



## Revitalization of Istihsan Bi Al 'Urfi in Sharia Financing: Fatwa Study 2010-2018

Syarifah Gustiawati Mukri<sup>1</sup>, Harisah<sup>2</sup>, Aliyeva Patimat Shapiulayevna<sup>3</sup>

<sup>1</sup>Universitas Ibn Khaldun Bogor, Indonesia, syarifah@fai.uika-bogor.ac.id

<sup>2</sup>Institut Agama Islam Negeri Madura, Indonesia, harisah@iainmadura.ac.id

<sup>3</sup>Moscow State University of Technologies and Management, Dagestan, Russia,  
patima.alieva@yandex.ru

**Abstract.** The community's need for sharia financing transactions is very urgent. So Islamic law products are required to be able to provide guidelines for community economic transactions as a form of response to community needs. From this, this study examines how the concept of istihsan bi al 'urfi was revitalized in one fatwa from 49 fatwas set by the DSN-MUI during the 2010-2018 period as evidence for legal determination. Therefore, istihsan bi al 'urfi is a form of ijtihad scholars in establishing law. The research method used is a qualitative research method with a literature approach, namely by observing the use of the determination method with istihsan bi al 'urfi. The results of the study stated that there was 13 times the use of istihsan bi al 'urfi in determining the permissibility of financing based on sharia as a legal consideration. Although previously it was equipped with arguments from the Qur'an and hadith as well as ijma' and qiyas. This shows that DSN-MUI ijtihad always develops according to the demands of the times to develop Islamic legal products in the field of Islamic finance and economics without losing the basic values of sharia.

**\*Corresponding Author**

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## INTRODUCTION

Along with the dynamics of contemporary economic challenges, and society's need for financing in the Islamic finance sector which is increasingly pressing, of course, there are many problems of Islamic law, especially those related to Islamic economic law and its development that must be considered. So, the urgency of the goals of Islamic law (*Maqashid al-Shari'ah*) and the formulation of the method of determining Islamic law (*fiqh*) contextually need to be revitalized. The role of the ulama should be able to provide solutions to the problems faced by the people, especially in terms of Islamic finance and economics, who are responsible for guiding and directing so that the goal of being good and prosperous beings in this world and the hereafter can be actualized.

In the context of the largest Muslim community in Indonesia, of course, the position of the ulema's fatwa is very important in socio-religious life, especially in building community institutions, fatwas are also very important for the growth and development of Islamic financial institutions (Fauzi, 2017). Thus, the increasingly widespread development of Islamic financial institutions in Indonesia lately, requires the role of the Sharia Supervisory Board (DPS) in each Islamic financial institution to accommodate various problems that require a fatwa, in order to obtain equality in handling problems that exist in the world. Islamic financial institutions through the National Sharia Council (DSN).

Fatwas in the view of Islamic law play an important role as an answer and response to problems that develop in society. Fatwa issued by the ulema or mufti individually or collectively in response to the questions posed. Although, fatwas are sometimes recognized as not having binding legal force (*ghoiru mulzimah*). But, fatwas have had a very significant role in providing religious legal considerations to the Muslim community from the past until now. Especially in this case, if an economic problem is not contained in a detailed legal explanation in the arguments of the Qur'an or al-Sunnah.

The stipulation of a fatwa as the basis for transactions in Islamic financial institutions is determined by the MUI through the DSN-MUI, which consists of fiqh experts and sharia banking practitioners whose function is to carry out the MUI's duties in encouraging and advancing the people's economy. The main tasks of DSN-MUI include; exploring, studying, and formulating the values and principles of Islamic law (*syar'iyah*) in the form of fatwas to be used as guidelines in transaction activities in Islamic financial institutions. DSN-MUI also has the task of supervising the implementation and implementation of these fatwas in Islamic financial institutions through DPS which is an arm of DSN-MUI. Amin, (2011) Giving fatwas on various problems of the Islamic economy that develops in the community is carried out systematically and procedurally so that the determination of the fatwa is better and more effective.

Based on the explanation above, the determination of the fatwa based on *ijtihad istihsan bi al-urf* needs to be reviewed, as one of the *ijtihad* methods that can be used as a source of law in overcoming various sharia economic transactions for which there are no legal arguments that are explained explicitly in the law. Al-Qur'an, Sunnah, Ijma and Qiyas. So that the urgency of using this method can be revitalized and developed to achieve the benefit. This study examines *Istihsan bi al-urf* in Sharia financing for the 2010-2018 fatwa study, through normative legal

studies, by examining several fatwas that have been set by the board. Thus, the purpose of determining the fatwa can provide benefits and be a solution in responding to the needs of community economic transactions.

## LITERATURE REVIEW

In financing in Islamic banking or in the practice of Islamic economics, transactions are often found whose laws have never been regulated and found in the past. In Indonesia itself, there are legal regulations for financing Islamic banking or sharia economic activities which are regulated by fatwas issued by the DSN and were formed and supervised by the MUI (Amin, 2011). Efforts to develop law are carried out to keep up with the times and the economy which is developing dynamically and progressively and is very much needed as a legal basis (*hujjatul Islam*) (Raharjo, 2003).

Sharia economy law still moves quickly and has no limit, but there are only a limited number of texts and they've either stopped or haven't gone down anymore. In situations like this, mujtahids need to help Muslims and give fatwas about legal issues that have just come up in the world of the economy or Islamic finance. They need to do this through their *ijtihad*. When people are allowed to answer for themselves in court, it can be very dangerous (Amin, 2008). DSN-MUI is the only institution that can issue fatwas in the field of Islamic law that deals with Islamic banking products. All possible mistakes in regulating fatwas must be avoided because the law that gives fatwas is *fardhu kifayah*. So, DSN-MUI needs the right way to figure out and respond to the law of a new issue in Islamic economics. This led to the development of several *istinbath al-ahkam* methods, such as *qiyas*, *istihsan*, *urf*, *istishab*, *maslahah mursalah*, and *syar'u man qoblana*, to name a few. If you want to learn about Islamic law, the *istinbath ahkam* method is what you want to learn about right now (Zahra & Syafi'i, 2005).

A fatwa as an explanation of a case of Islamic law should have a legal basis. This is because a fatwa that does not have a legal basis is seen as an act of making up the law (*tahakkum*) and is prohibited. The basis for the fatwa is a number of legal arguments (*adillah alahkam*) consisting of verses from the Qur'an, the hadith of the prophet, *Ijma'* & *Fihiyyah* Rules. Determination of fatwas also pays attention to the opinions of scholars, both those expressed by individuals and by clerical institutions, as well as the arguments of *'aqli*.

The procedure for determining a fatwa on Islamic economics is carried out by a plenary meeting attended by all members of the DSN-MUI, Bank Indonesia, or other financial authority institutions, business actors, including banking, insurance, capital markets, and others. The flow of the determination of the fatwa on Islamic economics is as follows: The first stage is the daily implementer of DSN-MUI receiving proposals or legal questions that can be submitted directly by practitioners of economic institutions through DPS or directly to the daily management of DSN-MUI. In the second stage, the secretariat submits proposals and questions related to the problem to the chairman. In the third stage, the head of the daily implementing agency together with members of the DSN-MUI BPH and expert staff must make a memorandum related to the study and discussion of a question and legal proposal at the latest 20 working days. In the fourth stage, the head of the daily implementing agency brings the results of the discussion to the DSN-MUI plenary meeting for approval. The fifth stage, the memorandum that has been approved by the DSN-MUI plenary meeting is set to become a DSN-MUI fatwa, in which the fatwa is signed by the general chairman of the MUI and the MUI secretary (Amin, 2011).

Before the fatwa is stipulated, a series of discussions will be held, including a careful review of the arguments and the opinions of the priests of the school of thought. If the problem to be a fatwa is a problem that has a clear law (*al-ahkam al-qath'iyyat*), then the fatwa will be delivered as it is. Meanwhile, if there is a difference of opinion between the schools of thought in the issues discussed, the determination of the fatwa is based on the results of efforts to find common ground between the opinions of the schools through the *al-jam'u wa al-taufiq* method. If efforts to find common ground are not successful, then the determination of the fatwa is based on the results of the *tarjih* through the *muqaranah al-madzahib* method using the rules of *ushul al-fiqh al-muqarin*. If there is no legal answer to the problem discussed in the opinion of the schools of thought, then the determination of the fatwa on the matter is based on the results of *ijtihad jama'i* (collective ijtihad) through the *bayani*, *ta'lili* (*qiyasi*, *istihsani*, *ilhaqi*) methods *zari'ah*. Every fatwa that is stipulated must always pay attention to the general benefit (*Mashalih 'amah*) and *maqashid al-syari'ah* (Mubarok & Hasanudin, 2017).

## **METHOD**

This study describes the process of determining the DSN-MUI fatwa on Islamic financing products and economic transactions that require legal certainty in meeting the increasingly pressing needs of the community. This study uses a normative legal research approach, namely

to reveal the level of use of *istihsan bi al'urf* as one of the ijihad methods, in sharia financing products in the DSN-MUI fatwa for the 2010-2018 period (Susiadi, 2014).

Of the various approaches that exist in legal research, the author only uses a conceptual approach to analyze the contract concepts contained in the DSN-MUI fatwa (Soekanto & Mamuji, 1985). While the legal materials used are secondary legal materials such as fiqh books, books, journals, and tertiary legal materials, especially dictionaries collected through literature review. To support the description of the level of use of *istihsan bi al'urf*, according to the needs of the community, the author chose three fatwas, which were then elaborated so that they could see the revitalization of *istihsan bi al'urf* in Sharia financing products.

It is known that Istihsan is one of the methods of ijihad in determining the law which must refer to the main purpose of the law, namely to maintain the benefit and avoid harm, both in this world and in the hereafter. Various legal cases, which are specifically regulated in the Qur'an and hadith as well as those produced through ijihad, must start with this goal. In this case, the determination of law for cases whose benefits are not explicitly explained in the Qur'an and hadith, then the role of the mujtahid is very important to explore and find the benefits contained in the determination of the law (Djamil, 1999). The search for *ushul fiqh* experts for "benefit" is manifested in the form of the ijihad method which is used as a tool for establishing laws whose cases are not explicitly mentioned in the Qur'an and Hadith.

Based on this explanation, it can be assumed that every method of determining the law used by *ushul fiqh* experts must lead to *maqashid al-sharia*. In the view of *ushul fiqh* scholars, the meaning of *istihsan* is to state and believe in the goodness of something, there is no difference of opinion between them because *istihsan* is often found in the Qur'an and Hadith. According to 'Abdu al-Wahab Khallaf formulates *istihsan*: "A person who turns away not to set a problem with existing legal provisions, to another law that is contrary to the law is due to something that requires it (Khallaf, 1970).

## **RESULTS AND DISCUSSION**

Financing products are always undergoing development or modification to meet the needs of the community for both consumptive and productive purposes, in this modification of financing products is carried out with the ijihad of fatwa scholars to avoid the practice of usury. Sharia financial products have developed very dynamically in line with the contemporary economic

developments of the global community. The transaction model that is so varied seems to be an unavoidable necessity. As a consequence, Islamic financial institutions, which are gaining popularity in contemporary society, are "forced" to follow the development of transaction models that tend to be value-free, forcing DSN-MUI to proactively respond to the dynamics of the conventional economy to provide value for trust in the community that Islamic finance is also able to exist in response to needs. So, it requires a process of *ijtihad* (Burhanuddin, 2016).

Sometimes, *mujtahid* fatwas grow from single contracts to multiple contracts. Fatwa scholars need to think about the sources of sharia economic law when they do this so that what they say in the fatwa doesn't include usury and has a *maslahah* effect on everyone, both the general public and Islamic financial institutions (Abdulahanaa, 2014).

There are several sources of law that are used as evidence in determining the fatwa. One of the sources of law used is *istihsan bi al'urf* which is studied in this study. There are as many as 49 fatwas issued by DSN-MUI for 8 years, namely from 2010 to 2018 from 49 fatwas there is only one fatwa that was stipulated by considering 'urf which is considered to contain goodness, namely fatwa No: 119/DSN-MUI/2018 About Ultra Micro Financing (*Al-Tamwil Li Al Hajah Al Mutanahiyat Al-Shughra*) based on Sharia Principles.

Ultra-micro financing, namely the purchase of objects in the form of various goods (multi goods) and objects in the form of various services (multi-services), the ability is determined by confirming the purchase price from the results of predicting the number of goods or services needed in various quantities to the buyer and the buyer pays it at the same price. more as an advantage. This financing is aimed at the purchase of goods or services in which the amount varies or the number of goods is not clearly known with certainty in the amount. This is a contract action that is contrary to the rules of contract permissibility in general, there are several conditions in the contract that must be fulfilled so that it is said to be legal according to some contract applications on ultra-micro financing detailed in fatwa Number: 119/DSN-MUI/II/2018.

Maslahah is one of the considerations of Indonesian scholars, when enacting a law, including a fatwa on ultra-micro financing, this financing is financing for the purchase of various goods and services in very small amounts. In addition to the consideration of *maslahah* used by scholars, there are several considerations, such as requests for fatwa requests by other institutions, including in determining the permissibility of ultra-micro financing.

Several provisions that must be considered in buying and selling transactions include the existence of pillars that require the existence of a seller and a buyer, goods, and prices, as well as consent and qabul. According to the number of scholars from several pillars that have been determined, there are conditions that must also be met, namely that goods and services must be halal so that transactions for goods and services that are haram are null and void, the prices of goods and services must be clear, the place of delivery must be clear, and goods transacted must be clearly fully in ownership (Hidayatullah, 2012).

In this ultra-micro financing, there is uncertainty about the price of the goods or services transacted because the number of goods transacted varies. However, this financing is considered legitimate by the board with some legal sources and some considerations.

DSN stipulates this ultra-micro fatwa with the consideration that many people need assistance in distributing funds from Islamic financial institutions with the principle of buying and selling and/or *ijarah*. In addition, this fatwa also responds to the needs of the community to carry out and improve welfare in various other economic transaction activities aimed at the benefit of the people. Therefore, Islamic financial institutions have facilities for ultra-micro financing products.

The arguments used in determining this ultra-micro financing consist of quotations from the Qur'an and Hadith. In terms of the methodology of this fatwa regarding ultra-micro financing, it uses the *ijma'* method taken from the events of the majority of scholars regarding the permissibility of buying and selling on a *murabaha* basis. In addition to these methods, this fatwa also includes general fiqh rules.

Sharia provisions relating to *muamalah* generally apply also in contracts (Maksum, 2013). So, that the permissibility of this ultra-micro financing fatwa is equipped with general rules, including; *Al-Ashlu Fil Muamalat al Ibahah Illa an Yadullu Dhalilun 'Ala Tahrimiha* a very general rule became the first rule used by scholars to determine the permissibility of this fatwa. In addition to these rules, there are several other fiqh rules that are included in the fatwa such as the rules of *Lil Aktsari Hukmil Kulli*, *Al Ashlu Ilhaqul Fardi Bil A'ammil Aghlabi Dunan Nadiri*, *Idza Darasy Syai Baynal Ghalibi Wan Nadiri Fainnahu Yulhaqu Bilghalibi*, *Inna Lizzamani Khisshatan Mina Tsamani*. These fiqh rules are the same as the previous ones, namely the general rules used in the stipulation of a law that has the opportunity to meet the legality needs of ultra-micro financing.

The ultra-micro financing fatwa's combination of contracts is a sort of modification by DSN. Modification of the contract is an innovative approach to filling a void in law while also ensuring that current transactions meet their legal requirements. Fatwa scholars are typically the ones who carry out these actions because they do not originate from existing contracts (Maksum, 2013).

In the last rule, the ulama includes general rules regarding benefit which is the main method used to determine the permissibility of fatwas with the aim of *maslahah* to the community, namely the rule of *Aynama Wajadatil Mashlahatu Fatsamma Hukmullah*. This rule is the most important consideration in determining the ultra-micro financing fatwa (Soemitra, 2019). According to Al-Buti, *maslahah* is a benefit or enjoyment for humans based on the five universal principles of Islam, with the formulation of *maslahah* boundaries that are in line with Islamic Sharia. *Maslahah* is used in legal considerations to get good and avoid harm, realize legal clarity, and is in line with common sense and has implications for the interests of the people/universal dimension (Solikhuddin, 2019).

If sharia and *maqasid* sharia are aimed at benefiting the earth and the afterlife, then they must be measured at the level of basic human requirements, according to al-Syatibi. For example, the concept of fulfilling human wants, the paradigm of economic activity, and utility standards in meeting the needs for products and services are all significant to the development of sharia economics since *maslahah* values can be implemented. The notion of *maslahah*, which is taken from the fiqh rules regarding *maslahah*, is nothing but to meet utility criteria in meeting goods and services needed by the community so that the objective of sharia is to make people prosperous is fulfilled in the determination of the ultra-micro finance fatwa.

Besides some of the rules used in determining this fatwa, there are several considerations of fatwa scholars by paying attention to the first, *al-ma'ayir al-syar'iyah* AAOIFI regarding *dhabit al-gharar al-mufsid lil muamalat al maliah*. Second, the opinion of the scholars regarding the permissibility of the mu'allaq contract includes the opinions of the majority of Hanabilah scholars, the opinions of Ibn Taymiyah and Ibn Qayyimah al-Jauziyyah al-Hanbali. Third, the letter from the sharia business unit of Bank Aceh No. 683/DIR/II/2016 dated 15 February 2016 regarding the request for a fatwa opinion. Fourth, letter from Bank BTPN Sharia No. S.205/DIR/BSPD/V/2016 dated 10 May 2016 regarding requests for opinions and DSN fatwas for the use of *murabahah jizaf*. Five, the opinion of the participants of the DSN plenary meeting on Thursday, February 22, 2018 (Sholeh, 2016).



Some of the legal bases and considerations, the fatwa for ultra-micro financing is determined based on sharia principles by taking into account the general provisions that; first, that ultra-micro financing is financing with a collection of goods and/or services whose value is very small and of various types, either in the form of goods or services. Second, the use of contracts in ultra-micro financing using *murabahah* sale and purchase contracts, *salam* sale and purchase contracts, *istishna'* buying and selling contracts, parallel *istishna'* buying and selling contracts. Meanwhile, multi-service ultra-micro financing uses *ijarah* contracts, *ijarah vomitayah bi al-tamlik* contracts, *kafalah* contracts, and *mua'llaq* contracts (Salenda, 2013).

The provisions in this fatwa are still associated with several other provisions, namely; Multi-goods ultra-micro financing may be carried out with a sale and purchase contract, so it must be subject to and comply with the provisions and limitations in the DSN-MUI fatwa number 110/DSN-MUI/IX/2017 concerning buying and selling contracts. If you use a *murabahah* sale and purchase contract, you must comply with the provisions and limitations contained in the DSN-MUI fatwa number 04/DSN-MUI/IV/2000 regarding *murabahah*. If you use an *istishna'* and/or parallel *istishna'* sale and purchase contract, then you must comply with the provisions of the DSN-MUI fatwa number 06/DSN-MUI/IV/2000 regarding *istishna'* buying and selling and the DSN-MUI fatwa number 22/DSN-MUI/III/2002 concerning parallel buying and selling. If you use a *salam* sale and purchase contract, you must comply with the provisions and limitations contained in the DSN\_MUI fatwa number 05/DSN-MUI/IV/2000 regarding the sale and purchase of greetings. (Apriyanti, et.al., 2021)

As for multi-service ultra-micro financing, if you use an *ijarah* contract, you must comply with the provisions and limitations in the DSN-MUI fatwa number 112/DSN-MUI/IX/2017 regarding the *ijarah* contract. However, if you use the *ijarah Muntahiyah bi al-tamlik* contract, you must submit and obey the DSN-MUI fatwa number 27/DSN-MUI/III//2002 concerning *al-ijarah al-muntahiyah bi al tamlik*. This financing can also use *ijarah* and *kafalah* contracts, so you must comply with the DSN-MUI fatwa number 09/DSN-MUI/IV/2000 regarding *ijarah* financing and fatwa number 44/DSN-MUI/VIII/2004 regarding multi-service financing and DSN-MUI fatwa number 11/ DSN-MUI/IV/2000 on *kafalah*.

Determination of the permissibility of this fatwa is also equipped with provisions for the implementation of ultra-micro financing contracts with several provisions; the implementation of ultra-micro financing contracts must fulfill the pillars and conditions stipulated by the DSN-MUI fatwas; if there are difficulties in implementing the buying and selling contract and leasing

contract in this fatwa, then the parties may use the main contract and *wakalah* contract as a complementary contract, or can use the *mu'allaq* contract in the main contract plus the *wakalah* contract as a complementary contract; *mu'allaq* contract in which the object of goods or services must be clear and measurable specifications (quantity and quality) according to business habits (*'urf tijari*); the use of the *mu'allaq* contract by the customer must be effective when as a representative carrying out the *wakalah* object; and customers are required to report the implementation of the *wakalah* contract with relevant evidence according to *'urf* no later than 15 days after the implementation (Chairiyah, 2019).

The consideration of *'urf* is used by Indonesian fatwa scholars as a legal basis and is a form of support for the community to form prosperous people in assessing the *masalah* category without leaving other considerations so that the sharia in the multi-goods and/or multi-service ultra-micro financing fatwa is realized by considering several legal bases that must be considered. It should be noted that the determination by looking at the existence of *'urf* is a form of decision-making with *istihsan* considerations.

Indeed, the position of *Istihsan* as a method of taking the law (*istinbath al-ahkam*) is still debated among the Hanafi and Shafi'i jurists. Shafi'i scholars have rejected the use of *Istihsan* as a method of taking the law because it is not based on arguments originating from the Qur'an or hadith. Meanwhile, Hanafi scholars use *Istihsan* in view of the use of stronger arguments because they are based on emergency affairs aimed at facilitating community affairs (Zahrah, 2005). As explained in the Qur'an that religion is not to complicate human life, but religion was revealed to provide benefits in human life. Thus, the *ijtihad* method through *istihsan al 'urf* needs to be reviewed and the purpose of the benefit is considered.

As Imam al-Bazadawi, an expert in *ushul fiqh* from the Hanafis, defines *Istihsan* as meaning "turning away from a stronger will of *qiyas* or specialization of *qiyas* based on stronger arguments because according to him in certain legal cases the *qiyas* method is difficult to apply, because the existing *illat* on *qiyas* is very weak" (Usman, 2002). Thus, it is necessary to find another method that is stronger, so that the law applied to a particular case is more appropriate and in line with the objectives of the *syara*. Imam al-Syatibi explained that the *Istihsan* rule is the result of induction from various verses and hadiths as a whole, which clearly shows that this rule is supported by *syara*. For example, in the provisions of the *musyarakah mutanaqisah* contract, where the contract is divided into two contracts in one transaction, then by using a stronger argument for benefit, the *Istihsan* rule is formulated.

Hanafi scholars divide several kinds of Istihsan, which are related to the theory of *maqashid al-sharia* (Syalabi, 1981). a. *Istihsan bi al-nash* (*istihsan* based on a verse or hadith). That is, there is a verse or hadith about the law of a case that is different from the provisions of general rules. b. *Istihsan bi al-ijma* (*istihsan* based on *ijma'*) c. *Istihsan bi al-qiyas al-khafy* (*istihsan* based on hidden qiyas). d. *Istihsan bi al-maslahah* (*istihsan* based on benefit) e. *Istihsan bi al-urf* (*istihsan* based on customary contract) f. *Istihsan bi al-dharurah* (*Istihsan* based on an emergency) means in an emergency situation that causes a mujtahid not to apply general rules or *qiyas* (Mubarok & Hasanudin, 2017).

Based on this explanation, it can be concluded that *istihsan* or the proposition of *syara'* law is not based on reason alone, but chooses the strongest alternative argument. Thus, these arguments can respond to the problems of the people to avoid difficulties and take advantage by not eliminating the basic values of Sharia.

## CONCLUSION

The fatwa is stipulated by considering authentic legal sources to provide goodness to all parties, both the community and Islamic financial institutions. Fatwa decision-making with consideration of the legal source of *istihsan bi al-'urf* is still minimally used by DSN-MUI in determining fatwas. Based on the results of the research study, there is one fatwa out of 49 fatwas throughout the 2010-2018 period that uses the *istihsan bi al-urf* method in determining its fatwa. As in the ultra-micro financing product in fatwa no 119/DSN-MUI/2018 which considers *istihsan bi al 'urf* in its determination. This provides an understanding that the concept of prudence in issuing fatwas must still pay attention to the main sources, namely the Qur'an, Hadith, *ijma*, and *qiyas* as well as *'urf* (culture) prevailing in society.

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