

Abortion From the Perspectives of Islamic Law and Women's Rights

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ABSTRACT: Abortion is the main killer for women. It is still an interesting issue in international and national level. The cause that has opened the public debate on the attitude of law, rule, religion, morality and the right of women to abortion. Such as in Indonesia, the data said that abortion almost 6.944 - 7000 cases each day and two million cases each year. There are much regulation to arrange on abortion, such as in Article 76 of Law No. 39/2009 concerning on Healthy (people can doing abortion with some conditions), Fatwa MUI No. 4/2005 concerning on Abortion and Presidential Regulation No. 61/2014 concerning on The Health of Reproduction. Although abortion has been arranged normatively, but the implementation on it always has contradiction because there are two rights to be protected. The right to live of the fetus and woman's right to get best condition on her health reproduction. The aim of the article is to evaluate Indonesian Law that related on abortion. The particular regulation from MUI and Law on The Health, arranged the provisions that is permitted doing abortion with some exceptions. And these provisions are contrary with the source of The Islamic Law (The Alqur'an), is it possible? This article will analyse it with deep discussion by exploring the sources.

KEYWORDS: Abortion, health, law and human rights.

I. BACKGROUND

Discussing on abortion is never ending issues. Abortion affected to the women, because it forced them to live a life they did not decided. It forced them to be moms, although they do not want to. It participates to its subordination to a patriarchal system in which she has no other choice but to play the expected role of their social object or child-raiser. In other word a utilitarian perception of the women.

In Indonesia, the data said that abortion almost 6.944 - 7000 cases each day and two million cases each year. There was much regulation to arrange on abortion, such as in Article 76 of Law No. 39 year 2009 concerning on Healthy (people can doing an abortion with some conditions), Fatwa MUI No. 4 year 2005 concerning on Abortion and Presidential Regulation No. 61/2014 concerning on The Health of Reproduction. Although abortion has been arranged normatively, but the implementation on it always has contradiction because there were two rights to be protected. The right to live of the fetus and woman's right to get best condition on her health reproduction.

Based on some conditions and some backgrounds above, there are some research question to this article, such as: a). How the regulation arranged on abortion from the women's rights health perspective? b). How the regulation arranged on abortion from the law perspective?

The structure of this article is divided into three sections. And each section will be consists of some sub sections. Section 1, will explain on Abortion from the women's rights health perspective. Section 2, will discuss on Abortion from law perspective. Last Section will be as some conclusions of the article and supported by some references.

II. DISCUSSION

II. 1. A. WOMEN'S RIGHTS IN HEALTH

Health is a prosperous condition of the body, soul and social that enables everyone to be economically productive. The importance of health as a human right and as a necessary condition for the fulfillment of other rights has been recognized internationally.

Women have the right to enjoy physical and mental health as well as possible. Health is very important for women, so they can participate in all kinds of personal and social life. Women's health includes their emotional, social and physical circumstances, and is determined by the social, political and economic, as well as biological conditions affecting women's lives. However, most women do not enjoy adequate health.

The right to health includes the right to a healthy life and work, the right to health care, and a special attention to mother and child.

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The protection of maternal and child rights is also of particular concern in the Convention on the Rights of the Child. Other international instruments on the right to health are also contained in Article 11 (f), Article 12 and Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women. Article 11 point (f) states: the right to health protection and to safety in labor conditions, including the protection of reproductive functions.

On the national scope, Article 28 H paragraph (1) of the 1945 Constitution states that every person has the right to live a physical and spiritual prosperity, to live, and to obtain a good and healthy environment and entitled to receive health services.

Article 49 Paragraph (2) of the Law on Human Rights states that: Women have the right to special protection in performing their work or profession from matters which may threaten their safety and/or health with regards to their female reproduction function.

Women's reproductive rights are a development on the concept of human rights. These rights are based on the recognition of the rights of all spouses and persons to determine freely and responsibly regarding the number, thinning and determination of their child's birth, the right to access to information and how to do so, as well as the right to seek the highest standards of sexual and reproductive health.

In the 1995 Beijing's Conference on Women, it stated that one of the forms of discrimination against women is a low access to holistic reproductive health services. Even though, women must face the risk of pain and death from the reproductive process that men do not have to take on.

II.1. B. ABORTION AND WOMEN'S REPRODUCTION HEALTH

Abortion consists in the removal of an embryo or a fetus out of woman's uterus. The act of termination of pregnancy before the fetus can live out of the womb or about 20 weeks. Abortion is a sensitive issue. Many people directly link it to moral issues. Blasphemy is always directed to women who are forced to do so, and is always associated with women without husbands as well as teenagers.

Abortion is a controversial issue in various international conferences. In countries where abortion is legalized, the rate of abortion declines, so does the maternal mortality rate. This is partly due to the access to holistic and open reproductive health services, including the protection and treatment of sexually transmitted diseases, non-discriminatory and respecting the rights of clients. In addition, the access to emergency essential obstetrics which covers the handling of safe abortion is also enhanced.

Health ethics is different from Medical Ethics. Medicine is a profession that recognizes education or special training. Each profession should serve the community. Each profession has a code of ethics based on morals, *akhlaq* and character. The medical code of ethics in this case consists of norms of decency and rules of behavior and attitude among the members of the profession itself.

Soerjono Soekanto argues that today's Medical Ethics is a code, based on the Hippocrates Oath. The oath was developed into a doctor's oath that is essentially the same across the world. Medical Ethics is basically a framework of attitude that is considered appropriate for a doctor.

When it is analyzed from the ethical perspectives, then an act of abortion can be seen from two sides, namely the medical/physician side, and the side of the aborted women. A medical practitioner who performs an abortion to his patient, in Indonesian society, is regarded as performing an act contrary to morality and goodness. This is because the act has killed the innocent fetus in the womb of a woman. Both doctors and patients will get sanctions that are social in nature, either in the form of mockery or exile. For the perpetrators, if the abortion is carried out not in accordance with medical ethics, it will be subject to sanctions for violating the code of ethics.

II.1. C. Abortion from the perspective of Women's Rights

When it is viewed from a human rights perspective, the issue of abortion is a two dimensional issue. The first dimension is the right of the fetus to live that must be protected, while the second dimension is the women's rights to the health of their reproductive systems. In Indonesia, an abortion can be done by observing certain conditions for pregnant patients. In the United States, up to this day, there are two opinions about whether abortion is allowed or not; some people believe in Pro Choice and some others believe in Pro Life.

Pro life means the right of baby to live. Some groups supporting the ban of abortion call themselves "pro-life", supporting the view that abortion is a murder of the fetus, acknowledging that the fetus is a human being.

In 2013, France adopted a legislation requiring the French government to pay for all the legal abortions.¹ In addition, the French government must pay for contraception for girls aged 15-18 years. Then, in 2014, France again issued a legislation allowing women to have an abortion within the first 12 (twelve) weeks of pregnancy without having further questions.¹ The reason for this

¹ TIME, "France Eases Abortion Restrictions in Sweeping Equality Law", <http://time.com/3086892/franceabortion-law-gender-equality/>, diakses pada 2 Februari 2019.

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legislation is to improve gender equality in France.² Any abortion should be performed by a medical doctor.³ The physician should provide complete information on the procedures and risks, as well as provide a consultation to the patients who will undergo an abortion.⁴ The doctor himself can refuse to perform an abortion to his patient.⁶

Apart from the legalization of abortion in France, the number of abortions in France from 2011 to 2014 tends to decline. In 2011, the number of reported abortions were 209,291, whereas in 2012, there were 207,120 cases; in 2013, there were 216,697 cases and no reported cases of abortion in 2014.⁵

In the Netherlands, abortion is permissible if the abortion is not performed, the safety of the pregnant woman will be in danger.⁶ Earlier, in the Dutch Criminal Code (1886), abortion was classified as a criminal act against life, and people could be sentenced to imprisonment.⁷

Then, in 1984, abortion was allowed if performed by a doctor in a hospital or clinic which was authorized for it under the Termination of Pregnancy Act.⁸ The existence of the Termination of Pregnancy Act is to protect the life of the unborn child and to help women in difficult situations resulting from unwanted pregnancies.⁹

In doing an abortion, there should be a consultation with a general practitioner in a hospital or an authorized clinic.¹⁰ The woman concerned must also receive information on solutions or alternative actions to resolve the situation.¹¹ Then, there is a 5-day pause between

¹ Reuters, "France Passes Sweeping Gender Equality Law", <http://www.reuters.com/article/us-france-womenidUSKBN0G61OO20140806>, diakses pada 2 Februari 2019.

the first doctor consultation and the abortion, to give time for the woman to rethink about her decision.¹²

Furthermore, the abortion rate in the Netherlands is high. Between 1996 and 2003, the abortion rate in the Netherlands rose by 31%.¹³ The increase is caused by the demand for abortion continues to increase, especially for ethnic minorities in the Netherlands.¹⁴

II. 2. ABORTION FROM THE LAWS PERSPECTIVES

From the legal point of view, abortion relates to several legal domains, including: Health Law, Criminal Law, Civil Law, Administrative Law and Islamic Law. Health Law is a legal field that covers all legal rules that are directly related to the field of health maintenance/services. In addition, the entire rules of Health Law also includes legislation, international rules and guidelines, customary law and jurisprudence.

Health Law is broader than the Health Ethics and Medical Ethics. This can be seen from some examples that illustrate the correlation between Health Law, Health Ethics and Medical Ethics, for example:

- a) If there is a provision in health law that is perhaps contrary to health ethics, then there may be a conflict and in this conflict, the provisions of health law remain in force and the rules of ethical health are ruled out because the law prevails and covers general aspects.
- b) Provisions of health laws can set aside medical ethics.

² *Ibid.*

³ Library of Congress, "Abortion Legislation in Europe", <https://www.loc.gov/law/help/abortionlegislation/europe.php#france>, diakses pada 2 Februari 2019.

⁴ *Ibid.* ⁶*Ibid.*

⁵ Johnston's Archive, "Historical Abortion Statistics, France", <http://www.johnstonsarchive.net/policy/abortion/ab-france.html>, diakses pada 2 Februari 2019.

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⁸ Communication Department, Corporate Communications and Public Diplomacy Division of Ministry of Foreign Affairs The Netherlands, http://www.minbuza.nl/binaries/content/assets/minbuza/en/import/en/you_and_the_netherlands/about_the_netherlands/ethical_issues/qa-abortus-en-2011.pdf, diakses pada 2 Februari 2019.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

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¹³ CNN, "Let's Get Real About Abortions", <http://edition.cnn.com/2012/10/29/opinion/frum-abortion-reality/>, diakses pada 2 Februari 2019.

¹⁴ Guttmacher Institute, "Legal Abortion Worldwide: Incidence and Recent Trends", *International Family Planning Perspectives Vol. 33, No. 3. September 2007*, <https://www.guttmacher.org/pubs/journals/3310607.html>, diakses pada 2 Februari 2019.

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- c) Health ethics may override the rules of medical ethics because the health ethics are a specialization of the living general ethics in the society and the rules of medical ethics apply only to physicians.

In terms of health, abortion is included in the discussion of women's reproductive health. This matter is regulated in both international and national regulations, among others are:

- 1) Article 25 of the 1948 UN Universal Declaration of Human Rights;
- 2) Article 12 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- 3) Article 28 paragraph (1) of the 1945 Constitution of the Republic of Indonesia;
- 4) Article 49 paragraph (2) of the Law on Human Rights No. 33 of 1999;
- 5) Law No. 36 of 2009 on Health, Article 4, Articles 47 – 48 point (e), and Articles 71 – 77 on Reproductive Health;
- 6) Government Regulation No. 61 of 2014 on Reproductive Health; 7) Fatwa MUI No. 4 of 2005 on Abortion.

Article 25 of the Universal Declaration of Human Rights regulates the rights to health for women relating to their reproductive health. These rights are:

- 1) Every person is entitled to an adequate level of living for their health;
- 2) Mothers and children are entitled to special care and assistance. All children, whether born inside or outside of marriage, should receive an equal protection.

Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides a guidance to all of its State Parties to provide health insurance for women:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in terms of health care, in order to ensure the provision of health services;
2. States Parties shall ensure that women receive appropriate services in relation to pregnancy, childbirth and postpartum, by providing free services, as well as adequate nutriment during pregnancy and lactation.

In the 1945 Constitution of the Republic of Indonesia, Article 28 H paragraph (1) states that: "Every person shall have the right to live physically and mentally prosperous, to live and to obtain a good and healthy environment and entitled to obtain health services."

Article 49 paragraph (2) of the Law No. 39 of 1999 on Human Rights describes the right of women to health, which states that: "Women are entitled to a special protection in the conduct of their work or profession on matters which may threaten their safety and or health with respect to their reproductive function."

In the Law No. 36 of 2009 on Health, there are several articles that regulate some matters about women's reproductive health, among others are: "Every person is entitled to health (Article 4);" Articles 47 and 48 (e): reproductive health; Section Six on Reproductive Health, Articles 71 to 77.

In the Government Regulation No. 61 of 2014 on Reproductive Health, Article 3 elaborates that the Regulation of Reproductive Health aims:

- (a) To ensure the fulfillment of the right to reproductive health of every person; and (b) To ensure maternal health in the reproductive age.

From the perspective of Islamic Law, abortion is a forbidden act by Allah SWT, as explained in the Al-Qur'an Surrah Al Isra and Al An Am. . The article of The Aquran stated are: **وَإِذَا قُلْتُمْ لِلنَّاسِ أَنْ لَا يَكُونُوا كَالْآبَاءِ الَّذِينَ كَانُوا يُكْفَرُونَ بِمَا كَانُوا يَفْعَلُونَ**

The Meaning:

And do not kill your children for fear of poverty. We Allah provide sufficiency for them and for you. Indeed, their killing is a great sin [Al Isra': 31]

وَلَا تَقْتُلُوا أَوْلَادَكُمْ إِنَّكُمْ لَكَاظِمُونَ **وَالَّذِينَ يَكْتُمُونَ** **أَسْرَارَهُمْ كَانُوا يُكْفَرُونَ بِمَا كَانُوا يَفْعَلُونَ** **وَالَّذِينَ يَكْتُمُونَ** **أَسْرَارَهُمْ كَانُوا يُكْفَرُونَ بِمَا كَانُوا يَفْعَلُونَ**

The Meaning:

Say Muhammad, "Come, I will recite what your Lord has prohibited to you. [He commands] that you not associate anything with Him, and treat your parents good, and do not kill your children out of poverty; We will provide sufficiency for you and them. And do not approach immoralities - whether it is appeared or concealed. And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right. This thing Allah has instructed you in order that you understand [Al An'am: 151]

However, there are some conditions that are exempted from the prohibition, and such matters are regulated in the Fatwa of the Council of Indonesian Ulama (MUI). In the Fatwa MUI No. 4 of 2005 on Abortion, it outlines some provisions such as:

1. Abortion is forbidden since the implantation of blastocyst on the mother's uterine wall (nidation).
2. Abortion is permissible because of *uzur*, whether it is an emergency or *hajat*.

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- a. The state of emergency related to pregnancies that would allow abortion is: a pregnant women who suffer from severe physical illnesses such as advanced stage of cancer, tuberculosis with caverna and other severe physical diseases that the team of physicians has to determine. In circumstances where pregnancy threatens the mother's life.
 - b. Pregnancy-related *hajat* conditions that may allow abortion are:
 - The conceived fetus is detected with a genetic disability that, when he is born later, it is difficult to cure.
 - Pregnancy due to rape, as determined by a competent team which includes families of the victims, doctors, and *ulama*.
 - c. The permissibility of abortion as referred to in the letter b must be performed before the fetus is 40 days old.
3. Abortion is forbidden in pregnancy that occurs because of *zina* (adultery).

III. CONCLUSIONS

From the international and national level, the issues of women's rights should be perceived as a problem faced not only by women, but also by all the societies. An awareness of women's rights in the society can not establish by itself without a social engineering. The challenges ahead are: The level of understanding of the government officials and public on gender is still low; Women's education level is still low; Social and cultural values still marginalize women.

At the highest level in the domestic scope, the body representing the Indonesian people is the House of Representatives who are responsible for realizing this condition. The implementation is very dependent on the political will of the government and at the next level, the judiciary body is expected to provide justice for many parties including women. This condition can be achieved if the personnel of these institutions have a complete understanding of women's rights especially about women's reproductive health. By regulating abortion in Indonesian legislation, it turns abortion into a legal action according to Indonesia's positive law. However, in its implementation, the medical terms and conditions must still be taken into consideration.

According to Islamic Law, the Fatwa of MUI on Abortion explains that an abortion performed not in accordance with the applicable terms and conditions is forbidden (*haram*). Base on the Alquran, abortion is a forbidden. Although MUI arranged the exception on it, but it is just in a particular case and not for generally.

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