

Legal Position of *Fatwa*: Observations from Selected Jurisdictions

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Abstract: This paper aims to trace the Islamic concept of *al-ifta'* within the context of the legal position of *fatwa* in the jurisdictional limits of four countries: Malaysia, Saudi Arabia, Pakistan and Sudan. Essentially, the Islamic *Shari'ah* has placed great emphasis on the practices of *ijtihad* in the early days of Islam. However, today, the Islamic nations worldwide are governed by the respective laws of the land, which makes it improbable that similar rules and treatment apply to the fatwas, muftis and fatwa issuing bodies. Hence, this paper examines the legal position of fatwa in selected jurisdictions as aforementioned. It was found that in Malaysia, the National *Fatwā* Council is merely as a consultative body and whatever *fatwā* passed by the Council is not binding until it has been gazetted by the respective state. There is no Grand *Muftī* in Malaysia unlike in Saudi Arabia, Pakistan and Sudan, which in turn makes the fatwa binding on the people. Additionally, it was further learned that *fatāwā* in Malaysia are not streamlined. There are various *fatāwā* issued by the respective states which are contradictory to each other. It is hoped that this paper will shed light to future research on this subject matter, particularly the legal aspects of fatwa, mufti and fatwa issuing body in Malaysia

Keywords: *Fatwa, Al-Ifta', Fatwa issuing body, Mufti*

1. Introduction

The Islamic concept of *al-ifta'* simply means the process of issuing decrees on a certain matter or dispute, and the outcome of the process is called a fatwa (Aziz Sheikh, 1998). The process requires a certain level of *ijtihad* to be exercised by the *mufti* based on the normative concepts of the Islamic *Shari'ah*. In the eyes of the *Shari'ah*, the *fatwa* is not binding in nature (Powers, 1992; Mahmud Saedon, 1971)). This paper seeks to provide an overview of the legal position of *fatwa* in selected jurisdictions, namely Malaysia, Saudi Arabia, Pakistan and the Sudan. The paper begins by introducing the concept of *fatwa* and its functions. The next part provides an account of the legal position of *fatwa* in light of the respective jurisdictions. The paper concludes by outlining the lessons learned from the experience of these other jurisdictions, with the aim to further improve the legal position of *fatwa* and the issuing process and procedure (*al-ifta'*) in Malaysia.

2. Fatwa and Its Functions

According to Muhammad Salām Madkūr (1969), a *fatwā* is basically to interpret a *ḥukm* and it is not binding. Based on the above concept, it is clear that a *fatwā* is a part of *ḥukm* that has been issued to the people who ask about it and really want to know about that issue. However, once he has been informed about the *ḥukm*, he is bound to follow or practice the *fatwa* (Othman Ishak, 1981).

On this note, Mahmud Saedon (1971) further emphasised that a *fatwā* is to interpret the *ḥukm* on a certain issue. The *ḥukm* that has been mentioned here is basically the one which is based on *istinbāt* (the methodology to deduce law). The process to issue the *ḥukm* or *istinbāt* on must draw conclusion on it based on *Shari'ah* sources. The main sources are *al-Qur'ān* and *al-Sunnah* and the secondary sources are *al-qiyyās* (analogy), *al-istihsan* (juristic preference) and *maṣāliḥ al-mursalah* (public interest). Nevertheless, a direct answer from *al-Qur'ān* and *al-Sunnah* to a certain question or

- (2) If the *mufti* considers that following the *qaūl al-mu'tamad* of the *madhhab Syafī'ī* will lead to a situation which is repugnant to public interest, the *mufti* may follow the *qaūl al-mu'tamad* of the *madhhab Ḥanafī, Mālikī* or *Ḥanbalī*.
- (3) If the *mufti* considers that none of the *qaūl al-mu'tamad* of the four *madhhabs* may be followed without leading to a situation which is repugnant to public interest, the *mufti* may then resolve the question according to his own judgment without being bound by the *qaūl al-mu'tamad* of any of the four *madhhabs*.

In this respect, once a *fatwā* is gazetted it becomes binding upon the *Muslims*. In the Federal Territories, Section 34(3) of the Administration of Islamic Law (Federal Territories) Act 1993 provides that:-

Upon publication in the Gazette, a fatwā shall be binding on every Muslim resident in the Federal Territories as a dictate of his religion it shall be his religious duty to abide by and uphold the fatwā, unless he is permitted by Islamic Law to depart from the fatwā in matters of personal observance, belief, or opinion.

In addition, a *fatwā* is to be recognized by the *Sharī'ah* courts generally as being authoritative, as provided in Section 34(3) of the Administration of Islamic Law (Federal Territories) Act 1993:-

A fatwā shall be recognized by all Courts in the Federal Territories as authoritative of all matters laid down therein.

3.2 Saudi Arabia

Saudi Arabia is almost unique in giving the '*ulamā*' comprising of Islamic religious leaders and jurists, a direct role in government (Goldstein, 2010). The '*ulamā*' have also been a key influence in major government decisions, for example, the imposition of the oil embargo in 1973 and the invitation to foreign troops to Saudi Arabia in 1990 (Nawaf, 1999). In addition, they have had a major role in the judicial and education systems (Farsy, 2010) and a monopoly of authority in the sphere of religious and social morals (Hassner, 2009; Joseph, 1986)). In this regard, the *al-lajnah al-dā'imah lil-buḥūth al-'ilmīyah wal-iftā'* (Permanent Council for Academic Research and *Fatwā*) holds the task of considering various issues and providing *fatwās* having to do with all aspects of life. The Council which comprises of a number of senior scholars in Saudi Arabia explains rulings of *Sharī'ah* to the people and prepares research papers for discussion among the Council of Senior Scholars and issues *fatwā* in areas of '*aqīdah* (creed), '*ibādah* (worship) and social issues.

As for the *Sharī'ah* rulings in Saudi Arabia, the primary source of law is the *Islamic Sharī'ah* derived from the teachings of *al-Qur'ān* and *al-Sunnah* (Campbell, 2007). *Sharī'ah* is not codified and there is no system of judicial precedent available in the Kingdom. Saudi judges are required to follow the principles of the *Ḥanbalī* School of jurisprudence which is found in the pre-modern texts (Hefner, 2011). Nevertheless, because the judge is empowered to disregard previous judgments (either his own or of other judges) and he will apply his personal interpretation of *Sharī'ah* to any particular case, divergent judgments arise even in apparently identical cases (Otto, 2010). Royal decrees are the other main source of law but are referred to as regulations rather than laws because they are subordinate to the *Sharī'ah* (Campbell, 2007). Royal decrees supplement the *Sharī'ah* in areas such as labor, commercial and corporate law. Additionally, traditional tribal law and custom would still remain significant (Vogel, 2011).

Accordingly, the Islamic *Sharī'ah* becomes the sacred prevailing law and the foundation of the legal system. Most of the judges and *muftīs* resort to *Ḥanbalī fiqh* books in deriving their decisions in the administration of justice. In this respect, *al-Qur'an* and the *al-Sunnah* are the main sources of law and relied upon by judges and *muftīs* in rendering judgments and *fatwā* on the individual cases brought before them, as provided by Article 45 of the Basic Law of Government: "*The source of the deliverance of fatwā in the Kingdom of Saudi Arabia are God's Book and the Sunnah of His Messenger*".

As for the *fatwa* issuing process, the *fatāwā* are derived according to the *Sharī'ah* principles and there is no specific provision or guideline for the methodology of deriving *fatwā*. There is no specific

situation. Therefore, two disputing parties could belong to different groups of *madhhab*, and adjudged by two judges belonging to different groups of *madhhab*.

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