

Abortion Dispensation Due to Verified Contraceptive Failure: A Normative Juridical Study of Article 60 of Law Number 17 of 2023 on Health

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ABSTRACT

Indonesia faces a paradox in its reproductive health policy: while actively promoting the Family Planning program, it explicitly acknowledges the possibility of contraceptive failure under Law Number 52 of 2009. However, it fails to provide a legal remedy when such failure results in unintended pregnancy. Law Number 17 of 2023 on Health and Law Number 1 of 2023 on the Criminal Code (KUHP) permit abortion only under limited exceptions, namely medical emergencies and pregnancies among rape victims, without accommodating contraceptive failure, notwithstanding the State's recognition that such failures may occur. This study, titled Abortion Dispensation Due to Verified Contraceptive Failure: A Normative Juridical Study of Article 60 of Law Number 17 of 2023 on Health, aims to (1) analyze the legal standing of unintended pregnancy resulting from verified contraceptive failure within the framework of exceptions to the prohibition of abortion and (2) develop a contextually appropriate legal dispensation model for abortion in such cases within the Indonesian legal system. The research employs a normative legal method, utilizing conceptual, statutory, and comparative approaches. Secondary legal materials are examined through systematic, teleological, and extensive interpretation, alongside a comparative analysis of six selected countries. The findings demonstrate that the legal status of contraceptive failure is characterized by a condition of normative incompleteness (*onvolledigheid van de norm*), thereby undermining the principles of legal certainty and legal protection. An interpretation of "medical emergency," grounded in the World Health Organization's definition of health, may serve as an entry point to accommodate such cases. The appropriate legal construction lies in the establishment of a dispensation mechanism implemented through an integrated dispensation panel at the district/city level. This study concludes that an administrative dispensation framework can bridge the gap between legal certainty and individual justice without compromising the integrity of the legal system.

INTRODUCTION

Indonesia, as the fourth most populous country in the world with approximately 275 million people in 2022, faces complex demographic challenges (Badan Pusat Statistik, 2023). The Family Planning (Keluarga Berencana) program, which has long been established as a national policy, has received international recognition from the United Nations Population Fund (UNFPA) as a model of best practice among developing countries (United Nations Population Fund, 2023). Law Number 52 of 2009 mandates the government to enhance both the accessibility and quality of contraceptive services while taking into account various individual factors affecting couples (Republik Indonesia, 2009).

Government Regulation Number 87 of 2014 explicitly acknowledges the possibility of contraceptive failure, stipulating the need to provide assistance to reproductive-age couples "who experience failure in the use of contraceptive methods" (Republik Indonesia, 2014). A study by Polis et al. (2016) found that contraceptive failure rates during 12 months of typical use vary considerably, ranging from 0.6% for implants to 13.9% for periodic abstinence methods. In developing countries, approximately 74 million unintended pregnancies occur annually, with around 30% attributable to contraceptive failure (Polis et al., 2016).

A paradox emerges when the Indonesian legal system does not fully address the consequences of contraceptive failure. Law Number 17 of 2023 on Health (Article 60 paragraph 1) prohibits abortion, subject to exceptions as regulated under the Criminal Code. Law Number 1 of 2023 on the Criminal Code (Article 463 paragraph 2) provides exceptions only under two conditions: rape-related pregnancies (up to a maximum of 14 weeks) and cases of medical emergency. Contraceptive failure is not encompassed within these exceptions (Republik Indonesia, 2023a; Republik Indonesia, 2023b).

Based on a systematic review published by Kelemu et al., (2023) contraceptive failure rates remain high in low- and middle-income countries. Correspondingly, a case report published by Erics et al. documented an unintended pregnancy due to contraceptive failure in a levonorgestrel implant user who experienced a ruptured ectopic pregnancy. The patient became pregnant despite using a levonorgestrel implant obtained from the National Population and Family Planning Board (Badan Kependudukan dan Keluarga Berencana Nasional, BKKBN) and inserted by a trained healthcare provider (Efrany et al., 2025). This case illustrates that contraceptive failure may lead to unintended pregnancy and, in certain instances, life-threatening complications.

Data from the Maternal Perinatal Death Notification (MPDN) of the Ministry of Health of Indonesia (2023) indicate that complications arising from unsafe abortion contribute to approximately 450–537 maternal deaths annually (11–13% of total maternal mortality) (Setyahadi, 2023). Globally, it is estimated that around 25 million abortions (45%) were performed under unsafe conditions between 2010 and 2014 (Ganatra et al., 2017). In contrast, the prevalence of abortion in Indonesia remains insufficiently documented, with only limited sources reporting reliable estimates. Recent research suggests that the incidence of induced abortion is approximately 42.5 per 1,000 women of reproductive age in Java (2018). Among these cases, approximately 16% used medication, 40% used jamu (traditional herbal medicine), and 39% used other methods, such as abdominal massage. The absence of comprehensive prevalence data may be attributed to substantial underreporting, driven in part by concerns over potential criminalization. Some cases occur among women who were actively using

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contraception and still resulted in unintended pregnancy (Stillman et al., 2019; Rahmawati, 2024).

Various countries have adopted more progressive approaches: the Netherlands permits abortion up to 24 weeks, recognizing contraceptive failure as a circumstance beyond the user's control (Government of the Netherlands, n.d.). The United Kingdom interprets "mental health" broadly to encompass the impact of contraceptive failure (Government of the United Kingdom, 1967). India explicitly acknowledges that contraceptive failure may constitute a "grave injury to mental health" through the amendment to the Medical Termination of Pregnancy Act 2021 (Ministry of Law and Justice, 2021).

Other countries, such as Canada through the decision in *R v Morgentaler* (1988), struck down criminal abortion provisions in their entirety, thereby placing the decision within the discretion of the woman and her physician (Supreme Court of Canada, 1993). Thailand, through the 2021 Criminal Code Amendment Act (No. 28) B.E. 2564, has legalized abortion upon request up to 12 weeks of gestation (Aungwara & Wongriantong, 2023). Turkey, under the Population Planning Law No. 2827 (1983), permits abortion upon request up to 10 weeks of gestation (Turkey, 1983). In contrast to these jurisdictions, Indonesia maintains a highly restrictive approach.

Based on the foregoing background, this study formulates two principal research questions: (1) What is the legal status of unintended pregnancy resulting from verified contraceptive failure within the framework of exceptions to the prohibition of abortion under Article 60 of Law Number 17 of 2023 on Health? (2) What constitutes an appropriate abortion dispensation mechanism for such cases within the Indonesian legal system?

METHOD

A normative legal research method (doctrinal legal research) was adopted in this study, focusing on the analysis of positive legal norms and underlying legal principles. Three approaches were employed: (1) a conceptual approach to examine the constructs of legal dispensation, medical emergency, and contraceptive failure; (2) a statutory approach to analyze Law Number 17 of 2023, Law Number 1 of 2023, and related regulatory instruments; and (3) a comparative approach involving a cross-jurisdictional analysis of regulatory frameworks in six countries, namely the Netherlands, the United Kingdom, Canada, India, Thailand, and Turkey.

Primary legal materials consisted of the 1945 Constitution of Indonesia, Law Number 17 of 2023, Law Number 1 of 2023, Law Number 52 of 2009, Government Regulation Number 87 of 2014, and Government Regulation Number 28 of 2024. Secondary legal materials included academic literature, scholarly journals, and policy documents. The analysis was conducted using grammatical, systematic, teleological, and extensive interpretation techniques to determine the proper meaning of legal norms and to formulate an appropriate legal construction of dispensation.

RESULT AND DISCUSSION

Legal Status of Unintended Pregnancy Resulting from Contraceptive Failure

Article 60 of Law Number 17 of 2023 and Article 463 of Law Number 1 of 2023 suggests that the legal status of contraceptive failure is marked by normative incompleteness

(onvolledigheid van de norm). According to Gustav Radbruch, legal certainty is constituted by four elements : (1) positivity of law (gesetzliches Recht); (2) factual grounding (Tatsachen); (3) clarity of formulation (Klarheit); and (4) relative stability (Beständigkeit).²⁰ Within the context of contraceptive failure, the element of factual grounding is compromised, despite being formally acknowledged by the state, it remains unaddressed within the legal exceptions to abortion.

From the perspective of legal protection by Philipus M. Hadjon, both preventive and repressive forms of protection are not ensured within the existing framework. Preventive protection, particularly in the form of comprehensive informed consent regarding the legal consequences of contraceptive failure, is not provided, nor is repressive protection afforded through effective dispute resolution mechanisms (Hadjon, 1987). This condition is in contravention of the State's constitutional obligation under Article 28I(4) of the 1945 Constitution of Indonesia to respect, protect, promote, and fulfil human rights.

An extensive interpretation of “medical emergency” may serve as an entry point for accommodating cases of contraceptive failure. According to the World Health Organization, health encompasses a state of complete physical, mental, social well-being and is not limited to the absence of disease or infirmity (World Health Organization, 1946). Based on this definition, unintended pregnancy resulting from contraceptive failure may generate a substantial mental health burden that qualifies as a medical emergency. Such an approach is reflected in the legal practices of Netherlands, United Kingdom, India, Canada, Thailand and Turkey, which adopt a broadened interpretation of health to accommodate similar circumstances.

A multidimensional analysis demonstrates that unintended pregnancy entails significant consequences across several domains: (1) the physical health dimension, characterized by an elevated risk of maternal complications; (2) the psychological dimension, indicated by increased levels of depression and anxiety; (3) the socio-economic dimension, reflected in heightened vulnerability to poverty and disruption of life trajectories; and (4) the intergenerational dimension, manifested in adverse outcomes for child development and the persistence of poverty across generations (Foster et al., 2018; Upadhyay et al., 2015; David, 2006).

The Legal Construction of an Abortion Dispensation Mechanism

The concept of dispensation, in legal-philosophical discourse, derived from *epieikeia* in the thought of Aristotle and *dispensatio* in the writings of Thomas Aquinas (Aristotle, 2011; Thomas Aquinas, 2006). Both concepts are serving as corrective instruments to positive law when its rigid application leads to injustice. Dispensation should not be understood as the legalization of abortion, but rather as an administrative mechanism designed to accommodate the realization of reproductive health rights in exceptional cases. A concept that has precedent within the legal framework of Indonesia, such as in the provision of marriage dispensation under Law Number 1 of 1974 on Marriage (Republik Indonesia, 1974).

The conceptual framework of dispensation categorized reproductive conditions into three distinct groups: (1) planned or accepted pregnancies; (2) unintended pregnancies resulting from negligence, in which the prohibition of abortion remains applicable; (3) unintended pregnancies resulting from the failure of responsible preventive efforts, where the possibility

of dispensation may be contemplated. This framework is philosophically grounded in Pancasila with particular reference to the second principle of humane and civilized justice (Kemanusiaan yang Adil dan Beradab) and the fifth principle of social justice (Keadilan Sosial bagi Seluruh Rakyat Indonesia) (Mahkamah Konstitusi Republik Indonesia, 2015).

Six eligibility criteria for the granting of a dispensation are purposed in the study: (1) the consistent and correct use of contraception supported by medical evidence; (2) the occurrence of a medically verified pregnancy despite contraceptive use; (3) the presence of significant adverse impacts on physical, mental, or socio-economic well-being; (4) the submission of the application within a maximum gestational limit of 20 weeks; (5) the applicant's willingness to undergo both pre- and post-procedure counseling; and (6) the provision of special consideration for vulnerable groups, including adolescents, individuals with disabilities, and survivors of violence.

From an institutional perspective, the mechanism is implemented through an Integrated Dispensation Team at the district/city level, composed obstetrician & gynaecologists specialist, psychologists/psychiatrists, social workers, legal experts, and community representatives. The dispensation process is designed to be concluded within a maximum of seven working days, through the five following stages: (1) initiation of application; (2) administrative completeness screening; (3) medical verification; (4) psychological and social assessment; and (5) a final decision by the team, with an available appeal mechanism.

The multi-religious legitimacy of a dispensation mechanism is reflected from various ethical doctrines of exception across major religions: the concept of Darurah in Islam (Al-Suyuti, n.d.), Situation Ethics in Protestant Christianity (Fletcher, 1966), Oikonomia in Catholicism (Protopapas, 2016), Apad Dharma in Hinduism (Long et al., 2022), Upaya in Buddhism (Pye, 2003), and Ren in Confucianism (Confucius, 1993). Each religion provides normative mechanisms for accommodating exceptional situations, thereby conferring moral legitimacy on an appropriately designed dispensation system.

CONCLUSION

First, the legal status of unintended pregnancy resulting from verified contraceptive failure under Article 60 of Law Number 17 of 2023 reflects a condition of normative incompleteness (onvolledigheid van de norm). The provision restricts permissible exceptions solely to cases of medical emergency and pregnancies resulting from rape, thereby excluding the empirically recognized occurrence of contraceptive failure in public health practice. This limitation creates legal uncertainty and leaves affected individuals without adequate legal protection. In this context, an extensive interpretation of the term "medical emergency" may serve as a potential entry point to accommodate such cases within the existing legal framework.

Second, an appropriate legal construction can be developed through the establishment of a dispensation mechanism administered by an Integrated Dispensation Team at the district or city level. This mechanism is designed to include clearly defined eligibility criteria, an integrated institutional structure, and a streamlined procedure with a maximum processing time of seven working days, complemented by an appeal process. As an administrative model, this dispensation system functions as a bridge between the need for legal certainty and the demand for individualized justice, while maintaining the coherence and integrity of the legal system.

Accordingly, several policy recommendations are proposed to strengthen the regulatory framework and its implementation. These include revising Article 60 to explicitly

accommodate contraceptive failure or, alternatively, adopting a progressive constitutional interpretation of “medical emergency” by the Constitutional Court. In addition, the formation of Integrated Dispensation Teams should be formalized through local government decrees in coordination with the Ministry of Health, supported by ministerial regulations governing verification criteria, standard operating procedures, counseling guidelines, and monitoring systems. Implementation should follow a phased approach—from regulatory drafting and pilot projects to evaluation and national expansion—while sustained dialogue with moderate religious leaders and collaboration with women’s organizations is encouraged to frame the policy within a public health and harm reduction perspective.

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