

# ABORTION OF A DEFORMED FETUS IN THE PERSPECTIVE OF MASLAHAH MURSALAH

**Abdul Hadi<sup>1</sup>**

abdul\_hadi@walisongo.ac.id

**Erry Nurdianzah<sup>2</sup>**

pai96eerry@gmail.com

**Agus Khunaifi<sup>3</sup>**

agus\_khunaifi@walisongo.ac.id

**Abdur Rouf<sup>4</sup>**

asyrafabi2@gmail.com

## ***Abstract***

*This study aims to reveal the legal excavations that allow abortion of a fetus with defects with mursalah maslahah. Basically, fetal abortion is forbidden, but because the times have brought us to a condition where we can see the condition of the fetus in the womb, under certain conditions, abortion is permissible. This research is a qualitative research study of literature using descriptive analysis of content analysis (content analysis). In this study, it was shown that the permissible abortion of a fetus with defects in the perspective of maslahah mursalah had fulfilled three conditions, namely; are in accordance with the objectives of the Shari'ah, are rational and definite, for the public interest. As well as in the use of maslahah mursalah as an istimbat al-ahkam method, it can be used when problems are not found or resolved in the texts, the opinion of the Medina experts, ijma' friends, Qiyas, istihsan then after that maslahah mursalah is used which in the case of abortion of a deformed fetus has fulfilled all aspects and produce a law that allows abortion of a defective fetus if the spirit has not yet been breathed into the fetus.*

**Keyword:** *maslahah mursalah, Abortion, deformed fetus*

## **A. INTRODUCTION**

Changes and developments in human civilization may have become an absolute in human life. As Comte argued that human civilization would move from being irrational to becoming more rational.<sup>5</sup> This can also be seen in the technology

---

<sup>1</sup> Guru Besar Ilmu Hukum Islam dan Dosen Program Studi Doktor UIN Walisongo Semarang

<sup>2</sup> Mahasiswa Program Studi Doktor UIN Walisongo Semarang

<sup>3</sup> Mahasiswa Program Studi Doktor UIN Walisongo Semarang

<sup>4</sup> Mahasiswa Program Studi Doktor UIN Walisongo Semarang

<sup>5</sup> Human civilization or society will continue to move from primitive, metamistic and finally positive. The last mention of Comte, namely as a positive society, means the tendency of thinking patterns that are causality which means cause and effect. This positivistic tendency to think is also in line with what was expressed by Zaid al-Dabbusi when he mentioned munasabah in Amir; fate is like

that is currently developing, such as technological advances in the world of medicine which can now detect the condition of the fetus in the womb very easily. So this allows humans to know whether the fetus suffers from defects or not. One of the severe defects that can be detected is physical and mental birth called Down syndrome.<sup>6</sup>

The ability to detect a malformed fetus makes people more able to predict the future which this cannot be done before the discovery of fetal detection technology in the womb, for example, ultrasound. If the fetus is detected to have abnormalities/defects, if it is allowed to grow until it is born, it is feared that it will be difficult for the people around him, especially his family. The concern about the abnormal/defective fetus has resulted in the possibility that humans, especially a pregnant woman, will choose an abortion or abortion because of their fear of the consequences if the fetus is born.

However, abortion for reasons of fear for the future of the fetus does not seem fully justified, because Allah SWT in the Qur'an has guaranteed human life on earth and has cursed those who kill not because of punishment, as in the QS. al-Isra 'verse 31 and QS. al-Maidah verse 32.

Likewise, Qardhawi stated that abortion (abortion) is basically forbidden, since the meeting of a male sperm cell and a female egg cell, from which a new creature emerges and settles in its strong settlement in the womb. So the new creature must be respected, even though he is the result of an unlawful relationship such as adultery. As the Messenger of Allah. had ordered the Ghamidiyah woman who claimed to have committed adultery and was about to be sentenced to stoning to wait until she gave birth to her child, then after that she was told to wait until her child was no longer breastfeeding, only after that she was sentenced to be stoned.<sup>7</sup>

The strict prohibition and opinion of Qardhawi are in line with Law no. 36 of 2009 concerning Health ("Health Law") Regarding abortion, basically everyone is prohibited from having an abortion based on Article 75 paragraph (1) of the Law.

---

something that if left to the mind will be easily accepted. A. Syarifuddin, *Ushul Fiqih I*. (Jakarta: Logos Wacana Ilmu, 1997), Hlm 182. Like a necessity for what is called a change not only in the form of material, but also towards something that is ideal. Let me give a little example of this, for example the career orientation of two women who are 30 years old, but one lives in the 1990s and the other lives in the 1950s, of course this will make a difference between the two. Desmita., *Psikologi Belajar*, ( Bandung: Remaja Rosdakarya, 2009), Hlm 26.

<sup>6</sup> N. Fatimah, *Aborsi Terhadap janin Cacat*, (Surakarta: IAIN Surakarta, (2001), Hlm 15.

<sup>7</sup> Yusuf Al-Qardhawi, *Fatwa-Fatwa Kontemporer*. (Jakarta: Gema Insani, 2002), Hlm 879.

Criminal sanctions for perpetrators of abortion are regulated in Article 194 of the Health Law which reads;<sup>8</sup>

*Everyone who intentionally has an abortion not in accordance with the provisions as referred to in Article 75 paragraph (2) shall be sentenced to a maximum imprisonment of 10 years and a maximum fine of Rp. 1 billion.”*

However, in Indonesia, as a country that has a constitution and is authorized to regulate government regulations, it provides an exception regarding this prohibition on abortion which can be enforced under 2 conditions, as follows (Article 75 paragraph [2] of the Health Law):

*Indications of a medical emergency detected at an early age of pregnancy, both those that threaten the life of the mother and/or fetus, who suffer from severe genetic diseases and/or congenital defects, or which cannot be repaired making it difficult for the baby to live outside the womb; or*

*Pregnancy due to rape which can cause psychological trauma for rape victims*

There are at least two categories regarding abortion when referring to the constitution of the Republic of Indonesia, namely abortion may be carried out and abortion may not be carried out, this is done by looking at the conditions surrounding a woman's womb. Not much different from the laws and regulations of the Republic of Indonesia, as well as the MUI (Indonesian Ulema Council) has stipulated fatwa Number 4 of 2005 concerning Abortion that: First, abortion is illegal since the implantation of a blastocyst on the wall of the mother's uterus (nidation). Second, abortion is allowed because there is an age, whether it is an emergency or a need, which includes (Pregnant women suffer from severe physical illness, such as: advanced cancer, tuberculosis with caverna and other serious physical illnesses that must be determined by a team of doctors, in circumstances where pregnancy threatens the life of the mother) this has an impact on the permissibility of abortion if; The fetus was detected as suffering from a genetic defect which would be difficult to cure when it was born, as well as a pregnancy due to rape determined by the competent team, which included the victim's family, doctors, and clerics. Permissibility of abortion referred to in letter (b) must be done before the fetus is 40

---

<sup>8</sup>In another article it is stated that a woman who intentionally aborts or terminates her pregnancy or orders another person to do so, is threatened with a maximum imprisonment of four years.. Moeljono, *KUHP*, (Jakarta: Bumi Aksara, 2008).

days old. For then, it is illegal to have abortions carried out in pregnancies that occur as a result of adultery.<sup>9</sup>

The permissibility of aborting a deformed fetus based on the constitution of the State of Indonesia is at least because it considers the necessity (a state of compulsion) to perform an abortion in achieving goodness which in this case can be called *masalah mursalah*. *Masalah mursalah* is defined as a tool to attract benefits and avoid damage due to the absence of provisions in the texts that previously confirmed or invalidated the related problems.<sup>10</sup> For example, a deformed fetus that is considered to be dangerous to the life of a pregnant mother is allowed to abort it. Thus, this paper will review how abortion of a deformed fetus is allowed in the perspective of *masalah mursalah*.

Among the writings that review the abortion of a disabled fetus is Fuat's writing with the title *Abortion of a Defective Fetus in the Perspective of Islamic Law*. In his writings, he stated that abortion of a deformed fetus is allowed because of the element of *dharurat* (forced circumstances) because if the fetus is maintained it will endanger the life of the mother of the fetus.<sup>11</sup> Fuat's writing only discusses whether or not an abortion is allowed without mentioning how to extract the law so that an action is permissible or in this case the abortion of a deformed fetus.

On the other hand, Saifullah in his writing entitled *Abortion and Risks to Women in the View of Islamic Law* revealed that although in an emergency situation abortion of a deformed fetus is allowed with various accompanying conditions, it is not only medical and religious issues that will also be affected by the abortion problem. but also personal and social problems that surround the mother of the fetus.<sup>12</sup> Saifullah's writing besides mentioning the permissibility of abortion of a disabled fetus in an emergency situation also shows how the social and personal aspects of the mother of the fetus are also affected by abortion of a disabled fetus. However, Saifullah's writing methodologically has not discussed how the abortion law is allowed.

Thus the most personal and social impact is pregnancy due to rape. Pregnancy due to rape is allowed to have an abortion with various conditions. However, this

---

<sup>9</sup> MUI, *Himpunan Fatwa MUI*. (Jakarta: Erlangga, 2011), 462.

<sup>10</sup> A. Beni, *Fiqih Syasah*. (Bandung: Pustaka Setia, 2007), 76-77.

<sup>11</sup> Z. Fuat, *Aborsi Janin Cacat dalam Perspektif Hukum Islam*. *Jurnal Pemikiran Hukum*, (2018). 43-55.

<sup>12</sup> M. Saefullah, *Aborsi dan Resikonya bagi Perempuan*. *Jurnal Sosial Humaniora*, (2011), 13-25.

ability must also be considered in terms of security in doing so. As stated by Tutik that pregnancy is not wanted or due to rape, that indeed this will have an impact on the psychological and social realm for the mother and fetus and should be handled immediately. In addition, a number of facts have been disclosed by Tutik that unsafe abortions are carried out in developing countries which often end in the death of the mother.<sup>13</sup> The facts presented by Tutik also become a consideration for the benefit of the *maslahah mursalah* to continue to have abortions for deformed fetuses by considering the ability and expertise of medical personnel in carrying out safe abortions. If this is not fulfilled, it is not impossible that what was initially considered *maslahah* will turn into a disaster.

The writing that best fits the study in this paper is Nailil Muna's thesis which reviews how the method of determining fetal abortion law is carried out by the MUI by analyzing the MUI fatwa 2b ARTICLE 1 NUMBER: 4 YEAR 2005 which mentions the permissibility of having an abortion because it is based on the Koran, namely QS. al-An'am verse 151, QS. al-Isra ': 31, QS. al-Mu'minun: 13-14, hadith, *ijma'* and *qiyas*.<sup>14</sup> Almost the same as Muna, but this article will explore more deeply about abortion of a defective fetus from the perspective of *maslahah mursalah* in more detail and depth.

The various writings above as a whole do have a discussion about abortion of a deformed fetus, but these writings have not explored how it is legal to extract a deformed fetus. So that the study of abortion with a disability from the perspective of *maslahah* is a form of originality from the author.

## **B. RESEARCH METHOD**

This study uses a qualitative literature study (library research). This study uses various materials related to the theme of writing. The sources of this research are books, books, journals, and other literature sources. So that it will describe how *maslahah mursalah* as a method of extracting sharia law works in the case of abortion of a disabled fetus.

---

<sup>13</sup> T. Tutik, *Analisis Hukum Islam Terhadap Praktik Aborsi Bagi Kehamilan Tidak Diharapkan*. (2012).

<sup>14</sup> N. Muna, *Analisis fatwa Majelis Ulama Indonesia*. (Semarang: UIN Walisongo, 2015).

## C. DISCUSSION

### 1. Position of Maslahah mursalah in Sharia Law Excavation

In the method of extracting Islamic law there are some differences among the scholars, but they still lead to one goal, namely for the good of all human life. Therefore, the scholars in extracting the law are still guided by the Qur'an and hadith as the basis for extracting the law. However, in its development, they have different opinions regarding the *istimbathul alkham* method, such as those who use *maslahah mursalah* and do not use it. or not *maslahah mursalah* as a method of extracting Islamic law itself. However, the author will provide a basic argument regarding *maslahah mursalah* as part of the method of extracting Islamic law.

*Maslahah mursalah* is a benefit that is prescribed by the Shari'a and has the form of a law, which is intended to create benefit, because in this problem there is no evidence that justifies and blames. Therefore, *maslahah mursalah* is called absolute because there is no evidence that states right and wrong.<sup>15</sup> From this we can understand that the purpose of *maslahah mursalah* itself is to seek goodness for humans in which there is no evidence that discusses the problem.

Thus the existence of *Maslahah mursalah* is always identical and related to the increasingly complex development of human life. In every development of human life, humans are always required to be creative and always think to solve problems that always arise in each of its changes, this is a sign that human civilization is always moving forward. With the movement and complexity of human life, *maslahah mursalah* emerges as a method of *istimbat al-ahkam* which is based on two things, namely:<sup>16</sup>

a. Problems about human life always arise and will never stop at a certain point.

Given this, if you don't use *maslahah mursalah*, it is certain that new problems will not be able to be arranged to improve humans.

b. *Maslahah mursalah* itself has actually been used for a long time, such as by the Companions, the *Tabi'in* and the *mujtahids*. Like Abu Bakr's Companions collecting manuscripts to be later recorded as the Qur'an.

In addition, *maslahah mursalah* is a way of consideration for humanity, in order to maintain five main things; religion, soul, mind, lineage and property.

---

<sup>15</sup>S. Al-Amidi, *Al-Ahkam fi Ushul Al-Ahkam* (Riyad: Muassasah Al-Halabi, 2010), Hlm 145

<sup>16</sup>R. Syafe'i, *Illmu Ushul Fiqih*. (Jakarta: Prenada Media Group, 2010), Hlm 125

Maslaha mursalah is also considered as an inherent trait of the legal structure itself, which is shown by the effort to take the positive and leave the negative, even though it is real or hidden from human eyes.<sup>17</sup>

Thus the author here uses *maslahah mursalah* as a method of extracting sharia law considering human life that will not stop at a certain point and human problems are increasingly complex. This writer uses because previously there was no discussion of issues that had just emerged and because there were no arguments to justify and blame.

## **2. Maslahah mursalah as a method of extracting sharia law**

In the excavation of sharia laws, of course, it cannot be done arbitrarily, therefore the method in extracting sharia law must get more attention for law diggers to comply with sharia guidelines. This also applies to *maslahah mursalah* which of course have provisions in extracting the law. So that in determining sharia law by using *maslahah mursalah*, the following points must be considered.<sup>18</sup>

- a. goodness must be in line with the goals of *syara'* in which it must have the support of the texts in general.
- b. The law must be rational and definite, so with this it is hoped that the established law will actually produce benefits and reduce/eliminate/reject harm.
- c. The law stipulated in the matter must concern the public interest or the common interest, and it is not allowed to conflict with the Qur'an.

However, not all scholars use *maslahah mursalah* in extracting sharia law, the most basic reason why they do not use *maslahah mursalah* in extracting sharia law is that they assume that what Allah and His Messenger ordered to be followed has been shown by themselves. *nash* or the result of *istimbath* itself.<sup>19</sup> Meanwhile, those scholars who use *maslahah mursalah* assume that the cycle of life will not stop and will be increasingly complex so that *maslahah mursalah* is needed in

---

<sup>17</sup> A. H. Uways, *fiqih Statis dan Fiqih Dinamis*. (Bandung: Pustaka Hidayah, 1998), Hlm 144.

<sup>18</sup> M. Kamali, *Principle of Islamic Jurisprudence*. (Selangor: Palanduk Publication, 1989), Hlm 349.

<sup>19</sup> M. Katib, *Maslahah Mursalah Sebagai Suatu Pertimbangan Ijtihad Mengembangkan Hukum Fiqih Yang Relevan dengan Kebutuhan Masa Kini*. (Jakarta: IAIN Syahid, 1998), Hlm 388.

extracting sharia law. It is proven that problems in human life always arise and will never stop at a certain point. In view of this, if the problem of mursalah is eliminated, it is certain that new and more complex problems will not be regulated to improve human life. In fact, maslahah mursalah itself has actually been used for a long time as a tool in establishing the law, such as by the Companions, the Tabi'in and the mujtahids. Like Abu Bakr's Companions when collecting manuscripts to be later recorded as the Qur'an.<sup>20</sup>

So from this it can be understood that maslahah mursalah is a method of determining syara' law which is used if it is not found in legal texts that discuss issues that have just emerged, but its use is not justified if it contradicts the texts even though in trying to protect religion, soul, intellect, lineage and wealth. Therefore, Maliki scholars consider maslahah mursalah as a logical induction from a collection of texts, and this induction does not come from detailed texts as used in qiyas.<sup>21</sup>

Thus the author assumes that maslahah mursalah can be used as a method of extracting sharia law after there are no texts that discuss the problem. So if there is a text in the text or there is a text that shows the law of a problem, then there is no need for maslahah mursalah. However, in determining the maslahah mursalah as a method of determining the law, one must pay attention to various things, including certain benefits, benefits are supported by texts even though it is not like qiyas, the benefits to be achieved should be general in nature or to apply also to the wider community and not only applies to individuals. or small groups.

### **3. Defective Fetal Abortion in the Perspective of Maslahah Mursalah**

Abortion is something that violates the law, be it state law or religious law. In the case of abortion or abortion according to state law, it will be subject to a sentence of 10 years and a maximum fine of 1 billion. This is in accordance with article 194 of the Health Law. It's not enough to stop there because as citizens of a religious state, the perpetrators of abortion are also threatened with a grave sin,

---

<sup>20</sup> R. Syafe'i, *Illmu Ushul Fiqih*,, Hlm 125.

<sup>21</sup> N. Haroun, *Ushul Fiqih*.( Jakarta: Logos, 1996), Hlm 12.



because an abortion/abortion actually takes away the right to life of the fetus. As the punishment for the killers according to the QS. Al-Baqoroh verse 178.<sup>22</sup>

However, there are sometimes exceptions so that an abortion is permitted, which is also based on state and religious law. In the view of the state, abortion may be carried out if it meets two criteria, namely; first. Pregnancy due to rape, which is feared to cause psychological trauma for the rape victim, so that abortion is permissible but must be carried out according to the procedure, secondly. Pregnancy with an indication of a medical emergency, which can endanger the safety of the pregnant mother, as well as the fetus, which has been indicated from the start with congenital defects and has severe genetic abnormalities that cannot be corrected, according to state law, abortion may be performed. Meanwhile, according to religion, there is a condition that allows a mother to abort her fetus. As Zein in his article, he mentions that abortion of a deformed fetus is allowed because nowadays there is technology that is able to diagnose abnormalities in babies from an early age so that it would be better if the problematic fetus was aborted with a note that the fetus is still in its first 40 days and has not yet been born. 120 days old..<sup>23</sup>

Thus, abortion of the unregistered fetus is allowed according to religion and also the state with the various notes above. Although we already know that abortion of a deformed fetus is permissible, we also have to look at how to determine whether it is permissible for an abortion to be carried out, especially if it uses *maslahah mursalah*. So we have to know how *maslahah mursalah* works. So that in determining sharia law by using *maslahah mursalah*, the following things must be considered:<sup>24</sup>

- a. goodness must be in line with the goals of *syara'* in which it must have the support of the texts in general.

---

<sup>22</sup> As this is also discussed in *Qs al Isra ' : 31*. And do not kill your descendants just because you are afraid of poverty. It is We (Allah) who provide sustenance to them and to you too. In fact, killing is a great sin.

<sup>23</sup> Fuat, Z.. Aborsi Janin Cacat dalam Perspektif Hukum Islam. *Jurnal Pemikiran Hukum*, (2018), 43-55.

<sup>24</sup> Kamali, M, *Principle of Islamic Jurisprudence*,, Hlm 349.

- b. The law must be rational and definite, so with this it is hoped that the established law will actually produce benefits and reduce/eliminate/reject harm.
- c. The law stipulated in the matter must concern the public interest or the common interest, and it is not allowed to conflict with the Qur'an.

These three things are absolute requirements that must be in the *maslahah mursalah*. This is attempted in such a way that although *maslahah mursalah* does not have direct guidance from the texts, it does not follow human desires and has broad interest in all human life. So that this *maslahah mursalah* is used when there is no textual guidance that discusses a certain law. As Imam Malik in his *istimbathul ahkam* he will look for it first from the Qur'an, and if it is not in the Qur'an then he looks for it in the hadith, and if it is not in the hadith then he will see how the Medina experts act, if in the actions of the Medina experts it is not there then he will look at the *Fatwa sahabat*, if the *Fatwa sahabat* is not found then he will use *qiyas*, and if with *qiyas* he does not find it then he will use *istihsan*, if with *istihsan* not found then Imam Malik will use *maslahah mursalah* and there are still more efforts that will be made by Imam Malik to explore the law if the *maslahah mursalah* cannot solve it.<sup>25</sup>

Thus, the first step in determining the permissibility of abortion of a deformed fetus is to first see whether in the texts, the opinions of the Medina experts, the fatwas of friends, *qiyas*, *istihsan* already exist or not. As explained one by one below;

- a. Al-Qur'an; In the Qur'an there is no text that allows abortion. On the contrary, in the Qur'an there is a condemnation of all acts of murder or abortion of a fetus out of fear for the future of the baby, as in Qs al Isra ': 31. And do not kill your offspring just because you are afraid of poverty. It is We (Allah) who provide sustenance to them and to you too. In fact, killing is a great sin.
- b. Hadith; in the hadith there is nothing that explains the permissibility of killing or abortion of the fetus.
- c. The opinion of the Medina expert; In the opinion of the Medina expert, it is also not found about the permissibility of fetal abortion

---

<sup>25</sup> M. Katib, *Maslahah Mursalah Sebagai Suatu Pertimbangan Ijtihad Mengembangkan Hukum Fiqih Yang Relevan dengan Kebutuhan Masa Kini*. (Jakarta: IAIN Syahid, 1998).

- d. Fatwa sahabat; In the fatwa of friends, there is also no fatwa regarding the permissibility of abortion
- e. Qiyas; because qiyas is a similitude or comparison with a comparison that already has instructions in the Qur'an.<sup>26</sup> Like khomer with shabu, because both have the same illat, which is intoxication, then it is considered haram. As for the problem of abortion of a disabled fetus, there are no texts that provide instructions on the permissibility of such an action.
- f. Istihsan; In this case of abortion, the writer considers that it will not be resolved by using istihsan, because istihsan is considering something good with stronger evidence.<sup>27</sup> In this case, although it seems as if istihsan can be applied, but in the case of a defective fetus, it cannot be resolved because in the case of a malformed fetus there are two things that must be considered, namely; first. Take more benefit (with the safety of parents), second. Avoiding kemadhorotan (loss of an aborted fetus).
- g. Maslahah mursalah is a benefit that is prescribed by the Shari'a and has the form of a law, which is intended to create benefit, because in this problem there is no evidence that justifies and blames. Therefore, maslahah mursalah is called absolute because there is no evidence that states right and wrong.<sup>28</sup> In maslahah mursalah there are two things that must be considered, namely; first. Take more benefit (with the safety of parents), second. Avoiding kemadhorotan (loss of an aborted fetus). So from here the author is of the view that maslahah mursalah is more appropriate to be used as a basis for legal stipulations to allow abortion of a disabled fetus.

Maslahah mursalah as a method of determining the law on the permissibility of abortion of a disabled fetus will be explained as follows;

- a. Goodness must be in line with the goals of syara' and have the support of the texts in general; which after the above discussion about the use of maslahah mursalah after first looking at the texts, the opinions of Medina experts, fatwas of friends, qiyas, istihsan and then using maslahah mursalah. However, even so, the results of the legal decision of maslahah mursalah must not deviate

---

<sup>26</sup> S. Sakirman, Metode Qiyas Dalam Istibat Hukum Islam. *Yudisia*, (2018). 37-55.

<sup>27</sup> F. Fitriani, Istibat dan Pembaharuan Hukum Islam. *Tahkim*, (2018). 18-32.

<sup>28</sup> S. Al-Amidi, *Al-Ahkam fi Ushul Al-Ahkam,, Hlm 125.*

from the objectives of *syara'*, namely; preserving religion, preserving the soul, preserving reason, preserving offspring, preserving property. So that in the case of abortion of a fetus with defects in the five objectives of *syara'* is to preserve the soul whose position is important after first maintaining religion which is supported by the hadith of the prophet that;

*From Abu Sa'id Sa'ad bin Malik bin Sinan al-Khudri radhiyallahu 'anhu that the Prophet sallallahu 'alaihi wa sallam said, "You must not harm yourself and you must not harm others." <sup>29</sup>*

Thus, the first condition for abortion of a deformed fetus is permissible based on the *mursalah* problem that has been fulfilled while still receiving support from the texts in general and remaining in line with the objectives of the *shari'a*.

- b. The law must be rational and definite: because *maslah mursalah* is the use of reason in minimizing damage and taking more good, it must be rational and have an impact on reducing damage. The first condition above is a basic tendency as a condition for the use of *maslahah mursalah*, then this next condition is a rational problem and is actually able to reduce damage, it seems that the explanation of the first point has also been answered. However, taking life in any form is still not allowed, therefore the writer here also relies on the hadith of the prophet that:

*From al-A'masy said, told us Zaid ibn Wahhab, told us Abdullah ibn Mas'ud, he said the Messenger of Allah has told us, he is a righteous and justified person. Indeed, one of you is gathered in his mother's belly for forty days, then made a clot of blood for forty days, then made a lump of flesh for forty days, then an angel is sent to him with four words, then his deeds, death and woe, his sustenance are written down. , and his happiness, then after that a spirit is breathed into him, And verily one of you does the deeds of the people of hell, so that the distance between himself and hell is only a cubit, but a record (destiny) precedes him and then he does the deeds of the people of heaven, then with that he enter it, verily one of you does with the deeds of the people of heaven, so that the distance between himself and heaven is only a cubit, but a record (destiny) precedes him and then he acts with the actions of the people of hell, so with that he enters it. (Narrated by Bukhari).<sup>30</sup>*

Based on the hadith and the formulation in the first condition, the abortion of a disabled fetus may be carried out if the spirit has not yet been

---

<sup>29</sup> A. Al-Qazwani, *Sunan Ibnu Majah*. (Jakarta: Gema Insani, 2016), Hlm 1112.

<sup>30</sup>M. Al-Bukhariy, *Al-Jami' Al-Mukhtashar*. (Beirut: Dar Ibnu Katsir, 1987), Hlm 1212

blown into the fetus. Which is also considering that it is permissible to abort a disabled fetus only to protect the life of the baby's mother and not for fear that the baby will be born with defects. Because in Qs al Isra ': 31.

*And do not kill your descendants just because you are afraid of poverty. It is We (Allah) who provide sustenance to them and to you too. In fact, killing is a great sin. Qs al Isra ': 31.*

- c. The law stipulated in the matter must concern the public interest or the common interest, and it is not allowed to conflict with the Qur'an. As a final condition so that this *maslahah mursalah* can be used, it is clear that the stipulation of the law on abortion of a disabled fetus is not for the benefit of individuals or groups, but for all people who have problems such as rape that causes trauma and the fetus in the womb is a real danger to the mother. Which is indirectly there is no conflict with the texts of either the Qur'an or hadith.

Thus, the author concludes that abortion related to a malformed fetus or a victim of rape, all of which can endanger the safety of a mother's life, is allowed to have an abortion as long as it is not yet time for the spirit to be breathed into the fetus.

#### **D. CONCLUSION**

Fetal abortion is basically a violation of both state and religion. However, under certain conditions, abortion of the fetus is allowed if it fulfills the conditions for allowing abortion of the fetus. It is permissible to carry out fetal abortion, including if the fetus in the womb is indicated to be permanently disabled and the fetus in question can endanger the life safety of the pregnant mother, in addition to the permissible abortion of the fetus when the fetus is the result of an act of rape that causes the mother of the fetus to experience mental stress.

In Islamic law the determination of permissible fetal abortion must be in the right way. So in this case the author considers *maslahah mursalah* as the *istimbath al-ahkam* method which is the right thing in the case of abortion of a disabled fetus. Because the use of *maslahah mursalah* as an *istimbath al-ahkam* method starts with looking first in the Qur'an, then hadith, the opinions of the people of Medina, *ijma'* friends, *qiyas*, *istihsan*, after all of that there is no solution to a new problem *maslahah mursalah* used. In addition, the *maslahah mursalah* requires three things that must be included in it, namely; first. *Maslahah mursalah* must be in accordance

with the objectives of syara' and have the support of the texts in general, secondly. Rational and definite, third. The law stipulated in the matter must concern the public interest or the common interest. As in the case of abortion of a deformed fetus, these three conditions have been met, abortion of a deformed fetus or a fetus that endangers the life of the mother is allowed if it does not have a life or a spirit has not been inserted into the fetus.

## BIBLIOGRAPHY

- Al-Amidi, S. *Al-Ahkam fi Ushul Al-Ahkam*. Riyad: Muassasah Al-Halabi, 2010
- Al-Bukhariy, M., *Al-Jami' Al-Mukhtashar*. Beirut: Dar Ibnu Katsir, 1987.
- Al-Qardhawi, Y, *Fatwa-Fatwa Kontemporer*. Jakarta: Gema Insani, 2002.
- Al-Qazwani, A, *Sunan Ibnu Majah*. Jakarta: Gema Insani, 2016.
- An-Naim, A, *Dekontruksi Syari'ah*. Yogyakarta: Pustaka Pelajar, 1994.
- Beni, A, *Fiqh Syasah*. Bandung: Pustaka Setia, 2007.
- Desmita, *Psikologi Belajar*. Bandung: Remaja Rosdakarya, 2009.
- Fatimah, N, *Aborsi Terhadap janin Cacat*. Surakarta: IAIN Surakarta, 2001.
- Fitriani, F. Istimbat dan Pembaharuan Hukum Islam. *Tahkim*, (2018), 18-32.
- Fuat, Z.. Aborsi Janin Cacat dalam Perspektif Hukum Islam. *Jurnal Pemikiran Hukum*, (2018), 43-55.
- Haroun, N, *Ushul Fiqih*. Jakarta: Logos, 1996.
- Kamali, M, *Principle of Islamic Jurisprudence*. Selangor: Palanduk Publication, 1989.
- Katib, M, *Masalah Mursalah Sebagai Suatu Pertimbangan Ijtihad Mengembangkan Hukum Fiqih Yang Relevan dengan Kebutuhan Masa Kini*. Jakarta: IAIN Syahid, (1998).
- UU Kesehatan, (2009). *UU Kesehatan*. Jakarta.
- Khatimah, Metode Istimbat Imam Malik. *Istidlal*, (2017), 29-37.
- Moeljono, *KUHP*, Jakarta: Bumi Aksara, 2008.
- MUI, *Himpunan Fatwa MUI*, Jakarta: Erlangga, 2011.
- Muna, N, *Analisis fatwa Majelis Ulama Indonesia*. Semarang: UIN Walisongo, (2015).
- Saefullah, M, Aborsi dan Resikonya bagi Perempuan. *Jurnal Sosial Humaniora*, . (2011), 13-25.
- Sakirman, S, Metode Qiyas Dalam Istimbat Hukum Islam. *Yudisia*, (2018), 37-55.
- Syafe'i, R, *Illmu Ushul Fiqih*. Jakarta: Prenada Media Group, 2010.
- Syarifuddin, A, *Ushul Fiqih I*. Jakarta: Logos Wacana Ilmu, 1997.
- Tutik, T, Analisis Hukum Islam Terhadap Praktik Aborsi Bagi Kehamilan Tidak Diharapkan, (2012).
- Uways, A.-H, *fiqh Statis dan Fiqih Dinamis*. Bandung: Pustaka Hidayah, 1998.