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Abortion Indications According to Law Number 17 of 2023 concerning Health

Indikasi Aborsi Menurut UU No. 17 Tahun 2023 tentang Kesehatan

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Abstract

This normative juridical research scrutinizes Indonesia's legal framework surrounding abortion, juxtaposing the criminalization of abortion with the nuanced provisions of Law Number 17 of 2023 concerning health. The study focuses on Article 42, which permits abortion under specific indications such as fetal viability challenges and pregnancies resulting from rape. The primary legal materials are sourced from statutory regulations, with a supplementary examination of secondary legal materials. The research reveals the legal complexities surrounding abortion in Indonesia, shedding light on the delicate balance between criminal sanctions and legal protections. The implications of the findings extend to the broader discourse on reproductive rights and the evolving legal landscape.

Highlights:

- Abortion Legislation in Indonesia: Balancing criminal sanctions and legal protections under Health Law Number 17 of 2023.
- Indications and Protections: Analyzing specific indications like fetal viability challenges and rape pregnancies, shaping women's reproductive rights.
- Normative Juridical Research: Utilizing primary and secondary legal materials to navigate the intricate legal landscape surrounding abortion in Indonesia.

Keywords: Abortion, Planning, Legal Protection

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Introduction

The event of the release of the result of conception (pregnancy) aged under 20 weeks is called a miscarriage, which occurs due to many causes. When a miscarriage occurs naturally or for physiological reasons, it is rarely discussed in public, while abortion is an act to remove the fetus or an attempt to forcibly remove a living baby from the womb of a mother with human intervention in it. The act of "negation" of this situation can be interpreted as a criminal act that takes someone's life or murder.[1]

The object of abortion is a fetus that has had the opportunity to live and sustain its life and the baby in the womb does not have the ability to defend itself, and defend its life against what certain individuals do not want. The term abortion translates as "miscarriage" (involuntary) or "abortion" (intentional) of the fetus/embryo before birth.[2] The World Health Organization says abortion is an act of terminating a pregnancy because of any argument or pretext when the baby has not been able to survive outside the mother's womb. The Penal Code defines abortion as the act of removing the results of conception at any stage of its development before reaching the perfect gestational age (38-40 weeks) or removing a baby that cannot survive outside the womb (weighing < 500 grams or < 20 weeks).

The conversation about abortion has been a byword in the community for a long time and has been discussed in the general public for a very long time. The focus of "debate" and "radicalization" of dissent is excessive deprecation of the right to life or defence of the interests of pregnant women. This is the "debate" among experts *Pro-Choice* and *Pro-Life* in dealing with abortion. Whether for the right to life of the baby in the womb or to save the mother who is carrying a baby. According to K. Bertens that Pro-life and pro-choice are radicalization experts who support abortion and prohibit abortion in America. Radicalization has had a powerful impact on social and political life in America. This radicalization also seems to have an impact on Indonesia.[3]

According to WHO, it is estimated that abortion in Southeast Asia is 4.2 million / year, including Indonesia, there are 750,000 to 1.5 million cases. According to Bearak, et al (2020) it is described, namely in 2015-2019, cases of unrefrigerated pregnancy exceeded 121 million / year. The figure explains that there are 64 unmasked pregnancies that occur in every 1,000 women aged 15-49 years. In the period 2015-2019, 61% of unwanted pregnancies ended in abortion. This data shows that 73.3 million abortions occur each year, in line with 39 abortions per 1,000 women aged 15-49 years. Based on these data, it can be concluded that there are 3 (three) out of 10 (ten) women who conceive end up having an abortion.[4]

The level of safety of abortion relates to the legal status in a country, for example for or against abortion. Indonesia, for example, is the country that most opposes the practice of abortion, while Sweden is one of the countries that strongly supports the principle or legitimacy of abortion, which is as much as 87 percent, followed by France and the Netherlands with ratios of 82 percent and 76 percent respectively. [5]. With the rules related to abortion in law number 36 of 2009 concerning health which was updated with law number 17 of 2023 concerning health expressly prohibits abortion, in reality abortion perpetrators still carry out abortions, illegally [6]

Illegal abortion means that the act is carried out by untrained people, does not meet health standards (WHO), overrides safety guarantees and prioritizes commercial only. As a result, high maternal and child mortality rates were found as well as reproductive diseases.[7] Illegal abortion affects approximately 7 (seven) million diseases. In futuristic countries it is estimated that there are 30 (thirty) women die in every 100,000 illegal abortions. This figure rises to 220 deaths in every 100,000 in developing countries (WHO, 2017). So, abortions that are not performed safely at 45% are equivalent to 25.1 million abortions. 97% of illegal abortions occur in developing countries. More than half of these illegal abortions occur in Asia (mostly South and Central Asia). [8]

The reason for having an unsafe abortion is often found because the pregnancy is not cold because there are already many children, with lack of finances, failure of contraceptive pills / injections can be due to irregularities in taking drugs / injections or there are no pills / injections available. Of particular interest is abortion due to rape, the perpetrator of which is not desirable/liked, because the helplessness of the act of intercourse makes women have to experience the effects of pregnancy.

Rape is an act of coercion in engaging in sexual intercourse without volition, which is often accompanied by acts of violence. This then often causes trauma to the victim., and can lead to unexpected pregnancies. Based on the opinion of Komnas Perempuan Commissioner Andy Yentriyani who stated that cases of violence in sexual relations which are defined not only related to rape, but can be classified into fifteen motives for acts of sexual violence including: threats or attempted rape and other sex violations, pressure to conceive, pressure for sterilization, sexual influence related to the use of clothing and criminalization of women through differentiation regulations that Based on integrity and religion, culturally motivated practices are harmful and/or differentiated.

Currently, the crime of rape or fornication has increased very significantly both in quantity and quality. The modus operandi used by perpetrators of acts of sexual immorality or rape varies, among others: forced, threatened, seduced, drugged, killed, deceived and others. The victims were not only women but also teenagers and children. There is a case in East Java, there is a teenage girl who was raped by her new friend who met through social media, the PTR victim (14 years old) claimed to be molested or raped by SK (22 years old) then trafficked herself to her

friends on campus. PTR failed to be sold to SK colleagues because PTR complained or disclosed the incident to the Surabaya City Polrestaes.[9]

The existence of news about rape victims in the age group of children and adolescents is supported by unpleasant perpetrator information, whether the selection of human rights derived from women's reproductive health rights, namely the right to determine oneself can choose abortion, can be enforced. Given the impact of rape on the victim causes various problems physically and psychologically. It is the author's goal to conduct a literature study by examining from a legal point of view associated with the birth of "Law number 17 of 2023 concerning health, is there any indication of abortion according to Law Number 1 of 2023 concerning the Criminal Code?" [10]

The legal situation in Indonesia, the making of laws and regulations related to abortion is discussed ranging from laws to fatwas, but the process of making laws and regulations related to abortion has not been able to reduce differences of opinion that arise. So that abortion cases remain a trending and interesting issue in conversations in society. With the ratification of "Presidential Regulation Number 61 of 2014 concerning reproductive health" dated July 21, 2014, one part of the debate in this Presidential Regulation is the legalization of abortion for victims of sexual abuse or rape. The main problem of this paper is to analyze what disputes the indications of abortion and try to prove that legalizing abortion is not a way out, without being followed by complete social change.

Methods

The type of research used in this study is normative juridical, which examines laws designed for rules or teachings that occur in society and as a guide to everyone's behavior. The legal sources used are primary sources of legislation and secondary legal sources. Carrying out the juridical approach used, namely an approach that uses teachings and legislation related to the problem under study. The *statute approach* is implemented by reviewing all laws and regulations related to this research. In addition, taking a conceptual *approach* by reviewing the values and teachings that develop in legal science, so as to answer the research question, namely looking for whether there are indications that abortion is allowed which examines Law Number 17 of 2023 concerning Health.

Results and Discussion

The issue of abortion is still a complicated issue in society, especially among the younger generation. The division of abortion according to medical science, namely abortion occurs automatically and abortion is provoked (provocatus). The act of abortion recognized by law and state is abortion provocatus criminalis, while abortion accompanied by medical symptoms is called abortion provocatus medisinalis. The legal authority regarding abortion is regulated in the "Criminal Code and Law Number 36 of 2009 concerning Health."

In Eastern culture, abortion is seen as an act that is not in accordance with rules and teachings or believed, this is due to eastern customs or customs that have a very strong religion. Today, abortion is not only a personal problem, but a social problem in society, because it is not only about women's health, but has a very significant influence on national society and all levels of society, especially the psychological situation in the family.[11]

Rape is an act of sexual violence that can have serious psychological effects on the victim. The psychological trauma of rape is diverse and influenced by many factors, including physical abuse, threats, fear, and loss of control over the body. The Psychological Impact of Rape a) Self-blame. b) Psychological illness of victims of sexual abuse or rape has the potential to suffer from several psychological diseases such as depression, and anxiety disorders. c) The desire to kill one's own life is one of the most fatal psychological effects experienced by victims of sexual abuse or rape. The main aspect that often provokes psychological disorders because the victim is depressed.[12]

Rape is one form of physical and psychological violence that always occurs to women. Based on analysis data from the FBI, there are approximately 84,000 women who report themselves as rape victims in 1 (one) year. While in Indonesia, the problem of rape cases is ranked second after murder.[13] Recorded in the National Commission for Women, namely in this period of 15 (fifteen) years (1998-2013), the problem of violence reported by victims reached 400,939 cases and 93,960 cases have not been reported.

Social Psychological Impact Rape can be in the form of psychic felt by the victim, namely: (1) organ damage such as tearing of blood membranes, fainting, death; (2) the victim is also potentially sexually infected, (3) unwanted pregnancy. Rape is a very real example of violence that occurs to someone using both subtle and violent pressure.

Psychological, sociological and medical assistance is carried out in the form of counseling before purposeful action is carried out":1. Explore the needs of women seeking abortions. 2. Convey and explain to women who want to have an abortion that abortion can or cannot be done based on the results of clinical examinations and supporting examinations. 3. Describe the stages of the abortion to be performed and possible side effects or complications 4. Assist women who wish to have an abortion to make their own decision to have an abortion or cancel the desire to have an abortion after obtaining information about the abortion 5. Assess the patient's readiness for an abortion."

Assistance of the victim after the abortion aims: "1. Observe and evaluate the patient's condition after the abortion. 2. Help the patient understand the state or physical condition after undergoing an abortion. 3. Explain the need for repeat visits for examination and follow-up counseling or referral action if necessary. 4. Explain the importance of using contraceptives to prevent pregnancy." [14]

The act of abortion can be distinguished from accidental abortion and intentional abortion. The act of accidental abortion means the release of the results of the womb without doing anything. Intentional abortion is removing the entire result of conception occurring as a result of an act. Involuntary abortion is divided into two, namely *abortion articialis therapicus* and *abortion procatus criminalis*. *Abortion articialis therapicus* is the emptying of the results of conception carried out by medical personnel for medical reasons aimed at prioritizing the safety of the mother's life if the pregnancy continues, *abortion provocatus criminalis* is the emptying of the results of conception carried out without medical indications but other purposes such as, eliminating evidence of sex outside marriage or ending unwanted marriage.

The availability of implementing regulations for abortion that allows rape victims in accordance with "Articles 34 to Article 39 of the Reproductive Health PP, it is explained that: 1. Pregnancy due to rape as referred to in Article 31 paragraph (1) point b is a pregnancy resulting from sexual intercourse without the consent of the woman in accordance with the provisions of laws and regulations. 2. Pregnancy due to rape as referred to in paragraph (1) is proven by: a. The gestational age is in accordance with the incidence of rape, which is stated by a doctor's certificate. Testimony of investigators, psychologists, and/or other experts regarding the existence of an alleged rape."

The application of the human right to life as a form of legal protection for the fetus from the mother's womb to birth, should be fulfilled and guaranteed. The fact is that a woman is not entitled to herself, when she decides to terminate her womb, she is charged with legal sanctions. For example, the permissibility of abortion if the pregnant woman is medically declared her pregnancy can be dangerous for the mother and fetus. It is at this point that pregnant women are allowed to determine, in consideration of the existence of the Human Rights Law. [15]

Indonesia considers the issue of abortion taboo to be full of discrimination, in contrast to South Korea where the Korean state applies the same legal system as its regulations. Opinions on abortion vary from race to race *Pro-Life* also the people *Pro-Choice*. Researcher found that Analysis *feminist legal theory* In particular, radical feminism is used to see the response of Indonesia and South Korea to abortion. [16] It said that in Indonesia abortion is not fully legalized in contrast to the decision of the Constitutional Court of South Korea to lift the ban on abortion. So *Feminist Legal Theory analysis* Discovering the fact that our country has not accepted and accommodated all forms of demands from feminism while the South Korean state has declared that abortion is actually a woman's right, which is fully attached.

The rarity of reports of rape or choosing to be prosecuted is because, because the victim is ashamed, does not want his shame to be known, there is a feeling of fear of the threat of the perpetrator, other intimidation. That is why the examination of rape victims experiences obstacles, starting from the stage of investigation, investigation, prosecution, and at the stage of reading the verdict. Difficulty in proof because cases of rape or lewd acts are generally committed without the presence of other people or witnesses. [17] Rape crimes that have been processed to court, the punishment given sometimes does not fully apply existing regulations. In the "Criminal Code (KUHP) Chapter XIV concerning Crimes Against Decency (Articles 281 to 296), specifically regulates the crime of rape (Article 285) prosecuting 12 years."

Violations such as rape can be included in the classification of forms of violent crimes, Soerjono Soekanto said that criminal acts are accompanied by threats of violence rewritten by Mulyana W. Kusuma, because the emergence of violent crimes is: "a. The existence of orientation on objects that cause the desire to get material in an easy way. b. There is no channeling of will and there is some kind of mental pressure on a person. c. Courage to take risks. d. Lack of guilt and poor example."

In "Article 285 of the Criminal Code, it is explained whether there are elements as a basis for proving the existence of acts in the form of rape, which are meant by the elements, namely: a. The presence of violence or threats of violence b. Coercing, a woman c. Having intercourse outside of marriage with him (the perpetrator)".

Sadewo research data (2013) that the KTD rate in West Java is 22.8%, East Java is 12.2%, Central Java is 11.6%, Banten is 6.5%, the incidence of KTD is as great as the desire to terminate her pregnancy. The highest data is West Java at 18.2%, then DKI at 9.8%, East Java at 9.1% and Central Java at 7.0%.

Another case, dragging HW, one of the leaders of an Islamic boarding school located in Bandung, was charged with raping 13 women who were his students, depraved behavior allegedly occurred since the end of 2016, and finally exposed in mid-2021. It was revealed that several places were used for his depraved actions such as foundation rooms, hotels and apartments. Starting with the lure of being given Islamic boarding school fees, free schools to enter police education, funded by college and others, victims of female students fell time after time, victims of which gave birth to children. [18]

Based on the decision of the Supreme Court dated December 8, 2022, case number 5642 K/PID. SUS/2022

stipulated that it "deprived defendant HW of property/assets in the form of land and buildings as well as the rights of the defendant in YPMH Foundation, TM Islamic Boarding School, MH Foundation". Then, the judge sentenced HW to life imprisonment for violating "Article 81 paragraph (1), paragraph (3), paragraph (5) jo Article 76D of Law Number 17 of 2016 concerning Child Protection Jo Article 65 paragraph (1) of the Criminal Code (KUHP)."

The weakness of the victim is almost uniformly that there is a sense of powerlessness to resist, so that the mode is seen not to be rape but sexual harassment under intimidation. Santriwati obeyed HW's request, unable to resist or attack. The denial of this lewd act is seen as degrading women's reproductive health rights so that they have to bear the losses when pregnant and giving birth to a child under the influence of power. The view of the Law on Health in 2009 has been updated to Number 17 of 2023 concerning health giving a new reality in society, namely the ban on abortion does not apply as referred to in "article 42 paragraph (1) part (b) pregnancy due to rape, then in paragraph (4) Abortion as referred to in paragraph (3) can only be carried out after going through counseling and / or pre-action counseling and ending with post-action counseling carried out by counselors who competent and authorized."

Protecting rape victims seeking abortion (*abortion provocatus*) is seen from the Criminal Code (KUHP) as *Lex Generale*, and Law number 17 of 2023 concerning health as *Lex Speciale*. Therefore, criminal regulations are in principle in line with the applicable Law on Health, which prohibits anyone from having an abortion. The act of abortion that violates laws and regulations is considered a criminal abortion, criminal sanctions for the perpetrators are regulated in Articles 464 and 465 of Law number 17 of 2023 concerning Health.

The application of positive law in Indonesia regarding abortion is regulated in laws such as the Criminal Code in articles 299, 346, 347, 348 and 349 as well as in Law Number 36 of 2009 concerning Health Articles 75, 76, 77. Differences were found between Law Number 36 of 2009 concerning the Criminal Code. The Criminal Code clearly prohibits abortion for any reason. The Health Law permits abortion on medical indication or rape. Then, the explanation of the act of abortion in Law Number 36 of 2009 provides guidelines that must be obeyed, such as the womb under 24 weeks counted since the last menstruation.

Unsafe abortion is defined as an action carried out by health workers assisted by health resources in the act of abortion contrary to regulations, not an indication described in "article 42 paragraph (1), namely an indication of a medical emergency detected from an early age of pregnancy, both threatening the life of the mother and / or fetus, suffering from severe genetic diseases, and / or congenital defects, or irreparable that makes it difficult for the baby to live outside the womb; or b. pregnancy resulting from rape". Globally, it is estimated that every year 19-20 million illegal abortions are performed unprofessionally, or in facilities that do not meet health standards. As many as 68,000 women die from unsafe abortions, millions of whom experience complications permanently.

The state is obliged to protect the welfare of infants and children to the fulfillment of their basic health rights, so pregnancy from rape does not guarantee the birth of a strong generation. We welcome the birth of the Golden generation needs serious attention, because the Golden Generation has a very strategic role in the success of national development, a generation born of a mother who is healthy body and soul, prosperous born and mental.

After the enactment of Law No. 1 of 2023 concerning the Criminal Code (KUHP), the Health Law and several regulations under the Law regulate the implementation of reprimanding actions possible under certain conditions such as indications of pregnancy due to rape as well as emergencies. But its implementation has encountered problems, related to various cases as well as lack of support from the government regarding the request for legal abortion, such as administrative problems for the implementation of abortion and adequate treatment infrastructure in our country to date. Although normatively regulated by law, the state still has not designated legal and official abortion facilities for rape victims.

Another obstacle is the problem of disharmony in regulations regarding safe abortion in the health law, child protection and the Criminal Code. In the Health Law, there is an exception to the prohibition of abortion according to Article 75, it is stated that for indications of medical emergencies and for victims, in "Article 194 of the Health Law has also been regulated as a criminal offense, anyone who intentionally performs an abortion not in accordance with the provisions as referred to in Article 75 paragraph (2) shall be punished with a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 1,000,000,000, 00 (one billion rupiah)". It is explained in the Health Law that criminal sanctions are not yet in sync with the regulation of abortion in the Criminal Code, so that the Criminal Code only emphasizes several acts related to abortion with different gradations of punishment (Maidina Rahmawati et al, 2023)

In positive law in Indonesia, there are still pro and con opinions about the perception or understanding of the existing law (Sulistiyowati Irianto, 2006).

Positive law in Indonesia, according to Agustina et al (2021) is a discussion and opposition from those who agree and disagree in understanding abortion regulations in the Criminal Code, Health Law, Medical Practice, Elimination of Domestic Violence (KDRT) and Human Rights Law.[19] The existence of complex problems triggers the emergence of illegal abortion practices carried out by formal medical personnel and informal medical personnel, whether they comply with medical operational standards or not. Before the birth of Law Number 36 of 2009 concerning health, provisions regarding abortion were regulated in Law Number 23 of 1992. In Health Law

Number 36 of 2009, it is explained that abortion if carried out on medical emergencies such as the mother's life is threatened, a defective baby will be born, cannot live outside the womb, how to apply women who choose *Abortion Provocatus* For the content can be convicted or not, the assessment is based on what is prioritized.

Legal certainty regarding the regulation of abortion in Indonesia can be achieved if the principle of applying the principle *Lex Specialis Derogat Legi Generali*, so that the meaning of the Law that more specifically overrides more general laws can be implemented, as well as the provisions for regulating abortion acts, namely applying the Health Law which allows abortion with the exception that there has been a medical emergency in the mother and / or baby and pregnancy due to rape. The regulation of abortion in Indonesia is associated with the new Criminal Code, where in the 2023 Criminal Code there is no change, the old Criminal Code still has the concept of prohibiting abortion by anyone and any conditions. However, abortion is allowed after undergoing counseling first, so abortion cannot be done immediately.[20]

Artificial abortion, which is divided into provocatus therapeutic abortion (legal artificial) and provocatus criminalist abortion (illegal artificial) . Abortions that occur as a result of physical conditions that are down, Abortions are further divided into spontaneous hormonal imbalances in the body, accidents, and other causes [21].

Conclusion

The term abortion or abortion *Provocatus* is to terminate the pregnancy or remove the result of pregnancy prematurely, often occurs due to unwanted pregnancy, one of the causes is rape caused by forced sex against her will, often accompanied by intimidation, violence, threats, and consequently causing physical and psychological trauma. Because pregnancy resulting from rape can exacerbate the suffering of the victim and affect mental and emotional well-being. It is the duty of the government at the central and local levels to protect and prevent women from abortion as written in "Law number 17 of 2023 Article 42 paragraph (2) to paragraph (4) which is unsafe, only allows it to be carried out for women who meet the indications according to article 42 paragraph (1)". There is legal certainty for women as rape victims can terminate unwanted pregnancies as part of reproductive health rights derived from human rights, also helping to reduce stigma, suffering and discrimination experienced by rape victims.

At the stakeholder level, the government should protect its citizens, namely pregnant women who are indicated by medical emergencies or pregnant women due to rape, as well as medical personnel who help exempt from the application of articles 464 and 465 for a doctor, midwife, paramedic or pharmacist. Community expectations for the protection of women's rights, the recovery of rape victims, and recognition of the complexity of the situation at hand can be fulfilled by the implementation of "Law number 17 of 2023 concerning health".

The abortion procedure can be carried out after the pre-counseling stage, has been interviewed and pre-action education and ended by a counselor after the action, an interview by a counselor who is appropriate in their field, and authorized and competent. In unwanted pregnancy (KTD) due to rape, it is possible to terminate the womb in accordance with "Article 75 point 2 and Article 76 of UUK Number 36 of 2009. The basis of legal protection for doctors is regulated in Article 50 and Article 51 of Law No. 29 of 2004 concerning Medical Practice, as well as Article 57 and Article 75 of Law No. 36 of 2014 concerning Health Workers".

Understanding that there is a principle *Lex Specialis Derogat legi generalis* So things that conflict between specific rules and general regulations, so that special priorities are prioritized. In this case, special rules apply regarding abortion in accordance with "Law Number 36 of 2009 concerning Health", rules related to abortion in the "Criminal Code" are set aside because they have been specifically regulated in "Law Number 36 of 2009 concerning Health". Then, "Law Number 36 of 2009 concerning Health article 75 paragraph (1) states that abortion is prohibited. However, in article 75 paragraph (2) it is explained that there are circumstances that are excluded from the prohibition of abors."The Ministry of Health should immediately follow up the safe abortion policy after the New Criminal Code, by immediately adjusting the "Minister of Health Regulation 3/2016 on Training and Implementation of Abortion"

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