

The Urgency of Formulating Legislation On The Protection of HIV/AIDS Patients From A Human Rights Perspective

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Abstract

The state has an obligation to guarantee the human rights of all members of society, including people living with HIV/AIDS (PLWHA). However, in practice, the human rights of PLWHA are often violated through various forms of discrimination. One way the state provides legal guarantees is by enacting legislation related to specific issues. This is the objective of the author's research: to examine PLWHA from a human rights perspective and the urgency of formulating legislation in the context of legal protection for people living with HIV/AIDS. The author employs a Normative Juridical research method in this study. The findings of the research indicate that people living with HIV/AIDS, or PLWHA, still possess human rights despite often being targets of human rights violations in Indonesia. Consequently, the formation of legislation for the legal protection of PLWHA must be expedited to ensure their legal protection.

Keywords: Human Rights, PLWHA, Violations

A. INTRODUCTION

The state holds a significant responsibility towards its citizens and is obliged to fulfill this responsibility. One manifestation of the state's responsibility in this context is to provide clear legal protection and certainty to its citizens. The legal basis for the state's responsibility to provide legal certainty to its citizens is found in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states that Indonesia is a state based on law. Therefore, clarity in legal protection and certainty for the Indonesian people must be prioritized. Similarly, Article 28D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia stipulates that every person has the right to legal protection, recognition, guarantees, and clear legal certainty. Thus, fundamentally, the protection and legal certainty of the people must be a primary focus of the state. In fulfilling its duty to provide legal certainty and protection, the state must ensure that laws are clear, precise, and accessible to all citizens. This involves drafting legislation that is not only comprehensive but also easily understandable, so that individuals can be fully aware of their rights and obligations under the law. Additionally, the state must establish and maintain judicial and administrative systems that are fair, impartial, and efficient. These systems should be capable of resolving disputes promptly and justly, ensuring that all citizens receive equal treatment before the law. Moreover, the state is tasked

with the responsibility of continuously reviewing and updating its legal framework to reflect societal changes and advancements. This ensures that the laws remain relevant and effective in protecting the rights and interests of the people. Public participation in the legislative process is also crucial, as it promotes transparency and accountability, allowing citizens to have a say in the laws that govern them. Furthermore, the state must provide adequate resources and support to legal institutions and enforcement agencies, enabling them to carry out their functions effectively. This includes proper training for law enforcement officers, judges, and other legal professionals to ensure they are well-equipped to uphold the law and protect the rights of citizens. In essence, the state's commitment to providing legal protection and certainty is not just a constitutional obligation but also a cornerstone of good governance. It fosters trust between the government and its citizens, promotes social stability, and contributes to the overall development of the nation. By prioritizing the protection and legal certainty of its people, the state not only upholds the principles of justice and equality but also strengthens the rule of law, which is fundamental to a democratic society.

In addition to being the responsibility of the state, legal certainty and protection are also manifestations of Human Rights. Human Rights are rights that cannot be diminished by anyone, except God.¹ Human Rights can also be defined as rights inherent in a person by virtue of being human.² This means that all individuals, whether born without disabilities or with disabilities, regardless of skin color, including those suffering from infectious and dangerous diseases such as HIV/AIDS (hereinafter referred to as PLHIV), have Human Rights that must be respected.³ One of the Human Rights of PLHIV that must be respected is the right to be free from discriminatory treatment. Discrimination against any group or specific category is prohibited and constitutes a violation of Human Rights. Discrimination itself is regulated in Article 1 Paragraph (3) of Law No. 39 of 1999 concerning Human Rights, which states that discrimination is an act that limits, undermines, bullies, or isolates either directly or indirectly against a specific group based on differences. The right to protection from discrimination is also enshrined in Article 28I Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which explains that every person has the right to be free from discriminatory behavior and to receive protection from such discriminatory treatment.

¹ Maylani, U., Gulo, D. V., and Azidan, F. L. "Penegakan Hukum Mengenai Hak Asasi Manusia (HAM) di Indonesia." *PLEDOI (Jurnal Hukum dan Keadilan)* 1, no. 1 (2022): 12-18.

² Universitas Islam Indonesia (Yogyakarta). Pusat Studi Hak Asasi Manusia (PUSHAM). Smith, R. K., Asplund, K. D., and Marzuki, S. *Hukum Hak Asasi Manusia*. Pusat Studi Hak Asasi Manusia, Universitas Islam Indonesia (PUSHAM UII), 2008.

³ *Ibid.*

Notwithstanding the written regulations, the reality of law often diverges from what is codified in legal texts. For instance, in a case that occurred in Surabaya, East Java, in January 2024. There was a rejection of a deceased woman who was living with HIV/AIDS (PLHIV). It was suspected that the woman was a Commercial Sex Worker (CSW). The body of the woman was initially rejected and left unattended for several hours before volunteers intervened to assist with the burial process.⁴ Discrimination against PLHIV extends not only to the deceased but also to their social interactions. Generally, PLHIV are ostracized from their communities, avoid social interactions, and tend to isolate themselves due to the discriminatory behavior of those around them. Similar issues arise regarding the confidentiality of PLHIV, where their privacy is often violated and disclosed to the public.⁵ Perilaku diskriminatif terjadi berkat adanya dorongan dari ketimpangan sosial.⁶ Such discriminatory behavior is driven by social inequalities, which exacerbate the distinctions between the inferior and the superior. This form of discrimination cannot be tolerated as it constitutes a violation of Human Rights.

In reality, the current regulations regarding human rights violations are deemed ineffective, as evidenced by the public's disregard for human rights violations. To address this issue, the state has enacted criminal law reforms encapsulated in Law No. 1 of 2023. However, the challenge lies in the fact that Law No. 1 of 2023 will not come into effect until 2026, whereas there is an immediate need for comprehensive legal regulations addressing human rights violations, particularly concerning the ODHIV (People Living with HIV). Based on this premise, the author seeks to examine the perspective of human rights concerning ODHIV and the urgency of establishing new legislation that provides legal protection for individuals living with HIV.

There is research on a similar topic conducted by Ari Rahmat Elsad and colleagues, titled "The Rights of HIV Patients in the Perspective of Human Rights." This research aims to detail the forms of human rights protection and the prohibition of discrimination against individuals with HIV/AIDS, as well as to examine the efforts to implement the prohibition of discrimination against those with HIV/AIDS. The findings of this research indeed reveal the injustices experienced by individuals with HIV/AIDS in various aspects, necessitating legislation that provides legal certainty for them. Although there are similarities in the topics

⁴ BBC Indonesia. "Jenazah Perempuan dengan HIV Ditolak Warga – Kurang Edukasi atau Stigma terhadap ODHA?" BBC Indonesia. Accessed May 1, 2024. <https://www.bbc.com/indonesia/articles/cgx5944je2go>.

⁵ Elsad, A. R., and Widjaja, G. "Hak Penderita HIV dalam Perspektif HAM." *Cross-border* 5, no. 1 (2022): 142-153.

⁶ Gaghegang, A. "Diskriminasi Terhadap Penderita HIV/AIDS Menurut Hak Asasi Manusia." *Lex Et Societatis* 1, no. 5 (2013): 83.

between the previous research and the current study conducted by the author, the differences are evident. The previous article focuses on the existing regulations and their implementation in society, whereas the author's research focuses on ODHIV from a human rights perspective and the urgency of establishing new legislation related to legal protection for ODHIV.

Based on the aforementioned background, the author can conclude the research questions to be examined in this study. The first research question is how PLWHA are viewed from a human rights perspective, and the second research question is how urgent it is to formulate legislation concerning the human rights of PLWHA.

B. RESEARCH METHODS

This time, the author has the opportunity to conduct research using the Normative Juridical model. Normative Juridical research is an adaptation of foreign languages into Indonesian, originally derived from the English term Normative Legal Research and the Dutch term *Normatief Juridisch Onderzoek*.⁷ According to E. Saefullah Wiradipradja, normative research is research where the object of study is the norms or laws applicable in society.⁸ Meanwhile, Peter Mahmud Marzuki details that normative legal research is a systematic approach to obtain legal norms, legal principles, or doctrinal law to solve legal problems.⁹ Simply put, normative research only uses library studies to support its research. Therefore, normative research is also known as Dogmatic Legal Research, Library Research, and Legistic Legal Research.¹⁰ Normative research itself has an absolute object of study. Normative research is divided into seven types according to the object of study of normative legal research, which include (a) Legal principle research; (b) legal governance research; (c) Legal harmonization research; (d) legal comparative research; (e) legal Historical Research; (f) positive Legal Inventory Research.¹¹

In this opportunity, the author focuses on the first object of research, which is Legal Principle Research.

Additionally, the author complements the research with various approaches. Generally, Jhonny Ibrahim posits that normative legal research has several approach models as follows:

⁷ Muhaimin, M. "Metode Penelitian Hukum." In *Metode Penelitian Hukum*, by S. Dr. Muhaimin, 45. Mataram: Mataram-NTB, 2020.

⁸ *Ibid.* Hlmn 46

⁹ *Ibid.* Hlmn 47

¹⁰ *Ibid.* Hlmn 45

¹¹ Solikin, H. N. *Pengantar Metodologi Penelitian Hukum*. Penerbit Qiara Media, 2021.

Statute Approach, Conceptual Approach, Analytical Approach, Comparative Approach, Historical Approach, Philosophical Approach, Case Approach.¹² This research employs the Statute Approach and the Conceptual Approach in its formulation. The Statute Approach is used to thoroughly examine all legislation and other rules governing the research object.¹³ Meanwhile, the Conceptual Approach uses views and doctrines that have developed in legal science. Generally, the Conceptual Approach is chosen to find answers to the legal object or issue being researched.¹⁴

C. DISCUSSION

1. PLHIV in Human Rights Perspective

HIV is a contagious disease that has caused widespread concern among the public. HIV is caused by the Human Immunodeficiency Virus, which affects the human immune system.¹⁵ Ultimately, individuals infected with the HIV virus will suffer from weakened immune systems, leading to severe health complications and eventually death.¹⁶ The transmission of HIV can occur through various means, including inadequate contraceptive use, insufficient medical personnel, prevalent free sex, limited sexual education among the younger generation, and many other factors.¹⁷ HIV transmission can happen through sexual intercourse, breastfeeding, repeated use of needles, blood donation, and other means. The HIV virus works by attaching to human cells, replicating the DNA of the human cells, releasing the duplicated DNA into the infected cells, and allowing the cells containing the duplicated HIV DNA to replicate into new cells containing the HIV virus, thereby proliferating the virus.¹⁸ The spread of HIV in Indonesia has tended to increase annually. According to data from the Ministry of Health, in 2023, HIV infection cases have shown a rising trend and are predicted to continue increasing.¹⁹

¹² Muhaimin, M. (2020). *Op Cit.* Hlmn 55

¹³ *Ibid.* Hlmn 56

¹⁴ *Ibid.* Hlmn 57

¹⁵ Silvi, R. "Analisis Cluster dengan Data Outlier Menggunakan Centroid Linkage dan K-Means Clustering untuk Pengelompokan Indikator HIV/AIDS di Indonesia." *Jurnal Matematika "MANTIK 4*, no. 1 (2018): 22-31.

¹⁶ *Ibid.* Hlmn 23

¹⁷ *ibid.*

¹⁸ Handayani, V. V. "Begini Tahapan Virus HIV Menginfeksi Tubuh." Halodoc.com. Accessed May 10, 2024. <https://www.halodoc.com/artikel/begini-tahapan-virus-hiv-menginfeksi-tubuh>.

¹⁹ Rokom. "Kasus HIV dan Sifilis Meningkat, Penularan Didominasi Ibu Rumah Tangga." Kementerian Kesehatan. Accessed May 10, 2024. <https://sehatnegeriku.kemkes.go.id/baca/rilis-media/20230508/5742944/kasus-hiv-dan-sifilis-meningkat-penularan-didominasi-ibu-rumah-tangga/>.

The author believes that the increase in HIV/AIDS cases is due to the adoption of lifestyles from outside Indonesia.²⁰ As we know, Indonesia is deeply rooted in religious norms, so the social interactions of young people in Indonesia were initially well-controlled. However, with the advancement of information technology, many foreign lifestyles have entered Indonesia. Indiscriminately, influencing both the young and the old. This foreign lifestyle, often negative, has gradually displaced the original Indonesian lifestyle.²¹ Consequently, free social interactions, not grounded in religious or customary norms, have emerged, including normalized cohabitation and free sex. Additionally, the author believes that the Indonesian education system is unprepared to face significant lifestyle changes. Education should prepare society on how to respond to social changes, particularly those that tend to be more negative than positive. The lack of readiness in education is evident from the minimal sexual education provided from an early age. Society still considers early sexual education to be taboo and inappropriate.²² This lack of early education leads children to become curious and seek information on their own without supervision from parents or other adults, leading to unintended consequences such as increased free social interactions and rampant, unprotected sex, resulting in the widespread transmission of HIV/AIDS.

Due to the ease of HIV transmission, individuals living with HIV (ODHIV) often face inappropriate treatment from society. In healthcare services, for example, if an ODHIV requires surgery or emergency treatment, the procedure might be halted immediately upon discovering the patient has HIV.²³ Such practices occur in society, yet they violate human rights. It must be remembered that every individual has equal rights to be respected, recognized as a whole person, and maintain their dignity. These rights were first articulated in the Universal Declaration of Human Rights in 1948, later ratified into Indonesian legislation through Law No. 39 of 1999 concerning Human Rights. Article 29 Paragraph (1) of Law No. 39 of 1999 states that every individual has the right to protect themselves from physical threats and threats to their dignity and rights. Thus, ODHIV has the right to defend their dignity and self-worth

²⁰ Inayati, Nur. "Dampak globalisasi terhadap perubahan gaya hidup pada masyarakat kampung komboi distrik warsa kabupaten biak numfor." *Gema kampus iisip yapis biak* 14, no. 2 (2019): 32-40. Hlmn 39

²¹ Fedrik, Devina. "RESPON HUKUM TERHADAP ANCAMAN GLOBALISASI TERHADAP EKSTENSI BUDAYA NASIONAL." *PROSIDING MIMBAR JUSTITIA* 1, no. 1 (2024): 29-37. Hlmn 30

²² Adikusuma, Melati Puspitajati, and Ega Asnatasia Maharani. "Pengetahuan, Sikap, dan Persepsi tentang Pendidikan Seks pada Pendidik Anak Usia Dini." *Aulad: Journal on Early Childhood* 6, no. 3 (2023): 312-321. Hlmn 313

²³ Gaghegang, A. (2013). *Op Cit.* Hlmn 84

when threatened by discrimination from others. Since ODHIV have the same rights as others, their human rights should also be equated with those of others.

One of these rights is the right to receive fair healthcare services.²⁴ This is stipulated in Article 41 of the Ministry of Health Regulation No. 21 of 2013 on HIV and AIDS Management, which was repealed by Ministry of Health Regulation No. 23 of 2022 on the Management of Human Immunodeficiency Virus, Acquired Immuno-Deficiency Syndrome, and Sexually Transmitted Infections.²⁵ ODHIV are individuals infected with a disease requiring special attention, and their treatment demands extra precautions, such as the use of personal protective equipment (PPE). This necessity often leads society to shun and discriminate against ODHIV. However, fundamentally, there is no significant difference between ODHIV and ordinary individuals that would warrant different rights. In fact, ODHIV require extra healthcare services due to their vulnerability to various external diseases. Therefore, ODHIV should receive quality healthcare services as this is their right, as stated in Article 1 letter d of Law No. 17 of 2023 on Health, which asserts that everyone has the right to receive healthcare services according to applicable quality standards without exception.

Generally, ODHIV may contract HIV/AIDS due to criminal acts such as drug use, adultery, sodomy, and other activities. There is even a notion that ODHIV contract HIV/AIDS as a form of retribution for their sins.²⁶ However, in the context of human rights, everyone has inherent human rights regardless of whether they have violated someone else's rights. Reflecting on the issue of capital punishment for certain crimes, even though the perpetrators have taken someone's life, their human rights are not entirely revoked as punishment. For example, in murder cases, the perpetrator's human rights are still respected by avoiding the death penalty. In contrast, ODHIV, who are primarily involved in victimless crimes (crimes without a direct victim), often face discrimination and a lack of respect for their human rights. Given that the crimes committed by ODHIV are generally victimless, their human rights should be equal to those of the general population, recognizing that their actions do not result in direct harm to others.

²⁴ Ashila, B. I. *Kompendium Pendamping ODHA Berhadapan dengan Hukum*. BP-FHUI: Depok, 2020.

²⁵ *Ibid.* Hlmn 54

²⁶ Inayah, N. "HIV, Perilaku dan Agama" *Republika Indonesia*. Accessed June 30, 2024.
<https://republika.co.id/amp/nfwboh29/hiv-perilaku-dan-agama>

2. The Urgency of Formulating Legislation Related to Human Rights for People Living with HIV/AIDS

Guaranteeing human rights is an absolute responsibility of a state, as stipulated by legal norms. In Indonesia, this provision is clearly articulated in the constitution, particularly in Article 1 Paragraph (3), which states that Indonesia is a state based on law. This concept of a rule-of-law state implies that Indonesia bears a significant responsibility to guarantee and provide legal assurance to all its citizens. This includes the protection of human rights without discrimination, encompassing all segments of society, including People Living with HIV/AIDS (PLHIV). As a rule-of-law state, Indonesia must ensure that all its citizens receive fair and equal legal protection, including access to healthcare, education, and social welfare. This guarantee is not only a moral responsibility but also a constitutional obligation that the Indonesian government must fulfill to create a just and prosperous society, maintaining the dignity and human rights of every individual without exception.

The urgency of formulating legislation can be assessed from the existence of laws regulating the issue. It is evident that crimes against human rights are governed by the new Penal Code (Law No. 1 of 2023) as *lex specialis*. Articles 593 and 594 of the new Penal Code address criminal acts related to human rights, but the necessary legal framework for PLHIV remains unresolved under the new Penal Code. Therefore, to fill this legal void, it is imperative to formulate more specific and comprehensive legislation. Although the Minister of Health Regulation No. 23 of 2022 concerning the Management of HIV, AIDS, and Sexually Transmitted Infections has been issued regarding PLHIV, this Ministerial Regulation is not included in the Hierarchy of Legislation according to Article 7 of Law No. 12 of 2011 concerning the Formation of Legislation.²⁷ Moreover, this Ministerial Regulation does not address the prohibition of rights violations, such as health rights, protection rights, and other rights, for PLHIV. Consequently, PLHIV still require a clear legal framework concerning their human rights. Therefore, it is crucial to swiftly formulate and enact legislation that provides adequate legal protection for PLHIV, ensuring that their rights are legally recognized and protected, and imposing strict sanctions on any form of rights violations they experience. By doing so, it is hoped that a fairer and more inclusive legal system will be created, capable of addressing the challenges and needs of society in the context of protecting human rights for PLHIV.

²⁷ Setiadi, W. *Ilmu & Pembentukan Peraturan Perundang-undangan*. Damera Press: Jakarta, 2022.

This aligns with the function of formulating legislation, which is to ensure legal certainty for the people of the state through binding regulations.²⁸ With specific legislation regulating the human rights of PLHIV, it is hoped that Indonesian society will better respect and protect the human rights of PLHIV. In Indonesia's legislation, the parent law related to human rights is regulated as *lex generalis*, but general laws typically do not address specific issues like the case discussed, namely human rights for PLHIV. Therefore, the author proposes formulating a Government Regulation (PP) as implementing regulations of the 1945 Constitution and Law No. 39 of 1999 concerning Human Rights. This Government Regulation is expected to provide a stronger and more specific legal foundation for protecting the rights of PLHIV. With this Government Regulation, it is hoped that clear and measurable mechanisms will be in place to address issues related to the rights of PLHIV, including health rights, protection rights, and other fundamental rights. Furthermore, it is essential to integrate a human rights approach into all aspects of public policy related to PLHIV. This includes increasing access to healthcare services, providing accurate information and education about HIV/AIDS, and addressing the stigma and discrimination often faced by PLHIV. The Government Regulation should also stipulate the obligations of the government and related agencies to provide adequate facilities and services for PLHIV, ensuring they receive fair and equal treatment in all aspects of life. Additionally, strict and consistent law enforcement is necessary to ensure that the rights of PLHIV are effectively protected. This includes imposing severe sanctions on parties violating the rights of PLHIV, whether through discrimination, spreading false information, or committing acts of violence. The author also emphasizes the importance of collaboration between the government, non-governmental organizations, and the PLHIV community in formulating and implementing this regulation, ensuring that the resulting policy truly aligns with the needs and realities faced by PLHIV on the ground. Thus, it is hoped that the new legislation will not only provide legal certainty but also enhance the overall quality of life and well-being of PLHIV.

There are reasons why the author proposes a Government Regulation (PP) guaranteeing the human rights of PLHIV. First, a PP serves as implementing legislation for existing laws.²⁹ While human rights are generally regulated in legislation, the issue is that PLHIV require *lex specialis* regulations. This need arises from the fact that the discrimination faced by PLHIV has been long-standing and continuous, necessitating specific regulations to address their needs

²⁸ *Ibid.* Hlmn 26

²⁹ *Ibid.* Hlmn 30

more accurately and effectively. The proposal to formulate a PP also aims to avoid overlapping regulations. With a PP specifically regulating the human rights of PLHIV, it is hoped that legal certainty and clear rules will be established, providing guidance for various related parties, including the government, healthcare institutions, and the wider community. The author also believes that the urgency of this legislative formulation is critical, as the lengthy process of enacting a law would result in ongoing negative impacts on PLHIV. Additionally, the shorter timeframe for formulating a PP compared to a law makes the author confident that the creation of a PP is the right step to guarantee and protect the human rights of PLHIV.³⁰ With faster formulation, legal protection for PLHIV can be promptly realized, allowing them to enjoy their rights without prolonged delays. This is crucial considering the situation faced by PLHIV requires a swift and appropriate response to prevent further discrimination and ensure they receive fair and equal treatment in all aspects of life.

D. Conclusion

HIV is a significant infectious disease caused by the Human Immunodeficiency Virus, weakening the immune system and often leading to death. This virus affects millions worldwide, transmitted through unsafe sexual practices, needle sharing, breastfeeding, and blood donation. Comprehensive prevention strategies must address sexual health education, safe medical practices, and rigorous screening for blood donations. HIV targets CD4 cells, essential for immune defense, by injecting RNA, which is reverse-transcribed into DNA and integrated into the host's genome. This process depletes the immune system, leading to AIDS (Acquired Immunodeficiency Syndrome) if untreated. In Indonesia, HIV cases continue to rise. The Ministry of Health data shows increasing cases in 2023, necessitating enhanced public health initiatives, targeted interventions, and education on HIV prevention and treatment. The rise is attributed to societal lifestyle changes and inadequate sexual education for the youth. The influence of global media and the internet has introduced new behaviors, contributing to HIV spread. The Indonesian education system is not yet ready to address these changes, with sexual education still considered taboo. People living with HIV (PLHIV) often face discrimination, especially in healthcare services, where medical procedures might be halted due to their HIV status. This discrimination violates ethical standards and human rights, deterring individuals from seeking necessary care. The Universal Declaration of Human Rights and Indonesian laws (Law No. 39 of 1999 and Law No. 17 of 2023) affirm the right to health

³⁰ *Ibid.* Hlmn 62

for all individuals, demanding equal access to medical services without exception. The author suggests forming a Government Regulation (PP) to address the legal vacuum and ensure fair and equal legal protection for PLHIV. This regulation should provide guidelines for treating PLHIV within the healthcare system, establish penalties for discriminatory practices, and promote awareness and education to combat stigma. Implementing such regulation would help create a more inclusive and just society, upholding the rights and dignity of all individuals.

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