

LAW ENFORCEMENT PROBLEMS CRIMINAL ACTION ABORTION IN INDONESIA

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abstract

The practice of illegal abortion is still rampant despite criminal threats against the perpetrators. Illegal abortion has been regulated in Law Number 36 of 2009 concerning Health and the Criminal Code. This article means analyze the regulation of the crime of abortion and law enforcement problems abortion crime. The threat of illegal abortion is regulated in Article 194 of the Health Law and Articles 299, 346-349 of the Criminal Code. Illegal abortion law enforcement problems namely the overlapping of illegal abortion arrangements, law enforcement does not understand illegal abortion provisions, no safe abortion services available, economic conditions society, and culture of premarital sex and free sex. In this case, Commission III The DPR RI needs to regulate the exception to the abortion ban in the amendment to the Criminal Code and ask the Police to take action against proven perpetrators perform illegal abortions. In addition, Commission IX of the DPR RI needs to ask the Ministry of Health conducts supervision of health facilities indicated to carry out illegal abortion, providing safe abortion and post-abortion health services, and anticipatory steps to prevent the practice of illegal abortion.

Key word: Enforcement, Criminal Action, Abortion

A. Introduction

Abortion is a social phenomenon that is getting more and more worrying, right. This concern is not without reason, because so far the behavior of abortion has caused many negative effects both for the perpetrators themselves and on the wider community. This is because abortion involves the moral and legal norms of a nation's life often used to end unwanted pregnancy, but also the most dangerous way. Abortion according to its occurrence is distinguished into Spontaneous Abortion, i.e. abortion that occurs by itself unintentionally or without being preceded by mechanical or medical factors, solely caused by natural factors, and provocative abortion, namely intentional abortion without medical indications, either with drugs, drugs or with tools. (Achadiat Chrisdiono M., 2006)

This type of abortion is further divided into medical abortion (abortion therapeuticus) which is an abortion because our own actions, with the excuse that if the pregnancy continues, can endanger the mother's life (based on medical indications). Usually we need to get the approval of 2 to 3 team of expert doctors (Notoatmodjo, 2010: 136).

According to Rukmin (2002; 10), abortion or known as abortion provocatus comes from the word abortion which means abortion / miscarriage. The definition of abortion or abortion provocatus is the termination or expulsion of the results of pregnancy from the uterus prematurely. In other words, the expulsion is meant that the expulsion of the fetus is intentional with human intervention, either through mechanical means, drugs or other means (Kusmaryanto, 2001: 203). Abortus Provocatus is another term that is officially used in medical and legal circles. In a medical sense Abortion (both miscarriage and abortion) means the cessation of pregnancy that occurs between the time the implanted egg (blastocyte) is implanted in the uterus until 28 weeks of gestation.

Abortion ban and threats illegal abortion has been regulated in Law Number 36 Year 2009 on Health (Health Law) and Criminal Code (KUHP). Likewise enforcement the law against this crime has been implemented, but the practice of abortion illegal is still rampant. Therefore that, this paper wants to analyze briefly follow settings abortion crimes and problems in law enforcement of the crime of abortion.

B. Methodologi of Reseach

Analysis is the activity of summarizing large amounts of data that are still The raw materials then group or separate the relevant components and parts to then link the collected data to answer the problem. Analysis is an attempt to describe patterns consistently in the data so that the results of the analysis can be studied and translated

and have meaning (Surayin, 200:10). While juridical is things that are recognized by law, based on law and things that form regularities and have an effect on their violation (mediainformation ll.com), juridical is a rule that is considered law or in the eyes of the law is justified in force. , whether in the form of rules, habits, ethics and even morals which are the basis of the assessment. (Soerjono Soekanto & Sri Mamuji : 1985)

In this study, what is meant by the author as a juridical analysis is an activity to find and solve the components of a problem to be studied more deeply and then relate it to the law, legal rules and applicable legal norms as a solution to the problem. The juridical analysis activity is to collect relevant laws and other basics to then draw conclusions as a solution or answer to the problem.

C. Discussion Analysis

1. Abortion Provokatus Criminalis In Undang UndangNo.36 Tahun2009 about The Healty

Abortion in medical means termination of pregnancy with fetal death and expulsion less than 20 weeks of age with fetal weight less than 500 grams, that is before the fetus can live outside the womb independently (Susanti, 2013: 295). Article 75 paragraph (1) The Health Act regulates the prohibition for everyone to have an abortion. Exceptions to this prohibition are provided for in Article 75 paragraph (2) is based on: (a) an indication of a medical emergency that detected early in pregnancy, good that threatens the life of the mother and/or fetus with genetic disease weight and/or congenital disability, or which cannot be repaired so make it difficult for the baby to live outside content; or (b) pregnancy due to traumatizing rape psychology for victims of rapists.

Action this abortion can only be done after going through counseling and/or pre-action advisory and end with post-operative counseling carried out by a competent counselor and authorized (Article 75 paragraph (3) UU Health). (Sunardi dan Fanny Tanuwijaya:2001) Implementing regulations This provision is regulated in the Regulations Government Number 61 of 2014 on Reproductive Health. Abortion regulated in Article 75 paragraph (2) of the Health Law is types of abortion provocatus therapeuticus, namely intentional termination of pregnancy from the outside, usually done for help the mother's life by the doctor because pregnancy endangers the life of the mother (Ibnu and Arianto, 2005: 3-4). Type of abortion this cannot be categorized as criminal offense because it has been excluded from the abortion ban in the Health Act.

Abortion categorized as an act the crime is abortion provocatus criminalis, namely the act of abortion willful and resisting fetus law. Against the law in a sense does not include exception elements in Article 75 paragraph (2) of the Health Law so it is a crime or criminal acts that are subject to threats punishment in law. Criminal threats for perpetrators Illegal abortion is regulated in the Health Act and the Criminal Code. Article 194 of the Health Law set everyone on purpose having an abortion is not in accordance with Article 72 paragraph (2) shall be punished with imprisonment for a maximum of 10 years and a maximum fine of Rp. 1 billion rupiah.

This provision can be applied to doctors, other health workers, and pregnant women with intentionally perform an illegal abortion. The Criminal Code regulates criminal acts abortion in Article 299 and Article 346 up to Article 349. Based on these provisions, which may be imposed criminal, namely a woman who is pregnant, perpetrators other than pregnant women, and people who intentionally treat or ordered an abortion. For women pregnant who had an abortion, either do it yourself or order others to do, can subject to Article 346 of the Criminal Code. For perpetrators other than pregnant women with intentionally abort without the consent of pregnant women threatened with Article 347 paragraph (1) of the Criminal Code and when pregnant women experience death is threatened Article 347 paragraph (2) KUHP.

When the action aborts content is carried out by actors other than pregnant woman with consent pregnant women, subject to Article 348 paragraph (1) of the Criminal Code. When abortion cause death for women containing the threat of Article 348 paragraph (2) Criminal Code. Difference from application Articles 347 and 348 of the Criminal Code are found in consent of pregnant women as well the punishment. If the perpetrator other than pregnant women are energy health (doctors, nurses, midwives, pharmacists, etc.) may be imposed Article 349 of the Criminal Code. Article 349 is heavier the penalty, which is plus a third from the punishment provided for in Article 347 and Article 348 of the Criminal Code.

For people who treats or orders to treat so that an abortion can occur subject to Article 299 of the Criminal Code. Regulations in the Health Law and the Criminal Code has given threats a strict and fairly high crime when viewed from the duration of the punishment for perpetrators of the crime of abortion. Rule it has also accommodated from the public.. As a result, female victims forced rape abortion goes to an illegal abortion clinic to abort the pregnancy.

In this case the revision of the Criminal Code (RKUHP) need to set the prohibition exception abortion as regulated in law Health to overcome the rampant illegal abortion practices. The problem of factors law enforcement, namely law enforcement officers the law does not understand the provisions that regulates criminal acts abortion. According to the Health Coalition Indonesian Sexual and Reproductive (KSRI), law enforcement officers often criminalize women as the party performing the abortion, and female companion, giver information, doctors, midwives, or nurses as service providers.

KSRI noted that there were at least 8 cases related to abortion criminalized by law enforcement officers law during February-August 2020. By criminalizing officers health, meaning the state is closing safe and direct abortion services women access abortion services not safe. Law enforcement officers don't dig deeper into the reason health of parties related to abortion (Adinda, 12 Desember 2021).

In terms of this, the government needs to socialize exception to the abortion ban regulated in the Health Law for officers law enforcement, so not all perpetrators of abortion should be punished. With regard to facilities infrastructure, the government needs provide safe abortion services and post-abortion health services to prevent development illegal abortion clinic. On the other hand, According to the Member of Commission IX of the DPR RI, Kurniasih Mufidayati, government need to carry out close supervision to the clinics in Indonesia and re-enroll the clinic illegal that must be followed up and closed. If there is an illegal clinic nor legal but do illegal abortion is expected by the government close it immediately. Medical team contributing to the practice of abortion The decree must be revoked and strict action is taken (Vinta, September 18, 2021).

From community factors, conditions poor community economy able to improve the practice of abortion illegal. Many couples of childbearing age who unable to pay less attention reproductive problems so have an unwanted pregnancy and an abortion because reasons for not being able to finance the life of the child when it is born (Asse, 2010: 58). From cultural factors, increase in premarital sexual behavior and free sex as a result of development modern culture and increasing age married couple. This modern culture influenced by western culture. As a result, many actions occur Illegal abortion due to pregnancy unwanted. Abortion done in general as a way to get rid of shame or cover the disgrace of the pregnancy unwanted. In this case, providing education regarding reproductive health to teenagers is absolutely done since secondary school. In addition, Build Bride and groom also need to be done related to the provision of health information reproductive and sexual and its importance communicate the number of children who desired with a partner (Wardoyo, 24 September 2021).

2. Policy on the Criminalization of Abortion in the Current Positive Law

Sudarto argued that criminalization means a process in which acts which was originally not a criminal offense was then threatened with a criminal offense in the law. Criminalization is the process of determining an act of a person as an act that can be punished. This process ends with the formation of a law in which the act takes place threatened with a criminal sanction. As stated by Sudarto⁹ that in the face of the central problem in criminal policy especially The first problem, which is also called the criminalization problem, must be considered: where of them The use of criminal law must take into account national development goals which creates a just and prosperous society that is equitable, material, spiritual based on Pancasila; in connection with this then (the use of) the law Criminal law aims to prevent crime and carry out transfers against the countermeasures themselves, for the welfare and community protection (Musa Perdana Kusuma: 1981)

Acts that are attempted to be prevented or overcome by law criminal offense must be an "unwanted act, namely an act that bring harm (material and or spiritual) to the community members; The use of criminal law must also take into account the principles of cost and results (cost and benefit principle); The use of criminal law must also pay attention to the capacity or ability the work power of law enforcement departments, that is, there should be no overload of duty (overbelasting) Abortion has been regulated in the Criminal Code and several laws in Indonesia outside the Criminal Code. This paper once again examines the theoretical criminalization policy academic or scientific, both those that have been made into offenses (regulated in the Act) or those that have not yet. So it can be distinguished between juridical criminalization (according to the law) and scientific or theoretical criminalization, especially from the point of view of "penal/criminal policy". (Agato: 2014)

Even though the author studies scientifically or theoretically, he can't do it without his feet on two things, namely how to regulate the criminalization of abortion policies currently regulated and a study of how the arrangements should be regulated in future positive law reforms. If it is based on one of the detailed criteria by Soedarto in order to obtain optimal legislative results and avoid over criminalization that abortion is an unwanted act, namely actions that bring harm (material and or spiritual) to citizens Public. The following will describe the policy of criminalizing abortion in the current positive law One of

the objectives of the founding of the Republic of Indonesia is to "protect all" the Indonesian nation and the entire homeland of Indonesia and to promote prosperity general" as stated in paragraph IV of the Preamble to the 1945 Constitution. (Bahder Johan Nasution: 2005)

So generally protection given by the state, namely to all nations and the spilled blood Indonesia, it can be said that this protection is not only given to people in general, but also to the unborn child. Thus the child in The content has the right to get protection from the state guaranteed by the constitution. Protection for children in the womb is even clearer with the presence of statement in paragraph IV of the Preamble that the State of Indonesia is based on Pancasila. The first precept, God Almighty, and the second precept, just and righteous humanity civilized, emphasize the existence of constitutional protection for children who are still in the womb that obtains life from God the Creator and therefore Humans according to their nature are obliged to protect, nurture, raise and protect survival.(Amir Ilyas: 2014)

As stated earlier, in this paper, it will be studied further in the second principle of Pancasila in relation to the renewal of Indonesian criminal law, by Therefore, the following 10 points from the second principle of Pancasila12 will be presented, namely: (Mia Amalia: 2017)

1. recognize and treat humans according to their dignity as a creature of God Almighty
2. recognize equality, equal rights and human obligations of every human being without discriminating against ethnicity, ancestry, religion, belief, gender, social position, skin color and so on.
3. develop an attitude of mutual love for fellow human beings
4. develop an attitude of tolerance and kindness
5. develop a non-discriminatory attitude towards others.
6. upholding human values
7. likes to do humanitarian activities.
8. Dare to defend truth and justice.
9. the Indonesian people feel themselves as part of all mankind.
10. develop an attitude of respect and cooperation with the nation other.

From the points of the just and civilized precepts of humanity above, it is clearly implied about high appreciation for human values. Therefore, abortion is an act that is contrary to the second principle of Pancasila "just humanity". and civilized"

Article 346 of the Criminal Code states that a woman who intentionally aborts or kill the womb or order someone else to do it is punishable by imprisonment a maximum of four years. Elements deliberately placed in front mean that all elements what is behind the intentional element must be covered by the intentional element. The intent of the perpetrator in Article 346 of the Criminal Code is aimed at the death of the womb or the death of the womb. The meaning is that the termination of the womb or the death of the womb must be intentional, intended, intended, desired or imagined by the perpetrator that by his actions will result in the fall or death of the womb.(Cucu Sholihah: 2009)

The Criminal Code only sees abortion as an act of killing one's life. Therefore, there are more articles that regulate abortion in the womb Chapter XIX, Book II of the Criminal Code which regulates Crimes Against Life while in Chapter XIV Book II Crimes against Morals and Chapter IV Book III of the Criminal Code which regulates the violation of decency is only regulated in each article only. Meanwhile, abortion is not only related to the loss of life, but also far from that there is a series of previous actions that lead to action abortion. Abortion is downstream of the problem, if upstream If the problem is not resolved, then abortion will always occur. For perpetrators of abortion there are two subjects who are subject to crime, namely: the woman herself is pregnant and whoever deliberately helps the woman it aborts the womb. A woman who is pregnant can get a criminal threat if he intentionally aborts the womb without the help of others. (Moh. Hatta: 2013)

He also can be subject to criminal threats if he asks for help from others by ordering people to it's to abort the womb. Especially for other people who are asked to aborts the womb and she actually does it, then for her the formula applies Articles 347 and 348 of the Criminal Code. According to Njowito Hamdani14, the most important of Article 299 of the Criminal Code are: "...was told or was given the hope that because of the treatment she could get pregnant aborted..." the woman according to this article does not need to be pregnant, but it is enough that she feels pregnant. The medicine given does not need to be effective, it can be given a cup of water that has been given a spell, the important thing is to give or raise hope that because treatment, the pregnancy can be aborted.

Only if the woman is really pregnant, then Article 346-349 of the Criminal Code applies. Regarding Articles 346, 347, 348 of the Criminal Code, which includes the following acts: "aborting" content (afdrijving van de vrucht or vrucht afdrijving) and turn off content (de dood van de vrucht veroorzaken or vrucht doden)". The Criminal Code is not given an explanation regarding the meaning of the content itself. Even the Criminal Code does not provide an

explanation regarding the difference in terms of abortion and termination of pregnancy. Therefore, the meaning or meaning of these terms must be sought from the opinion of experts. Musa Perdanakusuma¹⁵ provides several possibilities for understanding content (vrucht):

1. in the sense of the fetus in general, ie from two weeks of age up to 40
2. weeks in the womb
3. in the sense of pure embryo
4. in the sense of advanced embryo
5. in the sense of a pure fetus

This understanding of content (vrucht) is very important as a basis for analysis of articles 346, 347, 348 of the Criminal Code to determine when an act can be said to abort content (afdrijving van de vrucht or vrucht afdrijving) or when the action is said

turn off the content (de dood van de vrucht veroorzaken or vrucht doden). Besides being able to sought from the periodization of fetal growth as mentioned above, the meaning of the term Aborting or killing (turning off) the content can also be searched in terms of governance language:

To abort means to abort or cause to fall. Fall means the same by falling or dropping. Aborting the womb means making the womb become fall or cause fall. In the case of an abortion, the act that is threatened the crime is to cause the abortion of the womb, namely the release of the womb from the womb and the discharge of the content from the body of a pregnant woman. What is abortion content causes death or not, is not a requirement. While the term kill or kill has the same meaning, namely: cause death or loss of life. Turning off the content means causing the content becomes dead or eliminates the life of the womb. Thus a The act can be qualified as an act of killing the womb if the womb released from the womb and out of the body of the woman who is pregnant and her womb must die.

Meanwhile, the content that can be compared to ordinary humans is pure fetus because the pure fetus has shown signs of life. With regard to the contents of Article 346-348 of the Criminal Code, then it is in this pure fetus that the term killing (deadly) applies. content. The reason is, logically anything that can be killed is anything animate. Judging from the description of the fetal growth process above, only fetuses just pure (fetus aged between 16-40 weeks in the womb) that is alive and have signs of life such as blood circulation, heart rate and fetus can move in the womb.

Regarding Article 346-348 of the Criminal Code, there are two different terms, namely aborting content and turn off content. The meaning of these two terms from a grammatical point of view not the same. However, the punishments for each of the perpetrators remain the same, namely: a maximum of four years in prison (Article 346 of the Criminal Code) a maximum of twelve years in prison (Article 347 of the Criminal Code) and a maximum of five years and six months in prison (Article 348 of the Criminal Code). By Therefore, if you adhere to the periodization of fetal growth according to obstetrics, above, it should be that Articles 346, 347, and 348 of the Criminal Code only apply to the term abort the womb, i.e. cause the fall of the womb in the form of an embryo pure and advanced embryos (fetus aged 0 until the 16th week). While the term to kill the content means to cause death or take the life of the content that is in the form of pure fetuses. For this term, other articles concerning homicide (eg infanticide, because pure fetuses can be equated with babies).

Policy settings for the criminalization of abortion as regulated in the Criminal Code still creates gaps. Where in the Criminal Code uses two terms The difference is to abort the womb and turn off the womb. As which has been stated in the previous chapter that by definition according to Gulardi H.W, abortion is the cessation and expulsion of pregnancy before 20 weeks (calculated from the last menstrual period) or fetal weight less than 500 g or fetal length less than 25 cm. In general, abortion occurs before 3 months of pregnancy. Number The incidence of spontaneous abortion is 15%. Even if it is investigated on the entire menstruation that occurs on the probability that the figure will be 40% if including the results of the conception dissolve with menstruation. While the discharge of the products of conception (fertilization) after gestational age 20 weeks can be said as per copy considering that the fetus has been expelled already have a very slim life expectancy.

In an abortion, an act that is punishable by a crime is causing the fall of the womb, i.e. the release of the womb from the womb and the release of the womb from the body of a pregnant woman. Does abortion cause whether the womb dies or not, is not a requirement. While the term kill or to kill has the same meaning, namely to cause death or to eliminate life. To turn off the content means to cause the content to die or take away the life of the womb. Thus an action can be qualified as an act of killing the womb if the womb is separated from the uterus and comes out from the body of a pregnant woman and her womb must die.

The Criminal Code does not distinguish the two consequences of these two acts but provides a punishment the same one. Even though the subject who is subject to the consequences is clearly different where to abort the content of the aborted subject is a fetus while the death of the womb, the subject is the baby. So the arrangements regulated

in articles 346, 347, and 348 of the Criminal Code should only be used in terms of abortion. Whereas for the terminology of lethal content should be subject to articles relating to baby murder.

As regulated in Articles 346-348 of the Criminal Code that abortion is prohibited without exception. This has resulted in widespread practice of abortion illegally carried out without medical standards so as to endanger health maternal reproduction. In cases where pregnant women experience health problems both physically physical or psychological problems or the health of the fetus is disturbed, the paramedics faced with a dilemma between helping the mother or the fetus with the prohibition abortion. Therefore, the author argues that in the case of condition of the health of the fetus and the condition of the mother's health, the abortion selective is possible. Along with the development of the medical world that some certain diseases that previously could not be overcome have been found a way of treatment when this or vice versa with the emergence of several new generative diseases that have not been. If the method of treatment is found, the author argues that there is a clause or editorial regarding It is permissible to have an abortion if the health of the fetus and the mother are both physically and mentally healthy psychological or physical does not allow the continuation of the pregnancy. This is a limitation that without health reasons related to the fetus and mother, an abortion cannot be done.

D. Conclusion

1. Illegal abortion clinical practice still happened in Indonesia. Arrangement the crime of abortion is contained in Article 194 of Health Law, Article 299 KUHP, and Articles 346 to Article 349 of the Criminal Code. Problem in law enforcement abortion crime is overlapping regulation of the imposition of the crime of abortion illegal in the Health Act and Criminal Code; less law enforcement officers understand the stipulations that govern the crime of abortion; not available safe abortion services; economic conditions society, and increasing premarital sex and free sex. Commission III of the DPR RI through implementation of the legislative function is necessary set prohibition exception abortion in the amendments to the Criminal Code. In regarding the implementation of the supervisory function, Commission III of the DPR RI needs to request Police take action for perpetrators who are proven to have committed illegal abortion. Commission IX of the DPR RI through implementation of the supervisory function is necessary ask the Ministry of Health supervising facilities health that is indicated to do illegal abortion, providing services safe abortion and health services post-abortion, as well as taking steps anticipatory to prevent recurrence the practice of illegal abortion through giving reproductive health education to youth and providing information reproductive and sexual health in Bride and Groom Development.
2. The policy of criminalizing abortion in the current positive law The current policy of criminalizing abortion is regulated by law positive is not enough to guarantee protection for public health in particular related to reproductive health. Abortion criminalization policy which is regulated in positive law in outline can be studied in two parts, namely:
 - a. Positive law which explicitly includes the editorial of abortion are the Criminal Code and the Law of the Republic of Indonesia concerning Health Number 36 Year 2009 (UUK). The Criminal Code does not explicitly define abortion content that is medicinalis or abortion provocatus therapeuticus. Whereas UUK can be classified in the law that allows abortion with certain conditions complicated because emergency is the key word to abort the womb in an effort to save the lives of pregnant women.
 - b. Positive law that implicitly regulates the policy of criminalizing abortion content is regulated in the 1945 Constitution of the Republic of Indonesia, Law of the Republic of Indonesia Number 29 2004 concerning Medical Practice. the Constitution and the law indeed regulates the policy of criminalizing abortion explicit, but both in the constitution and in the law provide protection guarantees towards children (the definition of a child referred to here is someone who has not reached the age of 18 (eighteen) years, including children who are still in the womb) and reaffirm the responsibility of doctors to practice medicine based on Pancasila and based on scientific values, benefits, justice, humanity, balance, and patient protection and safety

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