

The Urgency of Reformulation of Regulations on the Crime of Abortion in Indonesian Criminal Law

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Abstract

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Abortion is an act that is prohibited by criminal law and has been regulated in the Criminal Code (KUHP). Discussing abortion is often associated with the crime of murder and violations of children's rights and human rights, especially the right to life. However, on the other hand, abortion is an act permitted by law, if the abortion is an abortion provocatus medicalis. The problems based on the 2 (two) ceteris paribus propositions will be described in this article using a normative research method, with a statutory approach. The analysis will focus on the comparison between the Criminal Code and Law Number 36 Year 2009 concerning Health. The result of this research is abortion medicalis which is a criminal extra-ordinaria needs to be re-examined, because all forms of killing of the fetus are essentially crimes and are contrary to the rights of children, especially the right to life.

Abstrak


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Aborsi merupakan salah satu perbuatan yang dilarang oleh hukum pidana dan telah diatur di dalam Kitab Undang-Undang Hukum Pidana (KUHP). Membahas terkait aborsi seringkali dikaitkan dengan tindak pidana pembunuhan dan pelanggaran terhadap hak anak serta hak asasi manusia, khususnya hak untuk hidup. Kendati demikian, di lain sisi, aborsi merupakan perbuatan yang diperbolehkan oleh undang-undang, jika aborsi tersebut merupakan abortus provocatus medicalis. Permasalahan yang berdasarkan pada 2 (dua) proposisi yang ceteris paribus tersebut akan diuraikan di dalam artikel ini dengan metode penelitian normatif, dengan pendekatan perundang-undangan. Analisis akan difokuskan pada perbandingan antara KUHP dengan Undang-



Undang Nomor 36 Tahun 2009 tentang Kesehatan. Hasil dari penelitian ini adalah abortus medicalis yang merupakan criminal extra-ordinaria perlu dikaji ulang, sebab segala bentuk pembunuhan terhadap janin pada hakikatnya merupakan kejahatan dan berentangan dengan hak anak, khususnya hak untuk hidup.

INTRODUCTION

The act of abortion has been known for a long time. The history of the development of abortion shows that abortion has been carried out using various methods, through natural processes as well as by human intervention, the use of sharp blades, and other traditional methods. The background of having an abortion is when a woman does not want the pregnancy process to occur.¹ Since decades ago, various nations have known and used several types of plants that are efficacious to stimulate uterine contractions to knock out or drop the fetus. Abortion is a problem faced in many countries, and there is a conflict between morals and law. Abortion and abortion-related issues are hot topics in national politics in almost every country. The pros and cons of abortion are also ubiquitous.

Abortion has always been a topic of discussion, both in official and informal forums involving the fields of health, law and other scientific fields.² Abortion is a social problem in society that is increasingly worrying. This concern is based on the fact that so far the behavior of abortion has had a negative effect on both the abortionist himself and society in general. This is because abortion is related to violations of morality and law in the life of society and the state.

According to Soebakti, legal norms are norms that can be sourced from norms of decency, norms of decency and social norms.³ Social norms are general provisions that apply as guidelines for behavior for individuals in people's daily life. The thing that is fundamental and needs to get attention in this problematic is the actions of individuals related to social life, the whole of which is regulated by social norms.

Observing the problems related to abortion is no longer a secret and is no longer taboo to discuss. Today abortion is an actual phenomenon and events can occur anywhere

¹ Manopo Abas, 1948, *Aborsi dan Kumpulan Naskah-Naskah Ilmiah Simposium aborsi*, Departemen Kesehatan RI, Jakarta, pg. 10.

² Achadiat Charisdiono, 2007, *Dinamika Etika dan Hukum Kedokteran*. PT Gramedia, Jakarta, pg. 12.

³ Abdul Djamil, 1984, *Psikolog Dalam Hukum*, Amico, Jakarta, pg. 118.

and can be carried out against the law. Examining related to the existence of the legal act of abortion in Indonesia, if it is important to study it again related to the purpose of carrying out the abortion practice.

So far, the issue of abortion is generally considered by most people as a crime. However, in positive law in Indonesia, abortion in certain cases can be justified if it is an abortion *provocatus medicalis*. Meanwhile, abortion which is generalized into a criminal act is better known as *abortion provocatus criminalis*.

Abortion can be caused by human actions (*abortus provocatus*) or caused by a natural process, which occurs by itself, in the sense that it is not due to human actions (*spontaneous abortion*). Abortion that is intentional or desired by human actions can occur either because it is driven by reasons of the health of the woman/prospective mother, for example because a pregnant woman experiences a dangerous disease and to protect the safety of the life of the woman/prospective mother, an abortion must be carried out (*abortion therapius*). . Other reasons are based on other reasons that are contradictory or against the law (*crime of abortion*).

The issue of abortion essentially cannot be separated from the values and religious norms that develop in Indonesian society, related to positive criminal law in Indonesia. . According to the provisions contained in Articles 346, 347, and 348 of the Criminal Code, *abortion criminalis* includes the following acts:⁴

1. Aborting the fetus (*Afdrijving Van de vrucht or vrucht afdrijving*)
2. Killing the fetus (*de dood van vrucht veroorzaken or vrucht doden*)

The formulation of positive law laws that exist do not provide clear understanding and boundaries regarding the differences in the meanings of abortion and homicide, as well as regarding the meaning of content. From a grammatical perspective, *abort* means to fall or cause to fall, which is the same as falling or letting go. Based on that, abortion can be interpreted as making the womb fall or causing it to fall. While the meaning of killing is the same as causing death or taking someone's life. So, killing the fetus means killing the womb or eliminating the life of the fetus. In the case of an abortion, namely the discharge of the womb from the uterus and the discharge of the womb from the body of a woman/prospective mother who is pregnant. Whereas in the case of homicide, the act that is punished is causing the death of the womb. medical emergencies, which threaten the lives of mothers and babies born with defects that make it difficult for them to live outside the womb.

⁴ Musa Perdana Kusuma, 1981, *Bab-bab Tentang Kedokteran Forensik*, Ghalia Indonesia, Jakarta, pg. 192.

In the period before the changes to the Health Law, there was still debate about abortions performed by victims of rape. This is due to the absence of an article that restrictively regulates abortion for victims of rape. So far, there have been many opinions that define abortion for rape victims as an indication of a medical emergency, so it can be done because of a psychiatric disorder or mental turmoil in the mother which can also endanger the mother's survival. However, on the other hand, there are also those who view that abortion for rape victims is a criminal abortion or a criminal act of abortion because it does not endanger the life of the mother and Law Number 23 of 1992 concerning Health does not explicitly and limitively mention in that article. With the amendment to the law, the legalization of abortion for rape victims is clearly stated in Article 75 paragraph 2 of Law No. 36 of 2009 concerning Health.

Regulations regarding the crime of abortion and the reasons for this can be seen in the Criminal Code Chapter XIX Articles 229, 346, 347, 348, 349, these articles normatively and limitively do not allow abortion. Meanwhile, *ceteris paribus* is contained in the provisions of Law No. 36 of 2009 concerning Health, provisions governing abortion in Articles 76, 77, 78 there are a number of differences between the Criminal Code and Law No. 36 of 2009 concerning Health in regulating abortion. The Criminal Code strictly does not allow abortion for any reason, while the Health Law allows abortions to be carried out on conditions that indicate a medical emergency or because the woman/mother-to-be is raped.

Based on the issue of abortion regulated in the Criminal Code and Law Number 36 of 2009 concerning Health, there is an anti-nomy normen. The anti-nomy norms will be elaborated and can be used as a basis for consideration in making a new formulation regarding the crime of abortion..

DISCUSSION

Regarding the response to the act of abortion, the Indonesian state from the beginning was against the legalization of abortion. Abortion or abortion is categorized as a criminal crime. However, in subsequent developments, abortion was allowed on the grounds of saving the mother. Apart from legal issues that rigidly regulate it, abortion is a phenomenon that is full of moral values, social values, culture, religion, or even political

values. The formal legal normative rules generally prohibit abortion by providing an emergency room for certain cases.⁵

Some of the regulations related to abortion issues include:

1. Law No. 1 of 1946 concerning the Criminal Code (Book of the Criminal Code);
2. Articles 2 and 1363 of the Civil Code;
3. Law No. 7 of 1984 concerning Ratification of CEDAW
4. Law No. 36 of 1992 concerning Health, which was amended by Law no. 36 of 2009.

Basically it is related to the problematic act of abortion which is qualified as a crime or a criminal offense can only be seen in the Criminal Code, even though Law no. 36 of 2009 also contains criminal sanctions against acts of abortion. The Criminal Code regulates various criminal acts in the form of crimes and violations. One of the acts regulated in the Criminal Code is the criminal issue of abortion. provisions regarding criminal abortion can be seen in chapter XIV Book II of the Criminal Code on crimes against life (especially Articles 299, 346–349).

The formulation of these articles is as follows:

Article 299:

- 1) Any person who intentionally treats a woman or orders her to be treated intentionally informs or has the hope that because of this treatment the pregnancy can be aborted, shall be punished by a maximum imprisonment of 4 years or a maximum fine of three thousand rupiahs;
- 2) If the guilty person does so to seek profit or makes the act a quest or habit or if he is a healer, midwife, or pharmacist, the penalty is increased by one third.
- 3) If the guilty party commits the crime while carrying out a search, his right to conduct a search may be revoked.

Article 346:

A woman who intentionally aborts or terminates her pregnancy or orders another person to do so, is threatened with a maximum imprisonment of 4 years.

Article 347:

- 1) Whoever deliberately aborts or terminates the womb of a woman without her consent, shall be punished by a maximum imprisonment of 12 years;

⁵ Mufliha Wijayanti, Aborsi Akibat Kehamilan Yang Tak Diinginkan (KTD), Jurnal Raden Intan, Vol. 15 No.1, 2015, hlm.51

- 2) If the act results in the death of the woman, she shall be subject to a maximum imprisonment of 15 years.

Article 349:

If a healer, midwife or pharmacist assists in committing the crime referred to in Article 346, or commits or assists in committing one of the crimes described in Articles 347 and 348, the punishment specified in that article may be increased by one third, and the right to carry out a search may be revoked. The crime was committed. Briefly, it can be explained that what can be punished, according to the Criminal Code in this case of abortion are:

- 1) The implementation of abortion, namely medical personnel or shamans or other people with a maximum sentence of 4 years plus a third and the right to practice may also be revoked;
- 2) Women who abort their pregnancy, with a maximum sentence of 4 years;
- 3) People who are directly involved and cause the abortion to be punished with various punishments.

Law Number 36 of 2009 concerning Health provides different arrangements regarding the issue of abortion. In this Law, abortion is regulated in Article 75-78. According to the Law, an abortion can be carried out if:

Article 75 of Law no. 36 of 2009 states:

- 1) Indication of a medical emergency detected at an early age in pregnancy, both threatening the life of the mother and/or fetus, suffering from severe genetic diseases and/or congenital defects. Nor can it be repaired making it difficult for the baby to live outside the womb;
- 2) Pregnancy due to rape which can cause psychological trauma for rape victims.

In addition, it also contains the terms and conditions of the implementation of abortion in Article 76 Law No. 36 of 2009 namely:

- 1) Before 6 weeks of pregnancy is calculated from the first day of the last menstruation, except in medical emergencies.
- 2) By health workers who have the skills and authority who have certificates determined by the minister;
- 3) With the consent of the pregnant woman concerned;
- 4) With the husband's permission, except for rape victims;
- 5) Health service providers who meet the requirements set by the minister.

The Criminal Code does not provide strict operational limits on the fetus and does not provide a limiting definition of abortion and killing (killing) of the fetus. So we can

conclude that the Criminal Code only regulates the crime of provocatus abortion, where all types of abortion are prohibited and not permitted by law based on any reason or condition.

The provocatus abortion regulation in the Criminal Code, which is a legacy from the Dutch era, is contrary to the legal and political foundations, namely "to protect the entire Indonesian nation and to advance public welfare based on Pancasila and the 1945 Constitution because it prohibits provocatus abortion without exception". forced to have provocatus abortion to save the mother's life which is an exception outside the law. An example is the entry into force of Article 349 of the Criminal Code, if this article is applied absolutely, then doctors, midwives, nurses and other medical personnel can be accused of violating the law and threatened with imprisonment. Even though they could have had a provocatus abortion to save the mother's life. Based on this problem, a new law and regulation is needed which contains aspects of legal protection for medical personnel in carrying out their obligations. The urgency of establishing statutory regulations n has just been fulfilled in Law Number 36 of 2009 concerning Health which replaced Law Number 23 of 1992 concerning Health.

In its development, regulations regarding provocatus abortion or criminal abortion can be found in Law No. 36 of 2009 concerning Health. If Articles 299 and 346-349 of the Criminal Code do not stipulate the issue of abortion provocatus medicalis. When examined further, the two regulations are different from each other. The Criminal Code recognizes the prohibition of provocatus abortion without exception, including abortion provocatus medicalis or abortion provocatus therapeuticus. But Law No. 36 of 2009 actually allows abortion provocatus medicalis with therapeutics specifications. In the context of criminal law, there is a difference between the old statutory regulations (KUHP) and the new statutory regulations. Whereas the laws and regulations here apply the principle of "lex posteriori derogat legi priori".

This principle assumes that if a new regulation is promulgated without revoking the old regulation governing the same material and both of them are in conflict with each other, then the new rules override the old rules.⁶ Thus, Article 75 of Law No. 36 of 2009 concerning Health which regulates abortion provocatus medicinalis can still apply in Indonesia even though the rules are actually different from the formulation of abortion provocatus criminalis according to the Criminal Code.

⁶ Hasnil Basri Siregar, 1994, *Pengantar Hukum Indonesia*. Penerbit Kelompok Studi Hukum dan Masyarakat Fakultas Hukum USU, Medan, pg. 53.

The application of the *Lex posteriori derogat legi priori* principle is actually one of the government's efforts to develop Indonesian criminal law. Many of the provisions of the Criminal Code which in special situations are no longer relevant to be applied at this time. To overcome the weakness of the Criminal Code, the government issued a health law in the hope of providing a conducive atmosphere for the dynamics of Indonesian society today. The principle of *Lex posteriori derogat legi priori* is a legal principle that has developed in all fields of law.

Observing the formulation of Article 75 of Law No. 36 of 2009 about Health, it appears that law clearly prohibits abortion except for the *provocatus therapeuticus* type of abortion (abortion carried out to save the life of the mother and or her fetus). In the medical world, *provocatus medicalis* abortion can be done if the mother's life is in danger of death and can also be done if the child to be born is estimated to have severe defects and is indicated to be unable to live outside the womb, for example, the fetus suffers from *ectopia chordalis* (a fetus that will be born without a chest wall). so that the heart can be seen), rickets (fetus who will be born with an open spine without being covered by skin) and *anencephaly* (fetus will be born without a big brain). The Health Law No. 36 of 2009 also regulates abortions performed by rape victims which are indicated to cause psychological trauma to the mother.

One thing that is an advantage of the abortion *provocatus* articles of Law No. 36 of 2009 about Health, is the criminal provisions. Criminal threats given to perpetrators of abortion *provocatus* criminals are much heavier than criminal threats similar to the Criminal Code. In Article 194 of Law No. 36 of 2009 about Health, the punishment is a maximum imprisonment of 10 years. And a maximum fine of IDR 1,000,000,000,000 (one billion). Whereas in the Criminal Code, the punishment for which is a maximum of 4 years in prison or a maximum fine of three thousand rupiahs (Article 299 of the Criminal Code), a maximum of four years in prison (Article 346 of the Criminal Code), a maximum of twelve years in prison (Article 347 of the Criminal Code), and a maximum of five years and six months in prison (Article 348 of the Criminal Code).

The criminal provisions regarding criminal *provocatus* abortion in Law No. 36 of 2009 are considered good because they contain general and special precautions to reduce the number of criminal abortion crimes. By feeling such a severe criminal threat, it is hoped that criminalist abortionists will become deterrent and not repeat their actions, in the legal world this is referred to as special prevention, namely prevention efforts so that criminalist *provocatus* abortionists will no longer repeat their actions. Whereas prevention generally

applies to members of the community because they consider it carefully before having an abortion rather than being subject to the very heavy criminal sanction. It is this general and special prevention that is expected by the legislators to reduce the number of provocatus abortion crimes to a minimum in Indonesia. In formulating the criminal threat, the legislators only provide a maximum limit, which is a maximum of 10 years and a maximum fine of Rp. 1,000,000,000,- (one billion rupiah). Thus, a criminal provocatus abortionist who is proven guilty before a court can be sentenced to the lightest possible sentence, for example a 10-month imprisonment and a fine of Rp. 10,000, - (ten thousand rupiah).

Regulations regarding the criminal act of abortion in the future are ideally based on the Constitution, the Criminal Code, the Civil Code, the Human Rights Law, UUPA, and Positive Law in Indonesia and other draft laws, preferably the rights of the child in the womb or fetus are part of human rights that must be guaranteed, protected, and fulfilled by parents, family, community, government and state so that they can live, grow, develop, and participate optimally in accordance with human dignity, as well as receive protection from violence and discrimination. Efforts to protect children need to be carried out as early as possible, from the fetus in the womb until the child is 18 (eighteen) years old.

Based on the concept of complete, comprehensive and comprehensive child protection, this law lays down the obligation to provide protection to children based on the principle of non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the opinion of the child. In carrying out the guidance, development and protection of children, the role of the community is needed, either through child protection institutions, religious institutions, non-governmental organizations, community organizations, social organizations, the business world, mass media, or educational institutions.⁷

The definitions of children, child protection, and children's rights are given in Article 1 point 1, number 2, and number 12 of Law no. 23 of 2002 concerning Child Protection (UUPA). Article 1 number 1 determines, namely: "Child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb". Article 1 number 2 stipulates: "Child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity, and receive protection from violence and discrimination". Article 1 number

⁷ Psikiatri & Sosial Serta Opini Publik, 2007, *Yang Berkembang dalam Masyarakat*, Bagian Hukum Pidana FH UAJY, Yogyakarta, pg. 16-17.

12 stipulates that: "Children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, governments and the state". However, the law is difficult to implement due to the absence of government regulations as operational guidelines. For this reason, the next challenge after the enactment of this new Health Law and for its implementation to run well, it is necessary to issue implementing regulations immediately.

CONCLUSION

Lew regulations regarding abortion are regulated in the Criminal Code and Health Law No. 36 of 2009 According to the rule of law, in the Indonesian criminal law (KUHP) abortion provocatus criminalis is prohibited and is threatened with criminal penalties regardless of the background of the act and the person who commits it, namely all people, both perpetrators and perpetrators. abortion assistant. This is regulated in Articles 346, 347, 348, and 349 of the Criminal Code. Meanwhile, Law No. 36 of 2009 Articles 75, 76, 77 in conjunction with Article 194 concerning Health provides an exception for abortion for medical reasons known as abortion provocatus medicalis. People who are pro consider abortion carried out by rape victims as something that can be done if the child born will bring psychological pressure to the woman and abortion is legal because it does not harm other people because the woman who feels the pain is legal. Meanwhile, the fetus that arises due to rape is innocent and still has the right to live and be protected. The child must still be born, and if indeed the child will remind the mother of the rape, the child can be kept away from the mother. Regarding the legalization of abortion, according to the public's view, it should not be carried out except for indications of a medical emergency, because the fetus in the womb has the right to live and if abortion is legalized it will shift the norm values in society.

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