

CHAPTER I

INTRODUCTION

1.1 Background

A child is a gift. It is one of the mandates given by the Creator to be guarded, educated, and cared for as well as possible. Children are said to be the mandate of their parents as the children may later become an investment in reward for their parents. However, this infamous saying about the precious “gift” oftentimes be misunderstood by some of individuals, as the high number of abortion is always high.¹ The research team from the Guttmacher Institute and United Nations Development Programme / United Nations Population Fund / United Nations Children Fund / World Health Organization / World Bank Special Program of Research, Development and Research Training in Human Reproduction (HRP) noted that during 2015-2019, there were 121 million unwanted pregnancy worldwide. Meanwhile, sixty one percent or the equivalent of seventy three million unwanted pregnancy ended in abortion.

The term abortion or *Abortion provocatus* comes from the Latin word², *abortus*, means deliberate miscarriage. In other words, abortion is the condition of death or discharge of a conception or fetus before 20 weeks of gestation.³

¹Baiq Anisya Yolanda, “Faktor-Faktor yang Berhubungan Dengan Sikap Terhadap Aborsi Pada Wanita Usia Subur di Wilayah Kerja Puskesmas Pekauman Kota Banjarmasin”. Skripsi, Banjarmasin: Program Studi Hukum Fakultas Hukum Universitas Islam Kalimantan, 2019, hal.11

²Eka Damayanti dan Aryani Witasari, “Legal Protection from Provocate Abortion Against the Child Conceived Because Rape (Case Study on Jurisdiction Ex Residency of Cirebon)”, Jurnal Hukum Daulat, Vol .2, No.4, December 2019, hal. 602

³ Maria Ulfa Anshor, *Fikih Aborsi*, (Jakarta: Gramedia, 2016), hal 32

According to the law, the definition of abortion is the birth of the womb prematurely by an act that is an act criminal crime. In this sense, attention is focused on the sentence "by an act of someone who is an act of criminal crime. Abortion is divided into two types, namely *Provocatus Therapeuticus* and *Abortion Provocatus Criminalis*.⁴ *Provocatus Therapeuticus Abortion* is *Provocatus Funding* which is done on the basis of medical considerations and carried out by the staff who get it special education and can act in a professional manner.⁵ Meanwhile, *Criminal Provocatus Abortion* is *Abortion Provokatus* who illegal abortion which is usually only done for the benefit of the perpetrator.⁶ Abortion is quite a complicated problem, because concerning many related aspects of human life with ethics, morals, religion, and law. Moreover, the spread abortion drugs are so easy to get in society. This is also a serious concern for the government in terms of coordinating and controlling the spread of drugs abortion on the market. The Penal Code defines abortion regardless of the reasons, is an act that is subject to criminal sanctions.⁷ In context daily life, abortion problems appear pent up and without turmoil. However, the practice of abortion content carried out by irresponsible people answer goes on secretly.

⁴Siska Elvandari, "Legalization of Abortion Against Victims of Rape Crimes Viewed from Victimology Perspective", *Jurnal Hukum & Pembangunan*, Vol .50, No.1, 2020, hal. 6

⁵Keman Fikar Muhammad, "Aspek Hukum tentang Abortus Provocatus Therapeuticus di Indonesia", *Jurnal Penelitian Ipteks*, Vol .5, No.1, Januari 2020, hal. 139

⁶Meida Putri Arisinta, "Analisis Putusan Pidana Terhadap Pelaku Tindak Pidana Aborsi". Skripsi, Jember: Program Studi Hukum Fakultas Hukum Universitas Jember, 2020, hal.10

⁷Puspitasari, Ni Putu Ratih, I Made Sepud, & I Made Sukaryati Parma, "Tindak Pidana Aborsi Akibat Perkosaan", *Jurnal Preferensi Hukum*, Vol .2, No.1, 2021, hal. 136

Abortion is a problem that is still a matter of controversy because it has not been thoroughly discussed. Along with the rapid development of era and technology, abortion cases are increasingly occurring, especially in Indonesia. One of the factors of abortion is unwanted pregnancy, but because the pregnancy was not done by her will, the desire to abort is very high. In Indonesia, it is estimated that two million cases of abortion are carried out every year⁸ as this statement supported by researchers in the early 2000s estimated that that every year about two million induced abortions occur in Indonesia.⁹

Indonesia already has a legal umbrella that regulates acts of the crime of abortion, where the crime of abortion itself is regulated in the Law No. 36 of 2009 concerning Health (hereinafter referred to as with Law 36/2009) which states that abortion is a crime which according to law is called abortion *Provocatus Criminalis*.¹⁰ In general, the regulations regarding abortion are contained in Article 299, Article 346, Article 347, Article 348, Article 349, and Article 350 of the Criminal Code. Articles This clearly and expressly regulates the prohibition of abortion with any reasons, whether it is for the perpetrator or the one who helps with the abortion. However, the law that is expected as a form of certainty of the protection of life for mankind, turned out to be a regulator and determinator of the survival of a person. This is related to the issue of abortion. The state anviled from its principle prohibits abortion, but in reality in some medical conditions abortion

⁸Putro Agus Harnowo, "2.5 Juta Janin Tiap Tahun "Menjerit: Karena Dimatikan". <https://health.detik.com/ulasan-khas/d-1928031/25-juta-janin-tiap-tahun-menjerit-karena-dimatikan/>, diakses pada 8 September 2021.

⁹Frans Sadewo & Sri Sadewo, "Kejadian Keguguran, Kehamilan Tidak Direncanakan, & Pengguguran di Indonesia", Buletin Penelitian Sistem Kesehatan, Vol .15, No.2, 2012, hal. 181

¹⁰Jusuf, B.S, *Aborsi*, (Surabaya: Bukit Zaitun, 1998), hal 7

is the only way that medical personnel must take to save the life of a mother who experiences serious health problems or complications during pregnancy. Abortion is a classic issue that has been the subject of debate throughout the ages. Along with various developments and changes in this era of globalization, abortion remains an interesting subject of study to be discussed. Actually the issue of abortion has been regulated in Article 15 of Law Number 23 of 1992 concerning Health. In this law, the word abortion is not found because the term used is a certain medical procedure. This regulation through the legal system is what is meant by legalization.

The debate over the legalization of abortion has its own point of view. There are 3 (three) opinions about abortion, namely¹¹:

1. Conservative view.

This view assumes that abortion should not be performed under any circumstances. Here there are religious and philosophical reasons including the sanctity of life, the prohibition to destroy innocent human life and the fear of liberal social implications for others who cannot defend themselves such as the disabled and the elderly;

2. The liberal view.

This view assumes that abortion is permissible under certain conditions. Here abortion is considered a moral decision, but its continuity can be justified morally, including the quality of the fetus, the physical and mental health of the

¹¹Cindy Oeliga Yensi Afita, "Pengaturan Aborsi Dalam Perspektif Perundang-Undangan Indonesia", Rio Law Journal, Vol .1, No.1, 2020, hal. 5

woman, the woman's right to self-integrity, family welfare, career considerations and family planning;

3. Moderate view.

This view puts itself in a middle position which recognizes the possibility of moral legitimacy as the reason for carrying out an abortion, but does not in the slightest deny the existence of suffering and heavy heart on the part of the mother towards the fetus. This view sees the fetus and woman as the owner of rights which recognizes that in an effort to resolve such a conflict of rights will inevitably lead to suffering and a heavy heart as a consequence.

Currently in Indonesia talking about abortion is no longer a taboo subject because abortion is happening now has become a fairly actual problem. We can see that in recent years there have been frequent abortion practices, both legally and illegally. Abortion cases in Indonesia really need to be reviewed regarding matters relating to the position of the abortion law that applies in Indonesia and also needs to be seen from the purpose of the abortion act. In Indonesia itself, an estimated of two million abortions occurred each year.¹² This prediction figure tends to be quite high compared to abortion number cases in other Asian countries. Other study by Badan Kependudukan dan Keluarga Berencana Nasional also conclude that Indonesia's abortion rate is currently increasing, especially in metropolitan areas.¹³ However, despite the ongoing trend and high number of abortion case in Indonesia,

¹²Terrence Hull & Ninuk Widyantoro, *Abortion in Indonesia: Local Dilemmas, Global Politics*, (New York: Berghahn Book, 2010, hal. 175

¹³Utami Diah Kusumawati, "Tercatat Angka Aborsi Meningkat di Perkotaan". <http://www.cnnindonesia.com/nasional/20141029111311-12-8642/tercatat-angka-aborsimeningkat-di-perkotaan/>, diakses pada 8 September 2021.

abortion viceversaly is prohibited *Kitab Undang-Undang Hukum Pidana* as a Lex Generalist rule clearly states that the act of abortion is prohibited in which it can be charged under Article 346 of the Penal Code, but, however in accordance with Article 75, Article 77, and Article 194 of Law Number 36 Year 2009 concerning Health (“Health Law”) as the Health Law provides room for abortion for certain reasons.¹⁴ In the section on reproductive health in the 2009 Health Law, article 75 states that every person is prohibited from having an abortion (paragraph 1) but there are two groups that can be excluded. First, the group of women with indications of medical emergencies detected at an early age, either those that threaten the life of the mother and / or the fetus, who suffer from serious genetic diseases and / or congenital defects, or those that cannot be repaired so that later it will be difficult for the baby to live outside the womb. Second, women who become pregnant as a result of rape which can cause psychological trauma. The act of abortion in this group must be preceded and ended with counseling by a competent and authorized counselor. Provisions on the legality of abortion for pregnant women as a result of rape are also strengthened in Article 31 paragraphs one and two of Government Regulation No. 61 of 2014 concerning reproductive health. This regulation regulates that abortion in pregnancy due to rape can only be done at a maximum of forty days of gestation from the first day of the last menstrual period. From this law, we can conclude that some medical condition may legalize abortion.

¹⁴Claudia Surdjajaja & Sussannah Mahyew, “Can Policy Analysis Theories Predict and Inform Policy Change? Reflections on the Battle for Legal Abortion in Indonesia ”, *Heath Policy and Planning*, Vol .26, No.6, Sep, hal. 381

In fact, if we look in deeper into what usually caused abortion, rape would be one of the big contributor compared to other reasons. Rape has a broad meaning, but the definition of rape in Article 285 of Indonesian Penal Code is narrowly defined. Rape according to law is an act of intercourse based on threats or violence committed against a woman who is not a legal wife. Cases of sexual violence including rape are increasing in Indonesia every year. The National Commission for Women (Komnas) finds that every day there are allegations of at least eight women being raped in Indonesia. Komnas Perempuan recorded that there were 17,088 cases of sexual violence that occurred during 2016-2018. Among the cases of sexual violence, there were 8,797 cases of rape or fifty two percent of the total cases of sexual violence. This data was compiled by Komnas Perempuan from a number of service institutions for victims of violence against women. Multitude number of woman who became victims of sexual violence as a result of unwanted pregnancies may forced them to do abortion to reduce the sense of trauma they may suffered, causing them to indirectly change their status from being victims to perpetrators of acts criminal.

Abortion has been regulated in such a way in laws and regulations as well as government regulations as implementing laws and regulations, but in reality there are still problems, especially abortion for rape victims where proving abortion for rape victims in Article 34 PP Number 61 of 2014 which states that Pregnancy due to rape as referred to in Article 31 paragraph (1) letter b is a pregnancy resulting from sexual intercourse without the consent of the woman in accordance with the provisions of the legislation and Pregnancy due to rape as referred to in paragraph

(1) is 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. Based on the article, there is a polemic in terms of proving the crime of rape which causes abortion to be legalized, especially for victims of rape. Based on Article 34 paragraph (2) letter b PP Number 61 of 2014 states that the investigator's statement can be used as evidence of a rape victim to have an abortion, based on the Penal Code, abortion is a crime and the authority to determine whether a rape has occurred is in the hands "Court Institution" based on a judge's decision that has permanent legal force (*inkracht van gewijsde*).

Cases regarding abortion in Indonesia are in fact rife, especially among teenagers. Of the many abortion cases that occurred in Indonesia, almost all court decisions found the abortionist guilty and punished the abortionist. This is because most abortions are carried out after a grace period of 40 days in accordance with Article 31 PP No. 61 of 2014. Moreover, for teenagers, many abortionists are punished with criminal penalties because the perpetrator did not previously know about the pregnancy, whether 40 days had passed or not. The envoy then raises the pros and cons in the community. Some people support the decision because the criminal element has been fulfilled, namely having an abortion at a gestational age of more than 40 days. However, some communities and several social institutions regretted the decision because they considered that the 40-day gestation period allowed by law to have an abortion due to rape was irrelevant because

children/adolescents lacked knowledge about pregnancy or gestational age, especially when the abortion was carried out due to rape.

Furthermore, In criminal procedural law, there is a principle where a person cannot be blamed for committing a crime, except if based on valid evidence the judge obtains a conviction about the defendant's guilt.¹⁵ Especially in Indonesia, which is a state of law, basically everything must be based on legal certainty (lex specialist) or based on the principle of legality. The principle of legality is a principle whose essence is contained in the expression *nullum delictu, nulla poena sie praevia lege poenali*. The expression implies that "there is no act that can be punished except for the existing criminal legislation before the act was committed". Due to the reason stated, there must be an evidential process to prove the criminal act. Regarding the proving process (criminal evidence) mentioned above, there are problems regarding the time period for rape victims to have an abortion where the 40 days given by the PP on Reproductive Health to legalize abortion due to rape, will not be enough to wait for the final process of the whole process. that is passed by a person suspected of committing rape, even more so if for example the person suspected of being is still carrying out legal appeals and cassation to the Supreme Court (MA), of course all these processes require time in accordance with the provisions of the appeal as regulated in Article 233 to Article 237 as well as the provisions for cassation based on Articles 254 to 258 in Law Number 8 of 1981 concerning the Criminal Procedure Code.

¹⁵Eko Raharjo, Devi Ramadhanti, & Sanusi Husin, "Pelaksanaan Asas Praduga Tak Bersalah Pada Penyidikan Pelaku Tindak Pidana", *Journal Peonale*, Vol .6, No.4 2018, hal. 2

Looking down on the problem mentioned above , this thesis will sharply peel on form of legal protection for rape victims as well as to mainly discuss the process of rape evidencing for the legality of abortion. Based on the description above, the Author proposed the title "**40-Day Limitation for Abortion Requirements Towards Evidential Process**", in which will be discussed in the next chapters in this thesis.

1.2 Formulation of Issue

Based on the background elucidated above, the author has presented a general background on abortion and rape. Hence, the formulation of issue of this proposal will be roughly anived from the evidential process of rape regarding abortion as well as abortion's perpetrator protection towards the 40-day limitation requirement. However, despite the broadness area that may be covered, the Author will limit the focus research on:

1. How is the system of proof towards legality of abortion resulted from rape in Indonesia?
2. How is the protection of the victim's right of the crime of rape against court orders that exceed the 40-day limit for abortion requirements in accordance with social justice principle?

1.3 Research Purpose

The research purpose of this thesis is to find answers to the formulation of the issue above. Therefore, specific purpose of this thesis covers:

1. To analyze the system of proof towards legality of abortion resulted from rape in Indonesia.
2. To elaborate the protection of the victim's right of the crime of rape against court orders that exceed the 40-day limit for abortion requirements in accordance with social justice principle.

1.4 Research Benefit

Research benefits of this thesis are divided into 2 areas which are theoretical benefits and practical benefits. Theoretical benefit is a benefit that is not yet applicable and realized in the society, in contrast practical benefit is benefit that can be taken directly upon the end of this thesis.

1.4.1 Theoretical Benefit

Theoretically, this thesis may increase understanding and society's view of rape and abortion, as well as as new information material for academics that can be useful for future researches and also adding material at field of scientific work so that it can become input and reference for future studies. It is hoped that this research will provide benefits and deeper knowledge regarding the legality of abortion due to rape as well as input in terms of proving the crime of rape before medical abortion is carried out by health workers.

1.4.2 Practical Benefit

The output of this research is expected to be useful to every party that is mentioned and involved in this research, as if:

1. Provide benefits and knowledge further into the legality of abortion due to rape as well input in terms of evidencing of rape crime prior to medical abortion procedures performed by health personnel. This matter also focuses on the safety of women who impregnate and the baby that will be born in a healthy condition but on the other hand is also in order to provide guidance for the health personnel so that before taking medical action still refers to the regulations that are enforced.

1.5 Framework of Writing

The writing framework is a guide for the Author in doing research in order to find out the meaning contained in the title proposal and avoid different interpretations so writing this directed and better which make this thesis really needs attention writing framework below:

Chapter one explains the background of this thesis, which focuses on abortion and rape. The main legal issue is the 40-day abortion requirement for rape victims. To peel sharply the issue, this chapter consists of the introduction, which is further divided into five parts, which are background, formulation of the issue, research purpose, research benefit, and framework of writing.

In chapter two, the Author will discuss thoroughly abortion in the Indonesian Penal Code, Indonesian Health Law, as well as in Government Regulation. Furthermore, to complete the information, the Author will also explain the abortion condition, rules of evidence which covers a system of proof, type and value of the evidence, and evidential process, the definition of crime and crime of

rape as well as its element. Not forgetting to explain rape, abortion, legal protection, also the social justice principle in the conceptual framework.

The third chapter will discuss in general the type of research, the type of data, data analysis technique, and the type of research approach. Followed by the types of research, data, data analysis technique, and research approach that the Author uses to discuss the issues in this thesis.

The fourth chapter will discuss the research problems along with its solution. This chapter will be divided into further sub-chapters and each sub-chapter will answer the respective research question as stipulated in chapter two of this thesis. The first sub-chapter will consist of laws and regulations applied in Indonesia. On the other hand, the second sub-chapter will analyze the protection of the victim's right to the crime of rape against court orders that exceed the 40-day limit for abortion requirements.

In this last chapter, the author will explain the conclusion as an answer to the issues that have been analyzed in chapter four. Aside from giving a conclusion, the Author will also give suggestions and recommendations towards these issues and the probable regulation that could be drafted and implemented in the future to ease the public in understanding the newest policy in regards to abortion, thus providing legal certainty and protection for all.