

Dispute Settlement in Therapeutic Agreement Protecting Patients

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Abstract: *Legal binding of doctor-patient in the form of "agreement" results in civil legal binding. However, in Indonesia, regulation on doctor registration states that it is an administrative relation. Legal impact of administrative legal relation is that patients consent in interpreted as administrative product in the form of "statement of patient" whose legal impact is administrative sanction and even criminal sanction in case of mal-administration. On the contrary, for "agreement" relation, patients' agreement is "contract between patient and doctor" and its legal impact is Unlawful Act or contract default resulting in "compensation" given to indemnify parties. Patient loss in the context of medical practices is based on "agreement" and there has not been law protection on the part of patients for dispute settlement resulting in legal insecurity for patient. Therefore, arrangement of legal substance for doctor-patient relation in the context of administrative and contractual relation should be elaborated. The elaboration of "agreement" substance as a contract is then stated in specific legislation regulating contract relation between doctor and patients. In addition, law on medical practice functions as requirement of medical registration. The formulation of specific law regulating the agreement is expected to be able to give certainty on the settlement of civil dispute for indemnified patient.*

Keywords: dispute settlement, agreement, therapeutic, protection, patients

A. Background

The abating level of trust of people to doctor and dentist and increasing number of lawsuit is taken as failure on the part of doctor and dentist to heal their patients. Inadequate law apparatus regulating medical practice and dentistry which are dominated by formal and government need and less portion for professional needs [1] are the reasons why Law no 29/2004 on Medical Practice is put into force.

As requirements of doctor registration, it is required that doctor-patient relation is administrative in nature and not contractual relation as stated in article 39 stating that medical practice which is based on agreement is contractual legal relation. Medical practice is the essence of various activities in delivering excellent health service by doctor and dentist. Medical practice which is based on agreement is an effort to give protection to patients, maintain high quality medical service, and achieve legal security to relevant people, doctor and dentist. However, as law regulating legal relation between doctor-patient in legal "agreement", it is unable to provide legal solution for patients when dispute with doctor occurs. Thus, legal problem arises when dispute between doctor and patients occurs and law no 29/2004 on Medical Practice cannot be used for dispute settlement for patients.

As a well-formulated law, law no 29/2004 on Medical Practice should function as guideline for "ethical practice". The substance of "ethical practice" in the form of "agreement" between doctor and patients should be formulated in specific law regulating contractual requirement between doctor and patients as the manifestation of progressive development of contract law beyond the Civil Law in Indonesia. Relevant association of medical profession should determine standard of assessment for objective capability of doctor and dentist in delivering health service to the people. Therefore, Medical

Council of Indonesia (MCI) should be founded. It is in charge of registering all doctors and dentists who are going to deliver health service, approving standards of professional education, and together with other relevant bodies, managing medical practices. The council is also responsible for giving legal security and protection, directing direct and creating legal foundation and managing various law apparatus on medical practices to keep up with the development of science and technology.

B. Statement of Problem

What is the appropriate dispute settlement inn therapeutic agreement which is able to protect patients?

C. Research Method

This is a normative and juridical study employing primary sources of legal materials such as Law no 29/2004 on Medical Practice especially article no 39 and 45; article no 1320 of Civil Law; and other legislations. The writer gathers various legislations on contractual legal binding between doctor and patient stated in Law no 29/2004 on Medical Practice and relates them with the other legislation. Analytical prescriptive analysis technique is used to formulate an arrangement of dispute settlement in the form of contract legislation that might be used by indemnified patients.

D. Discussion

1)Provision of article 39 of law no 29/2004 on Medical Practice, milestone for legal binding between doctor and patient.

Patient' right is stated in various international law instruments that should be respected, protected and fulfilled in Indonesia. The approval for medical treatment

is based on concept of acknowledgement of patients' autonomy which is also accepted universally since the declaration of *Nuremberg Code* in 1947. In Indonesia, it is then regulated in the provision of article 45 of Law on Medical Practice as the realization of "agreement" as stated in article 39 of Law on Medical Practice. Article 39 of law on Medical Practice is legal foundation of civil law for contract binding between doctor and patients. The impact of legal binding between doctor and patients is that each of them has their own civil right and obligation. In addition, the failure to fulfil the right and obligation may results in "loss" in case of medical negligence.

Article 39 of Law no 29/2004 on Medical Practice states that "Medical Practice is delivered based on agreement between doctors or dentist with patients in order to maintain their health, prevent possible disease, improve their health, treat disease and recover their condition". The agreement is only stated in civil code which is on the provision of article 1320 of Indonesia Civil Code. "There are four requirements for an agreement to be legally binding; 1) the relevant parties agrees to bind themselves; 2) the relevant parties are capable of making agreement; 3) there is a certain aspects; 4) there is a certain cause. The agreement between doctor and patients stated in the law shows the binding between doctor and patients is not only ethical but also legal binding.

The nature of doctor-patients relation is contractual due to "an agreement" between the two. It might be stated that contract between doctor and patient is marked by the utterance "agree" from doctor and patient. Moch Isnaeni stated that "agreement is the first aspect to determine whether certain binding is legal or not. The reason why "agreement" becomes the first requirement shows that it plays crucial role. The agreement is important and strategic to determine when the binding is formulated [2]. Legal binding between doctor and patients turns them into law subject with legal right and obligation. Therefore, it results in legal impact from right and obligation on the part of doctor and patients because contract as legal binding gives certain impact for prevailing right and obligation [3].

Medical Practice law states clearly on legal binding between doctor and patients; however, the right and obligation of doctor do not reflect obligation assurance and civil law right of both parties. As stated in provision of article 50 and 51 of Medical Practice Law, the obligations of doctor are a) giving medical service based on professional standards, other prevailing medical standard operating procedure and patients' need; b) referring patients to other doctor or dentist with better capabilities if they are unable to do so; c) keeping all information on patients confidential, even after the patients pass away; d) giving emergency treatment for humanitarian reason unless there is someone who is in charge and able to do so; e)improving their skills and keeping up with the development of medical or dentistry science. The above obligations are ethics obligation of doctor as stated in article 10 up to 13 of Medical Ethics Code of Indonesia on "Doctors' obligation to patients".

Ethics obligations of doctor are also reflected from regulation for obligation breach in the form of ethics sanction stated in article 68 of Medical Practice law. The sanctions are a) written warning letter; b) letter of recommendation to withdraw registration papers or medical practice license; and/or c) obligation to take further education and training in medical or dentistry education. The above obligation cannot guarantee that patients right will be fulfilled as what is stated in international document namely *Nuremberg Code* which resulted in moral principle of patients to determine their own fate (*the right of self-determination, TROD*). The right of self-determination result in "Informed Consent". In 1964, Forum World Medical Association released Declaration of Helsinki on "Clinical Research"[4].

Several international law documents regulating patients' right are [5] 1) Declaration of Geneva which was accepted by General Council of United Nation from World Medical Association in 1948 in Geneva and revised in 1968 in Sydney. The declaration is about dedication of doctor for humanitarian act as a reaction for evil medical misconduct during Nazi era. It is considered as the modern version of Hippokrates oath which is uttered when a doctor is accepted as member of medical profession; 2) *Bill of Right*. It was first adopted by American Hospital Association in 1973. The revision was approved by Board of Supervisor of American Hospital Association on October 21st, 1992; 3) Declaration of Lisbon; it was adopted by the 34th World Medical Council in Lisbon Portuguese on September/October 1981 in Lisbon and revised by the 47th General Council in Bali Indonesia, on September 1995".

In addition, the rights of doctor are a) to be legally protected for their medical practice as long as it is in line with professional standards and prevailing medical standard operating procedures. There won't be any legal problem as long as the standards are fulfilled. Therefore, the provision is excessive. If doctors should get legal protection, the question is that who protects them? Isn't it the patients who should be protected? Because they are on vulnerable position; b) to give medical service based on professional standards and prevailing medical standard operating procedures. Are doctors prevented of doing their job? And who will fulfil the right? Is it patients? The right should be the obligation of doctor; c) to obtain complete and sincere information from patients or their families; and d) to get financial incentive for their service; as a professional doctor, they should get information from patients because the patients do not know about technical aspect of medical service and it puts them in vulnerable position.

Article 52 and 53 of Medical Practice Law also regulate the right and obligation of patients. The rights of patient are a) to obtain complete explanation on medical treatment as stated in article 45 verse (3); b) to ask for second medical opinion from other doctor or dentist; c) to obtain medical service that they need; d) to refuse medical treatment; and e) to obtain medical records. In addition, the obligation of patients are a) to give complete and sincere information on their health problem; b) to obey

suggestion given by doctor or dentist; c) to obey prevailing regulation of medical service; and d) to give fee for medical service. The right and obligation of patients reflects the fulfilment of patient's right especially right as law subject resulting from provision of article 39 of Medical Practice law.

2) Substance of Law no 29/2004 on Medical Practice as the requirements for Doctor Registration.

Agreement as the basis of legal binding of civil law between doctor and patients is stated in Law no 29/2004 on Medical Practice. The provision of the law states the regulation of medical practices which are series of medical practices by doctor and dentist to the patient and the content of the law is mostly on doctor registration. It is reflected from explanatory provision that aspects stated in Law of Medical Practice are: 1) fundamental principles and objectives of medical practice which are based on scientific virtues, benefit, justice, humanity, balance, protection and safety of patients; 2) the founding of Indonesia Medical Council which consists of Medical Council and Dentistry Council with their members; function, duties and authorities; 3) doctor and dentist registration; 4) the formulation, declaration and approval of professional standards of education for doctor and dentist; 5) medical practices delivery; 6) the founding of Indonesian Medical Disciplinary Board; 7) management and supervision of medical practices; 8) arrangement of criminal provision. The substance of law norm stated in Law no 29/2014 on Medical Practice is "doctor registration". Therefore, the consequence of doctor-patient relation which is based on the law is that the nature of legal binding of doctor and patients is administrative.

The arrangement of civil law on doctor-patient relation in administrative law norms is against article 39 stating that the binding between doctor and patients is based on an "agreement" because it belongs to contract law and the nature is civil law. In addition, it is also against the principle of contract law, because an agreement is a consensus as requirement for a contract to be legal. The consequence of civil law binding between doctor and patient in administrative law is that the agreement for Medical Practice as concrete form doctor-patient agreement should be part or the agreement. However, Medical Practice law is considered as "patients' statement" and it is administrative product.

Law impact of putting informed consent for Medical Practice in administrative domain is also reflected in the Decree of Health Minister no 290 of 2008 on Medical Informed Consent in which it is stated that "Medical Informed Consent" is interpreted as administrative product. In case medical negligence, the charge is administrative sanction in the form of discipline sanction given to related doctor as stated in provision of article 69 of Law on Medical Practice. The sanction consists as: a) letter of warning; b) letter of recommendation to withdraw registration papers or practice license; and or; c) obligation to take further education and training in medical or dentistry education institution. Even as stated in Manual of Medical Informed Consent functioning as ethics

guidelines, it is stated that the informed consent is not a contract but "patients' statement".

Article 3 of Medical Practice law states that the goals of medical practice arrangement are: a) to give legal protection for the patients; b) to improve and maintain the quality of medical service given by doctors; and c) to give legal security to the people, doctors and dentists. The nature of the goals is administrative protection for doctors. For patients, the protections function as preventive protection. It is expected that doctor registration procedure requiring certain level of education standard is able to guarantee the capability of doctor. Each doctor delivering medical service should have medical practice license that should be updated regularly. In terms of delivering medical service, there are some medical standards as stated in Regulation of Health Minister of Indonesia no 1438/MENKES/PER/IX/2010 on Standard of Medical Service, in order to ensure the high quality medical service.

3) Types of Dispute Settlement in Therapeutic Agreement for Patients' Protection.

Although there are various administrative standards on doctor-patients relation on Medical Practice law, it is not able to give legal protection for the patients. According to Philipus M. Hadjon, there are two types of legal protection for people: [6] The first is Preventive Legal Protection. It is a legal protection in which relevant people are given a chance to express their opinion or objection before coming to definitive decision; *the second* is *Repressive Legal Protection*. It is a legal protection for dispute settlement. Conceptually, legal protection given to Indonesian people is the implementation of principle of acknowledgement and protection of human dignity and honour based on Pancasila and principle of nation of law."

As stated above, the arrangement of contractual binding between doctor and patients is still stated on administrative provision of Medical Practice law. In case of loss on the part of patients due to certain dispute, then the dispute is settled administratively. It of course fails to give security and protection to the patients. It only gives preventive protection. There is also no specific procedure of dispute settlement to compensate patients' loss and to secure patients' civil right. The problem might be solved by sorting out contractual provisions in the form of legal binding between doctor and patients from administrative provision of the law and put the contractual provision in specific law of medical service. In addition, Law no 29 of 2004 on Medical Informed Consent is used as law on Doctor Registration. The arrangement of agreement in the form of medical informed consent which is stated as contractual binding will give legal and secure dispute settlement on the part of patients.

Due to imbalance position between doctor and patients in contractual binding, it is important to give legal protection for patients in dispute settlement. It is because in Indonesia, therapeutic contract is not stated on Civil Code an there is no specific characteristics of doctor-patient legal binding compared to other existing types of contract.

The afore-mentioned particularities are as follows: 1) Related law subjects have imbalance position. Doctor has specific technical capabilities of medical knowledge and 2) Regarding its law object, the object of contract is not covenant to heal the patients but “maximum” effort to treat the patients. There is uncertain result of the effort. This characteristic is unique aspects of doctor-patients contract that should be set out specifically.

Airlangga University, Suraabaya. 2005. In Agus Yuda Hernoko, “Contract Law: Proportionality Principles in Social Contract”, (Prenadamedia Grup: Jakarta, 4th printed edition, 2014, page 100

Special arrangement of contract type is intended to protect the interest of relevant parties during the contract. The functions of contract are a) to give law foundation for formulated contract; b) to provide guideline for business transaction; c) to give benchmark for related existing contract [7]. As contractual provision, the settlement of contract breach between doctor and patients is “unlawful act/default”. Contractual dispute settlement provides specific scope and medium for dispute settlement for patients.

E. Closing

1. Conclusion

Type of dispute settlement in therapeutic agreement giving protection for patients is: that the legal binding between doctor and patients stated in Law no 29/2004 on Medical Practice is administrative binding and provides administrative settlement for doctor. Therefore, it should be set out in the form of specific contract law which is able to provide settlement procedure for indemnified patients and to provide repressive protection for patients.

2. Recommendation

There is a need for new construction to arrange contract type between doctor and patients. The contract should be able to accommodate “the uniqueness” of doctor-patients contract because the position of law subjects is not equivalent and the law object is not able to provide legal security (maximum effort).

References

- [1] The explanation of Law No 29/2004 on Medical Practice
- [2] Moch Isnaeni, “Diorama of Contract Law” (Surabaya, Revka, Petra Media; 2017), page 116.
- [3] Ibid, page 69-72.
- [4] Koeswadi: in Pitono Soeparto et al; editor; second edition, Ethics and law in Medical Field. (Airlangga University Press, Surabaya, 2006). Page 133
- [5] Desriza atman, “Legal Aspect of Informed Consent and Medical Records in Therapeutic Transaction” (Keni Media; Bandung, 2013) Page 6-14.
- [6] Phillipus M. Hadjon, Legal Protection for People in Indonesia: A Study On Its Principle, Settlement Procedure in General Court and The formulation of Administrative Judiciary:. (Peradaban: Surabaya; 2007), page 3-6
- [7] Agus Yudha Hernoko, “Fundamentals of Contract Law”. Lecture material for Contract Arrangement subject. Graduate program of Notary. Law Faculty of