

# Legality Of Abortion Due To Incestual Rape From The Perspective Of Balinese Customary Law

Ni Putu Ega Parwati<sup>1</sup>, Putu Riski Ananda Kusuma<sup>2</sup>, Ni Komang Irma Adi Sukmaningsih<sup>3</sup>, Ni Luh Made Madhusodani<sup>4</sup>

{ [ni.putu.ega.parwati@undiksha.ac.id](mailto:ni.putu.ega.parwati@undiksha.ac.id)<sup>1</sup>, [pkusuma@undiksha.ac.id](mailto:pkusuma@undiksha.ac.id)<sup>2</sup>, [nikm.irma@undiksha.ac.id](mailto:nikm.irma@undiksha.ac.id)<sup>3</sup>, [madhusodani@undiksha.ac.id](mailto:madhusodani@undiksha.ac.id)<sup>4</sup> }

Universitas Pendidikan Ganesha, Indonesia<sup>1,2,3,4</sup>

**Abstract.** Incest is a phenomenon that indicates moral degradation. Especially if it is done by coercion and rape of underage family members and causes pregnancy. Victims who are not ready to carry a fetus tend to choose to abort their pregnancy. The normative legal research method is used to examine this problem by looking at the legality of abortion in Indonesia, which is indeed prohibited in the Criminal Code without any tolerance, but if examined from Article 60 of Law No. 17 of 2023 concerning Health, abortion is legal as long as it meets the criteria in paragraph (2). Rape victims, especially incest, should receive attention from various groups regarding psychological trauma, reproductive rights, and the possibility of the fetus experiencing genetic abnormalities. The results of the study explain that the legality of incest in Balinese customary law is strictly prohibited and is included in the customary moral offense, namely the Gamia Gemana Customary Delict. In addition, the legality of abortion carried out by victims of incestuous rape is also prohibited because it is seen as a form of murder (Himsa) and the person concerned is in a state of cuntaka (dirty) so that purification (cleansing) must be carried out.

**Keywords:** Incest, Abortion, Legality, Balinese Customary Law

## 1 Introduction

Rape is a major problem that causes deep trauma for the victim, especially if she has to bear a child as a result of the heinous act committed by the rapist. The effects of trauma become more frightening when rape is committed by family or close relatives who have blood relations. This is called incest rape. Incest (incestuous sexual relations), is someone who suffers from incestuous psychosexual behavior is a sexual relationship between family members or siblings, for example between a father and his daughter, a son and his biological mother or between a son and a biological daughter [1]

Incest behavior does not look at social strata in other words this behavior can be found in the upper class, middle class and lower class society. Lately, we often find in the media, whether it's television, Instagram, TikTok, Facebook and other social media, the phenomenon

of incestuous sexual relations carried out by biological fathers against their biological daughters, biological uncles with their biological nieces and biological grandfathers who do it to their own biological grandchildren, biological older siblings impregnate their own biological younger siblings. Usually the perpetrators commit their actions because they are motivated by pornography, alcohol, narcotics, and the atmosphere or conditions and opportunities that allow the act to occur [1].

In addition, other factors that support the act can also be caused by weak parental supervision, and children who are less open to their parents and consider it commonplace (lack of sexual education). Pornography as one of the factors causing incestuous behavior when viewed according to Black's Law Dictionary comes from 2 (two) syllables pornos and grafi (Latin). Pornos means immoral or indecent or obscene acts. While graphics are pictures or writings, which in a broad sense include objects such as statues, and tools to prevent and abort pregnancy [2]. From a psychological perspective, pornography can result in weak self-control functions, especially against physical and sexual aggressive instincts in this case triggering and provoking rape or deviant sexual relations as a result of the loss of self-control [1].

Most victims of incest rape are girls, where physically and psychologically they cannot be said to be adults and their souls are not yet mature. It becomes a complex problem if the incest rape then causes pregnancy in the victim of incest rape. Pregnancy is a gift and something that is awaited by most women around the world. Pregnancy is a process of embryo growth in a woman's body. Undergoing pregnancy is highly anticipated by most women. However, pregnancy can be a stumbling block for women to achieve their goals and dreams when the time is not right. Of course, this also happens to women who experience pregnancy due to incest rape. Victims of incest rape often tend to choose abortion to eliminate the fetus they are carrying. There are many reasons for abortion (*abortus provakatus*), such as to cover up family shame and bad stigma, or to prevent children born from incestuous relationships from being disabled because genetic defects in children from incest rape are more likely to occur than ordinary rape.

Abortion is an alternative chosen by victims of incestuous rape to save the good name of the family or the future of the victim, and the choice of abortion can come from the victim herself, on the basis of coercion from the perpetrator of incestuous rape or the parents (mother) of the victim of incestuous rape. Abortion is an act carried out to terminate a pregnancy before the gestational age of pregnancy before the gestational age of twenty weeks, from a fetus of less than five hundred grams and a fetus length of less than twenty-five cm. Judging from its impact, abortion not only causes death to the fetus, but has the potential to cause death of the prospective mother. The existence of the fetus is not taken into account so that the choice of abortion is considered reasonable, even according to Fukuyama (2002) abortion as well as the use of contraceptives are also related to sexual resolution experienced by humans. This creates a dilemma because pills and abortion on the one hand can solve the problem of unwanted pregnancy, but on the other hand allow women to have sex without fear of the consequences. Likewise, men feel free from norms that require them to protect the women they impregnate.

The legal basis for regulating abortion in legislation is regulated in Articles 299, 346, 347, 348, and 349 of the Criminal Code. These five articles serve as references that abortion is considered invalid and prohibited in Indonesia. Abortion is not justified for any reason, including emergency circumstances (forced) due to incestuous rape, either for the perpetrator or the person who helped carry out the abortion. Therefore, the choice of abortion for victims of incestuous rape who have a blood relationship cannot escape the clutches of the Criminal Code. The Criminal Code is seen as not siding with women who experience incestuous sexual violence.

Abortion on the grounds of rape, especially incestuous rape, is still a matter of debate among many groups. The Criminal Code (KUHP) as the basis for criminal law in Indonesia completely prohibits abortion, the previous health law exempts abortion for rape victims. *Ius Constitutum* concerning changes to the health law has tightened the practice of organizing abortions in Indonesia by regulating Article 60 of Law No. 17 of 2023 concerning Health, abortion is legalized as long as it meets the criteria permitted according to the provisions of the criminal code as regulated in paragraph (1). Meanwhile, Article 60 paragraph (2) of the Health Law emphasizes that the implementation of abortion with the criteria permitted as referred to in paragraph (1) can only be carried out:

- a. By Medical Personnel and assisted by Health Personnel who have the competence and authority;
- b. At health service facilities that meet the requirements determined by the minister; and
- c. With the consent of the pregnant woman concerned and with the consent of the husband, except for rape victims.

Based on the provisions of the article, it can be concluded that abortions performed by rape victims are permitted as long as they are carried out by medical personnel assisted by health workers who are competent in their fields and are carried out at health service facilities that meet the requirements determined by the Minister of Health. In addition, if examined from Law Number 39 of 1999 concerning Human Rights, it regulates women's rights, one of which is the guarantee of women's reproductive rights as explained in Article 49 paragraph (3) which reads, special rights inherent in women due to their reproductive function, are guaranteed and protected by law. Reproductive rights are human rights and are guaranteed by law. Based on Article 75 paragraph (2) letter b of the Health Law, unwanted pregnancy due to rape clearly violates the reproductive rights of rape victims. In order to provide guarantees and legal protection for the reproductive rights of rape victims as a form of human rights, there is legalization of abortion for women who become pregnant due to rape.

## **2 Method**

The research method used in this article is legal research (doctrinal research). According to Peter Mahmud Marzuki, legal research is basically a know-how activity, not know-about, which is essentially carried out to solve the legal issues faced [3]. Normative legal research is conceptualized as what is written in laws and regulations (law in books) as a guideline for human behavior. Normative legal research functions to provide legal arguments when there is a normative vacuum, normative ambiguity, and normative conflict. This study

will examine the legality of abortion from the perspective of Balinese customary law. This is based on seeing that in the Health Law Article 60 paragraph (2) abortion is permitted, but in the Criminal Code abortion is prohibited without exception. Based on this national law, the existence of abortion becomes illegal in general and legal based on special laws, so in this case it is very interesting to study from the perspective of customary law, especially Balinese customary law as a law that lives in the midst of Balinese customary society and is inspired by the Hindu religion. The approach technique uses laws and case studies. The sources of legal materials used come from primary legal materials and secondary legal materials, namely the 1945 Constitution, the Criminal Code, Law Number 17 of 2023 concerning Health, Law Number 35 of 2014 concerning Child Protection, Government Regulation Number 61 of 2014 concerning Reproductive Health and legal literature related to this research. The data analysis technique is qualitative in the form of narratives or normative legal opinions and the final phase provides prescriptions regarding essential matters of legal research.

### **3. Results and Discussion**

#### **3.1 The Existence of Incest Relationships in Balinese Customary Law**

Incest comes from the English word originally from the Latin word *incestus*, which has a general meaning of impure, impure. Before the Latin term in the 16th century, incest was known in Anglo Saxon as *sib-leger* (from the word "kinship" *sibb* + *leger* "lie") but over time, both words tended to use terms such as *incester* or *incestual*. Furthermore, in the Great Dictionary of the Indonesian Language, incest is a sexual relationship between people who are close relatives which is considered to violate customs, laws and religion. In general, there are three categories of incest, namely:

- a. Parental incest, namely, sexual relations between parents and children;
- b. Sibling incest, namely, sexual relations between siblings;
- c. Family incest, namely, sexual relations between relatives who are still related by blood who have power over the child, either in a straight line down or up or related by blood in a lateral line, such as uncles, aunts, grandfathers, grandmothers, nephews, cousins, grandparents' siblings and this is based on the existence of a blood family bond.

Of the three categories mentioned above, parental incest is the most severe category in the incest criteria because such an illicit relationship is a truly pure incest from a blood relationship which is the core of the family, and usually such depraved acts have the potential to occur repeatedly.

Incest, seen from its types based on its causes, can occur because [4]:

- a. Incest that occurs accidentally, for example, teenage brothers and sisters who sleep in the same room, can be tempted to experiment sexually until incest occurs;
- b. Incest due to severe psychopathology. This type usually occurs between an alcoholic or psychopathic father and his daughter. The cause is the slackening of self-control due to the father's alcohol or psychopathy;
- c. Incest due to pedophilia, for example, a man who is thirsty to have sex with underage girls, including his own daughter;

- d. Incest due to a bad example from the father. A man becomes happy to commit incest because he imitates his father doing the same thing with his older or younger sister;
- e. Incest due to family pathology and disharmonious marital relationships. A husband (father) who is under pressure due to his wife's hostile and dominating attitude can be cornered into committing incest with his daughter.

According to customary law, any act that is contrary to customary law regulations is an illegal act, so customary law recognizes efforts to improve the law (*Rechtsherstel*) if the law is violated. Acts that are contrary to customary law are often referred to as "customary crimes" or "customary crimes". Customary crimes are all acts or incidents that are contrary to harmony, order, security, a sense of justice, and the awareness of the community concerned, whether as a result of acts committed by an individual, a group of people or acts committed by the customary administrators themselves. Such acts are seen as being able to cause shocks because they disrupt the balance of the cosmos and cause reactions from the community in the form of customary sanctions. In customary crimes, there are basically four important elements, namely there are acts committed by individuals, groups or customary administrators themselves, the act is contrary to customary law norms, the act is seen as being able to cause shocks because it disrupts the balance in society, and for these acts there is a reaction from the community in the form of sanctions/customary obligations.

In Bali, there are still four types of customary crimes/custom violations/customary offenses, namely customary crimes concerning morality, customary crimes concerning property, crimes related to personal interests and customary violations due to negligence or failure to carry out obligations to the customary village. Likewise regarding customary sanctions, in the Balinese Customary Society related to customary sanctions will be imposed on a person or group of people who violate the provisions in the Balinese Customary Society. This sanction is known as *Tri Danda* which includes, *Artha danda* which means the imposition of a witness in the form of a fine of money or goods. The second soul is the imposition of customary sanctions in the form of giving physical or psychological suffering such as ostracization or expulsion from the customary village area for customary violators. Finally, *sangaskara danda* is a customary sanction that aims to restore magical balance by carrying out punishment in the form of carrying out religious ceremonies. Rape is considered as one of the disgusting forms of crime and the perpetrator is seen as having low morals. Moreover, if the rape is committed against a family member who has blood relations, automatically the perpetrator's common sense will be questioned and considered abnormal. It is a serious concern that must be carried out by law enforcement and the community, because the behavior of rape is increasing without being limited by age, educational background, and family relationships.

Concretely, to resolve the case, it is carried out by customary courts. The institution that carries out the function of customary courts in the customary village is *Prajuru*, which is carried out through a deliberation forum (*Paruman Prajuru*) attended by the customary village institution, namely *Paduluan* (for Baliage villages/old villages) and/or village government officials (*Hamlet Head/Village Head*) who are in the territory or are in the customary village area concerned. *Paruman Prajuru* is a judicial function whose cool term is used in the local

area known as Kertha Desa which means court, village judge. Through Kertha Desa, it is hoped that every decision taken is in line with deliberation and consensus in the sense that things that have been decided/knocked with a fair decision and have a positive impact on the customary village.

Incest in Balinese customary law is included in the Customary Moral offense and is known as the Gamia Gemana customary offense. Gamia Gemana is defined as sexual relations between people who are closely related either in a straight line or a sideways line. In Bali, violations of customary offenses are considered and believed to give rise to cosmic imbalance, therefore customary reactions are needed to restore the disturbed state [5]. Incest from the perspective of customary law is the most serious offense and the punishment is very serious, the lightest punishment is to be exiled or expelled from the village, usually a light punishment is only given if the incestuous act is not known to the customary leader. Incest in the normative system that lives in Indonesian society, considers incest to be a despicable act and is strictly prohibited.

According to Teer Haar, customary crime is a disturbance of material and immaterial balance that causes a customary reaction [6]. This customary reaction can be said to be an effort to restore the disturbed peace so as to prevent the negative impacts resulting from a customary crime. According to Nyoman Serikat Putra Jaya, a limitation has been given that the act has previously caused a shock in the balance of community life. The occurrence of this shock does not merely violate legal norms but also when moral norms, religious norms and norms of decency in society are violated [7]. Thus, the impact of incestuous sexual relations, in this case rape committed by a family member against another family member in the Balinese customary community is known as the customary crime of Gamia Gemana and against the violation of this crime, the customary community demands that a customary reaction be carried out on the perpetrators and victims. The customary reaction is used to restore the cosmic shock that was disturbed due to the violation of the customary crime of gamia gemana.

### **3.2 Legality of Abortion for Incest Rape Victims in Balinese Customary Law**

Abortion in Indonesian law is regulated in several laws and regulations, both *lex generalis* and *lex specialis*. In *lex generalis*, abortion is regulated in the Criminal Code in Article 299, Article 346, Article 347, and Article 449. While in *lex specialis* it is regulated in the Health Law, namely Law Number 36 of 2009 in Article 75, Article 76, and Article 77. Finally, it is also regulated in Article 31, Article 32, Article 33, and Article 34 of Government Regulation Number 61 of 2014 concerning Reproductive Health.

Judging from its regulation in the Criminal Code, abortion is contained in Book II concerning crimes against life. The Criminal Code prohibits without exception the act of taking human life in which in this case is still in the form of *ajin*. The same thing is also found in Article 53 of the Human Rights Law which views abortion as a form of eliminating a person's opportunity to live, even though it is a natural right as a human being. However, the Health Law, specifically Article 60, states that abortion is permitted as long as it is in accordance with the provisions of that article.

In this case, there is still much debate about whether abortion is legal or not in the eyes of the law and society. Abortion is also often carried out by women who are victims of rape. The reason for these rape victims is that having a child from rape adds to their mental suffering, because the child will remind them of the rape they experienced. Those who are pro-abortion believe that women have full rights over their bodies. Women have the right to decide whether to continue their pregnancy or terminate it. For those who are against abortion, the discourse on this right is associated with the fetus which is a living creature that has the basic right to life. For those who are against it, abortion is the cruel murder of the fetus. The provisions of Article 60 of the Health Law are a form of legal protection for women who are victims of rape who carry out abortions, namely by excluding abortions against women who are victims of rape considering the psychological condition of the victim who experienced rape.

The social symptoms of rape are one of the challenges that must be considered seriously by the government and law enforcement. Inhumane acts from the past to the present still exist but are still hidden, rape is not just sexual violence, but is always a form of behavior that is influenced by a certain power system. The public's view of rape is a reflection of the values of society, customs, religion and even large institutions such as the state. The most detrimental impact on rape victims is the occurrence of unwanted pregnancies. The pregnancy experienced by the victim is very contrary to reproductive rights. The pregnancy will have a negative impact, namely experiencing physical, mental and social suffering. The victim experiences psychological trauma and feels worthless in the eyes of society. This can encourage the victim to have an illegal induced abortion that can endanger the victim's life, namely through non-medical methods carried out by incompetent non-medical personnel and at a gestational age that does not meet medical requirements. In cases like this, in addition to the trauma of the rape itself, the rape victim also experiences trauma from the unwanted pregnancy. This is what causes the victim to reject the existence of the fetus growing in her womb. The fetus is considered a dead object that deserves to be thrown away and is not considered a potential human being who has the rights to life.

Balinese Customary Law inspired by Hinduism, views abortion as an act called Himsa karma, which is a sin that is equated with killing, hurting, and torturing. Killing in a deeper sense as taking a life, underlies the philosophy of atma or spirit that already exists and is attached to the fetus even though it is still in the form of an imperfect lump like the human body. The philosophy regarding the origin of atma is contained in Sloka 4 Gunatraya Vibhaga Yoga Bhagavad Gita which states:

*“Sarva-yonisu kaunteya, murtayah sambhavanti yah tasam brahma mahad yonir,  
aham bija-pradah pita”.*

Meaning:

O Arjuna, no matter how many types of life are born in all wombs, all of them originate from the mother material world, and I am the father who gives the seed [8].

The Bhagavadgita does not explain in detail about abortion, but it explains the teachings about not killing or harming living creatures in this world as stated in Sloka 2 of

Daiva-Asura-Sampad Vibhaga Yoga as follows:

*“Ahimsa satyam akrodhas tyagah cantir apaicunam daya bhutesv aloluptvam mardavam hrir acapalam”*

Meaning:

Not hurting other creatures, holding on to the truth, not being angry, without attachment, calm, not slandering, compassionate towards fellow creatures, not confused by desires, gentle, polite and determined [9].

Based on the Sloka, it is explained not to hurt other creatures, let alone kill, especially by performing abortions because it is very contrary to the teachings of dharma. Humans as noble creatures should be gentle and loving towards all of God's creations. In addition, in Sloka 9 Sankhya Yoga Bhagavd Gita, the following is explained:

*“ya enam vetti hantaram yas cainam manyate hatam ubhau tau na vijanito nayam hanti na hanyate”*

meaning:

People who think that living beings kill or living beings are killed do not have knowledge, because the self does not kill and cannot be killed [9].

In addition, abortion is also known in the Manawadharmasastra Book. The Manawadharmasastra holy book is known as a Hindu law book that contains the main teachings of the Hindu religion and contains the basics of Hindu law which were later developed into a source of Dharma teachings for the Hindu community. Likewise, regarding the rules of law in social interactions in society, it is also contained in the Manawadharmasastra book along with the consequences that arise.

The Manawadharmasastra book views abortion as an act that can cause fatigue or cuntaka to the baby's family, especially to the mother who has aborted her pregnancy. This is explained in Article 66 of the Pancamo'dhyayah Veda Smrti which states:

*Rātribhirmāsatulyābhir garbhasrawe wicuddhyati,  
Rajasyuparate sādhwī snānena strī rajaswala.*

meaning:

A woman who miscarries becomes impure for as many days as the baby was in the womb after conception and a menstruating woman becomes pure again by bathing after her menstrual blood flow stops [9].

From the description of the verse, it is explained that the mother or woman who experiences a miscarriage must undergo purification in order to be free from cuntaka, likewise for aborted babies, they must undergo purification so that it is hoped that later the atma or spirit of the fetus can experience the reincarnation process. Abortion carried out by a prospective mother is an act of murder that causes the death of the baby, so it is not appropriate for the woman to get a good place in the world or in the afterlife.

The verses relating to the position of children and as one of the basic rules for child protection according to Hindu law include Article 26 of the Dwityo'dhyayah Veda Smrti which states:

*“waisikah karmabhih punyair nisekadirdwijanmanam,  
karyah carira samskarah pawanah pretya ceha ca”*



meaning:

In accordance with the provisions of the sacred ceremonies, they should be carried out at the time of fertilization in the mother's womb [9].

The verse states that a child receives a guarantee in the form of a purification ceremony since in the womb, even since fertilization in the mother's womb. The child has received attention and protection and parents and other parties are obliged to protect its existence.

Slokantara is a type of Hindu literature that teaches about religious teachings, especially ethics. This holy book contains many demands for religious ethics which, if truly lived out, can provide calm and guidance in living life. All actions that cause happiness or misery can be studied in this book. The value of purity in behavior and prohibitions which if violated will result in sin. Just as acts of premarital sex and abortion are also included in this literature, one of which is mentioned in slokantara 14.

#### 4 Conclusion

Incest in Balinese customary law is included in the Customary Morality offense and is known as the customary offense of *Gamia Gemana*. *Gamia Gemana* is defined as sexual relations between people who are closely related either in a straight line or a sideways line. In Bali, violations of customary offenses are considered and believed to give rise to cosmic imbalance, therefore customary reactions are needed to restore the disturbed state. This customary reaction can be said to be an effort to restore the disturbed peace so as to prevent negative impacts resulting from a customary offense.

Meanwhile, abortion in Balinese customary law inspired by Hinduism is seen as an act called *Himsa Karma*, which is one of the sinful acts that is equated with killing, hurting, and torturing, contained in Sloka 4 *Gunatraya Vibhaga Yoga Bhagavad Gita*. According to the *Manawadharmasastra V.66* book, a person who aborts a pregnancy becomes impure (*cuntaka*) so that it must be purified. Purification is carried out to be free from *cuntaka*, as well as an aborted baby who must receive purification so that it is hoped that later the *atma* or spirit in the fetus can undergo the reincarnation process. It is also explained in the *Manawadharmasastra V.90* book that abortion carried out by a prospective mother is an act of murder that causes the death of the baby, so it is not appropriate for the woman to get a good place in the world or in the afterlife.

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