

Implementation of Exceptions to the Prohibition of Abortion Based on Article 75 Paragraph (2) letters a and b of Law No. 36/2009 on Health and What are the Legal Consequences for Perpetrators of Abortion Crimes.

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ABSTRACT

This paper aims to examine the extent of the implementation of exceptions to the prohibition of abortion based on Article 75 Paragraph (2) letters a and b of Law No. 36/2009 on Health. This study uses a normative legal research approach (literature) by analyzing regulations relating to abortion, data collection techniques by reviewing books, literature, notes, and various reports related to the problem to be solved (Nazir, 2003). Specifically focusing on the application of Law No. 36 of 2009, PP No. 61 of 2014, what it looks like and the extent of its implementation. The potential problem is the existence of rules that have been overridden, unlawfully imposed, and abandoned medical procedures. Products that contain regulations on abortion must provide concrete evidence as the law has aspired to justice, expediency, and legal certainty. The alternative solution is to strengthen the regulations or regulations relating to the act of abortion and provide a specific explanation of the procedural handling of legal and medically real abortion and at the same time provide legal certainty by providing strict sanctions for Abortion Criminal Offenders.

Keywords: Abortion Prohibition; Exception; Legal Certainty

I. INTRODUCTION

1.1. Background of the Problem

Indonesia is a State of Law (Article 1 Paragraph 3 UUDNRI 1945)¹. Indonesia is a state of law that is reflected in the legislation that is present in Indonesian law. In addition, almost all aspects of social life are regulated in clear laws in Indonesia. Through law, the government is able to regulate and order society so that life in society becomes more orderly. In law, there are three things that must be contained in the law as an identity value and one of them is the principle of legal certainty. Definition of Legal Certainty: normatively, legal certainty can be interpreted as a legislation that is made and promulgated with certainty. This is because legal

¹ Constitution of the Republic of Indonesia Year 1945 Article 1 Paragraph (3).

certainty can regulate clearly and logically so that it will not cause doubts if there are multiple interpretations. So that it will not clash and not cause conflict in the norms that exist in society²

Regulation on the issue of abortion has been regulated in Lex Specialis and Lex Generalis as outlined in Law No. 36 of 2009 on Health, Government Regulation No. 61 of 2014, the Criminal Code (KUHP) and the Revised Criminal Code (RKUHP). In the focus that will be discussed by the author is on the provisions of the prohibition of abortion that is excluded as Article 75 Paragraph (2) letters a and b of Law No. 36/2009 on Health. Abortion is the abortion of the womb of a mother either due to factors of medical emergency indications, or as a result of rape. Therefore, the author seeks to see the extent of the implementation of the Regulation of the Exclusion of Abortion Prohibition in social reality.

1.2. Problem Formulation

After being given an explanation of the problems taken, the author finally formulates the problem as follows:

1. What is Abortion?
2. Types of Abortion?
3. How is the implementation of the exception of the prohibition of abortion according to Article 75 Paragraph (2) letters a and b of Law No. 36/2009 on Health, as well as the procedure of medical abortion?
4. What are the legal consequences for the perpetrators of abortion?

II. RESEARCH METHODS

The research method used is the normative legal method. The normative legal method is a method carried out through research on library materials which are secondary data. This method is also a scientific research procedure to make discoveries based on the logic of legal science from the normative side, which is built based on scientific disciplines and also the ways of working of normative legal science or legal science whose object is the law itself. The

² Gramedia Digital Blog Legal Certainty Theory <https://www.google.com/literasi/teori-kepastian-hukum/amp/> (accessed September 15, 2022).

legal reference sources were obtained through a literature review, which then all the legal reference sources were analyzed qualitatively normative.

III. RESULTS AND DISCUSSION

1. Definition of Abortion

Abortion (abortion: English, abortus: Latin) means miscarriage. In the Indonesian dictionary, abortion is a termination of pregnancy. In Arabic, abortion is called isqat al-haml or ijhad, which is the abortion of the fetus and uterus. Ijhad has synonyms isqot (drop), iqala (throw), tarah (throw), and imlas (get rid of). By definition, abortion is the termination (death) and expulsion of pregnancy before 20 weeks (counting from the last day) or fetal weight less than 500gr, length less than 25 cm. Medical definition defines that abortion is the end of a pregnancy before viability, before the fetus is able to live alone outside the womb, which is estimated to be under the age of 20 weeks (WHO). This definition clearly implies that abortion is performed on a fetus that cannot live outside the womb³.

2. What are the different types of abortion?

Abortion can be divided into two forms, namely:

- a. *Spontaneous abortion* is an abortion that occurs naturally either without a specific cause or because of a specific cause. *Spontaneous* abortions can be caused by accidents or chromosomal abnormalities, uterine abnormalities, hormonal abnormalities, and some cases due to infections or diseases such as *sphylis*, kidney disease and tuberculosis.
- b. Deliberate abortion (*abortus provocatus / inducet pro-abortion*) for certain reasons. There are 2 (two) types of abortion, namely:

³ Mufliha Wijayati Abortion for Unintended Pregnancy: Contestation Between Pro-Live and Pro-Choice. PPs UIN Sunan Gunung Djati Bandung. Page. 46

- Abortion *artificialis therapicus*, which is an abortion performed by a doctor based on indications of a medical emergency, before the child is born naturally to save the life of the mother who is threatened if the continuation of the pregnancy is maintained.
- Abortion *provocatus criminalis*, which is an abortion performed without medical indication. These abortions are performed intentionally but without any medical indication, such as economics, beauty, fear, moral sanction and other highly personalized factors.⁴

3. How is the implementation of the exception of the prohibition of abortion according to Article 75 Paragraph (2) letters a and b of Law No. 36/2009 on Health, as well as the procedure of medical abortion?

That abortion can be excluded according to Article 75 Paragraph (2) letters a and b of Law No. 36 Year 2009 on Health which reads as follows:

- a. Indications of medical emergencies detected early in pregnancy, either threatening the life of the mother and/or fetus, suffering from severe genetic diseases and/or congenital defects, or which cannot be repaired so that it makes it difficult for the baby to live outside the womb; or
- b. Pregnancy as a result of rape can cause psychological trauma for rape victims.

Then Article 76 of Law No. 36 Year 2009 on Health has regulated abortion can only be done that is:

- a. Before 6 (six) weeks of pregnancy calculated from the first day of the last menstrual period, except in the case of medical emergencies;
- b. By health workers who have the skills and authority who have a certificate stipulated by the minister;
- c. With the consent of the pregnant woman concerned;
- d. With the husband's permission, except for rape victims, and

⁴ Ibid., 47

e. Qualified health care providers as determined by the minister;⁵

There are still rampant cases where abortion is done illegally without looking at the provisions of the legislation, be it indications of medical emergencies or victims of rape should be done by a team of doctors through testing the feasibility of abortion that has the competence and authority of Article 33 (1) and (2) PP 61/2014 on Reproductive Health, while the rape victim must also be proven by a doctor's certificate, the statement of the investigator/psychologist (Article 34 PP 61/2014).

When talking about Implementation, what we have in mind is an application in the community that is in accordance with the plan, implementation has an etymological meaning according to the *Webster Dictionary* from English, namely to *Implement*. In the dictionary, *to implement* means *to provide the means for carrying out* and *to give practical effect* to.⁶

Abortion regulated in Article 75 paragraph (2) of the Health Act is a type of abortion *provocatus therapeuticus*, which is the termination of pregnancy intentionally from outside, usually done to help the mother's life by a doctor because pregnancy endangers the mother's life (Ibnu and Arianto, 2005: 3-4). This type of abortion cannot be categorized as a criminal offense because it has been excluded from the prohibition of abortion in the Health Act. Abortion categorized as a criminal offense is *abortus provocatus criminalis*, which is the act of aborting the fetus intentionally and against the law. Against the law in the sense that it does not include the elements of the exception in Article 75 paragraph (2) of the Health Law so that it is a crime or criminal offense that is regulated by the threat of punishment in the law⁷.

⁵ Law No. 36 of 2009 Concerning Health Article 75 Paragraph (2) letters a and b and Article 76.

⁶ D katadata.co.id, Understanding Implementation, Objectives, Factors and Examples <https://katadata.co.id/sitinuraeni/berita/6243accfd3afb/memahami-pengertian-implementasi-tujuan-faktor-dan-contohnya> (accessed September 18, 2022).

⁷ Monika Suhayati and Noverdi Puja Saputra (2020). Legal Affairs, Brief Info. Brief Review of Actual and Strategic Issues: Problems in Law Enforcement of Abortion Crimes. Vol XII, No. 19 / Puslit / October / 2020. Page. 2

Then what if the Regulation on the Health Act related to the exception of the prohibition of abortion as Article 75 Paragraph (2) letters a and b is still widely utilized by perpetrators or individuals who take advantage by taking a side road to perform abortion unlawfully. Whereas to perform abortion according to **Article 37 of PP 61/2014 on Reproductive Health which reads:**

- (1) Abortion based on indications of medical emergencies and pregnancy resulting from rape can only be done after counseling.
- (2) Counseling as referred to in paragraph (1) includes pre-action counseling and ends with post-action counseling conducted by the counselor.

Based on this article, it will be a little difficult to prove that the person who comes to the counselor is really a victim of rape, while this could potentially be a person or perpetrator who argues as a victim of rape even though it happened as a result of a relationship outside of marriage which because of the situation and conditions dramatizes the situation. In addition, the article also has connotations of confusion, which reads that abortion is prohibited but exempted for rape victims even though there are still conditions.

Abortion Facts and Reasons

Factually, in 1994 there were an estimated 1,000,000 abortions each year in Indonesia. 50% of these were performed by the unmarried, and of these approximately 10-25% were teenagers. The following year, Bali saw 100 teenagers a day in Denpasar and Badung seeking recovery from unwanted pregnancies (Andrian et al., 1998).

While the figures presented by Prof. Sudraji Sumapraja, in his notes he stated that 99.7% of women who perform abortions are married mothers (Kompas, 30/11/1997). Meanwhile, field research conducted by Indraswari from FISIP Unpad in 1997 concluded that 85% of abortionists were married. The study also revealed that spontaneous abortions due to fatigue, excessive workload and health conditions reached 20%. The rest, 10% of respondents performed abortus provocatus therapikus (APT), and 65% of respondents performed abortus provocatus criminalis (APK) (Syafiq Hasyim, 1999).

In fact, no less than 2 million Indonesian women each year have abortions due to unwanted pregnancies. The results of research by the UI Health Center and the Women's Health Foundation in 2003, found that 77% of those who had abortions were housewives who had husbands, only 12% by young women. Most abortions performed by Indonesian women are indicated to be unsafe abortions (Yendi Amalia, 2010). Based on a 2006 WHO report, this number increased to 2.3 million cases per year. It is assumed that there are 6,301 cases every day or 4 incidents every second. Research by the Women's Health Foundation in 2006 stated that 87% of abortionists are wives and mothers, while 15-20% are young women.

The varied figures above show that they do not reflect the real situation. This is because the respondents sampled in the study were small and not widely distributed. In addition, respondents were less honest and transparent in answering the questions posed by the researcher because of the assumption that abortion is a criminal act or a personal disgrace that must be kept secret.

The reasons why women have abortions are varied, but the most common reason is non-medical. In the United States, the reasons why women have abortions include the following: 1). Not wanting to have children for fear of interfering with career, school or other responsibilities (75%). 2). Not having enough money to care for and send the child to school (66%). 3). Not wanting to have children without a father (50%). Such reasons are also justified by Indonesian women who convince themselves that killing the fetus in their womb is permissible and right. All of these reasons are actually unfounded, on the contrary, they only show a woman's indifference and selfishness.

This data is also supported by the study of Aida Torres and Jacqueline Sarroch Forrest (1998) which states that only 1% of abortion cases are caused by rape, 3% because it endangers the life of the mother, 3% because the fetus will grow sesius body defects, while 93% of abortion cases are caused by reasons that are for self-interest (www.genetik2000.com).

In terms of the differences between abortions performed by married and unmarried women, the following reasons can be categorized:

1. For unmarried women, the reasons for having an abortion include being a teenager, their boyfriend not taking responsibility, fear of their parents, being a widow who got pregnant out of wedlock, and being someone's mistress who was forbidden to get pregnant by her partner.
2. In married women, the reasons include contraceptive failure, birth spacing that is too close, too many children, too old to give birth, socio-economic factors (no longer able to pay for their children and worried that the children's future is not guaranteed), medical reasons, being in the process of divorce from their husbands, or because they are second wives and their husbands do not want children from them (Atlas Hendartini Habsjah, 2001).⁸

From the reasons given, it appears that most abortions are not just the result of a woman's pure will, meaning that they are very varied. She had an abortion because she was afraid of social risks, afraid of other people (husband or parents and family), family coercion, family conditions that made her afraid to have more children and other reasons.

After issuing the Health Act, the Government then issued implementing regulations of the Act related to abortion, namely Government Regulation No. 61 Year 2014 on Reproductive Health in PP Reproductive Health there are changes or additions to the regulations regarding the legalization of abortion on indications of medical emergencies and pregnancy due to rape, which had previously been regulated by the Health Act. The changes or additions to the regulation are:

- a. There is an expansion of the meaning of abortion. In the Health Law, the sentence abortion of pregnancy due to rape can cause psychological trauma for rape victims. While in the PP on Reproductive Health there is a change of sentence to abortion

⁸ Moh. Saifulloh Abortion and its Risks for Women (in view of Islamic law), pp. 17

- due to pregnancy as a result of rape. The phrase "which can cause psychological trauma to rape victims" is not included.
- b. There is a change in the day limit for the rape pregnancy abortion requirement. In the Health Law, abortion due to pregnancy caused by rape can be done before 6 (six) weeks or 42 days counted from the first day of the last menstruation. Meanwhile, the Government Regulation on Reproductive Health states that abortion due to pregnancy resulting from rape can only be done if the gestational age is at most 40 days from the first day of menstruation.
 - c. There is no affirmation of the performer of abortion. In the Health Law, it is only mentioned that abortion is performed by health workers who have the skills and authority that has a certificate issued by the Minister. Meanwhile, the Government Regulation on Reproductive Health emphasizes that abortion can only be performed by doctors who have received abortion training accredited by the Government.
 - d. There are additional requirements for an abortion eligibility team. The Health Law does not include a requirement for an abortion eligibility team. The Regulation on Reproductive Health requires that the abortion eligibility team determine indications of medical emergencies. In determining the indication of a medical emergency, the abortion eligibility team must conduct an examination in accordance with the standards. Then based on the results of the examination, the abortion eligibility team makes an abortion certificate.
 - e. There are additional requirements for counseling by counselors. The Health Law does not include requirements for counseling by counselors. Meanwhile, the PP on Reproductive Health requires that abortion can only be done after counseling. The counseling includes pre-action counseling and post-action counseling conducted by the counselor.
 - f. There are additional requirements for a doctor's certificate, statement of the investigator, psychologist, and or other experts regarding the alleged rape for abortion due to pregnancy resulting from rape. In the Health Act has not included the requirements of a doctor's certificate, the statement of the Investigator,

Psychologist and or other experts on the alleged rape. While in the PP Reproductive Health required that abortion due to pregnancy as a result of rape can only be done after the pregnant rape victim has a doctor's certificate and a certificate of investigators, psychologists, and or other experts. The certificate must be fulfilled before the maximum gestational age of 40 days calculated from the first day of the last menstruation.⁹

This means that the implementation of abortion issues regulated in Law No. 36 of 2009 Concerning Health, Government Regulation No. 61 of 2014 has been in accordance with the legal instruments but many levels of abortion (abortion) more to abortion *provocatus criminalis* or abortion performed without an indication of medical emergency, because many abortions *provocatus criminalis* done on the grounds of not wanting to have a pregnancy or in other terms called the result of unwanted pregnancy (KTD).

In the case of teenage abortionists, lifestyle changes due to advances in information technology, as well as relationships that are not equipped with knowledge and understanding of reproductive health are the determinants of unwanted pregnancies in pre-marital age. In fact, knowledge about the reproductive process obtained from school/campus is less comprehensive or piecemeal, even mixed with popular knowledge or myths obtained from peers, parents, mass media, magazines, blue movies, or the internet. This condition certainly has implications for irresponsible attitudes and behaviors regarding the reproductive process such as unplanned marriage (*married by accident*), promiscuity (pre-marital sex), and sexual violence during the dating period. The taboo culture to discuss sexuality and reproductive issues also contributes to this case.

When a teenager experiences an unwanted pregnancy, either due to promiscuity or rape, she will experience psychological pressure from herself, people forbid marriage

⁹ Martha, Aroma Elmina Martha and Singgih Sulaksana (2019). Legalizing Abortion. Yogyakarta: UII Press, 2019. Pages. 14-16

while she is still in school if this happens then she will be expelled from school and prohibited from continuing her studies. Thus, abortion is the only option for teenagers who get pregnant out of wedlock.¹⁰

4. Legal Consequences for Abortion Offenders

The laws governing abortion, namely the Criminal Code (KUHP) and Law No. 36/2009 on Health, as stipulated in the following Articles: Article 346 of the Criminal Code (KUHP) A woman who intentionally causes a miscarriage or terminates her pregnancy or causes another person to do so, shall be punished by a maximum imprisonment of four years.

The subject is a pregnant or expectant woman. It does not matter whether the woman has a legal husband or not. From the title of Chapter XIX, crimes against the soul, it means that the unborn child is already a soul or, more precisely, is still alive. The female perpetrator of this crime can be a sole perpetrator and can also be a perpetrator in the framework of participation as interpreted from the formulation: or orders another person in this case the woman can be an orderer, participant-perpetrator, actor-mover or main perpetrator where the others are successively: the ordered, the driven participant or the helper. If Article 346 applies to the woman, then Article 348 applies to the person ordered (unless there is absolutely no fault on his part).

Thus, aborting a pregnancy must be read as aborting a living pregnancy. Aborting here is removing by force (*abortus provocatus*). Because this crime is called "*abortus provocatus criminalus*" if the womb is forced out and at the time it comes out it is still alive, while what is meant by killing the womb is that the womb is killed while still in the woman's body. Removing a dead womb is not a crime, even for the safety of the woman the dead womb must be removed.

¹⁰ Mufliha Wijayanti, Abortion Due to Unwanted Pregnancy: Contestation Between Pro-Live and Pro-Choice PPs UIN Susunan Gunung Djati Bandung. pp. 57-58

Article 348 of the Penal Code : 1. Any person who with deliberate intent causes the abortion or the death of a woman with 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, he shall be punished by a maximum imprisonment of seven years.

The subject here is whoever, but in this case it does not include the pregnant woman herself. This is because if the pregnant woman herself is the perpetrator, Article 346, which carries a lesser maximum penalty, applies to her. There is a clear distinction between the pregnant woman herself as the perpetrator and another person as the perpetrator despite the woman's consent. In terms of the application of Article 348, it should be noted that if the woman gives her consent, it is tantamount to the woman having committed Article 346 or Article 349 of the Penal Code.

If a physician, midwife or druggist assists in the commission of the crime described in Article 346, or commits or assists in the commission of any of the crimes described in Articles 347 and 348, the punishments laid down in said Articles may be enhanced with one third and may be deprived of the exercise of the profession in which the crime has been committed.

The subject is the doctor, midwife or druggist. These are special subjects, the acts committed are: a. Assisting the crime mentioned in Article 346; assisting here is within the meaning of Article 56. However, instead of the maximum punishment of four years minus one third, four years plus one third shall be imposed on them. b. Committing the crime mentioned in Articles 347 or 348. In this case the maximum punishment is increased by one third of Article 347 or 348.

Definition of Abortion in Law No. 36 of 2009 on Health Article 75 paragraph (1) of Law No. 36 of 2009 on Health states: The Health Act regulates the issue of abortion which is substantially different from the Criminal Code, according to this Act abortion can be done if there are medical indications. a. Every person is prohibited from performing abortion. b. Prohibition as referred to in paragraph (1) may be excluded based on: 1. Indications of medical emergencies detected early in pregnancy, either threatening the life of the mother

and or fetus suffering from genetic diseases and congenital defects 2. Pregnancy due to rape that can cause psychologic taruma for rape victims.

Article 194 of the Health Law Any person who intentionally performs abortion not in accordance with the provisions referred to in Article 75 shall be punished with imprisonment for a maximum of 10 (ten) years and a maximum fine of Rp.1,000,000,000 (one billion rupiah). Criminal provisions regarding abortion *provocatus criminalis* in Law No. 36 Year 2009 on Health is considered good because it contains general and special preventions to reduce the crime rate of criminal abortion. By feeling such a heavy criminal threat, it is hoped that the perpetrators of criminal abortion will be deterred and not repeat their actions, in the legal world this is referred to as a special convention, namely prevention efforts so that the perpetrators of abortion *provocatus criminalis* no longer repeat their actions.¹¹

IV. CONCLUSION AND SUGGESTIONS.

Conclusion:

There are several reasons for abortion, namely spontaneous abortion and intentional abortion. in spontaneous abortion this can occur due to accidents or chromosomal abnormalities so that this can lose a pregnancy at less than 20 weeks or a fetus weighing less than 500 grams so that miscarriage can occur because the body automatically detects an unsuccessful pregnancy. While in abortion on purpose, there are (2) things, namely from the indication of medical emergencies detected early in pregnancy either threatening the life of the mother or fetus, suffering from severe genetic disease or congenital or irreparable that makes it difficult for the baby to live outside the womb. Then abortion without indication of medical emergency because of the very personal factors in this type of abortion is called *abortus provocatus criminalis*. Nevertheless, this means that the implementation of abortion issues regulated in Law No. 36 of 2009 Concerning Health, Government Regulation No. 61 of 2014 has been in accordance with the legal instruments, but it cannot be denied empirically that many levels of

¹¹ Ida Bagus Made Putra Manohara, Application of Criminal Sanctions for Abortion Offenders According to the Applicable Legislation (Criminal Code and Law No. 36/2009 on Health). ISSN 2528-360X e-ISSN 2621-6159. Volume 3 Number 1 December 2018. pp. 9-12

abortion (abortion) are more to *abortus provocatus criminalis* or abortion performed without an indication of medical emergency, because many abortions *provocatus criminalis* done on the grounds that they do not want to have a pregnancy or in other terms called the result of unwanted pregnancy (KTD), or this is also still very varied. Women who have abortions are afraid of social risks, fear of others (husband or parents and family), family coercion, family conditions that make them afraid to have more children and other reasons.

Advice

The government as a policy maker should be able to see this kind of social conditions, do not let every year the number of abortions performed without going through medical procedures continues to grow, so for that in a regulation or regulation should be emphasized that the regulation should look at the philosophical, sociological and juridical elements.

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