

CHAPTER I

INTRODUCTION

1.1. Background

In life, people often wish that death should always happen naturally. However, in unlucky scenarios, there are certain conditions while waiting for natural death can cause more suffering and endless pain towards a person. Those scenarios can result in euthanasia—an act of ending a person’s life due to a chronic illness with little to no chance of recovery by the help of professionals namely doctors. The idea of “a good death” or “death with dignity”¹ was derived from a notion that supports a fulfilled life of a terminally ill patient². It is believed that euthanasia is considered as a fulfilling option for a patient because it is meant to stop the pain and suffering that one is feeling with hope that everyone involved would be in a better place after euthanasia is being conducted.

When talking about euthanasia, one should understand that euthanasia’s classification differs from various perspectives, namely³:

a. The perspective of action occurred:

1. Active euthanasia: euthanasia that is conducted by inserting active ingredients such as lethal injection to the body, or consuming

¹ Setiawan Budi Utomo, *Fiqh Aktual Jawaban Tuntas Masalah Kontemporer*, Jakarta: Gema Insani Press 2003, hal 177.

² University of Missouri School of Medicine, "Euthanasia." <https://medicine.missouri.edu/centers-institutes-labs/health-ethics/faq/euthanasia>. Accessed 09 Oct. 2021.

³ *Ibid*

prescribed overdose drug by the consent of a patient with the intention to end their life.

2. Passive euthanasia: euthanasia that is conducted by intentionally letting a person die by withholding or withdrawing medical act that will continue to support the patient's life. Eg: removal of life support, DNR (Do Not Resuscitate) patient, stopping ventilator, refusing to continue medication.

b. The perspective of request:

1. Voluntary euthanasia: request made by the patient himself.
2. Involuntary euthanasia: request made by the family or guardian of the patient due to the inability of the patient to make such decision. Eg: patient has been in a coma for years, then the family decide to perform euthanasia.

In short, however, euthanasia is divided into 2 (two), namely: active euthanasia and passive euthanasia.

Even if the intention of euthanasia is essentially good, there are a lot of controversial debate between “pro-life” and “pro-choice” which resulted in different approach regarding euthanasia in every country⁴. This is because each country has their own opinion and beliefs when it comes to euthanasia. Some country that is “pro-life” look into euthanasia as an act of murdering someone, an act that took a person's rights to live, which is illegal

⁴ Kompas. “Apa Itu Euthanasia dan Negara Mana Saja yang Melegalkan.” <https://www.kompas.com/tren/read/2020/11/02/144500665/apa-itu-euthanasia-dan-negara-mana-saja-yang-melegalkan-?page=all>, accessed 8 November 2021

and considered as punishable act, while countries that support the notion of “pro-choice” look into euthanasia as an act of mercy, an act that might help the patient to be at ease, and certainly not a punishable act of crime⁵.

When looking into euthanasia in Indonesia, we are not only looking from the perspective of Medical Law, Indonesian Criminal Code, human rights, or Indonesian Medical Code of Conduct of 2012 (*Kode Etik Kedokteran Indonesia* of 2012). It goes into the deeper core of our laws, the foundation of our country which is Pancasila, and how it affects our law system into deciding whether euthanasia is prohibited or not in Indonesia. As guidelines, Pancasila exist in hoping that all laws are in line according to the hierarchy, co-exist and not contradicting each other while reflecting the essence and value of Pancasila within. With that in mind, every law and regulation enacted in Indonesia are supposedly supporting one another, reflecting the same goal, and serve the 3 (three) main purposes of the law, which are justice, certainty, and utility.⁶ Without the existence of Pancasila as the guideline in creating the regulations in our country, the value of every law and regulation will be different from one another, and Indonesia will have difficulties in implementing the rules and regulation to prevent our society from chaos since there isn't any parameter or specific purpose that should be reflected within each of the regulation. Therefore, the existence of Pancasila is very important since all of Pancasila's value are reflected in each regulation that has been created.

⁵ *Ibid*

⁶ Muhammad Erwin, “*Filsafat Hukum.*”, (Jakarta: Raja Grafindo, 2012), hal.123

Indonesia is a religious country that has a strong belief in God Almighty. This is supported by the first principle of Pancasila, quoted “Belief in The One and Only God.”, translated, “*Ketuhanan Yang Maha Esa*”.⁷ As the Author has previously mentioned, every rule and regulation in Indonesia must reflect every principle of Pancasila. This is why, Indonesia believes in the existence of Someone who is far more powerful than us humans, which is God, and as God Almighty is the source of the livelihood of every living creature, Indonesia believes that it is beyond the right of a person to decide whether they have the right to die as such a decision belongs to God Almighty⁸. With that in mind, the previous statement also clarifies the reason why Indonesia is against active euthanasia, and the prohibition regarding that matter is regulated under Art. 344 of Indonesian Criminal Code, quoted:

“Any person who takes the life of another person at his explicit and earnest desire, shall be punished by a maximum imprisonment of twelve years.” and translated “*Barang siapa yang merampas jiwa orang lain atas permintaan yang sungguh-sungguh dan meyakinkan dari orang lain itu, diancam dengan pidana penjara maksimum dua belas tahun.*”

Even if the beforementioned article above does not explicitly stating “active euthanasia” within, such article is considered as the legal basis of the prohibition regarding active euthanasia due to the elements of active euthanasia elaborated in the body of the article, which are: (a) there is a person (hereinafter interpreted as doctor) who intentionally took the life of

⁷ Pancasila

⁸ Reynaldo & Rusliansyah Anwar, “Menerapkan Sila Ketuhanan Yang Maha Esa (Dilihat Dari Perspektif Masyarakat Modern)” <https://binus.ac.id/character-building/pancasila/menerapkan-sila-ketuhanan-yang-maha-esa-dilihat-dari-perspektif-masyarakat-modern/> Accessed 18 Nov 2021

another human being (hereinafter interpreted as patient) (b) within the consent or request of the person (patient) that decide to end their life. Furthermore, it is stated in Banda Aceh District Court Decision Number 83/PDT.P/2017/PN BNA (*PUTUSAN PN BANDA ACEH 83/PDT.P/2017/PN BNA*), in the case of Berlin Silalahi—a terminally ill and disabled person who’s request to perform active euthanasia was denied by the court, that active euthanasia is prohibited in Indonesia and regulated under Art. 344 of Indonesian Criminal Code. In conclusion, when talking about active euthanasia in Indonesia, there is no legal uncertainty regarding that matter since Indonesian Criminal Code has specifically elaborating the essence of active euthanasia in the body of Art. 344.

However, notice that the Banda Aceh District Court Decision 83/PDT.P/2017/PN BNA also mentioned how passive euthanasia is prohibited and regulated under Art. 304 of Indonesian Criminal Code, quoted “...in the criminal law applicable in Indonesia, the regulation of the issue of Euthanasia is regulated in Article 304 of the Criminal Code which prohibits passive euthanasia”⁹, it is rather confusing when passive euthanasia is allowed in Section 3 of The Ministry of Health Regulation No. 37 year 2014 regarding Determination of Death and Utilization of Donors.

Thereby, the Author notices that currently, there are two regulations regarding passive euthanasia that has an opposite point of view regarding the matter. The first point of view is: (a) From the perspective of Indonesian

⁹Putusan Pengadilan Negeri Banda Aceh Nomor Putusan Nomor: 83/Pdt.P/2017/PN BNA, hal 23

Criminal Code, which strictly prohibit passive euthanasia practice on Art. 304. This article can be interpreted as doctor who intentionally let their patient to be in a certain miserable condition by an action of withholding and withdrawing medical action, even if they are obliged to provide health, care, or sustain the patient's life. (b) The second perspective is from the Section 3 of the Regulation of the Ministry of Health no. 37 year 2014 which allow passive euthanasia practice by withholding and withdrawing medical action that will eventually result in the death of the patient. Due to this matter, a contradiction of law occurred regarding passive euthanasia practice and confusion arises as there is no justification regarding the legality of passive euthanasia.

As passive euthanasia aims to intentionally withhold and withdraw the medical treatment and life support of a chronically ill patient to help them die¹⁰, such practice is considered as an act of murder from Indonesian Criminal Code perspective. On the contrary, though the Regulation of Ministry of Health no. 37 year 2014 is regulating about the Determination of Death and the Utilization of Donors, the regulation briefly elaborate the definition of passive euthanasia in Art. 1 and Art. 2 of the said regulation (withholding and withdrawing medical treatment), and allow it to be conducted in Art. 14 and Art. 15. This way, problems arises as the legality of passive euthanasia practice is unknown.

¹⁰ University of Missouri School of Medicine, *Loc.Cit.*

To give the reader a portrayal how the legal uncertainty in passive euthanasia practice will result in chaos, the Author will give 2 portrayals:

(1) In the case where the patient is in a constant vegetative state.

In the event of coma, whereas the patient is fully unconscious but still considered medically alive, coma might result in a lot of malfunctions of the brain and body (due to many factors such as infection, stroke, or any other indication¹¹). Even if it does not result in malfunctions of the brain and body, during a coma, the patient's condition is chronic, since the doctors are not able to predict their chance of survival, yet they are not medically dead nor completely alive to live their life naturally. This incident often results in an act of passive euthanasia as one of the options to end the patient's life out of mercy.

After the patient stays in a state of coma for a long period of time, one of the biggest considerations why passive euthanasia might be conducted is due to the insignificant result in recovery, financial instability of the family, or mercy. If the country has legalized passive euthanasia practice, and if the patient's family has given their consent to perform passive euthanasia, then the doctor is obliged to withhold and withdraw the life support of the patient. Soon, the patient will eventually die due to the inability to support their life naturally.

¹¹ Alodokter, "Koma - Gejala, penyebab dan mengobati" <https://www.alodokter.com/koma>. Accessed 30 August 2021.

However, seeing from the status quo in Indonesia where the legality of passive euthanasia remained unknown, the Author would like to emphasize that our law has failed to protect our doctors, patients in coma, family of the patients, and hospitals within this portrayal. This is because, without the clarification on which law to follow, every party related to passive euthanasia practice will be confused on which action that could have been taken. Even if the Regulation of Ministry of Health no. 37 year 2014 allows passive euthanasia practice, no matter how long the patient is in a vegetative state, if the patient is still considered medically alive—not declared brain dead, or their cardiovascular and respiratory system has stopped permanently, stopping to continue medication or removal of life support is not an option in the eyes of Indonesian Criminal Code.

Therefore, the existence of two regulations that have an opposite point of view regarding this matter is problematic since there is no clarity whether passive euthanasia practice is allowed to be performed or not in Indonesia.

(2) A patient in futile condition with no prominent result, even if all necessary measure have been conducted.

As patient that allowed to consider passive euthanasia as an option are only patients with chronic illness with little to no chance of recovery, in the event that all necessary measure have been conducted and there

is still no significant result in recovery, according to the Ministry of Health Regulation no. 37 year 2014, withdrawing and withholding medical action are allowed to be performed. However, according to Indonesian Criminal Code, even when a patient decided to stop continuing the medication as an attempt to stop fighting for the recovery (Against Medical Advice (AMA))¹² such action is considered illegal, and the doctors will be sanctioned based on Art. 304 of Indonesian Criminal Code¹³.

This is because, when the decision of a terminally ill patient is to withhold and withdraw medical treatment, even if the patient is not immediately dead the moment they decided to withhold and withdraw medical treatment, soon or later, the patient will die as they are suffering chronic illness and they are refusing to get treated. Our Indonesian Criminal Code's perspective towards this portrayal is how our doctors have failed to do their job which is to provide care, living, or stopping them to be in a certain miserable situation which interpreted as more pain and suffering of the patient in the future. Indonesian Criminal Code believe that even if such action does not result in immediate death, leaving a patient to be in a certain miserable condition has already violate Art. 304 of Indonesian Criminal Code, as stopping to continue the medication or stopping medical treatment is one of the elements of

¹² dr. David J. Alfandre, "“I'm Going Home”: Discharges Against Medical Advice”, US National Library of Medicine. Mayo Clinic Proceedings, March 2009, hal. 255-260

¹³ Dr. H. Sutarno. dr. Sp. THT, SH, MH, *Hukum Kesehatan, Eutanasia, Keadilan, dan Hukum Positif di Indonesia.* SETARA Pres, 2014, hal. 75

passive euthanasia practice. This means, the existence of the Ministry of Health Regulation no. 37 year 2014 does not create an immunity towards the parties related to passive euthanasia practice, since there is another law that is strictly prohibits such action.

Therefore, the contradiction between Indonesian Criminal Code and Ministry of Health Regulation no. 37 year 2014 is an important issue that needs to be discussed thoroughly, since both laws are contradicting each other, and it result in uncertainty of law regarding passive euthanasia.

The uncertainty of law regarding passive euthanasia practice is harmful towards the people closely related to passive euthanasia practice because within the contradiction, there is a grey area of law that cause patients, doctors, and family of the patients at a disadvantage position since they are unaware of their option, and which action that could have been taken. Furthermore, doctors, patients, and family of the patients are confused since they don't know in which situation should passive euthanasia practice is allowed to be conducted, or not. It is very dangerous to not have a clarification on the legality of passive euthanasia because without such clarity, an action regarding that matter might result in lawsuit as the legality is unknown.

Moreover, the Author find that the regulation regarding passive euthanasia practice is not enough since Section 3 of The Minister of Health Regulation No. 37 year 2014 was created to address the determination of death and utilization of donors, and only regulating briefly regarding passive

euthanasia. That's why, the existence of this Thesis is important to point out how Indonesian Law are still lacking in regulating passive euthanasia, and there is a contradiction that needs a clarification.

Aside from legal certainty that is due, one of the reasons why Indonesia needs an immediate clarification regarding this matter is because of Covid-19 (Coronavirus Disease) pandemic.¹⁴ As Covid-19 pandemic is attacking the health of many people all around the world, patients infected by the virus needs a special treatment in the hospital, which automatically increase the hospitalized patients rate compared to the era before pandemic.¹⁵ During this time, a consistent and clear guideline for the medical workers regarding the legality of passive euthanasia practice is needed, because we cannot deny that there is a certain condition due to Covid-19 that results in patients needing CPR, or mechanical ventilation while being hospitalized.

Those examples—CPR and mechanical ventilator, are 2 (two) out of 13 (thirteen) examples of course of actions that are allowed to be withhold and withdraw based on the Art. 15 of the Ministry of Health Regulation no. 37 year 2014. Learning from the mistake in India that result in the death of a 40 years old Covid-19 patient, whereas the family of the patient mistakenly withdraw the mechanical ventilator of the patient in an exchange

¹⁴ World Health Organization, "Coronavirus disease (COVID-19)" https://www.who.int/health-topics/coronavirus#tab=tab_1?, Accessed 21 Nov 2021

¹⁵ BBC News, "Covid di Indonesia: IGD dan ICU sejumlah rumah sakit penuh, pasien dirawat di tenda - 'Kondisinya darurat mirip perang'" <https://www.bbc.com/indonesia/indonesia-57711018>, accessed 19 Nov 2021

of electricity for the air conditioner,¹⁶ if such tragic incident happen in Indonesia and is conducted by the doctor, due to the existence of two laws regarding this issue, the guilty doctor might argue that it is legal to withdraw the mechanical ventilator since Section 3 of the Regulation of Ministry of Health no. 37 year 2014 is allowing that action. With that, patients and the family will be at loss. Furthermore, if the family of the patients agreed to perform passive euthanasia practice, the doctors will be at loss since it is against Indonesian Criminal Code, and the doctor will be sanctioned accordingly.

Hence, the Author find that the legality of passive euthanasia is still uncertain and the regulation regarding such matter it is not enough, and thereby it is the main reason to research on this matter. The Author notices that this is not the first time someone writes about euthanasia as their topic of thesis. However, the difference between this thesis and other thesis that existed before are as follow:

- (a) Angela Novia Wangsa, *“Withdrawing life supports as euthanasia and comparison of euthanasia in Oregon, Netherland, and Canada.”*

Within this thesis, the Author focus on the philosophical and judicial perspective of withdrawal of life support as passive euthanasia.

Furthermore, the Author main point is to compare between passive

¹⁶ Kompas, “Keluarga Cabut Ventilator untuk Hidupkan AC, Pasien di India Meninggal” <https://www.kompas.com/global/read/2020/06/20/150325170/keluarga-cabut-ventilator-untuk-hidupkan-ac-pasien-di-india-meninggal?page=all>, accessed 17 Nov 2021

euthanasia in Indonesia, and passive euthanasia in Oregon, Netherland, and Canada.¹⁷

(b) Within this thesis, the Author will not compare between passive euthanasia in Indonesia to passive euthanasia in other countries. Instead, the Author will focus on pointing out the contradiction and inconsistency between both laws beforementioned. Moreover, the Author will highlight the uncertainty of law that result due to the contradiction, how it affects the legality of passive euthanasia in Indonesia, and how people closely related towards the issue: doctors, patients, and family of the patients will be at loss due to the matter. Furthermore, the Author will then answer whether a specific regulation that clarify the contradiction and elaborate thoroughly regarding passive euthanasia is needed.

This is the reason why the writing of this thesis has become important and urgent, as to highlight the contradiction between Art. 304 of Indonesian Criminal Code with Regulation of Ministry of Health no. 37 year 2014 regarding Determination of Death and Utilization of Donors, and to point out the needs in having a specific law regarding passive euthanasia that clarify whether such action is prohibited or not to gain legal certainty. Furthermore, this research will only focus on the analysis of the prohibition of passive euthanasia in Indonesia from the perspective of law that regulates

¹⁷ Angela Novia Wangsa, "Withdrawing life supports as euthanasia and comparison of euthanasia in Oregon, Netherland, and Canada." Skripsi, Tangerang: Program Studi Hukum Fakultas Hukum Universitas Pelita Harapan, 2017.

and using Indonesian Medical Code of Conduct year 2012 (*Kode Etik Kedokteran Indonesia* of 2012) as one of the references.

1.2. Formulation of Issues

In regard to the topic of the thesis, the Author will discuss the following formulation of issues:

1. Why there is a legal uncertainty regarding passive euthanasia in Indonesia?
2. What is the problem and solution if there is a legal uncertainty regarding passive euthanasia in Indonesia?

1.3. Research Purposes

The Author's purpose of writing this thesis is to provide answers of the formulation of issues above, namely:

1. To point out the contradiction between Section 3 of Regulation of Ministry of Health no. 37 year 2014 and Art. 304 Indonesian Criminal Code, which creates legal uncertainty regarding the legality of passive euthanasia.
2. To point out how the regulation regarding passive euthanasia is lacking, since the Regulation of Ministry of Health no. 37 year 2014 was created to focus on the Determination of Death and Utilization of Organ Donor instead of thoroughly elaborate regarding passive euthanasia.

1.4. Research Benefits

1.4.1. Theoretical Benefits

The theoretical benefit of this research is to provide academic legal reference regarding the issue related to passive euthanasia that needs clarification, which is the contradiction of The Regulation of Ministry of Health no. 37 year 2014 and Indonesian Criminal Code.

1.4.2. Practical Benefits

In practice, this thesis will be beneficial to address the uncertainty of law due to the contradictions between Regulation of Ministry of Health no. 37 year 2014 and Indonesian Criminal Code. Furthermore, this thesis will spike the urgency that a clarity regarding the issue is needed, therefore in the event of passive euthanasia practice, there is a law that specified whether it is prohibited or not.

1.5. Framework of Writing

This thesis is written and divided into five chapters that will help the readers to understand the discussion of this thesis:

CHAPTER I: INTRODUCTION

In Chapter 1, this chapter aim to gives elaborative background and general knowledge regarding the

thesis. This chapter will point out the issue within the thesis which later divided into 5 parts: background, FOI, purpose of research, and benefits, and framework of writing

CHAPTER II: LITERATURE REVIEW

In chapter 2, this chapter will be divided into 2: Theoretical Framework and Conceptual Framework. This chapter will explain the theory and concept regarding passive euthanasia in Indonesia, which will be the reference of the Author's analysis on Chapter 4.

CHAPTER III: RESEARCH METHODS

The methods of how the Author gain their research will be discussed thoroughly within this chapter by identifying: The types of research, data analysis method, the types of data, research approach.

CHAPTER IV: DISCUSSION AND ANALYSIS

In chapter 4, the Author will analyze and answer the research question stated in the formulation of issues. Thereby, this chapter will be divided into two sub-

chapters, one of each will answer one of the research questions and provide an answer regarding the questions.

CHAPTER V: CLOSING

This chapter will conclude the analysis and the thesis.

This chapter will also be consisting of the Author's personal suggestion, and recommendation of the said thesis.

