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The Use of Mediation as an Alternative Health Dispute Resolution

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Abstract:
In the conditions of the Covid-19 pandemic, the Indonesian government is increasingly serious about dealing with health issues. This situation can be seen with the increasing number of government legal products in the form of laws and government regulations governing the health sector. However, the government's legal products are still not adequate. Among others, there is no special regulation on resolving health disputes between doctors as health care providers and patients as health care recipients (receivers). This paper aims to examine the provisions of Indonesian positive law that regulates the settlement of health disputes outside the court or known as alternative dispute resolution (ADR), although there is an honorary council of Indonesian medical discipline (MKDKI) in resolving health disputes that are not mediation institutions but as a form of supervision. Health disputes are different from other civil disputes. This is because health service disputes affect individuals as legal subjects, professions, and institutions. The character of the profession and institution will be greatly harmed if the health dispute resolution process is done openly through the litigation process. The open nature will provide opportunities for the character assassination of the profession. Mediation is a non-litigation approach in dispute resolution recognized by positive law in Indonesia. Deliberation to reach a consensus with the help of mediators can be taken through the approach of kinship, humanitarian principles, justice, and in order to maintain good relations to end existing disputes. The final settlement of disputes through mediation can be a memorandum of peace or a final and binding deed of peace. Based on the deed of peace, the judiciary can execute if there is a violation of the agreement's content. Based on the study results, it was concluded that alternative dispute resolution (ADR) with a health mediation mechanism is the right approach to resolving existing health disputes because it is beneficial for the parties, and the final form of resolution is recognized by positive law in Indonesia. Health mediation as a complement to the litigation process will greatly help the judiciary resolve existing disputes so that there is no accumulation of cases in the judiciary. In mediating this health dispute, if it has been agreed to be done by the mediator to strengthen peace, both parties are advised to file a lawsuit in court. When mediating in court, they make a mediation agreement in accordance with the previous mediation and register with the court to have binding legal force.

Keywords: mediation, resolution, health.

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使用调解作为替代健康纠纷解决方案

摘要:
在 Covid-19 大流行的情况下，印度尼西亚政府越来越认真地处理健康问题。这种情况可以从以管理卫生部门的法律和政府规章形式出现的政府法律产品的数量增加中看出来。然而，政府的法律产品仍然不够充分。除其他外，没有关于解决作为医疗保健提供者的医生和作为医疗保健接受者（接收器）的患者之间的健康纠纷的特别规定。本文件旨在研究印尼实在法的规定，该法律规定在法院外解决健康纠纷，或称为替代性纠纷解决方案（ADR），尽管印尼医学纪律荣誉委员会（MKDKI）在解决不是调解机构而是作为监督形式的健康纠纷方面。健康纠纷与其他民事纠纷不同。这是因为卫生服务纠纷影响个人作为法律主体，职业和机构。如果健康纠纷解决过程是通过诉讼程序公开进行的，职业和机构的性质将受到很大的损害。开放的性质将为职业的性格暗杀提供机会。调解是印度尼西亚正法认可的解决争议的非诉讼方法。在调解人的帮助下达成共识的审议可以通过亲属关系，人道主义原则，正义的方式进行，并且为了保持良好的关系以结束现有的争端。通过调解最终解决争端可以是一份和平备忘录，也可以是一份具有约束力的最终和平契约。根据和平契约，如果违反协议内容，司法机构可以执行。根据研究结果，得出结论，具有健康调解机制的替代性争议解决（ADR）是解决现有健康争议的正确方法，因为它对当事人有利，最终解决形式得到印度尼西亚 健康调解作为诉讼程序的补充，将极大地帮助司法机构解决现有的纠纷，使司法机构没有积累的案件。在调解这一健康纠纷时，如果调解人同意由调解人来加强和平，建议双方向法院提起诉讼。在法庭调解时，他们按照以前的调解订立调解协议，并向法院登记，具有法律约束力。

关键词：调解，解决，健康。

1. Introduction

Based on the Decree of the Minister of Health of the Republic of Indonesia No. 434/Men. Case/IX/1983 on enacting the Indonesian code of medical ethics, the answer to health services is a doctor in agreement with its competence. The relationship between the doctor and the patient was originally paternalistic. Along with the development of technology, it changed with the same relationship pattern where the doctor is not in the higher strata of rights and obligations than the patient (Ali, 2010). The doctor and the patient are persons with the same dignity. Both are parties who agree to enter into a legal relationship in the form of a therapeutic contract (Amir, 2010).

In the amendment of the Constitution of 1945, Article 28 H stated, "Everyone is entitled to health services." The right to health by many people is often interpreted as limited to the right to health services, especially medical/curative services. Curative health care is only a small part of the right to be healthy because being healthy is not only "cured of disease" but encompasses a much wider range of things. Other health services include promotional, preventive, and rehabilitative. Many factors play a role in a person's health, including education, protection against infectious diseases, the availability of a healthy environment (both physical and social), safe water, balanced nutritional food, and a healthy home (shelter) (Faqih, 2013). The increasing number of cases of unsatisfactory health care patients, alleged malpractice by unscrupulous health workers, provision of health services that are not in agreement with standards, and other health disputes that enter the realm of law in court need to be addressed with dispute resolution through alternative dispute resolution non-litigation (Amir, 2007). The known case is Prita Mulyasari versus R.S. Omni International Alam Sutera. Understanding dispute resolution regulations in this case of health disputes is necessary to resolve them so that alternative non-litigation dispute resolution can produce the best solution that does not harm both parties to the dispute.

Disputes in the legal context are created due to opposing a sense of justice and legal certainty. Three values must exist as the law's content, namely fairness, expediency, and legality. Certain medical disputes are more related between doctors and patients where both make legal relations. If there is a medical dispute, it takes precedence to resolve it by mediation based on Article 29 of Law No. 36 of 2009 on Health. The relationships between the hospital and the patient, medical personnel (doctors) and patients, and nurses and patients are closely related to civil, administrative, and criminal laws. Health law regulation in Indonesia has not been fully codified and is still spread in various laws and regulations. Similarly, the regulation of provisions for resolving health disputes is insufficient in Indonesia's health law.

The Constitutional Court, in its decision dated April 20, 2015, Number: 14/PUU-XII/2014, has “rejected the application for all” from the representatives of the United Indonesia doctors in a judicial review request to cancel the provisions of Article 66 paragraph (3) of law no.29 of 2004 on the practice of medicine, so that doctors can be immediately complained and convinced

without passing the recommendation of the Indonesian Medical Discipline Honorary Mejelis (MKDKI).

There is a distinctive relationship between a hospital and its patients, the medical personnel (doctors) and the patients, and the nurses and patients, in the provision of health services. In its application, these relationships are closely related to various areas of law, such as civil law, administrative law, and criminal law. The regulation of health law in Indonesia has not been fully codified and is still spread across various laws and regulations. Similarly, the regulation of provisions on the resolution of health disputes is not sufficient in health law in Indonesia. The Constitutional Court, in its decision dated April 20, 2015, Number: 14/PUU-XII/2014, has “rejected the application for the whole” from the representatives of the United Indonesia doctors in a judicial review request to cancel the provisions of Article 66 paragraph (3) of law no.29 of 2004 on the practice of medicine, so that doctors can be immediately complained and convinced without passing the recommendation of the Indonesian Medical Discipline Honorary Mejelis (MKDKI). In connection with the matters described above, the main problem discussed in this paper is, how does the resolution of health disputes through ADR have a legal basis in Indonesian positive law? And what about the right to alternative health dispute resolution forum?

2. Methodology

The method of approach to be used in this study is a normative juridical approach. This approach was chosen because, to achieve the research objectives/research targets, researchers refer to the legal norms contained in legislation, court decisions, legal norms that exist in society, and legal health instruments (Junaidi, 2011). Therefore, the research approach to legislation examines all legislation and regulations related to legal issues to be studied and is named the normative study of the regulation of mining business activities concerning the settlement of health disputes.

3. Results and Discussion

3.1. Patient Rights in Health Disputes and Their Factors

Patients are protected and regulated by the laws and regulations in Indonesia. The theoretical basis for writing this thesis starts from the theory of consumer protection, which, in the Consumer Protection Act, regulates the rights and obligations of consumers in Indonesia. Consumer rights are regulated in Article 4 of the law of the Republic of Indonesia No. 8 of 1999 on Consumer Protection. Article 4(d) of the Law of the Republic of Indonesia No. 8 of 1999 on Consumer Protection Regulations, one of which is the basis for writing this thesis, denotes "the right to be heard opinions and complaints on goods and/or services used." Therefore, Article 4(d) of the Law of the Republic of Indonesia No. 8 of 1999 on Consumer Protection is one of the legal bases used to cover whether all consumer rights are fulfilled through this thesis research. A consumer also obtains the right to advocacy, protection, and efforts to resolve consumer protection disputes appropriately, as written in Article 4(e) of the Law of the Republic of Indonesia Number 8 of 1999 on Consumer Protection.

Priyatna Abdurrasyid proposed and postulated two philosophies of alternative dispute resolution (which included arbitration). The two philosophies are: (I) empowerment of the individual; and (ii) problem-solving by cooperation (cooperative). Huala Adolf suggested the "peace theory." This theory is derived from combining the philosophy of natural law with the philosophy of Pancasila law. In the philosophical theory of natural law, the theory of peace is reflected in the will of the creator in every Holy Book of the world's major religions (Islam, Christianity, Hinduism, Buddhism, Confucianism), that is, the creation of World Peace. In the theory of philosophy of Pancasila law, the theory of peace is reflected in all the precepts.

A patient has rights regulated in the same way as those of a consumer of health services, including patients' rights in resolving medical disputes with doctors and hospitals as health service providers (Balai Pustaka, 2001). Legislation related to the provision of rights to patients if they suffer losses when receiving health services that are not in agreement with their rights can be seen in Article 4(d), (e), (h), Law of the Republic of Indonesia Number 8 of 1999 Concerning Consumer Protection:

a. The right to be heard opinions and complaints about the goods and/or services used;

b. The right to appropriate advocacy, protection, and consumer protection dispute resolution efforts;

c. The right to obtain compensation and replacement if the goods and services received do not conform to the agreement or are not appropriate;

The article is related because the patient is a consumer of health services provided by doctors and hospitals. The rights of the patient himself have also been written in Article 32 letters (f) and (q) of the law of the Republic of Indonesia number 44 of 2009 concerning hospitals:

a. File a complaint on the quality of service obtained

b. Sue the hospital if it is suspected of providing services that do not agree with the standards under civil or criminal law.

The next article is regulated in the Law of the Republic of Indonesia No. 29 of 2004 on the Practice of Medicine. Article 66, Paragraph 1 of Law No. 29 of 2004 on the Practice of Medicine states,

"Any person whose interests are harmed by the actions of a doctor or dentist in running a medical practice can complain in writing to the chairman of the honorary council of Indonesian medical discipline."

The rules in the legislation that emphasizes the patient's right to the content of medical records are regulated in Article 52 of the Law of the Republic of Indonesia No. 29 of 2004 on the Practice of Medicine,

named "Patients." However, articles that regulate patients' rights when receiving adverse health services may not protect patients from medical disputes with doctors and hospitals that provide health services. Thus, medical disputes usually arise and enter the territory of civil law due to their private or person-to-person nature.

There are still some injustices experienced by patients even though the state has legally protected their rights through existing legislation (Mangesti, 2016). For example, patients and their families feel confused to convey what is complained about, seeing the hospital's location is very strict and with procedures that are quite difficult to take (Mertokusumo, 1993). Patients have the right to complain about the quality of services they receive, but the complaint procedure is not explained transparently in hospitals by health care providers (VIVA.co.id, 2013). As an example, the right of patients that is often ignored or denied by hospitals is the right to the content of medical records (Rahmadi, 2010). The patient has the right to the contents of his or her medical records in accordance with the provisions of Article 52 of the law of the Republic of Indonesia No. 29 of 2004 concerning the practice of medicine.

The injustice that affects patients is felt during the process of resolving medical disputes experienced by patients with doctors and/or dentists and hospitals. Laws and regulations provide space for patients to be able to fight for their rights if they feel harmed by doctors and/or dentists and sick households but, in fact, patients who are limited in terms of knowledge and physical conditions and have to face the costs of resolving medical disputes (commonly done in court) still do not realize their rights as stipulated in the laws and regulations.

The following are factors causing patients difficulties:

a. Not having a legal background to navigate health disputes with doctors and hospitals;

b. Psychological stress caused by the pain suffered and the costs of the health services.

Alternative dispute resolution with a mediation mechanism is the right choice in health dispute resolution. Dispute resolution falls into the realm of civil law. There are two channels for the disputing party: litigation and nonlitigation. The litigation path means that the case is handled by the judicial process, while nonlitigation is the resolution of legal problems outside the judicial process. Nonlitigation is generally done in civil cases because it is more private. The provisions of Article 45 paragraph (2) state that to resolve consumer disputes, there are two options, namely through the institution in charge of resolving disputes between consumers and business actors or through the judiciary located in the general judicial environment. Meanwhile, in medical disputes, the parties to the dispute are patients with doctors and/or dentists and hospitals (Beritasatu, 2013). There is currently not a body in place to resolve medical disputes, with the aim of avoiding disputes being brought to court. It is expected that such a body adhering to nonlitigation methods, especially mediation and as regulated in the legislation to resolve health disputes, will exist at a later date (Hamidi et al., 2021).

UU No. 48 of 2009 on judicial power. Chapter XII on out-of-court dispute resolution states that civil dispute resolution efforts can be made outside state courts through arbitration or alternative dispute resolution (Article 58). Arbitration is a way of resolving a civil dispute outside the court based on an arbitration agreement made in writing by the parties to the dispute (Article 59 paragraph (1)). Alternative dispute resolution is the act of resolving disputes or disagreements through procedures agreed by the parties, namely settlement outside the court by consultation, negotiation, mediation, conciliation, or expert assessment (Article 60 paragraph (1)).

UU No. 36 of 2014 on health workers. Chapter XI on dispute resolution states that any recipient of health services who is harmed due to the fault or negligence of health workers may seek compensation in accordance with the provisions of the legislation (Article 77). In the event that a health worker is suspected of negligence in carrying out his profession and thereby causes harm to the recipient of health services, disputes arising from such negligence must be resolved in advance through out-of-court dispute resolution in accordance with the provisions of the legislation (Article 78). The settlement of disputes between health workers and health care facilities is carried out in accordance with the provisions of the legislation (Article 79).

In addition to the prevailing laws and regulations (positive law), the jurisprudence remains the Supreme Court of the Republic of Indonesia, which recognizes the legal effect that gives absolute authority to the arbitration institution as an extrajudicial institution to resolve disputes arising from the implementation of the agreement based on the principle of pacta sunt servanda ex article 1338 of the civil code. Jurisprudence remains the decision of the Supreme Court of the Republic of Indonesia No. 013 PK / N / 1999 juncto No. 019 K / N / 1999; Supreme Court decision No. 1715K / Pdt / 2001 dated December 12, 2001; Supreme Court decision No. 2683 K / Pdt/2001 dated June 19, 2002; Supreme Court decision No. 3145k / Pdt / 1999 dated January 30, 2001.10.

Apart from the legal rights of parties to the health dispute to be fulfilled, there are also various factors such as emotional or psychological needs that can also be channeled (Sitompul et al., 2021). This can be fulfilled and is part of the benefits when mediation is undertaken (Sitompul, 2020). In mediation, the interests of the parties will be focused on so that not only legal rights but also psychological rights will be channeled through discussions brokered by the mediator (Sitompul & Sitompul, 2020). Openness is the key to mediation, making it more suitable for resolving medical disputes. In addition, patients as parties who do not have power in terms of means and education can express their wishes directly to other parties, namely doctors and/or dentists and hospitals, through mediation (Santoso et

al., 2019). The essence of mediation is good faith, which is the basis for the process of dispute resolution (Suryono & Indra, 2011). If the mediation agreement is violated, it can be the basis for a lawsuit being brought to the court, and this is what causes the accumulation of medical dispute cases at every level of the court because the cases require a lengthy process. The medical dispute resolution efforts that provide more protection to patients are through nonlitigation because nonlitigation provides space for patients to express complaints and wishes openly to doctors and hospitals in health disputes.

Mediation undertaken by the parties in a health dispute can still be affected by the classic problem in which the mediator has very limited knowledge in the fields of law and health (Supriadi, 2001). According to previous research (Neelakantan, 2014), the parties in medical disputes should have a special council that deals specifically with medical problems and is handled by several competent people and experts in law and health. Mediators handling the dispute's parties master health law, including medical and/or dental law, nursing law, clinical pharmacy law, dispensary law, public health law, medical law, hospital law, and environmental health law. There needs to be a council that deals specifically with medical disputes so that imperfections in dispute resolution through litigation and non-litigation can be resolved in a way that patients do not find it difficult to fight for their rights, and that is also considered fair for doctors, dentists, and hospitals. The council should consist of members who work in the field of law and health. It should be created to consider the condition of patients in medical disputes who are vulnerable due to health, psychological, or economic factors.

Mediation disputes are regulated in Article 130 HIR, Article 154 RBG, and PERMA no. 1 (2008), which in Article 1 Paragraph (7), defines mediation as a way of resolving disputes through the negotiation process to obtain an agreement of the parties assisted by a mediator. The presence of mediation in resolving medical disputes is very reasonable because not all medical disputes need to be resolved in court.

The government needs to establish a Medical Dispute Resolution Agency (MDRA) (BPSM) by considering several points that have been an obstacle. The MDRA can be under the Ministry of Health and spread across all provinces in Indonesia. BPSM is related to public services for all Indonesian people, so it is within the scope of the executive body. This means that BPSM is an independent government agency dealing with medical dispute issues. The scope of the judicial body is helped by the establishment of BPSM, thereby reducing the number of health disputes in the realm of litigation, which is time-consuming, energy-consuming, and costly for patients as well as for doctors and hospitals. Keep in mind that the relationship between patients and doctors as medical personnel and hospitals as a container for health care providers is balanced and necessary. The patient needs a doctor to cure the disease and a place in the hospital for treatment, and the patient pays for the services that have been provided. Important points that must be considered in forming an MDRA are that it is accessible, affordable, and confidential, and that it does not take long and is a favorable solution.

Another idea is to form a council for solving health disputes outside the government. For now, there is a medical settlement council that has been formed and is competent in resolving health disputes with mediation procedures: the Indonesian Dispute Council (IDC). Members of the IDC are mediators who are certified both nationally and internationally in resolving health dispute issues. The IDC also contributes to helping the government with disputes and provides such things as training and media benefits to health circles.

4. Conclusion

Health disputes are civil disputes with unique characteristics and are prone to character assassination attempts; therefore, a closed approach through the mediation process is an appropriate way that is beneficial for the parties, and the relationship between the parties can be maintained properly. Health disputes, categorized into special laws, must be handled specifically. This makes mediation the initial ledge to resolve beneficial medical disputes, and MKDKI and IDI become the sole container of the medical profession that has the authority to be a mediator to resolve medical disputes in the world of health services. Another option is that the government should establish a special health dispute resolution agency. However, outside the current government, there is the Indonesian Dispute Council (DSI), an institution playing a role in settling disputes in the health field, non-litigation disputes through the establishment of a special council, the medical dispute resolution agency belonging to the government, helping the patients fight for their rights. However, on the other hand, the profession of doctors and hospital agencies also gains balanced justice. So mediation is one of the right choices to solve health dispute problems. Recommendations, post the decision of the Constitutional Court dated April 20, 2015, Number 14/PUU-XII/2014, as follows: (I) health professional organizations (doctors, dentists, etc.) to establish an Indonesian Health mediation and Arbitration Agency ("BMAKI") or Indonesian Health Mediation & Arbitration Center ("IHMAC"), which may conduct an extra-judicial settlement of Health disputes out of court (state court); (ii) making provisions and procedures for proceedings on such agency; (iii) universities that have Faculties of Medicine/Dentistry to establish health mediation and Arbitration study centers that can organize activities in the form of research and training (research & development) on health mediation and arbitration; (iv) to cooperate (MOU) with related institutions (such as BANI Arbitration Center and National Mediation Center (PMN) in preparation for the establishment of bodies, making provisions and procedures and the

establishment of such study centers.

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