

“Halal” Abortion in Perspective Common Law system, Civil Law System and Ius Constituendum: Towards Legality and Safety

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Abstract

Background: *Tosafe services in hygienic conditions must be made widely available and affordable, so that the stigma associated with providing and obtaining abortions can lessen and safe services can become normal and accepted, abortion is broadly legal, widely available and safe in Indonesia.*

Objective: *The purpose of this article to discuss iusconstituendum on abortion in Indonesia from criminal law perspective between Common Law System and Civil Law System. In Indonesia IusContituendum on abortion is not directed to legalization of abortion as carried out both in Netherland and USA but tends to be harmonized with therapeutic abortion concept both medical and psychiatric fields.*

Material and Method: *Systematic review of studies evaluating the prevalence of unsafe abortion in Indonesia.*

Results: *The public health tragedy caused by unsafe abortion is all the more so because it is largely preventable, by improving the quality and availability of post abortion care, by making abortion legal and increasing access to safe services, and—because almost every abortion is preceded by an unintended pregnancy—by expanding access to contraceptive information and services. Restrictive laws have much less impact on stopping women from ending an unwanted pregnancy than on forcing those who are determined to do so to seek out clandestine means. Ironically, the abortion laws governing of Indonesia is holdovers from the colonial era.*

Conclutions: *“Halal” abortion is making a significant contribution toward reducing the need for abortion altogether and the likelihood of unsafe abortion by bringing down the rates of unintended pregnancy. This is also helping to reduce complications of unsafe abortion through its support for programs to increase access to and improve post abortion care. This includes not only treatment for septic or incomplete abortion, but also essential post abortion.*

Keywords: *“Halal” abortion, the public health tragedy, unintended pregnancy Commonlaw system, Civil law system and Ius Constituendum.*

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I. Preliminary

Etymologically comes from the word halla-yahullu-hallanwahalalan, releasing, solving and freeing. Terminologically, the word halal means something that can be done because it is free or not bound by the provisions that forbid it, which is free from worldly and ukhrawi. The definition of abortion is the termination of pregnancy before the fetus can live outside the womb (before the age of 20 weeks of pregnancy), not merely to save the lives of pregnant women in an emergency but also because the mother does not want the pregnancy.

Abortion is indicated as a health problem because it has an impact on maternal morbidity and death, it only appears in the form of bleeding complications and sepsis contributing 17.1% to the maternal mortality rate (MMR) (Sardjana, 2017).¹⁾

In countries that do not allow abortion like Indonesia, many women are forced to seek unsafe abortion services because of the unavailability of safe abortion services or the cost offered is too expensive. The biggest obstacle is fear, not knowing where to seek counseling, and often being trapped in unsafe abortion practices.

Unsafe abortion is the termination of an unwanted pregnancy carried out by workers who are not trained, or do not follow health procedures or both. People who oppose abortion assume that abortion is carried out by unmarried women for reasons of pregnancy outside of marriage or other reasons related to norms, especially religious norms. A study in Bali found that 81% of women who had abortions were married women (Ida, 2015)²⁾, also a study conducted by the Population Council, 98.8% of women who had an abortion at a private clinic in Jakarta (Yusuf, 2015)³⁾, were married and on average had have children, a common reason is because they do not want to have more children.

Abortion has become a necessity, because of the prohibition of both law and religion, causing the practice of unsafe abortion to spread. Research in 10 major cities and 29 regencies in Central Java Province shows 73% of abortions occur in cities, and the process of abortion performed by untrained personnel is found in 36% of abortion service points in the city by traditional birth attendants, out of all 64% service points in city and 95% in the Regency is done by private / private.

The Fatwa of the Indonesian Ulema Council explains that abortion is permissible because hajad state is a condition in which someone is otherwise do, he's going to have big trouble. Circumstances in between the fetus suffers from genetic defects, if it is difficult to be born be healed. An increasing number of human diseases are known have a genetic basis. In 1977 a survey showed that three percent of all hereditary diseases are transferred by means of Mendelian, and more than 5 percent have "familial" traits leading to something genetic basis, this percentage increases every year.⁴⁾

- 1) Sardjana A., *Kontroversi Aborsi*, Jakarta UIN Press, 2017.
- 2) Ida A. dan Iben S., *Pola Pembinaan Keluarga dalam Pedoman bagi Petugas Kesehatan*, 2015.
- 3) Yusuf B. dan Sardjana A., *Negara dan Perempuan; Reorientasi Kebijakan Kesehatan*, Jakarta UIN Press. 2015
- 4) Anna C. Pai, *Dasar-dasar Genetika*, Jakarta: Erlangga, 2006.

With the existence of a fatwa from the Indonesian Ulema Council 2b paragraph 1 Number: 4 Year 2005 concerning Fetal Abortion, Indicated by Genetic Diseases, presence the practice of abortion is again gaining attention, especially for those pregnancies indicated by a genetic defect. The fatwa describes abortion allowed because of his age, both emergency and urge.

- 1) Permissible pregnancy-related emergencies abortion is:
 1. Pregnant women who suffer from serious physical illnesses such as cancer advanced stage, tuberculosis with caverna and severe physical diseases other to be determined by a team of doctors.
 2. In circumstances where pregnancy threatens the life of the mother.
- 2) Circumstances associated with permissible pregnancy abortion is:
 1. The fetus is detected to have a genetic defect if it is born later difficult to cure.
 2. Pregnancy due to rape determined by the authorized team in which there are among other things the victim's family, doctor, and cleric.⁵⁾

With the passing of the fatwa of the Indonesian Ulema Council on abortion causing controversy at various levels of society, because of the fatwa which regulates the permissible abortion.

From this it can be determined that there are scholars' who allow abortion because they understand these facts, or because they think that abortion is haram after the fetus takes shape and after one feels fetal movement. Clear that abortion is a matter that is agreed upon as haram whenever an abortion takes place. However, some say: if with an investigation that can be justified, that the life of the child in the womb will endanger the mother, hence Islam in general rules command to take wrong one of the lightest dharurat (akhaffudh dharurain).⁶⁾

Thus, the Indonesian Ulema Council allowed for have an abortion at the expense of the fetus, as it is to save the life of the future mother. The life of a mother takes precedence, considering she is joints of the family and have had obligations.

The existing law in Indonesia should be able to save mothers from deaths due to unsafe abortion. There are 3 abortion rules in Indonesia that apply to date, namely, 1) RI Law No. 1 of 1946 concerning the Criminal Code (KUHP) is still being applied 2) RI Law No. 7 of 1984 concerning Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women and 3) RI Law No. 36 of 2009 concerning health which writes under certain conditions, certain medical measures can be done.

The existence of the regulation above is actually considered to cause harm, because abortion is still considered a criminal act, even though abortion can be done safely (safe abortion). The Health Law was made to amend the Criminal Code, but contains a wrong definition of abortion so that the service provider (doctor) is the only one convicted. At the Criminal Code, both service providers (doctors), service seekers (mothers), and those who help get services, are found guilty.

The Abortion Law Controversy in Indonesia

Changes in abortion law in the Netherlands that adhere to the Civil Law System and in the US that adheres to the Common Law System occur because of changes or developments in society. An analysis of the comparative perspective of abortion law in Indonesia, whether the development of our society about abortion will lead to the legalization of abortion as abortion law in the Netherlands or in the United States.

- 5) Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975, Jakarta: Erlangga, 2011.
- 6) Syekh. Muhammad Yusuf Qardhawi, op.cit.

A soft opinion of abortion was seen in Van Tienhoven's van den Bogaard's thesis on Article 295-298 of the Criminal Code of 1887, Bogaard was concerned that this prohibition would be unwise and would increase the number of child killings or increase the number of illegitimate children, who had to live their lives under the name of defilement. Bogaard concluded that the penalties for abortionists were too severe, and suggested that the penalties for abortionists be lightened only, should not be more than one month in prison.

Changes in views regarding population control before World War II, and after World War II there is a positive approach to contraception in Indonesia. The period from 1970 to 1979 was no less than seven bills that were submitted to Parliament to replace the old legislation concerning abortion, and on May 1, 1981 the Stb Abortion Disbursement Act was enacted. 1981, 257 which was later amended by Law of November 6, 1997, Stb. 1997, 510 which legalized abortion.⁴ With the existence of this new law, Article 295 s.d. 298 was issued from the Dutch Penal Code 1881 and declared no longer valid.

Dutch abortion law is grouped into laws that adhere to the privacy model (model of privacy) parallel to the US, Japan, Germany, France, Denmark etc. This change was also seen in several other study results. Rahman et al. 6 study results put the Dutch abortion law in the category no. 5 parallel to 49 other countries such as the US, France, Italy, Singapore, China, Russia, Cuba etc. which allows abortion without any restriction.

Abortion policy when viewed from the most liberal to the most conservative, the Dutch abortion law can be placed in category A according to the Indonesia Country Progress Report⁷ because abortion is permitted at the request of women. Whereas in terms of policy legalizing abortion based on contextual considerations, according to WHO survey results, 8 Dutch abortion laws can be placed in the category of reasons for allowing abortion No. 7, so that the Netherlands is included in one of the 27% of countries in the world that allow abortion on request. The existing law in Indonesia should be able to save mothers from death due to unsafe abortion by untrained personnel (shaman). There are 3 abortion rules in Indonesia that apply to date, namely, 1) RI Law No. 1 of 1946 concerning the Criminal Code (KUHP) is still being applied 2) RI Law No. 7 of 1984 concerning Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women and 3) RI Law No. 36 of 2009 concerning health which writes under certain conditions, certain medical measures can be done.

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Life Development Affects Changes in Abortion Law

The law prohibits abortion after quickening, and regards it as a major crime (capital crime), but stipulates a lighter sentence against abortion before quickening, and thus maintains differences based on the principle of quickening in the common law.

In 1828, New York enacted legislation which in two ways could become a model for early anti-abortion legislation. First, the law prohibits fetal destruction both before and after quickening. Fetal destruction before quickening is considered a violation, and if done after quickening is considered murder.

The change in the character of the abortion law from soft to harsh laws against abortion since the late 1950s in the US can be attributed to the fact of the development of US society's life. At the end of the 19th century in the US there was rapid progress in the field of science, resulting in the awareness that fetal development occurred in a continuous process and that life in the fetus had existed before fetal movement could be detected. The rapid progress in the field of science has broken the principle of quickening the common law heritage in England.

The Catholic Church is under heavy pressure to change its view of the embryo, which distinguishes between embryos who are not yet souled and have a soul. In 1869 Pope Pius IX eliminated this distinction and emphasized that anyone who had an abortion at any time would receive an ex-communication sentence.

The 1967 AMA Committee on Human Reproduction opposes deliberate abortion, except when there are medical documents as evidence of a threat to the health or life of the mother, or that the child to be born has a physical or mental disability that would make him unable to live as a normal human being, or that The pregnancy was caused by rape or incest that would threaten the mental or physical health of the patient, where two other doctors selected for professional authority examined the patient and provided written opinion, and that the abortion procedure was carried out in an accredited hospital.

Certified and competent doctors to carry out abortions based on safe and clinical conditions in accredited hospitals, they often face the risk of being detained and prosecuted for violating abortion laws. They described the conditions of the patients who came to them asking for an abortion, and as doctors, they stated that in many cases they were unable to determine whether the abortion they had included was an exception or deviated from the abortion law.

From the beginning, it is necessary to reaffirm the basis of the decision of *Roe v. Wade* and *Doe v. Bolton*, who gave the theory of the threetime frames, namely: 1) The ruling was a recognition of the privacy rights of women to choose abortion before the fetus is able to live outside the womb and can do it without state interference. Before the fetus is able to live outside the womb the interests of the state are not strong enough to support the prohibition of abortion or obstacles to women's privacy rights to choose abortion procedures, 2) The verdict is a confirmation of state power to prohibit induction after the fetus is able to live outside the womb, if the law regulates regarding exceptions to pregnancies that endanger the lives or health of women; 3) the principle that the state has a legitimate interest in protecting the life of a fetus that can become a child. These principles are not contradictory and each principle is the guide of the US nation.

The time limit must be drawn when the fetus is able to live outside the womb, so that before that time, women have the right to privacy to choose to stop the pregnancy, by adhering to the principle: 1) Any court action to draw a line can be an arbitrary act, but in the decision of *Roe* and *Doe* it was elaborated very thoroughly, and 2) The concept of the ability to live outside the womb, as can be seen in the decision of *Roe* and *Doe*, is a time where there is a realistic possibility to maintain and nurture life outside the womb, so that the existence free from the lives of children in the womb get protection from a state that now exceeds women's rights.

Legal arrangements regarding abortion are possible in Indonesia

From the description above it can be said that both the US abortion law which adheres to the common law system and the Dutch abortion law that adheres to the civil law system experienced a similar development, which has changed from restrictive to abortion laws that are liberal. It was said so, because in the beginning both the US abortion law and the Dutch abortion law followed the model of prohibition and then turned into a very liberal and embraced model of privacy.

In Indonesia, since the enactment of the Penal Code adopted from the Dutch Penal Code 1881 based on Law no. 1 of 1946, the legal provisions concerning abortion adhere to the model of prohibition because abortion is prohibited without exception as stipulated in Article 346 s.d. 349 of the Criminal Code which is a copy or derivative of Article 295 s.d. 298 Dutch Penal Code 1881. The model of prohibition adhered to in the Penal Code was perfected by an exception after the issuance of Law No. 36 of 2009 concerning Health (UUK), although only limited to medical reasons to save the lives of mothers in an emergency. Therefore criminal law relating to abortion or *iusconstitutum* on abortion in Indonesia is classified as the most conservative and harsh law against abortion because it prohibits abortion except to save the lives of mothers. To this day it has been controversial ethically and legally.

After the 1994 Cairo International Conference on Population and Development (ICPD) and the Beijing Fourth World Conference on Women (FWCW), a draft amendment to the UUK Law refers to the 1994 Cairo ICPD agreement on women's reproductive rights and implicitly legalized abortion because it allows safe, quality abortion and is responsible for preventing women who experience undesirable event from unsafe abortion practices which often claimed the lives of women (Rahman 1998).

The legal regulation on abortion in the UUK Amendment Bill has triggered pro and contra public opinion, especially between Pro-Choice and Pro-Life figures and has dragged both sides to public debate. The results of the analysis of the public debate show sharp differences between the two camps. The Pro-Life faction rejected the UUK Amendment Bill on the grounds that if the bill was passed, legalization of abortion would occur in Indonesia. They tend to maintain the UUK provided they need to be accompanied by PP as mandated by Article 15 paragraph (3). Instead the Pro-Choice camp urged that the bill be passed immediately to prevent women experiencing KTD from unsafe abortion practices which often claimed the lives of women.

The development of Indonesian people's lives today has two choices for the *iusconstitutum* on possible abortion. First, the provisions which only allow abortion based on medical indications to save the life of a mother in an emergency as stipulated in the UUK are still maintained with the obligation to complete them with PP as mandated by Article 15 paragraph (3) of the UUK. Second, ratifying the UUK Amendment Bill which contains provisions which basically legalize safe abortion based on the request of women experiencing KTD because it refers to the 1994 Cairo ICPD agreement on reproductive rights.

Analysis of vertical and horizontal synchronization levels, it can be seen that the Bill on the Amendment of the Law on the Capital is not vertical and horizontal with other legislation in positive Indonesian law, because it tends to legalize abortion. Then it can be said that legally the UUK Amendment Bill has legal defects. As a result if the bill is passed into law, the risk faced is that the new law will be declared null and void.

Abortion laws that are possible in Indonesia need to be linked to medical and psychiatric abortion. Sofowan (2005) abortion for medical indications is also called therapeutic abortion, which is an abortion performed before the fetus is able to live for the health of the mother: 1) to save the life of the mother, 2) protect the health of the mother, 3) the fetus is severely deformed so unable to live, 4) a pregnancy that is unable to live, 5) reduction of the fetus in multiple pregnancies, 6) pregnancy is very detrimental to the physical and mental health of the mother, 7) the baby to be born will suffer physical and mental disorders, or 8) pregnancy as a result of rape and incest.

Soewadi (2005), abortion based on medical indications or therapeutic abortion can be done if: 1) pregnancy causes risks to the lives of pregnant women, both in terms of physical and mental health, 2) there is a risk of physical integrity of the baby to be born (eugenic considerations), 3) and rape and incest (juridical consideration).

Legal abortion is possible in Indonesia, harmonized with the concept of therapeutic abortion as stated above, so legal abortion in Indonesia is not only limited to abortion based on medical indications to save the life of the mother in an emergency, but more broadly includes several reasons for therapeutic abortion in terms of both medical and psychiatric namely: pregnancy due to rape and incest, pregnant women experience severe mental disorders, and the fetus has severe congenital defects.

The harmonization of the legal arrangements regarding abortion has further consequences in the form of decriminalization and depenalization in criminal law regulations relating to abortion that will be realized in the formulation, application and execution policy to fulfill the *lex certa* principle in criminal law. This is necessary because of the three reasons for safe abortion, namely pregnancy due to rape and incest, pregnant women who have severe mental disorders, and fetuses that have severe congenital defects, in the *iusconstitutum* is a criminal act because it is prohibited and threatened with crime, but in *iusconstituendum* even though these acts remain unlawful, pregnant women and medical personnel who help to carry out abortions are not convicted because they have no errors based on exclusions in the form of forgiving reasons as a reason for abolition of crimes originating from Article 48 of the Criminal Code concerning *overmacht* and emergency conditions (*noodtoestand*).

The application of Article 48 of the Criminal Code to the three reasons for abortion is based on a balanced theory of legal protection based on the Pancasila, which can be measured by the idea of justice which includes the concept of distributive *iustitia*. The distributive *iustitia* concept clearly illustrates two things, namely the government's obligation to distribute welfare to its citizens and the right of citizens to obtain welfare from the government. The concept of the distributive scheme is clearly seen in the statement in paragraph IV of the Preamble of the 1945 Constitution which contains one of the objectives of the establishment of the Republic of Indonesia and becomes the basis of Indonesian legal politics, namely protecting all the people of Indonesia and all of Indonesia's blood. The protection provided by the state is to all Indonesians and to shed Indonesian blood, it can be said that the protection is not only given to people in general, but also to children in the womb. Thus the child in the womb is entitled to get protection from the state.

When compared with the US Constitution, it is clear that there are fundamental differences in the protection of children in the womb. The fact that British common law is a pattern of the US Constitution does not determine abortion as a crime. Therefore the protection provided by the 14th amendment to the US Constitution to "everyone" is not extended to the protection of children in the womb in the first trimester. This was confirmed in the 1973 Supreme Court ruling in the *Roe v. Wade* and *Doe v. Bolton* is very famous (Alen & Anita, 1995). Similarly, when compared with the Dutch Abortion Law on May 1 Stb. 1981, 257 Stb. 1981, 257 which was later amended by Law of November 6, 1997, Stb. 1997, 510., it should be emphasized that abortion released in the Netherlands is safe abortion until the fetus is 12 weeks old. In Indonesia there is no such time limit, so that the state has an obligation to provide protection to children in the womb starting from conception until before birth. Barda NA (1998) in his book *Abortion in the Criminal Code and Law no 36 of 2009*.

Article 347 of the Criminal Code

(1) Anyone who intentionally aborts or kills a woman without her consent is threatened with a maximum prison sentence of twelve years.

(2) If the deed results in the death of the woman, it is punishable by imprisonment for a maximum of seven years.

Article 348 of the Criminal Code

(1) Anyone who intentionally aborts or kills a woman's womb with his consent, is threatened with a maximum imprisonment of five years and six months.

(2) If the act results in the death of the woman, she is threatened with a maximum imprisonment of seven years.

Article 349 of the Criminal Code

If a doctor, midwife or medicine person helps to commit a crime under article 346, or commits or helps to commit one of the crimes described in articles 347 and 348, then the crime specified in that article can be increased by one third and revoked the right to carry out a search in where crime was committed.

Article 350 of the Criminal Code

In the case of conviction for murder, because of murder with a plan, or because of one of the crimes under Articles 344, 347 and 348, revocation of rights based on article 35 No. 1-5.u 36/2009

Article 194 UUK 2009

Every person who intentionally had an abortion was not in accordance with the provisions referred to in Article 75 paragraph (2) sentenced to a maximum imprisonment of 10 (ten) years and a maximum fine of Rp1,000,000,000.00 (one billion rupiah).

Article 75 paragraph (2) UUK 2009

(2) Prohibitions as referred to in paragraph (1) may be excluded based on:

- a. indications of medical emergencies detected from an early age of pregnancy, both those that threaten the lives of mothers and / or fetuses, who suffer from severe genetic diseases and / or congenital defects, or which cannot be repaired making it difficult for the baby to live outside the womb; or
- b. pregnancy due to rape which can cause psychological trauma to rape victims.

Differences in abortion in the case of doctors cannot be prosecuted in the act of abortion

Article 194 No. 36 of 2009

Every person who intentionally had an abortion was not in accordance with the provisions referred to in Article 75 paragraph (2) sentenced to a maximum imprisonment of 10 (ten) years and a maximum fine of Rp1,000,000,000.00 (one billion rupiah).

Article 75

(1) Everyone is prohibited from having an abortion.

(2) Prohibitions as referred to in paragraph (1) may be excluded based on: a. indications of medical emergencies detected from an early age of pregnancy, both those that threaten the lives of mothers and / or fetuses, who suffer from genetic diseases severe and / or congenital defects, or that cannot be repaired making it difficult for the baby to live outside the womb; or b. pregnancy due to rape which can cause psychological trauma to rape victims.

(3) The actions referred to in paragraph (2) can only be carried out after going through counseling and / or pre-action counseling and ending with counseling post actions taken by competent and competent counselors.

(4) Further provisions regarding indications of medical emergencies and rape, as referred to in paragraph (2) and paragraph (3) shall be regulated by Government Regulation. Article 80 paragraph 1 uu No. 23/1992 Whoever intentionally carries out certain medical actions against pregnant women who do not meet the provisions referred to in Article 15 paragraph (1) and paragraph (2), shall be sentenced to a maximum imprisonment of 15 (fifteen) years and a maximum fine of Rp 500,000. 000.00 (five hundred million rupiah).

Article 15

(1) In an emergency as an effort to save the life of a pregnant woman and / or her fetus, certain medical measures can be taken.

(2) Certain medical actions as referred to in paragraph (1) may only be carried out:

- a. based on medical indications requiring such action;
- b. by health workers who have the expertise and authority for it and are carried out in accordance with professional responsibilities and based on the consideration of a team of experts;
- c. with the consent of the pregnant mother concerned or her husband or family; d. in certain health facilities.

Suwarno (1998), the protection of children in the womb is clearer with the statement in paragraph IV of the Preamble of the 1945 Constitution that the Indonesian State is based on Pancasila. The first precepts, the Godhead of the Almighty, and the second precepts, Humanity that is just and civilized, reinforces the existence of constitutional protection for children in the womb who obtain life from God the Creator and therefore humans according to their nature are obliged to protect, nurture, nurture and maintain their survival.

II. Conclusion

From the perspective of comparative criminal law between the common law system and the civil law system, the *iusconstituendum* on abortion in Indonesia does not lead to the legalization of abortion as happened in the Netherlands and the US, but tends to be harmonized with the concept of therapeutic abortion both in terms of medical and psychiatry.

Abortion is permitted not limited to the reason of abortion based on medical indications to save the life of the mother in an emergency, but more broadly includes several other reasons namely: pregnancy due to rape and incest, pregnant women suffer from severe mental disorders, and the fetus has severe birth defects.

So what needs to be done is to revise the UUK in accordance with the mandate of Article 15 paragraph (3) and not by ratifying the UUK Amendment Bill. Abortion itself is still a discourse that always invites the pros and cons of both law and religion that might not be exhausted if there are no new regulations on safe abortion, especially firm and clear.

Requirements that can be made by the government, abortion should be done in hospitals or clinics that meet the requirements and get permission, the age limit of the first trimester of pregnancy until 8 weeks of pregnancy, women who intend to have an abortion need to get counseling in order to decide for themselves to be aborted or not and counseling post abortion to avoid recurring abortion, women under the age of marriage must be accompanied by their parents in making abortion decisions, the law should allow abortion on health indications, which was decided by the Minister of Health at a relatively low cost.

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