



Islamic concept of Fatwa, Practice of Fatwa in Malaysia and Pakistan: The Relevance of Malaysian Fatwa model for legal system of Pakistan

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Abstract

Fatwa is a Muslim religious practice which helps to mould the thoughts and actions for a particular community or person on any special issue, which effects social, economical and personal interest. The institution of fatwa plays a vital role in the contemporary society where different people and different legal regimes exist. It can be utilized as an instrument of social, political and religious control. In Malaysia, a fatwa has been institutionalized and has been used in all spheres of administration and activities related to human endeavour. On the other hand Pakistan is also an Islamic country and its constitution is Islamic. Fatwa in Pakistan is not institutionalized. There are a lot of problems raised in Pakistan and reason is that there is no any Islamic legal institution to administer that issue. There is a need to take Malaysia Fatwa as a model to give legal status and give judiciary the power to implement that Islamic verdict.

Keywords: Fatwa, Mufti, Malaysia, Pakistan, Legal Opinion.

Introduction

The term Fatwa literally means, “the answer in respect of an event”¹. That is the notification of the decision of the law in respect of a particular rule. It is defined technically as, “the elucidation of the legal rules in respect of an issue as a reply to a question of a questioner- irrespective of whether such a question is specific or general and whether the question is raised by individuals or a group. In other words, it is an opinion on a point of law expressed by a *mukallaf* (one who is legally obligated) who is intellectually sound and has attained the age of discretion and is able to deduce religious ruling from the *Qur’an*, *hadith*, *ijma*⁴ and *qiyas* together with the instrumental sciences.

Islamic Republic of Pakistan has been divided into different sects and *masalik*. Each of them has its own *madaris* that are producing muftis in a greater number who have authority of issuing *fatwa* in the light of the traditional rulings². Constitutionally, the legislative authority is Parliament whose majority of the members is illiterate and unaware regarding both aspects of the knowledge *inter alia* modern sciences and *Qur’anic* sciences. To recognize *Shari’ah* validity of any law made by the Parliament, Council of Islamic Ideology has been established whose recommendations have no binding force³. The third source of legislation is judiciary which has authority to legislate through the process of interpretation. The function of the interpretation has been assigned to the High Courts, Federal *Shari’at* Court and the Supreme Court of Pakistan. So far as concerned, the task of issuing fatwa in Pakistan, it has been exercising by a great number of muftis. For a correct understanding of the activity of issuing fatwa it is better to have a bird eye view of the historical development of this process.

While on other hand in Malaysia fatwa has been considered as a religious verdict that assists in regulating Muslim conduct of activities in the country. The Federal constitution of Malaysia vested the responsibility for enacting laws in the hand of parliament at the Federal level and the state Assemblies at the state level⁴. Fatwa has been used as a tool for clarification of issues in Malaysian Judicial, political and economic sectors. Once it is published in the Gazette, it becomes a strap and enforceable phenomenon in Malaysia. This research covers Malaysia model of fatwa for implementation in Pakistan.

Fatwa in Islamic Law

The concept of Fatwa is not a new phenomenon in Islamic law. It has enacted from the Quran: whereas Allah has commanded the Muslim faithful who are not knowledgeable in Islam to always seek knowledge from those who posses it⁵. This legal basis has been reiterated by many scholars while tracing the genesis of *fatwa* in Islam. In fact, most of the Muslims scholars have been capitalizing on the above verse to explain much about the concept of *fatwa*⁶. The term *fatwa* (Islamic legal Verdicts) is an Arabic term which is related to some compound words and phrases revealed in the *Qur’an* such as *ifta* (issuing Islamic verdict), *istefi* (request for an Islamic verdict), *mufti* (a person who issues an Islamic verdicts) and *yufi* (he issues an Islamic verdict). In the *Qur’an*, the almighty Allah has used the terms at several occasions, especially in making reference to the concept of asking questions with a view to providing the responses.

Fatwa according to the English/ Arabic Dictionary is a legal opinion issued by Islamic scholars. In the Oxford Dictionary (2013), it has been mentioned that the word fatwa originated

from the term “*ifta*” (to decide a point of law), and it can simply be defined as a ruling on a point of Islamic Law which is to be issued by a recognized authority. Thus the term *fatwa* could be defined as a formal Islamic legal opinion issued by a jurist-consult (*mufti*) in response to questions submitted to him by private individuals or judges⁷.

The phenomenon of fatwa has been around since the very inception of Islam with the revelation of Qur’an. This fact is affirmed by the presence of the terms in the Qur’an that indicate that the Prophet (peace be on him) was asked questions e.g. *yastaftenuka* (they ask seek your opinion/ instruction/ Advice) and *yas alunak* (they ask you). To which Qur’an would respond with legal or theoretical assertion depending on the nature of inquiry⁸. Muhammad Riyadh, 20th century scholar from Morocco, asserts that the phenomena of *ifta* (i-e process of fatwa production) was facilitated by the manner in which Qur’an was revealed in one event but was disclosed in instalments over many years, this facilitated dialectic interaction between the *Qur’anic* discourse and people religious and social needs. The dynamics of inquiries that arose from people concerns and the subsequent response of the *Qur’anic* discourse to those inquiries demonstrate the dialectical aspects of this discourse, this in turn created the atmosphere for religion consultation that later become the discursive impetus for the activity of *ifta* in Islam.

There are approximately nine verses in the Qur’an that begins with either of the two *ifta* phrases that are of legal nature. The question posed and responses given are on variant social, economic and political topics. A sample of those issues include the nature of determining time for ritual practice, the legality of fighting during the sacred months, the legality of alcohol and gambling and how to give charity, how to dispense the wealth of orphans, sexual conduct during menses, types of lawful food spoils of war treatment of women and orphans and division of inheritance⁹. This proves that fatwa as a legal practice derives its bases from the Qur’an. In other words, fatwa gained its acceptability as a valid form of legal practice and law production because it was something that was enunciated and practice by the authoritative discourse of Islam (i-e Qur’an). Once validated, *ifta* become the foundational practice for the establishment of whole legal tradition.

Qur’an is the primary discursive source for *fatwa*, the prophetic practice was instrumental in establishing *ifta* as a legal practice in Islam. This is understood that the *Qur’an* is viewed as a divine text and hence needs no rational justification to support its position, although the Prophet (peace be on him) authority is also from a theoretical point of view unquestioned in Islam, nonetheless, his authority is derived from the *Qur’anic* discourse and therefore it seems as a derivative and not to be seen as absolute in the same manner as Qur’an. There are few illustrations when Prophet (peace be on him) used reasoning to support his fatwa. First in fatwa to His wife Maymunah on the legality of benefiting from the skin of a dead sheep.

Maymunah mistakenly, expended the range of objects that are legally prohibited by a verse of Qur’an, which prohibits the eating of the meat of dead sheep that had not been properly slaughtered, to include prohibition of the utilization of its skin. In this incident we see that prophet used a sort of hermeneutical reasoning to justify his legal position by showing, how the text of Qur’an should be understood. Another example of where the use of reasoning in a fatwa is even more pronounced when the Prophet (peace be on him) used analogy, to justify some of his *fatawas*. Umar (RA) asked about the permissibility of kissing while fasting, the Prophet (peace be on him) responded by making an analogy to the performance of the ritual washing of one’s mouth as being something allowed during fasting and hence on the same ground argues for the acceptance of the act of kissing while fasting. The point of this analogy is that if swishing water to clean one mouth without willingly injecting it does not break ones fast, neither should kissing one’s spouse during fasting is an act of love so long as it does not produce sexual excitement which is against the spirit of fasting.

Contemporary Situation of Issuing Fatwa in the Muslim World: The current situation of all over the Muslim world is that the process of *ifta*’ has become a central institution of the Muslim societies to resolve the contemporary issues of the *Ummah*. Many of the Muslim governments appoint religious scholars on the reserve seats in their legislative bodies. The situations of modern *mufti*, the public and private, vary from state to state. Some formal institutions of fatwa have been established in many countries, e.g. World Muslim League in Mecca, *Fatwa* Committee of OIC and the Council of Islamic Ideology in Pakistan¹⁰. Many specialized committees of muftis are also working which answer the quires of the people and provide solution to their contemporary problems, Likewise, *Dar al-’Ulum* in India is performing the function of issuing *fatwa*.

The Concept of Fatwa in Malaysia: The history of fatwa in Malaysia could not be divorced from discussion on the history of Islamic law in the country. Islamic matters in Malaysia are matters upon which state governments are vested with powers to control, through their respective religious leaders (sultans) and Islamic institutions¹¹. However, at the same time the Federal government at the centre also established some religious coordinating bodies to oversee and control all the Islamic activities which are going on in the country. Thus, Malaysia Department of Islamic Development “Jabatan Kemajuan Islam Malaysia” (JAKIM) is the main Federal Government agency in Malaysia that is saddled with the responsibility of managing Islamic affairs in the country. Among its objectives inter alia include: the establishment of an institution that can be responsible for management and coordination of fatwa in the country; and also the coordination of *fatwa* that can be issued in different states for the purpose of developing the process of collective *ijtihad* (*Ijtihad jami’i*) in the country. Broadly, JAKIM serves different roles in Malaysia, among it functions include: to legislate and standardize the Islamic law in Malaysia; to coordinate the Islamic administration in the

country; and to adjust and develop the Islamic education in the country. However, the Department can also perform some specific functions such as serving as the secretariat to the National Council of Islamic Affairs i.e *Majlis Kebangsaan Hal Ehwal Islam* (MKI) in the country for the purpose of streamlining and implementing the directives and resolutions of the Council of Rulers (*Majlis Raja-Raja*); serving as an advisory institution to the Federal Government on Islamic matters in general and as well as fatwa matters in particular; streamlining the standardization of Islamic law throughout the country; serving as an Islamic reference centre in the country whereby all Islamic affairs are being referred to; enhancing coordination between the various State's fatwa institutions and that of the federal government, thereby developing an effective procedure for harmonizing and standardizing them. Finally, it ensures all the approved *fatawa* are effectively transmitted and well-disseminated to the larger public¹².

The manner in which the Islamic activities (such as the issuance of *fatwa*), are being carried out in various states of Malaysia differs from one state to another. However, one common thing among them all is that, they have almost uniform enactments containing the provisions that regulate the manners and conducts of Islamic affairs in their respective domain. Such enactment is called: "The Administration of Islamic Law enactments". The enactments provides for the creation of an Islamic Religious Council (*Majlis Agama Islam*), which is the mother organization that is responsible for advising the Sultan in all matters relating to Islam. Except matters related to *Hukum Syarak* (Islamic law and administration of justice), of which the enactment has specifically made it as a responsibility for the mufti to advise the Sultan. Furthermore, the Council is also responsible for the promotion of other non religious matters which are inclined to the development of the economic and socio-political well- being of the Muslim *Ummah* (community) in a state.

All members of the Council are chosen by the Sultan on the suggestion of the *Menteri Besar* i.e. the Chief Minister (this is in the case of the Selangor state), except the ex-officio members such as the mufti and deputy mufti who can be appointed solely by the Sultan without seeking an advice from anybody. However, the appointment of the mufti and deputy mufti in some other states such as Johor is based on the advice of the incumbent chairman of the Council. But in the Federal Territories, the *Yang di-Pertuan Agong* shall after consulting the Council (*Majlis*), seek the advice of the Minister.

The powers of issuing fatwa in Malaysia rest in the hands of the various states fatwa committees which usually comprises of: the *mufti*; the deputy *mufti*; the state legal adviser, representative of the *Majlis Agama Islam* (to be appointed by the *Majlis*); other specified members of the *Majlis* (as prescribed by the law); and a secretary who is usually appointed by the *Majlis* from the state" mufti department. The Committee is responsible for the issuance of fatwa in line with the tenets of the "Shafi'i School

of Islamic thought", except in a situation where resorting to the Shafi'i School would defeat the objectives of fatwa in Islam. In such circumstances, resort could be made to other *Sunni* schools of the Islamic thoughts like the Maliki, Hanbali and Hanafi School. When fatwa is prepared and issued by the above committee after a meeting, the mufti will, on behalf of the fatwa committee, submit the fatwa to the *Majlis Agama Islam* for its consideration and subsequent proceed over to the Sultan for his assent. If it is assented to by the Sultan, then it can be published in the Gazette and thereafter be announced to the public.

However, the issue of the *Sultan's* assent as condition precedent for the publication in the Gazette seems to be lacking in the case of the Federal Territories where it appears that the fatwa can be published in the Gazette even if it has not been assented by the *Yang di-Pertuan Agon*.

When a *fatwa* is published in the Gazette, it becomes binding and enforceable verdict on all persons and authorities in the state. It shall have the force of law except in matters of personal observance where a person has been permitted by *Hukum syarak* (Islamic law and administration of justice) to depart from it.

In exceptional circumstances, if the proposed fatwa is likely to affect the national interest, in some state like Selangor, it has been provided that the matter can be set aside and differed/adjourned for submission to *Majlis Agama Islam* (with the approval of the Sultan), in order to decide whether or not to take up the matter to the Council of Rulers (*Majlis Raja-Raja*) through the National *Fatwa* Committee for further deliberation and consideration. If subject to agreement of the Council of Rulers, the National *Fatwa* Committee recommends for the suitability of the proposed fatwa, then it will be returned to the states" *Majlis Agama Islam* for its final decision on whether or not to ask the Sultan again for his assent to publish in the Gazette.

Practice of Fatwa in Pakistan

In Pakistan, the task of issuing fatwa has been exercising by a number of religious sects and each of them claims of following its particular *maslak* in the light of its true teachings. There are unlimited *madaris* and their graduates who have authority to issue *fatwa* who in fact, are not expertise of Arabic language and their particular *madhhab* and do not know the methods and the techniques upon which their predecessors had to base during the process of *ifta*. Majority of them do not know about the flexible and liberal approaches of their *Aimmah*. For instance, majority of the Pakistani scholars is the follower of Abu Hanifa but only few of them have knowledge about the contextual, flexible and logical approaches of Abu Hanifa and majority of them are deciding the contemporary issues in the light of the literal interpretation of the past juristic opinions of their Imam who elaborated and constructed the legal texts of the *Qur'an* and

the *Sunnah* in the light of their contextual meanings, objectives, public interest, customs and his own logical reasoning.

Not only is this but there are numbers of people who do not know the parameters and the subject-matter of fatwa and are issuing *fatwa* regarding non-issues and trying to sabotage the true spirit of *Shari'ah*. This unlimited and unrestricted authority of issuing fatwa in Pakistan has created so many problems for Pakistani people and especially for women. For instance, a fatwa was issued on April 2012 in Kohistan against the women of NGO's that they would be forcefully married to the local men if they dared to enter there. Likewise, on May 11, 2012, in a mosque of Noshki, Baluchistan, a fatwa was issued that any women using a cell phone will have acid thrown on her face. This and similar fatwa not only cause to slander Islamic law but also grounds to destruct the flexible structure of Islamic law and its liberal system of interpretation. However, the fatwa issued by a *mufti* has no legal validity and remains optional to follow until adopted by the court through legal decision¹³. There is Islamic Ideology council made for the recommendation of fatwa. The Council of Islamic Ideology is a constitutional body that advises the legislature whether or not a certain law is against Islam, namely to the *Qur'an* and *Sunnah*. Fatwa in Pakistan is a non-binding interpretation or ruling by a *mufti*. It is an opinion. A fatwa in Pakistan does not have an executive branch to carry out the ruling.

Pakistani society is facing many unprecedented problems which demand flexible interpretation in the light of their objectives and public interest. For instance, lack of scientific study of Islamic legal sciences and theories of interpretation, issue of *ru'yat al-Hilal* on 'Eid (moon sighting) occasion, issue of banking interest, issue of unlimited population, illiteracy, issue of the status of women and issue of *hudud* implementation etc. However, majority of Pakistani scholars are reluctant to perform *ijtihad* for the solution of these and similar problems. They address only family issues in quite traditional manners and show less concern to the socio-economic and political issues. It can be judged by the detailed discussion which was arranged by a newspaper "Daily Jang" in November, 2004, on the topic of *ijtihad*, its need and capacity of a *mujtahid* etc. Unfortunately, majority of the participants were not in favour of the renaissance of the process of *ijtihad* as practiced by the companions and the traditional Muslim jurists. Some of them however, declared that the issues like *Ru'yat al-Hilal*, family planning, banking interest, political structure of the government, and issue of extrajudicial divorce might be solved through *ijtihad* and suggested for institutional *ijtihad*¹⁴. Some of these problems are given here which need to be solved by way of reinterpretation of the past judgments in the light of the general policy of *Shari'ah* and keeping in view the contemporary social, economic, and political conditions of Pakistani society.

The Most Striking Issue is of Illiteracy: At present, illiteracy in Pakistan is one of the most burning issues which require a

serious attention of the religious scholars because these guys hold a strong position to decide the socio-economic issues of the people at gross root level. In fact, Pakistani people are facing extreme thinking regarding getting education of worldly/secular and scientific issues. There are religious minded people who condemn worldly and as well as scientific education and favour only literal understanding of the *Qur'an*, *Sunnah* and traditional *fatawa* of their *Aimmah* and thus, try to confine the young generation to the study at *madaris* (Islamic School). This impression however, has made the common men confused and put them into anxiety as every Muslim just wants to please Allah and His last messenger (peace be on him). The credit goes to the wrong interpretation of the *hadith* that "Getting knowledge is obligatory for every Muslim". In this text the word knowledge is a general word and includes all types of knowledge, religious and secular but it is being interpreted as specific text and the term knowledge is used only in the meaning of religious knowledge and is confined to the knowledge of the literal translation of the *Qur'an* and some *fiqh* books of the later traditional scholars.

By ignoring the act of the Prophet (peace be on him) when he stipulated regarding the prisoner of *Badr* that any prisoner who could read and write would be set free for no ransom if he taught ten Muslim children to read and write getting knowledge in fact is one of the objectives of *Shari'ah*. For instance, the object behind the prohibition of drinking wine is the preservation of intellect if we see in perspective of the criminal law but if the same object is studied in perspective of intellectual capacity, it reveals that getting education is necessary to enhance and to develop one's mental capacity and enables him to live, to earn in more respectful way on the one hand and to preserve it from negative thinking and evils on the other. Hence, it is necessary that both religious and worldly knowledge should be taught in the same institutions at the same time. The motive of education should be to produce people who are imbued with Islamic learning and character. The education should make the people competent of meeting all the economic, social, political, technological, physical, intellectual needs of society. It is evident that the educated people are more concerned regarding the progress of their country and the welfare of the people than uneducated persons who in themselves become problem for the development of country. Likewise, special intention should be given to the education of girls. For, Islam did not differentiate between male and female regarding education. Awareness program regarding education should be started from grass root level at mosques.

Lack of scientific study of the *Qur'anic* sciences: Another hot issue is lack of scientific study of the *Qur'anic* sciences, *Sunnah*, philosophy of Islamic jurisprudence and Islamic legal theories. Majority of the *muftis* have no clear concept regarding legal sciences and knowledge of Islamic legal theories in modern legal context. It is this reason that they are not agreed to find out any flexible solution for an issue as held by the companions and the traditional jurists. For instance,

Umar (RA) held many contemporary issues in the light of the objectives of the provisions of the *Qur'an* and *Sunnah* rather than their literal meanings such as the case of three divorces at a time, suspension of cutting hand during famine, retaining of the conquered land of Iraq in the state treasury for the interest of the future generations, issue of paying *zakat* to new Muslims and many more¹⁴. Likewise, Abu Hanifah ever preferred the principle of public interest over literal meaning of the text and solved many contemporary issues broadly in the light of the changed context and changed needs of the people. Unfortunately majority of our muftis neither agree to reinterpret the *Qur'anic* texts and *Sunnah* nor think about modification of earlier *fatawa* in the light of their objectives and public interest to compete the challenges of the modern world.

Defining the scope of capitalist banking interest: The other issue is the problem of defining the scope of capitalist banking interest and its analogy on *riba*. Whether the contemporary capitalist banking interest is equal in status to *riba* or not? The question arose two centuries ago but the Muslims did not realize its seriousness until the present time. During the time of the Prophet (peace be on him) *riba* had to occur due to loan transaction and resulted in the exploitation of the poor segment of society who borrowed money from the rich segment to fulfil their basic necessities (*daruriyyat*) and could not pay it back as they consumed loan for their survival. In fact *riba* is the only financial transaction which has been declared prohibited by Allah Almighty through revelation with the threat of severe punishment. Without scientific understanding of the provisions regarding *riba* in its original context and without any sound analogical deduction, the *hukm* of *riba* practiced by Arab has been imposed upon the interest of the capitalist banking interest by majority of the contemporary Muslim by ignoring the fact that the issue of *riba* was taken by the companions as an ambiguous issue how can its *hukm* be applied to the modern banking interest?

'Umar (RA) is reported to have wished might the Prophet (peace be on him) had defined *riba* in explicit terms. Like present at that time there were different types of interest and *riba* and only those types of interest were made prohibited by Allah almighty and His last messenger (peace be on him) which were exploitative by nature. While discussing the issue, *Ibn Qayyim* held that *Shari'ah* demands only a just distribution of wealth or resources and that the private interest must yield to the public interest. Any rule which goes from justice to injustice, grace to trouble, and *maslahah* to mischief and from prudence to futility can never be a part of *Shari'ah* even though it is included therein by argumentation. Where a just and well ordered society is established, wherein economic justice finds a proper place and expression then notwithstanding the nature of the working process, it will be treated as part of *Shari'ah* and faith, and it shall be pleasure of *Shari'ah* and authority.

Conclusion

The concept of fatwa in Malaysia is beyond a mere legal opinion of a mufti. Hence it is binding piece of legislation that attracts a force of law. The *fatwa* making process in Malaysia is institutionalized in such a way that any verdict issued and published in the Gazette and binding on all Muslims and *Shari'ah* courts. It has been considered as another form of making legislation in the country but in a delegated manner. Unlike Pakistan which is also Islamic country. There is a council made in the name of Islamic Ideology, its function is to advice the legislature whether a law is repugnant to Islam. But their power is limited and there is no any implementation authority. It is quite necessary that Pakistan should take Malaysia as a model country for the institutionalization of Fatwa. To make the activity of fatwa as a purposeful enterprise, the Council of Islamic Ideology should bring certain changes in its structure and interpretive policy. It should be free of all types of political and religious interventions. The members of the Council should be from the intellectuals, scientists, engineers, academician and scholars. The mode of issuing fatwa should be *ijtihad al-maqasidi* (purposive interpretation) and contextual interpretation to provide ease to people and to remove hardship from them rather than literal interpretation.

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