

METHODOLOGY OF *HUKM* DEDUCTION FOR ISLAMIC FINANCE BETWEEN THE PRACTICES ADOPTED IN MALAYSIAN AND MIDDLE EASTERN FINANCIAL SYSTEM

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Abstrak

Artikel ini mengkaji perbandingan metod istinbat hukm di kalangan ulama-ulama Timur Tengah berbanding ulama-ulama tempatan. Kajian ini berupaya mengkaji kenapakah sesetengah produk-produk kewangan tempatan telah ditolak oleh ulama-ulama Timur Tengah. Untuk membincangkan perbezaan metod ini, kajian ini menggunakan bay al-'inah sebagai konsep rujukan. Dapatan kajian ini mendapati bahawa sedikit perubahan perlu dilakukan terhadap metode ulama-ulama tempatan sekiranya mereka mahu produk-produk tempatan lebih diterima dan 'lebih bertepatan' dengan kehendak Islam. Artikel ini menyimpulkan beberapa cadangan terhadap metod tempatan supaya disesuaikan dengan pandangan dari Timur Tengah. Penerimaan terhadap cadangan ini dijangka mampu menjadikan produk kewangan Islam tempatan diterima oleh pelabur global.

INTRODUCTION

Malaysia is moving in the right direction and at an accelerated pace to prove itself as a hub of Islamic banking and finance in Asia. Together with strong government support and suitable financial infrastructures, rapid development of this area could be seen. In order to achieve this holistic goal, many Islamic financial institutions and instruments need to be introduced to investors.

Although several efforts have been made to entice international investors, especially wealthy Muslim to participate in Malaysian Islamic financial instruments, the efforts

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have not been successfully. The issue of *Syari'ah* compliance remains the main barrier, especially to the Middle Eastern Arab investors. It seems some of the *Syari'ah* stance adopted by Malaysian scholars are not readily acceptable to Muslim scholars from middle-eastern countries. This is very unfortunate as it portrays the existence of divisiveness among Muslim brotherhood on several *Syari'ah* matters. One may wonder whether this is the outcome of different school of thoughts or *madhhabs* among scholars. It is a known fact that Malaysia has been very liberal in interpreting *Syari'ah* principles compared to scholars from other Muslims countries. But the different points of views among the Muslim scholars should not hinder the progress of developing and expanding the widely accepted Islamic financial system.

This paper aims to discover the reasons for the rejection by the middle-eastern Muslim scholars of the stance taken by Malaysia scholars on certain *Syari'ah* matters. A comparative study is made on the methodology of arriving at *al-hukm* decision, especially those that touch on 'grey areas' not clearly defined in the Quran and *Hadith*. The basis of the different methodology of *hukm* deduction adopted by Malaysian Scholars and that of their middle-eastern counterparts are explored. It appears that the methodology of *hukm* deduction undertaken by the Malaysian *Syari'ah* scholars, though has met the requirements of at least one school of thought, can indeed be further tightened to fully comply with the teachings of Islam. This article provides some suggestions in which Malaysian scholars can improve the way the methodology of *hukm* deduction can be acceptable to Muslim scholars of other countries.

ḤUKM DEDUCTION (ISTINBĀṬ AL-ḤUKM) AMONG CONTEMPORARY JURISTS

Generally *hukm* deduction is used in two situation under a process called *ijtihād*¹. Firstly, the deduction of *hukm* from divine text (*al-naṣṣ*) i.e. Quran and *Hadith*. Secondly, in cases where there are no divine text that explain specific subject matter. Islamic scholars generally agree that a *hukm* deduction can be derived by applying a methodology called *ijtihād istiṣlāḥī*². As shown in Table 1 , differences of opinion

¹ *Ijtihād* refers to the effort of the jurist (*mujtahid*) who uses his full capability in seeking knowledge of the shari'ah rules on any issue by using deductive method. See Zaydān, 'Abd al-Karīm (1987). *Al-Wajīz fī Uṣūl al-Fiqh*. Beirut: Mu'assasah al-Risālah.

² *Ijtihād istiṣlāḥī* is an *ijtihād*, that investigates the objective of *Shari'ah* for the *hukm* when textual instructions are absent (See Zaydān, p.378-385, 401-409, and Asmadi Mohamed Naim. (2003). 'Maslahah dan Nas: Suatu Wacana Semasa' *Jurnal Syariah*. No. 11. 2nd. edition . Petaling Jaya: Akademi Pengajian Islam Universiti Malaya).

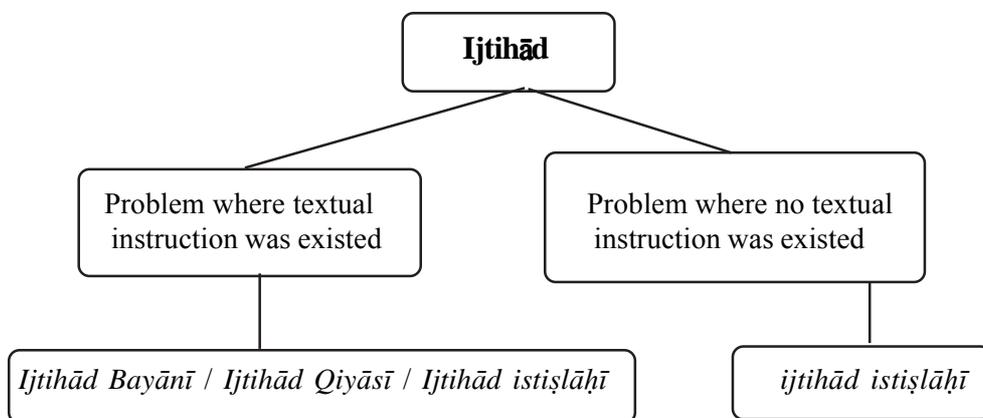
however, existed among the Muslim scholars when the *ijtihād istiṣlāḥī* is also applied in situations where there is already divine text.

Hence, there are disagreements among scholars regarding the types of *ijtihād* to be applied in situations where textual instructions already existed. The majority of the scholars agree that Muslim should follow and obey the textual instructions from al-Quran and *Ḥadīth* and use the *ijtihād bayānī*³ and *ijtihād qiyāsī*⁴ to interpret the rules. Some say the *ijtihād istiṣlāḥī* is permitted only in cases where there are no textual proofs available.⁵

It is suspected that the interpretation of textual evidence (*naṣṣ*) by different scholars resulted in the differing views as to the applicability of *ijtihād istiṣlāḥī*. Perhaps before moving further, it is necessary to understand the concept of *al-naṣṣ*.

Al-naṣṣ is a terminology used to show proof in support of the interpretation of the rulings found in divine text of al-Quran and *ḥadīth*. But, does this definition is what was selected by the jurists while discussing the type of *ijtihād* especially when they faced the divine proof which seen as contradicted each other. On the other hand, there are many maxims of *fiqh*, which used the word '*al-naṣṣ*'.

Table 1:



³ *Ijtihād bayānī* is an *ijtihād*, that uses al-Quran and *Ḥadīth* as sources for *ḥukm* deduction. (See Zaydān, p401-409).

⁴ *Ijtihād qiyāsī* is an *ijtihād*, that uses analogy method. (See Zaydān (1987), pp.194-200).

⁵ al-Shāshī, Abū ‘Alī (1982). *Uṣūl al- Shāshī*. Beirut: Dār al-Kitāb al-‘Arabī, p.300.

Following is a few maxims which using the word ‘*al-naṣṣ*’:⁶

- i. “ ” means that *ijtihād* is not to be dissolved by another *ijtihād* in same category but be dissolved because of proof from *al-naṣṣ*.
- ii. “ ” means that: No place for *ijtihād* with the existence of *al-naṣṣ*.
- iii. “ ” means that: No permission to practice *ijtihād* with the existence of *al-naṣṣ*.

On the other hand, scholars gave different definition on *al-naṣṣ*, which used in the maxims above:

- i. Sālim Rustum Baz al-Lubnānī said that *al-naṣṣ* in these maxim was *al-naṣṣ al-ṣarīḥ* (explicit text).⁷
- ii. Ali Haydar gave general explanation on the word ‘*naṣṣ*’ i.e. Quran and *Sunnah*.⁸
- iii. Ahmad al-Zarqā mentioned that *al-naṣṣ* in this context is *al-mufassar* and *al-muḥkam*.⁹
- iv. Muṣṭafā al-Zarqā included *al-ijmā*’ as a part of *al-naṣṣ*.¹⁰

From these definitions, it is clear that al-Lubnani and Haydar gave general meaning of *al-naṣṣ* i.e. Quran and Sunnah. Al-Lubnani added explicitness (*ṣarīḥ*) as a condition to include any divine statement as *al-naṣṣ* which *ijtihād* on it is prohibited. Otherwise *ijtihād* is still permissible in that context. On the other hand, Ahmad al-Zarqā and his son, Muṣṭafā stipulated that *al-naṣṣ* which *ijtihād* on it is prohibited must fall under

⁶ al-Lubnānī, Sālim Rustum Bāz (1304H) *Syarḥ al-Lubnānī ‘ala al-Majallah*. al-Istanah: Maktabah al-Ḥabībāh. p. 25; al-Jaṣṣāṣ (n.d) *Aḥkām al-Qur’ān*. Beirut: Dar Iḥyā’ al Turāth al-‘Arabī, v4, p. 65

⁷ al-Lubnānī, p. 25.

⁸ Haidar, Ali (1991). *Durar al-Ḥukkām Syarḥ Majallat al-Aḥkām*. Beirut: Dār al-Jill, p.32-33.

⁹ al-Zarqā, Ahmad Muḥammad (1998). *Syarḥ al-Qawā’id al-Fiqhiyyah*. Damsyik: Dār al-Qalam. pp. 147-150.

¹⁰ al-Zarqā, Muṣṭafā Ahmad (n.d). *al-Madkhal al-Fiqh al-‘Āmm*. Beirut: Dār al-Fikr. p.1015.

the category of *qaṭʿī dilālah* (definitive indication) i.e. *al-mufassar*¹¹ and *al-muḥkam*¹².

With depth analyzing, we understood that the definitions given by al-Lubnānī and Haydar were too general. But, did the word '*al-naṣṣ*' in jurist's practices specialize on definitive and explicit text only? On the hand, al-Zarqā just agreed that the prohibition of *ijtihād* was limited to the definitive text only. It means that he excluded explicit text of speculative indication (*ẓannī al-dilālah*) from the category which *ijtihād* was prohibited. The question arose from this interpretation was do the scholars were free to against the text which was explicit and clear but speculative (*ẓannī*) in nature, where there was mutual agreement among them that '*ḵabar āḥād*'¹³ was valid for action although it was speculative.¹⁴

Hence, it is more appropriate to accept the view that *al-naṣṣ* in this context refers to explicit textual proofs from al-Quran and *sunnah*. This view is no different from the explanation given by al-Lubnānī and Haydar.

In the other words, *maṣlaḥah* was not absolute evidence in Islamic law. Preference should be given to al-Quran and *sunnah*. *Maṣlaḥah* did not have any power to eliminate the rules from al-Quran and *sunnah*.¹⁵

Subsequently, in order to avoid scholars from using *maṣlaḥah* as an absolute evidence, al-Būṭī explained in detail the distinguish element of *maṣlaḥah* between Islam and philosophy. Al-Būṭī remarked that *maṣlaḥah* according to philosophers was totally

¹¹ *Mufassar* from *uṣūliyyūn* view is something, which is extended in clearness of the text and shows the meaning by itself without any probability to bring another interpretation. Thus, *mufassar* is a word or a text whose meaning is completely clear and is, in the meantime, in harmony with context in which it appears. Because of this and the high level of clarity in the meaning of *Mufassar*, there is no need for recourse to *ta'wil*. But *mufassar* may still be open to abrogation which might, in reference to the Quran and *sunnah*, have taken place during the lifetime of the Prophet. (See al-Shāshī, p.76, Zaydān, pp.343-345 and Kamali, Mohammad Hashim (1998). *Principles of Islamic Jurisprudence*. Kuala Lumpur: Ilmiah Publisher Sdn. Bhd.

¹² *Muḥkam* literary means accurate. *Muḥkam* from *uṣūliyyūn* view is the word, which appears its indication to the meaning by itself on very clear appearance, more than *al-mufassar*. It rejects other interpretation and abolishment (*naskh*). (See al-Shashī (1982), p.80, Zaydan (1987), *op.cit.*, pp.346-348).

¹³ *Ḵabar al-āḥād* or *sunnah al-āḥād* is something, which narrated from Rasulullah SAW by numbers of people who are no exceeded the numbers of *al-tawātur* (to be considered as *al-tawātur*). (See Zaydān (1987), *op.cit.*, pp.171-173).

¹⁴ Asmadi Mohamed Naim. (2003). 'Maslahah dan Nas: Suatu Wacana Semasa' *Jurnal Syariah*. No. 11. 2nd. edition . Petaling Jaya: Akademi Pengajian Islam Universiti Malaya.

¹⁵ al-Shāshī (1982), *op.cit.*, p.300.

materialistic. The justification between good and bad totally depended on empirical study and personal experience. This justification was contradicted with the teaching of Islam, where Islam justified good and bad by considering both worldly life and hereafter. In addition *maṣlaḥah* in this world was related strongly to the *maṣlaḥah* of hereafter.¹⁶

METHODOLOGY ISSUE IN BAY' AL-'ĪNAH ('ĪNAH PURCHASE).

This part of the article compares the *ḥukm* deduction methodology applied by the Malaysian *Syarī'ah* scholars in approving the *bay' al-'īnah* transaction and the points of disagreement of the middle-eastern scholars. This comparison is purely academic and is not aimed at questioning the decisions already made by the jurists on the matter.

Bay' al-'īnah is an exchange structure involving two transactions. In the first transaction, a seller sells his or her assets to a buyer on credit (delayed payment). Subsequently in the second transaction, the buyer resells the asset to the first seller on cash basis at a cheaper price from the first sale.

This kind of transaction has caused differences in opinion among *Syarī'ah* scholars. Many earlier companions (*aṣḥāb al-nabī*), together with the followers of companions (*tābi'īn*) had disapproved this transactions. Among them were Ibn 'Abbās, 'Ā'isyah, al-Hassan, Ibn Sirin, al-Sya'bi, al-Nakha'ī, Imam al-Thawrī, Imām al-Awzā'ī, Imām Mālik and Imām Abū Ḥanīfah and his followers. The exceptions were Imam Syafī'ī and his followers.¹⁷

Scholars' Method While Discussing The Topic

As mentioned earlier, the preference of *ḥukm* deduction method adopted by recent jurists is the *ijtihād bayānī*. Unless there is no *quranic* text or *ḥadīth* regarding the certain matters, *mujtahid* prefers to deduct using first the *ijtihād qiyāsī* then the *ijtihād istislahi*.

¹⁶ al-Būḥārī, Muḥammad Sa'īd Ramaḍān (1982). *Ḍawābiḥ al-Maṣlaḥah fī al-Syarī'ah al-Islāmiyyah*. Beirut: Mu'assasah al-Risālah.

¹⁷ al-Kāsānī, Abū Bakr Mas'ūd al-Hanafī (2000). *Badā'ī' al-Ṣanā'ī' fī Tartīb al-Syarā'ī'*. Beirut: Dār Iḥyā' al-Turāth al-'Arabī. v4, pp. 426-427, al-Syāfi'ī, Muḥammad Idrīs (1993). *al-Umm*. Beirut: Dār al-Kutub al-'Ilmiyyah. v4, 95, Ibn Qudamah, (n.d). *Al-Mughnī*. Beirut: Dār al-Kitāb al-'Arabī. v4. p.45.

Generally, Islamic scholars who rejected *bay' al-ʿīnah* were depended on the following evidences:

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Narrated by Ibn ʿUmar that he heard the Prophet (PBUH) says: If you transacted by using *al-ʿīnah*, and you took tails of cow (busy with material life), and you are satisfied with your job as farmer, and you left *al-jihād*, Allah (almighty) would overload on you humiliation which would not be removed from you unless you return back to your religion.

From this *ḥadīth*, they came to a conclusion that it showed explicitly about threaten of humiliation. This threaten explained that the rule of *al-ʿīnah* was *ḥarām*.¹⁹

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Narrated from Shuʿbah, from Ibn Ishāq al-Shabiī, from his spouse al-ʿĀliyah bint Anfaʿ bin Shurahbīl, she said: I and mother of Zayd bin Arqam's son (*umm walad*) entered (and met with ʿĀʾishah). The Umm Walad said (to ʿĀʾishah): I sold my slave to Zayd bin Arqam at eight hundred *dirhams* in credit. Then I bought back the slave from him at six hundred *dirhams* (in cash). She (i.e. ʿĀʾishah) told her: What a bad sale, and what a bad purchase. Tell Zayd bin Arqam that his jihad (holy sacrifice) were void except he repents.

Those who reject *bay' al-ʿīnah* concluded from the *ḥadīth* that ʿĀʾishah did not mentioned the coarsening warning except if it was revealed to the prophet PBUH. Hence, ʿĀʾishah's saying was considered as the revelation to the Prophet PBUH although ʿĀʾishah did not trace back the saying to him.²¹

¹⁸ Sunan Abū Dāwūd, Kitāb al-Buyūʿ, Bāb al-Nahy ʿAn al-ʿīnah, No. 3003.

¹⁹ Ibn Qudāmah (n.d), *op.cit.*, v4, p.45.

²⁰ al-Syāfiʿī (1993), *op.cit.*, v3, p. 47.

²¹ Ibn Qudāmah(n.d), *op.cit.*, v4, p.45.

Narrated from Ibn ‘Umar who said: I heard the Prophet PBUH says: If people grudged with their *dinārs* and *dirhams*, and transacted through *al-‘ayn* and they followed the tails of cow (busy with material life), and left away (their responsible on) *al-jihād fī sabīlillāh* (holy sacrifice), Allah shall send to them tribulation which will not be lifted from them unless they return to their religion.²²

Narrated from Ibn ‘Umar who said: I heard the Prophet PBUH says: If you followed the tails of cow and you transacted through *al-‘inah*, and you left away *al-jihād fī sabīlillāh* (holy sacrifice), Allah will impose humiliation on you and it will not be lifted unless you return to your religion and repent to Allah SWT.²³

Thus, the *ḥadīth* above explained explicitly as what was described by the first *ḥadīth*. Both of them explained that *al-‘inah* was prohibited.

On the other hand, Imam Syāfi‘ī and his followers approved this transaction. They rejected the deductive of *ḥukm* using the *ḥadīth* because of few reasons:

- i. This *ḥadīth* was narrated by ‘Ā’isyah. Abu Iṣḥāq said: He narrated from his woman (wife). If someone said: If acknowledgement about the woman was possible, but you are still not sure about the statement whether it came from her or not. I (Imam Syāfi‘ī) said: The *Ḥadīth*, which, was narrated by Busrah bint Sofwan was rejected although she was the recognized *muhajirah*.²⁴

²² Musnad Aḥmad bin Ḥanbal, Musnad al-Mukthirīn Min al-Ṣaḥābah, Musnad ‘Abd Allāh Ibn ‘Umar al-Khaṭṭāb, No. 4593.

²³ Musnad Aḥmad bin Ḥanbal, Musnad al-Mukthirīn Min al-Ṣaḥābah, Baqī al-Musnad al-Sabiq . no. 5304.

²⁴ al-Syāfi‘ī (1993), *op.cit.*, v3, p. 48.

- ii. If we accepted this *ḥadīth* as valid, but there was disagreement between companions i.e. Zayd bin Arqam and ‘Ā’isyah, because you knew that Zayd would not practice something except he believed that it was permissible, but ‘Ā’isyah saw it forbidden. In this situation, the principle of Syari’ah (*al-qiyās*) supported the practice of Zayd. So, why not you accept Zayd’s stand on it?²⁵
- iii. The rejection of ‘Aisyah in the *ḥadīth* was because of unspecified period for delayed payment. We agreed with her that the unmentioned date of payment would cause the contract to be void. Uncertainty in mode of payment was considered *gharar fāḥish* in Islamic commercial contract.²⁶

Discussions and Critics on the Evidences Given By Imām Syāfi’ī Towards *Bay’ al-‘Īnah*

The majority of jurist criticized the proofs given by Imam al-Syāfi’ī regarding *bay’ al-‘īnah*. Their rejections on Imam al-Syāfi’ī stance include:²⁷

- i. al-Mardinī said in *Zayl al-Sunan*: al-‘Āliyah is well known, Her husband and her son narrated from her and both of them were imams (level of knowledge). Ibn Ḥibbān mentioned their name as a *thiqāt* from *tābi‘īn* generation. Their *ḥadīth* used by most imams, among them were al-Thawrī, al-Awzā’i, Abū Ḥanīfah and it’s followers, Mālik and Ibn Ḥanbal.²⁸
- ii. ‘Ā’isyah’s warning in the *ḥadīth* did not refer to the first contract i.e. purchase with delayed payment. It was agreed among scholars that ‘Ā’isyah approved the using of delayed payment in purchase contract.
- iii. Zayd practiced did not represent the permissible of the action. ‘Ā’isyah rejection was a proof that divine proof against it.

Some current scholars discuss the *ḥadīths* relating to *bay’ al-‘īnah* in their books. Among them is Yūsuf al-Qaraḍāwī in his book about *bay’ bithaman ājil (Bay’ al-murābahah al-āmīr bi al-syrā’)*. Al-Qaradawi made comprehensive discussion on the *ḥadīths* of *bay’ al-‘īnah* from the authenticity of *ḥadīth* perspective or issues relating to its meaning. He concludes that: “I am inclined to what was told by Ibn

²⁵ *Ibid*, p.95.

²⁶ *Ibid*, pp.95-96,

²⁷ al-Kāsānī (2000), *op.cit.*, v4, p.427, al- Shāfi’ī (1993), *op.cit.* v4, p.98, Ibn Qudāmah (t.t.), *op.cit.*, v4. p.45.

²⁸ This explanation quoted from Mahmud Matraji in his *Hāsyiah* of al-Umm (See al-Syāfi’ī (1993), v4, p.98).

Qayyim that *al-'inah* is indeed prohibited (*haram*). Both sanads for the *ḥadīths* of *al-'inah*'s forbidden strengthened each other.²⁹

The writer of this article is not in position to mention his inclination regarding this matter. What is important to highlight is that most of the Middle-Eastern scholars are in favour to practice comparative study method of *fiqh* (*fiqh muqāran*) in order to identify the valid principle or nearest valid principle of *Syarī'ah* for Islamic finance regardless of which *madhhabs* they belong to.

Although a few of *uṣūliyyūn* (scholars of *uṣūl fiqh*) agreed that *al-talfīq and tatabbu' al-rukhaṣ*³⁰ are permissible among ordinary people, today's Islamic scholars especially those in Middle East are not in favour to practice *al-talfīq* and *tatabbu' al-rukhaṣ* in their *ijtihād*. They are more interested on deductive of *ḥukm* by using the method of *fiqh muqāran* and through group discussion (i.e. committee resolution), in which members of the group are made up by representative from different countries and who are free from any pressure from their governments in order to come out with independent and responsible views on Islamic financial products.

Hence, local scholars have to choose either one from these two ways. First way is to continue the method of choosing any *fatwa* from any imam (*al-talfīq and tatabbu' al-rukhaṣ*) without considering the proofs of other scholars when deducting the rule and put themselves as ordinary people who are permitted by *uṣūliyyūn* to practice any *madhhabs* they like under *al-talfīq* and *tatabbu' al-rukhaṣ* methodology. In this situation, they are free to choose any *fatwās*, which suit current financial practice (i.e. current conventional practices') by changing technical aspect of the contracts under their believe that "the basic rule in *al-mu'āmalāt* is permissible unless proven otherwise", and "when the judge gave the judgment, if he be in the right, he will get double reward, but if he be in wrong, he will get single reward". But if our local scholars chose this way, the Malaysian Islamic financial products may not be able to be accepted in the global market especially in Middle East.

A slight change in approach requires local scholars practice comparative methods of *fiqh* (*fiqh muqāran*) when deducting *ḥukm* for Islamic financial system by comparing

²⁹ Yūsuf al-Qaraḍāwī (1987). *Bay' al-Murābaḥah Li al-Āmīr bi al-Syirā' Kamā Tajrīhi al-Maṣārif al-Islāmiyyah*. 'Ābidīn: Maktabah Wahbah, p.44.

³⁰ *al-Talfīq* is the way of performing, which is not approved by any Imāms. It focuses on the practice, which is followed many *madhhabs*' views. *Tatabbu' al-rukhaṣ* means someone who chooses any easier view of any *madhhabs* to be practiced.

the proofs from the various contradicting views. Thorough study to subject matter must be done with the goal to achieve the nearest view to the teaching of al-Quran and *sunnah*. In addition, any current issues should be highlighted among local Islamic scholars and be debated. At the end, this view must be proposed for international discussion such as discussion in international *fiqh* Academy and other related councils. From writer point of view, this approach will help our Islamic financial system to be acceptable by all parties.

CONCLUSION

The outcome from the arguments in this article concludes that:

- i. The method of comparative study (*fiqh muqāran*) should be adopted by local scholars in order to identify the view, which is supported by strong *Syarī'ah* proofs rather than narrow view of the imams.
- ii. Any decision, which contradicted with the view of any imam, should not be interpreted as the members are more intelligent than the imam. The decision should be seen as an *ijtihād tarjīhī* related to the power of evidence.
- iii. The next step forward requires active participation among local scholars with international Islamic scholars. The Central Bank of Malaysia (BNM) is expected to allow participations of local scholars in international *fiqh* committees' discussions or any international research councils' discussion.

