

Criminal Liability For Illegal Abortion In Indonesian And Islamic Law: a Comparative Study

Zul Fahmi¹, Affan Muhammad Hasibuan², Roni Risky Nasution³, Asrofi⁴, Suroto⁵

¹Sekolah Tinggi Agama Islam Negeri Mandailing Natal, Indonesia

E-mail: zulfahmi1901@gmail.com

²Sekolah Tinggi Agama Islam Negeri Mandailing Natal, Indonesia

E-mail: fan.hasibuan01@gmail.com

³Sekolah Tinggi Agama Islam Negeri Mandailing Natal, Indonesia

E-mail: roninasution348@gmail.com

⁴Sekolah Tinggi Agama Islam Negeri Mandailing Natal, Indonesia

E-mail: asrofish8@gmail.com

⁵Al-Azhar University, Cairo, Egypt

E-mail: sirothalazhary@gmail.com

Corresponding Author: zulfahmi1901@gmail.com

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Abstract: This study examines criminal liability for illegal abortion under Indonesian positive law and Islamic law by analyzing their normative foundations, common ground, and points of difference. Using a normative legal research method with a comparative approach, this study utilized primary sources, including the Criminal Code, Health Law, Qur'an, Hadith, classical fiqh literature, and MUI fatwas to map the rules and rationale of each system. The findings show that both legal frameworks expressly prohibit abortion without a valid reason, but differ in terms of rationale and sanctions. Indonesian law emphasizes formal legal protection of the right to life, with prison sentences of up to 15 years and fines of up to 1 billion rupiah. Islamic law frames abortion as a moral-religious offense, calibrating punishment to the development of the fetus: before 120 days, the perpetrator pays *ghurrah*, and after 120 days, abortion is equated with murder and punishable by *qisas* or *diyat*. Integrating textual interpretation with the *maqasid sharia* framework, this research contributes a nuanced comparative model that highlights how secular and religious norms can inform one another. This research underscores the need for legal harmonization, policymakers can enrich Indonesia's regulatory regime by incorporating *maqasid sharia* principles such as staged medical review and psychosocial counseling into existing legislation to strike a balance between legal certainty, public health, and ethical imperatives. These insights pave the way for targeted reforms and empirical studies that assess



the real-world impact of a harmonized, combined approach in reducing illegal unsafe abortion and promoting reproductive justice.

Keywords: *Illegal Abortion, Criminal Liability, Comparative Law, Fiqh Jinayah*

Abstrak: Penelitian ini mengkaji pertanggungjawaban pidana terhadap aborsi ilegal menurut hukum positif Indonesia dan hukum Islam dengan menganalisis dasar-dasar normatif, titik temu, dan titik perbedaannya. Menggunakan metode penelitian hukum normatif dengan pendekatan komparatif, penelitian ini menggunakan sumber-sumber primer, termasuk KUHP, UU Kesehatan, Al-Qur'an, Hadis, literatur fikih klasik, dan fatwa MUI untuk memetakan aturan dan dasar pemikiran masing-masing sistem. Temuan menunjukkan bahwa kedua kerangka hukum tersebut secara tegas melarang aborsi tanpa alasan yang sah, namun berbeda dalam hal dasar pemikiran dan sanksi. Hukum Indonesia mengedepankan perlindungan hukum formal terhadap hak untuk hidup, dengan ancaman hukuman penjara hingga 15 tahun dan denda hingga 1 miliar rupiah. Hukum Islam membingkai aborsi sebagai pelanggaran moral-agama, mengkalibrasi hukuman dengan perkembangan janin: sebelum 120 hari, pelaku membayar ghurrah, dan setelah 120 hari, aborsi disamakan dengan pembunuhan dan dapat dihukum dengan qisas atau diyat. Mengintegrasikan penafsiran tekstual dengan kerangka kerja maqasid syariah, penelitian ini menyumbangkan sebuah model komparatif bernuansa yang menyoroti bagaimana norma-norma sekuler dan religius dapat menginformasikan satu sama lain. Penelitian ini menggarisbawahi perlunya harmonisasi hukum, pembuat kebijakan dapat memperkaya rezim peraturan di Indonesia dengan memasukkan prinsip-prinsip maqasid syariah seperti tinjauan medis bertahap dan konseling psikososial ke dalam peraturan perundang-undangan yang ada untuk menyeimbangkan antara kepastian hukum, kesehatan masyarakat, dan keharusan etika. Wawasan ini membuka jalan bagi reformasi yang ditargetkan dan studi empiris yang menilai dampak dunia nyata dari pendekatan gabungan yang harmonis dalam mengurangi aborsi ilegal yang tidak aman dan mempromosikan keadilan reproduksi.

Kata Kunci: *Aborsi Ilegal, Pertanggungjawaban Pidana, Perbandingan Hukum, Fiqh Jinayah*

A. Introduction

Abortion performed illegally or criminal abortion has become a multidimensional issue that touches not only the legal realm, but also moral values, social and health impacts.¹ This phenomenon reflects the complexity of social dynamics and evolving legal challenges, including in Indonesia. Abortion that is not medically recommended is categorized as a criminal offense with serious consequences for the perpetrator in the legal context,² both in terms of positive law and Islamic law.³ Nonetheless, the practice of abortion without a legally valid reason continues to increase, indicating a lack of public understanding of the applicable law, and posing a moral dilemma for the majority of Muslim Indonesians.⁴ These crimes often go unnoticed by the public due to their more secretive nature compared to other common crimes.

Abortion when viewed from a multidisciplinary perspective, encompasses three main frameworks: medical, legal, and socio-cultural.⁵ The medical dimension highlights its implications for reproductive health, which significantly affects physical and

¹ Fiona de Londras et al., “The Impact of Criminalisation on Abortion-Related Outcomes: A Synthesis of Legal and Health Evidence,” *BMJ Global Health* 7, no. 12 (2022): e010409, <https://doi.org/10.1136/bmjgh-2022-010409>.

² Kristen N. Jozkowski et al., “Abortion Stigma: Attitudes Toward Abortion Responsibility, Illegal Abortion, and Perceived Punishments of ‘Illegal Abortion,’” *Psychology of Women Quarterly* 47, no. 4 (2023): 443–61, <https://doi.org/10.1177/03616843231181350>.

³ Firdaus Firdaus et al., “Abortion Due to Unwanted Pregnancy: Perspective of Islamic Law and Positive Law,” *Al-Qisthu: Jurnal Kajian Ilmu-Ilmu Hukum* 19, no. 2 (2021): 188–201, <https://doi.org/10.32694/qst.v19i2.851>.

⁴ Adi Gunawan and Suhaimi, *Hukum Aborsi Tinjauan Hukum Positif Dan Hukum Islam*, 1st Print (Banyumas: PT. Pena Persada Kerta Utama, 2023).

⁵ Sarah Huber-Krum et al., “Estimating Abortion Prevalence and Understanding Perspectives of Community Leaders and Providers: Results from a Mixed-Method Study in Istanbul, Turkey,” *Women’s Health* 16 (2020), <https://doi.org/10.1177/1745506520953353>.

psychological well-being among women.⁶ Legally, it intersects with the fundamental right to life and the regulation of medical procedures, which are governed by provisions in the Criminal Code and Health Law.⁷ Socio-culturally, abortion often represents social pressures rooted in stigmatization, including responses to unwanted pregnancy, infidelity, or extramarital conception.⁸ This multifaceted problem transcends legal boundaries, and is a reflection of broader social dysfunction.

Previous research has extensively examined abortion from various viewpoints. Aeniwati & Kusriyah emphasized the criminal provisions outlined in the Criminal Code, which detail the penalties for individuals who perform abortions without legally acceptable reasons.⁹ Siregar expanded this discussion by referencing Law No. 36 of 2009, later revised into Law No. 17 of 2023 on Health, which strengthened the regulatory framework to penalize the practice of illegal abortion.¹⁰ Islamic legal perspectives, as explored by Firdaus et al. and Rahajeng, consider abortion a grave violation of the sanctity of life, rooted in theological principles derived from the

⁶ Hisham Shakhatreh et al., “Medico-Legal Aspects of Abortion: Updates of the Literature,” *Medical Archives (Sarajevo, Bosnia and Herzegovina)* 76, no. 5 (2022): 373–76, <https://doi.org/10.5455/medarh.2022.76.373-376>.

⁷ Elfan Winoto, “Legal Review of Medical Emergency That Happened After a Failed Abortion Attempt,” *Hang Tuah Law Journal* 4, no. 1 (2020): 23–30, <https://doi.org/10.30649/htlj.v4i1.6>.

⁸ Maryam Naji Abhary et al., “The Effects of Unsafe Abortion on the Health System from a Socio-Economic Perspective: A Narrative Review,” *Journal of Midwifery & Reproductive Health* 11, no. 4 (2023): 3896–3909, <https://doi.org/10.22038/jmrh.2023.64029.1863>.

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

¹⁰ Rospita Adelina Siregar, “Abortion Indications According to Law Number 17 of 2023 Concerning Health,” *Indonesian Journal of Innovation Studies* 25, no. 1 (2024), <https://doi.org/10.21070/ijins.v26i1.1033>.

Qur'an and Hadith.¹¹ Nonetheless, these studies do not offer a comprehensive analysis of criminal liability for abortion in a comparative framework between Indonesian positive law and Islamic law, highlighting the need for further exploration.

Regulations for abortion in Indonesian positive law are contained in several legal frameworks, including the Criminal Code, the Health Law, and the draft revision of the Criminal Code (Law No. 1 of 2023). These provisions establish sanctions for abortionists while carefully outlining exceptions under certain conditions, such as protecting the life of the mother or dealing with pregnancies resulting from rape.¹² Islamic law adopts diverse perspectives based on the various schools of *fiqh*, which generally categorize abortion as a grave offense unless justified by an emergency.¹³ These differences highlight the complexity of legal implementation in Indonesia, a Muslim-majority country that is governed simultaneously by the country's positive legal framework.

This research focuses on how the dimensions of criminal liability for *abortus provocatus criminalis* are regulated in Indonesian positive law and Islamic law. This research aims to examine and analyze the legal arrangements regarding criminal abortion in both legal systems,

¹¹ Andini Naulina Rahajeng, "Abortion in Islamic Law and Its Intersection with Human Rights," *Journal of Islamic Law Studies* 3, no. 2 (2020): Article 1, <https://scholarhub.ui.ac.id/jils/vol3/iss2/1>; Firdaus et al., "Abortion Due to Unwanted Pregnancy: Perspective of Islamic Law and Positive Law."

¹² Vivi Ariyanti and Supani, "Examining Muslims' Aspirations in Drafting the New Criminal Code: Analyzing Criminal Law Policy in Indonesia from a Maslaha Perspective," *Al-Manahij: Jurnal Kajian Hukum Islam* 18, no. 1 (2024): 37–58, <https://doi.org/10.24090/mnh.v18i1.8280>.

¹³ Thomas Eich, "Maliki Perspectives on Abortion," in *Abortion: Global Positions and Practices, Religious and Legal Perspectives*, ed. Alireza Bagheri (Cham: Springer International Publishing, 2021), 137–45, https://doi.org/10.1007/978-3-030-63023-2_11; Firdaus et al., "Abortion Due to Unwanted Pregnancy: Perspective of Islamic Law and Positive Law"; Rahajeng, "Abortion in Islamic Law and Its Intersection with Human Rights."

as well as explore the synchronization or contradictions between them. This approach is important to explain how Indonesians can understand and implement both legal frameworks in their daily lives, especially in light of the citizen's obligation to abide by national law as well as the religious requirement to practice Islamic law.

This study seeks to answer the following question: How do Indonesian positive law and Islamic law respectively regulate and impose criminal liability for illegal abortion, and to what extent can these frameworks be harmonized in practice? The findings show that Indonesian positive law and Islamic law both consider illegal abortion to be a grave offense requiring severe punishment. These legal frameworks differ in terms of their emphasis and underlying principles. Indonesian law prioritizes formal regulations and the protection of the right to life, while Islamic law places more emphasis on deeper moral and spiritual perspectives. Through a critical examination of these dimensions, this study aims to enhance the discourse in the criminal law literature and propose a more comprehensive approach to addressing abortion-related crimes in Indonesia.

B. Method

This study uses normative legal research methods with a comparative approach to examine the criminal offense of illegal abortion in the perspective of Indonesian positive law and Islamic law.¹⁴ This method focuses on analyzing the legal rules, doctrines, and principles that apply in the two legal systems,¹⁵ with the aim of

¹⁴ Hiba Al Abiad and Ayman Masadeh, "Law Comparison as a Research Method in Legal Studies, and Its Importance in Promoting Uniformity in Legal Systems," in *BUID Doctoral Research Conference 2023: Multidisciplinary Studies*, ed. Khalid Al Marri et al., 1st ed. (Cham, Switzerland: Springer Cham, 2024), 446–54, https://doi.org/10.1007/978-3-031-56121-4_42.

¹⁵ Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Cet. 8 (Jakarta: Kencana Prenada Media Group, 2013), 172.

identifying similarities, differences, and normative basis for the regulation and application of sanctions against illegal abortion. The analysis of Islamic law prioritizes the four main Sunni schools of thought, particularly those most influential in Indonesia. The comparative analysis is guided by a combination of textual interpretation and the *maqasid sharia* framework, to ensure alignment with the broader ethical and legal goals of both systems.¹⁶

Data were collected through a literature study that included books, scientific journal articles, laws, jurisprudence, fatwas, as well as classical and contemporary Islamic legal documents, where primary sources such as the Criminal Code, Law No. 1 of 2023, Law No. 36 of 2009 as updated by Law No. 17 of 2023 on Health, and MUI fatwas were the main references. Classical sources are interpreted based on traditional *fiqh* methodology, while contemporary interpretations are assessed in terms of their relevance to the current legal and social context in Indonesia. The analysis is done descriptively and comparatively to compare the normative substance, philosophical foundation, and legal implementation in the two systems.¹⁷

C. Results and Discussion

1. Abortion in Medical Dimension

Abortion in medical terms refers to miscarriage or spontaneous abortion. Abortion according to WHO is the termination of pregnancy before the fetus can live outside the mother's womb.¹⁸ The term abortion comes from the Latin *abortus*, which means untimely

¹⁶ Nasruddin Yusuf et al., "Examining The Basis of Maqashid Syariah in Renewal of Islamic Law in Indonesia," *PETITA: Jurnal Kajian Ilmu Hukum Dan Syariah* 9, no. 1 (2024): 357–75, <https://doi.org/10.22373/petita.v9i1.258>.

¹⁷ Al Abiad and Masadeh, "Law Comparison as a Research Method in Legal Studies, and Its Importance in Promoting Uniformity in Legal Systems."

¹⁸ World Health Organization, *Clinical Practice Handbook for Quality Abortion Care* (Geneva: World Health Organization, 2023).

birth.¹⁹ Similarly, we recognize the term premature birth or *miskraam* in Dutch, which means abortion.²⁰ Abortion can be natural and unintentional, or it can be intentional through the use of drugs and certain medical procedures.²¹ Abortion based on medical indications or therapeutic abortion can be performed if the pregnancy poses a risk to the life of the pregnant woman, both in terms of physical and mental health, if there is a risk to the physical integrity of the baby to be born or eugenics considerations.²²

Musa Perdanakusuma in Pribadi categorizes abortion into two types, known abortus, namely *spontaneous abortus* and *abortus provocatus*. *Abortus spontaneousus* is abortion that occurs naturally, not due to human intervention.²³ Several types of *spontaneous abortus* have been identified with known causes.²⁴ Many women experience miscarriages due to

¹⁹ Agustina Ramón Michel, Sonia Ariza Navarrete, and Susana Chávez, “Abortion as an Essential Health Service in Latin America During the COVID-19 Pandemic,” *Frontiers in Global Women’s Health* 3 (2022): 898754, <https://doi.org/10.3389/fgwh.2022.898754>.

²⁰ Lianne Holten, Eva de Goeij, and Gunilla Kleiverda, “Permeability of Abortion Care in the Netherlands: A Qualitative Analysis of Women’s Experiences, Health Professional Perspectives, and the Internet Resource of Women on Web,” *Sexual and Reproductive Health Matters* 29, no. 1 (2021): 162–79, <https://doi.org/10.1080/26410397.2021.1917042>.

²¹ Melanie Noel Maia and Liana Wernersbach Pinto, “The Role of Primary Health Care in the Access to Legal Abortion: International Experiences,” *Revista Brasileira de Saúde Materno Infantil* 24 (2024): e20230286, <https://doi.org/10.1590/1806-9304202400000286-en>.

²² Ester di Giacomo et al., “Therapeutic Termination of Pregnancy and Women’s Mental Health: Determinants and Consequences,” *World Journal of Psychiatry* 11, no. 11 (2021): 937–53, <https://doi.org/10.5498/wjp.v11.i11.937>.

²³ Slamet Pribadi, “Tanggunganjawab Pidana Dokter Dalam Melakukan Perbuatan Aborsi Menurut Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan,” *Syntax Literate: Jurnal Ilmiah Indonesia* 7, no. 6 (2022): 8770–81, <https://doi.org/10.36418/syntax-literate.v7i6.8228>.

²⁴ Hanxiang Sun et al., “Impact of Spontaneous Abortion History and Induced Abortion History on Perinatal Outcomes of Singleton Pregnancies,”

various diseases they suffer from, such as syphilis, malaria, or infections accompanied by high fever. These diseases can cause the embryo (fetus-to-be) in the mother's womb to not survive and continue to grow and develop as it should.²⁵ The embryo comes out on its own without causing pain to the pregnant mother. In Javanese society, this kind of miscarriage is often referred to as “*keluron*” which can only occur at a very young gestational age,²⁶ so that what comes out of the womb is usually only a blood clot and has not yet formed into a fetus. Abortion is divided into several parts. Clinically, the medical world recognizes several terms related to abortion as follows:

Table 1. Clinical Classifications of Abortion Terms

Term	Description
<i>Abortus imminens</i> (threatening miscarriage)	Patients are generally treated to save their pregnancy, although it is not always successful. ²⁷
<i>Abortus insipiens</i> (inevitable miscarriage)	Miscarriage that has already occurred or is in the process of miscarriage that can no longer be prevented.
<i>Abortus inkompletus</i> (incomplete miscarriage)	Part of the fruit of the pregnancy has been born, but part has not, usually the placenta remains in the uterus. ²⁸

BMC Public Health 23, no. 1 (2023): 2360, <https://doi.org/10.1186/s12889-023-17264-5>.

²⁵ Elena B. Kostova, Jelmer R. Prins, and Madelon van Wely, “Role of Infections in Miscarriage,” *Fertility and Sterility* 120, no. 5 (2023): 948–50, <https://doi.org/10.1016/j.fertnstert.2023.08.719>.

²⁶ Pribadi, “Tanggungjawab Pidana Dokter Dalam Melakukan Perbuatan Aborsi Menurut Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan.”

²⁷ Küçükyurt Ayça Kubat et al., “Correlation of Abortus Imminence Cases in the First Trimester with Biochemical Markers,” *Open Journal of Obstetrics and Gynecology* 13, no. 02 (2023): 207–13, <https://doi.org/10.4236/ojog.2023.132022>.

²⁸ Rista Retrina Haidi and Juariah, “Habitualis Abortion : A Case Report Of Pregnancy Care,” *Jurnal Kesehatan Silwangi* 3, no. 3 (2023): 728–35, <https://doi.org/10.34011/jks.v3i3.1407>.

<i>Abortus kompletus</i> (complete miscarriage)	When all the fruits of the pregnancy have been born entirely. ²⁹
<i>Abortus missed</i> (missed miscarriage)	Condition where the fetus has died in the womb before the 22nd week and remains there for two months or more. ³⁰
<i>Abortus habitualis</i> (recurrent miscarriage)	Miscarriage that has occurred repeatedly, specifically three times in a row. ³¹

Deliberate abortion occurs due to human actions that attempt to terminate an unwanted pregnancy, including:

- a) *Abortus provocatus medicinalis/therapeuticus*, which is an abortion performed based on medical reasons/considerations. Examples are abortions due to indications of medical emergencies detected early in pregnancy, either threatening the life of the mother and/or fetus, involving severe genetic diseases and/or congenital defects, or which cannot be repaired so that it makes it difficult for the baby to survive outside the womb.³²
- b) *Abortus provocatus criminalis*, which is the deliberate termination of pregnancy (abortion) carried out in violation of various applicable legal provisions. For example, abortion due to pregnancy due to rape, pregnancy due to sexual relations outside

²⁹ Rizki Aji Rahmawan Abdullah, "Ethics and Legal Issues in the Abortion Case," *Semarang State University Undergraduate Law and Society Review* 1, no. 2 (2021): 175–90, <https://doi.org/10.15294/lshr.v1i2.50547>.

³⁰ Wei-Zhen Jiang, Xi-Lin Yang, and Jian-Ru Luo, "Risk Factors for Missed Abortion: Retrospective Analysis of a Single Institution's Experience," *Reproductive Biology and Endocrinology* 20, no. 1 (2022): 115, <https://doi.org/10.1186/s12958-022-00987-2>.

³¹ Haidi and Juariah, "Habitualis Abortion : A Case Report Of Pregnancy Care."

³² di Giacomo et al., "Therapeutic Termination of Pregnancy and Women's Mental Health: Determinants and Consequences."

of marriage, socio-economic reasons, already have many children, can not afford to add more children, and so forth.³³

Induced abortion is essentially a deliberate abortion. That is, an action or several actions are taken to induce labor prematurely. Traditionally, the baby in a pregnant woman's womb will be born after 9 months and 10 days of pregnancy. In some cases, the baby may be born when the pregnancy is only 7 or 8 months old. Abortion is usually performed before the 7th month of pregnancy.³⁴ According to the medical definition proposed by Lilien Eka Chandra in Pribadi, abortion either due to miscarriage or induced abortion means the termination of pregnancy that occurs between the time the fertilized egg (*blastocyst*) implants in the uterus until the 28th week of pregnancy. The 28-week limit is calculated from the last menstrual period because before 28 weeks, the fetus cannot survive outside the uterus.³⁵

Abortion poses significant risks to the health and safety of pregnant women, potentially leading to death.³⁶ Continued bleeding

³³ Winoto, "Legal Review of Medical Emergency That Happened After a Failed Abortion Attempt"; Abhary et al., "The Effects of Unsafe Abortion on the Health System from a Socio-Economic Perspective: A Narrative Review"; Ida Bagus Wirya Dharma, "Legalitas Abortus Provocatus Sebagai Akibat Tindakan Pemerkosaan," *KERTHA WITAKSANA* 16, no. 1 (2022): 45–50, <https://doi.org/10.22225/kw.16.1.2022.45-50>.

³⁴ Endah Triwulandari and Edy Tarsono, "Socio-Juridic Analysis of Abortion According to Article 75 of Law Number 36/2009 Concerning on Health and Law Number 35/2014 Concerning on Child Protection," *IUS POSITUM (Journal of Law Theory and Law Enforcement)* 1, no. 2 (2022): 43–59.

³⁵ Pribadi, "Tanggunganjawab Pidana Dokter Dalam Melakukan Perbuatan Aborsi Menurut Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan."

³⁶ Mahmoud F. Fathalla, "Safe Abortion: The Public Health Rationale," *Best Practice & Research Clinical Obstetrics & Gynaecology* 63 (2020): 2–12, <https://doi.org/10.1016/j.bpobgyn.2019.03.010>; Abhary et al., "The Effects of Unsafe Abortion on the Health System from a Socio-Economic Perspective: A Narrative Review."

and infection after abortion are the leading causes of maternal death in cases of unsafe abortion. In addition, the psychological and mental state of the individual is affected by a haunting sense of guilt. Feelings of guilt and fear are signs of psychological distress.³⁷ In addition, an individual's psychological and mental state is affected by haunting guilt. Feelings of guilt and fear are signs of psychological distress.³⁸

Some of the consequences that can arise from abortion, according to Harris & Grossman are as follows: 1) Bleeding which can cause shock and neurological disorders in the future; the risk of continuous bleeding poses a high risk of death; 2) Infection of the reproductive organs due to non-sterile procedures. This can later lead to the risk of infertility; 3) Significant risk of uterine rupture, as well as thinning of the uterine wall due to curettage. Consequently, this may also lead to infertility as the ruptured uterus has to be completely removed; and 4) The occurrence of traumatic genital fistula, which is the emergence of a tract that normally should not exist, specifically a tract between the genital area and the urinary or digestive tracts.³⁹

2. Illegal Abortion in Positive Law Review

Indonesia views illegal abortion the same as most other countries, which is a form of violation of the right to human life that is recognized and protected, both based on moral values, ethics, and legal norms.⁴⁰ The regulation of illegal abortion in Indonesia has a

³⁷ Rachel E. Bridwell et al., "Post-Abortion Complications: A Narrative Review for Emergency Clinicians," *Western Journal of Emergency Medicine* 23, no. 6 (2022): 919–925, <https://doi.org/10.5811/westjem.2022.8.57929>.

³⁸ Zara Abrams, "The Facts about Abortion and Mental Health: Scientific Research from around the World Shows Having an Abortion Is Not Linked to Mental Health Issues but Restricting Access Is," *Monitor on Psychology* 53, no. 6 (2022): 40.

³⁹ Lisa H. Harris and Daniel Grossman, "Complications of Unsafe and Self-Managed Abortion," *New England Journal of Medicine* 382, no. 11 (2020): 1029–40, <https://doi.org/10.1056/nejmra1908412>.

⁴⁰ Shakhathreh et al., "Medico-Legal Aspects of Abortion: Updates of the Literature"; Jozkowski et al., "Abortion Stigma: Attitudes Toward Abortion

clear constitutional basis in the 1945 Constitution, especially in Article 28A and Article 28B paragraph (1). Article 28A states that every person has the right to life and to defend his or her life and livelihood, while Article 28B paragraph (1) affirms that every child has the right to survival, growth, and development.⁴¹ These two articles provide protection for the right to life, including for the unborn child, as part of human rights that cannot be reduced under any circumstances or non-derogable rights.⁴²

The Criminal Code (KUHP) regulates abortion as a crime against human life, with sanctions varying depending on the manner in which the abortion is performed and the involvement of other parties in the practice.⁴³ Article 346 of the KUHP prescribes a sentence of up to four years' imprisonment for women who knowingly terminate their own pregnancy or seek the assistance of another party. Meanwhile, Article 347 of the KUHP stipulates a maximum sentence of twelve years for those who terminate a woman's pregnancy without her consent, or up to fifteen years if the act causes death. Article 348 of the KUHP increases the sanction to seven years imprisonment for perpetrators who perform abortion with the consent of the woman if the act results in death. Article 349

Responsibility, Illegal Abortion, and Perceived Punishments of 'Illegal Abortion.'"

⁴¹ Budiyanto Budiyanto and Siti Ngainnur Rohmah, "Analisis Tindakan Aborsi Terhadap Undang-Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia," *SALAM: Jurnal Sosial Dan Budaya Syar-I* 7, no. 4 (2020): 801–12, <https://doi.org/10.15408/sjsbs.v7i9.16593>.

⁴² Jonaedi Efendi and Fifit Fitri Lutfianingsih, *Non Derogable Rights Dalam Peraturan Perundang-Undangan Di Indonesia*, 1st ed. (Surabaya: CV. Jakad Media Publishing, 2020).

⁴³ Aeniwati and Kusriyah, "Criminal Responsibility towards Criminals of Abortion in Indonesia"; Fikri Nasrullah, Materan, and Muhammad Idzhar, "Tindakan Aborsi Dalam Tinjauan Fiqih Jinayah Dan Kuhp," *QONUN: Jurnal Hukum Islam Dan Perundang-Undangan* 6, no. 2 (2022): 116–28, <https://doi.org/10.21093/qj.v6i2.5366>.

of the KUHP provides additional sanctions for medical personnel, such as doctors and midwives, who are involved in illegal abortions, including revocation of their right to practice their profession.⁴⁴

Law No. 1 Year 2023 emphasizes the criminal regulation of abortion, especially those involving medical personnel. Article 463 of the law stipulates a four-year sentence for women who have an abortion, except if the abortion is carried out due to being a victim of sexual violence with a gestational age of less than 14 weeks, or in a medical emergency. Article 464 stipulates that any person who performs an abortion on a woman can be sentenced to a maximum of 5 years in prison, if it is with the consent of the woman, but if it is without the consent of the woman, it can be sentenced to a maximum of 12 years in prison. Paragraph (2) states that if the abortion is performed with the consent of the woman, but causes the death of the woman, it can be sentenced to a maximum of 8 years in prison, and paragraph (3) states that if the abortion is performed without the consent of the woman and causes the death of the woman, it can be sentenced to a maximum of 15 years in prison. Furthermore, Article 465 imposes similar additional penalties for medical personnel who assist in the performance of abortions as stipulated in Articles 346, 347, and 348 of the KUHP, with the possibility of revocation of the right to practice in the location of the crime.⁴⁵

Other provisions in Law No. 17 of 2023, which replaced Law No. 36 of 2009 on Health (Health Law), provide a more specific legal basis for abortion law in Indonesia. According to the Health Law, abortion is prohibited except under certain conditions, such as medical emergencies that threaten the life of the mother or fetus,

⁴⁴ R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Bogor: Politeia, 1988).

⁴⁵ Republik Indonesia, “Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana,” 2023.

and pregnancy resulting from the crime of rape. Article 75 paragraph (1) explicitly states that everyone is prohibited from having an abortion, but under certain conditions, Article 75 paragraph (2) provides exceptions that allow the practice of abortion to be performed legally, namely in medical emergencies that threaten the life of the mother and in cases of pregnancy resulting from rape that causes severe psychological trauma to the victim. Article 194 of the Health Law states that any person who performs an abortion outside the provisions permitted in Article 75 paragraph (2) may be subject to criminal sanctions in the form of imprisonment for a maximum of 10 years and/or a fine of up to 1 billion rupiah. This sanction aims to prevent the practice of illegal abortions, which pose a high risk to women's health and are often performed outside of safe medical standards.⁴⁶

The requirements and procedures for abortion are further regulated in Government Regulation No. 61 of 2014 on Reproductive Health, which provides a more detailed explanation of the permissibility of abortion. Article 31 allows abortion based on indications of medical emergencies and pregnancy resulting from rape, which can only be performed within a maximum gestational age of 40 days from conception. Article 34 emphasizes that violations of these provisions are subject to criminal sanctions in accordance with applicable law.⁴⁷ This regulation provides clarity regarding the conditions under which abortion is permitted, ensuring consistency with the broader legal structure.

⁴⁶ Triwulandari and Tarsono, "Socio-Juridic Analysis of Abortion According to Article 75 of Law Number 36/2009 Concerning on Health and Law Number 35/2014 Concerning on Child Protection"; Dharma, "Legalitas Abortus Provocatus Sebagai Akibat Tindakan Pemerkosaan."

⁴⁷ Dharma, "Legalitas Abortus Provocatus Sebagai Akibat Tindakan Pemerkosaan."

Minister of Health Regulation (Permenkes) No. 3 of 2016 further clarifies the operational procedures to be followed for legal abortion. The regulation stipulates that before performing an abortion, victims of pregnancy due to rape must go through a counseling process by an authorized health professional. In addition, the consent of the pregnant woman is also required, except in medical emergencies that threaten her life, where the decision can be made by medical personnel based on clear medical indications.⁴⁸

The legal framework governing abortion in Indonesia strikes a balance between prohibition and limited authorization of abortion. Permitted abortion is carefully regulated to address both humanitarian and medical concerns.⁴⁹ For example, allowing abortion in cases of medical emergency helps preserve maternal health and prevent fatal loss of life, while allowing abortion for rape victims demonstrates sensitivity to the psychological and social trauma associated with forced pregnancy.⁵⁰ These provisions are in line with international human rights standards,⁵¹ where abortion outside the prescribed exceptions is strictly prohibited, with severe penalties for violators. This approach underscores the state's duty to protect life, including the life of the fetus, while holding accountable any party involved in the practice of illegal abortion.

⁴⁸ Republik Indonesia, "Peraturan Menteri Kesehatan Republik Indonesia Nomor 3 Tahun 2016," 2016.

⁴⁹ Budiyo and Rohmah, "Analisis Tindakan Aborsi Terhadap Undang-Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia."

⁵⁰ Triwulandari and Tarsono, "Socio-Juridic Analysis of Abortion According to Article 75 of Law Number 36/2009 Concerning on Health and Law Number 35/2014 Concerning on Child Protection."

⁵¹ World Health Organization, "Web Annex A. Key International Human Rights Standards on Abortion" (Geneva: World Health Organization, 2022), <https://iris.who.int/bitstream/handle/10665/349317/9789240039506-eng.pdf>.

3. Illegal Abortion in the Light of Islamic Law

Abortion is something that is strictly prohibited by Allah SWT, because it is indirectly included in the category of taking human life, and this is classified as a major sin, as explained by Imam Az-Zahabi in his book *Al-Kaba'ir*. In fact, this is included in the category of the second major sin.⁵² Abortion is also known as *tharbu* (throwing away), *ilqaa* (throwing), and *isqath* (aborting). It is not surprising that the practice of abortion is viewed negatively both from the perspective of Islamic law and criminal law, especially if there is no valid reason or justification.⁵³ Ibrahim An-Nakhai explains abortion as the removal of a fetus from the womb of a pregnant woman, whether fully formed or not, while Abdul Qadir 'Audah states that abortion is the termination of pregnancy and deprivation of the right to life of the fetus, or an act that separates the fetus from the mother's womb.⁵⁴

While the Qur'an does not explicitly address abortion, the principle of protection of life has been affirmed in various verses. The Qur'an prohibits the killing of children, both born and in the womb, especially for fear of poverty. Qur'an Surah Al-Isra' verse 31 states that Allah SWT forbids killing children for fear of poverty and guarantees sustenance for every human being, including children conceived by their mothers. Then in verse 33 of Surah Al-Isra' also emphasizes that a person's life should not be eliminated without a shar'i justified reason. This verse emphasizes that killing a soul that

⁵² Muh. Yunan Putra, *Aborsi Hasil Pemerkosaan (Analisis Metode Istinbath Hukum Ulama Salaf Dan Khalaf)*, ed. Abdul, 1st Print (Indramayu: Penerbit Adab, 2021).

⁵³ Hafidz Muftisany, *Fikih Muslimah Praktis: Hukum Aborsi Hingga Hukum Waxing* (Karanganyar: Intera, 2021); Rahajeng, "Abortion in Islamic Law and Its Intersection with Human Rights."

⁵⁴ Nasrullah, Materan, and Idzhar, "Tindakan Aborsi Dalam Tinjauan Fiqih Jinayah Dan Kuhp."

is forbidden by Allah SWT without a valid reason according to Islam is an injustice.⁵⁵

This provision in Surah Al-Isra' verse 33 is not absolute, but has exceptions. Islam does not absolutely prohibit abortion, but rather provides leeway in certain conditions that meet the conditions set by sharia. One important aspect of this discussion is the concept of the spirit in the fetus. Modern medical science has proven that the fetus in the womb has a spirit like a human being. The act of abortion must be considered carefully and can only be done in an emergency that has been determined in Islamic law.⁵⁶

The provisions regarding abortion in Islamic law are not only explained in the Qur'an, but also in the Prophet's hadith. One of the traditions narrated by Imam Muslim that discusses the case of killing a fetus, where it is said that two women from the tribe of Hudzail were involved in an incident. One of them attacked the other causing a miscarriage.⁵⁷ In response to this, the Prophet Muhammad prescribed a punishment in the form of paying *ghurrah*, which is a fine in the form of freeing a male or female slave, with priority on white slaves.⁵⁸ This hadith shows that the Prophet prohibited actions that cause the death of the fetus, even those that are done

⁵⁵ Afa Afiati, Olivia Sulistya Maspufa, and Nesya Ekaputri, "Abortion in the Perspective of Ahkam Verses/Hadith and Health Law: Comparative Study," *Shautuna: Jurnal Ilmiah Mahasiswa Perbandingan Mazhab* 5, no. 1 (2024): 89–112, <https://doi.org/10.24252/shautuna.v5i1.39284>.

⁵⁶ Gunawan and Suhaimi, *Hukum Aborsi Tinjauan Hukum Positif Dan Hukum Islam*, Muhammad Faisal Hamdani and Ishaq, "Abortion in Islam: A Fiqh Examination of Medical and Social Indications," *Journal of Ecobumanism* 3, no. 3 (2024): 1111–24, <https://doi.org/10.62754/joe.v3i3.3446>.

⁵⁷ Afiati, Maspufa, and Ekaputri, "Abortion in the Perspective of Ahkam Verses/Hadith and Health Law: Comparative Study."

⁵⁸ Moh. Faqih, "Studi Komparatif Tindak Pidana Aborsi Dalam Perspektif Hukum Positif Dan Hukum Pidana Islam (Imam Madzhab)," *Rechtenstudent* 1, no. 2 (2021): 204–13, <https://doi.org/10.35719/rch.v1i2.28>.

unintentionally. This prohibition is emphasized through the obligation to pay a fine for anyone who aborts a fetus, whether the fetus is in his own womb or in the womb of another person. The *ghurrah* penalty is proof that Islam considers the fetus as part of the life that must be protected, so the act of abortion cannot be done carelessly without legal consequences.

Abortion has been a topic of discussion among scholars, although this practice has been going on since the time of the Prophet Muhammad, as mentioned in the hadith narrated by Muslim. Along with the times and changes in the practice of abortion, scholars also have diverse views on this issue. Some scholars allow abortion under certain conditions, while others prohibit it for various legal and ethical considerations. The debate among Islamic jurists on abortion generally centers on the timing of the spirit being breathed into the fetus, which is before or after ⁵⁹. The Qur'an and hadith provide descriptions of this process. Allah says in the Qur'an Surah As-Sajdah verse 9, that He has perfected the creation of man and blown the spirit into him, and gave him hearing, sight, and a heart. Although the verse does not specify when the spirit is blown, scholars agree that this process occurs when the fetus is still in the mother's womb ⁶⁰

The majority of scholars stipulate that the blowing of the spirit occurs after 120 days from conception, which is from the meeting of male sperm with female ovum ⁶¹. This agreement refers to a saheeh hadith narrated by Abdullah bin Mas'ud, in which the

⁵⁹ Hamdani and Ishaq, "Abortion in Islam: A Fiqh Examination of Medical and Social Indications."

⁶⁰ Juwaini Juwaini, "The Process of Human Creation in The Qur'an (An Islamic Philosophy Study)," *Jurnal Ilmiah Al-Mu'ashirah* 21, no. 1 (2024): 16–31, <https://doi.org/10.22373/jim.v21i1.20912>.

⁶¹ Abdulhanan Abed et al., "Rulings on an Intended Abortion in Accordance with Islamic Law," *International Journal of Social Science Research and Review* 6, no. 7 (2023): 253–65, <https://doi.org/10.47814/ijssrr.v6i7.1372>.

Prophet Muhammad said: “*One of you is created in his mother’s womb for forty days, then becomes ‘alaqah for another forty days, then turns into mudghah for another forty days. Then an angel is sent to breathe into him, and he is commanded to record four things: his sustenance, his age, his deeds, and whether he is a happy or miserable person.*” It can be understood from this hadith that in Islam the status of the fetus’ life is very much taken into account, especially after the spirit is blown.⁶²

The above hadith is the basis for the scholars in determining the time limit allowed for abortion. According to the opinion quoted by Abbas Syauman from Hasyiyah Ibn Abidin, the scholars agree that abortion after the soul is blown into the fetus in the womb is forbidden. Even if abortion is done intentionally, this action is categorized as murder that can be subject to punishment, because it is considered an act that eliminates human life that has lived. This act in the perspective of the Qur’an is *haram* and can be subject to *qisas* sanctions.⁶³ The agreement of the scholars on the prohibition of abortion is mostly based on normative sources such as the Qur’an and hadith, without considering the development of medical technology. In the past, the limitations of science and technology made the analysis of pregnancy conditions rely solely on religious arguments. However, with current medical advances, many cases show that the presence of a fetus in the womb can endanger the life of the mother. Medical considerations become an important factor in determining the permissibility of abortion in such situations.⁶⁴

⁶² Mukhammad Alfani and Nur Annisa Istifarin, “Allah Is the Creator: An Analysis of Hadiths on Human Creation and Destiny,” *Medina-Te: Jurnal Studi Islam* 19, no. 2 (2023): 174–85, <https://doi.org/10.19109/medinate.v19i2.21398>.

⁶³ Gunawan and Suhaimi, *Hukum Aborsi Tinjauan Hukum Positif Dan Hukum Islam*.

⁶⁴ Zulfa Hudiyani, “Diskursus Aborsi Dalam Perspektif Fikih Klasik Dan Kontemporer,” *Al-Ahwal Al-Syakhsyyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 2, no. 1 (2021): 43–61, <https://doi.org/10.15575/as.v2i1.12172>.

The scholars of the madhhab have different views on abortion. The Hanafi school allows abortion before 120 days of pregnancy, although some scholars in this school consider it makrooh if there is no good reason. This school also considers that abortion can be done if there is a valid reason according to sharia. The Shafi'i school of thought allows abortion as long as the fetus is still a clot of blood and has not received the spirit. Within certain time limits, this school allows abortion if the gestational age has not reached 80 or 120 days, although it still considers it makruh. The Maliki school has a stricter view, prohibiting abortion under all circumstances, except when the mother's life is in danger. Meanwhile, the Hanbali school allows abortion as long as the fetus is still a clot of blood, provided that there are reasons that can be justified in sharia.⁶⁵

MUI Fatwa No. 4 of 2005 establishes the law of abortion by considering various aspects, including arguments from the Qur'an and hadith, the views of scholars, medical studies, and humanitarian considerations. This fatwa regulates abortion based on the principle of emergency. The emergency referred to in this fatwa is defined as a condition in which a person can face death or near death if he does not do something that is prohibited, or refers to a condition that causes a person to experience severe difficulties if he does not take certain actions.⁶⁶ The fatwa emphasizes that abortion is prohibited from the time of implantation of the blastocyst in the mother's uterine wall (nidation). However, under certain conditions, abortion may be allowed, either for emergency or urgent reasons. Emergency situations include cases where a pregnant woman is suffering from a serious illness, such as advanced cancer or severe tuberculosis, as

⁶⁵ Eich, "Maliki Perspectives on Abortion."

⁶⁶ 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* 3, no. 1 (2023): 35–40, <https://doi.org/10.29313/jrhki.vi.1939>.

well as pregnancy conditions that endanger the mother's life. Urgent situations that allow abortion include fetuses detected to have severe genetic defects or pregnancies resulting from rape, the validity of which must be determined by the authorities, including the victim's family, doctors, and clerics. In these cases, abortion can only be performed before the fetus reaches 40 days of age. Permitted abortions must also be performed in authorized health facilities designated by the government. The fatwa also emphasizes that abortion due to adultery remains prohibited.⁶⁷

Based on these provisions, abortion in Islamic law is generally viewed negatively and is only permitted in certain circumstances, such as threats to the life of the mother, severe fetal abnormalities, or as a result of rape. The Qur'an and hadith expressly prohibit abortion, with the blowing of the soul into the fetus after 120 days being central to determining its permissibility. The MUI fatwa states that abortion is generally prohibited after implantation, but may be justified under certain conditions if performed within 40 days of conception and in an officially approved medical facility. In the perspective of Islamic criminal law, abortion without a valid reason is considered a serious criminal offense (*abortus provocatus criminalis*) and is subject to severe punishment. If the abortion is performed after the soul has been breathed or around 120 days into the pregnancy, the perpetrator is liable to *qisas*. Prior to this, although still considered haram, the punishment is less severe, in the form of a fine (*ghurrah*), which is usually equivalent to freeing a slave.⁶⁸

The severity of these sanctions reflects how Islam strongly emphasizes the protection of life from the beginning of its existence

⁶⁷ Nasrullah, Materan, and Idzhar, "Tindakan Aborsi Dalam Tinjauan Fiqih Jinayah Dan Kuhp"; Firdaus et al., "Abortion Due to Unwanted Pregnancy: Perspective of Islamic Law and Positive Law."

⁶⁸ Faqih, "Studi Komparatif Tindak Pidana Aborsi Dalam Perspektif Hukum Positif Dan Hukum Pidana Islam (Imam Madzhab)."

in the womb. Likewise, when it comes to the permissibility of abortion, Islamic law is very strict and only in certain emergencies does abortion become permissible, such as the existence of a fetus in the womb in conditions that could pose a serious threat to the life of the mother or baby. A difficult decision must be made to save one of the two in this situation. The rules of Islamic jurisprudence state that if faced with two emergencies, then what must be prioritized is to avoid greater danger by choosing a smaller risk.⁶⁹

4. Comparative Synthesis between Positive and Islamic Law

Indonesian positive law bases the prohibition of illegal abortion on the right to life as outlined in the 1945 Constitution and further elaborated in the Criminal Code, Health Law, and implementing regulations, which provide sanctions ranging from 4-15 years in prison, fines of up to 1 billion rupiah, and revocation of professional licenses for medical personnel. The approach is textual and formal in that any act of abortion without emergency medical reasons or sexual violence is clearly and measurably penalized.⁷⁰

Islamic law affirms the prohibition of abortion within the framework of *maqasid sharia*, namely protecting life (*hifdz an-nafs*) as one of the main objectives of sharia, and based on verses of the Qur'an, hadith, and MUI fatwa, which applies two kinds of strict sanctions, namely *ghurrah* where the light compensation is the

⁶⁹ A. Djazuli, *Kaidab-Kaidab Fikih: Kaidab-Kaidab Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis*, Cet. 9 (Jakarta: Kencana Prenada Media Group, 2021).

⁷⁰ Aeniwati and Kusriyah, "Criminal Responsibility towards Criminals of Abortion in Indonesia"; Triwulandari and Tarsono, "Socio-Juridic Analysis of Abortion According to Article 75 of Law Number 36/2009 Concerning on Health and Law Number 35/2014 Concerning on Child Protection"; Dharma, "Legalitas Abortus Provocatus Sebagai Akibat Tindakan Pemerkosaan"; Budiyanto and Rohmah, "Analisis Tindakan Aborsi Terhadap Undang-Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia"; Nasrullah, Materan, and Idzhar, "Tindakan Aborsi Dalam Tinjauan Fiqih Jinayah Dan Kuhp."

freeing of slaves or equivalent value if before the soul is blown, and *qisas/diyat* if after the soul is blown, without monetary penalties like the positive system, but rather an emphasis on restoring the right to life and restorative justice. The Islamic legal approach combines the postulates and *maqasid sharia*, with exceptions only in cases of sharia emergency.⁷¹

Positive law does not differentiate sanctions based on the age of the fetus in cases of illegal abortion, any time before viability is treated the same, with varying degrees of punishment depending on the perpetrator, i.e. the woman, third parties, and medical personnel. Islamic law explicitly emphasizes two main categories based on the blowing of the soul after 120 days. Before the soul is blown, offenses that, although haram, are still subject to *ghurrah*. After the soul is blown, abortion is equivalent to murder (*qisas/diyat*).

Although both systems agree on prohibiting illegal abortion, the fundamental difference is formal textual, with textual (*dalil*) and *maqasid sharia*, or penal and fine-based sanctions, with *diyat/qisas* sanctions. This reflects the diversity of legal objectives. In an effort to harmonize the two legal systems, Indonesia could consider the *maqasid sharia* framework to enrich the human rights and medical ethics approaches, while maintaining the certainty of positive law.

⁷¹ Muftisany, *Fikih Muslimah Praktis: Hukum Aborsi Hingga Hukum Waxing*; Putra, *Aborsi Hasil Pemerkosaan (Analisis Metode Istibath Hukum Ulama Salaf Dan Khalaf)*; Nasrullah, Materan, and Idzhar, "Tindakan Aborsi Dalam Tinjauan Fiqh Jinayah Dan Kuhp"; Afati, Maspuha, and Ekaputri, "Abortion in the Perspective of Ahkam Verses/Hadith and Health Law: Comparative Study"; Gunawan and Suhaimi, *Hukum Aborsi Tinjauan Hukum Positif Dan Hukum Islam*; Hamdani and Ishaq, "Abortion in Islam: A Fiqh Examination of Medical and Social Indications"; Faqih, "Studi Komparatif Tindak Pidana Aborsi Dalam Perspektif Hukum Positif Dan Hukum Pidana Islam (Imam Madzhab)"; Abed et al., "Rulings on an Intended Abortion in Accordance with Islamic Law"; Hudiyani, "Diskursus Aborsi Dalam Perspektif Fikih Klasik Dan Kontemporer"; Eich, "Maliki Perspectives on Abortion"; Octaviani, Hayatudin, and Hidayat, "Analisis Hukum Aborsi Menurut Fatwa MUI Dan PP Nomor 61 Tahun 2014."

Table 2. Comparison of Illegal Abortion Sanctions

Aspects	Positive Law	Islamic Law
Sanctions before viability (without exceptions)	4 years imprisonment (female perpetrator), 5 years imprisonment (third party with consent)	<i>Ghurrah</i> : the freeing of a slave (equivalent value) before the soul is breathed (~120 days)
Sanctions after viability (maternal/child death occurs)	8-15 years in prison (depending on perpetrator and consent)	<i>Qisas/Diyat</i> : murder equivalent, perpetrators may be subject to retribution of life or high fines
Monetary fines	Up to 1 billion rupiah	—
Sanctions for medical workers	Additional imprisonment, fines, and revocation of license to practice	Medical personnel as third party subject to <i>diyat/qisas</i> just like other perpetrators, plus potential professional sanctions in MUI fatwa
Exclusion conditions	Medical emergency and pregnancy resulting from rape (<14 weeks/40 days)	Sharia emergency (threat to mother's life) & severe genetic defects before 40 days

Table 2 above shows that Indonesian positive law emphasizes certainty and clarity of criminal sanctions and fines as rigid retributive instruments, whereas Islamic law combines textual and *maqasid sharia* approaches by distinguishing sanctions before and after the spirit is breathed. This gives restorative leeway through *ghurrah* before 120 days and *qisas* retribution afterwards, as well as a more flexible emergency principle. Both agree on toughening sanctions for medical personnel, but positively emphasize administrative mechanisms (revocation of license to practice) and monetary fines, while Islam emphasizes moral and professional accountability according to MUI fatwa. The integration of *maqasid sharia* principles and medical and psychosocial consultation

procedures within the positive law framework can enrich policy synergies by taking into account humanitarian aspects, medical ethics and legal certainty.

D. Conclusion

Illegal abortion or the deliberate termination of a pregnancy without a valid medical basis, is considered a serious criminal offense in both Indonesian positive law and Islamic law. Positive law places this prohibition in the Criminal Code, Health Law, and its implementing regulations, with sanctions ranging up to 15 years in prison and a maximum fine of 1 billion rupiah, depending on the perpetrator (woman, third party, and medical personnel) and the consequences of the action. Islamic law categorizes sanctions based on the blowing of the spirit. Before the spirit is blown (<120 days), the sanction of *ghurrah* or compensation equivalent to freeing a slave is imposed. After the spirit is blown (≥ 120 days), the sanction of *qisas/diyat* is imposed because it is considered equivalent to murder. This research contributes to legal scholarship by presenting a comparative framework that combines positive textual-formal approaches and Islamic *maqasid sharia* to provide in-depth insights into the normative basis, differences in sanctions, and emergency principles in both systems. Policy-wise, the findings encourage regulatory harmonization, integration of *maqasid sharia* principles (e.g., psychosocial consultation and tiered medical evaluation) into legal abortion procedures can strengthen the protection of the right to life while maintaining legal certainty. As a follow-up, policymakers should review the threshold of medical urgency and mechanisms for monitoring abortion practices, and prepare national standard guidelines that accommodate both Islamic ethical perspectives and medical standards.

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