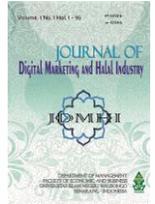




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## The Concept of Ifta 'in Establishing Halal Law (Study of Usul fiqh on Legal Determination Methods)

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### ABSTRACT

Fatwa and qadla activities as a form of delivering the laws of God, are the great mandate. In addition to requiring intellectual expertise, the fatwa giver must have moral virtue and spiritual intelligence. Indeed, this should be the figure of a scientist, especially the scholars who pursue Shari'a scientific fields. They must be able to create a balance between the power of reason and intuition of dhikr. Plus the level of concern for the social environment of the community. Because in their hands the change agenda is carried out.

### ABSTRAK

Aktivitas fatwa dan qadla sebagai suatu bentuk penyampaian hukum-hukum Allah, adalah amanat yang agung. Selain membutuhkan keahlian intelektual, pemberi fatwa haruslah memiliki keluhuran moral, dan kecerdasan spiritual. Memang demikianlah seharusnya figur seorang ilmuwan, apalagi para ulama penekun bidang keilmuan syariat. Mereka harus mampu menciptakan balance antara daya nalar fikir dan intuisi dzikir. Ditambah pula tingkat kepedulian atas lingkungan sosial masyarakat. Karena ditangan mereka lah agenda perubahan diemban.

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## **Introduction**

Reason given by God is the key to understanding the teachings of religion which includes Islamic law. Humans, especially Muslims will not be able to understand Islam without reason. Therefore, the Prophet Muhammad. State that religion is reason, and there is no religion for intelligent people. If this statement is related to the law, it means that the law and punishment are related to reason, there is no law or punishment for people who have no sense, so reason has a high position in the Islamic religious system. Intellect has a very important position and function in human life, and with that reason human thought processes to be able to grow and develop towards perfection. However, whatever the position and role of reason in the teachings of Islam, it must still get guidance and guidance from Allah in the form of revelation. This is because besides humans are weak, forgetful and indifferent, in themselves, there are also obstacles that cause it to not be able to use their minds properly and properly.

Related to this discussion, only qualified minds can do *ijtihad*. *Ijtihad* itself is a way to find out the law of something through the postulates of religion, namely the Qur'an and Al-Hadith by way of excavating (*istinbath*) and analyzing (*tahlil*) of a problem to the maximum point. The *mujtahid* is a *fiqh* expert who spends or exerts all his abilities to obtain a strong allegation of a religious law. In relation to the problem of *ijtihad*, humanity is divided into two groups. The group of people who have the ability of *ijtihad* and are able to carry it out, namely *mujtahidin*. And the second group are those

who do not have the means of *ijtihad* and are therefore unable to carry it out, they are ordinary people (mostly). Usually these ordinary people understand and practice the teachings of religion asking for guidance from the scholars and requesting *fatwas* from the *mujtahid*.

A layman will also always ask for a decision of a dispute problem faced by a *qodhi*. In this case the decision taken by a *qodhi* or judge is very closely related to *ijtihad* and *fatwa*. The two terms of the *fatwa* in response to the obscurity or obscurity of a law and *qadha* as a judicial decision are both legal products derived from the results of *ijtihad*. Both are also forms of the delivery of Allah's law to Muslims. In this short paper the speaker will discuss a little about the *fatwa* relating to *mufti* and *qadha* relating to *qadhi*. Based on the background of the problem above, the writer wants to present the problem formulation to direct the discussion in this paper to fit the target to be achieved. The formulation of the problem in this paper is as follows: What is the definition of *fatwa* and *qadla* and what elements must be in the *fatwa* and *qadla*? What is the problem with *fatwas* and *qadla*?

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## **Result and Discussion**

### **Fatwa Mufti**

*Ifta* '(Arabic version) is *ifta*', which means to give an explanation. While according to the term '*ifta*' is: "Efforts to provide an explanation of the law of sharia" by experts to people who do not know it. From these definitions it can be seen the nature or certain characteristics of the defendants are: 1). It is an attempt to provide an explanation. 2). The explanation given is about

sharia law 'obtained through the results of ijtihad. 3). The one giving the explanation is someone who is an expert in the field that he explained. 4). The explanation is given to those who ask who do not know the law.

#### 1. An attempt to give an explanation called Ifta

In reality, fatwa is a form of delivery of the results of multiplying God's laws to humans. Fatwa is used for a more specific and specific meaning than ijtihad, because ijtihad is the mobilization of the ability to obtain law from its source (al-Qur'an and al-Sunnah), with or without precedence by questions, in actual matters or limited discourse. Whereas fatwa is legal reasoning from its sources, preceded by a question submission in actual and casuistic problems.

#### 2. Mufti

The Mufti is the giver of an explanation of the shariah law 'that must be known and practiced by the people. The people will be saved if he gives the correct fatwa and will get lost if he is wrong in making the fatwa. And thus a mufti must have certain conditions. The experts of usul fiqh differed in formulating the conditions for becoming a mufti. The conditions for a mufti can be grouped into four groups as follows:

- a. General Conditions; because the mufti is a person who will convey matters relating to the shariah law 'and its implementation, he must be a Muslim, convert, mature, and perfect in his mind.
- b. Scientific Requirements; namely that the mufti is an expert and has the ability to do jihad. For that he must have the conditions as the conditions that apply to a mujtahid, including knowing well the arguments of sam'i and knowing well the arguments of aqli.

- c. Personality requirements; namely having moral integrity ('is) and being trusted. These two requirements are demanded from a mufti because he will directly become a role model for people in religion.

- d. Complementary requirements in his position as a role model cleric, according to Imam Ahmad, a mufti should have good intentions and i'tiqod, a strong stance and be known among the people

#### 3. Mustafi'

Mustafi' is a person who does not have knowledge of syara law 'in whole or in part and therefore must ask others so that he can know and do good in a religious matter. Basically, those who ask for fatwa are ordinary people who do not know anything and are unable to do ijtihad. If a layman has asked for a fatwa from a mufti let alone he has implemented the fatwa, is it possible for him to withdraw from the fatwa? This became the talk of the scholars. Al-asnawi (from the Shafi'ite clerics) and Ibn Hummam (from the hafiafiyah clerics) claimed the existence of an ulama agreement about not being able to withdraw from a mufti to follow another mufti in the same issue. Al-Amidi quoted ijma 'ulama in this matter. Ibn Subki also did not allow this, but did not mention the existence of ijma'ulama, aside from excluding if the fatwa had not been practiced. Furthermore Ibnu Subki put forward a number of bandigan opinions on that opinion in the form of exceptions, namely: a) Must not leave the opinion of the mufti by solely asking for a fatwa, b) must continue to follow the mufti if he is sure of the integrity of his opinion, c) It must continue to follow the opinion of the mufti if he has dedicated himself to it. From the last opinion, there is a sign that there is no need to continue to follow the opinion of certain mujtahids. On the principle of not having to

follow a mufti as the conclusion above, there is one thing that should be noted by someone who moves the mufti is that he does so not for negative purposes, such as to cancel what he believes by moving to another mufti.

#### 4. Fatwa material

It has been explained that the fatwa or fatwa material is sharia law 'obtained through ihtihad. In this case the mufti is the same position as the judge, which is to convey the law to the people, the fatwa is conveyed by the mufti with his words after receiving questions from the people. If the mufti is a mujtahid, the law delivered is the result of his own ijthad. If the mufti is a muqollid which according to some scholars is permitted, the law that is declared is a law that is produced through ijthad the findings of an imam who he follows his opinion.

#### 5. Legal LAW

Having an apathy or delivering a fatwa occupies the function of amar amar ma' ruf nahi mungkar, because it conveys religious messages that must be done or shunned by the people. Therefore, the law of law is originally Fardlu Kifayah. If in a region there is only a mufti who is asked about a law that has occurred and would be missed if he did not immediately take an offense, then the law of the mufti is fardlu ain. But if there are other mujtahid of the same or better quality (according to the ulama's view which requires looking for something more afdhol) or the problem that is asked to him is not urgent to be solved immediately, then the law of piety for the mufti is fardlu kifayah.

#### 3. Mufti Muqollid

There is a controversy among scholars about the ability of someone who has not reached the level of muhtahid, aka muqollid, to act as mufti. In this case there are two classifications of cases in describing opinions among the scholars. First,

the muqollid who intends to make the reconciliation refers to the opinion of the mujtahid who is still alive. Secondly, the muqollid who wanted to make the statement referred to the opinion of the mujtahid who had died. In the first classification, when a muqollid favors by referring to the opinion of the mujtahid who is still alive, there are several versions of the opinion.

First, absolutely not allowed. This opinion is supported by Abu Husain al-Basri and a group of ushuliyin. This opinion is based on the argument that if a muqollid is allowed to charge with his Imam's school of thought, surely it is also permissible for the layman to speak, because both of them quote the opinion of their imam. Whereas obtaining lay people to have an obligation is a violation of the results of the consensus of scholars'. However, this argument is refuted with an assumption, that a muqollid has the ability to analyze the arguments that are used as a legal basis by his role model mujtahids, so he is said to have knowledge about the schools of the mujtaahid. Therefore, it is fitting that the muqollid fatwa be accepted. As for muqollid who do not yet have the ability to analyze the arguments of their role model mujtahid, the fatwa cannot be accepted. Both are absolutely permissible, this opinion is supported by Ar-Razi and Al-Baidhowi. In their analysis, they base their arguments on the word of God: *"then ask someone who has the ability, if you all don't know it."* (Q.S. An-Nahl 43)

Whereas the muqollid who wanted to hold this position knew the role models of mujtahid's opinions. So there is no harm if he is devoted. However, this argument is rejected because the content of the above verse is not directed at the problem of someone who believes by simply knowing the role of Mujtahid's opinion. Because this knowledge is not enough to mention as

someone who knows that what is stated is really the opinion of mujtahid, his role model is in accordance casuistic, right and in accordance with the problems faced by the fatwa applicant. Because of this kind of muqollid, the fatwa is unacceptable.

Third is permitted when there is no mujtahid, because this kind of condition is forced. Therefore, if there is a mujtahid, the muqolid fatwa cannot be accepted. This opinion was expressed by a group of scholars. The third opinion with arguments of this kind cannot be accepted because the basic foothold whether or not a fatwa of a mujtahid is based on the ability of the analysis of the arguments on which the legal synthesis of the mujtahid's role model is based. Not based on the absence of mujtahid.

The four muqollids are allowed to claim on condition that they know the legal basis for taking a role model mujtahid, have the ability to analyze the propositions, and are able to develop problems from the basic rules and spark of opinions of the mujtahid role models. Strictly speaking, a muqollid who may conduct a fatwa is someone who has the potential to be able to istimbath. Whereas in the second classification, that is, in the case when a muqollid has an obligation by referring to the opinion of a mujtahid who has died, controversy surrounds this problem. There are at least four versions.

First absolutely allowed to follow mujtahid who has died. This version is supported by the majority of scholars, the Shafi'i Imam said, "Madhabs will not die with the death of their owner." In their analysis, they poured an argumentation, that their opinions still remain eternal even though the owner has died. If it is not permissible to put taqlid to people who have died, there will inevitably be disordered joints of life as well as unclear norms and social institutions in accordance with shari'ah parameters. This is due to the absence of

muthlaq mujtahid who gave fatwas on religious issues. In addition, if the opinion of the mujtahid is considered to be full along with his death, surely his narrative and his will are also considered to be extinct, because the narratives, wills and opinions have in common. Though the reality is not the case.

After making a claim that this opinion is the most valid, Al-zarkasyi added, that this opinion is also based on the words of the Messenger of Allah. "*follow two people after my death, Abu Bakr and Umar.*" (HR. Turmudzi) and "*my best friend is like the stars, with whomever you follow him, you will get a clue.*" (HR. 'Abd bin Humaid)

Secondly, it is not permissible to follow the opinions of mujtahid who have died, this version of opinion is supported by Al-Razi and Shi'ites. This opinion holds to two arguments.

- a) If the mujtahid is still alive, he might revise his ijtihaqd. And if he renews his ijtihaqd, of course the first opinion will be revoked.
- b) Mujtahid who has died, his opinion cannot be considered immortal. Evidently, by denying the unanimity of opinions of other ijma participants 'while he was still alive, ijma' cannot be considered valid. 'Ijma' was only considered legitimate - of course with the same opinion and other ijma ' - after he died.

This second argument is refuted by the fact that there are opinions of some scholars' who state that the denial of a mujtahid - even though he has died - in the ijma forum 'is always under consideration, this is also with the existence of ijma' on the difference of opinion. Besides that, ijma ', as the views of some scholars', can be effective after the death of all the agreement makers. Of course ijma' cannot be made as proof, because in reality, all the dealmakers have

died. Based on the assumptions of the second opinion version of this opinion, the codification (bookkeeping) reference books of the school after the owner, only serves to know the methodology of ijtihad in one issue, as well as to know the opinions that are mutually agreed upon (muttafaq) and opinions that are mutually exclusive. still controversial (mukhtalaf).

Third, may follow the opinion of mujtahid who has died if there are no mujtahid who are still alive. This is because there is a very urgent need. This opinion was held firmly by Ikiyah and Ibn Burhan. Al-Ghozali in his work *Al-Munkhul* emphasized that while there were still mujtahids who lived in his time, it was up to the Muqallid to follow him. He even claimed that there was an ulama agreement 'proposal on the prohibition of doing taqbid to mujtahid who had died. Whereas if at one time there was no mujtahid, then the obligation of the muqallid was to choose a great mujtahid who had died, who had the highest level of ability to reduce problems with the right methodology and analytical power. In addition, he is required to clarify the mujtahid school to those who have high credibility and are fully knowledgeable about their schools.

Fourth, may follow the school of the deceased if the opinion of the school of thought is narrated by people who truly master the methodology of his school, as well as having the capacity of knowledge at the level of the mujtahid. Because by knowing the methodology, he will be able to select and filter out opinions that are relevant to the times. This opinion was expressed by Al-Amudi and Al-Hindi. Al-Ustaz Al-Hakim, as quoted by Wahbah Al-Zuhayli, indicated that allowing the reconciliation of mujtahid who had died would kill the Islamic thought movement, and cause stagnation (ignorance) of thinking and creating, in order to answer the times. Furthermore Wahbah put forward an

assumption that the stagnation of thought is not merely because it is permissible to put taqlid on the earlier mujtahids. Kejumhudan happened only because of the discourse of closing the door of ijtihad that was brought up by some 'muta' akhkhirin ulama, which was no more just because of the negative factors that arose temporarily at that time

Wahba Zuhaili gave several emphases, at least there were three things that became the basic principle of mufti (which is still muqollid) in giving fatwa, when he wanted to choose the opinions of several scholars:

- a) Choosing the opinion of scholars based on insurance arguments. Therefore a mufti is not allowed to choose opinions on the basis of a weak argument.
- b) Berijtihad with as much as possible by still paying attention to the opinions of scholars who have become a joint agreement (muttafaq alayhi)
- c) Do not obey the passions, and must prioritize propositions and problems that are universal.

### **Qadha Qodhi**

Etymologically it is derived from Arabic language which contains many meanings, including law, al-farq min syai ('getting things done), qat al-munaza'at (resolving disputes), and al-amr (Orders). Someone who decides a case is called qodhi or judge. Qodhi is the person who makes the law and has the power of force, and qadha is the result of the decision. In this case there are several definitions of the fiqh scholars about qadla whose essence cannot be separated from the etymological understanding above, among the definitions are as follows.

Hanafi Islamic scholars define qadla with a binding decision that comes from the government to resolve and decide disputes. The

Maliki madama school defines qadla by reporting on sharia law 'through binding and definite means. Syafi'i and Hanbali madama scholars define qadla by resolving disputes between two or more parties based on Allah's law. Then there are also other opinions that say qadla is to decide the law between humans correctly and decide the law with what Allah has revealed.

Some fiqh experts divide the pillars of qadla into five parts, as follows: 1) A judge or qadli is a person appointed to settle the charges and dispute. 2) Law, i.e. qadli's decision to resolve disputes and resolve disputes. 3) Al-mahkum bih, namely rights 4) Al-mahkum alaih, the person sentenced on it. 5) Al-mahkum is the plaintiff of a right which is a mere human right (a civil right).

#### Conditions to be a judge or qodli

Experts provide conditions in appointing a judge or qodhi even though there are differences in these conditions. The intended conditions are as follows:

##### a. Free man

Talking about whether or not women can be judges is a matter of khilafiah. Jumhur, namely Imam Malik, ash-Shafi'i, and Imam Ahmad bin Hanbal argued that women should not be absolute judges. Imam Hanafi believes that women may be judges in civil cases, not in criminal cases. But here Ibn Hazm absolutely permitted women to be judges.

The reason Jumhur ulama forbids women from becoming judges is because of the hadith of the Prophet:

Will not get the glory of a people who blame their affairs to a woman (HR. Al-Bukhori).

The reason Imam Hanafi allowed being a judge in civil matters was from the hadith of Imam Bukhori's history above. Same with the reasons

used jumbur too, but different in putting the rules of ushul fiqh used. According to Hanafi's fiqh rules "the prohibition does not show the damage that is prohibited. It even shows to the law that is prohibited ". Because there will be no prohibition on something that is not possible to do. On this basis, according to Hanafi the above hadiths actually show the validity of women as judges.

While the reason for Ibn Hazm to justify women becoming judges mutually because of the word of God: "If you decide on matters between humans, then you should decide fairly". (Qur'an, An-Nisa: 58). According to him the dhomir (pronoun) found in the word حَكْمَتُمْ includes men and women.

##### b. Sensible (have intelligence)

This condition was agreed by all scholars. Judges must be intelligent, wise, able to obtain explanations and respond to something that is impossible.

##### c. Muslim

The reason why Islam is a condition to be a condition for a judge, because Islam is a requirement to be a witness of a Muslim, according to jumhur ulama. Therefore, non-Muslim judges must not decide on Muslim matters.

In this case the Hanafi school of thought argues in more detail, namely allowing non-Muslim judges to decide the case of non-Muslims, because people who are deemed competent to be witnesses must also be capable of becoming judges. However, it is also not permissible for a dzimmi infidel to break a Muslim's case because a dzimmi infidel cannot be a witness for a Muslim.

##### d. Fair

A judge must be protected from illicit acts, honesty is believed, both when angry or calm, and his words must be true.

In this case there are differences of opinion between the Hanafi and Shafi'i schools. The Hanafi group is of the opinion that a wicked Judge's ruling is if it is in accordance with shariah and the law. Whereas the Shafi'i group is not allowed to appoint the wicked to be judges or qadli because the wicked cannot be accepted as witnesses.

e. Knowing all the legal points and branches

The judge or qodhi must know the legal subjects and branches of the law in order to obtain a way for the case submitted to him. In this case, Hanafi allowed Muqollid to be a judge according to the opinion of Imam al-Ghazali because finding a just person and an expert in ijthad is very difficult with the provisions appointed by the authorities.

f. Hear, see, and not mute

A mute person cannot be appointed as a judge or qodhi because a mute person does not mention a decision that has been handed down. Likewise, deaf people cannot hear the statements of the parties, whereas blind people cannot see litigants. But here Syafi'I allows blind people to be judges or qodli even more so, people who are strong and healthy

### **Appointment and Dismissal of Qodli**

#### **1. Appointment of Qodli**

It has become a certainty that the people need authorities who discipline, regulate and maintain the comfort of their lives. It is not possible for the government to handle the community so servants are needed who carry out various people's affairs and carry out the burdens of government. They carry out according to their respective fields. Qodli was appointed by the ruler of the presidential government or his deputy. A qodhi cannot raise himself.

#### **1. Termination of Qodhi**

According to the Shafi'i school of thought, the government has the right to dismiss the qodhi which it adopts if there is a reason that wants it, and it is not justified in terminating it without any cause. This is related to the benefit of Muslims and the rights of the people. It is not justified the dismissal of innocent qodli because it is equated with time when it is related to the rights of others.

There is also an opinion that allows the government to fire Qodhi without any mistakes. This opinion is based on a history that Ali ibn Abi Tholib had appointed Abu Aswad (as qodhi) then he fired him. Then Abu Aswad asked, "Why did you fire me?" Ali replied: "I actually see the height of your words to the litigants."

### **Qadha law**

Qadha 'punishes fardhu kifayah, an Imam is obliged to appoint a Qadhi or more for mankind in each region or country, as needed; in order to settle disputes, enforce the law of had, punish properly and fairly, restore the rights of others, calm people who are wronged, and see the benefits for Muslims and so forth.

### **Fatwa And Qadha Equations and Differences**

In the literature there is no specific discussion about the similarities and differences between fatwas and qadla. This needs to be compared between fatwas and qadla based on the description mentioned above so as to get similarities and differences between the two. The most basic similarities between fatwa and qadla are as follows:

1. Equally the results of ijthad based on the Qur'an and Al-Sunnah.
2. Equally in the form of legal provisions.
3. Equally produce a legal product.

The most basic differences are as follows:

1. Fatwa is a personal product (non-binding) or can be on behalf of an institution. It does not have a forced power, while the qadla of the product on behalf of an institution or state (binding) has a forced power.
2. The Mufti can refuse to issue a fatwa on the matter that the fatwa is requested for. While qadla may not refuse the party who submitted the request for justice, even though the reason for the regulation does not yet exist.
3. The basic fatwa is knowledge (knowledge), namely mufti, is based on the knowledge possessed, while the basic qadla is a fact (reality) sought by qodli so that qodli decides on the basis of that fact.

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## Conclusion

The activities of fatwa and qadla as a form of conveying the laws of God, are a great commission. In addition to requiring intellectual expertise, the fatwa giver must have moral virtue and spiritual intelligence. Indeed, this should be the figure of a scientist, especially the scholars who pursue Shari'a scientific fields. They must be able to create a balance between the power of reason and intuition of dhikr. Plus the level of concern for the social environment of the

community. Because in their hands the change agenda is carried out.

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