

The Fetus's Rights Due to Pregnancy Abortion

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ABSTRACT--- *The debate about abortion is still actual topic relating to assumption that the fetus could not be dropped for certain reasons, especially abortion for pregnancy due to rape. This research aims to determine arrangement about abortion in positive Indonesian law and to review protection rights of the fetus in conjunction with the legality of abortion on pregnancy due to rape. The method used is normative juridical using a statutory and concept approach. The results of this research that Indonesian positive law related to abortion in pregnancy due to rape is a limited of Rape. The right to the fetus's life in the womb is the nature rights which are owned as a gift from Almighty God that cannot be reduced by any reason and must be protected and respected by every person, society or country. The role of the country is very important in providing a guarantee of protection against the fetus's right to avoid abortion.*

Keywords-- *Abortion, Fetus, right to life, Rape*

I. INTRODUCTION

The abortion problem is a classic problem that is still a serious debate. The debate occurs not only about the law but all the problems related to the health of the living rights of the fetus in the bladder. In Indonesia, serious debate about abortion is also a topic that is crowded discussed in the discussion of the draft Code of Criminal law. Various arguments are given to legalize abortion, especially the reasons for medical emergency or the consequences of rape crimes.

Abortion comes from the word abortion (English) which means a miscarriage (Anshor, 2006). From the medical aspect, the definition of abortion is interpreted by Gulardi that abortion is the Stop (dead) and the pregnancy before 20 weeks (calculated from the last period) or the fetus weight of less than 500 grams or the fetus is less than 25 cm. On Generally abortion occur before the three-month pregnancy "The Criminal Code determines that abortion or miscarriage is a deed that is threatened with punishment, this provision in detail can be seen in Article 299, Article 346, Article 347 and Article 348, but These provisions are then excluded under certain reasons through Law No. 36 of 2009 of Health. The exception to this abortion is of course a debate among the public between rejecting a patron against abortion and those who approve of a pregnancy abortion due to rape crimes (Anshor, 2002).

The Criminal Code stipulates that abortion is an act that is threatened with punishment, this provision can be seen in detail in Article 299, Article 346, Article 347 and Article 348, but this provision is then excluded based on certain reasons through Law Number 36 years 2009 about Health. This exception to abortion certainly provokes

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debate in society between rejecting the legalization of abortion and those who approve abortion for pregnancy as a result of rape.

Abortion for some people is still considered as a moral and taboo act, apart from the act of abortion committed by rape or other reasons, but for most people who view it, abortion is the choice needed to protect women who are pregnant for rape. Women victims of rape are entitled to abort, abort or not abort their reserves.

The concept of prohibition on abortion has been long known, by Hipocrates (460-370), a Greek medical expert. Hypocrates have a view that does not approve of abortion "I will not give deadly medications, though asked, and I also will not give such counsel. In the same way, I will not give medication to a woman who can cause an abortion, "similar to Hypocrates, Phytagoras (582-496) has a stance that does not allow abortion because he thinks life or soul a man enters and is in the body since conception. Whenever an abortion is done, it means disappearance of the living creature (Lambrini, 2013), "in addition to the unapproving view, some agree with the act of abortion as expressed by Aristotle and Plato who had the view that the fetus could not be seen As human beings (Hanggoro, 2015).

These differences of view continue to happen until now, different arguments are given by those assembled in the Movement Pro Choice (pro choice) and Movement Pro Life (Pro Life) both movements have different establishments where the movement Pro Choise seeks to protect the rights of women in this regard rights to his body, so that when pregnancy is in view as something that bothers his body, women can choose to disregard or not abort. Pro Choise has the view that women are entitled to determine matters relating to its reproduction. The existence of the embryo or fetus in the womb is deemed to have no right to be protected to remain until ready to be born, so that women who have the content can choose to decompose Its contents and neglect of the fetus's right to see that its content is part of its reproduction rights.

While pro life, it is established that living beings must be protected and guaranteed life since the content. The guarantee of protection against the fetus in the content must be given since the occurrence of conception in the uterus, so that abortion is seen as a disgraceful and inhuman deed. From the pros and cons to the holding of abortion, in Indonesiapun experiencing the same when the law of Health Law No. 36 year 2014 is passed, where there is a paradigm that shifts from provisions in the parent of criminal Law which is the book Criminal law which expressly prohibits the act of abortion, especially abortion provocatus Criminalis. The health law provides room for abortion due to medical emergency or rape criminal acts.

The reason for the abortion caused by rape crimes was based on a concern for women who were pregnant due to a criminal offence that could suffer trauma so that it could affect the health of her soul. The suffering of rape victims can not be seen trivial, given that physically and psychic must be a deep wound to the victim. From the psychic side, the act of rape is a disgrace inherent in the victim while on the physical side, the violence done to paralyze the victim will surely give the wound to the body even on the female victim's apparatus. A juridical rape is an act that forces a woman who is not her wife to be with her, where the compulsion has to be done by violent or violent threats.

By Lidya Suryani and Sri Wurdani, the suffering of rape victims is depicted differently from other Confucian crimes, rape victims experience birth and inner suffering. The victim's decision to report the incident to the authorities is not an easy decision. Such a traumatic and embarrassing event should be redisplayed chronologically by the victim. Not to mention the attitudes and treatment of law enforcement officers who sometimes look to the

eye to the victim, because the general view during this against victims of rape is as bad people sell (Prasetyo and Marzuki, 1997).

The Rifka Annisa Woman Crisis Centre Report explains that post-rape stress can be differentiated into immediate stress and long-term stress. Stress that immediately occurs is the stress of long-term reaction is a certain psychological symptoms that the victim felt as a trauma that causes the victim to have confidence, a negative self-concept, lose themselves from the association, and also somatic reactions such as heart pounding or excessive sweating (Prasetyo and Marzuki, 1997).

Of course this patent is dilematical, especially for the reason for abortion due to rape crimes, where the right of the fetus is also mandatory to be protected in accordance with the provisions of Act No. 39 year 999 on Human Rights, especially Article 52 Which confirms that every child has human rights recognized and protected by the law since the womb, and Article 53, confirming that each child has the right to live, sustain and improve his/her life from being in content. Based on the explanation above, the problem in this research is how the establishment of Indonesia's positive law on abortion as well as how to protect against the rights of the fetus in relation to the holding of abortion due to crimes Rape. The aim of the study was to examine Indonesia's positive law on abortion as well as to analyse how the protection of the fetus's rights in the womb especially caused by pregnancy due to rape crimes.

II. METHODOLOGY

The type of research is normative legal research, according to Peter Mahmud Marzuki normative research is a process to find a rule of law, principles of law and legal doctrines to answer the legal issues encountered. The source of legal material consists of primary and secondary legal materials (Marzuki, 2013). The primary legal material obtained from the related law is initiated from the Constitution 1945, the Code of Criminal Law, the Act on Human rights i.e. Law No. 39 year 1999, Act No. 36 year 2014 and Law No 23 of 2002 on child protection and government regulation number 61 year 2014 about reproductive health, while the secondary legal materials include materials that have a relationship with the primary legal material in particular which provides explanations of the primary legal material i.e. literature, journals and other materials that support the improvement of the problem of this research.

III. RESULTS

Abortion in the Indonesian Positive Law

Terminologically abortion is the burial of the fetus of a woman with a certain action before her pregnancy is perfect, both in life and death before the fetus can live outside But some of his limbs were formed (Istibsjaroh, 2012). Abortus derived from the Latin word abortio which means the production of the conception of the uretus prematurely at the age where the fetus can not live outside the content at the age of 24 weeks. Medically abortion means the expenditure of content before being 24 weeks old and resulting in death, whereas when the birth of the fetus after 24 weeks and death is not called an abortion but the killing of infants (infanticide) (Kusmaryanto, 2005).

Based on the legal dictionary, abortion is the termination or the deprecation of pregnancy or a abortion in the womb using a way that is against the law, while the abortion is a child's death in the womb because of birth before The time without any element of intent in the process (Marwan, 2009). In the criminal Code of abortion is seen as a crime or criminal act. Moeljatno's criminal act is prohibited in law and is threatened with the criminal of whosoever that disacts it (Hiariej, 2014). Meanwhile, according to Enschede, criminal acts are human behavior that fulfills the Delic formulation, against the law and can be reproached.

Abortion (pregnancy termination) is differentiated into two types namely (Solihah and Handayani, 2008):

1. Illegal (abortion Provocatus Criminalis) is performed by an uncompetent personnel and carried out by massaging the stomach, Include foreign bodies or types of herbs or grasses into the cervix and other drugs or chemicals that may result in severe and fatal infections;

2. Legal (abortion Provocatus Therapeuticus) is conducted based on medical indications by means of surgery or that is often done by means of curettage or aspiration of the vacuum, and medical way carried out in hospitals or clinics, ways Conducted by a trained physician or obstetrician and gynaecology specialist.

The type of abortion acts that are criminal acts and threatened with punishment is Abortion Provocatus Criminalis, where the abortion is done intentionally with certain reasons for example because Unwanted pregnancy or for economic and other reasons. In the national law instrument, especially the Penal code, the strict prohibition of abortion is governed by Article 299, article 346 and article 349. Then, the criminal specified in that clause may be coupled with a third and can be revoked the right to run a quest in which crimes are committed. The criminal threat from the provisions of the prohibition of abortions in the penal Code shall be addressed to women who are pregnant, others without approval or with the consent of the woman who contains the cause of the woman and the doctor or medical practitioner who helps.

The establishment of the Criminal Code clearly and firmly prohibited the abortion without any reason, but in the provisions of the health Law No 36/ 2009 there are exceptions to abortion. In Health Law, the exception of abortion can only be given based on medical emergency reasons, for example because of maternal life expectant mothers and the reason for pregnancy is caused by rape. In the case of abortion due to medical emergency, there is not much opposition because there is a mother soul to be protected, but related to abortion due to rape, there are some people who do not agree that the woman can still choose to retain its content with certain consequences. The basis of the legalized abortion due to rape in the Health Act is to provide psychiatric mental health protection from rape victims. Rape In Health Law, the exception of abortion can only be given based on medical emergency reasons, for example because of maternal life expectant mothers and the reason for pregnancy is caused by rape. In the case of abortion due to medical emergency, there is not much opposition because there is a mother soul to be protected, but related to abortion due to rape, there are some people who do not agree that the woman can still choose to retain its content with certain consequences.

In penal law reform, especially in the discussion of the Penal code, article on abortion is one of the chapters that continue to debate and become controversial. For example, Article 415 RUKUHP: *“Any person who is without a right to light the display of a tool to retype content, offer, post, or show to be able to obtain a tool to abort the content sentenced to jail criminal 6 (six) months or fined most categories II”*. The provisions in the clause of the article governing the abortion clearly the establishment of the RKUHP in substance does not tolerate the act of abortion, which differs only on the provisions of article 472 paragraph 3 which slightly give a gap for the Doctor

who did the abortion with Reasons for medical emergency or because rape victims are not sentenced, while for women who are dismissal of the contents are threatened with the provisions of the Criminal Code.

Controversy about not having the dependent for abortion for the perpetrators of rape criminal in the RKUHP voiced by some circles, misled by the Institute of Criminal Justice Reform (ICJR) and the Association of Indonesian Family Planning (PKBI) who assumed that the article in the RKUHP contains discrimination against rape victims due to the establishment of women who disqualified the contents of the womb while the doctors who help to abort the content are not sentenced. In addition to the view of ICJR should the RKUHP should contain assurance that there are no pipetting for abortions conducted on medical indications and for rape victims, all aspects of it, whether the treatment aspect, the act of abortion itself, or the promotion Related health, which is also governed by the provisions of the RKUHP. If the Pengecualiaan provision is not included in the RKUHP, then this can threaten the victims of rape who do the content Penguguran, when referring to the spirit of codification of government and parliament then the rules about major such as in the Health Law must be governed by the RKUHP (ICJR, 2019).

Therefore, the establishment of Indonesian positive law on abortion due to rape criminal act is a moderate or limited system, where The Criminal Code sees abortion as a criminal act, but in certain cases get the exception of the Health Law while the abortion is due to medical emergency reasons or due to rape victims. The consolation of abortion due to rape crimes in the Health Law, will indirectly implicates the implementation. Problematics that can arise is also related to the conditions stipulated in the PP No. 61 year 2014 which is mentioned in Article 31 and Article 34, namely:

- a. Pregnancy has not reached 40 days (calculated from the first day of last period)
- b. Gestational age according to the time of rape (evidenced by Doctor's description)

Evidence of information from investigators about alleged rape criminal offense. Evidence of psychologists and or expert description of alleged rape.

Noting the above conditions, in the level of implementation is difficult to implement. For the first condition that determines the specified time limit of at least 40 days calculated from the first day of the last period is not an easy problem to be implemented. As stated by Budi Wahyuni as Vice-chairman of Komnas Perempuan, Indonesia has legalized abortion for rape victims but it is difficult to implement because rape victims know her pregnancy on average of over 40 days (Detiknews, 2019). The determination of deadline 40 today, will pose a legal problem, because when the abortion process can not be done during this time, abortion is seen as an illegal act and threatened with punishment.

The same is the case with evidence from investigators on alleged rape crimes. In issuing information on alleged criminal acts rape investigators should not be rash because to determine there has been a criminal offence should be supported by the conditions of the investigation that has been determined by default. Especially for cases of sexual violence such as rape, it is difficult to find other witnesses in addition to the victim so as to do the investigation should rely on the Visum et investigation given by the expert. If reporting on rape is done immediately after the rape, the Visum et investigation can be used as a guideline because the resulting information is relatively still accountable, but if the Visum et investigation is made several days after Incident because the report is delayed by the victim or his family, then the expert will have difficulty in making visum et investigation because the objective conditions have changed even disappeared or disguised. Thus it is difficult to determine whether or not

a rape has occurred. Problematics of course should be examined seriously, so it is necessary to reformulate the rules that exist especially in health laws related to abortion in order to be easy to apply and not violate human rights.

Protection against the right of the fetus in content in conjunction with abortion due to rape crimes.

To face women's rights to his womb due to unwanted pregnancy due to the rape of living rights to the conceived fetus is not easy because it is dilematified by its nature, if it is likened in the Kias language "as The Simalakama fruit ", in which one of these rights would injure other human rights. The fulfillment of these two rights is equally important, as they have a guarantee of protection that must be respected. Man has the right to himself completely loose from others. Therefore, it takes a guarantee of fundamental rights for mankind to be understood and respected by every human being, for every person on earth needs those rights. However, because every human being has equal rights, each of them will acknowledge their rights and have conflicts of interest with other human beings. To overcome this, John Locke postulated that in order to avoid such conflicts of interest or the uncertainty of life on those rights in this nature, humanity has taken part in a social contract or a bond Voluntary, which by this way, the use of their unalienable right is handed over to the ruler of the state (Lubis and Jurnalica, 2005).

The protection of the right of life as part of human rights protection is a fundamental right that can not be ruled out by any reason, John Locke through his book Two Treaties on Civil Government, in the construction of the theory says that Manuisa Have a natural state of free according to the will of his heart and with which the fabric lives in degrees. Such a natural condition of Locke is social, therefore, people live in harmony and in accordance with the law of reason that teaches, that human beings should not disturb the life of freedom and property rights of others, because those things are related Human rights, namely the right to life, rights of liberty and property rights (Gunakarya, 2017). The affirmation expressed by John Locke is an essential basis for the protection of life rights that should not be reduced or restricted. Everyone, society and state are obliged to uphold and respect the fundamental rights. In other terms, the right to life is also protected under article 6 of the Rights of the Convention of the children stating that the Contracting States acknowledge that each child has a right inherent to his or her life. So that every child on Earth can state that, "I have to stay alive and develop as a human being (Gunakarya, 2017). Child protection is all activities to ensure and protect children and their rights in order to live, grow and participate optimally in accordance with human dignity and respect, and to obtain protection from violence and Discrimination. For the realization of a quality Indonesian child, noble and prosperous. Child protection efforts should be carried out as early as possible from the fetus in the womb until the child is 18 years. Based on the conception of comprehensive and comprehensive child protection, this legislation provides protection to children based on non-discrimination principles, the best interests for children, the right to life, and appreciation of children's opinions (Muliadi, 2009).

Guaranteed protection for the right to life should be given for the survival of the fetus, but when there are complicated problems related to the presence of the fetus present for evil deeds, especially rape, this problem becomes more complicated. Abortion is indeed prohibited in Indonesian legislation, specifically Article 299, Article 346, Article 347, Article 348 and Article 349 formulating the prohibition of abortion or miscarriage, this prohibition is intended for Women who contain the fetus and the person who provides aid to the occurrence of abortion. The criminal threat charged to a mother who with all its efforts to carry out her abortion is a maximum

of 4 years in prison, as well as for people who help to do the miscarriage of the abortion also threatened with imprisonment.

Everyone who during his life since before birth, has the privilege of being the essential human beings. The establishment of State and government for any reason, shall not eliminate the principle of rights and obligations are not determined by the standing of the person as a citizen of a country. Everyone wherever he is to be guaranteed basic rights. At the same time, everyone, everywhere, is also obliged to uphold the human rights of others.

In conjunction with a pregnancy abortion because rape criminal is actually not used as a reason to castrated the right of the fetus, even in the perspective of a woman's human rights also has the right to her content. In this case to continue or not to continue the content in consideration of psychological trauma that is suffered in the pregnant, childbirth and nurture the child later after birth.

The right of life is the nature inherent in a human being. This right is the right handed down by the Almighty God of man whom he wills. According to the tomistic view that the nature law is part of the perfect law of God that can be known through the use of human reason. Some of the content of the previous philosophy of nature law is the idea that the position of each person in life is determined by God, so that all people of any status are subject to God's authority. This foundation is theistic, in the sense of its truthfulness requiring faith in God (Ashri, 2018). Referring to the impact of rape that provides physical and psychic suffering for victims, of course the justification of the holding of abortions over pregnancy due to rape itself should also be considered as a matter of consideration, but consideration It should not waive the right of the fetus, given that the right of life is "given" and classified as non derogable rights which cannot be limited by the state even in an emergency. The protection of living rights in the Constitution expressly determines that everyone is entitled to life and life. Thus although the woman has the right to her content to make an abortion justified but the most important element whose value is also very important, like or dislike is protecting the right of life over the fetus in its womb.

Jean Jaques Rousseau (Ashri, 2018) stated that natural law does not create individual natural rights, but rather confers sovereignty for the citizens as a unity in which this sovereignty is unbiased. Thus, every right that comes from natural law will exist in the people as a collectivity that can be questioned by using the reference "public will" (voluntary generale or general will). The general will be not an absolute quality and may change itself or be altered by into leader.

The reason of abortion for pregnancy caused by rape criminal act, the essence is to remain as murder and forfeit on the right of the innocent child's life, so it remains a breach of the right Human rights. The suffering of rape victims remains to be considered, but this cannot be a reason for abortion against an innocent fetus. The right of the fetus remains to be protected by still letting it grow and develop in the womb until ready to be born. As part of the effort to ensure the fulfilment of the fetus's right, the role of State is necessary to respond to concrete measures in the form of mentoring when the mother is pregnant until later the baby is born. As part of the effort to ensure the fulfilment of the fetus's right, the role of State is necessary to respond to concrete measures in the form of mentoring when the mother is pregnant until later the baby is born.

IV. CONCLUSION

The establishment of a positive law against abortion is limited, limited to the deed of abortion is prohibited and threatened by criminal in the PENAL code, but in certain matters can be excluded by reasons Medical emergency

or rape victims in accordance with the provisions contained in the health law. While Protection against the right of the fetus in the womb has been firmly guaranteed fulfillment in the legislation on human rights, so that any reason for the right of the fetus remains to be respected without exception. Right of life is a given right from Allah SWT who can not be reduced for any reason. The reason for abortion due to rape crime, actually it can be done throughout the pregnancy to provide severe trauma so that abortion is the only way to treat the psychiatric and mental pain of pregnancy The. So this reason can be attached to the reason of medical emergency alone, where when the Doctor looks based on his knowledge that the pregnancy is harmful to the life of mothers caused by severe trauma, then the doctor can do an abortion Due to medical emergency reasons

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