

Harmonization of Abortion Settings in Indonesia

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ABSTRACT

This study is entitled Harmonization of Abortion Law in Indonesia. Abortion today is not something that is taboo to discuss and talk about, because abortion has occurred everywhere. Abortion is a health issue that is gaining attention nowadays in Indonesia. The regulation of abortion in Indonesia is regulated by 2 (two) Laws namely the Criminal Code and the Health Law, which is where there is a conflict of norms that the Criminal Code prohibits loopholes for abortion by anyone and under any conditions. While the Health Act provides space for abortions for women with pregnancies that endanger their lives and women with pregnancies due to rape. The problem of this writing is related to the harmonization of abortion arrangements in Indonesia and abortion arrangements in the future. This research was conducted by normative legal methods. Harmonization of abortion arrangements in Indonesia is resolved with legal theory, namely the Lex Specialis Derogat Legi Generalis legal theory, meaning that if there is an abortion case in Indonesia then the source of reference or legal basis is the Health Act because it is more specific than the Criminal Code. Abortion arrangements in Indonesia in the future in the form of a Penal Code also touches on the aspect of abortion which is regulated in Article 589 to Article 592 and remains on the concept to prohibit abortion by anyone and under any conditions.

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1. INTRODUCTION

Humans are the most perfect creatures and given the noblest position before God Almighty, human beings are equipped with physical and mental perfection and grace in the form of thoughts and reason so that they can distinguish between good and bad

this is the ideal concept of humans.¹ Abortion today is not something that is taboo to be discussed and discussed, because abortion is happening everywhere. Pregnancy which in principle will provide happiness for others - the closest people. However, adult pregnancy is often an undesirable thing by itself, many factors that cause pregnancy can not be expected to involve promiscuity by having intercourse with a husband and outside pregnancy, can also involve my husband weight, daily living expenses and can also unwanted pregnancy because victims of freedom of rape, these things that make unwanted and choose the path of abortion to eliminate the lives of these babies since needed in the cage. Very ironic indeed, because on the other hand there are husbands who really like children because they have been married for a long time but have not been blessed with a child, while on the other hand there are people who do not want the child and choose the path of abortion to solve their problems.

Abortion is a health issue that is gaining attention nowadays in Indonesia. Various groups debate and discuss abortion without ever reaching its end. Because abortion is associated with law, morals, health and human rights, then abortion will be so paradoxical. The high abortion rate in Indonesia is increasing every year, the average abortion rate in Indonesia reaches an average of 3,000,000 people every year.²

Abortion or better known in legal terms with *Abortus Provocatus* written in Latin has the meaning and meaning of abortion intentionally or the intention of oneself and others.³ Abortion in adulthood is now no longer just a matter of health, but in its development into a legal issue that experiences conflict in its regulation in Indonesia, this conflict of rules results in weak law enforcement regarding abortion in Indonesia and that also results in increased cases of abortion in Indonesia. every year.

Conflicts of norms regarding the regulation of abortion, namely between the Criminal Code (hereinafter referred to as the Criminal Code) with Law Number 36 of 2009 concerning Health (hereinafter referred to as the Health Act). Arrangements regarding abortion in the Criminal Code are regulated in Article 346, Article 347, Article 348 and Article 349 which in principle the Criminal Code prohibits abortion by anyone and for any reason, meaning the Criminal Code closes the gap on abortion in Indonesia. Meanwhile, the Health Act provides an opportunity for abortion to be carried out as formulated in Article 75 paragraph (2) which in principle excludes these 2 (two) conditions to be legalized for an abortion, namely due to medical emergency

¹ Arhjayati Rahim. (2019). Diversion in the Form of Protection of Human Rights. *Musamus Law Review*, 1(2), 87-94. <https://doi.org/10.35724/mularev.v1i2.1126> pp. 89

² Utami, T. K., & Mulyana, A. (2017). Tanggung Jawab Dokter dalam Melakukan Aborsi Tanpa Seijin Ibu Yang Mengandung Atau Keluarga dalam Perspektif Hukum Positif Di Indonesia. *Jurnal Hukum Mimbar Justitia*, 1(2), 499-517. h. 500. DOI : <https://doi.org/10.35194/jhmj.v1i2>

³ Susanti, Y. (2012). Perlindungan Hukum Bagi Pelaku Tindak Pidana Aborsi (*Abortus Provocatus*) Korban Perkosaan. *Siyar Hukum*, 14(2), 79-93. h. 80. DOI : <https://doi.org/10.29313/sh.v14i2.1470>

conditions that endanger the condition of both mother and baby; and conditions of pregnancy outside of marriage caused by rape. The Health Law provides a loophole for legal abortion in Indonesia.

There is clearly a dispute over norms related to the regulation of abortion in Indonesia. It is interesting to discuss because this dispute of norms has an impact on law enforcement for abortionists in Indonesia because in the hierarchy of legislation in Indonesia, the Criminal Code and Health Law is located at the same level or degree so have the same strong legal force. So that it is relevant to be appointed as a scientific journal in order to resolve issues regarding disputes over norms related to the regulation of abortion in Indonesia.

Explanation of the background becomes a basis and a description of the problems related to abortion arrangements in Indonesia which are then formulated concretely the problem into 2 (two) problem formulations in this scientific journal, namely regarding the harmonization of abortion arrangements in Indonesia and abortion arrangements in Indonesia in the future.

The purpose of this scientific journal is divided into general objectives and special objectives, while the general purpose of this scientific journal is to find out the harmonization of abortion arrangements in Indonesia. The specific objective that becomes the focus of this scientific journal is to understand and know the harmonization of abortion arrangements in Indonesia and abortion arrangements in Indonesia in the future.

The making of this scientific journal is new and original for the world of legal education in Indonesia, although there are scientific journals that are similar or related to this scientific journal, then it is not the basis of plagiarism, but as a view or reference in working on this scientific journal. The scientific journals which were first published and then used as references are:

- 1) Scientific Journal is written by Yuli Susanti in 2012, published by the Syiar Hukum Journal at the Faculty of Law, Bandung Islamic University, with the title "LEGAL PROTECTION FOR THE ABORTION CRIMINAL ABORT (ABORTUS PROVOCATUS) VOCATIONAL Rape". The issues raised are regarding legal protection against acts of abortion (abortus provocateurs) especially those committed by rape victims according to the Criminal Code (KUHP) which applies as *lex general* and Law No. 36 of 2009 concerning Health which applies as *lex speciale*.
- 2) Scientific journals made by I Komang Suardika, Ni Putu Rai Yulianti and Ketut Sudiarmika in 2019, published by the journal of the Yustitia Community at the Faculty of Law of the Ganesha University of Education, with the title "Jurisdictional Analysis of the Criminal Acts of Abortion Associated with the Actors as rapists of the Rapporteur. ". The issues raised are the regulation of

abortion committed by rape victims and the form of criminal liability against abortionists for rape victims associated with justification or forgiveness.

Based on the explanation above, it can be concluded that there is no similarity in all of the above scientific journals to what is being discussed in this scientific journal and there is no attempt to trace plagiarism in this writing. This scientific journal has an element of renewal in it, namely by discussing the problems regarding the harmonization of abortion arrangements in Indonesia and abortion arrangements in Indonesia in the future.

2. METHOD

This scientific journal uses normative legal research which uses norms or legal rules as a starting point rather than research.⁴ The type of research that the author uses in this study is normative legal research, also called library research, some also call doctrinal legal research.⁵ This scientific journal uses a statutory approach and a conceptual approach. The legislative approach is used to review all Shrimp and regulations relating to regulations relating to abortion. Then, the conceptual approach that starts from the views of experts and doctrines in the field of legal science which is then used to answer existing problems, especially those that are related to the general concepts of law and the concept of criminal law.⁶ The relationship between these approaches makes it easy or helpful to answer the problems that have been formulated in the formulation of the problem.

3. RESULTS AND DISCUSSION

3.1 Harmonization of Abortion Settings in Indonesia

Synchronization and Harmonization are carried out to understand how the relation of articles or provisions in one statutory regulation with other laws and regulations.⁷ Abortion is a condition in which the outcome of pregnancy is the baby from the mother's womb before the time that should be in a condition of death.⁸ Abortion can

⁴ Suantra, I. N., & Nurmawati, M. (2019). Penegakan Hukum Terhadap Pelanggaran atas Ketentuan Perizinan Toko Swalayan di Wilayah Provinsi Bali. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 8(2), 188-206. h. 190. DOI : <https://doi.org/10.24843/JMHU.2019.v08.i02.p04>

⁵ Yusdar, Yusdar. (2019). Accessibility of Persons with Disabilities in Realizing Elections with Integrity. *Musamus Law Review*, 1(2), 105-114. <https://doi.org/10.35724/mularev.v1i2.1198> pp. 107

⁶ Sudantra, I. K. (2018). Implikasi Keputusan Menteri ATR/Kepala BPN Nomor 276/KEP-19.2/X/2017 Terhadap Kedudukan Tanah Milik Desa Pakraman. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 7(4), 546-564. h. 549. DOI : <https://doi.org/10.24843/JMHU.2018.v07.i04.p09>

⁷ Julianto Jover Jotam Kalalo. (2018). Politik Hukum Perlindungan Hak Ulayat Masyarakat Hukum Adat di Daerah Perbatasan. Makassar: Disertasi Universitas Hasanuddin. pp. 193

⁸ Kusmianto, 2002, *Kontroversi Aborsi*, PT. Gramedia Widiasarana Indonesia, Jakarta, pp.203

also be said to be a miscarriage or the end of a pregnancy before 20 weeks of gestation or can be said before the baby is able to live outside the womb.⁹ Abortion is very dangerous for the mother's life if done in a way that is not in accordance with the rules in the medical world.

Abortion in Indonesia when viewed from the perspective of the Criminal Code is a prohibited crime and can be subject to criminal sanctions for anyone who has an abortion. Abortion arrangements are regulated in Article 346, Article 347, Article 348 and Article 349 of the Criminal Code. The following articles which in principle prohibit the opportunity to have an abortion, even abortion is prohibited for all roles and all conditions. Article 346 of the Criminal Code means that forbidding the person who has an abortion intentionally from committing or ordering an abortion to be punished with a maximum imprisonment of 4 years. Article 347 of the Criminal Code stipulates that if abortion does not obtain a permit from a pregnant woman, it will be subject to a maximum of 12 years imprisonment and if the woman dies after having an abortion, she will be subject to a maximum of 15 years in prison.

Article 348 of the Criminal Code stipulates that if an abortion is carried out with the permission of the woman, she will be threatened with imprisonment for a maximum of 5 years and 6 months and if the woman dies after an abortion, that person will be subject to a maximum of 7 years in prison. Not only that, but the Criminal Code also regulates if there is a doctor, midwife or drug interpreter who helps carry out as stipulated in Article 346, Article 347 and Article 348, the imprisonment determined by these Articles can be added a third and revoked the right to carry out the profession. back.

Once the strict restrictions on abortion in the Criminal Code touches all aspects and lines, namely women who have abortions, who instigate or who order and help will be exposed to the threat of imprisonment if viewed from the perspective of the Criminal Code. Because basically, the criminal aspect is the culmination of the criminal justice system to provide a deterrent and fear effect for the perpetrators.¹⁰ So tight without a loophole the Criminal Code regulates the prohibition of abortion, it does not simply reduce Indonesian women to have abortions and abortion is not likely to decrease. Imprisonment according to this theory is a form of the civilization of criminal law.¹¹

⁹ Afifah, W. (2013). Perlindungan Hukum Bagi Perempuan Korban Perkosaan Yang Melakukan Aborsi. *DiH: Jurnal Ilmu Hukum*, 9(18). 93-109. h. 100. URL : <http://jurnal.untag-sby.ac.id/index.php/dih/article/view/277/274>

¹⁰ Bima, M. R. Re-Evaluasi Vonis Hakim Pengadilan Negeri Makassar Pada Perkara Tindak Pidana Korupsi. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 8(1), 76-89. h. 80. DOI : <https://doi.org/10.24843/JMHU.2019.v08.i01.p06>

¹¹ Mulyadi Alrianto Tadjuddin, Yuldiana Zesa Azis. (2018). Protection of Papuan Native Children Conflicting with Law through a Restorative Justice Approach. *Musamus Law Review*, 1(1), 1-20. <https://doi.org/10.35724/mularev.v1i1.792> pp. 9

Since the promulgation of the Health Act in 2009 because the Health Act provides space and loopholes for abortions to occur under certain conditions. The regulation of abortion is regulated by Article 75 of the Health Law which in principle still prohibits the act of abortion but provides exceptions to certain conditions as regulated in Article 75 paragraph (2) of the Law that exceptions related to abortion may be made in the event of a medical emergency to the mother and or baby and pregnancy due to rape. Both of these are theoretically included in the group of provocateurs abortion which is an abortion carried out by deliberate either by using tools and/or using drugs.¹² Nevertheless, the said action can only be carried out after going through counseling first, the abortion as referred to in the Health Act cannot be carried out immediately as stipulated in Article 75 paragraph (3) of the Health Act. In the oath of appointment as a health worker in taking the first action is regulated in the rules of the code of ethics and hospital regulations and others.¹³

Legal issues that occur are the Criminal Code and the Health Law are still valid and are at the same hierarchical level in the order of the Law that is in the order of the Law. This causes a conflict of norms which regulate the same object that is about abortion, a conflict occurs in which the Criminal Code closes the gaps and opportunities by anyone and in any form to carry out an abortion, while the Health Act, although in principle prohibits but still gives room to exceptions to abortion in 2 (two) conditions, i.e. if there is a medical emergency to the mother and/or baby and pregnancy due to rape. Conflicts of norms will also result in the enforcement of penalties against abortionists in Indonesia.

Harmonization of the regulation of abortion must be carried out on how the views of the Criminal Code and how the views of the Health Act in view of this abortion. Legal theory is used to answer existing problems, used by *Lex Specialis Derogat Legi Generalis* legal theory. The *Lex Specialis* legal form *Derogat Legi Generalis* means "a special law that rules out the common law"¹⁴, the meaning in the Indonesian language is that the more specific law overrides the more general law. So if there are 2 (two) laws that are norm conflicts or norms disputes so what is used according to the theory is more specific, in this case, the Health Law is more specific than the Criminal Code itself. This means that if there is an abortion case in Indonesia, then the source of reference or legal basis is the Health Law which has a point of view that in principle

¹² Afifah, W.. *Op.Cit.* h. 100

¹³ Julianto Jover Jotam Kalalo, Chyntia Novita Kalalo. (2018). Legal Protection Against Health Workers in Taking First Aid Medical Measures. *Musamus Law Review*, 1(1), 40-52. <https://doi.org/10.35724/mularev.v1i1.1076> pp. 51

¹⁴ Wairocana, I. G. N., Sudiarta, I. K., Layang, I. W. B. S., Sudiarawan, K. A., & Pramana, I. G. P. (2019). *The Expansion of Administrative Decision Meaning Based on Government Administration Law: a Dispute Submission Process Approach*. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 8(1), 13-33. pp. 28. DOI : <https://doi.org/10.24843/JMHU.2019.v08.i01.p02>

rejects the act of abortion, but provides room for exceptions to conditions where medical emergencies occur in mothers and/or infants and pregnancies due to rape.

3.2 Arrangement of Abortion in Indonesia in the Future

Abortion arrangements in Indonesia in the future or can be said as the law aspired (*ius constituendum*) in Indonesia is an effort and effort of the government to implement reform of criminal law in Indonesia. The renewal of the criminal law itself is an action taken in an effort and effort to review and reform the law in accordance with the latest conditions.¹⁵ Renewal of criminal law in Indonesia can be done in two ways, among others, by making laws to make changes and additions to the current Criminal Code and by replacing the old Criminal Code by compiling a Draft Book of Criminal Law (hereinafter referred to as the Draft Criminal Code).¹⁶

The Penal Code draft also refers to the aspect of abortion or in this case is called an abortion. The Penal Code draft was initiated in 2015 and has not yet been finalized to this day. It is interesting to discuss Article by Article related to abortion, which also becomes pros and cons. In the Draft Penal Code, abortion is regulated from Article 589 to Article 592. In these Articles, there are no significant changes compared to the previous Penal Code, but only extends the subject of helping to have an abortion that can be criminally previously only a doctor, midwife and medicine interpreter. medical and pharmacists are also included in the scope of the scope. There is no significant change in the concept of prohibiting abortion in any way and by anyone and forbid abortion for any reason.

The presence of the Draft Penal Code should reflect and reflect on the previous regulations, namely the Health Act. The latest Law should not be in conflict with the earlier Health Law, because that would cause norm conflicts again. Because the Health Act is very good with the regulation of exceptions to the abortion of conditions where medical emergencies occur in mothers and / or babies and pregnancy as a result of rape. Women who are impregnating children who risk their lives and women who are pregnant because of rape should not be criminalized for having an abortion, there are moral values there that must be accommodated by this new Draft Penal Code. Because women with such conditions should receive protection from the Penal Code, that such conditions are not desired by the woman. However, the act of abortion should not be carried out immediately by women who experience medical emergencies in the mother and or baby and pregnancy due to rape to be able to have an abortion, it must be proven first by getting permission or prior counseling.

¹⁵ Yudistira Darmadi, A. A. N. O. (2013). Konsep Pembaharuan Pidana Dalam Rancangan KUHP. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*. 2(2). 1-14. h. 2. DOI : <https://doi.org/10.24843/JMHU.2013.v02.i02.p04>

¹⁶ Barda Nawawi Arief, 2016, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, Prenadamedia Group, Jakarta, pp. 94

The condition of having a medical emergency that can endanger the life of his mother and necessitate abortion can be proven by the resume of the doctor who examined it stating that it is true that the woman's condition must abort her birth. If in the condition the woman wants to abort her child on the basis of being a rape victim, she must prove it by getting a court ruling or from her investigator, explaining that the proof of pregnancy is the result of rape which must be carried out in a very short time because it would be dangerous if an old pregnancy to be carried out abortion.

The draft Criminal Code also when it comes to effect later if it does not provide an opportunity for abortion and the articles still prohibit abortion under any conditions, the government will be negligent and negligent in fulfilling the means of abortion that is appropriate for women and that will cause more widespread and uncontrolled abortion practices illegal, because her own country forbids legal abortion, on the other hand, the woman is ashamed to give birth to the child which is an undesirable result through rape. The need for abortion is what drives women to have illegal abortions outside.

Abortion according to Prof.'s research Dr. Azrul Azwar explained that unsafe abortions accounted for 11% of maternal mortality rates, in some areas even reaching 15 -50%.¹⁷ Not permitting abortion under any conditions in the Draft Penal Code also contradicts the President's commitment to the Sustainable Development Goals on reducing Maternal Mortality, where Unwanted Pregnancy contributes 75% to maternal mortality.¹⁸ This means that if the Criminal Code draft remains that way, women or expectant mothers who are pregnant are in danger of medical conditions for their mothers as a result of unhealthy pregnancies and pregnant women who are victims of rape will seek illegal ways to abort them, which of course with inadequate facilities due to actions which he did was wrong in the eyes of Indonesian law and carried out clandestinely which would certainly endanger the condition of women with such conditions. And the government should accommodate this.

4. CONCLUSION

Harmonization of abortion arrangements in Indonesia which contrasts with the concept of the Criminal Code and the concepts in the contradictory Health Law can be resolved with legal theory namely the legal theory of the *Lex Specialis Derogat Legi Generalis*, which means that the more specific laws override the more general laws. So, in the conflict of norms, the Health Law is more specific than the Criminal Code itself. This means that if there is an abortion in Indonesia then the source of reference or legal

¹⁷ M.Reza Sulaiman dan Dinda Rachmawati, *Helat dan Women*, Redaksi Suara. Com, *Kontroversi RUU KUHP, YKP Sebut Aborsi Korban Perkosaan Bukan Ranah Pidana*. Suara.Com, HTML : <https://www.suara.com/health/2019/09/24/102721/kontroversi-ruu-kuhp-ykp-sebut-aborsi-korban-perkosaan-bukan-ranah-pidana>, accessed on September 24, 2019, at 11:00 p.m.

¹⁸ *Ibid*.

basis is the Health Act which has a viewpoint which in principle rejects the act of abortion, but provides room for exceptions to the conditions where medical emergencies occur to mothers and / or babies and pregnancy due to rape.

Abortion arrangements in Indonesia in the future or can be said as the law aspired (ius constituendum) in Indonesia is an effort and effort of the government to implement reform of criminal law in Indonesia. The Penal Code draft also refers to the abortion aspect or in this case is called an abortion. The Penal Code draft was initiated in 2015. In the Penal Code draft, abortion is regulated from Article 589 to Article 592. In these Articles, there are no significant changes compared to the old Penal Code which still has the concept of prohibiting the Criminal Code abortion by anyone and under any circumstances. This applies to those who carry out, order and assist the abortion may be subject to imprisonment.

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