

MORALITY OF FATWA IN THE ISLAMIC LAW THINKING

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Abstract

In the recent years, certain people or institutions tend to give fatwa hastily. Those people are very easy to determine whether something is 'halal' or 'haram', although they tend to disobey the ethics of giving fatwa. They do not even have qualification or authority as mufti.

This situation attracts concern. This tendency should be ended. Fatwa is a method in The Qur'an and as-Sunnah to explain syara'; hence fatwa should not be produced by people or bodies who do not have religious authority. A mufti must obey the rules and ethics of giving fatwa.

This writing discusses how the position of fatwa in Islam and in the human's life as well as the academic rules and ethics of a mufti.

مستخلص

في سنوات الاخيرة، يفتي الشخص الخاصّ او المجمع استعجالاً. هم يتساهلون في تعيين الحكم، آ هو الحرم و الحلال. فكانوا مختلفين بأداب الفتوة. ومع انهم لا يحققون في الفتوة ولا قدرة لهم عجت هذه الحال قلوب الانسان ولا بُدّ في وقوف هذا النيل. الفتوة هي الطريقة في القرآن و السنة لتبيين الشرع، فلا تجوز الفتوة للأشخاص و المجمع الذين ما لهم القدرة الدينية في طبعها. انه يجب على المفتي عمل قانون الفتوة و أداها. هذه الكتابة باحثة عن مكان الفتوة في الإسلام و حياة الخلق و كذلك في نظام الجامعي و آداب المفتي.

Keywords: Fatwa, Ethic, Authoritarianism, Authoritative.

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Introduction

Not all people have capability to understand the Islamic law directly from the source. This is because we have different intelligence and knowledge. Moreover, every person or community has different values and interests in which influence the difference of constructing 'the religious lessons'. People understand the Islamic law from mujtahid. This emerges the phenomena of *taklid* toward the people who are viewed as having authority in Islam.

In the social history perspective of the Islamic law, it is recognized four kinds of thinking products of the Islamic law. These are: Kitab-kitab fiqh, fatwa of ulama, religious jurisprudence, and the laws exist in the muslim countries. Each thinking product has different characteristic based on the social, cultural, and political factors developed in the society.¹

Fatwa for example has case characteristic since fatwa is a response toward the question asked by the mustafti. Fatwa is not obligatory for the mustafti. It is dynamic because it is a response toward the problem faced by the mustafti. The substance of the fatwa might not be dynamic however, its responsive character is claimed to be dynamic.² One thing should be obeyed in giving fatwa is the ethics or the morality. This writing will discuss about the morality of fatwa. This is important because fatwa often emerges polemic or controversy among the people or communities. The recent controversy is the MUI fatwa about smoking prohibition and Ahmadiyah.³

The Human Need for Fatwa

The reality shows that people or society has diverse capacity and capability to understand the religion's doctrines. Some people understand that the religion is for the sake of human welfare (*rahmatan lil alamin*). However, the rest carry out the religion by 'guesses'. For this second group, what is important for them is just doing what the God's orders.

There, fatwa becomes highly important. In the history of Islam, the activity of giving fatwa had been started in the third generation of Islam (after the

¹ Khoiruddin Nasution (2009), *Pengantar Studi Islam*, Yogyakarta:ACAdemIA, p.51

² M. Atho Mudzhar (1998), *Membaca Gelombang Ijtihad*, Yogyakarta:TI, p.90

³ Majelis Ulama Indonesia (2009), *Ijmak Ulama: Keputusan Ijtimak Ulama se-Indonesia III th 2009*, Jakarta:MUI, p.56

generation of the companions and the tabi'in). This third generation of Islam was recognized as the followers of tabi'in. There were two models of fatwa developed at that time: the methodological model of fatwa and the thematic model of fatwa.

Fatwa based on its language means the answer of a problem. This comes from the word *alfata* means youth, something new, clarification and explanation. These connotations still exist in their various definitions. In the development of the word as a technical term in the Qur'an, the word fatwa is used in two forms of verbs that mean "asking for a definite answer" and "giving a definite answer". The definition of fatwa based on syara' is explaining syara' about a certain problem as the answer for a question proposed by someone or a community.⁴

A fatwa consists of some principles of Islamic view about a particular topic given by a mufti (fatwa giver). The practice of giving fatwa is called *ifta'* while those who ask for the fatwa are called *mustafti* (fatwa petitioner). The process of asking fatwa is called *istifta'*. Fatwa usually comes from various questions and then followed by various answers or responses. Fatwa is viewed as an excellent source to understand the social reality.⁵

In the early years of Islam, the concept of fatwa developed in the frame of asking-answer processes about Islam. This activity of giving fatwa had been started in the prophet era. The companions asked for the fatwa to the prophet. In the Qur'an and Hadist, there are many texts (nass) explanations found about the activity of asking for fatwa using several different terms. For example, it is found in the Qur'an and hadis the terms such as *yas alunaka*, *yastaftu naka* and the others *uslub istifham*.⁶ All of the answers given by the prophet are the truth that should be accepted because the epistemological base comes from the revelation (*wahyu*).

The position of the prophet then continued by his companions. They received fatwa directly from the prophet or from the other companions. Then, they gave

⁴ Yusuf Qardhawi (1997), *Fatwa: Antara Ketelitian dan Kecerobohan*, terj. As'ad Yasin, Jakarta:Gema Insani Press, p.5. Read also Syamsul Anwar (2007), *Studi Hukum Islam Kontemporer*, Jakarta:RM.Books, p.297-299.

⁵ Nico J.G. Kaptein (2005), "Theme Issue: Fatwas in Indonesia Guest Editor, in *Jurnal of Islamic Law and Society*, Leiden, Vol.12 No.1, p.1

⁶ The terms can be found in the surah al-Nisa (4):126 and 157; al-Baqarah (2):189,215, 217,219,220 and 222; al-Maidah (5):5; al-A'raf (7):186; al-Anfal (8):1; al-Isra (17):86; and al-Kahfi (18):84.

the fatwa to the society. In giving the fatwas to the society, they had three kinds of tendencies. Firstly, some of them tend to increase the fatwa. Secondly, some of them tend to decrease the fatwa. Thirdly, some of them stood up in between.⁷

Several problems emerged at this era of the companions. They were obliged to conduct *ijtihad* based on the Qur'an and Sunnah. If they did not find the answers in those two main sources, they should ask the other companions whether these companions had listened the answers about the problems from the prophet or not. They did not base the answers from the *ra'yu*, although it does not mean that they totally refused *ra'yu*. *Ra'yu* was accepted only if it based on *nass* through *qiyas* or *maslahah*. *Ra'yu* without *nass* could be trapped into personal desires or interests and thus improper. There were many proofs (*riwayat*) mentioned by Ibn al-Qayyim about the criticism toward *ra'yu*.⁸

The Position of Fatwa in the Islamic Law

Fatwa comes from the Arabic word *al-ifta*, *al-fatawa* that simply means 'giving decision'. Fatwa is an official advice given by the authority about a specific Islamic law or doctrine. There are three elements involved in issuing fatwa:

1. Mufti is a specialist who produces or issues fatwa.
2. Mustafti is the people who ask for fatwa.
3. Fatwa is the mufti's answer or opinion.

In general, a mufti is a trusted person in a community or society to answer the questions or problems emerge in the society's life. He determines the law of *halal* or *haram*, prohibited or not prohibited.⁹

Fatwa has the basic law. Fatwa always relates to the authority maker of fatwa and to the ethic code (*adabul ifta*) as well as to the method of producing or issuing fatwa (*al-istinbat*).¹⁰ The role of fatwa is truly to help the society understands the religion's doctrine. Fatwa helps the society to understand what they should and should not do. In the development, fatwa mediates between the society and the religion. However, the society becomes much closer to the fatwa rather than to the religion itself. The society practices the religion based on the contents of the fatwa.

⁸ *Ibid.*, p.62

⁹ Khoiruddin Nasution, *Pengantar....*, p.54

¹⁰ MB.Hooker (2003), *Islam Mazhab Indonesia; Fatwa-Fatwa dan Perubahan Sosial*, Jakarta:Teraju, p.16

Fatwa is issued one by one based on the case. However, the historical reality shows that several fatwas issued by the top ulamas had been codified, although the system differs from those of kitab-kitab fiqh (fiqh books).¹¹

The practice of fatwa codification emerged in the 12th century. The first fatwa compilation among the Hanafi mazhab were *Zakhirat al-Burhaniyyah* that consists of the fatwa compilation made by Burhan ad-Din bin Maza (570H/1174), *Al-Khaniyyah* that consists of the Qadhi Khan's fatwa compilation (592H/1196), *Al-Sirajiyah* consists of Sirajuddin al-sanjawi's fatwa compilation (6th H) and *Tatar Khaniyyah* that consists of Ibn al-'Ali al-Din (800H/1397). Among the Hanbali mazhab, the most recognized fatwa compilation was *Kitab Majmu'ah al-Fatawa* or *al-Fatawa al-Kubra* made by Ibn Taimiyyah. In the 17th century, the most famous fatwa compilation was made in India called *Fatawa 'Alamqiriyyah*.¹²

There are several points that should be spotlighted relate to this fatwa; firstly, the differences between fatwa and religion. Fatwa is the human's thinking product, while religion is the revelation of God. Secondly, since fatwa is the intellectual product of ulamas, this could not be avoided from the monopoly of ulamas. It is true that fatwa aims at helping the society to solve their problems. However, at the same time fatwa has separated the society from the religion and fatwa has become a kind of alternative religion. Thirdly, the fatwa tradition has taught the society to make decision. For example, when fatwa forbids an 'A' action then the society directly decides that they should do 'B' action. Take a look at the Ahmadiyyah case. The MUI stated that this group is misleading and thus prohibited.¹³

The MUI fatwas have always been guides both for the government and the society, although the fatwas have no legal consequences. In this context, fatwa can be grouped into the normative law. In the new order era, the MUI fatwa was even identical with the voice of the government. MUI admitted that their fatwas are the results of the fiqh selection that have *khilafiyah* character (consists of different opinions). Hence, people are ordered to respect the differences. The principles of fatwa in the Qur'an are as follows:

¹¹ Kitab-kitab fiqh covers all aspects of Islam, thus its character tends to be insensitive toward the change. The revise to some parts is considered destroy the integrity of the contents.

¹² M.Atho Mudzhar (1993), *Fatwa-fatwa Majelis Ulama Indonesia*, terj.Soedarso Soekanto, Jakarta:INIS ,p.2

¹³ M.Hasibullah Satrawi (2005), *Media Indonesia*, Wednesday, 3 August.

“And they asked you for fatwa about women. Say: “Allah gave you fatwa about them and he stated in the Qur’an about the orphan women whom you prevent them from what they should receive, while you want to marry them and about the vulnerable children.....”

“They asked you for fatwa about kalalah. Say: “Allah gave you fatwa about kalalah: if someone died and he has no children and he has a sister, then he should give her a half of his inheritance and his brother protects (the whole properties of his sister)....”¹⁴

The Ethics of Fatwa in the Islamic Law

1. Keep Away from the Authoritarianism

Many fatwas given by the authority people or bodies in the recent years could not be separated from the ideological and political conflicts. These authority people interpreted and decided fatwas based on the political interests. Take the examples of these several issues on power, gender, ideological violence, women leadership, the Islamic party, the power of Islamic country, the obligation on the Islamic law and paganism. These issues are maintained using the texts of the classical Islamic law without any accurate methodological research. Hence, the fatwas do not result in solution but in a new form of colonialization toward the human beings in the name of God.

The most demonstrative tension is showed by the relationship between the text- authority and the text - construction that has the authoritarian character. The human’s interpretation is believed and accepted as the God’s voice. Abou El Fadl said that the ulamas do not speak about God, but they speak in the name of God. Even, they become the God’s voice. When this absolute statement hands in hands with the despotic power, we find an affair between religion and power. This results in authoritarianism. They do not care about the methodological rules of making law decision. They easily issued fatwas for many problems without considering the universal values. The fatwas given are monolithic, linear and insensitive toward the community’s development. Those ulamas said that people should not think of several cases such as gender or any fatwas on women.¹⁵

¹⁴ QS.Al-Nisa (4):127 and 176

¹⁵ Abou El Fadl considered some Islamic fatwas on women are problematic, for example: women are prohibited to visit her husband’s grave; women do not allow to turn up her voice while praying; women are prohibited to drive alone; women must be accompanied by his mahram. Abou

The authoritarianism of interpretations exists in and adheres to the religion's fatwas. This authoritarianism legitimizes the arbitrary act of ulamas in interpreting the Qur'an and Hadist texts. This condition made Abou El Fadl unravel the authoritarianism in the process of the interpretation of the religion's texts. Moreover, Abou El Fadl also showed his 'theological concern' on the arbitrary acts of ulamas. These ulamas tried to make claim of the truth, they spoke and acted in the name of God.

Based on the above thought, Abou El Fadl proposed a conceptual frame to develop an idea about 'authority'. He attempted to identify the misuse of authority in the Islamic law. He did not point to the institutional authority but to the persuasive and moral authority. Abou El Fadl spotlighted the idea of the authority holder in the Islamic law that is differentiated from the authoritarianism. This means that he tried to find the idea about how someone represents the God's voice without viewing himself as God. Moreover, the people who based their views on the religious texts deny plurality, dialogue and inclusivity. Religious identities are narrowed to the codified meaning circle. There, the meaning of theocentric fiqh remains important. The fiqh has been monopolized by the fatwa givers such as CLRO, MUI, Bahsul Masail NU, Majlis Tarjih Muhammadiyah and Dewan Hisbah Persis. Hence, we should move from the theocentric fiqh to the anthropocentric fiqh.¹⁶ The anthropocentric fiqh will light up the essence of fiqh comprehensively exactly like the Mu'tazilah's concept "*al-adlu wa al-tauhid*" which means that the dimensions of justice and tauhid should be the priority.

To release fiqh from the authoritarianism and the arbitrary act of ulamas, Abou El Fadl proposed several requirements and ethics in giving fatwa. Those are: honesty, earnest, comprehensive, rational and self control. Abou El Fadl called these five points *daruriyah aqliyah* or the rational obligation. Firstly, honesty is the most important point of doing ijtiha because the process of ijtiha involves believe in God values that come from the Qur'an and hadist.¹⁷ Being honest means that we admit our understanding on the texts does not go over the God's authority. Secondly, earnestness is required for the observation process. The mujtahid should think and

El fadl considered those fatwas look down on women and thus should not be tolerated at the recent era. The fatwas claimed that this is what the God's want. See Amin Abdullah (2004), "Pendekatan Hermeneutik Dalam Studi Fatwa-Fatwa Keagamaan: Proses Negosiasi Komunitas Pencari Makna Teks, Pengarang dan Pembaca", (Pengantar atas karya Khaled, Atas Nama Tuhan, Dari Fikih Otoriter ke Fikih Otoritatif Jakarta:Serambi, p.ix

¹⁶ CLRO (Council for Scientific research and Legal Opinion) is an official institution in Saudi Arabia that is given authority to issue fatwa. See Amin Abdullah, "Pendekatan Hermeneuti..., p.xiii

¹⁷ Khaled M. Abou El Fadl, *Atas Nama.....*,p.99-100

observe (*badzl al-nazar wa jahd al-qarihah*) seriously in order to present a complete composition from the relevant texts about the problem.¹⁸ Thirdly, comprehensive is a requirement that should be fulfilled by someone/an institution/a mufassir/a fuqaha who has already conducted a deep observation. He must also consider all relevant orders/instructions and he can not relinquish his responsibility to observe and find certain proofs. Fourth, rational means someone who interprets and analyzes the religion's doctrines should consider the logic and rationality dimensions. Rationality should be examined based on the logic principle of religion's doctrine validity.¹⁹ Fifth, self control helps someone to keep away from the intellectual authoritarianism in understanding the God's law. The reader should realize that only the text can represent the God's will, not himself. Hence, the morality in this context is the discourse morality, not the truth morality.

2. Consider the Mustafti's Tradition

When giving fatwa, a mufti should consider the audien's tradition. The previous ulamas reminded a mufti to not stick to the kitab's texts. If the mustafti comes from a different tradition with the mufti, the mufti should ask and decide based on the mustafti's tradition, not the mufti's tradition. History shows how the social cultural tradition influences the formation of fiqh. *Qaul Jadid* of Imam Syafi'i was compiled after he arrived in Egypt and then he contrasted it in Iraq. This example reflected the influence of the tradition of both countries.²⁰ Imam Malik believed that the rules of tradition of a country should be considered while formulating laws, although he viewed traditions or *Amal ahl al-Madinah* as the most authoritative variable in his law theory. This is another proof of the strength influence of tradition. According to Malik, *Amal Ahli Madinah* was even stronger than hadist Ahad as he said, "*Al-amal asbatu min al-hadis*". Malik's commitment to respect the local tradition of Madinah was kept maintain, although many ulamas opposed him. Malik often had face to face with the authority regime. Once in a time, Khalifah Abbasiyah Abu Ja'far al-mashur had asked Imam Malik to let his book 'Kitab Muwatta' that collected

¹⁸ Khaled M. Abou El Fadl (2003), *Melawan Tentara Tuhan: Yang Berwenang dan Yang Sewenang dalam Wacana Islam*, terj. Kurniawan Abdullah, Jakarta: Serambi, p.99

¹⁹ Khaled M. El fadl, *Atas Nama.....*,p.102

²⁰ Ratno Lukito (1998) *Pergumulan Antara Hukum Islam dan Adat di Indonesia*, Jakarta:INIS ,p.19. A more complete research on *Qaul Qadim* and *Qaul Jadid* of Imam Syafi', read: Ahmad Nahrawi Abd al-Salam (1998), *Al-Imam al-Syafi'i fi mazhabih al-Qadim wa al-jadid*, Mesir:t.tp.

the prophet's hadists to become a source of positive law for the whole Islam countries. Imam Malik refused it. He said: "You know that in these various countries have developed law traditions based on their own context. Let the society choose their guidance. I don't think there is a reason to standardize all the laws. None has right to make a truth claim in the name of God."²¹ Ibnu Al Qayyim criticized people who only see the fiqh texts without consider the locality aspect of the communities who ask for fatwa.²²

*"And don't stick to the texts available on the kitabs. If somebody from another region or country comes to you and ask you for fatwa, firstly ask him about his tradition and then you can give him a fatwa based on his tradition not yours. According to ulamas, this is the right and clear way. And if you deny it, then you will get lost and you are not capable of understanding the ulamas' view and the view of the early generation of muslim (al-salaf)."*²³

The above view of Ibn al-Qayyim shows that to make fatwa, the ulamas should consider the social, cultural and even the geo-politic condition of a country or a region; hence the objective of the law could be achieved and run well.

In this context, the approach toward the religion's texts as well as the texts produced by the muslim intellectuals is highly possible to be reinterpreted. Giving an understanding which stresses on the objective of the law itself or *maqasid asy-syari'ah* is one of the new interpretations. It is the time to develop an understanding which stresses on the substance, not the formalistic legal of the text or nass. Muqsih said: "Catch the *maqasid asy-syariah* using many ways. Do not amaze with the beauty of the texts. The fascination on the beauty of the texts is an ideological act that will prevent your creativity from looking for the objective meaning as well as the importance of understanding the background of the descended verses."²⁴ The achievement on the substantive meaning would bring into the basic analysis, not only to the sentence analysis. These basic analyses are the class analysis and the social cultural analysis which follow the history of the text's birth.

²¹ Husein Muhammad (2006), *Spiritualitas Kemanusiaan Perspektif Islam Pesantren*, Yogyakarta: Pustaka Rihlah, p159

²² Ibn Qayyim al-Jauziah, *I'lam al-Muwaqqi'in...*,III:78.

²³ *Ibid.*,I:652.

²⁴ Muqsih (2005), Merancang (kaidah) Usul Fikih Alternatif in Komaruddin Hidayat and Ahmad Gaus AF (ed), *Islam, Negara dan Civil Society*, Jakarta: Paramadina, p.361

3. Fatwa Must Be Moderate

In our country, several controversial fatwas have emerged, for examples: fatwa on cross religion marriage, fatwa on several forbidden sects such as Ahmadiyyah,²⁵ fatwa on capital punishment²⁶ and others. Some religion's elite groups want to keep the unity of muslims through the fatwas. However, some parts of muslim groups feel those fatwas unfair and discriminative. The other MUI's most controversial fatwas are: being absent in general election is prohibited and smoking for children, pregnant women as well as smoking in the public area is also prohibited.

Fatwa in the Islam history has played an important role to answer the religion's problems especially problems on fiqh. Fatwa is an opinion about a problem, hence it could be correct or incorrect because fatwa is a part of ijtihad. Nowadays, it is difficult to accept 'absolutism fatwa'. Issuing fatwa does not only require an adequate knowledge on the Qur'an and hadist, but also on history, context and the era. Hence, fatwa has moderate character.

4. Follow the heart, not the personal desire or interest

When a mufti gives a fatwa, he should base on the knowledge and his heart, not his interest. Rasulullah reminded the muftis to ask their heart (*istafti qalbaka*) before giving fatwa in order to avoid doubts and interests. A mufti should not follow his personal interests and or someone else's interests for example the authority's interests. Al Qur'an in its many verses criticizes the ulamas that follow their interests.²⁷

²⁵ This fatwa on Ahmadiyyah was not the first time issued by MUI. In 1984, MUI issued the same fatwa on Ahmadiyyah. The writer views the case of Ahmadiyyah is the problem of the truth claim struggle between textualist, conservative, and innovative and any other Islam varians that happened along the history. In this context, the religion discourse critic and a comprehensive understanding on religion become highly important. See: M. Atho Mudzhar, *Fatwa-fatwa....*,p.134. For the latest fatwas of MUI about Ahmadiyyah see, Nanang RI Iskandar (2005), *Fatwa MUI dan Gerakan Ahmadiyyah Indonesia*, Jakarta: Darul Kutbil Islamiyah GAI.

²⁶ Fatwa on capital punishment had been issued by Forum Ulama Umat Indonesia (FUUI) for Ulil Abshar Abdalla (2002), related to his article "*Menyegarkan Kembali Pemahaman Islam*" (Kompas, 18/11/2002). This controversy on Ulil's article can be read on Ulil Abshar Abdalla, dkk (2005), *Islam Liberal dan Fundamental Sebuah Pertarungan Wacana*, Yogyakarta:Elsaq Press.

²⁷ Yusuf Qardhawi, *Fatwa Antara....*,p.43-44.

“Then have you seen someone made his desires his god and Allah let him do that and Allah has closed his ears, his heart and his eyes? Then, who will give him guidance after Allah let him lost. Why don’t you take the lesson?”²⁸

5. Make Easy, Do Not Make Difficult

A mufti should make the answers easy for the mustafti because of the following reasons:

- a. Syari’at is made to help people banish their difficulties in life. The Qur’an and Sunnah stated this clearly. A mufti should not think: “If the answers can be more difficult, why should we make them easy.”
- b. The characteristic of era has been changing all the time.²⁹ Ibn al-Qayyim explained: “The changing of fatwa could not be avoided because the time, place, situation and tradition have already changed.”³⁰

Those are the ethics of fatwa that the mufti should have and implement while giving fatwa. By acknowledge these requirements; the muftis will produce more proportional and uncontroversial fatwas. Moreover, they would not produce a new authoritarianism in the Islamic law discourse.

CONCLUSION

The dynamic of the society’s life often result in new problems. Those problems could have two possibility answers. Firstly, if we find the basic syar’i of the problem, we will find the answer clearly in the Qur’an and hadist. Secondly, if we don’t find the basic syar’i explicitly stated in the Qur’an and Sunnah, we need fatwa from the ulamas who have the authority.

In the recent reality of muslims, some muslims tend to simply give the law status of a problem, although they do not have an authority intellectually, morally not even adequate capacity. This writing may warn the muslims that only the muftis who have knowledge authority, integrity and morality who have right to give fatwas for the society.

²⁸ QS.45:23

²⁹ Yusuf Qardhawi, *Fatwa Antara....*,p.95-96

³⁰ Ibn Qoyyim al-Jauziah, *I’lam al-Muwaqqi’in....*III:11

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