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Talfiq In The Fatwa Of The National Sharia Council-Indonesian Ulema Council (DSN-MUI) Regarding Syirkah

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Abstrak

Artikel ini membahas tentang *ikhtilaf* Hanafiyah, Malikiyah Syafi'iyah dan Hanabilah terkait dengan akad *musyarakah/syirkah* dan *talfiq* dalam penetapan fatwa DSN-MUI tentang *syirkah.* Metode yang digunakan dalam penelitian ini adalah metode deskriptif analisis dengan pendekatan kualitatif. Sumber data yang digunakan berasal dari buku-buku, kitab, jurnal, internet, tesis serta fatwa-fatwa yang berhubungan dengan akad *syirkah*. Hasil penelitian dalam artikel ialah: *pertama,* Fatwa DSN-MUI tentang *syirkah* tidak merujuk kepada satu golongan ulama *madzhab* tertentu, tetapi berbeda-beda ada pendapat yang diambil dari satu kalangan ulama saja juga terdapat pendapat yang diambil dari jumhur ulama dan kebanyakan berasal dari jumhur. *Kedua,* dapat dikatakan jika terjadi *talfiq* dalam fatwa tentang *syirkah* ini, *talfiq* yang dimaksud disini adalah mengambil beberapa pendapat dari ulama madzhab dalam satu *qadliyah* yakni tentang *syirkah.* Tentang definisi dan penentuan *nisbah* keuntungan dalam *syirkah* mengambil pendapat ulama Hanafiyah, adapun rukun akad meninggal pendapat mengambil pendapat jumhur selain ulama Hanafiyah, dan tentang jenis *syirkah* lebih cenderung memakai pendapat jumhur ulama. *Ketiga, talfiq* dalam fatwa ini dapat digolongkan kepada *talfiq* yang diperbolehkan oleh beberapa kalangan ulama, bukan *talfiq* yang menimbulkan ketidak jelasan hukum *syirkah,* bukan *talfiq* dalam motif main-main serta tidak serta merta hanya mengambil yang mudah-mudah saja.

Kata-kata kunci : *Talfiq; Syirkah/Muryarakah;* Fatwa DSN-MUI; *Ikhtilaf.*

Abstract

This article discusses the *ikhtilaf* of Hanafiyah, Malikiyah Shafi'iyah and Hanabilah related to *musharakah/shirkah* and *talfiq* contracts in the determination of DSN-MUI fatwas on *shirkah.* The method used in this study is a descriptive method of analysis with a qualitative approach. The data sources used come from books, books, journals, the internet, theses and fatwas related to the *shirkah contract*. The results of the research in the article are: *first*, the DSN-MUI Fatwa on *shirkah* does not refer to one particular group of madhab scholars, but there are different opinions taken from one circle of scholars only there are opinions taken

from the number of ulama and most of them come from jumhur. *Secondly*, it can be said that if there *is talfiq in this fatwa* about shirkah, the *talfiq* referred to here is to take some opinions from madzhab scholars in one *qadliyah* namely about *shirkah.* About the definition and determination *of the profit ratio* in *shirkah taking the opinion of Hanafi scholars, as for the rukun of the death contract, opinions taking jumhur opinions other than Hanafi scholars, and about the type* of shirkah *more likely to use the opinions of jumhur ulama.* Third, talfiq in *this fatwa can be classified as* talfiq which is allowed by some scholars, *not talfiq which causes obscurity of* shirkah law, not *talfiq* in playful motives and not necessarily just taking the easy.

Keywords: Talfiq; Syirkah/Muryarakah; Fatwa DSN-MUI; *Ikhtilaf.*

Introduction

Allah Swt revealed the Islamic sharia to the Prophet Muhammad (peace be upon him) in the form of revelation contained in the Holy Qur'an. The allegedly violent Qur'an totaling 6,666 verses contains all the principle teachings of life for mankind. The sanctity and authenticity of the Qur'an is safeguarded and guaranteed by Allah Almighty as he says in Q.S. al-Hijr verse 9, "*Indeed, we have sent down the Qur'an and we are guarding it*" (RI, 2010). From this verse of the Qur'an, it can be ascertained that the Qur'an was revealed to the Prophet Muhammad as a miracle there is no doubt about its truth. However, keep in mind that what is guaranteed the authenticity and truth of the contents of the Qur'an is what is actually in the *nash* of the Qur'an not in the interpretation of the Qur'an. So when there are efforts made to remove laws from the Qur'an, it is possible to give birth to different views between scholars (Nurjaman, 2021).

This difference of opinion occurs on matters of *furu'iyah* rather than on matters *of creed* which are stipulated in the *nash.* The emergence of this difference is due to an effort to seek the essence of each other's truth. Differences of opinion on this *furu'iyah* issue become natural because indeed every human being is endowed with reason by Allah Almighty which can be used to think and explore. Of course, everyone's level of understanding, way of thinking and point of view is different, including the environment in which they live (Nashirudin, 2015). The occurrence of differences in understanding of fiqh teachings began from a fiqh teaching which later developed into a madzhab. It should also be emphasized that this difference of opinion does not lie in the essence of religion or shari'ah but in the issue of differences in understanding and interpreting *Nash* to be able to apply teachings that are *furious* (Susamto, 2014).

This difference of opinion and the birth of schools of jurisprudence gave birth to several problems that until now are still interesting to be studied such as the emergence of the concepts of *taqlid* and *talfiq.* Imam Al-Ghazali defines *taqlid as an acceptance of words without* argument, *whether in matters* of ushul or *furu'*, *essentially this taqlid* follows the *opinion or* teachings of certain scholars. Then from the existence of *this taqlid* comes a problem called *talfiq.* In simple terms, *talfiq* can be

defined as the behaviour of taking or combining several opinions of the school of jurisprudence on a problem. Scholars also differ on the permissibility of *this talfiq* behavior (Arsjad, 2015).

Sharia Economic Law is one of the scientific fields that is often synonymous with the word *mu'amalah* in jurisprudence. In a narrow sense, *mu'amalah* can be understood as the relationship between humans in economic matters. *Mu'amalah is* part of Islamic jurisprudence, in muamalah jurisprudence there are chapters discussing contracts and one of them is about the contract of *shirkah.* Jaih Mubarok and M. Hasanuddin in their book explain that *Shirkah or* musharakah *is a merger of assets to be used as joint business capital to obtain profits, profits are divided according to* the profit sharing ratio *or proportionally according to the agreement between the parties and losses are borne jointly by the parties* (Mubarok and Hasanudin., 2017).

Like other *furu' issues*, even in the concept of *shirkah* scholars have differences of opinion. The difference in the concept of *shirkah* will more or less have an impact on its application or absorption in regulations in Indonesia. Fatwa of the National Sharia Council-Indonesian Ulema Council (DSN-MUI) is a fatwa issued to provide legal certainty in Islamic economic matters, including one them regarding *the shirkah contract.* Fatwa as a regulation that can be used as a guideline in the implementation of sharia economic transactions in Indonesia (Nurjaman & Ayu, 2021) must certainly be able to provide clarity and certainty of rules on *shirkah*. The fatwa on *shirkah* issued by DSN-MUI is certainly not made by only adhering to and considering from one circle, but using opinions from various circles of scholars. The question arises, *first,* whether the formulation of provisions in the DSN-MUI fatwa on *shirkah* tends to adhere to one particular madzhab circle or combines the opinions of various madzhab scholars. *Secondly*, if you take and combine the opinions of several madhhabs, is it included in talfiq behaviour *or not? and if it includes* talfiq behaviour, what is the law?

Based on these problems, the author is interested in studying more deeply related to the concept of *shirkah* according to the scholars of the madzhab (Ulama Hanafiyah, Malikiyyah. In addition, the author also analyzes the existence of talfiq behaviour in DSN-MUI fatwas, especially about shirkah contracts to determine the tendency of DSN-MUI in determining fatwas on *shirkah*, the impact of the existence of khilafiyah *ulama madzhab on the determination of DSN-MUI fatwas and to prove the existence of* talfiq *in the DSN-MUI* fatwas.

Method

The method used in this study is a descriptive method of analysis with a qualitative approach. Descriptive studies are carried out by describing, describing and describing research objects objectively and factually based on the data sources obtained (Suryana, 2010). In this case, of course, the object is the opinions of

madzhab imams related to the concept of *musharakah* both contained in books, journals, theses, accompanied and other ilmiyah works and DSS-MUI fatwas related to *the shirkah contract.* There are at least three fatwas that discuss *shirkah,* namely Fatwa No. 08/DSN-MUI/IV/2000 concerning Musharakah Financing, Fatwa No. 73/DSN-MUI/XI/2008 concerning Musyarakah Mutanaqishah and Fatwa No. 133/DSN-MUI/X/2019 concerning *al-Musyarakah al-Muntahiyah bi at-Tamlik.* These fatwas will be used as the object of research in this article.

Result and Discussion

1. The Concept of *Syirkah/Musyarakah*

Lughawy, musharakah or often called *shirkah* comes from Arabic, namely from the word (شَرِكَ – يَشْرَكُ – شِرْكًا – وَشَرِكَةً) which means: allies, friends of the company, associations and associations (Bisri and Fatah, 1999). In terminology, jurisprudence scholars differ in defining *musharakah,* namely: First, *According to Hanafi scholars*. In the Kitab *Sharh Fath al-Qadir* as quoted by Jaih Mubarok in his book, Hanafi scholars explain that what is meant by *shirkah* is (Mubarok and Hasanudin., 2017):

اِخْتِلاَطْ نَصِيْبِينِ فَصَاعِدًا بِحَيثُ لاَيُعْرَفُ أَحَدُ النَّصِيبَيْنِ مِنَ الأَخَرِ

"*Merger of two or more parts of property so that one part is not known to the other"*

In addition, in the book *al-Ikhtikyar li Ta'lil al-Mukhtar,* there is also a definition of *shirkah* according to Hanafi scholars, namely (Mubarok and Hasanudin., 2017):

أَلْخُلَطَةُ وَثُبُوتُ الْحِصَةِ

"*combine and assign portions"*

As for the book of *fiqh al-Islam wa adillatuhu* by Wahbah az-Zuhaili, there is an opinion of Hanafi scholars about *shirkah* which is slightly different from the definition above. In this book, Hanafi scholars explain that what is meant by *shirkah* is a transaction or contract between two or more people in terms of capital participation and profit (Az-Zuhaili, 2006).

From these three definitions, it is clear that there is a difference, this may occur because the sources quoted from these reference definitions are different. Differences can occur because of different sources and considering that among Hanafi scholars this can occur from many scholars who can express their opinions. However, from the definitions given by these *Hanafi* scholars, the emphasis is on the word "اِخْتِلاَطْ" (*merger of property*). Second, *According to Malikiyya scholars.* According to ulaman Malikiyyah *musyarakah/syirkah*, it is (Mubarok and Hasanudin., 2017):

اِذْنٌ فِ التَّصَرُّفِ لَهُمَا مَعَ أَنْفُسِهِمَا

"permission in doing tasharruf (to others including to himself) to make joint efforts"

In line with this definition, Wahbah Zuhaili in his book explains that what is meant by *shirkah* is the granting of permission between partners to manage and manage mutual capital (Az-Zuhaili, 2006). This definition intends that each party to the union gives each other permission to organize or manage the property included by both without losing the right to do the same (Sa'diyah and Aziroh, 2014).

Third, *According to Shafi'iyah Scholars.* In the book *al-Iqna*' as quoted by Jaih Mubarok and Hasanuddin, Shafi'iyah scholars argue that *shirkah* is (Mubarok and Hasanudin., 2017):

عَقْدٌ يَقْتَضِي ثُبُوتَ الحَقِّ فِي شَيءٍ لِاِثْنَينِ فَأَكثَرَ عَلَيَ جِهَةِ الشُّيُوعِ

"an akad that gives birth to a right to something for both parties or more through a share".

The redaction is not much different in the book of *fiqh al-Islam wa adillatuhu*, that *Musharakah or* shirkah *according to Shafi'iyah scholars is the permanent property rights for two or more parties and cannot be distinguished from the rights of one party to another (*syuyuu *)* (Az-Zuhaili, 2006).

Fourth, *According to Hanabilah Scholars.* Hanabilah scholars give a fairly short definition of *shirkah*, namely the alliance of rights or the arrangement of property (Az-Zuhaili, 2006). In another editorial, Ghufron in his book wrote that *shirkah* according to Hanabilah scholars is an alliance in rights or *tasharruf* (Sa'diyah and Aziroh, 2014). Jaih Mubarok quoted from Ibn Qudamah, in the book *al-Mughni*, defines *shirkah* according to Hanabilah scholars, namely (Mubarok and Hasanudin., 2017):

اِجْتِمَاعُ فِي اِسْتِحقاَقِ أَوْ تَصَرُّفٍ

"*Joining (the parties) to obtain rights or do business"*

It seems that there are indeed different definitions *of musharakah* among the scholars of this madzhab. Each of the definitions given contains a different emphasis on defining *shirkah/musharakah.* When referring to the definition in *fiqh al-Islam wa adillatuhu,* the Hanafiyah make a distinction by stating that *shirkah* is a contract or transaction and there must be capital participation. As for referring to the definition presented in the book Jaih Mubarrok and Hasanuddin, the keyword is *al-ikhtilat* (merger of property).

Malikiyyah scholars in their definition emphasize that the parties in the alliance should allow each other to manage common property or capital. From this, it can be seen that there is equality of position between the two parties in their right to manage the property of the guild. The keyword of the definition given by Malikiyya scholars lies in *al-idzn* (permission). Then regarding the definition given

by Shafi'iyah scholars, if referring to the sources in the books Jaih Mubarok and Hasanuddin this definition feels more representative of what is meant by *shirkah.* An important point contained in the definition of Shafi'iyah scholars is that *musharakah is a contract carried out by two or more people, and after the existence of a* musharakah contract, *it cannot be distinguished between the rights between the two parties, because it has been unified and mixed.* As for the definition given by the Hanabilah scholars, the word is *al-ijtima'* (merger or collection). The point is the merger of property or others that can give birth to the right between two or more parties to conduct a joint business.

From some of these definitions, a common thread can be drawn that the essence of *musharakah* is related to merger, mixing, fellowship, partnership or cooperation. Of the four definitions, Wahbah Zuhaili stated that the most representative definition of these four madhhabs is the definition given by Hanafi scholars that the essence of *shirkah/musharakah* is a contract or transaction, considering that the opinion of Hanafi scholars in this book contains redaction of contracts or transactions, according to him other definitions only look at the purpose or impact (Az-Zuhaili, 2006). However, if you look at the definitions in the books Jaih Mubarok and Hasanuddin, then what is more representative is the opinion of Ulama Shafi'iyah. According to Jaih Mubarok, the definition given by Hanafi scholars only covers shirkah *'uqud* does not include *shirkah possession.* This difference occurs because it is a different source, but apart from all that this *shirkah/musharakah* is a contract of partnership, association or alliance transactions (Mubarok and Hasanudin., 2017).

The second problem that exists among the scholars of Madzhab is related to the rukun of *musharakah.* This difference is very likely to arise considering that in the definition alone there have been differences of opinion. It is undeniable that the definition or understanding is the initial description of *this musharakah* concept, so it will affect its continuation. Here are some opinions of Madzhab scholars about *musharakah:* Hanafi scholars believe that *there is only one pillar of the* musharakah contract, namely shigat *(ijab and qabul) because according to them,* it is shigat that makes the musharakah contract. As for *aqidain* (contracting parties), *ma'qud alaih* (the object of aqading and the *'charity* of effort made', in the view of Hanafi scholars this does not include the rukun *of musharakah* but only as a condition for the realization of *shirkah* (Suhendi, 2008).

In this case, it can be seen that *ijab qabul* or *sighat* akad becomes a very important thing and must be present in *musharakah transactions.* If the *shigat of the* contract is not in the *musharakah* contracts then the contract is invalid or considered void. In addition, *the shigat i.e. the statement* of ijab *and* qabul *of the parties must be in harmony between party A and party B, it must also be clear the intention expressed in the* shigat. The number of scholars agreed that there are 3 rukun of *shirkah*, namely

(Sa'diyah and Aziroh, 2014):

a. *Shigat* (ijab and Qabul). The validity of a *musharakah contract* is also influenced by the validity of the *shigat contract*. In the *musharakah contract, in* addition to being in harmony, the *contract shigat* must also reflect or contain permission between the parties to manage joint capital.
b. *'Aqidain* (subject *of Shirkah),* among the conditions for being able to perform *musharakah* are: 1) intelligent, 2) balligh, 3) independent or not under compulsory circumstances. In addition, in *musharakah*, the partner must be competent in carrying out the planned business or can provide representative power.
c. *Mahal al-Aqd* (Object of shirkah*), the object of* shirkah can include capital or labor. The capital included in *shirkah* should be: cash, gold, silver or other objects of similar value; capital can also be from trading assets. The capital included becomes one, which is the common property of the parties.

The difference that occurs in the rukun *of shirkah* occurs between Hanafi scholars and the number of scholars. In this matter, the author agrees more with the rukun *of musharakah* from the number of scholars. Logically *shigat* which is considered the only pillar according to Hanafi scholars will not exist without the parties (*aqidain)* and *mahal al-aqdi.* With the presence or absence of *sight, aqidain* will remain. But if *aqidain* does not exist then who will say *shigat?* certainly not because the parties do not exist. As is well known that *shirkah* is a contract that always lives and grows in tandem with the economic civilization of Islamic society. Academically, *shirkah can be classified into two, namely* classical shirkah and contemporary *shirkah*. Broadly speaking, *there are two classical* shirkahs, namely shirkah amlak/milik *and* shirkah Uqud.

Wahbah az-Zuhaili defines *shirkah amlak/property* as an alliance of two or more persons in the case of possession of an item without *a shirkah* transaction (Az-Zuhaili, 2006). A more detailed definition is found in the book *al-Fiqh 'ala al-Madzahib al-Arba'ah, Al-Juzairi* said that what is meant by *Shirkah belongs to* (Mubarok and Hasanudin., 2017):

إِجْتِمَاعُ اثْنَيْنِ فَأَكْثَرَ فِ اسْتِحْقَاقِ عَينٍ بِإِرْثٍ أَوْشَرَاءٍ أَوهِبَّةٍ أَونَحوِ ذَلِكَ

"The incorporation of two or more parties in the possession of an item by cause of inheritance, inheritance, grant, or otherwise."

In the book of *fiqh al-Islam wa adillatuhu* it is explained that *there are two shirkah amlak*, namely:

a. *Shirkkah amlak Ikhtiyar* (voluntary), which is *a shirkah* born from the will of two partners who ally voluntarily, such as two people who get a grant or will, or two people who ally to buy an item (Az-Zuhaili, 2006). Assets in this *shirkah*

can be divided but the owner chooses to own them together (Ngesti, 2018).

b. *Shirkkah amlak ijbariyah* (force), is a *shirkah* that occurs without the will of both parties. For two people who get inheritance property, then the property is the right of both (Az-Zuhaili, 2006). In this *shirkah*, goods or assets that are objects of ownership cannot be divided (Mardani, 2014).

Then what is meant by *shirkah 'uqud* is a contract made by two or more people to share in property and profit (Az-Zuhaili, 2006). From these definitions, it can be seen that the main difference between *shirkah amlak/milik* and *shirkah 'uqud* lies in its domain or territory. *Shirkkah amlak/belonging* is not intended to seek profit (*tabarru'),* while *shirkah 'uqud* is in the domain *of tijari* or aims to obtain profit. Scholars have detailed the types of *shirkah 'uqud* in various ways, namely (Mubarok and Hasanudin., 2017):

a. Based on the type of capital included, *shirkah* is divided into three, namely:
   1) *Shirkah amwal,* which is a partnership whose business capital is in the form of assets (money or other inventory items)
   2) *Shirkkah 'abdan / a'mal,* which is a partnership whose business capital is in the form of expertise or skills.
   3) *Syirkah wujuh,* a partnership that includes a reputation as its venture capital.

b. Based on the amount or portion of capital participation, *shirkah* is divided into two, namely:
   1) *Syirkah Inan,* the share of capital in *this syirkah* must not be the same. *Syirkah inan* covers the three previous types of *syirkah, namely:* syirkah 'inan fi al-amwal; syirkah inan fi al-'abdan/a'mal; and *syirkah inan fi al-wujuh.*
   2) *Syirkah mufawadhah, the* total portion of capital in this syirkah *must be the same, this* syirkah includes: *Syirkah mufawadhah fi al-amwal; Syirkah mufawadhah fi al-Abdan/amal;* and *syirkah mufawadhah fi al-wujuh.*

c. Based on the period, *shirkah* is divided into two, namely:
   1) *Shirkkah al-tawqit* (temporal), which is *shirkah* that is carried out without forming a business entity.
   2) *Shirkkah da'imah/tsabitah* (permanent), *shirkah* which is done by forming a business entity.

Qaul ulama on the Law *of Shirkkah*

Musharakah or *shirkah* is a transaction permitted by sharia as well as other *mu'amalah* transactions. Its legal basis is found in the Qur'an, Sunnah and Ijma'. In the Qur'an surah an-Nisa verse 12 Allah Swt says: *"Then they are together (fellowship) in that part of the third"* (RI, 2010). This proposition is confirmed by the hadith narrated by Abu Daud and Hakim, namely: "*Verily Allah Aza-Wa Zallah said, 'I am the third of two communities, as long as one of the two does not betray each other. If one of them betrays me then I leave the fellowship."* (HR. Abu Dawud)

The Muslims have also performed *ijma'* related to the ability to perform

musyarakah and have agreed. As for the differences in opinions of scholars regarding the question of the ability of various *syirkah.*

First, Ulama Hanafiyah. In the kitab *of fiqh al-Islam wa Adillatuhu, the* scholars of Hanafiyah divide the *syirkah into six, namely:* syirkah syirkah 'inan fi al-amwal; Syirkah Inan Fi al-'Abdan/A'mal; Syirkah Inan Fi al-Wujuh; Syirkah mufawadhah fi al-Amwal; Syirkah mufawadhah fi al-Abdan/amal; and *syirkah mufawadhah fi al-wujuh.* According to the scholars of Hanafiyah and the scholars of Zaidiyah, in all types of *syirkah*, it is permissible to fulfil the conditions that have been determined (Az-Zuhaili, 2006).

Second, Ulama Malikiyah. Malikiyya scholars do not recognize the validity *of shirkah wujuh because according to this circle in* shirkah wujuh, there is no property or skill included as business capital so *this shirkah wujuh does not fulfil the rukun* of *shirkah* (Mubarok and Hasanudin., 2017. In addition, it also does not recognize the validity *of shirkah mufawwadhah*, because according to their view in *shirkah,* there must be unity of business and do not allow the goods included to be different except for goods that still have a connection, such as weavers and spinners.

Third, *Ulama Syafi'iyah.* Shafi'iyah, Zahiriyah and Imamiyah scholars forbade all types of shirkah *kaculali* shirkah inan *and* shirkah mudharabah (Az-Zuhaili, 2006). Jaih Mubarok in his book writes that Imam Shafi'i only recognizes the validity of *shirkah 'amwal fi-al-inan* and considers void other types of *shirkah* (Mubarok and Hasanudin., 2017. Shafi'iyah scholars do not recognize the validity of *shirkah mufawadhah* because according to Shafi'iyah scholars, the capital property included in *shirkah* must be the same (Ngesti, 2018).

Fourth, *Ulama Hanabilah.* Hanabilah scholars view that shirkah *is divided into five, namely* shirkah inan, shirkah abdan, shirkah wujuh *and* mudharabah. This circle allows all types of *shirkah* except the *mufawadhah form of shirkkah* (Az-Zuhaili, 2006). The argument given is the same as among scholars who reject shirkah *mufawadhah* that in *shirkah* the capital property included must be the same size or amount and type.

Table 1 : Opinion of madhhab scholars on the form of *shirkah*

Term of *Syirkah*	**Hanafiyah**	**Malikiyah**	**Syafi'iah**	**Hanabilah**
Syirkah 'Abdan	√	√	*X*	√
Syirkah Wujuh	√	*X*	*X*	√
Syirkah 'Inan	√	√	√	√
Syirkah Mufawadhah	√	*X*	*X*	*X*

Contemporary forms of *shirkah*

In the previous discussion, it has been mentioned related to the classification of *shirkah academically, where* shirkah is classified into two, namely *classical shirkah*

and contemporary *shirkah*. The purpose *of contemporary shirkah here is that there are innovations* in the concept of shirkah that appear today. The emergence of the concept of *shirkah* with the inclusion of other contracts in it is undeniable considering that the times are growing and the practice of cooperation transactions is developing. So it is necessary to innovate the concept of shirkah *that can be used as a guideline without violating the concept of* shirkah in Islamic jurisprudence. In its development, there are two forms *of shirkah* formulated by contemporary scholars, namely the form *of musharakah mutanaqishah* and the contract *of musharakah al-mumtahiya bi at-tamlik.*

a. *Musyarakah Mutanaqishah*

Akad *musharakah mutanaqishah* is a form of *shirkah* in which the ownership of one party (*syarik)* decreases gradually due to purchases by the other party.**F**atwa DSN No 73/DSN-MUI/XI/2008 concerning Musharakah Mutanaqishah. In more detail, Jaih Mubarok explains in his book that this contract is a cooperation agreement between the parties (in this case the bank and the customer) to buy an item (Nurjaman et al., 2022). Then the goods are used as business capital by the customer to obtain profits which will be shared accompanied by the purchase of bank-owned business capital by the customer gradually so that bank ownership is decreasing over time (Mubarok and Hasanudin., 2017.

b. *Musyarakah al-mumtahiya bi at-tamlik*

Is the akad of cooperation (syirkah*) which is accompanied* by the removal of hishah *from* one syarik to the other at once by *the promise (wa'd)* by using akad al-bai', hibah *or* hibah wa al-bai' *until the ownership of the capital item is transferred to one of the syarik.*Fatwa DSN No. 133/DSN-MUI/X/2019 Tentang Al-Musyarakah Al-Muntahiyah Bi At-Tamlik,.

The Concept Of *Talfiq* In Islam

Lughawy, the word talfiq *comes from Arabic, namely from the word* لَفَقَ - يُلَفِّقُ تَلفِيقًا which means to merge, unify, discover, or can be interpreted to close or combine two different edges as in the word تَلْفِيقُ الثَّوابِ(*bring together two ends of the cloth and then sew it).* The term talfiq can be defined as the act of taking or following the law of a certain event or case by taking the law from various madzhabs (Jumantoro & Amin, 2005). Abu Humaid Arif Syarifudin in his writings quoted that *talfiq* is using a method in the question of worship or mu'amalah which has never been stated by madzhab scholars (Syarifudin, 2022). In line with this on the web page of the pesantren tebuireng. online as Helmi Abedillah said that usually what is meant by *talfiq* in fiqh and *ushul fiqh* is:

الإِتْيَانُ فِي مسألةٍ واحدةٍ بكيفية لا توافق قولا أحد من المجتهدين السابقين

"Execute *a matter in a manner that is not the same as the previous Mujtahid opinion"*.Hilmi Abedillah, "Understanding and Law of Talfiq Madzhab," Tebuireng.Online, 2018, Www.Tebuireng.Online/Pengertian-Dan-Hukum-Talfiq-Madzhab/.

It means that *talfiq* is to obey the opinions of the scholars of the madhhab, take and combine several opinions related to an issue that gives birth to a matter of new assembly that has never been stated by any madzhab scholar before. This can be called *talfiq* because it is done on the same problem together or continuously (Az-Zuhaili, 2006).

Wahbah Az-Zuhaili elaborates on the meaning *of talfiq in detail, namely that what is meant by* talfiq is to obey two or more imams in doing an act in which the act has several rukun and parts, each of which is interrelated and has its laws. In establishing the laws of these sections, scholars differed. A *talfiq person* obeys one part of the law to one imam and another part to a different imam. So that the form of action he did was a combination of several madzhabs (Az-Zuhaili, 2006). For example, a person who rents a place for 90 years, but has never seen the place he rents. In this case, the ability to rent a place for a long time, this person means taking the opinion of Imam Shafi'I and Ahmad bin Hanbal. The ability to rent a place without seeing it first means that the person follows the opinion of Imam Abu Haneefah.

There are at least two possibilities for someone to do *talfiq*, namely having the aim of taking a lighter opinion and leaving a heavy opinion. The opinion of some scholars related to choosing light cases according to their abilities, without the intention of doing lighter sharia law. This is simply because everyone is burdened according to his ability (Arsjad, 2015). *Talfiq* is also different from *ihdats qaulin tsalits* (sparking the third opinion). If *talfiq* combines two opinions and omits both, *ihdats qaulin tsalits* excludes the two different opinions of scholars and makes a third opinion that is not related to the two previous opinions. Another difference is that if *ihdats qaulin tsalits* leave only two opinions, then *talfiq* sometimes combines more than two opinions (Khasanah et.al, 2019).

In the Qur'an there is no explicit evidence about the permissibility or impermissibility of performing talfiq behavior, *this certainly gives rise to differences of opinion about the permissibility of* talfiq in Islam. This difference of opinion occurs in branch and *ijtihadiyah matters* (Az-Zuhaili, 2006). The scholars are divided into two groups, some forbid and some allow. Malikiyya scholars and some Hanafi scholars allowed *taqlid* against all madhhabs even if it reached *talfiq*, provided that it was in a state of compulsion *(ad-dharurat*), in dire need *(al-hajjah),* unable or in *'udzur. Tatabbu'ar-rukhshah'* or taking the opinion of the lightest madhhab is permissible when it is needed and there is fame because basically, Islam is an easy religion (Az-Zuhaili, 2006).

Islam is a light religion, and indeed Allah Almighty does not burden his people, Allah Almighty desires convenience for mankind, as in his words surah Al-Baqarah verse 185; يريد الله بكم اليسر ولا يريد بكم العسر... *"...Allah will ease for you and does not desire hardship for you..."*(RI, 2010) In a hadith narrated by Imam Bukhori from Aisyah r.a, which reads:

أخرجه البخارى بسنده عن أم المؤمنين عائشة رضي الله عنهما قالت (ما خير رسول الله ص.م. بين أمرين الاّ أخذ أيسرهما مالم يكن اثما, فان كان اثما كان أبعد الناس منه) رواه البخاري في صحيحه

"*The Prophet was never given two choices, except that he chose the easiest one, as long as it was not sin. If it is sin, he is the one who avoids it."* (Arsjad, 2015)

The hadith relates that when the Prophet Muhammad (peace be upon him) was faced with two equally correct choices according to the Shari'ah, the Prophet chose and carried out a lighter and easier matter, unless it included sin then the Prophet (saw) would shun him. These two propositions are at least the basis used in terms of the ability to perform *talfiq* in Islam. Another reason used to allow the practice of *talfiq* is that there are not many jurists or religious experts who can answer many new problems that arise by only being motivated by one madzhab, especially in the field of *mu'amalah* where many innovations have emerged by the times. Therefore, scholars or jurists are still open to references and opinions from other madzhab imams.

The majority of contemporary scholars accept the concept of *talfiq* in Islam, such as Wahbah az-Zuhaili. According to him, it is not a problem to do *talfiq* when there is a need and in an emergency, provided that it is not accompanied by playing games or deliberately taking light without any *udzur'.* Thus, the proposition that shows the ability to take the simple should not be used as a reference for us to always take the simple things in religion. So that in carrying out the commands of Allah SWT we are not trapped in *tala'ub* (playfulness) in carrying out worship to Allah SWT.

Shafi'iyah scholars became the most critical group of scholars in *talfiq matters.* Some scholars forbid all forms *of talfiq, others only forbid certain cases* of talfiq and some allow talfiq *provided that in the case* of the *talfiq* problem, the conditions determined by the scholars of the madhhab are accrued (Az-Zuhaili, 2006). Imam al-Ghazali (ulama ushul fiqh from among Syafi'iyah) thinks that it is impermissible to base *talfiq on the desire to take the easy on the impulse of lust alone,* talfiq *can be done due to the presence of* udzur' *or situations that require it* (Arsjad, 2015).

Other madhhab scholars also argue about the impermissibility of *talfiq.* Ibn Hajar stated that it is not permissible to do charity using the opinions of dhaif in

madzhab. Likewise, it is not permissible to practice *talfiq* in a matter, as well as to obey Imam Malik's opinion about the sanctity of dogs (not unclean), and to obey Imam Shafi'i's opinion about sweeping some of it during ablution, and both are done simultaneously before prayer. As for following one of these opinions perfectly on one particular issue with all its consequences, it is permissible (Az-Zuhaili, 2006). Muhammad Amin al-Kurdi in the book *Tanwir al-Qulub* states:

عدم التلفيق بأنلا يلفق في قضية واحدة ابتداء (الخامس) ولادواما بين قولين يتولد منهما حقيقة لايقول بها صاحبهما

"(The fifth condition of taqlid) is not talfiq, that is, not to mix between two opinions in one qadliyah, whether from the beginning, middle and so on, which later from the two opinions will give rise to an amaliyah that is never said by the person who argues" (Muhyiddin, 2011).

In the book *of I'anah at-talibin,* it is emphasized about the prohibition of performing *talfiq* in one *qadliyah,* namely: ويمتنع التلفيق في مسئلة كأن قلد مالك في طهارة الكلب والشافعي في بعد الرأس في صلاة الواحدة*"talfiq in one case was forbidden such as participating in Imam Malik in the sanctity of dogs and participating in Imam Shafi'i in the permissibility of rubbing part of the head to perform prayers)* (Abdusshomad, 2011). *Talfiq referred to in some of the statements above is* a form of talfiq carried out in one *qadliyah* (problem), between one opinion and another opinion, carried out jointly there is a difference in punishing it which causes the cancellation by all madhhabs that are taqlidi and *talfiq* in this form is prohibited by law.

However, there are forms *of talfiq* that are more than one *qadliyah*, as well as taqlid to Imam Shafi'i in the case of ablution by rubbing only part of the head. Then perform prayers leading to the Qibla by taqlid to Imam Abu Haneefah. In the next sense, *this type of* talfiq is called *intiqa al-madzhab* (Khasanah et.al, 2019). In this form of *talfiq,* the combined opinions satisfy or are agreed upon by both madhhabs. The opinion of scholars who do not allow *talfiq* is based on what the ulama ushul said in their *ijma'*. They thought it was feared that a third opinion would be born from the differences that occurred between the two madhhab groups. According to them, the opinion should not give rise to a third opinion, so that it can violate what has been the agreement of the scholars (Arsjad, 2015). Some forms of talfiq are not allowed, firstly, talfiq contradicts the judge's decision. The judge's decision serves to decide and resolve the questioner, if the judge's decision is not protected there will be chaos. *Secondly, talfiq* that is contrary to the already familiar traditions of the run, or contrary to the joint decision (Az-Zuhaili, 2006).

The Concept Of *Shirkah* In Fatwa DSN-MUI

Fatwas issued by the National Sharia Council-Indonesian Ulema Council (DSN-MUI) are fatwas related to the Sharia economy in Indonesia (Amin, 2011).

The DSN-MUI fatwa serves as a guideline in the implementation of sharia economic transactions in Indonesia, including the implementation of the *shirkah contract.* There are several fatwas issued by DSN-MUI that explicitly regulate *shirkah, including Fatwa No. 08/DSN-MUI/IV/2000 concerning Musyarakah Financing, Fatwa No. 73/DSN-MUI/XI/2008 concerning Musyarakah Mutanaqishah* and Fatwa No. 133/DSN-MUI/X/2019 concerning *al-Musyarakah al-Muntahiyah bi at-Tamlik.* The fatwas of DSN-MUI must certainly be able to provide legal certainty related to the concept of shirkah, *although there are* ikhtilaf *madzhab scholars about some provisions of* shirkah. So that there is no dispute and chaos in the community in implementing the shirkah contract.

Based on the results of the review of the fatwas on shirkah, *several provisions on shirkah contained* in the fatwa can be presented and harmonized with the opinions of madzhab scholars, here are some key points that can show the pattern of thought of jurisprudence ulama madzhab in the DSN-MUI fatwa on *shirkah:*

Table. 2 The pattern of thinking of scholars in the fatwa of *syirkah*

No	About	Fatwa of DSN-MUI on *Shirkah*	Hanafiyah	Malikiyah	Syafi'iyah	Hanabilah
1	Definition of *Syirkah*	A cooperation agreement between two or more parties for a particular business, where each party contributes funds/capital (*Ra's al-mal)* to be united into joint venture capital, provided that profits are divided according to *an agreed ratio or* ratio proportionally, while losses are borne by the parties proportionally. (Fatwa No. 133 of 2019)	Merger of two or more parts of property so that one part is not known to the other	permission to do *tasharruf* (to others including to himself) to make joint efforts	an akad that gives birth to a right to something for both parties or more through a share	Joining (the parties) to obtain rights or conduct business
2	Rukun *syirkah*	*Aqidain, Mahal al-Aqd (*Object akad) and *shigat aqd*	*Shigat aqd*	*Aqidain, Mahal al-Aqd* and *shigat aqd*		
3	*Profit ratio (nisbah)*	Fatwa No. 08/DSN-MUI/IV/2000 on *Musharakah Financing* part c paragraph 2 "*every partner's profit must be distributed proportionally."* Fatwa No. 133/DSN-MUI/X/2019 concerning *IMBT* Articles 11,12,13 states that *the ratio* can be proportional or can be according to agreement (even though it is not proportional)	*The ratio* can be proportional or as agreed	*The profit ratio* is set proportionally		
4	Types of *shirkah*	In Fatwa DSN No. 08 of 2000 concerning *Musyarakah*	1. *Syirkah Abdan*	*1. Syirkah Abdan*	*1.Syirkah Inan*	*1. Syirkah Abdan*

financing, there are provisions for *shirkah that can be done, namely* shirkah 'inan / amwal fi al-inan *and* Shirkkah abdan	2. *Syirkah Wujuh* 3. *Syirkah Inan* 4. *Syirkah Mufawadhah*	2. *Syirkah Inan*	2. *Syirkah Wujuh* 3. *Syirkah Inan*

From the table, it can be seen that *first*, this definition shows that the shirkah *referred to in the DSN-MUI fatwa is a type of* shirkah uqud whose domain is to obtain profits. The key word in this definition is the inclusion of capital that is united, and when viewed in the discussion of the definition of shirkah according to the *scholars of madzhab, this definition is closer to the definition given by Hanafi scholars, although the definition of* shirkah in this fatwa has been adjusted to include the current meaning of *shirkah*. *Second, related to the rukun of shirkah* in the fatwa of DSN-MUI *shirkah takes the opinion of jumhur ulama which states that* there are three *rukun of* shirkah. *Third, the* profit ratio in Fatwa DSN No. 08/DSN-MUI/IV/2000 concerning *Musyarakah* Financing takes the opinion of the number of ulama, namely proportionally. As for Fatwa DSN No. 133 / DSN-MUI / X / 2019 concerning *IMBT* takes the opinion of Hanafiyah scholars, namely the *ratio* can be proportional or according to agreement. *Fourth,* in the case of the type *of shirkah* mentioned in this fatwa refers to the opinion of several scholars. *Shirkkah Inan/amwal fi al'inan* is agreed upon by all scholars and shirkah abdan *is agreed upon by jumhur (Hanafiyah, Malikiyah and Hanabilah*).

Conclution

Based on the analysis in the discussion above, it can be concluded that: *first*, the DSN-MUI Fatwa on *shirkah* does not refer to one particular group of *madzhab* scholars, but there are different opinions taken from one circle of scholars only there are opinions taken from the number of ulama and most of them come from jumhur. *Secondly*, it can be said that if there *is talfiq in this fatwa* about shirkah, the *talfiq* referred to here is to take some opinions from madzhab scholars in one *qadliyah* namely about *shirkah.* About the definition and determination *of the profit ratio* in *shirkah taking the opinion of Hanafi scholars, as for the rukun of the death contract, opinions taking jumhur opinions other than Hanafi scholars, and about the type* of shirkah *more likely to use the opinions of jumhur ulama.* Third, talfiq in *this fatwa can be classified as* talfiq which is allowed by some scholars, *not talfiq which causes obscurity of* shirkah law, *not* talfiq *in playful motives and does not necessarily just take the easy.* The limitation of this study is the breadth of the study of *the ikhtilaf* ulama on shirkah *and this research tends to only analyze* the ikhtilaf *ulama* in general, therefore the analysis carried out is less in-depth. The author's advice for future research may be dedicated to one of the sections on *shirkah* so that the analysis can be deeper and

more valid.

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