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LEGAL FRAMEWORK IN IMPLEMENTING THE NATIONAL POLICY ON HIV/AIDS PREVENTION AND CONTROL IN INDONESIAN LOCAL REGULATIONS

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ABSTRACT

The purpose of this study is to analyze local regulations on the prevention and control of HIV/AIDS and their relevance to the implementation of national policies in Indonesia. More specifically, in light of the absence of a national law on the prevention and control of HIV/AIDS in Indonesia this study discusses the role of local regulation issued by local governments in response to this problem. This study has adopted the doctrinal legal study method and has examined legal materials from a library-based research. This study finds that the existing national policy on HIV/AIDS prevention and control is only substantially specified in the Regulation of the Ministry of Health No. 21 of 2013, which has been issued to fill the lacunae in legislation on the matter at hand. The Ministerial Regulation has substantively applied the human rights approach to serve as the central government's response and an interpretive guideline for local

governments in responding to HIV/AIDS prevention and control issues. The findings also pointed out that local governments are more responsive to the issue, their regulations have underscored the importance of health and human rights as the critical consideration in their policy regarding the prevention and control of HIV/AIDS. Practical recommendations are outlined for the central government to take serious measures to regulate the issues on HIV/AIDS prevention and control at the national level.

Keywords: Local regulation, legality, national policy, prevention and control, HIV/AIDS.

INTRODUCTION

As an effort to prevent and control diseases, especially HIV/AIDS (Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome), the strengthening of national legal strategies plays an important role in providing a set of legal rules and regulatory systems that serve as guidelines for the government and stakeholders to deal with this deadly infection crisis (Gable, 2007; Gable et al., 2009; Chalmers, 2008). Unfortunately, laws that specifically regulate the prevention and control of HIV/AIDS are not yet available in Indonesia, indicating the lack of response from Indonesian legislators regarding the matter. So far, there is only the Ministerial Decree No. 21 of 2013, an attempt to address the issue of the control and prevention of HIV/AIDS. There is to date no national law especially enacted to regulate such issues (Widyaningtyas, 2019; Tromp et al., 2018). Based on the Progress Report on HIV/AIDS & Sexually Transmitted Infectious Diseases published by the Indonesian Ministry of Health, the cumulative number of people living with HIV/AIDS (PLWHA) reported up to March 2021 was 427,201 people, while the cumulative number of AIDS as of March 2021 was 131,417 cases.

In the absence of adequate legislative guidelines at the national level for HIV/AIDS prevention, the local government in Indonesia is proactively regulating HIV/AIDS prevention and control by enacting local regulations to prevent the spread of this disease at the local level. From the perspective of the national legislative framework, this is quite problematic. This is because it is not in accordance with the hierarchy of ratification in Indonesia, whereby regional regulations should refer to the laws and regulations higher in the hierarchy (the

Constitution, national laws, and the central government regulations). As a result of this legal vacuum, most local regulations substantially refer to the Ministry of Health Regulation No. 21 of 2013. However, this regulation has no specific guidelines from the central government that explicitly direct the local government in how to deal with the prevention of this infectious disease. The lack of guidance has led to quite a precarious situation, considering that the local authorities may make arrangements on HIV/AIDS prevention and control that may negatively impact themselves as there has not been any specific directions from the central government. As a response to this adverse possibility, this study discusses the process of how the efforts to address HIV/AIDS prevention and control are transformed into local regulations. Most local regulations are premised on the principles of human rights and human health. They are temporary measures to address the issues of HIV/AIDS prevention and control in the absence of a comprehensive national policy in the form of a national law to guide the local governments. In this regard, the present study will discuss the role of laws, especially local regulations in Indonesia in responding to the spread or transmission of HIV/AIDS.

This study begins with an explanation of the background of regional regulations in Indonesia, which is essentially based on the concept of a decentralized unitary state (Nasirin & Lionardo, 2021). Furthermore, the contextual meaning of the regional regulation on HIV/AIDS prevention and control is elaborated by referring to the concept of regional autonomy, human rights and human health. The most important part of this study discusses how national policies on HIV/AIDS prevention and control can be adequately grafted onto local regulations, in this case regarding the principles of HIV/AIDS legislations.

The final section of the discussion describes a comparative study that focuses on showing the importance of the participation of the local government in various countries in dealing with HIV/AIDS prevention and control. More specifically, the role of the local government in responding to HIV/AIDS prevention and control in Indonesia by establishing local regulations is in line with the experience of either the state or sub-national entities in various countries in responding to such issues. The findings show that several countries having national regulations on HIV/AIDS prevention and control are proactively encouraging the local government to participate effectively in dealing with the issues. By demonstrating the importance of the responsibility

and responsiveness of the local government in responding to infectious disease issues, local regulations in Indonesia can be seen as helping to implement national policies on disease prevention and control.

LEGAL PRINCIPLES IN HIV/AIDS REGULATION

HIV/AIDS and Public Health

The government, both at the central and regional level, is the personification of the state (Kelsen, 1961; Crawford, 2012). Therefore, the government has an obligation to protect every citizen from the danger of HIV/AIDS transmission and to provide access to adequate health services so that people infected with HIV/AIDS (PLWHA or persons living with HIV/AIDS) are able to sustain their lives and ensure survival as much as possible (Kurnia, 2007). This obligation lies in the public health domain, generally characterized by government efforts in issuing legislation as the expected response (Hervey & McHale, 2004). In essence, from a public health perspective, the government is obliged to intervene on behalf of the society on health issues, especially, in the context of the present study, the prevention of infection and transmission of HIV/AIDS (Gostin, 2001a; 2001b; Fidler, 2022). Gostin (2002) explained that the government's involvement is to enact and enforce law as a primary means by which government creates healthier and safer life conditions for people. In this regard, "law creates a mission for public health authorities, assigns their functions, and specifies how they may exercise their power" (Gostin, 2002, p. 8).

The focus of public health is on the country's populations, communities, and the broader social and environmental influences on health (Upshur, 2002; Andriansyah et al., 2021). Public health has had a long and venerable relationship with constitutional law (Parmet, 2007). From the public health perspective, enacting the relevant public health legislations is necessary to address the extent of government intervention in society. Such legislation, which regulates public health issues in general, is perceived as a means of "protecting the collective public interest," which is the nation's health itself. Protecting public health as a collective public interest is the reasoning for developing the so-called health law (Gostin, 2004; 2007). The set of laws and regulations covered by health law is directed to achieve the following objectives (Harris, 2008):

a. to protect public health by preventing and controlling communicable disease and protecting the public against bioterrorism,
b. to promote the quality of healthcare services provided by facilities and individual practitioners,
c. to reduce healthcare costs and promote access to care, and
d. to protect consumers in the market through health insurance and other types of coverage.

Given the objectives to be achieved, it appears that the government has a crucial role to play in public health issues through the health law is inevitable (Gostin, 2005). The substantial inherent issue is that the health law has a close relationship with human rights (Gostin, 2014). Human rights, health, and development represent interdependent values, aspirations, and disciplines (Tarantola et al., 2008). The right to health as a human right is the starting point of health law. Based on the right to health as a human right, health law starts from the awareness that health is a fundamental entitlement (Tarantola et al., 2008). As it falls under the category of economic, social, and cultural rights, the right to health may require considerable budgetary resources when it comes to providing the appropriate health care services (Purwaningrum et al., 2020).

The prevention and control of HIV/AIDS is an issue that is very closely related to health and human rights. For example, Gostin and Lazzarini (1997, p. xiv) have pointed out that "human rights are critical because all people share an inherent worth and dignity which sometimes transcends even their own desire to be healthy and human rights and public health are fundamentally interconnected." Human rights for people living with HIV/AIDS (PLWHA) are evident from their right to live free from coercion and punishment. They, like everyone else in society deserve respect from the surrounding environment as an inherent part of the human rights to live free from discrimination and restraint. A similar view or opinion, but more explicit, is put forward by Gruskin et al. (2005a, p. xvi), who asserted that:

> While an essential focus of public health is improving health outcomes, human rights ... [are] fundamentally about what governments can do to us, cannot do to us, and should do for us. ... Governmental responsibility for health from a human rights perspective refers not only to government's duty not to violate human rights directly

> but also to its responsibility to ensure the conditions that enable people to realize their rights as fully as possible.

Although the opinion expressed by Gruskin et al. (2005b) is general, the idea put forth is more explicit from the perspective of human rights because it examines the government's position as the party charged with obligations. This statement applies *mutatis mutandis* in the case of HIV/AIDS prevention and control. On another occasion, Peter Piot and Jose Ayala-Lasso (1997, p. vii) have sought to remind us about the human rights aspects of public health issues concerning HIV/AIDS as follows:

> Public health should not be used by states as a justification for coercive powers against persons living with HIV/AIDS. Measures such as the loss of liberty and discriminatory employment, housing, education, insurance, and travel affect people living with HIV/AIDS in many countries. However, coercive and discriminatory powers do not necessarily promote public health. On the contrary, coercion, and discrimination -by driving people away from prevention and treatment services-, can fuel the HIV/AIDS pandemic. One clear message needs to be sent: respect for human rights and the advancement of public health are not in conflict but harmony. People cannot fully enjoy and exercise their human rights if they are not healthy, and people cannot remain healthy if they are deprived of their rights.

The above opinion illustrates what is familiar, yet erroneous, public policy in providing treatment to people with HIV/AIDS in the context of public health, and this has subsequently resulted in policy ineffectiveness (Gable et al., 2008). The mistake lies in the tendency of the government to adopt coercive and discriminatory public health policy. That is the reason why Piot and Ayala-Lasso are more inclined to choose a public health policy that is accommodative of human rights norms. Further, concerning what the state or government should do in providing a framework for its more human-friendly public health policy in terms of HIV/AIDS regulation, Piot and Ayala-Lasso (1997, p. vii) have stated the following view:

> There exists, therefore, an obligation by States to provide populations, within the limits of their resources, with

> prevention services, including precise and targeted health information necessary to reduce their risk of contracting HIV infection. It is critically important that individuals and groups be granted access to information necessary to make informed choices about their health and the means to protect themselves, in a manner consistent with universally recognized human rights standards yet reconciled within different cultures and religions.

While agreeing that the human rights approach is more favorable in addressing HIV/AIDS issues through public health policy, Gostin and Lazzarini (1997) have also pointed out that there has been a consensus that public health policies should be more voluntaristic than coercive. The voluntaristic approach becomes a reference in the handling of HIV/AIDS because it upholds human dignity (Piot & Ayala-Lasso, 1997). Therefore, governments should keep in mind that public health initiatives often generate intense controversy because they can involve controversial violations of personal privacy, i.e., contact tracing of sexually transmitted infections (Mayes & McKenna, 2011).

Protection of People Living with HIV/AIDS (PLWHA)

The protection of PLWHA (people living with HIV/AIDS) is one of the human rights issues related to the right to health in marginalized or vulnerable groups (McKay, 2016).) The status of PLWHA is not the same as other statuses attached to humans as a legal issue. This status often causes the subjects to be treated inhumanely and alienated from the social environment. The high cost of treatment, as well as the absence of drugs that are capable of curing HIV/AIDS have subsequently caused PLWHA to experience marginalization both physically and psychologically, which constitute a direct or indirect violation of their rights (Sepulveda et al., 2004). In many cultural contexts in Asia, Africa and America, PLWHA are stigmatized as dangerous individuals, and as a result the community shuns them by social distancing, discrimination, and adopting hostile attitudes that rob individuals of their human rights (Earnshaw & Kalichman, 2013). PLWHA in many cases cannot move freely in public spaces and receive justice in employment opportunities, income and access to education (Wang et al., 2019).

Placing PLWHA as a human rights issue necessarily demands that governments pay attention to this issue as an obligation because

human rights law places the government as the obligation holder. In this context, Nachega et al. (2012) considered that destigmatization related to PLWHA should be carried out by structural impetus with legal intervention and government policies, with the main consideration being to protect human rights through laws. Structural policy strategies can effectively help reduce stigma and discrimination related to PLWHA and promote their participation in society. This argument is consistent with the following statement put forward by Skogly (2001, p. 46):

> Legally guaranteed human rights are characterized by two specific features: entitlement and obligation. There is always someone who is the 'right holder,' that is, the one who is entitled to something, this something being 'the substance of the right' ... Corresponding to this entitlement holder there is an obligation holder, that is, someone who is under an obligation to respect or provide whatever the right holder is entitled. Thus, for legally codified human rights, the right holders are each human being, while the obligation holders are, first and foremost, states or agents of the states.

Human rights for PLWHA essentially cover all types of human rights applicable to humans in general (Abara & Garba, 2017). However, the existing human rights for PLWHA need to be based on the principle of specificity by considering the position of PLWHA as a vulnerable and marginalized group. PLWHA needs special protection of human rights and the perceived structural barriers to their status (Abara & Garba, 2017). For example, as a patient, PLWHA requires a different treatment protocol from that of other patients. As citizens in general, PLWHA has limitations compared to other members of the community, so PLWHA needs to be classified as a vulnerable and marginalized group (Kempf et al., 2015).

Non-Discrimination

An indispensable general principle to be applied to the protection of PLWHA is the principle of non-discrimination. This principle is related to the guarantee and enjoyment of rights, in which the particular right holders are not treated differently. This principle is expressed explicitly by two primary international human rights instruments, which are Art. 2.1 of the International Covenant on Civil and Political Rights

(ICCPR) and Art. 2.2. of the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[1] Article 3 paragraph (3) of Law Number 39 of 1999 determines the validity of the same principle by stating: "everyone is entitled to the protection of human rights and basic human freedom, without discrimination."

The principle of non-discrimination still applies even in emergencies in which the state may make derogatory measures (withdrawing from its human rights obligations temporarily to deal with emergencies): "State is allowed to take measures derogating from its obligations under a human rights treaty in time of public emergency, such measures may not involve discrimination solely on the ground of race, color, sex, language, religion or social origin" (Art 4.1 ICCPR). Thus, it shows that the prohibition against discriminatory practices is a fundamental principle even when the country is in an emergency. As an act that is not permitted or prohibited in the domain of human rights law, Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines discrimination as:

> any distinction, exclusion, restriction, or preference which is based on any ground such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or another status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The principle of non-discrimination has a broader scope than equality. The state is obliged to take different special measures to promote disadvantaged groups and eliminate certain conditions that help perpetuate discriminatory practices in certain circumstances (Jayawickrama, 2002). Such measures, commonly known by the term "affirmative actions," are not categorized as prohibited discriminatory practices and will allow:

> For example, in a state where the general conditions of a particular part of the population prevent or impair their enjoyment of human rights, the State may take specific action to correct those conditions. Such action may involve granting for a time to the part of the population

[1] Both instruments are binding for Indonesia based on their ratification through Law Number 11 of 2005 (ICESCR) and Law Number 12 of 2005 (ICCPR).

> concerned particular preferential treatment in specific matters compared with the rest of the population. However, as long as such affirmative action is needed to correct discrimination, the differentiation is legitimate (Jayawickrama, 2002, p. 179).

PLWHA is particularly vulnerable to discriminatory treatment. Therefore, the non-discrimination principle is fundamental in guaranteeing the optimal protection of the human rights of PLWHA. The non-discrimination principle is both negative character (prohibition of discriminative action against PLWHA) and positive (affirmative action by the government toward PLWHA). As a vulnerable group, PLWHA is entitled to special protection and attention, which is evident in Guideline 5 of the International Guidelines on HIV/AIDS and Human Rights:

> States are to enact or strengthen laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities, from discrimination in both public and private sectors. Furthermore, States shall ensure respect of all rights of these groups, inter alia: the right to the highest attainable standard of health; the right to liberty and security of person; freedom of movement; the right to privacy; the right to marry and find a family; the right to work; and the right to be free from torture and cruel, inhuman and degrading treatment or punishment.

Considering that PLWHA belongs to a vulnerable group, this special protection serves to strengthen the protection of human rights based on the principle of non-discrimination. This special protection emphasizes different treatments, which is more favorable for PLWHA (Sepulveda et al., 2004). Special protection as a form of different treatment to vulnerable groups is purported to reduce or eliminate discrimination. Therefore, such different treatment is legitimate as special protection and anti-discrimination measures (Kurnia, 2015).

Access to Health Services

Access to essential health services is a crucial issue in the protection of the human rights of PLWHA. This issue is closely related to the right to life and survival, particularly the right to health. In that context, the issue of the primary obligations of the state is as elaborated by Gruskin et al. (2005, p. xvi) who pointed out that "governmental responsibility for health from a human rights perspective refers not

only to government's duty not to violate human rights directly but also to its responsibility to ensure the conditions that enable people to realize their rights as fully as possible."

Access to essential health services is a key requirement for PLWHA to maintain and sustain life. General Comment No. 14 (2000) on Art. 12 of the International Covenant on Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights determines that the applicable standards in health services access are availability and accessibility, acceptability, and quality. Concerning the right to healthcare access, El Salvador is blamed for committing human rights violations for failing to provide health services to several patients with HIV/AIDS (case of *Miranda Cortéz et al. V. El Salvador (Case 12.249)*). The human rights violations for which El Salvador is blamed in the above case was the violation of the right to life, the right to health and the full development of self, and the right to be free from cruel, inhuman, and degrading treatment. Violations of these rights are deemed to occur due to the failure of the state in providing the plaintiff with a series of medications necessary to prevent them from dying and to improve their life quality (Sepulveda et al., 2004).

Protection of Right to Privacy

Everyone is entitled to the protection of his personal life, known as the concept of privacy (Gostin et al., 2001). The relevant human rights standard is Art. 12, the Universal Declaration of Human Rights, Art. 17 of the ICCPR and Articles 29 and 30 of Law Number 39 of 1999. The main issue in the protection of privacy is the protection of private life from public gaze:

> 'Privacy' is regarded as fundamental because of the protection it affords to the person's individuality on the one hand and the space it offers for the development of his personality on the other. An individual is entitled to function autonomously in his private life, and 'privacy' is aimed to shield him from the public gaze (Jayawickrama, 2002, p. 605).

Although HIV/AIDS is contagious and dangerous, it does not necessarily mean that people living with HIV/AIDS should be deprived of their privacy protection (Gostin et al., 2001). For example, as an implication of the protection of personal integrity and privacy,

tests or examinations of persons suspected of being infected with HIV/AIDS should be performed based on informed consent, instead of by force (Chalmers, 2008; Gostin, 2001a; 2001b). For instance, as part of their response to the transmission of HIV/AIDS, several countries have forcibly sterilized HIV-positive women to prevent HIV during childbirth (Nair, 2010). This coercive measure goes against the fundamental right of human beings to reproduce and control their own bodies. The general principle in the framework of protection of the privacy of PLWHA has been affirmed explicitly in Article 48 of Law Number 29 of 2004, stipulating that the reasonable conditions required to terminate such protection are: "the interests of the patient's health, fulfilling the request of the law enforcement apparatus in the context of law enforcement, the patient's request, or under the provisions of the legislation." The core of this protection shall remain balanced by an obligation assigned to PLWHA not to harm other people who have a risk of contracting the HIV/AIDS virus from him. One problematic and challenging issue arises around the potential conflict between patient confidentiality (medical confidentiality) and the interests of warning a third party (duties to warn). This issue is still addressed conditionally (Chalmers, 2008). The aim to balance PLWHA's and people's rights aligns with Article 48 of Law Number 29 of 2004.

Protection of the Community and Third Parties

The transmittable nature of the disease makes HIV/AIDS very dangerous. Therefore, the spread of this disease must be prevented so as not to endanger the community. The state must guarantee and protect the broad public interest in issues of safety and health (Gostin, 2017). In this regard, the relevant issue is the basis for protecting the community and third parties from the danger or threat of HIV/AIDS transmission or spread.

The general principle that functions as a justification for protecting society and third parties from infectious diseases is public good or, in this particular case, public health. This public health principle is the legitimate basis for carrying out the necessary restrictive measures to localize the dangers of the spreading or transmitting of diseases in general. In this regard, Gruskin and Tarantola (2005) have argued that:

> Public health is one such recognized public good. The specific power of the State to restrict rights in the name of public health can be understood to be derived from

> Article 12 (c) of the ICESCR, which gives the government the right to take the steps they deem necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.

The protection of the community and the third parties regarding HIV/AIDS should be based on real threats. In a ruling, the High Court of Bombay blamed a company for dismissing its HIV-infected employee without considering both the employee's capability to remain working and the fact that the employee did not pose a threat to other employees at the work place:

> A rule which denied employment to HIV-infected persons merely on the ground of their HIV status irrespective of their ability to perform the job requirements and irrespective of the fact that they posed no threat to others at the workplace was arbitrary and unreasonable.2

The ruling of the High Court of Bombay contains the principle that the protection of public interests must also consider the protection of the individual interests of the person infected with HIV. This approach emphasizes human dignity for the individual. Explicitly inherent individual rights should not be waived even if it is to protect the public interest. In another sense, philosophically, the consideration of protecting the public interest should not be utilitarian (Dworkin, 1978). Disregarding the norm may encourage the emergence of the arbitrary practice which runs against the protection of the interests of the society, in which the substantial part is the need to respect the human rights of persons. On that basis, the important understanding here is that the government is responsible for the protection of the public interest, and on the other hand, the HIV-infected individual interests must also be respected (Gostin, 1989).

The Intervention of the Government/Local Government

Generally, on the issue of human rights, , the state/government is confronted with three types of obligations, namely the obligation to respect, protect, and fulfill (Gostin & Hodge Jr., 2007). The discussion will subsequently be focused mainly on the right to health as a human right, which is closely related to the intervention of the government/local government in addressing HIV/AIDS issues. General Comment No. 14 (2000) states that:

2 Case *X* v. *Y Corp*, High Court of Bombay, [1999] in Jayawickrama (2002) p. 841.

> Like all human rights, the right to health imposes three types or levels of obligations on States parties: the obligations to respect, protect, and fulfill. In turn, the obligation to fulfill contains obligations to facilitate, provide and promote. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to prevent third parties from interfering with article 12 guarantees. Finally, the obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of the right to health. (par. 33)[3]

Government intervention in the prevention and control of HIV/AIDS is a consequence of the state's obligation as a correlation between human rights and public health, especially the obligation to protect the community. In this context, the state needs to be present in preventing the transmission of HIV/AIDS and providing access to health care and treatment for HIV/AIDS patients who lack access to health care and self-medication. This obligation shows an active role that must be taken by the government because of the limited capacity of individuals to realize their rights, especially the right to health of PLWHA (Chalmers, 2012).

IMPLEMENTING THE NATIONAL POLICY ON HIV/AIDS PREVENTION AND ITS IMPACT ON LOCAL LAWS

Indonesia does not yet have a national policy on laws about HIV/AIDS prevention and control (Widyaningtyas, 2019; Tromp et al., 2018). Representative manifestation of the national policy on HIV/AIDS prevention is limited to guidelines provided by the Ministry of Health Regulation No. 21 of 2013 on HIV and AIDS Prevention. However, this regulation cannot be seen as a full manifestation of the actual national policy because of its status as a secondary legislation

[3] Reference to General Comment No. 14 (2000) is made considering that the essence of the right to health as human rights in Indonesian national law is parallel to the provisions in international law. In addition, the right to health as a human right under international law (in this case, ICESCR) also applies and is binding in Indonesia.

by a minister, not a primary legislation by parliament. In addition, to become a full national policy, this regulation must first be attested for validity with the Law Number 36 of 2009 on Health which is a national policy, as well as with other principles on the regulation of HIV/AIDS prevention and control.

If the Ministry of Health Regulation Number 21 of 2013 is valid based on these two tests, the regulation can be viewed as a national policy in the context of the prevention and control of HIV/AIDS, and will be deemed as feasible to be implemented through local regulations. However, if the opposite is true, the national policy on HIV/AIDS prevention and control in the regulations needs to be corrected in such a way so that the local government is empowered to implement the "correct" national policies. Therefore, based on the Law on Health and principles on regulating human rights-based HIV/AIDS as the benchmark, the Regulation of Ministry of Health Number 21 of 2013 should first of all be thoroughly examined.

The Validity of the Ministry of Health Regulation

The Regulation of Ministry of Health Number 21 of 2013 is required to fill the lacunae in the law, particularly in legislation related to interpretive guidelines in the context of HIV/AIDS prevention and control efforts. This reasoning aligns with the principle of clarity of purpose as one of the principles in forming good legislation.[4] Although its binding power is not as strong as the legislative enactment, the Ministry of Health Regulation Number 21 of 2013 is sufficient to serve as the minimum directive to regulate efforts to prevent and control HIV/AIDS. Therefore, it should be viewed as a valid national policy responding to HIV/AIDS issues. Furthermore, the Regulation Number 21 of 2013 could be viewed as implementing the right to health as mandated by Law Number 36 of 2009 on Health and has been under the purview of the human rights-based principles in the existing, albeit limited scope HIV/AIDS legislation.

In principle, health is the right of every society that is guaranteed by law. Therefore, everyone, including PLWHA, is entitled to the right to health, and in this case through non-discriminatory health services. Law Number 36 of 2009 has clearly stated that health is a human right and one of the elements of welfare that must be realized according

[4] Article 5, Law Number 12 of 2011.

to the ideals of the Indonesian nation. It is also affirmed that every person has the right to health.[5] Therefore, everyone has equal rights to access health resources[6] and obtaining safe, quality, and affordable health services.[7] The fulfillment of this right is determined as the goal of regulating HIV and AIDS control as it has been stipulated in the Ministry of Health Regulation Number 21 of 2013.

Referring to the objectives outlined in the Ministry of Health Regulation Number 21 of 2013, it is recognized that HIV/AIDS control has several aims. First, to reduce and eliminate new HIV infections; second, to reduce and eliminate deaths caused by AIDS-related circumstances; third, to eliminate discrimination against PLWHA; fourth, to improve the quality of life of PLWHA; and fifth, to reduce the socio-economic impact of HIV/AIDS on individuals, families, and communities.[8] These provisions are also evident from the HIV/AIDS prevention activities, which comprises: health promotion, prevention of HIV transmission; HIV diagnostic examination; treatment, care and support, and rehabilitation.[9] Based on the above description, it becomes clear that the provisions in the Ministry of Health Regulation Number 21 of 2013 guarantee the fulfillment of the right to health for the community in general and PLWHA. The fulfillment of the right to health for the general public is reflected in health promotion and prevention of HIV/AIDS transmission, and to reduce and even eliminate HIV infections among the people. The fulfillment of the right for PLWHA is evident from the provisions concerning treatment, care, and support to improve the quality of life of PLWHA and reduce the socio-economic impact of HIV/AIDS on individuals, families, and communities.

The directives contained in the Ministry of Health Regulation Number 21 of 2013 are parallel with the regulation in Law Number 39 of 1999 on Human Rights, stating that everyone is entitled to the protection of human rights without discrimination.[10] It is an affirmation that everyone is born free with equal worth and dignity.[11] In its implementation, as far as the prevention and prevention of HIV/

5 Article 4, Law Number 36 of 2009.
6 Article 5 paragraph (1), Law Number 36 of 2009.
7 Article 5 paragraph (2), Law Number 36 of 2009.
8 Article 3, Minister of Health Regulation Number 21 of 2013.
9 Article 9 paragraph (1), Minister of Health Regulation Number 21 of 2013.
10 Article 3 paragraph (3), Law Number 39 of 1999.
11 Article 3 paragraph (1), Law Number 39 of 1999.

AIDS is concerned, it is mentioned that one of the principles in HIV/AIDS control is respect for human worth and dignity.[12] Furthermore, it should be noted that respect for human worth and dignity may be distinguished into two party-based categories: the worth and dignity of the society in general (non-PLWHA) and those of PLWHA. For non-PLWHA, the state must ensure that they get proper protection from HIV/AIDS. As for PLWHA, the state must ensure that their human rights are accordingly safe guarded, especially those related to health. Recognition of worth and dignity of both parties is also reflected in the Ministry of Health Regulation Number 21 of 2013, which specifically regulates the control of HIV/AIDS. In addition, fulfillment of rights for non-PLWHA is reflected in HIV/AIDS prevention activities in health promotion, prevention of HIV transmission, and HIV diagnostic examination.[13] Meanwhile, the fulfillment of rights for PLWHA is implemented through the activities of treatment, care, support, and rehabilitation.[14] As described in the next section, these activities are supposed to be at the center of the local HIV/AIDS prevention regulations.

The Transformation of the National Policy on HIV/AIDS Prevention and Control and its Impact on Local Regulations

Based on decentralization and regional autonomy principles, regions in Indonesia, consisting of provinces and regencies/municipalities, can play a positive role in HIV/AIDS prevention and control by first establishing local legal frameworks. Therefore, the following discussion will be how the local government -without adequate national policies- can positively contribute to HIV/AIDS prevention and control by drafting local regulations and adopting more appropriate policies based on the HIV/AIDS issues they face in the local context.

Law Number 23 of 2014 mainly determines the scope of compulsory governmental affairs which are related to essential services, and these include the following: education; health; public works and spatial arrangement; public housing and residential areas; peacefulness,

12 Article 4 b, Minister of Health Regulation Number 21 of 2013.

13 Article 9 paragraph (1) a, b, c, Minister of Health Regulation Number 21 of 2013.

14 Article 9 paragraph (1) d and e, Minister of Health Regulation Number 21 of 2013.

public order, and the protection of the community; and social affairs.[15] Health service is one of the compulsory concurrent governmental affairs related to the local governments' essential services. One of the essential elements in compulsory concurrent governmental health affairs is HIV/AIDS prevention and control.

The control of HIV/AIDS is the responsibility of the Government, and this include the Local Government. The duties and responsibilities of the district/municipal government in HIV/AIDS prevention include:

a. conducting various efforts to control and overcome HIV/AIDS;
b. organizing the determination of the district-level HIV epidemic situation;
c. ensuring the availability of primary and referral health care facilities in handling HIV/AIDS according to their capability; and
d. organizing recording, reporting, and evaluation systems by utilizing information systems.[16]

The above provisions constitute the scope of the relevant issues that may serve as the basis for determining the regulative content in drafting the Local Regulations on the Prevention and Control of HIV/AIDS. These provisions also confirm that the local authority when making local regulations related to HIV/AIDS is a legitimate authority in implementing decentralization based on its autonomy. In addition, the health services provided for people at risk of HIV infection is one of the minimum types of health service standards at the regency/municipality level.[17]

HIV/AIDS AND THE ROLE OF LOCAL GOVERNMENT: COMPARATIVE PERSPECTIVE

The role of the local government is crucial in responding to HIV/AIDS prevention and control. This is because the local government has the sole responsibility of dealing with these issues within its jurisdiction. Given its role as the local government, it must be actively involved in tackling the issues of HIV/AIDS prevention and control, it is to

15 Article 12 paragraph (1), Law Number 23 of 2014.
16 Article 8, Minister of Health Regulation Number 21 of 2013.
17 Minister of Health Regulation Number 43 of 2016.

be expected that such local policies for overcoming HIV/AIDS can be more effective (The World Bank, 2003; Swartz & Roux, 2004). This issue applies equally to both federal and unitary states – although institutionally, the participation capacity of the local government differs significantly between federal and unitary states.

Policies in dealing with HIV/AIDS prevention and control cannot only rely on national policies. Local governments must also play an important role in these policies because they are at the forefront of managing PLWHA in their respective jurisdiction, and the direct and indirect impacts of the policies on their respective communities – health/medical and non-medical. By involving the local government, policies in dealing with HIV/AIDS can be better drafted because these policies can adapt to the specific and concrete problems that the local government faces directly. In this case, the local situation where HIV/AIDS issues arise. In addition, the role of the local government can bridge the gap in national policies on HIV/AIDS that are too general. These may not reflect the actual problems caused by HIV/AIDS in government units that must take responsibility directly, mainly because they need speedy action (Albertus, 2007; Orievulu & Iwuji, 2022).

Based on the experience in South Africa, the positive side of the role of the local government in responding to the HIV/AIDS issue can be described as follows. First, decentralization provides incentives and possibilities for the local government to generate better information about the effects of the epidemic on vulnerable groups, because the local government is closer to such groups. Second, increased competition improves the efficiency of allocations, by forcing the local government to develop innovative and dynamic HIV/AIDS responses (Albertus, 2007). On that basis, support for the local government to play a more active role appears to be a concern – and is normative. The support is vital considering the inadequate role of the local government in responding to HIV/AIDS issues due to budget and expenditure constraints (Swartz & Roux, 2004; The Department of Provincial and Local Government, 2007).

A similar understanding also appears in the Brazilian experience. Given the difficulties faced, the national policy dealing with HIV/AIDS in Brazil was ultimately decentralized to the local government. The change in strategy through decentralization involved supporting

the role of the local government in responding to the HIV/AIDS issue in Brazil and is described as follows: "Brazil has, among recent initiatives, decentralized the handling of AIDS policies through incentives (incentivos), financial incentives allocated to states and municipalities that develop AIDS programs appropriate for the local epidemiological situation and integrated into the local health system" (Loup et al., 2009).

Although the scope of the comparative study conducted is quite limited, generalizations can be obtained about the importance of the role of the local government in responding to the issue of HIV/AIDS. Contextually, the role of the local government, to be underlined here, is related to its position as the closest government unit in dealing with the issue of HIV/AIDS. On that basis, as a consequence, the success of policies dealing with HIV/AIDS should have a very high level of dependence on the role of the local government, whether in the frame of the federal state or unitary state. This theoretical understanding justifies the role of the local government in responding to the issue of HIV/AIDS. The establishment of local regulations is, of course, one part of the participation of the local government in responding to the issue of HIV/AIDS so that the prevention of HIV/AIDS, including its impacts, can be effective. On this basis, the specific discussion on local regulation in responding to HIV/AIDS in Indonesia becomes relevant in light of the role of the local governments in responding to HIV/AIDS in Brazil and South Africa, as was highlighted above. Of the many roles that can be played by the local government in dealing with HIV/AIDS, this study highlights the role of local regulations in Indonesia, particularly with regard to the substance of appropriate local regulations in responding to HIV/AIDS transmission and infection. Due to the absence of the central government initiative to regulate HIV/AIDS in the form of a national policy, the local government in Indonesia has responded proactively by issuing locally situated policies for the prevention and control of HIV/AIDS. From a legal perspective, local regulations are one form of instrument for participation from the local government. Due to the absence of a national legal framework regarding HIV/AIDS and the relatively limited capacity of the local government, HIV/AIDS prevention and control strategies and synergies between the central and the local government need to be strengthened by taking into account the human rights and health of PLWHA.

CONCLUSION

Although there is no comprehensive national policy in the form of law as a foundation for the local government to respond to HIV/AIDS prevention and control issues, this problem could be temporarily resolved by relying on the effectiveness of the Ministry of Health Regulation Number 21 of 2013. Substantively, the Ministry of Health Regulation Number 21 of 2013 has applied the human rights approach to preventing and controlling HIV/AIDS. In addition, as a necessity, the Ministry of Health Regulation Number 21 of 2013 is needed to fill the lacunae of legislation to provide interpretive guidelines for local governments as the basis of a policy to respond to HIV/AIDS prevention and control issues. The local government has played its role by implementing the guidelines or principles of the Ministry of Health Regulation Number 21 of 2013 in their local enactments. Although the provisions in the Ministry of Health Regulation Number 21 of 2013 are still temporary, still awaiting legislators to establish a national policy on HIV/AIDS prevention and control, this piece of legislation is the closest enactment of a national policy and is therefore, an important guiding framework for local governments.

In essence, the Ministry of Health Regulation Number 21 of 2013 can be treated as a valid national policy on preventing and controlling HIV/AIDS. Local governments, can therefore, establish local policies on the prevention and control of HIV/AIDS by referring to the Ministry of Health Regulation Number 21 of 2013. Substantial reasons for the formation of local regulations in the context of the prevention and control of HIV/AIDS are: (i) the implementation of regional autonomy and co-administration tasks; (ii) further elaboration of the higher laws and regulations; and (iii) local content material in order to accommodate special local conditions. The above reasoning is in line with the experience of other countries which have showcased the participation of their local governments in responding to the issue of HIV/AIDS prevention and control in their jurisdiction.

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