

Abortion Discourse in the Perspective of Islamic Jurisprudence Scholars

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Abstract. Islam upholds related to maintaining the soul or self, this is following the purpose of Islamic law namely *hifdzu an-Nafs* or self-care. Regarding abortion, some scholars allow and others prohibit abortion. The discourse is abortion aborts the child before the perfect creation or before the perfect period of pregnancy. The study aims to analyze how abortion discourse is in the view of *fiqh* scholars. This study uses qualitative research with a normative approach. Research data sources use *fiqh* books, journal articles, and books. The data is collected by documentation techniques. Furthermore, the data is analyzed using integrative descriptive analysis. The results concluded that all scholars agreed that abortions performed at the gestational age of more than four months were haram. While abortions are performed when the gestational age is more than forty days and less than forty days the scholars differ as will be shown in this article.

Keywords: Abortion, Discourse, Islamic Law, Jurisprudence, Gestational

1 Introduction

Abortion is a social reality that is symptomatic in society. The rise of the practice of abortion in society has resulted in a tendency to shift values where this phenomenon is considered normal. The act of abortion is not merely a medical or public health problem, but rather a social problem related to the notion of freedom (freedom/liberalism) embraced by society. This foreign understanding has undoubtedly become the entrance for rampant abortion cases in any society. Apart from this problem, the abortion law itself must be well understood by Muslims, both the medical community and society in general. Because for a Muslim, Islamic Shari'a laws are the standard for all his actions. In addition, attachment to Islamic Shari'a laws is the obligation of a Muslim as a consequence of his faith in Islam. Allah SWT says: "So by your Lord, they did not actually believe until they took you (Muhammad) as a sever in the case that they disputed between them" (Surah An Nisaa: `65) "And it is not proper for a male believer and a female believer, if Allah and His Messenger had decreed, there would be a choice for them (other) regarding their affairs." (Surat al-Ahzab: 36).

The presence of children in the family for some people is very coveted, by making various efforts to obtain children. But some other women there are also those who do not want children, this can be caused by many factors such as economic factors, health, career, and pregnancy due to rape victims. Often this condition encourages a person to have an abortion, which is very risky to the fetus as well as himself. Having an abortion is used as an alternative to getting out

of the problem faced, so often people ignore the risks that will be faced to lead to death. This action has legal implications for the perpetrator as well as the person who assisted in performing the abortion. In Islam, the act of abortion is a concern, until there are various controversies of clerical opinion about abortion, especially in terms of abortions performed before the fetus is blown by the spirit and after being blown by the spirit.

2 Methodology

In this study, the authors used qualitative research then used a normative approach. The data sources used in this study are secondary data sources, namely jurisprudence books, journal articles, and books. The data collection in this study uses documentation techniques. Next, the data is then analyzed using integrative descriptive analysis.

3 Result and Discussion

3.1 Definition of Abortion

In the language of abortion is an abortion (fetus). It comes from the word (-) which means to eliminate. So (الحامل أجهضت) means throwing away the child before it is perfect and is called aborting the fetus [1]. Or, in the language, it can also be said, the birth of a fetus because it was forced or because it was born by itself. However, by linguists, the word al-ijhadh is more often interpreted as "abortion of a fetus that occurs before entering the fourth month of gestation". While the word used to mean a miscarriage that occurs at the age of the womb between four to seven months after the body is fully formed and has been blown by the spirit so that it cannot continue its life is al-isqath [2].

According to the terms of the syar'i scholars, they term abortion as linguists term it, only the Syafi'iyah, Jumhur, and Hanafiyah circles include abortion in the jinayat (criminal) chapter. As for the terminology, al-ijhadh means ending a pregnancy before its time, either it happens by itself (miscarriage) or is done intentionally [3]. Medieval fiqh scholars such as al-Ghazali, ash-Syarbini, al-Khatib, and ar-Ramli of the Shafi'iyah scholars [4] use the term al-ijhadh to mean abortion. The use of the term is different from the Hanafi, Malikiyyah and Hanabilah scholars who use the word *al-isqat*.

So actually between ijhad and isqat is one meaning, it's just that the word ijhad is mostly used for camels and isqat is mostly used for humans. Therefore, it can be concluded that ijhad and isqat according to linguists are aborting a child before the creation is complete or before the gestation period is complete. Either before the spirit is breathed in or after the spirit is breathed in, whether the fetus is male or female [5]. Likewise, according to jurists, such as Al-Ghazali, according to him, abortion is the destruction of the life in the fetus or destroying something that has been conceived (maujud al-hasil), furthermore, it is said that the death of life in the womb is an act of *jinayah* because the phase of fetal life has begun since its emission. sperm in the vagina so that conception occurs [6].

Fuqaha (Islamic law experts), except for Shafi'iyah, defines abortion as isqath al-haml which means the abortion of a fetus conceived by certain actions before the completion of the gestation period. That is before the fetus can live outside the womb, but some of its limbs have been formed. While medical experts define abortion as the termination of pregnancy before the

gestation period, which is 28 weeks or before the fetus reaches 1000 grams [7]. Classical fiqh scholars argue that the shortest gestation period is 6 months. Therefore, a woman who gives birth at the age of six months cannot be used as *ijhadh* or *isqath*, because she is considered to have given birth normally. As for *al-ijhadh* what is meant by *syar'i* is ending the pregnancy period before a normal delivery process, i.e. before the sixth month of the fertilization process.

From some of the definitions above, it can be said that abortion is an act to end the pregnancy period by removing the fetus from the womb before the natural birth period arrives [8]. From several definitions of abortion above. An action can be called an abortion if it fulfills the following elements: intentional abortion, certain actions, the occurrence of an incomplete pregnancy, and some of the body's limbs have been formed. From these definitions, there is a meeting point between the para version of abortion and the *fuqaha* and abortion medical expert version of abortion, namely the existence of certain efforts to expel the fetus or terminate the pregnancy and is carried out when the fetus cannot live outside the womb even though it is already formed [9].

3.2 Types of Abortion

According to the fiqh perspective, abortion is classified into five types, including:[10]

- a. Spontaneous Abortion (*al-isqath al-dzâty*).
The fetus aborts naturally without any external influence or falls by itself. Usually caused by chromosomal abnormalities. Only a small proportion is caused by infection, uterine abnormalities, or hormonal disorders. Chromosomal abnormalities do not allow the *mudghah* to grow normally. Even if it doesn't fall, it will grow up with congenital defects.
- b. Abortion due to emergency or medication (*al-isqath al-dharry/al-'ilâjîy*).
This type of abortion is carried out because there are physical indications that threaten the mother's life if the pregnancy is continued. In this case, the risk that is considered lighter is sacrificing the fetus, so according to religion this type of abortion is allowed. The principles of jurisprudence that support are: The lighter of the two dangers can be done to avoid the more dangerous risk [11].
- c. Abortion by mistake or accident.
In this case, the abortion was done accidentally. For example, a hunter who wants to shoot his prey but misses on a pregnant mother when she is walking in the rice fields, causing the mother to miscarry. The hunter's actions were classified as unintentional. According to fiqh, parties involved in such abortions must be held accountable for their actions. And if the fetus comes out dead, he is obliged to pay a fine for the death of the fetus or compensation for the family of the fetus [10].
- d. Intentional abortion (*shibh 'amd*).
Abortions are carried out on purpose. For example, a husband attacks his pregnant wife, causing a miscarriage. The attack was not intended for the fetus but against the mother, but later because of the attack, the fetus in the mother's womb died because the mother had a miscarriage. In this case, according to fiqh, the assailant must be punished, and the punishment will be even more severe if the fetus that comes out of the mother's stomach shows signs of life. According to fiqh, the attacker is subject to *diyat kamilah* if the mother dies, which is equivalent to 50 camels plus 5 camels (*ghurrah kamilah*) for the death of the baby.
- e. Intentional and premeditated abortion (*al-amd*).
This abortion is carried out intentionally by a woman who is pregnant, either by taking drugs that can abort her pregnancy or by asking for help from other people (such as doctors,

shamans, and so on) to abort her pregnancy. This type of abortion is considered sinful and the perpetrator is subject to punishment because it is considered a crime, namely intentionally eliminating the life of a human child. The sanction according to fiqh is commensurate with life for life (*qishash*).

3.3 Abortion According To Islamic Law: Permissibility and Prohibition of Abortion According to *Fiqh* Scholars

The Imams of the madhhab, except for the Shafi'i and the Shi'a Ja'fariyah, view the word *isqath* as the same as *ijhadh*. Thus, what is meant by *isqath* is a woman who aborts her fetus before the gestation period is complete, whether the fetus is dead or alive but later dies, some of the baby's physique is clear, and the process is carried out using drugs or other means [12]. In this matter the scholars are divided into three parts, some allow abortion, some prohibit abortion, and some allow with some provisions. Some of these opinions are explained as follows:

a. Opinion of Scholars Who Allow

The scholars of the Shafi'i madhhab have different opinions regarding aborting the fetus before the spirit is blown (not yet 120 days old), which we can classify into the following opinions:[13] The first opinion: what this school holds most is that it is permissible to abort the womb as long as the fetus has not been breathed into it. The second opinion: Ar Ramli came to a conclusion that eventually became the founder of this school, which was to prohibit the abortion of the fetus before the blowing of the spirit until the time was approaching the time of the blowing of the spirit and forbid it after entering the time which was approaching the blowing of the spirit.

Because of the difficulty of knowing the exact time of the inhalation of the spirit, it is forbidden to abort it before the time of the inhalation of the spirit is approached just in case, such as during the inhalation of the spirit or after the third opinion: Imam Al Ghazali forbids the abortion of the fetus at all stages of the development of pregnancy and he frankly states that fetus with all stages of development of its age before the blowing of the spirit is unlawful.

Various kinds of opinions have been expressed by the scholars of the madhhab of fiqh, especially the Syafi'iyah regarding the law of having an abortion on a fetus that does not have a soul. Some of them forbid it since the process of fertilization of the egg by the sperm cell. This opinion is considered the strongest by Imam al-Ghazali of the Shafi'iyah scholars, and Ibn Rajab. Others argue that having an abortion before the fetus has a soul is permissible. They include the majority of the Hanafiyya scholars, some of the Shafi'iyya scholars.

The debate on whether or not to abort the womb as described above agrees that abortions performed after *ba'da feed al-ruh* is a prohibited act. According to contemporary ulema' Mahmud Shaltut, the debate on abortion law among fiqh experts has ended in the conclusion that abortion after the fetus is four months old is *haram* and is a form of crime for which there is a criminal sanction. Contemporary scholars see the problem of abortion from two different points of view, namely before the spirit is breathed into the fetus and after it is breathed. The first group: Having an abortion before the spirit is breathed in. This group was led by Ali Tantawi, one of the Saudi Arabian clerics, Muhammad Salamah Madzkur, Mustafa az-Zarqa, and Muhammad Said Ramdhan al-Buthi. The reason is that Allah SWT. commanded us all to glorify humans as Allah SWT. has glorified His creatures.

This is according to one of His words:

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِمَّنْ خَلَقْنَا تَفْضِيلًا

Translate:

"And verily We have honored the children of Adam, We carried them on land and in the sea, We gave them sustenance from the good things and We gave them a perfect advantage over most of the creatures We have created." (Surah Al -Isra: 70).

In this case have the following arguments: One of the many purposes of marriage is to produce offspring that can preserve human beings. Therefore, the act of abortion is very contrary to the purpose of the marriage. Even though the spirit has not been blown, in essence, the fetus is ready to receive the spirit and is ready to become a human. The fetus is the initial process of human formation, so it is not allowed to hinder its growth. Islam commands us to maintain the lineage because it is one of the maqashid ash-shari'ah that must be maintained.

Dr. Abdurrahman Al Baghdadi, in his book *Emancipation, Is There In Islam*. Mention that abortion can be performed before or after the soul is breathed. If it is done after the breath of the soul, that is, after 4 months of pregnancy, then all the scholars of jurisprudence (fuqaha) agree on the prohibition. But the scholars of fiqh have different opinions if the abortion is carried out before the soul is breathed. Some allow it and some forbid it [14]. Those who allow abortion before the blowing of the soul, among others, Muhammad Ramli (d. 1596 AD) in his book *An Nihayah* because there are no living creatures. Some view it as makruh, because the fetus is growing [15].

b. Opinion of Scholars Who Forbid

Those who forbid abortion before the blowing of the soul include Ibn Hajar (d. 1567 AD) in his book *At Tuhfah* and Al Ghazali in his book *Ihya` Ulumiddin*. Even Mahmud Shaltut, former Chancellor of Al Azhar University, Egypt, argues that since the meeting of a sperm cell with an ovum (egg cell), abortion is haram because there is already living in the womb that is undergoing growth and preparation to become a new, animate creature called a human. respected and protected existence. It will be even more evil and sinful if the abortion is carried out after the fetus is alive, and it will be even more sinful if a newborn baby is discarded or killed. The opinion agreed upon by the fuqoha, namely that it is unlawful to have an abortion after the breath of the soul (four months), is based on the fact that the inhalation of the spirit occurs after 4 (four) months of pregnancy. Abdullah bin Mas'ud said that the Messenger of Allah said:

It means: Has told us Abu Bakr bin Abu Syaibah; Has told us Abu Mu'awiyah and Waki'; Likewise narrated from another path, And has told us Muhammad bin 'Abdullah bin Numair Al Mahdani and this lafazh belongs to him; Have told us my father and Abu Mu'awiyah and Waki' they said; Has told us Al A'masy from Zaid bin Wahb from 'Abdullah he said; Has told us the Messenger of Allah -peace and prayer of Allah be upon him-, namely -Ash Sadiq Al Mashduq- (a person who is honest and conveys the news that he conveys is true): 'Verily a human being is created in his mother's belly after being processed for forty days. Then it becomes a lump of flesh in the next forty days. Then it becomes a lump of flesh in the next forty days. After the next forty days, Allah also sent an angel to breathe the spirit into him and was commanded to write four things; his sustenance, his death, his deeds, and his suffering or happiness. (HR. Muslim) [16][17].

Based on the Qur'an and Hadith above, there are differences of opinion among scholars regarding the law of termination of pregnancy or abortion. This difference lies in the blowing of the spirit of the fetus, which is during the gestation period before 40 days. This view is divided into two opinions: first, is not considered a homicide or intentional abortion which is a criminal act, and second, It is a haraam for destroying the womb by removing a fetus that has settled in the womb for no reason [15]. Therefore, abortion after 4 months of pregnancy is haram, because it means killing a creature that is already alive. And this is included in the category of murder

whose prohibition is, among others, based on the following syar'i arguments. The Word of Allah SWT:

وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ۗ وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لَوْلِيهِ سُلْطٰنًا فَلَا يَسْرِفُ فِي الْقَتْلِ ۗ إِنَّهُ كَانَ مُنصُورًا

Meaning: "And do not kill the soul that Allah has forbidden (killing it), but with a right (reason) [853]. and whoever is killed unjustly, then indeed We have given power[854] to his heir, but let the heir not exceed the limit in the killing. Indeed, he is the one who gets help." (Qs. al-Isra` [17]: 33).

The meaning is justified by syara' such as qishas killing apostates, stoning and so on. Meaning: power here is the matter of the heirs who are killed or the ruler to demand kisas or receive diat. qishaash is taking the same revenge. Qishaash is not done, if the murderer gets forgiveness from the heirs of the slain, namely by paying a reasonable diat (compensation). the payment is requested well, for example by not pressing the one who kills, and the one who kills should pay it well, for example not delaying it. If the heir of the victim after God has explained these laws, kills someone who is not the killer, or kills the murderer after receiving the diat, then qishaash is taken against him in this world and in the hereafter, he will have a painful torment.

وَإِذَا الْمَوْءِدَةُ سُبِلَتْ
بِأَيِّ ذَنْبٍ قُتِلَتْ

Meaning: And when the baby girls who were buried alive are asked, because of sin Was He killed. (Qs. at-Takwiir [81]: 8-9).

Based on these arguments, abortion is haraam in a womb that is alive or has reached the age of 4 months, because in such circumstances it means that abortion is a crime of murder which is forbidden by Islam. As for abortion before the womb is 4 months old, as described above, the fuqoha differ on this issue. However, according to the opinion of Sheikh Abdul Qadim Zallum (1998) and Dr. Abdurrahman Al Baghdadi (1998), the more strong law is as follows. If the abortion is carried out after 40 (forty) days, or 42 (forty-two) days from the gestational age and at the time of the beginning of the formation of the fetus, then the law is haram. In this case, the law is the same as the law on the prohibition of abortion after the soul is blown into the fetus [14]. While the abortion has not reached the age of 40 days, then the law is allowed (allowed but not required) and that's okay.

The shar'i evidence that shows that abortion is haram when the fetus is 40 days or 40 nights is the following hadith of the Prophet: Which means: "If the germ (clot of blood) has passed forty-two nights, then Allah sends an angel to him, then he forms the germ; he made his hearing, his sight, his skin, his flesh, and his bones. Then the angel asked (to Allah), 'O my Lord, will he (Will You determine) to be male or female?' Then Allah made a decision..."[HR. Muslim from Ibn Mas'ud ra] [16][17]. The hadith shows that the beginning of the creation of the fetus and the appearance of its limbs is after passing 40 or 42 nights. Thus, the persecution of him is an abuse of a fetus that already has signs of being a human being whose blood is preserved (ma'shumudam). The act of abuse constituted his murder.

Based on the description above, it is forbidden for the mother of the fetus, the father, or the doctor to abort the mother's womb when the womb is 40 days old. Any one of those who carry out an abortion has committed a sin and has committed a crime that requires payment of diyat for the aborted fetus, namely a male or female slave, or a tenth of a perfect human being (10 camels), as explained in the authentic hadith in the matter. The Messenger of Allah said: Which means: "Has told us Abdullah bin Yusuf has told us Al Laits from Ibn Shihab from Sa'id bin Musayyab from Abu Hurairah, the Messenger of Allah sallallaahu 'alaihi wasallam once decided (diyat) a female fetus from the Bani Lahyan with a value equivalent to ghurrah, slave male or female slaves, then the woman whom he decided to pay ghurrah dies, the Messenger of Allah (peace and blessings of Allah be upon him) decides his inheritance for his children and husband, while the payment of diyat is for his friends."

While abortion of a fetus whose age has not reached 40 days, then the law is allowed (allowed but not required) and that's okay. This is because what is in the womb has not yet become a fetus. After all, it is still in the stage of being cum (blood clots), have not yet reached the stage of creation that exhibits minimal human characteristics. In addition, abortion before becoming a fetus, from a legal point of view, can be equated with 'azl (coitus interruptus) which is intended to prevent pregnancy. 'Azl is carried out by a man who does not want the pregnancy of the woman he is dating, because 'azl is the act of releasing sperm outside the woman's vagina. This action will result in the death of the sperm cell, as it will result in the death of the egg cell so that it will result in the absence of the meeting of the sperm cell with the egg cell which of course will not lead to pregnancy.

The Messenger of Allah allowed 'azl to a man who asked him about his actions with his female slave, while he did not want his female slave to become pregnant. The Messenger of Allah said to him: Which means: "Has told us Uthman bin Abu Syaibah, has told us Al Fadhl bin Dukain, has told us Zuhair from Abu Az Zubair from Jabir, he said; there was an Ansar man who came to the Prophet sallallaahu 'alaihi wasallam and said; verily I had a slave girl, I mingled with her while I didn't want her to get pregnant. Then he said: "Do 'azl if you wish, indeed what has been destined for him will come." Jabir said; the person stayed for a while then came to him and said; in fact, the slave was pregnant. He said: "I have told you that what is destined for him will come to him."

However, it is permissible to perform an abortion either at the stage of the creation of the fetus or after the spirit has been blown into it, if a trusted doctor determines that the presence of the fetus in the mother's womb will result in the death of both the mother and the fetus at the same time. Under these conditions, it is permissible to have an abortion and try to save the life of the mother's soul. Saving lives is something that is called for by the teachings of Islam, according to the word of Allah SWT: Meaning: "Therefore We set (a law) for the Children of Israel, that: Whoever kills a human being, not because that person (kills) another person, or not because of causing mischief on earth, it is as if He had killed a human. entirely. and Whoever preserves the life of a human, it is as if He has saved the life of all mankind. And indeed Our Messengers have come to them with clear statements, then many of them after that transgressed in doing mischief on earth."

In addition, abortion in conditions like this includes treatment efforts. Meanwhile, the Messenger of Allah has ordered his people to seek treatment. "If two harms (danger) are gathered together in one law, then the one that is lighter in harm is chosen." [18] Based on this rule, a woman is allowed to abort her pregnancy if the presence of the womb will threaten her life, even if this means killing the fetus. Indeed, abortion is a mafsadat. Likewise, the loss of the mother's life, if she keeps her womb, is also a mafsadat. However, there is no doubt that aborting the fetus is less harmful than taking the life of the mother or letting the mother's life be threatened by the existence of the fetus [14].

The opinion which states that abortion is forbidden from the meeting of the egg with the sperm cell because there is already living in the womb is not strong. Because real life isn't only exists after the meeting of the egg cell with the sperm cell, but even in the sperm cell itself there is life, so also in the egg cell, even though the two cells have not met.

c. Opinions That Allow Both

Life (al hayah) according to Ghanim Abduh in his book *Naqdh Al Isytirakiyah Al Marksiyah* (1963) page 85 is something that exists in living organisms. (*ash syai` al qa`im fi al ka`in al-hayyi*). The characteristics of life are growth, movement, irritability, need for nutrition, reproduction, and so on. With this understanding of life, then in the egg cell and sperm cell (which are still good, not damaged) there is life, because if there is no life in the sperm cell and egg cell, then fertilization of the egg cell by the sperm cell will not be able to occur. So, life is present in egg cells and sperm cells before fertilization occurs, isn't it? only exists after fertilization.

4 Conclusion

Based on this explanation, the opinion that forbids abortion after the meeting of the egg and sperm cells because life already exists is a weak opinion, because it is not based on an accurate understanding of the meaning of life (al hayah). This opinion implicitly states that before the meeting of the egg and sperm cells, it means that there is no life in the egg and sperm cells. However, this is not the case. If the opinion is accepted, surely all activities that take away life are haram, including 'azl. Because in the activity of 'azl there is an effort to prevent the occurrence of life, namely life in sperm cells and egg cells (before they meet). Even though 'azl has been allowed by the Messenger of Allah. In other words, the opinion stating that abortion is forbidden after the meeting of the egg and sperm cells because life already exists would be contrary to the hadiths that allow 'azl [19].

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