

The Role of Indonesian Constitutional Court in Protecting the Rights to Health Security for Health Workers

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ABSTRACT

As a state law that is bound to international treaties on the protection of human rights, Indonesia has regulated the protection of human rights in the 1945 Indonesian Constitution. The access to health and the rights to health security are two important part of human rights should be protected by the state. In the new normal era during the Covid-19 pandemic, the rights to health became a susceptible issue where many healthcare workers thought that the state had neglected their rights. Many healthcare workers died in battling the Covid-19 handling without further severe responses from the state. Concerning the pandemic handling in Indonesia, the primary regulation that should be referred to is Law Number 4 the year 1984 concerning Outbreaks of Infectious Disease and Law Number 6 the year 2018 Concerning Health Quarantine. It turns out there is a constitutional issue in the implementation of both regulations, especially the protection for healthcare workers as the front guard of the pandemic handling. This article wants to analyze how The Indonesian Constitutional Court plays its role in protecting the rights to health security through the Constitutional Court Verdict Number 36/PUU-XVIII/2020. This is normative research using a conceptual and comparative approach to elaborate the cases. The result will conclude that the protection of the rights to health security is not only guaranteed by the executive orders in a government but also by the Constitutional Court as a state body that has judicial authority.

Keywords: *The Indonesian constitutional court, health security, health worker, protection.*

1. INTRODUCTION

Montesquieu mentioned that a state of law should implement three aspects: the availability of the constitution, the protection of human rights, and the limitation of the state body and its authority [1]. The security of human rights in Indonesia is stipulated in the 1945 Constitution Chapter X A Articles 28 A-J [2]. Besides, Indonesia has also ratified the International Covenant on Economic, Social, and Cultural Rights on Law Number 11 of 2005 and the International Covenant on Civil and Rights on Law Number 12 of 2005[3].

The protection of people's rights in accessing public health facilities in Indonesia has been enacted in Article 1945 paragraph (3) that stipulates "*the state is responsible for the provisions of adequate health and services facilities and public service facilities.*" The word *adequate* should be implemented by the state not only to provide health facilities but also to provide a proper and qualified standard of health facilities. The

health of society becomes the pillar of a state's development. An old saying said that *healthy is everything; no health means no meaning of life* [4]. Therefore, the state should implement efforts and policies. That could increase the people's health level based on the principle of nondiscriminatory, participative, protection, and sustainability that is essential to the development of Indonesia's human capital, increasing national resilience and competitiveness, as well as national development.

The Covid-19 pandemic seems to awaken the government to be more aware in providing protection for people's primary needs, which is health and adequate public health facilities. There is a huge increase of burden for health workers in health facilities which eventually can risk the life of health workers. There have been more than 100 doctors and health workers who passed away from the Covid-19 diseases that infected them while they were serving in health

facilities. A researcher from the University of Indonesia found that 83% of health workers should face *burnout syndrome* in the medium and heavy phase that psychologically could risk their life quality and the work productivity in the health facilities [5].

As a matter of the fact that some health workers do not feel like the government has fulfilled the obligation to protect them as the frontliners of the battle against Covid-19, some try to apply for judicial review in the Indonesian Constitutional Court. There have been at least 11 judicial reviews on Law Number 36 of 2009 concerning health. Those could be seen in the Constitutional Court Decision Number 43/PUU-IX/2011; 19/PUU-VIII/2010; 24/PUU-X/2012; 34/PUU-VIII/2010; 55/PUU-IX/2011; 57/PUU-IX/2011; 63/PUU-X/2012; 66/PUU-X/2012; 86/PUU-IX/2011; 12/PUU-VIII/2010 and the latest application concerning the protection of health rights (especially for health workers) was filed in the Verdicts number 36/PUU-XVIII/2020. Judicial review in the Constitutional Court is the process of examining by the judges concerning the law and consider whether the law has been correctly implemented or not. This issue was delivered to Court by a judicial review in case Number 36/PUU-XVIII/2020.

This research will analyze the consideration of Constitutional Court decision Number 36/PUU-XVIII/2020. This paper shows that by the verdict of the Constitutional Court, the protection of the rights to health security is not only implemented by the government but also ruled by Constitutional Court.

1.1 Research Method

This research is conducted by the juridical-empirical method, which analyzes both primary and secondary data. The primary data is Constitutional Court Verdicts and regulations concerning health, while the secondary information consists of pieces of literature, journal, and dictionary related to the problems persisted in this research. Thus, this research not only compiles the materials such as theories, concepts, principles, and regulations of law dealing with the topic, but the dynamics in the aspects of implementation when the government has not fulfilled many rights to health security. All data needed are collected by literature review.

2. FINDINGS AND DISCUSSION

2.1 The Fulfillment of The Rights to Health for Health Workers.

The rights to health include the right to have a healthy working environment, the right to health facilities, and special attention for mother and child. It is in line with the international provision of human rights Article 25 [7] Universal Declaration of Human

The rights to health and equality to access health facilities should be guaranteed by the state and enacted in the constitution. Somehow, there have been found some old regulations that are not in line with the principle of human rights protection. Hans Nawiasky [6] stated that judicial review has become the solution for *justitiabellen* to seek justice in the term.

Rights that stipulates “*everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.*”

The right to health is a constitutional right of citizens that is derived from the human rights contained in Article 12 of the International Covenant on Covenant on Economic, Social, and Cultural Rights [8], which is regulated explicitly in paragraph 2 letters c and d as follows: "The steps to be taken by the state parties to the present Covenant to achieve the full realization of this right shall include those necessary for: c) the prevention, treatment, and control of epidemic, endemic, occupational and other diseases; d) the creation of conditions which should assure to all medical service and medical attention in the event of sickness [9].

Member States must be able to implement the agreements in the Covenant by realizing fundamental rights, including prevention, care, and monitoring of epidemics, endemics, and medical care for other diseases, creating a condition that ensures all health care and attention is focused on healing the disease. Therefore, as a member state, Indonesia must have confirmed the fulfillment of the health rights for all citizens, especially in the term of Covid-19 handling.

Concerning those regulations on ICESCR, the Committee on Economic, Social, and Cultural Rights has published General Comment Number 14 [10] in 2000, which states that at the level of implementation at the national legislation level, each state should fulfill the legislative framework as follows:

- a. The state must ensure the fulfillment of the right to health based on human rights principles that contain the objectives of the strategy, formulation of policies, and any rights related to health indicators. The national health strategy should be able to identify the resources available to achieve these goals, including the most effective use of resources to achieve these goals;
- b. The formulation and implementation of a national health strategy and plan should respect, not limited to, the principles of non-discrimination and public participation. Health protection must involve effective community activity in prioritizing, decision-

- c. making, planning and implementing, and evaluating existing strategies to achieve better health. Regulations concerning health services can be said to be effective only if the state protects the public participation;
- d. The national health and strategy planning should be based on the principles of accountability, transparency, and an independent judiciary because good governance is essential in the practical realization of human rights, including the completion of the rights to health. The state must be able to take steps to ensure the private business sector and civil society must have had awareness and respect for the rights to health to be able to operate effectively.
- e. The state should consider adopting a legal framework in order to implement the operationalization of the right to health into national health strategies. The legal framework should be able to establish a national mechanism to monitor the realization of the national health strategy and action plans. The instrument should include arrangements for the outcomes to be realized, time frame, collaboration with civil society including health experts, the private sectors, and international organizations; institutional responsibility for the realization of the rights to health in national strategies and plans of actions, including enabling resources. In the progress of evaluating the embodiment of the right to health, the state should be able to identify the factors and difficulties that can affect the state's obligations.

As the final interpreter of the constitution, the Indonesia Constitutional Court has stated in many decisions that the health service by the government is a mandate of the constitution. However, nobody can predict how the outbreaks or unusual symptoms would occur. However, the state (government) should prepare the health infrastructure that is necessary to maintain during pandemics.

Alexander Capron from the University of Southern California stated, "there remains the responsibility of the state in preparing for pandemic prevention, as well as strengthening and providing health infrastructure during a pandemic [11]. Referring to this idea, the government of Indonesia has regulated Law Number 2 of 2020 concerning the regulating of Government Institution in Law in Lieu Number 1 of 2020 Concerning State and State Financial Policies and Financial System Stability for the Management of Corona Virus Disease Pandemic and in Facing any Threat that Endangers the National Economic and or the Financial System Stability. This law mandates all state finance that all government officials and ministers manage to be focused on the program and

management of Covid-19 handling and national economic recovery.

In the Covid-19 handling and public health management, the government refer to these regulations that guarantee people's health security[12], namely:

- a. The law Number 36 of 2009 concerning health;
- b. The Law Number 40 of 2004 concerning National Social Security;
- c. The Law Number 11 of 2009 concerning Social Welfare;
- d. The Law Number 4 of 1984 concerning Outbreaks of Infectious Disease
- e. Law Number 6 of 2018 concerning Health Quarantine.
- f. Law Number 36 of 2014 concerning Health Workers.
- g. Law Number 24 of 2007 concerning Disaster Management;
- h. Government Regulation Number 40 of 1991 Prevention of Infectious Disease Outbreaks;
- i. Government Regulation Number 21 of 2020 concerning Large Scale Social Restriction in order to Accelerate the Covid-19 Handling;
- j. Presidential Decree number 82 of 2020 concerning Committee of Covid-19 Handling and the National Economy Recovery;
- k. Presidential Decree Number 11 of 2020 concerning the Determination of the Covid-19 Public Health Emergency;
- l. Presidential Decree Number 12 of 2020 concerning Non-Natural Disaster of the spread of Covid-19 as National Disaster;
- m. Regulation of the Minister of Health Number 1501/MENKES/PER/X/2010 concerning Certain Types of Infectious Disease that may Cause Outbreaks and the. Efforts to Overcome Them;
- n. Decree of the Minister of Health Number HK.01.07/MENKES/392/2020 concerning the Providing of Incentives and Death Compensation for Health Workers Handling Covid-19.

The availability of health infrastructure from this country is a form of adequate legal protection for struggling medical workers, health workers, and health workers, as mandated by Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The Article 28D paragraph (1) 1945 Constitution stipulates, "*Everyone has the right to recognition, guarantee, protection, and legal certainty that is just and equal treatment before the law.*" The availability of the necessary health infrastructure is also a manifestation of the state's responsibility for proper health facilities as mandated by Article 34 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Article 34 paragraph (3) stipulates "*state is*

responsible for the provision of adequate health service facilities and public service facilities.”

The primary basis that the protection of human rights is the obligation of the government is the principle of democracy that, in fact, the government is given the mandate of power to protect the rights of citizens. The efforts of the fulfillment of rights to health can consist of prevention or recovery actions. The efforts of prevention can be seen in the creation of conditions that are adequate for health, both ensuring the availability of foods and jobs, good housing, and a healthy environment. Meanwhile, healing efforts are carried out by providing optimal health services. The health service includes aspects of social security for health, adequate health facilities, qualified medical personnel, and service financing that is affordable to the community.

In the Covid-19 pandemic era, the health workers have played a significant role to be the frontliners guardian in the Covid-19 handling and management. The health workers not only work in the hospitals to take care of Covid-19 confirmed patients but also socialize all the preventive steps that the government has ordered. This fact places the health workers in a high-risk situation that they cannot deny. The government has tried to fulfill all resources that would be necessary for the series of 3T Action (Tracing, Testing, and Treatment) massively [13].

However, every state has a different policy to provide supports and fulfill the rights to health security for health workers. As a comparison regarding the awarding of medical personnel and health workers who carry out tasks in handling Covid-19, the United States Department of Labor [14] has a hazard pay policy which is additional income given to workers who carry out work with full risks. Or involve considerable physical exertion. At the federal level, the United States Labor Standards Act does not regulate the legal subject of hazard pay recipients. Still, it requires the hazard pay as the standard labor income rate needed by the federal state to enter into the payment system.

The national *hazard pay* policy then is implemented by the government in the state to provide incentives for the workforce, especially health workers who are front liners in response to the Covid-19 pandemic. The major of Detroit[15], for example, provides an additional incentive equivalent to 800USDollar per month for staff in the ministry of health, health workers, members of the police office, personnel in the water and fire departments, and all workforce in government and public services. On the other hand, more than 6500 health workers and medical personnel in charge of handling Covid-19 in Massachusetts will receive an additional wage of

10USD and a bonus of 500USDollar paid by check payment [16].

Russell Gold explained in the Wall Street Journal that more and more countries have changed or considered the existing regulations and policies to ensure and guarantee that paramedics, firefighters, health workers, and all workers who are directly fighting the Covid-19 pandemic have broad access to compensation or incentives as a result of the risk of their work [17].

The association of health workers who are members of the NUHW [18] (National Union Healthcare Workers) formulates ten rights that must be fulfilled and guaranteed during the Covid-19 response period, namely: 1) personal protective equipment; 2) the right to get a Covid-19 test facility; 3) a work environment-safe and hygienic; 4) healthy and safe co-workers; 5) adequate and adequate training and counseling; 6) mental health services; 7) temporary living quarters for self-isolation; 8) leeway to be able to work from home; 9) opportunities to express opinions and accountability for reporting in the workplace; 10) caregiver services for workers who still have families with caregiver needs such as children and parents.

Related to the fulfillment of the rights to health, a state has three responsibilities [19] or obligations that the state should implement. They are the obligation to respect, the obligation to protect, and the obligation to fulfill. It was mentioned that the obligation to safeguard mandates the state to block the prevention of any third parties interfering with the rights to health. State that will fulfill the obligation should ratify any international conventions, regulating any administrative, budgetary, and judicial procedure to realize the right to health.

It should be highlighted that in the previous Verdicts, The Indonesian Constitutional Court has also played its role in providing the protection of the rights to health. The previous verdicts are as follows:

a. Constitutional Court Verdict Number 82/PUU-XIII/2015 (Law Number 36/2014 concerning the Health Workers:

“Health services that are regulated by the government through the formation of laws and regulations must absolutely be based on the rights of citizens and the goals of the state as mandated in the Preamble to the 1945 Constitution.”

b. Constitutional Court Verdict Number 38/PUU-XI/2013 (judicial review on Law Number 44 of 2009 concerning Hospital)

So that “...the state (government) is obliged to guarantee.... Health service facilities... with the

aim of ensuring the achievement of adequate health services...."

2.2 *Indonesian Constitutional Courts Role in Protecting the Rights to Health Security*

The Indonesian Constitutional Court has sentenced some verdicts concerning the protection of the rights to health security for citizens. Still, this paper will show two verdicts that are related to the protection of the rights to health security, especially for health workers.

2.2.1 Constitutional Court Verdict Number 36/PUU-XIX/2020

The applicants in the *Constitutional Court Verdict Number 36/PUU-XIX/2020* represented five interests with different constitutional rights issues. The first applicant was an organization *Masyarakat Hukum Kesehatan Indonesia* (Health Law Society Indonesia) that represented the interest of any health workers and health practitioners in Indonesia. The second applicant was a health worker who worked as a specialist doctor in the Covid-19 referral hospital. The third applicant was a doctor who, in daily life during a pandemic, handled and took care of confirmed Covid-19 patients. The fourth and fifth applicants were health workers who served as a doctor in the first-rate health facility and felt that they did not get enough protection from their duty to battle Covid-19 in their work environment. In this verdict, the applicants tried to test the constitutionality of the norms in Law Number 4 of 1984 concerning Infectious Disease Outbreaks and Law Number 6 of 2018 concerning Territorial Quarantine.

There are two constitutional issues in this case, as follows:

- a. Is it true that the word "can" in article 9 paragraph (1) of Law Number 4, the year 1984 unconstitutional if it is not interpreted as "mandatory"?
- b. whether the phrase "availability of the necessary resources" in Article 6 of Law 6/2018 is unconstitutional if it is not interpreted as: "includes:
 - 1) Availability of Personal Protective Equipment for medical personnel, health workers, and health facility employees who handle diseases and/or Public Health Risk Factors that have the potential to cause a Public Health Emergency;
 - 2) Incentives for medical personnel, health workers, and health facility employees who handle diseases and/or Public Health Risk Factors that have the potential to cause a Public Health Emergency;

- 3) Compensation for families of medical personnel, health workers, and health facility employees who died while handling diseases and/or Public Health Risk Factors that have the potential to cause a Public Health Emergency; and
- 4) Resources for examining conditions and/or Public Health Risk Factors that have the potential to cause a Public Health Emergency for people who make contact with patients suffering from diseases and/or Public Health Risk Factors that have the potential to cause a Public Health Emergency, through a rapid examination flow";

According to Steven J Heyman [20] there are three main elements in the law protection, namely:

- a. The law protection that is related to the legal standing of a citizen as a freeman citizen;
- b. The law protection that is related to substantive rights as proof of the law guarantee and acknowledgment of the individual's rights to live, own things, and get freedom;
- c. The enforcement of righteousness, which is implemented by the government to prevent any violation of substantive rights, recover from and punish those violations.

There is a lack of protection to the rights to health that is enacted in Law Number 4 of 1984 concerning Outbreaks of Infectious Disease and Law Number 6 of 2018 concerning Health Quarantine.

In consideration of the verdict, the Court explains whether the petitions of applicants contain any constitutional issues. Law Number 4 of 1984 was actually regulated to handle any infectious disease outbreak without the specific mechanism of the outbreak management (or handling). A broad scope of outbreaks management efforts in the regulation and the Covid-19 pandemic are excluded. As a form implementation of the basis of mandate, the government has enacted Government Regulation Number 40 of 1991 concerning Contagious Disease outbreaks. There is a more comprehensive norm that cannot be separated from Article 9 Law Number 6 of 2018 in chapter IX concerning Health Quarantine Resources. Law Number 4/1984 is not the only regulation that should be referred by the government in the management of Covid-19 because they also regulate many technical regulations which contain *flexibility* of the implementation. One example of flexibility can be found in the policy of providing incentive for health workers that should work in the Covid-19 Referral Hospital. Health workers and society can refer to Law Number 20 of 2009 concerning Honors which gives compensation as a form other than money given to certain officers (and

health workers) who bear the risk of effort to handle the epidemic.

That regulation other than the law that is the review in this verdict principally aims to ensure that the implementation of epidemic control is carried out following the mandate of the constitution, namely in accordance with the rights of citizens to a healthy environment and health services as referred to Article 28H par (1) of the 1945 Constitution and as a form of state responsibility on the provision of health service facilities as stated in Article 34 para (3) of the 1945 Constitution.

Related to the word "can" in the *petitum*, the Court states that the norm "can" contains a discretionary meaning [21]. Due to the discretionary nature, the word "can" that contains "optional norm" could become mandatory because there are factors that require it. Considering the wide scope of law Number 4 of 1984, namely the type of epidemic that should be faced, the impact of the epidemic, the types of activities that can be included in the epidemic preventive efforts, officers who will be pointed to join the epidemic prevention efforts, as well as the forms of reward that can be given, then it is appropriate if the term used in the norm is the word "can." The transformation of the meaning of "can" into "mandatory" in its implementation is determined by many factors and a broad interpretation of laws. However, as long as the regulation binds the government and the officials in it to implement it, in fact, automatically rewarding officers affected by the Covid-19 pandemic has become a priority based on the implementing rules mandated by the law.

2.2.2 Dissenting Opinion by two Justices that Affirm the State Obligation in Protecting the rights of health

In the Constitutional Court Verdict Number 36/PUU-XVIII/2020, the Court rejected the petition. However, there are two dissenting opinions from judges in interpreting the state's obligation concerning the fulfilling of rights to the health facility. The Court should have granted the petition that is related to the constitutionality of article 9 para (1) Law Number 4/1984.

The dissenting opinion stated: "*Within reasonable limits of reasoning, the demands for the professionalism of a doctor and other medical personnel will increase when a pandemic occurs. They are not only required to be professionals in carrying out their professional duties but also must be prepared with all risks, including the risk of risking their rights to life which can lead to death. Furthermore, the work*

demands of a doctor and other medical personnel in pandemic conditions are also not normal, and some facts prove beyond the logic of human responsibilities. Even under certain conditions, it is far beyond the limits of one's physical abilities as an ordinary human, so that the threats of death will also become a risk that is difficult to avoid. This means that the risks referred to cannot be placed only as work risk, but rather the risk of facing an extraordinary health threats that threaten anyone, including human who work as doctors and other medical personnel."

In an international symposium entitled "Covid-19 Responses and States obligations Concerning the Right to Health,"[22] it was concluded that *protecting the right to health is in itself also a hard-legal obligation of states*. In this position, *merely safeguarding public health in a general sense is not enough*. This opinion is absolutely in line with the state obligation standard that is ruled in ICESCR that explicitly stipulates "State must realize the right to health not only within existing resources but "to the maximum of its available resources."

Therefore, there are three important messages that are sentenced in the dissenting opinion of Justices Suhartoyo and Justice Saldi in this verdict. *First*, the state has an obligation to provide any salary or incentives that is proper and in accordance with the demands of professional work addressed to every health worker, one of which is a doctor. *Second*, in fulfilling the constitutional obligation to provide health service facilities, especially during pandemics, the state must also provide incentives equal to the level of risk faced by every citizen who carries out state duties in the condition of battling a pandemic. *Third*, the meaning of protecting public health in a general sense is not enough without being followed by the obligation of states, especially in terms of facing a pandemic.

The obligation and responsibility of states should refer to any certain health workers that carry out the pandemic control tasks, including: epidemiological investigations, examinations, treatment, taking care and isolations of patients, including quarantine measures; prevention and immunization, elimination of the diseases cause; outreach to the community, and other countermeasures. *Fourth*, the spirit of ICESCR that addressed the state must realize the right to health not only within existing resources but to the maximum of its available resources that was ratified by Indonesia on February 23, 2006, has not been optimally provided for in Law number 4/1984.

It becomes the concrete action of state responsibility and obligation that is enacted on Article 28D para (1) and Article 34 para (3) 1945 Constitution. Article 34 para (3) of the 1945 Constitution states: "The state is responsible for the provision of proper health service facilities and public service facilities. Article 28D para (1): "Every person has the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law."

3. CONCLUSION

Based on the discussion above, the protection of human rights concerning rights to health and access to health facilities should really be implemented by the state not only in the *staatgrundgesetz* but also in all related *formell gesetz* and *verordnung* dan *autonome satzung*. Through its decisions, the Constitutional Court of the Republic of Indonesia has played essential roles in safeguarding the protection of human rights, especially in terms of rights to health and access to the health facility.

This research strongly recommends the government to obey the Constitutional Court Verdicts by reformulating all related regulations concerning the protection of health workers' rights, especially to health workers in the term of the Covid-19 epidemic era and the future epidemic we (human) could never predict.

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