

Legal Protection from Provocate Abortion Againts the Child Conceived Because Rape (Case Study on Jurisdiction Ex Residency of Cirebon)

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Abstract. The problems of this study are: view of the living norms of public life related to the legalization of abortion under PP No. 61 of 2014 on Reproductive Health in the jurisdiction of Ex Residency of Cirebon, Legal protection of children conceived for Pregnancy Preferred (KTD), form the legal protection of children conceived for Pregnancy Preferred (KTD), particularly rape victims in the future. The method used by researchers is sociological approach juridical law and specification in this study was included descriptive analysis. As for sources and types of data in this study are primary data obtained from interviews with field studies Cirebon MUI, and secondary data obtained from the study of literature. Data were analyzed qualitatively. The problems studied by the theory of effectiveness and progressive law.

Based on the results of research that potentially incompatible with Islamic law if it does not pay attention to the provisions of law or the Fatwa of Indonesian *Ulama* Council, besides that government regulation is taking the authority of the judiciary by the executive branch, because the authority to determine a person can have an abortion only submitted to the doctor and known by the Health Department / districts forwarded to the Provincial Health Office, without having to get a judgment and / or determined by the court, including the MUI Fatwa can ignore. Abortion performed by a rape victim is allowed and does not constitute a crime, but as a special *lex* and Health Act Government Regulation No. 61 Of 2014 on Reproductive Health has taken over the authority of the judiciary, because abortion is performed by a rape victim does not need to get a determination from the court. Reflected Bill-September 2019-the Penal Code refers to the Law of Health and Government Regulation No. 61 of 2014 on Reproductive Health, so that the provision is contrary to the Constitution of the Republic of Indonesia 1945.

Keywords: Provocate Abortion; Child; Rape; Legal Protection.

1. Introduction

Indonesia is a country of law, it has been described in Article 1 (3) of the 1945 Constitution which states "Indonesia is a country of law". This matter¹⁹⁴⁵ based on the explanation that Indonesia is based on law (*rechtstaat*) and not based on power alone (*machstaat*). Therefore, the state should not carry out its activity on the basis of mere power, but must be based on the law³, Thus can be said that every human being both citizens and foreigners is the bearer of rights and obligations that have the right to take legal actions, including an agreement with another party. Agreement that gave birth to the most important source Engagement⁴,

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³ CST Kansil, 1986, *Hukum Tata Negara Republik Indonesia*, Bina Literacy, Jakarta, p. 86.

⁴ Suharnoko. 2008. *Hukum Perjanjian, Teori dan Analisa Kasus*. Prenadamedia Group, Jakarta, p. 117.

The absence of legal certainty is a major problem in Indonesia in modern times. Legal uncertainty is large and systemic problems that include elements of society overall. Legal uncertainty is also a barrier to the development of political, social and economic stable and fair. In short, if someone asked what Indonesian law on a particular subject, it is very difficult for the person to explain with certainty, let alone how the law was later applied⁵, The apparent absence of legal certainty in the protection of the child who was conceived by women victims of rape, which are prevalent in the State Court located in Cirebon Residency Ex Jurisdiction to be researched. Sources in the District Court just enough cases of lewd acts and rape against children, which, although not directly proportional to the case of abortion, but the victim's daughter will eventually lead to an abortion if pregnancy occurs. And fuck child abuse cases in the District Court Source, among others: Decision; No. 414 / Pid.Sus / 2017 / PN.Sbr .; No. 415 / Pid.Sus / 2017 / PN.Sbr .; No. 416 / Pid.Sus / 2017 / PN.Sbr .; No. 468 / Pid.Sus / 2017 / PN.Sbr .; No. 88 / Pid.Sus / 2019 / PN.Sbr .; whereas among other abortion cases in PN Of Kuningan in case Number: No. 118 / Pid.Sus / 2014 / PN.Kng.

Article 1 paragraph 1 of Act No. 35 of 2014 on the Amendment of Act No. 23 of 2002 on Child Protection, stating that is someone who has not aged 18 (eighteen) years, including children who are still in the womb, while clause 2 states that the Child Protection are all activities to ensure and protect the Child and rights in order to live, grow, develop, and participate according to optimal human dignity, as well as protection from violence and discrimination. Thus the protection of children in question is to provide protection for children since she was in the womb, including not aborted in the womb of his mother.

Provocate Abortion known in Indonesia by the term abortion is derived from the Latin meaning of abortion due to deliberate. Provocate Abortion is one of the various types of abortion. In Latin dictionary - Indonesia, abortion is defined as region prematurely or miscarriage. Definition of abortion or abortion is the termination or removal provocatus pregnancy results from the womb prematurely⁶. In other words, "spending" it is meant that the intentional discharge of a fetus with human intervention, either through mechanical means, drugs or other means.

Case Pregnancy Preferred (KTD), which ended with unsafe abortion, is just one case that occurred in Indonesia. Health Research Center, University of Indonesia found that the average annual occurred about 2 million cases of unsafe abortions⁷. While the WHO estimates that 10-50% of cases of unsafe abortion ends with death of mother.⁸ Figures unsafe abortions (unsafe abortion) is quite high, it is estimated each year in the world happened around 20 million unsafe abortions, 26% of the amount over 70,000

⁵ Ade Maman Suherman and J. Satrio, 2010, *Penjelasan Hukum tentang Batasan Umur*, National Legal Reform Program, Jakarta, p. 2.

⁶ Kusmaryanto, SCJ., 2002, *Kontroversi Aborsi*. PT. Gramedia Widiasarana Indonesia. Jakarta, p. 203.

⁷ Budi Utomo et al., *Angka Aborsi dan Aspek Psiko-sosial di Indonesia: Studi di 10 kota Besar dan 6 kabupaten*. (Jakarta: Center for Health Research, University of Indonesia, 2002, p. 7.

⁸ WHO in Gulardi Wignyosastro. "Masalah Kesehatan Perempuan Akibat Reproduksi". Seminar Papers Strengthening Reproductive Rights of Women, held PP Fatayat NU, on 1 September 2001.

classified legal and safe abortions in developing countries ended with the death of mother⁹.

Based on the background of the problems mentioned above, then the problem can be formulated as follows: What does the norm of life in society related to the legalization of abortion under PP No. 61 of 2014 on Reproductive Health in the jurisdiction of Ex Residency of Cirebon? How legal protection of children conceived for Pregnancy Preferred (KTD), especially victims of rape against abortion (Provocate Abortion) conducted by the rape victim according to the Code of Penal applicable as *lex generale* and Act No.36 Of 2009 on Health applicable as *lex speciale* the jurisdiction of Ex Residency of Cirebon? And What is the nature of legal protection of children conceived for Pregnancy Preferred (KTD), particularly rape victims in the future?

Research methods

The method used by researchers is the law of juridical sociological approach and specification in this study were included descriptive analysis. As for sources and types of data in this study are primary data obtained from field studies MUI Cirebon interview with the Executive Board. And secondary data obtained from the study of literature. Data were analyzed qualitatively. The problems studied by the theory of effectiveness and progressive law.

2. Results and Discussion

3.1. The Views Life Norm In Society Related To The Legalization Of Abortion Under PP No. 61 Of 2014 On Reproductive Health In The Jurisdiction Of Ex Residency Of Cirebon

Abortion, as noted earlier, has been there and happened since ancient times to modern times today. Cases of abortion is still warm and still in the process of investigation and police investigation, the case Paseban in Central Jakarta, which of the suspects is a doctor recidivists (actor repetition criminal act of abortion) with several fields, in case Paseban Central Jakarta, this suspect is believed to have an abortion 1,600 (one thousand six hundred) times and there are an estimated 999 (Nine hundred Ninty-Nine) fetal abortion victims were found. The suspect allegedly earned income of the crime of abortion amounted to 5.5 billion.

Paseban abortion cases that are still in the stages of the investigation, described the case of abortion in Indonesia is quite high, and become a lucrative business for the perpetrators who provide abortion services, such as doctors or midwives or TBA. Today abortion is still a controversial issue in Indonesian society, but apart from these controversy, indicated abortion is a public health problem because an impact on maternal morbidity and mortality. As we know the main causes of maternal deaths are haemorrhage, infection, and eclampsia. But in fact abortion is a leading cause of maternal death, only appeared in the form of bleeding complications. However,

⁹ Widanti S., A., "Aborsi dan Perlindungan Hak Reproduksi Perempuan", paper, delivered in public discussion "Aborsi dan Perlindungan Hak Reproduksi Perempuan", organized in cooperation between IPPA Master in Health Law and the Central Java, Semarang, January 30th 2010, p. 4.

maternal mortality due to abortion complications often do not appear in the reports of deaths, but reported as bleeding. It happened because until now, abortion is still a controversial issue in society.¹⁰

The background of the enactment of the Health Bill that gave birth to Act No. 36 of 2009 on Health (Health Law) above, in the view of the *Indonesian Ulama Council* (MUI) Cirebon, is very based on, and according to the Board MUI Cirebon, the most important and the basis of kosher or not abortion, of course, we must be grounded to the *Fatwa Ulama* and refers to the fourth school of thought have explained the provisions of abortion very clear, just to be selected, it should be used as a benchmark, because Homeland is a country based on God, meaning that if the exit or contrary to the supreme deity, then the rules are not feasible abortion enacted in the Homeland¹¹, The views described above, of course, everything must be geared to the basic law or constitution of the Republic of Indonesia (Homeland) the 1945 Constitution and Pancasila, so there is no reason to misinterpreted Pancasila in the interests of groups and parties all the more religion made enemies Pancasila, because Pancasila itself born from people who are not Atheists.

The views norm of life in society related to the legalization of abortion under Government Regulation No. 61 Of 2014 on Reproductive Health in the jurisdiction of Ex Residency of Cirebon, is to be potentially incompatible with Islamic law if it does not pay attention to the provisions of law or the *Fatwa* of Indonesian *Ulama* Council, in addition to that of Government Regulation is taking the authority of the judiciary by the executive branch, because the authority to determine a person can have an abortion only submitted to the doctor and known by the City Health Department / County were forwarded to the Provincial Health Office, without having to get a judgment and / or determined by the court, including being able to ignoring the MUI *Fatwa*.

3.2. Legal Protection Of Children Conceived For Pregnancy Preferred (KTD), Especially Victims Of Rape Against Abortion (Provocate Abortion) Conducted By The Rape Victim According To The Code Of Penal (Penal Code) Applicable As *Lex Generale* And Act No.36 Of 2009 On Health Applicable As *Lex Specialis*the Jurisdiction Of Ex Residency Of Cirebon

Abortion in the jurisdiction of Ex Residency of Cirebon there is the evidence of cases processed in the District Court, for example in case No. 118 / Pid.Sus / 2014 / PN.KNG. Of Kuningan District Court, in this case abortions performed because of an unwanted pregnancy (KTD) resulted from an act of *Zina* is not the result of rape, because until the author of the thesis the author has found that women who had an abortion for victims of rape, in case No. 118 / Pid.Sus /2014/PN.KNG., Court Judge Of Kuningan dropped against the defendant to imprisonment for seven (7) months and a fine of Rp. 10.000.000, - (ten million rupiah).¹²

¹⁰ Hanifah, "Aborsi Ditinjau dari Tiga Sudut Pandang", 2007, See [Http://www.kesrepro.info/?Q=Node/205](http://www.kesrepro.info/?Q=Node/205), accessed on December 23, 2019.

¹¹ Results Interview With MUI Cirebon District, 25 November 2019.

¹² Results Interview With MUI Cirebon District, 25 November 2019.

Abortion is allowed based on *ijtihad* of the scholars are of abortions performed by doctors or other health professionals based on medical indications to save the lives of mothers whose pregnancy threatened if continuity is maintained. In this case the scholars choose the least dangerous of the two things that bring harm (*irtikab akhaffi adhdharain*), while abortions are performed not on the basis of medical indications such as economic conditions, the so-called abortion a criminal and unlawful according to the *ijtihad* of the scholars because stop the process of the life of a human being¹³, Legal protection of children conceived for Pregnancy Preferred (KTD), especially victims of rape against abortion (Provocate Abortion) conducted by the rape victim according to the Code of Penal (Penal Code) applicable as *lex generale* abortion is a criminal offense is no exception abortion conducted by rape victims, and Act No. 36 Of 2009 on Health applicable as *lex speciale*, abortions performed by a rape victim is allowed and does not constitute a crime, but as a special *lex* and Health Act of Government Regulation No. 61 Of 2014 on Reproductive Health has taken over the authority of the judiciary, because abortion is performed by a rape victim does not need to get a determination from the court.

3.3. Against Legal Protection Of Children Conceived Pregnancy Due Preferred (KTD) Specifically Rape Davictim In The Future

In the development of legislation on abortion or Provocate Abortion criminalist can be found in Act No. 36 Of 2009 on Health. If Article 299 and 346-349 of the Criminal Code there is no organized *provocatus medicalis* abortion issue. If we analyze further, the rules are different from each other. Penal Code *provocatus* recognize abortion ban without exception, including abortion or Provocate Abortion *medicalis therapeuticus*. But Act No. 36 of 2009, it occurred to allow Provocate Abortion *medicalis* with specifications *therapeutics*. In the context of criminal law, there was a difference between the legislation that is long (the Criminal Code) by legislation new. Though the legislation here apply the principle of "*lex posteriori derogat legi priori*".¹⁴ Thus, Article 75 of Act No. 36 of 2009 regulating abortion *medicinalis provocatus* can still apply in Indonesia, although the actual rules are different from the formulation of *provocatus criminalis* abortion under the Criminal Code.

Furthermore, in relation to children, child protection efforts need to be done as early as possible, ie, since the fetus in the womb until the child is aged 18 (eighteen) years. Starting point of conception of the child protection intact, thorough and comprehensive, this law laid the obligation to provide protection to children based on the principles of non-discrimination; best interests of the child; right to life, survival and development; and respect for the views of the child. In doing coaching, development and protection of children, need community role, whether through child protection agencies, religious institutions, non-governmental organizations, community organizations, social organizations, Business world, mass media, or

¹³ Ratna Dewi Lestari Winahyu Suhandi, "Aborsi Bagi Korban Pemerkosaan Dalam Perspektif Etika Profesi Kedokteran, Hukum Islam Dan Peraturan Perundang-undangan", *Journal Perspectives*, Vol. XVI. No. 2 of 2011, Edition of April, p. 78-79.

¹⁴ Basri Hasnil Siregar, 1994, *Pengantar Hukum Indonesia*, Publisher Group Legal Studies and Public Law Faculty USU, Medan, p. 53.

educational institution¹⁵, Definition of a child, child protection and child rights respectively given in Article 1 number 1, number 2, and number 12 of Act No. 23 of 2002 on Protection of Children (BAL). Article 1 point 1 determines, namely: "The child is a person who has berusia18 (eighteen) years, including the unborn child". Article 1angka 2 determines: "The protection of children is any activity to ensure and protect children and their rights in order to live, grow, develop and participate optimally in accordance with human dignity, And got protection from violence and discrimination". Article 1 paragraph 12 that: "Children's rights are part of human rights which must be guaranteed, protected and fulfilled by parents, families, communities, government and the country".

Legal protection of children conceived for Pregnancy Preferred (KTD), particularly rape victims in the future, as reflected in the Bill-September 2019 of the Penal Code refers to the Law of Health and Government Regulation No. 61 Of 2014 on Reproductive Health, so that the provision is contrary to the Constitution of the Republic of Indonesia 1945.

3. Closing

3.1. Conclusion

- The views norm of life in society related to the legalization of abortion under Government Regulation No. 61 Of 2014 on Reproductive Health in the jurisdiction of Ex Residency of Cirebon, is to be potentially incompatible with Islamic law if it does not pay attention to the provisions of law or the Fatwa of Indonesian *Ulama* Council, in addition to that of Government Regulation is taking the authority of the judiciary by the executive branch, because the authority to determine a person can have an abortion only submitted to the doctor and known by the City Health Department / County were forwarded to the Provincial Health Office, without having to get a judgment and / or determined by the court, including being able to ignoring the MUI Fatwa.
- Legal protection of children conceived for Pregnancy Preferred (KTD), especially victims of rape against abortion (Provocate Abortion) conducted by the rape victim according to the Code of Penal (Penal Code) applicable as *lex generale* abortion is a criminal offense is no exception abortion conducted by rape victims, and Act No. 36 Of 2009 on Health applicable as *lex speciale*, abortions performed by a rape victim is allowed and does not constitute a crime, but as a special *lex* and Health Act of Government Regulation No. 61 Of 2014 on Reproductive Health has taken over the authority of the judiciary, because abortion is performed by a rape victim does not need to get a determination from the court.
- Legal protection of children conceived for Pregnancy Preferred (KTD), particularly rape victims in the future, as reflected in the Bill-September 2019 of the Penal Code refers to the Law of Health and Government Regulation No. 61 Of 2014 on

¹⁵ Psikiatri & Sosial Serta Opini Publik, 2007, "Yang Berkembang dalam Masyarakat", FH UAJY Criminal Law Section, Yogyakarta, p. 16-17.

Reproductive Health, so that the provision is contrary to the Constitution of the Republic of Indonesia 1945.

3.2. Suggestion

- Should the legislation in the future related to women victims of rape, set regulations regarding the obligation Investigator Police since the known occurrence of the crime of rape, investigators in addition to the autopsy report on the victim, should be required also to submit the victim to the doctor and / or institutions concerned are handle rape victims to immediately anticipate that the absence of pregnancy, if the new victims reported after a pregnancy, an investigator with the Public Prosecutor applied for the determination of the pregnancies were in accordance with the wishes of rape victim, whether it is to prejudice the content as well as to maintain her pregnancy so having clarity to the unborn child.
- It should also stipulated regulations governing the stipulation against children conceived by rape victims, the judge in determining the status of babies conceived by rape victims, must involve a gynecologist to determine whether to do an abortion or not, as well as from the MUI to determine the legal status of abortion being applied, whether qualified or not.
- Should the regulations stipulated in the Bill-September 2019 Penal Code, the Law of Health and Government Regulation No. 61 Of 2014 on Reproductive Health along with regard to taking the authority of the judiciary, should be repealed through a revision or amendment of these regulations or Draft-Penal Code-September 2019.

4. References

- [1] Ade Maman Suherman and J. Satrio, 2010*Penjelasan Hukum tentang Batasan Umur*, National Legal Reform Program, Jakarta
- [2] Budi Utomo et al., *Angka Aborsi dan Aspek Psiko-sosial di Indonesia: Studi di 10 kota Besar dan 6 kabupaten*. (Jakarta: Center for Health Research, University of Indonesia, 2002
- [3] CST Kansil, 1986, *Hukum Tata Negara Republik Indonesia*, Bina Aksara, Jakarta
- [4] Hanifah, "Aborsi Ditinjau dari Tiga Sudut Pandang", 2007, See [Http://www.kesrepro.info/?q=node/205](http://www.kesrepro.info/?q=node/205), accessed on December 23, 2019.
- [5] Basri Hasnil Siregar, 1994, *Pengantar Hukum Indonesia*, Penerbit Kelompok Studi Hukum dan Masyarakat Fakultas Hukum USU, Medan
- [6] Kusmaryanto, SCJ., 2002, *Kontroversi Aborsi*. PT. Gramedia Widiasarana Indonesia. Jakarta
- [7] Psychiatry & Social And Public Opinion, 2007, "Yang Berkembang dalam Masyarakat", Bagian Hukum Pidana FH UAJY, Yogyakarta
- [8] Ratna Dewi Lestari Winahyu Suhandi, , "Aborsi Bagi Korban Pemerkosaan Dalam Perspektif Etika Profesi Kedokteran, Hukum Islam Dan Peraturan Perundang-undangan", Jurnal Prespektif, Vol. XVI. No. 2, 2011, edition April
- [9] Suharnoko. 2008. *Hukum Perjanjian, Teori dan Analisa Kasus*. Prenadamedia Group, Jakarta

- [10] WHO in Gulardi Wignyosastro. *“Masalah Kesehatan Perempuan Akibat Reproduksi”*. Seminar Papers Strengthening Reproductive Rights of Women, held PP Fatayat NU, on 1 September 2001.
- [11] Widanti S., A., *“Aborsi dan Perlindungan Hak Reproduksi Perempuan”*, paper, delivered in public discussion *“Aborsi dan Perlindungan Hak Reproduksi Perempuan”*, organized in cooperation between IPPA Master in Health Law and the Central Java, Semarang, January 30, 2010