

## ABORTION IN INDONESIA ON POSITIVE LAW AND MASLAHAH THEORY PERSPECTIVE

### ABORSI DI INDONESIA DALAM PERSPEKTIF HUKUM POSITIF DAN TEORI MASLAHAH

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**Abstract:** *Abortion is a social phenomenon that is increasingly concerning, this study seeks to answer the question, how the legal regulation of abortion in Indonesian positive law and how the analysis of maslahah against abortion. This research is a normative legal research using statutory approach and conceptual approach, namely the theory of maslahat. The results concluded, first; the act of abortion is prohibited and threatened with criminal penalties as mentioned in articles 299, 346, 347, 348 and 349 of the Criminal Code. However, under certain conditions, such as medical emergencies, abortion is allowed. This is mentioned in articles 31, 32, 33 and 34 of Government Regulation (PP) No. 61/2014 on Reproductive Health. Second, the prohibition and permissibility of abortion is in line with maslahat theory, abortion is prohibited because it can cause damage and abortion is allowed due to emergency conditions.*

**Abstrak:** *Aborsi merupakan fenomena sosial yang semakin hari semakin memprihatinkan, penelitian ini berusaha menjawab pertanyaan, bagaimana pengaturan hukum mengenai aborsi dalam hukum positif Indonesia dan bagaimana analisis maslahah terhadap tindakan aborsi. Penelitian ini merupakan penelitian hukum normatif dengan menggunakan pendekatan perundang-undangan dan pendekatan konseptual yaitu teori maslahat. Hasil penelitian menyimpulkan, pertama; tindakan aborsi dilarang dan diancam dengan hukuman pidana sebagaimana disebutkan dalam pasal 299, 346, 347, 348 dan 349 KUHP. Namun, dalam kondisi tertentu, seperti kedaruratan medis, aborsi diperbolehkan. Hal ini disebutkan dalam pasal 31, 32, 33, dan 34 Peraturan Pemerintah (PP) No. 61/2014 tentang Kesehatan Reproduksi. Kedua, pelarangan dan kebolehan aborsi sejalan dengan teori maslahat, aborsi dilarang karena dapat menimbulkan kerusakan dan aborsi diperbolehkan karena kondisi darurat.*

**Keywords:** *First Keyword, Second Keyword, Third Keyword*

## Introduction

One of the characteristics of living things is to reproduce. However, not everyone is happy with every pregnancy, not even expecting a pregnancy. Unwanted pregnancies can occur because of an anxiety of not being able to support and nurture another child, not being ready to have a child due to extramarital

relations and others. The existence of selpelrti is one of the factors, people choose abortion as a way out, when an unplanned pregnancy occurs. (Rajagukguk & Emaru, 2013). The debate about abortion in Indonesia is getting more and more crowded, because it is triggered by various events that shake the joints of human life. The life that is given to each human being is a human right that can only be revoked by the giver of that life. Speaking mengenai abortion of course we talk about human life because abortion is closely related to the woman and the foetus in the womb of women. (Charisdiono & Achadiat, 2007).

The crime of abortion is often discussed in both official and unofficial forums concerning the fields of medicine, law and other disciplines. Abortion is a social phenomenon that is increasingly alarming. The concern is not without reason, because so far the behaviour of abortion has many negative effects both for themselves and the wider community. This is because abortion involves moral and legal norms of a nation's life. Currently abortion has become an actual thing and the event has happened everywhere and done by anyone, for example done by teenagers who teribat promiscuity that initially dating ordinary, but after a long time dating they have intercourse, because they want and fear of being caught then they abort the bladder. This can also be done by married couples who do not want to be burdened with the responsibility of the birth of a child.

With some of the factors above, many women are reluctant to have children, even though children are a mandate from God who must be respected for all their rights, especially their right to life. Therefore, God threatens punishment to women who deliberately have abortions. The pro-abortionists argue that women have full rights over their bodies. Women have the right to decide for themselves whether or not to become pregnant, whether to continue the pregnancy or terminate it. For those who oppose abortion, this right discourse is associated with the foetus, which is a living being that has a human right to life. For them abortion is a cruel killing of the foetus. (Hawari, D. 2006). In the case of abortion of rape victims, a very important role is held by law enforcement to resolve abortion cases because the scope of the problem is quite broad, where there are two issues that must be considered, namely between the right to empower women to ensure their lives without psychological / mental and social pressure or to ensure the rights of children who are still in the womb to stay alive.

To determine whether women who perform abortions on their unborn children can be subject to criminal sanctions or not, and it can be judged from which uses are more prioritised. And in the provision of criminal sanctions, not only race there is a formulation of a *pasa* in the legislation alone, but in its implementation must also pay attention to how the background and reasons for the actions taken. In connection with this, in order to provide protection to victims who perform abortions on pregnancy caused by rape is something that we must pay attention to together. Considering based on the formulation contained in *Pasa* 346 of the Criminal Code formulates that: "Any woman who with deliberate intent causes a miscarriage or puts to death her pregnancy or causes someone else to do so, shall be punished by a maximum imprisonment of four years." Then seen from the formulation contained in Law No. 17 of 2023 on Health abortion activities are prohibited with certain criteria.

The Criminal Code and Health Law No. 17 on Health are not in sync because in the Criminal Code abortion is absolutely not prohibited while in Law No. 17 of 2023 gives space and permission to perform abortion but with certain criteria. In this case, Law No. 17 of 2023 is a special law governing health and the Criminal Code (KUHP) is a general law. In law, the principle of *ex speciais derogat egi generais* (special law overrides general law) is one of the principles of preference that is known in law. The principle of preference is a legal principle that indicates which law is preferable (to be enacted), if in an event (law) related or violated several regulations.

## Literature Review

### Abortion

In English Abortion dikenali with istilah Abortion, while in Latin, abortion dikenali with istilah Abortus. In Indonesian abortion means aborting the womb. (Hendrik, 2015). WHO (World Health Organisation) defines abortion as the termination of a woman's pregnancy prematurely. Abortus is fertilisation (fetus)

that beum time from the mother's womb and beum can live in uar womb. Medically, abortion is the end or loss of pregnancy before the pregnancy reaches 20 weeks or the baby weighs less than 500 g, that is, before the fetus can live outside the womb independently. Abortion is a pregnancy that stops the process at gestational age below 20 weeks, or the weight of the fetus is 500 grams or less. Abortion means the cessation of pregnancy that occurs between the time of implantation of the egg (bastocyte) in the uterus until 28 weeks of pregnancy. (Triwibowo, 2014).

Basically, abortion is divided into 2, namely spontaneous abortion and artificial abortion. Spontaneous abortion is a natural mechanism that causes the termination of the pregnancy process before the age of 28 weeks. While abortion abortion is a deliberate attempt to stop the process of pregnancy before the age of 28 weeks. The expelled foetus (hasi conception) cannot survive in the outside world. There are several terms to refer to keuarnya conception or fertilisation before the age of pregnancy 20 weeks commonly called abortion (abortion), including: Abortion criminalis, which is the unlawful termination of a pregnancy; Eugenic abortion, which is an abortion to get good offspring; Abortion Induced / provoked / provocatus, namely abortion of the womb because it is intentional; Abortion Natural, which is a natural abortion; Spontaneous Abortion, which is the unintentional termination of pregnancy; and Abortion Therapeutic, which is an abortion with the aim of maintaining the health of the mother. (Harahap, 2021).

In general, abortion is divided into two: spontaneous abortion and artificial abortion. If the pregnancy is not wanted by the woman and her partner then the woman and her partner are very likely to take shortcuts by doing artificial abortion or abortus provocatus criminalis as a way out to overcome the problem of pregnancy faced. The threat of punishment for women who perform abortions against unwanted pregnancies instead of making abortionists afraid to perform these actions, makes the more rampant perpetrators perform abortus provocatus criminais activities which are illegal or against the law in Indonesia. (isnawati, Mia, & Peupessy, 2019).

The general definition of abortion is termination of pregnancy. Abortion can be done intentionally or unintentionally. Abortion that is accidentally done can occur as a result of keceakaan and said abortion that is not against the law, meaning that the action does not menyaahi rule of law. While the act of abortion that meawan law adaah action that menyaahi rule of law, ebih jeasnya miscarriage of pregnancy that is done intentionally and can have legal consequences (can result in imprisonment according to the Criminal Code). Action abortion that meawan law often occurs but rarely surfaced, this happens because each party between the patient and the doctor can both keep all the abortion events secret. (Widowati, 2020).

### **Najm al-Din al-Tufi's Maslahat Theory**

The concept of maslahat initiated by al-Tufi began when he explained the interpretation of one of the Prophet's traditions in the book al Arba'in al-Nawawi. According to al-Tufi, this hadith is of hasan quality and is narrated with a complete chain of transmission by Ibn Majah, al-Daruqutni and others but without mentioning the first narrator (mursal). In the Muwatta' Malik Ibn Anas this hadith is narrated by Amr Ibn Yahya, from his father, from the Prophet, with no mention of Abu Said. (Sholeh, 1996). Even though the hadith is hasan rather than sahih, it is strong because there are many lines of transmission, each corroborating the other. Furthermore, according to him, a tradition that is weak in terms of its textual accuracy can be strengthened by a number of individual testimonies to the extent that it reaches the level of mandatory practice. This is similar to the case of an unknown narrator who, if he is judged to be honest, will be considered fair and his testimony will be accepted.

According to this Hadith, what it means is that it is not permissible to cause harm according to the rules of Shara' unless there is a special rule. The key word is darar, which means harm, the verbal noun of darra yadurru dirar and the word dirar which means to repay an act of harm with an act of harm. This hadith is also narrated with the following wording la darara wala idrar (with an alif added) the verbal noun of adarra which means to cause suffering and this is included in the meaning of darar. Lafad ladarara means the prohibition of harming oneself or others, while la dirar der means the prohibition of mutual harm between two other people. According to al-Tufi, the Prophet's words la darara wala dirara are a fragment of the full form: no suffering or loss should be inflicted on anyone and there should be no retaliation that could cause others to suffer or lose.

The further content of the Hadith is that it is not permissible to cause harm to others except for a specific reason (*la luhuqa darar shar' illa bi mujib khas mukhassis*), such as the hadd punishments, diat and ta'zir that have been prescribed by Shara'. Thus, the interpretation that "it is not permissible to make someone suffer or suffer loss unless there is a permissibility underlying the permissibility" is specific and particular. This shara'-based discussion is important, because evil or harm that is based on divine decree cannot be challenged. The exclusion of causing suffering or harm for special reasons is based on the fact that the hadd and its punishment are suffering inflicted on those who deserve it, and are legally justified by universal consensus (*ijma'*). But that is a specialised argument. Thus, all forms of harming or harming others are rejected by Shara' in all cases outside those that have been excluded.

In order to support the affirmation of human good or benefit, through the rejection or legitimate offence against harmful actions, al-Tufen cites several Qur'anic verses, such as "God wants ease for you, and does not want hardship" (*yurid allah bikum al-yusra wa la yurid bikum al-'usr*); "God wants to lighten your burdens" (*yurid allah an yukhofifa ankum*); "God does not want to give you hardship" (*ma yurid liyaj'ala alaikum min haraj*); "he does not set you hardship in religion" (*wama ja'ala alaikum fi al-din min haraj*). There are many other verses that prohibit various forms of lawlessness, injustice, harm, destruction, exploitation and other aspects of social evils. Al-Tufi mentions two fundamental points, namely: First, all forms of social harm and damage must be rejected, prohibited and prevented by law (*nafy al darar aw al-mafasid shar'an*). Secondly, the rejection, prohibition or prevention of harm is general and valid at all times, except in certain cases where legal sanctions are deemed necessary by *ijma'*.

Consequently, according to Tufi, the principle of not doing harm should be given top priority over other principles. This means that the essence of Islamic teaching is in the substance of this hadith, which is not to do harm to the individual and to society. The opinion of al-Tufi that makes the "rejection of actions that cause harm or damage" as the main source of Islamic law is in accordance with several scholars' opinions. Izz al-Din Ibn Abd al-Salam, for example, made the rule of "attracting benefits and rejecting harm" (*jalbu al-masalih wa dar' al-mafasid*) as the main source of Islamic law enforcement. Islamic law must be based on the provisions of "attracting benefits and rejecting harm" (*jalbu al-masalih wa dar al-mafasid*). If then summarised the rule, then according to Izz al-Din the important thing is "rejecting harm" (*dar al-mafasid*).

This opinion of al-Tufi is in line with the rules of fiqh derived from the hadith, for example, firstly, compelling circumstances make it permissible to do what is forbidden (*al-daruratu tubihu al-mahzurat*). (Di'as, 1965). For example, the permissibility of eating carrion in a state of necessity, because there is no other food. Second, that the permissibility of a person to do a prohibited act in an emergency is only as much as possible, not excessive (*ma ubiha li darurati bi qadri ta'azzuriha*). (Abdullah, 1967) Third, that the existence of danger (*madorat*) should not be eliminated by creating a new danger (*mahdarat*). (*al-daruratu la yuzalu bi al-darar*). (Nadwi, 1991) For example, if a person is suffering from kidney disease, then he should not ask for another person's kidney who only has one, because it will harm him.

Furthermore, to strengthen his legal principle, al-Tufim based it on two things: first, all forms of social harm or damage must be rejected, prohibited or prevented by law (*nafy al-darar wa al-mafasid syar'an*). Secondly, the law's rejection, prohibition and prevention of such harm is general and valid throughout the ages except in specific cases. In summary, the hadith *la darara wa la dirara* is used by al-Tufi as a textual proof (argument) for the existence of *maslahat*. Al-Tufi seems to make the hadith a basic principle of human benefit that is far above other sources.

## Method

This research is normative legal research using a statutory approach and conceptual approach, and takes legal issues as a system of norms to be analysed. Normative legal research is conducted to produce new arguments, theories or concepts as prescriptive in the problem at hand. (Marzuki, 2005). Primary data sources used in this research include: Criminal Code, Law Number 1 Year 2023

on Criminal Code, Law No. 17 of 2023 on Health Affair and Government Regulation No. 61/2014 on Reproductive Health.

## Results and Discussion

### Legal Regulation on Abortion in the Old and New Criminal Code

The old Criminal Code did not allow citizens to have abortions. There are at least five articles in the old Criminal Code that regulate the crime of abortion, namely:

#### Article 299

- 1) Any person who with deliberate intent treats a woman or causes her to be treated, knowing or having reason to expect that by means of such treatment the pregnancy may be terminated, shall be punished by a maximum imprisonment of four years or a maximum fine of sixty five thousand rupiahs.
- 2) If the offender commits the crime for gain, or makes an occupation or habit of it, or if he is a physician, midwife or medicine man, the punishment may be enhanced with one third.
- 3) If the offender commits the crime in the exercise of his profession, he may be deprived of the exercise of said profession.

#### Article 346

“Any woman who with deliberate intent causes or causes to cause the death of the fruit of her womb, shall be punished by a maximum imprisonment of four years.”

#### Article 347

- 1). Any person who with deliberate intent causes the abortion or puts to death the pregnancy of a woman without her consent, shall be punished by a maximum imprisonment of twelve years.
- 2). If the fact results in the death of the woman, he shall be punished by a maximum imprisonment of fifteen years.

#### Article 348

- 1). Any person who with deliberate intent causes the abortion or puts to death the pregnancy of a woman with her consent, shall be punished by a maximum imprisonment of five years and six months.
- 2). If the fact results in the death of the woman, he shall be punished by a maximum imprisonment of seven years.

#### Article 349

If a physician, midwife or pharmacist assists in the commission of the crime described in Article 346, or commits or assists in the commission of one of the crimes described in Articles 347 and 348, the punishments laid down in said Articles may be enhanced with one third and may be deprived of the exercise of the profession in which the crime has been committed.

In contrast to the old Criminal Code, Law No. 1 of 2023 on the Criminal Code (hereinafter referred to as the new Criminal Code), which came into force three years after its promulgation in 2026, provides an opportunity for abortion.

#### Article 463

1. Any woman who commits abortion shall be punished by a maximum imprisonment of 4 (four) years.
2. The provision as referred to in paragraph (1) shall not apply in the event that the woman is a victim of a criminal act of rape or other criminal act of sexual violence causing pregnancy whose gestational age does not exceed 14 (fourteen) weeks or has indications of medical emergency.

#### Article 465 paragraph 3

"Doctors, midwives, paramedics, or pharmacists who perform abortions due to indications of medical emergencies or against victims of criminal acts of rape or other criminal acts of sexual violence that cause pregnancy as referred to in Article 463 paragraph (2) shall not be punished".

#### **Legal Regulation on Abortion in Government Regulation No. 61/2014 on Reproductive Health**

Abortion is a condition in which the outcome of pregnancy, namely the baby, comes out of the mother's womb before the time that should be in a dead condition. (Kusmayanto, 2022). Abortion can also be said as a miscarriage or the end of pregnancy before the gestational age reaches 20 weeks or can be said before the baby is able to live outside the womb. (Afifah, 2013). When viewed from the point of view of the Criminal Code, abortion is not allowed for any reason, however, Government Regulation (PP) No. 61/2014 on Reproductive Health provides a loophole for abortion as stipulated in articles 31, 32, 33, and 34.

#### Article 31

1. Abortion is only performed based on: Indications of medical emergency and pregnancy due to rape.
2. Abortion due to rape as referred to in paragraph (1) letter b can only be done if the gestational age is at most 40 days calculated from the first day of the last menstrual period."

#### Article 32

1. Indications of medical emergencies as referred to in Article 31 paragraph (1) letter a include: pregnancy that threatens the life and health of the mother; and/or pregnancy that threatens the life and health of the fetus, including those suffering from severe genetic diseases and/or congenital defects, as well as those that cannot be repaired, making it difficult for the baby to live outside the womb.
2. The handling of indications of medical emergencies as referred to in paragraph (1) is carried out in accordance with the standards.

#### Article 33

1. Determination of the existence of indications of medical emergency as referred to in Article 32 shall be conducted by the abortion eligibility team.
2. The team as referred to in paragraph (1) shall consist of at least 2 (two) health workers chaired by a doctor who has the competence and authority.
3. In determining the indication of medical emergency, the team as referred to in paragraph (1) must conduct an examination in accordance with the standards.
4. Based on the results of the examination as referred to in paragraph (3), the team as referred to in paragraph (1) shall make a certificate of eligibility for abortion."

#### Article 34

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 in accordance with the provisions of laws and regulations.
2. Pregnancy due to rape as referred to in paragraph (1) is proven by: a. gestational age in accordance with the incident of rape, which is stated by a doctor's certificate; and b. information from investigators, psychologists, and/or other experts regarding the alleged rape."

## Abortion on Maslahah Theory Perspective

Najm al-Din al-Tufi built his maslahat theory based on the hadith.

لَا ضَرَرَ وَلَا ضِرَارَ

Basically, this hadith prohibits harming oneself and others. Lafad ladarara means the prohibition of harming yourself or others, while la dirar means the prohibition of mutual harm between two other people. According to al-Tufi, the Prophet's words la darara wala dirara are a fragment of the full form, namely: no suffering or loss should be placed on anyone and there should be no retaliation that can cause others to suffer or lose.

This is in line with the contents of the Criminal Code, namely articles 299, 346, 347, 348 and 349 which threaten punishment to anyone who commits the act of abortion intentionally, either with the consent of the woman or without her consent. Article 346 provides for a maximum imprisonment of four years if a woman intentionally aborts or terminates a pregnancy. There is a criminal threat to the perpetrator of abortion because the act of abortion can threaten the life of the fetus that is still in the womb, as well as threatening the life of the woman who is pregnant. The threat to life is what is not allowed by the hadith of the prophet Muhammad SAW above. So that the legal consequences of abortion is haram.

Abortion is not always prohibited. Under certain conditions, abortion is allowed, but it must still be performed by medical personnel. Article 31 letter a states that abortion can only be done based on indications of medical emergencies. The next article explains, what is meant by indications of medical emergencies, namely pregnancy that threatens the life and health of the mother; and / or pregnancy that threatens the life and health of the fetus, including those suffering from severe genetic diseases and / or congenital defects, or that cannot be repaired so that it makes it difficult for the baby to live outside the womb.

The permissibility of abortion on the basis of indications of medical emergencies is in line with the theory of maslahat. Under compelling circumstances it is permissible to perform prohibited acts. Abortion is a prohibited act because it can cause the loss of fetal life, so it is threatened with criminal punishment. However, in certain conditions, namely emergency conditions, where pregnancy can threaten the life and health of the mother, then abortion is allowed. The permissibility of a person to do a prohibited act when an emergency, it is only just, not excessive. The act of abortion on the basis of medical emergency indications is not excessive. It is an act that minimizes the harm that pregnancy can cause. If the pregnancy is maintained, it will threaten the life of the mother. In this case, abortion is the only action that can be taken to save the mother's life.

## Conclusion

Based on the results of the above analysis, it can be concluded that; First, the act of abortion is prohibited and punishable as referred to in articles 299, 346, 347, 348 and 349 of the Criminal Code. But in certain conditions, such as medical emergencies, abortion is allowed. This is stated in articles 31, 32, 33 and 34 of Government Regulation (PP) No. 61/2014 on Reproductive Health. Second, the prohibition and permissibility of abortion is in line with the theory of maslahat, abortion is prohibited because it can cause harm, namely the loss of life of the fetus conceived by women and abortion is allowed because of emergencies, namely in order to achieve greater benefits, in this context is the safety of the mother.

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## Legislation

Criminal Code

Law Number 1 Year 2023 on Criminal Code

Law No. 17 of 2023 on Health Affair

Government Regulation No. 61/2014 on Reproductive Health