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## An Analysis of Legal Concepts Concerning Abortion Case According to Criminal Code and Law No.36 of 2009 Concerning Health

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**Abstract:** Abortion practice has now become an actual phenomenon that can occur everywhere. The number of deaths due to abortion is very appalling and alarming. Based on data from World Health Organization (WHO), it is stated that 15-50% death of mother was resulted from miscarriage on purpose, which is not very safe. Under our law (hukum positif) particularly in Indonesia, abortion acts in some cases can be justified if it only relates to abortus provocatus medicinal condition. On the contrary, an abortion act which is generalized might become a criminal act that is commonly known as abortus provocatus criminalis. In this thesis, the writer discusses the problems concerning the concept of the law related to abortion criminal act pursuant to Indonesian Penal Law (KUHP) and Health Act No. 36 year 2009 using descriptive analysis method which does not apply hypothesis or testing a theory. This research originates from the idea that there are problems related to concept and actual law implementation concerning abortion as a criminal act based on our Penal Law (KUHP) and Health Act No. 36 year 2009. The analysis concept law meant in this thesis is to peruse Indonesian Penal Law and Acts No. 36 year 2009 concerning abortion as criminal act. The writer uses secondary data which is comprised of primary material, secondary and tertiary law. on the findings and discussion, it is concluded that the application of Indonesian Penal Law and Health Act as ground or standing of the law to become Judge's own consideration has yet to be realized or applied consistently to abortion as criminal act. In addition, it appears that there is a lack of enforcement of the law on the part of the law enforcer agency in resolving abortion-related problems and thus contributing to the problematic and debatable status of abortion

**Keywords:** abortion, abortion that can be justified, abortion as a criminal act.

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### 1. INTRODUCTION

The practice of abortion is now an actual phenomenon that can occur anywhere. The facts about the death rate from abortion are astonishing and indicating a deep concern. Data from the World Health Organization (WHO) states that 15-50% of maternal deaths are caused by unsafe abortion. Out of the 20 million unsafe abortions performed each year, it was found that 70,000 women died. In other words, 1 in 8 mothers die from unsafe abortion.

According to the positive law of Indonesia, the act of abortion in certain cases can be justified if it is a provocatus medicinalis abortion. Meanwhile, the generalized abortion as a criminal act is better known as Abortus Provocatus criminalis. Abortus Provocatus medicinalis is a condition in which a woman is forced to have an abortion because of a medical decision made for the reason that the pregnancy has endangered the mother or the reason for a defective fetal condition (Abortus Provocatus Therapeutic). This type of abortion is legally justified and has legal protection as stipulated in Law no. 36 of 2009 concerning Health.

Meanwhile, Abortus Provocatus criminalis is an abortion that is performed without any medical consideration as stipulated in Article 75 paragraph (2, 3), this type of abortion is called provocatus criminalis abortion. According to (Notoatmodjo, 2010) abortion is the discharge or release of conception from the womb of a mother prematurely. Moreover, (Umar, 2014) said that abortion can be divided into two. They are spontaneous abortion and artificial abortion. Spontaneous abortion is an unintentional abortion and occurs without any action. While artificial abortion is abortion that occurs as a result of human action and intervention. This view of the Criminal Code is in line with Sharon J. Reeder as quoted by Rinna Dwi Lestari: "Abortion is the termination of pregnancy at any time before the fetus reaches a standard of living". Abortion, known as abortion, is the termination of pregnancy or expulsion of the fetus from the womb when the fetus is disturbed at a certain stage of pregnancy before the fetus can live outside the womb (Lestari, 2020). This means that an abortion like this is considered illegal or cannot be legally justified. This kind of abortion is said to be a

criminal act or a crime. It is said to be controversial because on the one hand abortion is considered contrary to social, religious and moral norms, even legal norms. Meanwhile, on the other hand the law itself opens the possibility to "legalize" abortion, although with some exceptions (Dzikirullah, 2021). Moreover, the Criminal Code (KUHP) qualifies the abortion as a crime against life. Whatever reasons are put forward for an abortion, save for medical reasons, the mother and the person who helped to abort the womb will be subject to punishment.

Whereas an abortion is the same as murder, because it takes a life. According to Nani Soendo, abortion is the release of the fruit of pregnancy when the fetus is still so small that it cannot live (Yusriana, 2015). In connection with the choice to abort or maintain the pregnancy, there are now known terms as prochoice and prolife. Prochoice is a view which states that the decision to abort or keep the womb is the absolute right of the mother who carries the baby. While the Pro Life group believes that abortion (safe abortion) is the killing of God's creatures and violates the right to life of the child in the womb, while the Pro Choice group believes that it supports the legalization of abortion (safe abortion) to reduce the high maternal mortality rate (Elvandari, 2020). This view originated from the desire to reduce the maternal mortality rate due to abortion, because most mothers who are about to have an abortion use unsafe abortion services, so that many women die while having an abortion.

The provisions in the Criminal Code are based on a paradigm that a child who is still in the womb is a legal subject so that he is entitled to legal protection. Moreover, in countries that follow the Common Law system such as the UK, limiting the meaning of abortion to a fetus that cannot live. Meanwhile, the effort to remove the fetus when the fetus is still alive (28 weeks of gestation or more) is called child extermination, which has a heavier penalty than abortion (Sembiring, e., & asan, 2019). The term lethal is essentially any act that results in the death of the fetus in a woman's womb (Chazawi, 1999). In other words, it can be said to kill the life (fetus) in a woman's womb. It is also seen from the aspect of human rights that every person has the right to live and defend his life so that termination of the womb (abortion) can qualify as an act that violates human rights. In addition, it is necessary to put forward an analysis of the problem of abortion in Indonesia in relation to the medical profession or medical world as well as legal world, it seems that there is no clear light in the law enforcement system. To discuss this problem, this study would like to re-analyze the position of abortion in the light of positive law in Indonesia. The title of this research is "AN ANALYSIS OF LEGAL CONCEPT ABOUT THE CASE OF ABORTION ACCORDING TO THE CRIMINAL CODE AND LAW NO. 36 OF 2009 CONCERNING HEALTH".

### **1.1 Problem**

Based on the description above, the author raises the subject matter, namely how the legal concept of abortion according to the Criminal Code (KUHP) and Law No. 36 of 2009?

### **2. Research Methodology**

The type of research used is descriptive analysis that does not use a hypothesis or test a theory. This research departs from problems related to the concept and implementation of law on the abortion crime according to the Criminal Code (KUHP) and Law No. 36 of 2009. Based on the focus orientation of the proposed problem, the approach used is the analysis of the legal concept (Analytical and Conceptual Approach). The analysis of the legal concept in question is examining the Criminal Code (KUHP) and Law No. 36 of 2009 concerning the abortion crime. The data used are secondary data consisting of primary, secondary and tertiary legal materials.

### **3. Abortion Crime According to the Criminal Code and Law No. 36 of 2009**

Currently, abortion is a serious problem, seen from the high number of abortions that are increasing from year to year. There are those who prohibit it in the name of religion. There are those who claim that babies also have the right to live so they must be maintained, and so on. Abortion or, scientifically, *Abortus Provocatus*, is the method most often used to end unwanted pregnancies, although it is the most dangerous as well.

The practice of abortion is no longer a secret, especially as a result of the widespread culture of promiscuity and prostitution today. Also with the increasing cases of pregnancy outside of wedlock and the multiplication of the diversity of motivations. This in turn encourages certain people to have an abortion as a solution to get rid of disgrace. Millions of women each year experience unwanted pregnancies. Some pregnancies end in birth but some end in abortion. Abortion is a threat or release of the product of conception before the fetus can live outside the womb, and as a limit, it is used the pregnancy with less than 20 weeks or fetal weight less than 500 grams or before 22 weeks according to the World Health Organization or WHO.

The problem of *abortus* or better known as abortion, its existence, is a fact that cannot be denied and has even become an interesting topic of discussion and a dilemma which is currently a social phenomenon. Abortion, or by scientific language definition, *Abortus Provocatus*, is the method most often used to end unwanted pregnancies, although it is the most dangerous way.

Abortus Provocatus divided into two types, namely Abortus Provocatus Therapeuticus and Abortus Provocatus Criminalis. Abortus Provocatus Therapeuticus is an Abortus Provocatus which is carried out on the basis of medical considerations and is carried out by personnel who have received special education and can act professionally. Meanwhile, Abortus Provocatus Criminalis is an Abortus Provocatus secretly and usually by uneducated personnel, including pregnant women who want the Abortus Provocatus. Abortus Provocatus Criminalis is one of the causes of death for women in childbearing years in developing countries.

Likewise in the legal system in the State of Indonesia itself, there are also pro and contra legal rules regarding abortion, especially the legal construction in the Criminal Code (KUHP) and Law No. 36 of 2009 concerning Health against the abortion crime. In the Criminal Code, Articles 346, 347, 348 and 349 are quite clear regarding the rules on abortion as a criminal act. Meanwhile Law No. 23 of 2009 concerning Health in Article 75 and Article 76 provides an exception to abortion as a legal or justifiable act. Law Number 36 of 2009 concerning Health Legal protection for rape victims to protect the rights of victims can be seen in Article 77 of Law Number 36 of 2009 concerning health. Thus, Article 77 provides clarity that the Government is obliged to protect and prevent rape victims from abortions that are of low quality, unsafe, and irresponsible, which are contrary to religious norms and other regulations (Dzikirullah, 2021).

Both the Criminal Code and Law No. 36 of 2009 have legal force against the abortion crime, but in a different legal content. This means that the Criminal Code strongly prohibits abortion and views abortion in general, while the legal construction of Law No. 36 of 2009, in certain circumstances, abortion is a legal act that is legally protected and free from criminal elements.

From the perspective of the two rules above, in general, abortion (abortus provokatus) is classified into two, namely abortion which is included as a criminal act or abortus provokatus criminalis and legally justified abortion or abortus provokatus medicinalis.

Abortus Provocatus Criminalis is the act of terminating a pregnancy outside of or other than the abortus provokatus medicinalis. This kind of abortion is generalized as illegal abortion or cannot be legally justified. Abortion like this is said to be a criminal act or a crime. The Criminal Code qualifies the act of abortion as a crime against life. As in Article 346, Article 347 Paragraph (1), (2), Article 348 Paragraph (1) and (2), and Article 349, it is stated that:

- a. **Article 346:** A woman who deliberately aborts or kills the womb or orders someone else to do so, shall be subject to a maximum imprisonment of four years;
- b. **Article 347 paragraph (1):** Anyone who deliberately aborts or kills a woman without her consent, is subject to a maximum imprisonment of twelve years;
- c. **Article 347 paragraph (2)** If the said act results in the death of the woman, it will be subject to a maximum imprisonment of seven years;
- d. **Article 348 paragraph (1):** Anyone who deliberately aborts or terminates a woman's womb with her consent, shall be subject to a maximum imprisonment of five years and six months. (2) If the said act results in the death of the woman, it shall be subject to a maximum imprisonment of seven years.
- e. **Article 349:** If a **doctor**, midwife or medicine officer assists in committing a crime under article 346, or commits or helps committing one of the crimes described in articles 347 and 348, then the penalty specified in that article can be increased by one third and the right to carry out a search in where the crime was committed.

Abortus Provokatus Medicinalis is when the termination of the pregnancy must be carried out for medical reasons as the pregnancy is endangering the mother or the reason for the fetus's defect (Abortus Provocatus Therapeuticus). A woman is unable to maintain her pregnancy either because of a doctor's verdict on the health and safety of her or her baby's life or because of pregnancy as a result of rape. As in Article 75 (paragraph 1, 2) Law No. 36 of 2009 on Health.

### 3.1.1 Everyone is prohibited from having an abortion.

3.1.2 The prohibition as referred to in paragraph (1) may be exempted based on: (a) Indication of medical emergencies detected from an early age in pregnancy, whether threatening the life of the mother and/or fetus, suffering from serious genetic diseases and/or congenital defects, or those that cannot be repaired so that it is difficult for the baby to live outside the womb; or (b) Pregnancy as a result of rape which can cause psychological trauma for the rape victim.

If an abortion is performed, several conditions must be met, in accordance with Article 76 of the Law No. 36 of 2009 on Health are:

- Before 6 (six) weeks of pregnancy, counting from the first day of the last menstrual period, except in cases of emergency;
- By health workers who have the skills and authority, namely a certificate stipulated by the Minister;
- With the consent of the pregnant mother concerned;
- With the husband's permission, except for the victim of rape;

- Provision of health services that meet the stipulated requirements.

#### 4. CONCLUSIONS AND SUGGESTIONS

The application of the Criminal Code and the Law on Health as the legal basis for consideration in the judge's decision has not been consistently realized in the abortion crime. In addition, law enforcement agencies are less firm in alleviating the problem of abortion so that the phenomenon of abortion is still a problem in the society. Moreover, in the perspective of positive law in Indonesia - namely criminal law and health law - in principle, abortion is prohibited. Both in criminal law and in health law the principle of abortion is an act that is against the law (Tongat, 2020).

In general, the factors that influence the occurrence of abortion are the legal factors themselves, namely because of the weakness of the laws governing abortion, in this case the application of the punishment is still much less severe. Sociological factors, namely due to promiscuity which results in pregnancy outside the bond of marriage. Economic factors, namely due to poverty so that abortion (abortus) is carried out in order to balance the economic conditions that are very burdensome for the poor.

It is hoped that the legal concept and implementation by the apparatus and legal institutions will be stricter in dealing with abortion cases that are increasingly happening in the society, as well as health laws that must be implemented.

The younger generation should in their interaction maintain positive associations, in the sense of associating freely while still limiting freedom which can have a negative impact due to promiscuity. Likewise, the society should understand that abortion is not a solution to overcoming poverty, in this case, it is necessary to obey the applicable law as a moral instrument in life so as not to have an abortion.

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