

## The Rights of *Khiyar* (Option) in the Issue of Consumerism in Malaysia

<sup>1</sup>Mohd Murshidi Mohd Noor, <sup>1</sup>Ishak Suliaman, <sup>1</sup>Khadher Ahmad, <sup>1</sup>Fauzi Deraman, <sup>1</sup>Mustaffa Abdullah, <sup>1</sup>Faisal Ahmad Shah, <sup>1</sup>Mohd Yakub Zulkifli Mohd Yusoff, <sup>1</sup>Monika Munirah Abd Razzak, <sup>1</sup>Jilani Touhami Meftah, <sup>1</sup>Sedek Ariffin, <sup>1</sup>Ahmad K. Kasar and <sup>2</sup>Mohd Roslan Mohd Nor

<sup>1</sup>Department of al-Quran And al-Hadith, Academy of Islamic Studies,  
University of Malaya, 50603, Kuala Lumpur Malaysia

<sup>2</sup>Department of Islamic History and Civilization,  
Academy of Islamic Studies, University of Malaya, 50603 Kuala Lumpur, Malaysia

**Abstract:** *Khiyar* or option is the right given to buyers and sellers whether to continue or to cancel their transactions. The objective of this article is to analyse the types of *khiyar* and to uncover its applications in the right of consumerism. In addition, this article analysed the connection between Contracts Act 1950 and Consumer Protection Act 1990 with the elements of *khiyar* that contain the rights of salesman and purchasers. The methodology applied in this research is the comparative method that comparatively study between the laws of Islam in *khiyar* and the acts related to the right of consumerism. The research discovers that *khiyar al-'ayb* (option due to defects) can be applied due to its applicability with the existing laws in Malaysia. The research suggests that the concept of *khiyar* in Islamic law need to be applied into the existing law in Malaysia in order to preserve the interest for both consumers and sellers.

**Key words:** *Khiyar* • Option • Muamalah • Consumerism

### INTRODUCTION

The English Common Law was introduced in the states of Malay through the laws and decisions of the English judges residing in the courts during that time. The absorption of the English Law English through judiciary decisions were in fact prior to the time of the laws itself [1]. The first laws that were formally approved at the *Negeri-negeri Melayu Bersekutu* (Federated Malay States) was the Civil Law Enactment 1937 [1]. In the year 1951, The Civil Law Enactment 1937 was also approved at the *Negeri-negeri Melayu Tidak Bersekutu* (Unfederated Malay States) through the Ordinance of The Civil Laws (Extension) 1951 [1]. Later both the laws were terminated and replaced by the Ordinance of The Civil Laws 1956 that were executed in all of the states and the *Negeri-negeri Selat* (Straits Settlements) which comprised of Penang and Malacca [1].

For Sabah and Sarawak, after both the states have joined Malaysia, the laws that were previously executed

in Sabah which was the Ordinance of Application 1951 and in Sarawak the Ordinance of Application 1949 were replaced by the Act of Civil Laws 1956 [1]. This act determined that when there is no allocation in any of the laws for a particular case, the Common Law of English and the method of Equity which was approved in England on April 7, 1956 must be applied in the Peninsular of Malaysia [1]. This also implied that after the downfall the Ottoman Empire, the nations of Islam were truly colonized mentally and physically, to the extent that their laws were intervened with.

The Laws of English becomes the main reference in the legislation of Malaysia and there is no reference to the Islamic laws such as been mentioned in the magazine *al-Ahkam al-'Adliyyah* [2] during the time of Ottoman Turkey previously. For example, if the local laws related to the principle of English Trading Laws do not exist, therefore section 5 (1) Civil Law Acts 1956 (review 1972) mentions the following:

**Corresponding Author:** Mohd Murshidi Mohd Noor, Department of al-Quran and al-Hadith, Academy of Islamic Studies, University of Malaya, 50603 Kuala Lumpur, Malaysia, Tel. (Hp): +60126652451; Tel. (Off): +60379676010; Fax: +60379676143.

“In all questions or issues which arise or which have to be decided in the States of Peninsular Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act...” [3].

The Contracts Ordinance (Malay States) 1950 was one of the branches of the trading laws mentioned above. The Ordinance was revised in 1974 so that it can be applied in all of Malaysia and were named as the Contract Act 1950 (revised 1974) [1].

The law related to the process of selling things is also one of the divisions from the trading laws. Since Penang, Malacca, Sabah and Sarawak did not have that kind of law, therefore through section 5 (2) Civil Law Act 1956, Sale of Goods Act, 1893 was implemented in the states mentioned. However for other states, the local laws were applied, which was Sale Goods (Malay State) Ordinance 1957 that were made based on the Sale of Goods Act, India [1].

In the comparison of dates, it seems that The Consumers Protection Act was ratified much later than the Contracts Act. The Contracts Act was actualised in 1974 while the Protection Act was in 1999[4]. The Consumer Protection Act exists mainly to protect the rights of customers from being deceived during the process of transaction. In the Part II of this act, the topic is read as Misleading and Deceptive Conduct, False Representation and Unfair Practice, which clearly points that this act is meant to protect the rights of consumers from being deceived in the process of transactions.

Although the Consumer Protection Act was created for the purpose of protecting the rights of users, it is not fully implemented. This is due to the problem of consumers themselves who do not cooperate in increasing the level of protection for them. Legal protection also does not receive its due attention. In an article by Mohaji bin Selamat, *Urusan Jual Beli: Pengguna Masih Tidak Terlindung* (Business Transaction: Consumers Are Yet Protected), suggests two important actions need to be taken by Malaysians and the rulers, which are 1) all parties including consumers need to cooperate in increasing the level protection level for the users in the country and 2) emphasises on the execution of the existing laws so that the consumers will no longer be victimised [5].

In Islam, there is a discussion on the protection of the rights of sellers and buyers in their transactions. In the debate concerning *khiyar*, there exist elements that can be adapted to the contract act and consumers act. To consider the compatibility that exists between the laws of Islam and the laws in Malaysia based on the enacted act is important because of the laws executed in this country is based on the provisions of the acts. The questions that rises is that is it possible to fully execute the concept of *khiyar* in Malaysia based on provisions in the Contracts Act and the Consumers Protection Act?

**The Concept of *Khiyar* in Islam:** Linguistically, *khiyar* means choices. *Khiyar* commonly refers to certain rights of two parties, which are the seller and the buyer to verify or cancel a contract [6]. Usually the decision for *khiyar* is based on the price agreed by both parties [6]. The agreement between both parties should be during the same ceremony to discuss and focus on the respective transaction and is valid as long as they have not departed from the place of negotiation. [7]. In the book of *Kifayah Akhyar*, Imam Taqiuddin Abu Bakr bin Muhammad al-Husayni mentioned that *khiyar* for both the seller and buyer is as long as they have not separated in certain transaction [8]. He added more that the condition of separation is for a duration of three days [8].

Essentially *khiyar* was designed to fulfil the interests of business transaction in Islamic law. These interests includes the protection of benefits and wills of both parties in a contract and to protect them from possible danger that will harm their business in the future. The *ulama* have divided the *khiyar* to several categories. Imam Hanafi divides it to seventeen types, Shafi'i sixteen, Hanbali eighteen and Maliki two [9]. Meanwhile four of the main *khiyar* that will be discussed in this article is *Khiyar Majlis*, *Khiyar Syarat*, *Khiyar Aib* and *Khiyar Rukyah*.

*Khiyar majlis* refers to the right of choices during a certain ceremony [10]. It is defined as the right for both parties, between the seller and buyer to perform the transaction or cancelled it as long as still in place (the ceremony) of the transaction. When both have departed from the ceremony, then the right of the *khiyar* will be lost until there can be made no more changes to it [10].

*Khiyar syarat* is a particular choice that is set within the conditions of a certain contract. It gives right to one of them or both of them or a third party to verify or cancel certain contract in a certain period of time [11]. Basically, this *khiyar* provides a duration of time so that the re-evaluation of the benefits and costs involved can be

performed in the certain contract. Imam Shafie and Imam Abu Hanifah limit the duration of *khiyar syarat* up to only three days, meanwhile Imam Ahmad Ibn Hanbali does not prescribe the limitation of the duration [11].

*Khiyar Aib* is the right to cancel or continue a transaction when a certain good bought experience defects or damages, so the seller has the right to return the money of the buyer [12]. Islam emphasises perfection in the process of business and forbids actions that are related to the transaction to be done in unlawful manner [13].

*Khiyar Ru'yah* is the right to make choices given to purchasers whether he wants to continue the contract or cancel when the goods are not present during the contract process [14]. The school of Hanafi rules that transaction of goods that are not seen to be valid. They consider the risk taken by the purchaser to be minimal because once the goods have arrived, the purchaser has the right to make choices regarding the goods [14]. Imam Shafi'i however does not agree because in that kind of transaction there exists *gharar* of unknown risks [14].

Although a majority of the *fuqaha'* sees *khiyar* as an agreement of buying and selling certain goods at a certain price in a certain set duration [6] and is a legal transaction and subjected to the right of the product [15], however there is still room for discussions concerning the concept and practice of *khiyar* that are practiced in this country.

**Contracts Act and Consumer Protection Act and Their Connection with the Rights of *Khiyar*:** Based on the Contracts Act, the Consumer Protection Act and the concept of *khiyar* discussed above, the next step would be to examine the documented acts to determine the practicability of *khiyar* within the spaces of the acts. One of the important concepts in *khiyar* is the right given to the buyers or sellers to cancel their transaction, whether it is bind by certain duration of time, or because there are defects in the goods. Both buyer and sellers are given full rights according to Islam to cancel the transaction as long as it fulfils the criteria set by Islam on it.

According to the Contracts Act of 1950, part 5 mentions that: "A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards." [16]. If this is to be applied within *khiyar*, then it is referred to the schools of Hanafi and Maliki in the context of transaction between the seller and buyer. The right of *khiyar* that is meant here is *khiyar al-qabul* and *khiyar al-ruju'* which refer to the bargaining process between two parties before the contract is sealed. This means that the cancellation of the

transaction cannot be done if the *ijab* and *qabul* has been completed. This is different in the view of Shafi'i and Hanbali schools that acknowledge the presence of right in *khiyar al-majlis* even though the *ijab* and *qabul* has been perfected, as long as the seller and purchaser are still present in the contract ceremony. Based on the *fiqh al-hadith* about *khiyar al-majlis*, the view hold by the schools of Shafi'i and Hanbali are considered by many *ulama* as to be more accurate to the Prophetic tradition. This means that the concept of *khiyar al-majlis* cannot be applied in the allocation of cancellation of transaction in the Contracts Act. The rights of *khiyar* that can be applied is only *khiyar al-qabul* and *khiyar al-ruju'* which exist in the schools of Hanafi and Maliki.

Due to the non-existing space for the *khiyar al-majlis* in the laws of contract in Malaysia, the same can be said of *khiyar al-shart*. If the allocations in the Contracts Act are examined carefully, there exist a wide gap with the concept of *khiyar al-shart* as discussed by the *ulama*. In the *khiyar al-shart*, the seller and buyer are given a certain period, such as three days to cancel the transaction. If the given period has passed and there has not been a cancellation of the transaction, therefore transaction itself becomes legal and complete. Both the seller and buyer are then not given any space to cancel the transaction without the agreement from both parties. However, based on the Contracts Act, a different scenario takes place, that if the given period of time is over, while the cancellation of the transaction has not occurred, then the transaction itself is cancelled. It is mentioned in the Contracts Act part 6 (b) as follows: "A proposal is revoked by the lapse of the time prescribed in the proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance" [16]. Although this act seems to imply that the buyer does not accept the contract of the seller, but from the point of generally accepted transaction, when a certain period is given in a certain transaction, it means that one of the parties requires a certain period of time to verify the transaction that want to be executed. This does not mean that he or she does not want to accept the transaction, but instead wants a certain period of time to decide whether to continue with the transaction or otherwise. In the Islamic law, if the purchaser does not make commit the cancellation towards the transaction in a given time, the transaction then becomes valid. It differs with the Act of Contract 1950, if the purchaser does not commit any action that shows he accept the transaction, the transaction will automatically become annulled.

Based on the concept of *khiyar al-'ayb*, the authors believe that there is much room for its practice in Malaysia, due to the allocation the Malaysian law. In the Consumer Protection Act 1999, most of the allocations that exist in it are related to the control of the quality of goods to be sold by the suppliers. For example in the Part II under the title: Misleading and Deceptive Conduct, False Representation and Unfair Practice, the tenth section (1)(a) read: "No person shall make a false or misleading representation that the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model"[4]. This clearly clarifies that no one can conduct deception towards the quality of the goods that are meant to be sold. If there is a deception involved, then court action can be taken.

In the next discussion, the authors have selected several problems that occur in transactions, by examining the possibility for the application of *khiyar* in them. Matters that are given focus in these cases are through daily transaction Muslims in Malaysia that include transactions in supermarkets and also at home. Both transactions are example of transactions that are often practice by the Muslims of Malaysia. At the end of the discussion there will be a specific topic that discusses a comparison between the concepts of *khiyar al-'ayb* with the allocation of guarantee that exists in lay of Malaysia. This is done based on the allocation of guarantee that closely resembles the concept of *khiyar al-'ayb* in the Islamic law.

**Issues of Transaction in the Supermarket: Solution through the *Khiyar* Transition:** Transaction at the supermarket whether it involves large scale businesses or a smaller one, is one of the most common forms of present-day transactions that often involved almost everyone. Although basically the variety of transactions especially in the supermarket has fulfilled the right of consumerism, such as the rights to purchase the basic needs [17], however has caused quite a few problems and polemics that demand the authorities to conserve the right of users in various dimensions for the sake of ensuring that the rights of the users are preserved.

For example, based on the complaints received by the National Consumer Complaints Centre (NCCC) [18] from the year 2010 until October 2011, there are of recorded 107 complaints, where the authors discovered that almost 90 per cent of the complaints received involve transactions in the supermarket. Among the problems have been issues about the price, quality warranty of a certain bought goods [19], breaching of contract and various others.

Therefore the authors will not discuss all the issues, but rather select one that often occurs in the transactions at the supermarket, which is related to the quality warranty of goods. This is because this issue can be said as an *inverse phenomenon* in the transactions in Malaysia especially. For example, when a buyer wants to purchase something, like a can of milk and after the payment has been done, it is found out that the content of the milk has become bad even though the expiry date on label shows the good was still consumable. Meanwhile there have also been cases of the goods being inconsistent with the value paid. The following complaint describes the situation:

*"On 26 Dis 2010, I went to shop at the supermarket. I stopped by at a fabric store in the supermarket. I bought two T-shirts, that were said to be branded and in good quality. I bought the two T-shirts with the price of RM179.80 and RM89.90. On the third day, I asked my wife to clean both the T-shirts. I was shocked and wondered how the T-shirts could become limp and the colour turned dull. On Dec 30, 2010 and Jan 7, 2011, I went to the store to get answers. I did not receive any reasonable explanations". [19]*

In this matter, users have the right to claim their loss based on the flaws or defects that were present in the goods that were bought. However the existing situation in transactions at the supermarkets today does not only marginalize the consumers but also ignores the claim of their right as users and instead lay the blame on the consumers in absolute way.

From the context of Islam's *muamalat*, the concept of *khiyar* [20] is the best indication as a solution to the rising problems in transactions. Meanwhile in the situation mentioned above, the concept of *khiyar al-'ayb* [21] is a way that guarantees the right of consumers in transactions. What is clear is that if the good involved in the transaction do not fulfil its original purpose and has decreased in its market value or do not fulfil the conditions of its uses, then at that time the consumers in the contract has the *khiyar al-'ayb*. In the Maliki's school of thought, this choice is also named as *Khiyar al-Naqisah*'. This is because the defects that exist in the above situation have clearly decreased the market value of the good. It is a common method that duplicity and deception cannot exist in transactions. This guarantees the security of the transaction. Security does not exist if there are defects or deficiencies in the selling of a certain good.

In this situation, the provision of Consumer Protection Act 1999 under section 32 (1), (2), (3), (4) and section 68 (1), (2) can also be the foundation in protecting the right of consumers, as quoted below:

*“Where goods are supplied to a consumer there shall be implied a guarantee that the goods are of acceptable quality. [22]; Where any damage is caused wholly or partly by a defect in a product, the following persons shall be liable for the damage” [22]*

Therefore, as a macro conclusion, *Khiyar al-‘Ayb* is the interpretation of the comprehensiveness of Islam's *muamalat*. This is because the perfection of goods is important in transaction's contract for the sake of ensuring the satisfaction and benefits of both parties (seller and purchaser) and also to balance the defects of the respective goods. It is best to bear in mind that Allah S.W.T's prohibition as told in *Surah al-Nisa'*, verse 29 clearly states the prohibition of taking money illegally and the command that mankind carry out business with the consent of both parties [23].

#### **The Right of *Khiyar* in the Sale and Purchase of Houses:**

In the sale and purchase of houses that are executed in the country, among the most common contract is *al-bay' bi thaman 'ajil*. This form of contract is an alternative for the purchasers in obtaining the financing of housing through Islamic method. In short, transactions of houses through the principle of *al-bay' bi thaman 'ajil* means that the bank will purchase the asset from the developer with a specific price and then sell the house back to the customers with a price included with profits and the customers will make the payment within a certain period in instalments [24].

Meanwhile in the practice of Islamic banking in Malaysia, there are three main agreements that need to be signed [25]. First, the purchaser and the developer will sign the document of Sale and Purchase Agreement, SPA. This requires the purchaser to pay as much as 10 per cent from the price of the house to the developer as an indication that the purchaser has a right towards the house. After that, the purchaser will sign the document of Property Purchase Agreement, PPA with the bank where the bank will buy the asset from the purchaser and at the same time, both parties will sign the document of Property Sale Agreement, PSA where the bank will sell the house back with a price added with profit using the contract of *al-bay' bi thaman 'ajil*.

On closer examination, there are a few issues and problems that are related to the house transaction when there happens to be damage. This is because the contract of the housing transaction uses the principle of *al-bay' bi thaman 'ajil* that only involves business between the bank and purchaser but does not involve the developer. This is due to fact that the bank have gained full ownership after buying the house from the purchaser as signed in the document of PPA and then sell it back to the purchaser by using the contract of *al-bay' bi thaman 'ajil*. What becomes the issue here is which party that should be responsible for the damage of the house, should there be any.

Because of that, the concept of *khiyar al-‘ayb* [26] is seen as a solution to this kind of problem. Purchasers actually do not have to go to a certain extent as to have a specific agreement for *khiyar al-‘ayb* when the contract is sealed. However, *khiyar al-‘ayb* can only be implemented based on certain conditions, which are when any damage happens before the acceptance of the purchaser, the defects is unknown during the contract of the transaction and is not specified by the seller that for the purchasers should observe the asset in question in the first place [27]. If the purchaser has been clarified on the defects of the assets and purchaser did not oppose, the seller is considered free from his responsibility.

Based on the rules of *khiyar al-‘ayb*, the bank as the seller should be responsible for the damage of the house. However, in reality the practise of housing transaction shows that the bank does not hold the responsibility. This is clearly stated in the document of PSA that has been signed which stated that the bank is an exempt from any responsibility if there is damage to the house that was sold. However the right of the purchaser has indirectly been preserved in Consumer Protection Act 1999 where it is mentioned in the section 68 (1) as following:

*“Where any damage is caused wholly or partly by a defect in a product, the following persons shall be liable for the damage; (a) the producer of the product, (b) the person who, by putting his name on the product or using a trade mark or other distinguishing mark in the relation to the product, has held himself out to be the producer of the product; and (c) the person who has, in the course of his business, imported the product into Malaysia in order to supply it to another person.”*

It is clearly stated here that the bank as the owner of the house should hold the responsibility as the seller should any damage occur to the house, the purchaser has the right of *khiyar* whether to cancel the contract of transaction or claim their loss from the bank.

***Khiyar Al-'Ayb and Its Comparison with Guarantee:***

Guarantee means warranty or surety. If any damage occurs to the goods bought at a specific time, therefore the salesman will have to bear the damage of the goods whether to replace or provide the required services of repairing the broken goods. Usually, the period of time for guarantee is set by the seller depending on the price of the good, as well as certain properties or components within a respective good. Meanwhile the purchaser does not have any right in setting any conditions of the guarantee.

In the discussion of *khiyar al-'ayb*, most of the rulings in Islam set that if there exist any defects to the good, therefore based on certain conditions it is either the good is returned the purchaser is reimbursed, taking the goods at half price, or other reasonable practice. However with the present of guarantee from the seller, customer's satisfaction towards the buying of the goods becomes more ensured. Actually guarantee is not offered to regular goods that have been mentioned in the old *fiqh* books such as fruits, vegetables, livestock and others. Due to the advancement of the in current time goods has leads to the importance of having warranty to ensure the satisfaction of the purchasers and it is also guarantee from the seller that could convince purchasers on the quality of the goods.

The question of *khiyar* that was discussed in the past book of *fiqh* mentions the returning of goods that were damaged and the reimbursing of money. However in the current era, *khiyar* is not solely subjected to the acceptance or cancellation of contract, but also to the service for the guaranteed good, whether for free or at half price or by replacing with new good. This matter ensures more the satisfaction from the purchasers and the seller in the process of transaction.

In the present time, the application of *khiyar* among the sellers and buyer has to be included in the enforcement of law. This is to ensure the welfare of consumers from the victim of irresponsible actions of sellers. In the Consumer Protection Act of 1999, there are various parts that protect the consumers from becoming victims in transactions. Part V until part IX [4] specifically provides the guarantee that will be the discussion in comparing the acts to *khiyar*.

Part V explains the types of guarantees that need to be provided by the sellers for their goods like Implied guarantee as to title, Implied guarantee as to acceptable quality, Implied guarantee as to fitness for particular purpose, Implied guarantee that goods comply with description, Implied guarantee that goods comply with sample, Implied guarantee as to price, Implied guarantee as to repairs and spare parts, Manufacturer's express guarantee [4].

If we are to re-evaluate all of the sections and sub-sections that are provided allocated in the Consumer Protection Act 1999, it can clearly be stated that it fulfils the concept of *khiyar al-'ayb* that is allocated in the laws of Islam as connoted in the books of *fiqh* from all four venerated schools of thought. In part VI, section 41 and 42 for example explain that:

- Where a consumer has a right of redress against the supplier under this Part in respect of the failure of any goods to comply with a guarantee under Part V, the consumer may exercise the following remedies:
- where the failure is one that can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time in accordance with section 42; and
- where the failure is one that cannot be remedied or is of a substantial character within the meaning of section 44, the consumer may -
- subject to section 43, reject the goods in accordance with section 45; or
- obtain from the supplier damages in compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.
- In addition to the remedies under subsection (1), the consumer may obtain from the supplier damages for any loss or damage suffered by the consumer, other than loss or damage through a reduction in the value of the goods, which is proved to be a result or consequence of the failure.

The allocation to reject the goods whether through the return of money, or claiming loss by the reduction in the good's price is also one of the matters discussed in the *fiqh* of Islam.

The need to return back the good is stated under section 45. This is also discussed under the laws of Islam like types of goods that need to be returned and do not need to be returned and also to whom the expenses of the returned goods fall upon, however the statement in the act is in the context of the current time regarding the

expense to return the good if it is hard to be returned and involve quite a large sum on the purchaser's part.

Section 43 meanwhile stated that the loss of right of users to reject the goods due to a number of matters. According to the discussions on the conditions of returning a defected good by all four schools, it is clear that they judged a certain defect according to types of the good, whether it is an animal, slaves or others where the defect does not usually occur to the good; it only happens after the acceptance of the good and the one who defect it, or if the original purpose from the purchase of the good is not achieved.

The conclusion is, even though the provision in the Consumer Protection Act 1999 is not in overall according to what has been set by past fuqaha in regard to *khiyar al-'ayb*, the methods that are deemed required especially towards modern goods like electrical goods for example still follow the concept of *khiyar* set by Islam in the current times from fiqh muamalat aspect. However, periodically the provisions of the act needs to be updated and renewed consistent with the needs of time and condition to ensure the welfare of consumers from being abused and becoming the victim of the sellers who will take advantage despite the existing act [28]. The combination of several fiqh rulings from all schools is essential to ensure the rights of consumers especially in the existing allocations in Malaysia laws, which will look after the welfare of consumers and also place consumers' fiqh as a reference in the issue of consumerism not only involving the Muslims but all walks of life.

## CONCLUSION

Lastly, the research displays that the application of concept of *khiyar* in the enactments and acts is not thorough by not allocating about *khiyar syarat* and *khiyar majlis* and only fulfils the concept of *khiyar aib*. Whereas this research is also highlighting the issues that rises among users in various level that need to be given solution to.

Islam has provided the best solution to ensure the welfare of human life in every aspect. This matter cannot be disputed. In the present times the enforcement of laws in transactions contracts needs to be broadened and referred to the laws of contract, as provided in the laws of Islam for the purpose of optimizing the benefits of both parties in transactions.

Even so, current reality needs to be considered in implementation of Islamic for practical purposes. Maqasid al-Syariah needs to be applied to ensure the welfare for

consumers and sellers and also to oppose the *mafsadah* (?) from them and also to actualise justice among mankind that is also one of the purpose of Syarak that is important to be preserved.

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