

Type: Research Article

Exceptional Provisions Regarding Abortion Provocatus for Unwanted Pregnancy According to Positive Law

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ABSTRACT

Abortion, or what is better known as abortion, is still a taboo matter in Indonesia. This is a scientific term relating to the act of aborting a pregnancy. Abortion itself is not always negative, because there are two major divisions regarding abortion. Spontaneous and intentional abortion. Intentionally differentiated according to medical emergency indications and criminal indications. So, the negative stigma towards abortion must also be differentiated and not let it become an endless debate. What has become a debate that has become the issue studied in this research is the concept of abortion, with several types of abortion and whether abortion is prohibited without any exceptions or whether there are exceptional provisions regarding the prohibition of abortion in Indonesian positive law. With the various dynamics that exist, there are several positive laws that govern. These include the Criminal Code and the Health Law, including the New Criminal Code. The Criminal Code prohibits without exception, while the Health Law provides exceptions. The problem is how to legally apply the differences in these provisions. This problem was studied through normative research methods with a statutory approach and a conceptual approach to get a clear answer to the problem and based on this, the results were found that not all abortions are criminal acts, but only abortions with criminal indication or abortion provocatus criminalis which can be punished except victims of rape or abortion due to unwanted pregnancy.

KEYWORDS

Abortus
Provocatus
Criminalis;
Exceptional
Provisions;
Criminal
Offenses



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INTRODUCTION

Pregnancy is a dream for every married person, as one of the goals of marriage is to have children to continue the family lineage. However, on the other hand, sometimes a woman has to face the bitter reality of an unwanted pregnancy and be in the position of a victim. The pregnancy in question is a pregnancy caused by a sexual crime or rape. Pregnancy resulting from rape causes suffering that worsens the mental condition of the victim, who has previously experienced severe psychological trauma due to the rape she experienced. Trauma also certainly has an impact on the development of the fetus carried by the victim. Therefore, victims of sexual crimes reject their pregnancies. Including the burden that the victim must face when having to raise a child from an unwanted pregnancy due to the crime of rape that she experienced. The psychological pressure of the victim from rape and the views of the surrounding community, the economic burden that must be borne to support the child, the effects on the victim's future are certainly factors that trigger a victim to look for a way to escape from the situation in a way that is not desired but is forced to be done.

Often, the main choice is to abort the pregnancy to avoid the negative stigma that she will have to bear for the rest of her life. Therefore, abortion becomes the main alternative chosen if pregnancy occurs as a result of rape or a sexual crime. The complicated situation and psychological trauma experienced by the victim are urgent reasons for the victim to undergo an abortion. Abortion is an act that is still considered controversial and still carries a negative stigma in society. Abortion, as something that is regarded as bad, can even be said as something that is taboo to talk about in Indonesian society. Abortion concerns life, and life, which is truly a gift from God the Creator. Life and death are in the hands of God, who is the owner of life itself. Humans are considered not to have the right to take life, including a fetus that is still in the womb of a pregnant woman, and that is the right to life, which is part of Human Rights that must be respected by anyone without exception.

In reality, the issue of abortion still often gives rise to pros and cons among the public. This difference of opinion is based on a comparison between the interests in the existence of the fetus to be born and have the right to live as part of Human Rights, with the interests of the victim who does not want the existence of the fetus she is carrying. For victims, physical, psychological, and social suffering, including the negative stigma from society due to rape, is something that will stick with them for the rest of their lives. The opposing view of abortion that prioritizes the interests of the right to life for the fetus is primarily based on the 1945 Constitution (hereinafter referred to as the 1945 Constitution) Article 28 A, which essentially states that the right to life is a protected human right (including the right of a child in the womb to live). According to Law Number 39 of 1999 concerning Human Rights (State Gazette of the Republic of Indonesia Number 165, Supplement to the State Gazette 3886) hereinafter referred to as the Human Rights Law) in Article 53 (1), states: every child since in the womb has the right to live, maintain life and improve their standard of living. Likewise with Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection (State Gazette of the Republic of Indonesia 2014 Number 297, Supplement to the State Gazette Number 5606) hereinafter referred to as the Amendment to the UUPA, Article 1 number 12 states that Children's Rights are part of human rights that must be



guaranteed, protected and fulfilled by Parents, Family, Society, State, Government and Regional Government. Then Law Number 23 of 2002 concerning Child Protection (State Gazette of the Republic of Indonesia Year 2002 Number 109, Supplement to the State Gazette Number 4235) hereinafter referred to as UUPA in article 4 states that every child has the right to be able to live, grow, develop and participate properly by human dignity and dignity and receive protection from violence and discrimination. Moreover, according to the Criminal Code articles 346 - 348 explicitly prohibit the act of terminating or killing a pregnancy (hereinafter referred to as Abortion), and it is a criminal act.

This prohibition shows that the essence of life is a right for every creature of Almighty God, including a fetus that has not been born into the world, even though it is not yet human, the State must guarantee its existence until it is born into the world as in the Civil Code/*Burgerlijk Wetboek* (*Staatsblad* 1847 Number 23) hereinafter referred to as BW, in Article 2 it states: A child in the womb of a woman is considered to have been born, whenever the interests of the child require it. Regarding the Abortion Law, there is no absolute prohibition that completely prohibits abortion. By looking at both aspects of interest between the interests of the fetus and the victim, there are certain legal considerations related to the condition of the victim and the condition of the baby if born by a victim due to rape or other sexual violence crimes who are depressed and the consequences of parenting patterns that can hurt the baby which will worsen the situation for both of them. Therefore, indications appear that justify carrying out abortions accompanied by certain restrictions as a condition for fulfilling the legality of the abortion in question. This is as stated in Law Number 1 of 2023 concerning the Criminal Code (*State Gazette* of the Republic of Indonesia of 2023 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 6842) hereinafter referred to as the New Criminal Code, Article 463 essentially states that abortion is prohibited with exceptions to the prohibition for women who are victims of sexual violence or rape who experience pregnancy for no more than 14 weeks or due to indications of a medical emergency.

Likewise, Law Number 17 of 2023 concerning Health (*State Gazette* of the Republic of Indonesia 2023 Number 105, Supplement to the State Gazette of the Republic of Indonesia Number 6887) hereinafter referred to as the Health Law, Article 60 (1) of the Health Law which in essence prohibits abortion with exceptions to the prohibition referring to Article 463 of the New Criminal Code and the implementation of abortion must meet the permitted criteria as technical and mechanistic based on Article 60 paragraph (2) of the Health Law and its Implementing Regulations, namely Government Regulation Number 28 of 2024 concerning Health (*State Gazette* of the Republic of Indonesia 2024 Number 135, Supplement to the *State Gazette* Number 6952) hereinafter referred to as the Health PP. According to data released by the BKKBN, abortion is one of the cases with quite high numbers in Indonesia. It is estimated to reach 2.5 million cases out of 5 million births per year. In addition, based on data from the National Commission for Child Protection (KPAI), in the period 2008-2010, abortion cases continued to increase. In 2008, 2 million children were victims of abortion, in 2009, it increased to 2.3 million children, and in 2010, it reached 2.5 million children. According to research by the World Health Organization (WHO), abortion cases in Indonesia are estimated to be



20-60% intentional abortion cases. Meanwhile, data from the National Commission on Violence Against Women shows that there were 24,786 cases of sexual violence during the period 2016-2020. Of that number, 7,344 or around 29.6 percent were the result of rape cases. Several rape victims have abortions for various reasons, and the abortions are not always carried out voluntarily. The National Commission on Violence Against Women recorded 147 cases of forced abortions during 2016-2021. Abortions should be carried out by applicable legal provisions. In the period until now, abortion cases have become increasingly rampant, which we can see through the news in print and electronic media.¹

Based on Ipsos data, Indonesia is the country that is most against the practice of abortion. It was recorded that 74% of Indonesian respondents stated that abortion is illegal and should not be legalized for any reason.² The above facts show that women as victims tend not to report to the authorities about their rape incidents, including hiding their unwanted pregnancies as a result of the crime of rape in question, to cover up or protect their good name and the victim's future because of the negative stigma from society that they will bear throughout their lives. Women will tend to avoid official health facilities even though the opportunity for legal abortion is open to them. However, on the pretext of having to go through various procedures that must be fulfilled, complicated and afraid of being known publicly because the mindset of the community, most of whom still reject the existence of abortion, both illegal and legal, then creates a reluctance to take the legal route with a tendency to choose the illegal route and ask for help from irresponsible parties who have high risks. Of course, this needs to be considered to provide access to legal abortion and guarantee respect for the victim's rights, as well as aspects of legal protection and safe abortion services for pregnant women who are victims of rape.

Several previous studies have been conducted, namely a journal article written by Cintyahapsari Lanthikartika with the title "Decriminalization of Abortion (*Provocatus Abortion*) by Rape Victims and an article written by Trisnawaty Abdullah with the title "Legal Aspects of Abortion in Pregnancy Due to Rape". The difference with the first article is that the article focuses on how to decriminalize the act of induced abortion, which is a criminal act, while this article focuses on the concept and types of abortion to clarify the legal status and consequences of each form of abortion, which are prohibited and which are excluded. While the difference with the second article with this writing is that the second article focuses on the criminal law aspect according to the Criminal Code, Health Law Number 36 of 2009 which has now been revoked, PP on Reproductive Health while this article is more updating positive law not only the Criminal Code which is currently in effect but also the Criminal Code which will come into effect on February 2, 2026, namely through Law Number 1 of 2023 concerning the Criminal Code and using Health Law Number 17 of 2023 along with its Implementing.

¹ Alfina Nailul Maghfiroh, "Abortion Seen from a Legal Perspective", (2023), online: *Heylaw Edu* <<https://heylaw.id/blog/aborsi-dilihat-dari-perspektif-hukum>>.

² Nabila Muhamad, "Ipsos Survey: Indonesia Becomes the Country That Most Rejects Abortion Practices", (2023), online: <<https://databoks.katadata.co.id/datapublish/2023/09/01/survei-ipsos-indonesia-jadi-negara-paling-menolak-praktik-aborsi>>.



Based on the various considerations above, Therefore, in this research, it is necessary to further examine what abortion is and how the law applies to abortion, including exceptions to the prohibition of abortion with the rights that victims should receive, so that it will clarify the classification of abortions that are permitted and not permitted, with the hope that the fear and views of society towards abortion will not be so sharp. The existence of these problems is certainly a very interesting and relevant topic to be studied in more depth with research entitled "Exceptional Provisions for Abortus Provocatus for Unwanted Pregnancy According to Indonesian Positive Law.

METHOD

Method or Methodology comes from the words method and logic. Method means a way of doing something in an orderly (systematic) manner. While logic means science based on logical thinking. This means that methodology is the science of how to do something in an orderly (systematic) manner. Research Methodology means the science of how to conduct legal research in an orderly (systematic) manner. The research method consists of the type of research and research approach, as well as the type and source material of law. This research is a type of normative legal research or normative legal research with a statutory approach and a conceptual approach. Meanwhile, the legal materials in the research consist of primary legal materials and secondary legal materials.

According to Peter Mahmud Marzuki, According to Peter Mahmud Marzuki, Legal Research (Normative Research) is "...a process for finding a legal rule.³ Legal principles and legal doctrines are used to answer the legal problems faced. This is by the character of the legal science perspective. Normative legal research is carried out to produce arguments, a new theory, or a concept as a prescription for solving the problems faced.⁴ Meanwhile, the approach used in this research includes the Statute Approach, namely, examining all laws and regulations related to the legal issue being researched. In this case, it includes the Criminal Code, Health Law, Law Number 1 of 2023, PP Health; Conceptual Approach, namely an approach that starts from the views and doctrines that develop in legal science. Covers the definition of abortion with all kinds of abortion concepts, such as abortion *provocatus medicinalis*, abortion *provocatus criminalis*, and the like.

The legal materials used in this study are primary legal materials and secondary legal materials. Primary legal materials are authoritative legal materials, meaning they have the authority to make laws, official records, or minutes in the making of legislation and judicial decisions.⁵ In this case, the researcher uses primary legal materials, which include statutory regulations such as the Criminal Code, Health Law, Law Number 1 of 2023, and PP Health. Meanwhile, secondary legal materials consist of all publications on law that are not official documents. Publications on law include textbooks, legal dictionaries, law journals, and commentaries on court decisions.

³ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenadamedia Group, 2015).

⁴ *Ibid.*

⁵ Amiruddin & H Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: PT. Raja Grafindo Persada, 2006).



RESULT & DISCUSSION

I. Abortion Concept

Abortion, according to the meaning of the word, comes from Latin, namely *Abortus Provokatus*, which means deliberate miscarriage. Abortion in Indonesia is formed from the English word abortion with the basic word abort, which means to remove by force, whereas in Dutch it is called *Afrijving*, which means terminating or causing the death of a woman's pregnancy as a criminal act.⁶ According to the Law Dictionary, Abortion is defined as the unlawful termination of pregnancy.⁷ H. Holmer's opinion on abortion as the termination of pregnancy before the 16th week, when the placentation process has not been completed, and can occur spontaneously, which is generally known as miscarriage, and can also occur intentionally.⁸ Pius Partanto distinguishes between abortion, which means terminating a pregnancy, Abortion means miscarriage (*fetus*), and Provokatus Abortion means deliberate abortion of a *fetus*.⁹ Meanwhile, according to the Wikipedia page, Abortion (Latin: *Abortus*) is the termination of pregnancy by removing the fetus or embryo before it can survive outside the womb, resulting in death. An abortion that occurs spontaneously is also called a miscarriage. Abortions that are carried out intentionally are often called induced abortions or provoked abortions. The word abortion is generally only used in the sense of induced abortion. A similar procedure is performed after the *fetus* has the potential to survive outside the womb, which is also known as a late-stage abortion.¹⁰

Based on some of the concepts of the terms above, Abortion and abortion certainly have different meanings, and the meanings cannot be equated. Abortion means miscarriage; therefore, it contains an element of intention, in other words, intentionally causing miscarriage, while abortion means miscarriage, which means unintentional or, in other words, miscarriage. Between miscarriage and abortion lies the element of intentionally killing a fetus in the womb. Whereas abortion means the death of the fetus occurs naturally, not purely due to human will, in an unlawful manner. Just as the meaning of murder and death are, of course, two different things. Murder is an act of intentionally taking another person's life, containing an element of intentional loss in the sense that there is interference from another person, while death contains the meaning of loss of life that can occur naturally without any element of intention from another person. Differences in the meaning of abortion also lead to the division of types or kinds of abortion, which are based on certain factors or circumstances that underlie the purpose of the abortion of the perpetrator.

As explained in the definition of abortion above, inevitably, it becomes necessary to classify the types or kinds of abortion. Because, as we know, miscarriage of a fetus in the womb can be an intentional act and a natural or spontaneous miscarriage. Of course, this categorization cannot be separated from

⁶ Adi Gunawan & Suhaimi, *Abortion Law: A Review of Positive Law and Islamic Law* (Banyumas: Pena Persada Kerta Utama, 2023).

⁷ Bryan A Garner, *Black's Law Dictionary*, 8th ed (USA: Thomson West Publishing Co., 2004).

⁸ Novekawati, *Health Law* (Semarang: Sai Wawai Publishing, 2019).

⁹ Gunawan & Suhaimi, *supra* note 6.

¹⁰ Wikipedia, "Abortion", (2024), online: <https://id.m.wikipedia.org/wiki/Gugur_kandungan>.



the influence of elements that underlie the actions in question, both from a medical and normative perspective.

In general, in the medical world, abortion is known as spontaneous abortion and intentional abortion:¹¹

a. Spontaneous Abortion

An event beyond human control, the event can be an accident and occur naturally; in everyday language, this type of abortion is called a miscarriage. Spontaneous abortion is sometimes an unexpected event, and its occurrence causes deep sadness for the mother carrying the baby.

b. Intentional Abortion

Abortion is due to the deliberate will of the mother or another person. Abortion, to mention the release of the results of fertilization before the age of 20 weeks of pregnancy. With the following division:¹²

- 1) Criminal Abortion is the unlawful termination of pregnancy
- 2) Eugenic abortion is an abortion to produce good offspring
- 3) Natural abortion is the natural termination of pregnancy
- 4) Spontaneous abortion is the accidental loss of a pregnancy.

Therapeutic abortion is an abortion to maintain the mother's health. In his book entitled *Abortus Provocatus*, Suryono Ekotama divides abortion or termination of pregnancy more generally into two types, namely:¹³

- a. Spontaneous abortion is an abortion that occurs by itself, not due to human action.
- b. Induced abortion is an abortion that occurs due to human actions. It is divided into two:
 - 1) *Abortus Provocatus Medicinalis* or *Abortus Provocatus Therapeutic*

In the medical world, it is better known as *Abortus Provocatus Therapeutic*. That is an abortion due to medical reasons, or an abortion that is done intentionally for very urgent medical reasons. How far is the limit of a medical emergency? Of course, this is the realm of the medical world to determine it; even the law does not provide a definite limit. The limit in the medical world is when the age of the fetus in the womb of a pregnant woman can be abortion.

The medical reasons why an abortion can be performed with medical indications are as follows:¹⁴

- a) The presence of dangerous diseases in the birth canal, such as uterine cancer/cervical cancer;
- b) The presence of dangerous diseases in the mother's body, such as organic heart disease, hypertension, nephritis, tuberculosis, toxemia gravidarum, diabetes, and other dangerous diseases;
- c) There is a disturbance in the mother's mental state, leading to a tendency to commit suicide;

¹¹ Maria Ulfah, *Abortion Fiqh; Discourse on Strengthening Women's Reproductive Rights* (Jakarta: Kompas, 2006).

¹² Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum* (Jakarta: Rajawali Press, 2013).

¹³ Suryono Ekotama, *Induced Abortion for Rape Victims* (Yogyakarta: Andi Offset, 2001).

¹⁴ Maghfiroh, *supra* note 1.



- d) Have undergone repeated cesarean operations (caesarean);
- e) Reasons for age, because the mother's age when pregnant does not meet the minimum gestational age.

2) Criminal Provoked Abortion

An abortion that is carried out intentionally and against the law, in other words, there is no medical indication, and is a criminal act.

Another classification of types of abortion according to William Obstetrics, namely, Spontaneous Abortion:¹⁵

- a. Threatened abortion is an abortion with the presence of bleeding spots, which indicates a threat to the survival of the fetus.
- b. Abortus insipiens is an abortion with bleeding from a little to a lot during early pregnancy, where the results of conception are still left in the uterine cavity. If this is allowed to continue, it is feared that it will become an incomplete abortion or a complete abortion.
- c. Incomplete abortion is when bleeding occurs during early pregnancy, and it is found that some of the products of conception have come out.
- d. Incomplete abortion is when bleeding occurs during early pregnancy, and it is found that the products of conception have been completely expelled.
- e. Unsafe abortion is an attempt to remove a fetus in the womb, which is carried out by a party who is not competent in the field, does not comply with procedures, and is certainly not safe and carries a very large risk, and endangers the life of the mother or pregnant woman.
- f. Infectious abortion is an abortion with complications. Complications can be sepsis, septicemia, which can cause death for both the mother and the fetus.

II. Prohibitions and Exceptions of Abortion Provocatus

As previously explained, abortion is generally the exit or removal of a fetus from the womb before its time. There are several types of classification regarding abortion. The classification in question is based on the circumstances that accompany the abortion. Among the types of abortion mentioned above, the focus of discussion on the prohibition of abortion is related to abortions that are carried out intentionally, namely abortion induced, which is an act of intentionally terminating a pregnancy. Contains two forms of Abortus Provocatus: first Abortus Provocatus (Intentional Abortion) due to medical indications, then known as Abortus Provocatus Medicinalis. Second, Abortus Provocatus (Intentional Abortion) due to criminal acts or criminal acts known as Abortus Provocatus Criminalis. From both aspects of abortion, positive law determines whether abortion is permitted or prohibited, with terms and conditions that must be met by the provisions of existing laws and regulations. Whether the abortion is carried out legally or the abortion is carried out illegally depends on whether or not the mechanisms provided by the legal regulations are fulfilled. The legal provisions in question are as follows:

¹⁵ Rustam, "Analisis Yuridis Terhadap Tindakan Aborsi Dalam Perspektif Hukum Pidana Indonesia (Studi Komparatif; Undang-Undang Kesehatan, KUHP dan HAM)" (2017) 6:3 Dimensi 475-490, online: <<https://www.journal.unrika.ac.id/index.php/jurnaldms/article/view/1083>>.



a. Criminal Code

The prohibition on abortion under the Criminal Code is regulated in Articles 299, 346, 347, 348, and 349 of the Criminal Code. The text of each article is as follows:

- 1) Article 299 of the Criminal Code:
 - a) Whoever intentionally treats a woman or orders her to be treated by informing her or ordering her to be treated, by informing or raising the hope that with this treatment the pregnancy can be terminated threatened with a maximum prison sentence of four years or a maximum fine of forty thousand rupiah;
 - b) If the person guilty does this to seek profit, or makes this act a job or habit, or if he is a doctor, midwife, or pharmacist, the punishment can be increased by one third;
 - c) If the person guilty of committing the crime is carrying out his work, then his right to carry out that work can be revoked.
- 2) Article 299 of the Criminal Code: A woman who intentionally aborts or terminates her pregnancy or orders someone else to do so is threatened with a maximum prison sentence of four years."
- 3) Article 299 of the Criminal Code:
 - a) Anyone who intentionally aborts or kills a woman's pregnancy without the woman's consent is threatened with a prison sentence of up to twelve years.
 - b) If the act results in the woman's death, he is threatened with a maximum prison sentence of seven years.
- 4) Article 299 OF THE Criminal Code:
 - a) Anyone who intentionally aborts or kills a woman's pregnancy without her consent is subject to a maximum prison sentence of five years and six months.
 - b) If the act results in the death of the woman, the penalty is a maximum of seven years in prison.
- 5) Article 299 of the Criminal Code: If a doctor, midwife or pharmacist helps to commit the crime mentioned in Article 346 of the Criminal Code, or commits or helps one of the crimes described in Articles 347 and 348 of the Criminal Code, then the punishment determined in those articles can be increased by one third and his/her right to carry out the work in which the work is carried out can be revoked."
- 6) Article 299 of the Criminal Code:

In the case of a conviction for murder, for premeditated murder, or for one of the crimes under Articles 344, 347, and 348, can be subject to revocation of rights based on Article 35 No. 1-5."
- 7) Article 35 of the Criminal Code:
 - a) The rights of convicts that may be revoked by a judge's decision in cases stipulated in this code, or other general regulations are: 1. the right to hold office in general or a specific office; 2. the right to join the Armed Forces; 3. the right to vote and be elected in elections held based on general regulations. 4. the right to become a legal advisor or administrator upon court decision, the right to become a guardian, supervising guardian, custodian or supervising custodian, for a person who is not one's child; 5.



- the right to exercise paternal authority, exercise guardianship or custodianship over one's child; 6. the right to pursue a certain livelihood.
- b) A judge does not have the authority to dismiss an official from his position if special regulations specify another authority for the dismissal.

Regarding the crimes as regulated in the articles above, it is known as the crime of abortion and murder of a fetus (*doodslag op een ongeborn vrucht*). The object of the crime is content that can be in the form of a creature, namely, a human, with legs and arms and a head (*voldragen vrucht*) and may not be in human form (*onvoldragen vrucht*).¹⁶ The subject of the crime in Article 346 of the Criminal Code is stated to be a woman (*de vrouw*), not a mother. The reason is that in Article 346 of the Criminal Code, it is not required that the pregnancy has already taken the form of a perfect baby and that there has not been a process of giving birth to the baby or the birth of the baby, as in Article 341 and Article 342 of the Criminal Code. Hence, it is natural that the owner of the womb is referred to as a woman.¹⁷ Meanwhile, the subject of the crime of abortion is carried out by another person, whether with the person's consent or not, and the other person is a person who has certain personal qualities, namely, a doctor.¹⁸ Midwives and pharmacists, vide articles 299, 347-349 of the Criminal Code.

b. Health law

The prohibition of abortion under the Health Law is regulated in Articles 60, 61, 62, 427, 428, and 429. The text of each article is as follows:

1) Article 60:

- a) Everyone is prohibited from carrying out an abortion, except under the permitted criteria by the provisions in the criminal code.
- b) Implementation of abortion with the permitted criteria as referred to in paragraph (1) may only be carried out:
- (1) by Medical Personnel and assisted by Health Personnel who have the competence and authority;
 - (2) at Health Service Facilities that meet the requirements set by the Minister;
 - (3) with the consent of the pregnant woman concerned and with the consent of the husband, except for rape victims.

2) Article 61:

The Central Government, Regional Governments, and the community are responsible for protecting and preventing women from unsafe abortions and those that are contrary to statutory regulations.

3) Article 62:

Further provisions regarding abortion are referred to in Article 60 and Article 61 of the Government Regulation.

¹⁶ Adami Chazawi, *Kejahatan Terhadap Tubuh dan Nyawa* (Jakarta: Raja Grafindo Persada, 2013).

¹⁷ *Ibid.*

¹⁸ Fradhana Putra Disantara et al, "Sistem Hukum Penanggulangan Darurat Kesehatan dalam Perspektif Omnibus Law: Relasi terhadap Hak Asasi Manusia" (2024) 5:2 J Interpret Huk 1120–1130.



4) Article 427:

Any woman who has an abortion that does not meet the exclusion criteria as referred to in Article 60 shall be punished with a maximum imprisonment of 4 (four) years.

5) Article 428:

a) Any person who carries out an abortion not by the provisions referred to in Article 60 against a woman.

(1) With the consent of the woman shall be punished with a maximum imprisonment of 5 (five) years;

(2) without the woman's consent shall be punished with a maximum imprisonment of 12 (twelve) years.

b) If the act as referred to in paragraph (1) letter a results in the death of the woman, the perpetrator shall be punished by imprisonment for a maximum of 8 (eight) years.

c) If the act as referred to in paragraph (1) letter b results in the death of the woman, the perpetrator shall be punished with a maximum prison sentence of 15 (fifteen) years.

6) Article 429:

a) Medical personnel or health workers who commit a crime as referred to in Article 428 may have their sentence increased by 1/3 (one third).

b) Medical personnel or health workers who commit crimes as referred to in paragraph (1) may be subject to additional penalties in the form of revocation of certain rights, namely: the right to hold public office in general or a specific position; and/or b. the right to practice a specific profession.

c) Medical personnel or health workers who perform abortions due to indications of medical emergencies or on victims of rape or other sexual violence resulting in pregnancy, as referred to in Article 60, shall not be subject to criminal penalties.

c. Law Number 1 of 2023 concerning the Criminal Code

The prohibition of abortion based on the Criminal Code is regulated in Articles 463 to 465 of the Criminal Code. The text of each Article is as follows:

1) Article 463

a) Any woman who has an abortion will be punished with a maximum prison sentence of 4 (four) years.

b) The provisions referred to in paragraph (1) do not apply if the woman is a victim of a criminal act of rape or other criminal act of sexual violence which results in a pregnancy that is not more than 14 (fourteen) weeks old or has indications of a medical emergency.

2) Article 464

a) Any person who performs an abortion on a woman:

(1) with the woman's consent, shall be punished with a maximum imprisonment of 5 (five) years;

(2) without the woman's consent, shall be punished with a maximum prison sentence of 12 (twelve) years.

b) If the act as referred to in paragraph (1) letter a results in the death of the woman, the perpetrator shall be punished by imprisonment for a maximum of 8 (eight) years.



- c) If the act as referred to in paragraph (1) letter b results in the death of the woman, the perpetrator shall be punished with a maximum prison sentence of 15 (fifteen) years.
- 3) Article 465
- a) Doctors, midwives, paramedics, or pharmacists who commit a crime as referred to in Article 464 shall have their sentence increased by 1/3 (one third).
- b) Doctors, midwives, paramedics, or pharmacists who commit a criminal act as referred to in paragraph (1) may be subject to additional penalties in the form of revocation of rights as referred to in Article 86, letters a and f.
- c) Doctors, midwives, paramedics, or pharmacists who perform abortions due to medical emergency indications or on victims of rape or other sexual violence resulting in pregnancy, as referred to in Article 463 paragraph (2), will not be subject to criminal penalties.

Based on the provisions of the prohibition as well as the criminal threat mentioned above, the act of abortion, whether abortion with one's will/consent, abortion without consent, abortion with orders, or with the explicit assistance of another person, is an act that is expressly stated as prohibited by the Criminal Code. According to the Criminal Code, abortion is a prohibited act and is a crime without exception against any person, the subject of the crime in any form of qualifications, as long as they have contributed to the act of abortion in question. The subject of the crime in question includes a pregnant woman who has an abortion. Another person, a doctor, midwife, or pharmacist, who helps perform an abortion.

Abortion is an act carried out with an element of intent.¹⁹ The intent referred to in abortion cases, in criminal law theory and doctrine, is known as "Intention as Intent (*oogmerk*)", where there is a relationship between a person's consciousness, intellect, and thoughts, and the actions they carry out.²⁰ Thus, intent as an intention is interpreted as the will (*willens*) to realize/want a criminal act and the consequences that arise from it. The perpetrator of an abortion must have the intention to terminate the pregnancy based on his/her actions. Further provisions regarding abortion are regulated in the Health Law, which is also positive law in Indonesia. There are differences in the provisions regarding the crime of abortion between the Criminal Code and the Health Law. The Health Law regulates exceptions to the crime of abortion or exempts the prohibition of abortion with several terms and conditions regulated in the Law. Exceptions to the prohibition on abortion are contained in the Health Law, which regulates the terms and conditions as stated in Article 60, paragraph 2, which in essence stipulates that abortions that meet the permitted criteria may only be carried out:

- a. By Medical Personnel and assisted by Health Personnel who have the competence and authority;
- b. At Health Service Facilities that meet the requirements set by the Minister;
- c. With the consent of the pregnant woman concerned and with the consent of her husband, except for rape victims.

¹⁹ Agus Jerry Suarjana Putra, "Abortion by Rape Victims Reviewed Based on the Criminal Code and Law Number 36 of 2009 Concerning Health" (2016) 5:5 Kertha Wicara J Leg Stud.

²⁰ Hariati Kalia, "Proof of Criminal Acts by Openly and Joint Force Using Violence Against People Resulting in Injuries" (2013) 1:4 J Leg Opin.



Further implementation of the provisions of Article 60, paragraph 2 of the Health Law is Government Regulation Number 28 of 2024 concerning Health (State Gazette of the Republic of Indonesia 2024 Number 135, Supplement to the State Gazette Number 6952), hereinafter referred to as the Health PP. Since the emergence of the Health Law until July 26, 2024. The implementing regulations still refer to Government Regulation Number 61 of 2014 concerning Reproductive Health, hereinafter referred to as PP Reproductive Health. The PP is still in effect even though it was originally an Implementing Regulation of Health Law Number 36 of 2009, which has been revoked. This validity is based on Health Law Article 453, letter c, which reads:

“When this Law comes into force, all laws and regulations which are implementing regulations of this Law shall be, Law Number 36 of 2009 concerning Health (State Gazette of the Republic of Indonesia 2009 Number 144, Supplement to the State Gazette of the Republic of Indonesia Number 5063); is declared to remain valid as long as it does not conflict with the provisions of this Law.”

Furthermore, since July 26, 2024, the latest Implementing Regulation has been issued, which then revokes the PP on Reproductive Health as referred to above through the PP on Health. Based on the explanation above, abortion is permitted only if there is an indication of a medical emergency and the pregnancy is the result of rape. With several provisions and mechanisms regulated in the Health PP, as stated below:

Article 116 of the Health PP:

"Everyone is prohibited from having an abortion, except for indications of a medical emergency or for victims of rape or other acts of sexual violence that result in pregnancy, by the provisions of the criminal code."

Article 117 of the Health PP:

Indications of medical emergencies, as referred to in Article 116, include:

- a. pregnancy that threatens the life and health of the mother; and/or
- b. the health condition of the fetus with a congenital defect that cannot be repaired, so that it is not possible to live outside the womb.

Article 118 of the Health PP:

Pregnancy resulting from the crime of rape or other crimes of sexual violence resulting in pregnancy, as referred to in Article 116, is proven by:

- a. a doctor's certificate regarding the gestational age by the incident of rape or other sexual violence resulting in pregnancy; and
- b. investigator's statement regarding alleged extortion and/or other sexual violence resulting in pregnancy.

Article 119 of the Health PP:

- a. Abortion services that are permitted can only be carried out at advanced health service facilities that meet the health resource standards set by the Minister.
- b. Abortion services can only be carried out by medical personnel and assisted by health workers according to their competence and authority.



Article 120 of the Health PP:

- a. Abortion services are provided by a team of experts and doctors who have the competence and authority.
- b. The consideration team, as referred to in paragraph (1), is tasked with providing considerations and decisions in carrying out abortion services due to a pregnancy that has indications of a medical emergency and/or a pregnancy resulting from a criminal act of rape or other criminal act of sexual violence.
- c. The doctor as referred to in paragraph (1) is tasked with providing abortion services due to a pregnancy that is indicated as a medical emergency and/or a pregnancy resulting from a crime of rape or other crime of sexual violence.

Article 121 of the Health PP:

- a. The consideration team, as referred to in Article 120 paragraph (2), is formed by the head of the Advanced Health Service Facility for abortion services.
- b. The consideration team, as referred to in paragraph (1), is chaired by the Hospital medical committee with at least 1 (one) member of Medical Personnel who has the competence and authority.
- c. Doctors as referred to in Article 120 paragraph (3), in carrying out abortion services, are assisted by health workers who have the competence and authority.
- d. The doctor as referred to in paragraph (3) is not a member of the consideration team.
- e. If in a certain area the consideration team is insufficient, the doctor referred to in paragraph (3) may become a member of the consideration team.

Article 122 of the Health PP:

- a. Abortion services can only be carried out with the consent of the pregnant woman concerned and with the consent of her husband, except for victims of rape.
- b. The exception to the husband's consent as referred to in paragraph (1) also applies to victims of other acts of sexual violence which result in pregnancy.
- c. In the case of abortion services being carried out on people who are considered incompetent in making decisions, consent can be given by other family members.

Article 123 of the Health PP:

"In abortion services, assistance and counseling must be provided before and after the abortion, which is carried out by medical personnel, health workers, and/or other personnel."

Article 124 of the Health PP:

- a. In the case of a victim of rape and/or other sexual violence resulting in pregnancy, they decide to cancel their desire to have an abortion after receiving assistance and counseling. Victims are given support by counselors during pregnancy, childbirth, and postpartum.
- b. Children born to mothers who are victims of rape and/or other acts of sexual violence resulting in pregnancy have the right to be cared for by the mother and/or her family.



- c. If the mother and/or family are unable to provide care, the child can be cared for by a child care institution or become a child cared for by the state under the provisions of statutory regulations.

The implementation of abortion is regulated in Articles 118 to 124 of the Health PP, which in general determines the Standard Operating Procedure (SOP) for implementing abortions, both abortions due to medical emergency indications and abortions due to rape. The problem is what happens when there are two legal regulations that regulate the same crime but have different criminal provisions. As with abortion, the Criminal Code which is currently still in force expressly prohibits abortion without any exceptions while the Health Law prohibits abortion, it still provides exceptions to the prohibition in question and mandates compliance with the criteria permitted by the Criminal Code as stated in the Health Law, Article 60 paragraph (1), which states "Everyone is prohibited from performing an abortion, except under permitted criteria by the provisions of the criminal code." In such cases, the principle of *Lex Specialie Derogat Legi Generalie* applies, which means that special rules override general rules. The special rules in question are the Health Law, while the Criminal Code is a law that regulates in general. Therefore, the Health Law and its implementing regulations, namely the Health PP, apply as special regulations that override the Criminal Code as a general regulation. Regarding the wording of Article 60 paragraph (1) of the Health Law, "except with the criteria permitted by the provisions in the criminal code." This is a different matter. That the wording is intended as an effort to synchronize the Health Law with the Criminal Code which was formed based on Law Number 1 of 2023 as stated in Article 455 of the Health Law which states: "The provisions in Article 427, Article 428, Article 429, Article 430, and Article 432 shall apply until the enactment of Law Number 1 of 2023 concerning the Criminal Code (*State Gazette* of the Republic of Indonesia 2023 Number 1. Supplement to the *State Gazette* of the Republic of Indonesia Number 6842)."

CONCLUSION

Not all forms of abortion are criminal acts; abortion, which is a criminal act, means it contains an unlawful nature or, as a criminal offense, is *Abortus Provocatus Criminalis*. This is interpreted as an intentional abortion. The intentional meaning is with indications of a crime or crimes. The prohibition on *Abortus Provocatus Criminalis* applies with exceptions based on the Health Law with its Implementing Regulations, namely the Health PP. As long as it is by the criteria specified in the provisions, the abortion is legal and not an illegal abortion. Although the Criminal Code prohibits it without any exceptions, the Principle of *Lex Specialis Derogat Legi Generali* applies, "special rules override general rules".

DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of interest in the publication of this article.

FUNDING INFORMATION

None.



ACKNOWLEDGMENT

None.

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