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Legal Protection of Abortion Abusers In The Pregnancy of Rape in Indonesia

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Abstract

Abortion is prohibited except based on an indication of a medical emergency and pregnancy due to rape as regulated in Article 75 paragraph (2) of Law Number 36 the Year 2009 concerning health. However, there are several cases where rape victims who aborted their wombs were found guilty of violating Article 346 of the Criminal Code. This study discusses legal protection against abortion perpetrators in pregnancy due to rape. This study aimed to analyze the legal protection of rape victims who had an abortion (*abortus provocatus*). The research method used is a normative juridical approach, namely through a literature study that examines secondary data in statutory regulations and other legal documents, research results, assessment results, and other references. This study's results were rape victims who had an abortion were not convicted under Article 75 paragraph (2) of Law Number 36 of 2009 concerning health and the existence of pre-and post-abortion counseling under Article 37 of Government Regulation Number 61 of 2014 concerning Reproductive Health.

Keywords: electronic ticketing and failure

Abstrak

*Aborsi dilarang kecuali atas dasar indikasi kedaruratan medis dan kehamilan akibat perkosaan sebagaimana diatur dalam Pasal 75 ayat (2) Undang-undang Nomor 36 Tahun 2009 Tentang Kesehatan. Meskipun demikian ada beberapa kasus dimana korban perkosaan yang menggugurkan kandungannya diputus bersalah melanggar Pasal 346 KUHP. Penelitian ini membahas perlindungan hukum terhadap pelaku aborsi pada kehamilan akibat perkosaan. Tujuan dari penelitian ini adalah untuk menganalisis perlindungan hukum terhadap korban perkosaan yang melakukan aborsi (*abortus provocatus*). Metode penelitian yang digunakan adalah pendekatan yuridis normatif yaitu melalui studi pustaka yang menelaah data sekunder berupa peraturan perundang-undangan dan dokumen hukum lainnya, hasil penelitian, hasil pengkajian, serta referensi lainnya. Hasil penelitian ini yaitu korban perkosaan yang melakukan aborsi tidak dipidana sesuai dengan Pasal 75 ayat (2) Undang-undang Nomor 36 Tahun 2009 Tentang Kesehatan dan adanya konseling pra dan pasca tindakan aborsi sesuai dengan Pasal 37 Peraturan Pemerintah Nomor 61 Tahun 2014 Tentang Kesehatan Reproduksi.*

Kata kunci: *Perlindungan hukum, Aborsi, Korban perkosaan.*

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I. Introduction

Along with technological developments increasingly advanced and developing globally, there will also be more social burdens and crime burdens. This development has impacted the community's social life, both a positive impact, namely the existence of current technological advances, and a negative impact with the emergence of various forms of crime due to progress itself.

Crime does not only arise due to the misuse of technology and communication, other causes ranging from social, economic, moral, and sexual inequality. Sexual crimes, especially rape, often occur due to frequent viewing of pornographic content, thus attracting attention because these acts occur in almost every region and are committed by various groups.

A total of 13,384 cases were handled by 237 service provider partner agencies, spread across 34 provinces. Komnas Perempuan sent 751 forms to partner service providers

throughout Indonesia.¹ Regarding sexual violence, in terms of rape, especially incest, in 2017, there were 9,609 cases while there were 58 cases of sibling rape.

Protection of rape victims has always been an interesting issue to observe because the problem of protection for rape victims is related to providing protection and the obstacles faced. It is not easy to protect victims of rape because several factors act as obstacles. The victim factor plays an essential role in resolving or resolving this rape case, and this requires courage from the victim to report what happened to her. Because in general, the victim received threats and even received physical violence and psychological pressure from the perpetrator of the rape so that the victim did not report to the authorities, which made the victim feel afraid and traumatized.²

In connection with the victim's problems, the case in Muara Bulian, Jambi, the problem started with WA's older brother (15), namely AS (18). AS is said to have forced sexual relations with his younger sister 9 (nine) times since September 2017. During the coercion, WA often received threats of physical torture if she dared to refuse AS requests. As a result of her actions, WA became pregnant, and the pregnancy was first discovered by her mother (AD) and then decided to tell WA to abort her pregnancy because she was ashamed of WA being pregnant because AS raped her. After a successful abortion, the baby WA is then thrown away. A few days later, residents around Pulau Village, Muara Tembesi District, Batanghari Regency, were shocked by the news of discovering a baby in an oil palm plantation. From discovering the baby's body, not long after, the perpetrator was arrested by the police. AS was sentenced to 2 (two) years in prison for violating Article 81 paragraph (3) in conjunction with Article 76 of Law Number 35 of 2014 concerning Child Protection, then AD was imposed with layered articles, namely Article 77 in conjunction with Article 45 of Law Number 35 of 2014 concerning Child Protection and Article 55 of the Criminal Code regarding their involvement in the crime of abortion. WA was decided and charged with Article 77 letter A paragraph (1) in conjunction with Article 45 letter A Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection in conjunction with Article 55 paragraph (1) to 1 of the Criminal Code.³ Namely, in the form of a sentence of 6 months in prison and three months of job training by the Jambi District Court.⁴

II. Research Problems

1. What is the form of legal protection for abortion perpetrators in pregnancy due to rape victims in Indonesia?
2. What are the obstacles in the legal protection of abortion perpetrators in pregnancy due to rape victims in Indonesia?

III. Research Methods

The method in this research is to use the normative juridical method. The normative juridical method is carried out through literature studies that examine mainly secondary data in-laws and regulations, court decisions, agreements, contracts, other legal documents, research results, assessment results, and other references.⁵ Interviews can complement the normative juridical method. This research is descriptive, which provides an overview of legal protection for abortion perpetrators in pregnancy due to rape in Indonesia. In this paper, the writer will

¹ National Commission on Violence against Women Annual Notes for 2017, 7 March 2018

² Raditya Ermana, *et. al.*, "Perlindungan Hukum Terhadap Perempuan Korban Kekerasan Seksual Sebagai Pelaku Abortus Provokatus Indikasi Perkosaan". *Jurnal Hukum* 6 No.2, (2017): 3.

³ BBC News, *Korban Pemerkosaan Divoonis Bersalah Karena Aborsi, Pegiat HAM Protes* (Internet) Available from <https://www.bbc.com/indonesia/indonesia-45058277>; Accessed May 20, 2020.

⁴ Rahmi Khairina, "Perlindungan Hukum Terhadap Anak Yang Melakukan Aborsi Akibat Perkosaan Ditinjau Dari Peraturan Mahkamah Agung No. 3 Tahun 2017 Tentang Pedoman Mengadili Perkara Perempuan Berhadapan Dengan Hukum (Studi Putusan Pengadilan Negeri No. 5/Pid.Sus.Anak/2018/Pn" (Medan: Universitas Sumatera Utara, 2019), 96-99.

⁵ Badriyah Khaleed, *Legislative Drafting Teori dan Praktik Penyusunan Peraturan Perundang-undangan* (Yogyakarta: Medpress, Digital, 2014), 41

use secondary data sources. Secondary data is data obtained from literature by conducting literature studies, namely, conducting document studies, archives, and literature by studying theoretical matters, concepts, views, and legal principles relating to the subject matter and writing as well as legal knowledge consisting of primary legal materials, secondary legal materials, tertiary legal materials. The data in this study were obtained through Library Research. This library research was conducted to obtain secondary data, which included primary, secondary, and tertiary legal materials by reading, taking notes, and quoting books, and using data or information and information through requests for data requests from relevant agencies based on research objectives. Methods arranged systematically, logically, and rationally. In this case, the analysis used is qualitative data analysis, namely data that cannot be directly measured or assessed by numbers. Thus, after the primary data and secondary data in the form of documents are obtained entirely, then it is analyzed with regulations related to the problem under study.⁶

This study collects data by collecting secondary data obtained by conducting literature studies by carrying out an inventory of books, literature, laws and regulations, and articles that are then noted for their relevance to solving problems. This legal material is presented in the form of narrative and qualitative text. The data analysis method in this research uses the content analysis method. Then to support the discussion, the author uses a qualitative descriptive method.

IV. Result And Discussion

1. Legal protection for perpetrators of abortion in pregnancy as a result of rape victims in Indonesia

The main philosophy of the essence of law is justice. Without justice, the law is not worth it called law. The reality of the law in society is sometimes different from what we aspire to, which causes it to distance the law from its essence. Justice has become a slogan, and it has not yet inspired all aspects of the law. The tug of war between justice, certainty, and legal order is essential in developing the law. Justice as part of social values has a comprehensive meaning. Even at some point, it can be against the law as a social value system.⁷

Justice is often interpreted differently. Justice itself has many dimensions in various fields, such as economics and law. Nowadays, talking about justice is something that is always used as the main topic in solving problems related to law enforcement. Many legal cases are not resolved because they are drawn to political problems. Legal truth and justice are manipulated systematically so that the judiciary does not find the actual situation. Government policy cannot bring the law to become "commander" in determining justice because the law is castrated by a group of people who can afford it or have a higher power.⁸

The relationship between justice and positive law is the center of attention of experts in Greek thought and thought about law. Justice is a technical measure of the principles governing the application of the law. In regulating legal relations, there must be a general standard to correct every result of every action, regardless of the perpetrator, and an objective measure must measure the purpose of these behaviors and objects.

John Rawls raises an idea in his book *A Theory of Justice* or theory of justice which aims to be an alternative to the doctrines that dominated the previous philosophical traditions by presenting the concept of justice that generalizes and elevates the social contract theory expressed by, say, Locke, Rousseau, and Kant to the next level. By Rawls, this viewpoint of justice is called justice as fairness. Justice as fairness begins with one of the most common choices that people can make together, namely choosing the first principle of the conception of

⁶ Mathew Miles dan Michel Huberman, *Analisis Data Kualitatif: Buku Sumber tentang Metode-metode Baru* (Jakarta: UI Pres, 2009), 102.

⁷ Anthon F. Susanto, *Ilmu Hukum Non Sistematis: Fondasi Filsafat Pengembangan Ilmu Hukum Indonesia*, (Yogyakarta: Genta Publishing, 2010), 138.

⁸ Inge Dwiswimiar, "Keadilan Dalam Perspektif Filsafat Ilmu Hukum" *Jurnal Dinamika Hukum* 11, No.3 (2011): 522.

justice, which governs further criticism and institutional reform. Rawls's theory is based on two principles, namely, looking at Equal rights and Economic Equality. About Equal Right, he says:

"It must be regulated at a lexical level, that is, different principles work if the first principle works or in other words the difference principle will work if no fundamental rights are revoked (no human rights violations) and increase the expectations of those who are less fortunate. In Rawls's principle, it is emphasized that there must be the fulfillment of fundamental rights to implement the principle of inequality. In other words, economic inequality will be valid if it does not take away fundamental human rights."⁹

Justice concerning the philosophy of legal science, justice is manifested through law so that it can be concluded that the law that embodies justice is necessary for life with humans. Without law, humans cannot be protected, so that it is necessary to protect the law based on justice.

In general, protection means protecting something from dangerous things, something that can be in the form of interests or things or things. Besides that, protection also implies the protection given by someone to someone weaker. Thus, legal protection can be defined as all government efforts to ensure legal certainty to protect its citizens so that their rights as a citizen are not violated, and those who violate them will be subject to sanctions under applicable regulations.¹⁰

The theory of legal protection is a development of the concept of recognition and protection of human rights developed in the 19th century. The direction of the concept of recognition and protection of human rights is the limitation and placement of obligations to society and the government. According to Satjipto Raharjo, legal protection is an effort to organize various interests in society so that interests do not collide and enjoy all the rights provided by law. Organizing is done by limiting specific interests and giving power to others in a measured manner.¹¹

Protection of victims is often neglected regardless of what the alleged perpetrator is the victim. Referring to Article 1 point 2 of Law Number 13 of 2006 concerning Protection of Witnesses and Victims defines a victim, namely someone who experiences physical, mental, and/ or economic loss caused by a criminal act adheres to the meaning of victim in a broad sense. Namely, someone who experiences suffering, not only physically or mentally or economically, but can also be a combination of the three.

Arief Gosita stated the same thing; victims mean those suffering both physically and spiritually due to others' actions who seek fulfillment of their own or other people's interests contrary to the interests of the injured party's rights.¹²

Regarding abortions performed by victims of incest rape, what needs to be done as part of legal protection is that the pregnancy of the victim of incest rape is not wanted. Also, incest rape has a more significant impact on psychological trauma because of the blood relationship between the perpetrator and the victim. Likewise, this incest case of rape is the strength of sexual relations, usually accompanied by violent threats, both physical and psychological. Victims of incest rape must receive legal protections such as restoring their mental state due to coercive pressure from other parties (psychological pressure), providing a sense of security, ensuring that they are still valuable, and treating physical wounds. Rape victims can experience severe consequences, both physically and psychologically. The physical effects that can occur to the victim are as follows: (1) organ damage such as tearing of the hymen, fainting, death; (2) the victim is very likely to get a sexually transmitted disease (STD); (3) an unwanted pregnancy.¹³

⁹ *Ibid*, 528.

¹⁰ Wafda Vivid Izziyana, "Perlindungan Hukum Bagi Pekerja Anak Di Indonesia", *Jurnal Ilmu Hukum* Vol. 3, No.2 (2019): 16

¹¹ Luthvi Febryka Nola, "Upaya Pelindungan Hukum Secara Terpadu Bagi Tenaga Kerja Indonesia (TKI)." *Negara Hukum* Vol. 7, No. 1 (2016): 39-40.

¹² Firman Umar and Irda, "Penanganan Kasus Anak Korban Kejahatan Penganiayaan (Studi Kasus Pada Polres Bulukumba)." *Jurnal Supremasi* 12, No. 1 (2017): 2-3.

¹³ Achmad Prasteya Putra Syailendra, "Legal Protection of Incest Victims Who Have an Abortion." *Jurnal Hukum Novelty* 10, No.2 (2019): 145.

Psychologically, the victim can be stricken with depression, phobias, nightmares, and victims can also be suspicious of other people for a long time. Some feel restricted in dealing with other people, having sex, and worrying about a pregnancy due to rape.¹⁴

There are still many abortion cases in Indonesia where it is suspected that abortion perpetrators are victims, victims of rape, victims of pressure, or even others. Abortion, or the popular term aborting the womb, which performs an act regardless of its form and means of a woman's womb, results in a baby or fetus's birth from inside the woman's womb prematurely. Forcing a baby's birth or an immature fetus is often referred to as an *abortus provocatus* or sometimes simply abortion. There are several types of abortion, namely:

- a. *Abortus spontaneousus* (spontaneous abortion or natural abortion) is an abortion that occurs automatically, accidentally, and without external influence or any action. This spontaneous abortion can occur due to poor quality of ovum and sperm or other causes such as accidents, syphilis, et cetera.
- b. *Abortus therapeuticus* (medical abortion) is an abortion carried out with serious, mature, and unhurried medical considerations and is usually done to save the mother's life.
- c. *Abortus provocatus* (artificial or intentional abortion), an abortion carried out deliberately and consciously by the mother or the abortion operator (in this case, a doctor, midwife, or traditional birth attendant), is performed without any medical indication. This kind of abortion is considered a criminal offense, so that it can be subject to criminal sanctions.¹⁵

The provisions of the Provocatus Abortion in the provisions of positive law in Indonesia based on the Criminal Code prohibit the act of abortion provocatus, which is regulated in Articles 299, 346, 347, 348, 349. KUHP is a law that applies in general (*Lex Generale*). Law Number 36 of 2009 concerning Health allows the act of provocatus abortion but with terms and conditions either due to medical conditions or due to rape as stipulated in Articles 75 and 76 then further regulated in Government Regulation Number 61 of 2014 concerning Reproductive Health as a regulation. implementer in Articles 31-39. These laws and regulations apply as a special criminal law (*Lex Speciale*).

The phenomenon in Indonesia related to *aborstus provocatus* due to rape is often the victim as a suspect. As in the case that occurred in Muara Bulian, Jambi where her sibling raped WA (15) with the initials AS, then WA became pregnant and was first discovered by her mother; namely, AD then decided WA abort her pregnancy based on shame because WA was pregnant as a result of being raped by AS where AS is her brother. The police arrested the three people then have undergone trials, and each has been given a sentence.

WA was sentenced to 6 months in prison and three months of job training based on the law Article 77 letter a paragraph (1) in conjunction with Article 45 letter a Law Number 35 of 2014 concerning Child Protection *juncto* Article 55 paragraph (1) to 1 of the Book of Law Criminal Law, without seeing WA is the victim. The definition of victims themselves according to Law Number 31 of 2014 concerning Protection of Witnesses and Victims of Article 1 point 3, namely people who experience physical, mental, and/or economic loss as a result of a criminal act. When viewed from this understanding, WA is a victim because WA experiences physical and mental suffering. The suffering she experienced was that WA was raped 9 (nine) times and forced to abort her womb.

Abortus Provocatus, if referring to Article 75 paragraph (2) point b of Law Number 36 the Year 2009 concerning Health, is permitted because if the pregnancy is due to rape, which can cause psychological trauma to the victim. Abortion's Perpetrators in pregnancy due to rape in Indonesia have received a legal umbrella, but the public does not yet know that abortion is permitted with exceptions according to Law Number 36 of 2009 concerning Health.

Based on this case, if we take a look at Government Regulation Number 61 of 2014 concerning Reproductive Health that WA has exceeded the terms and conditions for permitting

¹⁴ Ariefka, Y., Sari, K., & Yulandari, N, "Memaafkan Pelaku Perkosaan Di Masa Konflik: Perjalanan Panjang Korban Konflik di Aceh." *Jurnal Psikologi Unsyiah* 1, No.2 (2018): 58-83.

¹⁵ Moh. Saifullah, "Aborsi Dan Resikonya Bagi Perempuan (Dalam Pandangan Hukum Islam)" *Jurnal Sosial Humaniora* Vol. 4, No.1 (2011): 15.

abortion, namely Article 31, which states that there must be an indication of a medical emergency, pregnancy due to rape and gestational age of 40 days. WA experienced an unwanted pregnancy, so she had an abortion at six months of gestation. That is because WA does not know the limit of gestational age allowed by Government Regulation Number 61 of 2014 concerning Reproductive Health to perform an abortion. Meanwhile, Law Number 36 of the Year 2009 regarding Health, the act of *abortus provocatus* is prohibited with exceptions as in the following articles:

Article 75

- (1) Everyone is prohibited from having an abortion.
- (2) The prohibition as referred to in paragraph (1) can be excluded based on:
 - a. indications of medical emergencies detected from an early age in pregnancy, either threatening the life of the mother and/or fetus, suffering from severe genetic diseases and/or congenital disabilities, or which cannot be repaired so that it makes it difficult for the baby to live outside the womb; or
 - b. pregnancy due to rape which can cause psychological trauma for the victim of rape.
- (3) The actions referred to in paragraph (2) can only be carried out after going through pre-action counseling and/or advice and ended with post-action counseling carried out by a competent and authorized counselor.
- (4) Further provisions regarding indications calculated from the first day of the last menstrual period, except in the case of medical emergencies and rape, as referred to in paragraph (2) and paragraph (3), shall be regulated by a Government Regulation.

Article 76

Abortion, as referred to in Article 75, can only be performed:

- a. before 6 (six) weeks of pregnancy;
- b. by health workers who have the skills and authority who have a certificate stipulated by the Minister;
- c. with the consent of the pregnant mother concerned;
- d. with the husband's permission, except for the victim of rape; and
- e. health service providers who meet the requirements set by the Minister.

If it is related to abortion in unwanted pregnancies due to rape, where a pregnancy due to rape can cause psychological trauma for the victim of rape can be used as an emergency reason (forcing) to have an abortion, it needs to be considered criminal sanctions. Rape itself is a criminal offense in which the perpetrator must be sentenced to a maximum imprisonment of 12 (twelve) years under Article 285 of the Criminal Code. Meanwhile, victims must receive legal protection to restore their mental condition due to pressure from other parties (psychological pressure). In terms of legal protection for abortion perpetrators due to rape victims, it has been regulated in Government Regulation Number 61 of 2014 concerning Reproductive Health Article 37, namely the existence of pre-action counseling and ending with post-action counseling carried out by the counselor.

The case that occurred in Muara Bulian, Jambi can be used as an example if there is an adult or underage pregnant woman due to being raped. There is an element of force that the victim cannot be convicted on the legal basis of Article 48 of the Criminal Code, Articles 75 and 76 of Law Number 36 2009 concerning Health, Articles 31-39 of Government Regulation Number 61 of 2014 concerning Reproductive Health cannot be convicted.

2. Barriers to Legal Protection for Abortion Abortion in Pregnancy Due to Rape in Indonesia.

Abortion perpetrators as a result of rape are often punished without seeing that the perpetrator is the victim. It is miserable considering that victims who should be protected are punished and often treated the same as rapists, so that the rights of victims that should be protected, such as the right to get legal assistance and assistance, the right to receive counseling both before an abortion and after abortion, physical and psychological recovery. It is ignored. In

practice, this form of legal protection cannot run smoothly due to the lack of socialization regarding legal abortion with terms and conditions as stated in Law Number 36 of 2009 concerning Health and Government Regulation Number 61 of 2014 concerning Reproductive Health.

Apart from that, other obstacles that victims often experience in obtaining legal protection are internal and external factors. Internal factors that become obstacles to the implementation of legal protection for perpetrators of abortion due to rape are victims of rape, cover themselves so that others do not know the disgrace they experience. Deep sadness causes victims of rape to bury their suffering, victims of rape feel dirty and disgusted by herself so that it causes the victim to be stressed, the victim of rape feels that her life is unworthy and unholy anymore which causes the victim to end her life, the victim of rape feels afraid because it is a disgrace to herself and her family.

The external factors that become an obstacle for victims in obtaining legal protection, namely the limited understanding and information that causes rape victims to carry out unsafe abortions and harms the victim's health, there are still many people who do not understand Law Number 36 of 2009 concerning Health and Government Regulation Number 61 of 2014 concerning Reproductive Health. It is difficult to find an institution that is willing to serve abortion due to rape. Rape victims who report themselves to the authorities become victims for the second time often.

V. Conclusions

Based on the analysis above can be concluded that the form of legal protection for perpetrators of abortion due to rape, namely, abortion is prohibited with the exception based on Article 75 paragraph (2) letter b Psychological trauma can carry out an abortion, then based on Government Regulation Number 61 of 2014 concerning Reproductive Health Article 37, namely, the existence of pre-action counseling and ending with post-action counseling carried out by the counselor. This form of legal protection has obstacles in terms of internal and external factors. Internal factors include rape victims covering themselves so that others do not know the shame they experienced. A deep sadness that causes rape victims to bury their suffering, rape victims feel dirty and disgusted with themselves, causing stress, rape victims feel their lives not worth it which causes the victim to end his life, the victim of rape feels afraid because it is a disgrace to himself and his family. At the same time, external factors include limited understanding and information that causes the victim of rape to have an unsafe abortion and is detrimental to the victim's health. There are still many people who lack understanding of the applicable law, and it is difficult to find an institution that is willing to serve abortion due to rape. Rape victims who report themselves to the authorities are often victims for the second time.

VI. Suggestion

1. The government can provide legal guarantees and protection for rape victims who have an abortion under the procedures and safety that have been established under the applicable laws and revise Government Regulation Number 61 of 2014 concerning Reproductive Health, especially regarding the limit of gestational age that can be aborted.
2. Assistance both psychologically and mentally so that every rape victim who is going to pre-abortion and post-abortion is ready physically and mentally to accept all the risks that will be faced in the future
3. Provide medical professionals who are professional in their fields to handle rape victims who are heading for pre-abortion and post-abortion at an affordable cost and are kept confidential by the authorized institution to handle it.

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