

Criminal Liability for Circumcision Malpractice: Ibn Qayyim's Jurisprudence and Indonesian Criminal Law

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Abstract: *This article analyzes criminal liability for malpractice committed by circumcision (khitan) practitioners, as outlined by Ibn Qayyim al-Jawziyyah, and examines its relevance to positive law in Indonesia. The study is motivated by fundamental differences in the determination of criminal liability between classical Islamic legal perspectives and national law. This research is normative legal research employing a statute approach and a conceptual approach. Data were collected through library research, including primary, secondary, and tertiary legal materials such as statutory regulations, the works of Ibn Qayyim al-Jawziyyah, and relevant scholarly literature. The data were analyzed using a descriptive-analytical method that integrated perspectives on positive law and Islamic normative law. The findings indicate that, according to Ibn Qayyim, a circumcision practitioner must possess both professional competence and a valid practice license. A competent and licensed practitioner is not subject to criminal liability for patient harm in the absence of intentional wrongdoing, whereas an unqualified and unlicensed practitioner may be held criminally liable. In contrast, under Indonesian positive law, criminal liability is not solely based on intent (mens rea) but also encompasses negligence and recklessness that result in harm; thus, a practitioner may still be held criminally liable despite having competence and a valid license. Accordingly, Ibn Qayyim's view appears less relevant within the framework of Indonesian positive law regarding criminal liability. Nevertheless, his emphasis on strict requirements for competence and licensing has preventive value, helping minimize malpractice and enhance professional standards in medical practice.*

Keywords: *Criminal Liability, Medical Malpractice, Circumcision, Indonesian Criminal Law*

Abstrak: Artikel ini menganalisis pertanggungjawaban pidana terhadap malpraktik dokter sirkumsisi (khitan) menurut Ibn Qayyim Al-Jauziyyah serta relevansinya dengan hukum positif di Indonesia. Kajian ini dilatarbelakangi oleh adanya perbedaan mendasar dalam penentuan pertanggungjawaban pidana antara perspektif hukum Islam klasik dan hukum nasional. Penelitian ini merupakan penelitian hukum normatif dengan pendekatan perundang-undangan (statute approach) dan pendekatan konseptual (conceptual approach). Data diperoleh melalui studi pustaka dengan menelaah bahan hukum primer, sekunder, dan tersier yang meliputi peraturan perundang-undangan, karya-karya Ibn Qayyim Al-Jauziyyah, serta literatur ilmiah terkait. Analisis data dilakukan secara deskriptif-analitis dengan memadukan perspektif hukum positif dan normatif Islam. Hasil penelitian menunjukkan bahwa menurut Ibn Qayyim, dokter sirkumsisi harus memiliki keahlian dan izin praktik. Dokter yang kompeten dan berizin tidak dapat dipertanggungjawabkan secara pidana atas kerugian pasien selama tidak terdapat unsur kesengajaan, sedangkan dokter yang tidak memiliki keahlian dan izin praktik dapat dimintai pertanggungjawaban pidana. Sementara itu, dalam hukum positif Indonesia, pertanggungjawaban pidana tidak hanya didasarkan pada unsur kesengajaan (*mens rea*), tetapi juga mencakup kelalaian dan kealpaan yang menimbulkan kerugian, sehingga dokter tetap dapat dipidana meskipun memiliki keahlian dan izin praktik. Dengan demikian, pandangan Ibn Qayyim dinilai kurang relevan dalam konteks hukum positif Indonesia terkait aspek pertanggungjawaban pidana. Namun demikian, penekanannya terhadap keahlian dan legalitas praktik memiliki nilai preventif yang sejalan dengan upaya pencegahan malpraktik dan peningkatan standar profesional dalam praktik medis.

Kata Kunci: Pertanggungjawaban Pidana, Malpraktik Dokter, Khitan, Hukum Pidana Indonesia

Introduction

Circumcision (khitan) is a medical procedure widely recognized across cultural traditions, including within Islamic teachings. Although it is generally performed by medical professionals in accordance with established safety standards, the procedure is not free from the risk of malpractice. Several cases have documented serious injuries, health complications, and even death, thereby raising legal questions regarding the criminal liability of practitioners who act negligently or unprofessionally.

Health law in Indonesia encompasses civil, criminal, and administrative aspects,¹ as regulated under Law Number 17 of 2023 on Health and the Indonesian Penal Code (KUHP). These regulations incorporate ethical standards that must be observed by physicians in performing circumcision procedures, including obtaining informed consent from the patient's family, prioritizing patient safety, possessing a valid practice license, and adhering to other professional codes of ethics.

In the context of criminal law, these regulatory frameworks allow for the imposition of criminal sanctions on medical personnel who commit serious errors in healthcare services during circumcision procedures. Provisions within the Penal Code

¹Beni Satria, "Medical Criminal Law and Malpractice (Aspects Criminal Liability of Internal Doctors Health Services)," *International Journal of Society and Law* 2, no. 1 (2024); Handoyo Prasetyo et al., "Reconstruction of Criminal Design Based on Strict Liability Theory for Hospitals in Cases of Medical Malpractice Against Patients," *Jurnal Suara Hukum* 6, no. 2 (2024); Muntaha, *Hukum Pidana Malpraktik: Pertanggungjawaban Dan Penghapus Pidana* (Jakarta: Sinar Grafika, 2022), 3–4.

and the Health Law stipulate criminal penalties for negligence resulting in death, serious injury, or other forms of harm, and also regulate reporting mechanisms through professional disciplinary bodies.

In the practice of circumcision, medical negligence may give rise to criminal liability when it results in organ damage, disability, or death, as such conduct is categorized as malpractice.² Malpractice refers to improper medical treatment caused by careless, reckless conduct, and, in certain cases, actions driven by criminal intent.³ A case of circumcision malpractice, for instance, in Pontianak (2022),⁴ demonstrates that a physician may be held criminally liable even when the procedure is performed within an official medical context. Therefore, Indonesian criminal law emphasizes the importance of physician accountability in every medical intervention.

In *fiqh al-jināyāt*, scholars such as Ibn Qayyim address medical error and the legal liability of physicians, including in the context of circumcision (khitan).⁵ According to Ibn Qayyim, not all physicians who commit malpractice in circumcision should be subject to criminal punishment. A qualified physician (*ṭabīb ḥāziq*) who possesses both a valid practice license and the requisite professional expertise cannot be held criminally liable⁶ if the patient suffers injury—such as genital damage, amputation, or even death—arising from the procedure.⁷ This position differs from the provisions of Indonesian positive law. Under the Indonesian Criminal Code (KUHP), the Health Law, and the Medical Practice Law, medical personnel may still be held criminally liable even when they have formally obtained legal authorization and professional licensure to practice.

Based on the aforementioned problem, this study aims to examine Ibn Qayyim's view on medical malpractice in circumcision (khitan) and its relevance to Indonesian positive law. There is a divergence of perspectives: on the one hand, Islamic jurisprudence holds that a competent physician should not be criminally liable when acting within their professional expertise; on the other hand, positive law imposes sanctions even when the physician possesses a valid practice license. This study seeks to bridge these two legal frameworks in order to achieve a more comprehensive understanding of criminal liability.

This research is qualitative in nature and employs a library research design with two approaches. First, the statute approach, which involves examining laws and

²Ismail Koto and Erwin Asmadi, "Pertanggungjawaban Hukum Terhadap Tindakan Malpraktik Tenaga Medis Di Rumah Sakit," *Volkgeist: Jurnal Ilmu Hukum Dan Konstitusi* 4, no. 2 (2021).

³Ridwan Ridwan, "Pertanggungjawaban Hukum Pidana Terhadap Pelanggaran Rahasia Medis," *Jurnal Hukum & Pembangunan* 49, no. 2 (2019).

⁴Diakses melalui: <https://regional.kompas.com/read/2023/05/23/184830278/kronologi-dugaan-malpraktik-dokter-khitan-anak-9-tahun-di-pontianak>, tanggal 14 November 2024.

⁵Ibn Qayyim Al-Jauziyyah, *Tuhfah Al-Maudūd Bī Aḥkām Al-Maulūd* (Damaskus: Maktabah Dār al-Bayān, 1971), 314–15.

⁶Al-Jauziyyah, 314–15.

⁷Ibn Qayyim Al-Jauziyyah, *Zād Al-Ma'ād Fī Hadī Khair Al-'Ibād*, Juz II (Bairut: Mu'assasah al-Risālah, 1998), 147.

regulations relevant to the legal issue under study, namely circumcision (khitan).⁸ Second, the conceptual approach, which refers to an approach grounded in legal doctrines or scholarly views relevant to the legal issue under examination. These doctrines and perspectives serve as the analytical framework for assessing the legal issues studied; in this context, the views of Ibn Qayyim al-Jawziyyah.⁹ In this article, the legal issue addressed concerns law enforcement and legal liability for malpractice committed by circumcision practitioners according to Ibn Qayyim al-Jawziyyah, as well as its relevance to positive law. The statutory framework (positive law) referred to in this study includes the Indonesian Penal Code (KUHP), the Health Law, and the Medical Practice Law.

The type of research employed in this study is normative legal research (juridical-normative approach).¹⁰ The research data were obtained through a survey of books, classifying legal materials into three categories: primary, secondary, and tertiary sources. The primary legal materials consist of two types. First, the works of Ibn Qayyim al-Jawziyyah, including *Zād al-Ma'ād*, *Ṭibb al-Nabawī*, and other relevant writings. Second, statutory regulations, including the Indonesian Criminal Code (KUHP), the Health Law, the Medical Practice Law, and other relevant regulatory instruments. Secondary legal materials comprise legal textbooks and scholarly articles addressing issues related to criminal acts of medical malpractice. Tertiary legal materials include encyclopedias, dictionaries, and other supporting references.

The data were analyzed using a descriptive-analytical method, aimed at examining the ideal legal values governing criminal liability for circumcision (khitan) malpractice from the perspective of Ibn Qayyim, as well as those established in statutory regulations—particularly the KUHP, the Health Law, the Medical Practice Law, and other relevant provisions within Indonesian positive law concerning circumcision and medical malpractice.

Previous studies relevant to this research can be classified into several categories. *First*, criminal liability based on negligence (*culpa*) in the practice of circumcision. A study by Zhalzabila Kartika Yusuf emphasizes that gross negligence in circumcision practice may be qualified as a criminal offense (*culpa*) and is therefore subject to criminal sanctions. This finding indicates that negligence constitutes the primary basis for determining the criminal liability of medical practitioners.¹¹

Second, the legal framework and mechanisms for assessing medical malpractice in Indonesia. Rizki Mubarak argues that malpractice is regulated under Law Number 29 of 2004, with initial procedures involving examination by the Medical Ethics

⁸Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2014);

⁹Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris* (Yogyakarta: Pustaka Pelajar, 2013).

¹⁰Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (2020).

¹¹Zhalzabila Kartika Yusuf, "Analisis Yuridis Tindak Pidana tenaga Kesehatan yang Melakukan Kelalaian Berat dalam Praktik Sunat (Studi Kasus Putusan Nomor 90/Pid.Sus/2022/PN.Pgp)" (Skripsi, Makassar, Universitas Hasanuddin, 2023), <http://repository.unhas.ac.id/id/eprint/27106/>.

Honorary Council (MKEK) and the Indonesian Medical Discipline Honorary Council (MKDKI) prior to the imposition of criminal sanctions. The results of ethical and disciplinary examinations serve as important references for judges in adjudicating cases.¹²

Third, the legality of practice and the qualifications of healthcare professionals. Yeni Triana et al. emphasize the importance of the Registration Certificate (Surat Tanda Registrasi/STR) as a prerequisite for lawful practice. Healthcare practitioners who perform medical procedures without an STR and are proven to have committed malpractice may be held criminally liable. This underscores the significance of administrative compliance in medical practice.¹³

Fourth, the limits of authority and exceptions to criminal liability. Ratna Tri W. and Achmad Dafir F. find that, under certain conditions, nurses who perform actions beyond their authorized scope cannot always be held criminally liable, particularly where professional judgment and situational considerations justify such actions.¹⁴

Fifth, the authority of nurses in performing circumcision procedures. Aris Prio Agus Santoso et al. demonstrate that nurses may be authorized to perform circumcision provided they meet administrative requirements and possess the necessary competencies, as well as under certain conditions, such as family request or emergency circumstances (*overmacht*), as long as the procedure is carried out in accordance with professional standards.¹⁵

Sixth, medical service standards and criminal consequences. I Gede Indra Diputra and Ni Md. Ari Yulianti Griadhi asserts that physicians are required to provide medical services in accordance with established medical standards. Any violation of these standards that results in disability or death may give rise to criminal liability.¹⁶ *Seventh*, legal protection for doctors in circumcision practice. Muhammad Andri Gunawan et al. emphasize the importance of informed consent and medical records as legal protections for physicians. In addition, there are exculpatory doctrines—such as medical risk, contributory negligence of the patient, and *volenti non fit injuria*—which may serve as grounds for excluding criminal liability.¹⁷

From this categorization, it is evident that previous studies have predominantly focused on aspects of Indonesian positive law, particularly negligence, professional

¹²Dinka Šago and Ivan Vukušić, "Criminal And Civil Aspects Of Healthcare Worker Liability For Medical Malpractice In Croatia," *Medicine, Law and Society* 16, no. 2 (2023).

¹³Dessy Adhya Purwandiny et al., "The Limitations of Living Law as a Principle of Material Legality in the Renewal of Criminal Law," *Jurnal IUS Kajian Hukum Dan Keadilan* 13, no. 3 (2025); T. Subarsyah, "Menyoal Pertanggungjawaban Pidana Terhadap Tindakan Malapraktik Dokter Di Tengah Pandemi Covid-19 Di Indonesia," *Mimbar Hukum* 34, no. 1 (2022).

¹⁴Vincent Maher and Mark Cwiek, "Criminal Liability for Nursing and Medical Harm," *Hospital Topics* 102, no. 2 (2024).

¹⁵Marin Mrčela and Igor Vuletić, "Navigating Criminal Liability In An Era Of Ai-Assisted Medicine," *Medicine, Law and Society* 18, no. 1 (2025).

¹⁶D. W. H., "Medical Malpractice Arbitration: A Comparative Analysis," *Virginia Law Review* 62, no. 7 (1976).

¹⁷Subarsyah, "Menyoal Pertanggungjawaban Pidana Terhadap Tindakan Malapraktik Dokter Di Tengah Pandemi Covid-19 Di Indonesia."

standards, the legality of practice, and legal protection for medical personnel. However, no study has specifically examined Ibn Qayyim al-Jawziyyah's perspective on circumcision malpractice and its relevance to Indonesian positive law. Therefore, this research addresses that gap by presenting a comparative analysis between classical Islamic law and national law.

Criminal Liability as a Legal Theory

Criminal liability refers to the imposition of legal sanctions on perpetrators of criminal offenses for acts that violate statutory prohibitions.¹⁸ Criminal liability, in Dutch referred to as *toerekenbaarheid* and in English as *criminal responsibility* or *criminal liability*, denotes the imposition of punishment on an offender due to the presence of fault.¹⁹ Fault in this context refers to an inner intention or motive, commonly known as *mens rea* (Latin). An individual is not considered guilty of an act unless the mind is culpable. The doctrine of *mens rea* is grounded in the maxim *actus non facit reum nisi mens sit rea*, meaning that an act does not render a person guilty unless the mind is also guilty.²⁰ Thus, it can be understood that criminal liability constitutes the imposition of legal responsibility upon an offender for a criminal act committed, grounded in the presence of fault, particularly in the form of malicious intent or wrongful motive.

Criminal liability in criminal law adheres to the principles of *geen straf zonder schuld* and *actus non facit reum nisi mens sit rea*, which essentially emphasize that criminal responsibility is imposed on a person only where fault is present, namely the existence of a guilty mind (*mens rea*) on the part of the offender.²¹ Criminal liability in criminal law consists of three requirements:

- a. The capacity of the perpetrator to bear or be held accountable.
- b. The existence of an unlawful act reflects the psychological disposition of the perpetrator in relation to the act, including intentional conduct as well as reckless or negligent behavior.
- c. The absence of any justification or excuse that would exempt the perpetrator from criminal liability (grounds for exculpation).

The prevailing conception in most countries places fault as the determining factor in criminal liability. In this context, fault encompasses two elements: *mens rea* (the guilty mind or intent) and *actus reus* (the physical act or the criminal conduct committed by the offender). Therefore, the existence of fault constitutes a decisive

¹⁸Mardani, *Teori Hukum dari Teori Hukum Klasik hingga Teori Hukum Kontemporer* (Jakarta: Kencana Prenada Media Group, 2024), 180.

¹⁹Arianus Harefa, *Dasar-Dasar Hukum Pidana Indonesia Pasca Berlakunya KUHP Nasional*, (Sukabumi: Jejak Publisher, 2023), 225.

²⁰Abdurrahman Alhakim dan Eko Soponyono, "Kebijakan Pertanggungjawaban Pidana Korporasi Terhadap Pemberantasan Tindak Pidana Korupsi," *Jurnal Pembangunan Hukum Indonesia* Vol. 1, no. 3 (24 September 2019): 322–36.

²¹Agus Rusianto, *Tindak Pidana dan Pertanggungjawaban Pidana: Tinjauan Kritis Melalui Konsistensi Antara Asas, Teori, dan Penerapannya*, (Jakarta: Kencana Prenada Media Group, 2016), 35.

basis for the imposition of criminal responsibility.²² On that basis, there are two principal elements in the context of criminal liability, namely:

- a. A criminal offense (criminal act), also referred to as *actus reus*.
- b. A guilty mind underlying the criminal act, such that it fulfills the element of *schuld* (fault). This guilty mind is referred to as *criminal intent* or *mens rea*.²³

Criminal liability is the notion of fault itself, namely the inner (psychological) relationship between the perpetrator and the act, manifested as intent or negligence.²⁴ In another account, Barda Nawawi Arief further explains that both intent and negligence constitute fault. Meanwhile, the fault itself is understood as the basis of criminal liability.²⁵ There is a distinction between an offense (criminal act) and culpability (*schuld*) or criminal liability. An offense constitutes one component, while culpability (*schuld*) or criminal responsibility constitutes another.²⁶ Referring to the foregoing discussion, it can be understood that the concept of fault is inherently linked to criminal liability. In other words, a criminal act can only be punishable if it fulfills the element of fault, thereby allowing the perpetrator to be held accountable. The benchmark, in this context, is the existence of fault, which must encompass elements of intentionality, unlawfulness, and malicious intent (*mens rea*).

In the context of Islamic criminal law, *fuqaha* have also established a number of theories related to criminal liability in Islam. Criminal liability in Islamic criminal law refers to an individual's capacity and freedom to act or refrain from acting.²⁷ This criminal liability encompasses the consequences arising from acts or omissions undertaken voluntarily, where the perpetrator is aware of the potential consequences of such conduct.²⁸

Ahmad Hanafi says that criminal liability (*al-mas'ūliyyah fī al-tasyrī' al-jinā'ī*) refers to the imposition of legal responsibility on an individual as a consequence of an unlawful act.²⁹ Criminal liability in Islamic criminal law, according to the perspective of Abdul Qadir 'Audah, includes three (3) essential requirements (elements):

- a. The existence of prohibited acts or mandated actions.

²²Chairul Huda, *Dari Tiada Pidana Tanpa Kesalahan Menuju Pada Tiada Pertanggung Jawaban Pidana Tanpa Kesalahan: Tinjauan Kritis Terhadap Teori Pemisahan Tindak Pidana & Pertanggungjawaban Pidana* (Jakarta: Kencana Prenada Media Group, 2011).

²³Huda.

²⁴Muladi dan Dwidja Priyatno, *Pertanggungjawaban Pidana Korporasi* (Jakarta: Kencana Prenada Media Group, 2018).

²⁵Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana Prenada Media Group, 2011), 105–6.

²⁶Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*.

²⁷Ishaq Fadhli and Muhamin Ishaq, *Hukum Pidana Positif Dan Hukum Pidana Islam* (Jakarta: Kencana Prenada Media Group, 2025).

²⁸Abd al-Qadīr 'Awdah, *Al-Tasyrī' Al-Jinā'iy Al-Islamiy: Muqaranah Bi Al-Qanun Al-Wadh'iy*, 1 (Bayrūt: Muassasah al-Risālah, 1997).

²⁹Dedy Sumardi, "Transition of Civil Law to Public Law: Integration of Modern Punishment Theory in Criminal Apostasy," *Ahkam: Jurnal Ilmu Syariah*, 2022; Dedy Sumardi, "Hudūd Dan HAM: Artikulasi Penggolongan Hudūd Abdullahi Ahmed An-Na'im," *MIQOT: Jurnal Ilmu-Ilmu Keislaman* 35, no. 2 (December 2, 2011).

- b. The existence of an act or omission carried out voluntarily, based on one's own will or intention.
- c. The perpetrator is aware of the consequences of the act committed.³⁰

With the aforementioned requirements, it can be understood that only human beings, as legal subjects, can be held legally accountable, provided that certain conditions are met, such as being of legal age, of sound mind, and acting voluntarily (without coercion). Other related conditions pertain to the element of unlawfulness. The element of unlawfulness constitutes an essential component of *jarimah* (criminal offense in Islamic criminal law).³¹ Thus, it can be understood that criminal liability in Islamic criminal law is related to whether a person is legally accountable based on the fulfillment or non-fulfillment of the required conditions of a criminal offense.

Criminal Offenses of Medical Malpractice in Circumcision (Khitan) Practice

Circumcision (*khitan* or *sunat*) is a medical procedure that provides health benefits, such as reducing the risk of urinary tract infections and sexually transmitted diseases. Medically, this procedure is generally performed by general practitioners or surgical specialists. Although traditional circumcision practices performed by non-medical practitioners still exist in some communities, it is recommended that the procedure be carried out by competent medical professionals. In this context, specialist doctors are expected to avoid actions that may result in errors during circumcision procedures that could lead to medical malpractice.

In the medical field, circumcision is referred to as *sirkumsisi*, with female circumcision specifically termed *female circumcision* and male circumcision termed *male circumcision*. The term *khitan* is widely used in various literatures, including legal, health, and child-related studies. Etymologically, the word *khitan* originates from Arabic, namely *khitān*, derived from the verb *khatana*, which means to cut the *qulfah* in males and *al-nawāh* in females. In males, the circumcised part is described using two terms, namely *qulfah* (the foreskin covering the head of the penis) and *al-jildah* (the skin covering the glans that is removed). In females, it refers to *al-nawāh* (a structure resembling a small seed or rooster's comb).³² Sheik Yusuf states that the term *khitan* is primarily used to refer to male circumcision, whereas for females, the term *al-khafdhu* is commonly employed. However, many scholars also understand that the term *khitan* can be used for both males and females.

From a terminological perspective, numerous definitions of *khitan* (circumcision) have been formulated by Islamic scholars. In this regard, only several opinions are cited in order to provide a clearer understanding of its meaning. According to Abdul Syukur, *khitan* refers to the removal of the skin covering the glans

³⁰Awdah, *Al-Tasyri' Al-Jina'iy Al-Islamiy: Muqaranah Bi Al-Qanun Al-Wadh'iy*.

³¹Muhammad Abu Zahrah, *Al-Jarimah Wa Al-'Uqubah Fi Al-Fiqh Al-Islami*, ed. Muhammad Rafiki, V, vol. V (Kairo: Maktabah Tawfiqiyah, 2014).

³²Wizārah Al-Auqāf, *Mawsū'ah Al-Fiqhiyyah* (Kuwait: Wizārah Al-Auqāf, 1995).

of the penis and the excision of a small portion of flesh located at the upper part of the female genitalia (the clitoris).³³

Thus, male circumcision involves cutting the foreskin that covers the head of the penis until it is exposed. Meanwhile, female circumcision refers to the act of cutting a portion of the skin of the female genital organ, specifically the part resembling a rooster's comb, whereby only the tip is removed and not the entire structure.

A further definition can be understood from the perspective of Sayyid Sabiq, who states that circumcision (khitan) involves the removal of the skin covering the tip of the male genital organ in order to prevent the accumulation of impurities, facilitate urinary control, and enhance sexual pleasure during intercourse. As for females, it involves the excision of the upper part that protrudes from the genital organ..³⁴ Based on the definitions above, it can be concluded that circumcision (khitan) is one of the many legislated (mashrū') rulings in Islam, involving the removal of the skin covering the glans of the male genitalia or the excision of protruding skin resembling a rooster's comb on the female genitalia.

Criminal Offenses of Medical Malpractice in Indonesian Positive Law

The term "criminal act" is also referred to as a "criminal offense" and is used to translate several legal terms, such as *strafbaar feit* (Dutch),³⁵ Criminal act, criminal conduct, and crime (English), *actus reus* (Latin), and *jināyah* or *jarīmah* (Arabic).³⁶ A criminal act refers to conduct that is prohibited or condemned by society, committed by a culpable individual, and subject to criminal sanctions. Thus, a criminal offense constitutes a subjective element directly related to a person's act or conduct, which is legally prohibited and reprehensible, and therefore, the perpetrator is subject to criminal penalties. In criminal law, there are various offenses, including medical malpractice.

In Indonesia, medical malpractice is classified as a criminal offense. A physician's error in providing healthcare services to a patient is referred to as malpractice. The designation of malpractice as a criminal act is based on the fact that medical practice does not always proceed successfully; in certain cases, it may result in injury or physical disability to the patient as a consequence of medical procedures performed by healthcare professionals. In such instances of professional error, the patient may bring a claim to the state to initiate public legal action in the form of criminal law proceedings against the perpetrator.³⁷

³³Abdul Syukur Al-Azizi, *Buku Lengkap Fiqh Wanita* (Yogyakarta: Diva Press, 2015).

³⁴Al-Sayyid Sabiq, *Fiqh Al-Sunnah*, III (Kairo: Dar al-Fath li 'l'lam al-'Arabi, 1996).

³⁵Asep Saepudin Jahar, Euis Nurlaelawati, and Jaenal Aripin, *Hukum Keluarga, Pidana Dan Bisnis: Kajian Perundang-Undangan Indonesia, Fikih Dan Hukum Internasional* (Jakarta: Kencana Prenada Media Group, 2013).

³⁶Al-Yasa' Abubakar and Marah Halim, *Hukum Pidana Islam Di Aceh (Penafsiran Dan Pedoman Pelaksanaan Qanun Tentang Perbuatan Pidana)* (Banda Aceh: Dinas Syariat Islam Aceh, 2011); Al Yasa' Abubakar, *Hukum Jinayat Dan Hukum Acara Jinayat* (Banda Aceh: Dinas Syariat Islam Aceh, 2015).

³⁷Subarsyah, "Menyoal Pertanggung Jawaban Pidana Terhadap Tindakan Malapraktik Dokter Di Tengah Pandemi Covid-19 Di Indonesia."

Medical malpractice, also referred to as a medical criminal act, is the negligence of a physician or nurse in applying the level of skill and knowledge required in providing medical treatment and care to a patient, which is ordinarily exercised in treating and caring for sick or injured individuals within the same geographical area. Malpractice constitutes a form of medical treatment or intervention in addressing illness or injury, resulting from careless, reckless conduct, or actions driven by criminal intent.³⁸ Malpractice refers to negligence that results in harm to another person. A medical professional who performs healthcare services—such as surgical procedures, drug administration, or anesthesia—that subsequently cause harm to a patient, including injury or even death, may be classified as committing malpractice. Accordingly, the medical professional concerned may be criminally liable.

Positive law generally regulates criminal acts arising from negligence and fault, as stipulated in Articles 359 to 361 of the Indonesian Criminal Code (KUHP). The provisions contained in these articles govern criminal liability for negligent acts or conduct that result in harm to another person.

Article 359 of the Indonesian Criminal Code (KUHP):

Whoever, due to his or her negligence (culpable negligence), causes the death of another person shall be subject to a maximum imprisonment of five years or a maximum detention of one year.³⁹

Article 360 of the Indonesian Criminal Code (KUHP):⁴⁰

- (1) Any person who, due to his negligence (culpable negligence), causes another person to suffer serious bodily injury shall be punished with imprisonment for a maximum of five years or a maximum confinement of one year.
- (2) Any person who, due to his negligence (culpable negligence), causes another person to suffer such injuries that result in illness or impairment in carrying out occupational duties or employment for a certain period of time shall be punished with imprisonment for a maximum of nine months or a maximum confinement of six months, or a fine not exceeding four thousand five hundred rupiah.

Article 361 of the Indonesian Criminal Code (KUHP):⁴¹

If the offense described in this chapter is committed in the course of carrying out an office or profession, the penalty shall be increased by one-third, and the offender may be deprived of the right to practice the profession in which the offense was committed. The judge may also order that the judgment be made public.

³⁸Muntaha, *Hukum Pidana Malapraktik: Pertanggungjawaban Dan Penghapusan Pidana*, 10.

³⁹KUHP, "Undang Undang Nomor 1 Tahun 2023 Tentang Kitab Undang Undang Hukum Pidana," no. UU (2023): 1–345.

⁴⁰KUHP.

⁴¹KUHP.

Based on the provisions of the Criminal Code (KUHP) above, it can be understood that any person whose negligence causes the death of another person may be subject to a maximum imprisonment of five years. If the negligence results in serious injury, the penalty is a maximum of three years' imprisonment. If it results in minor injury, the penalty is a maximum of one year's imprisonment.

Criminal sanctions for medical personnel who commit malpractice are also regulated under Articles 304 and 305 in conjunction with Article 306 of Law No. 17 of 2023 concerning Health (Health Law), which essentially stipulate that medical personnel or health workers may be subject to criminal sanctions if they commit errors that cause harm to patients or their families. These provisions also state that patients or their families who are harmed by medical personnel may file complaints with the professional disciplinary council. Article 308 of the Health Law further provides that such a council may, upon request by investigators, issue recommendations regarding the imposition of criminal sanctions.

Article 193 of the Health Law stipulates that hospitals are legally responsible for all losses arising from negligence by their healthcare professionals. However, in cases of medical practice errors and disputes between patients and healthcare workers, the initial step is non-litigation or out-of-court settlement, as stated in Article 310 of the Health Law. It provides that if medical personnel or health workers are suspected of committing professional errors that cause harm to patients, disputes arising from such errors shall first be resolved through alternative dispute resolution outside the court system.

Under positive law, physicians who provide medical services and engage in medical practice are required to comply with the code of ethics as set out in statutory provisions, including Law No. 29 of 2004 on Medical Practice. This requirement is also further stipulated in Law No. 17 of 2023 on Health. This can be understood from Article 274 of the Health Law, which regulates that medical personnel and health workers, in carrying out their professional practice, are obliged to:

1. To provide health services in accordance with professional standards, service standards, standard operating procedures, professional ethics, and the patient's healthcare needs.
2. To obtain consent from the patient or their family regarding the medical procedures to be performed.
3. To maintain the confidentiality of the patient's medical information.
4. To create and retain records and/or documentation of examinations, care, and medical procedures performed.
5. To refer patients to other medical or health professionals who have appropriate competence and authority.

Based on the above code of ethics, it can be understood that in performing circumcision procedures, medical practitioners or doctors are required to comply with several provisions, including obtaining informed consent from the patient's family and providing services in accordance with professional standards and ethical principles.

Therefore, if such obligations are not fulfilled and result in harm to the patient or the victim's family, then, in accordance with the provisions of the Indonesian Criminal Code (KUHP) and the previous Health Law (UU Kesehatan), the doctor concerned may be held criminally liable.

The Foundations of Criminal Liability for Circumcision Malpractice in Ibn Qayyim's Jurisprudence

Ibn Qayyim was a scholar who made significant contributions to the development and understanding of Islamic law. His legal thought is articulated in various works, including in the context of criminal legal liability of medical professionals (physicians) who commit malpractice in the performance of circumcision (khitan). At the outset, it is necessary to present Ibn Qayyim's view on the professional capacity of a physician. According to Ibn Qayyim, a physician must possess medical knowledge, including an understanding of medicines and their dosages or compositions. A physician must also be equipped with knowledge of the proportional content of medicinal substances. Ibn Qayyim emphasizes that medical discipline and medical practice must be grounded in sound medical knowledge.⁴² Thus, according to Ibn Qayyim, a physician who practices and provides public healthcare must possess adequate medical expertise and knowledge. This requirement applies to all forms of medical practice, including circumcision (khitan).

Ibn Qayyim al-Jawziyyah states that in providing medical services, a physician must possess adequate competence and expertise in his field. A qualified physician—referred to by Ibn Qayyim as *tabīb hāziq*—is a doctor who has obtained a valid practice license and has demonstrated professional proficiency in his area of specialization. In the view of Ibn Qayyim, professional competence is a fundamental requirement in medical practice, including circumcision (khitan). If a qualified physician performs circumcision in accordance with the proper procedures, but an error occurs during the procedure that results in harm to the patient—such as disability or damage to the genital organs, amputation of body parts, or even death—then the physician cannot be held criminally liable, provided that there is no element of intentional wrongdoing or violation of the required competence and practice license as the basic prerequisites for conducting medical procedures.⁴³ However, conversely, if a non-expert physician performs circumcision and makes an error that causes harm to the patient/child, then the physician may be held criminally liable. Ibn Qayyim's view on this matter can be understood from the following excerpt:

قلت: الأقسام خمسة: أحدها: طبيب حاذق أعطى الصنعة حقها ولم تجن يده. فتولد من فعله المأذون فيه من جهة الشارع، ومن جهة من يطبّه تلف العضو أو النفس، أو ذهاب صفة، فهذا لا ضمان عليه

⁴²Ibn Qayyim Al-Jauziyyah, *Al-Taubah Wa Inābah Terj: Ahmad Dzulfikar* (Jakarta: Qisthi Press, 2017), 125.

⁴³Al-Jauziyyah, 147.

اتفاقاً، فإنها سراية مأذون فيهِ، وهذا كما إذا ختن الصبي في وقت، وسنُّه قابل للختان، وأعطى الصنعة حقها، فتَلَف العضو أو الصبي، لم يضمن، وكذلك إذا بَطَّ من عاقل أو غيره ما ينبغي بَطُّه في وقته على الوجه الذي ينبغي فتَلَف به، لم يضمن، وهكذا سراية كُلِّ مأذون فيهِ لم يتعد الفاعل في سببها.⁴⁴

I (the author) state that physicians are divided into five categories. First, the competent physician who performs his work properly and does not commit any error. His actions are permitted both by religious law and by the patient. However, if a bodily organ is destroyed, life is lost, or the function of a particular organ is impaired, he is not held liable, because he has obtained proper authorization. For example, a physician who performs circumcision on a child at the appropriate time, when the child has reached the suitable age, and who carries it out in the prescribed manner, is not liable if any bodily injury occurs or if the child dies. Likewise, if a skilled surgeon performs an operation on a condition that is normally treated surgically, at the appropriate time and in the proper manner, but the patient subsequently dies as a result, the physician is not held liable. The same applies to anyone who has been granted permission and unintentionally causes harm or destruction.⁴⁵

In his other works, a similar opinion is also stated as follows:

وهذا كما إذا ختن الصبي في وقت، وسنُّه قابل للختان، وأعطى الصنعة حقها، فتَلَف العضو أو الصبي، لم يضمن.⁴⁶

For example, if a physician performs circumcision on a child at the appropriate time, when the child has reached a suitable age, and the procedure is carried out properly in accordance with medical standards, yet a bodily organ is damaged or the child dies, then the physician is not held criminally liable for the outcome.⁴⁷

Based on the above quotation, it can be understood that a qualified physician (*tabib haziq*) who performs circumcision (*khitan*) and has obtained a valid license to conduct such practice, or who is already experienced in performing circumcision and is recognized as an expert in the field, shall not bear criminal liability if an error occurs resulting in injury to the child's genitals, amputation, or even death. In such circumstances, the physician cannot be held criminally responsible. This is particularly so considering that the circumcision procedure is performed on children who have reached an appropriate age for the procedure. However, for a physician who does not possess a valid practice license or lacks the requisite expertise and commits an error in performing circumcision, Ibn Qayyim states that such a physician bears criminal liability and may be subjected to penal sanctions. This understanding is derived from his statement as follows:

⁴⁴Al-Jauziyyah, *Zād Al-Ma'ād Fī Hadī Khair Al-'Ibād*, Juz II, 128.

⁴⁵Al-Jauziyyah, 147.

⁴⁶Al-Jauziyyah, 128.

⁴⁷Al-Jauziyyah, *Tuḥfah Al-Maudūd Bī Ahkām Al-Maulūd*, 125.

وأما الأمر الشرعي: فإيجاب الضمان على الطبيب الجاهل. فإذا تعاطى علم الطب وعمله، ولم يتقدم له به معرفة: فقد هجم بجهله على إتلاف الأنفس، وأقدم بالتهور على ما لم يعلمه. فيكون قد غرر بالعليل. فيلزمه الضمان لذلك. وهذا إجماع من أهل العلم. قال الخطابي: لا أعلم خلافاً في أن المعالج إذا تعدّى فتلف المريض: كان ضامناً والمتعاطى علماً أو عملاً لا يعرفه، متعدي. فإذا تولّد من فعله التلف ضمن الدية، وسقط عنه القود. لأنه لا يستبد بذلك بدون إذن المريض. وجناية المتطب، في قول عامة الفقهاء على عاقلته.⁴⁸

The shari'ah issue that can be derived from the hadith is the guidance that a physician who lacks adequate knowledge is held responsible for his mistakes, because he has engaged in a profession without fulfilling its required qualifications. As a result, he causes harm to others, even endangering them. Therefore, he must be held accountable for his actions according to scholarly consensus (ijmā'). Al-Khattābī stated: "There is no disagreement that when a medical practitioner treats a patient and causes harm, he is liable for his actions. A physician who practices a profession outside his expertise and thereby causes harm must compensate for the damage in the form of financial liability (diyah), not criminal punishment, because the patient has given permission to be treated. According to the majority of jurists, the liability for the error falls upon his guardian."

The evidence used by Ibn Qayyim in establishing criminal liability for an unqualified physician is based on a narration reported by Ibn Mājah, as follows:

عن عمرو بن شعيب، عن أبيه، عن جده، قال: قال رسول الله صلى الله عليه وسلم: (مَنْ تَطَبَّبَ، وَلَمْ يَعْلَمْ مِنْهُ طِبٌّ قَبْلَ ذَلِكَ، فَهُوَ ضَامِنٌ). (رواه ابن ماجه).⁴⁹

From 'Amr ibn Shu'ayb, from his father, from his grandfather, it is reported that the Messenger of Allah (peace be upon him) said: "Whoever practices medicine without prior knowledge of medical science shall be held responsible." (Narrated by Ibn Mājah).

In his commentary on the aforementioned hadith, Ibn Qayyim stated that, from a Sharia perspective, an ignorant physician is obliged to bear responsibility. If a person engages in the field of medicine and its practice without a proper scientific foundation, their ignorance may lead to the loss of human life and the reckless performance of actions beyond their knowledge. He may also endanger patients. Therefore, such a practitioner must be held accountable. This view represents the consensus of the scholars.⁵⁰

This explanation essentially highlights a distinction in the treatment of criminal liability between qualified, licensed physicians and unqualified or unlicensed

⁴⁸Ibn Qayyim Al-Jauziyyah, *Ath-Tibb An-Nabawi* (Beirut: Dar al-Fikr, n.d.), 109.

⁴⁹Abī Abdillāh Muḥammad bin Yazīd Ibn Mājah Al-Qazwīnī, *Sunan Ibn Mājah* (Riyadh: Bait al-Afkār al-Dauliyyah Linnasyr, 1999).

⁵⁰Al-Jauziyyah, *Ath-Tibb An-Nabawi*, 146.

practitioners who commit malpractice during circumcision (khitan). If such malpractice—for instance, injury to the genitalia, amputation, or even death—is committed by a competent and licensed doctor, criminal liability is not imposed on them. In other words, under the theory of criminal liability, the physician does not fulfill the element of culpability (schuld), namely mens rea or intent, even though the actus reus element is evident, as there is malpractice in the circumcision procedure that results in harm to the patient.

In this regard, Ibn Qayyim emphasizes the importance of the element of fault in establishing criminal responsibility for physicians. This element of fault may take the form of intentional wrongdoing rooted in the heart, or it may manifest as a malicious inclination that reflects a person's inherent disposition when performing circumcision. In one of his views, it is explained that all actions that cause harm to others, crimes, and acts of immorality entail punishment. If the driving force behind a criminal act is a corrupt nature or inherent character within a person, then the punishment is determined in accordance with the degree or level of the resulting harm (mafsadah).⁵¹

Thus, in the context of circumcision practice, if there is damage to a child's genital organs or even resulting in death, and such an act is carried out based on a malicious intent within the medical practitioner, or there is clear intention directed toward harming the child during the circumcision procedure, then the medical practitioner must be subject to punishment in accordance with the harm or consequences arising from such conduct.

In this regard, it is evident that Ibn Qayyim's view is closely related to the theory of criminal liability, namely the imposition of legal responsibility on an individual as a suspected offender, which must fulfill the elements of a wrongful act (actus reus) and a guilty mind or criminal intent (mens rea). However, if only the actus reus is present—for instance, injury to the child's genital area or the death of the child—without the existence of mens rea, then in such circumstances Ibn Qayyim holds that the physician cannot be held criminally liable, provided that the physician possesses a valid professional license. This remains applicable even if there is an error in the conduct of the procedure. The most important consideration is the absence of any malicious intent on the part of the physician to commit harm, such as genital mutilation or causing the death of the child. In addition, another essential factor is the practitioner's competence in performing circumcision as well as possession of a valid circumcision practice license.

The Relevance of Ibn Qayyim's Theory of Criminal Liability to Circumcision Malpractice under Indonesian Positive Law

From the perspective of criminal liability theory, as previously explained, the prevailing conception places fault (schuld) as the determining factor of criminal responsibility. In order to establish fault in cases of circumcision (khitan) medical

⁵¹Al-Jauziyyah, *Tuḥfah Al-Maudūd Bī Ahkām Al-Maulūd*, 133.

malpractice, both *mens rea* (a guilty mind or intent) and *actus reus* (the physical act of the offense, or the criminal conduct manifested by the perpetrator) must be fulfilled. Therefore, the generally accepted concept holds that the existence of fault is the decisive element in determining criminal liability.⁵²

In cases of medical malpractice in circumcision (khitan), the element of fault that determines criminal liability is the presence of *mens rea*, which is evidenced by intentional acts such as improper excision of genital organs that should not be removed during circumcision, or the administration of anesthesia in an overdose manner, whether in terms of the type of anesthetic used or the dosage injected into the patient. Therefore, once the element of fault (fulfillment of both *mens rea* and *actus reus*) is proven, the physician concerned may be held criminally liable under the law, as the elements of unlawfulness (*wederrechtelijkheid*) and culpability (*schuld*) have been established.

When these elements of unlawfulness and culpability are fulfilled, an individual is deemed criminally responsible. This also applies to medical malpractice in circumcision (khitan). A licensed and professional doctor who acts unlawfully and is proven to have committed intentional wrongdoing is considered to have committed a criminal offense and may therefore be subject to criminal liability. However, even if *mens rea* (intent) cannot be proven, a doctor may still be criminally liable if negligence is established in the circumcision procedure that results in harm to the patient. This is in accordance with Articles 359 to 361 of the Indonesian Criminal Code (KUHP), covering cases where harm to the patient results in death, serious injury, or minor injury. In such cases, the patient or their family may file a complaint against the doctor and report the matter to the professional disciplinary board for further action, whether through civil, criminal, or out-of-court settlement mechanisms, as also regulated in the Health Law and Medical Practice Law as previously cited.

Further analysis indicates that Ibn Qayyim's view is less relevant to the framework of criminal liability for medical malpractice in circumcision under Indonesian positive law. His perspective does not emphasize the elements of fault and negligence as recognized in modern criminal law. Instead, the determining factors in his view are the existence of a valid medical license and professional competence in performing circumcision. These factors determine whether a doctor may be punished, regardless of whether harm occurs during the procedure.

Ibn Qayyim considers professional qualifications and licensing to be the decisive criteria for criminal liability in circumcision practice. This differs significantly from Indonesian positive law, which holds that competence and licensing alone are insufficient if negligence and fault result in harm to the patient or their family. However, there is a point of similarity between Ibn Qayyim's view and positive law in relation to the elements of *schuld* (fault) and unlawfulness. Both perspectives agree

⁵²Huda, *Dari Tiada Pidana Tanpa Kesalahan Menuju Pada Tiada Pertanggung Jawaban Pidana Tanpa Kesalahan: Tinjauan Kritis Terhadap Teori Pemisahan Tindak Pidana & Pertanggungjawaban Pidana*, 5.

that if *mens rea* (intentional wrongdoing) is proven, the physician may be held criminally liable.

Nevertheless, a distinction arises when *mens rea* is not established. According to Ibn Qayyim, if intentional wrongdoing and malicious intent cannot be proven, the doctor cannot be held criminally liable. Criminal liability arises only if the doctor lacks proper qualifications and licensing in performing a circumcision. In contrast, Indonesian positive law allows criminal liability even in the absence of *mens rea*, provided negligence is proven and results in harm, even if the doctor is licensed and professionally competent.

According to the author, Ibn Qayyim's view is not without rationale, as negligence and error are inherent aspects of human limitation. He emphasizes the importance of strict qualifications. The requirement for a doctor to possess recognized expertise and a valid practice license (SIP) reflects professional competence and legal legitimacy in the medical field, while also providing legal protection for qualified medical practitioners, without disregarding human limitations. According to Ibn Qayyim, a qualified doctor with a valid license is assumed to have sufficient experience, to perform procedures at the appropriate time, and to act in a measured and proper manner. If a doctor commits negligence that results in physical damage or even death, it indirectly indicates a lack of professionalism.

As a prominent scholar of the classical period who lived in the 14th century CE (8th century AH), Ibn Qayyim demonstrated a visionary perspective. The strict requirements of professional competence and licensing for circumcision practitioners can be understood as a preventive measure to avoid medical malpractice while simultaneously reducing the likelihood of negligence and errors.

In positive law, professional competence and licensing alone are insufficient when negligence or errors occur in medical practice; not every case of malpractice is immediately subject to criminal prosecution. In many instances involving negligence or medical errors, the process begins with professional disciplinary investigations. Physicians may be held liable if they are proven to have committed negligence or professional misconduct. A doctor must defend their position by providing arguments and evidence that the actions taken were in accordance with standard operating procedures (SOPs). If negligence is proven, sanctions may include imprisonment or fines, depending on the severity of the consequences, such as serious injury or death. This represents a point of convergence between Ibn Qayyim's view and Indonesian positive law.

Conclusion

Ibn Qayyim's view emphasizes that criminal liability for circumcision practitioners is highly dependent on the fulfillment of professional qualifications, namely competence and a valid practice license. A competent and licensed doctor is not criminally liable for patient harm, so long as there is no element of intentional wrongdoing. Conversely, a practitioner who lacks both professional competence and legal authorization may still be held criminally liable for resulting harm. Although there

are conceptual differences with Indonesian positive law, particularly regarding the proof of mens rea, there is a point of convergence in recognizing fault (schuld) and unlawfulness as the bases of criminal liability. Ibn Qayyim requires intent for criminal punishment, whereas Indonesian positive law also allows criminal liability for negligence even in the absence of mens rea. Furthermore, Ibn Qayyim's emphasis on strict requirements of competence and licensing carries preventive value that aligns with modern legal objectives, namely, minimizing malpractice risks through stringent professional standards. Thus, despite differences in approach, both perspectives ultimately aim to protect patients and enhance accountability within the medical profession.

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