Reformulation of regulation of giving subsidy of equitable health care and social security

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ARTICLE INFO

Article history:

Received 09 September 2020

Received in rev. form 16 Oct. 2020

Accepted 18 October 2020

Keywords:

Subsidy, National Health Care Security, Social security, Reformulation

JEL Classification:

I18, I31, K32, K36

ABSTRACT

Is giving the subsidy in the implementation of national health care security in line with the purpose of arrangement of Law of Republic of Indonesia Number 40 of 2004 on System of National Social Security? Health care security is a basic right of all citizens of Indonesia as regulated in Article 28 H paragraph (3) and Article 34 Article (3) of the Constitution of the Republic of Indonesia. This writing makes an analysis of the arrangement of subsidy of implementation of national health care security. Argumentation in this writing gives an analysis in doing reformulation of an arrangement of giving subsidy in implementation of national health care security as regulated in Article 14 paragraph (2) of Law of Republic of Indonesia Number 40 of 2004 on System of National social security, the program of national health care security is a program in the form of security done by the government, but in the implementation, it is done by using social insurance method. Premiums of poor people and deprived citizens are guaranteed by the state, formal premium is paid by the worker and employer while the informal worker pays the premium independently, by this system it makes injustice in the society. All costs of National health care security should be covered by the state as the aim of implementation of the Law of System of National Health Care Security and the government should use the method of system of security and not social insurance system.

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Introduction

Since the 1st of January 2014 program of National Health Care Security (JKN) is done effectively and followed by 84.6 millions of people which among them there is poor people as regulated in Article 14 paragraph (2) Law of Republic of Indonesia Number 40 of 2004 on System of National Social Security, which premium is paid by the government at Rp 19.250 per people which then in 2017 based on the Presidential Regulation Number 19 of 2017 on National Health Care Security the amount of premium is raised by the government into Rp. 23.000, then it is strengthened by Government Regulation Number 82 of 2018 on National Health Care Security, this group is called recipients of contribution assistance (PBI) while 37 millions of people consist of ex member of ASABRI, Jamsostek and ASKES which premium is 5% of wage, 2% is taken from the wage and 3% is paid by the government as employer while for private employee the composition of premium is also 5 % which consist of 4% (paid by the employer) and 1% (taken from the wage). For the other citizens who have not been mentioned previously they are given the opportunity until 2019 to become the member of JKN with the premium that is covered independently. Then local government can also register its citizens who have not become the member of JKN by covering the premium that is taken from regional budgets (APBD). Hence, fund sources of National Health Care Security consist of security of the government (PBI) which is taken from State Budgets (APBN) and regional budgets (APBD) and from other fund sources and cost covered by independent member.

Referring to criteria used by the government in determining poor people is really difficult to implement as the consequence of variety of culture of Indonesians. Based on the data established by BPS Indonesia that in the by end of 2019 there are 24 million of people included in the category of poor people, but based on the reality it does not reflect the real number of poor citizens. Then for group that does not fulfill the standard criteria made by the government, except by using the criteria of having permanent job but it cannot reach health service. Based on the data of number of poor and deprived people owned by the government which are used by the

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government in giving help to citizens of Indonesia affected by COVID 19. Based on the fact from field which is massively published by the media; those data are not accurate because most of poor people are included in the data of government even there are also many inaccurate data by giving assistance to the citizens who have prosperous lives. Therefore, it is clearer that the data collected by the government are not accurate and valid.

In fulfilling mandate of constitution then based on Article 14 paragraph (2) of Law of Republic of Indonesia Number 40 of 2004 on System of National Social Security stating that recipients of help of premium is poor and deprived people, then in Article 17 paragraph (4) in Law of Republic of Indonesia number 40 of 2004 it says that help of premium for program of Social security of poor and deprived people is paid by the state, in this article there is a phrase “program of Social security” because if we talk about Social security based on Article 18 of Law of Republic of Indonesia Number 40 of 2004 on System of National Social Security it explains that some points which are included in Program of Social Security namely: (a) health care security, (b) workplace injuries, (c) old age, (d) retirement security and (e) death security. Based on the fact, all this time the subsidized aspect is only the Program of Health Care Security that is one of Programs of Social Security. Based on this fact, the government is not consistent with the norm in Law because it only gives subsidy to members of National Health Care Security. As explained previously that group of society that get subsidy in health care security is poor and deprived people which in its process of selection is done by the government.

Criteria of someone stated as poor and deprived people is not regulated in Law of RI Number 40 of 2004 on System of National Social Security and derivative regulations and only refers to the stipulation made by Social Minister that all this time is used as a basis in giving any kinds of social aid to the society, and the definition of deprived people also refers to Regulation of Social Minister where the criteria has also been decided to accommodate any kinds of subsidy which is done before the National Health Care Security is implemented. The same criteria is also used by BPS to decide that the family/person can be categorized as poor and deprived people which then is recommended to Social Ministry to be able to be given to the BPJS Kesehatan to be registered further as the member who get subsidy or known as the member of recipients of contribution assistance (PBI) budgeted through APBN while the people who is registered by the local government is also included in the category of PBI but there is no clear criteria in its selection process because it does not refer to criteria of Social Minister Regulation.

Program of JKN exists in term of health service because of mandate of laws and regulations. In laws and regulations, it has regulated in detail on the aim, principle, the doer, and administration of JKN in a unity of service system, namely System of National Social Security. Determination of those things has completed a process of determination in term of public policy (Seri Buku Saku-4, 2014). It is different from the implementation of program of private/commercial health care insurance. Commercial health care insurance happened because of sale and purchase agreement between insurance company and the buyer of insurance product. Then in laws and regulations it only regulates things regulated to business licensing in insurance and the procedure of sale and purchase agreement among two sides. The advantage in term of number of premium, and administration of financial management are regulated by each insurance company. Insurance company and some parties negotiate those things and implement based on the result of agreement mentioned in the policy of commercial insurance. In scrutinizing characteristics of JKN, all stakeholder of JKN should understand the legal basis of implementation of JKN, derivative regulations of JKN, policies of government or other institutions. By good understanding it is expected that the support from the public is created continuously which is quality improvement-oriented.

If we scrutinize Law of Republic of Indonesia Number 40 of 2004 on System of National Social Security, it is clear that this program is the program of social security held by the state to the citizens with the system of social insurance and it is a must for all citizens and charge the premium to the other group of society. Phrase “security” should be understood that the state provides social security to all citizens by making the state as guarantor in the implementation of social security where the National Health Care Security is one of social security. Therefore, the implementation of National Health Care Security should not need to charge premium to the other group of citizens, thus the state should provide health care service security to all citizens with cost that all must be guaranteed by the state. Based on that explanation the writer will do reformulation of regulation of giving subsidy in the implementation of National Health Care Security that gives advantage and justice to all citizens.

Theoretical and Conceptual Background

This type of research is normative or doctrinal legal research. Doctrinal research is research that provides a systematic explanation between regulations explaining areas of difficulty and possibly predicting future development (Marzuki, 2011). Normative or doctrinal legal research is also referred to as library research or document study because this research is conducted or is aimed only at written regulations or other legal materials (Soekanto and Mamudji, 2004). This study uses several approaches to obtain comprehensive research results, including the legal approach, concept approach, historical approach, case approach and philosophical approach. In other words, in this study the researcher will see the law as a closed system that has the characteristics of comprehensive, all-inclusive and systematic (Ibrahim, 2006).

This research uses primary legal materials (consisting of laws and court decisions), secondary legal materials (consisting of textbooks from legal experts, Scientific Journal, Scientific Articles, Research Results, magazines, newspapers, internet sites and etc.), and tertiary legal materials (consisting of legal dictionaries, Indonesian dictionaries, encyclopedias, etc.). The technique of searching primary and secondary legal materials is done by studying literature and internet searching (Rahardjo, 2000). The analysis technique in this research is carried out in a perspective that is done to solve the problem to explanation the reformulation of regulation of

giving subsidy in the implementation of National Health Care Security that gives advantage and justice to all citizens (Abdlatif and Ali, 2010).

Basis of reformulation of regulation of giving subsidy in national health care security

In the appendix of Law of Republic of Indonesia Number 12 of 2011 on Arrangement of Laws and Regulations, it is stated that in the arrangement of laws and regulations and the other regulation mention philosophical, juridical and sociological basis. Then Bagir Manan states that three basis should be had by product of law namely; philosophical, juridical and sociological (Manan, 1992). In reformulation of regulation of giving subsidy in the implementation of National Health Care Security then it needs philosophical, juridical and sociological as the basis in reformulation thus there is a compromise between *sein* (fact) and *sollen* (norm), where it is expected that the norm made does not contain the thing that is impossible and hard to do, because each of instructing product of law is possible to lose its purpose. It is in line with adagium that people is not obligated to follow the impossible thing (*ultra posse nemo obligator*) (Vlies, 1987).

Philosophical Basis

Philosophical comes from the word 'philosophy' that is a study of wisdom. From that meaning, philosophical is characters that lead to wisdom, so 'philosophical' is a way of life of a nation namely moral values or ethics containing good and bad values (Ranggawijaya, 1998). Philosophical basis related to legal ideas (*rechtsidee*) where all societies should feel it, namely what they expect from the product of law, for example to guarantee justice, order, prosperity and others. Legal ideas or *rechtsidee* grow from their value system regarding good or bad, a way of relation of individual and society, on material, woman's position and others. All legislations have the philosophical basis (*filosofische gronslad, filosofische gelding*) and if the norms are reviewed philosophically it will get justification (*rechtsvaardiging*).

In the preamble of Constitution of Republic of Indonesia of 1945, the aim of establishment of Republic of Indonesia is mentioned such as to make a government of Indonesia that protect all of Indonesians all Indonesians and to promote prosperity for people. It is explained more in Article 28H paragraph (3) of Constitution of Republic of Indonesia of 1945 that all of people has rights of social security that enables self-improvement completely as a useful person. It means that the state must exist in fulfilling rights of each citizen in obtaining service of social security or at least health care security by making the social status of citizens equal. Then as a form of state responsibility in economic development and social prosperity as regulated in Article 34 paragraph (2) of Constitution of Republic of Indonesia of 1945 that mandate the state in order to develop system of social security for all citizens and empower the weak society. From the two norms it is clear that the state is willing to give security to all Indonesians especially in program of Health care Security all this time that has been implemented but the subsidy given by the government is still partial or only to the group of society that is poor and deprived people.

Juridical Basis

The implementation of System of National social security where the National Health Care Security is a mandate of Law of Republic of Indonesia Number 40 of 2004 on System of National social security and the regulation of implementation which is made in the form of Law namely Law of Republic of Indonesia Number 24 of 2011 on National Health Care and Social Security Agency. Based on analysis and normative evaluation of Article 14 of Law of Republic of Indonesia Number 40 of 2004 on System of National social security then the existing norm in the Article contradicts Article 28H paragraph (3) and Article 34 paragraph (2) of Constitution of Republic of Indonesia of 1945, it is caused by the existing norm in both Articles that command the state to hold Social security for all Indonesians, but in the reality that the government only gives subsidy to poor and deprived people even the requirement to determine poor and deprived people all this time is not able to be formulated appropriately, and also the member registered by the local government for further called the recipient of contribution assistance (PBI) in the implementation of National Health Care Security. Laws and regulations or norm in laws and regulations is said to have juridical basis (*juridische gronslag, juridische gelding*) if it has basis of law (*rechtgrond*) or legality to the higher regulation. Based on those considerations it needs to do reformulation of Article 14 of Law of Republic of Indonesia Number 40 of 2004 on SJSN and make regulation that achieves justice in giving the contribution assistance.

Sociological Basis

Policy of security of social protection in a state should continuously face changes and renewal based on the characteristics of a state and changes of social condition in that state. Social security in Indonesia nowadays is implemented at least in the last ten years and one of them is the program of National Health Care Security (JKN). As a state that is continuously moving in any fundamentals of life of Indonesia it should keep developing system of health care security based on the condition that keeps changing in society.

In formulating laws and regulations, the process of achieving values contained in legal ideas to the norm of law really depends on the level of awareness of society and appreciation upheld values by legislators. An absence of awareness of those values will cause the gap between legal ideas and norm of law made by legislators. Therefore, in Republic of Indonesia that is also a state based on law and has legal ideas of Pancasila as a source of fundamental norm of state, each law that will be formulated should be based on values and philosophy contained in the legal ideas. By the sociological basis a product of law is formulated and accepted by the

society normally even spontaneously. Soerjono Soekanto and Purnadi Purbacaraka add that there are two theoretical basis as sociological basis of functioning rule of law, namely:

1. Theory of Power, is a theory that is sociologically done forcedly by the authorities, whether it is accepted or not by the society and it frequently causes social problem in society.
2. Theory of recognition, rule of law is implemented where the product of law can be accepted appropriately by the society where the law is implemented (Soekanto & Purbacakra, 1993).

From the explanation stated previously what Lawrence M. Friedman said is right that The legal system is not a machine, it is run by human being, it depicts that the existing law will not function appropriately if people does not implement appropriately and it will be worse if the product of law does not fulfill justice in society. Therefore, for the policy of social protection it should be in line with the condition happened in structure of society. Social condition of society will keeps changing and the inhabitants also become the target of program of social protection. Policy of social protection that is done nowadays should also consider the economic condition, as one of the developed countries, then Indonesia will be considered to have good economic growth. Therefore, the change in giving the subsidy in program of health care security is expected to be a strong instrument to protect citizens from the potential of economic susceptibility:

Reformulation of regulation of giving subsidy in implementation of national health care security based on philosophical problems

Definition of Reformulation according to Cambridge dictionary is “to change a plan or idea so that you have a slightly different one, changing the existing form to be different from the early form (<https://dictionary.cambridge.org/dictionary/english/reformulate>). In contrast, according to Collins Dictionary, reformulation is “to change and update”; it means that make changes or renew an object (<https://www.collinsdictionary.com/dictionary/english/reformulate>). Based on those two definitions, Reformulation is an attempt that is done to change the form from the previous regulation.

The applied law in a state should be based on the existing law in the society of that state and it contradicts culture and the character of the society, even sometimes it adopts law from other countries but it may not contradict the existing value in the society and the adopted should be the universal values. As a consequence of difference of values from two differences of value, it will make the law to be unable to reach the ultimate goal’ namely justice because each citizen has value and character and way of life of its society (Raharjo, 2007). Therefore, those values should be the source of law of main material and renewal and formulation of law in the state.

The laws and regulations made are not only for all citizens but also for the government. Laws and regulations related to society’s life, such as related to social economy that contains obligation of government to its people, those regulations make the obligation for the citizens to their state. Those regulations are related to allowance or social security from the state to its people (Vlies, 1987).

From the aspect of ontology, the subsidy of the state in the implementation of health care security that is done through Program of National Health Care Security as mandated in Law of Republic of Indonesia Number 40 of 2004 on System of National Social Security. National Social Security System is a program held by the state to provide health protection, thus each citizen of Indonesia can fulfill basis need of health to be able to live properly and achieve social prosperity. Health care security is needed if the citizen faces unwanted health problem that can cause the income of someone lost or decreased because it should pay healthcare cost and medical treatment, because it has chronicle diseases, old age or because it enters retirement, disabled people, job lost and others.

Program of Social security/Health care security that is done at this time follows the model that is implemented universally in some countries. The implementation of health care security in some countries is not linear, there is a country which gives health security to all citizens, another gives security to the poor society, disabled, children, pensioner, and it depends on the product of law that is made for that interest. Law as a set of regulations that can only be understood through a set of system, where it is hard to get the meaning if only those regulations limit the analysis and to be able to understand the essence of a regulation, it needs to understand linkage by other regulation or product of law, the essence of law will be understood if we understand the relation that form the legal system (Kelsem, 1972).

National social security system is an enforcement of system of program of the state and government to provide social protection, in order to fulfill proper basic needs of life of each citizen, leading to the achieved social prosperity for all citizens of Indonesia. Social security needs if there are unwanted things that can affect the income of someone lost or decreased, beside that in implementation of state of formal law (formeel rechtsstaat) then the state in increasing people’s prosperity should be based on regulations made by the state, it is a realization of theory of Julius Stahl with the main characteristics such as; (a) the protection of human rights, (b) division of power and (c) the government based on Law.

In general, the legal experts understand that there are three principals of formulation of law as stated by Gustav Radbruch (1878), namely: (i) justice/*gerechtigheids*, (ii) certainty/*rechtmatigheid* and (iii) utility/*doelmatigheid* (Asshiddiqie, 2017). The meaning of justice here is when the balance happened in the society as subject of law and propriety or equity of the regulations that had been made, while certainty of law is related to order and calmness for subjects of law to the products of law that had been made, while

utility of law is related to the use of law in nation's and state's ways of life. Because of those unfulfilled three elements in the formulation of product of law then it will make antinomial of the three legal ideas previously.

In epistemological aspect it needs deeper understanding of meaning of giving subsidy in the implementation of Health care security, whether the subsidy is right on target or needs expansion of subsidy in the implementation of National Health Care Security, it is based on norm in Article 28H paragraph (3) of Constitution of RI of 1945 that each people has the rights of social security that enables for developing themselves completely as dignified human. In addition, it is explicitly stated in Article 34 paragraph (2) of Constitution of RI of 1945 that the state develops system of social security for all people and empowers weak and deprived people based on dignity of humanity. Those two norms are implemented in Law of Republic of Indonesia Number 40 of 2004 on System of National Social Security (SJSN).

The meaning of two norms in the constitution gives imperative duty to the state to involve all citizens in service of social security in this writing we limit for service of Health care security. In program of National Health Care Security that has been implemented since 1st of January 2014 it is seen that the government is not whole-hearted to implement of social security; we can see this in the implementation of giving subsidy to poor and deprived people. In Article 14 paragraph (1) of Law of Republic of Indonesia Number 40 of 2004 on System of National Social Security it is stated that government will register gradually the recipients of contribution assistance to Health Care and Social Security Agency (BPJS). Based on the fact that this time the government only gives contribution assistance to poor and deprived people member of program of Health care security, as we know that program of Health care security is only one of programs of social security as existed in Article 18 of Constitution of RI Number 40 of 2004 on SJSN. The government should also give assistance to poor citizens for program of old age security, retirement security, death security and workplace injuries. Moreover, the method of determining group of society that will get contribution assistance in implementation of JKN seems also unclear thus it causes social jealousy in the society that potentially makes instability in group of society. When the government will give direct assistance to the society that get impact of pandemic Covid 19 it should use the data of recipients of contribution assistance of National Health Care Security had by BPJS Kesehatan but in fact the data cannot be used completely because it is inaccurate. Those facts cause injustice in the society. Therefore, the state should rely on the meaning of Law of RI of Number 40 of 2004 on SJSN namely developing National Health Care Security by using mechanism of social security that is interpreted that all citizens should get protection and advantage of health care security from the state.

In the context of justice it should be seen from any perspectives because justice means that a people is not certainly equitable for other group. According to Amartya Sen in formulating equitable society to evaluate thing that is considered to have less justice, when we agree to determine something that is considered to have the least justice then it is possible if someday it is agreed to do evaluation (Sen, 2009). Then in arranging the concept of justice as fairness where one role is determining the principle of justice that become a choice in beginning position, to be able to do that thing we should explain the more detail situation and formulate the choice that should be stated precisely (Rawls, 1999). In this condition it needs populist laws where the product of law should reflect justice and can fulfill hope of all citizens. In the process of arrangement of such this product of law then it should involve participation of society completely namely social groups either organization or individual. In qualifying whether the product of law is popular or conservative, then the indicator that is used is process of arrangement of law and nature of function of law (Mahfud MD, 2009).

To be able to fulfill justice in the society and citizens in general then the state in giving the subsidy in the health service should have the main role and not give subsidy partially to the certain group of society but in the matter of health the state must fulfill basic need of health for all citizens. Hence, it needs to do reformulation of Article 14 of Law of Republic of Indonesia Number 40 of 2004 on National Health care security. This reformulation is *ius constituendum* that is a part of politics of law (Soedarto, 1986). In another part according to Utrecht, because law also becomes the object of politics namely politics of law, the politics of law attempt to make the ways that will determine how the people or group of people should act. Then the politics of law according to Utrecht investigate what changes should be made in the applied law at this time in order to be able to achieve social reality (*sociale werkelijkheid*).

Reviewed from the aspect of axiology it is expected that reformulation of Article 14 of Law of RI Number 40 of 2004 on SJSN can give justice to all citizens. Justice includes two important things, namely thing related to justice essence and content or norm to do concretely in certain condition (Mertokusumo, 1999). The essence of justice is judgment of a treatment or act by reviewing, using approach of a norm based on subjective perspective (subjective for interest of its group, and others) exceed other norms. In this case there are two parties involved, namely the party that do and the party that receive advantage or the impact of a treatment. Change of a norm in law is an attempt to be able to fulfill part of justice of society that is not represented in the discussion and legitimization of that law by House of Representatives and government. It is because since the arrangement of academic draft until the arrangement of law draft and the arrangement of problem inventory list (DIM) that is in a hurry to get legitimization, in fact the product of law is expected to protect the interest of people especially the interest in health care service in order to achieve the interest to be able to be implemented thus the product of law that is made should have idea of justice for all citizens. According to Amartya Sen idea of justice is an attempt of decreasing injustice compared to the attempt to create an institution with equitable regulation, approach that is done by Sen is the comparison approach with process of realization, focused and comparison (Sen, 2009).

Basically law is embodying justice externally where justice is the essence of spirit that is a form of law, thus the supremacy of law is a supremacy of justice and vice versa (Susanti & Widiatedja, 2011). Law is for human, then the implementation of law or enforcement

of law should provide utility, certainty of law, and justice for society. Hence, to formulate laws and regulations that reflect justice for society, it needs politics of legislations that become basis and aim in the formulation of laws and regulations (Wijayanti, 2013).

Finally, the development of national law at this time that includes almost all of pillars of state's ways of life depends on some factors, namely:

1. Urgent need, in any aspects the need of law is frequently urgent because the fast development of behavior of human's life then it needs fast product and also in line with the faced condition;
2. Feasibility, fields of law that contain too many obstacles or obstructions in the formulation is often postponed and it selects fields of law that do not get rejection or resistance from the society or that it does not contradict cultural, security and sociological aspects;
3. Fundamental change, the change through laws and regulations is often needed because political, economic and /or social considerations. Change of law is often made by former colonies and the government which have high political awareness (Kusumaatmaja & Sidartha, 2000).

Reformulation of regulation of giving subsidy in implementation of National Health Care Security is aimed to make justice for all citizens in health service for example preventive, promotive and curative and rehabilitation as a form of fulfilling responsibility of state based on the constitution of Republic of Indonesia as the state which follow the concept of welfare state.

Conclusion

Law of Republic of Indonesia Number 40 of 2004 on System of National Social security should be understood as follows: (i) Government and House of Representatives of Republic of Indonesia should make an amendment in Article 14 paragraph (2) Law of Republic of Indonesia thus it provides justice for all citizens of Indonesia; (ii) the implementation of program national health care security should be done by using pattern of security and not social insurance. The meaning of security is a state responsibility to held program of health care security to all citizens by making all costs as state responsibility; (iii) Administrator of National Health Care Security should register all citizens of Indonesia to be a member and get the advantage of National Health Care Security by not charging the cost to the member.

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