

Abortion in Criminal Law Perspective

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Abstract. This paper discusses the act of abortion from the perspective of criminal law. The act of abortion that is carried out as a result of sex outside of marriage is a crime. By using a qualitative approach, the normative juridical research method will examine the criminal law perspective in highlighting the act of abortion. The finding results is that the act of abortion is included in the category of criminal offenses because it is included in the loss of life.

Keywords: Abortion, Law, Crime, Criminal.

1 Introduction

In countries that do not allow abortion, such as Indonesia, many women are forced to seek unsafe abortion services because safe abortion services are not available or the fees are too high. For adolescent girls, the biggest obstacle is fear and not knowing where to seek counseling. It causes adolescents to delay seeking help from safe services, and are often trapped in the practice of unsafe abortion. WHO estimates that there are 4.2 million abortions performed per year, 750,000 – 1.5 million applied in Indonesia, 2,500 of them end in death? Household Health Survey (SKRT) in 1995: abortion contributed 11.1% to the maternal mortality rate (MMR).[1]

Currently, abortion is still a controversial issue in Indonesian society. But despite the controversy, abortion is indicated as a public health problem because it has an impact on maternal morbidity and mortality. As it is known, the primary causes of death for pregnant women and childbirth are bleeding, infection and eclampsia. But actually, abortion is also a cause of maternal death just appears in the form of bleeding complications and sepsis. However, maternal deaths due to abortion complications often do not appear in death reports but are reported as hemorrhage or sepsis. It is because abortion until now is still a controversial issue in society.

In the medical world, abortion is classified into 2 types, spontaneous abortion and abortion provocatus (intentional abortion). Intentional abortion (provocatus) is the expulsion of the fetus that is expelled intentionally and prematurely. In Indonesian society, the act of abortion is a criminal act, but in Indonesian law, if it endangers the life of the mother, abortion can be legalized or allowed because of medical indications which in medical language is called abortion provocatus medicines. Meanwhile, what is meant by abortion that violates the law and without specific medical indications is abortion provocatus criminals.[2] (2) Criminal provocateur abortion is closely related to unsafe abortion. According to the World Health Organization (WHO), unsafe abortion is an abortion carried out by incompetent medical personnel or even by parties who have not attended medical education.

The problem of abortion in Indonesia is related to positive law in Indonesia, which is regulated in articles 346, 347, 348, 349 of the Criminal Code. In the Health Act, abortion is regulated in Law Number 23 of 1992 Article 15, which was later replaced by Law Number 36 of 2009 Article 75 concerning Health. The Criminal Code (KUHP) expressly prohibits abortion for any reason, while in UUK Number 36 of 2009 in Article 75 point 1 "everyone is prohibited from having an abortion" but in paragraph 2 (two) it can be excluded, by allowing abortion based on clear medical indications, namely if a pregnancy that threatens the life of the mother or fetus with congenital defects is detected, abortion may only be carried out after the person concerned has received an understanding of the things that will happen before, during and after the action is given by the doctor. people who are competent in their fields.[3]

The Human Rights Law regulates legal protection for a fetus since it is still in its mother's womb. Although a woman has the right to herself, every living creature may have human rights from the time she is in the womb and is regulated in the law. This paper will further describe the act of abortion from the perspective of criminal law in Indonesia.

2 Research Methods

The research will be used using normative juridical review, which is research by examining various sources such as sources of literature such as journals, literature, books, and written documents, as well as various laws such as legal theories, legislation, and doctrines, opinions of lawyers. [4] The approach used in this study is a legal approach and a conceptual approach. [5].

3 Results and Discussion

The definition of abortion, in general, is abortion. Abortion can be done intentionally or unintentionally. Unintentional abortion can occur as a result of an accident and is said to be an abortion that is not against the law, meaning that the action does not violate the rule of law. Meanwhile, an abortion that is against the law is an act that violates the rule of law, more specifically, an abortion that is carried out intentionally can have legal consequences (can result in imprisonment according to the Criminal Code). Acts of abortion that are against the law often occur but rarely come to the surface, it happens because each party between the patient and the doctor can both keep all the abortion events a secret.

Abortion is prohibited by law. But based on Law No. 36 of 2009 concerning Health in Article 75 paragraph 2 there are exceptions. Abortion may be carried out as long as it fulfills several provisions that have become the main basis that must not be violated, both in the Criminal Code and special rules that have been set by the Government. Abortion is justified according to the provisions of the law because it is to save a person's health or life, e.g; there is a pregnant woman whose pregnancy is outside the womb, then to save the mother's life, surgery needs to be carried out to remove the fetus outside the womb because without surgery, it does not rule out the possibility that the life of the pregnant woman is threatened. It is emphasized again in Article 76 that in abortion with medical indications as referred to in Article 75 several things become a requirement, including:

- a. With the consent of the pregnant woman concerned or her husband or family.
- b. Based on medical indications that require such action to be taken.
- c. By health workers following the provisions of the rules.

To answer how the criminal liability for actions committed by a woman who intentionally aborts the womb and someone who orders/forces someone to have an abortion and the actions of a doctor who performs an abortion that is against the law, can be justified in terms of the existing positive law both according to the Criminal Code and the Law as well as Health Law No. 36 of 2009 will be described systematically so that various provisions of the law can be suspected or accused of acts committed by the perpetrators.

In the provisions of articles 346, 347, and 348 of the Criminal Code, it is mentioned about abortion or the death of a woman's womb. There is no use of the term child, but the terms pregnancy and abortion are declared as separate crimes that are not included in the definition of murder. The fetus in the womb can be aborted before birth, while after it, the child can be killed (Article 342 of the Criminal Code). Articles 346, 347, and 348 of the Criminal Code refer to the entire time of pregnancy so that legally there is no difference between a pregnancy that is only two weeks old and one that is already four months old.

However, in practice, there seems to be a difference in legal protection for pregnancies that are only two weeks old and those that are already four months old (especially if associated with the implementation of family planning programs in Indonesia). Although juridically fetus in the womb does not yet have human status, it still has its juridical nature. The fetus in the womb is one with its mother but cannot be equated with the other parts of the body of its mother because it has a life of its own. It was only temporary in his mother's body. The mother may die, and the fetus in her womb is still alive, or vice versa the perished fetus keeps the mother alive. The fate of the fetus in the womb cannot be determined arbitrarily, for example, a pregnant woman cannot decide to disrupt the life of the fetus or abort it. The woman can decide for herself to become pregnant, but since the egg becomes a fetus (embryo) the woman no longer has the full right to determine the fate of the embryo, because the fetus has received its legal protection (Nascendi status). [1]

The first issue that needs to be discussed in this case is: What is meant by the phrase "aborting a child in the womb" and which in Dutch is called "afdrijving"? The term commonly used in legal science is the Roman term "Abortus" or completely "Abortus Provocatus." As for what is meant by abortion or afdrijving is an act done intentionally with the intention that the child who is still in the mother's womb is born before its time according to nature. What is meant by "aborting a child from the mother's womb" is what in medicine is to cause the child to be born before its time according to nature. On the issue raised above, some scholars argue that in the formulation of the provisions of article 346 of the Criminal Code, it is not confirmed that the aborted child must still live or die. Further scholars hold the stated opinion that since the Law itself does not explicitly formulate on the matter, it does not matter whether the aborted child is still alive or not, essentially, it is all included in the definition of abortion.[6]

The Criminal Code itself determines which means that an abortion can be carried out from the moment of conception until the time the child is almost born. Maybe it was already dead in the womb at the time of the abortion. Here what needs to be considered is "the act of abortion."

A pregnant woman who deliberately performs an abortion has a clear motive, namely because she was tempted by a promise given by someone who forced an abortion that was against the law that she would marry his son, Hendra Jaya. If the womb is willing to abort, then she is willing to carry out an abortion. From that action, the woman had realized or should have understood that the action she had taken would result in the death of the child to be born.

Taking into account the criminal case committed by the party who intentionally aborts the womb, then the elements in Article 346 of the Criminal Code are fulfilled, thus it can be stated:

a. A woman who intentionally aborts her pregnancy with her knowledge, for example in the statement of the sample case below is Ninik, 18 years old from Oro-oro Ombo Malang,

Indonesian nationality, residing in Tulungagung, the religion of Islam, work as a billiards employee, found guilty of committing criminal acts as regulated and threatened in article 346 of the Criminal Code.

b. Can be sentenced to a maximum imprisonment of four years.

If you pay attention to the actions committed by someone who ordered an abortion, the person concerned can more precisely be netted under Article 55 (1) le-2 of the Criminal Code in conjunction with Article 349 of the Criminal Code, and not Article 55 (1) of the Second Criminal Code in conjunction with Article 346 of the Criminal Code. . It can be concluded that: In the case example: “..... the consensus of Mrs. Hanafi and Siti Marfuah ordered another person, namely Doctor Rizal to abort Siti Marfuah's womb, at the request of Mrs. Hanafi and Siti Marfuah, the doctor did this by spraying Prostaglandrin into Siti Marfuah's vagina, with the intention that the fetus in Siti Marfuah's womb could be aborted, and then the doctor would get paid for her hard work from Mrs. Hanafi in the form of money of Rp. 500,000.00.

Based on the description above, the elements of Article 55 (1) of the 2nd Criminal Code in conjunction with Article 349 of the Criminal Code are fulfilled. Thus it can be concluded that the involvement of Ms. Hanafi as the maker (dader) of a criminal act committed by ordering, giving advice, promising something to Siti Marfuah to perform an abortion (abortion) then her position is the same as that of a doctor as the implementation of the abortion, with Thus the punishment that should be given is the same as the punishment given to the doctor.

So it is very appropriate that Mrs. Hanafi was not charged with Article 55 (1) 2 in conjunction with Article 346 of the Criminal Code but the truth is Article 55 (1) 2 in conjunction with Article 349 of the Criminal Code. From the explanation above, it can be concluded that a person who deliberately orders and forces a person to have an abortion is against the law by making such promises: a. Found guilty of committing a crime as regulated in Article 55 (1) in conjunction with Article 349 of the Criminal Code. b. He was sentenced to the same prison sentence as a doctor, namely, 5 years and 6 months in prison, cut off the prison term.

4 Conclusion

Thus, abortion, in general, is a heinous act, inhumane, and against the law and religious teachings. However, abortion law, in particular, needs to be studied in more depth, because abortion is not one form of action but also has various reasons. Meanwhile, Islam is not a rigid religion, but a religion that views human life from various angles, so that it finds solutions to all the problems faced by humans, including the solution to the problem of abortion. In Indonesian legislation, the regulation of abortion is contained in two laws, namely the Criminal Code and the Health Law. In the Criminal Code and the Health Law, the threat of punishment for abortion is regulated (abortion, no mention of the type of abortion), while legal artificial abortion (therapist or medical) is regulated in the Health Law.

References

- [1] N. B, I. V, and N. AP., PERBUATAN ABORSI DALAM ASPEK HUKUM PIDANA DAN KESEHATAN. 2018.
- [2] B. Wahyuni, “Aborsi dan Kegagalan kontrasepsi IUD,” PPK UGM, vol. 2, no. 1, 2000.
- [3] L. Hanifah, “Aborsi Ditinjau Dari Tiga Sudut Pandang,” Jender dan Kesehatan, vol. 8, no. 1, 2001.

- [4] S. Irianto, "METODE PENELITIAN KUALITATIF DALAM METODOLOGI PENELITIAN ILMU HUKUM," *J. Huk. Pembang.*, vol. 32, no. 2, p. 155, Jun. 2017, doi: 10.21143/jhp.vol32.no2.1339.
- [5] D. L. Sonata, "METODE PENELITIAN HUKUM NORMATIF DAN EMPIRIS: KARAKTERISTIK KHAS DARI METODE MENELITI HUKUM," *FIAT JUSTISIAJurnal Ilmu Huk.*, 2015, doi: 10.25041/fiatjustisia.v8no1.283.
- [6] A. T. Hukum dan Abortus. Yogyakarta: deepublish, 2013.