

Legality of Abortion by Rapes Perspective of Islamic Law, Indonesian Positive Law and Human Rights

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Abstract

Promiscuity between men and women outside of marriage, especially students and college students, has now reached a very worrying limit. This is due to the weakening of religious values in people's lives, coupled with the development of information technology, which makes it easier to access various kinds of information, sometimes misused by children or teenagers. In addition, the incessant mass media that offers a glamorous, free and all-hedonistic life that causes the younger generation to be dragged into the brink of collapse. with the development of the times, many young people's morals are starting to erode and do things that are not appropriate to do, like this abortion. some formulations of the problem, namely how to legalize abortion for rape victims in Indonesia according to Law number 36 of 2009 concerning Health? What is the Concept of Abortion for Rape Victims from the Perspective of Islamic Law, Criminal Law and Human Rights? This study uses normative legal research methods, and by using a statutory approach and a philosophical legal approach. The health Law if we relate to abortion due to pregnancy due to rape, it can be concluded that in general the practice of abortion is prohibited, but the prohibition is excluded in several circumstances such as pregnancy due to rape. Islamic law in this case can be judged to be permissible if the abortion resulting from the act of adultery is permissible as long as it is still in the form of nutfah or 'alaqah, that is, not yet eighty days. Then there is an emergency which would otherwise endanger the life of his mother.

Keywords

aboriginal; rape; law



I. Introduction

Abortion is a topic that is still being discussed a lot lately because this action is very contrary to the existing Islamic Shari'a, along with the development of the times, many young people's morals are starting to erode and do things that should not be done, such as this abortion. Abortion or it can also be called an abortion is an act where when a woman is pregnant and decides to abort her womb for some reason. The case of abortion itself is increasing every year, it is recorded that there are more than 40 million cases of abortion every year worldwide, if we look in more detail, this abortion case is carried out by women aged around 16-20 years. In this condition, to a certain degree, it can be understood the "collapse" of adolescent endurance in the face of a flood of sexual stimulation that results in premarital pregnancy and subsequent abortion. However, critically, a generalization can be drawn that abortion is carried out not only due to pregnancy outside of marriage, but also occurs within marriage, by women with the status of wives. Both abortion due to pregnancy outside of marriage or in marriage, both have several different reasons, and both are hidden phenomena that tend to be covered up by the perpetrators. Organization must have a goal to be achieved by the organizational members (Niati et al., 2021). The success

of leadership is partly determined by the ability of leaders to develop their organizational culture. (Arif, 2019).

Regarding the issue of abortion, there are differences in each group, the pros and cons of legalizing abortion for rape victims received a lot of opposition and support from several parties. Abortion actions can affect human values that are upheld by religion. In addition, abortion can threaten the fetus that should be in the womb. The permissibility of the practice of abortion is contrary to the rules in the Qur'an al-Isra': 31. Islamic law clearly prohibits abortion for whatever reason, in Yusuf Qardhawi's opinion "abortion is a crime against living beings; therefore, the punishment is very severe. for those who do." If examined, abortion is an act of killing or eliminating a person's right to life and also abortion can be said to be against God's will. Meanwhile, there is another opinion which says that a woman has full rights to her reproductive health and has the freedom to choose to have children or not. In Islamic law there are different views of the four schools of thought, the Maliki school explains that a woman who is pregnant is forbidden to abort her pregnancy, while the Hanafi school allows abortion before the gestational age reaches four months and the pregnancy can endanger the woman's life. In the Shafi'i school it is explained that if fertilization has occurred and has formed a zygote then the content cannot be aborted.

In Indonesia alone there are thousands of cases of illegal abortions carried out by mostly teenagers who are not ready for pregnancy and most of them are victims of rape, in Jakarta alone there are illegal abortion clinics that have performed abortions of 32,760 fetuses from 2017 to 2020. Not a few rape victims who have abortions are found guilty by the court. The public prosecutor and the panel of judges should see that no criminal liability can be imposed on the child of a rape victim. "The condition of psychological trauma due to being raped nine times and the threat of being expelled indicates that there is a coercive power that eliminates the reason for the punishment." The public is angered by laws and regulations that are considered negligent in protecting the rights of a woman and early childhood. who should have the right to choose his life path and continue his education to the highest level should be in jail for an action to save his mental health? Women and young children who receive disrespectful treatment, sexual harassment and violence should get legal protection that can protect themselves and their rights, not being chased by criminal articles on abortion which are increasingly burdensome. Because there is a difference of opinion between positive law and Islamic law regarding abortion for rape victims, the author is interested in discussing these issues which will later be elaborated on the weaknesses and strengths of each of these laws and then rediscover a more perfect understanding.

II. Research Method

This study uses normative legal research methods, and by using a statutory approach and a philosophical legal approach. The health Law if we relate to abortion due to pregnancy due to rape, it can be concluded that in general the practice of abortion is prohibited, but the prohibition is excluded in several circumstances such as pregnancy due to rape.

III. Result and Discussion

3.1 Legalization of Abortion for Rape Victims in Indonesia according to Law No. 36 of 2009 concerning Health

As a state of law, everything in this country is regulated in laws and regulations. Likewise, regarding the issue of abortion or better known as the act of abortion. In Indonesia, abortion is regulated in several separate laws and regulations. In the Criminal Code regarding abortion, it can be found in the Criminal Code in Book II Chapter XIV (regarding crimes against decency) in Article 299 which states that someone who intentionally treats a woman to abort her pregnancy, namely: Whoever deliberately treats a woman or orders her to be treated, with notification or hope that because of this treatment the pregnancy can be aborted, is threatened with a maximum imprisonment of four years or a maximum fine of forty thousand rupiahs (Article 346 of the Criminal Code). Whoever intentionally aborts a woman without her consent, is threatened with a maximum imprisonment of twelve years (Article 347 paragraph 1 of the Criminal Code). intentionally abort or kill a woman's womb with her consent, is punishable by a maximum imprisonment of five years and six months (Article 348 paragraph 1 of the Criminal Code)

The same thing is also regulated in Law Number 36 of 2009 concerning Health (Health Law) Article 75 paragraph (1) which reads "Everyone is prohibited from having an abortion". However, there is an exception in Article 75 paragraph (2) which reads "The prohibition as referred to in paragraph (1) can be excluded based on a) indications of a medical emergency detected at an early age of pregnancy, both threatening the life of the mother and/or fetus, suffering from genetic diseases. severe and/or congenital defects, as well as those that cannot be repaired so that it is difficult for the baby to live outside the womb or; b) pregnancy due to rape which can cause psychological trauma for the rape victim. Then, .

Based on the provisions contained in the Health Law, if we relate to abortion due to pregnancy due to rape, it can be concluded that in general the practice of abortion is prohibited, but this prohibition is excluded in several circumstances, such as pregnancy due to rape. Medical action against abortion due to rape can only be carried out if: through pre-action counseling and/or advice and ends with post-action counseling carried out by a competent counselor; Performed before the age of 6 weeks of pregnancy calculated from the first day of the last menstruation, except in the case of a medical emergency; By health workers who have the skills and authority who have certificates determined by the minister; With the consent of the pregnant woman concerned;

According to Government regulation Number 61 of 2014 concerning Reproductive Health, the legal norms that become legality for rape victims are contained in the following articles: Article 31: The act of abortion can only be carried out based on: Indications of a medical emergency; or Pregnancy due to rape (Article 31 paragraph 1); The act of abortion due to rape as referred to in paragraph (1) letter b can only be carried out if the gestational age is 40 days at the longest calculated from the first day of the last menstruation. Article 34: Pregnancy due to rape is pregnancy resulting from sexual intercourse without the consent of the woman in accordance with the provisions of the legislation. Pregnancy due to rape must be proven by: The gestational age corresponds to the incidence of rape, which is stated by a doctor's certificate; And the investigator's statement, psychologist and/or other experts regarding the alleged rape. Article 35: Abortion based on indications of a medical emergency and pregnancy due to rape must be carried out in a safe, quality and responsible manner.

Safe, quality, and responsible abortion practices as referred to in paragraph (1) : Performed by doctors in accordance with standards; Conducted in health service facilitation that meets the requirements set by the Minister; At the request or consent of the pregnant woman concerned; With the husband's permission, except for rape victims; Non-discriminatory; and Does not prioritize material rewards. (3) In the event that the pregnant woman as referred to in paragraph (2) letter c is unable to give consent, the consent for abortion can be given by the family concerned. This government regulation can create loopholes to be misused by irresponsible parties, because proving the patient who had an abortion because of rape is difficult to do. In every act that is subject to a crime, the mechanism of proof is not easy, especially for the crime of rape. The legal process, of course, takes a long time because it is a system based on statutory regulations, while in the provisions of the government regulation it is only given 40 days, according to the author, that time will not be enough, so Government Regulation No. reviewed and obtained important notes from the aspect of evidence and its application must be followed by strict supervision so as not to be misused.

3.2 Abortion for rape victims in Indonesia from the perspective of Islamic law, Indonesian criminal law and human rights.

Broadly speaking, Indonesia is a country based on a constitution or a state of law, as regulated in the 1945 Constitution Article 1 paragraph (3) The State of Indonesia is a state of law . Everything related to aspects of life is regulated in laws and regulations. The theory of the rule of law is a concept of state administrators based on law . Then the relation regarding the abortion of Indonesian rape victims has several aspects of a legal perspective that can be related in determining whether the legal basis is appropriate regarding this matter. Researchers here take several legal perspectives such as Islamic Law, Criminal Law perspective and also Human Rights Law perspective, regarding the discussion that will be studied as follows;

a. Abortion Perspective of Islamic Law

In determining the law of a matter, a mujtahid must take several things, step by step the legal investigation of a problem must be in accordance with the basic sequence of Islamic law. This makes it imperative for a mujtahid who really wants to study the Qur'an while still using the Qur'an and Hadith as the basis of a reference law. Regarding references based on Islamic law regarding abortion in explicit stages, the discussion is not so detailed, but there is a general legal basis contained in the Qur'an, Hadith and Opinions of Islamic Scholars in establishing a law, especially in the issue of abortion. The Law of Abortion in the Quran In Surah Al-Isro 'verse 31

لَا تُلْوَاْ اَوْلَادَكُمْ لِامْلَاقٍ نَزَرْتُمْهُم اِيَّاكُمْ اِنَّ لَهُمْ اَنْ اِ

"And do not kill your children for fear of poverty. We are the ones who provide sustenance to them and to you. Killing them is a great sin."

b. Abortion Law in Hadith

The second legal basis is contained in the hadith, from various narrations that have been conveyed by the Prophet SAW. as a source of reference in applying all problems that can be used as evidence in life, it is of course very necessary in studying the issue of abortion. Found several editorials of hadith with various narrations, which can be traced in various sources of muktabarah hadith books, including the following:

Meaning: ...From Ubadah bin Shamit said: We are with the Messenger of Allah. In a gathering, he said: "I was sworn in not associating partners with Allah, do not commit adultery, steal, and do not kill souls which Allah has forbidden except with justice..."

c. Abortion Law of Scholars' Opinions

Differences of opinion among scholars are based on history at the time of the Prophet SAW. There has been a quarrel or fight between two women from the tribe of Huzail. One of them, who was pregnant, was thrown by a stone and hit her stomach, resulting in the death of the fetus or baby in her womb. When the matter was reported to the Messenger of Allah, the maker of the finger (who threw it) was subject to a penalty of *ghurrah*, which is one twentieth of a *diya*.

According to the majority of jurists, it is *haram* to have an abortion for a fetus that has reached the age of 120 days. While the age before 120 days occurs *khilafiyah*. There are those who think it is permissible, *makruh*, and unlawful. The reason for the prohibition of the age of 120 days and allowing before 120 days is the *hadith* narrated by Imam Muslim and Ibn Mas'ud which states about the creation of the fetus, from *nutfah* to *'alaqah*, to *mudghah* and until the soul is breathed at the age of 40 days.

Then in terms of legal views regarding abortion, it can be classified into several legal opinions from various scholars, such as the following;

Legal Opinion Allows (Mubah) Imam al-Subki is of the opinion that abortion resulting from adultery is permissible as long as it is still in the form of *nutfah* or *'alaqah*, ie before eighty days. And also the opinion of Imam al-Ramli of the Shafi'i school of thought. Their reason is the *hadith* narrated by Bukhari and Muslim about the creation of a fetus that is 40 days old and then the spirit is breathed in. Meanwhile, Abu Ishaq al-Marwaei is of the opinion that a person who takes medicine to abort his pregnancy as long as it is in the form of *nutfah* or *mudghah*, then it is permissible. Likewise the opinion of the Hanafi group which allows it absolutely.

Makruh Legal Opinion In the opinion of Ibn Rushd, from the Maliki school of thought, if a pregnant woman is beaten and causes the death of her fetus, the sanction is not obligatory, but it should be *kafarat*. The reason is like what has been done in the case of a fight between two women from the Huzail tribe that has been explained. Ibn Wahban argues that abortion is permissible if it is due to age. If not, then the law is *makruh*. Then Muhammad Said Ramadhan al-Buti assessed that abortion is permissible as long as there is an agreement between the father and mother of the fetus. Because of the *syara'* law, a father can be legitimate if he has children born from a legal wife. While adultery is not absolutely necessary (father). In this case the judge can replace the position in an emergency.

Haram Legal Opinions It is forbidden to have an abortion, even if the spirit has not breathed it, because if the semen has settled in the womb, even though it has not passed the 40-day period, it is not permissible to expel it. This opinion was expressed by many scholars of the Maliki school and the Zahiri school. Then according to Imam al-Ghazali, the law of abortion is absolutely *haram*, even since the meeting of male sperm and female ovum. This opinion is supported by Mahmud Saltut and Yusuf Qardhawi. According to 'Abd al-Rahman al-Baghdadi's opinion, if the abortion is carried out after 40 days of pregnancy, that is, when the fetus is formed, then the law of abortion is *haram*.

d. Abortion Perspective of Indonesian Criminal Law

Based on article 75 paragraph (1) of Law no. 36 of 2009 concerning Health, basically, everyone is prohibited from having an abortion. Exceptions to the prohibition on abortion are granted under the following two conditions:

medical emergency indication detected at an early age in pregnancy, both those that threaten the life of the mother and/or fetus, who suffer from severe genetic diseases and/or congenital defects, or which cannot be corrected so that it is difficult for the baby to live outside the womb; or pregnancy due to rape which can cause psychological trauma for rape victims. According to Article 346 of the Criminal Code, it states: "A woman who intentionally causes an abortion or death of her womb or orders someone else to do so, is sentenced to a maximum imprisonment of four years". It can be said that Article 346 of the Criminal Code prohibits abortion. This act of abortion, whether arising from his own will or the orders of others, is an element of intent.

The element of intent The abortionist must be based on the intention that the perpetrator wants to abort the pregnancy. The act of abortion is regulated in addition to Article 346 of the Criminal Code, it is also contained in Articles 347 to 349 of the Criminal Code. The explanations of each of these articles explain the prohibition of abortion. All kinds of abortion are prohibited with no exception in the Criminal Code. The Criminal Code prohibits all abortions for any reason without exception, the Health Law provides an exception for abortion or abortion due to rape, this is regulated in Article 75 paragraph (2) where abortion can be carried out if there are indications of a medical emergency and abortion due to pregnancy as a result of rape.

Meanwhile, Articles 456 to 459 of the Criminal Code state that abortion is prohibited without exception. The Criminal Code prohibits abortion because it also considers it a murder. However, in Arif Gosita's book entitled "The Problem of Victims of Crimes in a Collection of Authors" it is stated that, in the case of abortion, the fetus is rejected as a living being, and is considered an inanimate object. Because it was formulated that way, its destruction at that time was not considered a murder and did not cause moral anger or moral conflict as in other murder cases.

The Criminal Code and the Health Law, in this case, it is clear that there is a conflict between legal norms so that to resolve the case of the conflict of norms between the Criminal Code and the Health Law regarding cases of prohibition and exclusion of abortion due to rape, the principle of preference *Lex Specialis Derogat Legi Generalis* is used, where special regulations will paralyze general rules. The regulation that is used or prioritized here to resolve cases of conflicting norms regarding abortion is the Health Law because the Health Law here is specific, while the Criminal Code in this case can be ruled out of its usefulness because the Criminal Code is general.

e. Abortion in Human Rights Law

Human rights are basic rights that are inherent in humans, universal and lasting. Therefore, it must be protected, respected, maintained, and should not be ignored, reduced, or deemed appropriate by anyone. Law No. 39 of 1999 concerning Human Rights regulates rights, namely the right to life, the right to have a family and continue offspring, the right to develop oneself, the right to obtain justice, the right to personal freedom, the right to security, the right to welfare, the right to participate in government. , women's rights, and children's rights. Regarding the right to life, Article 9 (1) of Law Number 39 of 1999 concerning Human Rights, stipulates that everyone has the right to live and maintain life and improve their standard of living. This provision shows that the right to life is a fundamental right that is inherent or owned by a person as a gift from God. Furthermore,

Article 53 (1) of the Human Rights Law regulates the rights of children. In the article it is stated that every child in the womb has the right to live, maintain life and improve their standard of living. According to Baharuddin Lopa (1996), the Universal Declaration of Human Rights (UDHR) also regulates the rights to health and human life. Regarding the right to life and safety, it is stated in Article 3, that everyone has the right to life, freedom and security (safety) as an individual.

So naturally, in the application of the Human Rights Law, absolutely safeguard the values of a person's right to life, especially children both still in the womb and after birth because all of these things are a destiny that has been determined by God Almighty, it should be guarded and maintained. . The things that become problems are when you become a victim of rape and unwanted pregnancy whether the child in the womb can be aborted, if it is not aborted it will be undesirable, such as unstable psychological health and also facing various social sanctions such as being exiled in the community and so on. So, in this case, human rights are put forward as stated in the article which explains that the right to life is upheld.

IV. Conclusion

Based on the data analysis described in chapter IV, conclusions can be drawn regarding abortion of rape victims from the perspective of Islamic law, Indonesian criminal law and human rights as follows; Legalization of Abortion for Rape Victims in Indonesia according to Law No. 36 of 2009.

The health Law if we relate to abortion due to pregnancy due to rape, it can be concluded that in general the practice of abortion is prohibited, but this prohibition is excluded in some circumstances, such as pregnancy due to rape. Medical action against abortion due to rape can only be taken if: After going through counseling and/or pre-action counseling and ends with post-action counseling carried out by a competent counselor; Performed before the age of 6 weeks of pregnancy calculated from the first day of the last menstruation, except in the case of a medical emergency; By health workers who have the skills and authority who have certificates determined by the minister; With the consent of the pregnant woman concerned; and Health service providers who meet the requirements set by the Minister. Concept of Abortion for Rape Victims Perspective of Islamic Law, Criminal Law and Human Rights.

Based on the results of the analysis, the basic concept of taking binding laws in Indonesia regarding abortion of rape victims is prioritizing applicable positive laws such as the Criminal Code, Law No. 36 of 2009 concerning Health and then regulations that can support the exception of abortion due to rape. the principle of preference for *Lex Specialis Derogat Legi Generalis*, where special regulations will paralyze general regulations, but in relation to abortion cases there are various considerations other than these positive laws such as Islamic Law and also its relation to Human Rights, Laws Allowing Abortion of Rape Victims. Islamic law in this case can be punished if the abortion is the result of adultery, allowed as long as it is still in the form of *nutfah* or *'alaqah*, that is, before eighty days. Then there is an emergency which would otherwise endanger the life of his mother. In this regard, the Hanafi School absolutely allows abortion of rape victims. In criminal law it is allowed if there is a medical emergency, based on Law number 36 of 2009. Then in Human Rights, especially in Law number 39 of 1999 concerning Human Rights as a reference in various guidelines for human rights and obligations, abortion is strictly prohibited to apply to Article 9 (1) of Law Number 39 of 1999 concerning Human Rights, stipulates that everyone has the right to live, and to maintain life and improve their standard of living.

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