

ABORTION IN REVIEW OF THE FATWA OF THE INDONESIAN ULEMA COUNCIL (MUI)

Akhmad Kamil Rizani

State Islamic Institute of Palangka Raya

akhmadkamilrizani@iain-palangkaraya.ac.id

Ibnu Elmi A.S Pelu

State Islamic Institute of Palangka Raya

ibnu.elmi@iain-palangkaraya.ac.id

Much Hasan Darajat

University of Darunnajah

darajat@darunnajah.ac.id

Abstract

Abortion as a practice of termination of pregnancy is not a foreign concept in our society. Abortion is a controversial issue because it is related to religion and health issues. The opinions of scholars of the fiqh madhhabs on abortion differ. Over twenty-two years, the Indonesian Ulema Council has made decisions on abortion. This shows that there are pretty complex issues in the practice of abortion. This research is a literature review that is descriptive-analytic. This literature research uses written sources, such as books and various other literature related to the reasoning of the MUI fatwa on abortion. The result of this research is that MUI uses the tarjih method in collecting and identifying the opinions of the scholars of mazhab in determining fatwa related to abortion.

Keywords: *Abortion, fatwa, Indonesian Ulema Council*

Abstrak

Aborsi sebagai sebuah praktik pengguran kandungan bukanlah sebuah hal yang asing di masyarakat. Aborsi merupakan isu yang kontroversial karena berkaitan dengan masalah agama dan kesehatan. Pendapat para ulama mazhab fikih tentang aborsi berbeda-beda. Selama kurun waktu dua puluh dua tahun, Majelis Ulama Indonesia telah membuat keputusan tentang aborsi. Hal ini

menunjukkan adanya persoalan yang cukup kompleks dalam praktik aborsi. Penelitian ini merupakan penelitian kepustakaan, yang bersifat deskriptif-analitik. Penelitian kepustakaan ini menggunakan sumber-sumber tertulis, seperti seperti buku-buku dan berbagai literatur lainnya yang berhubungan dengan nalar fikih fatwa MUI tentang aborsi. Adapun hasil dari penelitian ini adalah MUI menggunakan metode tarjih dalam mengumpulkan, mengidentifikasi pendapat para ulama mazhab dalam menetapkan fatwa terkait aborsi.

Kata kunci: *Aborsi, fatwa, Majelis Ulama Indonesia.*

A. Introduction

Islam is the only true religion in the sight of Allah. The coming of Islam is a mercy for the universe. Among the mercies that Islam brings is upholding a person's right to life. Islamic law is regulated to protect and maintain the five things of religion, soul, offspring, mind, and property, commonly referred to as *al Kulliyat al Khamsu*¹ or *al Daruriyat al Khamsu*² (Five things that are urgent in human life) Some scholars say this is the main goal in religious teachings before the arrival of Islam.³

One form of grace given by Allah SWT that everyone must respect is life. Biological relations carried out by a pair of men and women will cause the birth of offspring. For some people, the presence of offspring in the family is very coveted. This can be caused by many factors, such as economic factors, physical health, psychological endurance, career, or pregnancy due to rape victims. Often, this condition encourages someone to take action, which in the medical world is known as abortion. Abortion is used as an alternative to get out of the problem at hand, the act of ending the pregnancy period by removing the fetus from the womb.⁴

Islam, as a flexible, elastic, and dynamic religion, views abortion not always as a reprehensible or harmful act, but by looking at the legal *illat* or the reason someone is having an abortion. The difference in legal interpretation will result in different legal *istinbath* among the fuqaha. There is no direct narration that explains abortion; from here, there are differences of opinion among the Fuqaha Mazhab in determining the law of abortion, what, how, and when abortion is allowed and prohibited by Sharia. Abortion in classical literature revolves only around the time before the process of compounding,

¹ Ibrahim Al-Bajuri, *Hasyiyah Al-Bajuri `Ala Jauharah Al-Tauhid* (Dar al-Salam, 2002). p. 322.

² Ahmad Al-Raisuni, *Madkhal Il Maqasid Al-Syari'ah* (cairo: Dar al-Kalimah, 2010). p. 85.

³ Abu Ishaq Al-Syatibi, *Al-Muwafaqat Fi Usul Al-Syariat*, Jilid 1 (Beirut: Dar al-Fikr, 2004). p. 37.

⁴ Huzaemah Tahido Yanggo, *Fiqih Perempuan Kontemporer* (Jakarta: al-Mawardi Prima, 2001). p. 114.

meaning pregnancy before the blowing of the spirit in the fetus, because pregnancy after compounding or the process of blowing the spirit, all scholars agree to prohibit it, except in emergency conditions that threaten the mother's life. The fuqaha are unanimous on the ruling on aborting a pregnancy after the soul has been breathed into the fetus. The majority of the differences between them are regarding the verdict on aborting the pregnancy before the soul is breathed.⁵

There is a difference of opinion on abortion in the four schools of fiqh. The Hanafi school believes that abortion before four months of pregnancy is permissible if it threatens the life of the pregnant woman; the Maliki school prohibits abortion after conception; the Shafi'i school believes that after fertilisation, the zygote should not be disturbed, and interference with it is a crime; while the Hanbali school strongly emphasises that abortion is a sin.⁶

Fatwa of the Indonesian Ulema Council No. 4, the Year 2005, explains the permissibility of abortion due to the circumstances of uzur, dharurat, and hajat. As the provisions of the law in point b number (2) that the State's of exigency, dharurat, and hajat related to pregnancy that can allow abortion is pregnancy due to rape determined by the authorised team in which there are, among others, the victim's family, doctors, and scholars.

B. Literature Review

The issue of abortion, Nurul Farhana's research published in the journal *Presumption of Law* in 2022 with the title *Abortion in the Perspective of Human Rights and Islamic Law* explains that positive law allows abortion on medical grounds. It is not contrary to the right to life, as well as in Islamic law, which is known to enable abortions both at the stage of fetal creation and at the time of the blowing of the spirit.⁷

Faisol Rizal's research published in the journal *Minhaj: Journal of Sharia Science* in 2022 entitled *Looking at the Indonesian Ulema Council (MUI) Fatwa No. 4 of 2005 on abortion in the Perspective of Istihsat Islamic Law* explains that in determining the MUI fatwa No. 4 of 2005 on abortion, the method used is *ijtihad istislahi*, namely the technique of extracting Islamic law summarised in *maqashid shari'a*. It can be seen that the fatwa

⁵ Ahmad Syirbasi, *Yas'alunaka Fi Al-Din Wa Al-Hayah* (Beirut: Dar al-Jayl, 1980). p. 216.

⁶ Dewani Romli, *Aborsi Dalam Perspektif Hukum Islam* (Banda Aceh: PPs. IAIN Ar-Raniri, 2009). p. 2.

⁷ Nurul Farhana, "Aborsi Dalam Perspektif Hak Asasi Manusia Dan Hukum Islam," *Journal Presumption of Law* 4, no. 2 (2022): 178–93, <https://doi.org/10.31949/jpl.v4i2.3431>.

dichotomises the condition of the mother who wants to have an abortion into two conditions, namely, *dharurat* and *hajjiat*.⁸

While Fikri Nasrullah, Materan and Muhammad Idzhar's research published in *Qonun: a journal of Islamic Law and Legislation* in 2022 entitled *Abortion in Review of Fiqh Jinayah and Criminal Code*, the results of this study indicate that the factors causing abortion are economic factors, hereditary disease factors, physiological factors, age factors, maternal disease factors, physical factors, environmental factors, contraceptive failure factors, and factors do not want to have children without a father. Abortion is allowed if it has not reached the age of 120 days or has not blown the spirit, and if the fetus has blown the spirit of the scholars agree on the prohibition, while abortion due to emergency scholars agree that abortion in this case, the law is permissible. The Criminal Code prohibits all forms of abortion, and Health Law No. 36 of 2009 on health allows abortion if it threatens the life of the mother and pregnancy due to rape. Sanctions for people who assist in abortion will receive criminal sanctions that have been determined and revoked license to practice, and receive legal sanctions to pay *diyat*, also subject to legal sanctions *kafarat* in *fiqh jinayah*.⁹

C. Research Methodology

This research is the result of descriptive-analytical (library research) research, which describes the *fiqh* reasoning of the abortion MUI fatwa study. This library research uses written sources, such as classical books and literature.¹⁰ According to Abdul Rahman Sholeh, library research is a study that tries to obtain sources or objects of research by using existing library facilities such as journals, books, magazines, documents, previous research, and records of historical stories.¹¹ The data collection technique used in this research is the documentation technique.

D. Discussion

1. Definition of Abortion

Abortion, according to the extensive Indonesian dictionary, is the scattering of embryos that are no longer possible before the end of the fourth month of pregnancy, or abortion can be defined as the abortion of the fetus or

⁸ Faisol Rizal, "Menilik Fatwa Majelis Ulama Indonesia (MUI) NO. 4 Tahun 2005 Tentang Aborsi Dalam Kacamata Istibat Hukum Islam," *Minhaj: Jurnal Ilmu Syariah* 3, no. 2 (2022): 193–207, <https://doi.org/https://doi.org/10.52431/minhaj.v3i2.1083>.

⁹ Fikri Nasrullah, Materan Materan, and Muhammad Idzhar, "Tindakan Aborsi Dalam Tinjauan Fiqh Jinayah Dan Kuhp," *QONUN: Jurnal Hukum Islam Dan Perundang-Undangan* 6, no. 2 (2022): 116–28, <https://doi.org/10.21093/qj.v6i2.5366>.

¹⁰ Sutrisno, *Metodologi Penelitian* (Yogyakarta: LkiS, 1990). p. 9.

¹¹ Abdul Rachman Sholeh, *Pendidikan Agama Dan Pembangunan Watak Bangsa* (Jakarta: PT. Raja Grafindo Persada, 2005). p. 63.

embryo after exceeding two months of pregnancy¹² and in Arabic, known as *ijhad* which has the meaning as the act of removing the fetus before the perfect period of pregnancy in specific ways. According to Ibn Manzur, *lafadz ajhada al-naqah* means a camel that aborts its womb when it is still imperfect in shape.¹³ At the same time, al-Fayyumi *ajhada al-mar'atu waladaha* defines it as a woman who aborts her pregnancy when it is not yet perfect in its form.¹⁴ According to al-Fairuz al-Abady, *ijtihad* can be used for aborted fetuses, whether they are fully formed or not.¹⁵ According to Ibn Abidin, *ijhad* is aborting the fetus before the womb is perfect.¹⁶ In Arabic, abortion is also called *isqath al-hamli*, which is the abortion of the fetus in the womb. If there is a sentence *ajhadhat al-hamil*, it means *alqat waladaha li ghairi tamam* (the pregnant woman forced out the fetus before it was perfect).¹⁷

Webster's Ninth New Collegiate Dictionary, as quoted by Maria, states that abortion is the spontaneous or forced exit of the fetus, which is usually done in the first 12 weeks of pregnancy. A complete definition of this is included in the Grolier Family Encyclopedia, which states that the definition of abortion is the termination of pregnancy by removing or damaging the fetus before the time of birth, which can be done by spontaneous or forced fetal expulsion.¹⁸

The definition of abortion according to medicine, as said by Dr. Gulardi, Abortion is the cessation (death) and expulsion of pregnancy before 20 weeks (calculated from the last menstruation) or fetal weight less than 500 grams or fetal length less than 25 cm. In general, abortion occurs before three months of pregnancy.¹⁹ Abortion is the end of pregnancy before the fetus reaches a weight of 500 grams or a gestational age of 20 weeks. According to WHO and VIGO, an abortion is said to occur if the gestational age is less than 20-22 weeks. Abortion during pregnancy occurs in 15-20% of the time, with 80% of them occurring in the first trimester, <13 weeks, and very few occur in

¹² Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia* (Jakarta: Gramedia Pustaka Utama, 2008). p. 564.

¹³ Muhammad Ibn Mukrim Ibn Manzur, *Lisan Al-Arab*, Jilid 1 (Qahirah: Dar al-Ma'arif, 1998). p. 713.

¹⁴ Ahmad Ibn Muhammad Ibn Ali al Muqri al Fayumi, *Misbah Al-Munir Fi Garib Al-Syarah Al-Kabir Li Al-Rafi'i* (Beirut: Dar al-Fikr, 2010). p. 113.

¹⁵ Muhammad bin Ya'qub al Fairuz Abadi, *Al Qamus Al Muhith* (Beirut: al Risalah, 2005). p. 63.

¹⁶ Zainuddin Ibn Ibrahim Ibn Muhammad al-Ma'ruf Ibn Nujaim al-Mashari Al-Hanafi, *Al-Bahr Al-Raiq Fi Syarah Kanz Al-Daqaiq*, Jilid 8 (cairo: Dar al-Hadits, 2003). p. 389.

¹⁷ Nurul Irfan, *Hukum Pidana Islam* (Jakarta: Amzah, 2016). p. 166.

¹⁸ Maria Ulfah Anshor, *Fikih Aborsi; Wacana Penguatan Hak Reproduksi Perempuan* (Jakarta: Kompas, 2006). p. 36.

¹⁹ Maria Ulfah Anshor, *Aborsi Dalam Perspektif Fiqh Kontemporer*, ed. Maria Ulfah Anshor, Wan Nedra, and Sururin (Jakarta: Balai Penerbit Fakultas Kedokteran Universitas Indonesia, 2002). p. 158.

the second trimester.²⁰ Abortion is the end of a pregnancy (by inevitable consequences) or before the pregnancy is 22 weeks old, or the fetus of the pregnancy is not yet able to live outside the womb.²¹ Furthermore, according to Huzaimah Tahido Yanggo, in the book *Masail Fiqhiyah*, abortion is the expulsion of the fruit of pregnancy when the fetus is still so tiny that it cannot live.²² From the various definitions above, it can be concluded that abortion is a deliberate or unintentional act to abort the womb that does not have enough time to live or abort the fetus conceived by women with specific actions before the perfect period of pregnancy, either alive or dead before the fetus can live outside the womb.

The most commonly cited reasons for abortion are non-medical, including not wanting to have a child for fear of interfering with career, school, or other responsibilities, not having enough money to care for a child, and not wanting to have a child without a father. Other reasons include being too young (especially for those pregnant out of wedlock) and being a disgrace to the family. This reason is also often expressed by women in Indonesia who try to convince themselves that killing the fetus in the womb is permissible and justified.²³

Abortion, in medical terms, has two kinds of understanding, namely spontaneous abortion (*abortus spontaneus*) and deliberate abortion (*abortus provocatus*). Spontaneous abortion, or spontaneous abortion, is an abortion that occurs naturally, either due to a cause or the absence of a cause. Abortion occurs by itself without any external influence, either mechanical or medical factors. Spontaneous abortion, or *al-ijhad attilqai* or *al-afwi*, is a natural process carried out by the uterus to expel the fetus; it is not possible to perfect the elements of life in him. For example, because the sperm cell or egg cell is not of good quality or because there is a deformity of the uterus. It can also be caused by disease, for example, syphilis, acute infection with high fever, or malaria. Spontaneous abortion can also occur because the mother is pregnant at a young age while she is doing heavy work, or the condition of the womb is not strong because the age of the pregnant woman is too young or too old. In fiqh terms, spontaneous abortion or spontaneous abortion is called *al isqat al-afwu*, which means forgiven abortion. Abortion like this does not have any legal consequences.²⁴

²⁰ Bayu Irianti, *Asuhan Kehamilan Berbasis Bukti* (Jakarta: Sagung Seto, 2014). p. 72.

²¹ Sarwono Prawirohardjo, *Ilmu Kebidanan* (Jakarta: Bina Pustaka Sarwono Prawirohardjo, 2010). p. 56.

²² Huzaemah Tahido Yanggo, *Masail Fiqhiyah (Kajian Hukum Islam Kontemporer)* (Bandung: Percetakan Angkasa, 2005). p. 192.

²³ Abrori, *Di Simpang Jalan Aborsi* (Semarang: Gigh Pustaka Mandiri, 2014). p. 42.

²⁴ Tim pendamping Manajemen Islami RSI JEMURSARI, *Fiqh Medis*, ed. Moh. Ali Azizi (Surabaya: Imtiyaz & Rumah Sakit Islam Jemursari, 2012). p. 74.

While *Abortus provocatus* is an abortion performed intentionally for specific reasons, in fiqh terms, it is called *alisqath al-dharurat* or *al-isqath al-ilaji*.²⁵ *Abortus provocatus* includes two types. First, *Abortus provocatus terapeutikus* or medical, namely abortion or pregnancy that is done intentionally based on medical reasons or considerations. In Islamic law, therapeutic *abortus provocatus* is known as *al-ijhad al-ilaji*, which is a miscarriage deliberately carried out by medics to save the life of the mother so that, in infrequent circumstances, the pregnancy can continue safely. This is done as a rescue for the mother's life, which is threatened if the continuation of the pregnancy is maintained. Among the fuqaha and contemporary scholars, abortion in this form is known as *al-isqat al-daruri* or *al-ijhad al-ilaji*. Second, *Abortus provocatus criminalis* is the abortion of the womb done intentionally by violating various provisions of the applicable law or not on medical indications. This type of abortion is called *al-ijhad al-ijtimai* or *al-ijhad al-ijrami*, which is an abortion that is deliberately done without any medical indication (illegal). Usually, abortion like this is done by using specific tools or drugs because the pregnancy that occurs is not desired.²⁶

2. *The Law of Abortion According to the Scholars of the School of Jurisprudence*

Abortion has always been a problem in the field of health and consistently raises the pros and cons. The discussion of scholars about the legal position of abortion is strongly influenced by the instructions of the Qur'an and the prophet's hadith about the stage of occurrence and growth of the fetus in the womb, and most ulama rely on the issue of abortion on the traditions that mention that the process of fetal development in the womb takes 120 days before the spirit is blown. The spirit is an essential factor in determining the law of abortion.

Scholars differ in their opinion on the law of abortion, especially when the baby has not yet been blessed with the spirit. Some scholars strictly forbid it because it is murder, but some scholars allow it to be even permissible because there is no spirit yet, so it is not considered murder. Unless the abortion is done in an emergency. The difference of opinion among scholars is based on history; during the Prophet's time, there was an argument or fight between two women from the tribe of Huzail. One of them, who was pregnant, was thrown a stone and hit her stomach. As a result, the fetus or baby in her womb died. When the matter was brought to the prophet's attention, the perpetrator of the crime (the one who threw the stone) was penalized with *ghurrah*, which is one-twentieth of a *diyyat*. The fuqaha later adopted this ruling to determine the legal sanctions against people who

²⁵ Suryono Ekotama, Harum Pujianto, and G. Widiartana, *Abortus Provokatus Bagi Korban Perkosaan Perspektif Viktimologi, Kriminologi Dan Hukum Pidana* (Yogyakarta: Universitas Atmajaya, 2001). p. 35.

²⁶ Anshor, *Fikih Aborsi; Wacana Penguatan Hak Reproduksi Perempuan*. p. 38.

perform abortions without valid reasons or commit criminal acts against the termination of pregnancy.²⁷

Most Hanafi fuqaha think that abortion is permissible before the fetus is formed, that is, before the creation of the spirit. However, rational conditions must accompany it, although the issue of when the fetus is formed is still in dispute (ikhtilaf). Scholars who allow abortion generally agree that abortion is permissible when there has been no "creation" because it is considered that there is no life yet, so if the pregnancy is terminated, it is not a criminal act. The opinion that allows abortion before the fetus is 120 days old is Ibn Abidin, one of the followers of Hanafi, who states that the fuqaha of this school allows abortion as long as the fetus is still in the form of a lump of flesh, or a clot of blood, and has not formed its limbs. The complete formation of the fetus occurs after the fetus is 120 days old. Abortion is still permissible before the fetus reaches that age because the fetus is not yet a human being.²⁸ Other scholars refute this opinion because creation occurs after the fetus is 80 days old. When the fetus has passed two forty days (80 days), Allah has sent an angel to it and formed and created its hearing, sight, and skin. Al-Buthi argues that abortion is permissible before the fourth month of pregnancy only in three cases: first, if the doctor fears that the pregnancy threatens the mother's life; second, if the pregnancy is feared to cause disease in the mother's body; and third, if the new pregnancy causes the cessation of breastfeeding of an existing baby whose life is very dependent on the mother's milk. The basis for the permissibility of abortion at the stage before basis for the permissibility of abortion at the stage before the "giving of life" is that everything that has not been given life will not be resurrected on the Day of Judgment. The same applies to a fetus that has not yet been given life. Another of the most cited sources of this school is that abortion is permissible when the pregnant mother is breastfeeding another child, so that her milk stops. The father does not have the money to provide replacement milk. In this case, abortion is permissible to preserve the life of the nursing child. Abortion is also acceptable if something terrible happens to the mother during childbirth.²⁹

According to the majority of Hanbali scholars, the fetus may be aborted as long as the difference is still in the phase of a lump of flesh because it is not

²⁷ Abil Faraj Jamaluddin Abdurrahman Al-Baghdad, *Kitab Ahkam an Nisa* (Beirut: Dar al-Fikr, 1987). p. 185.

²⁸ Muhammed V. Stodolsky and asim I. Padela, "Abortion: Global Positions and Practices, Religious and Legal Perspectives (Abortion in Hanafi Law)," in *Abortion: Global Positions and Practices, Religious and Legal Perspectives*, ed. Alireza Bagheri, 2021, 1-286, <https://doi.org/10.1007/978-3-030-63023-2>.

²⁹ Muhammad Sa'id Ramadan Al-Buthi, *Mas'alah Tahdid an-Nasl Wiqayatan Wa 'Ilajan* (Damaskus: Maktabah Al-Farabi, 1976). p. 111.

yet human, as confirmed by Ibn Qudamah in *Al-Mughni*: The abortion of a fetus that is still in the form of *mudghah* is subject to a fine (*ghurrah*) if according to the specialist team of obstetricians, the fetus has already seen its shape. However, if it has just entered the stage of formation, in this case, there are two opinions; the first is the most valid is the exemption of the *ghurrah* penalty because the fetus has not been formed, for example, only in the form of *'alaqah*, so the perpetrator is not subject to punishment, and the second opinion; *ghurrah* is still obligatory because the aborted fetus has entered the stage of creation of the human child.³⁰ Ibn Najjar explains that it is permissible for a man to take medicine to prevent coitus, while it is permissible for a woman to take an unguent to abort the fetus. However, the most vital opinion of this school is, as stated by Ibn Jauzi, that abortion is forbidden, either before or after conception, at the age of 40 days.³¹ From the explanation above, it can be stated that the Hanbali *fuqaha* are more inclined to say that abortion is permissible before creation, namely before the fetus is 40 days old.

The scholars of the Shafi'i school of thought agree to forbid abortions performed at the time the fetus has been given life, namely, after the fetus has gone through a growth process for four months or 120 days.³² Aborting the pregnancy after the fetus is given life without any reason or medical indication justified in religion is seen as a criminal act that is equated with the murder of a human being who has completed his form.³³

Shafi'iyah scholars disagree about abortion before the fetus is 120 days old.³⁴ Al-Ghazali said that according to the correct opinion, abortion in the form of a clot of blood (*'alaqah*) and a lump of flesh (*mudghah*) or before creation is okay to do as long as the fetus is not fully formed, not yet visible body parts, such as hands, feet, head, hair, and other body parts.³⁵ Al-Ramli, a Shafi'iyah scholar, absolutely forbids abortion after the spirit has been breathed and permits it if the spirit has not been breathed. From the time the spirit is breathed until the baby is born, abortion is forbidden. As for the time before the soul is breathed, it is not forbidden, but the time close to the time of the soul is disputed as to whether it is permissible or forbidden because it is the time close to the time when it is forbidden. Some scholars have defined

³⁰ Abi Muhammad Muwafiquddin Abdullah bin Qudamah, *Al-Mughni* (cairo: Hajar, 1992). p. 210.

³¹ Al-Buthi, *Mas'alah Tahdid an-Nasl Wiqayatan Wa 'Ilajan*. p. 113.

³² Syirbasi, *Yas'alunaka Fi Al-Din Wa Al-Hayah*. p. 216.

³³ Mahmud Shaltut, *Al-Islam Aqidah Wa Syari'ah* (cairo: Dar al-Qalam, 1966). p. 290.

³⁴ Abi Bakar Utsman Bin Muhammad Syatha al Dimiyati al Bakri, *I'annat Al-Thalibin*, Jilid 3 (Beirut: Dar al-Fikr, 1997). p. 147.

³⁵ Abu Hamid Muhammad Muhammad Al-Ghazali, *Ihya' Ulum Al-Din* (Mesir: Matba'ah Mustafa al-Bab al-Halabi, 1939). . 147.

42 days as the time of conception, which means that abortion is permissible before the 42nd day of pregnancy and banned after that.³⁶

Maliki scholars argued that it is forbidden to abort before the soul is blown at any stage of fetal growth (al-nutfah, al-mudghah, and al-'alaqah). This view is the most vital opinion in the Maliki school, although some of the scholars of this school say it is only makrooh if it is removed before the 40 days after fertilization.³⁷

Ibn Hazm al-Zahiri does not have a clear opinion on the ruling on the termination of pregnancy before the soul is breathed. However, he authorises that aborting the pregnancy before the fetus reaches four months is not considered an act of murder because murder removes the spirit from the body.³⁸

3. *Fatwa of the Indonesian Ulema Council on Abortion*

MUI, or Indonesian Ulema Council, is a non-governmental organization that accommodates ulama, zu'ama, and Islamic scholars in Indonesia to guide, foster and protect Muslims throughout Indonesia. The existence of the Indonesian Ulema Council is always synonymous with a fatwa. The Indonesian Ulema Council, established on 17 Rajab 1395 H, coinciding with July 26, 1975 M, by the National Deliberation of the Indonesian Ulema Council in Jakarta, is a forum for the deliberation of Muslim scholars, scholars, and scholars. This assembly aims to practice the teachings of Islam to participate in realising a safe, peaceful, just, and prosperous society, spiritually and physically, that is pleasing to Allah SWT in the context of the Unitary State's of the Republic of Indonesia based on Pancasila.³⁹

Since its establishment in 1975, MUI has acted as a fatwa provider for needy people. Demand for a fatwa can come from ulil amri (government) and can also come from the wider community. The problems that arise from asking for a fatwa to MUI are very diverse, ranging from daily problems related to personal affairs to policy issues related to public affairs, ranging from worship issues to socio-political and social problems, ranging from halal and haram food issues to medical issues and the development of science and technology. Of course, all of them are related to religious issues.⁴⁰

³⁶ Abu al-Abbas Al-Ramli, *Nihayah Al-Muhtaj Ila Syarh Minhaj* (Libanon: Dar Al-Katb Al Ilmiah, 2003). p. 416.

³⁷ Al-Buthi, *Mas'alah Tahdid an-Nasl Wiqayatan Wa 'Ilajan*. p. 115.

³⁸ M. Nu'aim Yasin, *Fikih Kedokteran* (Jakarta: Pustaka al-Kautsar, 2001). p. 63.

³⁹ Muhammad Atho Mudzhar, *Fatwa Fatwa Majelis Ulama Indonesia; Sebuah Studi Tentang Pemikiran Hukum Islam Di Indonesia 1975-1988* (Jakarta: INIS, 1993). p. 62.

⁴⁰ Majelis Ulama Indonesia, *Himpunan Fatwa MUI Bidang Sosial Dan Budaya* (Jakarta: Erlangga, 2015). p. vii

MUI issued its first fatwa on abortion in 1983. This fatwa on abortion was MUI's response to a question from the government. Then, MUI issued another fatwa on the issue in 2000. Furthermore, the last MUI issued a fatwa on the legal issue of abortion in 2005. MUI, during the period of approximately 22 years (1983 to 2005), set the law of abortion in the form of a fatwa; the three fatwas were issued at different times, and the distance is quite long; this fatwa is interesting to note because it was issued repeatedly. This is because more and more people perform abortions without following the rules of Islam, and also the pros and cons of the legal status of abortion.

The issue of abortion was discussed in MUI for the first time in the National Conference of Ulema with the theme of demographic problems, health, and development on October 17-20, 1983, in Jakarta, which was attended by fifty ulema and four medical doctors. Fatwa No. 7 of 1983 was issued during the New Order period under President Soeharto's administration, which was MUI's response to support the government program, which aimed to increase the involvement of Muslims in the success of national development. One of them is the population, health and development program.⁴¹

The National Conference made several decisions, namely on population issues, environmental issues, and health issues. One part of the National Conference decision explained that the practice of abortion in any form and stage of pregnancy is haram in Islam because it is a form of murder unless the practice of abortion is the only way to save the life of the mother. The fatwa shows clearly that MUI states that abortion in any form, including MR (menstrual regulation) and any stage of pregnancy, whether the baby is already alive or not yet alive, is forbidden because, according to MUI, it is a form of murder.

This fatwa decision only refers to the Qur'an and Hadith without referring to fiqh texts.⁴² The arguments on which the prohibition of abortion is based are not included, probably because the fatwa on abortion is only part of the ten-point fatwa of MUI on family planning; therefore, the arguments or texts mentioned are texts related to family planning issues only, such as QS. Al-Hujurat: 13, QS. Al-Ahqaf: 15, QS. Al-Baqarah : 233, QS. Al-Furqon: 74, QS. Al-Kahf: 46 and the hadith about the recommendation to marry immediately for men who are already established, then the importance of physical strength for Muslims. This was done because the theme of the National Conference

⁴¹ Muhammad Maulana Hamzah, "Peran Dan Pengaruh Fatwa Mui Dalam Arus Transformasi Sosial Budaya Di Indonesia," *Millah: Journal of Religious Studies* 17, no. 1 (2017): 127-54, <https://doi.org/10.20885/millah.vol17.iss1.art7>.

⁴² Majelis Ulama Indonesia, *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, ed. Hijrah Saputra (Jakarta: tariat Majelis Ulama Indonesia, 2015). p. 111.

was indeed comprehensive, namely, about population, health, and development.

The issue of abortion was discussed again in MUI seventeen years after the fatwa on abortion was first decided. This abortion issue was discussed after MUI realised that in society, there are pros and cons to the law of abortion without medical reasons before the blowing of the spirit (*nafk al-ruh*).⁴³ In response to this, MUI considers it necessary to issue a fatwa on abortion so that it can be used as a guideline aimed at Muslims not to get out of the corridor of Islamic law. This second fatwa on abortion was issued in the sixth National Conference of MUI, which took place on July 25-29, 2000. This fatwa was formulated systematically, beginning with the fatwa's background, the fatwa's legal basis, and the fatwa's dictum.

The Qur'anic evidence used by MUI as the basis for this second fatwa refers to verses about the process of human creation, namely QS. al-Mu'minun : 12-14, QS. Al-Hajj: 5, then QS. Al-Isra': 33 states that the fetus is a creature with a life that must be respected. In addition to these verses, this second fatwa also cites the Prophetic traditions about the process of human creation and also the time of the blowing of the spirit (*nafk al-ruh*) for the fetus narrated by Imam Bukhari in the book of *Bada'u al-Khalq*, chapter *Dhikru al-Malaikah*.⁴⁴ Imam Muslim in his *Sahih* in the book of *al-qadr* chapter *kayfiyyatu khalqi al-adami fi batniummih*.⁴⁵ The Hadiths generally explain the phase of human creation from the stage of a drop of semen (*nut fah*), namely fertilisation or the meeting of sperm and ovum that occurs in the mother's womb – establishing the egg in the uterus due to the emergence of *villas*, which is an extension of the egg that sucks the necessary substances from the uterine wall, which strengthens the egg in the uterus: the next stage *'alaqah* or blood clot. The meeting of sperm and ovum occurs for the zygote for forty days; the zygote is attached to the wall of the uterus, and then the process runs every forty days through each phase perfectly. Then, the stage from *alaqah* to *mudghah* (a lump of flesh) occurs when something attached to the uterus wall turns into frozen blood. After a lump of meat is formed, the next stage is forming bones, which are then wrapped in beef. In the last stage, the angel is sent to blow the spirit into the body and so on to become a new creature. This requires a process of 4 months or 120 days.⁴⁶

⁴³ Majelis Ulama Indonesia, *Himpunan Fatwa MUI Bidang Sosial Dan Budaya*. p. 397.

⁴⁴ Abi Abdillah Ibn Isma'il Al-Bukhari, *Shahih Al-Bukhari* (Beirut: Dar Ibn Hazm, 2003). p. 137.

⁴⁵ Abi al-Husain Muslim ibn al-Hajjaj al-Qushyairi al-Naisaburi, *Shahih Al-Muslim* (Beirut: Dar al-Kutub al-Ilmiyah, 2003). p. 1019.

⁴⁶ Khoirul Bariyyah and Khairul Muttaqin, "Legalisasi Aborsi Dalam Perspektif Medis Dan Yuridis," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial* 11, no. 1 (2016): 1-28, <https://doi.org/https://doi.org/10.19105/al-lhkam.v11i1.755>.

To complete the argumentation of this fatwa, MUI added the opinion of fuqaha about abortion before *nafkh al-ruh*. The fuqaha's opinions quoted in this fatwa have various rulings on abortion before *nafkh al-ruh*, some of which are permissible, some of which are permissible only with an excuse or medical reason, and *makruh* if it does not have an excuse. There are those whose law is *makruh* absolutely, and those who forbid it. Based on those views, it seems that MUI tends to follow the opinion that allows if there is an excuse, which is the opinion of Hanafi scholars and a group of shafi'i scholars; however, MUI has a different view if abortion is done without an excuse, which according to this opinion the law is *makruh* but according to MUI the law is *haram*. This fatwa also uses the opinion of al-Ghazali from the Shafi'i school of thought, which states that if fertilisation has occurred, namely if the *nuthfah* has mixed with the ovum and is ready to receive life, then destroying it is a criminal offence and the law is *haram*. The last thing that is used as the basis for this fatwa on abortion is the two *fiqhiyah* rules, which state that rejecting *mafsadah* is better than finding *maslahah*, and emergencies allow things that are prohibited.⁴⁷

In this fatwa, MUI uses *al-tarjih* by looking at the opinions of previous scholars and drawing conclusions from those considered the strongest argument. MUI stipulates that, in general, abortion is *haram* to be done anytime and in any way, either before *nafkh al-ruh* or after *nafkh al-ruh*. However, in certain circumstances, abortion can be done if there is an emergency based on the concept of *maslahat*. In this case, we can conclude that if there are medical reasons and other *sharia* reasons, then abortion is allowed. Abortion is allowed if there is an abnormality in the continuity of pregnancy. That is, the process of childbirth, which, if forced, will cause the death of the mother. In such conditions, the ethical consideration is to take the slightest risk; namely, saving the mother's life takes precedence over saving the fetus that will be born. Because preventing the death of the mother is morally preferable because they already have responsibilities about other people, while the fetus does not yet have any responsibilities."

This second fatwa was issued in response to questions that arose from people who were confused about the ruling on abortion before the soul is breathed without any medical reason or other excuse, which was only mentioned in the previous fatwa. This may be why people ask again about this issue because the previous fatwa was deemed insufficient. The condition and social reality above, MUI issued this second fatwa; in terms of legal product, this abortion issue is the same as the previous fatwa. However, in terms of methodology, this second fatwa uses four texts from the *Qur'an*, six

⁴⁷ A.Djazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis* (Jakarta: Kencana Prenada Media Group, 2006). p. 164.

texts from the hadith of the Prophet, some opinions of fuqaha, and MUI analyses the aspects of harm caused if abortion before *nafkh al-ruh* is allowed. With the consideration of these things, MUI forbids abortion before *nafkh al-ruh* without any medical reasons or other reasons that, according to Islamic law, are allowed.

This abortion issue was discussed again in MUI at the MUI Fatwa Commission meeting on February 3, 2005. MUI considers this third fatwa on abortion needs to be established to be used as a guideline by the community, with three points of consideration. First, the practice of abortion is increasing in society, and people perform abortions without considering religious guidance. Secondly, the practice of abortion is often carried out by incompetent parties, causing danger to the pregnant woman and the community in general. Third, the question arises in the community about the law of the prohibition of abortion, whether it is forbidden or allows some exceptions under certain conditions.

The third fatwa on abortion is based on several arguments from the Qur'an and hadith. Verses on the prohibition of killing children for fear of poverty are cited in this fatwa, mentioned in QS. al-An'am: 151, QS. Al-Isra: 31. The fatwa also cites the Qur'anic verse on the prohibition of killing except for a justifiable reason, along with Allah's sanction for this act in QS. al-Furqan: 63-71. The fatwa also cites Qur'anic verses about the process of human creation and the stages of fetal growth in the womb mentioned in QS al-Hajj: 5, then in QS. Al-Mu'minun: 12-14. These verses are complemented by several traditions of the Prophet Muhammad, including the process of human creation in the mother's womb. Then, the hadith clarifies when the spirit is blown into the fetus. There are also traditions about the legal sanctions for killing a fetus and killing a pregnant woman in the form of blood money. There is also a hadith about the prohibition of harming oneself and others.

Furthermore, this fatwa also cites three *fiqhiyah* rules. The first rule states that rejecting harm is more important than getting benefits. This rule emphasises that rejecting harm must take precedence if we are faced with rejecting harm or getting benefits simultaneously. By rejecting harm, we also achieve benefits.⁴⁸

The second rule concerns emergencies permitting prohibited things, which is the basis of the concept of an emergency excuse. Among the *fuqaha*, an emergency is a situation that allows a person to do prohibited things. However, the situation must meet certain conditions, namely that the

⁴⁸ A.Djazuli. p. 77.

condition is life-threatening, and then only in the sense of not exceeding the limit. Finally, there is no other way to do halal things.⁴⁹

The third rule, which is also the last rule, is about the condition of necessity that can sometimes overtake emergency conditions. Al-hajah is a situation that requires a person to do an act that should not be allowed according to Islamic law due to difficulty. The difference with emergency conditions is that if not done, danger arises in emergency conditions, while in the condition of necessity, difficulty arises. Then, in an emergency condition that is violated is an act that is haram li dzatihi, such as eating pork. In a state of necessity, what is violated is an act that is haram li ghayrih.⁵⁰

Then this fatwa also quoted several fuqaha opinions as the previous fatwa and added the opinion of Shaykh 'Athiyah Shaqr who is the Chairman of the Al-azhar Fatwa Commission, who stated that pregnancy caused by rape and causing the woman to experience regret and suffering might aborted, but not the same as pregnancy caused by adultery, the law is haram and may not be aborted.⁵¹ Based on that, MUI finally decided that abortion is forbidden since the implantation of blasts on the mother's uterine wall. However, abortion is permissible because of an excuse, either emergency or hajat. As for what is meant by an emergency excuse, it is a situation where someone will die or almost die if they do not do something that is forbidden. An emergency related to pregnancy that allows abortion is a pregnant woman who suffers from severe physical illness, such as terminal cancer, tuberculosis with complications, and other severe physical illnesses, whose determination must be made by a doctor. Then, Uzur hajat is a situation where someone will experience severe hardship if he does not do something forbidden. The circumstances related to pregnancy that allow abortion are when the fetus is detected to suffer from genetic defects that are difficult to cure later when born. Pregnancy due to rape is determined by an authorised team consisting of the victim's family, doctors, and scholars. The permissibility of abortion that is excluded must be done before the fetus is 40 days old. Then, this MUI fatwa forbids abortion performed on pregnancies that occur as a result of adultery.

This fatwa, issued in 2005, creates the same legal provisions as the fatwa issued in 2000, which both forbid abortion. However, in this third fatwa, the definition of nafkh al-ruh is more tightened to the occurrence of implantation in the wall of the mother's womb. Then, the definition of

⁴⁹ Siti Rahmawati et al., "Tindakan Aborsi Bagi Korban Pemerkosaan Perspektif Hukum Positif Dan Hukum Islam," *Qadauna: Jurnal Ilmiah Mahasiswa Hukum Keluarga*, no. 61 (2022): 259-75, <https://doi.org/https://doi.org/10.24252/qadauna.v4i1.27519>.

⁵⁰ A.Djazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis*. p. 165

⁵¹ Majelis Ulama Indonesia, *Himpunan Fatwa MUI Bidang Sosial Dan Budaya*. p. 398

emergency or excuse is expanded again with the concept of emergency excuse and excuse *hajat*. It also provides explanations and examples of medical reasons that are included in emergency excuses, namely, if the pregnancy threatens the life of a mother, for instance, advanced cancer. Also given are explanations and examples of medical reasons that are included in the exigency condition, namely, if the fetus is predicted to have a genetic defect and also pregnancy caused by rape. Finally, the third fatwa also states the prohibition of abortion in pregnancies caused by adultery.

Methodologically, the third fatwa on abortion, MUI, seems to use *tarjih* method by considering and combining the different opinions of these scholars on abortion and then concluding the most potent argument to overcome the complex problems of abortion in Indonesia. In the second fatwa on abortion, the discussion is more focused on differences in understanding when human life begins, and on what age the fetus can be aborted or not. In this third fatwa, the discussion of abortion is expanded to include the concept of emergency and urgent reasons as valid reasons for abortion. This gives the impression that this fatwa adopts a flexible approach to the issue of abortion. The reasons for abortion include contemporary medical issues, such as the severe illnesses that pregnant women experience today. This situation is categorised as an emergency that allows the abortion of the pregnancy after the spirit is blown because a specialist judges the pregnancy to cause the death of the mother. The conditions that must be met for an emergency to be included in the *shar'i* context include. Firstly, the emergency is an act of self-preservation because of the fear that not doing so will damage one of the parts of the *maqasid shari'ah* that must be safeguarded according to *shari'a*. Second, emergencies that are not related to immoral acts. Third, an emergency is the only reason that can be used to relieve distress for people who are in trouble. Fourth, *rukhsah* can only be used in cases of urgency or to prevent harm. Fifth, it is believed that the person in an emergency will be exposed to danger if he does not do this. Sixth, one must not violate the rights of others or violate things that have been prohibited by religion. Seventh, the damage caused by not doing the prohibited action is more significant than the damage caused by doing it.⁵² So, in Islam, implementing the concept of emergency is not easy because it must meet strict standards and conditions that can not necessarily be enforced just like that; it aims to avoid the attitude of ease because of the desire to fulfil the appetite alone.

The permissibility of abortion for medical reasons in this *fiqh* rule is classified as an act of emergency that allows the prohibition, which, if the pregnancy is continued, will endanger or even threaten the life of the mother.

⁵² Fuad Zein, "Aborsi Janin Cacat Dalam Perspektif Hukum Islam," *Al-Mazaahib: Jurnal Perbandingan Hukum* 5, no. 2 (2018): 273–87, <https://doi.org/10.14421/al-mazaahib.v5i2.1421>.

MUI includes this rule as the basis for taking the MUI fatwa on abortion. In addition to protecting the mother, this fatwa also makes genetic defects a reason that allows abortion to be included in *uzur hajat*. The abnormality of the result of pregnancy that will be born, namely the presence of genetic defects in the prospective child, will adversely affect the sustainability of the child because of the defects it has suffered since birth. These conditions are what the MUI fatwa refers to as *hajat*.⁵³ The advancement of medical science at this time has made it possible to detect damage or defects in the fetus before the age of four months, before reaching the stage of fetal development. However, MUI does not explain how the main categories of incurable genetic diseases become the reason for the permissibility of abortion. It seems that defects such as blindness, deafness, and dumbness cannot be used as a reason for abortion. These defects are diseases recognized in the wider community, and many people suffer from them.⁵⁴

Furthermore, MUI discusses abortion of pregnancy due to rape which is included in the excuse. Rape is an act of violence or sexual crime committed by a man against a woman in the absence of consent and will of the woman, or under threat. Rape leaves wounds for its victims, which are not known when they can be healed. Pregnancy in a rape victim will worsen the mental condition of the victim, who has already been severely traumatised by the rape. This trauma also adversely affects the development of the fetus that the victim is carrying. Therefore, most rape victims experience rejection of their pregnancy. In addition, if they want to continue the pregnancy until the child is born and raised, they will receive negative views from the community. This is additional pressure for the victim. In the cultural context, rape victims are seen as a disgrace to society rather than a victim. This cultural context also marginalizes women who should receive protection.⁵⁵

A woman who is pregnant as a result of rape is severely stressed, and if the pregnancy is not terminated, she will become mentally ill and insane. Psychiatrists and psychologists have consulted her, and she has been given advice by religious experts, but to no avail, which resulted in severe stress or mental illness that makes her crazy; then, in this condition, abortion can be done if it does not exceed 40 days.⁵⁶

If we look at the MUI fatwa on abortion, it is clear that MUI views abortion as an act that is prohibited by religion. However, there are certain

⁵³ Majelis Ulama Indonesia, *Himpunan Fatwa MUI Bidang Sosial Dan Budaya*. p. 399

⁵⁴ Zein, "Aborsi Janin Cacat Dalam Perspektif Hukum Islam."

⁵⁵ Ibnu Fadli, "Legalitas Aborsi Bagi Korban Perkosaan (Tinjauan Menurut Hukum Positif Dan Hukum Islam)," *Jurnal Lex Renaissance* 7, no. 3 (2022): 559-70, <https://doi.org/10.20885/jlr.vol7.iss3.art8>.

⁵⁶ Huzaemah Tahido Yanggo, *Fikih Perempuan Kontemporer* (Jakarta: Ghalia Indonesia, 2010). p. 35.

conditions, which in the language of religion are referred to as emergency or *hajat*, which allow a person to perform an abortion. In this case, it seems that MUI has begun to try to include other aspects, namely medical and psychological conditions, in issuing a fatwa on abortion. This development is arguably quite encouraging in terms of an effort to integrate Islamic sciences (Islamic law) with other sciences. This MUI fatwa tries to contextualize the fundamental values (universal values) of Islam with aspects and values of contemporary development. This can be seen in the understanding of the limits of abortion, which are based on physical measures in the first and second fatwas, and have been given additional psychological measures in the third fatwa. This shows that fatwas become very flexible in changing times and places. The influence of the structure and societal changes on the understanding of religious teachings or concepts resulted in the birth of rational-legal opinions. This abortion fatwa shows that MUI tries to face and answer the challenges of the ever-changing times by advising the people and the government regarding the legal certainty of this abortion. This abortion fatwa shows that it is issued repeatedly to deal with modern developments caused by social change.

E. Conclusion

The fatwa on abortion has changed three times in 22 years, namely the fatwa of 1983, the fatwa of 2000, and finally, the fatwa of 2005. The first fatwa was Fatwa No. 07 on Population, Health, and Development 1983. This fatwa explains the prohibition of abortion in any form and at any stage of pregnancy. Abortion Fatwa No. 1 of 2000 reaffirms the 1983 fatwa on population, health, and development. This fatwa is MUI's response because of the conflict in society regarding the law of abortion before *nafk al-ruh*. This fatwa forbids abortion before or after *nafk al-ruh* unless there are medical reasons and forbids all parties involved. Abortion Fatwa No. 4 of 2005 is MUI's response to the many abortions practised for various reasons. This fatwa forbids abortion since the implantation of the blastocyst in the uterine wall (*nidation*). Abortion is allowed because of an excuse, either emergency or *hajat*. An emergency exigency is a pregnant woman who is experiencing severe physical pain that, according to the doctor, can threaten the life of the mother. The situation of *hajat* is that the fetus is detected to have a genetic defect that will be difficult to cure later, or pregnancy due to rape determined by an authorised team such as the victim's family, doctors, and scholars. The permissibility of abortion due to *hajat* is done before the fetus is 40 days old. However, abortion is forbidden for adultery. All of these fatwas use the *tarjih* method by considering and combining the opinions of *fiqh* scholars and then concluding the strength of the arguments to be used in determining the fatwa.

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