

State Responsibility for the Fulfillment of the Right to Indonesian Citizen Health Constitutional Perspective

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ABSTRACT

One of human rights is the right to health which is an element of welfare must be realized as stated in the mandate of the Preamble to the 1945 Constitution of the Republic of Indonesia. Therefore, the state has the responsibility to fulfil the right to health for all citizens without exception. This research uses a statutory approach. The result showed that the state has an obligation to provide health fulfilment as a concept of a welfare state as stated in the Indonesian constitution (article 28 Hayat 1). The state's neglect of the right to public health is a violation of the constitution. Every citizen has the right to receive health services provided by the state because it is a basic right inherent in the individual (Article 1 point 1 of Law number 36 of 2009 concerning Health). The responsibility of the state regulates and protects the right to public health as well as to provide adequate health facilities and facilities that are easily accessible to the public. Hospitals as implementers of health services must be monitored intensely, in order to provide health services to citizens as mandated by the constitution.

Keywords: *State Responsibility, Human Rights, Health.*

1. INTRODUCTION

Indonesia with the concept of a welfare state is a must to ensure the fulfilment of welfare rights for citizens. The task of the welfare state organizes the wheels of government based on the interests of the people in order to realize prosperity and welfare as much as possible [1]. With the concept of a welfare state, the state should provide the fulfilment of the basic rights of citizens. The main foundation is the protection of human rights that the government is entrusted with the power to protect the rights of citizens[2].

One of the rights of citizens that must be fulfilled by the State as an embodiment of the concept of a welfare state is the right to health. As stated by Lubis that between Human Rights and Health there is a correlation that influences each other. It means that if the right to health is not granted by the State. Furthermore, it means the State has committed an act that violates human rights[3]. Therefore, the fulfilment of health becomes a necessity for Indonesian citizens so that they can live in prosperity.

A different opinion was expressed by Scott Davidson that Sipil rights require immediate implementation, while Eco sob rights do not require immediate implementation. It is in accordance with the conditions and capabilities of the country concerned. It means that

the right to health can be overridden if the State does not have the capacity to provide protection in the health aspect. To fulfil the health rights of citizens requires progressive implementation[4]. Moreover the leaders who care about their citizens.

The aspect of fulfilling for the right to health often encounters problems. The social security program as the implementation of the fulfilment of health should be able to cover all levels of people in Indonesia. Therefore, the justice as enshrined in the fifth principle of Pancasila is real that is not only a mere phrase. The health issue in question is the Health Insurance Organizing Agency (Badan Penyelenggara Jaminan Kesehatan /BPJS). BPJS participants who want to get health services often get obstacles, such as being sent home before fully recovering, patients being rejected by hospitals, patients, patients having to pay for hospital treatment [5].

The citizens are registered in National health insurance program (Jaminan Kesehatan Nasional/JKN) on May 31, 2020 are 220,687,267 with details of recipients of APBN contribution assistance 95, 897, 122, recipients of APBD contribution assistance 34, 216, 520, workers receiving PN 17 wages. 727. 915, BU wage earners 37. 613. 893, non-wage workers 30. 189. 487, non-employees 5.042.330[6]. Based on data from the Central Statistics Agency (Badan Pusat Statistik/BPS) on the Inter-Census Population in 2015, the projected population of Indonesia in 2020 is 269.6 million people.

There are still many people who are categorized as incapable or poor have not been touched by the health insurance program.

The loss of the State in fulfilling the health of citizens is a serious problem, considering that the concept of the State of Indonesia was built with the concept of a welfare state whose consequences are the State must be present in every citizen's needs, especially regarding health. From here, it is necessary to study related to the responsibility of the State in fulfilling health.

2. METHOD

The type of research is normative legal research. As for the data in normative legal research, the data used primary data and secondary data. The primary data are statutory regulations, statutory regulations, court decisions. The secondary data are books, books, legal theory and opinions of legal scholars [7]. The approach is the legislation approach to legal products[8]. The statutory approach is chosen as the approach to review the product of legislation or regulations related to the object of the research. This approach focuses on the question whether there is conformity and consistency in the legislation [7].

3. RESULT

I. HUMAN RIGHTS AND HEALTH RIGHTS

The development of Human Rights (Hak Asasi Manusia/HAM) has experienced a long dynamic, divided into three generations. The first generation, namely human rights centered on civil and political (Sipil dan Politik/SIPOL). Meanwhile, the second generation is Human Rights of the Economic, Social and Cultural (Ekonomi, Sosial Dan Budaya/EKOSOB) and the third generation is Human Rights Development. Karel Vasak argues that the development of three generations of human rights began with the theme of the French Revolution, namely *liberte, egalite and fraternite*. The essence of the first generation of human rights is freedom (*liberte*), which fall into this category are civil and political rights such as freedom of speech, freedom of religion, the right to vote, and the right to be tried honestly[9].

The right to health in this case is included in the second generation of human rights, which is oriented towards equality (*egalitarian*). This generation requires social and economic equality as well as cultural access for citizens[10]. While the third generation emphasizes the implementation of real human rights fulfilment, how the degree of human life must be considered, especially health issues. From here the explanation regarding the generational division of human rights can be understood if the right to health is classified as an individual right then that right is included and becomes part of the second

generation of human rights, but if the right to health is defined as public health then the right can be classified as the right to development (third generation).

In the sense that the right to health is placed in the third generation, the consequence is that the State is obliged to provide this guarantee to citizens, and the State must allocate a part of its revenue allocation towards health fulfilment. From here, the state expenditure is relatively more. Therefore, the consequence is the health service that can experience problems. Scott Davidson has denied the above statement. He stated that although these rights do require greater state expenditures such as for education, social security and health care, this also applies to Civil and Political Rights.

A large amount of expenditure is not enough reason to neglect or ignore the fulfilment of the right to health as part of the *Eco sob Human Rights*. Fulfilment of the right to health cannot be delayed because it can have an impact on human life, especially citizens. In other words, the state must remain responsible in any situation and condition in fulfilling the right to health. For the World Health Organization (WHO) as an international health organization, the right to health is positioned as a fundamental right, not just a human right. It means that the right to health must be fulfilled by the state as a form of basic rights[11].

As for the term health rights, there are several uses of the term including; the right to health, the right to health, or the right to attainable standard to health[12]. In addition, there are other terms such as right to health, rights to health care, right to health protection, and in a broad sense health right[13]. In other words, the definition of the right to health is still different, so the term has not been generally agreed upon.

II. LEGAL RULES RELATED TO THE RIGHT TO HEALTH.

The right to health is explicitly part of human rights which can be found in several laws, starting from the 1945 Constitution as a result of the second amendment in 2000. Chapter XA in this chapter is regulated regarding human rights which refers to the convention. International, namely civil and political rights (article 28A), application of the principle of equality before the law (article 28 D), health rights (article 28H paragraph 1), and social security rights (article 28 H paragraph 3). In the technique of legislation, article 28 is commonly referred to as an article of instructions ordering the formation of organic laws [14].

Article 28H paragraph 1 clearly states that health is a basic right for citizens, besides that, it is also the right to live in physical and spiritual prosperity, the right to live, and the right to a good environment.[15] Meanwhile, Article 25 of the 1945 Constitution states that the right to

an adequate standard of living for the health and well-being of himself and his family is the right of every Indonesian citizen. Article 34 paragraph 3: “The state is responsible for the provision of adequate health service facilities and public service facilities”. The regulation of the right to health has actually existed since the Constitution of the Republic of Indonesia (Republik Indonesia Serikat /RIS) in 1949, namely in Article 40 of the RIS Constitution which reads “The authorities always try to earnestly promote public hygiene and people's health”. After that the article was codified in article 42 of the Provisional Constitution of 1949 (Undang-Undang Dasar Sementara/UUDS 1949) [10].

In the next phase, a presidential decree was issued, in which the 1949 Constitution was annulled and replaced with the 1945 Constitution. Therefore, the norms related to the fulfilment of health rights for citizens no longer existed. Until it enters the next phase, namely the new order regime. During the New Order era, Indonesia's development orientation was economic, with an authoritarian model of government. So, there was a big protest from citizens in Indonesia, which ended in the ouster of President Suharto. It was at this phase that he entered the Reformation. It is marked by fundamental changes related to the constitution. At that time the 1945 Constitution of the Republic of Indonesia was amended four times.

Entering the beginning of the reformation in 2000, the regulations regarding the national health insurance model began to be considered. Finally, in 2004 the national health model was realized with the passing of the National Social Security System Law. In this law the community is provided with social assistance in the health sector, especially for vulnerable groups. Until finally the concept of health insurance was implemented with the issuance of the Law on the Social Security Administering Body.

Health as a human right can also be found in Article 9 of Law Number 39 of 1999 concerning Human Rights. In this article, the state must guarantee and fulfil human rights, including; First for the right to live; second for the right to maintain life and improve the standard of living; third for the right to live in peace, security, peace, happiness, prosperity, physically and mentally; fourth for the right to a good and healthy environment. The international instruments related to the right to health can be seen in the table below;

| Instrument | Norm |
|--|--|
| International Economic, Social and Cultural Covenant | “States attend Covenant that recognize the right of everyone to the enjoyment of the highest standards of physical and mental health.” |

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|---|--|
| (ICESCR) 1966, Article 12 5 | |
| General Comment No. 14 (2000) | “Everyone has the right to enjoy the highest attainable standard of health, to live a dignified life. The realization of the right to health can be created through the formulation of health policies, implementing health programs that have been developed by the World Health Organization (WHO) or adopting certain legal instruments.” |
| Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, Article 12 | “State must take appropriate steps to eliminate discrimination against women in Indonesia in the field of health services to ensure that it is based on equality of men and women, access to health services, including those related to family planning”. |
| International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, Article 5 | “Everyone has the right to the right to public health, medical care, social security and social services”. |
| Convention on the Right of the Child (CRC) 1989, Article 24 | “The State recognizes the right of children to enjoy the best standard of health in health and services in disease treatment & health rehabilitation. Countries ensure no rights are deprived, especially over access to these health services.” |
| Convention on the Rights of Persons with Disabilities (CRPD) 2006, Article 25 | “The State recognizes the right of persons with disabilities to enjoy the health standards are the best in healthcare without discrimination based on disability. States take appropriate steps to ensure access for persons with disabilities to access health services, including health-related rehabilitation.” |

Guarantees for the right to obtain optimal health are also contained in Article 4 of Law Number 36 Year 2009 concerning health. “Everyone has the right to health” in article 5 of the law on health. “Everyone has the same right in obtaining access to resources in the health sector, as well as obtaining safe, quality, and affordable health services and also everyone has the right independently and is responsible for determining the health services needed for himself.”

III. THE STATE’S RESPONSIBILITY FOR FULFILLING THE RIGHT TO HEALTH.

The fulfilment of health as part of the fulfilment of human rights is a logical ratio of human dignity. Since the public health can be a measure of how prosperous a nation is in that country. The poor quality of health can

turn on the state of the country. This awareness is a manifestation of the commitment of all nation states [16]. The right to health which is accommodated in the 1945 Constitution after the amendment is a manifestation of the concept of a welfare state, the state must be present in every aspect of the life of citizens for the realization of welfare (*sociale rechtsstaat*). Sociale rechtsstaat means that the state is required to realize welfare and social justice for all its people [17].

We can see the rules regarding the responsibility of the State in fulfilling the health of its citizens in several statutory instruments in the table below;

| Act | | Norm |
|---|-------------------------------|---|
| Indonesia Constitution (UUD 1945) | The Article 28I paragraph (4) | states that the protection, promotion, enforcement and fulfilment of human rights is the responsibility of the state, especially the government |
| | The Article 34 paragraph (3) | “The state is responsible for the provision of health service facilities ...”. |
| | The Article 34 paragraph (2) | “The state develops a social security system for all people and empowers the weak and incapable in accordance with human dignity” |
| | The Article 28H paragraph (3) | “Everyone has the right to social security that allows his full development as a dignified human being” |
| | The Article 34 paragraph (2) | “The state develops a social security system for all people and empowers the weak and incapable in accordance with human dignity” |
| Law Number 36 Year 2009 concerning Health | The Article 7 | Government is tasked with organizing health efforts that are evenly distributed and affordable by the community. |
| | The Article 9 | Government is responsible for improving the health status of the community. The efforts to fulfil the right to health can |
| | The Article 15 | “The government is responsible for the availability of the environment, challenges, health facilities, both physical and social for the community to achieve the highest degree of health”. |

| | | |
|---|--------------------------------------|--|
| | The Article 17 | “The government is responsible for the availability of access to information, education, and health service facilities to improve and maintain the highest level of health”. |
| Law Number 11 of 2009 concerning Social Welfare | The Article 4 | “The State is responsible for the implementation of social welfare” |
| | The Article 9 paragraph (1) letter a | Social security is intended to: “guarantee the poor, neglect orphans, neglect elderly people, people with physical disabilities, mental disabilities, physical and mental disabilities, former chronic disease sufferers who experience socio-economic disability problems. so that basic needs are met. |
| | Article 10 paragraph (1) | “Social welfare insurance is held to protect citizens who are unable to pay premiums in order to be able to maintain and maintain their level of social welfare”. |

Returning to the discussion of human rights, conceptually there are two kinds of human rights as follows: first for human rights which are held by the state and second for human rights that cannot be implemented by a state. The first classification of human rights is called legal rights, while the second classification is called moral rights[2]. The right to health is included in the concept of the first right, namely the right that must be fulfilled by the State.

Fulfilment of health rights is carried out by means of preventive and curative methods. Preventive efforts are by protecting citizens with the availability of nutritious food and a clean and healthy environment. While curative efforts are the availability of excellent health services, adequate facilities, professional medical personnel, and can also be accessed by every class of society. Provision of proper health care facilities and public service facilities are the rights to health[18].

For Paul Hunt, an important aspect of the right to health is that the state is obliged to pay attention and take sides with its citizens with concrete policies that are in the form of assistance to underprivileged citizens, and even if needed by cooperating with the international community [1]. The implementation of the fulfilment of

the right to health must meet the following principles: first for the availability of health services; second for accessibility; third for reception; fourth for the quality. Then the form of state obligations must pay attention to the principles: first for respecting the right to health; second for protecting the right to health; third for fulfilling the right to health[19].

In relation to state responsibility, Ces de Rover, among other things, emphasized that in every legal system there must be responsibility for failure to carry out obligations imposed by legislation. According to Rover, national law distinguishes between civil liability and criminal liability based on wilful acts or omissions or omissions that constitute a violation of that law. Meanwhile, responsibility in international law is known as "responsibility" where responsibility arises due to violations of obligations imposed by international law [20]. Hernadi interprets the state's responsibility in fulfilling the right to health in five forms, namely: first for the legal responsibility; second for the political responsibility; third for the economic responsibility; fourth for the moral responsibility; and the fifth for social responsibility[12].

The enactment of the Law on the National Social Security System (Sistem Jaminan Sosial Nasional/SJSN) has several programs for the state social security system in Indonesia which were formed in an integrated manner in one body determined by the government[21]. To accelerate the establishment of the Social Security Administering Body that is by law. On November 25, 2011, Law Number 24 of 2011 concerns to the Law of Social Security Administering Body (Badan Penyelenggara Jaminan Sosial /BPJS) was promulgated. The law on the National Social Security System regulates the withdrawal of mandatory monthly contributions to all citizens, this is in Article 17 paragraph (1). The withdrawal is a form of transfer of state responsibility to the people regarding national health insurance[22]. Furthermore, in Article 19 paragraph (1) BPJS as an authorized body in terms of health fulfilment functions as an insurance company.

The premium payment model in the national social security system can extort the people, this is due to the obligation of citizens to pay premiums, such a model is known as the concept of social insurance. Whereas when talking about health, it is a right and is included in the category of basic human rights that must be fulfilled by the state, the program that should be implemented is a social security program. The two concepts are clearly different. Social security is the protection of the state for its people in order to obtain a healthy life. While social insurance is insurance formed by the government to serve social security for every citizen[11]. Combining social security with social insurance has dragged lawmakers

into the neo-liberalism scenario. The makers of the SJSN Law have changed the government's obligation to fulfil the right to[11]. Jimly Asshiddiqie proposed that the BPJS Law be revised immediately because many problems arise in the governance run by the Social Security Administering Instance[23].

In the norms regulated in the SJSN Law, 4 of them implement the social security program namely: First for the Company of Labour Social Security (Jamsostek); second for the Company of Savings Fund and Civil Servant Insurance (Tabungan dan Asuransi Pegawai Negeri Sipil /TASPEN); third for the Indonesian Armed Forces Insurance Company (Asuransi Angkatan Bersenjata Republik Indonesia/ASABRI); fourth for the Company of Health Insurance (Asuransi Kesehatan/ASKES). However, since the existence of Law Number 24 of 2011 concerning the Social Security Administering Body (BPJS). The Social Security Administering Instance has been transformed into 2, namely BPJS Health and BPJS Employment.

4. CONCLUSION

Fulfilment of Health is a basic right that must be carried out by the State, especially since the State of Indonesia adheres to the concept of a welfare state. We can see the concept of a welfare state in the 1945 Constitution of the Republic of Indonesia, including articles 28 and 34. And it can be found in article 1 number 1 of Law number 36 of 2009 concerning Health. It means that it is the responsibility of the state to protect the right to public health, while at the same time providing adequate health facilities and facilities that are easily accessible to the public. However, the law in implementing the right to health is not in accordance with the objectives of the welfare state. Article 17 paragraph (1) of the Law is on the National Social Security System. Withdrawal of these contributions is a form of transfer of state responsibility to the people regarding national health insurance. Thus, the concept adopted in the SJSN Law is social insurance, whereas when we talk about health as a right, the concept used is social security. So that way, the state gives full responsibility.

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