

Continuity and Change in Islamic Law in Indonesia:
The case of Nahdlatul Ulama *bahtsul masail* in East Java

A sub-thesis for the degree of
Master of Arts (Asian Studies)

The Australian National University

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July 2004

I, the undersigned, pledge that this sub-thesis is entirely my own work,
and that all sources used have been acknowledged.

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Transliteration

System of the Arabic alphabet transliteration in consecutive order:

’, b, t, th, j, h, kh, d, dh, r, z, s, sh, s, d, t, z, ‘, gh, f, q, k, l, m, n, w, y, a, u, i

Long vowels are a, u, i

Ta’ female indicator is represented with h.

The Arabic words broadly used in Indonesia, which are incompatible with the aforementioned system, are excepted. They are Nahdlatul Ulama; bahtsul masail; Syuriyah; Tanfidziyah; mustasyar; kitab; muktamar.

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Introduction

The *fatwa* (pl. *fatawa*) or non-binding legal opinion is an important institution in Islamic thought. In relation to the *shari'ah* (the body of Islamic law), *fatwa* has been the agent for relating the teaching of *shari'ah* to 'the concrete world of human affairs' (Masud, Brinkley, and Messick, 1996:3). It is a medium to understand social change (Hooker, 2003) and a source of Islamic legal and social history (Powers, 1990) of Muslim community. For this reason, *fatwa*, along with *qada'* (Islamic court's decision) institution, is an important agent of *Shari'ah* application. In Islamic legal scholarship (*fiqh*), as some have argues (Schacht, 1964: 74-5 and Hallaq, 1994:), *fatwa* has been instrumental in the development of *furu' al-fiqh* (theoretical aspect of substantive law) as well as *usul al-fiqh* (legal methodology of Islamic law) in Islam. The *mufti* can be seen as the agent of legal change as well (Hallaq, 2001:174). Many *fatawa* of prominent *muftis* (jurist-consult) are incorporated into the substantive law of certain *madhhab* (school of law) and many *muftis* are prominent jurist-authors affiliated to schools of law (Hallaq, 1994:30-1, and 2001:). Therefore, the interplay between *fatwa*, *fiqh* and *madhhab* is inherent to the theoretical aspect of *shari'ah* and its practical application.

In Indonesia, the function of issuing *fatwa* is conducted both by individual *mufti* as well as (more commonly) by Islamic organisations. In Nahdlatul Ulama (NU), a Java-based traditionalist Muslim organisation, issuing *fatwa* has been instrumental for its existence. The NU's institution responsible for issuing *fatwa* is *majlis bahtsul masail*. In national level, more than four hundred *Fatawa* have been produced by this institution since the creation of NU in 1926 up to 2002 (Masyhuri, 1997)¹. Local East Java district branches of NU have also produced *fatawa*. While the national *fatawa* have attracted discussion², study on the local has been absent. This study is intended to examine and analyse the nature and development of *fatawa* and *fatwa* issuing institutions of some

¹ Abdul Aziz Masyhuri's work is a compilation of NU *fatawa* since 1926 until 1994 consist of 422 *fatawa*. There are four *bahtsul masail* forums between 1994 and 2004 (1997, 1999, 2000, and 2002) producing 40 *fatawa*.

² Studies of NU *fatawa* as the only object of study, such as Zahro (2001), in comparison with other Indonesian *fatawa* such as Ka'bah (1999), or in an attempt to describe the development of Islam in Indonesia, such as Hooker (2003).

district branches of NU. Since East Java is the basis of NU, many ulama participating in national *bahtsul masail* are originally from East Java. As a result, a study on *fatawa* of that region is always closely related and comparable to NU national *fatawa*.

In 13th/19th century when Islamic scholarship had to respond to modernism, Islamic authorities in Indonesia also had to make some difficult choices. Some tried to adapt, whereas others denied the need for adaptation. Some tried to fit Islamic law to modernism by liberally twisting and cramming tradition in modern context, attempted to purify Islamic law from non-Islamic contents by returning to primary sources, or boldly preserved the existing tradition. Each decision has its own risks. While modernism threatens the comprehensiveness of Islamic legal system (Hallaq, 1997:231), literally returning to primary sources only creates fundamentalism (Dallal, 1993:349-50).

Bahtsul masail forum is that group preserving classical tradition of scholarship, notably *madhhab* and *taqlid* (adherence to a school of law). This position requires NU to follow the prescription of classical *furu* texts of the schools. The texts are known in NU as *kitab kuning* or *al-kutub al-mu'tabarah*. All issues, classic and modern alike, are responded to by referring to those texts. The texts are not only constrained to one single school, which are texts of Shafi'ite *madhhab*. Opinions of other schools cannot be adopted in irresponsible way. Failing to give full commitment in observing a *madhhab* will result in confusion and chaos in legal system. In addition, the texts are also classic. No many recent works is accepted because of *ijtihad* restriction and strict *madhhab* affiliation.

The risk of preserving classical tradition, though, was not promptly concerned. However, shortcomings and limitations of such old tradition were sufficiently responded to by NU ulama using valid reasoning without compromising the tradition in great deal. In doing so, methodological tools of Islamic modernism are employed. They include a restricted practice of *ijtihad* (independent reasoning) as well as *talfiq* (combing the doctrines of different schools of law). It seems that NU ulama are aware of methodological deficiencies in *bahtsul masail*. In response, instead of constructing a new method, they chose to address the problems in a gradual and measurable manner

without sacrificing the tradition altogether. Nonetheless, some modernist NU ulama argued that methodology is not the only issue and that the underlying problems were not properly addressed by conservative NU ulama³. They started to urge the changes in early 1980s.

The main modernist argument for changes is that many *fatawa* produced by *bahtsul masail* forum have been 'out of touch'. That means that many *fatawa* cannot fulfil the people's quest for justice. Likewise, some *fatawa* are also considered illogical and impractical. *Maslahah* (public benefit) is the keyword. This has been the Islamic modernists' language some centuries ago. The response of the conservative ulama has been mixed, some of whom indicate qualified support. They argue that *fatwa* should be equitable as long it is religiously accountable. For this reason, they are ready to occasionally cross vertically to practice *ijtihad* or horizontally to tolerate *taqlid*. The remaining ulama are apologetically defensive. For the latter, the point is not producing equitable *fatawa*, but producing text-based *fatawa*. If an inquiry can be supported by text(s), it becomes a valid *fatwa*, if cannot be supported by a text, no *fatwa* can be issued. Applying text to contemporary legal cases might uphold justice, but it might be against its values as well. In the context of justifying an answer, once in a while they might tolerate *talfiq*, but not *ijtihad*. Admittedly, the dependence of NU *fatwa* on text is categorical. As a result, justice, logic, and practicality are secondary. Having said this, if some opinions are available for one inquiry (*fiqh qawlani* or two-opinion *fiqh*), the conservatives always prioritise practical recommendations. This utilitarian attitude is the furthest the NU ulama can go. No *fatwa* can be issued without a supporting text.

A decision reformulating the methodology of *bahtsul masail* and its general guidelines was sanctioned in 1992. There is a section in this document urging the creation of equitable *fatawa*, by considering social, cultural, economic, and political aspects in the process. In addition, the justification on which a *fatwa* should be based, is extended. By this decision, *talfiq* and *ijtihad* are institutionalized as among the valid methods in issuing *fatwa*. The modernist NU ulama expect that by enlarging the

³ Abdurrahman Wahid, Musthofa Bisri and Masdar F. Mas'udi are among these modernists. Describing them as modernists is acceptable because some of their opinions are Islamic modernists' views.

boundary of valid texts, equitable *fatawa* can be easily produced. Nonetheless, the ulama -the practitioners of *bahtsul masail* forums- do not wholeheartedly accept the decision. While *talfiq* is employed, *ijtihad* is scarcely performed. More crucially, the underlying assumption, that is the creation of equitable *fatwa*, is somewhat overlooked. Admittedly, *talfiq* also means various opinions from different *madhhabs* enabling the ulama for choosing the favourable opinion. Nonetheless, since *talfiq* only exposes equally old texts and the different schools tend to agree in many legal aspects, useful opinions are not so plentiful. This dilemma in turn makes the conservative ulama focusing only on finding supporting text(s), not producing equitable *fatawa*.

In parallel to these reforms, modernist NU ulama also introduced different format of *bahtsul masail* forums, such as *bahtsul masail maudu'iyah* (since 1997) and *bahtsul masail hukm wad'i* (since 2003). While the former deals with some modern concepts such as democracy and human rights from the Islamic point of view, the latter focuses on creating governmental policy-making favourable to Muslims. Likewise, pilot projects which train future *bahtsul masail* experts to use *talfiq* and *ijtihad* have been formed. Again, the Islamic modernist agenda is inserted in these forums. The conservative ulama responded ambiguously; while some conservatives support the activities, the rest perceive them negatively. To say the least, these innovations can be considered as challenges to the already established and official *bahtsul masail* forums. Thus, bearing the name *bahtsul masail* means *madhhab*, *taqlid*, and *kitab kuning*. The opposition from East Javanese conservative ulama is fierce.

This study aims to underline the practice of *bahtsul masail* in local branches of NU in East Java post the 1992 decision. East Java is the basis of NU. Moreover, East Javanese ulama dominate NU central management and the majority of NU membership is East Javanese. Fifty *fatawa* are discussed. Specifically, this study aims to prove the conservatism of *bahtsul masail* in east Java in terms of commitment to *madhhab*, *taqlid* and *kitab kuning*. Likewise, it also asserts that such a conservatism does not deny the very utilitarian nature of Islamic law as applied by the NU ulama of East Java, who tend to equate utilitarianism with *maslahah*. Certainly, it is not the modernists' position because public benefit does not always reside with the status quo. Further, the study

emphasises the increasing position of the compilation of the NU Central Board as jurisprudence text for the local NU branches.

The ulama involved in discussion of the aforementioned issues are those devoting their energy to *bahtsul masail* in East Java. They are responsible, in one way or another, for the administration of *bahtsul masail* forums in the NU East Java's district branches. More than twenty ulama from eleven different NU district branches in East Java were interviewed between August and October 2003. In addition, eighty *fatawa* were accumulated during the research in those eleven NU branches, but only fifty are suitable for the purpose of this study. All of them are graduates of *pesantren*, the training ground of *bahtsul masail* practitioners. Their opinions are conservative. Their commitment to *madhhab*, *taqlid* and kitab kuning is categorical. Their opposition to *ijtihad* and *talfiq* is indisputable. Consequently, conservative attitudes of the ulama reflect the *fatawa*. The Shafi'ite kitab kuning is still the dominant supporting text, although some texts of the non-Shafi'ite school are sparingly employed. *Ijtihad*, in terms of referring to primary sources and exercising legal maxims, is rarer. Nonetheless, some show unusual patterns. They believe that a *fatwa* should be equitable and applying *ijtihad* and *talfiq* is necessary if it is the only way to achieve this aim. Some of these ulama have continued their study in formal Islamic higher institutions or have interacted with some modernist NU ulama. This kind of ulama is a minority and their 'rank' in ulama hierarchy is low. The higher-rank ulama remain conservative and so far successfully prevent such 'deviant' ulama from promoting their opinion to the official *fatwa* of local branches in East Java. Still, given the intensive and tireless campaign of modernist ulama, it is hard to believe that such prevention will persist in the long run.

In further examining the changes, or continuity -for that matter- as a result of the 1992 decision several issues are discussed in this study. The first chapter is devoted to examine the character of *fatwa* with reference to the Islamic modernism efforts to reform Islamic law in general. Internal dynamic of NU ulama, both modernist and conservative is reported. East Javanese ulama response to the changes is also covered. At the end of this chapter a review of kinds of NU *bahtsul masail* forum is presented. The second chapter evaluates the practice of *bahtsul masail* forums in East Java. A short

account of *pesantren* education opens this chapter. Description of material on *bahtsul masail* forums in East Java is presented consequently. Later on, the actual proceeding of an East Javanese *bahtsul masail* forum is reported in detail. Finally, the discussion surrounding methods, texts, and East Javanese ulama's response to precedents from NU central board's *fatwa* and/or provincial branch of East Javanese NU is conducted. The third chapter is the analysis of the fifty-five *fatawa*. Their legal reasoning, that is the practicality and legitimacy of *fatawa*, is assessed. In so doing, techniques of consulting references are highlighted. The study concludes with some remarks underlining the findings and predicting some possible outcome in the near future.

Chapter I

Fatwa in Islamic Thought and in Nahdlatul Ulama

Fatwa depends on *fiqh*, the very material of *fatwa*. When the *fiqh* establishment underwent changes in order to accommodate modernism, *fatwa* had to follow accordingly. Similarly, *bahtsul masail* also shows such adaptability. Moreover, *bahtsul masail*'s Indonesian context also brings about some unusual features to the *fatwa* 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 further examine on the nature of *bahtsul masail* forums, this chapter begins by explaining *fatwa* 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 ulama.

A. *Fatwa*, *fiqh*, and *madhhab*

1. Explaining the institution of *fatwa*

Unlike *qada'*, *fatwa* is a non-binding legal opinion. It is requested by individual(s) (*mustafti*) from an expert in Islamic law called a *mufti*. The process of asking for a legal opinion is termed *istifta'*, and the enterprise of a *mufti* in issuing a *fatwa* is called '*ifta'*' or *futya*. Every time a *mufti* issues a *fatwa*, it is written on a sheet called *ruq'ah* of *fatwa* (Hallaq, 1994:31). The *mufti* must base his or her response on the teaching the school of law to which he or she is affiliated. *Talfiq* (or combining opinions from different schools of law) is not allowed. Questions of *fatwa* vary from 'worldly' affairs to 'hereafter' ones. A *mustafti* may ask about ablution, usury, and mysticism (Masud, Brinkley, Messick, 1996:19). The all-encompassing authority of Islamic law as God's commands regulating all aspects of Muslims' life (Schacht, 1964:1) also is applied in *fatwa*. The motives of a *mustafti* in seeking a legal opinion are manifold; it might be informational in nature or settling an anxiety of mind (Messick, 1986:103). Nonetheless, *fatwa* can also be used as a form of religious legitimisation of political criticism (Masud, Messick, Powers: 1996:9) and a litigant's support in a lawsuit

(Hallaq, 1994:35). Although *fatwa* as an institution is separate from judicial institutions, many *muftis* were advisers of *qadis* (judges in Islamic courts) in the past, especially in complex and difficult cases (Masud, Messick, and Powers: 1996:10). The *fatwa*'s non-binding status means a *mustafti* does not have to accept the opinion, he or she may request a second opinion from another *mufti* (Heyd, 1969:56). Still, it is authoritative for some reasons.

Fatwa is an institution in the Islamic world which reflects the division of Muslims into two categories, *muqallid 'ami* (followers and laity) and '*ulama*' *fuqaha*' (religious scholars) (Hallaq, 1997:122-3). Even though every Muslim is obliged to observe Islamic teachings to the best of their ability, for several reasons not every Muslim is sufficiently knowledgeable to practice Islam correctly or live in Islamic manner. Only a small group in the Muslim community called the *ulama* hold the authority on Islamic teaching and its ritual aspects. This situation is tolerable, though. Lay Muslims are not blamed because they must always consult the *ulama* on their religious practices. Quranic passages, such as chapter 16 verse 43⁴, is often used for legitimisation of this concept (Hallaq, 1997:122). As a result, ordinary Muslims are in constant need of guidance from the *ulama* in their religious affairs, although the latter party cannot guarantee salvation for the former. While Islam does not recognise a church-like hierarchy, the *fatwa* institution acts like one (Abou El Fadl, 2001:12). In more subtle terms, the relation between a *mufti* and *mustafti* is a relation of power (Masud, Messick, and Powers, 1996:21).

Technically, only *ulama* have the authority to perform *ijtihad* (deducing law from primary sources using legal methodology [*usul al-fiqh*]). In the *fatwa* institution, a *mufti* should be a *mujtahid* (qualified person to perform *ijtihad*). In its development, though, a *mufti* does not have to be a *mujtahid* (Hallaq, 2001:66). Still, the dichotomy between *mufti* and *mustafti* persists since a *mufti* still has to master a certain degree of understanding of his or her *madhhab* (Hallaq, 2001:66-75). As Hallaq (2001:9-14) reports from Ibn al-Salah (d. 643/1245), a Shafi'ite Scholar, there are still some

⁴ 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).

scholarly gradations between *mujtahid* and *muqallid*, who are eligible to issue *fatawa*⁵. (Hallaq, 2001:84-5).

In addition to the knowledge of Islamic sciences, personal integrity is crucial for a *mufti*'s authority. The legitimacy of a *mufti* depends on his or her moral qualities to an extent that a corrupt person might not be allowed to issue *fatawa* (Masud, 1984:131). Consequently, a *mufti* should be trustworthy, and seriously observe religious obligations. The *mufti*'s trustworthiness should also be apparent by declaring inability whenever he or she is unable to answer the *mustafti*'s question because answering a query without proper knowledge is a grave violation (Masud, Messick, Powers: 1996:20-23). Such personal integrity is certainly easier to maintain whenever a *mufti* is independent. Initially an independent institution, there are instances when Muslim governments appointed official *muftis*. A government-appointed single *mufti* during the Ottoman Empire and recognised as the ultimate source of religious authority called *Shaykh al-Islam* is a prime example (Masud, Messick, Powers: 1996:11). Government control might suggest restrictions on issuing *fatawa* infavourable to government or reinforcement of government political authority (Masud, Messick, Powers: 1996:11). Nonetheless, it should be kept in mind that instead of influencing and abusing the *fatwa* institution, the policy was mainly to ensure that only qualified persons assumed the position of mufiship (Masud, Messick, Powers: 1996:20-21). After all, only a few *muftis* are government appointees, the rest work independently (Messick, 1986:108).

2. *Fiqh*, *Fatwa* and modernism

The aforementioned exposition outlines the *fatwa* institution of pre-modern Islam. The institution depends on pre-modern Islamic legal scholarship built upon the literal interpretation of primary sources (Quran and Sunna) with *madhhab* as the institutional machinery (Hallaq, 1997:207-8). Since Islamic legal institutions as a whole suffer heavily from modernism and its legal systems following incursions into the

⁵ They are affiliated *mujtahid*, limited *mujtahid*, *ashab al-wujuh wa al-turuq* (those mastering the authoritative opinions of the *madhhab*), and transmitters of the *madhhab*. Scholars of these in-between categories are entitled to issue *fatawa*. At the last stage, all *muftis* are 'informed' *muqallid*. *Muftis* can only issue *fatawa* from authoritative opinions of the *madhhab* signaling the shift from (the unattainable) *ijtihad* to 'informed' *taqlid* as the main requirement of issuing *fatawa*.

Muslim world by Western colonial powers (Anderson, 1957:24), especially since the 13th/19th century (Rahman, 1966:212), *fatwa* as an integral part of that legal institution is also deeply affected. The gap between the real world and the prescriptions of Islamic law 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 (Rahman, 1970b, 644, Layish, 1978:263, and Abou el-Fadl, 2003:6), believe that the traditional Islamic legal system could hardly support the Muslim community living in modern times, either as a theoretical foundation (Coulson, 1969:2 and Hallaq, 1997:210) or as practical law (Schacht, 1959:133 and Anderson, 1971:1). Despite the literal approach of classical legal theory, Asha'arism as the Sunnite theological basis has repudiated creative legal alternatives (Hallaq, 1997:207). Ash'arism holds that reason is insufficient to seek the truth, therefore, revealed texts are always supreme (Rahman, 1971:92). 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 (Hallaq, 1997:208). 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 Muslim attempts to modernise Islamic law are derived from classical legal establishment. Some aspects of the 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 (Rahman, 1970a:331 and Khadduri, 1979-1980:213), although the driving force is the elevation of human intellect as reasonably independent vis-a-vis revelation (Rahman, 1966:217 and Hallaq, 1997:212). This effort is described as Islamic modernism (Schacht, 1959 and Rahman, 1970a). In practice, it can be performed by exercising *ijtihad*, by the liberal use

of *tahayyur* (selection of legal opinions) and *talfiq* as well as by the generous employment of weak opinions of *madhhab*. In addition, the expansion of codified Islamic law, and the extension of *siyasah shar'iyah* (rulers' authority to make regulations on religious affairs) (Anderson, 1960: 192-4, Rahman, 1970: 322-332, and Layish, 1978:263-66) are also sought.

The main vehicles of modernisation have included the concept of *maslahah* (public interest) and *'illah* (cause) (Ahmad Zaki Yamani, as reported and supported by Khadduri 1979-1980), *darurah* (necessity) and *hajah* (need) (Muslehuddin, 1982), and *maqasid al-shari'ah* (the general spirit and intention of the law) (Hallaq, 1997:218 and Gleave, 2003:569). Likewise, Rahman (1970a:329-30) combines historical, hermeneutic and sociological approaches in his reform project. Secondly, the *tahayyur* and *talfiq* 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 (Anderson, 1960:193 and Layish, 1978:264). 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 *siyasah shar'iyah*, rulers may restrict or expand the application of Islamic law as a 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, *ijtihad* 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 (Hallaq, 1997:210). Thus, their commitment to the classic establishment is mere lip service (Hallaq, 1997: and Abou el-Fadl, 2001:4). By the same token, *tahayyur* and *talfiq* are harmful to *madhhab* disciplinary adherence (Layish, 1978:267-8). The third and fourth expose 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 lives, 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 (Schacht, 1964:1). Leaving them unguided in uncertainty is secularism in its true meaning (Rahman, 1970:331). So far, the majority of Muslims are not ready for this option (Anderson, 1960:197 and Weiss, 1977:212). 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 utilitarian⁶ (Lombardi, 1998-1999:81, Abou el-Fadl, 2001:4). *Talfiq, hilah* (legal fiction) and casuistry are among the proofs (Anderson, 1957:21-24 and Johansen, 1995:156).

Trying to keep up with the context is not the only Muslim response, though. Wahhabism, which predates modernism by a century (Rahman, 1966:196), responds to the unfortunate situation of Muslims by returning to the pristine teaching of Islam using the method of directly and literally interpreting the Quran and the Sunna. 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 (Quran and the Prophet's tradition) without worrying about historical (Abou el-Fadl, 2001:5) or social aspects (Dallal, 1993:349). Although not necessarily *ijtihad*-minded or anti-*madhhab*, Wahhabism truly opposes *taqlid*. According to Muhammad ibn Abdul Wahhab, there are many straightforward Quranic passages enabling the laity to understand without requiring an *ijtihad*-type of reasoning (Dallal, 1993:350). Literal interpretation, which sometimes leads to intolerance, is the consequence (Abou el-Fadl, 2001:5). In turn, this

⁶ According to Routledge 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 the Enlightenment, its two major proponents being Jeremy Bentham and John Stuart Mill.

viewpoint undermines or even threatens classical legal scholarship altogether, *ijtihad*, as understood by classic jurists, and *madhhab* (Rahman, 1970b:640).

On the other hand, conservative ulama have been actively working to preserve the status quo. Accepting both modernist and Puritan persuasions and claims will harm the ulama's long-lasting interests as custodians of the *Shari'ah* via the *madhhab* tradition (Anderson, 1957:35 and Zaman, 2002:10). Whether or not this is the primary motive, certainly it is not the only motive. The dominant argument for resisting the reforms of modernism and Puritanism is the concept of *ijtihad*. The ulama argue is that the requirements of *ijtihad* have been beyond the reach of contemporary jurists (Fareed, 2001:355). Besides, they believe that *ijtihad* will not bring anything new; social chaos can be expected as a result of having a pragmatic attitude toward *Shari'ah*, instead. Therefore, *taqlid* is the only legitimate method. After all, the ulama believe that *taqlid* is 'the collective will of Muslim community' (Fareed, 2001:359). Nonetheless, the ulama also show ambiguous attitudes toward modernism, notably by accepting the idea of the legislative codification of some aspects of Islamic law and *siyasah shar'iyah* (Anderson, 1957:36).

B. *Fatwa* and *bahtsul masail* in Nahdlatul Ulama

This last group of ulama, the conservatives, comprise the backbone of NU. It is a Java-based organisation 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) (van Bruinessen, 1995:18-19 and Federspiel, 1970). The method of engaging Islamic law comprises the major difference between the two camps. Certainly, *fatwa* 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 Quran and Sunna. The following paragraphs are devoted to discussing how NU and *bahtsul masail* forums formulate a *fatwa*.

To begin with, some issues of terminology need to be explained. As mentioned earlier, the *fatwa*-issuing institution of NU is called *bahtsul masail*. *Bahtsul masail* is a forum in which *fatwa* is formulated. *Bahtsul masail* is derived from two Arabic words,

bahs and *al-masa'il*. *Bahs* is a noun meaning examination, analysis, and discussion (Wehr, 1961:42). *Masail* is the plural noun form of *mas'alah*, which means problem, question, and case (Wehr, 1961:391). 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* may be considered an effort to implement Islamic teaching of the Sunnite version based one of its four *madhhabs* (Hanafite, Malikite, Shafi'ite, and Hanbalite) in the Indonesian context (Pengurus Besar Nahdlatul Ulama, 1999:3). Thus, the function of *bahtsul masail* is to answer inquiries made mainly by members of NU on certain religious issues. NU has been performing such functions since its establishment in 1926. By considering practices in pesantren and informal discussions among traditionalist ulama, it is arguably older than NU (Mahfudh, 2002:xiii and Mun'im, 2002:108-9). 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 NU was formally established (Masyhuri, 1997:1, and Yahya, 2002:5). Holding a *bahtsul masail* forum coinciding with the national congress became the tradition within NU. Until 1940, the national congress was organised annually and so was the *bahtsul masail* forum. After 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 Ulama* and *konferensi besar Nahdlatul Ulama*) were arranged when necessary (PBNU, 1999:44). Similar to the NU central board, 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.

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* (Siddiq, 1980:23). 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 Syuriah body. (Mas'udi, interview, Jakarta at 8 October 2003). Traditionally, those sitting on the Syuriah body are senior and respected ulama, the very core of NU membership. Following a recommendation of the 1989 NU national congress and succeeding a decision of 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 NU structure (PBNU, 1989). Since then, these regional committees have conducted *bahtsul masail* forums under the auspices and surveillance of the Syuriah body. The 1999 version of 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” (PBNU, 1999:27). The personnel of this committee are relatively young ulama, some of whom are recent graduates of pesantren.

As indicated before, a forum is conducted to discuss and solve enquiries. Unlike its parallel institutions in Middle Eastern countries, in which a *fatwa* is issued by one single *mufti*, *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 bahs al-masa'il fiqhiyyah al-waqi'iyah* (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 (Mun'im, 2002:107). Besides, as many argue, *mushawarah mufaqah* (consultation and agreement) is fundamental to the culture of Indonesian society (Mattulada, 1977:36). Traditionalist ulama of NU who adhere to *taqlid* are not comfortable with the idea of independent *muftis*. Its requirements are too high, and its responsibility is simply too grave (Khoiruzzad, interview at Jember 23 September 2003, Ali, interview at Kediri 29 August 2003, and Fahmi, interview at Jember 24 September 2003). Since ignoring legal cases is irresponsible, collective *fatwa* issuing, which means collective responsibility, constitutes a moderate position between *ijtihad* and *taqlid* (Masyhuri, interview at 5 October 2003). This collective and institutional *fatwa* does not deny the practice of individual and informal *fatwa* within NU (van Bruinessen, 1994:212). A Muslim might visit a *kiai* accessible to him/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 *fatwa* are more numerous than documented *fatawa* of 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 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*) (Masyhuri, interview at Jombang 8 October 2003, Madani, interview at Jogjakarta 25 August 2003, and Sa'dullah, 2002:129). All have equal say in the forum, regardless of their position or seniority within the NU structure. Nonetheless, not all members of 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 NU, those equipped with such knowledge are ulama and graduates of pesantren. This is the very reason for the Syuriah body's involvement in *bahtsul masail* forums. While the personnel of NU's executive body (Tanfidziah) might not have intensive and extensive 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 ulama also confirms the dominance of ulama in the NU structure (Siddiq, 1980:21).

Another notable adjustment is the change in the nature of *fatwa*. The social and cultural background of NU stakeholders has equipped *fatwa* with additional authority. Although essentially a *fatwa* does not bind the *mustafti*, it is very unlikely that a *mustafti* would contradict the *fatwa*'s recommendation issued by NU ulama. The reason for such force is the paramount position of ulama or *kiais* 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 the mystical and healing aspects

of the 'religious' authority of Javanese *kia's* (Geertz, 1959-1960:234 and 238-9) ⁷. 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, *kia's* are better off economically. Sometimes neighbouring villagers depend on *kia's* economically to a certain degree (Marijan, 1998:37-8). The politics-based authority of the *kiai*, though, is problematic, it can corrupt as well as bolster *kia's* authority⁸.

1. *Fatwa* -issuing procedures in Nahdlatul Ulama

The basic guidelines of *fatwa* issuing in *bahtsul masail* can be traced back to 1926. The first two *fatawa* ever issued in NU were on the basis of *fatwa* issuing within NU (Masyhuri, 1997:2-3). Citing al-Sha'rani's *al-Mizan al-Kubra*, the first *fatwa* advised that Muslims must adhere to one of the four Sunnite *madhhabs*; Hanafite, Malikite, Shafi'ite and Hanbalite schools. In accordance with this prescription, NU decided to adhere Shafi'ite *madhhab*. It is the *madhhab* of virtually all Indonesian Muslims, and relates to the process of Islamisation of the Indonesian archipelago⁹. By citing Sayyid Bakri's *I'alah al-Talibin*, the second *fatwa* prescribed how the Shafi'ite *madhhab* was to be employed in *fatwa* formulation. The highest authority is the consensus of al-Nawawi (d. 676H/1277CE) and al-Rafi'i (623H/1226CE). If there is no consensus, al-Nawawi's opinions are preferred, but if that fails, then al-Rafi'i's. If these references fail to provide an answer, then the opinions of the majority of ulama, followed by the opinion of the cleverest scholar, and finally followed the opinion of the most pious scholar are sought.

⁷ For equivalent analyses of *kia's* authority in West Java, see Hiroko Horikoshi (1976), *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*, University of California Press, Berkeley, 1980. For an overall comparison between the religious elite in Java and West Sumatra see Taufik Abdullah, *Islam dan Masyarakat: Pantulan sejarah Indonesia*, LP3ES, Jakarta, 1987.

⁸ see for instance the aforementioned Geertz's article

⁹ 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*, Malaysian Sociological Research Institute, Kuala Lumpur, 2001 p.125-155, Martin van Bruinessen, 'Bukankah Orang Kurdi yang Mengislamkan Indonesia', *Pesantren*, 4:4, 1987, p. 43-53. Nonetheless, although the dominance of Shafi'ite *madhhab* is undisputed, the account of its origin of is disputed among historians.

One can easily point out that the aforementioned method and its hierarchy is *taqlid*. All references in the method are jurisprudence (*furu' al-fiqh*), and none comprises legal theory (*usul al-fiqh*). This is a typically *taqlid* method as Hallaq (2001:83-4) has pointed out. 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 *fatwa*? What happens if there is a clear primary text (from Quran or/and Sunna) 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 *ijtihad*. 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* (van Bruinessen, 1995:17). Many of the books are the authoritative jurisprudence of mainly the Shafi'ite School of law. Jurisprudence texts like *Fath al-Mu'in*, *Bughyah al-Mustarshidin* and *Kiyafah al-Akhyar* are taught in many pesantrens. Big volumes of jurisprudence, many of which are extensive commentaries and glosses of concise jurisprudence such as *Tuhfah al-Muhtaj*, *Mugni al-Muhtaj*, and *Nihayah al-Muhtaj*, 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 science.

Since the term *kitab kuning* is not entirely comprehensible, NU ulama 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 ulama can be used as basis for issuing *fatwa*. According to a *fatwa* from the 1983 mid-term congress, *al-kutub al-mu'tabarah* are those books affiliated to the four schools of law in one way or another (Masyhuri, 1997:301). Since NU adheres to the Shafi'ite school, jurisprudential books of the Shafi'ite school comprise the largest part of the *al-kutub al-mu'tabarah* list. This category consist of strict jurisprudence, such as al- *Fath al-Mu'in*

and those mixed with other aspects of Islamic teaching, such as *'Ihya' 'Ulum al-Din*. In this book, al-Ghazali embodied, and successfully so, the mystical element of Islam (Sufism) into the *fiqh*-dominated orthodoxy (Rahman, 1966:78). Likewise, Quranic exegeses and interpretations of hadith collections affiliated to Sunnite can be categorised *al-kutub al-mu'tabarah* and used, albeit sparingly, including al-Qurtubi's *al-Jami li Ahkam al-Qur'an* and al-'Asqallani's commentary to al-Bukhari's *al-Jami'-al-Sahih* entitled *Fath al-Bari*. In addition to that, books on different opinions of the four Sunnite schools of law are also used in *bahtsul masail* forums, such as *Rahmah al-'Ummah*, *al-Mizan al-Kubra*, and *al-Fiqh 'ala al-Madhahib al-'Arba'ah*. The last category of *al-kutub al-mu'tabarah* comprises jurisprudence of other rest three *madhhabs*. Among the books are Ibn Abidin's *Hashiyah Radd al-Muhtar* (Hanafite), al-Magribi's *Mawahib al-Jalil* (Malikite), and Ibn Taymiyyah's *Majmu' al-Fatawa al-Kubra* (Hanbalite).

Apart from the aforementioned jurisprudence texts, there are other kinds of books employed by NU ulama in *bahtsul masail*. In fact, many exceptions occur quite frequently. In its first *bahtsul masail* forum of 1926, an NU *fatwa* quoted al-Bukhari's hadith collection (Masyhuri, 1997:14). Directly citing primary sources (hadith) clearly violates the *taqlid* concept. In 1938, to define the nature of an emergency situation a *fatwa* has cited a legal maxim (*qa'idah fiqhiyyah*) from al-Suyuti's *al-Ashbah wa al-Naza'ir* (Masyhuri, 1997:157). Again, employing a legal maxim is a form of *ijtihad* (Heinrichs, 2003:517). Likewise, in 1939, NU *fatawa* cited the opinion of an Egyptian *Mufti* on life insurance, which was published in a magazine (Masyhuri, 1997:183-4). Obviously, a magazine is not jurisprudence. In 1961, NU *fatawa* cited the works of contemporary Muslim scholars of the time, Dr. Yusuf Musa and Dr. Abdul Qadir Audah, on the issue of land reform (Masyhuri, 232-3). Clearly, NU ulama 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. *ijtihad*, at least in a limited and partial manner, is used and the referred books and their writers may well be pro-*ijtihad* and contemporary. Likewise, *taqlid* is not always the guiding principle. As

Zahro (2003:6) concludes, the justification for using references in issuing *fatwa*, and therefore, the standardisation of *al-kutub al-mu'tabarah* relies heavily upon the 'wisdom' of the NU ulama. The accessibility of the reference is also a determinant since not all books can be purchased in Indonesia (van Bruinessen: 1995:116-7). As a result, the standard of *al-kutub al-mu'tabarah* is very subjective and relaxed.

These anomalous referencing styles increased in the 1980s, although referring to classic jurisprudence still dominates. Having said this, apparently there is a degree of anxiety and uncertainty among NU ulama about methods. Certainly, exercising *ijtihad*, 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 *fatwa*, there are still considerable numbers of inconclusive *bahtsul masail* forums (*tawaqquf*) (Masyhuri, interview at 5 October 2003). That is when the forum cannot give sufficient answers for legal problems for one reason or another¹⁰. Even if a degree of analogy (*ilhaq*) can be drawn from jurisprudence, the applicability of this mechanism becomes very vague and elusive (Asmuni, interview at Jombang 13 September 2003). Certainly, these *fatwa* questions are contemporary and modern. They concern the application of modern technology, contractual practices, and medical issues.

Nonetheless, seeing this 1983 *fatwa* on *al-kutub al-mu'tabarah* at a glance, *madhhab* discipline is immediately under threat of *talfiq*. Indeed, in 1929 while stating a Shafi'ite opposition against exchanging silver commodities with different measurements, an NU *fatwa* also presented a Hanafite opinion allowing such an exchange. (Masyhuri, 1997:48-9). Apparently, there is a degree of difficulty in complying with Shafi'ite opinion so a Hanafite view was provided. However, it is more usual to refer to the weak opinions of Shafi'ite *madhhab* before applying *talfiq*. An example is *Jum'ah* prayer which forty local male residents should attend according to the *rajih* (authorised) position of Shafi'ite. In case such a number is not met, then four residents is a must according to a *marjuh* (weak) opinion of Shafi'ite. This option is preferred over the Hanafite opinion allowing only two males for a *jum'ah* prayer

¹⁰ Legally, though, *tawaqquf* is justified because either recommending not well-supported *fatwa* or employing *ijtihad* without sufficient expertise is not allowed.

(PBNU, 1998:23-4). 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 *fatwa* that is contradictory to popular need (Syafi', interview at Mojokerto 10 September 2003). This principle confirms utilitarian nature of Islamic law. Because NU ulama have exhausted all Shafi'ite jurisprudential opinions -including the weak ones-, a breakthrough is a must. For that reason, some NU ulama suggest, among other things, the greater employment of jurisprudence from the other three schools of law (*talfiq*) and the employment of legal theory (*'usul al-fiqh* and *al-qawa'id al-fiqhiyyah*) (Madany, 1989:6-7 and interview at 25 August 2003, Masyhuri, interview at 5 October 2003). While the first suggestion openly justifies *talfiq*, the second reopens the gate of *ijtihad*. 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 ulama of NU, (eg. KH Musthofa Bisri and Masdar F. Mas'udi whose opinions are shared by some respected NU ulama such as KH A. Muchith Muzadi and KH M. A. Sahal Mafudh) demanding improvement in *fatwa* quality (Mahfudh, 1989:63, Muzadi, 1994:57 and van Bruinessen, 1994:214).¹¹ The main argument is not necessarily about methods, but about the nature and characteristic of the *fatwa*. They argue that many NU *fatawa* are impractical and out of touch with popular needs and dilemmas, and last but not the least; contradictory in terms of social justice (van Bruinessen, 1994:214, Baso, 1997:131, Ghazali, 2002:88, and Mas'udi, interview at 8 October 2003)¹². Intellectually, many of these young NU ulama might have a pesantren and State Islamic Institute background, but they also are

¹¹ 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*.

¹² For outside review see Martin van Bruinessen, *Kitab Kuning Pesantren dan Tarekat: Tradisi-tradisi Islam di Indonesia*, LKiS, Yogyakarta, 1994, for opinion of NU *kiai* see Mahfudh, Muhammad Ahmad Sahal, Bahtsul Masa'il dan Istibath Hukum NU: Sebuah catatan pendek, in Rahmat, M Imdadun (ed), *Kritik Nalar Fikih NU: Transformasi paradigma bahtsul masa'il*, p. x-xxiv, Lakpesdam, Jakarta, 2002, for NU young scholars' opinions see for instance Baso, Ahmad, 'Melawan Tekanan Agama; Wacana Baru Pemikiran Fiqih NU', in *Wacana Baru Fiqih Sosial; 70 tahun K.H. Ali Yafie*, ed Jamal D. Rahman et al, Mizan bandung 1997 p. 131-143, see also Ghazali, Abdul Moqsith, reorientasi Istibath NU and Operasionalisasi *Ijtihad* Jama'i, in Rahmat, M Imdadun (ed), *Kritik Nalar Fikih NU: Transformasi paradigma bahtsul masa'il*, p. 86-118, Lakpesdam, Jakarta, 2002.

exposed to the thinking of western Islamicists and social scientists (van Bruinessen, 1994:234 and Baso, 1997:136-8). As can be seen, there is a gap between the concerns of NU ulama and the demands of the younger ulama of NU. Generally speaking, while the former emphasises how to answer the questions, the latter stresses the importance of 'humanising' the *fatwa*.

2. 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 (van Bruinessen, 1994:220-1 and Mun'im, 2002:109)¹³. 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, he assigned Masdar F. Mas'udi to organise periodic *bahtsul masail* forums called *Majlis Mubahasah Kitab* to discuss issues surrounding *bahtsul masail* in NU (Mun'im, 2002:109). 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 *halqah* (seminars), participated in mainly by NU ulama on similar issues in the late 1980s (van Bruinessen, 1994:233 and Mun'im, 2002:115)¹⁴. In addition, P3M's four-monthly bulletin entitled *Pesantren* (1984-1993) is an effective means of conveying the message. This is true considering some of its contributors and interviewees are prominent NU ulama from both the conservative and the progressive persuasion¹⁵. From

¹³For his opinion of *fiqh* tradition in NU, see for example his essays entitled 'Asal Usul Tradisi Keilmuan di Pesantren' in *Pesantren*, Perdana 1984, p. 4-11 and 'Pengembangan Fiqih yang Kontekstual' in *Pesantren*, 2:2, 1985, p. 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* August 1975, 4 (4) p. 53-62.

¹⁴ 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 *halqah*. see van Bruinessen (1994:220-240) for this account.

¹⁵Such 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)

the two methods, issue like *kontekstualisasi pemahaman kitab kuning* (developing contextual understanding of *kitab kuning*) is communicated and championed¹⁶. Apparently, some conservative ulama were persuaded.

Nonetheless, this activity is not without reaction. As reported by Mun'im (2002:110), criticisms and attacks were launched. The background of the critics is varied. Some of whom are ulama of pesantren, such as KH. Syafi'i Hadzami and the late KH. Rodli Sholeh (Mun'im, 2002:110), whereas others are graduates of Islamic institutes in Saudi Arabia, such as Dr. Said Agil Munawwar (1988:45-6) and Dr. Abdul Muchid (Mun'im, 2002:1102). Similarly, some ulama, such as KH Ahmad Yasin Asmuni (interview at 13 September 2003), decided to withdraw his participation in *halqah* after knowing Masdar F. Mas'udi's opinions and intentions. As a result of severe criticism (van Bruinessen, 1994:222) some scheduled programmes were cancelled (Mun'im, 2002:111). For the conservative traditionalists, any critical remarks on *kitab kuning* (jurisprudence texts) are unacceptable, let alone critiquing *'usul 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 *halqah* is regrettable. Future graduates of pesantrens will likely remain conservative.

However, a 1990 *halqah* produced an important document. While acknowledging that the primary source of Islamic law are Quran and Sunna, *madhhab* system - restricting it only to the four Sunnite schools of law- is preserved. *Madhhab* in this *halqah* is expanded to include the *manhaji* (methodological) *madhhab*, though. While the laity must only comply with the *qawli* (opinion-based) *madhhab*, the specialists may perform *manhaji madhhab*. Still, this *manhaji madhhab* can only be performed collectively (*istinbat jama'i*) (Muzadi, 1994:58-9). 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 ulama to openly and resolutely implement the methods. Armoured with this official yet limited

¹⁶ Some papers and recommendations of the *halqah* can be seen at Aula: Majalah Nahdlatul Ulama no 2:XII/March 1989

documents and the rest of the seminars recommendations, these outcomes were brought into the mainstream of NU discourse for the same purpose (Yahya, 2002:63). At the 1992 mid-term congress, a decision concerning methods of decision making in *bahtsul masail* was sanctioned. The document is entitled 'Systems of taking legal decisions in *bahtsul masail* in the domain of the Nahdlatul Ulama'¹⁷.

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 *fatwa* 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 of a legal opinion from a jurisprudence text. If two or more texts are available, the collective determination among the ulama is used to select an answer. An example for this is a 1937 *fatwa* on the status of the available guardian who delegates another person to marry a woman under his guardianship (Masyhuri, 1997:149). There are two conflicting views on the matter, a text of *Kifayah al-Akhyar* indicates its unlawfulness, whereas al-Bajuri's *Hashiyah* justifies the practice. The *fatwa* recommends the lawfulness of the practice by inferring that the text of *Kifayah al-Akhyar* is only concerned with those guardians who delegate and act as the marriage witness at the same time.

The other two points of this section contain justification for the ongoing practice. The first is about exercising *ilhaq* (analogy) collectively¹⁸. A close examination of NU *fatawa* reveals that analogy has been the practice for long time. A *fatwa* in 1931, for instance, makes an *ilhaq* between Siamese twins and the expectant mother (Masyhuri. 1997:78). If one of the Siamese twins dies, it should be separated for

¹⁷ The used translation of this document is mainly derived from MB Hooker's translation in his book entitled Indonesian Islam: Social change through contemporary *Fatawa* Allen&Unwin, Sydney, 2003, p. 57-9.

¹⁸ Choosing *ilhaq* as expression instead of *qiyas* is to avoid objections from conservative ulama who maintain that *qiyas* is the tool of mujtahid alone. NU ulama do not claim the right of performing *ijtihad*. It is different name, but identical concept (Masyhuri, interview at 5 October 2003). This is the main reason of the ulama opposition toward *qiyas*, not because of their personal interests.

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 *Tuhfah al-Habib* confirms this caesarian section. The latter method is similar to this *ilhaq* in terms of its practicability in NU *fatwa*. It justifies the exercise of collective *ijtihad*. As explained earlier, the *manhaji* method, either using *usul al-fiqh* or *al-qawa'id al-fiqhiyyah*, 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 *talfiq* and *manhaji madhhab* at once. That is to employ some aspects of legal theory of non-Shafi'ite scholars - notably al-Shatibi's principle of *maslahah* of the Malikite school- while maintaining commitment to the Shafi'ite *madhhab* (Mahfudh, 2003:28). This desperate effort indicates the importance of religious justification (reference to *kitab kuning*) in issuing *fatwa* among the NU ulama.

Although these four methods have been practiced, the document gives guidance for implementing these four methods. Again, the 1926 *fatwa* on the method of employing legal texts is cited. Interestingly, this 1992 document also gives a foundation for considering *maslahah* 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 time. Interestingly, the young NU ulama 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 *fatwa*, 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 *fatwa* becomes more accountable and practicable. Such 'extra-judicial' considerations should be the priority in issuing the *fatwa*, whereas its religious foundation (*kitab kuning*) comes second. Citing Jeremy Bentham's legal utilitarian viewpoint, Masdar F. Mas'udi (interview at 5

September 2003) states that a *fatwa* should be logically tested, religiously founded, and practically functional.

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 *fatawa* issued by different *bahtsul masail* forums. Three points are recorded. *Fatawa* of different forums do not cancel each other out if the proper method is applied. Higher force is obtained if a *fatwa* 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 *fatwa* issuing. The role of the conservative ulama, as the authority in NU and as the practitioners of *bahtsul masail* remains unchallenged. Perhaps, some ulama are beginning to aware of the importance of producing accountable *fatwa*, but the majority of ulama, especially at the local levels, are only concerned with answering the *fatwa* questions. KH Abdul Aziz Masyhuri (interview at Jombang 5 October 2003) for instance, states that finding supporting texts for a *fatwa* is a laborious and daunting task, let alone embracing on the task of considering social implications as well. As a result, the 1992 decision was successful only in encouraging ulama to employ additional texts and exercise a degree of *ijtihad*, whereas social considerations are somehow overlooked.

3. 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 ulama camp, for instance, there are people who are wholeheartedly satisfied with the ongoing practice. They do not see any need for change. They refuse to exercise *ijtihad*, apply tight screening in accepting new references, and observe strict adherence to

Shafi'ite school with little room for *talfiq*, 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 ulama are concerned. KH. Miqdad Fahmi (interview at 24 September 2003), the chairperson of the *Bahtsul masail* Committee in Jember District NU Branch and KH. Abdul Nashir, (interview at 5 October 2003) the chairperson of *bahtsul masail* drafting board in the Jombang District NU Branch are key examples. This group can be considered to be conservative traditionalist. Nonetheless, there are also ulama who apply a relaxed attitude towards *talfiq*. 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 practicable and equitable is not their major concern. There are few ulama in this group. Among the examples are KH. Ahmad Farihin (interview at Malang 4 October 2003), the chairman of Syuriyah board in Malang branch of NU and K. Hayyin Nur (interview at Nganjuk 19 September 2003), the chairperson of the *Bahtsul masail* Committee in the Nganjuk District NU Branch. This group is called moderate traditionalist.

The last group of ulama comprises those seeking to achieve answers which are logical, just, and practicable. In so doing, the accountable method must be applied consistently, where *taqlid* is applied at first, but *ijtihad* is not dismissed altogether. Members of this group include KH Ahmad Wazir (interview at 26 September 2003), the secretary of Syuriyah board in Jombang branch of NU, and KH Abdullah (interview at 24 September 2003), a member of the *Bahtsul masail* Committee of the Jember District NU Branch. Using Hallaq's typology (1997:214), this group can be considered to practise a modest form of religious utilitarianism¹⁹. Young NU ulama are similar to this last group of ulama, but not completely so. They believe that just and practicable *fatwa* (*maslahah*) are the main objective. The method of reaching such *fatwa* is a secondary

¹⁹According to Hallaq (1997:214) 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 *maslahah* (public benefit).

concern. Still, they do not dismiss the method altogether and they believe connection to religious sources should be maintained in one way or another. If traditional connections, such as *kitab kuning* and *usul 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 Nahe'i, an academic staff member of *al-ma'had al-'ali*, can be included in this group²⁰.

Table 1: List of the East Javanese Ulama interviewed during research

NO	Name	Educational Background	Position in NU Structure
1	KH Abdul Ghofar Fadhil	Pesantren al-Khoziny Sidoarjo	Secretary of Syuriyah PCNU Sidoarjo
2	KH Abdullah, MA	Pesantren al-Khoziny and STAIN Jember	Member of LBM PCNU Jember
3	KH Abdul Nasir	Pesantren Kajen Pati	Chairman of Syuriyah PCNU Jombang
4	KH Ahmad Farihin	Pesantren Singosari	Chairman of Syuriyah PCNU Malang
5	KH Ahmad Wazir	Pesantren Kajen Pati	Secretary of Syuriyah PCNU Jombang
6	KH Ainurrofiq	Pesantren Ploso Kediri	Chairman of LBM PCNU Gresik
7	KH Ali Murtadlo	Pesantren of Lirboyo Kediri	secretary of Syuriyah PCNU Nganjuk
8	KH Fathurrahman	Pesantren Ploso Kediri	Secretary of Syuriyah PCNU Tuban
9	KH Hayyin Nur	Pesantren Lirboyo Kediri	secretary of Syuriyah PCNU Nganjuk
10	KH Khoiruzzad	Pesantren Kajen Pati	Chairman of Syuriyah PCNU Kencong
11	KH Kholilurrohman	STAIN Malang	Chairman of Syuriyah PCNU Tuban
12	KH Ma'sum Ali	Pesantren Ploso Kediri	Member of LBM PCNU Kediri
13	KH Miqdad Fahmi	Pesantren Sarang Rembang	Chairman of LBM PCNU Jember
14	KH Muhammad Atho	STAIN Malang	Secretary of LBM PCNU Malang

²⁰ See Abdul Mun'im's opinion in '*Bahtsul masail*: Tradisi akademis Muslim tradisional, *Jurnal Gerbang* 12:5 (September 2002), p. 104-15. For Imam Nahe'i's opinion see '*Posisi Akal Lebih Tinggi dari Wahyu*' *IslamLib.com*, 15 of December 2003 edition, (3/5/2004) .

15	KH Muhammd Sulton	Pesantren Kajen Pati	Chairman of Syuriyah PCNU Jombang
16	KH Munaseh	Pesantren Rejoso Jombang and UNDAR Jombang	Chairman of LBM PCNU Jombang
17	KH Sa'dullah	Pesantren Ploso Kediri	Member of LBM PCNU Surabaya
18	KH Syafi	Pesantren Ploso Kediri	Chairman of LBM PCNU Mojokerto
19	K Tamyiz	Pesantren Ploso Kediri	Chairman of Syuriyah PCNU Blitar

From the list it is evident that conservatism can be related to educational background. Almost all ulama interviewed during research are graduates of pesantren. A few of them continue training at Formal Islamic Institute, such as Institute Agama Islam Negeri (IAIN) and Sekolah Tinggi Agama Islam Negeri (STAIN).

Conclusion

Having considered *fatwa* and its relation to *fiqh* in modern times as well as conjuncture of NU *bahtsul masail* and the debates of the East Javanese, it can be stated that departure from *taqlid* and the *madhhab* establishment are indeed recorded. Modernism in Islamic law is embraced by the NU conservative ulama. 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 ulama of pesantren background still dominate the *bahtsul masail* forums, especially at the local levels, change should not be overemphasised. They apply *ijtihad* and *talfiq* not as a norm, but as exceptional 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 *maslahah* as understood by young NU ulama is indeed considered but not at the expense of ignoring *madhhab* and *taqlid* establishment.

Chapter II

Bahtsul Masail: From pesantren simulation to actual fatwa institution

Admittedly, stating that NU *bahtsul masail* is uniform and consistent is misleading. There are many *bahtsul masail* forums. They range from NU sub-district branches up to national NU meetings. Likewise, *bahtsul masail* types are divergent, some retaining *kitab kuning* and *taqlid* as the main components, whereas others reintroducing *ijtihad* and *maslahah* as the determining aspects in issuing *fatawa*. In East Java, *bahtsul masail* forums are conducted in all NU district branches. While *kitab kuning* and *taqlid* are still dominant, some figures welcome the reintroduction of *ijtihad* and *maslahah* concept. To further examine the aforementioned developments, this chapter is divided into three sections. The first section canvasses *bahtsul masail* simulation in *pesantren*, the training ground of NU *fatwa* drafters. The second section discusses the types of *bahtsul masail* forums, whereas the third observes the practice in East Java.

A. Bahtsul masail: From pesantren to muktamar

1. Bahtsul masail in pesantren

In NU circle, there are many kinds of *bahtsul masail*, but the root lies in *pesantren*. *Bahtsul masail* relates to the intellectual aspect of NU, and *pesantren* is the training institution (Mun'im, 2002:105). Since Islamic law is the most manifest aspect of Islam today, traditionally almost all *pesantrens* focus their training on *fiqh* and the related disciplines (van Bruinessen, 1995:114). In this regard, *bahtsul masail* simulation in *pesantrens* is an effective vehicle to further train the students to be capable of responding to actual legal cases happening in everyday life when they return to their community. Besides, as Makdisi (1981:184) has emphasized, the main purpose of Islamic education institutions is indeed to train future *muftis*. Since almost all *bahtsul masail* drafters of the NU structure are graduates of *pesantren*, discussing NU's *bahtsul masail* should consider its historical roots in *pesantren*.

It should be clarified that not all *pesantrens* provide *bahtsul masail* training. Following the typology of *salaf* (traditional) and *khalaf* (modern) *pesantrens* (Dhofier, 1982:41-2), it is usually the former which maintains the *bahtsul masail* tradition. Even so, not all *salaf pesantrens* have such tradition. Only some *pesantrens* affording comprehensive training on Arabic and *fiqh* can provide *bahtsul masail* training for their students. As van Bruinessen (1995:27-30) argues, *pesantren* curricula, especially the *salaf* ones, can be clustered into categories. The first is Arabic language, which is instrumental for understanding text of *kitab kuning*. Not only is Arabic grammar studied, but also all aspects of Arabic, including logic. The second and third categories are Quran-Sunnah and the related studies. The fourth is *fiqh* (along with *usul al-fiqh* and *al-qawa'id al-fiqhiyyah*). The fifth is Sufism and ethics. Although some *pesantrens* specialise in teaching Quran exegesis, Hadith collection, or Sufism practice, *fiqh* is always the main subject of *pesantren* education. *Fiqh* training can be done using two methods, class seminar and *musyawarah* (discussion) in *bahtsul masail* forums among the students.

Bahtsul masail forums in *pesantren* are merely exercises for students. *Bahtsul masail* answers do not have legal effect. They are not *fatwa*. Forums are usually conducted by *pesantren* students after completing a certain level of *pesantren* education. At the intermediate level, *bahtsul masail* is conducted by discussing a rather simple *fiqh* book such as *Fath al-Qarib*, whereas the more sophisticated books such as *Fath al-Mu'in* is discussed at the advanced level. Those two books are discussed in two sessions; their linguistic and grammatical aspects (*al-masa'il al-nahwiyyah*) as well as their legal aspects (*al-masa'il al-fiqhiyyah*) (Ali, interview at 29 August 2003). The discussion of Arabic grammar and related issues measures the degree of student comprehension of the material. One single mistake in understanding the Arabic text of non-vowel *kitab kuning* may result in an alteration of meaning. Arabic is the foundation for the study of Islamic law, both *usul al-fiqh* and *furu' al-fiqh* (Sa'dullah, 2002:107). Thus, proficiency in Arabic is seen as a basis of intellectual capacity, not as a means of communication.

After the discussion of Arabic, various legal questions in *bahtsul masail* are presented. Students are encouraged and expected to make use of *sharh* (commentaries)

and *hashiyah* (glosses) of the aforementioned books during discussion, such as al-Bajuri's *Hashiyah* and *Taushih al-Mustafidin* for *Fath al Qarib*, and *I'anah al-Talibin* and *Tarshih al-Mustarshidin* for *Fath al-Mu'in*. Some questions are based on actual occurrences, whereas the others are hypothetical. An example of hypothetical cases is question about a child resulting from sexual intercourse between a human being and a dog (PP al-Falah, 2003:111-2). Similarly, students are free to pose questions without considering their places of origin and discuss Muslims' concerns worldwide. Among other issues is human rights (Tim Karya Ilmiah & Bahtsul Masail MHM Lirboyo, 2001:130-3) and quiz programs of television stations and newspapers (Tim Kuliah Syariah PP Sidogiri, 2001, 114-5). Because the questions of the *pesantrens bahtsul masail* is arguably more difficult than *bahtsul masail* of some NU district branches, many see that the answers of *pesantrens' bahtsul masail* are valid answers to be recommended if a corresponding actual legal case does happen (Syafi', interview at Mojokerto 10 September 2003). Thus, the answers of *bahtsul masail* simulations in *pesantren* can be used as considered jurisprudence. This opinion is widely held by the graduates of certain *pesantrens*, who are now, and going to be, responsible in administering *bahtsul masail* within the NU structure.

In East Java there are some prominent *pesantrens*, which maintain and effectively conduct *bahtsul masail* as part of their *pesantren* curricula. The first and second *pesantren* are al-Falah of Ploso and Hidayah al-Mubtadi'in of Lirboyo. Both *pesantrens* are in Kediri, a district 130 kilometres southwest of Surabaya. Another *pesantren* is Sidogiri of Pasuruan, a district 100 kilometres to the northeast of Surabaya. The fourth *pesantren* is al-Khozini of Sidoarjo, a district 20 kilometres to the west of Surabaya. Those *pesantrens* publish their *bahtsul masail* sessions periodically²¹. In addition, there are also larger forums of *bahtsul masail* in which students from many

²¹ Al-Falah *pesantren* names its series of bahsul masail compilation as *Tuhfah al-Rahabah* or in the Indonesian version called *Tanya Jawab Masalah Agama* (book 1 2003). *Pesantren* of Hidayah al-Mubtadi'in published its bahsul masail compilation series with the name of *Fiqh Fawa'id: Jawaban Problematika Masyarakat Modern* (2001 edition). *Pesantren* Sidogiri's bahsul masail publication series are called *Muraja'ah fi al-Masail al-Diniyah* or *Masalah Keagamaan: Hasil Keputusan Muraja'ah dan Bahtsul Masail* in Indonesian (5th edition 2001). *pesantren* al-Khoziny's series of publication is *al-Fawa'id al-Janiyah min al-Muhawarah al-Khaziniyah* or *Kumpulan Bahtsul Masail Mengungkap tentang Berbagai Prospek Kehidupan yang Terjadi di Masyarakat Umum* (session 10th-14th 2002) in Indonesian.

pesantrens in East Java participate. In the Kediri region, for instance, there is a periodical *bahtsul masail* forum in which students from different *pesantrens* in Kediri and the surrounding districts participate (*Majelis Musyawarah Pondok Pesantren se-Karesidenan Kediri*; [Kediri; Nganjuk; Blitar; Tulungagung; Trenggalek])²². Similarly, there is also a *bahtsul masail* forum of *pesantren* students from all districts in East Java (*Forum Bahtsul masail Pondok Pesantren se-Jawa Timur*) (Murtadho, interview at 19 September 2003).

The format of presentation of *pesantren's bahtsul masail* is straightforward. Questions and answers are in Indonesian. They are legalistic and short, as well as on/off or yes/no question and answer. Basically, questions ask if a practice is either valid/invalid, allowed/not allowed, or in between (*al-hukm al-taklifi*). No elaborate and detailed answer is provided. The function of explanation is performed by the cited reference(s). Each answer is followed by references from *kitab kuning* without *shaql* or *harakah* (vowel). The name of the cited text, its volume (if applied), and its page are included. No translation whatsoever is provided. This might because the readers of those publications are *pesantren* students, whose Arabic literacy is expected. The length of quotations varies from one issue to another. If the referred quotation is in the middle of a discussion, the whole discussion might be quoted. Likewise, the numbers of quotations vary from one legal issue to another. The minimum is one *kitab kuning* quotation for one legal issue, whereas the maximum is six or seven quotations from *kitab kuning* for an issue. If there is only one quotation, it is very likely because no other books provide the answer. If numerous books are quoted, it means many books present identical answers. Alternatively, those books provide answers with some minor variations.

Here is an example of a recommendation taken from *Pesantren Hidayah al-Mubtadi'in* of Lirboyong (2001, 118-9).

Description:

²² The outcomes of this inter-*pesantren* bahtsul masail forum is also compiled and published. The title is of its first publication (1994) is *112 Masalah Agama; Keputusan bahtsul masail majelis musyawarah pondok pesantren se-karisidenan Kediri*.

The HIV-AIDS disease has spread in many countries and caused problems for people. Moreover, it can easily be transmitted to other persons through needles, sexual intercourse, blood transfusion, and other means.

Question

Can an HIV-AIDS positive person marry a woman? If affirmative, is the disease considered a handicap of marriage, which enables the spouse to annul the marriage?

Answer

An HIV-AIDS positive person can marry, but it is *makruh* (repugnant). HIV-AIDS disease is considered a handicap of marriage.

References

Hashiyah al-Mahalli volume III page 206: '*If a man is infected by a disease such as senility or permanent leprosy he is not recommended to get married*'.

Hashiyah al-Qalyubi volume III page 261: '*if one of the two spouses finds his or her spouse is permanently or temporarily insane or a leper, or if the wife's vagina is blocked by bone or flesh, or if the husband is impotent or has micro penis, the other party has an option to demand a divorce because no sexual pleasure is possible*'.

It is apparent in the example that no elaborate analysis is given. Texts of *kitab kuning* do the explanation. Thus, the effort is how to find a stipulation of *kitab kuning* corresponding or resembling to the question. This method is *taqlid*.

2. *Bahtsul masail* in the NU structure

The aforementioned *pesantren bahtsul masail* comprise the basic format of any *bahtsul masail* in NU circles. Certainly, there are some minor differences concerning the nature of questions and the presentations. *Bahtsul masail* questions are supposedly always based on actual occurrence of legal cases in the domain within which an NU office assumes a responsibility. Admittedly, engaging only actual legal cases is a central legal postulate in the *fatwa* enterprise (Hallaq, 2001:169). In addition, questions are also characterized by the nature of the forum in which a *bahtsul masail* is conducted. *Bahtsul masail* forums conducted by the association of *tariqah* (Sufi orders) followers affiliated to NU, for instance, discuss mainly issues of Sufism and mystical questions. Lastly, the presentation of *bahtsul masail* outside *pesantren* is slightly different considering the audience of *bahtsul masail*. Since *fatawa* in the NU structure are issued with regard to problems occurring in the real world, the origin of the questions is often mentioned. While specifying names is rare, mentioning the city or region from which the questions

originate is common practice. In addition, translation of the Arabic reference is sometimes provided. Apart from *pesantrens'* graduates, the Arabic literacy among NU members is very low. As a result, the recommendation of *bahtsul masail* should use the comprehensible language to them. Javanese and Indonesian translations of the text are the usual options.

Within the NU organisational structure, there is no available record of *bahtsul masail* forums at the village level of the NU branch (*ranting*). Thus, the lowest branch to have a *bahtsul masail* forum is MWC (Majelis Wilayah Cabang or NU's sub-district [kecamatan] branch). Some sub-districts in Kediri and Malang districts, for example, arrange periodical *bahtsul masail* forums (Ali, interview at Kediri 29 September 2003 and Fahmi, interview at Jember 24 September 2003). However, commonly sub-district branch only contributes questions, whereas *bahtsul masail* forum is conducted by PCNU (Pengurus Cabang Nahdatul Ulama or district [kabupaten or kota] branch of Nahdatul Ulama) (Munaseh, interview at Jombang 31 August 2003 and Fadhil, interview at Sidoarjo 3 October 2003). NU district branches arrange *bahtsul masail* periodically to discuss questions from sub-districts, individuals and other questions within their regional boundaries. In East Java, NU district branches also conduct additional *bahtsul masail* forums at least twice a year in preparation for the *bahtsul masail* initiated by PWNU (Pengurus Wilayah NU or Provincial Office of NU) of East Java (Fadhil, interview at Sidoarjo 3 October 2003).

Apart from the two aforementioned *bahtsul masail* forums, there are some other *bahtsul masail* forums in some districts in East Java. For instance, there is a *bahtsul masail* called as *Mushawarah baina al-Tullab* (Discussion among Students), organised and participated in by conservative *kiaís* affiliated to NU in the Jember district (Muzadi, interview at Jember 25 September 2003). Similarly, some *ijtihad*-minded lecturers of the State Institute of Islamic Studies in Jember district also initiate other *bahtsul masail* forums called Forum Kajian Keislaman (Islamic study forum) (Abdullah, interview at 24 September 2003). Likewise, there is an association of conservative *kiaís* of five sub-districts in Malang district that conduct their own *bahtsul masail* (Atho, interview at 4 October 2003). Since the personnel of these 'splinter' *bahtsul masail*

forums are *kiais* of *pesantren* and are also active at the district levels of *bahtsul masail* forums, the NU's district establishment acknowledges the presence of these *bahtsul masail* forums.

Beyond *bahtsul masail* at the district level, there are also other kinds of *bahtsul masail* in NU circles. In East Java, *bahtsul masail* forums organised by the NU East Java Office is one of them. It is arranged every six months. The questions of this *bahtsul masail* are unresolved legal queries originating from some district *bahtsul masail* forums (Fadhil, interview at Sidoarjo 3 October 2003). Alternatively, questions can be posed by the East Java office of NU or asked by PBNU (Pengurus Besar Nahdatul Ulama or NU Central Board) commencing NU's national congress or its mid term one. Its two volumes (volume I 1979-1986 and volume II 1987-1994) of *fatwa* compilations is entitled *al-Muqarrarat al-Nahdiyyah* (Asmuni et al, 2002). Finally, the NU central board conducts *bahtsul masail* at every *muktamar* (congress) and *musyawarah nasional/konferensi besar* (mid-term congress). Initially, the questions come from the lower levels of the NU structure or from individuals. Nowadays, questions are instigated and formulated by the secretary of the Syuriyah board for strategic and administrative reasons, in which questions are sent to regional branches two or three months before the forum (Mas'udi, interview at Jakarta 8 October 2003). The nature of *fatwa* questions is Islamic legal case and related issues, but there are also some *fatawa* on theology and mysticism as well. While the *fatawa* are always inserted in the printed version of every congress report, a separate *fatwa* compilation is also available. The *fatawa* of the NU Central Board has been published with in the title of *Ahkam al-Fuqaha'* (Masyhuri, 1997) In its previous and smaller edition, the publication is in Arabic. The latest edition published in 1997 (containing *fatawa* from 1926 to 1994), compiled by KH Abdul Aziz Masyhuri, are in Indonesian and uses Roman script for questions and answers instead. Here is an example of a NU central *fatawa* from 1960.

Question

Has a Muslim who can afford to pay the fare for the *hajj* (pilgrimage) but does not obtain a quota from government sinned? (Question from Temanggung [Central Java] NU Branch)

Answer

That Muslim has not sinned because he/she is considered not potential.

Reference:

Al-Mizan al-Kubra volume 1 page 29: *'The jurists (of four schools of law) are of the opinion that if a person obliged to perform hajj died before having had the chance to do so, his/her hajj obligation is dropped'.*

A few other bodies within NU also arrange their own *bahtsul masail*. Rabithah al-Ma'ahid al-Islamiyah (the Association of Islamic *Pesantrens*), for instance, arranges its *bahtsul masail* periodically at provincial and national levels (Masyhuri, interview at Jakarta 4 October 2003). Similarly, Jam'iyah Ahlith Thariqah al-Mu'tabarah al-Nahdliyah (the Association of Sufi Orders' Followers Affiliated to NU) arranges its *bahtsul masail*, but mainly discusses issues related to tariqah practices (Ujib, interview at Jember 23 September 2003). Although some argue that in discussing NU *tariqah* can be categorically differentiated from *pesantren* (van Bruinessen, 1994), the fact that many *tariqah* members are *pesantren* figures proves otherwise. Especially in the discussion of *bahtsul masail*, followers of Sufi orders tend to apply rigid employment of *kitab kuning* as many students of *pesantren* usually do (Fareed, 2001: 359, 361). It relates to the dominant patronage aspect between *murshid* (sufi master) and *murid* (follower) in *tariqah* institutions. This NU's autonomous body not only arranges its *bahtsul masail* periodically at provincial and national levels, but publishes its *bahtsul masail* recommendations as well. The title of the published compilation is *al-Fuyudat al-Rabbaniyyah* (Masyhuri, 1982)

Up to this point, the aforementioned *bahtsul masail* forums are the common *bahtsul masail* forums in NU in terms of the methodology used and the format of presentation. *Kitab kuning* is the reference and short presentation is used. While *kitab kuning* confirms rigid adherence of *taqlid*, short presentation is the adopted format of *fatwa* throughout the history of Islamic jurisprudence. As Hallaq (2001:169) points out, the short format of *fatwa* is employed to differentiate between *fatwa* and *tasnif* (writing jurisprudence). In addition, it is apparent that the role of conservative ulama and of *pesantren* and their students is instrumental in maintaining the tradition of *bahtsul masail*. Nonetheless, that is not yet all of available *bahtsul masail* forums in NU domain

nowadays. *Pesantren* personnel, both ulama and students alike, are forced to encounter a newly emerged genre of *bahtsul masail*.

3. New genres of *bahtsul masail*

There are at least three new kinds of *bahtsul masail* forums surfacing in the 1990s. Unsurprisingly, Masdar F Mas'udi, is now the secretary of the Syuriah Board of PBNU (1999-2004 period)²³, and is responsible in different degrees for their emergence. Among the consequences of this new discourse is the introduction of a new paradigm in viewing *fiqh* to *pesantren*. While in the aforementioned *bahtsul masail kitab kuning* texts determine the answer, this new genre of *bahtsul masail* place more emphasis on preserving *maslahah* (public welfare) and presenting communicative *fatwa*. For that purpose, four institutions called *al-Ma'had al-'Ali Qism al-Fiqh* or Lembaga Kader Ahli *Fiqh* (Institute for Training *Fiqh* Expert cadres) are founded in participating *pesantrens* as pilot projects. Among the successful projects is *al-ma'had al-'ali* of al-Salafiyah al-Syafi'iyah *Pesantren* in Sitobondo, East Java²⁴ (Saha, 2002:151).

In this *al-ma' had al-'ali*, three methodological adjustments of Islamic modernist persuasion are adopted; revitalisation of *usul al-fiqh*, diversification of *kitab kuning*, and the expansion of the domain of *ta'wil* (Allegorical interpretation to the text) (Tim Redaksi Tanwirul Afkar, 2000). Likewise, many modernist ulama, such as Masdar F. Mas'udi, Professor Sjaikhul Hadi Permono, and Professor Masjufuk Zuhdi, are regularly invited to give lectures on certain topics of Islamic law. As a consequence, while being aware of the unchallenged position of *kitab kuning* in NU, the students interpret and employ it to respond to contemporary issues in a very pragmatic manner. The compilation of discussion results of this *al-ma'had 'aly* students is published under the title *Fiqh Rakyat: Pertautan Fiqh dengan Kekuasaan* (Tim Redaksi Tanwirul Afkar, 2000) Before published, the weekly result of the discussion entitled *Tanwirul Afkar* is

²³ Masdar F. Mas'udi was a deputy secretary of PBNU's Syuriah board. President Megawati Soekarnoputri appointed the secretary of PBNU's Syuriah board, KH. Said Aqil al-Munawwar, as Minister of Religious Affairs in the middle of 2000 and Masdar F. Mas'udi took over his position.

²⁴ *Pesantren* Salafiyah Syafi'iyah is arguably the biggest and the most influential *pesantren* in the eastern part of East Java. After hosting the NU congress in 1984, its leader, the late KH As'ad Syamsul 'Arifin was the Chairman of PBNU's Syuriah board between 1984-1989.

printed and made available for public consumption. Although there are considerable similarities with conservative *pesantren* in term of the results, some controversial results are also evident. Among such controversial results are greater tolerance towards Christians and Jews, lenient attitudes towards music, and the further possibility of inter-religious marriage. Besides, unlike conventional *bahtsul masail* presentations, the presentation of *Tanwirul Afkar* is in an essay-like format with elaborate discussion. Comments and criticisms are launched against it, especially from conservative ulama and students of other *pesantrens*.

On the other development, starting in 1997 the NU central board launched a new kind of *bahtsul masail* after the 1992 decision failed to create significant impact. As mentioned earlier, this *bahtsul masail* forum is named *bahtsul masail al-diniyyah al-maudlu'iyah* (Saha, 2002:149). Unlike *bahtsul masail al-diniyyah al-waqi'iyah* which discusses particular actual legal cases, this *bahtsul masail* discusses modern issues, such as human rights, gender issues, democracy, and civil society. The material of this *bahtsul masail* is prepared beforehand by the Syuriyah secretary. The format of material is equivalent to an article or essay explaining certain aspects of modern concepts from an Islamic point of view. No *kitab kuning* citation is made. Primary sources (Quranic passages and Prophetic reports) are employed, instead. Since this *bahtsul masail* forum is conducted alongside *bahtsul masail waqi'iyah* in the NU national congress and the mid-term, virtually all participants of the congress are exposed. Many conservative ulama play down this *bahtsul masail* claiming that the Quranic passages and the Prophetic reports cited in *bahtsul masail al-diniyyah al-maudlu'iyah* originate from *kitab kuning* (Masyhuri, interview at Jombang 5 October 2003)²⁵. It means that no *ijtihad* is employed, and therefore conservative ulama tolerate it. A few, though, are persuaded and prepared to conduct similar forums in their locality (Rofiq, interview at 29 September 2003). After playing a crucial part in instigating the establishment of

²⁵ KH A. Aziz Masyhuri (interview at Jombang 5 October 2003) asserts that some jurist-authors of *kitab kuning* cited Quranic passages and Prophetic reports under the heading of chapter or sub-chapter of *kitab kuning*. They stated that those citations were the basis of legal reasoning before *ijma'* was reached. The NU ulama do not oppose this *bahtsul masail diniyyah maudu'iyah* because the cited passages are identical to what the writers of *kitab kuning* had mentioned.

bahtsul masail al-diniyyah al-maudu'iyah, Masdar F. Mas'udi, launches another type of *bahtsul masail* using P3M, in which he is the director. He calls it *Bahtsul masail Islam Emansipatoris*. He claims that this *bahtsul masail* forum deals with *al-hukm al-wad'i*, instead of *al-hukm al-taklifi*²⁶. Mas'udi (2003:4) asserts that *bahtsul masail* on *al-hukm al-taklifi* is the conventional and ongoing *bahtsul masail* forums, whereas *bahtsul masail al-hukm al-wad'i* is *siyasah shar'iyah*, emphasises creating governmental policies suitable to Islamic teaching of *al-'adalah* (justice) and *maslahah al-'ammah* (public benefit). Admittedly, *al-siyasah al-shar'iyah* is just another method of Islamic legal modernism²⁷. In practice, his *bahtsul masail* on *al-hukm al-wad'i* is a community empowerment project on certain topics. No *kitab kuning* whatsoever is ever referred in the project. In this project though, the disenfranchised people, ulama of the community, government officials, and experts on the discussed issues are invited. They sit together, discuss the concerned issue, and hopefully come out with a solution.

There have been three forums of this form of *bahtsul masail*, the first aimed to empower tobacco farmers in Jember East Java which was conducted in April 2003. The second session was to give solutions to migrant workers in Nusa Tenggara Barat province (July 2003). Lastly, there was a session to give a favorable solution for fishermen in Banyuwangi East Java (September 2003). The organisers always ask for cooperation from local NU branch in organising the project. At the end of the day, the presence of NU ulama at these occasions stimulates them to reassess their role in society. Mas'udi claims that the projects are successful especially to empower those disenfranchised. According to him (interview at Jakarta 8 October 2003), many ulama involved in the project are supportive and enthusiastic after seeing the positive outcomes. Since they are active in the NU structure and are leaders of *pesantrens*, their presence leads to further consequences. Nonetheless, some conservative ulama in East Java have decided not to allow Masdar F. Mas'udi to arrange similar forums in East Java

²⁶ *Al-hukm al-wad'i* is creating something as motive (*sabab*), requirement (*shart*) or prevention (*mani'*) for another thing, whereas *al-hukm al-taklifi* is the demand of God to mankind to do or leave something, or to choose between doing or leaving something (Sha'ban, 1979:218-20).

²⁷ In 1985, KH. Abdurrahman Wahid, another NU modernist has spoken about *al-siyasah al-shar'iyah* idea in his article entitled 'Pengembangan *Fiqh* yang Kontekstual' in *Pesantren*, 1985, 2(2):3-8.

anymore (Farihin, interview at Malang 4 October 2003). They see Masdar F. Mas'udi's approach as a threat to the *fiqh* establishment as a whole (Nashir, interview at Jombang 5 October 2003 and Farihin, interview at Malang 4 October 2003).

The above three *bahtsul masail* forums can be considered a new genre in the NU domain not only because of their methodology, but also because of their presentation. Indeed, a different methodology (*ijtihad*) necessitates different presentations (essay-like format). Above all, new methodology is in operation to achieve *maslahah* or public benefit since *kitab kuning* cannot always reflect *maslahah* (Mas'udi, interview at 8 October 2003 and Abdullah 24 September 2003). Moreover, there is a growing need to convey what has been discussed in NU domain to a wider audience in a more convincing and communicative manner both in content and in presentation (Wazir, 26 September 2003). Nowadays, not only are there NU members in the audience, but government agencies, legislators, academics, and the community as well²⁸. Nonetheless, these new activities are not conducted in a vacuum. Conventional *bahtsul masail*, in which *salaf pesantrens* and their ulama play a dominant role, is strongly intact. Moreover, East Java, in which some new genres of *bahtsul masail* are promoted, is the stronghold of *pesantren* and conservative ulama of NU. While a few ulama are persuaded, the majority of ulama are unmoved and rebuke fiercely.

B. *Bahtsul masail* of East Javanese NU District Level branches

East Java is the primary base of NU. Historically, it was traditionalist ulama, most of whom are East Javanese ulama who established NU in 1926 in Surabaya, the capital of East Java (PBNU, 1999:2). Demographically, more than fifteen million of the about thirty five million NU members are East Javanese (Kaptein, 2004:8). This is also reflected in the dominance of East Javanese ulama in Nahdatul Ulama's national office²⁹. Understandably, East Javanese ulama also dominate *bahtsul masail* forums in

²⁸ An excellent example for the urgency of reform is whenever the 2002 *fatwa* tolerating suicide bombing was not announced because of criticism from western countries representatives in Jakarta (Masyhuri, interview at 5 October 2003).

²⁹ See for example the NU organizational personnel of the 1999-2004 period in which East Javanese ulama hold key positions in executive board and many East Javanese ulama also sit on the consultative board.

NU. This last point is evidenced by the abundance of *pesantren* in East Java (Dhofier, 1982:35). Thus, this research further narrows the focus to *bahtsul masail* forums and *fatawa* of selected branches of NU. East Javanese *bahtsul masail* forums and their *fatawa* reveal the effect of the continuing debate on the issue of *ijtihad* vis-à-vis *taqlid*, *madhhab* vis-à-vis *talfiq* and *kitab kuning*. The description of *fatawa* used in this research reveals the debates. In addition, proceeding of a *bahtsul masail* forum is presented to illustrate the debates.

1. Describing East Javanese *bahtsul masail*

Some aspects of East Javanese *bahtsul masail* reveal the conservatism and the departure from it. In addition, formats of *fatwa* presentation, and their circulation and publication are described to demonstrate the spread of *fatawa* among NU members.

a. Conservatism and indication of changes

Three *fatawa* are provided to illustrate the persistence of conservatism (a *fatwa* from the Blitar District NU Branch), moderation in introducing changes (a *fatwa* from the Surabaya City NU Branch) and a modern approach in formulating *fatwa* (a *fatwa* from the Malang City NU Branch). The *fatwa* of the Blitar District NU Branch is the conventional version of *fatwa*, comparable to the *pesantren*'s. Virtually all districts use this version of *fatwa*. The question relates to whether Indonesians are allowed to establish an Islamic state. If the answer to the question is that Indonesians cannot establish an Islamic state, the *mustafti* asks the status of TNI (Tentara Nasional Indonesia or Indonesian National Armed Forces) soldiers fighting and killing Muslim rebels, considering the both parties (Indonesian soldiers and the rebels) are Muslims. The answer is that such action is not allowed because Indonesia has a legitimate *imam*. The text cited is al-Ramli's *Nihayah al-Muhtaj* Volume 7 page 402. The text is in Arabic without vowels. In response to the second question, the *fatwa* states that launching a military attack against rebels is allowed only if peaceful negotiation fails. Again, the subsequent pages of the aforementioned *Nihayah al-Muhtaj* are cited from page 405 to 406. What can be inferred from the Blitar *fatwa* is the conventional nature of the question and answer form as well as the cited reference. Questions and answers

are short, straightforward and unexplained. No analysis whatsoever is provided leading to the answer. A short explanation is presented. Sometimes this kind of *fatwa* is flawed. Critical readers will push forward the issue whether Indonesian president is a legitimate *imam* in a *fiqh* point of view and whether the position of the authority vis-à-vis rebels is always strong and unchallenged as the reference has indicated.

Similar in approach but rather unusual in terms of referencing is a *fatwa* from Surabaya. The question is about the status of suicide bombing, whether it is justified as a means of martyrdom. After establishing that the initial status of committing suicide is unlawful, the *fatwa* states that a suicide attack is allowed only if it is effective in confusing the enemy and creating chaos. However, if suicide attacks are harmful for Muslims, they are illegal. To support the answer, two references are presented. The first is Ibn Taymiyyah's *Majmu' al-Fatawa* Volume 3 page 554 and the second reference is al-Ghazali's *Ihya' 'Ulum al-Din*, Volume 2, page 315. The question and the answer are conventional, short and the answers are not explained. Still, the first reference is problematic. Ibn Taymiyyah is a Hanbalite Scholar. Citing his opinion means *talfiq*. More crucially, his works certainly are very unpopular among NU ulama, not only because of his *fiqh* opinions, but also because of some of his theological standpoints (Syahid, n.d). Put differently, *Majmu' al-Fatawa al-Kubra* is not considered *al-kitab al-mu'tabar*. They are not valid to be used in *fatwa* in NU circles.

Leaving the conventional *fatwa* format behind, Malang *fatawa* embrace additional features. In addition to an Indonesian translation for every citation, the *fatawa* present four citations and analyse them; one legal maxim, one Quran exegesis, one prophet tradition, and one citation of *kitab kuning*. The rationale behind using such presentation is so that NU members can participate and engage in the *bahtsul masail* discussion. It can be inferred that the Malang City NU branch has responded to the increasingly analytical NU members, who now demand more than just an answer without any sufficient explanation. Admittedly, the Malang City NU branch is very distinct in terms of its members and its *bahtsul masail* board. Its members are urban people with higher educational levels, whereas the board consists of *pesantren*

graduates, lecturers of the State Institute of Islamic Studies (STAIN), or the combination of both (Atho', interview at 4 October 2003).

This configuration of the *bahtsul masail* board of the Malang City NU Branch encourages the use of primary sources (Prophetic report or *hadith*) in the *fatwa*. While the last citation is the only citation from a *fiqh* book, the rest come from other sources. The first citation is a legal maxim based on a saying of the Prophet. According to the 1992 decision, the use of legal maxims is considered the last resort in issuing *fatwa* within NU circles. Likewise, the employment of Quran exegesis is unusual, although the cited material is not a Quran passage, but opinions of scholars on certain passages. The most striking referencing style is the third citation, when a Prophet hadith is cited directly from a hadith collection. This *fatwa* is an example how *qiyas*, which also means *ijtihad*, is exercised.

b. Language and format of presentation

Apart from the issue of methodology, intellectual flavour also reflects the way the *fatwa* is communicated. Firstly, the difference involves language and the script of *fatwa* presentation. While the Indonesian language is the lingua franca for the *fatawa*, Blitar *fatawa* form the only exception. The Blitar *fatwa* drafters provide bilingual versions of *fatwa* booklet. The first, which starts from the back cover just like Arabic books, is written in Arabic script but the language is Javanese. This type of writing is known as *Arab-Melayu* or *Arab-Pegon*. Those responsible for preserving this script are the traditional *pesantren*, the training ground of *bahtsul masail*s drafters (Dhofier, 1982:29-30). *Santris* use the script to translate the literal meanings of Arabic words into Javanese in the margins of their books. After giving the question and answer in Javanese employing *Arab-Pegon* script, the text's citation(s) is listed, including the name of the book, volume (if applicable), and page number. In addition to that version, a short Indonesian version of the *fatwa* is typed in Roman script starting from the front cover, just like Roman-script books. Question and answer are provided along with name of the book, volume and page of the cited material. No text of the citation is included for this

Indonesian version. While only Blitar drafters use Javanese, *Arab-Melayu* script is not the monopoly of Blitar *fatawa*. Two districts employ of *Arab-Melayu* or *Arab-Pegon*; Jember and Sidoarjo. Still, they write their *fatawa* in Indonesian language, instead of in Javanese.

The main aim of presenting *fatawa* in *Arab-Melayu* script is to communicate more effectively to the audience. The district of Blitar is quite remote, compared to other districts covered in this research. Consequently, the frequency and occurrence of Javanese language use is still widespread. Admittedly, unlike other districts, the *bahtsul masail* forum in the Blitar NU Branch is conducted in Javanese (research finding on 2003). The Malang and Sidoarjo NU Branches have other methods for communicating with their stakeholders. The citation of *al-kutub al-mu'tabarah* used as the basis of formulating recommendations is translated into the language of NU members. Firstly, the Arabic text is written with full vowels. The *pesantren*-like translation, using Arabic script to translate word-per-word of the text into Javanese (*Arab-Melayu* or *Pegon*), is written in smaller size diagonally underneath that Arabic text (*Tarjamah Jenggot* or 'beard translation'). Using *Arab-Melayu* script, the text then is translated into Indonesian, and finally the same translation is written in Romanised script. Likewise, questions and answers are also drafted in two versions of Indonesian. The first version is in *Arab-Melayu* script, and followed by its draft in Romanised script. In a more humble way, like Malang City NU Branch provides the cited text with Indonesian translation written in Romanised script.

Before leaving this section, there is another feature of contemporary *fatwa* to be explained. This feature is termed *deskripsi masalah* or description of the query. Initially, this feature is to assist the drafters of *fatwa* so that they will be able to respond to the query with full comprehension. While in the past this issue was explained verbally during *bahtsul masail* session by the inquirer (*mustafti*), now the explanation is presented alongside the recommendation. Judged from the motive, *fatawa* with such features must deal with contemporary problems, which *kitab kuning* has not mentioned yet, or practices of certain regions not found in other places. Alternatively, the query needs clarification from certain experts, such as economists or medical doctors. As

reported by Sa'dullah (2002:131-2), there was a time when some *fatwa* drafters misunderstood what is meant by transsexual surgery. Predictably, the *fatwa* draft was totally misguided. After quite some time, this feature is cited in every NU *fatwa*, for simple questions and technical questions alike. Below is a *fatwa* from Kediri District NU Branch on caesarian surgery.

Deskripsi masalah

It is increasingly commonplace among women to avoid delivering babies naturally. Instead, they undergo caesarian section to avoid pain and maintain beauty.

Question

What is the status of undergoing caesarian section when it is not an emergency situation?

Answer

Caesarian section is allowed because its risk is milder than delivering babies.

References (*Mughni al-Muhtaj*, *Fath al-Mu'in*, *I'anah al-Talibin*, *Hashiyah al-Sharwani*, and *Hashiyah al-Bajuri*)

In this regard, *deskripsi masalah* is crucial for the *fatwa* drafters and the comprehensiveness of the recommendation. Thus, making the aforementioned *fatwa* as an example, initially the *fatwa* should deal with the motive of undergoing caesarian. Justification from *kitab kuning* for this account is a must. Once a *fatwa* is drafted, it is printed and circulated to be read and understood by a wider audience, not merely by the *mustafti*. Thus, the inclusion of *deskripsi masalah* in the *fatwa* is highly justified. In its development, Mas'udi (interview at Jakarta 8 October 2003) realises the strategic role of the *deskripsi masalah* to swaying the discussion to the desired outcome.

c. Circulation and publication

The circulation of *fatawa* at district levels depends on the activity and frequency of the *bahtsul masail* forum. Some districts organise the *bahtsul masail* forum frequently, whereas others do not. The Lajnah *Bahtsul masail* or the *Bahtsul masail* Committee of Pasuruan conducts the forum monthly based on the Islamic lunar calendar (Izzuddin, interview at 25 September 2003), whereas the Malang (Atho', interview at Malang 4 October 2003) and the Jember (Fahmi, Interview at Jember 24 September 2003) committees of *bahtsul masail* arrange the forum every month based on the

Christian calendar. The *Bahtsul masail* Committee of Blitar (Tamyiz, interview at Blitar 20 September 2003) NU Branch arranges *bahtsul masail* every thirty-five day (based on *pasaran* day cycle on every Sabtu *wage*)³⁰. Sidoarjo arranges it every two month (Fadhil, interview at 3 October 2003). The *bahtsul masail* Committee of Mojokerto, Gresik (Rofiq, interview at Gresik 29 September 2003) and Surabaya (Sa'dullah, interview at 3 September 2003) branch of NU conducts *bahtsul masail* forum twice a year. The most observed frequency of *bahtsul masail* forum in East Java is three-month basis, such as Kencong (Khoiruzzad, interview at Jember 23 September 2003), Nganjuk (Murtadho, interview at Nganjuk 19 September 2003), Jombang (Wazir, interview at Jombang 29 September 2003),

Factors affecting the different frequencies of *bahtsul masail* forum in those districts are numerous. One factor is the availability of legal queries. In some branches, such as Jombang, queries to the NU branch are infrequent (Wazir, interview at 29 September 2003). Many *mustaftis* ask their question to individual kiai (of NU background) whom they trust. The *kiai* usually respond to the question, either at once or after quite some time. This kind of *fatwa* is not well documented. Only after the *kiai* fails to provide an answer will he consult an NU branch. As a result, the Jombang NU Branch regards conducting *bahtsul masail* forum every three months as sufficient. Likewise, for those who subscribe to the monthly bulletin *Aula* of East Java office of NU or newspapers affiliated to NU (*Duta Masyarakat*), there are special sections under the title of *Tanya-Jawab* allocated to respond to *bahtsul masail*-type questions. Moreover, in big cities like Jember, radio-talk, which Muslims can consult on-air or via mail, is also an option (Abdullah, interview at 24 September 2003). These alternative channels are fast, easy, and equally credible. The hosts of the alternative venues often are NU kiai with high credentials, including KH MA. Sahal Mahfudz, the chairperson of national syuriyah board, and KHA. Masduqi Mahfudh, the chairperson of East Java office Syuriyah board³¹.

³⁰ A Javanese calendar revolving in thirty-five day cycles.

³¹ KH MA Sahal Mahfudz is the host of newspaper *bahsul masail* in *Duta Masyarakat* daily. See its online edition at www.dutamasyarakat.com. KH A Masduqi Mahfudz is the host of monthly *Aula* magazine.

In contrast to some branches which lack legal queries, other branches like Malang and Blitar receive many queries forcing the *bahtsul masail* committee in those branches to arrange *bahtsul masail* forums on more regular bases. The example from Blitar branch will make clear the reason for having the forum every thirty-five day. One of the agenda items of the Blitar branch of NU is a *pengajian umum* or communal religious gathering every Sunday *wage* (one *pasaran* day). On that occasion, the audience poses queries about religious problems they are facing. At the same time, the *bahtsul masail* committee announces the answers of the queries asked by the audience at the previous meeting (Tamyiz, interview at 20 September 2003). As a result, the queries are abundant, and the committee only has less than thirty-five days to prepare the answers. Consequently, the committee has to arrange *bahtsul masail* forums on a monthly basis.

Despite the availability and absence of legal queries, another factor influencing the frequency of *bahtsul masail* forums is the performance of the *Bahtsul masail* Committee (Lajnah Bahdul Masail). As mentioned beforehand, the *Bahtsul masail* Committee is responsible for collecting, discussing, and solving legal queries. Indeed, the responsibility of the Committee is not only to discuss legal queries, but also to organise the event. The committee has to organise the date, place, administration works and meal. In districts where the Committee is active and energetic, *bahtsul masail* forums tend to be more frequent. An example of this kind of committee is the Jember Committee, which occasionally conducts *bahtsul masail* forums as frequently as twice in a month (Fahmi, interview at 24 September 2003). Both the chairperson and the members of the committee are committed to their responsibility to solve the incoming queries. In other branches, such as Sidoarjo, the tendency is to pile up the incoming queries. It is after the queries become sufficiently numerous that the Committee conducts a forum (Fadhil, interview at 3 October 2003). Excuses for this are manifold. Among other things is the accessibility of the board members. In many districts some *kiais* are busy teaching in their *pesantren* or performing other duties. Above all, conducting *bahtsul masail* forums is a big occasion for the host, especially if the *bahtsul masail* is a one-level forum. That is when the *bahtsul masail* recommendations of the

forum are formulated in the one single forum. On such occasions, not only are the members of *Bahtsul masail* Committee present, but respectable *kiaïs* of the districts are invited as well.

After the forum, the recommendations are circulated among the NU members of the district. The method of publication and circulation differs from one district to another. For districts with regular *pengajian umum*, such as the Blitar District NU Branch, it is a very effective means of communicating the *fatawa*. The same can be said of the Malang City NU Branch, whose committee members act as regular *ustadh* (Islamic teachers or consultants) of *majlis ta'lim* (religious study) in many small *mushallās* (prayer houses) (Atho', interview at 4 October 2003). Rather different in method but similar in effectiveness is the Jember District NU Branch where some members of its *Bahtsul masail* Committee host regular on-air religious consultation (Abdullah, interview at 24 September 2003). These NU branches publish the *fatawa* of every forum once they are finalised. The finalisation of a *fatwa* recommendation is whenever it has been sent to the consultative board of NU (*Syuriyah*) for ratification (Tamyiz, interview at 20 September 2003 and Fahmi, interview 24 September 2003). The publication is in the form of a booklet, between 8 and 14 pages long. The booklet by the Blitar City NU Branch is named *Jawaban Masail* in the Javanese *Arab-Melayu* version or *Tanya Jawab Masalah-Masalah Agama Islam* (Questions and answer of Islamic problems) in its Indonesian version. Similarly, the Malang City NU Branch names its booklet the *Hasil Keputusan Bahtsul masail*. Likewise, the Pasuruan District NU Branch labels the booklet *Pasuruan bertanya, NU Menjawab* (Pasuruan asks, NU responds). The branches ask for payment, usually one thousand rupiah per-booklet, to cover printing costs.

Some districts do not have regular gatherings, but this does not necessarily mean ineffectiveness of circulation, though. The district office of every branch circulates *fatawa* by sending them to the participants of the *bahtsul masail* forum (Munaseh, interview at 31 August 2003). They are sub-district branches of NU (Majlis Wakil Cabang), some *kiaïs*, and some *pesantrens*. Usually, the sub-district or the village levels of NU (*ranting*) have their own *pengajian*, which among other things announces the

fatawa. However, since administration is considered a key weakness of NU as an organisation, document and archives of *fatawa* and other activities are often lost. On many occasions, those keeping the *fatwa* archives are not those in charge of the Committee, but individual members dedicated to filing *fatawa* for personal purposes.

For this reason, and for fundraising purposes, almost all branches of NU intend to publish their accumulated *fatawa*. Usually, but not always, the publication covers a five-year period, coinciding with the end of office term of the NU administration (Tamyiz, interview at Blitar 20 September 2003 and Murtadho, interview at Nganjuk 19 September 2003). Blitar Branch, for instance, has published three volumes of compilations and is preparing for the fourth volume. The Arabic title of this compilation is *Tawdih al-Muhimmah: fi al-Masa'il al-Diniyyah al-Nahdiyyah Shuriyah Nahdah al-'Ulama' far' Blitar* (The explanation of the Urgent on the Religious issues in Nahdlatul Ulama of Blitar Branch) In its third volume of eighty pages published in 1995, one hundred *fatawa* are reproduced. Likewise, the Sidoarjo NU Branch published its *fatwa* compilation in 1997 and it contained forty-four *fatawa*. Its publication is entitled *al-Masail al-Diniyyah: Beberapa Masalah Agama Hasil Bahtsul Masail Syuriyah NU Cabang Sidoarjo* (The Religious Issues: Some Religious of *Bahtsul Masail* Produced by Syuriyah Board of NU Sidoarjo Branch). Nonetheless, not many branches of NU succeeded in publishing their accumulated *fatawa* because of financial shortcomings or the unavailability of old archives. The Mojokerto District NU branch never publishes *fatwa* compilations because many of its old *fatwa* archives have gone missing (interview at Mojokerto 10 September 2003). On the other hand, the Jombang District NU Branch declines to publish another compilation of *fatawa* since the earlier publication, which was entitled *Kumpulan Fatwa Ulama Jombang*, unexpectedly did not sell (Munaseh, interview at 31 August 2003).

2. Proceedings of *bahtsul masail*

In this part, the proceedings of a *bahtsul masail* forum are presented. Firstly, the personnel of a *bahtsul masail* forum are introduced along with their rights and responsibilities. The procedures of the forum are also illustrated. Later, the minutes of a *bahtsul masail* forum are presented from a forum in Jombang District NU Branch.

a. Personnel

The personnel involved in *bahtsul masail* fall into three groups. The first group is *al-mushawirun*, or participants of discussion. They, as individuals, are the ones who offer, support or dispute the tentative answer(s) for the posed question. The *mushawirun* are delegates of sub-districts, students of some *pesantrens* in that district, and *kia'is*. The second party is the discussion leader and secretary, whose responsibility is to manage the traffic of discussion and to record answers and references. Customarily, they do not have the right to voice out their opinions. Usually, the leader of the discussion and the secretary are members of the *Bahtsul masail* Committee of that district. The third party comprises the drafting board, and its task is to supervise the discussion, interrupt when necessary, and later draft tentative answers to be official *fatwa*. The people in this position are respected *kia'is* of the Syuriah Board (research finding, October 2003).

In many districts, all three groups are present during a session of the *bahtsul masail* forum. The session starts when the discussion leader presents the question. If that question is unclear, the forum clarifies it. Clarifying the question is an important aspect in a *bahtsul masail* forum. As Mas'udi (interview at Jakarta 8 September 2003) says, understanding the nature of the question is halfway to finding a solution. In some cases, an expert in a particular field is invited to do just that: A medical doctor explains a question relating to medicine, or an economist articulates how a contract works (Murtadho, interview at 19 September 2003). After the question is understood by the *mushawirun*, then they can respond to it with answers and the cited reference(s). Every participant wishing to offer his opinion introduces himself. Certainly, well-known *kia'is* are not required to introduce themselves. Participants whose answers are similar are invited to present their answers along with references. This is why a *fatwa* can contain more than one reference. Every reference is photocopied for ease of reference, and the opinion and copied document is then handed over to the Secretary. Later, participants with differing or opposing views present answers along with references (Munaseh, interview at 31 August 2003). A debate occurs with participants defending and challenging opinions. All participants, whether they contribute an answer or not, are

welcome to participate in the debate. Inaccurate answers are evident, and the accurate answer will be apparent. An answer can be agreed afterwards, but sometimes the different views persist.

As suggested by the hierarchy of decision making in *bahtsul masail* within NU, this is likely to arise from the degree of conformity between the proposed answer and cited reference(s). A clear match between text and answer is regarded as being the most valid answer, regardless of the prescription. In some cases, the insistence and eloquence of a participant is capable of swaying the outcome, even if dubious text is cited. Here, the role of the drafting board is crucial. Although the board cannot force the forum to accept its personal opinion, the board has the right to interrupt the discussion. Later, when the board believes that the forum has reached tentative answer(s) or has led to an inconclusive result, the board calls off the session of the question and urges the discussion leader to begin discussing the next question. Since every *bahtsul masail* forum is based on *mushawarah* (consultation), the tendency to sway the discussion into *mauquf* (inconclusive) discussion when agreement is not reached is understandable. However, in an urgent situation where the *bahtsul masail* forum needs to produce an answer, the discussion leader will recommend an answer (Munaseh, interview at 31 August 2003). If this occurs, the answer will not satisfy all of the participants. And as a result, some participants do not feel obliged to adopt the decision.

After the session, the discussion leader consults the drafting board to formulate the final draft of the *fatwa*. This can occur at the time of the meeting or at a later date. In some districts, though, the drafting board often does not attend the initial forum. In such situations, there are two-stage processes in *bahtsul masail*. Only participants of the discussion and the leader of discussion (the *Bahtsul masail* Committee) attend the first stage. The second is a kind of report of the Committee to the drafting board about the *bahtsul masail* session conducted previously. In this second stage, the committee presents the draft of the *bahtsul masail* outcome to the board. The nature of the outcome is tentative. The board has the right to fully review the outcome and the presentation. The board might wholly or partially agree with the outcome. The board

also has the right to reverse the draft decision altogether. Blitar is one district which has a two-stage *bahtsul masail* process.

b. Minutes

At the 5 October 2003, a one-stage *bahtsul masail* forum was conducted by the Jombang District NU Branch as part of its three-monthly forum (research finding 2003). The session was officially opened by *Rais Syuriyah* (The chairman of the consultative board) of the NU Jombang Branch. After his opening, he delegated the position of leading the discussion to the chairman of the *Dewan Perumus* (the Drafting Board). To his left was a secretary whose duties included listing opinions posed by the participants of *bahtsul masail* and asking the participant to cite the references employed. Everyone was seated in a circle on the floor. To the right are piles of reference books of *al-kutub al-mu'tabarah*, such as al-Nawawi's *al-Majmu' Sharh al-Muhadhdhab* and Sayyid Bakri's *I'annah al-Talibin*. To the left and at opposite sides were the remaining participants. They were members of the Syuriyah board, members of the *Bahtsul masail* Committee, delegates from NU's sub-district branches in Jombang, ulama of some leading *pesantrens*, and students representing those *pesantrens*.

In the *bahtsul masail* forum of Jombang, four questions were ready to be discussed. Only two were discussed and solved, the other two were put off due to time limitations. As often happens, the forum which was scheduled to begin at 9am was delayed until 10.30am, and the forum ended at 1pm. The first question concerned the status of a *sende* contract, a contract enabling the seller to re-purchase the merchandise (usually farmland) from the buyer after a period of time. An initial debate occurred when some participants asked for clarification about the *sende* contract. Apparently, there can be many variations. One version relates to whether the agreement to re-purchase the merchandise occurs within the contract, whereas another refers to whenever the agreement is reached before the contract takes place. Another variation concerns the interval between the date of the sale and re-purchase. The difference in definition creates different responses in the participants. Some participants maintain that it is a *bai'* (trade) contract, whereas others argue that is an *ijarah* (leasing) or *rahn* (pawning) contract. In such situations, the referee tends not to be the discussion leader,

but the mustafti. Unfortunately, that person is not present. At a result, the debates surrounding definitions last at least thirty minutes until the discussion leader intervened: *sende* contract is whenever the agreement to re-purchase the merchandise is not clearly mentioned in the contract.

The discussion continued as participants began to suggest answers. Three answers were recorded. The first answer was that such contract was legal because the agreement to re-purchase the merchandise was mentioned beforehand. Otherwise, it would have been a forbidden usurious contract. The references are al-Ba'alawi's *Bughyah al-Mushtarshidin* and al-Saqqaf's *Tarshih al-Mustafidin*. The second answer was that such a contract was illegal because it was a *dhari'ah* (medium or means) facilitating the practice of *riba* (usury). It was known that the buyer always asked a much higher price. Indeed, people chose the contract simply to avoid involvement in *riba*. In practice, the sellers are always poor farmers, and the buyers happen to be rich farmers. Therefore, by considering the social and ethical aspects, prohibiting such a contract is necessary to maintain justice. The reference was al-Zuhaili's *al-Fiqh al-Islami wa 'Adillatuhu*. The third opinion was *makruh* (repugnant) based on a maxim that “*if a contract was void whenever a condition is pronounced, concealing such a condition is not recommended*”. In the *sende* case, pronouncing the condition that the seller may re-purchase the merchandise in the future would make the contract void, therefore, concealing that condition made the contract *makruh* (repugnant). The reference used was *I'annah al-Talibin*.

The debate surrounding this question was very vigorous. The forum inclined to the first answer. The strength of the first answer lay in the clarity of its references. They correspond to the *sende* contract in every aspect. A citation from *Tarshih al-Mustafidin* states that the very contract is valid. In contrast, the second answer suffered from severe criticism. The first objection was whenever some participants disputed the employment of a relatively new book; *al-Fiqh al-Islami wa Adillatuhu*. Although, this book is warmly accepted in wider circles within NU, it was not welcomed by some participants of the *bahtsul masail* forum in the NU Jombang Branch. Further objections concerned the use of 'non-*fiqh*' considerations in *bahtsul masail*. When a participant

argued that a *sende* contract is socially and ethically unacceptable simply because it leads to usury, the discussion leader promptly dismissed that participant's opinion. As the discussion leader believed, if social and ethical aspects were to be preferred over the stipulation of jurisprudence text in formulating *bahtsul masail's* recommendations, the *fiqh* establishment would eventually collapse. Finally, the third answer was problematic for two aspects. A legal status in contract and related matters should either be valid or invalid. Otherwise, recommendations would be ambiguous and ineffective. Furthermore, there were at least two weaknesses in the reference. The reference was a maxim without a clear statement corresponding to a *sende* contract. In such a situation, the reference with a clear illustration, such as the first answer, tends to be preferred. Based on the debate, the *bahtsul masail* forum concluded the validity of the *sende* contract based on the first answer. In addition, as some participants pointed out, this answer corresponded to the recommendation of the second *muktamar* of NU in 1927 on this very contract (Masyhuri, 1997:22). The reference used (*Tarshih al-Mustafidin*) was also identical.

After completing the discussion on the first question, the forum continued to discuss the second question. The question was on the status of a teacher drawing or sculpting for educational purposes. The question was based on a saying of the Prophet; '*the severest punishment in hereafter is for the painter or sculptor*'³². The answer gave the permission to draw, but not to sculpt for educational as well as medical purposes. Some remarks on the debate were significant. A participant suggested examining the

³² There are some similar hadiths on the issue such as the following two reports from al-Bukhari's *hadith* collection (*al-Jami' al-Sahih*): Narrated Said bin Abu Al-Hasan: While I was with Ibn 'Abbas a man came and said, "O *father* of 'Abbas! My sustenance is from my manual profession and I make these pictures." Ibn 'Abbas said, "I will tell you only what I heard from Allah's Apostle . I heard him saying, 'Whoever makes a picture will be punished by Allah till he puts life in it, and he will never be able to put life in it.' " Hearing this, that man heaved a sigh and his face turned pale. Ibn 'Abbas said to him, "What a pity! If you insist on making pictures I advise you to make pictures of trees and any other unanimated objects." *Volume 3, Book 34, Number 428.*

Narrated Ibn Abbas: The Prophet said, "Whoever claims to have seen a dream which he did not see, will be ordered to make a knot between two barley grains which he will not be able to do; and if somebody listens to the talk of some people who do not like him (to listen) or they run away from him, then molten lead will be poured into his ears on the Day of Resurrection; and whoever makes a picture, will be punished on the Day of Resurrection and will be ordered to put a soul in that picture, which he will not be able to do." *Volume 9, Book 87, Number 165.*

quality of the hadith before further discussion occurred, but no support was gained. In fact, another participant declined the idea of reexamining the *hadith* arguing that its frequent inclusion in many *hadith* collections indicates the soundness of that hadith (the concept of *tawatur*). Furthermore, examining hadith is the responsibility of a *mujtahid*. Another significant remark was when a participant disputed the use of a non-Shafi'ite opinion cited from a comparative book, al-Jaziri's *al-Fiqh 'ala al-Madhahib al-Arba'ah*. The text stated that for educational and medical purposes, both painting and sculpting are tolerated because of *darurah* (emergency) situation. Again, this book is widely used in *bahtsul masail* in the wider circles of NU, but not so in Jombang. Similarly, a relatively new book on *fiqh*, al-Sharbashi's *Yas'alunaka fi al-Din wa al-Hayah*, was rejected. As a result, the final agreed answer was strictly based on the classic texts of the Shafi'ite *madhhab*.

The forum concluded after discussing the second question. The secretary collected all necessary references from the participants. In the subsequent week or so, the drafting board and the *bahtsul masail* committee met in an internal forum to formulate the final draft of the *bahtsul masail* recommendations. Since members of the drafting board were present, the answers were not changed. The main purpose of this meeting was to formulate word-for-word the questions and answers. Secondly, the meeting selected and verified references used in the final draft from the many references put forward by participants during the *bahtsul masail* forum. Two to four references are ideal for a *bahtsul masail* recommendation. Whenever the final draft is formulated, copies are sent to all NU sub-branches in Jombang, to all major *pesantrens*, and to some individual *kiais*, and are also put in archives in the NU office.

Conclusion

Having discussed the types of *bahtsul masail* and their practice in East Java, it can be concluded that conservatism, in terms of the adherence to *madhhab* and dependence on jurisprudence, is widely held among NU ulama. Traditional *pesantrens* are at the forefront of this effort. Still, innovations, in terms of *talfiq* and *ijtihad* are also recorded to accommodate popular practice, albeit sparingly. Certainly, popular practice is not necessarily indication of *maslahah*. It is an indication that changes introduced by

the NU Central Board are not easily welcomed. The ulama in local NU branches have their own means of accepting and rejecting the change. They interpret new types of *bahtsul masail* differently compared to the intention of the NU Central Board. *Fatawa* of some East Javanese NU districts in the subsequent chapter confirm this conclusion.

Chapter III

50 Local *Fatawa* in East Java

Fifty *fatawa* are discussed in this chapter. They are issued by NU local branches in East Java. The topics covered are wide-ranging, from religious duties, such as performing ritual purification using polluted water, to politics, such as the legality of establishing an Islamic state in Indonesia. The first part of the chapter discusses the origin and classification *fatwa* as well as the analysis of each *fatwa*. The second part evaluates those *fatawa* by tracing indications of *maslahah*, coupled with their method and reference as well as the nature of the interplay between *fatawa* produced by NU local branches and those produced by the NU upper level offices. The chapter concludes by overall assessment on aforementioned issues.

A. Discussion of the *fatawa*

The *fatawa* originated from eleven NU local branches in East Java province. Each branch contributes at least one *fatwa*, eg. Blitar, with Kencong being the biggest contributor with eight legal cases. All *fatawa* are recently produced. In analysing the *fatwa*, methodology and referencing styles are analysed. In so doing, degrees of conservatism, which is indicated by employment of *kitab kuning* and adherence of *madhhab*, as well as modernism, which is signaled by practicing *talfiq* and *ijtihad* are revealed to determine the outcome. That is whether conservatism will only produce impractical and inequitable *fatwa*, whether modernism will always bring about practicable and equitable *fatwa*. In addition, the attitude of the local *fatawa* towards the central board's *fatawa* is also highlighted whenever applicable³³. The *fatawa* are discussed based on their category; individual and religious duties, contracts and social relations, marriage and women's issues, politics and non-Muslims issues, and offences against religion³⁴.

³³ More than half of the discussed *fatwa* had precedent, either from *fatawa* of the NU Central Board or from *fatawa* of the East Javanese NU Branch.

³⁴ This category is a modified version of category used in the jurisprudence texts. Al-Malibari's *Fath al-Mu'in*, for instance, begin by discussing *'ibadat* or rituals and worships (ritual purification, prayers, alms giving, fasting, pilgrimage). It is followed by a chapter on *mu'amalat* or social relations (such as trading

Table 2: *Fatwa* percentages by category and topic

No	Category	Number	%	Topic	Number	%
1	Individual and Religious Duties	22	44 (out of 50)	Ritual purification	4	8
				<i>Salah</i>	5	10
				<i>Zakah</i>	9	18
				<i>Qurban</i>	2	4
				<i>Waqf</i>	2	4
2	Contracts and social relations	6	12	<i>Riba</i> related cases (usury)	4	8
				Other contracts	2	2
3	Marriage, inheritance and women issues	6	12	Marriage and women issues	5	10
				Inheritance	1	2
4	Politics and non-Muslims issues	9	18	Political and corruption issues	6	12
				Non-Muslims issues	3	6
5	Offences against religion	7	14	Music and visual art	6	12
				Gambling	1	2

It is evident from Table 2 that individual and religious duties, such as *salah* (prayer) and *zakah* (alms giving), are the main concern of East Javanese Muslims, and of all Muslims for that matter. Issues surrounding contracts and marriages are also relatively numerous. Modern contracts and socio-economic interactions are certainly plentiful. Issues on marriage remain up to date because it is arguably the only Islam institution practiced. Issues of politics and offences of religion can also be considered responses to ongoing practices in Indonesia.

Table 3: *Fatawa* issued by location, date and number

and investment), then *munakahat* or marriage issues (such as marriage, divorce and inheritance), *jinayat* or criminal law (such as adultery and homicide), and *qada'* or court procedures (such as judge and witness qualifications).

No	Branch	Date of <i>fatwa</i> issuance	Number of <i>fatwa</i>
1	Surabaya	June 2002	7 <i>fatawa</i>
2	Gresik (Northwest of Surabaya)	October 2002	6
3	Pasuruan (East of Surabaya)	June 2003	3
4	Sidoarjo (of Surabaya)	April 2002	2
5	Jombang (West of Surabaya)	October 2003	2
6	Nganjuk (West of Surabaya)	March 2003	4
7	Kediri (Southwest of Surabaya)	March and June 2003	7
8	Malang (Southeast of Surabaya)	June and July 2003	6
9	Blitar (Southwest of Surabaya)	August and Sept 2003	1
10	Jember (West of Surabaya)	August 2003	4
11	Kencong (East of Surabaya)	June 2003	8

Given the fact that research was conducted between August and October 2003, the available *fatawa* are the most recent ones. In addition, Table 3 also indicates the different timetables of East Javanese NU district branches in conducting *bahtsul masail* forums.

1. Individual and religious duties

This category includes the five Pillars of Islam. They are *shahadah* (confession of faith), *salah* (prayer), *zakah* (alms giving), *saum* (fasting) and *hajj* (pilgrimage). In addition, *taharah* (ritual purity) which is required for *salah* and some rituals of *hajj* is considered in this category. In practice, only *taharah*, *salah*, *zakah* and *qurban* are available. Likewise, *waqf* (religious endowment) is discussed in this category because of its devotional aspect, rather than because of its social aspect.

a. *Taharah*

There are four *fatawa* on this topic, all from the Malang City NU Branch (Pengurus Cabang Nahdlatul Ulama Kota Malang, 2003). Three *fatawa* deal with ritual purification using altered water from three different causes; boiling, chlorine, and waste. Since the questions concern many Muslims, the *fatawa* adopt mild positions. On the question of boiled water, the *fatwa* relies on a text from *Fath al-Wahhab* which states that boiled water which is cooled is valid for purification. Nonetheless, it also cites some references of no importance; *Ihya' 'ulum al-Din* which reports the Prophet saying that Muslims should perform *wudu'* (minor ablution) at their best and *Bushr al-Karim* which states that using boiling water for purification is repugnant. The question of the chemical interaction between polluted water and chlorine is a delicate one. Chlorine is a

chemical substance used in water refining, and its smell occasionally persists after the refinement process. Instead of dealing vigorously with this chemical process, the *fatwa* abruptly states that the chemical alteration is minor and therefore the water is tolerated for purification. A citation of *Bughyah al-Mustarshidin* is clear on that. In addition, two more texts, *Fath al-Mu'in* and al-Bajuri's *Hashiyah*, are cited to explain the unchanging nature of water after such an interaction. In so doing, the *fatwa* agrees with a 1989 *fatwa* of the NU Central Board (Masyhuri, 1997:354), but deviates from a formulation of a 1983 *fatwa* by the East Java NU Provincial Office (Asmuni, 2002:97-8)³⁵.

The third *fatwa* discusses the status of river water polluted by domestic waste. Here, instead of discussing the nature of the polluted water, the *fatwa* emphasises the quantity of water. Citing *Kashifah al-Saja*, the *fatwa* doubts whether big rivers can be polluted. Moreover, by citing *al-Muhadhdhab*, the *fatwa* suggests that water of small-streamed rivers remains clean if there is no direct contact with *najis* (defiled) substances. Indeed, the *fatwa* denies the severity of river pollution in Indonesia, especially in big cities. If people were not so highly dependent on rivers, the *fatwa* would result in a different outcome. Looking after the people's need of water, which means *maslahah*, is the motive of that decision.

The fourth *fatwa* covers the unlawfulness of deliberately polluting rivers (PCNU Kota Malang, 2003). This is in accordance with a 1994 *fatwa* of the NU Central Board on the unlawfulness of polluting environment (Masyhuri, 1997:401-4). Nonetheless, the method used by the Malang *fatwa* to arrive at such an answer is worth noting. A legal maxim from *al-Mawahib al-Saniyyah* and a prophetic *hadith* from the Ibn Hanbal collection suggests the exercise of *ijtihad*, whereas a Quranic exegesis of al-Qutubi's *al-Jami' li Ahkam al-Qur'an* and one text of *kitab kuning* of *Kifayah al-Ahyar* are *taqlid*-based referencing. Excepting the legal maxim which states the unlawfulness of inflicting injury to oneself and others, the remaining references prohibit polluting rivers in one way or another. Nonetheless, the *fatwa* does not elaborate further about the punishment for the polluters. The *fatwa* drafters accept that it is up to the temporal

³⁵ The 1989 *fatwa* of the NU Central Board suggests that chemically processed water is usable for purification because the alteration is minor, whereas the *fatwa* of the East Java NU Office argued that the

authority to decide as part of *ta'zir* (discretionary punishment) because it is a violation not specified by primary sources (Dien, 2000:406).

b. *Salah*

Five *fatawa* on *salah* begin with the question on the position of women in *jama'ah* (collective) prayers (PCNU Gresik, 2002). It has been accepted among NU ulama that the female congregation is placed alongside the male with a cloth or wall separating them, whereas a Prophet's prescription indicates having them in the back rows of the congregation. Attempting to preserve the practice, this Kencong *fatwa* infers a text of *al-Majmu' Sharh al-Muhadhdhab* saying that the recommended position of women in collective prayer is in the back row as long as there is no barrier between them and their male counterparts. This is an interesting *fatwa* showing how NU ulama accommodate local custom which placing women in a relatively equal position with men (Woodcroft-Lee, 1983:175).

The second *fatwa* on *salah* concerns offering *salah* on an aeroplane (PCNU Gresik, 2002). This Gresik *fatwa* assumes that there is not sufficient water or dust to perform purification (*wudu'* or *tayammum*) and no spacious spot to offer a *salah* in the plane. Still, the passengers have to offer *salah li hurmah al-waqt* (marking time prayer) instead. A newly written text about offering *salah* on a plane, *al-Risalah al-Muhtasarah*³⁶, is cited. It is interesting to note that the *fatwa* drafters do not wish to use some other *madhhabs* which validate *salah* without purification in some instances. Practicing *talfiq* indeed is easier for Muslims. Perhaps a *fatwa* of the NU Central Board issued in 1989 invalidating *salah* without purification is the reason behind this insistence (Masyhuri, 1997:335-7). Still about *salah* during a unusual situation, a *fatwa* from Gresik explaining that full-time drivers and tollgate tellers are allowed to combine *salah* (*jam' al-salah*), because, as a text from *Kashifah al-Saja* suggests, combining *salahs* is allowed in any situation (PCNU Gresik, 2002). Still, based on al-Bajuri's *Hashiyah*, only drivers, who are in transit, are allowed to shorten their *salah*

usability of chemically processed water depends on mildness and severity of alteration.

³⁶ The title in length is *al-Risalah al-Muhtasarah fi Mas'alah Salah fi al-Tayyarah* (trans. 'the short treatise discussing the issue of offering prayer in an aeroplane) by Shaykh Ahmad Zaki al-Yamani.

(*qasr*). Nonetheless, considering the abundance of mosques and prayer houses along the Indonesian highways, such leniency should be reconsidered. Although the *fatwa* offers ease for Muslims, it spoils Indonesian Muslims. It is abusive and not educative.

In contrast, a Pasuruan *fatwa* on *jum'ah* prayers clearly shows difficulty in accommodating ongoing practice. The question is on the status of *jum'ah* prayers without local residents and of two *jum'ah* prayers in one venue (PCNU Pasuruan, 2003). On the first part of the question, instead of discussing holding two *jum'ah* prayers in one mosque, the *fatwa* speaks mainly about holding them in separate mosques of a village. Four references are cited, two are Shafi'ite texts (*I'annah al-Talibin* and al-Yamani's *Qurrah al-'Ain*) and the remaining two are Hanafite's (*Hashiyah Radd al-Muhtar* and *al-Bahr al-Ra'iq*). According to a 1997 *fatwa* of the NU Central Board, the two cases are not analogous because a mosque can only hold one *jum'ah* prayer (PBNU, 1998:21-23). Similarly, this *fatwa* also unconvincingly answers the second part of the question. *Jum'ah* prayer without local participation is not allowed, but some Hanbalite scholars validate it. Still, while the initial position is sufficiently supported (by citing al-Yamani's *Qurrah al-'Ain*), no corresponding text(s) is cited to support the validating answer. Thus, this *fatwa* attempts to justify an increasingly

jum'ah common practice (more than one prayer in one venue without sufficient local participation) by providing a vague analogy, contradicting the central board *fatwa*, and recommending an inadequately supported answer.

The last *fatwa* on *salah* is from Malang. It is about the status of *salah ghaib* (prayer attributed to distant dead Muslims) for Iraqis who died during the Coalition invasion (PCNU Kota Malang, 2003). The *fatwa* is well supported. It deals initially with distinction between civilian and martyr casualties because *salah gha'ib*, and *salah janazah* on that matter, can only be performed for civilians. Martyrs do not require a full funeral. After that, it elaborates on the status of *salah gha'ib* according the four Sunni Schools of law, although the question can be sufficiently answered based on the Shafi'ite *madhhab*. *Al-Fiqh 'ala al-Madhahib al-'Arba'ah* is cited to explain the distinction between civilian and martyr, and *Rahmah al-Ummah* is referred to affirm that only the Shafi'ite and Hanbalite *madhhabs* acknowledge this kind of *salah*. *Al-*

Muhadhdhab, a basic text of Shafi'ite *madhhab* is cited to prove the historical basis of this *salah*³⁷. In addition, this *fatwa* is noteworthy for another reason; it signifies Indonesian Muslims' solidarity and position on the Iraq war issue. The dichotomy between *dar al-Islam* (Islamic territory) and *dar al-harb* (hostile territory) is helpful to understand the phenomenon.

c. *Zakah*

There are nine *fatawa* on *zakah*, five in response to the *Zakah* Management Law sanctioned by the government in 1999. In a way, the NU ulama are happy with the government's instigation as part of *siyash shar'iyah*. Nonetheless, any Islam-related policy should be considered by and agreed to by religious authority. The first *fatwa* is about the liability of invested money to *zakah*. Surabaya and Gresik branches discuss this question with identical outcomes (PCNU Kota Surabaya, 2002 and PCNU Kabupaten Gresik, 2002). Any kind of money is liable for *zakah* after a full year of ownership because of its equivalence to gold and silver. Unsurprisingly, the two branches cite an identical text from *al-Fiqh 'ala al-Madhahib al-'Arba'ah* stating that the majority of jurists (of the four schools of law) are of the opinion of the liability of bank notes (money) to *zakah*. In addition to that, the Gresik branch also cites two more references. The first is a 1933 *fatwa* of the NU Central Board on the liability of bank notes to *zakah* (Masyhuri, 1997:101)³⁸. This is a clear indication how the compiled *fatwa* (of the NU central board in this instance) operates as jurisprudence for NU members. The second reference is *al-Mauhibah Dhawi al-Fadl*³⁹ stating that bank notes are equal to *dirham* (silver money).

The second *fatwa* is about what is known as *zakat profesi* or *zakah* payable from performing professional services, such as those offered by lawyers, medical doctors and

³⁷ The text reported that the Prophet once offered a *salah* ghaib for an Abyssinian (Ethiopian) king who converted to Islam after receiving the news of his death.

³⁸ Nonetheless, in a 1929 *fatwa* of the NU Central Board (Masyhuri, 1997:45-6) concluded that coins (other than silver and gold) were not liable to *zakah*. Likewise, another *fatwa* in that year stated that bank notes were not liable to *zakah* except if they are traded (Masyhuri, 1997:46-7)

³⁹ Based on Ibn Hajar al-Haytami's Muqaddimah Bafadal, this text was written by a Javanese scholar, Muhammad Mahfuz al-Turmusi (d. 1338/1919)

civil servants. Four branches (Surabaya, Gresik, Kencong, and Nganjuk) each discuss this and all agree in principle that salaries and incomes are liable to *zakah* based on their equivalence to trade (PCNU Kota Surabaya, 2002, PCNU Kabupaten Gresik, 2002, PCNU Kencong, 2003, and PCNU Kabupaten Nganjuk, 2003). Three branches (Surabaya, Gresik, and Nganjuk) cite a text of *Kifayah al-Ahyar* stating that trade can include the exchange of a commodity or a service. Surabaya and Gresik also cite *al-Majmu' Sharh al-Muhadhdhab* stating a similar point. There are some interesting points about this question, though. The original question of the Kencong version asks whether civil servants and employees of private companies whose incomes are much higher than farmers and petty traders should pay *zakah*. This kind of statement reveals how classic *kitab kuning* stipulations cannot uphold justice. In response, the Kencong *fatwa* hesitantly answers that only with *niyah* (intention or motive) that such incomes can be liable to *zakah*. In so doing, a vague text listing the commodities liable to *zakah* is cited from *Fath al-Mu'in*. On this *niyat* issue, the Nganjuk *fatwa* asserts that Muslim preachers whose incomes are much higher than average Indonesians do not have to pay *zakah*. The intention of those preachers is to preach Islamic teaching, not to trade their oratory skill for money. Admittedly, it is difficult to judge the intention. Moreover, vested interests are at stake, because the preachers are ulama as well. Because the ulama do not have to pay *zakah* for their oratory fees, it will result in resentment from the community. In turn, it will threaten the ulama authority.

In addition to money, the *zakah* liability of companies providing services, like hotel and transportation companies, is also questioned. Two branches (Surabaya and Gresik) respond to this question (PCNU Kota Surabaya, 2002 and PCNU Kabupaten Gresik, 2002). There are two conflicting precedents from the NU Central Board on this question, a 1981 *fatwa* suggested that these businesses should pay *zakah* (Masyhuri, 1997:295-6), whereas a revised 1987 *fatwa* stated that only the profitable ones are obliged to pay *zakah* (Masyhuri, 1997:323). The two branches tend to believe that such a business is liable for *zakah*. Again, the aforementioned text of *Kifayah al-Ahyar* is cited by both branches to justify their answer. The Surabaya Branch adds a text from *al-Muqaddimah al-Hadramiyyah* for a similar point. By formulating the aforementioned

fatawa, the *fatwa* drafters of NU branches involved are aware of the changes in the sources of wealth and are ready to accommodate new sources into the *zakah* domain. So far, departure from *madhhab*, *taqlid* and *kitab kuning* has not been necessary.

This accommodation is absent from two subsequent *fatawa*. The first *fatwa* is on the cost of crop maintenance in relation to the percentage of its *zakah* (PCNU Kencong, 2003). Essentially, if an additional cost is issued for irrigation, the percentage drops from 10 percent to 5 percent. The question is whether the cost of fertilisers can reduce that *zakah* percentage. The answer is no. A text of *Hamish Qurrah al-‘Ain* clearly asserts costs other than irrigation do not reduce the *zakah* rate. It is the identical answer and identical reference for the identical question of a *fatwa* of the NU Central Board in 1987 (Masyhuri, 1997:328-30). This *fatwa* shows how a clear statement of jurisprudence is preferred over inference or analogy in formulating *fatwa*. Still, considering that fertilisers comprise the biggest cost in crop maintenance, this *fatwa* is not helpful for small farmers who are the majority of Indonesian farmers. Similarly, a *fatwa* from Jember branch stating that *pesantren* students are not entitled to accept *zakah* money is inaccurate for a few reasons (PCNU Kabupaten Jember, 2003). Although being students prevents them from accepting *zakah*, the fact that many *pesantren* students are poor makes them eligible. In addition, one of the five cited references (Muhammad Nawawi's *Marah Labid*) indicates that *pesantren* students are entitled to accept *zakah*, whereas the remaining four assert otherwise. *Fath al-Mu'in* indicates that the financial source of students' welfare is booty, but no such institution exists nowadays. Another text of *Fath al-Mu'in* indicates that the *zakah* recipients are restricted to the eight categories⁴⁰. Well, some students are poor. Finally, a text of *Rahmah al-Ummah*, a text of different opinions of the four Sunnite *madhhabs*, suggests only that *zakah* cannot be allocated to build mosques or to buy corpse cloths. The urgency is different and the analogy is inaccurate. The possible explanation for the answer is the Jember context in which the poor and the needy are in a more desperate situation than students are. While the former needs *zakah* for daily survival, the latter

⁴⁰Based on Quran 9:60, the eight categories are the poor, the needy, the workers who collect them, the new converts, to free the slaves, to those burdened by sudden expenses, in the cause of GOD, and to the travelling alien.

needs it for books or stationery. It is a matter of priority. Priority relates to policy making, that is *siyasah shar'iyah*.

A *fatwa* from Kediri also relates to *siyasah shar'iyah* (PCNU Kabupaten Kediri, 2003). It provides a response in the matter of the method of *zakah* expenditure. In making the most of *zakah* property, a method called *zakah produktif* is employed⁴¹. The Kediri branch states that this method is applicable if all *zakah* recipients are consulted and agree. A text of *al-Majmu' Sharh al-Muhadhdhab* is cited stating that the authority should consult and ask permission of the rightful recipients before spending *zakah* properties. Although the text does not clearly mention the scheme, the *fatwa* uses it because the scheme works. Besides, the NU Central Board has recommended the identical *fatwa* in 1989 with identical references (Masyhuri, 1997:361).

The last *zakah fatwa* also deals with *zakah* management. In a *fatwa* from Kencong, it is explained that a self-appointed or voluntary *zakah* collector is not '*amil*' (government-appointed *zakah* collector entitled to a portion of *zakah* property) (PCNU Kencong, 2003). Only government appointees are '*amiks*'. A text from *Mauhibah Dhawi al-Fadl* states clearly that the *imam* (the authority in Islamic states) must delegate '*amil*' to collect *zakah* and those who are self-appointed are not '*amiks*'. A text from *al-Muhadhdhab* also indicates that point. It can be inferred that the *fatwa* accept the legitimacy of Indonesian authority in religious-related affairs. Certainly, this position is historically founded in NU. NU's commitment to the Indonesian nation-state and its ideological foundation is assured as early as Indonesian independence⁴². The emphasis

⁴¹ According to this method, instead of directly distributed to all *zakah* recipients at once, the *zakah* property is distributed to a few *zakah* recipients as part of business capital. In so doing it is expected that the number of poor people would be reduced. Alternatively, *zakah* commodity is invested and only the dividend is distributed to the *zakah* recipients. See for example Sjechul Hadi Permono, 1992, *Pendayagunaan zakat dalam rangka Pembangunan Nasional; Persamaan dan Perbedaannya dengan Pajak*, Pustaka Firdaus, Jakarta:24-28.

⁴² See for example M. Ali Chaidar, 1998, *NU dan Islam di Indonesia: Pendekatan Fikih dalam politik*, Gramedia Pustaka Prima, Jakarta, M. Ali Haidar, 1994, 'Islam and the Pancasila within the struggles of the Nahdlatul Ulama', *Studia Islamika*, 1(3): 83-116, and Einar Martahan Sitompul, 1989, *NU dan Pancasila: Sejarah dan perjuangan umat Islam di Indonesia dalam rangka penerimaan Pancasila sebagai satu-satunya asas*, Pustaka Sinar Harapan, Jakarta.

of Sunnite political concepts on stability and status quo is an explanation for this position⁴³.

Two subsequent *fatawa* are on *qurban* (religious offering), which is conducted on the *hajj* days from the tenth to the fourteenth of *Dhu al-Hijjah* month (PCNU Kabupaten Kediri, 2003). It is often the case that too many cattle are slaughtered at these times and the meat is often not consumed and is therefore wasted. A question arises in Kediri about whether some cattle should be spared and bred for the greater good. The answer is negative. A text from *I'annah al-Talibin* indicating the virtue of offering *qurban* is cited. Apparently, the *fatwa* holds that the initial purpose of *qurban* is to build intimacy with God, just like Cain and Abel did. The *fatwa* understands *qurban* as a form of ritual which has to be performed as prescribed without alteration. Certainly, not everything can be rationalised. Similarly, a *fatwa* from Kencong asks whether *qurban* meat can be sold to build a mosque, instead of being bestowed freely (PCNU Kencong, 2003). Again, *maslahah* is the drive for this question, and this compromises the very purpose of *qurban*. Consequently, the *fatwa* refuses to accommodate such a scheme. A text from al-Sharqawi's *Hashiyah* indicates that selling of any part of *qurban* cattle is forbidden. So far, commitment to *kitab kuning* is maintained at the expense of *maslahah*. Besides, there are many channels by which Muslim philanthropists can contribute to the community, such as *zakah* and *sadaqah*.

d. *Waqf*

The use of the literal stipulations of *kitab kuning* is also apparent in two *fatawa* on *waqf*. The first *fatwa* is from Kencong on the validity of *waqf* using cash money (PCNU Kencong, 2003). As a text from *Fath al-Mu'in* indicates, *waqf* can only be performed by bestowing non-movable properties⁴⁴. On that basis, the *fatwa* invalidates *waqf* of cash money. Nonetheless, Muslims increasingly use the *waqf* institution in bestowing and accepting cash charity and successfully circumvent its basic regulation.

⁴³ See for example al-Mawardi's *al-Ahkam al-Sultaniyyah* (Dar al-Fikr, Beirut, 1978).

⁴⁴ This regulation is in line with the literal meaning of *waqf* which is postponement. Thus, *waqf* means postponing personal property forever to be used for God's purposes without losing the property. Likewise, a *waqf* property cannot be converted or exchanged with other non-movable properties.

Usually, the *waqf* management buys bricks, cements, tiles and other materials to build mosques with the cash *waqf*. Thus, the money becomes non-movable property. The second part of *waqf* regulation prevents the sale, giving away of property or the conversion or exchange of other non-movable properties. Seemingly, the scheme is flawless, although Muslims still can contribute to mosque building via *sadaqah* (charity).

On that point, a *fatwa* from Gresik responds to the conversion of a *waqf*-based graveyard to a site for commercial factories (PCNU Kabupaten Gresik, 2002). Predictably, the answer is no. A two-tiered answer is proposed; establishing the unlawfulness of moving graves by citing al-Qalyubi's *Hashiyah, Minhaj al-Talibin*, and al-Bujairami's *Hashiyah*, as well as establishing the illegality of converting *waqf* property by citing *I'annah al-Talibin* and *Nihayah al-Zayn*. Moreover, a 1961 *fatwa* of the NU Central Board has decided the unlawfulness of selling *waqf* properties (Masyhuri, 1997:238) and another in 1997 (PBNU, 1998, 24-5) has prohibited moving graves. In addition, a 1994 *fatwa* of the NU Central Board (Masyhuri, 1997:397-401) cautiously allowed land condemnation for obvious public purposes with proper compensation. Apparently, business and industry sectors as well as the state have the capacity to threaten the *waqf* institution. Unlike building public facilities, *maslahah* in building private companies is suspect. Thus, the *fatwa* resolutely maintain the basic *waqf* regulation as it is.

2. Contracts and social relations

There are six *fatawa* on this category, four of which relate to *riba* (usury) and bank interest, and the remaining two are other contracts. This is a confirmation of how usury and bank interests remains a delicate issue faced by many Indonesian Muslims. Ambiguity is the perfect word to describe it.

a. *Riba* related *fatawa*

The first *fatwa* is from Kencong about a community based usurious loan service (PCNU Kencong, 2002). When a person wants to borrow 100.000 rupiahs, he or she only receives 90.000 rupiahs with an obligation to return 100.000 rupiahs. The *fatwa*

does not find difficulty in describing this contract as usury and therefore as forbidden. Although it is a community-based service, *maslahah* in this case violates a statement of *kitab kuning*. A text of *Fath al-Mu'in* reporting the Prophet's prohibition on usury is cited⁴⁵. In contrast, in a fatwa from Jombang, a *kitab kuning* text *fatwa* essentially leads to usury (Wazir, 2003). In a sale contract with the option of re-purchasing⁴⁶, the price of repurchasing is much higher than selling price. In fact, people are involved in this contract only to disguise usury. This contract is a *hilah* (pl. *hiyal* or legal fiction) to avoid usury. A text of *Tarshih al-Mustafidin* clearly validates such a contract⁴⁷. This kind of text is certainly not conducive for producing equitable *fatawa*. Evidently, prohibiting the *sende* contract will preserve *maslahah*. Still, as far as the conservative ulama are concerned, there is no option but to follow *kitab kuning* texts. Moreover, the NU Central Board has decided accordingly on the issue back in 1927 (Masyhuri, 1997:22).

A Kencong *fatwa* reveals further issues about usury (PCNU Kencong, 2003). It is about *arisan* (a revolving credit association) in which the accumulated money is temporarily deposited in a bank for interest. In so doing, the *arisan* organiser manages to give members of the *arisan* more than the amount they have given to the organiser. While a text of *I'alah al-Talibin* establishes the validity of *arisan*, the position regarding the bank's involvement is ambiguous. Three opinions are presented; lawful, unclear and prohibited. Admittedly, this is the official position of the NU Central Board on bank interest⁴⁸. To add ambiguity, while the Kencong *fatwa* acknowledges that any attempt to disguise usury is equal to usury (*I'alah al-Talibin*), it also cites *Is'ad al-Rafiq* which states that legal fiction to avoid usury is permitted by Abu Hanifah and al-

⁴⁵ The translation of that *Hadith*: 'every credit attracting benefit for creditor is usury'.

⁴⁶ The agreement of re-purchasing is conducted verbally before the actual selling. Otherwise, the contract is void at once.

⁴⁷ Here is its translation: 'attention- you should know that the promise trading well-known in Arab and recognised in Mecca with the name of timely trading or trust trading is valid if it operates unconditionally. The condition should not be pronounced in the contract as well as in the *khiyar* (time of consideration)'

⁴⁸ The latest NU Central Board *fatwa* on bank interest is in 1992, in which three opinions were presented; allowed, unclear and prohibited (Masyhuri, 1997:368-70).

Shafi'i. No conclusion is drawn by this *fatwa*. The signal is that while the initial position is the unlawfulness of this particular *arisan*, there is justification for those who continue to be involved in it. *Fiqh qawlani* (*fiqh* of two-opinions) is quite typical in contemporary NU *fatawa*. Indecisiveness and hesitancy are apparent because the *fatwa* drafters do not sense any urgency in definitely justifying the practice. This attitude should not be tolerated when dealing with legal status because it threatens legal certainty.

In another development, a *fatwa* from Sidoarjo does not find any difficulty in prohibiting another kind of usury-related contract (PCNU Kabupaten Sidoarjo, 2002). It is a pyramid system-based business involving gold coin priced at \$USD100 (9,2 million rupiahs). There is a delay between payment and acceptance of the commodity and the price of the commodity is much lower than the market price⁴⁹. As a result of involvement in this pyramid system-based business, many NU members suffer from heavy financial losses. This point is enough for the *fatwa* drafters to decide the unlawfulness of this contract. The business is fraudulent and exploitative. Four references are cited, two of which (*al-Majmu' Sharh al-Muhadhdhab* and *Kifayah al-Ahyar*) underline the unlawfulness of delay, another two (two texts of *I'alah al-Talibin*) invalidate the condition embedded in the contract. Admittedly, the texts are not so convincing because there is no clear statement addressing the fraud. Nonetheless, prohibiting this business is important to avoid further financial loss. A sense of *maslahah* is preserved. Still, as a result in flaws of this Sidoarjo *fatwa*, a few NU members benefiting from the business (because of their high position in the pyramid) legitimate the business by citing favourable *kitab kuning* texts. Even though the Sidoarjo Branch obtained ratification from the East Java NU Provincial Office in November 2002 (Pengurus Wilayah Nahdlatul Ulama Jawa Timur, 2002), the tension persists. To say the least, *kitab kuning* is a mere tool, wisdom and morality are needed in applying its stipulations.

⁴⁹ People are motivated to buy the merchandise because of the bonuses promised by the company if the buyer can attract another four new buyers (called as down-lines). Multiple bonuses are offered if many of his/her down lines attract new buyers and so on and so forth.

b. Non-usury contracts

The two *fatawa* on non-usury contracts are from Nganjuk (PCNU Kabupaten Nganjuk, 2003). The first is on the status of stockpiling petrol before an expected price increase⁵⁰. Based on the Prophet's saying, classic jurisprudence only acknowledges the unlawfulness of concealing staple food because of its importance for human survival. Accordingly, the *fatwa* adopts this position relying on al-Ghazali's *Ihya' 'ulum al-Din* and arguing that petrol is replaceable. Admittedly, the *fatwa* does not consider the profound reliance of modern life on fossil fuels which means that the importance of petrol is equal to staple food. This reasoning is *qiyas*, the main method of *ijtihad*, and no NU ulama reserves this right. Thus, the only option is to follow *kitab kuning* stipulations.

The second is on the status of a photocopy business whose customers copy lottery pictures. Lottery is analogous to gambling. The answer says it is unlawful to accept those particular customers. The explanation given is that copying lottery pictures is considered assistance to (*ma'siyah*) evil doing. The text is from al-Jamal's *Hashiyah* stating that selling grapes to wine makers is not allowed because it is considered assistance to *ma'siyah*. This *fatwa* is a good example of how *ilhaq* (analogy) is exercised in a *fatwa*⁵¹. In this case, *maslahah* is upheld by employing the stipulations of *kitab kuning* because what happens in Indonesia is that buyers of lottery tickets and petty gamblers are poor people.

3. Marriage and women's issues

Marriage is one important aspect of Islamic law. It is not replaceable by a civil institution. Therefore, instead of replacing it, governments in Muslim states reconstruct this institution to be feasible in modern times, both in procedure and substance (Coulson, 1969). Six *fatawa* are available in this category. The first is from Kencong

⁵⁰ In Indonesia, the price is fixed by the government. Any announcement of a price increase always attracts opportunists to store the petrol to be sold after increase.

⁵¹ It should be understood the difference between *qiyas* and *ilhaq*. While the former is to make analogy of legal case to precedent in primary sources (Quran and Sunnah), the latter is to make analogy to scholar opinions in *kitab kuning*.

asking the validity of marriage conditions issued by Ministry of Religious Affairs⁵² (PCNU Kencong, 2003). Although the concept of marriage conditions is recognised in *fiqh* (*I'alah al-Talibin*), the *fatwa* does not directly affirm the policy. The answer is that the conditions are enforceable only if the husbands mean them (*Kifayah al-Ahyar*). To say the least, the *fatwa* cautiously welcomes the empowerment of women in an Islamic marriage. In addition, it reflects NU's qualified acceptance of government policies on Islamic affairs, such as the 1975 Marriage Law, the 1989 Law on Islamic Court, and others (Feillard, 1999:388-94). In the process of formulating these Laws, NU always has its own version at its disposal to be negotiated.

While the first *fatwa* shows how NU *fatawa* have to respond to government policy in Islamic affairs, the second *fatwa* reflects how they also have to deal with challenges from other kind of Islamic groups. This Jember *fatwa* concerns the hierarchy of marriage guardians for brides, which is obligatory in Islamic marriage, especially in the Shafi'ite *madhhab* (Fahmi, 2003). Essentially, the hierarchy is based on the blood relation of guardians to the brides, but judges act as guardians in the absence of blood-related guardians⁵³. The question is whether this hierarchy is based on primary sources (Quran and Sunna). Insisting that the hierarchy is based on the primary sources because *ijma'* (consensus of ulama) has been reached. Instead of citing Quranic passages and/or prophetic report(s), the *fatwa* is trying to establish that *ijma'* position by citing four jurisprudence texts instead. Thus, none corresponds to the question. A text of *Kifayah al-Ahyar* only indicates the indispensability of the marriage guardian hierarchy, a text of *Bughyah al-Mustashidin* only states the shift of the marriage guardian from an immediate to a distant relative, and *al-Mizan al-Kubra* and *Rahmah al-Ummah* only confirm the agreement of the four *madhhabs* on that shift. Nonetheless, tracing the origin of this hierarchy, it is very likely to be analogous to the hierarchy of male heirs in

⁵² The policy of the Ministry of Religious Affairs in formulating its version of marriage conditions and recommending husbands to pronounce it to guarantee the wellbeing of wives in case of abandonment or other husbands-originated marital problems.

⁵³ The right of judges to act as guardian is called *wali al-hakim*

inheritance as recorded in Quran chapter 4:11-13⁵⁴. Likewise, *ijma'* is as authoritative as the primary sources, although without clear reference to primary sources (Hallaq, 1986:427). Having said so, the question should be addressed to the Islamic group which does not acknowledge classical Islamic legal tradition, notably *madhhab* and *usul a-fiqh* (including *qiyas* and *ijma'*) (Abou al-Fadl, 2001:117)⁵⁵. Therefore, this *fatwa* will only satisfy NU members, but not this aforementioned group.

The third *fatwa* in marriage tests the Islamic concept of marriage and family values vis-à-vis modern sciences. This Kencong *fatwa* asks the status of fatherhood of a baby, which was born after seven months of marriage, if the husband of the baby's mother is not the one who makes her pregnant (PCNU Kencong, 2003). Thus, the husband is not the baby's biological father. However, the *fatwa* decides otherwise. Since classic jurisprudence recognises that sixth month of pregnancy is the earliest time of delivery, the husband is the father's baby and his marriage guardian (*Ghayah Talkhis al-Murad*). A citation from *Bughyah al-Mustarshidin* is also made to emphasise the point that even if a baby is delivered resulting from adulterous relationship, the husband is the father of that baby, and the baby is his heir. So far in Indonesia, such a classic Islamic legal concept is acknowledged by the 1991 Kompilasi Hukum Islam (Compilation of Islamic Law) (Abdullah, 1994:107). The *fatwa* continues stating that natural sciences

⁵⁴ The translation is: 4:11. "Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth. (The distribution in all cases ('s) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah. and Allah is All-knowing, All-wise". 4:12. "In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused (to any one). Thus is it ordained by Allah. and Allah is All-knowing, Most Forbearing". 4:13. "Those are limits set by Allah. those who obey Allah and His Messenger will be admitted to Gardens with rivers flowing beneath, to abide therein (for ever) and that will be the supreme achievement" (Ali, 1983:180-3).

⁵⁵ Among the notable group of this kind is the Salafi, in which the commitment of its members to their leaders is unqualified. The leaders also act as marriage guardian of female members in marriage, even though the brides' family, who are the rightful guardians, are still alive.

only perform as a complementary function in Islamic law. Again, a text of *Bughyah al-Mustarshidin* is cited. It states that a *qa'if* (shaman) is consulted in determining the fatherhood of a baby⁵⁶. Of course, modern natural science is not shamanism, but that is beside the point. This *fatwa* is a perfect example of the tension between Islam and medical science. To say the least, the *fatwa* reflects how society, in which the family institution is a cornerstone, works and is maintained in Islamic community at the expense of natural sciences. It shows how Islamic law acts to prevent fractures in the society by keeping families together and providing homes and fathers for non-biological children.

On the other hand, a *fatwa* from Jember on inheritance shows how NU *fatwa* drafters try their best to provide justification for Muslims distributing inheritance not according to *fara'id* (Islamic regulation of inheritance)⁵⁷ (Fahmi, 2003). The utilitarian nature of Islamic law returns. As a text of *Bughyah al-Mustarshidin* suggests, the *fatwa* permits abandoning *fara'id* as long as all potential heirs agree with the scheme. The answer and reference are identical to a *fatwa* of the NU Central Board in 1960 (Masyhuri, 1997:230). Realising that Muslims are avoiding *fara'id*, Munawir Sjadzali (1997:62) the former Minister of Religious Affairs between 1983-1993 suggests 'reinterpreting' the *fara'id* regulation, which effectively abandons it altogether. Moreover, Muslim litigants over inheritance may choose between civil and Islamic courts (Abdullah, 1991:392) which cripples the authority of the Islamic courts⁵⁸. Still, avoiding *fara'id* is problematic. It reflects the flexibility of classic Islamic law, but it

⁵⁶ The opinion of a *qa'if* is referred whenever more than two men are potential father of a baby. Since the Shafi'ite *madhhab* maintains that the longest pregnancy is four full years, when a woman is consequently married with two or more men in the span of those years, all men have the right to claim fatherhood.

⁵⁷ The main motive of avoiding *fara'id* is the ratio between male and female heirs, in which male heirs get twice as much female heirs in most of inheritance distributions. See for this account and Muslim efforts to avoid this regulation for pre-modern times in David. S. Powers, 1996, 'The Art of Legal Opinion: al-Wansharisi on Tawlij, in Masud, Muhammad Khalid, Brinkley Messick, and David S. Powers (eds), *Islamic Legal Interpretation: Muftis and their fatawa*, Harvard University Press, Massachusetts. For the modern period see Noel J. Coulson, 1969, *Conflicts and Tension in Islamic Law*, The University of Chicago Press, Chicago and Lucy Carrol, 2001, 'Life interest and inter-generational transfer of property avoiding law of succession, *Islamic Law and Society*, 8(2):245-86.

⁵⁸ According to the 1989 Law on Islamic Court, the jurisdiction of Islamic court is marriage, inheritance, *wasiyah* (bequest), *hibah* (gift) *waqf* (religious endowment), and *sadaqah* (charity) (Abdullah, 1991:372).

discards a cornerstone of Islamic marriage law in the process. It is a dilemma, but the NU ulama have no problem with it because a text of *kitab kuning* justifies it.

The last two *fatwa* in this category concern women's issues. The first is the right of women to undergo caesarian section not in an emergency situation (PCNU Kabupaten Kediri, 2003). The Kediri *fatwa* allows this surgery because the risk is milder than labour as long as the surgeon and surgery staff are female. Historically, caesarian section was practiced in classical period of Islam (Haddad, 1993:59), but there is no reference whatsoever to such sources in this *fatwa*. Instead, conventional jurisprudence texts are cited. Two references (*Mughni al-Muhtaj* and *Fath al-Mu'in*) tolerate piercing girls' ears, one text (*I'alah al-Talibin*) indicates the gravity of child labour, another text of *Mughni al-Muhtaj* urges the amputation of a dangerous protuberance (tumor?), and a text of al-Sharwani's *Hashiyah* regulates the issue of gender roles in the doctor-patient relationship from an Islamic law perspective. Certainly, making an analogy between piercing ears and a caesarian section is incompatible. Likewise, having the surgery room composed only of female staff is still not feasible in Indonesia. Had the *fatwa* cited classical Islamic scientific and medical treatises, it would be credible. To say the least, justifying Muslim practices is sometimes difficult if only jurisprudence texts are cited.

Therefore, a *fatwa* from Malang decides not to justify Muslim practices if jurisprudence clearly sways to the opposite side (PCNU Kota Malang, 2003). Responding to the status of using *ojek* (motorcycle taxi) service for women, the *fatwa* decides it is unlawful. Four explanations are presented. If women use the *ojek* service, it will lead to *zahmah muharrahmah* (unlawful leaning) between the female passenger and the male motorist (*Is'ad al-Rafiq*) and *halwah muharrahmah* (unlawful seclusion) between both (*Mirqah Su'ud al-Tasdiq*). Besides, women should not travel for reasons other than obligatory religious purposes without their immediate family or husband (*Mirqah Su'ud al-Tasdiq*). Still, they may travel alone in an emergency, that is whenever a person may die or be exposed to grave danger by not breaching the regulation (*al-'Ashbah wa al-Naza'ir*). This *fatwa* is in line with a 1933 *fatwa* of the NU Central Board on the unlawfulness of women attending non-obligatory religious

meetings (Masyhuri, 1997:95-6). Although this *fatwa* is credible in its own right, it is impracticable. Female Indonesian Muslims are as mobile as their male counterparts. They travel with men who are not relatives to schools, offices, marketplaces and any place they wish. Admittedly, while Islam empowers women in some aspects of social life, some argue that the pre-Islamic Indonesian culture put women in a better position in other aspects of life (Woodcroft-Lee, 1983:173-4).

4. Politics and non-Muslim issues

After the fall of Suharto, public participation in politics dramatically increased. Likewise, when NU became more political again⁵⁹, queries about politics and related issues multiplied. Included in this category are politics-related offenses, such as bribery and buying votes. Non-Muslim issues are also included in this category because they also concern politics and the role government.

a. Politics

The first *fatwa* on political issues is the legality of establishing an Islamic State in Indonesia (PCNU Kabupaten Blitar, 2003). This Blitar question relates to the ongoing separatist movement in Aceh, although religious issues are not the only motive (Aspinall and Berger, 2001:1015-18). In response, the *fatwa* argues that armed revolt against the legitimate Indonesian leadership is not allowed (*Nihayah al-Muhtaj*). In preventing separatism, the killing of Muslim rebels by Indonesian armed forces personnel who also happen to be Muslims is allowed, if peaceful negotiation fails (*Nihayah al-Muhtaj*). Admittedly, NU accepts the state of Indonesia which is not

⁵⁹ NU was active in politics in the late 1940s and early 1950s as part of Masjumi and then as a political party in 1952 until 1973 (see for example B.J. Boland., *The Struggle for Islam in modern Indonesia*, Martinus Nijhoff, The Hague). During Soeharto's New Order, NU also played a role in politics, but not in formal institutions (see for example Martin van Bruinessen, 1996, 'Indonesia's ulama and politics: caught between legitimising the status quo and searching for alternatives, in Greg Barton and Greg Fealy (eds), *Nahdlatul Ulama, Traditional Islam and Modernity in Indonesia*, Monash Asia Institute, Monash University Press, Clayton, 139-62). The formation of PKB (Partai Kebangkitan Bangsa or the National Awakening Party) by NU ulama and the appointment of Abdurrahman Wahid, then the chairman of the executive board of the NU Central Board, as Indonesian President in 1999, are the main motivations of NU members' increasing participation in politics. See for example Greg Fealy, 2001, 'Islamic Politics: A rising or declining force?' in Damien Kingsbury and Arief Budiman (eds) *Indonesia: The uncertain transition*, Crawford House, Adelaide, 119-36 and Bahrul 'ulum, 2002, *"Bodohnya NU, apa 'NU dibodohi'?: Menguji Khittah, Meneropong 'pergeseran' paradigma politik*, ar-Ruzz, Yogyakarta.

formally based on Islam as the final form of the state. In 1954, when NU was a political party in Sukarno's Guided Democracy, NU declared that Sukarno was *wali al-amr al-daruri bi al-shaukah* (the emergency authority based on force)⁶⁰ (Masyhuri, 1997:207-8). Likewise, in 2001, the NU Central Board recommended the unlawfulness of separatist movements (Lembaga Da'wah Nahdatul Ulama, 10 November 2003). The NU's pro-status quo position is rooted in Sunnite political perspectives, which can be reflected in Ash'arites' Sunni traditionalist-orthodoxy (Makdisi, 1962:44-6) and al-Mawardi's political concepts (Gibb, 1962:141-2). While this theology-based political concept was consistent with the monarchical system of pre-modern Indonesia, it is not conducive for democratization processes in modern Indonesia. This concept prioritises stability and order not anarchy and uncertainty, a situation which often stigmatises democratic robustness. Such a political concept denies equal opportunities in politics promoted by democracy. The status quo is always in a better position vis-à-vis oppositions of any persuasion; those involved in formal political processes and those who choose armed revolts. Nonetheless, since the presidency of Abdurrahman Wahid, many NU ulama spend most of their energy in politics and they use, among other things, *fatwa* for justification and legitimacy. Consequently, some claim that this trend threatens the authority of ulama altogether and affects the effectiveness of *fatwa* (Hosen, 2002:37). In worst scenario, Muslims will turn away from the ulama.

The subsequent four *fatawa* on political issues are on bribery⁶¹, two are on buying votes in village head elections and another two are on offering bribes to high-ranking officials. This is known in Indonesia as money-politics⁶². On the status of buying votes, both Kediri and Nganjuk branches find it unlawful (PCNU Kabupaten Kediri, 2003 and PCNU Kabupaten Nganjuk, 2003). Texts of *Kifayah al-Ahyar*, *Sullam*

⁶⁰ It means that although Indonesia is not necessarily an ideal Islamic state, Muslims are obliged to acknowledge its authority because the Indonesian leadership holds de facto authority, which is based on force.

⁶¹ Using al-Jurjani's generalising terminology in *al-Ta'rifat* (1969:116), bribery in Islamic law is that given to justify vice or to hide truth.

⁶² Village head election were introduced by the central government after Independence as part of the socio-cultural revolution. For a further account see Anthony J. S. Reid, 1974. *The Indonesian National Revolution, 1945-1950*, Longman, Hawthorn. Especially chapter 4 on social revolution.

al-Tawfiq, and *Nihayah al-Zayn* are cited to stress the unlawfulness of accepting bribes, and a text of *Rawdah al-Talibin* is cited to confirm the unlawfulness of offering bribes⁶³. A maxim stating that the status of the means is identical to the status of the goal is cited to generalise the unlawfulness of offering bribes to anyone with an interest (*al-Ashbah wa al-Naza'ir*). Certainly, buying votes is a modern version of bribery and the *fatwa* is correct in this point. Moreover, it devalues the meaning of the democratic process. Nonetheless, considering buying votes have been commonplace in every village head election for long time, why do such *fatawa* appear only (or reappear) in the 2000s? It should be remembered that not only are the voters the beneficiaries of the bribery, but the ulama, whose support is essential for candidates, occasionally are at the receiving end of bribery as well. Thus, the apologetic nature of this *fatwa* is suspected, because it is always the conservatives, like the ulama, who accept the changes lastly. The ulama can easily justify that a bribe is a *hibah* (gift), *hadiyah* (grant), *waqf* (endowment) or *sadaqah* (donation) by twisting stipulations of classic jurisprudence in the form of legal fiction⁶⁴.

The abuse of legal stipulations is also manifest in the two *fatawa* on money politics. A Kediri *fatwa* asks whether a bribe can be considered an exchange of an expected service, thus the status is lawful (PCNU Kabupaten Kediri, 2003). To begin with, the *fatwa* states that bribery can be lawful if it is offered to implement the truth, and that bribery can indeed be considered a form of trading. Three texts are cited to incriminate bribery; *Ihya' 'ulum al-Din* stating the unlawfulness of bribery, *Ghayah al-Wusul* reporting a *hadith* saying that God condemns those offering and accepting bribe, and *Is'ad al-Rafiq* citing a Quranic passage suggesting the unlawfulness of bribery⁶⁵. On

⁶³ In classical Islamic law, accepting a bribe is always forbidden, whereas offering bribes is permitted in some cases. See for instance, Franz Rosenthal, 1991, Gifts and Bribes: the Muslim view, in Rosenthal, Franz, *Muslim intellectual and social history: a collection of essays*, Variorum, Hampshire:135-44.

⁶⁴ The position of many ulama as the administrators and owner of *pesantren* requires them to provide financial support for the survival and expansion of *pesantren*. Likewise they also have to provide for the livelihood of their families.

⁶⁵ The cited passage is 2:188. '*And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property*' (Ali, 1983:74-5)

the other hand, another three texts are cited, two texts explaining the nature of exchange in trading (*al-Wasit and Tuhfah al-Muhtaj*) and one text tolerating offering bribes to judges in order for them to uphold justice (al-Jamal's *Hashiyah*). Certainly, bribery is not a form of trade. The *fatwa* makes the analogy only to justify practices, which sometimes benefit its drafters. Likewise, tolerating bribing to judges is not effective nowadays because unlike classical institutions which depended on personality, modern institutions are based on systems (Khadduri, 1984:145). While in the Islamic past bribing judges can sustain justice, it is proven contradictory nowadays. At least, this *fatwa* shows the incorrectness of responding to modern issues with Islamic classic concepts because the underlying assumptions are different. In a similar vein, a Surabaya *fatwa* also cites two texts of a jurisprudence text (al-Bujairami's *Hashiyah*) indicating both the lawfulness of bribery if its goal is virtuous as well as its unlawfulness if it is not (PCNU Kota Surabaya, 2002). In the process, the drafters are inclined to stipulate the unlawfulness of bribery. Given the conflicting interests in this issue, it is no wonder there is no precedent whatsoever from the NU Central Board about bribery. Admittedly, as Feillard (1999:385) puts it, the principle of the NU political participation is to empower, both economically and politically, NU members, rather than to give positive contributions to political process. It is opportunistic in nature.

b. Non-Muslim issues

The first *fatwa* in this section is on the status of suicide bombing (PCNU Kota Surabaya, 2002). Although this question is inspired by such operations in the Arab-Israeli conflict⁶⁶, the question formulation guides the answer using local precedent. It contains account of a hero Muhammad Toha of Bandung whose suicide bombing destroyed a Dutch arsenal during the revolutionary period (1945-1949). Predictably, this Surabaya *fatwa* tolerates it as long as effective in achieving its goal to defeat the enemy. Two references are cited, *Ihya' 'ulum al-Din* and Ibn Taymiyyah's *Majmu' al-*

⁶⁶ The sentiment arising from the Arab-Israeli conflict is quite strong among Indonesian Muslims in recent years. See discussion on that issue in Martin van Bruinessen, 1993, 'Yahudi Sebagai Simbol dalam Wacana Islam Indonesia Masa Kini', a Speech note delivered at DIAN (Institut Dialog Antar-Iman di Indonesia), 9 Oktober 1993, Yogyakarta and members of Masjid Shalahuddin of Gadjah Mada University, 17 Oktober 1993, Yogyakarta.

Fatawa. While the former makes an exception out of a Quranic passage in doing so⁶⁷, the latter reports a *hadith* suggesting that throwing oneself to enemy is a method of martyrdom. As far as the answer is concerned, the *fatwa* has provided sufficient reference, although Ibn Taymiyyah is very unpopular among the NU ulama. However, the equivalent to an act of terrorism is easily found in *kitab kuning* under the term of *muharabah* and the actors are *muharibs* (those who fight society). Classic jurisprudence severely condemned and heavily punished terrorism (Abou El-Fadl, 2001). He asserts that the rise of *salafism-wahhabism* at the expense of the classical juristic tradition has been responsible for the emergence of a literal yet an intolerant version of Islam. Unfortunately, as an organisation established to maintain that classic tradition NU is swayed to recommend against that tradition. Perhaps, the atrocities of the Israel as the occupying power have blurred the view of many NU ulama. Later, at the national level *bahtsul masail* on June 2002 (Mas'udi, interview at 8 October 2003), this sentiment persisted and its *fatwa* ratified the answer.

The second *fatwa* is about the response to ongoing church building (PCNU Kabupaten Sidoarjo, 2002). The answer from a Sidoarjo *fatwa* is that essentially Islam cannot tolerate other religions to flourish, but because Muslims live in Indonesia, in which some other religions are also recognised, Muslims should tolerate the building of other religions' places of worship. Underlining this point, a maxim of *al-Ashbah wa al-Naza'ir* is cited stating that '*tolerance toward an issue (Indonesia) also means tolerance toward possible consequences emanating from that issue (religious pluralism)*'. In addition, it also cites a joint decision of the Minister of Internal Affairs and Religious Affairs on the regulation of the building of places of worship⁶⁸. The *fatwa* does not cite references from jurisprudence on the matter mainly because *kitab kuning* only recognises non-Muslims as second class citizens. It is not suitable for the Indonesian context. The *fatwa* then acknowledges the authority of the state to 'organise' the

⁶⁷ The translation of the passage is: '*And spend of your substance in the cause of Allah, and make not your own hands contribute to (your) destruction; but do good; for Allah loveth those who do good*' (Ali, 1983:77).

⁶⁸ That decision is SKB No. 01/BER/mdn-mag/1969: a joint decision of the Minister of Internal Affairs and the Minister of Religious Affairs on the government's responsibility to maintain inter-religious harmony, including overseeing the building of religious places of worship.

interaction between adherents of different religions. After all, the joint decision favours the religion of the majority, that is Islam. Still, citing the joint decision in a *fatwa* is quite unusual because it is not considered *al-kitab al-mu'tabar*.

In contrast, the third *fatwa* relates to Muslims being in a disadvantageous position vis-à-vis non-Muslims (Fahmi, 2003). A *fatwa* from Jember asks about the status of Muslim employees who are compelled to wear shirts that feature other (non-Muslim) symbols. In response, wearing such shirts is not allowed and those employees should renounce it as best as they can. Two references are cited, a text of *Bughyah al-Mustarshidin* states that wearing clothes with the symbol of another religion may result in apostasy or at least sin. A text of *Fath al-Mu'in* which is also cited interprets a *hadith* on the three levels of Muslim response toward vice; by force, verbal criticism and silent rejection. Using the first reference, the *fatwa* sufficiently makes its case. However, realizing that the industrial relationship in Indonesia is yet an issue, it gives a solution for those unfortunate employees to continue working. By citing that very *hadith*, the *fatwa* establishes that the employees may wear the shirts as long as they repudiate the symbol in their hearts. It is fair enough, considering the scarcity of jobs in Indonesia. From the NU point of view, it is another example of applying *maslahah*. At least, this qualified *fatwa* does not contradict a *fatwa* of the NU Central Board in 1999 which allowed Muslim and non-Muslim interaction in non-religious aspects (PBNU, 2001:9-10).

5. Offences against religion

There are seven *fatawa* in this category. Four are on music and its instruments, two are about drawing and sculpting, and one about gambling. The four music *fatawa* is two types; one asking the status of music and another asking the employment of music. Initially, a *fatwa* from Kediri asserts that music is allowed if played using lawful music instruments (PCNU Kabupaten Kediri, 2003). For that reason, a text of *Fath al-Wahhab* is cited indicating that a kind of percussion is allowed because of a precedent from the

Prophet⁶⁹. Likewise, *Fath al-Bari* is cited suggesting that playing the tambourine is recommended during a wedding party. Still, another three references are cited asserting how dangerous and evil music is (*Is'ad al-Rafiq*, *Ittihaf al-Sadat al-Muttaqin*, and al-'Adawi's *Hashiyah*). Essentially, this is the basic position of classic Islamic law on music, just like an NU *fatwa* in 1926 (Masyhuri, 1997:14-16). It is not entirely prohibited yet it is very restricted. No wonder that it is not warmly observed nowadays. The musical band promoted by the NU (male tambourine band) does not attract new talent let alone fascinate audiences. The Pasuruan *fatwa* answers the question on the status of a drum band in the same vein (PCNU Kabupaten Pasuruan, 2003). It also lists instruments which are unlawful. They are all wind and string instruments and big drums (*Ihya' 'ulum al-Din* and *al-Fiqh al-Islami wa 'Adillatuhu*). It is interesting that the *fatwa* considers drum band mainly as a form of music, instead of equating them with a battlefield drum. The latter is justified in Islam to encourage warriors on the battlefield.

If essentially the regulation on music is restrictive, its utilization should observe that restriction. A *fatwa* from Nganjuk maintains that celebrating Islamic holy days and Islamic propagation using music concerts, the restriction should be observed (PCNU Kabupaten Nganjuk, 2003). The aforementioned text of *Ihya' 'ulum al-Din* is cited again. Moreover, when the Pasuruan *fatwa* refers to the lawfulness of fundraising for victims of natural and man-made disasters using music, the *fatwa* is dismissive (PCNU Kabupaten Pasuruan, 2003). It states that any virtuous goal should abide by religious regulations. Goals do not justify means. Three citations are made, two of which indicate that fees of performers of *ma'siyah* (evil doing), such as comedians and musicians, are worthless (al-Qalyubi's *Hashiyah* and *Nihayah al-Muhtaj*). Comparable to this is to perform pilgrimage or build mosques using illegal monies. The third text asserts that helping those victims is the obligation of Muslims (*I'alah al-Talibin*).

Another offence is about visual art. Two *fatawa* are available; a *fatwa* from Kediri asking the nature of visual art in Islam (PCNU Kabupaten Kediri, 2003) and a *fatwa* from Jombang questioning its employment (Wazir, 2003). The Kediri *fatwa*

⁶⁹ The text states that there was a time when the Prophet allowed his wife 'A'ishah to watch Abyssinian musicians played music and danced. Likewise, the Prophet had favourite poets to whom he used to listen.

responds by saying that the sculpting and painting of complete humans and animals is not allowed. Citations of *Bulugh al-Amniyyah* and *Sullam al-Tawfiq* are included on that point. The answer is the basic position of *fiqh* on painting and sculpting. Certainly, this regulation is increasingly unpopular nowadays. People start to differentiate between art and the impersonation of God when talking about painting and sculpting. Although NU has been successful in accommodating photographs (Masyhuri, 1997:167) and girls' dolls (Masyhuri, 1997:11-12), there is no further need to make concessions. Similarly, based on the aforementioned answer, the Jombang *fatwa* restricts teachers from drawing and sculpting. Identical stipulation from *Sullam al-Tawfiq* is cited. Nonetheless, the *fatwa* also includes texts tolerating drawing and sculpting for educational and medical purposes (*al-Fiqh 'ala al-Madhahib al-arba'ah* and *Yas'alunaka fi al-Din wa al-Hayah*), but they are ignored. Despite its unsurprising answer, this *fatwa* is an example of different attitudes toward different texts of *kitab kuning*. The validating texts are ignored because they are less authoritative than the text invalidating painting and sculpting. Both validating texts are recently written. Moreover, neither are strictly Shafi'ite jurisprudence, while the former listing opinions of four Sunnite *maddhabs*, the latter containing opinions of other schools in comparison to the Shafi'ite ones. Consequently, the opinion of a very authoritative book (*Sullam al-Tawfiq*) is observed instead. Conservatism, in method and essence persists.

The last *fatwa* on gambling is from Surabaya (PCNU Kota Surabaya). It asks about the lawfulness of localising a gambling area far away from a housing complex. The answer is no, because it is facilitation of *ma'siyah*. Three citations are presented; a hadith on the three levels of Muslims' response toward vice, two maxims suggesting that minimal harm is tolerated to avoid greater harm and that specialised authority is more effective than general authority (government). Surely, there is no *furu'* book in this *fatwa*. This aspect concerns *siyasa al-shar'iyah* (policy making on Islamic law), not substantive law. While the Hadis is a valid text for preventing prostitution localisation, the two maxims are problematic. The first maxim for instance, is suitable for legalising localisation, not invalidating it. Likewise, the second maxim implies the ulama should be consulted in issues of religious implications. Certainly, there is more

direct approach to this question, such as the concept of *I'alah 'ala al-ma'siyah* (assistance toward vice)⁷⁰. Vicious deeds should be combated at all costs. However, in term of *maslahah*, KH M. A. Sahal Mahfudh (2003:33), the Chairman of the Syuriah Board of the NU Central Board has a different position on the issue. Acknowledging that prostitution is a societal disease and without saying that prostitution is lawful, he states that localising prostitution in remote and clustered area is preferred over letting prostitutes to operate in a housing complex near to society. This position is based on a maxim saying that '*a policy with minor risk should be preferred over those with graver risks*' (al-Suyuti, 1995:63).

B. Remarks

Having discussed the fifty *fatawa* of some East Javanese district level branches, it is clear that most *fatawa* rely mainly on jurisprudence stipulations to justify some queries. Direct citation to primary sources is virtually absent and some very widespread community practices are not supported. Certainly the different references used reflect conservatism and utilitarianism. Many questions attempt to insert the *maslahah* concept but not all of them are responded to properly. In addition, if there is precedent(s) from the NU Central Board on the discussed question, local *fatawa* almost always conform to it. It is an indication that the compilations of the NU Central Board have become a sort of jurisprudence for local branches.

1. Method and referencing

In essence, the method of issuing *fatwa* as reflected in previous *fatawa* are the standard NU *fatwa*. Indeed, the dominance of the classic jurisprudence texts (*kitab kuning* or *al-kutub al-mu'tabarah*) in issuing *fatwa* remains unchallenged. In the aforementioned fifty *fatawa*, one-hundred and thirty nine citations are derived from sixty references (listed below), one-hundred and eight of which are from *al-kutub al-mu'tabarah* of the Shafi'ite *madhhab*. Given the dominance of jurisprudence, some exceptions occur from time to time in terms of the inclusion of unaccredited texts and texts of other *madhhabs*. Twelve citations are derived from texts containing divergent

⁷⁰ The example of the application of this principle is the aforementioned Nganjuk fatwa on Photocopy

opinions within the four Sunnite *madhhabs*, and there are five direct citations from non-Shafi'ite texts. In addition, the *ijtihad* method, in terms of employing *Usul al-Fiqh* and *al-Qawa'id al-Fiqhiyyah* (legal maxims), is applied sparingly. One Quranic verse is cited from an exegesis, two prophet reports are quoted from *fiqh* texts, whereas another two prophetic reports are directly quoted from *hadith* collection. Likewise, seven citations to legal maxim texts are made. The remaining two citations derive from miscellaneous sources.

Included in the aforementioned referencing styles, it should be kept in mind that dubious texts are employed. A type of dubious text is *al-kitab ghayr al-mu'tabar* or unaccredited texts. A text becomes unaccredited if the author is not approved of by NU ulama. An example of this is Ibn Taymiyyah, whose some viewpoints on theology are considered to deviate from Sunni Islam by the mainstream Shafi'ite-Ash'arite Ulama. Alternatively, if a reference is cited from a recent book, that it is not yet accessible to many NU ulama, no rigorous discussion on the status of the text has yet occurred or there is dispute among ulama on that matter. The suspicion about new texts also plays a dominant role in accrediting new texts. Since the NU ulama observe *taqlid*, new texts written using *ijtihad* methods are not readily welcomed. Works of Yusuf Qardawi are examples in this regard, although some conservatives have read his seminal work on *zakah* entitled *Fiqh al-Zakah*. Therefore, NU ulama will always locate the thread of classic scholarship in terms of citing and adopting classic jurists' opinions before accrediting the recently written texts as *al-kutub al-mu'tabarah*. In this regard, an elaborate text consisting of twelve volumes by Wahbah al-Zuhaili is warmly celebrated (Masyhuri, interview at 5 October 2003). His *al-Fiqh al-Islami wa 'Adillatuhu* is widely referred to in many *bahtsul masail* forums. His constant and accurate reference to classic works of Sunni jurisprudence texts, although he also discusses contemporary legal issues, persuades NU ulama to consider the text *al-kitab al-mu'tabar*.

Nearly all of the types of references have been covered, but not quite. Two district branches of NU in East Java make two miscellaneous references. The Sidoarjo NU Branch cites a 1969 joint decision of the Minister of Interior Affairs and the

Minister of Religious Affairs. This unusual citation indeed violates the basic guidelines in issuing *fatwa* within NU. To say the least, Sidoarjo *fatwa* regard the role of government policy worth considering before issuing a *fatwa*. The second is the Gresik District NU Branch's direct referencing to *fatwa* of the NU Central Board. The cited *fatwa* is issued in 1930 (Masyhuri, 1997:62-3). This account is an indication of how virtually all ulama in East Javanese districts are familiar with what had been decided in *bahtsul masail* forums of NU national congresses or conferences. Therefore, it reflects the corresponding interplay between *fatawa* at national level and at the lower levels.

Table 4: The list of references and their frequency of reference in *bahtsul masail* forums in East Java

No	Name of <i>kitab kuning</i>	Authors and dates (if available)	Times of referring
a.	Shafi'ite jurisprudence		
1	I'anah al-Talibin	Sayyid Bakri (d. 1300 H/1900CE appx)	12 times
2	Kifayah al-Akhyar	Taqi al-Din Al-Dimashqi (d. 829/)	12
3	Fath al-Mu'in	Al-Malibari (d. 975/ [appx])	8
4	Bughyah al-Mustarshidin	Abd al-Rahman Ba'alawi (d. 1245/1830)	7
5	Al-Majmu' Sharh al-Muhadhdhab	Al-Nawawi (d. 676/)	7
6	Ihya' 'Ulum al-Din	Al-Ghazali (d. 555/1111)	6
7	Is'ad al-Rafiq	Muhammad Ibn Salim Bafadal	4
8	Hashiyah Al-Bajuri	Ibrahim al-Bajuri (d. 1227/1861)	3
9	Tuhfah al-Habib	Al-Bujairami (d. 1100/ [appx])	3
10	Al-Mauhibah Dhawi al-Fadl	Mahfuz Al-Turmusi d. (1338/1919)	3
11	Al-Muhadhdhab	Al-Shirazi (d. 476/1083)	3
12	Sullam al-Tawfiq	Abdullah Ba'lawi (d. 1272/1855)	3
13	Nihayah al-Muhtaj	al-Ramli (d. 1004/1595)	3
14	Hashiyah al-Jamal	Sulayman al-Jamal	2
15	Mirqah Su'ud al-Tasdiq	Muhammad Nawawi (d. 1314/1896)	2
16	Nihayah al-Zayn	Muhammad Nawawi (d. 1314/1896)	2
17	Kashifah al-Saja	Muhammad Nawawi (d. 1314/1896)	2
18	Ajwibah 'an As'ilatika fi al-Zakah	Al-Zabibari	2
19	Hashiyah al-Qalyubi	Al-Qalyubi (d.1069/)	2
20	Ghayah Talhis al-Murad	Ibn Ziyad (d. 975/1568)	2
21	Fath al-Wahhab	Zakariya al-Ansari (d. 926/1520)	2
22	Mughni al-Muhtaj	Al-Shirbini (d. 977/ [appx])	2
23	Qurrah al-'Ayn bi Fatawa 'Ulama' al-Haramayn	Sulaiman al-Kurdi (d. 1194/)	1
24	Tuhfah al-Muhtaj	Ibn Hajar al-Haytami (d. 973H/)	1
25	Al-Muqaddimah al-Hadramiyyah	Bafadal (d.918/1700 [appx])	1
26	Rawdah al-Talibin	Al-Nawawi (d.676/1277)	1
27	Al-Hawashi al-Madaniyah	Sulaiman al-Kurdi (d. 1194/)	1
28	Al-Wasit	Al-Ghazali (d. 555/1111)	1
29	Risalah al-Mukhtasarah	Al-Yamani	1
30	Minhaj al-Talibin	Al-Nawawi (d. 676/1277)	1
31	Bushr al-Karim	Sa'id Ba'shan	1
32	Fath al-Qarib	Ibn Qasim al-Ghazzi (d. 918/1512)	1
33	Tarshih al-Mustafidin	'Alwi al-Saqqaf (d. 1300/ [appx])	1

34	Al-Iqna'	Al-Nisaburi (d. 318/)	1
35	Ittihaf al-Sadat al-Muttaqin	Murtada Al-Zabidi (d. /1791)	1
36	Hashiyah al-Sharwani	Al-Sharwani	1
37	Hashiyah al-Sharqawi	Al-Sharqawi (d. 1226/)	1
38	Al-Fatawa al-Kubra al-Fiqhiyyah	Ibn Hajar al-Haytami (d. 973/1567)	1
39	Al-Zawajir	Ibn Hajar al-Haytami (d. 973/1567)	1
b. Madhhabs' Comparison texts			
40	Al-Fiqh 'ala al-Madhahib al-Arba'ah	Abd al-Rahman al-Jaziri (d. /1941)	6
41	Rahmah al-Ummah	Al-Dimashqi (wrote. 780/1378)	3
42	Al-Fiqh al-Islami wa 'Adillatuhu	Dr. Wahbah al-Zuhaili (born /1932)	1
43	Al-Mizan al-Kubra	Al-Sha'rani (d. 973/1565)	1
44	Yas'alunaka fi al-Din wa al-Hayah	Dr. Ahmad al-Sharbashi	1
45	Al-Insaf fi Ma'rifah al-Rajih min al-Khilaf	Wali Allah al-Dihlawi (d. 1176/1762)	1
c. Non-Shafi'ite Jurisprudence texts			
46	Majmu' al-Fatawa al-Kubra	Ibn Taymiyyah (d. 728/1327)	1
47	Hashiyah Radd al-Muhtar	Ibn 'Abidin (d. 1252/1836)	1
48	Al-Bahr al-Ra'iq	Ibn Nujaym (d. 970/1563)	1
49	Hashiyah 'ala Kifayah al-Talib	Al-'Adawi (d.1189/1775)	1
50	Bulugh al-Amniyyah bi Inarah al-Duja		1
d. Exegeses and hadith texts commentaries			
51	Marah Labid (Tafsir al-Munir)	Muhammad Nawawi (d. 1314/1896)	1
52	Al-Jami' li Ahkam al-Qur'an	Al-Qurtubi (d. 671/1272)	1
53	Fath al-Bari		1
54	Al-Siraj al-Munir 'ala al-Jami' al-Saghir	Al-'Azizi	1
e. Hadith collections			
55	Al-Musnad	Ahmad ibn Hanbal (d. 241/855)	1
56	Al-Jami' al-Sahih	Abu al-Hasan Muslim (d. 261/875)	1
f. Legal maxim texts			
57	Al-Ashbah wa al-Naza'ir	Al-Suyuti (d. 911/1505)	6
58	Al-Mawahib al-Saniyyah	Al-Jarhazi (d. 1201/1786-7)	1
g. Miscellaneous			
59	SKB No. 01/BER/mdn-mag/1969	Indonesian government's ruling	1
60	Ahkam al-Fuqaha'	NU central board	1

This table shows how texts of Shafi'ite jurisprudence dominate the *bahtsul masail* in East Java in two ways; the number of jurisprudence texts and their referring times. Down the list, reference to non-Shafi'ite and employment of *ijtihad* is minimal. It shows how conservatism is maintained, with some exceptions. Certainly, one safe way to maintain conservatism is to cite a *fatwa* of the NU Central Board.

2. Indication of *maslahah*

Identifying the availability and the lack of *maslahah* consideration in formulating *fatawa* should always note that any *fatwa* must be based on texts. Besides,

employing the standard jurisprudence has been in line with *maslahah* in many *fatawa*. Textual justification is understandable considering the conservatism of East Javanese ulama. Thus, attempt to preserve *maslahah* only revolves around different types of valid text. In practice, a *fatwa* departs from a standard text to a less conventional text to preserve *maslahah*. Predictably, it turns out that some *fatawa* ignore *maslahah* whereas some accommodate it.

Fatawa insisting on conservatism and ignoring *maslahah* in the process are quite numerous. Notable in this category is the Kencong *fatwa* on crops' *zakah* for not reducing the *zakah* percentage from ten to five percent (see page 60 of this chapter). Admittedly, reversing the decision is helpful for small farmers. By bypassing the jurisprudence and practicing *qiyas*, favourable decision can be easily formulated. Unfortunately, *qiyas* is a form of *ijtihad* and no conservative ulama reserves the right to practise it. Likewise, the insistence of the Jombang *fatwa* to validate *sende* contract is contradictory to the spirit of Islamic law (see page 63-4 of this chapter). The contract disguises usury, and the poor farmers are the usual victims. Had the *fatwa* departed from textual stipulation to employ the legal maxim (see page 63-4 of this chapter), it will prevent the deprivation of poor farmers of their property. Similarly, the Nganjuk *fatwa* tolerating stockpiling petrol denies its urgency for modern life. In sharp contrast, some other *fatawa* shows the importance of equitable and practicable *fatawa*. The Malang *fatwa* on the cleanness of chlorine-mixed water is important for residents of big cities who rely on treated water (see page 55 of this chapter). In so doing, the Malang *fatwa* interprets standard texts in a moderate way. In the same vein, the Gresik *fatwa* allowing the female congregation in the same rows with the male congregation (although separated by fabric or a wall) validates the practice of Indonesian Muslims (see page 56 of this chapter). This *fatwa* infers a jurisprudence text, although the explicit Prophet report stating that female congregation should be in the back rows of congregation is easy to find in standard jurisprudence texts.

Admittedly, there is no explanation based on locality to indicate the tendency to ignore or preserve *maslahah*. An NU district branch can produce a *maslahah*-based *fatwa* yet ignore *maslahah* on another occasion. Nonetheless, some NU branches never

deviate from the prescriptions of jurisprudence texts such as Jombang and Kencong, whereas some try to accommodate *masalah* in one way or another, such as Malang and Kediri. In addition to a commitment to *kitab kuning*, conservative ulama in East Java still hold the dichotomous aspect of Islamic law; *ta'abbudi* (devotional) and *ta'aqquli* (rational) (Hosen, 1994:321-2). While the former refers to those aspects closed for interpretation which usually ritual aspects of Islamic law, the latter concerns those aspects which are open for rational interpretation and which usually covers the non-ritual aspects of law. *Salah, zakah, saum* and *hajj* are in the *ta'abbudi* domain, whereas contracts and political issues belong to the *ta'aqquli* domain. Therefore, when responding *masalah*-based questions like sparing *qurban* cattle and reducing *zakah* percentage because of fertilisers, the ulama are restrained from using analogy. Although the method is available, it is not applicable.

3. Interplay between local *fatawa* and upper level *fatawa*

Of the fifty *fatawa* examined in this research thirty-two have precedents from the NU Central Board's *fatawa* and/or the East Java NU Provincial Office. It accounts for more than half of the total *fatawa*. The way those *fatawa* relate to the upper level *fatawa* and the nature of the relationship can be distinguished in some categories. The previous example from the Gresik *fatwa*, which categorically cites an NU Central Board's *fatwa*, is the most explicit way of making the connection (see page 57-8 of this chapter). Another, rather obscure way is to make such a connection if the district prescribes a similar answer and provides identical references for identical cases without mentioning that such questions have already been addressed by the upper level of *bahtsul masail*. An example for this kind of connecting method is a *fatwa* from Jombang NU Branch on a *sende* contract (see page 57-8 of this chapter). Another type of connection is whenever the question and answer are identical, but the reference is different. An example of this type is a Gresik *fatwa* on the invalidation of offering prayers on the plane (see page 56 of this chapter). In 1989 the NU central board *fatwa* listed fourteen references of standard classic jurisprudence texts, whereas the Gresik *fatwa* cites one relatively new text by Shaykh Yamani entitled *Risalah al-Mukhtasarah* to arrive at the identical answer.

Another three methods of connection to upper levels of *fatwa* by district levels are not necessarily in the form of conformity. The first is if the question is resembling, not a carbon copy yet the answer and the reference are identical. An example of this kind is a *fatwa* from Surabaya on the unlawfulness of localising gambling (see page 65 of this chapter). The resembling *fatwa* is from the East Java provincial office of NU on the unlawfulness of localising prostitution. Both *fatawa* cited the identical *hadith* on the method of fighting vicious acts. The second example of connecting method is whenever the question and reference are identical, yet there is a degree of disagreement in the answer. An example of this kind is a *fatwa* from Malang on the status on water containing chlorine (see page 55 of this chapter). While a *fatwa* of the East Java office of NU conditionally accept the unaltered nature of water, the Malang NU Branch accepts its unaltered nature without reserve. The last connecting method is whenever *fatawa* from district branches recommend contrasting or different answers from upper level *fatawa* in similar questions. An example for that is from a Gresik *fatwa* on the government's policy to deduct *zakah* from the salaries of civil servants before handing them to those servants. While in 1997 the NU central board has recommended that such practice should be prevented, the Gresik *fatwa* validates the practice.

Having listed the interplay between local *fatawa* and upper level *fatawa*, contradiction is virtually absent. From thirty-two *fatawa* having precedents from NU central board's *fatawa* or East Javanese NU office's, only one *fatawa* are in contrast to its precedent but not in principle. Three *fatawa* select the desirable answer among the available alternatives, since occasionally there are more than one *fatwa* issued by the NU central board of the East Java office of NU on one single case over period of time. The rest twenty-eight *fatawa* reflect conformation with the answers of upper level version of *fatawa*, seven of which provides identical texts. With a tendency to agreement and occasional disagreement, it can be said that the compiled fatwas of the NU Central Board as well as the East Java NU Provincial Office may act as jurisprudence for the local East Java NU branches. Besides, East Java ulama comprise the majority of delegates during NU nationwide *bahtsul masail* forums. Nonetheless,

this fact does not necessarily undermine the 1992 decision on the autonomous nature of *fatwa* at all levels of NU structure.

There are some possible explanations concerning the tendency of the district-level *fatawa* to conform to *fatawa* of the upper level. Above all, the *fiqh* establishment, especially if it is confined within only one school of law, has one basic construction, in terms of legal theory and agreed jurisprudence opinions. All *fiqh* texts of that certain school of law maintain this basic construction, especially after *ijtihad* is no longer applied. Variations and disagreements among those *fiqh* texts are minor and trivial. The consequence of this *taqlid* aspect in *fatwa* issuing within NU is that different NU ulama at different times and contexts will very likely find identical answers for one legal case because they depend on the opinions of the classic ulama written in *fiqh* texts. Moreover, the texts are arguably never extended to include new texts or texts of the other schools of law. As reflected in the above illustrations, some similar answers are reached by employing different Shafi'ite texts.

Similar to agreement, disagreement is also understandable. If the jurisprudence is fixed, the interpretation of the jurisprudence is a different realm. It is also conceivable that external considerations play an important role in some *fatawa*. When invalidating the deduction of civil servants' salaries to pay *zakah*, the NU Central Board saw it as a violation of the regulation of *zakah* payment, such as intention (*niyah*) and the symbolic handing to the rightful *zakah* recipients. In addition, it is not clear if the accumulation of one civil servant's salary surpasses the minimum amount (*nisab*). On the contrary, the Gresik *fatwa* regards it as paying *zakah* in advance, as long as the minimum amount is exceeded. Moreover, in 1997 when the NU Central Board issued its *fatwa*, the 1999 *Zakah* Law was not yet formulated and enacted. In contrast, when the Gresik branch issued its *fatwa* in 2002, the *Zakah* Law had been enacted for three years. Apart from the issue of interpretation, in any forums, including in the national *bahtsul masail* forums, there are always participants whose opinions are discarded, yet hold these opinions for their own. It is quite likely that these participants reiterate their opinions when discussing similar questions in *bahtsul masail* forums of NU district branches from which they originate.

Conclusion

Jurisprudence texts, either the Shafi'ite's or the non-Shafi'ite, are dominant in East Java. The abundant number of texts and their frequent reference in the aforementioned *fatawa* are the evidence. Interestingly, the way those texts are employed the utilitarian nature of Islamic law. Many *fatawa* attempt to conform the practices of Muslims. Some are successful, but some are not so. Likewise, conforming Muslim practices does not always reflect *maslahah* (public benefit) because looking after a few Muslims' interest might mean ignore well-being of the Muslim *ummah* in general. Apparently, since more than half *fatwa* has precedent in one way or another, the unwillingness of the local NU structures to defy the *fatawa* of upper level *fatawa* plays a crucial role in East Javanese commitment in jurisprudence. It not an exaggeration to describe the role of, especially, the *fatawa* compilation of the NU Central Board as a jurisprudence for the local levels of the NU structures.

Conclusion

The admissibility of *fatwa* as an important institution in Islamic thought is clearly founded in the aforementioned exposition. For the Islamic law establishment, *fatwa* has been an eloquent speaker. *Fatwa* is the only surviving Islamic institution which remains reasonably independent from any external intervention and influence. While in the past many *fatawa* became the official position of certain schools of law, similar trends happen in NU circles as well. In NU circles, compilations of *fatwa* from *bahtsul masail* forums at all levels are published. Loyal NU members purchase them and use them as authoritative forms of jurisprudence. This practical nature is another importance aspect of *fatwa*. Amidst the incursion of secular forces of modernism, the voice of religion is still instrumental for Muslims. *Fatwa* forms the moral and ethical foundation as well as providing guidelines for application on a day-to-day basis. In addition, the significance of the ulama through whom *fatwa* is communicated is undeniable. To a lesser extent, the ulama also depend on the *fatwa* establishment in maintaining their authority over the Muslim laity. As a result, the ulama try their best to accommodate the needs of their stake-holders in issuing *fatwa*, as long as their *fatawa* remain legally legitimate.

Admittedly, bridging between Muslims and their religion in modern times has become a daunting task for the ulama. In NU, there have been some divergent approaches in dealing with the situation. While some are satisfied with classic legal traditions, some urge change to keep pace with the ever-changing modern environment. The majority of ulama still maintains conservatism in terms of commitment to *madhhab* discipline, *taqlid* and *kitab kuning*, both in theoretical debates and *fatwa*-issuing practice. Providing answers for queries is their primary goal, and such a commitment sometimes denies the equitability and practicability of *fatawa*. Still, they do not deny the need for equitable *fatawa*, they prefer to formulate such desired goals within the context of available traditions. Since *ijtihad* is not an option, limited *talfiq* and the employment of weak opinions are the breach they are ready to commit. Alternatively, some ulama locate themselves between the prescriptions of *madhhab*, *taqlid* and *kitab kuning* on the one hand, and the demands of equitable *fatawa* on the other. In achieving

this goal, extensive *talfiq* and limited *ijtihad* becomes their method. In addition, a few ulama try to modernise *fatwa* by focusing on producing equitable *fatawa* rather than on the method of its formulation. Formulating their own *ijtihad* style and utilizing *siyasah shar'iyah* become their primary methods. As a result of different attitudes toward the relationship between text and context, the likelihood of producing equitable *fatawa* differs from one group to another. The conservatives only occasionally produce equitable *fatawa*, the moderates on a more frequent basis, and the modernists guarantee equitability in all of their *fatawa*.

Moderate and modernist ulama finally joined forces to push changes through. Their main objective is to establish methodological foundations conducive to the creation of equitable *fatawa*. Contextually rereading classic jurisprudence texts and openly re-employing *ijtihad* are the main methods used. In so doing, a series of seminars and publications are conducted to socialize the objective, especially to conservative ulama. The most crucial episode of this campaign was the production of a document recommending the humanization of *fatwa* during the NU mid-term congress in 1992. In addition, pilot projects to train future muftis (*Ma'had 'Aly*) were opened in some pesantrens with the permission of their moderate ulama. Likewise, since 1997, other types of *bahtsul masail* emphasising the practice of *ijtihad* were institutionally introduced under the banner *Bahtsul Masail Diniyyah Maudu'iyah*. Further, starting in 2003 another *bahtsul masail* forum focusing on *siyasah shar'iyah* was initiated by Masdar F. Mas'udi, a modernist ulama primarily responsible for the reform.

Responses to such efforts have been mixed, but the majority of conservative ulama is defensive and skeptical. Certainly, liberally practicing *ijtihad* at the expense of *taqlid* and *kitab kuning* to maintain *maslahah* is unpopular among the conservatives. Besides, by tracing back to the *fatwa* files of the NU Central Board, they have a right to be skeptical. Most aspects of the 1992 document are not entirely new. Collective *ijtihad* and *talfiq* were occasionally practiced prior 1992. Likewise, *maslahah* was well considered in issuing *fatwa*, but remains as secondary consideration. Similarly, the conservatives also see *Bahtsul Masail Maudu'iyah* and *siyasah shar'iyah* as merely different presentations of *fatwa* issuing without making major changes in principle.

Admittedly, they miss the point. The aims of NU modernists are to produce equitable and practicable *fatawa*. In so doing, methodological flexibility is a necessity.

The endurance of conservatism can be explained by looking at traditional pesantren, the training institutions of *mufti* in NU. So far, virtually only the salaf pesantren supply cadres of 'muftis' in NU circles. Their curricula are conservative, advocating *madhhab*, *taqlid* and *kitab kuning*. There are at least two motives behind this conservatism. The first is that such modernist campaigns are perceived as being a threat to deeply adhered classical fiqh establishment as a whole. The modernists, whose educational background is often a combination of pesantren and formal Islamic higher education, complain about the over-obsequiousness of the conservatives as the only obstacle against practicing *ijtihad* and upholding *maslahah* as the determining factor in issuing fatwa. In addition, the conservatives perceive the classical fiqh establishment as the *raison d'etre* of the pesantren tradition. Therefore, such campaigns are also considered a threat to the authority of the ulama. The position of ulama as the experts of Islamic law is the primary source of the ulama's traditional authority. As a result, resentment from conservatives especially towards the modernist ulama is also evident, targeting both personal integrity and intellectual qualifications alike.

The evidence of conservatism is also recorded in East Java, the base of NU. It can be reflected by the lack of attempts to practice *ijtihad*, which is supposedly the gateway to producing equitable and practicable *fatawa*. Based on the aforementioned contemporary East Javanese *fatawa*, *ijtihad* in terms of reference to primary sources and to the employment of legal maxims is virtually absent. Almost all answers are based on the stipulation of jurisprudence texts. Consequently, although some *fatawa* advocate *maslahah*, there are many *fatawa* in which justice has been denied to people. *Sende* as a disguised form of usury is tolerated. Likewise, prohibition against from exchanging and selling *waqf* property has been proven to be impractical in some instances. Still, variations in the origin of texts are evident reflecting the employment of *talfiq* and *ijtihad*.

Admittedly, the purpose of employing *talfiq* and *ijtihad* by NU ulama is to find an answer for a given question and, more importantly for this discussion, to

accommodate Muslim practices. This last point is a confirmation of the utilitarian nature of Islamic law. The NU ulama always try to accommodate popular practices in issuing *fatawa*. The aforementioned *sende* contract is a good example. It is widely conducted among Indonesians, although it is exploitative. Using this example, utilitarianism is contradictory to *maslahah*. On the other occasion, such as allowing drivers to combine and shorten their prayers, this utilitarianism seems to maintain *maslahah*. At this point, the conservative ulama misunderstand *maslahah* as perceived by the modernist NU scholars. While the former understands *maslahah* as an effort to maintain the status quo, the latter see *maslahah* as an attempt to uphold justice. This gap has contributed to the defensive attitude of the conservative ulama vis-à-vis the modernist NU scholars' opinions.

In addition to conservatism, there is a tendency for East Javanese *fatawa* not to contradict *fatawa* of the NU Central Board. This can be described as a new genre of *taqlid* as well as the evidence of the authoritativeness of NU *fatwa* compilations as jurisprudence. For NU ulama at local levels, the ulama of east Java in this case, the NU Central Board's *fatawa* are highly regarded for two inter-related reasons; those sitting on the drafting board are respected ulama and those respected ulama are mainly East Javanese. It is *taqlid* in its extreme meaning. On the other hand, this phenomenon can be considered as an embryonic form of NU Indonesian Islamic law because the NU *fatawa* are classic jurisprudence-based responses to Indonesian-rooted Islamic legal cases.

Nonetheless, the increasing number of young, modernist ulama in East Java should also be noted. They are disciples of the pioneering moderate and modernist ulama. Alternatively, they combine pesantren education with formal Islamic higher education (such as from IAIN). Already they participate in official *bahtsul masail* forums in NU local branches. They articulate their *maslahah*-based method of reasoning during the forums, although to little avail so far. Coupled with the tireless campaigns of pioneering moderates and modernists, such as KH. M.A. Sahal Mahfudh and Masdar F. Mas'udi, it can be expected that their position will gain more support in the future. Programs like *Bahsul Masail Islam Emansipatoris* and *al-Ma'had al-'Ali* are surely the

catalysts for change. Certainly, they are not yet concerned about the consequences resulting from flaws of legal modernist methods. Still, it is sufficient enough to provide religious foundations for NU members living in modern times. It is interesting to see in the future the reactions of the conservatives and their *pesantrens* as the modernist NU ulama gain more supports from some conservative NU ulama. More importantly, in such divergent configuration, forms of *bahtsul masail* discussions and formulations are worth observing.

Documentary appendices

- A. An example of *bahtsul masail diniyyah maudu'iyah* from 1997 mid-term congress (Sekjen PBNU, 1998:45-7)

Appointing temporal leadership and democracy

1. in Islamic point of view, authority is mandate from God Almighty to mankind. Still, mankind should only delegate such mandate to the rightful personality.

[Quran Chapter 33:72] *'We did indeed offer The Trust to the Heavens and the Earth and the Mountains; But they refused to undertake it, Being afraid thereof: But man undertook it;- He was indeed unjust and foolish;-'* (Ali, 1983:1129-30)

[Quran Chapter 4:58] *'Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things'* (Ali, 1983:197-8).

2. Responsibility to hold such mandate require skill, honesty, impartiality, and vitality which favour the mandate stake holders.
3. There are some alternative procedures in appointing state leadership as the holder such mandate approved by citizens as long as in conformity with shari'ah.
4. Within the discourse of Sunni Islam, establishing a state or polity is a religious obligation. The premise is like this:
5. A state should built upon virtuous Islamic values, such as justice, integrity and consultation.
6. A democratic, clean and strong government is a necessity in implementing such values.
7. The awareness and willingness of people is instrumental in establishing clean and strong government.

8. A democratic state, which is the realisation *syuro* (consultation), demands control on its leadership. The leadership should be aware of that social control is required as a moral support to lighten the burden in establishing just, clean and strong government.

Evidence from Quranic passage:

[4:58] *'Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things'.*

[4:59] *'O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination'* (Ali, 1983:197-8).

Evidence from Prophet's sayings:

'Whoever dies without identifying oneself under a polity, that person dies as ignorant' (reported by Muslim)

'If the leadership is ignored, just wait the time (of chaos). How the leadership is ignored? Whenever it is entrusted to unqualified person' (reported by al-Bukhari)

'If three persons are on travel, one of them should be the leader'

9. NU central board, therefore, should
- formulate this substantial concept in a comprehensive draft.
 - continuously promote and develop the study on Islamic political concept based on *Ahl al-Sunnah wa al-Jama'ah* (Sunni) teaching.

- B. An example of fatwa issued by the association of sufi order followers al-Fuyudat al-Rabbaniyyah (Masyhuri, 1982:4).

Question:

Is a *murshid* (*tariqah*'s spiritual teacher) allowed to continue taking new followers' oath to join his *tariqah* without teaching them *shari'ah* (Islamic law)?

Answer:

The practice is not allowed if the new followers are ignorant about *shari'ah*, and there is no informed person but him who can teach them *shari'ah*.

References:

Al-Futuh al-Ilahiyyah page 823: *...then the master (murshid) must teach the followers (murid) about religious knowledge such as ritual purification, prayers and the related matters. Likewise, he also has to teach him basic Islamic theology. If the master is not an expert on such knowledge, he has to assign an expert to teach them.*

- C. System of taking legal decisions in examination of issues in the domain of the Nahdlatul Ulama (Hooker, 2003:57-59)

Main stipulations.

1. The permissible texts are those regarding the teaching of Islam which are in accordance with the belief of *Ahl Sunnah wa al-Jama'ah* (Sunnite Islam) (see 27th Congress).
2. To follow a school of law according to its fatwa is to follow its rendered opinions
3. To follow a school of law according to its method is to follow the way of thought and principles for setting of its law which have been built up by the eponym of that school
4. What is intended by *istinbat* (cultivation) is the drawing out of Islamic law from its propositions by the method of principles/roots and understanding (*usul a-fiqh* and *qawa'id fiqhiyyah*)
5. What is intended by *qawl* ('statement') is the opinion of the eponym of the school.
6. What is intended by *wajh* ('expression') is the opinion of the scholars of the school.

7. What is intended by *taqrir jama'i* (collective determination) is the collective effort to make a choice between a number of opinions of *qawl* or *wajh*.
8. What is intended by *ilhag* ('annexation') is the joining of the law for a certain case which has not been answered with one which has been answered by legal texts.
9. What is intended by a proposed problem is a request for discussion a case whether the title of the case only, some basic thoughts in addition or even the intention of revisiting a topic already discussed.
10. What is intended by 'ratification' is the ratification of the results of the discussion of the problem by the central board of NU consultative board, mid term congress, and national congress.

The system of legal decision making

A. Procedure of answering problems

The process occurs within the framework of the legal schools focusing on following established legal opinions:

1. if one opinion exists in the legal texts it is used
2. if more than one opinion exists in the legal texts, 'collective determination' is used to select an answer
3. if no opinion exists at all, the process of 'annexation' is carried out collectively by the experts
4. if no 'annexation' cannot be used the 'cultivation' is collectively performed using the following method by the experts.

B. Hierarchy and characteristics of the examination issues

1. All decisions on *bahsul masail* within the domain of NU taken according to the agreed procedure are of one status and do not cancel each other out.
2. A decision which has received approval by the Central board of NU is considered to have force without awaiting the decision of the mid-term congress or NU congress

3. The characteristics of a decision at the level of the mid-term congress and congress are ratification of drafted decisions prepared beforehand and/or the approval of decisions which are considered to have far-reaching repercussions in all fields

C. The framework for analysis of issues

In solving a social issue, *bahsul masail* should use the framework of discussion (which is reflected in the resulting decision) as follows:

1. analysis of the problem (the cause of problem is considered from a number of factors): economic, cultural, political and other social factors
2. analysis of the effect (positive and negative) which have arisen by this case and the law should be considered from a number of different aspects: socioeconomic, sociocultural, sociopolitical and so on.
3. Legal analysis (the legal opinion regarding a certain case after the background and the effects in all areas are balanced). Besides, the formal legal decision, the decision should consider the positive opinion of Islam and law: legal status (the five grades), the basis from teachings of the observers of the law, law which is positive.
4. Analysis of action, role and warnings (what must be done as a consequence of the legal opinion. who must do it, when, where ect. And what mechanism must be put in place to ensure all goes according to plan): the political path (influencing government policy), the cultural path (increasing awareness among people via the mass media), the economic path (improving social welfare), other social paths (improving the health of the populace, environment ect.).

D. Guidelines for implementation

1. procedure for choosing an option among alternatives (*qawl* or *wajh*)
 - a. choose the more beneficial and/or stronger opinion
 - b. employ as far as possible the hierarchy of opinions set by the first NU congress: those agreed on by al-Nawawi alone, those supported by al-Rafi'i alone, those supported by the majority of ulama, those supported by the most learned ulama, those supported by the most pious ulama.

2. procedure for annexation

This is carried out by examining that which is to be connected and that to which it is to be connected, and the guiding principles of annexation by the experts of annexation.

3. procedure of cultivation (*istinbat*) to be carried out collectively following the method of roots and understanding (*usul al-fiqh* and *qawaid fihiyyah*) by experts.

D. The cited East Javanese *fatwas*

No. 1

Place/Date : Malang, June 2003

Question : Whether ritual purification using boiled water is allowed.

Answer : Purification should be performed after the water becoming cold

Reference(s) :

- Ihya' 'Ulum al-Din I/16: citing a Hadith stating that Muslims should try their best to perform ritual purification.
- Bushr al-Karim (vol. I page 30): using very hot water is repugnant
- Fath al-Wahhab (I/4): '*the alteration of the bowl resulting from boiling water is dangerous for skin*'

No. 2

Place/Date : Malang, June 2003

Question : Whether ablution using water containing chlorine is allowed

Answer : Since chlorine does not alter the nature of water, it can be used for ablution

Reference(s) :

- Fath al-Mu'in (4): the definition of ma' mutlaq (infinite water)
- Hashiyah al-Bajuri (I/28): the definition of ma' mutlaq
- Bughyah al-Mustarshidin (11): minor alteration cannot influence the infinity of water

No. 3

Place/Date : Malang, June 2003

Question : The status of river water polluted by feces and domestic waste for ritual purification

Answer : The water becomes unpurified (mutanajjis) if the river's current is small, but it remains purifying if the river's current is big

Reference(s) :

- Kashifah al-Saja (32): *'water of big rivers remain purifying even after in contact with (defiled) substances as long as the nature (taste, odour, colour) unchanged'*
- Al-Muhadhdhab (I/7): *'water of a stream remains purifying as long as no direct contact with the defiled substances'*

No. 4

Place/Date : Malang, June 2003

Question : The status of those deliberately polluting river

Answer : The act of polluting water is unlawful because water is vital for people

Reference(s) :

- Al-Mawahib al-Saniyyah (114): citing a Hadith stating that no injury should be imposed nor an injury to be inflicted as a penalty for another injury
- Al-Jami' li 'Ahkam al-Qur'an (VII/226): based on Quran 7:56 stating that pollute the source of water is prohibited
- A Hadith from Ibn Hanbal's al-Musnad: urinating in a pond makes people furious
- Kifayah al-'Ahyar (I/30): *urinating in pond/rivers can be repugnant or prohibited*

No. 5

Place/Date : Gresik, October 2002

Question : The position of women in collective prayers (*jama'ah*)

Answer : Women can be in the back of congregation (behind male congregation) or side by side with them in main room with fabric separating between the two groups

Reference(s) :

- Al-Majmu' Sharh al-Muhadhdhab (IV/301): *'according to a Hadis, the recommended place of women in congregation is in the back, if no barrier between male and female congregation'*

No. 6

Place/Date : Gresik, October 2002

Question : The status of (obligatory) in the plane

Answer : If all requirements of prayer can be fulfilled, obligatory prayers are valid,

but if not, marking time prayers are performed instead. The status of marking time prayers is obligatory

Reference(s) : ▪ Al-Risalah al-Mukhtasarah (8): '*Muslims are still obliged to perform prayers even in planes. The prayer is to mark time, and whenever getting off Muslims must repeat their prayers*'

No. 7

Place/Date : Gresik, October 2002

Question : The status salat with *jam'* and *qasr* (combining and shortening prayers) for drivers and tollgate tellers

Answer : Drivers may combine and shorten prayers, if the prescribed distance is elapsed. Officials of toll way may only combine prayers

Reference(s) : ▪ Hashiyah al-Bajuri (I/209): '*travelers may shorten their prayers, but full-version of prayer is preferable*'
▪ Kashifah al-Saja (): combining prayers is allowed for no particular reason

No. 8

Place/Date : Pasuruan, June 2003

Question : a. The status more than one *jum'ah* prayer in a mosque (one *jum'ah* prayer after another)
b. The status of *jum'ah* prayer in offices or bus stations without (or small number) local citizen (*mustautin*) as congregation

Answer : a. In one village or sub-village, there should be only one communal *jum'ah* prayer, but in certain conditions more than one *jum'ah* prayers is tolerated
b. The communal *jum'ah* prayer in which its congregations are not local people is void (not *sah*). Nonetheless, some scholars of Hanbali School acknowledge its validity (*sah*)

Reference(s) : ▪ 'I'anah al-Talibin (II/60-1): two or more *jum'ah* prayers can be performed in different sub-villages
▪ Hashiyah Radd al-Muhtar (II/144): two or more *jum'ah* prayers can be performed in one sub-village
▪ Qurrah al-'Ayn bi Fatawa al-Shaykh 'Isma'il al-Yamani (83): two or more *jum'ah* prayers are allowed if each prayer attended by at least forty male local

citizens

- Al-Bahr al-Ra'iq (II/154): more than one *jum'ah* prayer is allowed to accommodate large congregation
- Al-'Insaf (II/280-1): cramped room, fear and distance legitimise more than one *jum'ah* prayer

No. 9

Place/Date : Malang, June 2003

Question : The status of *salah gha'ib* (prayer attributed to distant dead Muslims) for Iraqi people killed during war

Answer : *Salah gha'ib*, which is only recognised by Shafi'ite and Hanbalite Schools, can be performed only for civilian casualties

Reference(s) :

- Al-Fiqh 'ala al-Madhahib al-Arba'ah (I/530): the text explains the definition and division of martyrdom (prayer cannot be offered to martyrs, it is only for civilians).
- Kifayah al-Ahyar (I/164-5): further explanation on martyrdom
- Rahmah al-'Ummah (71): '*only Shafi'ite and Hanbalite recognise gha'ib prayer*'
- Al-Muhadhdhab (I/134): '*the Prophet once performed gha'ib prayer for Abyssinian king*'

No. 10

Place/Date : Surabaya, June 2002

Question : Whether the owners of share, dividend, saving and deposit bank interest should pay *zakah*

Answer : The invested money is liable to *zakah* because money is liable to *zakah*, and its *nisab* (minimum requirement) is equivalent to gold

Reference(s) :

- Al-Fiqh 'ala al-Madhahib al-Arba'ah (I/605): '*the majority of fuqaha' (jurists) are on the opinion that banknote (money) is liable to zakah because it is equivalent to gold and silver in exchange of goods*'

No. 11

Place/Date : Gresik, October 2002

Question : Whether money of liquid investment is liable to *zakah*

Answer : The money is liable to *zakah*, since it is parallel to gold and silver. As a

result, the minimum amount is similar to gold and silver, which must be paid after *haul* (one year of full ownership).

- Reference(s) :
- Ahkam al-Fuqaha' (62-3): *a 1930 NU fatwa on exchangeability of banknote'*
 - Al-Mauhibah Dhawi al-Fadl (IV/): *'bank notes are equal to silver money (dirham)'*
 - Al-Fiqh 'ala al-Madhahib al-Arba'ah (I/605): *'the majority of fuqaha (jurists) are on the opinion that banknote (money) is liable to zakah because of its equivalence to gold and silver in exchange of goods'*

No. 12

Place/Date : Surabaya, June 2002

Question : Incomes (of dentists and civil servants) and revenues of providing services (namely hotel and transportation companies) and their liability for *zakah* (responding Law No. 38/1999 on *zakah*).

Answer : Incomes and revenues of services are not liable to *zakah* except if they are considered trading. Still, civil servants' salaries cannot be deducted before handing them to those servants. This government ruling is in line with Islamic law as long as *haul* and *nisab* are observed.

- Reference(s) :
- Al-Muqaddimah al-Hadramiyyah (II/92): *'if a person employs oneself (ijarah) to other person in return of some sort of goods or commodity, that exchange is considered trading commodity'*
 - Al-Fiqh 'ala al-Madhahib al-Arba'ah (I/564): listing the commodities liable to *zakah*
 - Al-Fiqh 'ala al-Madhahib al-Arba'ah (I/572): *'the majority of fuqaha (jurists) are on the opinion that banknote (money) is liable to zakah because of its equivalence to gold and silver in exchange of goods'*
 - Kifayah al-Ahyar (I/178): *'if a person lease his/her property or service and receiving fee in return that exchange is considered trading commodity because trading is exchange'*
 - Al-Majmu' Sharh al-Muhadhdhab (VI/49): *'whoever employs himself in return of fee with intention of trading, that fee is trading commodity which is liable to zakah'*
 - Fath al-Qarib (): *'zakah of trading commodity is calculated at the end of year'*
 - Ajwibah 'an As'ilatika fi al-Zakah (28): *'the nisab for zakah of money is equal to the price of 85 grams of 24 carats of gold'*
 - Ajwibah 'an As'ilatika fi al-Zakah (28): *'the owner of the zakah commodity has the right to distribute the zakah'*

No. 13

Place/Date : Gresik, October 2002

Question : Incomes (of dentists and civil servants) and revenues of providing services (namely hotel and transportation companies) and their liability for *zakah* (responding Law No. 38/1999 on *zakah*).

Answer : Incomes and revenues of services are liable to *zakah* because they are considered trading. Likewise, civil servants' salaries can be deducted to pay *zakah* as long as the accumulation of one-year salary is above the nisab. This government's ruling is in accordance to Islamic law.

Reference(s) :

- Kifayah al-'Ahyar (I/178): *'if a person leases his/her property or service and receiving fee in return that exchange is considered trading commodity because trading is exchange'*
- Al-Mauhibah Dhawi al-Fadl (IV/31): *'bank notes are equal to silver money (dirham)*
- Al-Majmu' Sharh al-Muhadhdhab (VI/49): *'whoever employs himself in return of fee with intention of trading, that fee is trading commodity which is liable to zakah'*

No. 14

Place/Date : Nganjuk, March 2003

Question : Whether preachers' income is liable of *zakah*

Answer : It is not liable to *zakah* because no intention of trading

Reference(s) :

- Kifayah al-Ahyar (I/178): *'if a person leases his/her property or service and receiving fee in return that exchange is considered trading commodity because trading is exchange'*

Place/Date : Kencong, June 2003

Question : Whether civil servants and employees of private companies, whose incomes are more than traders and farmers, should pay *zakah*

Answer : No *zakah* is liable except if the money is treated as trading property

Reference(s) :

- Fath al-Mu'in ((in the margins of I'anah al-Talibin [II/148])); *zakah which is distributed to eight groups, is originated from gold and silver, cattle, staple food, and grapes and dates'*

No. 15

Place/Date : Kencong, June 2003

Question : Whether fertilizers' cost reduces *zakah* of plantation

Answer : Fertilizers do not reduce *zakah* of plantation

Reference(s) : ▪ Hamish Qurrah al-‘Ayn (100): *'some people put fertilizers for their crops instead of watering it. Still, it cannot reduce the amount of zakah'*

No. 16

Place/Date : Jember, February 2003

Question : Whether santri (student of pesantren) is entitled to receive *zakah*

Answer : Santri cannot receive *zakah* because they do not fit into one of eight categories

Reference(s) : ▪ Fath al-Mu‘in (in the margins of I‘anah al-Talibin [II/206]): *'five percent of war booty is allocated to maslahah 'ammah (public benefit), such as maintenance of fort and mosques, fees for judges and students of Islamic sciences'*

▪ Fath al-Mu‘in (in the margins of I‘anah al-Talibin [II/186-7]): *'the quranic verse (9:60) on the eight receiving groups is restricted. No other group should receive the zakah'*

▪ Rahmah al-‘Ummah (110-3): *'the jurists have agreed for not to allocate the zakah for building mosques or buying cloth for corpse'*

▪ I‘anah al-Talibin (II/192): *'zakah cannot be distributed for building mosques or buying corpse's cloth'*

▪ Marah Labid (I/113): *'al-Qaffal cited the opinion of some scholars who allowed the distribution of zakah to all kinds of good deeds, such as clothing corpses, building forts or funding mosques because the Qur'an verse (9:60) of "fi sabil li Allah" is general term'*

No. 17

Place/Date : Kediri, June 2003

Question : Whether the collected *zakah* can be invested, instead of distributed to its *mustahiqqun* (rightful recipients)

Answer : If the consent of all recipients is obtained, such investment is allowed

Reference(s) : ▪ Al-Iqna‘ (I/211): explaining properties liable to *zakah*

▪ Al-Majmu‘ Sharh al-Muhadhdhab (VI/159-60): the authority cannot buy something with *zakah* properties except with permission of the rightful recipients

▪ al-Muhadhdhab (I/169): the imam (government) cannot spend *zakah* property without permission of the rightful recipients

No. 18

Place/Date : Kencong, June 2003

Question : Whether voluntary (self-appointed) *zakah* collectors can be considered *amil* (*zakah* collector who is entitled to portion of *zakah*), and how to determine their fee

Answer : Voluntary *zakah* collectors are not *amil*, because government or its agencies should appoint *amil*. Their fee is determined by their job and be paid in identical commodity of *zakah*

Reference(s) :

- Mauhibah Dhawi al-Fadl (IV/130): *'the fifth (receiving) group is al-amilun (the collectors of zakah). The imam (authority) must delegate amil to collect zakah, such as coachman/driver. Consequently, those voluntarily appoint themselves to collect zakah are not amil*
- Al-Muhadhdhab (I/170-1): *'if the imam is the one who distributes the zakah, the first group to receive it is amil. Their fee is based on their work'*

No. 19

Place/Date : Kediri, March 2003

Question : Whether the cattle of *qurban* (religious offerings) can be let alive and breed instead of slaughtered

Answer : The cattle must be slaughtered

Reference(s) :

- I'anah al-Talibin (II/330): citing a Hadis stating that the most admirable deed of Muslims during festive days of *'id al-adha* is to spurt blood (slaughtering cattle for *qurban*)

No. 20

Place/Date : Kencong, June 2003

Question : Whether *qurban* meat can be sold and the money is used to build a mosque instead of bestowed freely

Answer : Such practice is not allowed, except if the seller happen to be poor.

Reference(s) :

- Hashiyah al-Sharqawi (I/21): *'the qurban performer cannot sell the meat, hide and wool'*

No. 21

Place/Date : Surabaya, June 2002

Question : Whether cash money can be bestowed for *waqf* (religious endowment)

Answer : *Waqf* of cash money is invalid, because only non-movable properties can be bestowed for *waqf*

Reference(s) : ▪ Fath al-Mu'in (in the margins on I'anah al-Talibin [III/162]): it explains the basic rule stating that *waqf* is only valid on non-movable properties for long lasting utilization

No. 22

Place/Date : Gresik, October 2002

Question : Whether converting graveyard, which was originated from *waqf*, to commercial factory is allowed

Answer : Any conversion is not allowed

Reference(s) : ▪ Hashiyah al-Qalyubi (I/352): *'digging graves after burial is not allowed except in emergency'*

▪ Minhaj al-Talibin (I/29): *'digging graves after burial is not allowed except in emergency, such as the corpse has not been bathed before buried'*

▪ Hashiyah al-Bujairami (I/446): *the only valid utilisation of graveyard is burying corpses*

▪ I'anah al-Talibin (III/211): *'the waqf property cannot be sold or given away. Likewise, changing its nature is not allowed, such as converting plantation to house'*

▪ Nihayah al-Zayn (272): *'swapping waqf property is not allowed, even if it is damaged or defunct'*

No. 23

Place/Date : Jombang, October 2003

Question : Whether sende contract or jual janji (the sale of land with an option to repurchase) is allowed

Answer : Since the agreement (to repurchase the land) is outside the contract, the contract is valid

Reference(s) : ▪ Tarshih al-Mustafidin: *'attention- you should know that the promise trading well-known in Arab and recognised in Mecca with the name of timely trading or trust trading is valid if operates unconditionally. The condition should not be pronounced in the contract as well as in the khiyar (time of consideration)'*

No. 24

Place/Date : Sidoarjo, April 2002

Question : Whether pyramid-system business (Multi Level Marketing) is allowed. This question concerns a pyramid-based business with gold coin as commodity. Many NU members have suffered financial loss as a result. they buy the system (multiple bonuses are awarded if attracting new potential buyers) not the product (surely the coin is as twice as much compared to market price)

Answer : The business is invalid because the procedure is fraudulent

Reference(s) :

- Al-Majmu' Sharh al-Muhadhdhab (I/263): *shafi'ite scholars according to their clear opinion said that selling unseen property is absolutely not valid*
- Kifayah al-Ahyar (I/240): *'while salam (contract for future delivery) is allowed, selling unseen property which cannot be observed is not allowed'*
- I'anah al-Talibin (III/6): *'selling with conditions in contract is not allowed'*
- I'anah al-Talibin (III/10): *'selling unseen property is absolutely not valid'*

No. 25

Place/Date : Kencong, June 2003

Question : Whether a usurious loan service, which all interests go back to community, is allowed. That practice is if a person borrow 100.000 rupiah, that person is only given 90.00 rupiah with obligation to return 100.00 rupiah.

Answer : It is unlawful, that is riba (usury)

Reference(s) :

- Fath al-Mu'in (in the margins of I'anah al-Talibin [III/52]): *'any credit necessitate benefit for creditor is void for a Hadith clearly stated that every credit attracting benefit are usury'*

No. 26

Place/Date : Kencong, June 2003

Question : Whether an arisan (a revolving credit association) with involvement of depositing the money to the bank is allowed. The organiser manages to give the members of this arisan more than their deposited money as a result.

Answer : Arisan is allowed since it is considered qard (credit), and the additional money given back to the participants is gift. Still, the involvement of bank is problematic. Three opinions on the matter; haram (unlawful), mubah

(allowed), and shubhat (uncertain).

- Reference(s) :
 - I‘anah al-Talibin (III/21): explaining the procedure of arisan and its lawful status
 - I‘anah al-Talibin (III/53): explaining the definition of *hadiyah* (gift), (*sadaqah*) charity, and *hibah* (grant)
 - I‘anah al-Talibin (III/144): *'hilah (legal fiction) to avoid usury is usury as well'*
 - Is‘ad al-Rafiq (I/133): *'hilah to avoid usury is unlawful according Malik ibn Anas, but lawful according to Abu Hanifah and al-Shafi‘i'*

No. 27

Place/Date : Nganjuk, March 2003

Question : Whether concealing petrol gas commencing price increase to gain benefit is allowed

Answer : The concealment is allowed, because it is not considered staple food

- Reference(s) :
 - Ihya’ ‘Ulum al-Din (II/74): citing some reports of Hadis saying that concealing staple food is condemned. Still, it also states that if a commodity other than food has become essential, concealing it for benefit is also prohibited.

No. 28

Place/Date : Nganjuk, March 2003

Question : Whether photocopier business can copy lottery prediction pictures

Answer : No, that business can only serve lawful customers because photocopying lottery pictures is considered an assistance to *ma'siyah* (evildoing)

- Reference(s) :
 - Hashiyah al-Jamal (III/92): *'selling grapes to wine maker is not allowed because it is considered an assistance to ma'siyah (evil doing)'*

No. 29

Place/Date : Kencong, June 2003

Question : Whether marriage conditions issued by Ministry of Religious Affairs is binding

Answer : It is binding if uttered with intention

- Reference(s) :
 - I‘anah al-Talibin (IV:16): explaining that *ta‘liq al-talaq* (divorce condition) is a valid practice.
 - Kifayah al-‘Ahyar (II/92): stating that a divorce does not effectual is the husband reading the text of divorce without intention to do so

No. 30

Place/Date : Kencong, June 2003

Question : After seven months of marriage, a woman delivered a baby and his husband is not the one who makes her pregnant. Whether that man is the Father of the baby according to Islamic law and if medical opinion is influential

Answer : Since in fiqh point of view the earliest delivery is six months of pregnancy, the husband is the Father of the baby and the guardian. Modern medical is considered as long as in line with Islamic law.

Reference(s) :

- Ghayah al-Talhis al-Murad (242): *'if a man married a woman and she delivers a baby after six month of marriage, the baby is his'*
- Bughyah al-Mustarshidin (237): *if a married woman delivers a baby resulting from adultrous relationship with another man, the Father is her husband'*
- Bughyah al-Mustarshidin (249): explaining that a *qa'if* (shaman) should predict the Fatherhood of a baby based on facial similarity should two men are potential Father

No. 31

Place/Date : Jember, February 2003

Question : Whether hierarchy of marriage guardian in kitab kuning originates from primary sources (Quran and Sunna)

Answer : Yes it does, because ijma' (consensus) has been reached on the matter

Reference(s) :

- Kifayah al-Ahyar (II:49): stating that the guardian hierarchy should be obeyed because marriage's validity depends on its observance
- Bughyah al-Mustarshidin (203): explaining the shift from immediate guardian to distant one had the former is unavailable
- Al-Mizan al-Kubra (II/110-1): explaining the opinions of four schools of law on the shift from immediate guardian to distant one had the former is unavailable
- Rahmah al-'Ummah (II/29-32): explaining the shift from immediate guardian to distant one had the former is unavailable

No. 32

Place/Date : Jember, February 2003

Question : Whether distributing inheritance not using *fara'id* (Islamic rules of dividing inheritance) is allowed

Answer : Yes, as long as agreement among all heirs is assumed

Reference(s) : ▪ Bughyah al-Mustarshidin (281): stating that selling the inheritance is not allowed except the heirs knowing their portion of it before hand and agreeing to accept the possible difference.

No. 33

Place/Date : Kediri, June 2003

Question : Whether a healthy expecting mother may choose caesarean surgery instead of normal delivery (not in emergency). If so, whether obligatory bath after delivery is intact

Answer : Since the risk of surgery is milder than delivery, it is allowed. There is a dispute among ulama concerning obligatory bath

Reference(s) : ▪ Mughni al-Muhtaj (IV/296): *'piercing ears of baby girl is not allowed because of pain'*
▪ Fath al-Mu'in (in the margins of I'anah al-Talibin [IV/175]): *'some scholars allow piercing girls' ears, not boys' for cosmetic purposes'*
▪ I'anah al-Talibin (IV/175): stating that delivering baby is a very critical stage in a mother's life
▪ Mughni al-Muhtaj (IV/200): stating that a person should have a protuberance in his body amputated if a doctor tells so
▪ Hawashi al-Sharwani (IX/170): explaining the basic regulation of interaction between doctors and their patients in relation to sex difference
▪ Hashiyah al-Bajuri (I/77): reporting from al-Ramli's opinion that obliged bathing after delivery is intact even if the baby is delivered not from vagina

No. 34

Place/Date : Malang, June 2003

Question : Whether women are allowed to use ojek (motorcycle taxi) service, which its drivers are men

Answer : No, because it necessitates *zahmah muharrahmah* (unlawful leaning), *khalwah muharrahmah* (unlawful togetherness), unlawful travel, and it is not in emergency situation

Reference(s) : ▪ Is'ad al-Rafiq (II/67): citing a Hadis stated that the prophet warns against the unlawful dating. Leaning between a man and woman of no legal justification is worse than leaning on a filthy stinky pig.
▪ Mirqah Su'ud al-Tasdiq (80): *secluded meeting between man and a woman of*

no lawful relationship is evil doing

- Mirqah Su'ud al-Tasdiq (80): *a woman cannot travel, except for religiously obligatory tasks, without companionship of mahram (immediate family) or husband*
- Al-Ashbah wa al-Naza'ir (61): *'emergency is whenever a person will die or be exposed to life threatening situation if not breaching 'azimah (the basic regulation)*

No. 35

Place/Date : Blitar, August 2003

Question : Whether Indonesian Muslim may establish an Islamic law in Indonesia, and whether Indonesian soldiers may kill rebels whose intention is establishing an Islamic state

Answer : Because Indonesia has already had a legitimate (*imam*) leadership, Muslims cannot establish Islamic state, and combating rebels is allowed after the failure of peaceful 'negotiation'

Reference(s) :

- Nihayah al-Muhtaj (VII/403): based on quranic passage (49:9) stating that the authority has the right to fight rebellion movement.
- Nihayah al-Muhtaj (VII/405-6): military operation against rebels can be launched only after the failure of peaceful negotiation

No. 36

Place/Date : Nganjuk, March 2003

Question : Whether a candidate of village head or his/her campaigner can buy votes in village head elections

Answer : If the money goes to own supporters it is allowed, if not it is considered unlawful bribery.

- :
 - Kifayah al-'Ahyar (II/189): explaining the unlawfulness of accepting bribery
 - Al-Ashbah wa al-Naza'ir: a maxim stating that *'the status of the means is identical to the status of the goal'*

No. 37

Place/Date : Kediri, June 2003

Question : Whether candidates of village head are allowed to buy votes in village head elections

Answer : Such action is not allowed

- Reference(s) :
 - Sullam al-Tawfiq (74): explaining the unlawfulness of accepting bribe
 - Rawdah al-Talibin (XI/144): citing al-Ghazali's explanation on the unlawfulness of offering bribery
 - Nihayah al-Zayn (I/370): explaining the unlawfulness of accepting bribe

No. 38

Place/Date : Surabaya, June 2002

Question : Whether money politics (gifts accepted by high-rank officers) can be considered bribery

Answer : It is unlawful to accept bribery. Those officers are analogous to judges.

- :
 - Hashiyah al-Bujairami (IV/330): receiving gift is allowed, except for judges.
 - Hashiyah al-Bujairami (III/202): bribing officials and policy makers is unlawful if it is mechanism to achieve the prohibited such as promoting the vice or abandoning the truth. If not, bribery is not prohibited.

No. 39

Place/Date : Kediri, June 2003

Question : Inquiry on the status of bribery, and whether a person offering bribe can be considered trading

Answer : Offering and accepting bribery is unlawful, except if offered to implement the truth, such as to make sure a qualified person assuming certain position (in this case only offering is lawful but accepting is unlawful). Bribery might be categorised as trading

- Reference(s) :
 - Ihya' 'Ulum al-Din (II/152-3): offering bribe to authority to do the vice is prohibited
 - Is'ad al-Rafiq (II/100): citing a Quranic passage (2:188: *You shall not take each others' money illicitly, nor shall you bribe the officials to deprive others of some of their rights illicitly, while you know*) to incriminate bribery
 - Hashiyah al-Jamal (V/348): citing al-Zarkashi who says that it is allowed for a person to offer bribe to judges in order for them to uphold justice, yet accepting it is unlawful.
 - Al-Wasit (III/17): *'trading commodities should be purified, worthwhile, owned by the seller, transferable and noticeable'*
 - Tuhfah al-Muhtaj (III/296): *'A property is considered trading commodity whenever there is intention and exchange'*

No. 40

Place/Date : Surabaya, June 2002

Question : Whether corruption is not allowed, if the money is returned whether it is still punishable.

Answer : Corruption is unlawful in analogy to stealing. The punishment is cutting hand. Returning the money may acquit the punishment in Islamic law, but not according to Indonesian law

Reference(s) :

- Mirqah Su‘ud al-Tasdiq (73): *'the thief who stole the commodity equal or more than a quarter of dinar (standard gold money) from the safety must be punished by cutting his/her right hand up to wrist'*
- Al-Ashbah wa al-Naza‘ir (86): citing a Hadith that explains that reasonable doubt may avoid someone from punishment
- Bughyah al-Mustarshidin (158): explaining that repentance and returning the stolen property(s) may avoid prosecution.

No. 41

Place/Date : Surabaya, June 2002

Question : Whether suicide bombing like that of Muhammad Toha of Bandung during revolutionary period (1945-1949) is lawful

Answer : If effective in achieving the goals, suicide bombing is allowed.

Reference(s) :

- Majmu‘ al-Fatawa al-Kubra (III/554): citing a Hadis saying that once the prophet praising a young adult who threw himself to enemy lines to gain martyrdom
- Ihya’ ‘Ulum al-Din (II/315): in exception of basic rule prohibiting causing destruction to oneself (Quran 2:195), a Muslim may attack enemy by throwing him/herself into enemy line in suicidal manner.

No. 42

Place/Date : Sidoarjo, April 2002

Question : The response to ongoing building of a church

Answer : In essence, Islam cannot tolerate other religion to flourish, but because Muslims live in Indonesia, in which some other religions are also recognised, Muslims should tolerate building of other religions' shrines

Reference(s) :

- Al-Ashbah wa al-Naza‘ir (98): *'tolerance toward an issue also means tolerance toward possible consequences emanating from that issue'*

- SKB No. 01/BER/mdn-mag/1969: a joint decision of minister of internal affairs and minister of religious affairs on government's responsibility to maintain inter-religious harmony including overseeing the building of religious shrines.

No. 43

Place/Date : Jember, February 2003

Question : Whether Muslims employees may wear shirts with missionary symbols of other religion if their employers make them wearing

Answer : Wearing such shirts is not allowed and those employees should renounce it as best as they can

Reference(s) :

- Bughyah al-Mustarshidin (248): stating that wearing cloths with symbol of another religion may result in apostasy or at least sinned
- Fath al-Mu'in (in the margins of I 'anah al-Talibin [182-3]): The text is an interpretation of the Hadith on the three levels of Muslims' response toward vice; by force, verbal criticism and silent rejection

No. 44

Place/Date : Kediri, June 2003

Question : Whether there is a sort of Islamic music

Answer : Islamic music is that of using lawful musical instruments

Reference(s) :

- Is'ad al-Rafiq (2/97): stating that listening prohibited musical instruments is not allowed because its beautiful sound may cause unlawful behavior
- Fath al-Wahhab (II/385): listening a kind of percussion is allowed because the Prophet let his wife 'A'ishah listening Ethiopians playing it.
- Fath al-Bari (IX/202): playing tambourine is instructed during marriage ceremony and wedding party
- Al-Zawajir (II/340): *al-malahi (musical instruments for entertainment) is prohibited*
- Hashiyah al-'Adawi (II/597): *al-malahi is all things, such as singing and music, which lure the mind forgetting its preoccupation.*

No. 45

Place/Date : Pasuruan, June 2003

Question : Whether drum band is allowed in Islam

Answer : Drum band is allowed as long as only using allowed musical instruments

and not causing unlawful mixing between men and women

- Reference(s) : ▪ Ihya' 'Ulum al-Din (II/307): explaining that instruments of the drunk and transsexuals such as all blown and string instruments, and big drums are prohibited, except small tambourine.
- Al-Fiqh al-'Islamy wa Adillatuhu (II/573-4): explaining that all blown and string instruments, and big drums are prohibited, except small tambourine in all four sunnite schools of law.

No. 46

Place/Date : Pasuruan, 2003

Question : Whether fundraising for disaster Muslims using music concert is allowed, and who is responsible for helping unfortunate Muslims

Answer : Fundraising using unlawful music concert is not allowed. Helping those victims is obligation of Muslims.

- Reference(s) : ▪ Hashiyah al-Qalyuby (IV/262): *'fees cannot be paid to performers of ma'siyah (evildoing)'*
- Nihayah al-Muhtaj (VIII/21): *'performers of ma'siyah, such as comedians, cannot receive fees even if there is contract because it is considered ma'siyah and entitled to receive ta'zir (chastisement)'*
- I'anah al-Talibin (IV/182): *'helping victims of famine is obligation of everyone informed'*

No. 47

Place/Date : Nganjuk, March 2003

Question : Whether celebrating Islamic holy days and *da'wah* with music concert is allowed

Answer : Forbidden musical instruments cannot be used for such purposes

- Reference(s) : ▪ Ihya' 'Ulum al-Din (II/307): explaining that instruments of the drunk and transsexuals such as all blown and string instruments, and big drums are prohibited, except small tambourine.

No. 48

Place/Date : Kediri, June 2003

Question : Whether visual art (two and three dimensions) is allowed in Islam

Answer : Full sculpturing and painting of human and animals is not allowed, and only partial painting is allowed

- Reference(s) :
 - Bulugh al-‘Amniyyah (239): *‘three-dimension body sculpture is prohibited, whereas four opinions are recorded concerning two-dimension sketch/painting; absolutely prohibited, absolutely allowed, allowed if no head and partial body, and allowed if not hung’*
 - Sullam al-Tawfiq (75): *‘painting animals, either on rugs, shirts, coins, dishes, walls or the rest is prohibited and among kaba’ir (major sins). All sculptures are prohibited except dolls’*.

No. 49

Place/Date : Jombang, October 2003

Question : Whether teachers can draw for educational purposes

Answer : Basic rules of drawing is applied even for educational purposes

- Reference(s) :
 - Sullam al-Tawfiq (75): *‘painting animals, either on rugs, shirts, coins, dishes, walls or the rest is prohibited and among kaba’ir (major sins). All sculptures are prohibited except dolls’*.
 - Al-Fiqh ‘ala al-Madhahib al-Arba‘ah: *‘paintings and sculptures for educational and medical purposes are tolerated as part of emergency notion’*
 - Yas’alunaka fial-Din wa al-Hayah: *‘paintings for medical purposes are tolerated’*

No. 50

Place/Date : Surabaya, June 2002

Question : Whether localising gambling is allowed

Answer : It is not allowed because gambling is ma‘siyah (evildoing)

- Reference(s) :
 - A Hadith from Muslim's collection: the Hadith is on the three levels of Muslims' response toward vice; by force, verbal criticism and silent rejection
 - Al-Ashbah wa al-Naza’ir (63): *‘minimal harm is tolerated to avoid greater harm’*
 - Al-Ashbah wa al-Naza’ir (105): *‘specialised authority is more effective than general authority’*

Glossary and Abbreviation

<i>Amil</i>	Official in charge of zakat collection and distribution (Hooker, 2003:256)
<i>Arisan</i>	Revolving credit association (Hooker, 2003:256)
<i>Ash'arism</i>	A theological school named after its founder Abu al-Hasan al-Ash'ari (Watt, 2002)
<i>Bahtsul masail</i>	Literally "examination of issues"; the fatwa issuing institution of Nahdatul Ulama
<i>Darurah</i>	Necessity, emergency situation enabling transgression of religious regulation (Masud et al, 1996:404)
<i>Fara'id</i>	Literally "compulsory matters in inheritance"; Islamic regulation of inheritance (Masud et al, 1996:406)
<i>Fatwa pl. fatawa</i>	Non-binding legal opinion (Masud et al, 1996:405)
<i>Fiqh</i>	Legal doctrine, substantive law (Masud et al, 1996:405)
<i>Furu' al-fiqh</i>	Literally "branches; derived substantive law (Masud et al, 1996:405)
<i>Hadith</i>	Narrative report from the prophet Muhammad, a fundamental source of Islamic law (Hooker, 2003:258)
<i>Halqah</i>	Literally "circle"; religious discussion (Wehr, 1966:202)
<i>Hilah pl. hiyal</i>	Legal fiction or stratagem (Masud et al, 1996:406)
<i>Ijma'</i>	Consensus of Muslim scholars (Masud et al, 1996:406)

<i>Ijtihad</i>	Independent reasoning, authentic scholarly endeavor (Masud et al, 1996:406)
<i>Ilhaq</i>	Literally "analogy", an effort to make analogy of new legal cases to cases available in substantive law (Wehr, 1966:860)
<i>Istinbat</i>	Derivation of rules for novel legal cases (Masud et al, 1996:406)
<i>Jam‘ al-salah</i>	Combining two prayers (between <i>zuhr</i> and <i>asr</i> or between <i>maghrib</i> and <i>‘isha’</i>) in one time
<i>Jama‘i</i>	Literally "together", doing things collectively (Wehr, 1966:135)
<i>Jum‘ah</i>	Friday, obliged collective Prayer over male Muslims on Friday (Wehr, 1966:135)
<i>Katib</i>	Secretary (Wehr, 1966:813)
<i>Al-qawa'id fiqhiyyah</i>	<i>al-</i> Legal maxims, legal guidelines that are applicable to a number of particular cases in various fields of the law, whereby the legal determinations of these cases can be derived from these principles (Heinrichs, 2002:517).
<i>Kiai</i>	Religious leaders or scholars in Javanese society
KH	Kiai Haji
<i>Kitab kuning</i>	Literally, "yellow book", Islamic books studied in pesantren
<i>Al-kutub mu‘tabarah</i>	<i>al-</i> Literally, "the accredited books", jurisprudence employed in bahsul masail
LBM	Lajnah Bahsul Masail, the Committee of bahsul masail
<i>Madhhab</i>	School of Islamic law (Masud et al, 1996:407)
<i>Manhaji</i>	Literally, "methodologically", usually combined with the word <i>madhhab</i> meaning to follow legal methodology of a certain <i>madhhab</i> (Wehr, 1966:1002).
<i>Maqasid al-shari'ah</i>	The aims of the law, the idea of God's law as a system encompassing aims (Gleave, 2002:569-570)
<i>Maslahah</i>	Literally "benefit", utility, public welfare (Khadduri, 2002).
<i>Mufti</i>	A person qualified to issue fatwa (Masud et al, 1996:)
<i>Mujtahid</i>	A person qualified to practice <i>ijtihad</i> (Masud et al, 1996:)

<i>Muqallid</i>	Practitioner of taqlid (Masud et al, 1996:409)
<i>Mustafti</i>	A person who requests a legal opinion (Masud et al, 1996:409)
<i>Niyah</i>	Intention (Wensick, 2002)
<i>Nikah</i>	Marriage ((Wehr, 1966:997)
NU	Nahdlatul Ulama
<i>Pasaran</i>	Javanese calendar revolving in 35 days by combining seven days and special Javanese attributes (<i>legi, kliwon, wage, pon, and pahing</i>)
PBNU	Pengurus Besar Nahdlatul Ulama or Nahdatul Ulama Central Board
PCNU	Pengurus Cabang Nahdlatul Ulama or Nahdlatul Ulama District Branch
<i>Pesantren</i>	Traditional Islamic teaching institution (Hooker, 2003:25)
PWNU	Pengurus Wilayah nahdlatul Ulama or Nahdlatul Ulama Provincial Office
<i>Qasr al-salah</i>	Shorten the four-circle prayer to two circles
<i>Qawli</i>	Literally, "textually", usually combined with the word <i>madhhab</i> meaning to follow the legal opinions of a certain <i>madhhab</i> .
<i>Qiyas</i>	Analogical reasoning, the fourth source of Muslim law (Masud et al, 1996:410)
<i>Qur'an</i>	The Muslim scripture, the first source of Muslim law
<i>Qurban</i>	Religious offering conducted during days of pilgrimage (10-14 Dhu al-Hijjah hojri month)
<i>Rais</i>	Literally 'head'; Chairperson
<i>Riba</i>	Usury, interest on money (Hooker, 2003:262)
<i>Santri</i>	Student of pesantren; a strict adherent of Islam (Hooker, 2003:263)
<i>Sende</i>	The sale of land with an option to repurchase (Hooker, 2003:119)
<i>Shahadah</i>	Testimony of faith ("There is no god but God, and Muhammad is the Prophet of God); witness testimony (Masud et al, 1996:411)
<i>Shari'ah</i>	Literally "the path", the concept of Islamic law in its widest sense (Hooker, 2003:363)

<i>Siyasah shar'iyah</i>	Literally "governance in accordance with the shari'ah", harmonisation between the law and the procedures of Islamic jurisprudence and practical demands of governance (Vogel, 2002)
<i>Sufism</i>	Or <i>tasawwuf</i> , Islamic mysticism (Massignon, 2002)
<i>Sunnah</i>	Exemplary behavior of the prophet Muhammad as represented in hadith (Masud et al, 1996:412)
<i>Sunnite</i>	Or ahl- al-Sunnah, the mainstream of Islamic sect as opposed to Shi'ite
<i>Syuriyah</i>	The consultative board of Nahdatul Ulama
<i>Talfiq</i>	Combining the doctrines of different schools of law to create a new, "patch-work" rule or assessment (Masud et al, 1996:412)
<i>Taqlid</i>	Adherence to a school of law or to a mujtahid (Masud et al, 1996:412)
<i>Taqrir</i>	Literally "decision making", a method in NU to formulate fatwa by choosing from conflicting opinions in jurisprudence
<i>Tariqah</i>	Literally "the path", sufi brotherhood (Wehr, 1966:559)
<i>Tawaqquf</i>	Literally 'suspension and postponement (Wehr, 1966:1094), a term used to illustrate the inability of a bahsul masail forum to draw a conclusion
<i>Ulama'</i>	Sing. "alim", religious scholars (Masud et al, 1996:413)
<i>Usul al-fiqh</i>	Roots of jurisprudence, methods of deriving positive law (Masud et al, 1996:413)
<i>Waqf</i>	Pious endowment, trust (Masud et al, 1996:413)
<i>Wudu'</i>	Literally "cleansing", minor ablution (Wensick)
<i>Zakah</i>	Alms tax, the third pillar of Islam (Masud et al, 1996:414)

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