

## Abortion in Indonesia: An overview of its current legislation

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### Abstract

Abortion, defined as the termination of pregnancy is one of the most contentious social issues in Indonesia although it has been practiced since long time ago. Abortion can be done in ways that conform to medical standards as well as in traditional ways. Abortion can be done by doctors, midwives, both in big cities and in remote areas. The moral and religious view of abortion is the biggest problem that has hitherto made it difficult to agree on a policy of abortion. Therefore, illegal and unsafe abortion is still running in secret. This is one of major problems threatening women in their reproductive era. This paper aims at reviewing legislation concerning abortion in Indonesia, particularly articles contained in the Indonesian Criminal Code and the Law No. 36 of 2009 on Health. The result show that to date, Indonesia does not have the specific legislation pertaining to abortion. In Indonesia, however, legal position of abortion is governed by the Indonesian Criminal Code and Law No. 39 of 2009 on Health. In this perspective, the Indonesian Criminal Code as the basis of criminal law in Indonesia strictly prohibits the act of abortion. Nevertheless, Law No. 36 of 2009 on Health provides a possibility for abortion for some reason. Abortion is permitted only to save a woman life.

**Keywords:** abortion in Indonesia, Indonesian criminal code, Law No. 36 of 2009 on health

### 1. Introduction

Abortion, defined as “the termination of pregnancy before 28 weeks of gestation - calculated from date of onset of last menses” or “the expulsion or extraction from its mother, a foetus or an embryo weighing 500 grams or less (Ubajaka *et al.*, 2014), is one of the most contentious social issues in Indonesia. Actually, as Noor *et al.* (2010) noted, abortion is practiced throughout most of the world and has been practiced since long time ago. Abortion can be done in ways that conform to medical standards as well as in traditional ways. Abortion can be done by doctors, midwives, both in big cities and in remote areas. The moral and religious view of abortion is the biggest problem that has hitherto made it difficult to agree on a policy of abortion. Therefore, illegal and unsafe abortion is still running in secret. This is one of major problems threatening women in their reproductive era.

Along with the development of science, technology, and law: patient now has an autonomous right. In this case, the patient is entitled to determine what action a doctor should take on her, or has right to reject it. If a doctor performs negligence, she may claim compensation for the negligence. This autonomous right make a women has right on her body, including on abortion discourse (De Costa and De Costa, 2009). Women are also entitled to determine unwanted pregnancy they experience (Noor *et al.*, 2010). On the other hand, a doctor has vowed to respect every human life from the moment of conception. Therefore, abortion is contrary to the doctor’s oath as the principal actor in the act of abortion. Abortion is considered a criminal offense.

Recent years, abortion becomes one of the most serious social problems as the rate of abortion is increasing. It is difficult to assess the number of unsafe and illegal abortions, as there is a lack of comprehensive and recent data on the issue in Indonesia. It is estimated that there may be up to two million induced abortion cases per year in Indonesia with 30 per cent

of them among unmarried women. Many of these abortions are conducted in unsafe conditions. The figure indicates that unsafe abortions account for between five and 11 per cent of maternal deaths (AIP, 2010).

Furthermore, abortion is also concerned with the religion perspective. According to Islamic view, all human life is considered sacred, from through to natural death (Noor *et al.*, 2010). Abortion is equal to killing a human life and is a very serious matter. In this sense, human life is sacred and should not be taken away except upon indications singled out and specified by law. The sanctity of human life covers all it stages including the intrauterine phase. Islam considers parents who killed their children will be under trial for that crime. Furthermore, people often fear that having more children will make them poor. In fact, Islamic teaching ask people to not not slay the children for fear of poverty because Allah shall provide for them for us. based on this perspective, it is believed that Allah will provide sustenance for us and for our children. Thus, the right to life is belong to God and no human should take away that right (Noor *et al.*, 2010).

Despite the use of contraception is prevalent and the safe method of abortion is available, yet, millions of unsafe abortions continue to take place globally every year. This might be caused by several factors: e.g., <sup>[1]</sup> all contraceptive methods occasionally fail <sup>[2]</sup>, people fail to use contraceptive methods correctly or consistently, leading to unintended pregnancies, and <sup>[3]</sup> many of women do not have access to safe abortion services when they decide to terminate a pregnancy. If the women live in the area whereas abortion is legally restricted, they end up having unsafe abortions (Shah and Áhman, 2010). Referring to WHO (2006), unsafe abortion is prevalent in developing countries where abortion is highly restricted by law. High prevalence of unsafe abortion is also occurs in countries abortion legally is permitted, yet, abortion

providers are not easily accessible. Therefore, women faced with an unintended pregnancy often obtain clandestine abortions from medical practitioners, paramedical workers, or traditional healers.

Women who seek to terminate a pregnancy might be caused by similar reasons. However, their ability to have abortion legally varies by where they live. In one country, abortion services may be provided by the government, while in another, abortion providers may face criminal sanctions for offering such services. Where abortion is legally restricted, women are more likely to undergo the procedure in unsafe conditions (Boland and Katzive, 2008). According to The World Health Organization (WHO), unsafe abortion refers to “a procedure for terminating an unintended pregnancy that is carried out either by a person lacking the necessary skills or in an environment that does not conform to the minimal medical standards, or both” (WHO, 2006).

Here in Indonesia, the act abortion is still become a contentious issue by many parties. However, to date, Indonesia does not have the specific legislation pertaining to abortion. In Indonesia, however, legal position of abortion is governed by the Indonesian Criminal Code and Law No. 39 of 2009 on Health. The Indonesian Criminal Code (hereafter the ICC) as the basis of criminal law in Indonesia strictly prohibits the act of abortion. Nevertheless, Law No. 36 of 2009 on Health (hereafter the ILCH 2009) provides a possibility for abortion for some reason. Abortion is permitted only to save a woman life. This paper aims at reviewing legislation concerning abortion in Indonesia, particularly articles contained in the ICC, the ILCH 2009, and other supporting legislation.

## 2. Abortion in Indonesia: an overview

### 2.1 Figure

Every year, millions of Indonesian women become pregnant unintentionally because of many reasons. Many of these women decide to terminate their pregnancies, despite the fact that abortions are generally illegal according to Indonesian law and social system. Like its counterparts in many developing countries, Indonesia is a country whereas abortion is stigmatized and restricted (Guttmacher Institute, 2008). Under such a condition, many Indonesian women who has no ability to access to legal and safe abortion services often try to terminate their pregnancies by their-self or seek illegal abortions that usually performed by unskilled providers with unsafe methods that might be danger for the pregnant mothers (Landiyanto, 2009).

It is difficult to find the number of abortion exactly occurred in Indonesia. Although reliable data does not exist, it is estimated that number of abortions in Indonesia is about two million per year including spontaneous abortions (Guttmacher Institute, 2008). Guttmacher Institute (2008) notes that the rate of abortion in Indonesia is relatively high: i.e., it is about 37 abortions for every 1,000 women of reproductive age. Many induced abortions in Indonesia are categorized unsafe; i.e., it is carried out either by an unskilled or in an environment that does not in accordance with minimum medical standards (WHO, 2006). It is estimated that approximately half of all women seeking abortion are going to traditional birth

attendants, traditional healers or masseurs to terminate their pregnancy (Guttmacher Institute, 2008).

### 2.2 Abortion and religion

Republic of Indonesia is a democratic country located in Southeast Asia. There are six official religions recognized by the country: Islam, Christianity, Catholicism, Buddhism, Hinduism and Confucianism. Majority of Indonesian are Muslim. Indeed, Indonesia is the largest Muslim country in the world with approximately 204 millions people is Muslim. However, Indonesia is not an Islamic state (Surjadjaja, 2008). In the context of abortion, Muslim scholars mostly agree that abortion is strongly prohibited and is considered to be an offence against a living human being. Abortion is prohibited except under exceptional circumstances: e.g., <sup>[1]</sup> before soul enters the fetus <sup>[2]</sup>, pregnancy results from a rape <sup>[3]</sup>, foetal deformity of the type of anencephaly <sup>[4]</sup>, congenital rubella, and <sup>[5]</sup> specific mental physical complications for the mother (Hewitt, 2004). However, it is important to note that Islam acknowledges five Muslim taughts: Hanafi, Maliki, Syafii, Hanbali, and Jafari, which have difference interpretation on Islamic law and jurisprudence (Sciortino *et al*, 1996).

### 2.3 Legal status of abortion

Rahman *et al*. (1998) classified the world's countries into five categories indicating the circumstances under which a pregnant woman could legally obtain an abortion under the following basis: <sup>[1]</sup> to save her life <sup>[2]</sup>, to preserve her physical health <sup>[3]</sup>, to safeguard her mental health <sup>[4]</sup>, on socioeconomic grounds, and <sup>[5]</sup> without restrictions as to reason. Boland and Katzive (2008) also classified the world's countries into five categories. The first category comprises of countries whose laws prohibit abortion entirely. Abortion is permitted only to save a woman's life. Some countries in this category permit abortion to save a woman's life, while others do not. The second category includes countries whose laws permit abortion to protect a woman's physical health. Many of these laws refer to abortion being permitted on health grounds. Countries in the third category have laws that explicitly recognize threats to mental health as justification for abortion. The fourth category includes countries whose laws permit abortion on the basis of socioeconomic factors. Fourteen countries have laws that permit a medical provider to take a woman's social and economic circumstances into account when determining her eligibility for an abortion. The fifth category consists of countries whose laws permit abortion without restriction as to reason.

## 3. Legal Status of Abortion Based on Indonesian Criminal Code

According to Indonesian Criminal Code (ICC), the act of abortion and other related measures is prohibited without exception. In the ICC, the act of abortion is stipulated in the Second Book Chapter XIV concerning Crimes against Decency (Article 299) and Chapter XIX concerning Crimes against Life (Article 346 to Article 349). The following is a description pertaining to the provisions of abortion contained in those articles

### 3.1. Article 299

The first article of ICC relates to the act of abortion is Article 299. It comprises of three paragraph. According to the first

paragrapgh, “Any person who with deliberate intent gives treatment to a woman or causes her to undergo a treatment, giving her to understand or raising the expectation that thereby pregnancy may be curbed, shall be punished by a maximum imprisonment of four years or a maximum fine of three thousand rupiahs”. The second paragrapgh stipulates that “if the offender has acted in pursuit of gain, an occupation or a habit of the commission of the crime, or is a physician, midwife or pharmacist, the punishment may be enhanced with one third”. Lastly, the third paragrapgh states that “if the person found guilty commits the crime in his profession, he may be released from the exercise of said profession” (art. 299 of ICC).

### 3.2. Article 346

Article 346 provides the treath of criminalization for a woman who seeks to terminate her pregnancy. The article reads as follows: “Any woman who with deliberate intent causes or lets another cause the drifting off or the death of the fruit of her womb shall be punished by a maximum imprisonment of four years” (art. 346 of ICC).

### 3.3. Article 347

Article 347 is concerned with the treath of criminalization for individual who perform abortion without her consent. It consists of two paragraphs. In particular, paragraph 1 stipulates that “any person who with deliberate intent causes the drifting off or the death of the fruit of the womb of a woman without her consent shall be punished with a maximum imprisonment of twelve years”. Meanwhile, paragraph 2 states that “if the fact results in the death of the woman, he shall be punished by a maximum Imprisonment of fifteen years” (art. 347 of ICC).

### 3.4. Article 348

Article 348 consists of two paragraphs governing the treath of criminalization for individual who perform abortion with her consent. In this sense, paragraph 1 stipulates that “Any person who with deliberate intent causes the drifting off or the death of the fruit of the womb of a woman with her consent shall be punished by a maximum imprisonment of five years and six months” while paragraph 1 stipulates that “If the fact results in the death of the woman, he shall be punished by a maximum imprisonment of seven years” (art. 348 of ICC).

### 3.5. Article 349

The last article of ICC containing provision on abortion is Article 349. It consists of one paragraph governing the treath of criminalization for health workers who perform abortion. The article states that “if a doctor, midwife or pharmacist is an accomplice to the crime in Article 346, or is guilty of or is an accomplice to one of the crimes described in Articles 347 and 348, the sentences laid down in the Articles may be enhanced with one third, and be may be deprived of the exercise of the profession in which he commits the crime” (art. 349 of ICC). Based on the provisions contained in Article 299 of the ICC, it can be described the criminal offense elements as follows <sup>[1]</sup> any person who deliberately gives treatment to a woman to terminate her pregnancy shall be punished by a maximum imprisonment of four years or a maximum fine of three thousand rupiahs <sup>[2]</sup>, any person who deliberately giving treatment to a woman to terminate her pregnancy in pursuit of

gain, the punishment may be enhanced with one third, and <sup>[3]</sup> if the act of abortion is conducted by a doctor, midwife or pharmacist; then he may be released from the exercise of said profession.

Based on the provisions stipulated in Article 346 of the ICC, it can be described the criminal offense elements as follows <sup>[1]</sup> the subject is a women or others she sent <sup>[2]</sup>, the intention, and <sup>[3]</sup> to terminate her pregnancy. The ICC also addresses other person involved in the acts of abortion without the consent of the woman. This type of act is included in Article 347 of the ICC which determines that this other person will be punished with a maximum imprisonment of twelve years. Based on the provisions stipulated inArticle 347 of the ICC, it can be described the criminal offense elements as follows <sup>[1]</sup> the subject is other individual <sup>[2]</sup>, the intention <sup>[3]</sup>, to terminate her pregnancy, and <sup>[4]</sup> without her consent.

Further, the ICC also addresses other person involved in the acts of abortion with the consent of the woman. This type of act is included in Article 348 of the ICC which determines that this other person will be punished with a maximum imprisonment of five years and six months. Based on the provisions stipulated inArticle 347 of the ICC, it can be described the criminal offense elements as follows <sup>[1]</sup> the subject is other individual <sup>[2]</sup>, the intention, <sup>[3]</sup> to terminate her pregnancy, and <sup>[4]</sup> with her consent. Finally, Article 349 of the ICC provides for criminal sentence for the health workers (doctors, midwives, and pharmacists) who are involved in the criminal act of abortion. Referring to the article, if a doctor, midwife or pharmacist is guilty of the crimes described in Articles 346, 347, and 348, the sentences laid down may be enhanced with one third and be deprived of the exercise of the profession.

## 4. Legal Status of Abortion Based on ILCH 2009

Law No. 36 of 2009 on Health (ILCH 2009) was passed to replace Law No. 23 of 1992 on Health. With the enactment of ILCH 2009, issues pertaining to abortion obtain legitimacy and affirmation. ILCH 2009 contains articles explicitly regulating abortion in Indonesia, although its practices generate reactions and controversy in the society. The provisions concerning abortion in ILCH 2009 are set forth in Articles 75, 76, 77 and 194. The following a description of pertaining to the act of abortion contained in the articles.

### 4.1. Article 75

Referring to Article 75 paragraph 1 of the ILCH, people are prohibited to perform abortion. Then, as stipulated in Article 75 paragraph 2, prohibition as intended in Article 75 paragraph 1 may be exceptional based on <sup>[1]</sup> indication of medical emergency detected as of the early age of pregnancy, either those threatening the life of the mother and/or fetus, those suffering from serious genetical disease and/or inviable deformity, or those unfixable so that troubling the infant to live outside the womb; <sup>[2]</sup> pregnancy due to rape that may cause psychological trauma to the victim. Furthermore, it is set out in Article 75 paragraph 3 that measures as intended in Article 75 paragraph 2 may only be carried out following counseling prior to measures and ended with counseling post measures by competent and authorized counselor. Finally it is stated in Article 75 paragraph 4 that further provision concerning indication of medical emergency and rape, as

intended in Article 75 paragraph 2 and Article 75 paragraph 3 provided for in a Government Regulation (ILCH 2009).

#### 4.2. Article 76

After that, Article 76 of the ILCH describes that abortion as intended in Article 75 may only be carried out <sup>[1]</sup> before the pregnancy reaches 6 (six) weeks from the first day of the last period, except in medical emergency situation <sup>[2]</sup>, by health personnel who have expertise and authority and have certificate stipulated by the minister <sup>[3]</sup>, with the consent of the pregnant mother concerned <sup>[4]</sup>, with the consent of the husband, except rape victim, and <sup>[5]</sup> in health service provider which satisfies the requirements stipulated by the Minister (ILCH 2009).

#### 4.3. Article 77

Article 77 of the ILCH is concerned with government obligation on abortion. It stipulated in this article that “The Government shall be obliged to protect and prevent woman from abortion practice as intended in Article 75 paragraph (2) and paragraph (3) which is of non quality, unsafe, and irresponsible and against religious norms and the provisions of statutory regulations” (ILCH 2009).

#### 4.4. Article 194

Article 194 relates to the sentence of abortion. Article 194 states that “Any body who is intentionally conduct abortion which are not conform to the provision as referred to in Article 75 shall be convicted with imprisonment at the longest 10 (ten) years and fine at the most IDR 1,000,000,000.00 (one billion Rupiah) (ILCH 2009).

Elucidation of Article 75 paragraph 3 of ILCH 2009 states that what is meant by counselor in this provision is any person who has been certified as a counsellor through the education and training. In this sense, the person who can serve as a counselor is a doctor, psychologist, community leaders, religious leaders, and anyone who have interest and skills for it. Furthermore, elucidation of Article 77 of ILCH 2009 states that the meaning of unsafe, uncertified, or irresponsible abortion practices that are not qualified, unsafe, and irresponsible are abortions is abortion conducted by force and without consent of the women concerned. This include the act of abortion performed <sup>[1]</sup> by not professional medical staff <sup>[2]</sup>, without following professional standards and applicable services <sup>[3]</sup>, discriminatory, or <sup>[4]</sup> preferred to material rewards instead of medical indications.

The provision pertaining to abortion contained in the ICC is of the principle “the act of abortion is illegal without exception”. This provision is considered to incriminate the health worker in performing their duties. The provision is also considered contrary to the provisions set forth in the ILCH 2009. According to ILCH 2009, the act of abortion is prohibited (Article 75 paragraph 1). Such restriction may be excluded based on: <sup>[1]</sup> indication of medical emergency detected as of the early age of pregnancy, either those threatening the life of the mother and/or fetus, those suffering from serious genetical disease and/or inviable deformity, or those unfixable so that troubling the infant to live outside the womb and <sup>[2]</sup> pregnancy due to rape that may cause psychological trauma to the victim (Article 75 paragraph 1).

### 5. Concluding remark

To date, Indonesia does not have the specific legislation pertaining to abortion. In Indonesia, however, legal position of abortion is governed by the Indonesian Criminal Code and Law No. 39 of 2009 on Health. According to Indonesian Criminal Code (ICC), the act of abortion and other related measures is prohibited without exception. In the ICC, the act of abortion is stipulated in the Second Book Chapter XIV concerning Crimes against Decency (Article 299) and Chapter XIX concerning Crimes against Life (Article 346, Article 347, Article 348, and Article 349). in particular, Article 299 relates to the prohibition of abortion. For instance, it is stipulated that any person who involved in the act of abortion shall be punished by a maximum imprisonment of four years. Article 346 provide the treath of criminalization for a woman who seeks to terminate her pregnancy. Article 347 is concerned with the treath of criminalization for individual who perform abortion without her consent. Article 348 governs the treath of criminalization for individual who perform abortion with her consent. The last article of ICC containing provision on abortion is Article 349. It governs the treath of criminalization for health workers who perform abortion.

Law No. 36 of 2009 on Health (ILCH 2009) was passed to replace Law No. 23 of 1992 on Health. ILCH 2009 contains articles explicitly regulating abortion in Indonesia, although its practices generate reactions and controversy in the society. The provisions concerning abortion in ILCH 2009 are set forth in Articles 75, 76, 77 and 194. For instance, it is stipulated that people are prohibited to perform abortion. This prohibition may be exceptional based on <sup>[1]</sup> indication of medical emergency detected as of the early age of pregnancy, either those threatening the life of the mother and/or fetus, those suffering from serious genetical disease and/or inviable deformity, or those unfixable so that troubling the infant to live outside the womb; <sup>[2]</sup> pregnancy due to rape that may cause psychological trauma to the victim. In addition, abortion may only be carried out <sup>[1]</sup> before the pregnancy reaches six weeks from the first day of the last period, except in medical emergency situation <sup>[2]</sup>, by health personnel who have expertise and authority and have certificate stipulated by the minister <sup>[3]</sup>, with the consent of the pregnant mother concerned <sup>[4]</sup>, with the consent of the husband, except rape victim, and <sup>[5]</sup> in health service provider which satisfies the requirements stipulated by the Minister.

### 6. References

1. AIP Left Without A Choice: Barriers To Reproductive Health In Indonesia, Amnesty International Publications, 2010, available at <https://www.amnesty.org>
2. Boland R, Katzive L. Developments in Laws on Induced Abortion: 1998 –2007, International Family Planning Perspectives. 2008; 34(3):110-120
3. De Costa C, Naomi De Costa N. Medical Abortion and The Law, *UNSW Law Journal*. 2009; 29(2):218-223
4. DESA Abortion Policies and Reproductive Health around the World, United Nations, Department of Economic and Social Affairs, Population Division (United Nations publication, Sales No. E.14.XIII.11), 2014,
5. Guttmacher Institute “Abortion in Indonesia 2008, available at [https://www.guttmacher.org/sites/default/files/report\\_pdf/ib\\_abortion\\_indonesia\\_0.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/ib_abortion_indonesia_0.pdf)

6. Hewitt I. What Does Islam Say? The Muslim Educational Trust, 1425 AH / 2004 CE, 2004
7. ICC. Indonesian Penal Code, Directorate General of Law and Legislation, Ministry of Law, available at [https://www.unodc.org/res/cld/document/idn/indonesian\\_penal\\_code\\_html/I.1\\_Criminal\\_Code.pdf](https://www.unodc.org/res/cld/document/idn/indonesian_penal_code_html/I.1_Criminal_Code.pdf)
8. Landiyanto EA. Abortion Policy in Indonesia: Rights, Law and Religious Perspectives, The Paper Presented at 5th Asia and Pacific Conference on Reproductive and Social Health and Rights, Beijing, 2009,
9. Law of Republic of Indonesia Number 36, Year On Health, 2009. available at [http://apiycna.org/wp-content/uploads/2014/01/Indonesia\\_Health-Law-no-36.pdf](http://apiycna.org/wp-content/uploads/2014/01/Indonesia_Health-Law-no-36.pdf)
10. Noor NAM, Aripin MA, Jusoff K. The detrimental crime of abortion: A comparative study between Malaysian law and common law, *Journal of Law and Conflict Resolution*. 2010; 2(3):46-52
11. Rahman A, Katzive L, Henshaw SK. A Global Review of Laws on Induced Abortion, 1985–1997, *International Family Planning Perspectives*. 1998; 24(2):56-64
12. Sciortino R, Natsir LM, Mas'udi MF. Learning from Islam: Advocacy of Reproductive Rights in Indonesian Pesantren, *Reproductive Health Matters*. 1998; 8:86-96
13. Shah I, Ahman E. Unsafe Abortion in 2008: Global and Regional Levels and Trends, *Reproductive Health Matters*. 2010; 18(36):90-101
14. Surjadjaja C. Policy Analysis of Abortion in Indonesia: The Dynamic of State Power, Human Need and Women's Right, *IDS Bulletin*, 2008; 39(3):62-71
15. Ubajaka CF, Adogu POU, Ilika C, Ilika AL. Perception of Abortion and Abortion Laws by Lawyers in Anambra State Nigeria, *International Journal of Clinical Medicine*. 2014; 5:695-703
16. WHO Unsafe abortion: the preventable pandemic, The World Health Organization, available at [http://www.who.int/reproductivehealth/publications/general/lancet\\_4.pdf](http://www.who.int/reproductivehealth/publications/general/lancet_4.pdf)