



## Abortion in the Perspective of Islamic Law and Health Law

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### Article Process Abstract

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*Free association is a primary factor that has been observed to significantly influence the rate at which abortion practices are being carried out among teenagers. In Indonesia, the rate of abortion cases was reported to be around 2.5 million, among which 1.5 million were carried out by teenagers due to reasons such as pregnancy outside marriage, conception as a result of rape, or life-threatening cases. Therefore, this study aims to thoroughly examine the perspective of Islamic law and health law related to abortion cases. In order to effectively achieve the stated objective, a normative legal analysis was carried out using the Qur'an, Law Number 1 of 2023, Law Number 17 of 2023, PP Number 28 of 2024, PP Number 61 of 2014, MUI Fatwa Number 4 of 2005, MUI Fatwa Number: 1/MUNAS VI/MUI/2000, fiqh 5 madzhab, as well as the results of previous studies published in journals and other references related to the problem. The analysis results were subsequently examined prescriptively by providing legally correct arguments against legal facts or events. The obtained results showed that abortion permitted according to Islamic law were only spontaneous cases (*al-isqathal-dzaty*), namely the fetus is miscarried naturally and abortion due to life-threatening emergencies (*al-isqath al-darury/al-ilajiy*). According to health law, abortion was permitted if there were indications of a medical emergency in the pregnant woman or if pregnancy was a result of rape. The permission to perform an abortion must be given by medical personnel and health workers who have the competence and authority, and the act must be carried out in health service facilities that meet the requirements determined by the Minister of Health. Furthermore, the pregnant woman and her husband must also grant an approval, except in cases where the woman is a victim of rape. This is as stated in Article 61 of Law Number 17 of 2023, Article 116 PP number 28 of 2024, Article 31, Article 35 paragraph (2) of PP Number 61 of 2014, Article 463 paragraph (2), and Article 465 paragraph (3) of Law Number 1 of 2023.*

**Keywords:** Abortion, Health Law, Islamic Law

### Abstrak

Pergaulan bebas di kalangan remaja menjadi salah satu dampak dilaksanakannya praktik aborsi. Kasus aborsi di Indonesia mencapai sekitar 2,5 juta kasus dan 1,5 juta yang dilakukan oleh remaja karena hamil di luar nikah, hamil hasil perkosaan ataupun ibu hamil yang membahayakan keselamatan jiwa. Penelitian ini bertujuan untuk mengetahui bagaimana perspektif hukum Islam dan hukum kesehatan terkait kasus aborsi. Penelitian ini merupakan penelitian hukum normatif dengan menggunakan Alqur'an, UU Nomor 1 Tahun 2023, UU Nomor 17 Tahun 2023, PP Nomor 28 Tahun 2024, PP Nomor 61 Tahun 2014, Fatwa MUI Nomor: 1/MUNAS VI/MUI/2000, Fatwa MUI Nomor 4 Tahun 2005, fikih 5 madzhab, hasil penelitian terdahulu yang dipublikasikan di jurnal dan referensi lain yang terkait dengan permasalahan. Hasil penelitian dianalisis secara preskriptif dengan memberikan argumentasi yang benar menurut hukum terhadap fakta atau peristiwa hukum. Kesimpulannya, aborsi yang diperbolehkan menurut hukum Islam hanya jenis aborsi spontan (*al-Isqathal-dzaty*) yaitu janin gugur secara alamiah dan aborsi karena darurat/pengobatan (*al-isqath al-darury/al-ilajiy*) yaitu terdapat indikasi yang mengancam nyawa ibu. Menurut hukum kesehatan, aborsi diperbolehkan jika terdapat indikasi kedaruratan medis pada ibu hamil dan diperbolehkan bagi perempuan hamil karena korban perkosaan. Kebolehan tindakan aborsi harus dilakukan oleh tenaga medis dan tenaga kesehatan yang memiliki kompetensi dan kewenangan, dilakukan di fasilitas pelayanan kesehatan yang memenuhi syarat yang ditentukan oleh Menteri Kesehatan dan ada persetujuan dari perempuan hamil serta persetujuan dari suaminya kecuali perempuan korban perkosaan. Hal ini sebagaimana Pasal 61 UU Nomor 17 Tahun 2023, Pasal 116 PP Nomor 28 Tahun 2024, Pasal 31, Pasal 35 ayat (2) PP No 61 Tahun 2014, Pasal 463 ayat (2), Pasal 465 ayat (3) UU No 1 Tahun 2023.

**Kata kunci:** Aborsi, Hukum Kesehatan, Hukum Islam

## I. Introduction

Free association between teenagers is considered very concerning<sup>1</sup>. This concern has been reported to be a consequence of weakened religious values in society. Additionally, the rapid growth of information technology has made social media easily accessible, often leading to misuse by teenagers. The lifestyle presented on social media, such as a free and hedonistic life, have been typically observed to negatively impact teenagers, as the behaviors are often imitated and practiced in the real world.<sup>2</sup> These behaviors, which include forms of free lifestyles, such as casual sex and free socializing, are often imitated by teenagers, and this can have negative consequences, leading to the practice of abortion.

Law Number 17 of 2023 on Health and its implementing regulations did not regulate the definition of abortion. However, based on terminology, the term can be defined as a form of effort to terminate a fetus that is in the womb of a woman through certain actions when the pregnancy is not yet complete.<sup>3,4</sup> In fiqh literature, abortion comes from the Arabic word *al-ijhad*, which is a mashdar of *ajhadha* or *isqath alhaml*, both of which mean giving birth forcibly in an incomplete state of creation. Linguistically, it is referred to as the expulsion of the fetus, either spontaneously or through coercion. The meaning of miscarriage, according to jurists, is expressed with the terms "to drop" (*isqath*), "to discard" (*tharh*), "to throw" (*ilqaa'*), and "to give birth in a dead state" (*imlaash*).<sup>5</sup>

In general, abortion can be defined as the termination of pregnancy either intentionally or unintentionally. Abortion performed intentionally typically constitutes a violation of legal regulations and can have legal consequences. This is supported by the Criminal Code, where the act of abortion has been associated with certain criminal charges. Unintentional abortion, on the other hand, includes cases where abortion does not violate the law or contravene legal regulations. In cases of unintentional abortion, the fetus is typically lost due to an accident.<sup>6</sup> According to Abul Fadl Mohsin Ebrahim, abortion is the termination of pregnancy, whether intentionally or unintentionally, due to different reasons including physical abnormalities in women, internal biomedical diseases, or intentionally through human intervention, such as the intake of certain medications or visiting abortion practitioners.<sup>7</sup>

Based on the different definitions, it can be inferred that abortion is the termination of pregnancy, whether intentionally or unintentionally. This act is generally divided into two categories, first, illegal abortion or *Abortus Provocatus Criminalis*, which is the termination of pregnancy carried out by an individual without competence by pressing the lower abdomen, inserting foreign objects such as plants into the cervix, and using drugs or chemicals that leads to

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<sup>1</sup> Muhammad Paezal, Muhammad Sadam Husen, and Beti Haerani, "Analisa Tingkat Pengetahuan dan Sikap tentang Pergaulan Bebas pada Remaja Kelas X dan XI di SMA Nurul Falah Perina Kecamatan Jonggat Kabupaten Lombok Tengah Tahun 2020," *Jurnal Indonesia Sosial Sains* 1, no. 3 (October 21, 2020): 197-206, <https://doi.org/10.36418/jiss.v1i3.32>.

<sup>2</sup> Linda Fidawaty, "Aborsi dalam Perspektif Hak Asasi Manusia dan Hukum Islam (Analisis terhadap Peraturan Pemerintah No. 61 Tahun 2014 tentang Kesehatan Reproduksi)," *AL-'ADALAH* 14, no. 1 (December 29, 2018): 107, <https://doi.org/10.24042/adalah.v14i1.2930>.

<sup>3</sup> Istibsjaroh, *Aborsi dan Hak-Hak Reproduksi dalam Islam* (Yogyakarta: LKis Pelangi Aksara, 2012); Nurhayati Mardin, Tuti Haryanti, and Adiguna Kharismawan, "Perbandingan Hukum Indonesia dan Malaysia: Reformulasi Kebijakan Aborsi Akibat Tindak Pidana Perkosaan di Indonesia," *DIKTUM: Jurnal Syariah dan Hukum* 1. N. Mardin, T. Haryanti, and A. Kharismawan, *DIKTUM J. Syariah dan Huk.* 20, 369 (2022) 20, no. 2 (December 29, 2022): 369-82, <https://doi.org/10.35905/diktum.v20i2.3307>.

<sup>4</sup> Mardin, Haryanti, and Kharismawan, "Perbandingan Hukum Indonesia dan Malaysia: Reformulasi Kebijakan Aborsi Akibat Tindak Pidana Perkosaan di Indonesia."

<sup>5</sup> Maria Ulfah Anshor, *Fikih Aborsi: Wacana Penguatan Hak Reproduksi Perempuan* (Jakarta: Kompas, 2006).

<sup>6</sup> Widowati, "Tindakan Aborsi dalam Sudut Pandang Hukum dan Kesehatan di Indonesia," *Yustitiabelen* 6, no. 2 (December 21, 2020): 16-35, <https://doi.org/10.36563/yustitiabelen.v6i2.243>.

<sup>7</sup> Op.cit

infection. The second category is legal abortion or *Abortus Provocatus Therapeuticus*, which is the termination of pregnancy based on medical reasons through surgical procedures such as curettage or vacuum aspiration.<sup>8</sup>

Abortion carried out intentionally clearly constitutes an action that violates the law and this act can attract legal consequences because according to the Criminal Code, the act of abortion can attract certain criminal charges. However, there are cases of unintentional abortion where the act does not violate the law or contravene legal regulations. In this case, the fetus is lost due to accidents.<sup>9</sup>

According to a previous study, abortion cases in Indonesia were approximately 2.5 million, with 1.5 million of these cases performed by teenagers.<sup>10</sup> From this report, inferences can be made that the promiscuity exhibited by teenagers has become a very concerning issue. The issue is very concerning particularly because the impact of promiscuity invariably leads to the practice of illegal abortion, which is certainly carried out due to unwanted pregnancies.

Besides promiscuity, the increase in abortion cases in society is fostered by other factors, including premarital pregnancies that are either consciously undertaken or a result of rape. In a previous investigation by Zahrotul Fitriani titled "Abortion Among Unmarried Adolescents, it was emphasized that premarital pregnancy is a major factor causing the practice of abortion. The investigation discussed the role of parents and educators in guiding adolescents who had reached sexual maturity to avoid immoral behaviors<sup>11</sup> Another study reported that abortion was generally performed due to the shame caused by an unwanted pregnancy.<sup>12</sup> Accordingly, a previous investigation, which was carried out across various states in the United States showed that restrictions on access to abortion services were often implemented due to concerns about health risks to both mothers and infants.<sup>13</sup> Mississippi law provides a narrow exception to allow abortion, permitting the act to be carried out after 15 weeks only in cases of medical emergencies or severe fetal abnormalities.<sup>14</sup>

The reason why abortion should be prohibited has become a public debate. According to Imam Al-Ghazali, the act is simply the destruction of the fetus or the termination of anything that has already been conceived. Imam Al-Ghazali described conception or the mixing of sperm with the ovum as a transaction of offer and acceptance (*ijab qabul*) that should not be disrupted.<sup>15</sup> However, cases where the pregnancy endangers the life of a woman or where abortion is performed by a rape victim certainly raise another opinion regarding whether abortion should be permitted or not. By considering this deliberation, the legal position of health regarding abortion in Indonesia needs to be re-evaluated.

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<sup>8</sup> Cucu Solihah and Trini Handayani, "Kajian terhadap Tindakan Atas Jiwa dan Bukan Jiwa (Aborsi) Menurut Hukum Pidana Islam dan Hukum Kesehatan," *Jurnal Hukum FH UNSUR* 50, no. 4 (2009).

<sup>9</sup> Op.cit

<sup>10</sup> SMAK ST. Thomas Aquinas Ruteng, "Meningkatkan Kesadaran Moral Kritis Remaja terhadap Masalah Aborsi Provocatus Ilegal," 2023, <https://www.smakaquinasruteng.sch.id/berita/detail/983912/meningkatkan-kesadaran-moral-kritis-remaja-terhadap-masalah-aborsi-provocatus-ilegal/>.

<sup>11</sup> Susi Yusuf and Lena Juliana Harahap, "Penyuluhan tentang Dampak Aborsi Bagi Kesehatan Reproduksi di SMA Negeri 5 Kota Padangsidimpuan Tahun 2022," *Jurnal Pengabdian Masyarakat Darmas2* 1, no. 2 (2022).

<sup>12</sup> Yati Purnama, "Kronologis Kasus dan Faktor Penyebab Aborsi, Pembunuhan dan Pembuangan/Penguburan Bayi," *Syntax Idea* 1, no. 7 (2019).

<sup>13</sup> Roman Pabayo et al., "Laws Restricting Access to Abortion Services and Infant Mortality Risk in the United States," *International Journal of Environmental Research and Public Health* 17, no. 11 (May 26, 2020): 3773, <https://doi.org/10.3390/ijerph17113773>.

<sup>14</sup> Martha F. Davis, "The State of Abortion Rights in the US," *International Journal of Gynecology & Obstetrics* 159, no. 1 (October 17, 2022): 324–29, <https://doi.org/10.1002/ijgo.14392>.

<sup>15</sup> Adi Nur Supriyanto, "Analisis Pendapat Imam al-Ghazali tentang Hukum Aborsi dalam Kitab Ihya' Ulum Ad-Din" (Universitas Islam Negeri Walisongo Semarang, 2020), [https://eprints.walisongo.ac.id/id/eprint/14185/1/1502026002\\_Adi\\_Nur\\_S\\_FUL\\_SKRIPSI-adi\\_nur\\_s.pdf](https://eprints.walisongo.ac.id/id/eprint/14185/1/1502026002_Adi_Nur_S_FUL_SKRIPSI-adi_nur_s.pdf).

The novelty of this study lies in its capability to effectively and comprehensively examine the manner in which abortion is viewed from the perspective of Islamic law and Indonesian health law. The subject of the study is quite interesting, specifically considering the fact that abortion is a social phenomenon that is becoming increasingly concerning with each passing day. Deep concerns have been associated with the behavior of abortion, an act that invariably brings many negative effects to the Indonesian nation. This exploration is based on the new Indonesian health law provisions, namely Law Number 17 of 2023, Government Regulation Number 28 of 2024, Government Regulation Number 61 of 2014, and Law Number 1 of 2023 of the new Criminal Code. It is important to state that the present exploration differs significantly from several other previous authors who discussed abortion based on Law Number 39 of 2009.<sup>16</sup>

## **II. Reseach Problems**

Based on the description presented in the study background, the following questions were addressed 1) How is abortion viewed from the perspective of Islamic law? and 2) How is abortion viewed from the perspective of Indonesian health law?

## **III. Research Methods**

This present study was conducted using normative legal analysis, which examines secondary data obtained from primary, secondary, and tertiary legal materials as the main data. The primary legal materials used include Law Number 17 of 2023 on Health, the Old Penal Code, Law Number 1 of 2023 on the Penal Code, Government Regulation Number 28 of 2024 on the Implementation Regulation of Law Number 17 of 2023, and Government Regulation Number 61 of 2014 on Reproductive Health. The secondary legal materials include references to books related to the issues and results of previous publications in national and international journals. During the course of this study, authoritative legal sources such as the Qur'an, Hadith, and Ijtihad results from several schools of thought related to abortion from an Islamic legal perspective were also used. The tertiary legal materials adopted were in the form of news articles in the mass media. Subsequently, the study materials were analyzed prescriptively, with arguments presented to assess the legal correctness or incorrectness of the facts or events identified in the obtained results.<sup>17</sup> For example, whether intentional abortion for medical reasons and criminal abortion is justified or not according to Islamic law and Indonesian health law certainly present substantial arguments and legal foundations, both in Islamic law and Indonesian health law.

## **IV. Result and Discussion**

### **1. Abortion in the Perspective of Islamic Law**

In Arabic, abortion, referred to as *al-ijhadh* and *isqath alalham*, signifies the termination of a fetus carried by a woman through certain actions before pregnancy reaches full term. This may occur whether the fetus is alive or dead and before the fetus can survive outside the womb, although it may have already developed some body parts.

In the Qur'an, several verses can be referenced when discussing issues related to abortion. These verses are as follows:

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<sup>16</sup> *Op.cit*

<sup>17</sup> Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris* (Yogyakarta: Pustaka Pelajar, 2010).

a. Surah al-Isra' verse 33

وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ۖ وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لَوْلِيهِ ۖ سُلْطَانًا فَلَا  
يُضِرُّ فِي الْقَتْلِ ۖ إِنَّهُ كَانَ مَنصُورًا

Meaning: "And do not kill the soul which Allah has forbidden (to kill) except by right. And whoever is killed unjustly, We have given his guardian the authority, but let him not exceed the limits in taking life." Indeed, he is the one who is granted help. (al-Isra': 33).

From the quoted verse, it can be interpreted that Allah SWT forbids His servants from killing a soul who Allah has made unlawful to kill. The meaning of "killing a soul" is to take a human life. Meanwhile, "the one whom Allah has forbidden to kill" means killing for reasons that are not valid or not permitted by religion.<sup>18</sup>

b. Surah al-An'am verse 151

قُلْ تَعَالَوْا أَتْلُ مَا حَرَّمَ رَبِّي عَلَيْكُمْ أَلَّا تُشْرِكُوا بِهِ ۚ شَيْئًا وَبِالْوَالِدَيْنِ إِحْسَانًا ۚ وَلَا تَقْتُلُوا  
أَوْلَادَكُمْ مِنْ إِمْلَاقٍ ۖ نَحْنُ نَرْزُقُكُمْ وَإِيَّاهُمْ ۚ وَلَا تَقْرَبُوا الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَنَ ۚ وَلَا تَقْتُلُوا  
النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ۖ ذَٰلِكُمْ وَصَّيْكُمْ بِهِ ۖ لَعَلَّكُمْ تَعْقِلُونَ

Meaning: "Say (Muhammad), 'Come, I will recite to you what your Lord has forbidden to you. Do not associate anything with Him, be good to your parents, and do not kill your children because of poverty. We are the ones who provide sustenance for you and for them; do not approach immoral acts, whether they are apparent or hidden, and do not kill anyone whom Allah has forbidden except for a just cause. Thus He commands you so that you may understand.'" (al-An'am: 151).

This verse is interpreted as the prohibition against killing a soul that Allah has forbidden to kill. As for the prohibition against associating partners with Allah, it is the first and most absolute principle, whether in words or beliefs. The principle forbids the belief that God has partners, which can be typically shown through actions such as worshiping idols or other deities.<sup>19</sup> In fiqh literature, abortion can be classified into four categories, namely:

1) Spontaneous abortion (*al-isqathal-dzaty*)

Spontaneous abortion (*al-isqathal-dzaty*) refers to the natural miscarriage of a fetus without any external influence, or simply a miscarriage that occurred on its own. Most spontaneous abortions have been observed to be caused by chromosomal abnormalities. Typically, these abnormalities do not allow for normal growth, and even if the pregnancy continues, the fetus will most probably be born with congenital defects.

2) Abortion due to emergency or medical reasons (*al-isqath al-darury/al-Ilajiy*)

This category of abortion is performed due to physical indications that may be life-threatening to the mother if pregnancy is sustained. In these cases, the lesser risk is sacrificing the fetus which is permitted according to religion. The supporting fiqh principle includes: "the lesser of two harms can be undertaken to avoid a greater harm."

<sup>18</sup> "QS. Al-Isra Ayat 33," kalam.sindonews.com, n.d., <https://kalam.sindonews.com/ayat/33/17/al-isra-ayat-33>.

<sup>19</sup> Redaksi, "Tafsir Surat Al An'am Ayat 151," tafsirquran.id, n.d., <https://tafsirquran.id/tafsir-surat-al-anam-ayat-151/>.

3) Abortion that resembles intentionality (*syibh 'amd*)

Abortion that resembles intentionality, which is referred to as *syibh 'amd*, can be exemplified using the case where a husband commits domestic violence against his pregnant wife, resulting in a miscarriage. This case is called resembling intentionality because the attack is not directly aimed at the fetus, but rather at the mother, causing the fetus to be miscarried.

4) Deliberate and planned abortion (*al-'amd*)

Intentional and planned abortion (*al-'amd*) include the situation where a mother intentionally takes medicine with the intention and purpose of terminating her pregnancy, or intentionally instructs someone else, whether a doctor, a traditional healer, or others, to abort her pregnancy. This type of abortion is considered sinful and the perpetrator can be punished under criminal law (*jinayat*), as it violates the rights of the unborn child.<sup>20</sup>

From the various types of abortion actions mentioned and explained, several opinions were formulated by the fuqaha, including: 1) According to Hanbali school of thought, abortion is a sin due to the bleeding it causes during miscarriage. (miscrammed and the pregnancy is less than 4 months old; 2) As stated by Maliki school of thought, abortion is prohibited once fertilization has occurred; 3) According to Shafi'i school of thought, abortion is prohibited once the zygote has been fertilized, and interfering with it is considered a crime.<sup>21</sup>

Considering the subject matter, Abdul Wahab Khallaf (1985), in a book titled "Principles of Islamic Law" mentioned that when a person is faced with two equally dangerous conditions, the condition with the lesser danger can be selected. This is in line with the fiqh principle, where it was states that the lesser of two dangers could be selected to avoid the greater (*yartakibu akhaff al-dhararain li ittiqa'i asyaddahuma*). Other principles state that "If faced with a dilemma that is equally dangerous, then take the lesser risk by avoiding the greater one" (*idzaa taaradhat al-mafsadaraani ruu'iy a'zamuhuma dhararan*). Furthermore, a different fiqh principle elucidated that, "*darul mafasid muqaddamu 'ala jalbi al-mashalih*," meaning avoiding harm (negative aspects) takes precedence over bringing about benefits.

In the context of Islamic law, abortion is fundamentally seen as an act that is forbidden (*haram*) if carried out for reasons not related to emergencies, such as intentionality. Therefore, in Islam, abortion is permitted either at the stage of fetal creation or if a trusted doctor determines that the presence of the fetus in the womb of the mother will lead to the death of both the mother and the fetus. In these conditions, abortion is permitted and efforts should be made to save the life of the mother.<sup>22</sup> Saving a life is a concept that is supported by Islamic teachings, as evidenced by the words of Allah SWT: "*Whoever saves a life, it will be as if they have saved all of humanity*." (Al-Maidah: 32).

A woman is allowed to terminate a pregnancy if the presence of the fetus in the womb is life-threatening, even though this means killing the fetus. Terminating a pregnancy is a *mafsadat*, just as the loss of the mother life if she continues with the pregnancy is also a *mafsadat*.<sup>23</sup> However, there is no doubt that terminating the pregnancy is less harmful than taking the life of the mother or allowing her life to be threatened by the presence of the fetus.<sup>24</sup> These

<sup>20</sup> Rumelda Silalahi and Rasmita Luciana, "Pandangan Hukum Kesehatan terhadap Abortus Provocatus Berdasarkan Undang-Undang Nomor 36 Tahun 2009," *Jurnal Darma Agung* 27, no. 3 (December 11, 2019): 1082, <https://doi.org/10.46930/ojsuda.v27i3.367>.

<sup>21</sup> Rahmawati Rahmawati, "Tindakan Aborsi (Tinjauan menurut Hukum Keluarga Islam)," *Jurnal Ilmiah Al-Syir'ah* 11, no. 1 (June 10, 2013), <https://doi.org/10.30984/as.v11i1.165>.

<sup>22</sup> Latifah et al., "Aborsi dalam Pandangan Agama Islam," *Jikes: Jurnal Ilmu Kesehatan* 1, no. 2 (2023): 102-10.

<sup>23</sup> *Ibid*, 104.

<sup>24</sup> *Ibid*, 105.

considerations, which serve as the basis for the formation of law, cannot be separated from the goal of realizing the welfare, preservation, and protection of the mother who is the host (al-ashl) of the fetus. To further emphasize the worth of the mother, another study stated that a mother has responsibilities towards her family and society, while the fetus has no responsibilities at all.<sup>25</sup>

The view of jurists who permit abortion cannot be considered an alternative for women with unwanted pregnancies in social reality. However, in the context of Indonesia, based on the decision of the Fatwa Musyawarah Nasional VI Majelis Ulama Indonesia (MUI) Number: 1/MUNAS VI/MUI/2000 dated July 29, 2000, it was established.<sup>26</sup> This law elucidates that: 1) Performing an abortion (fetal termination) after *nafkh al-ruh* (the blowing of the spirit) is haram, except for medical reasons, such as saving the life of the mother; 2) Performing an abortion from the moment of ovum fertilization, even before *nafkh al-ruh*, is haram, except for medical reasons or other reasons justified by Islamic law; 3) Prohibiting all parties from performing, assisting, or permitting abortion.

Based on MUI Fatwa Number 4 of 2005 regarding Abortion, in the first general provision, there are two reasons for the permissibility of abortion, namely emergency and necessity. An emergency means a condition where the life of a person is threatened if a prohibited action is not taken, while a necessity situation implies a situation where an individual would face significant difficulty if a prohibited act is not taken. This aspect is further explained in the second part of the second point in MUI Fatwa Number 4 of 2005 on Abortion, stating that <sup>27</sup>:

- 1) Pregnant women with emergencies such as advanced-stage cancer, tuberculosis with cavitation, and other diseases are allowed to perform an abortion if pregnancy is threatening to the life of the woman.
- 2) Situations of necessity that allow for abortion include: a) The fetus is identified to have a genetic defect that is difficult to cure after birth; b) Pregnancy caused by rape, decided by a responsible team consisting of doctors, family members of the victim, and religious scholars; c) Before the fetus is forty days old, one must have the ability to perform an abortion.

The opinions of the scholars regarding abortion can serve as proof that the character of *fiqh* is dynamic and realistic, and can be continuously reviewed in accordance with societal developments,<sup>28</sup> including in the development of modern science and technology. This is in line with the objectives of the formation of Islamic law (*maqasid al-ahkam al-syar'iyah*), which aims to prevent harm in human life and bring about general welfare (*almashalih al-'ammah*) through the provision of prosperity, distancing dangers, controlling the world with truth, justice, and virtue, and determination of the direction that must be taken using human reasoning.<sup>29</sup>

Based on these opinions, it can be concluded that the type of abortion known as *al-isqathal-dzaty* or spontaneous abortion is indeed permissible, as the fetus naturally aborts or aborts on its own and not due to external influences. Additionally, the type of abortion known as *al-isqath al-darury/al-ilajiy* is also permissible under the condition that it is an emergency or if continuing the pregnancy would endanger the life of the mother. Abortion, in the view of criminal law and

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<sup>25</sup> Probo Sutejo, "Aborsi dalam Perspektif Hukum Islam" (Universitas Negeri Sebelas Maret, 2010), <https://digilib.uns.ac.id/dokumen/detail/17546>.

<sup>26</sup> Majelis Ulama Indonesia, "Fatwa Musyawarah Nasional VI Majelis Ulama Indonesia" (2018), <https://mui-jateng.or.id/wp-content/uploads/2018/03/25.-Aborsi-1.pdf>.

<sup>27</sup> *Ibid.*

<sup>28</sup> Universitas Islam Indonesia, "Menggagas Fikih yang Berwawasan Keindonesiaan," 2022, <https://www.uui.ac.id/menggagas-fikih-yang-berwawasan-keindonesiaan/>.

<sup>29</sup> Nelly Yusra, "Aborsi dalam Perspektif Hukum Islam," *Marwah: Jurnal Perempuan, Agama dan Jender* 11, no. 1 (June 2, 2012): 1, <https://doi.org/10.24014/marwah.v11i1.496>.

Islamic law, is an act that cannot be justified, except in conditions permitted by medical necessity.<sup>30</sup>

Following the permitted cases where abortion can be performed, situations, where the act is prohibited, include cases of *al-'amd* or deliberate and planned abortion. The category of abortion is strictly prohibited because it is typically performed intentionally without any emergency, which is considered a violation of the human rights of the child. Another type of prohibited abortion is the *syibh 'amd* or abortion resembling intentionality. Even though the fetus is not directly aborted, it is still considered an action resembling intentionality where the cause of miscarriage is an attack on the mother carrying the fetus.

## 1. Abortion from Health Law Perspective

Abortion in simple terms is simply the termination of pregnancy or the premature expulsion of the conception or fertilization results. In medical terms, according to Holmer, abortion is the cessation of pregnancy with the death and expulsion of the fetus at an age of less than 20 weeks with a fetal weight of less than 500 grams.<sup>31</sup>

The Indonesian Encyclopedia provides a detailed explanation of abortion, defining the act as the termination of pregnancy before the gestational period reaches 28 weeks or before the fetus weighs 1000 grams. However, according to Suryono Ekotama, pregnancy of a woman can be terminated at any time provided there is a medical indication for the abortion. For example, if it is known that the child to be born has severe disabilities or the mother suffers from a life-threatening ailment such as heart disease.<sup>32</sup>

In medical terms, abortion consists of two types, which are as follows:<sup>33</sup>

### 1) Spontaneous abortion

Spontaneous abortion (*Abortus Spontaneus*) is abortion that occurs naturally, either without a specific cause or because of a specific cause. Spontaneous abortion that occurs due to a specific cause can be initiated by an illness, toxoplasma virus, anemia, high fever, and can even be caused by an accident. Abortion that occurs in this manner do not have any legal consequences.

### 2) Intentional abortion

Intentional abortion is an abortion that occurs intentionally due to certain reasons. This type of abortion is typically associated with certain legal consequences, depending on the underlying factors. There are 2 types of induced abortion namely:

#### a. Intentional medicinalis abortus

Intentional medicinalis abortus is the termination of pregnancy carried out based on medical reasons or considerations. A prominent example, in this case, is intentional abortus therapeuticus, where the abortion is performed to save the mother life. Intentional abortus therapeuticus is a type of abortion where the termination is performed by medical professionals and is often caused by medical indications. The act in this category is carried out by removing the fetus from the womb, even if it is far from the time of birth, and is performed as a life-saving measure for the mother after a medical examination.

#### b. Intentional criminalis abortus

<sup>30</sup> Soediro Soediro, "Aborsi dalam Pandangan Hukum Pidana dan Hukum Islam," *Kosmik Hukum* 12, no. 1 (2012).

<sup>31</sup> Asra Sakira, "Aborsi dan Hak Kesehatan, Reproduksi Perempuan dalam Hukum Islam dan Hukum Negara," *Al-Ubudiyah: Jurnal Pendidikan dan Studi Islam* 3, no. 2 (December 30, 2022): 11-27, <https://doi.org/10.55623/au.v3i2.120>.

<sup>32</sup> *Ibid.*

<sup>33</sup> Yonna B. Salamor, "Analisis Yuridis Ajaran Turut Serta dalam Kasus Abortus Provocatus dengan Alasan Kegagalan Alat Kontrasepsi," *Sasi* 20, no. 1 (June 30, 2014): 19, <https://doi.org/10.47268/sasi.v20i1.342>.



Intentional criminal abortus is a type of abortion performed without any medical reason. In other words, it is a type of abortion conducted without any medical health issues, which is often caused by the request of the patient. Several factors can lead to patients opting to carry out an intentional abortion, including economic factors, maintenance of beauty, or concerns about moral sanctions. This type of abortion is often related to actions that are contrary to the law and ethics. In general, induced abortion is caused by several factors, including (1) Economic factors, due to fear and being constrained by poor economic conditions, leading to uncertainty about being able to raise the child being carried, resulting in the act of abortion, (2) Social factors, often related to cases of abortion performed by someone pregnant out of wedlock. This behavior is generally viewed as disgraceful, hence, in cases where teenagers engage in premarital sex leading to pregnancy, abortion is seen as a medium to fix respective problems.<sup>34</sup> (3) Rape cases, where the victims are forced to have an abortion to save respective future.

Based on Article 60 paragraph (1) of Law Number 17 of 2023 in conjunction with Articles 116-123 of Government Regulation Number 28 of 2024, abortion is fundamentally prohibited except under criteria permitted according to the provisions in the Criminal Code. Furthermore, Article 60 paragraph (2) stipulates that the implementation of abortion must be carried out by medical and health personnel who have the competence and authority, conducted in healthcare facilities designated by the Minister, and with the consent of the pregnant woman and her husband, except for women who are victims of rape.<sup>35</sup>

Abortion procedures for women who are victims of rape are specifically regulated in Government Regulation Number 61 of 2014 concerning Reproductive Health. Article 31 stipulates that there are exceptions to the prohibition of abortion. These exceptions include the fact that abortion may be performed if there are indications of a medical emergency or if the pregnancy is a result of rape. Typically, the determination of a medical emergency indication must be carried out by the abortion eligibility team, and the abortion procedure must also be performed safely, with quality, and responsibly. This procedure is mentioned in Article 35 paragraph (2), which includes, the abortion must be (1) Performed by a doctor according to predefined standards, (2) Performed in a healthcare facility that meets the criteria set by the Minister, (3) At the request or consent of the pregnant woman concerned, (4) With the permission of the husband, except for rape victims, (5) Non-discriminatory, and (6) Carried out without prioritizing material compensation. In terms of prevention and protection for women from unsafe abortion practices, or even those that contradict legal regulations, the Central Government, Regional Governments, and society are also responsible. This is reinforced in Article 61 of Law Number 17 of 2023.

Abortion is indeed prohibited by law, but there are exceptions, depending on the purpose of the abortion. By examining Law Number 1 of 2023 in Article 463 paragraph (1), no criminal penalties were mentioned for women who carry out abortion. However, in paragraph (2), the criminal penalty provisions did not apply to women who are victims of rape or other sexual violence crimes that lead to pregnancy, those whose pregnancy is no more than 14 weeks old, and individuals with indications of medical emergencies. Article 465 paragraph (3) of Law Number 1 of 2023 states that in cases where the abortion is performed due to medical emergencies, or for

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<sup>34</sup> Sonya Airini Batubara et al., "Tinjauan Yuridis terhadap Tindak Pidana Abortus Provocatus Menurut UU Nomor 36 Tahun 2009 tentang Kesehatan," *Jurnal Dharma Agung* 28, no. 3 (December 7, 2020): 402, <https://doi.org/10.46930/ojsuda.v28i3.804>.

<sup>35</sup> Ahdiana Yuni Lestari et al., "Abortion Provisions for Rape Victims: A Comparative Study of 6 Asian Countries," *Multidisciplinary Reviews* 7, no. 8 (May 20, 2024): 2024183, <https://doi.org/10.31893/multirev.2024183>.

victims of rape or other sexual violence crimes that result in pregnancy, the healthcare professionals such as doctors, midwives, paramedics, or pharmacists who assist in the abortion process would not be criminally charged.

The process of abortion is a complex and sensitive issue. From a health perspective, the act is permitted as an emergency medical procedure to protect the safety and health of the mother in certain situations, such as contraceptive failure, victims of rape, or life-threatening medical conditions. However, the decision to perform an abortion must be accompanied by counseling sessions before and after the procedure, to ensure that the decision is made rationally and responsibly. Counselors should ensure that the final decision is the right of the woman to determine, not influenced by external parties. Before an abortion, patients are expected to consult with a doctor to understand all its medical aspects. If the fetus is diagnosed, parents must be provided with complete information about the defect before making a decision.<sup>36</sup>

In some jurisdictions, abortion is strictly regulated and can only be performed under certain conditions, such as a maximum gestational age and approval from various concerned parties. From the perspective of medical theory, abortion should be viewed as a last resort after careful consideration and comprehensive counseling. It is important to ensure that the final decision is made rationally and responsibly while minimizing emotional risks for the individuals included. From a legal perspective, sufficient attention should be given to compliance with applicable regulations and to ensure the protection of individual rights, including the right to reproductive health and access to safe and legal abortion services.<sup>37</sup>

By thoroughly examining several Articles specified in Law Number 17 of 2023, Law Number 1 of 2023, and Government Regulation Number 61 of 2014, it can be seen that abortion is typically permitted under the condition that there are indications of a medical emergency if the pregnancy is continued, and for women who became pregnant due to rape or other acts of sexual violence. Abortion due to human actions can occur for medical reasons, such as when a pregnant woman suffers from a disease that requires the pregnancy to be terminated to save her life. (therapeutic abortion).<sup>38</sup> This is in line with a previous study, where an elucidation was made that woman possessed the right to have an abortion if the pregnancy causes pain or suffering, if the life and health of the woman are in danger, or if the pregnancy is the result of incest or rape.<sup>39</sup> Lastly, the theoretical analysis of abortion from the perspective of health law shows that the decision to carry out an abortion must include interrelated medical, ethical, legal, and social considerations.

## V. Conclusion

In conclusion, the study results showed that abortion was permitted in both Islamic law and health law perspectives under certain conditions. First, from the perspective of Islamic law, abortion was permitted if the act fell under certain categories, including spontaneous abortion (*al-isqathal-dzaty*), where the fetus expels itself without any intention or external influence, and the category of abortion due to emergency or medical necessity (*al-isqath al-darury/al-ilajiy*), which was also permitted because abortion was performed due to physical life-threatening. In Islamic law, abortion performed outside of these two categories was observed to be prohibited. Second, from the perspective of health law, through the examination of Law Number 17 of 2023, Law

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<sup>36</sup> Dorteis Yenjau, Muhammad Yusuf, and Hudi Yusuf, "Pemahaman Aborsi: Tinjauan dari Perspektif Teori Kedokteran dan Hukum," *JICN: Jurnal Intelek dan Cendekiawan Nusantara* 1, no. 2 (2024).

<sup>37</sup> *Ibid.*

<sup>38</sup> Supriyanto, "Analisis Pendapat Imam Al-Ghazali tentang Hukum Aborsi dalam Kitab Ihya' Ulum Ad-Din."

<sup>39</sup> Lestari et al., "Abortion Provisions for Rape Victims: A Comparative Study of 6 Asian Countries."

Number 1 of 2023, Government Regulation Number 28 of 2024, and Government Regulation Number 61 of 2014, abortion was found to be permitted under the condition that there was a medical emergency indication for pregnant woman if pregnancy was continued. This act was also allowed for women who were pregnant due to rape or sexual violence. Typically, it was recommended that the process be carried out safely, with quality, and responsibly by an abortion jteam in accordance with Article 35 paragraph (2) of PP No 61 of 2014. No criminal penalties were applied to women and healthcare workers who performed abortion based on indications of medical or personal emergencies, such as pregnancies resulting from rape which could cause psychological trauma to the victims of rape and victims of sexual violence.

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