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Indonesian national health policy: Legal analysis of the elimination of mandatory health spending

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Abstract

Pusphose: The elimination of mandatory spending in Law No. 17 of 2023 on Health has sparked controversy, particularly because it contradicts the World Health Organization's recommendation that allocates 5-6% of GDP to health budgeting to facilitate better access to healthcare services. This removal also potentially violates the Indonesian Constitution, which through Article 28E, Article 28H paragraph (2), Article 28D paragraph (3), and Article 34 paragraph (3) guarantees the fulfillment of health rights for vulnerable groups.

Method: This study employs a legal dogmatic research method to analyze the constitutionality of eliminating mandatory spending in Law Number 17 of 2023 on Health, as it pertains to the 1945 Constitution of the Republic of Indonesia, using John Rawls' theory of justice as a tool for legal analysis.

Result: Law No. 17 of 2023 on Health has eliminated the mandatory spending provision, which previously stipulated a minimum health budget allocation of 5% from the national budget (called *APBN*) and 10% from the regional budgets (called *APBD*), as per Law No. 36 of 2009. The new law introduces performance-based budgeting, but it remains unclear how it will be implemented, especially at the regional level. The main criticism is that this potential elimination could reduce health guarantees for vulnerable groups, contradicting the principles of social justice mandated in the Indonesian Constitution.

Conclusion: Although the Constitutional Court has rejected a formal review of this law, opportunities still remain for a substantive examination of the real impact of this elimination on the health access of vulnerable groups.

Keywords: *theory of justice; john rawls; mandatory spending*

INTRODUCTION

The elimination of mandatory spending in Law No. 17 of 2023 on Health appears contradictory to data from the World Health Organization (WHO), which indicates that populations have easier access to healthcare services in countries where the health budget constitutes 5-6% of the GDP. The guarantee of health rights for vulnerable groups is established in the Constitution through Article 28E, Article 28H paragraph (2), Article 28D paragraph (3), and Article 34 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Therefore, the creation of legislation must include a substantive approach to justice. The substantive approach in the formation of legislation emphasizes aspects of legal substance such as adequate protection of human rights, justice, and other substantive values (Moh. Fadli & Hadi, 2023).

The national health insurance system in Indonesia is regulated by Law Number 24 of 2011 and is implemented by the Social Security Administering Body (called *BPJS*). The government is required to provide healthcare services to all citizens without discrimination, and every citizen is

mandated to participate in this system. The elimination of mandatory spending in the healthcare sector, as stipulated in Law No. 17 of 2023, could impact the mitigation of stunting. Data from 2022 indicates that the prevalence of stunting remains high, and a reduction of 3.8% per year is necessary to reach the target of 14% by 2024. In this context, an analysis using John Rawls' theory of justice is relevant.

Rawls' theory of justice, an alternative to utilitarianism. Rawls believes that justice should not be overlooked, even in the pursuit of improving the welfare of as many people as possible (Susanto, 2012). This theory emphasizes not only ensuring that individual rights are respected but also that social and economic inequalities are arranged in such a way that they benefit the least advantaged in society (Shaver & Saunders, 1999). This approach to justice seeks to balance fairness with the optimization of overall social welfare, advocating for a society where disparities are structured to support those who are most vulnerable.

Rawls argues that inequalities are permissible if and only if they benefit the least well-off or least fortunate members of society. This principle is particularly relevant when discussing justice in terms of access to healthcare for the most disadvantaged. Article 34 (3) and 28H (1) of the 1945 Constitution of the Republic of Indonesia serve as a concrete mandate for the implementation of mandatory spending in healthcare. However, following the enactment of Law No. 17 of 2023, mandatory spending in the healthcare sector was eliminated (Swasono, 2023).

This change raises significant concerns about whether the revised law aligns with the principles of justice as envisioned by Rawls. The removal of mandatory healthcare spending might undermine the support for those who are least advantaged, potentially widening health disparities instead of narrowing them. This situation calls for a critical examination of the new law's alignment with constitutional mandates and its implications for social justice in healthcare provision.

METHOD

This study employs the legal dogmatic research method to analyze the constitutionality of the elimination of mandatory spending in Law No. 17 of 2023 on Health against the 1945 Constitution of the Republic of Indonesia. Additionally, it examines related legislation such as Law No. 1 of 2022 concerning Financial Relations between the Central and Regional Governments, Law No. 23 of 2014 on Regional Government, and the Constitutional Court Decision No. 130/PUU-XXI/2023 regarding the formal testing of Law No. 17 of 2023 on Health against the 1945 Constitution of the Republic of Indonesia. The analysis of these regulations employs John Rawls' theory of justice as a legal analysis tool.

RESULT AND DISCUSSION

Health financing has two dimensions: first, financing based on the ability to pay, which can be illustrated in a healthcare system financed by income tax, where citizens with higher incomes pay more than those with lower incomes. Secondly, within a group of people with similar financial capabilities, it is essential to ensure that payments are also equal (Faiz, 2009).

To optimize health financing for all Indonesian citizens, a mandatory spending scheme is implemented in the healthcare sector. Mandatory spending refers to government expenditures

that are regulated by law. The primary function of this mandatory spending is to address social and economic inequalities across regions (Sofi, 2022). In addition to the healthcare sector, there are several other areas where mandatory spending is applied: 1. An education budget allocation of 20 percent of the national budget (*APBN*) as mandated by Article 31 paragraph (4) of the 1945 Constitution; 2. A minimum General Allocation Fund (called *Dana Alokasi Umum: DAU*) budget allocation of 26 percent of net domestic revenue; 3. A Revenue Sharing Fund (called *Dana Bagi Hasil: DBH*) budget allocation; 4. Special autonomy budgets for the provinces of Aceh and Papua, each at 2 percent of the national *DAU*; 5. Village funds amounting to 10 percent of the national budget as stipulated by Law No. 6 of 2014 concerning Villages; 6. Urban village funds through an additional *DAU* as stipulated by Government Regulation No. 7/2018 concerning Sub-districts (Sofi, 2022).

Following the enactment of Law No. 17 of 2023 on Health, mandatory spending in the healthcare sector was eliminated, which contradicts data from the World Health Organization (WHO) that states that populations have easier access to healthcare services in countries where the health budget constitutes 5-6% of GDP (Mawardi, n.d.). For comparison in the ASEAN region, Malaysia's health budget is recorded at 3.7% of GDP, Singapore at 4.15%, Thailand at 3.8%, the Philippines at 4.12%, and China at 4.95% (Hidayat, n.d.). Next, the following is the allocation of the health sector budget in Indonesia from 2019 to 2023:

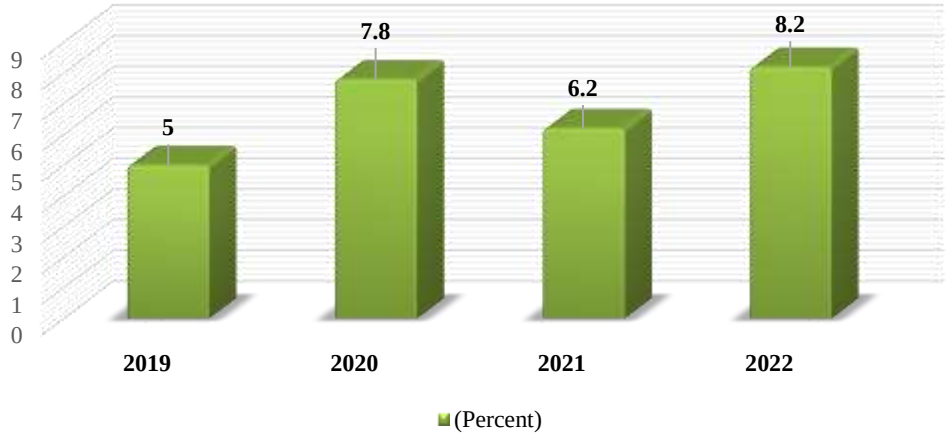

Figure 1. Expenditure on basic health services as a percentage of total government spending as cited from Badan Pusat Statistik RI, 2019.

With the elimination of mandatory spending in the health sector in Law No. 17 of 2023, there will be implications for stunting management. According to the Indonesian Nutritional Status Survey (called *Survei Status Gizi Indonesia: SSGI*) conducted by the Ministry of Health in 2022, the national prevalence of stunting is still at 21.6%. To achieve the target of 14% by 2024, as per the 2020-2024 medium-term development plan, a continual annual reduction in stunting rates of 3.8% is necessary (Kurniawan, 2023).

Furthermore, the elimination of mandatory health spending will have implications for funding participants in the health insurance program for Premium Assistance Recipients (Called *Penerima Bantuan Iuran: PBI*). Government Regulation Number 101 of 2012 was first introduced to regulate premium payments for participants in the National Health Insurance Program (Called *Program Jaminan Kesehatan Nasional: JKN*) who are categorized as Premium Assistance Recipients (*PBI*). This government subsidy is granted to individuals within the

impoverished and destitute groups who are unable to pay. The criteria for being a PBI participant are established by the Minister or institution responsible for statistics, which then carries out data collection to be verified and validated by the Minister of Social Affairs. This data is compiled into an integrated database that includes information by province and district/city. The integrated data is then submitted to the Ministry of Health for registration as participants in the BPJS Health program. Premium payments for PBI participants are sourced from the State Budget (*APBN*). The budget allocation for PBI membership from the APBN in 2020 was for 96,536,203 individuals, or 43.3% of the total number of participants (Aktariyani et al., 2021).

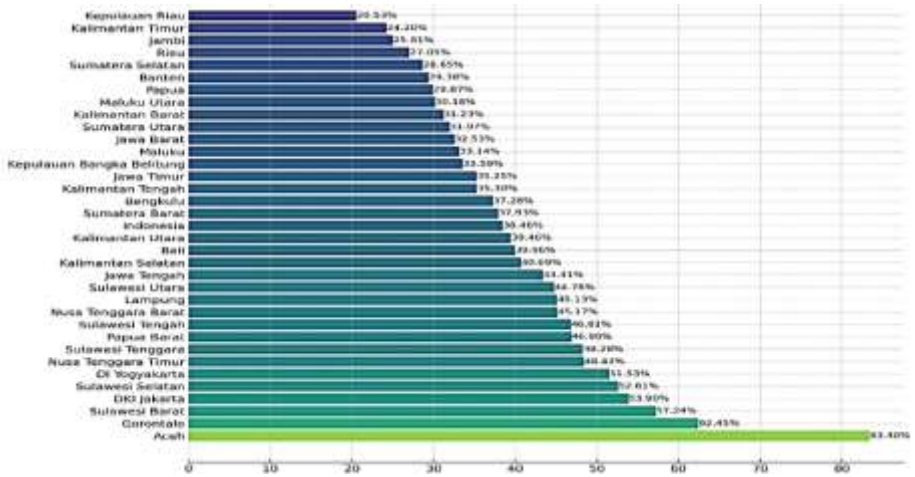

Figure 2. Percentage of population with health insurance by province and type of insurance, 2021 as cited from Badan Pusat Statistik RI, 2022.

The national health insurance system in Indonesia, regulated by Law Number 24 of 2011 concerning the Social Security Administering Agency (*BPJS*), is implemented by the Social Security Administering Body (*BPJS*). The government has the responsibility to fulfill the right to health by providing necessary healthcare services and facilities, as well as creating conditions for all citizens to access these services without discrimination. According to the provisions of the Law Number 24 of 2011, the government requires every citizen to become a participant in the national health insurance system.

However, in reality, there are still many complaints from the public related to the quantity and quality of healthcare services in various regions. The distribution of Premium Assistance (*PBI*) for the National Health Insurance (*JKN*) has not been accurate, with around 96.8 million people registered as recipients of the PBI JKN and the accuracy of the distribution being only about 57%. This means that approximately 40 million vulnerable poor people have not yet received assistance for JKN premium payments. Survey results conducted by the National Commission on Human Rights of the Republic of Indonesia (called *Komnas HAM RI*) in collaboration with the Kompas Research and Development Institute also show that the BPJS premium subsidy program does not meet its targets effectively, with 61.3% of 1,200 respondents in 34 provinces indicating inaccuracies in the distribution of the assistance (Limbong et al., n.d.). Regardless of the various issues in the misdirection of the *JKN PBI* participant implementation, it is known that the funding source for *PBI* participants comes from the state budget (*APBN*). Consequently, with the lack of regulated mandatory allocation in Law No. 17 of 2023 on Health, there is a potential for unclear budget allocation for Premium Assistance (*PBI*) participants.

Law Number 17 of 2023 on Health stipulates performance-based budgeting, which must adhere to principles and rules according to the legislation in the field of state finances. In this law, the allocation of health budgets from the Regional Revenue and Expenditure Budget (APBD) must be conducted in accordance with regional financial policies and integrated with the financial relationship between the central and regional governments. Additionally, a master plan in the health sector must be prepared by the Central Government and consulted with the Health Committee of the People's Representative Council of the Republic of Indonesia.

Previously, Law Number 36 of 2009 on Health required the central government to allocate at least 5% and regional governments 10% of their budget revenue and expenditures, excluding salaries, for health. From this budget, at least two-thirds must be prioritized for public services. Relatedly, Law Number 1 of 2022 concerning Financial Relations between the Central and Regional Governments states in the explanation of Article 179 that the monitoring of the Regional Transfer and Village Funds (TKD) as well as the Regional Revenue and Expenditure Budget (APBD) still adopts a mandatory spending system in the health sector.

The controversy over the elimination of mandatory health spending also became a key point in the formal testing petition at the Constitutional Court in Decision Number 130/PUU-XXI/2023 concerning the formal examination of Law Number 17 of 2023 on Health against the 1945 Constitution of the Republic of Indonesia. In this decision, the Constitutional Court rejected the petitioners' request, with a dissenting opinion from four judges of the Constitutional Court. The main point of the dissent was the exclusion of the Regional Representative Council (DPD RI) in the drafting of Law Number 17 of 2023 on Health.

Based on this, the performance-based health budgeting system under Law Number 17 of 2023 on Health still has legal issues, especially concerning local government health budgeting that was previously mandated to be at least 10% under Law Number 36 of 2009 on Health. Furthermore, Law Number 1 of 2022 concerning Financial Relations between the Central and Regional Governments states in the explanation of Article 179 that the monitoring of Regional Transfer and Village Funds (TKD) as well as the Regional Revenue and Expenditure Budget (APBD) still adopts a mandatory spending system in the health sector.

In addition to the formal legal issues concerning the elimination of mandatory spending in Law Number 17 of 2023 on Health, it is also necessary to consider the guarantee of fulfilling health rights for vulnerable groups as regulated in Article 28E, Article 28H paragraph (2), Article 28D paragraph (3), and Article 34 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (Badan Legislasi Dewan Perwakilan Rakyat Republik Indonesia, 2023). In addition to the constitutional mandate, People's Consultative Assembly Decree (TAP MPR) Number 10 of 2001 instructs the President to allocate 20% of the national budget (APBN) for education costs and to strive to allocate 15% of the APBN towards health to achieve the Human Development Index targets (Situmorang, 2023).

When analyzing the health-based budgeting issues as regulated in Law Number 17 of 2023 on Health through John Rawls' theory of justice in the health sector, the most crucial aspect is how the most disadvantaged groups (according to Rawls' second principle of justice, the difference principle) receive legal protection and equitable access to healthcare services. In the context of healthcare, the most disadvantaged individuals are those who do not meet or are considered not to align with the prevailing social norms and values within the framework of modern social

order. This group is often referred to as the vulnerable group, or sometimes as the at-risk group, or occasionally as the disadvantaged group. These terms highlight their increased susceptibility to health inequities and the necessity for targeted legal and policy interventions to ensure their equitable treatment in healthcare provisioning (Limbong et al., n.d.).

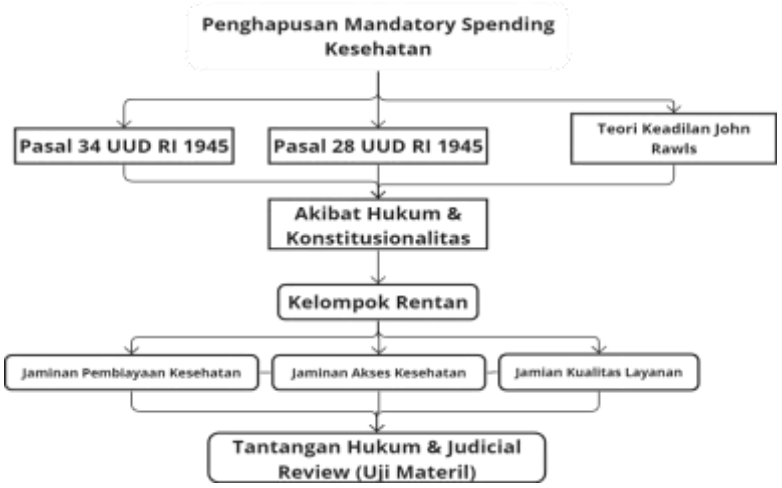

Figure 3. Analysis of john rawls' theory of justice on the elimination of mandatory health spending (adopted from the framework of john rawls' theory of justice).

Rawls developed his theory of justice as an alternative to utilitarianism (Faiz, 2009), which prioritizes maximum welfare for the majority, even if it means sacrificing the rights or interests of a few. The core of Rawls' theory of justice consists of two main principles: 1) The First Principle of Justice: This principle states that each individual has an equal right to the most extensive basic liberties compatible with similar liberties for others, such as the right to political freedom and the right to a fair social and economic arrangement. 2) The Second Principle of Justice: This principle includes two sub-principles: a) The Principle of Equal Opportunity: This sub-principle emphasizes the importance of providing equal opportunities for all individuals to achieve higher social and economic positions; b) The Difference Principle: This principle allows economic inequalities provided they benefit the least advantaged members of society (Rawls, 1971).

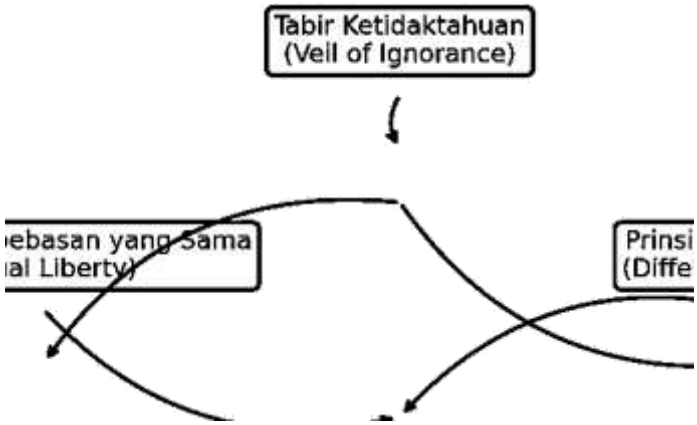

Figure 4. John rawls' theory of justice (adopted from rawls, j. (1971). atheory of justice. cambridge (mass.).

The first principle, concerning liberty, attempts to distinguish between aspects of the social system that define and guarantee the freedoms of citizens and aspects that demonstrate and reinforce socio-economic differences. Such freedoms for citizens include political freedom (the right to vote and be elected to public office), along with the freedoms of speech and association; freedom of belief and freedom of thought; and individual freedom alongside the freedom to maintain personal property. According to the first principle, these freedoms are required to be equal, because members of a just society are entitled to the same basic rights (Rawls, 1971).

The second principle concerns the distribution of income and wealth, as well as the design of organizational structures that involve differences in authority and responsibility, or chains of command. While the distribution of income and wealth need not be identical, a society that applies the second principle by making its positions open to everyone, thus subjecting itself to this limitation, will arrange socio-economic differences in such a way that they benefit everyone. This arrangement ensures that inequalities are structured to provide the greatest benefit to the least advantaged members of society (Rawls, 1971).

The foundation of Rawls' two principles of justice is based on the concept of "justice as fairness," which serves as a framework for formulating principles of justice for a fair societal structure. Rawls explains that in order to create a just societal structure in the sense that no one holds a higher position over another (Faiz, 2009), the concept of "justice as fairness" must be the main foundation of the community's justice contract in the formation of the social contract. This approach aims to ensure that all societal arrangements respect individual rights and promote equality of opportunity, with particular attention to the most disadvantaged (Rawls, 1971).

The concept of "justice as fairness" employs John Rawls' innovative approach known as the original position and the veil of ignorance. The original position (Wayne Morrison et al., 2019) places each person without knowledge of their own existence, social status, social class, intelligence, economic circumstances, strength, and so forth (Wayne Morrison et al., 2019). This position creates a condition of equality where individuals can make decisions about fair justice principles without bias or specific personal interests. The principles of justice that would be chosen and agreed upon by each individual in the original position are: The First Principle of Justice, which is the principle of equal liberty, and the Second Principle of Justice, which includes the difference principle and the principle of equal opportunity. These principles ensure that any inequalities in society benefit the least advantaged and that everyone has the same rights to basic liberties and opportunities (Faiz, 2009).

To create a condition for choices in the original position to be equitable, Rawls introduces the concept of the veil of ignorance. This concept invites us to imagine not knowing our own existence, social status, class, intelligence, economic situation, strength, and other personal factors (Rawls, 2001). The veil of ignorance is likened to a situation where humans have not yet been born into the world, and when this veil is lifted, all agreements on justice made will apply in accordance with the principles of justice agreed upon in the original position.

Rawls' first principle of justice in relation to healthcare can be seen in terms of equal access to healthcare services. Equal health access refers to the equal opportunity available to everyone to obtain healthcare services. Furthermore, regarding equal use/receipt, the question arises whether these opportunities are excessive, and if so, whether individuals have obtained and used these opportunities (Murti, 2001). Next is the principle of difference in justice as it relates to healthcare services. The state of the difference principle in justice, which Murti Bhisma calls vertical justice, emphasizes the principle of different treatment for different situations, namely: 1) Unequal treatment for different needs and progressive health financing based on the ability to

pay. For example, a patient who comes to the hospital with acute kidney failure receives different treatment than a patient with complaints of a cough or cold (Murti, 2001).

Rawls acknowledges the important role of healthcare institutions in improving health, but he notes that the primary distribution of health is controlled by genetic factors, which have a significant influence on an individual's health. Therefore, individuals who are less fortunate and suffer from health deficiencies may be allowed to apply the difference principle. This argument brings us to a point of convergence between Rawls' theory of justice and the right to health (Coogan, n.d.).

Therefore, up to now, the Ministry of Health has not provided alternatives or explanations regarding the status of health insurance participants who are Premium Assistance Recipients (PBI) following Law No. 17 of 2023. Consequently, based on previous PBI participant data, if Law No. 17 of 2023 ends up not providing protection to vulnerable groups or the most disadvantaged, it would violate the principles of justice as defined by John Rawls (Rawls, 1971). The elimination of mandatory spending in the healthcare sector threatens equal access to healthcare services and could potentially increase socio-economic inequalities in society. Thus, a policy approach based on the principles of justice is needed to ensure that all citizens, especially the most disadvantaged groups, receive fair and quality healthcare access.

CONCLUSION

Law No. 17 of 2023 on Health eliminates the provision for mandatory spending, establishing performance-based budgeting that aligns with national financial regulations. This replaces the previous mechanism of mandatory spending of 5% from the National Budget (APBN) and 10% from the Regional Budget (APBD) as mandated by Law No. 36 of 2009 on Health. The formal legal issue with Law No. 17 of 2023 concerns how performance-based health budgeting, especially at the regional government level, will be implemented, because according to Law No. 1 of 2022 concerning Financial Relations between the Central and Regional Governments, Article 179 explains that monitoring of Transfers to Regions and Village Funds (TKD) as well as the Revenue and Expenditure Budget (APBD) still adopts a mandatory spending system in the health sector.

The elimination of mandatory spending in Law No. 17 of 2023 also potentially removes health guarantees for vulnerable groups or those considered under John Rawls' Difference Principle as reflected in Article 28E, Article 28H paragraph (2), Article 28D paragraph (3), and Article 34 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Although the formal testing of Law No. 17 of 2023 was rejected by the Constitutional Court, a substantive challenge regarding the provision's elimination of mandatory spending could still be brought to the Constitutional Court to assess whether its implementation indeed eliminates health guarantees for vulnerable groups.

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