LEGAL POLITICS IN THE IMPLEMENTATION OF LEGALIZATION ABORTION CAUSED BY RAPE

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Abstract

Political power greatly determines the formation of legal rules in realizing people's expectations regarding the enactment of the law. One manifestation of the implementation of legal politics is the enactment of legislation in the context of legalizing abortion due to rape. This research aims to analyze the legalization of abortion as well as efforts to prevent abortion and not vice versa to provide space for abortion which leads to an increase in adulterous behavior by creating a systematic, factual and accurate picture. The research method is normative juridical using secondary and primary data. In positive Indonesian law, abortion is prohibited and is a type of crime. The Health Law and PP on Reproductive Health have a specific objective, namely ensuring the fulfillment of the right to continue life (HAM) and reproductive health through safe, effective and affordable health services, therefore, abortion with indications of a medical emergency and rape are exceptions to the prohibition on abortion.

Keywords:
Legal Politics; Legalization of Abortion.
1. Introduction

Indonesia is a state of law (rechtstaat) not a state based solely on power (machstaat). Expressing the ideals or goals of the state through law as a means of achieving state goals. According to its form, law in Indonesia is divided into written law and unwritten law. Unwritten law is customary law and customary law, while written law is one of them in the form of statutory regulations.

Law, which specifically is legislation, is a political product (Mahfud, 2009). As a political product, law is the final result of a long process, starting with the existence of an idea in society in the form of a desire (initiation), becoming public discourse (public discourse), then receiving various public responses, which finally occurs when the idea is tested through discussions and finally it is society that determines whether the idea passes or not to be regulated by law (socio-political stage) with the output of the idea being sharper and ready to enter the technical juridical stage. It is at this stage that an idea is formulated by legislators in a political forum until it takes the form of a legal and political law (Sajtipto, 1991).

Law is the embodiment of developing values and the values referred to are justice so that ideally laws are made by taking into account the interests of realizing justice which contains commands and prohibitions, obedience and sanctions. Law as one of the rules that is officially positive by state authorities is a product of political activity which can be read from the context and interests that gave birth to the law and how the law is implemented.

According to Daniel S. Lev, what is most determining in the legal process is the conception and structure of political power, that law is more or less a political tool and the place of law in a country depends on political balance, the definition of power, the evolution of political, economic and socio-cultural ideology. Therefore, law is not only seen as a set of rules and principles that regulate human life in society but must also include the institutions and processes necessary to make the law a reality.

Many people do not trust law enforcement agencies due to legal issues that have not been handled effectively. It is considered that law enforcement in Indonesia is still not free from political intervention. This intervention is not limited to the law formation process but also to the implementation process in court and often gives rise to discrimination in law enforcement.

Soerjono Soekanto, is of the opinion that there are five (5) factors that contribute to the law enforcement mechanism, namely legal factors (substance), law enforcement officers factors, means and facilities factors that support the law enforcement process, community factors and cultural factors (Soerjono, 1983).

This legal product was born as a reflection of the political configuration behind it. In the relationship between the legal sub-system and the political-legal sub-system, politics has a greater concentration of energy so that law is always in a weak position. This statement confirms that in reality the empirical nature of politics determines the operation of the law, starting from the formation process to the implementation stage.

One manifestation of the implementation of legal politics is the enactment of legislation in the context of abortion regulation. In Indonesian positive law, abortion as a prohibited act is one of the types of criminal acts or crimes regulated in (Article 346, Article 347, Article 348, Article 349) of the Criminal Code and Law no. 23 of 1992 jo. UU no. 36 of 2009 concerning Health, therefore abortion is prohibited except for medical considerations as an effort to save the life of the pregnant mother or her fetus, so abortion can be carried out by health workers who have the
expertise and authority to do so in accordance with their professional responsibilities. If an abortion is carried out without medical considerations, it is an illegal act or is not legally justified (abortion provocatus criminalis).

The act of abortion is a criminal act that is qualified as a crime against life using a paradigm that prioritizes the rights of the child. Currently, abortion is a social phenomenon that is very worrying, it is not without reason that abortion behavior has extraordinary negative effects on both the perpetrator and society because abortion concerns the norms, morals and ethics of a life, so seriousness is needed in the law enforcement process.

The problem that arises is the existence of Government Regulation no. 61 of 2014 concerning Reproductive Health in Article 31 and Article 34, states the legalization of abortion which can only be carried out based on pregnancy resulting from rape with a gestational age of no more than 40 (forty days) as proven by a certificate from a doctor, investigator, psychologist and/or other experts regarding the alleged rape. The enactment of these legal regulations has become a controversy in handling the abortion problem, how legal provisions can be properly enforced in order to deter and minimize the perpetrators of abortion crimes. This is the main point of the research objective in analyzing the legalization of abortion due to rape as well as efforts to prevent abortion and not vice versa to provide space for abortion which leads to an increase in adulterous behavior.

2. RESEARCH METHOD

The research method used in this research is the normative juridical method or normative legal research. By using a narrative review approach, the articles are obtained from searching on Google Scholar and Pubmed (Depri, 2014). The articles used are national and international journals with full text, and are in accordance with the contents and objectives of this research. The analysis technique used is through a qualitative descriptive method used in examining issues related to the legal force of the power of attorney for imposing mortgage rights to the issuance of the Head of the National Land Agency regulation number 8 of 2012. The collection of legal materials is carried out using library techniques, namely through the collection of legal materials originating from primary legal materials and secondary legal materials. The source of primary legal material is in the form of relevant laws and regulations and the collection of secondary legal material originating from e-journals, books and websites (Muhaimin, 2020). The data obtained were then analyzed descriptively qualitatively to obtain conclusions from the research conducted.

3. RESULTS AND DISCUSSION

1. The Role of Politics in Forming Legislation

Mochtar Kusumaadmadja argued, Legal politics is legal policy and legislation in legal reform with instruments, legal politics is carried out through laws. The essence of legal political thought according to Mochtar Kusumaadmadja is which laws need to be formed (renewed, changed and replaced) and which laws need to be maintained so that the state's goals can gradually be realized (Mochtar, 2002).

Moh. Mahfud MD is of the opinion that political law is legal policy or legal direction that will be implemented by the state to achieve state goals, which can take the form of new legal acts and replacement of old laws. More details Moh. Mahfud MD divides three (3) legal political groups, namely:

a. Official direction regarding the laws that will be implemented (legal policy) to achieve
state goals which include replacing old laws and establishing new laws;
b. The political background and other social sub-systems behind the birth of the law, including the official direction regarding the law that will or will not be enforced;
c. Problems surrounding law enforcement, especially the implementation of the legal politics that have been outlined (Mahfud, 2008).

The policy that is the basis of legal politics is to realize the goals of the state and the state's legal system contained in the preamble to the 1945 Constitution, especially Pancasila which gave birth to guiding legal principles.

In legal political theory, there are three (3) assumptions underlying the relationship between politics and law, namely:
1. Law determines politics in the sense that law must be the direction and control of all political activities;
2. Politics is a determinant of law, meaning that in reality both normative products and the implementation of law enforcement are greatly influenced and become dependent variables on politics;
3. Politics in law is intertwined in a mutually beneficial relationship, such as the adage: "politics without law gives rise to arbitrariness (anarchy) and law without politics will be paralyzed".

Legal politics is a legal policy that will be or has been implemented nationally by the government, including development that has as its core the creation and renewal of legal materials to suit the needs of implementing existing legal provisions regarding the confirmation of the function of law enforcement institutions and leaders.

Legal politics is government policy regarding which laws will be maintained, which laws will be replaced, which laws will be revised and which laws will be eliminated. Thus, through legal politics, the state creates a plan and the state develops national law. Achieving legal development will encourage the achievement of legal goals which will then lead to the creation of state goals and the goal of law is to create justice, benefit, order and legal certainty.

Justice is the main goal that is universal, justice is the glue that holds the order of life in a civilized society. Meanwhile, the law was created so that each individual member of society and state administrators takes action that is necessary to maintain social ties and achieve the goals of life together or, conversely, does not take action that could damage the order of justice, in order to restore order in social life, therefore justice must be upheld by providing sanctions, at all levels of offence. Here the role of the state is very important in implementing policies to resolve legal, social, economic and political problems on an ongoing basis.

Political law is the legal direction that will be implemented by the state to achieve the goal of creating new laws and replacing old laws. The urgency of legal politics in making legislative regulations includes 2 (two) things, namely the reasons why it is necessary to form a legislative regulation and to determine what will be translated into legal sentences into article formulations. These two things are important considering that the existence of statutory regulations and the formulation of articles is a "bridge" between the legal politics implemented and the implementation of legal politics in the implementation stage of statutory regulations (Mahfud, 2010).

Daniel S. Lev, believes that what is most decisive in the legal process is the conception and structure of political power, that the place of law in the state depends on political balance, the definition of power, the evolution of political, economic and social ideology.
In the process of forming legal regulations by political institutions, the role of political forces sitting in political institutions is very determining. Political power can be seen from two sides, namely the power possessed by formal political power (political institutions) and the political power side of political infrastructure. Thus, it can be concluded that the formation of legal products is born from the influence of political forces through political processes in state institutions that are given authority to do so. As is known, the legal theories that have a strong influence on the concepts and implementation of legal life in Indonesia are positivist legal theories which have a big influence on the concept of legal codification in various types of law that apply in Indonesia.

According to Padmo Wahyono, legal politics is the policy of state administrators which is fundamental in determining the direction, form and content of the laws that are formed and what will be used as criteria for punishing something. Thus, legal politics is related to laws that will apply in the future (\textit{ius constitutendum}) (Padmo, 1986).

The influence of positivism is very strong in the implementation of legal practice in society. What is called law is always identified with statutory regulations and values, while norms outside of law are only recognized if it is possible to fill the void in legislation that has not yet regulated the issue. The influence of political forces in forming laws is limited by the implementation of a constitutional system based on checks and balances, as adopted by the 1945 Constitution after its amendments.

Legislation is also a very effective instrument in legal reform (\textit{Law Enform}) because its legal force is binding and coercive. Legislation also provides higher legal certainty than customary law, customary law or jurisprudence law.

In a democratic country like Indonesia, the input that is used as material for consideration in determining laws comes from the aspirations of the people which are channeled through the people's representatives which are then processed in the form of legal regulations. However, it should be noted that planning for drafting laws is carried out in the national legislation program (\textit{Prolegnas}), while planning for drafting Regional Regulations is carried out in the Regional Legislation program (\textit{Prolegda}). The second aim is to realize Indonesia's national legal system.

The influence of politics in the formation of law is clearly visible in the formation of legislation. Each stage of the formation of statutory regulations cannot be avoided from political influence, which ultimately has an impact on the substance of the statutory regulations formed by the government which includes the planning, drafting, discussion, ratification or stipulation and legislation stages (Article 1 point 1 of Law No. 12 Year 2011).

Legal politics cannot be separated from the image of the welfare state in the constitution. According to Yudha Bhakti Ardiwisstra, legal politics contains 2 (two) inseparable sides, namely:

a. As a direction for making laws or \textit{legal policy} for state institutions in making laws;

b. As a tool to assess and criticize whether a law that is made is in accordance with the \textit{legal policy framework} to achieve state goals (Yudha, 2010).

In the new paradigm, law is no longer seen as an entity that stands alone but must be able to interact with other entities with the main aim of adopting existing interests in society so it is not surprising that law can interact with politics. Such a law is able to understand or interpret disobedience and irregularities that occur in society.

On the other hand, it shows that the influence of society in the formation of law has received a very wide place and appreciation, namely the existence of society's demands for
reform in all fields which were successfully won, marked by the fall of the leadership of the New Order which was considered authoritarian, so the era of reform has brought major changes in all fields with the birth of a number of legislative regulations that provide such great and broad appreciation.

2. The Influence of Legal Politics in the Implementation of the Legalization of Abortion Due to Rape.

In the large Indonesian dictionary, abortion is the termination of a pregnancy. Abortion is the termination of an unwanted pregnancy through drug or surgical methods. Abortion has physical health risks and psychological disorders. The greatest physical health risk is death caused by bleeding and infection. Meanwhile, post-abortion psychological disorders include loss of self-esteem, suicidal thoughts, repeated nightmares about the baby and feelings of guilt for having an abortion.

Abortion is the act of aborting a pregnancy, which in medical language is known as "abortion", namely the expulsion of the products of conception (the meeting of the egg and sperm) before the fetus can live outside the womb and is the process of terminating the fetus before it has the opportunity to grow/develop (Arif, 2004). What is meant by the act of aborting a pregnancy is carrying out an act in whatever form and method it takes against a woman's womb which results in the birth of a baby or fetus from the woman's womb before it is time to be born according to nature. This act of forcing the birth of a baby or fetus prematurely is often called abortion (Adami, 2004).

Sometimes abortion is carried out because there is a medical emergency in pregnancy, namely a pregnancy that threatens the life and health of the mother and/or a pregnancy that threatens the life and health of the fetus, including those suffering from severe genetic disease or congenital defects that cannot be repaired, making it difficult for the baby to live in outside the womb. (Article 32 paragraph (1) PP No. 61 of 2014 concerning Reproductive Health).

Therefore, outside of medical reasons, women may not carry out abortion and it is qualified as an act against life so that the perpetrator can be subject to criminal sanctions. In the Indonesian legal system, abortion is prohibited (Article 346 - Article 349) of the Criminal Code. Every person is prohibited from having an abortion, legally excluded, abortion is justified with indications of a medical emergency to save the pregnant mother or her fetus carried out by a doctor/health worker in accordance with his or her expertise and profession. If you deliberately carry out an abortion without medical considerations as intended, it is not legally justified and is an illegal act/criminal act or crime, known as abortion provocatus criminalis.

Provisions regarding the prohibition of abortion are also regulated in Article 75 and Article 194 of Law no. 36 of 2009 concerning Health. Meanwhile, Article 32 paragraph (1) Government Regulation no. 61 of 2014 concerning Reproductive Health, regulates pregnancy due to rape, namely pregnancy resulting from sexual intercourse without the consent of the woman. This Government Regulation explains the provisions for allowing abortion (termination of pregnancy).

Article 1 paragraph (1) of the Criminal Code states that no act can be punished except by the strength of the criminal regulations in existing laws. In criminal law, the principle of legality is known, namely the principle that determines that no action is prohibited and punishable by criminal law if it is not specified in advance in the law, which is known as nullum delictum nulla poena praevia lege poenalli meaning that there is no delict, no crime
without any rules first. Nowadays, this principle is often aligned with the non- \textit{retroactive principle} or the principle that laws and regulations must not apply retroactively. This principle can easily be interpreted as not being punished if there are no regulations.

According to BKKBN data, the practice of abortion is thought to have increased over time. Ironically, abortion is often carried out among urban teenagers with high school education. Efforts to terminate a pregnancy are carried out using herbal medicine and pills, this results in high maternal mortality rates (MMR).

In principle, the state prohibits abortion, this prohibition is confirmed in substantive law (KUHP), which is accommodated in Law no. 36 of 2009 concerning Health Article 75 Paragraph (1). However, with the issuance of Government Regulation no. 61 of 2014 concerning Reproductive Health has caused debate, this PP regulates the provisions for “permitting” abortion (termination of pregnancy) as mandated in the Health Law Article 74 paragraph (3), Article 75 paragraph (4), Article 126 paragraph (4) and Article 127 paragraph (2).

Regulations in PP No. 61 of 2014 aims to guarantee the fulfillment of every person’s reproductive health rights obtained through quality, safe and accountable health services as well as ensuring the health of mothers in reproductive age so that they are able to give birth to a healthy and quality generation and reduce maternal mortality.

The implementation of this Government Regulation (PP) strengthens two exceptions to abortion that are permitted by the state, namely abortion with indications of a medical emergency and pregnancy due to rape and also regulates procedures for carrying out abortion, namely that it can only be carried out by an abortion eligibility team of at least two (2) people. Health workers are led by a doctor who has the competence and authority to perform abortions. Meanwhile, abortion as a medical emergency includes pregnancies that threaten the life and health of the mother and/or pregnancies that threaten the life and health of the fetus, including those suffering from serious genetic diseases and/or congenital defects, or those that cannot be repaired, making it difficult for the baby to live outside the womb.

Currently, the crime of rape is a crime that has received quite a lot of attention from the public, the modus operandi used by perpetrators of the crime of rape is quite diverse, such as threats, seduction, coercion, deception and the use of drugs and so on. Meanwhile, the handling of criminal cases of rape causes many difficulties both at the level of investigation, prosecution and examination at court, namely difficulties in terms of evidence. So that often perpetrators of criminal acts of rape are not given the maximum sentence, in terms of the provisions in Article 285 of the Criminal Code, which states the following:

"Any person who, by force or threat of violence, forces a woman to have sexual intercourse with him outside of marriage, is threatened with rape with a maximum prison sentence of twelve years."

The most detrimental impact for the victim is an unwanted pregnancy, this encourages the victim to have an illegal abortion which can endanger the victim's own life, namely through non-medical methods. Victims also experience psychological trauma and feel worthless in the eyes of society. Often cases of criminal rape are not reported to law enforcement officials because of several factors, including the victim feeling embarrassed and not wanting his shame to be known by others. This will certainly affect the mental condition and mental development of the victim himself as well as difficulties in the law enforcement process in order to realize a sense of justice for the victim and society.

To overcome crime requires a rational effort from society, namely by means of criminal
politics. Policies or efforts to combat crime are essentially an integral part of efforts to protect society (\textit{social defense}). Therefore, it can be said that the main goal of criminal politics is the protection of society to achieve social welfare.

Meanwhile, abortions carried out illegally have a high risk to women's health and safety, namely physical health and safety risks during and after having an abortion, such as sudden death due to bleeding, sudden death due to failed anesthesia, death due to infection around the womb, torn uterus and so on. Apart from having an impact on health factors, abortion also has a very big impact on a person's mental state, namely loss of self-esteem, often screaming hysterically, often having nightmares about the baby and so on. The impact of these things on women who have abortions will always be haunted by feelings of guilt that will not disappear for years in their lives.

So it is the responsibility of the state and the state is obliged to provide protection from all forms of discrimination against women. With the promulgation of Republic of Indonesia Law no. 26 of 2000 concerning Human Rights, which regulates, among other things, the guarantee of women's reproductive rights (Article 49 paragraph (3)), unwanted pregnancy as a result of rape is a clear violation of the reproductive rights of rape victims. Every woman should have the right to determine her reproductive life freely, including freely determine their own pregnancy. In order to provide guarantees and legal protection for the reproductive rights of rape victims, it is very appropriate to have "legal abortion", but it is conditional for women who become pregnant as a result of rape.

Abortion as something that is prohibited is a very complex problem and cannot be seen from one point of view, therefore it needs to be studied, especially abortion that has strong reasons, such as abortion for medical reasons or abortion due to rape. The Criminal Code (KUHP) is a positive legal regulation that prohibits all forms of abortion and the Criminal Code only emphasizes abortion in criminal aspects, so there needs to be legal considerations for abortion victims of rape. Because laws are made with the aim of providing protection and justice to all levels of society.

Medical procedures in the form of abortion for any reason are also prohibited because they conflict with legal norms, religious norms, moral norms and politeness norms. However, the harsh regulations in the Criminal Code have been accommodated by providing opportunities for abortion, as stipulated in Law no. 36 of 2009 concerning Health (Article 75), that prohibitions on abortion can be excluded based on:
1. Indication of a medical emergency,
2. Pregnancy resulting from rape,
3. The act of abortion due to rape can be carried out after going through pre-action counseling and/or counseling and ends with counseling by a competent counselor,
4. Further provisions regarding indications of medical emergencies and rape are regulated by Government Regulation.

Furthermore, in Article 75 points 2 and 3 of Law no. 36 of 2009, shows that health experts and legal experts can understand the reasons for abortion because it is something beyond the victim's ability. where in point 2 if the baby is left alive it might become a burden on the family and not be good for the child's future. However, this also conflicts with children's right to life (HAM) and conflicts with children's protection rights to live, grow and develop naturally in accordance with human dignity.

Regulations for carrying out abortions are also regulated in government regulation no. 61 of 2014. That abortion can only be carried out by an abortion eligibility team consisting
of at least two (2) health workers headed by a doctor and who has the competence and authority to carry out abortions. This PP aims to guarantee the fulfillment of every person's reproductive health rights obtained through responsible and responsible health services. Government Regulation No. 61 of 2014 strengthens two (2) exceptions to abortion that are permitted by the state, namely abortion indicating a medical emergency and pregnancy resulting from rape. However, some parties are worried that this PP on Reproductive Health will become a tool to legalize abortion, giving rise to pros and cons, including:

1. Pros:
   - Abortion is a way to reduce the victim's mental stress after being treated badly (rape),
   - Abortion as an effort to reduce the psychological impact of women who receive unpleasant treatment,
   - Abortion as an exception is permitted because the person performing it is the victim.

2. Opponents:
   - There is no one to supervise and control the implementation of the PP on Reproductive Health, to ensure that a woman becomes pregnant due to rape. So this PP is easy to abuse.
   - Abortion without medical reasons is an act of eliminating a child's right to life.

   To prevent abuse of the legality of abortion, the following anticipatory steps are needed:
   a. Only those who are litigating a rape case can have an abortion, meaning that rape victims need to report the crime of rape so that the case can be resolved.
   b. Doctors, as the only health workers who have the right to legally perform abortions, must comply with applicable regulations. (Law No. 29 of 2004 concerning Medical Practice) (Setjen DPR-RI).

C. CONCLUSION

The process of forming legal regulations is strongly influenced by politics, the role of political power is very decisive in the formation of legal rules in realizing the expectations of society and the goals of the state through the formation of legislation. The legal political process cannot be separated from the role of the legislature and executive in realizing people's hopes. Meanwhile, the public's role and community aspirations must be prioritized to achieve state goals.

The Health Law and PP on Reproductive Health have the specific aim of ensuring the fulfillment of reproductive health rights through safe, effective and affordable health services including abortion with indications of medical emergency and rape as an exception to the prohibition on abortion, in order to avoid misunderstandings in legalizing the practice of abortion the government must carry out outreach thoroughly and comprehensively to the community and is obliged to provide assistance to rape victims on a regular and/or continuous basis to prevent doctors from practicing misuse of the code of ethics, as well as a preventive measure for the misuse of abortion procedures. Strict supervision is required in the implementation of the PP on Reproductive Health.

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