

Reinterpretation of Contemporary Islamic Law (Analysis Study of the Legal Fatwa of Smoking)

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Abstract

This study used normative-judicial approach performing the research on legal data related to legal determination against cigarette and smoking. Data sources obtained through literature research, information, and media news concerning legal status of smoking and any impacts arrived from it. The results showed that there are two relevant theories or *fiqh* which are used. The first principium is “*dar’ul mafasid muqaddamun ala jalbil mashalih fiqh*” (to refuse harm that would take precedence over the benefit). The second is rules of the prohibition of something namely *haram li zhatihi* (prohibition of its substance) *waharamun li ghairi zhatihi* (not prohibition of its substance). Cigarette is a product mainly made of tobacco, cloves and other ingredients which according to *fiqh* are not classified as prohibited ingredients. However, after going to the process, it has become prohibited or known as *haram li ghairizhatihi* due to its process. Meanwhile, smoking is an action which potentially having many harms such as tuberculosis, disturb health such as cough and difficulty in breathing as well as affecting welfare. Therefore, smoking is considered as prohibited (*makruh* and *haram*).

Keywords: Contemporary Islamic Law, Cigarette and Smoking, and Fatwa

1. Introduction

Muslims in Indonesia are known to be very dynamic in dealing with life's challenges which has always been attentive. Moreover, it has becoming the portrait of religious life by other nations in the world. Religious issues are always encountered with the typical approaches without neglecting the essences of Islamic Shariah producing something that is in accordance with human values (*Insaniah in Arabic*).

One interesting example is how to deal with the phenomenon of smoking that has been popular in the community. This phenomenon basically looks like the use of cell phones and internet connection that permeates all levels of society. According to Chairman of National Commission for Child Protection Seto Mulyadi, of the 60 million smokers, the number of child smokers is very significant ranging from the age of 5-9 years to the age of 10-15 years. They are influenced by cigarette advertising on television and outdoor advertising. These data suggest that smoking has become part of people's lives indiscriminately.¹

One internet site asked what exactly the benefits of smoking? It described how a teacher who is certainly not a smoker responded by issuing two benefits. First is concerning security around the home of a smoker. It would be safely guaranteed since the members of the house would cough all the times and no time is missed without the strains of cough, causing the thief to be reluctant and even think twice before get in because they thought the master of the house has not been sleeping yet. The second benefit referring to her is that a smoker seems braver against the attacks of wild animals such as dogs or possibly tigers. If other people are chased by dogs or tigers, those people would most likely run as fast as they could. However, smokers would not be able to run fast because they could hardly breathe and it made them seems brave eventhough they are terrified.

There are still some benefits other than those described inside those jokes. Smoking is seen as one of the most effective way in handling the issue of unpleyoment, which nearly reach 60 million with various qualifications². It must be surprisingly confusing how this could possibly work.³ Take a look by yourself or you may directly experience it yourown while a person just sit and chill doing nothing and he/she suddenly grab a cigarrete and light it with the match, smoke it, and exhale the smoke with the repetition cycle until the cigarette is gone. At that moment, those unemployed were suddenly disappeared since they were busy smoking ang exhaling their cigarette with their own pleasure. That activity could even feel like the most enjoyable ‘job’ in the world for a smoker.

If the previous scenarios happened then there will be no instructions, order from the government or any

¹ See Arfan Yap Bano, *Should be ‘Fatwa’ of Cigarette” prohibited?: is it Effective?*, <http://lambangperisai.blogspot.co.id/2010/03/fatwa-haram-rokok-efektifkah.html>, posted, 10th March 2010, accessed April 2017.

²<https://bps.go.id/linkTabelStatis/view/id/973>. Dhakiri said unemployment in Indonesia in 2016 reached 7.02 million people (5.5 percent of the total population). The number is lower than that of 2015 which reached 7.45 million people (about 5.81 percent). Data of Sakernas BPS on February 2016 recorded the workforce of Indonesia reached 127.67 million people where about 60.38 percent are graduated from junior high school. Bahkan If added with the educated to high school work force, the percentage is 77.81 percent.

³Arfan Yap Bano, loc.cit.

kind of threat from anyone that could prevent a smoker to smoke. According to Arfan Yap Bano,¹ for the real smoker, smoking is no longer related to any fatwa.² Despite it has become general knowledge that smoking has serious impacts on health such as cancer, impotence, and disorders of pregnancy, and severe, negative impact on the health not only affects the smoker, but also those around the smoker. But for smokers it could have been ignored for the sake of getting a satisfaction. Smoke exhaled from the smoker sometimes can be helpful for working concentration, a tool to socialize and making friends, and various other reasons. Hence, for the smoker to put cigarette beyond everything even exceeding their proximity to God could be happened. Similarly, if their memories are calculated it could possibly contained more about cigarette instead of Allah SWT.

With effectiveness of opium content on cigarettes will function like an extremely powerful antibody herb banishing any disease. For the smoker communities all forms whether the fatwa, *makruh*, or *syubhat* will not affect its intention to stop smoking. Proven by the previous experience where many *fatwa* has been issued by the Indonesian Ulema Council (MUI), Islamic organizations, and scholars Mujtahids but they are being ignored within the communities themselves.

Another form of prohibitions is smoking prohibition in several public places along with its sanctions issued by the government. However it does not receive its maximum objectives. *Fatwa haram* (forbidden) or *makruh* (literally detestable or abominable) has been ignored. Moreover, it has been clearly written in every pack of cigarette stated that "smoking may cause cancer, heart attack, impotention, and disorders of pregnancy and the fetus". However it does not led to any reduction in cigarette sales from time to time.

Even worst, the association of cigarette companies are targeting to sell 240 billion cigarettes in 2010, a target that was fantastic and had ignored all forms of propaganda and policies to reduce cigarette production today. That amount if shared with the number of smokers is about 60 million people, meaning about 4,000 cigarettes per smoker distributed by the number of days in a year, equal as smokers spending 11 cigarettes per day. So smokers will burn about minimal a pack of cigarettes per day, a fairly rational assumptions that continue to be pursued in order to be maintained by the cigarette companies.

One by one effort made to improve the anti-smoking movement has gradually show results, but qualitatively yet to show signs of success, all you see is change in behavior patterns and production patterns. The impact of changes in the pattern did not reduce the number of production nor the smokers that will negatively affect cigarette communities throughout the world.

In developed countries where the anti-cigarette movements are very tight, they are not diminishing the spirit of the production of cigarettes by investors instead they transfer the engine running production to developing countries, just like the situation that experienced by Indonesia today³. Therefore, the main issues will be discussed in this paper are (1) how the legal status of cigarettes and smoking in Contemporary Islamic law review?; and (2) what are the legal considerations of the issued of fatwa against the prohibition of smoking?

2. Research's Method

This research used descriptive analytical approach where data obtained through literature study or library research. Sociological normative approach also appears to explore theories and rules of *ushulfiqh*⁴ from books authored by several jurists which became the main reference in this paper. Aside from a number of primary reference, the data are also obtained through research of the news both in print and online from the view of religion, law, and medical scholars as well as cigarette manufacturers, which then being analyzed qualitatively and formulated comprehensively in order to get the results and adequate and objective conclusions.

3. Finding and Discussion

3.1 Limited Prohibition of Smoking

Basically, in Islamic Law there is an agreement stated that things that may endanger and cause harm should be avoided in accordance with *fiqh* principle of *Da'rul mafasid muqaddamun ala jalbil mashalih*. In the context of

¹ Ibid.

² A fatwā (Arabic: فتوى; plural *fatāwā* Arabic: فتاوى) in the Islamic faith is a nonbinding but authoritative legal opinion or learned interpretation that the Sheikhu'l Islam, a qualified jurist or mufti, can give on issues pertaining to the Islamic law.^[1] The person who issues a fatwā is called, in that respect, a *mufti*, i.e. an issuer of fatwā, from the verb أفْتَى *'aftā* = "he gave a formal legal opinion on". This is not necessarily a formal position since most Muslims argue that anyone trained in Islamic law may give an opinion (fatwā) on its teachings. If a fatwā does not break new ground, then it is simply called a *ruling*.

³ See Republika.co.id. Director of Prevention and Control of Non Communicable Diseases, Ministry of Health, dr Lily Sriwahyuni Sulistyowati said, the number of smokers in Indonesia currently reaches 90 million people. Atlas Tobacco Research, Indonesia reaches first ranks with the highest number of smokers in the world. Indonesia is in the first ranked in the number of smokers followed by Russia in second rank, then China, Philippines and Vietnam. Two of three men in Indonesia are smokers, including children, women, and adults.

⁴ The word *fiqh* is an Arabic term meaning "deep understanding" of "full comprehension". Technically it refers to the body of Islamic law extracted from detailed Islamic sources and the process of gaining knowledge of Islam through jurisprudence.

smoking, if the harms are certain for a person then it becomes prohibited in terms of protecting him/herself from dangers¹.

*Ijtima*² Ulama³ Fatwa Committee all around Indonesia which being held in Padang Panjang in 2009 assigned their disagreement among ulama regarding the law smoking, between makruh and haram. The ulama as the participants of *Ijtima Ulama* in that time agreed that smoking is not *mubah* (permitted), and they also agreed that smoking has harms despite its benefits. Therefore, the levels of its danger and benefit should be weighed proportionally. Some ulama confirmed that smoking was a definite danger and *haram* (should be forbidden), but there is also opinion that the danger of smoking was still speculative and conditional. There is not enough basis to ban it and its legal status become *makruh* (literally detestable or abominable).

For the people who significantly receive harm when smoke, then smoking becomes *haram* (forbidden) such as for children and pregnant women, as well as smoking in public places. Smoking for pregnant women medically would be harmful to the fetus and potentially harm the health of the fetus. Therefore, it is forbidden. Similarly, smoking in public places which disturb and harm others. This is the main consideration of the prohibition of smoking on a limited basis through the MUI Fatwa.

Muhammadiyah previously has issued a fatwa *mubah* for smokers. However, after further examination and study, it turns out and states that it has more harms than benefits. Hence a fatwa of smoking is issued. Muhammadiyah once had issued *fatwa* as *mubah*. After conducting further review with the speaker from medical and economic field, it can be re-discussed and lead to conclusion that smoking is firmly prohibited through the recent legal fatwa. According to Yunahar, fatwa which prohibit smoking was established in the meeting of Majelis Tarjih and Tajdid conducted on 8 March 2010 in Yogyakarta. In that meeting, the impacts for the tobacco farmers were also reviewed.⁴ MUI Fatwa Commission can understand that the prohibited status (*haram*) of smoking activities established by Majelis Tarjih of Muhammadiyah on March 8, 2010. MUI supports the fatwa in order to avoid danger for health, although the fatwa has not been finalized and will be discussed again in a higher forum.

3.2. Necessity of Theory as Analysis Benchmark of Prohibition of Smoking

Illat theoretical basis of law has been widely described by Islamic scholars, especially jurists, both in the form of books and research that have deeply discussed the *illat* Islamic law in the legal system. One monumental work is the work of Imam al-Ghazali (450-505H/1058-1111) which being *tahqiq* (verified) by Hammad al-Kubaisi with title *Syifa al-Ghalilfil Bayan al-Syabhwat al-Mukhayyalwa Masalik al-Ta'wil*.⁵

The writing of al-Ghazali has deeply inspired in reviewing *illat* and *qiyas*. Its preamble has explained about *illat* (basic feature of the transaction) and *dalalah* which included discussion of the indicator and how to determine the nature *illat* and directions to be taken in establishing it. It also features a discussion of relations containing its difference with some kind of *illat* and the legal implications.

Ulama Musthafa Syalabi⁶ also wrote 'legal *illat*, with title *Ta'wil al-Ahkam; 'ArdwaTahlil Thariqat al-Ta'wilwaTathawwaratiha fi 'Usul al-Ijtihadwa al-Taqlid*. His book has outlined a few things about *'illat* in the period before the preparation of *UsulFiqh* and the period of *Ijtihad*. It also contained explanation of the appointment of the Qur'an and As-sunnah concerning the motives or *illat* as well as explanation on how the companions determine *illat*.

In the period of preparation of *UsulFiqh* and its approaches among the scholars concerning *illat* law, the essence, and the terms as well as the lesson, MusthafaSyalabi also linked the discussion to the issue of beneficiaries and their correlation with *illat* and *istihsan*.

In one dissertation written by Juhaya S Prajahas, he reviewed *illat* by analyzing the view of IbnuTaimiyah. Hence the definition and scope of *Illat* in that writing are covered from several aspects.⁷ Similarly,

¹Asrorun Niam Sholeh, Secretary of MUI Fatwa Commission, electronic release, 9/3/2010.

²Ijtima means Islamic conference or congregation.

³Ulama means Islamic scholars or experts.

⁴See KOMPAS.com on 15/5/2016. Indonesia is in the first rank in the world for the number of male smokers over the age of 15 years. This is based on the latest data from The Tobacco Atlas 2015. The data shows, as many as 66 percent of men in Indonesia smoke. "In other words, two out of three men aged over 15 years in Indonesia are smokers," said Director of Disease Control No Transmitted the Ministry of Health, Lily Sulistyowatistates. More second highest, namely Russia with 60 percent of men smokers over 15 years. Ranked three to nine, respectively, namely China (53 percent), Philippines (48 percent), Vietnam (47 percent), Thailand (46 percent), Malaysia (44 percent), India (24 percent), and Brazil (22 percent).

⁵*Syifa al-Ghalilfil Bayan al-Syabhwat al-Mukhayyalwa Masalik al-Ta'wil* was published in (Baghdad: al-Irsyad, 1390 H/1971 M).

⁶Muṣṭhafā Syallābīs his doctoral dissertation in University of Al-Azhar Kairo in 1944 in *Fiqh and UsulFiqh*. Firstly, it published in 1949 by the fund of University of Al-Azhar. Then in 1981, it was re-published by Dār al-Nahdhah al-Arabīyah li Tibā'ahwa al-Nasyr Beirut.

⁷Islamic Law Epistemology (Discussion about sources, 'illat and purpose of Islamic Law as well as truth methods in the

through the written process of the dissertation, the existence of *illat* in determination of Islamic law for specific actual problems has been written by Rafi'i Nazari¹ with title '*Illat and Dynamic of Islamic Law*'. Its content and analysis showed the dynamic of Islamic law in responding the development of human civilization.

In order to conduct further study of the problem of Islamic Law development, Alyasa Abubakar stated that the questions could not be separated from reasons that lie behind them. In terms of *ushulfiqh*, this issue fall under '*illat* and context of *ta'lili*. Therefore, legal provisions given by Allah is to regulate human behavior have logical reasons (legal value).²

We should objectively review the status of cigarette and smoking. However, it is important to separate them considering they both have different characteristics despite the fact that it can be related. Clarifying the position of these two things is certainly helpful in determining the legal status of the two objects, especially motive or underlying legal *illat*.

'Cigarettes' and 'smoke' are two different things and can be given their own laws, but will bear its own juridical consequences, which as well has the sense of different pressures. Cigarette drawn to physical or object in the form of a product made from a number of elements including tobacco, cloves, paper, filters, and others made through expertise or certain standards. Smoking is an act to enjoy the function of cigarettes including acts of burning, smoking, and enjoying the process of exhale out.

Observing these two terms in the light of the science of jurisprudence and *ushulfiqh*, both of them (smoking and cigarette) can apply five categories of law or al-ahkamul khamzah (law of *taklifi*). Cigarettes as an object can be subjected to the law of *halal* (allowed), easy, *makruh*, *haram*, and *syubhat*. Similarly, the act of smoking can be subject to legal status started from mandatory, circumcision (sunah), *mubah*, *makruh*, and *haram*. Therefore, it is needed a deep knowledge on the principles *ijtihadiyyah* especially in *istimbath* to determine which legal category will be charged on these cigarettes will be required.

In order to determine what legal qualification that can be imposed on cigarettes and smoking, it is necessary to put forward some theories of Islamic law, as follows:

1. First, in the theory of jurisprudence known five legal categories or al-khamzah, also known as the common law of *taklifi*, i.e. the imposition of laws against human action and against the objects. The five legal categories are *halal*/obligatory prayers, circumcision, *mubah*, *makruh*, *haram*. Nevertheless jurist still refer to one type of law called *syubhat* to a type of Act or the object which could not be qualified into 5 legal categories, for example bank interest ruling *syubhat* before MUI 2004 again outlaw.

Rulings on the khamzah theory is effective for all mukallaf muslim (who are already facing puberty and ably), over all actions and behavior including behavior related to the natural including cigarette, business activities, and smoking. However, if the condition is classified as an abnormal situation then the law of *dharuri* will be applied, which means 5 legal categories can be changed and shifted, for example from *haram* or *makruh* become *halal*, as per the rules, *al-hukmu yadhuru illatihi wujudan wa'adamanma'a* (the existence of the law lies the reason of her or his motives). on this matter it will be further explained when it is discussed about the law of *wadh'iy*.

Observing the jurisprudence theory, means that in conducting business activities as an act of law including investment, it can be qualified into five legal categories. So that business could be *halal*, circumcision (recommended), *mubah* (permissible), *makruh*, *haram*, and *syubhat*. Therefore, in order to justify a type of business into one of the legal categories, it seems not easy. In addition, it is very casuistic. It also requires a process of *ijtihad* in the form of studies, research, testing, analysis, and justification. After the process is done in a careful, systematic and comprehensive new law to enter qualifying stage followed by penjustifikasian the law against smoking and smoking.

2. It is still in the theory of forbid jurisprudence. Something due to its acts or objects can be caused by the two things; (1) because of the nutritional/substance (*lizatihi*), the object of which is indeed forbidden among others, alcohol, drugs, prostitution, carrion, blood, certain animals, gambling, usury, RAID, and more. (2) unlawful in addition to nutritional/substance (*lighairi zatihi*), which is associated with the process and how to acquire it, such as usury, *gharar*, *zhalim*, perjury, fraud, unhealthy competition, dishonest, hoarding (*iktinaz*), monopoly, and all other actions do not mandate. The possibilities here include the processing of tobacco and clove so it turns into smoking.

The realities of economic life shows that it could have been (1) forbidden since the Foundation of the object commodities that is derived from something that has real economic laws in Islam which is *haram* (Islamic Economy) and has been arranged in a variety of legal sources of Islam in accordance hirarkhinya. The opposite is also a type of business; (2) prohibited not because its object that is prohibited, instead the objects

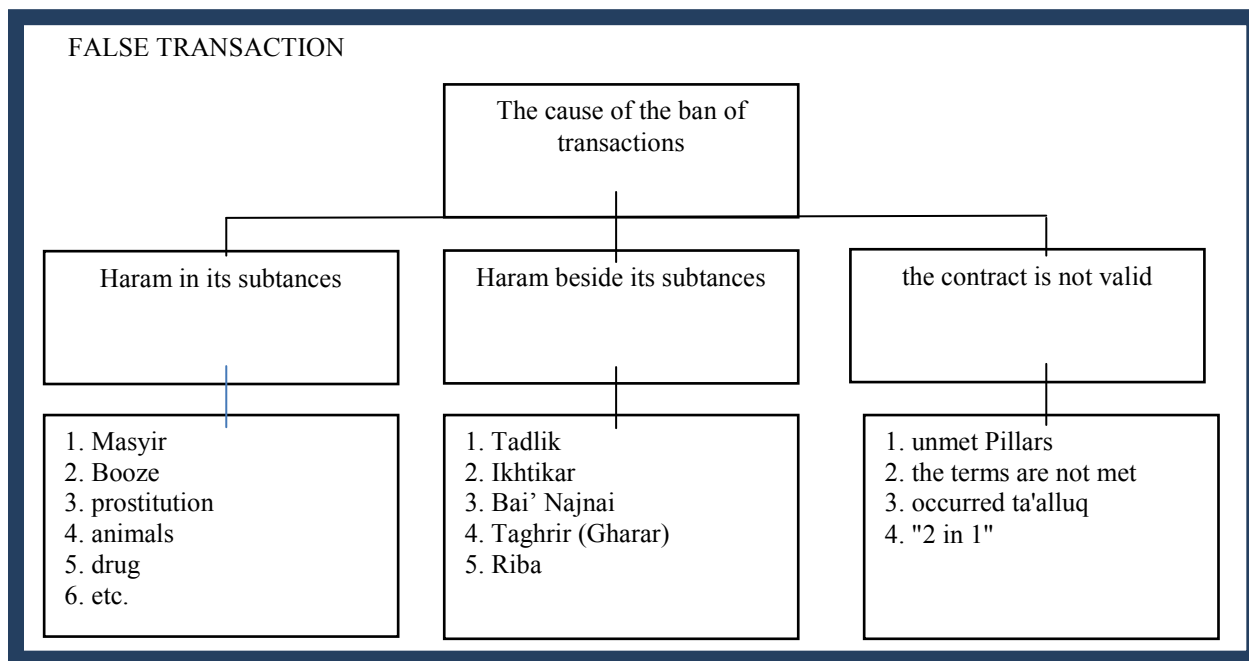
Islamic Law System in accordance with Ibnu Taimiyah". Dissertation on Doctoral Program in UIN Jakarta 1988.

¹Dissertation on Doctoral Program in UIN Jakarta 1991.

²Alyasa Abubakar, *Theory of 'Illat and Analysis of Ta'lili*, in TjunSurjaman (Edit.), *Islamic Law in Indonesia: Thought and Practice*, Remaja Rosda Karya, Bandung, p. 179.

could be lawful but the way and the management process contain actions that are forbidden in Islamic Economics; and (3) it is also very possible for both types of causes to be integrated at once and it is not hard to find in the realities of our current economic life.

In addition, experts of Islamic law still add one criterion which forbids in practice because it does not meet the elements of the pillars and the terms of a deed or contract law that made such pressure or compulsion between one of the parties. Thus causing the deeds were invalid or unlawful. As illustrated in the following chart:¹



3. The theory of Tazkiyah Business as expressed in a dissertation entitled: Actualizing values of Islamic Economy in the development of the Economic Law System in Indonesia.² The theory is built from a few verses and Sunnah, amongst other surah al-Baqarah, “*Kulu mimma fil ardhi halalal tayyiban wala tattabi-u khutuwati al-Syaitan*” (eat what is on Earth, lawful and good). And verse, “*la ta'kulu amwalakum bainakum bil bathili*” (do not eat their possessions among you in the way which achieve in unlawful way), “*wala tulkuu biaidikum ilat tahlukah*” ... (do not plunge yourself into destruction...). As well as from the Hadith of Abu Dawood, “*...wa-an malihi min aina iktasabahu wawadha'a-hu*” (concerning what and how do you get the treasure and how you use it), and a number of other propositions.

In order to qualify a business as tayyiban-the halalantazkiyah (sacred), we have to see whether the business conducts in accordance with Sharia, not least through at least four (4) phases as elements (pillars) which are mutually related and inseparable, thus giving birth to the business system that exactly fits the Sharia and includes any act or legal action which is generally not only in the context of the business. Several stages that are reflected in the table as follows³.

THE THEORY OF BUSINESS FLOW IN TAZKIYAH

Stages	description of activities	The qualifications of validity				
I	Object?	Haram	Halal	Halal	Halal	Halal
II	Process ?	Halal	Haram	Halal	Halal	Halal
III	Result ?	Halal	Halal	Haram	Halal	Halal
IV	utilization, management ?	Halal	Haram	Halal	Haram	Halal
-	Conclusion	Haram	Haram	Haram	Haram	Halal

A business activity or other legal deeds can be considered appropriate or least tazkiyah Sharia through several stages, namely:

¹Adiwarman Karim, 2004, *Islamic Bank, Fiqh and Financial Analysis*, Raja GrafindoPersada. Jakarta. p. 28

² See Postgraduate Program UNHAS, Makassar, 2005, p. 262.

³ M. Arfin Hamid, 2013, *Shariah Economy as Need. Professor's Inaugural Speech Book*, Hasanuddin University, Makassar. p.26.

1. The determination of the business objects (goods, services, the types of businesses). The whole must be assured of the validity and kehalalannya, not including unlawful lizatihi.
2. The method/process management and The business should contain no prohibited items, and not included as the haram lighairizhatihi.
3. The results/output must be assured to be determined as halal (lawful)
4. The use and management of results/the treasure are within the corridor of limardhatillah.

Prior to the determination of the object, intention/faith of the businesses must be ensured that it is runned in accordance with Sharia principle in advance. After that the legality and the lawfulness of the object and the type of effort should be ensured. However, if since the beginning its object is already unlawful (haraam), or makruh, or syubhat then its legal status then there is no possibility that it would turn into a halal or mubah.

Furthermore although the tested object made from lawful (halal) ingredients, still it should still followed by method/process management which is also legitimate in order to maintain its lawfulness (halal). Nonetheless, if the methods and ways to manage them still contain forbidden elements, such as gharar (blur), usury, tadlis (fraud), false, zhalim, monopoly, iktinaz (hoarding), and all other !ctions that are not reliable, its lawfulness (halal) will turn into unlawful (haraam) because it includes as lighairizhatihi.

The next stage (3) is the results of the lawful (halal) object or process must be guaranteed to be lawful (halal) as well. In reality, it is possible that the object and the process are legitimate, but the output is unlawful (haraam), such as (1) an intoxicating drink made from fruit, herbs, sugar, jar, water which its management has guaranteed as halal, made with lawful process but the result is haraam because the result is wine. (2) Employers of apparel (convection) business who produce clothes such as tank top, tights, pants, trendy clothes, and see-thru clothes. All the materials made from lawful goods, including cigarette which is made from sugar, and paper and even began with the basmalah, but tge output is haraam because the women who wear it certainly will show their bodies which are prohibited in surah al-Ahzab, similarly to the case of smoking. It is u lawful (haram) because it will damage the lungs, short lifespan, and invites disease. Certainly such business results or process is not in accordance with the Islamic principle (tazkiyah). Such things should be avoided in people's lives.

On the last stage, the acquisition of business results obtained from phase 1 to 3 should be followed by use and utilization which is in accordance with the syariah of Allah, "*wallazhina izha anfaqu yasrifuwa wa lam yaqturu wakana baina zhalika qawaamaa*"¹(and the people who not spend their money/treasure excessively and keep on being balanced). Eventually, if the lawful (halal) final results are utilized for purposes which are not blessed by Almighty God (Allah) then the ultimate conclusion will declared that the treasure is unlawful.

Thus, the mere illustration is that the mandatory treasure that must be shared as a command of verse, *amwalihim min tuthahirumwakhuztuzakkihim*, is simply a treasure that is obtained through the four stages in the chain, and that's called the treasure obtained in tazkiyah full sanctity, which classified as obligatory zakat if eligible.

3.3.Experts' Views on Cigarette and Smoking

Having regard to the various views of the legal status of smoking, a number of previous reason or evidence whatever regarding the existence of the cigarette and smoking should be presented by:

1. Shaykh Muhammad bin Salih Al-'Itsaimin. He states that cigarette is unlawful on the basis of the meanings of Zahir verse of Qur'an and As-Sunnah as well as i'tibar (logic). God said (which means), "and do not you drop yourself in perdition." (Al-Baqarah: 195). Which means, do not do something that will bring you to destruction. In accordance with Wajhuddilalah (chanting aspect) of the above paragraph, smoking is classified as act that lay yourself into destruction. While evidence from As-Sunnah is Sahih from the Prophet that he forbade wasting possessions. The meaning of wasted treasure is alocated them to utilizations that are not useful. Understandably, allocating treasure by buying cigarettes is classified as non-beneficial utilizatiin, even worse it is thought to be bringing more harms. The other evidence that the Prophet said that "we may not cause dangers and we should not also harm others".² So, poses a danger (*dharar*) is not applicable in the Shari'ah involving the dangers against the bodies, sense, or treasure. As understandably that smoking is dangerous against the bodies and treasure.
2. Shaykh Muhammad bin Ibrahim. He states that cigarette is haram because it contains poison. The Alquran states that "Permitted upon them anything good and forbide them anything bad."³ The Messenger also prohibits every intoxicating and debilitating as narrated by Abu Dawood and Ahmad from Ummu Salamah ra. Smoking also includes waste that is not useful. Furthermore, smoking and bad breath smokers could interfere with others, including on worshipers while pray.
3. Yusuf Qardhawi in his book states that cigarette is haram because of the harm. According to him,

¹AlquranSuratAl-furqan verse 67.

² see H.R. IbnuMajah from Al-Ahkam no.2340.

³ see Alquran surah Ala'raf verse 157.

people should not make and reply to danger as the words of the Prophet narrated by Ahmad and Ibnmaajah. Qardhawi added, in addition to the harm, that cigarette also invites people to enjoy wasting time and treasure. Whereas treasure is supposed to be used to a more useful utilization, or beinfinfaq or shared if indeed his family does not need it.

Of course, the community also has justification of argumentation. The standpoint of any legal reasons and motives of the smoker are also absolute thing that must be heard and taken into consideration because it is related to the rules of Fiqh “*al hukum yaduru ma'a illatihi waujudan wa adaman*” [its existence is determined by the law or whether there is reason (motive) law in it]. Having regard to the General rules or muamalah, *al-ashlu al-anisy sya'i al-ibahah hatta yadulla dalilun dilathrimiha* (everything is lawful unless there is a law that forbids the proposition).

3.4 Legal Analysis on Cigarette and Smoking

Referring to the theories of the establishment of Islamic law is very relevant in qualifying and put legal status towards cigarette and smoking which both have been qualified as legal objects. So, the *illat* and legal motive behind it have been delcared by the Islamic legal experts.

Firstly, it has been shown that the legal status of smoking from the beginning was nit explicitly found within syariah (Alquran and Assuñah). Instead it is only the result of ijthad (istimbath) in accordance to general prostulates. Later on the harm aspects were found and the benefits of cigarette were found as well. If the harms are bigger then it becomes makruh, haram and syuhbat. Meanwhile if the benefits are bigger. Therefore, it becomes mubah and halal.

Analysing several perspectives concerning status of cigarette from experts, it shows a balance between those who believe that cigarette has more harms than benefits and the opposite. Thefore the minimum legal status for cigarette is makruh potentially could become haram.

With a deeper analysis regarding the status of makruh and mubah of cigarette, it could be classified as *haram lighairizatihi* (not the substance) instead it is due to other reason which is the process. The main ingredients of cigarette are tobacco and cloves which are mubah and halal. In addition, not all tobaccos and cloves are processed to become cigarette. Hence, with some speciality, it could change tobacco and clove becoming a *halal* piece of cigarette. The cigarette which is being smoked that is the one that is haram because it has been processed eventhough the ingredients are not certainly haram.

The exact same analogy is the prohibition of alcohol (khamar). Khamar is made from halal juice; however with some speciality, such beer/alcohol is addicting due to *lighairi zhatihi*. It is certainly different with the prohibition of adultery, pig, dog and gambling which are origially prohibited due to its haram for its substance (*lazitihi*). Consequently, everything comes from it will be certainly haram.

The legal consequent of following the way of thought stated that cigarette is *haram lighairi zhatihi*. It means that every action related to cigarette is definitely *haram ghairi zatihi*, such as smoking, selling, managing and producing the cigarette. It is in accordance with fiqh principles that stated “*ma yaddy min haramin fahuwa haramun*” (anything produced from haram substabce will become haram as well). It is firmly explained under fiqh principles stated that either it is haram due to the substance or due to other than its substances, or then it becomes haram and should be left in order to gain merit. Otherwise if we do it, we will get sin. Efforts that could be taken in order to transform tobacco and cloves so that they will not become makruh or haram (unlawful) is just like coffee which turned into delicious and crispy cake just like 'Roti Boy' which is really famous in Indonesia.

How about smoking? From the previous discussion concerning smoking and its juridical existence will give direct impacts to the legal status of smoking. Smoking is one step ahead from the cigarette itself and it is also a part if cigarette which could not be separated. The logic is that people cannot smoke if the cigarette does not exist. Juridically, they are integrated into one another as a unity; therefore the legal status of smoking is classified as makruh or haram due to *lighairi zhatihi* reason. Those reasons are not different to make or produce or even sell the cigarette.

In reality, there is an institution that releases fatwa which prohibits smoking. It will raise some contradictions especially in building the proper legal logic. The first harm that might came up that if the logic is being used to prohibit the smoking action only. Then, the consequence will be referred to the process of production and selling of cigarette is halal as long as they do not smoke it. Finally, the production and marketing of the cigarette will not decline and the number of the smokers will not be controlled, viewed from the reality perspective. Essentially, it will be more dangerous if it is being understood and put on analogy as adultery and gambling which are prohibited. The logic of law as analogyed could damage the Islamic legal logic which has the natures of *tazkiyah*, hierarkhis and systematic. It will also be dangerous in practice. It is truly a sight/partial fatwa and deviated from the logic of ijthad.

Legal analysis as mentioned above indicates that the mindset of a systematic and comprehensive juridical should be maintained. Therefore, the views about smoking and all dependencies should be viewed as a

totality - *kaffah* as looked in the Islamic law.

3.5 Binding Power of Legal Fatwa

The Islamic law is a popularized term in the public universities in Indonesia containing two major - namely Sharia and Fiqh. Both terms cannot be separated. They can only be distinguished. Sharia is the source of the birth of the Islamic Fiqh and Fiqh is helpful in streamline the syariah.

The Contemporary Islamic law is a perspective of looking at a legal event that occurs in modern times in the Fiqh-jurisprudence. One of the phenomenal cases in a globalized world is smoking cigarette. It is not only affects the individuals' pleasure and health but also directly related to the industry, the country's foreign exchange, jobs, religion, and even well-being. This condition requires the interpretation of Islamic law in order to justify the law of smoking. The results of this study showed that the law of smoking cannot be separated with the cigarette itself. Both smoking and cigarette become objects of the law (*mahkumbihi*). They could be analyzed in its own ruling, but they can be combined as a series that cannot be separated. Law of smoking is closely related to raw material, while the smoking laws are related to the actions or conduct of legal subject which have legal consequences that fall within one of five categories, namely, *haram*, *makruh*, *mubah*, *sunnah*, and *faridhu*.

The results of this study indicated that a raw material of tobacco leaves, cloves, and other are not haram in the *zhatihi* or prohibited in substance aspects. Tobacco and cloves have not only made to create cigarette, but they also can be used for other materials for the other purposes such as medicines. In this context, smoking is haram because its process or it is *haram lighairi zatihi* just like prohibition of alcohol. While smoking is an act smoking cigarettes that have consequences in damaging the organs, harming the health, and even potentially cause ill as well as TB disease and shortness of breath. When smoke bring more harm than benefits, it is enacted the rule *dar'ul mafasid muqaddamun ala jalbil mashalih* (refusing haram should be put first instead of receiving the benefit). Therefore, the law of smoking should be at least *makruh* and *haram* (unlawful).

However, not all problems in life must be resolved through the fatwa. The 'fatwa' as a juridical term in Islam contains a legal charge for those who request the fatwa which is later given by the Mufti (the person who release the fatwa) that have more capacity compared to the mujtahid in General.¹ Mufti requires special requirements, namely (1) know and understand the true problem/case which being asked to him; (2) familiar with the situation and condition of the society who ask for and need a fatwa. With this indicator, it means that the Mufti does not randomly release a fatwa. It could only be issued against the cases brought to him, his nature is more specific. It is somewhat different with mujthad (Islamic Jurists) who are more open in giving the idea/thought to the problems of contemporary emerges.

The above indicators are associated with the haram *watma* concerning cigarette/smoking, bank interest, the woman becoming President of her group are *Isoharaam* to do and to vote it. The problem is who is asking to declare the fatwa, and whether the outbreak or the influence of the fatwa had been accounted for, instead of giving benefit², it even triggers the emergence of antipathy, resentment, suspicion, and crisis of example (*usmatun*). For example 'fatwa' of Abdullah Faqih, et al can not be qualified as a fatwa and he's not the mufti. His fatwa is no more than just idea/open thought. It's just a statement of scholars as the result of their *ijtihad*.³

The phenomenon indicated that in Islam the fatwas still need to be re-socializing. Muslims in General and the people outside Islam can understand it. The phenomenon of 'the war of the fatwas' among the elite of Islam is not a significant problem. Besides the scholars have understood these problems as part of *ijtihad*iyah, (debated), it will also sharpen and add vocabulary enrichment in Islamic thought. Uneducated Muslim in particular and people in General tend to consider the phenomenon as an inconsistency, but the scholars (religion leader/ulama) are arguing, none of them can be trusted because their *ijtihad* are vary.

The public figure who is having commitment like "Buya" Hamka is conveted due to his firmness and his ability to bring peace for the people especially in affirming the urgent matters in the religion and State's matters. His persistence then makes sure people not to get tangled in verse⁴, *wala tasytaru bi ayatollah stamanan qalilan* (do not Exchange/buy the verses of Allah for low prices).

4. Conclusion

1. The approach in this study is the juridical normative that performs searches against the legal materials related to the determination of the law against cigarette and smoking. Data were obtained through the library research, information and media coverage related to the legal status of smoking and the impact thereof. Cigarette is a product made from tobacco and cloves, where its main ingredients are not the type of substances that are *haram* but after undergoing the process of becoming cigarette, it became *haram* li

¹See Masjifuk Zuhdi, 1987, p. 134.

² Compare with the subtopic in Fajar Newspaper on 8 June 2004.

³View of HarifuddinCawidu, Tribun Newspaper, 5 June 2004.

⁴Alquran Surah al-Baqarah verse 41

ghairizhatihi due to its process. Since smoking cigarette has very harmful potentions, might cause TB disease, could create some health issues such as coughing and shortness of breath, as well as reduce welfare, then smoking is becoming rather makruh and unlawful.

2. The results of the study showed there are two theories or rules which are relevant to jurisprudence. The first rule of jurisprudence is *dar'ul mafasid muqaddamun ala jalbil mashalih* (refuse to obtain harmful results than receive benefit). The second one is the rule that prohibit substance that is haraam (substance) *li zhatihi waharamun li zhatihighairi* (non-substance). Determination of the fatwa by a number of scholars of Indonesia is generally carried out in the form of jama'i or collective. A number of fatwa regarding smoming prohibition are issued by some Islamic organizations ranging from Muhammadiyah, Nahdlatul Ulama, and Majelis Ulama Indonesia. The fatwa in fardhi (individuals) does not give significance impacts yet, but fatwas are jama'i (collective) that has given impacts towards the lives of Muslims in Indonesia.

Bibliography

- Abdul Wahhab Khallaf, 1996, *Principles of Islamic Law*, PT Raja GrafindoPersada, Jakarta.
- Abdul Wahhab Al-Khallaf, *History of Islamic Legislation*. Djamaluddin, A. Sjinqithy. Al-Ikhlash ; Jakarta.
- Adiwarman Karim, 2004, *Islamic Bank, Fiqh and Financial Analysis*. Raja GrafindoPersada. Jakarta.
- Alyasa Abubakar, Theory of 'Illat and Analysis of Ta'lili", in TjunSurjaman (Edit.)
- Anonim, *Islamic law in Indonesia: Thought and Practice*, Remaja Rosda Karya, Bandung.
- Atha' Khalil, 2008, *UshulFiqh*, PustakaThariquIzzah, Bogor.
- Hamka Haq, 1998, *Philosophy of UshulFiqhi*, Yayasan Ahkam, Makassar.
- Juhaya S Praja. 1988. *Epistemology of Islamic Law (A Study on the source, 'illat and Objectives of Islamic Law and Methods of truth in Islamic Legal System According to IbnuTaimiyah)*". Dissertation on Doctoral Program at UIN Jakarta.
- M. Arfin Hamid, 2013, *Islamic Economics as a Necessity. Professor Inauguration Speech Book*, Makassar.
- Masjfuk Zuhdi, 1987, *Introduction to Islamic Law*, Pustaka Jakarta.
- Mahmud Yunus, 1975. *Dictionary Arab-Indonesia*, PT Mahmud YunusWadzurriyyah, Jakarta.
- Muhammad Abu Zahrah. 2008. *Ushul Fiqh*. Jakarta: PustakaFirdaus
- Muin Umar, et.al., an 1985. *Ushul Fiqh I*. Departemen Agama RI, Jakarta..
- Yusuf, Qardhawy, 2004. *Al-halaluwal-haramufil-Islam (Halal Haram in Islam)*. Akbar Media EkaSarana ; Jakarta.