

PROGRESSIVE LEGAL VIEWS REGARDING DOCTORS' MEDICAL ACTIONS AGAINST PATIENTS WITHOUT INFORMED CONSENT

PUTRI MUTTAALLIYAH ¹ and MOHAMMAD JAMIN ²

^{1,2} Universitas Sebelas Maret Surakarta.

Email: ¹alliyaputri98@gmail.com, ²mohjamin@staff.uns.ac.id

Abstract

Approval of medical treatment or what is usually called informed consent is a form of protection for patients, therefore it is very important. The right to accept or refuse the health services they receive; The problem is that in certain situations and conditions, informed consent cannot be given to patients in emergency situations. Looking at this phenomenon from a positivist perspective, medical intervention without informed consent cannot be justified. This is actually considered to have undermined the concept of Indonesian law which emphasizes aspects of written law. The importance of this view is that legitimacy is not only seen through the actions and actions of society which are carried out in accordance with provisions set out in statutory regulations. Reading regulations alone cannot resolve all social realities. In some cases, you may need to use sophisticated legal thinking to challenge and analyze regulatory texts. The research question formulated is how progressive legal standards should be applied regarding doctors' medical actions towards patients without informed consent. The method used by the author in this case is normative legal research with a qualitative analytical approach. According to research, doctors usually need to obtain approval from the patient or the patient's family before carrying out medical procedures. However, if there are certain circumstances in which where the patient cannot ask for consent, informed consent can be waived without compromising patient safety. Time is a critical factor in saving the patient. If doctors delay in providing medical care, patients will suffer disability and, in some cases, death, with tragic consequences. Doctors can waive or not use informed consent (authorization for a medical procedure) when a medical procedure requires immediate patient assistance. According to this theory, agreements are essentially related to progressive law. The law must not only be understood explicitly, but also discovered implicitly.

Keywords: Informed Consent, Medical Procedures, Law.

INTRODUCTION

The history of health law based on a written legal system also influences the nudity of informed consent itself, and consent to medical procedures is usually given in writing. This is done to avoid misjudgments by the patient or the patient's family regarding medical procedures and the associated risks. Informed consent is an absolute procedure that must exist whenever consent can be requested from the patient or his family in these situations and circumstances. The existence of informed consent is intended to protect patients as recipients of health services and doctors as service providers.

The importance of informed consent is that a doctor cannot directly carry out a medical action on a patient without a form of approval for the medical action that the doctor is trying to carry out on the patient. This reluctance does not mean that doctors carry out their profession irresponsibly and unprofessionally. The professionalism of a doctor is only revealed when the doctor does not act on his own initiative, but involves the patient's parents and family members in his medical practice. Involving the patient or patient's family in decision making on a medical case is essentially a form of collaboration between the doctor and the patient. In the

era of Industrial Revolution 4.0, people have easy access to all kinds of information, both domestic and international. The information you can get covers various topics, from daily life, law, politics, economics, to health.

When Indonesian people were not familiar with the internet, people would immediately consult doctors and health experts if they had health problems. Because the Internet is now so easy to access and use, people with health problems first seek information on the Internet about their health problems. This phenomenon is part of scientific and technological advances in the medical field. It cannot be denied that patients have knowledge about health. Doctors cannot assume that they alone have the knowledge and will when dealing with the health of others. Moreover, since the enactment of Medical Law Number 29 of 2004, patients cannot be said to be ignorant people who entrust their lives to doctors.

This practice is the reason why doctors don't just give an approval sheet for a medical procedure and request a signature from the patient or patient's family. The patient and the patient's family have the right to know and receive a doctor's explanation regarding the informed consent they will carry out. If the doctor does not provide an understanding of the contents of the informed consent, there is a possibility that the therapeutic agreement between both parties could be canceled or deemed invalid because it fulfills the elements of fraud, error and coercion as regulated in Article 1321 of the Civil Code. Basically, approval for medical procedures must be made in writing and must be carried out. The problem is that in certain situations and conditions, informed consent cannot be implemented for patients who are in an emergency. The meaning of emergency is that referring to the Minister of Health Regulation Number 290/MENKES/PER/III/2008 concerning Approval of Medical Treatment, the emergency situation is not clearly explained. Emergency here can be interpreted as meaning that the patient is unconscious, whereas on the other hand, if the doctor tries to call the patient's family, it will take a long time and can have fatal consequences for the patient's condition, and if the doctor has to continue to urge the patient or family to give consent to the informed consent that has been approved and signed. by the patient or the patient's family, then this is an impossible action and can endanger the patient himself because it will take time. This is then in an emergency condition as regulated in Article 4 Paragraph:

(1) Regulation of the Minister of Health Number 290/MENKES/PER/III/2008 concerning Approval of Medical Actions that in an emergency, to save the patient's life and/or to prevent disability, no medical action is required.

If you look at this phenomenon from a positivistic perspective, medical action without informed consent is an action that cannot be justified. This is actually considered to have damaged the concept of law in Indonesia which prioritizes legal certainty in the form of written legal aspects. The thousands of laws and regulations that Indonesia has are a necessity that must be implemented by all Indonesian people. On the other hand, this large number of regulations has the consequence of overlapping various existing regulations, thus creating confusion and even resulting in complicated bureaucracy.

This view is starting to be challenged by the existence of a new legal view as put forward by Satjipto Raharjo, namely progressive law. The highest meaning in this view is that legality is not only seen through an act or action of society which is carried out in accordance with the text written in statutory regulations. Not all of society's social realities can be answered just by reading the regulations. In certain cases, sometimes the regulatory text can be challenged and overturned (violating the law), until finally giving rise to new laws and these laws can be used as a recipe for problems of social inequality in society. One of the social upheavals that occurs is the ambivalence of information that should be approved by the patient or his family, but on the other hand the patient is in an emergency condition. Therefore, the author is interested in studying further how progressive legal norms apply regarding doctors' medical actions towards patients without informed consent.

RESEARCH METHODS

The type of research used in writing this journal article is normative legal research. Normative legal research often refers to legal research through library research or secondary data analysis. The secondary data used are primary legal sources such as health laws and regulations such as Law Number 17 of 2023 concerning Health and Regulations of the Minister of Health of the Republic of Indonesia. The secondary legal sources used are health law books and magazine articles, while the tertiary legal sources are the Big Indonesian Dictionary (KBBI) and legal dictionaries. The approach used by the author is a qualitative approach, namely analysis and analysis of the problems of this research with aspects of norms, principles, theories law, doctor-patient relationship, progressive law regarding informed consent.

DISCUSSION

Since the introduction of legal elements in the common law concept in Indonesia, the previously implemented civil law system has become increasingly unimportant. A specific example is a judge's decision which brought about changes in laws and regulations in Indonesia. In principle, legal regulations guarantee legal certainty. There are no actions or activities of people that can conflict with the provisions of laws and regulations. The issue raised in this letter concerns medical procedures carried out by doctors on patients. If a doctor carries out medical procedures without the consent of the patient or his family, the doctor will be subject to legal sanctions. Legal sanctions imposed can be criminal, civil, or administrative.

In the criminal field, doctors can be subject to Article 338 of the Criminal Procedure Code (KUHP). An example of the application of this article is a doctor who performs medical procedures such as surgery when a part of the patient's body is no longer as perfect as it used to be. After surgery, the patient will experience pain, agony, and even death due to the effects of this medical procedure.

On the other hand, the patient does not agree to the action. This can be classified as harassment. In the aspect of civil law, the above actions constitute acts against the law (*onrechtmatige daad*). Article 1365 of the Civil Code states that every unlawful act that causes harm to another person, requires that person, because of his fault in causing the harm, to compensate for the harm,

because the doctor's actions are not in accordance with the medical code of ethics. In principle, doctors must ask for the patient's consent before carrying out medical procedures on the patient. In certain situations and conditions such as emergency or critical conditions, doctors cannot force informed consent from patients. This is not possible, it only requires informed consent when the patient himself is unconscious, ultimately putting the patient's safety at risk. This dilemmatic condition of course requires doctors to act quickly, but on the other hand, doctors must ask for informed consent.

In certain situations and conditions, it shows that not all written legal rules can be optimized in content and conditions. Written legal rules are rigid, orthodox and formalistic. In fact, this can make implementing legal objectives slow and complicated. Good law must be in the form of written legal rules (law in the book) in accordance with the legal principles that will be applied in social life (law in action). The problem is, law in the written aspect has its own limitations. Written legal rules are only limited to a collection of words created in a sentence, then the sentence turns into articles in a statutory regulation. Written legal rules are indeed a collection of reflections of phenomena that occur in society. The problem is, these written legal rules cannot always be enforced to be implemented in a society whose social conditions are always changing or dynamic. A simple example can be seen in the 1945 Constitution of the Republic of Indonesia, which underwent four changes or amendments after reform. The 1945 Constitution of the Republic of Indonesia is the highest legal regulation in Indonesia, but it can still change due to dynamic legal, social and political conditions. Another example is Law Number 17 of 2023 concerning Health. This regulation is a replacement regulation for the old regulation, namely Law Number 36 of 2009 concerning Health, which is considered no longer in accordance with developments, demands and legal needs in society regarding health. Examples of the changes that have occurred are evidence that the text of legal regulations becomes outdated over time in such a dynamic society. The formalism of judicial regulations only aims to fulfill the values of legal certainty, the value of justice and expediency, while the goals of law cannot be sought and found simply by applying written legal narratives to people's behavior.

Progressive law can be a solution when legal formalism hinders the fulfillment of the values of justice and benefit in the social environment of society. When the text in legislative regulations is unable to resolve social problems that exist in society, generally what can be done is to look for new laws behind rigid written legal rules. In principle, doctors are obliged to ask for the consent of the patient or the patient's family to carry out medical procedures, but this is difficult to do if the patient is unconscious, even though there is a principle that time saving is life saving, which means time is an important factor in saving the patient. If a doctor takes the time to carry out medical procedures too late, the patient will experience consequences in the form of disability or even death. Based on the events above, the doctor can waive or not use informed consent (approval for medical action) if the patient must be immediately saved by medical efforts. Theoretically, the validity of a doctor's actions towards a patient without informed consent is that informed consent can basically be divided into two types, namely express consent (expressing approval) and implied consent. Expressed consent is approval of a medical action that a doctor requests from a patient clearly and unequivocally. For example, doctors ask

the press The patient's consent and signature regarding plastic surgery. Usually doctors can ask the patient directly because the patient is not in critical condition or unconscious. In essence, the expressed consent applies to patients who are conscious and the medical treatment received by the patient is not an emergency action. The next point is implied consent, which means a medical action carried out by a doctor on a patient who is in a critical condition or unconscious. Even if this medical action is not given verbal or written approval by the patient or the patient's family, this is still justified because if the patient is conscious, the patient or the patient's family will definitely agree to it considering the urgency of the medical action that must be carried out immediately. In civil law, it is known as the *zaakwarneming* theory as regulated in Article 1354 of the Civil Code which states "if a person voluntarily without being assigned to represent another person's affairs with or without that person's knowledge, then he secretly binds himself to continue and complete the affairs, until the person whose interests he represents can carry out the affairs himself." He must also carry out all the responsibilities he carries. If he accepts openly declared powers. This article provides a clear explanation that doctors who handle a patient's medical needs are obliged to carry out their duties completely even if the patient is in an emergency situation. The patient must also fulfill the doctor's rights or complete receiving medical services from the doctor when the patient has recovered. On the other hand, patients whose rights have been fulfilled, namely receiving medical services when the patient is in an emergency situation, then the patient has an obligation to fulfill the rights of doctors who have completed their duties.

From a health law perspective, the absence of informed consent can be applied if the patient is in an emergency situation. Therefore, although informed consent is the most important thing to do, this is not absolute. Exceptions may apply if the patient is in critical condition or unconscious. The theory of approval and *zaakwarneming*, in essence has a correlation with progressive law. The law is not only understood expressly, but must be found implicitly. What is implied can be known from human actions or activities in society itself. Law is the general public's perception of a social phenomenon whose rationality can be accounted for. In the condition of a patient who is critical, or unconscious, the growing public perception is that appropriate rescue efforts are the main priority, compared to the assumption that informed consent is no longer urgent compared to the patient's condition which is already an emergency.

The application of progressive law regarding the absence of informed consent also does not reduce the value of legal certainty of these medical procedures. The nature of informed consent is regulated in Article 4 Paragraph 1 of the Regulation of the Minister of Health of the Republic of Indonesia Number 290/MENKES/PER/III/2008 concerning Approval of Medical Procedures. Article 4 Paragraph 1 embodies the principle of progressive law which states that every approval for a medical procedure, whether verbal or written, can be excluded for patients experiencing an emergency situation. Progressive law does not limit the meaning of law, namely statutory regulations, but must be developed based on sociological aspects of law in society itself, even tied to legality in statutory regulations. This shows that the law in the book and the law in action are experiencing optimal synchronization, especially regarding the absence of informed consent as regulated in Article 4 Paragraph 1 of the Minister of Health Regulation Number 290/MENKES/PER/III/2008 concerning Approval of Actions Medical.

CONCLUSION

The theory is that approval is correlated with laws which are essentially progressive in nature. Laws must be understood implicitly and explicitly. Their meaning can be seen from human actions and activities in society. Law is society's perception of social phenomena that can be explained by rationality. The public's perception that rapid rescue action is the most important thing when a patient's condition is critical or unconscious, compared to the opinion that informed consent is more necessary for the condition of a critically ill patient, is increasing. We are already in a crisis situation, and the emergency is no longer urgent. Even with the progressive implementation of laws regarding the lack of informed consent, the legal certainty of this modern procedure since Article 4(1) of the Minister of Health Regulation No.290/MENKES/PER/III/2008 Sex has not lost its value. Consent for medical procedures also regulates that the doctor's permission not necessary to save the patient and prevent disability in emergency situations. This provision embodies the Progress Act principle that verbal or written authorization for treatment may be waived for patients in emergency situations.

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