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GENERAL PRECEPTION OF FATWA AND ITS ROLE IN ISLAMIC FINANCE

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Contents

Abstract

Introduction

1. Meaning of *fatwa*
- 2.1 History of *fatwa* in Islam.
- 2.2 *Fatwa* of Sahaba (companion of the Prophet, ﷺ)
- 2.3 Contemporary Trends
- 2.4 Scope of *Fatwa*
- 2.5. Characteristics of *fatwa* in Islamic
- 2.6 Legal implications of a *fatwa***
3. Islamic Schools of law their Methodology of *fatwa* and its development
- 3.1. Maliki School of law
- 3.1.1. The Maliki School its Methodology and Development of *fatwa*
- 3.2. Shafai School of law
- 3.3. Hanafi School of law
- 3.4. Hanbali School of law
- 3.5. Imam *Al Shawqani* (as independent scholar)
- 3.5.1. Methodology of his *fatwa*
- 3.5.2. Technical approach in his *fatwa*
4. *Fatwa* in Islamic finance
- 4.1 Importance of *fatwa* and its roles in Islamic banking and finance

- 4.2. Methodology of *fatwa* in Islamic finance:
- 4.3. Some rules governing the *fatwa* and the mufti in Islamic finance
- 5. *Fatwa* issued by *Shariah* board or advisory *Shariah* council.
 - 5.1. The area covered by *Shariah* advisory
 - 5.2. Duties and responsibility of *Shariah* committee

Key Terms

References

Abstract

In the technical language of Shari`ah, the word *fatwa* clarifies the Islamic ruling in an answer given to question or a set of questions usually related to an Islamic issue. It does not make any difference whether the questioner is a person or a group of persons. It stands to reason that fatwa is not an easy task, but rather an arduous one. This is because the one who commits himself to issuing fatwas acts on behalf of Allah's Messengers and Prophets. The Prophet (peace and blessings be upon him) is reported to have said: **"Scholars are the heirs of Prophets, and Prophets neither left behind dinars nor dirhams (Arab coins); rather they left knowledge. He who acquires knowledge has really gained something of great value."** This paper will not only explore the meaning and perception of fatwa as a whole but would also link and reflect on its influence, bearings and links to Islamic finance.

Introduction

Fatwa has a very important role in Islamic law and jurisprudence and Islamic finance. Now a Days *Fatwa* has been given a very important position in Islamic Finance Industry, Shariah advisors are practicing as an independent body with the responsibility of issuing Shariah Rulings or *fatwa* to the various issues in the Islamic banking and finance industry.

The first legal rulings were issued by the Prophet ﷺ in his role as intermediary between God and the Muslims. *Fatwa* is one of the noble tasks of Prophethood that has been known throughout the history of mankind. Due to the critical position of *fatwa* competent scholars fear from it and prefer not to get involved in its process due to the implications on human life.

The Practical implications of *fatwa* in Islamic finance are evident in the daily business operations of Islamic banks and Islamic financial institutions. There are several fatawa in Islamic finance issued by competent scholars in various areas of Islamic banking and finance; these are issued through Shariah board, individually or through collective ijtiḥad and *fatwa*; by fiqh academy or Shariah council. Islamic finance today had shown fast growth and development in the critical role of *fatwa* in the Islamic financial system.

1. Meaning of *fatwa*

A fatwa (Arabic: فتوى; plural fatawa Arabic: فتاوى), in the [Islamic](#) faith is a religious opinion on Islamic law issued by an Islamic scholar. In Sunni Islam any *fatwa* is non-binding, whereas in Shia Islam it could be, depending on the status of the scholar.

Fatwa is derived from the root fata, which includes in its semantic field the meanings “youth, newness, clarification, explanation.” In the Qur'an, the term is used in two verbal forms meaning “asking for a definitive answer,” and “giving a definitive answer” (4.127, 176), although neither passage has a binding clause. Consequently, the concept of *fatwa* in early Islam developed in the framework of a question-and-answer process to better communicate on religious matters. Its subject was ‘ilm (knowledge) without further specification. Later, when ‘ilm was identified with ḥadīth (sayings of the Prophet ﷺ, which are divided into two parts, the matn (text) and the isnad (chain of reporters to verify authenticity)), *Fatwa* came to be associated with ra'y (opinion) and fiqh (jurisprudence). After a corpus of legal definitions emerged, the term followed madrasah (religious school) interpretations, especially when fiqh did not provide clear technical assessments.

In the early days of Islam, *fatwa* were pronounced by distinguished scholars to provide guidance to

other scholars, judges and citizens on how subtle points of Islamic law should be understood, interpreted or applied. There were strict rules on who is eligible to issue a valid *fatwa* and who could not, as well as on the conditions the *fatwa* must satisfy to be valid.

2.1 History of *fatwa* in Islam.

The first legal rulings were issued by the Prophet ﷺ in his role as intermediary between God and the Muslims. The form in which these legal commands were revealed takes into account the fact that the Islamic model instituted by the Prophet ﷺ reflected, in some respects, a drastic departure from previous Arab customs while in other areas, the Islamic response built upon existing customary practices. Because of this relationship between pre-Islamic customs and the new Islamic legal structure, many Qur'anic legal commands were revealed as a result of individual members of the Prophet's (ﷺ) community approaching him for "clarification regarding the continuing validity of a certain practice."

After the Prophet's ﷺ death, when direct access to divine revelation was no longer available, Muslims turned to the Prophet's ﷺ closest Companions for guidance. *Fatawa* at this point in Islamic history took the form of the Companions commenting on how the Prophet ﷺ approached a certain issue. When the generation of the Companions died out, Muslims came to rely on hadith, which were linked to the Prophet ﷺ through their isnad. Those who mastered these hadith, the 'ulama, became in the second Islamic century the means by which to receive religious guidance on specific issues. As the Islamic Empire expanded and sophisticated state control became increasingly necessary, legal scholarship as the basis of state legitimacy—took on a similarly bureaucratic nature. Whereas "*fatwa* began as a private activity that was independent of state control," it became increasingly formalized, culminating in the creation of the four Sunni madhhabs and Shi'i Jafari madhhab, each of which compiled its own "*fatwa* collections."

Today, with the existence of modern independent States, each with its own legislative system, and/or its own body of [Ulemas](#), each country develops and applies its own rules, based on its own interpretation of religious prescriptions. Many [Muslim countries](#) (such as [Egypt](#) and [Tunisia](#)) have an official [Mufti](#) position; a distinguished expert in the [Shariah](#) is appointed to this position by the civil authorities of the country.

2.2 *Fatwa* of Sahaba (companion of the Prophet, ﷺ)

Fatwa (opinion or ruling) of Sahaba is indeed a very important and deserves highest consideration, they being close to the Prophet ﷺ and because of their direct knowledge from the Prophet ﷺ. There is some disagreement as to who is a Sahabi. Majority hold that anybody who met the Prophet ﷺ while believing Islam is a Sahabi. Minority hold that "Suhbat" (continuity of companionship) is a requirement to call a person a Sahabi of the Prophet ﷺ [Imam Shawkani, Irshad; also Dr. Hashim Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society, Cambridge, U.K.]. Both points of view have justifications and cannot be ignored. The fact of being Sahabi can be established by continuous testimony (tawatur) or by affirmation of any other companion or even by own claim (if the person is upright).

Fatwa of Sahaba means an opinion reached by a Sahaba by way of Ijtihad. As regards whether *fatwa* of Sahaba constitute a proof on succeeding generations, there are three views: First view is that - it is an absolute proof. The proponents of this view quote the Quranic verses 9:100, 3:109. They also quote Hadith like "my companions are like stars" or "Honour my companions". First view is held by Imam Malik, Imam Shafii and Ahmad Bin Hanbal also have been quoted in its support. Against this view, it has been suggested that these references speak of the status and dignity of Sahaba. These are not categorical (Qaati) regarding compulsion to obey their decisions).

Second view is - that Ijtihad of a companion is not a proof and does not bind the succeeding generations. Hanafi jurist Abul Hasan al Karkhi, Imam Ahmed (according to one view of him) and Asharite and Mutazilite scholars hold this view. They quote the Quranic Ayat 59 : 2 ("Consider, O You who have vision"). It is argued that the Ayat makes Ijtihad an obligation of all who are competent and makes no distinction between Sahabis and others. Imam Gazali and Amidi consider it preferred view.

Third view is that of Abu Hanifa himself. He says that ruling of a companion is a proof if it is in conflict with Qiyas but not when it agrees with Qiyas. The aforesaid are the main views. There are some other views which may be seen in the books of Usul.

It can be concluded that the *Fatwa* of a companion is a source of guidance which merits careful consideration (though not binding except in case of their clear Ijma).

2.3 Contemporary Trends

There have been significant recent developments as to the mufti's character, the medium through which *fatawa* are communicated, the types of questions posed, and the methodologies by which the

mufṭīs arrive at their answers. According to the traditional principles of Islamic jurisprudence (usūl al-fiqh), a mufṭī must acquire a high level of specialized knowledge before issuing *fatawa*; however, many militant and reform movements have disseminated *fatawa* issued by non-specialists which have been widely circulated and followed.

For example, in 1998 'Usāma bin Lāden, together with four other associates calling themselves the World Islamic Front, issued a fatwa calling for a "Jihād against Jews and Crusaders." The fatwa proclaimed it the individual duty of all Muslims to kill as many Americans as possible, including civilians. In addition to denouncing the content of this and other *fatawa* attributed to bin Lāden, many Muslim jurists have stressed bin Lāden's lack of the requisite qualifications for either issuing *fatawa* or declaring jihād.

In July 2005, nearly two hundred prominent 'ulamā' convened in Jordan to issue a ruling that recognized the legitimacy of eight schools of Islamic law, forbade declaring any member of these schools to be an apostate, and declared that only scholars trained according to the requirements of a recognized school of law may issue *fatawa*. Known as the "Amman Message," a major purpose of the statement was to delegitimize the *fatawa* promulgated by leaders of violent Islamist movements

A fatwa issued in the aftermath of the September 11, 2001, attacks on the United States also illustrates several recent trends in ifṭā'. A few days after the attacks, a Muslim chaplain in the U.S. Army asked a group of 'ulamā' about the permissibility of participating in a war against Muslim countries. In response, five Middle Eastern scholars issued a joint fatwa permitting Muslim military personnel in the U.S. armed forces to participate in actions against Muslim states. Rather than referencing any of the major schools of Islamic law, the authors of this fatwa drew support for their position directly from the Qur'ān and ḥadith. The collective fatwa, the lack of adherence to any one school of law, and the incidence of questions from Western Muslims directed toward mufṭīs in Muslim countries have all become common features of ifṭā'.

An estimated one-third of the world's Muslims now live in majority non-Muslim countries. The demand for *fatawa* on such issues as attending church weddings, responding to a French ban on headscarves in public schools, or buying houses through mortgages, has led to the controversial development of what since 1994 has been termed fiqh al-aqallīyāt, or the jurisprudence of Muslim minorities. Organizations such as the Fiqh Council of North America, established in 1986, and the European Council for *Fatwa* and Research (ECFR, <http://www.e-cfr.org/ar/>), founded in 1997, have sought to provide authoritative rulings that address the concerns of minority Muslims, facilitate their

adherence to Islamic law, and stress the compatibility of Islam with life in diverse modern contexts. The ECFR's international membership has adopted an explicit methodology of drawing on all four major schools of law, as well as a range of other legal concepts, in order to produce collective *fatawa* suitable for European contexts. For example, an ECFR ruling issued in 2001 allowed a female convert to Islam to remain married to her non-Muslim husband; the muftīs justified this stance partly on the basis of existing European laws and customs which guarantee women the freedom of religion. Although this type of ruling has been welcomed by many, it has been criticized by others as a divisive system of exceptions.

Far less formal than the deliberations of the ECFR; are the *fatawa*, issued online by “cyber-muftis.” Web sites such as Islam-Online (www.islamonline.net/) and *Fatwa-Online* (www.fatwa-online.com/) are among a large number of sites offering instant *fatawa* to readers from all over the world. Islam-Online publishes a searchable archive of ‘live fatwa’ sessions, which numbered almost a thousand in mid-2007, and posts each muftī's biography. These sites, along with radio shows and satellite television programs offering call-in *fatawa*, have contributed to the changing, and thriving, nature of contemporary *iftā'*. Muslims may now consult any number of muftīs worldwide, anonymously, instantly, and from the comfort of their home or local Internet café.

2.4 Scope of *Fatwa*

Fatwa covers a wider scope, including matters of legal theory, theology, philosophy, and creeds, which are not included in *fiqh* studies. Thus, the concept retains a broader concern about religion and society than is reflected in the formal Islamic law defined by the five schools. From the perspective of judicial authority, realm, and enforceability, *fatwa* is contrasted with *qaḍā*, or court judgment. The jurisdiction of *fatwa* is wider than *qaḍā*; matters such as ‘*ibadat* (religious duties or obligations) are excluded from the power of courts, even though they are essential parts of Islamic law and appear very prominently in *fiqh* manuscripts and *fatawa*. The major difference between the two is in their enforceability: *qaḍā* is binding and enforceable whereas *fatwa* is voluntary. The concept of *fatwa* can therefore be seen as an indirect instrument for defining formal concepts of law when applied in courts. From the perspective of moral and religious obligation, *fatwa* is contrasted with *taqwā* or piety. For instance, a *fatwa* may allow choice between a lenient (*rukhsah*) and a severe (‘*azimah*) view about the permissibility of a certain matter, or it may resort to legal devices (*hilah*) to circumvent the strict implications of a law, but *taqwā* may not approve of such strategies. This last contrast is often referred to in literary and *Ṣūfī* writings.

2.5. Characteristics of *fatwa* in Islamic

Imam Ahmad (may Allah be pleased with him) said that the one nominated to hold the position of Mufti, should possess the following characteristics:

- He should have a pure intention to guide the questioner and never to misguide him.
- He should have deep insight, equanimity and tranquility.
- He should have a firm religious background and deep knowledge.
- In his capacity as a religious leader, the Mufti should have adequate means to earn his livelihood.
- Finally, he should be aware of daily life and contemporary issues.”

Moreover, Sheikh M. S. Al-Munajjid, a prominent Saudi Muslim lecturer and author, adds:

“Not every individual has the right to issue *Fatawa* and make pronouncements on matters. A Mufti must be qualified and of profound knowledge. He has to be able to know the evidence, the wording and apparent meaning of the texts, what is Sahih (authentic) and what is Da`if (weak), An-Nasikh wal-Mansukh (the abrogating and the abrogated), what is specific in application and what is general, and what is stated in brief and what is mentioned in detail.

This needs lengthy experience and practice, knowledge of the various branches of Fiqh and where to look for information, knowledge of the opinions of the scholars and jurists, and memorization or knowledge of the religious texts. The Mufti should be knowledgeable and rich in life experience. We cannot imagine him to live in an ivory tower and turn a blind eye to life around him.

Undoubtedly, issuing *Fatawa* without having qualification to do so is a grave sin. Allah has warned us against that, saying: "And speak not, concerning that which your own tongues qualify (as clean or unclean), the falsehood: "This is lawful, and this is forbidden,' so that ye invent a lie against Allah. Lo! Those who invent a lie against Allah will not succeed.” (An-Nahl: 116)”

According to the [usul al-fiqh](#) (principles of jurisprudence), the *fatwa* must meet the following conditions in order to be valid:

- The *fatwa* is in line with relevant legal proofs, deduced from Qur'anic verses and hadiths;

provided the ahadith was not later abrogated by [Muhammad](#).

- It is issued by a person (or a board) having due knowledge and sincerity of heart;
- It is free from individual opportunism, and not depending on political servitude;
- It is adequate with the needs of the contemporary world.

2.6 Legal implications of a *fatwa*

There is a binding rule that saves the *fatwa* pronouncements from creating judicial havoc, whether within a Muslim country or at the level of the Islamic world in general: it is unanimously agreed that a *fatwa* is only binding on its author.

Fata functioned independently of the judicial system, although in some systems muftīs who issued decrees would be officially seconded to religious courts. Thus, in Andalusian benches muftīs sat as *mushawar* (jurisconsults), and in early British Indian magistrates they sat as *mawlawis* (men of learning). Jurists compiled volumes of *fatawa* stating, for the benefit of judges, the consensual and authoritative views and doctrines of a particular school. Partly for these reasons, the position of muftīs in Muslim political systems was defined by the role *fiqh* enacted in that society. In Andalusia, jurists were indeed powerful, because they were part of the *shūrā* (council) of amīrs and caliphs, whereas in the Ottoman and Mughal political systems, the chief muftī was designated as *Shaykh al-Islam*. Muftīs were also appointed to various other positions, including market inspectors, guardians of public morals, and advisors to governments on religious affairs.

Under colonial rule the madrasahs took over the role of muftīs as religious guides. The madrasahs established the institution of *dar al-ifta*, a place to issue *fatawa*. The print and electronic media in the nineteenth and twentieth centuries reinforced the role and impact of *fatawa*. Muftīs were faced with day-to-day challenges in economic, political, scientific, and technological fields. Not only did the scope of *fatwa* widen, but because of its instant availability to a wider public, its language, presentation, and style adapted. Although no international Islamic authority has been established to settle legal differences, an Islamic Fiqh Academy was created in January 1981 by the Organization of the Islamic Conference (OIC), but its renditions are not binding.

This was underlined by Sheikh Abdul Mohsen Al-Obeikan, vice-minister of Justice of Saudi Arabia,

in an interview with the Arabic daily "Asharq al awsat", as recently as on July 9, 2006, in a discussion of the legal value of a fatwā by the Islamic Fiqh Academy (IFA) on the subject of misyar marriage, which had been rendered by IFA on April 12, 2006 .

Despite this, sometimes, even leading religious authorities and theologians misleadingly present their fatwa as obligatory, or try to adopt some "in-between" position.

Thus, the Sheikh of Al-Azhar in Cairo, Muhammad Sayid Tantawy, who is the leading religious authority in the Sunni Muslim establishment in Egypt, alongside the Mufti of Egypt, said the following about *fatawa* issued by *himself* or the entire Dar al-Ifta:

"*Fatwa* issued by Al-Azhar are not binding, but they are not just whistling in the wind either; individuals are free to accept them, but Islam recognizes that extenuating circumstances may prevent it. For example, it is the right of Muslims in France who object to the law banning the veil to bring it up to the legislative and judicial authorities. If the judiciary decides in favor of the government because the country is secular, they would be considered to be Muslim individuals acting under compelling circumstances." Otherwise, in his view, they would be expected to adhere to the fatwa.

In Morocco, where king Mohammed VI is also Amir al-Muminin (Commander of the faithful), the authorities have tried to organize the field by creating a scholars' council (*conseil des oulémas*) composed of Muslim scholars (ulema) which is the only one allowed to issue fatwa. In this case, a national theocracy could in fact compel intra-national compliance with the fatwa, since a central authority is the source. Muslims in other nations would obviously not be required to obey it.

3. Islamic Schools of law their Methodology of *fatwa* and its development:

There are a few methods of *fatwa* applied by scholars from different school of law, depending on various approaches in Islamic jurisprudence. We elaborate very briefly on those methods according to the popular school of law:

3.1. Maliki School of law:

Imam Malik was known as the “master” of the Hadith School and therefore the influence of hadith in his *ijtihad* is very clear, and his *fatwa* is tradition or hadith based. Before Imam Malik gets involved in the issuance of *fatwa*, he usually considers and observes few criteria in his *fatwa* as follows:

- ‘Farness from *fatwa*’, he used to say I don’t know in most of the cases subject to his *ijtihad*.

- Thoughtfulness, slowness, careful consideration, deliberation before *fatwa* in order to provide an accurate and sound Islamic ruling. This approach demonstrates the value and appreciation given to *fatwa*.
- Imam Malik dislikes issuing *fatwa* for something which did not yet happen, i.e. Propositional law. Usually he issues the *fatwa* only when it happens and becomes a real case which needs an Islamic ruling.

3.1.1. The Maliki School its Methodology and Development of *fatwa*:

The criteria that have been established by the Master of the school were taken into account by his followers and the leaders of the schools after him. Furthermore they have developed the methodology of the *fatwa* in the school and established a reliable and sound source and criteria for the *fatwa* in the mazhab. The major sources of Shariah in *ijtihad* and *fatwa* observed by the *Maliki* School taken into consideration during the issuing of the Islamic ruling are: the Holy Quran, Hadith Sharif (tradition of the Prophet ﷺ), *ijma*. (consensus of legal opinion), *amal ahl al madinah* (tradition of people of Madina), *fatawa* of the companion of the prophet ﷺ, *qiyas*(analogy), *masaleh al mursalah* (public interest), *istihsan* (juristic preference), *sadu darrai* (blocking the lawful means to an unlawful end), and *al urf*. (Custom).¹

The above sources represent the major and important sources for *ijtihad* and *fatwa* in the Maliki School. However there are some characteristics pertaining to each source which must be fulfilled to ensure the sound approach in the interpretation of the text, or in determining the new case subject to *fatwa*.

3.3. Hanafi School of law:

Abu Hanifa. the master of this school, is one of the prominent scholars recognized by this ummah, but his methodology in *fatwa* and *ijtihad* is different from Imam malik due to the normative influence from his intellectual environment in Iraq where the hadith was not the back bone of his *ijtihad* but he depended on a rational approach and the use of the intellect and reasoning as important sources for interpretation. The major sources in the Hanafi School taken into consideration considered during the issuance of *fatwa* and Islamic ruling are: the Holy Quran, Hadith Sharif, *ijma*, and selection from *fatawa* of the companion of the prophet ﷺ, *qiyas*, *masaleh al mursalah*, *al urf* and *Istihsan*.²

¹ Husain Mohamad al malah, *Al Fatwa*, p. 148-160.. Moustafa Sheikh Yahi, *Manhaj Fatwa* Imam Malik, p. 5 - 13

3.4. Hanbali School of law

Imam Ahmad Ibn Hanbal is the master of the Hanbali school of law and the prominent student of Imam Shafi, The *Hanbali* school took into consideration the following major sources when issuing the Islamic ruling and they are: the Holy Quran, *sunnah* (hadith sharif), *ijma*, *fatawa* of the companion of the Prophet ﷺ, *al ahديث al mursal* (broken chain in companion) and *qiyas*.³ Besides the abovementioned sources, Imam Ahmad considered other factors in his *fatwa* as follows:

- The changing of time and location (this factor is considered by other scholars as well).
- He is not restricted to his previous *fatawa*.
- He takes into account the principle of daroura.
- Observe the niyyah or intention of the person in his *fatwa* and the Islamic ruling can be affected according to his intention. .

3.5. Imam Al Shawqani (as independent scholar)

Imam al *Shawqani* is not a master of any school of law but he is an independent jurist and a competent scholar accepted by the ummah. By reviewing his *fatawa* in finance and other aspects of Shariah we can observe some important criteria which govern his methodology in *fatwa* and *ijtihad* as follows:

3.5.1: Methodology of his *fatwa*:

Shawqani has adopted some criteria in his *fatwa* methodology which can be summarized in the following points:

- Refer to *al dalil* (evidence) and dependence on it in issuing *fatwa* or in supporting any *Shariah* opinion.
- Independent in his *ijtihad*, which means that Imam *Shawqani* was an independent scholar in

²Husain Mohamad al malah, *Al Fatwa*, p. 121-136. Abdul Razak Abdul Rahman Al –sa'adi, *Manhaj Fatwa* Imam Abi Hanifah, p. 10 – 27.

Ibn qaim al Jawzi, *Ilam al muwaqi'in*, vol. 1, p. 25. Husain Mohamad al malah, *Al Fatwa*, p. 186-197. *Manhaj Fatwa* ³ .Imam Ahmad Bin Hanbal, p. 9 – 15

his *ijtihad* and interpreted the text according to his understanding as a qualified and competent scholar.

- Depending on the Arabic language in extracting the *fatwa* or Islamic ruling from the text,
- Connecting the branches of *fiqh* to the Islamic jurisprudence rules.
- Linking the investigation in *fiqh* with the *hadith* (*Sunnah*)
- Depending on reasoning as additional evidence to support his understanding and *fatwa*. Consideration of the social dimension in his *fatwa* Consideration of *maqasid* al Shariah in his *fatwa*.⁴

3.5.2: Technical approach in his *fatwa*:

In addition to the above criteria, *Shawqani* has some other technical methods which support his overall methodology in *fatwa* which are as follows:

- Providing an introduction to the *fatwa* by some rules of Islamic jurisprudence related to the subject matter of *fatwa*.
- Providing the *fatwa* in details and not in brief statements like other scholars do. The *fatwa* of *Shawqani* therefore is detailed and explicit like a research paper rather than a very brief statement.
- Emphasizing more on the *hadith* in his *fatwa*, and depending on it as sound proof and evidence in supporting and empowering his Shariah opinion due to his background in *hadith*. *He is* in fact considered as one of the distinguished scholars of *hadith*.⁵

4. *Fatwa* in Islamic finance

4.1 Importance of *fatwa* and its roles in Islamic banking and finance

Fatwa plays a crucial role in Islamic finance in regulating the market by production of Islamic rules, Shariah standards and regulations. We can observe the significant role of *fatwa* in the following:

- Settle unclear issues in banking and finance by issuing Islamic ruling.
- To ensure compliance of all financial transactions with the rules and principles of *Shariah*.

⁴.Saeed Bouharawa, Halima Boukrusha, *Manhaj fatwa* Imam shaukani, p, 15-19

⁵Saeed Bouharawa, Halima Boukrusha, *Manhaj fatwa* Imam shaukani, p, 20-21.

- To show the rules of *Shariah* by issuing *fatwa* when needed by the industry.
- To show what is lawful and what is unlawful in the financial transactions in banking and finance.
- To make sure that the requirements of Islamic law are fulfilled when new products are created before marketing.
- Obviously the marketability of any Islamic product in Islamic banking is dependent on an approved *fatwa* first before launching it in the market and introducing it to the public.

4.2. Methodology of *fatwa* in Islamic finance:

The *fatwa* in Islamic finance is an extension of the development of Islamic legislation throughout history. There is no doubt that the *fatwa* in Islamic finance represents part of the *fatwa* in *Shariah*. However in order to enhance the *fatwa* in Islamic finance, the scholars in this field, as represented by the *Shariah* advisor, should benefit from the sound methodology and accurate approach of the schools of law and the approaches of the independent scholars of the ummah at large.

Fatwa in the area of Islamic finance has become a very vital tool due to the fast growth track of the Islamic finance industry. The *fatwa* is said to be market driven due to the consistent demand for *fatwa* from the relevant parties in the industry, this necessitates the establishment of a strong *fatwa* methodology in Islamic finance to be adopted and implemented in issuing *fatwa* for various Islamic banking and finance issues, in order to ensure the soundness of the ruling. What is greatly needed is the structuring of a standard methodology which can provide an appropriate procedure in deriving the Islamic ruling and *fatwa* according to Islamic jurisprudence discipline.. In the structured methodology, there will be stages and technical tools that must be observed in order to issue a sound *fatwa* which will realize the objectives of *Shariah* in Islamic finance. It is important to note here that it is not necessary for the qualified person who issues the *fatwa* to be an official mufti. He can be an independent jurist, a qualified and competent scholar or a *Shariah* advisor.

4.3. Some rules governing the *fatwa* and the mufti in Islamic finance

There are some rules and governance which must be observed and highlighted to the parties involved

in issuing *fatwa* to the relevant parties in the industry, which are as follows:

- The Mufti/Shariah advisory must follow a clear, acceptable and accurate methodology in providing *fatwa*/ Islamic ruling, It is important that prior to that he has to fully understand the case presented to him before issuing an appropriate *fatwa*.,
- The Mufti/ Shariah advisory must seek easiness in his *fatwa* and take into account the condition of the *fatwa* seekers (mustafti).
- Accommodation of the easy way in issuing *fatwa* does not mean changing the *Shariah* ruling and dropping the weakest *Shariah* opinion and rules.
- The objective of *fatwa* is to moderate the problems by careful use of licenses.
- The Mufti/ Shariah advisory should be flexible in his *fatwa* by not being restricted to a specific School of law but rather to seek the strong *Shariah* opinions and the appropriate *fatwa* for the new case under investigation.
- If the mufti/Shariah advisory is not in a position to issue the *fatwa* on the spot, he can consult other scholars and Jurist in order to have a better understanding of the case.
- It is better to have a collective *fatwa* through joint efforts and consultations.
- The mufti/Shariah advisory should take the task of *fatwa* in a very serious manner and employ his best effort while exercising *ijtihad* by engaging himself very actively in deliberating the *Shariah* issues.
- It must be understood that issuing *fatwa* can expose the Islamic banks and financial institutions to very serious financial obligation.
- Obviously the participation of the potential investors in a business is based on the *Shariah* endorsement which validates the investment from the *Shariah* point of view and makes the revenue halal and permissible; therefore the accountability in front of God on the investors is on the responsibility of the *Shariah* advisory.

5. *Fatwa* issued by *Shariah* board or advisory *Shariah* council.

This type of *fatwa* is under *Shariah* board or *Shariah* council, each country has a different structure and different legal framework which govern this body. The *Shariah* board is legitimate control body consist from a selected members chosen based on their background in Islamic jurisprudence, Islamic law and Islamic finance. The principles duty of *Shariah* board is to ensure that the current financial operations conform to *Shariah* rules, principles and regulations.

5.1. The area covered by *Shariah* advisory

The *Shariah* advisory exercise *ijtihad* and issues *fatwa* accordingly, therefore their main tasks is to issue *fatwa* beside this task they involve as well in some other technical assignment and task in the Islamic banks such as:

- Revising the structure of the financial products.
- Legal documentation and evidence that providers of Islamic financial services.
- Products intend to implement *Shariah* recommendations
- Sharing information between *Shariah* scholars and advisors and the institutions offering Islamic financial services

5.2. Duties and responsibility of *Shariah* committee

All *Shariah* Committee members are expected to participate and engage themselves actively in deliberating *Shariah* issues put before them. The main duties and responsibilities of the *Shariah* Committee are as follows:

- To advise the Board on *Shariah* matters in its business operation: The *Shariah* Committee shall advise the Board on *Shariah* matters in order to ensure that the business operations of the Islamic financial institution comply with *Shariah* principles at all times.
- To endorse *Shariah* Compliance Manuals: The Manual shall be endorsed by the *Shariah* Committee.
- To endorse and validate relevant documentations: the *Shariah* Committee must endorse the following:
 - The terms and conditions contained in the proposal form, contract, agreement or other legal documentation used in executing the transactions; and
 - The product manual, marketing advertisements, sales illustrations and brochures used to describe the product.
- To assist related parties on *Shariah* matters for advice upon request: The related parties of the Islamic financial institution such as its legal counsel, auditor or consultant may seek advice on *Shariah* matters from the *Shariah* Committee. The *Shariah* Committee is expected to provide assistance to them so that compliance with *Shariah* principles can be assured completely.

- To advise on matters to be referred to the SAC: The *Shariah* Committee must advise the Islamic financial institution to consult the SAC on any *Shariah* matters which have not been resolved or endorsed by the SAC.
- To provide written *Shariah* opinion: The Committee shall prepare written *Shariah* opinions in the following circumstances:
 - Where the Islamic financial institution make reference to the SAC for advice; or
 - Where the Islamic financial institution submits applications to Bank Negara Malaysia for new product approval in accordance with guidelines on product approval issued by Bank Negara Malaysia.
- To assist the SAC on reference for advice: The *Shariah* Committee must explain the *Shariah* issues involved and the recommendations for a decision. It must be supported by relevant *Shariah* jurisprudential literature from the established sources. The *Shariah* Committee is also expected to assist the SAC on any matters referred by the Islamic financial institution. Upon obtaining any advice of the SAC, the *Shariah* Committee shall ensure that all SAC's decisions are properly implemented by the Islamic financial institution.

Key Terms

| | |
|----------------------------|--|
| <i>Fatwa</i> | |
| Shariah | |
| Ijtihad | |
| Fiqh | |
| Sunni Islam | |
| Shia Islam | |
| Ilm | knowledge |
| Hadith | sayings of the Prophet ﷺ |
| Matn | text |
| Isnad | chain of reporters to verify authenticity |
| Ra'y | opinion |
| Fiqh | jurisprudence |
| Madrasah | religious school |
| Companions | |
| Ulama, | |
| Mufti | |
| Sahaba | companion of the Prophet, ﷺ |
| Suhbat | continuity of companionship |
| Tawatur | continuous testimony |
| Ijtihad. | |
| Qiyas | |
| Jihād | |
| Jurists | |
| Iftā'. | |
| Fiqh al-aqallīyāt, | the jurisprudence of Muslim minorities |
| Fiqh Council | established in 1986, North America, |
| ECFR | European Council for <i>Fatwa</i> and Research |
| Cybermuftis | <i>Fatwa</i> -Online |
| Qaḍā | court judgment |
| Ibadat | religious duties or obligations |
| Taqwā | piety |
| Mushawar | jurisconsults |
| Mawlawis | men of learning |
| Asharq al awsat | Arabic daily News Paper |
| Mazhab | Islamic Schools of law |
| <i>Ijma</i> | consensus of legal opinion |
| <i>Amal ahl al madinah</i> | tradition of people of Madina |
| <i>Qiyas</i> | analogy |
| <i>Masaleh al mursalah</i> | Public interest |
| <i>Istihsan</i> | juristic preference, |
| <i>Sadu darrai</i> | blocking the lawful means to an unlawful end, |
| <i>Al urf.</i> | Custom |
| Niyyah | intention of the person |
| <i>Al dalil</i> | evidence |
| Mustafti | <i>fatwa</i> seekers |
| SAC | Shariah Advisory committee |

References

Al-Fatwa Bayna al-indibat Wa-at-tasayyub, the eminent Muslim scholar, **Sheikh Yusuf Al-Qaradawi**

Syamsul ANWAR, "The Fatwa, Purification and Dynamization: A Study of Tarjîh in the Muhammadiyah", Paper Presented at the workshop *Fatwa* and the Dissemination of Religious Authority in 20th Century Indonesia, Leiden, 31 October 2002 [unpublished].

Ahmad HASSAN, *Soal-Jawab Masalah Agama*, Vols. 1 and 2, Bangil, Pusstaka Tamaan

Lecture slides and presentations professor doctor HASAN LAHSASNA

ISLAMI ON LINE.NET

‘UTHMAN, *Kitab al-qawânîn al-shar’iyya li-ahl al-majâlis al-hukmiyya wa-liftâ’iyyah*, Bogor, Maktabat ‘Irfân, .

Noorhaidi HASAN, "Transnational Islam within the Boundary of National Politics: Middle Eastern *Fatwas* on Jihad in the Moluccas", Paper Presented at the workshop *Fatwa* and the Dissemination of Religious Authority in 20th Century Indonesia, Leiden, 31 October 2002 [unpublished].

Principles of Islamic Jurisprudence by Hashim Kamali, Islamic Texts Society, Cambridge, U.K.

Subhi Mahmassani - The Philosophy of Jurisprudence in Islam, Leiden, E.J. Brill

Dr. Taha Jabir Al -Alwani, *Ijtihad* published by IIIT, USA. Abu Zahra -- *Usul al Fiqh*, Cairo, Dar al Fikr al Arabi. Abdul Wahab Al Khallaf - *Ilm Usul Al Fiqh*, Dar al Qalam, Kuwait. Mohammad Al Khudari - *Usul al Fiqh*, Dar al Fikr, Cairo

Prof. Ahmad Hassan; *The doctrine of Ijma in Islam*, Islamic Research Institute, Islamabad.

Dr. Taha Jabir al Alwani: *Source Methodology in Islamic Jurisprudence*; IIIT, USA.

Allama Iqbal: *Reconstruction of Religious Thought in Islam*.

Makdisi, George. 1984. "The Juridical Theology of Shafi'i Origin and Significance of Usul al-Fiqh". *Studia Islamica* 59: 5Ð47.

Masud, Muhammad Khalid. 1977. *Islamic Legal Philosophy*. Islamabad: Islamic Research Institute.

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