

FORMULATION OF RULES CONCERNING ABORTION AGAINST OF VICTIMS RAPE: BETWEEN POSITIVE LAW AND FUTURE LAW

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Abstract: *This paper aims to describe the rules regarding abortion of victims of rape in the positive law and law that may apply within the future. Based on the results of the discussion, it can be concluded that abortion of victims of rape in the positive law isn't prohibited and the offenders are not sentenced as stated in Law no. 36 of 2009 and the Law of Child Protection. This also applies to a woman who has an abortion for her pregnancy as a result of rape. In the future law, abortion of victims of rape is also not prohibited, but can only be performed by a doctor. The Draft Criminal Code doesn't stipulate that abortion can also be performed by rape victims themselves. Even so, the rules contained in the Draft Criminal Code still cannot be applied to rape victims who have had an abortion for their pregnancy because positive laws (especially Law No. 36 of 2009 and the Law of Child Protection) have not been revoked by the Draft Criminal Code. In this context, the principle of "lex specialist derogat lex generalist" applies, namely Law no. 36 of 2009 and the Law of Child Protection as laws that are specific override general laws. For the sake of legal certainty, the Draft Criminal Code should confirm prohibited and non-prohibited abortion. The future law needs to be synchronized or harmonized with the positive law. If it's not prohibited, the granting of permission to abortion for victims of rape should be given strictly so, it's not abused.*

Keywords: *Formulation, Abortion, Victim of Rape, Positive Law, Future Law*

The Introduction

Indonesia as an independent country is attempting to commit development continuously in all areas of life, including within the field of law. Article I of the Transitional Rules of the 1945 Constitution of the Republic of Indonesia, fourth amendment states, "All existing laws and regulations are still valid as long as a new one has not been made according to this constitution." Before the amendment, this provision was included in Article II of the Transitional Rules of the 1945 Constitution.(for comparison, see. Soenaryo & Sugiharti, 2019, p.69).Under these provisions, there is the desire of the Indonesian nations to committing development in the field of law, within the sense of statutory regulations. Legal development efforts by introducing new ones for existing laws may be known as legal reforms.

One of the areas of law that's currently being reformed by the Indonesian nation is that the Criminal Code. The reform was carried out because the Criminal Code is a criminal law inherited from Dutch colonialism which is implemented Indonesia based on Law of the Republic of Indonesia Number 1 of 1946 concerning Criminals Law. Several provisions of the Criminal Code were amended and Law Number 1 of 1946 was applied to the entire territory of the Republic of Indonesia as stated in Law of the Republic of Indonesia Number 73 of 1958(see.Nawawi Arief, 2012, p. 6).

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The reform of the Criminal Code here is to be adjusted to the Indonesian constitution, which is the translation of Pancasila as a way of life of the Indonesian nation. Efforts to reform the Criminal Code in Indonesia has come a long way, starting from 1964 to the present (see. Nawawi Arief, 2012, p. 6). In 2019, to be precise in September, the Indonesian government wanted to ratify the Draft on Criminal Code but failed. This is because several provisions in the Draft Criminal Code has generated controversy. Several parties asked that the ratification of the Draft Criminal Code be postponed because several provisions in it were deemed problematic.

Finally, the government took a stance to delay the ratification of the Draft Criminal Code. One amongst the provisions which are considered problematic in the Draft Criminal Code is the rule on abortion as stated in Articles 469 to 471, which has the potential to criminalize women who have abortions for pregnancies due to rape. These rules are different from those in the positive law that permitted abortion by the victims of rape or pregnancy as a result of rape.

Starting from the above circumstances, the author is interested in finding out abortions that are performed on rape victims. The question is, is it true that abortion to commit by victims of rape on their own pregnancy in the Draft Criminal Code is prohibited and the offenders can be convicted?. This paper intends to explain the provisions regarding abortion contained in the positive law and the future law as stated in the Draft Criminal Code.

Review of Literature

Abortion

The term abortion in Latin is called "abortion", which etymologically refers to abortion or miscarriage. (M. Ali Hasan at Saifullah, 2011, p.4). Etymologically, abortion comes from the English word, "abortion"; miscarriage, which means abortion. Abortus means miscarriage. Abortion in terminology is abortion (n): the expulsion of a fetus from the womb during the first twenty-eight weeks of Regence. (As. Herley, AP Cowie, & Ac Ginson at Romli, 2011, p. 158). Abortion within the Black's Law Dictionary is defined as **the expulsion of embryos or fetuses spontaneously or artificially, as used in illegal context refers to induce abortion.** (Ariyanto, 2014, p. 83; Susanti, 2013, p. 294).

In the Indonesian dictionary, abortion has two meanings, namely 1) Doc, the scattered embryo which will now not live (before the end of the fourth month of pregnancy); miscarriage; 2) The state of normal growth cessation (concerning parts of plants or animals). The first meaning is for the field of medicine, whereas the second meaning is related to the field of biology. (Penyusun, 2008, p.4). Of the two meanings of abortion, what is related to this discussion is the first meaning, namely the scattered embryos that can no longer live before the end of the fourth month of pregnancy or miscarriage.

Abortion according to Dorland, as quoted by Masrudi Muchtar, is that the premature release of the product of conception from the uterus, or a fetus that has not yet been able to live, or in other words the termination of pregnancy before reaching the age of twenty weeks which resulted in the death of the fetus. (Mulyana, 2017, p.146). Ali Ghufuran Mukti stated that the definition of abortion according to the science of law is the birth of a womb

prematurely by an act of someone which is an act that's against the law and is subject to sanctions as regulated in the Criminal Code. The medical meaning of abortion is the abortion of the womb, and resulting in at the end of the pregnancy before January can live alone outside the womb. The limit for the age of the womb and the weight of the fetus that comes out is less than twenty-eight grams. (Yuniar, 2013, p.40).

Referring to the meaning of abortion in the Indonesian dictionary, Harkristuti Harkrisnowo argues that in the medical world there are three types of abortion as follows (Saifullah, 2011, p. 15):

- 1) *Spontaneous abortion* (natural abortion), namely an abortion that occurs automatically, accidentally, and without external influence or without any action. Abortion in this type will occur due to poor quality of eggs and sperm, or it also can be other causes, such as accidents, syphilis, and so on;
- 2) *Therapeutic abortion* (medical abortion), which is an abortion that is done with serious, mature, and unhurried medical considerations. In general, the aims of acting this abortion is to save the mother's life;
- 3) *Provocatus abortion* (artificial or deliberate abortion), which is an abortion that's hold out on purpose and consciously by the mother or abortion practitioner (such as a doctor, midwife, or traditional birth attendant), and is performed without any medical indication. This type of abortion is considered a criminal offense.

Of the three types of abortion above, specifically for abortion provocatus (artificial or deliberate abortion), it's further divided into two types, namely illegal/unlawful abortion (*abortion provocatus criminalis*) and abortion that is legal/lawful (*abortion provocatus therapeuticus*). (Cucu Solihah & Trini Handayani at Kirana Utami & A.M, 2015: 505; Romli, 2011, p.159). Abortion provocatus criminalis is an abortion that's performed without any medical indication, so, it's considered illegitimate. Meanwhile, what is meant by *abortion provocatus therapeuticus/therapeuticus/medicinalis* is abortion due to an effort to save the life of a pregnant woman and/or her fetus. (Suryono Ekotama at Yuniar, 2013, p.43).

Thus, it can be understood that abortion is an act of abortion by removing the contents of the womb (fetus) prematurely. There are at least three types of abortion, namely natural abortion, medical abortion, and artificial or deliberate abortion. The three types of abortion that is prohibited by law are artificial abortions which are performed illegally, for example, the absence of a medical indication for a woman's pregnancy.

Positive Law and Future Law

Theoretically, laws can be classified into several types. Given the period of validity, laws may be classified into positive law and *ius constituendum*. The law that applies to people in a certain area is called positive law. Meanwhile, the law which is expected to apply in the future is called *ius constituendum*. This type of law has not yet formally become a norm (law or other), however solely a draft law that will implement in the future. (Santoso & Y., 2016, p.8).

Research Methods

This study uses a type of normative legal research which SoerjonoSoekanto& Sri Mamudji defines as a study of positive law (Ramiyanto, 2016, p.325). The approaches used include the statute approach, conceptual approach, and futuristic approach. *The type of research material used in this paper is secondary data sourced from legal materials, namely: 1) Primary legal materials that include: the 1945 Constitution of the Republic of Indonesia, the Criminal Code, the Republic of Indonesia Law Number 36 of 2009 regarding Health, The Law of Child Protection, Government Regulation on Sexual Reproduction; 2) Secondary legal materials in the form of Draft on Criminal Code, and book or research results related to abortion by rape victims; and 3) The tertiary legal materials used are: scientific dictionary, Indonesian dictionary, Black's Law Dictionary, and so on.*

The research materials are collected using literature or document studies that are carried out by tracing, examining, and reviewing research materials of public nature, such as archival data, official data on government agencies, and published data (for example, Basic Laws, Laws, etc.).(see. Suteki & Galang Taufani, 2018, p. 217). The research material that has been collected is then processed and analyzed qualitatively which emphasizes the deductive and inductive inference processes and on the analysis of the dynamics of the relationship between observed phenomena with scientific logic. Attempts to answer questions in this study through a formal and argumentative way of thinking are the things that are emphasized in this analysis.(see. Suteki & Galang Taufani, 2018, p. 243). From the results of the analysis obtained, the conclusion is drawn with deductive thinking logic.

Discussion and Results

Rules on Abortion Against of Victims Rape in Positive Law

On the previous page, it has been explained there are several types of abortion, including artificial abortion that's done deliberately and consciously, each by pregnant women and other people (*abortusprovocatuscriminalis*). This type of abortion is categorized as an act that's against the law or that within the context of criminal law is referred to as a criminal act. The current criminal law governing abortion in Indonesia is referred to as "positive law."

In general, the rules regarding abortion in the context of criminal law are regulated within the Criminal Code, that's referred to as "abortion" or "terminating the womb", the regulations of which are contained in several articles, namely Articles 346 to 349. Besides, in that regard, several writings include Article 299 as one of the regulations governing abortion. Here it's necessary to pay attention to some opinions of legal experts related to Article 299 of the Criminal Codes, is it true that it prohibits abortion or not?.

Article 299 of the Criminal Code consists of three paragraphs which state, that: (1) Anyone who deliberately medicates a woman or orders her to be treated by being notified or having an expectation that her pregnancy can be aborted because of that treatment, is punishable by a maximum imprisonment of four years or a maximum fine of forty thousand rupiahs; (2) Such an act, the penalty may be increased by one third if the guilty person commits the act for profit or makes it a quest or habit; (3) The right to

conduct a quest can also be revoked if the guilty party has committed the crime to carry out a quest.

Article 299 of the Criminal Code prohibits an act that's similar to abortion but doesn't emphasize that there must be a living womb. The criminal acts regulated in Article 299 of the Criminal Code is very broad. There's no need for a living womb in it or even a woman who is pregnant. It's adequate for a woman to raise expectations that a possible pregnancy will be terminated with this treatment. Thus, Article 299 of the Criminal Code is very preventive to be able to more effectively eradicate abortion. (Prodjodikoro, 2010, p.75-76.)

That Article 299 of the Criminal Codes also contains a criminal act regarding abortion, however as a crime violates decency, and because it's broad. This criminal act already exists if the offender raises the hope that the treatment will abort the womb, thus additionally if the treatment doesn't have that effect. It's not even necessary for the woman to be treated to be pregnant. (Prodjodikoro, 2010, p.124-125). Article 299 of the Criminal Code a criminal provision that has been formed to prohibit actions taken by abortionists, who have treated or have advised a woman to receive treatment, by notifying or by giving hope to the woman that with such treatment a pregnancy can become disrupted. (Lamintang, & T. L, 2009, p.221-222).

The criminal provisions in Article 299 of the Criminal Codes have absolutely nothing to do with the matter of abortion, because what is prohibited in it are actions that are done to interfere with pregnancy, without paying attention to any consequences that may arise due to such actions. Such acts are considered by law as a criminal offense immorality and aren't a crime aimed at a developing fetus in the womb or a woman's pregnancy. (Lamintang & T. L, 2010, p.224-225). In the criminal provisions regulated in Article 299 paragraph (1) of the Criminal Code, the law talks about the interruption of pregnancy (*verstoring van zwangerschap*), and not about abortion. This criminal act of abortion is a type of crime, that by the applicable law has been qualified as a criminal offense directed against life and is regulated in Chapter XIX of Book II of the Criminal Code. (Lamintang & T. L, 2010, p.234-235).

Referring to the above opinion, the author dares to take the position that the rules on abortion in the Criminal Code are those listed in Chapter XIX Book II, Articles 346 to 349, and Article 299 of the Criminal Code are not included in it. This attitude is based on the reason that Article 346 to Article 349 of the Criminal Code regulates abortion or termination of the womb, while Article 299 of the Criminal Code regulates acts that intend to interfere with pregnancy. This is also related to the concept of abortion itself, which is the act of aborting the womb or fetus as described above.

The author agrees that Article 299 of the Criminal Code is closely related to abortion issues, but that is not the intention of the regulation. Therefore, the authors agree with the opinion of Prodjodikoro, who stated that Article 299 is preventive in eradicating abortion. This means that the provisions of Article 299 of the Criminal Codes additionally helps in efforts to eradicate or overcome abortion that's preventive, namely preventing abortion in the community.

Thus, the rules regarding abortion in the Criminal Code is regulated successively in Articles 346 to 349, the formulation of which might be seen within the following table I:

Table I
Abortion Rules in the Criminal Code

No	Regulation			
	Article	Actors/Subject	Act/Object	Threat of Punishment
1	Article 346	People who are female	Abort or kill the womb on purpose, either done alone or tell others.	Maximum, four years imprisonment.
2	Article 347	(1) Anyone (2) Anyone	(1) Purposely abort or kill the womb a woman without his approval. (2) The act referred to in paragraph (1), if it results in the death of the woman.	(1) Maximum, twelve years imprisonment. (2) Maximum, fifteen years imprisonment.
3	Article 348	(1) Anyone (2) Anyone	(1) Purposely abort or kill the womb a woman with his approval. (2) The act referred to in paragraph (1), if it results in the death of the woman.	(1) Maximum, five years and six months imprisonment. (2) Maximum, seven years imprisonment.
4	Article 349	Doctor, midwife, or medic	- Assisting to commit crimes regulated in Article 436; - Commit or assist in commit one of the crimes regulated in Article 347, and Article 348.	The penalties stated in Article 346, Article 347 and Article 348 are added by 1/3 (one third) and can be removed right to quest where the crime was committed.

Referring to the description of the table above, the provisions regarding the criminal act of abortion within the Criminal Code, when viewed from a formulation point of view, are categorized as material crimes because what's desired is the result of an act within the form of the abortion or death of the womb. In this context, if a person's actions don't lead in the abortion or death of a woman's womb, it means that what has happened isn't a criminal act of abortion, but only attempted abortion. Apart from that, the provisions of the criminal act of abortion which are formulated in the Criminal Code is also considered as *delictdolus*, so that no abortion is carried out based on negligence (*culpa*).

All acts of abortion are actions prohibited by the Criminal Code, without exclusion. This means there's no single act of abortion that's justified by the Criminal Code so that the offender is free from the present criminal threat. In its development, there are exclusions provided by the positive law relating to the prohibition of abortion. The exclusion is regulated by Law Number 36 of 2009 concerning Health.

According to the law No. 36 of 2009, abortion isn't prohibited based on two things, namely: 1) From an early age if the pregnancy is an indication of a medical emergency, whether it is life-threatening to the mother or fetus, suffering from hereditary diseases and/or disabilities that have been

inherited from birth, or cannot be repaired, making it difficult for the baby to live outside the womb, or 2) Pregnancy due to rape which can cause the victim of rape to experience psychological trauma. The exclusion of the prohibition on abortion in Law No. 36 of 2009 is further regulated in Article 31 paragraph (1) of the Government of the Republic of Indonesia Regulation Number 61 of 2014 concerning Reproductive Health.

Under Article 75 paragraph (2) Law No. 36 of 2009 in conjunction with Article 31 paragraph (1) Government Regulation No. 61 of 2014, the prohibition on abortion is exempted for abortion that is predicated on indications of a medical emergency and pregnancy because of rape. This means that abortion based on one of the two reasons cannot be called an illicit deliberate or artificial abortion (against the law), however, includes deliberate or artificial abortion that's legitimate or justified by the law (*abortion provocatus therapeuticus*). In this context, the offender of pregnancy abortion as a result of rape or the offender of abortion the victim of rape cannot be legally blamed, so that he cannot be subject to criminal sanctions.

Thus, the rules relating to abortion in Law No. 36 of 2009 regarding Health has deviated from the Criminal Code. The prohibition against abortion in the Criminal Code is absolute, while Law No. 36 of 2009 provides an exclusion for abortion due to the indications of a medical emergency or pregnancy due to rape. In this case, the "*lex posteriori derogate lex priori*" (the new law overrides the old law) principle can be applied. Under these principles, Article 75 of Law No. 36 of 2009, overrides the rules on abortion in the Criminal Code, so that the prohibition on abortion isn't any longer absolute because there are exclusions specified in Law No. 36 of 2009. (for comparison, see Annette Anasthasia at Mulyana, 2017, p. 148). Exclusions to the prohibition of abortion are also regulated in Law Number 23 of 2002 on Child Protection, which has undergone two changes. First, amended by Law of the Republic of Indonesia Number 35 of 2014. Second, amended by Government Regulation in place of Law of the Republic of Indonesia Number 1 of 2016. The Government Regulation in place of Law was then passed into law by Law of the Republic of Indonesia Number 17 of 2016.

Within the Law of Child Protection, the exclusion to the prohibition of abortion is explicit in Article 45A that states, "Everyone are prohibited from having an abortion of a child who is still in the womb, except for reasons and procedures justified under the provisions laws and regulations." Taking into account these provisions, the Law of Child Protection also provides an exclusion to the prohibition of abortion, namely abortion with reasons and procedures justified by statutory provisions.

The provisions of Article 45A of the Law of Child Protection are related to Article 75A of Law No. 36 of 2009 that has been described previously, which also eliminates the absolute prohibition of abortion in the Criminal Code. This can be supported by the principle of a "*lex specialist derogate lex generalist*" (specific laws overriding general laws). Criminal Code is a positive criminal law that's general so that it's excluded by the Law of Child Protection as a special criminal law.

Thus, the authors conclude that abortion by the victims of rape in the positive law is permitted, and the offender cannot be convicted because his actions are not contrary to the criminal law. This also applies to a woman who has an abortion for her pregnancy as a result of rape. The permissibility of

abortion in the positive law is a form of exception to the prohibition of abortion as stated in Law No. 36 of 2009 and the Law of Child Protection. This suggests that the prohibition on abortion in the positive law is not absolute. The procedure or process of abortion for pregnancy due to rape is regulated in Government Regulations No. 61 of 2014.

Rules on Abortion Against of Victims Rape in Future Law

Laws that are not yet valid or the law of the future is one of the types of law that are seen from the validity period or what is called the “*iusconstitutum*”. In this context, the future law regulating abortion is the Draft Criminal Code. Here, the Draft Criminal Code is a criminal law that is not currently in effect or criminal law that will be enforced in the future. **Is it true that rape victims who have an abortion are prohibited under positive law?**

In the Draft Criminal Code as future law, the rules concerning abortion are listed in Chapter XXI regarding Crimes Against Life and Fetus, Part Two concerning Abortion, Articles 469 to Article 471. The whole formulation of those rules may be seen within the following table II:

Table II
Abortion Rules in the Draft Criminal Code

No	Regulation				Explanation
	Article	Actor/Subject	Act/ Object	Threat of Punishment	
1	Article 469	(1) A person who is female (2) Everyone (3) Everyone	(1) Abort or kill the womb which is done alone, or by others at his request. (2) Abort or kill the womb a woman without her approval. (3) The act of aborting or killing a woman’s womb without her approval if it results in the death of the woman.	(1) Maximum, four years imprisonment. (2) Maximum, twelve years imprisonment. (3) Maximum, fifteen years imprisonment.	This provision aims to protect a woman’s womb. The criminal provisions in this article do not apply, the criteria for abortion are dead. It is irrelevant to determine the means, and means used to abort or terminate a woman’s womb. The consequences in the form of death or pregnancy are important things to determine. (Explanation).
2	Article 470	(1) Everyone (2) Everyone	(1) Abort or kill the womb a woman with her approval. (2) The act referred to in paragraph (2) if it results in death.	(1) Maximum, five years imprisonment. (2) Maximum, eight years imprisonment.	
3	Article 471	(1) Doctor, midwife, paramedis, or pharmacist.	(1) Assisting committing criminal acts referred to in Article 469 and Article 470.	(1) The threat of imprisonment contained in Article 469 and Article 470	Additional penalties as referred to in Article 86 letters a and b, namely the right to hold a general position or a

		(2) Doctor, midwife, paramedic, or pharmacist. (3) Doctor.	(2) Committing a criminal act referred to in paragraph (1). (3) Abortion due to medical indications or to the victims of rape.	can be increased by 1/3 (one third). (2) The penalty can be added with the revocation of rights as referred to in Article 86 letter a and letter b. (3) Not convicted	certain position, and the right to run certain professions. (Explanation of Article 471 Paragraph (2)). In particular, this provision threatens more severe punishment for offenders who have the profession of being a doctor, midwife, or medic, given that their profession is so noble for humanity that they should be guarded against did these acts. A doctor who performs an abortion for medical reasons/ <i>abortus provocatus</i> is not subject to a criminal sanction as stipulated in the laws, and regulations in the field of health. (Explanation of Article).
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The provisions for abortion in the Draft Criminal Code described above, if considered from the formulation point of view, are the same as the formulation of the Criminal Code which is included in a material crime because it focuses more on the consequences that arise within the variety of the death of a woman's womb. This's in line with the explanation of Article 469 of the Draft Criminal Code which states that what's important to determine is the consequences that arise, namely the fall or death of the womb. In contrast to the Criminal Code, the formulation of the criminal act of abortion within the Draft Criminal Code doesn't explicitly mention the "deliberate" element. However, when viewed from the formulation, it can be concluded that abortion which is prohibited by the Draft Criminal Code must be done on purpose.

The fall or death of the womb which is caused by natural causes, such as falling in the bathroom, isn't thought of as a criminal act of abortion. So, it's impossible for the criminal act of abortion to occur because of negligence (*culpa*). The consequence of whether there is an "intentional" element in the formulation of a criminal act lies in the burden of proof. The public prosecutor is obliged to prove the intentional element if it's included in the formulation of a criminal act, whereas if it's not included in the formulation of a criminal act, the public prosecutor isn't obliged to prove it because the intentional element is considered to be in it. (for comparison, see Hiariej, 2018, p.148). It's understandable, that in essence, the formers of the Draft Criminal Code want

to ease the burden on the public prosecutor regarding proving the crime of abortion in court.

Another distinction between the provisions of the criminal act of abortion in the Criminal Code and the Draft Criminal Code is that the criminal threat. The Criminal Code has determined that the criminal penalty for a person who has an abortion with the consent of the woman concerned is a maximum of five years and six months in prison, while within the Draft Criminal Code the threat is reduced to a maximum of five years in prison. If the act of abortion results in the death of the woman concerned, the punishment is a maximum of five years in prison, while within the Draft Criminal Code, the punishment is increased to a maximum of eight years in prison. Besides, the Criminal Code has determined that if the abortion is assisted or performed by a person who is a doctor, midwife, or medicine the sentence can be increased by 1/3, and the right is revoked. Within the Draft Criminal Code, the addition of the 1/3 penalty only applies to doctors, midwives, paramedics, or pharmacists who assist in committing an abortion. For those who have an abortion in addition to the sentence added 1/3, it can also be done revocation of rights.

In connection with this discussion, the Draft Criminal Code doesn't stipulate that rape victims who have an abortion are not prohibited. The Draft Criminal Code only provides exclusions for doctors who perform abortions due to medical indications or for victims of rape. Doctors who perform an abortion for either of these two reasons are not convicted. This is different from positive law, which allows rape victims to have an abortion for their pregnancy as regulated within Law no. 36 of 2009 in conjunction with the Law of Child Protection. The question is, the criminal threat within the Draft Criminal Code, does it really apply to rape victims who have an abortion of their pregnancy?.

Seeing the rules on abortion formulated in the Draft Criminal Code, some parties argue that these rules are contradictory or not in synchronizing with Law no. 36 of 2009, as stated by Abdul Fickar Hajar (<https://www.jawapos.com>), Azriana Manalu (Chair of the National Commission on Violence Against Women) (<https://beritagar.id>), Habsjah (Founder and Researcher of the Women's Health Foundation/YKP) (<https://www.suara.com>). This opinion relies on the rationale that the Draft Criminal Code doesn't provide exclusion to having an abortion as stipulated within Law No. 36 of 2009 because of an indication of a medical emergency or because of pregnancy due to rape. Habsjah even said that abortion in rape cases are not a criminal matter because it has been regulated in Law no. 36 of 2009.

According to Bivitri Susanti, the abortion article in the Draft Criminal Code is discriminatory against rape victims and women because the Article 470 paragraph (1) of the Draft Criminal Code punishes rape victims who have had an abortion. (<https://www.suara.com>).

Supriyadi Widodo Eddyono, International Executive Director for Criminal Justice Reform (ICJR) stated that abortion in the Draft Criminal Code is a criminal offense. Abortion can only be done if there are health reasons and it can only be done by a doctor. This narrows the scope of Law no. 36 of 2009 which allows abortion in special conditions, such as endangering the mother, fetus, and pregnant rape victims. This condition will be made

people afraid of being punished for abortion even though the conditions are appropriate for having an abortion. Besides, health staff, such as midwives who have been helping with abortion for medical reasons will also experience will expertise worry of being criminalized.(<https://www.voaindonesia.com>).

Some opinions state that the rules on abortion in the Draft Criminal Code are contrary to Law no. 36 of 2009, especially regarding the criminalization of women victims of rape who have had abortions, Yasonna Laoly (Minister of Law and Human Rights) responded that the Draft Criminal Code doesn't apply to the victims of rape and for medical reasons. The provisions of the Draft Criminal Code don't erase abortion provisions in the health law.(<https://news.detik.com>). Harkristuti Harkrisnowo also stated that rape victims who had an abortion were not punished according to the Draft Criminal Code because there was already a Health Law which was applicable as a *lex specialist*.(<https://republika.co.id>).

From the two opinions above, the author agrees that the rules on abortion in the Draft Criminal Code do not apply to rape victims who have had an abortion for their pregnancy, which is based on the principle of "*lex specialist derogat lex generalist*." Although the Draft Criminal Code doesn't provide exemptions for the prohibition of rape victims who have an abortion for their pregnancy, Law No. 36 of 2009 and the Law of Child Protection is not revoked. The Draft Criminal Code in its closing provisions only states that the criminal threat for abortion offenders in Articles 192, 194, and 195 of Law No. 36 of 2009 does not apply and the reference is replaced by the provisions in the new Criminal Code as stated in Article 626 paragraph (1) letter o and paragraph (13). So, that is repealed in the Draft Criminal Code only concerns the criminal threat, not the act of abortion.

In such a context, the rules on abortion in the Draft Criminal Code must be connected with the existing rules in a special law, namely Law No. 36 of 2009 and the Law of Child Protection because it provides an exclusion to the prohibition of abortion. Thus, the prohibition on abortion in the Draft Criminal Code, although it doesn't apply to rape victims based on the principle of "*lex specialist derogat lex generalist*", it still needs to be synchronized/harmonized with Law No. 36 of 2009 and the Law of Child Protection. Moreover, in the Draft Criminal Code, it's stated those doctors who perform abortions of pregnancies due to rape are not convicted. Here it's necessary to ask, "Why only doctors who are not convicted?, Why does it not apply to the victims of rape? Is simply the doctor authorized to perform the abortion?."

Even though in Law No. 36 of 2009 and the Law of Child Protection, rape victims who have an abortion of their pregnancy are also not sentenced. Concerning health workers who are allowed to commit abortions for pregnancies of rape victims, Law No. 36 of 2009 doesn't only mention doctors but more generally, namely health workers. Is it not true that in community life it's also found that the practice of abortion is also committing by the midwives or other medical personnel, perhaps even by non-medical personnel in remote areas.

Based on the description above, it is necessary to synchronize or harmonize the Draft Criminal Code as a future law (specifically for abortion rules) with the positive law (Law No. 36 of 2009 and the Law of Child Protection). The exclusion to the prohibition of abortion in the future law

should not only be given to doctors who did an abortion because of medical indications or to the victims of rape, but also to other health workers and victims of rape themselves. Especially for an abortion performed by a woman victim of rape for her pregnancy, it needs to be given with strict conditions. This's to avoid the actions of the irresponsible party to do an abortion, even though the pregnancy was not the result of rape and was only based on reasons of not wanting to get pregnant, for example, due to consensual sexual relations outside of marriage.

Conclusion

From the above discussion, the authors conclude that abortion of victims of rape in the positive law is not prohibited, so, it's not a crime, and the offender is not convicted. The exclusion of the prohibition on abortion also applies to a woman victim of rape who has an abortion for her pregnancy. This's stated in Article 75 paragraph (2) of Law No. 36 of 2009 and Article 45A of the Law of Child Protection. The procedure or process for pregnancy abortion as a result of rape is regulated in Government Regulations No. 16 of 2014. In the future law (Draft Criminal Code), no provisioning states that a woman victim of rape who has an abortion for her pregnancy is not sentenced. The Draft Criminal Code only stipulates those doctors who perform abortions of victims of rape are not convicted. Even so, the rules contained in the Draft Criminal Code still cannot be applied to rape victims who have an abortion for their pregnancy because positive laws (especially Law No. 36 of 2009 and the Law of Child Protection) have not been revoked by the Draft Criminal Code. In this case, the "*lex specialist derogat lex generalist*" principle can be applied, so that abortion by a rape victim is not a prohibited act. The author suggests that the Draft Criminal Code still needs to be synchronized or harmonized with the positive law for the sake of legal certainty, especially regarding the exclusion of the prohibition of abortion. In the Draft Criminal Code, it's necessary to emphasize the exclusion of the prohibition on abortion by the victims of rape themselves and other health workers, such as midwives who are allowed also to perform abortions of victims of rape.

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