

## NAHDLATUL ULAMA AND COLLECTIVE *IJTIHAD*:

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Studies on collective *ijtihad* (*ijtihad jama'i*), both in English and Arabic, are rare. The reason is that collective *ijtihad* is a new development in the process of Islamic law, not only in Indonesia but also throughout the Islamic world. *Ijtihad* in Islamic law can be defined simply as 'interpretation.' It is the most important source of Islamic law next to the *Qur'an* and the *Sunnah*. The main difference between *ijtihad* and both the *Qur'an* and the *Sunnah* (the traditions of the Prophet) is that *ijtihad* is a continuous process of development whereas the *Qur'an* and the *Sunnah* are fixed sources of authority and were not altered or added to after the death of the Prophet.<sup>2</sup> Historically, *ijtihad* in Islamic tradition refers to the exercise of Islamic legal reasoning by a single 'alim.<sup>3</sup> If a group of 'ulama exercise *ijtihad*, this activity is called by *ijtihad jama'i* (collective *ijtihad*).

This means that all the conditions to be *Mujtahid* (a person who performs *ijtihad*) will be held collectively by jurists acting together; not just a single jurist.<sup>4</sup> A jurist who is only expert in 'ulum al-*Qur'an* (*Qur'anic*

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<sup>2</sup> Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Cambridge, The Islamic Text Society, 1991, p. 366.

<sup>3</sup> The word 'ulama in Arabic is plural; its singular form is 'alim. However, Indonesian Muslims use the word 'ulama as both singular and plural.

<sup>4</sup> The forming of schools in Islamic law launched the issue of whether anyone at all could perform *ijtihad*, or only a limited number of people. Al-Amidi (d. 631 A.H./1233 C.E.) and al-Baydawi (d. 685 A.H./1286 C.E.) agreed that only people who satisfy specific requirements could apply *ijtihad*. According to them, there were two main conditions (*syartani*) of *Mujtahid*: firstly, to be an adult and believer in Allah and the Prophet; secondly, to be an expert in all aspects of Islamic law (*al-ahkam al-syar'iyah wa aqsamuha*) [See Sayf al-Din al-Amidi, *al-ihkam fi Usul al-Ahkam* Vol. 3, Matba'ah Syabih, 1347 H, p. 139. and Abu Nur Zuhair, *Muzakkirah fi Usul al-Fiqh li Ghair al-Ahnaq*, Vol. 4., Egypt, Matba'ah Dar al-Ta'lif, p. 225]. Furthermore, when discussing the

sciences) has the right to perform *ijtihad* in Islamic law if he performs it together with other jurists, who have expertise in other areas. Through this combined effort, *ijtihad* is not as difficult or as exclusive as was previously the case.

Collective *ijtihad* is also considered an apt solution for the crisis of thought in the Muslim world since it allows modern, contemporary and complex problems to be resolved, and tends to reduce the fanaticism of the schools of Islamic law. One of the reasons is that a number of Muslim scholars from different schools and various disciplines of science could sit together to perform *ijtihad* collectively. This procedure is followed since Muslim scholars appreciate and apprehend that problems in the modern era are far more complex than at the time of the Prophet fifteen centuries ago. Accordingly, Muslim communities today expect Muslim scholars to provide broad answers to their problems, not only the viewpoint of Islamic law, but also from other perspectives. This is why Yusuf al-Qardawi has stated that, 'the *ijtihad* which we need in our era is *al-ijtihad al-jama'i*.'<sup>5</sup>

The justification for collective *ijtihad* comes from the *Qur'an* [3: 159 and 42: 38], which advocates *syura* (consultation). It also refers to the sayings of the Prophet:

'I ('Ali bin Abi Talib) said to the Prophet, 'O, Prophet, [what if] there is a case among us, while neither revelation comes, nor the

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requirements of *ijtihad*, Imam al-Ghazali maintained that in order to reach the rank of *Mujtahid*, in addition to the two conditions mentioned above, the individual jurist must:

- Know the five hundred verses needed in law; committing them to memory is not a prerequisite.
- Know the way to relevant *Hadis* literature; he needs only to maintain a reliable copy of Abu Dawud's or Bayhaqi's collection rather than memorise their contents.
- Know the substance of *furu'* works and the points subject to *ijma'*, so that he does not deviate from the established laws. If he cannot meet this requirement he must ensure that the legal opinion he has arrived at does not contradict any opinion of a renowned jurist.
- Know the methods by which legal evidence is derived from the texts.
- Know the Arabic language; complete mastery of its principles is not a prerequisite.
- Know the rules governing the doctrine of abrogation (*naskh*). However, the jurist need not be thoroughly familiar with the details of this doctrine; it suffices to show that the verse or the *Hadis* in question had not been repealed.
- Investigate the authenticity of the *Hadis*. If Muslims have accepted the *Hadis* as reliable, it may not be questioned. If a transmitter was known for probity, all *Hadis* related through him are to be accepted. Full knowledge of the sciences of *Hadis* criticism is not required.

Al-Ghazali concluded that the jurist must have expertise in the science of *Hadis* ('*ilm al-Hadis*), the science of the Arabic language ('*ilm al-lughah*) and Islamic legal theory (*usul al-fiqh*). See Abu Hamid Muhammad al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, Vol. 4., al-Jami'ah al-Islamiyah, al-Madinah al-Munawwarah, n.d., pp. 5-15.

<sup>5</sup> Yusuf al-Qardawi, 'al-Ijtihad wa al-Tajdid baina al-Dawabit al-Syar'iyyah wa al-Hajat al-Mu'asirah,' interview in *al-Ummah*, Qatar, 31 May 1984, p. 48.

*Sunnah* exists.’ The Prophet replied, ‘[you should] have meetings with the scholars – or in another version: the pious servants – and consult with them. Do not make a decision only by a single opinion.’<sup>6</sup>

Historically, this term began to be used in referring to *ijma’* (consensus). For example, Mahmud Syaltut, used this term in respect of *ijma’* in the 1950s.<sup>7</sup> At this stage, there had not been any recent new development in the meaning of the term *ijtihadh jama’i*, as *ijma’* has been used since the fourteenth century. A new development occurred in 1964 when *Majma’ al-Buhus al-Islamiyah* held its first *mu’tamar* (conference), which was attended by scholars from many Islamic countries.<sup>8</sup> The conference announced that:

*Mu’tamar* has decided that the *Qur’an* and the *Sunnah* are the main sources of Islamic law, and performing *ijtihadh* is the right of every jurist who fulfills the requirements in the field of *ijtihadh*.

The procedure to maintain the *maslahah* (benefit) when facing new cases or problems is by choosing laws from the schools of Islamic law which are suitable for that case, and if there is still no answer by doing that, then by performing *al-ijtihadh al-jama’i al-mazhabi* (collective *ijtihadh* within the school), and if this way is not enough (to solve the problems), then by performing *al-ijtihadh al-jama’i al-mutlaq* (absolute collective *ijtihadh*).

This institution (*Majma’ al-Buhus al-Islamiyah*) will organise or manage the efforts to perform *ijtihadh jama’i* in both categories [*al-ijtihadh al-jama’i al-mazhabi* and *al-ijtihadh al-jama’i al-mutlaq*] when needed.<sup>9</sup>

It was unfortunate that the *mu’tamar* did not specify what it believed *ijtihadh jama’i* to be. Further, although at the first *mu’tamar*, *Majma’ al-Buhus al-Islamiyah* announced that it would organise and manage the implementation of collective *ijtihadh*, at the following *mu’tamar*<sup>10</sup> this institution neglected to

<sup>6</sup> See ‘Abd al-Halim Uwes, *al-Fiqh al-Isami baina al-Tatawwur wa al-Tsabat*, Madinah, Syirkah al-Madinah al-Munawwarah, n.d., p. 159.

<sup>7</sup> See Mahmud Syaltut, *Al-Islam Aqidah wa Syari’ah*, Cairo, Dar Syuruq, 4<sup>th</sup> edition, 1988, p. 536.

<sup>8</sup> *Majma’ al-Buhus al-Islamiyah* is formed by Law No. 103 of 1961 in Cairo (see Ahmad Muhammad ‘Uf, *al-Azhar fi Alf `Am*, Cairo, Majma’ al-Buhus al-Islamiyah, 1982, pp. 134-141). It consists of fifty ‘*ulama* from different *Mazhab*, thirty of them from Egypt. It has five committees (*lajnah*) such as *lajnah al-tasyri’ al-Islami*, *lajnah al-buhus al-Islamiyah*, *lajnah i`ya` al-turas al-Islam* and *lajnah tanim al-‘alaqat al-Islamiyah* (see al-Azhar al-Syarif, *al-Azhar Tarikhuh wa Tatawwuruh*, Cairo, 1983, pp. 193-194).

<sup>9</sup> See *al-Taujih al-Tasyri’i fi al-Islam min Buhus Mu’tamarat Majma’ al-Buhus al-Islamiyah*, Vol. 2, Cairo, 1972, p. 167.

<sup>10</sup> See the results of the *mu’tamar* from the first *mu’tamar* until the fifth in *al-Taujiè*, vol. 2, pp. 167-174. See the difference in title between the first volume and the second one: *al-Taujih al-Tasyri’i* and *al-Taujih al-Ijtima’i*. The results of the sixth, seventh and eighth *mu’tamars* can be found in *Majma’ al-Buhus al-Islamiyah*, pp. 416-448.

provide technical guidance for collective *ijtihad*.

Although the term *ijtihad jama'i* came into usage only in the 1950s, this paper argues that Muslims in Indonesia have in fact practised *ijtihad jama'i* since at least 1926 through the Nahdlatul Ulama.<sup>11</sup> This suggests that the concept of collective *ijtihad* has been applied for more than seventy years in Indonesia, despite the fact that Indonesian 'ulama have recognised it only very recently. In practice, before issuing a *fatwa* (legal opinion), 'ulama of the Nahdlatul Ulama hold a meeting, attended also by other scholars from differing backgrounds.<sup>12</sup> They discuss the subject, and at the conclusion of the meeting, a *fatwa* is issued by the organisation. This paper argues that collective *ijtihad* as practised by Nahdlatul Ulama could fill the gap of technical guidance neglected by *Majma' al-Buhus al-Islamiyah*.

By performing *ijtihad* collectively, Nahdlatul Ulama can invite opinions from, or consult with, 'secular' scholars. For example, before they make *ijtihad* on such matters as family planning or banking, they tend to discuss medical aspects with medical scholars and economic aspects with economists. Since there are many situations which are not mentioned in the *Qur'an* and

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<sup>11</sup> Established on 31 January 1926, Nahdlatul Ulama (henceforth NU; from the Arabic: *Nahdah al-'Ulama*) is one of the two largest Islamic social organizations in contemporary Indonesia (Muhammadiyah is the second largest one). According to Mitsuo Nakamura, the name of the organization — awakening of 'ulama — reflects two aspects of its origin. It was part of the wave of nationalist awakening spearheaded by the Sarekat Islam (SI), which was formed in 1912. KH. Abdul Wahab Hasbullah (1888-1971), a later co-founder of NU, is said to have formed a branch of the SI in Mecca in 1913. Upon returning to Indonesia, he co-funded, with Mas Mansoer, and established an educational organization named Nahdlatul Wathan (Revival of the Homeland) in Surabaya in 1916. This became the forerunner of the NU. See Mitsuo Nakamura, 'Nahdlatul Ulama', in John Esposito (eds.), *The Oxford Encyclopaedia of the Modern Islam*, Vol. 3., New York, Oxford University Press, 1995, p. 218. Meanwhile, the challenge of modernism represented by Muhammad 'Abduh of Egypt was influencing Indonesian 'ulama, as can be seen in the formation of the Muhammadiyah. The abolition of the caliphate in Turkey and the fall of the Hijaz to the Wahabi, Abdul Aziz Ibn Sa'ud, in 1924, caused open conflicts in the Indonesian Muslim community. These changes profoundly disturbed the mainstream Javanese 'ulama to which Hasbullah belonged. Therefore, they formed the Hijaz Committee and held a meeting on 31 January 1926. At the meeting, they wanted to send a delegation to Mecca under the name of Nahdlatul Ulama. After that, the Hijaz Committee was dissolved and the new organisation was born. KH. Hasyim Asy'ari (1871-1947), from the *pesantren* of Tebu Ireng, Jombang, East Java, who was then the most revered of Javanese 'ulama, approved their request to form the NU in 1926 and became its first president or *rais akbar*.

<sup>12</sup> In this article, the word *fatwas* is used as the plural for *fatwa*. A *fatwa* could be seen as a part of *ijtihad*. [Wahbah al-Zuhaili, *Usul al-Fiqh al-Islami*, Vol. 2, Beirut, Dar al-Fikr, 1986, p. 1156]. It is interesting to note that Wael Hallaq of McGill University refutes the claim of Joseph Schacht that Islamic law became increasingly rigid and set in its final mould [Joseph Schacht, *An Introduction to Islamic Law*, Oxford, Clarendon Press, 1998, p. 75]. Against this, Hallaq puts the case that the activity of *fatwa* in dealing with new issues proves that the gate of *ijtihad* was never closed [Hallaq, 'Was the Gate of Ijtihad Closed?', *International Journal of Middle East Studies*, 16, New York, 1984, pp. 3-41]. More information on *fatwa* can be found in M. Khalid Mas'ud, Brinkley Messick, David S. Powers, 'Muftis, Fatwas and Islamic Legal Interpretation,' in Mas'ud, Messick, Powers, *Islamic Legal Interpretation*, Cambridge, Harvard University Press, 1996, p. 17.

the *Sunnah*, particularly where social problems are concerned, Indonesian ‘*ulama* have realised that they have to work together with other ‘*ulama* and scholars. This, in effect, is the spirit of collective *ijtihad*.

The key question addressed in this paper is that, “How has Nahdlatul Ulama practised collective *ijtihad* for more than seventy years?” Having read classic Islamic sources, analysed NU’s *fatwas* and interviewed NU’s leaders in Jakarta, West Java, East Java and Central Java, I will analyse the components, characteristics, methods, sources, and role of collective *ijtihad*, as well as the problems associated with and the significance of practicing collective *ijtihad* in Indonesia, both at a theoretical level (*vis-a-vis* Islamic legal theory), and at a practical level (the results of *ijtihad*). Finally, I will attempt to show how Indonesian ‘*ulama* respond to Muslims’ daily problems by using collective *ijtihad* during the period 1926-1998.

### NU and Ijtihad

Until the beginning of the twentieth century, Indonesian Muslims sought advice or *fatwa* from ‘*ulama* in Middle Eastern societies, especially from those in Cairo and Mecca. For example, there is a book that consists of a compilation of Meccan *fatwas* for Indonesian Muslims from the end of the nineteenth century: *The Muhimmat al-Nafa’is*. This book was published for the first time in a lithographic edition in Mecca in 1310 H/1892 CE. Nico Kaptein’s work shows that most *fatwas* in this book refer to issues pertaining to situations in Indonesia. Kaptein also cites Djajadiningrat’s claim that the 1913 edition of this book was kept in stock in important Muslim bookshops in Indonesia.<sup>13</sup>

After the NU was established, Muslims, especially the NU’s members, did not have to look to Mecca and Egypt anymore for *fatwas*. They could seek Islamic answers from their own organisations, provided by their own ‘*ulama* who had a better understanding of the background of the questions and the character or culture of those seeking the *fatwa*.

However, this did not mean that the ‘*ulama* of the NU were permitted to use independent *ijtihad*. They were criticised by modernist groups for falling into *taqlid* (following the views and opinions of *Mujtahid* without reserve), since they provided answers or produced *fatwas* only by citing or quoting *fiqh* books without analysing the arguments of those books and, most importantly, without analysing the *Qur’an* and the *Sunnah* directly.<sup>14</sup> Between 1920 and 1930, there were debates over issues related to *taqlid* and *ijtihad*.

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<sup>13</sup> Nico Kaptein *The Muhimmat al-Nafa’is: A Bilingual Meccan Fatwa Collection for Indonesian Muslims from the End of the Nineteenth Century*, INIS, Jakarta, 1997, especially the introduction.

<sup>14</sup> More information on *ijtihad* and modernist groups can be found in Nadirsyah Hosen, ‘Revelation in a Modern Nation State: Muhammadiyah and Islamic Legal Reasoning in Indonesia’, *The Australian Journal of Asian Law*, Vol. 4, No. 3, December 2002.

In 1935, KH.<sup>15</sup> Hasyim Asy'ari replied to this criticism as follows:

O you 'ulama! If you see a person exercising a duty (service) based on views of the Imam [of the schools] who are allowed to be followed, although these views are weakly founded and you do not agree with them, do not scorn him, but advise him tactfully and in a friendly fashion. And if he still does not want to follow you, do not be hostile to him. If you do that [i.e. if you are hostile to him], you are like people who build a palace, by destroying first a city.<sup>16</sup>

Another attempt at reconciliation was made by K.H. Mahfudz Siddiq (1906-1944 C.E.), chairman of the Tanfidziyah council (1937-1942), who wrote a book on *Ijtihad* and *Taqlid*. As quoted by Deliar Noer, Siddiq believed that the main platform on which all laws of Islam are founded is the *Qur'an*.<sup>17</sup> However, the interpretation of the *Qur'an* should be based on *Hadis* of the Prophet. Furthermore, Siddiq took the view that during the first few centuries after the Prophet's death, 'ulama differed from each other in their judgment about several cases, especially because there had not yet been a general codification of *Hadis* and laws.

According to Siddiq, in the twentieth century, when *mazahib* (schools of thought; plural form of *mazhab*) had already been established in Muslim world, the Nahdlatul Ulama leaders recognised only the four founders of the Schools as being able to be called real *Mujtahid Mustaqil*. Therefore, Siddiq points out that other 'ulama are actually *Muqallid* (followers). For those who are able to exercise *ijtihad* of even limited character, Siddiq admits of the obligation to do so, while those who do not have the necessary requirements for *ijtihad* should be guided through *taqlid*. Finally, Noer cites Siddiq's conclusion that the opinions as expressed in the writings of these 'ulama were products of their *ijtihad* as based on the Book of Allah; they did not make laws of their own. It cannot be said that their opinions do not derive from the laws of the Book of Allah. Moreover, Siddiq took the view that, since the *mazahib* of the four *Imams* were known in all their aspects, it was not necessary for the general lay public who followed them to know their references or the foundations for their opinions. They could simply quote the opinions of the *Imam*.<sup>18</sup>

Several years afterwards, Mahfudz Siddiq's younger brother, KH. Achmad Siddiq, *Rais Am* of the NU 1983-1991, expressed his opinion on this issue:

*Ijtihad* is the harnessing of mental faculties, using approved and reliable methodology based on the *Qur'an* and the *Hadis*, to research a conclusion on a matter that is not clearly explained in the *Qur'an* and the *Hadis*. Those who meet the requirements are

<sup>15</sup> KH: abbreviation of *Kyai Haji*; originally attributed to Javanese 'alim.

<sup>16</sup> Deliar Noer, *The Modernist Muslim Movement in Indonesia 1900-1942*, Oxford University Press, Kuala Lumpur, 1973, p. 241.

<sup>17</sup> *Ibid.*, p. 233.

<sup>18</sup> *Ibid.*, p. 234.

welcome to conduct their own *ijtihad*. Whilst those who do not meet the requirements have the opportunity to follow the *ijtihad* of those whose ability can be trusted.<sup>19</sup>

Moreover, he explained:

Essentially, the system of following *Mazhab* does not set up the system of *Ijtihad* against the system of *Taqlid*, but rather sets forth the two systems in a balanced fashion. Each of the two systems represents a sound system which should be employed by all Muslims to obtain the pure teaching of Islam. But each one must be appropriate to the individual using it, for they should not be used by the wrong people nor should they be misapplied.<sup>20</sup>

What both Siddiq brothers explained is clearly similar to the opinions of other ‘*ulama* in the Muslim world who still recognise *ijtihad* in a limited sense. Therefore, theoretically, the NU stands in a position somewhere between *ijtihad* and *taqlid* and believes that the gate of *ijtihad* is still open in a limited fashion. However, in practice, the NU considers itself as *Muqallid* (a person who performs *taqlid*).<sup>21</sup>

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<sup>19</sup> As quoted by Greg Barton, ‘Islam, Pancasila and the Middle Path of *Tawassuth*: The Thought of Achmad Siddiq,’ in Barton and Fealy (eds.), *Ulama, Traditionalist Islam and Modernity in Indonesia*, Monash University, Monash Asia Institute, 1996, p. 122.

<sup>20</sup> *Ibid.*, pp. 118-119.

<sup>21</sup> Wahbah al-Zuhaili, an ‘*alim* who currently teaches at the University of Damascus, writes (al-Zuhaili, 1986: Vol 2, pp. 1079–181) that a *Mujtahid* is classified according to five levels. First, *al-Mujtahid al-mustaqil* is the ‘*alim* who carries out *ijtihad* by employing his own methodology and arriving at his own conclusions on Islamic law. Imam Abu Hanifah (d 150 AH/767 CE), Imam Malik (d 179 AH/795 CE), Imam Syafi’i (d 204 AH/820 CE), and Imam Ahmad bin Hanbal (d 241 AH/855 CE) were claimed to have qualifications at the level of *al-Mujtahid al-mustaqil*. Secondly, *al-Mujtahid al-mutlaq ghair al-mustaqil* has qualifications to perform *ijtihad*, but follows the methodology of the Imam of his *mazhab*. It is possible that, although he follows the Imam’s methodology, the results of his *ijtihad* will differ from that of his Imam. However, the main point to stress is that he does not devise his own method. His position is lower in ranking than *al-Mujtahid al-mustaqil*. Several well known names in this classification are: Abu Yusuf (d 182 AH/798 CE), Zufar (d 158 AH/775 CE) from the Hanafi school, Ibn al-Qasim (d 206 AH/823 CE) from the Maliki school, Muzani (d 264 AH/878 CE) from the Syafi’i school, Ibn Taimiyah (d 728 AH/1328 CE) from the Hanbali school and Ibn Hazm (d 456 AH/1065 CE) from the Zahiri school. Thirdly, *al-Mujtahid al-muqayyad* or *Mujtahid al-takhrij* (another term is *Mujtahid fi al-Mazhab*) is a person who follows the school of the Imam, but performs *ijtihad* by analysing the elements or the arguments of the school in order to defend the position or explain the opinion of his *mazhab* about *fiqh*. It is possible for this person to perform *ijtihad* in cases where the Imam of the *mazhab* did not pronounce on the issue. Al-Tahawi (d 321 AH/933 CE) of Hanafi’s school, Ibn Abi Zaid of Maliki’s school and Abi Ishaq al-Syirazi (d 476 AH/1093 CE) of Syafi’i’s school are claimed as possessing qualifications at this level of *Mujtahid*. Fourthly, *Mujtahid al-tarjih* refers to a person who performs *ijtihad* by choosing one from a number of opinions presented by *Mujtahids*. The task of the *Mujtahid al-tarjih* is to examine and analyse which is the best among several opinions. The last category is *Mujtahid al-futya* (*Mujtahid al-fatwa*), the person who issues a *fatwa*.

KH. Ilyas Ruchiyat, *Rais Am* of the NU 1994-1999, who leads Cipasung *pesantren* in West Java, confirms that the NU is only *Muqallid*, rather than *Mujtahid*.<sup>22</sup> KH. Azis Masyhuri explains the reason for *Rais Am*'s statement above. Being humble, the NU does not want to declare itself as *Mujtahid*. However, according to Masyhuri, it can be stated that the NU falls into the lowest category of *Mujtahid* since the highest rank of *Muqallid* is approximately equal to the lowest rank of *Mujathid*.<sup>23</sup>

The best way to look at whether the NU does perform *ijtihad* or not, and in which category of *ijtihad* it stands, is to analyse the method and the process of its *fatwa*. In the first Mukhtamar in 1926, the '*ulama* of the NU answered the first question, 'Is it compulsory for Muslims to follow one of the Four Schools (*mazahib*)?' The '*ulama* agreed (*ittifaq*) to answer, 'Nowadays, it is compulsory for Muslims to follow one of the famous Four Schools whose [books] were codified (*mudawwan*): Hanafi, Maliki, Syafi'i, and Hanbali.' This answer quoted from neither the *Qur'an* nor the *Sunnah*. Instead, it cited three books of Islamic law: *al-Mizan al-Sya'rani*, *al-Fatwas al-Kubra*, and *Nihayah al-Sul*.<sup>24</sup>

The next question related to the method of *fatwa*: 'Whose opinions can be used for a *fatwa* in a case of different opinions among the '*ulama* from the Syafi'i School?' The '*ulama*, citing *I'annah al-Talibin*, answered, 'The opinions which can be used for issuing the *fatwa*, hierarchically, are: firstly, any opinion based on the views or the agreement of Imam al-Nawawi and Imam al-Rafi'i. Secondly, if the answer is not available, then Nawawi's view only was sought. Thirdly, then the view of al-Rafi'i was sought. Fourthly, was the view supported by the majority of the other Syafi'i '*ulama*. Fifthly, then followed the view of the most knowledgeable ('*alim*) and, lastly, came the view of a humble '*alim*.'<sup>25</sup>

It is interesting that the books used to issue the *fatwas* were not Imam Syafi'i's books, but rather Syafi'ite books, such as *Minhaj al-Talibin* by al-Nawawi, *al-Muharrar* by al-Rafi'i, *Kifayah al-Akhyar* by al-Dimasyqi (d. 829 A.H./1546 C.E.), *Fath al-Mu'in* by al-Malibari, *I'annah al-Talibin* by Sayyid Bakri al-Dimyati (d. 713 A.H. /1330 C.E.), summaries and commentaries of Nawawi's book, such as *Kanz al-Ragibin* of al-Mahalli (d. 864 A.H./1460 C.E.), *Syarh Kanz al-Ragibin* of al-Qalyubi and 'Umayra, *Tuhfah al-Muhtaj* of Ibn Hajar al-Haitami (d. 973 A.H./1565 C.E.), *Mugni al-Muhtaj* by Syarbini (d. 977 A.H./1570 C.E.), and *Nihayah al-Muhtaj* by al-Ramli (d. 1004 A.H./1621 C.E.).<sup>26</sup>

As Wael B. Hallaq points out, each school of law came to recognise a set of canonical works produced by, or attributed to, its founding fathers.

<sup>22</sup> KH. Ilyas Ruchiyat, personal interview, Tasikmalaya-West Java, 17 December 1998.

<sup>23</sup> KH. Azis Masyhuri, personal interview, Jombang-East Java, 19 December 1998.

<sup>24</sup> K.H. Azis Masyhuri (ed.), *Masalah Keagamaan Hasil Mukhtamar dan Munas Ulama Nahdlatul Ulama 1926-1994*, PP RMI & Dinamika Press, Surabaya, 1997, p. 2.

<sup>25</sup> Masyhuri, *op. cit.*, pp. 3-4.

<sup>26</sup> See Khoiruddin Nasution, 'Maslahah and Its Application in Indonesian *Fatwa*', *Studia Islamika*, Vol. 3, No. 4, 1996, p. 128.

With the passage of time, and with the cumulative evolution of legal doctrine, some works by later authors — such as Nawawi and Rafi’I — acquired a canonical status, though in theory they were never equal in prestige or authority to those of the founding fathers.<sup>27</sup> However, the NU prefers to follow Nawawi, instead of the founding father of the School (Syafi’i), because they tend to follow strictly *I’annah al-Talibin*’s ranking of ‘*ulama*.

The evidence for this comes from the 12<sup>th</sup> Mukhtamar in 1937, when there was a question regarding the primacy of Syafi’i or Nawawi’s opinion on the cleansing of impurities. Surprisingly, without analysing both arguments first, the Mukhtamar, once again citing *I’annah al-Talibin*, agreed on the answer, ‘The Mukhtamar chooses Imam Nawawi’s opinion, as already chosen at the first Mukhtamar, as the stronger one in the School.’<sup>28</sup> This was despite it being pointed out that Imam Syafi’i was the founding father of the Syafi’i School, whereas Imam Nawawi was only his follower.

It is clear that the NU recognises the Four Schools and that it is compulsory for Muslims to follow one of them. The NU has produced its *fatwa* by strictly following the ranking of ‘*ulama* from the Syafi’i School, based on the quality of the person(s), no matter what the arguments and the background of cases are.

## NU and Reformulated Method of Ijtihad

Several *kyai* and young scholars of the NU began to appreciate that they needed a better method. For example, KH. A. Mustofa Bisri expressed his opinion that before giving a *fatwa*, the ‘*ulama* should look at the background of the question first, then provide an introductory statement based on that background. Following that they were then in a position to deliver the religious answer.<sup>29</sup> Those *kyai* held meetings (*halqah*) in several places. Firstly, in 1988 at Watucongol *pesantren*, Muntilan-Magelang, they discussed how to read the *Kitab Kuning* more critically. That is to say, as Masdar Farid Mas’udi points out, they discussed how to analyse the texts of Islamic books according to the background and the socio-cultural atmosphere in which those books were written. In other words, they tried to see the text contextually, rather than simply textually.<sup>30</sup>

In November 1998, at the next *halqah*, in the Krapyak *pesantren*, Yogyakarta, the method of Bahtsul Masa’il was discussed. The third *halqah* (Denanyar *pesantren*, Jombang) expressed its opinion on how to distinguish between citing the opinions of the ‘*ulama* literally (*qauli*) and methodically (*manhaji*). Afterwards, they discussed how to develop what they called, social

<sup>27</sup>Wael B. Hallaq, *A History of Islamic Legal Theories*, Cambridge, Cambridge University Press, 1997, p. 209.

<sup>28</sup> *Ibid.*, p. 148.

<sup>29</sup> KH. A. Mustofa Bisri, personal interview, Rembang, Central Java, 19 December 1998.

<sup>30</sup> Drs. Masdar Farid Mas’udi, personal interview, Jakarta, 11 January 1999.

*Fiqh*, in order to solve social problems. In effect, they wanted Islamic law to talk not only about ritual matters, but also social themes such as the position of the military, prostitution, tax, and democracy. This was an important and informing development.

The results of those meetings were: firstly, that it is not enough to issue *fatwa* merely by citing the text from *kitab kuning*.<sup>31</sup> *Qawa'id usuliyyah* and *qawa'id fihiyyah* should also be examined. Secondly, *fatwa* on social problems require analysis of such things as social background, the political situation, and the economic context. For example, to answer the problem of prostitution in an area, it is not sufficient to say that 'prostitution is forbidden according to *fiqh* books'. Instead, one should analyse why prostitution occurs in that area? Why do people love to go there? Why does the Government remain silent on that issue? The answer should be wider and have a broader scope.

Thirdly, giving *fatwas* without quoting the opinions (*qaul*) of the Syafi'i School is not acting against the School, as long as it follows the methodology (*manhaj*) of the School. Moreover, and fourthly, choosing the strongest opinion from different *fatwas* should be based on those arguments offering the most benefit (*maslahah*) for society; rather than merely on the hierarchy of 'ulama.

At the National Congress in Lampung, on 21-25 January 1992, a breakthrough was achieved. Those *kyai* who were involved in the *halqah* proposed that the methods of *fatwa* be discussed. Clearly, the attempt to change something which had been followed since 1926 was not going to be easy. Several senior *kyai* wanted to maintain the old methods. A compromise was reached, with some new methods being accepted while the principles underlying the old remained intact.

Henceforth, a *fatwa* issued by the NU generally would be produced by, firstly, searching through the opinions of earlier 'ulama. Secondly, if different points of views were found, the dominant view could be chosen collectively (*taqrir jama'i*). Thirdly, if an answer was still not found, *ilhaq al-masa'il bi nazairiha* must be used, by drawing an analogy between the case at hand and similar situations mentioned in the books of Islamic law. Fourthly, if *ilhaq al-masa'il bi nazairiha* was not able to answer the question, then *istinbat jama'i* must be conducted by looking at the method of the Imam of the Schools. It is at this point that experts from the 'secular' sciences, such as economics, law and engineering, could be consulted.<sup>32</sup>

Martin van Bruinessen's view of these developments may be noted here:

Thanks to the patronage of by now senior *kiai* such as Kiai Sahal Mahfudh and Kiai Imron Hamzah, the *halqah* discussions had a much wider impact than the relatively small number of participants

<sup>31</sup> *Ibid.*

<sup>32</sup> PB NU, *Keputusan Munas Alim Ulama & Konbes Nahdlatul Ulama di Bandarlampung 21-25 Januari 1992*, Jakarta, PB NU, 1992, pp. 2-9.

might suggest. Some of the problems first discussed in the *halqah* were later presented in the religious discussions sessions at NU's 1992 Lampung Munas. The most remarkable decision of this conference was also an important victory for the *halqah* group. For the first time the assembled *ulama* accepted a form of collective *ijtihad* as a legitimate method of answering religious-juridical questions to which no unambiguous answer can be found by more established methods. This was a watershed decision, guaranteeing that not only what the *ulama* discuss is changing, but also the methods by which they discuss it.<sup>33</sup>

Although analysis of social problems is incorporated in the new method, and for the first time the NU talks about issuing *fatwa* collectively, a number of preliminary points may be made. Firstly, the old method continues to be practiced fully. This means that choosing one opinion from several is based only on the hierarchy of the '*ulama*. It is not based on the stronger argument or on that which will be of more benefit to society. In this limited form, social analysis is accepted since it does not supersede the old method. The new proposal merely expands the old method.

Secondly, the NU still does not want to recognise that it is capable of performing *ijtihad*. For example, it avoids using the terms *ijtihad* and *qiyas*.<sup>34</sup> It believes that, following Imam Syafi'i, both terms are the same and since NU declares that it is a *Muqallid*, these terms are avoided.<sup>35</sup> Instead, the terms *istinbat* and *ilhaq al-masa'il bi nazairiha* are used. Yet, in reality, these terms are not dissimilar to *ijtihad*<sup>36</sup> and *qiyas*<sup>37</sup> respectively. It could be argued that although the NU does not want to be called *Mujtahid*, it performs *ijtihad* by a different name.<sup>38</sup>

<sup>33</sup> Martin van Bruinessen 'Traditions for the Future: The Reconstruction of Traditionalist Discourse within NU,' in Barton and Fealy (eds.), *op. cit.*, pp. 30-31.

<sup>34</sup> This fact is a bit strange, as in 1984 at the 27<sup>th</sup> Muktamar, they produced the NU Charter, which in its explanation, mentions that the NU believes in the *Qur'an*, the *Sunnah*, the *ijma'*, and the *qiyas*. They should recognise *ijtihad* since they accept *ijma'* and *qiyas* as the method to perform *ijtihad*. See Masyhuri, *op. cit.*, p. 132.

<sup>35</sup> Muhammad bin Idris al-Syafi'i (d. 204 A.H.) was the first to adopt *ijtihad* as a methodology synonymous with *qiyas* (analogy). He said, 'They (*ijtihad* and *qiyas*) are two names for the same thing (*innahuma ismani li ma'na wahid*).' See Muhammad bin Idris al-Syafi'i, *al-Risalah*, Cairo, Dar al-Saqafah, 1973, p. 209.

<sup>36</sup> When I confirmed the use of those terms with Masyhuri and Mas'udi, both agreed with this analysis. KH. Sahal Mahfudh writes that, actually, the word *istinbat* is not a popular word at the NU since the NU feels that word refers to *ijtihad mutlaq*, which is hard to perform [Mahfudh, *op. cit.*, p. 27]. However, Mahfudh takes the view that performing *ijtihad* collectively, rather than individually, is the solution. [*Ibid.*, p. 56].

<sup>37</sup> *Ilhaq al-masa'il bi nazairiha* follows the procedure of analogy. *Ilhaq al-masa'il bi nazairiha* uses analogy between the legal text in books of *fiqh* (*furu'*) and the new case (*furu'*). On the other hand, *qiyas* uses analogy between legal text in the *Qur'an* and the *Hadis* (*usul*), and the new case (*furu'*).

<sup>38</sup> The former Vice Chairman of the Syuriah Council, Prof. KH. Ali Yafie says, 'The NU never claim the word *ijtihad*, although they have already practiced it.' Prof. KH. Ali Yafie, personal interview, Jakarta, 12 January 1999.

The NU should look at the debate on the divisibility of *ijtihad* in the Islamic tradition. The majority of ‘*ulama* take the view that performing *ijtihad* in certain cases, instead of all cases, is allowed.<sup>39</sup> KH. Husein Muhammad, of the Arjawinangun *pesantren*, believes that the ‘*ulama* of the NU have the capability to perform *ijtihad* in particular cases.<sup>40</sup> The problem is that they are too humble to declare it.

Thirdly, the implementation of the new method deserves special consideration here. According to KH. Azis Masyhuri, seven years after the new method was published the procedure of *manhaji* and *istinbat* has never been practiced. The ‘*ulama* claim that they still can solve problems, including what are called ‘modern problems’, by using the old text of the *kitab kuning*.<sup>41</sup> The fact that there is no example of how best to apply the new method optimally is also a factor. Masyhuri claims that he asked the Vice Chairman of the Syuriah council (1994-1999), KH. Sahal Mahfudz, ‘Where is an example of issuing a *fatwa* by *manhaji* or *istinbat*?’ According to Masyhuri, Mahfudz acknowledged that he could not provide one.<sup>42</sup>

Dr. Ahsin Muhammad has criticised the National NU for not providing technical guidance in applying the new method. He also takes the view that if technical guidance for the new method is issued, then the effects will be, firstly, the *pesantren* would have to change their curricula, programmes and coursework, in order to teach their *santri* or students how to issue *fatwas* according to the new method. Secondly, the old *fatwas* since the first Mukhtamar in 1926 would need to be reviewed, based on the new method. According to him, the National NU has failed not only to introduce the new method to its members, but also to follow it up.<sup>43</sup>

In the new method, social analysis is required to solve social problems. However, in practice, it is rare to give that kind of analysis. It is much easier to avoid it by saying nothing at all. For example, at the 29<sup>th</sup> Mukhtamar, at the Cipasung *pesantren*, Tasikmalaya, West Java (two years after the new method had been decided), when answering a question about the minimum wage for labour, the *fatwa* fell back on the concept of *fiqh*, and neglected the real issue, the imbalance in the bargaining positions between the Government, the company and labour. Furthermore, this *fatwa* did not give any recommendations for action to solve the basic problem of labour in Indonesia, as required by the new method.<sup>44</sup>

<sup>39</sup> See Wahbah al-Zuhaili, *Usul al-Fiqh al-Islami*, Beirut, Dar al-Fikr, Vol. 2. p. 1156.

<sup>40</sup> Husein Muhammad, ‘Tradisionalisme NU dalam Sistem Pengambilan Keputusan dalam Bahtsul Masail,’ paper presented at Halqah daurah Tsalitsah Program Pengembangan Wawasan Epsitemologi Keislaman, PP Baitul Hikmah, Tegal Gubug, Arjawinangun, Cirebon, 12 July 1998.

<sup>41</sup> KH. Azis Masyhuri, personal interview, Jombang-East Java, 19 December 1998.

<sup>42</sup> Mahfudz was elected in November 1999 as *Rais Am* of the NU (1999-2004).

<sup>43</sup> Dr. Ahsin Muhammad is a member of Syuriah council of West Java. He was awarded a PhD from University of Um al-Qurra’ in Mecca. Dr. Ahsin Muhammad, personal interview, Jakarta, 29 December 1998.

<sup>44</sup> Masyhuri, *op. cit.*, p. 388.

By accepting social analysis as an additional method, the NU has the chance to expand the position of *fatwa* not only as a religious act but also as a tool of liberal social engineering. This requires scholars of the social sciences to be involved in issuing *fatwas*. The NU actually provided the opportunity for social scientists to take part. However, the low number of their members who were experts in the social sciences, and the expense of inviting such scholars to meetings were limiting factors.

### Technical Competence

It seems that the new method fails to lay down the conditions under which members can be involved in Bahtsul Masail meetings. The NU has not listed criteria or conditions that must be fulfilled before members can participate. Perhaps this can be attributed to the feeling of 'humbleness' which the NU tends to adopt. Since no one proclaims that it is *Mujtahid*, the NU does not have to determine any such conditions. Although the criteria are unclear, members of the NU know who has qualifications or not among their '*ulama*, especially in the field of Islamic law. They also glean this from meetings of the Bahtsul Masail at the branch level, or from the level of education which '*ulama* attending have attained.

Since 1983, the NU has provided the names of the *kyai* who are involved in making drafts and who attended the meetings for *fatwa* at a national level. Before then, however, no reliable documentation exists. Although not complete, the list of '*ulama* below will help analysis:

**Professors:** Ali Yafie, Chotibul Umam, Ali Mustafa Yaqub, Anwar Musaddad, Said Aqil Siradj, Tholhah Mansyur.

**Postgraduates:** Nur Iskandar al-Barsany, Irfan Zidny, Masyhuri Syahid, Said Aqil Husein al-Munawwar, Abdul Muhith Fattah, Munzir Tamam, Nahrawi Abdus Salam.

**Graduates:** Makki Rafi`i, K.A. Masduqi, Nadjib Hasan, Adzro`i, HM. Fachri Thaha Ma`ruf, Asnawi Latief, Masdar Farid Mas`udi

**Others:** Rodli Sholeh, Sahal Mahfudh, Mahfud Anwar, Imron Hamzah, Azis Masyhuri, A. Mustofa Bisri, Amin Shaleh, Sairazy, Subadar, Muntaha, Fayyumi, Mahshuni, Nawawi Abdul Azis, Sidqy Mudzhar, Amin Sholeh, Abdullah, Darman Fauzy, Maimun Zubair, Fauzi, Abdullah Mukhtar, Zainal Abidin, Asyhari Marzuki, Cholil Bisri, Yazid Romli, A. Yasin, Amin Mubarak, M. Moenasir, Ghozali, Adnan Iskandar, Mas`udy, Tgk. Nuruzzahri, Utsman Hasyim, Farihin, K.M. Ardani, M. Najid Mohammad, Romadlon Chotib, Ma`ruf Amin.

Several observations can be made about this list. Firstly, several members of the NU have academic titles. Some of them obtained their titles from universities in Middle Eastern countries, but none of them have degrees from

Western universities. Secondly, the balance between *kyai* who have traditional education in *pesantren* and scholars who pursued their educations to university level could be seen as a dynamic situation, rather than a cause of tension. The former may keep the traditional methods and sources, whereas the latter may contribute to developing the NU in the future. According to Masdar Farid Mas'udi, it is not hard to hold discussions with senior *kyai*, if one understands their world-views and uses terms well known to them. Thus, the problem of how to provide modern views with traditional packaging may be solved.

Thirdly, several people on the list are experts in *fiqh*, such as Abdul Muhitth Fattah, Sahal Mahfudh, and Nahrawi Abdus Salam. Ali Mustafa Yaqub is an expert in *Hadis* whereas Chotibul Umam has expertise in the Arabic language. Said Aqil Siradj obtained his PhD in the field of Islamic theology while Said Aqil Hussein al-Munawwar not only has expertise in Islamic legal theory and *fiqh*, but has also memorised all of the verses of the *Qur'an*. Therefore, with such varied expertise, they can fulfil the requirements of *ijtihad* together as a group; that is the character of collective *ijtihad*.

Fourthly, the position of 'secular' scholars who are experts in non-Islamic fields such as economics, politics, technology and sociology is not covered in the list above. Although several members of the NU have academic titles in these fields — for example, Muhammad AS Hikam (politics), M. Rozy Munir (economics), and M. Fajrul Falaakh (constitutional law) — they do not have access to Bahtsul Masail meetings since they lack expertise in the field of Islamic knowledge. They are invited to attend meetings if the '*ulama* require their expertise in certain areas. Rather than being active members, they are only guest attendees at Bahtsul Masail meetings. Even KH. Abdurrahman Wahid, the General Chairman of Tanfidziyah council (1984-1999) and the fourth President of Indonesia (1999-2000), has never been involved in Bahtsul Masail meetings since he is not part of the Syuriah council. Basically, it is the '*ulama* alone who possess the right to produce *fatwa*.

Mitsuo Nakamura, who attended the 26<sup>th</sup> Mukhtamar of the NU, in June 1979, describes the situation of the Syuriah meeting, before the issuing of the *fatwa*:

I attended a session of the Syuriah meeting held during the congress in the huge prayer hall of the Baituraahman Mosque, next to the GOR building. The meeting was carried on in a serious but informal manner. There was no furniture at all except for one simple low desk in front of the chairman and the secretary, around whom the participants sat directly on the carpeted floor in irregular concentric circles. There was no seating order except that the Central Syuriah members and local Syuriah delegates occupied the inner rings while ordinary delegates, observers and onlookers like myself sat in the outer rings. The chairman seemed to be making a conscious effort to canvass and exhaust different views among the participant *ulama* on the subject under discussion. Debate went on endlessly around some issues. It sounded as if, on average, one-third of the oral presentation by a speaker was made in Arabic,

apparently direct quotations from the Qur'an, the Hadith or a commentary, without being translated into Indonesian. Since I do not have a command of Arabic, I was not quite certain of what exactly was being discussed in the session.<sup>45</sup> But it seemed to me that the meeting was, more often than not, agreeing to disagree over a number of issues and then deciding how to deal with the disagreements. Certainly there were a number of renowned and revered senior *ulama* in this Syuriah session as well as in other meetings of the congress I observed. However, their seniority or 'charisma' did not at all stifle free and lively discussions. The absolute obedience of the *santri* (student) to the *kiai* (teacher), supposedly an ethos of the *pesantren*, did not seem to apply to the debate in the Syuriah or in any other meetings of the NU congress. A statement made by Idham Chalid in the beginning of his report that 'the NU had been pursuing its goals without being dictated to by anyone (*tanpa dikomando*), internally or externally' sounded truthful to me. In observing the sessions of the NU congress, I was sometimes irritated by an excess of democracy rather than by any lack of it. The NU's way of deliberation brought home to me the true meaning of *musyawarah mufakat* (deliberation for consensus), which is often mistaken as compromise for convenience.<sup>46</sup>

This process proves the character of collectivity in each *fatwa*. Another point worthy of note is that Nakamura's observation or testimony, that senior *kyais* did not at all stifle free discussion, is correct, at least at the national level. However, as KH. A. Mustofa Bisri points out, at lower levels, the seniority of the *kyai* can influence the 'atmosphere' of the meeting. This means that the opinion of local senior *kyai* can be accepted without reserve by other *kyai*. At the national level, when many *kyai* attend the meeting, Bisri agrees with Nakamura, that rather than charisma, only strong opinion and argument can influence the 'atmosphere' of the meeting.<sup>47</sup>

KH. Azis Masyhuri makes an interesting point that, since senior *kyai* at the national level are very busy, they often do not have time to re-read and analyse the books of *fiqh*. The effect is that at the Bahtsul Masail they only

<sup>45</sup> As Nakamura pointed, it is difficult for a foreign observer to follow the discussion in the Bahtsul Masail since most of *kyais* use Arabic, including those using in *fiqh* terms in their arguments. For instance, during the 30<sup>th</sup> Mukhtamar of the NU, in November 1999, an observer from France, who is fluent in the Indonesian language, asked me several times about the discussion. She was unfamiliar with *fiqh* terms.

<sup>46</sup> Mitsuo Nakamura 'The Radical Traditionalism of the Nahdlatul Ulama in Indonesia: A Personal Account of the 26<sup>th</sup> National Congress, June 1979, Semarang,' in Barton and Fealy (eds.), *op. cit.*, p. 82. By contrast, when I attended the 30<sup>th</sup> Mukhtamar in November 1999, I did not see any senior and charismatic *kyai* involved in Bahtsul Masail meetings. Therefore, the debate between senior and junior *kyai* did not take place at that time. Aqil al-Munawwar, Azis Masyhuri, Ali Mustafa Yaqub, Malik Madany, Irfan Zidny and Masdar Farid Mas'udi, to name a few, were young *kyai* who influenced the 'atmosphere' of the meeting.

<sup>47</sup> KH. A. Mustofa Bisri, personal interview, Rembang, Central Java, 19 December 1998.

give advice and a general view of the problem being discussed. If the *'ulama* have differences of opinion, then senior *kyai* tend to act as 'bridges' between those opinions.<sup>48</sup> The tendency at the NU now is that the young *kyai* are more active and involved in discussions.<sup>49</sup>

Since the *'ulama* at the national level are very busy, the Bahtsul Masail at the national level is not usually active. By contrast, at the provincial or lower level, these committees are active and have regular meetings.<sup>50</sup> At the national level, the Bahtsul Masail is active only in preparing material for the Mukhtar or National Conference. Another interesting thing is, whatever the decision on the *fatwa*, the national leaders of the NU never interfere with, 'veto' or modify the *fatwa*. They will accept and recognise those *fatwas* as the formal pronouncements of the NU. This indicates a democratic element in the process of *fatwa*-making.<sup>51</sup>

The NU states that although decisions of the National NU are ranked highest in terms of the structure of the organisation, each *fatwa* produced by the NU has equal status and cannot override others.<sup>52</sup> This clearly reflects the tolerance of the NU to different *fatwas* and its willingness to strike a balance between the organisation and its membership. In practice, however, members of the NU regard *fatwas* produced at the national level as stronger. The reason is that, at the national level, all *'ulama* from all branches sit and discuss matters together, rather than only local *'ulama* from local areas.

### Sources of *Fatwa*

Turning to the sources of *fatwas*, as has been mentioned, the NU uses books of *fiqh* as their main source. This does not mean that it neglects the *Qur'an* and the *Sunnah*. It is argued that the authors of those books of *fiqh* also quote directly or indirectly from the *Qur'an* and the *Sunnah*. Thus, by quoting books of *fiqh*, they already have the text of the *Qur'an* and the *Sunnah* and also explanations and opinions. If one can buy fruit at the Supermarket, why force oneself to go to the farm? Similarly, if the NU can produce *fatwa* by just searching in the books of *fiqh*, why should it force itself to analyse the *Qur'an* and the *Sunnah* directly? It will refer to and analyse the *Qur'an* and the *Sunnah* if it cannot find the answer in books of *fiqh*. Although the tendency of the NU is to refer directly to the books of *fiqh*, this does not

<sup>48</sup> It is interesting to note that when the leader of the meeting feels that the majority *kyai* agree on the text of the *fatwa*, he will close the discussion by asking audiences to recite *Surah al-fatihah*. After that, the minority *kyai* will accept the decision, as I observed in the 1999 Mukhtar.

<sup>49</sup> KH. Azis Masyhuri, personal interview, Jombang, East Java, 18 December 1998.

<sup>50</sup> Prof. KH. Ali Mustafa Yaqub, MA, personal interview, Jakarta, 12 January 1999.

<sup>51</sup> All *'ulama* whom I interviewed strongly stated this fact when I asked them. They are KH. Ilyas Ruchiyat, KH. Mustofa Bisri, and KH. Azis Masyhuri

<sup>52</sup> See PB NU, *Keputusan Munas Alim Ulama & Konbes Nahdlatul Ulama di Bandarlampung 21-25 Januari 1992*, pp. 6 & 9.

mean that books of *Hadis* are never consulted. For example, at the National Conference in 1961, *Kanz al-Umal* by al-Mufti al-Hindi was cited.

However, in 1992, it was formally recommended that the *Qur'an* and the *Sunnah* should be searched for guidance as well. The implication of this recommendation appeared in 1997, when the NU, in addition to citing the books of *fiqh*, also quoted from the *Qur'an* and the *Hadis* from *Sahih Muslim bi Syarh al-Nawawi*. One *Hadis*, which is narrated by both Bukhari and Muslim, was also cited without referring to either *Sahih Muslim* or *Sahih Bukhari*. In addition, one *Hadis* was cited by quoting Abu Dawud as the narrator, without referring to *Sunan Abi Dawud*.<sup>53</sup> Another *Hadis* was cited without referring to any books of *Hadis*, so people cannot see who narrated it.<sup>54</sup>

The NU has selected which books of *fiqh* may be used. They are known as *al-kutub al-mu'tabarah fi masa'il al-diniyah 'indana* (books which are recognised and used in religious cases). In December 1983, the NU decided that the justification for using *al-kutub al-mu'tabarah* was that they are used in the four Schools of Islamic law.<sup>55</sup> In January 1992, the criteria changed slightly to 'books regarding Islamic teachings which comply with the theology of *Ahl al-Sunnah wa al-Jama'ah*.'<sup>56</sup> The first criteria in 1983 referred to the four Schools of Islamic law, while in 1992, they referred to *Ahl al-Sunnah wa al-Jama'ah*.

The significance of the change resides in the fact that it encompasses a progressively widening application since many leaders of the NU described *Ahl al-Sunnah wa al-Jama'ah* as, 'firstly, in theology, following the Schools of Imam Abu al-Hasan al-Asy'ari and Imam Abu Mansyur al-Maturidi; secondly, in *fiqh*, following one of four Schools; thirdly, in *tasawuf*, following Imam al-Junaid al-Bagdadi and Imam al-Gazali and other imams.' Therefore, following the latest criteria, *al-kutub al-mu'tabarah fi masa'il al-diniyah 'indana* is valid not only regarding *fiqh*, but also theology and *tasawuf*.

NU definitely does not quote from the set of books by Ibn Taimiyah (d. 728 A.H./ 1328 C.E.). The reason is that although Ibn Taimiyah was a follower of the Hanbali school and therefore not against the criterion of *al-kutub al-mu'tabarah*, he was at the same time also a follower of the Salaf

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<sup>53</sup> While the NU does not mention the sources completely, I found this *Hadis* in Abu Dawud Sulaiman, *Sunan Abi Dawud*, book *al-buyu'*, *Hadis* Number: 3,003; Ahmad bin Hanbal, *Musnad al-Imam Ahmad*, book *musnad al-muksirin min al-Sahabah*, *Hadis* Number: 4,593, 4,765, and 5,304.

<sup>54</sup> The NU cited the *Hadis* — in the case of HIV/AIDS — without mentioning the narrator and the source at all. This *Hadis* is actually narrated by Abu Hurairah and can be found in Ahmad bin Hanbal *Musnad al-Imam Ahmad*, book *baqi musnad al-muksirin*, *Hadis* Number: 9, 345.

<sup>55</sup> Masyhuri, *op. cit.*, p. 301.

<sup>56</sup> *Ibid.*, p. 364. These 1992 criteria are claimed to refer to the criteria at the 27<sup>th</sup> Muktamar. It should be noted that the 27<sup>th</sup> Muktamar did not produce the criteria for books of *fiqh*. Those criteria were produced at the National Conference in 1983, at Situbondo. It is assumed that this mistake occurred because both the National Conference in December 1983 and the 27<sup>th</sup> Muktamar in December 1984 were held at Situbondo.

School of theology, which was adopted by the Wahabi movement in Saudi Arabia. It should be recalled that the victory of the Wahabi movement in Saudi Arabia was one of the reasons the NU was established in 1926. The original disagreement therefore underlies the NU's reluctant to quote from Ibn Taimiyah.

Although the NU, theoretically, recognises the books of the Four Schools, in practice, most of *fatwas* quote from the books of the Syafi'i school. As has been mentioned earlier, however, it is very rare that the books used are Imam Syafi'i's own, but rather books by his followers.<sup>57</sup> Surprisingly, as KH Husein Muhammad points out, Nawawi and Rafi'i books — both accorded the highest status in the NU view — are rarely quoted at the meetings of the Bahtsul Masail. He goes further and comments that choosing opinions from the books of *fiqh* to issue *fatwas* is done sporadically; not systematically.<sup>58</sup> If an answer can be located in one or two books, this is considered a sufficient basis for a *fatwa* without looking to the hierarchy of '*ulama*, as required in the method.

Prof. KH. Ali Yafie claims that when the '*ulama* of the NU meet before issuing *fatwa* — despite only citing the books of *fiqh* — they also use *qawa'id fiqhiyyah* (the rules of Islamic law) and *qawa'id usuliyyah* (the rules of Islamic legal theory).<sup>59</sup> From the sources quoted in the *fatwas*, it is hard to determine whether Yafie's statement is correct or not since both *qawa'id* are rarely mentioned. Yafie could be right, as both *qawa'id* are tools for the *Mufti* to produce *fatwas*. They must use them during the discussion, although they appear very rarely in the text of *fatwas*.

Relating his experience, Masdar Farid Mas'udi recalls the time when he became a member of the committee charged with preparing the material to be used at the Mukhtamar. He asked the '*ulama* to fill in the forms provided by the committee, and write answers to the particular question to be addressed by quoting the *Qur'an*, the *Hadis*, *qawa'id fiqhiyyah*, *qawa'id usuliyyah* and then the books of *fiqh*. The '*ulama* refused to comply arguing that they were not *Mujtahid*, and based their response on the books of *fiqh* alone.<sup>60</sup>

It may be concluded that some *kyai* use both *qawa'id fiqhiyyah* and *qawa'id usuliyyah* when discussing answers for *fatwa*, while other *kyai* do

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<sup>57</sup> This is an example of how the NU cites sources sporadically. The NU quotes *al-Um* by Imam Syafi'i in the case of temporary marriage, while in the case HIV/AIDS, refer indirectly to *al-Um* by quoting *Mugni al-Muhtaj* by Syarbini. It is interesting that both cases were discussed at the same time and place. Why did NU quote *al-Um* in one case and not in another? See *Keputusan Munas Alim Ulama & Konbes Nahdlatul Ulama di Bandarlampung 21-25 Januari 1992*, pp. 25 & 31.

<sup>58</sup> KH. Husein Muhammad, *loc. cit.*

<sup>59</sup> Prof. KH. Ali Yafie, personal interview, Jakarta, 12 January 1999. When I attended the Bahtsul Masa'il at the West-Java provincial level in 1995, I heard that one *kyai* quoted the *qawa'id fiqhiyyah*.

<sup>60</sup> Mas'udi smiled when, in order to answer my question, he said that he was not sure whether this happens, because these particular '*ulama* are either too humble or lack the requisite knowledge. Drs. Masdar Farid Mas'udi, personal interview, Jakarta, 11 January 1998.

not. Secondly, the text of *qawa'id fiqhiyyah* or *qawa'id usuliyyah* are rarely included in the body of the *fatwa*, which can be seen as a 'victory' for those who do not want to use them.

The NU refers to the books of *qawa'id fiqhiyyah* and *qawa'id usuliyyah*, such as *al-Asybah wa al-Naza'ir*, *Sullam al-Usul Syarh Nihayah al-Sul*, and *Hikmah al-Tasyri' wa Falsafatuh*. However, it should be noted that other classic famous books in the field of *usul al-fiqh* and *qawa'id fiqhiyyah* such as *al-Mustasfa min 'Ilm al-Usul* by al-Ghazali, *al-Mu'tamad fi Usul al-Fiqh* by Abu Husain al-Basri, *Qawa'id al-Ahkam fi Masalih al-Anam* by 'Izz al-Din 'Abd al-Salam and *al-Ihkam fi Usul al-Ahkam* are never quoted, despite the fact that all were written by the grand 'ulama from the Syafi'i school and were acknowledged as the primary sources in Islamic legal theory. This is another piece of evidence that the NU chose sources of the *fatwa* sporadically, not systematically.<sup>61</sup>

The criterion of *al-kutub al-mu'tabarah* above seems to exclude modern books, at least in KH. Husein Muhammad's opinion. For example, *al-Fiqh al-Islami wa Adillatuh* (published for the first time in 1984, and now consisting of nine volumes) by Dr. Wahbah al-Zuhaili is seen as outside the *al-kutub al-mu'tabarah*, only because the author lived in the twentieth century. It should be noted here that this book provides all opinions from all schools of Islamic law. Unlike the classic Islamic books, *al-Fiqh al-Islami wa Adillatuh* is written in the modern style, providing extensive footnotes relating to the authorities employed. From its footnotes, it would appear that most of the relevant sources are the classic books of *fiqh*. KH. Husein Muhammad asks, 'Why does the NU not want to use *al-Fiqh al-Islami wa Adillatuh*?'<sup>62</sup> However, KH. Husein Muhammad possibly forgot the *fatwa* from the 29<sup>th</sup> Mukhtamar in 1994 regarding surrogate motherhood, which quoted *al-Fiqh al-Islami wa Adillatuh*.<sup>63</sup> Thus, it is not correct that the NU does not want to use *al-Fiqh al-Islami wa Adillatuh* as one of its sources. The NU also used other modern Islamic books, written by Dr. M. Yusuf Musa and Dr. Abd al-Qadir Audah, at the 1961 Conference.<sup>64</sup>

Another interesting point is that the criterion of *al-kutub al-mu'tabarah* includes *fatwas* from *Mufti* in Middle Eastern countries. For example, at the 10<sup>th</sup> Mukhtamar in April 1935, while answering the question, 'What is the legal status of listening to the radio?', the 'ulama referred to the *fatwa* of Syaikh Bakhit al-Muti'i, Grand *Mufti* of Egypt.<sup>65</sup> The NU is not averse to using foreign *fatwa* as sources, but can also produce *fatwa* in reacting to them. For example, in 1994, there was a *fatwa*, regarding the Pilgrimage, which

<sup>61</sup> More information on the inconsistency of NU's *fatwa* can be found in Nadirsyah Hosen, 'Konsistensi dan Efektifitas Fatwa NU' *Gatra*, No. 38, 5 August 2002.

<sup>62</sup> KH. Husein Muhammad, *loc. cit.*

<sup>63</sup> Masyhuri, *op. cit.*, p. 1994. The same book was also cited in the 1997 Conference when the NU talked about mutual fund. See *Hasil-hasil Musyawarah Nasional & konferensi Besar Nahdlatul Ulama*, November 1997, p. 65.

<sup>64</sup> *Ibid.*, p. 232

<sup>65</sup> *Ibid.*, p. 117.

responded negatively to the *fatwa* of *Dar al-Ifta* of Saudi Arabia.<sup>66</sup> Although the NU's preference is to use the classic books of *fiqh*, it will use more modern sources where modern problems need to be addressed.

The NU, then, does not exclude modern books from *al-kutub al-mu'tabarah*, which suggests a dynamic, practical and forward-looking response to the questions they are asked to confront. Indeed, there is a school of thought that the NU should stand not only at the 'reader position' (as essentially a pupil), but should try to produce books of *fiqh*. If modern 'ulama from other countries in the Muslim world can produce such books, why cannot NU contemplate doing the same?

### Revision of *Fatwa*

Many 'ulama of the NU have several times asked for a review of several old *fatwas*. However, often the Mukhtar have decided that the arguments of the old *fatwas* are still right and relevant. One example is in the case of *gono-gini* (1926 and 1960). This does not mean that the NU never revised the old *fatwas*. At least, there is one case where the NU revised its *fatwa*.

The NU issued a *fatwa* in 1926 that it is not permitted to allocate *zakah* for the Mosque and Islamic schools. This *fatwa* took the view that the word 'sabilillah', as mentioned in the *Qur'an* [9:60], refers specifically to the condition of being at war. The NU also said that the opinion of al-Qaffal, who believes that the word above has a more general meaning, is weak. This *fatwa* referred to *Rahmat al-'Ummah* and *Tafsir al-Munir li al-Nawawi al-Jawi*. In 1981, the NU reviewed this *fatwa*. It provided two answers: (a) it is not permitted, as decided by the [1926] Mukhtar. It added one more reference, which is *Ahkam al-Fuqaha*; (b) it is permitted based on *Tafsir al-Munir li al-Nawawi al-Jawi*, *Qurrat al-'Ayn li Syaikh 'Ali al-Maliki*, *Fatwas al-Syar'iyah wa al-Buhu' al-Islamiyah li Muhammad Makhlu'f*.<sup>67</sup>

It is interesting that, both in 1926 and 1981, the NU has referred to *Tafsir al-Munir li al-Nawawi al-Jawi*. The only difference is that, when the NU referred to this book in 1926, it took the view that the opinion of al-Qaffal was weak, whereas in 1981, the NU did not mention whether al-Qaffal's opinion was weak or not. It is unclear why the NU said al-Qaffal's opinion was weak in 1926 and used it as one of its argument in the 1981 *fatwa*.

Again, it may be seen that the NU does not want to choose the stronger between two arguments or opinions. The NU changed its mind in 1981, but in this case its characteristic humility did not allow it to say that the NU's 'ulama in 1926 (the teachers and the founding fathers of the NU) were wrong. They revised the previous *fatwa* without denying their characteristic humility and respect for teachers. By mentioning two opinions, instead of one, the NU allowed their members to choose either one of them freely. Regarding the

<sup>66</sup> *Ibid.*, p. 385.

<sup>67</sup> Masyhuri, *op. cit.*, p. 283.

topics and the quantity of *fatwas* issued since the first Mukhtamar in 1926, they cover several themes such as faith, ritual matters, politics, economics, the environment, women, medical matters and internal NU affairs. The NU produced more than four hundred *fatwas* during the period 1926-1998. The topics and quantity of these *fatwas* mark the NU as an Islamic organisation which has always given responses to the problems of Indonesian Muslims, over more than seventy years. This is clearly a great contribution to Indonesia from the '*ulama* of the NU.

## Conclusion

Collective *ijtihad* is a new development in the Islamic world. From the time of the Prophet until the beginning of the twentieth century, *ijtihad* was performed individually. In 1964, the concept of *ijtihad jama'i* was introduced formally in the Islamic world by *Majma' al-Buhus al-Islamiyah* in Cairo. Indonesian '*ulama* have performed *ijtihad jama'i* since 1926, twenty-eight years before *Majma' al-Buhus al-Islamiyah* introduced the term, when traditionalist '*ulama* formed the Nahdlatul Ulama (NU).

This article has demonstrated that since 1926 the NU has played a vital role in the discourse concerning Islamic law in Indonesia. In addition, the NU has reviewed its methods, forms and sources in performing *ijtihad*. This indicates a positive development of the NU. Despite its humility in not declaring itself as *Mujtahid*, the NU has shown that it is able to use *fatwas* as instruments to cope with modern developments by performing *ijtihad* collectively. The model of collective *ijtihad* performed by the NU could be seen as an alternative model of *ijtihad jama'i* in the Muslim world, and, in particular, to fill the gap of technical guidance which has been neglected by *Majma' al-Buhus al-Islamiyah* since 1964.

The issues which are covered by Indonesian collective *fatwa* are wider than those discussed in the classic books of Islamic law. The topics in these books did not include modern issues such as insurance, corneal transplants, banking, and family planning, to name but a few, because the books of *fiqh* were written hundreds of years ago. Nor do the *Qur'an* and the *Sunnah* mention these things for the same reason. Another thing is that the possibility of revising *fatwas* provides some evidence that Indonesian '*ulama* are less rigid in their interpretation of Islamic positioning than is the case elsewhere. Indonesian *fatwas* are adaptable to social change, particularly where previous rulings have proven no longer suitable to the situation.

However, the NU has not yet performed *ijtihad jama'i* optimally. For example, the NU has chosen one opinion from several which is based only on the hierarchy of the '*ulama*. It is not based on the stronger argument or on that which will be of more benefit to society. Several *fatwas* of the NU were simply repetitions of opinions from *fiqh* books without making any modification through *ijtihad* or reinterpretation. Another reason is that the

'*ulama* still have a bigger role in deciding a case, while other Muslim scholars from various disciplines join only as secondary players. This means that the spirit of collective *ijtihad*, which requires the involvement of other scholars, is not as yet practiced effectively.

Collective *ijtihad*, or collective *fatwa*, has functioned as an instrument for the regulation and reconstitution of Indonesian society. Therefore, it could safely be stated that the institution of collective *ijtihad* is a viable tool through which a society can adjust itself to internal and external social, political, and economic change. The real challenge for the NU is to use its collective *ijtihad* as an effective instrument to make a contribution to Islamic teachings dealing with poverty, corruption, sustainable development, and good governance.