



## 40 Days vs. 120 Days

(Legal Time Limits for Abortion in Rape cases from the Perspectives of Positive Law and Islamic Law)

**Rahmat Hidayat<sup>1</sup>, Muhammad Iqbal Irham<sup>2</sup>, Muhammad Faisal Hamdani<sup>3</sup>**

<sup>1-3</sup>Universitas Islam Negeri Sumatera Utara Medan, Indonesia

[rahmathidayat@uinsu.ac.id](mailto:rahmathidayat@uinsu.ac.id)

### Abstract

One of the consequences of rape is unwanted pregnancy, which may lead to both psychological and physical distress, often resulting in the desire to undergo an abortion. According to the 2023 Indonesian Penal Code (KUHP) and the opinion of the Hanafi school of thought, abortion is permissible before the pregnancy reaches 14 weeks or 120 days. In contrast, under the 2009 Health Law and the Shafi'i school of thought, abortion is only allowed before 6 weeks or 40 days of gestation. This discrepancy calls for further examination to determine the most appropriate legal threshold for abortion in rape cases, from both the perspectives of positive law and Islamic jurisprudence. This study employs a qualitative method with a comparative approach, utilizing literature review and document analysis of statutory law, classical Islamic legal texts, and relevant medical literature. It also applies the principle of *hifz al-nafs* (protection of life) as a normative foundation. The findings reveal that the 2023 revision of the Penal Code, which extends the permissible period for abortion from 6 to 14 weeks, aligns with the majority of Islamic scholars who permit abortion before 120 days of gestation. Nonetheless, abortion before 40 days is preferable to avoid legal controversy and reduce medical risks and psychological trauma. This study recommends harmonizing national laws, medical ethics, and Islamic legal principles to ensure substantive justice and optimal protection for victims of sexual violence.

**Keywords:** Abortion; Fiqh; Penal Code; Rape; Health Law

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## Introduction

Rape cases in Indonesia constitute a serious issue that threatens individual rights, particularly the rights of women. Rape not only causes physical harm to the victims but also leads to profound psychological trauma.<sup>1</sup> Several key factors contribute to the prevalence of rape, including drug influence, patriarchal cultural norms, and weak enforcement of laws against perpetrators. Rapists often come from various social backgrounds and may even include individuals known to the victim, such as close relatives, friends, or strangers. While women are generally the primary victims, cases of sexual assault against boys are also on the rise. One of the most common motives identified in such crimes is the gratification of biological urges.<sup>2</sup>

In Indonesia, reported rape cases have shown a consistent increase year after year. According to data released by the National Commission on Violence Against Women (Komnas Perempuan), the number of rape cases in 2022 exceeded 4,000, and this figure is expected to rise further in 2023 and 2024.<sup>3</sup> These incidents are not limited to major urban areas but have also spread to rural regions, indicating that rape is a pervasive issue affecting all segments of society. The data also reveal that most perpetrators are adult men, while the majority of victims fall within the age range of 16 to 30 years.

The psychological impact of rape is profound and often long-lasting.<sup>4</sup> Victims may experience ongoing psychological trauma, including depression, anxiety, post-traumatic stress disorder (PTSD), and social anxiety disorders.<sup>5</sup> Data suggest that approximately 70% of rape survivors suffer from severe psychological disturbances following the incident. Moreover, many victims feel isolated from society, overwhelmed by shame, and perceive their lives as shattered. In cases where rape results in pregnancy, the psychological trauma can become even more severe, as the victim must cope with an unwanted pregnancy and the prospect of childbirth.<sup>6</sup>

Regarding the consequences of giving birth to a child conceived through rape, research indicates that such births often lead to significant social and psychological impacts for both the mother and the child. Mothers frequently experience emotional distress and anxiety, and many struggle to care for the child due to feelings of hatred or trauma associated with the assault. On the other hand, children born as a result of rape are often perceived as products of violence, leading to social stigmatization. Data show that approximately 60% of mothers

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<sup>1</sup> Komnas Perempuan, "Catatan Tahunan Kekerasan Terhadap Perempuan Tahun 2024" (Jakarta, 2024), 44.

<sup>2</sup> Rukman Rukman, Yeni Huriani, and Lily Suzana binti Haji Shamsu, "Stigma Terhadap Perempuan Korban Kekerasan Seksual," *Jurnal Iman Dan Spiritualitas* 3, no. 3 (2023): 447–54, <https://doi.org/10.15575/jis.v3i3.29853>.

<sup>3</sup> Komnas Perempuan, "Laporan Tahunan Kekerasan Terhadap Perempuan" (Jakarta, 2022), 5.

<sup>4</sup> Ila Adila and Pramestya Putri, "Dampak Dan Perlindungan Terhadap Fenomena Kasus Pemerkoasaan," *Jurnal Ilmu Hukum Dan Sosial* 1, no. 3 (2023): 1, <https://doi.org/10.51903/hakim.v1i3.1249>.

<sup>5</sup> Nurmini Sengan, Joko Yuwono, and Retno Nurasisyah Islamiati, "Analisis Dampak Sosial Dan Upaya Perlindungan Terhadap Kasus Pemerkoasaan," *Kajian Administrasi Publik Dan Ilmu Komunikasi* 1, no. 3 (2024): 14, <https://doi.org/https://doi.org/10.62383/kajian.v1i3.24>.

<sup>6</sup> Ekandari, Mustaqfirin, and Faturochman, "Perkoasaan, Dampak, Dan Alternatif Penyembuhannya," *Jurnal Psikologi* 28, no. 1 (2001): 1–3, <https://doi.org/https://doi.org/10.22146/jpsi.7011>.

who give birth after rape suffer from mental health disorders, and the majority report difficulties in raising the child.<sup>7</sup>

The various harms experienced by rape victims have led to the assumption that the pregnancy should be terminated, considering the potentially greater consequences if the child is born. As an unwanted pregnancy, both the victim and the fetus are exposed to long-term medical and psychological impacts that may persist into the future.

According to Law Number 17 of 2003 concerning Health, specifically Article 60, abortion is generally prohibited, except under specific criteria permitted by provisions outlined in the Criminal Code.<sup>8</sup> Law Number 1 of 2023 on the Indonesian Penal Code (KUHP), which is set to take effect in 2026, introduces new provisions regarding abortion. Article 463, paragraph (2), stipulates that abortion is not punishable if performed by a victim of rape or other forms of sexual violence that result in pregnancy, provided the gestational age does not exceed 14 weeks.<sup>9</sup>

This provision offers a more extended time frame compared to Law Number 36 of 2009 on Health, which limited abortion in rape cases to within six weeks of gestation, calculated from the first day of the last menstrual period. Legally, Law Number 36 of 2009 has been repealed by Law Number 17 of 2003.

The impact of this legislative change aligns with ongoing debates among Islamic scholars concerning the permissible time frame for abortion in rape cases. Scholars hold differing opinions on whether abortion is allowed for rape victims—some allow it up to a maximum of 40 days, others up to 120 days, while some prohibit it entirely. The 40-day limit in Islamic scholarly opinion closely aligns with the six-week limit in Law No. 36/2009, and the 120-day limit corresponds to the 14-week provision in Law No. 1/2023. This polemic over whether the proper threshold for abortion in rape cases should be six weeks (or 40 days) or 14 weeks (or 120 days) warrants in-depth analysis in both Islamic legal and medical contexts.

This paper also examines previous research on abortion in cases of rape. Several studies, such as those conducted by Engga Lift Irwanto et al.<sup>10</sup>, Ibnu Fadli,<sup>11</sup> Nur Azizah,<sup>12</sup> Abdul

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<sup>7</sup> Muhammad Rofiq Adhitya, "Tindakan Aborsi Akibat Pemerkosaan Yang Menyebabkan Trauma Psikologis Bagi Korban," *Lex Administratum* 12, no. 1 (2023): 2–4.

<sup>8</sup> "Undang-Undang Republik Indonesia Nomor 17 Tahun 2023 Tentang Kesehatan" (2023).

<sup>9</sup> "Undang-Undang Republik Indonesia Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana" (2023).

<sup>10</sup> Engga Lift Irwanto and Khairani, "Tinjauan Yuridis Terhadap Perbuatan Aborsi Akibat Pemerkosaan Berdasarkan Ketentuan Peraturan Perundang-Undangan," *Unes Journal of Suara Justisia* 7, no. 4 (2024): 1294–1307, <https://doi.org/10.31933/ujsj.v7i4.441>.

<sup>11</sup> Ibnu Fadli, "Legalitas Aborsi Bagi Korban Perkosaan (Tinjauan Menurut Hukum Positif Dan Hukum Islam)," *Jurnal Lex Renaissance* 7, no. 3 (2022): 559–70, <https://doi.org/10.20885/jlr.vol7.iss3.art8>.

<sup>12</sup> Nur Azizah and Risahlan Rafsanjani, "Hukum Aborsi Karena Penyakit Dan Korban Pemerkosaan Dalam Tinjauan Hukum Islam, Common Law System, Civil Law System," *SPECTRUM: Journal of Gender and Children Studies* 2, no. 2 (2022): 75–84, <https://doi.org/10.30984/spectrum.v2i2.412>.

Manaf et al.,<sup>13</sup> Dewa Ayu Dwi Purnamasari et al.,<sup>14</sup> and Novita,<sup>15</sup> address the issue of abortion in rape cases, but they primarily focus on juridical analysis, whether in terms of Indonesian positive law, Islamic law, or other legal systems. In their research, the discussion of the number of days is merely supportive in nature, not part of the substantive discourse. They include the mention of days simply because it is referenced in the regulation. However, when addressing the threshold, they do not approach it argumentatively. For example, Azizah's writing does not mention any scholars supporting each opinion, nor does it provide their reasoning. Similarly, Fadhil's writing only refers to the number of days as stated in the regulation, without further elaboration.

Meanwhile, other researchs, such as those by Muhammad Rofiq Adhitya,<sup>16</sup> Nurmini Sengan et al.,<sup>17</sup> and Ila Adila and Pramestya Putri,<sup>18</sup> explore the psychological and health impacts on rape victims. Their research focuses solely on the medical approach, while references to positive law or Islamic law are used merely as supporting data rather than as the primary object of the study. Therefore, this research differs from previous studies in that its main objective is to determine the appropriate legal time threshold for abortion in cases of rape. Therefore, this research differs from previous studies, as its primary objective is to analyze the changes in the time limit for abortion in cases of rape as regulated in positive law. With the enactment of the 2023 Indonesian Penal Code (KUHP), which introduced changes to the legal time frame for abortion, it has become essential to analyze the numerical thresholds related to the time limits for performing abortions in cases of rape. This article occupies a distinct research niche by integrating Islamic legal, positive legal, and medical perspectives in response to this legislative reform. Unlike previous studies that primarily focused on the permissibility of abortion according to statutory law and Islamic jurisprudence, or those that approached abortion from a medical standpoint, this research centers on a comparative analysis of the changing time thresholds for abortion. It examines the time-related provisions as stipulated in positive law and interprets them through the lens of Islamic law by presenting various scholarly opinions along with their supporting arguments. This approach is further contextualized using the principles of *uṣūl al-fiqh* and reinforced with relevant medical insights, offering a comprehensive and interdisciplinary understanding. Using the *maqasid al-shari'ah* framework, particularly al-Syathibi's theory concerning the protection of life (*hifẓ al-nafs*), this study evaluates whether the stipulated time limits reflect the principles of public interest (*maslahah*) and victim protection. Thus, this analysis not only highlights the normative

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<sup>13</sup> Abdul Manaf and Ida Priatna, "Aborsi Janin Hasil Perkosaan Dalam Perspektif Hukum Islam," *Minhaj: Jurnal Ilmu Syariah* 5, no. 1 (2024): 143–57, <https://doi.org/https://doi.org/10.52431/minhaj.v5i1.1897>.

<sup>14</sup> Dewa Ayu Dwi Purnamasari, Anak Agung Ngurah Wirasila, and Ngurah Wirasila, "Perlindungan Hukum Bagi Korban Perkosaan Yang Melakukan Aborsi," *Kertha Desa* 9, no. 9 (2021): 19–27, <https://doi.org/10.33476/ajl.v13i2.3090>.

<sup>15</sup> Novita, "Aborsi Terhadap Korban Tindak Pidana Pemerkosaan," *Belom Bahadat: Jurnal Hukum Agama Hindu* 13, no. 1 (2023): 2588–93, <https://ejournal.iahntp.ac.id/index.php/belom-bahadat%0AABORSI>.

<sup>16</sup> Adhitya, "Tindakan Aborsi Akibat Pemerkosaan Yang Menyebabkan Trauma Psikologis Bagi Korban."

<sup>17</sup> Sengan, Yuwono, and Islamiati, "Analisis Dampak Sosial Dan Upaya Perlindungan Terhadap Kasus Pemerkosaan."

<sup>18</sup> Adila and Putri, "Dampak Dan Perlindungan Terhadap Fenomena Kasus Pemerkosaan."

dimension but also emphasizes the urgent need for regulatory harmonization to ensure substantive justice and optimal protection for victims of sexual violence within the framework of the new legal system.

This study employs a qualitative method with a comparative analysis approach to gain an in-depth understanding of the legal phenomenon of abortion in cases of rape. The primary focus is directed at comparing Indonesian positive law, Islamic jurisprudence (fiqh), and medical perspectives in order to examine the time threshold for abortion in rape cases. Data in this research is conducted through library research and document analysis. Primary sources include the 2023 Indonesian Penal Code (KUHP), Law No. 36 of 2009 on Health, Government Regulation No. 61 of 2014 on Reproductive Health, and classical fiqh texts from the four major Islamic schools. Secondary sources consist of scholarly journals, academic articles, policy documents, and relevant medical publications.

Thematic analysis is used to identify key themes within the legal arguments. The analysis is further strengthened by source triangulation, ensuring the validity of findings by comparing data from national law, fiqh, and medical literature based on specific comparative parameters of legal basis and reasoning, medical considerations and consequences (both physical and psychological) and abortion time limit. In processing the data, the study also incorporates the maqāṣid al-sharī'ah framework, specifically the principle of hifz al-nafs (protection of life) to reinforce the analytical depth.

## **Result and Discussion**

Rape is a criminal act. This consensus is grounded not only in religious principles but also aligns with human rationality. All international criminal law systems universally condemn the act of rape, although the conceptual definitions of rape may vary.<sup>19</sup> Substantively, rape is consistently understood as sexual intercourse that occurs without the consent of one of the parties involved.

However, there are still instances of criminalization and social exclusion of rape victims, particularly when they become pregnant and seek to terminate the pregnancy. In some cases, victims are forced to bear the burden of pregnancies resulting from rape, despite the fact that, both morally and legally, they are the harmed party.

The impact of rape is severe, encompassing psychological, physical, and social dimensions. From a psychological perspective, the effects include:<sup>20</sup>

- a. Post-Traumatic Stress Disorder (PTSD) – a mental health condition that arises after experiencing a traumatic and life-threatening event. PTSD may manifest through symptoms such as flashbacks, nightmares, excessive fear, anger, or other intense negative emotions. Victims may also experience sleep disturbances, difficulty concentrating, and feelings of social isolation.
- b. Self-blame – Rape survivors often struggle with feelings of guilt or tend to blame themselves for the assault they endured, despite being the victim.

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<sup>19</sup> Fadli, "Legalitas Aborsi Bagi Korban Perkosaan (Tinjauan Menurut Hukum Positif Dan Hukum Islam)," 59–60.

<sup>20</sup> Adhitya, "Tindakan Aborsi Akibat Pemerkosaan Yang Menyebabkan Trauma Psikologis Bagi Korban," 2–5.

- c. Suicidal ideation – One of the most serious psychological consequences of rape is suicidal thoughts or attempts, commonly triggered by deep depression following the trauma.

From a physical perspective, the consequences may include:

- a. Increased risk of sexually transmitted infections (STIs) – including chlamydia, herpes, HIV, and hepatitis. For this reason, it is crucial for rape survivors to seek immediate medical attention so that any potential infections can be detected and treated as early as possible.
- b. Unwanted pregnancy – This is especially likely when the rape occurs during the victim's fertile period and the perpetrator ejaculates inside the vagina. Such pregnancies present complex emotional and physical burdens for the victim.

Social beliefs and rape-related myths often act as additional stressors for survivors. One of the major burdens faced by victims is the fear of social rejection. This fear encompasses concerns about acceptance within their community, their school environment, and in their interpersonal relationships with men, both generally and specifically.<sup>21</sup> Victims are frequently blamed for the incident or perceived as a source of shame for their families and communities. As a result, they often experience feelings of shame, guilt, and may withdraw from their social environment. This stigma also discourages many victims from reporting the assault, fearing ostracization or disbelief by society.

In the healthcare, abortion is defined as the termination of a pregnancy before the fetus is capable of surviving outside the womb. In medical terms, abortion is categorized into two types, spontaneous abortion which results from failed fetal development and is commonly referred to as miscarriage; and induced abortion, which is intentionally performed.<sup>22</sup> Abortion remains a contentious issue in the medical community. Many healthcare professionals are reluctant to perform it, while others exploit the procedure for personal gain through illegal means. Considering the severe consequences of rape, abortion is often viewed as a justifiable response. Technically, abortion can be carried out at any stage of pregnancy; however, the risks to the mother's health increase significantly as the pregnancy progresses.<sup>23</sup> Performing an abortion at a later stage of pregnancy carries significant risks, as it concerns both the life of the fetus and the mother.<sup>24</sup> The WHO recommends that safe abortions should be conducted before the fetus reaches 12 weeks of gestation.<sup>25</sup> It is also important to note that complications may occur during or after the procedure, especially if the abortion is

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<sup>21</sup> Ekdari, Mustaqfirin, and Faturochman, "Perkosaan, Dampak, Dan Alternatif Penyembuhannya," 3.

<sup>22</sup> Siti Cholifatun, "Aborsi Ditinjau Dari Segi Medis," *Musawa* 2, no. 2 (2003): 203.

<sup>23</sup> Henry Andrian, "Usia-Kandungan-5-6-Bulan," *Alodokter*, 2015, <https://www.alodokter.com/komunitas/topic/usia-kandungan-5-6-bulan>.

<sup>24</sup> Rizal Fadli, "Fakta Mengenai Aborsi Yang Perlu Dipahami," *Halodoc*, 2023, <https://www.halodoc.com/artikel/fakta-mengenai-aborsi-yang-perlu-dipahami?srsltid=AfmBOorOzMEwzu35j9znVOblh9ZFkosx7Gt0miySnAo9-0oCQd7g5J7V>.

<sup>25</sup> World Health Organization, *Abortion Care Guideline, Auqensua: Cc By-Nc-Sa 3.0 Igo* (Geneva: World Health Organization, 2022), xx, <https://creativecommons.org/licenses/by-nc-sa/3.0/igo/deed.ru>.

carried out improperly or without medical supervision. In fact, the WHO has issued specific guidelines for abortions performed after 12 weeks to minimize the associated risk factors.<sup>26</sup> The initial stage of fetal development begins with the zygote or germinal phase, which covers the first two weeks after fertilization. Once the sperm meets the egg, a zygote is formed and undergoes rapid cell division to become a blastocyst. This blastocyst then attaches to the uterine wall in a process known as implantation, which occurs around 10 days after fertilization. At this stage, the foundational layers of life begin to form: the ectoderm (which will become the brain, skin, and nervous system), the endoderm (which develops into the digestive and respiratory systems), and the mesoderm (which forms muscles, bones, the heart, and reproductive organs). The inner layer develops into the embryo, while the outer layer becomes the placenta and other supporting structures. From weeks 2 to 8, known as the embryonic stage, there is rapid development of the major organs. The nervous system begins forming by the end of the third week, and the heart starts to beat. The embryo continues to grow into a fetus, with the head, eyes, ears, and other body parts beginning to take shape. By the 12th week, primary ossification centers have developed, and external genitalia can be identified via ultrasound.<sup>27</sup>

From this, we can understand that abortion before 12 weeks, as recommended by the WHO, serves as a strong foundational guideline. This is further supported by the fact that growth and development after 12 weeks progress rapidly and significantly. The fetus can grow up to 20 times its original size during this period. Physical characteristics that resemble a proportionate adult begin to appear, and pregnant women can start to feel fetal movements, such as kicking or punching.<sup>28</sup>

From the perspective of Indonesia's positive law, abortion is permitted for rape victims. This is based on Law Number 1 of 2023 (Indonesian Penal Code – KUHP) and Government Regulation (PP) Number 28 of 2024 concerning the Implementation of Law Number 17 of 2023 on Health. Notably, there has been a change in the time limit for abortion in rape cases—from a maximum of 6 weeks as stated in the previous Health Law No. 36 of 2009 to 14 weeks under Law No. 1 of 2023. The rationale behind this change is not clearly stated, and it may be considered an anomaly, as there appears to be no logical justification for delaying abortion in rape cases.

A possible consideration behind the extension of the time limit could be related to procedural matters, particularly the requirement for an investigative statement confirming the suspicion of rape and/or other forms of sexual violence resulting in pregnancy, as stipulated in Government Regulation No. 28 of 2024. In practice, obtaining such a statement can be time-consuming, as it involves a criminal investigation process. Investigators may also rely on expert testimony to establish a causal link between the rape and the resulting pregnancy.

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<sup>26</sup> Organization, xx.

<sup>27</sup> Cindy Azkhya et al., “Perkembangan Masa Prenatal Mulai Dari Ciri-Ciri Periode Pranatal Sampai Periode Perkembangan Pranatal,” *Jurnal Pendidikan Sosial Dan Konseling* 1, no. 3 (2023): 1048.

<sup>28</sup> Elsa Apriani et al., “Analisis Bibliometrik (2019-2023): Perkembangan Kondisi Janin Dalam Masa Prenatal” 2 (2025): 64.

In positive law, when there is a conflict between legal provisions, the principle of *lex posterior derogat legi priori* applies, meaning that the newer law overrides or nullifies the earlier one. Consequently, the Health Law enacted in 2009, which regulated abortion, is superseded by the Indonesian Penal Code (KUHP), set to take effect in 2026. Under this newer legal framework, abortion is permissible up to 14 weeks of pregnancy, thereby overriding the previous 6-week limit. However, the question arises: does this revised legal provision align with Islamic law?

In Islamic jurisprudence, rape is categorically considered a criminal offense. It is defined as an act in which a man engages in sexual intercourse with a woman without her valid consent, either through physical force or coercion. In *fiqh* terminology, it is described as “*idkhal al-hashayafah bi al-ikrah fi farji insan min ghayr zawaj aw milk aw shubhah*”—which refers to the forcible insertion of the male genital organ into a woman’s private part outside the bounds of marriage, ownership (as per classical contexts), or any legitimate ambiguity. The *wasilah* (means) of such a crime is coercion that eliminates the woman’s consent and autonomy. This includes not only physical force but also other forms such as the use of intoxicants or drugs that impair consciousness or rational judgment.<sup>29</sup>

In Islam, there are differing scholarly opinions regarding abortion in cases of rape. These opinions are typically divided into two main categories: abortion before and after the ensoulment (*nafkh al-rub*) of the fetus. The first view concerns abortion after ensoulment. The majority of Islamic scholars agree that terminating a pregnancy after the soul has been breathed into the fetus (*nafkh al-rub*) is categorically forbidden (*ḥarām*), regardless of whether they believe this occurs at 120 days or 40 days of gestation. At that stage, the fetus is considered a living human being (*nafs muhtaramah*) with a soul, and therefore, killing it is strictly prohibited. Ibn ‘Abidin stated: “Abortion after the soul has been breathed into the fetus is impermissible.” When asked whether abortion is allowed after ensoulment, he replied: “No, because that only occurs after 120 days have passed.”<sup>30</sup> Similarly, Nihayah al-Muhtaj, affirms that once the soul has been infused into the fetus, abortion is clearly forbidden due to its established prohibition (*tabrim*).<sup>31</sup>

According to Ibn Taymiyyah, terminating a pregnancy after the soul has been breathed into the fetus is forbidden (*haram*) based on the consensus (*ijma’*) of the Muslim.<sup>32</sup> In alignment with this view, Ibn Ḥazm asserted that if someone intentionally kills a pregnant woman and the fetus is delivered but dies, the perpetrator is subject to retaliatory punishment (*qisas*), unless the killing was accidental or due to a mistake, in which case financial compensation or blood money (*diyyat*) is imposed. Ibn Hazm emphasized that the fetus, having blood and life, is to be regarded as a human being.<sup>33</sup>

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<sup>29</sup> Ali Rasyid Abu Hujailah, *Al-Himayah Al-Jaz’iyah Li Al-‘Arad* (Urdun: Darul Tsaqafah, 2011), 58.

<sup>30</sup> Ibnu ‘Abidin, *Radd Al-Mukhtar ‘ala Al-Durr Al-Mukhtar*, 2nd ed. (Beirut: Darul Fikr, 1986), 273.

<sup>31</sup> Ahmad bin Muhammad Al-Ramli, *Nihayat Al-Muhtaj Ila Sharh Al-Minhaj* (Beirut: Darul Fikr, n.d.), 24.

<sup>32</sup> Ibnu Taimiyah, *Majmu‘ Fatawa* (Riyadh: Mujamma‘ al-Malik Fahd, 1995), vol. 34, 150.

<sup>33</sup> Ibnu Hazm, *Al-Muballa Bi Al-‘Atsar* (Kairo: Mathba‘ah al-Nahdah, n.d.), 2217.

The second perspective concerns abortion before the soul is breathed into the fetus. Islamic jurists (fuqahā') differ in their opinions regarding the permissibility of terminating a pregnancy during this early stage. These differences arise even within the same legal school (madhhab). At least three widely recognized opinions can be identified in this regard.

The first opinion holds that abortion is absolutely haram (forbidden), even if the fetus is still in the *nutfah* stage (the earliest phase of conception). This view is upheld by some scholars of the Hanafī school<sup>34</sup> and is widely recognized within the Maliki school.<sup>35</sup> It is also the position of prominent figures such as Imam al-Ghazali,<sup>36</sup> Ibn al `Amd (from the Shafi'i school), and Ibn al-Jawzi (from the Hanbali school).<sup>37</sup> According to this perspective, abortion, even at the *nutfah* stage, constitutes a *jīnayah* (crime), as it involves destroying the potential of a living being that is in the process of being created. As the fetus develops further, the severity and gravity of the act increases. The *nutfah* is regarded as the origin of human life, and therefore, terminating it is considered unlawful from the outset.

The second opinion permits abortion at any stage of fetal development as long as the soul has not yet been breathed into the fetus. This view is considered the *rajih* (stronger) opinion within the Hanafī school<sup>38</sup> and is also supported by some scholars of the Shafi'i school,<sup>39</sup> as well as by Ibn `Uqayl from the Hanbali school.<sup>40</sup> The basis for this opinion is an analogy to the permissibility of *'azl* (coitus interruptus), which is allowed for men; therefore, terminating a pregnancy prior to ensoulment is likewise considered permissible. According to this view, prior to the infusion of the soul, the fetus is not yet regarded as a human being, and thus, the legal rulings associated with human life do not apply to it. Consequently, abortion before this stage is not considered prohibited. Moreover, some scholars argue that anything that will not be resurrected on the Day of Judgment lacks true legal existence and what lacks existence cannot be subject to prohibition.

The third opinion allows abortion within the first 40 days of pregnancy, during the *nutfah* stage, but prohibits it afterward, except in certain exceptional circumstances. This view is supported within the Hanafī school,<sup>41</sup> also considered the *qaul rajih* (stronger opinion) among some Maliki scholars,<sup>42</sup> and is also held by the Shafi'i school<sup>43</sup> and the predominant opinion within the Hanbali school.<sup>44</sup> The basis of this opinion is a hadith narrated by Ibn Mas'ūd

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<sup>34</sup> 'Abidin, *Radd Al-Mukhtar 'ala Al-Durr Al-Mukhtar*, vol. 3, 176.

<sup>35</sup> Muḥammad ibn Aḥmad Al-Dusuqi, *Hasyiyat Al-Dusuqi 'ala Al-Sharh Al-Kabir* (Beirut: Darul Fikr, n.d.), vol. 2, 267.

<sup>36</sup> Abu Hamid Muḥammad ibn Muhammad Al-Ghazali, *Ihya' Ulum Al-Din* (Beirut: Darul Ma'rifah, n.d.), vol. 2, 51.

<sup>37</sup> Ibnu Jauzy, *Abkam Al-Nisa'* (Beirut: Darul Kutub Ilmiah, 1994), 374.

<sup>38</sup> 'Abidin, *Radd Al-Mukhtar 'ala Al-Durr Al-Mukhtar*, vol. 3, 176.

<sup>39</sup> Aḥmad Salamah Al-Qalyubi and Aḥmad al-Barlisi Umayrah, *Hashiyata Qalyubi Wa Umayrah Ala Sharh Al-Mahalli Ala Minhaj Al-Talibin* (Beirut: Darul Fikr, 1995), vol. 4, 160.

<sup>40</sup> Muḥammad ibn Muflih, *Al-Furu'* (Beirut: Muassasah al-Risalah, 2003), 261.

<sup>41</sup> Alauddin Abu Bakr Ibn Mas'ud Al-Kasani, *Bada'i Al-Shana'i* (Kairo: Mathba'ah al-Syarikat al-Ilmiah, 1328), vol. 7, 115.

<sup>42</sup> Muhammad ibn Muhammad al-Hattab Al-Ru'ayni, *Mawahib Al-Jalil Fi Syarh Mukhtasar Khalil*, 3rd ed. (Beirut: Darul Fikr, 1992), vol. 5, 134.

<sup>43</sup> Al-Ramli, *Nihayat Al-Mubtaji Ila Sharh Al-Minhaj*, vol. 8, 442.

<sup>44</sup> Muflih, *Al-Furu'*, 281.

(may Allah be pleased with him), in which the Prophet Muhammad (peace be upon him) said: “Verily, the nutfah remains in the womb for forty days without undergoing any transformation. After that, it becomes a ‘alaqah (a clot of blood), and then a mudhghah (a lump of flesh).”

This hadith suggests that during the first forty days, the nutfah remains in its fluid form within the womb and has not yet undergone any biological structuring or formation. Hence, abortion is considered permissible during this early period.

According to a hadith narrated by Imam Muslim, it is stated:

"When forty-two nights have passed over the *nutfah*, Allah sends an angel to it, who shapes it and creates its hearing, sight, skin, flesh, and bones. Then the angel asks: 'O my Lord, is it male or female?' and the decree is written."

This hadith indicates that the formation and development of the fetus begin after the sixth week of pregnancy, or after 40 days, and that no substantial creation occurs prior to this point. Therefore, abortion before this stage is considered permissible by some scholars, as the fetus has not yet developed into a fully formed human being.

Through this discussion, the root of the scholarly differences lies in how Islamic jurists interpret the legal status of the fetus using various methodological approaches. These differences are shaped by their interpretations of hadith related to embryonic development and their respective balances between the principle of protecting life (*hifz nafs*) and promoting public welfare (*maslahah*). Scholars who strictly prohibit abortion from the moment of conception emphasize the sanctity of potential life and adopt a highly cautious legal stance. In contrast, those who permit abortion before 120 days focus on the moment the soul is believed to enter the fetus as the threshold for the application of full human legal status. Meanwhile, the view that permits abortion only within the first 40 days serves as a middle ground, supported by a textual reading of prophetic traditions and biological reasoning.

The distinction between 40 and 120 days is not merely a numerical difference but reflects a deeper divergence in the epistemology of Islamic jurisprudence and the prioritization of various shari‘ah principles. Understanding this helps generate legal responses that are not only normatively sound but also contextually relevant and ethically sensitive to the realities of modern abortion dilemmas. This provides a legal foundation for the permissibility of abortion in cases of rape within Islamic jurisprudence, particularly before the soul is breathed into the fetus, even though a minority of scholars permit it after ensoulment under exceptional circumstances. However, the prevailing opinion among jurists is that abortion post-ensoulment is categorically prohibited, except in dire emergencies, such as a severe threat to the mother’s life.

The debate between 40 and 120 days mirrors the legal discourse within Indonesian positive law, which differentiates between a six-week and a fourteen-week threshold. Given these varying perspectives, a more contextualized approach is necessary, one that incorporates *maqashid syari‘ah* and legal maxims (*qawa‘id fiqhyyah*). Among the three dominant positions on abortion before ensoulment, the absolute prohibition appears inconsistent with the broader Islamic legal tradition, where the majority of scholars permit abortion in cases of rape,

especially when accompanied by medical (physical or psychological) justification. This is further supported by the framework of *maqashid syari'ah*, particularly the principle of *hifz nafs*, which allows prohibited actions under specific conditions to preserve life. As Imam al-Syathibi affirms, actions ordinarily prohibited may be deemed lawful when life is at stake or in a state of emergency.<sup>45</sup> It is also important to note that scholars who prohibit abortion from the outset do so on the basis of potential life, rather than established personhood.

Furthermore, abortion in cases of rape can also be justified through the legal principle of *sadz dzari'ah* (blocking the means to harm), given the potentially devastating consequences for both mother and child. As noted earlier, the medical risks to the mother and severe hardship for the child are critical factors that must be mitigated, while still maintaining alignment with both Islamic and national legal standards.

In terms of the 40-day versus 120-day threshold, both can be harmonized through contextual legal reasoning consistent with syari'ah. Generally, abortion before 120 days is permissible based on the opinions of jurists and is reinforced by WHO guidelines. Consequently, the provision in the Indonesian Penal Code (KUHP) allowing abortion up to 14 weeks does not conflict with Islamic law or medical ethics. However, abortion before 40 days is preferable when possible, due to several considerations:

1. From a developmental standpoint, the nervous system begins to form by the end of the third week, and the heart starts beating around that time.
2. Medically, the earlier the abortion is performed, the lower the risk to the mother. If the victim decides to undergo the procedure early, delays can be dangerous and may cause severe health complications.
3. The fiqh maxim *keburuj minal khilaf* (avoiding disputed matters) encourages adherence to the safer and more widely accepted view. Opting for the 40-day limit aligns substantively with the 120-day position while avoiding legal and ethical controversy.
4. Early abortion also minimizes psychological trauma. The longer the fetus remains in the womb, the more emotionally taxing it becomes for the victim, making early termination a therapeutic consideration.

Accordingly, abortion in cases of rape should, if possible, be carried out before 40 days of gestation. However, when this is not feasible, due to delayed pregnancy recognition, bureaucratic requirements such as obtaining a police report, or the unavailability of licensed medical professionals, abortion may still be permitted up to the 120-day threshold.

## Conclusion

Abortion in cases of rape presents a complex issue intersecting legal, ethical, psychological, and social dimensions. In the Indonesian context, this issue is particularly urgent, given the high incidence of sexual violence that not only causes immense physical and psychological harm but can also lead to unwanted pregnancies. The resulting trauma, depression, and even suicidal ideation underscore the necessity of approaching rape-induced abortion with a multidisciplinary lens.

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<sup>45</sup> Asy-Syathibi, *Al-Muwafaqat* (Kairo: Dar Ibn Affan, 1997), vol. 2. 20

Based on a fiqh-based analysis of juristic opinions regarding abortion prior to ensoulment, it is evident that the root of the disagreement extends beyond numerical thresholds and lies in the diversity of legal methodologies, understandings of fetal status, and interpretations of maqāṣid al-sharī‘ah. For rape victims, the majority of scholars allow abortion before the soul is breathed into the fetus, viewing it as an exceptional but justified act grounded in the preservation of life and alleviation of harm. This view aligns with key Islamic legal principles such as *hifz nafs*, *sad dzari’ah* and *keburuj minal kabilah*, while also resonating with contemporary medical standards and WHO guidelines.

Nevertheless, when possible, abortion should be performed before 40 days to minimize both medical and psychological risks and to avoid contentious legal interpretations. If early abortion is not feasible due to procedural delays or medical constraints, extending the permissible window to 120 days remains valid within Islamic legal reasoning. This study also recommends further research into the procedural regulations in police institutions and hospitals concerning rape abortion cases, especially to evaluate whether current formal mechanisms are effective and efficient enough to enable timely and lawful medical intervention.

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