

The Limitations of Using *Fatāwā* for Islamic Bioethics Research

Aasim I. Padela MD MSc¹

Introduction²

Fatāwā, ethico-legal opinions of Islamic jurists, are key source material for Islamic bioethical guidance and research. Academic researchers use *fatāwā* as source texts for understanding Islamic normative goals, Muslim clinicians view *fatāwā* as the basis for religiously-aligned practice guidelines, and Muslim patients seek out *fatāwā* to discover religiously-permitted options when confronting a healthcare decision. For these and other stakeholders *fatāwā* provide critical insights into Islamic morality and represent a means by which the Islamic tradition engages with contemporary biomedical issues.

Within the nascent field of Islamic bioethics, *fatāwā* represent key source material, and in turn studies of *fatāwā*, have become the principal method of textual research. Indeed, one of the early foundational monographs of the field, *Islamic Medical Ethics in the Twentieth Century*, used *fatāwā* garnered from leading Egyptian newspapers and periodicals in the 1980s and 1990s to elucidate Islamic bioethical values, norms, and ideals.³ More recently, and following a similar pattern, researchers have collated *fatāwā* from prominent online forums and “fatwa banks” in order to canvass Islamic bioethical positions on issues such as organ donation, euthanasia, and assisted suicide.⁴

¹ Professor of Emergency Medicine, Bioethics, and the Medical Humanities at the Medical College of Wisconsin, Milwaukee, WI, USA; Chairperson and Director, Initiative on Islam and Medicine, Brookfield, WI, USA

² This paper builds on critiques I and colleagues have made regarding the use of fatwa research in several papers and book chapters. I would like to acknowledge Shaykh Amin Kholwadia and Dr. Hasan Shanawani who were collaborators on those earlier works.

³ Rispler-Chaim, Vardit. *Islamic Medical Ethics in the Twentieth Century*. Brill, 1993.

⁴ Stef Van Den Branden and Bert Broeckaert, "The ongoing charity of organ donation. Contemporary English Sunni fatwas on organ donation and blood transfusion," *Bioethics* 25, no. 3 (2011); S. van den Branden and B. Broeckaert, "Living in the hands of God. English Sunni e-fatwas on (non-)voluntary euthanasia and assisted suicide," *Medicine, Healthcare and Philosophy* 14, no. 1 (2011 2011), <http://www.springerlink.com/content/x863106859270230/fulltext.html>.

Fatāwā are certainly appealing as the primary source material to study Islamic bioethics. They are relatively accessible given they are located on public media channels, they contain relatively straight-forward arguments given that they are meant to address lay Muslims, and they possess motive force in that they inform the behaviors of Muslim patients, clinicians, and policymakers. Moreover, given that Islamic law, arguably, is the principal foundation for Islamic ethics, these instruments can justifiably be considered to convey ethical values and goals.⁵ In summative analyses of *fatāwā* are purported to allow for generalization about Islamic bioethical goals, and also possibly permit the induction of a moral vision for contemporary healthcare.⁶

Yet, this juridical instrument has inherent biases. In particular, *fatāwā* privilege individual and/or societal contexts and thus may represent exceptions from established ethical and legal precedents and norms. Additionally, by dint of their formulation, ethical and legal considerations dominate over theological ones and hence *fatāwā* may not accurately represent Islamic normativity. In related fashion, the research method for conducting a *fatāwā* review also has inherent limitations that constrain summative reporting. As such Islamic bioethics stakeholders, particularly academic ones, must account for the biases and limitations of *fatāwā* reviews when embarking on analysis and interpretation.

Herein I discuss several biases and limitations of *fatāwā*-based research. I begin by drawing attention to the fact that *fatāwā* represent contingent Islamic legal judgements. A lack of appreciation for this intrinsic nature could lead to misinterpreting Islamic moral visions for society. I next discuss methodological limitations of *fatāwā* reviews, specifically how publication and related biases impacts literature reviews. These methodological constraints impact the summative evaluation a researcher can feasibly perform, as well as the conclusions that can be drawn. As Islamic bioethics develops into academic field of inquiry, the rigor and

⁵ A. Kevin Reinhart, "Islamic Law as Islamic Ethics," *The Journal of Religious Ethics* 11, no. 2 (1983/10/01/ 1983), <http://www.jstor.org/stable/40017705>.

⁶ Noor Munirah Isa, "Darurah (necessity) and its application in Islamic ethical assessment of medical applications: A review on Malaysian Fatwa," *Science and engineering ethics* 22, no. 5 (2016).

validity of research in the field depends on recognizing the inherent biases of certain source materials, and the limitations of specific research methods. This paper focuses on several biases and limitations of *fatwa* research.

Fatwa and Islamic Bioethics: Definitions and Discourses

Before proceeding further some definitions are in order. *Fatāwā* (singular fatwa), are opinions rendered by Islamic jurists in response to a religious question of ethical and legal significance, and have two essential aspects. First, they are derived with consideration of, and using the techniques of argument within, Islamic moral theology, *usūl al-fiqh*. Second, they are formulated in response to a specific question from an individual or group, hence address the particular social, cultural, political, and legal contexts of the questioner.⁷ In this way a fatwa is both a legal instrument that is used to bridge Islamic values and contemporary contexts, as well as a discursive tool that involves engagement between a questioner rooted in a specific context and an Islamic scholar who is vested authority because of expertise in the scriptural tradition.

Fatāwā are nonbinding opinions that represent the jurist's attempt to discern God's will in a certain matter. Leaving aside theological questions about whether this is a singular 'correct' expression of God's will, or whether there are multiple such expressions,⁸ in Muslim life *fatāwā* encapsulate the plurality of the Islamic ethico-legal tradition. For the seeker of the fatwa, different opinions allow for personal choice regarding which opinion has the stronger argument and sets the seeker's heart at ease. In practice, however, the seeker often consults a specific jurist whose opinion he/she trusts and will consider it binding on the subject. This selection is often made based on adherence to a particular school of jurisprudence, familiarity with social contexts, or domain expertise.

⁷ Tariq Ramadan, *Radical reform : Islamic ethics and liberation* (Oxford ; New York: Oxford University Press, 2009). Table of contents only <http://www.loc.gov/catdir/toc/ecip0822/2008026901.html>.

⁸ A. M. Emon, *Islamic natural law theories* (New York: Oxford University Press, 2010).

Fatāwā have been categorized into four main types: the ephemeral, the school, the court and the public, each with relevance to Islamic bioethics. The ephemeral fatwa is what commonly comes to mind when discussing a fatwa. These statements focus on facilitating the everyday life of a questioner who wonders whether a specific action is religiously permitted or not. The school *fatāwā* are those that canonize the prevailing views of specific Islamic schools of law. These *fatāwā* serve instructional purposes as they crystallize ethico-legal theory, and record majority and minority views within a legal school. The court *fatwa* is a special type used for legislative and civil purposes within a state jurisdiction. These also mete out positive law and as such carry legal authority. Finally, the public *fatwa* transcends the nexus between the mufti and the *mustaftī* and introduces the broader public as the intended addressee. Hence the *mufitī* will avoid taking the individual circumstances of the question into account and seek to issue a generally valid fatwa across societal contexts.⁹

As for Islamic bioethics it is a “discourse that uses the Islamic tradition to address moral questions and ethical issues arising out of the biomedical sciences and allied health practice.”¹⁰ At the core of this discourse is an individual (or group) from the biomedical arena seeking Islamic ethico-legal guidance and a respondent (or group of respondents) with expertise in the Islamic tradition. Commonly the seeker is a Muslim patient or physician and the expert is an Islamic jurist. Involved in the discourse either through formal dialogue, or informally via their work which shapes the questions and context of the questioner, are biomedical scientists, social scientists, or health policy actors.

The central role accorded to Islamic jurists aligns with the dominant role Islamic law, *fiqh*, occupies within Islamic morality. Islamic law corresponds with Divine intents and purposes for humankind, thus an Islamic ruling sets out whether, and to what extent, a certain action accords with God’s approval. Accordingly, that

⁹ Jakob Skovgaard-Petersen, "A Typology of Fatwas," *Die Welt des Islams* 55, no. 3-4 (2015), <https://doi.org/doi:https://doi.org/10.1163/15700607-05534p02>, <http://booksandjournals.brillonline.com/content/journals/10.1163/15700607-05534p02>.

¹⁰ Aasim I. Padela, ed., *Medicine and Shariah: A Dialogue in Islamic Bioethics* (University of Notre Dame Press, 2020). Page 4

judgment is attached to afterlife ramifications; approval leading to positive consequences and disapproval to negative ones. Using established methods of scriptural hermeneutics and reasoning exercises ensconced within *usūl al-fiqh*, the task of the jurist is to discern Divine will and delineate act-based morality. Most certainly, determinations of Islamic law are approximations, the strength of which varies based on grounding within scripture and Prophetic precedent.

Beyond Islamic law, however, are other sciences within the tradition that speak to morality. For example, agent-based morality can be gleaned from the Islamic sciences of virtue and character development, *adab*, as well as spirituality, *taṣawwuf*. End-based morality can be ascertained from a science related to the higher objectives of Islamic law, the *maqāṣid al-Sharī‘ah*. Beyond these, theological considerations also inform Islamic moral frameworks through their influence on legal theory, or upon jurists in the conceptualization of the problem-space. All too often both in scholarly and professional circles, the *fiqh* of medicine is conflated with Islamic bioethics, leaving other sources of Islamic morality marginalized, and the ethical problem space not fully addressed. In critical discourse analysis terms¹¹, the orders of discourse in Islamic bioethics have privileged Islamic law and hence jurists to the exclusion of other sciences of morality and other moral considerations beyond the specific act. The reliance on *fatwa* research as the dominant research method within Islamic bioethics is a symptom of this phenomenon.

Biases of *Fatwa*

As with any methodology of research and method of inquiry, the study of *fatāwā* has its own challenges, and as source texts *fatāwā* contain implicit biases and provide areas of intellectual emphasis. Both the methodological issues and biases are, in all likelihood, known to those who study Islamic law, and such scholars likely account for them in conducting research. However, given that Islamic bioethics is a multidisciplinary field, some participants may not be as cognizant of the

¹¹ Norman Fairclough, *Critical discourse analysis : the critical study of language*, Language in social life series, (London ; New York: Longman, 1995).

shortcomings of *fatāwā* and *fatāwā* research. In this section we draw attention to two biases: *fatāwā* (i) *prioritize context over text* and are but (ii) *part of the whole*.

Prioritizing context over text

As noted above, *fatāwā* are sought out in response to exceptional circumstances and are driven by context. There is no need for a Muslim to seek out an Islamic jurist to ask about whether medical care can be sought for an ailment since there are multiple instances of the Prophet Muhammad and his companions doing so which set the norm. Indeed, there are also traditions well-known to the Muslim laity where the Prophet commands Muslims to seek medical treatment.¹² However newer modalities of treatment, e.g. xenotransplantation, might spur Muslims to ask whether a particular treatment is permitted. Similarly, there would be little need for a Muslim to inquire about what to do with the human body after death. Extant legal manuals are replete with instructions about burial. However, exceptional circumstances where burial might not be possible, e.g. due to fear of contagion, may motivate a Muslim to seek a fatwa to inform what they should do.

In the examples above technological innovation and social contexts underlie the need for a *fatwa*. Accordingly, the *fatwa* may represent a tentative response to the innovation, or an exception to the established norm. Prioritizing context over text in this case means privileging contextual considerations to issue an expedient ruling, particularly in areas where deeper textual analysis may be needed for a more determinative judgement. Alternatively, prioritizing context over text means deviating from scriptural precedents because the context meets the threshold for either an exception or an exemption.

Again, recall that the primary concern of the jurist while issuing the *fatwa* is to resolve the questioner's concern by keeping him/her within the bounds of faith. The questioner may be in a situation requiring urgent guidance to make time-sensitive healthcare decisions. A tentative or preliminary response regarding a novel issue would allow the questioner to proceed ahead with tacit approval. Similarly,

¹² Abū 'Abdillāh Muḥammad ibn Yazīd Ibn Mājāh, "Sunan Ibn Majah," (Sunnah.com).
<http://sunnah.com/ibnmajah>. Hadith 3436

judging the context to merit an exception to the rule allows the questioner to move ahead. That is not to say that a jurist would not exert their utmost abilities to understand the issue at hand and to provide a comprehensive response. Rather, the researcher must recognize that contingencies and contextual factors weigh heavily upon the *fatwa* giver's mind. Furthermore, jurists are taught to base their *fatāwā* on minority views when necessary, or piece together devices and constructs from different schools of law for keeping the questioner out of sin. In other words, so long as the proposed action can be justified from within the plurality of Islamic law and the reasoning is not overtly faulty, jurists should strive to relieve the questioner from hardship.

Consequently, for these and other similar reasons, the text of the fatwa may not represent a normative Islamic ruling, *ḥukm*. Hence care must be taken that summative reviews of fatwa literature do not misrepresent the exceptional as the normative, and misclassify the prevailing opinion gleaned across *fatāwā* as an Islamic moral ideal. Additionally, since *fatāwā* privilege contingencies and can represent exceptions to the rule, any change in context necessitates a reevaluation as to whether a particular fatwa applies. *Fatāwā*, therefore, are not necessarily portable from one person to the next, from one epic to the next, or from one society to another.

The implication of the foregoing for *fatwa* research is that the conditions and contextual factors that surrounded the jurist-questioner dyad must be foregrounded when providing a summative review of the body of literature. Not doing so could lead to misinterpretation; individuals seeking to apply a particular fatwa may not recognize the shift in contextual considerations that make the fatwa inoperable, or conversely make it such that a particular fatwa is now applicable.

At a more 'meta'-level, *fatāwā* researchers may believe that maxims and values that are ubiquitous in extant *fatāwā* are the bedrock of Islamic ethico-legal theory. Yet, such an extrapolation may be misguided as contextual considerations may lead to an over-utilization of secondary principles or constructs, e.g. *ḍarūra*, which may not have an foundational role in normative frameworks.

Seeing part for the whole

Another shortcoming of the study of *fatāwā* for developing an Islamic bioethics is that *fatāwā* are but one genre of Islamic ethico-legal reflection. Indeed, ethical frameworks and theories are judged on their coherence, comprehensiveness, power, and practicability. The effort to build an understanding of Islamic bioethics by relying on *fatwa* literature ignores other Islamic sciences and literary genres that offer building blocks for bioethics. For example, the cultivation of Godly virtue is the central concern of Islamic sciences related to spirituality, *taṣawwuf*. Similarly, ethical and virtuous character development is a core concern of the Islamic science of manners and morality, *ilm al-ahklāq*. And Islamic understandings of metaphysical realities as debated in scholastic theology also have ethical import. As such, relying on *fatāwā* alone may lead to an inaccurate portrayal of the ethical teachings of Islam. By their nature *fatāwā* are instruments of Islamic law and hence their construction betrays a bias towards legal understandings and reasoning exercises. However, privileging law in determining the ethical to the exclusion of other foundations for bioethics may lead to the unintended consequences such that the resulting frameworks are incoherent, incomplete, or impractical.

Furthermore, it is possible that theological considerations may preempt the address of some bioethical questions vis.a.vis a *fatāwā*. An entire class of ethical argumentation would thus be inaccessible to the researcher sufficing themselves with studying *fatāwā*. Theological considerations are a necessary part of the juridical imaginary and inform jurists' understandings of their role in solving the questioner's quandary. As a result, some potential *fatāwā* never materialize because questions are dismissed by theological arguments, a phenomenon referred to elsewhere as the "silent" fatwa.¹³

In sum, there are multiple reasons for *fatāwā* to prioritize context over text and privilege legal understandings of the bioethical problem-space over other

¹³ A.I. Padela et al., "Using Fatawa within Islamic and Muslim bioethical discourse: the role of Doctrinal and Theological considerations- A Case Study of Surrogate Motherhood," in *Islam and Bioethics*, ed. B. Arda and V. Rispler-Chaim (Ankara University Press, 2011).

aspects of the issue. These inherent biases must be accounted for when using them as sources of study.

Methodological Limitations of Fatwa Research

As a research method that depends on amassing textual source material in order to draw aggregate conclusions, *fatwa* research is subject to methodological limitations of literature reviews. Herein I focus on publication bias, as well as the related concerns of spectrum and selection bias. It is important to note that *fatwa* research as a method reliant on textual analysis, is also prone to challenges that other text-based research methods are. As these concerns are more related to analytic issues than methodological limitation they will be discussed in a future manuscript.

Publication bias is a potential threat in all areas of research yet has come to prominence in recent years due to the widespread adoption of literature review and meta-analytic methods for summarizing bodies of scholarship. This bias was originally conceptualized as a bias in summative literature analyses that results from the fact that certain types of research findings are more likely to be published than others. For example, in the field of health research, studies that find no benefit from a particular treatment regimen are less likely to be published by journal editors than those that have a positive association between a therapy and a health outcome. Because of this bias the aggregate literature tends to skew towards a positive effect for the therapy. From this initial conception, publication bias now has many different subcategories including outcome reporting bias where only findings from a research study are selectively published to generate a certain narrative, and language bias where significant findings are published in English language media and thus inaccessible to non-English speaking researchers. It is also associated with multiple other biases referring to various pitfalls in summarizing a body of literature.

With respect to *fatwa* research and Islamic bioethics, publication bias arises from the fact that a researcher can only report findings from *fatāwā* he/she can access. The risk, therefore, is that a researcher's summative review may miss

important rulings that they do not have access to, and consequently the posited conclusions may be spurious. Just like with journal articles, *fatāwā* that are issued by prominent jurists, innovative in some way, exotic, or controversial are more likely to be circulated in media circles. Hence researchers obtaining fatwa through print media may obtain *fatwa* that are not representative of the prevailing opinions of jurists.

Beyond this, as I have argued elsewhere¹⁴, it is impossible to conduct a comprehensive fatwa review. First, *fatwa* are authored in each of the languages of the Muslim polity. Second, not all *fatwa* are not only written down, some are issued in word only. Third, *fatwa* are communicated not only in written media, but also are issued online, on radio programs, and even on teleconferences and during phone calls. Because of the impracticality of obtaining all written and spoken *fatwa* in all of the languages of the world and on all media channels, the method is intrinsically limited and therefore conclusions from a summative review are subject to many caveats.

Spectrum and selection bias are closely related to publication bias. Spectrum bias occurs when the body of literature accessed is systematically misaligned with the body of literature one desires to summarize. For example, one may use a search engine to uncover *fatwa* yet the search engine may be restricted in the languages it can search within, or may be restricted to literature generated in specific parts of the world. Hence the *fatwa* that are aggregated from the search engine are skewed and not fully representative. Selection bias operates in a similar way where the researcher introduces limits to the literature review strategy *a priori* or *post hoc*. With respect to *a priori*, a researcher limiting their e-fatwa review to certain websites and overlooking others illustrates the phenomenon. With respect to *post hoc*, the analyst may dismiss certain rulings and focus their attention to others for explicit or implicit reasons.

¹⁴ A. I. Padela, "Islamic Bioethical Positions on Organ Donation and Transplantation: Stressing Rigor and Caution in Fatwa Reviews," *Transplant Direct* 6, no. 8 (Aug 2020), <https://doi.org/10.1097/TXD.0000000000001023>, <https://www.ncbi.nlm.nih.gov/pubmed/32766434>.

The result of publication and associated biases is the same. The literature that is obtained does not comprise of all *fatwa* on a particular matter, and the literature that is obtained may be systematically biased in a certain way. Consequently, researchers must address these biases by spelling out their literature review methodology so that readers can assess the effect of potential biases, and also must couch their findings to be representative of only the literature they obtained. Moreover, addressing these biases may require reproducibility checks of the literature search methods, and validity checks of the findings, as is becoming the norm in the medical journals that publish systematic literature reviews. Finally, the lack of comprehensiveness and publication biases related to *fatwa* reviews implies that an interpretation based on counts is specious. Much like in qualitative research, counts are supplemental to the thematic content analysis. The rigor of the ethico-legal arguments used, and the precision with which the biomedical contexts are described, are more important than the number of *fatwa* that judged a specific action licit or illicit.

While it is fashionable to report majority versus minority views within Islamic bioethics based on a review of extant *fatāwā* literature, such analytics are highly problematic for the reasons mentioned above. Specifically, *fatwa* prioritize context over text and thus may not be normative, both minority and majority views are actionable, the determination of which camp is in the minority and which in the majority must be made with caution given publication biases, and Islamic ethics is not fully reducible to *fatāwā* and *fiqh*.

Final remarks

In this paper I called attention to several pitfalls and shortcomings of *fatāwā* as source material for, and *fatāwā* research as a research method in, Islamic bioethics. Specifically, I noted that *fatwa* prioritize context over text which, if not recognized by the researcher, may lead to misreading exceptions to be norms or to the overlooking of the contingent nature of specific *fatāwā*. I also discussed the fact that *fatwa*, as instruments of Islamic law, are but *part of the whole*, and should not be interpreted as fully representing an Islamic moral vision. I next proceeded to

discuss how publication and related biases impact the types of conclusions that can be drawn from *fatāwā* reviews. I called for the foregrounding of the specific methods used to access the fatwa literature, as well as for the couching of summative findings from such reviews lest the results be mistakenly over-generalized. In medicine, publication and related biases can have dramatic consequences where ineffective or dangerous treatments are falsely viewed as safe and effective. I argue that research that proposes to reflect what the Islamic tradition (or the body of Islamic jurists) have to say on a specific bioethics issue, we need to tread just as cautiously given the same threats to research validity. Attending to the biases and limitations of *fatwa* research is necessary for developing Islamic bioethics into a field of rigorous scholarship.