

Research Article

Comparative Analysis of Abortion Arrangement on the Draft Criminal Code (Ruu Kuhp) and Law of the Republic of Indonesia Number 36 of 2009 Concerning Health

MUHAMMAD DZIKIRULLAH H. NOHO¹, BUDI SANTOSO², PARAMITA PRANANINGTYAS³, ROFI WAHANISA⁴

¹Doctoral Student Law Faculty, Diponegoro University and Lecturer Hasyim Asy'ari Tebuireng University (UNHASY), Indonesia

²Professors Law Faculty, Diponegoro University, Indonesia

³Associate Professor Law Faculty, Diponegoro University, Indonesia

⁴Assistant Professor Law Faculty, Universitas Negeri Semarang (UNNES), Indonesia

*Corresponding Author

Email ID: mdzikirullah94@gmail.com

Received: 30.10.20, Revised: 12.11.20, Accepted: 24.12.20

ABSTRACT

Abortion, as a deliberate act to abort a fetus in the country itself, has long been a very controversial issue. Judging from the law in Indonesia, we can see the problem of abortion in several regulations, namely the Criminal Code (KUHP), the Draft Criminal Code (RUU KUHP), the Republic of Indonesia Law Number 36 of 2009 concerning Health, and Government Regulation no. 61 of 2014. The research method used is juridical normative with an approach carried out by first examining the principles and laws and regulations. The results of this study found that the difference in terms of birth/philosophy: Law of the Republic of Indonesia Number 36 of 2009 concerning Health by prioritizing health clearly actually prohibits the practice of abortion. Criminal: Law of the Republic of Indonesia Number 36 of 2009 concerning Health provides for crimes based on Article 194. Meanwhile, RUU KUHP Bill provides for crimes based on Article 469, Article 470, Article 471. Legal subject: Law of the Republic of Indonesia Number 36 of 2009 Regarding Health and the Draft Criminal Code regulates the legal subject, namely "everyone."

Keywords: Abortion, The Draft Criminal Code (RUU KUHP), Health.

INTRODUCTION

Abortion is known and believed to be the oldest method of preventing unwanted births. Until now, it is the most dangerous way because it often causes maternal death (Berer, 2009). If a woman becomes pregnant without her wanting it and cannot accept that state as her fate, she makes every effort to abort the pregnancy (Woodruff, Zoloth, Campo-Engelstein, & Rodriguez, 2010). From ancient times there have been known traditional ways to abort, such as drinking herbal medicine, doing massage, inserting all kinds of objects into the womb, etc. However, women often have to risk losing their lives. Judging from the types, abortion can be divided into two, namely (Umar et al., 2014):

1. Spontaneous abortion, namely, abortion accidentally and occurs without any action. Usually, this happens because of factors beyond human ability, such as bleeding and accidents.

2. Artificial abortion, namely abortion that occurs as a result of an act and human intervention. Artificial abortion is divided into two:

- a. Abortion artificialis therapists is an abortion performed by a doctor on medical indications. This abortion is performed as a life-saving mother threatened if the pregnancy continues because the medical examination shows such symptoms.
- b. Abortion provocateurs criminals is an abortion that is performed without any medical indication. This type of abortion removes the fetus from the uterus on purpose without a cause that allows (emergency) before the birth period arrives. In general, abortion provokes criminals, because it is driven by several things, such as individual encouragement, beauty, and morals.

Abortion, as a deliberate act to abort a fetus in the country itself, has long been a very controversial issue. It is said to be controversial

because, on the one hand, abortion is considered contrary to social, religious, and moral norms, even legal (legal) norms. Meanwhile, on the other hand, the law itself opens the possibility to "legalize" abortion, although with a few exceptions. Judging from the law in Indonesia, we can see the problem of abortion in several regulations, namely the KUHP, the RUU KUHP, the Law of the Republic of Indonesia Number 36 the Year 2009 concerning Health, and Government Regulation No. 61 of 2014. In the Criminal Code itself, abortion is likened to premeditated murder or negligence that causes a person's death. Besides, it also touched on reproductive rights, which are based on recognizing human rights for each couple or individual to determine freely and responsibly the number of children, the spacing of children, and the birth of their child (Irianto, A, & Hafidz., 2017).

Therefore, to find out more about the differences in abortion in the KUHP, the RUU KUHP, Law of the Republic of Indonesia Number 36 the Year 2009 concerning Health, and Government Regulation No. 61/2014 will compare regulations (Ariyad& Masyhar, 2020). Comparative law is the act of comparing the laws of one country to another. The main act of comparison is to look at one legal data set about another and then to assess how the two legal data blobs are similar and how they differ (Eberle, 2011). Core comparisons then align similarities and differences between data points and then use this exercise as a measure to gain an understanding of the content and range of data points. At first, the comparison of law as a legal discipline as well as a branch of legal science was initially understood as a method of understanding the legal system, but in its development, it has been used more broadly in line with the increasing legal needs of society.

RESEARCH METHOD

This research uses juridical normative (normative law), which is carried out by examining library materials or secondary data only by discussing doctrines or principles in legal science (dogmatic studies / doctrinal research) (Heryant, Sihotang, & Natalis, 2020) (Noho, 2019). The approach is taken by first examining the principles and laws, and regulations relevant to the problem under study by examining the law from the normative aspect related to the comparative analysis of abortion regulations in the RUU KUHP and the Law of the Republic of Indonesia Number 36 of 2009 concerning Health.

RESULTS AND DISCUSSION

The Concept of Legal Protection for Victims of Rape in Indonesia Today

Legal protection means protecting everyone's right to receive equal treatment and protection by law and statute; therefore, for every violation of the law that is alleged to him and the effects suffered by him, he is also entitled to receive protection from the law required by the principle law (Hadiprayitno, 2010). However, we need to know that in the case of rape, the victim has been left out of the law's reach. This is evident from the many cases with female victims who were unable to be resolved fairly and satisfactorily (Bublick, 2006).

The reality of the need to ensure that safe abortion services are provided to victims of rape and included in humanitarian assistance funds has also been recognized several times by the Secretary-General of the United Nations. 22-24. Similarly, the Global Report on the Implementation of Security Council Resolution 1325 states that access to safe abortion is important in situations of conflict, where pregnancy is much more dangerous (due to the destruction and disruption of health services and access to care), and calls on the United Nations and countries its members, as well as donors and other humanitarian actors, to ensure access to these services as a matter of women's rights under IHL and international human rights law. Protection of rape victims can be seen from several regulations, namely (Radhakrishnan, Sarver, & Shubin, 2017);

1. Criminal Code (KUHP) and Criminal Procedure Code (KUHP)

The rights of rape victims in Indonesia are basically protected in the Criminal Code and the Criminal Procedure Code, which explains the existence of legal protection for victims of rape to protect victims' rights. Rape in the KUHP is contained in Book II Chapter XIV (concerning crimes against decency) in Articles 299, 346, 347, 348, and 349 of the KUHP. These articles clearly and expressly regulate the prohibition of having an abortion for any reason, including abortion for emergency (forced) reasons, namely as a result of rape, either for the perpetrator or for the person who helps to have an abortion. Even with heavy criminal sanctions if done by medical experts (Berer, 2017).

Article 285 of the Criminal Code provides clarity regarding violence or threats of violence against a woman to have a sexual relationship with her outside of marriage. Partially quoted as follows: "Anyone who uses violence or

threatens violence to force a woman to have sex with him outside of marriage is threatened with rape with a maximum imprisonment of two. twelve years ". Whereas in the Criminal Procedure Code, protection of victims of rape can be protected by the existence of Article 98 Chapter XIII of the Criminal Procedure Code, which states (Ekatama, Novianto, & Purwadi, 2019):

- a. If an activity that forms the basis of an indictment in an a assessment of a criminal trial by a district judge creates harm to other people and, at the hearing of that person, the head judge may decide to combine a claim for damages criminal case.
 - b. As meant in paragraph (1), the request can only be filed not later than before the public prosecutor has filed a criminal charge. Even in the incident of a prosecutor's office, not present, the request is submitted no later than before the judge makes a decision.
2. Law No 36 of the year 2009 on health

Legal protection for victims of rape to protect the rights of victims can be seen in Article 77 of Law Number 36 the Year 2009 concerning health, which reads: "The government is obliged to protect and prevent women from abortion as referred to in Article 75 paragraph (2) and paragraph (3) which not of good quality, unsafe, and irresponsible and contrary to religious norms and provisions of laws and regulations ".

Thus, Article 77 provides clarity that the Government is obliged to protect and prevent victims of rape from abortion that are of no quality, unsafe, and irresponsible, which is contrary to religious norms and other regulations. It also can be said there is the

protection of the rights of victims of rape in Indonesia in the KUHP. KUHP and Law Number 36 the Year 2009 concerning Health can protect victims of rape in the form of compensation in the form of (Widyastuti, 2015):

- a. Restitution, compensation provided by the perpetrator.
- b. Compensation, compensation provided by the State because the perpetrator is unable. It is possible as an effort to provide services to victims of crime in order to develop welfare and justice.
- c. Assistance: medication, mental recovery (psychiatrists, psychologists, volunteers), victims must be informed about their health conditions. Law enforcement personnel should be prepared to do so. Help and give special attention to each victim.

Comparison of Abortion Arrangements in the RUU KUHP and the Law of the Republic of Indonesia Number 36 of 2009 concerning Health

Generalized abortion into a crime is better known as abortion, provocateurs criminals. There are still debates and controversies regarding the existing laws to date. The issue of abortion was originally regulated in the KUHP, according to the development of regulations regarding provocative abortion or criminal abortion, which can be found in Law No. 36 of 2009 on Health. However, the current KUHP has also been amended with the Draft RUU KUHP. In this discussion, several things will be compared, such as the birth / philosophical side, the punishment imposed, the legal subject that can be accounted for, and what crimes are included in this rape. The following is a comparison between the RUU KUHP and Law No. 36 of 2009 on Health:

Table 1:

Comparison	Health Laws	The Draft Criminal Code (RUU KUHP)
Article	<p>Art 75</p> <p>(1) Everyone is prohibited from having an abortion.</p> <p>(2) The prohibition as intended in paragraph (1) can be exempted based on the following:</p> <ol style="list-style-type: none"> a. Indications of medical emergencies detected from an early stage age in pregnancy, either Menacing the mother's life and/or the fetus, experiencing pain, serious genetic diseases and/or congenital disabilities, or which cannot Repair, making it difficult for the Child living outside of the girl; or b. Pregnancy due to rape, which can cause psychological trauma for the victim of rape. <p>(3) The action as referred to in paragraph(2) can only</p>	<p>The second part, Abortion Article 469</p> <p>(1) Every woman who aborts or terminates her womb or asks someone else to abort or terminate said womb shall be punished with a maximum imprisonment of 4 (four) years.</p> <p>(2) Every person who aborts or terminates a woman's womb without her consent shall be sentenced to imprisonment of up to 12 (twelve) years.</p> <p>(3) If they act as intended in paragraph (2), which results in the woman's death, the woman A maximum of 15 (fifteen) years of</p>

	<p>be carried out after going through pre-action counseling and/or advice and ended with post-action counseling carried out by a competent and authorized counselor.</p> <p>(4) Further provisions regarding indications of medical emergencies and rape as referred to in paragraph (2) and paragraph (3) shall be regulated in a Government Regulation.</p> <p>Art 76 Abortion as referred to in Article 75 can only be performed:</p> <ol style="list-style-type: none"> before 6 (six) weeks of pregnancy, counting from the first day of the last menstrual period, Except for in the event of an emergency; by health workers who have the skills and authority who have a certificate stipulated by the minister; With the consent of a pregnant woman in question; With the husband's permission, except for the victim of rape; and Health service providers who meet the minister's requirements. <p>Art 77 The government is obliged to protect and prevent women from abortion as referred to in Article 75 paragraph (2) and paragraph (3), which are of no quality, insecure, and irresponsible, contrary to religious norms. and statutory provisions</p>	<p>imprisonment shall be punished.</p> <p>Article 470 (1) Every person who aborts or terminates a woman's womb with her consent shall be sentenced to imprisonment of 5 (five) years. (2) If the act as referred to in paragraph (1) results in the woman's death, the punishment shall be maximum imprisonment of 8 (eight) years.</p> <p>Article 471 (1) A doctor, midwife, paramedic, or pharmacist who assists in carrying out the Crime referred to in Article 469 and Article 470, the penalty may be added by 1/3 (one third). (2) A doctor, midwife, paramedic, or pharmacist who commits a criminal act as referred to in paragraph (1) may be subject to additional punishment in the form of revocation of rights as referred to in Article 86 letters a and f. (3) A doctor who performs an abortion due to an indication of a medical emergency or a victim of rape by the provisions of statutory regulations, shall not be sentenced.</p>
<p>The Birth / Philosophical Side</p>	<p>Care is really a civil right and is one of the elements with social assistance that must be realized in compliance with the Indonesian nation's principles as set out in Pancasila and the Constitution to the Law. The Constitution of The Republic of Indonesia, 1945. Moreover, as such, every behavior and hard work to enhance the highest possible public health status is carried out based on non-discriminatory, participatory, protective, and sustainable principles which are very important for the formation of Indonesian human resources, increasing resilience and national competitiveness, as well as national development.</p> <p>Philosophically, by prioritizing health, the health law clearly prohibits abortion. However, there are exceptions, namely indications of medical emergencies and pregnancy due to rape, which causes trauma to the victim who must comply with Articles 75 and 76. Failure to comply with these conditions will be subject to severe sanctions</p>	<p>Concerning the reform of criminal law, there are at least two goals to be achieved by criminal and criminal law, namely the inward and the outward goals. The internal objective is that criminal law reform is carried out to protect society and the welfare of the Indonesian people. These two objectives are the foundation stone ("cornerstone") of criminal law and criminal law reform. Meanwhile, the goal of exiting is to participate in creating world order about the development of international crimes (international crimes) (RUU KUHP).</p> <p>Basically, abortion is prohibited on the grounds of protecting a woman's womb. Nonetheless, abortion due to medical reasons for abortion provocateurs by the applicable laws' provisions are not subject to punishment. What is meant by "statutory provisions" are laws and regulations in the health sector..</p>

<p>The imposed penalty</p>	<p>Article 194 Any person who intentionally will have an abortion that does not comply with applicable laid down in Article 75 (2) must also be indicted to a limit of 10 (ten) years in jail and a highest of Rp1,000,000.00 in jail (one billion rupiahs).</p>	<p>Article 469 (1) Every woman who aborts or terminates her womb or asks someone else to abort or terminate said womb shall be punished with a maximum imprisonment of 4 (four) years. (2) Every person who aborts or terminates a woman's womb without her consent shall be sentenced to imprisonment of up to 12 (twelve) years. (3) If they act as intended in paragraph (2) results in the woman's death, the woman shall be punished with a maximum imprisonment of 15 (fifteen) years.</p> <p>Article 470 (1) Every person who aborts or terminates a woman's womb with her consent shall be sentenced to imprisonment of 5 (five) years. (2) If the act as referred to in paragraph (1) results in the woman's death, the punishment shall be maximum imprisonment of 8 (eight) years.</p> <p>Article 471 (1) A doctor, midwife, paramedic, or pharmacist who assists in carrying out the Crime referred to in Article 469 and Article 470, the penalty may be added by 1/3 (one third). (2) A doctor, midwife, paramedic, or pharmacist who commits a criminal act as referred to in paragraph (1) may be subject to additional punishment in the form of revocation of rights as referred to in Article 86 letters a and f. (3) A doctor who performs an abortion due to an indication of a medical emergency or a victim of rape by the provisions of statutory regulations, shall not be sentenced.</p>
<p>Accountable legal subject</p>	<p>"Each person" The word "everyone" indicates to whom the person should be responsible for the act/incident that is accused or who the person should be the accused. The word every person is identical to the term "whoever" or with the meaning of anyone who should be the accused or every person as a legal subject (supporters of rights and obligations) who can be held accountable in all their actions so that historically, human chronology as a legal subject has itself there is the ability to be responsible unless the law expressly stipulates otherwise. (Supreme Court Jurisprudence: Decision No. 05 / Pid.Pra / 2018 / PN.Bil)</p>	<p>Article 20 Everyone is convicted as a criminal if: a. committing the criminal act himself; b. committing a criminal act using means or ordering other people who cannot be accounted for; c. participate in committing a criminal act; or d. mobilizing others to commit a criminal act by giving or promising something, abusing power or dignity, committing violence, using threats of violence, committing misdirection, or providing opportunities, means, or information.</p> <p>Elucidation of Article 5 A criminal offender who is subject to this provision is any person, whether Indonesian citizen or foreigner, who commits a crime outside the territory of the Republic of Indonesia.</p>

CONCLUSIONS

In the KUHP, the protection of rape victims who have had an abortion can be seen from Book II

Chapter XIV (on crimes against decency) in Articles 299, 346, 347, 348, and 349 of the KUHP. Besides, Article 285 of the KUHP provides

clarity about violence or threats of violence against a woman to have intercourse with her outside of marriage. Whereas in the KUHAP, the protection of victims of rape can be protected by the existence of Article 98, Chapter XIII KUHAP. Furthermore, legal protection for victims of rape to protect victims' rights can be seen in Article 77 of Law Number 36, the Year 2009 concerning Health.

Differences in terms of birth/philosophy: Law of the Republic of Indonesia Number 36 of 2009 concerning Health by prioritizing health clearly actually prohibits the practice of abortion. However, there are exceptions, namely indications of medical emergencies and pregnancy due to rape, which causes trauma to the victim who must comply with Articles 75 and 76. Failure to comply with these conditions will be subject to severe sanctions. Meanwhile, the RUU KUHP philosophically provides reforms to criminal law. Basically, abortion is prohibited on the grounds of protecting a woman's womb. Even so, abortion due to medical reasons for abortion provocateurs by the provisions of the applicable laws is not subject to punishment. What is meant by "statutory provisions" are laws and regulations in the health sector. The criminal law of Indonesian No 36 of 2009 concerning Health provides for crimes based on Article 194. Meanwhile, the RUU KUHP provides for crimes based on Article 469, Article 470, Article 471. Legal subject: Law of the Republic of Indonesia Number 36 of 2009 Regarding Health and the Draft RUU KUHP regulates the legal subject, namely "everyone."

ETHICAL CLEARANCE: Yes

CONFLICT OF INTEREST: No

SOURCE OF FUNDING: Author

REFERENCES

1. Ariyad, F., & Masyhar, A. (2020). Abortion by Rape Victim: A Dilemma in the Draft of Penal Code and Indonesian Health Law. *Journal of Law and Legal Reform*, 1(4), 631–640. <https://doi.org/10.15294/jllr.v1i4.39659>
2. Berer, M. (2009). A Critical Appraisal of Laws on Second Trimester Abortion I. *E-Cadernos CES*, 4, 198–214. <https://doi.org/10.4000/eces.248>
3. Berer, M. (2017). Abortion Law and Policy Around the World. *Health and Human Rights*, 19(1), 13–27.
4. Bublick, E. M. (2006). Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies. *SMU Law Review*, 59(1), 55–121. <https://doi.org/10.2139/ssrn.883671>
5. Eberle, E. J. (2011). The Method and Role of Comparative Law. *Washington University Global Studies Law Review*, 8(3), 451–486. <https://doi.org/10.2139/ssrn.1265659>
6. Ekatama, N., Novianto, W. T., & Purwadi, H. (2019). Problems in Legalizing Abortion as a Legal Protection for Rape Victims. *Journal of Health Policy and Management*, 4(2), 117–127. <https://doi.org/10.26911/thejhpm.2019.04.02.07>
7. Hadiprayitno, I. I. (2010). Defensive enforcement: Human rights in Indonesia. *Human Rights Review*, 11(3), 373–399. <https://doi.org/10.1007/s12142-009-0143-1>
8. Heryant, B. R., Sihotang, A. P., & Natalis, A. (2020). Recognition of Traditional Inheritance Law in Indonesia: A Case Study of Sedulur Sikep Traditional Society. *Palarch's Journal Of Archaeology Of Egypt/Egyptology*, 17(10), 793–800.
9. Irianto, R., A. G., & Hafidz., J. (2017). Reconstruction of Public Health Service Supervision Based From Justice Value. *International Journal of Research in Social Sciences*, 5(9), 1611–1619. <https://doi.org/10.21474/ijar01/5484>
10. Noho, M. D. H. (2019). Politik Hukum Pengaturan Build Operate Transfer (Bot) di Indonesia: Di Masa Lalu, Saat Ini, Dan Akan Datang. *Jurnal Hukum Media Bhakti*, 3(1), 88–99. <https://doi.org/10.32501/jhmb.v3i1.51>
11. Radhakrishnan, A., Sarver, E., & Shubin, G. (2017). Protecting Safe Abortion in Humanitarian Settings: Overcoming Legal and Policy Barriers. *Reproductive Health Matters*, 25(51), 40–47. <https://doi.org/10.1080/09688080.2017.1400361>
12. Umar, N. J., Olubiyi, S. K., Aliyu, U., Aminat, G. U., Imam, A. A., Ibraheem, M. A., & Nwadiiorah, J. B. (2014). Spontaneous Abortion Among Women Admitted Into Gynaecology Wards of three Selected Hospitals in Maiduguri, Nigeria. *International Journal of Nursing and Midwifery*, 6(2), 24–31. <https://doi.org/10.5897/ijnm2013.0105>
13. Widyastuti, A. R. (2015). Action Against Abortion Pregnancy Due to Rape. *South East Asia Journal of Contemporary Business, Economics and Law*, 7(4), 11–17. Retrieved from http://seajbel.com/wp-content/uploads/2015/09/KLIBEL7_Law-12.pdf
14. Woodruff, T. K., Zoloth, L., Campo-Engelstein, L., & Rodriguez, S. (2010). Oncofertility: ethical, legal, social, and medical perspectives. Preface. *Cancer Treatment and Research*, 156, 30–31. <https://doi.org/10.1007/978-1-4419-6518-9>