deliberations, it is expected that two or several different parties do not continue to fight and get a middle ground. Therefore, in the process of consensus deliberation is required humility and self-sincerity and dispose of each ego. In public life, consensus deliberation has several direct benefits, namely as follows:

1. Consensus deliberation is the right way to overcome various cross-opinions.

2. Consensual deliberations have the opportunity to reduce the use of violence in the fight for interests.

3. Consensus deliberations have the potential to avoid and overcome the possibility of conflict.

Looking at the above benefits, there are several principles that must be held firmly in making joint decisions in consensus deliberation, namely as follows:

1. Opinions are conveyed politely.

2. Respect the opinions of others who disagree.

3. Find a meeting point among the opinions that exist wisely.

4. Accepting mutual decisions with great heart, even if not in accordance with the wishes.

5. Carry out decisions together wholeheartedly.

This culture of consensus deliberation has a philosophical and theological basis that leads to the restoration of the dignity and dignity of all parties involved, replacing the atmosphere of conflict with peace (the principle of silahturahmi), removing blasphemous blasphemy with forgiveness, stopping prosecution and blaming (the principle of mutual forgiveness and asking god for forgiveness). The desired clarification is not through the court table, but through the table of peace and negotiation (the principle of deliberation).

3. Conclusion

The settlement of medical malpractice through restorative justice approach or which in indonesian culture is known as consensus deliberation as contained in Sila Ke-4 Pancasila is one of the alternative solutions that are to restore conflict to the most affected parties (victims, perpetrators and community interests) and give priority to the interests of all parties. Restorative justice also emphasizes on human rights and the need to recognize the impact of social injustice and in simple ways to return the parties to their original state rather than simply giving the perpetrators formal justice or the perpetrators of the law and the victims not getting any justice. Then restorative justice also seeks to restore the safety of

victims, personal respect, dignity and more importantly the *sense of control* so as to avoid resentment both individuals and families or groups

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