

STUDY ON VICTIMOLOGY OF ABORTION ON PREGNANT WOMEN WHO DO NOT GET THE HUSBAND'S APPROVAL

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Abstract

Observing Article 71 and 72 of Law Number 36 Year 2009 on Health, it can be concluded that every pregnant woman who has fulfilled the legal requirements for the benefit of the pregnant woman to have an abortion can not be intervened by a legitimate partner. Indonesian Government Regulation Number 61 Year 2014 on Reproductive Health, which is an implementing regulation Health Act above, Article 26 Paragraph 1 explained that every woman has the right to undergo a healthy sexual life safely, without coercion and discrimination, without fear, shame, and guilt. One explanation healthy sexual life in verse two is free from physical and mental violence. The problem that arises is when a woman is medically to be aborted for the safety of the woman and meets all requirements of an abortion but did not get the approval of her husband because of certain reasons. Based on the principle of legal certainty, abortion would not be able to do as opposed to legislation by not getting the husband's consent, whereas if the terms of the principles of justice and expediency, a woman has the right to get her human rights, the right to live and determine her own destiny.

Keywords

the abortion pregnant women, victimology, husband's approval

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Introduction

Law Number 39 Year 1999 on Human Rights, there are two types of women's rights, namely the right of women after marriage and the right to health of the reproductive function. Rights of women are organized into nine sections, Article 45 and Article 51. However, Article related to this research exist in Article 50 and Article 51 Paragraph 1.

Article 50

The woman who has grown up and has been married or has the right to take legal actions themselves, unless otherwise stipulated by religious law

Article 51

- (1) *A wife during the marriage bond have the right and responsibility with her husband on all matters relating to his marriage, relationship with his children, and the rights of ownership and management of common property.*

While the right to health, reproductive function is regulated in Article 49 paragraph 3 of "Special rights inherent in women due to their reproductive function, guaranteed and protected by law". From the above it can be concluded that a woman has the same status as the husband, has the right to take legal actions themselves, including especially health related to health reproductive functions are protected and secured as special rights owned by women.

Reproductive health is specifically regulated in the sixth Law Number 36 Year 2009 on Health, from Article 71 to Article 77. Definition of reproductive health under Article 71 paragraph 1 of Law Number 36 Year 2009 on Health, the state of physical health, mental, and social as a whole, not merely free from disease or disability associated with the system, functions, and processes reproduction in males and females.

Reproductive health division referred to in Article 71 paragraph 1 above under Article 71, paragraph 2, namely:

- a. When pre-pregnancy, pregnancy, childbirth, and after childbirth;
- b. The setting of pregnancy, contraception and sexual health; and
- c. Reproductive health.

The patient's right is specifically regulated in Law Number 36 Year 2009 on Health in Chapter III section of unity, Article 4 and Article 8, but with regard to this study is Article 4, Article 5, Article 7 and Article 8.

Article 4

Everyone has the right to health.

Article 5

- (1) *Everyone has the same right to gain access to resources in the health sector.*

- (2) *Everyone has the right to obtain health services safe, quality, and affordable.*
- (3) *Everyone is entitled to independently and responsibly decide the necessary health services for themselves.*

Article 7

Everyone has the right to obtain information and education that is balanced and responsible.

Article 8

Everyone is entitled to obtain information about his health data including measures and treatments that have been or will be received from health professionals.

From the description of the articles above, it is known that everyone is entitled to health care, health information and after knowing the health condition, everyone is entitled to determine the health services needed by him.

The right of people (patients) and others as a consumer in the field of health is the right to be heard and get compensation when services obtained is not as it should be, as stated in Article 56 paragraph 1 and 2 and Article 58 paragraph 1, 2 and 3 of Law Number 36 Year 2009 on Health.

Article 56

- (1) *Everyone has the right to accept or reject any or all forms of help that will be given after having received and understood information about these actions are complete.*
- (2) *Accept or reject the rights referred to in paragraph (1) shall not apply to:*
 - a. *Disease patients whose disease can quickly spread into the wider community;*
 - b. *State of a person who is unconscious; or*
 - c. *Severe mental disorders.*
- (3) *The provisions concerning the right to accept or reject as referred to in paragraph (1) shall be in accordance with the provisions of the legislation.*

In particular, the right of every person on reproductive health is discussed in Article 72. In Article 72 explained that everyone is entitled to:

- a. *Living a life of sexual reproduction and survival of healthy, safe, and free from coercion and / or violence by a legitimate partner.*
- b. *Determining the reproductive life free of discrimination, coercion and / or violence, respect the noble values that are not degrading in accordance with religious norms.*
- c. *Decide themselves when and how often you want to reproduce medically fit and does not conflict with religious norms.*

- d. Obtain information, education and counseling on reproductive health that is correct and accountable

What should be emphasized in Article 72 here is in paragraph 1. In paragraph 1 explained that every person is entitled to a healthy reproductive life safe and free from coercion by a legitimate partner. Definition of reproductive life leads to reproductive health as defined in Article 71 is one of the future reproductive health is during pregnancy. So it can be concluded that every pregnant woman who has fulfilled the legal requirements for the benefit of the pregnant woman to have an abortion can not be intervened by a legitimate partner.

Indonesian Government Regulation Number 61 Year 2014 on Reproductive Health, which is an implementing regulation Health Act above, in Article 26, Paragraph 1 explained that every woman has the right to undergo a healthy sexual life safely, without coercion and discrimination, without fear, shame, and guilt. One explanation healthy sexual life in verse two is free from physical and mental violence.

According Masrudi Muchtar, a global reproductive health receive special attention from the issues raised in Internasionl Conference on Population and Development (International Conference on Population and Develompent, ICPD) in Cairo, Egypt in 1994 (Muchtar Masrudi, 2015:156).

Reproductive rights according to the agreement within the International Conference on Population and Development aims to bring health to the whole person, both physical and spiritual health, including (Muchtar Masrudi, 2015:159) :

- a. Right to information and education and reproductive health.
- b. The right to obtain reproductive health services and protection.
- c. Right to freedom of thought on health and reproductive services.
- d. The right to be protected from death due to pregnancy.
- e. The right to determine the number and spacing of children.
- f. The right to liberty and security related reproductive life.
- g. The right to freedom from torture and ill-treatment, including the protection of rape, violence, torture, and sexual harassment.
- h. The right to obtain services and reproductive life.
- i. The right to build and plan a family.
- j. The right to be free from all forms of discrimination in family life and reproductive lives.
- k. The right to freedom of assembly and political participation are related to reproductive health.

Upon this convention finally women have the right to enjoy the highest standard of physical and mental health throughout life including the right to access and adequate health care. This includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in the documents of human rights (Muchtar Masrudi, 2015:158).

Problem

The problem that arises is when a woman is medically to be aborted for the safety of the woman and meets all requirements of an abortion but did not get the approval of her husband because of certain reasons. Based on the principle of legal certainty, abortion would not be able to do as opposed to legislation by not getting the husband's consent, whereas if the terms of the principles of justice and expediency, a woman has the right to obtain their fundamental rights, namely the right to life and self-determination. For this article take the title "Study on Victimology of Abortion on Pregnant Women Who Do Not Get the Husband's Approval".

Research Method

According to Peter Mahmud Marzuki, legal research is discovering the truth of coherence, the norm that a command or prohibition is in line with the principle of law, and whether the action (act) someone after the law (not only in accordance with the law) or legal principles.

Legal theory based approach to the classification of the legal theory that views of aspects of the way in order to obtain data related to the research. Legal theory based approach is divided into two parts, namely:

- a. Empirical; and
- b. Normative.

In this study uses the type of normative juridical research. Normative legal theory is a theory of law which examine and analyze legal norms or seal the document rules contained in the legislation.

According to Peter Mahmud Marzuki, in legal research, there are several approaches. The approach used in the study of law is the approach of the law (statute approach), the historical approach (historical approach), a comparative approach (comparative approach), and the conceptual approach (conceptual approach).

In this study, the author will use the method of approach to the law (statute approach) and the conceptual approach.

Approach on legislation (statute approach) is done by examining all the legislation and regulation that has to do with legal issues being dealt with. The conceptual approach depart from the views and doctrines that developed in the jurisprudence. By studying

the views and doctrines in the law, authors would find the ideas that gave birth to notions of law, legal concepts, and principles of law relevant to the issues faced.

Result and Discussion

The basic function of a law is to ensure fairness, expediency and legal certainty. A law will be ideal when the substance and implementation of these laws has met the above three basic functions. However, not all laws can ensure the fulfillment of the three basic functions.

a. Convention on the Elimination of All Forms of Discrimination Against Women

Based on Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women, explained that "the term" discrimination against women "shall mean any distinction, exclusion or restriction made on the basis of sex the which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of Reviews their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field ". (Definition of discrimination against women is any distinction, exclusion or restriction made on the basis of sex; which has the effect or purpose to reduce, or eliminate the recognition, enjoyment or use of human rights).

According to the authors, there are three chapters contained in the Convention on the Elimination of All Forms of Discrimination against Women with regard to this research, namely Article 12, Article 15, paragraph 1 and Article 16. Article 12 contains about health and family planning, Article 15 contains about equality before the law and justice and Article 16 contains about marriage and family relations.

Article 12

- (1) *States Parties shall take all Appropriate Measures to Eliminate discrimination against women in the field of health care in order to Ensure, on a basis of equality of men and women, access to health care services, Including Reviews those related to family planning.*
- (2) *Notwithstanding the provisions of paragraph I of this article, States Parties shall Ensure Appropriate services to women in connection with pregnancy, confinement and the post-natal period, granting free services where Necessary, as well as adequate nutrition during pregnancy and lactation.*

(Participants are obliged to implement measures that right in order to eliminate discrimination against women in the field of health care, including those related to family planning, on the basis of equality of women and men; guaranteeing bring women receive appropriate assistance relating to pregnancy, childbirth and period after childbirth, by providing free services where necessary, as well as providing enough nutritious food during pregnancy and lactation)

Article 15

- (1) *States Parties shall accord to women equality with men before the law.*
- (2) *States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and Tribunals.*
- (3) *States Parties agree that all contracts and all other private instruments of any kind with a legal effect of the which is directed at restricting the legal capacity of women shall be deemed null and void.*
- (4) *States Parties shall accord to men and women the same rights with regard to the law Relating to the movement of persons and the freedom to choose Reviews their residence and domicile.*

(Participants are obliged to provide women equal rights with men before the law; give to women, in civil matters, the legal capacity equal to men and the same opportunities to run these skills; in particular giving the same rights to sign contracts and take care of possessions; give the same treatment at all stages of procedure in front of judges and the judiciary; agree that all contracts and all documents that have the force of law aimed at curbing the legal capacity of women, shall be deemed null and void; and gives men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile).

Article 16

- (1) *States Parties shall take all Appropriate Measures to Eliminate discrimination against women in all matters Relating to marriage and family relations and in particular shall Ensure, on a basis of equality of men and women:*
 - (a) *The same right to enter into marriage;*
 - (b) *The same right freely to choose a spouse and to enter into marriage only with Reviews their free and full consent;*
 - (c) *The same rights and responsibilities during marriage and at its dissolution;*
 - (d) *The same rights and responsibilities as parents, irrespective of Reviews their marital status, in matters Relating to Reviews their children; in all cases the interests of the children shall be paramount;*
 - (e) *The same rights to decide freely and responsibly on the number and spacing of Reviews their children and to have access to the information, education and means to enable them to exercise Reviews These rights;*
 - (f) *The same rights and responsibilities with regard to Guardianship, wardship, trusteeship and adoption of children, or similar institutions where Reviews These concepts exist in national legislation; in all cases the interests of the children shall be paramount;*

- (g) *The same personal rights as husband and wife, Including the right to choose a family name, a profession and an occupation; 7*
- (h) *The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property from, whether free of charge or for a valuable consideration.*
- (2) *The betrothal and the marriage of a child shall have no legal effect, and all Necessary action, Including legislation, shall be taken to specify a minimum age for marriage and to the make the registration of Marriages in an official registry compulsory.*

(Participants are obliged to take appropriate steps to eliminate discrimination against women in all matters relating to marriage and family relations on the basis of equality between women and men, and in particular will guarantee: equal rights to enter marriage; the same right to choose their husbands freely and responsibly the number and distance of births of their children, and to obtain information, education and means to enable them to exercise that right; the same rights and responsibilities with regard to guardianship, care, supervision and appointment of children or similar institutions where this concept exists in national legislation, in all cases the interests of children must take precedence; the same personal rights as husband and wife including the right to choose a family name, a profession and an occupation; The same rights for both husband and wife respect of the ownership, acquisition, management, administration, enjoyment and transfer the property, either for free or by the use of money. Engagement and marriage of a child shall have no legal effect, and all necessary actions, including making laws and regulations, must be done to set a minimum age for marriage and to require registration of marriages in an official registry office).

b. Human Rights in The Ideology of Pancasila

Pancasila as the state ideology of Indonesia is different from sensible capitalist ideology of individualistic liberalism, also different from the ideology of the Communist Socialist sensible communal collectivity. Pancasila recognize and protect both the rights of individuals and the rights of citizens, both economic and political.

Indonesia as a nation choose Pancasila as the state ideology, regard for human rights as the rights and fundamental kodratiah humanity, so that the concentration of human rights for both fixed nature of individual and human collectivity. things reflected in the principles of Pancasila.

The chapter on human rights in the Constitution the Republic of Indonesia Year 1945 has set the 27 point about the basic rules of human rights that have been systematized can be grouped into four groups, namely the group of civil rights (civil rights), a group of political rights (political rights), rights groups economic rights and development (social economic and developmental rights), and a group of state responsibility and obligation rights of citizens (accuntability rights).

Aswanto (2008, Lecture Material of PPS Doctor of Law UNHAS), said that human rights in general can be classified into four groups as follows:

- a. *Civil Rights*
- b. *Political Rights*
- c. *Socio Economic Rights*
- d. *Cultural Rights*

Apart from the grouping of human rights in the four groups mentioned above, it is also known as the groupings are as follows:

- c. *Rights to self-determination* (Right not to be affected).
- d. *Women's rights* (Women's rights).
- e. *Non discrimination* (Prohibition of discrimination).
- f. *Protection of children* (Protection of children).
- g. *Protection of minorities* (Classical right) (protection of minorities).
- h. *Right to development* (The right to enjoy the results of development).
- i. *Right to information* (Right to information).

In the United Nations Commission on Human Rights,
article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

(All people are born free and have the dignity and the same rights. They are endowed with reason and conscience and should relate to one another in a spirit of brotherhood.)

Article 25 Paragraph 2

Motherhood and childhood are entitled to special care and assistance. All children from, whether born in or out of Wedlock, shall enjoy the same social protection.

(Mothers and children are entitled to special care and assistance. All children, whether born in or outside marriage, should receive the same social protection).

On December 10, 1948, the United Nations human rights mengdeklarasikan. Declaration of Human Rights consists of 30 Articles and is a common standard legalizing human rights of every country. This Declaration has been translated into over 500 languages.

Of the existing Article 30, there are two Article correlated to the research topic, namely Article 1 and Article 25, Paragraph 2. In Article 1 said that there is equality of human rights. Equality in human rights apply to everyone regardless of background and gender. Whereas in Article 25 Paragraph 2 contains protection against both mother and child, which are given the privilege to get treatment.

c. Law in Indonesia to Protect the Rights of Mother

In Article 76 explained about the conditions that must be met when performing an abortion. These conditions are described by using the word "and", which means that these conditions must be met is imperative or all of them without exception. One of the conditions of abortion with the consent of her husband, except for rape victims. It is clearly written in the legislation, and should be implemented, so as to contain the principle of legal certainty.

Judging from the principles of justice and expediency, based on Indonesian laws and regulations in this regard marriage law, human rights and reproductive rights shows that the right of the mother has not been fully met. Various laws and regulations in Indonesia in writing acknowledge the human rights of women, especially pregnant women, the marriage law states that even if the rights and obligations that exist in each of husband and wife is different, but both have the same status in law, on human rights and reproductive rights has described various special rights owned by a woman who is not owned by men.

Although the law to be applied indirectly wholly related to the aspirations of the people, but according to the principle of legal certainty must be applied (Bayu Dwi Anggono, 2014:134). According Satjipto Rahardjo, legal certainty would not be becoming problematic when applied to countries that actually have held democratic principles and adhering to the principle of "Rule of Law" or "Rechtsstaat", where the laws are made to have reflected a sense of justice because the law it has to be aspirational, so that the law as it has been aspirated by the public. Conversely, in countries in transition to democracy and a country that adheres to the rule of law or rechtsstaat, the possibility of the law does not mnecermikan sense of justice. Because the laws are not aspirational (not fully express and reflect the values that live in the community) (Bayu Dwi Anggono, 2014:134).

Based Rahardjo Satjipto statement, we need to look at whether laws and applicable law in Indonesia has fulfilled the principle of "Rule of Law" or "Rechtsstaat".

Democracy is a form of political power of government comes from the people's government, either directly (direct democracy) or representatives (representative democracy) (Abdul Hamid, 2016:45). The purpose of this definition, both direct democracy and representative democracy, everything is done by the state should aim for the welfare of the people.

Frans Magnis S, said state law as a hallmark characteristic of democracy (Fajlurtrahman Jurdi, 2016:22) :

1. The function of state run according to the Constitution;
2. Constitution guarantees human rights;
3. The state agency exercising power adhere to the laws in force;
4. Against the action of the state, people can go to court and the state agency messenger should be implemented; and
5. Agency independent and impartial judiciary.

Based on the explanation above, according to the author, Indonesia is included in countries that actually have held democratic principles and adhering to the principle of "Rule of Law" or "Rechtsstaat". However it does not mean that the principles of justice and expediency are not considered, because as explained earlier that the law is deemed to have reflected the public's sense of justice because the law has to be aspirational, but the question here is whether it is true that the basis of the consent of the husband has to give justice to the people, especially pregnant women.

According Arfin Lenoarda Sambas, it is not uncommon these three values conflicting legal basis in law enforcement. If that happens then that should take precedence is justice, given the purpose of the law is a sense of justice in society (Arfin Lenorada Sambas K, 2016:134). Law and justice are actually two elements are intertwined is a "conditio sine qua non" for the "justice" is part of the value are abstract that has many meanings and connotations (Abdul Hamid, 2016:119). In addition to justice, justice is often equated with the word equity. The word equity is defined as follows (Abdul Hamid, 2016:120) :

1. Justice (justice), impartiality (as impartial), give everyone his right (his due);
2. Everything was decent (fair) or fair (equitable);
3. The general principle of eligibility (fairness) and righteousness (justice) in terms of applicable law in inappropriate circumstances (inadequate).

The principle of legal certainty, justice or expediency of law must be considered in the establishment of legislation. The principle of legal certainty can not simply be carried out without the principles of justice and legal expediency, because it is very difficult to assess that the existing laws have been derived from the aspirations of many people.

When this sense of justice really exists and is perceived by the majority of the collective, then legal certainty will move towards a sense of justice itself. Legal certainty is a sense of justice itself because justice and law are not two separate elements (Arfin Lenorada Sambas K, 2016:142).

About the need for consent from the husband when his wife was about to have an abortion. Ideally, when there are indications of abortion on a mother, a husband could allow it, such as the genetic defect in the fetus that does not allow the baby to live, the impact of pregnancy can endanger the mother's life, and so are forced to do abortions. However, problems arise when the husband does not give consent in this situation.

Conclusion and Suggestion

Various laws and regulations in Indonesia have set megenai equality of husband and wife standing in law. The position of the husband the wife is the same as before the law, even though there is a difference between rights and obligations. Additionally, in Act No. 36 of 2009 on Health also regulates reproductive health issues, which is their right is to determine the reproductive life free of discrimination, coercion and / or violence.

The things above shows that the three basic elements of the law is fairness, certainty and legal expediency is not always able to run everything. Implementation of these elements can not always do them all, but if it can not be run entirely priority is legal justice. Under the legislation, the most stressed element is an element of legal certainty, which is clearly written on each of the rules. While elements of justice and legal expediency is not the primary focus. The main essence of the law is essentially justice. Therefore, should the legislation in Indonesia stressed to legal justice, which after legal justice and expediency met then legal certainty will move towards a sense of justice itself.

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Constitution of the Republic of Indonesia

Laws on the Elimination of All Forms of Discrimination against Women

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)