

FATWA METHODOLOGY OF NATIONAL SHARIA BOARD OF INDONESIAN ULAMA COUNCIL IN ISLAMIC ECONOMICS

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Abstract: This study aims to find out the methodology of DSN-MUI fatwa in response to the problems of Muslims in Indonesia related to economy. The DSN-MUI comes by issuing its fatwa with a distinctive fatwa methodology, called *mutawassitah* (moderation) between the *mutasâhil* (liberal) method and the *mutasyaddid* (textualist) method. There are about 116 fatwas issued by DSN-MUI from 2000 to present time (2017). The first fatwa on Giro 01/DSN-MUI/IV/2000 and the latest fatwa No. 116/DSN-MUI/II/2017 on Uang Elektronik Syariah. The approach in this study is the *mashlahah* approach, the jurisprudence (*fiqh*) principles and madhhab comparison especially *mutasyaddid* (textualist) and *mutasâhil* sects (liberal). This study concludes that the methodology of the DSN-MUI fatwa declaring with moderation methodology is in fact closer to the mazhab of *mutasâhil* even though the approach of *fiqh* approaches more closely to the textualist but the substance is closer to the madhhab *mutasâhil*.

Abstrak: Moderasi Metodologi Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia dalam Perkembangan Ekonomi Syariah. Studi ini bertujuan untuk mengetahui model metodologi fatwa DSN-MUI dalam menjawab persoalan umat Islam di Indonesia yang berkaitan dengan ekonomi. DSN-MUI hadir dengan mengeluarkan fatwanya dengan metodologi fatwa yang khas, yaitu dengan jalan *mutawassitah* (moderasi) antara metode *mutasâhil* (liberal) dan metode *mutasyaddid* (tekstualis). Ada sekitar 116 fatwa yang dikeluarkan oleh DSN-MUI dari tahun 2000 sampai sekarang (2017). Fatwa pertama tentang Giro bernomor 01/DSN-MUI/IV/2000 dan fatwa terakhir bernomor 116/DSN-MUI/II/2017 tentang Uang Elektronik Syariah. Pendekatan dalam studi ini adalah pendekatan *mashlahah*, kaidah-kaidah fikih dan perbandingan mazhab terutama mazhab *mutasyaddid* (tekstualis) dan mazhab *mutasâhil* (liberal). Studi ini menyimpulkan bahwa metodologi fatwa DSN-MUI yang mendeklarasikan dengan metodologi moderasi, kenyataannya lebih mendekati kepada mazhab *mutasâhil* walaupun proses pendekatan *fiqh* lebih mendekati mazhab tekstualis, akan tetapi substansinya lebih mendekati mazhab *mutasâhil*.

Keywords: moderation, fatwa, DSN-MUI, Islamic economic

Introduction

The National Shariah Council is one of the institutions established by the Indonesian Ulema Council (MUI) post-reformation in 1998 which was later confirmed by the MUI Board of Directors Decree number KEP-754/MUI/II/1999 dated February 10, 1999. The establishment of this institution devoted to dealing with issues related to the activities of sharia financial institutions. The establishment of this institution as a decisive step of the scholars in handling cases that develop about the economy or finance and is expected to be the application of Islamic teachings especially about *mu'âmalah* fikih in economic life.

In the regulation of Indonesian Bank (BI),¹ it is explained that DSN is an institution formed by MUI. In the decision of DSN MUI number 01 year 2000 about basic guidance of DSN-MUI in part III paragraph 1 mentioned that DSN is part of Majelis Ulama Indonesia (MUI). DSN is an institution that is structurally under MUI. As an institution under MUI, the DSN position is the same as the position of the Institute for Drug and Food Control (LPOM-MUI). The fatwa commissions each have their respective roles and functions.²

In the process of determining the fatwa of DSN-MUI, firstly the study of imams madhhab's opinion about the problem that will be regulated with the argument was done. If the problem is clearly legal (*al-ahkâm al-qath'iyah*), the law is issued as it is. If there is a difference opinion among the scholars then, *al-Jam'u wa al-Tawfiq* method was done to find the meeting point of the problem faced. If the effort to find the intersection between the difference was not succeed, then *tarjih* method (search strongest argument of the madhab) with *muqâranah al-madzâhib* of the rules and *ushûl fiqh muqâran*.

In contemporary economic matters, the answer is often did not found in the classical *mu'tabarah fiqh* books, the DSN-MUI takes the path based on the result of *ijtihâd jamâ'i* (collective *ijtihâd*) through the method of *bayâni*, *ta'lîli* (including *qiyâsi*, *istihsâni*, and *ilhâqi*), *istishlâhi*, and *sadd al-dzar'ah*.

In addition, the decision-making process of DSN-MUI fatwa consider many factors both technical and non-technical factors. Technical factors such as the fatwa are issued not to conflict with the limitations made in the rules of *fiqh* or *ushûl fiqh* so as not to contradict sharia in general, but on the other hand fatwa must also consider non-technical, for example how fatwa issued for the interest and aspiration of people and on the other to encourage sharia financial institutions that are competing with conventional financial institutions in market-share and innovation. This is becoming the DSN-MUI considerations in determining fatwa that sometimes tend to characterize *mutasyaddid* and *mustasâhil*, so the middle way (*mutawassith*) was taken. The claim that the fatwa of DSN-MUI tends to be characterized by the textual madhhab can be seen from the consideration of its fatwa, by quoting Quranic

¹Briefcasebook, *Sistem dan Pengawasan Syariah* (Jakarta: Renaisan, 2005), p. 2.

²DSN and BI, *Himpunan Fatwa DSN-MUI* (Jakarta: DSN & BI, 2003), p. 426.

verses, hadith, scholar opinion and *fiqh* and *ushûl* jurisprudence rules. But one side when viewed from the product of fatwas more tends at the modernist madhhab.

Establishment of DSN-MUI, in addition to the macro reasons and ideological also micro. The success of MUI in initiating the establishment of shariah bank, shariah financial institution, and sharia business must be supported continuously by MUI. Therefore it is deemed necessary to establish an institution that specifically handles the sharia economic issues that increasingly complex and rapidly growing. Another reason of the establishment of DSN-MUI is as mentioned in the consideran SK DP-MUI about the establishment of DSN, that the background of the establishment of DSN is in order to realize the aspirations of Muslims on economic issues and encourage the application of Islamic teachings in the field of economy/finance that implemented according to the guidance of Islamic sharia.³

Another thing that encourages the establishment of DSN is as an efficiency and practical step. Coordination of the ulama in facing the existing economic/financial problems can provide the same view by each sharia Supervisory Board (DPS) in Islamic financial institutions.

The establishment of the DSN as an extension of the MUI in responding to sharia economic and financial developments in the community, encourage the application of *fiqh* doctrines in the field of *mu'âmalah* /economy and apply it in Islamic financial institutions. DSN members consist of scholars who are competent in *fiqh* (economic law), economic practitioners, and experts associated with *mu'âmalah* sharia appointed by MUI for a term of four years.⁴

Method

The approach used in this research is the approach of *ushûl fiqh* which in particular is *maqâshid al-syarî'ah*, *fiqh* rule and comparison between madhhab. Comparison between madhhab is an attempt to compare the opinions of textual madhhab and modernist madhhab by discussing theorem opened and also compare with the argument opened by knowable DSN-MUI so that where difference and equation in its methodologies *istinbath*.⁵ In the framework of research paradigm, this research uses qualitative paradigm (naturalistic). This is because the purpose of this research is directed to develop concepts, describe reality, and develop theory, also develop understanding. Therefore, this study put forward the philosophical meaning and purpose of the results.⁶ Source of primary data in this study is fatwa of DSN-MUI which amounted to 116 fatwas. First of 2000 numbered 01/DSN-

³*Ibid.*, p. 281.

⁴DSN-MUI decree No. 02, 2000 about Household Guidelines of the National Sharia Board of the Indonesian Ulema Council, Article 2 paragraph (1) and (2).

⁵Huzaemah Tahido Yanggo, *Pengantar Perbandingan Mazhab* (Jakarta: Logos, 2003), p. 83.

⁶Cak Hasan Bisri, *Model Penelitian Fikih* (Jakarta: Media Pranada, 2003), p. 26.

MUI/IV/2000 on Giro until the last fatwa numbered 116/DSN-MUI/II/2017 regarding Uang Elektronik Syariah as a result of DSN-MUI fatwa methodology.

Dynamics of Fatwa and Ijtihad of Tekstual Madhhab and Modernist Madhhab

Fatwa etymologically means *al-ibânah* that is explaining,⁷ in other words explaining the answer to 'the question asked.'⁸ Meanwhile, according to the terminology is explain syar'i law of an issue as an answer to the question asked by the person that request fatwa, both individual and collective, both known and unknown. The act of giving a fatwa is called *al-iftâ'*, the person who gives the fatwa is called *mufti*, while the person who asks for the fatwa is called *mustaftî*.⁹

The fatwa issued to individuals, collectives and institutions is not binding on the *mustaftî*, so fatwas are dynamic and there may be differences of opinion between one place and another because of the different environments, customs and benefits demanded.¹⁰

The opinions of the fatwa as ijtihad *mufti* can be related to those who ask (*mustaftî*), to those who give fatwas (*mufti*), and to the Muslims in general. For the Muslims, it is not bound to follow the opinion/*ijtihâd* of one *mufti* because it is *zhanni* and can be used as a field of *ijtihâd* for other *mufti*. As for those who give a fatwa, the result of his ijtihad is binding because that is the result of his conviction. Similarly, for those who ask for fatwas, the results of the *fatwâ* is binding because that opinion is the choice and beliefs it takes.

The *fatwâ*, in addition to being a solution to the question that is temporal to *mustaftî*, the fatwa also serves as a tool to respond to the development of contemporary issues. Therefore, the institution of fatwa is highly required to provide legal certainty to the existing problems. Without the fatwa, there will be many problems that will not be solved, so that the people will experience social shocks.¹¹

⁷Fairuz Abâdi, *al-Muḥîth*, Juz IV (Bairut: Dâr al-Fikr, n.d.), p. 375. Some linguists say *al-ifta'* is closely related to the word *al-fata* which means youth, which means when someone asks for a fatwa he is actually confused, then a *mujtahid* gives an explanation of the problem he faces and he becomes convinced and strong like a youth. Read Muḥammad Sulaimân 'Abdullâh al-Ashqar, *al-Futya wa Manâhij al-Iftâ' Baḥts Ushûl* (Kuwait: Maktabah al-Manâr al-Islâmiyyah, 2007), p. 7.

⁸Louis Ma'luf, *al-Munjid fî al-Lughah wa al-A'lâm* (Bairut: Dâr al-Masyriq, 1992), p. 569.

⁹Al-Ashqar, *al-Futya*, p. 21-23.

¹⁰Even according to Yûsuf al-Qardhâwî change *fatwa* that can happened because of ten factors such as time factor, place, condition, habit, information, human need, social economy, and politics. Read Yûsuf al-Qardhâwî, *Mujibat Taghayyur al-Fatwa fî Ashrina: Qadhâyâ al-Ummah* (Kairo: Dâr al-Syuruq, 2009), p. 39-40. The meaning of pronunciation *al-ḥukm* In the *taghayyur al-aḥkâm bi-taghayyur al-amkinah wa al-azminah* it is *al-fatwâ* which is closely related to the *dzanniyyah*. See Yûsuf al-Qardhâwî, *Mujîbât Taghayyur al-Fatwâ*, p. 19.

¹¹Read and compare with article of Jaih Mubarak, "Fatwa tentang Hadiah di Lembaga Keuangan Syariah," in *MIQOT: Jurnal Ilmu-ilmu Keislaman*, Vol. XXXVII, No. 2, 2013, p. 228-232.

In issuing fatwas, *mufti* either individuals or institutions are required to have the competence (expertise) to provide a sense of tranquility and legal certainty for people who want to run it.

At present the fatwa may be issued by individuals who have the requirement to issue a fatwa, sometimes can be issued by institutions such as DSN-MUI. For the first condition (individual) is rare because the requirements for the moment is very difficult, because rarely the individual master the various' sciences comprehensively. As for the second condition that is issued by the institution for now is very possible, because there collected various individuals who have different competencies so that the issued fatwa was comprehensive.¹²

The difference of fatwa or law in a place and time is a proof that legal *syar'i* in its determination according to the condition and the situation¹³ wanted and the prosperity demanded besides the process, the rule must go through the stages to reach perfection (*al-tadrij fi al-tasyrî*) as taught by God in the Quran in the prohibition of *khamr*.¹⁴ From time to time people always experience change (social transformation), whether changes in social records, economic culture, politics, and others. According to linguists and semantics, the language will change every ninety years.¹⁵ Changes in language indirectly mean a change in society. This opinion is in accordance with the word of the Prophet "in every hundred years (a century) there are people who are in charge of renewing the understanding of religion."¹⁶

Problems as object of fatwa or *ijtihad* is *furû'iyah* problem which is *dzanniyah* and *mutaghayyirat*, not *ushûliyyah qath'iyah* which is *al-tsawâbit*. In matters of *al-mutghayirat dzanniyah* the mujtahids should provide creations and views to answer the problems that develop in society while the problems that *qath'iyah* and *tsawâbit* are not allowed to innovate

¹²Asymuni A. Rahman, "Dari Ijtihad Fardi ke Ijtihad Jama'i," in *al-Jami'ah: Journal of Islamic Studies*, Vol. 9, 2008, p. 25.

¹³As the rule of *al-Islâm shâliḥ li kulli makân wa zamân* and *taghayyur al-aḥkâm bi-taghayyur al-amkinah wa al-azminah*".

¹⁴Such as the stages of prohibition *khamr* in such an inherent drinking habits *khamr* among them. First Q.S. al-Baqarah/2: 219 on the explanation of the *khamr* about the danger and its benefits, then followed by Q.S. al-Nisâ'/4: 43 about the prohibition of approaching prayer while intoxicated, then down Q.S. al-Mâ'idah/5: 90 about the explanation of drinking *khamr* is an abomination and an act of Satan. See Muḥammad Rasyîd Ridhâ, *Tafsîr al-Manâr*, Juz VII (Beirut: Dâr al-Fikr, n.d.), p. 49 on the wisdom of prohibiting the gradual drinking of wine).

¹⁵Further read Musahadi, *Sunnah Concept Evolution* (Semarang: Bina Ilmu, 2000), p. 153-154.

¹⁶This hadis is narrated by Abû Dâwûd in his *Sunan*, Juz III, p. 113 in chapter *al-Malâḥim*. The text of his hadis "Inna Allâh yab'atsu li hâdzih al-ummah 'alâ kulli ra's mi'ati sanatin man yujaddidulaha diniha". Concerning *mua'malat* reform see Mhd. Syahnan, *Modernization of Islamic Law of Contract: A Study of Abd al-Razzaq al-Sanhuri's Masadir al-Haqq fi al-Fiqh al-Islami: Dirâsah Muqâranah bi al-Fiqh al-Gharbi* (Jakarta: Badan Litbang & Diklat Departemen Agama RI, 2009); compare with another work of Mhd. Syahnan, "Modern Qur'anic Exegesis and Commercial Contracts: A Comparative Study of Rashid Ridha's and Sayyid Qutb's Interpretation of Some *Riba* Verses," in *MIQOT: Jurnal Ilmu-ilmu Keislaman*, November-December 1997, pp. 15-23.

and change, eg the problem of the number of fardu prayers in worship or certainty of forbidding *maysir*, *gharar* and *usury* in the economy.

Therefore, the society is always changing, there will also be change of *syar'ī* law which is adjusted with place and time, then the scholars divide the law to the *qath'ī* (permanent) and *dzhanni* (dynamic). The permanent can not be contested as the number of pillars of prayer and ordinances, the law of inheritance, the law of *qishâs*, and others. While laws that are *dzhanni* (dynamic) change according to the benefit, time and place, of course the benefit according to God. The law of *qath'ī* as the symbol of *al-ashl al-tsabit* (root that pierces) while the dynamic law as a symbol of twigs towering in the sky (Q.S. Ibrâhîm/14: 24). The law of *qath'ī* proves the legal certainty while the law *dzhanni* (dynamic) to answer the current development and this is where the fatwa is needed.

In *ijtihad* and *fatwâ*, as Busyami Muḥammad Said puts it in his book *Mafhûm Tajdîd al-Dîn*, there are two tendencies in dealing with the problems that arise, first the traditionalist madhhab that is textualist and the liberal modernist madhhab. These two tendencies are dichotomically considered to be in conflict with each other.

The sect of tekstualist put forward the text of the nash and the sect of modernist put forward human welfare. Those who put forward the nash as groups represented by the Zhâhiri while the scholars who put forward the human goodness rather than the text are represented by liberal groups like al-Thûfi. The Zhâhiri (*tafrîth*) are of the opinion that the texts ordered by Allah and His Messenger bring the benefit of mankind in all respects and if there is a change of circumstances and conditions which require a law then all must be subject to the provisions of the text. The liberals (*ifrath*) argue that the texts come for the benefit of man, if the text in *zhâhir* in opposition to the benefit of human, it is the human benefit that should take precedence.¹⁷

The *ifrath* that *mashlahah* (interests) and other sources of Islamic law may be appropriate or even contradictory. If between the two are contradictory then reconciliation must be done. If reconciliation is not possible, then top priority is given more than any other source of shariah. This is based on the words of the Prophet, “*la dharara wa la dhirâra*.”¹⁸ Position *mashlahah* in the context of *mu'amalah* according to al-Thufi, is the right to be the basis of law, because the activity of *mu'amalah* the determination of goodness of an activity (*mashlahah*) or not determined by reason.¹⁹ To determine this issue, continued al-Thufi, according to human rights.²⁰

¹⁷Al-Thûfi, *Syarḥ Mukhtashar al-Raudhah*, Juz I (Beirut: Mu'assasah al-Risâlah, 1990), p. 409; and see al-Thûfi, *al-Risâlah fî Ri'âyah Mashlahah*, p. 45, Wahbah al-Zuhayli, *Ushûl al-Fiqh al-Islâmi*, Juz II (Beirut: Dâr al-Fikr, 1986), p. 819.

¹⁸This hadis is narrated by Ibn Mâjah from 'Ubaidah Ibn Shamit, also narrated by Ahmad Ibn Hanbal through Ibn 'Abbâs, and narrated Mâlik through Yahya.

¹⁹Husein Hâmid Hissân, *Nazhâriyat al-Mashlahah fî al-Fiqh al-Islâmi* (Kairo: al-Maktabah al-Mutanabbi', 1998), p. 530-531.

²⁰*Ibid.*, p. 534-535.

Moderation of DSN-MUI Fatwa Methodology

As a *fatwâ* institution, DSN has its own method and procedure in establishing fatwas. The methods and procedures are set in the guidelines and procedures for determining the Fatwa of Indonesian Ulama Council. The guidelines and the determination of this fatwa are stipulated in the Decree of the Board of Leaders of the Indonesian Ulema Council Number: U-596/MUI/X/1997 dated October 27, 1997 which is a refinement of the guidelines based on the decision of the Plenary Session of the Majelis Ulama Indonesia on 7 Jumadil awwal 1406 H/18 January 1986 AD which is deemed to be no longer adequate.²¹

Fatwa systems and procedures are the *manhaj* in determining fatwas (*manhâj fî istinbath al-fatwâ*) that capable of providing answers to any problems that arise. The fatwa approach according to the above procedure should be done through *nash qath'î*, *qawli* and *manhaji*.²² The establishment of a fatwa through *nash qath'î* is based on the provisions already described in the Quran and hadith. Most scholars argue that the order of the sources of Islamic law is the Quran, hadith, *ijmâ'*, and *qiyâs*. The term *nash qath'î* is distinguished from *nash zhanni*. The *qath'î* and *zhanni* contexts here are used to explain the distribution of *dalâlah* from *nash*. Thus there is a clear meaning of the meaning *qath'î al-dalâlah* and there is also an unexplained meaning called *zhanni al-dalâlah*.²³

The *nash qath'î* approach is done by adhering to the *nash* of the Quran and the hadith to a problem if the problem that need to be fixed is contained in the *nash* Quran or hadith clearly. But if the problem is not contained in the *nash* Quran or hadith then the following method is followed by the method *qawli* or *manhaji*.²⁴

While the *qawli* approach is done by taking the opinions of the scholars present in the *madhhab*. Decisions on fatwas based on *manhaji* metodologis if the problem is not found in the opinion of the ulama. Both of these methods *qawli* and *manhaji* are closely related because the determination through *qawli* is done by taking the opinion of the scholars in the books of *mu'tabarâh* and can also be considered enough if there is only one opinion unless the opinion is not suitable anymore to be used as a handle because *ta'assur* or *ta'azzur al-a'mal* and *syu'ubat al-a'mal* which means it is difficult to practice because the *'illat* has changed. In this case it is necessary to re-examine *i'adat al-nazhar*. Re-examining is a habit

²¹DSN dan BI, *Himpunan Fatwa DSN*, (lampiran), p. 451.

²²Ma'ruf Amin, *Fatwa dalam Sistem Hukum Islam* (Jakarta: eLSAS, 2008), p. 267.

²³Division from *qath'î* and *zhanni* is seen from *wurûd* (transmission *nash*), ie *qath'î al-wurûd* dan *zhanni al-wurûd*. In the context of appealing lafaz (*al-dalâlah*) almost all jurisprudence is involved in it but in the context of *al-wurûd* only among the Syâfi'iyah and Hanafiyyah the most fierce as the problem *khavar ahad* with the *nash* the Qur'an is still common, *khavar ahad* with *al-qiyâs*, as well as *khavar ahad* with problems that are general *al-balwa* (problems that often occur in society). See 'Izz al-Dîn Muḥammad Aḥmad 'Umar, "Atsar al-Ikhtilaf fî al-Dalâlah al-'Am Qabl al-Takhshîs fî Fiqh al-Islâmî" (Thesis, Makkah: Umm al-Qura, n.d.), p. 149.

²⁴Amin, *Fatwa*, 260.

of the earlier scholars, they are not glued to the texts when they are no longer suitable for various situations and conditions.²⁵

The method of *nash qath'i* is a *mustaqil* method because it stands alone and does not require other sources of law different from the *qawli* method, especially *manhaji* where both are not independent sources of law, because in its *istinbath* need the directive guide *nash* Quran and hadith in searching the *'illat* law with these three approaches all existing problems that are presented to the DSN will be answered. The stages if the problem has been alluded to by *nash* then we just see what is said in Quran or hadith, but the problems mentioned by Quran and hadith very limited while problems arise always evolve in accordance with the times then certainly the solution with the *qawli* or *manhaji* approach.

From the description above, DSN in issuing its fatwa based on (*istinad*) Quran and Hadith, besides it also seems DSN MUI also base themselves on *Ijma* and *qiyâs*. Although the rest besides the Quran and hadith also to *ijmâ'* and *qiyas* but still within the scope of *nash qath'i* approach method as the first stage in legal *istinbath*. In the *manhaji* approach DSN using the source *istinbath* law that disputed by the scholars such as *al-istihsân*, *al-istishlâh*, *sadd al-zharî'ah*.

Since the verse of Quran and hadith are limited to certain answers in its day, most fatwas are based on the opinions of the earlier scholars present in the books of *mu'tabarâh*. Moreover, the dynamic *mu'âmalah* problem with the need for dynamic interpretation as well, but even then if already in the books *mu'tabarâh*, DSN not difficult to do *ijtihad* in giving fatwas but directly quote the opinion of these scholars. This has led to criticism from some scholars including the Kuwaiti scholar Majd al-Dîn 'Azzam, who criticized the religious consultant agency (such as DSN Indonesia) that gave its fatwas only *taqlîd* (just following) against the previous scholars instead of *ijtihadi* as expected in the fatwas of the contemporary issue.²⁶

Actually the criticism is good but not completely true because the fatwas are any form either *taqlîd* or *ijtihâdi* if not bring benefit and prosperity in economic context and *mu'âmalah* must be criticized especially if it will contradict the main purpose of *syar'î*, so whatever the form of fatwas even the results of *ijtihâd* if contrary to the benefit and not in accordance with the purpose of shariah then it should be criticized, not lies from the nature or process of fatwa but the output of the *fatwâ*.²⁷

DSN is not struggling anymore to seek a fatwa because it will spend time and energy only if the problems have been alluded to by previous scholars. Because DSN if the previous scholars had different opinion in the matter of *khilâfiah* then the determination of the

²⁵*Ibid.*, p. 261.

²⁶Kuwait Finance House, *al-Fatawa*, 220.

²⁷*Ibid*, p. 220.

fatwa is done by the method, *al-jam' u wa al-tawfiq*, *tarjih*, *ilhâqi*, and *istinbathi*.²⁸ *Al-Jam' u wa al-Tawfiq* is a compromise path to seek common ground, if the opinions of the ulama between one and the other are not on the line. If the determination of fatwa by way of compromise (*al-jam' u wa al-tawfiq*) cannot be taken then that must be followed by the *tarjih* method, the method of ijtihad by using *muqâranah al-madhâhib* ie comparing the principles of *ushûl muqâran*.²⁹

When a problem or a case do not have the opinion of the ulama (*qawl*) which explains precisely in *al-kutub al-mu'tabar* but there is an equivalent to the problem, then to find the answer is done by *ilhâqi* method, ie equating a problem that occurs with the same case in *al-kutub al-mu'tabar*.³⁰

The method of *manhaji (istinbathi)* is taken when it cannot be done by the method of *ilhâqi* because there is no *mulhâq bih* in *al-kutub al-mu'tabar*, *manhâji* or *istinbathi* taken by using *qiyâsi*,³¹ *istishlâhi*,³² *istihsâni*,³³ and *sadd al-dzarî'ah* method.³⁴ Where in general the determination of the fatwa should pay attention to the common good and *maqâshid al-syarî'ah*.

The concept which became the foundation of the DSN-MUI in establishing a fatwa based on the principle of *al-arjah* and *al-ashlah* is a strong opinion (*al-râjih*) or the present term is popular opinion and opinion that leads to the common good. If the opinion of *al-arjah* and *al-ashlah* is then chosen is the *al-ashlah's* opinion even if it comes from an unfavorable opinion (*al-marjûh*). KH. Ma'ruf Amin says that there was one of the *marjûh*

²⁸Amin, *Fatwa*, p. 268.

²⁹*Ibid.*, p. 269. Compare with article of Anggraini Binti Ramli, according to him, *ushûl* is as foundation early to know in detail *maqâshid*, so that *ushûl* and *maqâshid* are inseparable two sides. Anggraini Binti Ramli, "al-'Alaqah Baina Ushûl al-Fiqh wa Maqâshidi al-Syarî'ah wa al-Da'wah ila Ta'sis 'Ilm al-Maqâshid," in *Mazahib*, Vol. XV, No.2, 2016, p. 282-284.

³⁰This method (*ilhâqi*) is similar to *al-qiyâs*. See Ma'ruf Amin, *Fatwa*, p. 270.

³¹*Qiyâsi* is a method of likening an event that does not have its legal provisions in nass with an existing event of its legal provisions in nass because of the similarity '*illat*'. This concept is widely used by the Syâfi'iyah. Because according to them ijtihad is applying *al-qiyâs* because ijtihad and *qiyâs* are one meaning Read al-Syâfi'i, *al-Risâlah* (Qâhirah: t.p., 1993), p. 477 and compare with Fahd Ibn Sa'ad al-Juhni, "al-Qiyâs 'inda al-Syâfi'i" (Dissertation, Makkah, Umm al-Qura, 2007), p. 10.

³²*Ishtishlâhi* is taking benefits and rejecting mankind in order to preserve the social goals. This method is widely used among Mâlikiyyah with *mashlahah al-mursal* method. See al-Syâtibî, *al-Muwâfaqat*, Juz I (Kairo: Musytashfa Muhammad, n.d.), p. 38.

³³*Istihsâni* is turning from the *qiyâs jali* (ordinary) desire to the lower *qiyas* or specializing *qiyâs* based on a stronger proposition. This method is widely used by Hanafites. See *Ushûl al-Sarkhasi*, Juz II (Beirut: Dâr al-Fikr, 2000), p. 200, and compare with Wahbah al-Zuhayli, *Ushûl al-Fiqh al-Islâmi*, p. 780.

³⁴*Sadd zharî'ah* is closing or preventing things that can deliver people to things that are prohibited *syarâ'*. Metode is widely used among Malikiyyah, Syâfi'iyah and Hanabilah. Wahbah a-Zuhayli, *Ushûl al-Fiqh al-Islâmi*, Juz II, p. 797.

(unpopular) opinions of the earlier days that permitted it, but the current *marjūh* opinion becomes *rajih* (strong) because of the conditions currently required in the world modern banking.³⁵

Because modern banking and finance practices are constantly changing and evolving, it is necessary to have a continuous study of their conformity with the Islamic shariah. This requires a change of law that does not violate the shariah Islam based on universal principles, such as justice, equality, honesty, and feelings of empathy.³⁶

The change must be based on human benefit because God does not deliver revelation without a clear purpose. Therefore, the Quran in addition to providing information that is detailed, also provides the fundamental principles that lead people to the certain, where someone gets an answer with his own efforts. In fact he describes it in a general form, according to the changing circumstances in all times and places.³⁷

Based on the opinion of the above scholars, especially *ifrat* (liberal), there is a great opportunity to conduct an entirely new legal discovery and has not been discussed by previous scholars. Especially in the problems in modern banking and finance that always experience a change and rapid development that has never been discussed before. Thus the role of DSN in giving fatwas will be more dynamic and not fixated on the opinions of previous scholars who may not necessarily fit the current conditions and situations.³⁸

In line with the above ideas, Setiawan Budi Utomo said that DSN-MUI as an institution of economic and sharia banking affairs is of moderate character in choosing the path of *ijtihad* development of syaria financial products. This reason is because the DSN-MUI does not adhere to two extremes madhhab that is; first liberal (*tasahuli*) madhhab that are too easy and legalistic in accepting and labeling sharia on conventional financial system products. Second the conservative madhhab (*tashaddudi*) which view economic and financial system products with “black-and-white” glasses by maintaining the simplicity of the transaction model as described in the classical Jurisprudence books and always rejecting the conventional product innovations of conventional financial systems.³⁹

In contrast to Budi Utomo, Muhammad Maksum considered that the fatwa-fatwa DSN-MUI tends to loose if not said liberal. The leeway from one side leads to an increase in the number of Islamic finance products but on the other hand to pursue the legalistic

³⁵Amin, *Fatwa*, p. 264.

³⁶Abdullah Saeed, *Islamic Banking and Interest: a Study of Prohibition of Riba and it's Contemporary* (Leiden: Brill, 1996), p. 224.

³⁷Ahmad Hasan, “The Early Development,” in Abdullah Saeed, *Islamic Banking*, p. 230.

³⁸David Bondermen, “Modernization and Changing Receptions of Islamic Law,” in *Jurnal Harvad Law Review*, Vol. 81, No. 6, 1968, p. 169.

³⁹Setiawan Budi Utomo, “Dialektika Konstruksi Substantif Hukum Ekonomi Syariah Progresif,” in Muhammad Nadratuzzaman Hosen (ed.), *70 Tahun DR. KH. Ma'ruf Amin Pengabdian Tiada Henti Kepada Agama, Bangsa, dan Negara* (Jakarta: The Ibrahim Hosen Institute, 2013), p. 249-50.

side rather than morality. According to Maksum, there are three methods performed by DSN-MUI, first endorsing a number of combinations of contracts (*‘uqûd murakkabah*), endorsing the innovation model of income in avoiding of usury, and endorsing the submission of additional terms that disputed by *fiqh* scholars.⁴⁰ Although Maksum’s view of the fatwa of DSN tends to be loose, but Maksum concludes that the method of Fatwa DSN-MUI can be said Moderate compared to MPS (Assembly Fatwa Shariah) of Bank Negara Malaysia that tends to be Liberal.

Meanwhile, Mudzhar’s study concludes that DSN-MUI accommodates too much in almost every conventional economic instrument by using *hilah* (legal tricks) and multiple contracts (*‘uqûd murakkabah*). According to him, a method like this will lead to putting formalistic legal rather than the side of morality, but from the side of this morality can be seen the initial goal of the shariah of the akad.⁴¹

The moderate term for the method of fatwa DSN-MUI according to Ma’ruf Amin is “*lâ tekstualiyah wa lâ liberaliyah*,” indicating the DSN-MUI cannot be detected through the characteristics of the textual madhhab or the liberal madhhab. Because of the absence of these traits it is said to be a moderate madhhab.⁴² Even if you want to say to which madhhab fatwa DSN-MUI is more closely seen from the characteristics attached to the madhhab of textual and liberalist, the method of fatwa seen from the formal side of legalistic it is close to the textual madhhab, but when viewed from the side of moralist-substantif closer to the liberalist madhhab. The method of fatwa of DSN-MUI is said to have a textual thinking when viewed from its formal legal, because in its fatwa refers to the *nash qath’i* both the Quran or Hadith and it is said that the method of Fatwa DSN-MUI is closer to the liberal madhhab. This is characterized by the arguments cited in the fatwa or *fiqh* rules eg, *wijhat al-nazhâr* (the argument side) the issue is not on target. Because of its very wide scope, arguments are very loosely argued. In one argument can be used as the basis for argumentation of fatwa for various issues.

Evidence of the steps taken by the DSN-MUI is characterized by moderate, such as the release of a simple fatwas that describes the general provisions (deductive) of a contract such as Fatwa. 12/2000 on hawalah, fatwa no. 19/2001 on *al-qard*, Fatwa no. 25/2002 on Rahn, and others. But when dealing with economic issues that are operational (inductive), the DSN-MUI take the path that comes out of the general provisions made by giving the

⁴⁰Muhammad Maksum, “Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia dalam Merespon Produk-produk Ekonomi Syariah Tahun 2000-2011” (Dissertation, Sekolah Pasca Sarjana UIN Syarif Hidayatullah Jakarta, 2013), p. 267-269.

⁴¹See Muhammad Atho Mudzhar, “The Legal Reasoning and Socio-Legal Impact of The Fatwas of the Council of Indonesian Scholars on Economic Issues,” in *Ahkam: Jurnal Ilmu Syariah*, Vol. XIII, No. 1, January 2013, p. 9-18.

⁴²Fathurrahman Djamil, “Pemikir dan Praktisi Hukum Islam yang Moderat,” in Muhammad Nadrattuzaman Hosen (ed.), *70 Tahun KH. Ma’ruf Amin: Pengabdian Tiada Henti Kepada Agama, Bangsa, dan Negara* (Jakarta: The Ibrahim Hosen Institute, 2013), p. 164.

rule of “*al-ashl fî al-mu‘âmalah al-ibâhah*” and juxtaposed with the contract which the nature is contrary to the nature and purpose of the existing contract within the deductive fatwa, for example fatwa no. 21/2001 about sharia insurance guidelines, fatwa no. 26/2002 concerning Gold rahn, Fatwa No. 31/2002 on the transfer of debt, and others.

The middle path taken by the DSN-MUI, regularly seems more tends to approach the textualist madhhab by quoting some verses, hadith, clerical opinion, and *ushûl* and *fiqh* rules, but one side of that step more tends to the *mutasâhil* madhhab because the edges of the fatwa ended on the permissibility of making transactions that initially on the general provisions of the impression of such transactions are prohibited. This is done by DSN-MUI to answer the economic problems that develop so rapidly and to provide opportunities to Islamic financial institutions in order to compete with conventional financial institutions, so that the sharia economy does not experience stagnation and backwardness in competing with the conventional economy.⁴³

The Kaidah Offer *Ashl fî al-Mu‘âmalah al-Tawaqquf fî al-Zauhar wa al-Ibâhah fî al-Kaifiyyah* in Economic Development

Although the DSN-MUI declared its legal method as a mid-way method between *mutasyaddid* (tight) such as economic fatwa institutions in the Middle East with *mutasâhil* (liberal) madhhab like the economic fatwa institution in Malaysia. But in substance tend to be liberal (*mutasâhil*) with some arguments. This is reinforced by Ma‘ruf Amin as Chairman of DSN-MUI giving reasons to go through the road *mutasâhil*.⁴⁴

The rule of *al-ashl fî al-mu‘âmalah al-ibâhah illa ma yadulla al-dalîl ‘ala tahrîmiha* as evidence of DSN-MUI always uses this rule in every fatwa except in fatwa No. 21 on *al-qard*. This rule is taken from the book of *al-Ashbâh wa al-Nazhâ’ir* wrote by Imam al-Suyûthi. The book was composed in the 8th century. meaning that this rule is popular around this century. This rule also based on the verse of Q.S. al-Baqarah/2: 29 which means “*He is God*,

⁴³Compare with Ma‘ruf Amin, “Fatwa and Development of Syaria Finacial Industry: A Lesson From Indonesia,” in *al-Iqtishad: Jurnal Ilmu Ekonomi Syariah*, Vol. 9, No. 2, 2017, p. 338-340.

⁴⁴On various occasions of dialogue with KH. Ma‘ruf Amin, he said that if no action is taken with *istinbath* that is not liberal then the fatwa will be abandoned so that sharia financial institution does not grow and can not compete with conventional financial institution. From this assumption, it can be seen that the fatwas are actually not the content of the fatwa content to be achieved but there are sides or outsides that have nothing to do with the spirit of fatwa, whereas that side is not the purpose or for reasons that have nothing to do with sharia law such as the goal is just to catch up the market share of Islamic financial institutions. See and compare article of Musawar, “Pandangan Tuan Guru Lombok terhadap Multi Akad dalam Mu‘amalah Maliyah Kontemporer,” in *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan*, Vol. 16, No. 1, 2016, p. 142-149.

Who made all things in the earth for you and He wills (created) the heavens, and He made seven heavens. And He is All-Knowing all things,”⁴⁵ but this verse is not specifically talking about *mu‘amalah* especially for *istinbath* law but talking about everything that is in the heavens and on earth created by God is halal at first except some that have been forbidden through the description of good on the Quran and Hadith. To reinforce this assumption can be seen from some cases of *mu‘amalah* in the time of the Prophet, for example, hadith narrated from Hakîm ibn Hizam, that actually he said, “I asked the Messenger of Allah. O Messenger of Allah really I have bought something, but I do not know what is allowed and what is forbidden from him? The Messenger of Allah replied, “if you buy something do not sell again unless it is in your hand (your mastery).”⁴⁶

In addition there are several traditions and even hundreds explaining some prohibitions on *mu‘amalah* for example Khâlid al-Bathali writing a book *Aḥādîts al-Buyû‘ al-Manhi ‘anha Riwayatan wa Dirâyan*,⁴⁷ which more or less contains four hundreds of hadith about the forbidden transactions. This also indicates that *mu‘amalah* is basically *al-tawaqquf* (first seen whether bringing goodness or bring injustice) on the substance whether harming the rights of others either directly or indirectly, either *mashlahah khâssah* or *mashlahah ‘ammah*.⁴⁸

If the proposed rule is used by the DSN-MUI this is nothing other than to avoid allegations that actually the DSN-MUI fatwas are not *mutawassitah* (halfway between liberal and *tasyaddud/textualist*), but the fact is more liberal in substantive and formalistic tendency in the way of *istinbath*. So as to ignore the moral substance and the main purpose of the fatwa, in order to avoid the debate, the DSN-MUI should see the implications of its fatwa, especially on macroeconomic implications such as in the context of unemployment, gap, poverty, etc. Examples of fatwa cases (No. 7/2000) about *mudharabah* accompanied by guarantees. One side of guarantees in the provision of capital, there is *mashlahah* between the owners of capital and managers. They argue that sometimes the rich in managing his property lack of capital and other arguments said that if there is no guarantee, the manager

⁴⁵The text of the verse is as follows:

نُورَ الَّذِي خَلَقَ لَكُمْ مَا فِي الْأَرْضِ جَمِيعًا ثُمَّ أَسْتَوَىٰ إِلَى السَّمَاءِ فَسَوَّاهُنَّ سَبْعَ سَمَاوَاتٍ وَهُوَ بِكُلِّ شَيْءٍ عَلِيمٌ ﴿١١﴾

⁴⁶ The text of the hadith is as follows:

عن حكيم بن حزام أنه قال يا رسول الله إني اشتريت بيعا مما يحل وما يحرم علي قال فإذا اشتريت بيعا فلا تبعه حتى تقبضه

⁴⁷See Khâlid Ibn al-‘Azîz al-Bathali, *Aḥādîts al-Buyû‘ al-Manhi ‘anha Riwayatan wa Dirâyan* (Riyadh: Dâr al-Kunuz Isybiliya, n.d.), p. 480-490.

⁴⁸To harm others directly such as stealing or deceiving a second party or taking *usury*, usually this is explicit about the forbidance, while not directly harming for example about the case of *al-mudharabah* who use the guarantee. This is because those who will enjoy the transaction are only those who have the capital or the guarantee while the weak or poor people cannot enjoy it because of the guarantee.

⁴⁹Eliminate Poorness and distribute the estae fairly and flatten the included in *maqashid*

tends to default if there is profit sometimes they not say it honestly but if they experience a loss declared with the truth.⁴⁹

The argument is actually quite reasonable, but it goes against the objective of the sharia of *mudhârabah* that is empowering the poor to become rich (*al-aghniyâ'*). The rich man who manages his capital-deficient wealth will result in a rich axiom of the rich and the poor who have no assurance of suffering and become poorer.⁵⁰

The consequence of the guarantee in *mudhârabah* affects the concentration of property on some of people ie *al-aghniyâ'* who can manage the property plus has a guarantee, while the poor are left and not empowered for the reason of not having capital. This is also in fact contrary to the basic characteristic of Islamic economics, the basic of which human beings are created to help each other rich or financiers should help the weak and the poor, rather than help the rich and established in capital.⁵¹

Conclusion

The methodology of the DSN-MUI fatwa is characterized by a moderate path that is a mid way between a free (*mutasâhil*) and highly rigid (*mutasyaddid*) method, although in its substance it is close to a *mutasâhil madhhab* with some arguments and products issued by DSN-MUI which roughly until now (in 2017) has issued approximately 116 fatwas. But the methodology of the fatwa is not to be seen from the side of the tendency to the liberal, rigid or moderation madhhab, but it must be seen from its social context whether it will bring the overall benefit by seeing the other side such as macro economy and micro economy. From micro economy for example whether bring the benefit to the concerned who do contract, such as laziness, oppression, and others. The macro is whether or not it's impact on the global economy such as social inequality, unemployment. Therefore a suitable approach in the fatwas methodology is an inductive approach rather

law in context *hifzh al-mâl* as one of *al-ushûl al-khamsah*. A. Bahruddin, "Implementasi Maqashid Syari'ah sebagai Solusi Problematika Sosial," in *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan*, Vol. 17, No. 1, 2017, p. 15-16.

⁵⁰It is not wrong if the ideology of liberalism says that; poverty is a state formed by an environment of discrimination and narrow opportunities. If discrimination is eliminated and the same opportunity is granted the culture of poverty will be lost. The three ideologies of radicalism; which says; poverty is formed by socio-political structures, and economics. They are poor because they are preserved for the poor. Poverty is preserved to support the interests of a few people or capitalist elitists. The ideology of liberalism says that; poverty is a state formed by an environment of discrimination and narrow opportunities. If discrimination is eliminated and the same opportunity is granted the culture of poverty will be lost. The three ideologies of radicalism; which says; poverty is formed by socio-political structures, and economics. They are poor because they are preserved for the poor. Poverty is preserved to support the interests of a few people or capitalist elitists.

⁵¹See Agus Waluyo, "Kebijakan Fiskal dan Upaya Mengatasi Disparitas Ekonomi Prespektif Islam," in *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan*, Vol. 17, No. 1, 2017, p. 22-24.

than a deductive approach, in other words it must be seen the cases in different social contexts, so that between the fatwa institutions with each other does not have to be the same.

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