ABORTION ON PREGNANCY AS RESULT OF RAPE CRIME
(A HUMAN RIGHTS PERSPECTIVE)

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ABSTRACT

Abortion have become a controversial phenomenon in Indonesia. The debate on abortion attempt is still become an actual topic which correlate on the assumption on whether a fetus is able to be aborted with certain reasons specifically abortion on pregnancy based on rape crime, and whether abortion have violated the human rights. The abortion issue is intertwined with the fetus’s right to live in its womb, which such right is obligated to be respected and protected by each people, society, and country. This research is aimed to acknowledge the regulation on abortion in Indonesian positive law and to analyze the protection on fetus right to live in correlation to the legality on the act of abortion on pregnancy based on rape crime. The method utilized in this research is normative legal research by utilizing statutory and conceptual approach. The type on legal source utilized is relevant statutory regulations as primary legal source and secondary legal source to sustain the primary legal source. The result of this research can be concluded that the establishment of Indonesian positive law on the abortion on pregnancy based on rape crime is limitedly legal where abortion is only legal based on medical emergency and pregnancy based on rape as the excuse. The fetus’s right to live in its womb is an essential right given by god which cannot be derogated by any excuse, which shall be protected and respected by each people, society, and country. It is essential that the role of country contributes in guaranteeing the protection of fetus’s right to live in order to not be aborted, so the fetus can grow and develop till it is ready to be born and to grow as a human.

Keywords: Right to Live, Abortion, Human Rights

1. INTRODUCTION

Abortion is a classical issue which still become a serious debate which not only regarding on its regulation, but also pertaining with health and the fetus’s right to live in its womb. In Indonesia, debates on abortion have become a familiar topic to discuss in Draft Criminal Code (RKUHP). Various argumentations delivered to legalize abortion specifically in terms of medical emergency or pregnancy due to rape crime.

Abortion is derived from English word (abortion) literally translated as aborting fetus or miscarriage. [1] In medical aspect, abortion defined by Gulardi is the cessation (death) and discharge of the pregnancy before 20 weeks (counting from the last menstruation) or the fetus weighs less than 500 grams or the fetus is less than 25 cm long. In general, abortion occurs before three months of pregnancy. [2]

The criminal code (KUHP) regulates that abortion or miscarriage of fetus is an act punishable by punishment, this provision can be seen in detail in Article 299, Article 346, Article 347 and Article 348. However, this provision is excluded based on certain reasons through Law Number 36 of 2009 concerning Health. The exception to this abortion has certainly provoked a debate in the community between rejecting the legalization of abortion and those who agree to abortion for pregnancy as a result of the crime of rape.

In several parts of society, regarded that abortion is still viewed as a moral act and taboo, regardless of whether the abortion was carried out on the grounds of rape or other reasons. However, for some people, abortion is an obligatory choice to protect women who are pregnant as a result of the crime of rape. Women victims of rape have the right to their bodies, to abort or not to abort their wombs.
In RKUHP, the legislators still refer to the provisions in the KUHP which are still valid until now, where the perpetrator, in this case a pregnant woman who aborted her pregnancy, is seen as a criminal act and is threatened with punishment. The provisions regarding the conviction of a pregnant woman who abort her womb in Law Number 36 of 2014 concerning Health have an exception, namely if the abortion or abortion is carried out on the grounds of a medical emergency and in pregnancy as a result of the crime of rape is not punished or not convicted.

The concept on abortion prohibition has been known for centuries, by Hipocrates (460-370 BC), [3] a medical expert in Greek era. Hippocrates held the view against abortion. “I will not give deadly drugs, even if asked, and I will not give such advice. In the same way, I will not give drugs to a woman that can lead to an abortion.” Similar to Hipocrates, Pythagoras (582-496 BC) had a stance that did not allow abortion because according to him the life or soul of a human being entered and remained in the body from conception. Whenever an abortion is performed, it means the loss of the life of a living being." [4] In addition to the views that disagree, there are those who agree with the act of abortion as put forward by Aristotle and Plato, who have the view that the fetus cannot be seen as human.[3]

The battle of perspective still continues to occur, different arguments are given by those who are gathered in the pro-choice movement and the pro-life movement. Both of these movements have a different stance where the pro-choice movement seeks to protect women's rights in terms of this is a right over their body, so that when pregnancy is seen as something that disturbs their body, women can choose to abort or not to abort. pro-choice holds that women have the right to determine matters relating to their reproduction. The existence of an embryo or fetus in the womb is deemed not to have the right to be protected so that it continues to survive until it is ready to be born, so that a woman who has this womb may choose to abort her womb and ignore the right to life of the fetus because she considers that her womb is part of her right reproduction.

Meanwhile, pro-life has the opinion that living things must be protected and guaranteed for their life from the moment they are in the womb. Protection guarantees for the fetus in the womb must be given from the time the fertilization occurs in the womb, so that abortion is seen as a despicable and inhuman act.

From the pros and cons of legalizing abortion, Indonesia has experienced a similar thing when the Health Law, namely Law No. 36 of 2014 was passed, where there is a paradigm that shifts from the provisions in the main criminal law regulation (KUHP). which expressly prohibits the act of abortion, especially on provocatustraimabolition. The health law provides room for abortion of pregnancies as a result of a medical emergency or as a result of the crime of rape.

The reason for allowing abortion as a result of the crime of rape is based on concerns for women who are pregnant as a result of the crime of rape who can experience trauma so that it can affect their mental health. The suffering of a rape victim cannot be taken lightly, considering that it must have caused a deep wound physically and psychologically to the victim. From a psychological point of view, the act of rape is a disgrace that is inherent in the victim, while from the physical side, violence committed to immobilize the victim will certainly result in injuries to the body and even to the victim's female organs. Juridical rape is an act that forces a woman who is not his wife to have intercourse with him, where the coercion must be carried out by force or the threat of violence.

By LidyaSuryani and Sri Wurdani, the suffer of rape victims is described as different from other conventional crimes, rape victims experience physical and mental suffering, the victim's decision to report what happened to him to the authorities was not an easy decision. An event that is so traumatic and embarrassing must be recalled chronologically by the victim. Not to mention the attitude and treatment of law enforcement officials who sometimes underestimate victims, because the general view so far of rape victims is that they are badly traded. [5]

In the Rifka Annisa (Woman Crisis Center) Report, she explained that post-rape stress can be divided into immediate stress and long-term stress. Immediate stress is stress, a long-term reaction, which is a particular psychological symptom that the victim feels as a trauma that causes the victim to have self-confidence, negative self-concept, shutting down from social interactions, and also somatic reactions such as heart palpitations or excessive sweating. [5]
Certainly, this legalization is a dilemma especially for reasons of abortion due to the crime of rape, where the right to life of the fetus is also obliged to be protected in accordance with the provisions of Law No. 39 of 1999 on Human Rights, especially Article 52 of the Human Rights Law which affirms that every child has rights. Human rights that are recognized and protected by law from the time they are in the womb, as well as Article 53 which confirms that every child has the right to live, to maintain life and to improve his standard of life since he is in the womb.

Based on the description above, the problem in this research is how is the establishment of Indonesia's positive law against abortion and how to protect the right to life of the fetus in relation to the legalization of abortion due to the crime of rape. The purpose of this research is to examine the establishment of positive Indonesian law regarding abortion and to analyze how the protection of the right to life of the fetus in the womb, especially those caused by pregnancy due to the crime of rape.

II. RESEARCH METHOD

This type of research is normative legal research, according to Peter Mahmud Marzuki, normative research is a process to find legal rules, legal principles and legal doctrines in order to answer legal issues at hand. [6] Sources of legal materials consist of primary and secondary legal materials. Primary legal materials are obtained from related laws starting from the 1945 Constitution, the Criminal Code, Law on Human Rights, namely Law No. 39 of 1999, Law No. 36 of 2014 and Law No. 23 of 2002 concerning Protection. Children and Government Regulation number 61 of 2014 concerning Reproductive Health, while secondary legal materials include materials that have a relationship with primary legal materials, especially those that provide explanations for primary legal materials, including literature, journals and other materials that support the discussion of this research problem.

III. DISCUSSION

Abortion Regulation in Indonesian Positive Law

Terminologically, abortion is the miscarriage of a woman's fetus with certain actions before her pregnancy is complete, either alive or dead before the fetus can live outside the womb, but some of her limbs have been formed. [7] Abortion is derived from the Latin word *abortio*, which means premature removal of the conception from the *urethus* at an age where the fetus cannot live outside the womb at the age of 24 weeks. Medically, abortion means expulsion of the uterus before 24 weeks of age and results in death, whereas if the fetus is removed after 24 weeks and dies it is not called abortion but infanticide.[8]

According to the Law Dictionary, abortion is the termination or abortion of a pregnancy or abortion of a child in the womb using an unlawful means, while abortion is the death of a child in the womb due to an untimely birth without any deliberate element in the process.[9] In the KUHP, abortion is seen as a criminal act or a criminal act. According to Moeljatno, a criminal act is an act prohibited by law and punishable by any person who violates it. [10] Meanwhile, according to Enschede, a criminal act is human behavior that fulfills the formulation of offenses, is against the law and can be reproached. [10] Therefore, abortion is an act that is punishable by punishment or punishment.

Abortion or artificial abortion (termination of pregnancy) can be divided into two types, which are [11]:

1. Illegally (*Abortus Provocatus Criminalis*), that is carried out by incompetent personnel and done by massaging the lower part of the recruiter, inserting foreign objects or types of plants or grasses into the cervix and drugs or other chemicals that can cause severe infection and fatal;

2. Legally (*abortus provocatustherapeuticus*), that is done based on medical indications by means of surgery or which is often done by means of curettage or vacuum aspiration, and medical methods which are carried out in hospitals or clinics, this method is carried out by a trained doctor or a specialist in Obstetrics and Gynecologist.

The type of abortion which is a criminal offense punishable by the punishment of abortion is *provocatuscriminalis*, in which the abortion is carried out on purpose for certain reasons, for example because of an unwanted pregnancy or for economic reasons and other reasons. In national legal instruments, especially the KUHP. The prohibition of abortion is regulated by Article 299, Articles 346, 347, 348 and Article 349. The provisions of each of these articles are as follows:
1. Article 299: 1. Anyone who treats a woman on purpose or orders her to be treated, by being informed or giving the hope that because of the treatment the pregnancy can be aborted, is punishable by a maximum imprisonment of four years or a maximum fine of three thousand rupiah; 2. If the guilty person does so to gain profit or make the act a livelihood or habit, or if he is a doctor, midwife or medic, the penalty can be increased by one third; 3. If the guilty person commits the crime, in carrying out the search, he/she can be deprived of the right to carry out that search.

Article 299: Anyone who treats a woman on purpose or orders her to be treated, by being informed or giving the hope that because of the treatment the pregnancy can be aborted, is punishable by a maximum imprisonment of four years or a maximum fine of three thousand rupiah;

2. Article 347: 1. Any person who deliberately causes the abortion of a womb or the death of a fetus in a woman's womb without the consent of the woman herself, shall be punished by a maximum imprisonment of twelve years. 2. If the aforementioned act results in the death of the woman, he will be threatened with a maximum imprisonment of fifteen years.

3. Article 349: If a doctor, midwife or medicine officer assists in committing a crime under article 346, or commits or assists in committing one of the crimes described in articles 347 and 348, then the penalties specified in that article can be increased by one third and the right to carry out a search in which case can be revoked. A crime was committed.

The criminal threat from the provisions of the articles prohibiting abortion in the KUHP is aimed at both women who are pregnant, other people who without the consent or with the consent of the woman who are pregnant cause the woman's womb to be aborted, and the doctor or medic who helps the abortion. The establishment of the KUHP clearly and explicitly prohibits abortion without any reason, but in the provisions of the Health Law, which is the Law No. 36 of 2009, there are exceptions to abortion. In particular, article 75 stipulates that:

1. Each person is prohibited to commit abortion
2. The prohibition mentioned in paragraph (1) can be excepted based on:
   Indication of medical emergency detected during early phase of pregnancy, whether threatening the life of the mother and / or fetus, suffering from serious genetic diseases and / or congenital defects, or which cannot be repaired so that it makes it difficult for the baby to live outside the womb; or
   Pregnancy due to act of rape which impacts to psychological trauma to victim.

This health law was then followed by the issuance of a Government Regulation on Reproductive Health, namely PP no. 61 of 2014, which affirms Article 31 and Article 34, namely:

Article 31: (1) The act of abortion can only be done based of:
   Indication of medical emergency
   Pregnancy due to act of rape

(2) The act of abortion as mentioned in paragraph (1) point b can only be performed if the pregnancy age is at least 40 (forty) days from the first day of the last menstrual period.

Article 31: (1) The Pregnancy due to act of rape as mentioned in article 31 paragraph (1) point b is a pregnancy resulted from sexual intercourse without any consent from the female based on the statutory regulation.

(2) The Pregnancy due to act of rape as mentioned in article 31 paragraph (1) is proved with:
   Compatibility between pregnancy age and the act of rape, which is stated by medical certificate; and
   Information from investigators, psychologists, and/or other experts regarding alleged rape.

In the health law, exceptions to abortion can only be granted based on reasons of medical emergencies, for example because the pregnancy is life threatening to the mother and the reason the pregnancy was the result of rape. In the case of abortion due to medical emergencies, there is not much conflict because there is a mother's
soul to be protected. But with regard to abortion due to rape, there are some groups who disagree considering that the woman can still choose to keep her womb with certain consequences.

In the realm of criminal law reform, especially the discussion of the RKUHP, the article on abortion is one of the articles that continues to be debated and controversial. The provisions regarding abortion in the RKUHP are listed as follows:

Article 415: Any person who without rights openly displays a means of aborting, offers, broadcasts writing, or shows to be able to obtain an abortion instrument, shall be punished with a maximum imprisonment of 6 (six) months or a maximum fine of Category II.

Article 470: (1) Every woman who aborts or kill her womb or asks someone else to abort or kill the womb shall be punished with a maximum imprisonment of 4 (four) years.

(2) Every person who abort or terminates a woman's womb without her consent, shall be sentenced to imprisonment of up to 12 (twelve) years.

(3) If the act as referred to in paragraph (2) results in the death of the woman, the person shall be punished with imprisonment for a maximum of 15 (fifteen) years.

Article 471: (1) Every person who aborts or terminates a woman's womb with her consent, shall be punished with imprisonment of 5 (five) years.

(2) If the act as referred to in paragraph (1) results in the death of the woman, the person shall be punished with imprisonment for a maximum of 8 (eight) years.

Article 473: (1) Doctors, midwives, paramedics, or pharmacists who help carry out the Crime as referred to in Article 470 and Article 471, the penalty can be added by 1/3 (one third).

(2) A doctor, midwife, paramedic or pharmacist who commits a criminal act as referred to in paragraph (1) may be subject to additional punishment in the form of revocation of rights as referred to in Article 86 letters a and f.

(3) A doctor who performs an abortion due to an indication of a medical emergency or a victim of rape in accordance with the provisions of statutory regulations, is not sentenced.

The provisions in the formulation of articles regulating abortion are clearly illustrated that the establishment of the RKUHP in substance does not tolerate the act of abortion, which differs only from the provisions of Article 472 paragraph 3 which give a little gap for doctors who carry out an abortion on the grounds of a medical emergency or because victims of rape are not sentenced, while for women who abort their wombs are threatened with the same provisions in the Criminal Code.

The controversy over not accommodating depenalization of abortion perpetrators due to the criminal act of rape in the RKUHP was voiced by several groups, one of which was by the Institute of Criminal Justice Reform (ICJR) and the Indonesian Family Planning Association (PKBI) who thought that the articles in the RKUHP contained discrimination against victims. rape because of the opinion of a woman who aborted her womb is punishable while a doctor who helps to abort is not convicted. In addition, according to the ICJR's view, the RKUHP should contain guarantees that there is no punishment for abortions carried out on medical indications and for victims of rape, all aspects, both aspects of treatment, the act of abortion itself, and health promotion related to this matter, which are also regulated in the provisions. RKUHP. If the exclusion provisions are not included in the RKUHP, then this could threaten rape victims who do abortions, even though when referring to the spirit of codification of the Government and the DPR, the rules regarding exclusion as contained in the Health Law must be regulated in the RKUHP. [12]

Thus, the establishment of positive law in Indonesia regarding abortion due to the crime of rape adopts a moderate or limited system, where the KUHP views abortion as a criminal act, but in certain cases it is exempted from the health law when the abortion is carried out for reasons of a medical emergency or because of a victim of rape.
Legalizing abortion as a result of the crime of rape in the Health Law, will indirectly have implications for its implementation. Problems that can arise are also related to the conditions stipulated in Government Regulation no 61 of 2014 which is stated in Article 31 and Article 34, namely:

- pregnancy age is at least 40 (forty) days (counted from the first day of the last menstrual period);
- pregnancy age and the act of rape is compatible with the period of rape occurred, (proved by medical certificate);
- Information from investigators regarding alleged rape;
- Information from psychologists, and/or other experts regarding alleged rape.

By observing the conditions mentioned above, at the level of implementation it is difficult to implement. For the first condition that determines the specified time limit, which is a minimum of 40 days from the first day of the last menstruation, it is certainly not an easy problem to implement. As stated by Budi Wahyuni as deputy chairman of the National Commission on Violence Against Women, Indonesia has legalized abortion for rape victims, but this is difficult to implement because rape victims know that their average pregnancy is more than 40 days.[13] The determination of the 40-day time limit will create a separate legal problem, because when the abortion process cannot be carried out during that time, abortion is considered an illegal act and is punishable by punishment.

Necessarily, this problem shall be examined seriously. So that reformulation of existing regulations is needed, especially in the health law related to abortion so that it is easy to implement and does not violate human rights.

**Protection of the fetus right to live in the womb in connection with abortion as a result of the crime of rape.**

Confronting a woman's human rights to her womb due to unwanted pregnancy due to rape with the right to life of the fetus is not easy because of its dilemma, such as an Indonesian metaphor "on the horns of a dilemma", where sacrificing one of these rights will injure other human rights. The fulfillment of these two rights is equally important, because they both have guarantees of protection that must be respected.

Humans have the right to themselves completely apart from other people. For that we need a guarantee of basic rights for humans that must be understood and respected by every human being, because everyone on this earth needs these rights.[14] However, because each human being has the same rights, it is feared that each of them will mutually recognize their rights and experience conflicts of interest with other human beings. To overcome this, John Locke postulates that in order to avoid such conflicts of interest or the uncertainty of life over these rights in nature, human beings have taken part in a social contract or a voluntary bond, by which means the exercise of their rights. that which cannot be revoked is handed over to the ruler of the state.

The guarantee of protection of the right to life as part of the protection of human rights is a fundamental right that cannot be ruled out for any reason, John Locke, through his book Two Treatises on Civil Government, in his theory construction states that humans have a natural state that is free according to their heart's will and with which the fabric of life is in the same level. According to Locke, this natural condition is social, therefore humans live in harmony and peace in accordance with the law of reason which teaches that humans should not interfere with the life of freedom and property rights of others, because these matters are related to fundamental rights owned by humans, namely the right to life, the right to freedom and property rights. [15] In other provisions, the right to life is also protected in Article 6 of the Convention on the Rights of the Child which states that States Parties to the Convention recognize that every child has inherent rights to life. So that every child on earth can declare that, “I must continue to live and develop as a human”.

The guarantee regarding the right to life in the constitution, especially Article 28 A of the 1945 Constitution, affirms that everyone has the right to live and has the right to defend his life, And Article 28 A paragraph 2 that every child has the right to survive, grow and develop and have the right to protection. from violence and discrimination. Furthermore, in Law No. 39 of 2009, the sign of protection of the right to life for every child, including the life of the fetus in the womb, is explicitly described in Article 52 and Article 53 which confirms the following:

- Article 52: (1) Each child has the right of protection by the parents, family, society, and the country;
(2) Right of child is human rights and for its interests, right of child is recognized and protected by law even from the womb.

Article 53: (1) Each child starting from the womb, has the right to live, to maintain life, and to elevate its standard of life.

Child protection is all activities to guarantee and protect children and their rights so that they can live, develop and participate optimally in accordance with human dignity and protection from violence and discrimination. For the sake of realizing quality Indonesian children, with noble and prosperous characters. Child protection efforts need to be implemented as early as possible, starting from the fetus in the womb until the child is 18 years old. Starting from a comprehensive and comprehensive conception of child protection, this law places the obligation to provide protection to children based on the principles of non-discrimination, the best interests of the child, the right to life, survival and development and respect for children's opinions.[16]

The guarantee of protection of the right to life should be provided for the survival of the fetus that is conceived, but when there is a complicated problem related to the existence of a fetus that is present for an evil act, especially rape, then this problem becomes more complicated.

Actual abortion is an act that is prohibited by law in Indonesia, in particular Article 299, Article 346, Article 347, Article 348 and Article 349 which formulates the prohibition of abortion or abortion, this prohibition is aimed at women who are carrying the fetus or those who provide assistance against the occurrence of abortion. A maximum of 4 years imprisonment is imposed on a mother who, with all her efforts, carries out an abortion. Likewise, a person who assists in carrying out the abortion is also punishable by imprisonment.

Every person who during his life from before birth, has the essential rights and obligations as a human being. The formation of a state and government for any reason, must not eliminate the principle of rights and obligations not determined by the position of people as citizens of a country. Every person wherever he is must be guaranteed basic rights. At the same time, everyone, wherever he is, is also obliged to uphold the human rights of others. [17]

In relation to abortion for pregnancy, the crime of rape cannot actually be used as an excuse to castrate the right to life of the fetus, even though from a human rights perspective a woman also has the right to her womb. In this case, it is to continue or not to continue the womb by considering the psychological trauma suffered in conceiving, giving birth and caring for the child after birth.

The right to life is a natural right attached to a human being. This right is a right-handed down by Almighty God to human beings that He wills. According to the Tomistic view, natural law is part of God's perfect law which can be known through the use of human reason. Part of the contents of the previous philosophy of natural law was the idea that the position of each person in life was determined by God, so that everyone, regardless of status, was subject to God's authority. This foundation is theistic, in the sense that truth requires faith in God. [18]

Referring to the impact of rape which gives physical and psychological suffering to the victim, of course the justification for legalizing abortion of pregnancy as a result of rape itself should also be taken into consideration, but this consideration should not override the right to life of the fetus considering that the right to life is a "given" and classified as non-derogable rights whose fulfillment cannot be limited by the state even in an emergency.

Protection of the right to life in the constitution clearly determines that everyone has the right to live and live. Thus, even though women have the right to their wombs to have an abortion can be justified but the most important element whose value is also very important, whether you like it or not, is protecting the right to life of the fetus in its womb. Jean Jacques Rousseau stated that natural law did not create natural rights for individuals, but instead granted sovereignty to citizens as a unit in which this sovereignty could not be revoked. Thus, every right derived from natural law will belong to the people as a collectivity that can be identified using the reference "general will" (voluntaegenerale or general will). The general will be not an absolute quality and can change on its own or be transformed by a persuasive leader.[18]

The reason for abortion for pregnancy is due to the criminal act of rape, the essence is that it remains as murder and deprivation of the right to life of an innocent child, so that it remains a form of violation of human rights. The
suffering of a rape victim must still be considered, but this cannot be used as an excuse to carry out an abortion of an innocent fetus. The right of the fetus must still be protected by allowing it to grow and develop in the womb until it is ready to be born.

As part of the effort to ensure the fulfillment of the right to life of the fetus, the role of the state is needed to respond with concrete steps in the form of assistance when the mother is pregnant until the baby is born.

IV. CONCLUSION

It can be concluded that positive legal stance against abortion is limited, because the act of abortion is an act which is prohibited and punishable under the Criminal Code, however in certain cases it can be excluded on the grounds of a medical emergency or a victim of rape in accordance with the provisions contained in the Health Law. Protection of the right to life of the fetus in the womb has clearly guaranteed fulfillment in the human rights law, so that whatever the reason, the right to life of the fetus must be respected without exception. The right to life is a right given directly from Allah SWT which cannot be reduced for any reason. This requires state intervention in resolving problems related to abortion.

REFERENCES

1. Maria Ulfah Anshor 2006 Fikih Aborsi (Wacana Penguatan Hak Reproduksi Perempuan) (Jakarta: Kompas).
17. http://www.academia.edu/36635580/HAK_Asasi_MANUSIA DALAM_KONSTITUSI, downloaded in 2 Maret 2019. Pkl 09.15
18. Muhammad Ashri 2018 Hak Asasi Manusia Filosofi, Teori Instrumen Dasar, (Makassar: CV, Sosial Politic Genius)