

Criminal Law Policy Analysis Concerning Decriminalization of Abortion

Original Article

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Abstract

Pregnancy due to rape is a pregnancy that occurs outside of a person's will. When the victim is faced with violence or threats of violence, the victim is forced to have sex with the perpetrator outside of marriage. Therefore, that unwanted pregnancies generally result in abortion. In Indonesia, the incidence of unwanted pregnancies reaches 121 million per year. This figure shows that there are 64 unwanted pregnancies occurring in every 1,000 women aged 15-49 years and it is recorded that 73.3 million abortions occur each year, which is equivalent to 39 abortions per 1,000 women each year. Normatively, abortion is regulated by Health Law No. 17 of 2023, Article 60, which prohibits everyone from having an abortion except for the criteria permitted by national criminal law. This study seeks to analyze Indonesia's criminal law policy on abortion decriminalization and legal gaps for rape victims over 14 weeks gestation, using a normative juridical approach to examine relevant laws and their alignment with state policy. The decriminalization of abortion through the 2023 national criminal code is a criminal law policy that is harmonized from the previous law and abortions carried out based on the new national criminal law policy have a tendency to be victim-oriented. Although abortion has been decriminalized, the government has yet to establish clear policies, systems, and legal protections for rape victims with pregnancies over 14 weeks.

Keywords: Abortion Decriminalization, Criminal Law Reform, Gestational Age Regulation, Legal Protection, Rape Pregnancy.

1. Introduction

In Indonesia, the practice of abortion remains a subject of debate. According to Bearak et al. (2020) in a research report cited from the Legal Framework on Safe Abortion 2023 published by the Institute Criminal Justice Reform (ICJR) (Fitrianti et al., 2023), cases of unwanted pregnancy from 2015 to 2019 reached 121 million per year. These incidents show that there were 64 cases of unwanted pregnancy per 1,000 women aged 15-49 years, with 73.3 million abortion cases recorded annually, equivalent to 39 cases of pregnancy termination per 1,000 women each year (Beranda Hukum, 2020). Abortion in Latin is "*abortus*," meaning the expulsion of a fetus before its time (Abdullah, 2021), resulting in the death of the unborn baby (Muhammad & Tobing, 2022).

Normatively, abortion is regulated based on Health Law No. 17 of 2023, Article 60, which prohibits anyone from performing abortion except as permitted by applicable regulations, which in principle creates disharmony in regulatory arrangements with the Child Protection Law and the Criminal Code (Mainita et al., 2025; Siregar, 2024). The problem of regulatory disharmony regarding safe abortion in the Health Law vs. the Criminal Code and Child Protection Law exists. Article 75 of the Health Law already stipulates exceptions to the abortion prohibition, explaining that it only applies in cases of medical emergency and rape victims. Article 194 of the Health Law states that if abortion is performed not in accordance



with applicable regulations, based on Article 75 Paragraph (2), it can be punished with imprisonment for a maximum of 10 (ten) years and a fine of Rp1,000,000,000.00 (one billion rupiah). The enactment of the Health Law reveals an inconsistency with the Criminal Code, which regulates various abortion-related cases with differing degrees of punishment. Moreover, the Child Protection Law categorizes abortion as a violation of the right to life of the child, recognizing the existence of the child from the prenatal stage, as stipulated in Law No. 35 of 2014 concerning Child Protection (Iskandar et al., 2021).

According to Indonesian legal regulations, abortion must be based on conditions occurring due to medical factors and the victim's condition (Syailendra, 2019). One indication of abortion due to rape is unwanted pregnancy occurring when the victim is in a difficult situation under threat of violence (Setyawati & Nurdin, 2024), forcing the victim to engage in unwanted sexual relations with a perpetrator who has no marital relationship with the victim (Ariyad & Masyhar, 2020). Victims who become pregnant due to rape consider this shameful, so they often feel afraid and unprepared to face the consequences (Sihotang et al., 2022). Unwanted pregnancy due to sexual violence can cause negative impacts on both the victim and the unborn baby. Various negative impacts include physical suffering due to violence, psychological suffering caused by trauma, and social problems. These impacts lead victims to consider abortion without considering the regulations (Ekandari et al., 2001).

Illegal abortion that does not comply with regulations, performed through methods outside health provisions, can endanger the victim's life. In the medical world, this is known as "*Abortus Provocatus*," meaning "intentional abortion" based on someone's intention to end an unwanted pregnancy. Legally, abortion is also known as "*abortus provocatus criminalis*," which is abortion performed intentionally for various reasons such as unpreparedness or unwillingness to have children due to financial instability, extramarital sexual relations, or rape that is not legally recognized (Faturrahman, 2021).

According to the National Population and Family Planning Agency (BKKBN), it was reported that abortion cases numbered 2.4 million, with an estimated 700,000 abortion cases occurring among teenagers, indicated as illegal abortions in Indonesia in 2023. Based on data from WHO (World Health Organization) and United Nations Population Fund (UNFPA) reports, there are between 750,000 to 1,500,000 cases per year, with about 2,500 cases resulting in death (Beranda Hukum, 2020).

Abortion reaches 2.3 million cases annually in Indonesia. WHO research estimates that about 20% to 60% of abortion cases in Indonesia are intentional abortions. According to Kompas Research and Development data in 2009, 32% or more of clients from Indonesian Planned Parenthood Association (PKBI) clinics came for abortion due to pregnancy resulting from rape and attempted to terminate pregnancy through medically unsafe or illegal methods.

The Maternal Mortality Rate (MMR) in 2014 was caused by abortion or pregnancy termination that did not comply with regulations, and abortion cases were often performed by young women in urban areas. According to the Deputy for Family Welfare and Family Empowerment of BKKBN, Sudiby Alimoso, when contacted by CNN Indonesia, stated that 30% of maternal deaths were caused by abortion cases due to unwanted pregnancy outside marriage.

The latest data quoted from the Health Profile of the Ministry of Health published by the Institute Criminal Justice Reform (ICJR) shows that maternal deaths in 2020 were 4,627, then increased to 7,389 in 2021. From this health profile, very few deaths caused by abortion were visible, only 14 death cases, which may be due to unreported abortions because of the shadow of criminalization of involved parties (Beranda Hukum, 2020).

This reflects that complete criminalization of abortion is not appropriate, because abortion is only viewed from the perspective of criminal acts since someone intentionally committed the crime of eliminating the life of a legal subject in the womb (fetus) but does not consider justice for women's reproductive rights, especially for women who become pregnant due to rape. Therefore, abortion is often forced to be performed with the help of others to protect women's bodily autonomy rights.

In the era of abortion decriminalization, medical personnel actions that can be criminalized as per Article 428 of the 2023 Health Law are limitatively bound by Article 60 provisions with criminal penalties that can be increased by 1/3 (one-third) of the principal penalty, and additional criminal sanctions can be imposed in the form of revocation of certain rights: the right to hold public office in general or specific positions; and/or the right to practice certain professions as referred to in Article 429 Paragraph (2).

Article 463 of Law 1/2023 or the National Criminal Code stipulates that abortion is generally punishable by a maximum imprisonment of four years. However, this provision does not apply if the abortion is performed under specific conditions, namely when the woman is a victim of rape or other forms of sexual violence that result in pregnancy, provided the gestational age does not exceed 14 weeks, or when there are medical emergency indications justifying the procedure.

Nonetheless, a critical question arises regarding the fate of women who become pregnant as a result of rape when the gestational age exceeds 14 weeks. In many cases, victims of sexual violence face limited access to information and support, often due to social stigma and psychological trauma that led them to withdraw from their surroundings. Consequently, they may be compelled either to carry the pregnancy to term under severe psychological distress or to resort to unsafe and unlawful abortion practices.

Furthermore, the rights of the unborn child, as protected under Law of the Republic of Indonesia No. 35 of 2014 on Child Protection, must also be taken into account. This issue constitutes a significant concern for the author, as the initiative to decriminalize abortion represents a broader effort by the state to realize its objectives through criminal law. Accordingly, abortion policy within the framework of criminal law should align with the fundamental goals of criminal justice, which extend beyond mere punishment and deterrence to include considerations of social utility and restorative justice.

Therefore, this research seeks to figure out on how to analyze criminal law policy regarding abortion decriminalization from the perspective of applicable regulations, using normative juridical legal research methods with legal theory to examine and analyze law from norms or rules contained in legislation (Miharja, 2021).

2. Methods

This research employs a normative juridical approach to analyze criminal law policy concerning the decriminalization of abortion. The study focuses on examining legal norms and principles contained within statutory regulations relevant to abortion, including the Criminal Code, Health Law, and Child Protection Law. Legal analysis is conducted by interpreting the consistency, harmony, and objectives of these laws in light of the state's criminal policy. The method is based on legal research theory, as outlined by Miharja (2021), which emphasizes the use of legislation as the primary source of legal norms and the analytical framework for understanding how laws are formulated, applied, and potentially reformed.

3. Results and Discussion

3.1. Legal Framework Analysis

3.1.1. Law No. 17 of 2023 on Health

The prohibition of abortion is explicitly regulated in the Health Law, particularly in Article 60. This article stipulates that abortion is generally prohibited for everyone, except under specific conditions permitted by the provisions of the Criminal Code. The implementation of abortion under these permitted criteria must fulfill several procedural requirements: it must be conducted by competent medical personnel with the assistance of authorized health personnel, within certified health service facilities, and with the consent of the pregnant woman. In cases of rape, the consent of the husband is not required. This article clearly provides an exception for rape victims, allowing abortion under regulated circumstances.

3.1.2. Old Criminal Code (Book Two - Chapter XIV - Crimes Against Morality)

In the old Criminal Code (Book Two, Chapter XIV on Crimes Against Morality), Article 299 addresses the criminality surrounding abortion (Beranda Hukum, 2020). Paragraph (1) criminalizes actions involving the treatment of a woman related to abortion, including the act of providing information or instructions leading to abortion. Paragraph (2) further emphasizes the seriousness of the offense if abortion is performed by a midwife or a medical practitioner, by imposing a penalty that is increased by one-third of the basic punishment.

3.1.3. National Criminal Code (Law No. 1 of 2023)

The National Criminal Code, as stipulated in Law No. 1 of 2023, provides a more structured framework regarding abortion. Abortion is penalized with imprisonment for up to four years, as outlined in Article 463. However, the law recognizes several exceptions in which abortion is permitted: if the abortion is performed because the woman is a victim of rape or sexual violence; if the gestational age does not exceed 14 weeks; or if the abortion is necessary due to medical emergency indications. These provisions reflect a more victim-centered approach while still operating within a restrictive legal framework.

3.1.4. Law No. 35 of 2014 on Child Protection

A child is someone under 18 years old and still in the womb according to Law No. 35 of 2014 on Child Protection, which regulates shared responsibility between government and society in child protection. Article 34 Paragraph (1) of the 1945 Constitution explains that the state has full obligation to guarantee the social life of underprivileged and abandoned children, and this regulation also stipulates that the state must improve social security services for all people and empower weak and incapable communities. A child's right to life is a fundamental right for a child to live, grow, and develop both physically and spiritually, which must be in harmony with religious teachings and be able to implement noble ethics and morals for a child's life.

3.2. Criminal Law Policy on Abortion Decriminalization

Abortion decriminalization is the process of eliminating or reducing legal sanctions against abortion. This is not the same as legalization, which makes abortion legally valid and protected. The purpose of abortion decriminalization is for better health and to reduce negative impacts of abortion that does not comply with regulations, as well as to guarantee

women's rights to make important decisions about their own bodies, recognizing the bodily integrity of people with wombs.

In the National Criminal Code Article 463 Paragraph (2), it provides strengthened exceptions for abortion criminalization, with Article 463 Paragraph (1) stating that every woman who chooses to perform abortion not in accordance with regulations will be subject to imprisonment for a maximum of 4 (four) years. Paragraph (2) explains that this rule does not apply to victims of sexual violence or if pregnancy is under 14 (fourteen) weeks or in medical emergency conditions. This rule strengthens guarantee of rights for victims experiencing pregnancy to access safe abortion, as it is recognized by stronger regulations, up to 14 weeks of pregnancy. Previously, in Article 75 of Law No. 36 of 2009 on Health, exceptions for abortion only applied to rape victims with pregnancy age of 40 days or 8 weeks, which provided insufficient legal guarantee due to limited time. The new policy change provides a more certain legal framework.

In this framework, the Indonesian Government and Parliament allow safe abortion for victims according to applicable regulations with technical limitations up to safe abortion methods including self-managed or medication-based to surgery-based. Current regulations provide time relief and opportunities for victims to escape attempted abortion criminalization. However, despite this, there is still regulatory disharmony regarding abortion. Although abortion regulations are established, criminalization is still included.

Table 1. Comparison between Article 251 Paragraph (1) National Criminal Code and Article 299 Paragraph (1) Old Criminal Code

Difference Aspects	Old Criminal Code	National Criminal Code
Prohibited Acts	Giving medicine to women and asking them to consume it. This act informs and creates hope that consuming the medicine can cause abortion.	Giving medicine and ordering consumption. This act creates hope for women that consuming medicine will cause abortion.
Criminal Penalty	Maximum 4 years imprisonment or maximum Rp. 45 million fine (converted based on PERMA 2/2012)	Maximum 4 years imprisonment or maximum Rp. 200 million fines.

From the comparison above, we see that prohibited acts are the same between the New and Old Criminal Codes, but the criminal penalties in the New Criminal Code are considerably higher (Beranda Hukum, 2020).

Table 2. Comparison between Article 409 New Criminal Code and Article 535 Old Criminal Code

Difference Aspects	Old Criminal Code	National Criminal Code
Prohibited Acts	Directly showing means to abort pregnancy or providing written information without being asked, indicating where means or intermediaries can be obtained	Without having the right to display a tool and broadcast writing to obtain tools for abortion
Criminal Penalty	Maximum 3 months imprisonment or maximum Rp. 4.5 million fine (converted according to PERMA 2/2012)	Maximum 6 months imprisonment or maximum Rp. 10 million fine

This comparison proves that abortion services information that can be obtained from anywhere still has limited access.

4. Conclusion

The decriminalization of abortion through national criminal law regulations represents a commendable criminal law policy, as it reflects harmonization with previous legislation and adopts a more victim-oriented approach. Permitted abortions are now guided by clear legal provisions, offering protection to women under specific circumstances such as rape and medical emergencies. However, despite this progress, the government still needs to formulate a more comprehensive policy regarding pregnancies resulting from rape that exceed 14 weeks of gestation.

At present, there is a lack of specific policies, systems, legal structures, and substantive laws to address the needs of such victims. This legal gap not only places the psychological and physical well-being of victims at risk but also raises concerns about the protection of the rights of children born from unwanted pregnancies. A more inclusive legal framework is essential to ensure the fulfillment of both victims' rights and the rights of every child, in line with the national goal of achieving a Child-Friendly Indonesia by 2030.

To address these concerns, the government should ensure that the legal structure regulating medically performed abortions is comprehensive and fully aligned with the provisions set forth in both the Health Law and the Child Protection Law. Additionally, there is an urgent need to refine national criminal law policies to guarantee the protection of victims and the rights of unborn children in rape-related pregnancies that fall outside the current legal allowances for abortion. Such policy reforms are vital to achieving legal certainty, justice, and the broader objective of upholding human dignity in the criminal justice system.

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