FATWAS

Their Role in Contemporary Secular Australia

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In Australia, there has been confusion and misunderstanding surrounding the term 'fatwa'. This goes both to its meaning and also to the role fatwas fulfil for Muslims, whether in Australia or in other parts of the world. This paper seeks to address both of these issues, first by demystifying fatwa through exploration of the distinctive place the have in Islamic jurisprudence, and second by identifying the methodology used by jurists in *ifta* (the giving of fatwas), which has enabled Islamic law to be responsive to new developments and contemporary challenges. Given the recent expansion of technological, economic and medical advances and the pattern of migration of Muslims to secular societies, the paper argues that the need for fatwas is in fact increasing as Muslims strive to accommodate Islamic religious requirements within these new environments. The paper surveys the sources of Islamic authority in Australia, concluding that a process of collective *ijtihad* (independent legal reasoning) would best be suited to the diversity that is the hallmark of Islam in Australia. However, it is stressed that this would not lessen the primacy of Australian law but rather would complement it, as fatwas give guidance to Muslims Australians in the personal, individual and private spheres of life.

Introduction

The Arabic word 'fatwa'¹ has entered the lexicon of Western discourse. Simply stated, a fatwa is a legal opinion issued by an Islamic law specialist on a specific issue. Yet, while many Australians know of the word, it is fair to say that few appreciate its meaning or understand the contribution made by fatwas to Islamic jurisprudence and the role they play in the everyday lives of Muslims. Australian lawyers and legal academics are no different in this regard, as their understanding of many aspects of Islam and Islamic law also comes from the Western press and media.² Not surprisingly, the fatwas Western media organisations choose to report

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¹ In Arabic, the plural form of 'fatwa' is 'fatawa'. However, as fatwa is now a word used in English, the English plural form, fatwas, is used in this article.

² Courses on Islamic law have only recently been introduced into the curricula of a handful of Australian law schools, including those at the University of Queensland, the University of Melbourne, the University of Technology, Sydney, the University of

are typically those that are sensational, or highlight a cultural clash with Western values or practices. Reported in the Australian media have been fatwas prohibiting women from studying at tertiary institutions;³ fatwas issued by Osama bin Laden and Al-Qaeda;⁴ the decree that the Bamiyan Buddhist statues in Afghanistan be destroyed;⁵ and fatwas that amuse, such as the ban on beauty pageants in a Malaysian state⁶ and Saudi Arabia's ban on Pokemon games.⁷ Also reported have been the fatwas from Islamic Muftis and organisations condemning acts of terrorism, such as the 2005 bombings in central London.⁸ The 2006 publication of cartoons satirising the Prophet Mohammad in the Danish newspaper *Jyllands-Posten* resulted in a shaft of fatwas condemning this act, with the most significant being a collective fatwa issued under the name of the World Islamic Scholars.⁹ A total of 38 prominent Islamic Muftis, jurists and scholars jointly issued the fatwa, which ruled the publication to be an 'entirely unacceptable crime of aggression that has violated the highest sanctities of the Muslim people' and called on the Danish government and Danes to apologise, condemn and bring an end to this attack. It also called on Muslims to exercise self-restraint and not engage in violent retribution.¹⁰

The best known fatwa in Australia remains the 1989 ruling of Ayatollah Khomeini in which he condemned Salman Rushdie's book *The Satanic Verses* for its 'opposition to Islam, the Prophet, and the Qur'an' and called on 'all zealous Muslims to execute them [Rushdie and the publishers] quickly ... so that no one will dare insult the Islamic sanctities'.¹¹ This fatwa attracted considerable media attention at the time and has continued to be a focus of public discourse on core human rights regarding freedom of speech versus defence of religion.¹² For many in Australia, it defined their understanding of fatwa and made the term inextricably

Sydney, the University of Wollongong, Murdoch University and Charles Darwin University. On teaching of Islamic law to law students, see Black and Hussain (2006).

³ Harris (2005).

⁴ Osama bin Laden jointly published a fatwa with Ayman al-Zawahiri and others decreeing the killing of Americans and their allies. See: 'Text of Fatwah Urging Jihad Against Americans' published in *Al-Quds al-'Arabi* on 23 February, 1998, www.ict.org.il/articles/fatwah.htm.

⁵ Mullah Umar's fatwa, issued on 26 February 2001, called for all idols of worship to be destroyed. Note also there were fatwas issued from Muftis in other countries, including Egypt, Iran and Morocco, condemning the destruction of the Buddhas.

⁶ Selangor, Malaysia. See Mitton (1997).

⁷ Al-Issawi (2001).

⁸ ABC Online (2005).

⁹ 'Declaration of Fatwa by World Islamic Scholars about Danish Cartoons', issued in *Tabsir*, 20 February 2006, www.tabsir.net/?p=132.

¹⁰ 'Declaration of Fatwa by World Islamic Scholars about Danish Cartoons', issued in *Tabsir*, 20 February 2006, www.tabsir.net/?p=132.

¹¹ For the translated text of the fatwa and the text of the confirmation of the execution order see Pipes (1990), pp 27–30. Also see Crossley and Kerner (2005), pp 85–87.

¹² Slaughter (1993); Mayer (1991); Qureshi and Khan (1989); MacDonogh (1993); Ashan and Kidwai (1993).

linked with a sentence of death or with an anti-Western sentiment. The mental association between 'fatwa' and death sentence has not lessened in the decade and a half since Khomeini's pronouncement, and may have been reinforced by the publicity given to Ayatollah Khamenei's reaffirmation in 2005 of the continued validity of his predecessor's original 1989 fatwa denouncing Rushdie.

Against this background, the aim of this paper is to address the widespread misconceptions surrounding fatwas by explaining their distinctive place in Islamic law and their significance in the development and application of Islamic law in contemporary times. The role of fatwas is not limited to countries applying Shari'a law, but is equally important — if not more so — in non-Muslim countries like Australia where Australian Muslims strive to accommodate Islamic religious requirements within the framework of secular Australian society. Fatwas can act as beacons of guidance through the challenge of adhering to two sets of laws: those of religion and those of the nation. For the estimated 300,000 to 400,000¹³ Australian Muslims, interactions and dealings with the Australian legal system are inevitable. Therefore, the main question is: What is the role for fatwas in Australia?

In order to answer this question, a brief explanation of fatwa in both an historical and doctrinal context is needed. This paper will also examine the practice of issuing fatwas in the Muslim world. The model used by Indonesia, Australia's close neighbour and also the largest Muslim country in the world, is illustrative. Afterwards, the dynamics, topics covered in fatwas and problems of authority amongst Islamic communities in Australia, a secular country,¹⁴ will be evaluated. Having discussed all the issues, the paper argues that, although the fatwas in Australia fulfil an important role in social and cultural transformations amongst Muslim communities, such a role is limited to a personal, individual and private level, and as such does not negate the primacy of Australian law in the lives of its Muslim citizens. Yet the paper will show that the primacy of Australian law does not lessen, but rather intensifies, the demand and need for fatwas as Muslims construct identities, fulfil aspirations and express their religion in this pluralistic and secular nation.

What is a Fatwa?

As noted earlier, a fatwa is a non-binding¹⁵ legal opinion or ruling given by a recognised Islamic legal specialist. In the Shia tradition of Islam, the legal

¹³ The precise number of Muslims is not known because many do not declare their religious status for Census purposes. However, the Australian Bureau of Statistics in 2006 put the number at 340,000 making Muslims the third largest religious group in Australia, after Christians and Buddhists. See generally www.dfat.gov.au/facts/muslims_in_Australia.html.

¹⁴ Australian secularism's most formal expression is in section 116 of the Australian Constitution, which prevents the Commonwealth establishing any religion, preventing the free exercise of any religion or imposing any religious test for office.

¹⁵ Today, a small number of countries do give fatwas legal force, making them binding when gazetted and published. This does not apply to fatwas issued in Australia, nor to those issued in the majority of Islamic countries. In some Muslim countries, such as Bangladesh, it is an offence to issue an unauthorised fatwa.

specialists (*mujtahid*) who issue fatwas are their Ayotallahs and Grand Ayatallahs (*Ayatollah-e Ozme*). These men are recognised as the leading Islamic religious and legal scholars of their time, and their knowledge and ability are such that they are held in the highest esteem by their fellow Shia clerics. In the Sunni schools (*madhabs*) of Islam, fatwas traditionally are issued by acclaimed jurists (*Muftis*) or by an authoritative specialist body of Islamic scholars (*ulama*). A fatwa will be issued in answer to a question pertaining to Islamic law as asked by an individual inquirer (*mustafti*), or by a judge (*qadi*), or by a government authority or corporate entity. The process is known as *ifta*. The fatwa issued in response to the submitted question may also be published or disseminated in some form to the wider Islamic community. In this way, a fatwa gives guidance to the individual questioner whilst its dissemination educates, informs and guides others.

Collections of fatwas have been established by leading jurists and at major centres of Islamic scholarship, notably Al-Azhar University in Egypt and the Council of Fiqh in Mecca. Fatwas are to be issued only by leading Islamic scholars because the ruling or opinion given is to be arrived at through deep understanding and thorough knowledge of the Shari'a, drawing on the sources of Islamic law, namely the Qur'an and the Sunnah of the Prophet, the opinions of the jurists of the four Sunni schools of law (*madhabs*)¹⁶ and by applying the methodology of Islamic jurisprudence (*fiqh*).¹⁷ As Islam has no centralised, international priestly hierarchy, there is no uniform method for determining who can issue a valid fatwa, nor is there one definitive academic qualification on which a Mufti or Ayatollah's standing rests. There are accepted traditional criteria which include being an adult, male (though this is now being challenged by modernist scholars), Muslim, trusted, reliable, free of the causes of sin and defects of character, a jurist in identity, sound of mind, firm in thought, correct in behaviour, and also alert. One North African Mufti has stated simply that anyone who is learned and whose religious sentiments are recognised by others may issue a fatwa.¹⁸ Recognition by a significant number of followers, or by a Muslim ruler or government, is the important determinant for Mufti and Ayatollah status.

Although fatwas can deal with a vast array of issues, from the trivial to the profound, one can gain insight into the process through an example. The fatwa selected is instructive as to the structure and the methodology traditionally employed, and has become a point of reference for later Muftis, thereby aiding in the growth of consensus on the topic. It was issued by Hasanayn Muhammad Makhluḥ, Chief Mufti of Egypt (1946 to 1950).¹⁹ The question asked was: 'According to the Shari'a, is it permitted to perform a post-mortem examination for scientific purposes or in criminal cases?'

¹⁶ These are Hanafi, Maliki, Shafi'i and Hanbali jurists. See generally Edge (1996).

¹⁷ This includes principles of consensus (*ijma*), reasoning by analogy (*qiyas*), accepted customary practices (*urf*), *maslahah* (public benefit), equity (*istihsan*) and the use of legal presumptions (*istishab*). For discussion of the sources of law, see Part II in Edge (1996), n 16.

¹⁸ Masud et al (1996), pp 8, 18.

¹⁹ The original fatwa in Arabic has been translated in English and analysed in terms of structure and content by Rispler-Chiam (1996), pp 278–85.

At the time, it was an important question, as post-mortems necessarily involve violation and desecration of the human body — both of which are prohibited under Islamic ethics and law. In responding to the question the Mufti's fatwa commenced with a discussion of medicine in general and the high regard with which it is held in Islamic law. This was confirmed by references to the two most authoritative sources of law in Islam, the Holy Qur'an, which is the direct word of God, and the *Sunnah*, which are legal rules derived from the recorded and verified practices of the Prophet. In this fatwa, it is the medical practices of the Prophet that are highlighted to show how he sought cures and remedies whenever he, or a member of his family, was ill. A *hadith* recorded and verified by al-Bukhari recounts his edict: 'Cure yourselves, because God did not create an illness without a remedy.' (al-Bukhari 1928) The fatwa also draws on the word of God in the Quranic verses 2: 184–85 and 2: 196, which allow concessions from certain religious obligations for people who are ill. One of these is that an ill person can break his or her fast (fasting during the month of Ramadan being one of the five obligatory pillars of Islam) if it would enable vital or life-saving medical treatment to be given or avoid the illness worsening.²⁰ Having established the basis for his ruling in the two primary sources of law, the Qur'an and Sunnah, the Mufti determines that the practice of medicine is so essential in Islam that its provision amounts to a religious duty for Muslim communities.

Grand Mufti Hasanayn Muhammad Makhluḥ then proceeds in his fatwa to employ the secondary sources of law. These are the juristic techniques and scholarly methods sanctioned by Islamic jurisprudence (*fiqh*). He employs analogy (*qiyas*) to demonstrate how the duty to practise medicine cannot be fulfilled unless a doctor has knowledge of the internal components of the human body and to show that this level of knowledge can only be attained through dissection. Therefore, if postmortems are essential for medical knowledge to progress, they must be an essential part of medical education — in the analogous way that ablution is necessary for the obligation of prayer. His ruling on the first part of the question is that post-mortems are permissible for legitimate scientific purposes.

The Grand Mufti then addresses the second part of the question on the use of post-mortems for solving criminal cases. He holds these are also permissible on the basis of ensuring justice: they lead to the discovery of truth in criminal cases so that 'no innocent person is oppressed and no convicted criminal escapes punishment'.²¹ He supports this by employing the legal method of *maslaha* (public benefit) to show that the positive outcome of doing justice, which is of benefit to all, outweighs the damage done through violating the human body. 'Whenever the

²⁰ Quran 2:185 'The month of Ramadan in which was revealed the Qur'an, a guidance for mankind, and clear proofs of the guidance, and the Criterion (of right and wrong). And whosoever of you is present, let him fast the month, and whosoever of you is sick or on a journey, (let him fast the same) number of other days. Allah desireth for you ease; He desireth not hardship for you; and (He desireth) that ye should complete the period, and that ye should magnify Allah for having guided you, and that peradventure ye may be thankful.' Pickthal translation, www.geocities.com/askress2009/quran/pickthall/index.html.

²¹ Rispler-Chiam (1996), p 281.

benefit outweighs the harm permission is granted, whenever the harm outweighs the benefit, a prohibition is issued.’²² The Grand Mufti draws additional support from an earlier fatwa by Sheykh Yusuf al-Dajawi which also legitimised post-mortems by balancing the good over the bad in accordance with the spirit of Islamic law. Al-Dajawi drew a parallel with the permitted practice of opening the stomach of a dead person to extract a sum of money if it was known to have been swallowed before death. The Grand Mufti’s fatwa concluded that, while postmortems are permissible, they must be performed only when necessary and not too often. Doctors should be God fearing and should ‘know that God is All-seeing, Almighty and All-guiding’.²³

The above fatwa demonstrates how Islamic scholars give considered responses to questions posed by commencing with the primary sources then extending on these by applying appropriate juristic techniques such as analogy and public benefit, together with analysis of previous juristic opinions. The culmination of this is their own legal advisory opinion: the fatwa.

Distinction Between Fatwas and Cases

It is a point of distinction with the common law that in Islam it is the jurist, whether Ayatollah, Mufti or *alim* (religious scholar), not the *qadi* (judge), who is the one contributing to the development of the law. The *qadi* is solely an adjudicator and ‘neither contributes to the development of the law nor stands among the most learned in it’.²⁴ Patrick Glenn finds close parallels between the Mufti and the Roman jurist, or the modern European law professor, as each possesses knowledge of immense amounts of law and has great analytical abilities which are used to provide legal opinions to the courts.²⁵ Today, the fatwa of a Mufti or other Islamic scholar is still frequently filed in Shari’a courts as a means of informing the judge on the applicable law.

Frank Vogel has analysed the features of fatwa that distinguish it from the *qada* (judgment) of the *qadi*, issued in response to a case before in him.²⁶ First, the fatwa has potentially universal application to a class of persons to whom the ruling applies, whereas a judgment has a unique application to the parties and the event judged. Also, the fatwa is not obligatory but is advisory to the person requesting it, but the judgment is compulsory and will be enforced by the state. While the Mufti leaves the truth of facts to be determined by the requestor, the judge tests the facts through examination and employment of evidentiary procedures.

In addition, Muhammad Khalid Masud notes that, as the copies of court judgments were kept in the Shari’a court, with no wider distribution through publication or referencing, there could be no application of the concept of precedent. In contrast, important fatwas were published, distributed and frequently

²² Rispler-Chiam (1996), p 281.

²³ Rispler-Chiam (1996), p 282.

²⁴ Glenn (2004), p 178.

²⁵ Glenn (2004), p 178.

²⁶ Vogel (1996), p 266. There are countries such as Indonesia where there are female judges in Shari’a courts, but in the majority of Muslim countries, including Saudi Arabia (where Vogel undertook his research), the role remains the preserve of men.

collected in book form to 'be cited across space and time'.²⁷ A final point of distinction is that *qadi* gives judgments with respect to disputes that entail interests of this world (*al-dunya*), whereas Mufti can also deal with the 'hereafter' and with matters of ritual law and spirituality which are outside the domain of the judge.²⁸

Emergence of *Ifta* and Its Development Through the Centuries: Historical and Doctrinal Insights

When they ask you for a pronouncement ... Say: 'God pronounces to you ...

— Qur'an, 4: 126

The origin of *ifta* (the issuing of fatwas) lies in the practice of the earliest Muslims asking questions and receiving answers directly from the Prophet Mohammad during his lifetime. Following the Prophet's death, this role was entrusted to his companions in keeping with the Quranic direction to 'question the people of remembrance, if you do not know'.²⁹ So it was the men and women³⁰ who had best known the Prophet who became, in effect, the first Muftis, providing fatwas when questions arose requiring direction and guidance for members of the fledgling Muslim community on the Arabian peninsula. These early fatwas were issued on a wide variety of subjects, both sacred and practical, and collections of fatwas started to develop. Most prolific was Ibn'Abbas, whose fatwas were compiled in 20 volumes.³¹ The result was that the process of issuing fatwas became the entrenched mechanism for providing accurate guidance on Islamic law. It was to the legal specialist that the judges turned when difficult cases or novel points of law arose, with a resulting bifurcation between those entrusted with applying the law, the judges, and those entrusted with interpreting and developing the law, the legal specialist or jurist. This was a well-entrenched practical division by the eighth century — that is, the second century of the Islamic calendar.³²

In Umayyad times (661–750), Muftis served not only as legal consultants for judges and individuals, but also issued fatwas at the request of provincial governors. By the late Umayyad period, fatwa-giving had also become an important instrument of political criticism. It is reported, for example, that in the year 714 Sa'id bin Jubayr produced a fatwa criticising the tyrannical behaviour of al-Hajjaj,³³ the political ruler or governor of Iraq. In Andalusia (711–1609), the jurists were indeed powerful: they were part of the Shura council of the amirs and caliphs. In the Ottoman and Mughal political systems, the chief Mufti was designated as Syaikh

²⁷ Masud et al (1996), p 19.

²⁸ Masud et al (1996), p 19.

²⁹ Qur'an, 16: 43.

³⁰ These included the Prophet's secretary Zayd bin Thabit and his wives, in particular A'isha. This fact becomes important in the contemporary debate as to whether women can issue fatwas.

³¹ Masud et al (1996), p 7.

³² Hallaq (2005), p 89.

³³ Masud et al (1996), p 9.

al-Islam. The fatwas of the life-appointed Syaikh al-Islam had great influence in the courts across the empire, and it became an established practice for litigants to request a fatwa prior to their hearing in order to strengthen their case in court.³⁴ He had political power, being the designated head of the *ulama* and thus appointed the judges and other Muftis for the vast Ottoman Empire. Those Mufti were also appointed to various other positions, including market inspectors, guardians of public morals, and advisers to governments on religious affairs.³⁵

The significance of the fatwa in the pedagogy of Islamic law, coupled with the Mufti's undisputed command of the law, was such that throughout Islamic history the Mufti was often a powerful figure. For example, in the mid-twentieth century the Lebanese Mufti of the republic was actually an important political leader. Brinkley Messick points out that some Grand Mufti, appointed in various states over the past century, wielded considerable political influence through their official fatwas.³⁶ In 1804, Uthman ibn Fudi issued his fatwa to declare jihad in West Africa. In 1857, the *ulama* of Delhi issued a fatwa of jihad against British rule. In 1907, the *ulama* of Marakesh issued a fatwa deposing the sultan of Morocco.³⁷ It is well known that, in 1964, the transfer of power to King Faisal was made possible by a fatwa of the Saudi *ulama*.³⁸ In Indonesia, KH Hasyim Asy'ari of Nahdlatul Ulama issued a fatwa on the religious necessity of defending Indonesian independence (1945) and waging jihad against the Dutch Army which was trying to re-establish its power in Indonesia.³⁹ A recent instance of influential political fatwas can be found in post-Baathist Iraq, where Ayatollah Ali Al-Sistani's fatwas have given guidance throughout the troubled period of American and allied entry and occupation of Iraqi. In addition to his reported 2003 fatwa directing Iraqis not to resist the entry of Western forces, al-Sistani issued fatwas encouraging Shia to participate in the elections and in the democratic constitutional processes in Iraq.⁴⁰ Muqtada Al-Sadr has also issued fatwas which at times have been at variance with those of the more moderate al-Sistani; however, both are illustrative of the contemporary role fatwas are playing in the political, as well as religious, outcomes in Iraq.

Fatwas also have a long-standing role in the legitimisation of new social and economic practices. The topics in the Qur'an did not include modern issues such as insurance, corneal transplant, banking and family planning, to name but a few, and Muslim scholars have to issue fatwas, by analysing the core values of the Qur'an and the Sunnah in order to deal with modern problems. For example, in the Ottoman Empire, a fatwa was issued in 1727 authorising the printing of non-religious books; vaccination was declared legitimate in a 1845 fatwa; and several

³⁴ Haddad and Stowasser (2004), p 83.

³⁵ See Masud (1977).

³⁶ Messick (1995), p 12.

³⁷ Dallal (1995), pp 15–16.

³⁸ Pistacori (1980), p 128.

³⁹ See Amiq (1998); Hosen (2003).

⁴⁰ Office of the Grand Ayatollah Sistani, www.sistani.org/html/eng; Kursman (2003), pp 155–67.

fatwas were used to legitimise low interest rates, selling on credit and the practice of establishing cash *waqf* (endowment).⁴¹ Banking and Western modes of financing have been a rich field for fatwas throughout the last century, as legal scholars guide their followers on which banking transactions are Islamically acceptable and avoid *riba* (interest). Contemporary fatwas consider social and economic practices that challenge boundaries in the twenty-first century, including the legitimacy of genetically modified crops and foods, organ donation, stem-cell research, cloning and surrogacy.

Throughout history, the theory of private fatwa-giving held that fatwas should be given for free; however, gifts and various forms of pious support were common. Official Muftis, however, were salaried or received set fees from their questioners, and many grew wealthy in their position.⁴² Jacques Waardenburg explains that, although most were private scholars, some Muftis were appointed to official positions, notably in Mamluk Egypt and in the Ottoman Empire. Today, while some have been appointed as Mufti of the state, others provide consensus as part of advisory councils of religious scholars or constitutional assemblies of scholars.⁴³

While the establishment of the Egyptian Grand Mufti dates to the late nineteenth century, state Mufti were not appointed until after the middle of this century in a number of other nations, including Saudi Arabia (1953), Lebanon (1955), Malaysia (1955) and Yemen (1962). As state-appointed Muftis are salaried government employers who are generally also in control of the nation's religious administration, there are perceptions their role may be compromised to ensure religious legitimacy for a particular government or its policies, especially in authoritarian regimes. Although most Arab nations have a state Mufti, there is considerable variation in the Arab world in the appointment, tenure, background and training, formal relationship with the ruler or government, the scope of the fatwas issued and their dissemination, and whether the Mufti represents the government internationally on religious and other issues. A comparative typological analysis by Skovgaard-Petersen of the state Muftis of Lebanon, Syria and Egypt highlights this variation.⁴⁴ In addition to the institutionalisation of Muftis within government, another significant modern organisational development is the appearance of specialised committees charged with collective fatwa-giving. Institutions with titles such as *Dar al-Ifta* have appeared in many Muslim countries⁴⁵ and also in Western countries where Muslim minorities are equally seeking guidance in aspects of Islamic law and faith. The Ifta Department of the Canadian Council of Muslim Theologians is one example.

In both political and scholarly communities, doctrinal struggles between opposed states or competing instructional centres have been played out in 'fatwa wars'. Accordingly, to the extent that fatwas are contestable, a dissatisfied questioner might approach another Mufti for a second opinion, while opponents might seek out different Mufti to vindicate their respective positions. For instance,

⁴¹ Dallal (1995), p 37.

⁴² Messick (1995), p 12.

⁴³ Waardenburg (1995), p 151.

⁴⁴ Skovgaard-Petersen (2004), pp 81–97.

⁴⁵ Masud et al (1996), pp 27–28.

lay Indonesian Muslims can procure the fatwa they want simply by choosing the right *ulama* to ask. Indonesia does not have an officially appointed state Mufti but, as the largest Muslim country in the world, benefits from many Islamic organisations such as the Nahdlatul Ulama (NU), the Muhammadiyah and the Majelis Ulama Indonesia (MUI), each of which consists of separate branches in more than 20 provinces. It is possible a fatwa from one organisation may differ from those of other organisations. It can also happen that a fatwa issued from the national organisation is different from one given by the provincial organisation. Again, a fatwa from one provincial branch may be at variance with a fatwa from another province, even though both belong to the same organisation. Therefore, it is possible to have many fatwas in Indonesia covering one case.⁴⁶ Before issuing fatwas, each organisation holds a meeting attended by its *ulama* and, if necessary, other scholars. They discuss the subject and, if consensus is reached, a fatwa is issued at the conclusion of the meeting.

It is worth considering that both the MUI and the NU state that each fatwa has equal status and cannot cancel out others. This is matched with the norm of Islamic law, '*ijtihad la yunqad*' (*ijtihad* is not reversible).⁴⁷ This means that the ruling of one scholar arrived at by means of *ijtihad* (independent legal reasoning) is not reversed by the ruling of another scholar also reached through *ijtihad*, in the absence of a clear text from the Qur'an or Hadith to determine the issue, and provided that neither decision violates any of the rules governing the propriety of *ijtihad*. Thus the two decisions have equal authority. This legal maxim is important, because there are sometimes many fatwas covering the same case — including some issued by the national and provincial branches of the same organisation. Thus a fatwa from the national organisation cannot cancel one from a provincial branch. This indicates the element of democracy and tolerance towards other opinions.

Fatwas in Australia

It is not only Muslim countries such as Indonesia and Iraq that have different Islamic organisations, and individual scholars, issuing fatwas for their followers. Muslims in Australia also can turn to a range of fatwa-giving sources. That there is no dominant fatwa-issuing authority is both a reflection of the voluntary nature of *ifta* tradition and of the diversity within the Australian Islamic community. Australia's Muslims have come from over 70 countries, belong to 50 different ethnic or cultural groups, and speak a variety of different languages and dialects.⁴⁸ Members of this truly multicultural Islamic community are linked by their shared

⁴⁶ At the moment, Nahdlatul Ulama, established in 1926, is the biggest Islamic organisation in Indonesia numbering 30 million supporters. Muhammadiyah, established in 1912, is the organisation that represents modernist Muslims. It has 28 million supporters in Indonesia, and has built many schools, universities and hospitals. Later, in 1975, an institution supported by the government and including both modernist and traditionalist *ulama* was established: Majelis Ulama Indonesia (MUI). More information on Indonesian fatwas can be found in Hosen (2004a, 2004b, 2002).

⁴⁷ Sarhan (1987).

⁴⁸ For background on the Australian Muslim community, see Saeed (2003); Saeed and Akbarzadeh (2001); Hussain (2004).

belief in Islam and their adherence to Islamic laws, norms and codes of conduct. Yet interpretations of Islamic law are also diverse, ranging from liberal and progressive at one end through to moderate and to conservative and literalist (or fundamentalist) at the other end. Factors of overseas influence also impact on the community here, as some countries, such as Saudi Arabia facilitate the dissemination of their conservative Wahhabi perspective through the financing of Islamic schools, mosques and Islamic schools in Australia.⁴⁹ As well, there are different attachments to Australia, as some Muslims are descendants of the early Muslim camel drivers and traders who came at the time of the first settlement,⁵⁰ while others have only recently arrived as new immigrants or as refugees. Some, too, are Australians who have left other religions by converting to Islam. New converts have been found to be significant users of fatwas,⁵¹ but expert advice from scholars is also required by Muslim minorities everywhere as they deal with adjustment to life in a secular Western society. The multiplicity of backgrounds in the Muslim minority of Australia defies unanimity of thought and practice, and leads Muslims here to seek fatwas as navigational aids though the competing norms and practices within their own Muslim community and within the wider mainstream society.

In order to illustrate the role for *ifta* (issuing of fatwas) in Australia, it is necessary to provide background on the Islamic organisations that could fulfil this role, including the Australian Federation of Islamic Council (AFIC), the Australian National Imams Council (ANIC) and Darulfatwa Islamic High Council. In this context, the issue of an Australian Mufti will be examined. It is argued that a major concern in Australia is authority: who speaks for whom?

A Question of Authority

The Australian Federation of Islamic Council (AFIC),⁵² which consists of nine state and territorial councils, was established 45 years ago to present a united voice and leadership for Australian Muslims. In 2006, AFIC claimed to have 'co-ordinated the Muslim community across the nation, sponsored the building of schools and mosques and represented all the Australian Muslims in governmental and interfaith affairs'.⁵³ Today, AFIC promotes itself as the national umbrella organisation for Muslims in Australia.⁵⁴ AFIC derives most of its income from rent on land that houses Muslim schools across the country, and the certification of *halal* food. It manages an annual budget of about \$20 million and assets of about \$50 million.

However, the very public dissention and acrimonious disputes on leadership within AFIC over the last four years have highlighted a community divided on

⁴⁹ 'Revealed: the Saudi Paymaster in Australia', *Sydney Morning Herald*, 10 September 2005. See generally on Wahabism or Wahhabiyah, Algar (2002) and Commins (2006).

⁵⁰ There is also a strong case that Muslims from Macassar in Sulawesi were in Australia prior to European settlement. See Saeed (2003), p 3.

⁵¹ Caeiro (2009).

⁵² See www.afic.com.au viewed.

⁵³ See <http://muslimvillage.com/directory.php?dircat=95>.

⁵⁴ See www.afic.com.au.

ethnic, political and doctrinal lines and resulted in the organisation being placed under a court-appointed administrator in 2006.⁵⁵ Apart from the internal leadership dispute, the claim that AFIC represents all Australian Muslims has been questioned. It is argued that AFIC does not actually represent the composition of the Muslim Australian community. According to Irfan Yusuf, a Sydney-based Muslim commentator, AFIC is 'dominated by middle aged migrant males — first-generation migrant males — many of whom have poor English skills, many of whom don't understand mainstream Australian life very well'.⁵⁶ Essentially, Yusuf observed that 'it has become like a subcontinental middle-aged Indian men's club'.⁵⁷

In response to broader concerns and to internal aspects of AFIC, the Darulfatwa Islamic High Council was established in 2004. It was designed to employ a collective approach and to support views of moderation. Its first stated goal was 'to announce and disseminate Islamic judgments (fatwa) which Muslims need in their daily lives'.⁵⁸ It also called 'upon Muslims to oppose extremism and to support and reinforce the views of moderation' and aimed to represent 'the interest of all Muslim individuals, groups and associations regardless of their ethnicity at all governmental and non-governmental levels in the capacity of the highest Islamic authority in Australia'.⁵⁹ However, whether it has succeeded in this goal is a moot point, further highlighting the different perspectives amongst Australia's Muslims.

Apart from AFIC and Darulfatwa, there are many Islamic organisations in Australia that belong to different schools of thought, ethnic groups and activities.⁶⁰ In the context of fatwas, this begs the question of whether there is, or should be, a single authority to which all Muslims in Australia can subscribe. As outlined earlier, in many Muslim nations and also in nations with significant Muslim populations such as Singapore,⁶¹ authority to speak on Islamic law crystallises in the position of Mufti. Whether Australia needs a Mufti is quite contentious for several reasons. The position of Mufti of Australia was first bestowed by AFIC's former executive body on Egyptian-born scholar Sheikh Taj Din al-Hilali. The task assigned to the Sheikh was to 'provide religious advice to the community and to mediate in disputes, giving rulings on matters of religious interpretation'.⁶² As there was no collection of fatwas issued by Sheikh Taj Din al-Hilali that could be

⁵⁵ This details of the leadership struggles can be found in media reports, such as 'Islamic Group Hit by "Lies, Plotting"', www.theaustralian.news.com.au/story/0,25197,24309732-2702,00.html.

⁵⁶ See Irfan Yusuf interview with Stephanie March, *Asia Pacific News*, Radio National, 21 May 2008, www.radioaustralia.net.au/programguide/stories/200805/s2251892.htm.

⁵⁷ See Irfan Yusuf interview with Maxine McKew on *Lateline*, ABC TV, 29 July 2005, www.abc.net.au/lateline/content/2005/s1426097.htm.

⁵⁸ Darulfatwa Islamic High Council (DIHC), www.darulfatwa.org.au.

⁵⁹ DIHC, www.darulfatwa.org.au/English/Our_Goals.htm.

⁶⁰ A list of Islamic organisations in Australia can be viewed at www.acl.org.au/national/browse.stw?article_id=14634.

⁶¹ The Mufti of Singapore chairs the Fatwa Committee of the Majlis Ugama Islam Singapura (MUIS).

⁶² See www.afic.com.au.

accessed on the AFIC site, nor an avenue provided for requesting a fatwa (in contrast to its Singapore equivalent) it would seem that *ifta* — a means of disseminating legal opinions on issues of concern — was not a role fully embraced by Australia's first Mufti.

In addition, the Mufti of Australia has never had universal support from the Muslim community in Australia at either a personal or institutional level. Some Muslims would prefer the position to be held by a scholar who would promote a more moderate interpretation of Islam, and some⁶³ have argued that one individual cannot represent the entire Muslim community in Australia and that a collective body, such as a Board of Imams, would be more representative. The idea of having a Board of Imams has merit. It is based on the idea of collective *ijtihad* (independent legal reasoning), as has been practised in other parts of the Muslim world, notably in Indonesia since 1926 (as highlighted earlier). Collective *ijtihad* is also considered an apt solution for the crisis of thought in the Muslim world, since it allows modern, contemporary and complex problems to be resolved, and tends to reduce any fanaticism in the schools of Islamic law. One of the reasons for its moderating effect is that a number of Muslim scholars from different schools of law and various disciplines of science have to sit together to perform *ijtihad* collectively. The aim is to reach consensus. This procedure is advocated by Muslim scholars, who appreciate and apprehend that problems in the modern era are far more complex than at the time of the Prophet 15 centuries ago. Accordingly, Muslim communities today expect Muslim scholars to provide broad answers to their problems, not only the viewpoint of Islamic law, but also from other perspectives. The *ijtihad* which is needed in this era is *al-ijtihad al-jama'i ijtihad* as collective reasoning of the community.⁶⁴

The justification for collective *ijtihad* comes from the Qur'an [3: 159 and 42: 38], which advocates *shura* (consultation). It also refers to the following sayings of the Prophet:

I ('Ali bin Abi Talib) said to the Prophet, 'O, Prophet, [what if] there is a case among us, while neither revelation comes, nor the Sunnah (tradition of the prophet) exists.' The Prophet replied, '[You should] have meetings with the scholars — or in another version: the pious servants — and consult with them. Do not make a decision only by a single opinion.'⁶⁵

The idea of collective *ijtihad* led to the establishment of the Australian National Imams Council (ANIC) in 2006. Its website⁶⁶ claims that the ANIC is 'the sole national organisation of Imams and Islamic Scholars with broad community representation' and 'the ANIC's members are involved in the day-to-day affairs of

⁶³ Professor Abdullah Saeed, Head of Arab and Islamic Studies, University of Melbourne, expressed these views in interview with Geraldine Doogue on 'Sheik Al-Hilaly', *Sunday Profile*, ABC Online, 7 March 2004, www.abc.net.au/sundayprofile/stories/s1060425.htm.

⁶⁴ Al-Qaradawi (1984), p 48.

⁶⁵ See Uwes (nd), p 159.

⁶⁶ See www.anic.org.au.

the Islamic community and in addressing and assisting in the affairs and concerns of the growing Muslim community'.⁶⁷ ANIC also has elected a Council of Fatwa, consisting of seven Imams, and also appointed Sheikh Fehmi Elimam as Mufti of Australia, thereby replacing the more controversial Sheikh Taj Din al-Hilali. The current Mufti (80 years old and in poor health) has been criticised for being silent since assuming the position.⁶⁸ Dr Ameer Ali, the former chairman of AFIC, even urged Sheikh Fehmi to give up his position.⁶⁹

However, questions remain. Does Australia need a Mufti? If so, who should elect or appoint the Mufti? Should the role revert back to AFIC? Can ANIC and its Council of Fatwa better fulfil the *ifta* role? If the ANIC *ulama* select one of their own as a Mufti, could it lead to discord, clientelism and politicisation of the *ulama* group? Will other *ulama* recognise one single Mufti, who is not selected by and from their own organisation? The debate on who has authority to speak for Muslims in Australia has been a long-standing one.

In similar vein is the question of who should elect the members of the Board of Imams and be appointed to the Council of Fatwa. The relationship between ANIC and Council of Fatwa suggests that only Imams could play the role and be appointed as member of such council. This ignores the fact that there are many Muslim scholars outside the mosque who are also respected and capable of being appointed as member of such council. Notable academic scholars including Professor Abdullah Saeed of the University of Melbourne and Associate Professor Samina Yasmeen of the University of Western Australia, to name a few, are not part of ANIC.

The case of Dr Abdalla, Director of the Griffith Islamic Research Unit and also the Imam of Kuraby mosque, is interesting. He was appointed as a vice chairman and also the spokesperson of ANIC. He was given the unenviable task of explaining ANIC's handling of the crisis surrounding Sheikh al-Hilali. Dr Abdalla had told Radio National's *Religion Report* in March 2007 that ANIC members had decided that the position of Mufti would have to be replaced by a specialist sub-committee of the ANIC. However, some members of ANIC were not supportive of this, opting instead to choose a new Mufti on 10 June 2007. This led to the resignation of Abdalla,⁷⁰ with internal criticism within ANIC that it had broken its own rules in the appointment process of Sheikh Fehmi to the position of Mufti of Australia. The allegations were made in a letter sent to ANIC in 2007 by the Board of Imams in Queensland, in which it was alleged that 'during the selection of Mufti, very many irregularities and unspeakable corruption took place'.⁷¹

⁶⁷ See <http://anic.org.au/aboutus.html>.

⁶⁸ 'Australia's Mufti Pressured to Quit', *Islamica* 6 December 2007, www.islamicaweb.com/forums/news-media/2401-australia-s-Mufti-pressured-quit.html. 'Muslim Leader Urges Rethink on Mufti', *ABC News*, 3 December 2007, www.abc.net.au/news/stories/2007/12/03/2107761.htm.

⁶⁹ See 'Deception in Imams' Mufti Choice', www.theaustralian.news.com.au/story/0,25197,23662789-2702,00.html.

⁷⁰ Nadirsyah Hosen, personal communication with Dr Abdalla, 3 June 2008.

⁷¹ See 'Deception in Imams' Mufti Choice', www.theaustralian.news.com.au/story/0,25197,23662789-2702,00.html.

Casting aside such machinations over leadership, the diversity amongst Australian Muslims makes it difficult to have a single Mufti who can be accepted and recognised by all. For this reason, the adoption of the Indonesian model, as has been discussed earlier, is suggested. Despite the fact that Indonesia is the largest Muslim country in the world, Indonesia does not have a single official or state Mufti. As Australia is clearly not a Muslim country, why should Australia have a single official Mufti or a single *ifta* organisation?

Following the Indonesian model, what we propose is that a collective *ijtihad* be performed by Islamic organisations in Australia. The voluntary aspect and the diversity in Australia are vital for this model to operate. Each organisation would offer its fatwas, according to its unique doctrinal interpretations and institutional values.

In light of the above, it appears that under such a model no single organisation and no single school of Islam (*madhab*) would be given authoritative recognition by the Australian government. Rather, the Muslim consumer would be free to select the organisation or individual that best suited his or her religious, cultural and ideological needs. For example, if the claimant is a moderate, more progressive Muslim then he or she will choose a body that adheres to these values, rather than one that subscribes to more traditional views. Ultimately, as the consumption of these services grows and the marketplace becomes more crowded by *ifta* providers, the increased competition will result in the demise of substandard or unpopular providers. In the absence of a state institution, authority for *ifta* is socially conferred, so that the requests for a legal opinion, and in turn its acceptance, rest solely on the esteem with which the individual or the organisation is held in the eyes of a questioner. Authority cannot be proclaimed; it must be attained.

This plurality could enable new discourses on authority to emerge which are contemporary, and which resonate within an Australian context. This could include the issuing of fatwas by female Islamic scholars, in keeping with the role fulfilled by A'isha, the Prophet's wife (after his death) and which has been accepted by some progressive Muslim scholars,⁷² and recently by the Makkah International Conference on Fatwa and Its Regulations.⁷³ It may also lead to the emergence of a distinctively Australian *fiqh*, one in which the compatibility of being Muslim within an Australian framework supersedes past ethnic and theological divides. Scholars in Britain sense the emergence of a contextually relevant form of Islamic law labelled *angrezi shariat* (English Shariah), in which the Shariah has been mediated for the English socio-legal context.⁷⁴ In Europe, *fiqh* of minorities (*fiqh al-aqalliyyat*) has also been so identified with Europe-centered fatwas fuelling its development.⁷⁵

⁷² See above n 30. Islamic scholar Soad Saleh, has an Egyptian satellite TV show, *Women's Fatwa*: see Otterman (2006).

⁷³ Shaheen (2009).

⁷⁴ Yilmaz (2005), p 66.

⁷⁵ Caeiro (2009).

Fatwa's Database

As noted earlier, the fatwa issued in response to a submitted question should be published or disseminated in some form to the wider Islamic community. A failing to date in Australia has been the absence of a record or collection of fatwas issued by ANIC, the Mufti or the Council of Fatwa accessible on their websites. By contrast, the fatwas issued by Darulfatwa are available on the Council's website in a collection that was at first known as the Fatawa Bank⁷⁶ but now is simply titled 'Islamic fatwas'.⁷⁷ There is an 'Ask the Mufti' page that enables questioners requiring a fatwa to submit the request online. In keeping with the collective approach, the fatwas are not issued by one scholar, with the website listing the names of five sheikhs who it states are 'qualified and holding different degrees and from universities such as Al Azhar'. The categories of questions submitted range from matters of adherence to Islamic ritual, belief and practices to those directly centred on the adaptation of Islamic norms and practices to the Australian context. They show the role fatwas play in responding to the social and cultural challenges of migration and minority status of Muslim communities.

On the website, a high school student asked whether she could break her fast while doing her HEC exams on the understanding that she would pay back those fasting days after Ramadan. The opinion was that the obligation to fast remained, but some practical guidance on managing the fast was provided. Another questioner asked about organ donation. A matter of universal concern to Muslims in Western countries is the obligation to avoid interest (*riba*) on transactions and several questions were asked as to whether the situation outlined in their question would be in breach of this duty. A related issue was insurance, and there was a question about whether mosques should have building and public liability insurance.

An inquiry was made on the Quranic distribution of inheritance shares to enable an employee to complete a superannuation form requiring him to nominate who would benefit in the event of his death. There were doctrinal questions asking for guidance on aspects of Islamic ritual — for example, when it is best to conduct the *Juma Khutba* (a speech or sermon before Friday prayer) and *salaat* (prayers), given the period of daylight saving — and questions highlighting the constraints on religious practice brought on by work and school hours in this country. A question on when and at what stages the Qur'an could be read for the dead was asked because the questioner had been told different opinions and needed the confusion between these views authoritatively clarified. Several questions were in regard to the slaughtering of animals according to Islamic requirements for meat to be *halal* (permissible) and questions about whether products such as Coca-Cola and Fanta were *halal*. Other questions centred on issues arising in family and marital relationships, including relationships with a non-Muslim parent. Although each question was pertinent to the inquirer, the fatwas issued do provide a ready reference point for others seeking guidance on what may be recurring matters of concern for Australian Muslims.

⁷⁶ See www.darulfatwa.org.au/English/Fatawa_Answers-pg1.htm.

⁷⁷ See <http://darulfatwa.org.au/content/section/5/156>.

Fatwa Shopping

In addition to those institutions described above, there are many imams and sheikhs issuing 'private' fatwas to their Australian mosque congregations. Given that there is no hierarchy in Islam, each Muslim is free to seek guidance from any scholar in whom he or she has confidence, and to accept or reject such a ruling. This means Australian Muslims can request fatwas from overseas Muftis and scholars, and many chose to do so. The internet has facilitated this process, and the *ulama* across the globe have been innovative in employing the new technology for giving fatwas and for disseminating key information on Islam.⁷⁸

Many national fatwa-issuing organisations such as Majlis Ugama Islam Singapura, Majelis Ulama Indonesia, Jabatan Kemajuan Islam Malaysia, the European Council for Fatwa and Research and the Fiqh Council of North America, provide an online fatwa service. Online fatwas are one aspect of the burgeoning cyber Islamic environment that enables Muslims to enter dialogue with others, and to access and distribute Islamic information globally. E-fatwas have provided Muslim Australians with an array of alternative Islamic opinions and interpretations.

The nature of the internet, which permits anonymity, gives questioners the chance to pose private and controversial questions without fear of being identified. Another feature is that the online fatwas potentially have a much broader application to all those users who find themselves in a similar position to the questioner, whereas a face-to-face fatwa has a unique application to the parties concerned. This suggests that online fatwas will be cited across space and time.

The process of searching Islamic websites for suitable religious opinions can be called 'fatwa shopping', also termed surfing on the 'inter-madhab net'.⁷⁹ Potentially, it opens all sorts of new and alternative interpretations of Islam alongside the more traditional versions. It can open the eyes of Muslims who are entrenched in their own local brand of Islam to the diversity of their religion in its global form.

In the context of authority, now almost anyone can set themselves up as an authority and issue legal opinions. This might be seen as democratic, though providing wide divergent views on what is *halal* (permitted) and what is *haram* (forbidden) could lead to information anarchy. In other words, a consequence of letting anyone and everyone issue a fatwa on the internet is that quality assurance is minimal. Some fatwa-givers will take the time to check their references; others may not. Things become even more complex as bloggers and open forums, comment threads and other mechanisms in the internet arrive with a mix of news, hoaxes and speculation from unreliable sources. What is credible and what is baseless becomes increasingly difficult to discern. With the absence of a formal framework for deciding who may become a Mufti on the internet, it has become very hard to stop people from declaring themselves Muftis. This media-Mufti phenomenon has flourished in the cyber environment.⁸⁰

⁷⁸ Bunt (2003).

⁷⁹ Yilmaz (2005), p 39.

⁸⁰ Graf (2007).

A visit to sites such as Islam on-line,⁸¹ islamtoday,⁸² Ask the Imam,⁸³ Islam Q&A⁸⁴ and Fatwa on-line⁸⁵ show Australians are strongly represented as questioners. In the domain report of Islam Q&A there were 1,112,998 requests for fatwas from Australia.⁸⁶ Of the 128 countries from which requests have been received Australia is number seven, behind Saudi Arabia, the United Kingdom, France, the Netherlands and the United States. This supports the contention of Alexandre Caerio that the demand for fatwas in the Western world appears to be greater than in Islamic countries.⁸⁷ He argues this because there is a discontinuation in the transmission of Islamic knowledge which propels the young to find ways to adapt Islamic law to their Western context. As well, there is a need — particularly for women — to ‘elaborate strategies of survival and to navigate skillfully between different normative orders’.⁸⁸

The diversity of opinion found on the internet could help push reform within Islam, particularly in reducing its dependence on the old methodology, which was a product of the sociological structure of classical and medieval Muslim societies. Online fatwas can be seen as a tool for Australian Muslims to not only examine whether certain beliefs or practices within the Muslim community are congruent with the principles of Islamic law, but also to use as a viable tool through which a society can adjust itself to internal and external social, political and economic change.

However, the practice of asking foreign Islamic websites (not Australian ones) could be problematic, as those foreign Muslim scholars who answer the questions may not understand life in Australia. This could be disadvantageous, particularly when those foreign Islamic websites are trying to answer questions closely related to life and social interaction in Australian societies. Since many online Muftis do not live in the West, their answers might not be suitable. For instance, the issue of saying ‘Merry Christmas’ should be seen also as a cultural practice in Australia, rather than identifying it as a theological battle between Islam and Christian, but one Indonesian website, Syariah Online,⁸⁹ strongly forbids it.

⁸¹ Based in Doha, Qatar with fatwas issued by a committee of scholars headed by Dr. Yusuf Qardawi. www.islamonline.net/livefatwa/english/select.asp.

⁸² Based in Saudi Arabia with fatwas issued by committee of scholars supervised by Sheikh Salman bin Fahd al-Oadah. www.islamtoday.com/fatwa_archive_main.cfm.

⁸³ South African site with fatwas issued by Mufti Ebrahim Desai. <http://islam.tc/ask-imam/index.php>.

⁸⁴ Saudi Arabian site with fatwas issued under supervision of Shaykh Muhammad Saalih al-Munajjid. <http://63.175.194.25/index.php?ln=eng>.

⁸⁵ Saudi Arabian site designed to give English-speaking Muslims access to translations of officially published Arabic fatwas. www.fatwa-online.com.

⁸⁶ See <http://63.175.194.25>.

⁸⁷ Caerio (2009).

⁸⁸ Caerio (2009).

⁸⁹ See www.syariahonline.com/new_index.php/id/1/cn/24458.

Fatwas and Australian Courts

Given the continuing significance of fatwas for Muslims in Australia, it is to be expected that Australian courts will at times encounter the legal concept of fatwa in cases argued before them. On a matter remitted to it by the High Court of Australia, the Federal Court⁹⁰ had to consider the effect and status of a fatwa in order to determine whether the applicant had a well-founded fear of persecution warranting the grant of an Australian protection visa. The fatwa, ruling that his conversion to Hinduism made him an apostate from Islam, had been issued in the applicant's village in Bangladesh. There are severe traditional penalties for apostasy and it was his fear these physical punishments may be imposed that formed the basis of his persecution claim. As the Bangladeshi High Court had held in 2001 that fatwas issued at village level by *salishes* (conservative rural clergy villages in Pakistan and Bangladesh) were not to be enforced,⁹¹ together with the factual finding that the impact of this fatwa was really limited to his own village, the Federal Court held that the appellant would not be at risk of persecution were he to return to another part of Bangladesh.

As well, Australian courts, like their English and American counterparts, will on occasions need to determine legal issues that necessitate some knowledge of Islamic law. Whether it is the means by which an estate should be distributed under the Islamic laws of inheritance or whether a contract is an Islamically correct *murabaha* agreement to be enforced, questions pertaining to interpretation of Islamic law will inevitably arise, this again raises the issue of authority — who should have the authority to give an expert opinion or ruling on Islamic law to our courts? Whether it is the Mufti of Australia (in keeping with the Middle Eastern model) or whether it is through Council of Fatwa — ANIC or Darulfatwa — or a collective group of scholars, functioning here as they do in other Muslim societies (like Indonesia), this question of leadership and authority will need to be resolved.

Conclusion

This paper has demonstrated that fatwas in Islam should be seen as mechanisms for growth and change in Islamic law, which makes Islamic law adaptable to social change. Wael Hallaq correctly points out that:

our enquiry suggests that the juridical genre of the fatwa was chiefly responsible for the growth and change of legal doctrine in the schools, and that our current perception of Islamic law as a jurists' law must now be further defined as a Muftis' law. Any enquiry into the historical evolution and later development of substantive legal doctrine must take account of the Mufti and his fatwa.⁹²

Unlike the Qur'an, the fatwa emerges as only an intellectual activity which could be right in a certain time and place and be wrong in another time and place. A

⁹⁰ See *Applicant S76 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 120 (unreported).

⁹¹ On the issue of unlawful fatwas in Bangladesh, see Kabir (2001), p 224.

⁹² Hallaq (1994).

fatwa can be revised by the same Mufti, either because it is contrary to the Qur'an, the Sunnah (the tradition of the Prophet) or consensus (*ijma*), or because there is a social change which influences the validity of the original fatwas. This would suggest that a fatwa is not a sacred thing. Fatwas are adaptable to social change, particularly where previous rulings have proven no longer suitable to the situation. This means that fatwas will continue to be used as instruments to cope with modern developments.

This makes the fatwa an indispensable tool for Australian Muslims. Not only can it be used to examine whether certain beliefs or practices amongst the Muslim community are congruent with the principles of Islamic law, but also how local practices and values can be accommodated with scripturalist ideals. In other words, fatwa is a viable tool through which a society can adjust itself to internal and external social, political and economic change.

It is essential to note that fatwas in Australia are not intended to compete with or to replace the status of the Australian Constitution or Australian laws and regulations. Fatwas operate at the personal, individual and private level. Their existence amongst the Muslim community does not contradict the spirit of Australia as a secular state. Borrowing the works of Masaji Chiba, a Japanese jurist whose important work is gradually gaining more respect in the field of legal pluralism, fatwas in Australia could be seen as 'unofficial law'. According to Chiba, apart from official law, there is another level of law that transcends the legal, and yet needs to be counted into the equation because it influences the operation of legal systems in more substantial ways. The authority of such 'law' does not depend on official recognition; rather, such law is authorised in practice by the general consensus of a certain circle of people and having a distinctive influence upon the effectiveness of the official law. This scenario is offered by Chiba partly as a means to balance the general presentation of legal pluralism as one of a harmonious working together of the different levels of law.⁹³

Australian governments should recognise and respect the cultural and religious heritage of Australia's citizens, while at the same time participation in religious activities should influence the Muslim community to be more open towards the complexities of social life, as has been reflected in different topics and conflicting fatwas examined in this paper. It could be argued that the fatwas issued by Muslim scholars in Australia express the dialectic relation between the question posed by the Muslims and the answer given by the religious authority. The topics covered in current fatwas are closely related to Muslims' personal daily lives and accord to the requirements of different places and times.

In addition, as has been discussed above, differences of opinion among *ulama* are expressed in (conflicting) fatwa. For instance, in Australia, many Muslims followed the decision of Darulfatwa Islamic High Council that the first day of Ramadan was on 4 October 2005, while others took the view that fasting commenced on 5 October 2005. In one city alone — Wollongong in New South Wales — two different dates for celebrating the end of Ramadan occurred in 2008. Conflicting fatwas cannot be avoided, since each has its own reason and arguments, with Muslims free to choose any fatwa that suits their circumstances. Even the

⁹³ See Chiba (1986, 1989, 1998, 2002).

fatwa issued by the designated 'Mufti of Australia' is not legally binding. This illustrates that, in a multicultural society, a plurality of legal views cannot be avoided.

It is suggested that, accordingly, Australian *ulama* should reduce their dependence on the old methodology, which was a product of the sociological structure of classical and medieval Muslim societies.⁹⁴ The *ulama* should start to offer new concepts, or a reformulated methodology for Islamic law, in order to deal with modern phenomena in the twenty-first century. In other words, they need to develop new interpretations of original sources while studying the interpretations of the past, both to learn from their insights and to understand them as products of their historical environment. It may also mean that Muslim women, in the tradition of A'isha will be a part of this process to ensure that Australian fatwas are always responsive to the issues and challenges facing Australian Muslims.

It is relevant also for the Australian legal community to have some understanding that the populist notion of a fatwa as a pronouncement of death or a declaration of opposition to the West is not representative of the legal rulings issued by Islamic scholars. Fatwas demonstrate a mechanism for growth and adaptability inherent in Islam that is to be valued by Muslims and non-Muslims alike. From the media, one can get the impression that the Shariah is locked in a static medieval vault of Taliban construction, but it can be a living, evolving and dynamic force in contexts like Australia. Recognising this is important at this time, as Australian lawyers — like their counterparts throughout the Western world — will be pivotal in the accommodation of difference inherent in multicultural societies.⁹⁵ This is one of the challenges facing the Australian legal system in the twenty-first century, and an informed legal community will be better able to deal with this challenge than one ethnocentrically bound by knowledge only of the common law.

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⁹⁴ More information on Islamic legal theory can be read in Al-Zuhayli (1986); Madkur (1974); Kamali (1991); Al-Alwani (1993).

⁹⁵ Black (2008).

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