

REFERENCE TO *MADHAB*: THE POSITION OF NON *MUJTAHID MUFTI* AND JUDGE

Mohd Zakhiri Md Nor*, Hairuddin Megat Latif*, Mohammad Azam Hussain*,
Md Rejab Bin Desa* and Al Hanisham Bin Mohd Khalid*

The development of *Shariah* is very unique. Despite the primary sources of *Shariah*, *fatwa* plays an important role as the source engine for the growth of contemporary world and address the issue of present realities. *Fatwa* always refers to certain *madhhab* either Shafie, Maliki, Hambali or Maliki. In this regards, *mufti* and the judge place important role to the development of *Shariah*. However, it seems that the reference to *madhhab* is not clear among the society at our present day. Certain disputes could contain issues that receive different opinions from different *madhhab*. The paper first outlines the roles of *mufti* and the judge in *Shariah*. This paper shall examine the position of non *mujtahid mufti* and judge and also the essence of binding in *madhhab*. This paper concludes by outlining several recommendations for better understanding on the essence of binding with reference to *madhhab* in the context of non *mujtahid mufti* and judge. The methodology adopted in the research is purely qualitative, engaging in doctrinal archival research of classical and modern literatures on the position of non *mujtahid mufti* and judge with reference to *madhhab*. Since there is scarcity of resources on the subject matter, this study is deemed to be significant in filling in the gaps with reference to *madhhab* and position of non *mujtahid mufti* and judge under the *Shariah* law

Keywords: *Madhhab*, Non *Mujtahid Mufti*, Judge, Reference

1. INTRODUCTION

The *mufti* and the judge is part of the organ of Islamic state and they have to discharge their duties as the way it should be under the normative theory of *Shariah* (Mohd Zakhiri, 2010). The *mufti* who issues relevant *fatwa* on the issue at hand, which is one of the forms of clarification of Allah's *hukm* (legal ruling) and an utterance on *ikhbar 'an Allah* (Allah's behalf). (Calder, 2010) The *qadi* or judge who provides a decision or a determination which is binding on the litigants in respect of issues and evidence presented before him. (Mahmud Saedon, 1996) The decision or *qada'* (court judgment) is the right of Allah the fulfillment of which is a collective duty upon the society as a group; hence, it is noteworthy to point out that a *qadi* is a representative of the general community. (Muhammad Khalid Masud, 2006).

Based on the above, this paper examines the position of non *mujtahid mufti* and judge and the need to have reference to *madhhab*. This paper concludes by outlining several recommendations for better understanding on the essence of binding with regards to non *mujtahid mufti* and judge with reference to *madhhab*.

* School of Law, Universiti Utara Malaysia, Malaysia, E-mail: zakhiri@uum.edu.my; hairuddin@uum.edu.my; hmazam@uum.edu.my; rejab@uum.edu.my; hanisham@uum.edu.my

2. THE APPOINTMENT OF MUFTI AND QADI

As for the appointment of a *mufti*, one of the criteria of the *mufti* is that the candidate must be a *mujtahid* (Othman Ishak, 1998). In this regard, Othman Ishak further mentioned that Ibn Abidin categorized the *mufti* that qualified to issue a *fatwa* comprise of the following categories: First, a *mujtahid* that follows them in establishing legal maxim and the way as to how to deduce the *hukm* from *al-Quran*, *al-hadith*, *al-ijma`* and *al-qiyas* without relying on any methodologies or *qawaid hukm* that has been practiced by one *Imam*. Second, a *mujtahid fi al-madhab* should be capable to deduce a *hukm* from the evidences that had been explained by their *Imam*. Third, a *mujtahid fi al-masa'il* they do not issue *fatawa* that contradicts the opinion of the '*imam* in the legal methodologies or *furu`*', but they issue *fatawa* on the problem that has not occurred as yet based on the methodology that has been explained by their '*imam*. Fourth, a *muqallid* – they not able to exercise *ijtihad* but rather they have good understanding on methodologies and the *dalil* that has been deduced by the *imam*.

Therefore, in this case they can issue *fatawa* based on the explanation that they arrived at and they also can exercise *al-qiyas* on the problem in order to issue *fatwa*. The fifth type of *mufti* is a *mujtahid* who cannot exercise *ijtihad* but knows how to determine things based on the opinion of the *imam* that should be given preference that is better, stronger, clearer and suitable with *al-qiyas* and a reasonable opinion within the society. Sixth, a *muqallid* who cannot issue *fatwa* and cannot exercise *ijtihad* but can differentiate which opinion is the strongest between the *qaiif* opinion and the *zahir* opinion.

However, they cannot rely on the opinion of the '*imam* that has been rejected and cannot rely on the weak opinion. Seventh, a *muqallid - 'ulama`* who cannot exercise *ijtihad* to issue a *fatwa* because they cannot differentiate as mentioned before. Therefore, the Muslim society is prohibited to rely on this kind of *mufti*.

Sheikh Ghazali, 1986¹ pointed out that the *khalifah* (ruler) has the power to appoint a *qadi* (judge), generally. However, *qadi al-Quḍa`* (chief judge) can appoint a *qadi* to assist him if he has been given the authority to do so by the caliph. One cannot appoint himself as a *qadi*. In the state of emergency like in the case of no caliph or government, a *qadi* can be appointed by a group of knowledgeable people so that the administration of justice is not compromised.

The appointment of *qadi* is valid even though made by a cruel caliph. The *qadi* should be a *Muslim*, *baligh* (puberty), of sound mind, an independent, a male, '*adil* (just), not being handicapped and a *mujtahid* (one that can exercise independent reasoning).

For the case of a *mujtahid* judge, Mohamad Saedon, 1996 pointed out that the judge must have knowledge of the laws of the *Shari'ah* and his knowledge must extend to a comprehension of its principles and to the execution of legal decisions based on these principles. The judge should have knowledge of *al-Qur'an*. He

must have knowledge of the authentic *al-Sunnah* of the messenger of *Allah s.w.t.* He must have knowledge of the interpretations arrived by the first generations both regarding what they have agreed upon and what they had differed about in order to follow consensus and strive to apply his own intellectual judgment in cases of differences, and he must have knowledge of analogy enabling him to refer matters about which the law is silent to clearly formulated principles accepted by all. This will facilitate him to deal with new situations and ability to differentiate the truth from the falsehood.

3. ROLES OF *MUFTI* AND *QADI*

The roles of *mufti* are to provide explanation on rulings and issues sought by the person seeking explanation *mustafti* (the person seeking explanation) and the public, to provide coordination and ensure uniformity for the benefit of the public, to deal with problems and disputes among the public, to create situations of unity and brotherhood in the everyday lives among the *Muslim* public, to portray the high image and dignity of the Islam and its people in the eyes of non-*muslims*, and to become the center of reference in a subject matter relating to Islamic laws and regulations which arises from time to time. (Nooh Gadot : 2006).

In terms of the roles of the judge, the matter has been discussed in the book by al Mawardi. The book entitled "Laws of Islamic Governance: *Al Ahkam Al Sultaniyyah*" has been translated by Assadullah Yate stated that the jurisdiction or the roles of the judge are as follows:-to settle disputes, to avoid "*ulm*" and return, the rights to the rightful parties after the trial, to act as the administrator of the assets to the rightful people such as orphans, children, unsound people and those who are restricted from managing their own assets, to watch over *waqf* properties by guarding its safety apart from developing its growth. If there is no responsible party, the *qadi* has the power to administer the properties as instructed by the donor, to implement wills upon the beneficiaries based on what has been instructed by the deceased person, to marry off women who do not have *wali* on the condition that the partner is of the same *kafa'ah*. According to the *Hanafis*, a woman can marry herself, to issue sentencing on the convicted person. If the offence relates to the rights of *Allah s.w.t.*, the *qadi*' can do it himself, without waiting for the other party to sue on that offence. But if the offence relates to the rights of men, then it is up to the rightful parties. The *qadi* can just issue sentencing on the convicted persons after there is initiation of a legal suit by the relevant parties to watch over and eliminate obstacles on the highway and desert and demolish corridors of buildings which obstruct roads and routes, to choose, watch over and decide the rightful persons to become witnesses after fulfilling the required conditions. The *qadi* can also discharge the witness if there is any defect according to *shara'*, choose a stronger and more reliable witness and combine witnesses who are stronger and more reliable. This is a better and more appropriate method and to ensure

there are just sentences for the strong parties as well the weak parties; ensure justice in making judgments and issuing sentences between noble people and low-class people.

4. THE POSITION OF NON MUJTAHID MUFTI AND JUDGE

Abdullah Abu Bakar, 1998 pointed out that a non *mujtahid mufti* should fulfill the following conditions in issuing *fatwa inter alia*:-He shall not choose one opinion that contradicts in term of *dalil* even though there exists *dalil* that issued by other person that force him to choose that opinion. The act of choosing that particular opinion should bring good to the general public and avoid the element of hardship. In issuing *fatwa*, the *mufti* should have good intention. Therefore, the *fatwa* that been issued is not to satisfy the heart of the ruler and the general public at large. The *mufti* has to follow one opinion based on its *dalil*. The opinion that has strong *dalil* will be accepted while the weak opinion shall be rejected. Other than that, the *mufti* should know the *madhhab* that he has chosen. With the best endeavor, the *mufti* should avoid the *hukm* that is questionable and choose the *hukm* that unanimously agreed by *Ijma*.The *mufti* shall issue based on *maslahah* and the strong of the *dalil*. *Maslahah* that is quantifiable is only *maslahah* of the public and not personal in nature and the *mufti* that issues the *fatwa* should practice that particular *fatwa*.

Jackson, 1996 argued that the judge must follow the *fatwa* of his *imam* if he is a *mujtahid* or in case he is non *mujtahid* then he has to follow *fatwa* of another that is *mujtahid* jurist in the school of his *imam*. However, according to Muhammad Naim Yasin, 1984 and Md Nor 2015, one of the criteria is that the judge should be a *mujtahid*. In the case of the judge who is *not a mujtahid*, the jurists have different opinion. Abu Hanifah holds that if he is an ignorant but has the necessary uprightness in character (*jahil walakinna aadilana*), all his judgment must be reviewed, only the right ones with no apparent bias are to be enforced and bot to be set aside. For that matter, any judgment which is manifestly incorrect is to be set aside and not to enforced. The Maliki on the other hand, agree with the above position except according to their scholars, a judgment that is found to be correct is to be enforced in the above manner in cases is outside the purview of *ijtihad*. Hence matters of *ijtihadi* natures shall not be enforced. While the general view of Shafie and some Hanbali scholars is that the judgments issued by unqualified judge in term of the necessary knowledge are to be set aside. There is no need for it to be reviewed as it is basically not valid from the outset.

5. THE ESSENCE OF BINDING WITHIN MADHHAB

As far as the essence of binding within *madhhab* it can be shown in Jackson, 1996 critique on the work of al Qarafi in context which *madhhab* have to follow as whether the *madhhab* of the judge or the *madhhab* of the litigants before the court.

He stress that the *madhhab* of the defendant shall be upheld based on the principle of primary innocent.

The second issue is whether Maliki litigants could reject the judgment of Shafie judge. In this context the litigants have to follow the Shafie judge verdict because the verdict is specific and the *fatwa* is general. This follows the principle of specific takes precedence over the general. The judge also has to follow the *mashur* views within the *madhhab*.

This shows the views of the *madhhab* binds the judge if he is non *mujtahid*. In addition, in solving the disputes between the litigants the *madhhab* of the defendant has to be made as reference by the non *mujtahid* judge.

5. CONCLUSION

The *mufti* has the role of *nubuawah* and upholds the sanctity of the text. There are hierarchy of *mufti* and the non *mujtahid mufti* and judge should follow certain rules in discharging their duties and responsibilities. The non *mujtahid mufti* needs to follow the *mashur* view within his *madhhab*. Even the *mujtahid* judge is highly recommended for him to seek other opinion before makes judgment. In fact, not all matters need to bring before the court. The judge needs to follow certain rules and guidelines before giving judgment. This shows that reference to *madhhab* creates certainty to non *mujtahid mufti* and judge in discharging their duties. The fatwa by the non *mujtahid mufti* and judge could be review if it violates the *Shariah* rules and principles.

References

- Abdullah Abu Bakar (1998). Kedudukan Mazhab dalam *Fatwa in Mufti dan Fatwa di Negara-Negara ASEAN* edited by Abdul Monir Yaacob and Wan Rosili Abd Majid. Kuala Lumpur: Institut Kefaman Islam Malaysia.
- Calder, N. (2010). *Islamic Jurisprudence in the Classical Era* (United States of America: Cambridge University Press.
- Jackson Sherman (1996). *The Constitutional Jurisprudence o Shihab al-Dinf al-Qarafi*. New York: Brill.
- Mahmud Saedon Awang Othman (1996). *Institusi Pentadbiran Undang-Undang dan Kehakiman Islam* Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Mohd Zakhiri Md Nor (2015). *The Roles of Fatawa, Shariah Resolutions, Court Judgments and Governmental Policies in Contemporary Islamic Finance in Malaysia, with Cross Reference to the Practices in Saudi Arabia, Pakistan and Sudan*, INCEIF (Ph.D Thesis) (Unpublished).
- Mohd Zakhiri Md Nor (2010). The Application of Fatawa, Resolutions, Rulings by the Judge in Contemporary Islamic Finance in *International Conference on Islamic Banking and Finance: Cross Border Practices*. Harun M.Hashim Law Centre, International Islamic University.
- Muhammad Khalid Masud (2006). *Qāḍīs and Their Courts: A Historical Survey in Dispensing Justice in Islam: Qāḍīs and their Judgments* ed. Muhammad Khalid Masud United States of America: Brill.

- Othman Ishak (1998), *Fatwā Dalam Sistem Pemerintahan dan Kehakiman in Muftī dan Fatwā Di Negara-Negara Asean*, ed. Abdul Monir Yaacob Kuala Lumpur: Institut Kefahaman Islam Malaysia.
- Nooh Gadot (2006) Pengurusan *Fatwa* di Malaysia in Abdul Samad Musa, *et al.* (eds), *Prinsip dan Pengurusan Fatwa di Negara-Negara ASEAN*. Negeri Sembilan: INFAD.
- Sheikh Ghazali Abdul Rahman (1996). Peranan Kehakiman dalam Melaksanakan Hukum Syarak di Malaysia in 4th Asian Forum, Kuala Lumpur: Persatuan Syariah dan Undang-Undang (Persuma).