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Legal protection for people with mental disorders (PWMD) handling related approval of medical action

Protección legal para personas con trastornos mentales (PWMD) bajo el manejo de aprobación relacionada de la acción médica

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ABSTRACT

Medical malpractice is the unfulfilled rights of patients due to poor communication or information. The doctor-patient relationship during therapeutic transactions, such as in the case of an agreement, needs to meet the conditions stated in Article 1320 of the Civil Code. Therefore, their rights and obligations need to be fulfilled and carried out in good faith to achieve a common good. Patient-oriented utilitarianism is an example of an ethic situation, because the decision-makers consider the consequences of their actions, while a clinical person needs to analyze decisions in a broader perspective.

Keywords: Communication, Doctor, Medical Malpractice, Patient, Therapeutic, Utilitarianism.

RESUMEN

La negligencia médica es el incumplimiento de los derechos de los pacientes debido a la falta de comunicación o información. La relación médico-paciente durante las transacciones terapéuticas, como en el caso de un acuerdo, debe cumplir con las condiciones establecidas en el Artículo 1320 del Código Civil. Por lo tanto, sus derechos y obligaciones deben cumplirse y llevarse a cabo de buena fe para lograr un bien común. El utilitarismo orientado al paciente es un ejemplo de una situación ética, porque los tomadores de decisiones consideran las consecuencias de sus acciones, mientras que una persona clínica necesita analizar las decisiones en una perspectiva más amplia.

Palabras clave: Comunicación, Médico, Negligencia Médica, Paciente, Terapéutico, Utilitarismo.

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1. INTRODUCTION

Every legal relationship creates the rights and obligations of doctors to patients and vice versa. In addition, the unfulfilled right of one party leads to a legal dispute. Sabir Alwi stated that medical malpractice is mostly caused by the non-fulfillment of the basic rights of patients with 80% due to a lack of communication or information. Therefore, the rights and obligations of both parties need to be carried out in good faith for a common goal.

The doctor's relationship with the patient in a therapeutic transaction needs to fulfill the requirements, as stated in Article 1320 of the Civil Code.

When one of the conditions is not fulfilled, the request is canceled by the judge, which means the agreement failed to exist from the beginning. Elements 3 and 4, are objective conditions because both involve the promised object. Similarly, when one of the conditions is not fulfilled, the request for the judge has the ability to declare it null and void. The agreement was considered null from the beginning with the legal consequences of the two parties positioned to its original position before the commencement of the agreement.

However, by not fulfilling the subjective conditions, the agreement is canceled, and these skills are useful for the proper implementation of achievements. Actions that arise after engagement are truly accountable for each party and able to take responsibility (Subekti: 1987).

2. RESULTS

According to the analysis, conventional methods are common procedures used by clinical doctors to make decisions on behalf of patients while ignoring their autonomy. However, in many countries, including Scandinavia and the United Kingdom, patients see their doctors as advisors and not guardians, with the hope to be active in the decision-making process. Patients are defined as autonomous people, with the right to choose what they think is best for them as long as they are mentally fit.

The field of Psychiatry is seen as a medical discipline that is sometimes associated with mental illness, similar to somatic, which is described and analyzed according to the concept of biological diseases, such as a mechanical model. However, the symptoms of mental illness differ from somatic disease, and it is assumed that mental or personality disorders are determined by biochemical abnormalities in the central nervous system.

According to Jermy Bentham (1748-1832) and John Stuart Mill (1806-1873), the ethical theory of utilitarianism is the good or bad deeds of patients' impact on the perpetrators (Sutarno: 2014). Patient-oriented utilitarianism is an example of a situation ethic, based on the decision and consequences of their actions from a broader perspective. For example, when clinicians are faced with several treatments, utilitarian considerations enable them to choose cheaper treatment options, which are more beneficial.

Immanuel Kant (1724-1804), stated that deontological Theory is the merits of action which are not in line with the purpose or consequences of the patient, with reference to the formal rules of behavior generated from intuition. This is also known as Kantianism, which means that violating a person's autonomy is breaking their humanity. Therefore, this theory emphasizes more on duty and rationality, contrary to the theory of Utilitarianism, which is associated with happiness, pleasure, and pain of all people (Wattimena: 2008).

Generally, people that accept Kantianism's point of view as opposed to Utilitarianism's reasoning. The principle of Paternalism allows people to act on behalf of others, with the belief that these things serve their interests in the best possible way. However, this view does not imply that paternalism needs to be blamed because it is divided into three types, namely *true*, *solicited*, and *unsolicited paternalism*.

True paternalism is described as an act forcefully carried out by a father on a little child. In this situation, paternalistic behavior is agreed by most people because it is assumed that children are not matured enough

to make certain health decisions. Among these were unconscious patients due to high temperatures or severe mental disability, and in such cases with very little autonomy. According to Rawls, true paternalism shows that social contract theory is applicable to medical problems. Rawls further stated that the problem of paternalism discussed here concerns limited freedom. It is assumed that patients in medical affairs are considered rational and able to manage their affairs in the community. However, their power did not develop, and they found it difficult to rationally take care of their interests, as in the case of children, or patients with severe mental disorders. He also added that paternalistic decisions are supported by choices made by patients. Therefore, the persons concerned do not accept decisions made on their behalf.

Solicited paternalism is also morally acceptable because it implies that the person concerned is in agreement either explicitly or implicitly. For example, patients with serious illness do not want a lengthy explanation of the various therapeutic options and their advantages, but only expect the doctor to conduct treatment professionally.

Unsolicited paternalism creates serious ethical problems, and according to Kantian's understanding, ignoring patient autonomy is always morally wrong. Many clinicians, in principle, accept the Kantian opinion. However, they need to admit that under certain conditions, acting in a paternalistic way is the best.

M. S. Komrad also asserted that "all sickness conditions represent a state of diminished autonomy," which implies that it is a central feature of illness with the doctor-patient therapeutic relationship a dynamic process. Autonomy is discussed as a present, which is often reduced for a while. Komrad further stated that "The doctor-patient therapeutic relationship is a path from limited paternalism to maximal autonomy, which is the ultimate goal."

The danger associated with this method is when the doctor crosses the line between temporary paternalism, which supports true and unsolicited paternalisms. The best test of **Rawls** is after that, the patient agrees with the doctor's works in line with his responsibility and obligations to the community. Patients are also morally obliged to allow doctors to consider public interest (Laurie & Dove: 2019).

Therefore, it is increasingly clear that even though doctors apply an unsolicited paternalism, by referring to the patient's illness conditions which automatically reduces their autonomy rights and special conditions such as mental disorders, they are unable to make decisions. This attitude is good for oneself and those around them, and it is accepted by staying in strict ethical conditions and professional discipline. In addition, it is understood that when a patient is able to communicate and think rationally (insight), the doctor needs to restore his autonomy rights and start planning treatment options in line with their decision. The hope is that the boundary between attitudes determines patient competence with the "forced" treatment of PWMD (Paternalistic Attitudes of doctors), in the regulation of state law with permanent legal force.

The patient's signature at the Informed Consent is intended as an affirmation/confirmation, which has been provided after an explanation. In the informed consent, the explanation is more important than signing, as people do not agree to something without valid information. In addition, written informed consent does not change the amount of responsibility of health workers/doctors for actions or consequences, but the existence intended to reduce malpractice in the health profession and educate workers to be more careful in providing services to the patient.

Maggot Leenen stated that information and agreement do not always coincide, due to the following:

1. There is an agreement without information, such as in the provision of emergency assistance. In this case, the agreement is deemed to exist implicitly without providing complete information in advance.
2. There is an obligation to provide (minimum) information for health workers to obtain approval. For example, when information is withheld for the benefit of those with heart disease, etc.

According to the law, the aid provider needs to guarantee proper authorization before carrying out the diagnostic/therapeutic procedure on the patient. In many cases, the law requires that the patient/family

members need to be provided with sufficient information regarding the nature and risk of the treatment, as well as the cost of the recommended therapy.

However, in the doctor-patient relationship, there are some exceptions to the doctor for not providing information before taking medical action, such as (Komalawati, 1999):

- a) The therapy requires the suggestive placement of inactive pharmacological compounds.
- b) When the information is actually to the patient's detriment, such as those with a weak heart and prone to danger.
- c) When the patient suffers from a mental disorder and unable to communicate (Ameln: 1991).
- d) When the patient is in an emergency situation and is not accompanied by family.

From the above description, it is clear that in the condition of patients with psychiatric disorders, doctors immediately carry out medical actions deemed necessary without prior information or postponement (Kopackova & Libalova: 2019).

According to the Mental Health Law, Article 21, paragraph 3:

" When PWMD is deemed incompetent in making decisions, approval of medical action is provided by:

- a. husband and wife;*
- b. Parent, child or sibling at least 17 (seventeen) years old;*
- c. Guardians of helpers;*
- d. Authorized officials in accordance with statutory provisions. "*

In the United Kingdom and New South Wales, administrative protection from the human rights of psychiatric patients is carried out by giving consent for their representatives or patients at the start of "forced" first six months of care. Furthermore, a signature renewal is required by the informed consent every 12 months and monitored by the Secretary of State when there is no signature renewal for three years (Laurie & Dove: 2019).

According to the Indonesian Law, representation is defined as the authority to carry out legal on behalf of a child whose parents are late or unable to perform legal actions (Darmabrata & Sjarif: 2004).

While a guardian is someone that takes care of themselves and the assets of a minor that is not under the authority of a parent, in terms of management, it is interpreted as maintenance, both in the provision of education, and the livelihood of minors, able to trust itself interpreted as an institution that regulates the rights and obligations of guardians (Ramadhany: 2004).

In this case, the guardianship principles are found in the Civil Code, as follows:

- a. Principles cannot be divided (*Ondellbaarheid*)

According to Article 331 Civil Code, each guardianship consists of a guardian the principle has exceptions in 2 things:

1. Assuming the guardianship is taken by the mother as the longest-living parent (*langslevende ouder*) when she remarries, her husband becomes a *medevoogd* (participant's guardian) based on Article 351 of the Civil Code.
2. A *bewindvoerder* is appointed to manage *minderjarige* goods outside Indonesia based on Article 361 of the Civil Code

- b. Principle of Approval from Family

Families need to be asked for guardianship approval, and when they are not present, their agreement is not needed. While those that fail to arrive after the summons, are prosecuted based on Article 524 of the Criminal Code (Meliala: 2007).

Therefore, a person has the possibility of being the guardian of PWMD patients with or without obtaining the consent of the family. Incompetent PWMD guardians' are those acquired through the approval of another based on safety and the general public.

In the provisions of Permenkes 290 in 2008 (Darmini & Widyaningtyas: 2014) Regarding the Approval of Medical Measures, Article 13 is regulated:

(3) Patients are considered competent based on the following mental health:

a. No setbacks (mental retardation) and do not experience a mental illness that makes them unable to make decisions freely.

b. Patients with mental disorders are considered competent when they are able to understand information, trust, maintain and use it, making free decisions.

(4) The patient's competence needs to be assessed by the doctor when approval is needed, and when in doubt, it is determined by a team of doctors.

Occasionally, the "forced" treatment of PWMD is due to conditions that make it impossible to approve medical measures. It is the basis of moral justification for acts and forced treatment, against schizophrenics, using the principles of loss and paternalism (Golestani & Fallah: 2019).

The principle of loss refers to the teachings of John Stuart Mill, which essentially states that humans should not be prevented from freedom. The only reason that used to justify and limit people's freedom is when their person's actions endanger others. There have been many literary and philosophical studies to reveal the relationship between mental disorders and violence. People with mental disorders accompanied by paranoid ideology, tend to feel very threatened; as a result, they attack others in an effort to defend themselves. However, not all those suffering from paranoid ideology attack other people as some tend to attack themselves (Talebi & Nejad: 2019).

The principle of paternalism is used to justify coercive action for sufferers without endangering others. Poor surveillance of schizophrenics results in rejection of treatment, while understanding the bizarre, causes sufferers to carry out acts that harm themselves. In this case, the act of forced paternalistic treatment is morally justified. The severity of the patient's incompetence is the basis for justifying the paternalistic forced treatment. This is because the more incompetent the sufferer is, the more dangerous they become.

According to Leenen (Leenen & Laminating: 1991), in article 2 BOPZ, such forced treatment is carried out when the judge's judgment is as follows:

a. the mental disorder of that person has caused danger.

b. the danger cannot be eliminated by intermediaries people or institutions outside a psychiatric hospital

Both of these conditions need to be fulfilled as a legal standard of forced care for PWMD patients.

In article 1 paragraph (1), the definition of 'disturbance' is defined as imperfect growth or disease disorders on the ability of the soul, while 'danger' is defined as insecurity of people or objects. It is also said that the danger here does not exist but caused by a severe mental disorder (Kalogeropoulos et al.:2019). The apparent danger of an action/omission is a real hazard action and not just a latent possibility. The judge evaluates the danger with the solution eliminated by hazard question, by taking care of people with mental illness.

Forced care is a reality that occurs against the consent of the PWMD patient. The power of the patient is represented by the judge in the following stages: Stage 1 is a provisional power of attorney within four weeks after being treated and is no longer implemented two weeks after a power of attorney is signed. Stage 2 is the

first power of attorney for subsequent placements within a period of 6 months. Stage 3 is the power of attorney for subsequent placements within one year (Ahmadi & Movahed: 2019).

Therefore, schizophrenics remain autonomous moral agents to determine the best choice. The treatment of those suffering from schizophrenia such as trepanation, lobotomy, electroshock, rotational therapy with strong opposition, should have been abandoned. A careful examination of the incompetence degree in all mental disorders, including schizophrenia, needs to be conducted. Furthermore, analysis and evaluation of patient competence need to be carried out before they are declared incompetent.

This is related to the principles that apply in universal health laws according to Pitono Soeparto. There is the principle: "Aegroti Salus Lex Suprema." This principle stated that "patient safety is the highest law." Machli Riyadi (Riyadi: 2016) interpreted the purpose of this principle as every health worker need to always put patient safety first, and officers are prohibited from asking administrative questions during emergencies.

In the face of such conditions, doctors or hospitals have a legal obligation to saving the patient's life. In this case, in general, Article 531 of the Criminal Code is used as a basis for burdening legal obligations to doctors or hospitals to provide help. When the doctor does not immediately provide assistance on the grounds that there is no informed consent from the person or family resulting in the death, the hospital staff is to be blamed for committing a crime according to the provisions of Article 531 KUP and the hospital should be sued for compensation.

In an emergency, the doctor or hospital perform medical treatment without the consent of the patient or family. Doctors are not prosecuted by patients, even when medical procedures have been carried out without their consent, except when they violate the profession's standards, both intentionally or culpa (Chazawi: 2007). In the end, every doctor's action needs to be accounted for, to the following (Sutarno: 2014):

- a. Vertically to God
- b. Horizontally to the Ministry of Health or its staff
- c. Ethically to the Indonesian Doctors Association (IDI)
- d. Morally to the patient
- e. Legally

From the description above, it is concluded that handling PWMD refers to various basics of legal protection including, seven principles in the Medical Practice Law, Aegrotus Salus Lex Suprema, Doctor Paternalism, based on the possibility of misuse of rights and disability of PWMD patients with forced treatment. Besides, autonomy is an existential patient as long as the condition is capable of being responsible or insight. This right is ruled out when the patient's condition is truly incompetent, unable to communicate effectively, and thinks freely. Therefore, based on the patient's own safety and the interests of the general public, the patient's autonomy rights are temporarily shifted by unsolicited doctor paternalism and returned when they feel better. Therefore, the principle of doctor paternalism and patient autonomy is dynamic and is shifted according to the situation and condition in question.

Lastly, administrative matters as formal evidence in all aspects of risky medical treatment, including those related to those handling the PWMD patients.

3. CONCLUSION

Legal protection for PWMD nurses in the approval of medical action is said to be canceled due to failure to fulfill subjective conditions in an agreement. The basics of legal protection for both parties include seven principles in the Medical Practice Act, Aegroti Salus Lex Suprema, and Doctor Paternalism. These are used to eliminate the possibility of Misuse of rights and disability in PWMD patients forced to undergo treatment. Besides that, the patient's autonomy right is ruled out where the patient's condition is truly incompetent, unable

to communicate effectively, and cannot think freely on the purpose/effect of the action. The autonomy rights of patients are temporarily shifted by doctor paternalism based on their safety and public interests. The patient's autonomy rights are restored when they feel sufficient insight and are able to take responsibility. Therefore, the principles of doctor paternalism and patient autonomy are dynamic and are shifted according to the situation and conditions which occur based on the assessment of the doctor concerned.

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