

THE APPLICATION OF BAY' AL-'INAH AND BAY' AL-DAYN IN MALAYSIAN ISLAMIC BONDS: AN ISLAMIC ANALYSIS

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Financial contracts involving use of bay' al-inah and bay' al-dayn have been extensively used in design of Malaysian Islamic bonds. This paper argues that both these mechanisms have been found unacceptable by the majority of Islamic scholars and proposes the use of financing based on Muqarada and Musharaka principles as genuine alternatives to interest-bearing financial instruments.

1. Problem Statement

Capital as the prerequisite of economic growth is a crucial element in Malaysia's struggle towards achieving positive growth which is projected at about 2% in 1999. When domestic capital is found inadequate to fuel growth, economic planners have two options, namely to further intensify savings, namely forced savings or simply to attract foreign debt and equities. But to depend on foreign savings will also imply the ability to handle problems relating to short-term capital flows, which unfortunately most Asian economies have disappointingly failed to take precautions leading to the series of financial turmoil and economic recessions we are well aware today.

Efforts to attract foreign portfolio investment into this country will not be as easy as it used to be. The capital control plus the economic and political uncertainties seemed to outperform most of the optimistic forecast and guesses made by analysts. As efforts to mobilise more than RM65 billion needed to recapitalize the banking sector and RM16 billion more to balance the budget is taken with rigour, the need for foreign capital is no longer an option. As the economic recession has certainly deplete corporate earnings and household income, lower national savings will leave the country will relatively lower capital to spur growth.

This paper will look at the prospect of attracting portfolio capital from the Middle-East to complement the much needed capital inflows Malaysia direly needs. It is assumed that the pull-factor will much depend on the nature of Islamic bond issues while those affecting economic policy and political uncertainties play a secondary role. Based on this assumption, the supply of capital by Middle-eastern investors is expected to increase when less evidence of *bay' al-inah* and *bay' al-dayn* is found in the financial contracts of Islamic bonds. However, it cannot be denied that other factors do play an important role in determining capital flows from Middleeastern countries. These include the prospect of currency fluctuations when the capital control is lifted in September 1999, uncertainties in the financial markets and a less predictable monetary and fiscal policies introduced by the Malaysian government.

As most Islamic bonds issued by Malaysian companies today have been heavily structured using *bay' al-inah* and *bay' al-dayn* contracts and therefore less acceptable to some Middle-eastern investors, it can further frustrate attempts to attract the much need capital inflows especially middleeastern capital into the country when western sources are drying. It is therefore imperative to understand the underlying process of Islamic bond issuance in Malaysia, and to what extent it is not in line with the thinking of Middle-eastern jurists. It is urgent to find out the necessary steps taken by Malaysian companies to do away with these controversies so that they can source the much needed capital from the Middle-eastern investors.

Issuance of Islamic bonds began as early as 1992 and a total of RM20.5 billion (US\$5.3 billion) has been invested in Islamic bonds since then. Among the active investors have been the Islamic Banking Divisions (IBD), Islamic Unit Trusts and Pilgrimage Fund Board (LTH). These bonds were mostly over-subscribed as the economy then was booming with companies recording hefty earnings and the banking system flooded with funds.

But now, in the absence of short-term capital inflows as the government imposes the capital and currency control, the ailing banking system is set to undertake the painstaking effort of restructuring with the help of funds from Danamodal and Danaharta. Gone were the days when banks were flooded with funds from accounts held by foreign portfolio investors. With relatively fewer local funds left to push back the economy on track, finding new sources of funds particularly from the rich Gulf-States is therefore critical.

However, the problem with Malaysian Islamic bonds has been the application of *bay' al-'inah* and *bay' al-dayn*, which is not well-accepted by the Middle-eastern investors. The contract of *bay' al-'inah* and *bay' al-dayn* is seen as something similar to *riba* based financing. This will certainly pose a great challenge to the Malaysian companies seeking Islamic funds in the Middle-east via bond issues.

This paper intends to discuss some of the pertinent issues on the creation of Islamic bonds in Malaysia. It also tries to see how the problem can be overcome by looking in greater detail the underlying reasons behind the rejection of *bay' al-'inah* and *bay' al-dayn* oriented Islamic bonds by the Middle-eastern jurists. If this findings can help influence or convince Malaysian jurists to avoid using *bay' al-'inah* and *bay' al-dayn* as a legitimate contract to raise capital, the supply of Islamic global Islamic funds can indeed become the much needed source of capital for Malaysia's economic recovery. However, this may not be the case as the argument against *bay' al-'inah* securitization and the trading of Islamic bonds on a discount basis through the *bay' al-dayn* mechanism is too strong to make way for the much needed Islamic capital inflows from the Middle-East countries. This will lead us to say that the supply of Islamic bonds by Malaysian companies should now take heed of the tastes of Middle-East investors, namely their inclination for *Al-Murabahah*, *Al-istisna'* and *Al-Ijarah* mode of financing in which the elements of *bay' al-'inah* and discounted *bay' al-dayn* are relatively absent.

Based on the above objectives, section one looks at the types and nature of Islamic bonds issued by Malaysian companies. The three basic stages involve in Islamic bond issuance is discussed to identify the significance of Shariah issues that authors intends to give focus. Section two will analyze in greater detail the two main Islamic bonds used in Malaysia, This is followed by Section three where the nature of Islamic instruments applied in project finance by Middle-East investors is discussed. Section four will discuss the various Fiqh views on *bay' al-'inah* followed by Section five in which issues on *bay' al-dayn* are highlighted. Section six will introduce the concept and mechanics of the *Muqarada* bonds. Finally Section seven concludes the discussion with a recommendation for greater application of equity contracts.

2. Islamic Bonds in Malaysia

Since 1992, the Rating Agency of Malaysia (RAM) and Malaysian Rating Agency Corporation (MRAC) have both rated 20 Islamic private debt securities (IPDS) issued in Malaysia. RAM undertook most of the rating exercises amounting to 8 issues while the newly formed MRAC rated the remaining two. In principle, most of these bonds are issued and traded on the basis of *bay' al-'inah* and *bay' al-dayn*. Others, such as Khazanah zero-coupon and promissory notes have also incorporated *bay' al-'inah* and *bay' al-dayn* as the basis of trading both for liquidity and closing position when the bonds matures.(1)

To further understand the role of *bay' al-dayn* in an Islamic bond market, it is worthy to look at the three main steps involved in the bond issues, namely: (2)

Step 1: Securitization – The creation of the *bay' al-'inah* assets

Step 2: Bond issues – Issuance of debt certificate –*Shahdah al-dayn*

Step 3: Trading of debt certificates – buying and selling of debt certificate in the secondary market using the contract of *bay' al-dayn*.

2.1 STEP I : The Creation of a *Bay' al-' Inah* Underlying Asset

Asset securitization is the essence of Islam bond issues as a bond must assume the role of *al-mal* or property to qualify as an object of sale. An object of sale in the Islamic law of contract must be a property of value. When a bond certificate is supported by an asset as evidenced via the securitization process, it is transformed into an object of value and therefore qualifies to become an object of trade whereby it can be purchased and sold in both the primary and secondary market. Investors then will have to the right to sell (*haqq mali*) these bonds. In the *bay al-'inah* asset securitization, the financier purchases an asset from the issuer and sells it back to the same party at a credit price. This buy-back agreement will ensure that the issuer will receive the money in cash while financier will be paid a prefixed or contracted amount in a future date. Debt payments will be made by installment through bond issues. The difference between cash and mark-up price will represent the profit due to the financier.

The underlying asset is therefore crucial in determining the Islamicity of these bonds. In the Malaysian experience these assets include factories, equipment, stock and inventory and even intangible asset such as a list including building and properties. Some are given in Table 1.

Table 1: Selected Islamic Debt Securities (IPDS) in Malaysia: Underlying Assets

ISSUER	INSTRUMENT	UNDERLYING ASSET
Hicom Holdings Bhd	Guaranteed <i>Murabahah</i> Notes Issuance Facility	Mixture of halal shares (including unquoted shares)
Amanah International Finance Sdn Bhd	Guaranteed <i>Murabahah</i> Notes Issuance Facility	A list including buildings and properties
KFC Holdings	<i>Al-bai-bithaman ajil</i> Islamic debt securities	Restaurants, breeder, farm and hatchery
Petronas Dagangan Bhd	Redeemable Islamic debt securities	Gas processing line and pipeline

Source: Rating Agency Malaysia 1998

The first stage is critical because it is where the yield or simple the rate of return is determined. The buy-back arrangement using a deferred sale approach will show that the yield is a fixed one since there the contract specifies only one selling price.

2.2 STEP II: Issuance of Islamic Debt Certificate (*Shahdah al-Dayn*)

This usually takes place in the primary market where in settling its debt, the issuing company will sell debt certificates or bonds to investors. As mention above, debt certificates issues is valid only when it is supported by an asset. In otherwords, the bonds must be securitized. Here the underlying security is the BBA or al-murabahah asset. The underlying asset need not be BBA or al-murabahah alone. If the 1st stage involves a contract of *Ijarah*, then the debt certificate is called *Sukuk al-Ijarah*. If an *Istisna'* contract is used, we can called it *Sukuk al-istisna'* .

Islamic bonds new issues can be categorized into two, namely bonds issues with coupons and those with none. The former is known as the Islamic coupon bond while the latter Islamic zero coupon bond.

2.2.1 Islamic Coupon Bond

The term “coupon” here denotes the profit portion of the Islamic bond issues in both *al-murabahah* notes issuance facility (MuNif) and *al-bai-bithaman ajil* Islamic debt securities (ABBA).(3) The difference between MuNif and ABBA is mainly on their respective maturities. Long-term issues normally applies *the al-bai-bithaman ajil* buy-back contract while short-term and medium term issues will use *al-murabahah*. Some selected bond issues are given below:

ISSUER	INSTRUMENT	TENURE	ISSUE DATE	MATURITY DATE
Houlon Corporation	Al-Bai-Bithaman ajil Islamic debt securities	7 years	3/9/97	2/9/04
Teledata Sdn Bhd	Guaranteed Murabahah Notes Issuance Facility	5 years	5/4/96	4/4/01
Moccis Trading Sdn Bhd	Guaranteed Murabahah Notes Issuance Facility	5 years	29/3/96	28/3/99

Source: Rating Agency Malaysia, 1998

In both MuNif and ABBA, two types of debt certificates were issued. Certificates that represent the capital component are called primary notes while the profit portion are known as secondary notes or coupon notes. Coupon need not mean interest alone. In the IDS, it also refers to the profit or mark-up portion of the deferred sale. So it is safe to say that the Islamic version of the conventional coupon bonds are the MuNif and ABBA.

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2.2.2 Al-Murabahah Notes Issuance Facility (MuNif)(4)

The selling of *dayn* or debt by the issuer to the financier therefore involves two types of bond issues. In other words, *Shahdah al-dayn* (debt certificates) consists of the primary and secondary notes. The process is shown the following illustration:

Cost of financing : RM100 million

Annual profit rate: 8%

Underlying asset: Land and building

Issue Date : 5th February 1999

Maturity: 5th. February 2002

Tenure: 3 years

Total profit: $RM100,000,000 \times 8\% \times 3 = RM24$ million

Selling price = cost of financing + profit margin = RM124 million

Number of Primary notes : 100,000 units

Price per unit = $\text{RM}100,000,000/100,000 = \text{RM}1000$

Number of Secondary notes = 50,000 units

Price per unit = $\text{RM}24,000,000/50,000 = \text{RM}480$

Figure 1: Mode of payments in MuNif

1 6 12 18 24 30 36

RM4m RM4m RM4m RM4m RM4m RM4m + RM100m

Based on the above calculations and illustration in Figure 1, all primary notes will mature on the 5th February 2002, which implies that the capital component will be paid in a lump sum of RM100 million at maturity. Since investors desire to take out the profit out periodically, secondary notes maturing every six months were normally issued. In the above case, a 3 year maturity shall imply 6 semiannual profit redemptions at RM4 million each. The above example shows that MuNif or BaIDS are not zero coupon bonds. The absence of coupon interest payments does not mean that Islamic bonds are zero coupon. MuNif and BaIDS are coupon bonds because profit payments are contractual or fixed. Although similar to conventional coupon payments, issuance of secondary notes issues are said to be valid in Islamic law since it is based on sale (*al-bay*) while the former is based on debt (*al-duyun*)

2.2.3 Islamic Zero Coupon Bonds

Zero coupon bonds are bonds sold at a discount. Although no coupon or interest payments are made, the implicit interest is the difference between par value and discount value. The Islamic zero coupon bond operates on the same principle but works on a sale contract (*al-bay'*) which make it a valid transaction in Islamic law. The Khazanah benchmark bond will be used to illustrate some pertinent issues.

2.2.4. Khazanah Islamic Benchmark Bonds

Unlike MuNif and BaIDS, the Khazanah bonds are government guaranteed. But for trading purposes, Khazanah bond issues must fulfill the securitization requirement which involves assets of Khazanah Nasional Berhad (KNB). The securitization of Khazanah bonds is similar to other Islamic bonds in which the contract of *bay' al-inah* is applied. Securitization creates *hak maliy*, that is the right to sell or purchase a commodity one owns.(5) To exercise this right shall also imply an ability to derive usufruct or *manfaat* from it, which in essence qualify Khazanah bonds to take the role of *al-mal*.(6)

Although the Khazanah Islamic benchmark bonds are sold at a discount, the discount price is market determined through a bidding process (*bay' al-muzayadah*). The bidding process allows the bond to be priced according to the forces of demand and supply so as to produce a yield that can be used as a benchmark for the local bond market.(7) While the buy-back price at par value is set by the issuer, secondary trading will mean selling rights of debt to the third party. At this point, the contract of *bay' al-dayn* at a discount is intensively applied to create liquidity (*al-suyulah*) through secondary trading.

The basic feature of the Khazanah Islamic bond is quite straight forward. Let's say that through the bidding process, a RM1000 bond at par value is sold at RM800 per unit. For one million unit issues, the market value of securitized asset is therefore RM800 million, while the buy back price is RM1 billion. The return to investors is RM200 million. The *bay' al-'inah* element emerges in the securitization process, involving of some underlying assets, namely *Khazanah* assets consisting of physical and financial assets that the Malaysian government owns such as land, buildings, shares, bonds and reserves in hard currencies.

2.3 STEP III: Trading of Debt Certificate – *Discounted Bay' al-Dayn*.

For liquidity purposes, bond trading in the secondary market is crucial. However, almost all Islamic bonds today were bought for long-term investments. The lack of secondary market however should not imply that trading issues is no longer significant. One of the objectives in the Khazanah bond issues is to create a dynamic secondary market. This calls the need to explain the Islamic view of bond trading in the secondary market.

As mentioned earlier when a debt certificate is securitised, it now becomes property (*al-mal*) which is also an article of trade. As an article of trade, the bonds can be sold by investors to the issuer or the third party if a secondary market for Islamic bonds exists. The trading i.e sale and purchase of the debt certificates is called *bay' al-dayn*. In Malaysia, the contract is *bay' al dayn* at a discount is acceptable while Middle-east Ulama' considered it invalid even though the debt is supported by underlying assets. Any profit created from the sale and purchase of a debt is *riba*. As an example Ali holds a bond worth RM1000. His urgent need for cash makes him sell the bond to Bakar for RM900. For whatever reasons, Bakar purchases the RM900 bond because he felt the price of bonds may go up. He will dispose the bond when price exceeds RM950 to make a RM50 which according to Islamic law is *riba*.

In the case of an zero coupon Islamic bond, the company issues the bond to say, Ameen at a discount, say RM900. The bond is redeemable at par value of RM1000 upon maturity. In other words, when the bond matures, Mr. Ameen sells the bond to the issuer or another dealer for RM1000. Here trading of debt took place where Mr. Ameen receive RM100 as profit over a period of 1 year. In the Malaysian Islamic capital market, the \$100 profit is considered permissible (*halal*) while it is not permissible (*halal*) in the Middle-East countries *although* the bond is asset backed. It is therefore not surprising to observe that none of the deals made in the Arab countries so far has embraced *bay' al -dayn* bonds. The mode of financing applied in these countries were mostly the syndicated *murabahah* and *al-Ijarah* as shown in Table 3 below.

3. Islamic Securities in the Middle-East

Financial instruments for project finance in the Middle-East have been largely dominated by *Al-Murabahah* and *Al-Ijarah* financing as shown in Table 3 below. The *al-murabahah* project financing however, did not utilize bond instruments as doing so will mean applying *bay' al-'inah* for securitization purposes as well. The process simply involves the usual *al-murabahah* technique where financiers will purchase the raw material and equipment from the supplier. The goods will be sold to the customer at a mark-up price. This type of buy and sell technique proves suitable in projects involving lumpy items since it retains most of the characteristics found in traditional debt such as the need for collateral, debentures and guarantees. Among others, the documentation normally include the asset sale and purchase agreement among the contracting parties while the installment payments made adopts the usual traditional amortization principle.(8)

Table 3: Selected Project Finance, Deals and Transactions in the Muslim World.

COUNTRY	AMOUNT	PROJECT	MODE OF FINANCING
Bahrain	US\$30m	Purchasing construction material for Pakistan's Lahore-Islamabad Highway	Syndicated Murabahah
Kuwait	US\$30m	Purchase of capital equipment for the production of medium density fibreboard	<i>Ijarah</i> (lease finance)
Malaysia	RM1 billion	Finance Tenaga Nasional's current expenditure	Bai-bithaman ajil-bay al-Dayn (debt trading)
Bahrain	US\$70m	Water & Power Development Authority Syndicated Murabahah	Syndicated Murabahah
Egypt	US\$11.2m	Alexandria National Iron & Steel Company	<i>Ijarah</i> (lease finance)
Pakistan	US2.05m	Equity capital investment in Al-Meezan Investment Bank	Musyaraka

Source: Islamic banker, various issues

Al-*Ijarah* financing on the other hand, involves the issuance of profit certificates called *Sukuk- al- Ijarah* bearing the name *al-Ijarah* on which the transaction is based. The securitization process is valid since the underlying asset as the real *Ijarah* assets from which cash flows are created from the lease payments. Here a special purpose vehicle (SPV) is first created to purchase the asset from the supplier. The asset is then leased to a company that will use it in real production. The lessee makes periodic rental payments to the SPV who in turn will use these proceeds to pay the financiers. Prior to the purchase of assets, the SPV issues the *Ijarah* certificates to the investors with a predetermined profit. This is valid because in *Ijarah* finance the lessor can always stipulate the rentals in advance so making it possible to guarantee profits to the investors. Apart the examples given in Table 3, some other examples of project financing using *Sukuk al-Ijarah* include the Kentucky Fried Chicken and Citibank *Ijarah* facility with Guthrie worth US\$30 million and the ANZ Investment bank with the Beximco group in Bangladesh worth at US\$4 million.

As mentioned in the above, the absence of bonds instruments in most *al-murabahah* project finance in the Middle-East countries may be explained by the controversy on the validity of using *bay' al-'inah* in the securitization process and the application of *bay' al-dayn* at a discount in bonds in secondary trading. The question now is what are the underlying issues behind this controversy about the legitimacy of *bay al-'inah* and *bay' al-dayn* in Islamic law? What could explain its rejection in the Middle-East countries while gaining acceptance in Malaysia. The next section will provide some important insights and conclusive views concerning the Islamic position on *bay' al-inah* and *bay al dayn* which perhaps can put the effort to raise capital through Islamic bonds issues in the best possible manner as desired by the Holy Quran and Sunnah.

4.0 Bay al-'Inah and Islamic Securitization Process

4.1 Bay al-'Inah

A bond is like a loan. In bond investments, investors are effectively lending money to the issuer (a government or a corporation) for a pre-determined period of time. In return, you earn interest. Issues that enjoy a strong credit standing, generally offer lower interest rates. Conversely, less credit-worthy issuers offer high interest rates, to entice investors to take a bigger risk and invest with them. Bonds, when compared to equities in general, are considered safer and more solid instrument which pay regular or predictable income. The interest paid on an annual or semi-annual basis tends to be higher than the interest you would earn on bank deposits.(10)

By the conventional definition as noted above, one may deduce that bond constitutes the nature of the loan contract, that being the case, *Shariah* deems loan as a *Ribawi* contract and thus when the lender or borrower secures any benefit whether in term of money or any other kind of consideration is usury, to the effect it is pertinent to quote the saying of the Prophet Muhammad (S.A.W) : "That every loan entailing benefit is usury" (11) and thus the nature of bond would not be changed irrespective of the fact that nowadays the bond is becoming as an instrument for providing necessary capital for production.

In order to have a clear picture on this issue, we should determine whether Malaysian Islamic bonds constitute usury or not by looking into its nature and definition. The BIMB Securities Sdn Bhd. outlines that the Malaysian Islamic bonds are structured on the basis of *Bay^c al-'inah* (refinancing of assets) and subsequently traded on the basis of *Bay^c al-Dayn* (debt-trading). (12) If we focus on the structure of Malaysian bonds as noted above, we can deduce its operation on two unacceptable methods by virtue of *Shariah* standards, which render them usurious, i.e. *Bay^c al-'inah* and *Bay^c al-Dayn*. The process of bond issuance and trading has been put forward in the earlier pages, in which it consists of three main stages namely, 1) asset securitization via the *bay' al-inah* contract, 2) the sale of new bonds issues and 3) trading in the secondary market in which the contract of *bay al-dayn* at a discount has been applied. The critical issue at this juncture is to show that the securitization of Islamic bonds using *bay' al-' inah* has no legitimate basis since *bay' al-'inah* is not a valid contract according to the consensus of the Muslim jurists. The following sections give a clear conceptualization of *bay^c al-'inah* (credit).

4.1.1 The Meaning of *Bay' al-'Inah*

Bay' al-'inah is generally known as sale based on the transaction of *Nasi'ah* (delay). The (prospective) debtor sells to the (prospective) creditor some object for cash which is payable immediately; the debtor immediately buys simultaneously the same object for a greater amount for a future date. (13) Thus the transaction amounts to a loan. The difference between the two prices represent the interest. Such contract was evolved in the early period of Islam and it exists for the fundamental reason that a loan for interest is forbidden because it is equivalent to usury (*riba*). (14) In this contract, there is an economic interest for both the borrower and the lender, which at the same time circumvents the prohibition of usury.

The issue which concerns us here, is how does Islamic law view such contract: whether the sales be allowed *prima facie*, or disallowed because the motive behind the sales is to legalize that which is illegal or usurious.

4.1.2 The Shafi'i View

According to *Shafi'i* school such sales are to be allowed because, in the words of Imam Shafi'I, contracts are valid (*Sahih*) by the external evidence that they were properly concluded: the unlawful intention (*niyya* or *qasd*) of the parties is immaterial, it does not invalidate their act, unless expressed in that act.(15) Al-Shafi'i illustrated his teachings with following example which concerns the marriage of a man who intends to keep his wife for only a short period of time. That marriage is valid whereas a *mut'a* (16) marriage is invalid (*Batil*).

As the foregoing example illustrates, the Shafi's considered that the intention of the parties is taken into account only when the invalid intention is explicitly mentioned in the contract.

4.1.3 The Maliki and Hanbali Views (18)

The Maliki (19) and Hanbali jurists hold that the contract of *'Inah* are not valid (*Sahih*) because, according to them the motive of the parties to the contract determines the legality or illegality of the contracts, and in the sale under consideration the motive of the parties is illegal and, therefore, the sales are not valid because they constitutes a legal device (*Hilah*) to get a loan with interest which should be averted at all costs according to the *Shari'ah*. (20) Ibn Qayyim, (21) a Hanbali author states that intention influences legal acts: the formality of legal act can be the same but end results depend on the intention.

Another Hanbali (22) author noted that if the vendor of a quantity of juice of grapes 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 void. According to the Maliki Ibn Rushd, the marriage of a *muhallil* (a man who marries a woman divorced three times by her husband only with the intention to divorce her afterwards and make lawful her remarriage to her previous husband) is to be cancelled (*Batil*).(23)

Maliki (24) is also of the opinion to cancel the sale of any article when the contracting parties intend to make use of that article for an unlawful purpose, such as the sale of arms to people already at war or to bandits. It is explicit in the opinions of above noted jurists that the intentions are to be taken into account in relation to legal acts as they are in the matters of faith, Islam does not tell Muslims to define an objective, and then use what means they observe fit in order to attain it. Instead, it tells them that if the means are correct, the ends will look after themselves. Islam does not teach us to overcome usury by competing with usurer at his own game.

4.1.4 Conclusions Based on the Above Foregoing Discussions

From the foregoing discussion, we may draw the following conclusion:-

- 1 It is obvious that *Bay' al-'inah* is a legal device in order to overcome the prohibition of *riba*, (no person would effect such sale if he cannot realize profit), and is not deemed to be an act of sale, as there is clear evidence that such act amounts, in effect, to a contract of loan. Thus, it is forbidden as it is based on unjustified enrichment (*fadl mal bil a 'iwad*) or "receiving a monetary advantage without giving a countervalue".

- 2 The second point is that behind *al-Shafi'i's* recognition of the validity (*sahih*) of *Bay' al-'inah* as his personal opinion (*Ra'y*) and not based on interpretation of any authentic Islamic authority. However, according to other schools the prohibition of such sale was based on the consensus of the jurists (*Ijma' al-'ulama'*) on the authority of Islamic law sources. As Ibn Qayyim prohibited *Bay' al-'inah* quoting the following Hadith that Allah's messenger says: "A time is certainly coming to mankind when they legalise (*Yastahillun*) the *Riba* under the name of *Bay'*" (26) (trade concerning that intending usury by words of a sale).

Ibn Umar said: (27) I heard the Prophet of Allah (S.A.W) say when you enter into the *'inah* transaction, hold the tails of oxen, are pleased with agriculture, and give up conducting jihad, Allah will make disgrace prevail over you, and will not withdraw it until you return to your original religion".

Wasil b. 'Ata (28) is reported to have said that a right judgment can be arrived at through four sources: the express word of the Book, authentic Hadith, Qiyas and consensus of the *ulema* community. *Bay' al-'inah*, is a violation of the established consensus. Since this sort of sale agreement constitutes the taking of usurious interest as most jurists hold that such transaction should be forbidden.

Furthermore, Ibn Taimiyyah divides sales into three groups according to the buyer's intentions, namely:

- i that he purchases the goods in order to use or consume them such as food, drink and the like, in which case this is sale, which God has permitted.
- ii that he purchases the goods in order to trade with them; then this is trade, which God has permitted
- iii that the reason for purchasing the goods is neither the first nor the second, then the reason must be dirhams (money) which he needs, and it was difficult for them to borrow, so he purchases the good on credit (with an increased dirhams) in order to sell it and takes its price. This, then, is *'inah* which is Haram according to the most eminent of the jurists.

The third point is that there is hardly any satisfactory evidence which enables one to say that al Shafi'i has expressly declared that *al-'Inah* to be (*Halal*). It should be pointed out that al Shafi'i's method of determining the validity of any contract by its formal evidence that they are legally concluded, cannot be cancelled on account of the intention of the parties, although he had to recognize such intention as forbidden (*Haram*) but the contract remains valid unless the intention expressed in the contract. As not every valid contract is a *Halal* contract, the Shafi'i may, thus permits contracts because its legal preconditions are fulfilled, but forbids the transacting act of the parties when it conflicts with *Shari'ah* principle. The following example can illustrate his teaching. Al Shafi'i (30) states that it is not disallowed to sell a sword to a person who could use it to commit an unjust killing, however, that sort of sale is valid (*Sahih*), for that person might not use the sword for that purpose, but in the same time Shafi'i recognizes such transacting act as forbidden (*Haram*) and the person is not allowed to take possession of the sword (*Tamlik*), thus preventing the contract from producing its effects. (31) Conclusively speaking, one can say that al Shafi'i's teaching has reached a level which is similar to the other Muslim schools although the methodology which he adopted appears to be different. Al-Qaradawi (32) states; in relation to this question of *Bay' al-'inah* that it is a clear case of usury and the device: why should we practice transaction which contains elements of devices while we are in position to have a clear and apparent alternative transaction? Furthermore, *mu'amalat* which contains elements of device deviates from the true objective of *Shariah*.

The use of legal device is therefore an evidence that the *niyyah* factor is undermined or made secondary in the securitization process of Islamic bonds in Malaysia. It is apparently clear that most underlying assets used in the Malaysian Islamic bond securitization have no direct relation with the actual project itself. These assets were simply collaterals, that serve as guarantees to the debt issued. To retain the basic structure of traditional bonds in Islamic finance, that is providing fixed return to investors, practitioners and the relevant Shariah experts may have wrongly applied Shariah laws, which implies now that the legitimacy of Islamic bonds issued using *bay' al-'inah* is suspect.

5.0 The Nature of *Bay' al-Dayn*

The issue of *bay' al-dayn* arises when the bonds are traded in the secondary market at a discount. It is worthy to note that buyers in the secondary market are usually speculators, that those who do not intend keep the bond for long-term investment purposes. Their main objective is to make quick capital gains on the basis of market liquidity and interest rate movement. (33) However, there is no indication that controversies exist in the *bay' al-dayn* where bonds are sold or redeemed at par value. We may now discuss *Bay' al Dayn* to show its nature according to Islamic view.

According to *al-Majallah* (34), *Dayn* defines as the thing due i.e the amount of money owed by a certain debtor. So also a sum of money not existing is considered a debt, as also a certain sum of money from thing which exist or are present, or from a heap of wheat which is present before it is separated from the mass. *Al-Dayn* can be either monetary, or a commodity, i.e, food or metal. Based on the aforementioned of *al-Dayn*, and the literal meaning of *Bay' al-Dayn* we can define it as the sale of payable right either to the debtor himself, or to any third party. This type of sale is usually for immediate payment or for deferred payment (*al Nasi'ah*).

5.1 *Bay' al-Dayn* for Immediate Payment

The Shariah permits the selling of the debt by its equivalent in quantity and time of maturity by way of *Hawalah*. This form of debt trading is accepted by all Schools of Islamic law provided it is paid in full and thus gives no benefit to the purchaser. The rationale for this ruling is that financial transactions involving debt should never allow for a payment against the length of the period of the loan, as this would be regarded as *riba* or *Bay' al-Kali Bil Kali* (35) which is prohibited by the Prophet (S.A.W). There is a Hadith which says "Do not sell a debt for a debt", thus *Bay' al-dayn* for deferred payment is not allowed.

5.2 Sale of *al Dayn* to a Third Party

According to most of Hanafis, Hanbalis and Shafis jurists, (36) it is not allowed to sell *al Dayn* to non-debtor or a third party at all. Such opinions are based on the forbidden sale of *al Kali Bil al Kali*, sale of a *Gharar*, sale which the seller does not possess. These rules are attributed to the Prophet's (SAW) prohibition for a type of sale as indicated above.

5.2.1 Selling *al Dayn* to a Third Party is Allowed With Conditions

As an exception Malikis, Hanafis and some Shafi's jurists (37) allowed selling *al-Dayn* to a third party. Since the creditor has the right to sell it to the debtor, as well as he has the right to sell it to a third party provided the following rules must be observed:-

- a The *Dayn* must be *Mustaqir* (confirmed debt) and the contract must be performed on the spot, not deferred in order to avoid any relationship with the sale of a debt for a debt which is prohibited by Islamic law.
- b The debtor must be a financially capable, must accept and recognize the sale, in order that he will not deny the sale. This condition aims to avoid any dispute between the parties, and the debtor must be easily accessible so that the creditor knows whether he has the capacity to pay his debt or not.
- c The sale should not be based on selling gold with silver or opposite, because, any exchanges between these items necessitates the immediate possession, and if the debt is money, its price in another debt should be equal in terms of amount of quantity (if the debt is RM1000, then its price value should be RM1000 too).

Furthermore, the selling of *al-dayn* must avoid the occurrence of *Riba* between the two debts, and must also avoid any kinds of *Gharar* and *Makhatara* which may be raised at the level of inability of the buyer from possessing what he bought, as it is not permitted that the buyer sells before actual receipt of the purchased item. (38)

It is important to note that Muslim scholars have unanimously prohibited the trading of debt (*bay' al-dayn*) at anything other than face value. Where the price paid for a debt is not the same as the face value of that debt, the transaction would be tantamount to *riba al-Nasi'ah* and is therefore prohibited. It is noteworthy that trading in bonds is a subject of dispute on two counts:

First, the bonds are normally sold at less than their nominal values; second, the state or the issuer would use the mode of *Bay' al-inah* and *Bay' al-Dayn* and these both sales transactions are regarded as *riba* by the majority of Muslim scholars. This is the very reason for the controversy about the legitimacy of Malaysian Islamic bonds which renders it to be unacceptable by individual Islamic jurists and institutions outside Malaysia and the Middle-Eastern countries. Islam does not allow the legal devices to be treated as a justification for transactions which Islam regards unjust and against Islamic belief. The bonds would have been acceptable from an Islamic point of view if the application of the mode of financing would be based on the legal maxim of *al-Ghunmu bil ghurmi* (39) meaning that no person is allowed to invest in a way that generates profit without exposing himself to the risk of loss. It would expose both parties to the outcome of their deal, be it a profit or a loss, and thus avoid of usury as matter of Islamic principle.

5.2.2 Islamic Debt Discounting

It is permissible for the creditor who wishes to settle the debt before maturity to accept a reduction in the amount due to him. This is called *Dha'wa Ta'ajjal* and is based on a Hadith of the Prophet (saw), who advised certain creditors to accept reduced payments of debts in recognition of settlement before maturity. (40) Some parties in Malaysia encourage the development of debt discounting of an Islamic financial product on the basis that it represents an important field of short term and self liquidating investment, because the terms of negotiable instruments do not in most cases extend beyond six months.(41)

According to the definition formulated by Dr. Ali Jamalud Din, (42) discount is: "An agreement by which the discounting bank hastens payment to the applicant for discount, the value of a negotiable instrument, commercial paper or any other right, less a sum commensurate with the period of time remaining for collection of the right on the date of maturity of such paper, instrument or right, in consideration of conveyance of title of such paper, instrument or right by the applicant for discount to the bank and guaranteeing the discharge thereof on the date of maturity".

If we were to move to the field of Islamic law which bases its view in contracts on intentions (*maqasid*) and meanings (*ma'anin*), we would find the argument that the objective of the discount is in the nature of a loan which, seems to be the closest attribute acceptable in this regard. (43) The bank has no intention of buying nor being the assignee of the right established by the instrument, because the intention was directed at lending; on this basis, the bank accepts the discounted instrument as a security. If none of the persons liable thereon honour the value of this instrument on the date of maturity, the bank will have recourse against the beneficiary of the discount for the value; the bank will not take upon itself nor will it be willing to undertake any recourse action against those liable thereon to the last stages of the recourse, as is being practised.

They argue that the discount operation is a transfer of right or the sale of a debt established by the discounted instrument. We contend that neither of these definitions satisfies the conditions and rules of the transfer of right or the sale of a debt to other than the person liable thereon, especially where the subject-matter of the sale involves the sale of the currency for a term in consideration as being increase and delayed payment in the form of usury. (44)

In the case of bond issuance, the discounting mechanism normally takes place during the initial public issues for zero-coupon bonds. In the case of Khazanah Islamic bond, the debtor sells the bond at a discount to the creditor, which again has no association with *Dha'wa Ta'ajjal* since the latter only qualifies debt discounting by the creditor to the debtor and not otherwise as presently applied by the Khazanah bond issuer. In the same vogue, secondary trading took place between debtors and the third party, who are not the debtor, nor represent the interests of debtors.

It must, however, be clearly borne in mind that the alternative, which guarantees financial liquidity and helps economic activity in a form that is acceptable to Islam, is to transact according to Islamic law, particularly after what has been published by concerned organisations on the various aspect of operations which are actually implemented by Islamic banks and other Islamic financial institutions.

6.0 *Muqarada* Bonds an Alternative for Islamic Debt Bonds

The Islamic financial system is a set of rules and regulation that govern the flows of funds from the surplus-spending unit to the deficit-spending unit. These rules and regulations are strictly governed by *Shari'ah* principles where there is neither a possibility nor a need to apply usurious financial instruments such as the debt related bonds. Hence, the solution for Islamic financial system dilemma lies in the development of financial instruments in which the *Shari'ah* rulings are not violated. One such instrument is the *Muqaradah* bond.

A *Muqarada* bond, is an Islamic bond in which no interest is earned, but whose market value varies with the anticipated or expected profits. It is the product of Muslim scholars and thinkers who developed and designed the financial instrument where interest or similar forms of returns which Islam has unequivocally prohibited are excluded. The Council of the Islamic Fiqh Academy of Organization of Islamic Countries (OIC) during its fourth conference in Jeddah, Saudi Arabia from 18 to 23 Jamadul Akhir 1406H/6 to 11 February 1988, approved the mode of *Muqarada* by issuing *Fatwa* after having reviewed various studies on *Muqarada* bonds. The meaning of *Muqarada* bonds and its salient features is given in the following:

Muqarada bonds, as the term denotes, are based on the conclusion of lawful "*Muqarada*" (the *mudaraba*) with capital on one hand and labour on the other, and the shares of profit are determined beforehand by a definite proportion of the total. It is called a bond because it is terminal in nature, that is its maturity is determined by the tenure or project completion date.

6.1 The Salient Features of *Muqarada* Bonds

The *Muqarada* bond is a financial instrument for raising equity capital. To the capital-provider, the *Muqarada* bond is one form of investment. Unit price is determined by dividing of *Muqarada* capital by the number of units issued.. It registers under bondholder name (recorded bonds) all of which represent the common asset in *Muqarada* capital. This financial instrument is called the *Muqarada* Sukuk Bonds (MSB.) A *Muqarada* Bond has five main elements, namely,:

1) A *Muqarada* Sukuk Bond (MSB) represents a common ownership and entitle their holders shares in the specific project which the bonds have been issued for financing purposes. Duration of this ownership will be limited to the duration of the specific project or business on which the *Muqarada* was based. On the ownership of the *Muqarada* bonds, a bondholder is entitled to all rights specified by *Shari'ah* in matter of sale, gift, mortgage, succession and other as *Muqarada* Sukuk Bonds (MSB) which represent *Muqarada* capital.

2) The contract (*'aqd*) in *Muqarada_sukuk* is based on the official notice of bonds sale, namely the Prospectus. Subscription in these bonds (*sukuk*) are considered as offer from the investors, approval of the issuer is then regarded as acceptance to the contract. Official notice of sale must contain all the conditions which is required by *Shari'ah* in the *Muqarada* (*mudaraba*) *'aqd* and the clear information concerning acknowledge of the capital, the proportion and the distribution of profits which are in conformity with *Shari'ah* rules.

3) *Muqarada_sukuk* (bonds) on the expiry of the specified time period of the subscription the bondholder is given the right to transfer the ownership by sale or trade, the bonds in the securities market at his discretion, considering that this right has been agreed by the *mudarib* while the investor entering into the contract of *Muqarada* bonds.

a) Sale of *Muqarada* bonds:

The disposal or sale of the bonds must follow the rules stated below:

i) If the *Muqarada* capital after the subscription period is over and before the operation of the specific project still

in the form of money, therefore, the trading of bonds would be based on the exchange of money for money and it must satisfy the rules of *sarf*.

- i If such capital is still in the form of debt, it must be based on the principle of Islamic debt trading or exchange: debt for debt.
- ii If such capital is in the form of money, debt, assets and benefits, trade must be based on the market price evolved by mutual consent.

4) In the distribution of profits, the following rules must be observed:

- i The *mudarib*, the person who has received the fund and also been charged with the duty to run the affairs of the specific project or business, profits realized from investment in *Muqarada* bonds will be distributed between the *mudarib* and investor according to the agreement.
- ii *Mudarib's* share with the investor, the ownership of the assets in accordance with his participation to the total value of the company/project assets.
- iii It is not permissible to guarantee him a fixed lump sum amount of profits.
- iv The issuer has the right to purchase bonds offered for the sale by others according to the prices declared from time to time by the issuer.
- v The *mudarib* is considered as the depositary of the common fund and the project assets entrusted to him. If he is negligent or has committed dishonesty leading to losses, he shall be liable for the losses.

4. In matters concerning the Guarantee of *Muqarada* bonds, the following points must be observed:

- i It is permissible for the third party (the government) to promise to compensate any losses sustained in the specific project. However, this guarantee should be concluded in a separate contract and not included in the main contract of the *Muqarada* bond between the issuer and the investor.
- ii It is not permissible for the issuer to guarantee the capital of the Mudaraba (the investor would not bear any loss in the value of the bonds) or to guarantee the investor a fixed amount paid as profit.
- iii It is permissible for the Mudarib and the investor to agree to put aside a specific or certain portion of the profit as reserves to provide for protection or to meet any losses arising during the implementation of the project.

6.2 The *Muqarada* Bond: An Illustration

The above elements can be further understood by the following example. Suppose the *mudarib*, ABC Limited receives a contract worth RM100 million to build a university campus near Kuala Lumpur. The cost of the project is RM60 million, which the company intends to raise using *Muqarada* bonds. If each *Muqarada* bond is issued at RM1.00 each, then 60 million units will be issued to the investors or *Rabbul Mal*. The projected profit is expected to be RM40 million and the *mudarib* intends to take half or 50 per cent which is equivalent to RM20 million. So the profit sharing ratio is 50:50. If the project runs as planned and delivered to the buyer on time, the value of *Rabul mal* capital should increase to RM80 million causing the unit value of each bond to increase from RM1 per unit to RM1.33 per unit (RM80,000,000/60,000,000). Upon selling these bonds to the *Mudarib* at RM1.33, the *Rabulmal* should make a 33 per cent profit. However if the project did not go well as expected and only command a salvage value of say, RM30 million, then the value of the *Muqarada* bond will drop to 50 cents per unit (RM30,000,000/60,000,000) where the *Rabulmal* will realise a loss of 50 cents or 50 per cent for every ringgit invested.

It is apparent in the above that the *Muqarada* bonds do not need any form of securitization since the *Muqarada*

bond is a genuine asset. The using a legal device such as *bay' al-inah* is has no place here. The sale of *Muqarada* bonds to the investors is also free from any discounting mechanism as the need for discounting no longer exists as the value of the bond now will depend on company performance rather than movement in interest rates. Thus, when investors wish to dispose the *Muqarada* bonds before maturity it will do so on the basis of the project performance, which implies that it can be sold below or above face value. For example, if an investor feels that the project may take longer than required, it may want to sell the bond for less than RM1.00. Similarly if the other investors felt that this project is able to provide returns above market average, they may want to purchase the *Muqarada* bonds for more than par value.

7.0 Conclusion

We have argued therefore in the above that the views of Iman Shafie has reached a level which is similar to the other Muslim schools although the methodology which he adopted appears to be different as he considered that when the legal precondition of the contract are fulfilled, it cannot be cancelled on the account of the intention of the parties. Likewise, this study finds no significant Shariah justification of *bay' al-inah*. While the trading of Islamic bonds at a discount using *bay' al-dayn* has been found unacceptable by the majority of ulama' (*Jumhur Ulama'*) including al-Shafie. As such the position of Malaysian Islamic bonds remain unacceptable among the Middle-eastern jurists although some Malaysian jurists found this the opposite.

Islamic financing based on *Muqarada* and *Musharaka* principles that brought together the elements of equity, justice and social-moral values in business transaction are genuine alternatives to interest-bearing financial instruments. The proposed *Muqarada* bonds therefore need to be further examined and seriously considered by policy-makers as a dynamic alternative to Islamic private debt securities (IPDS) in Malaysia today as it can not only attract Middle-Eastern investors but able to free itself from legal device that usually allows back-door interest..

Wabillah et-taufiq wal-hidayah.

Notes:

- 1 The absence of active secondary market for Malaysian Islamic bonds however, limits the application of *bay al-dayn* for liquidity purposes.
- 2 Saiful Azhar Rosly, Sukuk-Islamic Securities, *The Sun*, April 25th 1997.
- 3 In the *bay' al-'inah* mechanism, the sale of underlying assets using the name of *al-murabahah* and *al-bai-bithman ajil* does not mean putting *bay' al-'inah* in a legitimate setting. These underlying assets are not part of the plant and equipment needed in the project operation. If these assets are collaterals to the issuers' existing interest-based debt, it is again difficult now to gauge legitimacy of this so called Islamic securitization. As a cautious note, Islamic securitization has nothing to do with asset-back securitization (ABS), where the latter deals with financial claims on the cash flows of securitized assets such as mortgages, credit card account receivable and vehicle loans.
- 4 For more detail, see Wan Abdul Rahim Kamil, "Jati's Pioneering Commercial paper Chase", in the *Islamic Banker*, May/June 1996, pp. 8-10.
- 5 Hassan Ahmal, *Fiqh Methodology for Islamic Benchmark Bonds*, Seminar on Islamic bonds, Malacca 1998.
- 6 Further discussions on the Khazanah bonds, see Abdul Rashid Hussain, "Malaysia's Khazanah Benchmark Bonds," *Islamic Banker*, April 1998, pp. 9-11. Also see, Hassan Ahmad, "*Fiqh Methodolgy for the Creation of the Benchmark Bond in Islam*", in a seminar on Shariah Experts on the 30th October 1998 at the Pan Pacific Legacy Hotel, Melaka, Malaysia.
- 7 At present, yield on the Malaysian government bond (MGS) cannot be used as a benchmark yield since its

demand is a captive one, while supply is irregular. Banks will subscribe to the MGS only to fulfill the liquidity requirement while the supply of MGS to finance economic development is irregular due to privatization of public works.

- 8 A good source of deals and transaction made in the Arab countries using Islamic mode of financing can be found in the “Islamic bankers” magazine published in London, United Kingdom. .
- 9 At present, there is only one Ijarah bonds issued in Malaysia. Known as *Sukuk al-Ijarah*, it was issued by Segary Energy Venture Sdn. Bhd worth RM337.5 million. with a four year maturity. For more detail, see *Islamic Bankers*, “Segari uses Islamic facilities to refinance loan”, March 1997, pp. 8-9.
- 10 United Overseas Bank, UOB Asset Management.
- 11 Al-Shirazi, al-Muhadhab, vol. 1, p. 304. This hadith can be found in other sources.
- 12 BIMB Securities.
- 13 Schacht. Introduction to Islamic Law, p. 79.
- 14 A carefully types of legal devices (*hiyal*) under which usurious transactions can take place developed in countries where the Hanafi and Shafi’i schools are in practised these legal devices are not acceptable to other schools of laws.
- 15 Qadri. Islamic Jurisprudence in the Modern World, pp. 334/5
- 16 Mut’^a is a temporary marriage where precariousness is the inherent rule. Mut’^a is allowed for the Shi’^c a but is void (*Batil*) for the Sunnis Muslims.
- 17 Al-Shafi’ⁱ, al-Umm, vol.3, p. 74
- 18 Al-Sanhuri, hold that Malikis teaching is like the Hanblis one when it comes to the significance of the intention of the contracting parties and the effect of such intention on the validity of contract (masadir al-haqq vol. 4 p. 72). This kind of transaction is also considered by Abu Hanifa as haram. See Al-Muwatta (Kitab al-Buyu’ pp. 295-296).
- 19 Ibn Rushd. Bidayat al-Mujtahid, vol.2, p. 58; see Majallah al-Ahkam al Adliyyah, Article 3, which states that “the intentions and meanings and not the wording or the construction of contract must be considered”.
- 20 Ibn Taymiyyah, Majmu’^{at} al-Fatawa, vol. 29 pp. 334.
- 21 Ibn Qayyim al-Jawziyya-I’lam al-muwaqqi’in, vol. 3, pp 98-99; and see for example the saying of the Prophet (saw) “deeds are judged according to intentions and every human being will have to take responsibility for what he intended” Sahih al-Bukhari.
- 22 Ibn Qudama, al-Mughni, vol. 4, pp. 245/7
- 23 This marriage was meant by the law to be real, but hiyal were developed by which the woman signed a marriage contract with a man paid for the purpose, who then immediately divorced her so that she could remarry he first husband. The end result is clearly against the Shariah principles.
- 24 Ibn Rushd, vol.2, p.58.
- 25 Ibn Qayyim, vol. 3, pp. 11-84
- 26 Ighatha al-Lahfan, vol. 1, p.352.

- 27 Al-Shukani, *Nayl al-Awttar*, vol. 5, pp 318/24, Sunan Abu Daud, Hadith No. 3455.
- 28 Abu Hilal al-‘Askari, *Kitab al-awa’il*, p. 278.
- 29 Ibn Taimiyyah, *Majmu’at al-Fatawa*, vol.29, p. 431.
- 30 Al-Umm, vol. 3, p. 74,
- 31 Ali Al-Saluos, *Mu’malatnaal al-mu’sira*, pp. 125-126..
- 32 Al-Qaradawi, *Islam and Current Issues* pp. 40-42
- 33 In the Malaysian Islamic bond market, investors may sell the primary notes if it is worth to use the cash proceeds to buy stocks or conventional bonds given movements in interest rates. As there is no restriction who can actually purchase Islamic bonds in Malaysia, the shift in bond purchases from Islamic to conventional or vice verse is only normal.
- 34 *Majallah al-Ahkam al‘Adliyyah*, Art. No. 158.
- 35 Al-Shukani, *Nayl al-Awttar*, vol. 5, p. 157
- 36 Al-Zuhili, *Bay‘ al Dayn in the Shari’ah*, pp. 35/6
- 37 *Ibid*, pp 36-45
- 38 Such rules are based on authentic narrations of the Prophet (saw), and thus are not subjects for re-interpretations.
- 39 *Majallah al-Ahkam*, Art. 87.
- 40 This Hadith reported by ‘Abd Allah ibn ‘Abbas concerning Banu al-Nadir : when the Prophet (saw) expelled the Jews from Madinah after they attempted twice on his life (saw) and sided with his enemies secretly, encouraged them to fight the Messenger of Allah (saw) and the Muslims, some Jews came and complained to the Prophet (saw) that “there are still debts due to us (for settlement in future date). The Rasulullah (saw) replied, “ give discount and asked for early payment”. It was related by al-Baihaqi and others. Most jurists maintain that the above hadith embodies a particular rule (*hukm Khass*) which is applicable only to the Jews. However, even if we were to hypothetically treat this hadith as a general rule, it cannot not be used as a rule for *Dha’wa Ta’ajjal* between the lender and a third party, namely the non-debtor (*Gyur al-madin*).
- 41 Negotiable instruments and other money market instruments are largely traded on discounted basis. These include negotiable certificates of deposits, bankers acceptances, treasury bills and commercial papers. In the Malaysian Islamic banking, two Islamic negotiable instruments namely the negotiable Islamic certificate of deposits and Islamic accepted bills, the discounting mechanism however took place between the debtor and the third party, which is not the *Dha’wa Ta’ajja* concept.
- 42 Ali Jamuludin, *Banking Operations*, p. 469..
- 43 *Encyclopedia of Islamic Fiqh*, Kuwait: Ministry of Wakfs, 1970, pp. 242/3
- 44 Sami Hassan, *Islamic Banking*, p. 157.

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