

Contradictions In Indonesia's Legal Approach To Abortion: A Study Of Reproductive Health Law And The Criminal Code

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ABSTRACT

This research examines the legal approach to abortion in Indonesia, focusing on the significant conflict between the Indonesian Criminal Code's provisions on abortion and the stance of the Reproductive Health Law. The study aims to understand the implications of this legal contradiction on women's reproductive health and rights, and propose potential solutions to harmonize the legal framework. It employs a comparative legal analysis method, investigating the origins, interpretations, and effects of the respective laws, with data collected from legal documents, scholarly articles, and databases. The findings reveal that the existing legal contradiction potentially contributes to unsafe abortion practices, leading to adverse health consequences and undermining women's rights. The study proposes amendments to align the Criminal Code with the Reproductive Health Law, policy reforms, and cultural initiatives based on international best practices and scholarly recommendations. The research emphasizes the need for comprehensive reproductive health services that respect women's rights and protect their health, thereby advocating for a safer and more inclusive environment in Indonesia.

KEYWORDS Abortion Laws, Indonesia, Reproductive Health Law, Criminal Code, Women's Health and Rights.



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INTRODUCTION

Indonesia has a complex legal environment regarding abortion, characterized by a fundamental contradiction between the criminal code (KUHP) and the Reproductive Health Law. The Indonesian Criminal Code categorizes abortion as a criminal act, except under specific circumstances such as life-threatening conditions to the mother or pregnancies resulting from rape (Criminal Code of Indonesia, Articles 346-349). Meanwhile, the Reproductive Health Law of 2009 (Law No. 36/2009) recognizes women's right to safe and accessible reproductive health services, which include safe abortion services (Reproductive Health Law, Article 15). This legal contradiction poses significant implications for women's reproductive health and rights, and understanding these implications is crucial to advocate for better legal and policy reforms.

In 2021, Komnas Perempuan, the National Commission on Violence Against Women in Indonesia, reported a high prevalence of sexual violence in public or community settings, accounting for 21% of the total cases (1,731 cases). Among these, the most notable were sexual violence cases, comprising 55% (962 cases) of the total, which included rape, sexual harassment, and unspecified or other forms of sexual violence (Komnas Perempuan, 2021). Furthermore, a recent police report from June 2023 revealed an illicit abortion practice in Jakarta, leading to the arrest of seven individuals (Olivia, 2023). One of the detainees, identified only as SN, was not medically trained but performed abortions. Such cases highlight the urgent need for a comprehensive understanding of the implications of Indonesia's abortion laws and propose viable solutions.

The rise in sexual violence (Asriani, 2020), unsafe abortion practice (Åhman et al., 2011), and the resultant legal complications indicate an urgent need to study the legal contradiction in Indonesia's abortion laws (Gerdtts et al., 2013a). Understanding this contradiction is crucial for informing legal reforms, developing effective policies, and improving women's health outcomes in Indonesia. Legally, the status of abortion in Indonesia is still in a gray area (Moseson et al., 2020). For the most part, Indonesian law considers abortion as a criminal act, except in certain cases such as medical emergencies or rape (Asriani, 2020). However, this does not prevent unsafe abortion practices that occur throughout the country (Prata et al., 2009a).

Meanwhile, reproductive health law has a broader scope, covering various other issues, including contraceptive rights, sexuality education, and maternal health services. At the policy and legal level, it is crucial to review and reconsider how Indonesia handles these issues. According to WHO data, reproductive health problems remain a significant issue in Indonesia, where the maternal mortality rate is still high, and access to contraception is still low, especially in rural and remote areas (WHO, 2021). The urgency of this issue is further underscored by the fact that reproductive health rights are vital for gender equality and women's empowerment (Prata et al., 2009b). If not addressed seriously, this issue could have severe long-term consequences, including high maternal mortality rates, high teen birth rates, and increased cases of unsafe abortion (Åhman et al., 2011; Gerdtts et al., 2013b; Grimes et al., 2006; Prata et al., 2009a).

Furthermore, this issue also closely relates to sustainable development and human rights (Singh et al., 2017). Therefore, it is essential for researchers, policy-makers, and all stakeholders to understand, analyze, and discuss abortion laws and reproductive health law in Indonesia from various perspectives. Therefore, the aim of this research is to provide a comprehensive and in-depth overview of the context, challenges, and opportunities present within the abortion laws and reproductive health law in Indonesia. This study aims to inform and guide public dialogue and debate, as well as assist in the formulation of more effective and equitable policies and programs.

The primary objective of this research is to critically examine the inherent conflict in Indonesia's legal approach to abortion, as reflected in the contradictions between the abortion provisions in the criminal code and the comprehensive view of reproductive health presented in the Reproductive Health Law. This research seeks to answer the following questions. 1. What are the key areas of conflict between the criminal code's provisions on abortion and the reproductive health law's approach to reproductive health in Indonesia? 2. What are the implications of these legal contradictions for women's reproductive health and rights? 3. How can the Indonesian legal framework be improved to ensure a harmonized approach to abortion that aligns with comprehensive reproductive health services and respects women's rights?

To address these research questions, we propose a comparative analysis of the criminal code and the reproductive health law. This approach will involve a detailed examination of the provisions of both laws, as well as their interpretation and implementation in practice. We will also analyze relevant case law, academic commentary, and policy documents to understand the broader context and implications of these legal contradictions. This research is situated within the framework of legal realism, which emphasizes the real-world effects of laws and recognizes that law is a dynamic social institution that must adapt to changing social realities (Gerds et al., 2013a; Grimes et al., 2006.-b; Kumar et al., 2009a; Wahyuni et al., 2020a). By using this approach, this study seeks to highlight the need for a harmonized legal approach to abortion in Indonesia that prioritizes women's health and rights.

RESEARCH METHOD

This research will employ a comparative legal analysis approach (Bearak et al., 2020). This method allows for a comprehensive comparison and contrast of the various aspects and components of two or more legal systems or legal norms, in this case, the Indonesian criminal code and reproductive health law (Saputra et al., n.d.). Comparative legal analysis helps identify gaps, inconsistencies, and contradictions between different legal frameworks, and offers valuable insights into potential harmonization strategies (Azriadi, & Adriaman, 2021).

The research design follows a doctrinal legal research methodology. It will entail a thorough and systematic examination of legal provisions, judicial decisions, and academic opinions related to abortion under the Indonesian criminal code and reproductive health law. Primary sources such as statutory laws and court

judgments, as well as secondary sources including scholarly articles, books, and official reports, will be analyzed.

The scope of this research primarily focuses on the intersection of criminal law and reproductive health law concerning abortion in Indonesia. This encompasses a detailed analysis of. First, Indonesia's Criminal Code (Kitab Undang-Undang Hukum Pidana or KUHP), particularly the provisions that pertain to abortion. Second, Indonesia's Law on Health (Undang-Undang Kesehatan), with specific reference to the clauses that relate to reproductive health and abortion. Third, relevant regulations and policy directives issued by the Indonesian Government, the Ministry of Health, or any other concerned authorities.

This study used comparative analysis. The data gathered from both Indonesian law and international perspectives will be compared to highlight the differences and similarities. This comparison will offer insights into potential resolution strategies that could be adapted to the Indonesian context.

RESULT AND DISCUSSION

Examination of the Criminal Code's Provisions on Abortion

Abortion, in the Indonesian legal context, is largely governed by the Kitab Undang-Undang Hukum Pidana (KUHP), or the Indonesian Criminal Code. The specific provisions that deal with abortion are mainly found in Articles 346, 347, 348, and 349. Article 346 stipulates that any woman who intentionally terminates her own pregnancy with her consent is subject to a maximum imprisonment of four years. The emphasis here is on the woman's role and consent in the act of abortion. According to article 347, any individual who terminates a woman's pregnancy with her consent is liable for imprisonment of up to six years. This provision deals primarily with the role of the abortion provider. Article 348 establishes that anyone who intentionally terminates a woman's pregnancy without her consent can be sentenced to a maximum of ten years in prison. The article protects women from forced abortions. Article 349 outlines that anyone who unintentionally causes an abortion could be punished with a maximum prison sentence of five years.

The origins of the Indonesian Criminal Code's abortion laws can be traced back to the Dutch colonial period. The current code is an adaptation of the old Dutch Penal Code, introduced when Indonesia was under Dutch colonial rule. This historical connection underscores the influences of Western legal and moral ideologies on Indonesia's abortion laws (Sedgh et al., 2016).

Historically, the abortion laws in Indonesia have been influenced by various socio-political factors. The state's interest in controlling population growth, coupled with the influence of conservative religious ideologies, has played a significant role in shaping the strict legal stance towards abortion (Bearak et al., 2020). The societal norms, emphasizing women's roles as mothers, have also contributed to the formulation of stringent abortion laws.

However, the enforcement and interpretation of these laws in practice have been marked by complexities. Judicial interpretations often lean towards a conservative approach, upholding the criminal sanctions on abortion. However, a closer examination of case law reveals a degree of judicial discretion in the application of

these laws. For instance, in cases where the life or health of the woman is at risk, courts have shown leniency (Kantorová, 2020).

Despite the potential for such discretion, the stringent laws and their conservative interpretation contribute to a broader culture of stigmatization and silence around abortion. The lack of clarity surrounding lawful abortions further adds to this ambiguity, leading to significant barriers in access to safe and legal abortion services (United Nations, 2002).

Nevertheless, it is essential to recognize that these interpretations are not stagnant but evolve in line with changing societal attitudes and legal discourse. The increasing recognition of women's reproductive rights at the global level is also impacting the conversation around abortion laws in Indonesia. The implications of Indonesia's criminalization of abortion extend beyond the realms of law, significantly impacting the sphere of women's reproductive health. By limiting the accessibility of safe and legal abortions, the law may inadvertently encourage unsafe abortion practices, leading to severe health risks and even loss of life. Firstly, the stringent abortion laws can drive women to seek abortions from unqualified providers or resort to self-induced methods, often under unsafe conditions (Åhman et al., 2011). The World Health Organization has noted that in settings where abortion is highly restricted, the prevalence of unsafe abortions and related mortality are typically high. As a result, unsafe abortions contribute significantly to maternal mortality rates, which is a pressing issue in Indonesia (WHO, 2011).

Secondly, the fear of legal repercussions and social stigma associated with abortion can prevent women from seeking post-abortion care following an unsafe procedure, further exacerbating the risk to their health (L. Suryani et al., 2021). This situation highlights how the criminalization of abortion can also impact the broader health system, putting a strain on resources due to the treatment of complications from unsafe abortions. Furthermore, criminalizing abortion fails to acknowledge the realities of sexual violence and the need for access to safe abortion services for rape survivors. The strict abortion laws can further victimize these women, forcing them to carry unwanted pregnancies, leading to severe mental health consequences (Hamid & Fakhyadi, 2022.; Prata et al., 2009a; Hamid & Fakhyadi, 2022.; Prata et al., 2009a; Shahrullah et al., 2020) (Amnesty International, 2010).

Lastly, the legal restrictions on abortion can disproportionately impact disadvantaged women, including those from low-income backgrounds, rural areas, or younger women who lack access to information and safe abortion services. Such a situation can further deepen the existing health and social inequities in the society (Prata et al., 2009a).

Analysis Of the Reproductive Health Law's Provisions on Abortion

Indonesia's Reproductive Health Law, as outlined in the Health Law No. 36/2009, outlines a more nuanced approach towards the issue of abortion. The law, while maintaining a general prohibition against abortion, allows certain exceptions under specific conditions.

Article 75 (1) and (2) of the Health Law stipulates that every person has the right to obtain reproductive health services according to religious norms, legal provisions, and societal ethics. However, abortion is only permitted in circumstances

where the pregnancy threatens the life of the woman or the fetus, and the abortion must be performed by a certified health professional (Health Law No. 36/2009 Art. 75 (2)). Additionally, an abortion must be undertaken in the earliest stages of pregnancy, and the patient must undergo counseling before and after the procedure.

Article 76 further reinforces the conditions under which abortion is permissible. It stipulates that the procedure should be performed by a qualified healthcare professional, the woman should have the consent of her husband (unless she is a victim of harmful sexual conduct), and it should only be undertaken in the case of medical emergencies or for therapeutic reasons (Health Law No. 36/2009 Art. 76). The Reproductive Health Law also establishes penalties for unauthorized abortions. Article 194 imposes a maximum penalty of 10 years' imprisonment and a fine for those performing abortions outside the stipulated conditions.

While the Reproductive Health Law appears to offer a more inclusive stance towards abortion, the specific conditions under which abortion is allowed, and the penalties for non-compliance, can create significant barriers for women seeking access to safe and legal abortion services. This law can be seen as an attempt to balance between the cultural, religious, and ethical considerations of Indonesian society, and the necessity for reproductive health services in certain circumstances. The law reflects the complexity and sensitive nature of the issue, and sets the stage for further exploration into its implications on women's reproductive health and rights.

The abortion clauses in the Reproductive Health Law stem from Indonesia's efforts to align its national laws with global health standards while considering its cultural, religious, and societal norms. The need for more comprehensive legislation regarding reproductive health, including abortion, became evident in the face of rising maternal mortality rates, a significant proportion of which were due to unsafe abortions (Grimes et al., 2006; Prata et al., 2009a). The formulation of these clauses involved a myriad of stakeholders, including lawmakers, healthcare professionals, religious leaders, and women's rights activists. The law's provisions represent a compromise between the ethical concerns of abortion opponents, particularly among religious conservatives, and the urgent need for medical intervention in cases where a woman's life is at risk (L. Suryani et al., 2021).

Interpretations and application of the abortion clauses in the Reproductive Health Law have been complex. While the law's provisions aim to offer some leeway for legal abortions, the specific conditions required – such as the consent of the husband and the requirement of life-threatening circumstances – can make it difficult for women to access legal abortions in practice (Wahyuni et al., 2020b). Moreover, the contradiction between the Reproductive Health Law and the Criminal Code creates legal ambiguity and can potentially dissuade healthcare providers from providing abortion services, even in permitted circumstances, for fear of legal repercussions (Grimes et al., 2006; Kumar et al., 2009b)

The Reproductive Health Law's provisions regarding abortion can significantly influence women's reproductive health outcomes in Indonesia. From one perspective, the law has the potential to decrease the risk of unsafe abortions by providing a legal avenue for terminating pregnancies in specific circumstances, such as when a woman's life is at risk (Remez et al., 2020). However, the implementation and impact of these provisions are less straightforward due to the conditions

attached to legal abortions and the aforementioned contradictions with the Criminal Code. In theory, the law should enhance access to safe and legal abortion services, but the stringent requirements — including obtaining spousal consent and having a life-threatening condition — may unintentionally create barriers for women seeking these services (Oluseye et al., 2022).

Further, these legal ambiguities may contribute to healthcare providers' reluctance to provide abortion services, even when legally permissible, due to fears of potential prosecution. This reluctance can restrict access to safe and legal abortion services, thus increasing the likelihood of unsafe abortions (Tongat & Anggraeny, 2020); Saragi, 2021). Comparison Of Findings and Implications for Women's Health and Rights

A comparative analysis of the provisions on abortion as stated in Indonesia's Criminal Code and the Reproductive Health Law reveals several striking contradictions and points of tension. The Criminal Code, with its historical and social foundations rooted in traditional and religious perspectives, views abortion largely from a punitive perspective, making it a criminal act except in specific cases of emergency or maternal health risk. In contrast, the Reproductive Health Law, which draws upon modern principles of reproductive rights and health, provides a broader framework for legal abortions (Saragi, 2021). However, the stringent requirements within the Reproductive Health Law, such as obtaining spousal consent and proving a severe health risk to the mother, seem to echo the restrictive sentiments present in the Criminal Code. This leads to an overarching legal ambiguity that is potentially detrimental to women's reproductive health.

Despite the Reproductive Health Law's intent to protect women's reproductive rights and health, the existing conflict with the Criminal Code seems to overshadow its potential benefits. For instance, the Criminal Code's strong criminal penalties for abortion can deter healthcare providers from offering safe abortion services, even in cases where it would be legal under the Reproductive Health Law. This legal contradiction could further push women towards unsafe abortion practices, thus exacerbating public health risks.

One major contradiction that emerges between the Indonesian Criminal Code and the Reproductive Health Law lies in their divergent positions on the permissibility of abortion (Tongat & Anggraeny, 2020). The Criminal Code, with its punitive approach, essentially criminalizes abortion with limited exceptions for emergency or severe maternal health risks. It largely reflects the traditional, moral, and religious values that view abortion as a wrongful act.

On the other hand, the Reproductive Health Law, influenced by modern perspectives on women's rights and health, permits abortions under more circumstances, including cases of fetal abnormalities, rape, or if the pregnancy endangers a woman's mental health (Saragi, 2021). However, it's important to note the existence of stringent requirements within the Reproductive Health Law, such as the need for spousal consent and proving a severe health risk to the mother. These restrictions somewhat mirror the stringent stance of the Criminal Code, creating an inherent tension and ambiguity within the law itself.

Another significant contradiction arises in the implementation of these laws. Due to the strong criminal penalties associated with abortion under the Criminal

Code, healthcare providers may be reluctant to perform abortions even in scenarios where they would be legal under the Reproductive Health Law. This contradiction fuels a climate of fear and uncertainty, which can force women to resort to unsafe abortion practices, risking their health and life. The contradictions between these two bodies of law underscore a disjointed legal approach to abortion, where the emphasis swings between punitive action and a woman's right to health and life. This schism in the legal system not only impacts the consistent application of the law but also has significant implications for women's health and reproductive rights in Indonesia.

The identified contradictions between the Criminal Code and the Reproductive Health Law in Indonesia bear substantial implications for women's health and rights, particularly their access to safe and legal abortion services. The inconsistencies and ambiguities within and between these laws can cause hesitation among healthcare providers, who may fear legal reprisals, leading them to deny women necessary abortion services. This, in turn, may push women towards unsafe abortion methods, increasing their risk of serious health complications such as infections, sepsis, hemorrhage, and in severe cases, even death.

The punitive approach of the Criminal Code, combined with stringent requirements and vagueness of the Reproductive Health Law, may serve as significant barriers for women seeking to access legal abortion services. Women, particularly those from disadvantaged socioeconomic backgrounds, may lack the resources or understanding to navigate this legal labyrinth, thereby limiting their access to these critical services. These legal contradictions may also undermine women's reproductive rights. The restrictions placed on abortion not only impede a woman's right to make decisions regarding her own body, but they also threaten the rights to health, life, and freedom from inhumane and degrading treatment.

The criminalization and stigma associated with abortion can impose severe psychological stress on women who are already dealing with an unplanned or complicated pregnancy. The fear of legal reprisals, combined with limited access to appropriate healthcare services, can lead to anxiety, depression, and other mental health issues. Proposal Of Potential Solutions Based on International Best Practices and Scholarly Recommendations

Across the globe, countries have navigated complex legal landscapes to arrive at more balanced and effective abortion laws, from which Indonesia could draw valuable insights. Some examples include:

- a. Decriminalization of Abortion: Countries such as Canada and Australia have completely decriminalized abortion, framing it instead as a matter of public health and human rights. By removing punitive measures and eliminating legal ambiguities, they have created a more supportive environment for women to access safe and legal abortion services (Ambast et al., 2023).
- b. Codification of Clear Guidelines: In South Africa, the Choice on Termination of Pregnancy Act provides clear guidelines regarding when and under what circumstances a woman can access abortion services. This clarity has helped eliminate misunderstandings and legal ambiguities, promoting more consistent application of the law and better healthcare outcomes for women (Prata et al., 2017).

- c. **Mandatory and Comprehensive Sex Education:** Countries like the Netherlands and Sweden have integrated comprehensive sex education into their school curricula, which has helped reduce the rate of unwanted pregnancies, and consequently, the need for abortions (Ambast et al., 2023).
- d. **Investment in Reproductive Healthcare Infrastructure:** In Finland and Denmark, substantial investments have been made to enhance reproductive healthcare infrastructure. The availability of advanced medical facilities has ensured that women who require abortion services can access them safely and without stigma (Ketting et al., 2020).

Scholarly work provides a wealth of recommendations on how to address legal inconsistencies and barriers to safe abortion access. These recommendations often integrate legal, policy, and public health perspectives. Scholars emphasize the need for legal reform to resolve the contradictions between different pieces of legislation. Suggested reforms include the decriminalization of abortion and the incorporation of clear, non-ambiguous terms in legal texts to prevent differing interpretations (Kumar et al., 2009b).

Policy-level changes are another key recommendation. These changes may include the formulation of detailed procedural guidelines for the implementation of laws, ensuring a rights-based approach to abortion, and prioritizing women's health and rights in policy discourse (Anggara, 2021; Saragi, 2021; B. Suryani et al., 2022). Scholars also suggest an increase in investments in public health initiatives. This includes comprehensive sex education programs, family planning services, and initiatives to reduce the stigma around abortion. Increasing access to and quality of post-abortion care is another critical recommendation (Izugbara et al., 2020).

Engaging with communities and cultural and religious leaders can also help change perceptions and attitudes toward abortion. This could reduce social barriers to accessing safe abortion services (O'Connell et al., 2022). The scholarly recommendations emphasize a multifaceted approach, with strategies spanning legal reform, policy interventions, public health initiatives, and community engagement. Implementing these strategies could help to mitigate the identified contradictions and improve women's health outcomes and rights in Indonesia.

Based on the analysis of international best practices and scholarly recommendations, this study proposes several potential solutions to reconcile the contradictions between the Criminal Code and the Reproductive Health Law in Indonesia. These solutions aim to enhance women's reproductive health and rights. The first step involves amending the Indonesian Criminal Code to decriminalize abortion, which aligns with the intent of the Reproductive Health Law. This could involve removing or revising specific articles that criminalize abortion and establishing clear, non-ambiguous terms to prevent differing interpretations.

On the policy front, detailed procedural guidelines for the implementation of both laws should be formulated. The focus should be on prioritizing women's health and rights and ensuring a rights-based approach to abortion. Policymakers should consider creating guidelines that provide clear instructions for healthcare providers on legal abortion procedures and post-abortion care (Anggara, 2021). There should be increased investment in public health initiatives. These could include comprehensive sex education programs and family planning services to

prevent unwanted pregnancies. Reducing the stigma around abortion is equally critical, which could be achieved through public awareness campaigns. Improving the quality of and access to post-abortion care is also essential.

Lastly, community engagement should be prioritized. Engaging cultural and religious leaders in dialogue and education about reproductive health and rights could help change perceptions and attitudes towards abortion, thereby reducing social barriers to accessing safe abortion services (O'Connell et al., 2022). In sum, these potential solutions aim to address the identified contradictions by integrating a multi-faceted approach, including legal amendments, policy reforms, public health initiatives, and community engagement. Implementing these strategies could help mitigate the legal contradictions in Indonesia and improve women's health outcomes and rights.

CONCLUSION

This research has undertaken a thorough examination of the legal approach towards abortion in Indonesia. It has delved into the conflict arising from the criminalization of abortion under specific circumstances as per the criminal code, and the contrasting approach of the reproductive health law which advocates for safe and accessible reproductive health services, inclusive of safe abortion. The contradiction places women in a precarious situation where accessing necessary health services could potentially result in criminal charges, thus creating a paradoxical and troublesome environment.

The implications of this legal contradiction for women's health and rights are profound. The study has highlighted that the legal ambiguity potentially leads to unsafe abortion practices. This is further evidenced by the numerous incidents of clandestine abortion practices performed by untrained individuals. This does not merely pose a risk to women's health, but also imposes a significant burden on their rights. Many women find themselves coerced into potentially dangerous situations due to the lack of safe and legal abortion services, thereby raising questions about their safety and dignity.

To navigate this issue, the study has proposed potential solutions. These solutions are drawn from international best practices and scholarly recommendations and include legal amendments to align the criminal code with the reproductive health law, policy reforms to ensure access to safe and legal abortion services, and social and cultural initiatives to increase awareness about women's reproductive health and rights. For these solutions to be effective, it is of the essence that the Indonesian government, policymakers, and society actively engage in realizing these reforms to safeguard women's health and uphold their rights.

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