

LAW ON FEE (*UJRAH*) IN GRATUITOUS CONTRACT: STUDY ON NATIONAL SHARIA BOARD-INDONESIAN COUNCIL OF ‘*ULAMĀ FATWĀ*’

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ABSTRACT

*The purpose of this study was to determine the argument of National Sharia Board-Indonesian Council of Ulama (DSN-MUI) in the permissibility of law on fee (*ujrah*) in gratuitous contract which ultimately resulted in a shift of contract from gratuitous contract to commutative contract whereby the social aspects of gratuitous contract is lost. The ‘ulama have a different opinions regarding the law on fee (*ujrah*) in gratuitous contract. DSN-MUI used three methods in issuing fatwa regarding fee in gratuitous contract. Namely *naṣ qat’ī*, *qawlī* and *manhājī*. DSN-MUI used *istinbāt qawlī* in which they referred to some opinions from the ‘ulama, both who allow or forbid the collection of fee (*ujrah*) in gratuitous contract. After seeing the cause (*‘illah*) and the people need (benefit), DSN-MUI chose the opinion that allow the collection of fee (*ujrah*) in gratuitous contract.*

Keywords: *fee, ujrah, gratuitous contract, commutative contract, DSN*

INTRODUCTION

The development of Islamic banking industry in Indonesia cannot be separated from the role of National Sharia Board-Indonesian Council of Ulama (DSN-MUI) whose task is to explore, assess, and formulate values and principles of the Islamic law (Shariah) which will be used as reference in the activities conducted by Islamic Financial Institution, and also to supervise the execution

and implementation of this law. Juridically, National Sharia Board is initially recognized in the Decree of the Board of Directors of Bank Indonesia No. 32/34/1999 on Commercial Banks based on Shariah principles, i.e., as the institution that set up Islamic banking products and operations, as well as the Shariah Supervisory Board in various Islamic Financial Institution (Cholil Nafis, 2010: 87).

Regarding the development of Islamic banking industry in Indonesia, DSN-MUI should be more careful in issuing fatwa related to the development of Islamic banking. In the determination of these fatwa, it often leads to a problem(s). One of the problems occurred can be found in the implementation of gratuitous contract (*tabarrū'*) in Islamic financial institutions, where the social-based products are not in tandem with the objective of the Islamic financial institutions which is commercial oriented (*tijārah*).

The issue is getting more complicated, when the financial institutions system is not in line with the model in Shariah contract. To address this issue, DSN-MUI try to find the solution on how to make the contract in classical fiqh can be applied in the Islamic financial institutions, in addition to the discrepancies between the objectives of the social-based gratuitous contract and profit-based (*tijārah*) Islamic financial institutions. One of the solutions taken by DSN-MUI is by combining the contracts in classical fiqh i.e., the combination of gratuitous contract with commutative contract. The determination of fee (*ujrah*/reward) in gratuitous contract is the form of combination of gratuitous contracts to compensational contract, since *ujrah* is the most important element in *ijārah* which mostly included in the commutative contract (*tijārah*).

The combination of gratuitous contracts and commutative contract in term of fee (*ujrah*), shows that there are various choices of combinations offered by DSN-MUI. For example, DSN-MUI fatwa No. 34 on Letter of Credit (L/C) import Shariah and fatwa No. 35 on Letter of Credit (L/C) export Shariah. In fatwa No. 34 there are *wakālah*, *ijārah/ujrah*, *qard*, *murābahah*, *salām*, *istiṣnā'*, *muḍārabah*, *mushārahah*, and *hawālah* contract. Therefore, if the contracts are classified by gratuitous (*tabarrū'*) and commutative (*tijārah*) contract then *wakālah*, *qard*, and *hawālah* contract are included in gratuitous (*tabarrū'*) contract. Whereas, *ijārah/ujrah*, *murābahah*, *salām*, *istiṣnā'*, *muḍārabah* and *mushārahah* are included in commutative (*tijārah*) contract. Furthermore, if viewed from the certainty and uncertainty of profit aspect then *murābahah*, *ijārah/ujrah*, *salām* and *istiṣnā'* contracts are natural certainty contract. On the other hand, *muḍārabah* and *mushārahah* contracts are natural uncertainty contract. In classical fiqh science, to ascertain whether there is an uncertain profit or certain profit in a contract is not allowed. Thus, if only

ascertain an uncertain profit is forbidden, then how about changing a contract which aimed for helping other people or social virtues (*tabarrū'*) into a profit-oriented contract (*tijārah*)?

OPINIONS FROM 'ULAMA ABOUT *UJRAH*/FEE IN GRATUITOUS CONTRACT (*TABBARŪ'*)

1. Gratuitous Contract (*Tabarrū'*)

Contract (*'aqd*) in Islamic law is defined as a bond between two or more parties in a two-way relationship. This relationship may apply for the material need in the form of movable and immovable objects. The objects can also in the form of services which measured by the custom within a particular society or can also in the form of a gift. Thus, in Islamic law the concept of contract does not only apply between two parties but also unilaterally (Wahbah al-Zuhaylī, 1992: 74).

The word "*tabarrū'*" (gratuitous) in Islamic law has the same meaning as *ṣadaqah* (charity), or *hibah* (gift). The word *tabarrū'* is derived from the word *tabarra' a-yatabarra'u- tabarrū'an* which means charity, gift, charity fund, or charitable. People who give charity or who do a good deed is called *mutabarri'* / philanthropic. *Tabarrū'* is a freewill offering from one person to other people, without compensation which resulted in the transfer of property ownership rights from the benefactor to the beneficiary (Nazih Hammad, 1986: 34). Thus, gratuitous contract (*tabarrū'*) can be defined as non-profit transaction or a virtue-based contract that do not aim for the profit. Some contracts that are included in gratuitous contract (*tabarrū'*) are *ṣadaqah*, *hibah*, *waqf*, *kafālah*, *wadi'ah*, *qard*, *rahn* and *ḥawālah* contract.

In essence, gratuitous contract (*tabarrū'*) is an agreement to do good deed which solely based on the hope of reward from Allah SWT. Thus, this contract is not aimed to seek commercial gain. Logically, if gratuitous contract (*tabarrū'*) is done to obtain commercial gain, then it is no longer called as gratuitous contract (*tabarrū'*). It will be a commutative contract (*tijārah*). If they wish the contract to remain as gratuitous contract (*tabarrū'*), then they should not take advantage (commercial gain) from the gratuitous contract (*tabarrū'*). The relevant parties are not obliged to bear the costs arising from the implementation of gratuitous contract (*tabarrū'*). It means that they may ask for a replacement for the expenses incurred in carrying out the contract.

2. Ujrah (Fee)

In Arabic term, fee is called as *ujrah*, in terms of language it means *'iwad* (remuneration), in other words the reward given as fee or compensation of a deed (Karim Helmy, 1997: 29). In Indonesian dictionary, fee (*ujrah*) is defined as the amount of money and other thing given as a service or labor payment for work/service done (Ministry of Education, 2000: 1108). According to Hendi Suhendi (2005: 115), fee is taking advantage of other people's labor and giving money as a form of remuneration according to certain conditions. Meanwhile, according to Zainal Asikin (1997: 68), fee is all forms of income received by workers (employees) in the form of money or goods within a certain period of time on an economic activity.

Ujrah is a payment (fee) received by workers as long as they do their work. Islam gives a guidance which states that the submission of fee shall be done upon the completion of the work. In this case, the workers are encouraged to expedite the service provided to the employer. Meanwhile, employer is recommended to give the fee as soon as possible. From this description, it can be concluded that fee or *ujrah* is payment or reward with various form, which is performed or given by an individual or institution or agency to another person for the effort, work and work performance or service performed.

The payment of fee (*ujrah*) should be based on the contract (work agreement) thus it would create cooperative relationships between the workers and employers. The contract should contain the rights and obligations of each party. The right of one party is an obligation to the other party. The primary obligation of the employer is to give the workers' fee.

3. Disagreement among the 'Ulama (mufti) Concerning Ujrah Theory in Gratuitous Contracts (Tabarrū')

Ever since DSN-MUI issuing fatwa on the permissibility of *ujrah* (fee) in gratuitous contracts (*tabarrū'*) it has raised pros and cons among the *'ulama*. This fatwa tends to shift the essence gratuitous contracts from non-profit oriented contract into a commercial contract (*tijārah*/profit oriented contract). According to Athon Mudzhar (2014: 126), various choices of the combination of contract offered by DSN-MUI which indicates the growing possibility of falling into *hilah* which basically contracting law and morality, as well as accommodating some contract for conventional bank.

In two *ḥadīth*, Prophet Muḥammad has forbidden the combination of contract. Narrated by Aḥmad from Abū Hurayrah RA, "Rasulullah forbids

trading and loan” (Aḥmad Ibn Ḥanbal, 1353 H). In this *ḥadīth*, the argument of Prophet’s prohibition for trading and loan in one transaction is because the contract in trading is included in commutative contract (*tijārah*), while loan is gratuitous contract (*tabarrū’*). The prohibition of the Prophet is applied if there is a combination of commutative contract with gratuitous contract. The second *ḥadīth* is from Abū Hurayrah RA, said: “The Prophet forbids two sales in one transaction” (al-Muwatta‘, 1409 H: 663). This *ḥadīth* is similar to the other *ḥadīth* that has been explained by the Prophet in other *ḥadīth*. This kind of transaction is known as conditional sale (*bay’ sharf*) (Aḥmad Ibn Ḥanbal, 1353H).

According to Abdullah Saeed (2006: 65), the act of modifying a contract which is allowed by the fatwa is an attempt to avoid interest in lending and borrowing money (credit) which is the main function of bank as a business entity (profit-oriented). The attempt of avoiding an interest is one of the ways to avoid something forbidden (*riba/usury*) which is known as *hilah* (legal tricks). According to Yūsuf al-Qaraḍāwī, *hilah* for something that is *haram* (forbidden) is *haram*, for example by changing the name and form but the main substance/essence is still the same. al-Qaraḍāwī (1993: 32) introduce “*la ibrah bi taghayyur al-ism idha baqiya al-musamma, wa la bi taghayyur al-surah idha baqiya al-haqiqah*” (a name change is not legally accepted if the substance is still the same and the change of form is not acknowledged if the essence is still the same).

Hilah (legal tricks) with the modification of contract by modifying contract is done also by DSN-MUI in the determination of *ujrah* (fee) in gratuitous contract (*tabarrū’*) such as in fatwa about *wakālah bi al-ujrah*, *ḥawālah bi al-ujrah*, *kafālah bi al-ujrah*, *rahn bi al-ujrah*, and other contracts. DSN is fully aware that gratuitous contract (*tabarrū’*) is basically a contract that aims to help others/virtue-based and not contract for profit (*tijārah*) (DSN and BI, 2006: 131).

According to the National Islamic Council, the determination of *ujrah* in gratuitous contract (*tabarrū’*) is a step in the implementation of *i’adah al-nazar* concept, which reversed the *qawl marjūh* in the past toward *qawl mu’tamad* used in the present time. It is said as *qawl marjūh* because *khazanah* of classical fiqh in the determination of *ujrah* in gratuitous contract (*tabarrū’*) is only allowed by Imam Ibn Ishaq Rahawayh, while most *mutaqaddimin ‘ulama* forbid it (*qawl mu’tamad*) (Ma’ruf Amin, 2011: 34). However, after the conflicting opinions was reviewed, by seeing the cause (*illah*) and the benefit of society needed at present time, then Imam Ibn Ishaq Rahawaih’s opinion which is originally *qawl marjūh* is now becoming *qawl mu’tamad* while the

opinion of majority of *'ulama* that is originally *qawl mu'tamad* become *qawl marjūh* (Atho Mudzhar, 2014).

The previous *'ulama* have also disagreement about the determination of *ujrah* in gratuitous contract (*tabarrū'*) that has shifted to the commutative contract (*tijārah*). There are two groups who have disagreement on this point. The first group is the one who states that the change of gratuitous contract (*tabarrū'*) into commutative contract (*tijārah*) is haram (forbidden). Some *'ulama* that belong to the first group are al-Sharbini Khatib, 'Abd Allāh Muhammad Ibn 'Abd Allāh al-Imrani dan Muhammad Hissan. According to 'Abd Allāh Muhammad Ibn 'Abd Allāh al-Imrani, gratuitous contract (non-profit) cannot be changed into commutative contract. It is prohibited as it goes against the purpose of the contract ('Abd Allāh al-Imrani, 1978: 181-182). Al-Sharbini Khatib argues that *tabarrū'* is an agreement that resulted in the transfer of property ownership rights, without compensation (*'iwad*) done by someone alive to others people voluntarily. If gratuitous contract (*tabarrū'*) turned into commutative contract (*tijārah*) because there is compensation (*'iwad*) that should be given by the beneficiary, then *tabarrū'* will be lost its meaning (Al-Sharbini Khatib, 1978: 296).

Muslim Hamid Hissan describes gratuitous contract (*tabarrū'*) as one thing prescribed in Islam in order to realize *ta'awun* and *tadamun*. In gratuitous contract (*tabarrū'*), the benefactor and philanthropic (*mutabarri*) do not have intention to make a profit and do not require any compensation or remuneration as a reward for what they have given/spent. Therefore, gratuitous contract (*tabarrū'*) is allowed. It is permissible, because if the things given is missing or damaged in the hands of the beneficiaries, then it will not cause any loss to them. It is because the beneficiaries are not required to give remuneration as a reward for the charities they have received. Hissan gives a simple illustration, i.e., if someone is given shoes but the shoes are broken, too small, or lost, then he/she has nothing to lose since he/she does not need to provide a replacement for the shoes given. Whereas in commutative contract (*tijārah*), if the thing given is lost after it has been received by the beneficiary, then he/she must replace it. Thus the beneficiary will experience loss on the lost items (Muslim Hamid Hissan, 1988: 136).

The second opinion is stated by the *'ulama* who allow the shift of gratuitous contract (*tabarrū'*) to commutative contract (*tijārah*) or gratuitous contract (*tabarrū'*) with *ujrah* or fee. The *'ulama* belong to this opinion are Ibn Qudāmah, al-Shawkanī, Muṣṭafā 'Abd Allāh al-Hamsari and Wahbah al-Zuhaylī. According to Ibn Qudāmah, to take/collect *ujrah* in *wakālah* contract is allowed as one of the gratuitous contract (*tabarrū'*). In his argument he states that Prophet Muḥammad once sent one of the friends to take *ṣadaqah* (*zakāh*)

and the Messenger of Allah give reward to them. It shows that, if someone is carrying out gratuitous contract (merely hoping for reward from Allah), and after that he take reward (*ujrah*) then it is permissible (al-Shawkanī, 2000: 527). Since the gratuitous contract (*tabarrū'*) is something indispensable to the human live, then taking *ujrah* or without *ujrah* is permitted (Wahbah al-Zuhaylī, 2002: 89).

Wahbah al-Zuhaylī states that if *wakālah* is done by taking reward, then it will have the same value as *ijārah* (Ibn Qudāmah, 2004: 468). Muṣṭafā 'Abd Allāh al-Hamsari argues, *ujrah* (fee) received by banks as a remuneration (*'iwad*) of the issuance of L/C (Letter of Credit) is allowed. This opinion is based on the characteristics of those *mu'āmalah* in *wakālah*, *hawālah*, and *kafālah* contract. *Wakālah* and *hawālah* with *ujrah* are allowed. As for *kafālah*, if the *ujrah* is based on service fees, according to Imam Shafī'i it is allowed as long as it is based on services on *ji'ālah* (wages given to others who have contributed to finding lost items) (Atiyyah Shaqr, 1998: 542).

DSN-MUI FATWA ON THE DETERMINATION OF LAW ON FEE (UJRAH) IN IN GRATUITOUS CONTRACT (TABARRŪ')

1. Methodology in the Determination of DSN-MUI Fatwa

DSN-MUI has their own means, methods, or procedures in setting/issuing fatwa on certain problem. The procedures, is set forth in the guidelines and procedures of determination of fatwa of Indonesian Council of Ulama (MUI). The guidelines and determination of these fatwa are set by Decree of the Indonesian Council of Ulama Executive Board No. U-596/MUI/X/1997 dated October 27th, 1997 which is a refinement of the decision of the Board of Plenary Session of Indonesian Council of Ulama dated 7 *Jumad al-Awwal* 1406 H/January 18th, 1986 which deemed irrelevant.

The systems and procedures of fatwa is the *manhāj* in determining a fatwa (*manhāj fī istinbāt al-fatwa*) that is able to provide answers for every issue arise. The approach for fatwa according to the above procedure shall be done through *nas qat'ī*, *qawlī* and *manhājī* (Ma'ruf Amin, 2008: 267). The determination of fatwa through *nas qat'ī* is based on the provisions described in the *al-Qur'ān* and *ḥadīth*. Most of the *'ulama* state that the order of the sources of Islamic law are the *al-Qur'ān*, *ḥadīth*, *ijma* and *qiyās*.

Nas qat'ī approach is done by referring to *al-Qur'ān* and *ḥadīth* for a problem that has been stated clearly in the *al-Qur'ān* and *ḥadīth*. However, if

the problem cannot be found/expressed implicitly in *al-Qur'ān* or *ḥadīth*, then the next method is used namely *qawlī* and *manhājī* method.

Meanwhile, *qawlī* approach is done by taking the opinion of the *'ulama* which is studied/reviewed in a particular *madhhāb*. Determination of fatwa through *manhājī* approach is done if the problem cannot be found from the opinion of previous *'ulama*. These two methods (*qawlī* and *manhājī*) are closely related. The determination of fatwa through *qawlī* approach is done by taking the opinions of the *'ulama* which have been reviewed in *mu'tabarāh* book (the book that became the ultimate reference by the scholars to solve a problem) and it is deemed to be enough even if there is only one opinion that can be used unless if it is no longer fit to serve as reference. It is because *ta'asur* or *ta'adhdhur al-a'mal* or *su'ubat al-a'mal* which are difficult to be practiced since the cause (*'illah*) is changed. Therefore, it needs to be reviewed (*i'adat an-Nazar*). Reviewing is the habits of the previous *'ulama*, they did not merely depend on certain text-in case such texts, due to some situations or condition, is no longer appropriate and cannot be applied.

Unlike the *qawlī* and *manhājī* method that need reference and guideline from *nas al-Qur'ān* and sunnah in determining the cause (*'illah*) law of certain law, *nas qat'ī* method is considered as *mustaqil* method since it does not require other sources of law. With these three approaches all the problems arise will be addressed by DSN-MUI. As for the way of addressing the problem, if the problem has been already mentioned by *nas* then the way to find the solution is by quoting what has been stated in the *al-Qur'ān* or *ḥadīth*. However, the problem mentioned in the *al-Qur'ān* and *ḥadīth* are very limited while the problems that arise are always evolving with the times. Thus, *qawlī* or *manhājī* methods are used (David Bondermen, 1968).

From the above explanation, it can be said that DSN-MUI issued its fatwa based on the *al-Qur'ān* and *ḥadīth*. In addition, DSN-MUI also use *ijmā'* and *qiyās* but still within the scope of *nas qat'ī* approach as the first phase in *istinbāt*. In the *manhājī* method, DSN-MUI uses the source of *istinbāt* law that disputed by some *'ulama* such as *al-istiḥsān*, *al-istiṣlah*, and *sadd al-dharī'ah*. Since *nas al-Qur'ān* and *ḥadīth* are limited to a specific answer at the time, most of the fatwa are based on the opinions of previous *'ulama* in *mu'tabarāh* book. Moreover, issues related to dynamic *fiqh mu'āmalah* will also need dynamic interpretation. However, it can only be done if the explanation can be found in *mu'tabarāh* book (Ma'ruf Amin, 2008).

2. DSN-MUI Argument on the Determination of Law of Fee (*Ujrah*) in Gratuitous Contract (*Tabarrū'*)

In determining fee (*ujrah*) in gratuitous contract (*tabarrū'*), DSN-MUI used three approaches, namely the *nas qat'i*, *qawlī* and *manhājī*. *Nas qat'i* approach is a method by quoting or referring to some verses in the *al-Qur'ān* or *ḥadīth* for the problems that have been mentioned clearly and comprehensively in the *al-Qur'ān* and *ḥadīth*. If the problem is not explicitly stated in the *al-Qur'ān* and *ḥadīth*, then *qawlī* method is used. *Qawlī* method is an approach to the process of determining fatwa which is based on the opinion of an imam from certain *madhhāb* that can be found in a well-known fiqh book (*mu'tabarāh*). If by using *nas qat'i* and *qawlī* approach the answers still not found, then the third method is used i.e., *manhājī* method. *Manhājī* method is an approach in the process of fatwa determination by using the basic rules and methodology developed by imam *madhhāb* in formulating the law. *Manhājī* method is done by collective *ijtihād* (*ijtihād jama'i*) by using means of *al-jam wa al-tawfiq*, *tarjihī*, *ilhaqi*, and *istinbātī*.¹

Method of *istinbātī nas qat'i* in the gratuitous contract (*tabarrū'*) in DSN-MUI fatwa refers to 25 verses in the *al-Qur'ān* and 33 *ḥadīth* which are scattered in 25² DSN-MUI fatwa concerning gratuitous contract (*tabarrū'*).

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- ¹ *al-Jam wa al-Tawfiq* is the establishment of a fatwa by finding common ground between the opinions priestly sect. *Tarjihī* is to choose the most powerful argument of the opinion and argument. *Ilhaqi* is a problem that there is no opinion clearly explained in the books *mu'tabarāh*. *Istinbātī* is *qiyāsī*, *istiṣlahī*, *istiḥsānī*, and *sadd al-dharī'ah* approach (Ahmad Ibrahim, 2006).
- ² In 25 fatwas is divided into three categories, first *ujrah* in *tabarrū'* contract which is giving of material which amounts to five fatwa that is fatwa number 21 about general guidance of Shariah insurance, fatwa number 39 about hajj insurance, fatwa number 51 about *muḍārabah mushārah* at Shariah insurance, number 52 about *wakālah bi al-ujrah* on insurance and reinsurance of Shariah and fatwa number 53 about *tabarrū'* contract on Shariah insurance. Second, *ujrah* in *tabarrū'* contract which is giving of energy or skills consisting of nine contracts are: fatwa number 10 about *wakālah*, fatwa number 11 about *kafālah*, fatwa number 1 about giro, fatwa number 2 about saving, fatwa number 34 about letter of credit Shariah imports, fatwa number 35 on the letter of credit of Shariah exports, fatwa number 36 on Bank Indonesia Wadiah Certificate (SWBI), fatwa number 57 regarding letter of credit with *kafālah bi al-ujrah* and fatwa number 74 on Shariah guarantee. Third, *ujrah* in *tabarrū'* contract which is giving time or opportunity which consist of eleven fatwa namely: fatwa number 12 about *hawālah*, fatwa number 19 about *al-qard*, fatwa number 25 about *rahn*, fatwa number 26 about *rahn* gold, fatwa number 31 about transfer of debt, fatwa number 37 on interbank money market

The distribution of the Quranic verses used in DSN-MUI fatwa varies from the most used to fewest. In fact, there are some DSN-MUI fatwa that do not at all refer to the verses of *al-Qur'ān*. The spread of Quranic verses at most are 11 verses, and the least one paragraph. The verses of the *al-Qur'ān* that often appeared are al-Maidah [5: 2] that express about the command to cooperate in righteous and piety.³ Furthermore, Al-Nisa (4: 29) state to not consume one another's wealth unjustly but only [in lawful] business by mutual consent (*antarodin*). Both of these verses, often appear in gratuitous contract (*tabarrū'*) for each verse represents two different contracts. Surah al-Mā'idah (5: 2) represent gratuitous contract (good/virtue), while Surah al-Nisā' (4: 29) represents commutative contract (business).⁴

The distribution of the 33 *ḥadīth* used is different, from 20 *ḥadīth* to 2 *ḥadīth*. *ḥadīth* that most often appears is the one narrated by Muslim from Abu Hurairah about the suggestion to eliminate the troubles of others. This *ḥadīth* represents gratuitous contract (*tabarrū'*) while the others represent commutative contract (*tijārah*) in accordance with the issues addressed in the fatwa.⁵

In the determination of fee (*ujrah*) in gratuitous contract (*tabarrū'*) by using *qawlī* methods, DSN-MUI cites several opinions of the '*ulama* that support their opinion. It proved that *ijtihād* by DSN-MUI is *ijtihād intiqā'i* i.e., chose one opinion among two or more, regardless of which one is stronger between the opinions that forbade or allowed the determination of fee in gratuitous contract (Ma'ruf Amin, 2008). In *manhājī* method, DSN-MUI used *qiyās* and rules in fiqh. *Qiyās* was only used in two fatwa, i.e fatwa number 2 on savings and fatwa number 3 on deposits (DSN and BI, 2006). Meanwhile,

based on Shariah principles, fatwa number 42 on charge card, fatwa number 54 about Shariah card, fatwa number 58 about *ḥawālah* (*murakkab*), fatwa number 67 about Shariah receivables and fatwa number 68 *rahn tasjily* (DSN and BI, 2006).

³ Surah al-Mā'idah (5: 2) has always been the first legal basis in the fatwa on *tabarrū'* contract can be seen from one of the meaning of the verse is "and please help is in doing the virtue".

⁴ Surah al-Nisā' (4: 29) used as the foundation of the first law in establishing fatwas in both *tabarrū'* and *tijārī* contract can be seen from one meaning of the verse is, "O people who believe! You shall not eat one another's treasures on the path of vanity except by way of a voluntary trade among you".

⁵ This *ḥadīth* says, "A man came to the Prophet(s) to collect debt to him in a rude manner, so that the companions intend to 'handle it'. He said, 'Let him, because the right owner has the right to speak'; then his sabd, 'Give (pay) to this man a year old camel like a camel (which is owed)'. They replied, 'We are do not get it except the elder.' Rasulullah then said: 'Give it to him. Truly the best of you are the ones who best in pay'".

the number of rules used in fatwa is around 10 rules which are spread in 25 fatwa in gratuitous contract (*tabarrū'*). The use of rules varies from 5 rules to only one rule. The most frequent rule is “*al-asl fī al-mu‘āmalāt al-ibāḥah illa al-yadulla dalīl ‘ala tahrīmiha*” which means the principle in *mu‘āmalah* is allowed, as long as there are no arguments against it.⁶ Whereas rules that appear only once is “*kullu qarḍ jar manfātin fa huwa ribā*” which means any loan or debt that bring benefits is usury (*riba*).⁷

Nas qat’ī and *qawlī* in the determination of fee (*ujrah*) in gratuitous contract (*tabarrū'*) is the arguments on the provisions of fiqh formal legalistic (*kayfiyyah al-tashrī'*/Shariah complaint). The provision in formal legalistic fiqh is by viewing the processes and procedures of the contract. *Manhājī* method sees the substance and purpose of the contract (*maqāṣid al-sharī‘ah*/Shariah based). Formal legalistic is within the *ijtihādiyyah* which has always resulting in differences of opinion. Meanwhile, *maqāṣid al-sharī‘ah* views from moral values and its universality.

Thus, in determining fee (*ujrah*) in gratuitous contract (*tabarrū'*) DSN-MUI did not used *i‘adah al-nazar* concept, but *istinbāt qawlī* i.e., by considering some opinion of the ‘*ulama*, both who allow and forbid the collection of fee (*ujrah*) in gratuitous contract (*tabarrū'*). After seeing the cause (‘*illah*) and the people need (benefit), DSN-MUI chose the opinion of ‘*ulama* who allow the collection of fee (*ujrah*) in gratuitous contract. This can be seen in DSN-MUI fatwa which included some opinions of the ‘*ulama* who allow the collection of fee (*ujrah*), such as Ibn Qudāmah, al-Shawkanī, Wahbah al-Zuḥaylī and others.

CONCLUSION

Ever since DSN-MUI issuing fatwa on the permissibility of *ujrah* (fee) in gratuitous contracts (*tabarrū'*) it has raised pros and cons among the ‘*ulama*. This fatwa tends to shift the essence gratuitous contracts from non-profit oriented contract into a commercial contract (*tijārah*/profit oriented contract). There are two groups who have disagreement on this point. The first group is the one who states that the change of gratuitous contract (*tabarrū'*) into commutative contract (*tijārah*) is haram (forbidden). Some ‘*ulama* that belong

⁶ This *uṣūl al-fiqh* rule is used in all fatwas set by DSN-MUI as the legal basis for the determination of fatwas in the *fiqh* rules that reinforce the fatwa must be determined.

⁷ The *uṣūl al-fiqh* rules used in the *tijārī* contract as the legal basis for strengthening the fatwa established by DSN-MUI.

to the first group are al-Sharbinī Khātib, ‘Abd Allāh Muḥammad Ibn ‘Abd Allāh al-Imrani dan Muḥammad Hissan. The second group, i.e., ‘*ulama* who allow the shift of gratuitous contract (*tabarrū’*) to commutative contract (*tijārah*) or gratuitous contract (*tabarrū’*) with *ujrah* or fee. The ‘*ulama* belong to this opinion are Ibn Qudāmah, al-Shawkanī, Muṣṭafā ‘Abd Allāh al-Hamsarī and Wahbah al-Zuḥaylī.

DSN-MUI used three methods in issuing fatwa regarding fee in gratuitous contract namely: *nas qaṭ’ī*, *qawlī* and *manhājī* approach. In determining fee (*ujrah*) in gratuitous contract (*tabarrū’*) DSN-MUI did not use *i’adah al-nazar* concept, but *istinbāt qawlī* i.e., by considering some opinion of the ‘*ulama*, both who allow and forbid the collection of fee (*ujrah*) in gratuitous contract (*tabarrū’*). After seeing the cause (*illah*) and the people need (benefit), DSN-MUI chose the opinion of ‘*ulama* who allow the collection of fee (*ujrah*) in gratuitous contract.

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