

## Abortion Due to Rape in A Juridical Perspective and Human Rights

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**Abstract.** *The problem of abortion due to rape is a social reality that is becoming increasingly prevalent in society. It is not uncommon in Indonesia that abortions are performed not because of health or age factors but because of shame and self-esteem. The purpose of this study was to determine and analyze the regulations regarding abortion due to rape based on Act No. 36 of 2009 concerning Health and a legal review of acts of abortion due to rape based on Act No. 36 of 2009 concerning Health and its relation to human rights. This study uses a juridical-normative approach and data collection techniques are carried out by collecting secondary data. The results of this study indicate that abortion cannot be done arbitrarily, there must be reasons and conditions that are met in accordance with statutory qualifications. Sanctions for violating these provisions can be subject to penalties. Judging from juridically, Act No. 36 Of 2009 concerning Health, Article 75 in particular paragraph (2) provides room for abortion for victims of rape. The article states that a pregnancy resulting from rape which can cause psychological trauma to the rape victim can be subjected to an abortion. In Article 9 of Act No. 39 Of 1999 concerning Human Rights paragraph (1) it is emphasized that everyone has the right to live, and to maintain life and to improve his standard of living. Human rights are basic rights that humans have since they were born.*

*Keywords: Abortion, Rape, Law on Health, Human Rights*

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### 1. Introduction

The issue of abortion is a problem that involves many things in human life, especially in a pluralistic society where the norms of action cannot be taken from only one source of standards that apply to everyone.<sup>1</sup> This difficulty is often seen in the legal field. In the UN Human Rights Charter in this matter states: "Respect for human rights and human dignity is the foundation of freedom, justice, and peace in the world".

Social gain or human pleasure that cannot be used as an excuse for having an abortion because there is an absolute moral principle that must not be violated. Modern thinkers think otherwise their ethical concept is based on observable social facts, for example: population problems, unwanted children and so on.<sup>2</sup> There are many cases of abortion in the community, but only a few are processed at the court level, partly due to the difficulty of law enforcers in gathering evidence that could bring abortion perpetrators to court. Reality like this can be understood, because abortion does not have a real impact as a crime of murder that can be clearly identified as a result, abortion, both the process and the result is more personal, so it is difficult to detect. Various factors can encourage the practice of abortion, including rape, irresponsible men, considerations of mental well-being,

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<sup>1</sup> Kusmaryanto, CB. (2005). *Tolak Aborsi, Budaya Kehidupan Versus Budaya Kematian*. Yogyakarta: Kanisius.p. 67

<sup>2</sup>Veith, g, e. (2003). *Loving God with All Your Mind*. Jakarta: PT BPK, Gedung Mulia.p. 14

body health, inability to care for babies, age of pregnant women, pregnant women who are still in school, and the economy.<sup>3</sup>

Abortion is a social reality that has recently become increasingly prevalent in society. The rise of abortion practices has made this phenomenon commonplace. Ironically, abortion is justified by several circles; that abortion is seen as a form of women's autonomy over their bodies; abortion is part of reproductive rights, and this means women have the right to get safe abortion services<sup>4</sup>. The problem is very different when the pregnancy actually threatens the life of the mother. In this case, abortion can be justified based on the principle of legitimate defense (legal defense).<sup>5</sup>

Abortion is not only a medical or public health problem, but also a social problem related to the notion of freedom (freedom / liberalism) adopted by a society. Unsafe abortion is a threat to women's health and life. Concrete action to solve the problem of unsafe abortion is part of the effort to improve the quality of reproductive health in Indonesia and fulfill women's reproductive rights<sup>6</sup>.

Abortion or abortion in human civilization that occurs as a result of humans or the mother who does not want the pregnancy. Abortion is a matter of great controversy at this time where the pros and cons of abortion arise. Efforts to prevent abortion are closely related to the discourse on the right of the fetus in the womb to live. Although this reason is not free from difficulties. First, it cannot be said that the fetus has legal rights. The debate about abortion has always been related to social policies but what is more important is the debate at the individual level about whether or not to have an abortion. There is not a single verse in the Qur'an that states that abortion is permitted by Muslims. The abortion act is categorized as a major sin and is a crime<sup>7</sup>. Abortion perpetrators during the modern era of ignorance partly did it not because they were afraid of poverty, both now and for their children, but they did this heinous act, to cover up the shame that befell them after an "accident" due to their mother's sins, not because of the shame of the consequences. mistreatment of others towards their children. In the era of ignorance, they killed because they were afraid that the child was raped and adultery, while in the modern era of ignorance, children were killed because their own mother had been raped or committed adultery.<sup>8</sup> Rape is often seen as double suffering for women who experience it. Apart from emotional and physical trauma, the victim also has to bear the burden of the result of the rape double suffering.

Abortion cases due to rape can cause unrest in the community, especially to victims who can experience prolonged trauma due to the incident, so they cannot forget the bad incident they experienced. In addition to being bad for health, abortion also has a major psychological impact, if the person who did the abortion has a sensitive soul, he will have feelings of guilt, sin, and dirtiness, this feeling will carry over until he has a family, over time, his soul can be disturbed Therefore, it is

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<sup>3</sup>Priharjo, R. (2005). *Konsep & Perspektif Praktik Kep Profesional* Ed 2. Jakarta: EGC.p. 20

<sup>4</sup>Istibsjaroh, BS. (2012). *Aborsi dan Hak-Hak Reproduksi dalam Islam*. Jakarta: Ikis.p. 31

<sup>5</sup>CB. Kusmaryanto, SCJ. (2002). *Kontroversi Aborsi*. Jakarta: Gramedia Widiasarana Indonesia. p. 85

<sup>6</sup>Hanafia, Jusuf. (2009). *Etika Kedokteran dan Hukum Kesehatan ed. 4*. Jakarta: EGC.p. 21

<sup>7</sup>Fauzi, w. i. (2008). *Fikih*. Bandung: Grafindo Media Utama. p. 25

<sup>8</sup>Shihab. (2007). *Membumikan Al-Qur'an*. Bandung: PT. Mizan Pustaka. p. 64

important to change the paradigm, that the best solution for rape victims is abortion.

Seeing the complexity of the relationship between abortion and rape in Act No. 36 of 2009 concerning Health, especially in Article 75 paragraph (2) point B, the author is encouraged to conduct a deeper study, by conducting scientific writing with the title "Juridical Review of Abortion. As a result of rape based on Act No. 36 of 2009 on Health and its Relation to Human Rights".

## 2. Research Methods

The method used is Normative Juridical. Normative juridical review is a research method that examines law as a rule that is considered in accordance with normative juridical research or written legal research. The data collection technique in this research was carried out by means of library research and field studies. Data analysis is carried out after the data has been collected, the data obtained from further research is analyzed using qualitative analysis, namely by describing the data and facts produced or in other words, describing the data with sentences arranged in a detailed, systematic, and analysis, so that it will make it easier to make conclusions from field research with an interpretation, evaluation and general knowledge.

## 3. Results and Discussion

### 3.1. Regulations regarding the act of abortion as a result of rape based on Act No. 36 of 2009 concerning Health

In Act No. 36 of 2009 concerning Health, the problem of abortion is regulated in several articles, namely Articles 75, 76, 77. The reasons as described above can only be done casuistically on the grounds that in accordance with Article 75 paragraph (2) above, no. can an abortion be performed on the grounds of shame, taboo, economy, failure of family planning or contraception and so on. The law only provides room for abortion for reasons as mentioned above.

Based on Article 75, abortion cannot be performed automatically even though the reasons have been fulfilled. Because the formulation of Article 75 paragraph (3) states that the abortion as referred to in paragraph (2) can only be carried out after going through pre-action counseling and / or advisors and ending with post-action counseling carried out by a competent and authorized counselor. The formulation of the Article emphasizes that prior to carrying out an abortion, consultation must be carried out both before and after the action taken by a competent and authorized counselor.<sup>9</sup>

Having an abortion is tantamount to committing murder, and murder is a very big sin. Therefore, the adherents of this belief strongly oppose abortion. According to them, legalizing abortion is against religion because indeed this group mostly comes from religious groups but many of them are not religious but have this view. On the other hand, the pro people claim that victims of rape, especially

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<sup>9</sup>Afifah, Wiwik. *Perlindungan Hukum Bagi Perempuan Korban Perkosaan Yang Melakukan Aborsj*, DIH, Jurnal Ilmu Hukum, Vol. 9, No. 18, February 2013. p. 99

rape committed by people who are still related by blood (incest), have experienced heavy pressure and burdens, it is unethical if the burden of women victims of rape is added to the presence of children who are not expected by the victim. rape.

Judging juridically, Act No. 36 Of 2009 concerning Health, Article 75, especially paragraph (2), provides room for abortion for victims of rape. The article states that a pregnancy resulting from rape which can cause psychological trauma to the rape victim can be subjected to an abortion. This article does not define whether the rape constitutes incestuous rape or not, which needs to be paid attention to, the article provides a limitation that the rape can cause psychological trauma for the victim of rape.

The reasons for psychological pressure and trauma due to rape should be taken into consideration to determine that abortion due to rape is an exception, so it should be legal. It has become public opinion that one of the reasons abortion is prohibited by law is because it is against public morals and / or religious morals. When connected with this opinion, actually what is against morals is that the rapist is not the person who had the abortion. In criminal law theory, Moejatno divides forced power into 2, namely forced power in the narrow sense or overmatch and forced power due to an emergency or noodtoestand which consists of 3 possibilities, namely:

- People are caught between two interests in the event of a conflict between two interests,
- People are caught between interests and obligations,
- People are caught between two obligations.

In connection with this theory, Suryoo Ekotama argues that "in the case of provoke abortion, there is a conflict between 2 (two) rights, the rights of pregnant women are against the rights of the fetus. Thus, to determine whether a woman who performs an abortion provoke for her womb can be punished or cannot be judged from which interest is more important. The right of the fetus to survive or the right of women to continue running without psychological and social pressure".<sup>10</sup>

In the case of incestuous rape, additional reasons can also be used in Article 75 paragraph (1), the article states that abortion can also be done because there are indications of a medical emergency detected from an early age in pregnancy, both which threaten the life of the mother and / or fetus, who suffer from disease. severe genetic and / or congenital defects, or those that cannot be repaired, making it difficult for the baby to live outside the womb. Children resulting from incestuous relationships, the chance of developing disabilities in children is very high. A study even states that the probability of disability for children resulting from incestuous relationships can reach 50%. Defects referred to in the meaning of this article are permanent disabilities that make it difficult for the baby to live outside the womb.

Njowito Hamdan stated that "abortion provokatus medicinalis can also be done if the child who will be born is thought to have severe defects and a thin life expectancy, for example the fetus suffers from an ectopia cordis disorder (the fetus

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<sup>10</sup>Ekotama, Suryono. (2001). *Abortus Provokatus Bagi Korban Perkosaan Perspektif Viktimologi, Kriminologi dan Hukum Pidana*. Yogyakarta: Universitas Atmajaya. p.32

will be born without a chest wall so that the heart can be seen), rickets (the fetus will be born with bones). open back without being covered with skin or anencephalus (the fetus will be born without a large brain). Defects like this are considered to be difficult for the fetus if it lives outside its womb".<sup>11</sup>

As in the theory of criminal liability, the Criminal Code has emphasized that actions taken by the parties involved in the abortion can be subject to criminal sanctions. There is criminal responsibility for the perpetrator of a criminal offense for his mistake of violating a rule, this is stated in Article 1 paragraph (1) of the Criminal Code "An act cannot be convicted, except based on the strength of the existing criminal legislation". All of that can also be related to the theory of the purpose of punishment which is needed to determine the nature and legal basis of crime.

### **3.2. Legal Review of Abortion Due to Rape Based on Act No. 36 of 2009 concerning Health and Its Relation to Human Rights**

The theory of legal protection also explains that Article 1 paragraph (3) of the 1945 Constitution states that Indonesia is a state based on law, thus the State guarantees the rights of its citizens by providing legal protection for every citizen. The rule of law is inseparable from the concept of protecting human rights, a rule of law without protection of human rights, a rule of law will lose its meaning and legitimacy as a rule of law, while protection of human rights in the absence of a rule of law will create tyranny and personal egoism. Protection of human rights is how the state establishes policies to prevent and tackle human rights violations, whether intentional or negligent.<sup>12</sup> Protection of human rights includes two things, namely means of prevention and means of oppression.

This is related to the Theory of Human Rights in 1999 passed the Act No. 39 of 1999 concerning Human Rights (hereinafter referred to as the Human Rights Law). According to the Human Rights Law, Article 1 paragraph (1) states that human rights are as follows: "Human rights are a set of rights inherent in the nature and existence of humans as creatures of God Almighty and are His eternal gifts. Respected, upheld and protected by the State, law, government and everyone, for the honor and protection of human dignity".

Human rights became an important topic after World War II and at the time of the formation of the United Nations in 1945. The term Human Rights replaces the term Natural Rights. Human rights which are understood as natural rights are a necessity from social reality that is universal. Human rights are basic rights that humans have since they were born. Human rights can be formulated as rights that are inherent in our nature as human beings, if there is no such right, it is impossible for us to live as humans. This right belongs to humans solely because he is human, not because of a gift from society or a gift from the State. So human rights do not depend on the recognition of other human beings, other

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<sup>11</sup>Hamdani, Njowito. (1992). *Ilmu Kedokteran Kehakiman, Second Edition*. Jakarta: Gramedia Pustaka Utama. p. 115

<sup>12</sup>Alvat, Andi Pradipta. *Politics Of Law Human Rights Protection In Indonesia*, Jurnal Daulat Hukum Vol 2, December 2019. p. 514



communities, or other countries. Human rights are obtained by humans from their creators, namely God Almighty and are rights that cannot be ignored.

In Article 9 of Act No. 39 Of 1999 concerning Human Rights paragraph (1) it is emphasized that everyone has the right to live, and to maintain life and improve his standard of living. This provision shows that the right to life is a fundamental right inherent in or possessed by a person as a gift from God. God has entrusted humans to live their lives well. Living a good life, one of which is by trying to protect and protect oneself from various forms of disease that endanger themselves or their safety.

#### 4. Conclusion

Abortion regulations are also contained in the Criminal Code as regulated in Articles 299, 346-349. The formulation of the Criminal Code does not provide any room for the implementation of abortion. Juridically, based on Article 75 paragraph (2) of Act No. 36 Of 2009 concerning pregnancy health for victims of rape, including incestuous rape, which can experience psychological trauma, it can be used as a reason for medical indications for abortion. A legal review of abortion due to rape based on Act No. 36 of 2009 on health and its relation to human rights:

- a) This description shows that rights are interests protected by law, while interests are demands of individuals or groups that are expected to be fulfilled. In essence, the interest contains the power guaranteed and protected by law in exercising it.
- b) Juridically based on Article 1 point (1) of Act No. 39 Of 1999 regarding Human Rights, it has confirmed the existence of protection of human rights. It was explained that Human Rights are a set of rights inherent in the nature and existence of humans as almighty divine beings and are gifts that must be respected, upheld and protected by the State, law, government and everyone for the honor and protection of human dignity.

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