

## DISSECTING PROCEDURAL JUSTICE: INDONESIAN AND THAI LEGAL POLICIES TOWARDS FEMALE RAPE VICTIMS WHO CHOOSE ABORTION

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### Abstract

The practice of abortion, particularly that resulting from rape, is a complex legal, health, and human rights issue in Indonesia and Thailand. Female victims of rape often experience unwanted pregnancies, which can have serious physical, psychological, and social consequences, potentially leading to illegal abortions that endanger lives. This study aims to analyze and compare the Indonesian and Thai criminal justice systems in handling abortions resulting from rape, with an emphasis on legal protection for female victims of sexual violence. The method used is a normative juridical approach with a comparative legal study, through analysis of legislation, court decisions, empirical data, and international reports. The results of the study indicate that Indonesia still applies a dualistic approach between the criminalization of abortion and limited exceptions under the Health Law, which in practice creates legal uncertainty and has the potential to lead to re-victimization of victims. In contrast, Thailand applies a more progressive approach by separating abortion as a health issue and rape as a criminal offense, and positions women as victims in need of protection and recovery, rather than as subjects of punishment. This comparison indicates that the Thai legal system is more responsive to the protection of women's reproductive rights and the prevention of re-victimization. Therefore, legal reform and harmonization are needed in Indonesia so that the handling of abortions resulting from rape is more oriented towards justice, victim protection, and women's reproductive health.

**Keywords:** *Procedural Justice, Women's Protection, Victims, Rape*

### INTRODUCTION

Abortion is a complex and controversial social and legal issue in various countries, including Indonesia and Thailand, due to its far-reaching impact on women's health, social aspects, and law enforcement. In the context of criminal law, women are often positioned as the primary perpetrators of sexual violence, resulting in them facing strict legal mechanisms. Abortion due to rape makes this issue not only related to medical aspects, but also involves ethical, religious, and legal dimensions, where abortion is often categorized as a criminal offense that can threaten life and social stability. In the modern era, abortion has become an increasingly widespread phenomenon in society, with two main forms: spontaneous (natural) abortion and induced (intentional) abortion. In particular, criminal induced abortion (illegal abortion) is of great concern because it is carried out without medical or emergency reasons, often triggered by socioeconomic factors such as unpreparedness for having children, financial problems, or family pressure.

Indonesia and Thailand share similar cultural and religious backgrounds, but both countries implement different abortion laws, particularly regarding procedural fairness in criminal cases. In Indonesia, abortion is regulated by the Criminal Code (KUHP), and the investigation and prosecution process follows the Criminal Procedure Code (KUHAP), which emphasizes the presumption of innocence (Article 56) and the prohibition of torture (Article 117 Paragraph 1). However, the implementation of the KUHAP is often insensitive to gender perspectives, resulting in women who have abortions due to rape being treated repressively without considering biological or psychological factors, such as unwanted pregnancies. In contrast, Thailand has implemented more liberal legal reforms through its Criminal Procedure Code, such as the amendments to the Thailand Criminal Code No. 28 BE 2564 (2021), which revised Articles 301 and 305 to limit illegal abortions to pregnancies under 12 weeks, and to account for cases of rape or threats to health. Thailand Penal Code Book II Chapter IX (Offences Relating to Sexuality) emphasizes a more protective approach, including health services and counseling for women, rather than a purely repressive approach.

The lack of support from society towards victims further weakens their condition. Society often blames victims whose rights have been violated. Society should demonstrate empathy and support for victims rather than cornering them and re-victimizing them. The victim's appearance and manner of dress are often used as justification by perpetrators to commit sexual crimes against women. Rape occurs not because of appearance or clothing, but because of opportunity and vulnerability. Vulnerability is a mental state, focus, alertness, and awareness of the situation. Because basically, women who wear modest clothing do not necessarily avoid rape, because modest clothing does not necessarily avoid rape. The state is responsible for protecting victims of sexual crimes in Indonesia and Thailand, as well as providing reparation and ensuring their rights. Regulations are needed that require perpetrators to provide conditions and compensation to victims to fully restore victims' rights. Although both countries have established regulations to address abortion, the main challenge lies in implementing policies that are equal and gender-sensitive. In Indonesia, the Criminal Procedure Code has not fully accommodated women's rights in the legal process, often ignoring the biological and social aspects behind abortion. In Thailand, despite progress such as the provision of counseling, gaps in fair law enforcement remain. This significant difference reflects the need for a comparative study to analyze the extent to which the criminal procedural systems of both countries provide justice for women who undergo abortion. Based on the description presented, the author is interested in examining procedural justice: Indonesian and Thai legal policies toward female rape victims who choose abortion. This research is expected to identify differences in the legal policy processes of Indonesia and Thailand, particularly from a gender perspective, in order to contribute to the development of laws that are fairer, more responsive, and protect women's rights. Thus, this research aims to recommend more inclusive policies in both countries.

## **RESEARCH METHODS**

### **1. Methods Used**

The type of research used is normative legal research, which is legal research conducted by examining library materials or secondary data.

### **2. Data type**

The nature of this research is descriptive analytical, descriptive is showing a comparison or relationship of a set of data with another set of data, and the aim is to provide an overview, review, with legislation as material for reviewing relevant regulations in the research. With a comparative approach, the aim is to describe legal regulations by comparing them with other legal systems.

### **3. Data source**

The data sources used are primary legal sources (Criminal Procedure Code, PERMA No. 3 of 2017, TPKS Law No. 12 of 2022, Criminal Procedure Code) and secondary legal sources (books, legal journals).

## **RESULTS AND DISCUSSION**

### **Analyzing Procedural Justice: Indonesian and Thai Legal Policies Toward Female Rape Victims Who Choose Abortion**

The rise in abortion practices in Indonesia and Thailand has attracted the attention of criminal law academics and the government. Indonesian and Thai criminal law experts view abortion as the deliberate termination of a pregnancy before the fetus is capable of survival outside the womb, without complying with applicable legal provisions. This view is based not only on biological considerations but also takes into account the moral and legal aspects of the Indonesian and Thai criminal law systems. The most detrimental impact on rape victims is unwanted pregnancy. This pregnancy violates the reproductive rights that should be protected. This situation has various negative consequences, both physical and psychological, and social. Victims often experience profound mental trauma and a loss of self-esteem in society. This situation can push victims to seek illegal abortions, which can be life-threatening because they are performed through non-medical procedures, by incompetent personnel, and at a gestational age that does not meet medical standards. As a nation based on the rule of law, Indonesia guarantees its citizens access to justice in accordance with applicable law through case handling procedures<sup>5</sup>, also known as settlement procedures, in accordance with applicable procedural law provisions stipulated in the Indonesian Criminal Procedure Code (KUHAP) and the Thai Criminal Procedure Code. Adequate legal protection for victims of sexual crimes is essential, as this is not only a national issue but also an international one, and therefore requires serious attention. Furthermore, when victims report sexual violence to law enforcement

officials, the possibility of re-victimization (unfair treatment) during the judicial process is not ruled out. Before the trial, the victim suffered physically and mentally from facing the law. Then, in order to gather data for evidence of sexual violence, the victim had to recount the traumatic incident to the police. The victim also felt uncomfortable with the perpetrator's threats, which caused mental distress. During the trial, the victim witnessed the sexual violence she experienced. In giving testimony, she had to recount her painful experience and reconstruct the incident. Furthermore, the victim had to face the perpetrator's defense attorney, who attempted to dismiss the perpetrator's guilt. Therefore, a counselor was needed to be on the side of the sexual violence case.

The Criminal Procedure Code (KUHAP), through the pretrial institution, provides protection to victims by exercising control if the investigation or prosecution of their case is discontinued. This control is a manifestation of protection for victims so that their cases are fully resolved through legal mechanisms. The Criminal Procedure Code (KUHAP) also regulates protection for victims of sexual crimes. As stipulated in Chapter III of the KUHAP, Concerning the Merger of Compensation Cases, Articles 98-101, namely Compensation is provided by the victim by merging criminal and civil cases. The KUHAP regulates protection for victims, so that in addition to the perpetrator receiving a punishment commensurate with their actions, the victim also receives compensation for the losses they have suffered. However, in fact, currently prosecutors have never filed a lawsuit for compensation in sexual violence cases they handle. Compensation claims only exist in written legislation. Thus, the opportunity is opened for judges to make a policy on whether to file a civil case or consolidate it, thus opening the opportunity for judges to reject the merger of the proposed cases. Because in principle, merging criminal and civil cases is in line with the principles of simple, fast, and low-cost justice. However, Article 99 paragraph (1) of the Criminal Procedure Code limits the compensation requested to punishment, compensation for actual costs incurred by the injured party, so that other demands such as immaterial losses cannot be accepted and submitted as ordinary civil cases.

The Criminal Procedure Code (KUHAP) also has specific regulations in the criminal justice system, such as Supreme Court Regulation No. 3 of 2017 concerning guidelines for adjudicating women in conflict with the law. It regulates guidelines for handling cases of women in conflict with the law in the judicial environment, providing a legal basis for women. Based on PERMA No. 3 of 2017 in Article 1 number 7, it is obligated to provide access to women to obtain justice and be free from discrimination in the judicial system. Access to justice for women in conflict with the law is accommodated by the state with this PERMA. Furthermore, in examining women as victims, judges are not permitted to inquire about the victim's sexual background as a basis for acquitting or giving a lighter sentence to the perpetrator. Judges base their decisions on the facts in the trial and the values of justice in society. In addition, judges are prohibited from making statements or opinions or views that contain gender stereotypes, namely general views or impressions about the attributes, characteristics that should be possessed and played by women and men.

The presence of PERMA No. 3 of 2017 is considered quite accommodating in providing a definition of power relations itself. It provides guidelines for judges to examine power relations when adjudicating cases involving women. Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence introduces a progressive legal mechanism, by providing protection for victims, including recovery services, and public education. Abortion is permitted for those who become pregnant due to rape with a pregnancy that causes trauma, as regulated in Law No. 36 of 2009 Article 72 paragraph (2) concerning Health. The Health Law is also a savior for women who choose abortion for certain indications, this is because there is a criminal law context when there is a difference between general legislation (the Criminal Code) and specific legislation such as the principle of *lex specialis derogate lex generalis*. So in the Health Law that regulates abortion *provocatus medicinalis* can still apply in Indonesia even though there are several differences regarding the formulation of abortion in the Criminal Code. The Health Law cannot revoke the formulation of abortion in the Criminal Code but special regulations can certainly override or paralyze it.<sup>10</sup>

Thailand, based on Thailand Criminal Code No. 17, BE 2547 (2003) and Thailand Criminal Code No. 28, BE 2564 (2021), the crime of abortion from a Thai legal perspective has several exceptions based on legitimate reasons. Under Thai law, anyone who intentionally performs an abortion for their own benefit will be subject to criminal penalties, along with those who assist in the abortion process, in the form of imprisonment or a fine. If it is done for medical reasons to save a mother's life and is done before 12 weeks, it cannot be punished. Likewise, women who are victims of sexual violence outside of marriage cannot be punished. Through the amendment to Thai Criminal Code No. 28, BE 2564 of 2021, there are articles 301 and 305, Women who undergo abortions due to rape are not legally considered perpetrators of criminal acts, this expressly provides an exception from criminal liability, from the beginning the handling of the case is not directed at the investigation and prosecution process for

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women, but rather diverted to the physical and psychological recovery of the victim. The handling of this case begins through a non-penal mechanism, with health services. As long as the medical procedure is carried out in accordance with the provisions of Article 305, it is carried out in a health facility and is carried out by medical personnel who have the competence in accordance with the Medical Council of Thailand. Thus, procedural fairness in handling cases of women who choose abortion due to rape under Thai law demonstrates that the state separates abortion as a health issue from rape as a criminal offense. Women are positioned as victims whose dignity and rights must be protected, rather than as subjects of criminal punishment. Thailand is more progressive in guaranteeing reproductive rights and preventing repeated victimization of women as victims of sexual violence. In cases of rape, the law does not require a police report or court order as a condition for abortion, thus legally attempting to protect victims from procedures that could potentially increase trauma.

Thailand also has a Health Law, such as the Ministry of Public Health Regulations and guidelines from the Thai Ministry of Health concerning abortion services, as well as the right of medical personnel to refuse to perform an abortion based on personal beliefs, with the obligation to provide a referral to another medical professional. With this right, the Thai legal system considers abortion a health service, not merely a criminal offense. Thus, Thai law is more progressive, providing legal protection for cases involving women and the health of rape victims. Abortion due to rape in the Health Law is indeed legal but in reality there are still cases of perpetrators of abortion due to rape who are given criminal sanctions in the Muara Bulian District Court Decision Number 5 / Pid.Sus.Anak / 2018 / PN.Mbn which is considered contrary to children's rights. Sentenced to 6 (six) months in prison and 3 (three) months of job training for committing the crime of abortion due to pregnancy from rape. Where the decision handed down by the judge is considered not to consider the impact of the rape so it is inappropriate for the judge to impose a prison sentence for a minor (17 years old) and charged with Article 77A paragraph (1) in conjunction with Article 45A of Law Number 35 of 2014 concerning amendments to Law of the Republic of Indonesia Number 35 of 2002 concerning Child Protection.

Referring to Article 77A of the Child Protection Law, any person who performs an abortion shall be subject to a maximum imprisonment of 10 (ten years) and a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah), so that in this case, a child who performs an abortion may be subject to a maximum imprisonment of 5 years. Article 45 of the law explains that any person is prohibited from performing an abortion on their pregnancy unless the act is carried out for reasons and mechanisms that have been regulated in the legal regulations governing abortion, namely the Health Law and PP No. 61 of 2014. The purpose of enacting these laws and regulations is to protect victims from all forms of sexual violence that occur by establishing sanctions and ensuring that victims receive adequate protection and rehabilitation. In deciding a case, judges can certainly use legal logic as a basis for their decisions. In carrying out their duties, judges are prohibited from interpreting something beyond its intended scope, even if there are already clear regulations. This does not restrict judges' freedom, as they are still permitted to interpret it more broadly if the existing regulations are not fully encompassing. Law serves as a means of reform in society that is not solely based on what is stipulated in legislation. Therefore, legal breakthroughs are needed through legal reasoning or legal reasoning conducted by judges.

Empirical data shows that illegal abortion is a pressing health and social problem in both countries. In Thailand, it is estimated that by 2025, 20-60% of illegal abortions will be performed on girls aged 17-19 years due to unpreparedness, unmarried status, and economic factors. WHO (World Health Organization) data in 2023 also shows that the birth rate for adolescents aged 15-19 years is 21 per 1,000 women, with more than 300,000 women seeking medical care for abortion, of which nearly 100,000 experience complications and more than 20 die each year.<sup>14</sup> According to the World Health Organization (WHO) in Indonesia, an estimated 20-80% of abortions are carried out intentionally, with the maternal mortality rate (MMR) reaching 226 per 100,000 live births in 2020, of which 11% are caused by abortion. The National Population and Family Development Agency (BKKBN) estimates that around 2.4 million abortion cases occur in Indonesia every year.

A comparison of Indonesian and Thai criminal justice law reflects the practice of Indonesian criminal justice. Female rape victims who choose abortion often face lengthy legal proceedings and the potential for re-victimization because law enforcement officials still adhere to the Criminal Procedure Code (KUHAP) and the Criminal Code (KUHP) without considering the status of victims and women's reproductive rights. In contrast to Thai criminal justice law, the Thai legal system shows more development. Progressive in dealing with women who have abortions due to rape, Thailand's criminal justice system positions women who have abortions not as perpetrators of criminal acts but as victims in need of legal protection and health services. This emphasizes human rights, reproductive health, and the best interests of women, thereby minimizing the use of criminal sanctions.

Comparatively, the difference lies in their legal policies. Indonesia still employs a dualistic legal system approach, involving criminalization and limited exceptions, which in practice often creates legal uncertainty for rape victims. Meanwhile, Thailand places a greater emphasis on decriminalization and victim protection, with criminal law as the ultimum remedium. This demonstrates that Thailand's criminal justice system is relatively more responsive to protecting the reproductive rights of women who have abortions due to rape.

## **CLOSING**

### **Conclusion**

The widespread practice of abortion in Indonesia and Thailand demonstrates that abortion, particularly abortion resulting from rape, is a complex issue that encompasses not only biological aspects but also moral, legal, health, and human rights dimensions. Pregnancy resulting from rape has severe physical, psychological, and social impacts on victims, and has the potential to lead to illegal abortions that endanger women's lives if not addressed through adequate legal mechanisms and health services. In the Indonesian legal system, although various legal instruments provide protection for victims of sexual violence, such as the Criminal Procedure Code (KUHAP), Supreme Court Regulation No. 3 of 2017, Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence, and the Health Law, judicial practice still exhibits legal uncertainty. This is evident in the tendency to criminalize female rape victims who choose abortion, including minors, and the suboptimal implementation of victim protection and recovery mechanisms. This situation has the potential to lead to re-victimization and contradicts the goal of protecting reproductive rights and the best interests of victims. In contrast, the Thai legal system demonstrates a more progressive approach by separating abortion as a health issue and rape as a criminal offense.

Through the exclusion of criminal liability and non-penal mechanisms oriented toward recovery, rape victims who undergo abortion are positioned not as perpetrators but as victims whose dignity and rights must be protected. This approach positions criminal law as the ultimum remedium and places greater emphasis on protecting reproductive rights and preventing re-victimization. Thus, a comparison of Indonesian and Thai criminal laws reveals that the main differences lie in legal policies and victim protection orientation. Indonesia still tends to maintain a dualistic approach between criminalization and limited exceptions, while Thailand prioritizes decriminalization and victim protection. Therefore, reforming criminal justice laws and practices in Indonesia is crucial to be more responsive to protecting the reproductive rights of female rape victims who choose abortion, in line with the principles of justice, humanity, and public health.

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