



## **CHANGES IN POLICY DIRECTION AND LEGAL CONSEQUENCES LAW NO. 17 OF 2023 CONCERNING HEALTH ON ABORTION ISSUES IN THE TRANSITION PERIOD FOR RENEWING THE CRIMINAL CODE**

**Novi Enjelina Putri<sup>1</sup>, Abdul Madjid<sup>2</sup>, Bambang Sugiri<sup>3</sup>**

<sup>1,2,3</sup> Faculty of Law, Universitas Brawijaya

Correspondence Address: [enjelinaputri99@gmail.com](mailto:enjelinaputri99@gmail.com)

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### **Abstract**

This research began with confusion regarding changes in the direction of legal regulatory policies regarding abortion in Indonesia. This is proven by the amendment to the Health Law Number 17 of 2023 which is part of the health omnibus law, which can result in multiple interpretations because it refers to the criteria specified in the criminal code. However, it is not explained which criminal law book will be used, which could create gaps in the application of criminal law in cases of legal abortion in Indonesia. The possibility of interpretation in determining the criminal law book is due to the transition period for the implementation of the new criminal law book, namely Law Number 1 of 2023, which will still come into force in 2026. The difference in the policy direction of the old criminal law book and The new one is very significant because the new one regulates the exceptions to which abortion can be carried out, whereas the old one does not see any reason and categorizes abortion as a criminal offense and will be subject to imprisonment for those who violate it. These differences in provisions will certainly have quite different legal consequences if the legal regulations are incorrectly applied in dealing with the issue of legal abortion in Indonesia. If they are incorrect then the disadvantage is the pregnant mother who has the right to abortion. This research uses normative legal research by looking at conceptual approaches and also legislation. With the aim of seeing how the legislation regarding abortion continues to undergo changes and the legal consequences that arise from these policies.

**Keywords:** *Legal Policy, Abortion, Legal Consequences.*

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### **1. INTRODUCTION**

The issue of abortion has become a phenomenon as a result of increasing cases of sexual violence in Indonesia. Abortion is often considered as a further step or alternative option for dealing with unwanted pregnancies, especially for victims of sexual violence, whether occurring outside or within marriage, as well as in situations of unwanted pregnancy or in medical emergencies. Despite this, the practice of abortion in Indonesia is still often carried out using unsafe and irresponsible methods. The latest research in Indonesia, which is limited to the island of Java and uses a modified AICM method, concludes that in 2018, the number of abortion cases on the island of Java reached 1,698,230. With this figure, the abortion rate on Java Island reaches 42.5 per 1000 women aged 15-49 years. This figure shows a higher abortion rate compared to the previous global abortion rate estimated by the Guttmacher Institute, namely 39 per 1000 women. Abortion, which is defined as an act of aborting a pregnancy or killing a fetus, certainly has legal consequences in legal regulations in Indonesia. The legal status of the act of abortion still tends to lead to criminal sanctions in the form of imprisonment. The perspective of law enforcement officials in handling cases still tends to be criminalization efforts which refer to the Criminal Code, which regulates the rules for criminal acts and criminal sanctions. The meaning of crime cannot be separated from the concept of criminal law itself, because crime is the main pillar in the criminal law system. Criminalization refers to the process in which an act that was not previously considered a criminal offense is later declared an offense that can be subject to criminal sanctions in law. The criminalization process is the determination that a person's actions can be punished, and ends with the formation of a law that determines criminal sanctions for that action. Likewise, abortion is vulnerable to being categorized as a criminal act because it does not comply with applicable statutory provisions. Despite the fact that Indonesia is one of the countries that allows

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abortion with conditions, the fact is that it is still not possible to carry out legal and valid abortions in accordance with statutory provisions. The legal regulation of abortion in Indonesia experiences ups and downs in the categorization of criminal acts and the application of criminal sanctions. Initially, in Indonesian law, abortion was categorized as a criminal act regulated in the Criminal Code, in Article 299, and Articles 346 to 349. . This dynamic experienced a change when Health Law number 36 of 2009 was passed, which regulates the exception that abortion can be carried out in Indonesia for two reasons, namely an indication of a medical emergency and being a victim of a criminal act of rape. It did not stop there that health law experienced dynamic changes with the idea of an omnibus law which was designed as a concept for creating legal products by combining several regulations. One of them is Health Law number 17 of 2023 which is categorized as a health omnibus law product.

Changes to the health omnibus law as a national policy in order to improve the level of public health in Indonesia by creating supporting legislation, namely the health omnibus law. These changes certainly have an impact on criminal provisions which cannot be separated from the legal politics of a statutory regulation. One of them concerns the rules for exceptions to abortion for medical emergencies and rape victims which are specifically regulated in Health Law Number 36 of 2009. However, because there are changes to the new Health Law No. 17 of 2023, it has different legal impacts and consequences. in handling abortion issues for rape victims and indications of medical emergencies. This law update raises new problems in that it refers to the new Criminal Code (KUHP) while the Criminal Code is still in a transition period and will come into effect in 2026. The problem is that there is a 2 year time lag when referring to the new Criminal Code.

If so, then what will apply in responding to the issue of abortion is the Criminal Code or Wetboek Van Straftrecht because it is still in effect to cover the legal gaps during the transition period for the use of the new Criminal Code. This is because in the implementation of Health Law number 17 of 2023 which refers to the new Criminal Code, there is still a transition period, so what is being debated is that the re-enactment of the Criminal Code regarding the issue of abortion is a valid criminal offense. It can be interpreted that if we return to the old Criminal Code, then all activities and acts of abortion are prohibited or classified as illegal acts to be carried out. The urgency of clarifying abortion regulations for rape victims who want to have an abortion has become the main problem because there have been efforts to change the direction of policy, which was initially decriminalization with certain conditions, then returned to criminalization efforts again. The legal ambiguity of the Health Law 17 of 2023, regarding references to the new Criminal Code, has resulted in multiple interpretations, so it is necessary to make improvements or implementing regulations as soon as possible to clarify the Health Law regulations.

### **Research question**

The formulation of research questions in this study is based on the description in the background above, namely:

- a. What is the direction of legal regulation of abortion exceptions in Indonesia before and after changes to Health Law Number 17 of 2023?
- b. What are the legal consequences after the promulgation of Health Law Number 17 of 2023 on cases of abortion in Indonesia?

### **2. IMPLEMENTATION METHOD**

The author uses a type of normative juridical research or legal research, namely by studying law as a system. By using a conceptual approach and a legislative approach. Legal materials were obtained from primary and secondary legal materials based on statutory regulations, especially the Health Law and the Criminal Code, which were analyzed prescriptively. Legal materials are explored through literature study, review of legislation and identification of legal facts. The collected legal material is then interpreted using purposive interpretation, namely contextual legal interpretation taking into account important factors of the law in question.



### 3. RESULTS AND DISCUSSION

#### Policy Direction for Legal Regulation of Abortion Exceptions in Indonesia, Pre and Post Amendment to Health Law Number 17 of 2023

The author will explain several periods in the laws and regulations which contain policies for the criminalization of abortion. These periods consist of regulations in the old Criminal Code (Wetboek van Strafrecht) or in Law Number 1 of 1946 which still categorizes abortion as a criminal offense for any reason. The next period is in the Health Law which contains the exception rules for abortion which can be carried out for 2 reasons. The third period is the amendment to Health Law number 17 of 2023 which refers to the provisions in the new Criminal Code or Law Number 1 of 2023. A more detailed explanation will be discussed as follows:

##### 1. Criminal Code or Weetboek Van Straftrecht

The view in the Criminal Code regarding the issue of abortion for women, both adults and children, is that it is an act that violates the law or is classified as a criminal act. Article 299 makes it clear that if a woman commits an abortion, she can be sentenced to prison for 4 to 7 years. Articles 346 to 349 regulate the prohibition on a woman having an abortion or terminating her pregnancy, whether by doing it herself or by asking someone else for help. The direction of the policy is more inclined towards criminalization efforts, regarding abortion as an act that violates moral norms and is classified as a criminal act or an illegal act to carry out. This is a decline in Dutch culture as a country that once colonized Indonesia due to the implementation of Weetboek Van Straftrecht. This criminalization of abortion is carried out without exception because the category of criminal acts of abortion in the Criminal Code does not recognize the reasons or reasons for the criminal act of abortion. So that the abortion that is carried out is only judged as a mistake without looking at any particular background and any reasons that can eliminate its unlawful nature.

##### 2. Law No. 36 of 2009

The dynamics of legal regulations in Indonesia are experiencing quite progressive developments, one of which is regarding the issue of abortion which is regulated concretely in Health Law Number 36 of 2009 in article 75 paragraph (2). This progressiveness is proven by a change in the direction of criminal policy, where initially abortion was not permitted for any reason and was a criminal offence, but after the promulgation of the Health Law, it was regulated that exceptions could be made on the grounds of medical emergencies or rape victims for pregnant women. The legal politics of the formation of the Health Law is a breath of fresh air for women's and gender issues, especially among feminist groups who support women's rights, including determining pregnancy. Why is this because the issue of abortion is one of the issues that is the focus of women's rights in determining reproductive rights and the right to determine whether or not the fetus will live as a result of the free will of the pregnant mother or is often referred to as (pro choice). This legal arrangement is the basis for women, especially rape victims who experience pregnancy, to be able to obtain their right to choose abortion. So it can be interpreted that health law number 36 of 2009 is a decriminalization step with special requirements for parties who meet the qualifications to be able to carry out abortions. Efforts to decriminalize article 5 paragraph (2) can be an effort to protect victims of criminal acts of rape, especially child victims based on the principle of the best interests of the child.

##### 3. Law No. 17 of 2023

The idea of changing this law is motivated by the emergence of the omnibus law, so that the health sector becomes a domain that cannot be left behind to improve the welfare of the Indonesian people in the health sector. . The enactment of Law Number 17 of 2023 certainly brings changes to the dynamics of legal regulations in Indonesia, especially for regulations regarding abortion. Abortion is regulated in articles 60 to 62 of the new health law. Where in article 60 paragraph (1), it is stated that abortion is an act that is prohibited for anyone who has an abortion. It was also explained that abortion is permitted in accordance with the provisions of the criminal code. The explanation regarding which criminal law book is used as a reference is also not explained concretely, giving rise to multiple interpretations and referring to the dualism of the

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Criminal Code from Weetboek Van Straftrech or Law Number 1 of 2023 concerning the Criminal Code (which is referred to as the new Criminal Code). Meanwhile, the new Criminal Code is still in the transition period to be implemented in 2026. So article 60 paragraph (1) could lead to criminalization and decriminalization depending on the enactment of the criminal code. The problem is that the criminal code currently in force still prohibits abortion for any reason. Meanwhile, Health Law Number 17 of 2023 abolishes and replaces Law Number 36 of 2009 as a new provision regarding health, instead referring to provisions in the criminal code. Indeed, article 60 does not explicitly mention the old or new criminal code, but if so, it could be interpreted using the law currently in force.

**4. Law No. 1 of 2023 Criminal Code**

The transition period for the implementation of the Criminal Code is certainly a legal blur and vacuum for the issue of abortion which is regulated in the Health Law Number 17 of 2023. Even though it has been passed, it still takes time to enact the 2023 Criminal Code as a legal regulation that is binding on all Indonesian society, until 2026. Article 60 of the Health Law Number 17 of 2023 clearly gives rise to multiple interpretations because the new Criminal Code has not yet come into effect. So there are still empty gaps that arise and this must be taken into consideration in determining which laws and regulations will be used to address the abortion issue. If we use the criminal law currently in force, the reference will be the Criminal Code or WvS, which still enforces criminalization efforts regarding the issue of abortion.

Meanwhile, article 463 paragraph (2) of Law Number 1 of 2023 concerning the criminal code. Article 463 paragraph (2) explains exceptions to being allowed to carry out abortions as per Law Number 36 of 2009, namely on grounds of indications of medical emergencies and victims of criminal acts of rape. Apart from that, in this article there are also developments regarding the types of criminal acts of rape or other criminal acts of sexual violence, so that it is not only specific to rape but also extends to other acts which also result in pregnancy in the victim, abortion can be carried out.

**Table I**  
**Direction of Legal Policy Regarding Abortion Issues in Indonesia**

Criminalization	Decriminalization
1. Criminal Code or Weetboek Van Straftrecht	1 Law No. 36 of 2009
2. Law No. 17 of 2023	2 Law No. 1 of 2023 Criminal Code
	3 Law No. 17 of 2023

Source: Legislation processed by researchers, 2024

The table above shows briefly that there is a changing direction of criminal policy in dealing with the issue of abortion in Indonesia. Previously, abortion was an act that was classified as a criminal act for any reason, so the efforts taken were of course criminalization, but since the introduction of Health Law Number 36 of 2009, the direction of punishment has shifted to decriminalization because there are exceptions in implementing abortion. Likewise, the changes to Health Law Number 17 of 2009 have had quite a confusing impact because in article 60 the benchmark for abortion is by referring to the Criminal Code. So, if you look at the old Criminal Code/Wvs then criminalization efforts are being implemented and if you use the Criminal Code/Law Number 1 of 2023 then decriminalization.

**Legal Consequences After the Promulgation of Health Law Number 17 of 2023 on Abortion Cases in Indonesia**

Indonesia takes a moderate view regarding the issue of abortion, namely by taking the middle point between the pros and cons of abortion being possible. This moderate view is a step to mediate between the pro-choice and pro-life camps, by making abortion permissible if it meets the requirements, namely endangering the life of the mother or often referred to as an indication of a





medical emergency or if the pregnancy continues it will cause a new disease. So Indonesia took a fairly neutral step and did not lean towards one of the pro-choice or pro-life camps by introducing a Health Law which still stipulates that abortion is a criminal act but can be carried out with special conditions. However, this solution is not very appropriate because there is a conflict in whether abortion is a form of crime or not, because it is difficult to fulfill the requirements for legal abortion with the dualism of these provisions.

Basically, when viewed from a legal context, abortion will always remain prohibited as a practice that takes place in Indonesia. Likewise, the Health Law still prohibits abortion unless it meets the criteria for 2 exceptions, namely for reasons indicating a medical emergency and pregnancy resulting from rape. This means that between the Criminal Code and the Health Law the principle of *lex specialis derogat legi generalis* does not apply, because basically the Health Law still regulates the prohibition of abortion but provides leeway in exceptions for special cases and reasons. Changes in the direction of legal policy with the presence of exceptions for special reasons for indications of medical emergencies and rape victims certainly bring about what was originally regulated in article 75 paragraph (2) of the Health Law. This article certainly has different legal consequences in the implementation of abortion practices in Indonesia.

### **1. Legal consequences of abortion**

Article 75 paragraph (2) opens up opportunities for abortion to be carried out for women who experience indications of a medical emergency and also pregnancy for women who are rape victims who want an abortion. Requirements regarding abortion are regulated in article 76 which must be fulfilled by pregnant women who meet the criteria for an abortion. These requirements include, namely, that it can be carried out before 6 weeks of pregnancy where the age is calculated from the first day of the last menstruation, the abortion is carried out by a skilled health worker, the abortion must be with the consent of the pregnant woman concerned, and carried out at a health service that meets the requirements as determined by Minister. So it can be ensured that women who meet the qualifications to be able to have an abortion, namely pregnant women who experience indications of a medical emergency and women who are pregnant because they are victims of rape, can have an abortion legally and lawfully as the provisions of the Health Law guarantee the right to abortion. These requirements are of course the main gate in implementing legal abortion practices. Every pregnant woman who can fulfill the requirements for a legal abortion must receive legal protection, because she has fulfilled the legal aspects and elements of the requirements set out in the Health Law. In this case, the government must also provide protection measures for women who meet the requirements for abortion if abortion practices are implemented.

This form of protection is of course in terms of legal protection, because there are still many law enforcement officials' perspectives which refer to abortion as a criminal act for any reason and being criminalized. The government must not only make promises in the form of dogma or norms but must also provide convenience for women who want to determine their right to life by having an abortion during their pregnancy. However, the dynamics of legal regulations regarding health have changed, namely with the passing of Law Number 17 of 2023 concerning Health, which is included in the health omnibus, the legal consequences have also changed according to the applicable provisions. The ratification of this latest Health Law is an effort to improve the quality of health for the people in Indonesia. However, the problem is the regulations regarding abortion, which can cause confusion and even loopholes in implementing the provisions of the law. The first concerns the legal consequences that arise in the form of imposing penalties on women who have abortions. In Law Number 17 of 2023 concerning abortion provisions, article 60 refers to criteria that are in accordance with the provisions of the criminal code (KUHP). The problem is that the new Health Law does not explain which criminal code is used as a reference, of course this brings confusion for law enforcement officials in enforcing legal regulations as well as for technical implementers in handling abortion cases. If we refer to the provisions of the criminal code, of course when the new Health Law is passed in 2023, what will apply will be the old criminal code or *Wetboek van Strafrecht*. So it can be interpreted that attempting an abortion when referring to *WvS* is a prohibited act and anyone who carries out an abortion can be subject to criminal sanctions

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because abortion is classified as a criminal act in the old criminal code. This ambiguity has an impact on the application of law, where there are differences in policy direction in regulating abortion in the old criminal code and the new criminal code which regulates exceptions to the possibility of abortion. The difference lies in the criminalization efforts where there are differences in the old views regarding abortion as a criminal act and must be criminalized and the latest Criminal Code regulations regulate efforts to decriminalize the act of abortion. Of course, if you apply the law incorrectly, it will actually be detrimental to women who want an abortion, because it can be criminalized. If law enforcement officials have a tendency to use the old Criminal Code as a reference, of course victims who have the right to abortion will always face criminalization efforts that will result in imprisonment.

The legal regulations regarding abortion in the criminal code initially implemented criminalization, then there was a progression towards decriminalization with certain conditions regulated in Health Law Number 36 of 2009. Then it underwent changes again in Health Law Number 17 of 2023 which It depends on which criminal law book will be used as a reference, namely the old or new Criminal Code. The confusion is because during the transition period for the implementation of the new Criminal Code or Law Number 1 of 2023, the reference will be to use the Criminal Code that is currently in force. This means that if you use the old Criminal Code then the direction will be towards criminalization again because it still considers abortion to be a crime to be committed. .

## **2. Legal Consequences of Rights and Obligations**

Rights and obligations emerged after the government took a moderate stance or sought a middle way between the pro-choice and pro-life camps, namely by introducing the Health Law. These rights and obligations rest with the government as the holder of the obligations and with women and children who hold their rights to live and survive. The main thing is a woman's right to determine her life choices, namely by aborting the baby she is carrying. Then the second is the right of a baby in the womb to the right to life. Both should be considered by the government as a form of responsibility. Through legal regulations, namely in the Health Law, these two rights have been accommodated, namely the right to choose to have an abortion in article 75 paragraph (1), the right to life of the baby is also in article 75 paragraph (1) which prohibits abortion and other forms of consideration before it occurs. abortion.

The promulgation of abortion exceptions certainly brings new obligations for the government in terms of providing access to certified health services and competent health workers to carry out abortions, obligations in carrying out training for health workers to carry out legal abortions. Apart from that, there is also an obligation to protect women who have abortions according to the requirements and must be protected legally and receive guarantees not to be criminalized. Talking about the government's obligations, of course it also concerns the obligation to implement Minister of Health Regulation Number 3 of 2016 concerning Training and Providing Abortion Services for Indications of Medical Emergency and Pregnancy Due to Rape, by realizing it through official training and certification of medical personnel to be able to carry out legal abortions. Appoint or build special health facilities for abortion that are safe and legally responsible. This responsibility is not only dogmatic but also a moral responsibility in implementing the provisions of existing laws and regulations. It has been 15 years since abortion was allowed with special requirements in Indonesia but to date not a single abortion has been successfully carried out legally and legally.

## **3. Legal Consequences If an Abortion Does Not Meet the Requirements**

If an abortion occurs that does not comply with the requirements of the existing Health Law, the woman who has the abortion will face the law. There is a big tendency that efforts will be made to punish or criminalize their actions in aborting a pregnancy, because they do not comply with the procedures or requirements regulated in the Health Law or in implementing regulations, namely in the Minister of Health Regulation Number 3 of 2016 concerning Training and Providing Abortion Services for Emergency Indications Medical and Pregnancy Due to Rape. Imprisonment for both women and medical personnel. This requirement is that if a woman meets the



qualifications, she can have an abortion because there is an indication of a medical emergency or she is a victim of rape. At the same time, if you have met the qualifications, you must also meet the requirements as strictly and strictly regulated in the Health Law to be able to practice abortion legally.

The conditions for being able to have an abortion are regulated in article 76 of the Health Law Number 36 of 2009 and the latest criteria which have been amended now are in article 60 paragraph (2) of the Health Law Number 17 of 2023. The new Health Law does not regulate the provisions for punishment and referring to the Criminal Code. Meanwhile, Article 463 paragraph (1) of the new Criminal Code stipulates that every woman who has an abortion can be punished with a maximum prison sentence of 4 years (for the individual who has the abortion). It is different if other people who carry out abortions with or without consent can be subject to criminal sanctions of 5 to 12 years in prison.

So, if there is confusion due to changes in regulations regarding the issue of abortion, it should be clarified by referring to which criminal law code will be applied. Does the new health law number 17 of 2023 only refer to the new criminal code or to the current Criminal Code? Due to the problem of a 2 year transition period before the enactment of the new Criminal Code, there must be an explanation by immediately forming implementing regulations to straighten out references to which criminal law regulations will be used in dealing with abortion issues. Because the two provisions in the criminal law are contradictory and there is a big difference between criminalization and decriminalization tendencies, they must be clear and not detrimental to women or rape victims who want to have the right to have an abortion.

#### 4. CONCLUSION

The direction of regulatory policy regarding abortion in Indonesia has experienced ups and downs, starting from the legal regulations in the Criminal Code which categorizes abortion as a criminal act and is an illegal act for any reason. Then progressive changes occurred after the promulgation of Health Law Number 36 of 2009 which allows abortion with special conditions, namely if there are indications of a medical emergency and the pregnancy is caused by a criminal act of rape. As time went by, the Health Law also underwent changes as did the Criminal Code, which ultimately had quite significant legal consequences in regulating the issue of abortion in Indonesia. The legal consequences of changes to Health Law Number 17 of 2023 and Law Number 1 of 2023 concerning the Criminal Code, have new impacts for rape victims, especially regarding confusion in applying which abortion reference will be used during the transition period. implementation of this Criminal Code.

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