

Abortion Perspective of Rape Victims Criminal Law Study

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Abstract

Whereas in the Indonesian legal system, the act of abortion/abortion is prohibited. Even the act of abortion is categorized as a crime in the context of criminal law so that the perpetrator and the person who helps to do it are subject to punishment. However, although most Indonesians are aware of these provisions, there are still many women who have abortions. This can be seen from the data submitted by researchers about the number of abortions that occur in Indonesia. Abortion is also often done by women who are victims of rape. The reason often put forward by women who are raped is that having a child as a result of rape will increase their inner pain because seeing the child will always remind them of the bad event. However, not always triggering events such as having too many children, pregnancy out of wedlock, and rape victims make a woman choose to have an abortion. There are also those who still maintain the womb on the grounds that the abortion is a sin, so he chooses to keep the womb. Whatever reason is put forward for abortion, if it is not due to medical reasons, the mother and the person who helped to abort the pregnancy will be punished with a crime. This is because positive law in Indonesia prohibits abortion. But on the other hand, if the pregnancy is not aborted, it will cause new problems, namely if the child is born from a poor family then he will not get a decent living, while if the child is born without a father, he will be ridiculed by the community so that he will live his life in shame. . This is because in eastern Indonesian culture, it is not possible to accept children born out of wedlock. This reason sometimes makes women who are pregnant out of wedlock desperate to have an abortion. So in this case how is the study of abortion in the perspective of criminal law in Indonesia.

Keywords: Abortion, Rape Victims, Criminal Law.

1. Background

The rule of law is a state based on law and guarantees justice for its citizens. The point is that all powers and actions of state equipment or authorities are solely based on law or in other words regulated by law. This will reflect justice for the social life of its citizens.

Law as the protection of human interests is different from other norms. Because the law contains orders and or prohibitions, as well as dividing rights and obligations. That related to abortion from the perspective of criminal law in Indonesia, in this case the act of abortion/abortion is prohibited. Even the act of abortion is categorized as a crime in the context of criminal law so that the perpetrator and the person who helps to do it are subject to punishment.

Criminal law is essentially just a "tool" that is a tool to achieve the purpose of punishment. Thus, before using the tool, it is necessary to understand the tool. Understanding of this tool is very important to help understand whether with the tool the predetermined goals can be achieved. So how does this understanding relate to rape victims who wish to have an abortion, it must be studied more specifically.

That abortion is often carried out by women who are victims of rape. The reason often put forward by women who are raped is that having a child as a result of rape will increase their inner pain because seeing the child will always remind them of the bad event. However, not always triggering events such as having too many children, pregnancy out of wedlock, and rape victims make a woman choose to have an abortion. From the background of the problem above, how is the study of abortion/abortion against rape victims from a criminal law perspective.

2. Formulation of the problem

How is the study of abortion/abortion against rape victims from a criminal law perspective?

3. Research methods.

This research uses normative legal research type. The approach method used in this research is:

- a. Legal Approach (Statute Approach)
- b. Conceptual Approach (Conceptual Approach)

Normative legal research, in this case, is to examine and analyze legal materials and issues based on statutory regulations and concepts related to the study of abortion/abortion against rape victims from the perspective of criminal law.

4. Theoretical basis.

Abortion Crime.

Law as the protection of human interests is different from other norms. Because the law contains orders and or prohibitions, as well as dividing rights and obligations. Sudikno Mertokusumo stated not only about the purpose of law, but also about the function of law and legal protection. He argues that: "In its function as the protection of human interests, the law has a purpose. The law has a goal to be achieved while the main purpose of the law is to create order and balance. With the achievement of order in society, it is hoped that human

interests will be protected. In achieving this goal, the law is tasked with dividing rights and obligations between individuals in society, dividing authority and regulating how to solve legal problems and maintaining legal certainty.

Whereas in several articles of criminal law provisions it is mentioned as one of the special elements of a certain crime: *wederrechtelijkheid* or the nature of breaking the law. There are times when this mention is emphasized that the nature of breaking the law is mainly about one part of a crime. For example in the criminal act of "abortion" by Article 346 of the Criminal Code. Abortion is discussed in articles 346 to 349 of the Criminal Code regarding abortion, because abortion is actually the same tone as child murder and premeditated murder.

The crime of abortion is regulated in the provisions for abortion (abortion) by Article 346 of the Criminal Code, abortion is discussed in articles 346 to 349 of the Criminal Code regarding abortion. Article 346 of the Criminal Code states: "A woman who intentionally causes the death or death of her womb or orders someone else to cause it, is sentenced to a maximum imprisonment of four years".

Article 346 of the Criminal Code states: "A woman who intentionally causes the death or death of her womb or orders someone else to cause it, is sentenced to a maximum imprisonment of four years". The similarity between child murder and abortion is that there must be a womb (*vrucht*) or baby (*kidn*) that is alive and then killed. This similarity also causes the criminal act of abortion (abortion) to be included in the title XIX Book II of the Criminal Code on Crimes Against People's Lives.

In addition, abortion is prohibited in the provisions of Law Number 36 of 2009 concerning health in Article 194 which explains that anyone who intentionally has an abortion not in accordance with the provisions as referred to in Article 75 paragraph (2) shall be punished with imprisonment for a maximum of 10 years and a fine at most Rp. 1,000,000,000, (one billion rupiah).

5. Research Results and Discussion.

Criminal law is essentially just a "tool" that is a tool to achieve the purpose of punishment. Thus, before using the tool, it is necessary to understand the tool. Understanding of this tool is very important to help understand whether with the tool the predetermined goals can be achieved. So how does this understanding relate to rape victims who wish to

have an abortion, it must be studied more specifically. That abortion is often carried out by women who are victims of rape. The reason often put forward by women who are raped is that having a child as a result of rape will increase their inner pain because seeing the child will always remind them of the bad event.

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Article 346 of the Criminal Code states: "A woman who intentionally causes the death or death of her womb or orders someone else to cause it, is sentenced to a maximum imprisonment of four years". The similarity between child murder and abortion is that there must be a womb (*vrucht*) or baby (*kidn*) that is alive and then killed. This similarity also causes the criminal act of abortion (*abortion*) to be included in the title XIX Book II of the Criminal Code on Crimes Against People's Lives.

The main difference between child murder and abortion is that in child murder there must be a baby born and alive, whereas in an abortion or death of a womb, what comes out of the body is a womb, which is alive but not yet a baby (*onvoldragen vrucht*). or an infant whose maximum sentence for abortion (four years) is less than that of child murder (seven years).

That in the case of abortion, it doesn't matter what reasons prompted the mother to do it, so it's not like in the case of child murder, where it is stated as a reason for the mother's fear of the birth of the child. If the abortion or death of the womb is carried out by someone other than the mother, and again without the mother's consent, then according to Article 347 of the Criminal Code paragraph 1 the maximum sentence is increased to twelve years in prison, and according to paragraph 2 it is increased again to fifteen years in prison, if This act resulted in the death of the mother.

If the act is carried out with the consent of the mother, then according to Article 348 of the Criminal Code paragraph 1 the sentence is reduced to a maximum of five years and six months in prison, and according to paragraph 2 it is increased again to a maximum of seven

years in prison if it causes the death of the mother. In this case of abortion, the target is the content in the mother's body, not the mother herself. If the target is the mother, not the womb, then someone who causes an abortion without the mother's permission can be considered to have committed a crime "deliberately seriously injuring another person" from article 354 of the Criminal Code, this is related to Article 90 of the Criminal Code which includes "aborting or killing content" into the term "severe injury". If this is considered the case, then the maximum sentence is reduced to eight years in prison, which can be increased again to ten years in prison if the mother dies. This is an oddity that the makers of the Criminal Code would not understand.

Furthermore, according to Article 349, if a doctor, midwife, or pharmacist assists the crime of Article 346 or is guilty of committing or assisting one of the crimes of Articles 347 and 348, the sentence specified in that article may be increased by one third, and may be revoked. his right to carry out the work in which he committed the crime.

Broadly speaking, abortion in the medical world is known as a type of abortion, namely spontaneous abortion (Spontaneous/Natural Abortion), namely: taking place without any action or unintentionally. Mostly caused by poor quality of egg and sperm cells, accidents and so on, this spontaneous abortion can occur among others because:

a. Imminence (threatening abortion) in the form of bleeding accompanied by contractions of the uterus. Imminence abortion can still be maintained, usually the mother is asked to rest (bed-rest) and given medication to strengthen the pregnancy again.

b. Incidence abortion is an abortion in progress, which usually can no longer be maintained. This is usually marked by heavy bleeding.

c. Incomplete abortion (incomplete abortion) in which part of the results of conception out while some are still left inside. Usually this is accompanied by heavy or profuse bleeding, because some of the products of conception are left inside, a curettage will be needed to clean the rest of the conception.

d. Complete abortion in which all the products of conception come out intact, so that in this case there is no need for action with other tools if it has been confirmed by the doctor that all the products of conception have come out.

2. Therapeutic/Medical Abortion, namely: artificial abortion performed on medical indications. For example, expectant mothers who are pregnant but have chronic high blood pressure or severe heart disease that can harm both the mother-to-be and the unborn child. But this is all on careful and unhurried medical considerations.

3. Abortion provocatus (Artificial/Intentional Abortion), namely: termination of pregnancy before 28 weeks of gestation as a result of deliberate and conscious actions by the mother-to-be and the abortionist (in this case a doctor, midwife or traditional birth attendant). Abortus artificialis therapicus is an abortion performed by a doctor on the basis of medical indications, that is, if the abortion is not taken, it can endanger the life of the mother.

Similar to the provisions of Article 346 of the Criminal Code, the provisions of Article 75 paragraph (1) of Law Number 36 of 2009 concerning Health ("Health Law") expressly prohibits abortion, which states as follows: Everyone is prohibited from having an abortion. However, there are exceptions for two things, namely as stipulated in the provisions of Article 75 paragraph (2) of the Health Law which states: The prohibition as referred to in paragraph (1) can be excluded based on:

a. an indication of a medical emergency detected at an early age of pregnancy, whether it threatens the life of the mother and/or fetus, suffers from severe genetic disease and/or congenital defects, or which cannot be repaired making it difficult for the baby to live outside the womb; or

b. pregnancy due to rape which can cause psychological trauma for rape victims.

In the letter b, it means that rape victims can have an abortion.

The Health Law is a special rule that regulates the act or act of abortion based on the principle of *Lex Specialist derogate Legi Generalis* as contained in the provisions of Article 63 paragraph (2) of the Criminal Code: If an act is included in a general criminal rule, it is also regulated in a criminal code that special, then only the special is applied.

Therefore, the provisions of Article 346 of the Criminal Code which regulates the act of abortion should be set aside because there are special rules, namely the Health Law which regulates this.

Then an abortion act can be declared as a legal action must also pay attention to the provisions of Article 75 paragraph (3) of the Health Law which explains as follows: The action as referred to in paragraph (2) can only be carried out after going through pre-action counseling and/or advice and terminated with post-action counseling carried out by competent and authorized counselors. So that the abortion act as regulated in Article 75 paragraph (2) of the Health Law can only be carried out after going through pre-action counseling and/or advice and ending with post-action counseling carried out by the counselor.

Whereas Article 31 to Article 39 of Government Regulation Number 61 of 2014 concerning Reproductive Health ("PP 61/2014") describes indications of medical emergencies and rape as an exception to the prohibition on abortion or in other words allowing abortion based on indications of a medical emergency or as a result of of rape victims. For abortions resulting from rape victims, the gestational age limit must be no more than 40 days from the first day of the last menstruation. Pregnancy due to rape must also be proven by: gestational age in accordance with the incidence of rape, which is stated by a doctor's certificate; and information from investigators, psychologists, and/or other experts regarding the alleged rape.

6. Conclusion

Article 346 of the Criminal Code states: "A woman who intentionally causes an abortion or death of her womb or orders someone else to cause it, is sentenced to a maximum imprisonment of four years, in line with the provisions of Article 75 paragraph (1) of Law Number 36 of 2009 concerning Health (the "Health Act") expressly prohibits abortion, which states as follows: Everyone is prohibited from having an abortion. However, there are exceptions for two things, namely as stipulated in the provisions of Article 75 paragraph (2) of the Health Law which states: The prohibition as referred to in paragraph (1) can be excluded based on one of them, namely pregnancy due to rape which can cause psychological trauma for rape victims.

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7. Recommendation

For abortions resulting from rape victims, the gestational age limit must be no more than 40 days from the first day of the last menstruation. Pregnancy due to rape must also be proven by: gestational age in accordance with the incidence of rape, which is stated by a doctor's certificate; and information from investigators, psychologists, and/or other experts regarding the alleged rape. So this matter needs to be considered carefully by the apparatus or related officers, in this case the need for synergistic understanding and socialization related to these matters.

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