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Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

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Abstract: *The role of ijtihad and fatwa in Indonesia has undergone a transformation over time. This transformation is reflected in the adoption of several binding regulations (legal binding) based on the results of ijtihad and fatwas issued by competent authority institutions. This process reflects the evolution of the role of ijtihad and fatwa in forming the legal basis that applies, provides direction, and binds Indonesian society. This research is qualitative research with a normative legal approach accompanied by a literature review. The data analysis used is content analysis. The research findings show that the process of legalizing ijtihad and fatwa as binding rules is one option in responding to problems. However, not all of these efforts are able to provide comprehensive solutions to every problem, and sometimes they can even give rise to new debates and problems amidst the diversity of Indonesian society.*

Keywords: *Ijtihad, Fatwa, Indonesia, Legal Opinion, Legal Binding.*

A. Introduction

In principle, a fatwa in Indonesia is generally non-binding and has no legal impact. However, in certain situations and conditions, a fatwa can have a status when it has been adopted into law so that it has binding legal force.¹ This is in line with the opinion of al-Syathibi (d. 790 H.) who stated that Islamic legal products aim to provide human benefit, both the benefit of the world and the hereafter, the benefit of individuals and groups.² This law does not only regulate the benefit of the world and ignores the benefit of the afterlife, or only pays attention to the benefit of the afterlife and ignores the benefit of the world. Not only does it prioritize the benefit of the individual and put the benefit of the group second, but there is a balance between the two, combining these two benefits so that they work in a balanced and parallel manner. The certainty of realizing human benefit in the world is essentially an effort to pave the way for realizing human benefit in the afterlife as benefit and prosperity can be considered if it can make worldly life an introduction to the life of the afterlife, and not just to fulfill one's desires.³

As an effort to overcome life's problems that continue to develop, Islam gives legitimacy to Muslims to carry out *ijtihad* as an effort to resolve problems that are not explained in detail in the Koran and Hadith. *Ijtihad* is an effort to understand and overcome these problems, with many methods used by *ulama*, but with the main aim of realizing the *maqashid of Sharia*. Indonesia, as a country with diversity, has emerged with various new problems that have not been covered in the main sources of Islamic law. To overcome this,

¹ Wildan Imaduddin Muhammad, "Keberangkatan Fatwa dari Legal Opinion Menjadi Legal Binding: (Studi Kasus Fatwa DSN MUI Tentang Perbankan Syariah)," *Jurisprudensi: Jurnal Ilmu Syariah, Perundang-Undangan Dan Ekonomi Islam* 11, no. 2 (November 4, 2019): 146, <https://doi.org/10.32505/jurisprudensi.v11i2.996>.

² Liky Faizal *et.al.*, "Age Limit for Marriage in Indonesia from The Perspective of Maqashid Sharia," *Analisis: Jurnal Studi Keislaman* 22, no. 2 (December 30, 2022): 306, <https://doi.org/10.24042/ajsk.v22i2.14068>; See also Jasser Auda, *Maqāsid Al-Sharī'ah: A Beginner's Guide* (London-Washington: International Institute of Islamic Thought (IIIT), 2008), 4–5; See also Ahmad al-Raisuni, *Al-Fikru al-Maqasidi Qawa'iduhu Wa Fawa'iduhu* (Ribat: Dar Al-Baida', 1999), 13.

³ Siti Hanna, "Urgensi *Ijtihad Kolektif* dalam Permasalahan Kontemporer," *Media Syari'ah: Wahana Kajian Hukum Islam Dan Pranata Sosial* 14, no. 2 (October 30, 2012): 173, <https://doi.org/10.22373/jms.v14i2.1874>.

Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

Indonesian ulama formed the Indonesian Ulema Council (MUI) as a fatwa institution consisting of a collection of ulama. In issuing a fatwa, the MUI uses the ijtihad method agreed upon by the ulama members.⁴

Etymologically, according to Zamakhsyari, a fatwa is a response to an event and comes from the word "*al-fata*" which means young.⁵ Meanwhile, fatwa in Yusuf al-Qaradawi's terminology refers to an explanation of Islamic law regarding an issue in response to questions from individuals or groups.⁶ In the context of the science of *ushul fiqh*, a fatwa is issued by a *mujtahid (faqih)* as an answer to a question regarding a problem and is non-binding in nature.⁷

Fatwa as an opinion regarding questions about Islamic legal issues only occurred in the seventh and eighth centuries of the Hijriyah according to the results of Atho Mudzhar's research. At that time, Muslims faced various legal problems that required answers from judges. Scientists who provide answers to these various problems include Ibrahim al-Nakha'i, Abi Rabah, and Abdullah bin Abi Nujaih. The collection of fatwas was not carried out until the twelfth century.⁸ The Hanafiyah group who codified fatwas were Burhanuddin bin Maza, Qadhi Khan, Sirajuddin al-Sanjawi, and Ibnu al-Aliddin. From among the Malikiyah ulama there was al-Wanyarisi. Meanwhile, among the Hanabilah, there was Ibn Taymiyyah. In the seventeenth century, the most popular collection of fatwas was the

⁴ Syafiq Hasyim, "Fatwas and Democracy: Majelis Ulama Indonesia (MUI, Indonesian Ulema Council) and Rising Conservatism in Indonesian Islam," *TRANS: Trans-Regional and -National Studies of Southeast Asia* 8, no. 1 (May 2020): 21–35, <https://doi.org/10.1017/trn.2019.13>; See also Heri Fadli Wahyudi and Fajar Fajar, "Metode Ijtihad Komisi Fatwa Majelis Ulama Indonesia dan Aplikasinya dalam Fatwa," *Cakrawala: Jurnal Studi Islam* 13, no. 2 (December 28, 2018): 121–122, <https://doi.org/10.31603/cakrawala.v13i2.2402>.

⁵ Zamakhsyari, *Al-Kasysyaf An Haqaiq al-Tanzil Wa Uyun al-Aqawil Fi Wujuh al-Tawil*, Jilid I (Mesir: Mushthafa al-Babi al-Halabi, n.d.).

⁶ Yusuf al-Qaradhawi, *Al-Fatwa Baina al-Indibath Wa al-Tasayyub*, Cet. Ke-III (Kairo: Dar al-Shahwah li Nasyri wa al-Tauzi, n.d.), 11.

⁷ Muchtar Ali, *Prospek Fatwa Sebagai Hukum Positif di Indonesia: Suatu Tinjauan Historis dan Yuridis (Disertasi SPs UIN Syarif Hidayatullah Jakarta, 2009)* (Jakarta, 2009); See also Wahbah Az-Zuhaili, *Ushul Al-Fiqh al-Islami*, Jilid I, Cet. Ke-16 (Damaskus: Dar al-Fikr, 2009), 35.

⁸ M. Atho Mudzhar, *Fatwa-fatwa MUI: Sebuah Studi Tentang Pemikiran Hukum Islam di Indonesia 1975-1988* (Jakarta: INIS, 1993), 2.

book *Fatāwā al-Āmqīrīyyāh* which came from India and contained various fatwas on legal issues.⁹

According to Abu Zahrah, *ijtihad* and *fatwa* have differences, where giving a *fatwa* is more specific than *ijtihad*. *Ijtihad* is a legal *istinbath* that is carried out whether there is a problem or not, while a *fatwa* is only carried out when a problem arises. However, both must be carried out by individuals who have met the specified requirements. A *fatwa* must pay attention to and know exactly what conditions are occurring at that time, so that it is not mistaken and could cause harm to society.¹⁰ According to Imam al-Syatibi, a *mufti* must give a *fatwa* in a moderate manner with a position in the middle, so that it can be easily accepted by the majority of society. Therefore, a *mufti* (*fatwa* giver) has strict requirements that must be met.¹¹

This study is interesting because the actualization of *ijtihad* and *fatwa* in Indonesia from legal opinion to legal binding reflects a significant evolutionary journey in the Islamic legal system. Initially, *ijtihad* and *fatwa* were more in the nature of legal opinions which provided guidance but did not have binding legal force. However, over time, there has been a shift towards deeper recognition of the authority of *fatwas*. This transformation is reflected in the steps towards legal binding status, where *fatwas* can have a direct impact on the national legal system. This process involves a tension between efforts to modernize the interpretation of Islamic law and the need to preserve the roots of traditional values. Factors such as social change, politics and societal pressure are driving this shift.

In this context, it is important to highlight the role of legal institutions, *ulama* and the government in confirming the legal binding of *fatwas*. Apart from that, it is necessary to pay close attention to the impact on legal stability and individual human rights. Harmonization between positive law and Islamic values is a challenge that must be overcome in maintaining the right balance. Overall, the

⁹ Mudzhar, 2.

¹⁰ Muhammad Abu Zahrah, *Ushul Fiqih*, Terj. Saefullah Ma'sum, dkk. (Jakarta: Pustaka Firdaus, 2018), 627-628.

¹¹ Zahrah, 628.

Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

process of actualizing ijtihad and fatwa from legal opinion to legal binding in Indonesia creates a complex and dynamic field where Islamic legal traditions unite with the demands of modernity, forming a face of law that is more inclusive and responsive to changing times.

This study is a follow-up study and seeks to obtain an element of novelty related to the study of the actualization of ijtihad and fatwa from legal opinion to legal binding. The previous researcher, Wildan Imaduddin Muhammad, focused on the MUI DSN Fatwa regarding Islamic banking. The results of this study show that the position of fatwa has a strategic function which is represented by the Indonesian Ulema Council.¹² Firdaus and Sup also conducted the same study. The results of the study show that legal opinion has an important role in the legal cycle that applies in a country. Legal opinion in Islam has been known for a long time, because many Islamic legal experts carry out ijtihad to be able to provide legal opinions on cases that may not be textually written in the Koran and Hadith, so that the scholars try to interpret them in order to find the appropriate law to the matter.¹³

Referring to previous literature reviews, this study seeks to further develop the same study by trying to find something new. This research is qualitative research by analyzing data in the form of text.¹⁴ The data collected is then analyzed in depth to identify an existing opinion.¹⁵ The approach used is a normative legal approach by attempting to answer questions that apply to legal norms. This research also uses a literature review to explain theories related to this research theme.¹⁶ Data analysis is used by analyzing content (*content*

¹² Muhammad, “Keberlanjutan Fatwa dari Legal Opinion Menjadi Legal Binding,” 160–161.

¹³ Muhammad Irkham Firdaus and Devid Frastiawan Amir Sup, “Legal Opinion dalam Perspektif Hukum Islam,” *El-Ghiroh: Jurnal Studi Keislaman* 21, no. 1 (March 31, 2023): 70–71, <https://doi.org/10.37092/el-ghiroh.v21i1.360>.

¹⁴ Russell W. Belk, *Handbook of Qualitative Research Methods in Marketing* (United Kingdom: Edward Elgar Publishing, 2007), 21–35.

¹⁵ Sharan B. Merriam and Elizabeth J. Tisdell, *Qualitative Research: A Guide to Design and Implementation* (San Francisco: John Wiley & Sons, 2015), 2.

¹⁶ Andrew Booth, Anthea Sutton, and Diana Papaioannou, *Systematic Approaches to a Successful Literature Review*, ed. Mila Steele (London: Sage Publications Ltd., 2016), 9–10.

analysis), exploring more in-depth information regarding written and printed content or information.¹⁷

B. The Position of Ijtihad and Fatwa in Islamic Law

The word "*al-hukm*" is still closely related to *ijtihad* and *fatwa*. "*Al-hukm*" can be interpreted as wisdom (*al-hikmah*) or knowledge (*al-'ilm*).¹⁸ The word *al-hukm* linguistically has several meanings, as stated by Said Agil Husin Al-Munawar, there are four meanings of *al-hukm* linguistically: *al-'alim* and *al-fiqh* which means understanding/knowledge, *al-man'u*, which means preventing injustice, and *al-qadhu bi al-adl*, which means fair decisions.¹⁹

Ijtihad according to *ushul fiqh* is the maximum dedication of the *mujtahid* to obtain answers about Islamic law.²⁰ According to al-Asnawi, a scholar from the Shafi'i school of thought, *ijtihad* is linguistically described as exerting all one's energy to achieve something and is not used except in problems that contain burdens and difficulties. Al-Thufi, a scholar from the Hanbali school of thought, *ijtihad* in linguistic terms is the mobilization of all abilities in difficult work. Al-Hummam, a scholar from the Hanafi school of thought, believes that linguistically *ijtihad* is the mobilization of all abilities to achieve something that has the burden of sharia. Al-Hajib, a scholar of the Maliki school of thought, defines *ijtihad* as the mobilization of a *faqih* with all his abilities to achieve something that is *zhanni* in sharia law.²¹

¹⁷ Krippendorf Klaus, *Analisis Isi: Pengantar Teori dan Metodologi*, Terj. Farid Wajidi (Jakarta: Rajawali Pers, 1993), 15; See also Ali Abdul Wakhid *et.al.*, "The Islamic Perspective Of Non-Muslim Leaders In Indonesian Muslim Majority Communities," *Akademika : Jurnal Pemikiran Islam* 26, no. 2 (December 14, 2021): 277–296, <https://doi.org/10.32332/akademika.v26i2.3753>.

¹⁸ Muhyiddin Ibn 'Arabi, *The Four Pillars of Spiritual Transformation*, Translated by Stephen Hirtenstein (Oxford, United Kingdom: Anqa Publishing, 2008), 29.

¹⁹ Said Agil Husin Al-Munawar, *Membangun Metodologi Ushul Fiqh: Telaah Konsep al-Nadb dan al-Karahah dan Istinbath Hukum Islam* (Jakarta: Ciputat Press, 2004), 9.

²⁰ Ibrahim Hosen, *Fikih Perbandingan Masalah Pernikahan* (Jakarta: Pustaka Firdaus, 2003), 16.

²¹ Faishal Agil Al Munawar and Mirwan, "Ijtihad Jama'i (Ijtihad Kolektif) Perspektif Ulama Kontemporer," *Istidlal: Jurnal Ekonomi Dan Hukum Islam* 4, no. 2 (October 15, 2020): 128–129, <https://doi.org/10.35316/istidlal.v4i2.268>.

Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

Currently, a form of ijtihad that is different from previous ijtihad is needed since *fardi* (individual) ijtihad must meet various requirements that are difficult for ulama to fulfill. Therefore, contemporary ulama create new innovations in ijtihad by applying the *jama'i* (collective) ijtihad method. *Jama'i* ijtihad is considered closer to the truth than *fardi* ijtihad.²²

The existence of *jama'i* (collective) ijtihad is very necessary to resolve legal problems that arise due to developments over time. Up to that now, contemporary ulama have not dared to make significant changes regarding the concept of ijtihad *fardi* which was formulated by previous ulama. Therefore, the creation of new innovations is considered an effort to overcome limitations and respond to ongoing changes in time, while Islamic legal problems cannot be avoided any longer. As a proposal in an effort to overcome the complexity of the needs of increasingly developing problems, it is necessary to develop and test the *jama'i* ijtihad formula.

According to Wahbah al-Zuhaili, *jama'i* ijtihad is a legal agreement between the ulama on a particular issue based on the legal decisions of previous ulama. This process involves the distribution of the arguments that are used as a legal basis by them, with the selection of the strongest and most relevant arguments with current and real benefits.²³ *Jama'i* ijtihad is different from *ijma'* as *ijma'* requires collective and simultaneous agreement of the ulama, while *jama'i* ijtihad does not require mass agreement, so that some can fulfill the specified criteria.²⁴

Ijtihad *jama'i* presents a viable and powerful method for developing contemporary *fiqh*, which is able to effectively overcome and adapt to the changes and progress of the times. Through joint efforts and mutual consultation, this approach makes it possible to get closer to the truth, especially in dealing with legal problems that are

²² Munawar and Mirwan, 128.

²³ Wahbah Al-Zuhaili, *Al-Wasith Fi Ushul al-Fiqh al-Islami* (Damaskus: Dar al-Kitab, 1978), 480; See also Ariyadi Ariyadi, "Metodologi Istinbath Hukum Prof. Dr. Wahbah Az Zuhaili," *Jurnal Hadratul Madaniyah* 4, no. 1 (June 23, 2017): 32–39, <https://doi.org/10.33084/jhm.v4i1.491>.

²⁴ Munawar and Mirwan, "Ijtihad Jama'i (Ijtihad Kolektif) Perspektif Ulama Kontemporer," 131–133.

new to current developments. However, this method still adheres to the Qur'an and Sunnah as the main sources.²⁵

Basically, the idea of *jama'i* ijthad is similar to the general meaning of ijthad, but the difference lies in its collective dimension.²⁶ In *jama'i* ijthad, efforts are made to reach agreement among Islamic legal experts on a particular issue.²⁷ Ijthad *jama'i* characterizes the joint efforts of the majority of Islamic legal experts, who engage in collective consultation and deliberation to formulate laws and reach legal decisions collectively.

Regarding the requirements for *mujtahids* to perform ijthad, *ushul fiqh* scholars have different opinions. However, in general, these requirements include the ability to understand the objectives of the Shari'a (*maqashid Shari'ah*) completely, perfectly and comprehensively, the ability to carry out legal *istinbath* based on concept and understanding of the aims of the Shari'a, and '*adalah* (just), staying away from all immoral things.²⁸ In other words, a *mujtahid* needs to have in-depth knowledge of the sources of Islamic law. For example, in the context of *jama'i* ijthad, Islamic legal experts involved in deliberations need to have a deep understanding of legal verses to reach collective agreement in formulating Islamic law.

The scholars have formulated the criteria and requirements for a *mujtahid* with various editorials. For example, Wahbah al-Zuhaili divides it into eight requirements which include knowledge of legal verses, legal hadith, *Nasakh* Science, *ijma'* law, *Qiyas*, Arabic and

²⁵ Felicitas Opwis, "Maslaha in Contemporary Islamic Legal Theory," *Islamic Law and Society* 12, no. 2 (January 1, 2005): 187, <https://doi.org/10.1163/1568519054093699>; See also Pauzi M, Darul Hipni, and Anwar M. Radiamoda, "The Importance of the Ijthad Jama'i Method in Contemporary Fiqh Formulations," *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 23, no. 1 (June 16, 2023): 14, <https://doi.org/10.30631/alrisalah.v23i1.1322>.

²⁶ Al-Syaikani, *Irsyad Al-Fuhul Ila Tahqiq Min Ilm al-Ushul* (Beirut: Dar Ibnu Hazam, 2018), 617.

²⁷ M, Hipni, and Radiamoda, "The Importance of the Ijthad Jama'i Method in Contemporary Fiqh Formulations," 15.

²⁸ Nurhayati and Ali Imran Sinaga, *Fiqh dan Ushul Fiqh* (Kencana, 2018), 43; See also Amir Syarifudin, *Ushul Fiqih Jilid II* (Jakarta: Prenada Media, 2014), 271.

Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

maqasid syar'iyah.²⁹ On the other hand, Ali Abd al-Kafi as-Subuki and Taj ad-Din as-Subuki stated 3 requirements: mastering the science of *'aqliyah*, sharak rules, and understanding *maqasid syar'iyah*.³⁰ Meanwhile, al-Ghazali explained that a mujtahid must master the Koran, Sunnah, *ijmak* and *qiyas*.³¹

Seeing the existing requirements, finding someone who meets all of them is surely a challenge. Each individual has their own strengths and weaknesses. Some only partially meet the requirements, while others may meet the requirements more completely. Therefore, fiqh scholars have established several levels of mujtahid. Abu Zahrah mentioned several levels of *mujtahid*: *mujtahid mustaqil*, *muntasib*, *madzhab*, *murajjih*, and *muwazin*.³² Imam Nawawi divided mujtahid into two levels, *mustaqil* and *ghairu mustaqil*. Mujtahid *mustaqil* is divided into four: *Mujtahid mutlaq* or *mustaqil* (independent), *mutlaq muntasib*, *muqayyad (takhrij)*, *murajjih*, and *fatwa*.³³

Judging from the level of mujtahid above, it can be said that ijtihad activities by *mujtahids* have decreased. According to Huzaemah, the decline and setback of ijtihad activities occurred after the time of the Imam Madzhab or also known as the *taqlid* period. According to him, this is caused by various factors, such as political problems, bigotry in the madzhab, the widespread distribution of ijtihad media from previous mujtahids which causes a lack of encouragement to carry out ijtihad (choosing instant ones), and other factors.³⁴

This is confirmed by the opinion of al-Khudri and al-Subki, quoted by Rahmat Syafe'i, that this condition causes concerns about

²⁹ Wahbah Al-Zuhaili, *Ushul Fiqh Al-Islami* (Damaskus: Dar al-Fikr, n.d.), 1044–1049.

³⁰ Ali Abd al-Kafi al-Subuki and Taj ad-Din bin Ali al-Subuki, *Al-Ibhaj Fi Syarh al-Minhaj*, Juz I (Beirut: Dar al-Kutub al-'Ilmiyyah, 1984), 8.

³¹ Abu Hamid al-Ghazali, *Al-Mustashfa*, Juz I (Beirut: Dar al-Kutub al-Arabiyyah, tt.), 181.

³² Zahrah, *Ushul Fiqh*, 315.

³³ Abu Zakarya Mahyiddin bin Syaraf al-Nawawi, *Majmu 'Syarh Al-Muhadhab*, Juz I (Makkah: Maktabah al-Irsyad, tt.), 75–77; See also Wahbah Al-Zuhaili, *Al-Fiqh al-Islami Wa Adillatuhu*, Cet. Ke-2 (Beirut: Dar al-Fikr, 1997), 1107–1109.

³⁴ Yanggo, *Pengantar Perbandingan Madzhab* (Ciputat: Gaung Persada, 2014), 43–48.

errors in *ijtihad* and violations of the provisions that have been established by the Imams of the previous *Madzhab*. After that, pros and cons emerged, both from Sunni and Shia ulama, as well as orientalist, regarding whether the door to *ijtihad* was closed or still open. Among the Sunni ulama who do not agree that the door to *ijtihad* has been closed are Imam al-Suyuthi, al-Baghawi, and al-Syahrastani, and the same thing also applies to the majority of Syiah ulama.³⁵

The decline in the practice of *ijtihad* has a direct impact on the position of *ijtihad* and *fatwa* in the context of Islamic law. When *ijtihad* declined, the process of interpreting and developing Islamic law by *mujtahids* (Islamic legal experts) became limited. This can influence the position of *ijtihad*, *fatwa*, and the authority of ulama in understanding and dealing with contemporary issues. On the other hand, when the ethic of *ijtihad* declines, most Muslims tend to follow certain schools of thought *taqlid* (following without their own considerations), which leads to dependence on existing legal views. This can reduce innovation and flexibility in responding to changing times.

The position of *ijtihad* and *fatwa* is important because they are a means of understanding and applying the principles of Islamic law in the context of everyday life. With the decline of *ijtihad*, *fatwa* authority may be more centralized in scholars representing particular schools of thought, and more dynamic or contemporary views may be ignored. However, debate continues among scholars regarding whether the door to *ijtihad* is truly closed or still open. Some scholars, as mentioned previously, argue that *ijtihad* is still possible in certain contexts, while others may be more skeptical. Understanding the relationship between the decline of *ijtihad* and the position of *ijtihad* and *fatwa* can vary depending on the perspective and interpretation of each scholar.

Ijtihad and *fatwa* are two concepts that have an important role in Islamic law,³⁶ but they operate in different contexts and have different

³⁵ Rachmat Syafe'i, *Ilmu Uşul Fikih* (Bandung: Pustaka Setia, 2010), 110.

³⁶ Andi Fariana, "Urgensi *Fatwa* MUI dalam Pembangunan Sistem Hukum Ekonomi Islam di Indonesia," *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 12, no. 1

Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

positions. Ijtihad has a very high position in Islamic law. Ijtihad is considered an intellectual and analytical effort to draw Islamic law from primary sources such as the Koran, Hadith, *ijma'* (agreement of scholars), and *qiyas* (analogy). Ijtihad is required when there are no clear legal instructions in the main Islamic sources regarding an issue.³⁷ *Mujtahids* (those who perform ijtihad) have the responsibility to draft new laws or adapt existing laws to suit the social context and time.

Meanwhile, fatwa has a more specific position compared to ijtihad.³⁸ A fatwa is an opinion or legal decision given by a *mufti* (scholar or cleric) based on his ijtihad. Fatwa functions as an answer to certain questions or problems raised by individuals or society. Although fatwas can be based on ijtihad, not all fatwas involve an ijtihad process. Some fatwas can be given based on laws that are clear in the main sources of Islam.

In general, ijtihad has a more fundamental role in the formation and development of Islamic law, while fatwa functions as a practical application of ijtihad in responding to the concrete needs of society by looking at the problems that exist in society. Both are dynamic and can adapt to changing times.

C. Method of Determining the Fatwa of Bahtsul Masail Nahdlatul Ulama, Tarjih Muhammadiyah Council and Indonesian Ulema Council

1. Bahtsul Masail Nahdlatul Ulama

The system and procedures for making or enacting laws since the National Conference (Munas) around 30 years ago have been formulated through several general provisions. More precisely, the

(August 6, 2017): 87–106, <https://doi.org/10.19105/al-lhkam.v12i1.1191>; See also Ibnu Elmi Achmat Slamet Pelu and Jefry Tarantang, "Fatwa Majelis Ulama Indonesia sebagai Solusi Permasalahan Umat Islam di Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 14, no. 2 (December 3, 2020): 307–316, <https://doi.org/10.24090/mnh.v14i2.3927>.

³⁷ Muannif Ridwan, "Ijtihad pada Era Kontemporer (Konteks Pemikiran Islam dalam Fiqih dan Maqashid al-Syariah)," *Jurnal Masohi* 1, no. 2 (December 25, 2020): 110–121, <https://doi.org/10.36339/jmas.v1i2.356>.

³⁸ Sari Damayanti, "Tinjauan Fatwa MUI Tentang Lembaga dan Keuangan Syariah," *Waratsah : Jurnal Ilmu-Ilmu Keislaman Dan Sosiolinguistik* 7, no. 2 (2021): 62–71, <https://doi.org/10.21202/waratsah.v7i2.46>.

results of the National Conference of Alim Ulama (Munas) and the NU Grand Conference (Konbes) held in Bandar Lampung in 1992 showed that the decision-making system of the Bahtsu Masail Nahdlatul Ulama Institute (LMBNU) prioritized the *qauli* method over *manhaji*. This is in line with the practice carried out by one of the four madzhab imams in responding to existing legal problems.³⁹

NU's intellectual tradition is embodied in the Bahtsul Masail forum using the book *al-kutub al-mu'tabar* as a reference. His research methods include *taqrîr jamâ'i* (collective legal determination) and *ilhâq al-masâil bi nadhâ'irihâ*. *Taqrîr jamâ'i* is a collective effort to determine the choice of one of several *qawl* or *wajah*. Problems are solved by looking for answers in *al-kutub almu'tabar*. Meanwhile, *ilhâq al-masâil bi nadhâ'irihâ*, this method replaces *qiyas*. *Ilhâq* is to equate fiqh problems that have not been found textually in the book with answers to problems that already have answers in the book. The procedures and requirements for *ilhâq* are similar to *qiyâs*, but in *ilhâq*, the reference is the opinion or *qawl/wajah* of the ulama in *al-kutub al-mu'tabar*, while in *qiyâs*, the main references are the Qur'an and sunnah. Furthermore, *istinbâth*, the last method used by Bahtsul Masail NU, is applied when a question or case does not have an answer in the *mu'tabar* books either in the form of *qawl* or *wajah*. If it is not possible to do *ilhâq*, the final step is *istinbâth* collectively by applying *qawâid usyûliyyah* and *qawâid fihiyyah* which have been formulated by previous mujtahids.⁴⁰

2. Tarjih Muhammadiyah Council

Muhammadiyah collectively formulated several tarjih methods in determining law. First: they use *istidlal* based primarily on the Koran and Sunnah. Second: they carry out *ijtihad* and *istimbat* with

³⁹ Imam Syafi'i *et.al.*, "Childfree in Islamic Law Perspective of Nahdlatul Ulama," *Al-Ahkam* 33, no. 1 (April 30, 2023): 7–8, <https://doi.org/10.21580/ahkam.2023.33.1.14576>.

⁴⁰ Ali Mutakin, "Kitab Kuning dan Tradisi Intelektual Nahdlatul Ulama (NU) dalam Penentuan Hukum (Menelisis Tradisi Riset Kitab Kuning)," *Syariah: Jurnal Hukum Dan Pemikiran* 18, no. 2 (November 29, 2018): 208, <https://doi.org/10.18592/sy.v18i2.2270>.

Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

reasons (*illat*) for issues that are not contained in the text and are not *ta'abbudi* issues, but are related to the needs of human life. Third: ijtihad using the *jami'i* ijtihad system. Fourth: they are not tied to any one madhhab, but some views from the madhhab can be taken into consideration in determining the law. Fifth: The Tarjih Council has the principle of tolerance and openness to criticism and suggestions. Sixth: they use *ijma' shahabi* as the basis. The main rules used by Muhammadiyah are based on the Koran and Sunnah, with comprehensive understanding carried out integrally between textual and contextual. Although they tend to pay attention to the role of reason in understanding the text, this is accepted as long as it does not conflict with *zhahir* and can be resolved with *ta'wil*. Muhammadiyah often uses *bayani* (semantic), *ta'lili* or *qiyasi* (rationalistic), and *istishlahi* (philosophical) methods in determining laws.⁴¹

Muhammadiyah uses the *bayani* method as a first attempt to interpret a *zhanni* verse with other verses. The second attempt is the *qiyasi* method, which is used to analogize a problem that does not yet have a law to a problem that already has a law because of the existence of *illah* equality. Meanwhile, the third effort, the *istishlahi* method, relies on the concept of *maslahah* as the breath in the implementation of any law in Islam. This is done for a matter that has absolutely no text, either *qath'i* or *zhanni* that discusses it, but in it there is a spirit of benefit for humans.⁴²

3. Method of Ijtihad Fatwa of the Indonesian Ulama Council

The Indonesian Ulama Council (MUI) is an institution that plays a role in providing Islamic religious guidance and fatwas in Indonesia. MUI was founded in 1975 and consists of Muslim ulama or scholars.⁴³ Its main task is to provide guidance in the interpretation

⁴¹ Ahmad Insyah Ansori and Moh Ulumuddin, "Kedudukan Fatwa Majelis Ulama Indonesia (MUI) dalam Hukum Islam," *Jurnal Mahkamah : Kajian Ilmu Hukum Dan Hukum Islam* 5, no. 1 (June 13, 2020): 47–48, <https://doi.org/10.25217/jm.v5i1.755>.

⁴² Asjmundi Abdurrahman, *Manhaj Tarjih Muhammadiyah: Metodologi dan Aplikasi*, Cet. Ke-III (Yogyakarta: Pustaka Pelajar, 2004); See also Abdul Munir Mulkhan, *Masalah-Masalah Teologi dan Fiqh dalam Tarjih Muhammadiyah*, Cet. Ke-I (Yogyakarta: Sipress, 2005), 101.

⁴³ Puji Pratiwi, *Dinamika Fatwa Majelis Ulama Indonesia tentang Aborsi dan Penggunaan Vaksin Meningitis dalam Merespons Perubahan Sosial* (Serang: Penerbit A-

of Islamic teachings and answer various religious questions that arise in society. MUI also has a role in issuing fatwas to provide direction regarding contemporary issues related to Islamic teachings.

The MUI fatwa is the result of the *ijtihad* of Indonesian Ulemas gathered in the official MUI organization. *Ijtihad* is a manifestation of the principle of dynamic movement in the Islamic treasury, and the reasoning activity carried out by *mujtahids* in exploring Islamic law. According to Amin, there are three pillars in determining a fatwa. First: the fatwa must be sourced from the Qur'an and the Sunnah which is up to date, which does not conflict with human benefit. Second: as not mentioned by the two sources above, a fatwa must not conflict with *mu'tabar ijma'* and *qiyas*, as well as other legal postulates such as *istihsan*, *masalih murlah*, and *saddu al-dzari'ah*. Third: a fatwa must consider the views of madzhab imams and involve experts related to the existing problem.⁴⁴

D. Actualization of Ijtihad and Fatwa from Legal Opinion to Legal Binding

Ijtihad and fatwa are closely related, where both are connected to each other. Fatwas emerge as a result of the *ijtihad* process carried out by *mujtahids* (Islamic jurists). *Ijtihad* and fatwa originating from ulama or competent authority institutions have a very important role in Islamic teachings, the aim of which is to provide solutions to answer a problem.⁴⁵

Initially, fatwas were only arguments presented by *muftis* (*mujtahid*) from official Islamic organizations such as Nahdlatul Ulama (NU), Muhammadiyah, the Indonesian Ulema Council (MUI), and other institutions. Therefore, a fatwa can be linked to a formal legal source in the national legal system, where the position of the fatwa is equivalent to the opinion of legal experts in Indonesia.

Empat, 2020), 49–50; See also Choirul Fuad Yusuf (eds.), *Fatwa Majelis Ulama Indonesia (MUI) dalam Perspektif Hukum dan Perundang-Undangan* (Jakarta: Badan Litbang dan Diklat Kementerian Agama RI, 2012), 93.

⁴⁴ Ma'ruf Amin, *Fatwa Produk Halal Melindungi dan Menetramkan* (Bogor: Pustaka Jurnal Halal, 2010), 53.

⁴⁵ Firdaus and Sup, "Legal Opinion Dalam Perspektif Hukum Islam," 64–65.

Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

Islamic law products, whether in the form of ijtihad or fatwa, which apply in Indonesia can be normative and formal juridical. Normative Islamic law generally relates to humans' relationship with God, such as prayer and fasting. Meanwhile, Islamic law which applies formally juridically is part of positive law in Indonesia, such as marriage, waqf, and so on. A concrete example of the implementation of Islamic law into positive law in Indonesia is Law (UU) Number 41 of 2004 concerning Waqf, which was previously regulated by Government Regulation (PP) Number 28 of 1977 concerning Waqf for Owned Land. Its contents are similar to Complications of Islamic Law (KHI) Book III Concerning Waqf. Article 2 of the Waqf Law states that waqf is considered valid if it is implemented in accordance with sharia provisions. Furthermore, article 6 determines that waqf must fulfill the elements: *wakif*, *nazhir*, waqf assets, waqf pledge, allocation of waqf assets, and waqf period.⁴⁶

One of the Islamic law products that has been adopted in the formation of national law is Law Number 1 of 1974 concerning Marriage Law, which has been amended into Law Number 16 of 2019. By making Islamic law a part of national law, Islamic jurisprudence is undergoing a transformation into a new phase. which is known as the *taqnin* phase (legislation phase). However, in its implementation, various problems still arise, including the lack of uniformity in judges' decisions regarding marriage law issues. This obstacle arises due to the lack of references or uniform sources of Islamic legal material. As an effort to overcome this problem, the Complications of Islamic Law (KHI) were born which came into force and are binding on the Muslim community through INPRES No. 1 of 1991.⁴⁷

Historically, the integration of ijtihad or fatwa into national law has occurred in several statutory regulations. For example, Law no. 1

⁴⁶ Abd. Shomad, *Hukum Islam: Penerapan Prinsip Syariah dalam Hukum Islam Indonesia* (Jakarta: Kencana Prenada Media Group, 2010), 373–398.

⁴⁷ Abd. Wahab Abd Muhaimin, *Adopsi Hukum Islam dalam Sistem Hukum Nasional* (Jakarta: Gaung Persada, 2010), 181–182.

of 1974 concerning Marriage (changed to Law Number 16 of 2019), Presidential Instructions, Complications of Islamic Law, Banking Law of 1998 (Amendment to Law Number 7 of 1992), Zakat Management Law, Hajj Organizers Law of 1999, and the 2008 Ahmadiyah Joint Decree (SKB). Apart from that, a similar phenomenon also occurs in several Sharia Regional Regulations, both at regional, city and provincial levels.⁴⁸

On the other hand, the MUI has special attention to problems that can damage the nation's morals, including issues related to pornography and pornographic action. In response to this, the MUI issued a fatwa related to this issue and encouraged the government to enact legislation that reflected the contents of the fatwa. As a result, Law Number 44 of 2008 concerning Pornography and Pornography was produced as a concrete step in responding to this problem.⁴⁹

Apart from that, several MUI fatwa materials have also been integrated into statutory regulations. For example, the 1997 Law on Narcotics includes articles that are in line with MUI Fatwa No. 10 Concerning Narcotics Abuse which was established in 1976.⁵⁰ Furthermore, the Decree of the Minister of Agriculture Number 413/Kpts/TN.310/7/1992 concerning the Slaughter of Slaughtered Animals and Handling of Meat and By-products, Chapter II Article 7 paragraph (2), states that the slaughter of sacrificial animals must be carried out in accordance with Islamic religious procedures which refers to the MUI fatwa issued in October 1976

In other sectors, the Halal Products Law which was initiated by the Ministry of Health, the Ministry of Religion and the MUI regarding the Inclusion of Halal Labels on Food Labels resulted in a Joint Decree (SKB) No. 427/Menkes/SKB/VIII/1985 and No. 68 of 1985. MUI's involvement in providing halal food certificates, as

⁴⁸ Ali, *Prospek Fatwa Sebagai Hukum Positif di Indonesia: Suatu Tinjauan Historis dan Yuridis (Disertasi SPs UIN Syarif Hidayatullah Jakarta, 2009)*, 239.

⁴⁹ Bahrudin S., "*Problematika Ijtihad Jama'I dan Legislasi Nasional: Studi Kasus Fatwa MUI Tentang Porno dan Aksi*" (Tesis Magister, Jakarta, UIN Syarif Hidayatullah, 2007), 145.

⁵⁰ Ali, *Prospek Fatwa Sebagai Hukum Positif di Indonesia: Suatu Tinjauan Historis Dan Yuridis (Disertasi SPs UIN Syarif Hidayatullah Jakarta, 2009)*, 265.

Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

stated by Mudzhar, is evidence of MUI's increasingly advanced and real development.⁵¹

In research related to Islamic economic fatwas issued by the DSN MUI and adopted into statutory regulations, it was stated that almost all fatwas produced by the DSN MUI were then used as references by Bank Indonesia or the Indonesian Ministry of Finance, especially by the Director General of Financial Institutions, the Director General of Debt Management, and the Capital Markets and Financial Institutions Supervisory Agency, into binding laws and regulations. A concrete example of a DSN MUI fatwa that is used as a binding regulation is DSN-MUI Fatwa No. 1/DSN MUI/IV2000 Concerning Current Accounts and DSN Fatwa No. 2/DSN-MUI IV/2000 concerning Deposits, which was later formalized as Bank Indonesia Regulation (PBI) No. 7/46/PBI/2005 Articles 3, 4, and 5. The Governor of BI in 2003 also stated that the MUI DSN Fatwa was the main reference in preparing Bank Indonesia regulations for Islamic banking. This PBI is used as the basis for supervising sharia aspects by BI as the banking supervisory authority.⁵²

However, as previously mentioned, when Islamic law, whether ijtihad or fatwa, is made into positive law or binding rules, obstacles always arise. This is in line with Sajipto Rahardjo's opinion, quoted by Muchtar Ali, that although legislation has various advantages, once it becomes statutory regulation or positive law, it will not necessarily be able to solve existing problems. This is due to rigidity and the risk of ignoring differences, so that some parties may be dissatisfied with the provisions that have been set.⁵³

An example of dissatisfaction regarding this matter can be found in Jan Michiel Otto's statement regarding the 1980 MUI Fatwa concerning the Prohibition of Marrying Non-Muslims, which made mixed or different religion marriages increasingly difficult to

⁵¹ M. Atho Mudzhar, *Membaca Gelombang Ijtihad* (Yogyakarta: Titian Ilahi Press, 2000), 152.

⁵² Bahrudin S., "Problematika Ijtihad Jama'I dan Legislasi Nasional: Studi Kasus Fatwa MUI Tentang Porno Dan Aksi," xx.

⁵³ Ali, *Prospek Fatwa Sebagai Hukum Positif di Indonesia: Suatu Tinjauan Historis dan Yuridis* (Disertasi SPs UIN Syarif Hidayatullah Jakarta, 2009), 251.

legitimize. The reaction of Bismar Siregar, a Supreme Court judge in 1994, illustrates that although as a Muslim he agreed with the MUI fatwa regarding the prohibition of interfaith marriages, as a judge, he considered that interfaith marriages should be considered legal.⁵⁴

The opinion above was reinforced by Nurshril Saat, who stated that not all MUI fatwas during the reform period underwent many changes and were considered controversial, especially those related to minority issues. Therefore, these fatwas are not always accepted and welcomed by Indonesian society.⁵⁵ In line with this view, Hasyim argues that the MUI has a history of issuing conservative fatwas in cases of religious blasphemy and has long been critical of non-Muslim leaders in Indonesia.⁵⁶ These notes should be of important concern to the parties concerned, showing that not all *ijtihad* or fatwa, in its various forms, can be forced into binding rules, because this can trigger the emergence of new problems in the heterogeneous Indonesian society.

E. Conclusion

Ijtihad and fatwa as products of Islamic law have undergone transformation from time to time. One of the significant changes is the shift from just the *legal opinion* of an individual or group that is considered authoritative to a binding rule (*legal binding*). This transformation can be seen in legislation, government regulations, regional regulations (Perda), and other binding regulations in Indonesia. These changes are proof that *ijtihad* and fatwa play an

⁵⁴ Otto Jan Michiel, *Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Amsterdam: Leiden University Press, 2010), 464, <https://doi.org/10.24415/9789087280574>.

⁵⁵ Norshahril Saat, "Theologians 'Moralising' Indonesia?: The Case of the Post-New Order Ulama Council of Indonesia (MUI)," *Asian Journal of Social Science* 44, no. 4–5 (January 1, 2016): 546, <https://doi.org/10.1163/15685314-04404005>.

⁵⁶ Muhammad Misbah and Anisah Setyaningrum, "Rising Islamic Conservatism in Indonesia Islamic Groups and Identity Politics, by Leonard C. Sebastian, Syafiq Hasyim, Alexander R. Arifianto," *Bijdragen Tot de Taal-, Land- En Volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia* 178, no. 1 (April 5, 2022): 138, <https://doi.org/10.1163/22134379-17801008>.

Actualization of Ijtihad and Fatwa in Indonesia from Legal Opinion to Legal Binding

important role and are needed by society as answers or legal certainty to various problems. However, the establishment of ijtihad and fatwa as binding rules still has shortcomings, because not all of them can accommodate various groups, and sometimes, in their implementation, they are not always in accordance with applicable regulations.

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