

ARE *FATWA* BINDING ON COMPANIES?

By

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This article refers to the *fatwa* of the Selangor Fatwa Committee under the title “*Fatwa Pemikiran Liberalisme Dan Pluralisme Agama*” published in the Selangor Gazette on 17 July 2014.

Part II (State List) of the Ninth Schedule of the Federal Constitution, inter alia, provides that Islamic law as mentioned in Paragraph 1 is within the jurisdiction of the State Legislative Assembly (SLA) to make laws. The following provisions of Paragraph 1 of the State List will become relevant in the discussion below:

“...Islamic law...of **persons professing the religion of Islam...**”

“...creation and punishment of offences by **persons professing the religion of Islam** against precepts of that religion...”

“...the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over **persons professing the religion of Islam** and in respect only of any of the matters included in this paragraph...”

“...the control of propagating doctrines and beliefs among **persons professing the religion of Islam...**”

“...determination of matters of Islamic law and doctrine...”

Note that the phrase “persons professing the religion of Islam” is repeatedly used in the paragraph. Thus, Islamic law, creation and punishment of offences, jurisdiction of the Syariah courts and the control of propagating doctrines and beliefs are all related to persons professing the religion of Islam.

Certainly, the phrase “persons professing the religion of Islam” must refer to natural persons who are able to believe or disbelieve, to whom Prophet Muhammad (p.b.u.h.) was sent and the Qur’an was revealed.

Pursuant to the State List, the Selangor SLA made the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (Enactment No. 1 of 2003).

Section 2 of the enactment, inter alia, provides:

“Muslim” means—

- (a) a person who professes the religion of Islam;
- (b) a person either or both of whose parents were at the time of the person's birth, a Muslim;
- (c) a person whose upbringing was conducted on the basis that he was a Muslim;
- (d) a person who is commonly reputed to be a Muslim;
- (e) a person who has converted to the religion of Islam in accordance with section 108; or
- (f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be oral or written;

and includes Majlis Agama Islam Selangor which is established under section 4 of this Enactment'.

Note that in all the subsections, the description attached to the word "person" could only mean that it refers to a natural person. It cannot be anything else because only a natural person can be a Muslim or a non-Muslim, a believer or a non-believer. This is clearly consistent with the phrase "persons professing the religion of Islam" in the State List.

Further, note that the proviso to Section 2 "and includes Majlis Agama Islam Selangor which is established under section 4 of this Enactment" was only added in 2011 by the Administration of the Religion of Islam (State of Selangor) (Amendment) Enactment 2011 (Enactment 25 of 2011).

The fact that it was added later clearly supports my argument that the original provision did not include non-natural persons. (Whether, in view of the phrase "persons professing the religion of Islam" in the Constitution, this amendment is valid or not, is another question.) Assuming that it is valid, if companies generally are to be included in the definition of "Muslim", a similar amendment must be made.

Section 46 provides for the establishment of the Fatwa Committee. Clearly, it was made pursuant to the phrase and for the purpose of "determination of matters of Islamic law" in the State List.

Section 47 provides for the power of the committee to "prepare *fatwa* on any unsettled or controversial question of or relating to *Hukum Syarak*."

Section 49 provides:

"(1) Upon its publication in the Gazette, a *fatwa* shall be binding on every Muslim in the State of Selangor as a dictate of his religion and it shall be his religious duty to abide by

and uphold the *fatwa*, unless he is permitted by *Hukum Syarak* to depart from the *fatwa* in matters of personal observance.”

Note again that a *fatwa*, upon publication in the Gazette shall be binding on every Muslim, which, by definition in section 2, must be a natural person who is a Muslim. It will then be his religious duty to abide by and uphold it. This is again consistent with the phrase “persons professing the religion of Islam” in the State List.

Section 13 of the Syariah Criminal Offences (Selangor) Enactment 1995 (Enactment No. 9 of 1995) provides:

“Section 13. Opinion contrary to *fatwa*.

(1) Any person who gives, propagates or disseminates any opinion concerning any issue, Islamic teachings or Islamic Law contrary to any *fatwa* for the time being in force in this State shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) The Court may order any document or other medium containing the opinion referred to in subsection (1) to be forfeited and destroyed, notwithstanding that no person may have been convicted of an offence in connection with such opinion.”

I submit that the word “any person” must necessarily mean a natural person who is a Muslim as the enactment was made pursuant to the State List.

We note that, so far, the provisions of the Constitution and all the laws made pursuant to the State List are applicable to “persons professing the religion of Islam”, who must be natural persons. The Majlis is the only exception. Whether the inclusion of Majlis is constitutional or not does not concern us here.

Further, note that power to forfeit and destroy any document or other medium containing the opinion contrary to a *fatwa* lies with court, not the Fatwa Committee.

This is how the system works. The Fatwa Committee issues a *fatwa*. Upon publication in the Gazette, section 13 comes into operation. If any person gives, propagates or disseminates any opinion concerning any issue, Islamic teachings or Islamic Law contrary to the *fatwa*, he shall be guilty of an offence.

If any document or other medium containing the prohibited opinion is to be forfeited and destroyed, the court will then make the order.

On 17 July 2014, the *fatwa* of the Selangor Fatwa Committee was published in the Gazette. It reads as follows:

“FATWA ON RELIGIOUS LIBERALISM AND PLURALISM

1. SIS Forum (Malaysia) and any individual, organization or institution that believe in religious liberalism and pluralism are deviant and had deviated from the teachings of Islam.
2. Any published material on the thoughts and beliefs of religious liberalism and religious pluralism should be banned and confiscated.
3. The Malaysian Communications and Multimedia Commission (MCMC) should block social sites contrary to Islamic teachings and Islamic law.
4. Any person who adheres to religious liberalism and religious pluralism must repent and return to the path of Islam.”ⁱ (My translation).

With reference to paragraph 1, the subject matter is “*fahaman liberalisme dan pluralisme agama*” (religious liberalism and religious pluralism.) Therefore, the *fatwa* should just state that “*fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam.*” (religious liberalism and pluralism is deviant and had deviated from the teachings of Islam.)

Such a *fatwa* will be consistent with the offence created by section 13(1) of Enactment No. 9 of 1995), i.e. giving, propagating or disseminating religious liberalism and pluralism, being an opinion concerning an issue or an Islamic teaching contrary to a *fatwa*.

Just see how odd this will be: giving, propagating or disseminating SIS Forum (Malaysia) and any individual, organization or institution, being an **opinion** concerning an issue or Islamic teaching, contrary to a *fatwa*.

Remember that the function of the Fatwa Committee is to “prepare *fatwa* on any unsettled or controversial question of or relating to *Hukum Syarak*.” By saying that “SIS Forum (Malaysia)...that believe in religious liberalism and pluralism are deviant and had deviated from the teachings of Islam”, the Fatwa Committee was making a finding of fact that SIS Forum (Malaysia) believed in religious liberalism and pluralism. It then ruled that SIS Forum (Malaysia) was deviant and had deviated from the teachings of Islam, without even giving SIS Forum (Malaysia) an opportunity to be heard, contrary to the rule of natural justice.

To make such a decision is the function of the court, after a trial.

On ground of denial of natural justice alone, in so far as the *fatwa* states that SIS Forum (Malaysia) that believed in religious liberalism and pluralism, was deviant and had deviated from the teachings of Islam, the *fatwa* is invalid.

Secondly, the *fatwa* treats SIS Forum (Malaysia), organization and institution as natural persons who are Muslims and who are able to believe in (*berpegang kepada fahaman*) religious liberalism and pluralism.

That is another flaw of the *fatwa*. As has been said earlier, a *fatwa* is only meant for natural persons (individuals) who are Muslims, not legal entities or robots.

SIS Forum (Malaysia) is a company limited by guarantee established under the Companies Act 1965. It has a separate legal entity from the guarantors/shareholders. It is neither a Muslim nor a non-Muslim as it is unable to believe (*beriman*) in Islam or any religion or, for that matter, in religious liberalism and pluralism. Therefore, it cannot be subjected to the *fatwa*. It is the individual Muslims, no matter in what capacities they are, who are bound by the *fatwa*.

The Fatwa Committee had made the same mistake when it issued the *fatwa* that companies were obliged to pay zakat. (See "*Fatwa Tentang Zakat Ke Atas Syarikat Yang Dimiliki Oleh Pelbagai Jenis Pemegang Saham Yang Bercampur Muslim dan Non-Muslim*"ⁱⁱ (Ruling (Fatwa) on Zakat On Companies Owned By Different Types Of Owners Mixed Between Muslims and Non-Muslims) dated 24 July 2001.)

Most probably, on both occasions, the committee was not even aware of the issue of separate legal entity of companies or that its *fatwa* are only binding on natural persons who are Muslims.

However, when the issue was raised, Syariah scholars fell back on old Syariah jurisprudence to search whether Syariah recognised the concept of separate legal entity. They argued that mosque, *Baitul mal* and *wakaf* were separate legal entities (even though they were a poor comparable to a company) and therefore, Syariah recognised the concept of separate legal entity.

To give religion to it, they looked at the shareholders. If the shareholders were Muslims, in the case of zakat, they said the company was liable (*wajib*) to pay zakat.

I am sure, when the same issue is raised in respect of SIS Forum (Malaysia), in defence of the *fatwa*, Syariah scholars would rely on the same argument too.

Some Syariah scholars who have heard of the doctrine of lifting the corporate veil, now seek to rely on the doctrine to justify the attribution of the religion of the shareholders to the company.

I submit that they are wrong on both counts.

On the first, they fail to appreciate that a company has a separate legal entity from the shareholders. It is unable to believe or disbelieve, thus it can neither be a Muslim nor a non-Muslim. The law says it very clearly that *fatwa* is only meant for Muslims, meaning natural persons who are Muslims.

On the second, lifting of the corporate veil is a common law principle, very rarely applied by the courts, to pass the liability of a company to its shareholders. A very simple example is where the company is indebted to an amount which it is unable to repay. Under very

exceptional circumstances, the court may lift the corporate veil to make the shareholders liable to pay the debt of the company.

Under no circumstances the corporate veil is lifted to make a company liable to pay the debts of its shareholders, which is the reverse. This is exactly what the Syariah scholars try to do here: they purportedly lift the corporate veil in order to look at the religion of the shareholders and impute the religion of the shareholders to the company. Even the debts of the shareholders cannot be imputed to a company, what more their religion! With respect, they have misunderstood the principle completely.

I repeat that, under our law, the Fatwa Committee is only empowered to issue *fatwa* “on any unsettled or controversial question of or relating to *Hukum Syarak*”. Its function is to determine the *hukum* or the law, not to judge anyone, in absentia, what more a company, whether it is *sesat* (deviant) or not, neither of which it is able be, without even giving it the right to be heard.

When published in the gazette, the *fatwa* is only binding on natural persons who are Muslims, not on legal entities which are incapable of believing or not believing and, therefore, are neither Muslims nor non-Muslims. For the *fatwa* to be binding on companies, the companies must be treated as natural persons who are Muslims. That is incorrect.

Next, “companies” is a federal matter and cannot be subjected to a state law made under the State List creating an offence against the precept of Islam by persons professing the religion of Islam as companies are unable to profess any religion.

Furthermore, companies are also outside the jurisdiction of the Syariah Court.

It might be said that this is a lacuna in the law. I submit that it is not. The drafters of the Constitution and the drafters of the enactments knew who they were addressing: natural persons who can be Muslims or non-Muslims who are able to abide by and uphold or reject and disregard the *fatwa*; who are subjected to the offence made under the State List and who are subjected to the jurisdiction of the Syariah Court. It is the Fatwa Committee that has failed to understand it.

With reference to paragraph 2 of the *fatwa*, even with regard to natural persons who are Muslims, the Fatwa Committee has no jurisdiction to make an order to ban and confiscate published materials even if they are the subject matter of an offence. Subsection (2) of Section 13 of Enactment No. 9 of 1995 clearly says that it is the court that has the power to make an order to forfeit and destroy the said documents. The committee’s jurisdiction is only the “determination of matters of Islamic law and doctrine.” That is what *fatwa* is all about.

Regarding paragraph 3, I do not think it is within the jurisdiction of the Fatwa Committee to issue such an order on a federal agency, besides it being neither a Muslim nor a non-Muslim.

Regarding paragraph 4, I have no comments.

Please note that I do not say that the *fatwa* is wrong according to *hukum syarak*. Instead, I am merely pointing out that the *fatwa*, as it is, has exceeded the power given to the Fatwa Committee by the Constitution and the laws.

In search of truth, I welcome legal arguments to the contrary. I am not concerned with the results. I am only concerned with the reasons.

12 09 2019

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ⁱ "FATWA PEMIKIRAN LIBERALISME DAN PLURALISME AGAMA

1. SIS Forum (Malaysia) dan mana-mana individu, pertubuhan atau institusi yang berpegang kepada fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam.
2. Mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalisme dan pluralisme agama hendaklah diharamkan dan boleh dirampas.
3. Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) hendaklah menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak.
4. Mana-mana individu yang berpegang kepada fahaman liberalisme dan pluralisme agama hendaklah bertaubat dan kembali ke jalan Islam."

ⁱⁱ <http://www.e-fatwa.gov.my/fatwa-negeri>