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FATWA AS AN AUTHORITY IN SECULAR COURTS OF MALAYSIA

Abstract:

Fatwa has been recognized as one of the sources of Islamic law in Malaysia. Fatwa issued by a Mufti's office becomes a reference to the Shariah court on any unresolved disputes and legal issues. Accordingly, the position of fatwa in civil court (a secular court) is called into question as there are many cases that refer to the fatwa ruling in such court. The extent of fatwa and views of mufti as authority in the Malaysian civil court has yet been explored as scope of discussion by many scholars. Thus, this article is a discussion on position of fatwa authority in the ruling of civil courts. This study was conducted using document analysis method on court cases to determine whether the views of mufti and fatwa being issued were really taken as reference and authoritative in the Malaysian civil court. The study found that secular court refers to fatwa in some cases and fatwa does affect the decision of the court ruling. However, in some other cases, the court did not refer to the fatwa ruling despite the availability of relevant fatwa. This study is important not only to reflect the position of fatwa as an authoritative source of law in the judicial system in Malaysia but also the influence of fatwa over the secular civil court.

Keywords:

Mufti, fatwa authority, civil court, expert evidence

Introduction

Study on position of fatwa as an authority in legal institution in Malaysia has often become subject of debate among legal experts in Malaysia. According to Mohd. Daud Bakar (1997), judges of civil court may seek opinion and justification from Muslim legal expert also known as mufti or fatwa on matters related to Islamic law for any case put on trial. Nevertheless, legal opinions issued by the mufti are not binding since fatwa is legal opinion in the form of advice despite it was issued by an official Mufti appointed by the government. This issue was supported by studies from Ahmad Hidayat Buang (2002) and Farid Sufian Shuaib (2010) on their observation that fatwa is not binding on the civil court as compared to the Sharia court.

However the civil court may request the mufti to issue a fatwa or legal opinion. The court may also request that the opinion to be authorized or request the mufti to justify their legal opinion of Islamic law. The acceptance of fatwa nevertheless depends on the court whether to establish the fatwa as part of authority or otherwise. This paper will explain the position of fatwa as an authority in civil court, whether it is recognized as a valid reference in a civil judgment or otherwise. Until today, discussion on fatwa authority in civil court receives little attention among local and international researchers who are more focused on management and administration of fatwa in Malaysia. Thus, this paper will explain the position of fatwa in civil court, to which extent does the fatwa taken as reference by the judges in reaching for decision on cases heard in court.

Fatwa and its Position as Authority in History of Legislation in Malaysia

Both fatwa and mufti have their authoritative position in the Malaya judicial system long before the British colonial arrival in this country. Their authoritative position was documented by several researchers and among them are Shamrahayu A. Aziz (2015), Mohd Hisham Mohd Kamal (2009), Auni Hj. Abdullah (2005) and @Alwi Abdullah Hj. Hassan (2005). The mufti are called in various names and positions such as Mufti, Qadhi, Imam, Khatib, Sheikh al-Islam, Sheikh al-Ulama, Qadi al-Malik al-Adil and numerous others which are evident of their role as experts of Islamic law to the public. Mufti or sultan's advisers used to play their part as counsel for case trial in court, and maufi have the authority to appoint judges and court advisors. Before the British arrival in Malaya, the mufti also serves as administration and judicial executive for every state in Malaysia. This was evident during the Malacca Sultanate whereby the Sultan acted as the judge for trial of cases in the palace with the assistance of *ulama'* as advisers. The impact from muftis' position as advisers to the Sultan later brings about the legislation of Malacca Legal Code or *Risalah Hukum Kanun* which was fully compiled during the heyday of Sultanate of Malacca (Abdullah @ Alwi Hj. Hassan, 2005).

Islamic law back then was the basis of legislative system in Malaya before the arrival of the British. The judicial institution for cases related to disputes among Muslims was the Hall Court / Qadhi Court. Study by Muammar Ghaddafi Hanafi et.al. (2015) argued that the Qadhi position has long existed in the Malay community since the reign of Sultan Muhammad Shah (1422-1444AD). Another study by Ramizah (2009) found that within the hierarchy of the Judicial System of the Malacca Sultanate (1400-1511AD), Qadhi was ranked higher as compared to other positions including the Treasurer. The Qadhi position was put under the Court Hall (now being called the Sharia court) and the Sultan hold the highest position in the court. Similarly, the position of fatwa and mufti's legal opinion played a major role in the governance system of the Malay Muslims and often become as reference for cases heard in court until the era of West pre-colonial. Nevertheless, their arrival has changed the landscape of legislation system in Malaya, with the declining importance on the role of Qadhi, mufti and fatwa, in fact the judiciary and fatwa institutions were separated into two different organizational structures.

British intervention in Malaya began officially with the signing of Pangkor Treaty on January 20, 1874 involving the British and Perak. Consequently, the British Resident became the adviser in all affairs except for matters related to customs and religion. However, the British covertly spread their ideology on various aspects related to political and administrative affairs, including the judiciary system with their introduction of civil laws, thus reducing the Islamic legal status which has long become the foundation of legislation in Malaya. As a result, once again, in the 1920s the Court Hall was no longer in existence (Ramizah 2009). The closure of Court Hall has eroded Islamic values in the legal system and it was replaced with civil law which has nothing to do with Islamic law. According to (Farid Sufian Shuaib 2009): "The established judicial system is filled with colonial English judges. The British also prioritize law codification. Thus Islamic law and institutions that are not legalized will be totally ruled out. "

However the British colonials could not simply ignore the absolute needs and importance of Islamic law in their judgment system. This is because most cases that were put on trial are dealing with Muslim affairs by which the civil judges do not have the expertise to resolve the disputes which are very much related to the Islamic law. Realizing on the importance of Islamic law, the British colonials have no choice but to recognize the Islamic law, fatwa and mufti as part of their current legislative framework in Malaya under the supervision of British advisers. In some states of Malaya, the British have set up the Mufti post in the judicial and legal systems for a number of tasks, especially in issuing fatwas. In the states of Straits Settlements, mufti and fatwa also play their importance as reference in the judgment. For cases related to *munakahat* affairs, the Marriage and Divorce of Mohamedans Act for the Straits Settlements was amended in 1908 to create the Mufti post appointed by the Governor. The mufti will act as as advisor in affairs related to the Islamic law. This position was created to assist the Registrar in resolution of appeals on marriage and divorce which were previously under the Qadhi's authority. Several books have been listed as

reference and authority in dealing with such cases. Some of them are Mohamedan Law by Syed Ameer Ali, Howard's Translation of the Minhaj al-Talibin and A Digest of Mohamedan Law by Neil B.E. Bailie (Abdul Monir Yaacob 2005 and Othman Ishak 1981).

In 1919, civil court in Johor have been obliged to refer to the Mufti to decide on legal dispute in court, should there be questions concerning with the Islamic law (Mohd Hisham Mohd Kamal 2009). In the Federated Malay States, the official Mufti was established following the case of Ramah v Laton [1927] 6 FMSLR 128. Two decades before that, namely in 1903, the Conference of Rulers were discussing issues of dissatisfaction on procedure of appeal in the Sharia court under fraud allegation against a magistrate who lacks knowledge of Islamic law. This matter led to proposal of a fatwa institution by the Sultan of Perak to resolve affairs involving Islamic law. The Sultan proposed that a case should be heard by the Mufti, assisted by two officers and a Europe magistrate. In the same year, the Court of Appeal from Federated Malay States decided that the Ramah v Laton case should be referred to the Qadhi / Mufti since the case involves Islamic law (Mohd Hisham Mohd Kamal 2009). The Court of Appeal in Selangor also ruled out that Islamic law is the state law and that the court shall recognize and use these laws (Ahmad Mohamed Ibrahim, 1999). Whenever there is a claim on matrimonial property made in the High Court, the judge will call forth a number of Qadhis to explain to the court on matrimonial property. The importance of Qadhi is a solid argument to address that civil court need and should consult with the Muftis as advisors of Islamic law, especially on fatwa issued in matters related to Islamic law.

The British colonials have also extended their influence at all states of Malaya by changing the existing legislation system which is based on customary and Islamic laws to the laws that they practised in their colonies such as the Indian contract law and property law based on the Australian Torrens System concept. The implementation of Islamic law was reduced and limited only to certain cases like the Islamic Family law. The Islamic law was gradually removed and segregated with the introduction of English law to replace the position of Islamic law (Rusnadewi Abdul Rashid 2013). The British managed to influence the legal system in Malaysia with their interpretation and notion that civil law is much better than Islamic law. The British have succesfully advise the Malay rulers to draft a written law by following the English law model either directly or indirectly. With regard to the judgment system, also with the advice of the British colonials, the Malay rulers have set up court and appointed British judges with civil law background. Any cases in court will be handled by the judges using their capacity and expertise and by refering to the law on Torts and Equity adopted in the Malay states (Ahmad Mohamed Ibrahim 1999). It can never be wrong to claim that the inclusion of civil law in Malaya meant that there is element of divide and rule, forcing the Malay rulers to agree to the British terms. This seems to prove that the English law have taken away the position of Islamic law as law of the states.

In 1948, there was a major change in the political system, governance and legislation with the establishment of Federation of Malaya on 1 February 1948. The Courts Ordinance was also established in 1948 to include the Sharia court in the national court structure together with the *Penghulu* Court. This set up has lowered the position of Sharia court as compared to the position of the Supreme Court, First Class Magistrate Court and Second Class Magistrate Court (Ramizah 2009). Nevertheless, despite the lower position given to the Sharia court, it is still part of the Federal courts. After Courts Ordinance 1948 was abolished, the position of Sharia court was once again reduced at the state level. The British subtly began to marginalise the Qadhi position and the Sharia court especially with the introduction of Subordinate Courts Act 1948 which resulted to the abolishment of Sharia court within the Federal Court system. Thus, the official Malaysian law only includes the Supreme Court, Sessions Court, Magistrate Court and *Penghulu* Court. This list gradually diminishes the Islamic court that has long been the basis of legal system in Malaya. Similarly, the position of other Islamic institutions are relatively put at a lower position as mentioned by Ramizah: "... The position of Islamic court is only a state court. Its position together with its mufti and qadhi is only at the state level as established in the Constitution of Malaysia, 1957, from the top beginning with the State Constitution, the Sultan / Yang di-Pertuan Agong (the Islamic State), Council of State, the Department of Islamic Affairs, *Kadi Besar* Court and District Qadhi Court ... "

Although the fatwa and mufti position are only at the state level, they are still considered authoritative and will always be consulted as reference to other court judges. Their authority will always be recognized by laws at state level.

Authority of Fatwa and Mufti's Legal Opinion in the Civil Court

Authority of fatwa and legal opinion of the mufti are fundamental to provision of fatwa with regard to Act, Enactment and Ordinance of Islamic States Administration in Malaysia. In the current context, fatwa is recognized by the legislative through authority of the Act, Enactment and Ordinance of Islamic States Administration in Malaysia. Official fatwa issued by the mufti and Fatwa State Committee will be acknowledged and recognized by the civil courts. The provision of Act, Enactment and Ordinance of Islamic States Administration proves the importance of fatwa as source of reference and authorized legal opinion on religious matters in civil courts. Thus whenever there are cases related to Islamic law in civil courts, fatwa could serve as reference and authority. It can be described by the following summary:

- I. A gazette fatwa is binding on Muslims within the state that gazetted the fatwa (all states except Kelantan);
- II. Mufti can not be sued or called upon to give opinion or evidence of Islamic law either in the Public / Civil Court or Shariah Court (Kelantan, Pahang, Negeri Sembilan, Kedah and Sabah and the Federal Territory);

- III. Any court other than the Shariah Court could request from the Mufti / Fatwa Committee to give legal opinions on Islamic Law and the Mufti can give his opinion to the Court (all states except Sarawak, Johor, Melaka and Perlis). Provision in Sarawak mentions 'any court, including the Shariah court'. A fatwa should be recognized by all courts in the State. The court mentioned here refers to the Shariah court (Penang, Selangor, Federal Territory, Terengganu, Negeri Sembilan, Perak, Sabah and Sarawak, Johor and Malacca);
- IV. In a court proceeding, submission of notification on a gazetted fatwa shall be a conclusive evidence of that particular fatwa (Sarawak only);
- V. Mufti and any members of the State Fatwa Council, could not be sued in any court of law or the civil courts for a gazette fatwa (Sabah only).

This proves that fatwa can be taken as reference by civil judges in deciding a case. Although fatwa is not binding on the civil judges, fatwa is better to be taken as reference to assist the judges in their judgment, especially in matters related to the Islamic law. Since the civil judges are not familiar in Islamic law thus they need the fatwa and mufti legal opinion to guide them in reaching for decision of cases heard in court. Moreover, it saves cost and time in completing cases that are put under trial.

Amendment on the Federal Constitution Article 121 (1A) in 1988 brings significant impact on the acceptance and authority of fatwa as source of reference in Civil Courts and Shariah Courts. Prior to the amendment, any decision issued by the Qadhi Court or fatwa issued by a mufti is not final, not authoritative, often disregarded and is not binding on the civil courts. Opinions and fatwa of mufti used to be rejected, for example, repudiation of fatwa on validity of endowment by the High Court in the case of Religious Affairs Commissioner, Terengganu and others v Tengku Mariam [1969] MLJ 110. The fatwa was rejected with the justification that the High Court, in reaching for a decision, does not refer solely to the Islamic law but taking into account the state public law. This decision creates conflict in giving priority of reference between legal opinion issued by religious authority like the mufti and man-made laws. In the case above, preference of reference is often given to opinions of civil judges thus dismissing the fatwa ruling. Such preference is among the issues that involve integrity of fatwa as source of reference before the 1988 amendment.

Nevertheless, there are some documentations and studies showing that fatwa and mufti's opinion have long been consulted and were given authority in some cases before the 1988 amendment. Among them are the case of *Re Bentara Luar, the Deceased, Hj. Yahya Yusoff and others v Hassan Othman and others* [1981] 2 MLJ 352, the case of *Viswalingam v Viswalingam* [1980] 1 MLJ 10 and the case of *Re Estate Sheikh Mohamad bin Abdul Rahman bin Hazim* [1974] 1 MLJ 184. Following the amendment, the authority of fatwa and mufti's opinion are often heard and consulted. Any case under the jurisdiction of the Sharia court can no longer be appealed, amended or even canceled by the civil courts (Nooh Gadot 2005). Fatwa

issued by the fatwa institution has always been taken as reference. There are some cases that referred to the fatwa and accepted by the court.

Although amendments were made, the position of fatwa and mufti's opinion as authority in the civil courts was still in debate because the power to interpret law is under the court's control. The capacity of fatwa authority is still debated among scholars and legal practitioners in Malaysia. In practice, the civil courts are not bound by the gazetted fatwa since the power to interpret law is subjected to the court's control.

Therefore provision of law that attempt to bind the court with a gazette or ungazette fatwa need to be further examined on its impact. However, what can be expected is that the legal provision may be ultra vires with the Court authorities conferred by the Constitution and Federal laws which are given more priority as compared to other laws. What more the laws of State Islamic Religious Administration and the gazette fatwa are only in the position of state laws and subordinate laws (Ahmad Hidayat Buang 2004). This observation was also presented in a study by Mohamed Azam Mohamed Adil (2012); Farid Sufian Shuaib (2001) and Suwaid Tapah (2004) in stating that the fatwa is not binding in the civil court as compared to the Shariah court. However, judges in the civil court are free to consult with the muftis for their legal opinion and explanation or fatwa related to Islamic law on cases put on trial. This view is based on a number of State Islamic Religious Administration Enactments provided. Nevertheless, for the sake of keeping good image, dignity and credibility of the muftis, provision of state law mentioned that they can not be sued to appear in court and give their views or being a witness for cases on trial. Nonetheless their affidavits and written evidence as an expert of legal opinion is admissible in court.

Beyond the issue of the pros and cons of fatwa being taken as reference in the civil court, fatwa seems to maintain its relevance in some civil court cases, as what has been practiced by the British courts in their former colonies (Kartik Raman 1994) and it is still practiced in the English courts until today (David Pearl 1995). In their effort to prevent any misunderstanding of problems in the system and Islamic law (Asaf Fyzee 1963), the civil court refers to legal opinion of the mufti as religious authorities and experts to gain more information about the Islamic law. In the meantime, the court has the right to repudiate legal opinion of the mufti and is not bound by fatwas issued by the mufti. The civil court dependancy on the mufti can be understood through decision made by Salleh Abas in the case of *Re Bentara Luar, the Deceased, Hj. Yahya Yusoff and others v Hassan Othman and others* [1981] 2 MLJ 352 which states that: "civil court judges are not trained in the Islamic law as compared to the mufti who has studied the interpretation of Islamic law. Similarly, the judge in the case of *Isa Abdul Rahman and others v Penang Islamic Religious Council* [1996] 1 CLJ 283 stating that the fatwa must not be binding on the civil court since the court itself should not be construed as Muslims, although the fatwa was called and stated in any civil proceedings. In this case, two contradictory fatwas on changes of waqf (endowment) status from two different states have been submitted to the civil courts, which resulted

to confusion on which fatwa is more appropriate to be authorized and which fatwa is more acceptable for the case.

Such views lead for further argument and debate on fatwa authority in the judgment system in Malaysia. It requires an in-depth analysis and discussion whether fatwa is actually taken as reference in civil court. With reference to some cases in court, there are several cases that recognized fatwa as reference. Since fatwa is an important instrument in the legislation context, though it is not binding to cases in the court, fatwa should be considered as an authority in court trials to avoid any dispute in court. In a study by Abdul Monir Yaacob (2005), it is argued that for cases involving Muslims and non-Muslims, the civil courts have the right for the cases jurisdiction and there are times when the court considers fatwa from the mufti before judgment is made.

Fatwa as Reference for Judgments In Civil Court

There are some cases in the civil court that refer to fatwa and legal opinion of the mufti and accepted them in the court's judgment. Issues such as change of religion and land endowment dispute are few examples of civil court cases that are often put on trial whereby fatwa and legal opinion of Mufti were taken as authority. The following cases are not the only cases that refer to fatwa after the amendment of the Constitution Article 121 (1A) 1988 since there are also other cases in the civil court which have referred to fatwa and legal opinion of the Mufti as authority even before the 1988 amendment:

1. *Majlis Agama Islam Negeri Pulau Pinang v Abdul Latiff Hassan (As Administrator of Estates of Hj Mohammad Hj Abdul Rasid; the Deceased) & Anor* [2016] 2 CLJ 150 (endowment land case).
2. *Ahmad Yahaya v Majlis Agama Islam Negeri Pulau Pinang* [2015] 1 LNS 802 and [2016] 1 CLJ 1018 (endowment land case).
3. *Ikbal Salam v Koperasi Permodalan Melayu Negeri Johor & Anor* [2012] MLJU 738 (property claim case)
4. *Nor A'shedah Jamaluddin @ Yusor & Anor v Datuk Zainul Arifin Mohammed Isa & Anor* [2012] 1 LNS 926 (defamation suit case)
5. *Fathul Bari Mat Jahya & Anor vs Majlis Agama Islam Negeri Sembilan & ORS* [2012] 4 CLJ 717 (fatwa violation case)
6. *Majlis Agama Islam Pulau Pinang & Seberang Perai v Khatijah Yoan & ORS* [2010] 3 LNS 5 and [2010] 4 CLJ 592 (endowment land case).
7. *Linggam Sundarajoo v Majlis Agama Negeri Kedah Darulaman* [1994] 2 CLJ 494 (Dispute over claim of the deceased whether the remain died as Muslim or non-Muslim)

8. *Hjh Halimatussaadiah Hj Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61 (violation of civil service ethic case)
9. *Dalip Kaur v Police Officer, Bukit Mertajam* [1992] 1 MLJ 1 and [1991] 1 CLJ Rep 77 (apostasy case)
10. *Re Bentara Luar, the Deceased, Hj. Yahya Yusoff and others v Hassan Othman and others* [1981] 2 MLJ 352 (endowment land case)
11. *Viswalingam v Viswalingam* [1980] 1 MLJ 10 (Muslim confirmation case).
12. *Re Property of Sheikh Mohamad bin Abdul Rahman bin Hazim* [1974] 1 MLJ 184 (property claim case)

Fatwa Not Taken as Reference for Judgments in Civil Court

Cases listed below are cases which were decided by the civil judge without considering fatwa as authority in the judgment. It is obvious that the judgments decided by the civil judges are not consistent with the existing fatwa issued by the fatwa institution in Malaysia. With reference to former list of cases that accepted fatwa as an authority in the civil court, namely in several endowment cases, the civil judges have looked into the fatwa and opinions of experts in deciding the verdict. However in some other cases which are also related to endowment matters, fatwa was not taken as an authority by the civil judges. Cases that exclude fatwa as the authority are as follow:

1. *Victoria Jayaseele Martin v Majlis Agama Islam Wilayah Persekutuan & Anor* [2001] 9 MLJ, [2011] 7 CLJ 233 (The case of non-Muslim lawyers applying as Sharia lawyers)
2. *Titular Roman Catholic Archbishop of Kuala Lumpur vs Minister of State Affairs & Anor* [2010] 2 CLJ 208 (claim on using the word Allah)
3. *Isa Abdul Rahman and others v Majlis Agama Islam Pulau Pinang* [1996] 1 CLJ 283 (endowment land case)
4. *Case of G Rethinasamy v Majlis Ugama Islam Pulau Pinang and others* [1993] 2 MLJ 166 (endowment land case)
5. *Commissioner of Religious Affairs, Terengganu and others v Tengku Mariam* [1969] 1 MLJ 110 (endowment land case)

Conclusion

Following the discussion whether fatwa should be taken as authority in the civil court, it was found that there are more civil court cases that took fatwa as reference than cases that are not. It is also concluded that the inclination of civil judges in considering fatwa as an authority demonstrates that fatwa is recognized by the civil judges as

source of legislation. Their recognition of fatwa also shows their confidence of Islamic law as reference in current legal issues. Coincide with the civil judges expertise on civil law, acknowledging and accepting fatwa as an authoritative reference is an appropriate action for entrusting Islamic law to the real experts.

The above cases also show that although there were cases put on trial under the jurisdiction of the civil courts, reference to the fatwa, Islamic law and legal opinion of experts in the Islamic law are still necessary to ensure that the judgment accurately conforms with the Islamic view. For trials involving Islamic law, reference to appropriate and relevant resources are highly important to ensure that smooth and fair judgement is taking place especially for cases heard in the civil court.

There are seven patterns on acceptance of fatwa as authority, namely (1) fatwa as reference and authority before the amendment of Federal Constitution Article 121 (1A) in 1988, (2) fatwa becomes more authoritative in the civil courts after the amendment, (3) civil judges referring to fatwa only at the state level but not at the National level, (4) the mufti can be called as a witness under the capacity of expert evidence, (5) a written statement or affidavit of muftis can also be accepted as an authority in court, (6) the acceptance of fatwa was not made in text form, but rather as evidence to arguments and facts and (7) either fatwa or mufti's legal opinion can be accepted as an authority even they are not gazetted. From all the patterns presented, it is obvious that the court recognizes the position of fatwa and mufti's legal opinion as authority for judgment as provided in the States Islamic Administration statute.

This study proves that civil judges are not obligated to accept and abide by the fatwa issued by the Fatwa Committee or the mufti's legal opinion realizing that submissions and truth of fact are given more priority rather than contents of the fatwa issued. This priority seems to imply that the civil judges are also capable of 'ijtihad' in resolving disputes in court without any guidance from the mufti. However, to ensure that the court have the right exposure and access of information on availability of fatwa with regard to disputed issues, therefore it is best for civil lawyers or judges to refer to fatwa and legal opinions from the authoritative experts because of their inability to master the vast field of Islamic law. Joint effort and ideas between civil and Shariah experts will certainly boost the ruling discourse and acceptance of fatwa in the Malaysian civil court.

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