

# Criminal action of abortion rape health perspective legal and Islamic law

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## ABSTRACT

This study aims to find out the provisions and what abortion as a result of rape is like in 3 aspects, namely Health, Law and Islamic law. The results of the study show that abortion due to rape in terms of health, the law and Islamic law both allow abortion to be carried out due to the health condition of the prospective mother which can be disrupted, such as psychological and physical injuries experienced by the victim. 61 of 2014 Concerning Reproductive Health However, by looking at his condition, that the defendant was a child victim of rape and made considerations in the Law on the Legality of Rape Abortion, then in Decision No. 5/PID.SusAnak/2018/Pn MBN the defendant was found guilty. However, by looking at the conditions that the defendant is a child victim of rape and made considerations for the Law on the legality of rape abortion, then in Decision No. 6/Pid.Sus-Children/2018/Pt and enact Law No. 36 of 2009 concerning Health, PP no. 61 of 2014 concerning Reproductive Health and the MUI Fatwa as the basis for the law on the legality of rape abortion, it is hoped that it can be enforced in the fairest way possible for rape victims who have abortions as relief for the losses that have been experienced by rape women. However, abortion also cannot be done carelessly because the right of the fetus to live is protected by Article 23 of 2009 concerning Child Protection. Cases of abortion rape have occurred in Indonesia, one of which is a 15-year-old boy who was charged with having an abortion as a result of rape by his older sibling.

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## 1. INTRODUCTION

As an effort to recover rape victims who have abortions Human Rights (HAM) are often the center of attention aimed at protecting the rights of victims who always require the State to make a Legislation to legalize rape abortion Comparison of the legality of rape abortion based on laws and laws Islam, namely based on medical indications to save the mother's life which is carried out according to statutory procedures, while in the view of Islam, religious scholars choose the one with the least risk of harm and more benefit.

Three Excerpt from the Criminal Code (KUHP) "Abortion as a crime against life", then excluded by the Health Law and Government Regulations which legalize abortion due to medical emergencies and/or rape.

The Legality of Abortion This is what makes the study of the Criminal Act of Rape Abortion in the Health Aspect of the Perspective of Law and Islamic Law very interesting to study because it is closely related to society and the world of education which examines the Human Rights of Women and the elimination of all forms of acts of discrimination against women (Convention on the Elimination of All Forms of Discrimination Against Women) Violence against women, especially rape is seen as a crime that will harm not only women but also society and the conscience of humanity and the culture of injustice in the country will continue.

The role of teachers, parents and the community is very necessary in shaping the character of children so that sex education needs to be instilled from an early age because if not, it can result in high levels of sexual violence against children, considering that acts of rape are often carried out by those closest to them, even the victim's own family. 14 The similarities of previous researchers with this research are: Astutik, 15 in his book entitled "Abortion Due to Rape in the Perspective of Health Law" which was printed for the first time in 2020.

It is this international convention that then makes health a human right and an element of welfare that must be realized in accordance with the ideals of the Indonesian people as meant in Pancasila and the opening of the 1945 Constitution. In this study it was concluded that the regulation of the criminal act of abortion is contained in the Criminal Code (KUHP) Chapter XIX concerning crimes against life in Articles 346 to Article 349 of the Criminal Code.

Then, criminal sanctions against perpetrators of abortion due to rape that are not in accordance with the procedures provided are regulated in Article 346 of the Criminal Code with a penalty of four years in prison, Article 347 of the Criminal Code with a penalty of fifteen years in prison, Article 348 with a penalty of 7 years in prison, While Article 349 of the Criminal Code, an additional one-third penalty and revocation of rights if the person assisting is a doctor, midwife and health care provider.

In Article 194 of Law Number 36 of 2009 concerning Health, the sanction for abortion perpetrators is ten years in prison and a fine. In this case the indication is a medical emergency and pregnancy due to rape can cause psychological trauma for the victim. Rape victims receive legal protection in Article 75 paragraph (2) of Law no. 36 of 2009 concerning Health and Human Rights protection.

36 of 2009 concerning Health is the basis for the government's obligation to protect and prevent women from abortions that are not of good quality, unsafe, irresponsible and contrary to religious norms and laws and regulations. In this research it was concluded that abortion is something that is prohibited but legal abortion due to rape is permissible.

Whereas the MUI Fatwa allows abortion as a result of rape before the fetus is 40 days old on the grounds that the abortion of the rape victim is one of the necessities and even an emergency which will cause physical, psychological and social consequences to occur to the victim. Nira Heluspa, 19 "Criminal Law Policy Against the Legality of Abortion Due to Rape in Law Number 36 of 2009 Concerning Health and the Code of Medical Ethics" reproduction health.

Meanwhile, the criminal law policy against abortion due to rape is related to medical ethics, namely related to the doctor's oath and the medical code of ethics to assist in abortion, contrary to the oath and code of ethics unless the pregnancy is life threatening to the mother and it is an emergency. Abortion is a criminal act that is prohibited both in law and Islamic law.

## 2. METHOD

This research uses a type of normative juridical research that is based on laws and regulations originating from laws and Islamic law. The research method is using a qualitative method which means analyzing data without using statistical procedures by examining a fact caused by a factor that refers to the rules. This research approach is a library research approach or commonly called library research. Library research or library research is research that is used using literature in the form of books, notes or research reports. The main secondary data material for this research is data material originating from laws and Islamic law.

Women who have been raped may contract sexually transmitted diseases (STDs), which are disorders or diseases caused by bacteria, viruses, parasites or fungi that are transmitted through sexual intercourse. Bleeding or infection in the vagina that causes the following diseases: Hypoactive sexual desire disorder; Vaginitis or inflammation of the vagina; Dyspareunia or painful intercourse; Vaginismus is a condition of vaginal penetration; Chronic or pelvic pain; Urinary tract infection; Pregnancy; HIV/AIDS.

A person who has experienced rape will experience a psychological burden from the event they are experiencing, such as feeling anxious and depressed, ashamed, withdrawing from society, negative self-concept, long-term stress. Medical treatment for rape victims consists of detailed examinations to protect the victim's health. or to resolve cases of sexual violence against rape victims.

In fact, pregnancy can be prevented by using emergency contraception, namely by using contraceptives or drugs, namely by taking drugs. The stress experienced by rape victims will result in psychiatric reactions such as palpitations, excessive sweating and even the desire to end their life. There are various types of abortion. Spontaneous abortion, namely abortion occurs by itself, unintentionally and is generally not wanted by the expectant mother.

There are several types of abortion, namely Abortus provocatus is an abortion that is carried out intentionally which is indeed an unwanted pregnancy, Spontaneous abortion includes spontaneous abortion, namely accidental abortion due to syphilis, malaria or other infections and natural abortion.

The Causes of Someone Having an Abortion: An unwanted pregnancy, for example in a marriage because the number of children is sufficient, because the last child is still small or for reasons not ready to have children; Pregnancies that are consensual that occur without a marriage bond either because they do not use contraception; Pregnancy that occurs due to failed contraception; Pregnancy due to rape; Pregnancy based on medical indications which if the pregnancy continues could endanger the life of the mother or fetus such as the presence of a serious illness such as severe tuberculosis or severe kidney disease.

### 3. RESULTS AND DISCUSSION

Criminal acts are formulated to be the subject of offense aimed at by legal norms (norm addressaat), prohibited acts (starfbaar) and criminal threats (strafmaat) following abortion according to experts According to March Ancel, crime is a human and social problem, which means that a crime is not only is a social problem, but also a humanitarian problem, Wirjono Prodjodikoro argues that a crime means an act where the perpetrator can be subject to criminal punishment and the perpetrator can be said to be the subject of a crime, Moeljatno states that criminal responsibility is not enough to just commit a criminal act, but there must be an error or attitude mind that can be reproached because in the principle of unwritten law, that a criminal act cannot be punished if there is no guilt or it is called green straf zoner schuld, ohne schuld keine strafe.

#### 3.1 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the elimination of all forms of discrimination against women (CEDAW) is a UN international agreement on the elimination of all forms of discrimination against women. Indonesia as a country that participates in international agreements creates obligations and accountability for the state in respecting, fulfilling, protecting women's human rights and eliminating all forms of discrimination against women. 39 of 1999 Article 7 paragraph (2) states that "the provisions of international law have been accepted by the Republic of Indonesia concerning human rights to become international law".

CEDAW is a convention that is recognized as the Bill of Rights For Women emphasizing equality between women and men, namely in the form of equal rights and opportunities to carry out all activities. Human rights have received recognition and protection, human dignity is respected by the United Nations (UN) is the institution that gave birth to the Universal Declaration of Human Rights (UDHR), which guarantees the protection of human rights to all people from acts of discrimination and states that all human beings are respected, equal in dignity and rights, have freedom and there is no difference whatsoever, including differences in gender.

#### 3.2 The Crime of Abortion Due to Rape in the Perspective of Islamic Law

Islamic criminal law is law that is carried out based on syara', namely in the form of roads or provisions that have been determined in Islamic law which is punishable by hudūd, qisash and takzir punishments.

Hudud are all types of criminal acts which are expressly regulated in the Qur'an and Hadith, both the nature of the criminal act and the penalty, so that qisash enters the realm of hudud. Then in Muslim criminal law there are actions for perpetrators who commit rape. Rape is a heinous act which has the same legal status as adultery. In the criminal conception of fiqh or al-hudud, rape is classified

as a crime of honor called al-'ardh rights. Islamic law prohibits acts of adultery that are punishable by 100 lashes and exile to foreign areas that apply to unmarried adulterers or to be stoned or stoned until the perpetrator dies for married adulterers. Pregnant due to rape is an unwanted pregnancy and only has two choices, namely the safety of the fetus or the safety of the mother, namely because of an emergency or necessity. The shortest gestation period according to ushul fiqh is 6 months of gestation. But in this pregnancy abortion is also not recommended. Abortion in Arabic is called al-ijhadh and isqath al-hamil. In terminology, isqath al-haml is the abortion of a fetus in a woman's womb with certain actions before the pregnancy is perfect, whether the fetus has not yet been able to live outside the mother's womb or has been able to live outside the mother's womb. Abortion in Arabic is called al-ijhadh and isqath al-hamil. In terminology, isqath al-haml is the abortion of a fetus in a woman's womb with certain actions before the pregnancy is perfect, whether the fetus has not yet been able to live outside the mother's womb or has been able to live outside the mother's womb. Abortion in Arabic is called al-ijhadh and isqath al-hamil. In terminology, isqath al-haml is the abortion of a fetus in a woman's womb with certain actions before the pregnancy is perfect, whether the fetus has not yet been able to live outside the mother's womb or has been able to live outside the mother's womb.

### 3.3 Review of Islamic Law Regarding Rape Abortion

The responsibility of the clergy is very large because they replace the Prophet in carrying out his duties to deal with religious and world affairs. Regarding the severe pros and cons of the ulema, it only lies in the matter of time or the phase of the fetus or the spirit, while abortions are carried out compulsorily or on the basis of a medical emergency, clerics make ijthad to choose the one with the least risk of harm and the most benefits, but if the abortion is done out of fear of poverty or because of shame the law is unlawful. a blood clot (alaqah) or 80 days old, but there are also those who allow before the age of the fetus is 120 days old or before the fetus is given a soul.

**Table 1.** Results of a Rape Abortion Review in the Aspect of Health, Law and Islamic Law

Overview	Rape abortion information		Information
	Can	Should not	
Health Aspect	If it is done because of medical indications, it is feared that it will threaten the mother's life if the pregnancy continues	If the abortion performed is of the type of abortion provocatus criminalis, namely intentional abortion in violation of legal provisions.	Both in terms of health, law and Islamic law, if an abortion is carried out as a result of rape then these three aspects equally allow the abortion to be carried out with
Constitution	It can be done, namely through a counseling process by an authorized counselor with a gestational age before 6 weeks from the day of the first menstruation or because of a medical emergency.	If done intentionally and not in accordance with the provisions referred to in Article 75 paragraph (2) shall be punished with imprisonment for a maximum of 10 (ten) years and a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).	

The Indonesian Ulema Council (MUI) is an institution that accommodates Islamic scholars, husbands and scholars in Indonesia to guide, protect and foster Muslims throughout Indonesia. The Indonesian Ulema Council (MUI) in 2005 issued MUI fatwa No. 4 of 2005 with the consideration that more and more people are doing abortions without paying attention to religious demands and what abortion laws are like in Islamic law, including rape abortions.

Nadhatul Ulama (NU) is the largest Islamic organization in Indonesia. This organization was established on January 31, 1926 and is engaged in religious, educational, social and economic fields. This organization has an institution called LBMNU (Lembaga Bahtsul Masail Nadhatul Ulama) which is an institution that discusses and solves ma'udluiyah (thematic) and waqi'yah (actual) problems that require legal certainty. The LBMNU decision considers the issue of abortion to be unlawful. However, if an abortion is carried out because of rape, it is permissible according to the results of the national meeting and at the big Nu conference. Some NU scholars also disagree about the issue of the spirit. There are those who allow abortion before the age of the fetus is 40 days from conception, even if there is no reason.

Majlis Tajrih Muhammadiyah is one of the largest organizations in Indonesia. The word Muhammadiyah is taken from the name of the Prophet Muhammad so that it can be interpreted as followers of the Prophet Muhammad SAW. Majlis in Muhammadiyah is interpreted as an auxiliary element of the leadership in charge of carrying out basic matters within Muhammadiyah, while Tajrih is interpreted as an analytical process to obtain legal decisions by looking at the strengths of the arguments of the Qur'an and Hadith, analogy provisions and considerations of their benefits.

Chairman of the Majelis Tajrih and Tajdid Central Executive of Muhammadiyah Syamsul Anwar regarding the issue of abortion of women victims of rape said that Muhammadiyah was still using the old fatwa and had not made any changes to the fatwa as was done by the Indonesian Ulema Council (MUI).

#### 4. CONCLUSION

Criminal acts or strafbaar feit are criminal acts and can result in punishment or sanctions for acts of violation of criminal law which in Islamic law is called yufsidu which is a form of mazid from the word fasafa. Rape or rape (rape) comes from the Latin rapere which means stealing, forcing, depriving or taking away and is an act of forcing someone to commit adultery. Abortion is medically defined as the loss of a fetus or termination of pregnancy after dination, before the formation of a viable fetus.

However, women victims of rape are entitled to protection and justice under the law as stipulated in Law no. 6/Pids. Sus-Children/2018/Pt. Jambi, in handling the case of a 15-year-old child who had an abortion, was acquitted and found not guilty in the case he experienced, even though he was asked to be a defendant in the verdict.

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That in theory abortion or rape abortion is protected in Law no. 36 of 2009 concerning Health and Government Regulation No. 16 of 2014 concerning Reproductive Health, however, in court cases it is still very difficult to prove. As in Decision No. 5/PID.Sus-Anak/2018/Pn.MBN which makes rape victims who have abortions as defendants. Only through the level of Appeal at the high court was he released. With that, it is very important that there is more special attention to the problem of abortion due to rape by the government. Positive law laws must work in accordance with Islamic law, namely by taking the opinion of ulil amri in handling court cases regarding rape abortion because religious knowledge is very important for the life of the people.

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