



Ratio Legis Differences in Abortion Provisions in Law Number 36 of 2009 Concerning Health and the Criminal Code

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Abstract

This research seeks to identify, describe, and analyze why the health law regulates abortion for rape victims while under the Criminal Code abortion is illegal and regarded a crime, as well as the abortion provisions for rape victims that should be regulated in the Health Law. In this paper, normative legal research was conducted. This research focuses on the Legis Ratio of Differences in Abortion Provisions in Law No. 36 of 2009 Concerning Health and the Criminal Code. The method utilized is the statutory approach. The findings revealed that the prohibition against abortion, which is a Dutch heritage, is prohibited in the Criminal Code because abortion is regarded antithetical to natural law and cannot be ethically justified in Greek and Roman law. The Health Law is permitted under the condition that there is an indication of a medical emergency and because the pregnancy is caused by rape, taking into account the good name of a woman or her family, if the pregnancy is caused by rape and can cause psychological trauma to the rape victim, including for the victim's unborn child. Nevertheless, the provisions in the health law do not provide legal certainty that the time limit for performing abortions on rape victims is six weeks/forty days from the first day of menstruation; this time is deemed insufficient to provide protection for victims due to the limited time required to obtain consent to allow abortions or not.

Keywords: *Abortion; Criminal Law; Health; Rape Victims; Legis Ratio*

Introduction

Abortion or the scientific term “*Abortus Provocatus*” (Hawari, 2006), is the most common method of terminating an unwanted pregnancy, despite being the most dangerous. Abortion is defined as an act with an attempt to terminate the pregnancy by removing the fetus or embryo before it has the ability to survive outside the uterus, resulting in the death of the fetus.

In 2020, the number of unwanted pregnancies in Indonesia is estimated to be approximately 17,5% based on data from the National Population and Family Planning Agency (hereinafter referred to as BKKBN). It is known that 19,6% of adolescents (aged 14-19) experience unintended pregnancies (hereinafter referred to as KTD), and that approximately 20% of abortions in Indonesia are performed by adolescents (Tunggaldewi & Suprpto, 2021).

The Criminal Code (hereafter referred to as KUHP) of Indonesia classifies abortion as a criminal act, thereby dictating the country's abortion laws. Abortion is expressly prohibited by the Criminal Code, so if it is performed, it can be prosecuted under Article 346, 347, or 348. Article 75, paragraph 1 of Law No. 36 of 2009 concerning Health also forbids abortion, stating that it is illegal for anyone to undergo one. However, in Article 75, paragraph 2, there are several exceptions to the prohibition on abortion, including the right of a rape victim to perform one. This conforms to the principle of *Lex Specialis derogate Lex Generalis*, which states that special laws (*lex specialis*) take precedence over general laws (*lex generalis*).

However, according to Article 75 paragraph (3) of the Health Law, the action described in paragraph (2) may only be taken after undergoing pre-action counseling and/or counseling and concluding with post-action counseling administered by a qualified and authorized counselor.

According to Hasto Wardoyo, the head of the National Population and Family Planning Agency, health workers are extremely cautious when performing abortions, including on rape victims. This is done to prevent future charges, investigations, and legal actions. To legalize abortions that last longer than the gestational age, health professionals typically seek judicial approval. In addition, female victims are often hesitant to obtain legal abortions due to shame or fear of negative stigma from the general public. Therefore, rape victims who are compelled to have abortions visit illegal abortion clinics to terminate their pregnancies (Suhayati & Saputra, 2020).

As an example of an abortion case involving a rape victim in 2018, the Muara Bulian District Court in Jambi sentenced a 15-year-old girl to six months in prison for having an abortion (Mazrieva, 2018). The woman was sentenced for either having an abortion or for having an abortion as a result of her biological sister's rape. The irony is that the woman should have been given protection and the right to have an abortion due to the rape, but she was not because of the laws governing the time limit for having an abortion, namely The Health Law, which stipulates that abortions are permitted if they occur within six weeks of the first day of menstruation. In the meantime, Government Regulation No. 61 of 2014 regarding reproductive health specifies a timeframe of forty days from the first day of the last menstrual period. Why are rape victims who want to have an abortion given a time limit of 40 days or 6 minutes from the first day of their last menstrual period? It's not psychological trauma, as it can be years of trauma, that prevents rape victims from knowing the time limit. Despite the fact that the rape victims did not know they were pregnant at the time.

On the basis of the preceding discussion, it can be concluded that there are overlapping rules in which the Criminal Code prohibits all types of abortion, regardless of whether the pregnancy is unwanted or the result of rape, while the Health Law provides an exception for permitted abortion. In regards to the abortion time limit that is permitted by the Health Law and its subsidiary laws, it provides a time limit of six weeks or 40 days from the first day of menstruation; nevertheless, in practice, rape victims realize they are pregnant after the grace period has passed, and they must acquire a judge's approval before proceeding regardless of whether or not abortion is legal.

According to background, this study aims to understand, describe, and analyze why the health law permits abortion for rape victims while in the Criminal Code abortion is prohibited and considered a crime, as well as the provisions on abortion for rape victims that should be regulated in the Health Law.

Literature Review

Legal Protection Theory

In the big Indonesian dictionary (KKBI), the word protection is derived from “*lindung*”, which means to protect, prevent, defend, and fortify. While security entails conservation, upkeep, surveillance, refuge, and bunkers. Protection typically entails shielding something from harm, whether it be interests, objects, or commodities. Additionally, protection encompasses the concept of a weaker individual receiving protection from a stronger individual. Consequently, legal protection can be interpreted as protection by law or protection through the use of legal institutions and means. In contrast, the legal definition of legal protection encompasses all conscious efforts made by every individual, as well as government and private institutions, to secure, control, and fulfill the well-being of life in accordance with existing human rights as outlined in Law No. 39 of 1999 on Human Rights. According to Wahyu (2007), there are two different kinds of legal protection:

- 1) Legal subjects have the opportunity to file objections or opinions prior to the finalization of a government decision under preventive legal protection. We must avoid conflicts. Preventive legal protection encourages the government to exercise caution when making decisions based on discretion; therefore, preventive legal protection is essential for government actions based on freedom of action. Preventive legal protection is not expressly governed in Indonesia..
- 2) What restrictive legal protection entails the purpose of restrictive legal protection is to settle conflicts. The administration of legal protection by General Courts and Administrative Courts in Indonesia falls under this category. The principle of legal protection against government actions derives from the concept of the recognition and protection of human rights because, according to the history of the west, the conception of concepts regarding the recognition and protection of human rights seeks to establish limitations and community obligations for the government as well. The rule of law is the second concept underlying legal protection against government actions. The recognition and protection of human rights occupy a central position and can be related to the goals of the rule of law.

Legal Certainty Theory

According to Sudikno Mertokusumo (2007), legal certainty is the assurance that the law will be enforced, that those entitled by law will be able to obtain their rights, and that judgments will be carried out. Despite the close relationship between legal certainty and justice, law and justice are not synonymous. The law is universal, obligatory, and generalizing, whereas justice is individualistic, subjective, and not generalizing (Hutabarat et al., 2022). Legal certainty is the implementation of the law in accordance with its intent, giving the community confidence that the law will be executed. Legal certainty is closely related to positive legal instruments and the state's role in implementing it through positive law (Sudikno, 2007). This connection must be taken into account when attempting to comprehend the worth of legal certainty.

Legal certainty requires efforts to control law in legislation made by authorized and authoritative persons, so that these regulations have a juridical component that ensures the law functioning as a must-obey rule (Wantu, 2012).

Criminal Act of Rape

Rape is among the most heinous acts of violence. Rape's defining characteristic is that it is not primarily an expression of sexual aggression (violence), but rather a sexual expression of a (violent) aggression (sexual expression of aggression). There are even those who believe that rape falls under the

category of sexual assault or sexual harassment. According to Arief osita, rape manifests itself through the following behaviors: (Wahid et al., 2001)

- 1) The victim of a rape must be a woman of any age. While a man is being raped by a female.
- 2) The victim must have been physically attacked or threatened with physical harm. This suggests that the victim does not concur with the perpetrator's aims and behavior.
- 3) Sexual relations outside the marriage bond are achieved by committing acts of violence or making threats of violence against specific women. In reality, there are marriages in which sexual activity is coerced by violence, causing mental and physical suffering. Even if this conduct caused the victim pain, it cannot be characterized as a crime because the random perpetrator did not intend for it to be a crime in advance.

Abortion

In etymologi perspective, abortion comes from the word “abort” which means “*ugur*”. While abortion or abortion is extending or extending. The difference in abortion lies in the presence or absence of the element of pleasure. In this case, giving birth is a pleasure to deliver the fetus while the release of the fetus is not enjoyed before it's time to give birth. Abortion cannot be separated from the attention of doctors, health experts and other medical personnel because it involves the baby/ fetus who is in the womb and the safety of the mother's life (Alimun, 2010).

In the medical world, there are several types of abortion, namely: (Susanti, 2012)

- a. Spontaneous/natural abortion or spontaneous abortion is continuous without any action. Most are caused by the lack of good quality of egg cells and sperm cells.
- b. Artificial/sensible abortion or criminal abortion is the termination of a pregnancy before the gestational age of 20 min or the fetal weight is less than 500 ram as a result of actions that were enjoyed and realized by both the mother or the midwife (in this case the midwife or midwife).
- c. Therapeutic/medical abortion or abortion provocatus therapeuticum is an artificial extraction of content that is performed on medical indications. For example, a mother who is pregnant but has a chronic high blood pressure disease or a severe mental illness that can harm both the mother and the fetus she contains. But this is all for serious medical considerations and is not rushed.

Victim

According to Stanciu as quoted by Teguh Prasetyo (2011), Victims of crime what is meant by victims in a broad sense are people who suffer the consequences of injustice. Stanciu further stated that there are two basic (inherent) characteristics of the victim, namely suffering (suffering, and injustice). Furthermore, the victim is someone who has suffered harm as a result of crime and/or a sense of justice as a result of harm as a crime target (a victim is a person who has suffered damage as a result of a rime and/or whose sense of ustice has been directly disturbed by experience of having been the target of rime) (Sunarso, 2012).

Government Regulation Number 3 of 2002 Article 1 section 3 and Article 1 section 5 of the UUKKr defines victims as follows: “a company or group of people who suffer physical, mental, or emotional suffering, economic loss, or experience deprivation their basic rights, as a result of serious violations of human rights, including victims and their heirs.” (Yulia, 2016).

According to the rime Dictionary dictionary, the definition of victim is as follows “person who has injured mental or physical suffering, loss of property or death resulting from an actual or attempted criminal property othermittede anom , or resulting in death for minor acts or attempts carried out by

perpetrators of criminal acts and others). Furthermore, according to ohen, the victims are: “ Whose pain and suffering have been neglected by state while it spends immensely resources to hunt down and punish the offender who is responsive for that pain and suffering” (Sunarso, 2012).

Legislation

Bagir Manan argues that the existence of legislative regulations and the activity of drafting drafts (legislation) play a crucial and strategic role in the administration of government as the primary support (Manan, 2004). This is due to several factors, including: (Al Atok, 2015)

- a. Legislative regulations are legal rules that are easy to identify (identify), easy to find and easy to trace. As a written rule of law, the form, type and place are clear, as well as the maker;
- b. Legislative regulations provide legal certainty that is more real because the rules are easy to identify and easy to find again;
- c. The structure and systematics of the legislative regulations are clearer so as to allow them to be re-examined and tested both in formal terms and in their content;
- d. The formation and implementation of legislative regulations can be planned. This factor is very important for countries that are currently building, including building a new legal system that is in accordance with the needs and developments of the community.

In Jimly Asshiddiqie's view (2014), the meaning of legislative regulations is the overall hierarchical arrangement of legislative regulations in the form of circulars downwards, namely all legal products that involve the role of the people's representative institutions alongside the government or which involve the government's role due to its political position within the legislature. whose respective levels are determined by the people's representative institutions in conjunction with the government (Al Atok, 2015).

Research Methods

In this study, the research conducted normative legal research. This research examines the Legis Ratio of Differences in Abortion Provisions between Health Law No. 36 of 2009 and the Criminal Code. The method utilized is the statutory method. This document utilizes primary, secondary, and tertiary legal sources, namely:

- 1) Primary Legal Materials, namely:
 1. Law No. 1 of 1946 concerning the Criminal Code (KUHP).
 2. Law No. 36 of 2009 concerning Health.
- 2) Secondary Legal Materials, namely:
 1. Literature books;
 2. The results of scientific writing; and
 3. Search on the internet.
- 3) Tertiary Law Materials, namely:
 1. Black's Law Dictionary; and
 2. Big Indonesian Language Dictionary (hereinafter referred to as KBBI)

In the technique of obtaining legal materials, which includes primary legal materials, secondary legal materials, and tertiary legal materials, this research is a literature review of the required legal materials, which will be identified and classified in order to analyze and solve problems. The above-

mentioned technique for collecting legal materials is obtained from the Central Library of Universitas Brawijaya, the Center for Legal Documentation and Information (henceforth PDIH) of the Faculty of Law at Universitas Brawijaya, Personal Collection, and internet research. After obtaining the legal materials, the author will conduct a descriptive analysis of them. Descriptive technique is the initial step in analysis because it is a fundamental technique of analysis that cannot be avoided. Descriptive technique entails describing the nature of a condition or legal position.

Results and Analysis

A. Ratio Legis Differences in Abortion Provisions in Law No. 36 of 2009 concerning Health with the Criminal Code

Abortion is an ancient practice in human history. Abortion remains a contentious issue in the human conscience, whether on a theoretical or a practical level. Before an ethical judgment on the practice of abortion can be made, the underlying causes of abortion must be thoroughly examined. Regarding the Abortion Law in Indonesia, the following abortion-related statutes are currently in effect:

1. Abortion in Law Number 1 of 1946 concerning the Criminal Code

The Criminal Code (hereinafter referred to as KUHP) governs a variety of crimes and infractions. Abortion is one of the offenses regulated by the Criminal Code. The abortion provisions can be found in Chapter XIV of the second book of the Criminal Code concerning crimes against morality (particularly article 299). On crimes against life, Chapter XIX of the second book of the Criminal Code (especially articles 346, 347, 348, and 349). The article is formatted as follows:

In accordance with paragraph (1) of article 299 of the Criminal Code, participants in criminal acts are equated to perpetrators. In the explanation of Article 299, paragraph (1) of the Criminal Code, R. Soesilo argues that the purpose of "being treated" includes massage. The fourth and fifth elements are the phrases "informed or expressed hope that the pregnancy can be terminated as a result of the treatment."

According to Nyowito Hamdani, a woman does not need to be pregnant in order to qualify under article 299; she only needs to feel pregnant. The important thing is to give or raise hope that the pregnancy can be terminated as a result of the treatment, regardless of the efficacy of the medicine administered; a cup of water infused with a spell suffices (Al Atok, 2015).

Contrary to R. Soesilo, who argues that Article 299 paragraph (1) of the Criminal Code requires proof that the woman is actually pregnant, it is not necessary to assume that she died or died as a result of treatment. According to the author, it must first be established whether or not the woman is pregnant, as an abortion on a non-pregnant woman clearly does not satisfy the requirements of Criminal Code Article 299, paragraph (1). Consequently, content is not disturbed.

Examined in conjunction with articles 346, 347, 348, and 349 of the Criminal Code pertaining to Crimes Against Life, the crime of abortion in this article includes "aborting the womb" and "killing" or "switching off the womb." According to the article, the following are their names: (Al Atok, 2015)

- 1) Article 346: A woman who willfully induces an abortion or the death of her fetus, or directs another person to do so, faces a maximum of four years in prison.
- 2) Article 347: (1) Whoever willfully causes the abortion or death of a woman without her consent is subject to a maximum of twelve years in jail. (2) If a woman dies as a result of this act, she is punished to a maximum of fifteen years in jail.

- 3) Article 348: (1) Whoever intentionally or knowingly induces the abortion of a woman with her consent shall be condemned to a maximum of five years and four months in prison. (2) If a woman dies as a result of this crime, she is punished to a maximum of seven years in jail.
- 4) If a doctor, midwife, or pharmacist is found guilty of aiding in the commission of the crime described in Article 346 or is found guilty of aiding in the commission of the crime described in Articles 347 or 348, the penalty described in Article 349 may be raised by one-third and he may be removed from his position.

There is no clarification about the definition of content in the Criminal Code. Even the Criminal Code does not explain the distinction between abortion and murdering (switching off) the womb. While the substance that can be equated with humans is a pure fetus since it has exhibited signs of life and life, the content that can be equated with animals is a sperm (according to Islamic teachings). Regarding the substance of paragraphs 346 to 348 of the Criminal Code, the word killing (deadly womb) refers to this pure fetus. Only pure fetuses (fetuses aged 16 to 40 weeks in the womb) that have been alive and exhibit evidence of life such as blood circulation, heart rate, and fetal movement can move in the womb (Suryono, 2001).

Wila Chandrawila Supriyadi asserts that the Criminal Code prohibits abortion for any reason and by any individual (Supriyadi, 2003). Since its promulgation by the Dutch East Indies government until the present day, this provision has not been modified, and it applies to anyone who engages in this conduct, including physicians. This provision imposes a legal obligation on anyone who engages in this conduct (*Lex Generali*).

Nevertheless, as noted by Hermien Hadjati Koeswadji (1976) that there are direct changes in society (such as the actualization of the implementation of laws and regulations) that are closely related to the legal requirements of developing communities. This shift reflects a shift in the public's perception of the values, attitudes, and behaviors of the community in relation to the prevalent norms. Regulations containing norms (written in the form of laws or other provisions).

In practice, doctors are required to perform abortions based on medical indications in order to save the mother's life due to the prohibitive nature of the law against unqualified abortions. According to Soerjono Soekanto, there are legal exceptions commonly referred to as *buitewettelijke strafuitsluitingsgronden*. If the following conditions are met, the *wederrechtelijkheid* of these actions can be neutralized: (Soekanto, 2007)

- 1) Performed on the basis of health indications;
- 2) There is informed consent; and
- 3) Done professionally and in good faith.

Based on these conditions depenalization may occur instead of decreminimization (Soge, 2002). The regulation of abortion provocatus in the Criminal Code, which is a Dutch-era relic, is contrary to the legal basis and politics, namely "to protect the entire Indonesian nation and to promote public welfare based on Pancasila and the 1945 Constitution", because it prohibits provocative abortion without exception. This is considered to be extremely burdensome for the medical community, which is required to perform illegal abortions in order to save the mother's life. Doctors, midwives, nurses, and other medical personnel can be charged with breaking the law and face the possibility of imprisonment if Article 349 of the Criminal Code is strictly applied. Even though an abortion could have been performed to save the mother's life. Therefore, there is a need for a new statutory regulation that provides medical personnel with a high level of legal protection in the performance of their duties. The need for new legislation is met by Law No. 23 of 1992 pertaining to Health.

Article 15 of Law No. 23 of 1992 concerning health states: (1) In an emergency, certain medical measures may be taken to save the life of a pregnant woman and/or her fetus. Clarification of Article 15 of Law No. 23 of 1992 indicates that medical action in the form of the use of the womb (abortion) is prohibited for any reason, but is permitted in the event of an emergency to save the life of the mother and/or the fetus it contains.

Looking at the formulation, it is clear that Law no. 23 of 1992 adheres to criminal provocatus abortion with the exception of abortion provocatus terapeutikus; the Act's regulations regarding provocative abortion services are extremely limited. Because it is only permissible if the mother's life is in imminent danger. Some people, particularly women's rights groups, believe that the regulations regarding provocative abortion in Law no. 23 of 1992 must be revised in order to improve the quality of life for women and as a result of the State of Indonesia's approval of the results of the 1994 ICPD conference and the 1995 Beijing declaration on reproductive health.

According to the history of the Health Law Amendment Bill, this is because the Criminal Code prohibits abortion without exception and considers it a crime, so it is insufficient to protect women. In addition, the Health Law Amendment was founded on Indonesia's approval of the results of the 1994 Cairo ICPD Conference and the 1995 Beijing FWCW. The abortion provocateur regulation in Law No. 23 of 1992 is so limited that it is considered out of step with the times and technology. On October 13, 2009, with the support of pro-choice groups such as POGI and YKP, the Bill on Amendment to the Health Law became Law No. 36 of 2009. After being ratified, the law remained controversial due to a provision that permitted abortions for rape victims.

2. Abortion in Law Number 36 of 2009 concerning Health

The Criminal Code expressly criminalizes abortion, but the Indonesian Law Number 36 of 2009 Concerning Health makes an exception to this prohibition (Health Law). On the basis of the principle *lex specialis derogat legi generalis*, the specific provisions for the exclusion of the abortion ban in the Health Law trump the general provisions on the abortion ban in the Criminal Code.

Article 75, paragraph 1, of the Health Law prohibits abortion in the same manner as the Criminal Code, stating: "It is forbidden for anyone to have an abortion." There are, however, exceptions to the abortion ban as outlined in Article 75 paragraph (2), such as the exception to the abortion ban for rape victims who become pregnant as a result of rape, as outlined in Article 75 paragraph (2) letter b of the Health Law. The fact that pregnancy "can cause psychological trauma" for a rape victim should be emphasized. In this instance, it is crucial to be aware of the provisions of Article 75, paragraph 3, which state: "An abortion may only be performed after pre-action counseling and/or advice, followed by post-action counseling by a competent and authorized counselor."

The criminal provisions regarding abortion provocatus criminalis in the health law are regarded as positive because they contain both general and specific safeguards to reduce the number of abortion-related crimes. By feeling such a grave criminal threat, it is hoped that abortionists will be deterred and refrain from repeating their actions; in the legal world, this is referred to as special prevention, i.e., efforts to prevent criminal provocatus abortionists from repeating their actions. In contrast, prevention typically applies to members of the community because they carefully consider it prior to having an abortion, rather than being subject to the extremely severe criminal sanction. Legislators anticipate that this general and special prevention will reduce the number of provocative abortion crimes in Indonesia.

Abortion is a component of reproductive health. In accordance with Article 70, paragraph 1 of the Health Law, reproductive health is a state of complete physical, mental, and social health, and not merely the absence of disease or disability relating to the reproductive system, function, and process in men and

women. Reproductive health includes women's reproductive health. Article 70, paragraph 2 of the Health Law defines reproductive health as including: a) during pregnancy, pregnancy, childbirth, and after childbirth; b) regulation of pregnancy, contraceptives, and sexual health; and c) health of the reproductive system. The Rhode Island Human Rights Law Number 26 of 2000 regulates women's rights, including the guarantee of reproductive rights, as stated in Article 49, paragraph 3. Article 72 of the Health Law recognizes that all individuals have reproductive rights. The law protects reproductive rights as part of human rights.

The establishment of law no. 36 of 2009 on health is based, among other things, on the following five guiding principles:

- 1) First, health is a human right and is an element of well-being.
- 2) Second, efforts to maintain and improve public health must be carried out based on non-discriminatory, participatory and sustainable principles.
- 3) Third, health is an investment for the country's development,
- 4) Fourth, health is the responsibility of all parties, both the community and the government.
- 5) Fifth: Law no. 23 of 1992 concerning Health is no longer in accordance with developments, demands and needs for the community so that it needs to be revoked and replaced with a new law.

The law is implemented based on the following principles: the principle of humanity, balance, benefits, protection, respect for rights and obligations, justice, gender, non-discrimination and religious norms.

This health law was enacted with the hope that everyone would get the knowledge, motivation, and resources to lead healthier lives, hence Law no. 23 of 1992 was later replaced by Law no. 36 of 2009 specifically relating to safe abortion for rape victims contained in Article 75 paragraphs 2b, 76, 77 and 194 is seen by some people who are pro against abortion as a form of protection of reproductive rights and to improve women's quality of life, because reproductive health is also is a human right of every woman, especially for rape victims who have experienced psychological trauma, the article also refers to Indonesia's agreement at the 1994 Cairo ICPD conference and the 1995 Beijing declaration, with the existence of this article it is hoped that it will fulfill the need to protect women from unsafe abortions/illegal can result in death.

As the provisions of these articles for rape victims who are pregnant, abortion provisions are regulated in article 75 paragraph 2b in that article it is explained that "abortion can be carried out for rape victims who experience psychological trauma". Unfortunately, the article does not explain how the criteria for proving rape victims are allowed to have an abortion by health workers and then how to find out if a woman is a rape victim or not, but an adulteress who abuses the provisions of the article. Furthermore, in Article 76 it is explained that "the act of abortion can only be carried out before six weeks of pregnancy is calculated from the first day of the last menstruation". This means that after the gestational age of more than six weeks for a rape victim who is pregnant, the abortion cannot be carried out, which is the problem in the provisions of this article, what if the pregnancy due to rape is found out after exceeding this provision, considering that the gestational age of six weeks is still very early.

From this basis, it is clear that there is no clause related to the time limit for having an abortion for a rape victim that results in pregnancy. The provision related to the time limit actually appears in the minutes of the decision-making meeting on the Bill on Health, which is related to the issue of abortion because the old Health Law did not specifically use the term abortion, but used the word certain medical actions. In practice, it is difficult to distinguish between clear boundaries when certain medical actions are

carried out in saving the life of the mother or fetus in an emergency or not in an emergency. In addition, there are differences of opinion regarding the use of the term certain medical procedures associated with the term abortion. The use of the term fetus is confusing when it is associated with the gestational age at which certain medical procedures are allowed. To emphasize that it does not lead to multiple interpretations, the regulation of the new Health Bill clearly states that everyone is prohibited from having an abortion. The prohibition is excluded based on medical emergencies detected at an early age in pregnancy and pregnancy due to rape which can cause psychological trauma to the victim. This bill also stipulates requirements for abortion to be carried out, among others, before the pregnancy is 6 weeks old, it can only be carried out by health workers who have the authority with the consent of the pregnant woman and the husband's permission.

Then in the report of the Chairman of Commission IX, Dr. Ribka Tjiptaning said that although she believed that the regulation of the substance of abortion in the Health Bill was the most likely solution for several exceptions related to abortion (Fat, 2009). Commission IX fully understands that pregnancy due to rape can cause psychological trauma for rape victims, including the unborn baby in the victim's womb. A woman's body and mind needed to be ready for an abortion, though. Therefore, Article 76 paragraph (3) stipulates that the exception can only be made as long as it has gone through counseling, both pre-action and post-action carried out by competent and authorized counselors. Against the concerns of various parties related to the exception for medical emergencies it will be misused by irresponsible parties. Commission IX has tried to anticipate this. Article 76 paragraph (2) letter a has clearly regulated the limits for indications of medical emergencies. With the inclusion of these provisions in the trunk of the Health Bill, it is no longer in the explanation. It is hoped that these concerns can be put aside.

However, in the discussion of the limitation or exclusion of permitted abortion why the reasons given within 6 weeks were not found in either the academic text or the minutes of the decision-making meeting related to the discussion of the Bill on Health. The irony is that the provisions that are supposed to protect rape victims that result in pregnancy are actually when they experience psychological trauma who want to have a late abortion with a 6-week timeframe and need to do counseling again within 6 weeks from the first day of menstruation. Even the rape victim herself found out she was pregnant after finding out that her period was late. Therefore, the existing provisions related to the time limit for rape victims do not provide legal certainty for rape victims.

- a. First, that the law is positive, meaning that legislation is the positive law.
- b. Second, that the law is founded on facts, or is grounded in reality.
- c. However, the facts must be written clearly so as to avoid misunderstandings in addition to being straightforward to apply.
- d. Fourth, positive law is difficult to amend.

Gustav Radbruch's opinion is based on his view that legal certainty is certainty about the law itself (Radbruch, 2006). Legal certainty is a product of law or, more specifically, of legislation. Then also in relation to Sudikno Mertokusumo's perspective on certainty in terms of the time limit for abortions that may be performed on rape victims, namely that legal certainty is a guarantee that the law is implemented, that those entitled under the law can obtain their rights, and that decisions can be implemented (Mertokusumo, 2012). Despite the tight relationship between legal certainty and justice, law and justice are not synonymous. The law is universal, mandatory, and generalizing, whereas justice is individualized, subjective, and not generalizing. Legal certainty is the implementation of the law in line with its intent, giving the community confidence that the law will be executed. To appreciate the usefulness of legal certainty, one must comprehend its tight relationship with positive legal instruments and the role of the state in implementing it in positive law.

B. Abortion provisions that should be regulated in the Law on Health for rape victims

In fact, abortion is a practice that exists in the midst of society, from ancient times until now humans need this abortion service/the practice of abortion has been going on for as long as humans interact and reproduce, history records that abortion has been carried out since the beginning of human civilization. A number of reliefs behind the Borobudur Temple (Central Java) and Ankor Watt (Cambodia) depict the practice by placing stones on the surface of a woman's stomach (Hui, 2007).

If the provisions regarding the time limit for having an abortion by a rape victim in the Health Law and its implementing regulations are 40 days from the first day of menstruation, it is referred to from the provisions of Islamic law, namely in Sahih Bukhari, the Book of Bad' al-Khalq, namely "...From Abdullah ibn Mas'ud : "The process of human occurrence is firstly a seed that has been fertilized in the mother's womb for 40 days, then it turns into 'alaqah which takes 40 days, then turns into mudgah which takes 40 days. After that, Allah sent an angel who was ordered to write down four things, namely about his deeds, his sustenance, his death, and his fate of misfortune or danger which the spirit then breathed on him..." (Fatmawati, 2016) then it should be a justifiable concept if a rape victim who is pregnant if she wants to have an abortion is at the time before the fetus turns into mudgah, that is, at the time before the fetus had bones and was still a lump of flesh (*alaqah*) (Jauhari, 1922). This means that before the spirit is breathed into the fetus, and before the bones are formed into the body of the unborn baby, abortion may be performed.

In Islamic law, abortion is only allowed for indications of a medical emergency. While other reasons are not justified as the reasons in the Health Law against rape victims who want to have an abortion. Apart from this view, Indonesia is a state of law. The law used is written law as stated in the legislation. Even if referring to the health law related to abortion for rape victims, it is actually allowed, meaning that the legal system in force in Indonesia is written law as stipulated in the legislation.

The legalization of abortion for rape victims aims to protect the future of rape victims. To avoid psychological trauma and the social burden of rape victims. This reason is also used as an argument for advocates of legalizing abortion as the realization of human rights enforcement. Women who are rape victims also have the freedom to determine something for themselves, especially regarding an unwanted pregnancy that will have a social and psychological impact. If a woman who is a rape victim wants to have an abortion, it is only because they also have the human right to determine their personal life which is free from psychological and social pressures due to the unwanted pregnancy. With the reason to protect the human rights of women who are rape victims, and to protect their future. While the fetus in the woman's womb also has the right to live, it needs to be protected. There is a conflict between the interests of protecting the human rights of the fetus that will grow in the womb and the rights of the mother who wants to be free from psychological and social burdens. On the other hand, Islam is not a rigid religion, but a dynamic one, which views human life from various angles, so that solutions to the problems faced by humans can be found. Referring to medical science. Abortion is divided into two, namely: (Zh, 2013)

- 1) Spontaneous abortion (*Abortus Spontaneus*), namely abortion that occurs without any element of external action, occurs by itself and is usually called a miscarriage.
- 2) Artificial abortion (*Provocatus abortion*), namely abortion that is done intentionally with a specific purpose. *Provocatus abortion* is performed based on:
 - a. Medical indications are eliminating pregnancy to save the mother's life due to indications of heart disease, kidney and other severe liver disease as well as impaired growth and development of the fetus in the womb. Therapeutic abortion *provocatus* is carried out by two

- doctors (one of whom must be a specialist), agreeing that the mental and physical health of the mother or child is threatened or the danger of fetal defects is very serious
- b. Social indications, abortion is carried out for social reasons such as not wanting to have children, pregnancy interval is too short, not ready to get pregnant and unwanted pregnancies. If it is done for non-medical reasons and violates applicable law, it is called Abortus Profocatus Criminalis.

Abortion authorizations for rape victims are restricted only if the abortion is deemed feasible by the abortion eligibility team. Abortion cannot be performed for fabricated reasons, such as pregnancy due to promiscuity and then claiming to be a victim of rape. Just that there are concerns regarding the application of the "complete package" to the lives of Indonesians. Regarding the applicant for an abortion or the respondent for an abortion's integrity. In addition, there are concerns that some individuals exploit this policy to legalize abortion. In other contexts, such as when conducting a feasibility study on abortion, it is feared that bribery and extortion will be carried out by the community in the form of bribes or by government officials (unscrupulous individuals) who actively engage in extortion.

Legally, it is evident that human rights relate to something fundamental to human existence. Human rights are fundamental rights that are inalienable, universal, and enduring. Therefore, it must be protected, respected, and maintained, and no one should disregard, diminish, or remove it. Human rights denote something inherent to humans as a result of both state law and divine provisions (Askandar, 2012).

Baharuddin Lopa asserts that the Universal Declaration of Human Rights (UDHR) also regulates the rights to health and human life (Hasanah, 2009). Regarding the right to life and safety, Article 3 states that everyone has an individual right to life, freedom, and safety (security) (Syahrizal, 2013).

The Human Rights Law No. 39 of 1999 regulates rights, including the right to life, the right to have a family and procreate, the right to develop oneself, the right to obtain justice, the right to personal freedom, the right to security, the right to welfare, and the right to participate in government, women's rights, as well as children's rights. Article 9 (1) of Law No. 39 of 1999 respecting Human Rights provides that everyone has the right to live and retain life, as well as to enhance their standard of living. This provision establishes that the right to life is a God-given, inalienable, fundamental right. In addition, the rights of children are governed by Article 53(1) of the Human Rights Law. According to the article, unborn children have the right to live, maintain life, and improve their quality of life.

Law No. 22 of 2002 on Child Protection also regulates child protection, in conformity with the Human Rights Act. Child protection comprises all activities meant to safeguard and protect children and their rights so they can optimally live, grow, develop, and engage in line with human dignity.

Parents, families, communities, governments, and the state are continuously committed to protect children in order to maintain their rights. Parents have the duty and responsibility to nurture, educate, and safeguard their children. Infringers of the child protection statute are liable to criminal penalties.

Based on the two articles of the Human Rights Law regarding the right to life for everyone, including unborn children, this implies a ban on killing (Wicks, 2012). Moreover, parents are incredibly accountable for maintaining and safeguarding their children from anything that could compromise their future. Because of rape victims, the provision legalizes abortion. The aim of this philosophy is to shield rape victims from psychological disorders and social trauma, as they must bear the risk of pregnancy on their own. With the hope of protecting the future and human rights of rape victims. Although the fetus in the mother's womb has the right to life, it must be safeguarded. The condition is that the fetus already possesses a soul or spirit (An Nakhrawie, 2007). Meanwhile, abortions performed before the fetus has a

soul or spirit cannot be referred to as deaths, because the fetus does not yet have a soul. Notwithstanding, seeking consent from specialists, in this case a physician, to assess the risks that would be caused to rape victims if the abortion is performed before 80 days from the first menstrual period must be regarded from the notion of a time limit for abortion before bone formation (*mudgah*). Specifically, before the third phase of fetal development begins. A competent and authorized counselor must first provide pre-action counseling and/or advise before providing post-action counseling. Consequently, it is obvious that this decision provides rape victims with legal certainty regarding the time restriction for having an abortion and protects them from criminal traps when obtaining an abortion. This is in line with Satjipto Rahardjo's view that legal protection is an attempt to protect an individual's interests by giving him the power to act in accordance with his human rights within the context of his interests (Rahardjo, 2009). Human rights as a notion have historically been conceived in the West with the intention of establishing limits and communal obligations in addition to those imposed by the state, and it is from this that the principle of legal protection against government actions is derived. The second principle that forms the basis of legal protection against acts of the state is known as the rule of law. There is a connection that can be made between the rule of law and the recognition and protection of human rights as one of its goals.

Conclusion

Based on the findings and discussion above, it can be concluded that:

1. In the Criminal Code, the prohibition against abortion which is a Dutch heritage prohibits abortion because in Greek and Roman law abortion is considered contrary to natural law and is morally unjustified. The Health Law is permitted under the condition that there is an indication of a medical emergency and because the pregnancy is caused by rape, taking into account the good name of a woman or her family, if the pregnancy is caused by rape and can cause psychological trauma to the rape victim, including for the victim's unborn child. Nevertheless, the provisions in the health law do not provide legal certainty that the time limit for performing abortions on rape victims is six weeks/forty days from the first day of menstruation; this time is deemed insufficient to provide protection for victims due to the limited time required to obtain consent to allow abortions or not.
2. In order to provide legal protection to rape victims resulting in pregnancy and wanting to have an abortion, it is necessary to regulate the time limit which was originally stipulated in the Health Law within 6 weeks from the first day of menstruation which does not provide protection to the victim due to time constraints, then it should be regulated before the fetus have a spirit or soul, namely before the formation of bones, namely before entering the third phase of the formation of the fetus within 80 days from the first day of menstruation.

Suggestion

As according to the findings and conclusion, following suggestion may be taken into account:

1. It is necessary to revise the time limit for having an abortion for a rape victim that results in pregnancy in the Health Law and its derivative regulations in order to protect the rights of rape victims.

References

- Al Atok, A. rosyid. (2015). *Konsep Pembentukan Peraturan Perundang-Undangan*. Malang: *Setara Pers*.
- Alimun, H. (2010). *Pengantar Kebutuhan Dasar Manusia: Aplikasi Konsep dan Konsep Keperawatan*. Jakarta: Salemba Medika.

- An Nakhrawie, srifin. (2007). *Adzab Kubur Antara Ada dan Tiada. Surabaya: Ikhtiar.*
- Askandar, N. C. (2012). 'Hak Untuk Hidup' dalam Kajian Islam dan Hak Asasi Manusia. *Jurnal An-Natiq, Universitas Islam Malang, 54.*
- Asshiddiqie, J. (2014). *Pengantar Ilmu Hukum Tata Negara, Ed.1, Cet. 6.* (1st ed.). Rajawali Pers.
- Fat. (2009). DPR Sahkan RUU Kesehatan. *HukumOnline.Com.*
[https://www.hukumonline.com/berita/a/dpr-sahkan-ruu-kesehatan-hol23142/?page=1.](https://www.hukumonline.com/berita/a/dpr-sahkan-ruu-kesehatan-hol23142/?page=1)
- Fatmawati, F. (2016). Aborsi dalam Perspektif Hukum Islam (Meluruskan Problema Perempuan di Mata Publik). *AL-MAIYYAH: Media Transformasi Gender Dalam Paradigma Sosial Keagamaan, 9(1), 151–163.*
- Hasanah, U. (2009). Human Rights in The Perspective of Islamic Law. *Indonesian J. Int'l L., 7, 716.*
- Hawari, D. (2006). Aborsi Dimensi Psikoreligi. *Jakarta: Fakultas Kedokteran Universitas Indonesia.*
- Hui, Y. B. (2007). *Diary of "a mass of stones": Borobudur in people's experiences.*
- Hutabarat, D. T. H., Fransisca, Z., Ritonga, F., Pardede, D. J., Almas, S., Sikumbang, N. A., Mutiara, Khoiriyah, A., Hamizah, S., Malahayati, & Suryadi. (2022). Understanding And Describing Relationship Of State Law And Human Right. *Journal of Humanities, Social Sciences and Business (JHSSB), 1(1), 65–72.* [https://doi.org/https://doi.org/10.55047/jhssb.v1i1.63.](https://doi.org/https://doi.org/10.55047/jhssb.v1i1.63)
- Jauhari, T. (1922). *al-Jawahir fi Tafsir al-Qur'an. Tehran: Intisharat Aftab, Nd, 25, 55.*
- Koeswadji, H. H. (1976). Law and development: The legal status of women in Indonesia, their role and challenge in creating a new national law. *Malaya L. Rev., 18, 339.*
- Manan, B. (2004). *Hukum Positif Indonesia. Yogyakarta. FH UII Press.*
- Mazrieva, E. (2018). Vonis Korban Perkosaan yang Gugurkan Kandungan di Jambi, Dikritik Tajam. *VOA Indonesia.* [https://www.voaindonesia.com/a/vonis-korban-perkosaan-yang-gugurkan-kandungan-di-jambi-dikritik-tajam/4493385.html.](https://www.voaindonesia.com/a/vonis-korban-perkosaan-yang-gugurkan-kandungan-di-jambi-dikritik-tajam/4493385.html)
- Mertokusumo, S. (2012). *Teori hukum. Yogyakarta: Cahaya Atma Pustaka.*
- Prasetyo, T. (2011). *Hukum Pidana, Edisi revisi.* Rajawali Pers PT. Raja Grafindo Persada.
- Radbruch, G. (2006). Five minutes of legal philosophy (1945). *Oxford Journal of Legal Studies, 26(1), 13–15.*
- Rahardjo, S. (2009). *Penegakan Hukum: Suatu Tinjauan Sosiologis.*
- Soekanto, S. (2007). *Faktor-faktor yang mempengaruhi penegakan hukum.*
- Soge, P. (2002). Aborsi Dari Perspektif Sejarah Hukum. *Keadilan Dan Perdamaian, 22(2), 1–14.*
- Sudikno, M. (2007). *Mengenal Hukum Suatu Pengantar.* Yogyakarta: Liberty.
- Suhayati, M., & Saputra, N. P. (2020). Permasalahan Penegakan Hukum Tindak Pidana Aborsi. *Puskit BKD: Jakarta.*
- Sunarso, S. (2012). *Viktimologi Dalam System Peradilan Pidana. Jakarta Timur: Sinar Grafika.*

- Supriadi, W. C. (2003). *Hukum kesehatan dan pelayanan kesehatan*. Diskusi Panel Penyusunan Kurikulum Program Master Hukum dan Kesehatan
- Suryono, E. (2001). Abortus provocatus bagi korban perkosaan : perspektif viktimologi kriminologi dan hukum pidana. *Yogyakarta : Universitas Atmajaya Yogyakarta*.
- Susanti, Y. (2012). Perlindungan hukum bagi pelaku tindak pidana aborsi (Abortus provocatus) korban perkosaan. *Syiar Hukum: Jurnal Ilmu Hukum*, 14(2), 79–93.
- Syahrizal, M. (2013). Hak Asasi Manusia: Keadayaan Kejahatan Kemanusiaan. *Jakarta: Pressindo Akademika*.
- Tunggaldewi, D. A., & Suprpto, S. H. (2021). Pendidikan Kesehatan Reproduksi Remaja sebagai Upaya Pencegahan Kehamilan Tidak Diinginkan. *Jawa Pos, Radar Semarang*.
- Wahid, A., Irfan, M., & Hasan, M. T. (2001). *Perlindungan terhadap korban kekerasan seksual: advokasi atas hak asasi perempuan*. Refika Aditama.
- Wahyu, S. (2007). *Ketentuan-ketentuan pokok hukum perlindungan konsumen*. Universitas Lampung.
- Wantu, F. (2012). Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan dalam Putusan Hakim di Peradilan Perdata. *Jurnal Dinamika Hukum*, 12(3), 479–489.
- Wicks, E. (2012). The Meaning of ‘Life’: Dignity and the Right to Life in International Human Rights Treaties. *Human Rights Law Review*, 12(2), 199–219.
- Yulia, R. (2016). Mengkaji kembali posisi korban kejahatan dalam sistem peradilan pidana. *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada*, 28(1), 33–45.
- Zh, M. (2013). *Kehamilan, persalinan, dan nifas*.

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