



**JURIDICAL ANALYSIS OF ABORTUS PROVOCATUS ACTIONS AGAINST RAPE
VICTIMS UNDER THE LAW
NUMBER 36 OF 2009 CONCERNING HEALTH**

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ABSTRACT

A doctor can exercise medical authority based on the authority he has as a health worker, but of course this action cannot necessarily be carried out by a doctor, this is related to the provisions of applicable laws and the medical procedures that must be carried out.

The research method that the researcher carried out was the research specifications carried out were analytical descriptive. Normative juridical approach method, namely legal research which prioritizes researching secondary data, in the form of positive law and how it is implemented in practice. The data collection technique is literature study, namely by searching for, collecting and reviewing statutory regulations, draft laws resulting from research, scientific journals.

The conclusion obtained in this research is that Medical Practice indicates that there is no medical action carried out by a doctor that is wrong (malpractice) as long as the patient does not feel disadvantaged. Legal protection for doctors who perform abortions according to Law Number 36 of 2009 concerning Health in conjunction with Government Regulation Number 61 of 2014 concerning Reproductive Health is that as long as the procedural requirements are carried out then there is no legal responsibility, apart from that as long as the condition faced is an emergency situation then that there is a professional responsibility.

Say Key : *Doctor, Authority, Abortion.*

A. Background of the problem

Indonesia is a developing country, accompanied by technological developments and advances in medical science, doctors in operating their profession in society



experience a dilemma, while medical science is very advanced, while legal science is still out of date. The current reality is that advances in medical sciences related to legal sciences such as abortion, test tube babies, euthanasia and so on still do not have strict regulations. Therefore, if a case occurs between a doctor and a sufferer or patient, it is not easy for law enforcement officials to determine who is at fault because doctors must also receive legal protection.

Based on Health Law Number 36 of 2009 concerning Health, medical procedures (abortion), as an effort to save pregnant women and/or their fetuses, can be carried out by health workers who have the expertise and authority to do so and are carried out in accordance with professional responsibilities and team considerations. expert. This shows that the abortion carried out is legal or can be justified and legally protected and all actions carried out by health workers against women's reproductive rights are not a criminal act or crime. Currently, abortions by medical personnel are carried out when there is a medical indication, for example the mother with serious, life-threatening illnesses.

Advances in medical science and technological developments play a very important role in enforcing criminal law. In criminal law, medical science is used to help find material truth in the judicial process, called forensic medical science, or judicial medicine, while legal regulations regarding health services or treatment are called health medical law or health law. With the development of technology and advances in medical science and the existence of strict legal regulations, there are still many people who carry out provocateur abortions, even in our society, especially big cities, there are often murders committed by humans on other humans by means of abortion, both classical and modern.

Murder or abortion is a crime and a condemnable act that can disturb public order in society and the state. In several countries, especially western countries, abortion is also carried out to save the fetus or baby in the womb, this is because the fetus or baby in the womb can already be classified as old enough and capable of living outside the womb, while the mother is carrying it in a state of death or death. In an incident like



this, it is necessary to save the fetus or baby considering that its age can be said to be perfect.

Other forms of abortion are carried out for treatment or medical indications and psychological indications, as well as provocatus abortions which are carried out with evil intentions. The above is confirmed in the law, but can be made an exception to the articles of the Criminal Code concerning the prohibition of abortion because the perpetrator cannot be subject to criminal sanctions as mentioned by R. Soesilo in his book commenting on the articles of the Criminal Code, namely "If the doctor and so on, abortion or termination of the pregnancy for birth control reasons, to help the soul or maintain the health of the woman is not punished."

Thus, the articles regulating the prohibition of abortion in the Criminal Code are no longer effective and out of date. In modern countries there are those that have allowed or legalized all forms of abortion, some are still at the stage of fighting for legalization of abortion. However, in many countries, especially developing countries and religious centers such as Indonesia, the problem of abortion is a problem that in society is still an act that is prohibited by state law.

Today's medical science is advancing rapidly from all-electronic and computer-based diagnostic tools to the most advanced therapeutic equipment. For example, people who experience kidney failure do not have to die immediately, they can still be given the opportunity to extend it through a kidney dialysis device to a kidney transplant, and a damaged heart can also be replaced with an artificial heart. In the world of medical science, it turns out that medicine is also progressing towards perfect treatment for disease. Seeing this reality, legal science must be able to adapt medical science to subjective reasons.

Provocatus abortion is murder carried out on a fetus that is still in the womb, this murder is an unlawful act. One of the abortion cases that became the center of attention in the mass media was an abortion case involving 10 people suspected of practicing abortion and around 5,400 fetuses were recovered by the Special Crime Directorate of Polda Metro Jaya. The ten perpetrators who were named as suspects consisted of two obstetricians with the initials Dr. MN and Dr. Li, four polyclinic employees YN, AE,



SA, DW, and four brokers or brokers whose job was to look for victims, namely Li, Sm, Ww, and Ro. . Disclosure of abortion cases was included in the largest category in the jurisdiction of Polda Metro Jaya during 2016.

Based on information obtained by the Special Crime Directorate of Polda Metro Jaya, the perpetrator admitted that on average he received three patients every day who wanted to abort their pregnancies, so that if multiplied by five years it was estimated that the number of fetuses that had been aborted would reach 5,400 fetuses. Talking about abortion rates set by illegal clinics, each patient who is three months pregnant is asked for an abortion fee of IDR 2.5 million. Meanwhile, for those who are more than three months pregnant, the price is set at IDR 5 million. Another case related to the profession of doctors as medical professionals is the High Court case in Rogers v Whitaker. The high court in V Rogers Whitaker had to deal with a case where the plaintiff underwent surgery on his right eye. The plaintiff had been blind for many years, Dr Rogers recommended surgery to improve the appearance of the eyes. Dr Rogers did not say that the risk of success was 1:14000. Dr Rogers was sued on the basis that he had been negligent in not providing advice regarding the risks of surgery, because given that information it was likely that the plaintiff would not have wanted to carry out the operation.

This problem is a problem of standard medical procedures that must be carried out, with an element of negligence regarding standard procedures, it can also be said that a medical violation has occurred due to the failure of family planning. Even though the family planning program organized by the government to limit the birth rate using various contraceptives can be said to be successful, there are still those who experience failure because the available contraceptives are still not perfect, so they feel that they are carrying out abortion provocateurs.

Therefore, the author is very interested in conducting research in order to obtain a clear picture regarding the criminal law review of abortion provocateurs carried out by doctors. Based on the description above, the author wants to research this matter which is contrary to the aim of the law itself, the aim of the law is to achieve the aim of the law, namely to uphold an orderly social order and uphold order and balance. It is hoped



that by establishing a social order, the interests of humanity will be protected. To achieve this goal, the law is responsible for dividing rights and obligations between individuals in society, sharing power, and standardizing methods for resolving legal problems and maintaining legal certainty. This research will explore the juridical analysis of abortion provocatus for rape victims based on the law. Number 36 of 2009 concerning Health, so the author took the title of Scientific Work as the final statement in the Open University Law Study Program with the title: "JURIDICAL ANALYSIS OF ABORTUS PROVOCATUS ACTIONS AGAINST RAPE VICTIMS BASED ON LAW NUMBER 36 OF 2009 CONCERNING HEALTH"

B. Formulation of the problem

Based on the description above, the problem formulation can be drawn as follows:

1. Is the act of abortion provocatus against a rape victim in accordance with Law Number 36 of 2009 concerning Health?
2. What is the process for resolving criminal and medical abortion provocatus cases?

C. Research methods

In carrying out this research, the researcher **used** a type of normative legal research. Normative legal research is conceptual legal research as contained in statutory regulations and conceptually existing in other legal rules that exist in society regarding a particular legal problem. In this research, researchers used a type of normative research, namely research carried out by reviewing statutory regulations or other regulations applied in resolving a particular legal problem. Normative research is often called doctrinal research where the object of study is are statutory regulatory documents and library materials which constitute basic data which in research science is classified as secondary data.¹ According to Soerjono Soekanto, legal research can be divided into:² Normative Legal Research, consisting of:

1. Research into legal principles

¹ Soerjono Soekanto, Normative Legal Research, (Jakarta, PT Raja Grafindo Persada, 2003) p.23

² *Ibid* pg 67



2. Research on legal systematics
3. Research on the level of legal synchronization
4. Legal history research
5. Comparative legal research

In accordance with the type of research, namely normative legal research (normative juridical), more than one approach can be used. In this research, a statutory approach and a concept approach are used. The legislative approach is carried out to examine the statutory regulations that regulate. In the perspective of legal theory, justice is the main goal of the natural law school. Where the natural law school holds the view that law is universal and eternal.³ In the Indonesian context, justice is in line with the values stated in Pancasila as the basis of the state. The fifth verse in Pancasila states that social justice is for all Indonesian people. Based on this verse it can be said that justice must be aimed at all citizens without exception as an embodiment of Indonesia's diversity. To realize social justice, development can be done that is oriented towards the welfare of all Indonesian people. In development, legal development is an aspect that cannot be separated. This is because the law functions as a means of development/renewal of society, as expressed by Mochtar Kusumaatmadja.

Mochtar Kusumaatmadja stated that law is a means of societal renewal.⁴ This is based on the assumption that the existence of order or order in development and renewal efforts is something that is desired or even considered (absolutely) necessary,⁵

D. Research Results and Discussion

1. Is the act of abortion provocatus against a rape victim in accordance with Law Number 36 of 2009 concerning Health?

The legality of abortion in Indonesia is still a hot topic of discussion among academics, advocacy practitioners and Islamic boarding schools. The practice of

³ Lili Rasjidi, *Basics of Philosophy and Legal Theory*, PT. Citra Aditya Bakti, Bandung, 2011, p. 47.

⁴ Otje Salman and Eddy Damian (ed), *Legal Concepts in the Development of a Collection of Prof.'s Writings. Dr. Mochtar Kusumaatmadja, SH, LL.M.*, PT. Alumni, Bandung, p. 83.

⁵ *Ibid*, p. 88.



abortion itself has a legal umbrella that legalizes this practice. This can disturb the public, because the existence of this regulation means that other parties can freely carry out abortions. The act of abortion can affect the human values upheld by religion. Apart from that, abortion can threaten human existence in the world. The permissibility of the practice of abortion is contrary to the rules in the Koran al-Isra': 31. This creates a dilemma for rape victims, because in Indonesia abortion resulting from the act of rape is regulated by law. However, the Koran clearly prohibits the practice of abortion because it is the same as killing innocent lives. Based on the 2019 National Commission on Violence Against Women's Annual Records, there were 792 cases of rape, in fact cases of incest were in first place with 822 cases that had been reported to service institutions, especially the government, such as the police.

Meanwhile, abortion cases in Indonesia reach 43% of abortions per 100 live births. These abortions occur both in urban and rural areas with a percentage of 78 and 40 based on the 2013 report from the Australian Consortium for In Country as in the online media CCN Indonesia. The practice of abortion is not only carried out because of being a victim of rape. There are several reasons underlying the practice of abortion, including: internal factors of the perpetrator, educational factors, family factors and factors from the partner. On the other hand, the practice of abortion can be carried out by women with or without marital status. If we look at the status of women, the reasons for having an abortion can be grouped into 2 (two). First, for women who are not married. They do this for several reasons, such as becoming pregnant at a young age, having no responsibility from their boyfriend, being afraid of their parents finding out about a pregnancy outside of marriage, having the status of a widow who is pregnant outside of marriage, being a mistress and having a pregnancy that is prohibited by her partner. Second, women who are married. They carry out abortions for reasons of contraceptive failure, too many children, birth spacing too quickly, too young an age to give birth, medical reasons and social and economic factors, other reasons can occur in couples who are in the process of divorce or in couples where the husband does not expect the birth of children from the second wife.

The process of abortion or aborting a fetus can be done in two ways, namely



safe and unsafe. An unsafe process can cause various risks including infection of the reproductive organs, infertility, tearing of the uterus (womb) which is an important organ in female reproduction, bleeding, neurological/nervous disorders, shock, damage to the reproductive organs in the birth canal (traumatic genital fistula). even causing death. Those who commit this act will be filled with feelings of guilt that will not go away for the rest of their lives. Even though the impact caused by the practice of abortion is very high, rape victims are given the right to have an abortion as stated in Article 75 paragraph 2 of Law no. 36 of 2009 concerning Health and Article 31 paragraphs 1 and 2 of Government Regulation no. 61 of 2014 concerning Reproductive Health. The aim of ijthad or development of Islamic law is to eliminate mafsadat that can threaten the survival of Muslims. One of the developments in Islamic law is to use the maqashis shari'ah method which is based on benefit.

In the al-Ahkam Journal Volume 11 Number 1 June 2016, Khoirul Bariyyah and Khairul Muttaqin, discuss Abortion Legislation from a Medical and Juridical Perspective. The results of this study explain that without an emergency reason, abortion cannot be carried out because it could threaten the mother's life. Abortion due to rape in the view of jurisprudence can be carried out as long as the sperm cells have not fused with the ovum cells. So, the law in force in Indonesia needs to pay attention to the provisions on the permissibility of abortion for rape victims and fetuses that are indicated to have disabilities. Legal differences between juridical, medical and Islamic law cause people to be confused because there is no legal uniformity. Apart from that, the lack of uniformity in the law can result in abortion practitioners getting protection because it has a legal umbrella. Although on the other hand he could be said to have violated the law. Likewise with doctors who help practice abortions.

In the Social Humanities Journal Volume 4 Number 1 June 2011, Moh. Saifullah discusses Abortion and its Risks for Women (from the View of Islamic Law). The results of this research explain that abortion according to Islamic law is haram. The scholars have agreed that abortion carried out after 4 months of pregnancy is haram, because at that age the fetus is already alive. Abortion may be performed in



an emergency, such as when it endangers the life of the mother. Meanwhile, abortion performed at less than 40 days of gestation is makruh. This must meet the requirements of the husband and wife's consent and recommendations from two specialist doctors that the abortion to be carried out will not cause harm to the mother.

Based on the description above, the legality of abortion is an interesting matter for the author to review considering the huge consequences it causes. Therefore, the author will analyze the legality of abortion using Imam Ghazali's maqashid sayri'ah method by presenting the research title "Abortion of Rape Victims in Indonesian Legislation from Imam Ghazali's Maqashid Syari'ah Perspective".

Firstly, we need to know the legality of abortion as stated in Indonesian legislation first regarding abortion. Abortion is an attempt to remove the products of conception from the womb before the fetus can live outside the womb. This understanding is written in the Regulation of the Minister of Health of the Republic of Indonesia. Meanwhile, according to medical abortion, a pregnancy is terminated before the fetus is 20 (twenty) weeks old or the fetus weighs no more than 500 grams, that is, the fetus cannot live independently outside the womb. In general, abortion is divided into 2 (two) types, namely spontaneous abortion and intentional abortion (*provocantus abortus*). First, spontaneous abortion is an accidental abortion or an abortion caused by natural causes, not the result of human action. This abortion usually occurs at three months of pregnancy and the cause of this miscarriage cannot be prevented, doctors cannot precisely determine what causes the miscarriage. Generally, this kind of abortion begins with bleeding that has no apparent cause or can occur due to a fall.

Second, intentional abortion (*provocantus abortus*) is an abortion carried out intentionally. There are 2 (two) types of abortion, namely medical abortion *provocatus*, this type of abortion is carried out by a doctor on the basis of medical indications which show symptoms in the mother's body and can threaten her life. Taking action like this is with the aim of saving the life of the pregnant mother and if it is not taken immediately then the mother's safety could be threatened. Next is abortion *provocatus criminalis*, namely abortion without any indication of a medical



emergency which is usually carried out illegally. The aim is to cover pregnancies resulting from casual or extramarital sex or unwanted pregnancies due to financial or other factors. Furthermore, the provisions for allowing abortion are stated in Indonesian legislation. Where the author limits the discussion of the law that regulates the permissibility of abortion, namely Law no. 36 of 2009 concerning Health, and strengthened by Government Regulation no. 61 of 2014 concerning Reproductive Health. In Law no. 36 of 2009 concerning Health, the provisions for abortion are contained in Articles 75 to 77. Article 75 explains that abortion is prohibited for anyone who performs it. However, there are exceptions for women who have obtained medical permission, among others.

There are indications of a medical emergency for women whose pregnancy has been detected to threaten their safety or whose fetus has a serious genetic disease or congenital defect, or which cannot be repaired, making it difficult for the baby to live outside the womb. Second, for women who experience pregnancy as a result of rape, the consequences can cause psychological trauma for themselves. This abortion can only be carried out if counseling has previously been carried out and after the abortion, counseling has also been carried out again with a competent and authorized counselor. Abortion cannot be done carelessly, there are provisions that regulate it as stated in Article 76 of Law no. 36 of 2009 concerning Health. Abortion can only be performed on pregnancies that are before 6 (six) weeks from the first day of the last menstruation except in cases of medical emergencies. The abortionist (wife) must obtain permission from her husband, except for women who are rape victims. Abortion is carried out with the consent of the person concerned. Abortions are carried out by certified medical or health personnel who have the skills and authority that have been implemented by the Minister. Health service providers must meet the requirements set by the Minister. In this law, Article 77 also states that the government is obliged to protect and prevent women from unsafe, low-quality and irresponsible abortions and which are contrary to religious norms and the provisions of applicable laws and regulations. Apart from being regulated in the Health Law, abortion is also regulated in Government Regulation no. 61 of 2014 concerning



Reproductive Health, namely Article 31. This article mentions that abortion can only be carried out on the basis of indications of a medical emergency and pregnancy due to rape. Pregnancy due to rape can be carried out if the gestational age is less than 40 days from the first day of the last menstruation.

Furthermore, indications of medical emergencies are regulated in Article 32 which includes that the pregnancy threatens the life or health of the mother or fetus. The threat to the life or health of the fetus could be in the form of having a congenital defect, suffering from a genetic disease or something that cannot be repaired, making it difficult for the baby to live outside the womb. Handling of medical indications is carried out in accordance with applicable standards and is determined by the abortion eligibility team as stated in Article 33 of the Government Regulation on Reproductive Health. The abortion feasibility team consists of at least 2 (two) health workers, chaired by a competent and authorized doctor. Determining indications of a medical emergency must go through an examination according to standards and the team must produce a certificate of eligibility for abortion. Furthermore, abortions carried out due to rape are regulated in Article 34 relating to indications of rape. Pregnancy resulting from rape is a pregnancy resulting from sexual intercourse carried out without the woman's consent. Pregnancy like this can be proven by a doctor's certificate stating that the gestational age corresponds to the rape incident and information from investigators, psychologists or other experts regarding the alleged rape.

Thus, in Law no. 36 of 2009 concerning Health and Government Regulation no. 61 of 2014 concerning Reproductive Health does not only regulate health, but also protects the rights of women, such as women who are rape victims, who are given leniency in being allowed to have abortions. Review of Imam Ghazali's Maqashid Syari'ah Concerning the Legality of Abortion in Indonesian Laws. Abortion is permitted in Law no. 36 of 2009 concerning Health, and clarified by Government Regulation no. 61 of 2014 concerning Reproductive Health is a type of abortion provocatus medicalinalis, namely intentional abortion with medical indications. Even though abortion is essentially not permitted, in certain circumstances, such as the threat to the life of the mother, abortion is permitted. The scholars who do not allow



this practice include some scholars from the Shafi'i school of thought and the Maliki school of thought. Life begins from conception, so Imam Malik is of the view that abortion cannot be permitted even if the fetus is not yet 40 days old. Meanwhile, the Shafi'i ulama group has different opinions regarding abortions carried out before 4 months, some allow it with the provisions as long as it is still in the form of sperm cells and ovum cells as well as a blood clot or 80 days old and there are those who forbid it. However, other scholars allow abortion as long as the fetus is not yet 4 months old, or the fetus does not have a soul. Most scholars from the Shafi'i school of thought agree that abortion is haram before the pregnancy is 40 - 42 days old. Like Imam Ghazali's opinion in the book *Ihya 'Ulum al-Din*, abortion is a criminal act so that it is haram whether the fetus has a spirit or not. According to him, life in a woman's womb begins when sperm cells and egg cells meet. If the fetus already has a spirit, the act of abortion is a heinous act that falls into the criminal category, equivalent to the act of killing a live baby. However, in his book *al-Wajiz*, Imam Ghazali believes that abortion is permissible if the womb is still a clot of blood ('alaqah) or a lump of flesh (mudghah). This is because fertilization has not yet occurred. Meanwhile, scholars who allow abortion include scholars from the Hanafi and Hanbali schools of thought. According to the Hanafi madzhab, abortion is permitted if the pregnancy is less than 120 days old. Meanwhile, the Hanbali school of thought states that abortion is permitted as long as the fetus is still a lump of flesh. If these differences of opinion are observed, it can be understood that the root of these differences is about the limits of life. When does life begin?

In the Al-Quran surah al-Mukminun: 12-14 it is not clearly explained when humans actually enter life, even so in the hadith it is only explained that the first 40 days the sperm process takes place, the next 40 days in the form of a clot of blood ('alaqah) and the next 40 days in the form of a lump of flesh (mudghah), after which he blows out the spirit. If you look at one of the objectives of the Shari'ah, namely *hifz al-nafs* (preserving the soul), then abortion has a very high risk impact on abortion perpetrators if it is carried out illegally, including physical health and safety risks in the form of sudden death caused by failure of anesthesia or heavy bleeding,



torn uterus, damage to the cervix, cancer of the uterus, liver, ovaries and breasts. Another risk is mental or psychological disorders, with symptoms such as loss of self-esteem, screaming hysterically, wanting to commit suicide and not being able to enjoy sexual relations anymore. However, in reality, if a woman is pregnant and has an illness or something that could endanger her life, abortion must be carried out because it is a way for her to survive. Taking a solution like this can be based on one of the rules of fiqh, namely first, al-dlarar yuzalu syar'an (danger must be eliminated). Second, al-dharar al-asyadd yuzaalu bi al-dharar al-akhaf (a heavier danger can be eliminated by choosing a lighter danger). Third, al-dharurotu tubihul mahdzuraat (compulsion can allow doing things that are prohibited). Fourth, , taghayyir al-ahkam bi taghayyur al-azman wa al-imkan (Islamic law can change with changing times and places).

In cases of abortion due to rape. The legal umbrella in Indonesia allows abortion. However, in the author's view, in cases like this, the physical and psychological condition of the mother should first be looked at, whether it is possible to have an abortion or not, in order to reduce or prevent the mother's death. In this case, the safety of the mother's soul is prioritized over the life of the fetus. The basis for these considerations is as follows:

- 1) The life of the fetus carried by the mother is uncertain, whereas the mother's life in this world is already real, so that the right to life rests with the mother more than the right to life of the fetus.
- 2) If the mother is sacrificed, the risks will be greater. If the mother dies, the other children she leaves behind will face difficulties, especially the babies after she is born. However, if the fetus is released, the risk is less than the risk of the mother dying.

2. What is the process for resolving criminal and medical abortion cases?

As we know, crimes involving criminal provocateur abortion are difficult for law enforcement officials to detect. Especially the police as investigating officers, criminal abortion provocateurs can be prosecuted if the crime is actually known. It is not



uncommon to find out about criminal abortion provocation crimes first after receiving reports from the public. Because this crime was committed against a human fetus that was in the womb and still in the form of blood, usually in society the fetus is known to have been buried or thrown into a river. The police as investigating officers, after learning or hearing reports of criminal miscarriage, the first step is to go to the scene where the crime was committed. As is known, basically investigating a crime is looking for strong evidence, to determine whether it is a crime or not. If it turns out that the act is a criminal act of abortion provocateur then look for who the perpetrator of the act is. Next, the police sought information from people who knew that the act had been committed, as well as evidence as convincing evidence.

The police then arrested the person who committed the act. If necessary, the person who commits the crime can be detained, or not, depending on the observations of the officer concerned. If the perpetrator of the crime is detained, he or she must fulfill the requirements. These requirements include the following: The existence of a detention order which contains the identity of the defendant or suspect and also contains the reasons for the case against which the defendant is accused. Subjective requirements include: There is a strong suspicion that the suspect has committed a criminal act with sufficient evidence. There are strong suspicions or concerns that the suspect/defendant will run away and destroy evidence. There is concern that the suspect will commit another criminal act. Objective requirements include: That the criminal act alleged by the defendant is punishable by imprisonment for five years or more, That the defendant committed certain criminal acts as regulated in article 21 paragraph 4b of the Criminal Procedure Code.

Then the perpetrator of the crime or suspect is asked for information. To strengthen the truth of the claims later, witness statements need to be heard. Witnesses include expert witnesses who know and can explain the actions that were carried out. If the police feel there is enough evidence to be sure of its truth, the file will be sent to the prosecutor's office to be read out in court. However, if the verbal process from the police is deemed not to meet the requirements, the prosecutor will return it to the original police to be corrected by paying attention to the prosecutor's instructions. In



terms of investigations, after the police have finished carrying out the investigation, the police will immediately hand over the case files to the public prosecutor. Then, within seven days, the prosecutor must provide the investigator with whether the results of the investigation are complete or not. If the investigation is complete, the investigator will immediately hand over responsibility for the suspect and the evidence to the public prosecutor. Returning the case file by the prosecutor to the investigator, because it is considered incomplete, is called pre prosecution.

The prosecution letter drawn up by the prosecutor as public prosecutor must contain the name and location of the agency making the accusation. Also the part of the law that is violated by mentioning regulatory articles, accompanied by criminal threats from the relevant law. In addition, it must also contain the events that occurred by stating the name of the accused, the time and place where the criminal act occurred, as well as other information relevant to the essence of the regulation that was violated. Once it is deemed sufficient, then this case or the letter of accusation will be read out by the prosecutor as public prosecutor at the court hearing, to prove its truth. After the author briefly describes the process of resolving or prosecuting cases of criminal abortion provocateurs, what follows is the process of resolving cases of medical abortion cases.

As explained above, abortion for medical reasons is justified or permissible, so the solution is not required in court. A doctor's action in carrying out an abortion can be said to be a medical consideration if the action meets the following requirements:

- 1) An expert doctor who may perform an abortion;
- 2) The hospital where the abortion was carried out;
- 3) The type of illness or spirituality is taken into consideration;
- 4) Prior to carrying out an abortion, written consent must be obtained from the woman or her husband or heirs;
- 5) Abortion must be carried out by a team of expert doctors;

An expert doctor must be included who explains the type of patient's illness that can be used as a reason for carrying out an abortion. The act of abortion provocation based on medical considerations, carried out by a doctor, is not prosecuted in court



because in medical practice the act is in line with the development of medical science, in addition, law enforcement officials assess that the requirements used as consideration for carrying out an abortion are a natural and logical act. carried out, so that an abortion carried out by a doctor based on medical considerations, is not an act that is contrary to criminal law, in fact it is an act or action that can be justified by criminal law. In practice, law enforcement officers use the teachings or theories of legal science, namely, teachings about the nature of material unlawfulness in a negative function, meaning that even though the doctor's actions are contrary or prohibited by law, in society they are not considered as actions that are contrary to the law. New cases arose after the patient felt that he had received inappropriate medical services. It could also be because the doctor committed malpractice, or made a mistake or negligence which resulted in a fatal outcome for the patient. The police or prosecutors are required to work hard and be careful, to find out whether the doctor has carried out his work properly or not, as well as whether the doctor in carrying out the abortion has fulfilled the requirements set by the hospital or the requirements provided by health law.

To determine that a doctor has committed an error or negligence is a difficult task, if carried out by a prosecutor or police. In situations like this, the police or prosecutor can ask for an explanation from another doctor, or submit it first to the honorary medical ethics court, to get the correct information. If, based on information obtained from the Honorary Court of Medical Ethics, it is confirmed that the doctor in carrying out a medical provocateur abortion made a mistake or negligence that violated criminal law norms, then the doctor must be held accountable for his actions. After being convinced that the doctor made a mistake and violated criminal law norms, the resolution process is carried out the same as in the process of prosecuting or resolving criminal abortion cases.

However, before this is done, in order to avoid the category of abortion provicatus criminalis carried out by doctors, the doctor must have the practice permit that a doctor must have to practice medicine first, so that the procedures carried out can be accounted for. This responsibility is basically a professional responsibility. As is known, the responsibility of the medical profession is in the form of "trying for



something" in other words, not the results obtained but the process obtained to get maximum results.

The action of a doctor in carrying out an abortion is not appropriate if responsibility is attached based on an element of error when the medical action carried out by the doctor is carried out based on the procedure that has been carried out, such as a registration certificate or informed consent which is a statement of the patient's willingness to undergo medical treatment. When this is done, abortion provocatus criminalis can be avoided. Abortus provocatus criminalis is attached to responsibility based on the element of error, however, this can immediately be applied to a doctor, because the nature of the doctor's action regarding abortion is limited to a medical action carried out by the doctor based on existing authority.

Apart from preventive protection, legal protection is strictly regulated by coercive laws and regulations. This legal protection is intended to create a fear effect on doctors from carrying out abortion procedures. This fear is based on sanctions determined by existing laws and regulations, such as the provisions of the Criminal Code.

This repressive protection is a border or limitation of actions that can be taken by doctors to carry out medical procedures which aims to provide direction or guidance for doctors not to carry out medical procedures (abortion) if they do not want to be charged by law. If a doctor performs a medical procedure (abortion) which is contrary to the provisions of the applicable legislation, the law will take action against the doctor in the legal arena with criminal charges, as is the case with many illegal abortions. Examining the actions that can be taken by doctors in the form of emergency medical procedures does not necessarily indicate the doctor's immunity from existing laws. If there are elements of existing procedures or rules or as regulated in the bulb test regarding actions taken by the doctor that are not in accordance with the procedures, then legal provisions can be applied to the doctor.

In other words, the bulb test, which can be said to be a standardization of doctors' actions to take responsibility for their actions, is very clear. In the bulb test itself, the doctor's procedures for carrying out medical procedures are explained and the doctor's



actions are also explained if not carrying out medical procedures is not in accordance with the procedure.

The Bollam test provides guidance regarding preventive protection and repressive protection. Repressive protection is explained regarding the procedural mechanisms that must be taken by doctors as also regulated in Articles 31 to Article 39 of Government Regulation Number 61 of 2014 concerning Reproductive Health, while repressive protection according to the explanation of the bulb test is the doctor's responsibility for actions that do not comply with procedures, namely criminal provisions.

The nature of the bollam test is basically global, that is, it is not aimed at or aimed at a particular country, but in its application every country with various legal systems implemented by these countries can apply or apply the bollam test. The Bollam test also basically not only protects doctors from the medical procedures they carry out, but also protects the patients the doctors face. Protection for patients can be seen from the exposure that doctors have to patients for medical procedures carried out by doctors. Patients must know and be able to question the doctor's actions. This is to avoid arbitrary actions by doctors towards patients.

One form of arbitrariness by doctors towards patients is fraud. Fraud committed by doctors against patients may occur. This is based on the doctor's ability to treat a disease that the patient does not know about. The opportunity for fraud to occur has basically been anticipated by the bollam test by stating that the interaction procedures carried out by doctors and patients must be open.

The doctor's ability to understand a disease must be informed to the patient so that the patient knows the good and bad in the treatment process carried out by the doctor. Thus, the doctor's responsibility in carrying out medical procedures on his patients can be held accountable both professionally and legally.

E. Conclusion

1. That the act of abortion provocatus against a rape victim is in accordance with Law Number 36 of 2009 concerning Health, the authority of a doctor to carry out an



abortion is not a criminal act as intended by Articles 346, 347 348 of the Criminal Code. According to the provisions of Law Number 29 of 2004 concerning medical practice, you must comply with the provisions of Articles 75 to Article 80, namely having a STR (Article 75) SIP (Article 76) using professional standards stipulated in administrative requirements and professional standards. In Indonesia, in principle, all abortions in all their forms are prohibited. In general, abortion in the form of aborting or killing the womb based on the provisions of Articles 346, 347, 348 of the Criminal Code is categorized as abortion provocatus criminalis, excluded from this provision if the abortion is carried out for medical health reasons or abortion provocatus medicalis. Strictly according to the provisions of Article 75 of Law Number 36 of 2009 concerning Health, it is stated that abortion is prohibited unless there is an indication of a medical emergency and psychological trauma to the rape victim as further regulated in Article 31 paragraph (2) of Government Regulation Number 61 of 2014 .

2. Whereas the process of resolving criminal and medical abortion cases, abortion is divided into spontaneous/natural abortion and provocatus (artificial) abortion. In Indonesian legislation, regulations regarding abortion are contained in laws, namely the Criminal Code and the Health Law. In the Criminal Code and the Health Law there is a penalty for carrying out an abortion (abortion), while legal artificial abortion (medicinalis) is regulated in the Health Law.

F. Suggestion

1. For the Government Because the legal rules regarding abortion are regulated spread across various laws and regulations, legal protection to create legal certainty is increasingly difficult to create, therefore a compilation (collection of laws regarding abortion in one book/one regulation) is needed. Steps to create certainty Law and legal protection require harmonization and synchronization of legal regulations regarding health in an integrative manner
2. For Practicing Doctors as a profession in seeking the health of their patients, they are obliged to interact with their patients and provide truthful information regardless of



whether medical treatment is carried out or not due to the information given to the patient. This is of course a basic procedure in medical services as well as to create accountable legal relationships.

3. Academics As pioneers of the birth of an idea or concept, academics are responsible for providing input to the government regarding protection schemes or systems for doctors and/or patients. It is hoped that this scheme or concept will create a harmonious relationship between doctors and patients that is protected by existing law.

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BIBLIOGRAPHY

BOOK

Abd. Rahman Dahlan. Ushul Fiqh. Jakarta: Amzah, 2011.

Abdullah, Mudhofir. Masail Al-Fiqhiyyah; Contemporary Issues. Yogyakarta: Teras, 2011.

Afifah, Wiwik. "Legal Protection for Female Rape Victims Who Have Abortions." DIH: Journal of Legal Studies 9, no. 18 (2013). doi:10.30996/dih.v9i18.277.

Aibak, Politikuddin. Contemporary Fiqh Studies. Yogyakarta: Teras, 2009.

Ali Imron. "Implementing Innovative Islamic Law Using the Sadd Al-Dzari'ah Method." QISTI Legal Sciences, nd

Aminah. "Maqasyid As-Syaria'ah Understanding and Application in Islamic Economics." Fitrah 3, no. 1 (2007).

Amir Mu'allim and YUSDANI. Configuration of Islamic Legal Thought. Yogyakarta: UII Press Indonesia, 2001.

Asmawi. Comparison of Ushul Fiqh. Jakarta: Amzah, 2011.

Bazro Jamhar. The Concept of Benefits and Its Application in Determining Islamic Law (Study of M. Sa'id Ramadhan Al-Buthi's Thought). Semarang: IAIN Walisongo Semarang Postgraduate Program, 2012.

CNN Indonesia. "It is recorded that abortion rates are increasing in urban areas." CNN Indonesia, 2014. <https://www.cnnindonesia.com/nasional/20141029111311-12-8642/terputar-angka-aborsi-meningkat-di-perkotaan>.

Fatma Amalia. "Highlighting Benefits as One of the Basis for Legal Determination." Socio Religion 9, no. 3 (2010).

Hafidzoh, Muyassarotul. Hilda; Love, Wounds and Struggle. Yogyakarta: Pustaka 1926, 2020.



Khatib, Suansar. "The Concept of Maqashid Al-Syari'ah: Comparison Between Al-Ghazali's and Al-Syathibi's Thoughts." *Mizani Scientific Journal: Legal, Economic and Religious Discourse* 5, no. 1 (2018): 47–62. doi:10.29300/mzn.v5i1.1436.

National Commission on Women. "Violence on the Rise: Policies to Eliminate Sexual Violence to Build Safe Spaces for Women and Girls." *Catahu: Annual Notes on Violence Against Women*, 2020, 1–109. [https://www.komnasperempuan.go.id/file/pdf_file/2020/Annual Notes on Violence Against Women 2020.pdf](https://www.komnasperempuan.go.id/file/pdf_file/2020/Annual%20Notes%20on%20Violence%20Against%20Women%202020.pdf).

Munawaroh. "Abortion Due to Rape and Medical Emergencies." *Journal of Sharia Science* 3, no. 2 (2015): 295–350.

Musolli. "Maqasid Syariah: Theoretical and Applicable Studies on Contemporary Issues." *AT-TURAS: Journal of Islamic Studies* 5, no. 1 (2018): 60–81. doi:10.33650/at-turas.v5i1.324.

Mustafa, Zulhas'ari. "Qualification of Maqashid Al-Syari'ah in the Context of Islamic Law Determination." *Al-Daulah* 3, no. 2 (2014).

Muttaqin, Khoirul Bariyyah and Khairul. "Abortion Legislation from a Medical and Juridical Perspective." *Al-Ahkam* 11, no. 1 (2016).

Regulation of the Minister of Health of the Republic of Indonesia Number 3 of 2016 concerning Training and Providing Abortion Services for Indications of Medical Emergency and Pregnancy Due to Rape (2016).

Purnama, Yati. "Chronology of Cases and Factors Causing Abortion, Murder and Dumping/Burial of Babies." *Syntax Idea* 1, no. 7 (2019).

Saifullah, Moh. "Abortion and its Risks for Women (From the View of Islamic Law)." *Journal of Social Humanities* 4, no. 1 (2011): 13–25. doi:10.12962/j24433527.v4i1.636.

Saleh, Abdul Munim. *Human Law as God's Law; Inductive Thinking Discovers the Essence of Law in the Al-Qawa'id Al-Fiqhiyyah Model*. Yogyakarta: Student Library, 2009.

Sarif, Akbar, and Ridzwan Ahmad. "The Concept of Maslahat and Mafsadah According to Imam Al-Ghazali." *Tsaqafah* 13, no. 2 (2017): 353. doi:10.21111/tsaqafah.v13i2.1183.

Tutik, Quarter Point. "Islamic Law Analysis of the Practice of Abortion for Unexpected Pregnancies (KTD) Due to Rape According to Law Number 36 of 2009 concerning Health." *Law and Development*, 2010.

Uman, Chaerul. *Ushul Fiqh 1*. Bandung: CV Pustaka Setia, 2000.



Law Journal Borobudur International
Vol 1 No 1, July 2024

ISSN: 2809-9664

Law Number 36 of 2009 concerning Health (2009).
https://detikemerging.kemkes.go.id/download/UU_36_2009_Kesehatan.pdf.

Wahyudi, Yudian. Islamic Law Between Philosophy and Politics. Yogyakarta: Islamic Boarding School Nawasea Press, 2015.

LEGISLATION

Law, 2004, "Law Number 29 of 2004 concerning Medical Practice", Jakarta

Law, 2009, "Law Number 36 of 2009 concerning Health", Jakarta

Minister of Health Regulation, 2014, "Minister of Health Regulation Number 39 of 2014 concerning Guidance, Supervision and Licensing of Dental Work", Jakarta

Criminal Code (KUHP), Jakarta.

Civil Code (BW), Jakarta.