

Constructing Penal Mediation on Medical Malpractice Cases: A Restorative Justice Perspective

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Abstract

Medical malpractice as another name of medical practice crime suit requires law settlement. The relationship between medics and their patients in a medical malpractice case can be shifted into the relationship between the perpetrator and the victim. This paper enquires about how is the penal mediation construction upon medical malpractice based on restorative justice perspective? Handling medical malpractice with penal mediation can be conducted both inside and outside the court that the construction should be set in the New Criminal Code Concept. Penal mediation theory departs from the idea of legal realism that can be proposed as an alternative treatment of restorative justice perspective.

Keywords: medical malpractice, penal mediation, restorative justice.

1. Introduction

Penal mediation is the antitheses of the concept of retaliation against those who have committed acts harm the interests of others. When associated with criminal acts of medical malpractice, the losses suffered by patients who are victims of medical malpractice must be avenged to the perpetrators. The concept of retaliation is of course done by the state in its capacity in law enforcement and avoiding the patterns of "vigilantism" (dutch: eigenrichting) that may occur. The inclusion of the concept of penal mediation in handling criminal act represents a paradigm shift in criminal law. Handling criminal act which was originally glued to the realm of public law slowly entered the realm of private law with the inclusion of the concept of penal mediation, although the concept of penal mediation differs from mediation in civil law. The consequences of the existence of mediation increasingly applied as an alternative penal settlement in the area of criminal law through restitution in criminal justice procedure shows that the difference between criminal and civil law and the difference is not so big it can become dysfunctional.¹

Restorative justice approach a point of departure, so that the reinstatement effort put forward is becoming usual conditions. Penal mediation (penal mediation) is practiced as a form of settling disputes out of court², including its application in medical malpractice settlement.

Medical malpractice is a criminal offense that occurs between medics and patients as the victim was originated from the private sphere, namely the relationship between health professionals and patients. The rights and obligations that arise are the rights and obligations emerge of the civil agreement. The right of patients to receive health care from health workers is due to the law, whereas health professionals have an obligation to do his best for his/her patients. Malpractice is a deviation from the best effort. Act of medical malpractice is one of the branches of the fault in the professional field. Medical malpractice action involving doctors and other medics there are many types and shapes, such as oversight perform diagnostics, one to act in accordance with the patient's care or treatment of the patient's failure to carry out thorough and meticulous.³

Many examples of alleged medical malpractice occur, and symptoms appear about the same, i.e. there is a difference of perception about the scope of acts that can be categorized as a crime of malpractice. Moreover, any settlement effort encountered resistance, especially with regard to verification and medical procedures that can only be understood by a doctor or health worker. Not surprisingly, then the general public thinks that the medical effort is an effort fraught with uncertainty. This then results in each handling medical malpractice is often deadlocked, especially with the approach of the criminal law.

Important issues in terms of the occurrence in handling of medical malpractice are not only the crime procedure, but also on rehabilitation for victims, including in the case of compensation claims procedures. The concept of restorative justice, thus, seeks to achieve fairness in the handling of a criminal offense, including the awarding of compensation for victims. Procedures that must be endured by the victim of medical malpractice to get their

¹ Barda Nawawi Arief, 2008, *Mediasi Penal Penyelesaian Perkara Di luar Pengadilan*, Semarang: Pustaka Magister, p. 4-5

² Lili Mulyadi, "Mediasi Penal dalam Sistem Peradilan Pidana di Indonesia: Pengkajian Asas, Norma, Teori, dan Praktik" (*Issue 85, January-April 2013*), p. 5

³ <http://dokteranakonline.com/2013/12/01/malpraktek-kedokteran-penyebab-dan-dampak-hukumnya/>

right are complex (complex), long (long), slippery (slippery) and winding (tortuous).¹ In fact, the principle of justice which is the aims of supreme law be achieved by the use of penal mediation in handling medical malpractice. The principle of justice that meets the expectations of patients who are victims of medical malpractice should be formulated in criminal law reform in Indonesia.

This paper is questioning about how construction with handling medical malpractice penal mediation in restorative justice perspective? Approach used in formulating utility construction penal mediation is closer to the meaning of the legal function for justice obtaining.

2. Discussion

2.1. Penal mediation concept and Indonesian culture

The use of penal mediation in the context of criminal law reform, according to Barda Nawawi Arief, also related to the issue of pragmatism and the idea of protection of victims, the idea of harmonization, the idea of restorative justice, the idea of overcoming stiffness (formality) and the negative effects of the criminal justice system and criminal system in force, and the search for alternative ways of punishment (besides prison).² This idea is closer to the true culture of Indonesian people do not know the conflict, because the culture of life "guyub" (gemeinschaft). Traditionally, this is a positive culture, but the cultural infiltration, which also includes the inclusion of legal values from outside has given appear to different interests. Conflicts of interest of each individual require the completion of a separate mechanism that ultimately reduced to the completion of the legal norms approach.

Gemeinschaft-shaped pattern of life which is very close to the consensus mechanism, that all the problems can be solved by dialogue between the different party's interests. The core of the penal mediation is deliberation itself. When viewed in historical culture of Indonesian society upholds the consensus approach.³ With this kind of approach, the interests of both parties—in this case the health workers who alleged medical malpractice and patients as victims—can be met and is a win-win Solutions. Course approach to handling medical malpractice penal mediation This is not in order to eliminate the criminal nature of the actions taken by the health workers, but in the context of a more humane legal settlement. The idea of restorative justice becomes a central theme, that the condition of the victim should be sought to be returned to its original state—even though this is a necessity.

2.2. The working principle of penal mediation

Penal mediation and the idea developed from the four working principles (working principles), namely: (1) handling conflicts (Conflict Handling / Konfliktbearbeitung), (2) oriented processes (Process Orientation; Prozessorientierung), (3) Mediation penal oriented quality process rather than outcomes, (4) informal process (Informal Proceedings - Informalität); (5) penal Mediation is a process that is informal, non-bureaucratic, avoiding strict legal procedures, (6) There are active and autonomous participation of the parties (Active and Autonomous Participation - Parteiautonomie / Subjektivierung); The parties (perpetrators and victims) are not seen as an object of criminal law procedure, but rather as a subject who has a personal responsibility and the ability to do. They are expected to act on his will.⁴

Penal mediation as an alternative dispute resolution instrument has four advantages or strengths, namely: (1) to reduce the victim's feelings of revenge, is more flexible because it does not have to follow the procedures and processes as well as in the criminal justice system, and less costly, and faster process compared with the litigation process (the process of settling disputes in court)⁵, (2) Cost of the criminal justice system by the stacked cases and settlement process takes a long time, can be reduced by the presence of mediation between the perpetrator and the victim.⁶, (3) Mediation provides the opportunity for victims meet with principals to discuss the crime that has been detrimental to their life, feelings and express concern and ask for restitution⁷, (4)

¹ Vivienne Harpwood, 2007, *Medicine, Malpractice and misapprehensions*, Oxon: Routledge-Cavendish, p.44

² Barda Nawawi Arief, 2000, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*, Semarang : Badan Penerbit Universitas Diponegoro, Semarang, p. 169-171.

³ Mushadi, 2000, *Mediasi dan Resolusi Konflik di Indonesia*, Semarang : Walisongo Mediation Center, p. 38.

⁴ Stefanie Tränkle, *The Tension between Judicial Control and Autonomy in Victim-Offender Mediation - a Study of a Paradoxical Microsociological Procedure Based on Examples of the Mediation Process in Germany and France*, http://www.iuscrim.mpg.de/forsch/cream/traenkle_e.html.

⁵ Mark William Bakker. *Op Cit*. pp. 1480

⁶ Larysa Simms. *Criminal Mediation is the Bast [fn1] of the Criminal Justice System Not Replacing Traditional Criminal Adjudication Just Making it Better*. Article on the Ohio State Journal on Dispute Resolution. No. 22 of 2007. pp. 801.

⁷ Mary Ellen Reimund, 2005, *the Victim Offender Mediation Confidentiality in A* Article in the Journal of Dispute Resolution, p. 404.

Mediation recreate a harmonious relationship between the victim and the perpetrator, this condition is not found in the resolution of conflicts through the criminal justice system; Giving sorry victim to the perpetrator will reduce guilt perpetrators and creates a reconciliation between the two.¹

2.3. When medical malpractice occurs

Criminal acts of medical malpractice often arise as a result of lack of communication between the medical staff with patients / families, so that information is not up entirely on the patient. What are the possible risks of treatment done, administering medications, no matter how small surgery, or other medical treatment is less delivered to the patient / family. This resulted in the event of unwanted things (diseases cured, cause complications or other illness), the patient directly accused doctor malpractice.²

It is clear that the conception of medical malpractice itself must be straightened out. Meaning of lexical (dictionary) of malpractice can be found in Black's Law Dictionary, is "Any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct."³ In this sense, malpractice contains elements: (1) error procedures, (2) lack of skills, (3) the professional duty of loyalty, (4) an evil practice, (5) illegal or immoral act. Medical malpractice can occur if health professionals do not provide any of the 3 (three) of the following, namely: (1) Medical Professional Standards, (2) SOP, (3) informed consent. These three things are related to the work of a medical professional and work procedures, as well as information about medical treatment to patients associated with recovery opportunities and risks. Often patients do not get enough information on this subject, so malpractices are common.

World Medical Association (WMA, 1992) provide a definition of malpractice as "Medical Malpractice involves the physician's failure to conform to the standard of care for the treatment of the patient's condition, or lack of skill, or negligence in providing care to the patient, the which is the direct cause of an injury to the patient."⁴ In its official statement, WMA aware that in some countries there has been an increase in medical malpractice claims made by the doctor (physician), so it should be given a clear distinction between the probable result of medical malpractice that occur in medical care and treatment that is not the doctor fault. Medical compensation issues also need to be arranged for patients who suffer medical injuries (Suffering a medical injury).

WMA also has recommended that compensation for patients harmed by medical malpractice should also be governed by national law. Departing from medical malpractice cases in Indonesia⁵, the concept of restorative justice needs to be prioritized. Cases done by dr. Dewa Ayu Sasiari on charges of malpractice against Julia Frances Maketey who died in childbirth may be filed as one example.⁶ 10-month prisons sentenced by the Supreme Court annulled the decision of the receiving PK No. 79/PK/PID/2013, and dr. Ayu was freed.

The case is one of a polemic, a hot issue, especially with regard to patient rights and medical malpractice allegations considered by the Indonesian Doctors Association (IDI) as an attempt to criminalize the profession of medicine. Health workers who work in the medical services will intersect with the interests of patients who expect a cure. Instead of being cured, the risk of medical services can also apply vice versa. The death of the patient and the health condition became worse after medical efforts often alleged medical malpractice. As described earlier, during medical procedures implemented by the efforts of health workers, the result of which appeared in the medical process cannot be categorized as medical malpractice.

2.4. Restorative justice as a side outcome of penal mediation

Penal mediation in handling medical malpractice is intended to bring it closer to the concept of restorative justice, as the Scottish Mediation Network provides the definition of "Mediation is a way of resolving Disputes roommates assists the people INVOLVED to reach an agreement with the help of a mediator an impartial. The

¹ Nawawi Arief Barda Jennifer Gerarda Brown cites in *Op. Cit.* p. 5

² Tini Hadad, "Kesan-kesan Menjadi Anggota Konsil Kedokteran Indonesia" dalam *Sewindu Konsil Kedokteran Indonesia*, Jakarta: KKI, 2012, p. 106.

³ Henry Campbell Black, 1933, *Black's Law Dictionary* (Third Edition), Washington DC: West Publishing Co., Hlm 1149

⁴ <http://www.wma.net/en/30publications/10policies/20archives/m2/Until>

⁵ January 2013 the number of complaints of alleged medical malpractice council to Indonesia or KKI reached 183 cases. That number increased sharply compared to 2009 were only 40 cases of alleged malpractice. Even these cases did not get proper treatment and only ended up in the middle of the road, without any sanction or penalty related to health workers. Of the 183 cases of malpractice in Indonesia, as many as 60 cases performed general practitioners, surgeons performed 49 cases, 33 cases performed obstetricians, and 16 cases performed pediatrician. The remaining under 10 kinds of cases reported. (Source: <http://dokteranonline.com/2013/12/01/malpraktek-kedokteran-penyebab-dan-dampak-hukumnya/>)

⁶<http://www.temp.co/read/news/2013/11/27/063532842/Kriminolog-Vonis-MA-untuk-Dokter-Ayu-Sudah-Tepat>

parties rather than the mediator, decide the terms of the settlement. "¹ The essence of mediation is the achievement of an agreement between the parties mediated. The basic question is why mediation is suitable for resolving conflicts and disputes? Can mediation result in the completion of the restorative (Cure)?

To answer the key questions that sharply distinguish the (distinct) between penal mediation and restorative justice first is necessary to understand both definitions. Mediation is intended as a penal settlement of "win-win" disputes, which are no party feels "losing" and "winning". A result of penal mediation is settlement or agreement of both parties. Penal mediation is designed and implemented using the approach in which both parties feel that they are treated as same position (equals). The mediator, in this case, is responsible for the mediation process, but has no interest in the outcome. Restorative justice is the other side of penal mediation. Mediation is a process; restorative justice's being by products. Mediation is mainly motivated by the need to resolve disputes or conflicts and stop there, that the results must be restorative or not, it is not a principal purpose of the mediation. So, the main purpose of mediation is to build a consensus on how the parties will relate or engage each other in the future and how they can avoid the next conflict.

The expected Justice through formal way, is expensive, protracted, exhausting and does not resolve the problem, and what's worse is it is full of corruption. Restorative justice is a goal to be achieved in the handling of a criminal offense. Understand that one is aware of the growing abolitionist, who considers that the criminal justice system containing problems or structural defects, so that fundamental changes must be made, including the search for a more viable alternative to criminal prosecution and effective than institutions such as prisons.² Restorative justice, thus a discourse offers answers to dissatisfaction with the criminal law and criminal procedural law.³ Restorative justice that emphasizes reconciliation, victim recovery, integration in society, forgiveness, and forgiveness can be used as an offer to replace the concept of retributive justice and punishment that is based on restitution, reply revenge on the perpetrators, exile and destruction in the handling of a criminal offense.

Construction of penal mediation in handling medical malpractice criminal acts aimed at restorative justice built on inevitability that the settlement a case should contribute to justice those litigants.⁴ Braithwaite, Australian criminologist, restorative justice divide into two kinds, namely: (1) focus the processes and concepts, which bring together the interests affected by an error, (2) focused in value, that restorative justice is considered as the value associated with healing (recovery) victims. Thus, restorative justice is very close to reconciliation between perpetrators and victims.⁵

2.5. Reconstruction of restorative justice in the SPP

Actually, the concept of restorative justice has been known in the Integrated Penal Court System (called SPP), as the purposes of the SPP by Mardjono Reksodipoetra are (1) to prevent people becoming victims of crime, (2) resolve cases of crimes so that people are satisfied that justice has been upheld and the guilty convicted, (3) and see to it that those who have committed a crime not to repeat his crime.⁶ Romli Atmasasmita cited Remington and Ohlin argued that the criminal justice system can be defined as:

"The use of a systems approach to the administrative mechanisms of criminal justice, and criminal justice as a system is the result of interaction between the laws and regulations, administrative practices and attitudes or social behaviour, understanding the system itself implies a process of interaction and rationally prepared in a manner efficient to provide certain result with all faults. "⁷

¹ Derek Brookes and Ian McDonough, *The Differences between Mediation and Restorative Justice / Practice*, UK: consultancy, November 2006, p. 2

² Romli Atmasasmita, 1996, *Sistem Peradilan Pidana: Perspektif Eksistensialisme, dan Abolisionisme*, Bandung: Bina Cipta, p. 101

³ Syaiful Bahri, 2009, *Perkembangan Stelsel Pidana di Indonesia*, Yogyakarta: Total Media, p. 89

⁴ Mansour Kartayasa, 2012, " Restorative Justice dan Prospeknya dalam Kebijakan Legislasi", *paper*, presented at *Seminar Nasional Peran Hakim Dalam Meningkatkan Profesionalisme Menuju Peradilan yang Agung*, Jakarta: IKAHI, 25 April 2012, p. 1-2.

⁵ Romli Atmasasmita, " Cita Keadilan Restoratif dalam Pembaharuan Hukum Pidana di Indonesia", *Paper*, presented at *Seminar Nasional Peran Hakim Dalam Meningkatkan Profesionalisme Menuju Peradilan yang Agung*, Jakarta: IKAHI, 25 April 2012, p. 1-2.

⁶ Mardjono Reksodipoetra, *Sistem Peradilan Pidana Indonesia (Melihat Pada Kejahatan dan Penegakan Hukum dalam Batas-Batas Toleransi)*, Pidato Pengukuhan Penerimaan Jabatan Guru Besar Tetap dalam Ilmu Hukum ada Fakultas Hukum Universitas Indonesia, Jakarta, 1991, p. 1.

⁷ Romli Atmasasmita' 1996, *Sistem Peradilan Pidana Indonesia*, Putra Bardin, Jakarta, p. 14.

SPP is envisaged that the repressive, because it is so character, but the goal is definitely geared to justice, though not always so in practice. Penalties that can be applied such as social work obligations by providing free services to certain period of time for medical personnel who commit criminal acts of malpractice is not accommodated in our criminal system.

To construct (constructs) to this case, first by dismantling (deconstruction) of the existing concept (exists) to obtain new construction. The concept of penal mediation perspective of restorative justice needs to be built in a way to deconstruct (disassemble) established the concept of the criminal (Criminal Law). According to Al Fayyadl, deconstruction is more intended as a strategy to break down the structure and meaning in the text field rather than the effort that would damage the text itself. While Chris Baker argues that deconstruction is dismantling a text to find out and show the text held assumptions.¹

It is adjacent to the meaning of the text meaning (hermeneutic) presented Richard E. Palmer when giving a definition of hermeneutic:

“What are we to say of this latest definition of hermeneutics as the rules of the modest yet foundational effort to determine the verbal meaning of a passage? The most striking thing about it is what it leaves out; hermeneutics is not concerned with the subjective process of understanding, as in Schleiermacher and Dilthey, or with relating an understood meaning to the present (criticism), but with the problem of umpiring between already understood meanings so as to judge among conflicting possible interpretations. It is a guide for the philologist who must decide among several possibilities what the most likely meaning of a passage is.”²

From this description, the construction of penal mediation legislation and policy in criminal medical practices that are part of the criminal justice process is needed, so that the penal mediation in criminal medical practice can be a legitimate means of completion and results of the deal are binding on the parties between physicians and patients and their families as well as law enforcement officers the authority to eliminate the demand. Restorative justice is the concept of punishment, restorative justice as a concept is not just limited to the sentencing provisions of the criminal law (formal and material). Restorative justice should also be observed in terms of criminology and correctional systems.³

3. Conclusion

Based on the description above, it can be concluded that the construction of the handling of medical malpractice with penal mediation in the restorative justice perspective is the idea that discourse in the concept of the New Criminal Code. Construction is built then become an integral part of the SPP. Penal mediation in handling different criminal acts malpractice concept with mediation in the field of civil law.

Penal mediation offered to the offender and the victim is reconciliation and payment of damages to the victim if an agreement acceptable to both parties of the final decision cannot be an excuse eraser prosecution and prosecution. The element of peace is achieved in the penal mediation is used as a pretext for removing run criminal offenders.

The construction needs legal basis and renewal as well as the arrangement of the criminal justice system, particularly with regard to the crime of medical practice. Construction of penal mediation perspective of restorative justice begin to provide the legal basis and the changes and revisions to the positive law relating to the settlement of criminal cases medical practice with the addition of a new agency, the penal mediation in criminal acts of medical practice in the criminal justice system in Indonesia.

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¹ Anthon F. Susanto, 200, *Wajah Peradilan Kita: Konstruksi Sosial tentang Penyimpangan, Mekanisme Kontrol dan Akuntabilitas Peradilan Pidana*, Bandung: PT. Refika Aditama, p. 137-139.

² Richard E. Palmer, 1969, *Hermeneutics Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer*, Northwestern University Press, Illinois, p. 62.

³ Bagir Manan, 2008, *Retorative Justice (Suatu Perkenalan)*, dalam *Refleksi Dinamika Hukum Rangkaian Pemikiran dalam dekade Terakhir*, Jakarta : Perum Percetakan Negara RI, p.4

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