

CONSTRUCTION OF ABORTION CRIMINAL PROVISIONS IN THE REFORM OF THE NATIONAL CRIMINAL CODE

M. Aris Munandar

Faculty of Law, Hasanuddin University, Makassar, Indonesia
m.arismunandar@unhas.ac.id

Received 10 Sept 2023 • Revised 27 Oct 2023 • Accepted 28 Nov 2023

Abstract

The construction of criminal sanctions for perpetrators of the crime of abortion in Law of the Republic of Indonesia Number 1 Year 2023 concerning the Indonesian Criminal Code (Kitab Undang-Undang Hukum Pidana/KUHP) in general contains a change in perspective regarding abortion. The criminalization of abortion in the National Criminal Code is a form of reform in law enforcement for the crime of abortion. The method of research used in normative legal research. The result of research reduction in the threat of imprisonment in the National Criminal Code for abortion perpetrators indicates a moderation of criminal sanctions for perpetrators of criminal acts. This is very different from the spirit of the Law of the Republic of Indonesia Number 36 Year 2009 concerning health (the Health Law) in preventing abortion. This is because abortion is indeed a field of criminal health law, which expresses the verb is and should indeed be regulated in health law as a *lex specialist*. However, there are also efforts to benefit that are proposed in the National Criminal Code, namely by providing 14 (fourteen) weeks of pregnancy termination for women who wish to have an abortion either for medical indications or for the crime of rape or other criminal acts of sexual violence.

Keywords: abortion, criminal law reform, national criminal code

INTRODUCTION

Abortion is a social and legal phenomenon that has always been the subject of academic and juridical study. The significance of the illegal abortion act that is rife in Indonesian society indicates that there is still a lack of public legal awareness regarding the legal implications of this act. According to data from the National Population and Family Planning Agency (Badan Kependudukan dan Keluarga Berencana Nasional/BKKBN) in 2020, the unwanted pregnancy rate (Kehamilan Tidak Diinginkan/KTD) in Indonesia has reached 17.5% (Utami, 2022). Of the teenage population (age 14-19 years) there are 19.6% of cases of unwanted pregnancy and around 20% of abortion cases in Indonesia are carried out by teenagers (Utami, 2022).

In principle, abortion is something that can be done if it complies with the provisions of the laws and regulations that regulate it. In Indonesia itself there are several rules that regulate abortion itself. Starting from Law 36 Year 2009 concerning Health (Health Law) and Law Number 1 Year 1946 concerning Criminal Law Regulations (Old Criminal Code).

The dynamics of the development of laws and regulations that regulate the crime of abortion will occur in 2022 at the time of Law Number 1 Year 2023 concerning the Criminal Code (National Criminal Code). Where, in the National Criminal Code, abortion is regulated *expressis verbis* (clean and clear). So there are variations in arrangements related to abortion, both in the National Criminal Code and in the Health Law.

Nevertheless, it should be noted that based on Article 624 of the National Criminal Code it is emphasized that Law Number 1 Year 2023 concerning the Criminal Code shall come into effect after 3 (three) years from the date of its promulgation. Thus, the National Criminal Code is basically not comprehensively applicable but is still in the form of an aspired law (*ius consituendum*).

Based on the above, it is very relevant to study normatively regarding the regulation of abortion in Indonesian legislation by looking at the legal ratio of illegal abortion criminal provisions in the National Criminal Code. So a new legal prescription can be produced regarding the theoretical basis for changing the provisions of the crime of abortion in the National Criminal Code as a form of national criminal law reform in Indonesia. The purpose of the research is a construction of abortion arrangements in Law Number 1 Year 2023 concerning the Criminal Code as a form of national criminal law reform.

RESEARCH METHOD

The type of research used in this paper is normative legal research. According to Peter Mahmud Marzuki (Handoko, 2010) referred to as normative legal research because this type of research is carried out by analyzing legal norms (existing provisions). Legal research (*rectsonderzoek*) is a process to find legal rules, legal principles, and legal doctrines in order to answer the legal issues faced (Marzuki, 2010). The approach in this research is the statutory approach. In the statutory approach, the author conducts a study of laws and regulations related to the legal issues studied, as well as looking for a legal ratio and ontological basis for enacting a law (Marzuki, 2017).

RESULTS AND DISCUSSION

Abortion

Abortion in particular does have its own problems in the world of law and medicine in Indonesia. The problem that often occurs in the case of abortion is that there is a conflict between ethics, human rights and law as a fundamental aspect of human life. There is a principle in law that what is meant by a child is someone under 18 years of age including a child in the womb, this can be seen in Article 1 number (1) of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2014. 2002 concerning Child Protection. It should be noted that having an abortion has its own limitations, that an abortion can only be performed if the gestational age is not yet 6 (six) weeks from the first day of the last menstrual period except in the event of a medical emergency (Article 76 of the Health Law). This is different in the United States, where abortion is limited to the termination of a 20-week pregnancy based on the date of the first day of the last normal menstrual period (Sofyan, 2021). With the phrase child in the womb in the Child Protection Act it becomes a problem in itself, especially in terms of universal human rights, that everyone including the state is obliged to provide protection for every human being who holds the status of a citizen in every country.

It should also be understood that in the KBBI version of the Language Development and Fostering Agency of the Ministry of Education and Culture of the Republic of Indonesia, there are also three types of abortion, namely (KBBI, 2019):

- a) Criminal abortion is an abortion that is carried out intentionally for a reason and contrary to the applicable law;

- b) Legal abortion is an abortion carried out with the knowledge of the authorities;
- c) Medical abortion is an abortion that is carried out through the administration of drugs.

Based on the description according to KBBI, it can be concluded that this describes procedural abortion, namely the mechanism for carrying out abortions by everyone. So that abortion in Indonesia is often seen that both abortions that are carried out naturally or accidentally and intentional abortions are sometimes considered the same because that view has taken root in people's lives. Even though these two things are very much different, an abortion that is carried out naturally or spontaneously certainly will not cause ethical and legal problems, including human rights. Unlike the case of intentional abortion without valid and convincing reasons according to law, of course, it will result in legal and human rights problems (Sofyan, 2014).

The forerunner to the emergence of problems or disputes over abortion according to Kartono Muhamad (Sofyan, 2014) namely the implementation of religious (celestial) norms, although there is another opinion that says that the question of abortion was started based on the Hippocratic oath (460-370 2BC).

In history, Hippocrates is known as the leading medical expert in Greece who did not support the practice of abortion. In a letter he stated that he would not give lethal drugs, even if requested, nor would he give such advice. In the same way, he would not give a woman drug that might result in an abortion (Sofyan, 2014).

Construction of Abortion Arrangements in the Reform of the National Criminal Code

Conceptually, abortion has a formal juridical prohibition. This is because there are criminal rules that regulate it. In the context of Indonesia as a rule of law country, there is Law Number 36 of 2009 concerning Health (Health Law) which regulates abortion in such a way. Based on Article 75 of the Health Law it is emphasized as follows:

- (1) Everyone is prohibited from having an abortion;
- (2) Prohibition as referred to in paragraph (1) may be excluded based on:
 - a. indications of medical emergencies detected at an early age of pregnancy, whether those that threaten the life of the mother and/or fetus, suffer from severe genetic diseases and/or congenital defects, or those that cannot be repaired, making it difficult for the baby to live outside the womb; or
 - b. pregnancy as a result of rape which can cause psychological trauma for rape victims.

Furthermore, it also regulates technically when someone can have an abortion. As in Article 76 of the Health Law which reads abortion as referred to in Article 75 can only be carried out:

- a. before 6 (six) weeks of pregnancy, counting from the first day of the last menstruation, except in cases of medical emergencies;
- b. by health workers who have skills and authority and who have certificates determined by the minister;
- c. with the consent of the pregnant woman concerned;
- d. with the husband's permission, except for rape victims; and
- e. health service providers who meet the requirements set by the Minister.

Referring to Article 75 of the Health Law, it can be understood that in principle an abortion can only be carried out with a number of formal requirements that must be met, such as due to medical emergency indications or pregnancy resulting from rape. Apart from that, Article 76 of the Health Law also stipulates a number of things that must be fulfilled before having an abortion, one of which is regarding gestational age. Where, everyone who wants to have an abortion, must first ensure that the gestational age is not yet 6 (six) weeks from the first day of the last menstruation.

Of course, these rules are not without criminal implications if they are violated. This is stated in Article 194 of the Health Law which reads: "Anyone who intentionally has an abortion not in accordance with the provisions referred to in Article 75 paragraph (2) shall be punished with imprisonment for a maximum of 10 (ten) years and a fine of up to Rp. 1,000,000,000.00 (one billion rupiah)".

The criminal threat in Article 194 is quite heavy because the sanctions are cumulative. Where, perpetrators of illegal abortions can be charged with two sanctions at once, namely a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah). Referring to the principle of legality in von Feurbach's teachings, basically wanting to be deterrence, but not with the application of punishment, but with the threat of punishment in statutory regulations. So that it must be stated expressly *verbis* crime and punishment (*psychologische dwang*) (Hiariej, 2022).

In a sense, in terms of determining actions that are prohibited in criminal regulation, not only are actions written concretely (clearly) in legislation, but also related to the types of offenses that are threatened. As a result, the person who wants to commit a crime already knows in advance about the

crime that is threatened by the law (Moeljatno, 2000). Van der Donk (Utrecht, 1960) describes that the intent of von Feurbach's teachings is to provide a limitation of a person's desire or intention to commit a crime.

From this explanation, it can be seen that the threat of criminal sanctions is actually very important in criminal law and regulation. This is to give the effect of fear and prevent people from committing a crime, including carrying out an abortion that is against the law. Abortion against the law can also be referred to as an act of abortion that is not in accordance with the provisions of the laws and regulations that apply in a particular country. In the legal context in Indonesia, unlawful abortion is any act of abortion that is carried out prematurely and is not in accordance with the provisions of the Health Law and contrary to the provisions of other regulations relating to abortion such as the Criminal Code (Sofyan, 2014).

The existence of criminal threats in law is very important so that criminal acts can be prevented normatively. One way is to increase the threat of imprisonment for perpetrators of abortion as stipulated in Article 194 of the Health Law. However, in 2022 after the issuance of Law Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as the National Criminal Code) the criminal provisions for the crime of abortion have changed significantly in terms of criminal penalties and several other technical matters.

Based on Article 463 of the National Criminal Code, it is confirmed as follows:

- (1) Every woman who has an abortion shall be punished with imprisonment for a maximum of 4 (four) years.
- (2) The provisions referred to in paragraph (1) do not apply in the event that a woman is a victim of the crime of rape or other crimes of sexual violence that causes pregnancy whose gestational age does not exceed 14 (fourteen) weeks or has indications of a medical emergency.

In expressis verbis, it can be seen that in the provisions of Article 463 of the National Criminal Code there is a degradation of the criminal threat for perpetrators of abortion. Where originally referring to Article 194 of the Health Law the maximum threat of imprisonment for abortion perpetrators is a maximum of 10 (ten) years, but after the promulgation of the National Criminal Code the criminal sanctions have changed significantly. Namely, for abortion perpetrators, they are only threatened with imprisonment for a maximum of 4 (four) years. In fact, there are no more fines for abortionists in Article 463 of the National Criminal Code. Even though the Health Law stipulates that abortion perpetrators can be fined a maximum of Rp. 1,000,000,000.00 (one billion rupiah) cumulatively with imprisonment.

The change in the construction of criminal sanction arrangements for abortion in the National Criminal Code shows that there are different points of view in assessing the abortion case. Moreover, according to the version of the National Criminal Code, the age of pregnancy cannot exceed 14 (fourteen) weeks. Initially, the Health Law stipulated that the gestational age for an abortion must be under 6 (six) weeks from the last menstrual period.

Based on this, it can be explained that there are several weaknesses in the regulation of abortion in the National Criminal Code, including:

- a) Low threats for perpetrators of criminal acts of abortion that have the potential to reduce fear for perpetrators to have illegal abortions;
- b) There is no threat of fines for the perpetrators of the crime of abortion;
- c) The regulation of abortion through the National Criminal Code is very irrelevant. Bearing in mind that abortion is a field of health criminal law, it should be sufficient to regulate it through the Health Law as a *lex specialis*.

Apart from the weaknesses of the National Criminal Code above, there is also relevance regarding the termination of pregnancy which is set at a limit of 14 (fourteen) weeks. This is almost similar to the United States which provides a term limit of 20 (twenty) weeks of gestation based on the date of the first day of the last normal menstrual period (Kenneth, 2004).

Juridical considerations that can be seen with the existence of a criminal law policy for terminating 14 (fourteen) weeks of gestation in the National Criminal Code are in order to facilitate the investigation process by providing sufficient time for investigators to investigate if the person performing the abortion is a victim of a criminal act of rape or other crimes of sexual violence.

In principle, there has been a change of perspective in the National Criminal Code regarding the crime of abortion. Considering that the Old Criminal Code did not explicitly regulate abortion in it. However, the inclusion of abortion in the criminal provisions of the National Criminal Code shows the intention of the legislators who consider abortion as a *lex generalis* which is included in the field of criminal law in general. In fact, abortion is closely related to aspects of health criminal law. So that abortion should still be regulated in the construction of the Health Law so that it is relevant both theoretically and in regulation.

CONCLUSION

After the promulgation of Law Number 1 Year 2023 concerning the Criminal Code (National Criminal Code), there has been a change in arrangements regarding criminal sanctions for perpetrators of illegal abortions. The moderation of criminal threats contained in the provisions of Article 463 of the National Criminal Code basically does not have a significant impact on the reform of the national criminal law that is expected by the public. Precisely this can be seen from the perspective of criminal law as a criminalization that is not on target. Given the number of abortions that occur in Indonesia has entered the emergency phase. Apart from that, abortion arrangements should be sufficiently regulated in Law 36 of 2009 concerning Health (Health Law). This is because abortion is part of health science and health criminal law. So that in order to be *lex specialis*, the regulation must be outside the National Criminal Code in order to make it easier for law enforcement officers to sort out which specific regulations will be enforced when such a legal incident occurs.

REFERENCES

- Agus Yudha Handoko, *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial*, Kencana Prenadamedia Group, Jakarta, 2010.
- Andi Muhammad Sofyan and M. Aris Munandar, *Aspek Hukum Pelayanan Kesehatan (Suatu Refleksi Teoretis dan Empiris)*, Kencana PrenadaMedia Group, Jakarta, 2021.
- Badan Pengembangan Bahasa dan Perbukuan, Kementerian Pendidikan dan Kebudayaan Republik Indonesia, KBBI V 0.3.2 Beta (32), Jakarta, 2019.
- Ch. J., Enschede, *Beginnselen Van Strafrecht*, Kluwer, Deventer 2002.
- E. Utrecht, *Hukum Pidana 1*, Penerbitan Universitas, Bandung, 1960.
- Eddy O.S. Hiariej, *Asas Legalitas dan Perkembangannya dalam Hukum Pidana*, Makalah Pelatihan Hukum Pidana dan Kriminologi, 23-27 February 2014, Yogyakarta.
- Fajarianto, O., Hapid, S. D., Hanafri, M. I., & Apriawan, R. (2017). Sistem Pakar Diagnosis Kerusakan Mesin Mobil Menggunakan Metode Forward Chaining Berbasis Android. *EDUTECH: Journal of Education and Technology*, 1(1), 67-79.
- Hendaru Tri Hanggoro, 2014, *Kontroversi Aborsi: Perdebatan Aborsi Mengemuka Sejak Zaman Yunani Kuno. Pangkalnya Pada Kapan Janin Mempunyai Jiwa*.
- Kenneth J. Leveno, et.al, 2004, *Obstetri Williams: Panduan Ringkas*, (translated by Brahm U. Pedit), Penerbit Buku Kedokteran EGC, Jakarta.
- Moeljatno, *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, 2000.
- Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta, 2010.
- Peter Mahmud Marzuki, *Penelitian Hukum (Edisi Revisi)*, Kencana Prenadamedia Group, Jakarta, 2017.
- Pramesti Utami, 2022, *Angka Kehamilan Tak Diinginkan di Kalangan Remaja Tinggi, Pendidikan Kespro Mendesak Dibutuhkan*.
- Zaenab, S., Maaruf, A. H., & Fajarianto, O. (2020). Teacher communication in caring children age 3-4 years in paud in mataram city. In *Proceedings of the International Conference on Industrial Engineering and Operations Management* (Vol. 59, No. 1, pp. 3289-3295).