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The Application of Wa'd bi al-tanazul in Preference Shares from the Islamic Jurisprudence Perspective

Marina Abu Bakar[1] & Shofian Ahmad[2]

[1]Lecturer, Kulliyyah of Sharia and Law, Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia. marinaabubakar@unishams.edu.my

[2]Associate Prof. Dr., Department of Sharia, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia (UKM), 43600, Bangi, Selangor, Malaysia. shofian@ukm.edu.my

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Abstract: Wa'd bi al-tanazul practiced in preference shares today has problems in terms of the implementation because the object of the contract, namely, the distribution of profits and losses in musharakah has not been confirmed at the beginning of the contract. This concept has been applied by the Shariah Advisory Council of the Securities Commission Malaysia in permitting non-cumulative preference shares. Non-cumulative preference shares represent shares in which the shareholder's tenure is permanent and is equivalent to ordinary shares unless the dividends are fixed and cannot be accumulated forward. Although the concept of wa'd bi al-tanazul has been adopted by the Shariah Advisory Council of the Securities Commission Malaysia, but the application is still dispute internationally at the beginning of the musharakah contract has caused the occurrence of gharar (uncertainty) in the distribution of profits and losses. Hence, this study will discuss the concept of wa'd bi al-tanazul in the preference shares from the Islamic Jurisprudence perspective and the modus operandi of wa'd bi al-tanazul in the preference shares practice. The data in this study is qualitative data collected through document analysis. Meanwhile, data analysis was done by applying the content analysis approach. The findings showed that although there is a differences of opinion among local scholars and Middle East scholars in relation to the concept of wa'd bi al-tanazul adopted in non-cumulative preference shares published in Malaysia, but, the Shariah Advisory Council of the Securities Commission Malaysia has agreed to make it permissible, because there is no solid proposition, which can be used as a reference to prohibiting the use of the wa'd bi al-tanazul concept disputed.

Keywords: Wa'd, Tanazul, Wa'd bi al-tanazul, Preference Shares

I. INTRODUCTION

The *wa'd bi al-tanazul* concept adopted in the non-cumulative preference shares by the Shariah Advisory Council, the Securities Commission Malaysia has aroused disputes between local and Middle Eastern scholars following its use which is contrary to the concept of *musharakah* and *tanazul* contained in classical Islamic Jurisprudence before. The use of the concept of *wa'd bi al-tanazul* is found to be contrary to the concept of *musharakah* in the distribution of profits and losses, while in the concept of *tanazul*, the use of it at the beginning of the *musharakah* contract involves things which do not yet exist and are unknown in the future.

Therefore, this paper will examine the issue of *wa'd bi al-tanazul* in the practice of preference shares according to Islamic spectacles. These discussions are divided into two main parts, namely; *tanazul* in the preference shares according to the Islamic jurisprudence perspective and *wa'd bi al-tanazul* in the practice of preference shares according to the Islamic jurisprudence perspective.

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II. METHODOLOGY

This research was conducted with qualitative approach. It selected non-cumulative preference shares published in Malaysia by Securities Commission Malaysia as the *wa'd bi al-tanazul* concept adopted in the non-cumulative preference shares by the Shariah Advisory Council, the Securities Commission Malaysia has aroused disputes between local and Middle Eastern scholars following its use which is contrary to the concept of *musharakah* and *tanazul* contained in classical Islamic Jurisprudence before. Securities Commission Malaysia is a self-funding statutory body that was established on 1 March 1993 under the Securities Commission Act 1993. The Securities Commission's regulatory functions include supervising exchanges, clearing houses and central depositories, registering authority for prospectuses of corporations other than unlisted recreational clubs, approving authority for corporate bond issues, regulating all matters relating to securities and derivatives contracts, regulating the take-overs and mergers of listed corporations, public companies, and entities as specified by the Securities Commission, regulating all matters relating to unit trust schemes, licensing and supervising all licensed persons, encouraging self-regulation, ensuring proper conduct of market institutions and licensed persons and others. It reports to the Minister of Finance and its accounts are tabled in Parliament annually.

The qualitative data in this research was collected through document analysis. Meanwhile, data analysis was conducted using a descriptive approach. However, this research has only focused on the non-cumulative preference shares published in Malaysia. It is possible for other types of preference shares practices to be studied in future research such as cumulative preference shares, participating preference shares, non-participating preference shares, convertible preference shares, non-convertible preference shares, redeemable preference shares and non-redeemable preference shares.

III. RESULTS AND DISCUSSION

This research provides valuable information regarding the practices of non-cumulative preference shares in Malaysia. The findings may be useful in solving the issue of *gharar* (uncertainty) and creating an alternative solution towards it. Future researchers could apply the concept of *wa'd bi al-tanazul* with some modification in the structure of the musharakah contract.

Definition and Concept of *Tanazul*

Classical Muslim scholars have discussed the use of the *tanazul* pronouncement since long ago. However, there is no specific use of the *tanazul* pronouncement. On the other hand, the use of *tanazul* is often associated with various other terms such as *al-isqat*, *al-ibra'*, *al- 'afw* and *al-hibah*. If observed, *tanazul* is also a popular term among the contemporary Muslim scholars through the writing of the Islamic financial system [1].

Generally speaking, *tanazul* in the context of Muamalat means the right of a person [2]. However, the use of *tanazul* in the context of classical Muslim scholars' discussion was limited to a few specific things. The use of the *tanazul* pronouncement in the context of *musharakah* is a new discussion, even though the previous Muslim scholars discussed *tanazul* in the *musharakah* contract, for example, *tanazul* in profit or loss. However, the discussion has not covered the practical aspect in the context of preference shares. This is because there are characteristics of preference shares that are in conflict with the original concept of *musharakah* agreement, for example, in terms of dividend distribution, voting rights and in a liquidation situation of the company.

Among the classical Muslim scholars who discussed the use of the *tanazul* pronouncement in the context of *musharakah* agreements are Sheikh Nazih Hammad, Imam al-Qarafi and Imam al-Ghazali. Sheikh Nazih Hammad views that the use of the most recent *tanazul* is in debt, which is also associated with *ibra'* and *isqat* [3], while Imam al-Qarafi sees its use in the context of *isqat* [4], while Imam al-Ghazali linked its use to *al-'afw* [5].

According to the scholars' view of the meaning of *tanazul*, it can be concluded that the meaning of *tanazul*, which is to release one's rights is quite common. In fact, *tanazul* can also mean another, namely *isqat*. In short, *isqat* in terms of language means dropping. Meanwhile, according to the term by jurist, *isqat* is defined as to release property or rights to non-owners or to persons who are not entitled to it. The *ibra'* utterance meant to get rid of and liberate. In legal terms, *ibra'* refers to one party frees another party's liability against it. *Ibra'* is not only denotes the abrogation of the rights in the law, but also means the transfer of property [6]. In addition, the concept of *isqat* is also closely related to the concept of *ibra'*, and it is described in *Al-Mawsu'ah al-Kuwaitiyyah* [7].

Meanwhile, AAOIFI also applies the term *tanazul* alternately with the term *ibra'* in Shariah Standard No. (8), *Murabahah* to the Purchase Ordered, issued clause 5/9 [8]. In this case, AAOIFI allows the affected institutions to release part of the selling price, if the customer pays in advance provided it is excluded from some of the contractual agreements entered into.

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In terms of terminology, *tanazul* intends to release the property or the right of a person not to the owner and not to the person entitled to receive the rights. The use of the term *tanazul* is also different because according to the views and situations used. Nevertheless, based on the meaning discussed, it can be understood that *tanazul* in the context of the *musharakah* agreement is an agreement entered into between the partners upon the conclusion of the *musharakah* agreement, that one or a part of the partner mutually agrees to release his or her right to profit or to assume all the possible loss of the *musharakah* contract.

Based on the definition of the *tanazul*, it can be concluded that the use of *tanazul* in the context of *musharakah* involves things which have existed rather than the uncertainty of their existence, whether they have been in Islamic Shariah or not. However, the *tanazul* practiced in the *musharakah* contract involves things that have not yet existed because the profit and loss still does not exist when the *musharakah* contract is sealed. In short, the concept of *tanazul* can be defined as an act to release certain claim rights in favour of the other party in the contract. Meanwhile, the concept of *tanazul* in Islamic finance is usually used in the context of the right to share in some parts that are given to others [9].

Use of *Tanazul* in *Musharakah* Contract

According to Aznan Hassan, to examine the true nature of the use of *tanazul* in the *musharakah* contract, there are some concepts that can be described as *tanazul* concept involving the right of a musharakah partner to profit or to get a share of the original capital in the event of a loss, the concept of tanazul as a grant on something that *ma'dum* (not yet existed), the concept of *tanazul* which has similarity with the right of *al-shuf'ah* and the concept of *tanazul* as a condition of *ja'li* in the *musharakah* contract [10].

1. *Tanazul* Rights of a *Musharakah* Partner to Earn or To Get a Share of the Original Capital When the Occurrence of Loss

In understanding the concept of *tanazul* involving the release of the right of a partner to gain profit or to get a share of the original capital at the time of loss, there are some terms that are closely related to this concept because *tanazul* in this context may be termed as *isqat, ibra'* or *tamlik.* The term *al-isqat* comes from the word *saqata* which means fall down from top to bottom [11], while in the meanings it means to dispel the ownership or the right not to the owner or the person entitled to draw closer to Allah SWT by special pronouncement [12]. Meanwhile, Ibn Faris argues that the term *ibra'* derives from the word *bara'a*, which is the basis of two things; *al-khalq,* which means to make and keep away from and eliminate something [13]. In terms of terminology, the definition of *ibra'* is different according to the observations of the jurists because some of them think that *ibra'* is *isqat* and some others think that *ibra'* is *tamlik*. Ibn al-Hummam argued about that by defining *ibra'* as the abolition of property belonging to another person [14], while al-Kharshi stated that *ibra'* is *tamlik* by defining *ibra'* as the provision of debt to the debtor [15].

In terms of language, *tamlik* derives from the word *mallaka*, which means to give property [16]. According to Ibn al-Hummam, *al-milk*, is the ability to manage *(tasarruf)* set by Allah from the beginning. Al-Jurjani says that *al-milk* is a Shariah relationship between one man and something that can only be managed solely by him and impedes the management of others to him [17]. Based on the views of the scholars, it is understood that the relation of al-*tamlik* with *ibra'* is the impression of *ibra'* on something. So, based on the scholars' views, it is also possible to explain that *tanazul* in the *musharakah* contract has all the three features namely *ibra', isqat* and *tamlik.* The term *ibra'* is more common than *tamlik*, while *ibra'* is more specific than *isqat* because some scholars' define *ibra'* as one of the possessions *(tamlik)* and some others define it as abortion *(isqat).* However, in the context of *musharakah*, the concept of *tanazul* practiced is different because in *ibra', isqat* and *tamlik*, the practiced *tanazul* involves what has already existed or the cause which led to the same thing already exists. In addition, the concept of *tanazul* used in *musharakah* involves profit, which is something that still does not exist. Similarly, the reason for profitability in *musharakah*, which is the calculation that leads to profit in *musharakah* also, does not exist.

Sharia requires that the matter to be dealt with must be a thing which has existed and is not a matter of uncertain existence, whether it has been covered by Islamic law or not. Among the things in *tanazul* which have been said to be liable is *tanazul* of the debt that has been convicted, while those who have yet to cover their obligations are the rights of *shuf'ah*. Although the right of *shuf'ah* has not been convicted, this right has existed since the commencement of the contract was enshrined until it led to matters which resulted in the rights of *shuf'ah*. Thus, the *tanazul* practiced in *musharakah* is not *ibra'* or *isqat* because of two main reasons, that is; no matter what to do and no cause that led to *tanazul* during the *musharakah* contract was sealed. This was also agreed upon by 'Ali al-Khafif, where he stated that the abortion of the right of *shuf'ah* is only effective when the right has existed and convicted. Therefore, when such rights do not exist, the abortion is not accepted on the Islamic law [18].

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2. *Tanazul* As a Grant *(Hibah)* On Something Still Not Exist *(Ma'dum)*

The word *al-hibah* in terms of language means giving without reward *('iwad)* or motif. In the sense of sharia, al-Kasani stated that *hibah* means to own an asset without compensation [19]. In the context of the *musharakah* contract, *tanazul* is practiced by one party in the contract to provide all the benefits to another party on the basis of giving *hibah*. The jurists have different opinions on the use of the *hibah* mechanism in *musharakah* contractual profits. The scholars' such as Sheikh 'Ulaysh, Fath al-'Ali al-Malik, al-Dardir and al-Dasuqi allowed the use of *hibah (tabarru')* on profits in *musharakah* [20].

The use of such *hibah* affects the difference in profitability and consequent to the overall profitability of *musharakah*. However, in order to avoid *syubhah* that may infringe *muqtada al-'aqd,* then the scholars' require that the *hibah* must occur after the *musharakah* contract is over and not before the contract or during the *musharakah* contract. However, the use of *tanazul* in the context of *musharakah* today involves the agreement of *musharakah* partners that took place before or during the *musharakah* contract. This is clearly contradictory to the views expressed by the scholars of the Maliki school except the views of Imam al-Sawi from Sheikh Abd al-Baqi who recognized the use of *tanazul* before or during the *musharakah* contract. Since *hibah* involves something that has existed during the agreement and this is different in the context of the *musharakah* contract, that is to say (the profit) on this basis *(hibah)* does not exist, then the use of *tanazul* as a grant *(hibah)* on a thing which does not exist is considered contradictory with Sharia.

3. *Tanazul* Conceptual Equations in *Musharakah* and the Right of *al-Shuf'ah*

The word *al-shuf'ah* comes from the word *shaf'* which means *al-damn*, that is, mixing. According to Muhammad Sa'id Sabiq, *al-shuf'ah* is a forced merger of a right that has been sold to others, to be resold to the more entitled party, namely partners *(al-shuraka')* [21]. In this context, *al-shuf'ah* means the ownership of shared goods *(al-mashfu')* by those who join a force belonging to aforesaid from the buyer by modifying the value of the sale that has already been made. So, it is understandable here that *al-shuf'ah* is the ownership of a partner *(sharik)* and two persons or parties sharing with compulsion against the things that are shared. The jurists have outlined some of the things that form *shuf'ah*, and the four elements must exist to form a legitimate *shuf'ah* in the Shariah, namely; people who take or accept *shuf'ah (shafi'),* things made *shuf'ah (mashfu'),* people who take *shuf'ah (mashfu' minhu)* and how to do *shuf'ah*. The concept of applied *tanazul* equation exists in matters involving *haq al-shuf'ah* and *ishtirak fi al-ribh* (profit sharing) in the *musharakah* contract.

If examined, there are two main equations, namely the cause and the release of rights in *shuf'ah* and *musharakah*. In terms of reason, when the occurrence of a partnership in *shuf'ah*, then the causes that led to *shuf'ah* already existed at the beginning although the right has not yet commenced. In *haq al-shuf'ah*, the cause of *shuf'ah* is the sharing of property or land with certain conditions. Although this reason exists, the right of *shuf'ah* has not yet begun because *haq al-shuf'ah* only begins when a partner *(sharik)* wants to sell his share of the property or land. So, at that moment, *haq al-shuf'ah* started. Whereas, in the *musharakah*, when the *musharakah* contract takes place, then the reasons that led to *musharakah* also existed at the beginning although the rights had not yet commenced. The reason that leads to *musharakah* is the right to profit from the *musharakah*. In this case, even though the right to profit has already existed, it will only begin when the profitability has already existed.

In addition, there are also similarities in terms of the release of the right *(tanazul)* in *shuf'ah* and *musharakah*. Generally, the scholars differ in opinion in the release of *shuf'ah* rights before the right of *shuf'ah* exists. The main issue in the release of this right is that the release of the right of *shuf'ah* by one of these partners is considered binding, in which, when one of the partners *(sharik)* in *haq al-shuf'ah* is selling the property or land, the right of *shuf'ah*, it remains and the act of the partner *(sharik)* transferring the right *(tanazul)* to another party at the beginning is thought to be unused according to Shariah. According to Wahbah al-Zuhayli in his book, Fiqh al-Islam wa Adillatuhu, differences in opinion of the scholars regarding the release of *shuf'ah* rights by the partners *(sharik)* before such rights existed can be categorized into two main groups, namely; those who do not recognize abortion *(tanazul)* in the right of *shuf'ah* by partners and those who recognize abortion in *shuf'ah* rights by partners. The scholars' views are as follows:

1. The view of the majority of the jurists from the Shafi'i, Maliki, Hanafi and Hanbali schools, which they believe that this right of *shuf'ah* applies and is not nullified by the *tanazul* given. They assumed that the release of the right *shuf'ah (tanazul)* has occurred before the occurrence of the sale and purchase process by the partner *(sharik)* which is considered to be the release of the right before the existence of the cause which led to *shuf'ah*. This is because they think that the cause which leads to *shuf'ah* is the sale and not the ownership as presented by other scholars.

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2. The views of the scholars such as Zahiriyyah, Sufiyan al-Thawri and one of the views of Imam Ahmad and Ibn Taimiyyah that this right of *shuf'ah* applies and *tanazul* rights have been abolished because the partner's consent to discharge the right of *shuf'ah* is considered binding. They think that when *tanazul* is caused by *shuf'ah*, then the cause that leads to the *shuf'ah* is permanent because this reason is fixed and certainly exists even though it is not yet operating. According to them, the cause of *shuf'ah* is the ownership of the property. Therefore, when the owner, one of the partners *(sharik)* releases the right *(tanazul)*, then the party has released something that has already existed and certain. So here, the right of release *(tanazul)* has been abolished.

However, there is a major difference between the two elements, namely *haq al-shuf'ah* and *ishtirak fi al-ribh* in *musharakah* contract. For *shuf'ah*, the rights involved are permanent, in which the rights remain the same as the causes which lead to *shuf'ah* until the release of the rights through *tanazul*. However, it is different from the state of *ishtirak fi al-ribh* in the *musharakah* contract, in which the profit right in *musharakah* is speculative and non-permanent. Hence, Aznan Hassan argued that the equations outlined here are inaccurate, according to Sharia.

4. Use of *Tanazul* As *Ja'li* Conditions in *Musharakah* Contract

Initially, a condition imposed by any party in the contract shall be accepted as long as it does not contravene the Shariah law and the purpose of the contract *(maqsud al- 'aqd).* In general, the scholars argued that profit and loss sharing is included in *muqtada al- 'aqd* for *musharakah* contracts. Therefore, without the sharing of profits and losses in the *musharakah* contract, the contract becomes a felony *(batil)* or *fasid*. The main issue that arises in the issue of using this *tanazul* is the sharing of profits and losses within the *musharakah* which is considered contrary to the religious texts or with *muqtada al- 'aqd*. As a result, Islam does not allow one of the *musharakah* partners to impose conditions that he will not receive profits or bear all losses in a *musharakah* contract.

Clearly, no legal argument prevents partners in a *musharakah* contract to agree on the condition that he will not receive profits or bear all losses in the contract. However, the majority of the jurists expressed their opinion that profit and loss sharing is the main purpose of the *musharakah* contract. In fact, there are scholars' as Al-Kasani stated that the profit *(al-ribh)* is the thing that is directed *(ma'qud 'alayh)* and because of that, profit is not allowed by one party only in the case that the contract is a mutual ownership contract, then each has the right to gain a share of their profits.

Similarly, the scholars of the Hanafi school, Ibn Qudamah and Ibn Taimiyyah [22]. Ibn Qudamah, for example, has detailed the profit sharing in *mudarabah*. In this case, he has pointed out that when profits are required to one of the partners of *musharakah* or *mudarabah*, the conditions set have breached *muqtada al- 'aqd*, which also causes the contract to be false or *fasid*. Ibn Taimiyyah also explained that the distribution of profits in *musharakah* is one of the elements of *muqtada al- 'aqd*. Hence, any agreement which leads to only one of the partners is profitable in the Sharia because it has contravened the principle of justice in Islam.

Based on the views of these jurists, it is understandable that profit and loss sharing is between *muqtada al- 'aqd musharakah*, without this, a *musharakah* contract is considered void and *fasid*. This is because the act of issuing or exempting one of the partners or contributors of capital from the sharing of profit and loss is considered to be contrary to *muqtada al- 'aqd musharakah*. This conflict not only violates the principle of justice, but also causes the cruelty to other *musharakah* partners.

The Application of *Wa'd bi Al-Tanazul* in Preference Shares

Sharia does not prohibit the practice of *tanazul* concept, which is to relinquish a person's right or to incur all losses in the mutual agreement during the distribution of profits or liquidation of the company. However, in order to implement the concept of *tanazul*, there is a problem that arises, that is the problem that exists in the origin of *tanazul*, namely *wa'd bi al-tanazul* or the *tanazul* binding promise. At the beginning of the *musharakah* contract, profits and losses cannot be known as the investment has not yet been realized. Therefore, when *tanazul* is executed during the commencement of the *musharakah* contract, it is possible that one or a part of the *musharakah* partner discharge certain rights in favour of the other contracting parties over something which is unknown and still unrealized at the time of will come in.

The Concept of *Wa'd bi al-tanazul* in Preference Shares According to Islamic Jurisprudence

Based on the clarification given by the Shariah Resolution, Securities Commission Malaysia, the *tanazul* in the context of preference shares, is to assign the rights to share profits on the basis of partnership, by giving priority to preference shareholders [23]. Meanwhile, in Islamic jurisprudence, *tanazul* is also known as *isqat al-haq*. When referring to *Mawsu'at al-Fiqhiyyah al-Kuwaitiyyah*, as proposed by the Shariah Resolution, it is found that *isqat al-haq* is very closely related to *ibra'* concept. Therefore, to get a clear picture of the concept of *tanazul* practiced the concept of *ibra'* should be discussed [24].

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There is a dispute among the jurists about the concept of *ibra'* whether *ibra'* is a void of rights or transfer of property. These jurists' disputes can be divided into several parts as follows:

1. Most of the scholars from the Hanafi, Maliki schools and a minority of Shafi'i and Hanbali schools [25]. They argued that *ibra'* is a rights abortion.
2. Some scholars of the Shafi'i school and Ibn Muflih of the Hanbali school. They argued that *ibra'* is a transfer of property in some circumstances.
3. Some scholars of the Shafi'i school and some of the scholars of the Hanbali school [26]. They argued that *ibra'* is a transfer of property.

Based on these scholars' views, it can be concluded that the term ibra' encompasses both purposes, namely abortion and transfer of property. However, the meaning of *ibra'* varies according to a certain context, for example ibra' for goods is considered as a transfer of property, as goods cannot be dropped, while in a debt case, both meanings for *ibra'* are applicable. For scholars who see *ibra'* as an issue of ownership transfer, they think that the object must be clear and can be identified because it is impossible to transfer something that is unknown. Meanwhile, for scholars who see *ibra'* as abortion rights, the transaction is considered legal in the religious side.

For the first scholars' group, which consists of a majority of the jurists, *ibra'* which involves an unknown object is calculated as valid. In fact, according to the scholars of the Maliki school, *ibra'* by way of representation is legitimate, although the right to the released object is not known by the representative or by agents and debtors, as *ibra'* in their view is a gift, and a gift involving an unknown object is allowed in Islam. For the second group of scholars, they have the same view as the first group of scholars, namely *ibra'* is considered valid even though the object is unknown when there is difficulty in identifying the object. However, if there is no difficulty in identifying the object, then *ibra'* in this case is considered invalid. The scholars' say that ibra' is considered invalid when the person asking the *ibra'* to hide something from his owner for fear that the owner does not release his rights while the person who asks the *ibra'* to know it. Meanwhile, for the third *ibra'* group that involves something uncertain is invalid. Some scholars of the Shafi'i school stated that there is no difference in the obscurity of the object, whether it involves the type, rate, character, dissolution, suspension or termination of the object. Scholars' clarify that if *ibra'* occurs in the exchange of *khulu'*, one of the resolutions is that both parties can identify and recognize the *ibra'* object. However, in cases other than exchange, it is sufficient if the owner knows the object because there is no effect on the parties involved with ibra' although they do not know it.

The scholars have laid down some conditions for *ibra',* among them are terms related to *mubarri'* (the party giving *ibra'*), *mubarra'* (the party receiving the *ibra'*), *sighah* (offer and acceptance) and *mubarra' minhu* (subjet matter) [27]. For the *mubarri'* (the party receiving the *ibra'*), there are some conditions as outlined below:

1. *Mubarri'* must have a religious qualification to enter a *tabarru'* contract (contribution contract), that they must be well-informed, have legal age, legal qualifications, and have no legal constraints as mental as *ibra'* is a *tabarru'* contract where the *mubbari'* voluntarily contributes and does not accept any retaliation from the *mubarra'* (the party receiving the *ibra'*).
2. *Mubarri'* must have the right to be abandoned *(ibra')* or to be the representative of the right.
3. *Mubarri'* must do *ibra'* voluntarily according to his own will because *ibra'* committed by *mubarri'* by force is considered illegal in the religious side.

In the meantime, for those who accept *ibra' (mubarra'),* the scholars Hanbali agrees that *mubarra'* must be known and identified [28]. Therefore, if the creditor drops "one of his debtors" without specifying which one of the debtors, then in such cases the *ibra'* is not valid. Similarly, *mubarra'* decides that debt abortion is illegal, namely, if the creditor says "I have dropped all my debtors", unless he specifically refers to the debtor or identifies them.

For scholars of the Shafi'i school, they consider *ibra'* unlawful when the debtors dropped from the debt are unknown or not properly identified. The scholars of the Shafi'i school rely on this view, assuming that *ibra'* involves the transfer of property; the transfer of ownership is invalid if the transferred party does not know it. Therefore, for debtors dropped out of debt, be aware of the party to be transferred to the debtor unless the creditor abrogates its debtors without any transfer of ownership. The Mejelle in item 1567, has summarized as follows: "The abandoned parties are to be known and identified, then when a person says:" I have dropped all my debtors ", or" No one owes me anymore ", then the debt abortion is not valid. However, if he says: "I have dropped the population of this location" and the residents are known and identified, the abortion is considered to be legal " [29].

For the things, namely *(mubarra 'minhu)*, the jurists outlined some of the conditions that are also followed. In general, these terms can be summarized as follows:

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1. There is a view among the scholars of the Shafi'i school which states that *mubarra 'minhu* must be known clearly. Hence, based on this view, then, it is illegal to abolish the unknown debt of the amount, the nature and where the circumstances of knowing the information on such matters are difficult. The view of the scholar of the Shafi'i school is a continuation of the view that *ibra'* is a transfer of property, as the transfer of property requires consent. In this case, the ignorance of the object of the contract denies the possibility of such agreement. In fact, the scholars' set two exceptions to the prohibition of dropping an unknown debt. The first exception is abortion from liability for a certain number of camels in *diyat* (compensation) payments. In this case, the liability is unknown, in which camel features are unknown, although the age and number of camels are known. Based on this scholarly view, the abortion is considered to be valid, while the camel's features for abortion are assessed on the basis of average camel-related attributes according to proportions across the globe. Meanwhile, for the second exception, it is allowed to abolish the unknown debt after the creditor's death as Sharia sees the debt as part of the dead creditor's will.

For scholars of the Hanafi and Hanbali schools, their views are contrary to the Shafi'i school, where they allowed the abrogation of liability for items of unknown quantities and features, although there is no difficulty in knowing the information that is. They think that abortion is releasing the creditor's right without any retaliation. The scholars analogize *ibra'* with examples in the case of divorce and liberation of slaves. In fact, the abortion is either implemented or not, the object or thing that is being taken is known. The jurists also consider abortion for a creditor if the creditor "frees one of two debtors", without determining which one of these debts.

However, the scholars of the Hanbali school submit an exception to this condition if the debtor deliberately withholds information on the amount of its debts, for fear that creditors cannot abrogate such debts if the creditor knows the real thing. In such situation, the scholars have decided that the abortion is invalid, as it involves fraud from the creditor [30].

1. *Mubarra' minhu* must have the nature of mutual exchange. This is because abortion involves the discharge of liability to another party, while for non-convertible, there is basically no liability. In fact, if someone robs a book, the abortion of the right of this hijacking is considered invalid. On the other hand, the liability for things that may change or vague the exchange (for example, such as camels used as a duty to kill) are legitimate. Abortion rights involving legal rights, such as the right to demand payment from the guarantor or the transferor of debt are also valid in the Sharia side.
2. *Ibra'* matter or object must exist at the time of *ibra'* conducted. In this regard, *ibra'* involves the rights of the former is invalid. For example, an abortion involving debt in the future is considered illegal in the Islamic side. In that regard, the scholars of the Hanafi school do not allow a wife to abandon the husband's right to spend his expenses and future needs, if the husband wishes to divorce him in the future. This is because *ibra'* intends to release or abolish the rights, and such rights can't be abolished if they do not exist. In fact, this is also stated in the Hadith by Rasulullah PBUH as follows; *"There is no divorce except in what you possess; there is no possession, there is no sale transaction till you possess."* You cannot divorce a person you do not know, and you cannot free a slave you do not have [31]. Clearly, *ibra'* equates to contracts in terms of the features that involve abortion or disengagement of genuine rights. In terms of bid and acceptance of *ibra'*, the scholars of the school have placed four conditions that need to be met to recognize the *ibra'* is legitimate in the Shariah side. The conditions are as follows:
1. The jurists apart from the Maliki school decided that abortion should be immediately executed, namely abortion cannot be delayed while waiting for the situation, or delayed to the future. They argue that abortion is a transfer of ownership, and transfer of ownership cannot be postponed on condition. In fact, if the contract signifies the execution of *ibra'* while waiting for the conditions that are appropriate for *ibra'* to be implemented, then it is permissible by the Shariah. The jurists also agreed that the contract is permissible if *ibra'* is delayed pending acceptance, for example, "if you owe me, then you are released" or "if I die, then you are released". They argued based on the words of Rasulullah PBUH, Abu al-Yusr to his debtor, that is: "If you can afford your debt, then pay, if you are not released". The actions of this prophet's companions have not received any criticism from the previous scholars. Meanwhile, the scholars of the Hanafi school allowed the abrogation of the right of the guarantee or the transfer of debt by the creditor, as a creditor said to the debtor: "if you repay the debt tomorrow, then you are released from the guarantee". In this case, the guarantor of debt is discharged from the debt if the debtor pays the debt the next. However, in such cases, the scholars of the Hanafi and Hanbali schools allowed the *ibra'* to be suspended pending the death of the creditor because *ibra'* in this case resembled part of the will and abolition of the debt allowed in the will. However, most scholars of the Hanafi school do not allow *ibra'* to be deferred with other terms with some exceptions.

The scholars other than the Maliki school stated that it is not permissible to withhold the abrogation of the rights, pending any condition other than those stated. This is because they argue that abortion rights involve the transfer of property, and the transfer of property cannot be deferred. Nevertheless, conditional delays are allowed for

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contracts involving abortion or discharge of a person's genuine right without any retaliation. On the other hand, the scholars of the Maliki sect allowed the delay to suspend the rights, pending the situation in all cases based on their view that *ibra'* involves the release of creditor rights [32].

2. *Ibra'* must not contradict any of the principles of Sharia. For example, *ibra'* in terms of acceptance *(qabd)* involving currency exchange contracts violates the principle of Sharia, then *ibra'* here is invalid. Similarly, *ibra'* involves the right of women to live in the home of the husband and wives within the period of *'iddah* after divorce, or *ibra'* involving the responsibilities as guardians of minor children, are each illegitimate due to Shariah. In addition, *ibra'* is also considered invalid if the *ibra'* is averse to the rights of a third party. For example, if a divorced mother releases her custody to the husband. In this case, the release or *ibra'* is not valid because the custody rights involve the mother and child.

3. Parties that accept *ibra' (mubarri')* must first have the right to the object of *ibra'*. This is because dealing in the property of others is not permissible under the Shariah, but as a representative on behalf of the owner.

4. *Ibra'* must occur after fundamental rights are formed. This is because in essence, *ibra'* involves the release of a prescribed liability. Hence, the scholars have agreed that *ibra'* before the existence of such fundamental rights is counted as illegitimate. The scholars view that it is impossible to release any rights which still do not exist and assume that the release is merely a non-binding promise. Meanwhile, if *ibra'* occurs before the existence of such fundamental rights, then the scholars differ in their views. The scholars other than the Maliki school stated that *ibra'* is invalid unless the *ibra'* occurs after the existence of that right. They adhere to the Hadith of the Prophet PBUH by equating *ibra'* in both the conditions mentioned, namely in the case of divorce and liberation of slaves [33].

5. The scholars of the Hanafi school also provide some classic examples of *ibra'* which are considered illegal due to violation of this requirement, which is to do *ibra'* on human rights which still does not exist. Among them, including the wife drops the liability for her expenses before it is estimated, and the price drops to the buyer before the buyer purchases the item again.

The scholars of Shafi'i also provide classic examples of *ibra'*, which occurred before human rights existed, as in the case of dowry abortion for women if her husband died before invoking her, and the dissolution of marriage involving an unspecified compensation. The Shafi'i scholar also presented several examples of *ibra'* which were considered invalid as *ibra'* from the wife before the divorce because in such cases the liability that forms the fundamental rights of *ibra'* does not exist before the ibra' is executed. In addition, there is also an old example of *ibra'* in a situation in which the buyer drops a guarantee against the damage of his goods before the receipt *(qabd)* because in such circumstances such a guarantee does not exist before *ibra'* is done and *ibra'* is considered invalid according to Shariah. However, the scholars of *mazhab* also listed several cases of exceptions involving *ibra'* prior to the existence of fundamental rights and are considered to be legal according to Shariah. Among these exceptions is in a case involving a man who dug a well over the land of another and without the owner's permission. In this case, if the landlord violates the right of infringement and agrees with the construction of the well, then the excavator is released from his responsibility if any individual or animal may fall into the well.

Meanwhile, the scholars of the Maliki school have two views that recognize the legitimacy of ibra' before the existence of liability, for example *ibra'* in the right of the woman to spend with her future husband, is considered legitimate in the opinion of the scholars of the Maliki school. Another example is to abolish the right of *shuf'ah* before the sale takes place. In the case of this *shuf'ah*, the scholars of Maliki school also differ in views, where some recognize the validity of this *ibra'* and some do not recognize it. In addition, they also recognize *ibra'* by the sick group to the heirs or third parties to inherit more than one-third of the land [34].

However, for scholars who support and recognize the use of *tanazul* at the commencement of such contracts, they argued that there are various examples of the use of *tanazul* provided by scholars of the Hanbali school, which apart from aiming to avoid *gharar* (uncertainty), it also seeks to meet the requirements, obligations as well as future responsibilities for contracting parties. This is seen in line with Ibn Hazm's view that any mutual agreement must exist before and not after the contract is concluded [35]. According to him, if *tanazul* is not clearly defined at the beginning of the contract, then this may lead to uncertainty over one party which may ultimately lead to ignorance or *gharar* (uncertainty). Ibn Hazm's stand is in line with the words of Allah SWT, where he expressed his views emphatically that truth can occur when one knows the effect of the matter, and it does not happen because of ignorance [36], as stated in the Quran: *"It is He who created for you all of that which is on the earth. Then He directed Himself to the heaven, (His being above all creation), and made them seven heavens, and He is Knowing of all things."*

In addition, there is also the hadith of Rasulullah PBUH and the Islamic jurisprudence method used in the use of *tanazul*. The hadith is: *"Muslims are bound to their conditions as long as they do not validate the haram things or invalid things or vice versa".* Muslims are bound to their terms as long as they do not legalize the illegal and

prohibit halal matters. There is also an Islamic jurisprudence method that applies in this context, namely; *"The original law of the covenant is a mutual agreement or agreement between both parties and the effect of the covenant is based on the rights and obligations agreed upon in the contract."* [37].

In fact, they also argued that the necessity of *tanazul* should be based on various Islamic teachings such as through practices practiced by previous Muslim scholars in abandoning the original law, especially in situations where there is an *'urf* requirement of matters connected therewith. In fact, the need for custom *('urf)* is also synonymous with current market conditions [38].

In the discussion of priority issues given to preference stakeholders based on *tanazul* that was agreed upon during the company's annual general meeting, there were two major issues arising, namely; the issue of *tanazul* objects that cannot be correctly identified and the issue of *tanazul* given before human rights is formed. For the first issue, the use of tanazul in this preference shares involves *tanazul* objects, which are the exact dimensions of *musharakah*. Since *tanazul* is agreed upon by a partner in the contract or at the Company's Annual General Meeting, the dividend rate subject to *tanazul* cannot be estimated accurately. For example, the dividend expected to be given to the priority shareholders is 5.5%. When the *musharakah* contract was concluded, the *musharakah* partners could not ascertain whether this 5.5% dividend could be achieved or not until the distribution of *musharakah* profit. Consequently, the *tanazul* practiced in this preference share may involve 100% of the profit margin if the actual dividend is less or up to 5.5%, while it may also be less if the actual dividend exceeds 5.5%. Thus, in this situation, the use of *tanazul* involves profits that cannot be accurately evaluated.

However, with reference to *ibra'* issues as abortion or transfer of ownership, it can be concluded that for scholars who see *ibra'* as a possession, the use of *tanazul* in such context is invalid because it involves the transfer of rights for unknown objects. However, for some scholars of the Shafi'i school, there is no difference whether ambiguity occurs in the type, character, dissolution, delay or termination of the *tanazul* object. Meanwhile, for the scholars' who see *ibra'* as claim of rights, the use of *tanazul* in this context is considered to be valid. Hence, the inability to quantify the exact quantities of *tanazul* objects is not an issue according to the majority of the scholars.

The second issue involves the use of *tanazul* given before the existence of *musharakah* rights. Based on the above discussion, *tanazul* is allowed if it is done after distribution of profit and loss. In other words, *tanazul* must occur after the existence of *musharakah* rights. Meanwhile, in the context of preference shares, it is found that *tanazul* is awarded during the advance of the *musharakah* contract or at the Annual General Meeting. The *musharakah* fundamental rights, namely dividends and capital gains in the event of loss have not yet formed or existed again. Therefore, ordinary shareholders waive the rights of something, which is not belong to them *(tanazul)*.

After reviewing all the arguments of the jurists regarding the use of tanazul at the beginning of the contract, it is to be observed that the majority of Muslim scholars did not allow tanazul practice at the beginning of the contract because the basic rights which still did not exist at the time of the contract were agreed upon by the hadith of the Prophet PBUH who also prohibited that in the beginning of the contract. Whereas, the arguments supporting the necessity of the tanazul practice can also be denied because there is no strong argument supporting the matter and the proposed basis, such as *'urf* and agreement with the contracting parties (both contracted parties), cannot be used as an argument because it violates muqtada *al-'aqd* for musharakah in the context of prioritization in preference shares. However, according to a view from the jurist of the Maliki school, the use of *tanazul* like this is permissible by Sharia. In addition, this view was also shared by Abu Hanifah as claimed by Izuddin Abd. Salam in Qawa'id al-Kubra [39].

The Modus Operandi of *Wa'd bi al-tanazul* in Preference Shares Practice

The modus operandi involving the implementation of *wa'd bi al-tanazul* in the preference shares can be described as follows:

1. The stock company issues share and offers them in an IPO for sale. The IPO stands for Initial Public Offering which is stocks offered by the company to the public for the first time being traded on the KLSE. The main purpose of the company is to issue an IPO and make it a public listed company to capitalize on expanding existing businesses. In most cases, the price offered for the first time is lower than the actual price after listing on the KLSE later.
2. In Malaysia, it is common for a limited company to issue ordinary shares and preference shares [40]. During the IPO, only a small number of preference shares are offered, while the remaining shares are ordinary shares. Preference shares will be offered before ordinary shares. Therefore, as investors purchase shares in the company, they have been informed and agree with the terms and specifications of the preference on preference shares.

3. When investors agree to purchase preference shares, they have entered into a musharakah contract with a stock company and become a priority shareholder in the company. Similarly, investors who buy common stocks, they also enter the same *musharakah* contract and become common shareholders in the company.
4. Ordinary shareholders give promise or *wa'd* to perform *tanazul* (abolish its right to the prescribed profit rate) to be divided into preference shareholders. *Wa'd* made by ordinary shareholders to the preference shareholders is binding *(mulzim)* from the point of view of religion and legislation *(mulzim diyanatan wa qada'an)* as stipulated in a resolution issued by the SAC, BNM regarding *wa'd* status. *Wa'd* is done at the beginning of the musharakah contract. At present, *wa'd* involves *gharar* because the investment has not yet been implemented and the amount of profit and loss distribution remains unstable at this stage. Thus, the promise made by ordinary shareholders to perform *tanazul* at this time involves the *ma'qud 'alaih (ma'dum)*.
5. *Wa'd bi al-tanazul* involves pledging tanazul in three situations in preference shares. First, *tanazul* is given by ordinary shareholders to the preference shareholders that ordinary shareholders agree with their right to profit until the preference shareholders earn profit based on certain rates. Secondly, *tanazul* is given by ordinary shareholders to preference shareholders and the preference shareholders agree to limit their profits only to a certain rate and they agree to their right to profit more than that particular rate. Therefore, if the profit from *musharakah* is great, they will only receive a specified rate so far only, and the rest will be given to holders of preference shares. Thirdly, *tanazul* provided by ordinary shareholders to the preference shareholders in the event of a liquidation situation of the company, ordinary shareholders agree to give their rights to preference shareholders, and preference shareholders will have the priority to regain their contribution capital. Only after the preference shareholders regain their capital, then ordinary shareholders will gain the right to obtain their capital based on their respective ownership only if there is a balance after the distribution of such priority shareholders. If there is no balance, then in this case, the ordinary shareholder does not get anything.
6. *Wa'd bi al-tanazul* will expire if the ordinary shareholders have performed tanazul against profit as agreed upon between the ordinary shareholders and the preference shareholders in the promise *(wa'd)*.

IV. CONCLUSION

In conclusion, based on the discussion on *wa'd bi al-tanazul* in the practice of this preference share, it can be concluded that the Shariah Resolution issued by the Shariah Advisory Council, the Securities Commission Malaysia regarding the requirement of non-cumulative preference shares is justified and is not baseless as is said by some parties. Although there is a dispute between local scholars and Middle Eastern scholars in relation to the concept of *wa'd bi al-tanazul* adopted in non-cumulative preference shares issued in Malaysia, however, the Shariah Advisory Council, the Securities Commission Malaysia agrees to allow its use since there is no proposition which can be used as a backup to ban the use of the disputed concept of *wa'd bi al-tanazul*.

Based on the principle of *musharakah* or *tanazul*, there is a view of the scholars that require the use of the *tanazul* that can be used to support the resolution issued. Accordingly, it is desirable that preference shares can be issued either on the basis of the *musharakah* principle (with some modifications of existing preference shares) or the principle of *tanazul*. The application of the *tanazul* concept in practice of preference shares is precisely because it is common in comparison to the use of other more specific terms such as *ibra'*, isqat or tamlik. In addition, some other concepts presented for the application of tanazul such as the use of *tanazul* as *hibah*, the equality of the *musharakah* concept and the right of *shuf'ah* and the use of *tanazul* as a condition of the contract in musharakah contract is also inaccurate in resolving the issue of *wa'd bi al-tanazul* in preference shares.

Although *tanazul* in the distribution of profits and losses of ordinary shareholders to the preference shareholders is permissible, however, the use of *wa'd* or the promise at the beginning of the musharakah contract has caused problems in the practice of *tanazul* in terms of Sharia. This is because *wa'd* done by ordinary shareholders is considered to be binding in religion and law. Therefore, the *wa'd* which binds *tanazul* in the future, comes into effect immediately and is considered a legitimate contract. Therefore, the *musharakah* contract contains *gharar* (uncertainty) because *ma'qud 'alayh* (profit and loss) is unknown when the promise *(wa'd)* is done.

In other words, *tanazul* is permissible and valid at the time of distribution of profits or dissolution, otherwise invalid at the beginning of the *musharakah* contract. Whereas, the profit-sharing ratio differs in the *musharakah* contract, but the loss to be incurred must be equally appropriate in accordance with the share of capital contributed in the *musharakah* contract. Therefore, in the *musharakah* contract, *tanazul* is permissible if it involves profits less than the profit ratio at the commencement of the contract, as long as there is no guarantee of return to any shareholder and the loss must be shared *pari passu*.

However, the practice of *tanazul* in the context of this preference shares must be done wisely so that it is not manipulated by other parties to justify profits with fixed guarantees, which are clearly contrary to Sharia principles. On the contrary, this dispute should be encouraged to local scholars to always seek better alternatives

so that the use of the *wa'd bi al-tanazul* concept in preference shares can be accepted internationally, especially in the Middle East. With this, the scope of investment in particular involving stock instruments will be wider and at the same time, the Islamic capital market can also be developed globally.

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