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**I Made Rika Gunadi**  
Master of Law Studies  
Program, Faculty of Law,  
Udayana University,  
Indonesia

**Nyoman Satyayudha  
Dananjaya**  
Faculty of Law, Udayana  
University, Indonesia

## Abortus provocatus against the crime of rape

**I Made Rika Gunadi and Nyoman Satyayudha Dananjaya**

### Abstract

The purpose of this article is to provide an understanding of Abortus Provocatus against rape crimes and sanctions against women victims of rape crimes. In this study, the method used is normative legal studies with a statutory approach, concept approach and case approach. This study essentially discusses the act of Abortus Provocatus committed by female victims of rape crimes is currently still a debate. The debate is based on two different views. In the past, victims of rape crimes in Indonesia were seen as objects of crime, but now it has changed to become subjects of crime who should be guaranteed protection both legally and socially. The legality of Abortus Provocatus for women victims of rape crime is a manifestation of legal protection guarantees provided by the state. Victims of rape crimes who perform Abortus Provocatus are not solely due to the “desire to release responsibility” but rather to restore the situation for the victim. Criminal sanctions for Abortus Provocatus by victims of rape crimes in the Criminal Code are regulated in several articles, namely Article 299, Article 346, Article 347, Article 348 and Article 349. However, the criminal sanctions against women who are victims of rape crimes must also consider the causes of abortion by victims of rape with the aim of providing protection for the rights of women as victims.

**Keywords:** Abortion, crime, rape

### Introduction

Abortus Provocatus is a legal issue that always experiences pros and cons. The pro group basically does not directly support abortion but rather emphasizes the importance of protecting the reproductive rights of women and guaranteeing the lives of children in the future. The contra group emphasizes the right to life of the fetus as a human being with a human right to life. Meanwhile, in addition to these debates, the data shows that abortion is already known in the community for several reasons, namely, not being ready, covering up shame, not wanting to trouble parents and work demands are the reasons why women have abortions (Dharma, 2022) <sup>[5]</sup>. As the Annual Record of the National Commission on Violence Against Women (CATAHU Komnas Perempuan) documented 24,786 cases of sexual violence that occurred during 2016-2020. Furthermore, in CATAHU Komnas Perempuan noted that among these cases of sexual violence, 7344 of them were cases of rape or 29.6% of the total cases of sexual violence, which among these rape cases there were victims who then had abortions for various reasons (Komnas Perempuan, 2021) <sup>[10]</sup>.

The position of women as victims of rape is a key consideration for not imposing punishment. The victim has to deal with the effects of the rape and a pregnancy resulting from rape can worsen the victim's condition. Not to mention if the victim of rape is a child, who sometimes loses the right to education because she has to continue her pregnancy. Criminalizing victims means putting women in a position of multiple suffering, namely as victims of rape and women who are criminalized (Chesney-Lind, 2002) <sup>[4]</sup>.

In Indonesia, arrangements related to abortus provocatus in relation to women as victims of rape are regulated in several provisions of legislation (Ariyad & Masyhar, 2020) <sup>[2]</sup>. Regulations related to abortion in general refer to the provisions of the Criminal Code (hereinafter referred to as the Criminal Code), which is regulated in the provisions of Article 346 of the Criminal Code which states that a woman who deliberately aborts or kills her womb or orders someone else to do so, is punishable by a maximum imprisonment of four years. Meanwhile, on the other hand, the provisions of Article 60 paragraph (2) letter c of Law Number 17 Year 2023 on Health (Hereinafter referred to as the Health Law) explicitly regulates the implementation of abortion with the criteria that can only be done with the consent of the pregnant woman concerned and with the consent of her husband, except for victims of rape. Furthermore, Article 429 paragraph (3) of the Health Law stipulates “Medical personnel or health workers who perform abortions due to indications of medical

**Correspondence Author:**  
**I Made Rika Gunadi**  
Master of Law Studies  
Program, Faculty of Law,  
Udayana University,  
Indonesia

emergencies or against victims of criminal acts of rape or other criminal acts of sexual violence that cause pregnancy as referred to in Article 60 shall not be punished”.

In principle, referring to this regulation, abortion by women as victims of rape is legal. This refers to the provisions in the Health Law. However, there are several other criteria that must also be considered, such as abortion must be performed by Medical Personnel and assisted by Health Workers who have the competence and authority and abortion must be performed at Health Service Facilities that meet the requirements set by the Minister (Fiedler & Suazo, 2002) <sup>[7]</sup>.

On the other hand, in principle, all children who are born have the right to life, as a human right that is a gift from God. As a consequence of the right to life, the state is obliged to protect the rights of the child. The state's commitment to protect the human rights of its citizens, including children, is contained in the preamble of the 1945 Constitution of the Republic of Indonesia (Hereinafter referred to as the 1945 Constitution of the Republic of Indonesia), particularly in the fourth paragraph, which states, “Therefore, to establish a government of the State of Indonesia that protects the entire Indonesian nation and the entire homeland of Indonesia and to promote public welfare, educate the nation's life, and participate in the implementation of world order based on independence, lasting peace and social justice”. Based on the preamble of the Fourth 1945 Constitution, the state guarantees that the law can provide not only legal certainty but also a sense of justice.

In some cases in Indonesia, discrimination as a result of the pros and cons of abortion against women crime until now still occurs, which is one of the cases is a child with the initials WA 15 years old, convicted by the District Court Judge (PN) Muara Bulian guilty and sentenced WA to six months in prison for aborting the pregnancy resulting from rape by his own biological brother. During the trial process, WA was only accompanied by legal counsel at her first hearing on July 9. In addition, in the trial process, there was no hearing agenda related to the interests of the defense of child victims of rape and no defense agenda. This means WA did not receive effective legal assistance (BBC, 2018) <sup>[3]</sup>. In addition to the case of this WA child, previously there was another case, where a girl with the initials BL had an abortion after being raped by her neighbor. The girl was convicted in court, but during the appeal hearing, LBH APIK presented a reproductive health expert. The expert's presentation then became the basis for the panel of judges not to send the child to prison, but instead decided to provide guidance to BL for 18 months (BBC, 2018) <sup>[3]</sup>.

Understanding from these two cases, the current arrangements are still unable to guarantee women's rights in the context of women as victims of rape who also have the right to receive protection and restoration of their condition. On the other hand, constitutionally, the right to life is a human right granted by God to a human being. Based on this description, the purpose of this study is to examine the legal legality of the act of Abortus Provocatus in Indonesia and identify criminal sanctions against the act of Abortus Provocatus committed by victims of rape crimes in Indonesia.

## Methods

The type of research used in this research is normative legal research. According to I Made Pasek Diantha, “the

normative legal research method examines the law from an internal perspective with the object of research being legal norms” (Diantha, 2019) <sup>[6]</sup>. The nature of the norm according to H. Kelsen is as an order or necessity (Ought), which this ought summarizes all the normative functions of the norm, which then results in the science of law being classified as a sui generis normative science (Diantha, 2019) <sup>[6]</sup>. In this type of legal research, the law is often conceptualized as what is written in legislation (Law in books) or law is conceptualized as a method or norm that is a benchmark for human behavior that is considered appropriate. Based on the legal framework, this research investigates the idea of legal regulation of abortion performed by women as victims of rape crimes. The approach used in this research is a statutory approach, concept approach and case approach.

## Results and Discussion

### Study of the legality of the law of abortion provocatus in Indonesia

In terminology, abortion is defined as removing (forcibly) the fetus in the womb before it is able to live outside the womb, this is a form of murder because the fetus is not given the opportunity to grow in the womb. The word abortus comes from Latin, if translated in English is abortion. Etymologically means, fall of the womb or miscarriage. Abortion in the Big Indonesian Dictionary is: First, the emission of an embryo that is no longer possible before the expiration of the fourth month of pregnancy or defined abortion of the fetus or embryo after exceeding two months of pregnancy. Second, the state of cessation of normal growth (For living things). Third, miscarriage (Of a fetus). Dr. Sardikin Gina Putra from the Faculty of Medicine, University of Indonesia explained that terminology defines abortion as the termination of pregnancy before the fetus can live outside the womb. Meanwhile, according to Doctor R.S Samil, a lecturer at the Faculty of Medicine, University of Indonesia, abortion is a miscarriage or abortion which means the end of pregnancy before the foetus can live alone outside the womb. It is said to be an abortion if the foetus comes out of the womb before 28 weeks of pregnancy and the foetus weighs 1999 grams (Syakirin, 2021) <sup>[17]</sup>.

In another understanding, Abortus Provocatus is one of the various types of abortus. In the Indonesian Latin dictionary itself, abortus is defined as an untimely pregnancy or miscarriage (Sakira, 2022) <sup>[15]</sup>. The definition of abortion or Abortus Provocatus is the termination or expulsion of pregnancy from the uterus prematurely, in other words “expulsion” it is intended that the exit of the fetus is intentional with human intervention, either through mechanical means, drugs or other means. In medical science these terms are used to distinguish abortion, including:

1. Spontaneous abortion, abortion that occurs on its own without any external influence. Such as weak womb or wrong diet and poisoning.
2. Abortus Provocatus, abortion performed with the intention of certain considerations, because the content is not desired or deliberately aborted (Syakirin, 2021) <sup>[17]</sup>.

The development of criminal offenses in a country's society coincides with the progress of a country's society. The victims of the crime of rape in its current development not

only afflict adult women, but women who are still minors or children. Women and children in Indonesia are still vulnerable to becoming victims of sexual violence, rape. The National Commission on Violence Against Women (Komnas Perempuan) states that three women in Indonesia face rape every two hours. Referring to CATAHU Komnas Perempuan Year 2023, based on Komnas Perempuan's complaint data, violence in the public sphere is still high at 1,276 cases. This shows that public spaces are not fully safe for women. In terms of forms of violence in the public sphere, sexual harassment and rape are the highest, followed by maltreatment, trafficking, sexual violence, and sexual abuse (Komnas Perempuan, 2023) <sup>[9]</sup>.

Under the Criminal Code the crime of rape is classified as a crime of decency. Crimes in criminal law are criminal acts regulated in Book II of the Criminal Code and in other rules outside the Criminal Code. The definition of rape itself according to Seatandyo Wignojo Soebroto is "an attempt to vent sexual appetite by a man against a woman in a way that according to morals and/or applicable law violates" (Saruan, 2022) <sup>[16]</sup>. In this sense, what is called rape, on the one hand, can be seen as an act, namely the act of someone who forcibly wants to vent his sexual appetite, and on the other hand, it can be seen as an event, namely the violation of norms and social order. According to Wirdjono Prodjodikoro, what is meant by rape is a man, who forces a woman who is not his wife to have intercourse with him, so that he is unable to do so, then by force he wants to have intercourse. So in general, rape can be defined as the coercion of the will of one party to another, without regard to the rights, interests and will of the other party who is forced for the purpose of profit or personal interest for the coercing party. The consequences of sexual violence (rape) that befalls victims are not only detrimental to their physical resilience, but also their psychological resilience (Rochayati, 2018) <sup>[14]</sup>.

In cases of rape crimes, some of them resort to abortus provocatus. This action is usually chosen for various reasons. Rape victims have the possibility of experiencing post-rape stress such as trauma that causes victims to have a lack of self-confidence (Nasrin, 2013) <sup>[11]</sup>, negative self-concept, close themselves from socializing, and also the psychological burden felt by rape victims when they find out they are pregnant as a result of the rape. Pregnancy from rape will put a lot of pressure on the victim. Not to mention the negative view of the community on the pregnancy that did not occur from a marriage, it is feared that it will have an even worse impact on the victim. Therefore, there are some victims and their families who take action to abort the fetus in the womb of a rape victim. Abortion is seen as the best solution for the psychological recovery of the victim (Rochayati, 2018) <sup>[14]</sup>. However, the act of abortus provocatus is still debated in Indonesia.

Constitutionally, as part of human rights, the right to life is protected as stipulated in Article 28A of the 1945 Constitution of the Republic of Indonesia, which reads "Every person has the right to live and the right to defend his life and life". Basically, the right to life is a right that cannot be reduced, as the provisions of Article 28I of the 1945 Constitution state that the right to life is a human right that cannot be reduced under any circumstances. Based on these provisions, it is understood that the right to life requires people to pay attention to the right to life.

The legality of Abortus Provocatus, especially for rape victims, received a positive response with the enactment of Article 60 of the Health Law. The Health Law regulates the act of Abortus Provocatus as a legal act for victims of the crime of rape (Ilyas & Widaningsih, 2020) <sup>[8]</sup>. This is when referring to the provisions of Article 2 of Government Regulation No. 61/2014 on Reproductive Health (Hereinafter referred to as PP Reproductive Health) which regulates that rape is an exception to the prohibition of abortion. In the provisions of Article 31 paragraph (1) letter b of PP Reproductive Health states that abortion can only be done based on pregnancy due to rape. Furthermore, Article 31 paragraph (2) letter b of the PP on Reproductive Health stipulates "Abortion due to rape as referred to in paragraph (1) letter b can only be done if the gestational age is at most 40 (forty) days calculated from the first day of the last menstruation".

In some medical conditions, abortion is the only way for medical personnel to save the life of a mother who is experiencing serious health problems or complications during pregnancy. Under different circumstances, due to the forced will of the perpetrator, a rape victim will suffer physically, mentally, and socially. And pregnancy due to rape will exacerbate the mental condition of the victim who has previously been severely traumatized by the rape. Severe mental trauma will also adversely affect the development of the fetus that the victim is carrying. Therefore, most rape victims experience a rejection reaction to their pregnancy and want to have an abortion.

Based on the provisions of Article 60 paragraph (2) of the Health Law, there are several criteria that allow the implementation of abortion can only be done:

1. By medical personnel and assisted by health personnel who have the competence and authority;
2. At a health care facility that meets the requirements set by the minister; and
3. With the consent of the pregnant woman concerned and with the consent of her husband, except for victims of rape.

Meanwhile, article 35 paragraph (1) of the pp on reproductive health stipulates that "Abortion based on indications of medical emergencies and pregnancy resulting from rape must be performed safely, with quality, and responsibly". Furthermore, Article 35 paragraph (2) of the PP on reproductive health states:

Safe, quality, and responsible abortion practices as referred to in paragraph (1) include:

- a) Performed by a doctor in accordance with the standards;
- b) Performed in health care facilities that meet the requirements set by the minister;
- c) At the request or consent of the pregnant woman concerned;
- d) With the permission of the husband, except for victims of rape;
- e) Not discriminatory; and
- f) Does not prioritize material rewards.

Referring to Mendelsohn's theory, victims are not only objects of crime, but also subjects who have interests and rights that must be seriously considered by the legal and social systems (Rasiwan, 2024) <sup>[13]</sup>. The basics of Mendelsohn's theoretical thinking related to victimology, namely:



**1. Focus on the victim**

Mendelson shifted the paradigm in criminology which initially focused more on criminals and their treatment by the legal system. On the other hand, Mendelson emphasized the importance of considering the victim as the main subject in the study of crime rather than just an object or statistic. This opened the door for a deeper understanding of victims' experiences and impacts.

**2. Victims' rights**

One important aspect of Mendelson's thinking is his emphasis on victims' rights. Mendelson advocated for the need to fight for the rights of crime victims, including the right to justice, redress, compensation, and protection from revictimization. Her views contributed to the development of a legal system that was more proactive in protecting and supporting victims.

**3. Legal protection**

Mendelson highlighted the importance of legal protection for victims of crime. Mendelson advocates for expanding the definition of crime to include not only the criminal act but also the impact on the victim. This reflects the need to take into account the psychological, physical, and social aspects of crime against victims in a legal context.

**4. Legal system responses:** Mendelson's thinking leads to the question of how the legal system responds to victims of crime. Mendelson emphasizes the need for a system that is responsive and sensitive to the needs of victims, including fair processes, accessibility to services, and recognition of the diverse individual experiences of victims.

**5. The role of social institutions**

Mendelson's thinking leads to the question of how the legal system responds to victims of crime. Mendelson highlights the role of social institutions such as government agencies, educational institutions, and community organizations in supporting victims of crime.

**6. A critique of policy and practice**

In addition to providing a conceptual foundation, Mendelson also engages in a critique of policies and practices that pay little attention to victims of crime.

Mendelson encourages critical evaluation of legal and social systems to ensure that victims are not neglected or further harmed by the legal process (Rasiwan, 2024) <sup>[13]</sup>.

Moving on from this victimology theory, victims of rape crimes must be seen as the subject of the crime. The act of Abortus Provocatus for women victims of rape crimes should be seen as a form of protection provided by the state to victims of rape crimes (Peterson, 2008) <sup>[12]</sup>.

In its current development, the legality related to Abortus Provocatus for women victims of rape crimes is getting more attention, this is shown by the enactment of Law Number 1 of 2023 concerning the Criminal Code (Hereinafter referred to as the New Criminal Code). The New Criminal Code which was promulgated in January 2023 will take effect from January 2026. Article 463 paragraph (2) of the New Criminal Code stipulates "The provisions as referred to in paragraph (1) shall not apply in the event that the woman is a victim of a criminal act of rape or other criminal act of sexual violence that causes pregnancy whose gestational age does not exceed 14 (Fourteen) weeks or has indications of medical emergency". Furthermore, Article 465 paragraph (3) of the New Criminal Code stipulates "Doctors, midwives, paramedics, or pharmacists who perform abortions due to indications of medical emergencies or against victims of criminal acts of rape or other criminal acts of sexual violence that cause pregnancy as referred to in Article 463 paragraph (2), shall not be punished". The strengthening of legality related to Abortus Provocatus for women victims of rape crimes illustrates that the criminal law that once viewed victims of rape crimes as objects of crime has changed and views victims of rape crimes as subjects of crime who should be guaranteed legal protection (Abbas, 2020) <sup>[1]</sup>.

**Criminal sanctions for abortus provocatus by victims of rape crimes in Indonesia**

In relation to Abortus Provocatus, looking at the Criminal Code, abortion is categorized as a criminal act. Criminal Sanctions for Perpetrators of Abortus Provocatus or abortion of the fetus including crimes, known as "Abortus Provocatus Criminalis". In the Criminal Code, the regulation of abortion is contained in several articles, namely Article 299, Article 346, Article 347, Article 348 and Article 349.

Article 299 of the criminal code	1) Any person who with deliberate intent treats a woman or causes her to be treated, knowing or having reason to expect that by means of such treatment the pregnancy may be terminated, shall be punished by a maximum imprisonment of four years or a maximum fine of fifty thousand rupiahs. 2) If the offender commits the crime for gain, or makes an occupation or habit of it, or if he is a physician, midwife or medicine man, the punishment may be enhanced with one third. 3) If the offender commits the crime in his profession, he may be deprived of the exercise of said profession.
Article 346 of the criminal code	1) Any woman who with deliberate intent causes a miscarriage or puts to death the pregnancy or causes another person to do so, shall be punished by a maximum imprisonment of four years.
Article 347 of the criminal code	1) Any person who with deliberate intent causes the abortion or puts to death the pregnancy of a woman without her consent, shall be punished by a maximum imprisonment of twelve years.
Article 348 of the criminal code	1) Any person who with deliberate intent causes the abortion or puts to death the pregnancy of a woman with her consent, shall be punished by a maximum imprisonment of five years and six months.
Article 349 of the criminal code	1) If a physician, midwife or druggist assists in the commission of the crime described in Article 346, or commits or assists in the commission of one of the crimes described in Articles 347 and 348, the punishments laid down in said Articles may be enhanced with one third and may be deprived of the exercise of the profession in which the crime has been committed.

In addition to the Criminal Code, the provisions regarding the prohibition of abortion are also contained in Law No. 17 of 2023 on Health (Health Law) Article 60 Paragraph (1),

namely "every person is prohibited from performing abortion, except with the criteria allowed in accordance with the provisions in the criminal code." Furthermore, criminal

sanctions for people who perform abortions not in accordance with the provisions of Article 60 of the Health Law, are regulated in Article 427 of the Health Law, which is punishable by imprisonment for a maximum of 4 (four) years. In this case, criminal sanctions can not only ensnare abortionists, but also health workers who assist abortion, such as doctors and health workers who deliberately perform illegal abortions. However, criminal sanctions against women who are victims of rape crimes must also consider the causes of abortion by rape victims in order to protect the rights of women as victims. Victims of rape crimes must be viewed as the subject of the crime in order to ensure the legality of women as victims of rape crimes. This is because of the enormous impact on physical and psychological health experienced by most victims of rape, which will also have an impact on the pregnancy if it is maintained. If the abortion is performed by the perpetrator in a way that is not in accordance with the criteria specified in the legislation then it must be given strict sanctions to enforce the law and provide a deterrent effect on the perpetrator.

### Conclusion

The study of abortion performed by women as victims of rape crimes in Indonesia, has now experienced a change of view. In the past, victims of rape crimes in Indonesia were seen as the object of crime, but now it has changed into the subject of crime that should get a guarantee of protection both legally and socially. The legality of Abortus Provocatus for women victims of rape crime is a manifestation of legal protection guarantees provided by the state. Victims of rape crimes who perform Abortus Provocatus are not solely due to the “desire to release responsibility” but rather to restore the situation for the victim. Criminal sanctions for abortus provocatus by victims of rape crimes in the Criminal Code are regulated in several articles, namely Article 299, Article 346, Article 347, Article 348 and Article 349. However, in the provision of criminal sanctions against women who are victims of rape crimes must also consider the causes of abortion by victims of rape with the aim of providing protection for the rights of women as victims.

It is hoped that in the future law enforcement officials can pay attention to and guarantee legal protection for women victims of rape crimes who commit Abortus Provocatus, so that criminalization of victims of rape crimes can be avoided. In addition, there needs to be serious assistance from the government related to the recovery needed by victims of rape crimes, both physical and psychological recovery, which starts from the initial process of the report being received until after the court decision.

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