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Sept 23 - 24 2020

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THE 2ND INTERNATIONAL CONFERENCE AND CALL FOR PAPER



Our Speaker



Prof. Henning Glasser
 Thammasat University



Prof. Yuzuru Shimada
 Nagoya University



Melissa Crouch
 UNSW Australia



Prof. Henk Adding
 Utrecht University



Assoc. Prof. Dr. Hj. Sri Kusriyah
 Sultan Agung Islamic University

*Democracy In Digital Era : Law,
 Governance, Sosial And Economic
 Perspective In Asia, Australia And
 Dutch*



September 23-24, 2020
 Imam Assafel Buiding, Faculty of Law, Unissula
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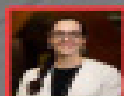
THE 2ND INTERNATIONAL CONFERENCE AND CALL FOR PAPER

THEME : DEMOCRACY IN DIGITAL ERA: LAW, GOVERNANCE, SOCIAL AND ECONOMIC PERSPECTIVE IN ASIA, AUSTRALIA AND DUTCH

Keywords: *Digital Media, Political and Governance Institutions, Electoral Processes, People Representation, Digital Disinformation, Democracy, Digital Economic, Social issue*



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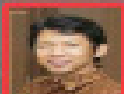
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TECHNICAL MEETING

1. Seminars will be conducted using the Zoom application
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OBJECTIVE

This agenda aims to provide insights in theory and practice:

1. To exchange and discuss views on the most important issues on Democracy in Digital Era: Law, Governance, Social and Economic Perspective in Asia, Australia and Dutch and its consequences to Law in countries.
2. To discuss the challenges and practical aspect of Democracy and Governance in a Digital Era.

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- Full Paper Submission and Transfer September, 07-22 2020
- Conference and Presentations September 24th 2020

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September **23th** 2020

The 2nd

International Conference and Call Paper

"Democracy In Digital Era : Law, Governance, Sosial And Economic Perspective In Asia, Australia And Dutch"

IMAM AS' SYAFEI BUILDING

Faculty of Law, Sultan Agung Islamic University

Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Diterbitkan oleh :
UNISSULA PRESS

ISBN. 978-623-7097-75-4

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Hal I-V, 1-127

Cetakan Pertama Tahun 2020

Penerbit UNISSULA PRESS

Jl. Raya Kaligawe Km. 4 Semarang 50112

PO BOX 1054/SM,

Telp. (024) 6583584, Fax. (024) 6594366

ISBN. 978-623-7097-75-4

Editor :

M. Ngazis, SH.,MH
Erna Sunarti, S.Pd.,M.Hum.
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Desain Cover :

Muh. Arifin, S.Kom

Desain Lay Out :

Suryo Atmojo, SH

ISBN :

978-623-7097-74-7

Penerbit :

UNISSULA PRESS

Alamat :

Jl. Raya Kaligawe KM. 4 PO. Box. 1054/SM

Semarang 50112 – Indonesia

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KATA PENGANTAR

Bismillahirrohmanirrohim

Assalamu'alaikum Wr. Wb.

Puji syukur kehadiran Allah S.W.T, Tuhan Semesta Alam Yang Maha Esa. Alhamdulillah, sebagai ucapan syukur kehadiran Allah Subhanahu Wata'ala kami dapat menyelenggarakan The 6nd Proceeding International Conference And Call Paper dengan tema "*Democracy In Digital Era : Law, Governance, Sosial And Economic Perspective In Asia, Australia And Dutch*" terselenggara dengan baik. Pemilihan tema tersebut dipilih karena pada era searang ini kita dihadapkan dengan era industri 4.0, dimana para kandidat doktor dituntut untuk bisa menyesuaikan dengan perkembangan global dan meningkatkan kompetensi keilmuan serta kemampuan.

Pada seminar ini telah dipresentasikan hasil penelitian dosen dan mahasiswa yang diikuti oleh peneliti-peneliti dari berbagai universitas yang telah membahas berbagai keilmuan Hukum dan Humaniora.

Sesungguhnya keberhasilan dalam mencapai tujuan pendidikan yang dicitakan sangat tergantung pada sikap mental, partisipasi serta disiplin setiap unsur yang terlibat dalam proses belajar mengajar. Mudah-mudahan seminar Internasional yang sederhana ini dapat memberi sumbangsih dalam mencerdaskan bangsa Indonesia serta semoga Allah SWT selalu menyertakan ridho-Nya. Amin. Akhir kata, kami mengucapkan terima kasih kepada pimpinan Universitas Islam Sultan Agung, pimpinan fakultas Hukum Unissuala, pemakalah, editor dan serta pihak-pihak yang telah membantu terselenggaranya seminar ini dengan lancar tanpa hambatan suatu apapun.

Wassalamu'alaikum Wr.Wb.

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Abortion Due To Rape

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Abstract

In essence, the practice of abortion is not allowed or prohibited because it is tantamount to killing a human being, but if the abortion is an attempt to protect or save the mother, then Islamic law allows it with strict terms and conditions. Thus, formulating the abortion fiqh that allows abortion of pregnancy due to rape (safe abortion) is the right step to overcome the problems faced by women who are victims, as an effort to prevent maternal death. Abortion in this case can be categorized as an emergency.

Keywords: Abortion; Rape; Emergency; Mother Death

I. INTRODUCTION

Rape is forcing sexual relations between women without the consent or conscious will of the woman. Rape is a very barbaric act, not only in terms of its disgusting act but also a psychological burden on the victim which is difficult to cure, especially if it results in pregnancy.

Menstrual Regulation is an English term, which has been translated by Arabic doctors into a term وسائل الإجهاض (how to abort a young child), while the term abortion is translated into a term الحمل اسقاط (abortion that is old or lifeless). Although the term menstrual regulation is defined as regulating the smoothness of the menstrual period by a medical expert, in practice it indicates the act of abortion, even though it is a young pregnancy.³³

In fiqh literature, the scholars use the term abortion with al-ijhadh which means abortion³⁴. In terms of terminology, fiqh scholars provide various definitions. Among them, Abdul Qadir Audah gave the definition of abortion as abortion and deprivation of the right to life of the fetus or actions that can separate the fetus from the mother's womb. Ibrahim al-Nakhai defines abortion as the abortion of a fetus from a pregnant woman's womb whether it is fully formed or not. While al-Ghazali defined abortion as the elimination of life in the fetus or damaging something that has been conceptualized (the result of the meeting between sperm and ovum). If it is damaged then it is a criminal offense.³⁵

According to health terms, abortion is defined as termination of pregnancy after implanting a fertilized egg (ovum) in the uterus (uterus) before the age of the fetus reaches twenty weeks. Meanwhile, a more complete definition of abortion was presented by Abul Fadl Mohsin Ebrahim. According to him, abortion is the termination of a pregnancy either intentionally or unintentionally, spontaneously due to a woman's physical abnormality or through human intervention, such as taking certain drugs or using the

services of a traditional healer to carry out abortion practices.³⁶

In the view of Islam, reproductive rights are rights given by God because of their unique reproductive function and therefore their rights need to be guaranteed. Abortion is a typical dilemma for women because only women have a reproductive system and function that allows them to get pregnant, and only women who experience unwanted pregnancies. The backgrounds for unplanned pregnancy vary widely. Starting from the ignorance of women about their reproductive system to the failure to protect themselves from unwanted pregnancies. The abortion dilemma is experienced by women when they need to choose and decide how to live an unwanted pregnancy because they have to decide something that is directly a part of themselves. The abortions experienced by women vary.³⁷

There have been many women victims of rape who end up having to save their own suffering. Often rape victims do not immediately report to their families, such as fear of their disgrace being discovered, pressure from the family and feelings of shame if this is known to many people. Conflict and religion are big problems that make it difficult to agree on policies to tackle an abortion. From a moral and societal perspective, it is difficult to let a mother take care of an unwanted pregnancy mainly because of the result of rape.

By looking at these conditions, article 31 of Government Regulation (PP) Number 61 of 2014 concerning Reproductive Health was issued. The legalization of abortion due to rape aims to protect the future of the victim of rape. Although this new regulation has sparked controversy because it will make the path easier for those who wish to have an abortion. Furthermore, in the PP it is stated that abortion can be performed by women for reasons of medical emergency or reasons of rape that cause trauma. However, this act of rape abortion can only be done if the gestational age is at least 40 (forty) days from the first day of the last menstrual period.

Then how does Islamic law address these problems. Based on the complex problems with the pros and cons, the writer tries to describe some of the ulama's opinions which are pros and cons and then analyzed based on the principles of ushul fiqh.

II. ULAMA OPINION

In Islamic law, abortion due to rape is not explicitly discussed whether it is permissible or not. In general, the law of abortion in Islam is not allowed (haram). Islam wants the descendants of its followers to continue to develop. Because when the sperm and egg have mixed to form an embryo, this is the beginning of life. As said in Surat Al-Insan (76) verse 2:

إِنَّا خَلَقْنَا الْإِنْسَانَ مِنْ نُطْفَةٍ أَمْشَاجٍ نَبْتَلِيهِ فَجَعَلْنَاهُ سَمِيعًا بَصِيرًا

“Surely We have created man from a drop of mixed semen which We want to test (with orders and prohibitions), therefore We make him hear and see.”

However, in Islam what is discussed is the law of abortion that is performed before compounding and abortion that is performed after compounding. Regarding the law of abortion when the spirit has been infused with cruelty, the jurists agree on its prohibition. The spirit is blown when the fetus is 120 days

36. M Nurul Irfan, *Gratifikasi dan Kriminalitas Seksual Dalam Hukum Pidana Islam*, (Jakarta: Amzah, 2014), p. 91

37. Maria Ulfah Anshor, *Fikih Aborsi (Wacana Penguatan Hak Reproduksi Perempuan)*, Cetakan pertama, (Jakarta: Buku Kompas, 2006), p. 6

(four months) old. The limit after giving the spirit or after 120 days is mentioned in the Al-Quran Surah al-Mu'minun verses 12-14, namely:

وَلَقَدْ خَلَقْنَا الْإِنْسَانَ مِنْ سُلْطَةٍ مِّنْ طِينٍ ثُمَّ جَعَلْنَاهُ نُطْفَةً فِي قَرَارٍ مَّكِينٍ
ثُمَّ خَلَقْنَا النُّطْفَةَ عَلَقَةً فَخَلَقْنَا الْعَلَقَةَ مُضْغَةً فَخَلَقْنَا الْمُضْغَةَ عِظْمًا فَكَسَوْنَا
الْعِظْمَ لَحْمًا ثُمَّ أَنشَأْنَاهُ خَلْقًا آخَرَ ۖ فَتَبَارَكَ اللَّهُ أَحْسَنُ الْخَالِقِينَ

“And indeed We have created humans from a quintessence (originating) from the ground. Then We make the essence of the semen (which is stored) in a firm place (the womb). Then the semen We made a clot of blood, and then We made a clot of blood We made a lump of flesh, and We made a lump of meat We made a bones, then We wrapped the bones with flesh. Then We made him another being. So Glory to Allah, the Best Creator. “

Also as mentioned in the authentic hadith which was narrated marfu ‘by Ibn Mas’ud. Rosulullah SAW said:

“Surely one of you is in his mother’s stomach for forty days in the form of semen, the next forty days becomes a clot of blood, then the next forty days becomes a lump of flesh, then an angel is sent to blow his spirit to him.” (Muslim)³⁸

There is no difference of opinion among jurists about the law of abortion after the spirit is inflated into the fetus. They emphasized that the law is the same as killing a living person. This haram law still applies even though the act of leaving the fetus in the womb can endanger the life of the mother. Ibn ‘Abidin emphasized, “if the fetus is alive and its existence is feared it could endanger the life of the mother, then aborting the fetus is still not allowed. That is because the death of the mother is something that might and might not happen (mauhum). Therefore it is not permissible to kill people because of something that is still mauhum.

Meanwhile, before the spirit is blown or implanted in the fetus, there are differences of opinion among the jurisprudence schools, even within one school. There are groups that prohibit abortion at any stage of fetal growth before being given life (nuthfah, alaqoh, mudghoh). This opinion was expressed by some Hanafi scholars, the majority of the Maliki school and some Shafi’i scholars. Ibn al-Hammam, one of the Hanafi schools stated that sperm in the womb will be alive as long as it is not damaged (aborted), because it is considered that there is life, so if it is have been aborted including criminal acts.

The legal basis used by scholars in determining the prohibition of eliminating fetuses at the nuthfah stage (commencement of human creation and formation) is the following hadith:

“Verily Allah SWT. if he wanted to create man, he brought together a man and a woman who would then emit sperm into each vessel and its members. When it comes to the seventh day, Allah SWT. gathered them and brought them to every vessel, except Adam’s creation. (HR. Al-Tabrani).

Imam al-Ghazali, one of the scholars of the Shafi’i school of thought also disapproves of abortion, even though it is only the conception (the result of a meeting between sperm and ovum), which is analogous to a transaction or agreement that has been agreed upon so that it cannot be canceled.

38. Imam Muslim, Shahih Muslim, (Beirut: Dar El Fiker, 1993. Hadis 2643, jilid 2, h. 412). Lihat juga hadis 2645, p. 414.

Another group that allows abortion at any stage before the compounding occurs. Most of the Hanafi schools allow abortion, because it is considered that there is no life, so if it is aborted it is not a criminal offense.³⁹The majority of the Hambali school of thought allow abortions while they are still in the lump of meat phase because they are not yet in the form of a human child. Zarkasyi's opinion is in line with the view of the majority of the Shafi'i school of thought which also allows abortion in the alaqoh phase because there has not been a compounding.⁴⁰

The argument put forward by the scholars is that it is possible to carry out an abortion at each stage before the giving of life is that everyone who has not yet been alive will not be resurrected on the Day of Judgment. Anything that is not resurrected means its existence is not counted. A fetus that has not been given life is not classified as a human, so there is no prohibition against abortion.

The law of abortion as a result of rape according to Islamic law is still being debated, because there is no clear passage about the law. Therefore, the Indonesian Ulema Council in its fatwa Number 4 of 2005 on Abortion provides the following provisions:

Abortion is allowed because of *udzur*, both emergency and urge.

a) Emergencies related to pregnancy that allow abortion are:

- 1) Pregnant women suffer from serious physical illnesses such as advanced cancer, tuberculosis with caverna and other severe physical diseases that must be determined by a team of doctors.
- 2) In circumstances where pregnancy threatens the life of the mother.

b) Circumstances related to pregnancy that allow abortion are:

- 1) The fetus was detected to have a genetic defect which, if born, is difficult to cure.
- 2) Pregnancy due to rape determined by the authorized team which includes the victim's family, doctor and cleric.

c) The abortion as referred to in letter b must be performed before the fetus is 40 days old.⁴¹

According to the Bahtsul Masail Nahdlatul Ulama Institute, based on the results of the decision of the Bahtsul Masail Diniyah Commission for the National Council of Ulama NU in 2014, there is a fatwa regarding the legal status of abortion due to rape which states that the law of abortion due to rape is haram. However, some scholars allow abortion before the age of the fetus is 40 days from conception. Abortion is not allowed except for abortion that has met the requirements for medical emergencies and pregnancy due to rape under certain conditions.⁴²

According to Majlis Tarjih Muhammadiyah, by the Chairman of the Tarjih Council and the Tajdid of the Muhammadiyah Central Leadership Syamsul Anwar said that his party was still using the old fatwa, the fatwa resulting from the XXII Muhammadiyah Tarjih Majlis Congress on February 12-16, 1989 at the Muhammadiyah University of Malang. The fatwa emphasizes that abortion can only be done for women who are threatened with a medical emergency.⁴³

39. Rohmawati, Tinjauan Hukum Islam terhadap Legalitas Aborsi akibat Perkosaan dalam PP No.61 Tahun 2014, Vol. 3, Nomor 1, Juli 2015, p. 77

40. Husein Muhammad, Islam Agama Ramah Perempuan Pembelaan Kiai Pesantren, (Yogyakarta: LkiS, 2004), p. 279

41. Sabarudin Ahmad, Hukum Aborsi Akibat Perkosaan (Analisis Hukum Islam terhadap PP No. 61 Tahun 2014 tentang Kesehatan Reproduksi), Vol. 8, No. 2, 2018, p. 168

42. <https://islam.nu.or.id/post/read/55645/hukum-aborsi-dalam-islam>

43. <https://m.cnnindonesia.com/nasional/20141117115321-20-11932/muhammadiyah-berbeda-soal-kontroversi-aborsi>

III. ISTIDLAL ANALYSIS

The purpose of Islamic law is to create the benefit of individuals and society in two fields, namely the world and the hereafter. This is the basis for the establishment of all Islamic law, there is no one area of belief or human activity or a natural occurrence unless there is a discussion in Islamic law that is studied with all broad and deep perspectives.⁴⁴

If Muslims are faced with two alternatives that are difficult to solve because they contain prohibitions, then he must do one problem which is less risky than the other. This action is in accordance with the fiqhiyah qaidah which reads:⁴⁵

إذا تعارض مفسدتان روعي أعظمهما ضررًا بارتكاب أخفهما

This means: when faced with two kinds of mafsadat (difficulties), what is defended is the greater the risk, while the lighter the risk is sacrificed.

This rule emphasizes that if at the same time we are faced with the choice of rejecting interdependence or achieving benefit, then what must come first is to reject adversity. Because by rejecting kemafsadatan means we also gain benefit. Meanwhile, the goal of Islamic law, in the end, is to gain benefit in this world and the hereafter. Benefit brings benefits to human life, while mafsadah results in deprivation for human life. What is called maslahat has certain criteria among scholars, which, when concluded, the criteria are as follows:

1. The benefit must be measured according to the maqashid alsyari'ah, the arguments of the kulli (general from al-Qur'an and as-sunnah), the spirit of the teachings and the kulliyah rules of Islamic law.
2. The benefit must be convincing, in the sense that it must be based on accurate research, so that there is no doubt.
3. The benefit must be of benefit to the majority of society, not to a small portion of society.
4. Benefit that makes it easy, not causes difficulties in the sense that it can be implemented.
5. Those who have the right to determine whether or not something is beneficial according to sharia are institutions that have competence in the field of sharia and are carried out through jama'i ijtihad.⁴⁶

Pregnancy due to rape which has an impact on high maternal mortality is not a simple problem, but has a complex social dimension both physically and psychologically for the person concerned, as well as psychosocial for the environment. Pregnancy will aggravate the psychological condition of the victim who previously experienced severe trauma due to the rape incident. The trauma experienced by a pregnant mother can also have a negative impact on the development of the fetus she is carrying. Therefore, most women who are victims of rape experience a rejection reaction to their pregnancy. Besides that, she will feel a heavy psychological burden if she has to raise a child who was raped because she has to bear the negative stigma from society.

44. Rasyad Hasan Khalil, Tasyri 'Date, (Jakarta: Amzah, 2009), p. 22

45. Mahjuddin, Masailul Fiqhiyah (Berbagai Kasus yang Dihadapi 'Hukum Islam' Masa Kini) (Jakarta: Kalam Mulia, 2008), p. 86

46. A. Djazuli, Kaidah-Kaidah Fikih, (Jakarta: Kencana Prenanda Media, 2010), p. 165

الصَّرُورَاتُ تُبَيِّحُ الْمَحْظُورَاتِ

In the law of fiqh it is mentioned (The state of emergency allows something that is forbidden). The emergency (danger) indicator in this contest has at least three criteria as follows; first, the danger is real, is something that is proven, concrete, not conjecture; second, it shows factual evidence which is shown by empirical research, so that it is a certainty and not just an estimate (zhanniyah); third, the motivation is to take advantage of religious considerations (syara ‘), which is believed that a safe abortion provides more benefits and benefits.⁴⁷

In the context of abortion due to rape, the principle that can be applied is benefit to preserve the soul and mind. The goal of nurturing the mother’s soul is oriented towards acknowledging the sanctity of life and the right to continue life. The soul is categorized as an emergency. In an emergency that causes slaughter of the soul, something that is forbidden is allowed. Most of the women who are victims of rape experience a rejection reaction to their pregnancy and choose to end the pregnancy but in an unsafe (unsafe) way that can result in the death of the mother. Meanwhile, maintaining the mind of the mother aims to prevent her from experiencing mental disorders (crazy). In general, rape victims experience psychological trauma which can cause severe stress or mental illness due to the rape incident they experienced.

So the safety of the mother’s life takes precedence over the life of the fetus, with the following considerations:

- a. The life of the mother in this world is real, while the life of the fetus is not certain. Therefore, the mother has more right to live than the fetus.
- b. Sacrificing the mother is more risky than sacrificing the fetus. Because if the mother dies, all the children she leaves behind experience suffering, especially the newborn baby. But if the fetus is sacrificed, the risk is lighter than the risk of death for the mother.

Indeed, talking about abortion cannot be seen only from one point of view because this is a very complex issue and does not stand alone, just like other humanitarian problems. The scholars agree that the law of origin of abortion is haram. However, there is still an opportunity to allow an abortion for good reasons.⁴⁸

IV. CONCLUSION

According to Islamic law, in essence the practice of abortion is not allowed or prohibited because it is tantamount to killing human but if the abortion is an effort to protect or save the mother, then Islamic law allows it with strict terms and conditions.

Thus, formulating the abortion fiqh that allows abortion of pregnancy due to rape (safe abortion) is the right step to overcome the problems faced by women who are victims, as an effort to prevent maternal death. Abortion in this case can be categorized as an emergency.

47. Rohmawati, Tinjauan Hukum Islam terhadap Legalitas Aborsi akibat Perkosaan dalam PP No.61 Tahun 2014, Vol. 3, Nomor 1, Juli 2015, p. 86

48. Abbas Syauman, Abortion Law in Islam, first printing, (Jakarta: Cendekia Sentra Muslim Member of IKAPI, 2004), p. 16

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