

# **THE CRIME OF HUMAN LIFE'S TERMINATION IN THE WOMB (ABORTUS PROVOCATUS CRIMINALIS) ACCORDING TO THE ISLAMIC LAW AND CRIMINAL LAW OF INDONESIA**

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## **ABSTRACT**

*The criminal law of Indonesia regulates on abortion criminal act has only come to a formal delict that underlines on the termination act and does not consider the elimination of the fetus's life as the main issue of abortion criminal act's defense. Therefore, in order to discuss the issue upon the right to live owned by the fetus, an Islamic law approach is used on abortus provocateur criminalis that eventually leads us to a new presumption regarding to the fetus' position as a living being and as a law subject that owns the right to live.*

**Keyword:** Abortus, Islamic Law, Criminal Law.

## **INTRODUCTION**

The practices of abortions are criminal restrictions contained in laws passed by legislature, sometimes as a part of the criminal code, which consolidate a group of criminal law (Berer, 2017). Abortion cases are difficult to have a precise data due to the fact that abortion is a covert crime. The data of (BKKBN-BKD), estimated that abortion performed in Indonesia are about 2 (two) millions of practices every year. Using the normative-judicial/socio-legal approach, this research would provide a perspective upon abortus provocatus criminalis as a crime that eliminates the life of human in the womb according to the Islamic law and Indonesia criminal law, also providing indicator to perform Indonesia criminal law reformation in the defense of abortion criminal act based on the Indonesia criminal law.

## **RESULT AND DISCUSSION**

Abortion is the spurt of an embryo that is unlikely to come back to life (before the fourth month of pregnancy). Other terms that are more common used are spontaneous or natural abortion (abortus spontaneus), artificial or intentional abortion (abortus provocatus criminalis), and abortion according to medical terms (abortus provocatus therapeuticum).

### **Abortion and the Causing Factors**

Generally, abortion is a circumstance where an embryo or fetus is stillborn. Abortion for medical purpose is a termination of a pregnancy with the death or expenditure of an embryo by less than 20 weeks and 500 mg of the embryo's weight or before it cannot live independently outside the womb (Dewi, 2011). Therefore, this discussion will first describe the basic

differences from abortus provocatus that would eventually be divided into two detailed parts, which are Abortus provocatus therapicus that is based by the possibility of the fetus's imperfect development. If the pregnancy is to be maintained, there is a possibility of disability or low life expectancy in a fetus, such as born without cerebral cortex, the second type is Abortus provocatus criminalis which is performed against the law or illegal and is not base by medical indication (Etika, 2010). Below are the following reasons why abortions are performed (Ratna, 2010):

### **Pregnancies outside marriage relationships**

Abortion by unmarried women in Indonesia has a rate of 33%. The unborn child status is an illegitimate child. Which became main factors for women to see abortion as the only way out in order to maintain their pride and dignity; personally and for their families.

### **Socio-economic factors**

The society's circumstances in continuous poverty focuses on their daily activities are to earn a living. The couples are not economically qualified to support the unborn child, because they are already responsible for so many children in the first place (Nalamba, 2017).

### **The reason of being unqualified to bear children**

These reasons usually happen with newlyweds and have not yet come to a firm planning. If an unwanted pregnancy happens, they would likely terminate the pregnancy because they are unqualified to bear children.

### **Pregnancies caused by rape**

Rape is a forced intercourse done by a man (men) towards a woman outside her will and approval (Coleman, 2015). Besides that, the existence of the fetus can cause continuous trauma to the victim that is very likely to damage her physic or mental condition.

### **Abortion Regulation According to the Indonesian Criminal Code**

Indonesian state including its constitutional system and social order system must be regulated by the law (Chandra, 2014). In Indonesia, performing an abortion is one of an act of crime, which makes a perpetrator of abortion a criminal (Adia, 2016). Briefly, the regulations upon abortions are regulated in Article 364, 347, 348, and 349 of the Indonesian Criminal Code (Yospin, 2015). The articles mentioned above are also included of a crime act as a form of negligence and errors of health workers (Mauli, 2017). This reflects in the provisions of Article 346 of the Indonesian Criminal Code. The Indonesian Criminal Code is not an original product of Indonesia, but a result the colonization which explains why the article contained in it are no longer relevant to overcoming crimes of the nation (Alfian, 2015).

## **Abortion in the Islamic Law Perspective**

Before we discuss about abortion in Islam, we need to analyze the steps of how mankind is created into a whole person. Below is an analysis of the human creation steps based on Islam:

### **The process of human creation**

The process of human creation has been explained both in the Al-Qur'an or Rasulullah SAW Hadits. One of the indicators is an explanation given in the Al-Qur'an, Surah Al-Mukminun (23): 12-14. It explained that mankind is created from the quintessence of soil. And then, the soil becomes semen gathered in a strong and safe place in a form of nutfah. And then, the nutfah turns into a lump of blood (alaqah), where the alaqah turns again into a lump of meat (mughdad). Afterwards, the lump of flesh is processed into bones. The bones will be covered with flesh and becomes a living being which a different form from the previous one (Karim, 2007)

### **Moslem scholars' opinions**

Terminologically, abortion in Arabic is "*al-ijhadh*" and "*isqath al ahkam.*" And then, regarding to the Moslem Scholars' point of view towards the act of abortion is categorized into two stages; abortion performed before the spirit insertion into a fetus and abortion performed after the spirit is blown into the fetus. The opinions of the Moslem Scholars' are divided into three categories, the first category allows a pregnancy termination before the womb is 102 days old (Demirel, 2011) with an argument that before that, a human creation has not started; the fetus does not possess a soul or life. Therefore, there is no prohibition towards the termination, the second category stated that destroying the life of a fetus in the early stage (nutfah) is a crime and if it has become "*alaqah*" and "*al mudghah*", then this act is felony, and the third category shows that termination in nutfah and "*alaqah*" stages are allowed. However, they are forbidden when the fetus reaches the stage of "*mudghah*" (Ali, 2013).

### **Redefining Abortion in the Indonesian Criminal Code**

If we would revise the stages of human creation explained both in Al-Qur'an or Hadiths. A form or effort of this reformation or renewal is to reach a better quality, usually consist of a lot of ways, with these particular starts by re-orientation, re-evaluation; reformulation, reconstructing, and reconstruction (Rosidah, 2014). Abortions has violated the essence of human rights because the law is basically a reflection of human rights, to prove if a law has served is justice must first be determined by the regulated human rights in a law (Putri, 2017). The protection of the right to live is also very fundamental and basic; because the right to live is in fact the main thing of human rights.

## **CONCLUSION**

After going through the discussion which is served briefly and solid, the researcher has a final view which states that abortus provocatus criminalis or the act of intentional abortion without any medical mediation is a crime act and could be categorized as a felony towards the

human life. The perspective of Islamic Law regarding to the stages of mankind creation has lead us to an insight of 102 days old fetus inside the womb has a life. Should an abortion be executed since, then the perpetrator has performed a homicide.

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