

The Uncertainty of the Right to Health in Indonesia during Covid-19 Pandemic

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Abstract

The Covid-19 pandemic has limited human movement across the world. However, interest in maintaining and fighting for justice, human rights (HAM), and democracy as the basis for building the civilization of the nation and state must not be weakened. On the contrary, it must be more strongly upheld and enforced. The government, as the primary duty bearer, is obliged to respect, protect, and fulfill the human rights of every citizen, as stated in numerous international and national legal instruments, including the constitution of the Republic of Indonesia (UUD 1945). This study uses a library research method and statutory approach. The author found that the government is still relatively lenient in handling the COVID-19 pandemic. Accordingly, this raises concerns about the uncertainty of the health environment in Indonesia. This violates Article 28 H paragraph (1) of the 1945 Constitution, which states that every person has the right to live in physical and spiritual prosperity, to have a place to live, to have a good and healthy living environment, and the right to obtain health services. The government should issue a stricter policy in dealing with this problem.

Keywords: *covid-19 pandemic, policy, health, human rights.*

I. INTRODUCTION

In December 2019, an outbreak of pneumonia caused by the coronavirus was reported in Wuhan, Hubei Province, and has spread rapidly throughout China. The virus has spread quickly and so fast that it has circulated around the world. The outbreak was named the Corona Virus Disease 2019 (COVID-19), and is caused by Severe Acute Respiratory Syndrome Coronavirus-2 (SARS-CoV-2). On January 30, 2020, the World Health Organization (WHO) declared COVID-19 a global public health emergency¹ and on March 9, 2020 they announced its official classification as

¹ *BBC News*, “Coronavirus declared global health emergency by WHO” (31 January 2020), online: <<https://www.bbc.com/news/world-51318246>>.

a ‘pandemic,’ meaning that the COVID-19 has spread massively throughout the world.² In the context of COVID-19 mitigation, Indonesia’s response has been lacking. The government’s response in early 2020 was centered around denial and official’s overconfidence in underestimating the threat of COVID-19, turning it into a joke.³ Moreover, instead of taking preventive measures, the government instead imposed special intensives for the tourism industry and appealed to the public to travel.⁴ It didn’t take long for COVID-19 to reach, on March 2, 2020 the spread of COVID-19 reached Indonesia, with the government officially announcing the first two positive COVID-19 cases.

Because of the rapid spread of this virus, the government of the Republic of Indonesia was forced to take immediate action to prevent further spread and manage existing cases. Article 1 Paragraph 3 of the Constitution of the Republic of Indonesia of 1945 (NRI Constitution of 1945) states that Indonesia is a country of law and, as such, is obliged to uphold the law and its implementation in state and community life. The state of law is generally centered between the government and the ‘governed.’ Accordingly, some regulations are necessary to govern society, both in the form of Government Regulations and the Regulation of the Minister of Health, both of which are implementation regulations from Law No. 6 of 2018 concerning Health Quarantine.⁵

The first action taken by the Government in responding to the COVID-19 pandemic was to issue national health protocols guided centrally by the Ministry of Health of the Republic of Indonesia.⁶ Then, on March 13, 2020, the Government issued Presidential Decree (Keppres) 7/2020, creating a Task Force for the Accelerated Handling of COVID-19.⁷ However, this failed to contain the spread of COVID-19 which continues to be transmitted widely and seems somewhat uncontrollable.

The right to health and the right to life is a mandate of the NRI Constitution of 1945: Paragraph (4) of the preamble enshrines the duty of the State to protect the welfare of all nations and citizens; Article 28A states that everyone has the right to live and maintain his life; and Article 28H Paragraph (1) states that everyone is entitled to a good and healthy living environment, including access to health services. The right to health is an inclusive right, encompassing all health services and a number of

² Website Resmi Penanganan COVID-19, “Tanya Jawab”, online: *covid19.go.id* <<https://covid19.go.id/tanya-jawab?search=Apa%20yang%20dimaksud%20dengan%20pandemi>>.

³ Isal Mawardi, “Ini Daftar 37 Pernyataan Blunder Pemerintah Soal Corona Versi LP3ES”, *detiknews*, online: <<https://news.detik.com/berita/d-4967416/ini-daftar-37-pernyataan-blunder-pemerintah-soal-corona-versi-lp3es>>.

⁴ Rr Ariyani Yakti Widyastuti, “Wishnutama Sebut Insentif Pariwisata Dirilis Awal Maret”, (29 February 2020), online: *Tempo* <<https://bisnis.tempo.co/read/1313624/wishnutama-sebut-insentif-pariwisata-dirilis-awal-maret>>.

⁵ Dalinama Telaumbanua, “Urgensi Pembentukan Aturan Terkait Pencegahan Covid-19 di Indonesia” (2020) 12:01 QALAMUNAJ Pendidik Sos Dan Agama 59-70 at 59.

⁶ *Ibid* at 60.

⁷ Herlambang Perdana Wiratraman, “Does Indonesian COVID-19 Emergency Law Secure Rule of Law and Human Rights?” (2020) 4:1 J Southeast Asian Hum Rights 306 at 308.

basic prerequisites for health that all citizens are entitled to.⁸ The right to a good and healthy environment, including clean air, is inseparable⁹ from the right to health.¹⁰

Despite the severity of the condition, some parties take advantage of the situation for personal gain and ignore public health recommendations. This has ignited public anger amidst a health emergency. In this case, uncertainty relating to the right to health haunts the people of Indonesia even more. In addition, uncertainty about the right to health also arises from the side of non-covid-19 patients. Health workers and institutions – such as hospitals, health centers, and clinics – have experienced overcrowding and increasing strain on resources during the preparation for, and management of, COVID-19, limiting the care they can provide. Transmission of COVID-19 occurs through droplet fluid from the nose or mouth, making it spread very fast.¹¹ This has prompted a need to maintain physical and social distancing and to encourage people in general to stay indoors. This situation directly disrupts public access to various public service facilities, including health services. The WHO stated that 53 percent of countries surveyed reported that treatment services for hypertension have been disrupted. Further, 49 percent of countries declared that treatment for diabetes and diabetes-related complications was impaired, 42 percent declared the impairment of cancer treatment, and 31 percent declared cardiovascular emergencies impaired, adding to the uncertainty of the right to health for people in Indonesia.¹²

Public health rights have clearly been disturbed by the pandemic, both in terms of healthy communities maintaining their health and the patients with existing conditions who have struggled to recover during this period. Relating to the mandate of the 1945 NRI Constitution, Article 28 H paragraph (1) becomes an interesting consideration when discussing the right to live a prosperous life, in particular when assessing whether a community has guaranteed sufficient access to health services and a healthy environment throughout the pandemic period. Further, it is relevant when analyzing the appropriateness of policies taken by the Government in response to the COVID-19 pandemic?

⁸ Article 4 of Law No. 36 of 2009 on Health

⁹ Decree of MK No. 19/PUU-VIII/2010; Decree no. 34/PUU-VIII/2010; Decision of MK No. 43/PUU-IX/2011; Decision of MK No. 55/PUU-IX/2011; Case Number 57/PUU-IX/2011 and Case Number 86/PUU-IX/2011. Smoke-free is part of the right to health so the provisions on tobacco/cigarette control regulations in the Health Act are not discriminatory provisions

¹⁰ Article 6 of Law No. 36 of 2009 on Health

¹¹ WHO, “Question and answers hub”, online: <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub>>.

¹² WHO, “COVID-19 significantly impacts health services for noncommunicable diseases”, (1 June 2020), online: <<https://www.who.int/news/item/01-06-2020-covid-19-significantly-impacts-health-services-for-noncommunicable-diseases>>.

II. RIGHT TO HEALTH AS PART OF HUMAN RIGHTS AND CONSTITUTIONAL RIGHTS OF CITIZEN

The process of realizing the right to health as an essential human right is no easy task. The human rights regime we have today composed of three generations:¹³ the first generation of human rights developments was influenced by the French Revolution and the American Revolution in the 17th century, human rights are influenced by liberal thought, focusing on civil and political rights. The second, which emerged in the 19th century, focused more on the right to health and was influenced by the British Industrial Revolution which caused many health problems among workers, leading to the Health Reform movement spearheaded by the British Government with the "Sanitary Revolution" recognizing the rights to health as a human right for the first time.¹⁴

The right to health is enshrined in Article 40 of the 1945 Constitution which states that "the Ruler always strives earnestly to advance the general cleanliness and health of the people."¹⁵ Even after the Indonesian State is no longer in the form of a union, provisions regarding the right to health continue to be adopted in the latest Constitution where Indonesia returned a Unitary State with the 1950 Provisional Constitution (UUDS) which refers to the right to health in Article 42.¹⁶

Policies enacted by the Government must be carried out with careful consideration to the State's responsibility to ensure protection, as stated in the mandate of the Opening of the 1945 NRI Constitution Paragraph (4): "form an Indonesian State Government that protects the entire Indonesian nation and all Indonesian blood spills." This notion of protection from threats can be interpreted to include the COVID-19 pandemic.¹⁷ Further, Article 34 Paragraph (2) and (3) and Article 28H Paragraph (1) of the 1945 NRI Constitution mandate that every citizen is entitled to a decent life and has the right to live in a safe environment, including the provision of health insurance. As such, it is appropriate and necessary for the right to health to be respected and fulfilled by the State as a fundamental right.¹⁸ The legal basis of the right to health is enshrined nationally in the 1945 Constitution, namely the provisions of Article 28 H Paragraph (1) as a result of the 2nd amendment.

¹³ Eddy Damian, *Dinamika Hukum Dalam Pembangunan Berkelanjutan* (Penerbit Alumni, 2021) at 515 Google-Books-ID: BvgkEAAAQBAJ.

¹⁴ Rico Mardiansyah, "Dinamika Politik Hukum Dalam Pemenuhan Hak Atas Kesehatan Di Indonesia" (2018) 4:1 *Veritas Justitia* 227-251 at 231.

¹⁵ Fakultas Hukum Universitas Muhammadiyah Surabaya et al, "Urgensi Pemenuhan Hak-Hak Konstitusional Warga Negara Era Pandemi Covid-19 di Indonesia" (2022) 1:2 *J Ilm Huk Dan Hak Asasi Mns* 55-66 at 58.

¹⁶ Indra Perwira, "memahami kesehatan sebagai hak asasi manusia" *Lemb Studi Advokasi Masy* 19 at 2.

¹⁷ Thoby Araya Kattsoff et al, "Konsep pengaturan pemberlakuan karantina wilayah (lockdown) saat Covid-19 meningkat di Indonesia" (2022) 3:1 *Indones Berdaya* 83-92 at 85.

¹⁸ Muhamad Beni Kurniawan, "Politik Hukum Pemerintah dalam Penanganan Pandemi Covid-19 Ditinjau dari Perspektif Hak Asasi atas Kesehatan" (2021) 12:1 *J HAM* 37 at 39.

More recently, Law Number 39 of 1999 concerning Human Rights reaffirmed the right to health as a fundamental human right to be guaranteed by the State. Further, Law Number 36 of 2009 concerning Health states that every citizen has the right to the protection of access to health.¹⁹ This aligns with the legal principle of *salus populi suprema lex esto* where the safety of the people is the highest law for a country.

The formation of legislation is unable to predict and solve all potential problems that may arise in the future. In anticipation of a situation that may threaten the future of the state, various legal instruments are prepared to deal with such matters. These arrangements are established in both its constitution and civil law. Policies and provisions made by governments refer to a concept of restrictions outlined by Christian Bjørnskov, "The State of Emergency describes a state of emergency regularly implies that the government has the right to derogate from some basic rights." In "abnormal" circumstances such as health emergencies, the government can restrict certain social, cultural, and economic rights with due regard to the principles of legality, proportionality, temporary, and non-discrimination.²⁰

In their writings, Tom Ginsburg and Mila Versteeg determine three general routes taken by States in tackling the COVID-19 crisis: (i) declaring a state of emergency under the constitution; (ii) using existing emergency legislation to deal with public health or national disasters; or (iii) passing new emergency legislation.²¹ In the first option, the state imposes the state of emergency set out in its constitution. According to Christian Bjørnskov and Stefan, 90% of constitutions across the world regulate the state of emergency clauses, mostly due to war or foreign aggression (48%), internal security (39%), or national disaster (26%).²² In the current public health emergency, governments may break out of the constitutional framework and take actions that, under normal circumstances, should not be taken. However, in the modern constitution the emergency clause is often accompanied by a restriction clause to regulate its use. According to Tom Ginsburg and Mila Versteeg, this first option has the disadvantage of conferring great power with limited supervision or regulation. Therefore, this option is prone to abuse for political purposes. In Indonesia, this option is similar to the 'state of danger' clause in Article 12 of the 1945 Constitution which grants the President absolute authority (executive) to establish, and remove the state of danger.

The second option departs from the assumption that some human rights are not absolute. Such rights can be limited as long such limitation is proportionate and legal.²³ Many constitutions do not contain specific regulations for health-related emergencies. Therefore, there is no need to activate an emergency under the constitution. This option focuses on granting extraordinary powers to the government

¹⁹ Nabilah Apriani & Ersya Aqila Wafa Azizah, "Vaksinisasi Covid-19 Upaya Pemenuhan Hak Kesehatan Atau Wujud Kewajiban Dalam Berbangsa Dan Bernegara" (2022) 6:2 19 at 98.

²⁰ Christian Bjørnskov, "The State of Emergency Virus" (2020) Verfassungsblog Matters Const, online: <https://intr2dok.vifa-recht.de/receive/mir_mods_00008572>.

²¹ Tom Ginsburg & Mila Versteeg, "States of Emergencies: Part I" (2020) Harv Law Rev, online: <<https://blog.harvardlawreview.org/states-of-emergencies-part-i/>>.

²² Bjørnskov, *supra* note 20.

²³ note 21.

through ordinary law regulations. The law in question seeks to overcome crises related to health regulations, disasters, or, perhaps, civil defence. This route is demonstrated in the cases of India, through the Epidemic Diseases Act 1897;²⁴, Taiwan, through the Communicable Disease Control Act; and in Australia, through the Biosecurity Act 2015. In Indonesia there are several laws that are of similar character, including Law No. 5 of 2018 Health Quarantine, Law No. 24 of 2007 disaster management and Law No. 23 of 1959 on the State of Danger (also known as Law No. 23 of 1952 which has a connection with Article 12 of the 1945 Constitution).

Meanwhile, the third option focuses on tackling the COVID-19 crisis with new legislation. This option allows the state to establish and meet the desired legal requirements to deal with the crisis at hand. In fact, many countries do not have appropriate legislation that is able to specifically regulate the complexity of the problems caused by COVID-19. However, this option is limited by the fact that new legislation is formed under pressure and in the restrictive conditions of the crisis, resulting in rushed legislation with minimal review which may not adequately consider the requirements or implications of its existence. This option has the potential to give broad powers to the ruler.

From the three alternatives above, the Government of Indonesia chose to use ordinary law to combat the COVID-19 pandemic, namely Law No. 5 of 2018 Health Quarantine and Law No. 24 of 2007 Concerning Disaster Management. The policy is reflected by the establishment of public health emergency status through Presidential Decree No. 11 of 2020 and Non-Natural Disaster Emergency through Presidential Decree No. 12 of 2020. This framework is similar to the second model set out above, using existing laws governing public health emergencies or disasters.

Presidential Decree (Keppres) 7/2020 created a Task Force for the Accelerated Handling of COVID-19 which was formed on March 13, 2020.²⁵ The Presidential Decree was then revised, with the modified version, Presidential Decree (Keppres) 9/2020, considering the inclusion of ministries or institutions to the Task Force. In the new structure, there were 32 implementers, an increase from the previous 12.²⁶

However, the spread of COVID-19 remained beyond control, triggering the issuing of the Presidential Instruction of the Republic of Indonesia 4/2020, which aims to protect public health in Indonesia by utilizing a budget specifically focused on responding to COVID-19. Social restriction measures have also been issued through the Government Regulation of the Republic of Indonesia Number 21 of 2020. Another solution would be to vaccinate the entire population. The provision of universal vaccination is the embodiment of the country's goal in accordance with the Paragraph (4) of the preamble of the 1945 Constitution, namely protecting the nation and Indonesian people.²⁷ In order to provide legal certainty for the

²⁴ Ruth Levush, "FALQs: India's Government Response to COVID-19 (Novel Coronavirus) | In Custodia Legis: Law Librarians of Congress", (19 March 2020), online: </blogs.loc.gov/law/2020/03/falqs-indias-government-response-to-covid-19-novel-coronavirus/>.

²⁵ Wiratraman, *supra* note 7 at 309.

²⁶ *Ibid.*

²⁷ Nabilah Apriani & Ersya Aqila Wafa Azizah, *supra* note 19 at 76.

implementation of COVID-19 vaccination in Indonesia, the Government issued Presidential Regulation No. 99 of 2020 concerning Vaccine Procurement and Vaccination Implementation in the Context of COVID-19 Pandemic Management which was then regulated in more detail in the Regulation of the Minister of Health Number 84 of 2020 concerning the Implementation of Vaccination in the Context of COVID-19 Pandemic Management (Permenkes 84/2020).

III. GAPS AND CHALLENGES IN HANDLING THE COVID-19 PANDEMIC IN INDONESIA

Considering health as a human right implies that health is a major element in the fulfillment of human rights in the context of realizing human dignity. As such, health service issues are an integral aspect of human rights. In the context of the COVID-19 pandemic, numerous gaps and challenges impede the fulfillment of the right to health. These include:

1. The uncontrolled transmission of COVID-19 which has made hospitals downstream for handling the pandemic, like the arrival of a flash flood that never subsided. Amelia Martira, one of the doctors working at RSUD Depok treating COVID-19 patients, said that patients were still welcome at the Depok City Hospital were still welcome, but they had to queue for an empty room. The number of patients outweighed available rooms.²⁸
2. The survey from the Faculty of Nursing, conducted by the University of Indonesia and the Indonesian Mental Health Nurses Association, showed that nurses who handled COVID-19 patients were asked to leave their homes and even experienced threats of expulsion and social ostracization, leading to feelings of humiliation.²⁹
3. Meirdhania Andhina (2020) also noted that several countries have opted for the 'herd immunity' method in the hope that the pandemic will pass quickly through mass exposure to the virus. Those infected with the virus and subsequently recover usually have strong antibodies to said virus. The body produces antibodies in response to unfamiliar viruses or bacteria. Therefore, the more people who experience and recover from the infection, the more

²⁸ Kompas Cyber Media, "Ancaman RS Kolaps di Depok Kian Nyata, Pasien Covid-19 Menumpuk di IGD", (28 January 2021), online: *KOMPAS.com* <<https://megapolitan.kompas.com/read/2021/01/29/06205141/ancaman-rs-kolaps-di-depok-kian-nyata-pasien-covid-19-menumpuk-di-igd>>.

²⁹ Jhon Rico, "InfoPublik - Stop Stigma Negatif ke Tenaga Medis dan Pasien Covid-19", (18 July 2020), online: <<https://infopublik.id/kategori/lawan-covid-19/468607/stop-stigma-negatif-ke-tenaga-medis-dan-pasien-covid-19?video=>>>.

people will have immunity to it. According to this perspective, people with antibodies can act as a protective wall for other uninfected people within a population. However, this method carries a high risk due to the lack of an effective vaccine. As such, the concept of ‘herd immunity’ will likely result in high rates of positive infection and related deaths. Undoubtedly, with the lack of a viable option for vaccination, this violates human rights given the implications for the right to life and health, which are non-derogable rights that cannot be contested by anyone and under any conditions.³⁰

The chairman of the Center for Human Rights Studies (Pusham) at the Islamic University of Indonesia, Eko Riyadi, stated that the State has an obligation not to take any action that eliminates or reduces the ability of anyone to enjoy the right to health. Indicators for the fulfillment of the right to health include the availability, accessibility, acceptability, and quality of health services.³¹

The protection of people from the COVID-19 pandemic is a tangible manifestation of the fulfillment of the right to health. It is also regulated in various laws including the ICESCR, which was ratified under Law No. 11 of 2005. Article 12 Paragraph (1) of the ICESCR strictly regulates the implementation of government obligations (central and regional) in fulfilling the right to enjoy the highest attainable standard of physical and mental health, which must be implemented through all available resources, including budget, infrastructure facilities, and human resources.³²

The exercise of the right to health must fulfill four principles: 1) availability; 2) accessibility; 3) acceptability; and 4) quality.³³ Availability means sufficient availability of facilities, equipment, drugs, and health services, including medical personnel. Accessibility means everyone can access health services without discrimination, especially for vulnerable and marginalized groups of people. There should be no discrimination in obtaining health services based on gender, race, color, language, religion, political views, health status or social background. Physical accessibility means physical health facilities and infrastructure must be safely accessible to everyone. Economic affordability means everyone can access health services without economic restrictions, especially for the poor. Accessibility of information means everyone can access information about health, patient rights and obligations, and other matters related to the right to health. Everyone has the right to seek, receive

³⁰ Tabah Apriliani Suhartono, “Herd Immunity Sebagai Pelanggaran HAM di Masa Pandemi COVID-19?”, online: *Kawan Huk Indones* <<https://kawanhukum.id/herd-immunity-sebagai-pelanggaran-ham-di-masa-pandemi-covid-19/>>.

³¹ Kompas, “Tanggung Jawab Negara Penuhi Hak Atas Kesehatan Dinilai Belum Optimal”, (17 July 2021), online: *kompas.id* <<https://www.kompas.id/baca/polhuk/2021/07/17/tanggung-jawab-negara-dalam-memenuhi-hak-atas-kesehatan-belum-optimal>>.

³² LBH Makassar, “Mengurai Pelanggaran HAM di Masa Pandemi Covid-19”, (19 May 2020), online: <<https://lbhmakassar.org/publikasi/opini/mengurai-pelanggaran-ham-di-masa-pandemi-covid-19/>>.

³³ “Mengurai Pelanggaran HAM di Masa Pandemi Covid-19”, online: *LBH Makassar* <<https://lbhmakassar.org/publikasi/opini/mengurai-pelanggaran-ham-di-masa-pandemi-covid-19/>>.

and impart information about health. Acceptability means that health services must be accepted in accordance with medical ethics and community culture, while maintaining patient confidentiality. Quality means everyone must get good quality health services in accordance with scientific and medical principles.

Violating any of these four principles constitutes a violation of human rights through Government negligence.³⁴ It is possible to postpone, reduce/limit certain human rights which are classified as ‘derogable’. Such restrictions must be proportional and within the bounds of relevant legislation. Based on Law no. 6 of 2018 and Permenkes No. 9 of 2020, Large-Scale Social Restrictions (PSBB), namely: a) holidays from schools and workplaces; b) restrictions on religious activities; c) restrictions on activities in public places or facilities; e) restrictions on transportation modes; and f) restrictions on other activities specifically related to defense and security aspects, accompanied by threats of sanctions for violators.³⁵

Ratio legis in applying restrictions on civil rights must meet the principles of proportionality, propriety, and balance. Without guaranteeing the fulfillment of basic needs, the implementation of PSBB violates of human rights, especially if it is found that there are people who are hungry, fall sick, experience mental disorders or even die as a result of confining themselves in the house due to the prohibition/restriction, while their basic needs are not met. On the other hand, a policy that relaxes PSBB may increase exposure to COVID-19 which may lead to higher death rates. The government has not only failed to carry out its obligations to protect public health, but has violated citizens’ non-derogable right to life which cannot be suspended in any circumstances, even in an emergency.³⁶

IHRL establishes and governs states responsibilities towards their citizens. The violation of IHRL may be due to a state’s inability to fulfil its obligations or a result of its unwillingness to do so. By examining the APBN/APBD documents along with all reports on their realization and inventory lists for reporting on State/Regional Property. Stagnancy in using available resources appropriately, such as patient self-isolation programs that violate general principles of good governance or the plan to procure five luxury cars for the leadership of the South Sulawesi DPRD during the pandemic. If accompanied by acts of official corruption involving COVID-19 funds – such as fictitious transactions, mark-ups on the budget for the procurement of PPE and other medical devices, and equipment for handling COVID-19 bodies – this can be categorized as a series of human rights violations. All forms of human rights violations, either direct or indirect, committed by government officials must be legally accounted for and subject to criminal, civil or administrative sanctions in accordance with the provisions of laws and regulations (general explanation of Law No. 39 of 1999) which can be prosecuted in stages, namely through national and international legal mechanisms.³⁷

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

IV. HARMONIZATION OF GOVERNMENT POLICIES AS AN EFFORT TO FULFILL THE RIGHT TO HEALTH DURING THE COVID-19 PANDEMIC

The 1948 Constitution of the WHO affirms that the enjoyment of the highest attainable standard of health is a fundamental right of every human being. Here, it is referred to not as a "human right," but a "fundamental right." The idea of the right to health as a human right continues to develop in both national and international law. Recognition of the right to health is explicitly enshrined in several international instruments, the most prominent example being Article 25 Universal Declaration of Human Rights (UDHR), which states that everyone has the right to have a decent life for himself and his family, including food, clothes, housing, medical care and social services as well as the right to feel safe and secure in times of unemployment, sickness, disability, being a widower, being an elderly, or other circumstances that may hinder someone's attainment of a decent life beyond their control.

Second, Article 12 of the ICESCR states that the States Parties to this Treaty recognize everyone's right to the enjoyment of the highest attainable standard of physical and mental health. This article also details steps that shall be taken by the States Parties to fulfill the realization of said rights, for example: infant and child health development; environmental and industrial hygiene improvement; control, treatment, and prevention of epidemic, endemic, occupational and other diseases; and guaranteed medical service and attention in times of sickness.

The Second Amendment of the 1945 Constitution affirms health as a part of human rights in Indonesia. Article 28H Paragraph (1) states that "[e]veryone has the right to live a prosperous life born and inward, residing, and having a good and healthy living environment and entitled to health services." The inclusion of such provisions in the 1945 Constitution illustrates a remarkable paradigm shift. Health is no longer a personal matter related to fate or the grace of God but is enshrined as a legal right. Incorporating provisions to protect certain human rights, including the right to health, into the 1945 Constitution demonstrates the State's political commitment upholding these principles. However, from the perspective of constitutional law, this still contains problems. The main problem is related to various limitations to, or definitions of, the right to health, despite their importance for establishing legal certainty. Without clear restrictions, it would be difficult to determine the scope of state responsibility as set out in the 1945 Constitution. Given the importance of 'health' for basic human function, it is often considered that health is everything, or without health everything is meaningless.³⁸

The right to health is a positive legal right which the Government is obliged to protect through real and concrete efforts. The right to health is broad in scope, concerning not only the rights of individuals, but also the factors that contribute to the health of that person such as environment, nutrition and housing. Though related, the right to health and this right to medical treatment are different. Both the UDHR (co-signed by Indonesia) and the 1945 Constitution in Article 28 H stipulate that health is the fundamental right of every individual and all citizens. Therefore, the

³⁸ Bagir Manan,; *Dimensi-dimensi Hukum Hak Asasi Manusia* (PSKN FH UNPAD, 2009) at 138.

government is bound by the responsibility to ensure adequate access to decent health services. States' efforts to respect, protect and fulfill their obligations relating to the right to health, must meet the principles: (1) availability; (2) accessibility; (3) acceptability; and (4) quality for health services. The internalization of this obligation in the form of government policies must satisfy the principles of respect, protection, and fulfillment of the right to health.³⁹

General Comment No. 14 on Article 12 of the ICESCR on the right to the Achievement of High Health Standard, refers to the guarantee of access to adequate health services including financial accessibility. In other words, health services must be affordable for all citizens.⁴⁰ The government is thus bound by the responsibility to ensure the availability of financial resources to support access to adequate health services. Law No. 40 of 2004 on the National Social Security System (SJSN), explains that the responsibility of the State in fulfilling citizens' access to health can be met through the provision of health insurance policies or programs that are fair and accessible to all citizens. Further, Law No. 32 of 2004 on Local Government establishes the position of the health sector within the business of both the Central, Provincial and Regency / City Government. Law No. 32 of 2004, explains that the Local Government (Province / City Regency) has an obligation to improve the quality of life of the community through the realization of justice and equality, providing adequate health care, social, and public facilities and developing social security systems.

1. The Concept of Meeting Standard Norms and Regulations (SNP) of The Right to Health During Covid-19 Pandemic

The Indonesian National Commission on Human Rights (Komnas HAM RI), drafted in accordance with the authority stipulated in Law on Human Rights (No. 39 of 1999), establishes the standard of norms and regulations (SNP) to develop conditions conducive to the implementation of human rights in accordance with Pancasila, the NRI Constitution of 1945, the UN Charter, and the UDHR. The institutional character of Komnas HAM RI is impartial, independent, and authoritative in providing the meaning of human rights standards and norms. This contributed to the development of the 2018 Standards of Norms and Regulation (SNP), which is a National Priority Program. The SNP is a practical document detailing examples of implementation for various human rights instruments both internationally and nationally, helping to contextualize human rights norms. This is expected to ensure easier understanding and promote proper and effective implementation by relevant stakeholders. To date, Komnas HAM RI has endorsed the SNP on: the Elimination of Racial and Ethnic Discrimination (PDRE), the Right to Freedom of Religion and Belief (KBB), the Right to Freedom of Assembly and Organization (KKB), the Right to Health, and the Right to Freedom of Opinion and Expression. These interpretations become binding for all relevant parties when published by Komnas HAM RI. When viewed substantively, the SNP becomes part

³⁹ Dedi Afandi, "Hak Atas Kesehatan Dalam Perspektif HAM" (2008) . ISSN 14.

⁴⁰ Seri Advokasi, "Analisis Pembiayaan Jaminan Kesehatan di Daerah" 151.

of the broad arrangement of norms, guidelines and court decisions that govern the implementation of human rights.

The SNP on the Right to Health is based on the understanding that said rights is fundamental for the exercise of other human rights⁴¹ and that everyone has the right to enjoy the highest standards of health that can be reached.⁴² The right to health is the right to obtain and enjoy the highest standard of health that can be achieved for every person by nature that person being born free and equal.⁴³ The right to health is the right to obtain and enjoy the highest standard of health that can be achieved for every person by nature that person being born free and equal. Letter C Number 25 explains that the phrase "the highest attainable standard of health" refers to the highest level of health that can be enjoyed by everyone and supported with maximum resources, including access to appropriate services and facilities to treat or prevent ill health. Health system analysis in the form of multisector assessments, must be conducted periodically to determine the level of performance of health systems and highlight the main obstacles to improving access to health services. The right to health is based on the principles of human rights, namely universality, equality, non-discrimination, indivisibility, interrelated, interdependence, human dignity, and state responsibility as listed in the SNP On the Right to Health Letter D Number 37.

The availability aspect provides guidance to ensure that the implementation of public health functions, health care facilities, health goods and services, as well as programs, are available in sufficient quantity. The adequacy of goods, services and facilities vary depending on many factors, including the level of state development. It also includes certain factors that affect health, for example safe drinking water, adequate sanitation, hospitals, clinics, and health-related buildings, as well as experienced medical personnel and professionals with competitive incomes and good medicine, as referred to in the WHO Action Programmed on Essential Drugs.

The accessibility aspect provides guidance to regulate the accessibility of health facilities, goods and services to all without discrimination, within the jurisdiction of the state. Healthcare providers should develop reasonable accommodations that meet the needs of vulnerable groups and individuals in an inclusive and respectful manner. The affordability aspect provides guidance that all health facilities, goods, and services must be accepted by medical ethics, be culturally appropriate - so as respect for the culture of individuals, minorities, groups and societies - and sensitive to gender and life cycle requirements. It is also designed to respect the confidentiality of individuals' health status, and improved health status for those in need. The quality aspect provides guidance that, in addition to being culturally sensitive, health facilities, goods, and services must be scientifically and medically appropriate and in good quality. This requires medically capable and authorized personnel, medicines, and

⁴¹ Standards of Norms and Regulations on the Right to Health were ratified through the Plenary Session Decree No. 04/PS/00.04/IV/2021 dated April 5, 2021 in Decision No. 16 and stipulated in The Komnas HAM Ri Regulation No. 1 of 2020 dated April 20, 2021.

⁴² General Comment No. 14 on the Right to the Highest Accessible Health Standards (Article 12 of the Covenant on Economic, Social, and Cultural Rights), Paragraph 1.

⁴³ Article 1 Universal Declaration of Human Right.

hospital supplies that are scientifically recognized and not expired, safe drinking water, and adequate sanitation. The Government must raise the level of public health optimally.

In emergency conditions, the State must fulfill the right to health, especially for affected communities, without discrimination and provide bureaucratic ease in its implementation. States shall enforce infection control and patient safety at every appropriate health facility and emergency response, continuous infection prevention and control programs should continue at the national and remote levels as well as within facilities. In emergency conditions, states are obliged to create a policy platform that is centralized and controlled, transparent, participatory, non-discriminatory, and accountable. This should include policies and mechanisms for reporting the current situation in accordance with the principle of transparency in order to mitigate the impact of emergency conditions.

2. Reflections on Government Policies in Handling the Covid-19 Pandemic

With regards to the handling of the COVID-19 pandemic in Indonesia, the Government has taken steps to protect the health of its citizens, beginning with the establishment of a health emergency status through Presidential Decree No. 11 of 2020 on The Determination of Corona Virus Disease 2019 Public Health Emergency, detailing government obligations to implement the 3T's (testing, tracing, treatment). This may include anything from building emergency hospitals, to enforcing restrictions in various regions as stated in Government Regulation No. 21 of 2020 on Social Restrictions Large Scale in order to accelerate the Handling of Corona Virus Disease 2019.

By adhering to the principle of "*salus populi suprema lex esto*," - the safety of the people is the highest law⁴⁴ - health policy should be the first priority in order to save lives, prevent unnecessary spread, and cure patients from COVID-19.⁴⁵ The government's efforts toward this are reflected in the following policies:

a. Large-Scale Social Restrictions (PSBB) and The Implementation of Community Activity Restrictions (PPKM)

Article 15 of the 2005 International Health Regulations explains that under the conditions agreed upon by the existence of a Public Health Emergency of International Concern (PHEIC), the WHO has the right to issue recommendations in the form of countermeasures that must be carried out by member states. One of which is the implementation of a 'health quarantine.' As a member state of the WHO, Indonesia must adjust its response according to existing conditions and

⁴⁴ J G F Powell, ed, *M. Tulli Ciceronis De Re Publica, De Legibus, Cato Maior de Senectute, Laelius de Amicitia*, Oxford Classical Texts (Oxford, New York: Oxford University Press, 2006).

⁴⁵ Phoebe E Arde-Acquah, "Salus Populi Suprema Lex Esto: Balancing Civil Liberties and Public Health Interventions in Modern Vaccination Policy" 31. See also Nguyen Thi Hong Yen & Tran Thi Thu Thuy, "Ensuring the Rights of Vietnamese Migrant Workers in the Context of the Covid - 19 Pandemic" (2022) 2:1 J Contemp Sociol Issues 40-58.

situation. Related to the PSBB policy, the quarantine of people and the implementation of an online learning and work system (Work from Home) are implemented through Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating Handling of COVID-19. Article 2 Paragraph 1 states that the PSBB has the right to limit the movement of people and goods who want to enter or leave certain provinces, regencies, or cities.⁴⁶ Through evaluation, the government then stipulated the Instruction of the Minister of Home Affairs Number 1 of 2020 concerning the Implementation of Activity Restrictions to Control the Spread of Coronavirus Disease 2019 (COVID-19). This transformed into the Implementation of Community Activity Restrictions (PPKM) in January 2021 and was extended again in February 2021.⁴⁷

b. Implementation of International Travel Health Protocols

The Government of Indonesia issued a COVID-19 Kasatgas Circular Letter Number 8 of 2021 concerning International Travel Health Protocols during the COVID-19 Pandemic. This tightened the country's entry and exit permits for Indonesian citizens and foreign nationals, regulating various administrative and health requirements that must be met in order to visit or transit through Indonesia. The policy reflects the provisions contained in Article 23 of IHR 2005, that states have the right to request information related to the purpose and plans of visitors in an effort to protect the public and meet the health goals of the country. Article 43 of IHR also allows states to take additional policies to restrict visitors from certain countries for the sake of their own domestic health.

V. CONCLUSION

A healthy environment and access to good health services during a pandemic are among the fundamental rights of every citizen. However, reality is marked by continued uncertainty about the protection, respect, and fulfilment of the right to health and its compliance with the four principles of: availability, accessibility, acceptance, and quality. Access and availability have not been fulfilled, demonstrated by the case of an overcrowded hospital making patients queue for access to an empty room. This also highlights the lack of sufficient quality of medical services. Violating one of the four principles constitutes an infringement on human rights through government negligence or unwillingness to establish effective safeguards. As such, we can conclude that uncertainty of the right to health in Indonesia remains high throughout the COVID-19 pandemic.

Early protection and preventions mechanisms should have been utilized by government's since the first announcement of the COVID-19 virus by limiting access

⁴⁶ Rewang Rencang, "Perspektif Regulasi Kesehatan Internasional dalam Kebijakan Mitigasi Covid-19: Studi Komparatif Antara Indonesia dengan Korea Selatan" (2021) 19 at 966.

⁴⁷ C N N Indonesia, "Bedah Tutar Jokowi soal PPKM Tak Efektif", online: *nasional* <<https://www.cnnindonesia.com/nasional/20210201143806-32-600876/bedah-tutar-jokowi-soal-ppkm-tak-efektif>>.

to international travel routes and preparing health facilities needed to overcome the possibility of an outbreak of COVID-19 patients. However, at that time the Government did not consider the first case as a significant health threat to the country. As such, their approach focused primarily on minimizing economic and social disruption while balancing their obligations to respect human rights, including the fulfillment of the right to health. The economic and health sectors are necessarily entwined, interdependent, and interrelated. However, based on the legal principle of *salus populi suprema lex esto* - the safety of the people is the highest law - the Government is obliged to prioritize its citizens right to health because public health is part of the foundation of the country's success in building economic, social, and political balance. As such, we can see that the Government's initial steps in issuing a Presidential decree to deal with the COVID-19 pandemic are relatively slow.

BIBLIOGRAPHY

- Advokasi, Seri, "Analisis Pembiayaan Jaminan Kesehatan di Daerah" 151.
- Afandi, Dedi, "Hak Atas Kesehatan Dalam Perspektif HAM" (2008) . ISSN 14.
- Arde-Acquah, Phoebe E, "Salus Populi Suprema Lex Esto: Balancing Civil Liberties and Public Health Interventions in Modern Vaccination Policy" 31.
- Bjørnskov, Christian, "The State of Emergency Virus" (2020) *Verfassungsblog Matters Const*, online: <https://intr2dok.vifa-recht.de/receive/mir_mods_00008572>.
- BBC News*, "Coronavirus declared global health emergency by WHO" (31 January 2020), online: <<https://www.bbc.com/news/world-51318246>>.
- Eddy Damian, *Dinamika Hukum Dalam Pembangunan Berkelanjutan* (Penerbit Alumni, 2021).
- Fakultas Hukum Universitas Muhammadiyah Surabaya et al, "Urgensi Pemenuhan Hak-Hak Konstitusional Warga Negara Era Pandemi Covid-19 di Indonesia" (2022) 1:2 *J Ilm Huk Dan Hak Asasi Mns* 55-66.
- Ginsburg, Tom & Mila Versteg, "States of Emergencies: Part I" (2020) *Harv Law Rev*, online: <<https://blog.harvardlawreview.org/states-of-emergencies-part-i/>>.
- Indonesia, C N N, "Bedah Tutar Jokowi soal PPKM Tak Efektif", online: *nasional* <<https://www.cnnindonesia.com/nasional/20210201143806-32-600876/bedah-tutar-jokowi-soal-ppkm-tak-efektif>>.
- Indra Perwira, "memahami kesehatan sebagai hak asasi manusia" *Lemb Studi Advokasi Masy* 19.
- Rico, Jhon, "InfoPublik - Stop Stigma Negatif ke Tenaga Medis dan Pasien Covid-19", (18 July 2020), online: <<https://infopublik.id/kategori/lawan-covid-19/468607/stop-stigma-negatif-ke-tenaga-medis-dan-pasien-covid-19?video=>>>.

- Kattsoff, Thoby Araya et al, “Konsep pengaturan pemberlakuan karantina wilayah (lockdown) saat Covid-19 meningkat di Indonesia” (2022) 3:1 *Indones Berdaya* 83-92.
- Kompas, “Tanggung Jawab Negara Penuhi Hak Atas Kesehatan Dinilai Belum Optimal”, (17 July 2021), online: *kompas.id* <<https://www.kompas.id/baca/polhuk/2021/07/17/tanggung-jawab-negara-dalam-memenuhi-hak-atas-kesehatan-belum-optimal>>.
- Kurniawan, Muhamad Beni, “Politik Hukum Pemerintah dalam Penanganan Pandemi Covid-19 Ditinjau dari Perspektif Hak Asasi atas Kesehatan” (2021) 12:1 *J HAM* 37.
- LBH Makassar, “Mengurai Pelanggaran HAM di Masa Pandemi Covid-19”, (19 May 2020), online: <<https://lbhmakassar.org/publikasi/opini/mengurai-pelanggaran-ham-di-masa-pandemi-covid-19/>>.
- Levush, Ruth, “FALQs: India’s Government Response to COVID-19 (Novel Coronavirus) | In Custodia Legis: Law Librarians of Congress”, (19 March 2020), online: <<https://blogs.loc.gov/law/2020/03/falqs-indias-government-response-to-covid-19-novel-coronavirus/>>.
- Manan, Bagir, *Dimensi-dimensi Hukum Hak Asasi Manusia* (PSKN FH UNPAD, 2009).
- Mardiansyah, Rico, “Dinamika Politik Hukum Dalam Pemenuhan Hak Atas Kesehatan Di Indonesia” (2018) 4:1 *Veritas Justitia* 227-251.
- Mawardi, Isal, “Ini Daftar 37 Pernyataan Blunder Pemerintah Soal Corona Versi LP3ES”, *detiknews*, online: <<https://news.detik.com/berita/d-4967416/ini-daftar-37-pernyataan-blunder-pemerintah-soal-corona-versi-lp3es>>.
- Media, Kompas Cyber, “Ancaman RS Kolaps di Depok Kian Nyata, Pasien Covid-19 Menumpuk di IGD”, (28 January 2021), online: *KOMPAS.com* <<https://megapolitan.kompas.com/read/2021/01/29/06205141/ancaman-rs-kolaps-di-depok-kian-nyata-pasien-covid-19-menumpuk-di-igd>>.
- Nabilah Apriani & Ersya Aqila Wafa Azizah, “Vaksinisasi Covid-19 Upaya Pemenuhan Hak Kesehatan Atau Wujud Kewajiban Dalam Berbangsa Dan Bernegara” (2022) 6:2 19.
- Powell, J G F, ed, *M. Tulli Ciceronis De Re Publica, De Legibus, Cato Maior de Senectute, Laelius de Amicitia*, Oxford Classical Texts (Oxford, New York: Oxford University Press, 2006).
- Rencang, Rewang, “Perspektif Regulasi Kesehatan Internasional dalam Kebijakan Mitigasi Covid-19: Studi Komparatif Antara Indonesia dengan Korea Selatan” (2021) 19.
- Suhartono, Tabah Apriliani, “Herd Immunity Sebagai Pelanggaran HAM di Masa Pandemi COVID-19?”, online: *Kawan Huk Indones* <<https://kawanhukum.id/herd-immunity-sebagai-pelanggaran-ham-di-masa-pandemi-covid-19/>>.

- Telaumbanua, Dalinama, “Urgensi Pembentukan Aturan Terkait Pencegahan Covid-19 di Indonesia” (2020) 12:01 QALAMUNA J Pendidik Sos Dan Agama 59-70.
- Website Resmi Penanganan COVID-19, “Tanya Jawab”, online: *covid19.go.id* <<https://covid19.go.id/tanya-jawab?search=Apa%20yang%20dimaksud%20dengannya%20pandemi>>.
- WHO, “COVID-19 significantly impacts health services for noncommunicable diseases”, (1 June 2020), online: <<https://www.who.int/news/item/01-06-2020-covid-19-significantly-impacts-health-services-for-noncommunicable-diseases>>.
- WHO, “Question and answers hub”, online: <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub>>.
- Widyastuti, Rr Ariyani Yakti, “Wishnutama Sebut Insentif Pariwisata Dirilis Awal Maret”, (29 February 2020), online: *Tempo* <<https://bisnis.tempo.co/read/1313624/wishnutama-sebut-insentif-pariwisata-dirilis-awal-maret>>.
- Wiratraman, Herlambang Perdana, “Does Indonesian COVID-19 Emergency Law Secure Rule of Law and Human Rights?” (2020) 4:1 J Southeast Asian Hum Rights 306.
- Yen, Nguyen Thi Hong & Tran Thi Thu Thuy, “Ensuring the Rights of Vietnamese Migrant Workers in the Context of the Covid - 19 Pandemic” (2022) 2:1 J Contemp Sociol Issues 40-58.

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