

Conference Paper
3rd Annual World Conference On Riba

*The Multifaceted Global Crises of Riba:
Resilience, Response & Reform*

www.worldribaconference.org

26th & 27th November 2012

*Palace of the Golden Horses,
Mines Wellness City, Kuala Lumpur*

TABLE OF CONTENTS	PAGE
Fractional Reserve Banking from Islamic Perspective, Part 1: the Prohibition Moussa Larbani and Jilani ben Touhami Meftah	1-16
The Grondona System of Conditional Currency Convertibility: An Analysis of Implementation in the Malaysian Economy Jameel Ahmed, Patrick Collins, Ahamed Kameel Mydin Meera	17-42
The Potential Contribution of Islamic Microfinance Activities in Socioeconomic Development in Sudan Dirar Elmahi Elobeid	43-61
The Proposed Formation of a Single Currency in ASEAN-5 Countries Under Commodity Basket Arrangement Dimas Bagus Wiranata Kusuma, Mochammad Arif Budiman, M. Khairul Anwari	62-85
Riba free Alternative Money Systems - an experiment in localized Islamic money & economy Paul Mann	86-99
Between Riba and Alcohol Consumption: The Similarity of Qur'anic Tahrim Strategy as a tool of Qiyas Vis-à-vis Interest Charges Being Riba: Muhammad Sani Isa	100-118
Application of Bay' al-'Inah in Islamic Banking and Finance: From the Viewpoint of Siyasah Shar'iyah Tita Nursyamsiah, Saim Kayadibi	119-136
The Effect of Riba in the Religion of Islam Safih-iu Abdul Azeez Bello	137-152
Riba Free Financing for Dwellings Kevin Cox	153-157
Alternative Financial Institutions to Riba Within the Structure of Islamic Economic System Magda Ismail A. Mohsin	158-176
Riba or without Riba; How Micro Finance should restructure to eradicate poverty; A case Study on a particular area of Bangladesh Kazi Farzana Shumi	177-192
Fractional Reserve Banking from Islamic Perspective, Part 2: The Case against Current Islamic Banking Practice Jilani ben Touhami Meftah and Moussa Larbani	193-208

Application of Bay' al-'Inah in Islamic Banking and Finance: From the Viewpoint of Siyasah Shar'iiyah.

Tita Nursyamsiah¹

Saim Kayadibi²

Abstract

In siyasah shar'iiyah perspective, the rulers have to administer shari'ah principles to get beneficence (*salah*) and to prevent from any form of harm or corruption (*fasad*). Thus, any muamalah activities are allowed providing that no substantive shari'ah principles are violated, including any activities in Islamic banking. Islamic banking products have enhanced their popularity since the last two decades, have taken more attention in sector of banking and financing due to its characteristics and differences compared with conventional bank and have been trusted as a solution for the current crisis as well. Many banks have created and adapted the system of Islamic Banking based on the *shari'ah* principles which are the Quran and the Sunnah followed by the consensus of the jurists and interpreters of Islamic law. The main difference between Islamic Banking and its counterpart is particularly prohibition of *riba*. This main concept has deliberately led many scholars of Islamic law to explore the system of Islamic banking which must be set free from *riba*. Moreover, there is an aqd named *bay al-'inah* that leaves any issues among the scholars. Bay' al-'Inah refers to the selling of an asset by the bank to the

customer through deferred payment. It comprises two agreements (*akad*). In the first agreement, the bank sells an identified asset to the customer at an agreed price. The customer can complete the purchase of bank's asset via fixed monthly installments on agreed tenure. While for the second agreement, the bank repurchases the same asset from the customer at a lower price. Upon completion of the 2nd transaction, the bank will pay the lump sum amount as agreed by both parties in the agreement. Some fuqaha have different opinion on this transaction, particularly that al-'inah has inherent *riba* and is an unlawful transaction. Especially in Malaysia, bay al-'inah has been offered though its application in Islamic banking which has left many issues particularly about the existence of *riba* and illegal transaction which violate shari'ah itself. This study thus attempts to describe bay al-'inah itself and analyzes the different thoughts among some scholars about bay al-'inah in case of its implementations in Islamic banking system which will highlight the reality and tricky usage of it in Islamic banking and Finance issues.

Keywords: Bay' al-'Inah, Islamic banking system, Siyasah Shar'iiyah; *Riba*.

1. Introduction

Talking siyasah shar'iiyah is normally related with Islamic law, particularly how the leaders or *imam* implement shariah principles. Basically, siyasah shar'iiyah is a broad doctrine of Islamic law which authorizes the ruler to determine the manner in which the principles of shariah must be

¹Tita Nursyamsiah, M.Ec student, the Department of Economics, Faculty of Economics and Management Sciences, International Islamic University Malaysia (IIUM), Kuala Lumpur. Email: tsyamsiah.280188@gmail.com

²Assoc. Prof. Dr. Saim Kayadibi, Deputy Director, International Affairs Division, teaching at the Department of Economics, Kulliyah of Economics and Management Sciences, International Islamic University Malaysia (IIUM), Gombak, Kuala Lumpur, Malaysia, email: saim@iium.edu.my and skayadibi@yahoo.com

administered³. In the usage of the fuqaha, siyasah shar'iyah involves decisions and policy measures taken by the imam and the ulu'amr on matters for which no specific rules can be set up in the Shariah. According to Ibn Qayyim in Kamali (1989), *“any measure which actually brings the people closest to beneficence (salah) and furthest away from corruption (fasad) partakes in just siyasah even if it has not been approved by the Prophet (PBUH) nor regulated by Divine revelation. Anyone who says that there is no siyasah shar'iyah where the shariah itself is silent is wrong and has misunderstood the companions....”* (p.61).

From the explanation above, we can conclude that rulers have to administer shariah principles in every *muamalah* (rules regarding the social interactions between human), including in economic part. Some of economic activities usually occur in financial institutions such as bank.

³Mohamad Hashim Kamali, “Siyasah Shar'iyah or the Policies of Islamic Government,” (The American Journal of Islamic Social Sciences, vol.6 No. 1,1989) p. 59

Nowadays, there is new banking system named Islamic banking which offers many transactions based in shariah principles. In shariah's principles of Islamic banking, there are three fundamental prohibited elements that should be aware in any transaction such *riba* (interest rate), *gharar* (uncertainty), and *maysir* (gambling).

In terms of history, Islamic banking started in earnest in the 1970s with personal initiative of the concerned Muslims to address the problem for *riba*. *Riba* literally means excess, increases, addition, or growth and technically be defined as unlawful gain derived from loan contract or excess is due to in deferred payment (*ribaal-duyun* or *nasi'ah*) and in exchange contracts or excess accruing or barter transaction (*ribaal-buyu* or *al-fadl*)⁴. Thus, *riba* is a crucial problem and issue in banking sector since its harm could inflict toward some people especially to the

⁴ISRA,” Islamic Financial System Principles and Operations,” (Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance, 2010) p. 177.

borrowers of the loan. In banking system itself, *riba* is known as interest-rate and its existence as stated above, is totally prohibited in Islamic banking system.

Moreover there is one transaction in Islamic banking named *bay al-inah*, which is generally defined as sale-based on the transaction of *Nasi'ah* (delay). *Bay al-inah* is normally defined as an arrangement whereby a person sells an asset to another for a deferred payment and buys it back the asset from the buyer before the full payment which is lesser amount than the deferred price⁵. Technically, the application of *bay al-inah*⁶ in Islamic banking involves two set of transactions; (i) *al-bay al-mutlaq* (cash sales), and (ii) *murabahah* or BBA (deferred sale), both of which are executed after one another.

⁵Asyraf Wajdi Dusuki and Nurdianawati Irwani Abdullah, "Fundamentals of Islamic Banking" (Kuala Lumpur:IBFIM, 2011) p. 197.

⁶Arzim Naim, "Issues in *Bay al-inah* and Bay Al-Dayn and Proposal for Other Concepts Available in Islamic Commercial Law to be Employed As Alternatives in Contemporary Islamic Finance," (<http://arzim.blogspot.com/2010/02/issues-in-bay-al-inah-and-bay-al-dayn.html>, 2010). (Accessed April 25 2012).

The process could take place in the reverse form too whereby the deferred sale is preceded by a cash sale and vice versa (known as reverse '*inah*'), but in both ways each party gets what it intended to achieve. It is worth noticing that the contract of *murabahah* and BBA is instrumental in making the *bay al-inah* transaction possible.

On the other hand, *bay al-inah* has left any issues related with its transaction particularly about the existence of *riba* and illegal transaction violated shariah principles. Thus, this paper endeavours to analyze ultimately about *bay al-inah* based on its definition, the application in Islamic banking, some opinion from some scholars, and *siyasah shar'iyah* perspective in *bay al-inah*.

2. *Bay Al-Inah*; Definition, Application in Islamic Banking, and Some Opinions About *Bay Al-Inah*

This part elaborates the definition about *bay al-inah*, the application in Islamic banking, some opinions from some

scholars about *bay al-inah*, and siyasah shar'iyah perspective in *bay al-inah*.

2.1. Definition of *Bay al-inah*

Inah is a loan or an advance payment which is said in Arabic as *I'tana al-rajul* or the man bought on credit, such as bartering one thing for another on credit and buying on credit⁷. As it known, credit means the buyer of one commodity for a fixed time is able take a compensation from the seller in cash on the spot. Some scholar have different definition of *inah* because of their opinion based on its form. Instead, the most famous definition given to it by some classical was: "A situation whereby a seller of one sells commodity to another for a specific price with payment deferred until the fixed date, then he buys it back from the other person a lower price in cash"⁸. On the other hand, Al-Mawsu'ah Al-Fiqhiyyah (The Juristic Encyclopedia) defines it on the basis of the essence of engaging in it as a loan in form a sale in

order to make the increase lawful⁹. Classical jurists define the form of *inah* in their books as¹⁰:

1. "A" sells commodity to "B" for certain price with payment deferred until fixed date, and buys it back at a lower price in cash.
2. "A" buys a commodity from "B" by an intermediary present at the time of transaction. Firstly, the intermediary buys it from B, then he sells it to A at price higher than the price he bought from B with payment delayed till a fixed time. A next sells it to B for cash at a price lower than the price A paid for it.
3. "A" sells a commodity to "B" and delays the payment until fixed time, then he buys it back, with payment delayed until a date later than that of the first transaction a higher price.

2.2. Application *Bay al-inah* in Islamic Banking

⁷ISRA, ibid., p.221

⁸ISRA, ibid., p. 221

⁹ ISRA, ibid., p.221

¹⁰ISRA, ibid., p.221

For now, only two countries which are Malaysia and Brunei Darussalam allow *bay al-inah* applying in their banking system. Their shariah scholars concur that majority of scholars and financial institutions prohibit *'inah*, though wonder the issue as a kind of *ijtihad* (personal reasoning) that permits divergence of ideas.

The shariah Advisory Council of Bank Negara Malaysia¹¹ in its meeting held on 12 December 1988, resolved that *bay al-inah* is permissible subject to the following two conditions :

- The transaction of *Bay al-inah* must strictly follow the mechanism which is accepted by the Shafi'i school.
- The transacted item is not a *ribawi* item (goods that are not consonance with fiqh rules with respect to cash or items sold by weight and/or measure)

¹¹Bank Negara Malaysia, "Resolutions of Shariah Advisory Council of Bank Negara Malaysia" (Kuala Lumpur: Bank Negara Malaysia, 2002) p.15

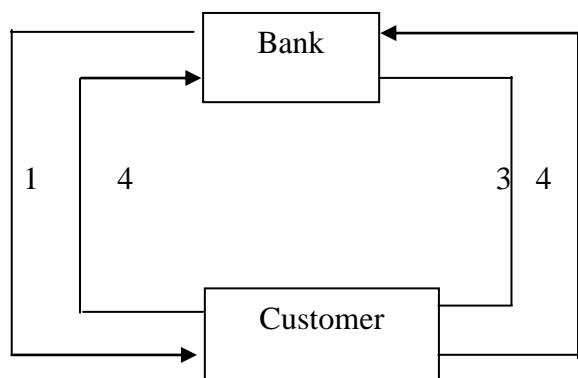
Notwithstanding the above, the Council acknowledges the fact that the issue of *bay al-inah* is still a matter of juristic disagreement among shariah scholars, backed by their own basis of justifications. Consequently, the Council during the Regional Shariah Scholars Dialogue on 29 June 2006, resolved that:

*"Bay al-inah concept is still necessary in the context of local Islamic finance development. However, market players are required to strengthen and enhance their operational processes and documentation to comply with the features of Bay al-inah as permitted. Since the Bay al-inah concept is still regarded as a matter of juristic disagreement among Shariah scholars, it is more desirable for IFIs to limit its use in products"*¹²

Thus, the common mechanism of *'inah* application in the Islamic banking system is described in chart 1.

Chart 1. *Bay Al-Inah* Application in Banking System.

¹²ISRA, *ibid.*, p.224



Remarks from the chart above is defined below:

1. The bank sells a particular asset to the customer on a delayed payment basis at the real cost plus profit that is tantamount to the maximum amount to be paid by the customer.
2. The customer then resells the same commodity to the bank on a cash basis that is equivalent to the limit of card.
3. The proceeds are then paid out into wadi'ah savings account conceived for the customer. The amount becomes the card limit that might be used by the customer when he or she wants.
4. The customer pays the bank the amount he or she uses by instalments or the full amount at once.

In addition, Islamic bank system also offer credit card to its customer. The proposed mechanism is as follows¹³:

1. The customer purchases an asset from the bank on deferred terms (the purchase price comprise cost plus profit); for example, RM11, 800 (RM10, 000 + RM1, 800) to be paid within one year by the customer;
2. The customer thereafter will sell back the asset to the bank on cash basis (at cost value); for example, RM10,000. The selling price of the asset is lower than the purchase price. This is the amount which will be credited into a marginal *wadi'ah* account of the bank for customer's use.

2.3. Opinion About *Bay al-inah*

In recent time, most of the contemporary Muslim jurists are obviously inclined towards the majority's view in disallowing this transaction mainly debating that it is a *hiyal* (legal device) to

¹³Bank Negara Malaysia, *ibid.*, p.16

circumvent *riba*-based financing, which actually open a “back door” to *riba*¹⁴. On the other hand, some scholars also allow ‘*inah* and consider that this contract is not contrary to Shariah principles. Therefore, this part will discuss both of opinions whether it is contra or pro with *bay al-inah*. Before that, we would like to explain about *hila* shariyyah thus it will be obviously seen why ‘*inah* leaves issue for Islamic banking.

2.3.1. *Hiyal Shar’iyyah* (Legal Tricks)

Hiyal an act may seemingly be lawful in accordance with the literal meaning of the law but could hardly be in conformity with the spirit or the general purposes of Shari'a law¹⁵. According to Al-Shatibi¹⁶, *hiyal* is to conduct good action which is fundamentally allowed to repeal the other principles. It means, even though

basically someone performs an action which is allowed, but there is an implicit intention to avoid from his or her obligatory which is more crucial than what he or she performs.

According to Ibn Qayyim Al-Jauziyah¹⁷, he divided *hiyal* into four forms. Firstly is *hiyal* that implies intention which is prohibited and conduct it illegally. For instance the case someone who drinks *khamr* before prayer, thus his or her obligatory to do prayer loses at that time. Secondly *hiyal* which is done the action that is allowed, but its intention is to cancel the other principles. For example someone who give *hibah* (gift) a half of his or her property when *haul* (limit time) is getting closer, thus he or she is free from the obligatory to pay *zakat* since the property is decreased from *nisab* (limit property). Thirdly, an action that is actually not prohibited, even it is advised but its intention is to obtain something that

¹⁴Dusuki and Abdullah, *ibid.*, p.197

¹⁵Rosly Saiful Azhar and Sanusi Mahmood, “Some Issues of Bay' al-'*inah* in Malaysian Islamic Financial Markets”, (Arab Law Quarterly, Vol. 16, No. 3 : BRILL, 2001). P. 274

¹⁶Asy Shatibi in Zamzani Mukhtar, “Hilal As-Syariah dalam Praktek Hibah dan Wasiat”, (Essay of the Judge presented in Jakarta, September 2011), p. 2.

¹⁷Ibn Qayyim al Jauziyah in Zamzani Mukhtar, “Hilal As-Syariah dalam Praktek Hibah dan Wasiat”, (Essay of the Judge presented in Jakarta, September 2011), p. 2.

is forbidden. For example a marriage which is performed by a person to a woman who is given *talaq* (divorced) by her husband, in order that woman is able to be married again by her husband after she is divorced by that person (*bay al-inah* including in this part since basically, *bay* transaction is allowed, but the intention is prohibited due to the real motive to get loan and take usury). Finally, *hiyal* which is used in purpose to obtain something its rights and reject the harms.

Al-Shatibi¹⁸ mentioned why *hiyal* shar'iyyah is prohibited. Firstly the intention is contrary to shariah principles. Secondly, the effect of this action brings more *fasad* (harm) which is invalidated by our religion. Thirdly, there is a fake action since actually the intention to do that action is not exist, thus the willingness from this action literally not to be present. Fourthly, *hiyal* is cancelled since its requirement is contrary with the intention

of its action. Moreover, *hiyal* is repeal to law, since *hiyal* is performed by leaving or adding requirement which violate shariah. Finally, *hiyal* is prohibited based on *istiqla* (induction from many explanations). Those explanations comes up from Quran which elaborates the hypocrites who is not sincere to do the good thing. *Hiyal* is conducted to avoid an obligatory and this action is not pure from his heart.

2.3.2. Contra and Pro Opinion

There are some opinions supported that *bay al-inah* is prohibited especially the issue of existence *riba* in this transaction. Actually, the developmental role of Islamic banking and finance is not fairly different from its conventional counterparts¹⁹. Both of the financial intermediaries are serving to assemble savings from the surplus sector and conducting a credit allocation function to the deficit sector. The main difference to be in the nature of financial contracts adapt

¹⁸ Asy Shatibi in Zamzani Mukhtar, "Hilal As-Syariah dalam Praktek Hibah dan Wasiat", (Essay of the Judge presented in Jakarta, September 2011), p. 2.

¹⁹ Rosly Saiful Azhar and Sanusi Mahmood, *ibid.*, p. 263-280

in these markets. For instance, in Islamic banking, the contract of *al-bay'* such as *murabahah* or BBA take the place of the contract of loans in conventional banking since there is main issue of the prohibition of interest as *riba* and it is supported in Quran which states below.

“...that they say: ‘exchange is like usury,’ but Allah has permitted trade and forbidden usury...”²⁰

Therefore, deposit taking and financing activities must refrain from the payments and receipts of interest. The distributional issue has often been used to elaborate the harms of *riba*. Since profits from *riba* are created without the existence of an equivalent countervalue, *riba* constitutes an unlawful gain as it is created without risk-taking and value-addition activities²¹. Literature on Islamic banking states that people who get benefit from *riba* or lenders, do so without doing work and effort into the business

transaction. On the contrary, people who perform to risk-taking and value addition, called as the borrowers, are leaped by the law to repay both capital and interest even if the business obtain loss or no profit obtained. It means that in the long-run the distribution of income will only work in favour of the lending sector. Thus, since *bay al-inah* has left an issue of *riba*, many jurists concur that this transaction is prohibited. Some of jurists agree that *'inah* is such a *hiyal* to get loan and usury.

The Maliki²² and Hanbali jurists say that the contract of *bay al-inah* is invalid since based on their the motive of the parties to the contract causes the legality or illegality of the contract, and in the sale under consideration the motive of the parties is illegal and, therefore, the sale is not valid because it constitutes a *hiyal* to obtain a loan with interest which should be averted at all costs according to the

²⁰ Stated in Surah Al Baqarah 275

²¹ Haque Ziaul, “*Riba - The Moral Economy of Usury, Interest and Profit*”, (Kuala Lumpur: Ikraq Publication) p. 11.

²² Ibn Rushd, “*Bidayata l-Mujtahid*”, (Lebanon, Vol. 2, 2009) in Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p. 275.

Shariah²³. Ibn Qayyim²⁴, a Hanbali author, argues that Islamic law and its rules specify that intention influences legal acts: the formality of a legal act can be the same but the end result depends on the intention", and after he had mentioned 99 proofs of preventing what is conclusive to unlawfulness even if it is permitted he said: "All these examples show that contracts are not regarded as valid if the contracting party harbours ill intention". Another Hanbali author²⁵ denoted that if the vendor of a quantity of grape juice knew, either directly or owing to circumstantial evidence, that the buyer intended to use the juice in order to make wine, then the contract is illegal. In the Maliki Fiqh²⁶ book *Al-Mutwatta*, which was written by Imam Malik at the beginning of the second century Hejira, it

is found that countless examples of contracts and transactions that were considered as unlawful by Muslim scholars because the intentions of the contracting parties were bad and illegal. Malik²⁷ is also of the opinion to cancel the sale of any article when the contracting parties purpose to use that article for an unlawful intention, such as the sale of arms to people already at war or to bandits. Imam Sahnoon²⁸ mentions in his book *Al-Mudawanah* that it is unlawful and haram to lease a shop to someone who purposes to purchase alcohol therein. It is explicitly stated in the opinions of the above jurists that intentions are to be taken into account in relation to legal acts just as they are in matters of faith: Islam does not convey Muslims to delineate a goal, and then use what means they observe fit in order to achieve it. Instead, it says them that if the purposes are correct, the ends will look after themselves.

²³Ibn Taymiyyah, "Majmu'at al-Fatawa", (Lebanon, Vol. 29,1969) in Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.275

²⁴Ibn Qayyim, "al-Jawziyya-al'lam al-muwaqqi" in Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.275

²⁵Ibn Qudama, "al-Mughnial Mukhtasar al-Kharqi", (Lebanon, Vol. 4,1969) p. 245-247.

²⁶Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.275

²⁷Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.275

²⁸Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.275

In addition there is also a Narration from Saidatina Aishah states:

“A mother once asked Saidatina Aishah, she said “O Ummu al-Mu’minin! I have sold a slave belongs to Zaid bin Arqam to `Ata’ at 800 dirham. Since `Ata’ needed some money, I have bought back the slave before it is due for me to receive 600 dirham” Saidatina `Aishah replied, “how could you execute such a bad sale. You should inform Zaid bin Arqam that his conduct has extinguished all his rewards for participating in jihad with the Prophet PBUH if he does not repent. The mother said: “What is your opinion if I forgot the profit and take the principal sum only?” `Aishah then recited the verse which means: “Whoever receives an admonition from his Lord and stops eating riba shall not be punished for the past, his case is for Allah (to judge).”²⁹”

The scholars view that the above sayings and fatwa of Saidatina Aishah shows that it is necessary to take certain

precaution and abstain from conducts that would lead to unlawful result in Shariah (*sadd zari`ah*). There are also a few hadith that indicate the prohibition of *bay al-inah*:

First hadith

“If you sell and purchase based on `inah, and you cultivate, and you are satisfied with the cultivation, and you ignore the duty to do jihad, Allah SWT will curse you and He will not remove the spell until you return to your religion”³⁰”

Second hadith

“If the people count every single dinar and dirham, and sell and purchase based on `inah, and cultivate the land, and abandon the duty of jihad for the sake of Allah SWT, Allah SWT will befall misfortune on them, and will not remove it from them until they return to their religion”³¹”

On contrary some of Muslim scholars, which consist of Imam Shafii, Abu Yusuf, Abu Daud, and Abu Thur, including a report from Ibn Umar are of the view that this contract of sale is not

²⁹Dusuki and Abdullah, *ibid.*, p.198

³⁰Reported by Abu Dawud

³¹Reported by Imam Ahmad

contrary to Shariah principles, thus it is allowed³². They argue among others that the hadith relied on as narrated from Saidatina Aishah above is weak in terms of its *sanad* (transmission). This is because one of the narrators of the hadith named al-`Aliah binti Anfa` ismajhullah unknown. Al-Dar Qutni³³ regards her as an unknown figure, therefore the hadith cannot be proved.

Besides having a weak *sanad*, the hadith is also weak in terms of its *matan* (wordings). They claim that Saidatina Aishah is not in a capacity to determine status and to invalidate the rewards for *jihad* that Zaid had involved together with the Prophet PBUH in the battle fields since Zaid had conducted an *ijtihad* and was of the view that such a sale is permissible.

Moreover, Imam Shafii says, in his book al-Umm, as following:

“If we are going to assume that someone’s sale and purchase contract is forbidden whereas he believes that the contract is

permissible, we are not allowed to judge his past good deeds as have been wiped off by Allah SWT³⁴”

In addition Al Shafi’i describes his stand by denoting that:

The basis for my position is that if a contract fulfils the shariah’s manifest criteria for its validity, i will not invalidate it on the basis of a presumption or a customary practice between the sellers and buyers. Hence, I will approve it by virtue of its validity, but I prohibit a kind of situation where the two of them nurse an intention that may likely lead to the invalidation of the contract if it is manifested. For instance, I forbid someone buying a sword with the intention to kill with it unjustly, but it is not unlawful for the seller to sell it to someone he suspects will use it to kill unjustly because it is possible that he will not use it to kill unjustly. I, therefore, do not invalidate this kind of business transaction. Likewise, I detest that someone sells grapes to a buyer

³² ISRA, ibid., p. 224

³³ ISRA, ibid., p.224

³⁴ Al-Syafii, “al-Umm”(Lebanon: Dar al-Fikr, 1990) p.68,69

he thinks will use them to make wine, but I do not invalidate such a sale because he is selling it as something lawful, and it is possible that the buyer will not, however, make wine from the fruit, just as it is possible that the purchaser of a sword may not use it to kill. Likewise I invalidate a temporary marriage, i.e., mut'ah, whereby an expiry date is stipulated in the contract, but if a man marries a woman through a valid contract with the motive to have her as his wife for only a day, or less or more, I would not invalidate such a marriage contract but I only invalidate the contract when such a kind of intention is made manifest or detected. In another vein, if a man buys a commodity from another person, and the payment is deferred to a stipulated time, there is nothing wrong if he sells it back to the person he bought it from or to another person for cash a price lower or higher than the price at which he bought it, or for a debt or barter of a commodity at a value he chooses to assign to it. The reason is that the second

transaction is not linked to the first transaction³⁵”

This opinion of Al-Shafi'i denotes that he does forbid 'inah ethically if the party in contrast is not able to validate his action and intention before Allah ³⁶. This is to say he does not prohibit it on the basis of just presumption of people's intention in entering into the sales contract. Eventhough, if the mal-intention of the person dealing in 'inah is explicit or apparent through his expression that the commodity is to be resold to the first seller, then he would inevitably forbid it ³⁷. The foregoing example illustrates that Shafi'ies wondered the intention of the parties is only taken into account when the illegal intention is explicitly stated in the contract.

Al Shatibi commented on Al-Shafi'i idea by saying:

“It is absolutely incorrect to say that Al-Shafi'i allowed the adoption that lead to

³⁵ Al-Syafii, *ibid.*, p.90

³⁶ ISRA, *ibid.*, p.222.

³⁷ ISRA, *ibid.*, p.223

usury. He does not presume the existence of an intention to do something forbidden unless there is manifest evidence to that effect³⁸”

The Zahiri School concurred with Al-Shafi'i, as stated by Ibn Hazm that:

“Whoever sells a commodity for a stipulated price to be paid immediately or for a deferred payment for a short or long term, he has the right to sell that commodity to the one he bought it from at the same price he paid for it, or less or more. Payment can be made instantly, and it may be deferred to a time shorter or longer than the time of the first transaction or for the same time. All these are permissible as long as no condition to that effect is attached to it in the initial contract. If there is such a condition, then it is forbidden and must be nullified without any hesitation, and it should be

classified as a kind of coercion as maintained by Al-Shafi'i³⁹”

Some people or country may hold Imam Shafi's opinion about *bay al-inah* thus they allow this transaction in Islamic banking such as Malaysia. But in my opinion, the transaction of *bay al-inah* itself has to be paid more attention since most the transaction violate the shariah principles in term of unlawful practice such as usury. In the contract of *bay al-inah* it is clearly indicated that the contracting parties concerned do not purpose to obtain the objective for which the Shariah has initiated legitimate sale (*bay'*) in the first place, but they intended to achieve an illegal objective which is against Islamic principles, namely *riba* by getting an increase on the lending of money. It is to be emphasized that according to the Islamic concept, *bay* (sale) does not mean purchasing out thing for achieving money. But it also indicates the sense of buying other necessities with

³⁸ Abu Ishaq al-Shatibi, “al-Muwafaqat fi usul al-Shariah”, volume 4 p. 435-436 in ISRA, ibid., p. 222.

³⁹ Ibn Hazm, Al-Mahalla bi Al-Athar, Volume 7 p. 549 in ISRA, ibid., p. 223

that money. Allah SWT has used *bay'* in the sense of *shira* (purchase) and vice versa in the Holy Quran⁴⁰.

Moreover, it can be concluded that *bay al-inah* is prohibited behind al-Shafii's recognition of the validity (*sahih*) of *bay al-inah* is his personal opinion (*ra'y*) not based on interpretation of any authentic Islamic authority⁴¹. However, based on other schools the prohibition of such transaction was based on the consensus of the jurists (*ijma' al-'ulama'*) on the authority of Islamic law sources. Ibn Qayyim⁴² prohibited *Bay' Al-Inah* quoting the following Hadith that Allah's messenger says: "A time is certainly coming to mankind when they legalise the *riba* under the name of *bay'*"⁴³ (trade concerning that intending usury by words

of a sale). Wasil b. 'Ata⁴⁴ is reported to have said that a lawful judgment can be obtained at through four sources: the express word of the Book, Hadith, *qiyas* and *ijma*. *Bay al-inah*, is a violation due to this sort of sale agreement constitutes the taking of usurious interest as most jurists hold that such transaction should be prohibited.

In addition, Ibn Taimiyyah⁴⁵ divides sales into three groups according to the buyer's intentions. Firstly, that the purchases the goods in order to use or consume them such as food, drink and the like, in which case this is a sale, which God has permitted. Secondly, that the purchases the goods in order to trade with them; then this is trade, which God has permitted. Lastly, that the cause for purchasing the goods is neither the first nor the second, then the cause must be dirhams (money) which he needs, and it

⁴⁰Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.276

⁴¹Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.276

⁴²Ibn Qayyim, Vol. 3, p. 11-84 in Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.276

⁴³Ighatha al-Lahfan, Beirut, 1985, Vol. 1, p. 352 in Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.276

⁴⁴Abu Hilal al-'Askari, "Kitaba al-awa'il", (Cairo, 1985) p. 278 in Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.276

⁴⁵Ibn Taimiyyah, *M aumu'ata l-Fatawa*, Vol. 29, p. 431 in Rosly Saiful Azhar and Sanusi Mahmood. *ibid.*, p.277

was difficult for them to borrow, so he purchases the good on credit (with increased dirhams) in order to sell it and takes its price. This, then, is *bay al-inah* which is haram according to the most eminent of the jurists. In addition, since *bay al-inah* transaction is so debatable, thus it is better to avoid this transaction and look for the other transaction in Islamic banking.

2.4. *Siyasah Shar'iyah* Perspective in *Bay Al-Inah*

Although Shafii's school allows *'inah* but, as it stated above, most of the jurists concur that *'inah* is prohibited since there is like a *hiyal* to get loan and take usury (*riba*) in the name of *bay* transaction. When Shafii's argued that *'inah* is allowed since intention or motive is immaterial, thus it could determine the contract unless there is manifested act that violates shariah, most jurist agree that in *'inah* there is unlawful intention that influences transaction such Maliki and Hanbali's opinion. They state that the

motive of the parties to the contract determines the legality or illegality of the contract, and in the sale under consideration the motive of the parties is illegal and, thus, the sale is invalid due to it constitutes a *hiyal* to obtain a loan with interest which should be averted at all costs according to the Shariah.

So many questions have appeared related the implementation of *'inah* in the Islamic banking such Malaysia. Why does Malaysia allow *'inah* while there are so many contra opinion within the transaction? So thus what is the purpose behind of Malaysia government to allow *'inah*?

Islamic banking institutions has operated in a very competitive and demanding industry. In order to survive, they must be able to meet their customers' satisfactory needs. Product innovation is seen as the key success to maintain current business growth. Interestingly, the development of new products occurs more extensively in the banking institutions of

South-East Asia especially Malaysia, and it is compared to innovation within the Middle East. The country became the first to found the Islamic Inter-bank Money Market (IIMM), the full-fledged Islamic stock broking company, the corporate sukuk (Islamic bond) and the Islamic unit trust⁴⁶.

In addition, the Malaysian shari'ah scholars validate the practice of *bay al-inah* based on two main justifications⁴⁷. Firstly, they state that the contract is not clearly prohibited either in the Quran or in the Sunnah. They do not admit the validity of the hadith which indicate the prohibition of the contract.

Secondly, the Malaysian scholars argue on the basis of *maslahah*, in which refers to the need of Muslims

contemporary society. The scholars admit the argument that for example, credit card has become an important banking facility for majority of Muslims. In today's world, the card is important for daily business dealings and commercial transactions. Wondering this case, the scholars support the bank's idea to create a credit card that is shari'ah compatible. In this terms, *bay al-inah* is seen as a key contract due to it provides a *makhraj* (mode of problem solving).

So in this case, *bay al-inah* implemented in Malaysia mostly is due to the rulers analyse this contract will bring *maslahah* to arouse Islamic banking in Malaysia, particularly at the first period of Islamic banking established. In perspective of *siyasah shar'iyah* itself, any measure that brings people closest to *maslahah* and furthest away from *mafsadah* partakes shariah, even if it has not been proved by Prophet (PBUH) and

⁴¹Shaharuddin Amir, "The Bay' al-Inah Controversy in Malaysian Islamic Banking", (<http://www.scribd.com/doc/39837216/The-Bay-Al-Inah-Controversy-in-Malaysian-Islamic-Banking>) (accessed May 28 2012).

⁴²Shaharuddin Amir, "The Bay' al-Inah Controversy in Malaysian Islamic Banking", (<http://www.scribd.com/doc/39837216/The-Bay-Al-Inah-Controversy-in-Malaysian-Islamic-Banking>) (accessed May 28 2012).

Divine revelation⁴⁸. *Bay al-inah* as perspective of Malaysia's government has brought any *maslahah* those mentioned above. In addition, referring to the report by Muhammad Abduh⁴⁹, Malaysia government attempts to provide all customers banking need by adapting conventional transaction into Islamic transaction. After obtaining good position, the rulers will make up their ruling, such as this controversial transaction slowly. For information, since *bay al-inah* transaction is very controversial, many banks in Malaysia has limited this contract.

3. Conclusion

In perspective of *siyasah shar'iyah* concept, the rulers have to administer shariah's principle in every place, including in Islamic banking system. The transactions in Islamic

banking thus does not allow to violate the shariah principle itself since this shariah principles are the significant difference between Islamic banking and conventional bank. In banking system, Islam has its own rule to regulate the system itself. No *riba*, *gharar*, *maysir*, and any illegal transactions should be paid attention.

One transaction in Islamic banking is *bay al-inah*. *Bay al-inah* defines as a situation where someone sells one commodity to another for a specific price with payment deferred until the fixed date, then he buys it back from the other person a lower or higher price in cash. Some *fuqaha* have different opinion for this transaction, thus it left some issues, particularly the issue of existence *riba* and any unlawful transaction within.

According to Al-Shafi'i the validity of *inah's* transaction is determined by its expression or the form of the contract. The purpose of the contracting parties or one of them are not to be considered unless it is

⁴⁸According to Ibn Taimiyah in Mohamad Hashim Kamali, "Siyasah Shar'iyah or the Policies of Islamic Government," (The American Journal of Islamic Social Sciences, vol.6 No. 1, 1989) p. 59

⁴⁹ Muhammad Abduh is a researcher from Indonesia. He presented his essay in ISEFIT (Islamic Economic Forum for Indonesia Development) discussion.

expressed or declared. Thus, they make a clear demarcation between the *manifestation* or corrupted intent in the contract and the absence of clear indicators. If the intent to relate with unlawful or inflict harm appears clearly, such as the purpose to partake usury, then al-Shafi'isuch as othes scholars do not allow it. Holding this Shafi'i opinion, The shariah Advisory Council of Bank Negara Malaysia in its meeting held on 12 December 1988, resolved that *bay al-inah* is permissible.

On the other hand, Imam Malik and most of the jurists reject *bay al-inah* because it is deemed as a contract which is apparently allowed but it leads to an unlawful practice according to Shariah (*riba*). This transaction seems not to purpose to get the objective for which the Shari'a has initiated legitimate sale (*bay'*) in the first place, but they intended to obtain an illegal objective which is against Islamic principles, called *riba* by getting an increase on the lending of money. It is

like *hiyal* (legal device) to get loan and take the usury. Thus, most of jurists enact that *bay al-inah* is unlawful or haram. I induvidually agree *bay al-inah* is prohibited since the motive is clearly seen that the customer need of loan and thus the banks will get usury. In addition, *bay al-inah* transaction is so debatable, so it is better to avoid this transaction.

In case of Malaysia, the rulers here attempt to arouse Islamic banking system, thus they allow this transaction since the need of their customer especially for having personal financing such as credit card. In siyasah shar'iiyah perspective, the rulers consider the *maslahah* behind this transaction, thus they validate this transaction. But since this transaction is very controversial, they have limited this transaction in banks.

References

Arzim Naim, 2010, "Issues in *Bay al-inah* and *Bay Al-Dayn* and Proposal for Other Concepts Available in Islamic Commercial Law to be Employed As Alternatives in Contemporary Islamic Finance," <http://arzim.blogspot.com/2010/02/iss>

- ues-in-bay-al-inah-and-bay-al-dayn.html. (acssessed April 25 2012).
- Asyraf Wajdi Dusuki and Nurdianawati Irwani Abdullah, “Fundamentals of Islamic Banking” (Kuala Lumpur: IBFIM, 2011) .
- Al-Syafii, “al-Umm”(Lebanon: Dar al-Fikr, 1990).
- Bank Negara Malaysia, “ Resolutions of Shariah Advisory Council of Bank Negara Malaysia”, (Kuala Lumpur: Bank Negara Malaysia, 2002).
- Muhammad Anwar, “Islamicity of banking and modes of Islamic banking”,(Arab Law Quarterly , vol. 18, No. 1,2003).
- Mohamad Hashim Kamali, “Siyasah Shar’iyyah or the Policies of Islamic Government”, (The American Journal of islamic Social Sciences, vol.6 No. 1, 1989).
- Rosly Saiful Azhar and Sanusi Mahmood, “Some Issues of Bay' al-’inah in Malaysian Islamic Financial Markets”, (Arab Law Quarterly, Vol. 16, No. 3 : BRILL, 2001).
- Shaharuddin Amir, “The Bay' al-Inah Controversy in Malaysian Islamic Banking”,
<http://www.scribd.com/doc/39837216/The-Bay-Al-Inah-Controversy-in-Malaysian-Islamic-Banking>
 (accessed May 28 2012).
- Zamzani Mukhtar, “Hilal As-Syariah dalam Praktek Hibah dan Wasiat”, (Essay of the Judge presented in Jakarta, September 2011).
- Ziaul Haque, “*Riba* - The Moral Economy of Usury, Interest and Profit”, (Kuala Lumpur: Ikraq Publication, 1995) .