



**Progressiveness of Islamic Economic Law in Indonesia:
The *Murā'at Al-'Ilal wa Al-Maṣāliḥ* Approach**

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Abstract: Islamic economic law is unresponsive and tends to be legal-formal in supervising Sharia finance and economic development. Economics, in fact, emphasizes the aspects of flexibility and convenience. This study aims to reveal the response of fatwas to economic and financial developments using the *murā'at al-'ilal wa al-maṣāliḥ* approach. The study use qualitative research method. The study used qualitative research methods, analyzed using the proposed fiqh and fiqh approaches. The data studied is the fatwa of the National Sharia Council (*Dewan Syariah Nasional/DSN*) of the Indonesian Ulema Council (*Majelis Ulama Indonesia/MUI*). This fatwa is examined by comparing chronologically the time, the opinion of the clergy, and economic developments. The three fatwas became the focus and debate of scholars examined to find patterns in responding to the needs of financial and economic transactions. As a result, fatwas are dynamic and responsive to industry needs. The law can change since the legal reasons (*'illat*) behind it also changes. The existence of a law lies in how the cause of the law works; hence, in fatwa, there are things changing and some are permanent legal provisions. This finding has implications for corrections to previous legal provisions and changes to contracts made between financial institutions and clients.

Keywords: Fatwa, Islamic economics, legal reason (*'illat*), *maṣlāḥah*, *ijtihad*

Abstrak: Hukum ekonomi Islam dipandang tidak responsif dan cenderung legal formal dalam mengawal perkembangan keuangan dan ekonomi Islam. Di sisi lain, ekonomi mengedepankan aspek fleksibilitas dan kemudahan. Penelitian ini mengungkap respon fatwa terhadap perkembangan ekonomi dan keuangan dengan pendekatan *murā'at al-'ilal wa al-maṣāliḥ*. Kajian tersebut menggunakan metode penelitian kualitatif, dianalisis dengan memakai pendekatan usul fikih dan fikih. Data yang telaah adalah fatwa Dewan Syariah Nasional (DSN) Majelis Ulama Indonesia (MUI). Fatwa ini dikaji dengan membandingkan secara kronologis waktu, pendapat ulama, dan perkembangan ekonomi. Tiga fatwa tersebut menjadi konsen dan perdebatan ulama dieksaminasi untuk menemukan pola dalam merespon kebutuhan transaksi keuangan dan ekonomi. Hasilnya, fatwa bersifat dinamis dan merespon kebutuhan industri. Hukum dapat berubah karena sebab hukum yang melatarbelakanginya berubah pula. Keberadaan suatu hukum terletak pada bekerjanya sebab hukum tersebut. Karena itu, dalam fatwa tersebut ada hal-hal yang berubah dan ada ketentuan hukum yang bersifat tetap. Temuan ini berimplikasi pada koreksi ketentuan hukum sebelumnya dan perubahan kontrak yang dibuat antara lembaga keuangan dan nasabah.

Kata Kunci: Fatwa, ekonomi Islam, 'illat hukum, masalahat, ijtihad

Introduction

The Fatwa (Islamic Instructions of rules) of DSN-MUI (National Sharia Council-Indonesian Ulema Council) has become the sharia standard for financial, business and economic activities with an aim to ascertain the implementation of sharia compliance. The implementation of sharia principles has been increasingly widespread in many financial, business and economic sectors such in hospitals, crypto, electronic money, financial technology, or hotels. There are various methods available to answer the complexity of the business sectors, for instance, by legalizing the use of a combination of contracts, either in the form of multi-contract (*'uqud mujtami'ah*) or plural contract (*'uqud muta'addidah*),¹ the transformation of *ijārah* from fiqh to banking, which was originally *dzanni* to be binding,² using the promise in the

¹ Muhammad Maksum, "Model-Model Kontrak dalam Produk Keuangan Syariah", *Al-Adalah* 12, No.1 (2014), p. 49-62.

² Hasanudin and Ainul Yaqin, "The Transformation of Ijārah: From Fiqh to Sharia Banking Products", *al-Ihkam: Jurnal Hukum dan Pranata Sosial* 14, No. 1 (2019), p. 95.

engagement and make it a separate contract for multicontract,³ and shifting *tabarru'* contract into *tijāri*, namely *wakālah*, *hawālah*, and *kafālah* contracts.⁴

A number of researchers stated that the Fatwa of DSN-MUI has brought a positive contribution to the development of Islamic economic law discipline and the improvement of Islamic economics. The fatwa has produced a new methodology in the implementation of modern *ijtihad* by applying collective *ijtihad* involving Islamic law experts, related experts and interested authorities. It also encourages many studies that have made fatwa as research primary data. This can be seen from several authorities such as Financial Services Authority (*Otoritas Jasa Keuangan/OJK*), Bank Indonesia (BI), the Supreme Court, the Ministry of Finance, and LPS (the Deposit Insurance Corporation) that have used this fatwa as the source in preparing the legal codification. The clauses used in the regulations of those institutions have adopted the editorial of the fatwa as specified in the OJK Regulation Number 33/POJK.04/2019 on the Issuance and Requirements for Sharia Mutual Funds, Minister of Finance Regulation Number 125/PMK.08/2018 on Issuance and Sale of Retail State Sharia Securities in the Domestic Primary Market, LPS Regulation on the Settlement of Troubled Banks, PBI (Bank Indonesia Regulation) Number 11/33/PBI/2009 on the Implementation of Good Corporate Governance for Sharia Commercial Banks and Sharia Business Units and the Regulation of Supreme Court Number 2 of 2008 on the Compilation of Sharia Economic Laws. Sharia becomes value added in hospital services.⁵

The strategic role of the fatwa, however, cannot be separated from criticism. Aziz argued that fatwa tends to be formalistic by prioritizing the legal aspects-not responding to the flexibility of economic activities.⁶ The fatwas have been dominated by the prohibitions on *riba* (interest), contract arrangements,⁷ and the use of Arabic terms.⁸ Further, fatwa tends to match the economic facts

³ Muhammad Maksum, "Al-Wa'd as Muhallil of Multi Contract: Ambiguity of Applying al-Wa'd in Modern Transaction", *Karsa: Jurnal Sosial dan Budaya Keislaman* 24, No.2 (2016), p. 282-300.

⁴ Muhammad Maksum, "The Shift of Non-Profit Contract to Business Contract in the Islamic Financial Institution Business Activities", *Istinbath* 19, No.2 (2020), p. 221-441.

⁵ Muhammad Maksum, "Sharia Service as An Added Value: Response to Sharia Standard in Hospital Service", *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 6, No. 1 (2022), p. 423.

⁶ Jamal Abdul Aziz, "Islamic Banking in Global Economic Context (Critical Studies of Operational System and Performance of Islamic Banking)", *al-Ihkam: Jurnal Hukum dan Pranata Sosial* 12, No. 2 (2017), p. 344 -361.

⁷ Muhammad Maksum, "Economics Ethics in the Fatwa of Islamic Economics", *Al-Ulum* 15, No.1 (2015), p. 107-134. Muhammad Maksum, "The Relationship Model of Sharia and Financial Authorities", *Ahkam: Jurnal Ilmu Syariah* 20, No. 1 (2020).

⁸ Jamal Abdul Aziz, *Islamic Banking in Global Economic Context...*, p. 344 -361.

with the existing sharia contracts more. It should have an ability to create innovations to answer the needs of economic development to make their roles for economic progress and people's welfare getting tangible.⁹ On the other hand, in fatwa, the aspects of economic values have no adequate portion in sharia standards in banking¹⁰ and the values of bank and social responsibilities tend to be ignored.¹¹ Islamic bank has three responsibilities to the God, mankind, and environment.¹² As a consequence, the practices of riba (interest) can still be found in Islamic banking as seen in the practice of *bay' al-'inah* and *tawarruq*.¹³ The contract of *bay' al-'inah* still becomes a matter of debate among the sharia supervisory boards. The application of the contract is not similar with the one in LKS.¹⁴ The contextualization of the prohibition of riba is required in order to make the principle of social solidarity more prioritized.¹⁵ The use of *bay'* and *salaf (qard)* contracts in savings has emerged the potential for riba if the two contracts are interdependent. An alternative to this contract is by using *qard*, which is not business-oriented and does not provide any profit sharing for the customers. *Tawarruq* contract is also another alternative, allowing the customers to have benefit.¹⁶

The gap between the role and tendency of the formal legality of the fatwa raises the question of how Islamic jurists and muftis combine legal provisions and the growth of economic. To respond to these criticisms, a fatwa method has

⁹ Mohamad Akram Laldin and Hafas Furqani, "Innovation Versus Replication Some Notes on the Approaches in Defining Shariah Compliance in Islamic Finance", *Al-Jāmi'ah: Journal of Islamic Studies* 54, no. 2 (2016), p. 249-272.

¹⁰ Zulkifli bin Hasan, "From legalism to value-oriented Islamic finance practices", *Humanomics* 2, No. 4, (2016), p. 437-458.

¹¹ Saeed Mohammed Akhtar Ali and F. Mansor, "Value-based Islamic banking and reporting in Bahrain", *International Journal of Ethics and Systems* 37 No. 4, (2021), pp. 644-663.

¹² Asep Syarifuddin Hidayat, et.all., "Legal Obligations of Social Responsibility as Efforts to Improve the Image of Islamic Banking in Indonesia", *Samarah: Hukum Keluarga dan Hukum Islam* 6, No. 2 (2022), p.775.

¹³ Fathullah Al Haq Muhamad Asni and Jasni Sulong, "The Model of Istinbat by the Sharia Advisory Council of Central Bank of Malaysia", *International Journal of Academic Research in Business and Social Sciences* 8, No. 1 (2018), p. 12–23.

¹⁴ Fathullah al-Haq Muhamad Asni, "Management of fatwa standardisation on the practice of bay' 'inah contract in Malaysia: an analysis according to usul al-Fiqh and mura'ah al-Khilaf method", *Qualitative Research in Financial Markets* 13, No. 1, (2021), p. 118-139.

¹⁵ Servet Bayindir and Murat Ustaoglu, "The issue of interest (riba) in the Abrahamic religions", *International Journal of Ethics and Systems* 34 No. 3, (2018), p. 282-303.

¹⁶ Mahadi Ahmad and Riaz Ansary, "Fiqhī views on bay' wa salaf and qard-based Islamic banking deposit accounts in Malaysia", *ISRA International Journal of Islamic Finance* 9, No. 1, 2017 pp. 106-112.

been developed by considering the aspects of legal philosophy and benefits. Benefit as the goal of religion should be integrated into *sharia* banking.¹⁷ This is the focus of this research that has not been discussed by previous researchers. Fatwas can entirely be a driving force for the implementation of benefit, for both micro and macro aspects in *sharia* financial activities.¹⁸ The targeted benefit should consider the collective benefit that can be realized by providing financing to the real and businesses sector and by reducing financing that only provides personal benefits such as consumptive *murābaha* financing.¹⁹ The benefit considerations are structured through the *ijtihad murā'at al-'ilal wa al-maṣāliḥ* approach. This paper is to explain a number of DSN-MUI fatwas by using the *murā'at al-'ilal wa al-maṣāliḥ* approach with a focus on three fatwas that have been issued, i.e. *wa'd or muwā'adah mulzimah*, compensation for guarantee services (*kafālah bi al-ujrah or kafālah bi al-ju'l*), and non-cash buying and selling of gold by considering that these three topics are the DSN-MUI fatwa many Islamic law experts are discussing most.

The study used qualitative research methods, analyzed using the proposed *fiqh* and *fiqh* approaches.²⁰ The data studied is the fatwa of the National Sharia Council (*Dewan Syariah Nasional/DSN*) of the Indonesian Ulema Council (*Majelis Ulama Indonesia/MUI*). This fatwa is examined by comparing chronologically the time, the opinion of the clergy, and economic developments in Indonesia.

Murā'at al-'Ilal wa al-Maṣāliḥ Approach

In the realm of *fiqh*, finance and economics are categorized as the muamalah activities. The main principle of understanding religious texts related to muamalah activities is acceptability and benefit. Principally, every muamalah activity is allowed as long as there is no any restrictions governing it. The muamalah activities purposely is to realize the widest possible goodness, welfare and benefit for mankind. Two approaches can be used to understand the

¹⁷ Absori, et.al., "Transformation of Maqāshid Al-Syarī'ah (An Overview of the Development of Islamic Law in Indonesia)", *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* 11, No. 1 (2016), 1-18.

¹⁸ Luqman Zakariyah, "Harmonising Legality with Morality in Islamic Banking and Finance: A Quest for Maqāsid al-Shari'ah Paradigm". *Intellectual Discourse* 23 (2015). 355-376.

¹⁹ I. Cebeci, "Integrating the social maslaha into Islamic finance", *Accounting Research Journal* 25 No. 3, (2012), p. 166-184.

²⁰ Juhaya S. Praja, *Teori Hukum dan Aplikasinya*, (Bandung: Pustaka Setia, 2011). Hafas Furqani, *Metodologi Ekonomi Islam: Membangun Pradigma dan Format Keilmuan*, (Banda Aceh: Naskah Aceh, 2018).

mu'āmalah texts, i.e. textual approach (*ta'ābbudi*) and logic to understand the meaning of a text (*ta'āqquli*).²¹

The *ta'ābbudi* (textualist) approach is an approach using the linguistic meanings of the texts of the Qur'an and the hadith of the Prophet Muhammad PBUH as the sources of truth without a need to deeply know the intent or purpose as the reason (*'illat*) of the existence of the laws contained in these texts. The hadith of the Prophet Muhammad about the prohibition to combine the *bai'* contract with *qard* (*nahā Rasulullah SAW 'an bai' wa salaf*), for instance, is interpreted by this approach as *harām* (unlawful act) and there is no attempt to understand the reason why such combination is forbidden. In contrast, the *ta'āqquli* approach places the causes of the existence of the texts of Al-Qur'an and hadith as both the source of truth and the basis for determining a law. In the example of the hadith above, the prohibition of combining the contract of *bai'* with *qard* is because there is a cause of *'illat riba* (cause) and/or *hilah ribawiyah*. For this, the combination of the contract is permissible if not causing *riba* and/or *hilah ribawiyah*.

The *ta'āqquli* approach applies the principle of considering causes and benefits (*murā'at al-'ilal wa al-maṣāliḥ*).²² As al-Syathibi stated, this principle states that the provisions of Allah and the Messenger as contained in the Qur'an and hadith regarding *mu'āmalah maliyyah* are *ma'qūlat al-ma'na* (معقولة المعنى), meaning that the cause and understandable as cause or its legal essence (*'illat*). The aim of *mu'āmalah* activities is to reach benefit (obtaining benefits and eliminating harm [جلب المنافع ودرء المفاسد]).²³ For this, *mu'āmalah* applies the rule that "the implementation of legal provisions is in line with the *'illat*, if there is *'illat*, then the law is valid; while when there is no *'illat*, then the legal provisions are invalid (الْحُكْمُ يَدُورُ مَعَ عِلَّتِهِ وَجُودًا وَعَدَمًا).²⁴

The implementation of these rules, for instance, include; first, the goods price determination by the state (*tas'ir*). The Hadith of the Prophet as narrated

²¹ Umar Muhammad Sayyid 'Abd al-'Aziz, *Ahkām al-Mu'āmalat al-Māliyyah baina al-Ta'abbud wa Ma'quliyyat al-Ma'na* (Dubai: Islamic Affairs & Charitable Activities Departement. 2010).

²² Muhammad Utsman Syubair, *al-Madkhal ila Fiqh al-Mu'āmalat al-Māliyyah: al-Māl al-Milkiyyah al-'Aqd* (Ardan: Dar al-Nafa'is. 2009), p. 34-38.

²³ Abi Ishaq Ibrahim Ibn Musa al-Syathibi, *al-Muwāfaqat fi Ushul al-Ahkam* (Beirut: Dar al-Fikr. 1341H), vol. I, juz II, p. 268.

²⁴ Muhammad Ibn Shalih al-'Utsaimin, *al-Qawa'id al-Fiqhiyyah* (Iskandariyyah: Dar al-Bashirah. 1422H), hlm. 39; 'Ali Ahmad al-Nadawi, *al-Qawa'id al-Fiqhiyyah: Maḥsumuḥa wa Nasy'atuḥa wa Tathawwuruḥa wa Dirasah Mu'alifatihā wa Adillatuḥa wa Muhimmatuḥa wa Tathbiqatuḥa* (Damaskus: Dar al-Qalam. 1994), p. 212. Isma'il Kukasal, *Taghayyur al-Ahkam fi al-Syari'ah al-Islamiyyah* (Beirut: Mu'assasah al-Risalah. 2000), p. 69.

by Imam al-Tirmidhi (3: 606) mentions the rejection of the Prophet's to set the prices when there was a price fluctuation of goods.²⁵ Through the approach of understanding meaning, Ibn Rif 'ah al-Syafi'i, the Ulama of Malikiyah and Hanafiah interpreted it not as an absolute prohibition. Price determination is accepted in a state of *darurah/hajah* to prevent any public harm. The legal *'Illat* of the Prophet Muhammad PBUH related to the unwillingness for the price control is because of business injustice (*ẓhulm al-tujjār*), while Ibn Rif'ah allowed it to prevent business injustice so that the State was allowed to control prices.²⁶ Kamil Shagr al-Qaisi stated that: a) price control is not original law (but it is done due to emergency reasons); b) the original law of price determination in business is voluntary (not under any coercion); and c) price determination is the authority of the contracting parties and may not exceed the limit by limiting the price (and profit).²⁷ Sheikh Ahmad Ibn Sheikh Muhammad al-Zarqa stated that price control is legitimate only in emergency states (*yutahamal al-darar al-khashsh li daf' al-darar al-'amm*).²⁸ Hence, the Ulama of Hanafiah in *Majallat al-Ahkām al-'Adliyyah* allow the price control by limiting the profit that the seller is entitled to receive.²⁹ Imam Malik viewed that the maximum amount of profit that the seller deserves is one-third of the acquisition price or production price.³⁰

Another thing is related to the prohibition of buying and selling *garar* (the *mabi'* is not available under the contract), but some allow the contract of *bai' al-salam* and *bai' al-istishna'* because the *mabi'* allows it to be handed over in future.³¹ The Prophet forbade buying and selling fish in water (*bai' al-samak fi al-ma'*), but Ibn Qumadah al-Maqdisi allowed buying and selling fish in ponds

²⁵ Imam Abu Daud, *Sunan Abi Dawud* (Bandung: Maktabah Dahlan. t.th), vol. III, p. 272. Abi 'Isa Muhammad Ibn 'Isa Ibn Surah al-Tirmidzi, *Sunan al-Tirmidzi* (Bandung: Maktabah Dahlan. t.th), vol. II, p. 388.

²⁶ Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuh* (Damaskus: Dar al-Fikr. 2006), vol. IV, p. 2695-2697. Muhammad Utsman Syubair, *al-Madkhal ila Fiqh al-Mu'amalat al-Maliyyah: al-Mal al-Milkiyyah al-'Aqd* (Ardan: Dar al-Nafa'is. 2009), p. 37.

²⁷ Kamil Shagr al-Qaisi, *Ma'ayir al-Ribh wa Dhawabithuh fi al-Tasyri' al-Islami* (Dubai: Da'irah al-Syu'un al-Islamiyyah wa al-'Amal al-Khairi. 2008), p. 83-87.

²⁸ Syeikh Ahmad Ibn Syeikh Muhammad al-Zarqa, *Syarh al-Qawa'id al-Fiqhiyyah* (Damaskus: Dar al-Qalam. 1989), p. 197-198.

²⁹ Ali Haidar, *Durar al-Hukkam Majallat al-Ahkam* (Beirut: Dar al-Kutub al-'Ilmiyyah. 1991), vol. I, p. 113, Chapter 165.

³⁰ Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuh* (Damaskus: Dar al-Fikr. 2006), vol. V, p. 3307.

³¹ al-Syeikh 'Ala' al-Din al-Za'tari, *Fiqh al-Mu'amalat al-Maliyyah al-Muqaran: Shiyaghah Jadidah wa Amtsilah Mu'ashirah* (Damakus: Dar al-'Ashma'. 2010), p. 47-49. 'Ali Muhy al-Din 'Ali al-Qurrah Daghi, *Buhuts fi Fiqh al-Mu'amalat al-Maliyyah al-Mu'ashirah* (Beirut: Syirkah al-Basya'ir al-Islamiyyah. 2009), p. 109-160.

as long as the fish are seen (*mari'an*) and can be caught for handover (*al-qudrah 'ala al-taslim*).³² Buying and selling with down payment (first payment) for the commitment to buy goods, which is a deduction from the total price to be paid at the agreed time (*'urbun*) is forbidden, but this is done. The down payment becomes the right of the prospective seller if the sale is not carried out. The prohibition of buying and selling is because the down payment has become a part of the price, so when a sale is void, there is no price (*tsaman*). For this, the down payment belongs to the prospective buyer which must be returned. Ulama viewed that down payment as a commitment to purchase is acceptable provided that the down payment must be returned to the prospective buyer when the buying and selling contract is not carried out.³³

These examples prove that the considerations of legal reasons and benefit have determined the understanding of the texts of the Qur'an or hadis. The purpose of every prohibition or order can be explored so that the legal provisions can be set aside if the causes and objectives are not fulfilled. Such method is applied in formulating the fatwa of DSN to respond to Islamic economic and financial developments. The examination of this method in a number of DSN fatwas is presented as follows.

The Implementation of *Murā'at al-'Ilal wa al-Maṣāliḥ Muwa'adah* and *Wa'd Mulzim* Concept

Promise (*wa'd*) means a statement of the will of a certain party to do something good (or not do bad deed) in the future. A promise consists of three important elements: a statement from the party to do or not to do an act, the action to be done in future, and the promised action as a good deed. A person who promises states that he or she will do a certain good in future. If two people make a promise, it is then called as *muwa'adah* (mutual promise).

Ulama have different thoughts about the obligation to fulfill promises. Some stated that the law of fulfilling promises is *sunnah*, while other ulama stated that it is binding. Mahmud said that this obligation, according to Fahd Ahmad al-Amuri, is divided into two situations: the obligation to fulfill

³² 'Abd al-Sami' Ahmad Imam, *Nazharat fi Ushul al-Buyu' al-Mamnu'ah fi al-Syari'ah al-Islamiyyah* (Kuwait: Wizarat al-Awqaf wa al-Syu'un al-Islamiyyah. 2012), p. 206-209. Muhammad Ibn 'Ali Halawah, *Shuwar min al-Buyu' al-Muharramah wa al-Mukhtalaf fiha* (Mesir: Maktabah al-'Ulum wa al-Hikkam. 2006), p. 75-76.

³³ Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuh* (Damaskus: Dar al-Fikr. 2006), vol. V, p. 3501. Khalid Ibn 'Abd al-'Aziz al-Batali, *Ahadis al-Buyu' al-Manhiy 'anh: Riwayah wa Dirayah* (KSA: Dar Kunuz Isybiliyya. 2004), p. 122-137.

promises whatever form and the obligation to fulfill promises dependent upon certain conditions (*mu'allaq*).³⁴

Wahbah al-Zuhaili explained the opinions of the Ulama of Hanafiah (al-Syarkhasi and Ibn Abidin), Malikiyah (Sheikh Ilyas), Syafi'iah (Imam al-Nawawi and Ibn Allan), Hanabilah (Imam al-Bahuti), and al-Zhahiriah (Ibn Hazm) stating that the law of fulfilling a promise is not obligatory in terms of positive law (*qada'*). The law of fulfilling a promise is recommended and seen as a noble character. A party who promises another party to buy something, *qard*, or donate something is not able to be legally forced to fulfill his/her promise, but he/she is encouraged to fulfill it. The basis of this willingness is stated in *QS. al-Shaf* (61): 2-3 stating that it is a big sin for someone who says something to another party but the person concerned does not carry it out. A hadith as narrated by Imam Bukhari and Imam Muslim from Abu Hurairah states that one of the characteristics of hypocrisy is the person who breaks his/her promise.³⁵

Mahmud Fahd Ahmad al-Amuri in detail explained the opinions of Ulama who argued that the law of fulfilling a promise is *sunnah* (not binding). Imam al-Sarkhasi (Ulama of Hanafiah) explained that promises that are not *mu'allaq* with conditions or causes are not *mulzim* (binding); the law of fulfilling promises that are absolute is *sunnah* (suggested). Ibn Abidin (an Ulama of Hanafiah) explained that promises are not *mulzim*, so they are not legally binding; however, fulfilling a promise is the best deed. Sheikh 'Ilyas and Ibn Rushd (the Ulama of Malikiyah) argued that promises are not *mulzim* and, among the Ulama (Malikiah), there is no *ikhtilāf* (disagreement) about the advice to fulfill promises (not binding). Imam al-Nawawi (the Ulama of Shafi'iah) explained that Ulama have different opinions about the nature of promises as well as the law to fulfill them. Imam Abu Hanifah and Imam al-Shafi'i (and most of ulama) agreed that promises are not *mulzim*; the law to fulfilling it is recommended; the law of breaking a promise is *makruh* and breaking a promise is not sinful. Meanwhile, other Ulama agreed that the law of fulfilling a promise is obligatory; promises are *mulzim*. Ibn 'Allan (the Ulama of Shafi'ah) argued that the law of fulfilling promises is *sunnah*

³⁴Mahmud Fahd Ahmad al-Amuri, *al-Wa'd al-Mulzim fi Shiyagh al-Tamwil al-Masharif al-Islami* (Yordan: Kuliyyah Syari'ah and Dirasah Islam Uiniversitas Yordan. 2004), pp. 13. al-Syekh Ahmad Ibn Muhammad al-Razin, *Hukm al-Ilzam al-Wafa' bi al-Wa'd* (n.d.), p. 3-4. Muhammad Taqi al-'Utsmani, *Fiqh al-Buyu' 'ala Mdzahib al-Arba'ah ma'a Tathbiqathih al-Mu'ashirah Muqaran bi al-Qawanin al-Wadh'iyah* (Karachi: Maktabah Ma'arif al-Qur'an. 2015), vol. I, p. 77-94.

³⁵ Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuh* (Damaskus: Dar al-Fikr. 2006), vol. IV, p. 2928. Muhammad Ahmad al-Sarkhasi, *al-Mabsuth* (Beirut: Dar al-Ma'rifah. 1986), vol. II, p. 129.

(*mandub*) - not obligatory. Ibn Hajar (the Ulama of Shafi'ah) citing the opinion of al-Muhallab argued that the law of fulfilling a promise is ordered and recommended - not obligatory. Imam al-Buhuti (a Hanabilah ulama) viewed that promises are not *mulzim* and the law of fulfilling them is not obligatory as explained by Imam Ahmad Ibn Hanbal who equated the law of promises with the law of grants before *qabd*. Imam Ibn Hazm (the Ulama of Zahiriah) argued that the law of breaking a promise is *makruh* (disapproved); and fulfilling promises is a noble character whether the conditions promised have been fulfilled or not.³⁶

Meanwhile, a number of Ulama such as are Sa'id Ibn Umar, Ibn Syubrumah, Ibn al-Syath al-Maliki, Ibn al-Arabi, Ishaq Ibn Rahawaih, al-Ghazali, and al-Jashash obliged to fulfill any forms of promise. Sa'id Ibn Umar as narrated by Imam al-Bukhari argued that the law of fulfilling promises is binding. Ibn Syubrumah and Ibn Rushd argued that all promises are binding so that they must be fulfilled by the promised party and the promised party can be forced to fulfill them. Ibn al-Syath al-Maliki (Qasim Ibn Abd Allah) argued that promises are binding so that the law fulfilling them is absolutely obligatory. Muhammad Abd Allah Ibn al-'Arabi viewed that the valid opinion is the opinion stating that every promise must be fulfilled in every condition except for an excuse (*udzur*). Imam Muhammad al-Ghazali believed that promises must be fulfilled unless with an excuse (*udzur*). Imam Abu Bakr al-Razi al-Jashash in interpreting QS al-Shaf: 2, explained that every promise must be fulfilled because saying (promise) without realization is included into a disgraceful act forbidden by Allah.³⁷

The obligation to fulfill promises legally (*qadhā'iyān*) is based upon QS. al-Shaf: 2-3. Imam al-Qurafi explained that breaking a promise means breaking QS. al-Shaf: 2-3. Another legal basis is the hadith mentioning that breaking a promise is forbidden and includes a form of hypocrisy and the hadith narrated by Ali Ibn Abi Talib and Ibn Mas'ud ra states that the Prophet said: "*A promise is a debt;*" and *debts must be paid*.

Some Ulama criticized the use of QS. al-Shaf: 2-3 as the basis for the obligation to keep the promises. QS. al-Shaf: 2-3, as explained by Imam Qatadah and Imam Dhahak, is a verse explaining *Jihad* for a people in which some of them call for jihad but they themselves do not do it. Therefore, the verse only applies to these people. Ibn Hazm argued that QS. al-Shaf: 2-3 deals with obligatory matters such as promising to fulfill obligations. Ibn Hazm's opinion is in accordance with the rule of *al-'ibrah bi 'umūm al-lafzh la*

³⁶ Mahmud Fahd Ahmad al-Amuri, *al-Wa'd al-Mulzim...*, p.29-31.

³⁷ Mahmud Fahd Ahmad al-Amuri, *al-Wa'd al-Mulzim...*, p. 13-16.

bi khushush al-sabāb. Therefore, what must be made as *'ibrah* is the generality of lafazh.³⁸

Other Ulama rejected if the hadith about hypocrisy is associated with the law of fulfilling promises. They argued that what is meant in this hadith is *khālish* hypocrisy, i.e. statements and attitudes showing themselves embracing Islam and hiding disbelief so that they will be placed in hell. Most of Ulama considered that this *hadith* has nothing to do with the law on the obligation to fulfill promises.³⁹ The *hadith* stating that a promise is a debt (*al-'idah dain*) as narrated from Ali Ibn Abi Talib and Ibn Mas'ud is a *da'if hadith* that cannot be used as an argument. Meanwhile, the hadith as narrated from Abu Hurairah in which, among the narrators, there was Ibn Syihab who was underage when Abu Hurairah died so he did not hear it directly from Abu Hurairah. Therefore, Ibn Hazm explained that the hadith was rejected so that it could not be used as a *dalil* or proof.

Meanwhile, some ulama such as Ulama of Hanafiyah, Imam Malik, Imam Sahnun, Imam al-Qurafi, Imam al-Lakhmi, and Ibn Qasim viewed that fulfilling a promise is legally obligatory if associated with certain conditions.⁴⁰ The Ulama of Hanafiah stipulated that the law to fulfill a promise is mandatory if the conditions are met because the promise is binding.⁴¹ Ibn Rusyd argued that conditional promises are legally binding. The state can force the party that promises to fulfill a conditional promise if the conditions have been fulfilled if the person concerned does not carry out the promise voluntarily.⁴² Imam Malik, Imam Sahnun, Imam al-Qurafi, Imam al-Lakhmi, and Ibn Qasim argued that the law of fulfilling a conditional promise is obligatory if the specified conditions have been fulfilled with a reason to prevent any harms (*daf' al-dharar*).⁴³ The obligation argument avoids harm (*daf' al-dharar*), avoids uncertainty (*gharar*),⁴⁴ and the party who promises is bound by the promise he/she has made.⁴⁵

³⁸ Abd al-Wahab Khalaf, *Ilm Ushul al-Fiqh* (Kairo: Dar al-Qalam, 1987), p. 123.

³⁹ Mahmud Fahd Ahmad al-Amuri, *al-Wa'd al-Mulzim...*, p. 20-22.

⁴⁰ Al-'Iyasyi Fidad, *al-Ta'liq fi al-'Uqud ma'a al-Isyarah ila ba'dh al-Tathbiqat al-Mu'ashirah* (Jedah: al-Ma'had al-Islami li al-Buhuts wa al-Tadrib al-Bunk al-Islami li al-Tanmiyyah. t.th), p. 4-7. Abd al-Satar Abu Ghadah, *al-Ta'liq fi al-'Uqud al-Mu'awadhat* (t.t: t.pn, t.th), p. 3-4.

⁴¹ Mahmud Fahd Ahmad al-Amuri, *al-Wa'd al-Mulzim...*, p. 20.

⁴² Mahmud Fahd Ahmad al-Amuri, *al-Wa'd al-Mulzim...*, p. 22.

⁴³ Malik Ibn Anas, *al-Mudawanah al-Kubra* (Beirut: Dar al-Fikr. t.th), vol. III, p. 246; and Mahmud Fahd Ahmad al-Amuri, *al-Wa'd al-Mulzim fi Shiyagh al-Tamwil al-Masharifi al-Islami* (Yordan: Kuliyyah Syari'ah and Dirasah Islam Uiniversitas Yordan. 2004), p. 24.

⁴⁴ Yasin Ahmad Ibrahim Daradkah, *Nazhariyat al-Gharar fi al-Syari'ah al-Islamiyah: Dirasah Muqaranah* (Kairo: Jami'ah al-Azhar. 1973). al-Shadiq Muhammad al-Amin al-

The decision of *Majma' al-Fiqh al-Islami* distinguished promises from one party (*wa'd*) and promises from two parties (*muwa'adah*). Unilateral promises might be obligatory to be fulfilled (*mulzim*), while *muwa'adah* cannot be obligatory because they are similar to contracts that are *mustaqbal* (*musyabihah li al-'aqd al-mudhaf ila al-mustaqbal*). However, Muhammad Taqi Uthmani stated that there was a real need (*al-hājah*) to oblige *muwa'adah*, especially interstate (bilateral) and international transactions, as well as the issuance of securities.⁴⁶

DSN-MUI Fatwa Number 85/DSN-MUI/XII/2012 concerning Promises (*Wa'd*) in Sharia Financial and Business Transactions states that promises in sharia financial and business transactions are binding (*mulzim*) in which the person who promises must fulfill them. This obligation is valid if the party who promises is legally competent and has an ability and authority to realize what has been promised and the promise must be made in writing, associated with something (condition) that is not contradicting to sharia, and what is required has been carried out.

The provisions of the fatwa are in line with the opinions of Ulama of Hanafiah, Imam Malik, Imam Sahnun, Ibn Rushd, Imam al-Qurafi, Imam al-Lakhmi, and Ibn Qasim. The consideration is legal certainty so as to avoid *gharar* (uncertainty) and as an effort to prevent any disputes (*daf' al-dharar*). This scheme of promise (*wa'd*) and mutual promise (*muwa'adah*) is found in the DSN-MUI fatwa Number 73/DSN-MUI/XI/2008 on *Musyarakah Mutanāqishah*. LKS promises to sell its capital portion to customers in stages and customers promise to buy a portion of LKS's capital in stages. In this case, promising each other is not a contract because a mutual promise is made in the context of entering into a buying-selling contract for the share of capital owned by LKS in the future. Another fatwa Number 27/DSN-MUI/III/2002 on *al-Ijarah al-Muntahiyah bi al-Tamlīk* in which in this fatwa, the LKS promises to sell the *Mahal al-manfa'ah* to the customer if the obligation arising from the *ijarah* contract has been fully paid for by the customer and the customer promises to buy *Mahal al-manfa'ah* owned by LKS if the obligations arising from the *ijarah* contract have been fully paid or LKS promises to grant *mahal al-manfa'ah* to the customer if the obligation arising from the *ijarah* contract has been fully paid by the customer. DSN-MUI Fatwa Number

Dharir, *al-Gharar fi al-'Uqud wa Atsaruhu fi al-Tatbiqath al-Mu'ashirah* (Saudi Arabia: al-Ma'had al-Islami li al-Buhuts wa al-Tadrib. 1993).

⁴⁵ Mahmud Fahd Ahmad al-Amuri, *al-Wa'd al-Mulzim...*, p. 25-26.

⁴⁶ Muhammad Taqi al-'Utsmani, *Fiqh al-Buyu' 'ala Mdzahib al-Arba'ah ma'a Tathbiqathih al-Mu'ashirah Muqaran bi al-Qawanin al-Wadh'iyyah* (Karachi: Maktabah Ma'arif al-Qur'an. 2015), vol. I, p. 93-94.

28/DSN-MUI/III/2002 on Currency Trading (*Sharf*) contains a provision that forward transaction is unlawful except for the forward agreement mechanism in which the parties promise each other to trade in currency (*bai' al-sharf*) to be carried out in the future. This fatwa is also related to DSN-MUI fatwa Number 96/DSN-MUI/IV/2015 on Sharia Hedging Transactions (*al-Tahawwuth al-Islami/Islamic Hedging*) on Exchange Rates; In this fatwa there are provisions for a mutual promise (*muwa'adah*) to carry out spot transactions in the future by agreeing on the currency to be traded, nominal amount, the exchange rate or the calculation of the exchange rate (formula), and the transaction time, for hedging using both '*aqd al-tahawwuth al-basith* (simple) and '*aqd al-tahawwuth al-murakkab* schemes (with a spot transaction flow, a forward agreement followed by a spot transaction).

If *muwa'adah* in the contract of *musyarakah mutanaqishah* is ignored by the LKS and the customer, it means that there is no buying and selling of the LKS' capital portion. Then, there will be no reduction in the LKS' capital portion and the contract automatically loses its special characteristics, i.e. the reduction in the LKS' capital portion due to gradual purchases made by customers. Also, if the LKS does not want to grant *mahal al-manfa'ah* to the customer (in the contract of IMBT) because the promise is seen not *mulzim*, then it is suspected or should be suspected that the customer is disappointed and it will create a dispute (*niza'*) between the LKS and the customer. Similarly, if *muwa'adah* is not carried out by the parties for spot transactions through *forward agreements* and hedging (*al-tahawwuth al-islami*), then the party that will buy the foreign currency has the potential to be unable to fulfill his/her obligations in the currency he/she needs. Thus, the DSN-MUI fatwa on *wa'd mulzim* is an endeavor of the DSN-MUI, which is based on the principles of *sadd al-dzari'ah* that is to avoid difficulties (*daf' al-dharar*) including avoiding disputes (*daf' al-niza'*), and avoiding uncertainty (*daf' al-gharar*) to realize benefit (*dar' al-mafasid wa jalb al-maṣalih*).

Compensation for Guarantee Services

Ulama agree that guarantees without wages are allowed and they have different views regarding the law of guarantees with wages (*kafalah bi al-ujrah*). Some Ulama allow but some forbid it. Most of Ulama, as explained by al-Syinqithi, viewed that a guarantee in return is a void contract. Al-Khithab in the book of Syarh al-Khithab (4: 242) argued that Ulama have an agreement (*la khilaf*) regarding the prohibition of *kafalah bi al-ujrah/kafalah bi al-ju'l* as in sharia there is a provision that guarantees (*kafalah*), borrowing money (*qard*), and reputation (*jah*) should not be done except for the sake of Allah without taking *ujrah*. Ibn 'Abidin in the book of *al-Bahr al-Rai'iq* (6: 342) and al-Dardir

in the book of *al-Syarh al-Kabir* (3:77) argued that the position of guarantor (*kafil*) is equal with the position of *muqridh* (read: comparing [*qiyas*] kafalah contract to *qard* contract), which is prohibited to receive any compensation. The prohibition is because the compensation for guarantee services is seen as *riba* (interest). *Kafalah* contract may only be made in the domain of virtue (*tabarru'*) - not as a part of a business contract (*tijarah*). Imam Malik in the book of *Majma' al-Dhmanat* (5: 111) by al-Baghdadi argued that guarantees in return is not seen as a good deed. Ibn 'Irfah stated that guarantees in return are not accepted. Imam Ibn Jarir al-Tabari in his book *Ikhtilaf al-Fuqaha'* (9) also argued that a guarantee in return is a void contract.⁴⁷

The prohibition of compensation for the guarantee is based upon several considerations. The *kafalah* contract is equal with *qard* contract in which both contracts are included in the domain of *tabarru'* contract; taking compensation for *qard* is seen as *riba*, similar with taking compensation for guarantees (as explained by Ibn 'Abidin and al-Dardir).⁴⁸ In the perspective of *maqashid al-shari'ah*, *Kafalah* contracts include the contracts aimed at social good (*al-irfaq*, *al-tawasu'ah*, and *al-ihsan*).⁴⁹ The agreement on compensation for guarantees is a legal act violating the *maqasid al-shari'ah*.

Ulama who allowed the compensation for guarantee include al-Winsyarisi in his book *al-Mi'yar al-Mu'arab fi Fatawa Ahl al-Maghrif* and al-Syeikh al-Khafif in *al-Iqtishad al-Islami* (1: 462) by al-Thahawi. Ishaq Ibn Rahawaih, as stated by Imam al-Mawardi in the book of *al-Hawi*, and Imam al-Tasuri, as stated by Ibn al-Mundzir in the book *al-Isyraf* (1: 120), viewed that compensation for guarantee services is permissible.⁵⁰ This permissibility is as the compensation for the risk (*al-mukhatharah*) that becomes his/her responsibility. Al-Winsyarisi conveyed the opinion of 'Abdullah al-Qauri regarding the differences of opinion of Ulama regarding the legal status of taking compensation for good name services (*al-jah/prestige*). 'Abdullah al-Qauri considered the need for a guarantor in expressing his opinion.⁵¹ In this

⁴⁷ Muhammad Mushthafa Abuhu al-Syinqithi, *Dirasah Syar'iyah li Ahamm al-'Uqud al-Maliyyah al-Mustahdatsah* (KSA: Maktabah al-'Ulum wa al-Hikkam. 2001), p. 330-337. 'Abd al-Rahman al-Ghuryani, *Ahkam al-Mu'amalat al-Maliyyah fi al-Fiqh al-Islami* (Torobus: al-Jami'ah al-Maftuhah. 2002), p. 243-244.

⁴⁸ Rafiq Yunus al-Misri, *Fiqh al-Mu'amalat al-Maliyyah* (Damaskus: Dar al-Qalam. 2007), p. 218.

⁴⁹ Al-Syeikh 'Ala' al-Din al-Za'tari, *Fiqh al-Mu'amalat al-Maliyyah: Shiyaghah Jadidah wa Amtsilah Mu'ashirah* (Damaskus: Dar al-'Ashma'. 2010), p. 507. Nazih Hammad, *Qadhaya Fiqhiyyah Mu'ashirah fi al-Mal wa al-Iqtishad* (Damaskus: Dar al-Qalam. 2001), pp. 284.

⁵⁰ Nazih Hammad, *Qadhaya Fiqhiyyah Mu'ashirah...*, p. 284.

⁵¹ Nazih Hammad, *Qadhaya Fiqhiyyah Mu'ashirah...*, p. 292.

case, the guarantor needs living expenses (income [guarantee fee]. With *masyaqqah* he/she experiences, and the guarantor requires travel expenses [*mas'a*], and the agreement on compensation for guarantee services is then seen permissible

Historically, the prohibition of guarantee compensation is acceptable since it is solely hoping for a compensation from Allah. However, the current conditions are different because of the guarantee agreement (*kafalah*) as a part of corporate businesses. Guarantee is a condition that must be fulfilled by the cooperative receiving the financing. Under these conditions, it is impossible to guarantee for free. The impossibility of taking guarantee services is an opinion that is not in line with the current reality. In accordance with the *maṣlāḥah* principle and the principle that "fatwas can be changed due to the changing circumstances of the times," compensation for guarantee services (business activities) is permissible then.⁵²

Nazih Hammad explained that there is no prohibition on changing a benevolent contract (*wadi'ah*, *kafalah*, *wakalah*, and *hawalah*) into a business contract (*ijarah* and *ju'alah*) provided that the parties accept it voluntarily (*al-ridha*) and are the part of the agreement (contract).⁵³ He allowed the compensation for guarantee services with analogous arguments (*qiyas*) against the opinion of ulama who allow compensation for obedient work and getting closer to Allah.⁵⁴ Hanafiah, Malikiah, Hanabilah, and Syafi'iah scholars allow compensation for compulsory work because it is done to get closer to Allah and as a form of obedience to Allah such as in services for teaching the Qur'an, calling for prayer, and praying priests. explained the opinion of Hanafiah Ulama that allows compensation for teaching fiqh. Most of the scholars who allow compensation for the services of washing and shrouding the corpse. Ibn Taimiah allowed compensation for witness services (*syahadah*). Syafi'iyah scholars allow compensation (*ujrah*) for work including fardhu 'ain, namely compensation for searching for missing (drowning) people. and teaching services for Surah al-Fatihah.

Al-Syeikh al-Khafif argued that the opinion of the Ulama prohibiting to take compensation for guarantee services is an opinion that is not based on verses of *Al-Qur'an* and *hadith* (directly), but through reason known as the analogy method/*qiyas* (equating *kafalah* with *qard*). He emphasized that permissibility to take the compensation for guarantee services is included in the domain of *ijtihad* based upon *al-'urf* (good habits in society). Since the opinion

⁵² Muhammad Mushthafa Abuhu al-Syinqithi, *Dirasah Syar'iyah li Ahamm al-'Uqud al-Maliyyah al-Mustahdatsah* (KSA: Maktabah al-'Ulum wa al-Hikkam. 2001), p. 333.

⁵³ Nazih Hammad, *Qadhaya Fiqhiyyah Mu'ashirah...*, p. 290-291.

⁵⁴ Nazih Hammad, *Qadhaya Fiqhiyyah Mu'ashirah...*, p. 298-299.

of the ulama is not based directly on the arguments of *Al-Qur'an* and the *hadith* of the Prophet PBUH, and takes into account *al-'urf*, the benefit in the form of *raf' al-haraj* (removal of difficulties), an agreement on the compensation for guarantee services is permissible. Muhammad Baqir Shadr in *al-Bank al-Laribawi fi al-Islam* (131) allowed the compensation for guarantee services as it considers the risk (*al-mukhatharah*), actions (*al-'amal*) carried out by the guarantor, and the guarantee period.

Muhammad Mushthafa Abuhu al-Syinqithi conveyed two conclusions in relation to the differences of opinion among ulama regarding the permissibility of compensation for guarantee services. The strong opinion in terms of theorem (*arjah al-aqwal*) is the opinion of the majority of Ulama stating that taking compensation for guarantee services is forbidden (*mamnu'*) as a *kafalah* contract can only be done for free (*tabarru'*). This opinion is based upon analogical reasoning (*qiyas*) as a part of the *ijtihad* method. Opinions of Imam Malik in the book of *Bidayat al-Mujtahid wa Nihayat al-Muqtashid* (2: 284) and Imam Abu Hanifah as contained in the book of *Hasiyyah Ibn 'Abidin* (5: 687) allowed the compensation for the guarantee services (*hibbah bi al-tsawwab* contract). Muhammad Mushthafa Abuhu al-Syinqithi argued that the compensation for guarantee services is not equal with the compensation for *qard* (money loans). Agreements and taking the compensation for guarantee services are permitted.⁵⁵

DSN-MUI has issued two fatwas related to *kafalah*: DSN-MUI fatwa Number 11/DSN-MUI/IV/2000 concerning *Kafalah*; in the decision of the fatwa, part one, Number 2 it is determined that the guarantor can receive a fee as long as it is not burdensome; and DSN-MUI fatwa Number 57/DSN-MUI/V/2007 concerning Letter of Credit (L/C) with *Kafalah Bil Ujrah* Contract.

In terms of essence, as contained in the sociological considerations of the DSN-MUI fatwa Number 11/DSN-MUI/IV/2000, the *kafalah* contract is required by entrepreneurs in running their business; and sociological considerations of fatwa Number 57/DSN-MUI/V/2007, that guarantee facilities are required from Islamic Financial Institutions for foreign trade transactions conducted by customers; Therefore, it is seen sociologically that the fatwa regarding *kafalah bi al-ujrah* has been stipulated to meet the needs of business transactions (*tijarah*).

Non-cash Buying and Selling of Gold

Among Ulama, the legal status of non-cash buying and selling of gold has become a debate, which has initiated from the method in understanding the

⁵⁵ Muhammad Mushthafa Abuhu al-Syinqithi, *al-Dirasah al-Syar'iyah li Ahamm al-'Uqud al-Maliyyah al-Mustahdatsah* (KSA: Maktabah al-'Ulum wa al-Hikkam. 2001), vol. I, p. 336-337.

hadith about the transaction of *ribawi* goods (*al-amwal al-ribawiyyat*). In the *hadith* as narrated by Imam Muslim, Imam Abu Daud, Imam Tirmizi, Imam Nasa'i, and Imam Ibn Majah, from 'Ubadah Ibn Shamit, the Prophet Muhammad PBUH stated: "(Sell) gold for gold, silver for silver, wheat for wheat, *sya'ir* (peanut) for *sya'ir*, dates for dates, and salt for salt (is allowed with a condition that they must be equal, having the same type and done in cash. If it is a different kind, sell it as you wish as long as it is done in cash." In addition to this *hadith*, Muslim narrated a *hadith* from Bara' bin 'Azib and Zaid bin Arqam stating that "the Prophet forbade selling silver for gold in a cashless way."

A *hadith* as narrated by Imam Muslim from 'Ubadah and Abi Sa'id in regard to six *ribawi* objects (gold, silver, wheat, barley, dates, and salt) has become the main subject of discussion in determining the 'illat (legal reason) of *riba*/usury. These objects are grouped into two: *nuqud/tsamaniyah* (objects with money as a medium of exchange such as gold and silver) and *al-tha'am* (objects can be consumed such as wheat, barley, dates, and salt). The Ulama disagreed about 'illat of gold and silver. The Ulama of Hanafiah and Hanabilah (Imam al-Nakha'i, Imam al-Zuhri, Imam al-Tasuri, and Imam Ishaq) viewed that 'illat of usury on the gold and silver exchange is a scale (measured by weighing); for this, the law of *riba* is applied for every exchange of similar objects measured by scales such as the exchange of iron, lead, zinc, gold, silver, meat, sugar and every weighed object. These objects may not be traded unless they have the same weight and are paid in cash.⁵⁶ The Ulama of Malikiyah and Syafi'iah viewed that 'illat of usury for gold and silver is money (*al-nuqud/al-tsamaniyyah*). Muhammad Abu Zahrah argued that 'illat in terms of the prohibition of the exchange of gold and silver is because the status of these two stones as *mi'yar* (price standard) as they are intrinsically precious; thus becoming the price standards for other objects.⁵⁷

Salih Ibn Muhammad al-Sulthan affirmed that the 'illat for the prohibition of exchanging gold for gold and silver for silver is related to in their position as a price (*tsamaniyah*). The determination of the 'illat is intertwined as it can explain two legal facts: a) the recent money is in the form of paper (not made of gold or silver). Although not being gold, money serves as a value standard (*tsaman/qimah*). The exchange of money for money, therefore, must apply the law of *ribawi* though money is not mentioned in the *hadith* above. b) The existence of jewelry (*sil'ah*) in the form of vessels or other unique objects is not

⁵⁶Shalih Muhammad al-Sulthan, *al-Riba: 'Illatuhu wa Dhawabithuhu wa Bai' al-Dain* (KSA: Dar Ashda' al-Mujtama'. 1418 H.), p. 26. Umar Ibn Abd al-Aziz al-Matruk, *al-Riba wa al-Mu'amalat al-Mashrafiyyah fi Nazhar al-Syari'ah al-Islamiyyah* (t.t: Dar al-'Asimah. t.th), p. 96-96.

⁵⁷Shalih Muhammad al-Sulthan, *al-Riba...*, p. 31.

subject to the law of usury since jewelry does not serve as a standard/*tsaman*/price.⁵⁸

The Ulama have differentiated objects into objects as price (*al-nuqud*) or standard prices (*al-tsamaniyyah*) and objects in the form of goods (*al-'urudh*). *Al-nuqud* is an object accepted by public as a medium of exchange and as a standard of value for goods and services, whether it is made of mineral (metal) or leather. Meanwhile, *'ardh* assets refer to objects agreed upon and/or determined by the authorities not as a medium of exchange, which can be in the form of movable objects (*al-manqul*) and immovable objects (*al-'iqar*).

In addition to the word *nuqud* (plural form of *naqd*), there are several terms in Islamic laws referring to money. *Atsman* (plural form of *tsaman*) means the value of something and the price (*tsaman*) of the goods sold (*qimah*) received by the seller in return for the goods he/she has sold. Historically, *naqd* or *tsaman* was money made of gold and silver. *Fulus* (the plural form of the word *fals*) refers to money made of metal other than gold and silver and is used in society as money and means of payment. *Sikkah* (the plural form of the word *sukak*), which has two meanings of an iron stamp to stamp currency and the currency of Dinar and Dirham that have been coined and stamped. *'Umlah*, which has two meanings of currency units applied in certain countries or regions, such as in Jordan, is similar with Dinar or Rupiah applied in Indonesia and is the currency, in general similar with *nuqud*.

Muhammad Rawas *Qal'ah Ji* stated that money (*nuqud*) must meet the following criteria. First, money is an object that is not able to be directly used but only as a medium to obtain benefits, which is used as a price by community, whether it is made of metal, printed paper or other materials. Second, money is issued by an authorized institution. For this reason, if people use camels (or camel skins) as a payment instrument, these camels are not able to be considered as money (*nuqud*), but only as *badal* (replacement) for money.

Principally, the status of assets recognized as a medium of exchange (money [*nuqud*]) functions as a standard of value for other assets. In history (including in Islamic history), gold and silver were treated as money (*nuqud*) - called as *Dinar* (gold) and *Dirham* (silver). Imam Ghazali in his book *Ihya' 'Ulum al-Din* (4: 91) stated that Allah created Dinar and Dirham as *hakim* (*regulating*) and *mutawasith* (mediators) for other assets to determine their value (*qimah*). Ibn Khaldun in book of *Muqaddimah* (680) stated that Allah created gold and silver as the values (*qimah*) for all other assets. Sarkhasi in the book *al-Mabsuth* (2: 191) stated that gold and silver in various forms have been created by Allah as a value substance (*qimah*) or price.

⁵⁸Shalih Muhammad al-Sulthan, *al-Riba...*, p. 32.

The history of using gold and silver as currency followed the state policies. The Jahiliyah Arab community used to use gold Dinar (Heraclius Dinar [Emperor of Byzantium]) and silver Dirham (Persian Baghli Dirham). The people of Mecca at that time used money made of metal in the form of *tibr* (gold that had not been minted as currency). People at that time used gold Dinars and silver Dirhams based on the weight - not the amount because the scale of the money at that time was not the same. One (1) Baghli Dirham was equal to 8 Daniq; 1 *Dirham* Thabari was equal to ½ Dirham Baghli, i.e. 4 Daniq; 1 Rithl was equal to 12 Uqiyah; and 1 Uqiyah was equal to 40 Dirhams. 1 Nishsh/Nasysy was equal to half Uqiyah, i.e. 20 Dirhams; 1 Nuwah was equal to 5 Dirhams; 1 Daniq was equal to 1/6 Dirham; 1 Qirath was equal to ½ Daniq and 1 Habbah was equal to the weight of 1 moderate *sya'ir* peanut. The use of Dinar and Dirham as money did not differentiate the forms, both printed (*madhrub*) and stamped (*masbuk*) money with gold or silver (money), which was still in the form of grains (*tibr*). All of these forms of money were used on the basis that these objects were gold and silver and not required to be in a special form as official money.

Umar Ibn al-Khaththab wrote the words "*Bismillah*," "*al-Hamdu lillah*," "*Bismi Rabbi*," and "*Muhammad Rasulullah*" (as Islamic symbols) on Dinar and Dirham originating from Byzantium and Persia. A number of historians stated that the first person to issue Dinar and Dirham to be enforced in the Islamic region (State) was Abd al-Malik Ibn Marwan (Khalifah of the Umayyads coming to power after the phase of al-Khulafa' al-Rashidun) in 74 H as a response to the governors who made their own currency. Several governors who made the money included al-Hajjaj in 75 H making Dirham Baghli; Abdullah Ibn Zubair making his own dinar by affixing his name on dinar (i.e. Abdullah Amir al-Mu'minin) and Mush'ab Ibn Zubair (Governor of Iraq) making a special dirham.

The expert's explanation showed a change in Islamic literature regarding money. Muslims accepted Dinar and Dirham from Byzantium and Persia as money. Caliph Umar Ibn al-Khatthab affixed some Islamic symbols on money coming from Byzantium and Persia; Caliph Abd al-Malik Ibn Marwan unified currencies created by a number of governors of the Umayyad caliphs who minted local money (*'umlah*) and Abd al-Malik Ibn Marwan made his own gold Dinar in 75 H.

In Indonesia, the Central Bank (the authorized institution) has issued Rupiah currency made of metal and paper - not as money with intrinsic value (gold and silver) or not using gold and silver as *usul al-nuqud* or underlying of the money issued. Therefore, it implicitly shows that gold is not money (*nuqud*) and not used as a medium of exchange. In this regard, the DSN-MUI has viewed

that the *hadith* of the Prophet regulating the exchange (buying and selling) of gold for gold, silver for silver, and gold for silver or vice versa, requires that the exchange is done in cash. If it is done not in cash, then the Ulama agreed that the exchange is declared as a usury transaction. For this, gold and silver in the view of the Ulama are known as *amwal ribawiyah* (usury goods). Most of Ulama viewed that the provisions or laws in transactions are *ahkam mu'allalah* (law with *'illat*). *'Illat* of money is as a price (*tsamaniyah*), meaning that gold and silver during the *wurud* hadith were *tsaman* (price, means of payment or means of exchange, money).

DSN also assesses money (in *fiqh* literature called as *tsaman* or *nuqud*) defined by Ulama as a medium of exchange and is generally accepted, whatever its form and conditions of the media is⁵⁹ and is used as a price (*tsaman*) by society, whether it consists of metal or printed paper or other materials and issued by an authorized financial institution.⁶⁰ Therefore, something, whether gold, silver or others including paper, is seen or has the status of money only if the public accepts it as money (means of exchange) and is issued or determined by the authorized institution. In other words, the basis for the status of something declared as money is custom or community behavior.

Today, the world community no longer treats gold or silver as money, but as goods (*sil'ah*). Ibn Taimiyah and Ibn al-Qayyim emphasized that if gold or silver is no longer used as money, say, used as jewelry, then they have the same status as goods (*sil'ah*). Based on these matters and considering the rules of *uṣul al-fiqh* and *fiqh* rules, then at this time the legal terms or provisions in the exchange of gold and silver stipulated by *hadith* are no longer valid.

Based on this, DSN allows buying and selling gold not in cash since it is not money. The DSN-MUI Fatwa Number 77/DSN-MUI/V/2010 concerning Cashless Gold Trading, is a fatwa as a legal breakthrough, triggering many criticisms. In the fatwa, it is stated that buying and selling gold not in cash, either through ordinary buying and selling or through buying and selling of murabaha, is acceptable (*mubah, ja'iz*) as long as gold does not become the official medium of exchange (money). The selling price (*tsaman*) of gold may not increase during the term of the agreement even though there is an extension after the due. The fatwa also states that gold purchased not in cash may be used as collateral (*rahn*) and the collateral gold cannot be transferred.

Sociologically, the fatwa is a sharia legal answer to public questions regarding the legal status of non-cash gold trading. The fatwa sees that the

⁵⁹ Abdullah Ibn Sulaiman al-Mani', *Buhuts fi al-Iqtishad al-Islami* (Mekah: al-Maktab al-Islami. 1996), p. 178.

⁶⁰ Muhammad Rawas Qal'ah Ji, *al-Mu'amalat al-Maliyah al-Mu'ashirah fi Dhau' al-Fiqh wa al-Syari'ah* (Beirut: Dar al-Nafa'is. 1999), p. 23.

community is accustomed to do such the buying and selling model, either in *taqsith* (installments) or on *ta'jil* (tough). It then arises a question regarding the permissibility of such buying and selling model. The fatwa has been issued to provide guidelines for non-cash gold transactions.

Something Flat and Changed

The fatwa of the National Sharia Council (DSN) containing the promise is found in the fatwa *ijārah Muntahiyah bi al-tamlīk* (IMBT) Number 27 of 2002, *mushārah mutanāqishah* Number 73 of 2008, *murābahah* Number 4 of 2000, *sale and lease back* Number 71 of 2008, and promise Number 85 of 2012. DSN has two views. Non-binding promises as contained in fatwa number 27, 71 and 4 and the binding fatwa that must be implemented as contained in fatwa Number 73 and 85. In the chronological context, it can be seen that the view of DSN has changed on the status of promises. At the beginning, the DSN viewed that promises were not binding, and then they became binding in the next fatwa. This showed two things about the dynamics of Islamic law as seen from its interaction with business development and the consequences of changing these provisions. This change has corrected the previous opinion regarding the promise or not caused by the last fatwa Number 85 on binding promises not mentioning a clause correcting the previous fatwa.

In terms of the compensation in the guarantee contract (*kafālah*), the DSN is consistent. Fatwa Number 11 of 2000 concerning *kafālah* has stated that compensation is permissible. Similarly, fatwa Number 57 of 2007 concerning letters of credit with *kafālah bi al-ujrah* contracts explicitly mentions the permissibility of compensation. This is interpreted as the consistency of the fatwa regarding the permissibility of compensation in guarantee. The fatwa that appeared later has emphasized the provisions of the previous fatwa, which were less strict in allowing compensation in guarantee.

DSN is consistent in regulating the buying and selling of gold. In fatwa Number 28 of 2002 on *al-ṣarf*, it is emphasized that buying and selling of currency must be done in cash and if the currency is similar in type, then the value is equal. Also, fatwa Number 77 of 2010 concerning non-cash buying and selling of gold has emphasized that buying and selling gold as currency must be done in cash and its value. However, this fatwa provides a new norm regarding the sale and purchase of gold as a commodity that can be done in installments (not in cash). In this fatwa, the function of gold is considered to have shifted from currency to traded commodity goods.

The existence of flat and changed provisions shows the effectiveness of the concept of *murā'at al-ʿilal wa al-maṣāliḥ*. The law follows developments and considers the benefit. The binding promises are to anticipate the parties to

avoid their obligations and to provide legal certainty. Practices in Sharia finance has also proven the binding promises because if one of the parties does not carry out his/her promise, he/she will be subject to sanctions to pay the losses.⁶¹

These findings support the research of Saeed, Aziz, and Maksun which states that formal legal aspects still dominate fatwas. However, fatwas have attempted to respond the economic needs by providing solutions to modern transaction practices that legal status is debatable in *fiqh* scholars. This is different from the findings of Laldin which states that Islamic financial products copy conventional products.

Conclusion

The *murā'at al-'ilal wa al-maṣāliḥ* approach starts from the principle stating that every text of the *Qur'an* and *hadith* related to economic activities has a legal cause (*'illat*) and that cause can be known through *ijtihad* (*ma'qulāt al-ma'na*). From this approach, it is proven to be able to dynamize law and respond to community needs. This can be seen from the fatwas issued by the National Sharia Council of the Ulama Council such as binding promises (*wa'd* and *muwā'adah*), permissibility of compensation for guarantee services, and buying and selling gold not in cash. This fatwa has provided an answer to the public's need for transaction law because there are some different views among the ulama regarding its legal status. DSN has chosen the legal opinion that fulfilling conditional promises is obligatory with the considerations of avoiding harm (*sadd al-dzari'ah*), avoiding disputes (*daf' al-niza'*), and avoiding uncertainty (*daf' al-garar*). Compensation for guarantee services is also based on modern business processes requiring guarantees for business activities. While, the permissibility of buying and selling gold not in cash is due to a shift in the use of gold. In the past, non-cash buying and selling of gold was forbidden because of the status of gold at that time as currency or a value standard for money, but now gold is used as a commodity to be traded. Due to the change in status, gold status becomes goods like other goods that can be traded on credit. The law then moves by looking at the existing benefits and both community and financial institutions can implement these transactions. The implementation of *murā'at al-'ilal wa al-maṣāliḥ* implicate the satuts of law that there are things fixed and changeable. Because *'illat* is permanent and can be translated for different contexts and circumstances. The law can change when

⁶¹ Rafiq Yunus Al-Misri, "The Binding Unilateral Promise (*wa'd*) in Islamic Banking Operations: Is it Permissible for a Unilateral Promise (*wa'd*) to be Binding as an Alternative to a Proscribed Contract?". *Journal of Islamic Economic*, King Abdul Aziz University 15, No. 1, (2002), p. 30.

the cause of the law is no longer found. The Islamic banking then might the comfortable contract for their business.

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Regulation and Fatwa

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