

DOCTOR LEGAL PROTECTION FOR ACTION OF ABORTION DUE TO RAPE

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A. Introduction

The issue of abortion is not an open secret and is not a strange matter to be discussed. This is because abortions occur everywhere and can be done by anyone from various circles, whether it is by teenagers who are due to promiscuity or adults who do not want this future baby to be born. The birth of a child should be considered a gift from God Almighty, not considered an unwanted burden of life. It is very ironic, a lot of husband and wife want the presence of a baby for years, but on the other hand there are couples who throw away their fetus or child who is still in the womb without human instinct.

Regarding the act of abortion, in Indonesia it is necessary to review the purpose for which it is performed. There are several perceptions that arise regarding the consideration of efforts to save the condition of the mother or related to the problem of considering the shame to protect the good name of the family. The problem of abortion is still seen as a crime by some people. In the legal system in Indonesia, the problem of abortion can be done in matters relating to abortus provocatus medicalis, this can be done because there are certain things. But at a certain point, the problem of abortion can become a criminal problem known as abortus provocatus criminalis.

This is despite the reasons that arise in the fact that abortion is carried out for reasons of health or for other reasons, for example an unwanted pregnancy, for reasons of economic problems so that the abortion must be performed, this condition can be categorized as an abortion have an impact on the occurrence of a criminal act in that action.

Abortion can fall on the choice to do or not, and this is called Prochoice and ProLife. This condition has imposed an obligation on the government to be able to make efforts to fulfill adequate health facilities related to this abortion. Patient's safety and security factors are the top priority that must be considered. This is intended to reduce the risk of maternal death as an abortion result. There must be a clear government policy in dealing with abortion, so that it does not harm the safety of the mother's life. The question is how the legal provisions governing abortion by doctors for rape victims.

B. Research Method

The paradigm used in this research is the positivism paradigm. With an emphasis on understanding the truth that comes from empirical experience or facts that are clearly described through sensing or observation, so that the source of knowledge is found in the natural sciences approach. Truth is based on empirical facts in order to build certainty about the phenomena that occur. In this case, with regard to legal facts that occur in the case of abortion. The research approach used is normative juridical, the law is conceptualized as law about rule, written law that regulates abortion, namely the Criminal Code and Act Number 36 Year 2009 on Health. The research approach by examining the applicable legal provisions in writing is a reference for virtue considering that the validity of legal norms in society can be viewed from various perspectives. And the main thing is that the objectives of the law can still be achieved to build legal justice in society, legal certainty and the benefit of applicable legal principles.

C. Theoretical Foundation

The definition of abortion is the removal or abortion of a pregnancy where the aborted fetus has no possibility of living outside the womb. This is as revealed by medical science. This will be different from abortion without medical reasons, this can be categorized as illegal and violates applicable legal norms. In the regulation of the Criminal Code it is classified into crime because of human life problem. The process of abortion can be carried out in its own way, by consuming drugs that are capable of aborting the fetus, it can also be done through deliberate acts with the intention of aborting the womb. Abortion is carried out with the involvement of other people, the help of a

doctor, midwife or it can also be assisted by a traditional birth attendant who helps with the delivery. If the abortion is categorized as a criminal offense, because the act of abortion involves another person, the legal facts can occur more than one person who can be held liable for the criminal incident.

The phenomenon of abortion can be a violation of the doctor's oath and code of ethics, so that it is found that in some countries it is prohibited to carry out the act of abortion, because the reason is that abortion is not only seen in terms of efforts to save the condition of a pregnant mother in an emergency condition, or because the mother does not want it. Abortion is a crucial issue in building public health, especially for mothers and children, so that on the one hand the problem of abortion becomes a pro and contra in society. There is a strong current of opposition to the act of abortion in the community because in some cases it was found that abortions were carried out because of an pre-marriage pregnancy, or in some cases because of the economic conditions of family poverty.

At the level of the doctor's code of ethics, the problem of abortion is not given a room for justification, but in certain contexts abortion can be done on the condition that there is a medical reason, namely mental retardation, due to the crime of rape, abnormal birth of a baby or congenital abnormalities, disabilities. In its development, the act of illegal abortion has become a profitable economic practice and promises huge profit aspects, along with changes in modern lifestyles, in building relationships between women and men. Illegal abortion is rife, and doctors are allowed to perform these actions without paying attention to the safety of the mother soul who performed the abortion. Even though we can clearly understand that abortion is certainly not acceptable to the doctor's oath and the prevailing legal norms. The doctor's position is placed in the category of the main party who plays a role in this abortion issue, although on the other hand there are other health workers, formal or non-formal.

The act of abortion can become a criminal problem if the criminal elements in the act are fulfilled, and abortion can also have a negative impact on the party carrying out the abortion, regardless of the reasons why the abortion must be performed by the mother. For this reason, there must be clear regulations governing the matter to guarantee legal justice and legal certainty for the parties. Regulations related to abortion are contained in the Criminal Code as regulated through the legal provisions of Article 299, Article 346, Article 347, Article 348 and Article 349 and also regulated through Act Number 36 Year 2009 on Health, Article 75, Article 76, Article 77.

If the two regulations are juxtaposed between the Criminal Code and Act Number 36 Year 2009 on Health which regulates abortion.

Whereas the provisions of the Criminal Code have clearly stipulated that there is a prohibition of having an abortion for any reason, however in the regulation of the legal norms of the Health Act, it is possible to allow abortion to be carried out, because the reason is that there is a medical indication or because of the rape.

Furthermore, it was found that a review in the legal norms regulating the issue of abortion for Act Number 36 Year 2009 must refer to restrictions that are not possible to be violated, for example in cases where the state of pregnancy has reached a maximum of 6 (six) months after the first day of the last menstrual period. The substance of Act Number 36 of 2009 has also provided a limitation corridor with normative regulations that medical action in relation to abortion is carried out in the context of efforts to save a pregnant mother and her fetus, this action is carried out by medical personnel with competence expertise and authority inherent due to professional duties and considerations by a team of experts. If this happens, the abortion is considered to be carried out legally without violating legal norms, there is an aspect of legal protection for the parties involved in carrying out the act of abortion. There are aspects of obligations and issues of protected rights. Balance of rights and obligations can be maintained and harmony for the parties. This is much different when an abortion is performed without medical reasons and considerations, the abortion becomes illegal so that it cannot be justified based on applicable legal norms.

Abortion can be defined as the process of releasing the results of conception in pregnancy before reaching the time limit of 20 (twenty) weeks or five months with the condition that the fetus weighs less than 500 grams¹. Based on the definition of abortion, it is the removal or abortion of a pregnancy in which the aborted fetus has no possibility of living outside the womb. This is in accordance with what medical science reveals that a fetus weighing less than 500 grams is unlikely to live outside the womb even though there are medical reports stating that there are fetuses under 500 grams that can live. This is because a fetus weighing 500 grams is the same as 20 weeks of gestation,

¹ Rose Kusuma Ningratri, *Esiklopedi Kesehatan Untuk Umum*, (Yogyakarta: Ar-Ruzz Media, 2010), hlm. 13.

so the birth of a fetus under 20 weeks is an abortion². Medical experts describe that abortion or miscarriage can be divided into two types, namely³:

- a. *Abortus spontaneus*, is an abortion that occurs without coercion or naturally that occurs without any external encouragement or without human intervention. In this category, abortion that occurs accidentally can be called spontaneous abortion and natural abortion is known as abortion, usually because it occurs due to natural factors, the result of various factors including venereal disease, accidents or other pregnancy disorders.
- b. *Abortus Provactus* is a deliberate abortion due to human intervention due to an unwanted pregnancy. There are various types of abortion, including 1) provactus medicinalis abortion, which is an abortion for medical reasons such as a dangerous disease if the womb is not aborted, or an attempt to abort the womb in the context of saving the mother's mental condition; 2) abortion provocatus criminalis, as a form of abortion in the presence of intentional elements with conditions of violating the law, such as abortions on the grounds of shame with neighbors, abortion due to illegal relationships, abortion due to not being ready to have children and so on.

D. Discussion

There are many reasons for abortion, this is because the problems faced by humans are very complex, this makes it difficult for people to make the right decisions. Whatever the decision is made, the abortion has a huge impact on the parties involved in carrying out the action, in this case including provocatus abortion to abort a fetus that the mother does not want to be born with.

Abortion is the release of the fetus in the womb before delivery. The fetus in the womb that is released prematurely can certainly be caused by various reasons that cause the uterus to fall. The reasons for abortion are various, among others⁴:

1. Pre-marriage pregnancy

Pregnancy that occurs as a result of intimate contact outside the womb is an unwanted pregnancy. Pregnancy that occurs outside the womb is one of the effects of promiscuity where this situation leaves a big problem including the increase in pregnancy outside of marriage. This situation can be caused by low human resources regarding sexuality. Pregnancy that occurs outside of marriage in Indonesia is something that is considered a disgrace by most of the community and family. It becomes psychological pressure for women who get pregnant outside of marriage and decide to have an abortion.

2. Socio-economic factors

People who are at an economically disadvantaged level usually experience many complex problems. People who cannot afford it tend not to pay attention to reproductive health problems. This can be due to a limited level of knowledge about reproduction, so that the poor do not consider the number of children. The large number of children in poor communities will carry a financial burden so that if the pregnancy occurs again, the choice of abortion is considered a good way because they do not have the money to raise the children.

3. Factors of having a lot of children

The factor of the number of children is actually related to socio-economic factors. Too many children can become a burden for parents, especially for the poor, having many children will become a financial burden. So that the reason for having many children becomes an excuse for an abortion because the child needs too much.

4. The mental readiness factor to have children

Some young couples who marry too early so that they seem rushed without careful consideration often feel that they are not ready to have children, unpreparedness can occur due to economic factors, career development, or household problems. In some cases, the household conditions of the young family are sometimes found, making an agreement to jointly commit to postpone having children, within a certain period of time in accordance with the unwritten agreement, so that in certain cases it turns out to be pregnant but the condition does not allow the young family to have children, they choose to have an abortion, provided that conditions from various factors were unavoidable.

² Alexandra Ide, *Etika Hukum dalam Pelayanan Kesehatan*, (Yogyakarta: Grasia Book Publisher, 2012), hlm. 71.

³ Nasrun Harun, *Ensiklopedia Hukum Islam*, (Jakarta: PT Ichtiar Baru Van Hoeve, 2009), hlm. 7

⁴ Paulinus Soge, *Legalisasi Aborsi di Indonesia Perspektif Perbandingan Hukum Pidana: Antara Common Law System dan Civil Law System*, (Yogyakarta: UII Press, 2009), hlm.136.

5. Pregnancy caused by rape

This condition is seen as a very dilemmatic condition, so that it can have a negative impact in the decision to have an abortion, this is due to an unwanted pregnancy. There are great psychological and mental disorders for women who experience this condition. The fetus that is in the womb as an unwanted fetus, the bad incident that has befallen a woman as a result of this rape, sees what is in her womb as something that must be eliminated without seeing the existence of the fetus life as a human being who has the right to live.

Based on Act No. 36 of 2009 on Health as stated in Article 75 paragraph (1) it stipulates that everyone is prohibited from having an abortion. In this article, it is stated that everyone is prohibited from having an abortion, but there are exceptions, namely abortion based on medical indications and abortion due to rape victims. This is also regulated in the legal provisions of Article 75 paragraph (2) the prohibition as stated in Paragraph (1) contains exceptions based on the following conditions:

1. There are indications of a medical emergency that has been identified at the time of early pregnancy, that emergency, suffering from serious genetic diseases or pregnancy that cannot be maintained or does not allow the fetus to live outside the womb.
2. Pregnancy caused by rape so that it can cause psychological trauma for the rape victim.

Based on the legal product, the Law on Health regulates the exclusion of abortion, namely due to indications of medical emergencies and pregnancy due to rape victims. The exception to abortion due to rape is a new law in Indonesia. Then in Act Number 36 of 2009 on Health, Article 75 Paragraph (4) regulates that the problem of emergency indication as well as relating to rape victims is regulated in a Government Regulation. Act No. 36 of 2009 has mandated the terms and conditions for medical indications and victims of rape in having an abortion as regulated in Government Regulation Number 61 of 2014 which stipulates that abortion can be carried out with indications of a medical emergency or rape victim, and abortion that occurs as a result of the victim of rape as described in paragraph (1) letter b, which states that the act of abortion can be carried out no later than 40 days from the first day of the last menstrual period.

The practice of abortion due to rape in its implementation has standards as stipulated in Article 35 of Government Regulation Number 61 of 2014 that abortion in its implementation must be carried out in accordance with the standard of professional competence, namely the profession as a doctor with adequate health infrastructure with reference to medical service standards. This is because abortion must be carried out safely, with quality and responsibly, namely:

1. The act of abortion is carried out based on medical emergency factors, its implementation still refers to clear and definite parameters based on the patient's sense of safety, good quality standards and can be accounted for (accountable).
2. The implementation of abortion practices that can ensure patient safety, meet the parameters of guaranteed quality of service and can meet the criteria of accountability, the action is borne by the profession of a doctor based on the medical competence factor parameters, with actions taken through medical infrastructure in accordance with the provisions that have been determined by the Government, through request and approval from the pregnant woman, or obtaining consent from the husband, except in the case of rape, the victim's interests must be considered, on the other hand, attention must also be paid to avoid discriminatory treatment and not prioritizing financial/economics aspects in making decisions regarding the implementation of the abortion.
3. A woman who is pregnant as referred to in the provisions of the Act Paragraph (2) letter c and under certain conditions does not have the ability to express her willingness to have an abortion, this fact allows other family members of the woman to give her consent.
4. For certain conditions when the husband is unable to be contacted, the issue of consent to abortion can be given by the family.

Based on this Government Regulation requires abortion to be carried out with a specified standard. The reason this occurs is because we found that most abortions or abortion practices occur in ways that can endanger the health of the abortionist, for example by using the services of illegal abortion clinics. So with the existence of the existing legal institution it aims to provide clear boundaries based on the interests of the parties so that it can provide justice for the parties, certainty in decision making and be able to guarantee benefit in the context of building mental safety. On another perspective it must also be considered that the doctor or medical personnel in carrying out the abortion, it is required that a doctor or medical personnel have sufficient expertise and competence. This is intended to provide safety to patients, quality in service and can be accounted for.

In the provisions of legal norms in the contents of Article 346 to Article 349 of the Criminal Code, the regulation does not question the mother's reason for having an abortion, this is very interesting to study. In contrast to childkilling, which must have a reason for fear of having a pregnancy that is known by people. Unlike the case with aborting for medical reasons, if the fetus is not aborted it will threaten the safety of the mother, for that in material considerations it does not

meet the category of illegal acts. These considerations provide legal analysis that abortion due to medical considerations cannot be included in an act that fulfills the elements of a criminal offense.

Even so, in the paradigm of a criminal law approach, such as "*abortion provocatus criminalis*" is an act which is prohibited and can be subject to criminal penalties. However, in reality, abortion cases are still often found in the community.

The proliferation of illegal abortion practices can be influenced by several factors and the practice of covert abortion is spread throughout the country, both medically in the city and traditionally in rural areas. Usually, the infiltration of Western culture to Indonesia has increased free sex, which has made pre-marriage pregnancy more prevalent and has increased the number of cases of abortion and the sale of abortion drugs, both chemical and traditional medicines that are easy to obtain.

Based on the Criminal Code, it states that in the act of abortion it is possible to have a criminal element arise. There is criminal liability for the parties who do it. This is a consideration that doctors and medical personnel do not feel comfortable in carrying out their profession because they are overshadowed by the possibility of legal sanctions when carrying out their duties. A medical personnel can safely carry out their duties without fear of being caught in legal proceedings if they practice in accordance with the Medical Practice Law. But if a doctor deliberately opens a practice or performs an illegal abortion, criminal and administrative sanctions may be imposed.

When examining the substance of the legal provisions stipulated in the Criminal Code, it is clear that it has regulated the prohibition of abortion, and in Act No. 36 of 2009 on Health has regulated the existence of exceptions for acts of abortion due to reasons for the occurrence of rape considering logical and rational considerations based on conscience and not contrary to the medical code of ethics, these arrangements can be found through the legal provisions of Article 75, Article 76 and Article 77 of Act Number 36 of 2009 on Health.

The results of the research show that there are people who have abortions due to rape who are caught in legal cases, this proves that the provision of abortion to rape victims is limited to less than 40 days of pregnancy. The normative regulation becomes multiple interpretations because the act of abortion is perceived as possible because of the occurrence of rape which can result in the possibility of psychological, mental and adverse effects that can occur at any time affect a woman rape victim, regulations must suppress these problems because in the applicable legal provisions, there has not been a deep discussion of the matter in question, especially in the content concerning the explanatory part of the law.

Based on medical considerations, there are no clear parameters regarding the time period when the abortion can be performed so that it can be done at any time if a clear medical reason is found, it is logical for the abortion to be carried out, for example when it is found that the baby born is considered to be disabled severe or there is a consideration that the mother has heart failure so that it can endanger the health and safety of her mother if she gives birth. These medical considerations are factors that can determine whether *abortus provocatus* is performed⁵. This is very important to be studied because it can determine the legal burden attached to the parties regarding the issue of their rights and obligations, as a result of their legal actions.

The complexity of legal abortion process, which collides with a queue of laws and government regulations, has made abortion cases in illegal clinics increasing. The research fact states that there are more abortions that are not covered by legal problems than those that are covered by legal problems, one of them is abortion in illegal clinics. This situation causes violations of the law for aborters and medical personnel.

Legal responsibility can be examined from the provisions of the criminal law which include Article 246, Article 347 and Article 348 of the Criminal Code. Which regulates if the practice of abortion is carried out illegally by a doctor or other health worker, the criminal threat will be exacerbated by an additional one-third of the criminal threat and administrative sanctions such as revocation of the license to practice.

In the perspective of civil legal liability emergence is based on the possibility of unlawful acts elements emergence (onrechtsmatigedaad) in the field of health services. A doctor can be subject to civil liability if he does not perform his obligations at all, is late in carrying out his obligations, carries out obligations but in certain cases it is found that there are inconsistencies with what should be done, taking medical measures but which should not be carried out such as illegal abortion is an act which shouldn't have done. Illegal abortion can also be defined as activities that violate administrative law.

Rape cases with reference to the legal norms of Government Regulation Number 61 of 2014 and Act Number 36 of 2009 on Health, that the act of abortion, if possible, must have the consent of the family, namely the consent of the parents because when having an abortion it can cause women

⁵ Suryono Ekotama, *Abortus Provokatus Bagi Korban Perkosaan Perspektif Viktimologi, Kriminologi dan Hukum Pidana*, (Yogyakarta: Universitas Atma Jaya, 2001), hlm.35.

of rape victims in a state of unconsciousness and even result in death due to abortion such as bleeding. This reason is an important consideration for the need for permission from the family to understand the conditions for putting the safety of the mother's life first.

Legal aspects concerning the emphasis on the protection of the parties are based on Article 37 of Government Regulation Number 61 of 2014, a form of protection aspect, namely the existence of counseling in carrying out abortion.

The formulation of this article shows that an abortion act, both medical emergencies and rape victims, can only be done through physical examinations, supportive examinations and pre-treatment and post-action counseling carried out by a professional counselor. Apart from having to do counseling with professional counselors, counselors can be done by doctors, psychologists, community leaders, religious leaders, and anyone who has an interest and talent in the field of counseling which is supported by a certificate or special education in the counseling field. The consideration of legal protection aspects emergence as a result of the crime of rape, this is due to the impact of rape, that the party who is the victim of rape is not only physically injured, but rape causes psychological trauma that can have a lasting negative impact.

E. Conclusion

Abortion can only be done casuistically based on a medical emergency that threatens the life of the mother or fetus, as well as for victims of rape in accordance with Act Number 36 of 2009 on Health and Government Regulation Number 61 of 2014 on Reproductive Health.

Legal sanctions for abortion by doctors in the context of rape, if proven to have violated the abortion problem, are contained in Article 346, Article 347, Article 348, Article 349, and Article 350 of the Criminal Code. And Act Number 36 of 2009 on Health provides exemptions for abortion that is carried out as a result of rape, this is regulated in Article 75, Article 76 and Article 77.

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