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ABORTION IN ISLAMIC LAW AND ITS INTERSECTION WITH HUMAN RIGHTS

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Abstract:

Abortion was legally restricted in almost every country by the end of the nineteenth century. Abortion is a controversial topic due to its involving with fundamental morals, ethics, and religious concerns. Legal restrictions on abortion do exist throughout Islam jurisprudence, though allowed only with emergency circumstances. Nowadays, people become more aware of abortion as a part of human rights, as it is considered female autonomy over her body and part of reproductive rights. Abortion considered should be legally allowed and accessible to women. This paper will describe the construction of abortion in Islamic Law and the awareness of abortion as human rights.

Keywords: Abortion, Islamic Law, Human Rights.

Abstrak:

Aborsi dibatasi oleh hukum di hampir setiap negara pada akhir abad ke-19. Aborsi adalah sebuah topik kontroversial karena melibatkan moral, etika, dan masalah keagamaan yang mendasar. Pembatasan hukum tentang aborsi memang ada di seluruh yurisprudensi Islam, walaupun hanya diizinkan dalam keadaan darurat. Saat ini, masyarakat menjadi lebih sadar tentang aborsi sebagai bagian dari hak asasi manusia, karena dianggap sebagai suatu otonomi perempuan atas tubuhnya dan bagian dari hak reproduksi. Aborsi dianggap harus diizinkan secara hukum dan dapat diakses oleh wanita. Makalah ini akan menggambarkan konstruksi aborsi dalam Hukum Islam dan kesadaran aborsi sebagai hak asasi manusia.

Kata Kunci : Aborsi, Hukum Islam, Hak Asasi Manusia.

A. Introduction

1. Issue Background

For some individuals, abortion is a controversial topic. Abortion involving fundamental moral, ethics, and religious concerns. The failure of many countries to confront the abortion issue may be primarily because religious and moral obstacles prevent discussion of the question. Talking about abortion considered as something taboo. Nowadays, the act abortion is not merely a medical or public health problem, but rather a social problem associated with the understanding of freedom (freedom or liberalism) adopted by a society.¹ There's an endless debate about whether abortion is considered as murder and amenable to governmental intervention and

¹ Nelly Yusra, "Aborsi Dalam Perspektif Hukum Islam" Marwah: Jurnal Perempuan, Agama dan Jender Vol 11 No 1 (2012), pg 2

criminalization. The party whom against it, claim a superior right of privacy and/or equality exists under the Constitution, vesting in a woman the right to decide activities and actions that affect her physical corpus.²

The decriminalization of abortion also one of the point, which removing specific criminal sanctions against abortion from the law, and changing the law and related policies and regulations to achieve (1) not punishing anyone for providing safe abortion, (2) not punishing anyone for having an abortion, (3) not involving the police in investigating or prosecuting safe abortion provision or practice, (4) not involving the courts in deciding whether to allow an abortion, and (5) treating abortion like every other form of health care.³ While on the other hand, the claimed interest of a State to protect the fetus is impliedly based on the concept of “morality” or “natural law,” specifically on the premise that feticide is violative of the basic code of conduct of societal norms.

During 2010–2014, an estimated 56 million induced abortions occurred each year worldwide. This number represents an increase from 50 million annually during 1990–1994, mainly because of population growth. As of 2010–2014, the global annual rate of abortion for all women of reproductive age (15–44) is estimated to be 35 per 1,000, which is a reduction from the 1990–1994 rate of 40 per 1,000. The estimated global abortion rate as of 2010–2014 is 35 per 1,000 for married women and 26 per 1,000 for unmarried women.⁴

Islam is the second-largest religion in the world. 57 countries are official members of the Organisation of the Islamic Conference (OIC). Muslims comprise close to half of all Africans, one-fourth of Asians and growing numbers of Europeans and Americans, and represent great variation across racial, ethnic, linguistic and geographic lines. While all Muslims share certain core beliefs, official and practised Islam manifests itself are held in different ways as it intersects with local cultures, traditions, histories and politics. The diversity can be seen in

² Barbara Pfeffer Billauer, “Abortion, Moral Law, And The First Amendment: The Conflict Between Fetal Rights & Freedom of Religion” *William and Mary Journal of Women and the Law* Vol 23 Issue 2 (Winter, 2017), pg 1

³ Merge Berer, “Abortion Law and Policy Around the World: In Search of Decriminalization” *Health and Human Rights* , Vol. 19, No. 1 (June 2017), pg 14

⁴ Guttmacher Institute, “Induced Abortion Worldwide” <https://www.guttmacher.org/factsheet/induced-abortion-worldwide> accessed November 26th 2019.

different countries' abortion laws and practices. Tunisia, for example, reformed its abortion law before France and the USA, is socially acceptable with provided free services through the public healthcare system and pregnancy. Legal restrictions on abortion do exist throughout the Muslim world which most are not due to *Shariah*, but to antiquated colonial texts which are the basis for abortion laws in the majority of countries.

Islamic law, or Qur'anic law, is called *Shariah*, and generally governs family law in Muslim countries. The Holy Qur'an is the primary authority for Muslims. Basically, Islam is a way of life. Other aspects of life are governed by the civil laws of the various Islamic states. Islam looking abortion as a crime, the commission of which is prohibited to the Muslim because it constitutes an offense against a complete, live human being. Almost all of Muslim scholars and authorities regard ethical dilemmas surrounding abortion as jurisprudential topics.⁵ But with the spread of liberalism, capitalism, and/or individualism ideology, people become aware and see abortion as one of human rights or women right. Safe abortion should be legal and be accessible, which in most country likely not happen due to the law. Restricting access to safe abortion countries violate women's rights, especially the Article 25 of the United Nations' Universal Declaration of Human Rights states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."

2. Problem Identification, Research Limitation, and Research Method

This research focus on discussing how abortion is constructed in Islamic Law and the awareness of abortion as a human rights. Initial problem that is popped up and will be assessed through the research is the perspective gap between the morality and allowance of abortion that triggered endless dialectical discourse among diverse layers of community around the world. In order to set a clear border of research limitation, this research will only analyze abortion in Islamic Law and

⁵ Kathleen A. Portuán Miller, "The Other Side Of The Coin: A Look At Islamic Law As Compared To Anglo-American Law—Do Muslim Women Really Have Fewer Rights Than American Women?" New York International Law Review Vol. 16 (2003), pg 1

abortion as human rights. Conduct of this research is based on literature and press-based sources research. This research will provide an explanation abortion in Islamic Law perspective, abortion as a form of human rights, and how abortion is ruled. This research aims to provide an alternative perspective by providing analysis of abortion from Islamic Law perspective and abortion as human rights. It is hoped that this research, with the synthesis of the debate, would produce theoretical basis to bridge the gap between each of the perspectives.

B. Discussion

1. Abortion in Islamic Law Perspective

For both women and physicians who know abortion can be legally performed, stigma was a notable barrier to accessing and providing safe care. In Ghana, abortion is stigmatized for a number of reasons, including the high value placed on motherhood and social sanctions against premarital sexual relationships. Importantly, influential Christian and Muslim communities serve as drivers of societal opinion on such matters. Conservative interpretations within both religious groups consider abortion immoral. Although, particularly within Islam, a wide range beliefs regarding the permissibility of abortion early in pregnancy exists. Nonetheless, strict religious interpretations and beliefs influence societal attitudes toward women seeking abortion.⁶

The majority of abortions in Muslim countries are unsafe, which is due to the laws that are restrictive. Abortions also often take place in clandestine settings by a person lacking the necessary skills or in an environment lacking minimal medical standards, or both. The distinction between unsafe and safe abortions is critical to understanding how lack of access to safe abortion services is an issue of discrimination that leads to social inequities, widespread illness and premature death. When services are pushed underground, women have to pay high prices to access abortions, services are often of a poor quality, and governments have no

⁶ Carolyn M. Payne *et al*, “Why Women Are Dying from Unsafe Abortion: Narratives of Ghanaian Abortion Providers” *African Journal of Reproductive Health / La Revue Africaine de la Santé Reproductive*, Vol. 17, No. 2 (June 2013), pg 119

responsibility to provide them – all factors which serve to perpetuate and deepen discrimination and social inequities.

In Islam, abortion know with the word *al-Ijhadh* or *Ishqat al-Haml*, which means to keep away, prevent, or in other words is defined as the discharge or fall of the womb of a mother whose womb is not yet 20 weeks old. In the Islamic context it states that the life of a fetus (child in the womb) is a life that must be respected. Therefore, it is an offense to abort a fetus that is being conceived (abortion), let alone such abortion without a valid reason or strengthened by the medical team.⁷ The holy Qur'an, as the most important source for Islamic jurisprudence, does not explicitly mention abortion but explains the stages of creation of a human in the intrauterine life in Surat al-Mukminûn [23]: 14, "Then We made the sperm-drop into a clinging clot, and We made the clot into a lump [of flesh], and We made [from] the lump, bones, and We covered the bones with flesh; then We developed him into another creation. So blessed is Allah, the best of creators."

In surah Al-maidah verse 32, stated that God decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land, it is as if he had slain mankind entirely. And whoever saves one, it is as if he had saved mankind entirely. The holy Qur'an makes it clear that a child should not be killed because the parents fear that they will not be able to provide and support the child, and they should trust Allah to look after things, as stated in surah Al-Isra verse 31. But in the verse 33, it's stated to do not kill the soul which Allah has forbidden, except by right. According to these verses, Islam provides a clear legal basis that human life is sacred. It must be preserved and must not be destroyed (terminated) unless done for a reason or a valid reason, such as in the execution of the death penalty, in war or in self-defense justified by the *Shariah*.

The four school have different opinion on abortion. The Hanafi School allows the incorporation of pregnancy assessments before the 120th day with consideration not being involved, yet some scholars of this school only allow before 80 days of pregnancy, with acceptable reasons such as illness or the mother feels unable to

⁷ Dewani Romli, "Aborsi Dalam Perspektif Hukum Positif dan Hukum Islam" Al- 'Adalah vol 10 no 2 (July 2011), pg 159

conceive.⁸ It is still considered as a sin, but not as big as the sin of killing humans. The majority of Hanbali scholars allow abortion as long as the fetus is still in the form of a blood clot (*'alaqoh*) because it is not yet in human form.⁹ Syafi'iyah school, among which was stated by al-Ghazali in *Ihya Ulumuddin*, forbids abortion. This school believes that abortion is an unlawful criminal act regardless of whether there is a spirit or not, because life has started since the meeting between sperm and ovum in the womb of a woman. However, al-Ghazali in the book of *al-Wajiz* opinion is different from his writings in *al-Ihya*, he acknowledged the truth of the opinion that abortion in the form of a blood clot (*'alaqoh*) or a lump of meat (*mudghoh*) is allowed because there has not been a spirit.¹⁰ Malikiyyah School, abortion is clearly prohibited even though the age of the fetus is still less than 40 days after the meeting of sperm and ovum.¹¹

Imâm al-Subki believes that the abortion of the results of *zina* (sexual intercourse outside marriage), is permissible as long as it is still in the form of *nuthfah* or *'alaqoh*, ie before eighty days. Imam al-Ramli opined the same thing, based on the hadith narrated by Bukhari and Muslim about the creation of a 40-day-old fetus which is then blown by a spirit. Whereas Abû Ishâq al-Marwaei, also Abû Bakar Ibn Sa'id al-Furati and al-Qalyubi, argues that someone who takes medicine to abort the womb during the form of *'alaqah* or *mudghah*, then it is permissible.¹² Ibn Rusyd opined if there is a beating of a woman who is pregnant and causes the death of her fetus, then the penalty is not obligatory expiation (*kaffârah*) but preferably expiation. Ibn Wahban argues that abortion is permissible because of *uzur* or obstacle. If not, then the ruling is *makrûh*. Whereas Muhammad Said Ramadhan al-Bûti considered that abortion was permitted provided there was an agreement between the father and mother of the fetus. Because according to the *Shariah law* ',

⁸ Ibnu Abidin, *Hasyiyah Rad al-Mukhtar 'ala al-Dur al-Mukhtar*, da'ar al-Fikr, 2nd Ed, pg. 302 and 411

⁹ Abi Muhammad Abdullah bin Ahmad bin Muhammad bin Qudamah, *al-Mughni*, Hajar, Kairo, 2nd Ed, pg 210

¹⁰ Al-Ghazali, *al-Wajiz*, Da'ar al-Ma'rifah, Beirut, pg 158

¹¹ Agung Sasongko, "Aborsi dalam Pandangan Islam" <https://www.republika.co.id/berita/dunia-islam/fatwa/18/07/27/pcipbu313-aborsi-dalam-pandangan-islam> accessed November 28th 2019.

¹² Dewani Romli, "Aborsi..." pg 161

a father can be legitimate if he has a child born to a legitimate wife. In *zina*, the father is not necessary. In cases like this, the judge can sit as a father to give permission and consideration though he could not forgive the issue of *qishas* even though it was a child of *zina*. Because it is contrary to *mashlahah*. But the judge can replace in an emergency. The reason is fetus not yet alive, but has a law as a living human, Therefore, the *tahqîq* expert said the ability to abort the womb must be interpreted as being in a state of senility, or with the understanding that he is as innocent as his sin of killing.¹³ Imâm al-Ghazâlî argues, supported by Mahmîd Syaltet and Yûsuf Qaradhawî, that the law of abortion is absolutely haram, even since the meeting of the sperm and the ovum. ‘Abd al-Rahman al-Baghdadi opined if the abortion is carried out after 40 days of pregnancy which is when the fetus begins to form, the abortion is haram. A fetus that is in the process of forming its organs can be ascertained as a fetus that is undergoing a process of formation of a perfect human being.

There are similiar disparities among countries whom identifying themselves as Islamic. Jordan, Iran, Egypt and Syria generally allow abortion only if the mother's life is endangered. Iran allows abortion in cases of birth defects, and Iraq sometimes in cases of rape or incest. Saudi Arabia allows limited abortion availability until four months after conception. By comparison, the Islamic countries of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan (whose Islamic populations range from 56% in Kazakstan, 93% in Turkmenistan, to 84% in Tajikistan and 96.3% Uzbekistan) allow abortion on demand until the twelfth week of pregnancy. In Malaysia, abortion is both restricted and heavily criminalized. Abortion in Turkey is legal until the tenth week after the conception, although that can be extended to the twentieth week if the pregnancy threatens the woman's mental and/or physical health or if the conception occurred through rape.¹⁴

2. Abortion As a Form of Human Rights

¹³ Abd al-Rahmân al-Baghdâdi, *Emansipasi Adakah Dalam Islam*, (Jakarta: Gema Insani Press, 1988), pg 129.

¹⁴ Barbara Pfeffer Billauer, “Abortion, ...” pg 21

Abortion is both an emerging human rights issue in international law and a continuing source of controversy in the United States.¹⁵ In 1987, Mary Ann Glendon framed North American abortion laws as a choice between the approach of the United States, symbolizing the protection of women's constitutional rights. The constitutional right to an abortion is unrealizable for many women due to restrictive state and federal laws and the absence of providers in many areas. In many Western European nations, women are beginning to view the right to an abortion as an extension of the right to privacy guaranteed by international human rights agreements. In the abortion landmark cases, a right of privacy has been culled from the concept of liberty or personal freedom or autonomy as a predicate for a constitutional right to abortion.¹⁶

Abortion was legally restricted in almost every country by the end of the nineteenth century. The most important sources of such laws were the imperial countries of Europe—Britain, France, Portugal, Spain, and Italy—who imposed their own laws forbidding abortion on their colonies. The restrictions on abortion were introduced for three main reasons. The first one, abortion was dangerous and abortionists were killing a lot of women. Hence, the laws had a public health intention to protect women—who nevertheless sought abortions and risked their lives in doing so, as they still do today if they have no other choice. Second, abortion was considered a sin or a form of transgression of morality, and the laws were intended to punish and act as a deterrent. And third, abortion was restricted to protect fetal life in some or all circumstances.¹⁷

Soviet Union was the first country to reform its abortion law, spurred by feminist Alexandra Kollantai, through a decree on women's health care in October 1920. Since then, progressive abortion law reform (the kind that benefits women) has been justified on public health and human rights grounds. This is to promote smaller families for population and environmental reasons, and because women's education and improved socioeconomic status have created alternatives to

¹⁵ Melissa A. Matteo, "Governmental Abortion Policies and The Right to Privacy: The Rights Of The Individual and The Rights Of The Unborn" *Brooklyn Journal of International Law* (Winter, 1985), pg 1

¹⁶ Barbara Pfeffer Billauer, "Abortion, ..." pg 7

¹⁷ Merge Berer, "Abortion ..." pg 14

childbearing. Perhaps most importantly, controlling fertility has become both technically feasible and acceptable in almost all cultures today. Yet despite 100 years of campaigning for safe abortion, the use of contraception has been completely decriminalized while abortion has not.¹⁸

For some parties, abortion considered as immoral, which bring up the debate whether abortion are immoral or moral. Those who argue that most abortions are immoral argue that unborn human beings, no less than born human beings, are inviolable. Human fetuses, are inviolable even in the period of pregnancy prior to viability, or even human embryos and human zygotes are inviolable. Inviolable stands for not to be violated both physically or free from profanation. Robert George has written that opponents of abortion view all human beings, including the unborn, as members of the community of subjects to whom duties in justice are owed, and the real issue of both parties has to do with the question of who are subjects of justice. By contrast, those who argue that abortion is often a morally acceptable option typically argue that human fetuses, at least in the pre-viability period of pregnancy (and, a fortiori, human zygotes and human embryos), do not have the same moral status as other human beings. Means, they are not subjects of justice, they are not inviolable.

As the time goes by, people become more aware with abortion as part of human right. Abortion is considered as a form of female autonomy over her body and part of reproductive rights. Understandably, the text of United Nations human right treaties, including CEDAW, the main global instrument for the protection of the human rights of women, have been fraught with circumspection and stayed clear of addressing abortion directly. In its interpretation of Article 12 of CEDAW (right to health), the CEDAW Committee has implicitly associated restrictive abortion laws with discrimination on the bases of gender and biology. It has said that barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures. The Committee has said that when possible, criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion.

¹⁸ *Ibid.*, pg 15

But to be noted, UN human rights instruments don't preclude the recognition of abortion rights. In several human treaties, contain rights that are supportive of abortion rights although it isn't address directly but leave open sufficient windows of opportunity for the recognition of abortion rights as unenumerated rights.¹⁹ The Center for Reproductive Rights welcomes and firmly supports the United Nations Human Rights Committee's General Comment on the Right to Life. The language of the comment affirms that abortion is a human right, that preventable maternal deaths are a violation of the right to life, and that the right to life begins at birth.²⁰ United Nations human rights bodies—including the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Political Rights, the Working Group on discrimination against women in law and practice, and the Special Rapporteurs on the right to the highest attainable standard of health, the rights of women in Africa, and torture—have played an increasingly visible role in calling for progressive abortion law reform. Regional bodies such as the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Commission on Human and Peoples' Rights (ACHPR) have been very active in this regard as well.²¹

C. Final

1. Conclusion

The *Sunnah* or *Hadith* also do not directly cite or prohibit abortion, and further elaborate on the Qur'an's embryonic stages of development and ensoulment. Islamic jurisprudence does not encourage abortion, there is no direct biblical prohibition. An important point to keep in mind is that in Islam, fetus as having some legal protections, even though this legal protection are fewer than that of a full-fledged human being. Modern fatwas on abortion do not necessarily have

¹⁹ Charles G. Ngwena, "Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa" *Human Rights Quarterly*, Vol. 32, No. 4 (November 2010), pg 788

²⁰ "UN Human Rights Committee Asserts that Access to Abortion and Prevention of Maternal Mortality are Human Rights" <https://reproductiverights.org/press-room/un-human-rights-committee-asserts-access-abortion-and-prevention-maternal-mortality-are> accessed November 29th 2019

²¹ Merge Berer, "Abortion ..." pg 16

women's liberty as their aim, but instead uphold regressive patriarchal structures. Positions on abortion are notably variable, and many religious scholars permit abortion in particular circumstances during specific stages of gestational development. Islamic schools, based on a tenable interpretation of the Holy Qur'an and teachings of the prophet, do not at all agree with those who say that a woman has full control over her unborn child as part of her body, which is what the ideology that abortion as a form of human rights aims for. Islam considers bodies as a trust, which every human have to preserve and maintain. Fetus is the creation of Almighty God which makes no one, not even the parents, has the right to make decision about the fetus' life unless its presence threatens the life of the mother. Abortion never be considered as human rights where every women can access it without emergency.

2. Advise

The debate about abortion always lead up to whether it is allowed or prohibited. Most country allow it, but with emergency conditions. The restriction on abortion will make the women in needs has difficulty accessing safe abortion services. In the end, they have to deal with providers of illegal abortion services, or vice versa do independent abortion protection. These actions, however, move abortion safety requirements; risk of making an infection or bleeding. With this circumstances, there should be law that rule about abortion that can be implied in real life without contradiction and be accessible to those who need and have permission to it.

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