# STUDIA ISLAMIKA

INDONESIAN JOURNAL FOR ISLAMIC STUDIES

Volume 4, Number 4, 1997

ISLAM AND MEDICAL SCIENCE:
EVIDENCE FROM MALAYSIAN AND INDONESIAN *FATÂWÂ*
**M. B. Hooker**

ISLAMIC LEGAL LITERATURE
AND SUBSTANTIVE LAW IN INDONESIA
**Nur Ahmad Fadhil Lubis**

AN EMPIRICAL ASSESSMENT
OF DIVORCE LAW REFORM IN INDONESIA
**Mark Cammack**

INDONESIANS IN SAUDI ARABIA:
WORSHIP AND WORK
**Laurence Husson**

ISSN 0215-0492

# STUDIA ISLAMIKA

Indonesian Journal for Islamic Studies

Volume 4, Number 4, 1997

EDITORIAL BOARD:

*Harun Nasution*
*Mastuhu*
*M. Quraish Shihab*
*A. Aziz Dahlan*
*M. Satria Effendi*
*Nabilah Lubis*
*M. Yunan Yusuf*
*Komaruddin Hidayat*
*M. Din Syamsuddin*
*Muslim Nasution*
*Wahib Mu'thi*

EDITOR-IN-CHIEF:

*Azyumardi Azra*

EDITORS:

*Saiful Mujani*
*Hendro Prasetyo*
*Johan H. Meuleman*
*Didin Syafruddin*
*Ali Munhanif*

ASSISTANTS TO THE EDITOR:

*Arief Subhan*
*Oman Fathurrahman*
*Heni Nuroni*

ENGLISH LANGUAGE ADVISOR:

*Donald Potter*

ARABIC LANGUAGE ADVISOR:

*Nursamad*

COVER DESIGNER:

*S. Prinka*

STUDIA ISLAMIKA (ISSN 0215-0492) is a journal published quarterly by the *Institut Agama Islam Negeri* (IAIN, The State Institute for Islamic Studies) Syarif Hidayatullah, Jakarta. (STT DEPPEN No. 129/SK/DITJEN/PPG/STT/1976) and sponsored by the Department of Religious Affairs of the Republic of Indonesia. It specializes in Indonesian Islamic studies, and is intended to communicate original researches and current issues on the subject. This journal warmly welcomes contributions from scholars of related disciplines.

All articles published do not necessarily represent the views of the journal, or other institutions to which it is affiliated. They are solely the views of the authors. The articles contained in this journal have been refereed by the Board of Editors.

*M. B. Hooker*

# Islam and Medical Science: Evidence from Malaysian and Indonesian *Fatâwâ*, 1960 1995

**Abstraksi:** *Pembahasan mengenai persoalan masyarakat modern yang timbul akibat kemajuan ilmu dan teknologi seringkali hanya dibatasi pada aspek-aspek ekonomi dan sosial. Tetapi, seperti yang dapat dijumpai dalam masyarakat tradisional umumnya, revolusi teknologi melibatkan transformasi sistem yang mengatur pola hidup masyarakatnya — baik sistem politik, psikologi, nilai, moralitas dan pandangan agama. Hampir semua masyarakat keagamaan mencoba menggunakan pendekatan keagamaan terhadap berbagai masalah yang mereka hadapi. Sulit sekali mengubah secara radikal pandangan tradisional yang mereka anut. Temuan di bidang teknologi kedokteran, misal-nya, seperti transplantasi, aborsi, keluarga berencana dan bayi tabung, memunculkan persoalan-persoalan serius dalam hal etika dan moralitas masyarakat tradisional.*

*Proses tersebut juga dialami masyarakat Muslim di Asia Tenggara, khususnya Indonesia dan Malaysia, di mana Islam, baik ajaran maupun kelembagaan, merupakan unsur penting dalam budaya tradisional. Sejak awal ada perbedaan cukup mendasar antara pandangan keagamaan yang dirumuskan ulama dengan pandangan "ilmiah obyektif" para perumus program pembangunan negara. Pandangan ulama bertitik tolak dari kemaslahatan dan kewajiban hidup manusia secara individu dan kolektif tidak hanya kepada sesama manusia, melainkan juga kepada Allah. Sedangkan perumus pembangunan bertitik tolak dari pandangan teknis-ilmiah. Akibatnya, ada penolakan di kalangan ulama terhadap keabsahan suatu temuan di bidang medis yang dipandang tidak bermula dari etika dan moral Islam.*

*Salah satu kasus adalah penolakan terhadap program pembatasan kelahiran (*birth control*) oleh sejumlah besar ulama Malaysia. Pada tahun 1965, ulama Negeri Kelantan mengeluarkan fatwa yang menolak secara mutlak program pembatasan*

kelahiran, karena tidak sesuai dengan norma Islam. Dalam fatwa itu disebutkan bahwa pembatasan kelahiran yang dilakukan secara medis merupakan usaha memberhentikan proses pembuahan. Fatwa itu juga tidak membenarkan alasan sosial-ekonomi bagi seorang Muslim untuk mengikuti program kontrasepsi, karena menurut pandangan Islam tradisional, Tuhan tidak akan membiarkan makhluknya kelaparan. Fatwa ulama ini terus dijadikan sandaran pemerintah Malaysia berkenaan dengan program keluarga berencana. Hingga, pada tahun 1973, sebuah fatwa lain dikeluarkan para ulama Perak, lalu diikuti Selangor pada 1979 yang membolehkan kontrasepsi dengan sejumlah catatan. Umumnya, fatwa itu terkesan lebih maju jika dilihat dari alasan "obyektif ilmiah". Dalam penggunaaan beberapa jenis kontrasepsi, ada yang diterima mutlak (pil, kondom, pantang berkala), ada juga yang diterima dengan keberatan. Namun ada juga yang ditolak secara mutlak, seperti aborsi karena bertentangan dengan jiwa ajaran Islam.

Tranplantasi juga mengalami perlakuan yang sama. Pada awalnya, para ulama menolak transplantasi bagi seorang Muslim, jika organ yang akan dipasangkan itu adalah milik orang yang berlainan jenis dan berbeda agama. Namun pada 1976 organisasi ulama Kedah memperbolehkan transplantasi seorang Muslim dari organ non-Muslim dengan alasan mempertahankan hidup orang bersangkutan.

Di Indonesia, pandangan ulama tentang berbagai masalah medis tampaknya sedikit lebih liberal. Pada 1979, Majelis Ulama Indonesia (MUI), mengeluarkan fatwa pembolehan transplantasi. Terdapat argumen keagamaan yang diberikan dalam fatwa itu. Pertama, dua hadits Nabi Muhammad tentang kebolehan mematahkan tulang jenazah tentara Muslim dengan tujuan menyelamatkan yang hidup. Kedua, prinsip kemaslahatan kehidupan manusia untuk mempertahankan hidup.

Selain itu, pada 1983, ulama Indonesia juga memperkenankan permintaan seorang Muslim untuk mendapatkan kontrasepsi permanen, jika ia telah mempunyai anak dan diizinkan suami/istrinya untuk melakukannya. Walaupun masih dilaksanakan dalam lingkup kecil, penting untuk mengamati bagaimana sebagian ulama di Indonesia melihat persoalan tersebut dari sudut implikasi ketentuan Islam yang mendorong pengembangan kepribadian unggul dan peningkatan kualitas hidup yang lebih baik.

Hal yang barangkali harus dicatat adalah bahwa dalam mencari landasan fatwa, baik ulama Indonesia maupun Malaysia, sedikit sekali menggunakan qiyâs atau analogi; sebuah prinsip ijtihâd yang paling sederhana tetapi populer di kalangan masyarakat Muslim. Hal ini bisa dimaklumi karena banyak persoalan medis di atas tidak ditemui presedennya dalam perkembangan historis masyarakat Muslim Abad Pertangahan, ketika metodologi qiyâs dibangun.

م. ب. هوكر

# الإسلام والطب: شواهد من الفتاوى الماليزية والإندونيسية ١٩٦٠-١٩٩٥م

**ملخص:** كانت الدراسات حول قضايا المجتمع العصرى الناجمة عن التقدم فى العلوم والتكنولوجيا محصورة فى كثير من الأحيان فى حدود الجوانب الاقتصادية والاجتماعية، ولكن كما يمكن مشاهدته فى المجتمع التقليدى المحافظ، تأتى الثورة التكنولوجية بتغيير جذرى لجميع الأنظمة التى تسير على منوالها حياة المجتمع، سواء كانت نظاما سياسيا أم نفسيا أم قيميا أم أخلاقيا أم دينيا؛ ويكاد جميع المجتمعات التى تتخذ من الدين نظاما لحياتها أن يستخدموا المنهج الدينى لمعالجة المشاكل التى يواجهونها؛ ومن الصعوبة بمكان إجراء تغيير جذرى للمواقف المحافظة التى كانوا ينتهجونها؛ والمكتشفات العلمية فى مجال الطب على سبيل المثال، كزراعة الأعضاء، والاجهاض، وتنظيم الأسرة، وطفل الأنابيب كلها تأتى بمشاكل خطيرة فيما يتعلق بسلوك المجتمع المحافظ وأخلاقياته.

وتنطبق تلك الظاهرة على المجتمع الاسلامى فى جنوب شرقي آسيا، وخاصة فى اندونيسيا وماليزيا، حيث أن الاسلام، شريعة ومؤسسات، يمثل أهم العناصر التى تكون ثقافة المجتمع المحافظ؛ ولقد ظهر لأول وهلة خلاف بين الآراء الدينية فى حدود ما رسمه رجال الدين وبين الآراء العلمية الموضوعية التى ينتهجها رجال الدولة فى تنفيذ المشروعات التنموية؛ حيث ينطلق رجال الدين من مصلحة الانسان فى وجوب أن تقوم الحياة البشرية، فردا وجماعة، على أساس أن الحياة ليست مجرد علاقة بين بنى الانسان وإنما مع الله ايضا؛

بينما ينطلق رجال العلم من اعتبارات علمية فنية؛ وكانت النتيجة أن نشأت معارضة لدى رجال الدين للاكتشافات العلمية فى مجال الطب، وتقوم تلك المعارضة على عدم الانطلاق من أساس التفكير العلمي بل من اعتبارات القيم الاسلامية والأخلاقية.

ومن الأمثلة على ذلك قيام عدد كبير من الفقهاء الماليزيين بمعارضة مشروع تنظيم الأسرة، فقد أصدر الفقهاء فى ولاية كلنتان (Klantan) عام ١٩٦٥م فتوى يعارضون به تحديد النسل لعدم موافقته مع القيم الاسلامية؛ وفى الأدلة التى يقيمون عليها الفتوى يذكرون أن القيام بتحديد النسل باستخدام وسائل طبية، إنما هو محاولة للحيلولة دون وقوع الإخصاب، ولا يسمحون أيضا أن يتذرع المسلم بأسباب اقتصادية واجتماعية للاشتراك فى استخدام وسائل منع الحمل، لأنه طبقا للتعليم الدينى التقليدى المحافظ، فإن الله لن يترك مخلوقه دون رزق منه؛ ولقد ظل هذا الفتوى سندا للحكومة الماليزية فى اتخاذ موقفها من مشروع تنظيم الأسرة، حتى وافت سنة ١٩٧٣م، عندما صدر فتوى آخر اصدره فقهاء فيرلاك (Perlak)، ويتبعهم فى ذلك فقهاء سلانجور (Selangor) سنة ١٩٧٩م، أجازوا فيه استعمال وسائل منع الحمل مع عدد من الشروط؛ وعموما قد يكون هذا الفتوى أكثر تقدما من وجهة نظر العلمية الموضوعية، ففي استعمال أنواع معينة من وسائل منع الحمل، هناك البعض منها مقبول مطلقا (كالأقراص، والعازل الطبي، وعدم الممارسة فترة) بينما يتم قبول البعض الآخر منها بالمعارضة، بيد أنه يوجد منها مرفوض مطلقا، بناء على عدم موافقته مع روح الشريعة الاسلامية فيما يتعلق بالإخصاب وهو الاجهاض المنهي عنه.

والأمر كذلك ينطبق على زراعة الأعضاء، فقد عارض الفقهاء فى البداية زراعة الأعضاء على مسلم، إذا كان العضو الذى تتم زراعته من جسد يختلف عنه أولا من حيث الذكورة والأنوثة، وثانيا من حيث الدين، ولكن

جميعة الفقهاء بولاية كيده (Kedah) أجازوا عام ١٩٧٦م زراعة عضو على المسلم من جسد غير مسلم، بناء على أساس المحافظة على حياته.

وأما فى اندونيسيا فقد كانت آراء فقهائها فيما يتعلق بمختلف المسائل الطبية أكثر تحررا، ففى سنة ١٩٧٩م أصدر مجلس العلماء الاندونيسي (MUI) فتوى بجواز زراعة الأعضاء، وهناك أدلة دينية يقوم عليها الفتوى، أولها حديثان شريفان من أحاديث النبي محمد (صلى الله عليه وسلم) حول جواز قطع عظم الجندى الذى مات شهيدا فى سبيل المحافظة على حياة الأحياء؛ وثانيها الاعتبار بالمصلحة التى يحتفظ بها الانسان حياته.

وبالاضافة إلى ذلك، أجاز فقهاء اندونيسيا لمسلم يطلب استخدام وسائل منع الحمل نهائيا بشرط أن يكون لديه أولاد وباتفاق الزوجين، وذلك سنة ١٩٨٣م عندما دخل مشروع تنظيم الأسرة عامه الثالث، حيث جرى تنفيذه على قدم وساق؛ ورغم أن تطبيق الفتوى فى نطاق محدود (ولم ينتشر فى أنحاء المناطق الريفية) فإن من الأهمية ملاحظة كيف أن بعض فقهاء اندونيسيا ينظرون إلى القضية من حيث مقاصد تطبيق الشريعة الاسلامية التى تشجع على تكوين شخصية قوية ومتفوقة، والارتقاء بالحياة إلى مستوى أفضل.

ولعل ما تجدر الاشارة إليه هو أنه فى سبيل البحث عن الأسس الشرعية لإصدار الفتوى، من النادر أن يلجأ الفقهاء؛ اندونيسيون وماليزيون على حد سواء، إلى استعمال القياس؛ وهو أساس من الأسس الاجتهادية الأكثر بساطة مع شهرته الواسعة لدى اوساط المجتمع الاسلامى، وقد يكون هذا مفهوما لأن كثيرا من المسائل الطبية المذكورة لم يكن لها ما يشبهها فى تاريخ تطور المجتمع الاسلامى فى عصره الوسيط حيث كان المنهج القياسى يجرى استخدامه.

## Introduction

The purpose of this paper is to illustrate some of the dilemmas in which Islam finds itself with respect to advances in modern medical science. This is of course a very large subject and all I can do here is to take a very small sample of problems as expressed in *fatâwâ* (legal rulings—see further below) over the past thirty years. Coincidentally, these are also the years which have seen tremendous advances in medicine and the ways in which we can now treat (or mistreat?) the human body.

For Islam, as for all religions, these new techniques raise serious and so far intractable problems in the fields of ethics and morality. Some of these are familiar to us; is an embryo "alive", who "owns" it, can it be "sold", can it "inherit" and so on. These are real questions in medical ethics although they are probably fairly remote in practice for most people. But this does not, of course, detract from their difficulty. This is true for Islam as well; however, in the Malaysian and Indonesian cases we have not progressed to the embryo problem yet. Instead, the problems with which the evidence is concerned is at the earlier stages of scientific innovation—organ transplant, blood transfusion, contraception and family planning. Most of us have probably forgotten the ethical debate of thirty and forty years ago on these subjects and for the younger generation (post-pill!) these debates are only history. This is not true for Islam generally or for Muslims in South East Asia in particular. These issues are very much alive and continue to plague not just the conscience of the individual Muslim but also have repercussions in government health policy, in religious law, and in the state criminal law. Indeed, the depth of feeling and its incidence is probably greater in Muslim countries than in the West. The reason for this is the view which Islam takes of science in general and of medical science in particular. It is to these that I now turn.

## Islam and Science

The Islamic view can be stated succinctly; it is that science is not and cannot be value free 'Value' here refers to the truths of Revelation and also to what is called the 'Islamic' or 'Muslim context', ie, whether the science being done is ethically, morally and socially justified. Science is always value laden. The Western claim that science is pure and value free is, in the view of many Muslim scientists (or philosophers of science), just not true. Its context is always value laden and the lack of perspective from Revelation can lead to waste-

ful and, thus, 'illegitimate science', to say nothing of science which is purely destructive, (as in military science).[1]

As evidence of the legitimacy of the Islamic approach Muslim philosophers of science point to the outstanding achievement of this science in the medieval period. The achievements are undeniable in all fields of science but at the same time there was also a profound decline of Islamic science in the later medieval period which has been variously attributed to the triumph of the theologians over the (Greek inspired) philosophy and the subsequent acceptance of a "passive and authoritarian intellectualism";[2] another reason put forward, often in conjunction with the above, is the state of political and intellectual exhaustion characteristic of the later Muslim world—and this was followed by the subjection of that world to the Western powers, (from the 18th century) a circumstance which has only recently ceased. But perhaps not entirely ceased; it is held by many Muslim scholars that the Western intellectual domination of Muslim thought, including scientific thought, continues simply as a consequence of the overwhelming scientific and technological dominance of the West. This is probably true and, as a consequence, the attempt to establish an 'Islamic' science is reactive, even (to some degree) defensive.

Consider the following; from the early 1970s (possibly earlier) we have a political and economic revival in the heart lands of Islam—the Middle East. This has been preceded by and is now accompanied by a renewed interest in the religion of Islam—it is indeed a renewal[3] of pride and commitment to faith itself. At the same time a perceived Western dominance remains, and indeed is reinforced as young Muslims are educated in the West or in newly founded but Western style universities at home. This melange of circumstance is conducive to a considerable debate amongst Muslim philosophers of science as to what an Islamic science can or should be.

As one might expect, there is a variety of answers which range in quality from the naive to the rather sophisticated.[4] For example, it is quite common to find the Qur'ân 'proved' by science. This consists in reading contemporary scientific principles into passages from the Qur'ân.[5] The results are ludicrous but, more importantly, the attempt betrays a serious misunderstanding both of the Qur'ân and of science. The former does not need legitimating; it is, for the believer, the work of God and it stands on that alone. To suppose it needs support is to suppose, ultimately, that God needs scientific proof. This is not the Muslim position.[6] Conversely, if the Qur'ân can be

seen as justifying science then the latter has the same validity as Revelation. This cannot be because, in the Muslim view, scientific facts are always relative in at least two senses. First, the facts of yesterday are often overtaken by new facts, science does not stand still. Second, and related, science is a product of man's mind and this, by its nature, is not capable of absolute truth.

Enough has now been said to indicate some of difficulties,[7] but it would be wrong of me to give the impression that the Muslim discussion on Islam and science is wholly negative and defensive and that it is invariably naive. This is not so, and there has been and is now a vigorous discussion on the subject. I would like to indicate some of the main features of this but it should be clearly understood that differences of approach exist between Muslim philosophers of science. On the other hand it should also be noted that many, perhaps the majority of Muslim scientists, who are not philosophers of science, are content to live in a dual world. Professional scientist on the one hand, and true believers on the other, and never the twain need meet!

But to return to the philosophers of science; all agree that 'it is the very method of science that the Muslim scientists need to tackle'[8]. Method here appears to mean two things. First, that it must be acknowledged that science cannot be value free.[9] There is no disagreement about this amongst the Muslim philosophers of science. The values are the Islamic values. Second, and this is the real problem, what are these values or, more specifically, how and by whom are they to be determined?

The answer is really in two parts. First science is a matter of civilization and each civilization has produced its own science. Greek science, for example, is not Chinese science, nor is it medieval European science, though unlike Chinese science it is connected to it. Islam is a civilization and therefore has its own identifiable science. It is not denied that there are Greek connections. The second part of the answer is, therefore, to identify the distinctive Islamic element or elements. It is here that Muslim philosophers of science experience difficulty. There appears to be, on the one hand, an acknowledgment that the pursuit of knowledge is always subject to a higher (God's) purpose and hence limited by the perceived definitions of that purpose. This may of course, change from time to time; indeed, the definitions of God's purpose do change overtime and they vary also from place to place. But however this might be God's purpose is

taken as a fundamental datum. The result, in theory at least is a limit upon free enquiry. On the other hand, and less restrictive in practice is the view that the material world is a reflection of spiritual values(s) and, provided the obviously destructive is avoided, then knowledge may be pursued as the scientific method dictates. In effect, this is the more popular view but, as is obvious from this formulation, the opportunity for disagreement is both immediate and, in fact quite frequently taken.

We can illustrate these general comments by turning to medical science.

## Medicine in Islam

The evidence which I am going to bring forward here dates from 900 to 700 hundred years ago. This should occasion no surprise; the main principles of Islamic theology and law, and it is these which determine the status of medicine, were established in the 8th century of the Christian era. The arguments and positions from that time are equally valid in 1995, and will remain as such as long as the religion of Islam exists. Those who refuse to take Islam historically do so at their peril!

Our first example[10] is by one Ibn Hindu who was an active writer and government servant in the late 10th century. As the following extract shows, he was competent in Greek philosophy and he was concerned to show that attacks on medicine, particularly from the dogma point of view could not be justified. This reminds us of the earlier comments on reason and Revelation with which I began this paper:

> "I think that (people who consider medicine worthless) are among those whom Aristotle has in mind when he declares it forbidden to enter into debates with certain people and, instead, commands (their opponents) to pray for them or to chastise them and to exercise firm control over them. In the *Kitab al-Jadl* (the *Topics*), he mentions that some kinds of problems, such as, for instance, the problem of the part (the atom) or the problem of eternity and createdness, must not be debated because of their obscurity and subtlety. They require the immersion of the mind in refined speculation and are not responsive to hasty thoughts and quickly applied faculties. Then, there are problems that must not be debated because of their clarity and obviousness. One should pray for the person who raises such questions and ask God to give him sound sense perceptions. He would, for instance, be the person who raises the problem of whether the fire burns or snow is cold. Then, there are problems that must not be debated because they are disruptive of the social and political situation (*sîyâsah*) and impugn the fundamentals of the religious law. A person who raises problems of this sort must (not

be debated but) rather be chastised and prevented from advertising them. This applies, for instance, to someone who raises the problem of why it is necessary to honor one's parents or why it is not permitted to kill an innocent person. Then, there is a fourth kind of problems, which may give rise to discussion and where debate is permissible, namely, problems that are neither entirely clear nor entirely obscure, nor do they have a deleterious effect upon social and political matters. Now look, dear reader, at the person who denies the validity of medicine, and take note that he covers the eye of the sun and ignores the dawn of morn, in spite of the usefulness of physicians and the beneficial outcome of most medical treatments experienced by both the mass and the elite. Take note, further, how such a person impugns the social and political order by (attempting to) deprive people of something useful and to make them dislike some of life's conveniences. Is there anyone more in need of prayer than he be given the gift of (sound sense perceptions, and more in need of being chastised?

Thus, those who deny the validity of medicine are poor and misguided. They do not deserve to be taken seriously and to be debated. It is obvious that they are wrong."

As Rosenthal remarks,[11] this passage shows a somewhat 'self righteous' attitude, but the theological argument always remains. This is to the effect that the practice of medicine, by attempting to reverse that which has occurred, ie, the illness, shows a lack of true faith. This is in fact an argument still heard today and it is a very dangerous one in a Muslim country. It essentially says that one is attempting to disrupt God's purpose or dispositions and, hence, one is a bad Muslim—even worse no true Muslim at all. The medical answer as expounded by Ibn Hindu and later (late 11th century) by 'Abd al-Wadûd' is that medicine is an 'ordinary function" like eating and drinking and, as such, necessary for life itself. The latter will come to an end when ordained by God in any and all cases.

We can see this well put in the following passage[12] from Ibn al-Quff (mid-late 13th century)

It has been said that the will, or knowledge, or power of God, in eternity or following the (prevailing) horoscope as the astrologers say, either requires the health of Zayd and that he will not fall sick for a specified time, or it requires the change and dissolution of his temper. Now, in the first case, the science of medicine is not needed, because health is going to stay in the body in question (even) without the application of the rules of medicine. In the second case, the application of medicine is of no use.

In reply we say: Just as God has destined the existence of health, He has made the proper application of medicine for the sake of health a reason for health. To a person expressing such doubts (as just mentioned), it can be said that he ought to take a respite from the task of eating and drinking. The line of argumentation suggested above either requires somehow satiety and be-

> ing provided with water, or it does not require it. If it does, there is no need to employ (eating and drinking). In the second case, there is no need either for employing (food and drink) as this would be 'trifling'. All this is absurd, because it would follow from it that the existence of any food means 'trifling,' which is a denial of God's attributes (*ta'til*). It is an obvious error.

A further point put by the same author is that his opponents, in their turn may also be accused of irreligion. God did not create in jest or for no purpose[13] and medicine is 'natural'; to suppose otherwise is to suppose God without purpose which is to say that one doubts His existence.

With these introductory remarks, and I must emphasize they are very brief,[14] I would like now to turn to the Malaysian.

## The Malaysian *Fatâwâ*

The term fatwâ (*fatâwâ*) has achieved a certain notoriety in the world as a result of the fatwâ declared by the Ayatollah Khomenei concerning Salman Rushdie. Indeed, many people think *fatwâ* means 'death sentence'. A *fatwâ* is a ruling on a point of law in all religious matters given by a learned (qualified) person[15]—an *'âlim* (*'ulâmâ'*) who has the authority to do so. The definition thus stated is simple enough; the difficulty, however (as with so many 'simple' definitions) lies in the question of 'authority'. Who has authority and what is a properly constituted authority? The answer varies throughout the Muslim world and I take only Malaysia at this point (see below for Indonesia).

Malaysia is a federal state and, under the Constitution, religion is a state and not a federal matter. This means that each state has its own laws on religion. By and large these are fairly standard though important variations do exist. However, common to all is a Majlis Ugama, Majlis Islam or some such term which is essentially a 'Council of Religion'. Its primary function under the legislation is to advise the ruler of the state on disputed or difficult questions of law. In addition any Muslim may also send in a query and the Majlis will give a reply. This (the *fatwâ*) is binding on all Muslims in the state[16] or is supposed to be so in theory. Whether or not this is actually so is unknown. As to 'authority', it is clear from the current law(s) in the states of Malaysia that *fatâwâ* draw their authority from the relevant legislation. The giving of *fatâwâ* outside the legislation is forbidden. Ultimately, therefore, validity derives from State fiat.

The data: the Malaysian data are from the period 1960-1990 and

comprise just over fifteen hundred *fatâwâ*. The great bulk of these are concerned with marriage, divorce and inheritance, and matters of ritual and dogma. That is, with the subjects which have always featured in *fatâwâ* through the centuries. Each *fatwâ* is in a fairly standard form which consists of (a) a statement of the problem, (b) the relevant passage from a text book of authority and (c) the application of that passage to the problem and, hence, its solution. Reasoning is by way of direct application or, occasionally by way of analogy (*qiyâs*) which is a standard form for reasoning. Only rarely are there direct citations from the Qur'ân. The point I am making is that for the overwhelming majority of cases, the answers are known to the educated scholar and all that is necessary is reference to the appropriate authority.

When we come to consider the Malaysian *fatâwâ* on medical matters none of the comments I have just made holds good. In terms of numbers, they are only about 2% of the total for the period, there is no standard form and almost nothing in the way of authority is cited.

The *fatâwâ* I have are on (a) organ transplants and )(b) family planning originating from the state Majlis.

On the general issue of transplants, these are justifiable according to a *fatwâ* of Perak in 1975 because 'the preservation of life is paramount in Islam' and may be justified because 'necessity permits prohibited things'. 'The transfer of a non-Muslim cornea into the eye of a Muslim is allowable'. A Selangor *fatwâ* in 1972 is a little more explanatory. It approves organ transplants whether Muslim or non-Muslim in origin and whether with permission or without. These organs are considered as 'without ownership'. However, there are some conditions; the transfer must be for the preservation of life and the operation must be guaranteed as successful. The donor must be dead, and 'killing for the purpose of obtaining organs' for use is forbidden. Permission *should*, but need not be acquired from the donor and his family.

Finally, there is a fatwa from Kedah in 1967 allowing the transplant of a non-Muslim cornea into a Muslim eye; we then have the rather *striking statement*—'It is allowable to pray with it for the sake of necessity"!

There is little in the way of direct authority stated in any of these *fatâwâ*. The only specific reference is to the Qur'ân, al-Hajj, 18—'God has chosen you and imposed no difficulties on you in religion'.[17]

We turn now to Family Planning, by which is meant contraception, sterilization and abortion. In common with most other devel-

oping countries Malaysia has a well-developed family planning program which is run by the state Family Planning Board. It emphasizes 'responsible' contraception so that children may be spaced and, eventually, depending on economic circumstances and individual choice, limited. The scheme assumes stable marriages.

The response from the various *Fatâwâ* Committees has been very mixed. Kelantan in '1965 said, '...the program... is an attempt to restrict the freedom of Islamic family life, and it is also contrary to the law of nature'. The *fatwâ* then went on to give a number of justifications which are: the Prophet himself encouraged marriage for the purposes of reproduction. The argument that poverty may be taken as a cause was also dismissed on the ground that God provides and will provide sustenance for his creatures. The point was also made that the world is in fact well provided for materially but that the rich states are selfish and will not make available the existing resources, indeed '...we have also heard of occasions where some rich countries destroyed their food owing to surplus".

However, having made these points, the Kelantan Committee then went on to allow contraception where:

1. Conception would endanger the health of the wife;
2. Where either or both of the parents have an infectious disease; and
3. In cases of severe poverty.

Trengganu in 1976 was prepared to allow contraception for health reasons and, secondly, on the ground that the Prophet's companions practised *azl* during *jihâd*.[18] On the other hand, sterilization is absolutely forbidden as is abortion after four months.

Selangor in 1979 is slightly more complex. The contraceptive pill *before* sexual intercourse is permissible but *after* intercourse it is forbidden, 'because such an act can destroy the process of germination'. The same is true for abortion—'it destroys the process of germination'. Sterilization is forbidden. Finally, under-age or unmarried women may not use contraceptives. No real authority is cited except a vague reference to past Muslim practice.

The National Council for Religious Affairs in 1981 forbids sterilization but permits contraception on the grounds of health and economy. No authority is given.

Finally, we come to a rather remarkable *fatwâ* from Perak in 1973. The view is that contraception reduces population size, and would thus reduce the total number of Muslims. To quote the *fatwâ*:

> "Out of twenty parliamentary constituencies only eight seats are held by Muslim candidates and out of forty seats of state councillors, only eighteen seats are held by Muslims...(Because of this) the *fatwâ* Committee strongly rejects the implementation of the Family Planning Programmes".

Such a view has nothing to do with Islam at all, as is acknowledged in Malaysia, though it has quite a lot to do with Muslim feelings about internal politics at least in the state of Perak. This point is also generally acknowledged. I suppose one can call this 'necessity' in a very vague sense, or perhaps in the sense of promoting Islam in its political aspects?

Finally, there are several *fatâwâ* dating from the late 1960s up to the early 1990s, on blood transfusion. The sole issue here is whether it is allowed for a Muslim to receive blood or blood products from a non-Muslim. Although not stated in so many words, the worry appears to be that an element of 'religious' contamination might occur from the introduction of non Muslim blood. There are three *Fatâwâ*, all of which permit transfusion on the ground on 'necessity'. There is no discussion nor is any authority cited.

There are two points arising out of these examples. The first is that state or national policies or national politics can influence *fatâwâ*. This is understandable, the *'ulamâ'* , after all, owe their positions to the state and they are expected to support state policy. The extent of support varies from Committee to Committee and also over time and subject. For example, state lotteries which, strictly speaking are gambling in Islam, are in fact supported by Malaysian *fatâwâ*. The reason appears to be that the object of the lottery is charitable and not for individual profit; thus, being state policy and for a proper purpose, it may be allowed[19]. But exactly the opposite result was reached in Indonesia (see below).

The second feature of these *fatâwâ* is the reference to 'necessity'. This has a wide range of meaning in English but it has no technical legal significance. In Islamic law, on the other hand, the idea in the sense of 'public interest' *(maslahah mursalah)* is a recognized principle in jurisprudence. It is that which both prevents harm (*mafsadah*) and provides a benefit. These essential parameters were established in the 11th century, particularly by al-Ghazâlî for whom it meant protecting religion, life, intellect, lineage and property. However, *maslahah* cannot apply in respect of specific injunctions (*muqâddarat)* of Sharî'ah; to allow otherwise would obviously destroy the primacy of Revelation. But given that God's purpose in the Sharî'ah is the

welfare of man, then *maslahah* is itself a Qur'ânic objective.[20] The public interest is classed into three; that which is essential (*darûriyyat*-religion, life, intellect, lineage and property). That which is supplementary (*hajiyyat*) to the essentials, to the negation of hardship in achieving the essentials and that which is additional (*kamaliyyat*) i.e., acts which lead to the encouragement of that which is desirable. It is only the first, the essentials, which is in discussion in Malaysian and Indonesian[21] *fatâwâ*. To be valid any rule made must be for a genuine purpose, it must be general and it must not negate or diminish any explicitly stated rule (*nass*). There has been and ... will be considerable debate over *maslahah*,[22] but surprisingly enough there appears to be little in the way of substantial disagreements between the four Sunni schools. This does not mean to say that there are not examples of arbitrary use or self seeking; for example, there is a *fatwâ* from Indonesia prohibiting that which is clearly permitted in the Qur'ân itself-in this case forbidding Muslim males from marrying Christian females. Such is allowed but here it was forbidden on the basis of *maslahah* for the reason that the man might not be strong enough to remain Muslim or to ensure that children would be brought up as Muslims[23].

The Malaysian *fatâwâ* all rely on *maslahah*, and that includes answers to other modern problems, eg, in the difficulties raised by such things as insurance policies, proceeds from state lotteries and superannuation funds[24]. However there is no discussion of the technical aspects of *maslahah* (see below pp on *qiyâs* for the reason).

## The Indonesian *Fatâwâ*

There is a long tradition of *fatâwâ* in Indonesia,[25] especially in the pre-colonial period (ie before the mid 18th century). The natural development of Islam was halted by Dutch colonialism under which Islam was severely limited in its legal application and suppressed in the political sphere.[26] Broadly speaking, the political position of Islam in post-independence Indonesia is slightly better but the religion is still subject to considerable state control and restriction. This is so, despite recent reforms[27] in 1991 and 1993.

These general comments apply to *fatâwâ*. It was not until 1975 that regional councils of *'ulamâ'* were established under the auspices of the Ministry of Internal Affairs. Representatives from these Regional Councils met later in the same year (this time under the auspices of the Ministry of Religion) and agreed to form an Indonesian

Council of 'Ulamâ'[28] for Indonesia. The motive for the establishments of these Councils was clearly political but, then, everything connected with Islam is always political the intention is to control fatwa. For example, there are fatawa from the 1960s and 1970s which say that it is obligatory (*wâjib*) i.e., legally binding for Muslims, to vote for Islamic political parties. This is not acceptable to governments in contemporary Indonesia.[29] The M.U.I., on the contrary, has as its functions the provision of *fatâwâ* to government (and to private individuals) on religious issues, the creation of unity between Muslims, and to represent Islam generally and in intra-religious dialogue.[30]

If one looks at the period from 1975 to the early 1990s it is quite clear that the main function of the M.U.I. is to support and, in some cases, to justify government policy on government programs.[31] These are not our concern here but it is important to bear in mind the public policy dimension of *fatâwâ*.

They are not 'merely scholarly opinion'; they involve government and the legitimacy of government because Islam is always an alternative source of authority, i.e., an authority deriving from Revelation. Any government policy is, therefore, open to question or judgement deriving from the absolute value(s) that is in Revelation. Examples from Malaysia include the validity of state lotteries and insurance policies (both gambling and that is forbidden), employee provident fund schemes (difficulties with the rules of inheritance), attendance at Christian ceremonies (denial of Islam). All eventually get *fatâwâ* to say that these things could be done on the basis of necessity and benefit. In Indonesia the same is true for stunning animals before slaughter, the use of Islamic themes in films and popular songs, attendance at Christian ceremonies and the breeding of frogs and rabbits for food.[32]

Medical Science does not seem to arouse great heights of controversy, or at least nothing to compare with the examples just given in the preceding paragraph. I suppose this is because we are all grateful to medical science without really knowing what it does or fully understanding its procedures!

The Indonesian Council of 'Ulamâ' has given three *fatâwâ* on medical issues. Unlike the Malaysian examples, the Councils's ruling are detailed, complex and fully use existing authorities.

We take first, a *fatwâ* on cornea transplant[33] given in June 1979. This was requested by the Red Cross and the Council ruled that cor-

nea donation was lawful provided (a) it is agreed to and witnessed by close relatives and (b) that the removal of the cornea is carried out by qualified surgeons. The actual arguments presented by the Council are as follows.

a. There is an initial reference to a *hadîth* by Abû Dâwud[34] which equates the breaking of the bones of a dead person with the same action in respect of a living person. The analogy (*qiyâs*) is obvious, and thus the former is also an assault. But what exactly is the interest in a corpse? The answer is found in the text books of *fiqh* ('knowledge'—rules of law).
b. Before looking at these sources it is important to make clear that *maslahah* is not recognized as an independent proof in the Hanâfî and Shâfi'î schools of law—the latter of course is the prevailing school in Indonesia (and Malaysia).[35] Instead, it is within *qiyâs*; that is, there is no category of public interests beyond an explicit text rule and a proper analogy from it[36]. Discussion on public interest, therefore, is always conducted in terms of analogy and it is in these terms that this Indonesian *fatwâ* on transplants rests.

This brings us to the text books on *fiqh*. Two are cited in this fatwa. The first is al-Nawawî's *Majmû' Sharh al-Muhadhdhab*, a standard work of the Shâfi'î school where it is allowed that a living baby may be recovered from the body of the dead mother. The second citation is to the same text, this time to the case that where a person has swallowed another's jewels just before his death it is allowed that the corpse should undergo surgery to recover the jewels. If the person swallowed his own jewels, the closest relative has the option.

The M.U.I. concluded, therefore, that the analogy applied in the case of cornea transplant, indeed it was a (classed) 'strong' analogy (*qiyâs jalî*) since a cornea transplant has a higher purpose and good than the mere recovery of jewels. It should be noted in this case that the intention of the donor *and* the consent of the closest relatives are required. These override the hadîth, and it is only on the basis of consent that the technical justification through *qiyâs* can be founded.

In other words, we are talking about two things; the morality of dealing with the human body and, second and *dependent* upon this, the technical justification by legal process for interfering with human remains. I suggest that these two aspects of the same set of circumstances must be kept separate. The reason is that if we subsume the morality under the technical, then justification by *maslahah* will

certainly lead to arbitrary and self seeking interests,'[37] a result with which Muslim philosophers of science are always and rightly concerned. This is certainly the approach adopted in this *fatwâ*.

I turn now to the second *fatwâ*; in this case a request from the Head of Surgery in the Jakarta Heart Hospital in 1985 asking whether post-mortem surgery on a dead person to take his heart for transplanting was allowable.[38] The answer was yes provided that the donor had willed the donation, that the nearest relatives had consented and, in addition, the donation could only be made in a case of emergency, where there was no other option. This last is in extra condition and not found in the earlier *fatwâ*. In addition two rather general passages from the Qur'ân are cited[39] as are two ḥadîth both, interestingly enough, on the defence of medicine generally. This is a reminder that the state of medical science in Islam continues to be if not problematical then of concern.[40] However, the actual decision is based firmly in analogy and the specific authorities are those cited earlier, *ie*, that post-mortem surgery on the corpse of a woman to recover the baby, and on a corpse who had swallowed jewels is allowable.

I turn now to family planning: in 1983 a comprehensive *fatwâ* was issued by the National Conference of 'Ulamâ' as follows:[41]

1. Islam justifies the practice of family planning exercised for the sake or the health of the mother and the child, and in the interests of the education of the child. The practice must be undertaken by choice, and employ contraceptives that are not prohibited in Islam.
2. Abortion practiced in any form and at any stage of pregnancy is forbidden in Islam (*ḥarâm*), because it constitutes murder. This includes menstrual regulation by pills. Exception is granted only if the abortion is conducted to save the life of the mother.
3. Vasectomy and tubectomy are forbidden in Islam, except in emergency cases such as to prevent the spread of disease or to save the life of the person undergoing vasectomy or tubectomy.
4. The use of IUDs (Intra Uterine Devices) in family planning is justified provided that the insertion is carried out by female doctors or, in certain circumstance, male doctors in the presence of other females or the husband.

As Dr Mudzhar points out,[42] no *fiqh* texts are cited; instead we have references to Qur'ânic verses and ḥadîth. In other words, the

justification is general rather than technically legal. Conception, for example, was known and practised at the time of the Prophet and the use of I.U.D. is an extension of this practice.[43] The I.U.D. did in fact cause a technical problem because its use was forbidden in 1971 by a *fatwâ* on the ground that its insertion involved the sight of the woman's private parts by a man not her husband. This was classed as forbidden (*ḥarâm*). However, this classification was overcome by the following reasoning.

The concept of *ḥarâm* has a number of references and the important one here is its division into two types-i) *ḥarâm lî-dhâtih*, that which is forbidden as such (eg. murder, adultery) and ii) *harâm li-ghayrih*, that which is forbidden because to allow it, would lend to (i) (eg. making an offer of betrothal to a woman already betrothed). The consequence of the distinction is that the former can never be lawful but the latter may become so—it is irregular (*fasîd*) but not void (*batîl*). Thus, looking at the private parts of a woman can lead to unlawful sex which is *ḥaram* by itself, and hence the necessity for witnesses specified in the *fatwâ*. Essentially then, the insertion of I.U.D. was re-classed as *ḥarâm li-ghayrih* because the intention is not unlawful sex[44] but the prevention of undesirable consequences and hence allowable though irregular.

The motive in this case is equally important,. As Dr Mudzhar explains,[45] the Indonesian government's national family planning policy is directed toward the stabilization of the population and, hence, an improvement in the general health and welfare of society. Contraception is an essential element in this program and when one reads this *fatwâ* it is quite clear that the public policy aspects play a major role.

We may continue with the general theme of reproduction by taking three *fatâwâ* from the regional Majlis Ulama of Jakarta.[46] We take first artificial insemination. there is nothing in the textbooks on this and the references to the Qur'ân are very general.[47] In addition, there is a reference to family guidelines developed by the *'ulamâ'* and I return to an example of these below. Returning to artificial insemination, a direct 'injection' of the husband's sperm into his wife is allowed. However, the keeping of semen in a sperm bank, even if it is the husband's, is forbidden. The intention is to prevent sin and misuse.

Furthermore, providing semen to a bank for sale or donation is forbidden. Likewise the insemination of a woman with semen from

a man who is not her husband is also forbidden. The term used here is *mutlaq* (absolute) which admits of no qualification; it is the strongest prohibition. The same position is adopted where a woman undergoes an artificial insemination with the semen of a man not her husband with the intention of giving up the consequent child to the donor. It is absolutely forbidden. To encourage or support such actions is also forbidden. However, the *fatwâ* does conclude by saying that it may be reviewed if later pressing circumstances (unspecified) occur.

The second example relates to vasectomy and tubectomy. Both are generally forbidden though the latter may be allowed to preserve the life of the woman. Obviously there are no technical rules on the matter, instead we have a selection of verses from the Qur'ân and some ḥadîth. None of these is particularly helpful in giving an indication of legal reasoning. For example from the Qur'ân we have S.XXXVII: 100 which says 'O Lord!, grant me a righteous (son)' and again in XIX: 5-6 a plea to be granted a son. There are other examples to the same effect especially perhaps S.LXXX1: 8-9 which is cited so as to equate tubectomy with female infanticide. The point is not argued but it is suggested. In addition, there is a reference to a formal instruction from the Ministry of Health (1980) which says that sterilization is not an option in the national family planning program. The *fatwâ* explicitly approves this position, and recommends its strict enforcement.

The third example is abortion, in this case by means of a vacuum aspirator. The technique is forbidden, it is murder and contrary to the will of God. It is recommended to government that criminal action be taken against those who perform it. This result does not, however, apply to accidental abortions where the intention was merely the cleaning of the womb. Again, no classical fiqh texts are cited though we do have verses from the Qur'ân[48] and ḥadîths[49] on the sanctity of life.

The final example I would bring up here is the case of blood transfusion. There are two opinions (or advice)[50] and one *fatwâ* to cite. Before looking at these we should notice that in Islam blood is prohibited for human consumption. These are two verses, '...forbidden to you are the dead carcase and blood'[51] and later, also a prohibition; blood is qualified as 'blood shed forth.[52] This is important because the phrase 'shed forth' as a qualifier will take priority, and thus it may well be argued that transfusions are not 'consumption'.

In the first opinion which is on the propriety of transfusion in general the point was not raised. Instead, transfusion to relieve accidents or illness is an act of virtue and humane feeling. The only Qur'ânic verse cited seems to have little relevance (it is on the lawfulness of foods)[54] and the same is true for the various *ḥadîth* cited. This opinion, while certainly giving effect to national or government policy is less than satisfactory.

The second opinion is similar; here the question was whether people could give blood donations during the fasting month, would it result in an incorrect observance of the rules in fasting? The answer was that donation is permitted in this period provided that the donor does not risk his health and so require food or drink before or after the act of donation. If the latter, then he has breached the fasting rules.

The final example, this time a *fatwâ*, is concerned with whether the giving of blood creates a kinship between donor and donee. The term used in '*nasab*'—which means lineage, particularly on the patrilineal side. This is an important question because it has immediate repercussions for family law and inheritance. One may or may not marry or may or may not inherit depending upon one's position within a lineage. The primary text is SIV: 23 which includes '...[foster] mothers who gave you suck...' There is a considerable jurisprudence on this but the point for present purposes is that in the classical fiqh the 'milk' relationship counts as a blood relationship. The obvious question in this present *fatwâ*, is does a blood donor to blood donee relation give rise to the same result? The *fatwâ* says no, without discussion, except that it flatly denies analogy (*qiyâs*) even as a possibility. Instead, some rather unconvincing citations from Qur'ân and ḥadîth are given[55].

I think it is interesting that the possibility of *qiyâs* is not discussed. In a way this amounts to an avoidance of one of the considerable technical resources to be found in Islamic jurisprudence. Such is a pity given the extensive and unknown future advances of medical science. I do not say that in the present instance a *qiyâs* can be established to show a *nasab*—like relationship; indeed, I think it would fail on a number of grounds particularly as to the conditions relating to the acceptance of a new ruling.[56] Additionally of course, since, as we have seen, necessity is a part of *qiyâs* in Indonesian and Malaysian Islam, the public utility of blood transfusion would almost certainly override any purported *nasab*.[57] However, the *fatwâ* form does have

the advantage of allowing scope for discussion and also for testing public acceptance and national interest and it should be utilized to the full for these purposes. It is a pity it was not done in this case; even the rejection of an argument can sometimes be as useful as an acceptance! But, on the other hand, this is not the practice of the *'ulamâ'* any more than it is the practice of the courts in this country.

## Concluding Remarks

### *Malaysian and Indonesian Fatawa in Context*

The data which have been presented raise important issues in ethics, morality and law. These *fatâwâ* obviously need a context or a set of contexts within which we can assess the implications of this material. One can, of course, make the obvious comments; e.g. that the *'ulamâ'* in Malaysia and Indonesia insists on "Islamic Values" in medical matters.

That this is so is not a surprise to readers of this journal, though it is to many Western doctors, scientists and (even) Aid agencies! Values, however, are for each country and person to decide for themselves. The contexts I wish to speak about here are, respectively , the state-legal, the comparative, and the theoretical.

i. *The State-Legal context:*

By this I mean that the state authority very often asks for or demands an answer to some question about Islam with the expectation that the Muslim "authority" will give an answer acceptable to the state "authority". The former is thus a tool of the state and lends legitimacy to whatever purpose the state intends. This need occasion no surprise: one has only to look at the enabling legislation in Malaysia and Indonesia.

To take Malaysia first; each of the states in the Federation has it's own "Islamic Law" Enactment. The enactments are of similar pattern though there are important differences between the states. So far as the *fatwâ* is concerned the legislation is uniform. A good example is the Administration of Islamic Law (Federal Territories) Act, No 505/1993. Part III deals with the appointment of the *Muftî* and his powers. The *Muftî* is appointed by the King on the advice of the Minister for Religion.[58] There are no qualifications stated, only that the appointee be a "fit and proper person". His function is to "aid and advise" the ruler in all matters of Islamic law and this is done primarily by way of *fatwâ*. A *fatwâ* may be an answer to a question

or it may be a ruling issued on the *Muftî*'s own initiative. Once published it is binding on all Muslims in the state unless an individual is permitted by the *Sharî'ah* to depart from the *fatwâ*. *Fatâwâ* are published in the Gazette in the Malay language using *Rumi* (i.e. Latin) Script but also in the *Jawi* (Arabic–derived) Script. It is authoritative in the courts of the state. The Muftî may amend, modify or review earlier *fatâwâ* and these actions are themselves *fatâwâ*. Prior to giving a *fatwâ* the *Muftî* must discuss it with the Islamic Legal Consultative Committee (of which he is Chairman) but the act does not say that he needs the permission of the Committee. Likewise a *Muftî* cannot be summoned to appear in any court but he may give an opinion. Ordinarily, the *Muftî* will follow the views of the madhhab Shâfi'î although the option of the other three Sunnî schools is open to him if the "public interest" demands it. He may even resolve an issue "according to his own judgement" without being bound by any of the Sunni schools.

Each of the states of Malaysia publishes its own collections of *fatâwâ*, some of which date back to the 1930's. There is also a National *Fatwâ* Committee but to date it has published little and what has been published tends to be blatantly political. In addition to these contemporary *fatâwâ*, there are collections known from the premodern period. The most important of these is the *Al-Fatâwâ al Fataniyyah* by Shaykh Ahmad Muhammad Zain published in 1903. A proper analysis and edition of these *fatâwâ* remains to be done, but it is an outstanding example of Islamic literature written in Malay[59]. Traditionally this literature was known as *Kitab Kuning* ("Yellow Books"—from the yellow covers—but, now some are often pink!) and consisted of translations from and commentaries on the standard Arabic text of the Shâfi'î school.[60] These texts were the standard works in the *pondok*, (lit. "hut")—the traditional Islamic school of Malaya and Patani in southern Thailand. The *pondok* were the traditional training schools for the *fuqahâ'*, though from the mid 19th century increasing numbers went to Mecca, Medina and Al-Azhar. This is still the case for Malaysia but in addition there is now an International Islamic University and several Faculties/Institutes of Islamic Studies in Malaysia. It is from these that *fuqahâ'* increasingly come to staff the Department of Religious Affairs, and *Sharî'ah* Courts in the States of the Federation. In addition many of these qualified as *fuqâhâ* have also received post-graduate education in Western (especially English, American and Australian) universities. Since the Malaysian

legal system is based on the British, this last has important implications for the future development of *sharî'ah*.

Turning now to Indonesia;[61] in contrast to Malaysia Islam has always had a very high profile politically. Perhaps this generalization is less apt than it once was, but in Indonesia Islam has always been seen to be a potent force for resistance to the state. This is as true now for the Republik Indonesia as it was for the Netherlands East Indies. The result was that the *sharî'ah* was denied the status of law for Muslims—instead one of a number of *adat* ('ada'—custom) was preferred for the native Indonesians. It was not until 1882 that the *sharî'ah* achieved a minimal recognition and even this was always subject to being overridden by the secular courts. This has remained the position[62] until recently. It is only in the last five or six years that the *sharî'ah* has been completely organized in the "New Order" Indonesia which dates from 1965. The essence of this regime is to attain and preserve political stability, and an important aspect of this is the control of Islam, and, indeed, the control of any other competing ideology. This is achieved by two methods, one general and one specific to Islam.

The former is found in an ideology called *Pancasila*—the five "principles" on which the state is founded and by which society is guided. These are belief in God, humanitarianism, nationalism, democracy and social justice. These are broad classes, the meanings of which are determined by Presidential fiat and given practical expression by means of a complex and elaborate bureaucracy. The Constitution (Undang-undang Dasar 1945) reinforces this ideology if it can be called such, by concentrating power in Presidential hands. There has been much discussion in Muslim circles and among the *fuqâhâ* in particular as to how the Pancasila can be accepted as an articulation of Islamic principles. Is this a possibility or is Pancasila essentially a secular ideology? The answer at the moment appears to be that the *fuqahâ'* can accommodate Pancasila as "a manifestation of central basic Islamic principles adjusted to the real conditions of Indonesia".[63]

Second, and more specific to Islamic law there is recent legislation which (a) provides for a *Sharî'ah* Court[64] and (b) a Presidential Instruction[65] which brings into effect *The Compilation of Islamic Law* - a text in three books (marriage, inheritance and *Waqf*). Together, these materials comprise the formal recognition of *Sharî'ah* in Indonesia. So far as *fatâwâ* are concerned, these too have been organized under government control. In 1975 regional councils of *'ulamâ'* were estab-

lished and this was followed later in the same year by the establishment of a national Council of Indonesian 'ulamâ'[66] under the Ministry of Religious Affairs. The function of the council is to give advice both to government and to individual Muslims in respect of Islam. This includes giving *fatâwâ*. In addition the Council also holds seminars on national and religious issues and provides a forum for the expression of Muslim concerns. It has made known its concerns in the fields of family law and education and has been successful in lobbying the Indonesian Parliament to achieve amendments to legislation. On the other hand, it must be remembered that the closeness of the Council to the Ministry of Religion allows for a great deal of political pressure to be exerted on the Council. There are examples; the most striking is the Council's approval for the State lottery as not gambling. This caused something of a furor in Indonesian Muslim circles.[67] The Council's *fatâwâ* do often reflect government policy.

At the lower levels of Regional Councils this is not necessarily so. A greater degree of independence can be found though the precise extent of this is unclear. Published data tend to be conflicting and internally inconsistent.[68] However, as in Malaysia the approach adopted in medical matters tends to be conservative (see immediately below—(ii) comparative contexts). To a large extent this can be explained by noticing that the textbooks of Islam are the same or similar to those in Malaysia. They are the *Kitab Kuning*[69] used in the *pesantren* (Islamic religious schools) of Indonesia. It is here that *'ulamâ'* receive training which is later completed overseas or in the IAIN.[70] It is important to remember that the *'ulamâ'* appointed are civil servants and the whole process is bureaucratic. This is characteristic feature of the Indonesian legal system.

*ii. Comparative Contexts:*

The Malaysian and Indonesian data are part of an international set of material from other parts of the Muslim world.[71] In this section I would like to indicate some point of contrast with *fatâwâ* from the Arab world, and I rely here on the material published by Dr Vardit Rispler—Chaim in *Islamic Medical Ethics*).[72] One general comment can be made immediately. The range of medical subjects dealt with in the Arab *fatâwâ* is more extensive than in Malaysia and Indonesia. The subjects of abortion, artificial insemination, organ transplant and sperm storage are found in common. However, the Middle East material also includes cosmetic and sex change surgeries, doctor-patient

relations, post-mortems, euthanasia, Aids and the creation of 'banks' for keeping semen. These latter subjects are not dealt with in Malaysia and Singapore. To compare briefly the common subjects.

*Abortions*: Forbidden except to save the life of the mother. This is the general rule, although there is a more elaborate discussion on the timing of abortion in the Arabic *fatâwâ*. There is no discussion in the Malaysian and Indonesian material that I have seen on the doctors duty and/or liability. However on the related matters of contraception (*'azl*) the Malaysian and Indonesian *fatâwâ* allow it is a matter of public interest or national interest. However they forbid the 'morning after' pill, classing this an abortion. This is in line with Middle Eastern discussion on *saqt* vis-a vis *wa'd*.[73] The Malaysian and Indonesian data seem to conflate the two.

*Artificial insemination*: The case where the husband's sperm in artificially transferred to his wife while they remain married is generally accepted. The Indonesian *fatâwâ* prohibits the storage and later use of a husband's sperm and of course the use of sperm outside existing marriage is absolutely forbidden. The Indonesian and Malaysian *fatâwâ* have not as yet dealt with all the complexities reported[74] in the Middle East, but sperm banks are forbidden in any form.

*Organ Transplants*: (including blood transfusion); these are accepted in both the Arabic and South East Asian worlds. However, the justifications and citation of sources is much more elaborate in the former than in the latter material. And in this subject we find some interesting contrasts. I think it is generally true to say that the Middle Eastern material is much more speculative or less 'conservative' and this is a reflection of the respective societies. All this means is that the questions put in Cairo have not yet arisen in Kuala Lumpur or Jakarta. No doubt they shall. The main issues;[75] we can begin with the donation of body parts. This is perfectly acceptable. In Malaysia or Indonesia it is justified as *maslaḥah* but the consent of the relatives is essential. There if no discussion of 'trust' as in the Middle East nor is the problem of non-regenerative organs raised.[76] We take now moment of death; this is not discussed at all in South-East Asia except that killing for the sake of obtaining organs is forbidden and a donor can never be forced to donate an organ. The Arabic discussion on this issue is much more complex. The question of transplants from animals to humans; there are no South-East Asian data, nor has the question of whether an organ bank may be established been considered.

*Blood donations*; this a (and cornea donations) is the most common form in both areas. It is allowed and indeed an act of merit. Blood may be from a non-Muslim but the reverse has not been ruled upon in Malaysia and Indonesia. In addition, it is also a rule that the donor must not himself suffer physically from the donation, particularly during the fasting month. There seems little difference in this matter between the Middle East and South-East Asian practice.

*The preservation of sperm*: This has not been considered in Malaysia but is absolutely forbidden in Indonesia on the ground of possible misuse, ie, it could be sold or otherwise misused without the knowledge of the donor. The prohibition is stated and not discussed in detail but it is probable that the issues of *nasab* is the underlying reason as it is in the Arabic *fatâwâ*.

I think it is fair to say that there is an obvious agreement in principle and practice between the Middle East and South-East Asian *fatâwâ*. The former tend to be more elaborate and to deal with a wider range of issues.

*iii. National Interests and Fatâwâ*

The *sharî'ah* has undergone much change in the colonial and post-colonial worlds. Now, at the end of the 20th century the main issue is the relation of the *sharî'ah* to the institutions of the nation state foundered on secularism. The state is the dominant partner in this relationship and it is the state which determines the form and functions of *sharî'ah*. These comments are of course not new and they are equally applicable to the Muftî and *fatâwâ* in South-East Asia as well as elsewhere. There are two or three general comments which can be made here.

First, as elsewhere in the Muslim world[77] the *Muftî* and *'ulamâ'* are part of the bureaucracy—they are public servants. *Fatâwâ* tend to be issued by committees and whether or not this is so in all cases, they draw their authority from the state.

Second, and as a natural corollary to this, the ulama express the national interest as defined by the government of the day. In Indonesia this is called *politik hukum*—'legal policy'. By its nature this is variable but on the other hand the *'ulamâ'* are constrained by Pancasila and the Constitution to which they must swear allegiance.

Third, while the national interest in both Malaysia and Singapore is a matter of policy/politics it has also much widened the areas of uncertainty for the individual Muslim. These are the 'new' problems

of which medical science is one. In this area where the classical *fiqh* is lacking the recourse to such principles as *maslaḥah* can tend toward the issue of *fatâwâ* which are somewhat problematic. Thus for example, it is not clear in Malaysia and Indonesia whether maslahah is a source of law, a proof (I think almost certainly not) or a justification. The data at the moment certainly support justification, but source remains debatable.

A further point on national interest; such is one of these things about which we can all have an option. This is as true for the Muslim public as for anyone else and the educated Muslims of Malaysia and Indonesia certainly have their own views on *sharî'ah* in the modern state. This includes the *fatâwâ* which are published and discussed in the mass media, not always to the gratification of the *'ulamâ'*! Women's groups especially, have become very vocal in the last few years and are quite prepared to argue theology where this is of concern to women—such always includes family matters, contraception and so on—in fact anything to do with the status of women.[78]

The *'ulamâ'*, therefore, no longer give *fatâwâ* in a private or limited sphere. It is now public and the public to whom these rulings are addressed is increasingly better educated and is also increasingly willing to debate issues in religion. I do not say that this is the general position in South-East Asia but I am sure we are on the road toward this becoming so in the fairly near future. It is quite possible that *fatâwâ* will become documents for debate rather than binding rulings as such.

## Notes

1. There is a vast range of writing on Islam and science dating from the 1960s and which has much proliferated in the 1980s and 1990s. For examples, see Sardar 1989 for an overview and argument, al-Faruqi and Nasseef 1981 on social and natural sciences and Rosenthal 1990 on the history of Islamic science.
2. The detailed arguments are outside the scope of this paper. See Leaman 1985 for an introduction especially on *taqlîd* and *ijtihâd*. See also below pp on these terms.
3. Sometimes called 'fundamentalism'—a term without meaning except to lazy newspaper editors for whom it is a code for 'terrorism'.
4. A good brief summary, rather polemical, is in Sardar 1989:29ff—'anatomy of a confusion'!
5. *Ibid*: 31 ff for examples
6. I might, however, point out here that some well intentioned Muslims do come very close to this. For example, '*The Book of Signs*', a popular and readily available video through the spectacular use of scientific footage and animation, ...illustrates the scope and depth of knowledge contained within the Qur'ân.
7. See Sardar 1989: 30 ff for other examples
8. *Ibid*: 59 and the contributions in al-Faruqi and Nasseef 1981
9. Indeed, Western science by an over-emphasis on rationality alone is not only not suitable for Muslim societies it has a negative value—that is, it is essentially destructive.
10. This, and the following two examples are taken from Rosenthal 1990:521 (originally published in 1969)
11. *Ibid*: 523
12. *Ibid*: 525
13. Qur'ân XXIII
    'did ye then think
    That we had created you
    In jest, and that ye
    Would not be brought back
    To us (for account)?
14. For further references see Rosenthal 1990 and especially Nanji 1988
15. See *Encyclopedia of Islam* (2nd.ed) Vol II: 866-67
16. I should make it clear here that I am talking about official and officially published *fatâwâ*. There are many hundreds, perhaps thousands of informal rulings given each year in villages and poor suburban areas. These are part of local arbitration and mediation processes and are mainly concerned with family problems and inheritance. They have no official status.
17. This is a widely known proposition and is always used to justify that which otherwise has no authority at all.
18. Obvious methods were interrupted coitus and the use of a variety of materials as barriers. See Musallam 1983 for a full discussion of the pre-modern texts.
19. See Hooker 1993 for examples.
20. See eg the *âyah*—S.21.107, S10.75.
21. The last two classes raise difficult questions in their relation to *qiyâs*-analogical deduction. See Mohammad Hashim Kamali 1991: 197 ff on *qiyâs* and at pp 276 ff generally for a brilliant short account.
22. *Ibid*, Mohammad Hasim Kamali 1991: 275 ff for examples. See also Muhammad Khalid Masud 1977, an al-Shâtibî's theory of *Maslahah* especially ... pp 173-182 for an interesting summary of 19th century and early 20th century approaches.
23. See Mudzhar 1993: 90 for details
24. Hooker 1993 for examples
25. For literature on Islam see "Indonesia' in *Encyclopedia of Islam* (2nd ed.) Vol. III: 1213ff
26. See generally
27. See Hooker n.d.
28. "Majlis Ulama Indonesia". Abbreviated M.U.I.
29. See for example, the papers in Budiman 1990

30. Mudzhar 1993: 53 ff
31. *Ibid*: 61ff for examples
32. *Ibid*: 93-105
33. Reported *ibid*: 106-107
34. And also by Ibn Mâjah. These are two transmitters of great authority. See *Encyclopedia of Islam*.
35. However, there is provision in both the Malaysian and Indonesian legislation on *sharî'ah* for a recourse to the Hanbâlî and Mâlikî schools of law, where *maslahah* is directly adopted—especially in the Mâlikî where it is 'a norm by itself' See Kamali 1991:280.
36. This is not the case with other schools of law See Kamali 1991:278ff
37. Kamali 1991:281
38. Reported in Mudzhar 1993:107f
39. Qur'ân V:21 and II: 195
40. And generally Rosenthal 1990: 'The defence of medicine...'
41. This citation is taken directly from Mudzhar 1993: 109
42. *Ibid*: 109-110
43. See above n 18
44. There is considerable authority from the Middle East allowing this see eg. the authorities cited in Kamali 1991:331
45. Mudzhar 1993:112ff
46. *Rangkaian Fatwa/Keputusan* 1980-85. Jakarta
47. For example Nahl (S XVI: 27)
48. S.XXXVIII: 100, S ii: 205, S.LXXXI : 8-9
49. Al-Bukhari, Muslim
50. These do not have the binding force of a *fatâwâ*
51. S.V: 3
52. S.VI : 145
53. '*Muqayyad*'
54. S.V: 2
55. S XVI : 116 and from Abû Dâwud, Bukhârî and Muslim
56. See Kamali 1991:199 ff and esp. at 200 for an example
57. But, on the other hand, while milk is 'life', so is blood in this case literally.
58. On this question of limited data I should point out that the same results, on the same reasoning are known from India, Egypt and Syria. Exactly the same arguments are put forward. See Babu Sahib 1987 and Ahmad 1987.
59. See Matheson and Hooker, 1988: 70-31 especially at p. 30.
60. *Ibid* for a general description.
61. For the position of *sharî'ah* in Indonesia to 1980, see Hooker 1984.
62. 'New Order' refers to the post 1965 imposition of military/bureaucratic rule following a failed Communits coup and a massive loss of life.
63. For a full discussion, see Pranowo 1990:495.
64. Act No. 7/1989. See Hooker n.d. for a discussion.
65. No. 1/1991, see *Ibid*.
66. 'Majelis Ulama Indonesia' - see Mudzhar 1993:48 ff.
67. See Mudzhar 1993:63 f for a full description.
68. I hope to have an analysis done by late 1998.
69. See van Bruinessen 1995.
70. National Religious Institute.
71. For India see Babu Sahib 1987 and Ahmad 1987.
72. Rispler-Chaim 1993.
73. *Ibid*.10-11.
74. *Ibid*.23 ff.
75. I take these from Rispler Chaim 1993:30 ff.
76. See Zakaria Siddiqi 1987 on Indian practice.
77. See Masud et.al 1996: 26 ff.
78. See Norani Othman 1994.

## References


Ahmad, Furqan, "Organ Transplants in Islamic Law" in *Islamic and Comparative Law Quarterly* VII (s), (1987), pp. 132-136.

Al-Faruqi, Ismail, R & Nasseef (Abdullah Omar [eds]), *Social and Natural Sciences: The Islamic Perspective* (Jeddah: King Abdulaziz University (& Hodder & Stoughton, 1981).

Babu Sahib, M.H., "The Islamic Point of View on Transplantation of Organs: Islamic and Comparative Law" (*Quarterly*) VII (s), (1987), pp. 128-131.

Budiman, A (ed), "State and Civil Society in Indonesia" (Clayton, Victoria University Monash Papers, S.E. Asian Studies, 1990).

Flon, Menachem, "Jewish Law and Modern medicine" in H. M Cohn (ed), *Jewish Law in Ancient and Modern Israel* (KTAV Publishing House, 1971), pp. 131-142.

Hooker, M.B.(ed), *Islam in South-East Asia* (Leiden: Brill, 1983).

_____, "Fatawa in Malaysia, 1960-1985", *Arab Law Quarterly*, 8 (1993), pp. 93-105.

_____, "The State and Syariah in Indonesia, 1945-1995", in, T E Lindsey (ed), *Indonesia The First Fifty Years* (Melbourne: in press, nd).

Kamali, Mohd, Hashim, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991).

Leaman, Oliver, *An Introduction to Medieval Islamic Philosophy* (Cambridge: Cambridge University Press, 1985).

Masud, Muhammad Khalid, Brinkley Messick and David S Powers (eds), *Islamic Legal Interpretation* (Cambridge, Mass: Harvard University Press, 1996).

Matheson, V & Hooker M. B., "Jawi Literature in Patani", *Journal of the Royal Asiatic Society - Malaysian Branch*, LXI (1988), pp. 1-88.

Mudzhar, Mohd. Atho', *Fatwa-Fatwa Majlis Ulama Indonesia* (Jakarta: INIS, XVII, 1993).

Musallam, *Sex and Society in Islam: BIRTH Control before the Nineteenth Century* (London: Cambridge University Press, 1983).

Nanji, A.A., "Medical Ethics and Islamic Tradition", *Journal of Medicine & Philosophy*, 13 (3) (1988), pp. 257-275.

Nurani, Othman (ed), *Sharia Law and the Modern Nation State* (Kuala Lumpur: SIS Forum, 1994).

Pranowo Bambang, "Which Islam and which Pancasila?" in, Arief Budiman (ed), *State and Civil Society in Indonesia* (Clayton, Vic: Monash University, Centre of Southeast Asian Studies, 1990).

Rispler-Chaim, Vardit, *Islamic Medical Ethics in the Twentieth Century* (Leiden: Brill, 1993).

Rosenthal, Franz, *Science and Medicine in Islam* (Hampshire: Vapiorum, 1990).

Sardar, Ziauddin, *Explorations in Islamic Science* (London & New York: Mansell, 1989).

Van Bruinessen, Martin, *Kitab Kuning Pesantren* (Bandung: Mizan, 1995).

Yaseen, M.N., "The Rulings for the Donations of Human Organs in the Light of Sharia Rules and Medical Facts", *Arab Law Quarterly*,5 (1990), pp. 49-87.

Zakaria Siddiqi, M, "Legal Issues in Human Organ Transplant", *Islamic and Comparative Law Quarterly*,7 (1987), pp. 144-164.


---

M. B. Hooker *is professor at the Australian National University (ANU), Canberra.*