

Legal Protection of Abortion for Rape Victims

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ABSTRACT

This study discusses: How is the legal review of the act of abortion as a result of rape based on Law no. 39 of 1999 concerning Health and its Relation to Human Rights, and how is the application of material criminal law by Judges to perpetrators of participation in the crime of abortion. The approach method used in this study is a normative juridical approach. The data collection method in this study was carried out by means of literature study. The data that has been collected, then processed and analyzed using qualitative methods. The results of this study can be concluded that: Rape victims experience unwanted pregnancies not only experience mental and psychological suffering, they also have to seek justice through legal means as a result of their abortions. The Indonesian Criminal Code strictly prohibits all forms of abortion. Whereas Law Number 36 of 2009 concerning Health provides confirmation of legal abortion arrangements, namely the result of medical emergencies and pregnancy as a result of rape. The perpetrator of the abortion as a result of rape is included in the category of unlawful acts or strictly regulated in Article 48 of the Criminal Code that no one can be punished by anyone who commits an act because he was forced by an urgent condition (overmacht). Human rights which are more specific to women's reproductive rights as part of women's human rights are guaranteed to be fulfilled in the Constitution of the Republic of Indonesia jo. Article 49 paragraph (3) of Law Number 39 of 1999 concerning Human Rights states that the special rights attached to women due to their reproductive function are guaranteed and protected by law. Children as victims of rape as well as perpetrators of abortion who are charged with imprisonment will have a negative impact on the mental growth and soul of the child. Based on criminal responsibility explained in the doctrine that the elements seen are the ability to be responsible, there is an element of error, there is no excuse for forgiveness. Rape victims as well as abortion perpetrators, who are clearly victims, instead receive unfair treatment when seeking justice. Children should receive guarantees for normal physical, mental and mental development. Settlement of cases against child victims of rape as well as perpetrators of abortion through the judicial process, the results will give a negative stamp to children as convicts who can adversely affect the community environment.

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I. INTRODUCTION

Abortion or known as Abortus Provocatus is not only a medical or health problem, but also a problem that arises because humans follow Western civilization.

The problem of abortion today is no longer a secret to talk about, because abortion has become an actual thing and the event has happened everywhere and done by anyone, for example, done by teenagers who are involved in promiscuity that initially dating ordinary, but after a long dating they have intercourse, because of shame and fear of being caught, It can also be done by a married wife who does not want to be burdened with the responsibility of the birth of a child, so she aborts the child in her womb, even though the birth of a child should be considered an infinite gift, this is instead considered a burden whose presence is not desired. This is very ironic because on the one hand people get married because they want to have offspring, even those who have been married for years have not yet had offspring, they have to do various ways to get offspring immediately, but on the other hand, there are couples who throw away their own biological children who are still in the womb without any human conscience.

The term abortion or Abortus provocatus comes from the Latin language which means miscarriage of the womb due to deliberation. Abortus Provocatus is one of the various types of abortion. In the Indonesian Latin dictionary itself, abortion is defined as an untimely womb or miscarriage. The definition of abortion or Abortus Provocatus is the termination or expulsion of pregnancy from the uterus prematurely.¹ In other words, "expulsion" means that the exit of the fetus is intentional by human intervention, whether through mechanical, medicinal or other means.

Basically, abortion is a phenomenon that lives in Indonesian society. Abortion can be said to be a "hidden" phenomenon because the practice of abortion often does not come to the surface, even tends to be covered by the abortionist or the community. This cover-up is influenced by formal laws and political, social, cultural and religious values.

The impact of the many cases of unwanted pregnancies, especially rape victims, basically brings bad consequences, in addition to the victim experiencing a long trauma even for life, she cannot continue her education, cannot socialize with her environment. Likewise, if the child is born, the community is not ready to accept his presence and even gets stigmatized as an illegitimate child who cannot mingle with other children in the neighborhood and receive other negative treatment. While if aborted (abortion), in addition there is no safe place of service and legally considered a criminal act, violation of religious, moral and social norms. In looking at how the legal position of abortion in Indonesia is very necessary to look back at what is the purpose of the act of abortion. So far, the issue of abortion is generally considered by most people as a criminal offense. However, in positive law in Indonesia, abortion in certain cases can be justified if it is a medical provocatus abortion. Meanwhile, abortion that is generalized into a criminal act is better known as abortion provocatus criminalis.

The term abortion in criminal law in Indonesia is known as the crime of "miscarriage of pregnancy". In general, the regulation of abortion is contained in Articles 299, 346, 347, 348, and 349 of the Criminal Code. These articles clearly and unequivocally regulate the prohibition of abortion for any reason, including abortion for emergency reasons (forced) as a result of rape, both for the perpetrators and those who assist in abortion. The penalties are even doubled if the abortionist is a medical professional. This provision is particularly onerous for medical teams who perform abortions for medical reasons.

Before the revision of the health law, there was still a lot of debate about abortion performed by rape victims, including medical personnel who assisted in performing the abortion. This is because there is no article that clearly regulates the abortion of rape victims. So far, there are many views that interpret that abortion of rape victims is equated with medical indications so that it can be done because psychological disorders against the mother can also threaten the life of the mother. On the other hand, there is also a view that abortion of rape victims is a criminal abortion because it does not endanger the life of the mother, and the old health law, Law No. 23 of 1992, does not contain clear provisions.

Legal protection of women victims of rape who perform abortions received attention with the enactment of Law No. 36 of 2009 on Health, and as a substitute for Law No. 23 of 1992. With the issuance of the revised health law, the legalization of abortion against rape victims has been clearly contained in Article 75 paragraph 2 of Law No. 36/2009 on health. However, this law has caused controversy in various layers of society because the articles governing abortion in medical practice contain various reactions.

Based on this description, one problem that needs to be studied further is how the legal protection of abortion (abortus provocatus), especially those performed by victims of rape according to the Criminal Code (KUHP) which applies as *lex generale* and Law No. 36 of 2009 concerning Health which applies as *lex speciale*.

¹ Kusmayanto, SCJ, *The Abortion Controversy*, Jakarta, PT Gramedia Widiasarana Indonesia, 2002, p.203.

II. RESEARCH PROBLEMS

1. How is the legal review of abortion due to rape based on Law No. 39/2009 on Health and its Relationship with Human Rights?

III. RESEARCH METHODS

The approach used in this research is a normative juridical approach, which is a method of study based on secondary data in the form of legal materials, especially primary legal materials, in this case positive criminal law regulations that are relevant to the existing problems. This research includes descriptive analytical research, which describes the applicable laws and regulations or positive laws associated with legal theory and the practice of implementing positive law in society. Descriptive research is research to solve problems that exist in the present (actual problems) by collecting data, compiling, classifying, analyzing and interpreting it.² Thus, this research can provide an overview of the regulation of abortus provocatus, especially for rape victims in criminal law, and because this research focuses more on a normative juridical approach, the determination of population, samples and sampling techniques is not a necessity.³

IV. RESULT AND DISCUSSION

1. First Research Problem Discussion legal review of abortion due to rape based on Law No. 39/2009 on Health and its Relationship with Human Rights

1. Definition of Abortion

In terms of abortion is the abortion of the womb, the discharge of conception or fertilization prematurely. In the Indonesian English dictionary Abortion is translated as abortion.⁴ Kata Abortion dalam Blaks's Law Dictionary, diterjemahkan menjadi aborsi dalam bahasa Indonesia mengandung arti: "Pengusiran embrio atau janin yang diinduksi secara spontan atau tidak resmi. Seperti yang digunakan dalam konteks ilegal mengacu pada aborsi yang diinduksi."⁵ Thus, according to Blaks's Law Dictionary, a miscarriage with the expulsion of the embryo or fetus is not merely a natural occurrence, but is also intentional or occurs due to human intervention (provocation).⁶

The Indonesian Encyclopedia gives the following definition of abortion: "termination of pregnancy before the gestation period of 28 weeks or before the fetus reaches a weight of 1,000 grams".⁷ Another definition of abortion is the process of terminating the life of a fetus before it has had a chance to grow.⁸ In addition, here is the definition of abortion according to experts, namely:⁹

- a. Eastman: Abortion is a state of termination of a pregnancy in which the fetus is not yet able to stand alone outside the uterus. Not yet able to be interpreted if the fetus weighs between 400 - 1000 grams or less than 28 weeks of pregnancy;
- b. Jeffcoat: Abortion is the removal of the result of conception before 28 weeks, ie the fetus is not yet viable by Ilaous;
- c. Holmer: Abortion is the termination of pregnancy before the 16th week where placentation has not been completed.

In medical terms, abortion is the termination of pregnancy by death and expulsion of the fetus at less than 20 weeks with a fetal weight of less than 500 grams, i.e. before the fetus can live outside the womb independently.¹⁰

According to Suryono Ekotama, et al, from a medical perspective, there is no definite limit to when a pregnancy can be aborted. A woman's pregnancy can be aborted at any time as long as there are medical indications to abort the pregnancy. For example, if it is known that the child to be born has severe defects or the mother suffers from heart disease which will be very dangerous for the safety of her life when giving birth later. Even if the fetus is already five months or six months old, medical considerations still allow abortus provocatus.¹¹

² Bambang Sunggono, *Legal Research Methods*, Jakarta, PT Raja Grafindo Persada, 2002, p.36

³ Philipus M. Hadjon, "The Study of Legal Science", Paper, 'One-day Workshop and Workshop on Initiating Normative Legal Research Proposals and Reports', Faculty of Law, Brawijaya, Malang, February 22, 1997, pp.2-3.

⁴ Echols and Hasan Shaddily, *English Indonesian Dictionary*, Jakarta, Gramedia, 1992, p.2

⁵ Henry Campbell *Black's Law Dictionary*, Sixth Edition, St. Paul Min West Publishing Co, hlm.1

⁶ Translation of Abortion according to Black's Law Dictionary, taken from Suryono Ekotama, et al., *Abortus Provocatus for Rape Victims from the Perspective of Ichymology, Criminology and Criminal Law*, Yogyakarta, Atmajaya University, 2001, p.31.

⁷ Indonesian Encyclopedia

⁸ Capita Selekt Kedokteran, 3rd Edition, p.260

⁹ Rustam Mochtar, *Synopsis of Obseteri*, Jakarta, EGC, 1998, p.209

¹⁰ Lilien Eka Chandra, "Without Medical Indication, Abortion is the Same as Crime", Lifestyle, May, 2006, p.10

¹¹ Suryono Ekotama, et al., *Op.Cit.*, p.35

Abortus provocatus, known in Indonesia as abortion, comes from the Latin language which means deliberate abortion. Abortus Provocatus is one of the various types of abortion. In the Indonesian Latin dictionary itself, abortion is defined as untimely termination or miscarriage. The definition of abortion or Abortus Provocatus is the termination or expulsion of pregnancy from the uterus prematurely.¹² In other words, "expenditure" means that the exit of the fetus is intentional with human intervention, either through mechanical means, drugs or other means.

2. Types of Abortion

The abortion process can take place by:

1. Spontaneous/natural (occurs naturally, without any action);
2. Artificial/intentional (abortion that is done intentionally);
3. Therapeutic/medical (abortion performed on medical indications because there is a problem / complication).¹³

Medical abortions can be divided into two types:

1. Abortus spontaneus, is an abortion that occurs with no preceding factors mechanical or medicinal solely due to natural factors. Rustam Mochtar in Muhdiono mention macammacam spontaneous abortion:¹⁴
 - a. Abortus completes, (complete miscarriage) means that the entire conception is removed so that the uterine cavity is empty.
 - b. Abortus incpletus, (miscarriage remains) means that there is only part of the results of conception that is removed which is left behind is deci two and placenta.
 - c. Abortus iminen, which is a miscarriage that is talented and will occur in this case the exit of the fetus can still be prevented by giving hormonal and anti-postmodica drugs.
 - d. Missed abortion, a condition in which the fetus is dead but remains in the uterus and the fetus is still in the uterus not issued for two months or more.
 - e. Abortus habitulis or recurrent miscarriage is a condition where the patient experiences consecutive miscarriages 3 times or more.
 - f. Infectious abortus and septic abortus, is an abortion accompanied by genital infection.

Unintentional fetal loss usually occurs in young pregnancies (one to three months). This can occur due to illnesses such as: fever; high fever; kidney tuberculosis, syphilis or due to genetic errors. In spontaneous abortions it is not uncommon for the fetus to come out intact.¹⁵ Sometimes a woman's pregnancy can terminate on its own without any deliberate action. This is often called a "miscarriage" or spontaneous abortion. This often happens to mothers who are still young pregnant, due to an unintentional and unwanted result or because of an illness.

2. Abortus provocatus, is a deliberate abortion either by using drugs or tools. Abortion that is done intentionally (abortus provocatus) is divided into two:
 - a. Abortus provocatus medicinalis. Is an abortion performed by a doctor on the basis of medical indications, ie if the abortion is not taken will endanger the life of the mother. Abortus provocatus medicinalis/artificialis/therapeuticus is an abortion performed with medical indications. The conditions that are determined as medical indications are:
 1. Performed by a health worker who has the expertise and authority to do so (ie a doctor who is an obstetrician and gynecologist) in accordance with professional responsibilities.
 2. Must request the consideration of a team of experts (other medical experts, religion, law, psychology).
 3. There must be written consent from the patient or her husband or next of kin.
 4. Performed in a health facility that has adequate personnel/equipment, appointed by the government.
 5. The procedure is not confidential.
 6. Medical documents must be complete¹⁶

b. Abortus provocatus criminalis.

Is an abortion that occurs because of actions that are not legal or not based on medical indications, for example abortion performed in order to eliminate the fetus as a result of sexual intercourse outside of marriage.

¹²Kusmayanto, SCJ, *The Abortion Controversy*, Jakarta, PT. Gramedia Widiasarana Indonesia, 2002, p.203

¹³Lilien Eka Chandra, *Loc.Cit*

¹⁴Rustam Mochtar in Muhdiono, Abortion According to Islamic Law, "A Comparison of the Shafi'I and Hanafi Madhhabs", Thesis, Yogyakarta, UIN, 2002, p.211.

¹⁵Rural Development Foundation, *Reproductive Health*, mold 1, Malang, Danar Wijaya,, 1997, p.141

¹⁶*Legal and Medikolegal Aspects of Abosrtus Provocatus Criminalis*, <http://situs.korespro.info>, accessed on December 17, 2013

In general, the definition of abortion provocatus criminalis is an early birth before the baby can live alone outside the womb. In general, the fetus that comes out is no longer alive.¹⁷ While juridically abortus provocatus criminalis is any termination of pregnancy before conception is born, regardless of the age of the baby in the womb and the fetus is born dead or alive.

Based on this understanding, there is an element of intentionality in abortus provocatus. That is, an act or actions taken so that the womb is born before its time. According to custom, the baby in a woman's womb will be born after a period of 9 months and 10 days. Only in certain cases can a baby in the womb be born when the womb has only reached 7 months or 8 months of age. In this case the act of abortion is usually done before the womb is 7 months old. According to the medical understanding put forward by Lilien Eka Chandra, abortion (both miscarriage and miscarriage) means the termination of pregnancy that occurs between the time of implantation of the egg (blastocyte) in the uterus until 28 weeks of pregnancy. The limit of 28 weeks is calculated since the last menstruation was taken because before 28 weeks, the fetus cannot live (viable outside the uterus).¹⁸

3. The Crime of Rape

The formulation of the crime of rape is contained in Book II Chapter XIV of the Criminal Code on crimes against decency, specifically Article 285. The complete formulation of Article 285 of the Criminal Code is as follows: "Any person who by force or threat of force forces a woman to have sexual intercourse with him outside marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years".¹⁹

4. Legal Protection Against Perpetrators of Abortion (Abortus Provocatus) Rape Victims

Legal protection means protecting the right of everyone to get the same treatment and protection by the law and the law, therefore for every violation of the law that is accused of him and the impact suffered by him he is also entitled to get protection from the law as needed in accordance with the principles of law. But we need to know that in cases of rape the victim has been neglected from the reach of the law. This is evident from the many cases with female victims that are unable to be resolved fairly and satisfactorily²⁰.

Based on the provisions contained in Law No. 36 of the Year if we relate to abortion due to unwanted pregnancy (KTD) due to rape, it can be concluded: First, in general, the practice of abortion is prohibited; Second, the prohibition of the practice is excluded in some circumstances, pregnancy due to rape that can cause psychological trauma for rape victims. In addition, medical action against abortion of KTD due to rape can only be done if: then it can be concluded: First, in general, the practice of abortion is prohibited; Second, the prohibition of the practice is excluded in some circumstances, pregnancy due to rape that can cause psychological trauma for rape victims. In addition, medical action against KTD abortion due to rape can only be done if performed only if: (1) after pre-action counseling and / or counseling and ending with post-action counseling conducted by a competent counselor; (2) carried out before the pregnancy is 6 (six) weeks old calculated from the first day of the last menstruation, except in the event of a medical emergency; (3) by health personnel who have the skills and authority who have a certificate stipulated by the minister; (4) with the consent of the pregnant woman concerned; and (5) by a qualified health service provider as determined by the Minister.

When connected with abortion due to unwanted pregnancy (KTD) due to rape, where pregnancy due to rape that can cause psychological trauma for rape victims can be used as an emergency reason (coercion) to perform abortion actually needs to be a consideration in applying criminal sanctions, especially for law enforcement (Judge). Because the aborted fetus is as a result of coercion (rape) with the threat of violence. Rape itself is a criminal offense whose perpetrators must be sentenced to a maximum imprisonment of 12 (twelve) years in accordance with Article 285 of the Criminal Code. Meanwhile, the victim must receive legal protection, one of which is to restore her mental condition due to coercive pressure from other parties (psychological pressure). The reason for psychological pressure due to rape is what should be taken into consideration to determine that abortion due to rape as an exception, so it should be legal.

Arif Gosita in his book Problems of Crime Victims Karangan Collection says that: "In the case of abortion, the fetus is rejected as a living being and is considered a dead object. Because it is formulated as such, its destruction at that time is not considered a murder and does not cause moral outrage or moral conflict as in

¹⁷ Sri Setyowati, *The Problem of Criminal Abortion in Indonesia and Its Relationship with Family Planning in View of the Criminal Code*, Jakarta, TP, 2002, pp.99 and 22.

¹⁸ Lilien Eka Chandra, *Loc.Cit*

¹⁹ Moeljatno, *Kitab.....*, Jakarta, Bina Aksara, 1990, p.105

²⁰ Erwin Yuliatiningsih, "The Need for Legal Protection for Women Crime of Rape in Indonesia" <http://www.google.com>, accessed on December 18, 2013.

other cases of murder."²¹ The provisions on overmacht or force are contained in Article 48 of the Criminal Code, namely: "Whoever commits an act under the influence of force shall not be punished".²² From the provisions of Article 48 of the Criminal Code, it can be concluded that what is meant by force is a compulsion or pressure that cannot be avoided. The coercion is carried out by a person against another person with a threat that endangers his/her body and soul. Of course, in this case, the person threatened has a strong suspicion that the threat will actually be carried out if he refuses to do something that the coercer (threatener) wants.

This overmacht is an excuse. In this excuse, a person who commits a criminal act cannot be punished due to the absence of guilt. This means that the act committed by the defendant is still against the law, so it is still a criminal act. But he is not punished, because of the absence of guilt. Thus, an excuse is a reason that eliminates the defendant's guilt. Because overmacht as stated in Article 48 of the Criminal Code only contains excuses, meaning that the acts committed are still against the law, but the guilt can be forgiven due to the influence of the force.

If abortion due to rape is made an exception as medical reasons, then the criteria used as an exception must be very clear and firm, so that it is not misused by irresponsible people, resulting in rampant abortion. Thus Law No. 36 Year allows the practice of abortion against pregnancy due to rape with the requirements carried out by competent personnel, and fulfill the provisions of religion and applicable legislation.

Regarding the threat of criminal sanctions for perpetrators of abortion provocatus, the criminal law (KUHP) formulates the existence of criminal penalties for those who commit abortion. The Criminal Code does not care about the background or reasons for the abortion. Thus, if abortion provocatus is a choice that must be taken and carried out by women victims of rape, either at their own request or through the help of others with or without the consent of women victims of rape, then by using the provisions of the Criminal Code, women victims of rape cannot escape legal bondage, so the Criminal Code does not provide legal protection to women victims of rape who perform abortion provocatus.

Whereas in Law No. 36 of 2009 concerning Health, the legal protection given to women victims of rape who perform abortion (abortus provocatus) becomes the right of the woman. This means that abortion (abortus provocatus) performed by women victims of rape is allowed. As mentioned in Article 75 paragraph (2) of Law No. 36 of 2009, one of the exceptions for women to have an abortion is pregnancy due to rape which can cause psychological trauma for the rape victim. The psychological pressure experienced by women who are pregnant due to rape, can be included as a medical indication to perform abortion as long as it meets the conditions as specified by Law No. 36 of 2009, as a legal basis for legalizing the act of abortion performed by rape victims, including those in this case are health workers who are competent and have the authority granted by law to perform abortion.

V. CONCLUSION

Criminal law (in this case the Criminal Code) which applies as *lex generale* through the provisions of Law No. 36 of 2009 concerning Health which applies as *lex speciale* provides legal protection against abortus provocatus in rape victims with several requirements as medical reasons as stipulated in Article 75 paragraph (3) and Article 76 of Law No. 36 of 2009.

In terms of the legalization of abortion (abortus provocatus), there needs to be firmness from law enforcers, because based on the revision of Law No. 36/2009 on Health that abortion is allowed not only limited to the reasons of medical indications to save the life of the mother in an emergency, but also includes for pregnancies resulting from rape and incest, pregnant women suffering from severe mental disorders, and the fetus has severe congenital defects.

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²¹ Arif Gosita, *Problems of Crime Victims*, A Collection of Essays, Jakarta, Akademika Persindo, 1985, p.88

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