

LEGAL REVIEW OF MEDICAL EMERGENCY THAT HAPPENED AFTER A FAILED ABORTION ATTEMPT

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ABSTRAK

Aborsi adalah penyebab tertinggi kelima angka kematian ibu. Aborsi dibenarkan atau legal disebut abortus provokatus medisinalis dan yang kriminal atau ilegal disebut abortus provokatus kriminalis. Hukum Indonesia melarang melakukan aborsi kecuali indikasi kegawatdaruratan medis dan akibat pemerkosaan. Tujuan penelitian, mengetahui akibat hukum seseorang yang gagal melakukan aborsi dan perlindungan hukum dokter yang merawatnya. Jenis penelitian, menggunakan yuridis normatif dengan pendekatan konseptual dan perundangan. Para pelaku dan mereka yang membantu aborsi yang menyebabkan kedaruratan medis terancam dengan KUHP Pasal 53. Mereka tidak dapat dihukum jika sesuai dengan standar profesional dan prosedur operasi standar. Kesimpulan dan sarannya ialah dokter tidak dapat dihukum sebagai pelaku kejahatan atau sebagai pembantu untuk kejahatan aborsi jika dapat dibuktikan bahwa aborsi dilakukan dalam kondisi darurat untuk menyelamatkan ibu atau janin dan mencegah kecacatan. Pemerintah perlu membuat undang-undang yang mengatur siapa yang akan melakukan aborsi yang aman, kualitatif dan bertanggung jawab.

Kata kunci: *aborsi; dokter; perlindungan hukum; kegawatdaruratan medis.*

1. Introduction

The legal status of abortion is an important indicator of women's ability to enjoy their reproductive rights. Legal restrictions on abortion often lead to high rates of unsafe illegal abortion that affect maternal mortality. The Health Law and Government Regulation allow abortion on the grounds that there are indications of medical emergencies detected at an early age, both those that threaten the life of the mother and or fetus with birth defects, making it difficult to live outside the womb.¹ Efforts to prevent unsafe abortion are very important if Indonesia wants to achieve the fifth goal of the Millennium Development Goal which is to reduce maternal mortality rate to 102 per 100,000 live births in 2015.² While the Sustainable Development target Goals in 2030 for maternal mortality rate are 70 per 100 thousand births.³

According to the Ministry of Health of the Republic of Indonesia in 2004, the cause of high maternal and infant mortality due to complications of pregnancy and childbirth was 45.2% bleeding, hypertension (preeclampsia and eclampsia) 12.9%, abortion 11.1%, postpartum sepsis 9.6 %, prolonged labor 6.5%, anemia 1.6%, and indirect causes of death 14.1%. In Indonesia,

¹ Ani Triana et al, *Kegawatdaruratan Maternal dan Neonatal*, Deepublish, Yogyakarta, h. 2.

² Ferry Efendi dan Makhfudli, *Keperawatan Kesehatan Komunitas Teori dan Praktik dalam Keperawatan*, Salemba Medika, Jakarta, 2009, h. 205.

³ Elizabeth A. Armstrong-Mensah, *Global Health Issues, Challenges, and Global Action*, John Wiley & Sons Ltd, United Kingdom, h. 170

abortion is the fifth highest cause of maternal death after 28% bleeding, 24% eclampsia, 11% infection, and 8% puerperium complications.⁴

An estimated 4.7% - 13.2% of maternal deaths are associated with unsafe abortion and every year around 7 million women are delivered to hospitals in developing countries due to unsafe abortion.⁵

Medical abortion is the result of conception before the fetus is able to live outside the uterus before 20 weeks and / or fetal weight less than 500 grams. In the medical approach, abortion consists of two kinds, namely spontaneous abortion (spontaneous abortion) and intentional abortion (*abortus provocatus*). *Abortus provocatus* is the termination or expenditure of pregnancy from the womb prematurely. In Indonesian positive law, abortion in certain cases is justified if it is medicinal *provocatus* abortion. Whereas generalized abortion becomes a criminal act better known as *criminalist provocatus abortus*.⁶

Judging from the legal aspect, *abortus provocatus* can be classified into two types, namely legal *provocatus* abortion and illegal *provocatus* abortion.⁷ Unwanted abortions and pregnancies are neglected problems in many developing countries, including Indonesia. As health workers who are integrated into the community, midwives are often visited by women with this problem. The causes of unwanted abortion and pregnancy include the ignorance of the reproductive system, rape victims, lack of knowledge about reproductive health, and contraceptive failure.⁸

In Indonesia, abortion is governed by several types of legislation. Previously, abortion was regulated in Article 15 of Law Number 23 of 1992 concerning Health which was subsequently replaced with Law Number 36 of 2009 concerning Health, namely Article 75.⁹ Abortion that occurs because human actions can occur either because they are driven by medical reasons, for example because a pregnant woman suffers from an illness and to save the woman's life the womb must be aborted. In this case it is necessary to have a strict regulation in Indonesian positive law relating to abortion. In positive criminal law in Indonesia regulating abortion problems are contained in Articles 299, 346, 347, 348, 349, and 535 of the Criminal Code.¹⁰ The

⁴ Wagiyo dan Putrono, *Asuhan Keperawatan Antenatal, Intranatal Bayi Baru Lahir Fisiologis dan Patologis*, ANDI, Yogyakarta, 2016, h. 133.

⁵ Say L et. al, Global causes of maternal death: a WHO systematic analysis. *Lancet Glob Health*. 2014 Jun; 2(6):e323-33.

⁶ Kusmaryanto, *Kontroversi Aborsi*, PT. Gramedia Indonesia, Jakarta, 2002, h. 20

⁷ Ratna Winahyu Lestari Dewi dan Suhandi, "Aborsi Bagi Korban Pemerkosaan Dalam Perspektif Etika Profesi Kedokteran, Hukum Islam Dan Peraturan Perundang-Undangan", *Jurnal Perspektif*, Publish Or Perish, April 2011, h. 137.

⁸ Gita Farelya, *Etikolegal dalam Pelayanan Kebidanan*. Deepublish, Yogyakarta, 2015, h. 86.

⁹ Fajlurrahman Jurdi, *Teori Negara Hukum*, Setara Press, Malang, 2016

¹⁰ Musa Perdanakusuma, *Bab-bab tentang Kedokteran Forensik*, Jakarta: Ghalia Indonesia, 1981, hal. 192

provisions in the Criminal Code are based on the idea that children who are still in the womb are legal subjects so that they are entitled to legal protection. In addition, when viewed from the aspect of human rights that everyone has the right to live and maintain his life, so abortion can be qualified as an act that violates human rights. In other words, there are thoughts that prioritize children's rights to be protected and protected. Therefore in the Criminal Code the act of abortion qualifies as a crime against life.

In connection with this problem, agreement on medical or health indications is actually unclear in the medical community itself. The medical indications that are commonly used are based on the clinical condition of the patient without regard to social factors. Medical indications in the narrow sense are very limited to vital indications, namely abortion carried out to save the lives of mothers who are pregnant because they are in danger of death which cannot be avoided in any way except by aborting them. Medical indications in the broadest sense are indicative of the safety or health of the mother. The medical indication of abortion is always associated with efforts to maintain the health of the mother and or fetus. This study using a type of normative juridical research with a conceptual approach and a statute approach.

From the applicable regulations and analysis of the above rules, it will be used to answer the problem formulation in this chapter.

2. DISCUSSION

Abortion is an act that disturbs moral and religious Indonesian society because if studied from a cultural, social, or religious perspective, abortion is not justified. Based on Friedman's legal system theory, the legal system cannot work without one of the three elements of the legal system, namely substance, structure, legal culture. The legal substance which includes the laws and regulations must be obeyed by the doctor by trying as much as possible to save the life of the mother and the fetus in order to create justice, order and expediency. Law enforcers who are credible, competent, and independent are included in the legal structure that determines the law is properly implemented or not. Regulations relating to abortion efforts in Indonesia are regulated in several laws and regulations, namely:

- 1) The Criminal Code Acts Article 53, 299, 346, 347, 348 and 349.

The abortion effort even though it does not cause the fetus to die, including the crime of attempting to commit a crime such as in the Criminal Code article 53. The most important thing from Article 299 of the Criminal Code is that there is hope that the pregnancy can be aborted. According to articles 346, 347, and 348 there are elements that intentionally indicate the intention or desire to do something. In addition there is an element of "causing the death or death of the womb" indicating

that the fetus in the womb comes out prematurely due to coercion or deliberate action so that the fetus dies or dies.

2) Law Number 36 of 2009 concerning Health Article 75 and article 76

According to the Criminal Code, any act of killing or aborting a woman is subject to criminal sanctions without exception and for any reason. While Law Number 36 of 2009 concerning Health, although it prohibits abortion, is an exception that abortion can be done with an indication of medical emergency that threatens the life of the mother and or fetus, who suffers from severe genetic diseases and or congenital defects that make it difficult for the baby to live outside the womb.

The Health Act does not explain what is meant by medical emergencies as a basis for carrying out abortion and does not distinguish between abortion subjects between ordinary people, drug interpreters, midwives, and doctors

3) Government Regulation Number 61 of 2014 concerning Reproductive Health Article 31, 32, 33 and 35

The Criminal Code does not mention the exclusion of abortion, while the 2014 PP No. 61 concerning Reproductive Health and Law No. 36 of 2009 concerning Health states that there are exceptions to having an abortion on indications of a medical emergency that threatens the life and health of the mother and / or fetus. Rape pregnancy is one of the exceptions to abortion.

Medical indications used are based on clinical conditions without regard to social factors and are limited to abortions that are carried out to save the life of the mother without any other means except abortion.

Legal protection for doctors who treat medical emergency patients due to the failure of abortion is based on Law Number 29 of 2004 concerning Medical Practice Article 50 and Article 51, Law Number 36 Year 2014 concerning Health Workers Article 57 and Article 75, and Law Number 44 of 2009 concerning Hospital Article 29. Doctors have the right to legal protection as long as the doctor runs according to professional standards and standard operating procedures in the event of a medical emergency arising from a patient's failed abortion attempt.

If a patient who fails to do an abortion and emerges a medical emergency is taken to the hospital, the patient will get initial help by the emergency physician in emergency department. In carrying out his profession doctors have an attachment to legal provisions. During treatment at the Emergency Departments if the pregnant woman and or the womb dies, the treating doctor has civil and criminal legal responsibilities. The doctor is responsible in the field of civil law if the doctor does not carry out his obligations, namely not giving maximum effort to heal the patient as agreed and because of actions that are against the law.

Relations between doctors and patients in civil law agreements include the category of engagement based on effort or maximum effort (*inspanningsverbintenis*). This is different from the ties that include the engagement category which is based on work (*resultaatververintenis*). Patients must have evidence of loss due to not fulfilling the doctor's obligations in accordance with the medical professional standards that apply in a therapeutic contract.

In the implementation of this therapeutic agreement must be preceded by the approval of the actions of health personnel or doctors or dentists on patients which is commonly called informed consent. Giving approval for medical action in an emergency is different from an emergency situation. This is stipulated in Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures. Patients who are in an emergency and need immediate medical attention, no more informed consent is needed, but after the action is taken it is necessary to immediately explain to the patient after being aware and the immediate family.

Abortion indications of medical emergency carried out without informed consent conflict with the Health Law and Government Regulations on Reproductive Health because it is necessary to determine the abortion feasibility team consisting of two health workers headed by doctors who have competence and authority and need pre-action and post-action counseling conducted by competent and authorized counselors.

If based on the superior lex principle of inferior legal derogation, the implementation of abortion practices on medical emergency cases arising from the failure of the abortion effort is in accordance with the Health Law and the Government Regulations on Reproductive Health. Based on the type and hierarchy of laws and regulations in Law No. 12 of 2011 concerning the Establishment of Legislation, the position of Law and Government Regulations is higher than that of Regulation of the Minister of Health..

Based on the principle of *lex specialis derogat legi generalis*, the Health Law and PP on Reproductive Health are specifically regulating health, especially the practice of abortion. Whereas the Minister of Health Regulation concerning Medical Action Agreement does not specifically mention what medical actions can be done to save the lives of mothers and or fetuses and prevent disability. The criminal responsibility of a doctor along with the increasing legal awareness of the community creates a lot of problems, especially concerning negligence based on the theory of errors in criminal law. Criminal responsibility arises if a professional error can be proven, such as a diagnosis or error in treatment or treatment. Errors or omissions will always be related to the illegal nature of an act carried out by someone who is capable of being responsible.

The difference between ordinary crime and medical crime is that ordinary crime is considered as a result, while medical crime is the cause. Even though it is fatal, if there is no element of negligence or error, the doctor cannot be blamed.

Abortion carried out without medical indication is an example of criminal malpractice in the form of intentions. Abortions without medical indications have occurred even though there are not many cases that have arrived at court. Doctors in practicing medicine are obliged to make medical records. According to Minister of Health Regulation No. 269 / MENKES / PER / III / 2008 concerning Medical Records, medical records are files containing notes and documents about patient identity, examination, treatment, actions and other services that have been given to patients. Whereas according to Minister of Health Regulation No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures, the approval of medical action is the agreement given by the closest patient or family after obtaining a complete explanation of the action of medicine or dentistry that will be performed on the patient. The usefulness of medical records and informed consent is when proof is needed.

If it can be proven that the doctor treats the patient with maximum effort to save the patient's life, then medically and legally it is said that the doctor does his work and does not violate the law. Even if the baby dies, the doctor can prove that it does not violate standard operating procedures and does not practice malpractice.

3. CONCLUSION

Legal consequences for someone who has failed an attempt at abortion and has medical emergency:

- a. If an abortion does not cause an end to pregnancy, it is threatened with the Criminal Code article 53 paragraph 1 because it includes an attempt to commit a crime;
- b. Notify or give rise to expectations that the content can be aborted threatened with article 299 of the Criminal Code;
- c. Abortions performed by pregnant women and resulting death babies are threatened by article 346 of the Criminal Code. Abortions performed by other people and resulting in the death of the mother and baby are threatened with article 347 or 348 of the Criminal Code. Abortions assisted by doctors, midwives, or medics based on Article 349 of the Criminal Code the criminal threat can be increased by one third and revoked the right to search
- d. Someone who commits, instructs, participates, gives or promises something by abusing power or dignity, by violence, threats or misdirection, or by giving opportunity, means or information, intentionally encouraging others to commit acts of Article 55 of the Criminal Code as criminal offenders

- e. Someone who intentionally provides assistance, opportunities, facilities, and information to commit a crime are threatened with Article 56 of the Criminal Code as a helper for a crime.
- f. The criminal threat for abortionists in Law Number 36 Year 2009 concerning Health Article 194 can ensnare anyone who deliberately commits an abortion.

And for the Legal protection against doctors who treat medical emergency patients due to failed abortion efforts:

- a. Doctors and hospitals have an obligation to conduct emergency relief and provide medical services in accordance with Law No. 36 of 2009 concerning Health, Law No. 44 of 2009 concerning Hospitals, Law No. 29 of 2004 concerning Medical Practice, and Code of Ethics for Medicine
- b. Doctors have the right to obtain legal protection as long as carrying out their duties according to professional standards and standard operating procedures in accordance with Law No. 29 of 2004 concerning Medical Practices Article 50 and Law No. 36 of 2014 concerning Health Workers Article 57
- c. Even though according to Minister of Health Regulation No. 290 / Menkes / PER / III / 2008 Article 4, in the event of a medical emergency, medical approval is not required, this does not apply to the act of abortion. Abortion for the indication of medical emergencies must be determined by the abortion feasibility team and can only be done after going through pre and post-action counseling and / or counseling by a competent counselor in accordance with Law No. 36 of 2009 concerning Health
- d. A doctor cannot be convicted of a criminal offense or a helper for an abortion crime if it can be proven that an act of terminating a pregnancy is carried out in an emergency to save the life of the mother and or the fetus and prevent disability after an abortion attempt.

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