

Fatwa as a Non-State Legal System: A Critical Analysis from the Perspective of Pakistani Society

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Abstract

The present paper gives a critic of the task of issuing *Fatwa* as a non-state legal system in Pakistan which in fact means legislation of Islamic law by any religious expert out of the state legislation. It discusses some important issues facing by Pakistani people but could not be solved in the light of the changed context and public interest which is in fact a failure of true understanding of the task of issuing fatwa. In the light of the historical development of the activity of issuing *fatwa*, this research argues that getting knowledge of strict literal translation of the Qur'an and confinement to the study of the traditional juristic opinions does not accomplish the prerequisites to become a mufti. Hence, it is necessary for the contemporary *muftis* of Pakistan to insight into the social, economic and customary problems of the people and to strive hard to resolve them in the light of the changed context and public interest. (200 w)

Keywords: Fatwa, history, contemporary mode of issuing fatwa, social issues, conclusions and recommendations

Introduction

Islamic Republic of Pakistan has been divided into different sects and *masalik*. Each of them has its own *madaris* that are producing *muftis* in a greater number who have authority of issuing *fatawa* in the light of the traditional rulings of their respective *Ammah*.

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Constitutionally, the legislative authority is Parliament whose majority of the members is illiterate and unaware regarding both aspects of the knowledge, i.e., modern sciences and Qur'anic sciences. To recognize *Shar'i* validity of any law made by the Parliament, Council of Islamic Ideology has been established whose recommendations have no binding force (Constitution of Pakistan, 1973, Art, 227-230). The third source of legislation is judiciary which has authority to legislate through the process of interpretation. The function of the interpretation has been assigned to the High Courts, Federal Shari'at Court and the Supreme Court of Pakistan (Constitution of Pakistan, 1973, Art, 251-203). So far as concerned, the task of issuing *fatawa* in Pakistan, it has been exercising by a great number of *muftis*. For a correct understanding of the activity of issuing *fatwa* it is better to have a bird eye view of the historical development of this process.

1. Historical Development of the terms Ijtihad, Mujtahid, Fatwa and Mufti

The word *ijtihad* has been derived from the Arabic word *Jahd* which literally means to strive, pain, trouble and to spend effort in search of anything (Ibn Manzur, 1300 A.H., Vol.3, p.132). Gad declares: "Then judge (think, consider) O you with eyes" (Qur'an:59:2). Another corresponding Arabic word is "*juhd*" which means capacity and capability to do something (Ibn Manzur, Vol.3, p.133). Hence, this word is attributed to both to do effort, striving hard and to the capacity of one person. During the time of the prophet and the companions word *ijtihad* was technically used in the meaning of personal opinion (*ra'y*) not necessarily based upon any evidence, in the absence of any clear provision of Qur'an or Sunnah (pbuh) regarding a particular case and it was considered as a third source of interpretation to interpret and to legislate to fulfill the demands of the changed needs of the people.

The term *fatwā* has been derived from the Arabic word *Fata* and is spoken as *futya*, *fatwa* and *futwa*. Literally, it may be defined as an issue decided by a jurist or *faqih* (Ibn Manzur, Vol.4, p.13450). For instance, the verse: "She said: O chief! Decide the matter regarding mine" (The Qur'an: 27:32). It is also used in the meaning of explanation such as the text: "O notables! Explain (*Aftuni*) to me my dream" (The Qur'an: 12:43). In this text, the word *fatwa* is used in the meaning of explanation. There are other synonyms of this word such as *Ifta* and *Istifta*. It is stated in the Qur'an: "They (*yastaftunaka*) ask your legal opinion (or instruction) concerning women, say: Allah (*yuftikum*) opines you about them" (4:127).

In this text, the word "*Yastaftunaka*" means to ask or to raise a query concerning women and the word "*Yuftikum*" leads that God Himself describes the *ḥukm* what you ask for. There are five components of "*fatwa*": *Al-Istifta* which means a query concerning an issue, *mustafti*, the person who raises query, *mufti*, the person to whom the query is raised, *ifta*, the task to issue a *fatwa* and the term *fatwa* that is the *ḥukm* or legal opinion of a *mufti* over that particular issue. Technically, the word *fatwa* may be defined as a legal opinion of a *mufti* over an issue raised before him to resolve ('Abd al-Karim, Zaydan, 1976, p. 130). It is also defined as information about the *ahkam* of Allah Almighty concerning obligation, permission and prohibition (Shihab al-Din Ahmad bin Idris, al-Qarafi, 1387 A.H., Vol.4, P.53).

It is important to note that during the period of the companions, the traditional Muslim jurists and their disciples, both terms *fatwa* and *ijtihad* were used synonymously for the ruling of an independent *mujtahid* or mufti and he who had no capacity to do *ijtihad* was also declared as ineligible for issuance of *fatwa* (Muhammad 'Ali, al-Shawkani, 1937, p.265). For instance, Imam Shatibi defined a *mufti* as a deputy of the Holy Prophet (pbuh) among the Muslim Ummah (Abu Ishaq al-Shatibi, 1389A.H., Vol. 4, p.243). Ibn Qayyim (1955) described that a *mufti* is a reporter of God's *ḥukm* regarding an issue (Vol. 4, p.224). It was in later period when the *mujtahidin* or *muftis* were categorized in different categories and the term *mufti* was started to be used only for a person who is expertise of the *madhhab* of his teacher or Imam (Shaykh Muhammad al-Khidri, n. d., pp. 320-324). For instance, Ibn al-Abidin (1784-1836) a Hanafi jurist divided Muslim jurists in to seven grades. Four of them were declared as independent jurists while other three were called as followers or *muqallidin* (Vol.2, P.231).

The majority of the Muslim jurists of this era however, divided a *mujtahid* into two major categories: Independent *mujathid* (mutlaq) and dependent/muqallid *mujtahid* (follower of a teacher/imam). An independent *mujtahid* means a person who interprets the legal texts of the Qur'an and the Sunnah (pbuh) in the light of his own interpretive modes and thus, derives Islamic law. He establishes his own rules of interpretation based on the general interpretive principles of the Qur'an and the Sunnah (pbuh) and does not follow any other jurist. A *mujtahid muqallid* has limited capacity to interpret the texts of the Qur'an and Sunnah (pbuh) and follows the interpretive techniques of his teacher/ imam.

This type of the *mujtahid* is sub-divided into four types such as *mujtahid al-muntasib* or affiliated *mujtahid* who has capacity to do *ijtihad* but follows the interpretive techniques and modes of his teacher to derive Islamic law but his own juristic opinion on a particular issue may be different from his teacher. Then *mujtahid fi al-madhab* who follows the juristic modes and opinions of his imam but at the same time he is able to derive new laws for which no ruling is found by his Imam. Third type is *mujtahid al-murajjih* who is the follower of his imam in all aspects. The function of this jurist is to choose and to prefer any one of the rulings issued by his predecessors. He decides the contemporary issue in the light of the *fatawa* of the earlier jurists (from his own school of law) and prefers one opinion over the other on the basis of the strength of its arguments. Lastly, *mujtahid al-muhafiz* who is expertise of his *madhab* and the function of this jurist is to find out the logical reasoning and causes behind the decisions of his predecessors and then to apply these logics by way of analogy to the new cases brought before him. He just searches out the base and the logic of the *fatawa* of his predecessors (Jamal al-Din, Abd al-Rahim, al-Isnawi, *Nihayah al-Sul fi Sharah Minhaj al-Usul*, 1343 A.H., Vol.4, p.552). In this way, the concept of issuing *fatwa* from a *mujtahid muqallid* was initiated by the followers of the traditional Muslim jurists.

They were reluctant to exercise independent *ijtihad* out of the way of their respective Aimmah and confined themselves to the discussion concerning principles and the modes of their teachers, preference of their intellectual capacity and ability over others etc. Further, the *muftis* were also divided into two types: *Mufti mustaqil* and *mufti ghayr mustaqil* (Uthman bin `Abd al-Rahman, Ibn al-Salah al-Shaharhuri, (ed). Dr. Muwaffaq bin Abd Allah bin `Abd al-Qadir, 1986, p. 86). It is necessary for a *mufti mustaqil* that he must be a mature person and an expertise of the language of the Qur'an, its syntax and grammatical rules. He must know all the legal rules of Shari'ah from the Holy Qur'an which are five hundred in number. Likewise, he should have a firm grasp over the strange of the Qur'an and Sunnah. Similarly, from Sunnah (pbuh) he should know the occasion and the circumstances under which a particular ruling was made by the prophet (pbuh) or by the companions and then by his imam. Further, he should have knowledge of the general principles of Islamic jurisprudence (Al-Qarafi, p.436). He should be free from all types of prejudices. He should not have affiliation to any particular thinking or group. He should be open minded and to accept the opinions of the opponents. He should not consider himself beyond any doubt and mistake. He should not follow his own desires and wishes(Abu Zahrah, 1958, p.308).

In this sense, a *mufti mustaqil* has same capacity and ability as that of *mujtahid mutlaq*. A *mufti ghayr mustaqil* means a *mufti* who cannot reach the capacity of a *mufti mustaqil* and relies heavily upon the precedents of his predecessors. He may be a *Mujtahid al-muntasib*, or *mujtahid fi al-madhab*, or *mujtahid al-murajjih*, or *mujtahid al-muhafiz* or *muqallid*.

2. Contemporary Situation of Issuing Fatwa in the Muslim World

The current situation of all over the Muslim world is that the process of *ifta'* has become a central institution of the Muslim societies to resolve the contemporary issues of the Ummah. Many of the Muslim governments appoint religious scholars on the reserve seats in their legislative bodies. The situations of modern *mufti*, the public and private, vary from state to state. Some formal institutions of fatwa have been established in many countries, e.g. World Muslim League in Mecca, Fatwa Committee of OIC and the Council of Islamic Ideology in Pakistan (Khalid Masud, 2005, pp.22-25). Many specialized committees of muftis are also working which answer the queries of the people and provide solution to their contemporary problems (Weal B. Hallaq, *Islamic Law and Society*, 1994, p. 214). Likewise, Dar al-'Ulum in India is performing the function of issuing *fatawa*.

3. Contemporary Situation of Issuing Fatwa in Pakistan

In Pakistan, the task of issuing *fatawa* has been exercising by a number of religious sects and each of them claims of following its particular *maslak* in the light of its true teachings. There are unlimited *madaris* and their graduates are assigned authority to issue *fatawa* who in fact, are not expertise of Arabic language and their particular *madhab* and do not know the methods and the techniques upon which their predecessors had to base during the process of *ifta*. Majority of them do not know about the flexible and liberal approaches of their Aimmah. For instance, majority of the Pakistani scholars is the follower of Imam Abu Hanifah but only few of them have knowhow about the contextual, flexible and logical approaches of Imam Abu Hanifah and majority of them are deciding the contemporary issues in the light of the literal interpretation of the past juristic opinions of their Imam who elaborated and constructed the legal texts of the Qur'an and the Sunnah (pbuh) in the light of their contextual meanings, objectives, public interest, customs and his own logical reasoning.

Not only is this but there are number of people who do not know the parameters and the subject-matter of *fatwa* and are issuing *fatawa* regarding non-issues and are trying to sabotage the true spirit of Shari'ah. This unlimited and unrestricted authority of issuing *fatwa* in Pakistan has created so many problems for Pakistani people and especially for women. For instance, a *fatwa* was issued on April 2012 in Kohistan against the women of NGO's that they would be forcefully married to the local men if they dared to enter there. Likewise, on May 11, 2012, in a mosque of Noshki, Balochistan, a *fatwa* was issued that any women using a cell phone will have acid thrown on her face (Published in The Express Tribune, May 14th, 2012). This and similar *fatawa* not only cause to slander Islamic law but also cause to destruct the flexible structure of Islamic law and its liberal system of interpretation. However, the *fatwa* issued by a *mufiti* has no legal validity and remains optional to follow until adopted by the court through legal decision (Khalid Mas'ud, pp. 22-24).

4. Contemporary Issues of Pakistani People which Demand Flexible Fatawa

Pakistani society is facing many unprecedented problems which demand flexible interpretation in the light of their objectives and public interest. For instance, lack of scientific study of Islamic legal sciences and theories of interpretation, issue of *ru'yat al-Hilāl* on 'Iid occasion, issue of banking interest, issue of unlimited population, illiteracy, issue of the status of women and issue of *hudud* implementation etc. However, majority of Pakistani scholars are reluctant to perform *ijtihad* for the solution of these and similar problems. They address only family issues in quite traditional manners and show less concern to the socio-economic and political issues. It can be judged by the detailed discussion which was arranged by a newspaper "Daily Jang" in November, 2004, on the topic of *ijtihad*, its need and capacity of a mujtahid etc. Unfortunately, majority of the participants were not in favor of the renaissance of the process of *ijtihad* as practiced by the companions and the traditional Muslim jurists. Some of them however, declared that the issues like *ru'yat al-Hilal*, family planning, banking interest, political structure of the government, and issue of extrajudicial divorce might be solved through *ijtihad* and suggested for institutional *ijtihad* (Council of Islamic Ideology Pakistan, *Ijtihad: A Quarterly Journal*, (June, 2007), pp. 81-94).

Some of these problems are given here which need to be solved by way of re-interpretation of the past judgments in the light of the general policy of Shari'ah and keeping in view the contemporary social, economic, and political conditions of Pakistani society.

4.1 The Most Striking Issue is of Illiteracy.

At present, illiteracy in Pakistan is one of the most burning issues which require a serious intention of the religious scholars because these guys hold a strong position to decide the socio-economic issues of the people at gross root level. In fact, Pakistani people are facing extreme thinking regarding getting education of worldly/secular and scientific issues. There are religious minded people who condemn worldly and as well as scientific education and favor only literal understanding of the Qur'an, Sunnah (pbuh) and traditional *fatawa* of their Aimmah and thus, try to confine the young generation to the study at *madaris*. This impression however, has made the common men confused and put them into anxiety as every Muslim just wants to please Allah and His last messenger (pbuh). The credit goes to the wrong interpretation of the *hadith* (pbuh) that "Getting knowledge is obligatory for every Muslim". In this text the word knowledge is a general word and includes all types of knowledge, religious and secular but it is being interpreted as specific text and the term knowledge is used only in the meaning of religious knowledge and is confined to the knowledge of the literal translation of the Qur'an and some *fiqhi* books of the later traditional scholars.

By ignoring the act of the Prophet (pbuh) when he stipulated regarding the prisoner of Badr that any prisoner who could read and write would be set free for no ransom if he taught ten Muslim children to read and write (Sirah Ibn Hashsham, Vol.2., p.345). Getting knowledge in fact is one of the objectives of Shari'ah. For instance, the object behind the prohibition of drinking wine is the preservation of intellect if we see in perspective of the criminal law but if the same object is studied in perspective of intellectual capacity, it reveals that getting education is necessary to enhance and to develop one's mental capacity and enables him to live, to earn in more respectful way on the one hand and to preserve it from negative thinking and evils on the other. Hence, it is necessary that both religious and worldly knowledge should be taught in the same institutions at the same time. The purpose of education should be to produce people who are imbued with Islamic learning and character. The education should make the people capable of meeting all the economic, social, political, technological, physical, intellectual needs of society. It is evident that the educated people are more concerned regarding the progress of their country and the welfare of the people than uneducated persons who in themselves become problem for the development of country.

Likewise, special intention should be given to the education of girls. For, Islam did not differentiate between male and female regarding education. Awareness program regarding education should be started from grass root level at the mosques.

4.2 Another hot issue is lack of scientific study of the Qur'anic sciences, Sunnah (pbuh), philosophy of Islamic jurisprudence and Islamic legal theories. Majority of the *muftis* have no clear concept regarding legal sciences and knowledge of Islamic legal theories in modern legal context. It is this reason that they are not agreed to find out any flexible solution for an issue as held by the companions and the traditional jurists. For instance, Hadrat 'Umar held many contemporary issues in the light of the objectives of the provisions of the Qur'an and Sunnah (pbuh) rather than their literal meanings such as the case of three divorces at a time, suspension of cutting hand during famine, retaining of the conquered land of Iraq in the state treasury for the interest of the future generations, issue of paying *zakat* to new Muslims and many more (Abu Yusuf, 1302 A. H., pp.24-27). Likewise, Imam Abu Hanifah ever preferred the principle of public interest over literal meaning of the text and solved many contemporary issues broadly in the light of the changed context and changed needs of the people. Unfortunately majority of our muftis neither agree to re-interpret the Qur'anic texts and Sunnah (pbuh) nor think about modification of earlier *fatawa* in the light of their objectives and public interest to compete the challenges of the modern world.

4.2 The other issue is the problem of defining the scope of capitalist banking interest and its analogy on *riba*. Whether the contemporary capitalist banking interest is equal in status to *riba* or not? The question arose two centuries ago but the Muslims did not realize its seriousness until the present time. During the time of the Prophet (pbuh) *riba* had to occur due to loan transaction and resulted in the exploitation of the poor segment of society who borrowed money from the rich segment to fulfill their basic necessities (*daruriyyat*) and could not pay it back as they consumed loan for their survival (). In fact *riba* is the only financial transaction which has been declared prohibited by Allah Almighty through revelation with the threat of severe punishment. Without scientific understanding of the provisions regarding *riba* in its original context and without any sound analogical deduction, the *hukm* of *riba* practiced by Arab has been imposed upon the interest of the capitalist banking interest by majority of the contemporary Muslim by ignoring the fact that the issue of *riba* was taken by the companions as an ambiguous issue how can its *hukm* be applied to the modern banking interest?

Hadrat 'Umar bin Khattab is reported to have wished might the Prophet had defined *riba* in explicit terms (Muhammad Shahrur, 1992, pp.467-68). Like present at that time there different types of interest and *riba* and only those types of interest were made prohibited by Allah almighty and His last messenger (pbuh) which were exploitative by nature. While discussing the issue, Ibn Qayyim held that Shari'ah demands only a just distribution of wealth or resources and that the private interest must yield to the public interest. Any rule which goes from justice to injustice, grace to trouble, and *maslahah* to mischief and from prudence to futility can never be a part of *Shari'ah* even though it is included therein by argumentation. Where a just and well ordered society is established, wherein economic justice finds a proper place and expression then notwithstanding the nature of the working process, it will be treated as part of Shari'ah and faith, and it shall be pleasure of Shari'ah and authority (vol. 3, p. 27, 543).

4.4 Likewise issue of *ru'yat al-Hilal* at Id occasion has become one of the most unsolvable issues for Pakistani people. The muftis of Pakistan do not have consensus of opinion regarding this minor issue and consequently, on every '*Id*' occasion people suffer from anxiety and disparity due to stagnated attitude of the muftis. Irrespective of the fact that Shari'ah insisted on the unity of Ummah, the muftis of Pakistani society cannot maintain unity among themselves. On every '*Id*' occasion, there are more than two celebrations in Pakistan and people cannot enjoy this great religious celebration.

4.5 The explosive growth of population of Pakistan is also a threatening issue. It is a matter of deep concerned that the contemporary society of Pakistan is passing through a period of grave crisis of over-population threatening the whole structure of the society. The population of Pakistan in 2011 was over 187,342,721 at 1.573% growth rate (Pakistan, An Official Hand Book, Islamabad, 2011, p.269). The rocketing expansion of the population is resulting in poverty which is increasing day by day and about 43% of the population is living below the international poverty line of US\$ 1.25 a day (Pakistan Planning Commission, *Report*, Islamabad, 2011, p. 23). We are unable to utilize fully and righteously the vast resources we have come to acquire. Lack of scientific knowledge, lack of technology, over population and poverty resulted in the failure to establish an organized society with strong moral and good consciousness and to maintain justice among the people.

This issue is also being exploited in the name of Islam by decalring family planning as prohibited and by ignoring the strong and authentic *ahadith* on the permissibility of the birth control policy by using contraceptive methods (*'azl*). In the same manners, the majority of the traditional jurists declared *'azl* as lawful and permissible in all cases (Al-Sayyad al-Sabiq, *Fiqh al-Sunnah*, n.d., Vol. 2, p.192).

Conclusions and Recommendations

From the above discussion, it has become clear that the activity of issuing *fatwa* is not an easy task. Ijtihad or *ifta* both have been considered as sacred duty and divine obligation to legislate and to keep pace with the changes of time and changed needs of the people. It is also a source to get pleasure of God. It is also concluded that the many contemporary *muftis* of Pakistan are issuing *fatawa* or making Islamic law without deep understanding of the Qur'anic sciences, Sunnah of the Prophet (pbuh), interpretive techniques of the companions and the traditional Muslim jurists and the objectives of their *fatawa* and in this way creating a grave misunderstanding among the Muslims of Pakistan regarding Islam.

A thorough study of the socio-economic and political issues of the Pakistani people leads to conclude that the contemporary Pakistani *muftis* have been failed to resolve them due to their rigid and inflexible attitude. The prevailing modes of issuing *fatawa* have become out-moded and retarded. Further, the generous distribution of the authority of issuing *fatwa* to a large number of institutions and individuals has created so many difficulties for the Muslims of Pakistan who do not know what is right and what is wrong from the perspective of Islamic jurisprudence.

In this context, it is suggested that the contemporary Muslim *muftis* must go back to their past legacy to examine how their predecessor were conscious regarding the solution of the problems of their age in the light of the objectives of the texts, customs and usages of that time and the public interest.

It is also suggested that the task of issuing *fatwa* should be exercised by well-educated and well-acquainted scholars of Islamic legal theories and philosophy of Islamic law. Not only is this, but they should be well-informed with all modern sciences including social, economic, psychological and scientific knowledge regarding a particular issue.

The sole purpose of issuing *fatawa* should be to make Islamic law compatible and accommodative to the contemporary needs of the society to meet the challenges of new issues created by every day changes of the life.

The institutions that are producing *muftis* are under obligation to teach and to train contemporary them in the light of the interpretive principle of time changes and legal changes (*taghyir al-ahkam bi taghyir al-zaman*). This rule has been declared as an independent source of interpretation by the traditional Muslim jurists (Ibn Qayyim, Vol.1, p. 355). The contemporary *muftis* must have awareness regarding the scope of the said principle.

However, the prevailing situation of the country, perplexity of the modern technical and scientific issues, political affiliations and above all lack of knowledge regarding true spirit of Islamic law and rigid attitude of the contemporary *muftis* lead to suggest that the task of issuing *fatwa* should be taken from the individual *muftis* and should be assigned to the Council of Islamic Ideology.

To make the activity of *fatwa* as a purposeful enterprise, the Council of Islamic Ideology should bring certain changes in its structure and interpretive policy. It should be free of all types of political and religious interventions. The members of the Council should be from the intellectuals, scientists, engineers, academician and scholars. The mode of issuing *fatwa* should be *ijtihad al-maqasidi* (purposive interpretation) and contextual interpretation to provide ease to people and to remove hardship from them rather than literal interpretation.

It is also necessary for them to have a comparative study of the jurisprudence and legal theories with western philosophy of law in order to be able to analyze Islamic law in the light of the contemporary legal theories to make it accommodative and compatible.

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