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THE DYNAMISM OF *FIQH* OF PROPERTY IN MALAYSIA

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Abstract

The development of *fiqh* in Malaysia allegedly has always been at two major extremism. To certain quarters *fiqhi* fatwas in this country is too rigid and narrow and to others it is too lenient and loose. These claims and allegations impacted the credibility and integrity of the institutions and individuals involved with the development and implementation of *fiqh* itself. Hence this paper is written to discuss the understanding and practice of *fiqh* in this country, especially in relation to the property with special reference to some selected cases. This study will apply qualitative method of analysis where the collected data from the relevant texts and documents on some relevant items will be critically analyze based on the researcher's understanding in order to achieve research aims and objectives. Based on the analysis of the data collected, it is found that the understanding and practice of *fiqh* in Malaysia is dynamic enough to cater for the relentless events that occur daily among Muslims society in Malaysia. At the same time it is also not too flexible and open to accept different understandings and interpretations that are beyond the mainstream understanding recognised and accepted by the major schools of Islamic law within the Sunnis branch of Islamic *fiqh*.

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Keywords: Dynamism of *fiqh*, *fiqh* of property, *fiqh* in Malaysia, *fiqh* muamalat, zakat, waqf.



1. Introduction

Fiqh is one of the main branches of knowledge in Islam. The main feature of *fiqh* that make it very distinctive from other branches of knowledge is its dynamic and ever changing nature. Unfortunately this nature is less understood by most of the public. Thus, when the reality of dynamism taking place in the form of the changing of *fatwa*, then there will be voices that dispute the credibility of the *fatwa* decided by the parties concerned. This fact is more apparent in the *fiqh* of property. In the context of Malaysia, the *fatwa* including those related to the property also experience changes whenever circumstances, times and *maslahah* demands change. The reality of the society has always been the difference between the people who are constantly demanding change and those who are always more comfortable with the old value system and maintaining status quo. With that, the *fiqh fatwa*, including those related to the property are always exposed to the different level of acceptance and appreciation of those two groups. This paper is an attempt to assess the dynamicity or otherwise of the understanding and practice of *fiqh* in Malaysia based on the *fatwa* related to property.

2. Problem Statement

The development of *fiqh* in Malaysia is generally at two major extremism. On the one hand, there are claims that the understanding and practice of *fiqh* in Malaysia, especially in the area that fall under the state's jurisdiction are too rigid, non-dynamic, non-progressive and so forth. An article appears in the official website of Sisters in Islam entitled "dimana silapnya fatwa kita" or "what is wrong with our fatwa" (Anwar, 2017) can cited as an example. On the other, there are also allegations that the understanding and practice of *fiqh* especially in the sphere of Islamic banking and financial system are too loose and lenient. In this case, an article entitled "fatwa Keungan Syariah Malaysia Lebih Longgar dari Indonesia" or "fatwa on Islamic Finance in Malaysia is more loose than Indonesia" can be cited as an example. (<https://www.dream.co.id/dinar/wow-malaysia-gencar-adopsi-fatwa-syariah-dari-indonesia>, August 2017) These claims and allegations impacted the credibility and integrity of the institutions and individuals involved with the development and implementation of *fiqh* itself.

3. Research Questions

Based on the main topic of this paper and the above mentioned problem statement, there are several question could be asked.

- i- What is the meaning of dynamism of *fiqh*?
- ii- What is the meaning of *fiqh* of property referred to in this paper?
- iii- How the fatwa on property related issues were made?
- iv- Are the fatwas too rigid or too flexible?

4. Purpose of the Study

The main purpose of this paper is to examine some of the property related fatwas in Malaysia in term of its rigidity and/or flexibility. Based on the analysis of those fatwas it is a hope that a general conclusion could be made regarding the true nature of the understanding and practice of fiqh in this country.

5. Research Methods

To achieve the above objective this study will apply qualitative method of analysis. In doing so some fatwa related to property are identified and collected from available texts and documents. All these fatwa are accordingly analyzed based on the existing rules in fiqhi treatises of the four major schools of Islamic law. From these qualitative and textual analysis the conclusion finally could be made to ascertain the true nature of the understanding and practice of fiqh in Malaysia.

6. Findings

6.1. Fiqh of Property

Dynamism of *fiqh* means the strength of Islamic *fiqh* that is able to deal with the changing times and its ability to make adjustments to be always relevant to the various needs of the people (Abdullah, Ramli, & Jamaludin 2013). This has been discussed by Islamic scholars since a long time ago with the term *murunat al-fiqh* or flexibility of *fiqh*. *Fiqh* of property in this article refers to human understanding of the set of laws on property in the context of obtaining, granting and managing property rights based on specific and detailed evidences from the sources of the Quran and prophetic *hadith*. In terms of ownership whether to obtain ownership (*tamalluk*) or to give ownership (*tamlik*), the law of property hovering around topics like sale and purchase (with all its types such as absolute sale and purchase, *muqayadah*, *sarf*, *musawamah*, *muzayadah*, *amanah*, *munajjaz*, *mu'ajjal*, *salam*, *istisna'*, *murabahah*, *wadi'ah*, *tawliyah*, *musawamah* and so on), rental, grant, *ibra'*, *waqf*, loan, mortgage, inheritance and *ihya' al-mawat*. In terms of management, the law of property is hovering around the law of *wadi'ah*, *mudarabah*, *musharakah*, *wakalah*, wills and so on. In terms of the obligation the law of property hovering around the law of *zakat* and maintenance (*nafkah*). Hence, the purpose and scope of *fiqh* meant here is broader than the scope of *fiqh al-muamalat* commonly known today, the law concerning the business transactions between parties, whether individuals or financial organizations. The breadth of the concept of *fiqh* of property intended here can be seen with its coverage of the topic of *zakat* which is usually discussed under *fiqh* of worship (*fiqh al-ibadat*), maintenance (*nafkah*) and inheritance which that are usually discussed under *fiqh* of family institution (*fiqh al-munakahat*). The table below summarizes the scope of *fiqh* of property referred to in this article.

Table 01. The scope of fiqh of property

Bil	Ownership (obtaining and granting)	Management	Obligation
1	Sale and purchase	Deposit	<i>Zakat</i>
2	Hire/rental	Investment	Maintenance
3	Grant, gift, donation	Partnership	
4	Wave and withdraw <i>Ibra'</i>	Agency	
5	<i>Waqf</i>	Wills	
6	Mortgage	Loan	
7	Inheritance		

6.2. The reality of the dynamism of *fiqh* of property in Malaysia

In general, the discussion of the *fiqh* of property in Malaysia can be broken down into two categories namely the *fiqh* of property lies under the jurisdiction of the states administration such as *zakat*, family members' maintenance, inheritance, wills and *waqf* and *fiqh* of the property beyond jurisdiction of state administrations such as *fiqh muamalat* applied in the Islamic financial institutions. For the *fiqh* of property under the jurisdiction of state administration, it is subject to the provisions in the Islamic law or enactment or ordinance regulated in each state concerned. Most of the states in Malaysia have clearly stated their attachment to the *Shafi'i* sect as the main sect which was followed in the application and enforcement of Islamic law. Only in certain circumstances the views of the other sects are taken into account if *maslahah* demands it. For example, the Islamic Religious Administration Enactment (State of Penang, 2004) in section 54 explains the guidelines for the mufti in issuing a fatwa as follows;

“Section 54. *Qaul muktamad* to be followed.

(1) In issuing any *Fatwa* under section 48, or certifying an opinion under section 53, the *Fatwa* Committee shall ordinarily follow the *qaul muktamad* (accepted views) of the *Mazhab Syafie*.

(2) If the *Fatwa* Committee is of the opinion that following the *qaul muktamad* of the *Mazhab Syafie* will lead to a situation which is repugnant to public interest, the *Fatwa* Committee may follow the *qaul muktamad* of the *Mazhab Hanafi, Maliki* or *Hambali*.

(3) If the *Fatwa* Committee is of the opinion that none of the *qaul muktamad* of the four *Mazhabs* may be followed without leading to a situation which is repugnant to public interest, the *fatwa* Committee may make the *Fatwa* according to *ijtihad* without being bound by the *qaul muktamad* of any of the four *Mazhabs*”.

Similar provision is also found in the enactment of other states except Perlis which stipulate that the Qur'an and the Sunnah only as the main reference. This means that *fiqh* of family and others which are under the jurisdiction of the Islamic religious affairs of the states is legally controlled and guided. It hovers within the framework of the *Shafie* sect only and also the other three major *fiqh* sects in certain circumstances. For the time being the limitation to this sect is felt to be sufficient to deal with the issues that arise in society and that it can preserve the well being of society and reject unwarranted condition from it. Additionally, these sanctions are also felt reasonable to contain the widespread differences that result in endless quarrel and argumentation.

However the implementation of *fiqh* in Islamic financial institutions is not tied to the provision of the enactments as it is outside the jurisdiction of the Islamic religious affairs of the states and the *shariah* courts. Since 2013, Islamic finance in Malaysia is governed by two major acts namely the Islamic Financial Services Act 2013 (Act 759) and the Central Bank of Malaysia Act 2009 (Act 701). These Acts only require that Islamic financial institutions operate in accordance with Islamic law as decided by the appointed *Shariah* Committee in every Islamic banking and BNM *Shariah* Advisory Council. These *Shariah* committees may determine their own rules in providing *shariah* views to the bank without being bound by a particular sect or opinion. (Section 27-33 of Act 759 and section 51-58 of Act 701) This means in the field of Islamic finance, the scope of *fiqh* is more dynamics and wide. The *Shariah* Committee in every Islamic banking, and the *Shariah* Advisory Council of BNM may issue its *fiqh* resolution pursuant to any scholarly views of the authoritative scholars in any school or they can conduct their own legal inference (*ijtihad*) which is more likely to conform to the objective *shariah* and meeting the needs of general *maslahah*.

6.3. Some selected examples of the dynamism of *fiqh* of property within the states jurisdiction.

6.3.1. *Zakat fitrah* with currency

According to the decisive view in the *Shafie* sect, *zakat fitrah* is obliged to be taken from the main food or the basic staple of the population and the payment with the value of the currency is invalid. However in this case, seeing the *maslahah* and its greater benefits, then all states in Malaysia adopt a view in the *Hanafi* school which allow the payment of *zakat fitrah* with money (Al-Zuhaili, 1989). In this regard, the decision of the National Fatwa Committee in the 57th Meeting of Islamic Religious Affairs of Malaysia, dated 10 June 2003, among others, ruled that,

a) The value of *zakat fitrah* for states in Peninsular Malaysia is based on the local value set by BERNAS for the Local Super Grade A rice based on Baghdad weighting scales which is equivalent to 2.60kg.

b) The value of *zakat fitrah* for the states of Sabah and Sarawak is based on the local value set by BERNAS, respectively for Vietnam White rice for the state of Sabah and the Thailand White rice for the state of Sarawak based on Baghdad weighting scale which is equivalent to 2.70kg

Section 56 of the State of Sabah *Zakat and Fitrah* Enactment of 1993 states that "*Fitrah's* payment shall be settled by the person paying by delivering to *Amil* 2 kilograms and 250 grams of rice or the amount thereof for himself and every person he is liable to make the payment. The payment of *zakat fitrah* in the form of money is more preferable as it provides convenience for the recipients to buy whatever he wants in the future. Sometimes the recipients do not need food, but require clothes, meat or others. Sometimes the recipients have to sell the food at a cheaper price than its actual value. These are all in the normal condition where there is abundance of food circulating around the markets. As for the difficult situation when food is rarely available in the markets, then paying with food is more preferable than the value.

6.3.2. *Zakat* on salary

Zakat salaries or *al-mal al-mustafad* is an interesting example of the dynamism of *fiqh* of property in Malaysia. Previously the issue of *zakat* on monthly salary has never been discussed, let alone to be made compulsory in Malaysia. *Zakat* on salary may already be included in *zakat* of property when it reaches

enough amount (*nisab*) kept for a certain period of time (*haul*). Over the last few decades, especially with the popularity of the view of al-Qaradawi (Al-Qaradawi, 1996), this issue has been warmly discussed and accordingly *zakat* on salary became compulsory in Malaysia. For example, the Special *Muzakarah* of the National Council for Fatwa Committee for Islamic Religious Affairs held on June 22, 1997 discussed the *zakat* on salary and professional income. This *Muzakarah* has decided that *zakat* on salary is compulsory for a person who is eligible to pay *zakat*. This was subsequently followed by the Federal Territory and state of Selangor in 2001 which stipulated that *zakat* is obliged on all income in the all forms whether wages, salaries, allowances, remuneration and bonuses. These *fatwas* also do not place period of time (*haul*) as a requirement. However, this provision is quite contrary to the law provision in the state of Perak. The Perak *Shariah* Committee has issued a *fatwa* that wages or income are not obligatory for *zakat* because it does not meet the conditions of *haul*. The *fatwa* is as follows: "Salaries or income are included in the obligatory category when it completes *nisab* and *haul*. This is due to the completion of *haul* is a condition for the obligatory payment of *zakat* as stipulated by the majority of scholars. Since this condition does not apply to salaries or income, they are not included under the obligatory payment of *zakat*." In this *fatwa*, the Perak *Shariah* Committee adopted the view of the majority scholars (Al-Zuhaili, 1989).

6.4. Time frame for *Mua'allaf*

The previous scholars did not put a certain period of time for someone who had just converted to Islam to be called as a *mu'allaf*. The *Muzakarah* of the 71th Malaysian Islamic Religious Affairs Council Fatwa Committee convened on 22 - 24 November 2005 discussed the 'Limitation of the *mu'allaf* Call Period'. The *Muzakarah* has decided that in Islam there is no law requiring a new convert to Islam to be called the *mu'allaf*. The terms and time limit of the term of the *mu'allaf* are purely *urf*. Following that, the time limit of the status of *mu'allaf* is referred to and decided by the State *Fatwa* Committee respectively. Hence every states in Malaysia make their own decisions in determining the time limits of the status of *mu'allaf* (Abdullah, A. 2016). The National *Fatwa* Committee, the Kedah, Penang, Kelantan, Sarawak and Perak committees, for example, did not specify a certain period of time. Its execution is based on the local customs and the needs of each case. The Selangor and Negeri Sembilan and Malacca State *Fatwa* Plans set the *mu'allaf* period for 5 years, The Perlis for 5 years than need to be assessed to continue, Pahang 7 Years, Terengganu 3 Years, while Sabah set a base period of 5 years and can reach 7 years (Azman et al., 2015).

6.5. Cash *waqf* (endowment)

Cash *waqf* means to endow cash to any *waqf* trustee, in which the capital money is retained to the beneficiary. The money will be collected and then converted into a permanent property called *badal* (substitution). Benefits of the cash *waqf* will be used for the welfare and development of the *ummah* (Wakaf & dan Haji, 2009) such as the construction of mosques, prayer room, religious schools and cemeteries. The scholars hold different views about the validity of cash *waqf* practice. The decisive view in *Shafi'i* school which is the official school in most states in Malaysia, cash *waqf* is invalid. This is also the view of some of the *Hanafi* scholars, the *Maliki* and *Hanbali* scholars. The argument is that the nature of the money itself cannot be used unless by changing or releasing it to another owner which contrary to the basic understanding of *waqf* itself ie to hold a substance as it is. Similarly, they do not approve the

endowment of food for its lack of immortality (Al-Zuhail, 1989). However there is also a minority of scholars within the *Hanafi*, *Shafie* and *Hanbali* schools who opined that cash *waqf* is valid. *Muzakarrah* of the Council of *Fatwa* for the National Council for Islamic Religious Affairs Malaysia The 77th meeting which took place on 10-12 April 2007 has decided that the *waqf* in the form of cash is permissible and valid in Islam. Based on this position most of the fatwa of the states in Malaysia also approve cash *waqf*. For example, the Fatwa Committee of the State of Selangor 2006 and the State Fatwa Committee of Terengganu 2007, the Kedah Fatwa Committee and the Johor Islamic Religious Council (MAIJ) allowed cash *waqf* although it contradictory to the decisive view in *Shafi'i* school of law which regarded as the main reference in the field of *fiqh* in Malaysia.

6.6. Harta sepencarian (assets acquired by spouse during their marriage by their joint efforts)

In legal term, '*harta sepencarian*' is defined as "property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by *Hukum Syarak*". In essence, the concept of *harta sepencarian* has no unambiguous and clear-cut textual evidence from the Quran and the prophetic *hadith*. Even in the works of *fiqhi* scholars there is no specific discussion on the concept of *harta sepencarian* or its equivalent. The closest one could get is discussion on the shared (*sharikah*) property between wife and husband. The discussion on this topic can be traced in the works like *I'anat al-Talibin* of al-Dimyati, *Bughyat al-Mustarsyidin* of al-Sayyid 'Abd al-Rahman, *Qurrat al-'Ayn bi Fatawa Ulama' al-Haramayn* of Saleh al-Zubayriy, *al-Fatawa al-Fataniyyah* of Wan Ahmad al-Fataniyy, *al-Turuq al-Hukmiyyah* of Ibn al-Qayyim and others (Ahmad, Husni, & Said, 2014). In view of the past history, *harta sepencarian* could be considered as a form of customary practice in the Malay community (Ibrahim, 2000). In *Adat Papatih* for example *harta sepencarian* is called '*carian laki bini*' (literally means effort of husband wife). Before the amendment of the article 121 (1A) of the Federal Constitution, judges' were more likely to refer to Malay custom when it came to *harta sepencarian*. For example in the case of *Roberts@Kamarulzaman v Umi Kalthom*, it was decided that the disputed property was considered as *harta sepencarian* and the court had divided every half part if the parties agreed. This is based on the assumption that it is a custom rather than Islamic law (Abdullah, Martinez, & Radzi, 2010). In Malaysia although there is no specific discussion on *harta sepencarian* in any of the four schools *fiqhi* treatises, all states in Malaysia accepts this concept and incorporate it in the Islamic family law legislations.

6.7. Some selected examples of the dynamism of *fiqh* of property beyond the states jurisdiction

i- *al-Inah* sale

al-Inah sale is when a person sells his assets to another person at a certain price to be paid later, then buys them back from the same person at a lower price in cash. Generally Islamic scholars agree that *al-inah* sale is not permissible if both sales are tied up to one another or in other words the existence of inter-conditionality as it construes performing the prohibited *riba* through the medium of buying and selling. In the event of no inter-conditionality, there are two views of *fiqhi* scholars regarding *al-inah* sale (Abdullah, 2005). The first view is *al-inah* sale is unlawful and invalid although in its appearance *al-inah* sale contracts fulfils both pillars and conditions. This view is supported by the majority of *fiqhi* scholars of *Hanafi*, *Maliki* and *Hanbali* schools. The second view comprises of some scholars in the *Hanafi*, *Maliki* and *Shafie* schools

who opine that the contract of *al-inah* sale is valid and permissible so long as all its pillars and conditions are fulfilled (Sawari et al., 2018). Based on the view that allows this contract and considering the urgent need of Islamic banking institutions in Malaysia to replace the lending activities with prohibited *riba* as practiced by the conventional banking system, the *shariah* committee of Islamic banking institutions in Malaysia has allowed this *al-inah* sale to be practiced by Islamic banking institutions until better mechanism is found. The argument is, at least there are scholars who allowed *al-inah* sale contract and therefore it is better than the contract of loan with *riba* which is no disagreement at all among the scholars regarding its prohibition. However, due to its close resemblance to the practice of loan with *riba*, this contract becomes highly controversial, thus it is gradually marginalized by Islamic banking institutions in Malaysia to be replaced by *tawarruq* arrangement.

ii- *Tawarruq*

Tawarruq arrangement comprises of at least two contracts and a promise. It involves the contract of sale, agency and a promise to buy from one of the party (Yusof, 2014). The main difference between *tawarruq* and *al-inah* sale is that the subject matter of sale will not return to the first seller. This is in order to create a situation similar to the genuine sale and purchase contract and therefore distant this practice further from the contract of loan with *riba*. Basically the practice of *tawarruq* in its natural form is not a problem in the view of the majority of *fiqhi* scholars. However to make it practical and workable in the modern Islamic banking system the practice of *tawarruq* needs to be adjusted and organized. Thus the phrase of 'organised *tawarruq*' arises which renders different opinion from the *fiqhi* scholars. The International Islamic *Fiqh* Academy in its resolution in 2009 defines organised *tawarruq* as "a buyer (*mustawriq*) buys goods in a market place locally or abroad with deferred payment and he appoints the financier(bank) to arrange the sale of the goods either by the financier itself or through agents and at a price which lower than the purchase price". Regarding this practice the Academy has issued its resolution which considers organised *tawarruq* as unlawful. (The International Islamic *Fiqh* Academy, 2018) Nevertheless, this form of *tawarruq* transaction is also adopted by some *shariah* bodies such as the *Shariah* Supervisory Council of the al-Rajhi Bank, Kuwait Finance House. The Islamic Financial *Shariah* Resolution issued by Bank Negara Malaysia in the 51st *Shariah* Advisory Council meeting has decided that deposit products, financing products and *sukuk* issuance using the *tawarruq* concept is permissible and *tawarruq* is the best alternative over *riba* based financing.

iii- Safe keeping (*wadi'ah*) based deposit to loan(*qard*) based deposit

Wadi'ah means a contract to store property in trust to another person. Through *wadi'ah* contract, the trustee is responsible for safekeeping the property and cannot use or take any benefit from it. In the event of any damage or loss of the property not due to negligence, the trustee shall not be liable to pay any damages to the owner of the property. This contract is used in Islamic banking when the customer deposits cash as a bank deposit. However, the practice of *wadi'ah* in Islamic banking institutions is different from the actual *wadi'ah* rules. Islamic banking normally uses the deposit for its own business and if anything happen to the deposited cash the bank will responsible to pay the money to the owner. Banks also states its intention to give certain percentage of the deposited amount to the owner after a certain period of time as a

gift on the discretionary basis. Because of the elements mentioned above, the nature of *wadi'ah* contract is totally changed from a trust contract to a guarantee contract. Hence in the context of Islamic banking in Malaysia this practice is called *wadi'ah yad damanah* (Qaed, 2014). This make the whole exercise similar to the contract of loan. Hence each reward given by Islamic banking to the owner of the money is classified as *riba* even though it is called a gift. This means the branding of this practice as *wadi'ah yad damanah* does not conform to the true fact according to the Islamic *fiqh* (Ibrahim & Noor, 2011). As such, Bank Negara Malaysia which control the operation of all banking institutions in Malaysia has directed all Islamic banking institutions to change the title of the product from *wadi'ah* to its true nature which is *qard* or loan. (Bank Negara Malaysia, 2018) However, the gift granted by Islamic banking based on its discretion to the depositor is continued even though the gift has a very close resemblance to the prohibited *riba* in a loan contract. This has to be maintained to be an attraction to Islamic banking and to ensure its ability to compete with conventional banking institutions.

7. Conclusion

Based on the above discussion it is clear that *fiqh* as practiced in Malaysia is not too loose and not too rigid. We can see clearly the dynamism of *fiqh* when it comes to issuing fatwa and its implementation. This dynamism occurs in many ways. There are cases where the religious authorities in different states subscribe to the same view in the *Shafie* school of law. There are cases where different states hold different views in different schools of law. There are cases where states change their views from their previous one due to changes in situation related to the cases evaluated. There are also cases where the states infer their own conclusion and issue their own fatwa especially in cases where there is no precedent to be referred to. The same goes to the Islamic financial institutions which are beyond the states jurisdiction. This dynamism is undeniably necessary to enable *fiqh* of property as it is understood in Malaysia to cater and address current issues and events that happening in muslims society in this country. Islamic *fiqh* should not be too loose that it fails to prevent the inclusion of negative foreign elements and not too rigid that it fails to address modern issues that keep developing and changing. The most important thing is that while there is a need to strive to move forward rapidly there is also a need to be careful not to lost the track to the extent that we are being cut off from our grassroots.

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