



# Problems of Abortion Implementation in the Perspective of Indonesian and Thai Criminal Acts

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**Abstract:** Abortion is a complex and controversial issue involving legal, moral, and ethical aspects. This study aims to analyze the problems of implementing abortion from a criminal perspective in Indonesia and Thailand, as well as a review of Islamic law. The method used in this study is the normative legal research method. This study is theoretical and tends to use secondary data as the main source, such as laws and regulations, court decisions, legal journals, books, and related documents. The purpose of this study is to Analyze the Legal Regulations on Abortion from Indonesian Law and Law in Thailand, and to identify the Problems of Its Implementation. In the Indonesian context, abortion is regulated in Law No. 1 of 2023 and Law No. 36 of 2009 concerning Health, which permit abortion under certain conditions, such as medical emergencies and pregnancy due to rape, with strict time limits. Meanwhile, in Thailand, recent legal reforms allow abortion up to 12 weeks without conditions, reflecting a more liberal approach compared to Indonesia. From a Positive legal perspective, abortion is generally considered haram, but there are exceptions in emergency or hajat situations. This study found that there is a discrepancy between the positive laws in both countries regarding the time limits and conditions that allow abortion. This analysis is expected to provide a better understanding of the legal and ethical challenges in the practice of abortion, and encourage dialogue between positive law and religious values to achieve more just and sustainable solutions.

**Keywords:** Abortion; Criminal Acts; and Problems

## 1. Introduction

Abortion is a medical procedure performed to terminate a pregnancy before the fetus can survive outside the uterus. In general, abortion can be defined as the removal of the product of conception (fetus) from the mother's uterus, which occurs before the gestational age reaches 20 to 28 weeks, depending on the applicable legal and medical context.(Sinaga, 2023),(Wibowo, 2018). Abortion can be done through several methods, namely Medical Abortion by Using drugs to end the pregnancy, and Surgical Abortion by Involving procedures such as vacuum aspiration or dilation and evacuation (D&E), which are performed by trained medical personnel.(Leveno, 2009),(Andyani, 2024).

Thus, abortion is a complex act, both medically and legally, and often involves profound ethical and social considerations.(Akmal & Ainurrofiq, 2024),(Siregar, Sitepu, & Darma, 2023). In Indonesia, abortion is not a new problem, currently abortion is still a problem in Indonesia, this is related to the practice of abortion which is often carried out by the younger generation, especially the incidence of criminally provoked abortion in Indonesia reaches 2.5 million cases per year, or 43 abortions for every 100 pregnancies and around 30% of these abortion cases are carried out by those aged 15-24 years.(Suryadi, 2020),(AT KOTA & BAHIRIN REGIONAL HOSPITAL, nd).

The debate on abortion in Indonesia has recently become increasingly heated, triggered by various events that have shaken important aspects of human life. The state actually prohibits abortion, which is regulated in Law Number 36 of 2009 concerning

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Health (hereinafter abbreviated as Law No. 36 of 2009). The practice of abortion increases by around 15 percent each year. Based on data from the BKKBN, there were 2.4 million cases of abortion in 2012, most of which were carried out by teenagers. (LUBIS, 2018), (Rima Wirenviona, Riris, & ST, 2020). The high death rate due to abortion also contributes to the increasing Maternal Mortality Rate (MMR), which is the main indicator of Indonesia's health status. In 2007, the MMR was recorded at 228 per 100,000 live births, lower than in 1991 which reached 390 per 100,000 live births, in 1997 it was 334 per 100,000 live births, and in 2002 it was 307 per 100,000 live births. However, the MMR rose again in 2012 to 359 per 100,000 live births, far from the Millennium Development Goals (MDGs) target of 102 per 100,000 live births in 2015. (Yuningsih, 2016), (Lestariningsih, 2020).

Since the enactment of the Criminal Code (KUHP), the legal regulations regarding abortion are prohibitive without exception, as regulated in Articles 346 to 349 of the Criminal Code, which were adapted from Articles 295 to 298 of the Criminal Code (WvS) or better known as the Criminal Code (KUHP). (Nasution, Naldo, & Pasaribu, 2024). After the International Conference on Population and Development (ICPD) in Cairo in 1994 and the Fourth World Conference on Women in Beijing in 1995, Law No. 36 of 2009 was passed. This law refers to the 1994 Cairo ICPD agreement on women's reproductive rights, and implicitly allows for safe, quality, and responsible abortions to protect women who experience unwanted pregnancies from unsafe abortion practices that often have fatal consequences. (Haryanto, 2022).

In Indonesia there are several regulations that prohibit abortions and among them are based on Article 75 paragraph (1) of the Health Law, basically abortion is prohibited in Indonesia. However, there are also exceptions for several conditions as regulated in Article 75 paragraph (2) of the Health Law, the first being due to indications of medical emergencies and the second being pregnancy due to rape, abortions can be performed with the conditions as stated in Article 76 of the Health Law which must be met as follows: (a) Performed before the pregnancy is 6 weeks old; (b) By certified health workers; (c) With the consent of the pregnant woman; (d) With the permission of the husband (except for rape victims); (e) In health facilities that meet the requirements (Fatahaya & Agustanti, 2021), (Sakir, Purwanda, Phireri, & Musran, 2024).

Article 194 of the Health Law in Indonesia stipulates that perpetrators who carry out illegal abortions can be subject to quite severe criminal sanctions. (Sakir et al., 2024). Based on this provision, perpetrators of illegal abortion can be sentenced to a maximum of 10 years in prison and a fine of up to Rp1 billion. This provision is intended to reduce the number of illegal abortions that have the potential to endanger the lives and physical and mental health of both the mother and the fetus. (Septiana, 2022). This article is also part of Indonesia's legal efforts to strictly regulate abortion, by only allowing abortion under certain conditions, such as when there is an indication of a medical emergency that threatens the mother's life or when pregnancy occurs due to rape, which must be carried out according to legitimate medical procedures. The regulations mentioned above show that Indonesia applies a strict approach but provides exceptions for certain conditions in terms of abortion. (Yenjau, Yusuf, & Yusuf, 2024), (Kansil & Madelin, 2024).

Abortion has been a hotly debated issue in many countries because it concerns the right to life, the right to health, and moral and legal values held in society. In the context of criminal law, Indonesia and Thailand have different approaches to regulating abortion, reflecting the influence of their respective legal systems and cultural values. (Purwanti, 2020), (Herman, Subianta Mandala, & Vidya, n.d.). In Indonesia, abortion is considered a criminal offense with very limited exceptions, and is regulated in the Criminal Code (KUHP) and the Health Law. In contrast, Thailand has implemented a

more relaxed policy, providing some leeway for women in certain situations to access abortion safely. (Sofyan, SH, & Nur Azisa, 2023), (Almubarak, 2024).

In 2017, abortion statistics in Thailand showed that 51.4% of abortions were performed illegally, while only 48.6% were performed in accordance with the law. Among illegal abortions, 5.2% resulted in severe complications, with 50.6% involving heavy bleeding. According to the 2020 Health Division Survey, 20.3% (215 out of 1,060 cases) of abortions involved university students. (Suherdi, 2021). In addition, the Department of Health, Ministry of Public Health, Thailand, has reported that there are about 2 million abortions per year, with more than 70,000 women dying from unsafe abortions. The most common complications are severe bleeding (42.1%) and sepsis (36.8%). Most illegal abortions are performed on teenagers (Sholikhah, 2020), (ANGGRAENI, 2020).

Princess Agrarajakumari College of Nursing, Chulabhorn Royal Academy continuously engages with the community in Laksi District through education, research and healthcare initiatives. A survey was conducted among community leaders, Laksi district officers and other individuals responsible for healthcare in Laksi District, Bangkok, as part of a meeting focused on curriculum development and health service promotion. The survey revealed that there were 7,352 adolescents aged 13-19 years, representing 7.3% of the total population. Within this group, unintended pregnancy and illegal abortion emerged as significant issues, reflecting broader national concerns as outlined in the Medical Council of Thailand's regulations on termination of pregnancy. (INDONESIA II, DANGER, & RAPE, nd).

The differences in these regulations not only reflect variations in legal policies but also show differences in the interpretation of religious values, especially from an Islamic perspective. In the Islamic view, abortion is a complex issue because it involves principles related to the right to life which is considered a divine right, but also considers emergency situations that can provide leniency. Islamic law regulates this issue strictly, especially by considering the stage of pregnancy, the health of the mother, and emergency conditions that may be a legitimate reason for having an abortion. In Indonesia, where the majority of the population is Muslim, the Islamic legal view on abortion is an important reference in the formation of regulations, although the legal system remains secular. On the other hand, Thailand, with a majority Buddhist population, provides greater freedom for women regarding reproductive rights, although there is still the influence of religious teachings in its society. (Son, 2024).

The differences in legal views between the two countries are interesting to study, especially from an Islamic legal perspective, in order to understand how religious values can be applied in state regulations with different social contexts. Through this comparison, the problems and challenges faced by each country in balancing human rights, moral values, and the legal aspects of implementing abortion can be identified. This study is also expected to provide deeper insight into the role of Islamic law in overcoming abortion problems in countries with different legal and cultural backgrounds. (Nas, 2023).

## 2. Materials and Methods

The method used in this study is the normative legal research method, which is a legal research approach that focuses on the study of laws and regulations, legal principles, legal theories, and applicable legal doctrines. This research is theoretical and tends to use secondary data as the main source, such as laws and regulations, court decisions, legal journals, books, and related documents. This method is often referred to as library research because it uses written legal materials that are analyzed to understand the

application of rules in a particular context. In normative legal research, researchers seek to identify and analyze existing regulations in order to find answers to a particular legal problem, by considering how the regulations apply and are generally applied in society. Primary data obtained directly from the Law (UU) refers to information or primary legal materials obtained directly from official and authoritative legal sources, namely the original text of applicable laws and regulations. In the context of legal research, this primary data includes documents containing legal rules promulgated by legislative institutions or authorized authorities, and which are the main basis for legal analysis and interpretation. Secondary data is collected from laws and regulations related to the problem being researched, and other library sources.

### 3. Results and Discussion

#### 3.1 *Problems of Abortion Implementation from a Criminal Perspective in Indonesia*

Premature removal of a fetus, whether intentional or unintentional, is commonly referred to as abortion. Before the fourth month of pregnancy, when the fetus is still immature, it is usually performed. In medical terminology, abortion is the end of a pregnancy before the fetus is capable of living on its own outside the womb, that is, before the gestational age reaches 20 weeks. Linguistically, abortion refers to the destruction or disposal of a fetus. Legally, it refers to a fetus being removed from the womb before it is ready for natural birth.

There are two types of abortions. The first category of abortion is spontaneous abortion. This is defined as an abortion that occurs naturally, without any outside intervention. This includes spontaneous abortion, also known as unintentional abortion, and natural abortion, which is the term used for an abortion that occurs without any external intervention or influence. Secondly, we can consider induced abortion. This is the intentional termination of a pregnancy, which can be done for a variety of reasons, including: (a) *Abortus provocatus medicinalis*: This is the termination of pregnancy for medical reasons. An example is *abortus provocatus therapeuticus*, which is a term used to describe an abortion performed with the intention of saving the mother's life; (b) *Criminal provocatus abortion*, which includes abortions that are intentionally carried out in violation of various applicable legal provisions. This includes induced abortion, which is an abortion that is intentionally carried out for reasons beyond medical necessity, such as to avoid embarrassment to neighbors or to overcome infertility problems.

The Criminal Code regulated by general criminal law (*Lex Generalie*) also contains regulations relating to abortion. Specifically, Article 299 and Chapter XIV on Morality Crimes, especially Articles 346 to 349, contain regulations relating to intentional abortion (*abortus provocatus*), which is categorized as a crime against life. The function of the forensic medicine specialty "*Visum et repertum*" has the main purpose of forensic medicine is to support the legal system and law enforcement, especially in criminal situations involving the human body, health, and life. According to Article 187 of the Criminal Code, the *visum et repertum* found in "*Staatsblad No. 350 of 1937*" functions as valid expert testimony evidence. The reason is, "*Visum et repertum* is made based on the results of a doctor's examination and submitted to the court as a copy or copy of evidence,

accompanied by the opinion of the doctor who made it on the results of the examination". Considering the above-mentioned explanation of premeditated murder under Article 340 of the Criminal Code, it is clear that forensic medicine plays an important role in the administration of justice as it enables the judge to decide whether an accused can be found guilty of his crime or not.

To carry out the procedure before the victim is declared able to have an abortion, there are quite significant challenges when the legal framework used is Law Number 36 of 2009 concerning Health and Government Regulation Number 61 of 2014 concerning Reproductive Health. A report from the victim to the authorities is needed in order to provide recommendations to the next agency, while the relevant agency or the next agency to which the victim is directed does not yet have a special field to handle abortion issues in the agency or agency that is authorized to grant permission to perform abortions. This is a factor that inhibits the implementation of abortion based on pregnancy due to rape. Its implementation is hampered by differences in perception between law enforcement officers and other institutions, related to the definition of rape. Law enforcement officers continue to use the definition of rape as a whole as outlined in the Criminal Code. As a result, the implementation of abortion is hampered and cannot be carried out optimally. Legislation, especially Law Number 36 of 2009 concerning Health and Government Regulation Number 61 concerning Reproductive Health, does not have clarity in defining abortion due to rape.

### ***3.2 Problems of Abortion Implementation in Thai Legal Perspective***

#### **a. Abortion Problems in Thailand**

Early abortion laws in Thailand were adopted from Europe in the nineteenth century. Those who requested or provided abortions were subject to penalties, including imprisonment and fines. The previous references to the Thai Criminal Code consisted of three main sections. Articles 301, 302, and 305 of the Thai Criminal Code allowed medical professionals to perform abortions only in two cases: First, when the procedure was necessary for the woman's health and when the pregnancy resulted from a sexual offense. Second, the lack of safe abortion services and the legal threats faced by women seeking to terminate an unwanted pregnancy have led to the use of ineffective and dangerous alternatives. In 2020, the Thai Ministry of Health conducted a reproductive health survey among women admitted to gynecology units of public hospitals. The results showed that 80% of respondents who underwent unsafe abortions experienced serious complications.

The majority of women do not admit to having undergone induced abortions because of the illegality of the procedure and the social sanctions that accompany it. A prospective observational study conducted over a one-year period in 1984 revealed that 78% of abortions were induced, 13% were therapeutic, and 65% were illegal. In addition, 22% of abortions were spontaneous. Among unmarried women who had undergone therapeutic abortions, the primary motivations were mostly socio-economic, including premarital pregnancy, student status, and incompatibility with certain occupations. Among married women who had undergone therapeutic abortions, the primary reasons were socio-economic and contraceptive failure.

The interpretation and implementation of the Abortion Act presents a number of challenges. First, there is no definition of “health” or whether it encompasses the full spectrum of physical and mental health and social well-being as defined by the World Health Organization (WHO) legal documents. In fact, some lawyers and public prosecutors have indicated that the courts tend to interpret health in a narrow sense, solely in terms of physical health. In response to a formal request from the Medical Council of Thailand in 2001 to interpret the meaning of health in the law, the Royal Institute provided a response indicating that a broader interpretation, encompassing both physical and mental health, was an accurate interpretation. However, it should be noted that the Royal Institute is not a judicial body.

The majority of induced abortions in Thailand are performed illegally, and conducting community-based household surveys to document their incidence among women of reproductive age is inherently and extremely challenging. The general hospital-based approach in Thailand has been largely effective in capturing legal abortions for medical reasons and abortions for women with complications requiring hospital care. Access to care depends on a number of factors, including fear of sanctions, geographic and financial accessibility, and social and health worker attitudes. Women are often reluctant to admit that they have had an induced abortion. As a result, a large number of unconfirmed cases in community-based studies may be misclassified as spontaneous abortions.

In ambiguous cases involving fetal indications, congenital abnormalities, and vertical transmission of HIV or rubella effects, physicians tend to exercise greater flexibility in their interpretations. However, the implementation of a nationwide mother-to-child transmission prevention program in 1999 has reduced the HIV transmission rate from 8-10% to around 1%, prompting some medical professionals to challenge the need for abortion as a means of preventing vertical transmission of HIV.

#### b. Legal Reform on Abortion in Thailand

In 1999, the Thai Ministry of Public Health, with support from the World Health Organization, conducted a study on unsafe abortion in Thailand. The findings indicated that unqualified providers performed nearly 30% of all abortions in Thailand, resulting in significant morbidity and mortality. A strong desire for policy advocacy and reform to improve sexual and reproductive health, and in particular abortion safety, emerged from this high-impact study. Participants in the consultative workshops and seminars decided that the Medical Council of Thailand, a non-governmental body, would be the most effective independent body to make policy recommendations for public health reform.

This consensus arose from the recognition that previous reform efforts at the national legislative level had been unsuccessful and that capacity within ministerial departments was limited. Therefore, a task force of the Medical Council of Thailand conducted research and introduced a series of additional regulations over five years. In accordance with Article 305 of the Thai Penal Code, the “Regulations on the Criteria for Performing Therapeutic Termination of Pregnancy” sets out the following circumstances

in which abortion is legally permissible: First, Necessity due to the physical health of the pregnant woman; Second, Necessity due to a mental health problem certified or approved by at least two medical practitioners, including the one performing the abortion; and Third, Severe distress due to the discovery of a fetal defect or high risk of serious genetic disease. The pregnant woman must be clinically documented as having a mental health problem and this must be acknowledged in writing by at least one medical practitioner other than the one performing the abortion

Furthermore, between January and October 2016, Thai authorities confirmed 392 cases of Zika, including 39 cases involving pregnant women.<sup>20</sup> In October 2016, Thailand became the first country in Asia to issue guidelines for Zika surveillance and treatment, including allowing abortions up to 24 weeks on a case-by-case basis. Although implementation of these new guidelines has not been fully documented, legal permission for abortion on this basis appears to be included in the Thai Medical Council Regulations relating to mental health and mental health and severe stress.

On February 19, 2020, the Constitutional Court of Thailand ruled that the above-mentioned provisions of the Penal Code were partly unconstitutional and ordered the legislature to amend the Penal Code. The ruling was the result of a lawsuit filed with the Constitutional Court in 2018 by a doctor who argued that Articles 301 and 305 of the Penal Code were unconstitutional. The doctor, who had performed an abortion with the consent of the woman in question, was arrested by the police and charged with the offence of performing an abortion with the consent of the woman in contravention of Article 302 of the Penal Code. The woman whose pregnancy was terminated by the doctor was also arrested and charged under Article 301, but the police did not apply the provision in Article 305 of the Penal Code that allows abortions performed by medical practitioners. In its ruling, the court ruled that Article 301 of the Penal Code was in contravention of Article 28(1) of the Thai Constitution, which states that “a person shall enjoy the rights and freedoms in their personal and personal life.” Therefore, the court ordered the legislature to amend the provision within 360 days from the date of the ruling.

On January 25, 2021, the Ratthasapha (National Assembly) amended Thailand’s Criminal Code to relax the current restrictions on abortion by decriminalizing termination of pregnancy during the first 12 weeks. The amendment was published in the Official Gazette on February 6, 2021, and came into effect the following day. (Penal Code Amendment Act (No. 28), BE 2554, Article 2.) The relevant provisions of the Criminal Code affected by the amendment are as follows: First, Article 301, which stipulates that a woman who commits an act that causes her to terminate her pregnancy or who allows another person to perform an abortion for her is punishable by up to three years in prison or a fine of up to 60,000 baht (about US\$2,000), or both. Second, Article 302, paragraph 1, which stipulates that a person who performs an abortion for a woman with her consent can be punished with up to five years in prison or a fine of up to 100,000 baht (about US\$3,330), or both (the fine was increased in 2017). Third, Article 305, which stipulates that a medical practitioner who commits an offense described in

Article 301 or Article 302 is not guilty of an offense if (1) the act is necessary for the woman's health or (2) the woman becomes pregnant as a result of a sexual crime.

#### 4. Conclusions

Regulation of abortion in its implementation in Indonesia is regulated in several legal regulations, namely Law Number 36 of 2009 concerning Health, the Criminal Code and Government Regulation Number 36 of 2009 concerning Health and Government Regulation Number 61 of 2014 concerning Reproductive Health. The problems that exist in the implementation of abortion are that the legal framework in abortion activities has not been made clear and harmonious and the continued problem regarding the standard for determining the abortion action because it must obtain approval from the authorized party to carry out the abortion action. There are factors regarding differences of opinion between law enforcement and other institutions in the health sector.

The problem of implementing abortion in Thailand in practice has many problems. Abortion is often done because of the many sexual violations and this results in unwanted pregnancies for women. In addition, many abortions are carried out unsafely and end in serious complications. The regulation in Thailand on abortion is based on Articles 301, 302 and 305 of the Thai Criminal Code. The regulation has undergone reforms in which the regulation has been expanded by the Thai National Assembly. There is a discrepancy between positive law and the views of Islamic scholars, especially regarding the time limit for abortion. Positive law is stricter in enforcing the time limit, while the views of Islamic scholars pay more attention to the moral and ethical context of abortion.

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