

Abortion Legalization and Child in The Womb Right to Life: A Study from Indonesia

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Abstract: Based on the Indonesian legal system, women's reproductive and unborn child's rights to life are equally important. A woman has the right to determine her pregnancy period or even reject her unwanted pregnancy. On one side, legal abortion is part of women's reproductive rights. On the other side, the unborn child's life in the womb is also protected by law. Any attempt to harm the fetus' well-being or deliberately dispose of its life is illegal. Generally, Indonesian are against abortion. However, in specific cases, abortion legalization occurs when the pregnancy becomes harmful and endangering the mother's life. In fact, in certain labor cases, the doctor must do an abortion to save the mother's life. Through Health Act No. 36 of 2009 Article 75, abortion is permitted with emergencies on mothers and rape victims. This paper aims to analyze whether two indications of abortion legalization written on the Health Act are still acceptable from the standpoint of unborn child rights. As normative research, this paper uses both statutory and medical approaches.

Keywords: Abortion, Fetal Living Rights, Legalization.

INTRODUCTION

The legalization of abortion has always been the pros and cons of national life in Indonesia. For those who agree with the legalization of abortion (Prochoice), women's reproductive rights are often the reason. Women are entitled to their reproductive function, entitled to a fulfilling and safe sexual life, the right to reproduce, and the freedom to determine if they wish to do so, when, and how often. Women are also entitled to quality reproductive health services, including legal abortion services. For those who reject the legalization of abortion (Pro-life), the appreciation of the fetus's right to live in the womb is the main reason. Legalizing abortions performed for no apparent reason is a gross violation of the fetus's right of life in the womb, a gross violation of prevailing norms in Indonesia, violating religious standards, decency, and legal models. These two strongholds' pros and cons continue from the past to the present (Ismail & Ahmad, 2017).

On the other hand, the laws governing abortion in Indonesia are also evolving. In addition to pro-choice and Pro-life strongholds, societal changes are also influenced (Haris & Al-Fatih, 2020). The high maternal mortality rate in Indonesia, which is contributed by maternal deaths from illegal abortions, high rates of out-of-wedlock pregnancies, increased incidence of rape, and others, is a very influential social factor in the development of laws governing abortion in Indonesia (Afriana, 2011).

The Maternal Mortality rate in Indonesia is still very high. Maternal death by WHO definition is a death that occurs during pregnancy or within 42 days after the end of pregnancy, as a result of all causes associated with or disputed by pregnancy or its treatment, but not caused by accident. Maternal Mortality Rate (AKI) is a sensitive indicator in describing the degree of public Health in a country. According to the Directorate of Family Health year 2017, AKI did decrease from 1994-2015. However, the figure is still well above the 5th global MDGs (Millennium Development Goals) target of 102 per 100,000 live births in 2015. AKI in 2015 was 305 per 100,000 live births. This figure is much higher than the Maternal Mortality Rate in some neighboring countries, e.g., Malaysia, at 62 per 100,000 live births and Sri Lanka at 58 per 100,000 live births (Achadi, 2010).

There are five leading causes of maternal death: bleeding, hypertension, infection, abortion, and old parts. These five causes of death accounted for 75% of maternal mortality, and abortion accounted for about 13% (Amalia, Purnomo, & Nurlatif, 2016). The percentage for these abortions is not static but dynamic and tends to be higher. This is due to a large number of cases of maternal deaths from illegal abortions disguised due to the legal implications. As one of the contributing elements of maternal mortality, lowering the incidence of abortion, especially unlawful abortions, is very important to reduce maternal mortality rates and improve women's degree of reproductive Health (Saifullah, 2011).

Data compiled from Indonesia's National Commission for Child Protection has about 2 million

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cases of abortion each year. On average, there is an increase in abortion cases of about 10-15% per year (Bariyyah & Muttaqin, 2016). Three facts about abortion are undeniable: (1) unsafe abortion is one of the causes of maternal pain and death. (2) the need for an abortion in a woman will always exist. (3) women do not need to die from abortion because if the abortion is performed in the right and hygienic way, abortion is relatively safe (Rukmini & Maryani, 2006).

The increase in the incidence of abortion is directly proportional to the rise in the incidence of rape. From the annual record of Komnas Perempuan, there were 348,466 cases during 2017, a sharp increase from the previous year, 259,150 topics. Of the issues of violence against women that occurred in 2017, domestic violence covered 71%. Of all domestic violence cases, 31% experienced sexual violence. More surprisingly, of all the instances of sexual violence that occurred in 2017, the most were cases of incest rape (Female, 2018).

Lentera Sintas Indonesia, a support group for survivors of sexual violence, in June 2016 surveyed 25,213 female respondents online. Some 6.5% or 1636 people said they had been raped, and ironically, 93% said they did not report the crime out of shame and fear of being blamed. Sophia Hage, director of her camp Lentera Sintas, noted that the high percentage of unreported rape cases is an "iceberg" phenomenon in the country. Komnas Perempuan, in its statement, released that this discovery reflects the low public confidence in law enforcement agencies in Indonesia in resolving cases of sexual violence against women and children. Bad social stigma, lack of empathy from society, and law enforcement often lead to rape victims shutting down and not reporting their cases (Reuters, 2016). The development of the times and technological advances had a positive impact and left many social problems. Poverty, economic inequality, *free sex*, drugs, pornography are some of the social issues that exist and lead to increased rape incidence rates. Rape as an act of violence is a gross violation of the reproductive rights of its victims (Muzaini, 2014).

Rape has a pretty severe impact on the victim. Soother causes physical trauma, as well as psychic and social trauma. Physically, rape victims can experience infection and damage to reproductive organs, unwanted pregnancies, even death (Novika *et al.*, 2020). Psychologically, rape victims can experience severe psychic trauma, severe depression, feelings of guilt, unworthy, dirtiness, and so on that can be

prolonged and even sedentary throughout life if not handled properly. Socially, rape victims tend to isolate themselves from the outside world. This severe trauma often causes the victim to take a shortcut, commit suicide or if the hospital is pregnant then secretly perform an illegal abortion on an incompetent person (unsafe abortion) or perform a self-induced abortion, which will increase the risk of damage to reproductive organs and even death, especially if the pregnancy is due to a case of incest rape (Ekandari *et al.*, 2001).

The legal products governing abortion in Indonesia are evolving in line with increasingly complex social issues. Penal Code, a work of Dutch law that continued to be used after Indonesia's independence, chapter XIX article 346 to 350, states that all forms of abortion are prohibited. There are no exceptions and can be threatened with fines or criminal sanctions (Judge, 2006). In a further development, through Health Law No. 23 of 1992, article 15, it was stated that an abortion might be performed to save the mother's soul in an emergency. This law provides a legal umbrella for doctors in carrying out their duties (Soge, 2016).

In the end, after a heated debate in the House of Representatives, the article on abortion was passed in Health Law No. 36 of 2009, especially in article 75, which reads

paragraph 1: Everyone is prohibited from having an abortion;

paragraph 2: Prohibition as referred to in paragraph (1) may be excluded:

- a. Medical emergency indications
- b. Pregnancy due to rape victims can cause psychological trauma for rape victims (Undang Undang Republik Indonesia Nomor 36 Tahun 2009 Tentang Kesehatan, 2009).

This law is then regulated implementation in Government Regulation No. 61 of 2014. Government Regulation No. 61/2014 Article 31 paragraph 2, reads as follows, "The act of abortion due to rape as referred to in paragraph (1) letter b can only be performed if the gestational age is at least 40 (forty) days from the first day of the last period". Government Regulation No. 61/2014 Article 34, paragraph 2, reads as follows." Pregnancy due to rape, as referred to in paragraph (1), is proven by a. gestational age following the occurrence of rape stated by the doctor's certificate; and b. information of investigators, psychologists,

and/or other experts regarding the alleged rape (Government, 2014). This study seeks first to review how women's reproductive rights and fetal life rights are in the legal system in Indonesia. What's more, how is the legalization of abortion contained in Health Law No. 36 of 2009 seen from the perspective of the right to live in the womb.

METHOD

The research method used in this writing is a method of legal research of normative juridical law, using the approach of statute approach, conceptual approach, and medical approach (Peter Mahmud Marzuki, 2014). A statute approach is an approach based on the study of the rule of law related to the issues discussed. The practice of law is the primary legal ingredient in this study. The conceptual approach will provide understanding by using doctrines that are legal experts' opinions (Soerjono Soekanto, 2018). A medical procedure is an approach that uses medical theory, especially regarding mental Health (psychiatry). The reasoning used is deduction reasoning that will eventually be used to solve specific problems.

RESULTS AND DISCUSSIONS

Women's Reproductive Rights and Fetal Life Rights in the Legal System in Indonesia

Abortion, as one of the social problems in Indonesia, from year to year, the number continues to increase. Medically, an abortus is the fruit of pregnancy before 20 mg, or the fetal weight is less than 500 grams. Abortus is classified into two large parts, the first being a spontaneous abornatural abortus, occurring with itself. The second is an artificial abortus provocateur or abortus, performed with zincaja to abort the womb. Abortus provocateur himself, based on his indications, is divided into two. The first is abortus provocateur medicinal, which is performed on the Indika of the medic, and the second is abortus provocateurs criminals, without the Indika of the doctor (Quarterly, 2010).

Legally, abortion can be legal or illegal. Abortion is permitted if performed following the law's provisions, indications accordingly, competent personnel, adequate means, and infrastructure. Abortion is unlawful if performed unlawfully, without motion, incompetent energy and with rough standards and infrastructure, often carried out in secret and at significant risk (Quarter, 2010).

Women's reproductive rights and fetal life rights have focused on much debate in discussions about abortion. Prochoice group uses the reason that women have reproductive rights so that the right to decide whether to continue their pregnancy and the government is also obliged to provide safe, legal abortion services. The difficulty in accessing legal abortion services will cause a woman who feels she needs an abortion service to seek illegal abortion services that risk damaging her reproductive organs and endangering her life. Similarly, pro-life groups argue for the right of fetal life to strengthen their arguments (Ismail & Ahmad, 2017). Women's reproductive rights are highly protected and valued in the legal system in Indonesia. The Opening Section of the 1945 Constitution contains the Indonesian nation's objectives, one of which is to advance public welfare. One component in promoting general well-being is through quality health services, including reproductive Health.

In the Torso Section of the 1945 Constitution, there are also many statements that the law in Indonesia respects women's reproductive health. Among them is article 28 B paragraph 1, it is said that everyone has the right to form a family and continue through a legal marriage; article 28 H paragraph 1, it is said that everyone has the right to live prosperously born and mentally, live and get a good and healthy environment and is entitled to health care (Undang-undang Dasar Negara Republik Indonesia Tahun 1945, 1945). It is clear that the state guarantees the right to reproduce, the right to healthy living, and to obtain health care, including reproductive health services that also include safe abortion services.

Law No. 36 of 2009 On Health also shows that the state guarantees reproductive rights and good reproductive health services. Among them are: Article 72 (a) it is said that everyone has the right to lead a healthy and safe reproductive and sexual life and be free from coercion and/or violence with a partner who legally; Article 72 (b) says that every person has the right to determine his reproductive life and is free from discrimination, coercion and/or violence that respects noble values that do not demean human dignity following religious norms; Article 72 (c) determines for yourself when and how often to reproduce medically healthy and not contrary to religious standards. Article 73 says that the government must ensure the availability of information facilities and facilities for reproductive health services that are safe, quality, and affordable to the public.

Origin 74 (b) states that the implementation of reproductive health services is carried out in contravention of religious values and statutory provisions. So even though women have reproductive rights, these rights are still limited by religious values and legislation (House of Representatives, 2009). The same is the right to live in the womb. The state cares deeply about the right to live in the womb. This can be seen clearly in the opening section of the 1945 Constitution, where one of the Indonesian nation's objectives is to protect all Indonesians and all Indonesian spills, including fetuses in the womb that are potential successors to the nation's struggle.

In the 1945 Constitution, article 28 A, it is stated that everyone has the right to live and defend his life. Furthermore, in the torso of the 1945 Constitution article 28 B paragraph 2, it is stated that every child is entitled to survival, growth, and development and is entitled to protection from violence and discrimination (Undang-undang Dasar Negara Republik Indonesia Tahun 1945, 1945). Law No. 23/2002 on child protection, article 1 paragraph 1 states that a child is a person who is not yet 18 years of age, including a child who is still in the womb; Article 1 paragraph 2 says that child protection is all activities to guarantee and protect the child and its right to live, grow, develop and participate optimally following the dignity and dignity of humanity, and to be protected from violence and discrimination (House of Representatives, 2002).

In Human Rights Law No. 39 Article 53 (1) of 1999, it is said that every child since the womb has the right to live, maintain life, and improve their standard of life (House of Representatives, 1999). The government respects women's reproductive rights, but the government also respects the right to live in the womb. There is no single verse in the legal system in Indonesia that considers that women's reproductive rights are more important than the right to life of the fetus, and vice versa. These two rights are the same important.

Legalization of Abortion and The Right to Fetal Life in the Womb

The legalization of abortion is an act that forcibly deprives the right to life of the fetus. For no apparent reason, the act of abortion is a gross violation of the right to life of the fetus. During the Dutch colonial period, Dutch legal products were applied in Indonesia as its colonies, expressly prohibiting abortion in any form. The Penal Code (Penal Code), a work of Dutch

law that continues to be used after Indonesia's independence, chapter XIX article 346 to 350, states that all forms of abortion are prohibited, and there is no exception and all parties involved in this abortion can be threatened with both fines and criminal sanctions (Judge, 2006).

Legalizing abortion in the legal system in Indonesia first occurred through Health Law No. 23 of 1992, where the legalization of abortion can be done in an emergency to save the lives of pregnant women. Abortion legalization measures on indications of pregnancy conditions that could threaten the mother's life are included in doctors' forced defense action to save pregnant women. Article 49 of the Criminal Code paragraph 1 states that, "Not convicted, whoever commits a defense is compelled to himself or for others, honoring decency or property himself or others, because there is an attack or threat of a very imminent attack at that time that is against the law." Therefore, the legalization of abortion on medical indications also provides a legal umbrella for doctors to work more calmly in carrying out their duties. There is not much debate arising as a result of the legalization of abortion over these medical indications (Soge, 2016).

But in the subsequent development, driven by several conditions, including the continued high maternal mortality rate in Indonesia with one of the causes is the increasing incidence of illegal abortions, cases of rape that continue to increase, especially issues of incest rape that often leads to unwanted pregnancies, then through Law No. 36 of 2009 On Health, indications of the legalization of abortion plus, not only allowed on medical symptoms but also allowed on the representation of rape victims (Afriana, 2011).

The legalization of abortion on behalf of rape victims has sparked much debate. In pregnant women victims of rape, there are two individuals whose rights are violated. The pregnant woman of the rape victim suffered a severe violation of her reproductive rights, but the baby she was born with also suffered human rights violations. A pregnancy that occurs due to rape or coercion is difficult to accept by the mother, and this rejection pregnancy can interfere with the growth of the baby in the womb. The fetus's right to grow and develop safely and prosperously is challenging to fulfill primarily if the mother has an abortion.

The debate arose from the moment the rape victim's abortion legalization bill was drafted, passed, and even after it was enacted. Many people consider

this reason too weak and easily abused, especially in the government rules governing the implementation of this law. Legalizing abortion in rape victims is only allowed at the pregnancy age, less than 40 days, a brief period. The haste in deciding abortions on rape victims would amount to potato abuse and gross violations of the fetus's right to life (Rohidin, 2015). Three essential points that lead to the legalization of abortion victims of rape are potentially mainly in violation of the fetus's right to life.

The first point is that abortion victims of rape are very prone to be abused. Bis based on Government Regulation No. 61 of 2014, as the implementation rule of Health Law No. 36 of 2009 Article 75 on the legalization of abortion, the determination of rape cases and also the determination for abortion should only be carried out with a brief period, at the age of pregnancy less than 40 days. Investigators and doctors only carry out even the decision of rape cases and the determination of abortion. It could happen, to take advantage of this, someone claims to be pregnant because of rape when that is not the case. If there is an indication of abortion, this is a gross violation of the fetus's right to life (Rohidin, 2015).

The second point, not all pregnant women rape victims need abortion services. If the pregnant woman gets good medical and psychotherapy services, then abortion is not required. Sandra Mahkorn, 2013, researched 37 rape victims who were pregnant. Of these 37 pregnant women, 28 went on to have pregnancies, 5 had abortions, and four were out of supervision. All victims at the time of initial evaluation experienced severe depressive conditions. Two-thirds of the rape victim's mother continued her pregnancy through good counseling of the victim and family, gradually improving her psychic trauma as her pregnancy progressed. Good counseling, support of nearby people, and the environment mean a lot to the psychic trauma recovery of rape victims (Mahkorn, 2013).

However, abortion in pregnant women victims of rape should be considered if the mother falls into a state of a psychiatric emergency, namely acute insanity, rowdy anxiety, and suicide crisis, as the condition can threaten the mother's life and endanger the environment. In reality, not all pregnant women of rape victims fall into a psychiatric emergency, especially if from the beginning they have received adequate medical therapy and psychotherapy (Pinastikasari, 2009). It can be concluded that if this

abortion is performed without a good medical evaluation and psychotherapy and results in abortion to the pregnant woman who does not need it, then this abortion is a gross violation of the right of life of the fetus (Mirantri, 2018).

Abortion itself is not without side effects. Even if performed legally, abortion remains a risk. That risk can be an infection, bleeding, damage to reproductive organs, or psychic trauma that can be prolonged. This psychic trauma can be remorse, sinful feelings, unworthy, and feelings of inferiority (Wijayati, 2015). In 2000, in America, Brenda Major and colleagues conducted a study of 1177 women with abortions. Of these, 38% can be followed for up to 2 years. 1.5% of the remaining participants were found to have abortion-specific-post-traumatic stress disorder (PTSD) symptoms. Even in 2008, the American Psychological Association, which specialized in abortion and mental Health, issued a statement saying that some women who receive abortions are clinically at risk of depression or anxiety behind the scenes (Reardon, 2018).

Three, if the pregnant woman of the rape victim does not want her fetus, then there is no other option than abortion, namely adoption after the baby is born. This choice should be explained from the beginning to the mother. If the mother has never been informed of the adoption option, then this abortion is a gross violation of the fetus's right to life (Lathrop, 1998). In this case, the state has a substantial obligation to protect women with unwanted pregnancies, especially for pregnant women rape victims who are still willing to continue their pregnancies. These kinds of women often face bad stigma and are ostracized from families, schools, and communities. The state does not *provide shelters* that can protect them from public blasphemy and give a sense of security. The lack of protection is one of the things that drives these women to choose illegal abortion pathways. For many young women who experience unwanted pregnancies, having an abortion is a tough decision. But the lack of support from the environment is often even more pressure, causing them to choose an abortion path. The state is obliged to provide a sanctuary for women with unwanted pregnancies and adopt or accommodate and bear the care of the child born if the woman is not willing to care for it (Soge, 2016).

The legalization of abortion for rape victims requires a better rule. Hasty actions, inadequate medical and psychotherapy evaluations, and adoption options not

offered in the first place to pregnant women will harm pregnant women and gross violations of the fetus's right to life.

CONCLUSION

The legalization of abortion, for whatever reason, is an act of abortion that is legalized to deprive the right to life of the fetus forcibly. If indications and implementation rules are unclear, it will potentially violate the fetus's right to live in vain. Legalizing abortion in Indonesia is only allowed on two indications of a medical emergency and rape victims. Legalizing abortion on the movement of a medical emergency, to save the life of the pregnant woman, is indispensable and is a legal umbrella for doctors in carrying out their duties. Abortion does deprive the fetus of the right to life, but it saves the mother from her life-threatening pregnancy. This is a justifiable reason for doctors to perform abortions.

On the other hand, the legalization of abortion on behalf of rape victims has sparked much debate. Restricted abortions before 40 days gestation, medical evaluations, and psychotherapy that pregnant women are supposed to undergo but are not emphasized by the rules of implementation and also adoption options that are not offered, causing the legalization of abortions for victims of rape are prone to abuse, can harm pregnant women and, potentially lead to gross violations of the right to life of the fetus. There needs to be a lot of improvement, especially in the rules of legalizing abortion for rape victims, so that these rules are not abused and provide protection against the right to life of the fetus.

The author recommends the government, so that rules of abortion in Indonesia should be a specific regulation, not just a norm in Penal Code. Thus, law enforcement against abortion practices will be better than before. As a preventive step, the government can also prevent the practice of abortion by providing education about the danger of abortion for health and safety, especially education to prevent rape and unwed pregnancy.

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