

Shubuhat on Matter of Bai' alinah and Tawarruq

Essia Ries Ahmed¹, Sofri Yahaya² and Md. Harashid³

ABSTRACT

Bai` alinah and Tawrruq concepts are used in Islamic banking system and capital market to facilitate the needs of market players when Islamic financial industry was pioneered in the Islamic countries. Even though the majority of Shariah scholars disallow these concepts, some of them are of the opinion that it is acceptable as long as all the pillars and conditions of the contracts are complied with. Based on these opinions, bai` alinah and tawrrauq concepts are differences about comply with Shariah rules. Therefore products of Bai` inah and Twarruq are very controversial issues based on Shariah compliance criteria; the primary objective of this paper is to highlight to Shubuhat on product of Bai` alinah and Tawrruq. It was found that shubuhat did exist in product of Bai` alinah and Tawrruq.

Keywords: Doubtful activities (shubuhat), bai' inah, tawrruq.

1. INTRODUCTION

Nowadays, the institutions of Islamic banking operate in a very competitive and demanding industry. In order to survive in this challenging environment, they should be able to meet their customers' financial needs. Innovation of product is seen as the key successful factor to maintain current growth of business. Interestingly, the new products development can be seen more extensively in the institutions of banking in South-east Asia when compared to innovation within the Middle East. Malaysia is one of the countries where new products are regularly developed and it becomes the first country to establish the Islamic Inter-bank Money Market (IIMM), the full-fledged Islamic stock broking company, the corporate *Sukuk* (Islamic bond) and the Islamic unit trust. However, the advancement of Malaysian Islamic banking industry has raised controversial issues as the advancement is solely based on the application of *bai' al-Inah* and *Tawarruq* which has been harshly criticized by most of *Shariah* scholars in the Middle East. Because of the *bai' al-Inah* and *Tawarruq*, Malaysian *Shariah* scholars are viewed as adopting a more lenient approach when compared to their Middle East counterparts.

¹ And ³School of Management, Universiti Sains Malaysia, 11800 USM, Penang, Malaysia.

² Graduate School of Business, Universiti sains Malaysia, 11800 USM, Penang, Malaysia.

The world over, individuals, governments and public and private corporation seek places where they can obtain loans at a very minimum interest rate so that if any business environment risks prevents them from achieving their desired goals, they would still be able to off-set their loan obligation and remain 'good' in the eyes of the bank for future purposes. However, the conventional banking system whose "life-blood" is interest cannot guarantee such an environment for business growth, hence increasing the risk factors for businesses especially SMEs (Small and Medium Enterprises). It is against the backdrop that the Malaysian government opted to adopt the Islamic Banking system in 1993 in order to tap into the latent and untapped potentials of the system and thereby hasten development by providing finances for every category of the populace.

Further restructuring was embarked upon in 1993, realizing the potentials and competitiveness of Islamic banking, another depth to Islamic banking was introduced, where conventional banks in Malaysia are allowed to offer Islamic banking products through Islamic windows. This system leads to the introduction of the Interest-Free Banking scheme or "*Skim Perbankan Tanpa Faedah* (SPTF). These Islamic banks and "Islamic windows" have to operate hand in hand with conventional banking system where issues of marketability; viability and competitiveness are very pertinent in securing and maintaining large customer base. Islamic banking today has become an undeniable reality. The number of Islamic banks and the financial institutions are forever increasing. New Islamic banks with large amount of capitals are being established while, conventional banks are opening Islamic windows or Islamic subsidiaries for the operations of Islamic banking. Even the non-Muslim financial institutions are entering the field and trying to compliment each other's business in order to attract as many Muslim and non-Muslim customers as they can. "It seems that the size of Islamic banking industry will be multiplied during the next decade and the operations of Islamic banks are expected to cover a large area of financial transactions of the world" (Usmani, 2002)

Although the Islamic banking system is different from the conventional banking system; there are some similarities between the two. For instance, "an Islamic bank conducts its activities in accordance with the Islamic *Shariah* principles that strictly prohibit any payment or receipt of interest, but they can also offer products and services which are similar to those offered by a conventional bank" (Gerrad and Cunningham, 2001), however, the difference lies in the manner the banking transactions are conducted and the way money is mobilized and recorded.

As mentioned by Haron and Shanmugam (1999), "the establishment and operations of Islamic banks have raised many theoretical and conceptual considerations" because Islamic bank are not expected to have similar 'objectives and philosophies' with other business entities. However, Islamic banking still has the same purpose as conventional banking except that it claims to operate in

accordance with the rules of *Shariah*, known as *fiqh al-Muamalat* (Islamic rules on transactions). In contrast, Islamic banking differs from conventional banking in several ways, such as the prohibition of transactions based on interest rate and the requirement that bank's operations must be carried out according to certain procedures through the use of certain financial instruments.

Wafa, Nasri and Nizam (2003) observed that “the objectives of Islamic banking and philosophies should be in line with the revelations in the Al-Quran and *Hadith*”, as the term of Islamic banking means conducting banking operations in consonance with Islamic teachings. Ismail (1992) asserts that, “the primary goal of Islamic banking is not to maximize profits as the interest-based banking system does, but rather to render socio-economic benefits to the Muslims”. On the other hand, Muslim bankers consider the role of Islamic banking as strictly commercial, based on interest-free financial instruments without making losses.

One of Malaysia's foremost Islamic banks, the Bank Islam Malaysia *Berhad's* (BIMB) corporate objective is to provide banking facilities and services in accordance with Islamic principles to all Muslims as well as the population of Malaysia. The Islamic principles mentioned here are essentially those belonging to the body of *Shariah* rules on commercial transactions that relate to banking and finance. “The bank efforts to provide these banking facilities and services are undertaken within the framework of its viability and capability to continuously grow and expand” (BIMB, 1984). Islamic banks offer a wide variety of Islamic financing products, one of which is Personal Financing. While Personal Loan in conventional banks is interest based, Personal Financing in Islamic banking adapts the principle of *Bai al-Inah*, which is essentially “sale based on the transaction of *Nasi'ah* (delay)”.

Saiful azhar and Azizi (2003) “*Bai al-Inah* is allowed by the *Shafie'* School of *Fiqh*” and this is the school of *fiqh* of Muslims in Malaysia, it follows that the *Bai al-Inah* is widely used in many banking facilities such as Personal Financing. With global markets becoming more competitive, the requirement for the product to be globally viable is no longer an option but a necessity for Malaysian banks if they are to share in the global economy, this has become even more important with traditional portfolio investments leaving the country, and requiring an urgent action to forestall the tide hence the reversal factor must come from global Islamic funds. It is worth mentioning that fund managers of international Islamic portfolios are generally advised by Middle-Eastern Muslim jurists (*Fuqaha'*) most of whom belong to the *Maliki*, *Hanbali* and *Hanafi* schools of *Fiqh*. It is critical that Islamic financial instruments in Malaysia are designed to attract these investors as well; therefore insisting on a *Shariah* standard based on one school of *fiqh* alone may not be of interest to Malaysia as this may isolate the country from global Islamic finance.

As mentioned by Mhod (2007) *Tawarruq* is the sale that is comprehensive as it examines as it the kinds and forms and it current practiced by Islamic and commercial banks and financial institutions. This sale has become one of the important transactions used by certain banks to enable their customers to get liquidity.

According to (Jamal, 2002), "It was mentioned earlier that *Imam al-Bukhari* recorded this *Hadith* in *Kitab ul-Buyu* (Trading)". When it comes to trading there are many issues which are doubtful, matters which exist then and even now, e.g. where cheating is done professionally. Therefore, we have to be careful if the matter related to trading is it permissible or not permissible, or if it is doubtful, in which case we have to avoid it". There are a lot of doubtful things and controversial issues "*Bai'al'nah, Bai' Al Tawwaruq, Commercial Insurance, Short selling, Pricing and The interest received due to depositing savings in government deposit funds*"(Ahmad Yusuf, 1990), particularly those institutions that are using both systems. This will affect the Muslim customers, if these institutions are not committed to comply with the law. There are differences among traditional scholars as well as between the commissions and contemporary jurisprudential boards about the issue of *Bai' Al I'nah* because the buyer is not after the commodity but he is interested in the *Ein*, i.e. the money, and only uses the transaction as a ruse for achieving his purpose. The majority of traditional scholars have forbidden it and the *Shafi'I* school followers allow it (Al Showkani – Nayl Al Awtar – 5/206) (Majmoo' Al Fatawa – 29/30). As well as the majority of *'ulama* in the Middle East do not agree with transactions of *Bai' al Inah* which involves *Bai' al dayn*, while some of the *'ulama*, have accepted them based on the valid external evidence of sale (Mohd. Ma'sum, 2001). Also, there are differences among traditional scholars about issue of *Tawarruq*. These are controversial issues, because the differences in the rule of *Tawarruq* raise Shubuhah. According Alsarkhasi view of Hanbali and Shafi'i, *Tawarruq* is generally allowed. But according Ibnu Taimiah and Ibnu Al Qayyim, *Tawarruq* is generally disallowed (Mohd F, 2007).

Therefore, the present paper will investigate the Shubuhah the issues of bai'alinah and Tawarruq in Islamic Banking. There is still a lack of studies in such doubtful activities (i.e. Shubuhah) in Islamic Banking especially with regard to problem of defining the concept of Shubuhah. Therefore, this paper will be a pioneer in this regard.

2. DEFINING AL SHUBHA

***Al Shubha* lexically (likeness):** that which bears resemblance to two things. Allah (swt) says in surat Al Baqarah: 70, (*for surely to us the cows are all alike - tshabaha-*) i.e. It has become difficult for us to distinguish between the required cow and the others. Surat Al Baqarah: 118 (*and those who have no knowledge*

say: *Why does not Allah speak to us or a sign come to us? Even thus said those before them, the like of what they say; their hearts are all alike –tshabahat-. Indeed we have made the communications clear for a people who are sure)* i.e. they are alike. Also in surat Ale Imran: 7 (*He it is Who has revealed the Book to you; some of its verses are decisive, they are the basis of the Book, and others are allegorical -mutshabihat-; then as for those in whose hearts there is perversity they follow the part of it which is allegorical -tshabaha-, seeking to mislead and seeking to give it (their own) interpretation. but none knows its interpretation except Allah, and those who are firmly rooted in knowledge say: We believe in it, it is all from our Lord; and none do mind except those having understanding*).

Al Shubha in shariah (doubtful deeds): The scholars have disagreed on how to define *al Shubha* according to *shariah*; some say as ibn Rajab al-Hanbali said "It is the doubtful deeds that occurs whenever there existed two different beliefs regarding a matter generated from two different reasons". Al Showkani said in *Nayl Al Awtar* (5/p309), "It is that for which there is conflicting evidence". Some scholars said that is *mubah* (permissible) and others said it is *makrooh* (disliked). (Nayl Al Awtar, Al Showkani). Ibn Daqeeq Al Eid said, " doubtful deeds is any matter supported by conflicting evidence from Quran and *sunnah*, and could carry more than one meaning, and it is devout to avoid" (The explanation of the Imam Nawawi's forty hadeeth: p24).

Dr. Yousef Al Qaradawi said "In the mind of a *mujtahed* (a scholar qualified to issue rulings) there is a region in between the obvious *halal* and the obvious *haram*, either due to conflicting evidence, or due to doubtful in the application of the evidence on a particular matter. It is devout as a Muslim to avoid these doubtful deeds so as not to be dragged into resembling what is known to be *haram* (*Halal* and *Haram*, p33). *Al-Imam al-Suyuti* said in his commentary on *Sunan Al Nassa'i* while narrating this *hadith*, " The scholars have had a lot to say on the explanation of doubtful deeds, we can explain it in the best way, doubtful deeds is confusion (*iltibas*) and this term is used to describe something resembles a certain base matter, while at the same time it resembles another matter conflicting with the former, as if it resembles the latter more closely, hence they say *ishtabaha* i.e. its mixed from two deferent things and become one thing. Obviously, here it is devoutness to avoid this confusion and whoever does that is described as devout and conservative in his religion (Al Suyuti – Al Hashiah: 7/243)". Al Suyuti has also explained this matter in detail in his book *Al Ashbah wa al nathaer*.

As for those who said that doubtful deeds is those matters that are considered permissible (*mubah*), their reasoning is that these matters are neither explicitly *halal*, nor explicitly *haram*, therefore what else could they be but *mubah*, especially as excesses in these permissible matters could lead to *haram*, for instance in food and drink and attire and so on. And those who defined it as

makrooh took into consideration that *shariah* has warned against doubtful deeds, and if there is no clear evidence forbidden a certain matter, and then what would it be? It must be *makrooh*, and excesses of this nature certainly lead to *haram* itself.

As such, in consistent with the synthesized concepts of *shubuhah* by Islamic scholars discussed above, this study conceptualizes *shubuhah* as a region between the *halal* category and the *haram* category leading to confusion (*iltibas*) in the mind of a *mujtahed* (a scholar qualified to issue rulings) in the matter of categorizing it in either category. In the mixed financial quantities, *shubuhah* is generated when (quantity of *haram* has become mixed with quantity of *halal*). *Shubuhah* is generated due to conflicting evidence, or due to doubtful in the application of the evidence on a particular matter. It is devout as a Muslim to avoid these doubtful deeds so as not to be dragged into resembling what is known to be *haram*.

This study further conceptualizes *shubuhah* as one of the elements of *shariah* compliance. *Shariah* compliance is commonly delineated by *halal* (permissible) and *haram* (forbidden). In a way, this study adds another element to the concept of *shariah* compliance, *shubuhah* in consistent with the first *hadith* quoted in the foregoing section earlier.

3. LITERATURE REVIEW ON BAI' ALINAH AND TAWARRUQ PRACTICE

Bai'alinah is an act of selling subject matter and then purchase it again (immediately) with the cheap price. (ibnu qudamah 1408H:26). Saiful and Azizi (2003) since the “school of *fiqh* of Muslims in Malaysia is predominantly *shafie'*, *bai'alinah* is popular and widely used in many banking facilities such as personal financing overdraft, and deposits”. Although it appears that a consensus on *bai'alinah* has been made at the supervisory level, the view of *Shariah* scholars do differ, especially when the requirement for the product to be globally viable is concerned.

Wan Ismail (1992), “in the contracts of sale by way of *bai'alinah* the intention is to create a sum price difference between two normally almost simultaneous sales of the same commodity or subject property by the same parties, only alternating in roles as vendor and purchaser vice versa”. The sum difference between the first sale (immediate cash price) and the second sale (deferred payment- BBA) is the essence of the transaction, and it is in the classification or determination of this sum, whether it is a debt or a loan, that the Islamic legal experts and scholars have disputed for the last fourteen centuries, right from the time of the Prophet (PBUH), and to this day no solution in the sense of consensus has been reached.

The Islamic financing services industry has witnessed the introduction of some mechanisms recently that are forbidden or at best controversial; these products have been the subject of intense debate. Some mechanisms permit *Riba* (interests) through the back door. Others appear permissible in form only, and not in substance.

3.1 The Meaning of *Bai' alInah*

Bai' alInah 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. (Schacht. Introduction to Islamic Law, p. 79), thus the transaction amounts to a loan.

In the transaction described above, the difference between the two prices represents 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*)” (Rosly & Mahmood, 1999). In this contract, *bai' alInah*, 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 Islamic law views such contract: whether the sales are allowed *prima facie*, or disallowed because the motive behind the sales is to legalize that which is illegal or usurious.

3.1.1 The Creation of a *Bai' alInah* Underlying Asset

Asset securitization is the essence of Islamic *sukuk* issues, as a *sukuk* 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 markets. Investors then will have the right to sell (*haqq mali*) these bonds. In the *bai alinah* asset securitization, the financier purchases the asset from the issuer and will sell 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 and debt payments will be made by installment through bond issues. The difference between cash money and mark-up price will represent the profit due to the financier; however, the underlying asset is therefore crucial in determining the legality of these bonds under Islamic law. In the Malaysian experience, these assets include factories, equipment, stock and inventory and even intangible asset such as a list including building and properties.

3.1.2 *Bai' allnah* and Process of Islamic Securitization

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. (UOB Asset Management) 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 loans 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, it is usury. To that effect, it is pertinent to quote the saying of the Prophet Muhammad (P.B.U.H): “That every loan entailing benefit is usury” (Al-Shirazi, al-Muhadhab, vol. 1, p. 304) and thus the nature of bond would not be changed irrespective of the fact that nowadays the bond is becoming an instrument for providing necessary capital for production. In order to have a clear image on this issue, we should determined 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 *Bai'alinah* (refinancing of assets) and subsequently traded on the basis of *Bai' alDayn* (debt-trading). (BIMB Securities) 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. *Bai'alinah* and *Bai'al-Dayn*. The process of issuing and trading bonds consists of three main stages namely, 1) asset securitization via the *bai' al-inah* contract, 2) the sale of new bonds issues and 3) trading in the secondary market in which the contract of *bai' al-dayn* at a discount has been applied. The critical issue at this juncture is to show that the securitization of Islamic bonds using *bai'al-'inah* has no legitimate basis since *bai'al-'inah* is not a valid contract according to the consensus of the Muslim jurists.

4. VIEWS OF THE FOUR SCHOOLS OF THOUGHTS (CONSENSUS OF THE MUSLIM JURISTS)

4.1 View of Imam *Shafi'i*

According to school of *Imam Shafi'i*, such sales are to be allowed because, in the words of Imam *Al-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. (A. A. Qadri, 2007) *Al-Shafi'i* illustrated his teachings with the following

example which concerns the marriage of a man who intends to keep his wife for only a short period of time but does not make the intention known to anyone, the marriage is valid, whereas a *mut'a* marriage is invalid (*Batil*) because the intention is expressed before or during the process. As the foregoing example illustrates, the *Shafi'is*' considered that the intention of the parties is taken into account only when the invalid intention is explicitly mentioned in the contract.

4.2 View of Imam Maliki and Imam Hanbali

The Maliki (Ibn Rushd. *Bidayat al-Mujtahid*, vol.2, p. 58) and Hanbali jurists hold that the contract of *bai' al 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 *Shariah*. (Ibn Taymiyyah, *Majmu' al-Fatawa*) and Ibn Qayyim, 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 (Ibn Qudama,) author noted that if the vendor of a quantity of grapes 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 void. According to the Maliki Ibn Rushd, the marriage of a *muhilil* (a man who marries a woman divorced three times by her husband only with the intention to divorce her afterwards and make lawful her re-marriage to her previous husband) is to be cancelled (*Batil*). Maliki (Ibn Rushd vol.2, p.58.) is also of the opinion to cancel the sale of which article when the contracting parties intend to make using of that article for an unlawful purpose, such as the sale of weapon to people already at war or to bandits. It is explicit in the opinions of previous noted jurists that the intentions are to be taken into account in relation to legal deeds as they are in the matters of Islam, faith, does not tell Muslims to define an objective, and then use what means they observe fit in order to attain it. Instead, it informs them that if the means are correct, the ends will look after themselves. Islam does not learn and teach us to overcome usury (*riba*) by competing with usurer at his own game.

4.3 Conclusions in the Light of the Above Evidence

Firstly, It is obvious that *bai'alinah* is a legal device evolved in order to overcome the prohibition of *riba* (interests), 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 (unlawful) as it is based on unjustified enrichment or "receiving an advantage of monetary value without giving a counter-value" (Rosly, 1999).

The second point is that behind, Imam al-*Shafi'i's* recognition of the validity

(*sahih*) of *Bai alinah*, is his personal opinion and not based on interpretation of any authentic Islamic authority. However, according to other schools the prohibition of such sale was based on *Ijma'* ulama (the consensus of the jurists) on the authority of Islamic law sources. As Ibn Qayyim (Ighatha al-Lahfan, vol. 1, p.352.) prohibited *Bai alinah* quoting the following *Hadith* that Allah's messenger says: "A time is certainly coming to mankind when they legalize (*Yastahillun*) the *Riba* under the name of *Bai'* "(trade concerning that intending usury by words of a sale).

Ibn Umar said: (Al-Shukani, *Nayl al-Awtar*, vol. 5, pp 318/24) I heard the Prophet of Allah (P.B.U.H) say when you enter into the *bai' alinah* 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. A'ata* (Abu Hilal al-'Askari, *Kitab al-awa'il*, p. 278.) 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 *ulama* community. *Bai' alinah*, 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:

- 1) 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.
- 2) That he purchases the goods in order to trade with them; then this is trade, which God has permitted.
- 3) That the reason for purchasing the goods is neither the first nor the second, then the reason must be dirham's (money) which he needs, and it was difficult for them to borrow, so he purchases the good on credit (with an increased dirham's) in order to sell it and takes its price. This, then, is *bai' alinah* 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 *Shafiai* has expressly declared that *bai, alinah* to be (*Halal*). It should be pointed out that al *Shafiai'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 is expressed in the contract. As not every valid contract is a *halal* contract, the *Shafi'is'* may, thus permit contracts because its legal preconditions are fulfilled, but forbids the transacting act of the parties when it conflicts with *Shariah* principle. The following example illustrates his teachings, *Al Shafi'i* in

his book *Al-Umm*, 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 at the same time Shafi'i recognizes such transacting act as forbidden (*haram*) and the person is not allowed to take possession of the sword (*Tamlík*), thus preventing the contract from producing its effects, (Ali Al-Saluos, *Mu'malatnaal al-mu'sira*).

In conclusion, 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 in his book (*Islam and Current Issues*) states; in relation to this question of *bai' alinah* 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 devices deviates from the true objective of *Shariah*. The use of legal device is therefore evidence that the Intention (*niyyah*) factor is undermined or made secondary in the securitization process of Islamic bonds in some countries. It is apparently clear that most underlying assets used in 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, the relevant *Shariah* experts may have wrongly applied *Shariah* laws, which implies now that the legitimacy of Islamic bonds issued using *bai' alinah* is *Shubuhah*.

5. TAWARRUQ

Tawarruq is one of the Islamic banking products, the present contract by the Islamic financial institutions and conventional banks with Islamic windows. This contract is considered a means of obtaining money according to Islamic law. *Tawarruq* is defined as "the process, whereby a client who is in need of liquidity, purchases an item from the bank on deferred installment payments, he then sells the item and use the money obtained for his personal needs. It is one of the financing instruments that witnessed sharp disputes among a number of Muslim jurists in the Muslim world" (Source: Islamic Online). This resembles *Bai' ali'nah* except in that the buyer sells the commodity to someone other than the original seller. Some scholars have permitted it while others have refrained from it. Omar ibn Abdel Aziz named it the "sister of *riba*" and Shaikh of Islam Ibn Taimiyyah disliked it and said this was the more likely ruling among the scholars (*Majmoo' Al Fatawa* – 29/431). *Tawarruq* has been quite a controversial issue lately, especially after the resolution of the International *Fiqh* Academy Council on *Tawarruq*. In view of the advisory opinion (fatwa), various stakeholders of Islamic finance such as scholars of *Shariah*, accountants and bankers, have

attempted to express their opinion on the matter. *Shariah* scholars like DeLorenzo, Dr Aznan Hasan, Dr Nikan Faroozye, Dr Akram Laldin, Monzer Kafh and Shaikh Nizam Yaquby are among scholars that responded to the matter with some unique arguments. "These scholars understand and see that matter from a global perspective in responding towards the resolution made" (Ibn Yusuf, 2009). The disagreement over the legality of *Tawarruq* between the bodies, religious councils, as well as *Shariah* scholars indicates the existence of mixing *halal* and *haram* in this contract. This means that there are suspicions because of a conflict of views between scholars of *Shariah*, the religious councils and the bodies to the legitimacy issues of *Tawarruq*, this, as indicated by the presence of Imam al-Ghazali's *shubuhah* due to a mismatch (contradiction) between the evidence and the lack of clarity to this controversial issue (*Tawarruq*).

5.1 The Meaning of Tawarruq

According to the *fiqhi* Encyclopaedia of Kuwait's *Awqaf* and Islamic Affairs, *Tawarruq* means "buying a commodity with deferred payment and selling it to a person other than the buyer for a lower price with immediate payment".

According to Engku Rabiah (2006), *Tawarruq* has been generally used to refer to an arrangement whereby a person who was in need of cash bought some goods for deferred payment. Then, he sold the goods to another party (not the original seller) for cash payment at a lower price.

According to AAOIFI *Shariah* standard (summarized draft translation of exposure draft on *Tawarruq*- July 2006. *Tawarruq* is the purchase of a commodity (i.e. subject matter of *Tawarruq*) on deferred payment basis by way of either direct sale or *Murabahah*. The commodity is then sold for cash to a party other than the original seller". In the terminology of *fiqh*, *Tawarruq* is a stratagem for generating cash, when goods are purchased on a deferred payment, and then sold for less than the agreed price. Thus, the buyer goes into the deal knowing that he will lose, but accounting for the cash is worth the loss. Among the classical schools of *fiqh*, the only one to approve of such a transaction was the *Hanbali* School. There is no legal bar to this form of sale, though certain scholars have disliked it, particularly if someone habituates this sort of transaction.

According to Zaharrudin (2005), selling possessions for payment to be made later at a price more than its current price is known among the people of knowledge as the issue of *At-Tawarruq*. The preferred view among the Hanabilah (followers of the Hanbali Mathhab) is that it is permissible. Shaikh of Islam Ibn Taimiyyah said, "If the one who buys the product has no need of gold and silver, he buys the product to sell it for that which he needs. If the product returns to the original buyer, then that is that which there is no doubt concerning its forbiddance? If he sells it to other than the original buyer in a complete sale

and it does not return to the first person in any way, the *Salaf'* have differed concerning its dislike, and they call it *At-Tawarruq*. 'Umar bin 'Abdul-Aziz disliked it and he said that *At-Tawarruq* is the brother of *riba* but Iyyas bin Mu'awiyah allowed it. There are two different opinions recorded from Imam Ahmad about it." He (Ibn Taimiyah) also said, "Whoever takes a loan from a man, there are three aspects to it:

According to Riyadh bank, *Tawarruq* is a *Shariah* compliant financing method, with which you can raise loan finance through buying instalments in a local commodity, owned by the Bank. The applicant then authorizes the bank to sell his share in this commodity, on his behalf, to a third party for cash and then deposit the proceeds into his account.

According to Obaidullah (2005), *Tawarruq* is another financing product that is cited as a classic case of *hiyal*, or legal stratagem, but has been permitted by mainstream scholars under certain conditions. *Tawarruq* becomes a source of funds by combining two separate sale and purchase transaction. An individual in need of funds purchases a commodity on a deferred payment basis from a seller and then sells the same in the market in order to realize cash. This is considered from the perspective of *hiyal* (legal stratagem), since the individual concerned has no real intention of buying or selling the commodity.

5.2 Financing based in *Tawarruq* principle

According to Obaidullah (2005), *Tawarruq* is a prior-arrangement between parties. Another condition of a valid and permissible *Tawarruq* is the absence of any pre-arrangement between the three parties. You may recall here that under *Bai'al-Inah* the market price of the commodity need not bear any relationship with the amount effectively borrowed, in *Tawarruq* too, the three parties involved - bank, client and vendor may enter into a prior agreement.

In *Tawarruq*, therefore, one need to exercise extra care and subject the product to an additional dose of investigation before accepting it as *Shariah* compliant especially, when the bank asserts that the terms of the *Tawarruq* based product are same as the credit term of other conventional financing products. Example a *Tawarruq* - Based credit Card. Based on the mechanism which allows short-term funding of an amount that closely matches the need of the customer, a credit card has recently been designed by an Islamic bank that uses the concept of *Tawarruq*.

The mechanism begins with the bank advancing a certain amount of funds to customer under *Tawarruq*, the bank then creates under *Wadiah* principle a guaranteed deposit account for the customer for the safe custody of the amount. Now the customer can use his card for retail purchases and cash withdrawals just

like a conventional credit card except that the cash held in his *Wadiyah* account now backs each transaction.

At the end of every month, the value of total transactions by the customer is computed. A fresh *Tawarruq* for this value is undertaken to replenish the deposit account. Needless to say, this card is essentially similar to the Bank Islam Card with the replacement of *Bai 'al-Inah* by *Tawarruq*. Areas of application a survey of the above controversial mechanisms in use at various banks across the globe reveals the following major areas of application. *Bai' al-inah* is being used to provide short-term working capital financing, short-term personal finance and in structuring credit card. The *Tawarruq* is being used to provide short-term finance to meet working capital, other short-term requirement and in structuring credit card.

5.3 Islamic *Shariah* view of the *Tawarruq* transaction

The issue which concerns us here is how Islamic law views such *Tawarruq* contracts. Differences in scholar opinion on ascertaining the *hukm* on the concept of *Tawarruq* in transactions are summarized below.

1) View of The *jumhur*, Hanabilah and Shafie'

According to al- Sarakhsi, *Tawarruq* is generally allowed. **Hanabilah and Jumhur's reason.** Allah has allowed the sale and purchase and has forbidden the interest.

- i. Sell subject matter to third party.
- ii. The Prophet (PBUH) said in work: “*The sale of large amount of dirham and sale of dirham jamb have no element of Tawarruq riba. It is a sale and purchase transaction*”.

2) View of The Ibnu Taimiyah and Ibnu AlQayyim

According Ibn Qayyim, *Tawarruq* is generally disallowed. In fact, they are strongly against the practice and consider it as fraud against Allah & *Shariah*.

Reason presented for Ibnu Taimiyah's assertions

i.) “Verily, the Prophet has forbidden selling while in urgent condition”. Abdul Halim (2004), “the sale and purchase by way of *Tawarruq* and *Bai' alinah* are both meant for producing immediate cash, but not for selling and differentiating between both of them”. Thus *Bai alinah* transaction must be observed through its price to the first seller and not to *Tawarruq*. This is *Bai*

alinah for sale and purchase contract between two parties whereas *Tawarruq* is the contract between three parties.

In conclusion, one can say that *Tawarruq* has been suspicious *Mashubuh* because it contains elements of usury and *hilah* and also because the *Tawarruq* is controversial (i.e. have conflicting the evidence between scholars (conflicting of evidence is one of determinants of *shubuhah*) This means that there are suspicions because of a conflict of views between scholars of *Shariah* , the religious councils and the bodies to the legitimacy issues of *Tawarruq*, this, as indicated by the presence of Imam al-Ghazali's *shubuhah* due to a mismatch (contradiction) between the evidence and the lack of clarity to this controversial issue (*Tawarruq*).

5. CONCLUSION

In conclusion, one can say that *bai'alinah* and *Tawarruq* has been suspicious *Mashubuh* because it contains elements of usury (*riba*) and *hiayl* and also because this products is controversial (i.e. have conflicting the evidence between scholars (conflicting of evidence is one of determinants of *shubuhah*) This means that there are suspicions because of a conflict of views between scholars of *Shariah* , the religious councils and the bodies to the legitimacy issues of *bai'alinah* and *Tawarruq* product, this, as indicated by the presence of Imam al-Ghazali's *shubuhah* due to a mismatch (contradiction) between the evidence and the lack of clarity to these controversial issues.

This study should be viewed in Islamic business perspective. In other words, the increasing emphasis made on *shubuhah* is not for hindering the growth of IFIs, but for accentuating and, most importantly, giving practical form to the general purpose of *shariah* which seeks to benefit the people and prevent harms from occurring to them.

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