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Utilitarian Policy of Criminalization for the COVID-19 Vaccine Refusal in Indonesia

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ABSTRACT

This article aims to analyze several issues of the implementation of the regulation of vaccination in Indonesia, encompassing the issues of the imposition of criminalization following the vaccination refusal, discussion on its objective, and practical challenges that potentially emerge. As qualitative research, this article employed a normative legal approach and social contextualization to comprehend regulations, legal interpretations, and arguments. This article finds that the government has amended the Presidential Regulation No. 99 of 2020 on the Procurement and Implementation of Vaccination to the Presidential Regulation No. 14 of 2021 on the Change of the Presidential Regulation No. 99 of 2020 in dealing with the issue of punishment imposed on those refusing the vaccination. From the perspective of utilitarian humanism, the regulation aims to ensure the success of the vaccination and is expected to result in the herd immunity of society that determines the social welfare in the country. The implementation of the regulation is being criticized on the practical level because it is claimed to raise the likelihood of the violation of human rights and overlook the public trust on account of excessive criminalization. This article argues that support from society is vital in the implementation of the regulation, while a positive campaign over public vaccinations need to be massively urged.

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1. Introduction

In the face of the widespread COVID-19 pandemic, many countries have grappled with the ethical and legal complexities of vaccine mandates.¹ Indonesia is no exception. This article examines the controversial policy of criminalizing vaccine refusal in Indonesia. Through a normative legal study informed by social context, the article explores the rationale behind the

¹ Fei Qi and Luanjiao Hu, 'Including People with Disability in the COVID-19 Outbreak Emergency Preparedness and Response in China', *Disability and Society*, 35.5 (2020), 848-53. <https://doi.org/10.1080/09687599.2020.1752622>.

policy, its intended goal of achieving herd immunity, and the potential drawbacks, such as human rights violations and declining public trust.²

The government implemented this policy via Presidential Regulation No. 14 of 2021, amending the earlier Regulation No. 99 of 2020. This amendment established penalties for refusing vaccination, ranging from fines to service suspensions. Local governments have followed suit with supplementary regulations.³ However, critics argue the policy infringes on the right to bodily autonomy guaranteed by the Constitution and international human rights law. The World Health Organization (WHO) warns of public apathy with mandatory vaccination.⁴ However, although the aforementioned regulation is currently revoked by the Presidential Regulation No. 48 of 2023 on Termination of Coronavirus Disease 2019 (COVID-19) Pandemic Response which practically impacts on the voidance of the regulations, the reflexive study emphasizing the politics of law, legal consideration and implementation of legal policy has remained its relevance to anticipate any possibility of similar cases took place.⁵

The implementation of the regulation faces criticism at the practical level. Concerns include the emergence of human rights violations and a decline in public trust due to excessive criminalization.⁶ This article argues for social support for the regulation's implementation, alongside a strong emphasis on positive public vaccination campaigns.⁷ However, proponents of the policy might argue that it aligns with the principles of utilitarian humanism. This philosophy emphasizes maximizing overall happiness and well-being. In this context, achieving herd immunity through widespread vaccination protects not only the vaccinated individuals, but also the broader community, particularly those who are vulnerable or cannot be vaccinated.⁸

After outlining our research method in the subsequent section, we will turn to the key findings and their implications. This section will dissect the policy of criminalizing vaccine refusal through a multi-faceted lens. First, we will explore the stated goals of this policy. Next, we will critically evaluate its effectiveness as the ideal solution. Then, we will zoom in on a specific challenge: the potential violation of civil rights. Finally, we will explore the possibility of a "middle ground" approach, drawing on principles of utilitarian humanism, to balance the pursuit of public health with the protection of individual rights.

² Herlambang P. Wiratraman, 'Does Indonesian COVID-19 Emergency Law Secure Rule of Law and Human Rights?', *Journal of Southeast Asian Human Rights*, 4.1 (2020), 306-34. <https://doi.org/10.19184/jseahr.v4i1.18244>.

³ Cut Meutia Karolina and Irwa Rochimah Zarkasi, 'Pros and Cons of Vaccine Refusal in Social Media', *Jurnal ASPIKOM*, 7.1 (2022), 98-111. <https://doi.org/10.24329/ASPIKOM.V7I1.1062>.

⁴ Anna Krasilnikova, 'Brief Overview of the Currently Available COVID-19 Vaccines', *Journal of Clinical and Health Sciences*, 7.1 (2022), 5. <https://doi.org/10.24191/jchs.v7i1.14658>.

⁵ Kingsley Eghonghon Ukhurebor Paul Atagamen Aidonojie, Nosakhare Okuonghae, 'The Legal Rights and Challenges of COVID-19 Patients Accessing Private Healthcare in Nigeria', *Bestuur*, 10.2 (2022), 183-97. <https://doi.org/10.20961/bestuur.v10i2.68118>.

⁶ Ali Roziqin, Syasya Y.F. Mas'udi, and Iradhad T. Sihidi, 'An Analysis of Indonesian Government Policies against COVID-19', *Public Administration and Policy*, 24.1 (2021), 92-107. <https://doi.org/10.1108/PAP-08-2020-0039/FULL/PDF>.

⁷ Haley E. Randolph and Luis B. Barreiro, 'Herd Immunity: Understanding COVID-19', *Immunity*, 52.5 (2020), 737-41. <https://doi.org/10.1016/j.immuni.2020.04.012>.

⁸ Muhamat Agung Sanjaya, Dewi Asri Puannandini, and Ida Kurniasih, 'Kajian Hukum Pelaksanaan Vaksinasi Covid-19 Di Indonesia Ditinjau Dari Perspektif Hak Asasi Manusia', *PEMULIAAN HUKUM*, 4.1 (2021), 83-98. <https://doi.org/10.30999/JPH.V4I1.1450>.

2. Research Method

This study employs a qualitative method supported by secondary sources collected from journal articles, laws and regulations, books, and legal cases.⁹ The results of this study is presented in a descriptive analysis to draw a correlation between the criminal sanctions regarding the refusal to have the COVID-19 vaccine in Indonesia when examined from the purpose of punishment, specifically from utilitarian theoretical and philosophical perspectives of determining a criminalized act.

This research pertains to the enactment of various government regulations amidst the COVID-19 pandemic intended to enforce vaccination. These regulations include Presidential Regulation No.14 of 2021 which revised Presidential Regulation No. 99 of 2020 on Vaccine Procurement and Vaccination Procedures for Addressing the Corona Virus Disease 2019 (COVID-19) Pandemic, as well as Regional Regulation of Jakarta Province No. 2 of 2020 on the Management of Corona Virus Disease 2019.

As a specific note that although the government releases the Presidential Regulation No. 48 to terminate the COVID-19 Pandemic response which comes into effect in voiding the mentioned regulations, this study does not include this current regulation (No. 48/2023) to analyze the government's legal consideration and practice. This exclusion aims to ensure the significance and validity of this study based on the limited time frame of the implementation of the Indonesian law during the COVID-19 Pandemic.

3. Results and Discussion

In January 2021, President Joko Widodo (Jokowi) and some ministers were vaccinated. He also campaigned for the importance of vaccination to prevent the terrible impact of COVID-19 and its spread.¹⁰ Based on the positive objection to vaccination, vaccination has been mandatory. Consequently, it will lead to administrative punishment, fines, and even imprisonment following the refusal to get vaccination. These various punishments are the government's approach effectively aimed to influence society to get vaccinated. This argument has been built based on the utilitarian thought that implements a certain law to punish those refusing to be vaccinated. Accordingly, the punishment will work following the warrant against those who intend to refuse, as in line with Law No. 6 of 2018 on Health Quarantine.

The criminalization is specified in policies and regulations. For instance, the COVID-19 vaccination refusal is categorized as disobedience to health quarantine law, particularly Article 9 Paragraph (1) *jo* Article 93:

"Whoever is disobedient to the health quarantine law as mentioned by Article 9 (1) and/or hindering the health quarantine program that leads to the social emergence can be punished by a maximum imprisonment of 1 (one) year and/or pay a maximum fine of IDR 100 (one hundred) million."

⁹ Tunggul Ansari and Setia Negara, 'Normative Legal Research in Indonesia: Its Originis and Approaches', *Audito Comparative Law Journal (ACLJ)*, 4.1 (2023), 1-9. <https://doi.org/10.22219/ACLJ.V4I1.24855>.

¹⁰ Mohammad Syahrul RA, Yusuf Hamdika, and Sholahuddin Al-Fatih, 'The Impact of COVID-19 Through the Lens of Islamic Law: An Indonesian Case', *Lentera Hukum*, 7.3 (2020), 267-78. <https://doi.org/10.19184/EJLH.V7I3.18983>.

This regulation has been claimed as relevant because the vaccination program is one of the health quarantine activities as stated in Article 1 Paragraph (1) "... Measures to protect the people or prevent the incoming or outgoing diseases and/or health risk factors of the members of the public that are likely to trigger social emergencies." From the legal perspective, vaccination is an act representing part of health quarantine unless the vaccination objectives are not figured out. Consequently, based on the law, it is expected to be a legal reference for the central and regional governments to make the practical law that consists of the practical implementation of the criminalization for whoever refuses the COVID-19 vaccination.

The sequence commences with the issuance of Presidential Regulation No. 99 of 2020 on the Procurement and Execution of Vaccination on October 5, 2020. This was subsequently revised through the enactment of Presidential Regulation No. 14 of 2021 on February 9, 2021, which amended the original Presidential Regulation No. 99 of 2020, focusing on the Procurement and Execution of Vaccination amid the COVID-19 pandemic. Within the amended version of the regulation, a new provision, Article 13A, has been introduced. This article delineates the obligation to undergo COVID-19 vaccination and outlines potential penalties for refusing vaccination.¹¹ The penalties encompass administrative repercussions, encompassing the deferral or cessation of social aid, administrative services, or the imposition of fines. The practical application of these legal measure's hinges upon the jurisdiction of regional governments or specific institutions.

This regulation additionally outlines the framework for the potential imposition of imprisonment as a punitive measure. Article 13B elucidates that such measures could apply to individuals who meet certain criteria, including those who (a) have been designated to receive the COVID-19 vaccine, (b) decline vaccination, (c) contribute to the spread of COVID-19, and (d) incur administrative sanctions while facing imprisonment, as stipulated in Article 14 of Law on the Infectious Disease Outbreak. This article underscores that:

"(1) Deliberate obstruction of disease prevention programs outlined in this legislation could result in a maximum prison sentence of 1 (one) year and/or a fine of up to IDR 1 (one) million. (2) Negligent actions leading to disruption of disease prevention efforts outlined in this legislation could result in a maximum prison sentence of 6 (six) months and/or a fine of up to IDR 500,000 (five hundred thousand Rupiah). (3) The acts outlined in Paragraph (1) constitute a crime, while those defined in Paragraph (2) constitute a violation."

The formulation of the criminal act within this article is divided into elements of intent and negligence. It can be categorized as a purposive act when one who commits the act is aware of what he or she has done and its impacts.¹² Therefore, negligence is not an intentional act because it has been done unintentionally and without being aware of its impacts. As referred to in Paragraph (3), any act hindering the prevention of disease outbreaks can be categorized as a violation of law that may lead to criminalization because categorizing it as a criminal act is also specified in a regulation.¹³

The imposition of criminal penalties for refusing vaccination is also present in regional regulations. For instance, this is evident in Jakarta's Regional Regulation No. 2 of 2020

¹¹ Allina Mustaufiatin Ni'mah and Syufa'at Syufa'at, 'Legalitas Impor Vaksin Covid-19 Perspektif Maqashid Syariah', *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 4.1 SE-Articles (2021), 11-24. <https://doi.org/10.24090/volksgeist.v4i1.4695>.

¹² Marsudi Utoyo and others, 'SENGAJA Dan TIDAK SENGAJA Dalam Hukum Pidana Indonesia', *Lex Librum : Jurnal Ilmu Hukum*, 7.1 (2020), 75-85. <https://doi.org/10.46839/LLJIH.V010.298>.

¹³ S Supriyadi, 'Penetapan Tindak Pidana Sebagai Kejahatan Dan Pelanggaran Dalam Undang-Undang Pidana Khusus', *Mimbar Hukum*, 27.3 (2016), 389. <https://doi.org/10.22146/jmh.15878>.

pertaining to COVID-19 prevention, with necessary adjustments made in accordance with its superior legislation.¹⁴ This regulation entails a potential maximum prison sentence of 1 (one) year and/or a fine of up to IDR 5 (five) million. An examination of the content of the regional regulation reveals that the inclusion of criminal sanctions (imprisonment and fines) is permissible. This aligns with the provisions outlined in Article 15 of Law No. 11 of 2012 on Legislation Formation and Article 5 of the Minister of Internal Affairs Regulation No. 80 of 2015 on Regional Legislation Formation. It is posited that the inclusion of criminal penalties within Jakarta's policy remains consistent with the overarching regulations.

3.1. The Aims of the Criminalization

Implementing the criminal law as a primary approach of vaccination will lead to negative impacts encouraging the public trust in the government. At the same time, violating the individual's freedom in dealing with various ways of protection and prevention from COVID-19 will decrease the social benefits. In addition, some disagree with the criminalization approach in the program of vaccination. However, the government claims that the aims of the criminalization are important mainly to encourage people to obey the law to achieve the goal of ending the pandemic. In the context of law enforcement, Prasetyo argues that the state has the right to implement the law and coercively involves its people in obeying the law and gives sanction to whoever violates the judicial mechanism.¹⁵ The rights appear due to the state ensuring the protection of its people. Therefore, to secure the protection program, it needs an instrument that coercively engages with the social order. These instruments are in the form of norms, which bind people to obey and carry them out even if they are forced to. Of the various existing norms, the author is more inclined towards using legal norms, in this context the norms in criminal law.

Criminal law is an instrument that aims to control crimes through the way of punishing whoever violates the law. Soedarto explains that the criminal law and its model of criminalization seem to be negative because they impose criminal punishment on whoever violates the law. It connects to the way of life, morality, and religious doctrine that are important to the aim of the state and government. To some extent, criminal law serves as an indicator of the development of the civilization of the state.¹⁶ In its content and implementation, the law must respect principles of humanism, nature, and culture in the region. Its disrespect to the principles will lead to dysfunction of the law and hinder the development program of the state.

Criminalization has changed over time in line with the changing way of life and the human viewpoint has also transformed within society. The changes are normal because substantively human beings will always engage with them to get better welfare in the future. Because the function of criminalization is to solve social problems, it tends to be categorized as social policy, meaning that the state needs such rational efforts to ensure the welfare of its people.

¹⁴ Orin Gusta Andini and others, 'The Impact of Covid-19 Pandemic on Effective Electronic Criminal Trials: A Comparative Study', *Journal of Human Rights, Culture and Legal System*, 3.2 (2023), 185–209. <https://doi.org/10.53955/jhcls.v3i2.57>.

¹⁵ Andika Dwi Amrianto and others, 'Kriminalisasi Dan Reformulasi Perbuatan Prostitusi Dalam Hukum Pidana: Catatan Kritis Atas Minimnya Pengaturan Perbuatan Prostitusi Di Indonesia', *Jurnal Penegakan Hukum Dan Keadilan*, 4.2 (2023), 123–43. <https://doi.org/10.18196/JPHK.V4I2.18091>.

¹⁶ Moh. Yasir, Joko Widodo, and Ali Ashar, 'Islamic Law and National Law (Comparative Study of Islamic Criminal Law and Indonesian Criminal Law)', *Al Hurriyah : Jurnal Hukum Islam*, 6.2 (2022), 82. <https://doi.org/10.30983/alhurriyah.v6i2.4952>.

Law enforcement in this context can be understood as an effort to implement certain laws and impose punishment to ensure the improvement of the policy.

It is obvious that the expected welfare needs social order and political stability. The key idea of stability must be supported by the legal instrument or legal policy which consists of the matters of criminal law and criminalization, is not categorized as criminal law, and can be imposed for certain crimes since any acts dealing with the instrument cannot be punished by the criminal punishment. Accordingly, the substance of the policy of criminalization is a criminal policy.¹⁷ That is, purposively it has been made because it gains specific aims, thereby leading to the problem within this criminal policy. It can be said that the problem is that the basis of the instrument of the penal policy, legal consequences, and punishment must be formulated to respond to criminal acts.¹⁸ It is a failure when criminal law or penal law fails to fulfill its main requirement (the imposition of the law is only for the crimes and cannot be imposed for the specific acts that are categorized as non-criminal conduct).¹⁹

Contemporary criminal science encompasses elements of criminology, criminal law, and penal policy.²⁰ Nevertheless, it tends to counter the above argument. The penal policy is the art of making the law more sophisticated to allow for better laws beneficial not only for the legislator but also for the court. The perfection of the law must be made by all legal experts and involve their good intentions. In addition, from the perspective of the politics of law, the perfection of the law closely relates to the effort of making better law that is relevant to the current situation, and the authority can make certain legal policies to accommodate the aspiration of the people to gain their ideals. In the specific context of the making of the penal policy, the penal policy is aimed at developing law, the reformation of law, and preventing crimes.²¹ Thus, deciding such a legal policy that involves criminal matters (law and its punishment) emphasizes matters that can be categorized as crimes and can be imposed with proper punishments.²²

3.2. The Ideal Policy and Challenge of the Criminalization

Determining what crime is and ensuring the ideal policy of criminalization requires rational considerations. First, criminal law and its implementation must be focused on the aim of the national development of the state as an attempt to build a just and prosperous society. In the

¹⁷ Sahat Maruli and Tua Situmeang, 'Politics of Criminal Law Against Criminalization and Decriminalization Policies in The Legal System in Indonesia', *Res Nullius Law Journal*, 4.2 (2022), 201-10. <https://doi.org/10.34010/RNLJ.V4I2.7166>.

¹⁸ Ariefulloh Ariefulloh and others, 'Restorative Justice-Based Criminal Case Resolution in Salatiga, Indonesia: Islamic Law Perspective and Legal Objectives', *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 23.1 (2023), 19-36. <https://doi.org/10.18326/IJTIHAD.V23I1.19-36>.

¹⁹ Yordan Gunawan and Hanna Nur Afifah Yogar, 'Handbook of Research on Innovation and Development of E-Commerce and E-Business in ASEAN', *Handbook of Research on Innovation and Development of E-Commerce and E-Business in ASEAN*, 2 (2020), 594-606. <https://doi.org/10.4018/978-1-7998-4984-1>.

²⁰ Richard Rosenfeld and Mark T. Berg, 'Studying Crime Trends: Introduction to the Special Issue', *Journal of Contemporary Criminal Justice*, 40.1 (2023). <https://doi.org/10.1177/10439862231189977>.

²¹ Orin Gusta Andini, Nilasari, and Andreas Avelino Eurian, 'Restorative Justice in Indonesia Corruption Crime: A Utopia', *Legality: Jurnal Ilmiah Hukum*, 31.1 (2023), 72-90. <https://doi.org/10.22219/ljih.v31i1.24247>.

²² Yordan Gunawan, M. Fabian Akbar, and Eva Ferrer Corral, 'WTO Trade War Resolution for Japan's Chemical Export Restrictions to South Korea', *Padjadjaran Jurnal Ilmu Hukum*, 9.3 (2022), 408-31. <https://doi.org/10.22304/pjih.v9n3.a6>.

Indonesian context, the aim has been legitimated by the state principles of Pancasila.²³ Accordingly, the prevention of criminal acts is in line with the aim of the criminal law that ultimately guarantees the welfare of the people. Second, the attempt to prevent certain crimes must be by purpose (by commission) since the crimes may strongly lead to negative impacts on society. Third, the implementation of the criminal law must also have a projection over the cost that must be paid and what aims are to be achieved. The implementation must also consider the ability of the legal apparatus to avoid over-criminalization.²⁴ The project of the criminalization must properly consider the balance between the instrument of law and its legal achievement, calculate the cost and its possible result, evaluate the aim of the law and its priority of implementation, and predict possible social impacts of the criminalization.²⁵

The implementation of the policy of criminalization is not without challenges dealing with, first, the readiness for the implementation of the law, financial support in dealing with rational and legal procedures, and the absence of a critical evaluation, which may lead to legal despotism and the disruption of the social and political system of the state. When the process of legislation is not ready for practical execution, the implementation of the policy of criminalization may be delayed. When this is the case, rational and scientific legal arguments, and procedures cannot be achieved mainly due to the problem of financial support. The risk escalates when the government itself has remained absent from any act of critical evaluation on both challenges. The absence may lead to a crisis of democracy in the state, and it potentially stimulates the emergence of over-criminalization.

For the latter case, it can be seen from the reality that the implementation of the policy of criminalization, which seems ineffective because it has problems with procedures, the economy, and the absence of critical evaluation, encourages the people to deny their trust to the government and the state. It tends to happen because criminal law is the public law that is made for the goodness of the democratic system. The position of the people in this system is higher than the state and its governmental agencies. Despotically oppressing the people through an unjust policy will be understood as the destruction of democracy.²⁶

The public substance of the criminal law covers these elements: (1) it rules and governs relations between the states and people's interest; (2) the government has authority to control as well as dominate and even oppress its people (though in the democratic system, the government must work for the people); (3) imposition of the law does not depend on the victim(s), but in general, the authority imposing its law is based on the crime that a person commits. (4) the authority's rights of imposition of the law are determined by the policy which tends to engage with legal positivism.

The second challenge pertains to adhering to formal legal prerequisites. Within the context of criminalization policy, this gives rise to a practical implementation issue, particularly in meeting formal requirements that constitute an essential facet of due process within Indonesia's legal framework. To illustrate, during the preparation of an indictment, the public

²³ Mohammad Hazyar Arumbinang, Yordan Gunawan, and Andi Agus Salim, 'Prohibition of Child Recruitment as Soldiers: An International Regulatory Discourse', *Jurnal Media Hukum*, 30.1 (2023), 21-32. <https://doi.org/10.18196/jmh.v30i1.19322>.

²⁴ Matt Clement, 'Deconstructing Criminalization Processes', *Contention*, 11.1 (2023), 89-103. <https://doi.org/10.3167/CONT.2023.110105>.

²⁵ Jaakko Kalverkämper, 'Re-Imagining Criminal Justice: The Ethical Fusion of Substantive Law and Procedural Law', *Social Science Chronicle*, 2.1 (2023), 1-18. <https://doi.org/10.56106/ssc.2023.006>.

²⁶ Yordan Gunawan and others, 'Does the Protection of Minority Groups in Xinjiang Fail?', *Sriwijaya Law Review*, 4.2 (2020), 205-20. <https://doi.org/10.28946/slrev.Vol4.Iss2.432.pp205-220>.

prosecutor must abide by the guidelines stipulated in the Attorney General Circular of the Republic of Indonesia No. SE-004/J.A/11/1993 (16 November 1993) and No. B-607/E/11/1993 (22 November 1993). This underscores the significance of fulfilling formal prerequisites, highlighting the necessity of accurate identity representation to prevent errors such as "*error in persona*" or rendering the legal action "*vernietigbaar*" (null and void).²⁷

Furthermore, the policy must consist of material (substantive) provisions that underline that the indictment must be drafted properly without flaws or mistakes at all. It would ensure that the indictment would not be *niet onvankelijk verklaard* (cannot be accepted because the indictment is formally a defect). Once again, the indictment must be drafted properly. It would be easier to understand and in turn, it would better explain the legal facts of the legal subject(s). In addition, the indictment must be drafted comprehensively. It must show various elements of the accusation and the charge as the legal chronology has argued for.

The subsequent obstacle involves legal clarity. The understanding of vaccination in conjunction with health quarantine poses a burden for the prosecutor when formulating the charges. This predicament arises due to the absence of a definitive statement within the regulation that explicitly categorizes vaccination as an integral component of health quarantine. Consequently, interpreting the term "health quarantine" as a means of disease prevention and containment encompasses multiple methods beyond vaccination alone. Additional measures that serve as preventative actions against COVID-19 encompass the 5M campaign: mask-wearing, thorough handwashing, maintaining distance, avoiding crowds, and restricting mass gatherings or interactions.²⁸

Consequently, the construal regarding the combination of vaccination regulations and health quarantine appears to be rigorously and autocratically enforced to achieve specific objectives. Another underlying issue arises when this interpretation seemingly contradicts Article 5 (3) of Law No. 36 of 2009 on Health, which affirms that "Every individual has the autonomy and responsibility to determine their own healthcare needs." Within the context of legal rationale, it is highlighted that health decisions constitute an integral facet of human rights. The right of individuals to make choices regarding healthcare services is a fundamental entitlement that should be upheld, safeguarded, and ensured by the state.

While not the sole approach, immunization represents one of the mechanisms aimed at halting the spread of a pandemic. The necessity for immunization arises from its capacity to expedite communal or herd immunity, thereby expediting the termination of the pandemic. Hence, vaccination stands as an embodiment of the government's responsibility to safeguard public health. Receiving immunization is aligned with a citizen's entitlement to health, as articulated in Article 28H paragraph (1) of the 1945 Indonesian Constitution and Article 9 of Law No. 39 of 1999 on Human Rights. However, the WHO contends that enforcing mandatory vaccination might yield counterproductive results, potentially generating a reluctance towards COVID-19 vaccines among individuals.²⁹

²⁷ Andrew Yonathan Panjaitan, 'Analisis Putusan Nomor 194/Pid.Sus/2019/PN-MNK Tentang Tindak Pidana Penipuan Terhadap Transaksi Elektronik', *NOVUM: JURNAL HUKUM*, 8.4 (2021), 101-10. <https://doi.org/10.2674/NOVUM.V0I0.38041>.

²⁸ Sholahuddin Al-Fatih and Felinda Istighfararisna Aulia, 'Tanggung Jawab Negara Dalam Kasus COVID-19 Sebagai Perwujudan Perlindungan HAM', *Jurnal HAM*, 12.3 (2021), 349-66. <https://doi.org/10.30641/ham.2021.12.349-366>.

²⁹ Farina Gandryani and Fikri Hadi, 'Pelaksanaan Vaksinasi Covid-19 Di Indonesia: Hak Atau Kewajiban Warga Negara', *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 10.1 (2021), 23. <https://doi.org/10.33331/RECHTSVINDING.V10I1.622>.

The final obstacle, which is equally significant, pertains to the issue of violating human rights.³⁰ Certain individuals who decline vaccination hold the viewpoint that mandating immunization represents coercion and an infringement upon their human rights. Moreover, this is perceived as a violation of bodily integrity, a safeguard established under Health Law No. 36 of 2009. Article 8 of this law enunciates, "Every individual possesses the entitlement to access information about their own health-related data, encompassing interventions and therapies they have undergone or are slated to receive from medical practitioners or healthcare providers." Article 56, paragraph (1), reinforces that "Every individual has the prerogative to accept or decline any part or the entirety of assistance proposed to them, subsequent to comprehending comprehensive information about the procedure."

Nevertheless, it is imperative to recognize a stipulation within Article 56, Paragraph (1) of Law No. 36 of 2009 on Health, pertaining to the right to accept or decline. This provision, however, does not extend to individuals afflicted with an ailment capable of rapidly disseminating throughout the broader populace. If alternative methods exist to motivate participation in health initiatives for the betterment of the community (public health), resorting to criminalization should be averted. Advocates contend that employing a coercive stance towards vaccine hesitancy poses the risk of estranging public support.

The outcomes of a 2020 study, utilizing extensive sentiment analysis on Twitter on the availability of a COVID-19 vaccine, hold encouraging promise, notwithstanding the existence of differing viewpoints. This is evident in the investigation undertaken by Rachman, which illustrates that the populace's reaction to the vaccine's presence yielded a favorable perception of 30%, while a counteractive sentiment of 26% emerged. It is pertinent to note that the prevalence of terms with optimistic undertones surpassed those reflecting unfavorable mass sentiments.³¹

Similarly, findings from Rakhmawati's research portrayed public sentiment toward the accessibility of the COVID-19 vaccine, revealing a positive sentiment of 48%, a neutral sentiment of 29%, and a negative sentiment of 23%.³² A survey conducted by the University of Maryland and Facebook in 2021, titled "The COVID-19 Symptom Survey," further corroborated this trend, indicating that 80.8% of Indonesians expressed belief in and willingness to undergo the COVID-19 vaccine, while 19.2% of respondents expressed uncertainty. As a result, this presents a latent opportunity that the government should capitalize on while implementing the COVID-19 vaccination strategy judiciously, avoiding any form of coercive measures such as administrative penalties, fines, or imprisonment.³³

In support of the Government's vaccination strategy, the Indonesian Ulema Council (MUI) has issued two edicts on the COVID-19 vaccine, designed to address the concerns of Muslims in

³⁰ Yordan Gunawan and Yovi Cajapa Endyka, 'The Protection of Small and Medium Enterprises in Yogyakarta: The Challenges of ASEAN Economic Community', *Pertanika J. Soc. Sci. & Hum*, 25 (2017), 199-206.

³¹ Fajar Fathur Rachman and Setia Pramana, 'Analisis Sentimen Pro Dan Kontra Masyarakat Indonesia Tentang Vaksin COVID-19 Pada Media Sosial Twitter', *Health Information Management Journal*, 8.2 (2020), 100-109. <https://doi.org/10.47007/inohim.v8i2.223>.

³² Nur Aini Rakhmawati and others, 'Analisis Klasifikasi Sentimen Pengguna Media Sosial Twitter Terhadap Pengadaan Vaksin COVID-19', *JIEET (Journal of Information Engineering and Educational Technology)*, 4.2 (2020), 90-92. <https://doi.org/10.26740/JIEET.V4N2.P90-92>.

³³ Rizka Rizka and others, 'Legal Protection for Doctors' Work Safety in Handling Covid-19 Cases Reviewed Based on Saddu Al-Dzari'ah', *Legality: Jurnal Ilmiah Hukum*, 30.2 SE-Journal's Articles (2022), 228-42. <https://doi.org/10.22219/ljih.v30i2.22259>.

Indonesia. These edicts serve to alleviate any apprehensions and assure their active participation in the COVID-19 vaccination campaign. The first edict affirms the permissibility (*halal*) and sanctity of the COVID-19 vaccines, namely CoronaVac, COVID-19, and Vac2Bio, thus endorsing their safety and suitability for use among the Muslim population.³⁴

Second, the fatwa allows the AstraZeneca vaccine to be used even though the manufacturing process uses trypsin derived from pigs. This is permissible (*mubah*) due to emergency conditions and the limited availability of vaccines.³⁵ The existence of these two fatwas can be interpreted as a persuasive approach to answer doubts that are still inherent in the community regarding the *halal* status of the COVID-19 vaccine.³⁶ Therefore, this is in line with the policy of having a vaccination program that is being promoted by the government.³⁷ The aim of this effort is that the community can voluntarily participate actively in carrying out vaccinations, regardless of whether there is a criminal policy or not. Thus, it can be determined that the ideal policy to make vaccination mandatory and punish people who refuse to be vaccinated is based on the legal basis regarding the obligation to vaccinate, both in the form of legal norms, social norms and religious norms (through MUI fatwas).³⁸

3.3. Civil Rights as a Specific Problem within the Policy of Criminalization

This section discusses civil rights as a specific problem in criminalization policy, where society has the human right to refuse vaccination, but on the other hand, the state also has the right to regulate. The question of whether the act of engaging in vaccinations is a right or a duty continues to evoke contrasting viewpoints within society. From a normative perspective, the fourth paragraph of the preamble to the 1945 Constitution asserts the mandate of establishing an Indonesian government that safeguards the entire populace and fosters the well-being of the nation, inculcating education and contributing to the establishment of global order. This underscores the state's responsibility to promote the betterment of public welfare. In the context of a pandemic, the vaccination initiative is strategically directed towards enhancing the overall welfare of the nation's inhabitants.

Citizens possess a constitutional and civil entitlement to health, a provision enshrined within Article 28H Paragraph (1) of the 1945 Constitution. This stipulation affirms that every individual has the prerogative to experience physical and mental well-being, inhabit a suitable dwelling, enjoy a salubrious living atmosphere, and access healthcare services. Moreover, it lies within the state's purview to ensure the foundational entitlement of each citizen (health),

³⁴ Ibnu Radwan Siddik, 'Kehalalan Vaksin Covid-19 Produksi Sinovac Dalam Fatwa MUI Dan Implementasi Vaksinasinya Pada Tenaga Kesehatan Di Puskesmas Tanjung Morawa, Deli Serdang (Perspektif Qawaidh Fiqhiyyah)', *Al-Mashlahah Jurnal Hukum Islam Dan Pranata Sosial*, 9.01 (2021), 59–83. <https://doi.org/10.30868/AM.V9I01.1250>.

³⁵ M. Asrorun Niam Sholeh and Muhammad Isha Helmi, 'The COVID-19 Vaccination: Realization on Halal Vaccines for Benefits', *Samarah*, 5.1 (2021), 174–90. <https://doi.org/10.22373/sjkh.v5i1.9769>.

³⁶ Heri Sudarsono and others, 'Effects of Religiosity, Halal Knowledge and Halal Certification on the Intention of Muslims to Use the Halal Vaccine during Covid-19 Pandemic', *Journal of Islamic Marketing*, 15.1 (2023), 79–100. <https://doi.org/10.1108/JIMA-06-2021-0179/FULL/PDF>.

³⁷ Nabila Nurrahmi, Reny Fitriana Kaban, and Hidayat Sofyan Widjaja, 'The Effects of Religiosity and Halal Knowledge on the Decision to Use the Covid-19 Vaccine', *Ilomata International Journal of Social Science*, 4.3 (2023), 376–89. <https://doi.org/10.52728/IJSS.V4I3.788>.

³⁸ R. S. Iza Rumesten and others, 'Discretionary Policy Responses in India and Indonesia Amidst the COVID-19 Pandemic: Challenges, Strategies, and the Imperative for Legal Reform', *Journal of Indonesian Legal Studies*, 8.2 (2023), 1151–96. <https://doi.org/10.15294/jils.v8i2.70143>.

as underscored in Article 28I Paragraph (4), wherein the state bears the duty of safeguarding, fostering, upholding, and fulfilling human rights.

However, although there are regulations that emphasize the importance of fulfilling civil rights for everyone by the state, in terms of guaranteeing protection for the fulfillment of these rights, restrictions are imposed, so that overlapping does not occur. Therefore, the state provides limitations in the form of rules that are binding on all citizens so that they can guarantee that the civil rights of every citizen are not violated.

Provisions pertaining to this constraint can be found in Article 28J paragraph (2), emphasizing that while exercising their rights and freedoms, every individual is required to adhere to limitations established by legislation. These limitations are intended only to guarantee that other citizens' rights and freedoms are acknowledged and respected and to comply with lawful demands consistent with morality, religious beliefs, public safety, and preserving law and order in a democratic society. As the recognized religious body for Muslims in Indonesia, the MUI has declared some COVID-19 vaccination varieties to be halal. The people are also guided to obey and comply with the immunization policy by the legitimacy of the MUI.

In connection with the fundamental civil entitlements granted to all individuals, this aspect consistently correlates with the corresponding responsibilities that are incumbent upon them. As outlined in Article 69 paragraph (2) of Law No. 39 of 1999 on Human Rights, each human right possessed by an individual inherently entails a foundational duty and accountability to mutually respect the human rights of others. It is within the state's jurisdiction to respect, safeguard, bolster, and advance these rights. Amid the context of a pandemic, the civil entitlement to health aligns harmoniously with the duty to undergo vaccination.

Meanwhile, in a more subtle argument, although there is a legal instrument mentioning that everyone has the right to get a vaccination or refuse it when he or she is living within the social system, maintaining health is the obligation of an individual as a form of respect for the human rights of others. Vaccination is an obligation of the government as an effort to realize public health, but when referring to existing legal provisions, every individual has an obligation to be involved. Human rights perspectives support the validity of the COVID-19 vaccination requirement and the penalties imposed on those who violate it. The need to safeguard others by lowering the risk to their health and transmission has become a compelling argument.

3.4. The Middle Way of the Utilitarian Policy of Criminalization

Collaboration between the government and society is the key to implementing an effective approach to tackling the COVID-19 pandemic. The former has a responsibility to fulfill public health, thereby encouraging vaccination in society, while the latter has an equal responsibility to respect others' human rights in a way of maintaining health and getting involved in the process of vaccination. This mutualistic relation must be supported by stronger cooperation that understands each other's roles to create public trust in government policies in tackling a pandemic.³⁹

Another problem that must be resolved by a mutualistic relationship between the government and the public is the spread of misinformation about COVID-19 and vaccination – thus giving rise to doubts in society about vaccination. Efforts to rectify this misinformation have been

³⁹ Yordan Gunawan, 'Arbitration Award of ICSID on the Investment Disputes of Churchill Mining PLC v. Republic of Indonesia', *Hasanuddin Law Review*, 3.1 (2017), 14-26. <https://doi.org/10.20956/halrev.v3i1.948>.

made by the government through the delivery of correct and quality information material by presenting experts who are concerned in their fields. Meanwhile, society prevent itself from spreading hoaxes and deals with critical clarification on the spread of suspicious information. Progressive action in treating information has been an effective solution in increasing public trust in the government during this pandemic.

The immediate imposition of penalties on individuals declining vaccination is purported to offer a swift resolution, yet upon closer examination, it carries the potential to trigger a social predicament. Ultimately, such an approach proves ineffective in effectively managing the pandemic. Therefore, a more compassionate methodology is essential for the successful execution of the vaccination program. This strategy can foster introspection within each person and prompt a collective sense of social responsibility. A rather unconventional proposal was put forth by Patryn, suggesting that anti-vaccine groups should independently cover their medical expenses as a gesture of respecting the rights of others. In Australia, a comparable approach is observed, wherein the government encourages vaccination without deeming it an absolute mandate. The Australian COVID-19 Vaccination Policy states, "While the Australian Government strongly supports immunization and will run a strong campaign to encourage vaccination, it is not mandatory and individuals may choose not to vaccinate. However, there might be situations where the Australian Government, along with other governments, might enforce entry or re-entry prerequisites contingent on proof of vaccination." Another option that could be implemented in mandatory vaccination in Indonesia, is to imitate the Australian best-practice; namely, those who do not want to be vaccinated (free from the government) can choose their type/brand of COVID-19 vaccine and pay for it.

These rules do not emphasize coercion or punishment for individuals who are not vaccinated. However, regional restrictions are imposed on them and the obligation to show proof of having vaccinated travelers.⁴⁰ It has been implemented in Indonesia as well, through the Legal Instruction of the Minister of Home Affairs No. 48 of 2021 on Implementation of Level 4, Level 3, Level 2, and Level 1 Community Activity Restrictions and Optimizing 2019 Corona Virus Disease Handling Command Posts at the Village and Subdistrict Levels to Control the Spread of 2019 Corona Virus Disease in the Sumatra, Nusa Tenggara, Borneo, Celebes, Maluku, and Papua. Travel activities are subject to rules in the form of showing proof of the first vaccination certificate and PCR test result which is valid for only two days or showing proof of the second vaccination certificate and the result of the Antigen Swab test which is valid for only a single day.

4. Conclusion

The implementation of the utilitarian policy of criminalization in the context of vaccination of the COVID-19 pandemic in Indonesia seems to be ineffective. It potentially leads to the rise of public aversion and distrust. Society tends to perceive that the government is despotic and authoritarian. It encourages them to argue that the government is violating human rights. Some argue that getting vaccinated is a right rather than an obligation. Accordingly, law enforcement, missing the contextual approach to appreciating society, tends to urge the emergence of non-compliance and violations. We arguably state that the government's legal

⁴⁰ Aisya Sanghra Devi Nugraha, Eliza Putri Sanggarwati, and Sholahuddin Al-Fatih, 'Government Legal Policy: Dampak Pembebasan Bersyarat Narapidana Selama Pandemi COVID-19', *Indonesia Law Reform Journal*, 2.1 (2021). <https://doi.org/10.22219/ilrej.v1i2.17185>.

thought and practice within the specific context of the crisis (pandemic) – as it shows by the enactment of some regulations before the Presidential Regulation No. 48 of 2023 on the Termination of Coronavirus Disease 2019 (COVID-19) Pandemic Response – tend to undermine sociological considerations emphasizing the social virtues and human rights of the people. Consequently, it is recommended to the government to have a more humanistic approach which strengthens public awareness. This needs massive programs of education that especially spread true and relevant information on COVID-19 and its vaccination. Therefore, it can be argued that the implementation of the policy of criminalization is impossible without any support from society, and to get the public trust, society must be ensured by positive campaigns over-vaccination. In this case, society is the fundamental basis of the practical implementation of law.

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Utilitarian Policy of Criminalization for the COVID-19 Vaccine Refusal in Indonesia

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ARTICLE INFO	ABSTRACT
<p>Keywords: COVID-19; Criminalization; Human Rights Violations; Utilitarian Humanism; Vaccine Refusal</p> <p>How to cite: Kurniawan K. D., Bachtiar, H., & Al-Fatih, S. (2024). Utilitarian Policy of Criminalization for the COVID-19 Vaccine Refusal in Indonesia. <i>Jurnal Media Hukum</i>, 31(1), 134-149.</p> <p>Article History: Received: 03-02-2024 Reviewed: 05-03-2024 Revised: 06-06-2024 Accepted: 20-05-2024</p>	<p>This article aims to analyze several issues of the implementation of the regulation of vaccination in Indonesia, encompassing the issues of the imposition of criminalization following the vaccination refusal, discussion on its objective, and practical challenges that potentially emerge. As qualitative research, this article employed a normative legal approach and social contextualization to comprehend regulations, legal interpretations, and arguments. This article finds that the government has amended the Presidential Regulation No. 99 of 2020 on the Procurement and Implementation of Vaccination to the Presidential Regulation No. 14 of 2021 on the Change of the Presidential Regulation No. 99 of 2020 in dealing with the issue of punishment imposed on those refusing the vaccination. From the perspective of utilitarian humanism, the regulation aims to ensure the success of the vaccination and is expected to result in the herd immunity of society that determines the social welfare in the country. The implementation of the regulation is being criticized on the practical level because it is claimed to raise the likelihood of the violation of human rights and overlook the public trust on account of excessive criminalization. This article argues that support from society is vital in the implementation of the regulation, while a positive campaign over public vaccinations need to be massively urged.</p> <p>DOI: https://doi.org/10.18196/jmh.v31i1.21564</p>

1. Introduction

In the face of the widespread COVID-19 pandemic, many countries have grappled with the ethical and legal complexities of vaccine mandates.¹ Indonesia is no exception. This article examines the controversial policy of criminalizing vaccine refusal in Indonesia. Through a normative legal study informed by social context, the article explores the rationale behind the

¹ Fei Qi and Luangjiao Hu, 'Including People with Disability in the COVID-19 Outbreak Emergency Preparedness and Response in China', *Disability and Society*, 35:5 (2020), 848-53. <https://doi.org/10.1080/09687599.2020.1752622>

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