CONTEMPORARY *FATĀWĀ* OF NAHDLATUL ULAMA
Between Observing the *Madhhab* and Adapting the Context

Achmad Kemal Riza
IAIN Sunan Ampel, Surabaya - Indonesia

Abstract: *Fatwā* in the circle of Nahdlatul Ulama (NU) remains showing reminiscent of classical period of Islamic jurisprudence. It uses *madhhab* and *taqlīd* with the employment of classical jurisprudence texts. Being identical in certain crucial features, the NU's version of *fatwā*, however, is different from classic *fatwā* in various aspects. *Fatwā* is collegial, binding and modern. This last aspect remains debatable within the NU. While senior *ulamā'* resist the reintroduction of *ijtihād* in the process of *fatwā* issuing as a tradition which should be preserved, certain younger *ulamā'* in the organization urges the employment of *ijtihād* to keep up with the demand of modern context. Senior *ulamā'* of the NU maintain that *taqlīd* and *madhhab* is the very essence of their commitment to Islamic law, whereas the younger *ulamā'* assert that such attachment will only result in the abandonment of Islamic law altogether by Muslims, especially the NU members. This article shows that dynamic with special reference to what is happening in East Java, the traditional stronghold of the NU.

Keywords: Nahdlatul Ulama, *ijtihād*, *taqlīd*, Islamic modernism.

Introduction

As it is elsewhere in the Muslim world, the legal aspect of Islam is dominant in Nahdlatul Ulama (commonly abbreviated as NU), a Muslim organization in Indonesia long being perceived as conservative. As the name gives its hint, the organization's authority revolves surrounding the *ulamā'*, the traditional Muslim scholars, or traditional Muslim jurists to be more accurate. The *ulamā'* have a

central role in NU in steering the organization's social, religious and even political activities. In the area of Islamic jurisprudence (*fiqh*), the NU *ulamā'* are responsible to ensure the observance of Shāfi'ī *maddhab* (Islamic school of law) by the NU members. Among the means of doing so is the institution of *fatwā*, roughly translated as non-binding legal opinion. However, issuing a *fatwā* is not as easy as it used to be; the situation of modern Indonesia has forced the NU *ulamā'* to not only issue *fatwā* in accordance with the doctrine of Shāfi'ī *madhhab*, but also make sure that the *fatwā* is practicable. The interface between textual doctrines of Shāfi'ī *madhhab* and the demands of NU members living in today's Indonesia is the issue of this article.

Since its establishment in 1926, NU has a council of *ulamā'* addressing legal inquiries of its members. The council is called Shuriah, seated and chaired in general by senior *ulamā'*. They arrange regular meetings to issue *fatwā* which is called *bahtsul masail*. *Fatwā* depends on *fiqh*, the very material of *fatwā*. When the *fiqh* establishment underwent changes in order to accommodate modernism, *fatwā* had to follow accordingly. Similarly, *bahtsul masail* also shows such adaptability. Moreover, *bahtsul masail* in the Indonesian context also brings about some unusual features to the *fatwā* institution. Therefore, contrary to commonly held views that NU consistently maintains the tradition of classical Islamic law, some features of contemporary *bahtsul masail* show otherwise. In examining on the nature of *bahtsul masail* forums, this paper begins by explaining *fatwā* institution and *fiqh* development. Response of such classic Islamic institution to modernism is highlighted. Later on, the development of *bahtsul masail* is discussed and the chapter concludes by describing the *bahtsul masail* debates of the East Javanese *ulamā'*.

The Institution of *Fatwā*

Unlike *qaḍā'*, *fatwā* is a non-binding legal opinion. It is requested by individual(s) (*mustafti*) to a Muslim jurist called a *muftī*. The process of asking for a legal opinion is termed *istifta'*, and the enterprise of a *muftī* in issuing a *fatwā* is called *'iftā'* or *futya*. Every time a *muftī* issues a *fatwā*, it is written on a sheet called *ruq'ah* of *fatwā*.[1] In a classical term, the

[1] Wael B. Hallaq, "From Fatwas to Furu': Growth and Change in Islamic Substantive Law," *Islamic Law and Society*, 1, 1 (1994): pp. 29-65 and p. 31.

muftī must base his or her response on the teaching the school of law to which he or she is affiliated. *Talfīq* (or combining opinions from different schools of law) is not allowed. Questions of *fatwā* vary from 'worldly' affairs to 'hereafter' ones. A *mustaftī* may ask about ablution, usury, and mysticism.[2] The all-encompassing authority of Islamic law as God's commands regulating all aspects of Muslims' life also is applied in *fatwā*.[3] The motives of a *mustaftī* in seeking a legal opinion are manifold; it might be informational in nature or settling an anxiety of mind.[4] Nonetheless, *fatwā* can also be used as a form of religious legitimization of political criticism and a litigant's support in a lawsuit.[5] Although *fatwā* as an institution is separate from judicial institutions, many *muftī*s were advisers to *qāḍī*s (judges in Islamic courts) in the past, especially in complex and difficult cases.[6] The *fatwā*'s non-binding status means a *mustaftī* does not have to accept the opinion, he or she may request a second opinion from another *muftī*.[7] Still, it is authoritative for some reasons.

Fatwā is an institution in Islam which reflects the division of Muslims into two categories, *muqallid 'āmm* (followers and laity) and '*ulamā'' fuqahā*' (religious scholars).[8] Even though every Muslim is obliged to observe Islamic teachings to the best of his or her ability, not many Muslims are sufficiently knowledgeable to practice Islam correctly or live in Islamic manner. Only a small group in the Muslim community called the *ulamā''* holds the authority on Islamic teaching and its ritual aspects. This situation is tolerable, though. Lay Muslims

---

[2] Muhammad Khalid Masud, Brinkley Messick and David S. Powers, "Muftis, Fatwas, and Islamic Legal Interpretation," in Masud, Muhammad Khalid, Brinkley Messick and David S. Powers (eds), *Islamic Legal Interpretation: Muftis and Their Fatwas* (Massachusetts: Harvard University Press, 1996), pp. 3-32 and p. 19.

[3] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), p. 1.

[4] Brinkley Messick, "The Mufti, the Text, and the World: Legal Interpretation in Yemen," *Man* 21, 1 (1986): pp. 102-19 and p. 103.

[5] Hallaq, "From fatwas to furu'," pp. 35.

[6] Masud, Messick and Powers, "Muftis, Fatwas," p. 10

[7] Uriel Heyd, "Some Aspects of the Ottoman Fetva," *Bulletin of the School of Oriental and African Studies*, 31, 1 (1969): pp. 35-56 and p. 56.

[8] Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997), pp. 122-3.

are not sinful, but they must always consult the *ulamā'* on their religious practices. The Qur'ān, such as chapter 16 verse 43[9], is often used for legitimization of this concept.[10] As a result, ordinary Muslims are in constant need of guidance from the *ulamā'* in their religious affairs, although the latter cannot guarantee salvation for the former. Thus, while Islam does not recognize a church-like hierarchy, the *fatwā* institution acts like one.[11] In more subtle terms, the relation between a *muftī* and *mustaftī* is a relation of power.[12]

Technically, only the *ulamā'* who have the authority to perform *ijtihād* (legal interpretation on the basis of primary sources). In the *fatwā* institution, a *muftī* should be a *mujtahid* (qualified person to perform *ijtihād*). In its development, though, a *muftī* does not have to be a *mujtahid*.[13] Still, the dichotomy between *muftī* and *mustaftī* persists since a non *mujthid muftī* still has to master a certain degree of understanding of his or her *madhhab*.[14] As Hallaq reports from Ibn al-Salah (d. 643/1245),[15] a Shāfi'ite Scholar, there are still some scholarly gradations between *mujtahid* and *muqallid*, who are eligible to issue *fatāwā*.[16]

In addition to the knowledge of Islamic sciences, personal integrity is crucial for a *muftī*'s authority. The legitimacy of a *muftī* depends on his or her moral qualities to an extent that a corrupt person might not

---

[9] The translation is: "*And before thee also the apostles We sent were but men, to whom We granted inspiration: if ye realise this not, ask of those who possess the Message*" (Ali, 1983: 667).

[10] Hallaq, *A History of Islamic Legal Theories*, p. 122.

[11] Khaled Abou El Fadl, "Islam and the Theology of Power," *Middle East Report*, Winter 2001, http:/www.merip.org/mer/mer221/221_abu_el_fadl.html. (Accessed on 4/2/2004).

[12] Masud, Messick and Powers, "Muftis, fatwas," p. 21.

[13] Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), p. 66.

[14] Ibid., pp. 66-75.

[15] Ibid., pp. 84-5.

[16] They are affiliated *mujtahid*, limited mujtahid, *aṣḥāb al-wujūh wa al-ṭuruq* (those mastering the authoritative opinions of the *madhhab*), and transmitters of the *madhhab*. Scholars of these in-between categories are entitled to issue *fatāwā*. At the last stage, all *mufti*s are 'informed' muqallid. *Mufti*s can only issue *fatāwā* from authoritative opinions of the *madhhab* signaling the shift from (the unattainable) *ijtihād* to 'informed' *taqlid* as the main requirement of issuing *fatāwā*.

be allowed to issue *fatāwā*.[17] Consequently, a *muftī* should be trustworthy, and seriously observe religious obligations. The *muftī*'s trustworthiness should also be apparent by declaring inability whenever he or she is unable to answer the *mustaftī*'s question because answering a query without proper knowledge is a grave violation.[18] Such personal integrity is certainly easier to maintain whenever a *muftī* is independent. Initially an independent institution, there are instances when Muslim governments appointed official *muftī*s. A government-appointed single *muftī* during the Ottoman Empire and recognized as the ultimate source of religious authority called *Shaykh al-Islām* is a prime example.[19] Government control might suggest restrictions on issuing *fatāwā* unfavorable to government or reinforcement of government political authority.[20] Nonetheless, it should be kept in mind that instead of influencing and abusing the *fatwā* institution, the policy was mainly to ensure that only qualified persons assumed the position of mufiship.[21] After all, only a few *muftī*s are government appointees, the rest work independently.[22]

Fiqh, *Fatwā*, and Modernism

The aforementioned exposition outlines the *fatwā* institution of pre-modern Islam. The institution depends on pre-modern Islamic legal scholarship built upon the literal interpretation of primary sources (the Qur'ān and the Sunnah) with *madhhab* as the institutional machinery.[23] Since Islamic legal institutions as a whole suffer heavily from modernism and its legal systems following incursions into the Muslim world by Western colonial powers,[24] especially since the

[17] Muhammad Khalid Masud, "*Adab al-Muftī:* the Muslim Understanding of Values, Characteristics and the Role of a Mufti," in Barbara Daly Metcalf (ed.), *Moral Conduct and Authority: the Place of Adab in South Asian Islam* (Berkeley: University of California Press, 1984). pp. 124-49.

[18] Masud, Messick and Powers, "Muftis, fatwas," pp. 20-3.

[19] Ibid., p. 11.

[20] Ibid.

[21] Ibid., pp. 20-21.

[22] Messick, "The Mufti, the Text, and the World," p. 108.

[23] Hallaq, *A History of Islamic Legal Theories*, pp. 207-8.

[24] JND. Anderson, "Law as a Social Force in Islamic Culture and History," *Bulletin of School of Oriental and African Studies*, 20, 1/3 (1957): pp. 3-40.

13th/19th century,[25] *fatwā* as an integral part of that legal institution is also deeply affected. The gap between the real world and the prescriptions of Islamic jurisprudence has become the widest of all time. Viewing this situation, Muslim response has been mixed. Some believes that reform should be undertaken, whereas the rest are satisfied with the status quo. For those who promote the urgency of reform, their methods are divergent; some base their reform on modernism point of view, whereas the other promotes purification.

Modernists, such as the Egyptian Muhammad Abduh, as reported by many,[26] believe that the traditional Islamic legal system could hardly support the Muslim community living in modern times, either as a theoretical foundation[27] or as practical law.[28] Despite the literal approach of classical legal theory, Ash'arism as the Sunnite theological basis has repudiated creative legal alternatives.[29] Ash'arism holds that reason is incapable of finding the truth and, therefore, revealed texts are always supreme.[30] Consequently, the adaptability of classical Islamic law to change is limited. To make things more complicated, the Islamic legal tradition of *madhhab* has been so instrumental in the whole establishment of Islamic law that it becomes impossible to get rid of it.[31] As a result, any attempt to reformulate a legal system into one that is adequate for Muslims in modern times should accommodate the classical legal establishment in one way or another.

Accordingly, almost all Muslims' attempts to modernize Islamic law are derived from classical legal establishment. Some aspects of the

---

[25] Fazlur Rahman, *Islam* (London: Weidenfeld and Nicolson, 1966), p. 212.

[26] For example Fazlur Rahman, "Revival and Reform in Islam," in PM Holt, Ann K.S Lambton, and Bernard Lewis (eds), *Cambridge History of Islam: The Further Islamic Lands, Islamic Society and Civilization* (Cambridge: Cambridge University Press, 1970), pp. 630-56 and Aharon Layish, "The Contribution of the Modernists to the Secularization of Islamic Law," *Middle East Studies*, 14, 2 (1978): pp. 63-77.

[27] Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), p. 2.

[28] Joseph Schacht, "Islamic Law in Contemporary States," *The American Journal of Comparative Law*, 8, 2 (1959): pp. 133-47.

[29] Hallaq, *A History of Islamic Legal Theories*, p. 207.

[30] Fazlur Rahman, "Functional Interdependence of Law and Theology," in Gustave. E. von Grunebaum (ed.), *Theology and Law in Islam* (Wiesbaden: Otto Harrassowitz, 1971), pp. 89-97.

[31] Hallaq, *A History of Islamic Legal Theories*, p. 208.

classical legal establishment are useful for reform after all, especially to justify the claim that the efforts undertaken are based on a general framework of Islamic religious and moral values,[32] although the driving force is the elevation of human intellect as reasonably independent vis-a-vis revelation.[33] This effort is described as Islamic modernism.[34] In practice, it can be performed by exercising *ijtihād*, by the liberal use of *taḥayyur* (selection of legal opinions) and *talfīq* as well as by the generous employment of weak opinions of *madhhab*. In addition, the expansion of codified Islamic law, and the extension of *siyāsah shar'iyyah* (rulers' authority to make regulations on religious affairs) are also sought.[35]

The main vehicles of modernization have included the concept of *maṣlaḥah* (public interest) and '*illah* (ratio legis),[36] *ḍarūrah* (emergency) and *ḥājah* (necessity),[37] and *maqāṣid al-sharī'ah* (the general spirit and intention of the law).[38] Likewise, Rahman combines historical, hermeneutic and sociological approaches in his reform project.[39] Secondly, the *taḥayyur* and *talfīq* approach seeks to select in an eclectic manner and combine opinions of different schools of law, even weak opinions of the Sunnite schools of law and Shi'ite opinions, in order to achieve applicable and appropriate sets of law for modern times.[40] The third and the fourth avenues are not exactly a reform of substantive law, but are procedural in nature. On the issue of the codification of Islamic law, for instance, some ethical aspects of classic Islamic law are given a binding positive character. On the issue of *siyāsah shar'īyah*, Muslim rulers may restrict or expand the application of Islamic law as a

---

[32] Fazlur Rahman, "Islamic Modernism: Its Scope, Method and Alternatives," *International Journal of Middle East Studies*, 1, 4 (1970), p. 331.

[33] Hallaq, *A History of Islamic Legal Theories*, p. 212.

[34] Rahman, "Islamic Modernism," p. 317.

[35] Layish, "The Contribution of the Modernists," pp. 263-66.

[36] Ahmad Zaki Yamani, as reported and supported by Khadduri 1979-1980.

[37] Muhammad Muslehuddin, "Islamic Law and Social Change," *Islamic Studies*, 21, 1 (1982): pp. 23-54.

[38] Robert Gleave, "Makāsid al-Sharī'a," in *The Encyclopaedia of Islam* (Leiden: E.J. Brill Academic Publication, 2003), p. 569.

[39] Rahman, "Islamic Modernism," pp. 329-30.

[40] Layish, "The Contribution of the Modernists," p. 264.

positive law. An example of this is the institutionalization of monogamy as the principle of marriage and the rejection of the effectiveness of divorce outside the court.

For some people, *ijtihād* attempts are proven to be fragment and ad hoc. In turn, their methods are flawed, exposing inconsistencies and contradictions insufficient in a comprehensive legal system.[41] Thus, their commitment to the classic establishment is mere lip service.[42] By the same token, *taḥayyur* and *talfīq* are harmful to *madhhab* disciplinary adherence.[43] The third and fourth exposes the potency of tensions between the state and religion (or between governmental and religious authorities). For some Muslims, though, the dilemma is profound. Since Islamic law encompasses all aspects of Muslim life, there must be a response by Islam to all issues Muslims are encountering. Islamic law is the very identity of Muslims and the essence of Islam.[44] Leaving them unguided in uncertainty is secularism in its true meaning.[45] So far, the majority of Muslims are not ready for this option.[46] Consequently, a measurable degree of pragmatism should be applied as long as it is justifiable. Religious justification no matter how weak it is, perhaps just in moral and ethical terms, is still legally instrumental and religiously meaningful for Muslims. After all, some argue that the very nature of Islamic legal theory has been utilitarian[47]. *Talfīq, ḥīlah* (legal fiction) and casuistry are among the proofs.[48]

---

[41] Hallaq, *A History of Islamic Legal Theories*, p. 210.

[42] Khaled Abou el-Fadl, *Speaking in God's Name: Islamic Law, Authority, and Women* (Oxford: Oneworld, Oxford, 2001), p. 4.

[43] Layish, "The Contribution of the Modernists," pp. 267-8.

[44] Schacht, *An Introduction to Islamic Law*, p.1.

[45] Rahman, "Islamic Modernism," p. 331.

[46] Bernard Weiss, "Law in Islam and in the West," in Wael B. Hallaq and Donald P. Little (eds), *Islamic Studies Presented to Charles J. Adams* (Leiden: E.J. Brill Academic Publication, 1977), pp. 239-53.

[47] Clark Benner Lombardi, "Islamic Law as a Source of Constitutional Law in Egypt: the Constitutionalization of the *Sharia* in a Modern Arab State," *Columbia Journal of Transnational Law,* 37 (1998-1999): pp. 81-123. According to Routlegde Encyclopaedia of Philosophy, Utilitarianism is a theory about rightness, according to which the only good thing is welfare (wellbeing or 'utility'). Welfare should, in some way, be maximized, and agents are to be neutral between their own welfare, and that of other people and of other sentient beings. In the modern period, utilitarianism grew out of

Trying to keep up with the context is not the only Muslim response, though. Wahhabism, which predates modernism by a century,[49] responds to the unfortunate situation of Muslims by returning to the pristine teaching of Islam using the method of directly and literally interpreting the Qur'ān and the Sunnah. Predictably, instead of accommodating aspects of modernism, such as democracy and nationalism, the response has been backward and negative. Although the movement is not purely legalistic in nature, as is the case with Islamic modernism, the legal implications of the movement are evident. The main argument of this movement is that the cause of Muslim misfortunes is deviation from the very teachings of Islam. Therefore, the panacea involves returning directly to Islamic primary sources (the Qur'ān and the Prophet's tradition) without worrying about historical[50] or social aspects.[51] Although not necessarily *ijtihād*-minded or anti-*madhhab*, Wahhabism truly opposes *taqlīd*. As reported by Dallal, Muḥammad bin `Abd al-Wahhāb stated that there are many straightforward Qur'ānic passages enabling the laity to understand without requiring an *ijtihād*-type of reasoning.[52] Literal interpretation, which sometimes leads to intolerance, is the consequence.[53] In turn, this viewpoint undermines or even threatens classical legal scholarship altogether, *ijtihād*, as understood by classic jurists, and *madhhab*.

On the other hand, conservative *ulamā'* have been actively working to preserve the status quo. Accepting both modernist and Puritan persuasions and claims will harm the *ulamā'*s long-lasting interests as custodians of the sharī'ah via the *madhhab* tradition.[54] Whether or not

---

the Enlightenment, its two major proponents being Jeremy Bentham and John Stuart Mill.

[48] Baber Johansen, "Casuistry: Between Legal Concept and Social Praxis," *Islamic Law and Society*, 2, 2 (1995): pp. 135-56.

[49] Rahman, *Islam*, p. 196.

[50] el-Fadl, *Speaking in God's Name*, p. 5.

[51] Ahmad Dallal, "The Origins and Objectives of Islamic Revivalist Thoughts 1750-1850," *Journal of the American Oriental Society*, 113, 3 (1993), p. 349.

[52] Ibid., p. 350.

[53] el-Fadl, *Speaking in God's Name*, p. 5

[54] Muhammad Qasim Zaman, *The Ulama in Contemporary Islam* (Princeton: Princeton University Press, 2002), p. 10.

this is the primary motive, certainly it is not the only motive. The dominant argument for resisting the reforms of modernism and Puritanism is about *ijtihād*. The *ulamā'* argue is that the requirements of *ijtihād* have been beyond the reach of contemporary jurists.[55] Besides, they believe that *ijtihād* will not bring anything new; social chaos can be expected as a result of having a pragmatic attitude toward sharī'ah, instead. Therefore, *taqlīd* is the only legitimate method. After all, the *ulamā'* believe that *taqlīd* is 'the collective will of Muslim community'.[56] Nonetheless, the *ulamā'* also show ambiguous attitudes toward modernism, notably by accepting the idea of the legislative codification of some aspects of Islamic law and *siyāsah shar'īyah*.[57]

Fatwā and *Bahtsul Masail* in Nahdlatul Ulama

The conservative *ulamā'* comprise the backbone of the NU. It is a Java-based organization dedicated (among other things) to preserve Islamic traditionalism in Indonesia from Islamic modernism (as exemplified by the Muhammadiyah and, to a lesser extent, by Persatuan Islam).[58] The method of engaging Islamic law comprises the major difference between the two camps. Certainly, *fatwā* is the cutting edge of the practical uses of Islamic law. In short, while the former tends to preserve the *madhhab* establishment, the latter prefers to refer directly to the two primary sources of Islamic law; the Qur'ān and Sunnahh. The following paragraphs are devoted to discussing how the NU and *bahtsul masail* forums formulate a *fatwā*.

To begin with, some issues of terminology need to be explained. As mentioned earlier, the *fatwā*-issuing institution of the NU is called *bahtsul masail*. *Bahtsul masail* is a forum in which *fatwā* is formulated. *Bahtsul masail* is derived from two Arabic words, *baḥth* and *al-masā'il*. *Baḥth* is a noun meaning examination, analysis, and discussion.[59] *Masā'il*

[55] Muneer Fareed, "Against *ijtihad*," *The Muslim World*, 91, 3/4 (2001), p. 355.

[56] Ibid., p. 359.

[57] Anderson, "Law as a Social Force," p. 36.

[58] See for example Martin van Bruinessen, *Kitab Kuning Pesantren dan Tarekat: Tradisi-tradisi Islam di Indonesia* (Bandung: Mizan, 1995) p. 18-9 and Howard M. Federspiel, *Persatuan Islam: Islamic Reform in Twentieth Century Indonesia* (Ithaca: Cornell University Press, 1970).

[59] Hans Wehr, *A Dictionary of Modern Written Arabic* (Ithaca: Cornell University Press, 1961), p. 42.

is the plural noun form of *mas'alah*, which means problem, question, and case.[60] When combined, the phrase means the examination of problems or the discussion of questions. Indeed, *bahtsul masail* is a forum where several people examine and solve problems.

In relation to the NU Statute, *bahtsul masail* is an effort to implement Islamic teaching of the Sunnite version based one of its four *madhhab*s (Ḥanafite, Mālikite, Shāfi'ite, and Ḥanbalite) in the Indonesian context.[61] Thus, the function of *bahtsul masail* is to answer inquiries made mainly by members of the NU on certain religious issues. The NU has been performing such functions since its establishment in 1926. By considering practices in *pesantren* and informal discussions among traditionalist *ulamā'*, it is arguably older than the NU.[62] Certainly, the first *bahtsul masail* forum ever reported under the NU structure coincided with the first NU congress (*muktamar*). It was conducted on 21 October 1926, nine months after the NU was formally established.[63] Holding a *bahtsul masail* forum coinciding with the national congress became the tradition within the NU. Until 1940, the national congress was organized annually and so was the *bahtsul masail* forum. After national Independence (1945) congresses were held less frequently, mainly for practical reasons. To fill the gap between two congresses, sometimes mid-term congresses (*Mushawarah Nasional Alim Ulamā'* and *konferensi besar Nahdlatul Ulama*) were arranged when necessary.[64] Similar to the NU central board, the NU structures at the lower levels, such as the provincial or district levels, arrange their *bahtsul masail* forums in a similar fashion. Still, not only did they arrange the forum during their conference, but they had additional and more regular forums throughout the year as well.

---

[60] Ibid., p. 391.

[61] Pengurus Besar Nahdatul Ulama, *Anggaran Dasar dan Anggaran Rumah Tangga Nahdlatul Ulama Hasil Muktamar XXX* (Jakarta: PBNU, 1999), p. 3.

[62] Muhammad Ahmad Sahal Mahfudh, "Bahtsul Masail dan Istinbath Hukum NU: Sebuah Catatan Pendek," in M. Imdaddun Rahmat (ed.), *Kritik Nalar Fikih NU: Transformasi Paradigma Bahtsul Masa'il* (Jakarta: Lakpesdam NU, 2002), pp. x-xxiv and p. xiii

[63] Abdul Aziz Masyhuri, *Ahkam al-Fuqaha' fi Muqarrararat Mu'tamarat Nahdlatul Ulama wa Mushawaratiha/Masalah Keagamaan Nahdlatul Ulama: Hasil-Muktamar dan Munas Ulama Nahdatul Ulama kesatu-1926 s/d kedua puluh sembilan 1994* (Surabaya: PP RMI and Dinamika Press, 1997), p. 1.

[64] Pengurus Besar Nahdatul Ulama, *Anggaran Dasar dan Anggaran Rumah Tangga*, p. 44.

Among the three bodies within the NU structure, Syuriyah (consultative) body, Tanfidziyah (executive) body, and the less influential Mustasyar (advisory) body, it is the Syuriyah body that is responsible for conducting *bahtsul masail*.[65] Since the Syuriyah body holds the highest authority in the NU structure, *bahtsul masail* assumes a reasonably prestigious position. Admittedly, *bahtsul masail* can be considered the most important function and the main agenda of the Syuriyah body.[66] Traditionally, those sitting on the Syuriyah body are senior and respected *ulamā'*, the very core of the NU membership. Following a recommendation of the 1989 NU national congress and succeeding a decision of the NU central board in 1990, a special committee, called LBM (*Lajnah Bahtsul masail* or *Bahtsul masail* Committee) was to be established at national and district levels of the NU structure (PBNU, 1989). Since then, these regional committees have conducted *bahtsul masail* forums under the auspices and surveillance of the Syuriyah body. The 1999 version of the NU's Rules of Association (*Anggaran Rumah Tangga*) article 16 point 2.e states that the tasks of LBM are "to collect, examine, and solve actual legal cases which urgently require definitive legal answers".[67] The personnel of this committee are relatively young *ulamā'*, some of whom are recent graduates of pesantren.

As indicated before, a bahtsul masail forum is conducted to discuss and solve enquiries. Unlike its parallel institutions in Middle Eastern countries, in which a *fatwā* is issued by one single *muftī*, *bahtsul masail* is an institution in which decisions are taken in a *mushawarah* (consultative) manner. The collective aspect corresponds to the naming of the forum; *majlis bahts al-masa'il al-fiqhiyyah al-waqi'iyyah* (the forum for discussing actual legal issues). There are many reasons for its consultative structure. Firstly *bahtsul masail* originates from discussions and forums among the students in pesantrens, the base of NU intellectualism.[68] Besides, as many argue, *mushawarah mufaqah* (consultation and agreement) is fundamental to the culture of

[65] Achmad Siddiq, *Khittah Nahdliyah* (Bangil: Persatuan, 1980), p. 23.

[66] Interview with Masdar Farid Mas'udi (October 8th, 2003).

[67] Pengurus Besar Nahdatul Ulama, *Anggaran Dasar dan Anggaran Rumah Tangga*, p. 27.

[68] Abdul Mun'im DZ., "Bahsul Masail: Tradisi Akademis Muslim Tradisionalis," *Jurnal Gerbang*, 5, 12 (2002), p. 107.

Indonesian society.[69] Traditionalist *ulamā'* of the NU who adhere to *taqlīd* are not comfortable with the idea of independent *muftī*s. Its requirements are too high, and its responsibility is simply too grave.[70] Since ignoring legal cases is irresponsible, collective *fatwā* issuing, which means collective responsibility, constitutes a moderate position between *ijtihād* and *taqlīd*.[71] This collective and institutional *fatwā* does not deny the practice of individual and informal *fatwā* within the NU.[72] A Muslim might visit a *kiai* accessible to him or her, and request a legal opinion from him. In response, that *kiai* will provide a verbal response by carefully citing the available jurisprudential text(s). Admittedly, these kinds of *fatwā* are more numerous than documented *fatwā*s of the NU. However, quite often a *kiai* is unable to answer complex and delicate questions, and will not be so stubborn that he invents an answer without adequate supporting text(s). These kinds of inquiries are 'appealed' to be discussed and examined in the formal *bahtsul masail* forums of the NU.

Although *bahtsul masail* can be considered a specialist forum, it is not necessarily a panel of jurist-consults. In these *bahtsul masail* forums, there are at least three groups; the discussion leader(s) (*moderator/pimpinan rapat*), the drafting board (*dewan perumus*), and the rest of the participants (*mushawirun*).[73] All have equal say in the forum, regardless of their position or seniority within the NU structure. Nonetheless, not all members of the NU are eligible to participate in *bahtsul masail* forums. At the very least, a basic understanding of classical Arabic, as used in the classic books of jurisprudence, is a must. In the NU, those equipped with such knowledge are *ulamā'* and graduates of pesantren. This is the very reason for the Syuriyah body's involvement in *bahtsul masail* forums. While the personnel of the NU's executive body (Tanfidziyah) might not have intensive and extensive

[69] Mattulada, "Demokrasi dalam Tradisi Masyarakat Indonesia," *Prisma*, 6, 2 (1977), p. 36.

[70] Interview with Khoiruzzad (September 23rd, 2003); with Ali (August 29th, 2003); and with Miqdad Fahmion (September 24th, 2003).

[71] Interview with Abdul Aziz Masyhuri (October 5th, 2003).

[72] Martin van Bruinessen, *NU: Tradisi, Relasi-relasi Kuasa, Pencarian Wacana Baru* (Yogyakarta: LKiS & Pustaka Pelajar, 1994), p. 212.

[73] Interview with Abdul Aziz Masyhuri (October 5th, 2003); and with Abdul Malik Madani (August 25th, 2003).

training in Islamic sciences, members of the Syuriah body are expert in Islamic sciences, especially pesantren version of Islamic sciences. The fact that the NU was established and run by *ulamā'* also confirms the dominance of *ulamā'* in the NU structure.[74]

Another notable adjustment is the change in the nature of *fatwā*. The social and cultural background of the NU stakeholders has equipped *fatwā* with additional authority. Although essentially a *fatwā* does not bind the *mustafti*, it is very unlikely that a *mustafti* would contradict the *fatwā*'s recommendation issued by the NU *ulamā'*. The reason for such force is the paramount position of *ulamā'* or *kiai*s as authorities in the Javanese cultural setting. The source of the authority can be explained in many ways. In addition to the legal aspects of religious authority, there are also mystical and healing aspects of the 'religious' authority of Javanese *kiai*s.[75] Geertz also adds that non-religious sources of *kiai* authority are manifest, notably economic and political ones. In many instances, as the elite group in a feudal society, *kiai*s are better off economically. Sometimes neighboring villagers economically depend on *kiai*s to a certain degree.[76] The politics-based authority of the *kiai*, though, is problematic, it can corrupt as well as bolster *kiai*s' authority.[77]

Fatwā-issuing Procedures in Nahdlatul Ulama

The basic guidelines of *fatwā* issuing in *bahtsul masail* can be traced back to 1926. The first two *fatāwā* ever issued in NU were on the basis of *fatwā* issuing within NU.[78] Citing al-Sha'rānī's *al-Mīzān al-Kubrā*, the first *fatwā* advised that Muslims must adhere to one of the four Sunnite

---

[74] Siddiq, *Khittah Nahdliyah*, p. 21.

[75] Clifford Geertz, "The Javanese kijaji: the Changing Role of a Cultural Broker," *Comparative Studies in Society and History: an International Quarterly*, 2, 2 (1960): pp. 228-59. For equivalent analyses of *kiai*s' authority in West Java, see Hiroko Horikoshi, "A Traditional Leader in a Time of Change: The Kijaji and Ulama in West Java," Ann Arbor, Michigan and Karl D. Jackson, *Traditional Authority, Islam and Rebellion: A study of Indonesian political behavior* (Berkeley: University of California Press, 1980). For an overall comparison between the religious elite in Java and West Sumatra see Taufik Abdullah, *Islam dan Masyarakat: Pantulan Sejarah Indonesia* (Jakarta: LP3ES, 1987).

[76] Kacung Marijan, "Socio Economic and Political Role of NU elite," *Indonesian Quarterly*, 26, 1 (1998): pp. 37-51 and pp. 37-8.

[77] See for instance the aforementioned Geertz's article.

[78] Masyhuri, *Ahkam al-Fuqaha'*, pp. 2-3.

*madhhab*s; Ḥanafite, Mālikite, Shāfi'ite and Ḥanbalite schools. In accordance with this prescription, NU decided to adhere Shāfi'ite *madhhab*. It is the *madhhab* of virtually all Indonesian traditional Muslims, and relates to the process of Islamization of the Indonesian archipelago[79]. By citing Sayyid Bakri's *I'ānat al-Ṭālibīn*, the second *fatwā* prescribed how the Shāfi'ite *madhhab* was to be employed in *fatwā* formulation. In term of textual reference, the highest authority is the consensus of al-Nawāwī (d. 676H/1277CE) and al-Rāfi'ī (623H/1226CE). If there is no consensus, al-Nawāwī's opinions are preferred, but if that fails, then al-Rāfi'ī's. If these references fail to provide an answer, then the opinions of the majority of *ulamā'*, followed by the opinion of the cleverest scholar, and finally followed the opinion of the most pious scholar are sought.

One can easily point out that the aforementioned method and its hierarchy is *taqlid*. All references in the method are jurisprudence (*furū' al-fiqh*), and none comprises legal theory (*uṣūl al-fiqh*). This is a typically *taqlid* method as Hallaq has pointed out.[80] Nonetheless, one also can see loopholes in it. What should be referred to if no answer can be found in the prescribed jurisprudence? How can the prescribed jurisprudence be employed to formulate a *fatwā*? What happens if there is a clear primary text (from the Qur'ān or/and the Sunnah) relating to the discussed issue? And what if the text is contradictory to peoples' immediate needs and to justice? It is in the context of these questions that *bahtsul masail* forums show some degree of flexibility in terms of breaching *madhhab* discipline and performing *ijtihād*. The first hint can be found in the employment of the aforementioned jurisprudence.

These jurisprudence books are well known in pesantren as *kitab kuning*. *'Kitab kuning'* literally means 'yellow book' representing the paper on which the books are often printed. Basically, all books employed in pesantren teaching are described as *kitab kuning*.[81] Many

[79] See for instance G.W.J. Drewes, "New Light on the Coming of Islam to Indonesia?," in Alijah Gordon (ed.), *The Propagation of Islam in the Indonesian-Malay Archipelago*, (Kuala Lumpur: Malaysian Sociological Research Institute, 2001), pp. 125-155 and Martin van Bruinessen, "Bukankah Orang Kurdi yang Mengislamkan Indonesia," *Pesantren,* 4, 4 (1987): pp. 43-53. Nonetheless, although the dominance of Shāfi'ī *madhhab* is undisputed, the account of its origin of is disputed among historians.

[80] Hallaq, *Authority, Continuity, and Change in Islamic Law*, pp. 83-4.

[81] van Bruinessen, *Kitab Kuning, Pesantren dan Tarekat*, p. 17.

of the books are the authoritative jurisprudence of mainly the Shāfi'ite School of law. Jurisprudence texts like *Fatḥ al-Mu'īn, Bughyat al-Mustarshidīn* and *Kifāyat al-Akhyār* are taught in many pesantrens. Big volumes of jurisprudence, many of which are extensive commentaries and glosses of concise jurisprudence such as *Tuḥfat al-Muḥtāj, Mugnī al-Muḥtāj,* and *Nihāyat al-Muḥtāj*, are not taught for practical reasons, though. These books are frequently referred to in *bahtsul masail* forums. Nonetheless, pesantrens do not only teach Islamic jurisprudence, but almost all kinds of traditional Islamic sciences.

Since the term *kitab kuning* is not entirely comprehensible, NU *ulamā'* use a more technical term for books used in *bahtsul masail* forums. That is *al-kutub al-mu'tabarah* (the accredited books). This implies that only books agreed by NU *ulamā'* can be used as basis for issuing *fatwā*. According to a *fatwā* from the 1983 NU's mid-term congress, *al-kutub al-mu'tabarah* are those books affiliated to the four schools of law in one way or another.[82] Since NU adheres to the Shāfi'ite school, jurisprudential books of the Shāfi'ite school comprise the largest part of the *al-kutub al-mu'tabarah* list. This category consists of strict jurisprudence, such as al- *Fatḥ al-Mu'īn* and those mixed with other aspects of Islamic teaching, such as *'Iḥyā' 'Ulūm al-Dīn*. In this book, al-Ghazālī embodied, and successfully so, the mystical element of Islam (Sufism) into the *fiqh*-dominated orthodoxy.[83] Likewise, Qur'ānic exegeses and interpretations of Ḥadīth collections affiliated to Sunnite can be categorized *al-kutub al-mu'tabarah* and used, albeit sparingly, including al-Qurṭubī's *al-Jāmi' li Aḥkām al-Qur'ān* and al-'Asqallānī's commentary to al-Bukhārī's *al-Jāmi'-al-Saḥīḥ* entittled *Fatḥ al-Bārī*. In addition to that, books on different opinions of the four Sunnite schools of law are also used in *bahtsul masail* forums, such us *Raḥmat al-'Ummah, al-Mīzān al-Kubrā,* and *al-Fiqh 'alā al-Madhāhib al-'Arba'ah*. The last category of *al-kutub al-mu'tabarah* comprises jurisprudence of other rest three *madhhab*s. Among the books are Ibn 'Ābidīn's *Ḥāshiyat Radd al-Mukhtār* (Ḥanafite), al-Magrabī's *Mawāhib al-Jalīl* (Mālikite), and Ibn Taymīyah's *Majmū' al-Fatāwā al-Kubrā* (Ḥanbalite).

[82] Masyhuri, *Ahkam al-Fuqaha'*, p. 301.

[83] Rahman, *Islam*, p. 78.

Apart from the aforementioned jurisprudence texts, there are other kinds of books employed by NU *ulamā'* in *bahtsul masail*. In fact, many exceptions occur quite frequently. In its first *bahtsul masail* forum of 1926, an NU *fatwā* quoted al-Bukhārī's Ḥadīth collection.[84] Directly citing primary sources (Ḥadīth) clearly violates the *taqlīd* concept. In 1938, to define the nature of an emergency situation a *fatwā* has cited a legal maxim (*qā'idah fiqhīyah*) from al-Suyuti's *al-Ashbāh wa al-Nazā'ir*.[85] Again, employing a legal maxim is considered a form of *ijtihād*.[86] Likewise, in 1939, NU *fatāwā* cited the opinion of an Egyptian *Muftī* on life insurance, which was published in a magazine.[87] Obviously, a magazine is not jurisprudence. In 1961, NU *fatāwā* cited the works of contemporary Muslim scholars of the time, the Egyptian Yusuf Musa and Abdul Qadir Awdah, on the issue of land reform.[88] Clearly, NU *ulamā'* were comfortable in employing the opinions of contemporary scholars whose commitment on *madhhab* and classic jurisprudence were dubious. From these examples, it can be inferred that *bahtsul masail* methods in relation to references vary. *Ijtihād*, at least in a limited and partial manner, is used and the referred books and their writers may well be pro-*'ijtihād* and contemporary. Likewise, *taqlīd* is not always the guiding principle. As Zahro concludes, the justification for using references in issuing *fatwā*, and therefore, the standardization of *al-kutub al-mu'tabarah* relies heavily upon the 'wisdom' of the NU *ulamā'*.[89] The accessibility of the reference is also a determinant thing since not all books can be purchased in Indonesia.[90] As a result, the standard of *al-kutub al-mu'tabarah* is very subjective and relaxed.

---

[84] Masyhuri, *Ahkam al-Fuqaha'*, p. 14.

[85] Ibid., p. 157.

[86] W.P. Heinrichs, "Kawaid Fikhiyya," *The Encyclopaedia of Islam* (Leiden: E.J. Brill Academic Publication, 2003), p. 517.

[87] Masyhuri, *Ahkam al-Fuqaha'*, pp. 183-4.

[88] Ibid., pp. 232-3.

[89] Ahmad Zahro, "Kitab-Kitab Mu'tabarah dalam Lajnah Bahtsul Masail NU," the paper presented in a seminar entitled Pengaruh Liberalisme Pemikiran dalam Standardisasi Kitab-Kitab Mu'tabarah held in Pesantren Darul 'Ulum Rejoso Jombang on February 23rd, 2003.

[90] van Bruinessen, *Kitab Kuning, Pesantren dan Tarekat*, pp. 116-7.

These anomalous referencing styles increased in the 1980s, although referring to classic jurisprudence is still dominant. Having said this, apparently there is a degree of anxiety and uncertainty among NU *ulamā'* about the methods. Certainly, exercising *ijtihād*, no matter how infrequent and trivial it is, and employing dubious references, need clear justification. Moreover, even when there is a great deal of flexibility in issuing *fatwā*, there are still considerable numbers of inconclusive *bahtsul masail* forums (*tawaqquf*).[91] That is when the forum cannot give sufficient answers for legal problems for one reason or another[92]. Even if a degree of analogy (*ilḥāq*) can be drawn from jurisprudence, the applicability of this mechanism becomes very vague and elusive.[93] Certainly, these *fatwā* questions are contemporary and modern. They concern the application of modern technology, contractual practices, and medical issues.

Nonetheless, seeing this 1983 *fatwā* on *al-kutub al-mu'tabarah* at a glance, *madhhab* discipline is immediately under threat of *talfīq*. Indeed, in 1929 while stating a Shāfi'ite opposition against exchanging silver commodities with different measurements, an NU *fatwā* also presented a Ḥanafite opinion allowing such an exchange.[94] Apparently, there is a degree of practical difficulty in complying with Shāfi'ite opinion so a Ḥanafite view was provided. However, it is more usual to refer to the weak opinions of Shāfi'ite *madhhab* before applying *talfīq*. An example is *Jum'ah* prayer which forty local male residents should attend according to the *rājiḥ* (sound) position of Shāfi'ite. In case such a number is not met, then the attendance of four residents is tolerable according to a *marjūḥ* (weak) opinion of Shāfi'ite. This option is preferred over the Ḥanafite opinion allowing only two males for a *jum'ah* prayer.[95] Again, applying weak opinions is the modernists' method, although it is practiced cautiously and sparingly. It has been an unwritten rule in NU not to issue a *fatwā* that is contradictory to

[91] Interview with Abdul Aziz Masyhuri (October 5th, 2003).

[92] Legally, though, *tawaqquf* is justified because either recommending not well-supported *fatwa* or employing *ijtihād* without sufficient expertise is not allowed.

[93] Interview with ahmad Yasin Asmuni (September 13th, 2003).

[94] Masyhuri, *Ahkam al-Fuqaha'*, pp. 48-9.

[95] Pengurus Besar Nahdatul Ulama, *Anggaran Dasar dan Anggaran Rumah Tangga,* pp. 23-4.

public need.[96] This principle confirms utilitarian nature of Islamic law. Because NU *ulamā'* have exhausted all Shāfi'ite jurisprudential opinions -including the weak ones-, a breakthrough is a must. For that reason, some NU *ulamā'* suggest, among other things, the greater employment of jurisprudence from the other three schools of law (*talfīq*) and the employment of legal theory (*'uṣūl al-fiqh* and *al-qawā'id al-fiqhīyah*).[97] While the first suggestion openly justifies *talfīq*, the second reopens the gate of *ijtihād*. Although employed for relatively different purposes, the two methods have been the tools used by modernists in reforming Islamic law.

On the other side of the story, there is a call from the young *ulamā'* of NU (such as KH Musthofa Bisri and Masdar F. Mas'udi whose opinions are shared by some respected NU *ulamā'*, including KH A. Muchith Muzadi and KH M. A. Sahal Mafudh) demanding improvement in *fatwā* quality.[98] The main argument is not necessarily about methods, but about the nature and characteristic of the *fatwā*. They argue that many NU *fatāwā* are impractical and out of touch with popular needs and dilemmas, and last but not the least; contradictory in terms of social justice.[99] Intellectually, many of these young NU *ulamā'* are pesantren graduates who continue studies in State Institute

[96] Interview with Imam Syafi'i (September 10th, 2003).

[97] Interview with Abdul Malik Madany (August 25th, 2003); and with Abdul Aziz (October 5th, 2003).

[98] See, for example, Muhammad Ahmad Sahal Mahfudh, *Nuansa Fiqh Sosial* (Yogyakarta: LKiS, 1989) p. 63; Abdul Muchith Muzadi, *NU dan Fiqh Kontekstual* (Yogyakarta: LKPSM, 1994), p. 57; and Martin van Bruinessen, *NU: Tradisi, relasi-relasi kuasa,* p. 214. Not all young generation of NU share the opinion of these NU scholars, though. The majority of pesantren graduates and many graduates of institute of Islamic studies remain traditionalists. The term of 'young' in this regard refers to their different approach to *fiqh*.

[99] Ahmad Baso, "Melawan tekanan agama; wacana baru pemikiran fiqih NU," in Jamal D. Rahman et al (eds), *Wacana Baru Fiqih Sosial; 70 tahun K.H. Ali Yafie*, (Bandung: Mizan, 1997), p. 131-143. For outside review see Martin van Bruinessen, *Kitab Kuning Pesantren dan Tarekat: Tradisi-tradisi Islam di Indonesia.* For opinion of NU *kiai* see Muhammad Ahmad Sahal Mahfudh, "Bahtsul Masail dan Istinbath Hukum NU: Sebuah catatan pendek"; for NU young scholars' opinions see for instance Ahmad Baso, "Melawan Tekanan Agama; Wacana Baru Pemikiran Fiqih NU"; see also Abdul Moqsith Ghazali, "Reorientasi Istinbath NU and Operasionalisasi *Ijtihād* Jama'i," in Rahmat, M Imdadun (ed.), *Kritik Nalar Fikih NU: Transformasi paradigma bahtsul masa'il*, (Jakarta: Lakpesdam, 2002), pp. 86-118.

of Islamic Studies (Institut Agama Islam Negeri/IAIN). They also are exposed to the thinking of western Islamicists and social scientists.[100] As can be seen, there is a gap between the concerns of NU *ulamā'* and the demands of the younger *ulamā'* of NU. Generally speaking, while the former emphasizes how to answer the questions, the latter stresses the importance of 'humanizing' the *fatwā*.

Changes in Bahtsul Masail and Their Responses

It is in these conflicting opinions that a series of critiques on *fiqh* and, therefore, *bahtsul masail* are communicated in the 1980s. The appointment of Abdurrahman Wahid, whose ideas on Islamic law are considered progressive in NU, as the chairman of NU executive body in 1984 was a crucial catalyst.[101] Since then, the NU Central Board or its autonomous bodies, facilitated a series of programs reforming NU's conservative approach to Islamic law. In 1985, Wahid assigned Masdar F. Mas'udi to organize periodic *bahtsul masail* forums called *Majlis Mubahasah Kitab* to discuss issues surrounding *bahtsul masail* in NU.[102] RMI (*Rabitah al-Ma'ahid al-Islamiyyah* or the Association of Islamic Boarding Schools affiliated to NU) and P3M (*Pusat Pengembangan Pesantren dan Masyarakat* or Centre for Pesantren and Community Empowerment) also jointly conducted *ḥalqah* (seminars), participated mainly by NU *ulamā'* on similar issues in the late 1980s.[103] In addition, P3M's four-monthly bulletin entitled *Pesantren* (1984-1993) is an effective means of conveying the message.[104] This is true considering

[100] See for example van Bruinessen, *NU: Tradisi, relasi-relasi kuasa*, p. 234 and Ahmad Baso, "Melawan tekanan agama; wacana baru pemikiran fiqih NU," pp. 136-8.

[101] For Wahid's opinion of *fiqh* tradition in NU, see for example his essays entitled "Asal Usul Tradisi Keilmuan di Pesantren," in *Pesantren* (1984): pp. 4-11 and "Pengembangan Fiqih yang Kontekstual," in *Pesantren* 2, 2 (1985): pp. 3-8. For his opinion on the position and role of Islamic law in Indonesia, see for instance "Menjadikan Hukum Islam sebagai Penunjang Pembangunan," *Prisma,* 4, 4 (August 1975): pp. 53-62.

[102] Mun'im DZ, "Bahsul Masail: Tradisi Akademis Muslim Tradisionalis," p. 109.

[103] Ibid., p. 115.

[104] The role of P3M is instrumental not only because of its financial support, but also the prominence of Masdar F. Mas'udi, who is P3M staff, in orchestrating the forums. Aside from *fiqh*-related issues, issues like taxation and zakat, land condemnation, and democratic processes were also discussed in the *ḥalaqah*. See van Bruinessen, *NU: Tradisi, relasi-relasi kuasa, pencarian wacana baru,* for this account.

some of its contributors and interviewees are prominent NU *ulamā'* from both the conservative and the progressive wings.[105] From the two methods, issue like *kontekstualisasi pemahaman kitab kuning* (promoting contextual understanding of *kitab kuning*) is communicated and fostered.[106] Apparently, some conservative *ulamā'* were persuaded.

Nonetheless, this activity is not without reaction. As reported by Mun'im, criticisms and attacks were launched.[107] The background of the critics is varied. Some of whom are *ulamā'* of pesantren, such as KH. Syafi'i Hadzami and the late KH. Rodli Sholeh, whereas others are graduates of Islamic institutes in Saudi Arabia, such as Said Agil Munawwar and Abdul Muchid.[108] Similarly, some *ulamā'*, such as KH Ahmad Yasin Asmuni, decided to withdraw his participation in *ḥalqah* after knowing Masdar F. Mas'udi's opinions and intentions.[109] As a result of severe criticism some scheduled programmes were cancelled.[110] For the conservative traditionalists, any critical remarks on *kitab kuning* (jurisprudence texts) are unacceptable, let alone critiquing *uṣūl al-fiqh* and the central figures of Islamic scholarship. Since these conservatives are teachers of pesantrens, they are responsible for producing future *bahtsul masail* practitioners. Failing to convince them to accept some aspects of the discussed issues in the *ḥalqah* is regrettable. Future graduates of pesantrens will likely remain conservative.

However, a 1990 *ḥalqah* produced an important document. While acknowledging that the primary sources of Islamic law are the Qur'ān and Sunnah, *madhhab* system -restricting it only to the four Sunnite schools of law- is preserved. *Madhhab* in this *ḥalqah* is expanded to include the *manhajī* (methodological) *madhhab*, though. This *manhajī* method simply enable NU *ulamā'* to practice *ijtihād* in issuing *fatwā*.

---

[105] Such as KH. Abdurrahman Wahid (Perdana, 1984 and 2, 2, 1985); KH. MA Sahal Mahfudh, KH. Ali Yafie (1, 6, 1989); KH. A Muchith Muzadi (1, 6, 1989); KH. Abdul Aziz Masyhuri (Perdana, 1984); and KH. Said Aqil al-Munawwar (1, 5, 1988).

[106] Some papers and recommendations of the *ḥalqah* can be read in Aula: Majalah Nahdlatul Ulama no 2, XI (March 1989).

[107] Mun'im DZ, "Bahsul Masail: Tradisi Akademis Muslim Tradisionalis," p. 110.

[108] Ibid., p. 102.

[109] Interview with Ahmad Yasin Asmuni on September 13th, 2003.

[110] Mun'im DZ, "Bahsul Masail: Tradisi Akademis Muslim Tradisionalis," p. 111.

While the laity must only comply with the *qawlī* (opinion-based) *madhhab*, the specialists may perform *manhajī madhhab*. Still, this *manhajī madhhab* can only be performed collectively (*istinbāṭ jamā'ī*).[111] Finally, the methods that have been being practiced for years in NU *bahtsul masail* now gain justification. Consequently, this justification is aimed at providing psychological and moral support for NU *ulamā'* to openly and resolutely implement the methods. Armored with this official yet limited documents and the rest of the seminars recommendations, these outcomes were brought into the mainstream of NU discourse for the same purpose. At the 1992 mid-term congress, a decision concerning methods of decision making in *bahtsul masail* was sanctioned. The document is entitled 'Systems of formulating legal decisions in *bahtsul masail* in the circle of the Nahdlatul Ulama'.[112]

Considering the interests underlying the formulation of this document, it can be divided into three parts. The first part comprises the views agreed upon and supported by conservatives such as the section on the accredited texts (*al-kutub al-mu'tabarah*) and the procedure of answering problems. While the former repeats the 1983 *fatwā* formulation, the latter section is not completely new either. The first and second points of the section reflect a justification of the ongoing practice. The first is the preference of using legal opinion from a jurisprudence text. If two or more texts are available, the collective determination among the *ulamā'* is used to select an answer. An example of this is a 1937 *fatwā* on the status of a present marriage guardian who delegates another person to marry a woman under his guardianship.[113] There are two conflicting views on the matter, a text of *Kifāyat al-Akhyār* indicates its unlawfulness, whereas al-Bājūrī's *Ḥāshiyat* justifies the practice. The *fatwā* recommends the lawfulness of the practice by inferring that the text of *Kifāyat al-Akhyār* is only concerned with those guardians who delegate and act as the marriage witness at the same time.

---

111 Abdul Muchith Muzadi, *NU dan Fiqh Kontekstual*, pp. 58-9.

112 The used translation of this document is mainly derived from MB Hooker's translation in his book entitled *Indonesian Islam: Social Change through Contemporary Fatāwā* (Sydney: Allen&Unwin, 2003), pp. 57-9.

113 Abdul Aziz Masyhuri, *Ahkam al-Fuqaha' fi Muqarrararat Mu'tamarat Nahdlatul Ulama wa Mushawaratiha*, p. 149.

The other two points of this section contain justification for the ongoing practice. The first is about exercising *ilḥāq* (analogy) collectively[114]. A close examination of numerous NU *fatāwā* reveals that analogy has been the practice for long time. A *fatwā* in 1931, for instance, makes an *ilḥāq* between Siamese twins and the expectant mother.[115] If one of the Siamese twins dies, it should be separated for the sake of the living, just like a baby should be taken out from the mother's womb if she dies. A text from al-Bujairami's *Tuḥfat al-Ḥabīb* confirms this caesarian section. The latter method is similar to this *ilḥāq* in terms of its practicability in NU *fatwā*. It justifies the exercise of collective *ijtihād*. As explained earlier, the *manhajī* method, either using *uṣūl al-fiqh* or *al-qawā'id al-fiqhīyah*, has been operational for a long time. Nonetheless, there is another development, but not widely accepted, in practicing this doctrine. KH M. A. Sahal Mahfudh, for instance, combines *talfīq* and *manhajī madhhab* at once. That is to employ some aspects of legal theory of non-Shāfi'ite scholars -notably al-Shaṭibī's principle of *maṣlaḥah* (benefit or utility) of the Mālikite school- while maintaining commitment to the Shāfi'ite *madhhab*.[116] This desperate effort indicates the importance of any form of textual reference (reference to *kitab kuning*) in issuing *fatwā* among the NU *ulamā'*.

Although these four methods have been practiced, the document gives guidance for implementing these four methods. Again, the 1926 *fatwā* on the method of employing legal texts is cited. Interestingly, this 1992 document also gives a foundation for considering *maṣlaḥah* in the process of choosing between conflicting legal texts. Public benefit necessitates an assessment of external factors, such as economic, culture and social concerns. It is further evidence of the utilitarian nature of practicing Islamic law and Islamic modernism at the same

---

[114] Choosing *ilḥāq* as expression instead of *qiyās* is to avoid objections from conservative ulama who maintain that *qiyās* is the tool of mujtahid alone. NU ulama do not claim the right of performing *ijtihād*. It is different name, but identical concept (Masyhuri, interview at 5 October 2003). This is the main reason of the ulama opposition toward *qiyās*, not because of their personal interests.

[115] Masyhuri, *Ahkam al-Fuqaha' fi Muqarrararat Mu'tamarat Nahdlatul Ulama wa Mushawaratiha*, p. 78.

[116] Mahfudh, "Bahtsul Masail dan Istinbath Hukum NU," p. 28.

time. Interestingly, the young NU *ulamā'* instigated the second part of this document.

This part is under the section of 'the framework for the analysis of issues'. Basically, this section suggests that in the process of issuing a *fatwā*, economic, social, cultural, political and other social factors should be well considered. This analysis includes assessing the problems, measuring the possible effects, performing legal analysis, and formulating guidelines for application. The purpose of bringing these considerations into *bahtsul masail* forums is to ensure the *fatwā* becomes more accountable and practicable. Such 'extra-judicial' considerations should be the priority in issuing the *fatwā*, whereas its religious foundation (*kitab kuning*) comes second. Citing Jeremy Bentham's legal utilitarian viewpoint, Masdar F. Mas'udi states that a *fatwā* should be logically tested, religiously founded, and practically functional.[117]

The third part of the 1992 document comprises elements agreed by both aforementioned groups. Included in this part is the section of technical terms used in the document. In addition, there is a section on hierarchy and the nature of force of *fatāwā* issued by different *bahtsul masail* forums. Three points are recorded. *Fatāwā* of different forums do not cancel each other out if the proper method is applied. Higher force is obtained if a *fatwā* receives approval from the central consultative board without waiting for the national congress or the mid-term one. The nature of *bahtsul masail* decisions in congress and mid-term congress comprise the ratification of drafted decisions prepared beforehand and/or the approval of decisions which are considered to have far-reaching repercussions in all fields.

Nonetheless, these guidelines are not always applied in the process of *fatwā* issuing. The role of the conservative *ulamā'*, as the authority in NU and as the practitioners of *bahtsul masail*, remains unchallenged. Perhaps, some *ulamā'* begin to be aware of the importance of producing accountable *fatwā*, but the majority of them, especially at the local levels, are only concerned with answering the *fatwā* questions. KH Abdul Aziz Masyhuri, for instance, states that finding supporting texts for a *fatwā* is a laborious and daunting task, let alone embracing on the

[117] Interview with Masdar F. Mas'udi on September 5th, 2003.

task of considering social implications as well.[118] As a result, the 1992 decision was successful only in encouraging *ulamā'* to employ additional texts and exercise a degree of *ijtihād*, whereas social considerations are somehow overlooked.

Debates in East Java

More than ten years later, debates surrounding the 1992 decision persist. In East Java, the stronghold of NU, the situation is unsettled as well. The 1992 decision is perceived differently; some oppose while others support or fall in between. From the *ulamā'* camp, for instance, there are some who are wholeheartedly satisfied with the ongoing practice. They do not see any need for change. They refuse to exercise *ijtihād*, apply tight screening in accepting new references, and observe strict adherence to Shāfi'ite school with little room for *talfīq*, Likewise, they occasionally employ vague analogy, and accept *tawaqquf* (inconclusive *bahtsul masail*) as a form of legitimate response. Apparently this group is the biggest, especially when local *ulamā'* are concerned. KH. Miqdad Fahmi,[119] the chairperson of the *Bahtsul masail* Committee in Jember District NU Branch and KH. Abdul Nashir, the chairperson of *bahtsul masail* drafting board in the Jombang District NU Branch are key examples.[120] This group can be considered to be conservative traditionalist. Nonetheless, there are also *ulamā'* who apply a relaxed attitude towards *talfīq*. They believe that *tawaqquf* is no longer acceptable, especially if the problems urgently need definitive legal status. Still, their main mission is to give answers to the questions and whether those answers were practicable and equitable is not their major concern. There are few *ulamā'* in this group. Among the examples are KH. Ahmad Farihin,[121] the chairman of Syuriyah board in Malang branch of NU and K. Hayyin Nur,[122] the chairperson of the *Bahtsul masail* Committee in the Nganjuk District NU Branch. This group is called moderate traditionalist.

[118] Interview with Abdul Aziz Masyhuri on October 5th, 2003.

[119] Interview with Miqdad Fahmi on September 24th, 2003.

[120] Interview with Abdul Nashir Fattah on October 5th, 2003.

[121] Interview with Ahmad Farihin on Malang October 4th, 2003.

[122] Interview with Hayyin Nur on September 19th, 2003.

The last group of *ulamā'* comprises those seeking to achieve answers which are logical, just, and practicable. In so doing, the accountable method must be applied consistently, where *taqlīd* is applied at first, but *ijtihād* is not dismissed altogether. Members of this group include KH Ahmad Wazir,[123] the secretary of Syuriyah board in Jombang branch of NU, and KH Abdullah,[124] a member of the *Bahtsul masail* Committee of the Jember District NU Branch. Using Hallaq's typology, this group can be considered to practice a modest form of religious utilitarianism[125]. Young NU *ulamā'* are similar to this last group of *ulamā'*, but not completely so. They believe that a just and practicable *fatwā* (*maṣlaḥah*) is the main objective. The method of reaching such *fatwā* is a secondary concern. Still, they do not dismiss the method altogether and they believe that connection to religious sources should be maintained in one way or another. If traditional connections, such as *kitab kuning* and *uṣūl al-fiqh*, cannot provide justification, then a different approach to primary texts, such as radical hermeneutics, might be the solution. This group can be considered an extreme form of religious utilitarianism. Abdul Mun'im DZ, a Pesantren teacher in Tuban, and Imam Nakha'i, an academic staff member of *al-ma'had al-'ālī,* can be included in this group.[126]

From the list it is evident that conservatism is occasionally also related to educational background. Almost all *ulamā'* interviewed during the research are graduates of pesantren. A few of them who have moderate approach and wish to produce workable *fatwā*s are graduates of formal Islamic higher education, such as State Institute of Islamic Studies (IAIN) or State College of Islamic Studies (STAIN).

---

[123] Interview with Ahmad Wazir on September 26th, 2003.

[124] Interview with Abdullah September 24th 2003.

[125]According to Hallaq religious utilitarianism is a form of response from Islamic scholarship to modernism based on the compatibility between reason and revelation. Among the goals is bringing a conceivable synthesis of Islamic teaching and a substantive law suitable for people living in modern times. The method for doing so is the reformulation of legal theory by abusing the concept of *maṣlaḥah* (public benefit). See his book *A History of Islamic Legal Theories: An introduction to Sunni usul al-fiqh,* p. 214.

[126] See Abdul Mun'im's opinion in '*Bahtsul masail*: Tradisi akademis Muslim Tradisionalis, pp. 104-15. For Imam Nahe'i's opinion see "Posisi Akal Lebih Tinggi dari Wahyu," *IslamLib.com*, December 5th, 2003 (accessed on 3/5/2004).

Conclusion

Having considered *fatwā* and its relation to *fiqh* in modern times as well as conjuncture of NU *bahtsul masail* and the debates among the East Javanese *ulamā*'s, it can be stated that departure from *taqlīd* and the *madhhab* establishment are indeed recorded. Modernism in Islamic law is embraced by the NU conservative *ulamā*'. In fact, it predates the widely held view of the momentum of change in the 1992 decision. This 1992 document only serves as additional encouragement for changes. However, because the conservative *ulamā*' of pesantren background still dominate the *bahtsul masail* forums, especially at the local levels, changes should not be overemphasized. They apply *ijtihād* and *talfīq* not as a norm, but as exception methods in *bahtsul masail* which are to be used sparingly if not preferring *tawaqquf*. In this regard, such anomalous methods are used either to find corresponding texts for the questions or in lesser extent to provide justification for the Muslim practices. Thus, the issue of *maṣlaḥah* as understood by young NU *ulamā*' is indeed considered but not at the expense of ignoring *madhhab* and *taqlīd* establishment. []

Bibliography

Books and Articles

Abdullah, Taufik. *Islam dan Masyarakat: Pantulan Sejarah Indonesia.* Jakarta: LP3ES, 1987.

Abou El Fadl, Khaled. *Speaking in God's Name: Islamic law, authority, and women*. Oxford: Oneworld, 2001.

----------. 'Islam and the theology of power', *Middle East Report*, Winter 2001, http:/www.merip.org/mer/mer221/221_abu_el_fadl.-html. (accessed on 4/2/2004).

Anderson, JND. "Law as a social force in Islamic culture and history." *Bulletin of School of Oriental and African Studies*, 20 (1/3) 1957: pp. 13-40.

----------. "Modern trends in Islam: legal reform and modernisation in the Middle East." *International and Comparative Law Quarterly*, 20 (1971): pp. 1-21.

Aula: Majalah Nahdlatul Ulama No 2, XI/March 1989.

Baso, Ahmad. "Melawan Tekanan Agama; Wacana Baru Pemikiran Fiqih NU." in Jamal D. Rahman et al (eds). *Wacana Baru Fiqih Sosial; 70 tahun K.H. Ali Yafie*. Bandung: Mizan, 1997.

Van Bruinessen, Martin. "Bukankah orang Kurdi yang mengislamkan Indonesia?." *Pesantren,* 4, 4 (1987): pp. 43-53.

----------. *NU: Tradisi, Relasi-Relasi Kuasa, Pencarian Wacana Baru*. Yogyakarta: LKiS & Pustaka Pelajar, 1994.

----------. *Kitab Kuning Pesantren dan Tarekat: Tradisi-tradisi Islam di Indonesia*. Bandung: Mizan, 1995.

Coulson, Noel J. *Conflicts and Tensions in Islamic Jurisprudence*. Chicago: The University of Chicago Press, 1969.

Dallal, Ahmad. "The origins and objectives of Islamic revivalist thoughts 1750-1850." *Journal of the American Oriental Society*, 113, 3 (1993): pp. 341-59.

Drewes, G.W.J. "New Light on the Coming of Islam to Indonesia?." in Alijah Gordon (ed.). *The Propagation of Islam in the Indonesian-Malay Archipelago*. Kuala Lumpur: Malaysian Sociological Research Institute, 2001.

Fareed, Muneer. "Against *ijtihād*." *The Muslim World*, 91(3/4) (2001): pp. 355-70.

Federspiel, Howard M. Persatuan Islam: Islamic Reform in Twentieth Century Indonesia. Ithaca: Cornell University Press, 1970.

Geertz, Clifford. "The Javanese Kijaji: the Changing Role of a Cultural Broker." *Comparative Studies in Society and History: an International Quarterly*, 2(2) (1960): pp. 228-59.

Gleave, Robert, "Makasid al-Shari'a." in *The Encyclopaedia of Islam* (suppl). 2nd ed. Leiden: E. J. Brill Academic Publication, 2003.

Hallaq, Wael B. "From *Fatwā*s to *Furu'*: Growth and Change in Islamic Substantive Law." *Islamic Law and Society*, 1(1) (1994): pp. 29-65.

----------. *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh*. Cambridge: Cambridge University Press, 1997.

----------. *Authority, continuity, and Change in Islamic Law*, Cambridge: Cambridge University Press, 2001.

Heinrichs, W.P. "Kawaid Fikhiyya." in *The Encyclopaedia of Islam* (suppl). 2nd ed. Leiden: E. J. Brill Academic Publication, 2003.

Heyd, Uriel. "Some Aspects of the Ottoman Fetva." *Bulletin of the School of Oriental and African Studies*, 31, 1 (1969): pp. 35-56.

Horikoshi, Hiroko. "A Traditional Leader in a Time of Change: The kijaji and ulama in West Java." in Michigan Ann Arbor and Karl D. Jackson. *Traditional Authority, Islam and Rebellion: A study of Indonesian Political Behavior*. Berkeley: University of California Press, 1980.

Layish, Aharon. "The Contribution of the Modernists to the Secularization of Islamic Law." *Middle East Studies*," 14 (1978): pp. 263-77.

Lombardi, Clark Benner. "Islamic Law as a Source of Constitutional Law in Egypt: the Constitutionalization of the *Sharia* in a Modern Arab State." *Columbia Journal of Transnational Law*, 37 (1998-1999): pp. 81-123.

Mahfudh, Muhammad Ahmad Sahal. "Bahtsul Masail dan Istinbath Hukum NU: Sebuah Catatan Pendek." in M. Imdadun Rahmat (ed.). *Kritik Nalar Fikih NU: Transformasi Paradigma Bahtsul Masa'il*. Jakarta: Lakpesdam, 2002.

----------. *Fiqh Sosial: Upaya Pengembangan Madzhab Qauli dan Manhaji*, speech delivered in receiving honorary doctorate degree on Islamic law at State Islamic University of Syarif Hidayatullah (UIN) Syarif Hidayatullah, Jakarta.

Marijan, Kacung. "Socio Economic and Political Role of NU Elite." *Indonesian Quarterly*, 26, 1 (1998): pp. 37-51.

Masud, Muhammad Khalid. "*Adab al-Muftī*: the Muslim Understanding of Values, Characteristics, and the Role of a Muftī'." in Barbara Daly Metcalf (ed.). *Moral Conduct and Authority: the Place of Adab in South Asian Islam*. Berkeley: University of California Press, 1984.

----------, Brinkley Messick and David S. Powers. "Muftīs, fatwās, and Islamic Legal Interpretation." in Muhammad Khalid Masud, Brinkley Messick and David S. Powers (eds), *Islamic Legal Interpretation: Muftīs and Their Fatwās*. Massachusetts: Harvard University Press, 1996.

Masyhuri, Abdul Aziz. *Ahkam al-Fuqaha' fi Muqarrararat Mu'tamarat Nahdlatul Ulama wa Mushawaratiha (Masalah Keagamaan Nahdlatul Ulama: hasil-muktamar dan munas ulama Nahdatul Ulama kesatu-*

1926 s/d kedua puluh sembilan 1994). Surabaya: PP RMI and Dinamika Press, 1997.

Mattulada. "Demokrasi dalam Tradisi Masyarakat Indonesia." *Prisma*, 6, 2 (1977): pp. 35-43

Messick, Brinkley. "The Mufti, the Text, and the World: Legal Interpretation in Yemen." *Man* 21, 1 (1986): pp. 102-19.

Munawwar, Sayyid Muhammad Agil. "Tidak Semuanya Harus Berubah." *Pesantren*, 1, 5 (1988): pp. 43-47.

Mun'im DZ, Abdul. "Bahsul Masail: Tradisi Akademis Muslim Tradisionalis." *Jurnal Gerbang*, 5, 12 (2002): pp. 104-15.

Muslehuddin, Muhammad. "Islamic Law and Social Change." *Islamic Studies*, 21, 1 (1982): pp. 23-54.

Muzadi, Abdul Muchith. *NU dan Fiqh Kontekstual*. Yogyakarta: LKPSM, 1994.

Pengurus Besar Nahdatul Ulama (PBNU). Anggaran Dasar dan Anggaran Rumah Tangga Nahdlatul Ulama Hasil Muktamar XXX. Jakarta: PBNU, 1999.

Rahman, Fazlur. *Islam*. London: Weidenfeld and Nicolson, 1966.

----------. "Islamic Modernism: its Scope, Method and Alternatives." *International Journal of Middle East Studies*, 1, 4 (1970): pp. 317-33.

----------. "Revival and reform in Islam." in PM Holt, Ann K S Lambton, and Bernard Lewis (eds). *Cambridge History of Islam: The Further Islamic Lands, Islamic Society and Civilization*. Cambridge: Cambridge University Press, 1970.

----------. "Functional Interdependence of Law and Theology." in Gustave. E. von Grunebaum (ed.). *Theology and Law in Islam*. Wiesbaden: Otto Harrassowitz, 1971.

Nakha'i, Imam. "Posisi akal lebih tinggi dari wahyu." *Islamliberal*. http:/www.islamlib.com/id/page.php?page=article&id=463, (accessed on 10/2/2004).

Schacht, Joseph. "Islamic Law in Contemporary States." *The American Journal of Comparative Law*, 8, 2 (1959): pp. 133-47.

----------. *An Introduction to Islamic Law*. Oxford: Clarendon Press, 1964.

Siddiq, Achmad. *Khittah Nahdliyah*. Bangil: Persatuan, 1980.

Wehr, Hans. *A Dictionary of Modern Written Arabic*. Ithaca: Cornell University Press, 1961

Weiss, Bernard. "Law in Islam and in the West." in Wael B. Hallaq and Donald P. Little (eds). *Islamic Studies Presented to Charles J. Adams*. Leiden: E.J. Brill Academic Publication, 1997.

Zaman, Muhammad Qasim. *The Ulamā' in Contemporary Islam*. Princeton: Princeton University Press, 2002.

Zahro, Ahmad. "Kitab-kitab Mu'tabarah dalam Lajnah Bahtsul Masail NU." the paper presented in a seminar entitled Pengaruh Liberalisme Pemikiran dalam Standardisasi Kitab-Kitab Mu'tabarah held in Pesantren Darul 'Ulum Rejoso Jombang at 23 February 2003.