

CONTRIBUTION OF MUFTĪ TAQI USMANI IN
IDENTIFYING RULINGS OF THE SALE CONTRACT
APPLIED IN SHARĪ‘AH COMPLIANT FINANCING
COMPARATIVE STUDY WITH COLLECTIVE IJTIHĀD

BY

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ABSTRACT

Shari'ah supervision in Islamic banking is provided through efforts of collective *ijtihad* made by renowned Shari'ah scholars and jurists around the world. Mufti Muhammad Taqi Usmani (b. 1943) is a globally recognized scholar who contributed to the development of Islamic banking through his various writings in three languages, his participation in the proceedings of Shari'a supervisory boards and suggesting amendment of banking laws, contract act and sale of goods act, and presenting a suggestion of a Shari'ah compliant sale of goods act. There are evidences which show that, despite his presence in the collective *ijtihad*, he took a different view or stand to the matters related to Islamic commercial transaction. This sort of Shari'ah heterogeneity has direct implication on the banking industry, and even hinder the process of Shari'ah harmonization. The study aims to present the contribution of Mufti Taqi in highlighting rulings of the sale contract (which represents almost 70% of financing application) besides his approach of dealing with transactional issues and contract operationalization. The study follows qualitative method with case study pattern to focus mainly on the contributions of a single jurists. The study applies descriptive and comparative research. The study refers to all the available writings of Mufti Taqi up to 2018 which are in Arabic, English and Urdu. The study divides contribution of Mufti Taqi into 5 chapters: formation of the contract and the contracting parties, subject of sale and the sale price, conditions and rescission option, sale contracts in Islamic bank, financing applied in Islamic, the findings and then conclusion. The study found that, by comparing 814 rulings (in the form of Shari'ah pronouncement (*fatwā*) or resolution) made by 24 different collective *ijtihad* bodies (e.g., Shari'ah supervisory boards or *fiqh* academies) against the writings of Mufti Taqi on the sale contract, there are 44 instances of Shari'ah heterogeneity which have commercial, financial, legal or risk implication. In 36% instances, the view taken by Mufti Taqi has more favourable implication against the view taken by collective *ijtihad*. The study found that Mufti Taqi takes into consideration *hājah* (needs), *urf* (customary practices) and socio-ethical standards while concluding an opinion on the sale. It was found that Mufti Taqi contributed to the concept of contract operationalization by defining concepts related to performance and status of the contract, highlighting cases of quasi contracts, rulings of disbursement to charity and special legal procedures (e.g., taking oath). The study offers few recommendations like conducting impact analysis of the Shari'ah heterogeneity, removing any cases of difference of opinion among the same body, issuance of standards or guidelines on the general rulings of the sale contract, relooking at translation of some Shari'ah terminology and conducting similar studies on the contribution of Mufti Taqi in the Ijāra, Mushāraka and Muḍāraba contracts.

خلاصة البحث

تعتمد أسس الرقابة الشرعية في المصارف الإسلامية على الجهود المبذولة من قِبل العلماء والفقهاء حول العالم فيما يمكن أن يطلق عليه: "الاجتهاد الجماعي". ويعتبر المفتي محمد تقي العثماني (مواليد ١٩٤٣م) من العلماء البارزين الذين أسهموا في تطوير المصرفية الإسلامية من خلال تأليفه كتباً متعددة المواضيع في هذا المجال وبلغات مختلفة، إضافة إلى المشاركة في أعمال هيئات الفتوى والرقابة الشرعية على مستوى العالم، وتقديم اقتراحات من أجل تعديل القوانين المصرفية وقانون العقد وقانون البيع، واقتراح صيغة متوافقة مع الشريعة الإسلامية لقانون البيع. وعلى الرغم من أن المفتي العثماني يمثل جزءاً مهماً في عملية اتخاذ قرارات الاجتهاد الجماعي؛ إلا أنه يتخذ في بعض الأحيان رأياً مخالفاً فيما يتعلق بالمعاملات التجارية الإسلامية، وقد يرى البعض أن في هذه الآراء المخالفة ما يؤثر سلباً على الصناعة المصرفية، وأنه قد يعكس بنتائج سلبية على مسيرة المواءمة الشرعية. لذا؛ فإن هذه الدراسة بعنوان (إسهامات المفتي محمد تقي العثماني في معرفة أحكام عقد البيع المطبق في التمويلات المتوافقة مع الشريعة الإسلامية - دراسة مقارنة مع الاجتهاد الجماعي)، تهدف إلى الوقوف على إسهامات المفتي العثماني المتعلقة بأحكام عقد البيع (الذي يمثل ٧٠٪ من التطبيقات التمويلية)، بالإضافة إلى إبراز النهج الذي يتبعه في قضايا المعاملات المالية وآلية تنفيذ العقود. تتبع الدراسة أسلوب البحث النوعي، مع دراسة حالة لإسهامات المفتي العثماني من خلال البحث الوصفي، والبحث المقارن، وقد اعتمدت الدراسة على جميع أعمال المفتي العثماني باللغة العربية، والإنجليزية، والأردنية التي صدرت حتى عام ٢٠١٦م في الوقوف على إسهامات المفتي العثماني. تقوم الدراسة بتقسيم إسهامات المفتي العثماني إلى خمسة فصول: إنشاء العقد والأطراف المتعاقدة، ومحل البيع وثن البيع، والشروط والخيارات، وعقود البيع في المصارف الإسلامية، والتمويلات المقدمة في المصارف الإسلامية، والنتائج، ومن ثمّ الخاتمة. وبعد مقارنة ٨١٤ حكم شرعي (سواء على شكل قرار أو فتوى) صادر عن ٢٤ جهة اجتهاد جماعي مختلفة (سواء هيئات الفتوى والرقابة الشرعية أو الجامع الفقهي)، إضافة لمؤلفات المفتي العثماني، خلصت الدراسة إلى أنه توجد ٤٤ حالة اختلاف شرعي في قضايا المعاملات المالية لها أثر تجاري، أو مالي، أو قانوني، أو متعلق بالمخاطرة. وقد ظهر أنه في ٣٦٪ من هذه الحالات، يكون موقف المفتي العثماني ذو أثر إيجابي من الموقف الذي اتخذته الاجتهاد الجماعي. كما أظهرت الدراسة أن المفتي العثماني يأخذ الحاجة، أو العرف، أو المعايير الاجتماعية والأخلاقية بالاعتبار عند إقرار حكم فقهي متعلق بعقد البيع. وأظهرت الدراسة أن المفتي العثماني ساهم في توضيح مفهوم سير تنفيذ العقود من خلال التعريف بمفاهيم متعلقة بتنفيذ وحالة العقد، وإبراز حالات العقود المشابهة، وذكر أحكام صرف الأموال في الخيارات وبعض الإجراءات القانونية الخاصة (مثل أخذ اليمين). وقدّمت الدراسة بعض المقترحات؛ مثل: إجراء دراسات تحليل الأثر الميداني للتباين الشرعي، وإزالة أية حالات تباين في الحكم الشرعي الصادر من ذات الجهة، وإصدار معايير أو موجهات لأحكام عامة لعقد البيع، والنظر في ترجمة بعض المصطلحات الشرعية، وإجراء دراسات مماثلة لإسهامات المفتي العثماني في عقود الإجارة، والمشاركة، والمضاربة.

APPROVAL PAGE

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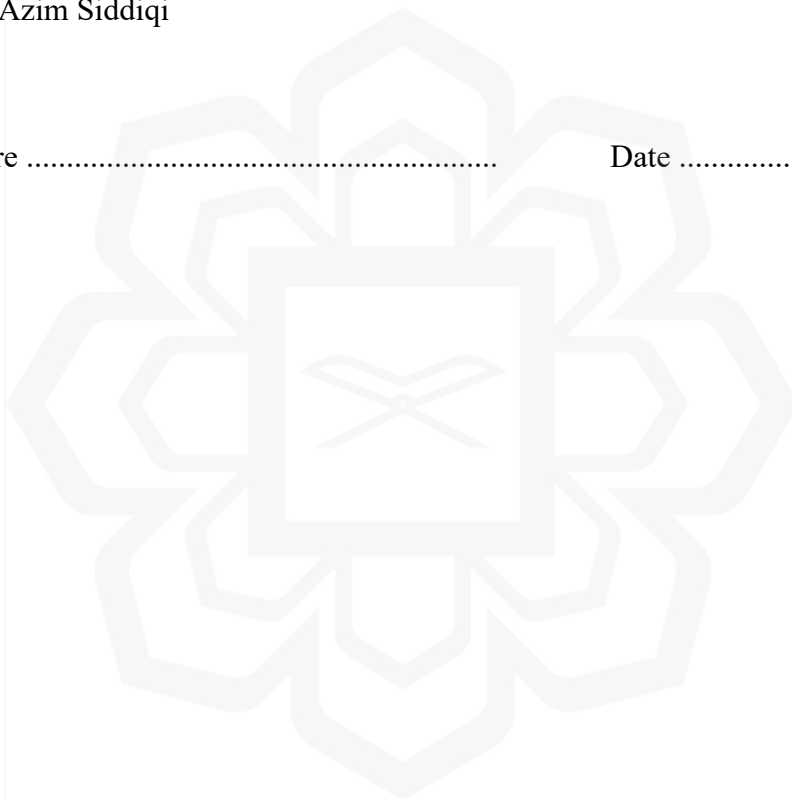
DECLARATION PAGE

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Yousuf Azim Siddiqi

Signature

Date



INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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Dedicated to

*My Parents- Mr. (Late) Aleem Ahmad Siddiqi and Mrs. Naheed Siddiqi
for nurturing in me love of scholars and admiration of Arabic since my childhood*

*My Brothers – Eng. Ahmad Viqar and Eng. Abdullah Siddiqi
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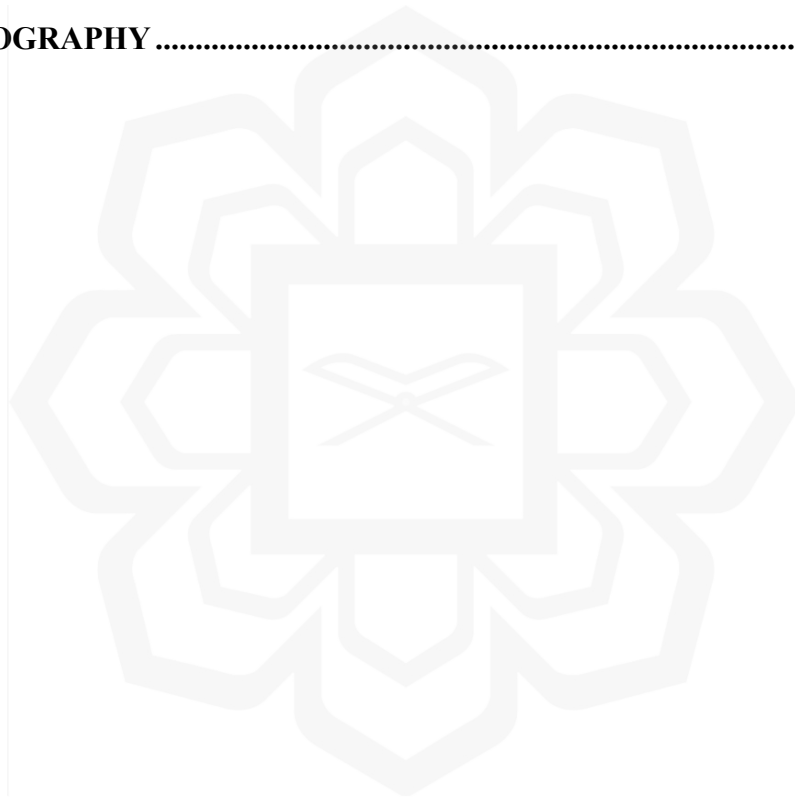
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