

## CHAPTER II

### LITERATURE REVIEW

#### A. The Scope of Permit

With reference to the modern state theory, permit is a combination of concepts between law-state and welfare state. A law-state theory view that the activities of the government and citizen have to obey regulation was made by state. Welfare state obliges the government to give a more prosperous life to citizen, for instance giving the services to public facilities.

The implementation of permit is one kind of the government services. Permit is a government mechanism to allow people for conducting an action. However, permit should follow the regulation from the government. Permit must be regulated specifically, focusing on the limitation of action which is allowed. The limitation aims to protect the other people from arbitrary. From the above explanations proof that permit contains of two concepts, namely: law-state and welfare state.<sup>23</sup>

#### 1. Definition of Permit

Generally, permit is a special kind of legal action and known as *vergunning* in Dutch and *perijinan* in Indonesian language.<sup>24</sup> According to Black's Law Dictionary, the definition of permit is the act of permitting, a license or liberty to do something.<sup>25</sup> Sjahran Basah said that it is difficult to define the terminology of permit. Similarly, Van der Poot explains it is very difficult to

---

<sup>23</sup> Sutedi, Adrian., *op.cit.* p. 3

<sup>24</sup> *Ibid.* p. 167

<sup>25</sup> Campbell Black, Henry, *op.cit.* p. 1176

define what permission is. The reason why the scholars difficult to define the permit because among every scholars have different focus on the object of permit. This condition makes the scholars have no consent with the definition.<sup>26</sup> For instance, the scholar may have different opinion regarding on the definition of permit in the mining and nurse practice matter.

The law maker does not prohibit an action, but require some conditions that have to be fulfilled or commonly called as *vergunning*.<sup>27</sup> In addition, Fockema Andreae defines *vergunning* as an action which is regulated under legislations and it needs special control and supervision. However, the action as mentioned above is not forbidden act.<sup>28</sup>

The objective of permit is to remove the obstacle in prohibition an action for someone to do something. With permit, the people allow which is an forbidden act before.<sup>29</sup> In Dutch, this explanation similar with *Als opheffing van een algemene verbodsregel in het concrete geval* (The objective of permit is a mechanism to remove the prohibition action in the daily activity).

Bagir Manan mentions permit in wider meaning namely an approval action from the government for public to conduct a prohibit activity. Furthermore, the approval has been regulated under the regulations.<sup>30</sup>

---

<sup>26</sup> Ridwan HR, *op.cit.* p.205

<sup>27</sup> Sutedi, Adrian., *op.cit.* p. 170

<sup>28</sup> Ridwan HR, *op.cit.*, p. 207

<sup>29</sup> *Ibid.*

<sup>30</sup> Sutedi, Adrian., *op.cit.* p. 170

As a rule, permits are defined as written decisions issued by government agencies which allow legal bodies to carry out particular activities that are prohibited in the absence of a permit.<sup>31</sup>

It is also important to mention that, in Indonesian administrative law, the authority of government officials providing permits is not limited to their issuance. They are also responsible for controlling applicants' actions after the permit is issued and may, if the permit holder violates the obligations or abuses the rights granted in the permit, decide to suspend or revoke the permit concerned.<sup>32</sup>

In his book, Adrian Sutedi defines permit (*izin or vergunning*) as an approval action by the government. Certainly, the action commonly known as prohibits action. However, regulation gives a concession to conduct the action with some requirement.<sup>33</sup>

In order to deliver a permit to the people, government has to supervise the implementation of permit. It aims to prevent the infringement of limitation of permit by people. Therefore, permit and supervision cannot be separated and should be conducted effectively.

## **2. The Differences among Permit, License, Concession and Dispensation**

In the discussion of permit definition, there are three terms which have similar meaning with permit, namely: license, concession and dispensation. In

---

<sup>31</sup> Cf. mr. N.M Spelt & J.B.J.M ten Berge, Pengantar Hukum Perizinan, as reworked by Tristam Pascal Moeliono, 2011, *Spatial Management in Indonesia: From Planning to Implementation*, p. 122

<sup>32</sup> *Ibid*

<sup>33</sup> Sutedi, Adrian., *op.cit.* p. 167

general, the definition of license is closer with permission. Usually, the term of license used in the business activities which regarding on using the brand and company product.<sup>34</sup> For instance, the owner of cyber café uses operating system. Mostly the owner does not use the original operating system. With respect to the problem of piracy, *Microsoft Corporation* gives a license to the owner for using the original software of *Microsoft Corporation*.

Concession is a government policy for specific privileges.<sup>35</sup> Furthermore, concession could be understood as a legal action of the government for giving a permit to private party in order to conduct the government duties. This situation happen because the government may not fulfill the duty for serving society especially in providing in people wealth (*beztuurzorg*).

The example of government duties may be conducted by private party are providing health service, education and other public facilities. In order to conduct the government duty, the focus of private party is not only to get benefit but also to provide people wealth. The supervision of concession is very important for preventing the fraud, corruption and other deviations that will be occurred by private party. Concession is often happens in the establishing of highway. The government will open the highway tender to invite the private party to establish the highway.

Dispensation means an exemption from a law, penalty or duty; permission to do something that is ordinarily forbidden. Ateng Syafrudin said the aim of dispensation is to open the prohibition which is normally could not be conducted.

---

<sup>34</sup> Ridwan HR, *op.cit*, p. 205

<sup>35</sup> Black's Law Dictionary, *op.cit*, p. 873

It means; the dispensation is change the prohibition with special condition (*relaxatie legis*).<sup>36</sup> Dispensation commonly happens in the campus when the student proposes to the university for giving the dispensation when the student may not to pay the tuition fee at the time.

### 3. The Elements of Permit

In view of permit, the following points are considered as the elements of permit:

#### a. Legislations

One of the characteristic of constitutional state is the government's action must be under the legislation. It means every government's action has to refer to the regulation which was made. F.A.M. Stroink and J.G. Steenbeek in Ridwan HR book's explain that: *Om positief recht ten kunnen vastellen en handhaven is een bevoegdheid noodzakelijk. Zonder bevoegdheid kunnen geen juridisch concrete besluiten genomen worden.* (To conduct and enforce the regulations, we need an authority. Without the authority, we could not produce concrete legal decision).<sup>37</sup>

Therefore, in the permit issuance matter, legislation has to rules specifically about which government body who competent and what the government body authority is. This situation relates to legality principle. In legality principle, every government activity requires to refer to the legislation.

---

<sup>36</sup> Sutedi, Adrian., *op.cit.* p. 178

<sup>37</sup> Ridwan HR, *op.cit.* p. 213

**b. Permit as a Legal Instrument**

The obligation of government is giving the prosperous life to the people. The people facility such as health, education and infrastructure should be provided in order to fulfill that obligation.

The government must have an authority to produce legal instrument. In the administrative law, the legal instrument is called by decree (*beschikking*). The characteristic of decree is concrete, individual and final. Permit is one kind of governmental decree.

According to the types of decree, permit is included as decree of constitutive. Constitutive means permit occurs a new right and obligation to the individual or groups relating to issue of permit. Furthermore, the content of law, right and obligation has been fulfilled by permit with the specific characteristic. Hence, the permit is one legal instrument which is based on the characteristic of permit itself.

**c. Governmental Organization**

Governmental organization is the organ which conducts the governmental affair whether in central or local level. In a matter of issuance permit, the governmental organization could produce the permit according to the position of the governmental organization itself. There is distribution of authority in this matter. Central and local government have their own area of authority of issuance of permit.

The type of various governmental organizations that issue the permission could make the process of permission run smoothly, because the

process of permission is depend on the performance of government organ. Thus the lack of government performance may become a problem for applicant.

Theory of deregulation and debureaucratization are used in the permission procedure to ignore the regulation which infringes the process of permission. However, the implementation of deregulation and debureaucratization should determine the following below:

1. Do not eliminate the essence of permission system itself;
2. Deregulation could only be prevailed in matter of administration and financial;
3. Deregulation and debureaucratization do not eliminate the basic of permission regulation;
4. Deregulation and debureaucratization have to consider good governance.

#### **d. Concrete Event**

Permit is one kind of legal instruments. Which has an important role in facing the concrete event of daily life. Concrete event means a fact happens in certain place, time and subject. The various event also produce various kinds of permit. Not only the kinds of permit, but also the procedure adjusts the concrete situation.

For instance: among permit procedure for nursing clinic is different with doctor clinic. There are different competences between nurse and doctor. The government will give a permit according to the competence of health profession. For nursing clinic does not need disorder and waste permit.

Nevertheless, for doctor practice both permit, disorder and waste permit are needed.

**e. Process and Procedure**

Process and procedure of permit are regulated base on the government goals in order to develop the country. Process and procedure could be different among the kinds, the institutions and the goal of permit. Therefore, the private party would like to propose permit should follow to some requirements in the process and procedure of permit regulated by the government.

In the process and procedure of permit, lack of competence may appear in the reality. Some government officers have no competence to give a permit to applicant. The legal knowledge of government officer is important in this process, yet they should have a knowledge relating to the matter of permit. It is the way to prevent the problem of issuance a permit.

There are some contact in the permit process and procedure. Sometimes in the contact between the government officer and private party (applicant) may appear the infringement of good governance principles such as bribery.

The government should rule the requirement of permit procedure specifically to prevent bad behavior. The amount of cost should be mentioned in the requirement. Detail of cost may prevent the bribery action. The requirement also has a control function to limit the people propose the permit.



Although the government has an authority to rule it, yet they should not arbitrary in making the requirement of permit process and procedure.

In the process of requirement, government should explain how long the process will run. It is a part of transparence and good service from the government. The government officer will work under control of the government. Punishment could be prevailed if needed.

#### **4. The Function of Permit**

From the point of view of administrative law, permit is important government tools and a social engineering mechanism for directing and monitoring people's behavior, in order to achieve certain goals and/or implement specific laws.

Permit basically allows an action which is generally prohibited. So, the function of permit is limit the access of society to conduct this action. The requirement of permit related to the social engineering. The permit for serious action must has high requirement. For instance mining activity permit, the effect of mining to the environment is damage. Mining activity could damage the surrounding area such as pollution the air, land and water. In this activity, the requirement should be strict to control which society could conduct this activity.

## **B. The Scope of Nursing Clinic**

### **1. The Competence of Nursing Practice**

Nurse, one of health profession in Indonesia has specific competence in order to give the health service to society. The separation of competence in health profession is important because the overlapping of competence by health profession may be categorized as medical malpractice, whether administration or criminal malpractice.

Erna Tri Rusmala stated that according to the authority of nursing practice, there are three competences, as follows:<sup>38</sup>

- a. Independent competency;
- b. Delegation competency; and
- c. Wider out competency.

In the nursing practice, nurse should implement the theory of nursing care in giving the treatment to the patient. Nursing care gives the treatment according to the specific problems, such as nursing care for children, fever and other medical problems. Nursing care explain what is the proper treatment to the patient with a specific problem.

Some literatures and regulations have talked about the competence of nurse. Such as Health Minister Decree No. 1239 of 2001 which specifically explain about the nursing practice especially in Article 15 to 20. Article 15 state:

---

<sup>38</sup> Erna Tri Rusmala R., *op.cit.* p. 93

- a. The process of nursing care is consist of assessment process, decision, diagnose, treatment plan, nursing action and evaluation;
- b. The nursing actions as mentioned in point (a) also included: nursing intervention and observation, education and health counseling;
- c. In conjunction with the nursing care which mentioned in point (a) and (b), the nursing care should follow the standard which is decided by organization of profession;
- d. Medical care could be conducted by nurse as long as the doctor delivers the written request.

From above statement there is a conclusion the division of nursing care consist of several process as stated in point (a) namely:

- a. Assessment

Assessment is systematic collection of data relating to patient, also the problems and needs. The assessment process will influence the other processes of nursing care. The data collected in this process will be used to determine which action has to be taken by nurse. Usually, the method used in this step is interview. Nurse will ask to the patient about the factors of problem.

- b. Diagnosis

According to NANDA International the definition of nursing diagnosis is a clinical judgment about individual, family or community responses to health problems. A nursing diagnosis

provides the basis for selection of nursing interventions to achieve outcomes for which the nurse is accountable.<sup>39</sup> Nurse will analyze data which has received through the assessment process. After the analysis, the data will be interpreted to determine which treatment should be given to patient.

c. Planning

After diagnose, the next process is planning. Nurse should prioritize patient needs based on the data of assessment. After that nurse identifying goals and choosing solutions. Nurse should choose the most prioritize action to the patient.

d. Nursing Action

Generally, nursing action is realization of plan. In the article 15 poin (b) Health Minister Decree No. 1239 stated nursing intervention and observation, education and health counseling are the components of nursing action (implementation).

Nursing interventions are actions undertaken by a nurse to further the course of treatment for a patient.<sup>40</sup> The treatment should be appropriate with the analyzing of assessment data. It aims to protect the disorder action to patient. After giving the treatment, nurse observes the reaction of patient. Whether or not the treatment have a good effect to patient.

---

<sup>39</sup> NANDA International, 2009, *Nursing Diagnoses*, West Sussex, Wiley-Blackwell, p. 419

<sup>40</sup> <http://www.wisegeek.com/what-are-nursing-interventions.htm> accessed on April 20<sup>th</sup>, 2012

e. Evaluation

Assessing the effectiveness of the plan and changing the plan as indicated by current needs. Evaluation information in data, action and response (DAR) categories facilitates tracking and following what is happening to the client at any given moment.

The standard of nursing care has been regulated in the standard of nursing competence which has been compiled by Indonesian Nurse Organization (Persatuan Perawat Nasional Indonesia). It contains the detail standard of nursing care.

If refer to point (d) basically medical action is only competence of the doctor, so nurse has no authority to conduct it. Nurse just help the doctor in giving the medical action to patient. Yet, nurse could conduct it if doctor deliver a written request. Another condition which allow nurse to give medical action is in the emergency condition. It has rule in Article 20.

Nurse also has right and obligation in order to conduct his/her practice. The right is mentioned in Article 16 as follows:

- a. Nurse has to respect to right of the patient;
- b. Refer to the doctor for unhandled problem;
- c. Keep the patient's secret as stated in the legislations;
- d. Giving the information;
- e. Propose an approval for the action; and
- f. Well recorded the nursing document.

## 2. The Definition of Nursing Clinic

Every health profession has an authority to open special clinic as stated in the regulation. According to Article 23 Sub-article (1) of Health Act 2009

*Professional medical officer has an authority to conduct health services*

Nurse as one of health profession has an authority to open the clinic. The supporting regulation for nursing practice is Health Minister Decree No. 1239 of 2001 and Health Minister Regulation No. 148 of 2010. In those regulations, there are stated implicitly about the competence and area of nurse in conducting nursing clinic. The competence of nurse in condition refers to article 15 to 20 of Health Minister Decree No. 1239 of 2001. In Article 8 of Health Minister Regulation No. 148 state:

1. Nursing clinic is began to be conducted in the first up to third levels of health service facility;
2. Nursing practice aims to individual, family, groups and society;
3. Nursing practice is conducted through the activity:
  - a. Nursing care implementation;
  - b. The implementations of promotion, preventive, rehabilitation and social utilization;
  - c. Complementary nursing action;
4. Nursing care (sub article 3) poin A consist of assessment, nursing diagnose decision, planning, implementation and nursing evaluation;
5. Nursing implementation (sub article 4) consist of the implementation of planning and nursing action;

6. Nursing action consist of nursing procedure, nursing observation, education and health counseling; and
7. In conjunction of nursing practice, nurse could give over-the-counter drugs.

In Article 9 state that nurse should operate the clinic with nursing competency. Yet in Article 10 rules the exception for nurse conduct over the competency in the emergency situation and the lack supported human resources for instance a patient need a medical action but there is no doctor in that location.