

DISPUTE OVER THE LEGALITY OF *AL-IJĀRAH AL-MAWṢŪFAH FĪ AL-* *DHIMMAH*: A SURVEY OF *FIQHĪ* OPINIONS

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Abstract

The legality of al-ijārah al-mawṣūfah fī al-dhimmah (AIMAD) has been disputed. Some contemporary scholars have mentioned disagreement among the early Muslim scholars about it and have identified the Ḥanafī School's position to be prohibition. In fact, the classical texts of most juristic schools are similar in terms of the discussion on this contract. Hence, the question that arises is whether there is really a dispute among the four major Sunni schools of Islamic law or consensus on the legality of AIMAD. In order to answer the question, this paper discusses the classical and contemporary fiqh literature on this issue. The method followed in this paper is a critical analytical approach. The most important finding of this paper is that there is actually no dispute among the scholars of the four major Sunni schools of Islamic jurisprudence over the legality of AIMAD; rather, they unanimously agreed on its legality. However, what was mentioned by some contemporary scholars is only differences in their approaches while dealing with the classical texts of Islamic law. The agreed view on AIMAD could be the basis for new innovations in Islamic financial institutions in the future.

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I. INTRODUCTION

Al-ijārah al-mawṣūfah fī al-dhimmah (AIMAD) is a newly introduced mode of financial transaction in Islamic financial institutions. It is construed as a “*lease contract in which the subject matter is a usufruct to be delivered in the future, and it is clearly defined in a way that there remains no potential for dispute*” (al-Qurah Dāgī, 2008). It is also termed as forward *ijārah* (lease). From the literature, it is found that there is disagreement over the legality of AIMAD among contemporary scholars in their reporting of the opinions of classical *fuqahā* (Muslim jurists). Some contemporary scholars have mentioned a dispute among the early Muslim scholars over its legality. According to this view, the majority of scholars from the major Sunni schools of Islamic law (Mālikī, Shāfi‘ī, and Ḥanbalī) allowed AIMAD whereas scholars of the Ḥanafī School did not allow it (Abū Ghuddah, 2007). On the other hand, some other contemporary scholars have mentioned unanimous consensus of the four schools, including the Ḥanafī School, on the legality of AIMAD (Ḥāmid Mīrah, 2012). The question that therefore arises is whether the legality of AIMAD is agreed upon among the four popular Sunni schools of Islamic law, or is it a matter of dispute?

It is worth mentioning that due to the unclear stance on the legality of AIMAD, it was not applied during the early period of the practice of Islamic finance, and thus it is still considered a new issue (Abū Ghuddah, 2007). Nonetheless, the concept of AIMAD has been applied in Islamic financial transactions for the last few years as it helps to fulfill the financial needs of those who cannot afford to buy their necessary commodities or services by cash payment. AIMAD is currently used in the Islamic banking industry as a stand-alone contract as well as a sub-contract in hybrid transactions such as *mushārakah mutanāqīṣah* partnership (MMP) for home financing. Therefore, it is important to verify the authenticity of AIMAD in the light of the classical literature in order to validate financial products which are structured using it.

Accordingly, this paper aims to study the views of both classical and contemporary scholars on the legality of AIMAD in order to remove any misconception about it. Since AIMAD is closely related to *ijārah* and *salam* contracts, the paper also examines the views of scholars on the *fiqh* characterization (*takyīf fiqhī*) of AIMAD in order to determine its origin and to conclude which contract takes the dominant effect in AIMAD.

II. LITERATURE REVIEW

Most of the classical scholars discussed AIMAD together with *ijārah mu'ayyanah* (specific *ijārah*/normal *ijārah*), except al-Bahūtī (1051 AH) and al-Minhājī (880 AH). These two scholars classified *ijārah* as two types (*ijārah mu'ayyanah* and *ijārah mawṣūfah*) and discussed them separately. The majority treatment is why AIMAD was not highlighted as a separate contract in the first instance by Islamic financial institutions.

A number of articles and research papers have been written by contemporary scholars in relation to the legality of AIMAD. Among the contemporary scholars, Abū Ghuddah (2007) was among the first to address the issue. He mentioned disagreements among the classical four Sunni schools of Islamic law and stated that the Ḥanafī School does not allow AIMAD, but he did not refer to any Ḥanafī classical text to support his stand. Some scholars like Nazih Ḥammād (2007) and Aḥmad Naṣṣār (2009) also adhered to this opinion. They mentioned two clauses from *Majallat al-Aḥkām al-ʿAdliyyah* (clause 449) and *Murshid al-Ḥayrān* (clause 580) as well as one principle from the Ḥanafī School. However, it appears that these texts do not support their standpoint; rather, they uphold the opposite view.

On the other hand, Sāmī al-Suwaylem (2010), Ḥāmid Mīrah (2012) and Yūsuf al-Shubaylī (2012) held the opinion that the Ḥanafī School also allows AIMAD and that there is consensus among the four schools on the legality of AIMAD. However, only Sāmī al-Suwaylem (2010) directly cited classical Ḥanafī texts in this regard; while Ḥāmid Mīrah (2012) quoted from him. Still, none of them comprehensively discussed all the views of the classical scholars thoroughly. Mikail (2013) examined some issues relating to

AIMAD, but he did not discuss the legality of AIMAD in the light of classical literature. Therefore, this paper aims to do a survey on the *fiqhī* opinions of classical and contemporary scholars in order to conclude whether there is a dispute among the four Sunni schools about the legality of AIMAD.

III. METHODOLOGY

This is library-based research; the inductive approach is employed to critically analyse various juristic views regarding the legality of AIMAD. As contemporary scholars specifically differ in their approaches to the classical texts of the Ḥanafī School on this issue, this paper will analyse their approaches. It will also examine the resolutions of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) and Bank Negara Malaysia (BNM) to determine the contemporary practice of AIMAD by Islamic financial institutions (IFIs).

IV. GENERAL DISCUSSION AND POINTS OF AGREEMENT ON THE DEFINITION OF AIMAD

a. Early Connotations of the Concept of AIMAD

Early Muslim scholars did not pay special attention to AIMAD, not considering it an independent contract; therefore, no specific definition of it can be found in the classical books. Most scholars simply mentioned AIMAD while discussing the conditions of the subject matter as to whether it is an existing item or non-existent item stipulated by specifications. The Ḥanbalī scholar Ibn Najjār al-Fatūhī (2000: 4/5) is typical in his treatment of AIMAD, saying that “*the subject matter is either a particular existing item or stipulated by specifications*” while giving the definition of *ijārah* in general. This indication can be helpful in defining AIMAD, as is his mention of the subject matter possibly being a liability in his definition of *ijārah*, which he intended to be inclusive of its various types. Al-Minhājī (1996) discussed AIMAD more extensively than did other classical

scholars, but he also did not provide any particular definition for it. Instead, he gave a statement which resembles a simple connotation of AIMAD while discussing types of *ijārah*. He said: “*The mode of al-ijārah al-wāridah ‘alā al-dhimmah (that is executed on liability) is executed by deferring the usufruct and paying the rental in advance*” (Al-Minhājī, 1996: 2/220).

b. Contemporary Connotations of AIMAD

With regard to contemporary scholars, since AIMAD is a newly introduced mode of Islamic financing, they also appear to provide different definitions of it. Abū Guddah (2007) is the pioneer among contemporary scholars who paid attention to this mode of financing. Subsequently, other scholars wrote a number of papers on this financial instrument. Some important connotations are mentioned below.

Abū Ghuddah (2007: 73) states:

Al-ijārah al-mawṣūfah fī al-dhimmah can be defined as the commitment of the lessor to provide a benefit that has been thoroughly described (to the standards required in *salam* sales) such that potential conflict is eliminated, whether the subject matter is the benefit of an object, such as leasing a car of stipulated specifications, or a human service such as tailoring or teaching.

He (2007: 73) proceeds by saying:

It is not a condition that the lessor should possess the benefit at the time of contract; rather, the usufruct is attached to the future so that he can possess it by the promised time when the *ijārah* is to be executed.

He explicitly states that this definition is synthesized from a number of references. It is also observed that this statement could be considered a connotation for AIMAD rather than a logical *jāmi‘ māni‘* (inclusive and exclusive) definition because it does not consist

of the essential elements of a definition—that is, *jins* (genus) and *faṣl* (what distinguishes it from other members of the same genus).

Al-Qurah Dāgī (2008: 14) defines AIMAD as “a contract in which the subject matter is usufruct stipulated as a liability in such a way that it removes potential dispute.” In this definition, al-Qurah Dāgī does not mention the *jins* in the definition; rather he mentions a phrase which is more general than the *jins* of *ijārah*. In addition, he adds another phrase to this term which can include all the conditions of *ijārah* despite the fact that the definition should be free from conditions. Hence, this connotation is also not a proper definition.

Aḥmad Naṣṣār (2009) denotes AIMAD by different idioms such as “sale of future usufruct in exchange for immediate cash.” Secondly, it is “a salam contract on usufruct” whether the usufruct comes from objects or acts. Thirdly, it is “rental that entails obligation” because the promised usufruct is attached to the liability of the *mu’ajjir* (lessor) and is not particularized. Fourthly, it is “rental executed on guaranteed usufruct” because the *mu’ajjir* guarantees the usufruct in all situations and it is attached to his obligation. In this definition, Aḥmad Naṣṣār (2009) intended to explain the nature of AIMAD. That is why, he mentions different terms that include some of the conditions of AIMAD. Moreover, he does not mention the *arkān* (essential elements) of AIMAD. Hence, none of these terms could be a *jāmi’ māni’* definition for this type of *ijārah*.

c. The Preponderant Definition of AIMAD

Since none of these definitions given by classical and contemporary scholars is a *jāmi’ māni’* definition of AIMAD, there is a need to provide a definition of it in order to crystallize the theory of AIMAD. Based on the previous terms provided by scholars and the preponderant definition of *ijārah* in general, the concrete definition of AIMAD is:

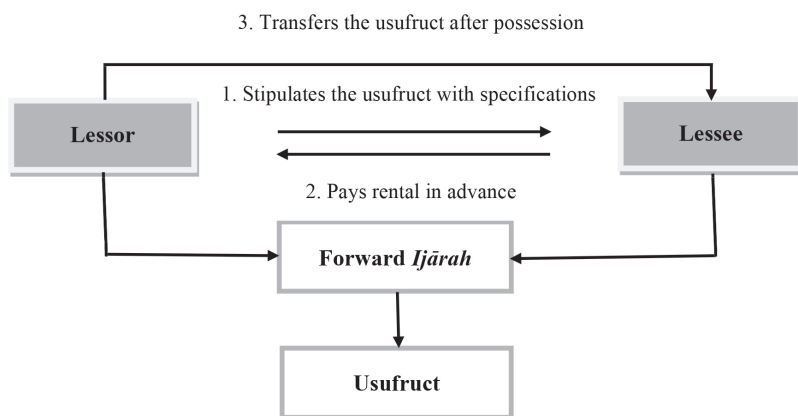
تَمْلِكُ مَنَفَعَةَ مَوْصُوفَةٍ فِي الذِّمَّةِ بِعَوَضٍ بِشُرُوطٍ

*Transferring ownership of usufruct stipulated in the liability
in exchange for a counter- value with conditions.*

This definition is *jāmi’* and *māni’* because it identifies the genus to which the defined item belongs along with what distinguishes it from other members of the same genus. In this definition, *tamlīk*

(transferring ownership) is the genus, which includes transfer of anything, whether it is an object or usufruct. In other words, it includes *ijārah*, sale, gift, charity, marriage, commission, *muḍārabah* and sharecropping, among others. *Manfaʿatin* (usufruct) is the first *faṣl*, which excludes transferring the ownership of objects from the definition; it thus excludes *bayʿ* (sale), *hibah* (gift), and charity, among others. *Mawṣūfatin fī al-dhimmah* (stipulated in liability) is the second *faṣl* which excludes the usufruct of particular objects because leasing usufruct of particular objects is *ijārah muʿayyanah* (particular *ijārah*). The third *faṣl* is *bi ʿiwāḍin* (in exchange for) which excludes gifting usufruct, bequeathing it, partnership and lending, among others (al-Zuhaylī, 1996: 2/241). The fourth *faṣl* is *bi shurūṭ* (with conditions) which means that the usufruct and consideration are not ordinary; rather, there are some conditions that must be fulfilled for the validity of the contract. An illustration of AIMAD is provided in Figure 1.

Figure 1: Structure of Forward *Ijārah*



Source: Authors' Own

1. The lessee comes to the lessor and requests a usufruct such as use of a house or a car, or use of a personal service, while the usufruct is non-existent or is existent but not possessed by the lessor. Hence, the lessor stipulates the usufruct with certain specifications and offers the usufruct.

2. The lessee accepts the offer and makes the payment in advance even though the usufruct is not determined as a specific one.
3. Once the lessor possesses the usufruct, he will deliver the usufruct with all the criteria stipulated.

V. LEGALITY OF AIMAD

a. General Evidence

Since AIMAD is a forward sale of usufruct, the general evidence for *salam* and *ijārah* is used as evidence for the legality of AIMAD. The scholars referred to conditions of *ijārah* and *salam* according to their points of view while discussing the *takyīf fiqhī*¹ and conditions of AIMAD. Scholars are in agreement on the permissibility of *ijārah* and *salam* on the basis of evidence from the Qur’ān, the Sunnah, and *ijmā’* (consensus). As for the evidence of the Qur’ān on *ijārah*, Allah (SWT) says:

“And if they suckle your [offspring], give them their recompense: and take mutual counsel together, according to what is just and reasonable” [al-Ṭalāq: 6].

Since the verse ordains consideration for suckling, it means that the contract of suckling is a form of *ijārah*. This is the literal meaning of the verse because suckling without contract does not necessitate any counter-value; rather, it is considered a donation.

The Qur’ān also mentions:

One of the two women said: “Father, employ this man in your service. The best whom you might employ is he who is strong and trustworthy.” Her father said to Moses: “I want to

1 *Takyīf fiqhī* means to refine a *fiqhī* issue which is apparently related to different legal codes and disputed over through identifying its *fiqhī* origin that is distinguished with the standard of reference by the legal authority. The researcher derived this definition from Qutub Muṣṭafā Ṣānū (2000: 143) and Aḥmad Mukhtār ‘Abdul Ḥamīd ‘Umar (2008: 1978).

marry one of these two daughters of mine to you if you serve me for eight years. But if you complete ten years, that will be of your own accord [but not an obligation]. I do not intend to treat you harshly. If Allah wills, you will find me an upright man” [al-Qasas: 26-27].

Here, Mūsā (AS) is being offered employment as a shepherd in exchange for a determined compensation. The incident proves that *ijārah* is known and allowed. This is because *ijārah* is a necessity for mankind and helps in maintaining good social relations among people (al-Qurṭubī, 1985: 13/271).

As for the Sunnah of the Prophet (SAW), it is reported that the Prophet (SAW) said: “*Give the worker his wage before his sweat dries*” (Ibn Mājah, n.d.: 3/397, no. 2443). In this *ḥadīth*, the Prophet (SAW) commands payment of the recompense immediately after the work is finished. If *ijārah* was not permissible, he would not have commanded payment, immediate or otherwise.

It is also reported that when the Prophet (SAW) instructed Abū Bakr to make preparations to emigrate from Makkah to Madīnah, Abū Bakr hired a guide from Banī al-Dayl to lead them on their journey.

The Prophet (SAW) also quoted Allah (SWT) as saying: “*There are three people whose enemy I shall be on the Day of Judgment; one of them is a man who hired a worker to carry out some work for him but did not give him his wage*” (al-Bukhārī, 1400 AH : 2/133, no. 2270). This is explicit evidence for the permissibility of *ijārah* because if the contract was not legal, Allah (SWT) would not threaten those who withhold payment of the recompense with His enmity on the Day of Recompense.

The evidence for *salam* is also supportive of the legality of AIMAD because scholars like al-Bahūtī (1996: 2/251), Ibn Mufliḥ (2003: 7/160) and al-Nawawī (2003: 4/250) referred AIMAD to the *salam* contract. With regard to the evidence from the Qur’ān on *salam*, Allah (SWT) says:

“O you who believe! When you deal with one another in transactions involving future obligations for a fixed term, reduce them to writing” [al-Baqarah: 282].

The phrase “transactions involving future obligations” in the context of the above verse also includes the *salam* contract in which delivery of the subject matter occurs in the future. Ibn ‘Abbās referred to this verse when explaining the *salam* contract (Ibn Kathīr, 1999: 1/722). As the verse talks about future obligations of any transaction, it encompasses AIMAD as well, except when it includes any prohibited element.

Regarding the Sunnah, the Prophet (SAW) said:

Whoever wishes to enter into a contract of *salam*, he must effect the *salam* according to specified measure or specified weight and a specified date of delivery (al-Bukhārī, 1400 AH, No. 2240).

Since the *salam* contract is a forward sale, it entails future obligation. Likewise, AIMAD entails a future obligation similar to that of *salam* because it is the *salam* of usufruct.

With regard to the *ijmā’* on the validity of *ijārah* and *salam*, there has been agreement among the scholars from the time of the Ṣaḥābah (Companions) to this day on the permissibility of *ijārah* (Ibn Qudāmah, 1997: 8/6; al-Zuhaylī, 1985: 4/598) and of *salam* (al-Zayla‘ī, 1985: 4/110), and none violated this consensus except ‘Abd al-Raḥmān ibn al-Aṣamm (d. 279 H), who disagreed to the consensus on *ijārah*, and Sa‘īd ibn al-Musayyab (d. 94 H), who opposed the consensus on *salam*, as is mentioned by Al-Qurah Dāgī (2008).

With regard to *ijārah*, ‘Abd al-Raḥmān ibn al-Aṣamm opined that it is prohibited due to *gharar* (uncertainty) as it is a contract on usufruct not yet found. However, jurists refuted his argument by indicating that *gharar* shall be ignored here because the contract on usufruct is not possible after the existence of the usufruct as it is known that usufruct perishes with the passage of time; so a contract for usufruct should be concluded before it comes into being—similar to a *salam* contract on assets (al-Zuhaylī, 1985: 4/730).

It has been reported that Sa‘īd ibn al-Musayyab opposed the consensus of the Ṣaḥābah on the legality of *salam*. Some scholars have challenged the authenticity of the attribution of this opinion to him as *shādh* (anomalous). Even if it is correct, it is ineffective due to the consensus of the Ṣaḥābah before him (al-‘Assāf, n.d.: 32).

All the proofs mentioned above indicate the legality of AIMAD in general because AIMAD is a kind of *ijārah*. AIMAD is no different in its rules from the original *ijārah* except that the subject matter herein is non-existent or not owned whereas it is a particular existing item in the original *ijārah*. Based on the above discussion, it can be said that as long as *ijārah* is permissible in Sharī‘ah, its modes are also permissible while fulfilling their respective conditions and being kept within the parameters established by the scholars. In addition, as long as it is similar to the *salam* contract according to some scholars, its legality is also derived from the proofs of *salam*.

The above discussion was on general evidence for the legality of AIMAD. The next discussion will be on scholarly opinion about its legality.

b. Opinions of Early Scholars on the Legality of AIMAD

Scholars of the four Sunni schools of Islamic jurisprudence agreed on the legality of AIMAD. However, although Ḥanbalī, Mālikī and Shāfi‘ī scholars allowed it on the basis of the general evidence for *ijārah*, Ḥanafī scholars allowed it on the basis of *istiḥsān* (juristic preference).²

i. The Ḥanafī School of Law

Al-Kāsānī (1982: 4/233) says:

If the *ijārah* is effected for a pack-animal (*dābbah*) stipulated by specifications and the pack-animal is delivered to the *musta’jir* (lessee) and it dies after he received it, the *ijārah* will not be void. The *mu’ajjir* (lessor) must replace it with another one for the lessee because the subject matter of the contract is not the particular animal which died. The contract is executed on the usufruct with future obligation and the pack-animal is not particularized.

2 *Istiḥsān* is a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing law (Kamali, 2007: 218).

In this passage, ‘pack-animal stipulated by specifications’ indicates that the type of *ijārah* here is AIMAD because the subject matter, the animal, is not a particular one; rather, it is specified with some specific features.

ii. The Mālikī School of Law

Ibn Juzay al-Kalbī (741 AH: 182), in *al-Qawānīn al-Fiqhiyyah*, says: Leases of boats and riding animals (*dābbah*) are of two types: a lease that particularizes a specific animal or a specific boat, and a lease in liability. For example, if somebody says, ‘I will hire an animal or a boat from you’ it is allowed to pay the compensation on the spot or on credit in both leases, and if the animal dies, the lease will be revoked. If the animal is in liability and not particularized, the lessor must replace it with another animal.

Replacing the dead animal with a new one is a condition of AIMAD because it is the *salam* of usufruct.

iii. The Shāfi‘ī School of Law

Al-Minhājī (1996) in his book ‘The Essentials of Contracts and Conditions’ mentions two types of *ijārah*:

- i. *Ijārah* of a tangible asset, such as rental of real estate or of a specific animal (or vehicle) to ride or carry goods, or the renting out of a particular person’s service to sew.
- ii. *Ijārah* of an assigned liability (AIMAD) such as rental of a car of certain specifications or guaranteeing someone on the performance of a service like sewing or construction.

If a person says: ‘I have employed you to do such-and-such,’ does it mean particularized *ijārah* or the commissioning of liability? There are two opinions regarding this question. The more obvious of the two is that it is particularized *ijārah* (al-Minhājī, 1996: 1/360). It is considered as such because the hirer has identified the worker he expects to produce the output.

iv. The Ḥanbalī School of Law

In *al-Furū'*, Ibn Muflīḥ (2003) classifies *ijārah* into three types:

- i. *Ijārah* of a corporeal asset which is similar to an item for sale. This is revocable if its future usufruct is impaired at the inception (of the contract) or while part of the period remains.
- ii. *Ijārah* as a liability to provide a generic item meeting certain specifications. For this, the specifications of *salam* must be fulfilled and should it be usurped or destroyed or a defect appear in it, a substitute is mandatory. However, if it becomes impossible to replace it, the hirer has the option to annul the contract. It automatically dissolves with the passage of [the appointed] time if its period of validity has been fixed.
- iii. A forward contract for a designated benefit, like tailoring, for which liability is undertaken. [The liability] must be precisely determined so as to eliminate potential conflict (Ibn Muflīḥ, 2003: 4/440- 441).

All these texts of classical Islamic Jurisprudence prove that the early Islamic scholars unanimously agreed on the legality of AIMAD.

*c. Opinions of Contemporary Scholars on the
Legality of AIMAD*

Contemporary scholars such as al-Būṭī (2007: 8), Abū Ghuddah (2007: 89), al-Qurah Dāghī (2008: 14), Nazīh Ḥammād (2007: 33), Yūsuf al-Shubaylī (2012: 4) and Ḥāmid Mīrah (2012: 8), among others, allow AIMAD. Throughout the review of contemporary writings, the researcher could not find any dispute among them on the legality of AIMAD. However, while dealing with the classical texts, they differ in their approaches on the opinions of classical *fuqahā* as to whether the classical *fuqahā* allowed AIMAD unanimously or not. Some contemporary scholars say that there was dispute among the classical *fuqahā* on the legality of AIMAD, whereas others opine that there was consensus among the classical *fuqahā*.

*i. The Dispute as Understood by
Some Contemporary Scholars and Its Refutation*

In this section, we will discuss whether there was any dispute among classical *fuqahā* on the legality of AIMAD as understood by some contemporary scholars and will refute if there was any misattribution to classical scholars. Nazīh Ḥammād (2007) and Aḥmad Naṣṣār (2009) mention disagreement among the four classical schools of Islamic Jurisprudence on the legality of AIMAD and attribute the view of illegality to the Ḥanafī School. Aḥmad Naṣṣār (2009: 102-103) states the following, although he does not mention any proof in support of his assertion:

The *fuqahā* differed on the legality of *al-ijārah al-mawṣūfah fī al-dhimmah*. Ḥanafī scholars prohibit leasing of usufruct of objects which are stipulated in liability and they require the leasing object to be particularized whereas the majority of the *fuqahā*, comprising the Mālikīs, Shāfi'īs and Ḥanbalīs, allow leasing of an object stipulated in liability and they considered it a type of *salam* in usufruct.

As for Abū Ghuddah (2007: 73), he does not mention the Ḥanafī view with regard to AIMAD at all. While discussing the legality of AIMAD, he states:

There is no need to mention the evidence for the legality of *ijārah mu'ayyanah* (particularized) because it is well known. As for *al-ijārah al-mawṣūfah fī al-dhimmah* (AIMAD), which Shāfi'ī and Ḥanbalī scholars consider valid, they did not provide proofs to support its legality in particular.

This statement indicates that Abū Ghuddah (2007) has a similar approach to Nazīh Ḥammād (2007) and Aḥmad Naṣṣār (2009). He also discusses the Mālikī viewpoint on some issues pertaining to AIMAD, but he does not discuss the Ḥanafī view at all, because he focuses only on those scholars who allow it.

Nazīh Ḥammād (2007) declares that the *fuqahā* varied in their opinions on the legality of *ijārah al-dhimmah* (lease in liability).

The majority of the *fuqahā*, including Mālikī, Shāfi'ī and Ḥanbalī, held the view of its legality; whereas the Ḥanafī scholars preferred the opinion that it is not permissible at all. This is because the particularization of the leased item is one of the conditions for the validity of the *ijārah* contract. Hence, any contract of the usufruct stipulated in liability which does not depend on any particular object is not allowed. In order to prove this view, Nazīh Ḥammād (2007) refers to *Majallat al-Aḥkām al-ʿAdliyyah*. It is mentioned therein that “*particularization of the leased item is required. Therefore, leasing one of two shops is not allowed unless one of them is particularized or specified*” (*Majallat al-Aḥkām al-ʿAdliyyah*, 1302 AH: 75, clause 449). In addition, it is mentioned in *Murshid al-Ḥayrān* (clause 580) that “*consent of both contracting parties and knowledge of the usufruct are made conditions for the legality of ijārah*” (*Murshid al-Ḥayrān ilā Maʿrifat Aḥwal al-Insān*, 1909: 146). Moreover, there is a principle in the Ḥanafī School that “*usufruct is not considered as a valuable asset*” (al-Sarakhsī, 2009: 15/137). Based on these texts, he concludes that Ḥanafī scholars do not allow AIMAD (Ḥammād, 2007: 328). His interpretation of these texts could be refuted as follows.

With regard to the *Majallat al-Aḥkām al-ʿAdliyyah* (1302 H), clause 449 means that the subject matter of the contract of hire must be specified. Consequently, if one of two shops is let out on hire without the particular shop in question being specified, and the lessee is given an option as to which one he will take, such a contract is considered invalid. Actually, this clause explains that the Ḥanafī School making one of two objects the source of the contracted usufruct without any specification or any distinction in the case of *ijārah muʿayyanah*. This case includes the *jahālah* (lack of information) and *gharar* (ambiguity and uncertainty) that must be removed from the subject matter in *ijārah muʿayyanah*. It is not related to the subject matter of AIMAD wherein *gharar* is removed by stipulating the necessary traits of the object. Since the counter-value will differ according to the qualities of the usufruct, it should be stipulated by specifications (Ḥāmid Mīrah, 2012: 9). The classical books of the Ḥanafī School denoted the legality of this type of *ijārah*; even *Majallat al-Aḥkām al-ʿAdliyyah* itself contains several clauses that explicitly prove the legality of AIMAD; such as clauses 466, 538, 540 and 541. Clause 540, for example, states:

If a bargain has been agreed to carry something to a certain place, and the animal becomes fatigued and stops on the way, the owner of the animal is bound to transfer such load onto another animal to carry it to the place in question (*Majallat*, 1302 H: 85, clause 540).

As for the clause of *Murshid al-Hayrān*, clause 580 means that consent of the two contracting parties, particularization of the subject matter, and knowledge of the usufruct in the way that does not lead to conflict are all required for the legality of AIMAD. The discussion on the clause of *Murshid al-Hayrān* is exactly the same as that in the *Majallah*. In addition, there are also several clauses mentioned in *Murshid al-Hayrān* itself that prove the legality of AIMAD such as clauses 580, 582, 598 and 616. Clause 598 states: “*if the musta’jir hires a riding animal not in particular (to carry his luggage to a specific place), he has the right to demand another animal*” (*Murshid al-Hayrān*, *Māddah*, 1909 AH: 152). The phrase ‘a riding animal not in particular’ means any animal stipulated by specifications.

Regarding the principle of the Ḥanafī School which states that usufruct is not considered property, those who attributed the prohibition of AIMAD to the Ḥanafī School derived the prohibition of usufruct stipulated in liability by specifications from this principle. Nevertheless, not all Ḥanafī scholars supported the principle. There are two views in the texts of the Ḥanafī School regarding whether usufruct is considered an asset or not. For example, al-Sarakhsī (2009: 15/137) said: “*This is according to the opinion which considers usufruct an asset, although it is not a particular object...while according to the [other] opinion, which does not consider usufruct an asset...*” This text signifies that usufruct is considered an asset to al-Sarakhsī. However, when an asset is used, it generally means an object. Ibn Māzah (2004: 4/11) reported: “*If anybody leases and hires, this is allowed, because ijārah is a business. Business is an exchange of one asset for another asset and usufruct is an asset.*” Hāmid Mīrah (2012) quotes Ibn Nujaym (n.d.: 2/217) on the contrary declaring:

وَالْمَالُ — كَمَا صَرَّحَ بِهِ أَهْلُ الْأُصُولِ — مَا يَمُوتُ وَيُذْخَرُ
لِلْحَاجَةِ، وَهُوَ خَاصٌّ بِالْأَعْيَانِ، فَخَرَجَ تَمْلِكُ الْمَنَافِعِ ...
لِأَنَّ الْمَنْفَعَةَ لَيْسَتْ بِعَيْنٍ مُتَقَوِّمَةٍ.

An asset, in the view of *usūl* scholars, is something that has financial value and can be saved for [future] need. This applies to tangible objects in particular; thus, the transfer of ownership of usufruct is excluded...because usufruct is not a tangible object to which a value can be attached.

By comparing these three texts, it can be concluded that Ḥanafī scholars considered the basic rule for usufruct to be that it is a non-valuable asset, but they excluded the usufruct of the *ijārah* contract (from being a valueless asset) regardless of whether it is *ijārah* of a particular object or usufruct in liability. In this case, they considered it a valuable asset as an exception and *khilāf al-qiyās* (contrary to analogical reasoning) (Ḥāmid Mīrah, 2012: 9). This view is supported by another fact that many Ḥanafī scholars such as al-Samarqandī (1984: 2/361), Ibn Māzah (2004: 7/509) and al-Humām (2000: 4/522), among others, explicitly reported the legality of AIMAD.

ii. Consensus as Understood by Other Contemporary Scholars

Monzer Qaḥf (2010), Sāmī al-Suwaylem (2010), Ḥāmid Mīrah (2012) and Yūsuf al-Shubaylī (2012), among others, stated that there is consensus among early *fuqahā* on the legality of AIMAD. For example, Monzer Qaḥf (2010: 41) states:

The four schools of Islamic jurisprudence agreed on the permissibility of AIMAD, and they do not look at the existence of the object as a condition at the time the contract is concluded, because it is similar to *salam* in terms of obligation on the basis that leasing a specific object attaches to the future date.

In this statement, Monzer Qaḥf reports the permissibility of AIMAD from the Ḥanafī School as well.

Sāmī al-Suwaylem (2010) comments, while discussing its legality according to the Ḥanafī School, that there is no deferment of leased object in this type of *ijārah* (AIMAD); rather, there is guarantee to change the object if it perishes (Hāmid Mīrah, 2012: 8). In this statement Sāmī al-Suwaylem (2010) is focusing on the strength of AIMAD rather than its legality by highlighting the guaranty aspect in case of any damage to the object.

Hāmid Mīrah (2012: 8) states:

The ruling on issuance of *Ṣukūk* for the usufruct of objects stipulated in obligation depends mainly on the resolution of the *fuqahā* with regard to *ijārah* of the usufruct of objects as stipulated in obligation; which the four schools of Islamic jurisprudence (Ḥanafī, Mālikī, Shafī'ī, and Ḥanbalī) generally agree upon.

In this statement, Hāmid Mīrah (2012) explicitly mentions a general agreement of the four schools on the legality of AIMAD. As long as there is no specific evidence or text conflicting with this general statement, AIMAD should be considered allowed by all the scholars including the Ḥanafīs.

Yūsuf al-Shubaylī (2012: 4) also made a similar statement:

All scholars generally opined that *ijārah* is permitted if either the subject matter is a particular item (particularized) or is described as a liability (forward). The attribution of prohibition of AIMAD to the Ḥanafī scholars is inaccurate; rather, the views mentioned in their classical books prove its legality.

iii. The Preponderant View of Classical Fuqahā

The preferred view on the notions of classical scholars on the legality of AIMAD is that there is consensus among the four Sunni schools on its legality. In fact, the Ḥanafī School seemed to be more flexible in this regard because the scholars did not require immediate payment

of the compensation before a period of time passes unlike the other schools which required immediate payment (Abū Ghuddah, 2007: 86; Monzer Qaḥf, 2010: 4/69).

VI. CONTEMPORARY RESOLUTIONS ON AIMAD

a. Resolutions of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)

AAOIFI referred to the AIMAD contract and permitted delayed payment in it, as mentioned in its Shari'ah Standard No. 9 pertaining to *ijārah* and *ijārah muntahiyah bi al-tamlīk* (*ijārah* terminated at ownership), Article 3, Point 5.

AAOIFI Article: An *ijārah* contract may be executed for an asset undertaken by the lessor to be delivered to the lessee according to accurate specifications, even if the asset so described is not owned by the lessor. In this case, an agreement is reached to make the described asset available during the duration of the contract, giving the lessor the opportunity to acquire or to produce it. It is not a requirement of this lease that the rental should be paid in advance as long as the lease is not executed according to the contract of *salam* (or *salaf*). If the lessee receives an asset that does not conform to the description, he is entitled to reject it and demand an asset that conforms to the description (AAOIFI, Shari'ah Standard No. 9, p. 142).

Discussion on the AAOIFI Article: It is noted that the AAOIFI standard differentiates on the basis of the wording of the contract; delayed payment is allowed if the contract is concluded by the wording of *ijārah* and its derivatives, whereas advance payment is mandatory if the contract is executed by the wording of *salam* or *salaf*. This differentiation does not conform to the purpose of the transaction and the intention of contracting parties. On this point, Aḥmad Naṣṣār (2009: 107-108) puts forward some observations in order to reconcile different opinions regarding advance payment in the contract of AIMAD as follows:

- i. If we consider permissibility of the delayed payment based on the wording, then which rules will we apply here? The rules for the lease of a particular object or the rules for AIMAD? This makes a difference since the rules differ.
- ii. If we consider permissibility of delayed payment, we will be involved in the prohibition of initiating the sale of debt for debt (*al-kāli' bi al-kāli'*).
- iii. The apparent meaning of the consideration of wording is that the consideration should be based on the intention of the contracting parties and that this should be deduced from their wording. However, if this intention is apprehended by custom (*'urf*), particularly in contemporary societies that rely upon documentation and authentication in order to clarify the transactions, that would be more helpful in understanding the transaction and the purpose of the contracting parties.

Aḥmad Naṣṣār (2009) raises these issues and calls for further research to settle them.

With regard to the above resolution of AAOIFI, this paper has already discussed that delayed payment is allowed in AIMAD regardless of whether the contract is executed by the wording of *ijārah* or *salam/salaf*.

Second, in response to the observation of Aḥmad Naṣṣār (2009), it can be stated that transactions do not differ on the basis of the wording of the contract because *al-'ibrah* (decisive factor) is not the wording but the meanings and objectives of the contract. The intention of the contracting parties may remain the same even if the wording of the contract differs. In addition, the argument for the impermissibility of sale of debt for debt is weak because the *ḥadīth* narrated is not authentic and no consensus is found in this regard (Aḥmad Naṣṣār, 2009: 83).

b. Resolutions of Bank Negara Malaysia

The Sharī'ah Advisory Council (SAC) of Bank Negara Malaysia (BNM) refers to the application of AIMAD for home financing under construction, and its use as a sub-contract of the hybrid financial product in Part 1 under Sharī'ah contracts and in Part 3 under hybrid products.

Resolutions:

1. The SAC, in its 68th meeting dated 24 May 2007, has resolved that the application of *ijārah mawṣūfah fī al-dhimmah* in financing for house under construction using *mushārah mutanāqishah* contract is permissible (BNM, 2010: 16).
2. The SAC, in its 68th meeting dated 24 May 2007, has resolved that the proposed house financing product based on *istiṣnā' muwāzī*, *ijārah mawṣūfah fī al-dhimmah* and *ijārah muntahiyah bi al-tamlīk* is permissible (BNM, 2010: 169).

Discussion on the Resolutions: In resolution (1), the SAC was asked to decide whether the application of AIMAD as a sub-contract in the product of home financing based on *mushārah mutanāqishah* is permissible. In resolution (2), the SAC was asked to decide whether the financing product for a house under construction based on these three contracts is permissible. However, the SAC does not mention this financing product based on *mushārah mutanāqishah* partnership (MMP) specifically; rather, the SAC mentions the product based on a hybrid mode compounded from the three contracts. The SAC's resolution also does not address some issues that might arise from this home financing product based on the hybrid mode, such as what will happen in the event of non-completion of the house? Who will be liable for the damage during construction? What will happen to the deposit paid by the customer?

VII. TAKYĪF Fiqhī (FIQH CHARACTERIZATION) OF AIMAD

The scholars differed in terms of the *takyīf fiqhī* of AIMAD. There are two opinions regarding this:

1. AIMAD is similar to *salam* because the subject matter in both AIMAD and *salam* is stipulated in liability. Shafi'ī and Ḥanbalī scholars preferred this opinion. According to them, the *salam* contract is for stipulated objects whereas AIMAD is for stipulated usufruct (BNM, 2010: 2/251). Thus, they looked at AIMAD as the *salam* of usufruct and referred its legality to the evidence for *salam* (al-Bahūtī, 1996: 4/28, 39; Abū Ghuddah, 2007: 71, 73).

They also suggested that the conditions for AIMAD should be exactly the same as the conditions of *salam*.

2. Others such as Ḥanafī scholars considered AIMAD similar to *ijārah* and that makes it in general a kind of *ijārah*. Based on this point of view, Ḥanafī scholars did not differentiate between AIMAD and *ijārah mu'ayyanah* (particularized) while discussing its legality. They discussed the legality of *ijārah* in general and mentioned different forms of *ijārah*, one of them being AIMAD. Thus, they looked at it as *ijārah* of usufruct and referred its legality to the evidence of the original *ijārah*. Hence, they applied the conditions of original *ijārah* in AIMAD. They are concerned about the wording of *ijārah* and any other words similar to it (Abū Ghuddah, 2007: 73-74).

Preponderant View:

Regarding the rules of AIMAD, the second view could be preferable. The reasons for this preference are as follows:

- i. Most of the scholars opined that AIMAD is executed by the wording of *ijārah* in addition to the wording of *salam* and *salaf*. If it is not a kind of *ijārah*, this wording cannot be used to execute the contract. However, if the same is applicable with regard to *salam* and *salaf*, this is because of the similarity between AIMAD and *salam* in terms of their execution procedure, albeit they are different in terms of the basic contract. This is why the classical *fuqahā* said that it must fulfill the *ṣifāt* (qualities/ conditions) of *salam*, but they did not exclude it from being *ijārah* (al-Bahūtī, 1996: 1/360, 2/251).
- ii. Some Ḥanbalī scholars opined that spot payment is not necessary in AIMAD if it is executed by the wording of *ijārah*. If AIMAD is not a kind of *ijārah*, it cannot be executed by such wording in the first place. In addition, the ruling of the same contract cannot be different merely based on the wording.
- iii. Most of the classical scholars discussed AIMAD in the chapter of *ijārah*, not in the chapter of *salam*.

VIII. IMPLICATIONS AND CONCLUSION

Even though the application of AIMAD has expanded to include some new types of transactions, its use has been limited because there is dispute among scholars with regard to the legality of AIMAD as some contemporary scholars mentioned disagreement among the early Muslim scholars thereon and attributed its prohibition to the Ḥanafī School. This paper has examined the legality of AIMAD, and it notes that the classical scholars of the four Sunni schools of Islamic law unanimously agreed on its legality. Some contemporary scholars have confusingly mentioned a dispute in this regard by attributing the prohibition of AIMAD to the Ḥanafī School. This attribution is not correct as proven by many classical texts of the Ḥanafī School.

With this finding, it is hoped that this paper will contribute towards promoting the innovation of new types of financial products based on AIMAD and in expanding its application to other types of financial services in the future. Moreover, by clearing up this misunderstanding, the paper attempts to increase public confidence in Islamic banking products based on the concept of AIMAD.

Nonetheless, this paper focuses only on the dispute of scholars with regard to the legality of AIMAD as reported by some contemporary scholars. There are some other related issues which are still not addressed—such as delayed payment and whether usufruct is a valuable asset. As such, further research is required so as to remove disputes and facilitate the application of this principle in the development of financial products. It is also recommended to carry out research on hybrid modes of financial services wherein the concept of AIMAD is already used such as *mushārah mutanāqishah* partnership (MMP), *istisnāʿ* and parallel *istisnāʿ* in order to investigate their validity.

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