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PANCASILA AS THE SOLE BASIS FOR ALL POLITICAL PARTIES AND FOR ALL MASS ORGANIZATIONS; AN ACCOUNT OF MUSLIMS' RESPONSES

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*MASLAHAH* AND ITS APPLICATION  
IN INDONESIAN *FATWĀ*

**Khoiruddin Nasution**

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## *Maslahah and Its Application in Indonesian Fatwâ*

**Abstraksi:** Istilah (*masalahah*) merupakan salah satu teori dalam melakukan *ijtihad* dengan menggunakan akal untuk meingsitibathkan hukum dari *al-Qur'an* dan *Sunnah*. Teori ini terutama digunakan di kalangan ahli *fiqh* *Syi'ah* dan *Dzahiri*. Di kalangan ulama terdapat perbedaan tentang apakah teori *Maslahah* boleh dan dapat diterima sebagai dasar dalam penetapan *fatwa*. Termasuk di antara mereka yang menolak adalah Imam *Syafi'i*, yang *mazhab fiqhnya* sangat dominan di Indonesia.

Mempertimbangkan hal ini, tulisan berikut mengkaji tentang bagaimana penerapan *Maslahah* dalam *fatwa-fatwa* yang ditetapkan oleh berbagai kelompok atau individu ulama di Indonesia.

Untuk menjelaskan penerapan *Maslahah* di Indonesia, penulis pertama kali membahas metodologi yang digunakan dalam menetapkan dan mengeluarkan *fatwa*; dan selanjutnya mengkaji tentang aplikasi *Maslahah* dalam perumusan dan penetapan *fatwa* tersebut.

Menurut penulis terdapat dua kelompok *fatwa* di Indonesia; pertama, *fatwa individual*; dan kedua, *fatwa kelompok*. Sedangkan masalah yang dibahas kedua kelompok ini sebenarnya tidak berbeda; kedua kelompok ini pada umumnya merumuskan dan mengeluarkan *fatwa-fatwa* yang berkenaan dengan ibadah, dan dalam beberapa kasus, juga dengan hal-hal yang berkenaan dengan *mu'amalat*. Kedua kelompok ini tidak ada yang membahas masalah-masalah yang berkenaan dengan politik, semacam sistem negara, sistem pemilihan umum, dan demokrasi.

Terdapat dua metode yang sering digunakan individu ulama dalam menghasilkan *fatwa*. Pertama, adalah dengan langsung kembali kepada *al-Qur'an* dan *Sunnah*. Metode ini digunakan terutama oleh A. Hasan, tokoh Persis; dan A.R. Fakhruddin, tokoh *Mubammadiyah*. Metode kedua, adalah dengan merujuk kitab-kitab klasik, khususnya karya para ulama *Syafi'i*. Metode ini digunakan misalnya oleh tokoh semacam Sirajuddin Abbas atau Masduki Mahfudz.

Pada pihak lain, juga terdapat perbedaan dalam fatwa kolektif, yang dikeluarkan Majelis Ulama Indonesia (MUI) dengan yang ditetapkan organisasi semacam Muhammadiyah dan Nahdlatul Ulama. Perbedaan ini terutama muncul karena posisi MUI yang berbeda dengan posisi kedua organisasi tersebut, khususnya dalam hubungannya dengan pemerintah dan kaum Muslimin umumnya. MUI berfungsi khusus untuk memberikan saran kepada kedua pihak ini, yang pada gilirannya menempatkan MUI sebagai lembaga yang memproduksi fatwa.

Selanjutnya, karena keanggotaan MUI mencakup kalangan Muhammadiyah dan NU—serta organisasi dan pihak-pihak lain (pejabat pemerintah dalam soal yang berkaitan dengan soal umat Islam dan pemerintah) tidak mengherankan kalau fatwa yang dikeluarkan MUI juga merefleksikan keragaman pendapat dan kecenderungan intelektual. Metode yang sering digunakan MUI adalah dengan kembali kepada al-Qur'an, Sunnah, Ijma' dan Qiyas. Sedangkan metode pokok Muhammadiyah adalah kembali kepada al-Qur'an dan Sunnah, sesuai dengan ideologi Salafisme yang dianutnya. Sementara NU kembali kepada pendapat para ulama masa klasik, sesuai pula dengan paham Ahlussunnah wal-jama'ah yang mereka pegangi.

Meski seluruh organisasi atau lembaga di atas mengeluarkan banyak fatwa, mereka kelihatan tidak begitu sering menggunakan Maslahah sebagai dasar bagi mereka dalam mengistinbathkan hukum. Fatwa-fatwa yang menggunakan teori maslahah pada umumnya berkaitan dengan upaya untuk memecahkan dan menjawab masalah-masalah kontemporer dari sudut pandang hukum Islam. Termasuk di antara masalah-masalah kontemporer tersebut, misalnya, adalah tentang Keluarga Berencana, penggunaan IUD (spiral) sebagai metode KB, vasektomi, tubektomi; masalah sistem (bunga) bank dalam ekonomi dan keuangan, ihwal perkawinan wanita non-Muslim dengan lelaki Muslim dan lain-lain.

Dalam konteks ini, penulis menguraikan panjang lebar tentang pendapat dan fatwa-fatwa yang dikeluarkan ulama individual dan kelompok. Masing-masing mempunyai alasan, logika dan metode, yang sebenarnya bertitik tolak dari teori Maslahah. Namun, baik ulama individual maupun lembaga (kelompok organisasi) tidak pernah pernah menyebut Maslahah sebagai dasar dalam penetapan fatwa-fatwa mereka. Terlepas dari sikap semacam itu, penulis berargumen, bahwa penggunaan Maslahah akan semakin banyak dan dominan di masa-masa mendatang di Indonesia. Alasannya adalah bahwa kaum Muslimin akan menghadapi semakin banyak masalah-masalah kontemporer yang menuntut respon—berupa fatwa—dari para ulama, baik secara individual maupun kelompok.

## المصلحة وتطبيقها فى الفتاوى الإندونيسية

**الخلاصة:** المصلحة مصلحة تعتبر إحدى النظريات المستعملة عند القيام بالاجتهاد مستعينا فى ذلك بالعقل لاستنباط الحكم من القرآن والسنة. هذه النظرية تستعمل أولا عند الفقهاء فى أوساط علماء الشيعة والظاهرية. يوجد اختلاف عن هل نظرية المصلحة يمكن قبولها كأساس لإقرار الفتوى؟. ودخل فِيمَن يرفض ذلك الإمام الشافعى، ومذهب فقهه ذو سيطرة فى إندونيسيا. لتقييم هذه المسألة، فهذه المقالة تبحث عن كيفية تطبيق المصلحة فى الفتاوى التى تقررها بعض الأفراد أو العلماء فى إندونيسيا. ولتوضيح مسألة تطبيق قاعدة المصلحة فى إندونيسيا، فالكاتب أولا يبحث عن الطريقة المستعملة لتقرير وإصدار الفتوى وبالتالي يدرس تطبيق قاعدة المصلحة فى تنسيق وإثبات تلك الفتوى.

بناء على الكاتب، إنه يوجد قسمان من الفتاوى فى إندونيسيا. الأول، فتوى فردية. والثانى فتوى جماعية، إنما كلاهما -على وجه العموم- يبحثان ويصدران الفتاوى المتعلقة بالعبادات، وفى بعض المشكلات عن الأمور المتصلة بالمعاملات. فهذان القسمان منهما من يبحث عن المسائل المعنية بالسياسة مثل نظام الدولة، ونظام الانتخابات العامة وعن الديمقراطية.

توجد طريقتان الكثير استعمالهما فى إصدار الفتاوى. الأولى هى الرجوع مباشرة إلى القرآن والسنة. هذه الطريقة يستعملها أولا أحمد حسن، زعيم الاتحاد الإسلامى (PERSIS)، و أ. ر. فخر الدين، زعيم المحمدية. الطريقة الثانية هى الرجوع إلى الكتب القديمة، وبالأخص كتب علماء الشافعية. هذه الطريقة يستعملها مثلا العلماء مثل سراج الدين عباس أو مصدوقى محفوظ.

ومن ناحية أخرى، يوجد اختلاف فى الفتاوى الاجتماعية التى يصدرها مجلس علماء إندونيسيا ومثل ما تقرره المنظمات مثل المحمدية ونهضة العلماء، وهذا الاختلاف إنما ظهر خصوصا لما لمجلس العلماء من المكانة المختلفة عن مكانة المنظمين الآخرين ولاسيما فيما يتعلق بالحكومة والأمة الإسلامية على وجه العموم. فمجلس العلماء له مهمة خاصة فى إعطاء اقتراح إلى هذين الطرفين وبالتالي قد اعتبرا مجلس العلماء كمؤسسة لإصدار الفتاوى.

وبالتالى، لأن أعضاء مجلس العلماء يدخل فيهم المحمديون والنهضيون والمنظمات والأطراف الأخرى (الجهة الحكومية التى لها صلة بالشؤون الإسلامية الحكومية) فليس من العجيب إذا كانت الفتوى التى يصدرها مجلس العلماء ينعكس فيها الاتفاق فى الرأى وتصور الميول الثقافية.

والطريقة التى أكثر ما يستعملها مجلس العلماء هى الرجوع إلى القرآن وإلى السنة وإلى الإجماع والقياس. بينما الطريقة الأساسية للمحمدية هى الرجوع إلى القرآن والسنة مبنية على المذهب السلفى الذى تعتنقه. بينما نهضة العلماء ترجع إلى آراء علماء العهد القديم، متفقة كذلك مع فهم أهل السنة والجماعة الذى تعتنقه.

رغم أن كل المنظمات أو المؤسسات المذكور أعلاها تصدر كثيرا من الفتاوى، ولكنها فيما يظهر لم تستعمل كثيرا قاعدة المصلحة كأساس لها فى استنباط الأحكام. فإن الفتاوى التى تستعمل نظرية المصلحة على وجه العموم

هى التى لها صلة بالمساعى المؤدية إلى حل أو إجابة المشاكل المعاصرة من ناحية النظر الإسلامى، وداخل فى المسائل المعاصرة تلك مثلا موضوع تنظيم الأسرة واستعمال آلات منع الحمل، والتعقيم وفوائد البنوك فى البناء الاقتصادى، وزواج المرأة غير المسلمة بالمسلم وغير ذلك.

وفى هذه الصياغة، شرح الكاتب مطورا عن الآراء والفتاوى التى أصدرها العلماء سواء بصفة شخصية أو اجماعية. ولكل حجة منطقية أو نظرية، وفى الأساس من نقطة الانطلاق فى نظرية المصلحة بينما العلماء الفرديون أو المؤسسات (فرقة المؤسسات) لن تذكر المصلحة كقاعدة فى تقرير فتاويهم. بعيدا عن تلك الخطة، فإن الكاتب يقيم حجة بأن استعمال المصلحة يكون أكثر اتساعا ونقوذا فى الأزمنة الآتية فى إندونيسيا. ودليله هو أن الأمة الإسلامية ستواجه كثيرا من مسائل المعاصرة المطالبة للإجابة كفتاوى العلماء سواء من ناحية شخصية أو اجماعية.

In the history of Islamic jurisprudence there are two theories concerning ruling (*hukm*) on matters which are not mentioned in the Qur'ân or the traditions; one theory involves utilizing *ijtihâd al-ra'y*, such as *istihsân*, *istislâh*, and the other uses the implications of the text of the Qur'ân and the sunnah of the Prophet as determined by *qiyâs*, "reasoning by analogy." The former is commonly cited as used in Iraq and Madinah by Imâm Mâlik and Abu Hanîfah, whereas the latter is mostly utilized by Shâfi'îtes and Zâhirîtes.<sup>1</sup> Those who utilize the former theory maintain that *ijtihâd bi al-ra'y* is used when rulings are not found through *qiyâs*.<sup>2</sup>

Generally speaking a *muftî* to whom problems are commonly relayed, has the responsibility of finding ruling on certain matter,<sup>3</sup> despite the fact that to date the *fatwâs* have never been used as a means of justifying the policies and practices of the government.<sup>4</sup> In doing so a *muftî* normally performs an *ijtihâd* by *qiyâs* or as he feels appropriate to solve the matter at hand.

In Indonesia, there are two main types of *fatwâ*. (1) The *fatwâs* of individual Indonesian 'âlim ('ulamâ), such as those Sirajuddin Abbas,<sup>5</sup> Hasbi al-Shiddieqy (d. 1975),<sup>6</sup> Ahmad Hasan,<sup>7</sup> Peunoh Dali,<sup>8</sup> A.R. Fachruddin (d. 1995),<sup>9</sup> Masduki Makhfudz,<sup>10</sup> or Munawwar Khalil,<sup>11</sup> and; (2) those issued by a group of Indonesian 'ulamâ', for example, the Council of Indonesian 'Ulamâ' (M.U.I), Majelis Tarjih of the Muhammadiyah, the Bahtsul Masail department of the Nahdlatul Ulama, and Majelis Syura of the Majelis Syura Muslimin Indonesia (Masyumi). Unfortunately, not all of their *fatwâs* have been compiled and printed in book form.

To frame this discussion, classification concerning the nature of *fatwâs* and those who request them (*mustafi*) is in order. Some *fatwâs* are issued at the governments request when it seeks the advice of the 'ulamâ', some of which are directed towards the government policy or national stability. Others are voluntary issued by the 'ulamâ', some of which are directed towards the government, when it regards certain matters be in violation of Islamic law; this is usually given in the form of advice. Finally, most *fatwâs* are issued in response to the people, when a particular matter becomes problematic for the community and requires an immediate answer. This last kind comprises the majority of Indonesian *fatwâs*.

This essay will, therefore, present the methodology followed in issuing *fatwâ* as well as an analysis of the application of *maslahah* in the *fatwâ*. However before discussing this matter it is necessary to



discuss the theory of *maslahah*. For a clearer and more systematic presentation of the matter, this article will be divided into four sections. The first section will discuss the theory of *maslahah*. The third section will analyze the application of *maslahah* in *fatwās*. Finally, the last section will offer some conclusions.

However, before presenting this topic, it is necessary to note that the data used to analyze the decisions of the Council of Indonesian 'Ulamâ' (MUI) is the collection of *fatwās* issued between 1976 and 1987 and the 1992 report. Similarly, the report of the regional council of the 'ulamâ' of Jakarta from 1980 to 1985 will be taken as representative of the 'ulamâ'.<sup>12</sup> However, this report is not thematically different from issued by other Indonesian Muslim movements, although those issued by the Muhammadiyah and Nahdlatul Ulama contain more data. Consequently, only the *fatwās*, from individuals, the collections of A. Hasan, Sirajuddin Abbas, A.R. Fachruddin and Masduqi Makhfudz will be analyzed.

## The Theory of Maslahah

### The Definition of Maslahah

Etymologically the word *maslahah* is an infinitive noun of the root *s-l-h*. The verb *saluha* is used to indicate when someone or something becomes good and upright. *Maslahah* in its relational sense, means a cause, an occasion or a goal which is good. In Arabic it is said: *nazara fi masâlih al-nâs*, which means "he looked into the well-being of the people." The sentence *fi al-amr al-maslahah* is used to say there is benefit in this affair.<sup>13</sup>

In the Qur'ân various derivatives of the root *s-l-h* are used. The word *maslahah*, however, does not appear there. The Qur'ân uses the active participle of *s-l-h* very frequently. On one such occasion the meaning of this term is used thus; "They believe in Allâh and in the Last Day and enjoin correct conduct and forbid indecency and vie one with another in good words. There are the righteous (*sâlihîn*)."<sup>14</sup>

By contrast, for the opposite meaning of *s-l-h*, in the Qur'ân, the term *zalam* is used (he did wrong) (5:39) and *fasada* (he/it corrupted) (Q. 26: 125; Q. 27: 142 and Q. 2: 220).<sup>15</sup>

It is quite often claimed that *maslahah* as a principle of legal reasoning—broadly speaking, to argue that "good" is "lawful" and that "lawful" must be good—come to used at a very early period at the time of the development of *fiqh*. The use of this principle is attribut-

ed to the early jurists or even to the Companions of the Prophet. Some scholars associated its usage with Mâlik ibn Anas. Therefore, as stated by Mas'ûd, there seems to be confusion in equating the use of *maslahah* as a general term with its use as a technical term.<sup>16</sup> Rudi Paret maintains that *maslahah* is not used by Mâlik or Shâfi'î as a technical term, but the concept must have been developed in the pre-Shâfi'î and post-Shâfi'î period.<sup>17</sup> Paret does not, however, deny the possibility of the appearance of this term pre-Shâfi'î, and the post-Shâfi'î development of the concept of *maslahah* was a continuation of early methods of reasoning which were not yet formally defined. It is clear as a source of law when Shâfi'î defined the *ra'y* method reasoning and linked it to the revealed texts through *qiyâs*.<sup>18</sup>

### *Kinds of Maslahah*

In Islamic legal theory, *maslahah* have been divided into three categories: (1) *al-maslahah al-mu'tabarah* (benefits that are textually relevant) are the ones that have been explicitly recognized by the sharî'ah such as struggle (*jihâd*) for protection of the faith, retaliation (*qisâs*) for the protection of life and the prescribed penalties for theft, drinking and adultery, for the protection of property, intellect and chastity respectively. Muslim jurists recognize the validity of this kind of *masâlih* and the *ahkâm* (rules) on which they are based.<sup>19</sup> (2) *al-maslahah al-mulghâh* (benefits that textually excluded) are the ones that have been ruled out by the sharî'ah, for example, disproportionate distribution of inheritance between a man and woman on the basis of the following verse of the Qur'ân; "Allâh chargeth you concerning (the provision for) your children: to the male the equivalent of the portion of two females."<sup>20</sup> Another example is the prohibition of usury regardless of the apparent loss that many accrue to a money lender as a result. The jurists agree that this kind of *maslahah* cannot serve as a source of law. Prime facie they may seem beneficial, but in reality they are based on false assumptions (*mawhûmah*) and are thus harmful to an individual and society.<sup>21</sup> (3) *al-masâlih al-mursalah*. This kind of *masâlih* that have generally been defined as the *manâfi'* (things beneficial to men) that have neither been explicitly recognized nor ruled out by the sharî'ah.

There is no significant disagreement among the jurists with regard to the first two kinds of *masâlih*. As for the validity of *al-masâlih al-mursalah*, however, there are, theoretically at least, four trends of thought as follows: (i) there are the rejectionists, such as Shâfi'î and

Ibn Hazm, who argue that the acceptance of such *masâlih* would amount to an admission that the sharî'ah has not taken into account all the *masâlih* of the people, thus attributing an imperfection to the sharî'ah in spite of the divine declaration; "This day I perfected your religion for you and completed my favor unto you."<sup>23</sup> Their second criticism is based on the apprehension that the recognition of all *maslahah al-mursalah* would open the door for personal likes and dislikes to infiltrate Islamic law, thus undermining its divine nature. (ii) There are the Hanafîs who advocate the use of juristic preference (*istihbân*) along with analogy (*qiyâs*). The concept of juristic preference, irrespective of how they define it, is based on *al-mursalah*. Therefore, it can be said that they have relied on *maslahah al-mursalah* in their legal theory, even though they have not acknowledged this as they should have. In theory, the Hanafîs do not give much credence to *al-maslahah al-mursalah* as a source of law, but in practice they like the Shâfi'is, have resorted to it to solve unprecedented legal problems;<sup>24</sup> (iii) There are the extremists who rely too heavily on *al-maslahah al-mursalah*. In matters relating to transaction (*mu'âmalah*) they uphold that in cases where a *maslahah* and *nass* contradict each other the *maslahah* takes precedence. Tûfî, a Hanbalî jurist (d. 761 A.H), initiated this trend of thought, but did not receive much support from traditional scholars;<sup>25</sup> (iv) There are Mâlikîs who accept *al-maslahah al-mursalah* as a source of law in the conviction that Mâlik himself uses this principle extensively in his legal theory, albeit with due regard to the objectives of the sharî'ah and without violating any principle of the sharî'ah.<sup>26</sup>

Jurists then, divide *al-maslahah al-mursalah* into *darûri* (necessary), *hâjî* (needed) and *tahsînî* (commendable). *Darûri masâlih* are necessary because they are indispensable in sustaining the *masâlih* of *dîn* (faith) and *dunyâ* (this world), in the sense that their disruption results in the termination of life in this world. In the hereafter they result in loss of spiritual salvation and blessings. *Hâjî* are so called because they are necessary to give broader application (*tawassu'*) to the purpose of *masâlih* and remove the strictness of their literal application which led to impediments, hardship and, eventually, to the disruption of the *maqâsid*. *Tahsînî* implies the adoption of what conforms to the best customs (*âdat*) and the avoidance of that which is disliked by decent people. This type of *maslahah* covers noble habits, ethic and morality.<sup>27</sup>

### Condition of al-Masâlih al Mursalah

According to the Mâlikî, *al-masâlih al-mursalah* should conform to objective of the sharî'ah. It may not contradict any sharî'ah *dalîl* (proof of evidence) that has already conclusively proven (*qat'î*) that specific *dalîl* is not necessary for such *maslahah*. The absence of proof does not necessarily entail the negation of *maslahah* because for an *al-maslahah al-mursalah* it should appeal to human reason. The general criterion in this regard is that people may not reject it as something abnormal.<sup>28</sup> An *al-maslahah al-mursalah* must not cause an impediment in any matter relating to *dîn*. Matters relating to faith compared to an *al-maslahah al-mursalah* should be given preference.<sup>29</sup>

Zaidân adds two more qualifications which validate a *maslahah*: (a) it should be *haqîqî* (real, conclusive) and not *wahmî* (presumptive); (b) that the *maslahah* should be *'âmm* (general) and not limited to a particular person or to a group.<sup>30</sup>

### Arguments in Favor of and Opposing al-Maslahah al-Mursalah

Jurists justify their recognition of *al-maslahah al-mursalah* on a variety of grounds; (1) All the Islamic rules (*sharî'ah ahkâm*) contain *masâlih* of the people. If in any given situation a particular *hukm* is based on a text, consensus or analogy it should be accepted by believers as such. However, if a *hukm* is not explicitly based on any of the above three sources it would be determined on the basis of *al-maslahah al-mursalah*. A study of the *sharî'ah ahkâm* would indicate that they revolve around the concept of *maslahah*; any change in *maslahah* causes a corresponding change in *ahkâm*. Therefore, by basing the *sharî'ah ahkâm* on *maslahah* a jurist fulfils the intention of the sharî'ah.<sup>31</sup> (2) Experience shows that society undergoes change, new events occur, situations vary and new problems emerge. People at any given time may face a situation that did not exist in the past. Society may attach importance to certain *masâlih* that were not previously considered important. In such a flexible situation if the door is not opened for a jurist to solve juristic problems on the basis of *maslahah*, the sharî'ah will no longer guarantee benefits for the people and will not solve their genuine problems or meet the requirements of changing times, places and conditions in spite of the fact that it is considered to be valid for all times.<sup>32</sup> (3) the Companions of the prophet were faced with new situations after his death. They encountered new problems that had no precedents in the sharî'ah.

The fact that a particular problem was not specifically dealt with by the sharî'ah did not deter them from exercising their *ra'y* (considered opinion) in the light of the spirit of sharî'ah. They were concerned only with the fact that anything that ensures benefit and avoids *harm* is *maslahah*, hence a valid basis for their juridical opinion. Abu Bakr, 'Umar, 'Uthmân and 'Alî solved juridical problems, such as the compilation of the Qur'ân, the pronouncement of three divorces on single occasion and the second call (*âdhân*) for the Jum'ah (Friday) prayer, on the basis of *maslahah*.<sup>35</sup>

Mustafâ Ahmad Zaraqâ', in his article on the sources of Islamic law, quotes 'Allâmah ibn 'Âbidîn who says that "there are many issues that a *mujtahid* decides on the basis of conditions and *masâlih* of a particular time. With changing circumstances, these *ahkâm* keep changing too. This is due to the fact that the people whose requirements were taken into consideration no longer exist."<sup>34</sup> Ibn 'Âbidîn illustrates this principle with an example that a jurist, at one point in time, had given a *fatwâ* that teachers of the Qur'ân should not accept any remuneration from the people they teach. But later on they reversed their position, because teachers in the old days used to receive salaries from the government. After some time this practice was discontinued. Therefore, if the old opinion was upheld they (teachers) would not have been able to support themselves or their families.

Yet it should be noted that a new rule given on the basis of *al-maslahah al-mursalah* should not violate any of maqâsid of the sharî'ah; if it does, such *hukm* could be considered vain. The *maqâsid* of the sharî'ah have been categorized into five groups: protection of faith (*dîn*), life (*nafs*), intellect (*'aql*) and property (*mâl*).<sup>35</sup>

Disagreeing with this assessment, others put forward a variety of arguments. The *maslahah* comes with the sharî'ah, in contrast the *maslahah* is not stated by human beings, since the sharî'ah is already complete (*akmâl*). This is in accordance with Q. 6: 3.<sup>36</sup> If the *maslahah* is stated by people, the wish (*hawâ*) or *shahâwât* will penetrate sharî'ah and then the *mafsadah* to become a *maslahah*. If this happened, the sharî'ah would be different at certain times and places, then the *hukm* concerning any matter is *halâl* in certain place and time but *harâm* in other places or times.<sup>37</sup>

## The Procedure and the Method of Issuing Personal and Collective *Fatwâs* in Indonesia

### Personal *Fatwâs*

The issues discussed by the individual 'ulamâ' are generally not that different from those elaborated upon by groups of scholars, in the sense that both deal with matters related to *'ibâdât* and in some cases with *mu'amalah* matters. None of these discuss political issues, such as the state system, election system and democracy.<sup>38</sup>

The issues discussed by the individual 'ulamâ' are similar in subject matters, yet the age and the cultural and geographic environment in which an *'âlim* lives greatly influences the complexity of the questions and the answer given. For example, in his collection, Sirajuddin Abbas addressed only three questions related to contemporary issues, the legal rules for bank interest, lotteries and art, while the rest of his *fatwâs* elaborate upon *tawhîd*, *'ibâdât* and common *mu'amalah* issues.<sup>39</sup> On the other hand, in Hasan's collection, the issues touched upon were more complex since, besides similar problems to those in Sirajuddin's collection, he also discussed the issue of taking medicine while fasting, racism, engaging in the trading of snake skins, the possibility of identifying alms with tax, the problem of tax levied on money saved in banks, the sale of dogs, purchase by installments and preaching in cinemas. Similarly the issues discussed by A.R. Fakhruddin<sup>40</sup> and Masduqi are also quite complex and include legal ruling on watching TV, polishing hair, women going abroad to study without a *muhrim* and so forth.

*Fatwâs* can be disseminated through oral written mediums. The oral medium takes the form of a direct dialogue between the 'ulamâ' and the Muslim community, and usually takes place in mosques, schools or in *halaqah* (meetings), on special occasions such as the birthday of the Prophet and the celebration of the revelation (*nuzûl*) of the Qurân.<sup>41</sup> Sirajuddin and Fakhruddin's collections, are classified in this category and so far this is the only material of this type that can be found.<sup>42</sup> The written medium is produced through magazines and newspapers. When a person seeks an answer to a certain problem, he sends a letter to the media,<sup>43</sup> the answer to which, will then given by the 'ulamâ' through the same medium. In such a case, the magazine or newspaper is only the means by which the questions and answers are provided. Hasan's collections and some part of Fakhruddin, Munawwar Khalil, Peunoh Daly and Masduki Makhfudz's writing are included in this group.

There are two methods employed in the production of *fatwās*. The first is to provide an answer based on the Qur'ân and the Sunnah of the Prophet. This method is adopted by Hasan and Fakhruddin. However, there is a marked difference between these two figures. In giving an answer, Hasan always provide a long explanation, citing sources from the Qur'ân and the Sunnah of the Prophet which are related to the subject. In the case of two differing opinions, each with a different base either in the Qur'ân or the Sunnah of the Prophet, he tries to explain the Qur'ânic verse (sometimes the *asbâb al-nuzûl*) and the reliability of the *sanad* and *matan* of each Sunnah. Fakhruddin just gives a short and simple explanation. This is probably due their different audiences. Fakhruddin usually addressed the layman and the uneducated, while Hasan audience is much more educated and more diverse coming from across Indonesia. Another difference is that Hasan dislikes the use of *qiyās*, and only reluctantly uses it in worldly matters, where it becomes incumbent upon him to do so.<sup>44</sup> On the other hand, Fakhruddin relies extensively on *qiyās*, particularly in cases not stated in the Qur'ân or the Sunnah of the Prophet. Moreover, Hasan accepts *ijmâ'* but limits himself only to the *ijmâ'* of the companions.<sup>45</sup> Similarly, when there is no rule stated in the Qur'ân or the Sunnah, prohibiting a certain action, he relies on the principle that permissibility is the original state of things (*al-asl fi al-ashryâ al-ibâhah*).<sup>46</sup> Therefore, any activity concerning worldly matters which is not prohibited by the Qur'ân or the Sunnah of the Prophet, is lawful unless otherwise indicated. In addition, Hasan's opinions display certain similarities to the Zâhirî and Hanbâli school. A case in point, is his definition of *ribâ* as any profit received by a lender on the goods he lends. Therefore, *ribâ* is only excessive profit, while interest from banks, insurance companies and corporations is usually reasonable and should not be considered *harâm*. The *ribâ*, which was forbidden by the Prophet, in his view, was the amount doubled due to failure to repay to the loan on time.<sup>47</sup> Another reason for permitting profit, specific to the Indonesians, is that by not taking bank interest, the money will automatically go to Christian Dutch, thus reinforcing their tyranny. For the second case, *maslahah* and necessity become the main basis.

In contrast to the above scholars, Sirajuddin Abbas and Masduki search for their answers in the classical positive law books, particularly from the Shâfi'î school; such as *Majmû' al-Nawawî*, *Fath al-Mu'in*, *I'ânah al-Tâlibîn*, *al-Fiqh al-Wâdih*, *Irshâd al-'Ibâd*, *al-Ashbâh wa al-*

*Nadhâ'ir*, etc. Sirajuddin Abbas even states in the preface to his book that his collection is based solely on the Shâfi'î inclination. Accordingly, he cites some Qur'ânic verses and Sunnah indicating that the Shâfi'î school always relies on the Qur'ân and the Sunnah. However, Masduqi, at times, basis his answers directly to the Qur'ân and the Sunnah of the Prophet.

There are at least two main reasons for the different methodologies adopted by these scholars. The first is their differences in background, education and environment. The former group of scholars were educated and grew up in an environment influenced by the thought of Wahabism and 'Abduh. Meanwhile the latter group grew up and were educated in orthodox environments, particular about following a single school of thought and wary of 'Abduh's ideas, which they either rejected or deemed unreasonable. The second reason is a political. Whereas the former group regarded reform as a necessary without which Muslims would not be able to compete with others, in particular if they buried themselves in theology and neglected the secular sciences. The second group, on the other hand, maintained that the influences of Wahabism and Muhammad 'Abduh would cause dissection in Indonesian Muslim society. This society, according to them, was fairly united and harmonious before the advent of Wahabism and 'Abduh's views. Therefore, the best way to maintain the unity and the stability of the Indonesian *ummah* was to adhere to one school, namely the Shâfi'î school, as it was already familiar to them. By contrast, allowing Indonesian Muslims to follow other schools would inevitably lead to disunity, fragmentation and loss.<sup>48</sup>

### The Collective *Fatwâs*

As has already been mentioned, there is a number of institutions in Indonesia involved in the production of *fatwâs*. All of these can be classified into two major institutions: the MUI stands apart from other institutions such as the Nahdlatul Ulama and the Muhammadiyah.

There are several features that set the MUI apart from other institutions. The first is its function. The MUI is expected to provide valuable *fatwâs* and advice to both the government and the Muslim community on issues related to religion in particular, and to problems facing the nation in general. The MUI is also expected to encourage unity among Muslims, to play a mediating role between the government and the 'ulamâ', and to represent Muslims in inter-religious group deliberations.<sup>49</sup> In the words of the third general chairman of



the MUI, Hasan Basri, it should function as a watchdog ensuring that there no laws are passed in Indonesia that are contradictory to the teaching of Islam.<sup>50</sup> Therefore, the main function of the MUI is the production of *iftâ'*, while other institutions contribute to more general matters, such as social issues, politics and education, but not focus on *iftâ'* the way the MUI does. Another difference is the level and scope of reaching the masses. The Council of Indonesian 'Ulamâ', for instance has branches in almost every province. Meanwhile the Indonesian Muslim movements, have centralized headquarters and produces *fatwâs* only at the national level.

Moreover, there is a difference with regard to the permanent members of each institutions. The permanent members of the MUI are selected from traditionalist and modernist 'ulamâ', and display a plethora of attitude and opinions. In the other institutions, their permanent members come exclusively from within each organization, and they are usually united by similarity of thought. However, when deliberating upon *fatwâs*, scholars from different institutions are usually also invited and asked for their contributions.

The questions raised with the Council of Indonesian 'Ulamâ' are frequently of national relevance, whereas the regional councils deal with provincial concerns. However, it often occurs that the same issue is raised by both councils; thus producing two different, if not opposing answers.<sup>51</sup> In general, Indonesian Muslim movements receive a large number of queries, while the council receives few.

Fortunately, the procedure for producing *fatwâs* is uniform in all these institutions. *Fatwâ* sessions are usually attended by all the permanent members of each organization as well as by guest Muslim scholars from other institutions. In addition, "secular" scholars who are expert in the matter in hand are also consulted.<sup>52</sup>

The Nahdlatul Ulama, which was founded in 1926, was the first organization to produce collective *fatwâs*. As a matter of fact, its first *fatwâs* was produced in 1926 during the organization's first congress. In addition, each congress of the Nahdlatul Ulama has produced *fatwâs* on issues related to Islamic law. The number of issues dealt with is 325 altogether,<sup>53</sup> mostly ritualistic in nature, with a few dealing with modern issues such as land reform. These collections of *fatwâs* are compiled and published under the title *Abkâm al-Fuqahâ*.<sup>54</sup> The methodology of deriving *fatwâs* is entitled *bahsul masail*, and is an important development in the Nahdlatul Ulama. Before the congress 1992, the method used by the Nahdlatul Ulama was as follows: (1) Any

opinion must be based on the view or the agreement of al-Nawawî and al-Râfi'î together. This view is famously called the consensus of the *shaykhâyn*. If the answer was not available, then, (2) Just Nawawî's view was sought; then, (3) the view of al-Râfi'î was sought; then, (4) the view supported by the other majority of Shâfi'î 'ulamâ', then, (5) the view of the most knowledgeable ('âlim) and lastly, (6) the view of an 'âlim and *wara'*.<sup>55</sup> In the event that no answer was found in any the above sources, Nahdlatul Ulama remains silent, an act widely know as *tawaqquf*. *Tawaqquf* is based on the consideration that contemporary 'ulamâ' are only entitled to practice *taqlid*.<sup>56</sup>

Therefore, Nahdlatul Ulama derived its judgements from the Shâfi'î school alone. Unfortunately, the books used were not Imâm Shâfi'î's books, but rather Shâfi'îte books, such as *Minhâj al-Tâlibîn* by al-Nawawî (d. 676/1277), *al-Muharrar* by al-Râfi'î (d. 623/1226), *Kifâyah al-Akhyâr* by al-Dimashqî (d. 829 A.H.), *Fath al-Mu'în* by al-Malibârî, *I'âna al-Tâlibîn* by Sayyid Bakri al-Dîmyatî (ca. 1330 A.H.), summaries and commentaries of Nawawî's book, such as *Kanz al-Râghibîn* of al-Mahallî (d. 876 A.H.), *Sharh Kanz al-Râghibîn* of al-Qalyûbî and 'Umayra, *Tuhfah al-Muhtâj* of Ibn Hajar (d. 973), *Mughnî al-Muhtâj* by Sharbînî (d. 977 A.H.), and *Nihâyah al-Muhtaj* by al-Ramlî (d. 1004 A.H.).<sup>57</sup>

However, at the congress, in Lampung, on 21-25 January 1992, a breakthrough was simultaneously agreed upon. Henceforth, a *fatwâ* issued by *bahtsul masail* would be produced by (1) searching through the opinions of earlier 'ulamâ', (2) if different points of views were found, the dominant view could be chosen or a compromise would be achieved if possible. If a compromise cannot be reached, an opinion must be chosen collectively. The *nahdiyyîn* (the followers of Nahdlatul Ulama) call this method *taqrîr jamâ'î*. But it should be noted that the views of the Nawawî and Râfi'î should be prioritized, then (3) if an answer is not found, *qiyâs* must be used, by drawing an analogy between the case at hand and similar matter stated in the Qur'ân or the Sunnah (4) if *qiyâs* is not able to answer the question, than *istinbât jamâ'î is* to be conducted. In so doing, experts from the "secular" sciences such as economy, law and engineering, are to be consulted.<sup>58</sup>

Another Islamic organization is the Muhammadiyah. Even though this organization was founded in 1912 by Ahmad Dahlan, it did not concern itself with *fatwâs* until 1927<sup>59</sup> when it created a special committee called Majlis Tarjih for this purpose. This committee produced *fatwâs* dealing with religious issues in general, and Islamic law in particular. This issues dealt with were also mostly ritualistic with a few

exceptions on banking and family planing. The *fatwās* produced by this Majelis Tarjih amount to 190, compiled and published under the title *Himpunan Putusan Majelis Tarjih Muhammadiyah*.<sup>60</sup>

The Muhammadiyah's *fatwā* methodology relies first and foremost on the Qur'ân and the Sunnah of the Prophet. In case where there is no ruling in these sources, *qiyās* is utilized by comparing the *'illa* of a matter that has a rule in the Qur'ân or Sunnah, to one that does not. If, however, *qiyās* is not applicable to answer the matter at hand, a *fatwā* based on *maslahah* is produced.<sup>61</sup> Moreover, in most cases, in *mu'âmalât* problems, *maslahah* and necessity are generally used. For example, the organization's permission for bank interest, family planning, transmigration and so forth, are generally based on *maslahah* and necessity. Even though the Qur'ân or the Sunnah is cited, this done to demonstrate a *maslahah* necessity.

The last institution, the MUI, was established in 1975. The *fatwās* of MUI are compiled and published under the title *Putusan Fatwa Majelis Ulama Indonesia*.<sup>62</sup> Theologically, the basis used by MUI are al-Qur'ân, al-Sunnah, al-ijmâ' and al-qiyâs.<sup>63</sup> Practically, the reasoning of MUI *fatwās* is mainly nourished by the use of *nass* from primary sources as well as quotations from Arabic fiqh texts. Rational arguments are also supplied. In a few instances however, no arguments, either religious or rational, are presented at all, instead the decree closely follows the pronouncements of the *fatwā*. However, the arguments might be available in the minutes of meeting.<sup>64</sup> Therefore, in general, the method used by the MUI is based on the Qur'ân and the Sunnah, as well as the adoption of *fatwās* produced by other countries, that bear a strong resemblance to contemporary Indonesian problems. Yet, it should be noted that even though the MUI cites Qur'ânic verses and the Sunnah to support their ideas, their recourse to the primary sources is not an individual endeavor but an imitation and direct borrowing from the argument of the various schools of law. In other words, if a *nass* is used is Shâfi'î manual, it is adopted by MUI, together with the Shâfi'î argument. Again, in many cases, even though the Qur'ân or the Sunnah is cited, this is done to demonstrate a *maslahah* or necessity.

### The Application of *Maslahah*

Even though Indonesian *fatwās* based on *maslahah* are not many in number, it is reasonable to state that some of them, particularly those which deal with contemporary matters, are generally based on this

theory. These matters include: the program of family planning,<sup>65</sup> the use of IUD (Inter-Uterine Device) vasectomy and tubectomy in family planning, the usage of banks in the development of the Indonesian economy and more importantly the permissibility of taking bank interest, and, the prohibition of marriage between a non-Muslim woman (*ahl-kitâb*) and a Muslim man. All of these cases are based on *maslahah* or necessity.

The main and original purpose of family or marriage in Islam, as stated in Qur'ân 16:72, is to have children.<sup>66</sup> The Sunnah of the Prophet even stress the important of having many children in a family.<sup>67</sup> Therefore, the original purpose of the family in Islam, is to have as many children as possible. Family planning is, however, allowed where there is any condition of *darûrî* (necessity), either for the mother or the child. For instance, a case which is commonly cited, is that by having many babies the mother will give less care to a child, whereas the Prophet also emphasized the significance of the quality of family. For instance, he states that a powerful believer is much better than a weak family. In order to have a powerful family good care of children is necessary. In other words, what the Prophet wanted is to have as many children who posses good qualities as possible. Thus, the permissibility of family planning is due to the need to give adequate care so that a child develop well, and to give sufficient time for a mother to prepare herself to have another baby.

The 'ulamâ' maintained that the use of IUD was forbidden in Islam, for their insertion violates the privacy of woman (*'awrat*). Therefore, the problem here is not the use of IUD itself but rather its insertion, which normally done by a male doctor. This *fatwâ* was produced in 1971. Later in 1983, during the national conference of the 'ulamâ' in Jakarta, the ban on the use of IUDs was lifted by the 'ulamâ' with a condition that it should be done by a female doctor.<sup>68</sup> In addition, in any situation which makes it necessary to help a woman, a male doctor is then permissible, despite the fact that the condition of necessity is not defined clearly here.

A similar reason is noted to legitimate the permissibility of carrying out a vasectomy or a tubectomy in family planning. If any condition arises, which makes it necessity to avoid harming a mother or a baby, then these operations become permissible.<sup>69</sup>

There are two main reasons to permit the receiving of interest from banks, insurance companies and corporations, in the view of Ahmad Hasan. One is that *ribâ* is only excessive profit, while the

interest from the above institutions is usually reasonable and should not be considered *harâm ribâ*, which was forbidden by the Prophet and, according to Ahmad Hasan, was the amount doubled due to failure to repay the loan on time. Another reason, specific to the Indonesian situation, is that by not taking banking interest, the money will automatically go to the Christian Dutch, thus reinforcing their tyranny. This latter reason is again based on *maslahah* and necessity for Muslims. In addition, when discussing the rule on lotteries, Hasan believes in the permissibility of receiving money from lotteries despite arguing for the prohibition of the buying lotteries tickets. His reason for this is again based on the *maslahah* of the *ummah*. In his view the money could be used to build a school or a hospital which could be utilized for the welfare of the society. In contrast, by refusing to do so, one gives opportunities to Christian to build their own schools, hospitals and so forth. He even states that *maslahah* should be given priority over *mu'âmalah* matters.<sup>70</sup>

The Muhammadiyah congress in Sidoarjo stated that the interest the government banks is *mutasâbih*. Based on this rule it would be better to avoid using the banks. Yet it is also noted that in any case the *maslahah* of the people demanded that *mutasâbih* banks become permissible since there are no Islamic banks without interest, whereas banks are necessary for a Muslim both for the security of saving money and for economic development.<sup>71</sup>

The prohibition of marriage between a non-Muslimah (non-muslim woman) and a Muslim man is in contrast to the Qur'ân as well as to the classical fiqh texts. This prohibition is on the grounds that the *mafsadah* (harm) of such a marriage is greater than the *maslahah* (benefit). The reasons given are, firstly that marriage for Muslims, is not only matter of external agreement involving the reproduction of human beings but also a sacred bond aimed at achieving both happiness and obedience to God. It is therefore argued that adherence to the same religion by the parties to be married is a prerequisite; Islam forbids a Muslim woman to marry a non-Muslim man. The statement admits that a Muslim man may marry a woman of the *Ahl al-Kitâb* but only if he fully confident that he can lead his future children to the path of Islam. This *fatwâ* appeared because in Jakarta there was a couple, a Muslim woman and non-Muslim man, who were married under the procedures of the man's religion, which was called a Pancasila marriage.<sup>72</sup> On the basis of this the MUI felt it necessary to justify a rule on such matters so that the term is not used in

the wrong way.

In comparison, it is also important to note that Malaysian *fatwâs* deal with contemporary matters. Take for example, the rule on using a bank. It was stated in Selangor, in 1971, that bank deposits are *ribâ* except in the case of economic urgency. Yet this economic urgency is not defined. From Kedah in 1974 came the argument that commercial undertakings, such as bank, are unacceptable but they become acceptable if spent on providing benefits for the Muslim community. Similar answer are given to other problems such as insurance, both life and public insurance, organ transplants and family planning.<sup>73</sup>

### Conclusion

All the jurist agree that *maslahah* is the main purpose of the *shâri'ah*. The difference whether the *maslahah* is based on the views of human beings or the *shâri'ah* itself. Those who reject this theory of *maslahah* normally hold that the *maslahah* comes with the *shâri'ah* itself whether human beings can find it or not. On the other hand, those who hold the necessity of *maslahah*, in the eyes of human beings argue that the *maslahah* should be based on the capability of human beings.

Theoretically, the theory of *maslahah* has never been cited as the basis of Indonesian *fatwâs*, but in practice it has been used in many cases, particularly in contemporary matters. In other words, the principle of necessity or *maslahah* is being used to justify new ruling. It is also not wrong to assume that the theory of *maslahah* or necessity seems likely to be more dominant in the future. Therefore, whatever the reason to refute the theory of *maslahah*, the usage of this theory seems to be more numerous and dominant, particularly when it deals with contemporary problems that arise in a different place and environment.<sup>74</sup>

## Endnotes

1. George F. Hourani, "Two Theories of Value in Medieval Islam", *The Muslim World* 50 (1960), pp. 269-274; Majid Khadduri, "The Maslahah (Public Interest) and 'Illa (cause) in Islamic Law", *New York University Journal of International Law and Politics* 12:23 (1979), pp. 213-214.
2. See for example 'Abd al-Wahhâb Khallâf, *Masadir al-Tashri' al-Islâmî fi mâ lâ Nassa fihî* (Misr: Dâr al-Kitâb al-'Arabî, 1954), p. 74.
3. A book entitled *Adâb al-fatwâ wa al-Muftî wa al-Mustafî* states that *muftî* are the inheritors of the Prophet, those who perform a community duty (*fard al-Kifâyah*) and avoid mistakes. Al-Nawawî, *Adâb al-Fatwâ wa al-Muftî wa al-Mustafî*, 2nd end, (Beirut: Dâr al-Bashâir wa al-Islâmiyah, 1411/1990), p. 13.
4. Tahâ J. al-'Awlânî, "The Crisis in Fiqh and the Methodology of Ijtihad", *The American Journal of Islamic Social Sciences*, 8: 2 (1991), p. 320.
5. He was member of Perti (Persatuan Tarbiyah Islam, Islamic Educational Organization), which was founded in 1972, in Padang, West Sumatra. Unfortunately, at present, the influence of this organization is decreasing. It concentrated on Islamic education, while its approach to Islamic law is close to the Nahdlatul Ulama.
6. A former dean of the Islamic law faculty of the Institute of Islamic Studies (IAIN) Yogyakarta.
7. He was founder the Persatuan Islam (Persis) movement established in 1923, in Bandung. This collection is actually a collection of the *fatwâs* of Hasan and five of his colleagues. They are Moh. Ma'sum, H. Mahmud Aziz, Abdul Qadir Hasan and H. Yunan Hasyim. It is still classified as an individual one because the answers are individual endeavors not collective ones. For example, questions were answered by an individual scholars, without any comment from the others. However it is highly possible that they discussed the answers together beforehand. This collection (consisting of three books) has been printed eight times. Originally, the *fatwâs* were written in the "Pembela Islam, al-Lisan dan Fatwa" magazine, from 1931 to 1934, when Indonesia was still under Dutch colonial rule. Therefore, his ideas were greatly influenced by confrontational attitude towards the Dutch. Hence, Hasan sometimes identified Christianity with the Dutch. For example, one of the reasons he used to legitimate banking interest was to avoid the use of this interest by Dutch Christians, which, according to him, support their colonization.
8. A professor of Islamic law at the Faculty of Islamic Law of the State Institute of Islamic Studies (IAIN Jakarta). His *fatwâs* are still published in the biweekly magazine *Amanah*.
9. A former chairman of the Muhammadiyah.
10. A permanent member of the Bahtsul Masail of the Nahdlatul Ulama and also a general chairman of the regional Nahdlatul Ulama for East Java.
11. Unfortunately his *fatwâs* are not yet compiled, but available in the newspaper *Abadi*. The available *fatwâs* are mainly for 1953, 1954 and 1960, when he was a permanent contributor in the religious section of this newspaper.
12. This material is an official report for the period 1980-1985. See Majelis Ulama Jakarta, *Rangkaian Fatwâ/Keputusan Majelis Ulama Jakarta Masa Bakti 1980-1985* (Jakarta: Majelis Ulama Jakarta, 1985), microfilm.
13. Edward W. Lane, *An Arabic-English Lexicon* (Cambridge: The Islamic Texts Society Trust, 1984), vol. II, pp. 1714-1715.

14. Al-Qur'ân 3: 114.
15. Muhammad Khalid Masud, *Islamic Legal Philosophy: A Study of Abu Ishaq al-Shatibi's Life and Thought* (Pakistan: The Islamic Research Institute, 1977), p. 149.
16. *Ibid.*, p. 150.
17. B. Lewis, V.C. Menage, CA Pellat and J. Schacht, eds. *Encyclopedia of Islam* (Leiden: E. J. Brill, 1978), vol. IV, s.v. *Isuhsân* and *Isuislâh*, by R. Paret, pp. 256-258.
18. *Ibid.*
19. 'Abd al-Karîm Zaidân, *al-Wajîz fi al-Ushûl Fiqh*, 5th ed. (Baghdad: Matba'ah Salmân al-A'zamî, 1974), p. 197.
20. Al-Qur'ân 9: 11.
21. Zaidân, *al-Wajîz*, p. 199.
22. Muhammad Abû Zahrah, *Mâlik: Hayâtuhû wa 'Asrühû Arâ'uhû wa Fiqhuhû* (Cairo: Dâr al-Fikr al-'Arabî, n.d.), p. 356.
23. Al-Qur'ân, 5: 3.
24. Abû Zahrah, *Mâlik*, p. 357.
25. *Ibid.*
26. Abû Ishâq al-Shâtibî, *Al-I'tisâm* (Cairo, n.p. 1332), II, p. 113.
27. Al-Shâtibî, *Al-Muwâfaqât* (Cairo: Mustafâ Muhammad, n.d.), II, pp. 16, 17.
28. Al-Shâtibî, *Al-I'tisâm*, II, p. 110.
29. *Ibid.*, p. 114.
30. Zaidân, *Al-Wajîz*, p. 204.
31. Khallâf, *Masâdir al-Tashrî'*, p. 74.
32. Zaidân, *Al-Wajîz*, p. 202.
33. Khallâf, *Masâdir*, p. 75.
34. Allâmah Ibn 'Abidîn in *Risâlah Nasbr al-'Urf*, vol. 22, 125, as quoted by Zarqâ in his article "Ma'âkhidh al-Fiqh al-Islâmî".
35. Al-Shâtibî, *Al-Muwâfaqât*, II, pp. 10-13.
36. *al-yaum akmaltu lakum dînakum wa atmamtû 'alaykum ni'matî wa radîtu lakum al-Islâma dînâ* (al-Qurân 5:3)
37. Zakariyâ al-Barrî, *Ushûl al-Fiqh al-Islâmî* (Cairo: Dâr al-Nahdah al-'Arabiyah, 1403/1982), p. 138.
38. Both individual and group collections are available.
39. His book entitled *40 Masalah Agama* (40 Religious Issues) (Jakarta: Penerbit Pustaka Tarbiyah, 1982), and consists of 4 vols. These were published in 1970, 1972, 1974 and 1976 and reprinted 5 times, in Malaysia in 1978.
40. The book (or bound collection of *fatwâs*) of A.R. Fakhruddin, who was the former chairman of the Muhammadiyah, was entitled by Abdul Munir Mulkhan under the title *Pak A.R. Menjawab 275 Masalah* (Yogyakarta: SIPRESS, 1992).
41. There are also numerous kinds of events celebrated by Indonesian Muslims, such as the *Isra' Mi'raj*, the beginning of Ramadan and so forth.
42. It should be mentioned that Sirajuddin's collection is actually written by him, based on the common issues that appeared during his life, and is not merely the result of his dialogues with the Muslim community, while A.R. Fakhruddin's collection is a combination of his direct dialogues and his media answers (*Kedaulatan Rakyat* newspaper and radio). Both of these books include a thematic representation of subjects and are not organized in the order in which the questions were raised. For example, *tahârah*, is in the first chapter, followed by



- prayers and other subjects.
43. Hasan's collection is included in this classification. Another example is the biweekly magazine, *Amanah*, entitled "Membahas Masalah Agama", which discusses religious issues, at present in the hands of Peunoh Daly. In addition, the Bahtsul Masail Issues the monthly magazine, *Aulia*, handled by Masduqi Makhfudz.
  44. See for example, Hasan, *Soal Jawab: Tentang Masalah Agama* (Answers and Questions dealing with Religious Problems) (Bandung: CV Diponegoro, 1983), vol. III, p. 1198.
  45. *Ibid.*, vol. I, p. 93.
  46. *Ibid.*, vol. II, p. 668.
  47. He actually discusses this matter, at length, in his book entitled *Kitab Riba*.
  48. Sirajuddin Abbas cited this statement on many occasions.
  49. M.U.I., *15 Tahun Majelis Ulama Indonesia* (Jakarta: Sekretariat Majelis Ulama Indonesia, 1990), pp. 101-103.
  50. Mohammad Atho Mudzhar, *Fatwas of the Council of Indonesia Ulama: A Study of Islamic Legal Thought in Indonesia 1975-1988*, bilingual edition (Jakarta: INIS, 1993), p. 54.
  51. For example, the issue of breeding green frogs raised by the West Sumatra regional council of 'ulamâ' and the West Nusatenggara 'ulamâ'. According to the former, both the breeding and the consumption of frogs are permitted in Islam, while according to the later both are forbidden. See Atho Mudzhar, *The Fatwas*, p. 74.
  52. M.U.I., *15 Tahun Majelis Ulama Indonesia*, 107.
  53. The *fatwâs* produced at the last congress in Lampung, in 1992, are not included in this collection.
  54. See Abû Hamdân 'Abd al-Jalîl Hamîd, *Abkâm al-Fuqahâ: fî Muqarrarât Mu'tamarât Nahdat al-'Ulamâ'* (Semarang: Toha Putra, 1388/1960), 2 vols.
  55. *Ibid.*, I, p. 7.
  56. Based on their explanation, the meaning of *taqlid* here is just following the preceding 'ulamâ' views with or without knowing their reasons. See Malik Madany, "Ijtihad", *al-Jami'ah*, p. 24.
  57. See Aziz Masyhuri's statement "Laporan Kongres Nahdlatul Ulama Lampung," *Tempo*, (February, 1992), p. 30. See also Malik Madany, "Ijtihad dalam Kemandapan Hidup Bermadzhab (Dari Halaqah-halaqah di Pesantren sampai dengan Munas Alim Ulama di Bandar Lampung)", *al-Jami'ah*, no. 51, pp. 21-32, *ibid.*, "Cara Pengambilan Keputusan Hukum Islam Dalam Bahtsul Masail Nahdlatul Ulama," *Aulia*, no 12 (Dec., 1991), pp. 53-63.
  58. See Masyhuri, "Laporan," *Tempo* (February, 1992), p. 31. See also Malik Madany, "Ijtihad," *al-Jami'ah*, pp. 28-29.
  59. Deliar Noer, *The Modernist Muslim Movements in Indonesia 1900-1942* (London: Oxford University Press, 1973), p. 80.
  60. Pimpinan Pusat Muhammadiyah, *Himpunan Putusan Tarjih* (A Collection of the Decision/Fatwâs of Tarjih), n.p., 1967.
  61. Fathur Rahman Jamil, *Ijtihad Muhammadiyah dalam Masalah Ijtihad Kontemporer: Studi tentang Penerapan Teori Maqasid Shari'ah*, dissertation of State Institute of Islamic Studies (IAIN) (Jakarta, Fakultas Pascasarjana IAIN Jakarta, 1994), p. 124.
  62. Atho' Mudzhar, *The Fatwas*, p. 4.

63. M.U.I., *15 Tahun Majelis Ulama Indonesia*, p. 106.
64. Atho' Mudzhar, *The Fatwas*, p. 69.
65. See Majelis Ulama Indonesia, *Keputusan Majelis Ulama Indonesia Th. 1992* (Jakarta: Sekretariat Majelis Ulama Indonesia, 1993) pp. 7-18.
66. The meaning of the verse; "And God has made for you mates (and companions) of your own nature, and made you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best:." Abdullah Yusuf Ali, *The Holy Qur'ân: Text, Translation and Commentary* (Washington: American International Print. co., 1946), p. 675.
67. See for example the Sunnah of the Prophet which stated the significance of having as many children possible. From Anas it is stated *tazawwajû al-walûda al-walûd inni mukâthirukum al-anbiyâ' yawma al-qiyâmah* (from Anas, transferred from Ahmad).
68. Pimpinan Pusat Muhammadiyah Majlis Tarjih, *Membina Keluarga Sejahtera* (Yogyakarta: Persatuan, n.d.), p. 50.
69. Jamil, *Ijtihad Muhammadiyah*, p. 147.
70. Hasan, *Soal-Jawab*, 1, pp. 368-369.
71. Mulkan, *Pak A.R. Menjawab*, p. 142.
72. Atho Mudzhar, *Fatwas*, p. 87.
73. See Barry Hooker, "Fatwa in Malaysia 1960-1985: Third Coulson Memorial Lecture," *Arab Law Quarterly*, 8: 2 (1993), pp. 93-105.
74. See Ihsan A. Bagby, "The Issue of Maslahah in Classical Islamic Legal Theory," *International Journal of Islamic and Arabic Studies*, 2:2 (1985), p. 10.

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