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Application of Bayʿ al-ʿInah in Islamic Banking and Finance: From the Viewpoint of Siyasah Sharʿiyyah.

Tita Nursyamsiah
Saim Kayadibi

Abstract

In siyasah sharʿiyyah perspective, the rulers have to administer shariʿah 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 shariʿah 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 shariʿah 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-ʿinah that leaves any issues among the scholars. Bayʿ al-ʿInah 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 re-purchases 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-ʿinah has inherent riba and is an unlawful transaction. Especially in Malaysia, bay al-ʿinah 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 shariʿah itself. This study thus attempts to describe bay al-ʿinah itself and analyzes the different thoughts among some scholars about bay al-ʿinah 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: Bayʿ al-ʿInah, Islamic banking system, Siyasah Sharʿiyyah; Riba.

1. Introduction

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

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administered. In the usage of the fuqaha, siyasah shar‘iyyah 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 Phophet (PBUH) nor regulated by Divine revelation. Anyone who says that there is no siyasah shar‘iyyah 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. 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 deffered payment (ribaal-duyun or nasi‘ah) and in exchange contracts or excess accruing or barter transaction (ribaal-buyu or al-fadl). Thus, riba is a crucial problem and issue in banking sector since its harm could inflict toward some people especially to the

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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 price\(^5\). 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. 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‘iyyah 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’iyyah 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 credit. 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 deffered until fixed date, and buys it back from the other person a lower price in cash.”

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 lawful.

Classical jurists define the form of inah in their books as:

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

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7 ISRA, ibid., p.221  
8 ISRA, ibid., p. 221  
9 ISRA, ibid., p.221  
10 ISRA, 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 Malaysia\textsuperscript{11} 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).

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\textsuperscript{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.

\textsuperscript{11}Bank Negara Malaysia, “Resolutions of Shariah Advisory Council of Bank Negara Malaysia” (Kuala Lumpur: Bank Negara Malaysia, 2002) p.15

\textsuperscript{12}ISRA, 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 follows\textsuperscript{13}:

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 wadiah account of the bank for customer’s use.

\textbf{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

\textsuperscript{13}Bank Negara Malaysia, ibid., p.16
circumvent *riba*-based financing, which actually open a “back door” to *riba*. 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 hilal 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 law. According to Al-Shatibi, *hiyal* is to conduct good action which is fundamentally allowed to repeal the other principles. It means, even though basically someone perfomes 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 Qayyin Al-Jauziyyah, 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

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14 Dusuki and Abdullah, ibid., p.197  
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-Shatibi\(^{18}\) 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* 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 *istiqra* (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 existance *riba* in this transaction. Actually, the developmental role of Islamic banking and finance is not fairly different from its conventional counterparts\(^{19}\). 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

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\(^{19}\) 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...”

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 activities. 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 Maliki 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

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20 Stated in Surah Al Baqarah 275
Shariah\textsuperscript{23}. Ibn Qayyim\textsuperscript{24}, 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\textsuperscript{25}, 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 author\textsuperscript{25} 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 Fiqh\textsuperscript{26} book \textit{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. Malik\textsuperscript{27} 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 Sahnoon\textsuperscript{28} mentions in his book \textit{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.

\textsuperscript{23}Ibn Taymiyyah, “Majmu’at al-Fatawa”, (Lebanon, Vol. 29,1969) in Rosly Saiful Azhar and Sanusi Mahmood.ibid., p.275
\textsuperscript{24}Ibn Qayyim,“al-Jawziyya-al'Iam al-muwaaqqi” in Rosly Saiful Azhar and Sanusi Mahmood.ibid., p.275
\textsuperscript{26}Rosly Saiful Azhar and Sanusi Mahmood.ibid., p.275
\textsuperscript{27}Rosly Saiful Azhar and Sanusi Mahmood.ibid., p.275
\textsuperscript{28}Rosly 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).”

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.”

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.”

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

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29 Dusuki and Abdullah, ibid., p.198

30 Reported by Abu Dawud

31 Reported by Imam Ahmad
contrary to Shariah principles, thus it is allowed\textsuperscript{32}. They argue among others that the hadith relied on as narrated from Saidatina Aishah above is weak in terms of its \textit{sanad} (transmission). This is because one of the narrators of the hadith named al-`Aliah binti Anfa` is \textit{majhullah} unknown. Al-Dar Qutni\textsuperscript{33} regards her as an unknown figure, therefore the hadith cannot be proved.

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

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

\textit{“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 SWT\textsuperscript{34}.”}

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

\begin{quote}
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
\end{quote}

\textsuperscript{32}ISRA, ibid., p. 224
\textsuperscript{33}ISRA,ibid., p.224
\textsuperscript{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 or a value he chooses to assign to it. The reason is that the second transaction is not linked to the first transaction\(^{35}\).

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. Even though, 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 effect."

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’i.”

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

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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

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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
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, V ol. 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'iyyah 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 trust.

In addition, the Malaysian shari’ah scholars validate the practice of bay al-inah based on two main justifications. 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 mosly is due to the rulers analyse this contract will bring maslahah to arouse Islamic banking in Malaysia, particularly at the first periode of Islamic banking established. In perspective of siyasah shar‘iyyah 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

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Divine revelation⁴⁸. *Bay al-inah* as perspective of Malaysia’s government has brought any *maslakah* 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’iyyah 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 existance *riba* and any unlawful transaction within.

According to Al-Shafi’ithe 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

⁴⁹Muhammad 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’i such as others 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 individually 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’iyyah 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


