

THE POSITION OF FATWA IN CIVIL AND SYARIAH COURT OF MALAYSIA

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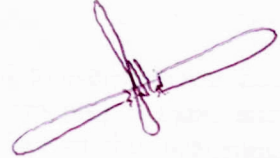
AUTHOR DECLARATION

بسم الله الرحمن الرحيم

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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ABSTRAK

Kajian ilmiah ini membincangkan tentang kedudukan fatwa di dalam Mahkamah Sivil dan Mahkamah Syariah di Malaysia. Kajian ini tidak berhasrat untuk mengulas tentang persoalan hukum terhadap fatwa-fatwa yang telah dikeluarkan. Sebaliknya, ianya bertujuan untuk mengkaji dan menyelidik sejauh manakah penggunaan dan kedudukannya sebagai salah satu instrumen undang-undang di dalam Mahkamah Sivil dan Mahkamah Syariah di Malaysia. Dalam kajian ini, penulis menggunakan kaedah diskriptif iaitu dengan menerangkan definisi fatwa dan penggunaannya menurut beberapa sumber yang diiktiraf dalam Islam. penulis juga menggunakan kaedah induktif, iaitu dengan meneliti, mengeluarkan, mencari dan mengumpul maklumat yang berkait rapat dengan tajuk ini. Hasil daripada kajian ini, penulis mendapati bahawa fatwa diterima pakai di dalam Mahkamah Sivil dan Mahkamah Syariah di Malaysia sebagai salah satu daripada penghujahan penghakiman.

ABSTRACT

This academic project is discusses about the position of *fatwa* in civil and syariah court in Malaysia. The objective of this research is not to comment on the question of the *hukm* upon the *fatwa* which is has been decided. However, the purpose of this research is to study and discover how far the practice and the position of it as a legal instrument in civil and syariah court in Malaysia. In this research, the writer applied descriptive method to clarify the definition of *fatwa* and its practice from various sources which proves by Islam. The writer also applied inductive method to analyze, to find out and to gather information related to this topic. As a result, the writer notices that *fatwa* is applicable in civil and syariah court in Malaysia as one of the ground of the judgement.

ملّخص البحث

هذه الكتابة الأكاديمية تناقش عن موقع الفتوى في محكمة مدنية ومحكمة الشريعة في ماليزيا. الهدف هذا البحث ليس للتعليق على مسألة الحكم للفتوى التي قرّرت. على أية حال، الغرض هذا البحث أن يدرس ويكتشف كم بعيدا الممارسة والموقع منه كأداة القانونية في محكمة مدنية ومحكمة الشريعة في ماليزيا. في هذا البحث، طبّق المؤلف طريقة وصفية لتوضيح تعريف الفتوى وممارستها من المصادر المختلفة التي تثبت بالإسلام. طبّق المؤلف الطريقة الإستقرائية أيضا لتحليل، لإكتشاف وجمع معلومات متعلّقة بهذا الموضوع. والنتيجة هذا البحث الأكاديمي، يلاحظ المؤلف بأنّ الفتوى قابلة للتطبيق في محكمة مدنية ومحكمة الشريعة في ماليزيا كأحد أرض القرار.

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TRANSLITERATION

1. Alphabet

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ء	'	النساء	An-Nisā'
ب	B	بدري	Badri
ت	T	تفكر	Tafakkur
ث	Th	مباحث	Mabāhith
ج	J	جيلاني	Jālānī
ح	ḥ	حضانة	Hadhanah
خ	Kh	خليل	Khalīl
د	D	داعي	Dā'i
ذ	Dz	ذكر	Dzikh
ر	R	رابطة	Rābiṭah
ز	Z	زكير	Zakīr
س	S	سيد	Said
ش	Sy	شيخ	Syeikh
ص	ṣ	صبر	Sabr
ض	ḍ	ضعيف	Dai'f
ط	ṭ	الطور	At-Tur
ظ	ẓ	عظيم	'Azīm
ع	'	عمان	'Ammān
غ	Gh	غافر	Ghāfir
ف	F	فتح الله	Fethullah
ق	Q	القسطون	Al-Qāsītūn
ك	K	كثير	Kathīr
ل	L	لم	Lam
م	M	مسلم	Muslim
ن	N	نطفة	Nutfah
و	W	وجودية	Wujūdiah

هـ	H	هريرة	Hurayrah
ي	Y	يوسف	Yūsuf

2. Short Vowel

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
----- َ	A	أمر	Amr
----- ِ	I	عاصم	‘Aṣim
----- ُ	U	صبر	Sabr

3. Long Vowel

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ا	Ā	مذاكرة	Muzākarah
و	Ū	المتقون	Al-Muttaqūn
ي	Ī	علمين	‘Ālamīn

4. Diphthong

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
و	Ww	منورة	Munawwarah
ي	Yy	تيمية	Taimiyyah
ي	Iyy	البخاري	Al-Bukhāriyy

5. Exemption

5.1. Arabic letter ء (hamzah) found at the beginning of a word is transliterated to the letter “a” not to ‘, example:

<u>Example</u>	<u>Transliterated</u>
أحمد	Ahmad

ABBREVIATION

AS	‘alayh al-salām
Act	Akta
A.H	After Hijrah
CLJ	Current Law Journal
comp.	compiler/compiled by
d	death
Def.	definition
Dr.	doctor
ed.	editor/edition/edited by
Etc	et cetera, and so on
H	hijriyyah
Hj.	Haji
Ibid, ibid	ibidem, in the same place
i.e	that is to say
JH	Journal Hukum
LRA	Law Reform Act Marriage and Divorce
M	mīlādiyyah
MLJ	Malayan Law Journal
Prof.	Professor
S	Section
Sdn. Bhd.	Sendirian Berhad
Trans.	Translator or translated by
n.a	no author/no artist
narr.	narrated by
n.d	no date/no year
n.pb.	No publisher
n.pl.	No place
p.	page
pp.	pages
perf.	performers
RA	radiya Allāh ‘anhu/ ‘anhā / ‘anhum
Rev.	review/revision of
SAW	salla Allāh alayh wa sallam
SWT	subhānahu wa ta’ālā
trans.	translator/ translated by
v	versus
vers.	version
vol.	volume
writ.	written by

GLOSSARY

Ahadith	Plural of hadith of the Prophet Muhammad s.a.w.
a.s.	Abbreviation of “Alaihi Al-Salam” meaning “upon him the peace”. Only observed for prophets other than Muhammad s.a.w.
ayah	sign
ayat	plural of ayah, verses of the Quran.
Baligh	of the age majority
Da’wah	change, claim or accusation
‘ilm al-qadi	personal knowledge of a judge
Fatwa	opinion upon a point of law
Fiqh	Jurisprudence
Fuqaha	Islamic jurists
Hadith	saying of the Prophet Muhammad s.a.w.
Hujjah	argument
Hukm	legal rule
Iddah	period of divorce
Ijma’	consensus of opinion of the Ulama
Ijtihad	extracting legal rules from the original sources
Imam	leader
Jahiliyyah	ignorance, i.e. the period before Islam embraced by the Arabs
Hadhanah	custody or guardianship of children
Kitabi	Jews and Christians
Mazahib	schools of jurisprudence
Merdeka	independence day
Mukallaf	persons with full legal competence
Nas shar’i	authority
Nasab	patterning or lineage
Nafkah	maintenance
Qadi	judge
Qias	analogical reasoning
Shar’i	legally recognized by the shariah

Sunnah	saying, deeds and approvals of the prophet s.a.w.
Surah	chapter of the Quran. The number preceding colon denotes the chapter number while the numbers after the colon denote the verse number
‘ulama	plural of ‘alim, Islamic jurist
Ummah	the global Muslim community
Wajib	mandatory or obligatory

RESEARCH PROPOSAL
THE POSITION OF FATWA IN CIVIL AND SYARIAH COURT OF
MALAYSIA

1 BACKGROUND

Fatwa is an Islamic Institution which had existed since the period of our prophet Muhammad (Peace be upon him) until now. The *Fatwa* Institution had expanded in the period of *Amawiyah*, *'abasiyah* and *Uthmaniyah*. Therefore, the *Darul ifta'* was existed.¹ DG Macdonald further defines *Fatwa* as a formal legal opinion given by a *Mufti* in an answer to a question to him either by a judge or by a private individual.²

In Malaysia, there is a *Fatwa* committee which is existed in every state in this country which is established under the respective states Administration of Islamic Law enactments. In the Administration of Islamic Law (Federal Territories) Act 1993³ provide that there shall be a committee known as the Islamic legal Consultative Committee (2) The committee shall consist of the (a) *Mufti* as a chairman (b) The Deputy *Mufti* (c) Two Members of the *Majlis* nominated by the *Majlis* (d) Not less than two fit and proper persons to be appointed by the *Majlis* and (e) an officer of the Islamic Religious Department of the Federal Territories to be appointed by the *Majlis*, who shall be the secretary.

Among the function of this committee are to discuss any issue at national level and eventually issue a *Fatwa* on it, its function also I to unify or standardize contradicting *Fatwa* in Malaysia. The committee plays the main role to advise the Yang-Dipertuan Agong in all matter regarding *Hukum Syara'*.

However, the writer's main purpose is to analysis how the position of *Fatwa* and its applicability in Civil and Syariah Courts of Malaysia.

¹ Prof. Dato' Dr. Hj. Othman Hj. Ishak. *Fatwa Dalam Sistem Pemerintahan dan Kehakiman*. Kuala Lumpur: IKIM. p. 1

² Farid Sufian Shuaib et al. 2001. *Administration of Islamic Law in Malaysia*. Kuala Lumpur: Malayan law Jurnal. p. 264

³ S 37

1.1 RESEARCH PROBLEM

As a legal opinion given by a *mufti*, *Fatwa* is a valid *hukm* according with *hukm syara'*. However, although there are a *Fatwa* committee and rules regarding to the *Fatwa* in this country, is that *Fatwa* is considered as a rule because of its capacity⁴ as a *hukm* especially the position and the applicability of it in both Civil and Syariah Courts of Malaysia.

2. SIGNIFICANCE OF RESEARCH

Many Muslims in our community are not aware of the existence of Fatwa Institution,⁵ because of that, the academic writing on the position of *Fatwa* in Civil Court and Syariah Court of Malaysia is necessary and important in order to give a better understanding about it.

3 AIM OF RESEARCH

- 3.1 Get a better understanding on the position of *Fatwa* in Civil Court and Syariah court of Malaysia
- 3.2 Increase the knowledge on *Fatwa*
- 3.3 Give the knowledge and the information to the community to understand clearly about the topic

⁴ Farid Sufian Shuaib. 2001. *Administration of Islamic Law in Malaysia*. p. 273

⁵ *Ibid*. p. 282.

4 OBJECTIVE OF RESEARCH

- 4.1 To research the function of *Fatwa* in Civil and Syariah Court of Malaysia
- 4.2 To research the position of *Fatwa* in Civil Court of Malaysia
- 4.3 To research the position of *Fatwa* in Syariah Court of Malaysia

5 SCOPE OF RESEARCH

This research will focus on the position of *Fatwa* in two types of court in Malaysia. First is the Civil Court which included Federal Court, Court of Appeal, High Court, Session Court and Magistrates' Court while the second one is the Syariah Court which is included Syariah Appeal Court, Syariah High Court and Syariah Subordinate Court.

6 LITERATURE REVIEW

As to make as a literature review, a book entitled "Administration of Islamic Law in Malaysia" has been chose. This book was written by Farid Suffian Shuaib, Tajul Arif Ahmad Bustami and Mohd Hisham Mohd Kamal who are the lecturer at the Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia (UIA).

The book was divided into seven chapters and one of the chapters explains about the Institution of fatwa in Malaysia. in that chapter, it explain about the definition and scope of fatwa, fatwa committee in Malaysia and its function, Basis of Fatwa, Enforcement of it and the offences against it and also the status of Fatwa in Civil Courts.

So that, this book is very useful to the writer because it has a relation with the academic writing project and it will assist the writer to generate the idea in order to find what is necessary to complete the research.

7 RESEARCH METHODOLOGY

Among the methods used by the writer are:

1. Library

The writer used the library to access the materials and references to prepare for this research.

2. Data collection

Several methods such as internet and others have been used as secondary sources for completing this paper. From these sources, the writer will know the development of areas related to this topic.

CHAPTER ONE

FATWA INSTITUTION

1.1 INTRODUCTION

1.1.1 DEFINATION OF FATWA

Fatwa is come from Arabic word, *Fata-yafu-fatwan*. *Fatwa* or *futya* is similar with *ifta'*, means *fatwa* that issued by a'lim related with *hukm shara'*. Ibn manzur explained that *futan* or *fatwa* have same meaning with *al ifta'* means the issuances of *fatwa* related with a *hukm* or decision made by *mufti* or *faqih*.

Al- Badakhshi defines *fatwa* as a legal decision on *hukm shara'* issued by a *mujtahid*. Jamaludin al Qasimi said, according to *al-raghib*, *al fatya* or *al fatwa* means answer on every problem in *hukm shara'*.¹ J.G Hava. S.j. stated that *fatwa* is a decision of a sacred law. Meanwhile, E. Tyan defines; *fatwa* is an opinion on point of law, the term law applying in Islam, to all civil or religious matters. Besides that, Joseph Schact also stated that “ A *mufti* is a specialist on law who given an authoritative opinion on points of doctrine. His considered legal opinion is called *fatwa*.

DG Mc Donald further defines *fatwa* as a formal legal opinion given by a *mufti* in an answer to a question submitted to him either by a judge or by a private individual.² *Fatwa* or *Fatwah* means a religious decree issued by a Muslim leader.³ Besides, *fatwa* also defined as an authoritative ruling on a point of Islamic law.⁴

¹ Abdul Munir Ya'akob & Wan Roslili Abd. Majid. 1998. *Mufti dan Fatwa di Negara-Negara Asean*. Kuala Lumpur: IKIM. V.1. p. 3

² Farid Sufian Shuaib et al. 2001. *Administration of Islamic Law in Malaysia*. Kuala Lumpur: Malayan law Journal. p. 264

³ Patrick Hanks. 1998. Oxford Dictionary. Dorling Kindersley Limited and Oxford University Press. p. 289

⁴ Judy Pearsall. 1999. The Concise Oxford Dictionary. Oxford University Press. p.517.

1.1.2 SOURCES OF FATWA

Any *Istinbat* of *hukm* produced at the time is limited. A *fatwa* will be given based on the questioned by the people. That means is *fatwa* will be produced based on what happened in that period.⁵ They won't make any *hukm* on matter that did not occur yet. That was practiced by *sahabah* to issuances of *fatwa*. In order to issuances of the *fatwa*, they referred to:

1. Based on the Qur'an al Karim because it is one of the basic in our religious. They might understand all about the content of the Qur'an clearly and precisely. Allah s.w.t had given it to them in Arabic Language. Therefore they knew the reasons of *asbab an-nuzul* of the Qur'an. They unable to understand anything if they are not Arabian.

Allah said:

﴿إِنَّا جَعَلْنَا قُرْآنًا عَرَبِيًّا لَعَلَّكُمْ تَعْلَمُونَ﴾

*We have made it a Qur'an in Arabic that you may be able to understand and (learn)*⁶

﴿وَكَذَلِكَ أَنْزَلْنَاهُ قُرْآنًا عَرَبِيًّا وَصَرَفْنَا فِيهِ مِنَ الْوَعِيدِ لَعَلَّهُمْ يَتَّقُونَ أَوْ يُحَدِّثُ لَهُمْ ذِكْرًا﴾

To the effect:

*Thus we have sent this down- an Arabic Qur'an- and in there some of the warnings are explained in detail, so that they may fear Allah, or that it may make them remember (Him)*⁷

⁵ Sheikh Muhammad Al-Hadoury. 1960. *Tarikh al-Tasyrik al-Islami*. Mesir: Maktabat al-Tijariah al Kubra. p.8

⁶ Al-Qur'an. Az-Zukhruf 43:3

⁷ Al-Qur'an . Tha Haa 20:113

﴿ وكذلك أوحينا إليك قرآنا عربيا لتنذر أم القرى ومن حولها وتتنذر يوم الجمع

لا ريب في هذا فريق في الجنة وفريق في السعير ﴾

*Like this we have sent by inspiration to you an Arabic Qur'an; that you may warn the mother of cities (Mecca) and all around her, and warn (them) of the Day of the Assembly, about which there is no doubt. (when) some will be in the garden, and some in the Blazing Fire.*⁸

﴿ كتاب فصلت آيته قرآنا عربيا لقوم يعلمون ﴾

*(This Qur'an) a book, in which the verses are explained in detail. A Qur'an in Arabic, for (those) people who understand.*⁹

Besides that, Qur'an provides detail explanations related to *hukm shara'*. Allah has said in the Qur'an:

﴿ ونزلنا عليك الكتاب تبيانا لكل شيء ﴾¹⁰

The Qur'an has a solution to solve any problem faced by the umat.

2. Based on sunnah Rasulullah (peace be upon him) they unanimously decided to follow his Sunnah and they believed on every matter what he has done daily. Abu Bakar, when were any problem come to him, he will refer to the main sources, which it is al-Qur'an al Karim. If there has a *hukm* or solution, he'll with it, and if there has no in the al-Quran, he returned to sunnah Rasulullah (peace be upon him) as a second source. If there has a *hukm* on that matter, he'll *hukm* with it.

⁸ Al-Qur'an. Syura 42: 7

⁹ Al-Qur'an. Fussilat 41: 3

¹⁰ Al-Qur'an. An-Nahli 16: 89

According to Abu-Baqa',¹¹ Hadith means name of report that means report. Besides that, hadith is words, *iqrar* that has been done by Rasulullah (peace be upon him). The Arabic Jahihiliah people realized that *al-ikhbar* has contained of some explanation. Because of what, they have a special day just for them which is known as *al-ahadith*. If we see to the words of hadith, it is cannot change to the other meaning.

Allah said in the Quran:

﴿ فليأتوا بحديث مثله ... ﴾¹²

The word hadith primaly means 'new'. It is used as opposed to *qadim* which means 'old'. From this followed the use of the term for a piece of news, a tale, a story or a report, be historical or legendary, true or false, relating to the present or to the past immediate or remote. In this sense the word has been used by the pre-Islamic poets, and in the Qur'an and the tradition of the prophet.¹³ The story tellers also were called *huddath*.

Sometimes, sahabah used *qiyas* or *ra'yu*.¹⁴ They have a reason to do that. When al-Qur'an and as-sunnah cannot be a main source, they decided to used *qiyas* or *ra'yu*. One of the sahabah, Abu Bakar used *qiyas* when there has no a *nas* or *hukm* in the al-Quran and sunnah.¹⁵ Among the famous *sahabah* that using a *ra'yu* to issue fatwa are Abu Bakar as-siddiq, Umar al-Khattab, Usman al-Affan, Ali Abi Talib, Ai'syah ummul mukminin, Abdullah ibn Mas'ud, Abdullah ibn Abbas, Zaid bin Thabit, Ubai ibn Ka'ab, Mu'az bin jabal and Umar al-Khattab, all of them often used the *qiyas*.

¹¹ Arrifin Omar & Mohd Nor Ngah. 1993. *Ilmu Hadis. Satu pengenalan dan kajian*. Kuala Lumpur: Dewan Bahasa dan Pustaka. V 1. p.3

¹² Al-Quran. At-Tuur 52: 24

¹³ P.K. Koya. 2000. *Hadith and Sunnah-Ideals and Realities*. N.pl: Islamic Book Trust. Second Edition. p.3

¹⁴ Sheikh Muhammad Al-Hadoury. 1960. *Tarikh al-tasyrik al-islami*. p. 114

¹⁵ Dr. Al-Warur Muhammad As-Sariyati. 1993. *Tarikh Fiqh Al-Islami*. Lubnan: Darul Nahdhah Al-Arabiah. p. 69

However, there has an opinion, which is said that *ra'yu* is despicably. They won't use *ra'yu* because *ra'yu* no need to *i'lmi* or knowledge. But *sahabah* has reasons to deny on matter that had been debated among them. Something is wrong about *ra'yu* is to issue of fatwa without refer to the *nas* or *dalil* from al-Qur'an. They have just following to their instinct. Umar Al-Khattab had said that: learn about *al-amsāl* and *al-ašybah*, then qiyas on that matter deeply.¹⁶

There are four type sources for that time: al-Quran al-Karim, Sunnah, Ijma' and Qiyas or Ra'yu ulaa'. There has no *khilaf* in order to issue fatwa whether it is referring to the Al-Quran or Sunnah Rasulullah. It is not due to the existence of *khilaf ulama'* but when the fatwa issued by them which was using the *ra'yu*. As we all understood, there are too small quantity of *ulama'* which is issuing fatwa by *ra'yu*.¹⁷ Abu Bakar has said that; "*this is my opinion. If it is correct, so, it's come out from Allah. And if it's wrong, it's come out from me. Therefore, may Allah bless me.*"

¹⁶ Dr. Al-Warur Muhammad As-Sariyati. 1993. *Tarikh Fiqh Al-Islami*. p. 115

¹⁷ *Ibid* p.116

1.2 THE HISTORICAL BACKGROUND

1.2.1 FATWA IN THE PERIOD OF KHULAFAT AR-RASYIDIN

This period began from year 11 to 40 H, after Rasulullah (peace be upon him) died. Rasulullah (peace be upon him) had chose Abu Bakar r.a to be the first *khalifah*. Then, it is continuously to Umar al-Khattab, Usman al-Affan and Ali Abi Talib r.a.

There are too many Islamic countries opened during this period. Therefore, Muslims spread their power through conquered on any countries such Syam, Cairo, Iraq and Paris. When these countries opened, there has no Arabian in those countries. As we all understood, the *a'dat*, or *u'rf*,¹⁸ the law of the land and also public relation in the financial management, administration and industry which is never done by the Arabian, all of these need to the *hukm* or rules. Thus, Muslims need to solve it by return to the *Shari'ah al-Islamiah*.

The Qur'an had been completed and united into one *mashaf*.¹⁹ However, sunnah rasulullah has not completed yet as a book. Just a small amount among *sahabah*, have decided to book the sunnah. Beside that, there was exist new *fiqh* sources, namely al-ijma'.²⁰ There was too many *sahabah*, used the ra'yu as a source in order to issue a *fatwa*. The ra'yu was also recognized by *shara'*. They cali it with 'Ruh al-Shari'ah.

Al- fiqh in the period of *sahabah* is known as *fiqh al-Waqiah*. *Fiqh al-waqiah* means, every *hukm* or fatwa issued immediately based on the matter occurred at the time.²¹

¹⁸ *U'rf* is whatever known by the people whether by act or by word, and they practice it in their life until its became familiar in their community. Because of that, *ulama'* did not compare it with *adat*. However, *u'rf* was divided into two part, *u'rf* by act and *u'rf* by word. Thus, there is an *u'rf* which is permissible and unacceptable in Islam. (Abd Latif Muda & Rosmawati Ali. 1997. *Pengantar Usul Fiqh*. Kuala Lumpur: Pustaka Salam. p. 256.)

¹⁹ *Mashaf* is a term in Arabic which means book and it is a compilation of all one hundred and fourteen surah.

²⁰ Dr. Al-Warur Muhammad As-Sariyati. 1993. *Tarikh Fiqh Al-Islami*. p. 78.

²¹ *ibid*