



## Decriminalization Against Women Who Perform Illegal Abortions From the Islamic Law Perspective

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Submitted: Aug 4, 2023	Accepted: Dec 28, 2023	Published: Dec 31, 2023
How to Cite (Chicago): Ramadhita, Ramadhita, Tutik Hamidah, Abbas Arfan, and Badruzzaman Badruzzaman. 2023. "Decriminalisation Against Women Who Perform Illegal Abortions From the Islamic Law Perspective". <i>Al-Qadha : Jurnal Hukum Islam Dan Perundang-Undangan</i> 10 (2). <a href="https://doi.org/10.32505/qadha.v10i2.6867">https://doi.org/10.32505/qadha.v10i2.6867</a> .		

### Abstract

Illegal abortion remains a problem in many countries, medically, ethically, and legally. Although it restricts the practice of abortion, Islamic law does not question its legality. This study aims to analyze the criminalization of abortion in Islamic criminal law after 120 days of pregnancy. This article is normative legal research with a conceptual approach. The results of this study indicate that Islamic law gives full respect to the right to life of a person, including the right to life of the foetus. However, Islamic legal scholars differ on the priorities for safeguarding the lives of pregnant women and fetuses. Islamic legal scholars differ on the criminalization of abortion. For abortions performed under 120 days of age, the perpetrator is not subject to criminal sanctions. Abortion after 120 days is prohibited, except where there are compelling medical, ethical, and legal reasons to do so. In cases of rape that result in pregnancy, women have the full right to abortion at any gestational age. Nevertheless, women are still subject to sanctions in the form of kaffarat and diyat al-ghurrah. Those aim to prevent people from easily performing abortions.

**Keywords:** Illegal abortion, Islamic law, Indonesiaian penal code

### Abstrak

Aborsi ilegal masih menjadi persoalan di berbagai negara, baik secara medis, etik, maupun hukum. Meskipun membatasi praktik aborsi, hukum Islam tidak mempersoalkan legalitasnya. Penelitian bertujuan menganalisis kriminalisasi pelaku aborsi dalam hukum pidana Islam setelah kehamilan berusia 120 hari. Artikel ini merupakan penelitian hukum normative dengan pendekatan konsep. Hasil penelitian ini menunjukkan bahwa hukum Islam memberikan penghormatan penuh terhadap hak hidup seseorang, termasuk hak hidup janin. Sehingga hukum Islam melarang praktik aborsi tanpa ada alasan yang jelas. Meskipun demikian, sarjana hukum Islam berbeda pendapat tentang prioritas dalam penjagaan terhadap nyawa ibu hamil dan janin. Para sarjana hukum Islam berbeda pendapat tentang kriminalisasi pelaku aborsi. Aborsi yang dilakukan di bawah usia 120 hari, pelakunya tidak dikenai sanksi pidana. Aborsi yang dilakukan di atas 120 hari dilarang



kecuali ada alasan pendukung secara kuat baik secara medis, etis, maupun hukum. Pada kasus perkosaan yang berakibat pada kehamilan, Perempuan memiliki hak penuh melakukan aborsi pada usia kehamilan berapa pun. Meskipun demikian, Perempuan tetap dikenai sanksi berupa *kaffarat* dan *diyat al-ghurrah*. Hal ini bertujuan agar Masyarakat tidak mudah melakukan aborsi.

**Kata Kunci:** Aborsi Ilegal, Hukum Islam, Hukum pidana Indonesia

### **Introduction**

Illegal abortion has remained a controversial issue in many countries.<sup>1</sup> An unwanted pregnancy is a major cause of illegal abortion.<sup>2</sup> Illegal abortions are more common in developing countries or countries with strict abortion laws.<sup>3</sup> Various cases of illegal abortion also occur in Indonesia. The number of abortions reaches 2.3 million per year, with ironically 30% of the perpetrators being teenage girls. Most of these abortions are carried out by women who became pregnant before marriage and victims of sexual violence.<sup>4</sup> However, illegal abortion is not only based on the woman's will, but also on the will of other parties such as parents or boyfriends.<sup>5</sup> Illegal abortions occur as a result of a series of events experienced by women.<sup>6</sup> These include irresponsible partners and rape. The fear and stigmatisation of abortion actors makes women choose to have illegal abortions even though it is dangerous.<sup>7</sup> The complexity of legal abortion procedures is also allegedly the reason why

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- <sup>1</sup> Roya Rashidpouraie et al., 'Complications of Illegal Abortion in the Suburbs of Tehran: A 9-Year Cross-Sectional Study', *Journal of Research in Medical Sciences: The Official Journal of Isfahan University of Medical Sciences* 26 (2021): 89, [https://doi.org/10.4103/jrms.JRMS\\_141\\_20](https://doi.org/10.4103/jrms.JRMS_141_20); Monica Malta et al., 'Abortion in Brazil: The Case for Women's Rights, Lives, and Choices', *The Lancet Public Health* 4, no. 11 (1 November 2019): e552, [https://doi.org/10.1016/S2468-2667\(19\)30204-X](https://doi.org/10.1016/S2468-2667(19)30204-X).
  - <sup>2</sup> Gilda Sedgh and Haley Ball, 'Abortion in Indonesia', *Issues in Brief (Alan Guttmacher Institute)*, no. 2 (September 2008): 1–6; Ms Katrina Molloy et al., 'O4 - Providing Unplanned Pregnancy Care and Early Medical Abortion to Marginalised Groups at the Kirketon Road Centre (KRC) - a Walk in Targeted Primary Health Care Service in Kings Cross, Sydney', *Women and Birth, Australian College of Midwives National Conference - Together at the Top, 13 September - 15 September 2022, Cairns, QLD, Australia*, 35 (1 September 2022): 4, <https://doi.org/10.1016/j.wombi.2022.07.010>; Genanew Kassie Getahun et al., 'Exploring the Reasons for Unsafe Abortion among Women in the Reproductive Age Group in Western Ethiopia', *Clinical Epidemiology and Global Health* 22 (1 July 2023): 101301, <https://doi.org/10.1016/j.cegh.2023.101301>.
  - <sup>3</sup> Ayush Anand et al., 'Suspected Illegal Abortion and Unsafe Abortion Leading to Uterine Rupture and Incomplete Abortion: A Case Report', *Annals of Medicine and Surgery* (2012) 84 (December 2022): 104933, <https://doi.org/10.1016/j.amsu.2022.104933>.
  - <sup>4</sup> Ari Ardianto and Achmad Hariri, 'Perlindungan Hukum Atas Pengguguran Kandungan Korban Pemerkosaan Di Tinjau Dari Hukum Nasional', *Media of Law and Sharia* 2, no. 3 (3 July 2021): 218–37, <https://doi.org/10.18196/mls.v2i3.11535>.
  - <sup>5</sup> Komisi Nasional Perempuan Republik Indonesia, 'Mewujudkan Akses Dan Layanan Aborsi Aman Legal Bagi Perempuan Korban Perkosaan Sebagai Upaya Pemenuhan HAM Perempuan', Komnas Perempuan | Komisi Nasional Anti Kekerasan Terhadap Perempuan, 29 September 2021, <https://komnasperempuan.go.id/siaran-pers-detail/siaran-pers-komnas-perempuan-memperingati-hari-aborsi-aman-internasional-28-september-jakarta-29-september-2021>.
  - <sup>6</sup> Nurhadi Sucahyo, 'Menyoal KUHP Baru dan Aborsi bagi Perempuan Korban Kekerasan Seksual', VOA Indonesia, 7 December 2022, <https://www.voaindonesia.com/a/menyoal-kuhp-baru-dan-aborsi-bagi-perempuan-korban-kekerasan-seksual/6866115.html>.
  - <sup>7</sup> Mufliha Wijayati, 'Aborsi Akibat Kehamilan Yang Tak Diinginkan (Ktd): Kontestasi Antara Pro-Live Dan Pro-Choice', *Analisis: Jurnal Studi Keislaman* 15, no. 1 (6 April 2017): 43–62, <https://doi.org/10.24042/ajsk.v15i1.712>.

women prefer to have illegal abortions. The state has not been able to create a favourable climate of legal protection for abortionists, especially for victims of sexual violence. Often, victims of sexual violence are asked to continue their pregnancies despite the risk to their psychological health.<sup>8</sup>

Normatively, Indonesian law prohibits the practice of abortion.<sup>9</sup> As stated in Article 60 of Law Number 17 Year 2023 on Health. Unless there are reasons for medical emergencies or pregnancy resulting from rape. Abortion must be performed by a certified health worker and with the consent of the pregnant woman and her husband except in cases of rape. An illegal abortion is subject to criminal sanctions.<sup>10</sup> A person who accesses an illegal abortion is subject to a maximum of four years imprisonment as stipulated in Article 463 of Law Number 1 Year 2023 on the Criminal Code. The criminalisation of illegal abortion often creates legal problems. On the one hand, criminalisation of illegal abortion aims to provide guarantees for life safety and reproductive health for women.<sup>11</sup> On the other hand, criminalising the perpetrators of illegal abortion can undermine the sense of justice. Take the case of the criminalisation of illegal abortion in Muara Bulian District Court. The panel of judges imposed a 6-month sentence on WA, a 15-year-old girl who had an illegal abortion. The case proceeded to the appeal and cassation levels. WA was eventually acquitted of all charges because the cassation decision upheld the decision of the Jambi High Court cancelling the decision of the Muara Bulian District Court. The Jambi High Court judges acquitted WA from criminal sanctions on the grounds that the perpetrator performed the illegal abortion under duress.<sup>12</sup>

Legal studies of illegal abortion practices have been conducted by many criminal experts. Maridjan's research,<sup>13</sup> Aeniwati & Kusriyah,<sup>14</sup> showed that illegal abortions are punishable by imprisonment and penalties. Sampebulu argues that the state should provide access to abortion regardless of the background of the pregnancy. So that the problem of

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<sup>8</sup> Permata Adinda, 'Kebijakan Aborsi Berbalut Stigma: Ketika Layanan Kesehatan Tidak Berpihak Pada Hak Korban Kekerasan Seksual', Project Multatuli, 27 September 2023, <https://projectmultatuli.org/kebijakan-aborsi-berbalut-stigma-ketika-layanan-kesehatan-tidak-berpihak-pada-hak-korban-kekerasan-seksual/>.

<sup>9</sup> Ahmad Syakirin, 'Dualisme Abortus Provocatus Dalam Perspektif Regulasi (Perundang-Undangan) Di Indonesia', *Al-Syakhsyiyah: Journal of Law & Family Studies* 3, no. 1 (14 July 2021): 1–15, <https://doi.org/10.21154/syakhsyiyah.v3i1.3008>.

<sup>10</sup> Fikri Ariyad and Ali Masyhar, 'Abortion by Rape Victim: A Dilemma in the Draft of Penal Code and Indonesian Health Law', *Journal of Law and Legal Reform* 1, no. 4 (31 July 2020): 631–40, <https://doi.org/10.15294/jllr.v1i4.39659>.

<sup>11</sup> Shafira Fatahaya and Rosalia Dika Agustanti, 'Legalitas Aborsi Yang Dilakukan Oleh Anak Akibat Perkosaan Inses', *JURNAL USM LAW REVIEW* 4, no. 2 (5 November 2021): 504–24, <https://doi.org/10.26623/julr.v4i2.4041>.

<sup>12</sup> Mhd Wahyu Prawira Hrp, 'Pertimbangan Hakim Dalam Menjatuhkan Putusan Terhadap Anak Korban Perkosaan Yang Melakukan Aborsi (Studi Perbandingan Putusan Nomor 6/Pid.Sus-Anak/2018/Pt.Jmb Dan Putusan Nomor 5/Pid.Sus-Anak/2018/Pn.Mbn)', *Brawijaya Law Student Journal*, 19 May 2022, <http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/4681>.

<sup>13</sup> Gracia Novena Maridjan, 'Aborsi Dalam Penerapan Hukum Pidana Di Indonesia', *LEX CRIMEN* 8, no. 6 (21 October 2019), <https://ejournal.unsrat.ac.id/v3/index.php/lexcrimen/article/view/25940>.

<sup>14</sup> Zahri Aeniwati and Sri Kusriyah, 'Criminal Responsibility towards Criminals of Abortion in Indonesia', *Law Development Journal* 3, no. 1 (7 March 2021): 9–18, <https://doi.org/10.30659/ldj.3.1.9-18>.

illegal abortion no longer exists in Indonesia.<sup>15</sup> The criminalisation of abortion perpetrators has created a negative impact on women. The woman who has an abortion is considered morally bad.<sup>16</sup> This negative stigma will stick with her and become a psychological burden.<sup>17</sup> Lisnawati et al's research suggests that there needs to be changes to abortion regulations in Indonesia, such as revising the criteria for women experiencing unwanted pregnancies, extending the gestational age that can be aborted from 6 weeks to 24 weeks, and more urgently affirming that women have full authority over their decision to have an abortion or not.<sup>18</sup>

Meanwhile, the discussion of the legal status of abortion in Islamic law focuses on the age limit of the foetus.<sup>19</sup> The majority of scholars of Islamic law agree that abortion is permissible for foetuses under the age of 120 days. Abortion of unborn children above 120 days of age is prohibited.<sup>20</sup> The perpetrator is penalised, as it is considered killing a living entity even though it has not yet been born.<sup>21</sup> The issue of abortion raises two main problems, namely whether women who abort a foetus over 120 days of age due to rape are subject to criminal sanctions? Then the type of sanctions given to women who perform abortions both legally and illegally. This article aims to analyse the urgency of decriminalising illegal abortion according to Islamic criminal law. The article argues that women who have abortions due to rape are basically not subject to criminalisation even though they have exceeded the 120-day age limit. Abortion of foetuses beyond 120 days is to create a benefit in the form of psychological health of women. However, in order to create general benefits, the practice of abortion needs intensive guidance and assistance.

The conceptual method of normative legal research serves as the foundation for this study. The idea of Islamic criminal law is applied. Law Number 1 of 2023 concerning the Criminal Code, Law Number 17 of 2023 concerning Health, and Fatwa *Dar ifta al-Mishriyyah*, as well as the Fatwa of the Indonesian Ulema Council, serve as secondary sources of information for this study. Research findings and journal papers about abortion make up secondary data. As analytical tools, texts on Maqashid Syariah, fundamentals of Islamic law, and Islamic criminal law are consulted.

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<sup>15</sup> Hariansi Panimba Sampebulu, 'Abortion: A Review on Indonesia Regulations', *Rechtsidee* 6, no. 1 (7 December 2019): 10.21070/jhr.2019.6.73-10.21070/jhr.2019.6.73, <https://doi.org/10.21070/jhr.2019.6.73>.

<sup>16</sup> Ade Yulfianto and Fullah Jumaynah, 'Melawan Kredo Aborsi: "Gerakan Abortion Is Not A Crime Sebagai Sebuah Wacana Tandingan"', *Jurnal Pemikiran Sosiologi* 3, no. 2 (25 October 2016): 59-69, <https://doi.org/10.22146/jps.v3i2.23536>.

<sup>17</sup> Kristen N. Jozkowski et al., 'Abortion Stigma: Attitudes Toward Abortion Responsibility, Illegal Abortion, and Perceived Punishments of "Illegal Abortion"', *Psychology of Women Quarterly*, 4 July 2023, 03616843231181350, <https://doi.org/10.1177/03616843231181350>.

<sup>18</sup> Lilis Lisnawati, Mirra Noor Milla, and Dicky C. Pelupessy, 'Urgensi Perubahan Kebijakan Aborsi di Indonesia', *Deviance Jurnal Kriminologi* 3, no. 1 (1 June 2019): 24-36.

<sup>19</sup> Mohammad Ali Al-Bar, 'Abortion: Shafi'i Perspective', in *Abortion: Global Positions and Practices, Religious and Legal Perspectives*, ed. Alireza Bagheri (Cham: Springer International Publishing, 2021), 147-53, [https://doi.org/10.1007/978-3-030-63023-2\\_12](https://doi.org/10.1007/978-3-030-63023-2_12).

<sup>20</sup> Gilla K Shapiro, 'Abortion Law in Muslim-Majority Countries: An Overview of the Islamic Discourse with Policy Implications', *Health Policy and Planning* 29, no. 4 (1 July 2014): 483-94, <https://doi.org/10.1093/heapol/czt040>.

<sup>21</sup> Perihan Elif Ekmekci, 'Abortion in Islamic Ethics, and How It Is Perceived in Turkey: A Secular, Muslim Country', *Journal of Religion and Health* 56, no. 3 (June 2017): 884-95, <https://doi.org/10.1007/s10943-016-0277-9>.

## Honouring the Right to Life in Islamic Law

Islam provides a guarantee of life to every human being without exception.<sup>22</sup> Allah SWT makes a metaphor that a person who preserves the life of one human being is like preserving the life of all human beings. Conversely, the one who kills one person and makes damage is like killing all the people in the world. As stated in Q.S. Al Maidah [5]: 32. Whoever kills a person without cause, or without a reason for causing damage to the earth, it is as if he has killed all human beings because he has damaged the honour of their blood. Allah's wrath and punishment for killing one person is the same as His wrath and punishment for killing all people. Whoever preserves the life of a human being, by enforcing the law of qisash, then it is as if he has preserved the life of all people, because he has protected their blood. For that, they will receive a great reward from their Lord.<sup>23</sup> Allah SWT also prohibits people from killing their children for fear of poverty, because in fact Allah SWT will provide sustenance to these children, including the parents. The act of killing a child is an act of great sin as in Q.S. Al-Isra: 31. In other verses, Allah SWT prohibits killing people's souls without rights, as Allah SWT says in Surah Al-Isra verse 33 and Q.S An-Nisa: 93.<sup>24</sup>

Based on the above verses, the preservation of the soul is one of the main objectives of Islamic law (*maqashid sharia*).<sup>25</sup> The scholars of ushul fiqh agree that the preservation of the soul is a basic human need. The preservation of the soul aims to maintain human existence in the world. In addition, the preservation of the soul aims to maintain the order of life in society. This purpose should be maintained for the sake of human welfare in this world and the hereafter.<sup>26</sup> One way to protect the human soul is the application of qisash as Allah SWT says in Q.S. Al-Baqarah [2]: 179. Human action must not be harmful or endanger themselves or others.<sup>27</sup> According to Abu Ishaq al-Syatibi, a human being should not be harmed, injured, let alone killed. The right to life is a basic human right. Violation of the right to life is subject to *qishash* or *diyat*.<sup>28</sup>

On the issue of abortion, scholars differ. Although abortion is considered interfering with God's authority in matters of life and death, Islam does not prohibit abortion absolutely. There is no explicit evidence in the Qur'an or hadith that discusses abortion. The discussion of abortion is the result of ijtihad of scholars in interpreting various existing texts. Ijtihad on abortion is influenced by scholars' views on foetal development. Based on fiqh literature, the opinion of Islamic legal scholars is divided into two, namely: First, the group that views that

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<sup>22</sup> Endrika Widdia Putri, 'Memahami Hak Untuk Hidup Dalam Islam Berdasarkan Deklarasi Kairo', *Legalite: Jurnal Perundang Undangan Dan Hukum Pidana Islam* 5, no. 1 (10 September 2020): 1-13, <https://doi.org/10.32505/legalite.v5i1.1908>.

<sup>23</sup> Andri Nirwana dan Zaglul Fitriani, 'Penalaran Istislahi Terhadap Tindakan Euthanasia Berbasis Ayat-Ayat Ahkam', *Al-Munir: Jurnal Studi Ilmu Al-Qur'an Dan Tafsir* 2, no. 01 (11 May 2020): 107-46, <https://doi.org/10.24239/al-munir.v2i01.49>.

<sup>24</sup> Linda Fidawaty, 'Aborsi Dalam Perspektif Hak Asasi Manusia Dan Hukum Islam (Analisis Terhadap Peraturan Pemerintah No. 61 Tahun 2014 Tentang Kesehatan Reproduksi)', *Al-Adalah* 14, no. 1 (2017): 107-30, <https://doi.org/10.24042/adalah.v14i1.2930>.

<sup>25</sup> Ahmad Umam Auli and Maila Shofa Maghfiroh, 'The Use of Coal Fossil Energy of Mashlahah Perspective and Hifdz Al-Nafs al-Ghazali Principles', *Jurnal Fuaduna: Jurnal Kajian Keagamaan Dan Kemasyarakatan* 6, no. 2 (31 December 2022): 133-47, <https://doi.org/10.30983/fuaduna.v6i2.5140>.

<sup>26</sup> Musolli Musolli, 'Maqasid Syariah: Kajian Teoritis Dan Aplikatif Pada Isu-Isu Kontemporer', *AT-TURAS: Jurnal Studi Keislaman* 5, no. 1 (23 September 2018): 60-81, <https://doi.org/10.33650/at-turas.v5i1.324>.

<sup>27</sup> Moh Toriquddin, 'Teori Maqâshid Syari'ah Perspektif Al-Syatibi', *De Jure: Jurnal Hukum Dan Syari'ah* 6, no. 1 (30 June 2014), <https://doi.org/10.18860/j-fsh.v6i1.3190>.

<sup>28</sup> Ahmad al-Raisuni, *Nazhariyyât Al-Maqâshid 'Inda al-Syathibi* (Rabat: Dâr al-Amân, 1991).

the foetus has the potential for life that must be protected. This potential is sacred and forbidden to be removed. This is because the development of the foetus is determined by Allah SWT, not humans. Based on this logic, a person has no right to choose to terminate a pregnancy.<sup>29</sup> This view is followed by the scholars of the Maliki madhhab who prohibit abortion absolutely. Meanwhile, Hanafi scholars, most Shafi'i scholars, and some Hambali scholars allow abortion at 40 days of pregnancy. Some scholars of the Shafi'i madhhab, Hanafi scholars, and some scholars of the Hambali madhhab still allow abortion at 40-120 days of pregnancy. Meanwhile, a foetus that is more than 120 days old is forbidden to be aborted based on the opinion of all scholars of the Islamic school.<sup>30</sup>

In the contemporary era, scholars state that eliminating the existence of a foetus without a valid reason is prohibited. Abortion for reasons of physical, mental health, or as a result of rape/incest is generally justified. Abortion for reasons of foetal distress can be performed under strict conditions. As for abortion for social and economic reasons, in principle it is prohibited.<sup>31</sup> The Indonesian Ulema Council through Fatwa No. 1/MUNAS VI/MUI/2000 justifies the practice of abortion. This fatwa states that abortion can be justified because there is a medical emergency. Whereas in Fatwa No. 4/2005 on Abortion, the Indonesian Ulema Council states that abortion can be done because of two things, an emergency condition or because of necessity.<sup>32</sup> Emergency abortions include pregnancies that threaten the life of the mother. A pregnancy resulting from rape is an emergency. The decision to have an abortion must be taken into consideration by the doctor, the victim's family, and the ulema. However, these two fatwas of the Indonesian Ulema Council only allow abortion before the foetus is 40 days old.<sup>33</sup>

Abortion has also received attention from Islamic mass organisations in Indonesia. In the Decree of the XXII Tarjih Congress in Malang, East Java in 1989, Muhammadiyah allowed abortion for medical reasons and prohibited abortion for criminal reasons. In its development, Muhammadiyah provided an additional fatwa as the result of the XXX Tarjih National Conference in 2018. Abortion performed in cases of rape is allowed on the condition that the pregnancy will have adverse consequences for the mother and foetus, due to the heavy psychological pressure that must be borne by the rape victim. The abortion must be performed in an authorised service and under the consideration of experts in the field.<sup>34</sup> Similar to the Indonesian Ulema Council and Muhammadiyah, Nahdhatul Ulama states that abortion is basically prohibited. In 2014, the Nahdhatul Ulama National Conference and Meeting decided that abortion is justifiable if there is a media emergency,

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<sup>29</sup> Ekmekci, 'Abortion in Islamic Ethics, and How It Is Perceived in Turkey'.

<sup>30</sup> Wahyu Adi Tia and Azhar Azhar, 'Hukum Menggugurkan Janin Sebelum Ditiupkan Ruh Menurut Imam An-Nawawi Ad-Dimasyqi', *Quality: Journal Of Islamic Studies* 2, no. 1 (20 February 2023): 20–27.

<sup>31</sup> Shapiro, 'Abortion Law in Muslim-Majority Countries'.

<sup>32</sup> Ansori Ansori, Mughni Labib, and Marwadi Marwadi, 'Reformulation of Islamic Law in Indonesia: Study on Indonesian Ulama Council's Fatwa', *Ulul Albab: Jurnal Studi Dan Penelitian Hukum Islam* 4, no. 2 (13 July 2021): 157–75, <https://doi.org/10.30659/jua.v4i2.15604>.

<sup>33</sup> Risma Octaviani, Amrullah Hayatudin, and Asep Ramdan Hidayat, 'Analisis Hukum Aborsi Menurut Fatwa MUI Dan PP Nomor 61 Tahun 2014', *Jurnal Riset Hukum Keluarga Islam*, 31 July 2023, 35–40, <https://doi.org/10.29313/jrhki.vi.1939>.

<sup>34</sup> Ilham, 'Kebolehan Aborsi Untuk Korban Kejahatan Seksual', *Muhammadiyah* (Blog), 7 December 2021, <https://Muhammadiyah.Or.Id/Kebolehan-Aborsi-Untuk-Korban-Kejahatan-Seksual/>.

and it is performed before the 40th day of pregnancy. Abortion must be performed in an authorised health facility.<sup>35</sup>

The legality of abortion for rape victims is philosophically aimed at protecting women victims of rape from psychological disorders and social trauma because they have to bear the risk of pregnancy alone without anyone being responsible.<sup>36</sup> The Indonesian Ulema Council used the rule that avoiding damage takes precedence over bringing benefit. In addition, the rule of emergency allows something that in principle is prohibited.<sup>37</sup> The rights of the mother take precedence over the rights of a foetus that has the potential to live. In this context, there is a scale of priorities that scholars pay attention to in the issue of abortion.<sup>38</sup> However, scholars in Indonesia do not allow abortion of foetuses over the age of 40 days. This is because they refer to the hadith about the spirit being blown into the foetus.<sup>39</sup> Thus, legal problems arise for women who have abortions above this age. Whether the perpetrator is subject to criminal sanctions for committing *jarimah* or not.

### **Criminalisation of Illegal Abortion Perpetrators from an Islamic Law Perspective**

Respect for the right to life in Islam carries legal consequences. Islamic law provides criminal sanctions against people who take the lives of others. In Q.S. Al-Baqarah [2]: 178-179 Allah SWT commands *qishash* against perpetrators of murder and physical violence. However, if the victim's family gives forgiveness then the perpetrator is free from the law of *qishash*. However, it is obligatory to provide *diyat* as compensation. *Qishash* aims to provide sanctions commensurate with the perpetrator's actions and provide a deterrent effect on him. Handling *jarimah* against the life or physical of a person is the prerogative right of the victim or his heirs. The Government or society is not authorised to intervene.<sup>40</sup> The implementation of *qishash* prioritises the principle of humanity by promoting respect for the rights of the perpetrator and the victim/heir. *Qishash* punishment can be applied flexibly in accordance with the prevailing sense of justice in society.<sup>41</sup>

The criminalisation of abortion in Islamic law is due to two reasons, namely the reason and time of abortion. Abortion must be based on reasons justified by Islamic law such as medical emergencies that threaten the life of the mother. In its development, genetic defects carried by the foetus are also a valid reason for abortion in the contemporary era.<sup>42</sup> Islamic law prohibits abortion for adulterers. The life of the foetus is sacred and does not bear the sins of its parents so it is not worth aborting. The same applies to abortion for economic

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<sup>35</sup> Vennya Agna Mentari et al., 'Hukum Keluarga Di Indonesia Dalam Fatwa Bahsul Masail Nahdlatul Ulama (NU)', *Qiyas: Jurnal Hukum Islam Dan Peradilan* 8, no. 2 (2023): 227-39, <https://doi.org/10.29300/qys.v8i2.12229>.

<sup>36</sup> Jozkowski et al., 'Abortion Stigma'.

<sup>37</sup> Octaviani, Hayatudin, and Hidayat, 'Analisis Hukum Aborsi Menurut Fatwa MUI Dan PP Nomor 61 Tahun 2014'.

<sup>38</sup> Muh Yunan Putra HI Lc, M., *Aborsi Hasil Pemeriksaan (Analisis Metode Istinbath Hukum Ulama Salaf dan Khalaf)* (Penerbit Adab, 2021), 133.

<sup>39</sup> Mentari et al., 'Hukum Keluarga Di Indonesia Dalam Fatwa Bahsul Masail Nahdlatul Ulama (NU)'.

<sup>40</sup> Chuzaimah Batubara, 'Qishâsh: Hukuman Mati Dalam Perspektif Al-Quran', *MIQOT: Jurnal Ilmu-Ilmu Keislaman* 34, no. 2 (2 December 2010), <https://doi.org/10.30821/miqot.v34i2.204>.

<sup>41</sup> Muhammad Tahmid Nur, 'Justice in Islamic Criminal Law: Study of the Concept and Meaning of Justice in The Law of Qisâs', *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* 55, no. 2 (15 October 2021): 335-65, <https://doi.org/10.14421/ajish.v55i2.1011>.

<sup>42</sup> Octaviani, Hayatudin, and Hidayat, 'Analisis Hukum Aborsi Menurut Fatwa MUI Dan PP Nomor 61 Tahun 2014'.

reasons.<sup>43</sup> Allah SWT. in Q.S. al-Isra [17]: 31 guarantees the sustenance of each child born in the world. Eliminating their existence is a great sin. In the contemporary era, the prohibition of killing children also applies for psychological and social reasons, not only because of economic issues..<sup>44</sup>

Regarding the gestational age limit, Al-Ghazali argues that after fertilisation and the zygote has attached to the uterine wall, it is forbidden to have an abortion. The abortion of the foetus from this phase is *jarimah*.<sup>45</sup> However, the majority of scholars are of the opinion that criminal sanctions are imposed on abortions beyond 120 days of pregnancy. This is because at this stage the spirit is already in the foetus.<sup>46</sup> The punishment of abortion perpetrators brings *mashlahah*, namely the guarantee of life for the foetus and the emergence of social order. Punishment is an educational effort for the community to be responsible for the actions taken, especially for the perpetrators of adultery. Criminalisation of abortion in Islamic law is not the same as the crime of murder in general. Punishment of the perpetrator of abortion is to pay *diyat al-ghurrah*. Or in other cases the perpetrator is subject to full *diyat* depending on the age of the foetus. *Diyat al-ghurrah* is imposed as compensation for abortion before the soul is blown.<sup>47</sup> The physical shape of the foetus becomes the measure of the amount of *diyat al-ghurrah* that must be paid.<sup>48</sup>

*Diyat al-ghurrah* is based on the hadiths of the Prophet that have been narrated by Imam al-Bukhari, Imam Muslim, Imam Abu Dawud, Imam Nasa'i, Imam Ibn Majah. These hadiths provide information about the Prophet's decision against the perpetrators of abusing women and resulting in the death of the unborn child. The Prophet sanctioned the *ghurrah* of a male or female slave as a fine for the death of the foetus. *Diyat al-ghurrah* is given to the heirs of the victim.<sup>49</sup> In general, the value of *diyat al-ghurrah* is 1/20th of the *diyat* for murder or 5 camels.<sup>50</sup> *Diyat al-Ghurrah* applies if the abortion fulfils five conditions: (1) There was a specific act that caused the foetus to die; (2) The foetus died after the specific act; (3) The foetus came out dead; (4) The foetus has passed the *mudghah* period (has taken shape);

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<sup>43</sup> Vick Ainun Haq, Adella Dewi Nur'aini, and Amirudin Amirudin, 'Islamic Study On The Law Of Husbands Forcing Wives To Have Abortions Due To Economic Factors', *An-Nawa: Jurnal Studi Islam* 4, no. 2 (27 December 2022): 147–60, <https://doi.org/10.37758/annawa.v4i2.530>.

<sup>44</sup> Zahfa Lisnaeni Putri and Naqiyah Naqiyah, 'Kontekstualisasi QS Al-Isrā (17): 31 Tentang Larangan Pembunuhan Anak Pendekatan Tafsir Kontekstual Abdullah Saeed', *MAGHZA: Jurnal Ilmu Al-Qur'an Dan Tafsir* 8, no. 1 (30 June 2023): 14–28, <https://doi.org/10.24090/maghza.v8i1.7963>.

<sup>45</sup> Mega Aini, M. Tamudin, and Jumanah Jumanah, 'Tinjauan Hukum Pidana Islam Terhadap Pelaku Penyertaan Tindakpidana Aborsi Dalam Putusan Nomor Perkara 1106/Pid.Sus/2018/Pn.Plg', *Ta'zir: Jurnal Hukum Pidana* 5, no. 2 (2021): 181–97, <https://doi.org/10.19109/ta'zir.v5i2.17901>.

<sup>46</sup> Hannisyah Gurusinga, 'Sanksi Pelaku Aborsi dalam Tinjauan Hukum Pidana Islam dan Pasal 346 KUHP (Studi Analisis Putusan No. 569/Pid.Sus/2017/PN Tenggara)', *Al-Qanun: Jurnal Kajian Sosial dan Hukum Islam* 1, no. 3 (28 September 2020): 221–44.

<sup>47</sup> Badawy A. B. Khitamy, 'Divergent Views on Abortion and the Period of Ensoulment', *Sultan Qaboos University Medical Journal* 13, no. 1 (February 2013): 26–31.

<sup>48</sup> Sri Aisyah and Zainal Azwar, 'KELUARGA BERENCANA (Studi Analisis Fatwa Ali Jum'ah Dalam Kitab Al-Fatâwâ Al-Islâmiyyah)', *Jurnal AL-AHKAM* 11, no. 2 (21 December 2020): 103–18, <https://doi.org/10.15548/alahkam.v11i2.2168>.

<sup>49</sup> Dadi Nurhaidi, 'Aborsi Dalam Perspektif Kajian Hadis', *Musâwa Jurnal Studi Gender Dan Islam* 2, no. 2 (30 September 2003): 131–49, <https://doi.org/10.14421/musawa.2003.22.131-149>.

<sup>50</sup> Zulfa Hudiyan, 'Diskursus Aborsi Dalam Perspektif Fikih Klasik Dan Kontemporer', *Al-Ahwal Al-Syakhshiyyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 2, no. 1 (30 March 2021): 43–61, <https://doi.org/10.15575/as.v2i1.12172>; Sri Warjiyati, 'Aborsi Pada Masa Iddah Wanita Hamil Untuk Mempercepat Perkawinan Dalam Perspektif Hukum Islam', *Al-Ahwal: Jurnal Hukum Keluarga Islam* 12, no. 1 (24 June 2019): 46–55, <https://doi.org/10.14421/ahwal.2019.12104>.



and (5) The parents of the foetus are not both *kafr harby*.<sup>51</sup> In addition to paying diyat al-ghurrah, the abortionist is also required to pay kaffarah, which is to free a slave. If not able to then the perpetrator is required to fast two months in a row. As Allah SWT says in Q.S. An-Nisa [4]:92. This is required because the perpetrator is considered to have intentionally killed a living entity even though it has not been born.<sup>52</sup>

The criminalisation of abortion perpetrators can cause madharat. In addition to legal problems, abortionists receive social sanctions from the community.<sup>53</sup> Abortion is not only the will of the woman, but also the will of her family or partner/ex-partner. Abortion can occur under duress and even with the threat of violence/murder. Women in the context of abortion can be both perpetrators and victims. In the case of victims of sexual violence, for example, abortion is the best option to restore the victim's mental health and the family's honour. However, abortion is often negatively stigmatised by society.<sup>54</sup> Victims of sexual violence prefer to access illegal abortion. The ease of access to services, the absence of convoluted procedures, and the confidentiality aspect are factors that encourage illegal abortions despite the danger to the perpetrator. In addition, the perpetrator has full authority over the service and the timing of the abortion. For legal abortion services, the perpetrator is bound by the stipulation that the gestational age must be under 14 weeks. Anything over that period is a criminal offence. As stipulated in Law No. 17 of 2023 on Health and Law No. 1 of 2023 on the Criminal Code. Although victims of sexual violence can choose to have a legal abortion, there are also health workers who persuade victims of sexual violence not to have an abortion.<sup>55</sup> There is still a debate between pro-abortion and anti-abortion groups.

Punishment of abortion perpetrators who do not pay attention to the psychological aspects and conditions behind the action will hurt the aspects of justice. As in the case of WA who was sentenced to 6 months in prison by a panel of judges at the Muara Bulian District Court, Jambi Province. WA is a 16-year-old female victim of sexual violence who chose to have an illegal abortion. The criminalisation of victims of sexual violence who have illegal abortions has the potential to cause psychological distress, hindering their growth and development as full human beings. The perpetrator may experience feelings of inferiority and may even lead to the practice of prostitution, which is also prohibited by religion. As an attitude towards illegal abortions carried out by victims of sexual violence, it is interesting to convey Muhammad Sayyid Tantawi, a great scholar of al-Azhar Egypt, who stated that sexual violence is an extraordinary crime. Sexual violence attacks the honour of women, so it is appropriate for women to have full authority in performing abortions. There should be no interference with a woman's decision. Unmarried women who are raped should be allowed

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<sup>51</sup> Bariyah Fayumi, 'Hukum Aborsi dalam Perspektif Islam', Kupipedia, May 2004, [https://kupipedia.id/index.php/Hukum\\_Aborsi\\_dalam\\_Perspektif\\_Islam](https://kupipedia.id/index.php/Hukum_Aborsi_dalam_Perspektif_Islam).

<sup>52</sup> Dewani Romli, 'Aborsi Dalam Perspektif Hukum Positif Dan Hukum Islam (suatu Kajian Komparatif)', *Al-'Adalah* 10, no. 2 (28 February 2017): 157-64, <https://doi.org/10.24042/adalah.v10i2.251>; Wika Wulandari, 'Iddah of Women Who Had Abortus In The Book of Mughni Al-Muhtaj and Mukhtashar Khalil in Perspective of Maqasid Shari'ah', *JURNAL ILMIAH MIZANI: Wacana Hukum, Ekonomi, Dan Keagamaan* 8, no. 1 (29 September 2021): 1-10, <https://doi.org/10.29300/mzn.v8i1.3660>; Suhaizad Saifuddin et al., 'Peranan Undang-Undang Syariah Di Malaysia Dalam Melindungi Hak Kanak-Kanak Berdasarkan Maqasid Al-Shari'ah: The Role of Syariah Law of Malaysia In Protecting The Children's Rights Based on Maqasid Al-Shari'ah', *Journal of Muwafaqat* 4, no. 1 (30 April 2021): 93-109.

<sup>53</sup> Alicia J. VandeVusse et al., "'Technically an Abortion': Understanding Perceptions and Definitions of Abortion in the United States', *Social Science & Medicine* 335 (1 October 2023): 116216, <https://doi.org/10.1016/j.socscimed.2023.116216>.

<sup>54</sup> Yulfianto and Jumaynah, 'Melawan Kredo Aborsi'.

<sup>55</sup> Adinda, 'Kebijakan Aborsi Berbalut Stigma'.

to have an abortion. In cases of sexual assault, abortion should be allowed after the foetus is 120 days old.<sup>56</sup>

Shaykh Ali Jum'ah, mufti of al-Azhar gave a fatwa on the legal status of aborting a foetus that is more than 120 days old because it endangers the safety of the mother. Shaykh Ali Jum'ah in principle prohibits abortion at the age of less or more than 120 days, but in certain conditions such as there are medical reasons that endanger the safety of the mother or the unborn child comes from extramarital relations or the result of adultery may be aborted. The same applies to foetuses resulting from rape. Shaykh Ali Jum'ah refers to the opinion of Ibn Abidin, a Hanafi scholar who allows abortion due to economic factors.<sup>57</sup> Imam Zarkasyi also exempts women who are forced to take halal medicine from legal liability.<sup>58</sup> In Q.S. al-Isra' [17]: 33 Allah SWT prohibits killing except for a just reason. Such as killing for qishash, suppressing rebellion against the legitimate government, stoning the perpetrators of adultery muhshan. Included in the haq reason is to perform abortion because there is a strong medical recommendation endangering the safety of the mother, both physically and psychologically. Referring to the fatwa of the great ulama of al-Azhar above, it is necessary to decriminalise victims of sexual violence who perform illegal abortions. Muslim society and the state must be present to provide protection for victims of sexual violence so that their psychological condition returns to normal and they are able to socialise again with their environment, instead of labeling, stigmatising or criminalising them.

## **Conclusion**

Abortion is in principle prohibited by Islamic teachings, but in certain contexts abortion can be justified. Such as medical emergencies and sexual violence. The majority of scholars still adhere to the limitation that abortion may be performed before the age of the foetus reaches 120 days. If more than this limit, then the perpetrator is punished by paying compensation in the form of diyat al-ghurrah. The amount of compensation refers to the state of the foetus at the time of the abortion. However, it should be noted that the imposition of punishment for victims of sexual violence who have abortions needs to consider the principles of the best interests of the victim, a sense of justice, and punishment is the last step (*ultimum remedium*). Victims of sexual violence who have illegal abortions may be due to lack of information, moral and psychological pressure, lack of responsibility on the part of the man who impregnated them, or threats received by the perpetrator. The state should be present to provide legal protection. Criminalisation does provide *maslahah* but the *madharat* aspect is also quite significant. Women who have abortions can experience mental disorders that endanger their lives. This article recommends that the gestational age limit is not the determining factor of whether or not abortion is allowed, but the will of the woman to continue the pregnancy. Abortion should certainly take into account the opinion of a gynaecologist so that the process does not harm women. This is in accordance with the principle of not endangering themselves and others.

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<sup>56</sup> Ariyad and Masyhar, 'Abortion by Rape Victim'.

<sup>57</sup> Ali Jum'ah Muhammad, 'Ruling on aborting the foetus after 120 days due to the risk to the mother's life', Dar Ifta al-Mishriyyah, 2010, <https://www.dar-alifta.org/ar/fatawa/18140/> / حكم إجهاض الجنين بعد يومًا لوجود خطر على حياة الأم

<sup>58</sup> Aisyah and Azwar, 'Keluarga Berencana (Studi Analisis Fatwa Ali Jum'ah Dalam Kitab Al-Fatâwâ Al-Islâmiyyah)'.

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