

The Process of Legal Reform of Management the Zakat in Indonesia

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Abstract: This study aims to analyze and formulate: (1) Urgency fatwa in zakat legal reform in Indonesia; (2) The nature of fatwas and methods of determining the fatwa of Islamic mass organizations; (3) Contributions of fatwas against the legal reform of zakat; (4) the legal reform of zakat in the fatwa of Islamic mass organizations; (5) Application of zakat law in Indonesian society; (7) Compatibility of zakat legal reform in the fatwa of mass organizations concerning zakat management; The theoretical framework used in this research they are: Grand Theory, *maqashid al-syari'ah* theory that the law of *ijtihad* result must be in accordance with *al-syari'ah* intent. Middle Range Theory, legal system theory (legal system), that law is a unity system consisting of elements: substance, structure and culture. Applied Theory, the *ijtihad* theory and the law substance theory. The theory of *ijtihad*, that new legal products can be formulated through the process of *ijtihad*. Theory of legal substance, that the substance of the law must be in harmony with the other rule laws either vertically or horizontally. The method used in this research is the normative juridical method. Implementation of this normative juridical method is to conduct analysis and interpretation of texts fatwa Islamic mass organizations and texts that are used as a back and source of reference by the *ulema* and contemporary *fuqaha* in formulating and establishing fatwas about the zakat. Further analyzing and interpreting the articles in the Act on the management of zakat, to be revealed in accordance with the theory used, namely the theory of *maqashid al-syari'ah*, the theory of legal systems and the theory of *ijtihad*. The results of the study can be concluded: (1) Fatwa has a very urgent position to answer various contemporary legal issues about zakat; (2) The fatwa is essentially a legal opinion conveyed by the '*ulema*, established through the process of *ijtihad* in response to the matter conveyed to him; (3) The fatwa of mass organizations contributes significantly to the development of zakat law in Indonesia (4) The legal reform of zakat in the fatwa a.l.: the zakat savings, deposits, giro, the zakat crops other than rice, the zakat fishery, zakat for productive business and zakat management through investment (5) the zakat reform in the law al: the zakat legal entity, zakat money and securities, forestry, fishery, industry, income and services, and zakat for productive enterprise (article 27); (6) Sociologically, every Muslim accepts the authority of Islamic law and obeys the *shari'at*, including the *shari'at* of zakat, but the degree is different from each other depending on his piety, in accordance with the theory of *credo* or *shahadah* and the non-territoriality theory of *Shafi'i* states that a Muslim is forever bound to implement Islamic law wherever he is; (7) In general there is an agreement between the rerorm of zakat law contained in the fatwa of Islamic mass organizations in Indonesia.

Keywords: Process, Legal Reform, and Zakat Management.

1. Introduction

The *ulema* who argue that zakat is a *mahdah* worship will have consequences on the law that the type of zakat property must hold on to what has been explicitly stated in the texts. There is no room for permission to determine the worship of the *mahdhah*, because of the absence of a specific the *nash* (*tafshili*) which is the basis of the obligation of professional zakat, it means that it cannot include the income of the profession as part of the kind of obligatory zakat (Dede Rosyada 1999: 107-108).

The other of *ulema* argues that zakat not as a kind of *mahdhah* worship but as worship *ghair mahdhah*. For this group the addition of the kind of *zakah* obliged, such as property obtained from professional or other opinion, may be accepted as long as the determination is established through *ijtihad* procedure (Ending Solehudin, 2001).

The other thought of zakat reform is the emergence of the idea of zakat institution, i.e. the obligation of zakat which is imposed to legal entity such as company (the Join-stock

Company or *Kommanditgesellschaft* Indonesian: *Persekutuan Komanditer*), foundation or NGO that bring profit, if the legal entity has income which has reached the *nisab* (Ayat Dimiyati, 2004: 65-75). The institute's zakat idea is based on the idea that the legal subject in the theory of jurisprudence is not just human individuals; legal entities can act to do legal deeds as humans do.

Corporate legal entities work as human beings accumulate wealth and can achieve income that can exceed individually. Implementation and management of zakat continues to be implemented by several organizations or the *amil zakat* agencies established on the initiative of religious and civic leaders supported by the local government, although without formal regulation by law by the state. This certainly has implications for the result of the efforts of the agency or zakat institution that has not been felt significantly by the wider community (Ibid: 62). Legal reform in general can be illustrated in the picture below:

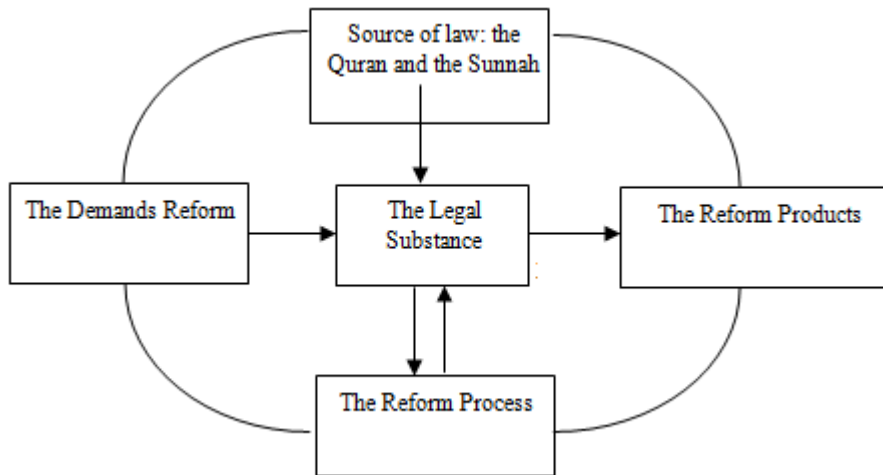
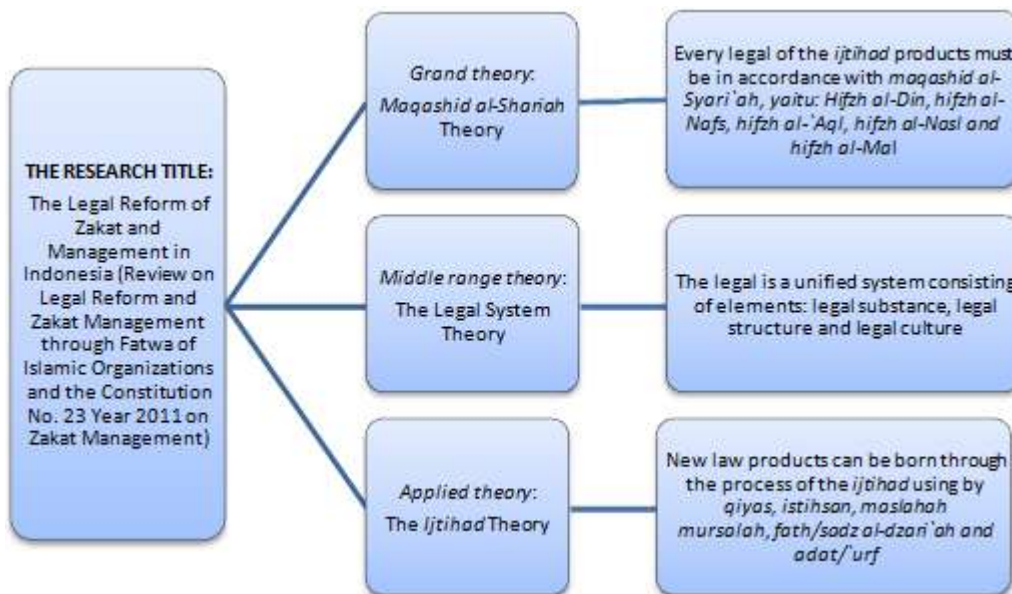


Figure 1: The *Fiqh* Reform Model



Explanation of Theory and Application on Research on the Legal Reform Process of Management the Zakat in Indonesia

2. Literature Review

Methodology

The method used in this research is the normative juridical method. Implementation of this normative juridical method is to conduct analysis and interpretation of texts fatwa Islamic mass organizations and texts used as guidelines and sources of reference by the *ulema* and contemporary the *fuqaha* in formulating and establishing fatwas about the zakat. Further analyzing and interpreting the articles in the Constitution on the management of zakat, to be revealed in accordance with the theory used, namely the theory of *maqashid al-syari'ah*, the theory of legal systems and the theory of *ijtihaad*. Method of data analysis to be conducted in this research is normative-interpretative analysis with stages as follows:

- 1) Collected data is classified according to data type and problem area;
- 2) After the next classification is done interpretation based on theories used, namely the theory of the *maqashid al-syari'ah*, the theory of legal systems and the theory of the *ijtihaad*;

- 3) The results of interpretation of primary and secondary data then connected with the formulation of the problems studied;
- 4) After obtained the intersection between the data, interpretation of data and the formulation of the problem then compiled into systematics that have been made;
- 5) Last done withdrawal conclusion.

The method of law enforcement (*thuruq al-istinbath*) The Hisbah Council is Exactly set in the decision of the 14th session of the 14th Exactly Hisalah Council signed by KH. E. Sar'an (as chairman) and H. Siddiq Amien (as secretary) on June 8, 1996 which was later published by the Central Executive of Jalan Pajagalan No. 14 Bandung.

In general, the legal decision-making methodology of the Counsels Exactly Persistent can be divided into three: introduction, legal source and the *istinbath* legal method. The introduction contains the definition of the law of language and term. It is said that the law is to set something on something else or prevent it (إبثبات شىء على شىء أو نفيه عنه). Further described five categories of law are: mandatory, sunnah, haram, makruh and mubah (Jaih Mubarak, 2002: 182).

In the second part it is explained that the source of Islamic law is: (1) al-Qur'an, (2) al-Sunnah, and (3) *Ijma Sahabah*. Hereinafter described that *istidlal* method to al-Qur'an they are:

- 1) Precede of *dzahir* verse from *ta'wil* and choose the way *tafwidh* in matters belonging to the field of belief (*itiqadiyah*);
- 2) Accept and believe in the content of the Qur'an's content even though it appears to contradict the common sense and custom (*adiy*);
- 3) Require the essential meaning of the meaning of the *majazi* unless there is *qarinah*;
- 4) If the verses of the Qur'an contradict al-Hadith then the precedence of the Qur'an even though the hadith is *muttafaq `alaih*;
- 5) Accepting the *nasikh* in the Qur'an but not accepting the *mansukh*;
- 6) Accepting the interpretation of the Companions in understanding the verses of the Qur'an and taking the interpretation of the more skillful Companions if there is a difference of interpretation among the Companions;
- 7) Prioritizing the interpretation of *bi al-ma'tsur* rather than the interpretation of *bi al-ra'yi*;
- 8) Accepting hadith as a parrot against the Qur'an, except the verse that has been expressed with *shighat hashr* (restriction);

And the *istidlal* method with al-Sunnah:

- 1) Using the *hadith saheeh* and *hasan* in making legal decisions;
- 2) Accepting the rules of "*hadith dha`if* can mutually reinforce one another" *الاحاديث الضعيفة يقوي بعضها بعضا* if the *dha`if* in terms of memorizing and not contrary to the Qur'an and *saheeh hadith*. This rule does not apply if its *dha`if* terms of disability *rawi*, such as *fasiq*, lie, or accused lie;
- 3) It does not accept the rule of "*hadith dha`if* can be used for the virtue of charity" *الاحاديث الضعيفة يعمل في فضائل* (الاعمال), because *saheeh hadeeth* which indicates virtue is quite a lot;
- 4) Accepting *hadith saheeh as tasyri`* independent;
- 5) Accepting hadith *ahad* as the legal basis as long as the *hadeeth* is *saheeh*;
- 6) The *hadith mursal shahabi* and hadith *mauquf bi hukmi al-marfu`* can be used *hujjah* if *sanad* shahih and not contradict other *hadith saheeh*;
- 7) Hadith *mursal tabi`i* can be *hujjah* if *ittishal sanad*;
- 8) Accepting the rule: الجرح مقدم على التعديل
- 9) Accepting the rule: الصحابة كلهم عدول
- 10) The *Mudallist* history is acceptable if it is clear *shighat tahammul* and *ittishal sanad* (Ibid: 183-185).

From the above description it seems very clear that the *istinbath* method used by Hisbah Council of Islamic Unity is very synonymous with what Wahbah Zuhaili calls the salafi method. That is the method that invites the people back to the Qur'an and al-Hadith as practiced by the *Salaf*, ie the Companions and the *Tabi`in*, and break away from the influence of the *ulema* of the School. The IUC Fatwa Commission, which is more likely to use the *mu'tadil mutawazin* or *wasathi* method, which is also referred to as a moderate, balanced, or mid-term method. namely the method of trying to keep everything that has been fixed in

the *Shari'ah*, on the one hand, on the other hand also pay attention to the demands of the times on the basis of the *mashlahah mursalah*, including *urf* (custom), as a form of the Shari'ah spirit practice without "*nash*".

3. Result and Discussion

3.1 Result

The fatwa has a very urgent role in the legal reform of the zakat in Indonesia, because although the provisions of zakat legal are set in detail in the texts of the Qur'an and al-Sunnah, but in line with the ever-changing social life, the demand for legal reform of the zakat is inevitable from time to time. This is in accordance with the principle which states: "Nash (al-Qur'an and al-Hadith) has ceased, while events / problems in society will not cease" (النصوص مناهية (والواقائع غير مناهية). To answer new issues about zakat can only be done through a fatwa established by *ulema* for institutions that are competent and reliable.

In essence, a fatwa is a legal opinion submitted by the *ulema* of both individuals and groups belonging to the fatwa institution, which is established through the process of *ijtihad* in response to the issues conveyed to him. The method of *ijtihad* by the Council of Hisbah Persatuan Islam tends to return the question to the Qur'an and al-Sunnah through textual interpretation (*istidlal*). The method of *ijtihad* used by the IUC Fatwa Commission takes a middle ground between the method of *ittiba` al-madzhab*, the textual method and the contextual method. The execution is first to study the opinions of the previous *ulema* in the polar *al-mu`tabarah* if found then the opinion is considered as a source of law then look for the argument *nash* (al-Qur'an and al-Sunnah) and make interpretation of the argument contextually, then taken the conclusion as a fatwa decision.

Much new legal thoughts are contained in the fatwas of the good zakat issued by the Indonesian Ulema Council, the Dewan Hisbah Persis. These fatwas make an important contribution to the development of zakat law in Indonesia, both at the discourse level, at the application level and in the process of drafting the Legal on Zakat Management. In many cases these fatwas make a major contribution as an ingredient in the drafting of the Legal on Management.

Judging from the fatwa institution issuing it, it consists of: 9 fatwas issued by the Indonesian Ulema Council (IUC), 5 fatwas issued by the Dewan Hisbah Persis. If it is classified based on the substance of its fatwa, it consists of: 6 fatwas in respect of *muzaki*, of which 1 fatwa among them contains elements of reform, namely about the zakat / the *infaq* obligatory for corporate institutions. 46 fatwas in respect of zakat compulsory property, of which 27 are fatwa among them identified to contain elements of reform, but after seen from the similarity of substance of 27. Can be squeezed into 11 kinds, such as zakat savings, deposits, demand deposits, and zakat plants other than rice, zakat fisheries, and others.

The application of the zakat law in Indonesian society is manifested as stated in the theory of legal authority, namely that if a Muslim has accepted Islam as his religion, he will accept the authority of Islamic law to him. Thus,

sociologically, people who embrace Islam will accept the authority of Islamic law and obey in the implementation of Islamic law, including *syari'at* about zakat. But this obedience will be different from each other because it depends on the level of piety of each. This is also in accordance with the theory of credo or creed which requires the implementation of Islamic law by those who have uttered the two of *kalimah shahada* as a logical consequence of the pronunciation of his credo. Similarly, the non-territorial theory of Shafi'i Imam states that a Muslim is forever bound to implement Islamic law wherever he is.

3.2 Discussion

3.2.1 The Definition of Reform

The Great Dictionary of the Indonesian Language (Indonesian: *Kamus Besar Bahasa Indonesia*) defines the word of reform (Indonesian: *pembaruan*) as the process, the way, the act of updating. Renewing itself according to KBBI means (1) to improve to become new, (2) repeat once again, start again and (3) replace with new, modify (Depdiknas, 2005: 109). When associated with the word "the law" a phrase will appear: the process of enforcing legal reform by means of fixing, modifying, or replacing with a new one.

In Arabic the reform is a translation of the word the *tajdid*. Abdul Manan, professor of law and former judge, in his book *The Law-Changing Aspect*, explains at length about the notion of *tajdid* based on accurate sources.

3.2.2 Legal Reform According to the Jurist

Most the Jurists agree that the law (always) requires a reform. This happens because society is always changing, not static. According to (Satjipto Rahardjo, 2000: 190), changes occurring in people's lives can be categorized into two categories: 1. Slow, incremental change, gradually increasing; 2. Changes in a large scale, revolutionary change.

3.2.3 Legal Reform in the National Politic Law

Mahfud MD, (2001: 11) presents two ways to find out the form of the National Political Law (NPL). From a formal perspective, PHN can be seen in the *Garis-garis Besar Haluan Negara* (GBHN) which set its outline continuously over time. But in another perspective, NPL can also be understood from the background and the process of issuing official formulations contained in the GBHN. Along with the coming era of reform, GBHN is not known anymore. Instead, to find out the PHN from a formal perspective, it can be seen Law No. 17 of 2007 on the National Long Term Development Plan (Indonesian: *Rencana Pembangunan Jangka Panjang Nasional* or RPJP) of the Year 2005-2025, which by the law is summarized in the RPJP 2005-2025.

According to the 2005-2025 National Long-Term Development Plan (Indonesian: RPJPN), legal development is carried out through: "Reform of legal materials with due regard to the diversity of prevailing legal arrangements and the effects of globalization as an effort to increase legal certainty and protection, law enforcement and human rights human rights, legal awareness, and legal services of justice and truth, order and prosperity in the framework of a more

orderly, orderly, smooth, and globally competitive state" (Constitution No. 17, 2007).

According to the Islamic Encyclopedia (Nina M. Armando, 2005: 32) since the beginning of its history Islam has had a tradition of reform (*tajdid*). This is because *tajdid* gets justification and validation from the Qur'an and the *hadith* of the Prophet Muhammad narrated by Abu Dawud: "Allah will send this *Ummah* (Muslims) at the beginning of every century that will renew his religious affairs".

The phrase religious affairs reform (*yujaddidu laha dinaha*) is of course in the sense of all areas of religion such as *aqidah*, worship, *muamalah* (in the broadest sense), including the field of law (*sharia*). It's just that in the field of *aqidah* and worship, the meaning of reform is to improve by restoring it as it was in its original state because of this field there which has been contaminated by *bid'ah* and *khurafat*. However, in the field of legal reform can be meaningful to change, remodel, or reconstruct. Islamic law in writing as a concrete rule (though not using the format of legislation) is contained in the books of jurisprudence. That is why reform of law in Islam is often identified with the *fiqh* reform.

According to the history of *madhhab Syafi'i* actually reform of *fiqh* in the sense of change of jurisprudence is not new. This is illustrated by the *qaul qadim* and *qaul jadid* in this school. Wahbah Zuhaili mentions the existence of five methods of reform of jurisprudence which has been running among Muslims. These methods are:

- 1) *Salafi Method*. This method invites the people to return to the *fiqh* of the Salaf, ie the Companions and the *Tabi'in*, and break away from the four schools. Pioneers of this movement include Muhammad Yusuf Musa, Syakih Muhammad al-Muntashir al-Kattani, and Ruwwas Qala'ji. The group of adherents of this method invites to re-learn the *ijtihad* of the Companions, especially Umar bin Khattab.
- 2) *Intiqai' or Ghawgha'i Method*. Wahbah Zuhaili defines this method as a method of choosing what feels good according to personal desires and lust. The overview of the method is cursory and not exhaustive, whereas adherents of this method have no requirement as a *mujtahid*. Unfortunately Wahbah Zuhaili does not show examples of *ijtihad* adherents of this method.
- 3) *'Udwani Method*. This method is hostile to the firmness of Islamic jurisprudence as a whole and ignores the legacy of the legacy of *fiqh* that is very rich and has been recognized by legal experts and legal practitioners in the contemporary world. Abandoning Islamic *fiqh* is a destructive method, as it places the *syar'i nash* in the last position, and takes what is considered to have the *maslahat* based on lust.
- 4) *The Taqribi Method*. This method tries to bring jurisprudence to the positive law, as if the positive law is sacred and high, while the Islamic jurisprudence is underneath. Adherents of this method attempt to do *takwil* of *nash sharia* and contrary to the *nash* of goals. This is a reversal of reality, because the positive law establishes the reality of social relationships to achieve stability regardless of morality and religion.
- 5) Method of *mu'tadil mutawazin* or *wasathi*. This method is also called a moderate, balanced, or mid-way method.

This method can be accepted *syari* 'as well as reason, because first, this method keep everything that has been fixed in the *shari'ah*; secondly, this method looks at developmental demands on the basis of *mashlahah mursalah*, including the general *urf*, as a form of practicing the spirit of *shari'ah* without "crashing the *nash*". This method is used by the friends, *tabi'in*, and the imams of the school in every time and time. This method seeks to realize authenticity and modernity at once. This method also brings together two things: first, sticking to the texts, and secondly, maintaining and reconciling the benefits and needs after deep understanding of the texts and explaining the *illat*. Wahbah Zuhaili pointed to an example in the banking world with the emergence of Islamic banks, which eventually evolved throughout the world (Wahbah Zuhaili and Jamal Athiyah, *Op.Cit*: 129).

In the twentieth century, more and more reforms of Islamic legal thought were made by Muslim *ulema* as well as by Orientals *ulema*. They actually contributed a lot in the development of Islamic legal studies conducted by figures such as Goldziher, Joseph Shacht, N.J. Coulson and Others. It's just that Orientals studies do not get a good reputation among the Muslims for various reasons (Syamsul Anwar, 2002: 149). In the book of Contemporary Islamic Thought an ontology essay on the study of figures, there can be found analysis of the map of Islamic legal thought that according to Mulyadi Kartanegara, based on the area of study; it can be divided into two major parts:

The first is about the sacred texts which include, among others, the theory of "Humanistic Hermeneutics" from Egyptian thinkers, Hasan Hanafi, "The Boundary Theory" Mohammed Syahrur of Syria, "Text Analysis" from Nasr Hamid Abu Zayd from Egypt, "Thematic Tafsir" al-Syathi (A'isha bint Abd al-Rahman) also from Egypt and others (A. Khudori Sholeh, 2003: 4)). Second, discuss topics that are more related to philosophy or thought. Among other "Islamic Efistemology Model", by M. Abid Jabiri, a professor of Islamic philosophy and thinker from Morocco, "Neo-Sufism as an Alternative to Modernism," by Sayyed Hossein Nasr, a well-known contemporary Iranian thinker; "Historical Philosophy" By Murtadha Mutaharri, one of contemporary Iranian philosophers and one of the architects of Iran's Islamic revolution, and "Islamic Public Law Paradigm" By a Sudanese legal expert, Abdullah Ahmad al-Na'im. "Islamization of Civilization", by Ziauddin Sardar, "Towards Liberation Theology" by an Indian Islamic thinker Asghar Ali Engineer; "International Islamic Calendar," by a Malaysian physicist, M. Ilyas; "Islamization of Science" By Malaysian contemporary Malaysian thinker Naquib al-Attas and "Towards Gender Justice" By Amina Wadud.

Actually there are many more figures and thoughts that are not recorded in the Antology. Fazlur Rahman, for example, offers a specific moral and legal ideal in the meaning of texts and the early division of Islamic tradition; Muhammad Arkoun offers a re-understanding of Islamic tradition and he also questioned the validity of the restoration of fiqh theories that have been composed several centuries ago that are irrelevant to the present (*Ibid*).

Meanwhile the question of how the sacred text can be understood and then operated in the context of the modern world, which is no longer the same as the context of the Prophet's time. Such statements, according to some experts such as Muhammad Iqbal, Mahmud Muhammad Taha, Abdullah Ahmed al-Na'im, Muhammad Said Ashmawi, Fazlur Rahman and Muhammad Syahrur, cannot be solved completely based on the classical principles of *maslahah* above. They assume that *maslahah* principle is no longer sufficient to make Islamic law relevant in the modern world. The Weil B. Hallaq names this group with the flow of religious liberalism because it tends to stand on a paradigm apart from the classical paradigm (Amin Abdullah, 2002-118-125).

3.2.4 Theory and Status of the Fatwa Law

3.2.4.1 Terminology of Fatwa

ztyomologically the fatwa means advice, and answers to questions relating to the law. The person who gave the fatwa is called a mufti, and he is a *mujtahid*, but the result of *ijtihad* does not always mean a fatwa. While the person receiving the fatwa is called mustafti. Fatwa is a single form, while the form the *jama`* fatwa (Abdul Aziz Dahlan, 2000: 40).

The word of fatwa, in Arabic, is often used in two forms (افتى يفتى افتاء) which means giving a fatwa or advice based on religious teachings (Islam), the word (استفتى يستفتى استفتاء) meaning "asking for fatwas". The terminology of the fatwa is: "a fatwa is a formal legal opinion given by a mufti or a canon lawyer of standing in answer to a question submitted to him either by a judge or by a private individual". In the Encyclopedia of Islam a fatwa is defined: "The answer to a question of legal stipulation based on the results of *Ijtihad* on an issue that is not yet clear the law". (*Ibid*). In the Encyclopedia of Islam the limits of the fatwa are expressed as "the answer to a question of legal stipulation based on the results of *ijtihad*, on an issue that is not yet clear" (*Ibid*).

The study of fatwas is often discussed by *ulema ushul fiqh* in his books. According to *ulema ushul fiqh* fatwa is the opinion expressed by a *mujtahid* or *faqih* as the answer of the proposed fatwa in a case that is not binding. The party requesting the fatwa may be a private person, an institution, or a community group. The fatwa proposed by the *Mujtahid* or *faqih* is not necessarily followed by the person who asks for a fatwa and therefore the fatwa has no binding power (Cik Hasan Bisri, 2003: 39).

In terms of the legal products, there is a difference between the *mujtahid* and the *mufti*. The *Mujtahids* seek to decipher the laws of the Qur'an and al-Sunnah in various cases, whether requested by others or not. While mufti only issue fatwa if requested and the problem posed to him is a question that can be answered according to the knowledge he has. Therefore, mufti in the face of legal issues must really know in detail about the case in question, considering the welfare of the fatwa, the surrounding environment, and the objectives to be achieved from the fatwa (Abu Zahrah, Muhammad, TT: 401).

3.2.4.2 Term of the Mufti

According to Imam Ahmad bin Hanbal (164-241H / 750-855M) the requirement to be a mufti is: (1) Intent solely seeking the pleasure of Allah; (2) authoritative, patient, able to withstand anger and not arrogant (humble); (3) Knowledgeable and broad-minded, so he is steadfast in bringing forth truth; (4) To be adequate, not to rely on the necessities of life to others, so that he is not affected by the giving or gifts of others in making decisions; (5) Knowing the sciences of society, because a decree of law which is decided must be based on the benefit and not cause the community's conscience (Abdul Aziz Dahlan, *Op.Cit.*: 299).

For terms of *mufti*, *ulema ushul fiqh* also put forward the implications of this condition. According to them, there are three things that must be considered by the mufti in relation to the fair terms (Wahbah Zuhaili, 1986: 168):

- a) Each fatwa must always be based on the proposition. If the fatwa was taken from the opinion of the early *Mujtahids*, then he should choose the strongest opinion of his theorem and more oriented to the benefit;
- b) If the mufti has the knowledge capacity to distribute the law, then he should seek to extract the law from the texts by considering the various realities;
- c) The fatwa does not follow the will of the *mustafti*, but consider and follow the will of the theorem and the benefit of mankind.

3.2.4.3 Legal Status of Fatwa

The fatwa is also seen as having a strong legal standing because it is issued after a thorough review and review process by the competent institution in its field, the institution specifically authorized and responsible for conducting Islamic legal studies and issuing a fatwa. In every major Islamic organization in Indonesia has its own fatwa institution, the fatwa institution of Persatuan Islam (Persis) is known as the the Hisbah Council, and the Indonesian Ulema Council (IUC) fatwa institution under the name of the IUC Fatwa Commission.

Therefore, it can be said that the fatwa institution is an authoritative institution, because the institution accommodates the elite group of influential clerics in the community, so that the fatwa issued will also have a widespread impact among the people. The power of the *ulema* as an elite group, stems from several factors, among others: First, because of the depth and breadth of knowledge possessed by *ulema* especially religious knowledge, so they are considered more competent to talk about the issues of religious (Islamic) law; Secondly, *ulema* usually have broad followers and influence in society, so their opinions are often used in religious affairs; Thirdly, because of its widespread authority and influence, the *ulema* also became respected and respected informal leaders and leaders in the community (*Ibid*).

However, the fatwa of a mufti is not binding to *mustafti*, that is, if a person asks a fatwa and mufti to provide a legal solution, then *mustafti* may accept and practice the fatwa and may also refuse and not practice it. This is different from the legal decision issued by the judge. If he is *incracht*, has permanent legal force, the judge's verdict is binding and must be carried out by the parties concerned. Besides the

fatwa can be given to anyone indiscriminately, while the judge only gives a decision on the territory of his power (Mukhtar Yahya and Fatchurrahman, 1986: 407).

If the mufti's opinion is the same, or at least one direction, then it can show that it is the only solution to the problem. But if there are many fatwas for one problem, then in this case there are three alternative opinions: First, the layman or *mustafti* may choose one of the fatwas and ignore the other. For all muftis are assumed to do the same effort to establish (*mengistinbath*) a law. The mufti work within relative, relative, truth (*dzan*) realms. Secondly, the layman or *mustafti* does not have the freedom to choose, but must choose the fatwa which is considered the most fair, the most trusted and the most expert in the field of Islamic law. Thirdly, the layman or *mustafti* is required to accept a prohibiting opinion rather than allow or advocate, since such is considered more cautious (Wael B. Hallaq, 2000: 183-184). Among the three options was the first opinion of the most widely used, because *mustafti* has enough space to determine which fatwa is more suited for himself in accordance with his knowledge and belief.

In some Islamic countries today, mufti occupies an important position and is one of the official institutions that take care of various problems of Muslims. For example in Egypt, Saudi Arabia, Syria and Morocco. Mufti as one religious office is no longer bound by one of the schools, but it is more comprehensive considering the various opinions of schools according to the circumstances of the people. In addition, mufti is also bound by the applicable legislation in this country (Abdul Aziz Dahlan, *Op.Cit.*: 327).

3.5 The Fatwa Determination of Hisbah Persatuan Islam Council (Persis)

3.5.1 The Persis Fatwa Institution (Hisbah Council)

At the first this institution was named Majelis Ulama, chaired by A. Hasan, with the task of assisting the Head of the Center in the review and establishing Islamic laws based on the Qur'an and al-Sunnah. It has mass media to convey religious fatwas to its members and to the wider community, including: Islamic Defenders Magazine, al-Fatwa, al-Lisan, and al-Muslimun.

This Majelis Ulama Persis lasted until the leadership of KH. Isa Ansari (1948-1960), then his name was changed during the leadership of KH. E. Abdul Rahman (1960-1983) under the name of Hisbah Council which means the Examining Council, which is at the 6th muktamar in Bangil, East Java.

The name change is intended to further affirm the duties and functions of ulama, ie not only to give legal edicts but also to control the executive and members of the hour. However, this new institution also functioned effectively after 1983, namely during the leadership of KH. Latif Muhtar. Thus, the Hisbah Council in addition to functioning as a fatwa institution also serves as a supervisory agency.

3.5.2 The function of the Hisbah Council

The Hisbah Council has the following functions:

- a) Examining the laws of Islam;

- b) Prepare the instructions and practice of worship for the members;
- c) Overseeing the implementation of Islamic law;
- d) Give a reprimand to members who are judged to conduct legal proceedings through the Central Executive.

3.5.3 The Legal Determination Method

The legal determination method (*thuruq al-istinbath*) The Hisbah Council assigned to the decision of the 14th session of the 14th Exactly Hisalah Council signed by KH. E. Sar'an (as chairman) and H. Siddiq Amien (as secretary) on June 8, 1996 which was later published by the Central Executive of Jalan Pajagalan No. 14 Bandung.

In general, the legal decision-making methodology of the Counsels Exactly Persistent can be divided into three: introduction, legal source and the *istinbath* law method. The introduction contains the definition of the law of language and term. It is said that the law is to set something on something else or prevent it (إثبات شئى على شئى أو نفيه عنه). Further described five categories of law are: mandatory, *sunnah*, *haram*, *makruh* and *mubah* (Jaih Mubarak, *Op.Cit*: 182).

In the second part it is explained that the source of Islamic law is: (1) al-Qur'an, (2) al-Sunnah, and (3) the *Ijma Sahabah*. Hereinafter described that *istidlal* method to al-Qur'an, they are:

- 1) Preface *dzahir* verse from *ta'wil* and choose the way *tafwidh* in matters belonging to the field of belief (*itiqadiyah*);
- 2) Accepting and believing in the content of the Qur'an's content even though it appears to be contrary to reason and custom (*adiy*);
- 3) Understand the essential meaning of *majazi* unless there is *qarinah*;
- 4) If the verses of the Qur'an contradict al-Hadith then the precedence of the Qur'an even though the hadith is *muttafaq `alaih*;
- 5) Receive the existence of *nasikh* in the Qur'an but does not accept the existence of *mansukh*;
- 6) Receive interpretations from the Companions in understanding the verses of the Qur'an and take the interpretation of the more skillful companions if there is a difference of interpretation among the companions;
- 7) Prioritizing the *bi al-ma'tsur* interpretation of the *bi al-ra'yi tafsir*;
- 8) Accepting hadith as a parrot against the Qur'an, except the verse that has been revealed with *shighat hashr* (restrictions);

While the *istidlal* method with al-Sunnah:

- 1) Using the hadith *saheeh* and the *hasan* in making legal decisions;
- 2) Accepting the rules of "hadith *dha`if* can mutually reinforce each other" الأحاديث الضعيفة يقوي بعضها بعضا the *dha`if* in terms of memorizing and not contrary to the Qur'an and *saheeh hadith*. This rule does not apply if it's the *dha`if* in terms of disability *rawi*, such as *fasiq*, lie, or accused lie;
- 3) Not accepting the principle of "hadith *dha`if* can be used for the virtue of charity" (الأحاديث الضعيفة يعمل في فضائل)

الأعمال), because *hadith saheeh* which shows the virtue of charity quite a lot;

- 4) Accepting *hadith saheeh* as *tasyri`* that is independent;
- 5) Accepting *hadith ahad* as the legal basis as long as the *hadith* is *saheeh*;
- 6) Hadith *mursal shahabi* and hadith *mauquf bi hukmi al-marfu`* can be used *hujjah* if the *sanad* *issahih* and not contradict other *hadith saheeh*;
- 7) Hadith *mursal tabi`i* can be *hujjah* if *ittishal sanad*;
- 8) Accepting the rule: الجرح مقدم على التعديل
- 9) Accepting the rule: الصحابة كلهم عدول
- 10) Mudallist history is acceptable if it is clear *shighat tahammul* and *ittishal sanad* (*Ibid*: 183-185).

3.2.6 The Fatwa Determination Method of the Indonesia Ulema Council (IUC)

3.2.6.1 Background of Establishment of IUC

The IUC West Java was first established from the Central IUC, which was on August 22, 1958. IUC was born as a clerical organization that accommodates existing Islamic organization groups that are perceived to happen split each other. Officially, the IUC organization was confirmed through the Decree of Regional War Authority Number 53/8 / PPD / 1958. in its development then the existence of IUC felt its need throughout the territory of the motherland of Indonesia, so the Central IUC was established which marked the development of IUC institutional nationally on July 26, 1975.

The background of the founding of IUC West Java is inseparable from the factors of the political situation at that time, mainly due to the influence of the rebellion, Darul Islam / the Islamic Army which received the support of the wider community and the *kiyai* in *pesantren*, West Java. To compensate for the strength of the Darul Islam / Army of Islam, the TNI needs the influence and authority of the pro-clerics against the government of the Republic of Indonesia and does not give support to the Darul Islam / Army of Islam (DI/TII) movement, so it is hoped that the appeal of pro-clerical groups against this government will be followed by the wider community and turn citizens will support the government (Indonesian National Armed Forces) to equally eradicate the Darul Islam / Army of Islam movement.

This strategy proved to be quite effective, proved after receiving support from pro-Indonesian religious clerics the Darul Islam / Army of Islam movement increasingly lost support from the wider community and ultimately could be paralyzed by Indonesian National Armed Forces with community support (IUC West Java, 2007: 16).

The purpose of the founding of the IUC is to participate in the realization of a safe, peaceful, just and prosperous society that is blessed by Allah in the Unitary State of the Republic of Indonesia based on the *Pancasila* (Basic Guidance of IUC). The IUC mission is (*Ibid*):

- 1) Build the *ukhuwah Islamiyah* and the relationship between the organization the *da`wah* Islam and development organizations;
- 2) Fostering inter-religious harmony;
- 3) To foster education, culture and cadre of *ulema*;
- 4) Conducting religious studies;

5) Perform functions as servants and counselors of the people;

3.2.6.2 The History of IUC Fatwa Determination Process

Initially, the determination of IUC fatwa was done by doing the *ijtihad* in *jama`i* based on the scientific capacity in *fiqh* and *ushul fiqh* owned by the members, the character of the cleric or leader in this period is very prominent, so the decision of fatwa is determined more by the leader. Meanwhile, local fatwa committees run in accordance with their respective opinions, so that there may be differences in the pattern of fatwa determination between the regions with other regions and also with the central IUC.

To overcome these differences, Head of the IUC Center issued a decision Number. 069 / MUI / I / 1986 on Guidelines for the Fatwa Determination which apply to the IUC Fatwa Commissions central and regional throughout Indonesia. The guidelines are then refined through the Decree of Head of the IUC Center number U-596 / MUI / X / 1997 dated November 2, 1997 on Guidelines for Fatwa Determination of IUC. In general, the guidelines for determining the fatwa in 1997 are more detailed and clearer in fatwa procedures and mechanisms than the 1996 guidelines. The 1986 guidelines only contain 5 articles consisting of: (1) basic fatwas; (2) how to focus; (3) the authority of the soul; (4) meeting commission mechanism; and (5) the memorized fatwa. The 1997 guidelines contain 9 articles and 6 provisions, namely: (1) general provisions (art 1); (2) the general basis of the determination of the fatwa (article 2); (3) fatwa procedure procedures (articles 3 and 8); (4) commission meetings; (5) authority and hierarchy; and (6) a cover which states: "IUC fatwa decision has equal and non-canceling legal status" (Jaih Mubarak, *Op.Cit.*: 170).

The basic improvements to the 1997 Guidelines are, among others, on the grounds. In the 1986 Guidelines it is stated that the basic fatwas are: (a) the Qur'an; (b) al-Sunnah (c) al-*Ijma`*; and (d) *Qiyas*. In the 1997 Guidelines added point (e) other legal arguments. If not found in the four theorem IUC is allowed to take the opinion of imam *madhhab* or *fuqaha* earlier which argument is stronger and more *maslahat* for people. If that cannot be done, the last way is by *ijtihad jama`i*.

Meanwhile, in the procedure of fatwas determination in 1997, there are six steps as follows:

- 1) Hearing the considerations of experts;
- 2) Used the five basic provisions of the fatwa: al-Qur'an, al-Sunnah, *ijma`*, *qiyas* and other legal propositions, if in the five sources it is not found, then
- 3) Taking into account the opinions of priests or early *fuqaha* taking into account the power of the theorem and the benefit of the people;
- 4) If there is more than one opinion, then *tarjih* is done to select the opinion which is considered the most *rajih*;
- 5) If the fourth step cannot be done then the method of "*ilhaq al-masa'il bi nadza'iriha*" is as far as possible;
- 6) If the fifth step cannot be done then the determination of the law is done through *ijtihad jama`i* by using *ushul* rule and *fiqhiyah* rules (Ibid: 170-171).

The amendment of the fatwa decision-making procedure of the 1986 Guidelines to the 1997 Guidelines aims to preserve

and develop the benefit based on the principle of maintaining the old who benefit and taking on new, more benevolent ones.

3.2.6.3 Institutional Structure of the IUC Fatwa Commission

In the Basic Guidelines IUC chapters 4 and 5 stated that the tasks and functions of the IUC are as follows (Majlis Ulama Indonesia, 1985: 37-38):

- 1) Providing guidance and guidance to Muslims in realizing religious and social life.
- 2) Providing advice and fatwas on religious and social issues to the government and society;
- 3) Increasing activities for the realization of the *ukhuwah Islamiyah* and inter-religious harmony in consolidating the unity and unity of the nation;
- 4) Making connections between the *ulema* and *umaro* (government) and reciprocal interpreters between government and people to succeed national development;
- 5) Improving relationships and cooperation between organizations, Islamic institutions and Muslim *ulema*;
- 6) Representing Muslims in interreligious relations and consultations;
- 7) Other businesses that is appropriate to the organization's objectives;

To realize the tasks and functions of IUC is then in the organizational structure of IUC there are several operational institutions that each runs their duties and functions according to the rules that have been determined. One such operational institution is a commission that specifically deals with issues of fatwas, known as the Commission on the Establishment of Islamic Law and the Fatwa. The position of the Fatwa Commission is at the level of the Central IUC, the provincial area up to the Branch at the district / city level, but not every IUC Branch Office has a Fatwa Commission.

The Commission regularly conducts meetings, called *Ijtima Ulema* IUC Fatwa Commission, and at Central IUC level is called *Ijtima Ulema* IUC Fatwa Commission in Indonesia. The *Ijtima* is conducted to discuss any questionable or massively developed issues among Muslims. The result of the Fatwa Commission meeting was then submitted to the IUC's Board of Directors to be asked for it's the *tanfiz*, therefore institutionally the IUC Leadership Council has the authority to determine or not to issue the fatwas of the result of *Ijima* as an official IUC fatwa.

3.2.6.4 Guidelines of the Fatwa Determination

The IUC Fatwa Guidelines are stipulated in IUC Decree number U-596 / MUI / X / 1997. In the Decree, there are three main parts of the process of establishing fatwas, namely: The general principles of fatwa determination, fatwa procedure, and organization of the fatwa. The general principles of IUC fatwa stipulated in article 2, paragraph 1 and 2. In paragraph 1 mentioned that every fatwa is based on the most powerful *adillat al-ahkam* and bring benefit to the people. In the next verse (verse 2) it is explained that the basic fat was are: al-Qur'an, al-Hadith, *Ijma`*, *Qiyas*, and other legal postulates.

In more detail the basic determination of IUC fatwa is stated in the Guidance of IUC Fatwa Determination No: U-596 / MUI / X / 1997 Article 2 stated:

- 1) Every Decision of the Fatwa shall be based on the Book of Allah and the Sunnah of the Apostle which *mu'tabarah*, and not contrary to the benefit of the *Ummah*;
- 2) If it is not found in the Book of Allah and the Sunnah of the Apostle as prescribed in Article 2, paragraph 1, the Fatwa Decision shall not be contradictory to *Ijma' Qiyas* which *mu'tabarah* and other legal arguments such as *Istihsan*, *Mashalih Mursalah* and *Sadz al-Dzari'ah*;
- 3) Prior to the decision of the Fatwa Decree, consider the opinions of the previous imams of the schools of thought, whether those relating to the arguments used or in connection with the arguments used by the dissenting party;
- 4) The views of experts in problem areas to be filed, considered (*Ibid*).

Furthermore fatwa determination procedure is done with the following steps:

- 1) First, every problem proposed (encountered) IUC is discussed in the Commission Meeting to know the substance and sit down the problem;
- 2) Secondly, in the Meeting of the Commission, experts will be presented with regard to matters to be heard for their opinions to be considered;
- 3) Third, after the expert's opinions are heard and considered, the *ulema* conduct a study of the opinions of the imams of the *madhhab* and the *fuqaha* by observing the arguments used in his various ways of *istidlal* and the benefit of the people. If the opinions of the clergy are uniform, or only one cleric has an opinion, the commission may take the opinion as a fatwa;
- 4) Fourth, if the *fuqaha* has a variety of opinions, the commission elects the opinion which is considered the strongest by *tarjih* and chooses the most *rajih* opinion to be filed;
- 5) Fifth, if *tarjih* does not produce the expected product, the commission may perform *ilhaq al-masa'il bi nadza'iriha*, taking into account *mulhaq bih*, *mulhaq 'ilaih*, and *wajh al-ilhaq* (art. 5);

- 6) Sixth, if *ilhaq* does not produce a satisfactory product, the Commission may exercise *ijtihad jama'i* by using *al-qawa'id al-ushuliyyah* and *al-qawa'id al-fiqhiyah*.

3.2.6.5 The Fatwa Determination Mechanisms

The fatwa techniques conducted by the IUC is through the Meeting of the Fatwa Commission by presenting experts related to the issues to be the fatwas. Commission meetings are held if there are any questions or issues raised, whether they come from government, social institutions, or IUC. (Jaih Mubarak, *Op.Cit*: 170-171).

In more detail the mechanisms and steps to establish the fatwa as stipulated in the Working Mechanism of IUC Fatwa Commission No. : U-634 / MUI / X / 1997 and Guidance of IUC Fatwa Stipulation No. : U-596 / MUI / X / 1997 Article 3, 4, 5, 6, 7 and 8 are as follows:

- 1) Conducting a IUC Fatwa Commission Meeting attended by members of the Fatwa Commission whose numbers are considered sufficient by the Chair of the Commission (Session) with the possibility of inviting experts related to the issues to be discussed, if deemed necessary; (Article 6 of the IUC Fatwa Stipulation Guidelines);
- 2) The result of the Fatwa Commission Meeting shall be formulated into a Decision of the Fatwa by the Special Team, and then signed by the Chair and Secretary of the Commission;
- 3) Fatwa Decision as referred to in point 2 shall be reported to the Board of Executive / Secretariat of IUC for the memorized letter in the form of Decree of Fatwa IUC;
- 4) Each Decree of IUC Fatwa which is received numbered and signed by the Chairman, General Secretary, and Chairman of IUC Fatwa Commission.
- 5) Fatwa Determination Procedures, as set out in the IUC Fatwa Determination Guidelines No : U-596 / MUI / X / 1997 Articles 3, 4, 5, 6, 7 and 8, and IUC Fatwa Commission Working Mechanism No. : U-634 / MUI / X / 1997 can be summed up in the scheme as follows:

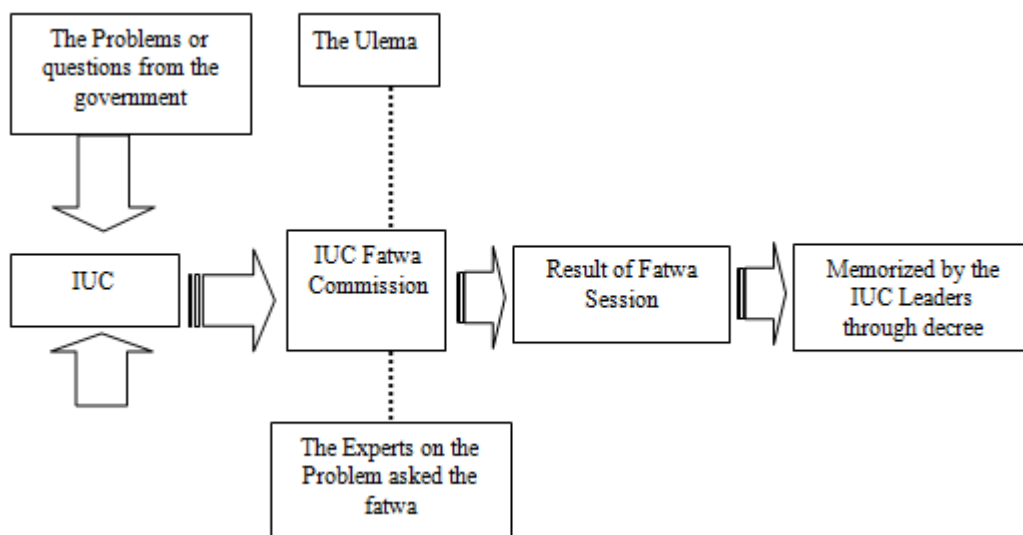


Figure 2.1: Procedure and Mechanism of IUC Fatwa Determination

The decision of the result of the Fatwa Commission Assembly is then reported to the Board of Directors / Secretariat of IUC for the determination (the *tanfidz*) in the form of IUC Fatwa Decree, or known as Fatwa determination. Therefore, the decision of the Fatwa is the endorsement of the fatwa decision by the IUC Chief Board and the Chair of the Fatwa Commission in the form of the decree of the IUC Fatwa.

Furthermore, the decision of the fatwa by Head of the IUC Center is submitted to the government or concerned parties (who ask for fatwas), or to the wider community. However, usually Fatwa at the request of the government or other parties only submitted to the requesting party. This is done to avoid the impact caused because before the fatwa is accepted by the requesting party, it has first spread in the community (Ahmad Fatoni, *Op.Cit*: 45).

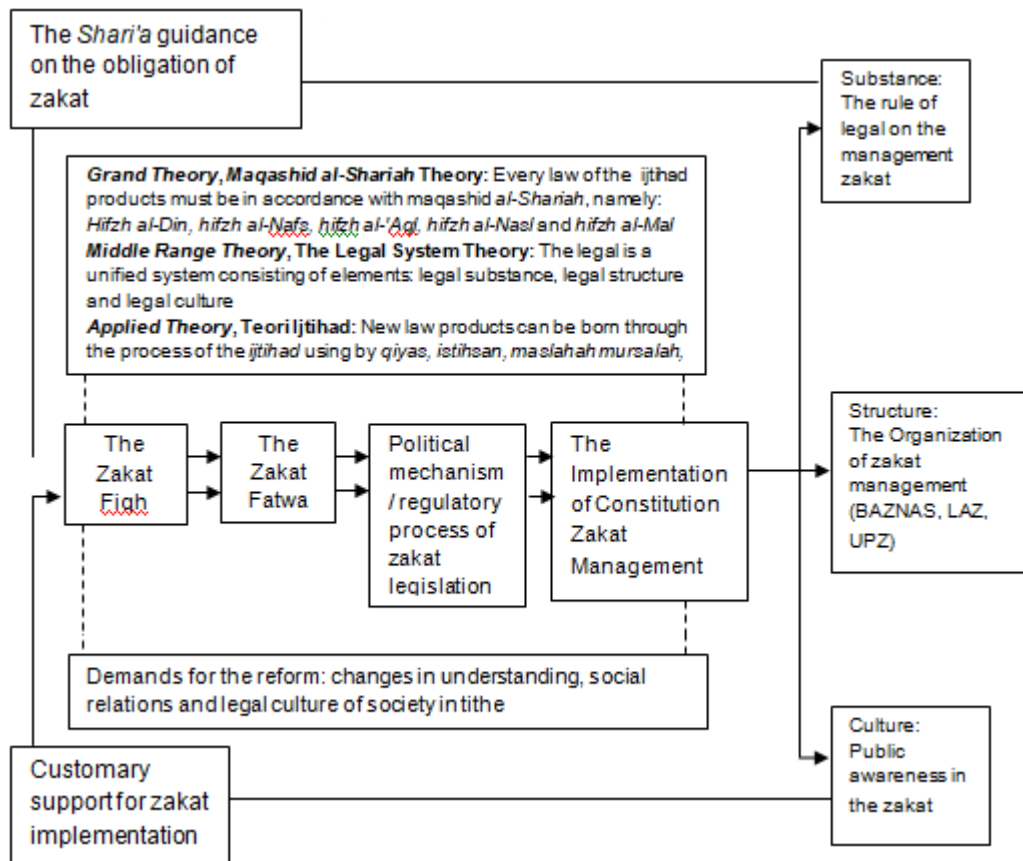


Figure 1.5: The Theory Framework in *Fiqh* reform is adapted from David Easten's Political System, Andrew Mc Collin & Mochtar Mas'ud

4. Conclusion

The fatwa has a very urgent role in the legal reform of zakat in Indonesia, because although the provisions of zakat law are set in detail in the texts of the Qur'an and al-Sunnah, but in line with the ever-changing social life, the demand for the legal reform of zakat is inevitable from time to time. This is in accordance with the principle which states: "Nash (al-Qur'an and al-Hadith) has ceased, while events / problems in society will not cease" (النصوص مناهية والواقائع غير مناهية). To answer new issues about zakat can only be done through a fatwa established by the *ulema* institutions that are competent and reliable.

The *ijtihad* method by the Hisbah Persatuan Islam Council tends to return the question to the Qur'an and al-Sunnah through textual interpretation (*istidlal*). The *ijtihad* method used by the IUC Fatwa Commission takes a middle ground between the method of *ittiba' al-madzhab*, the textual method and the contextual method. The execution is first to study the opinions of the previous *ulema* in the polar *al-mu'tabarrah* if found then the opinion is considered as a

source of law then look for the argument *nash* (al-Qur'an and al-Sunnah) and make interpretation of the argument contextually, then taken the conclusion as a fatwa decision.

Much new legal thoughts are contained in the fatwas of the good zakat issued by the Indonesian Ulema Council (IUC), the Hisbah Persatuan Islam Council (Persis). These fatwas make an important contribution to the development of zakat law in Indonesia, both at the discourse level, at the application level and in the process of drafting the Constitution on Zakat Management. In many cases these fatwas make a major contribution as an ingredient in the drafting of the Constitution on Management.

Judging from the fatwa institution issuing it, it consists of: 9 fatwas issued by the Indonesian Ulema Council (IUC), 5 fatwas issued by the Council Hisbah Islamic Unity. If it is classified based on the substance of its fatwa, it consists of: 6 fatwas in respect of muzaki, of which 1 fatwa among them contains elements of reform, namely about zakat / infaq obligatory for corporate institutions. 46 fatwas in respect of zakat compulsory property, of which 27 are fatwa among

them identified to contain elements of reform, but after seen from the similarity of substance of 27. Can be squeezed into 11 kinds, such as zakat savings, deposits, demand deposits, and zakat plants other than rice, zakat fisheries, and others. 24 fatwas concerning the *mustahic* of zakat, of that amount, 12 fatwas of which are identified to contain legal reform of zakat, such as zakat management for productive enterprises, zakat distribution for scholarships, orphanages, mosque construction, and others. 4 fatwas in respect of *amilin*, of which only one of them is identified as having an element of reform, namely a fatwa stating that the individual or community group is legitimate as *amiline* if approved by the government. Fatwas related to zakat management are all 23 fatwas, out of which, 9 fatwas can be identified with legal reform elements of zakat, such as fatwas on zakat management for investment, zakat fund distribution for productive enterprises, storing zakat property to be distributed at the time of the clash, and etc.

The legal implementation of zakat in Indonesian society is manifested as stated in the theory of legal authority, namely that if a Muslim has accepted Islam as his religion, he will accept the authority of Islamic law to him. Thus, sociologically, people who embrace Islam will accept the authority of Islamic law and obey in the implementation of Islamic law, including the *syari'at* about zakat. But this obedience will be different from each other because it depends on the level of piety of each. This is also in accordance with the theory of *credo* or the *kalimah shahadah* which requires the implementation of Islamic law by those who have uttered the two *kalimah shahada* as a logical consequence of the pronunciation of *credo*. Similarly, the non-territorial theory of Shafi'i Imam states that a Muslim is forever bound to implement Islamic law wherever he is.

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