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ASSESSING VALIDITY OF SOME CRITIQUES TOWARDS THE FATWAS OF THE DSN-MUI ON *MUḌĀRABAH* WITHIN THE PERSPECTIVE OF THE *AQWĀL* OF ISLAMIC LEGAL EXPERTS

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Abstract: Abdullah Saeed and Mervyn K. Lewis argue that the implementation of contracts in Islamic banking has deviated from fiqh. With the same critical framework, some researchers in Indonesia also criticize the fatwas of the DSN-MUI (National Sharia Board of the Indonesian Ulema Council) on the *muḍārabah* contract. This paper, however, argues that all of those criticisms can be categorized as a *khilāfiyyah* (differences of opinion among muslim jurists). Again this backdrop, this paper will assess the validity of those critiques towards the fatwas of the DSN-MUI on *muḍārabah* within the perspective of the *aqwāl* of islamic legal experts (*madhāhib*) as well as prove that the *muḍārabah* model in Islamic banking in Indonesia does not deviate from fiqh. After reviewing relevant library sources, this paper shows that the fatwas of the DSN-MUI on *muḍārabah* are supported by the *aqwāl* of islamic legal experts among Ḥanbalī, Ḥanafī, Mālikī, and Shāfi'ī schools. Moreever, although it is different from the *muḍārabah* form known by many people in fiqh, the *muḍārabah* contract system adopted by the DSN-MUI can be categorized as a model of *muḍārabah* permitted by islamic legal experts.

Keywords: Fatwa, DSN-MUI, *Muḍārabah*, *Aqwāl*, Islamic Legal Experts

Abstrak: Abdullah Saeed dan Mervyn K. Lewis berpendapat bahwa pelaksanaan akad-akad pada perbankan syariah telah menyimpang dari fiqh. Dengan kerangka kritikan yang sama, beberapa peneliti di Indonesia pun mengarahkan kritikan mereka kepada fatwa-fatwa DSN-MUI tentang akad *muḍārabah.* Hanya saja, tulisan ini berargumentasi bahwa semua kritikan tersebut merupakan perbedaan pendapat di dalam fiqh (*khilafiyyah*). Karena itu, tulisan ini akan menakar validitas kritikan-kritikan tersebut sekaligus membuktikan bahwa model *muḍārabah* pada perbankan syariah di Indonesia tidak menyimpang dari fiqh. Setelah menelaah sumber pustaka yang relevan, tulisan ini menyimpulkan bahwa fatwa DSN-MUI tentang *muḍārabah* didukung oleh *aqwāl* ulama mazhab Ḥanbalī, Ḥanafī, Mālikī,

dan Shāfi'ī. Lebih dari itu, walaupun berbeda dengan bentuk *muḍārabah* yang diketahui banyak orang dalam fiqh, sistem kontrak *muḍārabah* yang difatwakan oleh DSN-MUI, masih termasuk model pelaksanaan *muḍārabah* yang dibolehkan oleh ulama mazhab.

Kata Kunci: Fatwa, DSN-MUI, *Muḍārabah*, *Aqwāl*, Islamic Legal Experts

Introduction

Dewan Syariah Nasional (DSN, National Sharia Board), a body under the Majelis Ulama Indonesia (MUI, Indonesian Ulema Council), henceforth DSN-MUI, has a special duty to issue fatwas related to Islamic finance. Officially, this institution was formed in 1998 in response to the rapid development of Lembaga Keuangan Syariah (LKS, Islamic Financial Institutions) in Indonesia, while Bank Indonesia (BI) and the Ministry of Finance, two institutions that has authority in the financial sector, but not in the field of sharia.[1]

Sharia Bank carries out its business activities based on the sharia principles.[2] Its birth stems from the rise of the Islamic movement in the early 20th century when Muslims wanted to practice their religion in all aspects of their lives, including the economy.[3] Therefore, the fatwas of the DSN-MUI regarding Islamic banking and the system/mechanism of its contracts must convince the religious 'ummah' that all of their activities are in accordance with the sharia principles.

As a responsibility to ensure that the contracts used in Islamic banking are conforming to the Islamic rules, the DSN-MUI issues fatwas by following the guidelines set by the Fatwa commission of the MUI. Stating that every issue discussed in the fatwa commission, including the issue of Islamic finance, must be based on four principles; Quran, Sunnah, *Ijmā'* and *Qiyās*. The very first step of fatwa issuance is thus to carefully review the opinions of the Imams of the *madhhab* regarding the issue and their arguments. When the problem in question has a *qaṭ'ī* (certain) basis, such as the Quran, then the fatwa can be immediately issued according to that basis.[4] Since its establishment until the end of 2019, the DSN-MUI has issued 130 fatwas on contracts in Islamic banking, sharia insurance, and sharia business. Out of 78 fatwas that have been published in the Fatwa Association book, 53 fatwas are related to Islamic banking.[5]

The fatwas of the DSN-MUI on Islamic banking, however, seem to have no basis, although it is deemed new and different from what has been circulating in the community. Even the early fatwas such as those on *giro*, savings, deposits, *murābaḥah*, *muḍārabah*, *mushārakah*, *ijārah* and others did not at all attach the opinion or *aqwāl* of the scholars of *madhhab* . Therefore, it is just logical that these fatwas have received a lot of criticism from various parties: scholars, academics, and researchers. Cholil Nafis, for example, generally questions the independence of the DSN-MUI because it is more influenced by opinions in the Shāfi'ī school.[6]

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1 M. Cholil Nafis, *Teori Hukum Ekonomi Syariah* (Jakarta: UI-Pres, 2011), 82.

2 Indonesian Law no 21 of 2008 on Islamic Banking, Article 1.

3 Abdullah Saeed, *Menyoal Bank Syariah: Kritik Atas Interpretasi Bunga Bank Kaum Neo Revivalis* (Jakarta: Paramadina, 2004), p. 4.

4 Majelis Ulama Indonesia, *Himpunan Fatwa MUI Sejak 1975* (Jakarta: Penertbit Erlangga, 2011), pp. 3–8.

5 DSN-MUI-BI1, *Himpunan Fatwa Dewan Syariah Nasional MUI*, 1 (Jakarta: Gaung Persada, 2006).

6 M. Cholil Nafis, *Teori Hukum Ekonomi Syariah*, p. 82.

Amir Syarifuddin[7] criticizes the DSN-MUI Fatwa for not providing an explanation for the use of the argument or *wajh istidlāl* (method of argumentation) which forms the basis of a fatwa.

Among the contracts that receive a lot of criticism is the *muḍārabah*; one which is considered an icon of Islamic banking in its position as a more equitable system in providing the benefit of the people. The criticism is directed to both the theoretical system and its implementation in the field.[8] Criticism of the system and mechanism of the *muḍārabah* contract in Islamic banking, which is formally based on the DSN-MUI fatwas, indirectly questions the validity of these fatwas. On the other hand, a fatwa must obtain the *miṣdāqiyah* (recognition) of the people that the fatwa is truly based on sharia principles. One way of convincing them is by providing an explanation that these fatwas have strong arguments and are supported by the opinion or *aqwāl* of the scholars of *madhhab* whose capacity and integrity have been recognized.

This article discusses the fatwas of the DSN-MUI on *muḍārabah* and places them among the opinions (*aqwāl*) of the scholars of *madhhab*. It questions whether the fatwas are supported by the *aqwāl* of the scholars or the rather new '*ijtihad*' of the DSN-MUI; and why the DSN-MUI chooses one of the *aqwāl* if there is a dispute regarding the problem in question. By doing so, this article provides answers to the criticism raised on the system and mechanism of *muḍārabah* implemented in Islamic banking.

This is a library research with the main data obtained through a review of the literature related to the research object. The focus is on the thoughts of the *fiqh* scholars from some schools reflected in their fatwas. It employs comparative method or, as Muslim scholars call it, *muqāranah al-madhāhib*. The type of data in this research is mainly secondary data obtained from libraries, consisting of primary materials from standard *fiqh* books from various schools, and secondary and tertiary ones which consist of studies and research of *muta'akhkhirīn* (contemporary) scholars. It initially collects the responses that either support or against the fatwas of the DSN-MUI on *muḍārabah*; lists the themes that are often questioned in the implementation of it and more generally the contracts practiced in Islamic banking; elaborates the *aqwāl* of the scholars of *madhhab* related to these themes, and; finally compares them with the fatwas of the DSN-MUI. Conclusively, this article uses the framework developed in *fiqh* and *uṣūl al-fiqh* and presents the results with a qualitative descriptive method.[9]

DSN-MUI's Fatwas on *Muḍārabah*: Pros and Cons

We have mentioned before that the fatwas on this issue have received a lot of criticism. Muhammad Abduh Tuasikal in his article "*Kamuflase Istilah Syariah* (Camouflage of Sharia Terms)," Muhammad Arifin Badri with the article "*Bank Syariah Sudahkah Menjawab Harapan Umat* (Have Sharia Banks Answered the Expectations of the People)," and Muhammad Abdus Somad in the article "*Keraguan atas Praktik Bank Syariah Indonesia* (Doubts on the Practices of Indonesian Sharia Banking)," [10] question the validity of the *muḍārabah* contract in today's Islamic bank-

[7] Personal interview with Amir Syarifuddin, associate professor in the Faculty of Syariah IAIN Imam Bonjol Padang. He is the former head of MUI Padang.

[8] Moh.Nurul Qomar, "Mudharabah Sebagai Produk Pembiayaan Perbankan Syariah Perspektif Abdullah Saeed," *MALIA: Journal of Islamic Banking and Finance* 2, no. 2 (2018): 209.

[9] Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: Penerbit Universitas Indonesia (UI-Press), 2006), p. 252.

[10] Muhammad Abduh Tuasikal, "Kamuflase Istilah Syariah," *Majalah Pengusaha Muslim*, no. 24 (2012): 6.

ing. Their main critique is on the profit sharing in the *muḍārabah* scheme which is based on the prediction of profit at the beginning of the contract, carried out every month, and is not based on the real profit known at the end of the contract. Riri Anggraini criticizes the profit sharing with the revenue sharing system (for revenue sharing) instead of a pure profit and loss sharing system.[11]

Similar to Abdullah Saeed, Muhammad Sjaiful also questions the legal standing of Islamic banks which has dual status, as *muḍārib* on the one hand and as *ṣāḥibu al-māl* on the other. According to Sjaiful, this lack of clarity causes the *muḍārabah* contract to turn into *dayn* (debt). Muhyidin, Muhammad Mukhtar Shidiq and Triyono argues that charging *muḍārib* a guarantee payment has changed the *muḍārabah* into *dayn*.[12] Khudari Ibrahim says that the practice of *muḍārabah* in Islamic banking which obliges *muḍārib* to pay for insurance will burden the *muḍārib* and be regarded a violation of sharia compliance.[13]

A. Chairul Hadi and Sofhian are of the opposite opinion, that banks or *ṣāḥibu al-māl* is allowed to charge *muḍārib* an amount of guarantee for the capital they distribute. Both of them do not present the arguments of the *aqwāl* of ulama, but consider it as *al-maṣālih al-mursalah* that conforms the needs, situations and conditions of the ummah. According to Sofhian, the guarantee from *muḍārib* is not to secure the capital, but rather to ensure that the *muḍārib* will not violate the agreement.[14]

Zuhirsyan and Nurlinda argue that with regard to savings and time deposits, Islamic banks have implemented real profit sharing.[15] However, Nosain finds that Islamic financial institutions does not really implement the *muḍārabah* contract, but instead provide a working capital (mainly short-term) loan, to regulate the procedures for withdrawing funds, and share profits based on bank regulations.[16] Therefore, Popon Srisusilawati emphasizes the urgency of intensive supervision in the implementation of *muḍārabah* by Islamic banks ensuring that it runs in accordance with the principles of Islamic law and realizes justice for both parties.[17]

Abdullah Saeed and Mervyn K. Lewis, supported by M. Maksum, concludes that Islamic financial activities do not fully implement the *fiqh* contract model, in fact they are very contrary to it.[18] Rahman Ambo Masse also argues that the practice of *muḍārabah* by Islamic banking has undergone a fundamental change from its basic rules in

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11 Riri Anggraini, Kompasiana.com, 20 December 2016.

12 Muhammad Sjaiful, "Studi Kritis Model Perjanjian Mudarabah Pada Perbankan Syariah Di Indonesia," *IJTIHAD Jurnal Wacana Hukum Islam Dan Kemanusiaan* 15, no. 1 (January 21, 2016): 128.

13 Khudari Ibrahim, "Mudharabah Priciple of Banking Products," *Jurnal IUS Kajian Hukum Dan Keadilan* 2, no. 1 (2014): 51.

14 Ahmad Chairul Hadi, "Problematika Pembiayaan Mudharabah Di Perbankan Syariah Indonesia," *Jurnal Al-Iqtishad* 3, no. 2 (2011); Sofhian, "Pemahaman Fiqhi Terhadap Mudharabah (Implementasi Pembiayaan Pada Perbankan Syariah," *Jurnal Al-'Adl* 9, no. 2 (2016).

15 Zuhirsyan and Nurlinda, "Perspektif Mudharabah Pada Perbankan Syariah Dan Sistem Bunga Pada Perbankan Konvensional," *Polimedia* 2, no. 2 (2018): 8.

16 Norsain Norsain, "Tinjauan Kritis Pembiayaan Mudharabah Pada Bank Syariah Mandiri Sumenep," *Jurnal Performance* 3, no. 2 (2013): 13.

17 Popon Srisusilawati and Nanik Eprianti, "Penerapan Prinsip Keadilan Dalam Akad Mudharabah Di Lembaga Keuangan Syariah," *Law and Justice* 2, no. 1 (June 21, 2017): 12–23.

18 Saeed, *Menyoal bank syariah*, p. 88. See also Muhammad Maksum, "Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia Dalam Merespon Produk-Produk Ekonomi Syariah Tahun 2000-2011 (Studi Perbandingan Dengan Fatwa Majelis Penasihat Syariah Bank Negara Malaysia," 2013, 91, Dissertation UIN Syarif Hidayatullah Jakarta.

fiqh.[19] This is also revealed by Mahmudatus Sa'diyah and Meuthiya.[20]

Abu Majid Harak also admits that the *fiqh* debate on Islamic banking practices still leaves many problems, for example; time restrictions that would damage the *muḍārabah* contract.[21] Furthermore, it also distributes the illegitimate capital instead of cash according to scholars.[22] However, this article will explore the *aqwāl* of legal scholars regarding the models of *muḍārabah* contracts through their works, then measure the validity of the criticisms towards the fatwas of the DSN-MUI.

The *Aqwāl* of Islamic Legal Experts

Having compiled the pros and cons on the fatwas of the DSN-MUI, the following pages will provide an elaboration of ten subthemes under the issue of *muḍārabah*. The discussions below will help us assess the validity of the fatwas and see whether they conform or rather violate the arguments developed in various legal schools.

1. Muḍārabah with Non-Cash Capital

In its fatwa on *muḍārabah*, the DSN-MUI declares that it is allowed to conduct *muḍārabah* with either cash or non-cash (goods/assets) capital. This triggers questions particularly from Muslim scholars for the majority of legal scholars (*jumhūr al-'ulamā`*) to regard it illegitimate to conduct *muḍārabah* with any form of capital other than *dīnār* and *dirham* (cash), including *al-'urūḍ* and *as-silā`* (assets).[23]

The majority says that it is difficult to return the capital due to fluctuations in the price of goods;[24] the so-called 'cash capital' is safer for it allows *muḍārib* and *ṣāḥib al-māl* to take the profit without any risks. Furthermore, the non-cash capital also provides both parties with uncertain profit.[25] However, there are names such as Ṭāwūs, Auzā'ī, and Ibn Abī Lailā,[26] that regards it to be legitimate (*ṣaḥḥ*) to make use of goods and assets because they belong to the category of *māl* (property). If one is allowed to conduct *muḍārabah* with 'cash capital', one is also allowed to do so with goods and assets.[27] However, the latter argument by Ṭāwūs is similar to a *marjūḥ* (weak) argument ascribed to Imam Aḥmad b. Ḥanbal who says that the price of those goods can be the nominal of capital when the contract begins, but if it increases, the surplus cannot be regarded as profit.[28]

Thus, in this regard the DSN-MUI seems to follow the argument of Ibn Abī Lailā and

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19 Rahman Ambo Masse, "Konsep Mudharabah Antara Kajian Fiqh Dan Penerapan Perbankan," *Jurnal Hukum Diktum* 8, no. 1 (2010).

20 Mahmudatus Sa'diyah and Meuthiya Athifa Arifin, "Mudharabah Dalam Fiqih Dan Perbankan Syari'ah," *EQUILIBRIUM* 1, no. 2 (2014).

21 Abu Majid Harak, *al-Bunūk al-Islāmiyah* (Cairo: Dar Sahwah, n.d.), p. 213.

22 Al-Sayyid Sābiq, *Fiqh al-Sunnah*, 3 (Beirut: Dar al-Fikri, 1983), p. 213.

23 'Alā' al-Dīn Abi Bakr bin Mas'ūd Al-Kasānī, *Badāi' al-Ṣanāi' Fi Tartīb al-Sharāi'*, 2nd ed., 8 (Beirut: Dār al-Kutub al-'Ilmiyah, 1986), p. 3594; Abī Isḥāq Al-Shayrāzī, *Al-Muhadhdhab Fī Fiqh al-Shāfi'ī*, 1 (Damascus: Dār al-Qalam, 1996), p. 385; Muḥammad ibn Aḥmad Ibn Rushd, *Bidāyah Al-Mujtahid Wa Nihāyat al-Muqtaṣid* (Cairo: Dār al-Fikri, n.d.).

24 Abī Ḥasan 'Alī ibn Muḥammad ibn Ḥabīb Al-Mawardī and Abu Sulaimān Abd al-Wahāb Hawas, eds., *Al-Muḍārabah* (Manṣūrah Mesir: Dār al-Wafā, 1989), pp. 126–27.

25 Syamsuddin Al-Sarakhsī, *Al-Mabsūṭ*, p. 20 (Beirut: Da al-Ma'rifah, n.d.), p. 33; Al-Kasānī, *Badāi' al-Ṣanāi' Fī Tartīb al-Syarāi'*, p. 3594; Ibn Rushd, *Bidāyat Al-Mujtahid Wa Nihāyat al-Muqtaṣid*, p. 237; 'Abd Allāh ibn Muḥammad ibn Qudāmah, *Al-Mughnī*, p. 5 (Beirut: Dār al-Kitāb al-'Arabi, n.d.), p. 112.

26 Muḥammad ibn Aḥmad ibn Uthmān ibn Qaymaz Al-Dhahabī, *Tadhkirat Al-Ḥuffāz*, 1 (Dar al-Ma'arif al-Usmaniah, 1374), p. 171.

27 Al-Sarakhsī, *Al-Mabsūṭ*, p. 33.

28 Ibn Qudāmah, *Al-Mughnī*, p. 112.

the *marjūḥ* (weak) argument of Imam Aḥmad, rather than the *jumhūr*'s. I argue that this is the right choice, for the basis for *jumhūr*'s argument is yet arguable. The price fluctuation does nowadays apply to the money. Its currency when the contract begins might not be the same when it terminates. Therefore the return on capital will depend on the agreement between the two parties, even when the capital is in the form of money; in which form will the capital be returned. Either way, both parties will refer to the market price at the time of the contract. There is indeed a little uncertainty regarding *muḍārabah* profit, as it is in the contract of *musāqāh* and other kind of businesses. However, such uncertainty is natural and does not lead to the void of the contract. That is why Muslim legal scholars allow a little *jahālah* (uncertainty) as long as it is *gairu fāḥisy* (insignificant) or cannot be avoided.[29]

2. *The Object of Muḍārabah Is Not Trade*

The DSN-MUI's fatwa regarding *muḍārabah* does not limit its form and business activities to trade or commerce. It thus sort of violates the general definition commonly known in the *fiqh* books; *muḍārabah* is a cooperation between two parties, in which one party (*ṣāḥib al-māl*) provides capital to the other (*muḍārib*), to be traded, under the condition that profits are shared between them according to the agreed percentage. The loss, if any, is borne by the owner of the capital. This means that the form of *muḍārabah* activity is limited to trade/commerce.

A close reading to the fiqh literatures present a high disputes between legal scholars on this issue. The Shafiite and Hanafite scholars only allow *muḍārabah* in the scheme of trade or other scheme the profit of which comes from trading or trading-like activities. In *Kifāyatul-Akhyār* we can find a great example; if one conducts a *muḍārabah* for (to buy) wheat and one bakes a cake from it, the *muḍārabah* will be void. The same applies to a case of someone who conducts *muḍārabah* for yarn then he/she spins, weaves and sells it. This is due to the status of *muḍārabah* as a *rukhṣah* (permission) which can be applied in emergency. It is initially unlawful for the profit uncertainty, but is then allowed for a *ḥājah*. Spinning, weaving, and cake-baking, however, can be conducted through *ijārah* (lease). In this case, *muḍārabah* returns to its basic status, that is unlawful.[30] The Hanafites go further by saying that those kinds of activities belong to the category of skill outside trade or commerce and are thus not incorporated in the *muḍārabah* contract.[31]

On the other hand, the Hanbalites allow *muḍārabah* with trading *plus* other forms of work or productive activity by *muḍārib*. It bases its argument on *qiyās* (analogy) to *musāqāh* and *muzāra'ah*, both of which engage other form of productive activities. These three contracts share similar aspect, which is passing on capital or assets to another party so that the latter can manage the capital/assets and both parties may gain some profit. According to this legal school, if one (*ṣāḥib al-māl*) gives yarn to a tailor (*muḍārib*) and the latter sells it and gains profit, the profit can be shared by both parties.[32]

In this regard, DSN-MUI clearly follows the argument of the Hanbalite scholars who allow the contract with either trade/commerce or other productive activities.

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29 Sābiq, *Fiqh Al-Sunnah*, p. 136.

30 Abū Bakr ibn Muḥammad al-Ḥusaynī al-Ḥusnī Al-Dimasyqī, *Kifāyat Al-Akhyār Fī Ḥalli al-Ikhtiṣār*, 1 (Beirut: Dār al-Ma'rifah, n.d.), p. 187; Abū Zakariya Yaḥya ibn Sharaf Al-Nawawī, *Rawḍat Al-Ṭālibīn*, 5 (Al-Maktab al-Islamī, n.d.), p. 120.

31 Al-Kasānī, *Badāi' al-Ṣanāi' Fī Tartīb al-Sharāi'*, p. 3624.

32 Ibn Qudāmah, *Al-Mughnī*, p. 118.

3. *Muḍārib (A) Conducting Muḍārabah with Another Muḍārib (B)*

In other fatwa, the DSN-MUI states that in their status as *muḍārib*, banks can carry out various kinds of business and development that are not against sharia principles, including conducting *muḍārabah* with other parties.[33] M. Maksum quoting El. Gamal calls the second muḍārabah the silent partnership.[34] The concept of parallel *muḍārabah* is also acknowledged by Majma 'al-Fiqh al-Islāmi, which firmly places the bank as a *muḍārib* who performs another *muḍārabah* to a third party (*muḍārabatul-muḍārabah*), not as an intermediary between customers and *muḍārib*s.[35]

Legal scholars from many schools have discussed this issue. First they agreed that muḍārib should not give capital that he/she received as *muḍārabah* to other *muḍārib*s, if the *ṣāḥib al-māl* did not give permission.[36] According to Mālikiyah *muḍārib* should not do so unless *ṣāḥib al-māl* orders it. Otherwise, *muḍārib* is considered to have committed a mistake (violation), so that he/she must be responsible if the business incurs a loss. But if the business is profitable, he is still entitled to a share of the profits from both contracts.[37]

Nevertheless, the scholars of the school differed on the opinion of *muḍārib* conducting another *muḍārabah* with other *muḍārib* by the permission from *ṣāḥib al-māl*, and regarding the sharing of the profits.[38] Sayid Sabiq absolutely prohibits this practice,[39] the same argument with that of the Shāfi'iyah scholar in *Nihāyah al-Muḥtāj*.[40] The reason for this prohibition is the confusion about who is the actual manager and that the bank does not act as an intermediary for a job. This makes the bank not eligible for profit sharing. On the other hand, Ḥanafiyah and Ḥanābilah scholars allow this practice only with the permission of *ṣāḥib al-māl*.[41]

The DSN-MUI in this regard follows the opinion of Ḥanafiyah and Ḥanābilah. I would argue again that this is the right choice, mainly because there is no *naṣṣ* which prohibits this practice. The second reason is due to the significant contribution of intermediary and therefore it is worth receiving a reward. It might be difficult for the *ṣāḥib al-māl* to directly find a trustee (*muḍārib*) to manage his/her capital, and the otherwise for a *muḍārib* to find *ṣāḥib al-māl* to fund his/her business. Moreover, banks also select *ṣāḥib al-māl* by assessing the feasibility of business and management. They do not just pass on the funds. Third, *muḍārib* already knows the character of their business partners, namely as intermediaries with

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33 DSN-MUI-BI1, *Himpunan Fatwa Dewan Syariah Nasional MUI*, p. 19.

34 Maksum, "Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia Dalam Merespon Produk-Produk Ekonomi Syariah Tahun 2000-2011 (Studi Perbandingan Dengan Fatwa Majelis Penasihat Syariah Bank Negara Malaysia," p. 100.

35 Verdict no 123 (13-5) agreed in the Thirteenth Congress in Kuwait on 22-27 December 2001. Majma' al-Fiqh al-Islāmī, "*al-Muḍārabah al-Mushtarakah fī al-Muassasāt al-Mālīyah*", downloaded from http://www.fiqhacademy.org.sa/qrarat/13-5.htm, accessed 3 July 2011.

36 Abū Abd Allāh Muḥammad al-Khurshī, *Sharḥ Al-Khurshi 'Alā al-Mukhtaṣar al-Jalīl Li al-Imām Abī al-Ḍiyā' Al-Saydī Khalīl*, 6 (Cairo: Al-Maṭba'ah al-Kubrā al-Amīriyah, 1317), p. 214.

37 Ibn Rushd, *Bidāyat Al-Mujtahid Wa Nihāyat al-Muqtaṣid*, p. 182; Al-Kasānī, *Badāi' al-Ṣanāi' Fī Tartīb al-Sharāi'*, p. 84; al-Imām Shaḥnūn ibn Sa'īd Al-Tanukhī, *Al-Mudawwanah al-Kubrā*, 12 (Saudi Arabia: Wizārah al-Shu'ūn al-Islāmiyah wa al-Awqāf wa al-Da'wah wa al-Irsyad, n.d.), p. 104.

38 Al-Sarakhsī, *Al-Mabsūṭ*, p. 100; Sharaf Al-Dīn Mūsā ibn Aḥmad ibn Mūsā Al-Hajjāwī, *Al-Iqnā' Fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, 2 (Beirut: Dār al-Ma'rifah, n.d.), p. 264.

39 Sābiq, *Fiqh Al-Sunnah*, p. 214.

40 Muḥammad ibn Abi al-'Abbās Aḥmad ibn Hamzah ibn Shihāb al-Dīn Al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Sharḥ al-Minhāj Wa Ma'ahu Hashiyah al-Shibramlisī Wa Hashiyah al-Maghribī*, 5 (Beirut: Dār al-Kutub al-'Ilmiyah, 2003), p. 227; Al-Shayrāzī, *Al-Muhadhdhab Fi Fiqh al-Shāfi'ī*, p. 480.

41 Al-Sarakhsī, *Al-Mabsūṭ*, p. 100; Al-Hajjāwī, *Al-Iqnā' Fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, p. 264.

third parties and do not operate in the real sector. Customers (*muḍārib*) acknowledges that the business is run by both banks and depositors (*ṣāḥib al-māl*), not a business managed by a debtor customer. It can be said thus that *ṣāḥib al-māl* has given permission to the bank to do *muḍārabah* with other parties, according to the rules: المعروف عرفا كالمشروط شرطا or المعروف بين التجار كالمشروط بينهم.[42]

4. *Muḍārib Gains Other Capital from Other Ṣāḥib al-Māl*

Investment with *muḍārabah* contracts in LKS is a collective investment. This means that the bank as a *muḍārib* also receives funds from other *ṣāḥib al-māl*. This applies to Islamic banking even though it is not explicitly stated in the fatwa.

As in the previous sub-theme, legal scholars have different opinions on this issue. Ḥanafites and Ḥanbalites permits and considers it as a management method which becomes the authority of the *muḍārib*, because *ṣāḥib al-māl* has handed it over to the *muḍārib*.[43] Only if the *muḍārib*'s sustenance comes from the *muḍārabah* fund, then the *muḍārib* may not receive *muḍārabah* funds from other *ṣāḥib al-māl*. This is because it will be detrimental to the first *ṣāḥib al-māl*, unless he/she gives permission. The author of *al-Inṣāf* that if the contract says the sustenance of *muḍārib* is borne by *ṣāḥib al-māl*, then he/she serves as the worker and therefore he/she must not work for other people (by accepting *muḍārabah* from others).[44]

According to Ibn Qudāmah, *muḍārib* should not receive funds from other *ṣāḥib al-māl* because it would disturb the first *muḍārabah*. If the *muḍārib* does and he/she cannot differentiate between each *muḍārabah*, he/she must take the responsibility for whatever that may happen. However, if *ṣāḥib al-māl* gives permission, then the *muḍārib* may receive *muḍārabah* funds from other *ṣāḥib al-māl*. A simple statement that the *ṣāḥib al-māl* will accept *muḍārib*'s considerations suffices.[45] Imam Malik also allowed receiving *muḍārabah* funds from other *ṣāḥib al-māl* under the condition that *muḍārib* would not neglect the first contract. Accordingly, if the capital from the first is already significant, it is better for the *muḍārib* not to receive funds from others.[46]

Shāfi'ite scholars also allow the *muḍārib* to cooperate with two *ṣāḥib al-māl* at the same time because in practice he/she will conduct the same thing. If the share of profits for *muḍārib* in the two *muḍārabah*s is the same, then he will receive according to the agreement. In fact, if it is different in each contract, for example with one party he gains 50%, and 25% from the other, it does not invalidate the *muḍārabah* as long as each are described in the contract.

From the above explanationm it is understood that the scholars of the *madhhab* agrees that *muḍārib* can receive *muḍārabah* capital from several *ṣāḥib al-māl* as long as the first *ṣāḥib al-māl* gives permission and all parties are clearly aware of each of the benefits. It seems that the DSN fatwa is in accordance with the opinion of the majority of the *'ulamā'* (*jumhūr*), and this is what every Sharia Bank practices.

5. *Muḍārib Encloses His/Her own Capital to the Muḍārabah*

[42] Muḥammad Ṣidqī ibn Aḥmad ibn Muḥammad Al-Burnu, *Al-Wajīz Fī Īḍāḥ Qawā'id al-Fiqh al-Kulliyah* (Saudi Arabia: Mu'assasah al-Risālah, 1996), p. 306.

[43] Al-Kasānī, *Badāi' al-Ṣanāi' Fī Tartīb al-Sharāi'*, 92; Al-Hajjāwī, *Al-Iqnā' Fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, p. 265.

[44] 'Alī ibn Sulaymān Al-Mardāwī and Muḥammad Ḥāmid al-Faqī, eds., *Al-Inṣāf Fī Ma'rifat Al-Rājiḥ Min al-Khilā*, 5 (Saudi Arabia: Mat}ba'ah al-Sunnah al-Muh}ammadiah, 1956), p. 437.

[45] Ibn Qudāmah, *Al-Mughnī*, p. 134.

[46] Al-Tanukhī, *Al-Mudawwanah al-Kubrā*, p. 106–7.

One can find in many cases that bank as a *muḍārib* also includes its capital in the *muḍārabah* that it conducts. The DSN-MUI uses the term *muḍārabah musytarakah*, which is a combination of *muḍārabah* and *musyārakah*. The bank acts as *musyārik* and at the same time as *muḍārib*. The profit sharing is differentiated between the profit from the *musyārakah* contract and the profit from the *muḍārabah* contract.[47]

The practice of combining *muḍārabah* funds with that of *muḍārib* has been discussed by scholars. According to Hanbalite and Ḥanafite scholars, this practice may be permitted with the permission from *ṣāḥib al-māl* before the business starts. A simple statement that the *ṣāḥib al-māl* will accept *muḍārib*'s considerations suffices.[48] For Ibn Qudamah, the *muḍārib* may see that the merger brings more benefits and this becomes his/her main consideration.[49] Imam Malik also allowed this practice only with orders from *ṣāḥib al-māl*.[50] According to Ibn Juzayy, in al-Qawanin al-Fiqhiah Shāfi'ite scholars are reported to have two opinions. The stricter one reports the prohibition of such practice, while the weaker one discloses its allowance under the condition that the *ṣāḥib al-māl* clearly gives permission. However, according to Mālikiyah, if the *muḍārib* can manage two assets at once then he/she is allowed to combine them, otherwise it is not allowed. However, if the capital makes the *ṣāḥib al-māl* funds unused, then the *muḍārib* is obliged to return the funds. Ulama prohibit *muḍārib* from combining with *muḍārabah* property and his/her own after the contract terminates, because it will cause the uncertainty of the profit. The Ulama also prohibit *muḍārib* from combining their own funds with that of *muḍārabah* unless the *ṣāḥib al-māl* gave a permission.[51]

The system in Sharia banking, which divides capital into the core capital and third party funds, is in accordance with the opinions of Hanbalite scholars including Ibn Qudamah, Ḥanafites and Imam Malik, who allow *muḍārib* to combine his/her own capital in *muḍārabah* with the partners.[52] In its implementation, Islamic banking prioritizes the distribution of third party funds in the financing scheme. Thus, if the third party funds received are equal to the financing channeled, then all the financing is calculated to come from third party funds.

6. *Profit Sharing When Muḍārib Conducts Another Muḍārabah with Funds of the Former*

We have explained that the DSN-MUI allows banks as *muḍārib* to conduct *muḍārabah* with other *muḍārib*. Some scholars also supports this concept. However, the DSN-MUI does not explain the profit sharing system. It simply says that the profit sharing should be based on the rules regarding profit sharing. On a practical level, the funds from savers are managed collectively, and the profits to be distributed to savers are the profits from all forms of financing. The benefits that the *ṣāḥib al-māl* gains do not come from transactions made only with their own capital. The profit distributed is also not from the net profit obtained by the bank or pure profit sharing, but rather from the financing distributed before deducting the bank's operational costs, which is also known as revenue sharing.

If all forms of financing are carried out in the form of *muḍārabah* and the bank agrees on a 50:50 ratio for profit sharing, and the

47 DSN-MUI-BI1, *Himpunan Fatwa Dewan Syariah Nasional MUI*, p. 377.

48 Al-Kasānī, *Badāi' al-Ṣanāi' Fī Tartīb al-Sharāi'*, p. 87; Ibn Qudāmah, *Al-Mughnī*, p. 161.

49 Ibn Qudāmah, *Al-Mughnī*, p. 161.

50 Al-Tanukhī, *Al-Mudawwanah al-Kubrā*, p. 104.

51 Abī al-Qāsim Muḥammad ibn Aḥmad Ibn Juzayy, *Qawānīn Al-Fiqhiyah* (Saudi Arabia, n.d.), p. 438.

52 DSN-MUI-BI1, *Himpunan Fatwa Dewan Syariah Nasional MUI*, p. 374.

contract with the customer (second *muḍārib*) agrees with 30% for the customer, then what the bank will share with the saver is 50% of 70% of the profit. In other words, savers will only receive 35%, not 50%. On the other hand, savers will benefit from the percentage of their average balance in a certain month (this comes from the amount of third party funds) multiplied by the profit to be divided, multiplied by the agreed profit sharing ratio.

The dispute of the scholars in this matter is quite extreme. According to the scholars of Hanbali and Maliki schools, the benefits obtained are the right of the *ṣāḥib al-māl* and the second *muḍārib*. The first *muḍārib* is not entitled a sharing, because he/she is not the funding party nor the manager. The right to *muḍārabah* benefits only falls to these two categories. Ibn Qudamah in al-Mugni even states that if *ṣāḥib al-māl* gives permission, *muḍārib* may do so in the status of a representative of *ṣāḥib al-māl*. Being in this position, he/she would not get the power as the real *ṣāḥib al-māl* nor the manager. Thus, he/she is not allowed to receive the profit.[53]

In contrast, according to Imam Malik, *muḍārib* can take the benefit as much as the difference in sharing ratio between the two *muḍārabahs*. If the agreement in the contract between *ṣāḥib al-māl* and the first *muḍārib* agrees the ratio of 50:50, and the contract between the first and the second *muḍārib* agrees 1/3:2/3, then *ṣāḥib al-māl* will gain ½ of the profit, the second *muḍārib* gets 2/3 according to the agreement, and the first *muḍārib* has to pay an amount of 1/6 of the total profit.[54] Al-Kasani from the Ḥanafi school also argues that the benefits of the two *muḍārabahs* are the rights of all three parties. In Badā`i 'he describes a condition in which *ṣāḥib al-māl* gives *muḍārabah muṭlaqan* i.e. without specifying the manager, with a profit ratio of 50:50, then the *muḍārib* conducts another *muḍārabah* with other people with a profit ratio of 1/3 for this second *muḍārib*. In this condition the first *muḍārib* only receives the rest of the profit, ½-1/3 = 1/6.[55]

Profit sharing as it is practiced today is not found in the literatures written by the ulama of *mazhab*. The *muḍārabah* contract at that time might still be carried out individually and the first *muḍārib* was not really considered as a *muḍārib*. In this matter, the DSN-MUI gives permission and issues a new fatwa, although it was similar to Ḥanafiyah's opinion. This kind of ijtihad might be what Yusuf al-Qardawi calls ijtihad *intiqā`ī insyā`ī*. I would also argue that profit sharing as explained above is allowed as long as it runs on the basis of *taāḍin* between *muḍārib* and *ṣāḥib al-māl*. This is in accordance with a fiqh slogan al-Muslimūna 'alā syurūṭihim. I also see that the profit sharing between *ṣāḥib al-māl* (savers) and *muḍārib* (banks) with the revenue sharing system is in accordance with the provisions of *muḍārabah*, where the operational costs of the *muḍārib* are borne by him/herself.

7. Profit Sharing Before the Contract Terminates

The DSN-MUI does not explicitly regulate the profit sharing term. The DSN-MUI fatwa does not explicitly regulate the timing of profit sharing. The DSN-MUI fatwa only states that profit is the amount obtained as an excess of capital. Yet in practice profit sharing in Islamic banking *muḍārabah* scheme, be it in the form collection such as savings or distribution, is conducted monthly. In *fiqh* discussion, we may state that the profit sharing is carried out before the capital is returned and before the end of the contract period.

Fiqh scholars point out that *muḍārib* gains a share of the net profit only after the contract ends or *muḍārabah* activity has termi-

[53] Ibn Qudāmah, *Al-Mughnī*, p. 161.

[54] Al-Tanukhī, *Al-Mudawwanah al-Kubrā*, p. 104.

[55] Al-Kasānī, *Badāi' al-Ṣanāi' Fī Tartīb al-Sharāi'*, p. 97.

nated. According to Ibn Munzir, as cited by Ibn Qudamah, the profit can only be known when the capital has been returned to *ṣāḥib al-māl*. The *muḍārib*, accordingly, did not have the right to profit before the business activities have concluded.[56] Shāfi'ite scholars argue that the benefits of *muḍārabah* cannot be determined until one of the following three things occurs: converting all assets into cash, returning the capital and terminating the contract; or changing the assets and terminating the contract without profit sharing, or; changing the assets as much as the nominal amount of the initial capital and dividing the remaining assets and finally terminating the contract.[57] Abu Hanifah argued that profit sharing should not be carried out before *ṣāḥib al-māl* received all his capital back.

Ibn Qudamah the Ḥanbalite is the only scholar who says that *muḍārib* may take some of the profits before the contract is completed if *ṣāḥib al-māl* gives permission, because the funds actually belong to them both. However, this way of sharing the profit only applies temporary until the real profit is known.[58] According to him, if one party asks for a profit sharing before the agreed term, and the other party refuses, then the law will side with the latter. However, if both of them agree to share the profits before the *muḍārabah* contract terminates, then the shariah allows it, for the profit is the right of both of them. If it turns out afterwards that they bear loss or their capital are exhausted, the *muḍārib* who has received temporary gains must do one of two things: returning what he/she has taken or bearing the loss at the percentage of the profit he/she received.[59]

The above explanation shows that the reasons for forbidding profit sharing before the contract terminates are the uncertainty of the profit and the difficulty in returning the capital. This opinion tends to protect the interests of the *ṣāḥib al-māl* by ensuring a return of the capital. However, according to Ibn Qudamah, if the *ṣāḥib al-māl* has agreed to share the profits before the contract termination, it is then allowed by the sharia. The worst scenario is when the *muḍārib* cannot return the capital of *ṣāḥib al-māl* or *ṣāḥib al-māl* must give up the profits received by the *muḍārib*.

The fatwa of the DSN-MUI is quite similar to Ibn Qudamah's opinion. In its latest fatwa No. 115 / DSN-MUI / IX / @ 017, the DSN-MUI emphasized that the advantages and disadvantages of *muḍārabah* must be clear and agreed by both parties in order to avoid the misunderstanding. However, it is not that strict, in that the *muḍārib* may ask for a few percent of the surplus if the profit has reached such a high amount. The DSN-MUI implicitly allows the sharing of *muḍārabah* financing profits before the contract termination with the revenue sharing system, under the condition that all profit and loss calculations will be completed at the end of the contract (known as profit and loss sharing). The DSN-MUI implicitly adds that *muḍārib* must cash out the *muḍārabah* assets at the end of the contract.

In practice of the *muḍārabah* system, mainly the financing aspect, with this provision is very difficult to do, especially for customers from the MSME sector. The challenge mainly lies in the difficulty of MSMEs in creating and providing proper and reliable financial reports. Many of them have run a business with no financial records at all. Therefore, Islamic financial institutions that have used *muḍārabah* financing products only rely on profit predictions made at the time of contract signing. This very point has received critics from both academics and legal

[56] Ibn Qudāmah, *Al-Mughnī*, p. 169.
[57] Al-Sharbaynī, *Mughnī Al-Muḥtāj Fī Ma'rifat Ma'ānī al-Minhāj*, 2 (Beirut: Dār al-Kutub al-'Ilmiyah, 2000), p. 318.
[58] Ibn Qudāmah, *Al-Mughnī*, p. 178.
[59] Ibn Qudāmah, *al-Mughnī*, p. 179.

scholarships, saying that LKS makes no difference from conventional banks for profit sharing and the profit sharing ratio is fixed at the initial stage of the contract. This also leads to the fact that only a few Islamic banks use *muḍārabah* even though it constitutes the icon of Islamic banking.

On the other hand, the *muḍārabah* contract system is well implemented in the fund-raising sector, both in savings and time deposits products. The barriers to the practice of *muḍārabah* financing do not apply to the case of saving and deposits. The difference between the two lays in the ability of the *muḍārib*, in this case the Islamic bank, to carry out neat and reliable financial records. Profit sharing for savings and time deposits is made every month based on the profit earned or bank income for that month. Each saver makes a profit based on the average balance for the month and the agreed profit ratio. Pure profit and loss sharing can be done in *muḍārabah muqayyadah*, where *muḍārabah* funds are used for certain projects and profit calculations are made after the project is completed. Meanwhile, in *muḍārabah muṭlaqah* what is done is only monthly revenue sharing, because *muḍārabah* has no end.

8. *Muḍārabah Operational Cost*

According to the DSN fatwa, the bank as a *muḍārib* pays operational costs using the profit that is due to it. However, the fatwa No.115 / DSN-MUI / IX / 2017[60] on *muḍārabah* explains that the costs for doing business on behalf of a party involved in *muḍārabah* may be borne by the party. However, as stated by M. Maksum, *muḍārabah* operational costs are borne by the *muḍārib*. In other words, costs should not be charged to the *muḍārabah* funds.[61]

The scholars have different opinions about the payment of operational costs by the *muḍārib*, whether he/she may take it from the *muḍārabah* funds or from his/her personal assets, such as the profit sharing ratio he/she receives. Ḥanafite and Māliki scholarships argue that *muḍārib* may take his/her sustenance from the *muḍārabah* fund when he/she is on a trade mission. Otherwise, he/she must not do so. It is assumed that *muḍārib* will not do a trade mission with other people's capital if the sustenance only comes from profit, for it is yet uncertain.[62]

The Shāfi'ite scholars agree that *muḍārib* is not entitled to sustenance when he/she is not on a trade mission. Yet they have different opinions when it comes to the case in which the *muḍārib* is on a trade mission. Some Shafi'ite scholars state that *muḍārib* will gain the standard amount of sustenance, while others argue that the *muḍārib* is not entitled to earn a living other than the agreed sharing (the latter is more sound).[63] According to Shāfi'ī himself, the right to *muḍārib* had been agreed upon in profit sharing, so he/she is no longer entitled to other form of benefits. However, if the *ṣāḥib al-māl* agrees to take the operational costs from the *muḍārabah* fund, then it is allowed.[64] Hanbalite scholars agree that *muḍārib* is only entitled to operational costs when there is an agreement. If the agreement does not specify any amount of money, the *muḍārib* will receive the standard amount.[65]

Produk-Produk Ekonomi Syariah Tahun 2000-2011(Studi Perbandingan Dengan Fatwa Majelis Penasihat Syariah Bank Negara Malaysia," p. 220.

60 See the official website of DSN-MUI, dsnmui.or.id

61 Maksum, "Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia Dalam Merespon

62 Al-Kasānī, *Badāi' al-Ṣanāi' Fī Tartīb al-Sharāi'*, p. 105.

63 Al-Sharbaynī, *Mughnī Al-Muḥtāj Fī Ma'rifat Ma'ānī al-Minhāj*, p. 317.

64 Al-Sharbaynī, *Mughnī Al-Muḥtāj Fī Ma'rifat Ma'ānī al-Minhāj*, p. 317; Al-Shayrāzī, *Al-Muhadhdhab Fī Fiqh al-Shāfi'ī*, pp. 483–84.

65 Al-Mardāwī and al-Faqī, *Al-Inṣāf Fī Ma'rifat Al-Rājiḥ Min al-Khilāf*, p. 440.

In this regard, the DSN-MUI is closer to the opinion of Ḥanbalite and Shāfi'ite scholars. This opinion is indeed more suitable with the *muḍārabah* practiced in Islamic banks, where they only serve as intermediaries between customers and *muḍārib* in the real sector. The same also applies to a contract between the bank and the customer or the second *muḍārib*, in which the operational costs of *muḍārib* are borne by him/herself. Ḥanafite scholars' argument that *muḍārib* will not carry out the *muḍārabah* if he/she must bear the sustenance his/her own, is incorrect. An entrepreneur can estimate the profits he/she will get and the operational costs required for it. Thus, when *muḍārib* agrees the profit sharing ratio, he/she must have known the operating costs.

9. *Muḍārib Guarantees the Muḍārabah Funds*

In the fatwa no. 07 / DSN-MUI / IV / 2000 regarding *muḍārabah*, DSN-MUI explains that basically the guarantees are not a requirement for *muḍārabah* financing. However, to ensure that *muḍārib* will not commit any form of violation, the bank may ask for guarantees from *muḍārib* or a third party. The Financial Services Authority (OJK) as the party assigned by the government to supervise financial institutions even requires all financing to use a collateral. The DSN-MUI accommodates OJK regulations for the aforementioned reasons. Therefore, the DSN-MUI added that the guarantee could only be disbursed if the *muḍārib* was proven to have violated the agreement. This is then reinforced by the fatwa of the DSN-MUI No: 105 / DSN-MUI / X / 2016 concerning *Penjaminan Pengembalian Modal Pembiayaan Mudarabah, Musyarakah, Dan Wakalah bi al-Istiṡmar* (Guarantee of Return on Capital for Financing *Muḍārabah, Musharaka*, and *Wakalah bi al-Istiṡmar*).[66]

In the so-called *fiqh mu'āmalah* (transactional law), *muḍārib* serves as a *yadu amānah*; a person who holds other's wealth / property with permission, without any intention of owning the wealth/property, for the benefit of the owner or of the holder or of both, such as *muḍārib, syārik, muzāri'* or *musāqī*.[67] Basically, *yadu amānah* cannot be charged for compensation even if the property under his/her protection is damaged, as long as there is no kind of negligence. A fiqh rule reads "تلف العين بلا تعدٍ ولا تفريط والظالم cلا يضمن الأمين يضمن مطلقًا" (a person who was given a mandate was not asked to guarantee. However, the original *ḥukm/law* can be changed if there is a reasonable factor).

I would argue that this is part of a discussion on adding other terms and conditions that may change the original nature of a contract. The addition of guarantee as one of the requirements for contracts involving *yadu amānah* such as *muḍārib*, *musta'jir*, *wadī'*, representatives and *syārik* was responded differently by legal scholars. There are at least three opinions on this.[68]

First, Hanafite, Shāfi'ite, Māliki and Ḥanbalite scholars who argues that the addition of guarantee as a condition is void. This is a more well-known opinion ascribed on them. The argument they put forward is a 'conflict' with the consequences of the contract. This is also the opinion of aṡ-Ṡaurī, al-Auza'ī, Ishaq,

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66 Downloaded from the official website of DSN MUI, https://dsnmui.or.id/produk/fatwa/

67 Abī Ḥasan 'Alī ibn Muḥammad ibn Ḥabīb Al-Mawardī, *Al-Ḥāwī al-Kabīr*, 7 (Beirut: Dār al-Kutub al-'Ilmiyah, 1994), p. 184; Abī Bakr Muḥammad ibn Ibrāhīm Ibn Munẓīr, *Al-Ishrāf 'Alā Madhāhib al-'Ulamā'*, 1 (Maktabah Makkah al-Saqafiyah, 2004), p. 71; Abī Faraj 'Abd al-Raḥmān Ibn Rajab al-Ḥanbalī, *Al-Qawā'id Fī al-Fiqh al-Islāmī* (Beirut: Dār al-Jīl, 1988), pp. 59–63.

68 Nazīh Ḥammād, *Qaḍāyā Fiqhiyah Fī Al-Māl Wa al-Iqtiṣād* (Damascus: Dār al-Qalam, 2001), pp. 396–98.

an-Nakha'ī and Ibn Munżir. According to al-Khaṭṭābī, in a contract whose original status is an *amānah*, the addition of guarantee as a condition cannot change its original status.[69] According to al-Mawardī the addition of *ḍamān* as a condition, as in *wadī'ah* and *syirkah*, is void. A particular thing that has no guarantee in the *aqad* (in its basic form) must not have any form of *ḍamān*.[70] Ibn Qudamah shared the same stance, in that he regarded illegitimate to make *ḍamān* a condition of a contract / place that should not be, such as charging the owner a *ḍamān* for his/her own asset.[71]

Second, Abu Hanifah, Malik and Shāfi'ī agreed that if the *muḍārib* might violate the agreed terms, then asking *muḍārib* for guarantees is permissible. However, scholars differ on the terms.[72]

Third, Qatadah, Uthman al-Battī, Ubaidillah ibn al-Hasan al-'Anbarī, Daud az-Ẓāhirī and Ahmad (there is another tradition ascribed to him) argue that it is legitimate to make *ḍamān* a requirement for an *aqd* (transaction) characterized as *yadu amānah*. This is an opinion that is not well circulating in the Māliki school. It is even deemed weak in the Ḥanafite school. Yet a contemporary scholar asy-Shaukānī supports it. According to them, for the people who has the status of *yadu amānah* agreed to such mechanism and chooses (not forced) to be responsible, it is considered to be legitimate. Agreement (*riḍā*) is a factor that allows someone to take other's property. On the other hand, a Muslim is bound by the conditions that he/she agrees upon. According to Ibn Qudamah, when someone asks Imam Ahmad whether it is allowed to make *ḍamān* a requirement on a transaction in which daman is not basically required, Ahmad says: المسلمون على شروطهم. This shows that whether or not *ḍamān* is required depends on the conditions when the contract begins, for the Prophet said: المسلمون على شروطهم."[73] However, this contradicts Ahmad's own argument saying that if *ṣāḥib al-māl* dan *muḍārib* have agreed to bear the loss of *muḍārabah*, then that particular requirement is nulled.[74]

According to Ibn al-Hajib, as cited by Nazih Hammad, when *ḍamān* is required in an *'aqd* it is not supposed to be, *ulama* have disputed regarding this issue. There is a group of *ulama* who regards it to be legitimate, and their dissents. Al-Maqarri in his book *al-Qawā'id* also points out the same.[75]

Thus, the fatwa of the DSN-MUI which is issued to anticipate the violation of *muḍārib* is closer to the fatwa of Imam Ahmad, Dawud al-Zahiri, and al-Shawkani.[76] This is to me quite suitable to the current condition. It is not easy today to find an *amīn*, a person we can be fully trusted. A bank, on the other hand, needs to act very carefully. It still needs to ensure that the liquidation can only be done when the losses are proven to be caused by violations and negligence of the *muḍārib*. Accordingly, making *ḍamān* a requirement does not change *muḍārabah* status into *dayn* (debt), for الأصل في العقود بالمقاصد والمعاني لا بالألفاظ والمباني.

10. Specified Period for Muḍārabah

One of the characters of *muḍārabah* is a contract period which regulates the term for return on capital. This is agreed by both parties at the initial stage of the contract. In line

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69 Ḥammād, *Qaḍāyā Fiqhiyah Fī Al-Māl Wa al-Iqtiṣād*, pp. 396–98; Abū Sulaymān Al-Khaṭṭābī, *Ma'ālim al-Sunan* (Cairo: Al-Maṭba'ah al-'Ilmiyah, 1932), p. 198.

70 Al-Mawardī, *Al-Ḥāwī al-Kabīr*, p. 371.

71 Al-Sharbaynī, *Mughnī Al-Muḥtāj Fī Ma'rifat Ma'ānī al-Minhāj*, p. 258.

72 Ibn Rushd, *Bidāyat Al-Mujtahid Wa Nihāyah al-Muqtaṣid*, p. 180.

73 Ibn Qudāmah, *Al-Mughnī*, p. 115.

74 Ibn Qudāmah, *Al-Mughnī*, p. 183.

75 Ḥammād, *Qaḍāyā Fiqhiyah Fī Al-Māl Wa al-Iqtiṣād*, p. 399.

76 See the fatwa No. 105/DSN-MUI/X/2016, dsnmui.or.id

with the DSN fatwa No. 07 of 2000 concerning *muḍārabah*, stating that it is allowed to prescribe a specified period for *muḍārabah*,[77] as the actual banking law requires it. A bank is even prohibited from investing its funds into long-term projects such as buying shares.

Again, legal scholars have disputed on this issue. Shāfi'ī regards it illegitimate for the specification implies that neither one of the parties is allowed to terminate the contract before the agreed term. Shāfi'ī sees that this is not the character of *muḍārabah*. It is *jā'iz* (allowed), then it is not that binding (*dūna lāzim*). One is allowed to conduct *muḍārabah* without any specified period. Otherwise, muḍārabah is not allowed.[78] Al-Mawardī argues that specifying the period makes the *'aqd* void (*fāsid*), with the same argument as Shāfi'ī. in other words, a particular *'aqd* that is characterized as *muṭlaq* (has no specified period) will be nulled once it becomes specified, similar to trade transaction and marriage.[79]

Maliki school has the same stance and argument. *Muḍārabah* is *jā'iz* (allowed), then it is not that binding (*dūna lāzim*). One is allowed to conduct *muḍārabah* without any specified period. Defining a specified period violates the character of *muḍārabah* itself. Al-Bājī even states that it needs to make sure that each parties can end/terminate the contract whenever they wish. Thus, it is not allowed to specify the period of *muḍārabah*.[80]

Scholars of Hanafite and Hanbalite school rather allows the specified period. Al-Kasāinī asserts "if one says 'take this as a muḍārabah fund for a year,' it is allowed for us." He further says that *muḍārabah* is similar to *tawkīl* which can be specified in certain period.[81] According to Ibn Qudamah the period of *muḍārabah* can be specified, such as 'take this as *muḍārabah* for one year, when it is over, do not sell or buy." He reported to have asked Ahmad about this issue, and Ahmad says that when the period is over, the fund turns into *qarḍ* (loan), and it is allowed.[82]

We would argue that the position of the Hanafite and Hanbalite scholars is stronger. The other one is disputable. *Muḍārabah* is closer to *taukīl* than *bai'* (sale) for the *muḍārib* makes use of the fund under the permission of *ṣāḥib al-māl*. It is different from *bai'* which causes the transfer of ownership. The loose character of *muḍārabah* only applies as long as there is no specification in any aspect. If the contract sets a form of specification, in time for example, it is then not flexible. However, the specification set must be based on the *maṣlaḥah* for both parties. If one of them requires longer period to run the business, then he/she should receive longer period.

Thus, the fatwa of the DSN-MUI that the *muḍārabah* can be specified in period is in accordance with the argument of Hanafi and Hanbali schools. I would argue that this is stronger and more suitable for various kinds of business. Yet, in practice one needs to make sure that the *ṣāḥib al-māl* will not proscribe the *muḍārib* to run the business in case the period has been over and the fund remains. This is to allow *muḍārib* to gain more profit.

Table 1. the *aqwāl* of Ulama Closer to the Fatwa of the DSN-MUI on *Muḍārabah*

Theme	*Aqwāl* of the Ulama	Argument
Muḍārabah	Ṭāwūs, Auzā'ī	Property/asset can be

77 DSN-MUI-BI1, *Himpunan Fatwa Dewan Syariah Nasional MUI*, p. 46.

78 Al-Mawardī and 'Abd al-Wahhāb Hawas, *Al-Muḍārabah*, p. 145.

79 Al-Mawardī and 'Abd al-Wahhāb Hawas, *Al-Muḍārabah*, p. 145.

80 Abū Walīd Sulaymān ibn Khalaf Al-Bājī, *Al-Muntaqā Sharḥ al-Muwaṭṭa'* (Maṭba'ah al-Sa'ādah, 1332), p. 162.

81 Al-Kasānī, *Badāi' al-Ṣanāi' Fī Tartīb al-Sharāi'*, p. 99.

82 Ibn Qudāmah, *Al-Mughnī*, p. 185.

with Non-cash Capital	, Ibn Abī Lailā dan Imām Aḥmad bin Hanbal	regarded equal to money, price fluctuation also occurs to money
The Object of*Muḍārabah* is not Trade	Ḥanābilah	*Qiyās* (analogy) to *muzāra'ah* and *musāqāh*
Muḍārib (A) Conducting *Muḍārabah* with Another *Muḍārib* (B)	Ḥanafiyah and Ḥanābilah, Mālikiyah with an order	*muḍārabah* is managing one's property, the permission of the *ṣāḥib al-māl* relieves conflict
Muḍārib gain other capital from other *Ṣāḥib al-māl*	Jumhur (*majority* of) ulama	Not cause loss for *ṣāḥib al-māl*, as long as the *muḍārib* is able to run the business, and the sustenance does not come from *ṣāḥib al-māl*
muḍārib Encloses His/Her Own Capital to the muḍārabah	Ḥanafiyah, Mālikiyah, Ḥanābilah and one argument of Shāfi'iyah	No Shar'i excuses, not bearing any loss as long as *muḍārib* prioritize the capital of the client
Profit sharing when *muḍārib* conducts another *muḍārabah* with funds of the former one	An element of new ijtihad and closer to the argument of Hanafite school	More suitable for banking system
Profit sharing before the contract terminates	Ibn Qudamah from Ḥanābilah	No shar'i excuses, not bearing any loss as long as *muḍārib* prioritize the capital of the client
Muḍārabah Operational Cost	Shāfi'iyah dan Ḥanābilah	Fits the original character of *muḍārabah*
Muḍārib *guarantees the* muḍārabah *funds*	A flawed one from Hanafiyah, unfamiliar argument from Maliki school, and one of some traditions ascribed to Mahmud, and az-Zahiri	The agreement from both parties may change the status from *amana* into *daman*
Specified Period for *muḍārabah*	Ḥanafiyah and Ḥanābilah	No excuses, must bear *maṣlaḥah*, the *muḍarat* can be anticipated

This shows that partially the *muḍārabah* as practiced in today's bank system is in accordance to the *aqwāl* of the scholars of mazhab. Generally speaking, the basis for the fatwas seems to be Hanbalite school, particularly Imam Ahmad. Only in few themes can we see the argument of Hanafi, Maliki, and Shafi'i. The argument that has been put forward is merely the general regulations on *muḍārabah*. The dispute on technical matters, such as how far the agreement influences the transaction, the application of *ḥīlah* and *makhārij* is out of the scope. Having compiled all these, we can see that this dispute provides us with alternatives and further proves the flexibility of *muḍārabah*. We can say that this would make *muḍārabah* relevant for many years to come.

Conclusion

Having compiled the themes that often receive criticisms from many parties, there are ten subthemes regarding DSN-MUI's fatwas on *muḍārabah* one needs to elaborate further. They are: *muḍārabah* with Non-cash Capital; the Object of *Muḍārabah* is not Trade; *muḍārib* (A) conducting *muḍārabah* with another muḍārib (B); *muḍārib* gains capital from other *Ṣāḥib al-māl*; *muḍārib* encloses His/Her own capital to the *muḍārabah*; profit sharing when *muḍārib* conducts another muḍārabah with funds of the former one; profit sharing before the contract terminates; *muḍārabah* operational Cost; *muḍārib* guarantees the *muḍārabah* funds, and; Specified Period for *muḍārabah*.

Closely reading the literatures regarding the aforementioned subthemes, we would argue that ulama have discussed quite deeply on all the subthemes one can find in the

fatwas of the DSN-MUI on *muḍārabah*. To put it more specific, the literatures provide the varying arguments on the Book of *Muḍārabah*, *Qirāḍ* or *Shirkah*. None of the ten subthemes that legal scholars have not disputed on them. At the end of one spectrum, there are scholars with very strict arguments, while other scholars point out to very flexible ones. This dispute must come from different interpretation on the concepts and basic rules.

Thus, we conclude that DSN-MUI's fatwas on *muḍārabah* in Islamic banking have its legal basis coming from the arguments of legal scholars from various schools. Out of the ten subthemes, nine of which have strong basis from legal scholars. Furthermore, it turns out that the argument from Hanbalite scholars is the closest to the fatwas, followed by Maliki, Hanafi, and Syafi'I, respectively. The DSN-MUI offers its 'new ijtihad' only in one theme, namely the profit sharing when a *muḍārib* (A) conducts another *muḍārabah* with another *muḍārib* (B). This might be due to the significant difference of the conditions of *muḍārib* as represented in classical literatures and the one we have today in Islamic banking system. Accordingly, we may conclude that the *muḍārabah* practiced in Islamic banking nowadays does not violate the concept regulated in *fiqh*. One can indeed see that the practice is quite different from the concept offered by Shafi'i school, the one followed by majority of Indonesian Muslims, but still it has some roots in the great storage of Islamic legal discussions. At least, *muḍārabah* belong to the category of *khilāfiyyah* upon which legal scholars have been commonly dissenting against one another.

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