

## Sanctions for the Criminal Act of Extramarital Abortion Based on Article 346 of the Indonesian Criminal Code and Islamic Criminal Law

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Received: 16-06-2025

Revised: 29-06-2025

Accepted: 30-06-2025

### Abstract

Abortion is a life-threatening crime and often occurs as a result of promiscuity among adolescents. Abortion is regulated by Article 346 of the Criminal Code. However, there are exceptions in Law Number 36 of 2009 concerning Health, which permits abortion in medical emergencies and pregnancies resulting from rape. The purpose of this study is to explain abortion as a result of promiscuity, economic factors, and socio-cultural factors. In addition, to gain an understanding of the positive legal regulations in Indonesia regarding abortion sanctions as stipulated in Article 346 of the Criminal Code, and to examine the perspective of Islamic law on the practice of abortion and its sanctions. A legal relativism and criminalization approach is used to understand the complexity of the abortion phenomenon. The method used in this study is a normative juridical approach using literature study techniques. The research findings reveal that the practice of abortion among adolescents occurs due to weak social control, promiscuity, economic factors, open access to pornographic content, and minimal supervision of people who encourage pregnancy outside of marriage. From a positive legal perspective, abortion regulations in Indonesia are still inconsistent. The Criminal Code criminalizes abortion without medical reasons, especially in Article 346, while Law Number 36 of 2009 provides exceptions in cases of medical emergencies or rape. From the perspective of Islamic criminal law, abortion is considered forbidden, especially if it is performed after the fourth month of pregnancy, when it is believed that the soul has been blown.

**Keywords: Abortion as a Criminal Offense, Penal Sanctions, Relative Theory of Punishment, KUHP.**



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## INTRODUCTION

Adolescence is a transitional stage from childhood to adulthood, during which individuals experience various emotional and psychological fluctuations. At this stage, limited knowledge and cognitive maturity render adolescents vulnerable to negative social influences, including a tendency to engage in promiscuous behavior that often leads to premarital sexual activity (Rosdiana et al., 2021). Such behavior is commonly observed among youth who are still pursuing their education, and the lack of parental involvement further exacerbates the situation. The ease of access to pornographic content through social media and the internet is another contributing factor to the rise of sexual behavior among adolescents. Consequently, incidences of unwanted pregnancies and abortions continue to occur over time (Arsalna & Susila, 2021). Abortion itself is defined as the termination of pregnancy before the fetus reaches viability (approximately 20 weeks of gestation), whether through medical intervention or illegal means.

The rising phenomenon of abortion among adolescents due to promiscuity represents a deeply concerning social symptom. This phenomenon reflects a shift in societal values and

norms, particularly concerning morality, social control, and the roles of families and educational institutions (Anggraini et al., 2025). Adolescents, who are ideally under the supervision of their parents and educational environments, are instead falling into promiscuity, which leads to unwanted pregnancies. The critical impact of this condition results in serious legal and social consequences. In many cases, individuals who undergo abortion face public stigma, psychological distress, and the possibility of criminal prosecution, as abortion conducted without legal grounds constitutes a criminal offense (Apriliani & Tjempaka, 2025). On the other hand, the reality demonstrates that abortion practices continue to occur for various reasons, including economic pressure, shame, or unpreparedness for parenthood.

The issue of abortion resulting from extramarital pregnancy is important to examine, as it involves various dimensions including ethics, social dynamics, health, and law. The high rate of illegal abortions, particularly among adolescents, reflects a lack of education on reproductive health, weak environmental supervision, and the suboptimal enforcement of existing legal regulations. The urgency of this research lies in the serious consequences it poses, not only for the physical and psychological well-being of women but also for the legal structure within society (Arifin et al., 2025). Therefore, this study is expected to contribute to strengthening legal understanding regarding abortion and serve as a reference in the formulation of more adaptive policies that align with the evolving social dynamics especially those concerning adolescents.

Abortion refers to an act carried out by a woman to terminate her pregnancy (prior to 20 weeks of gestation), not only as a medical measure to save the mother's life, but also intentionally performed through the intervention of others without any medical indication justifying the procedure (*Siwu,dkk. 2021*). Many abortions are carried out under compulsion due to various factors, such as financial problems, health conditions, lack of preparedness, or the desire to protect one's dignity from shame.

Regulations concerning abortion practices within the Indonesian legal system are reflected in several normative instruments, including the Indonesian Criminal Code (KUHP), Law Number 36 of 2009 on Health, and Government Regulation Number 61 of 2014 concerning Reproductive Health (*Susanti, S. 2015*). Within the provisions themselves, there is no article that explicitly permits abortion, even when based on medical indications (*Simanjuntak et al., 2022*). This stands in contrast to the provisions of Law Number 36 of 2009 on Health, which provides exceptions as stipulated in Article 75 paragraph (2) (*Yanti & Susanti, 2024*).

One of the most common types of abortion found is *Abortus Provocatus Criminalis*, which refers to the termination of pregnancy conducted without a lawful basis or in violation of the law. Considering that the majority of Indonesia's population adheres to Islam, religious norms play a significant role in shaping public perspectives and legal formulations concerning abortion. Islam upholds the sanctity of human life as a fundamental value, both during fetal development and after birth as part of social interaction within the community. Therefore, abortion is deemed haram (forbidden) in Islamic law, particularly when performed after the soul has been breathed into the fetus. Islamic teachings assert that abortion at this stage constitutes an act of destroying God's creation and falls under the category of a major sin, as

the fetus is considered a human being with the right to life (Yudha Ardy Tama & Rachmat Ihya, 2023).

Islamic legal scholars (fuqaha) have expressed differing opinions regarding the permissibility of abortion in Islam, which are generally associated with the stages of fetal development. Some fuqaha argue that abortion carried out after the fetus reaches four months of gestation corresponding to the stage when the soul is believed to be breathed into the fetus is strictly prohibited (haram). However, other scholars maintain that abortion performed before the four-month period or prior to the ensoulment may be permitted. Accordingly, the prohibition of abortion in Islam is strict, yet it also takes into account the principle of *maslahah* (public interest) in urgent and exceptional circumstances. Despite the diversity of opinions, the majority of fuqaha conclude that abortion after four months of gestation is forbidden in Islam, except in cases of extreme necessity, such as when the mother's life is at risk (*Susanti, S. 2015*)

Both legal systems the Indonesian Criminal Code (KUHP) and Islamic criminal law indicate that abortion outside of marriage is not only a legal issue but also a moral and social one. Therefore, it is essential to understand the normative values underlying these regulations in order to formulate more effective and responsive policies on abortion, as well as to provide adequate public education, particularly for adolescents, regarding reproductive health and the consequences of abortion.

Several scholarly references are used in this study to compare and contrast with other research findings. One such study is by Mochammad Chaidar Ajie (2023), which examines law enforcement aspects related to abortion from the perspective of criminal law, including the sanctions imposed on perpetrators and those assisting in illegal abortion practices. The similarity between that research and the present article lies in their discussion of abortion sanctions within the framework of criminal law. However, the key difference is found in the methodology employed. Ajie's study adopts an empirical juridical approach to analyze the issue, using a combination of literature review, field observation, and interviews with communities within the jurisdiction of the Semarang Police Department.

Second, a journal article written by Hanifta Andras Arsalna and Moh. Endriyo Susila (2021) discusses criminal liability for adolescents who undergo abortion as a result of extramarital pregnancy. The study reveals that the abortion was carried out by ingesting the drug *Gastrul* three times. On the third attempt, when the pregnancy had reached seven months, the perpetrator reportedly consumed up to 15 pills in one day based on an agreement with her partner. As a result of this act, the perpetrator was found guilty and sentenced in accordance with Article 77A paragraph (1) in conjunction with Article 45A of Law Number 35 of 2014 on Amendments to Law Number 23 of 2002 on Child Protection, in conjunction with Article 55 paragraph (1) point 1 of the Indonesian Criminal Code. In its ruling, the court sentenced the defendant to one year and four months of imprisonment and imposed a fine of IDR 15,000,000 (fifteen million rupiah). Should the fine not be paid, it would be substituted by an additional three months of imprisonment. The similarity between this study and previous research lies in the application of a normative juridical approach and the use of secondary data derived from legal materials, scholarly literature, relevant documents, and legal textbooks. The key difference, however, is in the data collection techniques. This study relies solely on library

research, while the other incorporates interviews as part of its empirical data collection methods.

Third, a thesis by Lisa Meiriska (2023), titled *Analysis of the Criminal Act of Abortion by Adolescents Due to Premarital Relationships in Makassar City*, demonstrates methodological relevance to the present article, particularly in its use of a qualitative approach for data analysis. Nonetheless, a fundamental distinction exists in the scope of study, as Meiriska's thesis focuses exclusively on the applicable positive law and employs an empirical legal research approach (non-doctrinal legal research). Primary data in that study was obtained through direct interviews with various relevant informants. The thesis investigates the driving factors behind abortion practices such as the desire to conceal shame and maintain family honor and examines the efforts undertaken by the Panakkukang Police Department in Makassar to address abortion cases among adolescents (Ismail & Ja'far, 2024).

Based on the background described above, this study is focused on an in-depth examination of the criminal sanctions for abortion committed outside the bounds of marriage, with specific reference to Article 346 of the Indonesian Criminal Code (KUHP) and an analytical perspective from Islamic Criminal Law. The primary objective of this research is to gain a comprehensive understanding of the legal provisions within Indonesia's positive law regarding abortion as stipulated in Article 346 of the KUHP, as well as to explore how Islamic criminal law views and prescribes sanctions for such acts, particularly when committed by individuals outside a legally recognized marital relationship.

## RESEARCH METHODS

This study employs a qualitative method, which focuses on gaining an in-depth understanding of legal phenomena through a detailed descriptive and analytical approach. The aim is to present a comprehensive depiction of the research context and to establish a foundation for discussing and analyzing the research findings. The study adopts a normative juridical approach, emphasizing the analysis of positive legal provisions and relevant statutory regulations. The research is centered on legal aspects related to the resolution of the legal issues under examination. The primary legal source utilized in this study is the Indonesian Criminal Code (KUHP). Data collection is conducted through library research, by gathering and analyzing information from various written references, including books, scholarly journals, articles, legislation, and other relevant documents.

## RESULTS AND DISCUSSION

### Definition and Factors of Abortion

The term "abortus" is derived from the English word abortion, which has its roots in Latin and means miscarriage or termination of pregnancy. In the medical field, abortion is defined as the termination of pregnancy resulting in fetal death, typically occurring at a gestational age of less than 20 weeks or when the fetus weighs less than 500 grams. In Indonesia, Abortus Provocatus, more commonly referred to as abortion, denotes the intentional termination of pregnancy. Therefore, abortion or abortus provocatus can be understood as the act of expelling the product of conception from the uterus before the fetus reaches a stage of development in which it is viable outside the womb (Hamidah & Amnar, 2021). Fundamentally, abortion is regarded as an act that ends the life of an unborn individual and is generally considered illegal,

given that the fetus is entitled to legal protection, including the right to life (Fatahaya & Agustanti, 2021).

From an Islamic perspective, abortion is known as *al-ijhād*. According to Abdul Qadir Audah, *al-ijhād* refers to the termination of pregnancy that essentially eliminates the potential right to life possessed by the fetus, as part of human rights. Meanwhile, Imam al-Ghazali defines abortion as an act that terminates the life of the fetus or destroys a living entity that has already been formed (*al-maujūd al-hāṣil*). He emphasizes that life begins at the moment a pregnancy test returns a positive result, marking the commencement of life. Therefore, destroying that life is classified as a criminal act (*jināyah*). Al-Ghazali further explains that human life develops in stages, beginning with the ejaculation of sperm, which then meets the ovum in a woman's womb to form a conception. Following conception, the embryo begins cellular development, which marks the beginning of life. Thus, the destruction of life from this early stage is considered a violation of Islamic criminal law (*jināyah*) (Susilawati & Ag, 2015).

The phenomenon of abortion among teenagers cannot be separated from the complex underlying factors. One of the main factors triggering the increase in abortion practices is promiscuity. Changes in increasingly loose social interaction patterns, especially among the younger generation, have led to a tendency to neglect moral norms and values. Teenagers often lack a complete understanding of the boundaries of sexual behavior and the legal and health consequences of premarital sex. When pregnancy occurs outside of marriage, this situation creates significant psychological stress and fear, leading to abortion being seen as the quickest "solution," even though it violates the law and religious norms.

Furthermore, economic pressures also play a significant role in driving abortion decisions. Teenagers facing premarital pregnancies often lack financial independence, while their families may be financially unprepared to bear the additional burden. This lack of preparedness drives some teenagers to have abortions, claiming they want to escape what they perceive as overwhelming life burdens. Weak economic conditions also limit access to safe and legal health services, leading many abortions to be performed clandestinely, posing a high risk to women's lives.

Several environmental factors significantly influence the practice and perception of abortion in Indonesia, including:

- a. **Social and Cultural Aspects:** The prevailing social rules and cultural principles in Indonesian society play a major role in shaping attitudes toward abortion. Social stigma surrounding abortion can be particularly strong, affecting the decisions of individuals and their families.
- b. **Economic Conditions:** The economic situation of a family or individual can impact the decision to undergo an abortion, especially when pregnancy is perceived as a financial burden that cannot be managed.
- c. **Education and Access to Information:** Levels of education and access to accurate health information influence individuals' knowledge and understanding of abortion, as well as their awareness of reproductive health rights.
- d. **Legal and Policy Framework:** Government policies and law enforcement also play a critical role in how abortion is viewed and practiced in Indonesia. While strict laws may deter

illegal abortion practices, they may also lead individuals to seek unsafe or unlawful alternatives (Budoyo et al., 2023).

In the context of abortion in Indonesia, analysis using the theory of legal relativism and criminalization is crucial for understanding the influence of social norms, cultural values, and existing laws. Legal relativism theory emphasizes that law is not absolute but is influenced by the social, cultural, and economic conditions of society. Abortion is viewed not only as a medical issue but also as a phenomenon shaped by stigma and social norms.

The practice of abortion law in Indonesia is influenced by socio-cultural, economic, educational, and legal policy factors, which can lead to differences in the acceptance and implementation of the law. Social stigma and cultural values can reinforce the view that abortion is a criminal offense, while economic factors can encourage illegal abortion. Therefore, the application of legal relativism and criminalization theory to abortion cases emphasizes the importance of understanding abortion as a complex social phenomenon. Law enforcement must be sensitive to social and economic conditions to achieve legal justice that is humane and in accordance with prevailing social values.

### **Criminal Sanctions for Extramarital Abortion Under Article 346 of the Indonesian Criminal Code**

The legal regulation of abortion practices in Indonesia reflects a complex legal dynamic. The Indonesian Criminal Code (Kitab Undang-Undang Hukum Pidana, or KUHP), particularly Article 346, states: *“A woman who deliberately terminates or causes the termination of her pregnancy, or who instructs another person to do so, shall be subject to imprisonment for a maximum of four years”* (Moeljatno, 2021). This article clearly criminalizes the act of abortion without providing any explicit exceptions based on medical or social conditions. It stipulates that a woman who intentionally terminates her pregnancy or orders someone else to carry it out is liable to a prison sentence of up to four years. This legal provision is absolute in nature and implicitly reflects the repressive approach of Indonesia’s classical criminal law system, which aims to control public behavior through the threat of punishment.

However, this provision in the KUHP must be viewed in light of the evolving landscape of national law, particularly with the enactment of Law Number 36 of 2009 on Health and Government Regulation Number 61 of 2014 concerning Reproductive Health. These laws, especially Article 75 paragraph (2), permit abortion under two narrowly defined circumstances: (1) in cases of medical emergencies that threaten the life of the mother or fetus, and (2) pregnancies resulting from rape that have the potential to cause severe psychological trauma. These provisions serve as exceptions under the principle of *lex specialis*, acknowledging that legal protection for the fetus must be balanced proportionally with a woman’s rights to reproductive health and bodily integrity.

Although normatively these two legal instruments can complement each other, in practice there remains overlap and ambiguity in the applicable norms, which can create fear among medical professionals when providing legally permitted abortion services. This situation indicates that harmonization between criminal law and health law still needs to be strengthened to ensure that women’s access to legal and safe medical services is not obstructed (Lopulalan, J. J. C. (2021).

Further implementation of these provisions is regulated under Government Regulation Number 61 of 2014 concerning Reproductive Health. This regulation provides technical guidelines for carrying out abortions that are legally permitted, subject to strict requirements. These include mandatory examinations by professional medical personnel, gestational age limits (a maximum of six weeks in cases of rape), and written consent from the woman or her family in emergency situations (*Kemnkes RI*, 2014)

In addressing the criminal act of abortion (*abortus provocatus*), law enforcement authorities in Indonesia apply two primary approaches: preventive measures and repressive actions through legal enforcement.

a. Preventive Measures (Prevention)

Preventive measures aim to deter the occurrence of illegal abortion practices through education, social surveillance, and control over media or facilities that may trigger deviant behavior (Batubara et al., 2020). For instance, the police conduct raids on the distribution of pornographic content and monitor internet cafés suspected of facilitating adolescents' access to sexually explicit information. In addition, outreach activities related to reproductive health and criminal law concerning abortion are conducted in schools and community settings. A study by the National Commission on Violence Against Women (Komnas Perempuan) reveals that the high rate of illegal abortions in Indonesia is largely due to limited access to safe and legal reproductive health information and services, especially among adolescents and impoverished women (*Komnas Perempuan*, 2020). A case that illustrates the limitations of preventive efforts involved a teenage girl in Semarang (2023), who performed a self-induced abortion out of fear of her parents finding out, with no access to proper information or legal and medical assistance (*Kompas.Com*, 2023). This indicates that normative educational efforts alone are insufficient to address the root causes, such as social stigma and lack of access to counseling services.

b. Repressive Measures (Law Enforcement)

Repressive measures are applied as a form of legal enforcement against individuals who commit illegal abortion. Through raids, arrests, court proceedings, and the imposition of criminal penalties, the state seeks to create a deterrent effect so that both perpetrators and the general public are discouraged from engaging in similar acts (Batubara et al., 2020). The effectiveness of this approach can be illustrated by a case involving a university student in Yogyakarta (2022) who aborted her pregnancy using medication and, together with her partner, disposed of the fetus in a trash bin (*Tribun Jogja*, 2022). The couple was prosecuted under Articles 346 and 348 of the Indonesian Criminal Code. Although legal procedures were carried out, a purely repressive approach failed to address the underlying social problems, such as societal pressure, shame, or psychological unpreparedness. In such cases, repressive policies that are not accompanied by rehabilitative measures risk exacerbating psychological trauma.

To strengthen the theoretical foundation of the repressive approach, the relative theory of punishment can be applied, which posits that criminal sanctions serve to protect the interests of society. Karl O. Christiansen is a key proponent of this theory. According to the relative theory, punishment is not merely a form of retribution against the offender, but also serves an instrumental function with both preventive and educational purposes. In this regard, Wayne R.

LaFave, as cited by Eddy O.S. Hiariej, explains that one of the objectives of punishment is to produce a deterrent effect on offenders, thereby preventing the recurrence of unlawful behavior. This perspective constitutes a core element of the relative theory of penal sentencing. The primary goal of punishment under this theory is to prevent criminal acts, whether by discouraging recidivism (specific deterrence) or by deterring potential offenders within the broader society (general deterrence). In this context, punishment functions as a means of prevention through its deterrent effect, aiming to dissuade the offender from repeating the offense and to discourage others from committing similar acts (Rivanie et al., 2022).

Analysis based on the theory of legal relativism and criminalization provides a deeper understanding of the purpose of criminal sanctions. Relativism theory views punishment not only as a means of revenge but also as an instrument with preventive and educational functions. The provision in Article 346 of the Criminal Code, which threatens imprisonment for women who intentionally perform abortions, reflects the repressive approach of criminal law to control societal behavior. However, this provision should also be seen as an effort to protect the interests of society, including the fetus, and to warn against illegal abortions.

From the perspective of relativism theory, the application of criminal penalties aims to create a deterrent effect for both perpetrators and the general public, thus hopefully reducing the number of illegal abortions. Criminalization here functions as a deterrent, encouraging society to respect legal norms for the common good. However, it is important to consider the aspect of substantive justice, given that many women are forced to undergo abortions due to sexual violence, social pressure, or lack of access to information.

Overall, this analysis concludes that the theories of relativism and criminalization in the context of abortion in Indonesia serve as a normative basis for law enforcement. However, its effectiveness depends heavily on aligning the law with health policies and social efforts that protect women's rights and respect fetal life. A balanced approach, combining deterrence and education, is key to controlling illegal abortion and fulfilling the right to reproductive health.

### **Islamic Criminal Law Perspective on Extramarital Abortion**

Acts that result in fetal death or are related to the practice of abortion can fundamentally be categorized as criminal acts against life (homicide), given that the fetus is regarded as a living entity. However, from a legal standpoint, criminal acts against a fetus are classified separately and not equated with crimes against the life of a person who has been born. This distinction arises from the fact that although a fetus shows signs of life, it is still in a stage of development where it is not capable of sustaining life independently outside the mother's womb. According to the Hanafi school of thought, criminal acts against a fetus can be considered offenses against life from one perspective, but they cannot be entirely equated with crimes against a fully autonomous human life, as the fetus does not yet possess independent legal personhood (Muslich Ahmad, 2005)

In Islamic criminal law, abortion outside of marriage is categorized as an act that violates the principles of sharia, particularly those concerning the sanctity and protection of life. The Qur'an and Hadith provide clear guidance on the value of life and the responsibilities of parents toward the fetus. Islamic jurists (fuqaha) assert that abortion after the soul (ruh) has been breathed into the fetus typically considered to occur at four months of gestation is categorically haram (prohibited) (Rofiq et al., 2023).

Abdullah ibn Mas'ud narrated that the Prophet Muhammad (peace be upon him) said: *"Verily, the creation of each one of you is brought together in the womb of his mother for forty days as a drop of fluid (nutfah), then it becomes a clot ('alaqah) for a similar period, and then a piece of flesh (mudghah) for a similar period. Then Allah sends an angel who is commanded to blow the soul into it and to write four things: his provision (rizq), his lifespan, his deeds, and whether he will be among the fortunate or the wretched."* (H.R Bukhari dan Muslim). Additionally, Allah (SWT) states in the Qur'an, in Surah Al-An'am verse 151 and Surah Al-Isra verse 31 (Susanti, S. 2015 ).

Q.S Al-An'an verse 151:

نَحْنُ نَرْزُقُكُمْ وَإِيَّاهُمْ وَلَا تَقْرُبُوا الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَنٌ وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ذَلِكُمْ وَصَّكُمْ بِهِ لَعَلَّكُمْ تَعْقِلُونَ

*"We provide for you and for them. And do not approach immoralities—what is apparent of them and what is concealed. And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right. This He has instructed you, that you may use reason".*

Q.S Al-Isra verse 31:

وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةً إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطْئًا كَبِيرًا

*"And do not kill your children for fear of poverty. We provide for them and for you. Indeed, killing them is a great sin."* (Munawir, 2022)

Cases of abortion among adolescents are generally rooted in acts of zina (unlawful sexual intercourse) committed outside the bounds of marriage. In the study of fiqh (Islamic jurisprudence), zina is defined as sexual intercourse specifically, the penetration of the male reproductive organ into the female reproductive organ in circumstances considered shubhat (ambiguous or doubtful), and driven by lust. Perpetrators of zina are categorized into two groups: those who have never been married (ghairu muhshan) and those who have been married (muhshan), with distinct penalties prescribed for each category. For unmarried offenders, Islamic law prescribes corporal punishment in the form of flogging, classified as a hudud penalty. This type of punishment is absolute and immutable; it cannot be altered, reduced, or substituted with another form of sanction, as it has been explicitly outlined in the nass (textual sources). Consequently, judicial authorities have no discretion to grant leniency or pardon for such violations, as these sanctions represent divine injunctions established by Allah (Rahmi, 2023).

#### 1) Abortion Before the Soul is Breathed In

There are differing opinions among Islamic scholars (ulama) regarding the permissibility of abortion performed before the soul (ruh) is breathed into the fetus, which is believed to occur at four months of gestation.

The first opinion holds that such an act is permissible. Some scholars even permit the use of medication to induce abortion during this early stage. This view is supported by the majority of scholars from the Hanafi, Shafi'i, and Hanbali schools of thought, on the condition that both parents consent to the procedure. The basis for this opinion is a hadith narrated by Ibn Mas'ud, which indicates that before the fetus reaches four months, the soul has not yet been breathed in

and the process of creation is still incomplete. Therefore, the fetus is not yet considered a fully living being and may be regarded as lifeless matter, thus making its termination permissible.

The second opinion regards abortion before ensoulment as *makruh* (discouraged). However, once the fetus reaches the stage at which the soul is believed to enter, the act becomes *haram* (forbidden). This perspective is shared by some Hanafi scholars and by Imam al-Ramli, a prominent figure in the Shafi'i school.

In contrast, the third opinion categorically forbids abortion even before the ensoulment stage. Scholars such as Imam al-Ghazali and Ibn al-Jawzi argue that once the sperm and ovum meet and settle in the womb, the resulting embryo enters the initial phase of life. Thus, terminating it is considered an act of destroying a potential life and is deemed a form of wrongdoing. However, a fetus aborted at this stage is not yet considered to possess a soul, and therefore, religious rites such as washing, shrouding, and funeral prayer are not required. While not classified as murder, the act is still seen as a violation of something with inherent value and purpose.

Despite the differences in legal reasoning, all three views converge on the understanding that abortion, even at an early stage of pregnancy, must be considered within the framework of *maslahah* (public interest or benefit), particularly in cases where there is a valid medical justification. In the medical field, such circumstances are referred to as *Abortus Provocatus Therapeuticus*, an abortion performed for therapeutic reasons or to save the life of the mother. In contrast, abortion conducted without lawful or medical grounds, and contrary to legal norms, is referred to as *Abortus Provocatus Criminalis*.

## 2) Abortion After the Soul Has Been Breathed In

In general, Islamic scholars (*ulama*) unanimously agree that abortion after the soul (*ruh*) has been breathed into the fetus is strictly prohibited (*haram*). The process of ensoulment is believed to occur when the pregnancy reaches four months of gestation. This ruling is based on a hadith narrated by Ibn Mas'ud, which explains that at this stage, the fetus receives its soul, and thus its status transforms into that of a complete human being who possesses the right to life. Therefore, ending its life is regarded as an act of killing, which is unequivocally forbidden.

However, this prohibition is absolute only when there are no emergency circumstances. In situations where the life of the mother is at risk, abortion may be permitted. This ruling is grounded in a legal maxim (*qa'idah fiqhiyyah*) that prioritizes the protection of a life whose existence is certain in this case, the mother over that of a fetus whose life remains in a state of potentiality and uncertainty.

Differences in scholarly opinion arise primarily in discussions concerning abortion prior to 120 days of gestation. Scholars of the Hanafi school, for instance, allow abortion before the point of ensoulment, provided there is a legitimate justification according to Islamic law (*shari'ah*). Ibn 'Abidin, a prominent figure in the Hanafi tradition, offered an example in which a mother who is still breastfeeding may be permitted to terminate a new pregnancy if it threatens her ability to produce milk and her husband is financially incapable of providing an alternative source of nutrition. In such cases, abortion is considered permissible for the sake of the welfare (*maslahah*) of the breastfeeding child (Rumadan, 2023)

According to Imam Malik, a person who performs an abortion must be held accountable for anything expelled from a woman's womb, provided that it is confirmed to be a pregnancy-

related discharge whether it has taken the form of a complete fetus, a mudghah (lump of flesh), an 'alaqah (clot of blood), or even mere blood. Imam Abu Hanifah and Imam al-Shafi'i also hold that legal responsibility applies to the expulsion of any substance from the womb, as long as it has begun to take a discernible form, even if it has not reached full development. Meanwhile, the Hanbali school stipulates that liability arises only if the aborted fetus exhibits clear human physical features. If the fetus lacks such biological human traits, the individual cannot be held criminally responsible under the applicable legal provisions.

According to Imam Malik and Imam Abu Hanifah, criminal liability for abortion is established only if the fetus is aborted while the mother is still alive. If the abortion occurs after the mother's death, the perpetrator cannot be held accountable. However, if the fetus is born alive even after the mother's death the perpetrator is still considered liable. If the fetus subsequently dies due to the perpetrator's actions, they are required to pay diya (blood money) as a form of legal compensation. Conversely, if the child is born alive, the offender may also face ta'zir (discretionary punishment). In contrast, Imam al-Shafi'i and Imam Ahmad maintain that the perpetrator bears legal responsibility for the abortion regardless of whether it occurs while the mother is alive or deceased, and regardless of whether the fetus is born alive or dead. This position is based on the premise that the abortion and its consequences are directly attributable to the perpetrator's deliberate actions (Muslich Ahmad, 2005).

The majority of Islamic scholars agree that abortion performed after the pregnancy reaches 120 days (approximately 16 weeks after conception) is unequivocally prohibited. This ruling is based on the belief that by this stage, the soul (ruh) has been breathed into the fetus, and thus its termination is regarded as an act contrary to the principles of shari'ah. However, there are differences of opinion among scholars regarding abortion conducted before the fetus reaches 120 days of gestation. Scholars from the Hanafi and Hanbali schools tend to permit abortion during the early stages of pregnancy, arguing that the fetus at that point has not yet been ensouled and therefore, its termination can be justified from a shari' perspective. In contrast, the Shafi'i school generally considers abortion prior to the ensoulment as makruh (discouraged). Nonetheless, within this school, a stricter view is found in the opinion of Imam al-Ghazali, who holds that abortion under any circumstances is categorically prohibited. Based on these various perspectives, it can be concluded that abortion after the 120th day of pregnancy is definitively forbidden in Islamic law, as at that point the fetus is considered to possess a soul and thus has a life status that must be protected (Harmain et al., 2023).

Islamic criminal law stipulates that diyah (blood money) and ta'zir (discretionary punishment) play significant roles in upholding justice and providing compensation to victims. Ta'zir serves as an alternative punishment that may be imposed by a judge in situations where diyah is forgiven or for other offenses that require penal sanctions. This concept is intended to safeguard justice, deter criminal acts, and ensure the protection of society (Audah, 2007).

The criminal act of abortion in Islamic law is classified as a jarimah (criminal offense) because it directly concerns the protection of human life. However, abortion is not included within the categories of jarimah hudud or qisas, since the elements required to meet the criteria for hudud offenses are not fully satisfied, and there is no explicit naṣṣ (scriptural text) in the Qur'an or Hadith that regulates it directly. Therefore, abortion is categorized as a jarimah ta'zir, where the type and severity of punishment are not explicitly prescribed in the Qur'an or

Sunnah, but are instead determined through judicial discretion (*ijtihād*) by a judge (Aini dkk., 2023).

Etymologically, the term *ta'zīr* derives from *at-ta'dīb*, which carries the meaning of discipline or correction. In Islamic legal theory, *ta'zīr* is understood as a discretionary punishment for offenses not subject to fixed penalties, where neither the form nor the degree of punishment is stipulated in the religious texts. Thus, its implementation is entrusted to the discretion of the ruler or judge, based on the needs and public interest (*maṣlaḥah*) (Mustofa, dkk. 2013 ). According to the Ḥanafī school of thought, the authority to impose *ta'zīr* including the determination of its minimum and maximum limits lies with the *ulī al-amr* (those in authority or the government) (Djazuli, 2000). For example, a teenage girl undergoes an abortion with the help of a traditional birth attendant (*dukun bayi*) after discovering she is pregnant as a result of an extramarital relationship. Her action was not medically or legally justified by any emergency. In such a case, the perpetrator may be subjected to a *ta'zīr* punishment, such as imprisonment, a fine, or other social sanctions. These measures are intended to serve both as a deterrent and a form of moral and legal education (az-Zuhaili wahbab, 1985.).

*Diyah* (blood money) is a sum of money or wealth that must be paid by the perpetrator or convicted individual as compensation for causing death or the loss of a body part. *Diyah* serves as a substitute for *qīṣāṣ* (retaliation) in cases of intentional homicide or other criminal acts when the victim's family or legal guardian grants forgiveness to the offender (Maulidar, 2022). For example, a man physically assaults his wife, who is three months pregnant, during a domestic dispute. As a result of the beating, the fetus dies in utero. A medical examination confirms that the cause of death was physical trauma. In this case, the perpetrator is not subject to *qīṣāṣ*, but is obliged to pay *diyah* for the fetus to its rightful guardian (i.e., the biological father, if the perpetrator is not the father) (Abdurrahman al-Jaziri, 2003)

Within the Islamic criminal justice system, *ta'zīr* represents a form of discretionary punishment characterized by its flexibility, non-codified nature, and reliance on judicial discretion. Unlike *ḥudūd* (fixed punishments prescribed by explicit scriptural texts) or *qīṣāṣ/diyah* (which relate to the rights of the victim or their heirs), *ta'zīr* has no definitive rulings in the Qur'an or Sunnah regarding its form, type, or severity. As such, its implementation is entrusted to the *ijtihād* (independent legal reasoning) of the judge or *ulī al-amr* (authority), based on contextual factors, intent, and the public interest (*maṣlaḥah*). In the case of abortion, particularly when it occurs outside of a legitimate marital framework and without valid *shar'ī* justification such as a medical emergency *ta'zīr* sanctions may be applied when the act does not fulfill the legal criteria for *ḥudūd* or *qīṣāṣ*. For instance, if an abortion is carried out secretly, without lawful cause, and does not involve the killing of a viable fetus, the act may not be punishable under *qīṣāṣ* or *diyah*. Instead, *ta'zīr* penalties such as imprisonment, fines, or public reprimand may be imposed based on the judge's assessment of the severity and social impact of the offense.

The flexibility of *ta'zīr* reflects that Islamic criminal law provides a wide scope for interpretation and contextual application. The judge, as the enforcer of *sharī'ah*, plays a central role in determining the type of punishment based on both the objective and subjective conditions of the offender. Therefore, *ta'zīr* embodies the spirit of dynamic justice and a

maṣlaḥah-oriented approach, allowing the law to adapt to societal developments and the complexities of individual cases, including sensitive issues such as abortion (Sulton, dkk, 2013).

The sanctions imposed on perpetrators of abortion outside of marriage vary depending on the consequences of the act. Several forms of punishment that may be applied include:

a. Miscarriage Resulting in the Death of the Fetus

If the fetus that is aborted is already deceased at the time of delivery, the perpetrator is subject to the penalty of *diyāt al-janīn* (blood money for the fetus). This form of *diyāt* is referred to as *ghurrah*, which originally meant a slave or servant. The term *ghurrah* is used because it is considered a valuable form of compensation. In practice, the value of *ghurrah* is equivalent to five camels. However, according to the Ḥanafī school, the monetary equivalent can be calculated as fifty dinars or five hundred dirhams, while the *jumhūr* (majority of scholars) maintain that it amounts to six hundred dirhams.

b. Miscarriage Where the Fetus is Born Alive but Later Dies Due to the Perpetrator's Actions

If the fetus is delivered alive but subsequently dies as a result of the perpetrator's actions, then, according to some scholars who consider the act intentional, the offender may be subjected to *qīṣāṣ* (retributive punishment). Conversely, if no element of intent is found, the applicable penalty is *diyāt kāmīlah* (full blood money). The amount of *diyāt kāmīlah* depends on the gender of the fetus: for a male fetus, it is equivalent to the full *diyāt* for an adult male, i.e., one hundred camels; for a female fetus, it equals the *diyāt* for an adult female, i.e., fifty camels or half that of a male. The total *diyāt* payable corresponds to the number of fetuses aborted. For instance, if two or three male fetuses are aborted, the perpetrator must pay the full amount of *diyāt* for each.

c. Fetus Does Not Miscarry or Miscarries After the Mother's Death

If a criminal act does not directly cause the miscarriage of the fetus but results in the death of the mother subsequently leading to the miscarriage then the perpetrator is subject to *ta'zīr* punishment. This applies when there is no evidence proving a direct causal link between the perpetrator's actions and the miscarriage, or when the mother's death cannot be definitively attributed to the perpetrator's conduct. As such, due to the absence of a clear causal connection between the criminal act and the harm suffered by the fetus, the type of punishment falls under the discretionary authority of the judge (*ta'zīr*), and its determination is based on considerations of public interest (*maṣlaḥah*) and justice.

d. Fetus Is Born Alive or Dies Due to Other Factors

If the fetus is delivered alive and survives for a period of time but later dies due to other causes, the perpetrator is subject to a *ta'zīr* punishment. This is grounded in the principle that the fetus's death was not causally linked to the perpetrator's actions, and thus, more severe criminal sanctions cannot be imposed. However, if the perpetrator intentionally kills the fetus after it has been born and is physically separated from the mother's womb, such an act is classified as homicide of a living human being, and the perpetrator may be subject to the death penalty as a legal measure to uphold the sanctity of fully developed human life.

e. Criminal Acts Causing Injury, Suffering, or Death to the Mother

If the perpetrator's act of abortion not only causes miscarriage but also inflicts harm on the mother such as physical injury or even death they are legally obliged to bear full

responsibility for all consequences arising from the act. In cases where the mother dies as a result of the abortion, the perpetrator must pay diyah (blood money) equivalent to fifty camels as compensation for the loss of life. Meanwhile, if the perpetrator strikes the woman without leaving physical marks but causes the fetus to be miscarried in a non-viable state, two forms of punishment apply: first, ta'zīr for committing violence against the mother; and second, diyah al-janīn in the form of ghurrah, which is traditionally valued at fifty camels, as accountability for the fetal death (Muslich Ahmad, 2005)

In Islamic law, abortion is fundamentally prohibited as it is viewed as the termination of a potential life. However, in certain emergency situations (ḍarūrah), this prohibition may be subject to exceptions. In such cases, two foundational legal maxims from uṣūl al-fiqh and fiqh are commonly invoked to justify exceptions:

“مَا أَلْبَحَ لِضَرُورَةٍ تَقْدَرُ بِقَدَرِهَا”

*“Necessities are assessed and permitted only in accordance with the extent of the harm to be averted”* (Nainunis, 2021)

This legal maxim emphasizes that permissibility of actions originally deemed unlawful due to ḍarūrah (emergency necessity) is not absolute; rather, it must be confined strictly to the minimum extent necessary to eliminate the harm. In other words, abortion under medical emergency conditions can only be justified to the extent required to save the life or prevent serious harm to the mother or fetus, and should not be carried out beyond what is urgently needed (Djazuli, A. 2006).

Another fiqh maxim relevant to abortion conducted due to genetic defects or fetal abnormalities falls under the category of abortus artificialis therapeutics or abortus medicamentalis. Such actions are not solely interpreted as a means of terminating pregnancy, but rather as a form of medical intervention aimed at preserving the well-being of either the mother or fetus based on a well-established fiqh principle:

“الضَّرَرُ يُزَالُ”

*“Harm must be eliminated”* (Pikahulan & Hamuddin, 2020)

The use of this principle provides the basis that if a pregnancy poses a significant risk to the mother's physical or mental safety, or if the fetus is certain not to survive and would pose additional danger, then abortion can be justified within certain limits. However, it should be emphasized that this justification only applies if there is no less severe alternative to eliminate the harm.

However, the concept of emergency cannot be interpreted freely. The explanation in the marginal notes of the Book of Al-Muqni' provides a clear definition of what is meant by dharurah in Islamic law. In the view of Imam Ahmad ibn Hanbal, an emergency only occurs when there is a strong belief, based on valid and professional medical considerations, that not performing an abortion will result in a real threat to the mother's life. In fact, a person is considered to be in an emergency if they rationally believe they will face a serious risk to their safety. (Hamzah, N.A. 2020).

The theory of relativism emphasizes that law cannot be separated from the social, cultural, and moral context of society. In this regard, abortion is viewed as an act involving

legal aspects as well as ethical and moral values. Abortion, especially those performed outside of marriage, is often associated with zina (adultery), which is considered a serious offense under Islamic law. Islamic criminal law provides varying sanctions depending on the situation, with abortion before the inception of the soul (before four months) viewed more leniently by some scholars, subject to certain conditions.

After the inception of the soul, the majority of scholars agree that abortion becomes haram (forbidden), as the fetus is considered a living entity. In this context, criminal sanctions aim to create a deterrent effect and prevent illegal abortions. However, it is important to consider substantive justice, given that many women are forced to undergo abortion due to urgent circumstances. Therefore, an educational and empathetic approach is necessary, including counseling and access to safe reproductive health services.

Overall, the application of the theory of relativism and criminalization in the context of abortion in Indonesia must consider social norms, cultural values, and the living conditions of the community, with the aim of striking a balance between controlling illegal abortion and fulfilling the right to reproductive health.

## CONCLUSION

Abortion occurs as a result of the impact of promiscuity, and socio-cultural, economic, educational, and legal policy factors greatly influence the practice and understanding of abortion in Indonesia. From a positive legal perspective, abortion is deliberately criminalized under Article 346 of the Criminal Code with the threat of imprisonment, although Law Number 36 of 2009 concerning Health permits abortion in medical emergencies and as a result of rape. The approach of the theory of legal relativism and criminalization emphasizes the need for law enforcement that is sensitive to socio-economic conditions, to achieve humane justice and in accordance with community values.

Abortion, from the perspective of Islamic criminal law, is generally prohibited because it contradicts the principle of protecting life, one of the main objectives of sharia (maqashid al-syari'ah). A fetus, even though it does not yet have an independent life, is still considered to have a life value that must be respected and protected. Scholars agree that abortion after the inception of the soul (120 days of pregnancy) is absolutely forbidden, except in emergency situations to save the mother's life. At this stage, the fetus is considered a complete living being and has the right to life. Meanwhile, regarding the phase before the inception of the soul, there are differences of opinion: some permit it with certain conditions, some consider it makrooh, and others still prohibit it. In the event of a violation, Islamic criminal law applies two types of sanctions: *Diyat* and *Ta'zir*.

Scholars differ in their views on determining the limits of criminal liability, depending on the gestational age, the condition of the fetus, and the perpetrator's involvement. However, the majority of scholars emphasize the importance of caution in handling abortion cases, as it concerns the life of a potential human being who morally and legally has the right to life. Within the framework of Islamic criminal law, abortion is not simply a medical procedure or a personal choice, but rather a legal, ethical, and religious issue that must be addressed by considering Islamic texts, medical conditions, and social and spiritual responsibilities. The crime of abortion outside of marriage is considered a serious violation of the fetus's right to life under Islamic criminal law and therefore carries varying sanctions, depending on the consequences

of the perpetrator's actions. These penalties reflect the principles of Islamic justice, which consider the degree of culpability, the impact, and the underlying medical condition.

Within the framework of the theory of relativism regarding criminalization, the application of sanctions against perpetrators of abortion is intended to create a deterrent effect and prevent society at large from committing similar acts, so that criminalization functions as an instrument of prevention (preventive) and an effort to take action (repressive) against violations of the law related to the protection of the right to life of the fetus

Thus, both the positive legal system and Islamic criminal law share a common emphasis on the importance of preserving and protecting the right to life. Both establish strict provisions prohibiting the practice of abortion, except in very limited, specific circumstances. Abortion cannot be justified as a solution to morally or legally deviant behavior. Therefore, consistent law enforcement, increased legal awareness within society, and strengthening religious values are necessary in a synergistic manner as a manifestation of shared responsibility in protecting human survival.

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