

## THE PRINCIPLE OF NON-DISCRIMINATION IN HEALTH SERVICES IN THE PERSPECTIVE OF GOVERNMENT RESPONSIBILITY

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**ABSTRACT :** Everyone has the right to receive health services. This is guaranteed in the 1945 Constitution. The government is responsible for making this happen through various health service efforts which include individual health service efforts and public health service efforts. The principle of non-discrimination in health services is a principle that originates from Human Rights. This principle must become the foundation in the implementation of health services, so that everyone must be treated equally and humanely and not discriminatory Health services that are based on the principle of non-discrimination are the responsibility of the government through the implementation of government functions, in the form of regulation, implementation and supervision of the administration of health services. public services and general principles of good governance, one of which is the principle of non-discrimination. Therefore everyone has the right to get the same treatment to get the right to health services.

**Keywords:** responsibility; Government; principle of law; non-discriminatory; health services

### INTRODUCTION

One of the issues that often arises in human rights is the field of health, this has the consequence that every human being has the right to health and the state is obliged to fulfill these rights. Health as a crucial issue faced by every country because it is directly related to the development of the personal integrity of each individual to be able to live in dignity If the people of a country have problems and are not well managed, it will result in low Human Resources, as a result, it will certainly be difficult to compete with other countries.

When examined in general, there are two types of problems related to the decline in the quality of health, namely health problems that are extraordinary and temporary but have a large impact, such as anthrax, bird flu. The second type is a health threat which is actually an event

that repeats even every year, such as malaria, dengue fever, and nutritional-related diseases, both in the form of malnutrition, hunger and hungry edema that is still happening today. An event like this is a crucial issue that should be of concern to all parties, especially the Government, because the incident is actually not the first time, in fact it always repeats from year to year. The emergence of these events is a reflection of how the Government has been negligent in carrying out its obligations to provide health services to the community. Whereas the right to health is a constitutional right of every citizen, as stated in the amendment to the 1945 Constitution article 28H paragraph(1) which regulates "Every person has the right to live in prosperity, to be born physically, to live and to get a good and healthy environment and to be entitled to obtain health services" . Likewise in article 34 paragraph (3) the 4th amendment stipulates that "the state is responsible for the provision of adequate health service facilities and public service facilities".

The right to health as a human right in Indonesia has broad scope, not only the right to obtain health services, but also the right of every Indonesian people to obtain protection from hazards that threaten their health. Philosophically, health as the right of every human being, and the obligation of the state to fulfill that right, especially in the situation that not everyone has the same opportunity to enjoy their rights, this will raise the issue of justice in society. Because there is a close relationship between health, justice and human rights issues, naturally the legal function becomes vital. The main problem related to equitable access to health services in Indonesia is the issue of poverty, especially structural. Expensive health costs cause equal opportunities for everyone to enjoy their rights in the health sector is difficult to realize.'

Health problems that are used as issues of justice and human rights will result in that everyone has the right to obtain the same benefits regardless of their status and it is the responsibility of the state to realize them. This has become the state's obligation to provide protection and services to the people / citizens as a consequence of its goals and functions. The state's relationship with the people / citizens gives birth to certain obligations that must be fulfilled. The obligations arising as a consequence of the relationship between the state and the people / citizens are very broad and varied, one of which is the legal obligations that are born due to human rights claims. The purpose and function of the state in relation to the people / citizens is essentially carried out by the government as the legal entity of the state personification. The state is an abstract entity that is personified by the government as a legal entity that represents the interests of the state. Like a vehicle, the government is the driver. <sup>2</sup>

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1 Ifdhal Kasim, *Potret Pemenuhan Hak Atas Pendidikan dan Hak Atas Kesehatan*: ELSAM, can be accessed through: <http://pusham.ui.ac.id/up/article/kasus-ecosob.pdf>, page.7

2 The concept of government in the narrow sense is executive. However, the executive concept itself is inadequate to describe the concept of modern government. The term that is quite representative is *bestuur* (Dutch). Sartika Sismi Ticoalu, *Tanggung Jawab Pemerintah Dalam Memberikan Pelayanan Kesehatan Terhadap Masyarakat*, *Jurnal Lex et Societatis*, Volume. I.Number. 5, September. 2013

The government cannot carry out an act except through the mediation of the people in it who act in their capacity as apparatus. The irony is that currently there has been an act of discrimination against patients in health services in hospitals without regard to patient rights. For example: people who can afford treatment costs will get the right to good health services, and can choose the hospital or doctor they want. But for people who do not have the cost to pay for the hospital / can not provide a down payment for certain medical actions, it will get bad treatment and even refused to seek treatment at the hospital. This is contrary to the Health Act article 5 paragraph 2, which states that: "Everyone has the right to obtain safe, quality and affordable health services." Also in the 1945 Constitution article 28 H paragraph (2), stated that: "Everyone is free from discriminatory treatment on any basis and has the right to get protection against discriminatory treatment." Even worse, rejection of underprivileged patients occurs at government-owned hospitals. The basis for rejection revolves around profit-oriented and high hospital operational costs. So the hospital will only serve patients who provide guarantees for medical treatment only. The government as the organizer of the State is responsible for the availability of resources in the health sector, the availability of all forms of health efforts aimed at the community fairly and equally.

### **Problem**

Based on the description above, the problem that will be discussed in this paper is how the application of the non-discriminatory principle in health services from the perspective of government responsibility?

### **Discussion**

#### **A. Healthy as Human Rights**

In some literatures it is mentioned that human rights are basic human freedoms relating to political and legal rights and social justice to improve people's lives optimally by meeting basic human needs.<sup>1</sup> Basic human needs consist of biological, psychological, social and spiritual needs.<sup>4</sup> One of which is included in biological needs is health.

Before discussing the right to health services, the definition of that right must first be stated. Rights are powers or authorities possessed by a person or legal entity to obtain or decide to do something. Rights can also be interpreted as follows: "Rights are justified claims that individuals and groups can legitimately make upon other individuals or a social group or

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3 Freddy Tengker, 2007, *Hak Pasien*, Cetakan Ke-1, CV. Mandar Maju: Bandung, page, 34

4 Asmadi, 2008, *Teknik Procedural Keperawatan. 'Konsep dan Aplikasi Kebutuhan Dasar Klien*, Salemba Medika: Jakarta, page. 2

5 Susatyo Herlambang, 2011, *Etika Profesi Tenaga Kesehatan*, Gosyen Publishing: Yogyakarta, page.43

institution. To have a right is to be in a position to determine by one's choices what others should or should not do.'

The right to a healthy life is a part of universal human rights specifically formulated in the Universal Declaration on Human Rights. This right is contained in Article 25 which states that: "Every person has the right to live on an adequate standard for their health and well-being, and their families, including the right to receive food, housing, and health services (everyone has the right to a In the standard of living adequate for the health and well-being of self and of his family, including food, clothing, housing, and medical care). mandated by Article 28 H paragraph(1) of the 1945 Constitution that, "Every person has the right to live in prosperity and conscience, to live, and to have a good and healthy environment and to have health services".

The right to a healthy life is a part of universal human rights specifically formulated in the Universal Declaration on Human Rights.<sup>7</sup> This right is contained in Article 25 which states that: "Every person has the right to live on an adequate standard for their health and well-being, and their families, including the right to receive food, housing, and health services (everyone has the right to a standard of adequate living for the health and well-being of self and of his family, including food, clothing, housing, and medical care) mandated by Article 28 H paragraph (1) of the 1945 Constitution that , "Every person has the right to live in prosperity and conscience, to live, and to have a good and healthy environment and to have health services".'. So humans in every part of the world have it, including Indonesian people. Then there should be no need for poor patients, especially in a state of "emergency" to be rejected by the Hospital because formalities (administrative requirements) are not fulfilled, resulting in very inhumane treatment. That is certainly contrary to the principle of non-discrimination and the principle of humanity, which means it also contradicts the principles of human rights.

## **B. Non-Discriminatory Principles in Health Services**

Health service is one type of public service. In Article 1 number 1 of Law Number 25 of 2009 concerning Public Services, it is stated that what is meant by: " Public service is an activity or series of activities in the framework of fulfilling service needs in accordance with statutory regulations for each citizen and population of goods, services, and / or administrative services provided by public service providers. " Some definitions of public services, can be described as follows:

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6 Endang Wahyati Yustina, 2018, *Withdrawing Life Supports Therapy in Human Rights Perspective*, ISSN: 2517-9616, can be accessed through:[https://tafpublishations.com/gip content/paper/jahms-4.2.1.pdf](https://tafpublishations.com/gip/content/paper/jahms-4.2.1.pdf), page. 34

7 Sri Siswati, 2013, *Etika dan Hukum Kesehatan dalam Perspektif Undang-Undang Kesehatan*, Cetakan ke-1, Rajawali Pers: Jakarta, page. 2.

8 *ibid*, hal34

- a. The definition of public service according to Mahmudi is "All service activities carried out by public service providers as an effort to meet public needs and the implementation of statutory provisions".<sup>9</sup>
- b. The definition of public service according to Moenir is "Activities carried out by a person or group of people on the basis of material factors through certain systems, procedures and methods in an effort to meet the interests of others according to their rights."<sup>10</sup>

The scope of public services is regulated in Article 5 of the Law on Public Services which in paragraph(1) and paragraph(2) states as follows:

- The scope of public services includes public goods and public services as well as administrative services that are regulated in legislation.
- The scope referred to in paragraph (1) includes education, teaching, work and business, housing, communication and information, environment, health, social security, energy, banking, transportation, natural resources, tourism, and other strategic sectors .

Based on these provisions it is clear that health services are one type of public service. Therefore, the implementation must be based on the principles of public service. The principle of public service based on the Law on Public Services is regulated in Article 4 which can be explained as follows:

- a. Public interest: the interests of many people to access it do not require certain burdens.
- b. Legal certainty: the implementation of public services can be completed within a specified period of time. Circumstances where human behavior both individuals, groups and organizations are bound and are in the corridor that has been outlined by the rule of law.
- c. Equality of rights: non-discriminatory in the sense of not differentiating between ethnicity, race, class religion, gender and economic status.
- d. Balance of rights and obligations: the giving and receiving of public services must fulfill the rights and obligations of each party.
- e. Professionalism: an expertise and ability to do a job in one field.
- f. Participatory: encourage community participation in the delivery of public services by taking into account the aspirations, needs and expectations of the community
- g. Equality of treatment and non-discrimination
- h. Openness

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9 Mahmudi, 2010, *Manajemen Kinerja Sektor Publik, Edisi Kedua*, YKPN: Yogyakarta, page.22

10 Moenir, 2001, *Manajemen Pelayanan Umum di Indonesia*, BumiAksara: Jakarta, page. 13

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- i. Accountability: public services must be accounted for in accordance with statutory provisions.
- j. Facilities and special treatment for groups
- k. Vulnerable: public services are easily influenced by things that cause public mistrust.
- l. Punctuality
- m. Speed, ease and afford ability.

Article 4 letter c clearly states that one of the principles of public service is "Equality of Rights, which means that services are not discriminatory in the sense of not distinguishing ethnicity, race, religious group, gender and economic status", as well as in health services.

Health services which are the responsibility of the Government must also be based on the general principles of good governance, and one of the principles is the principle of impartiality or can be interpreted as the principle of non-discrimination. This was formulated in Article 10 paragraph (1) of Law Number 30 of 2014 concerning Government Administration which states that: General Good Governance Principles referred to in this Law include the principles of:

- a. Legal certainty
- b. Usefulness
- c. Impartiality
- d. Accuracy
- e. Do not abuse authority
- f. Openness
- g. Public interest, and
- h. Good service.

In the elucidation of Article 10 paragraph (1) letter c, it is stated that what is meant by "the principle of impartiality" is the principle that obliges Government Agencies and / or Officials to determine and / or make decisions and / or actions taking into account the interests of the parties as a whole and is not discriminatory.

Based on the aforementioned provisions, it is increasingly emphasized that the principle of non-discrimination must be the foundation in health services which is one type of public service and is the main task and responsibility of the Government in its implementation. The principle or principle of non-discrimination is one of the soul/ spirit in the regulation of health

services. This is expressly stated in Article 2 of Law Number 36 of 2009 concerning Health that. "Health development is carried out on the basis of humanity, balance, benefits, protection, respect for rights and obligations, justice, gender and non-discrimination and religious norms." Furthermore, in the provisions of Article 5 paragraph (1) which states that, "Every person has the right the same in obtaining access to resources in the health sector", is a rule that is based on the principle of equality.

Listen to some recent cases, for example: the patient's refusal by the Hospital because the patient has no identity and does not have health insurance and even in special conditions (emergency department), based on the Health Act it is clear that it violates Article 32, which formulates that, paragraph(1) "In an emergency, health service facilities, both government and private, are required to provide health services for saving the lives of patients and preventing disability first." Next to paragraph (2) it is stated that, "In an emergency, facilities health services, both government and private, are prohibited from rejecting patients and / or asking for advances.

Even patients with mental disorders have the same right not to be discriminated against. Article 149 of the Health Act mandates as follows: paragraph (1) "People with mental disorders who are neglected, vagrant, threaten the safety of themselves and / or others, da / or interfere with public order and / or security are obliged to get treatment and care in service facilities health. "Furthermore, in paragraph (2)" The Government, regional government, and the community are obliged to carry out treatment and care in health service facilities for people with mental disorders who are displaced, vagrant, threaten the safety of themselves and / or others, and / or disturb order and/ or public security".

In Act Number 44 of 2009 concerning Hospitals the principle of non-discrimination is also formulated in Article 2 which states that, "Hospitals are based on Pancasila and are based on human values, ethics and professionalism, benefits, justice, equal rights and anti-discrimination, even distribution, protection and patient safety, as well as having a social function. "The principle is further elaborated in the provisions of Article 29 paragraph (1) letters b, e, f and m which read as follows:" Every Hospital has an obligation: b. provide safe, quality, anti-discrimination and effective health services by prioritizing patient interests in accordance with Hospital service standards; e. provide facilities and services for the poor or poor; f. carry out social functions, among others, by providing facilities for poor patients, emergency services without down payment, free ambulances, disaster victims and extraordinary events, or social services for humanitarian missions; m. respect and protect the rights of patients; "As for paragraph (2), formulating sanctions, namely," Violations of the obligations referred to in paragraph(1) are subject to administrative sanctions in the form of: a.

reprimand; b. written warning; or c. fines and revocation of hospital permits.

In, Article 32 letter c and letter n Law number 44 of 2009 concerning Hospitals is also a norm for the principle of non-discrimination which is formulated as follows: Every patient has the rights stated in letter c: "obtain humane, fair, honest, and without discrimination ". As for Article 32 letter n it is stated: "obtaining security and safety during his treatment in the Hospital".

Some of the provisions of the law the principle of non-discrimination should be an important basis in health services. Patients who are poor, frail and even experiencing mental disorders still have the same rights as other communities, namely to get the best health services and should not be discriminated against. Because if this happens, it means that there have also been violations of human rights. Therefore it is necessary to enforce the law, namely by consistently implementing sanctions in accordance with Articles 188 and 190 of the Health Act. In the provisions of Article 188 paragraph (1) it is stated that, "The Minister may take administrative actions against health workers and health service facilities that violate the provisions stipulated in this Law." Furthermore, Article 190 is stated as follows:

- 1 The head of a health service facility and / or health worker who performs practice or work at a health service facility that intentionally does not provide first aid to patients who are in an emergency situation as referred to in Article 32 paragraph (2) or Article 85 paragraph (2) shall be sentenced to a maximum imprisonment of 2 (two) years and a maximum fine of Rp. 200,000,000.00 (two hundred million rupiah).
- 2 In the event that the acts referred to in paragraph(1) result in disability or death, the head of the health service facility and / or the health worker is sentenced to a maximum imprisonment of 10 (ten) years and a maximum fine of Rp1,000,000,000, 00 (one billion rupiah).

### **C. Government Responsibilities in Health Services**

In general, the term responsibility is meant as a necessity for a person or country to carry out properly what is required of it. In the legal dictionary there are two terms that refer to responsibility, namely liability and responsibility. The term liability refers to legal liability, that is, accountability due to mistakes made by legal subjects, while the term responsibility refers to political liability. " State or government responsibilities are contained in these two terms. According to Goldie, the difference between the two terms is that the term responsibility is used for obligations, or shows the standard fulfillment of a social role established by a particular legal system, while liability is used to refer to the consequences from an error or

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11 Ridwan H.R, 2006, *Hukum Administrasi Negara*, Raja Grafindo Persada: Jakarta, page. 335-337



failure to carry out an obligation or to meet a certain standard that has been set.<sup>12</sup>

Government responsibility in this regard is related to the government's obligation to realize the right to health for the community.

The provisions of the Health Law stipulate that the Government is responsible for fulfilling and guaranteeing the realization of the right to health. The government is obliged to realize the optimal health status. The government is obliged to maintain and improve efforts to provide quality, equitable and affordable health services to all levels of society. So the responsibility that must be shouldered by the government in the health sector is ensuring the availability of health resources according to the needs and all forms of health service efforts to fulfill the people's right to health. Health resources in question include: health workers, health facilities, medical devices and pharmaceutical supplies, as well as other resources. This is as formulated in Article 14 through Article 20 of the Health Act. The responsibility of this Government is also regulated in Law No.44 of 2009 concerning Hospitals, which in Article 6 paragraph (1) letter e states that, "The Government and regional governments are responsible for providing protection to the public users of Hospital services in accordance with the provisions of the legislation.

The state through the Government or private organizations is responsible for the realization of health for everyone, so to ensure the implementation of the right to health the steps taken by the Government must be aimed at:"

1. As far as possible to eliminate the causes that make people's health conditions worse;
2. To pay attention to the extension and education sectors in such a way that public health and personal responsibility in the health sector is increased;
3. As far as possible, prevent the emergence of infectious diseases, endemic diseases, and diseases equivalent to that.

In fulfilling this obligation, it requires the involvement and cooperation between the Government and various parties, because it is not possible for the Government to bear all of it alone. Therefore, the responsibility for fulfilling the needs of a healthy life is also the responsibility of the community, so the government also regulates community participation in health services. In practice, what often comes first is rights and does not pay attention to obligations. The right to a healthy life and the right to obtain health services are indeed the rights of everyone and the Government is responsible for making this happen.

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12 L.F.E. Goldie, 1986, *Transfrontiers Pollution—from concept of Liability to Administrative Conciliation*, 12 *Syracuse Journal of International Law*, page. 185

13 Freddy Tengker, *op. cit.*, page. 57

However, everyone must always be aware that they have an obligation to realize their own health and the environment. As formulated in Article 9 through Article 11 of the Health Law, it is as follows: Article 9 paragraph (1) "Everyone is obliged to participate in realizing, maintaining, and increasing the highest degree of public health." Whereas paragraph (2) states that "Obligations as referred to in paragraph (1), include the implementation of individual health efforts, public health efforts, and health-oriented development. "Furthermore, Article 10 states that," Everyone has the obligation to respect the rights of others in an effort to obtain a healthy environment, both physically, biological or social. "As for Article 11, it is formulated that," Every person is obliged to behave in a healthy life to realize, maintain, and promote the highest health. "

Based on these provisions, it means that the fulfillment of the right to a healthy and prosperous life is not only the government's obligation but also the people's obligation. Meanwhile the Government is responsible for fulfilling the right to health and health services for the community through its authority by regulating, fostering, and overseeing the implementation of health service efforts. The aim is to improve the highest level of public health.

To realize its responsibilities in the health service, the Government must base on the principles of public service and general principles of good government service.

### **Conclusion**

The right to health and the right to obtain health services is the right of every person who is a right derived from human rights. The principle of non-discrimination is also a principle that comes from human rights. This is guaranteed in our constitution, the 1945 Constitution. Law Number 39 of 1999 concerning Human Rights.

Health services are one type of public service, therefore Law number 25 of 2009 concerning Public Servants and Law number 30 of 2014 formulate the principle of non-discrimination as a service foundation. Furthermore, the Health Act, namely: Law No. 36/2009 concerning Health, Law No. 44 of 2009 concerning Hospitals also clearly establishes the principle of non-discrimination as its foundation.

Guaranteed protection of non-discriminatory health rights in an equal and humane sense has been carried out through its regulation in various provisions of the law complete with sanctions. The government is responsible in relation to its duties and functions to regulate, carry out development and supervision, so that the right to health and the right to optimal health services can be realized, without discriminating against anyone. The government is responsible for making the right to healthy for the community based on the principles of public service and general principles of good governance, one of which is the principle of non-discrimination.

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