

Abortion Law in Rape Victims' Cases: Perspective of the KUHP and Indonesia's Health Law

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Abstract

Abortion is an issue that is always debated in various parts of the world, including in Indonesia. This study aims to examine the legal aspects of abortion performed on rape victims from the perspective of the latest criminal code, namely Law Number 1 of 2023, and from the perspective of the health law currently in force in Indonesia, namely Law Number 17 of 2023. The theory that focuses on the importance of law for rape victims is the Trauma theory, where trauma is not only an individual event, but also has broad social impacts. This study will examine abortion law from the current perspective of the regulations in force in Indonesia. This study found that there is harmonization in the regulations related to abortion in Indonesia, especially for rape victims. The contribution made by this study is the need for the real implementation of the rules and laws related to rape victims to show that the state is on the side of women. The consequences of rape have been proven to cause mental trauma, worsen the victim's mental condition, and result in physical and psychological suffering for the victim.

Keywords: abortion, rape victims, Law No. 17 of 2023

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INTRODUCTION

Rape cases not only have physical impacts, but also profound psychological impacts on victims. One impact that can occur is an unwanted pregnancy due to rape. In this situation, many argue that abortion should be allowed to protect the welfare of the victim. According to the Regulation of the Minister of Health of the Republic of Indonesia Number 3 of 2016, abortion is an effort to remove the results of conception from the womb before the fetus can live outside the womb. According to the Great Dictionary of the Indonesian Language (KBBI), abortion is the termination of pregnancy.

Abortion practices in Indonesia have become a major focus of government efforts. A study by Angie & Srihadiati (2024) reported that reports from two global organizations, the World Health Organization (WHO) and the United Nations Population Fund (UNFPA), indicate that the number of abortions in Indonesia ranges from 750,000 to 1,500,000 per year, with approximately 2,500 cases resulting in death. The Jombang Women's Crisis Center (WCC) provided support to rape victims in 2023, stating that although there are regulations governing abortion practices (in laws and their derivatives), there are currently no safe abortion services accessible to victims of sexual violence. There is an illegal abortion practice allegedly carried out by a dentist in Bali, with a total of 1,300 patients in 2023 (<https://www.bbc.com/indonesia/articles/c883m7x871do>). Although abortion is generally prohibited by law, exceptions exist for medical reasons and rape victims. Nevertheless, the research and information above demonstrate that illegal abortion practices are still widespread and often pose significant risks to women's health.

Abortion in cases of rape is a complex issue with legal, ethical, and social implications. Many countries, including Muslim-majority countries, have restrictive abortion laws, although some allow it for medical reasons or in cases of rape. In Pakistan, the abortion law does not specifically address pregnancy related to rape, highlighting gaps in the legal framework (Qurratul-Ain-Munir-Minhas and Niazi, 2020). Russell (2022) stated that Brazil legally allows abortion in cases of rape, but access remains limited due to barriers such as misinformation, inadequate service networks, and conscientious objections by health care providers.

Some countries require a medical examination to qualify for a legal abortion in cases of rape, which can pose practical challenges and uncertainties for health care providers. This study emphasizes the need for clearer guidelines and increased access to safe abortion services for rape victims, considering cultural, religious, and ethical perspectives in policy making. Article 55 of Health Law Number 17 of 2023 states that: Everyone has the right to: (a) live a healthy, safe reproductive and sexual life, free from discrimination, coercion, and/or violence by respecting noble values that do not degrade human dignity by religious norms; (b) obtain information, education, and counseling regarding reproductive health that is correct and accountable; and (c) receive health services and recovery from criminal acts of sexual violence.

The current rampant acts of violence are a particular concern for feminists and the wider community. This concern arises because, apart from looking at the enforcement of justice by punishing the perpetrators, it is also necessary to protect victims of sexual violence, especially victims who are pregnant with children, from the perpetrators of rape because of rape. The various problems experienced by rape victims require a multidisciplinary approach involving legal policies, sensitive health services, community education, and psychological support for victims. The rights of rape victims must be respected, and they must receive proper care. The following are problems [A1] that can arise from pregnancy in rape victims, namely:

1. **Social Stigma:** Rape victims often face stigma and discrimination from society. This can make victims feel pressured not to report the rape or seek medical help, including abortion services.
2. **Limited Access to Health Services:** Many rape victims do not have access to safe and legal health services for abortion. These limitations can be caused by geographic location, lack of licensed health facilities, and lack of information about reproductive health rights.
3. **Unclear Legal Regulations:** Although there are provisions in the Health Law that allow abortion in certain conditions, including cases of rape, the implementation and understanding of this law are often still limited. There is legal uncertainty that affects the decisions of medical personnel, who may be hesitant to perform abortions in these cases.
4. **Moral and Religious Considerations:** Many people in Indonesia have strong views based on religious norms and morality that oppose abortion. This can cause victims to feel guilty and pressured not to continue with the abortion process, even in conditions that require it.
5. **Lack of Reproductive Health Education:** The low level of reproductive health education in the community leads to ignorance about their rights and available options, including safe and legal abortion services.
6. **Psychological Trauma:** Many rape victims experience deep psychological trauma. The abortion process, if not handled sensitively and with adequate psychological support, can worsen the victim's mental condition.
7. **Economic Difficulty:** The cost of having an abortion, especially at a legal and safe health facility, can be a barrier for many victims, especially those from weak economic backgrounds.
8. **Institutional Violence:** In some cases, there are reports of discriminatory treatment or even violence experienced by victims in hospitals or other health services, which makes them reluctant to seek help. (Sources: <https://findahelpline.com/countries/id/topics/sexual-abuse>; <https://www.cdc.gov/sexual-violence/about/pregnancy-resulting-from-rape.html>)

Based on the introductory description, guided by the legal basis in force in Indonesia, the research question that will be sought in this study is how the legal protection in Indonesia is related to abortion in rape cases. In addition,

this study also wants to find answers to the suitability (synchronization) of the current legal regulations in Indonesia regarding abortion in cases of rape victims. The research method employed in this paper is normative juridical, meaning it is based on theory, rules, and legal systems, as well as existing studies.

Discussion and Research Results The law regulating abortion in Indonesia has existed since 2009, namely in the Health Law number 36 of 2009 (omnibus law Law Number 17 of 2023). However, it still causes problems because it is still not in line with the Criminal Code (KUHP). Government Regulation Number 61 of 2014 concerning Reproduction, as a mandate of Law 36 of 2009, is still relevant to Law Number 17 of 2023 concerning Health, which is new and explained in more detail in Government Regulation (PP) Number 28 of 2024.

The theory that focuses on the importance of law for rape victims is trauma theory. Trauma theory, where trauma is not only an individual event but also has a broad social impact. The theory used in this study as a basic assumption that supports the argument on the importance of law for rape victims is Trauma theory. Trauma theory was introduced by Judith Herman in her famous book "Trauma and Recovery" in 1992, which explains that trauma is not only an individual event but also has a broad social impact. This trauma theory explains how trauma can disrupt a person's sense of control and adaptation to everyday life, as well as how recovery involves reconnecting fragmented memories and restoring social ties. Herman (1992) explains in trauma theory that trauma is understood as an experience that threatens the self, disrupting psychological and social functioning. The recovery process for victims through methods that can increase self-confidence and build strength to rise above the horrific shadows is essential for some people.

Criminal Code (KUHP)

Abortion, or better known in legal terms as *abortus provocatus*, written in Latin, means the termination of pregnancy intentionally or with the intention of oneself or another person. The rules regarding abortion are regulated in the old Criminal Code, article 346, which states, "A woman who intentionally aborts or kills her pregnancy or orders someone else to do so, is threatened with a maximum imprisonment of four years".

Meanwhile, Law Number 1 of 2023 has been issued, even though it will only be in effect for 3 years since it was enacted, namely in 2026. Where there are already exceptions, such as those in article 463, which states;

1. Every woman who has an abortion shall be punished with a maximum imprisonment of 4 years.
2. The provisions as 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 that causes a pregnancy whose gestational age does not exceed 14 weeks or has indications of a medical emergency.

If a medical officer performs an abortion due to an indication of a medical emergency, then they are not subject to criminal penalties; likewise, if the woman who undergoes the abortion is a victim of rape, then they are also not subject to criminal penalties. This provision is contained in paragraph (3) of Article 465 of the Law which states that; Doctors, midwives, paramedics, or pharmacists who perform abortions due to indications of a medical emergency or against victims of rape or other sexual violence resulting in pregnancy as referred to in Article 463 paragraph (2), are not subject to criminal penalties. The Health Law provides space for abortion practices under certain conditions. Before the issuance of Law Number 17 of 2023 concerning Health, Law Number 36 of 2009 also contained regulations related to abortion. However, it is not in line with the regulations in the Criminal Code at that time.

Article 60, paragraph 1 of Law Number 17 of 2023 expressly prohibits abortion except with the criteria permitted according to the provisions of the Criminal Code. Meanwhile, abortion permitted in Law Number 1 of 2023 states except as in paragraph 2, namely that the Provisions as 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 that causes a pregnancy that is not more than 14 weeks old or has an indication of a medical emergency. Thus, there is a relationship in the regulation of abortion between the Health Law and the Criminal Code/Law Number 1 of 2023. As a criminal sanction for perpetrators of abortion in Law Number 17 of 2023, it is contained in Articles 427 to 429.

This research uses a normative legal method. This normative legal method is a legal research methodology that focuses on the study of written legal norms or rules, such as laws, regulations, official documents, legal literature, and court decisions. Normative legal research uses law as the basis for norms.

Normative descriptive research emphasizes caution in guarding against bias and attempts to maximize reliability (Kothari, 2019). In this study, the rules used are expected to reduce bias and maximize reader reliability. This research uses normative descriptive research, by describing existing phenomena, collecting facts and data, reviewing applicable legal norms, and describing applicable laws and regulations about legal theories and the 4 practices of implementing positive law concerning the problems that have been formulated.

The steps taken in this normative legal research are as follows.

1. Determination of Objectives and Problem Formulation. At this stage, the researcher determines what they want to achieve from the research and formulates the problem specifically. This objective serves as the primary guide throughout the research process and helps focus the research and study.
2. Data Collection through Interviews, Documents, and Observations. Data is collected using various methods, such as direct interviews, collecting relevant documents, and conducting direct observations of the objects or situations being studied. This system ensures that the data obtained is complete and in-depth.
3. Data Analysis Thematically or Narratively. The collected data is analyzed by grouping specific templates or themes (thematic analysis) or by constructing a story based on the data (narrative analysis). The goal is to discover patterns, meanings, and relationships within the data.
4. Development of Contextual and In-depth Interpretations. After analysis, interpretations are conducted that focus on the context, deeper meanings, and interpretations of the data relevant to the situation or phenomenon being studied to gain a comprehensive understanding.
5. Reporting Results Based on Data and Critical Analysis. Research results are compiled in a report that outlines the main findings, supported by data and critical analysis. This report provides a complete and reliable overview of the research results, including conclusions and recommendations.

DISCUSSION

Delmiati et al. (2023) studied legal protection for abortion for rape victims based on Article 76 of the Health Law. Their study related to legal protection for rape victims who undergo abortion is regulated through Article 76 of Law Number 36 of 2009 concerning Health. This law explains the exceptions to abortion and allows abortion under certain conditions for rape victims. Abortion is permitted under special conditions related to the health of the mother. The findings of Delmiati et al. (2023) are in line with studies conducted by previous researchers who found psychological trauma in rape victims, where psychological trauma due to rape is considered a legitimate reason for having an abortion. The abortions carried out are by the law governing the case, so that victims who have abortions are not punished by Article 75 paragraph (2) of Law Number 36 of 2009 concerning Health. However, the implementation of pre- and post-abortion counseling by Article 37 I22 of Government Regulation Number 61 of 2014 concerning Reproductive Health is an aspect that is needed by women who are victims of rape (Pradana, 2020). In line with the arguments given in Pradana's study (2020) other studies have also found that pregnancy due to rape has been proven to cause mental trauma (Novita, 2023), worsen the victim's mental condition (Dharma, 2022), and experience physical and psychological suffering due to violence from the perpetrator and loss of mental capacity (Lestari et al., 2024). Novita (2023) explains that rape victims are psychologically unable to accept the pregnancy they experience, and of course, this gives rise to the victim's desire to have an abortion.

Research in Indonesia that has conducted studies in the realm of abortion that can be legally permitted for rape victims in certain emergencies, with legal protection for doctors and patients based on Law Number 36 of 2009 concerning Health, has been widely conducted. Yanti (2020), Putri et al. (2022), Ekatama (2019), Fadli (2022), Pradana (2020), Delmiati et al. (2023), and Alfi and Gunarto (2020) are some of the studies that have been conducted on the Health Law of 2009. However, Lestaria et al. (2024) have started a study using abortion regulations in Indonesia in the Criminal Code and the Health Law of 2023. In a study of 6 (six) countries in Asia (namely: Indonesia, Malaysia, Singapore, the Philippines, Japan, and South Korea), Lestaria et al. (2024) found that each country has different laws and regulations regarding abortion.

Previous research has shown that in Indonesia, abortion is generally illegal except to save the mother's life, as regulated by the Criminal Code (KUHP) and health laws. In Malaysia, abortion laws are also limited, permitted only if performed to save the mother's life and subject to specific medical procedures; the regulations are quite strict. Singapore has more liberal regulations, allowing abortion on request up to a certain gestational age, which is legally available at certified clinics. Abortion in the Philippines is based on very strict laws;

abortion is completely prohibited, and violations are subject to criminal penalties, although there is debate and pressure for change. Japan allows abortion under certain conditions, such as medical and social reasons, and it is legally regulated to prevent health or financial risks. South Korea has recently revised its abortion regulations and partially legalized premarital pregnancies, and there are reform efforts to expand access. This research shows that the legal frameworks related to abortion in Asian countries vary widely, ranging from total prohibitions, strict prohibitions with certain exceptions, to more liberal regulations and national legalization. These differences reflect differences in culture, morals, religion, and national policies that impact access to and protection of women's reproductive health rights in each country.

Rape is a criminal act regulated in the Criminal Code. The definition and provisions regarding rape need to be understood as a basis for assessing cases related to abortion. Several provisions permit abortion in the context of rape. In the Health Law, it is stated that abortion can be carried out if the pregnancy endangers the physical and/or mental health of the mother, which can include cases of rape.

Government Regulation Number 61 of 2014 (PP 61/2014) concerning Reproduction explains in detail regarding abortion for rape victims. PP 61 of 20214 is a mandate of the previous health law, namely Law Number 36 of 2009. Chapter IV of the PP explains the indications of medical emergencies and rape as exceptions to the prohibition of abortion, namely from Article 31 to Article 39. As the Criminal Code and Health Law which allow abortion for indications of medical emergencies or victims of rape or other sexual violence crimes that cause pregnancy, then Article 31 paragraph 1 also states the same thing, but in paragraph 2 regarding the gestational age can only be carried out if the gestational age is a maximum of 40 (forty) days calculated from the first day of the last menstruation. This is different from the latest Criminal Code Article 463, which states that the gestational age permitted for abortion is not more than 14 weeks.

In terms of indications of rape, it is explained in Article 34 of PP 61/2014, as follows.

1. Pregnancy due to rape, as referred to in Article 31 paragraph (1) letter b, is a pregnancy resulting from sexual intercourse without the consent of the woman, by the provisions of statutory regulations. Point b explains that in this sexual relationship, the act is carried out without the woman's consent or permission and is included in the category of sexual violence that violates women's human rights. This case is governed by the provisions of national laws and regulations, such as the Criminal Code and the law on the protection of women and sexual violence, which determine the definition and criteria for rape and related criminal acts. The legal implication in this case is that pregnancy resulting from rape is considered the result of a crime and is usually followed by the woman's right to receive protection, medical assistance, and abortion services according to law. In other words, if pregnancy resulting from rape is a direct consequence of a particular criminal act, it is specifically regulated in applicable legal provisions.
2. Pregnancy resulting from rape, as referred to in paragraph (1), is proven by: Gestational age based on the planned incident, as stated in a doctor's certificate. Determination of the planned gestational age of the victim must be based on the results of a medical examination by a doctor, who will provide information regarding the estimated date of conception or gestational age. This doctor's certificate serves as crucial official evidence in legal and administrative proceedings, as it helps establish the timing of the pregnancy and its relationship to the time of the accident.

Statements from investigators, psychologists, and/or other experts regarding the allegations. In addition to medical evidence, opinions and statements from investigators, psychologists, or other experts, such as psychiatrists or forensic experts, are also important in strengthening the suspicion that the incident was a hoax. Investigators provide explanations based on the results of their investigation and the evidence gathered, while psychologists or other experts can assess the victim's psychological condition and evidence of sexual violence experienced, all of which will help strengthen or confirm the victim's mental status and the incident in legal proceedings and case management.

This study aims to highlight the trauma experienced by rape victims. Therefore, several factors must be considered to deepen the trauma experienced by rape victims. One approach is to firmly enforce the law and change society's perspective on victims.

CONCLUSION

Law enforcement in Indonesia regarding abortion in rape cases already has clear regulations, namely Law 1/2023 concerning the Criminal Code (valid for 3 years since it was enacted, namely in 2026), Law 17/2023 concerning health which is further explained in PP 28/2024, also in PP 61/2014 as a mandate of Law Number 36 of 2009 (which is no longer valid with the issuance of Law 17/2023). The legal regulations currently in force in Indonesia regarding abortion in cases of rape victims are relevant to each other; even if there is a discrepancy, it can still be set aside by prioritizing new regulations or *lex posterior derogat lex priori*.

SUGGESTION

Abortion in cases of rape victims is a complex and multidimensional issue. Although existing regulations provide space for abortion under certain conditions, there are still many challenges in their implementation. It is important for the government, stakeholders, and society to work together to create an environment that supports victims. For example, create a warm family environment that supports the victim, so that the victim does not feel like a victim for a long time. Improvements and revisions to regulations regarding abortion, to better support rape victims, and to consider women's reproductive health rights.

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