

Legal Protection of Health Workers Against Alleged Acts of Abortion that Have Been Committed: A Legal Realism Approach

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Abstrac

Nowadays, health workers who help to carry out abortions at the request of the mother/parents are always charged and sentenced under the Criminal Code, even though health workers are *lex specialis* which have their own regulations. In fact, everyone, including health workers who help with abortions, is always taken to legal channels to be immediately secured. The purpose of this study is to determine the legal protection of health workers against alleged abortions that have been carried out: a legal realism approach. The approach used in this study is a normative juridical approach. This research will examine normative aspects of the legal protection of patients based on the principles of legal certainty and statutory regulations which focus on the conceptual approach and statute approach. Data analysis techniques in this study used qualitative analysis techniques. Based on the results of the research, it shows that this legal realism movement provides an opportunity for health workers as suspected perpetrators of abortion not to be detained before being proven guilty. This is because it is not certain that what was done was due to a conspiracy with the mother/parents. There is authority from the health worker professional organization to review the truth of this case. The police should not immediately arrest health workers because doing so would disrupt the delivery of health services and undermine the concept of legal realism. Efforts not to detain health workers are a legal protection solution for health workers in cases of suspected abortion so as not to injure the health services that will be carried out by these health workers.

Abstrak

Dewasa ini, para tenaga kesehatan yang membantu melakukan aborsi atas permintaan ibu/orang tua selalu didakwa dan dijatuhi hukuman berdasarkan KUHP, padahal tenaga kesehatan sifatnya adalah *lex specialis* yang mana memiliki peraturannya sendiri. Kenyataannya, setiap orang termasuk tenaga Kesehatan yang membantu melakukan aborsi selalu dibawa ke jalur hukum untuk langsung diamankan. Tujuan dari penelitian ini adalah untuk mengetahui perlindungan hukum tenaga kesehatan terhadap dugaan tindakan aborsi yang telah dilakukan: pendekatan realisme hukum. Pendekatan yang digunakan dalam penelitian ini adalah pendekatan yuridis normatif, Penelitian ini secara yuridis akan dikaji aspek normatif tentang perlindungan hukum pasien berdasarkan asas kepastian hukum dan peraturan perundang-undangan yang menitikberatkan pada *konseptual approach*, dan *statute approach*. Teknik analisis data dalam penelitian ini menggunakan teknik analisis kualitatif. Berdasarkan hasil penelitian menunjukkan bahwa gerakan realisme hukum ini memberikan kesempatan kepada tenaga kesehatan sebagai terduga pelaku tindakan aborsi untuk tidak dilakukan penahanan sebelum terbukti bersalah. Sebab, belum tentu yang dilakukan karena persekongkolan dengan ibu/orang tua. Ada kewenangan dari organisasi profesi tenaga Kesehatan untuk meninjau kebenaran dari kasus ini. Polisi tidak boleh langsung menahan tenaga kesehatan karena hal itu akan mengganggu jalannya pelayanan kesehatan yang diberikan dan mencederai konsep realisme hukum. Upaya untuk tidak menahan tenaga kesehatan merupakan solusi perlindungan hukum tenaga kesehatan atas kasus dugaan tindakan aborsi agar tidak mencederai pelayanan kesehatan yang akan dilakukan oleh tenaga kesehatan tersebut.

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A. BACKGROUND

Nowadays, disputes often occur between health workers and patients. This is often encountered because of the paternalistic pattern that still exists between patients and health workers. A relationship with a paternalistic pattern is a relationship where the position of the health worker and the patient are not equal, namely the position of the health worker is higher than the patient because the health worker is considered to know everything related to disease and its healing. On the other hand, health workers are aware of this image, so either consciously or unconsciously they try to maintain this image by acting as if they know better than the patient and that the patient must surrender completely to him. Disputes that occur between health workers and patients are usually caused by a lack of information from health workers, even though information about diseases and medical procedures that will be carried out by health workers is the patient's right. As a result, it is not uncommon for patients to become victims with various cases occurring which cause public dissatisfaction, giving rise to issues of alleged medical malpractice, such as in cases of abortion which have recently become widespread.

Until now, there are still pros and cons and endless debates, from various parties who support abortion and those who are against abortion. As a result of not having found common ground on the issue of abortion, this has resulted in pro-life adherents who seek to preserve the life of the fetus, and pro-choice adherents who want abortion to be permitted because women have the right to maintain their health in determining their reproductive health rights. Debates about abortion occur everywhere, both in print and electronic media. Every year abortions increase, whether carried out by medical personnel, traditional healers or by women themselves. There are many opinions regarding whether abortion can be legalized for women who are victims of rape, both in terms of law, reproductive health rights, from legal scholars, feminist groups, religion, and human rights. So this causes debate. Likewise, in statutory regulations there are differences, namely the Criminal Code (KUHP) prohibits abortion, on the other hand, is permitted for medical reasons, according to Law no. 36 of 2009 concerning Health. Based on the provisions of the Criminal Code (KUHP), there are two forms of abortion, namely the act of aborting the pregnancy and the act of terminating the pregnancy. According to the Criminal Code, every act of abortion with any motive, indication and method at any gestational age is a criminal offense.

From the laws and regulations in force in Indonesia, the right to abortion is legally justified if it is carried out for medical reasons or considerations or a medical emergency if it is done not in conflict with law and religion. In other words, medical personnel have the right to perform an abortion if it is considered necessary by the media or a medical emergency to save the life of the pregnant mother.

Basically, abortion is a phenomenon that lives in Indonesian society. Abortion can be said to be a "hidden" phenomenon because the practice of abortion often does not appear on the surface, and even tends to be covered up by abortionists or society. This closure is influenced, among other things, by the existence of formal laws and political, social, cultural and religious values that live in society.

In looking at the legal position of abortion in Indonesia, it is very necessary to look again at what is the aim of the act of abortion. So far, the issue of abortion is generally considered by the majority of society to be a criminal act, but in positive law in Indonesia, the act of abortion in certain cases can be justified if it is a medical provocation abortion. Meanwhile, abortion which is generalized into a criminal act is better known as abortion provokes criminals.

Lawsuits in Indonesia against health workers alleging malpractice are increasing. This shows that there is an increase in legal awareness and people are more aware of their rights. On the other hand, health workers are required to carry out their professional duties and obligations more carefully (professionally and proportionally) and with full responsibility. A health worker, especially a doctor, should be able to establish or provide a diagnosis correctly and precisely in accordance with applicable procedures, provide therapy, and carry out services (medical actions) in accordance with medical service standards and these actions are carried out for the benefit of the patient.

In Law Number 36 of 2009 concerning Health Article 75 Paragraph (2) it is stated that this prohibition can be excluded or ignored based on indications of a medical emergency detected at an early stage of pregnancy and this exception is strengthened by Article 77, that the Government is obliged to protect and prevent women from abortion as intended in Article 75 paragraph (2) and paragraph (3) which is not of good quality, unsafe and irresponsible and is contrary to religious norms and provisions of laws and regulations. So, as stated in this article, the government is obliged to provide protection for the safety of the mother or unborn fetus and prevent all acts of abortion as referred to, whether at the request of the pregnant mother or the person who assists in the act of abortion which could endanger the mother or fetus (irresponsible, irresponsible, not safe, contrary to religious norms and statutory provisions).

Currently, health workers who assist in carrying out abortions at the request of mothers/parents are always charged and sentenced under the Criminal Code, even though health workers are *lex specialists* and have their own regulations. This matter should have entered the domain of the ethics and disciplinary committee of the professional organization first before being taken to legal action to ascertain whether the person concerned was truly guilty or not, but in reality this is not the case. Everyone, including health workers who assist in carrying out abortions, is always taken to legal action to be immediately arrested.

B. RESEARCH METHODS

The approach used in this research is a normative juridical approach, namely an assessment method based on secondary data in the form of legal materials, especially primary legal materials, in this case positive criminal law regulations that are relevant to the existing problems.. This research will juridically examine normative aspects regarding the legal protection of patients based on the principles of legal certainty and statutory regulations which focus on the conceptual approach, and *statute approaches*. This research is a type of prescriptive design research which aims to determine the legal protection of health workers against suspected abortions that have been carried out using a legal realism approach. The data analysis technique in this research uses qualitative analysis techniques. Researchers are more interested in qualitative data analysis because it is integrated with the activities of data collection, data reduction, data presentation, and concluding research results. The qualitative analysis in this research is used to answer the problems in this research.

C. RESULTS AND DISCUSSION

Philipus M. Hadjon groups legal protection into 2 (two) parts, namely preventive legal protection including legal protection originating from the government for prevention before violations occur and repressive legal protection, namely final protection in the form of sanctions given to violators when a violation or dispute has occurred such as fines, imprisonment and additional penalties.

In general, the aim of law is to create legal certainty, legal benefits and justice, so that the role of legal philosophy emerges which is not limited only to legal aims but to every problem that arises in society and which requires a solution. One of the goals of health law is to protect the interests of patients, in addition to other goals such as developing the professional quality of health workers. This does not mean that the patient's interests always have to be prioritized: what this means is that there is harmony between the patient's interests and the interests of health workers, for example health workers, nurses, etc. Health law is based on two principle legal principles. The first is the legal principle of the right to health services, namely care provided by health workers based on their ability and skills to apply health science and technology. The second is, human independence rights or the right to self-determination ("the right to self-determination" or "*zelfbeschikkingsrecht*"). The right to health services is a social aspect, while the right to self-determination is a personal aspect.

Legal realism holds that there are no rules that regulate a problem until there is a judge's decision on the case, meaning that what is considered law in the book is the interpretation of how

the judge will decide. Legal realism means that law is the result of social forces and tools of social control which include human personality, social environment, economic conditions, commercial interests, dominant ideas, emotions in general and the results of law on life. This flow means that the law must adapt to the development of society because it is known that the conditions of society change more quickly than the law. Therefore, changes to the law are claimed to be evaluated to make the law more effective for society. on legal protection for victims, so this flow allows for revision and evaluation of statutory regulations regarding legal protection for health workers.

Legal realism provides a scheme regarding the workings of the law starting from the movement of critical and radical thought. On the other hand, this idea is dynamic, considering that legal concepts and systems are always developing and legal instruments that follow the needs of social goals, so that the law must be studied and tested regarding its effects and objectives. This concept also assumes that there is a separation between the objectives of legal studies and the objectives of other studies. The view of legal realists places social reality above the law. Thus, law is a consequence of various forces and tools of social control. Law is seen as not limited to aspects of human personality alone; but it also includes business interests, the social environment, economic conditions, current ideas, and all these things are elements that form law in social life.

Legal realism departs from three collaborative movements. First, the philosophy of legal realism is driven by various syntheses of legal philosophies which have different opinions regarding the existence of an existing legal philosophy. That is, legal scholars who did not support the existing philosophies at that time researched a form of transformative change by paying attention to moral and social aspects as the basis for achieving social and societal justice. Second, there are efforts to take a practical approach to provide lasting legitimacy. The philosophy of legal realism was formed to accommodate various facts that exist in the field regarding legal actions and actions carried out by each legal subject. Therefore, positivistic philosophy does not look at things contextually or empirically, so it only refers to written laws and regulations. The philosophy of legal realism wants to examine everything that is not reviewed by positivistic philosophy. Third, community welfare. In this aspect, the philosophy of legal realism wants to encourage people to be 'courageous and willing' in facing legal cases if they believe in the truth based on existing evidence. This is related to the community's accessibility to obtain justice; So, if society finds it easy to access justice, society will also gain prosperity.

Legal realism can actually be divided into two types. First, the philosophy of American legal realism. This philosophy has the idea that law is a real pattern of action as carried out by law enforcement officials. American legal realism considers that the meaning of law is "not what is in the law book", but what is in practice (Law in Action); So, law is no longer a closed logical system but an open logical system. Therefore, the law from the perspective of legal realism is only a reference source for resolving a case. Laws can be used if they are suitable, and abandoned if they are not. Second, the characteristic of Scandinavian realism is the paradigm that law is a very important thing in society, without law, it is impossible for society or legal subjects to win power over other parties. Scandinavian legal realism holds the view that the norms contained in a rule have two elements of 'directive correspondence', namely the description of social facts and the existence of instructions for doing or not doing something related to that social factor. Typical Scandinavian philosophy states that all actions carried out by each legal subject as caused by practical human needs and not because of human moral obligations, will not be considered as norms. However, Scandinavian philosophy challenged many of the metaphysical foundations associated with jurisprudence. Laws must be reviewed based on historical, conceptual and psychological aspects but not empirically as done by American realists. Psychology is an important part of this philosophy because there is an assumption that when someone believes the truth is on their side, then that person has the right to fight for justice. On the other hand, legal culture or customs carried out by society are the result of construction from historical concepts which must be handled by various hypotheses and psychology to understand legal concepts as determined by human behaviour.

Brian stated that the law does not always provide legal certainty and there is a little leeway that is justified in making judicial policies. This is in line with the view expressed by Leiter that the law as it should be and the law that actually occurs in the judiciary is often inconsistent. There are special considerations regarding future legal politics that are different from what society expects. The actual law that occurs during and in the judicial process is what is truly law. Such a law is often called empirical law, but what is true is real law, so it is called legal realism.

This philosophy explains that law cannot be separated and separated between norms and their implementation, nor can they be separated from their enforcement. Thus, legal realism emphasizes the law as it is, not the law as it should be. Legal discoveries in aspects found in legal opinions, judges' legal considerations, jurisprudence or past precedents, and stare desis, emphasize the factors of direct involvement in juridical decision making.

Thus, if we refer to the legal realism approach, the following results are obtained:

Table. 1

Analysis of the Legal Realism Movement in the Legal Protection of Health Workers against Alleged Abortions that have been carried out

Legal Realism Movement	Legal protection	
	Preventive	Repressive
Existing legal philosophy	-	So far there have been no studies that allow health workers to perform abortions, except as stated in Law no. 36/2009 concerning Health which is specifically for rape victims and also indications of pregnancy.
Practical Approach	-	There are facts in the field regarding actions or legal acts carried out due to errors by the legal subject. It must first be determined whether there was an element of intent, conspiracy or negligence. So it is necessary to carry out a review by considering other aspects such as the type of service provided, the results of the service work and the benefits of the service provided.
Public welfare	-	The alleged perpetrator who carried out the abortion act 'courageous and willing' in facing a legal case if they believe it is true based on existing evidence that there is no error.

This Legal Realism Movement provide an opportunity for health workers as suspected perpetrators of abortions not to be detained before being proven guilty. Because, it may not necessarily be done because of a conspiracy with the mother/parents, it could be because there are other indications that require immediate abortion. This shows that there is authority from the professional organization for health workers to review the truth of this case. If this is related to the phenomenon that has occurred recently, then what the police did in detaining health workers was wrong. Because, in this philosophy of legal realism, the legal subject can be said to be innocent, and must prioritize the welfare of the alleged perpetrator of the abortion act, who in fact is a health service provider and there are certainly still many who need his services.

Table. 2

Analysis of the Types of Legal Realism in the Legal Protection of Health Workers against Alleged Abortions that has been carried out

Types of Legal Realism	Legal protection	
	Preventive	Repressive
American Legal Realism	-	There is a real pattern of actions carried out by law enforcement officials in cases of suspected abortion. However, this action prioritizes protection of the victim (in this case the fetus still in the womb which has the right to live).
Scandinavian Realism	.-	The breakdown of social facts and the existence of instructions for doing or not doing something related to abortion as outlined in legal norms

Referring to this concept, there is no legal protection for health workers as suspected perpetrators of abortion who are proven to have done so without a court order or based on medical indications. If the perpetrator does it at the request of the patient/parent, then no protection can be provided. The police must also not immediately detain health workers because this will disrupt the health services provided and harm the concept of legal realism. Based on the concept of legal

realism, the legal protection that can be provided is a repressive effort, because actions that have legal consequences have already occurred, so that efforts not to detain health workers is a solution that can be offered by researchers in cases of suspected abortion so as not to injure the health services that will be carried out. by the health worker. Apart from that, law enforcement officials must also be willing to wait for the review process and results of the ethics trial that has been conducted by professional organizations. Therefore, SOPs are carried out by law enforcement officials must be studied and tested regarding its consequences and objectives in order to provide benefits and justice.

D. CONCLUSION

Based on the results and discussion above, it can be concluded that this legal realism movement provide an opportunity for health workers as suspected perpetrators of abortions not to be detained before being proven guilty. Because, it may not necessarily be done because of a conspiracy with the mother/parents, it could be because there are other indications that require immediate abortion. This shows that there is authority from the professional organization for health workers to review the truth of this case.

Efforts to provide legal protection for health workers as suspected perpetrators of abortions who are proven to have done so without an order from the court or based on medical indications. If the perpetrator does it at the request of the patient/parent, then no protection can be provided. The police must also not immediately detain health workers because this will disrupt the health services provided and harm the concept of legal realism. Efforts not to detain health workers are a solution to legal protection of health workers in cases of suspected abortion so as not to injure the health services that will be provided by the health worker.

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