

Conflict Between Health Law and Territorial Quarantine Law Regarding the Provision of COVID-19 Vaccine



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ABSTRACT. In the context of preventing the increasingly widespread Covid-19 which has claimed many lives, the Indonesian government has made various efforts to overcome this and the most recent effort is giving Covid-19 vaccinations to the public. In practice, various conflicts emerge and one of them is the conflict between Law Number 6 of 2018 concerning Health Quarantine which states that vaccines are an obligation and Law Number 36 of 2009 concerning Health which states that vaccines are a right. This type of research is juridical normative using a statutory and conceptual approach. The results of this study indicate that Covid-19 is an emergency so that the principle of *non-habet legem necessity* applies, which means that in a state of legal emergency it does not apply, so that regulatory conflicts regarding Covid-19 vaccination do not become a problem, because the current government's efforts are the safety of the people. the highest law in an emergency, this is also in line with the *salus populi suprema et lex principle*. To ensure the safety of the people, the government is obliged to make efforts to vaccinate Covid-19 to restore the situation to its original state, this is in line with the principle of *restitutio in integrum*. In its enforcement, sanctions are needed to make the community obey. However, several regulations have different norms regarding sanctions for those who do not comply and until now there have been no specific regulations from the center regarding the provision of the Covid-19 vaccine. As a conclusion, currently giving the Covid-19 vaccine is mandatory because it is an emergency, but the government also needs to make special regulations from the center regarding vaccine administration regulations so that there are no disparities between each of the regulations from the vaccine-giving regions.

KEYWORDS. Criminal Law, Health Policy, Vaccine, Covid-19

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Introduction

COVID-19 has been endemic to the world since the beginning of January 2020 and it has been 1 year since this virus has claimed many lives. Until now, more than 2,000,000 people have died from around the world¹. In Indonesia alone, it has been recorded that more than 20,000 people have died from this virus². Due to the increasing number of deaths from this virus, the government has made various efforts to reduce this death rate and make Indonesia free from the virus. Various ways have been done by the government, such as Large-Scale Social Restrictions in various regions, socialization to remote parts of the country with the help of influencers, to the last resort, namely to bring in an early antidote for this virus in the form of a vaccine. Indonesia imports several types of vaccines such as: Red and White Vaccine, AstraZeneca, China National Pharmaceutical Group Corporation (Sinopharm), Moderna, Pfizer Inc and BioNTech and Sinovac Biotech Ltd³.

Along with the development of news about vaccines, negative rumors have also emerged about the injection of the vaccine, thus causing public

¹ Worldometer, "Coronavirus Cases," Worldometer, 2021.

² Satgas COVID-19, "Peta Sebaran COVID-19," Covid-19.go, 2021.

³ Indonesia.go.id, "Mengenal 6 Jenis Vaksin Covid-19 Pilihan," INDONESIA.GO.ID, 2020.

interest to take part in proving the vaccine that will be carried out by the government. In preventing this, the government will impose sanctions for those who do not want to be vaccinated for various reasons, through Article 93 of Law Number 6 of 2018 concerning Health Quarantine Article which states, "Everyone who does not comply with the implementation of Health Quarantine as referred to in Article 9 paragraph (1) and / or obstructing the implementation of Health Quarantine, thereby causing a Public Health Emergency to be punished with imprisonment of up to 1 (one) year and / or a maximum fine of Rp. 100,000,000.00 (one hundred million rupiah) ".

Article 9 paragraph (1) of Law Number 6 Year 2018 concerning Health Quarantine states, "Everyone is required to comply with the implementation of Health Quarantine". The management of Health quarantine as referred to is contained in Articles 19 - 70. The implementation includes: Health Quarantine at Entrance and Territory, Health Quarantine Implementation at Entrance, Implementation of Health Quarantine in Areas, Large-Scale Social Restrictions, Supervision of Crew, Personnel and Passengers , including vaccines therein. So, it can be said that the nature of giving vaccines, based on Law Number 6 of 2018 concerning Health Quarantine, is mandatory.

However, there are other regulations regarding health, which are contained in Law Number 36 of 2009 concerning Health. The regulation also contains vaccines, which are a provision for health for the public, as contained in Article 38 paragraph (1) and paragraph (2). Regarding the provision of vaccines to the public, the law is regulated in Article 5 paragraph (3) which states, "Every person has the right to independently and responsibly determine the health services that are needed for himself". Thus, based on Law Number 36 Year 2009 concerning Health, the nature of vaccines is not mandatory because vaccines are an independent right.

Through this background, the author will solve the problems faced, so as not to cause confusion next time and provide legal certainty. There is a problem in the form of a conflict of norms between the regulations regarding vaccine administration in Law Number 6 of 2018 concerning Health Quarantine and Law Number 36 of 2009 concerning Health. Based on this description, this research takes the formulation of the problem: how is the power of criminal law in overcoming the refusal to give vaccines to the public? This research is limited to the formulation of the problem and the output of this research will contribute to providing legal certainty regarding the provision of the Covid-19 vaccine to the public.

Method

This type of research is normative juridical law research. The reason for using normative juridical is because there is a conflict between laws and regulations. The collection of legal materials is carried out using the literature study method in accordance with the approach used. This research was conducted using a statutory approach, namely using Law Number 6 of 2018 concerning Health Quarantine, Law Number 36 of 2009 concerning Health and Law Number 12 of 2011 concerning the Formation of Laws and Regulations. Then the conceptual approach, which uses the concept of statutory regulations, emergency situations and punishment which refers to the doctrine and opinions of legal experts. The result of the analysis is an argument to solve the issue at hand ⁴. Criminal law research is not only focused on criminal law regulations, but can include research on concepts, theoretical aspects, criminal court decisions, law enforcement institutions and related institutions, and criminal law problems that arise ⁵.

Health Policy During Covid-19 Outbreaks in Indonesia

Several settings have defined understanding about vaccines. Article 1 number 2 Regulation of the Minister of Health Number 12 of 2017 concerning the Implementation of Immunization, states that "Biological products containing antigens are in the form of dead or alive microorganisms that are weakened, are still intact or part of them, or in the form of microorganism toxins that have been processed into toxoid or protein. recombinants, which are added with other substances, which when given to a person will actively induce specific immunity against certain diseases".

Based on Article 1 point 3 of the Regulation of the Minister of Health Number 23 of 2018 concerning Services and Issuance of International Vaccination Certificates, it states that "Special vaccines are given in the context of creating or actively increasing a person's immunity to a disease, so that if one day they are exposed to the disease, they do not. will be sick or will only experience mild pain and will not be a source of infection".

⁴ Peter Mahmud Marzuki, *Penelitian Hukum*, 12th ed. (Jakarta: KENCANA, 2016).

⁵ Yazid Bustomi, "Efektivitas Hukum Pidana Dalam Melindungi Perempuan Korban Kekerasan Seksual Di Era Sekarang Dan Mendatang" 4, no. 1 (2020): 79–91.

Based on the above understanding, it is concluded that with the current situation, vaccines are urgent to be produced and given to the community. With the aim of providing an immune effect to a disease, in this case covid-19. The goal of this vaccine is none other than to create new conditions in the form of life that can coexist with this virus. In the case of the covid-19 vaccine that is experiencing disputes, it is necessary to pay attention to the following:

State Emergency Related to COVID-19

In stating that the state is in a state of emergency, it is necessary to take a normative step as stipulated in Article 12 and Article 22 of the 1945 Constitution. Article 12 states that "the President declares a state of danger, the conditions and consequences of a state of danger are stipulated by law invite". Then Article 22 states that "in matters of urgency forcing the President to establish government regulations in lieu of laws" ⁶. Based on these regulations, if a breakdown is carried out, it will be found that there are two categories of state emergencies: First, a state of danger, and Second, a compelling emergency. The two categories have the same meaning as a state emergency, but both have differences in their emphasis, namely the term danger emphasizes its structure (external factors), whereas in terms of urgency, it forces more emphasis on its content (internal factors) ⁷.

The use of these two articles is very different, namely Article 12 of the 1945 Constitution focuses more on the authority of the President as head of state to save the nation and state from outside interference, while the use of Article 22 of the 1945 Constitution is in the regulatory domain, namely with regard to the President's authority to stipulate a Perppu. This it emphasizes more on the internal aspects of the state in the form of urgent legal needs. force, namely: first, the element of a dangerous threat; second, there is an element of necessity, and third, there is an element of limited time available ⁸.

⁶ Mohammad Zamroni, "KEKUASAAN PRESIDEN DALAM MENGELUARKAN PERPPU (PRESIDENT'S AUTHORITY TO ISSUE PERPPU)," *Legislasi Indonesia* 12, no. 3 (2018): 1–38.

⁷ Calvin Epafroditus Jacob, "TINJAUAN YURIDIS TERHADAP PENETAPAN KEADAAN DARURAT BERDASARKAN UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN 1945," *Lex Et Societatis* 6, no. 7 (2019): 60–67.

⁸ Reza Fikri Febriansyah, "Eksistensi Dan Prospek Pengaturan Perppu Dalam Sistem Norma Hukum Negara Republik Indonesia," *Legislasi Indonesia* 6, no. 4 (2009): 667–81.

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For the enforcement of an emergency must meet the requirements both material requirements and formal requirements. The material requirements are that there must be a new state institution related to the emergency situation and must also be equipped with a new authority to act and the formal requirements are that the new state institution must act based on the prevailing laws and regulations. In the context of the Indonesian state, several formal requirements that must be fulfilled in order to implement an emergency are as follows ⁹:

1. The statement or declaration of the entry into force of the emergency must be stated in a certain form, namely by a Presidential Decree, while the material arrangements required in such an emergency are set forth in the form of a Perppu as intended by the 1945 Constitution;
2. The only official who is constitutionally authorized to determine and regulate a state of emergency is the President, not any other official;
3. Perpres (Presidential Decrees) and Perppu as meant above are ratified and signed by the President and promulgated in the state sheets accordingly;
4. The Perppu should clearly define what statutory provisions are overridden by the enactment of the Perppu;
5. The Presidential Regulation in question must clearly define the jurisdiction of the Republic of Indonesia, for example whether the Perppu applies to the entire national territory or only applies to certain areas, such as in certain provinces or in certain regencies;
6. The Perppu and Perpres must also determine with certainty the duration of the emergency. If such restrictions are not affirmed, it means that the Presidential Decree or Perppu is only valid during the DPR trial period until the reopening of the next trial period as referred to in Article 22 of the 1945 Constitution;
7. Immediately after the Perppu is implemented, it must be submitted to the DPR for proper approval. If during the next trial period the DPR does not or has not declared its approval, the Perppu must be declared revoked by the President.

Indonesia has several regulations related to emergencies, including: civil emergency which is regulated in Government Regulation in Lieu of Law Number 23 Year 1959; public health emergency as regulated by Law Number

⁹ Risni Ristiawati, "PERTANGGUNGJAWABAN PRESIDEN MENURUT SISTEM KETATANEGARAAN SETELAH PERUBAHAN UUD 1945," *Badamai Law Journal* 3, no. 1 (March 2018): 145, <https://doi.org/10.32801/damai.v3i1.5918>.

6 of 2018 concerning Health Quarantine; as well as disaster emergencies as regulated by Law Number 24 of 2007 concerning Disaster Management. When related to the current situation, based on Presidential Decree No.11 of 2020 concerning the Determination of the Corona Virus Disease 2019 (COVID-19) Public Health Emergency, the current emergency condition is a public health emergency.

So the reference to the law used is Law Number 6 of 2018 concerning Health Quarantine. In the *a quo* law Article 1 point 2 explains that public health emergencies are public health events of an extraordinary nature characterized by the spread of infectious diseases and / or events caused by nuclear radiation, biological pollution, chemical contamination, bioterrorism, and food health hazard and has the potential to spread across regions or across countries.

It is further clarified that the health quarantine law is a form of response to public health emergencies described in Article 15 paragraph (1). This will be supported by the assumption that when the government is given great power to issue various policies under the pretext of protecting public health, it is feared that there will be intolerable violations of human rights. Given that in view of international law, human rights limitations are not allowed, unless the limitation mechanism has been legitimized by national law in a clear and generally accepted manner, with reference to the relevant international conventions. For countries that are forced to deviate from their obligations to comply with international conventions, they are obliged to officially announce the existence of threats to the life of their nation ¹⁰.

This means that Indonesia has officially determined that it is experiencing an emergency through Presidential Decree No.11 of 2020 concerning the Determination of the Public Health Emergency for Corona Virus Disease 2019 (COVID-19). In an emergency, *non habet legem necessity* principles will apply. This principle implies that in an emergency there is no law, or in other words the law in a country that is experiencing an emergency does not apply ¹¹. Because this principle applies with the aim of giving the government the flexibility to provide the best action, if it is related

¹⁰ Osgar S Matompo, "PEMBATASAN TERHADAP HAK ASASI MANUSIA DALAM PRESPEKTIF KEADAAN DARURAT," *Jurnal Media Hukum* 21, no. 1 (2014): 58–72.

¹¹ Yulia Kusuma Wardani and Muhammad Fakhri, "PRAKTIK PENERAPAN PERATURAN MENTERI KESEHATAN NOMOR 290 TAHUN 2008 TENTANG PERSETUJUAN TINDAKAN KEDOKTERAN (INFORMED CONSENT) PADA PELAYANAN GAWAT DARURAT DI RUMAH SAKIT," *Jurnal Hukum Replik* 5, no. 2 (August 2018): 112, <https://doi.org/10.31000/jhr.v5i2.921>.

to the current situation, giving vaccines to the public is mandatory because it is the government's best effort to eliminate Covid-19 from Indonesia. This is also in line with the adigum *salus populi suprema et lex*, which means that people's safety is the highest law ¹².

In line with the above, there is a legal principle of *restitutio in integrum* which means that the government is obliged to return an emergency to a normal state ¹³. To expedite these efforts, based on the principle of *non hebet legem necessity*, in this case the meaning of *legem* is a law which states that the covid-19 vaccine is a right. So that referring to the above principle doctrine, even in the scope of constitutional law it is known as the emergency constitutional law, because Covid-19 is an emergency disease outbreak, the waiver of the law which states that vaccines are a right is justified.

Criminal Sanctions for Refusing COVID-19 Vaccine

In an effort to enforce policies to provide the Covid-19 vaccine to the public, the government made a policy in the form of an administrative law that was given criminal sanctions. The background of the existence of a criminal aspect in administrative legislation is due to the realization of a just and prosperous society as mandated by the Preamble to the 1945 Constitution, it is necessary to have a policy of protecting society ¹⁴. In order for all provisions of state administration to be effective, a law enforcement policy has been developed by functionalizing the aspects of criminal law in administrative regulations so as to give rise to administrative criminal law. This is related to one of the functions of the law, which is to regulate social life and control society in a direction that is considered useful ¹⁵.

¹² Moh Zakaria and Sri Sulistijaningih, "Tinjauan Hukum Terhadap Pelaksanaan Asimilasi Di Rumah Berdasarkan Keputusan Menteri Hukum Dan Ham Republik Indonesia Nomor M.Hh-19.Pk.01.04.04 Tahun 2020 Dalam Rangka Pencegahan Dan Penanggulangan Covid-19 Bagi Narapidana," *Era Hukum - Jurnal Ilmiah Ilmu Hukum* 18, no. 2 (2020): 156–81.

¹³ H. Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana," *Media Hukum* 25, no. 1 (2018): 13, <https://doi.org/10.18196/jmh.2018.0107.111-123>.

¹⁴ Abid Zamzami, "Pelaksanaan Fungsi Hukum Administrasi Negara Dalam Mewujudkan Pemerintahan Yang Baik," *Yurispruden* 3, no. 2 (June 2020): 200, <https://doi.org/10.33474/yur.v3i2.6736>.

¹⁵ Henry Donald Lbn. Toruan, "IMPLIKASI HUKUM PEMBERIAN KREDIT BANK MENJADI TINDAK PIDANA KORUPSI (Legal Implications of Bank Loans Turn into Corruption)," *Jurnal Penelitian Hukum De Jure* 16, no. 1 (August 2016): 41, <https://doi.org/10.30641/dejure.2016.V16.41-60>.

These provisions can be found in existing laws, such as Law Number 6 of 2018 concerning Health Quarantine, Law Number 36 of 2009 concerning Health, and Regional Regulation of DKI Jakarta Province Number 2 of 2020 concerning Management of Corona Virus Disease 2019. This law is a tool to enforce the government's efforts in the smooth implementation of the injection of the Covid-19 vaccine to the public whose purpose is none other than to free Indonesia from the Covid-19 outbreak.

However, if the regulation is broken down, it will be seen that there is a problem with the regulation. Law Number 6 of 2018 concerning Health Quarantine has made it clear that vaccines are an obligation. This statement can be seen in Article 9 paragraph (1) which states "Everyone is obliged to comply with the implementation of Health Quarantine". In the explanation of the article, Article 9 is written quite clearly and there is no other information regarding the sound of this article. Thus, the meaning of Article 9 regarding compliance with administration in this case is that all matters related to health quarantine, be it area restrictions, movement restrictions to vaccine injection, must be obeyed. If there is a violation of this, then there will be sanctions in Article 93 of the *a quo* law which states if it obstructs the implementation of the Health Quarantine and causes a Public Health Emergency to be punished with imprisonment of a maximum of 1 (one) year and / or a maximum fine. a lot of IDR 100,000,000.00 (one hundred million rupiah).

The norm in the article has an alternative cumulative character, where if someone violates the provisions of Article 9, the perpetrator may be punished in the form of a fine and imprisonment. This is of course very excessive considering that the current situation has ruined the economy, and if the sanctions to enforce the regulations are also related to the economy, it is feared that actors who do not have the capacity to fulfill these demands will feel more objections and cause new problems. In addition, the *a quo* law does not further explain that after being given a criminal offense, a person will not be re-impaled to administer the Covid-19 vaccine at a later date. This means that if someone has refused to be vaccinated, then sentenced to punishment, and officers can again force that person to inject the Covid-19 vaccine.

Provisions for vaccine refusal sanctions are also contained in the DKI Jakarta Provincial Regulation Number 2 of 2020 concerning Management of Corona Virus Disease 2019. Article 30 of the *a quo* regulation states, "Everyone who deliberately refuses to receive Covid-19 treatment and / or

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vaccination, shall be sentenced to a maximum fine of Rp. 5,000,000.00 (five million rupiah) ". In contrast to the health quarantine law, the norm of sanctions in this regional regulation only charges the perpetrator of rejection with a fine. However, this has also become a polemic because the regulation only applies in the Jakarta area, not all people in that area are able to pay such a large fine. If it is enforced, it is feared that it will cause new problems. In addition, the *a quo* regulation does not further explain that after being convicted of a criminal offense, a person will not be re-subjected to vaccination at a later date. This means that if someone has refused to be vaccinated, then sentenced to a criminal offense, and officials can again force that person to inject the vaccine.

Apart from the two regulations above, there are other regulations regarding the handling of Covid-19 such as Law Number 36 of 2009 concerning Health, Presidential Regulation Number 99 of 2020 concerning Vaccines Procurement and Implementation of Vaccinations in the Context of Combating the 2019 Corona Virus Disease Pandemic (COVID-19), and Perpu Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the 2019 Corona Virus Disease (COVID-19) Pandemic, the three regulations also do not include sanctions, either administrative or criminal if they refuse to be vaccinated. But it is a different story at the regional level.

For other regional regulations, until now only the Jakarta Regional Regulation Number 2 of 2020 provides provisions regarding the rejection of the Covid-19 vaccine, and until now in other regions it has not been formed or has not been formed regarding the issue of giving the Covid-19 vaccine - Each region will impose fines only or simultaneously with imprisonment. Of course, these sanctions are also adjusted to the capabilities of each region. However, the regulations at the central level should have provided direction in this regard, so that there is no criminal disparity that creates confusion for anyone and it is very unfortunate that until now there has been no regulation at the central level regarding the Covid-19 Vaccine.

Fortunately, in overcoming this problem, the government will not immediately impose penalties for those who refuse vaccines, the government will continue to make persuasive efforts, socialize and provide direction to the public regarding the provision of the Covid-19 vaccine. This means that it can be said that the use of criminal law in the case of Covid-19 vaccination is indeed used as a last resort or *ultimum remedium* not as a *premium remedium*, so that the authority of the criminal law is strictly maintained and

the government will also focus on persuasive efforts to provide Covid-19 vaccination.

Conclusion

Currently, the provision of Covid-19 vaccination to the public is mandatory and must be done because of an emergency, and the government also has an obligation to return this emergency to its original state in accordance with the principle of *restitutio in integrum*. In imposing sanctions for enforcement of Covid-19 vaccination, the government must make regulations from the center regarding the provision of the Covid-19 vaccine so as not to create disparities between regulations at the regional level. Because the current Covid-19 vaccination regulations have different criminal provisions and are prone to causing problems.

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Quote

“The human body has been designed to resist an infinite number of changes and attacks brought about by its environment. The secret of good health lies in successful adjustment to changing stresses on the body.”

Harry J. Johnson