

Analysing the entitlement of Indonesian Health Security Body (BPJS Kesehatan) to issue regulations

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Abstract. Recently Indonesian Health Security Body (BPJS Kesehatan) through Director of Healthcare Security had issued three regulations that become controversies. The Minister of Health of the Republic of Indonesia and many healthcare organizations have requested BPJS Kesehatan to withhold the implementation of or to withdraw those regulations. The aim of this research was to find out the right of BPJS Kesehatan in issuing regulations that will effect the rights of the participants of National Social Security System (SJSN). This research was a normative legal research. It conducted literature review to obtain the required data. Data obtained and used in this research were secondary data, which consisted of primary, secondary and tertiary legal documents. Data obtained from literature review were analysed using qualitative approach. As an explanatory analytical research, the research analysed, discussed and further provided a comprehensive explanation on the role and rights of BPJS Kesehatan to make regulation for the implementation of SJSN. The conclusion of the research proved that BPJS Kesehatan in some occasions has issued regulations beyond its authorities.

Keywords: BPJS Kesehatan, Indonesian National Health Security Body

1. Introduction

1.1 Background

In year 2004, the Government of the Republic of Indonesia together with People's Representative Council (Dewan Perwakilan Rakyat (DPR)) had issued Law No.40 Year 2004 regarding National Social Security System (Sistem Jaminan Sosial Nasional (SJSN) (Law40/04) [1]. Article 5 paragraph (1) of Law40/04 required the establishment of a Social Security Administration Body (Badan Penyelenggara Jaminan Sosial (BPJS)) by a law. In 2011 Law No.24 Year 2011 regarding Social Security Administration Body (Law24/11) [2] was promulgated and at the same time the intended body (BPJS) was established. Based on article 5 paragraph (2) of Law24/11, the law established two BPJS. First was BPJS that was responsible for health security known as BPJS Kesehatan, dan the other was BPJS that was responsible for manpower called BPJS Ketenagakerjaan. BPJS Kesehatan started its operation

since 1 January 2014, meanwhile BPJS Ketenagakerjaan started on 1 July 2014.

Just recently on a press release held 30 July 2018, people were informed that the Director of Healthcare Security (Direktur Jaminan Pelayanan Kesehatan) of BPJS Kesehatan has issued three regulations. The first regulation was Regulation No.2 Year 2018 regarding the Security for Cataract Care in Health Security Program (Peraturan Direktur Jaminan Pelayanan Kesehatan Nomor 2 Tahun 2018 tentang Penjaminan Pelayanan Katarak dalam Program Jaminan Kesehatan (Per2/18)). The second was Regulation No.3 Year 2018 regarding Security for Maternity care with Healthy Born Baby (Peraturan Direktur Jaminan Pelayanan Kesehatan Nomor 3 Tahun 2018 tentang Penjaminan Pelayanan Persalinan dengan Bayi Lahir Sehat (Per3/18)). The third was Regulation No.5 Year 2018 regarding Security for Medic Rehabilitation (Peraturan Direktur Jaminan Pelayanan Kesehatan Nomor 5 Tahun 2018 tentang Penjaminan Pelayanan Rehabilitasi Medik (Per5/18)).

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The issuance of those three regulations, Per2/18, Per3/18 and Per5/18, has attracted many controversies. The controversies do not only come from government institutions such as the Minister of Health [3], the National Social Security Council (Dewan Jaminan Sosial Nasional (DJSN)) [4] but also from professional healthcare organisation such as Indonesian Doctor Association (Ikatan Dokter Indonesia (IDI)) [5]. Most of the controversies criticized the content of the regulations. In reply to the critics, the spokesman of BPJS Kesehatan also argued on the content of the regulations, that according to BPJS Kesehatan, the regulations were in-line with the function of BPJS Kesehatan and had been discussed with relevant competent organizations, institutions or event authorities.

1.2 Objective

Despite the controversies as mentioned above, the aim of this research was to find out whether BPJS Kesehatan has the authority to issue the three regulations according to prevailing Indonesian laws and regulations, and whether BPJS Kesehatan has complied with the formalities that must be fulfilled for a regulations to become in force. The research will not discuss on the content of the regulations as whether the regulations will benefit or on the other side harm the people who participated in the Indonesian National Healthcare Security system (sistem Jaminan Kesehatan Nasional (JKN)).

2. STUDY REFERENCES

2.1 Kelsen and the hierarchy of law

Kelsen, a German-American legal philosopher, was well known for his pure theory of law. The theory of Hans Kelsen on the pure theory of law came back to 1930s, when he first time wrote his view about law. His work then become famous and polemics between many scholars at that time, however Kelsen theory on the pure theory of law was accepted and become one of the most appreciated works among legal scholars. His first edition of the pure theory of law was published in 1934. His other famous writings, the General Theory of Law and State was published in 1945 [6].

According to the pure theory of law, Kelsen stated that law was a coercive order. People needed to obey the law. The law commanded certain behaviour of human being by attaching coercive power for those who did not obey it. The pure theory of law indicated that it may delegate or order subordinate officials to further create or issue subordinate legal norms which contents shall be in line with and shall not violate the superior or higher legal

norms [6] [7]. It meant that there existed a hierarchical structure of legal system and legal norms in every country. There would never rules or regulations unless it was ordered by or delegated by a superior legislation. The highest norm in every country can be found in its constitution. The constitution will then provide the process of making legislation itself or delegate the power to a certain kind law. The process of making legislation itself is the process of making laws, rules and other kind of regulations. It will determine how laws and all other subordinated rules and regulations will be made. The constitution will establish the required organs and subsequently confer power to the organ the rights and authorities and the procedure to make and issue laws, rules and regulations as legislation [8]. So there is no legislation without the power to issue it.

To implement the basic norms in the constitution, according to Kelsen, there should be a legislative process. The legislative process took place at the parliament. The legislative process produced laws in the form of statutes, either substantive or procedural (formal) laws. The laws contained in the statutes were the general laws. If the general laws were made by the parliament, the subordinated legislation were made by administrative organs created by the constitution or the laws delegated by the constitution that authorized it. There would be many administrative organs involved at several level to produce rules and regulations as the implementation of the general laws as delegated by the constitution or the laws [8].

Under current development in practices, besides laws, rules and regulations, there were also guidelines [9]. Law as mentioned above was made in the forms of statute that was made general. After the law, in the form of statute, there existed rules and regulations that must be made by administrative body. The rules and regulations shall in line with the general rules, because they were made to implement the laws. Current practice showed that guidelines can be established either by agreement of people or institutions or professionals in the community where the guidelines will be implemented; or issued by government administrative body. The guidelines issued by the government administrative body may have coercive power in the event that there were issued because based on delegation from the laws, rules or other kind of regulations.

2.2 Fuller and eight desiderata for better legislation

If Kelsen was known of his positivism of law, that was reflected on how he saw the law; Fuller was known as natural law philosopher. If Kelsen believed that laws must be made in the order that made it lawful, Fuller

discussed on eight desiderata that must exist if a law “made accordingly” would be accepted and followed by the people for those the law was made for. A positivism legal scholar will not recognise morality as part of law, meanwhile the natural law scholar acknowledged morality as part of the law. Only law made with inner morality, that fulfil the requirements for the eight desiderata will become a real law that people will obey [10].

The work of Lon F. Fuller, *The Morality of Law* was published in 1964 based on his lecture given at the Yale Law School in April 1963 [11]. Fuller identified eight desiderata that must be fulfilled for law to be obeyed. According to him, law must be (#1) general, (#2) widely promulgated, (#3) prospective, (#4) clear, (#5) non-contradictory, (#6) possible for obedience, (#7) constant over time and (#8) congruence between the content of the law and the act of the officials [10] [11] [12] [13] [14] [15]. Generality of laws reflected the similarity between Kelsen and Fuller that laws must be general and shall not regulate something specific. Promulgation in state gazette is a part of fraction theory of law. In order for law to be known by all people in and therefore to be obeyed by the people the laws must be published, announced in state gazette. By promulgation, all people are deemed to be known and therefore must be obeyed. Without promulgation, there will be no laws to be enforced. The promulgation of laws only make people know what will happen in future and therefore laws must be prospective. Laws shall not be retroactive. Clarity is the next desiderata that must exist in the wording of laws. This will avoid misinterpretation of the laws, and make people easily obey the laws. Laws are not independent, they are co-related one with another. So in order to understand the implementation of a legal system, laws shall not be in contradiction among one another. Two or more contradictive laws will make people incapable to understand and to act accordingly. In no way that by obeying one law people will violate the implementation of other law. Law must not change over a short period of time, since it only regulated general principles. The law that change over short time will confuse the people who will act upon it. How to expect people to follow the new law, even the people themselves have not understand the old law. The congruence between the content of the law and the conduct of the official who implemented the law will be the last desiderata required for people to obey the law. If the official who implemented the law acted differently from the content of the law, then there would be no reason to expect the people to obey the law, because the people will never understand what the law meant [12] [13].

3. Methodology

3.1 Scope of research

The scope of this research is to discuss and prove that whether BPJS Kesehatan as an administrative body has the authority to issue the legislation and whether it has fulfil the requirements to issue legislation.

3.2 Type and source of data

Data used in this research were secondary data, which included data from primary legal sources, secondary legal sources and tertiary legal sources. Data were obtained through literature review.

3.3 Method of analysis

This was an explanatory analytical normative research. Analysis in this research used qualitative approach. The research were conducted in order to understand the legislation process, in theory and its application in Indonesia, especially the authority of BPJS Kesehatan to issue regulations as legislation.

4. Result

4.1 Law No.12 Year 2011

The research found that the Government of the Republic of Indonesia has promulgated Law No.12 Year 2011 regarding the Making of Legislation (Law12/11). Article 7 paragraph (1) of Law12/11 provided the types and hierarchy of legislations in Indonesia. They are, in systematical order:

1. The 1945 Constitution of the Republic of Indonesia;
2. The Resolution of People’s Consultative Assembly (Majelis Permusyawaratan Rakyat) (Tap MPR);
3. Law (Statute) or Government Regulation in lieu of the Law;
4. Government Regulation;
5. President Regulation;
6. Provincial Local Regulation (Peraturan Daerah Provinsi);
7. County/ Municipal Local Regulation (Peraturan Daerah Kabupaten/ Kota). [16]

Besides those legislations, under article 8 paragraph (1) Law12/11, there were also rules and regulations that were issued by the MPR, DPR, Regional Representative Council (Dewan Perwakilan Daerah (DPD)), Supreme Court (Mahkamah Agung (MA)), Constitutional Court (Mahkamah Konstitusi (MK)), Financial Auditor Body (Badan Pemeriksa Keuangan (BPK)), Judicial

Commission (Komisi Yudisial (KY)), Bank Indonesia (BI), Minister, body, institute, or commission with the same level, established by laws or government based on the order of law, Provincial DPR, Governor, County/ Municipal DPR, County Head/ Municipal Head, Village Head (Kepala Desa) or the same level authority. The regulations issued by those “bodies” can only exist and have legal binding power to be enforced as legislations only if such rules and regulations was ordered by the superior legislation or based on its authority. The reference to the superior legislation that order or delegate the issuance of such regulation must be clearly stated in the part of such legislations after the consideration stipulated therein. The ellucidation of article 8 paragraph (2) Law12/11 provided the meaning “based on its authority” is the administration of special governmental duty according to the prevailing legislations [16].

Based on the definition given in article 1 point 1 Law12/11, legislation process is the process of making legislation which include the phase of planning, drafting, discussion, ratification or determination, and promulgation. Legislation itself was defined as the written rules with legal norm that bind in general and made or determined by state institution or competent authority through procedure determined under the legislation. The type are as defined in article 7 paragraph (1) Law12/11. All legislations must be promulgated. The promulgation itself shall be done in the State Gazette, Supplement to the State Gazette, State News, Local Gazette, Supplement to Local Gazette or Local News [16].

4.2 Law No.40 Year 2004

Law40/04, as explained before, regulated National Social Security System (SJSN). Based on Law40/04, further legislations required to implement SJSN were delegated in form of either President Regulation or Government Regulation. There is no statement about the authority of BPJS to make the rules and regulations. The Law40/2004 only mentioned that BPJS would be established as the only institution to administer the implementation of SJSN. There were also no delegation for BPJS to make and issue any kind of legislation as defined in Law12/11.

4.3 Law No.24 Year 2011

As ordered by Law40/04, article 11 of Law24/2011 stated that BPJS had the authority:

1. to collect the premium;
2. to place the Social Security Fund for short and long term investment, considering the liquidity, solvability, prudence, security aspect of the fund and the appropriated results;

3. to perform supervision and examination towards the compliance of the participant and employer in fulfilling their obligation in accordance with national social security legislation;
4. to deal with the health facilities concerning the payment to health facilities with reference to the standard rate determined by the government;
5. to make and terminate contract with the health facilities;
6. to impose administrative sanction to the participant or employer who did not fulfil its obligation;
7. to report the employer to the competent institution for the un-compliance of paying the premium or in performing other obligations in according with the legislation;
8. to cooperate with other party for the purpose of the implementation of Social Security program.

There was no specific provision on the Law24/11 that provided BPJS with authorization to issue regulation except the one regulated in article 48 paragraph (3) Law24/11, with respect to the provision of quality control and complain handling from participant. In article 44 paragraph (7) of Law24/11, it was stated that provision on the remuneration and other additional benefit and incentive for employee will be regulated based on Board of Director Regulation. Further authorization for BPJS Kesehatan to issue regulations were based on delegation given by President Regulation No.12 Year 2013 regarding Health Security (PresR12/13), which has been amended twice. First in year 2011 with President Regulation No.111 year 2013 regarding Amendment of President Regulation N0.12 Year 2013 regarding Health Security (PresR11/13). The second was done in year 2106 with President Regulation No.19 Year 2016 regarding Second Amendment of President Regulation N0.12 Year 2013 regarding Health Security (PresR19/16). The PresR12/13 as amended latest by PresR19/16 was replaced by President Regulation No.82 Year 2018 regarding Health Security (PresR82/18).

5. Discussion

The research result proved that BPJS is an institution stipulated in article 8 paragraph (1) Law12/11. This meant that any kinds regulations issued by BPJS will not become part of the legislation mentioned in article 7 paragraph (1) Law12/11. This made BPJS as an institution that cannot made legislation which become or be part of the hierarchy structure. As an insitution mentioned in article 8 paragraph (1), BPJS can only issue legislation based on the authorization granted under article 8 paragraph (2) Law12/11. In view of article 7 paragraph (1) the **BPJS Kesehatan’s Director of Healthcare Security Regulations were wrongly issued, and therefore had no legal binding as legislation.**

Further analysis on the implementation of article 8 paragraph (2), there were two issues to be discussed and analysed. First is with respect to the order or delegation from the superior legislation. The superior legislation must be legislation stipulated in article 7 paragraph (1) Law12/11. As found in the research result, Law24/11 as the law that established BPJS, the only legislation that BPJS can issue was only legislation on quality control and in participant complaint handling. The other regulation, not legislation, that is allowed to be issued by the Board of Directors of BPJS was in relation to compensations given to all its employees. There was no provision in Law24/11 that allow any member of the Board of Directors to issue any kind of regulations, either as legislation or not. From this perspective, neither the Board of Directors nor any Director of BPJS Kesehatan shall be entitled to issue legislation. BPJS Kesehatan as institution can only issue legislation on quality control and participant complaint handling.

Further finding in research showed that President Regulation regarding Health Security as regulated in PresR12/13, PresR111/13 and PresR19/16 ordered and delegated BPJS Kesehatan to issue legislations for the implementation of Health Security. The delegations were given based on article 15 on registration procedure, verification of participation, amendment of participant data and participant identity, article 17 paragraph (7) on premium payment from workers wage earners, article 17A paragraph (6) on premium payment from workers not wage earners and non workers, article 17A.1 on penalty due to late premium payment, article 26 paragraph (3) on health technology assessment, article 31 on healthcare services procedure, article 40 paragraph (5) on emergency assessment and cost reimbursement procedure for emergency care, and article 42 paragraph (3) on the implementation of quality control. This meant that BPJS Kesehatan can issue regulations only for the field that its is authorized based on the President Regulations above. It was BPJS Kesehatan that can issue such regulations to become legislation that bind people. Neither the Board of Directors of BPJS Kesehatan Regulation or Director of BPJS Kesehatan Regulation is allowed. Since Per2/18, Per3/18 and Per5/18 was not issued in the form of BPJS Kesehatan Regulation but instead in the forms of **Director of Healthcare Security Regulation, it meant that the BPJS Kesehatan's Director of Healthcare Security Regulations were issued without authority or delegation or order from any legislation, and therefore had no legal binding at all.**

PresR82/18 regarding Health Security replaced PresR12/13, PresR111/13 and PresR19/16. According to the PresR82/18 BPJS Kesehatan only had authority to issue legislation on registration procedure and administration of participation (article 19), amendment

of participant status (article 26), premium payment procedure for workers wage earners (article 39 paragraph (6)), workers not wage earners and non workers (article 40 paragraph (4)), premium payment procedure for re-activation and payment procedure for penalty due to late premium payment (article 42 paragraph (9)), screening procedure on medical history and filtering service or certain health screening and health improvement for patient with chronic diseases (article 48 paragraph (11)), and other possible payment method as regulated in article 71. The issuance of the PresR82/18 did not change the fact that **Director of Healthcare Security of BPJS Kesehatan's Regulations cannot issue any kind of legislation that can bind health security participants.**

The second issue on article 8 paragraph (2) Law12/11 was the scope of its authority given based on the prevailing laws and regulations. As explained above the authorization with respect to the implementation of health security system in Indonesia was already distributed to President Regulation or Government Regulation. The limit of authorization of BPJS Kesehatan as institution, not in form of Board of Directors or Director of BPJS Kesehatan, to issue legislation was given under PresR82/18. Outside that limitation, BPJS Kesehatan has no more authority to issue legislation.

One thing that also need to be noted was that the Per2/18, Per3/18 and Per5/18 issued by Director of Healthcare Security in form of BPJS Kesehatan's Director of Healthcare Security Regulations were never promulgated as it was the utmost requirement for legislation to exist. Without promulgation, even BPJS Kesehatan, as institution, had the authority to issue regulations, it will never satisfied the legislation requirements. For such important conditions, the **BPJS Kesehatan's Director of Healthcare Security Regulations were never considered as legislation at all.**

6. Conclusion

The research concluded that BPJS Kesehatan as institution had limited authorities to issue legislation on quality control and participant complaint handling, based on delegation or order from Law No. 24 Year 2011; and to issue legislation on registration procedure and administration of participation, amendment of participant status, premium payment procedure for workers wage earners, workers not wage earners and non workers, premium payment procedure for re-activation and payment procedure for penalty due to late premium payment, screening procedure on medical history and filtering service or certain health screening and health improvement for patient with chronic diseases, and other

possible payment method as regulated in article 71, based on the delegation from President Regulation No.82 Year 2018.

Neither the Board of Directors nor the Director of BPJS Kesehatan has the authority to issue legislation that binds people. The BPJS Kesehatan's Director of Healthcare Security Regulation No.2 Year 2018 regarding the Security for Catarac Care in Health Security Program, BPJS Kesehatan's Director of Healthcare Security Regulation No.3 Year 2018 regarding Security for Maternity care with Healthy Born Baby, BPJS Kesehatan's Director of Healthcare Security Regulation No.5 Year 2018 regarding Security for Medic Rehabilitation were invalid and had no legal binding. With respect to those three regulations, it is obvious that BPJS Kesehatan's Director of Healthcare Security had exceeded its authority. The facts that the three regulations were not promulgated made those regulations never fulfilled the formality of making legislation.

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