

Criminal Legal Policy on Abortion Due to Pregnancy Resulting from Rape

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Abstract. *This study aims to obtain data on the study of criminal law policies regarding acts of abortion due to pregnancy resulting from rape in current positive law and to obtain data on the study of criminal law policies that should be regarding acts of abortion due to rape which are linked to the fetus' right to life as a human right in future criminal law. The research method uses a normative legal approach method that is descriptive analytical. Data sources use secondary data. Data collection methods are carried out in 2 stages, namely literature study and documentation study. The results of the study indicate that the legal policy regulating the rights of victims of rape is quite complete with an analysis of the criminal law policy regarding acts of abortion due to pregnancy resulting from rape in current positive law and conducting an analysis of the criminal law policy that should be regarding acts of abortion due to rape which is linked to the right of the fetus to life as a human right in future criminal law.*

Keywords: *Criminal; Female; Law; Policy; Victims.*

1. Introduction

Studying law (Legal Science) cannot be separated from studying human behavior in society (Behavioural Sciences) and social sciences (Social Sciences). Legal science is a normative social science, namely a normative science about human relations.¹

Currently, rape is a crime that has received quite a lot of attention in society. Often in newspapers or magazines it is reported that rape has occurred. If we study history, actually this type of crime has existed since long ago, or it can be said as a form of classic crime that will always follow the development of human culture

¹Krismiarsi, 2012, Main Materials of Criminal Law. Semarang: Diponegoro University Publishing Agency, p. 7

itself, it will always exist and develop at all times even though it may not be much different from before.²

Rape is classified as a form of crime in Indonesia, and perpetrators are threatened with quite severe criminal sanctions.³

Rape acts are quite diverse, such as: being threatened, forced, seduced, killed, and given drugs, stimulants, lied to or tricked and so on. Although many rape crimes have been processed to the Court, but from these cases the perpetrators were not given the maximum sentence in accordance with the provisions of the laws and regulations contained in the Criminal Code (KUHP) CHAPTER XIV concerning Crimes Against Morality (Articles 281 to 296), especially those regulating the crime of rape (Article 285) which states: "Anyone who with violence or the threat of violence forces a woman to have sexual intercourse with him outside of marriage, is threatened for committing rape, with a maximum imprisonment of twelve years."⁴

Punishment is not as retaliation for the perpetrator's mistake but aims to protect society towards prosperity. Sanctions are emphasized on the accused in order to prevent people from committing crimes.⁵

The Health Law allows abortion for indications of medical emergencies or because of rape. This shows that abortion is legal or can be justified and protected by law. However, this situation is contrary to Article 53 of Law Number 39 of 1999 concerning Human Rights, which concerns the right to life of children starting from the fetus until birth.⁶

Abstract protection is basically a form of protection that can only be enjoyed or felt emotionally (psychically), such as a sense of satisfaction (satisfaction). Meanwhile, concrete protection is basically a form of protection that can be enjoyed in real terms, such as the provision of material or non-material nature. Material provision can be in the form of compensation or restitution, exemption from living expenses or education. Provision of non-material protection can be in the form of exemption from threats, from news that degrades human dignity.⁷

² Saputri, S.A., 2018, Legal Protection for Rape Victims Case Study at Semarang District Court. Other thesis, Unika Soegijapranata Semarang.

³ Ekotama, Suryono, et al, 2003, Induced Abortion for Rape Victims: Perspective of Victimology, Criminology and Criminal Law, Yogyakarta: Atmajaya University Yogyakarta, p. 186.

⁴ Afifah, W, 2013, Legal Protection for Women Victims of Rape Who Have Abortions. DIH: Journal of Legal Studies, 9(18), 93–109

⁵ Wibowo, SP and Wahyuningsih, SE, 2019, Legal Review of Criminalization of Violence Perpetrated Together Resulting in Death (Case Study of Kendal District Court). Unissula Student Scientific Conference (Kimu) 2. p. 318

⁶ Tarore, FBJ, 2013, Abortion Due to Rape in the Criminal Code. Lex Crimen. Vol. II No. 02

⁷ Wahyuningsih, SE, 2016, Legal Protection for Children as Victims of Criminal Acts Against Morality in Current Positive Criminal Law. Unissula Legal Reform Journal. Vol. III No. 02

Legalizing abortion for rape victims is one of the government's repressive steps to fulfill its obligations to the constitutional mandate in the form of health as a basic right of every citizen. However, these repressive steps must be accompanied by preventive measures. Because the root of the main problem is actually how the government protects all its citizens from various detrimental actions and guarantees every citizen's rights. Including guaranteeing reproductive health, namely preventing unwanted pregnancies due to immoral acts.

This study aims to obtain data on the study of criminal law policies on abortion due to pregnancy resulting from rape in current positive law which is linked to the fetus's right to life as a human right in future criminal law.

2. Research Methods

The method used in this study is to use a normative legal approach method, the research specifications used by the researcher in discussing the problems contained in this study are descriptive analytical, the data collection method used in this study is literature study and documentation study, and the data analysis method used by the author in this legal writing research uses qualitative data analysis.

3. Results and Discussion

3.1. What is the Criminal Law Policy on Abortion Due to Pregnancy Resulting from Rape in Current Positive Law?

1. Abortion in Criminal Law in Indonesia

The terms of abortion are clinically divided into Threatened Miscarriage (*Abortus Imminens*), Ongoing Miscarriage (*Abortus Inceptus*), Incomplete Miscarriage (*Abortus Incompletus*), Complete Miscarriage (*Abortus Completus*), Delayed Miscarriage (*Abortus Missus*) and Recurrent Miscarriage (*Abortus Habitualis*). While artificial abortion or also called pregnancy termination consists of 2 (two) types, namely Illegal (*Abortus Provocatus Criminalis*) and Legal (*Abortus Provocatus Therapeuticus*).⁸

The definition of abortion cannot be found clearly in the Criminal Code. Bambang Poernomo stated that abortion according to legal science is the birth of a fetus before its time by the actions of a person who is a criminal act.⁹

⁸Cucu Solihah and Trini Handayani in Tanti and Aji Mulyana, Doctor's Responsibility in Performing Abortion without the Consent of the Pregnant Mother or Family in the Perspective of Positive Law in Indonesia, Postgraduate Law Science, Suryakencana University: *Mimbar Justitia Journal*, Vol. 1, No. 02, July-December 2015 Edition, p. 505

⁹Bambang Poernomo in Rodliyah. 2012. *Criminalization of Women in the Criminal Justice System*. Yogyakarta: CV. Arti Bumi Intaran. p. 99.

Indonesia is a country where law cannot be separated from social life and if there is no law, it will cause chaos and conflict because there is no binding law. In general, abortion in Indonesia is positioned as an act that is prohibited by laws and regulations because it is not in accordance with religious, moral, social, and legal norms. However, the legal status of abortion can be legal and illegal when viewed from the perspective and purpose of the abortion.

Abortion in the Criminal Code (KUHP) According to the laws in force in Indonesia, abortion or termination of pregnancy is a crime, known as "Abortus Provocatus Criminalis". The act of abortion according to the Criminal Code (KUHP) in Indonesia is categorized as a criminal act. The Criminal Code (KUHP) strictly prohibits abortion for any reason as regulated in articles 283, 299, and 346-349.

According to the Criminal Code (KUHP), those who receive punishment are:

- a. The mother who had the abortion.
- b. A doctor, midwife or shaman who helps perform an abortion.
- c. People who support abortion.¹⁰

The Criminal Code regulates the issue of abortion in Book Two Chapter XIV on Crimes Against Morality in Article 299 and Chapter XIX from Article 346 to Article 349, categorized as a crime against life, the contents of which state that if a doctor, midwife, or pharmacist mixes drugs or helps commit the crime, the criminal threat is increased by one third, and his/her practice license can be revoked. In general, these articles contain threats to:

- 1) Article 299: Threats directed at parties who provide hope for abortion;
- 2) Article 346: Threats directed at the mother;
- 3) Article 347: Threats directed at others who carry out abortions without the mother's permission;
- 4) Article 348: Threats directed at another person made with the mother's permission; and
- 5) Article 349: Threats directed at medical or pharmaceutical staff performing abortions.

These articles clearly and firmly regulate the prohibition of abortion for any reason, including abortion for emergency reasons (forced) namely as a result of

¹⁰Angelina V. Achmad, Legal Study of the Criminal Act of Abortion Performed by Doctors According to Law Number 36 of 2009 concerning Health, Manado: Sam Ratulangi University, Lex Crimen Journal, Vol. IV/ No. 6/Ags/2015, p. 7.

rape, both for the perpetrator and those who help perform the abortion. Even with severe criminal sanctions if carried out by medical experts.

Specifically, the Criminal Code does not provide a definition of the difference between terminating a pregnancy and killing a pregnancy, but in terms of grammar terminating a pregnancy means causing a pregnancy to fall, namely the release of the pregnancy from the uterus and the release of the pregnancy from the body of the pregnant woman, while terminating a pregnancy means causing the pregnancy to die, namely in addition to the pregnancy having to be released, it must also die because it was killed while still in the womb.¹¹

Several articles on abortion in the Criminal Code concerning the perpetrator are:

1) Prohibition against a woman (the mother of the fetus) as the perpetrator of abortion:

Article 346 of the Criminal Code: A woman who intentionally causes a miscarriage or the death of her pregnancy, or orders someone else to do so, shall be punished with imprisonment for a maximum of four years.

Threatened with punishment for:

- a. A woman who deliberately causes her pregnancy to abort or die, or
- b. A woman who deliberately orders someone else to cause her pregnancy to abort or die.

Abortion or killing of a fetus in the womb can be done in various ways, for example: with drugs that are taken orally or with a tool that is inserted into the uterus.

- a. Doctor or Midwife or someone who helps perform an abortion:

Article 299 threatens a maximum prison sentence of four years for anyone who gives a woman hope that her pregnancy can be aborted.

Article 299 of the Criminal Code:

- 1) Anyone who intentionally treats a woman or orders a woman to be treated by telling her or giving her the hope that the treatment will cause a miscarriage, shall be punished by imprisonment for a maximum of four years or a fine of up to forty-five thousand rupiah.
- 2) If the person guilty acts in search of profit, or commits the crime as a livelihood or habit, or if he is a doctor, midwife or pharmacist, the punishment may be increased by one third.

¹¹Freedom Bramky Johnatan Tarore, Abortion Due to Rape in the Criminal Code, Manado, Lex Crimen Journal Vol. II/No. 2/ Apr-Jun/2013, p. 33.

3) If the person guilty of committing the crime is at work, then his right to do that job will be revoked.

Article 347 of the Criminal Code:

1) Anyone who intentionally aborts or kills a woman's pregnancy without her consent is subject to a maximum prison sentence of twelve years.

2) If the act results in the death of the woman, the perpetrator is subject to a maximum prison sentence of fifteen years.

Article 348 of the Criminal Code:

1) Anyone who intentionally causes a woman to abort or kills her pregnancy without her consent, shall be punished by a maximum imprisonment of five years and six months.

2) If the act results in the death of the woman, the perpetrator is threatened with a maximum prison sentence of seven years.

Article 349 of the Criminal Code:

If a doctor, midwife or pharmacist assists in committing a crime under Article 346, or commits or assists in committing one of the crimes described in Articles 347 and 348, then the penalty specified in that Article may be increased by one third and the right to carry out the profession in which the crime was committed may be revoked.

What is threatened with punishment in this article is:

1) Intentionally treating a pregnant woman, with the information or explanation that the treatment can cause the woman to abort her pregnancy,

2) Intentionally committing an act against a pregnant woman, with the information or explanation that the act could cause the woman to miscarry.

3) Then, paragraph (2) stipulates that the threat of punishment is increased by one third if the crime is committed as a livelihood or habit, or is carried out by a doctor, midwife or pharmacist.

4) In this article, it is necessary to prove that the woman is truly pregnant, but that the pregnancy is truly miscarried due to the treatment (intentionally miscarrying a pregnancy is punishable by Article 348). It is sufficient if the perpetrator has carried out treatment or committed an act against a pregnant woman with information or a method that can give rise to the hope that it can miscarry the woman's pregnancy.

5) If the perpetrator mistakenly assumes that the woman is pregnant, when in fact she is not, then he cannot be punished. his actions because they do not abort the pregnancy. The commission of the crime is considered complete, if treatment has been given or massage has been performed. has so that it raises the hope that the pregnancy will be miscarried because of the treatment or massage.

In Indonesia, abortion can be justified for certain reasons, one of which is abortion carried out due to the crime of rape. Rape is a criminal act of a sexual nature that occurs when a person forces another person to have sexual intercourse in the form of vaginal penetration with a penis, by force or by violence. In the big dictionary of the Indonesian language, rape comes from the word rape which means to rape or violate with violence, while rape is defined as the process, method, act of rape or violation with violence.¹²

2. Law Number 36 of 2009 concerning Health

The enactment of Law Number 36 of 2009 concerning Health replaces the previous health law, namely Law Number 23 of 1992. The law provides legitimacy and affirmation of abortion. Explicitly, in this law there are articles that regulate abortion. Although, the law prohibits the practice of abortion, but in certain circumstances there is permission.

1) The provisions governing abortion in Law Number 36 of 2009 are outlined in Articles 75, 76, 77, and 194. Specifically, the permissibility of abortion due to rape is outlined in Article 75, which states that: Everyone is prohibited from performing an abortion.

2) The prohibition as referred to in paragraph (1) may be exempted based on: a. indications of a medical emergency detected at an early stage of pregnancy, whether it threatens the life of the mother and/or fetus, who suffers from a serious genetic disease and/or birth defect, or one that cannot be repaired, making it difficult for the baby to survive outside the womb; or b. pregnancy resulting from rape which can cause psychological trauma for the rape victim.

3) The actions referred to in paragraph (2) may only be carried out after undergoing pre-action counseling and/or advice and ending with post-action counseling carried out by a competent and authorized counselor.

4) Further provisions regarding indications of medical emergencies and rape, as referred to in paragraph (2) and paragraph (3), are regulated by Government Regulation.

Looking at the formulation of Article 75, it is clear that Law Number 36 of 2009 concerning Health prohibits abortion except for the type of abortion provocatus

¹²Prima Pena Team, Big Indonesian Dictionary, Jakarta: Gitamedia Press, p. 453.

therapeuticus (abortion carried out to save the life of the mother and/or fetus). Furthermore, Article 76 specifically regulates that abortion may only be performed at a maximum gestational age of 6 (six) weeks, performed by certified medical personnel at qualified service providers, with the consent of the pregnant mother and husband (except for rape victims). The problem is that abortion is also related to the Indonesian doctor's oath, which among other things states that doctors will respect every life.¹³

Provisions regarding Abortion due to rape are further explained in Government Regulation Number 61 of 2014 concerning Reproductive Health. Abortion can be performed with the following provisions:

- 1) Performed by a doctor according to standards;
- 2) Carried out in health service facilities that meet the requirements determined by the Minister;
- 3) At the request or consent of the pregnant woman concerned;
- 4) With the husband's permission, except for rape victims;
- 5) Non-discriminatory;
- 6) Not prioritizing material rewards.¹⁴

Specifically, abortion with indications of rape requires that:

- 1) The gestational age corresponds to the rape incident, as stated by a doctor's certificate; and
- 2) Statements from investigators, psychologists and/or other experts regarding the alleged rape.¹⁵

The difference in the regulation of abortion in the Criminal Code and Law Number 36 of 2009 concerning Health lies in the prohibition of induced abortion without exception contained in the Criminal Code, including medical abortion induced or therapeutic abortion induced, while Law Number 36 of 2009 concerning Health actually allows medical abortion induced with therapeutic specifications on the condition that the maximum gestational age is 6 weeks and is carried out by certified medical personnel at qualified service providers. Referring to the two provisions of the legislation, in the legal context the principle of "Lex Posteriori Derogat Legi Priori" applies, meaning that if a new regulation is enacted without

¹³Mufliha Wijayati. 2015. Abortion Due to Unwanted Pregnancy (KTD): Contestation Between Pro-Live and Pro-Choice, Bandung: Journal of Islamic Studies, Volume 15, Number 1

¹⁴Republic of Indonesia, Government Regulation Number 61 of 2014 concerning Reproductive Health, Article 32 paragraph (2).

¹⁵Ibid., Article 34

revoking the old regulation that regulates the same material and both conflict with each other, then the new regulation overrides the old regulation. Thus, Article 75 of Law Number 36 of 2009 concerning Health which regulates medical abortion induced can still apply in Indonesia.

3. Abortion According to Positive Law in Indonesia

The crime of rape as regulated in Article 285 of the Criminal Code states that "Anyone who by force or threat forces a woman who is not his wife to have sexual intercourse with him, because of rape, is punished with imprisonment for a maximum of twelve years." This article requires the necessity of having sexual intercourse with someone who is not his wife accompanied by the threat of violence. Rape is characterized by penetration of the penis into the vagina during sexual intercourse accompanied by threats and physical violence against the victim by the perpetrator.

Abortion According to Positive Law in Indonesia Indonesia as a country of law determines the legal provisions for abortion perpetrators. The laws that regulate are Law No. 36 of 2009 concerning Health, PP No. 61 of 2014 concerning Reproductive Health, the Criminal Code (KUHP). The act of abortion is stated by law as a criminal act in the form of murder, therefore the act must be subject to sanctions for the perpetrators. Basically, the act of abortion is prohibited by law expressly in Article 75 of Law No. 36 of 2009.

But this provision is not general for all conditions, in situations where the abortion perpetrator or the pregnant mother is affected by a disease that can be life-threatening if the pregnancy is maintained, then it is permissible to have an abortion. Not only that, if a woman is pregnant due to rape, then it is permissible to have an abortion.

However, this permission has provisions that must be considered, namely that the gestational age is no more than 40 to 42 days for rape cases. Meanwhile, for medical emergencies (health), PP No. 61 of 2014 only determines it for rape victims, while Law No. 36 of 2009 does not specify the time limit for certain conditions. This means that abortion due to medical emergencies or because of rape victims, the gestational age is no more than the specified time, namely 40 to 42 days. As explained previously, abortion is basically strictly prohibited except for reasons justified by law.

For every perpetrator of abortion, whether as a pregnant woman, supporting abortion, assisting abortion, is threatened with imprisonment. This is regulated in the Criminal Code. Meanwhile, based on Article 194 of Law No. 36 of 2009 concerning Health, abortion without a justified reason is threatened with a maximum sentence of 10 years in prison and a fine of IDR 1,000,000,000.00.

Currently, the latest legality regarding abortion in the Criminal Code Law No. 1 of 2023 Article 463 is as follows:

(1) Any woman who has an abortion shall be punished by imprisonment for a maximum of 4 (four) years.

(2) The provisions as referred to in paragraph (1) do not apply in cases where the woman is a victim of a criminal act of rape or other criminal act of sexual violence which results in a pregnancy which is not more than 14 (fourteen) weeks old or has indications of a medical emergency.

This article regulates the act of abortion and the sanctions aimed at women who have abortions and in this article provides an exception for women who are victims of rape or other sexual violence crimes to have an abortion but their pregnancy must not be 14 weeks and there must be an indication of a medical emergency. What if the child's pregnancy exceeds 14 weeks. The act of abortion is still considered illegal and can still be punished with imprisonment.

Article 464:

1) Any person who performs an abortion on a woman: a. with the consent of the woman, shall be punished with a maximum imprisonment of 5 (five) years; b. without the consent of the woman, shall be punished with a maximum imprisonment of 5 (five) 12 (twelve) years.

2) If the act as referred to in paragraph (1) letter a result in the death of the woman, the perpetrator shall be punished by imprisonment for a maximum of 8 (eight) years.

3) If the act as referred to in paragraph 1 letter b results in the death of the woman, the punishment shall be a maximum of 15 (fifteen) years' imprisonment".

Article 465: "(1) Doctors, midwives, paramedics, or pharmacists who commit a crime as referred to in Article 464, their punishment may be increased by 1/3 (one third). (2) Doctors, midwives, paramedics, or pharmacists who commit a crime as referred to in paragraph (1) may be subject to additional punishment in the form of revocation of the rights as referred to in Article 86 letters a and f. (3) Doctors, midwives, paramedics, or pharmacists who perform abortions due to indications of medical emergencies or against victims of rape or other sexual violence crimes that result in pregnancy as referred to in Article 463 paragraph (2), shall not be subject to punishment.

The formulation in this Article provides legal protection so that there is no more criminalization of the professions of Doctors, Midwives, Paramedics, or pharmacists concerned when providing assistance for abortions that are legalized in the legislation. So that this legal provision will not criminalize these medical personnel.

4. Ulama's Views on Abortion Due to Rape in Indonesia

In Indonesia in 2005, the Indonesian Ulema Council (MUI) has issued a fatwa on abortion law in response to public questions. The Indonesian Ulema Council Fatwa Number 4 of 2005 on Abortion stipulates the following abortion law provisions:

1) Abortion is forbidden from the moment the blastocyst implants into the mother's uterine wall (nidation);

2) Abortion is permitted due to an excuse, whether it is an emergency or a necessity:

a. Pregnancy-related emergencies that permit abortion are:

1) Pregnant women suffering from serious physical illnesses such as advanced cancer, tuberculosis with caverna and other serious physical illnesses must be determined by a team of doctors.

2) In situations where pregnancy threatens the life of the mother.

a. Necessary conditions related to pregnancy that may permit abortion are:

1) The fetus being carried was detected to be suffering from a genetic defect which, if born, would be difficult to cure.

2) Pregnancy resulting from rape is determined by an authorized team which includes the victim's family, doctors and religious leaders.

b. The permissibility of abortion as referred to in letter (b) must be carried out before the age of 40 days.

3) Abortions that are permitted due to an excuse as referred to in point 2 may only be carried out in health facilities designated by the government.

4) Abortion is forbidden by law for pregnancies that occur as a result of adultery.

Then in 2014, the Nahdlatul Ulama (NU) Executive Board through the Ulama Conference decided that abortion was forbidden by adopting the strictest opinion among the opposing opinions of scholars. NU stated that the law on abortion other than in the context of a medical emergency is forbidden, including abortion due to rape which is permitted by the MUI and Government Regulation Number 61 of 2014 concerning Reproductive Health. This decision was confirmed on November 1-2, 2014.¹⁶

Referring to the MUI Fatwa Number 4 of 2005 concerning Abortion, abortion due to rape is permitted with the provision that it must be carried out before the fetus

¹⁶Op.Cit., in Mufliha Wijayanti, p. 55.

is 40 days old. And carried out in health facilities designated by the government. Meanwhile, according to NU, abortion due to rape is haram.

3.2. What Should Be the Criminal Law Policy Regarding the Act of Abortion Due to Rape in Connection with the Fetus' Right to Life as a Human Right in Future Criminal Law

The right to life is a human right, so the taking of life by another person (in the form of murder) is essentially a violation of human rights if it is carried out arbitrarily or without valid justification according to applicable law, including by carrying out an abortion.

The concept of Human Rights, during its development, can be divided into two basic ideas. First, the view that is based on the belief that every human being is born with individual rights that cannot be separated from him. Second, the view that emphasizes the obligation of society and the state to guarantee not only freedom and opportunity for citizens, but also to ensure that citizens are able to obtain or exercise freedom and what is their right.¹⁷

The state is obliged to protect all the rights of its citizens, especially human rights, as stated in articles 28A to 28J of the 1945 Constitution. The Republic of Indonesia has also ratified the convention on the elimination of all forms of discrimination against women through Law/7/1984 as a form of the state's seriousness in protecting women's rights. Law/39.1999 on Human Rights also regulates women's rights as stated in the ninth part on women's rights.

According to Philipus M. Hadjon¹⁸ Indonesia is a country of law based on the values of Pancasila that it adheres to so that it must provide legal protection based on Pancasila and that legal recognition and protection of human dignity to achieve shared prosperity must always be fought for. The idea of women's reproductive rights is a development of the concept of human rights, so that women's reproductive health must be guaranteed and protected by law. Including the crucial part of reproductive health issues, among others, is the problem of abortion. Law Number 39 of 1999 concerning Human Rights states that Human Rights are a set of rights inherent in the nature of human existence as a creature of God Almighty and are His gifts that must be respected, upheld and protected by the state, law, government and everyone for the honor and protection of human dignity. Humans are gifted by God Almighty with reason and conscience which give them the ability to distinguish between good and bad which will guide and direct attitudes and behavior in carrying out their lives.

¹⁷Adriana, et, al, *Reproductive Rights of Women Who Are Restricted*, (Jakarta: Pustaka Sinar Harapan, 1998), p. xxi.

¹⁸Philipus M. Hadjon, *Legal Protection for the Indonesian People*, (Surabaya: Bina Ilmu, 1987), p. 84.

The Criminal Code as the main source that is the parent of positive criminal law in Indonesia should develop legal regulations that regulate rape so that they can adapt to current legal developments and crime developments. Legal developments should be in line with the development of community life.

Institute for Criminal Justice Reform (ICJR) in response to the issuance of Government Regulation or PP Number 28 of 2024 concerning the Implementation of Law Number 17 of 2023 concerning Health. The policy, among other things, regulates the practice of legal abortion with certain conditions, such as indications of medical emergencies or for victims of rape or other sexual violence.¹⁹

ICJR researcher Johanna Poerba said that her party emphasized that the guarantee abortion safe not only needs to be done at the level of issuing regulations, such as the existence of this new government regulation. "However, a commitment to concrete realization of stakeholders is very necessary," he said in an official statement on Thursday, August 1, 2024.

Johanna explained that PP 28/2024, which regulates abortion practices for victims of rape and sexual violence, as well as indications of medical emergencies, is not a new regulation. She also gave examples of several policies, such as the 2009 Health Law, PP 61/2014, and Permenkes 3/2016.

From these regulations, ICJR said that the provision of safe abortion services cannot be implemented in the field. "Because there is no concrete realization from stakeholders to provide services," said Johanna.

First, he explained, the Police have not responded to the need for internal regulations to provide emergency contraception and abortion referrals for rape victims. Since the enactment of PP 61/2014 and Permenkes 3/2016, the Police have been mandated to support the provision of emergency contraception and provide certificates for rape victims who want to access safe abortions.

"With the current conditions, rape victims should be able to get emergency contraception and have safe abortions up to eight weeks of pregnancy," said Johanna.

However, ICJR research in 2021 and monitoring to date, there has been no national commitment in the Police to issue internal regulations to refer the provision of emergency contraception or issue a certificate of alleged rape. "In fact, in 2021, the police rejected the abortion request of a 12-year-old child, a rape

¹⁹Government Issues PP Legalizing Abortion for Rape Victims, ICJR Calls for Commitment to Concrete Realization in the Field, Metro Tempo, article: <https://metro.tempo.co/read/1898658/pemerintah-terbitkan-pp-legalkan-aborsi-untuk-korban-pemerkosaan-icjr-imbau-komitmen-realisasi-konkret-di-lapangan>

victim in Jombang, even though at that time the victim's pregnancy was not yet eight weeks," said Johanna.²⁰

Second, the Ministry of Health has not yet appointed a service that can provide safe abortions. Even though that is the mandate of Permenkes 3/2016. "Eight years since the Permenkes was present, and fifteen years since the 2009 Health Law was in effect, the Ministry of Health has still not appointed a health facility that can provide safe abortion services," explained Johanna.

In a public discussion held by ICJR involving the ministry in 2022, the Ministry of Health stated that it had prepared guidelines, module curriculum and training for safe abortion services. The Ministry of Health also said that in 2023 it had provided health facilities or faskes that could provide safe abortions. "However, until now the determination has not been fulfilled," said Johanna.

"Regarding this commitment issue, ICJR also has notes on the substance of PP 28/2024," said Johanna.

First, Article 60 of the Health Law and Article 1154 of PP 28/2024 state that the regulation of abortion services and the age limit for abortions that can be performed for all sexual violence will apply simultaneously with the Criminal Code or the new Criminal Code. Thus, abortion services will only be available in January 2026.

Abortion in Law Number 17 of 2023 concerning Health is the latest Health Law replacing the old Health Law, namely Law Number 36 of 2009 concerning Health, which has been revoked and is no longer valid.

The practice of abortion is also expressly prohibited in the Health Law, just like the provisions in the Criminal Code. The Health Law also regulates the exception of abortion which can only be done under certain conditions and this Law also formulates the criteria for exceptions to abortion which are permitted but with strict limitations for its implementation. The regulation of abortion is stated in Articles 60, 61, 62, 427, 428 and Article 429.

Article 60 of the Health Law:

- 1) Everyone is prohibited from having an abortion, except under permitted criteria in accordance with the provisions of the Criminal Code.
- 2) The implementation of abortion with the permitted criteria as referred to in paragraph (1) may only be carried out by:

²⁰Government Issues PP Legalizing Abortion for Rape Victims, ICJR Calls for Commitment to Concrete Realization in the Field, Metro Tempo, article:
<https://metro.tempo.co/read/1898658/government-terbitkan-pp-legalkan-aborsi-untuk-korban-pemeriksaan-icjr-imbau-komitmen-realization-konkret-di-lapangan>

- a. by medical personnel and assisted by health workers who have the competence and authority;
- b. at health service facilities that meet the requirements set by the Minister; and
- c. with the consent of the pregnant woman concerned and with the consent of her husband, except for rape victims."

4. Conclusion

Based on the research conducted, the author can draw several conclusions, namely, Abortion According to Positive Law in Indonesia today as a state of law determines the legal provisions for abortion perpetrators. The laws that regulate are Law No. 36 of 2009 concerning Health, PP No. 61 of 2014 concerning Reproductive Health, the Criminal Code (KUHP). The act of abortion is stated by law as a criminal act in the form of murder, therefore this act must be subject to sanctions for the perpetrators. Basically, abortion is prohibited by law expressly in Article 75 of Law No. 36 of 2009, but currently the legality regarding abortion is the latest in the Criminal Code Law No. 1 of 2023 Article 463 as follows: (1) Every woman who has an abortion shall be punished with a maximum imprisonment of 4 (four) years. (2) The provisions as referred to in paragraph (1) do not apply if the woman is a victim of a criminal act of rape or other criminal act of sexual violence that causes a pregnancy whose gestational age does not exceed 14 (fourteen) weeks or has an indication of a medical emergency. The right to life is a human right, so the taking of life by another person (in the form of murder) is essentially a violation of human rights if it is carried out arbitrarily or without a legal justification according to applicable law, including by performing abortion. The Institute for Criminal Justice Reform (ICJR) responded to the issuance of Government Regulation or PP Number 28 of 2024 concerning the Implementation of Law Number 17 of 2023 concerning Health. One of the policies regulates the practice of legal abortion with certain conditions, such as there being an indication of a medical emergency or for victims of rape or other sexual violence.

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