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The Paradox of the Standard Clauses of Therapeutic Agreement and Legal Protection of Patients

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Abstract

This study is intended to analyse, review and find the "Paradox of the Standard Clauses of Therapeutic Agreement and Legal Protection of Patients". In Indonesia, the concept of the doctor and patient relationship, known as the Health Services Therapeutic Agreement, still uses the standard clauses of the Indonesian Consumer Protection Act which are considered to be no longer in line with legal developments in Indonesia. This study uses the Legal Protection Theory, Health Theory and Agreement Theory as Grand Theory, Middle Range Theory and Applied Theory supported by Normative Juridical methods based on positive law (dogmatic) to examine and review secondary data referring to a law or regulation with other regulations applied in the community. This study includes research on the principles of law, legislation, comparative law, normative law, and legal history. This study found: (1) The implementation of standard clauses has not yet materialized legal protection for patients, both from the perspective of the Consumer Protection law, the Health Law and the Hospital Law, bearing in mind that the Indonesian Consumer Protection Act is no longer in line with legal developments in Indonesia, (2) The Court's verdict on malpractice cases so far has not been completely resolved in realizing legal protection for patients. As a Recommendation: (1) It is recommended that Regulators update the regulations that govern more specifically the distinction of standard clauses in the economic field from health services, (2) It is recommended that Regulators revise or update regulations on the Health Law which governs more specifically about standard clauses (informed consent) in health services.

Keywords:
Health law, Legal protection, Health service, Therapeutic relationships

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Background to the Study

Health service is a service effort that is carried out alone or together in a scope of body or organization that is useful for the prevention, maintenance, healing and recovery of the health of a person, or group. Health services are essential to serve people who want to get treatment until they recover from their illness. Health services are certainly very different from other products or types of services. In the economic (business) context there is more relationship between producers and consumers, while in health services the emphasis is more on the context of the relationship between patients and doctors. Of course, patients cannot be identified with consumers who have a variety of uniqueness in terms of the legal relationship between doctors and patients. The 1945 Constitution of the Republic of Indonesia has regulated the rights granted to Indonesian citizens. One of them is Article 28H Paragraph (1), which states that "Every citizen has the right to health services". Every Indonesian citizen is Guaranteed by law and has the right to health services regardless of social status. Furthermore, the rights of patients are regulated in the Law of the Republic of Indonesia Number 44 of 2009 concerning Hospitals, Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practices, Law of the Republic of Indonesia Number 36 of 2009 Concerning Health, and as patients regulated by Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection".

In an effort to realize therapeutic relationships that can meet the expectations of the community in health services, the Law of the Republic of Indonesia Number 8 of 1999 concerning Consumer Protection and the Law of the Republic of Indonesia Number 36 of 2009 concerning Health have an important role in placing the rights and obligations of doctors and patient. The contractual relationship between doctor and patient (therapeutic transaction) pertains to the Law of the Republic of Indonesia Number 8 of 1999 Article 4 which regulates the provisions regarding consumer rights that need to be protected in obtaining health services. Article 58 of Law Number 36 of 2009 regulates the provision of legal protection to patients in obtaining compensation for patients, health workers, and/or health providers who cause losses due to errors or negligence in health services, which causes death, mental disability or permanent disability.

In medical services, doctors, patients, and hospitals are three legal subjects that are related to establishing both medical and legal relationships. Medical relationships and legal relations between doctors, hospitals and patients are relationships which objects are the maintenance of health in general and health services in particular. Doctors as health service providers and patients as health service recipients. In practice, the patient and doctor have an interrelated relationship with each other that is inseparable from an agreement known as the Therapeutic Agreement. Implementation of the standard clause of the Indonesian Consumer Protection Act in the Therapeutic Agreement on health services raises several paradoxes. Standard clauses are any rules or terms and conditions that have been prepared and determined beforehand unilaterally by business actors as outlined in a document and/or agreement that is binding and must be fulfilled by consumers (Article 1 point 10 of the Consumer Protection Act).

In the Therapeutic Agreement there is a standard clause in the form of informed consent which contents have been standardized, the patient must obey and sign it. This is where there is a difference; the standard clause contains the rules, terms and conditions that have been prepared in advance unilaterally. On the one hand, therapeutic transactions involve two parties; doctors and patients, but the contents have been standardized into informed consent, as a standard clause that has been prepared in advance by the doctor or hospital, without first negotiating with the patient. On the other hand, up to now the application of the standard clause is considered inappropriate when applied in health services that are very different from the economic field.

The findings in the field show that many patient rights are still ignored and have not yet fully obtained the rights as stipulated in the legislation. On the one hand, patients often experience medical disputes with doctors, dentists or hospitals, because patients have not received full rights. On the other hand, a number of court decisions regarding cases of malpractice in health services are deemed not to be able to realize legal protection for patients, because the settlement is still using the context of the Consumer Protection Law not from the perspective of the Health Act. Data and phenomena show that there are 182 cases of malpractice throughout Indonesia, as many as 60 cases by general practitioners, 49 cases by surgeons, 33 cases by obstetricians, and 16 cases by paediatricians, and 27 cases by other types of malpractice. From this phenomenon raises the problem that the implementation of standard clauses in health services raises the paradox, Patients are still positioned as consumers, and doctors (hospitals) as business actors (business institutions). This indicates that the standard clause of the Consumer Protection Act is not appropriate when applied in a health service context that is different from the economic (business) context.

Discussion

Standard Clause According to the Perspective of Legal Protection Theory

One form of standard clauses in health services is informed consent, as a sign of approval that must be signed by the patient, parent or guardian of the patient, which has been prepared and determined unilaterally by a business actor as outlined in a document and/or binding agreement and must be fulfilled by consumers. Some parties refer to the standard clause as "standard contract or take it or leave it contract". By having the provisions in advance prepared in an agreement, the consumer can no longer negotiate the contents of the contract. When examined from the contents, then there is an imbalance between the parties.

Viewed from the doctor's point of view, a doctor cannot be identified with business actors in the economic field, because work in the health sector contains many social elements. In terms of medical legal responsibility and legal liability of business actors, doctors cannot be compared to business actors, because an engagement that occurs between a business actor and a consumer is in the form of an outcome engagement, whereas an engagement between a doctor and a patient is an endeavour engagement. A doctor who does not perform work according to the standards of the medical profession and is not in accordance with medical measures, is said to have made a mistake or negligence, besides being prosecuted according to criminal law if it fulfils criminal elements and also sued for civil damages in the event that the

patient suffers a loss. Prosecution in the field of criminal law can only be prosecuted in the event that the patient suffers from permanent disability or dies, but a civil law suit can be made if the patient suffers a loss despite a small error.

Article 1320 of the Civil Code and Article 1338 paragraph (1) of the Civil Code confirms that the standard clause content has been made by one party, while other party cannot express their wishes freely. Obviously here does not fulfil the freedom set forth in the law of agreement and the principle of freedom of contract. The concept of the standard clause of the Consumer Protection Act is not in line with the law in Indonesia that continues to develop. Although the Consumer Protection Act explicitly and in detail regulates the rights and obligations of consumers and the rights and obligations of business actors, and prohibits the inclusion of standard clauses (vide Article 18 of Law Number 8 of 1999 concerning Indonesian Consumer Protection). But it still has weaknesses with the not yet regulated use of standard clauses in health services. The use of standard clauses is very detrimental to consumers using products and services. This happened before the entry into force of the Consumer Protection Act. Generally, consumers are in a weak and unbalanced position and cannot do anything when facing problems that arise after a transaction is made. Consumers who should get their rights, but in reality, are not entitled to compensation, even though the goods/services purchased are found to contain defects, on the grounds that the goods have left the store when purchasing products or after signing a service agreement. In addition, if there is a replacement it will be limited only to a certain nominal amount, which is far lower than the value of the goods purchased.

From the business actor side, the benefits obtained are as a breakthrough in the field of binding law because they can run the economy effectively and efficiently. From the consumer side, the effectiveness and efficiency of using standard clauses actually puts the consumer's position at risk of being weakened. Potential weakening occurs due to the more dominant position of business actors with a stronger bargaining position that creates economic and sociological advantages, which in turn can control those who have a weaker bargaining position. From the patient's side, the regulation on patient protection cannot be applied in the Law of the Republic of Indonesia Number 8 of 1999 Concerning Consumer Protection, because the Act is generally accepted and still cannot represent the interests of patients of health services that are very different and unique from business consumers or product user. In terms of doctors, doctors cannot be identified with business actors in the economic field, because work in the health sector contains many social elements.

In connection with the legal protection of patients who need to get the main attention in a standard agreement that contains a standard clause that is related to the exemption clause, as a clause containing the exemption or limitation of liability from business actors (doctors) which is usually contained in the agreement, as well as in the therapeutic agreement on health services which until now has not been regulated further in the Indonesian Consumer Protection Act. The concept of the standard clause of the Consumer Protection Act in health services is considered to be no longer appropriate, because it is not in line with the development of law in Indonesia. The standard clause only regulates the rights and obligations

of consumers and businesses, not regulating the rights and obligations of patients and doctors (hospitals), so that the patient's position is always weakened and impaired (vide Article 18 of the Indonesian Consumer Protection Act).

Normatively, the standard clause is found in the form of documents or agreements which are based on the development of modern society and socio-economic conditions for efficiency and practical reasons. In fact, there are standard clauses that are detrimental to consumers that can eliminate the liability of business actors for their legal consequences. All forms of potential loss that may be experienced by consumers are clearly a mistake/negligence of the business actor. Consumers do not seem to have the right to obtain or make claims for compensation. Article 18 paragraph (2) of Law Number 8 of 1999 concerning Consumer Protection states that business actors are prohibited from including standard clauses which location or form is difficult to see or cannot be read clearly, or the disclosure is difficult to understand and in the form of small writings placed vaguely where the reader of the agreement has expected to be missed. Until the agreement occurs the consumer only understands a small part of the agreement. That is, the standard agreement can only be read at a glance without a deeper understanding of its juridical consequences. This situation will make consumers often do not know what is their rights. This law only provides legal protection to consumers and business actors as stipulated in Article 4 and Article 6. However, it has not yet set clearer forms of protection for the rights of patients for health services.

Standard Clause from the Perspective of Health Law

Minister of Health Regulation Number 290 concerning Approval of Medical Treatment Article 1 states: Approval of medical treatment is approval given by the patient or immediate family after obtaining a complete explanation of the medical or dental treatment to be performed on the patient. Such approval can be cancelled or withdrawn; as a result, arising from the cancellation of the approval of the medical treatment becomes the responsibility of the cancelling consent (patient or patient's family). This Regulation of the Minister of Health does not regulate the application of standard clauses in therapeutic agreements in health services.

There are two types of legal relationships between patients and doctors in health care, namely the relationship between patients and doctors due to the therapeutic agreement and the relationship due to laws and regulations. In the first relationship, it starts with an agreement (not written) so that the will of both parties is assumed to be accommodated when the agreement is reached. Agreement reached includes, among others, approval of medical treatment or even rejection of a medical action plan. Relationship due to laws and regulations usually arise because of obligations imposed on doctors because of their profession without the need for patient approval.

Engagements that may arise in a therapeutic agreement based on the agreed achievements are:

a. Inspanningsverbintenis, which is an engagement based on maximum effort and is carried out carefully. Most therapeutic agreements are included in this type of agreement. Doctors make efforts to heal in accordance with the standards of his

profession and because his achievements are empowered with maximum effort then the results are uncertain or cannot be ascertained.

b. Resultaatsverbintenis is an engagement based on definite work results. Resultaatsverbintenis can arise in a therapeutic agreement, for example dentists make dentures or orthopaedists make foot prostheses. Even in Europe, easy operations are included in resultaatsverbintenis whereas complex operations include inspanningsverbintenis.

The legal relationship between the doctor and the hospital is the relationship between the legal subject and the hospital. Based on this relationship, there are mutual rights and obligations governing the rights and obligations of the parties which are based on a contract or employment contract. The legal relationship between a doctor and a hospital can be seen from the doctor's status at work or as an employee at a hospital. Based on this relationship, it can then be classified into 3 (three) status of doctors with hospitals reviewed legally.

A practicing doctor in a hospital is a doctor who has been appointed to carry out a practice in a hospital, whose duties shall refer to Article 1 Paragraph 1 of Law Number 29 of 2004 concerning Medical Practices. A doctor as a hospital employee is a doctor who is legally declared as a permanent employee who has to do a job at a hospital with certain characteristics. First, doctors work on the orders of the hospital. Second, doctors must obey all forms of regulations that apply in these hospitals. Third, doctors are paid by the hospital concerned. Thus, between the permanent doctor and the hospital concerned, an agreement was issued to do something as stated in the provisions of Article 1234 of the Civil Code.

Independent practice doctor is a doctor who conducts or opens practice individually or independently and has been accredited as a doctor. This means that individual practice/ independent practice is a private practice carried out by a doctor, both general and specialist. Doctors have their own place of practice, and usually have hours of practice. Sometimes doctors are assisted by administrative staff who manage patients, sometimes also assisted by nurses, there are also truly alone in providing services, so that doctors handle all the health care procedures they provide. While being independent here means that the doctor who opens an independent or private practice is responsible for matters of leadership, practice management and the fulfilment of all logistical facilities for medical needs borne by the doctor himself.

In an effort to provide legal protection to patients in the Therapeutic Agreement on health services, Article 56 of Law Number 36 of 2009 regarding Health states that in an approval of medical treatment, patients can receive part or all of the treatments that will be given by doctors. Patients have the freedom to determine the actions taken as they wish, while in a standard contract (standard agreement) a patient can accept or reject all the proposed clauses, not in part but in full. Legal protection to others is contained in Article 6, Article 7, and Article 8: "Everyone has the right to a healthy environment for achieving health status" (Article 6). "Everyone has the right to obtain information and education about balanced and responsible health (Article 7)." Everyone has the right to obtain information about his health data including actions and treatments that he has or will receive from health workers" (Article 8).

Furthermore, the form of legal protection given to patients regulated in Law Number 44 of 2009 concerning Hospitals is contained in Article 32, which states: Every patient has the right to:

In a therapeutic transaction, malpractice is an act of carelessness or frivolity (professional misconduct) or an inability and incapacity that is not acceptable (unreasonable of skill) which is measured according to the level of expertise and skills in accordance with the scientific degree practiced in each condition and situation at a community of professional members who have been provided expertise far above the average and reputation that results in accidents, damages or losses suffered by patients as recipients of health services. Medical disputes in health services occur as a result of the imposition of standard clauses that are not appropriate in the context of health services. Based on the perspective of the Health Act, the therapeutic agreement states a legal relationship that is interpreted differently, although in principle using the concept of the agreement is generally the same as other types of agreements. Furthermore, the context of the relationship in the therapeutic agreement is different from the relationship between the business actor and the consumer, the therapeutic agreement emphasizes the context of the relationship between the doctor/health worker and the patient.

As a conclusion, Law Number 36 of 2014 concerning Health Personnel, Law Number 36 of 2009 concerning Health and Law Number 44 of 2009 concerning Hospitals, have not provided legal protection and certainty to patients, because there are no article regulating the use of standard clauses in health services, still using the provisions of standard clauses in the Consumer Protection Act, so the application of standard clauses in therapeutic agreements creates a paradox because patients are still considered as consumers and doctors (hospitals) as business institutions.

Standard Clause and Agreement Theory

Article 1320 of the Civil Code, a therapeutic agreement requires four conditions that must be fulfilled, namely: (a) Agree that they bind themselves, (b) Ability to make an agreement, (c) A certain matter, and (d) A cause which lawful. Article 1338 of the Civil Code, the agreement that has occurred cannot be cancelled for any apparent reason because the agreement referred to as a transaction or therapeutic contract applies as law. Therefore, in terminating the therapeutic agreement, the doctor needs to be careful of the risks that may arise in the future, because this cancellation does not always have to be written because the circumstances or reasons stated by law are sufficient, it will also constitute evidence that the agreement is null and void.

The standard clause that must be signed by the patient in health services is informed consent in the form of a standard form as a statement of patient consent. The contents of the informed consent were made and determined unilaterally by the doctor or hospital. Patients cannot bid on the provisions contained in the informed consent. Referring to Article 1 point 10 and Article 18 of the Consumer Protection Act, informed consent in a therapeutic agreement is considered contrary to the principle of Article 1320 of the Civil Code. According to the Agreement Theory, the use of the standard clauses of the Consumer Protection Act in a

therapeutic agreement is considered as a doctrine of injustice (unconscionability) which is a doctrine that states that a contract is cancelled or can be cancelled by the injured party when in the contract there is an unfair clause and is very damaging to one party, even though both parties have signed the contract in question.

Implementation of the standard clause of the Consumer Protection Act raises paradoxes in the therapeutic agreement for health services, due to more regulating the context of the relationship between producers and consumers, while the therapeutic health services agreement emphasizes the relationship between doctors and patients. If the therapeutic agreement is associated with the provisions in Article 1338 paragraph (1) of the Civil Code that all treaties made legally apply as a law for those who make them. This provision implicitly regulates the principle of freedom of contract in an agreement. However, in reality it was found that the implementation of standard clauses in the therapeutic agreement for health services did not meet the legal requirements for an agreement as regulated in Article 1320 of the Civil Code.

In fact, the standard clause used in health services is still using the standard clause concept of the Consumer Protection Act. The standard clause has not fulfilled the agreement element, only made by one party without any prior negotiation or agreement, and the contents have not fulfilled the skill element, because there is no "balanced" position between the doctor and the patient. If negotiations do not take place, what has come to be termed "unequal bargaining power or unconscionability", which places the bargaining position of the consumer (patient) always weak? Consumers have no choice but to accept existing requirements. While economic considerations are only based on efficiency factors in making agreements or contracts.

The principle of freedom of contract or laissez faire in Article 1338 of the Civil Code states that the regulation of the standard clauses is a consequence of policy efforts to empower consumers so that they are in a balanced condition, namely there is a contractual relationship between producers (business actors) and consumers in the principle of freedom of contract. Freedom of contract is when the parties in entering into an agreement are in a situation and condition that is free to determine their wishes in the concept or formulation of the agreement agreed upon. Freedom is interpreted as not being forced by any parties to enter into an agreement. This also means that each party is fully aware of the contents of the agreement, and likewise each party is not in a difficult condition to determine the desire and choice in entering into that agreement. This principle of freedom of contract is the basis for the existence of a standard contract in an agreement.

Based on the above explanation from the perspective of the Agreement Theory, the use of standard clauses in health services has not fulfilled the elements of agreement and skills, harming patients which in turn can lead to medical disputes between patients with doctors and hospitals. Furthermore, the settlement of medical disputes in court has not provided full legal protection for patients, because it still uses the context of the Consumer Protection Law rather than the context of Health Law.

Conclusions

1. The implementation of standard clauses in health services has not provided legal protection to patients. The standard clause is a one-sided rule that positions patients as consumers and doctors (hospitals) as business institutions. As a result, the patient is in a weak position and is always disadvantaged. Until now, the Indonesian Health Act still uses the standard clause of the Consumer Protection Act and there is not a single article in this Act that regulates the standard clause in health services. Based on the Agreement Theory, the contents of the clause are considered contrary to the legality of the agreement (Article 1320 Civil Code) because it is only determined unilaterally without being negotiated by the patient.
2. Based on the perspective of Health Legal Theory, cases of malpractice and medical disputes occur as a result of the implementation of an inappropriate standard clause in health services, not yet able to realize legal protection for patients. The Court's decision on malpractice cases has not fulfilled the principle of justice in protecting and enforcing the law for patients. Cases of malpractice in health services that are considered inappropriate if resolved using the Consumer Protection Law, but must use the Health Law.

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