

Abortion in Perspective the Medical and Criminal Law of Indonesia

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Abstract

The act or the conduct of aborting womb or mostly known as abortion has caused polemic within Indonesian society. This polemic happens because the abortion is only viewed as a prohibited act, whether it is from religion law, social norm, or substantial law perspective view. However, according to the Act Number 36 Year 2009, abortion is considered as a justification based on medical aspect.

Keywords: Abortion, perspective, medical, criminal law, Indonesia.

A. Introduction

Nowadays abortion becomes one of the problems in western country and it happens in Indonesia as well. Abortion is getting more crucial because of the development of criminal typology in medical profession or medical world¹. Based on the information that we get from the western media such as newspapers and televisions there are 45% of the baby that was born by the abortion and the reason of this is the illegal relationship of the unmarried couple or married couple. The percentage of this is fluctuated, sometimes lower and sometimes higher than 45%.² The abortion in western also happens because of the freedom to do the abortion in these countries.

Based on the report from PKBI, every year there are around 800.000 until 1.000.000 abortions in Indonesia. From those numbers 51% of the abortions are done by 20-29 year old girls. Dr. Boyke, Ds. OG also mentioned that 50% the visitors of abortion clinics are 15-20 years old and 44, 5% abortions are done because of illegal relationship.³ Furthermore Boyke mentions that 35% of the medical faculty students agree with sex before married,⁴ another research from PKBI also found that 75% youth in Lampung have ever done sex before married.⁵ With regard to the article 346 until 349 of the Indonesian Criminal Code and the article 480-483 of this code, the abortion is forbidden and has sanction.

B. The Problems

The abortion is assumed as a needed in medical world but on the other hand abortion also forbidden by the regulation and the norms such as law norm, religion norm, morality norm and the other living norm in the civilization. Therefore in this paper, the problem that will be discussed is how to enforce the criminal law to overcome the abortion crime?

C. The Law Enforcement by Penal

It is forbidden in Indonesia to do the abortion and it can be identified as a crime. The abortion is stipulated in Indonesian Criminal Code. It mentions that doing the abortion is a crime, therefore every woman who does the abortion and everyone who helps in doing abortion will get punishment. But on the other hand, implicitly, in regulation Number 36 Year 2009 open the change to do the abortion and the abortion is possible to do if there is justification of why doing so. From the criminal policy, this situation can create the law ambiguity because it is not fair for the society. To guaranty that the abortion activity does not contradictive to the article in Indonesian Criminal Code, The Law of Public Healthy gives the strict limitation to this activity, that the abortion can only be done for emergency situation; for instance to save the mother of the baby.⁶

The Indonesian Criminal Code does not define clearly the meaning of the abortion. The articles only mention that abortion is a crime, means that the doer of the abortion can be mentioned as a criminal. The articles

¹Muladi in Barda Nawawi Arief, *Anthology of Criminal Law*, Alumni Bandung, 2013, p. 59.

²Abda Qadim Zullum, *Hukmu Al-Syar'i Fi Al Intisaakh, Naglu Al-Adhaal, al-ijhadh, athfaalu al-anaahiib,ajhazatu Al-ins'aasy-thabiyah, alhayah wa-al-maut*, Daar al ummah, Beirut Libanon, 2011, p. 45-46.

³Al-Islam Newslatter, *Momentum of Changes*, 97 Edition/Year VIII, 2012, p. 1-4.

⁴*Ibid.*

⁵*Ibid.*

⁶Barda Nawawi Arief, *Rationale (Basic Idea) Drafting The New Criminal Code*, Delivered in Public Discussion on Political Law, Contribution of Islamic Law and Traditional Law for The Criminal Code, Faculty of Social Sciences of Semarang State University, 23 Desember 2009 (Without Publication), p.2. Criminal Policy in This Paper Have The Meaning as a part of Rational Effort to Overcome The Criminal to Social Defence Including the Effort to Increase the Legislation Policy and Criminal Law Enforcement.

stipulate the abortion are 346, 247(1) & (2), 348 (1) & (2) and 349. The Article 346 mentions that a woman, who does the abortion on purpose or asks someone else to do it, will be punished for four years stay in jail. Furthermore the article 347 also stipulates that anyone who is on purpose doing the abortion without the agreement of the pregnant woman will be punished in jail for 12 (twelve) years and if that activity caused the death of that woman, the punishment is 15 (fifteen) years.

The other article which stipulates about abortion is the article 348 of the Indonesian Criminal Code. This article mentions that anyone who is helping the abortion or termination of the pregnancy of a woman and with her agreement, the punishment is five (5) years and six (6) months in jail; and if that activity causes the death of the mother, then the punishment is seven (7) years. With regard to the articles 346, 347 and 348, If the doctor or midwife or nurse help to do the abortion as mention in those articles, then based on the article 349 of the Indonesian Criminal Code stipulates that person will get the punishment as stated on the above articles and it will be added one third of the punishment and termination of the license to do the practice.

Regarding to those articles, it can be explained that the lowest penalty for the abortion is 4 years for the women who are on purpose doing the abortion or asking someone else to do it. If the abortion is done without the agreement of the women, and finally because of the abortion the women is passed away, then the penalty is about 15 (fifteen) years.¹ Meanwhile, for the people who is helping the pregnant woman to do the abortion activity; whether they are as the doer, the one who asking the doer, helping the doer or the one who is suggesting the doer will get additional punishment. They will lose their right to do medical practice; the doer in this case could be a doctor, midwife or pharmacist.

In Indonesian Criminal Code concept year 1999/2000, the abortion or termination of the pregnancy is stipulated in Chapter XX (twenty) about The Crimes on Human Life and in article 480-482. The article 480 paragraph 1 stipulates "A woman who does the abortion or termination her pregnancy or asking someone else to do it will get the longest punishment stay in jail for four years or fine as stated in category IV", furthermore in the article 480 paragraph 2 mentions that "everybody who does the abortion or termination the pregnancy without her agreement will get the punishment for 3 until 12 years". In article 480 paragraph 3 mentions "if the action as stipulate in 480 paragraphs 1 and 2 caused the death of that woman, then the punishment is about 5-15 years".

The other articles on this draft that stipulate about the abortion are the article 481 paragraphs 1 and 2, the article 482 paragraphs 1 and 2. The article 481 paragraphs 1 and 2 provide that everyone who does the abortion or termination the women pregnancy with that women agreement will get the punishment for 5 years and get fine as stated in category IV. And if that action caused the death of that woman then the punishment will be 10 years. The article 482 paragraphs 1 and 2 provide that the doctor, nurse or pharmacist who helps the woman in doing this crime as stated in article 480 paragraph 1, doing or helping the activity as stated in article 480 paragraphs 1 and 2 and the article 481, the punishment will be added one third from the original punishment and termination the right to have practice in that profession. The doctor who is doing the abortion with the medical reason, to save the mother's life will not get the punishment or indicate as a doer of criminal action.

Actually, the crime for the abortion which stipulated in Indonesian Criminal Code or the new concept of The Criminal Code is almost the same. The different is only the explicit statement about the doctor helping in doing the abortion with medical reason can not be punished. From the formulation policy aspects, in formulating the punishment of the crime, the Indonesian Code Draft uses general maximum and minimum system. It is also stipulated about the fine which does not explicitly stated in Indonesian Criminal Code. The new Indonesian Criminal Code Draft formulates the punishment by using classification system whether it is a simple crime or not.

It's clear that from those two regulations explicitly assured that criminal threat is not only for pregnant women, but also for other persons whether they did it on purpose or not and for the people who suggested or helped in doing the abortion. For instance a man who is asking the pregnant woman to do the abortion because of their unlawful relationship, then this man can be punished, as well as medical professional.

Wirjono Prodjodikoro² defines the meaning of abortion as 'Doing the abortion or termination the pregnancy, the baby that is born by the mother is an alive or a death baby'. And as explained above, abortion remains forbid by the regulation although there are justifications that stated clearly in Indonesia Regulation Number 36 of 2009 which implicitly open the opportunity to do the abortion with emergency medical reason, to save the mother's life. Different from the opinion of Wirjono Projodikoro, Effendi Pulung mentions that abortion is removal the life of the baby from his mother either the activity is spontaneous or on purpose by the

¹In Criminal law doctrin, *the problem of dader and pleger*, still become a problem and create a conflict. The different opinion is about the wrong position of the article 55 of the Indonesian Criminal Code. The Article 55 is in Chapter V of Indonesian Criminal Code, and it is about the doer of the crime consist of more than one person, in the other hand the doer of the abortion is only one single person,. But some of the schoolars can understant this position, because the plager in abortion is also Hazewinkel Suringa. See, Barda Nawawi Arief, Criminal Law II, The material for Criminal law Lecture in University of Diponegoro, Semarang, 2012, p.30-31.

²Wirjono Projodikoro, *Specific Criminal offense in Indonesia*, Eresco, Bandung, 2013, p. 221.

doer.¹

In Black's Law Dictionary, mentioned that "the abortion is knowing destruction of the life of an unborn child or the intentional expulsion or removal of an unborn child the worn, other than for the principal purpose of producing a live birth or removing a dead fetus."²

The first meaning mentioned that abortion can be divided into two categories spontaneous abortion and on purpose abortion such as *abortus provocatus medinalis* and *abortus provocatus criminalis*. The *abortus provocatus medinalis* means the abortion is done because of the medical reason and based on the doctor consideration, it is also done by medical staff that specially trained for doing it well, while *abortus provocatus criminalis* is doing the abortion deliberately or killing the fetus without legal medical reason and because of that can be categorized as a criminal act.

The issue now is not about it is ethic or not if abortion is allowed, but it is allowed or not to do the abortion practice according to the law in Indonesia. This question is difficult to answer. The reason is obvious, because in one side, the law in Indonesia forbids the abortion practice; on the contrary, the abortion practice has been happened everywhere in Indonesia without any criminal sanction from the recent law (The article 10 of Indonesian Criminal Code). Even though according to religious opinion that the abortion is assumed as a murder and violate the human rights, because it is connected to the rule on criminal code and the law that regulate human rights (Act. Number 39/1999), medical law even United Nation Resolutions on United Declaration of Human Right. However, recently that action has been happened almost in every Indonesia territory. This action or practice is mostly done traditionally; such as by doing massage or drinking traditional ingredients that the fact is very dangerous for the pregnant woman's safety and also the fetus. The other practice of the abortion is done by asking a help from doctor, even in hospital or places that prepare for doing it.

Even though there is law prohibition and threaten with hard punishment, the fact has indicated that abortion had happened widely in Indonesia with *various Modus operandi* that hard to be detected by the law. The influence of social culture changing and pressing of demography factor as well as particular politic contribute to the abortion act in this country.

A research in Indonesia done by Hull. Th, Sarsanto and Ninuk Widyantono³ found that there is an indication that the abortion is mostly done by young women that has not been married yet who becomes pregnant. This situation caused by the changing of sexual culture, especially in city. While, Budi Utomo and Sujana Adi Putra⁴ tell that the proportion of women that has not married yet is bigger on abortion case that done outside the medical regulation than abortus spontaneous, whereas the case proportion is 10 to 60 percent, all abortions are done illegally outside the article 15 of the Indonesian Regulation Number 36/2009.

This need is become more strengthen by pressing incessant of family planning program done by the government. The small and welfare family program with the motto "two children are enough" seems become one of the effect of distribution of abortion everywhere. So it is unobvious when the abortion for life and when the abortion of choice is. The doctors, who help the abortion, commonly thought that abortion is a bad act, but it's better done than isn't done at all. The reason is obviously to save the life of the pregnant woman. In fact, there is an opinion that abortion is a medical necessity that is needed by the pregnant women who becomes the victim of the fail use of contra captives' tools as suggested by the government. Aside from the cheap budget of doing the abortion, the available facilities that are easy to find everywhere may cause the abortion practice becomes easier to do, beside of that it's possible to do based on the medical law as has said above. Even though in the meeting of the House of the Representatives to formulate the Draft Health Bill there is a strong debate whether abortion should be stated in that regulation but the fact is the health law implicitly give a chance or moving space to do abortion practice especially based on medical emergency.

The opportunity in doing the abortion can be seen in Indonesian regulation Number 36/2009 on Medical as follows:

Article 15 paragraph 1 stipulates that in emergency condition and on purposing to safe the pregnant women or her fetus, could be done particular medical act or allowed to do such medical procedure.

Extended to article 15 paragraph 2, it is provided that such medical action as has been said on paragraph 1 can be done if:

- a. Based on medical indication that have to be done;
- b. By the medical staff who has qualification and expert for doing it and done with profession responsibility and based on the expert team consideration;
- c. By approval from the pregnant woman itself or husband or her family
- d. To particular medical instrument.

¹Atang Ranoehimarja, *Medical Science of Judiciary*, Tarsito, Bandung, 2014, p. 89.

²Nyoman Serikat Putrajaya, *Capita Selecta of Criminal Law*, University of Diponegoro Press, Semarang,, 2013, p.20.

³L. Tukan, *Legal Potpourri of Social and Political*, University of Diponegoro Press, Semarang, 2013, p.56.

⁴Atang Ranoehimarja, *Op. Cit.*, p.112.

Then the particular medical act is mentioned on paragraph 3 that state the enforcement of paragraph 1 and 2 above will be determined with government regulation. In explanation of article 15 paragraph 1 above, it is stated that medical act on the form of abortion with any reason, is prohibited because it against the law norm, religion norm, moral norm and ethic norm. However, in emergency condition as an act done to safe mother or her fetus life, the abortion can be taken in such a particular medical act.

Paragraph 2 point (a) also explained that medical indication is a condition that truly has to take that particular medical action, the pregnant mother and her fetus is in danger condition. Then point (b) explained the medical staff that can do the particular medical act is the staff that is qualified and expert to do it, that is an obstetrician.

To enforce the medical law Number 36/2009 above, it is needed the Government Regulation to explain about the emergency condition, the expert and qualified medical staff and from of approval and medical instrument (see explanation on paragraph (3)).

From the explanation of the above regulation, it can be concluded that abortion in any reason is not allowed because it against the law norm, religion, ethic norm. But there is exception that the abortion can be done for the safety of the pregnant woman and her fetus.

Based on the above article it can be said that the practice to do abortion can be justified in the condition that abortion only done in emergency condition and complied with the medical procedure by considering the life of pregnant woman and her fetus.

From the last thing that has been explained, there have to have a strong indication to do abortion and only done by expert and qualified medical staff. Whereas the condition is needed before doing the action, there is approval from the woman it self or if the woman in unconscious condition, the approval must be get from her husband and family.

The justification of the abortion according law Number 36/2009 which has been explained above is not very different from what Abdul Qadim Zallom said, the allowing to do abortion is step of creation the fetus, whether after breathed the soul to mother's fetus, if trusting doctor determines the fetus on mother's uterus can cause the mother and her fetus die. It means, this kind of condition may be allowed to have abortion, by considering the safeness of the mother's life. Saving life is appealed in Moslem doctrine.¹

From the above explanation, can be concluded that even though law Number 36/2009 gives the chance to do abortion, but the action is only for keeping the pregnant woman's safety and must be done through medical procedure. The procedure can be done by a doctor who will help the abortion and responsible based on medical ethic code, it happens because not all doctor can be adjusted to do the abortion.

D. Law Enforcement Through Non Penal Instrument

The policy to handle crimes issue in Profession like doctor (include lawyer, accountant, taxation, notary, and etcetera), it is needed an effort to handle it professionally as well, because that issue is not as simple as turning hand, which means that a comprehensive and multi dimensional policy is important to take into account. It is also mean that to handle it, some aspects should be considered, not only from law issue (criminal, civil or administration law), but also should be seen from any other issue such as ethic, morality, even economical issue. Therefore if mal-practice is happened, and then it is done by a doctor, midwife or nurse with economical reason or business reason, then they can be prosecuted as an effort to take responsibility based on the law.

Related to the above explanation, Muladi² mentioned that "in order to form a politic crime toward crime regarding to the profession, it can use penal or non penal instrument". Nevertheless in using non penal instrument to handle crime toward profession circumstances, should be notice what we called professional disciplinary law and also the court. Meanwhile to increase the effort to enforce the norms, it is necessary to increase the education and ethic course for the doctor, nurse and physician or for those who has no academic knowledge. Furthermore the enforcement of discipline should be done by the government as well.

The use of non penal instrument on effort to enforce the law in medical or healthy profession is the steps that should be done strictly with a consideration that does not use the criminal law emotionally to punish them, but it should be consider about the victim or victim oriented. This is only done to explain that although the law gives the opportunity in doing the abortion, this action is only to safe the mother as explained in non penal instrument. Related to the necessity of the effort on preventing the crime in medical profession by using non-penal, Muladi ever criticized that:

- a. Class Justice sometimes happened, and it can't be differentiated whether the case is under the discipline court jurisdiction or general court jurisdiction such as criminal court;
- b. It seems that profession disciplinary court tends to manipulate the fact and try to defense the members;

¹See Abdul Qadim Zullum, *Op.Cit.*, p. 55.

²Muladi and Barda, *Op. Cit.*, p. 69-74.

- c. Disciplinary court composition only consist of the profession colleagues itself, sometimes does not defense the public interest, it would be better if law academician can participate in this court;
- d. The disciplinary court is usually a closed court, and it can create a suspicious that something wrong in it and if we look at the benefit of the sanction can't be justified because *derent effect* toward potential suspect is not existing;
- e. The discipline court process sometimes too long.¹

Beside the necessity of law enforcement discipline, Muladi thought that the importance things that should be done to enforce the law, as follow:

- a. Each of the profession organizations should evaluate their discipline, and it will be used to guarantee the protection of the cavitations and their profession, which means the norms, should be clear and socialized.
- b. Besides the good discipline regulations consist of morality ethic, should be formulated clearly, in frame what has been mentioned above.
- c. In profession limitation the discipline enforcement should be done by the government also;
- d. Every profession organization should strengthen their financial and the staffs for investigation interest if there is an action that against the discipline;
- e. To make the discipline procedure as simple as possible;
- f. It is important to increase the ethic through the education and course to increase the understanding of the discipline of the profession;
- g. There should be inter or multi discipliner study to the law of the profession;
- h. It is needed the standard of quality of the institution who educates the candidate profession;
- i. Used social sanction and administrative sanction such as termination of the member of the organization;
- j. If positive law prove that the criminal in profession happened, then the profession should responsible to his action on criminal law.

Based on above explanation, it can be mentioned that the effort trough criminal politics to overcome the crimes on profession activity especially in medical professions is changing the discipline court system. It must be in accordance with the change of the social norms. Besides it is also important to provide the better regulations with a clear meaning and explanation, then there will be no ambiguity on it. The role of the society is also important to anticipate or control the wrong act of the medical profession as stipulated in Indonesian regulations.

E. Conclusion

The abortion basically is a wrong act based on the regulation in Indonesia and also the other norm. The abortion or terminate the pregnancy (*abortus provocatus criminalis*) can be sued in a court based on The Indonesian Criminal Code (Article 346, 347, and 348) and the Indonesian Act Number 36/2009. But the above regulations can not be enforced for the abortion or terminate the pregnancy based on medical emergency reason such as to save the woman's life. Therefore the abortion because of choice or the wish of the mother is an illegal action and it can be penalized.

The law enforcement to overcome the abortion crime can be done by using the penal. If the abortion is done and it against the ethic code of the medical profession, non penal can be used. The using of non penal in this case is done by a profession discipline.

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