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Siska Elvandari

Faculty of Law University of Andalas, siska.elvandari@yahoo.com

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LEGALIZATION OF ABORTION AGAINST VICTIMS OF RAPE CRIMES VIEWED FROM VICTIMOLOGY PERSPECTIVE

* Siska Elvandari

* Teaching Staff at The Criminal Law Department of The Andalas University Law School, Padang
Sumatera Barat

Korespondensi: siska.elvandari@yahoo.com

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Abstract

One of human rights guaranteed and protected in the 1945 Constitution is the right to live and maintain life, stated in Article 28 A of the 1945 Constitution. The right to live and maintain life is the highest right that is inherent in human beings as the subject of law since humans were born to death in the world. The right to live and maintain life is not only inherent in human beings who have been born, but also in humans or children who are still in the womb, stated in Article II of the Civil Code that "Children are considered to have been born when interest is desired. However, in fact the guarantee and protection of the right to live and maintain life has been neglected in line with the legalization of abortion against victims of rape crimes stated in Law Number 36 Year 2009 concerning health. The legalization of abortion against victims of rape crimes certainly has drawn polemics in various circles, namely between pro life and pro choice groups.

Keywords: Abortion, human rights, legalization

Abstrak

Salah satu HAM yang dijamin dan dilindungi di dalam UUD 1945 adalah hak untuk hidup dan mempertahankan kehidupan, dinyatakan dalam Pasal 28 A UUD 1945. Hak untuk hidup dan mempertahankan kehidupan merupakan hak tertinggi yang melekat pada diri manusia sebagai subjek hukum sejak manusia tersebut lahir hingga meninggal dunia. Hak untuk hidup dan mempertahankan kehidupan ini tidak hanya melekat pada manusia yang telah dilahirkan, melainkan juga pada manusia atau anak yang masih dalam kandungan, dinyatakan dalam Pasal II Kitab Undang-Undang Hukum Perdata bahwa "Anak dianggap telah dilahirkan bilamana kepentingan menghendaki. Namun, nyatanya jaminan dan perlindungan atas hak hidup dan mempertahankan kehidupan tersebut telah terabaikan sejalan dengan dilegalkannya aborsi terhadap korban tindak pidana perkosaan yang dinyatakan dalam Undang-Undang Nomor 36 Tahun 2009 tentang kesehatan. Dilegalkannya aborsi terhadap korban tindak pidana perkosaan tentu telah menuai polemik di berbagai kalangan, yakni antara kelompok *pro life* dan *pro choice*.

Kata Kunci: Aborsi, HAM, Legalisasi.

I. INTRODUCTION

Indonesia is a State of law, this provision is stated in Article 1 paragraph (3) result of the fourth amendment to the 1945 Constitution (hereinafter abbreviated as the 1945 Constitution), which states "Indonesia is a State of law". If we look at these provisions, then all aspects of life both in the social, political, cultural and economic fields are regulated and limited by applicable legal norms.¹ Sudarto Gautama presents three characteristics or elements of the rule of law, namely: a. There are restrictions on the state's power over individuals, meaning that the state cannot act arbitrarily, state actions are limited by law, individuals have rights to the authorities; b. The principle of legality, every state action must be based on the law that has been held in advance which must also be obeyed by the government or its apparatus; c. Separation of powers, that human rights are truly protected is by the separation of power, legislative, executive and judicial bodies should be separate, not on one hand.² One form of embodiment of the characteristics of State of Law is the existence of legal protection.

According to Philipus M. Hadjon, legal protection is the protection of dignity and recognition of human rights, hereinafter referred to as human rights owned by legal subjects based on legal provisions of arbitrariness or as a collection of rules or laws protecting something from other things.³ One of human rights guaranteed and protected in the 1945 Constitution is the right to live and maintain life, stated in Article 28 A of the 1945 Constitution.

The right to live and maintain life is the highest right that is inherent in human beings as the subject of law since humans were born to death in the world. The right to live and maintain life is not only inherent in human beings who have been born, but also in humans or children who are still in the womb, stated in Article II of the Civil Code that "Children are considered to have been born when interest is desired". However, in fact the guarantee and protection of the right to live and maintain life has been neglected in line with the legalization of abortion against victims of rape crimes stated in Law Number 36 Year 2009 concerning health.

Abortion in the Great Dictionary of Indonesian means *pengguguran kandungan*.⁴ Abortion is the discharge or release of conception from the womb of a mother prematurely.⁵ In looking at how the legal position of abortion in Indonesia, need to get back what the objectives of the act of abortion itself, though, the issue of abortion is generally regarded by most people as a crime.

Basically, abortion for any reason is prohibited, as stated in Article 346 of the Criminal Code, hereinafter referred to as the Criminal Code which reads as follows: "A woman who intentionally aborts or kills her womb or tells others to do so, is threatened with imprisonment for a maximum of four years. The Criminal Code does not give any exceptions to the prohibition of abortion, whether for medical reasons (medical indications) or reasons for rape (indications of rape). Abortion in the Criminal Code is a crime.

The birth of Law Number 23 Year 1992 concerning Health has ruled out the rules regarding abortion contained in the Criminal Code. The application of this Law is based on the principle of *Lex Specialis Derogat Lex Generalis* (a law that

¹ Achmad Ali, 2010, *Revealing Legal Theory and Judicial Theory*, Jakarta: Kencana Prenada Media Grup, pp. 20

² Didi Nazmi Yunas, 1992, *The conception of State of Law*, Padang: Angkasa Raya, pp. 23.

³ Philipus M. Hadjon, 1987, *Legal Protection for the Indonesian People*, Surabaya: Bina Ilmu, pp 25.

⁴ Great Dictionary of Indonesia Online.

⁵ Soekidjo Notoadmojo, 2010, *Health Ethics and Law*, Jakarta: Rineka Cipta, pp. 135.

specifically overrides general law). In this law, lawmakers provide a small amount of leeway by allowing medical staff to take certain medical actions against pregnant women who are in a medical emergency. This is stated in Article 15 paragraph (1) of Law Number 23 Year 1992 which reads as follows: "In an emergency situation as an effort to save the lives of pregnant women and/or their fetuses, certain medical actions can be carried out". One of those included in the category of medical action is abortion. Nevertheless, there are no rules regarding abortion for rape victims.

The existence of abortion practices again received attention with the passing of Law Number 36 Year 2009 concerning Health in lieu of Law Number 23 Year 1992 concerning Health. In the latest Health Act, lawmakers have given exceptions to the prohibition of abortion as contained in the Criminal Code, listed in Article 75 paragraph (1) and (2) of Law Number 36 Year 2009 which reads as follows:

- (1) Everyone is prohibited from having an abortion.
- (2) The prohibition as referred to in paragraph (1) can be excluded based on:
 - a. Indications of a medical emergency detected early in pregnancy, whether threatening the life of the mother and/or fetus, who suffer from severe genetic disease and/or congenital defects, or which cannot be repaired make it difficult for the baby to live outside the womb or
 - b. Pregnancy due to rape can cause psychological trauma to rape victims.

The birth of the regulation regarding the acquisition of abortion against victims of rape was followed by Government Regulation Number 61 Year 2014 concerning Reproductive Health as a manifestation of the mandate of the Health Law. In the government regulation it is also stated that the act of abortion can be done for medical reasons (medical indications) and reasons for rape (indicative of rape). This is contained in Article 31 paragraph (1) Government Regulation Number 61 Year 2014 concerning Reproductive Health which reads as follows: "The act of abortion can only be done based on: a. Indications of medical emergencies; b. Pregnancy due to rape."

The birth of the Health Law and Government Regulation on Reproductive Health can be considered as a form of legal protection for rape victims, given the high rape cases that have occurred in Indonesia. Several related agencies such as Komnas HAM explained that last year sexual violence was ranked third, this year it rose to second place, in the form of rape by 72% (2,399 cases), in the form of sexual abuse as much as 18% (601 cases), and sexual abuse 5% (166 cases).⁶ The data does not include unreported rape. Some of these rape cases lead to pregnancy. This unwanted pregnancy often results in abortion. Based on data released by the National Population and Family Planning Agency, hereinafter abbreviated as BKKBN, it is estimated that each year the number of abortions reaches 2.4 million. Even 800 thousand of them occur among teenagers.⁷

The legalization of abortion against victims of rape crimes certainly has drawn polemics in various circles, namely between pro life and pro choice groups. The Pro life group believes that abortion (safe abortion) is the killing of God's creatures and violates the right of life of children in the womb, while the Pro choice group believes that it supports the legalization of abortion (safe abortion) to reduce high maternal mortality in Indonesia, out of 100 thousand births, 307 mothers die because of the secret abortion.⁸

⁶ <http://klikkabar.com/2016/05/12/kekerasan-seksual-tempati-peringkat-ke-dua> accessed on Monday, dated July 22, 2017, at 07.00 am.

⁷ <http://tina28net.blogspot.co.id/2014/05/aborsi-pada-remaja.html?m=1>, accessed on Wednesday, dated September 20, 2017, at 10.37 pm.

⁸ Baslica Dyah Putranti (ed), 2005, *Abortion in the Cross-Religion Perspective*, Yogyakarta: PSKK Universitas Gadjah Mada, pp. 10-11.

K. Bertens stated that the prolife movement emphasized the right of the fetus to live. Those who abort the fetus are the same as murder, while the prochoice movement prioritizes the choice of the woman whether to continue or end it with abortion. Their opinions are pro choice, women have rights to their own bodies, so they have the right to choose between these two possibilities while others in this matter cannot interfere.⁹ The right to choose between maintaining or aborting the content in the Health Act is referred to as reproductive rights which are included in the scope of the right to health guaranteed in Article 28 H of the 1945 Constitution which reads:

The legalization of abortion against rape victims can be considered as a form of legal protection for victims of rape crimes. The attention and protection of victims of rape crimes must be considered because they are very sensitive to various kinds of threats of mental, physical and social disorders. In addition, often they do not have the ability to maintain and defend themselves.¹⁰ Therefore, the threat of serious penalties for rape perpetrators is intended so that the state has the opportunity to improve the behavior of the convicted person so that they are no longer dangerous and can live a normal life in the community and warn other people not to commit similar crimes.¹¹

Protection according to Law Number 13 Year 2006 concerning Protection of Witnesses and Victims is all efforts to fulfill rights and provide assistance to provide security to victims that must be carried out by the Witness and Victim Protection Agency (LPSK) or other institutions in accordance with the provisions.¹² Legal protection for victims of crime as part of protecting the community can be realized in various forms such as through retribution and compensation, medical services, and legal assistance..¹³

It should be, Law Number 13 Year 2006 concerning Protection of Witnesses and Victims in conjunction with Law Number 31 Year 2014 concerning Amendments to Law Number 13 Year 2006 concerning Protection of Witnesses and Victims, hereinafter referred to as the Witness and Victim Protection Act which has container for victims of rape to obtain legal protection without having to choose to abort the womb, even though the conditions are very strict and the implementation is safe (savety abortion). In addition, it should be borne in mind that in this case, the victim is not only the mother but also the child in the womb. It is fitting that children in the womb are seen as innocent human beings who should not be sacrificed to provide legal protection for victims of rape crimes..

Based on the background above, the author views that it is necessary to conduct study of the legalization of abortion against victims of rape crime in perspectives on victimization. Therefore, the author is interested in conducting legal analysis in the form of legal writing with the title, Legalization of Abortion against Victims of Rape Crime viewed from Victimology Perspective.

The formulation of the problem that author will discuss is: "How can the legalization of abortion against victims of rape crimes be viewed from victimology perspective?"

⁹ K. Bertens, 2007, *Ethics*, Jakarta: Gramedia Utama, pp. 67.

¹⁰ 8 Arif Gosita, 1995, *Potpourri Victimization*, Bandung, PT. Eresco, pp 136.

¹¹ Suryono Ekotama, ST Harum P, dan Widiartana, 2001, *Abortus Provocatus For Victims of Rape Perspective Victimology, Criminology, and Criminal Law*, Yogyakarta: Andi Offset, pp 97

¹² Article 1 Number 6 of Law Number 13 Year 2006 concerning *Protection of Witnesses and Victims of Juncto* Law Number 31 Year 2014 concerning Amendments to Law Number 13 Year 2006 concerning *Witness and Victim Protection*

¹³ Rena Yulia, 2010, *Victimology of Legal Protection Against Victims of Crime*, Yogyakarta: Graha Ilmu, pp. 178

II. DISCUSSION

The word *aborsi* comes from English, namely abortion and Latin abortus. Etymologically means abortion or miscarriage.¹⁴ Unlike the term, abortion in the Indonesian Dictionary means *pengguguran kandungan*/the discharge or release of conception from the womb.¹⁵ From these two terms, in this case the author tends to use the term *aborsi*, because in the opinion of the author this term is more popouler used, both in legislation and in everyday life.

In Indonesian itself, the meaning of abortion shows an understanding of termination of pregnancy before the gestational period (pregnancy) 28 (twenty eight) weeks or before the fetus reaches a weight of 1,000 grams.¹⁶ While the definition of abortion according to medicine is seen from the uniformity of opinion even though with different language utterances, including abortion is done by limiting the maximum age of pregnancy to about twenty weeks or or before the fetus is able to live outside the womb. More than that age is not classified as abortion, but it is called infanticide or the killing of a baby who has been able to live outside the womb.¹⁷ This is in line with the definition given by Gulardi, abortion is cessation (death) and the release of pregnancy before 20 (twenty) weeks (calculated from the last menstruation) or fetal weight less than 500 grams or fetal length less than 25 cm.¹⁸ In medicine, a new fetus can be born if the fetus is mature enough (matur) which lasts about 40 weeks (280 days) and no more than 43 (300 days) and produces a mature baby.¹⁹

Based on the above meanings, the authors conclude that abortion is an act of removing the fetus before the fetus can live outside the womb. The statement shows that for the occurrence of abortion, three elements must be fulfilled:

1. The existence of a fetus (embryo) which is the result of fertilization of sperm and ovum in the uterus.
2. The existence of abortion, abortion is the discharge or release of the fetus from the uterus which is done intentionally by humans.
3. Abortion is done before the fetus (embryo) can live outside the womb.

In looking at how the legal position of abortion in Indonesia needs to be seen again what is the purpose of the act of abortion itself. The issue of abortion is generally regarded by most people as a criminal act. Moelijatno provides a definition of a criminal offense by using the term criminal event, which is an act that is prohibited by a legal rule, which prohibition is accompanied by a threat (sanction) in the form of a certain crime, for those who violate the prohibition.²⁰

According to a medical perspective, abortion or abortion is divided into two types:

1. Spontaneous abortion (*abortus spontaneus*)
Spontaneous abortion is an abortion that occurs naturally either without a specific cause or for a specific reason, such as a disease, toxoplasma virus, anemia, high fever, etc. or because of an accident
2. Intentional abortion (*abortus provocatus*)

¹⁴ Istibsjaroh, 2012, *Abortion and reproductive rights in Islam*, Yogyakarta: PT. LKiS Printing Cemerlang, pp. 19.

¹⁵ Indonesian Great Dictionary *Online*.

¹⁶ Maria Ulfah Anshor, Wan Nedra, dan Sururin, 2002, *Abortion in a Contemporary Jurisprudence Perspective*, Jakarta: Balai Penerbit FKUI, pp. 33.

¹⁷ *Ibid*.

¹⁸ Maria Ulfah Anshor, *Abortion in a Contemporary Jurisprudence Perspective* pp. 3.

¹⁹ Manuba dan Ida Bagus Gede, 2007, *Introduction to Obstetrics Lecture*, Jakarta: EGC, pp. 58.

²⁰ Moelijatno, 1985, *Principles of Criminal Law*, Jakarta: Bina Aksara, pp. 54.

Intentional abortion is a deliberate abortion due to certain reasons. This type of abortion has legal consequences whose type of punishment depends on the factors behind it.²¹ This type of abortion is divided into two:

- 1) *Abortus Provocatus Therapeuticus*, i.e. abortion carried out on the basis of considerations made on the basis of genuine medical considerations and in general to save the life of the mother.²²
- 2) *Abortus Provocatus Criminalis*, i.e. abortion that is carried out without any medical indication, and is considered a criminal offense.²³ This abortion is said to be an illegal abortion and is threatened with punishment, both in positive law and Islamic law.

The abortion referred to in this writing is *Abortus Provocatus*, because abortion performed by rape victims is a deliberate abortion due to rape.

The birth of Law Number 36 Year 2009 concerning Health has given birth to new legal provisions regarding abortion. Abortion which was initially considered a criminal act in the Criminal Code was finally excluded for two specific reasons, listed in Article 75 paragraph (1) and (2) of Law Number 36 Year 2009 concerning Health which reads as follows:

- (1) Everyone is prohibited from having an abortion.
- (2) The prohibition as referred to in paragraph (1) can be excluded based on:
 - a. Indications of medical emergencies detected early in pregnancy, both those that threaten the life of the mother and/or fetus, those who suffer from severe genetic diseases and/or congenital defects, or those that cannot be repaired make it difficult for the baby to live outside the womb; or
 - b. Pregnancy due to rape which can cause psychological trauma for rape victims.

Before reviewing abortion against victims of rape crimes based on the victimism perspective, it is necessary to look at some of the things that make up the background of lawmakers giving an exception to the abortion ban, which can be seen from the consideration of Law Number 36 Year 2009 concerning Health, including:

1. That health is a human right and one of the elements of welfare that must be realized in accordance with the ideals of the Indonesian nation as referred to in Pancasila and the 1945 Constitution of the Republic of Indonesia.

Health as a human rights issue is a right that must be protected by the State, the state has the right to guarantee the recognition and protection of the right to health. In the opening of the 1945 Constitution it was stated clearly the ideals of the Indonesian nation which at the same time constituted the national goals of the Indonesian nation. The National Goal is "To protect the entire Indonesian nation and all of Indonesia's bloodshed and to promote public welfare, educate the nation's life and participate in carrying out world order based on freedom, eternal peace and social justice" To achieve these national goals, sustainable development efforts are held, which is a series of development that is thoroughly directed and integrated, including among others health development as mandated by Article 34 paragraph (3) of the 1945 Constitution.²⁴

One of the scope of health is reproductive health. Reproductive health is the right of all human beings regardless of sex and in accordance with the normative

²¹ *Ibid*,

²² Istibsjaroh, *Abortion and reproductive rights in Islam*, pp. 22.

²³ *Ibid*.

²⁴ House of Representative of Indonesia Republic, without years, "Academic Manuscript of Draft Law on Health", Jakarta, pp. 1.

values prevailing in society. The scope of reproductive health is not only limited to pregnant and childbirth women, but covers all reproductive health from before and after childbirth, as well as during the growth period to past fertile age. The rights included in reproductive rights include the right to determine their reproductive life and be free from discrimination, coercion and/or violence that respects noble values that do not demean human dignity in accordance with religious norms. In addition, everyone has the right to determine for themselves when and how often to reproduce healthfully medically and not against religious norms.²⁵

In relation to the development of offspring the most important thing to pay attention to is reproductive health. In this case there should not be a difference between men and women that must be understood as individuals who have the same rights and that must be guaranteed in the Health Law. Differences in understanding only on physical traits such as women have the right to conceive that is not owned by men. Reproductive rights related to women are the right to have an abortion.²⁶

2. That every activity in an effort to maintain and enhance the highest degree of community health is carried out based on non-discriminatory, participatory, and sustainable principles in the framework of forming Indonesia's human resources, as well as increasing the nation's resilience and competitiveness for national development.

National development is one of the national goals of the Indonesian Nation (the ideals of the nation) as stated in the opening of the 1945 Constitution, namely: "To protect the entire Indonesian nation and all the bloodshed of Indonesia and to promote public welfare, educate the nation's life and participate in implementing world order based on independence, lasting peace and social justice ". National development is carried out based on non-discriminatory, participatory and sustainable principles. Sustainable development is a series of comprehensive and integrated developments, including health development.

National development including the development of human resources cannot be separated from health efforts, especially efforts to improve maternal and newborn health. In principle, the mother has a dual role, namely as a child caregiver who in macro will participate in determining the future generation of the nation and the micro mother to determine the family economy. On this basis, efforts to improve maternal and neonatal health have become very strategic for efforts to build quality human resources. The success of these efforts can be seen from the reduction in MMR and Infant Mortality Rate, especially the neonatal mortality rate).²⁷

Reducing maternal morbidity and mortality has become one of the main priorities in the development of the health sector. This is because the MMR in Indonesia is still quite high compared to other countries. AKI in Indonesia is currently the highest in ASEAN, namely 370/100,000 live births - BPS; 307/100,000 live births, the Indonesian Population Health Demographic Survey (SDKI) and more than 30 (thirty) years cannot be reduced significantly.²⁸ Untuk itu, dilaksanakanlah kegiatan-kegiatan yang mendukung upaya guna menurunkan AKI tersebut salah satunya adalah meningkatkan pelayanan kesehatan reproduksi.

²⁵ Article 72 of Law Number 36 Year 2009 concerning *Health*.

²⁶ The Ministry of Health of the Republic of Indonesia, without years, "*Academic Manuscript on Draft Law on Health*", Jakarta, pp. 22.

²⁷ House of Representative of Indonesia Republic, *Academic Manuscript on Draft Law on Health*, pp 23.

²⁸ Maria Ulfah Anshor, *Abortion in a Contemporary Jurisprudence Perspective*, pp. Xx.

In the interests of reproductive health services in Indonesia, two components of reproductive health services have been agreed nationally, namely:²⁹

- a. Components of essential reproductive health services, which consist of:
 - 1) Maternal and newborn health;
 - 2) Family planning;
 - 3) Adolescent reproductive health;
 - 4) Prevention and treatment of sexually transmitted diseases including HIV/AIDS
- b. Comprehensive health service component, which consists of:
 - 1) Maternal and newborn health;
 - 2) Family planning;
 - 3) Adolescent reproductive health;
 - 4) Prevention and treatment of sexually transmitted diseases including HIV/AIDS.
 - 5) Reproduction of old age.

Of these components, the problem of infertility and abortion is an important issue in the implementation of reproductive health services because it is closely related to the ethicolegal aspects. The practice of unsafe abortion is one of the causes of increasing MMR, so there needs to be clear regulation about it because it has the potential to be a polemic in society.³⁰

The results of the analysis of data on the Indonesian Population Health Demographic Survey (IDHS) in 2002 and 2003, unsafe abortion is estimated to be the cause of 11% (eleven percent) of maternal deaths in Indonesia. Death can actually be prevented if women have access to contraceptive information and services and care for complications of abortion.³¹ However, in reality many pregnant women have unsafe abortion in ways such as vacuum aspiration, using massage drugs, injected abortifacient, inserting foreign objects into the vagina/uterus including drugs or herbal preparations, acupuncture and mystical methods.³² These things are done because of various factors and reasons, one of which is because the fetus conceived is result of rape.

The unsafe abortion procedure chosen by most women in Indonesia (especially for rape victims) is due to the absence of rules that allow female victims of rape to have abortions and the absence of health services in the form of safe abortion facilities and procedures for rape victims so victims feel safe and protected when choosing to have an abortion.

On the other hand, human resource development cannot be separated from efforts to improve children's health. Associated with pregnancy due to rape, of course this will be a prolonged dilemma when women who are pregnant as a result of rape have no choice not to continue their pregnancy and are forced to give birth to the child as a result of the rape. The occurrence of pregnancy in rape victims is an unwanted pregnancy and can result in psychological trauma and social stigma for women who experience it. Generally there will be rejection from the woman against the fetus she contains. This certainly will have a negative impact on the development of the fetus during the womb even for its growth and development after birth.³³

²⁹ Ministry of Health of the Republic of Indonesia, "Academic Manuscript on Draft Reproductive Health", pp. 3.

³⁰ *Ibid*, pp 3 and 5.

³¹ *Ibid*, pp. 6.

³² *Ibid*, pp. 7.

³³ *Ibid*, pp. 21.

As the rationale for the MUI is used as a reference in making rules on the legalization of abortion in the new Health Law, that children born from rape are feared to be threatened with their future, including concerns about the suffering that the child will bear during his/her life.³⁴ The suffering is not just physical suffering where the child is feared not to get enough physical needs from his parents, but also psychological suffering where the child is worried that he does not get attention and affection from his parents because the child is an unexpected child. These factors are certainly very influential on the growth and development of children which of course will also affect the development of human resources in general.

Therefore, lawmakers, including the ministry of health as the proponent of the implementation of these rules make rules regarding abortion against victims of rape along with their requirements to maintain and enhance the highest degree of public health in the framework of establishing Indonesian human resources, as well as increasing resilience and power nation's competitiveness for national development.

3. That every thing that causes health problems for the people of Indonesia will cause a large economic loss for the country and every increase in the degree of public health also means investment in the development of the country.

Health problems do not mean only physical healths such as anemia, asthma, allergies, and others. Health problems also include mental/psychic health problems. One of the things that causes psychological health problems is psychological trauma. Psychological trauma is mental damage that occurs as a result of traumatic events. When trauma leads to post-traumatic stress disorder, damage may involve physical changes in the brain and brain chemistry, which changes a person's response to future stress.³⁵

Psychological trauma occurs as a result of traumatic events, one of which is pregnancy due to rape. The rape experienced by a woman can cause deep trauma to her. Trauma from rape is a traumatic situation that is not easily forgotten and can change one's way of life. Victims of rape are more sensitive if they are close to the opposite sex, so that they have difficulty interacting socially. In addition, feeling embarrassed and worried about what other people talk about makes the victim increasingly depressed, not confident, tends to be more quiet and withdrawn. Moreover, if rape causes pregnancy, the victim will be increasingly depressed and can do things that endanger her if she is not accompanied, given positive support and views. It could be that the victim had a stealthy abortion which would certainly endanger herself. As the author explained earlier, that unsafe abortion provides a substantial contribution to maternal mortality rate in Indonesia. This certainly will lead to a large economic loss for the country.

On the other hand, maternal health is the nation's investment because it is related to the generation that will be born. Maternal health has a major influence on development both now and in the future.³⁶

4. That every national development effort must be based on health insights in the sense that national development must pay attention to public health and is the responsibility of all parties, both government and society.

Public health is inseparable from efforts to improve maternal and newborn health. In principle, the mother has a dual role, namely as a child caregiver, who in

³⁴ House of Representative of Indonesia Republic, *Academic Manuscript on Draft Law on Health*, pp. 23.

³⁵ https://id.m.wikipedia.org/wiki/Trauma_psikologis, accessed on Monday, November 2, 2017 At 9.56 pm.

³⁶ Ministry of Health of the Republic of Indonesia, "*Academic Manuscript on Draft Reproductive Health*", pp. 7.

macro will also determine the generation of the nation to come as well as micro, the mother determines the family economy. Therefore the development of human resources must start early when the fetus is still in the womb of the mother and the initial period of its growth. Thus the health of newborns less than one month (neonatal) becomes very important because it will determine whether our future generations are healthy and of high quality and able to face the challenges of globalization.³⁷

As the author explained earlier that one of the factors that causes low maternal health in Indonesia is a complication of abortion. There are many women who have unsafe abortion because of reasons, one of them is rape. On the other hand, the health of babies, especially newborns, is also a determinant of the health of the Indonesian people, even in the womb (fetus) must be considered growth and health. This will certainly be the opposite, if the babies conceived and born are rape babies. Physically, the mother is not necessarily able to meet the needs of the fetus or the baby who was born either in the form of nutritional intake, clothing, or place to live because the child she is born is an unexpected child. Whereas psychologically, it could be that the baby born will be ignored without being given attention and affection. Of course these things will affect the health of the fetus and the baby born.

Public health is the responsibility of all parties, both government and society. When looking at various factors relating to the rights and obligations of each party involved in health, the state must experience difficulties when required to materially fulfill all health needs. Nevertheless, at least the state formally has the authority to formulate and supervise by involving the community in managing health.³⁸

Associated with abortion, the state in this case represented by the government materially is required to provide health service and facilities for women who want to have an abortion. However, it should be underlined that the abortion is only an abortion because of medical indications and/or indications of rape. Access to health services must also be fair and equitable regardless of status and wealth. Looking at the reality, access to health services for women who want to have an abortion, especially rape victims, is not yet fair and evenly distributed because abortion has not been legalized at the time, so those who can get an abortion are just rich people by bribing doctors or going abroad to do abortion.

Formally, the government is required to prepare rules regarding the abortion of victims of rape including the requirements and implementation. For this reason, the government established Law Number 36 Year 2009 concerning Health which regulates abortion against rape victims. According to lawmakers, the regulation was made not to legalize abortion practices in Indonesia but to fulfill the rights of women victims of rape with conditions agreed upon and stipulated in the MUI Fatwa. The Fatwa of the MUI reads as follows:

First: General Provisions

1. Emergency (*dharurah*) is a condition where one does not do something forbidden then it will die or almost die.
2. The intent (*hajat*) is a situation in which a person does not do something that is prohibited then he/she will have difficulty.

Second: Legal Provisions

³⁷ House of Representative of Indonesia Republic, *Academic Manuscript on Draft Law on Health*, pp 24.

³⁸ The Ministry of Health of the Republic of Indonesia, "*Academic Manuscript on Draft Law on Health*". pp. 13.

1. Abortion is unlawful since the implantation of blastocyst in the uterine wall of the mother.
2. Abortion is permissible because there is an emergency reason or intention (*hajat*).
 - a. An emergency related to pregnancy that allows abortion is:
 - 1) Pregnant women suffer from severe physical pain such as advanced cancer, tuberculosis with cavernas and other severe physical illnesses that must be determined by the team of doctors.
 - 2) In situations where pregnancy threatens the life of the mother.
 - b. Conditions related to pregnancy that can allow abortion are:
 - 1) The fetus that is conceived is detected as having a genetic defect which if it is born later is difficult to cure.
 - 2) Pregnancy due to rape determined by the authorized team which includes among the victims' families, doctors, and scholars.
 - c. Ability of abortion as referred to in letter b must be done before the fetus is 40 days old.
3. The permissible abortion due to reasons as referred to in number 2 may only be done in a health facility designated by the government.
4. Unlawful abortion is carried out in pregnancies that occur due to adultery.

These requirements are then also regulated in the Law Number 36 of 2009 concerning Health. On the other hand, the community as the right holder of health is also responsible for national health development. It's useless if the government has provided facilities and provided health services as well as possible but public awareness of the importance of health is still low. This also includes reproductive health, especially abortion services to rape victims. In the new Health Law it has been stated that women who are pregnant as a result of rape may have an abortion in accordance with the terms and conditions stipulated by law. However, if the woman herself is reluctant to express her intention to have an abortion, of course her rights guaranteed by the law cannot be fulfilled. This is as expressed by Yanti Herman:

"Not all rape will be aborted, only people who really want to do it and they do it quickly, that's the right requirement and we still make limitation"

Based on the description above, it can be concluded that the background of the legalization of abortion to victims of rape crimes as contained in Law Number 36 Year 2009 concerning Health and Government Regulation Number 61 Year 2014 concerning Reproductive Health are: First, to provide recognition and protection against Human rights of women victims of rape, namely the right to health, precisely the right to reproductive health in terms of safe and quality abortion services; second, because of the high MMR in Indonesia, one of which is caused by the high rate of unsafe abortion; third, referring to the MUI Fatwa Number 4 of 2005 concerning Abortion.

The legalization of abortion against rape victims is of course accompanied by certain strict conditions stipulated in Government Regulation No. 61 of 2014 concerning Reproductive Health. These conditions are regulated in the following articles:

1. Article 31
 - (1) The act of abortion can only be done based on:
 - a. Medical indication;
 - b. Pregnancy due to rape.

- (2) The act of abortion due to rape as referred to in paragraph (1) letter b can only be done if the gestational age is no longer than 40 (forty) days from the first day of the last menstruation.
2. Article 34
 - (1) Pregnancy due to rape as referred to in Article 31 paragraph (1) letter b is a pregnancy resulting from sexual intercourse without the consent of the woman in accordance with the provisions of the legislation.
 - (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;
 - b. Information from investigators, psychologists and/or other experts regarding alleged rape
3. Article 35
 - (1) Abortion based on indications of medical emergencies and pregnancy due to rape must be carried out safely, qualitatively, and responsibly.
 - (2) The practice of safe, quality and responsible abortion as referred to in paragraph (1) includes:
 - a. Performed by doctors according to standards;
 - b. Performed in health care facilities that meet the requirements set by the minister;
 - c. Upon request or pre-approval of the pregnant woman concerned;
 - d. With the husband's permission, except the rape victim;
 - e. Not discriminatory
 - f. Not prioritizing material benefits.
 - (3) In the case of pregnant women as referred to in paragraph (2) letter c unable to give consent, the abortion agreement can be given by the family concerned.
 - (4) In the event that the husband cannot be contacted, the permit as meant in paragraph (2) letter d is given by the family concerned
4. Article 36
 - (1) Doctors who have an abortion based on an indication of a medical emergency and pregnancy due to rape as referred to in Article 35 paragraph (2) letter a must receive training by an accredited training provider.
 - (2) The doctor as referred to in paragraph (1) is not a member of the abortion feasibility team or a doctor who provides a certificate of gestational age for rape victims.
 - (3) In the event that in a certain area the number of doctors is insufficient, the doctor as referred to in paragraph (1) may come from members of the abortion feasibility team.
 - (4) Further provisions regarding training as referred to in paragraph (1) shall be regulated by a Ministerial Regulation.
5. Article 37
 - (1) The act of abortion based on an indication of a medical emergency and pregnancy due to rape can only be done after counseling.
 - (2) Counseling as referred to in paragraph (1) includes pre-action counseling and ends with counseling after the actions taken by the counselor.
 - (3) Pre-action counseling as referred to in paragraph (2) is carried out with the aim of:
 - a. Exploring the needs of women who want to have an abortion;

- b. Conveying and explaining to women who want to have an abortion that the act of abortion can or cannot be done based on the results of clinical examinations and investigations;
- c. Explaining the stages of the abortion that will be performed and the possible side effects or complications.
- d. Helping women who want to have an abortion to make their own decisions about having an abortion or canceling the desire to have an abortion after getting information about abortion.
- e. Post counseling as referred to in paragraph (2) is carried out with the aim of:
- f. Observing and evaluating the patient's condition after an abortion;
- g. Helping patients understand their physical condition or condition after undergoing an abortion;
- h. Explaining the need for repeat visits for follow-up examinations and counseling or referral actions if needed; and;
- i. Explaining the importance of using contraception to prevent pregnancy.

Based on the articles above, the author can draw the conclusion that the conditions for abortion against rape victims are as follows:

1. The maximum gestational age of 40 (forty) days is calculated from the first day of the last menstrual period.
2. Pregnancy due to rape is evidenced by a doctor's certificate (to prove gestational age, information from investigators, psychologists, and/or other experts regarding alleged rape).
3. Done safely, with quality and responsible.
4. Doctors who have an abortion must receive training by an accredited training provider.
5. Doctors who has an abortion is not a member of the abortion eligibility team or a doctor who gives a certificate of gestational age to a rape victim.
6. Abortion can only be done after counseling.

The strict requirements provided by the government for the implementation of abortion against victims of rape are intended so that the provisions are not misused by irresponsible couples. Nevertheless, the strict conditions set by the government do not necessarily make the pro-life group agree with the legalization. Still, pro-life groups see that abortion should not be done for any reason except medical emergency reasons (medical indications). Unlike the pro life group, the pro choice group actually views the legalization as a form of legal protection for rape victims. Protection is given on the basis of the negative impact caused if the abortion of victims of rape is not legalized, such as the implementation of unsafe abortion (prolonged abortion), prolonged psychological trauma, and concerns about the future of the child who is seen as an unexpected child.

Before discussing more about legal protection for rape victims, it should be explained again what is meant by rape crime, regulated in Article 285 of the Indonesian Criminal Code which reads as follows: , threatened with rape, with a maximum imprisonment of twelve years. "Based on the above understanding, elements of rape can be withdrawn, namely:³⁹

- a. Whoever

³⁹ Laden Marpaung, *Crime Against Decency*, 2008, Jakarta: Sinar Grafika, pps. 52-53.

Some experts argue that "whoever" is not an element, only shows the perpetrator (dader / doer) is human. Some experts again argue that "whoever" is a human being, but it is important to describe who and how many people. So the identity of the "whoever" must be clear.

b. With violence or threats of violence

According to Tirtaamidjaja, with violence intended, every act carried out with a rather strong body strength.

Article 89 of the Criminal Code extends the notion of "violence" so as to stun or weaken people, equated with committing violence.

"Violence or threat of violence" is directed against the woman herself and is such that other actions do not possible for her but to allow herself to be raped.

c. Forcing

"Forcing" means beyond the will of the woman or contrary to the wishes of the woman. Satochid Kartanegara states, among other things, "This forced act must be interpreted as an act in such a way as to cause fear to others."

d. A woman has sex with him

If it is not a woman (in the case of homosexuality) then Article 285 of the Criminal Code cannot be applied. The definition of "intercourse" according to Tirtaamidjaja means the inner contact of the male and female genitals which generally results in pregnancy. While the notion of "intercourse" at this time means that the penis has penetrated (entered) into the vagina.

e. Outside of marriage

Outside marriage means not with his wife. With the smooth enforcement of human rights, many people argue that this element was abolished so that the husband's arbitrariness towards the wife does not occur: the husband must respect the rights of his wife. However, until now there has been no unity of opinion. In Indonesia, this has never been questioned because of the assumption that serving a husband is an obligation and happiness for his wife.

Article 291 paragraph (2) of the Criminal Code states that if the rape results in the death of the woman, the threat becomes fifteen years in prison which reads as follows:

Article 291

- (1) If one of the crimes under Articles 286, 287, 288, and 290 causes serious injuries, it shall be imposed with a maximum imprisonment of twelve years.
- (2) If one of the crimes under Articles 285, 286, 287, 289 and 290 causes death to be imprisoned for a maximum of fifteen years.

Based on the two Articles above, it can be concluded that the Criminal Code only form criminal provisions for rape perpetrators and rape perpetrators that cause the death of the victim. However, there is no criminal provision for the perpetrators of rape which results in the pregnancy of the victim or woman.

If judging from the factors, rape occurs due to various types of causes. Galib can be distinguished in two different types, namely internal factors (which come from the victim itself) or external factors (which come from outside the rape victim). But even so, from the two factors put forward it can be confirmed basically that a woman becomes a victim of rape because of her physical and psychological condition which is weaker than a man (a raper).⁴⁰

⁴⁰ Suryono Ekotama, ST. Harum Pudjiarto, dan G. Widiartana, *Op.Cit*, pp. 79.

The Criminal Code does not further regulate the forms of legal protection that can be given to rape victims. Therefore, the Law on Witness and Victim Protection as a place to provide protection for victims of crime, including victims of rape crimes.

According to the Crime Dictionary quoted by Bambang Waluyo: Victim is a person who has suffered physical suffering or mental suffering, loss of property or resulted in the death of an act or effort of minor violations committed by criminal offenders and others.⁴¹ In line with the above opinion, Arief Gosita, who stated that the meaning of victims is: Those who suffer physically and spiritually as a result of the actions of others who seek fulfillment of themselves or others who are in conflict with interests and suffering rights.⁴²

Victims are also defined by van Boven, who refers to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power as follows: People who individually or in groups have suffered losses, including physical or mental injury, emotional suffering, economic loss or real deprivation against basic rights, both because of their actions (by act) or because of negligence (by omission)).⁴³ Furthermore, in a juridical manner, the understanding of the victim is contained in Law Number 13 Year 2006 concerning Witness and Victim Protection, which states that the victim is "someone who has suffered physical, mental, and/or economic losses caused by a criminal act.

Seeing these formulations, it can be concluded that victims are people who experience physical or mental suffering due to deprivation of their rights or due to criminal acts. From this definition, victims of rape who can be said as victims are victims of rape themselves and children in the womb. Victims of rape experience physical and mental suffering as a result of the crime of rape they have experienced, while children of rape victims also experience physical and mental suffering that can occur as a result of the mother being unable to care for her child and the loss of maternal love due to children is not expected. Then, why only rape victims get legal protection, is not the child in the womb also a victim. Lawmakers actually turn off children's rights to life that should be legally protected.

The Witness and Victim Protection Act regulates forms of protection against victims of crime including rape victims, including:

1. Restitution

Restitution according to Article 1 paragraph (5) of the Government Regulation (Pouvoir Reglementair) of the Republic of Indonesia Number 44 Year 2008 is compensation given to victims or their families by perpetrators or third parties, can be in the form of return of property, compensation for loss or suffering, or reimbursement of costs for certain actions.⁴⁴

Requests for restitution can be submitted by victims, families, or their proxies with a special power of attorney in writing in Indonesian on stamped paper and an application submitted to the court through the Witness and Victim Protection Agency.

In the case of restitution intended and directed at the responsibility of the perpetrator to the consequences caused by crime so the main goal is to overcome all the losses suffered by the victim.⁴⁵ The benchmarks used in

⁴¹ Bambang Waluyo, 2011, *Victimology of Legal Protection Against Victims of Crime* Jakarta: Sinar Grafika, pp 9.

⁴² *Ibid*, pp 9.

⁴³ Rena Yulia, *Legal Protection Victimology Against Victims of Crime*, pp 50-51.

⁴⁴ Article 1 paragraph (5) Government Regulation Number 44 Year 2008 concerning Provision of Compensation, Restitution and Assistance to Witnesses and Victims.

⁴⁵ Lilik Mulyadi, 2008, *Potpourri of Criminal Law - Theoretical and Practice Perspective*, Alumni: Bandung, pps. 253-254.

determining the amount of restitution given are not easy to formulate. This depends on the social status of the perpetrator and the victim. In the case of victims with lower social status than the perpetrators, they will prioritize compensation in the form of material, and vice versa if the social status of the victim is higher than the perpetrator, the recovery of dignity and good name will be preferred.⁴⁶

2. Medical assistance and psycho-social rehabilitation assistance

According to Law Number 13 Year 2006 concerning Witness and Victim Protection in conjunction with Law Number 31 Year 2014 concerning Amendments to Law Number 13 Year 2006 concerning Protection of Witnesses and Victims, rape victims are also entitled to medical assistance and psycho-social rehabilitation assistance. The assistance is a service provided to victims and/or witnesses by the Witness and Victim Protection Agency. Requests for medical assistance and psycho-social rehabilitation assistance can be submitted by the victim, the victim's family, and their proxy with a special power of attorney. The application is submitted in writing in Indonesian and on stamped paper to the Witness and Victim Protection Agency. In addition, it should be noted also, the victims' rights contained in Article 5 according to the Witness and Victim Protection Act are the legal rights of victims given by the law stating that the victim has the right to:⁴⁷

- a. Obtain protection for personal, family, and property security, and be free from threats relating to testimony that will, is, or has been given;
- b. Participate in the process of selecting and determining security protection and support;
- c. Give information without pressure;
- d. Get a translator;
- e. Free from entangling questions;
- f. Get information about the development of cases;
- g. Obtain information about court decisions;
- h. Know in the event that convicts are released;
- i. Confidential identity;
- j. Get a new identity;
- k. Get a temporary residence;
- l. Get a new residence;
- m. Obtain replacement transportation costs according to needs;
- n. Get advice; and/or obtain temporary living expenses until the protection deadline ends.
- o. Get assistance.

Based on the explanation above, it is clear that the government has provided sufficient legal protection for victims of rape by protecting the rights of victims as stated in Article 5 of the Law on the Protection of Witnesses and Victims, plus the provision of restitution, medical and psychosocial rehabilitation. However, lawmakers continue to provide opportunities for abortions for victims of rape on the grounds of reducing maternal mortality due to unsafe abortion and providing protection for mothers' reproductive health rights. In fact, not only rape victims should be protected

⁴⁶ Rena Yulia, *Legal Protection Victimology Against Victims of Crime*, pp 180.

⁴⁷ Law Number 13 Year 2006 concerning Protection of Witnesses and Victims juncto Law Number 31 Year 2014 concerning Amendments to Law Number 13 Year 2006 concerning Protection of Witnesses and Victims

by their rights, but also children as victims who should be protected by their right to live and maintain life as the highest inherent right given by God.

The child is a gift from God that deserves to be protected and protected by which rights and obligations are attached to the subject of law. Children referred to as legal subjects are not only children who have been born but also children who are still in the womb, stated in Article II of the Civil Code that children are considered to have been born when the interest is desired. Killing a child is a cruel act that violates the right of God which gives life, also violates human rights. Children in the womb are basically innocent people who should not be killed for any reason except medical emergency reasons (medical indications). Children of rape victims should also be given protection from the time of pregnancy to birth and growing up, rather than being killed by putting forward the reasons for protection for rape victims..

Concern about the future of the child should be overcome by giving debriefing to the mother of the rape victim such as medical and psychological therapy on a regular basis until finally the mother can receive and care for the child properly. In addition, regarding the survival of children, the Constitutional Court has issued a decision Number 46/PUU-VIII/2010 relating to this matter, the point of which is as follows:

"Children born outside of marriage have a civil relationship with their mothers and their mothers' families and with men as fathers who can be proven based on science and technology and/or other evidence according to the law to have blood relations, including civil relations with their father's family".

Based on the verdict, it can be concluded that the father or perpetrator of the crime of rape is also responsible for the continued growth and development of the child and the mother and family of the mother are also responsible for this.

There are many other better alternatives to do than legalizing abortion against rape victims. If indeed the mother and her family are truly unwilling to raise the child, then care can be transferred to other people who are willing. Besides that, the government can also form rules to overcome pregnancy problems due to rape without legalizing abortion which is very, very contrary to the right to live and defend life by humans who are totally innocent. Therefore, the author views that the legalization of abortion in terms of the perspective of victomology is inappropriate because the child in the womb is also an innocent victim who deserves to be protected by his rights, especially the right to live and maintain life.

III. CONCLUSION

Based on the formulation of the problem that the author has presented along with the discussion in the previous section, it can be concluded that the legalization of abortion against victims of rape crimes viewed from victomology perspective is considered inaccurate considering that the child in the womb is also an innocent victim who deserves especially the right to live and maintain life. The author recommends that the government along with the House of Representatives immediately provide special rules for dealing with pregnancy problems due to rape crimes in order to provide legal protection for victims of rape and child abuse in the womb.

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