

Abortion Legalization And Child In The Womb Right To Life

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Abstract. Based on Indonesian legal system, the rights of women's reproductive and unborn children to life are equally important. A woman has the right to determine her pregnancy period or even reject her unwanted pregnancy. In one side, legal abortion is part of the women's reproductive rights. On the other side, the life of the unborn child in the womb is also protected by law. Any attempt to harm the fetus' well-being or deliberately disposing its life is illegal. Generally, Indonesian are against abortion. However in specific cases, abortion legalization occurs when the pregnancy become harmful and endangering mother's life. In fact, on certain labour cases, the doctor must perform an abortion in order to save mother's life. Through Health Act No. 36 of 2009 Article 75, abortion is permitted with emergencies indication on mothers and rape victims. The legalization of abortion, especially in rape victims, has been widely critized and considered easy to be abused, and potentially violates the right to live in the unborn child. 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 a normative research, this paper uses both statutory and medical approaches.

Keywords: Abortion, Fetal Living Rights

1 Introduction

Abortion legalization has always been a pros and cons in between Indonesian society. The Pro-Choice circle put Women's reproductive rights as their foundation. Women have the right on their reproductive function, namely reproducing, satisfying and safe sexual life, freedom to determine sex action whenever and as often as they want. Women are also entitled to excellent reproductive health services, including legal abortion. In the contrary, Pro-Life circle appreciate life of unborn child in the womb. Abortion legalization without obvious reasons is a huge violation to it, as well as violating Indonesian norms including religious norms, decency and legal norms. Until recently, the pros and cons of the two groups are still ongoing. [1]

In the other side, in Indonesia the law regulated abortion is developing. Beside the influence of Pro-Choice and Pro-Life circles, social changes also plays a great role in affecting the regulation. Social factors that highly influencing the development of laws governing abortion in Indonesia are high maternal mortality due to illegal abortion, pregnancy outside marriage, rape and others.[2]

The World Health Organisation defines maternal mortality as a death that occurs during or after 42-day period of pregnancy due to all causes related to pregnancy or mother treatments, excluding accidents. Maternal Mortality Rate (MMR) works as a sensitive indicator in describing the public health rate in a country. According to the 2017 Annual Directorate of Family Health Report, Indonesian MMR was high. A decrease occurred from the period of 1994 to 2015 as much as 305 per 100,000 live births. It was under qualifications of the 5th Millennium Development Goals global target in 2015, as much as 102 deaths per 100,000 live births. Indonesian MMR has

almost doubled the neighboring countries like Malaysia and Srilanka, at 62 and 58 per 100,000 live births respectively.[3]

There are five main causes of maternal death, namely bleeding, hypertension, infection, abortion and prolonged labor. They accounted for 75% reason of the MMR while abortion accounted for around 13% [4]. The MMR percentage from performing abortion is dynamic and tends to get higher due to the large number of maternal deaths cases because of illegal abortion, despite its legal implications. As one of the MMR factor, reducing the number of abortion, especially illegal abortion, is very important. Thus, maternal death rates may reduced and women's reproductive health getting better [5]

In fact, as one of Indonesian social problems, abortion rate continues to increase around 10 to 15 percent in average per year. Based on the data compiled from the Indonesian National Commission for Child Protection, there are around 2 million cases of abortion each year.[6] There are three undeniable facts about abortion: (1) Unsafe abortion is one of the causes of maternal pain and death. (2) Woman's need to perform abortion will always exist. (3) Maternal death due to abortion is unnecessary. If abortion is done in a proper and hygienic manner, then it is relatively safe . [7]

Surprisingly, increasing number of abortion cases directly proportional to the rise of rape cases. Mentioning the National Commission for Women's annual records, 348,466 cases were recorded throughout 2017. The number was increasing sharply compared to the previous year which was 259,150 cases. In 2017, domestic violence covers 71% from violence cases against women with 31% of housewife experienced sexual violence. Most surprisingly, majority sexual violence that occurred in 2017 were incest rape cases .[8]

Lentera Sintas Indonesia, a support group for sexual violence survivors, conducted online survey to 25,213 female respondents in June 2016. Around 6.5% or 1636 women admitted to being raped and ironically, 93% of them did not report the crime out of shame and fear of being blamed. Sophia Hage, director of the Lentera Sintas campaign, said that a high percentage of unreported rape cases in Indonesia were only "the tip of the iceberg". The National Commission for Women stated that this finding reflects the low public trust towards Indonesian law enforcement institutions in resolving sexual violence cases against women and children. Poor social stigma, lack of empathy from the community and law enforcement often causes rape victims to close down and not reporting their case .[9]

The technological advancements not only bring positive impacts, but also leave many social problems. Poverty, economic inequality, free sex, drugs, pornography to name a few, are may cause an increase rape cases. As a violence act, rape is a serious violation of its victim's reproductive rights [10]. It also causes physical, psychological and social trauma. Physically, rape victims may experience infection and damage in their reproductive organs, unwanted pregnancy, and even death. Psychologically, they may have severe psychological trauma, severe depression, feelings of guilt, inadequacy, filth, etc. which can be prolonged and persist throughout their life if they are not handled properly. Socially, rape victims tend to isolate themselves from the outside world. This severe trauma often push them to committing suicide. If the victim's concern is the pregnancy, they may secretly perform illegal abortion and conducting unsafe or self-induced abortion. Those actions will increase reproductive organs damage risks and even death, especially if the pregnancy caused by incest rape .[11]

Rape victims are easily fall into psychiatric emergencies, especially if they experienced incest rape or pregnancy. Psychiatric emergency requires immediate countermeasures because behavioral, emotional and thought disturbance poses risks to the victims and their environment. Psychological factors, like severe depression, helplessness, deep anxiety, and outbursts of anger, are able to put the raped victim in a critical psychological condition, namely acute madness, restless anxiety and suicide crises. Every pregnant woman due to rape is assessed by psychiatric department. They must conduct 3 psychological evaluations: suicide risk, violence risk and psychosocial assessment. Although psychiatric emergencies did not appear in every sexual violence cases, improper handling will worsen their condition and may cause both short and long term impact on their life [12].

Laws governing abortion in Indonesia develop in line with increasingly complex social problems, but the legal response is often late. During the colonial period, Dutch law was applied in

Indonesia. This law strictly prohibits abortion in any form. Later on, Dutch inheritance laws remain used after Indonesian independence and shift into Indonesian criminal code (KUHP). In KUHP chapter XIX articles 346-350 states that all forms of abortion are prohibited without any exception and the executants are threatened with sanctions, fines or penalties. Legalization of abortion developing through Health Law No. 23 of 1992 article 15. It states that abortion can be done in emergency situation in order to save the mother's live. Thus, doctors have legal permission in performing their duties .[13]

As time goes by, Health Act No. 23 of 1992 is no longer in accordance with legal demands in responding to social changes as well as science and technology advancement. The act needs to be revoked and replaced with a new one. Then Commission IX of Indonesian House of Representatives (DPR) who were in charge of health issues submitted the Amendment Draft for Health Act No. 23 of 1992, which was DPR initiative rights from 1999-2004. More comprehensive regulation on reproductive health became their important agenda on the new draft. The Draft Amendment Law to Health Law No. 23 of 1992 places reproductive health independently in Chapter IXq .[2]

Finally, after went through a heated debate in DPR, abortion article published as the Health Act No. 36 of 2009, especially in article 75, which are:

Paragraph 1 : Abortion is prohibited for everyone;

Paragraph 2 : Prohibitions as referred to paragraph (1) may be excluded:

- a. Indication of medical emergencies
- b. Pregnancy due to rape, which may cause psychological trauma for the rape victims.[14]

Implementation of this law is then regulated in the Government Regulation No. 61 of 2014.

Government Regulation No. 61 of 2014 Article 31 paragraph 2, written as follows, "Acts of abortion due to rape result as referred to paragraph (1) letter b, can only be carried out if the maximum gestational age is 40 (forty) days, counted from the first day of the last menstruation".

Government Regulation No. 61 of 2014 Article 34 paragraph 2, written as follows: "Pregnancy due to rape as referred to paragraph (1) is proven by: a. gestational age in accordance with the rape event, proved with the doctor's certificate; and b. information from investigators, psychologists and / or other experts regarding the alleged rape .[15]

This research aims to review two objects: First, the position of women's reproductive rights and unborn child life rights within the Indonesian legal system. Second, the legalization of abortion written in Health Law No. 36 of 2009 from the unborn child rights to life point of view.

2 Method

The research method used in this paper is a normative juridical legal research method, using the statutory approach, conceptual approach and medical approach. Statutory approach is based on legal regulations review related to the discussed problem. In this study, legal regulations become the primary legal material. The conceptual approach will provide understanding by using doctrines from the legal experts opinion. Medical approach uses medical theories, especially the one that is related to mental health and psychiatry. The reasoning used is deduction, which in turn can be used to solve specific problems.

3 Results and Discussion

3.1. Definition of Abortion

Abortion, as one of the social problems in Indonesia, continues to increase annually. Medically, abortion is a fetus disposal before it reaches 20 weeks or under 500 grams. Abortion is classified into two major parts. First, spontaneous or natural abortion that occurs by itself. Second, an artificial abortion (*Abortus Provocatus*) that carried out deliberately to abort the womb. Based on its indications, artificial abortion divided into two categories. Namely, *abortus provocatus medisinalis* that performed under medical indications and *abortus provocatus criminalis* that performed without medical indication. [16]

Legally, abortion practice is permitted if its implementation in accordance with the law, supported by suitable indications, competent personnel and adequate medical facilities. On the contrary, abortion practice without those qualified indications and facilities is often done secretly and has a huge risk. [16]

3.2. Women's Reproductive Rights and Unborn Child Life Rights in the Indonesian Legislative System

In the discussion about abortion, women reproductive rights and fetal living rights have been the main topic. The Pro-Choice side agree that women have reproductive rights in deciding whether or not to continue pregnancy. The government also obliged to provide safe legal abortion services. The difficulty of accessing legal abortion services will cause women to seek for the illegal one, which has the risk in damaging the reproductive organs and endangering their lives. In contrast, Pro-Life group put forward the fetal living right to strengthen their argument. [1]

Women's reproductive rights are highly protected and respected by Indonesian legal system. Indonesian purpose in advancing public welfare is listed in the Preamble section of the 1945 Constitution. One component to realize this advancement is through quality health services, including reproductive health. The body of the 1945 Constitution stated that Indonesian law respects women's reproductive health. For example, article 28 B paragraph 1 written that everyone has the right to form a family and continue their progeny through a legal marriage; in Article 28 H Paragraph 1 written that everyone has the right to have a prosperous life physically and spiritually, have a place to live in a good and healthy environment, and entitled to health services.[17] It is clear that the state guarantees reproductive rights, the right to live healthily and obtaining health services, with no exception to reproductive health services that include safe abortion services.

Law No. 36/2009 concerning Health shows that Indonesia guarantees reproductive rights and good reproductive health services, namely:

Article 72 (a) states that every person has the right to have a healthy, safe reproductive and sexual life free from coercion and / or violence with their legal partner; Article 72 (b) states that everyone has the right to determine their reproductive life and is free from discrimination, coercion and / or violence as long as they respect noble values, do not demean human dignity and in accordance with religious norms; Article 72 (c) states that everyone has the right to determine for themselves when and how often they wants to reproduce in medical and healthy way, as long as it does not militate to religious norms.

Article 73 says that the government is obliged to guarantee, availability of information facilities and safe, qualified and affordable reproductive health services for the community.

Article 74 (b) states that reproductive health services implementation shall be carried out without contradicting religious values and statutory provisions. So, women's reproductive rights are limited by religious values and legislation.[14]

The state is also very concerned with the unborn child's right to life. Seen in the opening of the 1945 Constitution which aims to protect all Indonesians, including fetus in the womb who are potential successors to the nation. Article 28 A of the 1945 Constitution states that every person has the right to live and defend their life. Furthermore, in Article 28 B paragraph 2, it is stated that every child has the right to survive, grow and develop, and has the right to get protection from violence and discrimination .[17]

In Law Number 23 Year 2002 concerning child protection, Article 1 Paragraph 1 defines child as a person under 18 years old, including unborn children in the womb; Article 1 Paragraph 2 defines child protection as any activities to guarantee and protect children and their rights so that they can live, grow, develop and participate optimally in line with human dignity and rights, and receive

protection from violence and discrimination [18]. Human Rights Law No 39 Article 53 (1) of 1999 states that every child, since in the womb, has the right to live, maintain life and improve his standard of living .[19] The government highly respects the reproductive rights and unborn child to live equally. There is not a single verse in Indonesian legal system that considers one right is more important than others.

3.3. Abortion Legalization and Unborn Child in The Womb Right to Life

Abortion legalization is clearly a forcible act that depriving fetal rights of life if it is done without specific reason. During the colonial period, Dutch law was applied in Indonesia. This law strictly prohibits abortion in any form. Later on, Dutch inheritance laws remain used after Indonesian independence and shift into Indonesian Criminal Code (KUHP). In KUHP chapter XIX articles 346-350 states that all forms of abortion are prohibited without any exception and the executants are threatened with sanctions, fines or penalties .[20]

In Indonesian legal system, abortion legalization was first approved through Health Act Number 23 of 1992, as an emergency in order to save the mother's life. Article 49 Criminal Code Paragraph 1 states that "not convicted, whoever makes a forced defense for himself or for others, the honor of decency or his own property or others, because there is an attack or threat of attack, which is very close at the time and against the law ". This article became fundamental legal protection for doctors who perform abortion due to medical indication. Thus, they can work peacefully without reaping much debate on abortion legalization due to medical indication . [13] In Indonesia, maternal mortality rates continue to increase, with illegal abortion rates dominating. The number of rape cases also continuing to increase, especially incest rapes, which often leads to unwanted pregnancy. Thus, through Law No. 36/2009 concerning Health, legalization of abortion was added with indications of rape victims .[2]

Abortion legalization with rape victim indication causing much debate. In this case, there were 2 individuals whose rights were violated: pregnant women as rape victims who clearly experienced reproductive rights violation, and fetuses who experienced human rights violations. Pregnancy that occurs due to rape or coercion is difficult to accept. Unwanted pregnancy is potentially interrupting fetal growth and development. The right of a fetus to grow and develop well and safely is difficult to fulfill, especially if the mother conduct an abortion. Many people consider these reasons are too weak and tend to be misused. Moreover, in government regulations governing Law No. 36/2009 implementation, abortion legalization for rape victims is only permitted at gestation less than 40 days. Haste in deciding abortion will potentially abuse and violate unborn child right to live.[21] There are 3 important points that underlie this argument.

First, abortion legalization for rape victims is tend to be misused. Based on Government Regulation No. 61 of 2014, as Health Law No. 36 of 2009 Article 75 implementation rule concerning abortion legalization, the determination of rape cases and acts of abortion should only be done within a very short gestational age, less than 40 days, and can only done by investigators and doctors. Someone could uses it by claiming their pregnancy because of rape, but it is not. False abortion indication can violate unborn child right to life .[21]

Second, not all pregnant women due to rape needs abortion service. If she undergoes decent medical and psychotherapy services, abortion is possibly unnecessary. Sandra Mahkorn (2013) conducted a study of 37 pregnant rape victims. 28 of them continued their pregnancy, 5 had an abortion and 4 went missing from the surveillance. In initial evaluation, all victims experienced severe depression. However, through good counseling to the victims and families, psychological trauma from two-thirds of them who continued pregnancy slowly improved. Good counseling, family and environment support are very important for their recovery . [22]

However, abortion is needed if the rape victims experience psychiatric emergency like acute madness, restless rowdy and suicide crisis. Mentioned conditions may threaten mother's life and endangers the environment. In fact, if from the beginning they have received adequate medical and psychotherapy therapy, this psychiatric emergency rarely happened [23]. Thus, if abortion is carried out without proper medical evaluation and psychotherapy and done to the pregnant women who actually not need it, then the act of abortion is a serious violation to the unborn child right to live .[24]

Although done legally, abortion still has risks including infection, bleeding and reproductive organs damage. Besides, prolonged psychological trauma like regret, feelings of sin, inadequacy and inferiority may appear [25]. In 2000, Brenda Major et. al, conducted research in America towards aborted 1177 women. 38 percent participants was followed until 2 years, while 1,5 percent caught abortion specific post traumatic stress disorder (PTSD) symptom. In 2008, the American Psychological Association, which specializes in abortion and mental health, stated that women who conducted an abortion were clinically at risk of experiencing depression or anxiety disorders later .[26]

Third, if rape victims experience unwanted pregnancy, they have two options which should be explained from the beginning: abortion and adoption for the born baby. if the choice of adoption is not explained, then the act of abortion is a serious violation to the unborn child right to live.[27] In this case, the state has a huge obligation to provide protection for women with unwanted pregnancies, especially rape victims who are still willing to continue their pregnancy. They often experience bad stigma and exclusion from families, schools and communities. Sadly, the state does not provide shelter that can protect them from public blasphemy and provide a sense of security. As the consequence, it drives these women to choose illegal abortion, especially young women. Thus, the state is obliged to provide adoption facilities or accommodate and bear the care of the child if the woman refuses their child .[13] Abortion legalization for rape victims need better regulations. Immediate action, inadequate medical evaluation and psychotherapy, and adoption options that are not offered from the beginning will possibly harm pregnant women and violate the unborn child right to live.

4 Conclusion

Abortion legalization, in any circumstances, is the act of legalizing abortion to forcibly deprive fetal rights of life. Thus, unclear indications and regulations will put fetal rights of life end in smoke. This action only permitted under two indications, medical emergencies and rape victims. Under the first circumstance, saving pregnant mother's life is necessary. Despite performing abortion, saving people's live become doctor's legal basis in doing their duty. In the contrary, the second indication still become a debate. Raped pregnant mother able to receive medical evaluation, psychotherapy and perform abortion as long as their gestational age is under 40 days. However, implementation of these rules are not emphasized and they also did not receive an adoption offer. Thus, abortion legalization for them is prone to abuse. It may harm pregnant women and potentially cause severe violations to fetal rights of life. Plenty of legal improvements are needed, especially on the implementation rules of abortion legalization for raped women. So that the rule cannot be misused and may provide protection for them.

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