

## Abortion Reviewed From Islamic Law and Positive Law in Indonesia: Government Regulation No. 61 of 2014 about Reproductive Health

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<p><b>Article History</b>            Received : 2017-09-05            Revised: 2017-09-15            Published: 2017-09-30</p> <p><b>Keywords:</b>  <i>Abortion, Islamic Law, Positive Law</i></p>	<p>In mid-2014, the Indonesian government, through the Ministry of Health of the Republic of Indonesia, issued Government Regulation No. 61 of 2014 concerning Reproductive Health as a derivative regulation/mandate of Law No. 36 of 2009 concerning Health. This regulation contains nine articles governing abortion, which was previously a criminal offense regulated in the Criminal Code with a maximum penalty of fifteen years. In this regulation, the government provides exceptions for abortion based on two reasons: 1). Due to indications of medical emergency, and 2). Due to pregnancy resulting from rape, and can be performed if the gestational age is no more than forty days calculated from the first day of the last menstrual period. In Islamic law, abortion without <i>old ageis</i> a prohibited act. Scholars have agreed that abortion is prohibited if the fetus is one hundred and twenty days old and the soul has been breathed into it. This is based on a hadith narrated by Bukhari and Muslim which states that after the fertilization phase, <i>mugah</i>(120 days), an angel was sent to her and the soul was breathed into her. Regarding the permissibility of abortion before the gestational age of one hundred and twenty days, scholars have different opinions, Imam al-Ghazali and Imam al-Dusuqi prohibit abortion when the male sperm and the female ovum have mixed in the uterus, while Ibn 'Abidin permits abortion until the fetus is one hundred and twenty days old and the soul has been breathed into it. The middle opinion between the two groups is Ibn Rajab who permits abortion with a time limit of up to forty days of fetal age. This research is a descriptive normative juridical research with a comparative legal research approach that uses qualitative research methods. The tools and techniques for data collection are carried out by tracing laws and other legal sources from the legal system that are considered relevant to the main issue at hand.</p>

### I. INTRODUCTION

The dynamics of society continue to evolve in all aspects, including science, technology, and economics, each of which has two sides. The positive side brings advancement to civilization, while the negative side creates moral degradation within the community social life. This negative impact is further fueled by the strong current of globalization entering Indonesia, so that local wisdom, which was expected to act as a filter, is now considered obsolete.

The ongoing moral decline has led Indonesian society to disregard the values and norms that have developed in Indonesia. Western culture, which violates moral values in Indonesia, is considered trendy and modern. The dangers of drugs and promiscuity have become epidemic

among Indonesia's youth, leading to unwanted pregnancies among Indonesian women.

The crime rate among women is also relatively high, and the high number of rape cases leaves numerous problems that require government attention and resolution. Rape victims often experience unwanted pregnancies, severe trauma, and discrimination within their social environment. The birth of a child is a disgrace to the family and can severely impact the mother's psychological well-being. Abortion is considered a solution when this occurs, leading victims to seek out midwives or traditional healers for abortions, ultimately resulting in unsafe abortions and maternal death.

Unwanted pregnancies ending in unsafe abortions are just one example of what happens in

Indonesia. The University of Indonesia's Health Research Center found that an average of two million unsafe abortions occur annually (Budi Utomo, 2002).

This issue has certainly received serious attention from various groups. Some want abortion legalized, while others insist that it remain a criminal offense. This is the current stance in our criminal code and aligns with the provisions of the International Code of Medical Ethics and the Physician's Oath, as outlined in the 1948 Geneva Declaration. Furthermore, it is complemented by the norms contained in the Pancasila Philosophy (Basyid, 1993).

In 2009, President Susilo Bambang Yudhoyono (SBY) passed a health law, which included three articles that provided exceptions to abortion: medical emergencies and pregnancy resulting from rape. Five years after the law was passed and enacted, technical regulations were created in the form of Government Regulation No. 61 of 2014 concerning Reproductive Health. It contains nine articles governing abortion. This has naturally drawn much criticism from various groups, due to concerns that the regulations will be abused and misused by the public.

On the other hand, Ibn 'Abdullah permitted abortion within a period of no more than one hundred and twenty days of pregnancy. This idea can be seen in his writings: Is it permissible to abort a pregnancy after pregnancy? Yes, it is permissible as long as it is not yet a living creature. It will not become a living creature until it reaches one hundred and twenty days. Rasulullah SAW was once visited by a gamidiyyah woman who admitted that she had committed adultery, and the apostle ordered the gamidiyyah woman who was about to be sentenced to stoning to wait until she gave birth to her child, then after that he ordered her until the child was no longer breastfeeding, after that she was sentenced to stoning (Gibtiah, 2014).

## II. RESEARCH METHODS

This study employs a normative legal research method using both a statutory approach and a conceptual approach. The research relies on secondary data obtained through library research, including legislation, legal literature, fiqh references, scholarly journals, and other legal documents related to abortion regulation in Indonesia. The data are analyzed qualitatively by examining and interpreting relevant legal provisions, particularly the Indonesian Criminal Code (KUHP), Law No. 36 of 2009 on Health, and Government Regulation No. 61 of 2014 on Reproductive Health, in order to understand the legal framework, exceptions, and legal protection concerning abortion practices in Indonesia.

## III. RESULTS AND DISCUSSION

### A. Understanding Abortion

In terms of language, abortion comes from the word abort, which means to abort a child, to fail (Willy, 1997), or abortion: miscarriage, which means to terminate a pregnancy. Abortus means miscarriage (John, 1990). Abortion also means to miscarry a pregnancy, to terminate a pregnancy, or to throw away a fetus (Dahlan, 1996).

Terminologically, abortion is defined as ending a pregnancy before the gestational age reaches 28 weeks. However, there is a tendency to lower the minimum limit to 22 weeks. Another definition mentions the expulsion of the fetus from the womb during the first twenty-eight weeks of pregnancy, namely ending a pregnancy before it is full term, namely under twenty to twenty-eight weeks, and is not yet heavy enough, namely under four hundred grams to one thousand grams (Homby, 1987). In the book *Majma' al-Lugah al-'Arabiyyah*, the meaning of the word *ijhad* is interpreted as the expulsion of the fetus before the fourth month (Mu'jam, 1960), and the meaning of the word *isqaf* is interpreted as aborting the fetus between the fourth and seventh months.

Meanwhile, the definition of abortion according to the terminology as stated by Muhammad Said Ramadan al-Buthi is Every act of separating a fetus from its mother before birth is complete according to custom, whether by the pregnant person's own efforts or by the efforts of another person, whether by hitting the pregnant person's stomach, by shocking them, giving them medicine, or by other means.

Another opinion was written by Wahbah al-Zuhaily in his bookal- Fiqh al-Islam wa Adillatuhu, that is Abortion is terminating a child that a woman is carrying, whether it is dead or incomplete.

From all the terms explained above, it seems that the use of the word *ijhad* refers to an abortion before the natural time, carried out by a pregnant woman, or carried out by another person with an intentional element with the intention of removing the fetus she is carrying.

## B. Types of Abortion

Medical science has advanced so rapidly that researchers working in the field have attempted to define and define each form of abortion, making it easier for the general public to recognize the various forms. Some terms have also been coined to euphemistically euphemize the term abortion, including termination of pregnancy, removal of the fertilized egg, embryo termination, and so on (Chisbiyah, 1997).

The following will present various abortion terms in the book *Contemporary Fiqh* written by Budi Juliandi, namely: (Juliandi, 2011)

### 1) Abortion/Miscarriage/Procured Abortion/Induced Abortion

Medically, abortion is the termination and removal of a pregnancy from the uterus before the fetus is viable outside the womb (viability). Some limit the age of a fetus that can survive outside the womb (viability) to twenty weeks, while others limit it to twenty-four weeks. A fetus that is seven months old is considered

immature, while a fetus that is seven to nine months old is considered premature, and a fetus that is nine months or older is considered mature. Therefore, the removal of a fetus that results in death up to twenty to twenty-four weeks is called an abortion. However, if the removal occurs after that age and results in the death of the fetus, it is called infanticide.

### 2) Miscarriage

Miscarriage is the termination of a pregnancy before the baby can live outside the womb without human intervention. Naturally, around 30-50% of fertilized egg cells (zygotes) will miscarry due to various natural causes. This miscarriage is also often called spontaneous abortion/*abortus spontanea*.

### 3) Abortion Therapeutic/Medicinalist

Therapeutic abortion is the termination of a pregnancy for medical reasons to save the mother's life or prevent her from experiencing irreversible, fatal damage to her health/body. This creates a conflict of rights between the two parties: the right to life of the fetus in the womb and the right to life of the mother. Therapeutic/medicinal abortion presents a difficult and dilemmatic situation, requiring a choice between the two. Therefore, before carrying out an abortion, it is necessary to carefully examine whether the mother's life can be saved only by abortion.

### 4) Abortion Criminalist

Criminal abortion is the termination of a pregnancy before the fetus can survive outside the womb for reasons other than therapeutic purposes, and is prohibited by law. Of course, what constitutes a criminal abortion varies from country to country. In some countries, abortions performed before three months are not prohibited, while in Indonesia, all forms of abortion, except for medical reasons and pregnancy related to rape, are criminal abortions.

### 5) Abortion Eugenic

Eugenic abortion is the termination of a pregnancy to prevent the birth of a baby with a disability or a genetic disease. Eugenicism is an ideology that aims to produce only superior offspring. If these eugenic criteria are applied to animals and plants, there are no ethical issues. However, if these criteria are applied to humans, it becomes a major problem, because this action means that people with disabilities, whether physically or mentally disabled, sick, elderly, or otherwise, have no right to live in this world and must be killed.

#### 6) Direct – Indirect Abortion

Direct abortion is a medical intervention that directly aims to kill the fetus in the mother's womb. Indirect abortion is a medical intervention that results in an abortion, even though the abortion itself was not intended or the goal of the procedure.

#### 7) Selective Abortion

Selective Abortion Termination of pregnancy is the termination of a pregnancy because the fetus does not meet the desired criteria. For example, some parents want a girl, but upon discovering the child is a boy, the pregnancy is terminated. Some abortions are eugenic, such as a fetus with a disability or a genetic disease.

#### 8) Embryo Reduction (Embryonic Reduction)

Many people who undergo artificial insemination (IVF) experience excess fertilization. During the process, women undergoing fertility treatment are stimulated with fertility hormones, resulting in the release of approximately six ova ready for fertilization at the same time. Although all

The ovum is fertilized, but usually not all of them are implanted into the uterus. Between three and six are implanted. This is intended to increase the chances of pregnancy. Even if an embryo dies during the process, others may still survive. However, in many cases, more than two embryos develop simultaneously. If this

occurs, doctors will usually recommend aborting some of the embryos and leaving only one or two, as too many embryos in the uterus can hinder their development. This type of abortion is called embryo reduction.

#### 9) Partial Birth Abortion

Partial Birth Abortion is a political/legal term which in medical terms known by the name intact dilation and extraction (D&X). This method is carried out by giving medication to pregnant women with the aim of cervix(cervix) opens prematurely.

Meanwhile, based on the type, abortions are divided into spontaneous abortions and induced abortions. Spontaneous abortions are abortions in which the miscarriage process occurs on its own without any external influence. This type of abortion occurs accidentally, caused by a weak uterus, a lack of endurance due to excessive activity, an incorrect diet, and poisoning (Sulistianingsih, 2007). In general, spontaneous abortions are difficult to determine precisely, because it is impossible to know for sure when the pregnancy began, whether sperm penetration into the ovum means pregnancy, whether cell division in the ovum has undergone fertilization, blastocysts, and so on. Therefore, the need for precision in the technique used in determining pregnancy is important. By using a test that can determine small amounts of the hormone HCG (human chorionic gonadotropin). The frequency of abortions is based on histological confirmation of the presence of trophoblast (advanced development between the ovum and sperm) (Jack, 1991). Spontaneous abortions can be divided into: (Juliandi, 2011).

1) Imminent Abortion, namely the event of bleeding from the uterus during pregnancy before 20 weeks, where the product of conception is still in the uterus, and without any cervical dilatation.

- 2) Incipient Abortion, namely the bleeding eventuterus in pregnancy before twenty weeks with the presence of cervical dilactation which is increasing, but the results of conception are still inuterus.
- 3) Incomplete abortion, namely the expulsion of part of the product of conception in pregnancy before twenty weeks with some remaining in the uterus
- 4) Complete abortion, that is, all the results of conception have been expelled.
- 5) Missed Abortion (delayed miscarriage), which is a condition where the fetus has died before the 22nd week, but is retained in the uterus for two months or more after the fetus dies.
- 6) Accidental Abortion, namely repeated and consecutive abortions that occur, at least three times in a row.

Abbas Syauman in his book explains the types of abortion according to doctors, namely;

- 1) Complete Definitive Abortion, which is the complete descent of the fetus from the mother's womb. This abortion is performed before twenty-eight weeks of pregnancy, even if the fetus is alive. This is not related to a crime against the fetus, instead he tries to maintain the life of the fetus with similar care.
- 2) Incomplete Abortion, which is the descent of part of the fetus, while the other part is still in the womb, and it is impossible to survive in the mother's womb because there is no life in it.
- 3) Rotten Abortion, which is the doctor removes the dead fetus from the mother's womb so that it is not dangerous.
- 4) Abortion of an Imperfect Fetus, where the doctor removes the membrane in the mother's uterus without a fetus inside, due to considerations of defects in the fetus or spermatozoa. This type is not actually considered an abortion because there is no

violation of the rules by the doctor at all, in fact what he did is related to Islamic treatment and is necessary for the health of the mother.

- 5) Warning Abortion, where some blood comes from the pregnant mother which warns of the miscarriage of the fetus but is not definitive, because sometimes the bleeding stops and the fetus remains alive.
- 6) Abortion Without a Legal Reason, where some doctors perform abortions not because of medical necessity, but to fulfill the wishes of the mother who does not like her pregnancy (Abbas Syauman, 2004).

### C. Abortion Law in Indonesian Legislation

In 2014, the Indonesian government, through the Ministry of Health, issued Government Regulation No. 61 of 2014 concerning Reproductive Health as a derivative/implementing regulation for Law No. 36 of 2009 concerning Health. What is interesting from a legal perspective are the articles that provide exceptions to abortion, which was previously an illegal act and was not given any space at all in Indonesian legislation.

This can be seen in the Criminal Code (KUHP) which contains 4 articles on the prohibition of abortion, including articles 346, 347, 348 and article 349 in Chapter XIX on Crimes against life (Hamzah, 2005). In these articles, the object of the crime is the womb, whether it is in the form of a creature, namely a human, with legs and hands and a head (voldragen vrucht) or it can also not be in the form of a human (onvoldragen vrucht) (Chazawi, 2001).

The legal subjects of the above articles can be divided into; 1). Those carried out by oneself (346), 2). Those carried out by others, which in this case are divided into two, namely; a). With their consent (347), and b). Without their consent (348). As for abortions and murders carried out by others, whether with their consent or not, and these other people are people who have certain

personal qualities, namely doctors, midwives and pharmacists (349). The threat of punishment also varies, from the lowest four years in prison to a maximum of fifteen years in prison.

#### ARTICLE 346

A woman who deliberately aborts or terminates her pregnancy or instructs another person to do so, is threatened with a maximum prison sentence of four years.

#### ARTICLE 347

- 1) Anyone who intentionally causes an abortion or terminates the pregnancy of a woman without her consent shall be punished by a maximum prison sentence of twelve years.
- 2) If the act results in the death of the woman, the perpetrator is subject to a maximum prison sentence of fifteen years.

#### ARTICLE 348

- 1) Anyone who intentionally causes a miscarriage or terminates the pregnancy of a woman without her consent shall be punished by a maximum prison sentence of fifteen years and six months.
- 2) If the act results in the death of the woman, the perpetrator is subject to a maximum prison sentence of seven years.

#### ARTICLE 349

If a doctor, midwife or pharmacist assists in committing a crime under Article 346, or commits or assists in committing one of the crimes described in Articles 347 and 348, then the penalty stipulated in that article may be increased by one third and the right to pursue the profession in which the crime was committed may be revoked.

In 2009, the Legislative Council, along with the Executive Branch, passed Law No. 36 of 2009 concerning Health. This law contains three articles that contradict the articles on abortion in the Criminal Code. These three articles provide exceptions for legal abortion based on indications of medical emergency and pregnancy resulting from rape. The articles in this law are as follows:

#### ARTICLE 75

- 1) Everyone is prohibited from having an abortion.
- 2) The prohibition as referred to in paragraph (1) may be excluded based on:
  - a) Indications of a medical emergency detected at an early stage of pregnancy, whether it threatens the life of the mother and/or fetus, suffers from a serious genetic disease and/or congenital defect, or one that cannot be repaired, making it difficult for the baby to survive outside the womb; or
  - b) Pregnancy resulting from rape can cause psychological trauma for rape victims.
- 3) The actions referred to in paragraph (2) may only be carried out after pre-action counseling and/or advice and ending with post-action counseling carried out by a competent and authorized counselor.
- 4) Further provisions regarding indications of medical emergencies and rape, as referred to in paragraph (2) and paragraph (3), are regulated by Government Regulation.

The Indonesian government strictly prohibits abortion, as it constitutes a crime against life and violates religious norms. Furthermore, the ever-evolving dynamics of society and the evolving health sciences require research to determine whether the life of a fetus, which threatens the mother's life, or the fetus itself. This article provides an exception for medical reasons that could threaten the mother's life.

What's even more interesting is that point (b) of paragraph 2 of Article 75 provides rape victims with the opportunity to terminate their pregnancy (abortion) if it causes psychological trauma. This will undoubtedly raise concerns among various groups regarding the interpretation of this point.

The above article can be used as a legal umbrella for carrying out abortions against the exceptions mentioned in paragraph (2), where

before this law was passed, the Indonesian state was still using Law No. 23 of 1992 concerning Health, which in Article 15 of the law only permits abortions in cases of medical indications, and does not tolerate abortions for pregnancies resulting from rape. This can be seen in the text of the article, namely:

Article 15 (Law No. 23 of 1992)

- 1) In an emergency, in an effort to save the life of the pregnant mother and/or her fetus, certain medical measures can be taken.
- 2) Certain medical actions as referred to in Paragraph (1) may only be carried out:
  - (a) Based on medical indications that require such action to be taken;
  - (b) By health workers who have the expertise and authority to do so and carried out in accordance with professional responsibilities and based on the considerations of a team of experts;
  - (c) With the consent of the pregnant woman concerned or her husband or family;
  - (d) At certain health facilities.
- 3) Further provisions regarding certain medical actions as referred to in Paragraph (1) and Paragraph (2) are stipulated by Government Regulation.

Even though the article above does not explicitly state abortion, the medical action referred to is terminating a pregnancy, and only permitted for medical emergencies, there is even a criminal threat for those who carry out medical procedures on pregnant women without following the provisions in Article 15 above. These criminal provisions can be seen in Article 80 paragraph (1), namely:

"Anyone who intentionally carries out certain medical actions on pregnant women which do not fulfill the provisions as referred to in Article 15 Paragraph (1) and Paragraph (2) shall be punished with a maximum prison sentence of 15 (fifteen) years and a maximum fine of IDR 500,000,000.00 (five hundred million rupiah)."

Meanwhile, abortion of pregnancy resulting from rape is still seen as a crime that can be prosecuted under Articles 346, 347, 348 and 349 of the Criminal Code.

In paragraph (3) of Article 75 above, the counseling process before an abortion is mandatory, in which all information related to abortion will be provided, both medically and regarding religious and cultural values. This process is guided by a counselor, which in the explanation of the law above, a counselor is defined as anyone who has a certificate as a counselor through education and training. And those who can become counselors are doctors, psychologists, community leaders, religious leaders and anyone who has the interest and skills for it. Furthermore, Article 76 reads as follows:

#### ARTICLE 76

Abortion as referred to in Article 75 may only be performed:

- 1) Before the pregnancy is 6 (six) weeks old, calculated from the first day of the last menstruation, except in the case of a medical emergency;
- 2) By health workers who have the skills and authority and have a certificate determined by the minister;
- 3) With the consent of the pregnant woman concerned;
- 4) With the husband's permission, except for rape victims; and
- 5) Qualified health service providers as determined by the minister.

In the contents of the article above, the implementation of the exception of abortion for pregnancies resulting from rape is limited to six weeks or forty-two days calculated from the first day of the last menstruation, while in the case of a medical emergency, no time limit is specified, as long as the fetus threatens the health and life of the mother, then abortion can be a solution provided that the consent of the pregnant woman

concerned and permission from her husband must be obtained.

Regarding the consent of the pregnant woman in question, consent can be defined as a shared desire with another person to terminate the fetus. The condition for consent is that there must be two parties who share the same desire (Chazawi, 2001). In this case, the initiative comes from the doctor who analyzes and concludes that the pregnancy could threaten the health and life of the mother, and the pregnant woman responds with the same desire as the doctor to terminate her pregnancy.

In article 77 of Law no. 36 of 2009 reads:

#### Article 77

The government is obliged to protect and prevent women from abortions as referred to in Article 75 paragraph (2) and paragraph (3) which are of poor quality, unsafe and irresponsible and which are contrary to religious norms and statutory provisions.

This is related to the high maternal mortality rate due to unsafe abortions, according to the University of Indonesia Health Research Center, which found that annually there are an average of around two million cases of unsafe abortions (Chazawi, 2001). Meanwhile, WHO estimates that 10-50% of unsafe abortion cases end in maternal death (Budi Utomo, 2002).

What is meant by poor quality, unsafe, and irresponsible abortion practices are abortions carried out by force and without the consent of the woman concerned, carried out by unprofessional health workers, without following applicable professional and service standards, discriminatory, or prioritizing material rewards over medical indications. Intentional abortions that violate various legal provisions (*abortus provocatus criminalis*) contained in the Criminal Code adhere to the principle of illegality without exception, which is considered very burdensome for paramedics in carrying out their duties (Atang 1983).

Therefore, to reduce maternal mortality due to unsafe abortions, the government must not fail to protect and prevent its citizens from substandard, unsafe, and irresponsible abortions. To prevent this regulation from becoming an illusion, strict sanctions must be established for those who violate this provision. Abortion services must be provided by involving qualified health experts and in facilities designated by the government.

As a follow-up to Law No. 36 of 2009, in 2014 the government issued a derivative of this law, Government Regulation No. 61 of 2014, which sparked controversy among the public. This Government Regulation outlines abortion regulations in nine articles, namely Articles 31-39. Article 31 states:

#### Article 31

- 1) Abortion can only be performed based on:
  - (a) Indication of a medical emergency; or
  - (b) Pregnancy due to rape.
- 2) The act of abortion due to rape as referred to in paragraph (1) letter b can only be carried out if the gestational age is no more than 40 (forty) days calculated from the first day of the last menstruation.

The articles regarding abortion in this Government Regulation are contained in Chapter IV Concerning Medical Emergency Indications and Rape as Exceptions to the Abortion Ban. To date, exceptions to abortion are limited to medical emergencies and pregnancy resulting from rape. Outside of these reasons, the act is considered a crime and a criminal offense punishable by Articles 346, 347, 348, and 349 of the Criminal Code, which carries a minimum sentence of four years and a maximum of fifteen years, with the revocation of certain rights for doctors, midwives, or pharmacists who perform the abortion.

There is a slight difference in the time limit tolerated for abortion for pregnancies resulting from rape. Law No. 36 of 2009 provides a maximum of 6 weeks (42 days) from the first day

of menstruation, while this Government Regulation only limits it to 40 days of pregnancy from the first day of menstruation. There is a 2-day difference between the laws that form the basis for this Government Regulation.

#### Article 32

- 1) Indications of medical emergencies as referred to in Article 31 paragraph (1) letter a include:
  - (a) Pregnancy that threatens the life and health of the mother; and/or
  - (b) Pregnancies that threaten the life and health of the fetus, including those suffering from serious genetic diseases and/or congenital defects, or those that cannot be repaired, making it difficult for the baby to survive outside the womb.
- 2) Handling of medical emergency indications as referred to in paragraph (1) is carried out in accordance with standards.

#### Article 33

- 1) Determination of the presence of indications of a medical emergency as referred to in Article 32 is carried out by the abortion eligibility team.
- 2) The team as referred to in paragraph (1) must consist of at least 2 (two) health workers chaired by a doctor who has the competence and authority.
- 3) In determining indications of a medical emergency, the team as referred to in paragraph (1) must carry out an examination in accordance with standards.
- 4) Based on the results of the examination as referred to in paragraph (3), the team as referred to in paragraph (1) will issue a certificate of eligibility for abortion.

#### Article 34

- 1) Pregnancy resulting from rape as referred to in Article 31 paragraph (1) letter b is a pregnancy resulting from sexual relations without the consent of the woman in

accordance with the provisions of statutory regulations.

- 2) Pregnancy resulting from rape as referred to in paragraph (1) is proven by:
  - (a) Gestational age according to the rape incident, as stated by a doctor's certificate; and
  - (b) Statements from investigators, psychologists and/or other experts regarding the alleged rape.

#### Article 35

- 1) Abortions based on indications of medical emergencies and pregnancies resulting from rape must be carried out safely, with quality and responsibly.
- 2) Safe, quality and responsible abortion practices as referred to in paragraph (1) include:
  - (a) Performed by a doctor according to standards;
  - (b) Carried out in health service facilities that meet the requirements stipulated by the minister;
  - (c) On request or consent of the pregnant woman concerned;
  - (d) With the husband's permission, except for rape victims;
  - (e) Non-discriminatory; and
  - (f) Does not prioritize material rewards.
- 3) In the case of a pregnant woman as referred to in paragraph (2) letter c who cannot give consent, consent for abortion can be given by the family concerned.
- 4) In the event that the husband cannot be contacted, permission as referred to in paragraph (2) letter d is given by the family concerned.

#### Article 36

- 1) Doctors who perform abortions based on indications of medical emergency and pregnancy resulting from rape as referred to in Article 35 paragraph (2) letter a must

receive training from an accredited training provider.

- 2) The doctor referred to in paragraph (1) is not a member of the abortion eligibility team or a doctor who provides a certificate of gestational age due to rape.
- 3) In the event that in a certain area the number of doctors is insufficient, the doctor referred to in paragraph (1) may come from a member of the abortion eligibility team.
- 4) Further provisions regarding training as referred to in paragraph (1) regulated by Ministerial Regulation.

#### Article 37

- 1) Abortion based on indications of medical emergency and pregnancy resulting from rape can only be carried out after counseling.
- 2) Counseling as referred to in paragraph (1) includes pre-action counseling and ends with post-action counseling carried out by the counselor.
- 3) Pre-action counseling as referred to in paragraph (2) is carried out with the aim of:
  - (a) Exploring the needs of women who wish to have an abortion;
  - (b) Convey and explain to women who wish to have an abortion that the abortion can or cannot be performed based on the results of clinical examinations and supporting examinations;
  - (c) Explain the stages of the abortion procedure that will be carried out and the possible side effects or complications;
  - (d) Helping women who want to have an abortion to make their own decision to have an abortion or to cancel the desire to have an abortion after receiving information about abortion; and
  - (e) Assess the patient's readiness to undergo abortion.
- 4) Post-action counseling as referred to in paragraph (2) is carried out with the aim of:

- (a) Observe and evaluate the patient's condition after abortion;
- (b) Help patients understand their physical condition or circumstances after undergoing an abortion;
- (c) Explain the need for a follow-up visit for further examination and counseling or referral if necessary; and
- (d) Explain the importance of using contraception to prevent pregnancy.

#### Article 38

- 1) In the event that a rape victim decides to cancel her desire to have an abortion after receiving information regarding abortion as referred to in Article 37 paragraph (3) letter d or does not fulfill the requirements for having an abortion as referred to in Article 31 paragraph (2), the rape victim can be provided with support from a counselor during the pregnancy.
- 2) Children born to mothers who are victims of rape as referred to in paragraph (1) can be cared for by the family.
- 3) In the case where the family as referred to in paragraph (2) refuses to care for a child born to a rape victim, the child becomes a foster child, the implementation of which is carried out in accordance with the provisions of statutory regulations.

#### Article 39

- 1) Every abortion must be reported to the head of the district/city health service with a copy to the head of the provincial health service.
- 2) The report as referred to in paragraph (1) is carried out by the head of the health service facility.

Essentially, the nine articles governing abortion in this government regulation explain concrete technical matters, which are technical interpretations of the abstract provisions in Law No. 36 of 2009 concerning Health. After research by several legal experts, there are no fundamental violations of the law in these articles, as they

stipulate that abortions must be carried out under strict conditions and under controlled, supervised, and controlled procedures, carried out by experts so as not to harm the woman undergoing the abortion (Kusmayanto, 2002).

Legally, although Law No. 36 of 2009 has been ratified and enforced for the Indonesian people, and technical regulations have been enacted in the form of Government Regulation No. 61 of 2014, the articles prohibiting abortion in the Criminal Code have not been revoked and remain in effect. The legal principle of *lex posteriori* applies to these articles in the Criminal Code derogate *lex priori*. This principle assumes that if a new regulation is enacted without revoking the old regulation that regulates the same material and both contradict each other, then the new regulation defeats or paralyzes the old regulation. Thus, Article 75 paragraph (2) of Law No. 36 of 2009 concerning Health which regulates medicinal abortion can still be applied in Indonesia even though the regulation actually contradicts the formulation of criminal abortion according to the Criminal Code (Suryono, 2001).

#### IV. CONCLUSION AND SUGGESTIONS

##### A. Conclusion

Based on the discussion, abortion is generally defined as the termination of a pregnancy before the fetus is able to survive outside the womb. From both medical and legal perspectives, abortion consists of various forms, including spontaneous abortion, therapeutic abortion, criminal abortion, eugenic abortion, selective abortion, and several other classifications. Each type has different causes, objectives, and legal implications.

In Indonesian law, abortion is fundamentally prohibited because it is considered a crime against human life, as regulated in Articles 346–349 of the Criminal Code (KUHP). However, legal developments have introduced limited exceptions through Law No. 36 of 2009 on Health and

Government Regulation No. 61 of 2014 on Reproductive Health. These regulations permit abortion only under specific circumstances, namely medical emergencies that threaten the life or health of the mother and/or fetus, and pregnancies resulting from rape that may cause psychological trauma to the victim. Even in these situations, abortion must be performed under strict legal requirements, including counseling, medical examinations, approval from competent authorities, and implementation by qualified healthcare professionals in authorized health facilities.

Therefore, Indonesia adopts a restrictive approach toward abortion by maintaining its general prohibition while allowing narrowly defined exceptions for humanitarian and medical reasons. This policy reflects an effort to balance the protection of fetal life, the rights and health of women, public safety, and legal certainty.

##### B. Suggestions

This study recommends that the government strengthen public awareness and legal education regarding abortion regulations in Indonesia, particularly concerning the exceptions permitted under Law No. 36 of 2009 and Government Regulation No. 61 of 2014. Greater coordination among healthcare professionals, law enforcement agencies, psychologists, and women's protection institutions is necessary to ensure that legally permitted abortions are carried out safely, responsibly, and in accordance with established legal procedures. Furthermore, efforts should be made to harmonize the provisions of the Criminal Code and health legislation to prevent inconsistencies in legal interpretation and enforcement. In addition, public education on reproductive health, the prevention of unwanted pregnancies, and the protection of victims of sexual violence should be continuously enhanced in order to reduce the incidence of unsafe and illegal abortions and to promote the protection of

women's health and rights within the framework of the law.

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