IJTIHAD AND ITS APPLICATION IN ISLAMIC FINANCE

By:
Norhazlina Ibrahim

Abstract

This paper is an exploration on the importance and scope of ijtihad. It is one of the vital sources and act as the main references that can be used in explaining the ever-changing human needs in response to the muamalat-related needs and practices. The application of ijtihad in few controversial Islamic contracts such as bay' ‘inah and bay' al-dayn in Islamic Finance are also discussed in great detail.

Keywords: ijtihad, Islamic Finance, bay' ‘inah, bay' al-dayn

INTRODUCTION

Islam is a way of life; it is evolving and still progressive. In Begum v. Din' (1966) Judge Mohammad Shafii pointed out that:

"Reading and understanding the Quran implies the interpretation of it and the interpretation in its turn includes the application of it which must be in the light of the existing circumstance and the changing needs of the world".

It could be implied from his statement if the interpretation on the Holy Quran by the jurists in the early centuries after the death of the Prophet Mohammad S.A.W is to be considered as the final and binding word on subjects then Islam would have no place in modern times and would cease to fulfill its role as a universal religion, restricted to when and where it was revealed.

If the role of ijtihad is blocked, the consequences would be rigidity, resistance to any changes and inflexibility in Islamic law. In contrast, others argued that the gate of ijtihad need to be closed due

---

1 Begum v. Din, High Court Decision in Pakistani Legal Decisions, Lahore, 1960, vol. XII, p.1153.
to limiting human errors in interpretation of al-Quran and Sunnah and lead to misappropriating the power of ijtihad.

**DEFINITION OF IJTIHAD**

Literally, *ijtihad* means “striving” or “self-endeavour” or “exerting” (Nyazee, 2003). The author further elaborates that *ijtihad* is the expending of maximum effort in the performance of an act. However, in legal jurisprudence, *ijtihad* refers to the striving of the jurist to a point of mental exhaustion to derive principles and rules of law from evidence found in the sacred texts or sources (Kamali, 2006). According to Rahim (1911) *ijtihad* is “the capacity for making deductions in matters of law in cases to which no express text or rule already determined by *ijmak* (consensus) is applicable”.

Bank Negara (2007) defines *ijtihad* as the science of Islamic jurisprudence, which is “an endeavor undertaken by the mujtahid in formulating a particular rule and value of a subject matter that is not clearly explained whether by the al-Quran or al-Sunnah”. Clearly from the various definitions explored above, *ijtihad* is a process to produce rules of law, usually when these issues are not clearly defined in other main sources of Islamic law.

**The Importance of Ijtihad**

*Ijtihad* is a process that produce other sources of law such as *ijmak, qiyas, maslahah, istihsan, sadd dharāh, ‘urf, siyasah shariyyah, ta’wil, istiqrā’* and many more which have been accepted in Islamic jurisprudence. *Ijtihad* is one of the vital sources and act as the main references that can be used in explaining the ever-changing human needs in response to the muamalat-related needs and practices (Bank Negara, 2007: 2). Issues such as whether certain Islamic banking products are accordance to Shariah are mostly resolved by *ijtihad* practice by Shariah Advisory Council of Bank Negara Malaysia.

Every resolution derived by the Shariah Advisory Council of Bank Negara Malaysia; comprising members who are qualified in Shariah, economics, laws and finance is regarded as a collective *ijtihad*. It has been considered as one of the sources of ruling that become a general guidance on Shariah ruling on any contemporary financial transaction in Malaysia (Bank Negara, 2007:10).
The basis for using *ijtihad* is based on *Sunan Abi Dawud*, when the prophet S.A.W intended to send Mu‘adh ibn Jabal to Yemen, he asked:

*How will you judge when the occasions of deciding a case arises?* He replied: *I shall judge accordance with Allah’s book.* He asked again: *What will you do if you do not find guidance in Allah’s Book?* He replied: *I will act in accordance with the sunnah of the prophet.* He asked: *What will you do if you do not find guidance in accordance with Sunnah of prophet and in Allah’s Book?* He replied: *I shall do my very best to form an opinion and spare no pains.* The Prophet S.A.W then patted him on the breast and said: *Praise be to Allah Who helped the messenger of the prophet S.A.W to find a thing which pleases the prophet S.A.W.*

Another basis could be derived from narration by ‘Amru bin al-‘As: That he heard prophet S.A.W saying, “*If a judge gives a verdict according to the best of his knowledge and his verdict is correct (i.e. agrees with Allah and His Apostle’s verdict) he will receive a double reward, and if he gives a verdict according to the best of his knowledge and his verdict is wrong, (i.e. against that of Allah and His Apostle) even then he will get a reward*” (Hadis. al-Bukhariyy).

With the growth of Islamic Finance industry, many Islamic financial institutions are coming out with many complex Islamic contracts. Some of these contracts are not specifically dealt in Quran and Sunnah, thus *ijtihad* is the best methodology in tackling these new issues.

**Who Can Exercise Ijtihad And What Are The Qualifications?**

Only *mujtahid* can perform *ijtihad* as and it does not extent over the entire law, only to ambiguously state of law that needs further interpretation. In this case, *ijtihad* is not only admissible but also considered as religious duty incumbent upon those in the community who are learned enough to perform it and falls under *fard kifayah*.

There are few conditions that must be fulfilled by the jurist in order to qualify for practicing *ijtihad* including a complete knowledge of Arabic language and also the theory of abrogation. He must also possess an adequate understanding of nearly 500 legal verses in the Quran, need not to memorize them, but capable of retrieving them.
efficiently and quickly. He must also be familiar with the hadith collections relevant to law and proficient in the techniques of hadith criticism so the authenticity value of the reports is needed in providing the reasoning (Hallaq, W.B., 1997: 118). Other attributes are, he must have attained majority, be of sound mind and willing and ready to exert his utmost intellectual effort in solving the case (Lowry, 2007: 211-219).

**Limitation Of Ijtihad**

These are areas which *ijtihad* is forbidden. Firstly, if these texts are the most authentic and the meanings found in them are most clear. Basically these texts can be clearly understood by those who read them. For example, in the case of 100 stripes pertaining to zina, the numerical 100 is definitive and no need to practice *ijtihad* here, however the meaning of stripes could be construed as “stick, whip, rope, or something with similar functions”.

Further elements such as how much force should be applied to the body could also fall under the scope of *ijtihad*. All these questions need to be searched and examined carefully by muftahid. According to Nyaze (2003), Shafi’iyy jurists stated that there is no *ijtihad* with the nas. Others elements which are outside the ambit of *ijtihad* are general obligations and proscription such as prayer, fasting and prohibition of zina. In summary *ijtihad* is relevant where the text is not clear and have several meanings.

**APPLICATION OF IJTIHAD IN ISLAMIC FINANCE**

The rapid pace of growth in Islamic finance has greater impact in muamalat activities in Malaysia. Therefore, Bank Negara has come out with Shariah principles based on al-Quran and al-Sunnah to cater these needs. In response to these muamalat-related needs and practices, the *ijtihad* from Islamic jurists’ has also been given due importance in certain matters where both these primary sources (al-Quran and al-Sunnah) do not specifically elaborate them. The scope of the *ijtihad* is certainly founded on these two primary sources and takes into account the practical aspects of life, which is consistent with the spirit of Shariah (Bank Negara, 2007:2-3).

The approach taken by Shariah as explained above clearly shows that Islamic financial instruments are developed based on the
comprehension and the deduction process from al-Quran and al-Sunnah (Bank Negara, 2007:8).

There are few contracts that are not specifically mentioned in Al-Quran; contract of mudarabah and bay‘ al-wafa‘. On the ruling of these contracts, there are bound to see difference of opinion from various schools. In Malaysia, these roles are under the responsibility of Shariah Advisory Council (SAC) of Bank Negara Malaysia. Their roles are very pertinent particularly in ensuring that every instrument offered complies with the Shariah principles. They also have to ensure that the development of Islamic finance in relation to policy-making and product development, which must be done in a manner that conforms to Shariah principles (Bank Negara, 2007:9-10). SAC comprising members who are qualified in Shariah, economics, laws and finance and every resolution arrived will be regarded as a collective *ijtihad*.

**Bay‘ ‘Inah**

_Bay‘ ‘inah_ concept is used in Malaysian Islamic banking system and capital market to facilitate the needs of market players when Islamic financial industry was first pioneered in the country. Even though the majority of Shariah scholars disallow this concept, some of them are of the opinion that it is acceptable as long as all the pillars and conditions of the contract are complied with.

Based on this opinion, _bay‘ ‘inah_ concept is accepted. This contract is practiced in Malaysia to ensure that Islamic finance is as competitive as its conventional counterpart. Among others, this concept is applied in money market transaction, bond issuance, debt securitization and credit card facility.

_Bay‘ ‘inah_ means a seller sells an asset to client and then buy back that asset from the same client at a different price, in which the deferred price will be higher than the cash price. The question is whether the application of _bay‘ ‘inah_ as explained above complies with the concept of _bay‘ ‘inah_ which is acceptable in Shariah.

The SAC in its 8th meeting resolved that _bay‘ ‘inah_ transaction in the Islamic Inter-bank Money Market is permissible based the following conditions:

i. _Bay‘ ‘inah_ transaction must strictly follow the mechanism which is accepted by Shafi‘iyy school; and

ii. The transacted asset is not a _ribawiyy_ item.
On this point, it is worthy to look at the eminent jurist Ibn Taymiyyah who divided sales into three groups executed according to the buyer’s intentions, namely (Saiful Azhar Rosly, 2009):

i. He purchases the goods in order to use or consume them such as food, drink and the like, in which case this is sale, which God has permitted.

ii. He purchases the goods in order to trade with them; then this is trade, which God has permitted.

iii. The reason for purchasing the goods is neither the first nor the second, then the reason must be dirhams (money) which he needs, and it was difficult for him to borrow, so he purchases the good on credit (with increased dirhams) in order to sell it and take its price. This, then, is “inah which is haram according to the most eminent of the jurists. Based on these arguments, the contract of bay‘ inah is considered invalid (batil). In fact in middle-eastern countries, it is unlawful to practice bay‘ inah.

Whatever suspicion one has about bay‘ inah, the Shafi‘iyy school of fiqh still considered it as legal and valid contract. The Shafi‘iyy school says the intention or niyyah is not a significant element in determining the validity of a contract. This is the viewpoint taken up by the Shariah scholars in Bank Negara and the Securities Commission.

The issues of bay‘ inah did not stop here as the Regional Shariah Scholars Dialogue which was held on 28th and 29th June 2006 aims at harmonising and promoting understanding amongst the Shariah scholars who are involved in Islamic finance. The dialogue had specifically focused on finding the best solution to resolve the issue of the use of bay‘ inah. One of the resolutions passed is it is more desirable that Islamic financial institutions to limit its use in products which face difficulty in structuring them based on other consensually accepted contract, since bay‘ inah concept is still regarded as a matter of juristic disagreement among the Shariah scholars.

Generally, the majority view of Muslim scholars that such a sale is forbidden. However, a group of the scholars are of the opinion that this sale is not contradictory to Shariah principles.
Those Who Reject Bay' ‘Inah

The first group of scholars who nullified bay' ‘inah are, scholars of Imam Abu Hanifah, Imam Malik and Imam Ahmad and some Shafi‘ites. They view that this kind of sale is forbidden. Among the arguments given by the first group are bai’ al-inah was a legal trick (hilah) to circumvent the prohibition of riba. The argument is due to the incident happen to ʿA’īshah R.A (prophet’s wife) as follows:

“ʿA mother once asked Sayyidatina ʿA’īshah, she said “O Ummu al-Mu’minin! I have sold a slave belongs to Zayd bin Arqam to ʿAta’ at 800 dirham. Since ʿAta’ needed some money. I have bought back the slave before it is due for me to receive 600 dirham”. Sayyidatina ʿA’īshah replied, “how could you execute such a bad sale. You should inform Zayd bin Arqam that his conduct has extinguished all his rewards for participating in jihad with the Prophet S.A.W if he does not repent. The mother said: “What is your opinion if I forgo the profit and take the principal sum only? ʿA’īshah then recited the verse which means: “Whoever receives an admonition from his Lord and stops eating riba shall not be punished for the past, his case is for Allah (to judge)” (Al Zuhayli, n.d: 469).

The scholars view that the above sayings and fatwa of Sayyidatina ʿA’īshah shows that it is necessary to take certain precaution and abstain from conducts that would lead to unlawful result in Shariah (sadd dharihah).

Those Who Accept Bay' ‘Inah

The second group of Muslim scholars, which consists of Imam al-Shafi‘iyy, Abu Yusuf, Abu Dawud, and Abu Thawr, including a report from Ibn ʿUmar are of the opinion that this sale is legal and permissible to Shariah principles, thus, it is allowed. They refuted the authenticity the report narrated from Sayyidatina ʿA’īshah above is weak in terms of its sanad (transmission). This is because of one of the narrators of the hadith named al-ʿAliyah binti Anfa is unknown (majhulah). Imam Shafi‘iyy says, in his book al-Umm, as following:
"If we are going to assume that someone's sale and purchase contract is forbidden whereas he believes that the contract is permissible, we are not allowed to judge his past good deeds as have been wiped off by Allah SWT."

Some of the Muslim scholars indicate that there are 24 kinds of bay‘ inah. According to Bank Negara (2007) among the permissible bay‘ inah are:

i. A sale which is followed by a subsequent sale but without any intention to have ‘inah arrangement.

ii. ‘Inah that involves two contracts of sale in which the price of each contract (either cash or deferred) is similar to the other.

iii. ‘Inah which is concluded on an asset with a gap of time between the two contracts, the purchase and sale contracts.

iv. ‘Inah which is concluded on an asset which has changed in certain aspect.

Imam al-Shafi‘iyy and Hanafites, such as al-Sarakhsiyy, views that bay‘ inah in general, is allowed and in line with Shariah principles as long as it does not violate human's right or carry unlawful elements. As far as hilah is deemed as demeaning the religion, bay‘ inah will not be acceptable. One of the arguments raised to support the adoption of the Shafi‘is’ view in legalizing this type of contract is public interest (maslahah) especially to combat the problem of liquidity shortage in the country without having to follow conventional loan (riba elements). This is parallel with the legal maxim on the lesser of two evils. Nevertheless, both Shafi‘is and Zahiris considered bay‘ inah as discouraged despite acknowledging its validity (Engku Ali, 2004).

Bay‘ al-Dayn

"Bay‘ al-dayn", connotes the sale of debt. Bay‘ al-dayn or debt trading or sale of debt can be defined as the sale of payable right or receivable debt either to the debtor himself, or to any third party. This type of sale is usually for immediate payment or for deferred payment.

The Shariah permits the selling of debt by its equivalent in quantity and time of maturity by way of hawalah. This form of debt trading is accepted by all schools of Islamic law provided it is paid in full and thus gives no benefit to the purchaser. The rationale for this ruling is that financial transactions involving debt should never allow
deferred payment, as this would be regarded as riba or *bayʿ al-kali bi al-kali* which is prohibited by the Prophet S.A.W (Saiful Azhar, 2005).

Trading on debt on its face value is always permitted in Islam. Controversies on the legitimacy of the issuance of Malaysian Islamic Bonds are mainly due to deferred payment, which render its unacceptable by Islamic jurists, institutions outside Malaysia and Middle-Eastern countries (Norzrul Thani et al., 2003). The religion strictly prohibits this kind of transactions, as if it allows a legal device to overcome the prohibition of usury.

However Malikis, and some Hanafis and Shafiʿīyy jurist allowed selling of debt to third party with some conditions which are:

i. The ability of seller to deliver the debts.

ii. The debt must be *mustaqirr* or confirmed and the contract must be performed on the spot.

iii. The debt cannot be created from the sale of currency (gold and silver) to be delivered in the future and the payment is not of the same type as debt, and if it is so, the rate should be the same to avoid riba.

iv. The debt should be goods that are saleable, even before they are received. This is to ensure that the debt is not of the food type which cannot be traded to the debtor (Al-Dusuqiyy, n.d: 3/63).

Some scholars argue some forms of *bayʿ al-dayn* is permissible, and they said that the permissibility of *bayʿ al-dayn* is restricted to a case where the debt is created through a sale of a commodity. In this case, they say, the debt represents the sold commodity and its sale may be taken as a sale of the commodity. In this context of the sale of securitized debt, the characteristics of securities differentiate it from currency, and hence, it is not bound by the conditions for exchanging of ribawiyy goods, therefore, selling debt which is represented non-ribawiyy asset is permissible to be discounted (Securities Commission Shariah Advisory Council Resolution, n.d: 19).

According to Zaharuddin (2006), we must also realize that there is still room for *ijtihad*, particularly in the Fiqh Muamalat issue which fall under the Islamic legal maxims “*it is a fundamental principle that rulings in Islamic transaction must be take into account it objectives*”. Therefore, as long as there no *ijmāʿ* (consensus of jurist) that forbids *bayʿ al-dayn*, it is not healthy to condemn other *ijtihad*. However the best way suggested in this kind of issue is “get out from the disputation.
is always recommended". Thus, it is better to avoid hay' al-dayn when there is alternative.

CONCLUSION

The Prophet S.A.W urged Muslims to acquire knowledge and learning from the cradle to the grave, making it the duty of Muslims to seek knowledge in all spheres of life and in all disciplines. This is probably why the gate to practice *ijtihad* is never close and still evolving.

Recommendation by Nyaze (2003), the process of Islamization will remain incomplete until the activity of the legislatures in Islamic states is brought fully under the purview of the institution of *ijtihad*.

This is due the *ijtihad* process from different backgrounds, institutions and professions must be supported as an institution for the performance of collective *ijtihad*. Shariah law derived from *ijtihad* need to be uniform and devoid confusion to the public at large. The practice of *ijtihad* can be clearly seen in Islamic Finance.

BIBLIOGRAPHY


Rahim, Abdul, The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi‘i and Hanbali Schools


