Received: November 29th 2023 Accepted: December 28th 2023 Online Published: January 31st 2024

JUDICIAL JUDGEMENT IN ISLAMIC JUDICIARY: AN APPRAISAL OF ITS DISTINCTIVE ATTRIBUTIONS AND FEATURES

Mohd Lotpi Mohd Yusob*
Abdul Karim Ali**

ABSTRACT

One of the important features of Islamic judiciary is the judicial judgement. The judicial judgement is an avenue where the judge pronounces his judgement and its reason. The judgement and its reason will be filled by plethora of jurisprudential discussions. Hence, it is occasionally confused with fiqh and fatwa while in fact the judgement is completely a different ruling mechanism compared to both fiqh and fatwa. In fact, judicial judgement will have its attributions and characteristics. On this point, this article aims to address its distinctive attributions and features. The library research and content analysis will be conducted to accomplish that aim. At the end, the article will expose and elucidate thoroughly the concept of judicial judgement of Islamic judiciary, its ingredients and distinctive attributions.

Keywords: Judicial Judgement; Judiciary; Distinctive; Feature.

* Senior Lecturer, Faculty of Law & International Relations , Universiti Sultan Zainal Abidin (UniSZA), Kampus Gong Badak, 21300 Kuala Nerus, Terengganu, Malaysia. mohdlotpi@unisza.edu.my

** Professor, Department of Fiqh and Usul. Academy of Islamic Studies. Universiti Malaya (UM), 50603. Kuala Lumpur. Malaysia. abdkarim@um.edu.my

INTRODUCTION

Rule making process in Islamic legal system can be categorised into three different types namely *fiqh, fatwa* and judge's decision. Each of these three must not be mistakenly conceived since they differ in terms of the process, functions and end-product. This article aims to deliberate on judicial judgement and its special attributions compared to others. Before the further discussion is embarked, it is pertinent to note that judicial judgement positioned in the judge's finding only and will not be found anywhere else. It is difficult to be looked for since the written one is hardly found unlike *fiqh* and *fatwa*. However, the modern legal system in certain countries, especially those who implemented binding judicial precedent doctrine, has paved the way for the systematic written judgment to the extent that the judge is obligated to prepare it. This is a sound system because, through the written judgment, the parties of the proceeding may be conscious of the reason for the judge's decision and may prepare for the appeal on that reason in the case of dissatisfaction.

MEANING, NATURE AND INGREDIENTS OF JUDICIAL DECISION

The judicial decision is known as *al-ḥukm al-qaḍā'ī* in Islamic legal literature. This term is used by contemporary scholar. However, in many Islamic legal and jurisprudential references, it is just mentioned as *al-ḥukm*. What differentiates it from the ḥukm in fiqh (jurisprudence) is the context of the discussion. The *ḥukm* in *fiqh* discussion can be translated as jurisprudential rule and can be defined as *shara'*'s message relating to the actions of *mukallaf* and the message can be in form of instruction or choice.[1] Meanwhile, *al-ḥukm*, as in the judicial context, has brought a different connotation. This means the term of *al-ḥukm* is a *mushtarak*[2] word that has been used literally for several meanings but in the context of Islamic judiciary it means decision or judgement or order of the judge.[3] The judicial decision, also called judicial judgment or order, has

[1] This was touched in the previous chapter.

[2] *Mushtarak* means a word which shares several different meanings.

[3] Mohd Badrol bin Awang, 'Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia' (International Islamic University Malaysia 2018).

been thoroughly defined as Islamic legal work. Some of the scholars raise the discussion on the definition of judicial decision in addition to the meaning of Islamic judiciary (*al-qaḍā'*).[4]

Firstly, it is the most appropriate perusal to refer to al-Majallah al-Aḥkām al-ʿAdliyyah in looking for the definition of judicial judgment since it is a code of law and not just a *fiqh* book. According to the clause of 1786 of al-Majallah al-Aḥkām al-ʿAdliyyah, *al-ḥukm* has been assigned of its meaning as "a term on the judge's decision to stop and settle the dispute".[5] This definition then enhanced fundamentally and impliedly in defining the meaning of the judge in the clause of 1785 where it is said the function of the judge is to adjudicate and settle the claim and dispute that happens among the people according to *shara'*. Here al-Majallah has indicated that a judgment must contain the adjudication of dispute by the judge. If the adjudication is not from the judge or no decision is delivered, then it is not a judicial judgment. However, mere judge's adjudication and decision is not complete to end the disagreement unless accorded with the binding effect. [6] This point was not addressed by al-Majallah.

However, this missing point of al-Majallah can be found in the writings of the classical and contemporary scholars when they were defining *al-ḥukm* One of the Malikite scholars, Muḥammad al-Fāsī, articulates that *al-ḥukm* means the action of the judge to bind his decision on the dispute with *shara'* rule.[7] He then requotes al-Qarāfī's saying, "the function of the judge is to impose bindingly the rule".[8] Al-Qarāfī himself put *al-ḥukm* as "providing blanket and binding rule in converging *ijtihadic* (speculative and not certain) issue, which consists

[4] ʿAbd al-Nāṣir Mūsā Abū al-Baṣl, *Naẓariyyah al-Ḥukm al-Qaḍā'ī fī al-Sharī'ah wa al-Qānūn* (Jordan: Dār al-Nafā'is, 2000), 35.
[5] Al-Majallah (Beirut: *al-Maktabah al-Adabiyyah*, 1884), 260.
[6] Mohd Badrol Awang, "Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia", (Doctorate Thesis, International Islamic University Malaysia, 2018), 232.
[7] Muḥammad al-Fāsī, *al-Itqān wa al-Aḥkām fi Sharḥ Tuḥfah al-Aḥkām* (Cairo: Dār al-Ḥadīth, 2011), 41.
[8] *Ibid.,* 42.

disagreement, for the worldly *maṣlaḥah* ".[9] Blanket here means giving the choice to the litigating party to execute the judge's order should he wants to resort to it but it does not mean the party in dispute can depart from the decision because it is still binding. It is akin to the judicial review as practiced in Malaysia where a party seeks for a judicial inquiry before the court on certain particular issue. In the same wavelength, al-Bahūtī said *al-ḥukm* is making the *shara' 's* rule to be binding and settling the dispute.[10] All of these definitions by the classical scholars provide adjudicating the dispute and coupled with its bindingness or binding effect to constitute what is judgment.

Apart from the classical scholar's opinion, the contemporary jurist has also addressed the meaning of the judicial decision. Their opinion seems to be more conclusive. For instance Wahbah al-Zuḥaylī elucidates *al-ḥukm al-qaḍā'ī* is adjudicating the dispute and ending the disagreement by the judges in form of oral and action and it has binding effect.[11] This understanding on judicial decision is also very much identical with what found by Naʿīm Yāsīn where he also put *al-ḥukm al-qaḍā'ī* as adjudicating the dispute, in form of oral and action, by the judge and those who have the same authority in a binding way. Both definitions are considered comprehensive because they contain the general pillars of the judicial judgment namely adjudication by the judge and its binding effect.[12] However they are still criticized of having lacunae by not including pronouncement of punishment for the crime case. It seems that they only addressed the civil or mal case. Therefore ʿAbd al-Nāsir included it as part of his definition.[13]

[9] Aḥmad bin Idrīs al-Qarāfī, *al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām* (Beirut: Dār al-Bashā'ir al-Islāmiyyah, 1995), 33.

[10] Manṣūr bin Yūnus al-Bahūtī, *Sharaḥ Muntahā al-Irādāt Daqā'iq Ūlī al-Nuhā li Sharḥ al-Muntahā* (Beirut: Mu'assasah al-Risālah Nāshirūn, 2000), 6: 462.

[11] Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh* (Damascus: Dār al-Fikr, 1985), 6: 785.

[12] Muḥammad Naʿīm Yāsīn, *Naẓariyyah al-Dawā' bayna al-Sharī'ah al-Islāmiyyah wa Qānūn al-Murāfā'ah al-Madaniyyah wa al-Tijāriyyah* (Riyadh: Dār 'Ālam al-Kutub, 2003), 643.

[13] ʿAbd al-Nāṣir Mūsā Abū al-Baṣl, *Naẓariyyah al-Ḥukm al-Qaḍā'ī fī al-Sharī'ah wa al-Qānūn* (Jordan: Dār al-Nafā'is, 2000), 52.

From the above discussion, it can be established that judicial judgment is not just an opinion of the judge as uttered by some quarter[14] but the decision which is pronounced by the judge or the person who has the authority to adjudicate the dispute, settle the disagreement, decide the issue and produce the punishment for the crime case and that decision is legally binding to the addressed party. The judicial judgment, in short and more technical understanding, can also be regarded as a manifestation of an ultimate decision of the judge resulting from the application of the governing law to the facts of the case[15] or issue brought before him.

Albeit of the explicit meaning of the judicial judgment as above-discussed, it actually requires us to look on the nature of the judgment, including its ingredients and forms, to understand what is judicial judgment all about. It is submitted that the judicial decision is understood to be a complete process after it contains the six pillars namely the judge, the claimant or plaintiff, the defendant, the subject matter, the governing law and the reason of the judgement. In the Malaysian modern context, the claimant or plaintiff in crime case is known as prosecutor and appointed by the government while the defendant is known as the accused.

In the legal nature, the judicial decision will not come out unless there is dispute, crime or request for the judicial opinion.[16] The judge is prohibited from pronouncing his decision if there is no claim or case at the first place.[17] If the judge produces the decision only based on hypothetical issue, then the decision will not be considered as a judicial decision[18] and it will not have legal consequences. If the judge produces the *ḥukm* based on mere *ijtihād* or examination on *dalīl* then it is not

[14] Mohamad bin Adullah, *Kehakiman Islam: Teori dan Pelaksanaan* (Shah Alam: Persatuan Ulama Malaysia, 2017), 66.
[15] Mohd Badrol Awang, "Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia", (Doctorate Thesis, International Islamic University Malaysia, 2018), 232.
[16] ʿAbd al-Nāṣir Mūsā Abū al-Baṣl, *Naẓariyyah al-Ḥukm al-Qaḍā'ī fī al-Sharīʿah wa al-Qānūn* (Jordan: Dār al-Nafā'is, 2000), 77.
[17] *Ibid.*, 329.
[18] Muḥammad Kāmil bin Muṣṭafā, *al-Fatāwā al-Kāmilah fī al-Ḥawādīth al-Ṭarablīsiyyah* (t.tp: t.p., 1890), 106.

judicial judgment but it maybe falls under *fiqh* or *fatwa*. The dispute, claim or any judicial request by the public must follow proper procedure and rule called as *uṣūl istimā' al-da'wā* (principles of claim hearing).[19] Subsequently the judicial judgement will also be produced by the judge only after all procedure like presentation of claim, defence, witness testifying, examination of lawyer and others are exhausted.[20] The evidential requirement must be fulfilled before the judgment is declared.[21]

One of the essential ingredients of the judicial decision, other than the decision itself, is the reason behind the judgement or in civil law it is known as *ratio decidendi*. The reason of the judgment is a manifestation of *ijtihād* of the judge (*al-ijtihād al-qaḍā'ī*). It displays how the judge comes to a conclusive decision. *Ijtihād* of the judge is not hypothetical but practical (*al-ijtihād al-taṭbīqī*) like what has been done by the judge among the companions like ʿUmar al-Khaṭṭāb RA[22] because the judge encounters with the real case and fact. This practicality aspect is certainly concurred to accommodate and facilitate no other than the *maṣlaḥah* of the people.[23] *Ijtihād* of the judge encompasses three scopes namely *ijtihād* in relation to the fact of the case (*ijtihād fi al-wāqi'ī*), *ijtihād* in relation to the determination on the applicable law (*ijtihād fi al-ḥukm*) and *ijtihād* to apply the law (*al-ijtihād al-taṭbīqī*).[24]

[19] ʿAbd al-Karīm Zaydān, *Niẓām al-Qaḍā' fī al-Sharī'ah al-Islāmiyyah* (Beirut: Mu'assasah al-Risālah, 2002), 97.
[20] Mohamad bin Adullah, *Kehakiman Islam: Teori dan Pelaksanaan* (Shah Alam: Persatuan Ulama Malaysia, 2017), 68; ʿAbd al-Nāṣir Mūsā Abū al-Baṣl, *Naẓariyyah al-Ḥukm al-Qaḍā'ī fī al-Sharī'ah wa al-Qānūn* (Jordan: Dār al-Nafā'is, 2000), 78.
[21] Zainuddīn bin Nujaim al-Miṣrī, *al-Baḥr al-Rā'iq fī Sharḥ Kanz al-Daqā'iq* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1998), 428; Ahmad Ibrahim and Mahmud Saedon, "Judges and Lawyers Under the Shari'ah", in *Administration of Islamic Law in Malaysia,* ed. Farid Sufian Shuaib et al., (Petaling Jaya: Lexis Nexis, 2010), 91.
[22] Fatḥī al-Duraynī, *al-Manāhij al-Uṣūliyyah fī al-Ijtihād bi al-Ra'yī fī al-Tashrī' al-Islāmī* (Beirut: Mu'assasah al-Risālah, 2013), 14-16.
[23] *Ibid.,* 14.
[24] Mohd Badrol Awang, "Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia", (Doctorate Thesis, International Islamic University Malaysia, 2018), 73.

Accordingly, the judge is required to state his findings after doing each *ijtihād* and in the same course he will provide the reasons behind his findings. These reasons later will converge to constitute a ground of judgment to produce a valid, legitimate and cogent judicial decision. The good judgment comes from the good reason behind it. The reason of judgment will also demonstrate the credential of the judge. Ultimately, in connecting it to this present research, the reason of the judgment is a place where we can notice how *maṣlaḥah* is appreciated and applied.

It is pertinent to note here that eventhough providing the reason of the decision by the judge is not a condition for the valid judgment but it is recommendable (*nadb*).[25] This is what opined and encouraged by Imam al-Shafi'i. He says he pleases if the judge would place a person and tells him on his reason for his decision.[26] The later jurist (*muta'ākhirīn*) in Shafiite school of law (*madhhab*) even opines that it is a compulsory (*wujūb*) for the judge to provide his ground of judgment[27] and this is regarded as an authoritative view of the *madhhab* (*qawl mu'tamad*). Meanwhile, Article 1827 of al-Majallah has instructed the judge to notify the litigating parties the reasons of his decision and then it went further making that compulsory to be in a written form, not just an oral judgment.[28] The latest Shafi'ite and Hanafite are found to be in a same wavelength in this issue.

In spite of the said opinions, in Malaysia, the government does not obligate the judges to produce the reason of the judgment except in the Shariah courts which exercise the appellate jurisdiction. This obligation is enshrined in section 145 of the Syariah Court Civil Procedure (Federal Territories) Act 1998. The provision says:

> "The Court hearing the appeal shall state the grounds of its judgment in writing."

---

[25] Muḥammad Naʿīm Yāsīn, *Naẓariyyah al-Dawā' bayna al-Sharī'ah al-Islāmiyyah wa Qānūn al-Murāfā'ah al-Madaniyyah wa al-Tijāriyyah* (Riyadh: Dār 'Ālam al-Kutub, 2003), 651.

[26] Muḥammad bin Idrīs al-Shāfiʿī, *al-Umm* (Manṣurah: Dār al-Wafā', 2001), 7: 535.

[27] Aḥmad bin ʿAbd al-ʿAzīz al-Malībārī, *Fatḥ al-Mu'īn bi Sharḥ Qurrah al-'Ayn* (Damascus: Dar al-Faiha', 2019), 588.

[28] Al-Majallah, 265.

The provision uses the word "shall" which connotes the obligatory effect. Unfortunately, this order is only applicable in civil cases, not criminal cases. It remains uncertain on why the authority does not impose the same statutory direction in criminal cases despite of the criminal cases is having harsher punitive effects which will logically require more justification in the ground of judgment. Nevertheless, there is practice direction issued by Department of Shariah Judiciary Malaysia which instructs the judge to write the grounds for the judgment[29] except this practice direction has no binding effect because is it not a law passed by the parliament or state assembly. It is just a guidance.

Pursuant to the above, the ground of the judgment is imperative to be aired because it can pave the way for the litigating parties to contemplate the appeal.[30] The losing party has the chance to prepare the rebuttal for the appeal if there is any loophole or legal shortcoming is found in the ground of judgment. While the winning party can also use the ground of judgment if he dissatisfies with the legal remedy and wants to claim more. While for the fellow judges, it can be an academic compass or a yardstick to produce more eloquent judgment. In this regard, the ground or reason of judgment is actually can demonstrate the credential and legal wise of the judges. The good judgements come from the good judges.

Further, the judicial decision itself, which is made up from the ground of the judgment, can be in several forms. Firstly, it can be in form of *al-aḥkām al-mulzimah* which means an order to do or to restrain from doing an act.[31] In modern form, it is sometimes also known as legal injunction in certain cases. Secondly, it may be in form of *al-aḥkām al-inshā'iyyah* which means order in form of punishment. In Islamic legal system, this form of judgment is found in crime cases like *qiṣāṣ*, *ḥudūd*

[29] See Practice Direction of No. 2 of 2014. This is actually a substitution to the Practice Direction of No. 11 of 2011 which was repealed.

[30] Mastura Razali and Jasni Sulong, "Amalan Penulisan Penghakiman dan Pelaksanaannya di Mahkamah Syariah Malaysia", *Jurnal Syariah* 24, no. 1 (2016), 25-58.

[31] Mohd Badrol Awang, "Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia", (Doctorate Thesis, International Islamic University Malaysia, 2018), 233.

or *ta'zīr*.[32] Lastly judgement also can be pronounced in form of declaratory order in upholding the rights and avowing the obligations of the parties. This kind of order is only found in *mal* or civil cases.

DISTINGUISHING JUDICIAL DECISION *(AL-ḤUKM AL-QAḌĀ'Ī), FIQH* AND *FATWA*

In Islamic legal theory, the term judicial decision *(al-ḥukm al-qaḍā'ī)* and *fatwa*[33] have their own connotation. Both share some similarities albeit with conspicuous difference. However, for some quarter including those who are knowledgeable, the differences between both are not fully appreciated and noticed.[34] This is the reason why al-Qarāfī comes out with an explanatory book to discuss on the distinguishment between judicial decision and *fatwa* under the title of *al-Iḥkām fi Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām*. In his introductory remark of this book, he explains that he notices the failure of some quarter to differentiate between judicial decision and *fatwa* especially on the legal effects. This is the reason that inspires him to write the book.

Judicial decision and *fatwa* share the similarities in the sense that both concentrate on solving the sectional specific *ḥukm* (not general principle) and both deliver the legal and religious verdict on the specific issue. It means the judge and *muftī* in reality address the specific situation only. This fact, further, distinguishes both and *fiqh*. Whereas *fiqh* technically does not function to address the problematic issue brought before the *fuqahā'* but it is mere a knowledge on set of rules that was extracted from the specific *dalīl* (divine proof). *Fiqh* has nothing to do with solving the real situation or applying and imposing of the rule on

[32] ʿAbd al-Nāṣir Mūsā Abū al-Baṣl, *Naẓariyyah al-Ḥukm al-Qaḍā'ī fī al-Sharī'ah wa al-Qānūn* (Jordan: Dār al-Nafā'is, 2000), 53.

[33] *Fatwā* is rule deduced by the *mujtahid* when he is demanded regarding specific occasion and issue. *Mujtahid* who produces the *fatwā* is called *muftī* (jurist-consult). What differs *fatwā* and *ijtihād* is *fatwā* is produced based on the issue while *ijtihād* is mere deduction of rule from the sources. See Wahbah al-Zuḥaylī, *Uṣūl al-Fiqh al-Islāmī* (Damascus: Dār al-Fikr, 2004), 2: 1184.

[34] Mohd Badrol Awang, "Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia", (Doctorate Thesis, International Islamic University Malaysia, 2018), 41.

the specific occasion.[35] However it attaches to judicial decision and *fatwa* as a ground for *al-ḥukm al-qaḍā'ī* and *al-iftā'* in form of applied selected rule.

Firstly, judicial decision and *fatwa* differ in terms of the nature of the presented issue or problem. *In al-qaḍā',* the issue to be entertained by the judge comes from the dispute and the judge is tasked to ascertain the disputed fact. The fact and issue before the judge must be real and not hypothetical. The judge then will hear the argument on the issue from the adjudicating parties.[36] However in *iftā*', the issue comes from the public and is not necessarily a dispute. The *muftī* is not obliged to establish the reality and truth of the fact. He may ask about the fact but for the purpose of his understanding only.[37] The *muftī* is also not positioned to hear and value the evidence and argument.[38] He will just apply the jurisprudential rule and principle to address the issue.[39] Unlike in *al-qaḍā',* the question before the *muftī* can be a hypothetical.

Further, judicial decision and fatwa can be drawn of their differences in terms of the legal effect. The judicial decision binds legally the litigating parties whereas fatwa is not bound to be followed. Fatwa has no legal effect and it works as mere information to the one who requests the fatwa (*mustaftī*).[40] This is the general rule in Islamic legal theory but in Malaysia the fatwa is still can be binding and enforceable if it is published in state's gazette. Section 34 (1) and (2) of the Administration of Islamic Law (Federal Territories) Act 1993 provides that no statement by a *muftī* can be regarded as a fatwa unless it was

[35] Muḥammad Naʿīm Yāsīn, *Naẓariyyah al-Dawā' bayna al-Sharī'ah al-Islāmiyyah wa Qānūn al-Murāfa'ah al-Madaniyyah wa al-Tijāriyyah* (Riyadh: Dār 'Ālam al-Kutub, 2003), 29-30.
[36] *Ibid.*, 30.
[37] Mohd Badrol Awang, "Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia", (Doctorate Thesis, International Islamic University Malaysia, 2018), 43.
[38] Muḥammad Taqī al-ʿUthmānī, *Uṣūl al-Iftā' wa Adābihi* (Damascus: Dār al-Qalam, 2018), 14.
[39] Muḥammad Naʿīm Yāsīn, *Naẓariyyah al-Dawā' bayna al-Sharī'ah al-Islāmiyyah wa Qānūn al-Murāfa'ah al-Madaniyyah wa al-Tijāriyyah* (Riyadh: Dār 'Ālam al-Kutub, 2003), 30.
[40] *Ibid.*, 31.

published in the Gazette and the publication can be done by the *muftī*'s initiative or on the request from the public. Section 34 (3) then clearly mentions that a fatwa shall be binding. In addition, Section 9 of Syariah Criminal Offences (Federal Territories) Act 1997 provides the punishment of a fine not exceeding three thousand ringgit, imprisonment for a term not exceeding two years or both for those who defies fatwa. Those sections have actually given the effect to the fatwa to become a legal instrument. Without those said sections, fatwa is not binding in its capacity and function as practiced in Islamic legal system generally.

Based on the legal effect of judicial decision and fatwa as discussed before, it can be encapsulated that the application of the ruling in judicial decision implicates the adjudicating parties only while the fatwa is a rule for the public at large and not only restricted to the *mustaftī*. [41] This, consequently, has indicated that *al-iftā'* holds greater moral risk compared to *al-qaḍā'* due to its general application of the issued ruling.[42] This consequence was briefly noted by Ibn Qayyim al-Jawziyyah as follow:

> "Every danger faced by the *muftī* is also faced by the judge with the extended danger on the judge on the specific case he tried, but the danger on *muftī* is greater in other aspect because his fatwa implicates more general subject, be it *mustaftī* or others (compared to the judge where his subject is only the litigating parties)".[43]

The statement of Ibnu Qayyim for all intents and purposes concerns on the scale of the affected party. The larger scale means the greater moral risk involves. This is the reason why *muftī* is said to be facing greater moral risk due to the more people that may be affected by his fatwa. However in terms of enforcement, a judge is in a greater moral

[41] *Ibid.*, 32.
[42] Mohd Badrol Awang, "Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia", (Doctorate Thesis, International Islamic University Malaysia, 2018), 41.
[43] Ibn Qayyim al-Jawziyyah, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn* (Mecca: Dār Ibn al-Jawzī, 2002), 1: 72.

risk because his judgment is enforceable against the adjudicating parties.[44] Whereas the legal verdict of the *muftī* is not binding and unenforceable unless there is law like in Malaysia to make it legally and statutorily binding.

Moreover, *al-ḥukm al-qaḍā'ī* and fatwa can be differentiated within the purview of subject matter jurisdiction. *Al-ḥukm al-qaḍā'ī* will not entertain on the individual practice of devotional and worshipping matters.[45] *Al-ḥukm al-qaḍā'ī* will also not touch on the belief and faith matters except in certain restrictive issues such as deviant teaching case, apostasy and others. In Malaysia, the jurisdiction of Shariah court is constitutionally and statutorily governed as discussed in the previous sub-chapter whereas the scope of fatwa is not restricted legally by any law. Fatwa or *al-iftā'* by the *muftī* may include all the matters. The devotional and worshipping matters exclusively fall under *al- fatwā*, not *al-ḥukm al-qaḍā'ī*. For instance the judge has no authority to determine the validity of *'ibādah* of one person and it is under *muftī*'s jurisdiction.[46]

Apart from the above, Taqi Usmani and Naʿim Yāsīn have observed other notable contrast between *al-ḥukm al-qaḍā'ī* and fatwa. According to Taqi Usmani, status of rule in fatwa may fall under the *wujūb* (obligation), *nadb* (recommendation), *ibāḥah* (permissibility), *karāhah* (reprehension), *taḥrīm* (prohibition), *ṣiḥḥah* (validity) and *baṭlān* (nullity). On the contrary, the rule in *al-qaḍā'* will never be under the category of *nadb, ibāḥah* and *karāhah* (reprehension) because these three categories encourage the action and omission in the form of non-

[44] Mohd Badrol Awang, "Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia", (Doctorate Thesis, International Islamic University Malaysia, 2018), 42.
[45] Muḥammad Taqī al-ʿUthmānī, *Uṣūl al-Iftā' wa Adābihi* (Damascus: Dār al-Qalam, 2018), 14.
[46] Aḥmad bin Idrīs al-Qarāfī, *al-Furūq* (Beirut: Mu'assasah al-Risālah Nāshirūn, 2003), 4: 94; Badruddin Ibrahim, Mahmad Arifin, and Siti Zainab Abd Rashid, "The Role of Fatwa and Mufti in Contemporary Muslim Society", *Pertanika Journal of human Science and Humanities* 23 (2015), 322.

binding status while the rule in *al-qaḍā'* must be obligatory and binding.[47]

Last but not least, according to Naʿīm Yāsīn, the task of the judge is more strenuous and demanding. *Al-Qaḍā'* necessitates the judges to be more meticulous, intelligent and attentive since he is required to weigh the fact and evidence and face the disputing parties who is trickier than *mustaftī* due to their aim to win the case.[48] The element of securing the justice and avoiding its miscarriage is the reason that put the judge in such trickier situation.

CONCLUSION

The nature of judicial decision differs from *fiqh* and fatwa. Its nature in dealing with real specific case, not theoretical like *fiqh* and fatwa, makes it to be very distinctive and idiosyncratic. Conscience on its nature will make the academician and legal practitioner comprehend more of the reasoning of a legal judgement.

REFERENCES

ʿAbd al-Karīm Zaydān, *Niẓām al-Qaḍā' fī al-Sharī'ah al-Islāmiyyah*. Beirut: Mu'assasah al-Risālah, 2002.

ʿAbd al-Nāṣir Mūsā Abū al-Baṣl, *Naẓariyyah al-Ḥukm al-Qaḍā'ī fī al-Sharī'ah wa al-Qānūn*. Jordan: Dār al-Nafā'is, 2000.

Aḥmad bin ʿAbd al-ʿAzīz al-Malībārī, *Fatḥ al-Mu'īn bi Sharḥ Qurrah al-'Ayn*. Damascus: Dar al-Faiha', 2019.

Aḥmad bin Idrīs al-Qarāfī, *al-Furūq*. Beirut: Mu'assasah al-Risālah Nāshirūn, 2003.

Aḥmad bin Idrīs al-Qarāfī, *al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām*. Beirut: Dār al-Bashā'ir al-Islāmiyyah, 1995.

[47] Muḥammad Taqī al-ʿUthmānī, *Uṣūl al-Iftā' wa Adābihi* (Damascus: Dār al-Qalam, 2018), 14.

[48] Muḥammad Naʿīm Yāsīn, *Naẓariyyah al-Dawā' bayna al-Sharī'ah al-Islāmiyyah wa Qānūn al-Murāfa'ah al-Madaniyyah wa al-Tijāriyyah* (Riyadh: Dār 'Ālam al-Kutub, 2003), 30.

Ahmad Ibrahim and Mahmud Saedon, "Judges and Lawyers Under the Shari'ah", in Administration of Islamic Law in Malaysia, ed. Farid Sufian Shuaib et al., (Petaling Jaya: Lexis Nexis, 2010), 91.

Al-Majallah. Beirut: al-Maktabah al-Adabiyyah, 1884.

Badruddin Ibrahim, Mahmad Arifin, and Siti Zainab Abd Rashid, "The Role of Fatwa and Mufti in Contemporary Muslim Society", *Pertanika Journal of human Science and Humanities* 23 (2015), 315-326.

Fatḥī al-Duraynī, *al-Manāhij al-Uṣūliyyah fī al-Ijtihād bi al-Ra'yī fī al-Tashrī' al-Islāmī*. Beirut: Mu'assasah al-Risālah, 2013.

Ibn Qayyim al-Jawziyyah, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*. Mecca: Dār Ibn al-Jawzī, 2002.

Manṣūr bin Yūnus al-Bahūtī, *Sharaḥ Muntahā al-Irādāt Daqā'iq Ūlī al-Nuhā li Sharḥ al-Muntahā*. Beirut: Mu'assasah al-Risālah Nāshirūn, 2000.

Mastura Razali and Jasni Sulong, "Amalan Penulisan Penghakiman dan Pelaksanaannya di Mahkamah Syariah Malaysia", *Jurnal Syariah* 24, no. 1 (2016), 25-58.

Mohamad bin Adullah, *Kehakiman Islam: Teori dan Pelaksanaan*. Shah Alam: Persatuan Ulama Malaysia, 2017.

Mohamad bin Adullah, *Kehakiman Islam: Teori dan Pelaksanaan*. Shah Alam: Persatuan Ulama Malaysia, 2017.

Mohd Badrol Awang, "Methods of Ijtihad in Islamic Judicial Proceedings with Special Reference to the Practice of the Syariah Courts in Malaysia", (Doctorate Thesis, International Islamic University Malaysia, 2018).

Muḥammad al-Fāsī, *al-Itqān wa al-Aḥkām fi Sharḥ Tuḥfah al-Aḥkām*. Cairo: Dār al-Ḥadīth, 2011.

Muḥammad bin Idrīs al-Shāfiʿī, *al-Umm*. Manṣurah: Dār al-Wafā', 2001.

Muḥammad Kāmil bin Muṣṭafā, *al-Fatāwā al-Kāmilah fī al-Ḥawādīth al-Ṭarablīsiyyah*. t.tp: t.p., 1890.

Muḥammad Naʿīm Yāsīn, *Naẓariyyah al-Dawā' bayna al-Sharī'ah al-Islāmiyyah wa Qānūn al-Murāfaʿah al-Madaniyyah wa al-Tijāriyyah*. Riyadh: Dār 'Ālam al-Kutub, 2003.

Muḥammad Taqī al-ʿUthmānī, *Uṣūl al-Iftā' wa Adābihi*. Damascus: Dār al-Qalam, 2018.

Practice Direction of No. 2 of 2014.

Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*. Damascus: Dār al-Fikr, 1985.

Wahbah al-Zuḥaylī, *Uṣūl al-Fiqh al-Islāmī*. Damascus: Dār al-Fikr, 2004.

Zainuddīn bin Nujaim al-Miṣrī, *al-Baḥr al-Rā'iq fī Sharḥ Kanz al-Daqā'iq*. Beirut: Dār al-Kutub al-ʿIlmiyyah, 1998.