Al-Ahwal Al-Syakhsiyah, Universitas Al-Qolam Malang
Maqashid (2026) Vol 9 No 1 : Mei-2026
https://ejournal.alqolam.ac.id/index.php/maqashid/index
e-ISSN: 2685-4619 p-ISSN: 2613-9758

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THE LEGALITY OF ABORTION FOR RAPE VICTIMS UNDER THE FOUR SCHOOLS AND INDONESIAN LAW (GR NO. 28/2024 AND THE NEW CRIMINAL CODE): A Maqasid Al-Shariah Perspective

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ARTICLE INFO

Article History
Recieved Feb 2026
Accepted Mar 2026
Available April 2026

Keywords:

Abortion; Rape Victims; Four Schools of Islamic Jurisprudence; Government Regulation No. 28 of 2024; Criminal Code; Maqasid al-Shariah

ABSTRACT

Pregnancy from rape creates legal, medical, and religious dilemmas, especially with the issuance of Government Regulation (PP) No. 28/2024 and the new Criminal Code (Law No. 1/2023). Using a normative legal approach, this study maps positive law provisions, examines four Sunni fiqh views, and analyzes their alignment through maqasid al-shariah.Findings show PP No. 28/2024 permits abortion for rape victims, transitioning through a 40-day limit (PP No. 61/2014) until the new Criminal Code sets a 14-week limit (Article 463(2)). Fiqh views vary: Hanafi and some Shafi'i scholars permit it before ensoulment (~120 days), Hanbali permits it while the fetus is a lump of flesh (mudghah), and most Maliki scholars forbid it from conception; all forbid it post-ensoulment. The 14-week limit fits more permissive fiqh views but exceeds MUI's 40-day fatwa limit. From a maqasid perspective, early-stage abortion serves as a hajiyyat measure to protect maternal mental health (hifz al-nafs), while protecting the fetus (hifz al-nasl) requires strict time limits, counseling, and support services. The study recommends harmonized gestational guidelines and strengthened victim support.

INTRODUCTION

Rape and other forms of sexual violence are serious problems in Indonesia. The violence summary page of the Ministry of Women's Empowerment and Child Protection recorded 14,868 reported rape cases from 1 January 2025 to the access date, with 12,775 female victims and 3,089 male victims.[1] Pregnancy resulting from rape places additional burdens on victims, including profound disruption to their lives, persistent fear, and deep shame, as described in a phenomenological study of rape survivors.[2] In psychology, prolonged trauma of this kind is known as *post-traumatic stress disorder* (PTSD).[3] Some victims reject the pregnancy and seek abortion, often through unsafe methods. The World Health Organization (WHO) estimates that approximately 45% of induced abortions worldwide are unsafe and that unsafe abortion accounts for approximately 8% of maternal deaths.[4]

In Indonesia, abortion is generally prohibited, except where there is an indication of a medical emergency or where rape or other sexual violence has resulted in pregnancy (Article 116 of PP No. 28 of 2024). The difficulty concerns the gestational limit. PP No. 61 of 2014 prescribed a limit of 40 days from the first day of the last menstrual period. PP No. 28 of 2024 did not establish its own limit but referred back to PP No. 61 of 2014 until the new Criminal Code took effect, whereas Article 463(2) of Law No. 1 of 2023 (the Criminal Code) prescribes a limit of 14 weeks. The new Criminal Code entered into force on 2 January 2026. This discrepancy in gestational limits has been noted in the criminal law and health literature.[5]

For Muslims, who constitute the majority of Indonesia's population, these provisions raise questions about the period within which abortion is permissible under fiqh and its compatibility with positive law. Classical fiqh discussions of abortion generally centre on the timing of ensoulment (*nafkh al-ruh*) and the stages of fetal development, namely nutfah, 'alaqah, and mudghah. Scholars from the four schools hold diverse views, with disagreements also occurring within individual schools.

Meanwhile, the Indonesian Ulema Council (MUI), through Fatwa No. 1/MUNAS VI/MUI/2000 on Abortion, prohibits abortion from conception without specifically

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[1]Ministry of Women's Empowerment and Child Protection, violence data (summary page), https://kekerasan.kemenpppa.go.id/ringkasan, accessed 5 July 2025 (the access date in the initial manuscript). When checked in October 2026, the page displayed data for 2026; the 2025 figures cited above could therefore not be reverified.

[2]Abimanyu, "Studi Fenomenologis: Mantan Korban Perkosaan yang Menjadi *Wounded Healer*," *Jurnal Psikodimensia* 15, no. 2 (2016): 296–313, https://doi.org/10.24167/psiko.v15i2.993.

[3]American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5-TR*, 5th ed., text rev. (Washington, DC: American Psychiatric Association Publishing, 2022).

[4]World Health Organization, "Abortion," *fact sheet*, updated 8 December 2025, https://www.who.int/news-room/fact-sheets/detail/abortion, accessed 22 October 2026. According to the *fact sheet*, the 45% figure is an estimate for 2010–2014, and the 8% figure derives from a review covering 2009–2020.

[5]Nuri Yani, "Perlindungan Hukum Pelaku Tindak Pidana Aborsi Korban Pemerkosaan," *Mandub: Jurnal Politik, Sosial, Hukum dan Humaniora* 2, no. 4 (2024): 93–107, https://doi.org/10.59059/mandub.v2i4.1712.

providing an exception for rape victims.[6] Through Fatwa No. 4 of 2005 on Abortion, however, MUI provides an exception permitting abortion for rape victims before the fetus reaches 40 days of age.[7]

Table 1 summarises relevant previous studies. The focus column is based on the titles and abstracts of the articles.

Table 1. Previous studies on abortion following rape

Author and year	Focus (based on title and abstract)	Additional contribution of this article
Afifah (2013)[8]	Legal protection for women who undergo abortion following rape.	Examines recent regulations (PP No. 28 of 2024 and the new Criminal Code) and adds a fiqh analysis.
Rochayati (2018)[9]	The legality of abortion for rape victims under positive law.	Compares gestational limits under positive law with those of the four schools of fiqh.
Anggara (2021)[10]	Harmonisation of abortion regulations in Indonesia.	Adds harmonisation with fiqh and examines changes in gestational limits following the entry into force of the new Criminal Code.
Fentiningrum (2021)[11]	Abortion under legislation from al-Ghazali's maqasid al-shariah perspective; findings: abortion is permissible primarily to protect maternal life, and efforts are needed to mitigate the psychological effects on rape victims.	Details the gestational thresholds of each school and assesses them against the 40-day and 14-week limits.

[6]Indonesian Ulema Council, Fatwa No. 1/MUNAS VI/MUI/2000 on Abortion, available on the official website mui.or.id.

[7]Indonesian Ulema Council, Fatwa No. 4 of 2005 on Abortion. The 40-day provision for rape victims is cited from secondary sources, including NU Online (2006) and Siti Nur Aini's undergraduate thesis, IAIN Sunan Ampel Surabaya (2009), https://digilib.uinsa.ac.id/id/eprint/7225/.

[8]Wiwik Afifah, "Perlindungan Hukum bagi Perempuan Korban Perkosaan yang Melakukan Aborsi," *DiH: Jurnal Ilmu Hukum* 9, no. 18 (2013): 95, https://doi.org/10.30996/dih.v9i18.277.

[9]Siti Rochayati, "Legalitas Tindakan Abortus Provocatus oleh Korban Perkosaan," *Solusi* 16, no. 1 (2018): 76, https://doi.org/10.36546/solusi.v16i1.99.

[10]Bayu Anggara, "Harmonisasi Pengaturan Aborsi di Indonesia," *Jurnal Hukum Saraswati* 3, no. 1 (2021): 83–104, https://doi.org/10.36733/jhshs.v3i1.1859.

[11]Hilda Fentiningrum, "Komparasi Aborsi dalam Perspektif Maqashid Syari'ah Imam Ghazali dan Hubungannya dengan Faktor Ekonomi," *Kodifikasia* 15, no. 1 (2021): 69–88, https://doi.org/10.21154/kodifikasia.v15i1.2607.

Author and year	Focus (based on title and abstract)	Additional contribution of this article
Khairunnisa (2024)[12]	A literature review of abortion following rape under Islamic law.	Adds a comparison of the schools, recent positive law, and maqasid.
Sofiyullah (2024)[13]	A comparison of abortion law in Indonesia and Canada.	Compares positive law with fiqh rather than with another country's law.
Yani (2024)	Differences in gestational limits between the Criminal Code (14 weeks) and the Health Law/PP No. 28 of 2024; a call for harmonisation.	Highlights fiqh perspectives and the conversion between gestational dating methods.

A preliminary review indicates that previous studies have not integrated three principal aspects: (1) a comparison of the gestational limits of the four schools of fiqh with the 40-day and 14-week provisions of positive law; (2) reconciliation of medical gestational dating, which begins on the first day of the last menstrual period (LMP), with fiqh perspectives based on conception and ensoulment; and (3) an assessment of the alignment of these perspectives through a maqasid al-shariah approach. The novelty of this study therefore lies in integrating these three aspects within a comprehensive analytical framework.

Against this background, the study addresses three research questions. First, how does Indonesian positive law regulate abortion for rape victims, particularly under PP No. 28 of 2024, PP No. 61 of 2014, and the Criminal Code? Second, what are the views of the four schools of fiqh on the permissibility of abortion and the applicable gestational limits? Third, to what extent do the provisions of positive law align with the views of the four schools from a maqasid al-shariah perspective?

In line with these questions, the study aims to identify the provisions governing abortion under Indonesian positive law, compare the views of the four schools of fiqh, and assess their alignment from a maqasid al-shariah perspective. Theoretically, the study is expected to contribute a framework for converting between medical and fiqh approaches to gestational dating. In practical terms, its findings are intended to inform policymakers, healthcare professionals, victim support workers, and fatwa bodies.

[12]Khairunnisa, "Literature Review Aborsi Akibat Pemerkosaan dalam Perspektif Hukum Islam," *UNES Law Review* 6, no. 4 (2024): 11467–11478, https://doi.org/10.31933/unesrev.v6i4.2099.

[13]A. H. Sofiyullah, "Perbandingan Hukum Tindak Pidana Aborsi di Indonesia dengan Kebijakan Praktik Aborsi di Kanada," *Jurnal Hukum dan Sosial Politik* 2, no. 3 (2024): 64–79, https://doi.org/10.59581/jhsp-widyakarya.v2i3.3396.

METHOD

This study employs normative legal research based on a literature review and three principal approaches: statutory, conceptual, and comparative. The statutory approach examines PP No. 28 of 2024, PP No. 61 of 2014, Law No. 17 of 2023, and Law No. 1 of 2023. The conceptual approach explores the concepts of abortion, ensoulment, and maqasid al-shariah, while the comparative approach examines the views of the four schools of fiqh on the permissibility of abortion.

Primary sources comprise legislation, MUI Fatwa No. 1/MUNAS VI/MUI/2000 and Fatwa No. 4 of 2005, and the fiqh works of the four schools listed in the references. Secondary sources include scholarly journal articles and other relevant supporting literature. Data were collected through documentary and literature reviews and examined using descriptive content analysis. A comparative analysis was then conducted by school, stage of fetal development, and gestational limit, followed by an assessment of alignment from a maqasid al-shariah perspective.

The study is limited by the fact that the fiqh works consulted do not explicitly address abortion for rape victims. Their views are therefore applied to rape cases by analogy. In addition, the study relies entirely on a literature review and does not involve empirical field data collection.

DISCUSSION

Positive Law Provisions on Abortion for Rape Victims

Government Regulation (PP) No. 28 of 2024 on the Implementing Provisions of Law No. 17 of 2023 on Health was enacted on 26 July 2024. Article 116 states: "Every person is prohibited from performing an abortion, except where there is an indication of a medical emergency or where a victim of the criminal offence of rape or another criminal offence involving sexual violence becomes pregnant as a result, in accordance with the provisions of the Criminal Code."[14] This provision establishes a general prohibition on abortion while allowing exceptions in circumstances specified by legislation. Table 2 summarises the principal provisions concerning abortion for rape victims.

Table 2. Principal provisions of PP No. 28 of 2024 on abortion for rape victims

Article	Principal provisions

[14]Government Regulation of the Republic of Indonesia No. 28 of 2024 on the Implementing Provisions of Law No. 17 of 2023 on Health, Article 116, https://peraturan.bpk.go.id/details/294077/pp-no-28-tahun-2024, State Gazette of the Republic of Indonesia of 2024 No. 135, Supplement to the State Gazette No. 6952; accessed 8 July 2025, p. 53.

Article	Principal provisions
116	Abortion is prohibited, with exceptions for medical emergencies and pregnancies resulting from rape or other sexual violence, in accordance with the Criminal Code.
117	Medical emergency indications include pregnancies that threaten maternal life and health and irreparable congenital fetal abnormalities.[15]
118	Proof of pregnancy resulting from rape or sexual violence requires a doctor's certificate confirming that the gestational age is consistent with the incident and an investigator's statement concerning suspected rape or sexual violence.
119	Abortion services may be provided only at advanced healthcare facilities that meet ministerial standards, by medical personnel assisted by health personnel within their respective competencies and authority.[16]
122	Consent from the pregnant woman and her husband is required, with exceptions for rape victims (paragraph 1) and victims of other sexual violence (paragraph 2); for a person deemed incapable of giving consent, another family member may consent (paragraph 3).[17]
123	Support and counselling must be provided before and after abortion.
124	If a victim decides against abortion after counselling, a counsellor provides support during pregnancy, childbirth, and the postnatal period. The child is entitled to care by the mother and/or her family, or by a childcare institution or the state if the family cannot provide care.[18]

Gestational Limits

PP No. 28 of 2024 does not directly prescribe a gestational limit for abortion. However, the transitional provision in Article 1154 stipulates that permissible abortions, including the applicable gestational limit, remain subject to Article 31 of PP No. 61 of 2014 on Reproductive Health until the Criminal Code enters into force.[19]

Under Article 31, abortion following rape is permissible only when the pregnancy does not exceed 40 days, calculated from the first day of the last menstrual period (LMP).[20] Although PP No. 61 of 2014 was repealed by PP No. 28 of 2024, as

[15]The summary of Articles 117–119 is drawn from Hukumonline, "Syarat Aborsi dalam PP Kesehatan [Abortion Requirements under the Government Regulation on Health]," https://www.hukumonline.com/berita/a/syarat-aborsi-dalam-pp-kesehatan-lt66ab6221c3039. The summary follows the account of Articles 117–119 presented in that article.

[16]PP No. 28 of 2024, Article 119(2), p. 54.

[17]PP No. 28 of 2024, Article 122(3), p. 55.

[18]PP No. 28 of 2024, Article 124(3), p. 56.

[19]PP No. 28 of 2024, Article 1154, p. 473. The article number follows secondary sources, including ICJR.

[20]Government Regulation of the Republic of Indonesia No. 61 of 2014 on Reproductive Health, Article 31, https://peraturan.bpk.go.id/Details/5502/pp-no-61-tahun-2014, accessed 8 July 2025, p. 19.

recorded on the official website of the Audit Board of the Republic of Indonesia (BPK), the transitional provision in Article 1154 retained the limited application of Article 31, particularly its gestational limit for permissible abortions, until the Criminal Code took effect.[21]

Article 463 of Law No. 1 of 2023 on the Criminal Code entered into force on 2 January 2026. Article 463(1) states: "Any woman who undergoes an abortion shall be liable to imprisonment for a maximum of four years." Paragraph (2), however, provides an exception: "The provision referred to in paragraph (1) shall not apply where the woman is a victim of the criminal offence of rape or another criminal offence involving sexual violence resulting in pregnancy, where the pregnancy does not exceed 14 weeks, or where there is an indication of a medical emergency."[22] Articles 464 and 465 regulate criminal penalties for persons who perform abortions on other women and the liability of health personnel.

With the entry into force of the Criminal Code, the transitional provision of PP No. 28 of 2024, which applied until that date, no longer provides the basis for applying the previous gestational limit. These provisions therefore indicate that the current limit for abortion following rape is 14 weeks rather than 40 days. Table 3 compares the provisions of the relevant legal instruments.

Table 3. Gestational limits for abortion for rape victims under positive law and MUI fatwas

Instrument	**Provisions for rape victims**	**Gestational limit**	**Status**
PP No. 61 of 2014, Article 31	Abortion is permitted.	40 days from LMP	Reapplied through the transitional provision of PP No. 28 of 2024.
PP No. 28 of 2024, Articles 116–124	Abortion is permitted subject to proof, consent, and support.	No independent limit prescribed	In force since 2024.
Law No. 1 of 2023 (Criminal Code), Article 463(2)	Victims are exempt from punishment.	14 weeks or a medical emergency	In force since 2 January 2026.

[21]The status of PP No. 61 of 2014 follows the page at peraturan.bpk.go.id/Details/5502; the interpretation of Article 1154 follows a secondary source (ICJR).

[22]Law of the Republic of Indonesia No. 1 of 2023 on the Criminal Code, Article 463(1) and (2), State Gazette of the Republic of Indonesia of 2023 No. 1, Supplement to the State Gazette No. 6842; effective 2 January 2026 pursuant to Article 624. The quotations were checked against the text reproduced by Hukumonline.

Instrument	Provisions for rape victims	Gestational limit	Status
MUI Fatwa No. 1/MUNAS VI/MUI/2000	Abortion is prohibited from conception; no specific provision for rape victims.	From conception	Fatwa; relationship with the 2005 Fatwa
MUI Fatwa No. 4 of 2005	Permitted, according to secondary sources	Before 40 days	Fatwa; not legislation.

Definition and Classification of Abortion

According to Arif Mansjoer, abortion, or *abortus*, is the termination of pregnancy through the expulsion of the products of conception before the fetus can survive outside the uterus.[23] Medically, abortion is classified as either spontaneous abortion (*abortus spontaneus*), which occurs naturally and is termed *al-isqat al-'afw* in fiqh, with no legal implications, or induced abortion (*abortus provocatus*). Induced abortion is divided into two categories: *abortus artificialis therapeuticus*, performed by medical personnel for medical indications and termed *al-isqat al-daruri* or *al-ijhad al-'ilaji* in fiqh; and *abortus provocatus criminalis*, performed without medical indications, for example for economic reasons or fear of moral sanctions, and termed *al-isqat al-ikhtiyari* or *al-ijhad al-ijtima'i* in fiqh.

In fiqh, abortion is termed *al-ijhad*, meaning the termination of a pregnancy before fetal formation or the gestational period is complete. Other terms include *al-isqat*, *al-ilqa'*, *al-tarh*, and *al-imlas*. The dictionary *Mu'jam al-Muhit* distinguishes between *al-ijhad*, referring to termination before four months of pregnancy, and *al-isqat*, referring to termination between four and seven months.[24] Jad al-Haqq 'Ali Jad al-Haqq notes that some scholars define abortion as the loss of a fetus before the pregnancy reaches full term.[25]

Abortion Following Rape in the Four Schools of Fiqh

Disagreements among classical fiqh scholars regarding the permissibility of abortion primarily concern abortion before ensoulment (qabla nafkh al-ruh). Abortion after ensoulment (ba'da nafkh al-ruh) is generally agreed to be prohibited, although some scholars allow an exception in emergencies that threaten maternal life.

[23]Arif Mansjoer, *Kapita Selekta Kedokteran* (Jakarta: Media Aesculapius, Faculty of Medicine, Universitas Indonesia, 2004), 321.

[24]Kuwaiti Institution for Awqaf and Islamic Affairs, *al-Mawsû'ah al-Fiqhiyyah al-Kuwaitiyyah* (Kuwait: Wizârat *al*-Awqâf wa *al*-Syu'ûn *al*-Islâmiyyah), 2:56.

[25]Jâd al-Haqq 'Alî Jâd al-Haqq, *al-Fiqh al-Islâmî: Murûnatuhu wa Tathawwuruhu* (Cairo: Mushaf al-Syarîf bi al-Azhar, 1995), 205.

These differences largely arise from the question of when human life begins. From an Islamic perspective, the true nature of life is known fully to Allah alone; views on the beginning of human life are therefore approximate and cannot be established with absolute certainty. This is expressed in the words of Allah in Qur'an 17:85 (al-Isra'):

وَيَسْأَلُونَكَ عَنِ الرُّوحِ قُلِ الرُّوحُ مِنْ أَمْرِ رَبِّي وَمَا أُوتِيتُم مِّنَ الْعِلْمِ إِلَّا قَلِيلًا

> "They ask you about the spirit. Say: 'The spirit is a matter for my Lord, and you have been given only a little knowledge.'"

Disagreement on this matter is therefore understandable, both among scholars of different schools and among those within the same school.

a. The Hanafi School

The majority of Hanafi scholars permit abortion before the fetus takes shape or before ensoulment (nafkh al-ruh), subject to certain conditions. However, scholars within this school differ on both its permissibility and the applicable gestational limit. 'Ali al-Qamiy, as cited by al-Asrushani, considers abortion reprehensible (makruh),[26] specifically in the category approaching prohibition (makruh tahrim).

By contrast, al-Haskafi permits abortion before fetal formation, that is, before 120 days of pregnancy.[27] Ibn 'Abidin expresses a similar view, permitting abortion while the fetus remains a clot of blood or a lump of flesh and before its limbs have formed.[28] Meanwhile, 'Abdullah Mahmud al-Musili, as cited by al-Buthi, adopts a shorter limit, permitting abortion before the fetus reaches 42 days of age.[29]

Nevertheless, this permission is not absolute. If the fetus is alive, concern for maternal life does not automatically justify abortion. Hanafi scholars affirm this position in al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah:[30]

لَوْ كَانَ الْجَنِيْنُ حَيًّا، وَيَخْشَى عَلَى حَيَاةِ الْأُمِّ مِنْ بَقَائِهِ، فَإِنَّهُ لَا يَجُوْزُ تَقْطِيْعُهُ؛ لِأَنَّ مَوْتَ الْأُمِّ بِهِ مَوْهُوْمٌ، فَلَا يَجُوْزُ قَتْلُ آدَمِيٍّ لِأَمْرٍ مَوْهُوْمٍ

> "If the fetus is alive and its continued presence is feared to endanger the mother's life, it may not be aborted, because the mother's death is merely conjectural, and a human being (the fetus) may not be killed on the basis of conjecture."

The foregoing discussion reveals differing gestational limits for permissible abortion among Hanafi scholars. Al-Haskafi adopts the most permissive position, allowing abortion before 120 days, whereas al-Musili limits it to before 42 days. Ibn 'Abidin bases permissibility on the stage of fetal development, specifically before the

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[26]Muhammad bin Mahmûd bin Husain al-Asrûsyanî al-Hanafî, *Jâmi' Ahkâm al-Shighâr* (Beirut: Dâr al-Fadhîlah, 1994), 1:221.

[27]Muhammad 'Alâ' al-Dîn al-Haskafî, *al-Durr al-Mukhtâr Syarh Tanwîr al-Abshâr* (Beirut: Dâr al-Fikr, 2002), 2:411.

[28]Muhammad Amîn bin 'Umar Ibn 'Âbidîn, *Radd al-Muhtâr 'alâ al-Durr al-Mukhtâr* (Beirut: Dâr al-Fikr), 2:320.

[29]Muhammad Sa'îd Ramadhân al-Bûthî, *Tahdîd al-Nasl* (Damascus: Maktabah al-Fârâbî, 1979), 179.

[30]*al-Mawsû'ah al-Fiqhiyyah al-Kuwaitiyyah*, 2:56.

formation of limbs. However, the fiqh literature consulted does not explicitly address abortion for rape victims.

Accordingly, using psychological trauma resulting from rape as a ground for permitting abortion involves applying these views by analogy. The final quotation, however, indicates that permission does not extend to a living fetus, even where maternal life is feared to be at risk. Thus, the formulation of an exception for life-threatening maternal emergencies requires further examination in subsequent research.

b. The Maliki School

The majority of Maliki scholars hold that human life begins at conception, when a sperm cell meets an ovum. Consequently, abortion is prohibited even before 40 days of pregnancy.[31] Al-Lakhmi, however, permits abortion before 40 days without an obligation to pay compensation, as quoted by Muhammad bin ‘Abd al-Rahman al-Maghrabi in the following passage:[32]

وَأَحْفَظُ لِلَّخْمِيِّ أَنَّهُ يَجُوزُ قَبْلَ الْأَرْبَعِينَ مَا دَامَ نُطْفَةً

> “I recall al-Lakhmi’s view that abortion is permissible before forty days, provided that it remains a nutfah.”

Some Maliki scholars grant a concession (rukhsah) allowing abortion before ensoulment (nafkh al-ruh) in pregnancies resulting from zina (unlawful sexual intercourse), out of concern that the pregnancy may become known. The majority, however, permit abortion only to save maternal life and prohibit it in other circumstances.

The Maliki school may therefore be considered the strictest in its position on abortion. Applying this concession to pregnancy resulting from rape is possible only by analogy with the views of a small minority of Maliki scholars. Permission for rape victims to undergo abortion before ensoulment cannot therefore be presented as the position of the Maliki school as a whole; it is confined to a minority opinion within it.

c. The Shafi’i School

Shafi‘i scholars differ on the permissibility of abortion and the applicable gestational limit. Ibn ‘Imad prohibits abortion, whereas Muhammad Abi Sa‘ad permits it during the nutfah and ‘alaqah stages, up to approximately 80 days. Some other scholars permit abortion before ensoulment (nafkh al-ruh), at approximately 120 days. A further view, attributed to the majority of Shafi‘i scholars, sets a limit of 40–42 days for permissible abortion.

However, accounts of this threshold are not consistent in specifying whether abortion is permissible before or after the stated gestational age. This diversity within the

[31]Muhammad bin Ahmad bin ‘Arafah al-Dasûqî al-Mâlikî, *Hâsyiyat al-Dasûqî ‘alâ al-Syarh al-Kabîr* (Beirut: Dâr al-Fikr, 1998), 2:267.

[32]Muhammad bin ‘Abd al-Rahmân al-Maghribî, *Mawâhib al-Jalîl Syarh Mukhtashar Khalîl* (Beirut: Dâr al-Fikr, 1992), 3:477.

Shafi'i school is also reflected in the following quotation from Abdurrahman al-Masyhur, which contrasts the views of Ibn Hajar and al-Ramli:[33]

يَحْرُمُ التَّسَبُّبُ فِيْ إِسْقَاطِ الْجَنِيْنِ بَعْدَ اسْتِقْرَارِهِ فِيْ الرَّحْمِ، بِأَنْ صَارَ عَلَقَةً أَوْ مُضْغَةً وَلَوْ قَبْلَ نَفْخِ الرُّوْحِ كَمَا فِيْ الْتُّحْفَةِ، وَقَالَ (م ر): لَا يَحْرُمُ إِلَّا بَعْدَ النَّفْخِ

"It is prohibited to cause the loss of a fetus after it has become established in the womb, that is, after it has become a clot of blood or a lump of flesh, even before ensoulment, as stated in Tuhfat al-Muhtaj. Al-Ramli states that it is not prohibited until after ensoulment."

Al-Ghazali is among the scholars who adopt a strict position on abortion. He regards the termination of pregnancy as an offence against an existing being, with the gravity of the offence increasing as the fetus develops. He expresses this view as follows:[34]

وَلَيْسَ هَذَا كَالْإِجْهَاضِ وَالْوَأْدِ لِأَنَّ ذَلِكَ جِنَايَةٌ عَلَى مَوْجُوْدٍ حَاصِلٍ وَلَهُ أَيْضًا مَرَاتِبُ وَأَوَّلُ مَرَاتِبِ الْوُجُوْدِ أَنْ تَقَعَ النُّطْفَةُ فِي الرَّحِمِ وَتَخْتَلِطُ بِمَاءِ الْمَرْأَةِ وَتَسْتَعِدُّ لِقَبُوْلِ الْحَيَاةِ وَإِفْسَادُ ذَلِكَ جِنَايَةٌ فَإِنْ صَارَتْ مُضْغَةً وَعَلَقَةً كَانَتِ الْجِنَايَةُ أَفْحَشَ وَإِنْ نُفِخَ فِيْهِ الرُّوْحُ وَاسْتَوَتِ الْخِلْقَةُ اِزْدَادَتِ الْجِنَايَةُ تَفَاحُشًا وَمُنْتَهَى التَّفَاحُشِ فِي الْجِنَايَةِ بَعْدَ الْاِنْفِصَالِ حَيًّا

"This is unlike abortion and burying an infant alive, for these are offences against an existing being, and existence itself has stages. Its earliest stage is when the nutfah enters the womb, mixes with the woman's fluid, and becomes ready to receive life; destroying it is an offence. Once it becomes a lump of flesh and a clot of blood, the offence is more serious. When the spirit has been breathed into it and its formation is complete, the offence becomes graver still, reaching its greatest gravity after the child has been born alive."

Al-Ghazali likens the union of sperm and ovum to a contract concluded through offer and acceptance, which must not be annulled. In his view, terminating the products of conception destroys that contract, is religiously prohibited, and may subject the perpetrator to sanctions.[35] By contrast, Abu Ishaq al-Marwazi, as cited by Ibn Hajar al-Haitami, permits abortion during the nutfah and 'alaqah stages:[36]

وَاخْتَلَفُوا فِي جَوَازِ التَّسَبُّبِ إِلَى إِلْقَاءِ النُّطْفَةِ بَعْدَ اسْتِقْرَارِهَا فِي الرَّحْمِ فَقَالَ أَبُو إِسْحَاقَ الْمَرْوَزِيّ يَجُوزُ إِلْقَاءُ النُّطْفَةِ وَالْعَلَقَةِ

"Scholars differ over the permissibility of causing the expulsion of the nutfah after it has become established in the womb. Abu Ishaq al-Marwazi states that the nutfah and 'alaqah may be expelled."

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[33]'Abd al-Rahmân bin Muhammad bin Husain al-Masyhûr, *Bughyat al-Mustarsyidîn* (Beirut: Dâr al-Fikr), 1:522.

[34]Abû Hâmid Muhammad al-Ghazâlî, *Ihyâ' 'Ulûm al-Dîn* (Beirut: Dâr al-Kutub al-'Ilmiyyah, 2004), 2:65.

[35]Mahmûd Syaltût, *al-Fatâwâ* (Cairo: Dâr al-Qalam), 291.

[36]Ibn Hajar al-Haytamî, *Tuhfat al-Muhtâj fî Syarh al-Minhâj* (Cairo: al-Maktabah al-Tijâriyyah al-Kubrâ, 1983), 7:186.

Shafi'i views on abortion can thus be broadly divided into two principal positions. The first permits abortion before ensoulment (nafkh al-ruh), as expressed by al-Ramli and al-Marwazi. The second prohibits it once the fetus has become established in the womb, as reflected in Tuhfat al-Muhtaj and al-Ghazali's views. Despite their disagreement over abortion before ensoulment, both positions prohibit it after ensoulment.

d. The Hanbali School

The majority of Hanbali scholars permit abortion while the fetus remains at the mudghah stage (a lump of flesh), on the grounds that it has not yet acquired a fully developed human form. Ibn Qudamah expresses this view in al-Mughni.[37] Meanwhile, al-Mardawi explains in al-Insaf that terminating a fully formed fetus gives rise to an obligation to pay ghurrah (compensation).

Conversely, this obligation does not arise if the fetus is not fully formed.[38] Ibn al-Jawzi adopts a stricter position, prohibiting abortion categorically, both before and after ensoulment, which the account in question associates with 40 days of pregnancy.[39] The majority Hanbali position therefore shares common ground with some Shafi'i views in permitting abortion before ensoulment (nafkh al-ruh) and prohibiting it thereafter.

e. Comparative Matrix

Table 4 summarises the views of scholars from the four schools discussed in subsections a–d. The gestational limits shown follow the respective sources and are calculated from conception unless a different dating method is expressly specified.

Table 4. Comparative matrix of the four schools' views on abortion

School	More permissive views	Stricter views	Cited thresholds	Rape victims
Hanafi	Permitted before ensoulment or before 120 days (al-Haskafi, Ibn 'Abidin); before 42 days (al-Musili).	Makruh tahrim (al-Qamiy); a living fetus may not be aborted even if maternal life is feared to be at risk.	42 days; 120 days	Not explicitly addressed; applied by analogy.

[37]'Abdullâh bin Ahmad bin Muhammad Ibn Qudâmah, *al-Mughnî* (Cairo: Maktabat al-Qâhirah, 1992), 12:62.

[38]'Alâ' al-Dîn Abû al-Hasan 'Alî bin Sulaymân al-Mardâwî, *al-Inshâf fî Ma'rifat al-Râjih min al-Khilâf 'alâ Madzhab al-Imâm Ahmad bin Hanbal* (Beirut: Dâr al-Kutub al-'Ilmiyyah, 1997), 10:69.

[39]al-Bûthî, *Tahdîd al-Nasl*, 79.

School	More permissive views	Stricter views	Cited thresholds	Rape victims
Maliki	Permitted before 40 days without compensation (al-Lakhmi); a concession for pregnancy resulting from zina before ensoulment.	Prohibited from conception (majority); permitted only to save the mother.	40 days; before ensoulment	Zina; applied by analogy.
Shafi'i	Permitted before ensoulment (al-Ramli, al-Marwazi); up to approximately 80 days (Muhammad Abi Sa'ad).	Prohibited once the fetus is established in the womb (*Ibn Hajar*, al-Ghazali); prohibited (Ibn 'Imad).	40–42, 80, 120 days	Not explicitly addressed; applied by analogy.
Hanbali	Permitted during the *mudghah* stage (Ibn Qudamah).	Categorically prohibited (Ibn al-Jawzi).	Mudghah; 40 days	Not explicitly addressed; applied by analogy.

Analysis: Reconciling Positive Law and Fiqh

a. Conversion between Gestational Dating Methods

Positive law and fiqh differ in their methods of calculating gestational age. Positive law adopts the medical approach, which dates pregnancy from the first day of the last menstrual period (LMP), whereas fiqh refers to conception and ensoulment (nafkh al-ruh). These methods cannot be equated directly, because in a 28-day menstrual cycle conception generally occurs approximately two weeks after LMP.

Accordingly, age calculated from conception is generally about two weeks shorter than gestational age calculated medically.[40] Assuming conception occurs on day 14 of a 28-day menstrual cycle, the gestational thresholds in fiqh can be converted to medical dating as summarised in Table 5.

Table 5. Conversion of gestational thresholds (assuming conception on day 14 from LMP)

[40]Arcangela Lattari Balest, "Gestational Age," *Merck Manual Professional Edition*, reviewed February 2025, https://www.merckmanuals.com/professional/pediatrics/perinatal-problems/gestational-age. See also "Gestational Age," *Embryology* (UNSW), https://embryology.med.unsw.edu.au/embryology/index.php/Gestational_Age.

Threshold	Equivalent age from LMP	Equivalent weeks from LMP
Fiqh: 40 days from conception	≈ 54 days	≈ 7.7 weeks
Fiqh: 42 days from conception	≈ 56 days	8 weeks
Fiqh: 80 days from conception	≈ 94 days	≈ 13.4 weeks
Fiqh: 120 days from conception (ensoulment)	≈ 134 days	≈ 19.1 weeks
Law: 40 days from LMP (PP No. 61 of 2014)	40 days (≈ 26 days from conception)	≈ 5.7 weeks
Law: 14 weeks from LMP (Criminal Code, Article 463(2))	98 days (≈ 84 days from conception)	14 weeks

These conversions show that the 40-day gestational limit under PP No. 61 of 2014 is equivalent to approximately 26 days from conception. This is stricter than all the gestational limits specified in the scholarly opinions discussed above, including the view of al-Lakhmi of the Maliki school, who permits abortion before 40 days from conception. The statutory limit thus falls within the period of permissibility recognised by opinions allowing exceptions, although this does not apply to views that prohibit abortion categorically.

Meanwhile, 14 weeks from LMP is equivalent to approximately 84 days from conception. This exceeds the 80-day limit but remains below the 120-day threshold associated with ensoulment (*nafkh al-ruh*). The 14-week limit is therefore consistent with the views of Hanafi scholars, some Shafi'i scholars, and Hanbali scholars who permit abortion before ensoulment. It is not, however, consistent with the majority Maliki position prohibiting abortion from conception. It also exceeds the 40-day limit in MUI Fatwa No. 4 of 2005 if that fatwa's threshold is calculated from conception.

b. A Maqasid al-Shariah Perspective

Maqasid al-shariah, as formulated by al-Shatibi and others, seeks to protect five fundamental interests: religion (*hifz al-din*), life (*hifz al-nafs*), intellect (*hifz al-'aql*), progeny (*hifz al-nasl*), and property (*hifz al-mal*). These interests are classified into three levels of need: *daruriyyat* (necessities), *hajiyyat* (complementary needs), and *tahsiniyyat* (refinements).[41] In the context of abortion for rape victims, this approach can be used to examine the following three principal considerations.

First, the protection of maternal life and mental health (*hifz al-nafs*). Where pregnancy threatens maternal life or health, protecting the mother falls within the category of *daruriyyat*. In such circumstances, the maxims *al-darar yuzal* (harm must be

[41] Abû Ishâq al-Syâthibî, *al-Muwâfaqât fî Ushûl al-Syarî'ah* (Egypt: Dar Ibn 'Affan), 2:21.

removed) and *al-darurat tubih al-mahzurat* (necessities permit what is otherwise prohibited) apply.

Severe psychological trauma resulting from rape may, meanwhile, be classified as a *hajiyyat* need aimed at removing hardship (*raf' al-haraj*). It may rise to the level of *daruriyyat* if the psychological disorder threatens the victim's safety; the degree of urgency must be established through clinical assessment.

Second, the protection of fetal life and progeny (*hifz al-nafs* and *hifz al-nasl*). The fetus is a prospective human being with an interest in protection, the strength of which increases as fetal development progresses. This principle accords with the gestational limits prescribed in fiqh, which generally prohibits abortion after ensoulment (*nafkh al-ruh*), with some schools prohibiting it from the beginning of pregnancy. In positive law, this protection is also reflected in Article 124 of PP No. 28 of 2024, which regulates care for the child after birth, whether by the mother and her family, a childcare institution, or the state.

Third, the alignment of means (*wasa'il*) with protective objectives. From a *maqasid al-shariah* perspective, the means employed must align with the intended public benefit. The requirements for proof, counselling, services at advanced healthcare facilities, and support under PP No. 28 of 2024 serve to protect both victims and fetuses. Furthermore, Article 124, which allows victims to decide against abortion after counselling, indicates that abortion is treated as an option subject to specified conditions rather than an unrestricted right.

c. Synthesis and Implications

The analysis yields three principal findings concerning the relationship between positive law and fiqh views on abortion for rape victims.

First, the limit of 14 weeks from the first day of the last menstrual period (LMP) is defensible in fiqh according to scholars who permit abortion before ensoulment (*nafkh al-ruh*). However, it is inconsistent with the views of schools or scholars prescribing stricter gestational limits. The provisions of positive law are therefore better understood as an exercise of governance in accordance with Islamic law (*siyasah shar'iyyah*) that accommodates fiqh views while considering victim protection, rather than as the sole position within the fiqh tradition.

Second, gestational limits create practical challenges for abortion services for rape victims. Victims who recognise their pregnancy late or must await an investigator's statement as proof under Article 118 of PP No. 28 of 2024 may lose access to abortion services despite substantively meeting the requirements. This highlights the importance of assessing the effectiveness of evidentiary procedures in relation to the prescribed time limit.

Third, gestational limits differ between the Criminal Code and the fatwas of the Indonesian Ulema Council (MUI). MUI Fatwa No. 4 of 2005 sets a 40-day limit for abortion in permissible circumstances, whereas Fatwa No. 1/MUNAS VI/MUI/2000 generally prohibits abortion from conception. This divergence indicates a gap between

fatwa provisions and positive law that requires further examination through collective ijtihad.

These findings give rise to three policy implications. First, the Ministry of Health should develop guidelines clarifying the gestational limit for abortion following the entry into force of the new Criminal Code, including the dating method to be used. Second, the MUI Fatwa Commission, the Bahtsul Masail Institute of the Central Board of Nahdlatul Ulama (LBM PBNU), or Muhammadiyah's Council for Tarjih and Tajdid (MTT) should review gestational limits in consultation with medical personnel and victim support workers to obtain a more comprehensive assessment. Third, the government and service providers should expedite procedures for establishing victim status and expand access to counselling, enabling victims to make decisions within the prescribed period.

CONCLUSION

The findings and discussion support three principal conclusions. First, Indonesian positive law provides an exception to the prohibition on abortion for rape victims. PP No. 28 of 2024, particularly Articles 116–124, regulates proof, consent, healthcare facilities, and support but does not directly prescribe a gestational limit. The 40-day limit under PP No. 61 of 2014 remained temporarily applicable through the transitional provision until the new Criminal Code took effect. Since its entry into force, Article 463(2) has prescribed a maximum gestational age of 14 weeks for rape victims.

Second, the four schools of fiqh differ on abortion, particularly concerning gestational limits before ensoulment (*nafkh al-ruh*). The majority of Hanafi scholars permit abortion before ensoulment, at approximately 120 days, although stricter opinions set a limit of 42 days or classify abortion as *makruh tahrim*. By contrast, the majority of Maliki scholars prohibit abortion from conception, except al-Lakhmi, who permits it before 40 days. Within the Shafi'i school, some opinions permit abortion before ensoulment, while others prohibit it once the fetus has become established in the womb. The majority of Hanbali scholars permit abortion during the *mudghah* stage, although Ibn al-Jawzi prohibits it categorically. Nevertheless, the four schools generally agree that abortion after ensoulment is prohibited. Applying these views to pregnancy resulting from rape involves analogical analysis, because the fiqh literature consulted does not explicitly address such cases.

Third, after adjustment for different gestational dating methods, the limit of 14 weeks from the first day of the last menstrual period (LMP), equivalent to approximately 84 days from conception, remains within the period of permissibility recognised by scholars who permit abortion before ensoulment. However, it exceeds both the limits prescribed by stricter fiqh opinions and the 40-day threshold in the MUI fatwa. From a *maqasid al-shariah* perspective, permitting abortion for rape victims within a specified period may be considered a response to *hajiyyat* needs to protect maternal mental health, while maintaining protection for the fetus and progeny through gestational limits, counselling services, and alternative care arrangements. Future research may examine the

provision of abortion services for rape victims empirically and further investigate fiqh literature that specifically addresses rape cases.

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