

**RESEARCH ARTICLE**

# ABORTION BY RAPE VICTIM: A DILEMMA IN THE DRAT OF PENAL CODE AND INDONESIAN HEALTH LAW

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## ABSTRACT

In this present time, the debate about abortion in Indonesia is increasingly crowded. Abortion is also carried out by women - victims of rape to reduce the burden they suffered. The regulation on abortion in Indonesia has been regulated in the statutory regulations, namely the Criminal Code, especially in Article 346, Article 347, Article 348, and Article 349. In the RKUHP (Draft of Criminal Code), abortion regulation is regulated in two chapters namely, Chapter XIV Article 501 and Chapter XIX Articles 589, 590, 591, 592. In addition, the government has also issued several regulations governing abortion such as Government Regulation No. 61 of 2014 concerning Reproductive Health and also Law No. 36 of 2009 concerning health. However, the various regulations that exist between the Criminal Code, RKUHP, PP and the Act actually contradict to each other. There is no synchronization between the regulations regarding abortion by women rape victims. The KUHP and RKUHP clearly do not allow abortion in Indonesia and do not legalize it without any exception, including abortion carried out by women victims of rape. Whereas in Law Number 36 of 2009 concerning health, abortion can be carried out on an indication of medical emergencies and pregnancy due to rape that causes psychological trauma, so abortionists cannot be prosecuted as criminal.

Keywords: *Abortion; RKUHP; Rape Victims; Criminal Code*

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## INTRODUCTION

Violence against women can occur anytime, anywhere, and can be done by anyone. Among the various cases that occur against women, most perpetrators are people who are very close to the victim. Even in one family, violence can still occur. Such violence is for example the violence of a husband against his wife, father to his child, brother to his sister and, so forth.

Violence against women can be in the form of physical violence such as abuse and torture. In addition to physical violence, sexual and psychological violence also often occurs against women such as rape and others. Among the various cases of rape, it happened because it was voluntary from the victim and there were also acts of coercion committed by the perpetrators.

Cases of rape in Indonesia continue to occur. The impacts on victims other than pregnancy, cases like this also lead to psychological disorders such as severe depression, social impacts on children born, the victim's own status in socializing with the surrounding community, and other impacts that must be borne alone by a woman who was pregnant as a result of rape.

This kind of circumstances make women rape victims take shortcuts such as abortion to reduce the psychological burden that is experienced, cover up the family's disgrace and feelings of self-shame, family, and bad views from the community.

The debate about abortion in Indonesia lately is increasingly crowded. It's no longer a secret to talk about, because abortion has become an actual thing and events that have occurred and carried out by anyone. For example, it is carried out by teenagers involved in free promiscuity initially dating normally, but after long dating they have marital relations, because of shame and fear of being caught, then they abort. It also can be done by a married wife who does not want to be held responsible

for the birth of a child, then the child is aborted in the womb. Abortion is also carried out by women victims of rape to reduce the burden they suffered as explained above.

The problem of abortion performed by women victims of rape is reaping the pros and cons. Those who do not agree to have an abortion by women who are victims of rape are because of the opinion that everyone has the right to live, including fetuses in the womb of women due to rape. It is God's creation that is entitled to enjoy life. For those who agree that an abortion can be carried out for rape victims, the pregnancy arises do not because the victim wishes to be able to reduce the suffering of the victim both psychologically and socially, thus giving the rape victim the right to be able to have an abortion.

Judging from the high rate of abortion which is increasing from year to year, the abortion needs to get attention through wiser arrangements to avoid unsafe abortion practices and fulfillment of women's reproductive rights as well as women's and fetal rights. The regulation on abortion in Indonesia has been regulated in the legislation, namely the Criminal Code, especially in Article 346, Article 347, Article 348, and Article 349. In the RKUHP, the regulation on abortion is regulated in two chapters namely, Chapter XIV Article 501 Concerning Criminal Acts Decency Part Six Concerning Medication that Can Cause Birth Abortion and Chapter XIX Articles 589, 590, 591, 592 concerning Crimes Against Life Part Two on Abortion. In addition, the government has also issued several regulations governing abortion such as Government Regulation No. 61 of 2014 concerning Reproductive Health and also Law No. 36 of 2009 concerning health. However, the various regulations that exist between the Criminal Code, RKUHP, PP and the Act actually contradict to each other. There is no synchronization between the regulations regarding abortion by women rape victims.

Therefore, this study aims to find out and analyze how the regulation of abortion carried out by victims of rape according to the Criminal Code and the Draft Criminal Code. The study also intended to analyze the regulation of abortion according to Law No. 36 of 2009 concerning Health.

## METHOD

The type of research in this paper is Normative (literature) sourced from laws and regulations, books, official documents, and research results which are solely used to obtain complete data as the basis for writing this scientific work. This research is descriptive analytical, which reveals the laws and regulations relating to legal theories as research objects. The data collection technique is carried out by means of Library

Research. This method is carried out by conducting research on various sources of written reading from scholars such as theoretical books on law as well as lecture materials, as well as legislation regarding abortion carried out by rape victims. In addition, this writing is written via the internet in Indonesian language with the help of legal dictionaries and encyclopedias.

## DISCUSSION

Generally, the term abortion is defined as the removal of the fetus prematurely, whether intentionally or not. It is usually done when the fetus is still young (before the fourth month of pregnancy). Medically, an abortion is the end or death of a pregnancy before the womb reaches the age of 20 weeks, that is, before the fetus can live outside the womb independently. The term abortion or linguistically means abortion or disposing of the fetus. In legal terms, this means the removal of the conception from the uterus prematurely (before it can be born naturally).

Abortion carries a high enough risk, if it is performed not according to the standards of the medical profession. Abortion or in the medical world is known as abortion. Means the release of the results of conception (meeting the egg and sperm cells) before the fetus can live outside the womb. This is a process of terminating the life of the fetus before being given the opportunity to grow. Types of abortion can be grouped into two different types:

1. Abortus spontaneus

It is the abortion that occurs naturally without any effort from outside or human intervention, including spontaneous abortion (accidental abortion) and natural abortion (abortion naturally).

2. Abortus provocatus

It is the intentional abortion, occurs because of human actions that try to abort unwanted content, including:

- a. Abortus provocatus medicinalis

It is the abortion carried out based on medical reasons/considerations. An example is abortus provocatus therapeuticus (abortion to save the life of the mother).

- b. Abortus provocatus criminalis

It is the abortion done deliberately by violating various applicable legal provisions. For example, induced abortion/provoked abortion (abortion intentionally for various other reasons, such as embarrassment to neighbors, have not been able to have children and so on).

The terrible effects of illegal abortion are:

- 1) If it is done by using sharp non-standard equipment such as sticks, tree branches, or others, then the risk of uterine tear or injury is huge.
- 2) A uterus that is aborted more than 3 times is at risk of becoming dry, infected, or even triggering tumor growth.
- 3) Illegal abortions carried out by unskilled people can cause an unclean curettage process to cause severe bleeding.
- 4) Unsterile equipment will trigger infections in the female reproductive organs, even to the intestines.
- 5) For perpetrators, the sense of sin arising from abortion can cause them to suffer from depression, change their personality into introverts, and often cannot enjoy sexual relations if they are married.
- 6) If the abortionist becomes pregnant again with the desired pregnancy, then the pregnancy is most likely to have problems, or the fetus may experience problems in the eyes, brain or digestive devices.

Legalization of abortion needs to be heeded and emphasized even more given the existing regulations are contrary to each other.

#### 1. The Regulations of Abortion in the Criminal Code (KUHP) and the Draft of Criminal Code (RKUHP).

The regulations regarding abortion are also contained in the Criminal Code (KUHP) which applies as a general criminal law (*Lex Generalie*), the regulation on intentional abortion (*abortus provocatus*) in the Criminal Code (KUHP) regulated in the second book Chapter XIV concerning Crimes of Decency especially Article 299, Chapter XIX Article 346 to Article 349, and classified as crimes against lives. The following is a description of the regulation of *abortus provocatus* contained in each of these articles:

Article 299:

- 1) Anyone who deliberately treats a woman or orders to be treated, is notified or raises hope that because the treatment can be aborted pregnancy, threatened with imprisonment at most four years or a maximum fine of forty-five thousand rupiah.
- 2) If the person who is guilty does so for profit, or makes the act a quest or habit, or if he is a physician, midwife or medic, the penalty can be increased by one third.
- 3) If the person who is guilty of the crime is conducting a search, then the right to revoke the search can be revoked.

## Article 346:

"A woman who deliberately aborts or turns off her womb or orders someone else to do so is threatened with a maximum prison sentence of four years".

## Article 347:

- 1) Anyone who intentionally aborts or kills a woman's womb without his consent is threatened with a maximum prison sentence of twelve years.
- 2) If the act results in the death of the woman, then the maximum imprisonment is fifteen years.

## Article 348:

- 1) Anyone who deliberately aborts or kills a woman's womb with his consent, is threatened with a maximum imprisonment of five years and six months.
- 2) If the act results in the death of the woman, then the maximum imprisonment is seven years.

## Article 349:

"If a physician, midwife or medicine person helps to carry out the crime mentioned in Article 346, or commits or helps to commit one of the crimes described in Article 347 and Article 348, then the crime specified in that article can be increased by one third and may be added to revoked the right to conduct searches in which a crime was committed. "

In the RKUHP the regulation on abortion is not much different from the regulation on abortion in the Criminal Code, where the draft KUHP has the potential to criminalize pregnant women due to rape. The abortion due to rape is called abortion of provocatus herapetics. This is an effort to save the future of the mother. The articles in the RKUHP are related to abortion, namely article 589 Paragraphs (2) and (3), Article 590 paragraphs (1) and (2), Article 591 paragraphs (1) and (2).

Based on the formulation of the articles in the Criminal Code and the Criminal Code Criminal Procedure Code above, the elements of the crime can be described as follows:

- a. A pregnant woman who intentionally had an abortion or ordered someone else, is threatened with a sentence of 4 (four) years in prison.
- b. A person who intentionally had an abortion with a pregnant woman, without her consent, was threatened with a 12-year prison sentence, and if the pregnant woman died, he was threatened with 15 years in prison.
- c. If the act is done with the consent of the pregnant woman, then she will be sentenced to 5.5 years in prison and if the pregnant woman dies she will be sentenced to 7 years in prison.

- d. If the person who assisted in the abortion was a doctor, midwife or interpreter (health worker) the threat of punishment was increased by a third and the right to practice could be revoked.

The articles in the Criminal Code clearly do not allow an abortion in Indonesia. The Criminal Code does not legalize it without any exception. Even included are abortions carried out by women victims of rape.

## 2. Regulation of Abortion in Law Number 36 of 2009 Regarding Health.

In law No. 36 of 2009 on Health there are regulations that allow someone to have an abortion with two conditions. One is because there are indications of medical emergencies, and two is because of unwanted pregnancy due to rape that can cause psychological trauma for victims of rape. The highlight of abortion here is article 75 of Law No. 36 of 2009 concerning Health that basically abortion is prohibited, but there are exceptions which one of which is if the pregnancy is due to rape which can cause psychological trauma for rape victims.

Article 75 health law:

- a. Every person is prohibited from having an abortion.
- b. Prohibitions as referred to in paragraph 1 can be excluded based on:
  - 1) Indications of medical emergencies detected from an early age of pregnancy, both those that threaten the life of the mother/fetus, who suffer from severe genetic diseases and / or congenital defects, or which cannot be repaired making it difficult for the baby to live in pregnancy, or
  - 2) pregnancy due to rape that can cause psychological trauma for rape victims.
- c. The actions referred to in paragraph (2) can only be carried out after going through pre-action counseling and/counseling and ending with post-action counseling carried out by competent and authorized counselors.
- d. Further provisions regarding indications of medical emergencies and rape, as referred to in paragraph (2) and paragraph (3) shall be regulated by Government Regulation.

Other than in Law Number 36 of 2009 concerning Health, Article 75, in Government Regulation No. 61 of 2014 concerning Reproductive Health also states that abortion is permitted for pregnancy as a result of rape victims Government Regulation (PP) Number 61 of 2014 concerning Reproductive Health was endorsed by President Susilo Bambang Yudhoyono on July 21, 2014. This regulation is the implementation of Law No. 36 of 2009 concerning Health in particular Article 75, Article 126, and Article 127.

Part of the spotlight is the legalization of abortion in the Government Regulation, which reads:

Article 31 Government Regulation No. 61 of 2014:

- 1) Acts of abortion can only be done based on:
  - a. Indications of medical emergencies.
  - b. Pregnancy due to rape.
- 2) Abortion due to rape as referred to in paragraph (1) letter b can only be carried out if the gestational age is at most 40 (forty) days counted since the first day of the last menstruation.

Article 34 Government Regulation No. 61 of 2014:

- 1) Pregnancy due to rape as referred to in Article 31 Paragraph (1) letter b is a pregnancy resulting from sexual relations without the consent of the woman in accordance with the provisions of the legislation.
- 2) Pregnancy due to rape as referred to in Paragraph (1) is proven by:
  - a. Pregnancy is in accordance with the rape event stated by the doctor's statement.
  - b. Information from the psychologist investigator and / or other expert regarding the alleged rape.

Regarding pregnancy due to rape victims, this can be done if the pregnancy is over 40 days after the first day of the last menstrual period. While what is meant by indications of medical emergencies are:

- a. Pregnancy that threatens the life and health of the mother.
- b. Pregnancies that threaten the life and health of the fetus, including those suffering from severe genetic diseases and / or congenital defects, or that cannot be repaired making it difficult for the baby to live outside the womb.

Evaluation of medical indications is carried out by at least 2 health workers, known to doctors who have competence and authority.

Based on the description above, if the abortion was carried out on the indication of medical emergencies and pregnancy due to rape that caused psychological trauma, then the abortionist cannot be prosecuted criminal. However, if the abortion is not included in the exceptions in article 75 paragraph (2) of the Health Act, then the abortionist can be prosecuted as contained in article 194 of the Health Act: *"any person who intentionally had an abortion is not in accordance with the provisions as referred to in Article 75 paragraph (2) shall be sentenced to a maximum imprisonment of 10 years and a maximum fine of Rp. 1 billion.*



## CONCLUSION

This study highlighted that articles in the Criminal Code and RKUHP (Draft of Criminal Code) clearly do not allow an abortion in Indonesia. KUHP and RKUHP do not legalize it without any exception. Even provocatus medical abortion or abortus provocatus therapeuticus is also prohibited, including provocatus abortion which is carried out by women victims of rape. In Law Number 36 of 2009 concerning health, abortion can be carried out on an indication of medical emergencies and pregnancy due to rape that causes psychological trauma, so abortionists cannot be prosecuted criminal.

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### Law, Regulations

Law Number 36 of 2009 concerning Health  
 Indonesian Criminal Code (KUHP)  
 Draft of the Criminal Code (RKUHP)

## QUOTE

Any country that accepts abortion, is not teaching its people to love, but to use any violence to get what it wants.

**Mother Teresa**