



## The Application of *Ijtihâd Takhrîj* in Contemporary Sharia Business

Panji Adam Agus Putra

Universitas Islam Bandung

Correspondence Email: [panjiadam@unisba.ac.id](mailto:panjiadam@unisba.ac.id)

### Keywords:

*Tâkhrîj; Ijtihad;  
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### Abstract

This research aims to elaborate on the concept of *ijtihâd takhrîj*, which was introduced by scholars to address evolving contemporary legal issues. It also seeks to analyze the application of *ijtihâd takhrîj* in the field of *mu'âmalah mâliyyah* or Islamic economic law. The approach used in this research is a normative juridical approach. This research is classified as a literature study and uses secondary data. The results of the study indicate that: first, *ijtihâd takhrîj* is crucial for realizing the efforts of *ijtihâd* to solve legal issues, including Islamic economic law, which is continuously developing; and second, in practice, *ijtihâd takhrîj* is applied to address contemporary legal issues in *mu'âmalah mâliyyah* activities. Some applications of *ijtihâd takhrîj* in contemporary sharia business such as law of commercial insurance, intellectual property rights, issues of inflation, law on giving discounts, law of travel checks, law of savings deposits, credit and debit cards, buying and selling via social media, law of compensatory payments in transactions, and Sharia-Based Financial Technology Peer-To-Peer Lending.

### Kata Kunci:

*Tâkhrîj; Ijtihad;  
Bisnis Syariah  
Kontemporer*

### Abstrak

Penelitian bertujuan untuk menguraikan konsep *ijtihâd takhrîj* yang diperkenalkan oleh para ulama untuk menjawab isu-isu hukum kontemporer yang terus berkembang. Penelitian juga berusaha menganalisis penerapan *ijtihâd takhrîj* dalam bidang *mu'âmalah mâliyyah* atau hukum ekonomi Islam. Pendekatan yang digunakan dalam penelitian adalah pendekatan yuridis normatif. Penelitian tergolong penelitian kepustakaan dan menggunakan data sekunder. Hasil penelitian menunjukkan bahwa: pertama, *ijtihâd takhrîj* sangat penting untuk merealisasikan upaya *ijtihâd* dalam menyelesaikan persoalan hukum, termasuk hukum ekonomi syariah yang terus berkembang; dan kedua, dalam praktiknya, *ijtihâd takhrîj* diaplikasikan untuk menjawab persoalan-persoalan hukum kontemporer dalam kegiatan *mu'âmalah mâliyyah*. Beberapa aplikasi *ijtihâd takhrîj* dalam bisnis syariah kontemporer seperti hukum asuransi komersial, hak atas kekayaan intelektual, masalah inflasi, hukum pemberian diskon, hukum cek perjalanan, hukum tabungan giro, kartu kredit dan kartu debit, jual beli melalui media sosial, hukum pembayaran ganti rugi dalam transaksi, dan Financial Technology Peer-To-Peer Lending Berbasis Syariah.

## INTRODUCTION

In addressing contemporary legal challenges, Muslims frequently turn to *ijtihad* (research and interpretation of Islamic law by scholars) to formulate legal perspectives that align with Islamic principles in a modern context.<sup>1</sup> Islamic scholars and intellectuals engage in the understanding of the fundamental values and principles of Islam, intending to address complex and novel legal issues that arise in the contemporary era. *Ijtihad* represents a method of determining legal rulings based on scriptural evidence, namely Qur'an and Hadith, through the method of *istinbâth* (derivation of law). *Ijtihad* is employed to ascertain laws that are not explicitly detailed in the Qur'an and Hadith.<sup>2</sup>

*Ijtihad* constitutes a pivotal element of Islamic law. Through *ijtihad*, Islamic legal experts (*mujtahid*) endeavor to address the challenges posed by changing times, ensuring that Islamic law can adapt and remain relevant in the face of evolving circumstances.<sup>3</sup> Methodologically, *ijtihad* serves as a solution for the continuity of Islamic law at every stage. However, the door to *ijtihad* was closed at the end of the 3rd century Hijri, marking the beginning of a period of stagnation among Muslims. This resulted in scholars being reluctant to offer their views, fearing that their opinions might differ from established schools of thought, especially concerning contemporary legal issues.

Islamic legal experts posit that an enhanced understanding and mastery of *ijtihad* is imperative for the formulation of decisions pertaining to the discovery and establishment of laws.<sup>4</sup> Similarly, in the domain of economic transactions (Islamic economic law), legal principles that regulate these activities are necessary.<sup>5</sup>

One of the methods of *ijtihad* employed by scholars to address legal issues, including contemporary economic and business matters, is the concept of *ijtihad takhrîj*. *Ijtihad takhrîj* represents a significant branch of the *ushul fiqh* (principles of Islamic jurisprudence), offering a valuable avenue for scholars, researchers, students, and fatwa experts to identify and establish rulings on contemporary cases. The concept of *ijtihad takhrîj* emerged due to the difficulty and rarity of producing absolute mujtahids (independent jurists) like the great imams of the past, although it is not impossible. Thus, to ensure the continuity of Islamic law across different times and places, *ijtihad takhrîj* allows scholars in every era to address and resolve emerging issues.

It is imperative that contemporary business issues be addressed progressively to prevent legal voids. Consequently, *ijtihad* plays a pivotal role in solving a multitude of problems, particularly in domain of business law. *Takhrîj ijtihad* represents one of the

<sup>1</sup> Asep Supriatna, "Perkembangan Fikih Dalam Era Digital: Kajian Terhadap Metode Ijtihad Dalam Memahami Masalah Kontemporer," *As-Syar'i: Jurnal Bimbingan Dan Konseling Keluarga* 6, no. 1 (2024): 719, <https://doi.org/10.47467/as.v6i1.5478>.

<sup>2</sup> Joni Zuhendra, "Fresh Ijtihad Sebagai Upaya Dalam Meretas Tertutupnya Pintu Ijtihad (Studi Perkembangan Hukum Islam Pada Masa Kontemporer)," *Al-Qanun: Jurnal Pemikiran Dan Pembabaran Hukum Islam* 26, no. 1 (2023): 84, <https://doi.org/10.15642/alqanun.2023.26.1.83-95>.

<sup>3</sup> Muannif Ridwan Herdiansyah, Sri Hidayanti, "Ijtihad Kontemporer Perspektif Yusuf Al-Qardhawi (Studi Kitab Al-Ijtihad Fi Asy-Syari'ah Al-Islamiyyah)," *Jurnal Indragiri Penelitian Multidisiplin* 2, no. 2 (2022): 98, <http://dx.doi.org/10.58707/jipm.v2i2.212>.

<sup>4</sup> Nurul Rahmania dan Syamsuri Imam Kamaluddin, "Implementasi Qowaidh Fiqhiyyah Pada Bagi Hasil Perbankan Syariah Melalui Akad Musyarakah, Al-Muamalat," *Jurnal Ilmu Hukum & Ekonomi Syariah* 8, no. 2 (2022): 113, <http://repo.unida.gontor.ac.id/2688/>.

<sup>5</sup> Panji Adam, "Penerapan Sad Al-Dzarf'ah Dalam Transaksi Muamalah," *Jurnal Istiqro: Jurnal Hukum Islam, Ekonomi Dan Bisnis* 7, no. 1 (2021), <https://doi.org/10.30739/istiqro.v7i1.669>.

methodologies employed by scholars to achieve contemporary *ijtihad*.

In light of those as mentioned earlier, this research project aims to elucidate the concept of *ijtihad takhrîj*, as proposed by scholars, as a means of addressing contemporary legal issues that continue evolving with time. Furthermore, the research seeks to examine the application of *ijtihad takhrîj* in contemporary Sharia business.

## RESEARCH METHODS

This research employs a normative juridical approach, which involves examining and analyzing secondary data, thus constituting a type of library study. The objective of the application in this research is to provide theoretical examples that are not based on empirical field data. The primary sources for this research are Islamic legal literature related to the concept of *takhrîj*. The secondary sources include various literatures. As the study focuses on Islamic law, the data sources for this research are the Quran, Hadith, and Fatwas, whether from individual scholars or collective bodies—especially those focusing on contemporary *fiqh muamalah*. As this research employs a qualitative data analysis method, statistical data calculations are not required.

## RESULTS AND DISCUSSION

### The Concept of *Ijtihad Takhrîj*

Etymologically, the word *takhrîj* is a form of the root "*kharaja-yakhruju-takhrîj*," which linguistically means to extract or separate from a part or group. Another meaning is production, which carries a connotation of generating metaphorical and tangible meanings.

Terminologically, the definition of *takhrîj* is explained by scholars with varied expressions. Ibn Taimiyah,<sup>6</sup> al-Mawardi, and Ibn Badran (from the Hanbali scholars) provide the following definitions of *takhrîj*:

وَأَمَّا التَّخْرِيجُ فَهُوَ نَقْلُ حُكْمٍ مَسْأَلَةٍ إِلَى مَا يُشْبِهُهَا وَالتَّسْوِيَةُ بَيْنَهُمَا فِيهِ

"Transferring a legal issue to another similar one by equating the two."

The definition of *takhrîj* mentioned above is similar to the definition of *qiyâs* or analogy. Ibn Farhun,<sup>7</sup> provides the following definition of *takhrîj*:

"إِسْتِخْرَاجُ حُكْمٍ مَسْأَلَةٍ مِنْ مَسْأَلَةٍ مَنصُوصَةٍ"

"Extracting the ruling of a question from a prescribed question"

Sheikh 'Ali Jum'ah<sup>8</sup> provides the following definition of *takhrîj*:

"إِسْتِخْرَاجُ حُكْمٍ مَسْأَلَةٍ لَيْسَ فِيهَا حُكْمٌ مَنصُوصٌ مِنْ مَسْأَلَةٍ مَنصُوصَةٍ"

"Deriving the legal ruling for an issue that does not have a specific textual ruling from another issue that does."

Sheikh 'Alawi al-Saqaf,<sup>9</sup> ('Alawi Ibn Ahmad Ibn 'Abd al-Rahman al-Syafi'i al-Makki) and Sheikh Muhammad Riyadh define *takhrîj* with different approaches, namely deductive and inductive approaches. Sheikh 'Alawi al-Saqaf provides the following definition of *takhrîj*:

<sup>6</sup> Ali Taimiyyah, *Al-Muswaddah Fî Ushûl Al-Fiqh* (Beirut: Dar al-Kitab al-'Arabi, n.d.).

<sup>7</sup> Ibn Farhun al-Maliki, *Kasyf Al-Naqâb Al-Hâjib Fî Musthalab Ibn Al-Hâjib* (Rabath: Dar al-Gharaib al-Islami, 1990).

<sup>8</sup> Ali Jum'ah Muhammad Abd Al-Wahab, *Al-Madkhal Ilâ Dirâsah Al-Madzâhib Al-Fiqhiyyah* (Kairo: Dar al-Salam, 2001).

<sup>9</sup> Alawi Al-Saqaf, *Fawâ'id Al-Makkiyyah* (Riyadh: Maktabah al-Rusyd, 1984).

"التَّخْرِيجُ أَنْ يَنْقُلَ فُقَهَاءُ الْمَذْهَبِ الْحُكْمَ مِنْ نَصِّ إِمَامِهِمْ فِي صُورَةٍ إِلَى صُورَةٍ مُتَشَابِهَةٍ"

"The jurists of the madhhab apply the opinion (legal ruling) of their imam to another issue due to the similarity between them."

As for Sheikh Muhammad Riyadh,<sup>10</sup> he provides the following definition of *takhrîj*:

"إِنَّ التَّخْرِيجَ أَنْ يَنْظَرَ مُجْتَهِدُ الْمَذْهَبِ فِي مَسْأَلَةٍ غَيْرِ مَنْصُوصٍ عَلَيْهَا فَيَقْيِسُهَا عَلَى مَسْأَلَةٍ مَنْصُوصٍ عَلَيْهَا فِي الْمَذْهَبِ"

"The jurist of the madhhab analyzes issues that do not have specific legal rulings in their madhhab by drawing analogies with issues that do have established rulings within their madhhab."

It can be understood from the various terminologies of *takhrîj* mentioned above, as conveyed by Sheikh Yaqub al-Bahasin,<sup>11</sup> in his book "*al-Takhrîj 'Inda al-Fuqahâ wa al-Ushûliyyîn*," that *takhrîj* encompasses several aspects, including: 1) *Takhrîj* will lead to the principles and rules established by the imams as foundations that interact with the legal rulings in the *fiqh* issues derived from them; 2) Generally, *takhrîj* returns all *fiqh* differences to the foundational principles; 3) Sometimes, *takhrîj* aligns with its usage among the jurists, meaning the interpretation of texts resulting in limited rulings (*al-istinbâth al-muqayyad*). This involves explaining the imam's opinion on partial issues that lack specific texts and linking them to similar issues or measuring them using certain principles within the *madhhab*; 4) Occasionally, jurists expand the meaning of *takhrîj* to include the reasoning of *'illat* (legal rationale) or projecting the opinions quoted from the imams and explaining their sources by investigating the legal rationale established by the imam. This allows for the interpretation of new issues.

From the definitions explained, it is clear that *takhrîj* is fundamentally based on the view that the opinions of the imam of the madhhab are to be considered essential (*ashl [ushul]*) by the mujtahid of the madhhab in determining the legal status of new issues that do not yet have established rulings. New issues are considered as branches (*furu'*) similar to the process of *qiyâs* (analogy); the difference is that the *ashl* in *qiyâs* is derived from the Qur'an and/or the Sunnah, whereas the *ashl* in *takhrîj* is opinion of imam of the madhhab. This can relate to the substance of opinion (*aqwâl/ara* [known as adhering to a madhhab in a *qaulî* manner]) or to the principles and/or reasoning methodology (known as adhering to a madhhab in a *manhajî* manner). Therefore, the analogy in *takhrîj* is not called *qiyâs*, but is termed *ilhâq*.<sup>12</sup>

To correctly and accurately carry out the *takhrîj* process, it is necessary to fulfill the principles of *takhrîj* outlined by the scholars of *ushul* so that the legal derivation process can be conducted effectively. The components (pillars) established by scholars of *ushul* for the *takhrîj* process are as follows: 1. *Al-Mukharrij*: The person performing *takhrîj*. 2. *Al-Asl al-Mukarraj 'alaih*: The foundation connected to the branch issue. 3. *Al-Far' al-Mukharraj a'la*

<sup>10</sup> Muhammad Riyadh, *Ushûl Al-Fatâwâ Wa Al-Qadhâ Fî Al-Madzâhib Al-Mâlikî* (Maroko: Matkabah al-Mathba'ah, 1996).

<sup>11</sup> Ya'qub Al-Bahsain, *Al-Takhrîj 'Inda Al-Fuqahâ Wa Al-Ushûliyyîn* (Riyadh: Maktabah al-Rusyd, 1994).

<sup>12</sup> Musfir Ibn 'Ali Ibn Muhammad al-Qahthani, *Manhaj Istinbâth Al-Abkâm Al-Nawâzil Al-Fiqhiyyah Al-Mu'âbirah* (Jeddah: Dar al-Andalus al-Khadra', 2010).

*al-Asl*: The new issue related to the original issue. 4. *Kaifiyyah al-Takhrîj*: The rules and procedures for conducting *takhrîj*.<sup>13</sup>

### Principles of *Takhrîj*

The principles of *takhrîj* can be divided into two primary categories: those concerning the subject matter and those pertaining to the individual performing the *takhrîj*. The first category encompasses principles related to the object of *takhrîj*, namely, the issue whose legal status is to be determined from a Shariah perspective. The second category focuses on the qualifications and knowledge required of the person undertaking the *takhrîj*.<sup>14</sup>

Regarding the principles related to the object of *takhrîj*, it is essential to note that *takhrîj* should not be applied to matters that have already been explicitly addressed in the Qur'an or Sunnah. Such issues are considered explicit (*wudhûh*) and do not necessitate further elaboration.

Turning to the principles concerning the person performing *takhrîj*, the individual must thoroughly understand the *fiqh* principles of their chosen madhhab, including the various opinions and interpretations within that school of thought. Additionally, a comprehensive grasp of *ushul fiqh*, particularly the intricacies of *qiyas*, is indispensable.

Furthermore, the person engaged in *takhrîj* must identify the sources of scholars' opinions and their methods of *istinbâth*. This includes understanding the connection between the new legal ruling and the underlying principles of the madhhab, encompassing *ushul fiqh*, its rules, *fiqh*, and its principles.

A deep understanding of the issues related to differences in *fiqh* (*al-fawâriq al-fiqhiyyah*) and new issues (*furu'*) is crucial for the person performing *takhrîj*. This knowledge enables them to accurately determine the legal status of these matters from a Shariah perspective.

Moreover, mastering the external factors that influence Islamic law and the various branches of *fiqh* is another essential principle in the practice of *takhrîj*. The person must be cognizant of factors that could potentially undermine the validity of *takhrîj* or affect a legal ruling through abrogation, specification, or restriction. A thorough understanding of these factors can be achieved by referring to discussions in *ushul fiqh*.

### History of the Development of *Takhrîj al-Furû' 'Alâ al-Ushûl*

The evolution of the science of *takhrîj al-furû' 'alâ al-ushûl* unfolded in parallel with the advancement of *ushul fiqh*. This is based on the premise that *takhrîj al-furû' 'alâ al-ushûl* is an application of *ushul fiqh*, which serves as the foundation in the process of *ijtihâd* and *istinbâth al-ahkâm* (derivation of legal rulings). The early scholars engaged in *ijtihâd* using methods they deemed to be accurate. These methodologies were subsequently adopted by the students and followers of these early scholars, thereby establishing a school of thought

<sup>13</sup> Ahmad Fauwaz Fadzili Noor Naemah Abdul Rahmani & Muhammad Ikhlas Rosele, "Takhrîj Methodology and Its Application Based On Minhâj Al-Talibîn Book: A Review," *Journal of Fatwa Management and Research | Jurnal Pengurusan Dan Penyelidikan Fatwa* 9, no. 1 (2017): 65, <http://doi.org/10.12816/0050565>.

<sup>14</sup> Ibn Amir al-Haj, *Al-Taqrîr Wa Al-Tabbîr* (Kairo: Maktabah al-Nashr, 2014).

(madhhab) in Islamic law that was based on the concepts formulated by the imams of the madhhab.

The history of the development of *takhrîj al-furû' 'alâ al-ushûl* can be viewed from two distinct perspectives. The initial perspective regards *takhrîj al-furû' 'alâ al-ushûl* as an integral aspect of *ijtihâd* and the process of legal discovery, independent of any particular madhhab. The second perspective regards *takhrîj al-furû' 'alâ al-ushûl* as a distinct scientific field that examines the process of *istinbâth al-ahkâm* (legal discovery) through the principles of *ushul fiqh* established by the imams of the madhhab. The practice of *takhrîj al-furû' 'alâ al-ushûl* has been an integral aspect of *ijtihâd*, operating independently of any particular madhhab of *fiqh*. It has existed concurrently with the advent of *ushul fiqh*. This is due to some *ijtihâd* conducted by Islamic legal experts since the Prophet Muhammad. However, it has not yet been conceptualized and structured in academic forms such as written books.

However, from the second perspective, which views *takhrîj al-furû' 'alâ al-ushûl* as a specific science that considers the legal causes (*'illat*) and methodologies developed by particular madhhabs, it can be said to have emerged after the first book of *ushul fiqh*, *al-Risâlah* by Imam al-Shafi'i. The argument is that *takhrîj al-furû' 'alâ al-ushûl* requires the presence of *ushul fiqh* principles as its foundational basis.

Although the study of *takhrîj al-furû' 'alâ al-ushûl* originated with the Shafi'i madhhab, the written documentation of this field began relatively late, around the 6th century Hijri, with the publication of the book *Takhrîj al-furû' 'alâ al-ushûl* by Imam al-Zanjani. This book is regarded as the earliest to elucidate the methodologies of *ushul fiqh* and the derived branches, employing specific principles. It also addresses debates on disparate opinions and arguments from various madhhabs of *fiqh*.

The delay in the development of the science of *takhrîj* can be attributed to the writing style of *ushul fiqh* adopted by Shafi'i scholars, which separates *ushul* (principles) from *furu'* (branches) (the method of al-Shafi'iyyah al-Mutakallimin). This style of writing impacted the development of written works on *takhrîj al-furû' 'alâ al-ushûl* because their writings focused on the formation and reinforcement of legal rulings without providing examples and applications of the principles. This delayed the development of *takhrîj* writings until the difficulty in linking *furu'* (branches) to their *ushul* (principles) was recognized, which presented challenges during *ijtihâd*. Consequently, writings were produced on how to connect *furu'* to the *ushul*, thus giving rise to the science of *takhrîj al-furû' 'alâ al-ushûl*.

Given the significance of *takhrîj al-furû' 'alâ al-ushûl* in conducting *istinbâth* within specific madhhabs, scholars from various schools of thought have authored books dedicated to this subject. Each book possesses unique characteristics in terms of the topics it covers.

Among the notable works specifically addressing *takhrîj al-furû' 'alâ al-ushûl*<sup>15</sup> is *Kitab Al-Takhrîj Al-Furû' 'Alâ Al-Ushûl* by Imam al-Zanjani. This pioneering text, one of the earliest and most influential in the field, elucidates the principles of *ushul fiqh* employed in the Shafi'i madhhab and their application in deriving branch rulings (*furu'*). A distinctive feature

<sup>15</sup> Ridzwan Bin Ahmad dan Ahmad Zakirullah Bin Mohamed Shaarani, "Takhrîj Al-Furu' 'ala Al-Usul Dalam Pengisbatan Hukum Syarak: Sorotan Sejarah Hukum Islam," *Jurnal Al-Tamaddun* 12, no. 2 (2017): 94–95, <http://doi.org/10.22452/JAT.vol12no2.7>.



of this book is its organization according to the chapters of *fiqh*, setting it apart from other *takhrîj* texts that are typically arranged based on the chapters and titles of *ushul fiqh*. Additionally, *Kitab Al-Takhrîj Al-Furû' 'Alâ Al-Ushûl* serves as a valuable comparative work between the Shafi'i and Hanafi madhhabs.

Another significant work, *Kitab Tamhîd Fî Takhrîj Al-Furû' 'Alâ Al-Ushûl*, was authored by Jamal al-Din Abi Muhammad 'Abdul Rahim bin al-Hassan al-Isnawi. Published approximately a century after Imam al-Zanjani's work, this book distinguishes itself by focusing exclusively on the Shafi'i madhhab. It provides a comprehensive explanation of the *ushul* methods utilized by the Shafi'i school, the branch rulings derived from them, and the various opinions and narratives within the Shafi'i tradition pertaining to these rulings.

While *Kitab Miiftâh al-Wushûl Fî Binâ al-Furû' 'Alâ al-Ushûl* by Imam al-Syarif Abi 'Abdullah Muhammad bin Ahmad, al-Maliki, al-Tilmisani, is relatively concise, it is considered a primary reference in the study of *takhrîj al-furû' 'alâ al-ushûl*, particularly within the Maliki madhhab. Although fundamentally a book of *ushul fiqh*, it incorporates examples of each *ushul* method discussed, leading scholars to classify it as a work on *takhrîj al-furû' 'alâ al-ushûl*.

*Kitab al-Qawâ'id wa al-Fawâ'id al-Ushûliyyah*, authored by Hanbali scholar Abu al-Hassan Alaaddin bin Muhammad bin Abbas al-Ba'li al-Hanbali, also known as Ibn al-Lahham, presents a unique approach. While it may not cover as many titles and *ushul fiqh* methods as other *takhrîj* books, it stands out by providing numerous branch rulings (*furu'*) for each method discussed. This feature renders it particularly useful for those studying the field of *takhrîj al-furû' 'alâ al-ushûl*.

### Types of *Ijtihâd Takhrîj*

Scholars categorize *takhrîj* into three types: *takhrîj al-ushûl 'alâ al-furû'*, *takhrîj al-furû' 'alâ al-ushûl*, and *takhrîj al-furû' 'alâ al-furû'*. The details of these three types of *ijtihâd takhrîj* are as follows:

#### 1. *Takhrîj Al-Ushûl 'Alâ Al-Furû'*

Scholars define *takhrîj al-ushûl 'alâ al-furû'* as follows:

"لِعِلْمِ الَّذِي يَكْشِفُ عَنْ أَصُولِ وَقَوَاعِدِ الْأَيْمَةِ مِنْ خِلَافِ فُرُوعِهِمُ الْفِقْهِيَّةِ  
وَتَعْلِيلَاتِهِمْ لِلْأَحْكَامِ"

"The science that uncovers the *ushul* (principles) and methodologies of the madhhab imams through the branches of *fiqh* and the determination of their legal causes ('illat)."

According to al-Qahthani, *takhrîj al-ushûl 'alâ al-furû'* explains the opinion of an independent mujtahid in terms of how legal rulings (*istinbâth al-ahkâm*) are derived, their sources, and the method of their extraction:<sup>16</sup> Al-Qahthani describes the *takhrîj* performed by Abu Ya'ala al-Farra, a scholar from the Hanbali madhhab, in his book al-'Uddah. Abu Ya'ala proposed a methodological

<sup>16</sup> Musfir Ibn 'Ali Ibn Muhammad al-Qahthani, *Manhaj Istimbâth Al-Ahkâm Al-Nawâzil Al-Fiqhiyyah Al-Mu'âbirah*.

framework for resolving new issues requiring legal status determination in terms of shariah, which includes: 1. Explaining Imam Ahmad Ibn Hanbal's opinion on *ushuliyah* (principles of fiqh); 2. Determining if Imam Ahmad's opinion was based on linguistic approaches (*'ibârah al-nass, isyârah al-nass, dilâlah al-nass, or iqtidhâ al-nass*); 3. Identifying the source of Imam Ahmad's opinion from earlier scholars, such as the Companions or the Tabi'in; 4. Examining how the opinion was derived, considering both the substance (*matan*) and the transmitters, and reviewing the ushul and fiqh principles used.<sup>17</sup>

Using this framework, Abu Ya'ala addressed the new issues presented to him. The methodological approach employed by Abu Ya'ala in relation to new problems (*nawâzil*) that require legal status determination highlights that a deep understanding of *fiqh, ushul fiqh*, and the principles of the imams of the madhhab will:<sup>18</sup> 1. Strengthen the *mujtahid takhrîj* in performing *takhrîj* by understanding the strength of the evidence used; 2. Help the *mujtahid takhrîj* recognize the relationship between *fiqh* branches, understand the legal causes (*'illat*), and align these with the branches narrated from the madhhab imams; 3. Reinforce the conclusions of the *mujtahid takhrîj* on branch issues not covered by the opinions of independent *mujtahids*, align them with the principles and *ushul*, or find a more authoritative view.

This first type of *takhrîj* offers several benefits, including: first, the interaction between this knowledge and the principles of the imams helps *mujtahids* facing contemporary issues to weigh different opinions and choose the most superior (*râjih*) based on these principles; second, this knowledge serves as a tool to identify the correlation between *fiqh* branches, investigate and explain the legal causes (*'illat*), and align these with the existing branch rulings, leading to concrete understanding and adaptation of the branches narrated from the imams to their *ushul*; third, with this knowledge, a scholar can draw conclusions by performing *takhrîj* on problems and branches lacking explicit texts, addressing new incidents and cases in line with the *takhrîj* principles or finding a more authoritative opinion; fourth, this type of *takhrîj* introduces the *mujtahid* to the sources and references used by scholars in deriving legal rulings (*istinbâth al-ahkâm*) and their *ushul ijtihâd*, aiding in understanding the reasons for differing juristic opinions<sup>19</sup>

## 2. *Takhrîj al-Furû' 'Alâ al-Ushûl*

Scholars explain that *takhrîj al-furû' 'alâ al-ushûl* refers to:<sup>20</sup>

صَمُّ الْفُرُوعِ الْحَادِثَةِ الَّتِي لَمْ يُنَصَّ عَلَيْهَا إِلَى أَصُولِ أُمَّةِ الْمُجْتَهِدِ وَإِدْخَالَهَا فِي مِزَانِهَا

<sup>17</sup> Musfir Ibn 'Ali Ibn Muhammad al-Qahthani.

<sup>18</sup> Hasanudin, *Metodologi Istinbath Dalam Penerbitan Fatwa DSN-MUI* (Bandung: Hasanudin, Metodologi Istinbath Dalam Penerbitan Fatwa DSN-MUI (Bandung: Pusat RISKALIKBANG Fatwa DSN-MUI dan Simbiosis Rekatama Media, 2024).

<sup>19</sup> Meirison Desmadi Saharuddin dan Rosdialena, "Takhrîj Fikih Dan Permasalahan Kontemporer," *Al-Istinbath: Jurnal Hukum Islam* 5, no. 1 (2020): 56, <https://doi.org/10.29240/jhi.v5i1.1235>.

<sup>20</sup> Hasanudin, *Metodologi Istinbath Dalam Penerbitan Fatwa DSN-MUI* (Bandung: Pusat RISKALIKBANG Fatwa DSN-MUI dan Simbiosis Rekatama Media, 2017).



قَوَاعِدِهِمْ"

"Referring new issues (*furu'*) that do not have established rulings in the views of the *madhhab* imams back to the methodology (*ushul* and principles) of the independent imam's *ijtihad*, and incorporating them under the principles used by the imam."

Ya'qub al-Bahasin, in his book "*al-Takhrîj 'Inda al-Fuqahâ wa al-Ushûliyyîn*," defines *takhrîj al-furû' alâ al-usûl* as follows:<sup>21</sup>

الْعِلْمُ يَبْحَثُ عَنِ الْعِلَلِ أَوْ مَأْخِذِ الْأَحْكَامِ الشَّرْعِيَّةِ لِرَدِّ الْفُرُوعِ إِلَيْهَا بَيَانًا لِأَسْبَابِ الْخِلَافِ أَوْ لِبَيَانِ حُكْمِ مَا لَمْ يَرِدْ بِشَأْنِهِ نَصٌّ عَنِ الْأَيْمَةِ بِإِدْخَالِهِ ضِمْنَ قَوَاعِدِهِمْ وَأُصُولِهِمْ"

"The science that discusses the legal causes (*'illat*) or the instances where shariah rulings are determined, in order to refer new issues (*furu'*) back to them by explaining the reasons for differing opinions, or to clarify the rulings of issues that do not have established opinions from the *madhhab* imams, thereby placing them under the principles of *fiqh* and *ushul*."<sup>22</sup>

Utsman Ibn Muhammad al-Akhdar Syusyan, in his book "*Takhrîj Al-Furû' Alâ Al-Usûl*," explains that *takhrîj al-furû' alâ al-usûl* means:

"الْعِلْمُ الَّذِي يُعْرِفُ بِهِ اسْتِعْمَالُ الْقَوَاعِدِ الْأُصُولِيَّةِ فِي اسْتِنْبَاطِ الْأَحْكَامِ الشَّرْعِيَّةِ الْعَمَلِيَّةِ مِنْ أَدْلَتِهَا التَّفْصِيلِيَّةِ"

"The science through which the application of *ushuliyyah* principles in deriving shariah legal rulings, practical (*amaliyyah*) matters, is understood from detailed evidences."

Among the benefits of the science of *takhrîj al-furû' alâ al-ushûl* are as follows: First, it enhances mastery of *fiqh* and trains students in *istinbâth* (derivation), *tarjîh* (weighing evidence), and developing issues following the evidences obtained; second, enables an Islamic legal expert to understand what they study and research in *fiqh* books deeply; third, produces *ushul* knowledge from its theoretical aspects, derived practically and applicably in the field as fruits emerging from the principles of *ushul* and even *fiqh* principles; fourth, serves as a reference for researchers in addressing contemporary issues in making shariah decisions. The legal outcomes in facing various issues may differ depending on the method of *istinbâth* and the cases encountered by the *fuqaha'* in the *furu'* they derive. This results in diverse *fiqh* rulings; and fifth, one of the benefits of *takhrîj* is that it supports the *mujtahid*'s opinion in deriving consistent legal rulings on contemporary issues, enriching the methods used by the *fuqaha*.<sup>23</sup>

<sup>21</sup> Al-Bahsain, *Al-Takhrîj 'Inda Al-Fuqahâ Wa Al-Ushûliyyîn*.

<sup>22</sup> Utsman Ibn Muhammad al-Akhdar Syusyan, *Takhrîj Al-Furû' Alâ Al-Usûl* (Riyadh: Dar al-Thayyibah, 1998).

<sup>23</sup> Meirison Meirison et al., "Moderasi Islam Dalam Kesenjangan Gender (Komparasi Terhadap Agama Yahudi Dan Nasrani)," *Jurnal Al-Ijtima'iyyah* 6, no. 1 (2020): 1, <https://doi.org/10.22373/al-ijtima'iyyah.v6i1.5510>.

### 3. *Takhrîj al-Furû' 'Alâ al-Furû'*

According to al-Qahthani,<sup>24</sup> *takhrîj al-furû' 'alâ al-furû'* refers to:

"جاء أتباع المذاهب إلى استنباط آراء أئمتهم في أحكام التّوازل المعاصرة والوقائع الجديدة بناءً على ما يُشبهها أو يشترك معها في علة مماثلة من خلال تلك الفروع المنصّوبة للأئمة والمبتوتة في كتبهم الفقهية"

"The scholars who follow the madhhab perform legal derivation (*istinbâth*) using the method employed by the mujtahid of the madhhab. They use the *istinbâth* methodology of their imam to address new issues or incidents that did not occur during the imam's lifetime, considering the similarities or legal causes (*'illat*) based on the branches (*furu'*) previously addressed by their imam, as documented in their fiqh books."

According to Ya'qub al-Bahasin,<sup>25</sup> *takhrîj al-furû' 'alâ al-furû'* refers to:

"العلم الذي يتوصل به إلى التعرف على آراء الأئمة في المسائل الفرعية التي لم يرد عنهم فيها نص، بإلحاقها بما يُشبهها في الحكم عند اتّفاقها في علة ذلك الحكم عند المُخرج أو بإدخالها في عُمومات نُصّوبه أو مفاهيمها أو أخذها من أفعاله أو تفريراته."

"The science that generates knowledge about the opinions of the imams on branch issues (*furu'*) that do not have explicit textual evidence from them by connecting it with similar legal rulings when both share the same legal cause (*'illat*). It can also be aligned within the generality of the imam's statements or understanding, or derived from their actions or approvals."

### Application of *Takhrîj al-Furû' 'Alâ al-Ushûl* in Contemporary Mu'âmalah Mâliyyah

Classical scholars have performed extensive *ijtihâd* during their lifetimes. This practice began with the generation of scholars from the Prophet's Companions, the Tabi'in scholars, and subsequent generations, who explored legal rulings concerning *muamalah mâliyyah* (Islamic economic law) transactions that occurred.

When a case in *muamalah mâliyyah* activities arises, and there is no precedent from previous or contemporary scholars, contemporary scholars often look for similar cases discussed by classical scholars. These cases can be a foundation for analogies between contemporary and classical *fiqh* cases. If there are similarities or commonalities between the two cases, the ruling for the contemporary case is aligned with the ruling for the classical case. This practice is known among *fiqh* and *ushul fiqh* experts as *takhrîj al-furû' 'alâ al-ushûl*, or often simply as *ijtihâd* "*takhrîj*."

In this research, the author attempts to examine and analyze contemporary *muamalah* cases to determine their legal status using the *takhrîj al-furû' 'alâ al-ushûl* method. Some contemporary issues analyzed based on this *takhrîj* method include:

<sup>24</sup> Musfir Ibn 'Ali Ibn Muhammad al-Qahthani, *Manhaj Istinbâth Al-Abkâm Al-Nawâzil Al-Fiqhiyyah Al-Mu'âbirah*.

<sup>25</sup> Al-Bahsain, *Al-Takhrîj Inda Al-Fuqahâ Wa Al-Ushûliyyîn*.

## 1. Commercial Insurance (*al-Ta'mîn al-Tijârî*)

One of the contemporary transaction contracts that did not exist previously (before the 14th century CE) and lacks established fiqh rulings is the issue of commercial insurance, known in contemporary terms as *al-ta'mîn al-tijârî*. Previously, there were no scholarly opinions on the insurance ruling, except for the opinion of Ibn 'Abdin from the Hanafi madhhab, who prohibited commercial marine insurance.

Islamic scholars differ in their opinions regarding the ruling on commercial insurance. According to al-Qahthani, there are at least two (2) divergent views on the legal status of commercial insurance from a *fiqh* perspective. Here are the opinions of scholars on this matter:

*"Contemporary scholars have differing opinions (khilâf) on the legal status of insurance. First, some scholars prohibit insurance. Among those who prohibit it argue by analogy (qiyâs) to qimâr (gambling, as it involves the transfer of risk); or they consider insurance as a contract containing gharar (uncertainty) because it is speculative in nature. Others permit it by performing takhrîj, analogizing it with the contract of muwâlah (a loyalty contract involving mutual assistance) and 'aqilah (compensation [diyat] for unintentional murder)."*

## 2. Intellectual Property Rights (*Haq al-Ta'lîf wa al-Thab' wa al-Nashr*)

These rights did not have established rulings among classical scholars. In the past, reproducing works was not prohibited; however, with the advent of the printing press in Europe, publishers gained extraordinary profits while the original creators received little material benefit.<sup>26</sup>

According to al-Qahthani,<sup>27</sup> contemporary scholars have differing opinions regarding intellectual property rights (i.e., copyrights). Here are the opinions of contemporary scholars on intellectual property rights:<sup>28</sup>

*وَهُوَ مِنَ الْحُقُوقِ الَّتِي لَمْ يَسْبِقْ فِيهَا حُكْمٌ لِلْفُقَهَاءِ الْأَوَائِلِ. وَقَدْ اِخْتَلَفَ الْفُقَهَاءُ الْمُعَاصِرُونَ فِي حُكْمِهِ بِنَاءً عَلَى اِخْتِلَافِهِمْ فِي تَخْرِيجِهِ وَتَكْيِيفِهِ أَيَّضًا: فَمِنْهُمْ مَنْ أَنْبَتَ هَذَا الْحَقَّ قِيَّاسًا عَلَى الْمَصْنُوعَاتِ لِأَنَّ الْكِتَابَ مُؤَلَّفٌ مَصْنُوعٌ، وَمِنْهُمْ مَنْ خَرَجَهُ قِيَّاسًا عَلَى مَا وَرَدَ فِي الْفِقْهِ الْحَنْفِيِّ بِشَأْنِ (التَّرْوِيلِ عَنِ الْوِظَائِفِ بِمَالٍ). وَمِنْهُمْ مَنْ لَمْ يُنْبِتْ هَذَا الْحَقَّ تَخْرِيجًا عَلَى مَصْلَحَةِ تَرْوِيجِ الْفِكْرِ الْإِسْلَامِيِّ وَتَخْرِيبِهِ مِنْ كَافَّةِ الْقِيُودِ."*

*"The legal status of intellectual property rights is not found in the opinions of classical scholars. Contemporary scholars have differing views on intellectual property rights from the aspects of tayîf and takhrîj. Some argue that intellectual property rights should be recognized as the creator's property, with the basis for takhrîj being qiyâs (analogy), comparing*

<sup>26</sup> Meirison et al., "Moderasi Islam Dalam Kesetaraan Gender (Komparasi Terhadap Agama Yahudi Dan Nasrani)."

<sup>27</sup> Musfir Ibn 'Ali Ibn Muhammad al-Qahthani, *Manhaj Istîbâth Al-Abkâm al-Nawâzil al-Fiqhiyah al-Mu'âbirah*.

<sup>28</sup> Musfir Ibn 'Ali Ibn Muhammad al-Qahthani.

*intellectual property to manufactured goods (items created by humans) because a book is created by its author. Another opinion acknowledges intellectual property rights as the creator's property, with the basis for takhrîj being qiyâs on the permissibility of selling business premises (an-nuzûl 'an al-wadzâif bimâl) or trading routes, provided the seller has the right to sell them. The final opinion recognizes intellectual property rights as the creator's property, with the basis for takhrîj being the public interest in promoting Islamic thought and freeing it from all restrictions."*

In Indonesian law, intellectual property rights receive legal protection in legislation and in the fatwas of the Indonesian Ulema Council (MUI). According to MUI Fatwa No. 1/MUNAS VII/MUI/5/2005 on the Protection of Intellectual Property Rights, several legal provisions regarding intellectual property rights are explained. Firstly, in Islamic law, intellectual property rights are considered one of the *huquq mâliyyah* (property rights) that receive legal protection (*ma'sun*) similar to *mâl* (wealth). One of the substantial points in the fatwa explains that intellectual property rights can be the object of a contract (*al-maqud 'alaih*), whether it is a *muawadhah* contract (exchange, commercial), a *tabarru'at* contract (non-commercial), and can also be endowed (*waqf*) and inherited.

### 3. The Issue of Inflation (*al-Tadhakum*)

One application of *takhrîj al-furû' 'alâ al-ushûl* is determining the legal status of inflation (*al-tadhakum*). Regarding this, al-Qahthani explains that contemporary scholars have differing opinions on this matter:

"وَبَعْضُ الْفُقَهَاءِ خَرَجَهَا قِيَاسًا عَلَى الْجَائِحَةِ كَمَا عِنْدَ شَيْخِ الْإِسْلَامِ ابْنِ تَيْمِيَّةَ رَحِمَهُ اللَّهُ، حَيْثُ قَالَ: إِذَا انْقَصَتِ الْمَنْفَعَةُ فَإِنَّهُ يُنْقَصُ مِنَ الْأُجْرَةِ بِقَدْرِ مَا نَقَصَتِ الْمَنْفَعَةُ. نَصَّ عَلَى هَذَا الْإِمَامُ أَحْمَدُ بْنُ حَنْبَلٍ وَعَيْرُهُ. فَيُقَالُ: كَمْ أُجْرَةُ الْأَرْضِ مَعَ حُصُولِ الْمَاءِ الْمُتَعَادِ؟ فَيُقَالُ أَلْفٌ دِرْهَمٍ. وَيُقَالُ: كَمْ أُجْرَتُهَا مَعَ نَقْصِ الْمَطَرِ هَذَا النَّقْصِ؟ فَيُقَالُ خَمْسِمِائَةٌ دِرْهَمٍ. فَيَحْطُّ عَنِ الْمُسْتَأْجِرِ نِصْفُ الْأُجْرَةِ الْمُسَمَّاةِ فَإِنَّهُ تَلَفَ بَعْضُ الْمَنْفَعَةِ الْمُسْتَحَقَّةِ بِالْعَقْدِ مِثْلَ التَّمَكُّنِ مِنْ اسْتَيْفَانِهَا. فَهُوَ كَمَا لَوْ تَلَفَ بَعْضُ الْمَبِيعِ قَبْلَ التَّمَكُّنِ مِنْ قَبْضِهِ."

*"Contemporary scholars have differing opinions regarding the depreciation of money (inflation). Sheikh al-Islam Ibn Taimiyyah conveys the opinion of Imam Ahmad Ibn Hanbal, who stated that a decrease in benefit results in a decrease in the ujah (wage) that the mu'jir (lessor) is entitled to receive. It is explained that Ahmad Ibn Hanbal was asked about the ujah for land utilized by taking a specific cubic amount of water. Imam Ahmad answered: the ujah is 1000 dirhams. Then he was asked again about the ujah to be paid when the quantity of water decreased by half. Imam Ahmad responded that the ujah is 500 dirhams (half) due to the reduced benefit received by the musta'jir (lessee). Ibn Taimiyyah analogized inflation (al-tadhakum) with crop blight (ja'ihah) in agricultural-livestock endeavors,*

stating that both blight and inflation are risks (*khatar*). Blight is a risk in agriculture-livestock, and inflation is a financial risk."

#### 4. The Ruling on Giving Discounts

Based on *takhrīj*, the subsequent ruling is the provision of discounts merchants give to their consumers. According to Khalid Ibn Abdullah al-Muslih<sup>29</sup> the ruling on discounts given by merchants to consumers is permissible. This is based on *takhrīj* with the case of selling goods below market price. Here is the excerpt regarding the ruling on giving discounts:

"حُكْمُ التَّخْفِيزِ الْعَادِيِّ: هُوَ حَسْمٌ مِنْ سِعْرِ السَّلْعِ وَالْخِدْمَاتِ يُمْنَحُهُ الْبَاعَةُ لِلْعُمَّلَاءِ لِتَرْغِيْبِهِمْ فِي الشَّرَاءِ مِنْهُمْ... هُوَ فِي الْحَقِيقَةِ بَيْعٌ لِلْسَّلْعِ أَوْ الْخِدْمَاتِ بِأَنْقَصَ مِنْ سِعْرِ السُّوقِ، وَذَلِكَ جَائِزٌ لَا حَرَجَ فِيهِ، وَهَذَا بِنَاءً عَلَى الْقَوْلِ بِأَنَّهُ يَجُوزُ الْبَيْعُ بِأَقْلَ مِنَ السَّعْرِ السَّائِدِ فِي السُّوقِ".

"The ruling on regular discounts: a discount is a reduction in the price of goods and services given by the seller to the consumer to attract them to buy the products... In essence, a discount is selling goods or services at a price lower than the market price. The ruling is that it is permissible, and there is no harm in it. This ruling is based on *takhrīj* from the opinion that permits selling goods at a price lower than the market price."

#### 5. The Ruling on Traveler's Checks

Sa'ad Ibn Turki al-Khatlan, in his book "*Ahkâm al-Awraq al-Tijâriyyah Fî al-Fiqh al-Islâmî*"<sup>30</sup> applies *takhrīj* to traveler's checks by analogizing them with the classical scholars' discussion of *suftajah*. He states that:

"وَأَمَّا التَّخْرِيجُ الْفَقْهِيُّ لِلشَّيْكِ السِّيَاحِيِّ فَأَقْرَبُ مَا يُمَكِّنُ تَخْرِيجَ الشَّيْكِ السِّيَاحِيِّ عَلَيْهِ مَا يُسَمَّى بِالسَّفْتَجَةِ، وَقَدْ سَبَقَ تَعْرِيفُهَا بِأَنَّهَا (مُعَامَلَةٌ مَالِيَّةٌ يُفْرَضُ فِيهَا إِنْسَانٌ قَرْضًا لِآخَرَ فِي بَلَدٍ لِيُوفِيَهُ الْمُقْتَرِضُ، أَوْ نَائِبُهُ أَوْ مَدِينُهُ فِي بَلَدٍ آخَرَ) وَأَنَّ فَائِدَتَهَا: السَّلَامَةُ مِنْ خَطَرِ الطَّرِيقِ، وَالشَّيْكَاتِ السِّيَاحِيَّةِ: شَيْكَاتٌ تَصُدِّرُهَا الْمَصَارِفُ وَالْمُؤَسَّسَاتُ لِمَصْلَحَةِ الْمَسَافِرِ عَلَى فُرُوعِهَا أَوْ مُرَاسِلِيهَا فِي الْخَارِجِ لِيَحْضَلَ الْمَسَافِرُ عَلَى قِيَمَتِهَا بِمَجَرَّدِ عَرْضِهَا لِلْوَفَاءِ لَدَى أَيِّ فَرْعٍ، أَوْ لَدَى أَحَدِ مُرَاسِلِي الْمَوْسَسَةِ أَوْ الْمَصْرِفِ الْمَصْدِرِ، وَفَائِدَتُهَا: السَّلَامَةُ مِنْ خَطَرِ الطَّرِيقِ، وَمِنْ هُنَا يَظْهَرُ النَّشَابَةُ الْكَبِيرُ بَيْنَ السَّفْتَجَةِ وَالشَّيْكَاتِ السِّيَاحِيَّةِ فِي تَعْرِيفِهَا وَفَائِدَتِهَا وَالْعَرْضِ مِنْهَا، بَلْ يُمَكِّنُ أَنْ يُقَالَ إِنَّ الشَّيْكَاتِ السِّيَاحِيَّةِ مَا هِيَ إِلَّا سَفْتَجَةٌ".

"The *fiqh* analogy for traveler's checks is very close to *suftajah*. *Suftajah* is defined as a financial transaction where someone borrows a sum of money in one country so that the borrower, their representative, or a third party indebted to the borrower can repay the loan in another country. The purpose is for the fund owner to be safe from dangers during the journey

<sup>29</sup> Khalid Ibn Abdullah Al-Muslih, *Al-Hawâfiẓ Al-Tijâriyyah Al-Taswîqiyyah Wa Ahkâmuhâ Fî Al-Fiqh Al-Islâmî* (Damman: Dar Ibn al-Jauzi, 2005).

<sup>30</sup> Sa'ad Ibn Turki Al-Khatlan, *Ahkâm Al-Awraq Al-Tijâriyyah Fî Al-Fiqh Al-Islâmî* (Riyadh: Dar Ibn al-Jauzi, 2017).

between the two countries. A traveler's check is a check issued by a bank or financial institution for the benefit of someone who will be traveling. It stipulates that branches and correspondent banks of the issuing bank will provide the funds to the traveler holding the check, simply by presenting the check to the branch or correspondent bank. The purpose of the traveler's check is to ensure the fund owner's safety from dangers during the journey between the two countries. Thus, it is very clear that there are similarities between *suftajah* and traveler's checks, both in definition, function, and purpose. It can even be said that a traveler's check is essentially *suftajah*."

#### 6. **Wadâ'î al-Mashrifīyah (Savings Deposits)**

*Wadâ'î al-Mashrifīyah* is defined by scholars as follows:

"الْوَدَائِعُ الْمَصْرِفِيَّةُ بِأَنَّهَا: الْمَبَالِغُ الَّتِي يَضَعُهَا صَاحِبُهَا فِي الْمَصْرِفِ، وَيَجُوقُ لَهُ سَخْبُهَا فِي أَيِّ وَقْتٍ شَاءَ، سِوَاءَ كَانَ السَّحْبُ نَقْدًا، أَوْ عَن طَرِيقِ اسْتِعْمَالِ الشَّيْكَاتِ، أَوْ أَوَامِرِ التَّحْوِيلَاتِ الْمَصْرِفِيَّةِ لِعَمَلَاءِ آخَرِينَ"

"A sum of money deposited (saved) by its owner (customer) with the bank, and the customer has the right to withdraw it at any time, either in cash, using a check/ATM, or through a bank transfer order to another customer.<sup>31</sup>

Contemporary Islamic scholars, who are part of the Fiqh division of the OIC, the Muslim World League division, and AAOIFI (Accounting Auditing Organization for Islamic Financial Institutions) in their Shariah Standards, have performed *takhrīj* on the case of funds deposited in the form of savings and current accounts with a *qardh* contract. This is due to the similarities between them, where one party hands over a sum of money, the second party receives the money for consumption or investment purposes, and the second party will return the equivalent amount.

'Ala al-Din Za'tari in his book "*Fiqh al-Mu'âmalât al-Mâliyyah al-Muqâran: Shiyâghah Jadîdah wa Amsalah Mu'âshirah*,<sup>32</sup>" explains as follows:

"الْوَدَائِعُ الْمَصْرِفِيَّةُ بِأَنَّهَا: الْمَبَالِغُ الَّتِي يَضَعُهَا صَاحِبُهَا فِي الْمَصْرِفِ، وَيَجُوقُ لَهُ سَخْبُهَا فِي أَيِّ وَقْتٍ شَاءَ، سِوَاءَ كَانَ السَّحْبُ نَقْدًا، أَوْ عَن طَرِيقِ اسْتِعْمَالِ الشَّيْكَاتِ، أَوْ أَوَامِرِ التَّحْوِيلَاتِ الْمَصْرِفِيَّةِ لِعَمَلَاءِ آخَرِينَ."

"The deposit products (current accounts/savings) offered by both Islamic and conventional banks are considered *qardh* contracts from a *fiqh* perspective, as the bank guarantees the deposited funds and is obligated to return the funds when the customer needs them (on call)."

<sup>31</sup> Mahmud Abd al-Karim Ahmad Arsyid, *Al-Syâmil Fî Mu'âmalât Wa 'Amaliyyât Al-Mashârif Al-Islâmiyyah* (Yordania: Dar al-Nafais, 2007).

<sup>32</sup> 'Ala al-Din Za'tari, *Fiqh Al-Mu'âmalât Al-Mâliyyah Al-Muqâran: Shiyâghah Jadîdah Wa Amsalah Mu'âshirah* (Damaskus: Dâr al-'Ashamâ, 2010).



Similarly, Rafiq Yunus al-Mishri,<sup>33</sup> believes that funds deposited as savings in a bank (*wadâ'î al-mashrifīyyah*) are more accurately viewed as a *qardh* contract. He states:

"إِذَا كَانَتْ الْوَدِيعَةُ مِنَ النُّقُودِ، وَاسْتَحْدَمَهَا الْوَدِيعُ، انْقَلَبَتْ قَرْضًا مَضْمُونًا بِذِمَّتِهِ، وَمِنْ هُنَا فَإِنَّ الْوَدَائِعَ الْمَصْرِفِيَّةَ هِيَ قُرُوضٌ، لِأَنَّ الْمَصْرِفَ مَاذُونٌ بِاسْتِعْمَالِهَا حَسَبَ النُّظْمِ وَالْأَعْرَافِ".

"If the *wad'ah* contract involves money as the deposited object, and the depositor requests the recipient to manage the deposit, then the *wad'ah* contract changes to a *qardh* (loan) contract, which becomes the responsibility of the recipient. From this, it can be understood that money deposited in Islamic Financial Institutions is considered *qardh* assets because Islamic Financial Institutions are licensed to use them according to the regulations and customs that apply in these institutions."

In the context of implementing Islamic financial products, *wada'i mashrafi* is the implementation of fund collection products such as savings. This is further regulated by the fatwa of the National Sharia Council of the Indonesian Ulama Council (DSN-MUI) No. 2 on Savings.

## 7. Credit and Debit Cards

AAOIFI (Accounting Auditing Organization for Islamic Financial Institutions), in their Shariah Standards for "Credit and Debit Cards," has performed *takhrīj* on the case of buying gold with debit and credit cards, aligning it with the resolution of the OIC Fiqh division on the case of transferring account balances being considered as *qabdh hukmi* (constructive possession). The *takhrīj* reads as follows:<sup>34</sup>

يَجُوزُ شِرَاءُ الذَّهَبِ أَوْ الْفِضَّةِ أَوْ النُّقُودِ بِبِطَاقَةِ الْحَسَمِ الْفَوْرِيِّ، كَمَا يَجُوزُ ذَلِكَ بِبِطَاقَةِ الْإِئْتِمَانِ وَالْحَسَمِ الْأَجَلِ فِي الْحَالِ الَّتِي يُمَكِّنُ فِيهَا دَفْعُ الْمَوْسَسَةِ الْمُصَدِّرَةِ الْمَبْلَغَ إِلَى قَابِلِ الْبِطَاقَةِ بِدُونِ أَجَلٍ. مُسْتَنَّدٌ: إِنَّ الشَّرَاءَ بِبِطَاقَةِ الْحَسَمِ الْفَوْرِيِّ فِيهِ تَقَابُضٌ حُكْمِيٌّ مُعْتَبَرٌ شَرْعًا، فَإِذَا تَسَلَّمَ الْمُشْتَرِي الذَّهَبَ أَوْ الْفِضَّةَ أَوْ الْعُمَلَاتِ الْمُشْتَرَاةَ، وَاسْتَحْدَمَ الْبِطَاقَةَ وَوَقَعَ عَلَى قَسِيمَةِ الدَّفْعِ لِحِسَابِ الْجِهَةِ الْقَابِلَةِ لِلْبِطَاقَةِ حَصَلَ الْقَبْضُ الْحُكْمِيُّ، تَخْرِيجًا عَلَى قَرَارِ مَجْمَعِ الْفِئْهِ الْإِسْلَامِيِّ الدَّوْلِيِّ الَّذِي نَصَّ عَلَى أَنَّ الْقَيْدَ الْحِسَابِيَّ يُعْتَبَرُ قَبْضًا حُكْمِيًّا، قَرَارٌ (رَقْمٌ 4-53) وَبِذَلِكَ يَتَحَقَّقُ الشَّرْطُ الشَّرْعِيُّ لِلتَّعَامُلِ بِالْبِطَاقَةِ فِي شِرَاءِ الذَّهَبِ أَوْ الْفِضَّةِ أَوْ الْعُمَلَاتِ وَهُوَ التَّقَابُضُ".

"It is permissible to buy gold, silver, and foreign currency with debit and credit cards in conditions where the issuing financial institution can transfer the funds to the seller's account without any delay. The legal basis for this statement is that the purchase using a debit card constitutes an immediate transfer of funds in a constructive sense (*hukmi*). This is considered

<sup>33</sup> Rafiq Yunus al-Mishri, *Bahûts Fî Fiqh Al-Mu'âmalât Al-Mâliyyah* (Damaskus: Dar al-Maktabi, 2009).

<sup>34</sup> Erwandi Tarmizi, *Metode Ijtihad Muamalat Kontemporer* (Bogor: PT Berkas Mulia Insani, 2023).

*legitimate according to shariah. If the buyer receives gold, silver, or foreign currency and uses a debit card and signs the payment receipt issued by the seller, a constructive transfer of ownership occurs. This is based on the ruling by the International Islamic Fiqh Academy, which states that account transfers can be considered equivalent to constructive possession, as outlined in decision No. 53 (4/6)."*

The idea of using a Sharia card in Indonesia emerged in early 2003. Since then, the discourse on the use of Sharia cards has undergone lengthy debates. These lengthy debates have occurred both in theory and practice. From a theoretical perspective, many argue that Sharia cards tend to encourage excessive behavior (*israf*), leading Muslims to become more consumptive, wasteful, and accustomed to debt. However, opinions also suggest that if the tendency towards *israf* is controlled, it can be managed effectively. To provide legal certainty and Sharia guidelines in practical application, the National Sharia Council issued Fatwa No: 54/DSN-MUI/X/2006 concerning Sharia Cards. Therefore, Sharia credit card products in Islamic financial institutions must comply with this fatwa.

#### **8. Buying and Selling via Social Media**

Selling goods that are in stock through social media is analogized by some fiqh researchers to *bai' al-ghâib 'alâ al-shifah*, which means selling goods that are not present at the contract meeting or not directly witnessed, even if the meeting is held. The ruling on conducting online transactions returns to the ruling on *bai' al-ghâib 'alâ al-shifah* as explained by classical scholars. According to the Shafi'i madhhab, this type of sale is invalid because it involves *gharar* (uncertainty). However, according to most scholars from the Hanafi, Maliki, and Hanbali madhhabs, this type of sale is valid because the default ruling in transactions is permissibility unless evidence prohibits it. The element of *gharar* in online transactions is considered minor and does not affect the contract's validity.<sup>35</sup>

#### **9. The Ruling on Penalties in Transactions (*Gharâmah Mâliyyah*)**

An example of applying *ijtihad takhrîj al-furû' 'alâ al-ushûl* in the context of Islamic economic and financial law in Indonesia is the decision of the National Sharia Council-Indonesian Ulama Council (DSN-MUI) regarding penalties (*gharâmah mâliyyah*). Financial penalties are one form of sanction among other types. Muhammad al-Zuhaili undertook *ijtihad* regarding financial penalties (*ta'zîr*) in relation to contemporary financial transactions, as it is closely related to Islamic criminal law (*fiqh jinayah*). Muhammad al-Zuhaili,<sup>36</sup> introduced ten types of *ta'zîr* that could be considered for implementation, including: (1) flogging (lash) penalties, (2) detention (imprisonment) penalties, (3) exile, (4)

<sup>35</sup> Tarmizi.

<sup>36</sup> Muhammad Al-Zuhaili, *Nadẓaiyyat Al-Fiqhiyyah* (Damaskus: Dar al-Qalam, 1993).

crucifixion penalties, (5) reprimands, (6) ostracism (including employment termination), (7) rebuke penalties (including blacklisting), (8) probation, (9) public shaming (announcement in the media), and (10) reduction of rights (e.g., salary reduction).

The National Sharia Council-Indonesian Ulama Council (DSN-MUI) issued two fatwas regarding financial penalties: Fatwa No. 17/DSN-MUI/IX/2000 on Penalties for Able Customers who Delay Payment, and Fatwa No. 123/DSN-MUI/XI/2018 on the Use of Funds that Cannot be Recognized as Revenue for Islamic Financial Institutions (LKS), Islamic Banking Services (LBS), and other Islamic financial services. The substance of the DSN-MUI fatwas permits financial penalties, as per the opinion of Imam Abu Yusuf (a follower of Abu Hanifah). Still, the penalty funds cannot be recognized as revenue and must be used for social purposes, which is in line with the opinion of the majority of scholars.<sup>37</sup>

#### 10. Sharia-Based Financial Technology Peer-To-Peer Lending

In the past decade, a new business model, namely online peer-to-peer lending, has been developing globally. This business model is an essential innovation in the financing business, especially in the current era of digital finance. Peer-to-peer lending is a new financial transaction platform that simplifies conventional intermediation functions by directly connecting those needing funds with those with excess funds.

The National Sharia Council of the Indonesian Ulema Council issued a fatwa regarding information technology-based financing services following Sharia principles. It is stated in Fatwa DSN-MUI No. 117/DSN-MUI/II/2018 that information technology-based financing services based on Sharia principles are the provision of financial service activities based on Sharia principles that connect financiers with finance recipients to conduct financing agreements through electronic system with the help of the internet network.

According to the Fatwa of the National Sharia Council of the Indonesian Ulema Council No. 117/DSN-MUI/II/2018, Fintech peer-to-peer lending is allowed as long as it complies with sharia principles. One of the provisions in this fatwa concerns the contracts used. The contracts used must align with the characteristics of financing services such as *al-bai'*, *ijarah*, *mudharabah*, *musyarakah*, *wakalah bi al-ujrah*, and *qardh*.

Sharia-based fintech peer-to-peer lending, according to the DSN-MUI fatwa, can be conducted in models such as: 1) accounts receivable financing, 2) financing the procurement of goods ordered by third parties, 3) financing the procurement of goods for online sellers, 4) financing the procurement of goods for online sellers with payment through a payment gateway, 5) employee financing, and 6) community-based financing.

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<sup>37</sup> Hasanudin, *Metodologi Istinbath Dalam Penerbitan Fatwa DSN-MUI*.

There are three parties in the legal subject of fintech peer-to-peer lending: the organizer, the finance recipient, and the financier. The fatwa stipulates that the contract between the organizer and the financier is a *wakalah bi al-ujrah* contract. However, substantially, the concept of peer-to-peer fintech is a form of *wakalah bi al-ististmar* contract. If the *wakalah bi al-ististmar* contract is accompanied by *ujrah* (fees), then its legal status follows the law on *ijârah* contracts, particularly *ijârah 'alâ 'amâl* (services) contracts. This is as explained in Ma'ayir Syar'iyah as follows:<sup>38</sup>

إذا كانت الوكالة باجرة تطبق عليها احكام الاجارة

*"If the wakalah contract is accompanied by ujarah (wages/fees), then its legal status follows the ijârah (service) contract."*

If an *ijtihâd takhrîj* is conducted on sharia peer-to-peer lending products, it constitutes a *wakalah bi al-ujrah* contract according to the opinion of Ibn Juzai, a scholar from the Malikiyyah school of thought, in the book *Qawânin al-Fiqhiyyah*, who states:

تجوز الوكالة بأجرة وبغير أجرة فإن كانت بأجرة فحكمها حكم الإجازات

*"The wakalah contract is permissible with or without ujarah (wages/fees). If the wakalah contract is accompanied by ujarah, then its legal status follows the law of ijârah contracts."*<sup>39</sup>

## CONCLUSION

*Ijtihad takhrîj* plays a pivotal role in the process of deriving legal rulings (*istinbâth al-ahkâm*) as it enables a *fiqh* expert to comprehend how *ushul fiqh* principles are applied in the derivation of *fiqh* rulings, particularly in the context of contemporary legal rulings. Additionally, *ijtihâd takhrîj* facilitates comprehension of the Shariah evidence and legal principles and the superior and robust opinions of the madhhab. It is paramount for a *fiqh* expert to possess knowledge of these matters, as it enables them to perform *istinbâth* based on the madhhab they adhere to. Consequently, *ijtihâd takhrîj* functions as a means of fostering and maintaining the continuity of a madhhab. In practice, *ijtihâd takhrîj* is employed to address contemporary legal issues in contemporary Sharia business. The applications of *ijtihâd takhrîj* in Contemporary Sharia Business include (1) The ruling on commercial insurance; (2) Intellectual property rights; (3) The issue of inflation; (4) The ruling on giving discounts; (5) The ruling on traveler's checks; (6) The ruling on savings Deposits; (7) credit and debit cards; (8) buying and selling via social media; (9) the ruling on penalties in transactions; and (10) Sharia-based financial technology peer-to-peer lending.

<sup>38</sup> Panji Adam, *Fikih Muamalah Kontemporer: Perkembangan Akad-Akad Dalam Hukum Ekonomi Syariah* (Malang: Intelegensia Media, 2021).

<sup>39</sup> Ibn Juzai Al-Gharnati, *Al-Qawânin Al-Fiqhiyyah* (Kairo: Dar al-Hadîts, n.d.).

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