

The Role and Position of Fatwa in Malaysian Court

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ABSTRACT

The institution of *fatwa* in Malaysia has been regarded as an important institution in dealing with any matters on Islamic Law. The Administration of Islamic Law Enactments in the Federal Territories and other states in Malaysia has provided for the establishment of *fatwa* institutions in order to issue binding *fatwa* and regulate Islamic verdicts in Malaysia. Once *fatwa* is gazetted by the *Fatwa* Committee, it becomes binding on all Muslims in a particular state. The issue arose as to whether the *fatwa* given is also binding on the courts in making their judgement. In reaction to the above issue, this paper attempts to examine the practice of judges in dealing with *fatwa* issued by the *Fatwa* Committee or Mufti in a state on any particular issue. The authors adopted the qualitative research method to gather data for writing this paper. It was found that there was inconsistency by the courts in accepting *fatwa* as a source of law in Malaysia as some of judges accepted the *fatwa* ruling but some refused. Thus, the authors recommend that there should be a codified *fatwa* system for all Malaysian states so as to make it binding upon courts to consider a *fatwa* in their decision making.

Keywords: Binding, cases, *fatwa*, *Fatwa* Committee, gazette, judges, juristic opinion, *Sharia* Court

INTRODUCTION

Fatwa is an Islamic religious ruling that can be referred to as a scholarly opinion on a matter of Islamic Law that is issued by a recognised religious authority of a country. It derived from the *ijtihad* of the *mufti* that began from the birth of Islam in the 7th century. According to the English/Arabic Dictionary (Almaany, n. d.), *fatwa* is defined as a legal opinion issued by Islamic scholars

ARTICLE INFO

Article history:

Received: 24 January 2017

Accepted: 30 May 2017

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and in the Oxford Dictionary (Bjork, 2010), the word is said to have originated from the term “*iftā*”, which means to decide a point of law, and it can simply be defined as a ruling on a point of Islamic law that is to be issued by a recognised authority. Gilani (2011) stated that the term *fatwā* could be defined as a formal Islamic legal opinion issued by a jurist-consult (*mufti*) in response to questions submitted to him by private individuals or judges as justified by the Quran in *Surah Ali Imran* [3:159]:

So by mercy from Allah, [O Muhammad], you were lenient with them. And if you had been rude [in speech] and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in the matter. And when you have decided, then rely upon Allah. Indeed, Allah loves those who rely [upon Him]. (Saheeh International, 2004, p. 63)

and *Surah Ash-Shura'a* [42:38]:

And those who have responded to their lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We have provided them, they spend. (Saheeh International, 2004, p. 484)

These two *Surah* advocate for consultation when Muslims are faced with a problem. The practice to consult others has also

been further stated in the *Hadith* where ‘Ali bin Abi Talib said to the Prophet, “O, Prophet, [what if] there is a case among us, while neither revelation comes, nor the *Sunnah* (tradition of the prophet) exists?” The Prophet replied, “[You should] have meetings with the scholars,” and in another version these words are added, “...the pious servants and consult with them. Do not make a decision only by a single opinion.”

According to Bakar (1997), *fatwa* is a unique process in Islamic law as it always involves two parties, one who asks the question (*mustafti*) and a competent party who answers the question (*mufti*). The application to get an answer from the *mufti* is called *istifta'* or *su'al*. The *mustafti* may be more than one person as *istifta'* is also made by a judge in court when he asks for an explanation on Islamic matters in deciding the case before him. The post of *mufti* was created by Caliph Umar Abdul Aziz during the Abasyiah period. In Malaysia, it is the *mufti* who is responsible for issuing *fatwa*, as established by Syed (2007, p. 108) that the *mufti* and his deputy will be responsible to aid and give advice to the Yang di-Pertuan Agong on matters related to Islamic Law. Once a *fatwa* is adopted, it will be gazetted by the Federal or State Territories.

Institution of *Fatwa* in Malaysia

Shuaib, Ahmad and Mohd (2010) stated that in Malaysia, *fatwa* in all states, except Perlis, must be based on prevailing views (*qaul mu'tamad*) of the Shafie school of law. However, if such a view is against public interest, the *mufti* may follow the

qaul mu'tamad of other *Sunni* schools. If all the views are against public policy, the *mufti* may exercise his own *ijtihad* and the *fatwa* should be gazetted in advance by the Sultan before it is enforced. It also may change from time to time in accordance to the requirements of the current situation in each particular case.

They also said that even though the *mazhab* referred to in the issuance of a *fatwa* in Malaysia is *Mazhab Syafei*, the practice of the *Fatwa* Committee shows that the opinion of other *mazhab* also has to be taken into consideration and adopted in special circumstances such as the use of local currency to replace rice in *zakat fitrah* payment as prescribed by *Mazhab Hanafi*. However, this differs from state to state. In Perlis, the most relevant opinions of any accepted *mazhab* are referred to in issuing a *fatwa*. This practice began with the 1920s reform (*islah*) movement that called Muslims to reject the practice of *taqlid* (blindly following others, blind follower) by making direct reference to the Quran and the *Sunnah*. Shuaib et al. (2010) stated that this was the beginning of the search for the best opinions of any *Sunni* school in Perlis.

The *Fatwa* Committee in every state in Malaysia is established under the respective state's administration. The *mufti* presides over the National *Fatwa* Committee for Islamic Religious Affairs, Malaysia. Section 34(3) of the Administration of Islamic Law (Federal Territories) Act 1993 states that upon publication of a *fatwa* in the Gazette, it becomes binding on every Muslim resident in the Federal Territories as a dictate of

his religion and it shall be his religious duty to abide by and uphold the *fatwa*. The section also mentions that all courts in the Federal Territories shall recognise the *fatwa* as authoritative of all matters laid down therein.

The institution of *fatwa* in Malaysia is established at the national level and state level. Article 74(2) of the Federal Constitution places any Islamic matter or affair under the State List (Ninth Schedule, List II of Malaysia Federal Constitution) at state level. Islamic affairs are organised and managed as detailed in the Administration of Muslim Law Enactments. These state-based enactments are generally similar in content but not identical to one another. A *fatwa* is issued by the respective *mufti* of each state and it becomes binding on every Muslim of the state. However, if the proposed *fatwa* affects national interests, a slight procedure is set in motion at the national level. The National *Fatwa* Committee, which comprises the *mufti* of each state as well as five Muslim scholars appointed by the Yang di-Pertuan Agong, will recommend that the proposed *fatwa* be made and when the Conference of Rulers agrees with the recommendation, the matter will be returned to the *Majlis Agama Islam Negeri*. However, the *fatwa* issued by them are not necessarily followed by other states as Islamic affairs are under a state's jurisdiction. The National *Fatwa* Committee only acts as an advisory body.

Shuaib (2003) highlighted that unlike in other states, in the Federal Territories, the *mufti* is given power to issue a *fatwa*

in his own personal capacity. The *mufti* is required to call for a meeting with the *Fatwa* Committee to discuss the matter for which the *fatwa* is to be issued. This power is vested by Section 37(5) of the Administration of Islamic Law (Federal Territories) Act 1993. The *mufti* may on his own initiative or by request, make and publish in the Gazette, a *fatwa* on any unsettled or controversial question of or relating to Islamic law.

In the case of *Ramah bte Taat v Laton bte Malim Sultan* (1927) 6 FMSLR 128, the court was of the view that Muslim law is not foreign law but local law; it is the law of the land and the local law is a matter of which the court must take judicial notice. The court must propound the law and it is not competent for the courts to allow evidence to be led as to what is local. This clearly highlights that any rulings in Islamic Law should be celebrated in the courts. As *fatwa* is one of the verdicts in Islamic Law, thus, the courts should follow its ruling when it is requested.

Effect of *Fatwa* in Malaysia

Any *fatwa* made by the National Committee can be enforced in the respective state if the state committee gazettes it via its State *Fatwa* Committee. Ishak (1981) highlighted several important issues regarding *fatwa*:

1) The only recognised *fatwa* in Malaysia is an official *fatwa* that is published by the state *mufti* or the State *Fatwa* Committee or the National *Fatwa* Committee with the consent of the Conference of Rulers;

- 2) Other personal opinion on *Hukum Shara'* is not conclusive and not legally enforceable. It is merely an explanation of a legal ruling to the public; and
- 3) An official *fatwa* is a conclusive legal ruling enforceable in this country and it should not be questioned because:
- It is based on the provisions in the Quran and the *Sunnah*;
 - It is sanctioned by a Ruler, in case of state, or by the Yang di Pertuan Agong and Conference of Rulers, in case of national *fatwa*; and
 - It is gazetted as law.

Thus, *fatwa* plays a very important role in Malaysia once it is gazetted. However, its position is still left optional to the courts when dealing with any issue relating to it. For example, the 37th *Muzakarah Jawatankuasa Fatwa, Majlis Kebangsaan Hal Ehwal Islam Malaysia* (JAKIM, 2015, p. 200) declared that smoking is *haram* (forbidden) in Islam. However, only a few states have gazetted this as a *fatwa*, i.e. Penang and Selangor (Ahmad, Sivanandam, & Rahim, 2015), while Kedah accepted that *fatwa* but has made no step to gazette it. The same attitude is practised in Perlis and Sarawak. Meanwhile, in Pahang, the restriction only covers mosque areas in the state.

When a *fatwa* is gazetted, it becomes binding on those who reside in a particular state. However, the punishment for those who act in contravention of the *fatwa* is different. In the Federal Territories, for

instance, the punishment for those who act in contempt of religious authority or defy, disobey or dispute the orders or directions of the Yang di-Pertuan Agong as the Head of the religion of Islam, the *Majlis* or the *mufti*, expressed or given by way of fatwa, is a fine not exceeding RM3,000 or imprisonment for a term not exceeding two years or both as prescribed in Section 9 of the *Sharia Criminal Offences (Federal Territories) Act 1997*. Meanwhile, in Section 4 of the *Sharia Criminal Offences Sarawak Ordinance 2001*, those who teach or expound in any place, whether private or public, any doctrine or perform any ceremony or act relating to the religion of Islam shall, if such doctrine or ceremony or act is contrary to Islamic Law or any *fatwa* for the time being in force in the State, be guilty of an offence and shall on conviction be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding 3 years or to whipping not exceeding six strokes or to any combination thereof.

Thus, an individual who resides in a particular state will be held liable if performs any actions or words contrary to a *fatwa* gazetted by that state and he will also be subject to punishment prescribed in the state law. However, the question arises if the courts are also bound to follow the *fatwa* given by the *mufti*.

Position of Fatwa in Courts of Malaysia

Hallaq (1994) pointed out that:

the juridical genre of the *fatwa* was primarily responsible for

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

This means that a *fatwa* should be taken into consideration when making any decision in a court of law and it should also become binding law in the country. However, it is still ambiguous as to how far Malaysian courts, either the Civil or *Sharia* Court, will take *fatwa* into consideration in making the decision, or whether the *fatwa* can be used as grounds for a claim or for prosecuting a person in the courts. The acceptance of *fatwa* in the Civil Court and the *Sharia* Court in Malaysia are different, as discussed below.

Sharia Court. Shuaib (2003) stated that the *Sharia* Court has the jurisdiction to deal exclusively with matters of Islamic law regarding Muslims in the country. Article 74 (2) of the Federal Constitution clearly states that the Legislature of a state may make laws with respect to any of the matters enumerated in the State Legislative List and Article 145 (3) further elaborates that the Attorney General of Malaysia has no power over matters related to *Sharia* Courts. Thus, *fatwa* are also included under the jurisdiction of *Sharia* Court and once it is published in the Gazette, it becomes binding

and enforceable. This is evidenced by Section 34 (3) and (4) of the Administration of Islamic Law (Federal Territories) Act 1993, which denotes that

upon publication in the Gazette, a *fatwa* shall be binding on every Muslim resident in the Federal Territories as a dictate of his religion and it shall be his religious duty to abide by and uphold the *fatwa*, unless he is permitted by Islamic Law to depart from the *fatwa* in matters of personal observance, belief, or opinion. A *fatwa* shall be recognized by all Courts in the Federal Territories as authoritative of all matters laid down therein.

Thus, it is clear that the *Sharia* Court should take into account the *fatwa* which have been statutorily regulated and gazetted when making any judgement because according to the Interpretation Act 1948/1967 (Section 61) all gazetted *fatwa* may be given statutory recognition by the *Sharia* Court in Malaysia. However, if the *fatwa* are not statutorily regulated, the *Sharia* Court still has the option of either following it or not. This is illustrated in the case of *Victoria Jayaseele Martin v Majlis Agama Islam Wilayah Persekutuan & Anor* [2013] 9 CLJ 444, where the issue arose with regards to the *fatwa of the Muzakarah Jawatankuasa Fatwa Kebangsaan bagi Hal Ehwal Agama Islam Malaysia Ke-92*, which does not allow a non-Muslim to become a *sharia* lawyer, was not gazetted and has no binding effect on the courts. The judge, nevertheless,

referred to the *fatwa* and decided that non-Muslims are not eligible to become *sharia* lawyers.

With regards to the obligation of judges to follow *fatwa* issued by the Council, judges, in practice, are not bound to follow all issued *fatwa*. There are cases where the judge, while making a decision, referred to *fatwa* such as in the case of *Perisytiharan Pembubaran Perkahwinan Kerana Pemelukan Islam Norhairy Cheong Abdullah @ Cheong Foo Siong* [2010] JH 20/1, the petitioner submitted an application in the Seremban *Sharia* High Court on 11 November, 2008 in order to verify the operation of this court regarding the annulment of the petitioner and his wife's marriage. The wife was brought to the court as a witness and was advised about the continuity of marriage if she reverted to Islam. The wife, however, affirmed that she wanted a divorce and refused to revert to Islam to follow her husband's religion. The procedure was in conformity with the decision given by the National *Fatwa* Council in their 11th Dialogue of the *Fatwa* Committee of the National Council for Islamic Affairs on 16 March, 1976, which provided that the marriage of the couple who does not revert to Islam when one of them is Muslim, will be dissolved and they should be informed on the impacts of non-reversion. Thus, in this case the judge, Mohd Nadzri Abdul Rahman, held that the marriage was dissolved following the *fatwa*.

There were also cases where the judge sentenced the defendants guilty for violating a *fatwa* issued by the council as in the

case of *Pendakwa Syar'ie v Fahyu Hanim Ahmad dan lain-lain* [2000] Jurnal Syariah 8 (1) 137, where the accused persons were found guilty under section 12 (c) Selangor Syariah Criminal Enactment 1995, which provides, *inter alia*, that any person who acts in contempt of lawful authority, or denies, violates or disputes the orders or instructions of the *mufti*, disclosed or provided through *fatwa*, commits an offence and is liable on conviction to a fine not exceeding RM3,000 or to imprisonment for a term not exceeding 2 years or to both. In this case, the accused persons were charged under the said provision for participating in a pageant contest, in contravention of a *fatwa* issued by the Council.

However, there were also cases where the judge did not follow the *fatwa* given on certain issues. For instance, in *Halijah Abdul Rahman v Zambree Baharom* [2009] 1 CLJ (SYA) 402, the judge at the Sharia High Court of Seremban, Mohd Nadzri Abdul Rahman, held that the *talaq* written by the husband using Short Message Service (SMS) was *sorih talaq* and intention was not necessary in this case. However, the National Fatwa Council agreed that a clearly written *talaq* by a husband specifically to his wife either through facsimile, SMS or e-mail is considered *kinayah at-talaq* and it is valid when accompanied with intention. Thus, in this case the court's decision was seen to be contrary to the *fatwa* issued by the Council.

Civil Court. The civil courts of Malaysia consist of the Federal Court, the Court of Appeal, the High Court, the Sessions Court

and the Magistrate's Court. The standing of *fatwa* in civil courts differs from that in the Sharia Court because *fatwa* are not binding on any of the civil courts but the courts may in their discretion refer to the opinion of the *mufti* for cases involving Muslims and matters of Islamic Law. The court may request the opinion of the *mufti* on a particular issue, and the *mufti* may certify his opinion and appear before the court as a witness.

The civil court judge in the case of *Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110 held that the judge had the option of accepting or declining to be bound by the *fatwa* in question even though the *mufti* was called by the judge to give his *fatwa* on the issues related. On the other hand, in the case of *Re Dato' Bentara Luar (decd) Haji Yahya bin Yusof & Anor v Hassan bin Othman & Anor* [1982] 2 MLJ 264, the court was of the view that as the opinion was expressed by the highest Islamic authority in the state, who had spent his lifetime in the study and interpretation of Islamic Law, the court had no reason to justify the rejection of the opinion, especially when the civil court judges themselves were not trained in the system of Islamic jurisprudence.

In *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, the judicial commissioner in the case referred the question at hand to the Fatwa Committee and after receiving a *fatwa*, confirmed his earlier findings and decision at the High Court in accordance

with the *fatwa* given. Similarly, in *Hajjah Halimatussaadiyah binti Haji Kamaruddin v Public Services Commission, Malaysia & Anor* [1992] 1 MLJ 513, the Supreme Court judge, in giving his judgement, took into consideration the opinion given by the *mufti* of Wilayah Persekutuan, who said that Islam as a religion does not prohibit a Muslim woman from wearing, nor requires her to wear, a *purdah*. Thus, the wearing of *purdah* is not an obligation for every Muslim as it is not stated in the Quran and *Sunnah*. In this case, the court did not only refer to the *fatwa* given by the *mufti* but also followed the *mufti's* opinion in delivering their judgement.

However, in *Isa Abdul Rahman & 1 Lagi v Majlis Agama Islam, Pulau Pinang* [1996] 1 CLJ 283, the Penang High Court judge held that the *fatwa* given by the *mufti* individually or the *Sharia* Committee would not bind the civil court in this country since the state law cannot decrease the jurisdiction of the civil courts as authorised by the Federal Constitution and Federal law. Besides that, Section 37 (2) of the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993 used the term '*fatwa* will only bind Muslims who reside in this particular state' to not refer to the court since the court could not be defined as 'Muslim' under the enactment. In this case, the court decided that the fact that the donated land was vested in the Council did not mean that the Council could make anything they wanted as landlords, but the Council was still subject to legal provisions and conditions of the *waqf* land

concerned. This is contrary to the second *fatwa* delivered by the *Sharia* Council in 1989, which allowed the construction of mosques and banks on the *waqf* land in concerned.

There was also a civil court judge who said that even though the judgement delivered was in line with the *fatwa* given by the *mufti*, the civil court need not consider any submission of jurisdiction to the *Fatwa* Committee. This was firmly held in the case of *Tegas Sepakat Sdn. Bhd. V Mohd. Faizal Tan Abdullah* [1992] 2 CLJ 2297, whereby the judge also said that there was no question of whether a civil court was surrendering itself to the jurisdiction of the *Fatwa* Committee since the latter body was merely a *sharia* committee as defined under Section 15 of the Johore Administration of the Islamic Law Enactment 12978 and thus could not come under the term 'a Court of law'.

In the case of *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354, the Supreme Court of Malaysia had decided that the *Fatwa* Committee of the State of Terengganu could make any *fatwa* on the *Sharia* Law, but the only *fatwa* which may bind the Court was the *fatwa* that had gone through the process as provided under Section 50 of the Administration of Muslims Affairs Terengganu Enactment (2001). Section 50 of the Administration of Muslims Affairs Terengganu Enactment requires a *fatwa* issued by the *Majlis Fatwa* to be gazetted for it to take effect.

This was also supported by Abdul Malik Ishak in his dissenting opinion for the decision of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488, when he stated that “the views of the ‘ulamas’ or Muslim scholars on wakaf would greatly assist the civil High Court to arrive at a just decision in the judicial review proceedings and this could only be achieved if State Religious Council was allowed to intervene ...”

Criticism against Position of Fatwa

The previous quoted cases show that there was no uniformity among the judges; either a civil court judge or a *Sharia* court judge could apply a *fatwa* ruling given by the *mufti* either in court or out of court. There were no standardised factors and consideration that had to be taken into account when considering whether a *fatwa* would bind the decision of the judge in the court. However, it should be noted why *fatwa* made by the *mufti* has no binding effects to all judges.

Sharia courts in Malaysia do not hold higher authority on its rules and regulations compared to the civil courts. The Federal Court is the highest authority in dealing with any issue on civil and also criminal cases in Malaysia while the *Sharia* courts have been divided into states and none of the courts reach the level of the Federal Court. The National *Fatwa* Committee acts as the head of *fatwa* resolution and also holds position as a high institution in *fatwa* matters in Malaysia; unfortunately, it only acts as an adviser to all *mufti* in Malaysia and is the

main reference for all *fatwa* cases with no binding effect on the courts in Malaysia.

The difference between administration of civil law and *Sharia* law is that the former is guided by the supreme law of the land, which is the Federal Constitution whereas the latter is conducted by the relevant laws of each state individually.

With regard to the issuance of *fatwa*, the *Fatwa* Committee does not hold any authority over any rulings in the courts especially in the *Sharia* Court because, normally, the *fatwa* is discussed by the Committee at national or state level but it is not binding on the whole country. It depends on a particular state either to gazette or not gazette a *fatwa*. If it is gazetted, only then may it bind the court but this is limited to the residents of the particular state that gazetted the *fatwa*. This gives rise to non-uniformity of rulings as everything depends on the state. The limited jurisdiction of the *Sharia* court also gives rise to the limited application of the *Sharia* Law in this country. The jurisdiction of the *Sharia* Court in Malaysia is only limited to Muslim family law and personal matters. Section 2 of the *Sharia* Courts (Criminal Jurisdiction) Act 1965 limited the jurisdiction of criminal matters in the *Sharia* Court to offences carrying a punishment of not more than 3 years’ imprisonment or RM5,000 in fine or six strokes of the cane or a combination these punishments.

According to Chiba (1989), there is another law that has not been given legal recognition. He referred to a hidden law that is considered important in the legal

field. Hosen and Black (2009) said that the 'law' introduced by Chiba did not depend on official recognition, but could be regarded as unofficial law among certain groups. Taking this view of Chiba's and that of Hosen and Black (2009), *fatwa* in Malaysia, even if not gazette, can be considered acceptable law that binds, and therefore, has legal credence in court.

CONCLUSION

The inconsistency of the courts in accepting *fatwa* as a source of law will cause chaos in the administration of justice in Malaysia. With regards to the acceptance of the *fatwa* in the civil courts, it can be said that it does not harm the juridical system of the civil courts, but with regard to the *Sharia* Court this is different. The problem with the inconsistency of the law in the different states, the reluctance of the states to codify and gazette the *fatwa* and the non-acceptance of the *Sharia* Court of a *fatwa* will result in chaos when it comes to making decisions.

We cannot neglect *fatwa* because it is a feature of Islamic Law. The *fatwa* is the result of the *ijtihad* of the *mufti* based on the current situation. It may be used at certain times but may not be suitable for other times (Hosen & Black, 2009). However, the *fatwa* is needed in the community because of its flexibility in adapting to social change, particularly when previous *fatwa* are no longer suitable for a situation. This means that *fatwa* will continue to be used.

So, there is an urgent need to combine and codify all *fatwa* into a single system that can regulate the issuance of *fatwa* by the individual states and bind all states in Malaysia as the Islamic Judicial Department of Malaysia (IJDM) does, through uniform administration of the *Sharia* Courts in Malaysia. This is because the different *fatwa* in each state in Malaysia contributes to the misunderstanding of people in the context of its application so as to lead to the difficulty of its enforcement. Therefore, there is a need for a uniform method that binds all states in Malaysia in terms of any *fatwa* made by the Committee at the national level. The best step is to centralise the administration of *fatwa* at the national level and create the post of 'National *Mufti*' who acts as a coordinator of all *fatwa* given by the *mufti* or the Committee whether at the national level or state level.

In addition, all the states' religious councils should also cooperate in this matter so that any direction given by the National *Mufti* will bind lower authorities. The decision of the National *Mufti* should also bind any civil courts in Malaysia without decreasing its position in the *Sharia* court.

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