

READING FATWAS OF MUI A PERSPECTIVE OF *MAŞLAĤAH* CONCEPT

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Abstrak: Kemaslahatan dan kebaikan manusia merupakan tujuan pokok setiap bentuk peraturan, termasuk fatwa-fatwa Majelis Ulama Indonesia (MUI). Salah satu bidang fatwa yang diterbitkan MUI adalah hukum keluarga. Fokus utama tulisan ini adalah membaca ulang dan menganalisa fatwa-fatwa MUI dalam bidang hukum keluarga dengan perspektif konsep masalah mayoritas fuqaha yang juga telah diterbitkan dalam Fatwa MUI tentang Kriteria Masalah Nomor: 6/MUNAS VII/MUI/10/2005. Fatwa-fatwa tersebut, dilihat menggunakan paradigma konsep masalah, adakalanya masuk dalam kategori *maşlahah mu'tabarab*, *maşlahah mursalah*, dan ada indikasi beberapa fatwa yang masuk kedalam kategori *maşlahah mulghab*. Adapun fatwa MUI dalam bidang hukum keluarga yang dimaksud dalam tulisan ini yaitu fatwa tentang Aborsi, tentang Perkawinan Beda Agama, tentang Kewarisan Beda Agama, tentang Perkawinan Di Bawah Tangan (*sirri*, tidak dicatatkan), dan tentang Nikah Wisata.

Kata kunci: *Maşlahah*, Gradasi *Maşlahah*, MUI, Hukum Keluarga

Abstract: Human benefit and goodness are the main objectives of every form of regulation, including the fatwas of the Council of Indonesian Ulama (MUI). One of the fatwa fields issued by MUI is family law. The main focus of this paper is to reread and analyze the fatwas of the MUI in the field of family law with the perspective of the concept of majority fuqaha masses which have also been published in the MUI Fatwa concerning the Maslahat No. 6 / MUNAS VII / MUI / 10/2005. These fatwas, are seen using the concept of *maslahat*, sometimes include to the category of *maşlahah mu'tabarab*, *maşlahah mursalah*, and there are indications of several fatwas that include to the category of *maşlahah mulghab*. The fatwas of the MUI in the field of family law referred to in this article is a fatwa on Abortion, concerning Differential Marriage, about Different Religions, About Marriage Under the Hand (*sirri*, not recorded), and about Tourism Marriage.

Keywords: *Maşlahah*, Gradation of *Maşlahah*, MUI, Family Law

***Maslahah* As A Consideration And
Main Objective; An Introduction**

Fatwa, as one of the legal products, must be oriented to benefit, the world and the hereafter. The purpose is clearly stated



in the Basic Guidelines for Determining the Fatwa of the Council of Indonesian Ulama (MUI) Chapter III paragraph 5 and emphasized in the Establishment of Fatwa Halal point I, namely that every fatwa must not conflict with the benefit of the people.¹ The MUI in its fatwa guideline states that the fatwa issued must be through the established legal procedure (*istidlāl*), which must be based on the Qur'an's argument, the hadith which is *mu'tabar* and must not conflict with the benefit of the people. Related to the last condition, that is, it must not conflict with the benefit of the people, the writer has two assumptions, first, that which should not conflict with the benefit of the people is the argument of the Qur'an and hadith. Second, that which should not conflict with the benefit of the people is the product of the MUI fatwa. The first assumption has the understanding that benefit is the main argument for the other two arguments.² In some cases, this can be

justified where the priority is given to the text.

The second assumption has the understanding that the fatwa issued by the MUI must not conflict with the benefit of the people. The main object in the second sense is about the results or product of the fatwa. The main proposition in this sense is the Qur'an and hadith, then the results of the taking of the two arguments which will be used as a determination of fatwa. Thus the fatwa is considered to have accommodated benefit, or in other words reality or context must be subject to the text. Whatever the condition of the community, it still must be subject to the existing texts because they are considered to contain benefits. The question that arises next is what if it turns out that the text (*naṣṣ*) is contrary to benefit? Which is the main proposition in the case? Related to the case, there are two answers, first, that the provision of texts must still be used as a proposition, which is why the benefit of the people must obey and comply with the provisions of the text. The second relates to the first assumption that the benefit of the people must take precedence over the

¹Guidelines and Procedures for Determining the Fatwa of the Council of Indonesian Ulama Chapter III point 5 in K.H. Ma'ruf Aminat.all., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975* (Jakarta: Sekretariat Majelis Ulama Indonesia, 2011),6, and the System and Procedure for Determining Products in the Council of Indonesian Ulama in K.H. Ma'ruf Amin at.all., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 14.

²This concept is stated by Najm al-Dīn al-Ṭūfī when describing *maṣlahah* as the basis of the main law. Regarding al-Ṭūfī can be read in Najm al-Dīn al-Ṭūfī, *Sharḥ al-Arba'īn al-Nawāwī* in Muṣṭafā Zayd, *al-Maṣlahah fī al-Tashrī' al-Islāmī wa Najm al-Dīn al-*

Ṭūfī (Kairo: Dār al-Fikr al-'Arabī, 1964). Najm al-Dīn al-Ṭūfī, *Sharḥ Mukhtaṣar Raḍḍab* (Beirut: Mu'assasah al-Risālah, 1990). Maskur Rosyid, *Implementasi Konsep Maslahat al-Ṭūfī dalam Fatwa MUI (2005-2010)* (Magelang, Ngudi Ilmu, 2013).

texts of the texts, so the texts are under the auspices of benefit.

However, the MUI then explained that the benefit of the people intended was a benefit which did not contradict Nash, manifesting the *maqāṣid al-sharī'ah* in the form of the preservation of *al-darūriyyah al-khamsah* namely preserving religion, reason, soul, wealth, and descent.³ The MUI then issued a fatwa on the criteria for *maḥlahah* - as mentioned - based on the following considerations.⁴ First, there are many groups or groups who, in the name of *maṣlahah*, then use it as a proposition to establish a law, thus ignoring standard rules and boundaries. Second, by ignoring the standard rules and boundaries of the problem, it has resulted in errors in establishing the law. As a result of the mistakes of Islamic law, then it has an impact on unrest in the community. Thirdly, in an effort to position and maintain Islamic law proportionally, the MUI needs to establish a fatwa regarding the criteria of the *maṣlahah* in an effort to avoid misunderstandings. The basis used in the fatwa is the Qur'an, the Hadith of the Prophet, and the opinions of the ulama

which Opwis⁵ classifies as conventional scholars, they are al-Ghazzālī (505 H)⁶ and al-Shāṭibī (790 h)⁷, and the opinions of al-Khawārizmī(850 h) in al-Shawkānī (1250 H)⁸.

Determination of the criteria for the *maṣlahah* is a re-explanation of the criteria of the *maṣlahah* which have been explained by medieval scholars. This is like what Khallāf(1956 M) did in explaining *al-maṣlahah*.⁹ Unlike other contemporary thinkers who tried to formulate a new theory about *maṣlahah*, but he instead affirmed the theory of medieval

⁵Felicitas Meta Maria Opwis, "Maṣlahah in Contemporary Islamic Legal Theory" Articles in *Islamic Law and Society* 12, 2, Leiden (2005).

⁶Al-Ghazzālī's opinion which is used as one of the bases for determining the fatwa is taken from his essay entitled *al-Mustaṣfā*uz I pages 286-287 as follows. المصلحة في عبارة في الاصل عن جلب منفعة او دفع مضرة etc.

⁷Al-Shāṭibī in *al-Muwāfaqāt*uz II, 39-40 he stated that every basis of religion (benefit) which was not appointed by a particular nass and he was in line with the act of sharak and its meaning was taken from the arguments of the sharak, then that was true, could be used as a legal basis and reference. Thus if the problem - based on the conclusions of several arguments - can be ascertained the truth. Because the arguments do not have to show legal certainty on their own without being combined with other arguments, because that is difficult to happen. Al-Shāṭibī, *Al-Muwāfaqāt fi Uṣūl al-Aḥkām* (Mesir: Dār al-Fikr, 1341 H), II, 39-40. This statement was quoted by MUI as one of the basis of the fatwa, K.H. Ma'ruf Amin *at.all.*, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 489.

⁸ K.H. Ma'ruf Amin *at.all.*, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 488.

⁹In Opwis' research it was said that Khallāf in his perspective on maslahat preferred to affirm the conventional theory which was assumed to be established rather than formulating a new theory, Felicitas Meta Maria Opwis, "Maṣlahah in Contemporary Islamic Legal Theory" 190.

³The first point in the MUI Fatwa concerning the Criteria of Maṣlahah, K.H. Ma'ruf Amin *at.all.*, *Himpunan Fatwa Majelis Ulama IndonesiaSejak 1975*, 490.

⁴MUI Fatwa concerning the Criteria of Maṣlahah, Number: 6/MUNAS VII/MUI/10/2005.



Jurisprudence which discussed again about *maṣlahah* with terms *maṣlahah mursalah* and at the same time completely refused the use of *maṣlahah mulghab*. This is what happened in the MUI fatwa on the criteria of the *maṣlahah* who want to reaffirm the *maṣlahah* theory that has been put forward by the jurists. That the benefit received is a problem that is in line with the text or in line with the intent contained in the text, so that the problem that conflicts with it must be rejected.

Although not only bound by one school, for example the al-Shāfi'ī school or the Mālikī school, but the MUI did not dare to get out of the opinion of the priests of the school. In this matter, Nadir said that most of the MUI fatwas constituted a repetition of what had been explained by the previous clerics and there was no new fatwa issued by the MUI.¹⁰ It seems that this opinion is correct but not one hundred percent because in some cases there are cases that have never before existed and have never been explained by the scholars.¹¹

Back to the theme of the problem used by the MUI, that in terms of not being contradictory to the text of the MUI it does not explain in detail about the intended text. However, by looking at the guidelines used by MUI, which is in line with the number of scholars, it can be concluded that the texts in question are texts that *qaṭ'i* is not the *ẓanni*. In this connection, the MUI explained that Islamic law is divided into two, first *qaṭ'i* laws and the two *ẓanni* laws, without further explaining the understanding of both.¹² The possibility of two divisions of Islamic law is in line with the meaning of the texts *qaṭ'i* and *ẓanni*. Because then the MUI said that if it turns out the problem posed after being examined is a problem with the *qaṭ'i* law and found in *ijmā'* which is *mu'tabar* then the fatwa must be reported as it is and does not need to do *ijtihad* because the law which is *qaṭ'i* is assumed to be a law may be contested.¹³ On the other hand, if the problem is included in the legal issue that is *ẓanni*, then the MUI will carry out *ijtihad*.

¹⁰Nadirsyah Hosen, "Behind the Scenes: Fatwas of Majelis Ulama Indonesia 1975-1998" *Journal of Islamic Studies*, 15:2. 2004, 170-175.

¹¹Some of these new cases include cases of food and medicine, as well as labeling or halal certificates for processed food. More complete reading; K.H. Ma'ruf Amin *at all.*, *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 593-etc..

¹²Chapter III concerning the Method of Determining the Second Point Fatwa in K.H. Ma'ruf Amin *at all.*, *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 5-6.

¹³Chapter III concerning the Method of Determining the Second Point Fatwa in K.H. Ma'ruf Amin *et al.* *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 5.

Nash who is *qaṭ'ī* and *ijmā'* occupy the highest position in the MUI fatwa methodology, so that it must be in line with both. The logical consequence if it is contrary to both is not referred to as *maṣlahah*. From the explanation above, it can be concluded that *maṣlahah* is used as a basic guideline for determining fatwa. The mass criteria used by the MUI are more referring to al-Ghazzali's opinion, that the benefit that is used must not conflict with the text so that each fatwa must have support and approval or at least in line with the soul's text. Such a theory is taken by the author from reading about the basic guidelines for making fatwas related to the concept of *maṣlahah* which was used as a

Fatwas About Abortion

This fatwa was published twice by the MUI in 2000¹⁴ and in 2005¹⁵. If the reason for issuing a fatwa in 2000 was to question the law for abortion before the *naḥk al-rūḥ*,¹⁶ then in 2005 the reason for its publication was more developed. Initially only questioning the law, the latter

guideline by the MUI. However, in reality, the guidelines that are so neat do not work as written.

Many fatwas have been published by MUI. Related to *aqīdah*, worship, social, and economy. Both published through the results of *ijtimā'*, the results of the National Conference, as well as the results of the fatwa commission meeting. However, in this paper, writing is restricted to the socio-cultural field and narrowed down in the fields of marriage and family law. The fatwa in the field of family law will be re-read by the author using the concept of *maṣlahah* as mentioned by MUI in its fatwa regarding the criteria for *maṣlahah*.

is the reason because many cases of abortion are not according to religious guidance, carried out by people who are not competent, and questioning the prohibition of abortion as the 2000 MUI fatwa or still may do so under certain circumstances.¹⁷

Answering questions about abortion, the MUI delivered a number of verses from the Qur'an, including QS. Al-An'ām (6): 151¹⁸, QS. Al-Isrā'(17): 31¹⁹, QS.

¹⁴MUI Fatwa Number 1 / Munas VI / MUI / 2000 concerning Abortion.

¹⁵MUI Fatwa Number 4 of 2005 concerning Abortion.

¹⁶See the MUI National Conference Number 1 / National Assembly VI / MUI / 2000 Fatwa concerning Abortion in K.H. Ma'ruf Amin et al. *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 395-dst.

¹⁷MUI Fatwa Number 4 of 2005 concerning Abortion in K.H. Ma'ruf Amin et al. *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 455.

¹⁸That verse is that. *و لا تقتلوا النفس التي حرم الله الا بالحق* (QS. Al-An'ām (6): 151). which means the prohibition of killing souls that God forbids except for reasons permitted by Islam.



Al-Furqān (25): 76²⁰, QS. Al-Ḥajj (22): 5²¹, and QS. Al-Mu'minūn (23): 12-14²². In addition, the MUI also mentions a number of traditions that regulate human creation²³ as well as the punishment for killing a fetus of a mother by giving a male or female slave,²⁴ and a hadith regarding the prohibition of doing harm.²⁵ Several rules were also conveyed to reinforce the fatwa argument, which among other things concerning the prioritization of removing damage to the withdrawal of benefits.²⁶

¹⁹that God forbids humans and لا تقتلوا اولادكم خسية املاق¹⁹ from killing their children because of fear of poverty.

²⁰the contents of the verse are not different from those found in the surah al-An'ām above, namely the prohibition of killing a soul that is forbidden by Allah except for justified reasons.

²¹The verse in the surah contains the life after death. This is true, to convince those who doubt the resurrection after the death of God then to continue by explaining the beginning and process of human creation.

²²This verse only explains about the process of human creation, and does not explain the topic of discussion, namely the law on abortion.

²³The Hadith is:

ان احدكم يجمع خلقه في بطن امه اربعين يوما ثم يكون علقه مثل ذلك ثم يكون مضغة مثل ذلك ثم يبعث الله ملكا فيؤمر بابع كلمات و يقال له اكتب عمله و رزقه و اجله و شقي او سعيد ثم ينفخ فيه الروح .

Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, hadith number 2969. This hadith does not mention abortion only explained about the time of the baby's growth in the womb of his mother until the spirit was blown to him.

²⁴The Hadith is.

اقتلت امراتان من هذيل فرمت احدهما الاخرى بحجر فقتلها و ما في بطنها فاخصموا الى رسول الله صلى الله عليه و سلم فقضى رسول الله صلى الله عليه و سلم ان دية جنينها غرة عبد او وليدة (متفق عليه).

'Abd Allah bin 'Abd al-Raḥmān al-Bassām, *Tawḍīḥ al-Aḥkām min Bulūgh al-Marām* (Libanon: Mu'assasah al-Khidmāt al-Ṭiba'iyyah, 1994), V: 185.

²⁵The Hadith is. لا ضرر و لا ضرار

²⁶The rules used by MUI regarding abortion are as follows.

Explicitly, the problem of abortion is not mentioned in the Qur'an above, so the law of temporary abortion is analogous to the law of killing. That is, the *qisās* sentence is imposed or pay *diyyat* if the family forgives. The law of a new abortion is mentioned in a hadith about the dispute between two women who eventually killed one of them in the stomach. The sentence for the murder of the fetus was to pay *diyyat* in the form of giving a slave. The fetus referred to by the hadith still feels ambiguous and has not been able to answer the question of necessity, regarding the absolute prohibition of abortion. Is it always haram, meaning that under any circumstances the act of abortion is prohibited or prohibited under certain conditions. To be able to better answer the questions raised, the MUI then quoted various opinions of the scholars from various circles.

Al-Ghazzālī in *Iḥyā' 'Ulūm al-Dīn* says that when a sperm has mixed with the ovum in the womb and is ready to accept life then destroying it is seen as a crime.²⁷ Thus the opinion of al-Ghazzālī states the inability to have an abortion. Then the MUI

درء المفساد مقدم على جلب المصالح. الضرورة تبيح المحظورات، and الحاجة قد تنزل منزلة الضرورة.

²⁷Al-Ghazzālī, *Iḥyā' 'Ulūm al-Dīn* (Kairo: Dār al-Hadith, 2004), II: 67.

quoted the opinion of the Azharscholars who stated that in terms of abortion there were two provisions, firstly that the abortion was carried out before the spirit was blown, and the two abortions performed after the spirit was blown. Regarding the first thing, there are several opinions, firstly the opinions expressed by the Zaydiyahscholars, some Ḥanafiyah scholars, some al-Shafiyahscholars, some Mālikiyah and Ḥanabilah scholars who claim such abortion is absolutely permissible. The two opinions expressed by the Ḥanafiyahscholars and some al-Shāfi'iyah stated their ability with strong reasons and *makrūh* if there were no strong reasons. Thirdly, according to some of the Mālikiyah scholars, they declare absolutely absolute, and finally the four opinions which are agreed upon by the Malikiyahscholars and are in line with the Zahiriyah school which states the prohibition of the act of abortion.²⁸ Regarding the second problem, which is abortion that is carried out after the spirit is blown, all the jurists express their prohibition if there is no strong reason.

In additional information from the MUI was obtained by quoting the opinion of Shaikh 'AṭīyahShaqr (chairman of al-

Azhar's fatwa commission) regarding the causes of pregnancy and the legal consequences of abortion. Pregnancy that occurs as a result of adultery - according to him - there are two conditions, first if the pregnancy occurs because of compulsion so that women as victims feel remorse and pain then abortion is permissible. Second, if adultery is carried out on the basis of conditions in which self-esteem has been underestimated and is no longer ashamed of having sex which is forbidden, then abortion for such acts is forbidden, because by allowing abortion on the second case can legalize adultery.²⁹

Based on the rule of eliminating the precedence over withdrawing benefits and that the need sometimes occupies an emergency position while the emergency conditions permit things that are considered illegal, then the MUI applies the following abortion law. That abortion performed after the implantation of blastocyst on the uterine wall is haram. The absence of abortion also applies to pregnancies caused by adultery. Abortion is allowed because there are strong reasons,

²⁸ K.H. Ma'ruf Amin at.al, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 460-461.

²⁹ K.H. Ma'ruf Amin at.al, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 462.



both in the form of an emergency and in a state of urgency.³⁰

The first fatwa is related to the prohibition of abortion, so in the perspective of the concept of the *maṣlahah* of the majority of scholars, it is considered as the *maṣlahah mu'tabarab*, namely *maṣlahah* which is in accordance with the objectives of the text. As explained earlier, that *maslahat* in the view of al-Ghazzali or even the majority of scholars is always subject to *qiyās* reasoning, in this case abortion - abortion of the fetus in the womb - is analogous to killing, then the act is punished as killing. Then the second fatwa that the act of abortion is permissible if there are reasons that Islamic law occupies an emergency position or at least occupies a position of position that is nearing emergency. So that this is in line with the ability to use the *maṣlahah* described by al-Ghazzālī, namely the benefit of occupying an emergency position or purpose.³¹ Therefore, in the case of a fatwa concerning abortion, it agrees with the concept of *maṣlahah* as conveyed by the majority of scholars.

³⁰MUI's decision regarding abortion, see in K.H. Ma'ruf Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 464.

³¹Al-Ghazzālī, *al-Mustaṣfā min 'Ilm al-Uṣūl*(Beirut: Dār al-Fikr, t.th), I: 296.

Fatwa About Different Religion Marriage

Interfaith marriage is an old issue but always a hot issue to be discussed.³² The problems of interfaith marriage will be examined in the perspective of Islamic law with the *maṣlahah* method. This kind of marriage is regulated in the Qur'an with the terms *ahl al-kitāb* and *mushrik*. These two things are different in their understanding, *ahl al-kitāb* is defined as those who believe in one of the prophets and one of the divine books. *Mushrik* is a person who not only associates partners with Allah, but also does not believe in the Prophet and divine books.³³ The verses relating to *ahl al-kitāb* are Surah al-Mā'idah (5): 5³⁴ and al-Baqarah

³²Discussions about interfaith marriages in DewiSukarti's research fall into three categories. First, the category of liberals, which tries to harmonize the text with universal human rights, especially related to marriage. According to this group, religion cannot be used as a partition to carry out marriage, so even though it is different in religion, a woman and a man can still have a marriage. Second, the conventional category. This group tries to safeguard the values in the text while separating them from human rights. This means that interfaith marriage in the view of the second group cannot be done. Third, the category of secular agnostics, which views the issue of marriage as a personal matter of man, therefore religion cannot interfere. see DewiSukarti, *PerkawinanAntaragamaMenurut al-Qur'an dan Hadis* (Jakarta: PBB UIN dan KAS, 2003), 1-2.

³³Zainun Kamal, "MenafsirKembaliPerkawinanantarUmatBeragama," in Maria UlfahAnshorand Martin LukitoSinaga (ed), *Tafsir UlangPerkawinan Lintas Agama: PerspektifPerempuan dan Pluralisme* (Jakarta: KAPAL Perempuan, 2004), 150.

³⁴In this verse, Allah explains three kinds of things that are lawful for believers, including the ability to marry free women from both mu'minah and ahl al-

(2): 221 concerning the *musbrik*,³⁵ which are then used as the basis for interfaith marriages. Based on these two verses, interfaith marriages are divided into two; the first marriage between Muslims and women *Abl al-kitābis* permissible, while Muslim women with men *abl al-kitāb* are not allowed. The two marriages of a Muslim and / or Muslim woman with *musbrik* are not permitted.

With the method of *maqāṣid al-shari'ah*, interfaith marriages, both from *abl al-kitāb* and *musbrik*, both done by Muslims and Muslim women are not allowed. At the beginning it was explained that the principle of *maqāṣid al-shari'ah* was based on five things, namely in order to maintain religion, soul, mind, lineage, and wealth. The five can be realized properly if the smallest institution, namely the family, is well-nurtured, including in this case is religion. This conclusion rejects Ahmad Ali's opinion with his *maṣlahah maqṣūdah* which states that interfaith marriages may be based on the principle of equality, freedom, and benefit.³⁶ Also different from

the conclusions of classical jurisprudence; regarding the validity of the marriage of a Muslim with a woman *abl al-kitāb* on the condition of giving dowry as an obligation, not intending to commit adultery, and not being a concubine (*gundik*).³⁷

Interfaith marriage in the Indonesian context is not explicitly stated in the laws and regulations. It's just that in KHI Article 2 it is stated that marriage is a very strong contract to obey God's commands.³⁸ Then in Article 3 it is stated that the purpose of marriage is to create a peaceful, happy and loving life.³⁹ Furthermore, in Article 4, a new marriage is considered valid if it is in accordance with Islamic law,⁴⁰ and this is in accordance with Law No. 1 of 1974 concerning Marriage.

m IslamKontemporer,"Thesis at UIN SyarifHidayatullah Jakarta, 2008.

³⁷Al-Marāghī, *Tafsir al-Marāghī*, I: 211 dan II: 267.in traditional discourse, the issue of interfaith marriage is divided into three types; first, the ability of a *mukmin* to marry an *abl al-kitāb* woman. Second, the inability of Muslim women to marry non-Muslim men, and thirdly, the prohibition of men to marry polytheistic women, as well as Muslim women with non-Muslim men. Muhammad 'Ali al-Ṣabuni, *Tafsir Ayāt al-Aḥkāmīn al-Qur'an* (Beirut: Dār al-Kutub al-Ilmiyyah, 1999), 203. RashīdRiḍā, *Tafsir al-Manar* (Beirut: Dār al-Kutub al-Ilmiyyah, 1999), VI: 159. Hamka, *Tafsir al-Azhar* (Jakarta: PustakaPanji Masyarakat, 1983), VI: 143.

³⁸Compilation of Islamic Law (KHI) Chapter II article 2 reads: "Marriage according to Islamic law is marriage, which is a very strong contract or *mitsaqanghalīqan* to obey Allah's commands and carry it out is worship".

³⁹KHI Chapter II article 3 reads: "Marriage aims to realize the *sakinah, mawaddah, and rahmah* household life".

⁴⁰KHI Chapter II article 4 reads: "Marriage is legal if carried out according to Islamic law in accordance with article 2 paragraph (1) of Law No. 1 of 1974 concerning Marriage".

kitāb,AḥmadMuṣṭafā al-Marāghī, *Tafsir al-Marāghī*(Beirut: Dār al-Fikr, 2006), II: 267. 'Ali al-Sayis, *Tafsir Ayāt al-Aḥkām* (Mesir: Mu'assasāt al-Mukhtar, 2001), I: 347.

³⁵The verse contains the prohibited meaning of marrying polytheists.

³⁶Ahmad Ali, "RelevansiMaslahah dan Implementasinya dalam Pengembangan Pemikiran Huku



Then in article 44 KHI explicitly stated that an illegitimate woman marries a man who is not Muslim.⁴¹ More than that in Chapter IV concerning Pillars and Terms of Marriage in article 14 concerning the pillars of marriage,⁴² both witnesses⁴³ and guardians⁴⁴ are one of the conditions that must be Muslim. Of the several articles stated above, it is not explicitly stated whether or not a man should marry a non-Muslim woman. However, it can be concluded that this also applies to men, so men also cannot do marriages with non-Muslim women. This is done by the method of *maqāṣid al-sharī'ah* which is in addition to preserving religion, as well as guarding offspring.

The fatwa of the MUI regarding interfaith marriages was published twice, namely in 1980 with the title "Fatwa on

Mixed Marriage"⁴⁵ and in 2005 entitled "Fatwa on Marriage of Different Religion"⁴⁶. The second fatwa issued in 2005 was a reinforcing fatwa for the previous fatwa. The fatwa was issued for several reasons, namely that interfaith marriages were rife in the community, so that in addition to causing various differences of opinion, it also caused unrest among the community. Interfaith marriage is carried out by the perpetrators under the pretext of benefit and human rights. Therefore, the MUI then issued a fatwa on the above issues with the aim of maintaining the peace of the household.⁴⁷

The basis used by the MUI in acting includes the Qur'an, hadith and *maṣlaḥah* rules and *sadd al-dharī'ah*. Nash which is used as a legal basis is QS. Al-Nisā '(4): 3 and 25, QS. Al-Rūm (30): 21, QS. Al-Taḥrīm (66): 6, QS. Al-Mā'idah (5): 5, QS. Al-Baqarah (2): 221, and QS. Al-Mumtaḥanah (60): 10. The hadith used as a basis for his fatwa is a hadith concerning the criteria of a woman who will be made a wife that includes beauty, wealth, blood,

⁴¹KHI Chapter VI article 44 reads: "A Muslim woman is prohibited from carrying out a marriage with a man who is not Muslim."

⁴²KHI Chapter IV article 14 reads: "To carry out a marriage there must be:

- a. Future husband
- b. Prospective wife
- c. Guardian of marriage
- d. Two witnesses, and
- e. Ijab and kabul.

⁴³This is in accordance with KHI article 25 that "who can be appointed as a witness in the marriage contract is a Muslim man, fair, aqilbaligh, uninterrupted and not deaf or deaf."

⁴⁴Expressed in KHI article 20 paragraph (1) as follows. "The one who acts as a guardian of marriage is a man who fulfills the requirements of Islamic law, namely Muslims, aqil, and baligh."

⁴⁵The fatwa of the MUI in the Second National Conference in 1980.

⁴⁶MUI Fatwa Number 4 / Munas VII / MUI / 8/2005.

⁴⁷See the fatwa of the MUI regarding Differential Religion Marriage in K.H. Ma'ruf Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 477.

and religion.⁴⁸ The arguments used by the MUI are more varied when compared to the arguments used by previous ulama as mentioned earlier, namely only surah al-Ma'idah (5): 5 and surah al-Baqarah (2): 221. Arguments of the Qur'an He mentioned the suggestion of marriage with a religious person,⁴⁹ even said that marriage with a slave was better than marrying a *mushrikah*.⁵⁰ Term *mushrik* and *mushrikah* are initially different from the terms *abl al-kitāb*, this difference can be observed as follows. That the marriage between a *Muslim* or *Muslimah* and a *mushrik* or *mushrikah* is absolutely forbidden,⁵¹ while the marriage of a *Muslim* with *abl al-kitāb* women is permitted and does not apply otherwise.⁵²

The explanation of this matter has been mentioned at the outset, so that the discussion on interfaith marriage at first was indeed divided into two terms. But lately, the MUI by stating based on traditional *qawls*⁵³ stated that interfaith marriages, whether with *musrik* or *musrikah* or with women and or men *abl al-kitāb*,

were illicit marriages.⁵⁴ This security indirectly violates the regulations contained in the Qur'an where a man is allowed to marry a woman *abl al-kitāb*. Such an opinion might be based on the rule of avoiding dangerous things which must be prioritized over attracting a usefulness, also the rule of *sadd al-dhari'ah* which is closing the way for the opening of danger.

The fatwa concerning the interfaith marriage case if examined by using the *maṣlahah* concept of the majority of scholars is as follows. All provisions stipulated in the text must be followed, because it violates the text, it means violating religious teachings.⁵⁵ In a clear statement it is stated that the marriage of a Muslim with a woman *abl al-kitāb* is permissible.⁵⁶ Therefore, if the fatwa follows this provision, the sound of the fatwa is as follows. That marriage between Muslims and or Muslim women with non-Muslim people is *haram*. That the marriage of a Muslim with *abl al-kitāb* is permissible. Such a fatwa in the view of the *maṣlahah* concept is that the majority of ulama are

⁴⁸ K.H. Ma'ruf Amin at.al, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 481.

⁴⁹QS. Al-Mā'idah (5): 5, QS. Al-Mumtaḥanah (60): 10, dan QS. Al-Nisā' (4): 25.

⁵⁰QS. al-Baqarah (2): 221.

⁵¹QS. al-Baqarah (2): 221.

⁵²QS. Al-Mā'idah (5): 5.

⁵³See the fatwa of the MUI regarding Differential Religion Marriage in K.H. Ma'ruf Amin et al, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 481.

⁵⁴See the MUI fatwa decision on the 2nd point of Religion Differences in Marriage in K.H. Ma'ruf Amin et al, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 481.

⁵⁵This *maṣlahah* belongs to the type of *mulghah* because it is contrary to Nash. The majority of scholars agree not to allow use as a legal proposition.

⁵⁶QS. Al-Mā'idah (5): 5.



referred to as *maṣlahahmu'tabarab*, which is benefit in accordance with the text.

But the reality is that the fatwa issued by the MUI said that marriage between Muslims and non-Muslims, both women and men, was unlawful.⁵⁷ Marriage with *ahl al-kitab* women was also forbidden by the MUI.⁵⁸ The second fatwa in the author's view is published based on the principle of benefit, not on the basis of textual provisions of the text. Thus the second fatwa in the perspective of the majority concept of *maṣlahah* is seen as *maṣlahahmulghab* because it is contrary to the text of the Qur'an. On the basis of the above assessment, it can be concluded that MUI in terms of interfaith marriage has implemented *maṣlahahmulghab* and in the perspective of the concept of majority, this type of problem is a problem that is rejected and cannot be used as a legal basis.

Fatwa On The Inheritance Of Different Religions

This fatwa regarding inheritance of different religions was published by MUI in 2005⁵⁹, which was motivated by several

things, namely that in the midst of society inheritance often occurred due to the diversity of many people who believed that inheritance of different religions was allowed. The MUI assessed that this had come out of the teachings of Islam and therefore MUI needed to issue a fatwa on this matter so as not to cause various actions that came out of the teachings of Islam and so that the fatwa was used as a guide to inheritance problems.⁶⁰

The fatwa of the MUI regarding inheritance of different religions is based on several verses and hadith, namely QS. Al-Nisā '(4): 11⁶¹ which regulates the distribution of each heir, also in the same surah Verse 141 which writes my opinion is not relevant to the case under study.⁶² Verse 141 states that unbelievers will not be given a way by Allah to destroy believers. The two verses do not state the inability to inherit each other between Muslims and disbelievers. The problem then becomes clear when affirmed by the hadith which

⁵⁷MUI's Fatwa on Marriage Differs in Religion, first point.

⁵⁸The fatwa of the MUI regarding Marriage of Different Religion is the second point.

⁵⁹MUI Fatwa Number 5 / Munas VII / MUI / 9/2005 concerning the Inheritance of Different Religion.

⁶⁰The reasons for issuing the MUI fatwa on the inheritance of different religions see more clearly in the MUI fatwa concerning the inheritance of different religions in K.H. Ma'ruf Amin et al., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 483.

⁶¹The verse in surah al-Nisā 'explains about the parts of each of the ahl heirs. The problem regarding inheritance of different religions is not explained in the verse. The provisional conclusion of the verse says that even though heirs and heirs of different religions, each has the right to inherit.

⁶²That verse is that. *و لن يجعل الله للكافرين على المؤمنين سبيلا* al-Nisā' (4): 141.

states that Muslims should not inherit infidels and vice versa the unbelievers may not inherit Muslims.⁶³ And the hadith which states that there is no inheritance between two people of different religions.⁶⁴

Based on the two texts, the MUI then filed a case of religious inheritance with two fatwas. The first is that in Islamic law it does not provide mutual inheritance rights between people of different religions. This means that the law of giving and receiving inheritance for Muslims to and from non-Muslims is haram. For the perpetrators will sin because they have violated Islamic law. Second, accepting and giving property between people of different religions can only be done outside of inheritance problems, for example in the context of receiving or giving grants, wills and gifts.⁶⁵ Thus the MUI gave a fatwa decision on the case of different religious inheritance.

Regarding the inheritance of different religions, actually it is not only

found in the Surah al-Nisā'verse 11, but also in verses 8, 12, and 13. The whole verses only regulate inheritance in general, and are related to cases that are currently studied, namely the inheritance of different religions is not explicitly mentioned by the Qur'an. So from the rules contained in the Qur'an it can be concluded that at first, cases of inheritance can occur between Muslims and non-Muslims, between masters and slaves, or between people who have killed the heirs either intentionally or unintentionally. Then the general rule is explained (*takhsīs*) by the hadith narrated by Usāmah bin Zaid and the hadith has been issued (*takbrīj*) by hadith experts such as al-Bukhārī, Muslim, al-Tirmīdhī, AbūDāwud, Ibn Mājah, Aḥmad ibn Ḥanbāl, and al-Dārimī in their respective books. The hadith referred to belongs to the category of hadith *ṣaḥīḥ* because it is narrated simultaneously⁶⁶ by al-Shaykhānī in one line of hadith, namely Usāmah bin Zaid. The law stated by the hadith which is then held up by the majority of scholars is the prohibition of mutual inheritance between people of different religions.

The opinion of the majority of scholars according to Ibn Rushd is not only

⁶³The Hadith is. لا يرث المسلمون الكافر ولا الكافر المسلم

⁶⁴The Hadith is. لا يتوارث اهل ملتين The word *millatayn* in the hadith means two different religions namely infidel and Islam so that the content is the same as the previous hadith which states the prohibition of mutual inheritance between Muslims and non-Muslims. The hadith has two strengths in terms of *sanad*, the first is considered as a legitimate hadith, and the second is considered as *ḥasan* hadith. More complete reading; al-Kaḥlānī, *Subul al-Salam*, III:99.

⁶⁵The MUI's decision on the inheritance of different religions in K.H. Ma'ruf Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 485.

⁶⁶The definition of hadith muttafaq'alayh see in;Muḥammad bin Ismā'īl al-Kaḥlānī al-Ṣan'ānī, *Subul al-SalamSharḥBulūgh al-Maram min Adillab al-Aḥkām* (T.tp.: Dār al-Fikr, t.th), I: 13.



based on the hadith but also based on QS. Al-Nisā '(4): 141, which is the general law between infidels and Muslims. Thus the hadith is a *mukhaṣṣiṣ* for the generality of the verses governing inheritance, and states that the inheritance law of different religions is unlawful. However, there is an opinion that Muslims can accept inheritance from unbelievers and do not apply otherwise. This opinion was held by Imāmiyyah and al-Nāṣir based on Mu'adh's historical tradition that the Prophet said that Islam did not increase and not diminish, so Muslims inherited non-Muslims.⁶⁷ Al-Kahlānī stated that the hadith was narrated by AbūDāwud and was validated by al-Ḥākim. But according to al-Sayīs, the hadith is a hadith which is weak in quality (*da'if*) and cannot be used as a legal backing for the ability of a Muslim to inherit from non-Muslim people.⁶⁸

The majority of scholars argue that the hadith which is *muttafaq'alayh* above is the one that holds in the law of inheritance in different religions, while the tradition of Mu'adh is only information, that Islam is a religion that exceeds other religions,

it increases and will not decrease.⁶⁹ The lesson behind the inherited law of mutual inheritance between people of different religions according to al-Jurjāwī is that the unbelievers have left Islam, which is the strongest bond between Muslims.⁷⁰ So the basic foundation in inheritance is because of the Islamic religious ties. Even though - the purpose of inheritance is to love one another (*ta'āluḥ*), help (*ta'āwun*), and gain mutual benefit for the relatives (*iṣāl al-manfa'abilā al-aqārib*).⁷¹ Therefore the main goal can be realized so that each other inherits by not confining oneself to just one religious bond should be applied.

The explanation above, if seen from the making of the argument, the opinion of the majority is *rājih*.⁷² Thus once again based on the hadith, the inheritance law of different religions is unlawful. The perspective of the previous scholars regarding the inheritance of different religions is still textual because it only refers

⁶⁹ Al-Kahlānī, *Subul al-Salam*, III: 99.

⁷⁰ AlīAḥmad al-Jurjāwī, *Ḥikmah al-Tashrī'*, 269.

⁷¹ AlīAḥmad al-Jurjāwī, *Ḥikmah al-Tashrī'*, 269.

⁷² However, based on the discussion, then a group of observers stated that classical ulama, although in the majority considered the inheritance of different religions, were haram, there were minorities of scholars who tried to accommodate non-Muslims. Evidenced by the second opinion which states that Muslims can inherit from non-Muslim people even if they do not apply otherwise. Read; NucholisMadjid, *Fikih Lintas Agama* (Jakarta: Paramadina, 2003), 166.

⁶⁷The Hadith is. ان الاسلام يزيد و ينقص. The hadith is a fragment of a long hadith, see in: al-Kahlānī, *Subul al-Salam*, III: 99.

⁶⁸Muḥammad 'Alī al-Sayīs, *Tafsīr: Āyāt al-Aḥkām* (Kairo: Mu'assasah al-Mukhtar, 2001), I: 234.

to the sound of the text, while the spirit contained in the text is indirectly ignored.

Fatwa On Marriage Under Hands (Not Recorded)

Nikah bawah tangan (Underhanded marriages), or can be called *sirri* marriage, were translated in 2008.⁷³ Some of the reasons for the issuance of the fatwa on the case are as follows. Whereas in the midst of the community there is often the practice of underhanded marriages or mating *sirri*, which means that the marriages carried out are not registered with the Marriage Registrar, which is why a lot of negative things occur due to such marriages. In addition, in 2006, through the agreement of scholars of the Indonesian fatwa commission, the case had been filed, so that the MUI deemed it necessary to declare it again, as well as the MUI's fatwa as a guideline.⁷⁴

The MUI based its fatwa on several arguments taken from the Qur'an, hadith, *fiqh* rules, as well as the opinions of scholars. Ayat al-Qur'an in question is QS. Al-Rūm (30): 21 and QS. Al-Nisā '(4): 59. If the first verse explains the general rule of

marriage as one of the signs of God's power so that by marriage humans will feel at ease,⁷⁵ then the second verse is a general rule that every human being is obliged to obey to Allah, Rasul, and *ulilamri* (government).⁷⁶ The two verses do not explicitly state the rules regarding the terms and conditions of marriage, so that any type of marriage is permissible by Islam. Then the MUI refers to several traditions as follows. Hadith which states the obligation to obey a leader,⁷⁷ a hadith that states the criteria of a prospective partner,⁷⁸ a hadith about the suggestion of carrying out a wedding party,⁷⁹ a hadith about the recommendation to announce marriage,⁸⁰

⁷⁵That verse is that. *ومن آياته ان خلق لكم من انفسكم ازواجا لتسكنوا اليها وجعل بينكم مودة ورحمة*. QS. Al-Rūm (30): 21.

⁷⁶That verse is that. *ياايها الذين امنوا اطيعوا الله و اطيعوا الرسول واولى الامر منكم*. QS. Al-Nisā' (4): 59.

⁷⁷The Hadith is. *عليكم بالسمع والطاعة وان ولي عليكم حبيبي*. K.H. Ma'ruf Amin at.al, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 532.

⁷⁸This hadith is popular as a sign of the criteria for the candidate pair covering four things; wealth, manners, appearance and religion. But closed with *كذلك تريت يدالك* which carries the similarity of religion as a basis for carrying out marriage. K.H. Ma'ruf Amin at.al, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 532.

⁷⁹This hadith is mentioned as the first step in the marriage recording law, namely *ولو بشاة* namely regarding the order to announce marriage. See; K.H. Ma'ruf Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 533.

⁸⁰The content of the hadith is almost the same as the previous hadith, namely the command to announce marriage, only if the previous hadith uses the editorial word "walimah", then the method of announcement contained in this hadith is with musical instruments such as tambourine. See; K.H. Ma'ruf

⁷³MUI Fatwa Number 10 of 2008 concerning Marriage Under Hands.

⁷⁴Consideration of stipulating the fatwa of the MUI on underage marriage can be seen in K.H. Ma'ruf Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 531.



and a hadith which prohibits doing damage.⁸¹ Of the many traditions, there is no single hadith that forbids under-marriage or *sirri* marriage. As far as observations about marriage there are hadiths which advocate announcing marriage, meaning the marriage carried out should be known to the general public. Furthermore, the rules used are rules of benefit, namely prioritizing avoiding damage to the benefit of benefit⁸² and rules of *sadd al-dhāri'ah*.⁸³

In addition to these arguments, the MUI also quoted the opinion of al-Nawāwī who stated that the decision of the imam or leader over something must be obeyed.⁸⁴ This is related to under-marriage marriage that is not legally recognized by the Indonesian government. This means that the form of marriage does not have legal force if at any time there are deviations made by both parties. Therefore the MUI also cited Article 2 of Law Number 1 Year 1974 concerning Marriage, and Article 100 Compilation of Islamic Law (KHI). On this basis, the MUI states that under-marriage if the terms and conditions of marriage are

fulfilled is that Islamic law is legal, but it can be haram if it is dangerous.⁸⁵ In addition, the MUI also stated that marriage must be officially registered with the competent authority as a preventive measure to reject damage.⁸⁶ Thus, the MUI stated that the case of marriage was under the hands (unregistered marriage).

It is important to note that under-marriage or *sirri* marriage is defined as a marriage that has fulfilled all the terms and conditions of marriage stipulated in conventional Islamic law. This is important, because this definition is different from that given by traditional jurists as a marriage that is kept secret by the parties, such as being kept secret to family, society, or the general public. So that the ambiguity of marriage under the hands or *sirri* marriage need not be discussed again.

Underhand marriage is studied with the theme of *Sirri* marriage and is closely related to the function of witnesses in marriage. Al-Sarakhsī states that in the Hanafiyah perspective, the witness is one

Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 533.

⁸¹ The Hadith لا ضرر ولا ضرار is.

⁸²The rule is. درء المفاسد مقدم على جلب المصالح.

⁸³ K.H. Ma'ruf Amin at.al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 533.

⁸⁴ K.H. Ma'ruf Amin at.al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 533.

⁸⁵The decision of the MUI fatwa on marriage is under the hands of the first point in K.H. Ma'ruf Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 534.

⁸⁶The decision of the MUI fatwa on marriage is under the hands of the second point in K.H. Ma'ruf Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 534.

of the pillars in marriage,⁸⁷ this at the same time disproves the opinion of Mālik, Ibn Abīlaylā, and Uthmān al-Bātā which states that the witness is not a pillar of marriage, but which is harmonious *i'lān*.⁸⁸ This means that if the marriage is carried out there is an element of secrecy then the marriage is not valid. So in the opinion of those who become pillars of marriage not witnesses but the function of witnesses is the effort to disseminate. Whereas the witness according to him is only a suggestion, as recommended by witnesses in matters of *mu'amalah*. Whereas the Ḥanafīyah included four elements that must be present in the marriage contract, namely the prospective husband, guardian, and two witnesses, mentioned in the hadith and *athar* 'Umar who did not recognize the validity of the marriage which was only attended by one witness.⁸⁹

Al-Shāfi'ī also requires that there be witnesses when the marriage contract,

which must be two fair men.⁹⁰ So that marriage carried out without witnesses is considered invalid and null and void by law. Marriage in his view must fulfill four things, namely guardian, approval from male candidates and approval from female candidates except in certain cases, and finally two witnesses are fair. Ibn Qudāmah (w.620 H) from Hanbali stated the same thing that marriage must contain a witness, provided that it is not permissible for a *dhimmī*, not a woman, and witnesses to be allowed by a blind person.⁹¹ The basis for the prohibition of women to be witnesses is the hadith of the Prophet which prohibits women from being witnesses, also in other matters. So, the condition of the witnesses of the two opinions is that both must be male and number two. Regarding announcing marriage is a suggestion only and is not a mandatory thing, because if it is required, it must be indicated as other conditions.

⁸⁷This opinion is based on the hadith of the Prophet. لا نكاح الا بشاهدي عدل و ولي مرشد. اتى عمر. لا نكاح الا بشهود. sourced from 'Abbās friends, see; Al-Tirmidhī, Sunan al-Tirmidhī hadith no. 1022 Chapter of Marriage. Shams al-Dīn al-Sharakhsī, *al-Mabṣūṭ* (Beirut: Dār al-Ma'rūfah, 1989), V: 30.

⁸⁸In this case al-Sharakhsī revealed a number of hadith and *athar* companions about witnesses who were in harmony, not just announcements as the opinions of Mālik, Abī Laylā, and al-Bātā. Shams al-Dīn al-Sharakhsī, *al-Mabṣūṭ*, V: 31.

⁸⁹Shams al-Dīn al-Sharakhsī, *al-Mabṣūṭ*, V: 31.

⁹⁰Al-Shāfi'ī's opinion is based on the hadith of the Prophet. as follows. لا نكاح الا بشاهدي عدل و ولي مرشد. اتى عمر. لا نكاح الا بشهود. sourced from 'Abbās friends, see; Al-Tirmidhī, Sunan al-Tirmidhī hadith no. 1022 Chapter of Marriage. Shams al-Dīn al-Sharakhsī, *al-Mabṣūṭ* (Beirut: Dār al-Ma'rūfah, 1989), V: 30.

⁹¹This opinion is based on the hadith also used by al-Shāfi'ī above. Ibn Qudāmah, *al-Mughnīna al-Sharḥ al-Kabīr* (Beirut: Dār al-Fikr, 1984), VII: 340. See also; Khoiruddin Nasution, *Status Wanita di Asia Tenggara: Studi Terhadap Perundangan-Undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia* (Jakarta: INIS, 2002), 145.



Based on the explanation of various opinions above, it can be concluded that the majority requires witnesses in the marriage contract, only Mālik does not say so. He emphasized the function of witnesses as a means to announce marriage. In addition, all agree that marriage is something that should not be kept secret because by keeping it a secret marriage is considered an illegitimate marriage. As far as the search for marriage under the hands - because it has never been discussed by conventional scholars - can be punished as a legitimate marriage if all the terms and conditions are met. However, with the pretext of better protecting the rights of wives and children produced after marriage, in Indonesia, as in various Muslim worlds,⁹² the government regulates a new rule concerning the registration of marriages.

Marriage records are regulated in legislations⁹³, Government Regulations⁹⁴, and KHI⁹⁵, stating that marriage must be

carried out according to the beliefs of each religion and must be registered with the marriage registrar employee for marital order. Unregistered marriages do not have legal force, and marriage can only be proven by a marriage certificate made by a marriage registrar employee. Of the various types of regulations regarding the registration of marriages, it creates problems regarding whether or not the marriage is valid if it is not listed, or if the registration of the intended marriage is only an administrative requirement. Many people consider marriage registration only as an administrative requirement and have nothing to do with the validity of a marriage.⁹⁶ So that unregistered marriages are considered legitimate marriages. But there are also opinions that state that marriage registration is a legitimate requirement for a marriage, so that unregistered marriages are considered as illegitimate marriages.⁹⁷

Recording of marriage - as discussed earlier - is a new thing, and in the context of *uṣūl al-fiqh* it is classified as

⁹²The Law on Marriage Registration is regulated in various Muslim countries and the majority of Muslims as follows. Malaysian Family Law, 1977 Article 81 and 86 of the Personal Laws of the Philippines, Druze Law of Lebanon Law No. 24 of 1948, Jordanian Law No. 61 of 1976, and several laws on family law in several other countries. Khoiruddin Nasution, *Status Wanita di Asia Tenggara*, 150-dst.

⁹³The law is Law Number 1 Year 1974 concerning Marriage Article 2 Paragraph (2).

⁹⁴Government Regulation Number 9 of 1975 in various articles.

⁹⁵Compilation of Islamic Law (KHI) Article 5 Paragraphs (1) and (2), Article 6 Paragraph (2), and Article 7 Verses 1-4.

⁹⁶SaidusSyahar, *Undang-Undang dan Masalah Pelaksanaannya (Ditinjau dari Segi Hukum Islam)* (Bandung: Penerbit Alumni, 1981), 18-24. Khoiruddin Nasution, *Status Wanita di Asia Tenggara*, 159-160.

⁹⁷SaidusSyahar, *Undang-Undang dan Masalah Pelaksanaannya*, 18-19. Tahir Mahmood, *Personal Law in Islamic Countries* (New Delhi: Times Press, 1987), 210. Watjik Saleh, *Hukum Perkawinan Indonesia* (Jakarta: Balai Aksara, 1987), 3.

maṣlahahmursalah, because implicitly or explicitly, the case is neither rejected nor supported by the text. It is seen from the point of view of *maqāṣid al-sharī'ah* that it is in line with the soul of *naṣṣ*, which is to better guarantee the benefit of the parties who will do the marriage. Benefits meant include guaranteeing the rights of the parties from various abuses that may occur after marriage. With the authentic evidence in the form of Marriage Certificate, the parties will be bound by law and legally protected. Conversely, unregistered marriages will cause various kinds of harm, such as husbands arbitrarily leaving their wives and / or vice versa. Especially in the case of distribution of inheritance, then the evidence that the heirs are truly heirs is also nil. This is the location of the importance of marriage recording. If in the classical context, where the community is still communal, then the proof of the occurrence of a marriage is enough with the announcement. But now things are changing, modern times demand stronger evidence not just witnesses or announcements.

Life is certain and always changes from time to time. Relationships are not only limited to a community in an area but over the borders of the island and the State. Therefore it is not possible for someone

who wants to go out of the island or abroad to always bring a witness as proof of his marriage so that he is not accused of being an illegitimate partner. It is possible that the accusation is subject to stoning because it is considered as committing adultery, or is bound 100 times because it is considered to have committed adultery *ghayr muḥṣān*. Or it can be subject to a fine and must pay for the fine. For these various accusations, many *maqāṣids* become neglected, starting from *ḥifẓ al-naḥs* to *ḥifẓ al-māl*. The existence of the Marriage Certificate will be seen here as proof of marriage and in response to accusations as an illegitimate partner. With the marriage deed it means maintaining the *maqāṣid*, both *ḥifẓ al-naḥs* and *ḥifẓ al-māl*.

A benefit that contains greater benefit must be prioritized for the benefit that is beneath it. The sense position here has an urgent role to determine which are positively charged (*maṣlahah*) and which are negatively charged (*maḍarat*). Marriage records if viewed with the concept of *maṣlahah*, then occupy the position of *maṣlahahmursalah*, which is a provision that is not supported by any text and also not rejected by Nash. This type of benefit is permitted to be used as a proposition of law stipulating on the terms *qat'ī*, *ḍarūrī*,



and *kullī*. Certainly, marriage records accommodate the benefit of all parties, both men and women, both parents and children. It is an urgent need, because if not, many parties will be harmed so that *maqāṣid al-sharī'ah* is neglected, it is also comprehensive, meaning that the benefit is universal for all parties involved. Thus, recording a marriage is an absolute

Fatwa About Tourism Marriage

Tourist marriage is a new issue and problem in the dynamics of Islamic law, both in classical and contemporary discourse. Basically, tourist marriage is a marriage that is carried out when making a trip (touring) complete with terms and harmony of marriage agreed upon by the majority of conventional jurisprudence but with additional term terms. This kind of marriage as reported by the MUI has been carried out in the midst of the community when traveling. These problems then raised questions from the public about the law in the case. Based on these two things, the MUI then considered it necessary to issue a fatwa that regulated the issue of tourist marriage to be used as a guideline.⁹⁸

In the formulation of the fatwa, the MUI uses several arguments both from the

⁹⁸MUI Fatwa Number 2 / Munas VIII / MUI / 2010 concerning Tourism Marriage.

requirement when making a marriage. Under-marriage (unregistered marriage), even though Islamic law (*fiqh*) has fulfilled the terms and conditions but is not relevant if applied to the current conditions. Such marriage is unconsciously detrimental to many parties, so the old paradigm must be changed by adding one condition, namely that marriage must be listed.

Qur'an, hadith, consensus of scholars, and athar companions. The reference verse is as follows. QS. Al-Mu'minūn (23): 5-7, QS. Al-Rūm (30): 21, and QS. Al-Nisā '(4): 1. These verses constitute a general rule regarding the promulgation of marriage, that the command to preserve the genitals⁹⁹ and information about the creation of partners for each human¹⁰⁰ is the content of these verses. However, until here, there are no firm rules regarding the practice and law of tourist marriage cases. Therefore the MUI then traced it to the Prophet's hadith. Some of the hadiths referred to are details of the verses of the Qur'an which are still

⁹⁹The contents of these meanings are contained in the verse as follows. *والذين هم لفروجهم حافظون # الا على ازواجهم*. QS. Al-Mu'minūn (23): 5-6 which was then closed with the statement that those who sought behind the decree really exceeded the limit. QS. Al-Mu'minūn (23): 7.

¹⁰⁰The verse is *ومن آياته ان خلق لكم من انفسكم ازواجا* and *لتسكنوا اليها و جعل بينكم مودة و رحمة*. QS. Al-Rūm (30): 21. Also the verses that can be found in al-Nisā '(4): 1 concerning the spouse of human life which was in its own beginning so that with him humans both men and women became numerous.

common. There are four hadiths which state the prohibition of *mut'ah* marriage¹⁰¹ or marriage practices which are mentioned for a period of time, for example for two weeks, one month, or several months, which is essentially a period of marriage. Until now, the law on marriage *mut'ah* is very clear, which is haram. But to strengthen the argumentation, the MUI then included the consensus of the ulama and *athar* companions, in this case *athar* 'Umar, who both stated the same thing, namely the prohibition of marriage *mut'ah*.¹⁰²

There is no argument that explicitly regulates tourism marriage. Marriage tourism, as explained earlier, has differences and similarities with marriage *mut'ah*. The difference is, if a tourist marriage is done when someone is traveling, marriage will not require that. The point of similarity lies in the length of time in the marriage. So on the basis of that similarity, the MUI then stated that tourist marriage is one form or branch of marriage,

mut'ah, so that it is punished forbidden. Thus, the MUI prepared tourism marriages by placing them in marriage *mut'ah*.¹⁰³

In terms of *maqāṣid al-shari'ah*, the purpose of marriage is to create and maintain offspring in accordance with Islamic guidance. So in addition to realizing the maintenance of offspring, the function of marriage is also a means to maintain religion. Of course this goal can be carried out if all parties carry out it in accordance with the principles set by Islam, which is based on benefit. The phenomenon of tourist marriage or in the above discussion is assumed to be another form of *nikah mut'ah*, has damaged the joints of Islam and certainly undermined the ideals of social welfare. How not, by doing the practice of marriage, the purpose of forming a family full of love and peace as indicated by the general rules in the Qur'an and also the purpose of preserving good offspring will automatically be ignored.

The practice of tourist marriage is not based on religion and love, but solely on the impulse of lust. How can something done on the impulse of lust give birth to the benefit that Islam aspires to? The answer, that this is in good reason, will not

¹⁰¹One of these traditions is *عن علي رضي الله عنه ان رسول الله صلى الله عليه وسلم نكح المتعة يوم خيبر و عن لجوم الحمر لاهلية*. Whereas the next three traditions have more or less the same content, namely the prohibition of marrying *mut'ah*. See these arguments as the basis of the MUI's fatwa on tourist marriages in; K.H. Ma'ruf Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 562-565.

¹⁰² K.H. Ma'ruf Amin at.al, *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 565.

¹⁰³MUI's decision on tourist marriages, see; K.H. Ma'ruf Amin et al., *Himpunan FatwaMajelis Ulama IndonesiaSejak 1975*, 566.



be achieved, because good goals can only be obtained by a good process. Herein lies the importance of good intelligence in addition to the use of the *naqli* argument.

Analysis And Classification Of MUI's Fatwa

Some of the MUI fatwas above can be viewed in terms of the level and gradation of *maṣlahahs* according to the majority of jurisprudence - in accordance with the guidelines for stipulating the fatwa of the MUI - and the fatwa on the criteria of *maṣlahah* can be classified into several levels. *Maṣlahah*, in the perspective of the majority of scholars divided into three parts. The first part is *maṣlahahmu'tabarab*, both *maṣlahahmursalah*, and the third is *maṣlahahmulghab*. In accordance with their agreement, only the first type can absolutely be used as a legal proposition. Whereas the second type of problem is the debate between may be used absolutely and there are those that provide rather strict conditions to be used as legal propositions. These conditions must be *darūrī* or necessity, meaning that if they are not fulfilled, a legal and life order is broken. Besides being *darūrī*, it is also *kulliyāt*, and *qaṭ'īyyāt*.¹⁰⁴

¹⁰⁴The requirements for the three criteria are different from one character to another. Al-Ghazzālī,

The requirement is that it is applied by al-Ghazzālī as a provision that must exist when it will be used as a legal proposition.¹⁰⁵ The example he put forward was related to the ability to kill a Muslim who became a prisoner of war and made their shield. The killing ability is based on the assumption that by not killing these prisoners, the lives of the Muslims can be dangerous.¹⁰⁶ Therefore, the terms *darūrī*, *kullī*, and *qaṭ'ī* must absolutely be present in *maṣlahahmursalah*.

The majority of scholars also agreed on the inability to use *maṣlahahmulghab* as a legal proposition.¹⁰⁷ *MaṣlahahMulghab* is interpreted as a benefit that is contrary to the existing argument. It can also be interpreted as a problem which is clearly rejected (*ṣāriḥ*) by the strongest legal proposition. Because it violates the provisions of the Nash as the strongest legal proposition, the majority of scholars

for example, provides strict conditions regarding the ability to use *maṣlahah*, which is different from al-Shāṭibī who uses it more loosely.

¹⁰⁵Al-Ghazzālī, *al-Mustasfā min 'Ilm al-Uṣūl*, I: 296.

¹⁰⁶Al-Ghazzālī, *al-Mustasfā min 'Ilm al-Uṣūl*, I: 295-296.

¹⁰⁷The various divisions of *al-maṣlahah* see; al-Ṭūfī, *SharḥMukhtaṣarRanḍab* (Beirut: Mu'assasah al-Risālah, 1990), III: 204-217. Amir Syarifuddin, *Ushul al-Fiqh* (Jakarta: Logos WacanaIlmu, 2005), II: 332. FathurrahmanDjamil, *FilsafatHukum Islam* (Jakarta: Logos WacanaIlmu, 1999), 141-143. The rejection of the last type of *maṣlahah* - *mulghah* - was openly stated by al-Ghazzālī, and several other scholars. See; 'AlīḤasbullāh, *Uṣūl al-Tashrī' al-Islāmī*, 45. 'Abdul WahhābKhallāf, *UṣūlFiqh*, 85-86.

agree to prohibit using it as a legal proposition. Later, this opinion was questioned again by reformers. Their reasoning is quite rational, that is, it could be that in the case of the rejected problems there is goodness for humans, such as justice and equal rights.¹⁰⁸ However, in reality, Indonesian fatwa institutions continue to use old opinions - the majority of classical scholars - as the standard in the fatwa.

The fatwa of the MUI which is the main concern of this paper will be grouped through the classification of the *maṣlaḥah*

¹⁰⁸See for example in the "limit theory" proposed by Shahrur, which states that in terms of inheritance women can be equal to men, meaning 1: 1 with men. Of course this is contrary to the text which states that women are half a part of men. This theory uses contemporary reading (*qirā'ahmu'āṣirah*) rather than using the traditional *maṣlaḥah* approach. Through this paradigm, he tries to position the text as a flexible proposition, meaning that a law sometimes moves at the lower and upper limits so that the legal provisions can be looser and more flexible. Muḥammad Shahrūr, *Nahwa Uṣūl Jadīdah al-Islāmī: Fiqh al-Mar'ab (al-Waṣīyah, al-Irth, al-Qanāmab, al-Ta'addudīyah, al-Libas)* (Suriyah: al-Aḥālī al-Ṭabā'ahwa al-Nashrwa al-Tawzī', 2000), 222. Munawwir Sjadzali was mentioned as a national figure who also tried to actualize *maṣlaḥah*, as Shahrūr, Sjadzali also offered the concept of *al-Musāwah* in inheritance, namely 1: 1 between women and men, see Munawwir Sjadzali, *Ijtihad Kemanusiaan* (Jakarta: Paramadina, 1997), 4-10. Falicitas Meta Maria Opwis, *Maṣlaḥah and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Boston: Brill, 2010). Wael B. Hallaq, *A Histories of Islamic Legal Theories: an Introduction to Sunni Uṣūl al-Fiqh* (United Kingdom: Cambridge University, 1997). See also; Aḥmad 'Alī, "Reformulasi al-Maṣlaḥah: Relevansi dan Implementasinya dalam Pengembangan Pemikiran Hukum Islam Kontemporer", Thesis at UIN Syarif Hidayatullah Jakarta, 2008. Yūsūf al-Qarḍawī, *al-Siyāsah al-Shar'iyyah fī Daw' Nūṣūṣ al-Shar'i'at wa Maqāṣidihā* (Kairo: Maktabah Wahbah, 1998).

division above. First, that the fatwa of the MUI which uses the classification of *maṣlaḥah mu'tabarab* is four fatwas. Among other things, the fatwa concerning the first abortion point¹⁰⁹ is based on the provisions stated in the text. That killing the law is haram, both killing parents, children, and babies in the womb. This is in line with the masculine concept of the MUI, that *maṣlaḥah mu'tabarab* can be used as a legal basis.

The next fatwa that uses the classification of *maṣlaḥah mu'tabarab* is a fatwa concerning the case of inheritance of different religions. In this case the MUI fatwa is in line with the hadith text which states that two people of different religions cannot inherit each other.¹¹⁰ So that this is in accordance with the MUI's concept of *maṣlaḥah*. The third fatwa that uses the *maṣlaḥah mu'tabarab* classification is a fatwa concerning tourism marriage.¹¹¹ Marriage tourism is analogous to formal marriage

¹⁰⁹The fatwa reads "*Abortion is unlawful since the occurrence of implantation of blastocyst on the mother's uterine wall (nidasi)*". K.H. Ma'ruf Amin et al., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 462.

¹¹⁰The fatwa reads "*Islamic inheritance law does not give mutual inheritance rights between people of different religions (between Muslims and non-Muslims)*". K.H. Ma'ruf Amin et al., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 485.

¹¹¹The fatwa reads "*Tourism marriage as referred to in the general provisions of the law is haram because it is the marriage of mu'aaqat (temporary marriage) which is one form of mut'ab marriage*". K.H. Ma'ruf Amin et al., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 566.



because it has the same *'illat* (ratio legist) law, which is both giving a period of time. Because marriage is punished illegally, tourist marriage is also the case. This fatwa is the same as the MUI concept about *maṣlahah*.

The fourth fatwa that uses the *maṣlahahmu'tabarab* classification is the marriage fatwa under the hand (not recorded).¹¹² It is confirmed that marriage is basically if all the pillars have been fulfilled and the conditions are the marriage is legal. However, this fatwa is irrelevant to the present because harmony and the requirements of conventional marriage then develop along with the dynamics of the development of space and time.

Secondly, the fatwa of the MUI which uses *maṣlahahmursalah* as the basis of its fatwa is a fatwa on marriage under the hands of the second point.¹¹³ This is related to the recording of marriage based on benefits that are not rejected or supported by certain texts. Such a fatwa is more

relevant to the present age because it corresponds to space and time.

Third, the fatwa of the MUI which uses *maṣlahahmulghab* as the basis of its fatwa is two fatwas. The first fatwa concerning the ability to have an abortion is because of the elements *darūri*, *qaṭ'i*, *hāji*, and *kullī*.¹¹⁴ This is said because it is based on an analysis of the fatwa with the conclusions of the Islamic jurists above. The ability to do an abortion basically violates the provisions. Because basically abortion is prohibited by rules and this is agreed upon by the majority of Muslims. But then abortion is permissible with several reasons which are permissible by *syara'*. The conditions for obtaining an abortion are as explained by MUI. On this basis, then the fatwa concerning the ability to carry out acts of abortion with various conditions is classified as the type of *mulghab*. The second fatwa included in this group is a fatwa about interfaith marriages.¹¹⁵ Considered as having violated the provisions in the text stating the ability to do marriage between Muslims and women *abl al-kitāb*. Regarding the classification of the ability of abortion and the prohibition of marrying different

¹¹²The fatwa is contained in the MUI fatwa concerning marriage under the first hand as follows. "Marriage under the law is legal because conditions and pillars of marriage are fulfilled, but it is forbidden if there is a *maḍarrab*." K.H. Ma'ruf Amin et al., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 534.

¹¹³The fatwa is contained in the MUI fatwa on marriage under the second hand as follows. "Marriage must be officially registered with the authorized agency, as a preventive step to reject the negative impact (*maḍarrab*) (*sadd li al-dharrī'ah*)." K.H. Ma'ruf Amin et al., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 534.

¹¹⁴ K.H. Ma'ruf Amin et al., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 462.

¹¹⁵ K.H. Ma'ruf Amin et al., *Himpunan Fatwa Majelis Ulama Indonesia Sejak 1975*, 481.

religions, it is indeed at a glance like it has violated the text. However, it can actually be assessed using other approaches, namely

Conclusion

Based on the description above, several things can be concluded. First, *maṣlahah* as a fatwa guideline for the MUI only recognizes the type of *maṣlahah mu'tabarah* and *maṣlahah mursalah* as a basis for establishing law, and at the same time rejects *maṣlahah mulghab*. Thus, *maṣlahah* in the view of the MUI is in accordance with the concept of *maṣlahah* stated by the majority of scholars. Secondly, based on the fatwa in the field of family law above, it appears that the MUI fatwas are in

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emergency conditions and urgent needs. While the need can occupy an emergency position.

accordance with the *maṣlahah* concept of the majority of the jurists. In terms of the ability of abortion and the prohibition of interfaith marriages, it seems contrary to the text. However, if examined further, it is precisely the MUI Fatwa in both cases of abortion and interfaith marriages - actually using a priority approach, which is carried out because of an emergency. Third, regarding the validity of marriage under the hands (not recorded), even though it is in accordance with the old conception, but not relevant for the present.

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