

USING *BAY AL-INAH* IN ISSUANCE OF SUKUK IN PRIMARY MARKET: A LOOK INTO SCHOLARS' VIEW

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Abstract

This is a doctrinal research. It aims to specifically look into scholars' differing opinions on using *bay al-inah* to issue Sukuk in primary market and the causes of the said difference. It is found that the Shariah Advisory Council of the Securities Commission Malaysia allows using *bay al-inah* to issue Sukuk in the primary market. However, this practice has been criticized by a big number of the Middle Eastern Countries as it involves the issue of *bay' al-'inah*. Moreover, it is found that one of the main reasons of the differences of opinions between the scholars is the different methods of *ijtihad* adopted in creating Islamic financial products and services (such as using *bay al'inah* in issuance of Sukuk in primary market as in our context). The Middle Eastern scholars adopt comparative study method of *fiqh (fiqh muqaran)* in order to identify the valid principle or nearest valid principle of Shari'ah for Islamic finance regardless of which (School of thought) *madhhabs* they belong to, while the Malaysian scholars adopt *al-talfiq* and *tatabbu' al-rukhas* method. It is recommended that in the process of making law, the comparative study method of *fiqh (fiqh muqaran)* should be adopted, as it scrutinises all views and chooses the one nearest to principle of Shari'ah without inclining to any particular *madhhab* (school of thought). With this approach it is more likely to achieve standardization of Islamic banking and finance products and services worldwide.

Keywords: Sukuk, Primary Market, Islamic Law, Creation of Islamic law, Islamic financial products and services, Islamic capital Market.

Introduction

Recent modernization in Islamic finance has created significant changes in the dynamics of the Islamic financial industry. The demand for Sukuk or Islamic securities has become gradually more popular in the last few years and has received universal acceptance as a practical alternative to conventional financial products. Sukuk signifies a new development in global capital market. It is one of the fastest growing sectors in Islamic finance and is regarded by a big number of people as the most innovative product of Islamic finance. Sukuk has developed as one of the most important mechanisms to advance finance in the market through structures

acceptable by the Shariah. In addition to the apparent attractiveness to Muslim investors, *Sukuk* may appeal to conventional investors as well, looking for attractive instruments for regular income and capital gains.

As a somewhat young asset class in the global capital market, the *sukuk* market certainly faces issues at its early stage of development. In this regard, some Muslim scholars have examined its level of compliance with the Shariah law. One of these issues is the involvement of *bay al-'inah* in issuance of *Sukuk* in the primary market. There is a difference of opinion between the Malaysian scholars and other scholars, mainly those in the Middle Eastern countries regarding this issue. The former allow this practice while the latter disapprove. This research will look into these two opinions and their authorities in reaching to their decisions.

Section II of this research will discuss Concept of *Sukuk*. Section III looks into using *bay al-'inah* (*inah* purchase) in issuance of *sukuk*. Section IV provides Methods of Ruling Deduction (*Istinbat al-hukm*) among Contemporary Jurists. And finally section V which is the conclusion will summarise the research findings and recommendations.

Concept of *Sukuk*

It is imperative to examine the meaning of *sukuk* before getting into its details. Literally, *sukuk* means certificates.¹ The AAOIFI defines “*sukuk*” as:

... certificates of equal value representing, after closing subscription, receipt of the value of the certificates and putting it to use as planned, common title to shares and rights in tangible assets, usufructs and services, or equity of a given project or equity of a special investment activity².

Basically, *sukuk* are simply documents or certificates that represent ownership in an asset. It awards the investors a share of the asset together with profit and risks resulting from the said ownership. *Sukuk* can be structured by observing the principles of contract of exchange (e.g. *ijarah*, *murabahah*, *istisna'*) and contract of participation (e.g. *musyarakah* and *mudharabah*).³ In essence, there are two types of *Sukuk*, namely: asset-based and asset-backed. Under the asset-based *Sukuk*, the *Sukuk* holders have beneficial ownership in the asset. And this means that the *Sukuk* holders have recourse to the originator in case of any shortfall in payments. The beneficial ownership is a legal term used where specific property rights, such as its use and title belongs to a person although legal title of the property belongs to another person. A common illustration of beneficial owner is the owner of funds held by a nominee bank or for stocks held in the name of brokerage firm. However, under asset-backed *Sukuk*, the *Sukuk* holders owned the asset and accordingly do not have recourse to the originator but to the asset if there is a shortfall in payment.⁴

Using *Bay Al-'Inah* (*Inah* Purchase) in Issuance of *Sukuk*

Basically, the Shariah Advisory Council of the Securities Commission Malaysia allows the utilization of *bay al-'inah* in the issuance of sale-based *Sukuk* in the primary market. However, scholars in the global capital market, mainly in the Middle Eastern countries disallow the said practice.⁵

Bay al-Inah is a contract that is debatable among the Muslim scholars. *Bay' al-'inah* is an exchange structure involving two transactions. In the first transaction, a seller sells his or her assets to a buyer on credit (delayed payment). Subsequently in the second transaction, the buyer resells the asset to the first seller on cash basis at a cheaper price from the first sale.⁶ Actually *bai' bithaman ajil* (BBA) has received severe criticism because of involvement of *bay' al-Inah* contracts in it, where the financier buys and sells the products back to the customer. *Bay al-Inah* has caused differences in opinion among Shariah scholars. Many earlier companions of the Prophet (p.b.u.h.) and the followers of companions (*tabi'in*) had rejected this transaction. Among those who rejected are Ibn 'Abbas, 'Aishah, al-Hassan, Ibn Sirin, al-Sha'bi, al-Nakha'i, Imam al-Thauri, Imam al-Auza'i, Imam Malik and Imam Abu Hanifah and his followers. Only Imam Shafi'i and his followers approve this transaction.⁷

As mentioned earlier, the preference of *hukm* deduction method adopted by recent jurists is the *ijtihad bayani*. And where there is no *Qur'anic* text or *hadith* regarding a particular issue, *mujtahid* prefers to deduct ruling using first the *ijtihad qiyasi* then the *ijtihad istislahi*.⁸ Generally, Islamic scholars who rejected *bay' al-'inah* depend on the following evidences:

Narrated by Ibn 'Umar that he heard the Prophet (p.b.u.h.) says: If you transacted by using *al-'inah*, and you took tails of cow (busy with material life), and you are satisfied with your job as farmer, and you left *al-jihad*, Allah (al-mighty) would overload on you humiliation which would not be removed from you unless you return back to your religion.⁹

From this *hadith*, they came to a conclusion that there is an explicit threat of humiliation in transaction using *bay al-inah*. And this is an indication that *al-'inah* transaction is haram.¹⁰

Narrated from Shu'bah, from Ibn Ishaq al-Shabi'i, from his spouse al-'Aliyah bint Anfa' bin Shurahbil, she said: I and mother of Zayd bin Arqam's son (umm walad) entered (and met with 'Aishah). The Umm Walad said (to 'Aishah): I sold my slave to Zayd bin Arqam at eight hundred dirhams in credit. Then I bought back the slave from him at six hundred dirhams (in cash). She (i.e. 'Aishah) told her: What a bad sale, and what a bad purchase. Tell Zayd bin Arqam that his *jihad* (holy sacrifice) were void except he repents.¹¹

Those who reject *bay' al-'inah* concluded from the *hadith* that 'Aishah mentioned the warning because it was revealed to the prophet (p.b.u.h.). Hence, 'Aisha's saying was considered as the revelation to the Prophet (p.b.u.h.) even though 'Aisha did not attribute the saying to him.¹²

Narrated from Ibn 'Umar who said: I heard the Prophet PBUH says: If people grudged with their *dinars* and *dirhams*, and transacted through *al-'ain* and they followed the tails of cow (busy with material life), and left away (their responsible on) *al-jihad fi sabilillah* (holy sacrifice), Allah shall send to them tribulation which will not be lifted from them unless they return to their religion.¹³

Narrated from Ibn 'Umar who said: I heard the Prophet PBUH says: If you followed the tails of cow and you transacted through *al-'inah*, and you left away al-jihad *fi sabilillah* (holy sacrifice), Allah will impose humiliation on you and it will not be lifted unless you return to your religion and repent to Allah SWT.¹⁴

The two *hadith* mentioned above also explained explicitly the prohibition of transaction using *al-inah*.

In contrast, Imam Shafi'i and his followers approved this transaction. They rejected the deduction of *hukm* using the *hadith* because of some reasons, which are as follow:

- i. If we accept this *hadith* as valid, but there was disagreement between companions i.e. Zayd bin Arqam and 'Aishah; it is absolutely believed that Zayd would not practice something except he believed that it was permissible, but 'Aishah saw it as forbidden. In this situation, the principle of Shariah (*al-qiyas*) supported the practice of Zayd. So, why not accepting Zayd's stand on the issue?¹⁵
- ii. The rejection of 'Aishah in the *hadith* was because of unspecified period for delayed payment. However, we agree with Aisha that the unmentioned date of payment would cause the contract to be void as uncertainty in mode of payment is considered *gharar fahish* in Islamic commercial contract.¹⁶

However, majority of jurist criticized the proofs given by Imam al-Shafi'i regarding *bay' al-'inah*. Their arguments on Imam al-Shafi'i stance include: ¹⁷

- i. Zayd's practice did not indicate permissibility. And 'Aishah rejection was a proof that a divine proof is against it.
- ii. 'Aishah's warning in the *hadith* did not refer to the first contract i.e. purchase with delayed payment. It was agreed among scholars that 'Aishah approved the using of delayed payment in purchase contract.

Some contemporary scholars discuss the *hadiths* relating to *bay' al-'inah*. Among them is Dr. Yusof al-Qaradawi in his book about *bay' bithaman ajil* (*Bay almurabahah al-amir bi al-syira*). He made a comprehensive discussion on the *hadiths* of *bay' al-'inah* from the authenticity of the *hadith* and issues relating to its meaning. He concludes: "I am inclined to what was told by Ibn Qayyim that *al-'inah* is indeed prohibited (*haram*). Both sanads for the *hadiths* of *al-'inah*'s prohibition strengthened each other."¹⁸

Methods of Ruling Deduction (*Istinbat Al-Hukm*) Among Contemporary Jurists

Basically, the main reason for the differences of opinion between the Muslim scholars is the method adopted in deducting *hukm* (*istinbat al-Hukm*).

Generally *hukm* is made in two situations based on a process called *ijtihad*¹⁹. Firstly, *hukm* is created from divine text (*al-nas*) i.e. Quran and *Hadith*. Secondly, in situations where there is no divine text that describes specific subject matter, Islamic scholars in general agree that a *hukm* can be created by applying a methodology called *ijtihad istislahi*²⁰. The Islamic scholars are not

unanimous regarding the types of *ijtihad* to be applied in situations where textual instructions already existed. The majority of the scholars agree that Muslim should follow and obey the textual instructions from al- Quran and *Hadith* and use the *ijtihad bayani*²¹ and *ijtihad qiyasi*²² to interpret the rules. Some say the *ijtihad istislahi* is permitted only in cases where there are no textual proofs available.²³

It is assumed that the interpretation of textual evidence (*nas*) by different scholars resulted in the opposing views as to the applicability of *ijtihad istislahi*.²⁴ Following are a few maxims where the word '*al-nas*' is used:²⁵

- i. "*Ijtihad* is not to be dissolved by another *ijtihad* in same category but be dissolved because of proof from *al-nas*".
- ii. "No place for *ijtihad* with the existence of *al-nas*."
- iii. "No permission to practice *ijtihad* with the existence of *al-nas*."

In contrast, some scholars gave different definition of *al-nas* as mentioned in the maxims above:

- i. Salim Rustum Baz al-Lubnani said that *al-nas* in these maxim is *al-nas al-sarih* (explicit text).²⁶
- ii. Ali Haydar gave general explanation on the word '*nas*' i.e. Quran and *Sunnah*.²⁷
- iii. Ahmad al-Zarqa mentioned that *al-nas* in this context is *al-mufassar* and *al-muhkam*.²⁸
- iv. Mustafa al-Zarqa included *al-ijma*' as a part of *al-nas*.²⁹

From these definitions, it appears that al-Lubnani and Haydar gave general meaning of *al-nas* i.e. Quran and *Sunnah*. Al-Lubnani added explicitness (*sarih*) as a condition to consider any divine statement as *al-nas* which *ijtihad* on it is prohibited. On the contrary, Ahmad al-Zarqa and his son, Mustafa are of the opinion that *al-nas* which *ijtihad* on it is prohibited must fall under the category of *qat'i dilalah* (definitive indication) i.e. *al-mufassar*³⁰ and *al-muhkam*³¹.

With deep analysis, it is understood that the definitions given by al-Lubnani and Haydar are too broad. The question here is, is the word '*al-nas*' in jurist's practices restricted to definitive and explicit text only? Conversely, al-Zarqa is of the view that the prohibition of *ijtihad* is limited to the definitive text only. So, this means that he excluded explicit text of speculative indication (*zanni al dilalah*) from the category which *ijtihad* is prohibited. The question that arises from this interpretation is, are the scholars free to go against the text which is explicit and clear but is speculative (*zanni*) in nature. Furthermore, it is also worth mentioning here that there is a mutual agreement among the scholars that '*khbar ahad*'³² is valid to be utilised although it is speculative?³³

According to Asmadi Muhammad Naim, it is more appropriate to accept the view that *al-nas* in this context refers to explicit textual proofs from al-Quran and *sunnah*, which is the view of al-Lubnani and Haydar.³⁴ Here, we need to highlight that in deducting *hukm*, most of the Middle-Eastern scholars are in favour of practicing comparative study method of *fiqh* (*fiqh muqaran*) in order to identify the valid principle or nearest valid principle of *Shari'ah* for Islamic finance regardless of which *madhhabs* they belong to.³⁵ Although a few of *usuliyyun* (scholars of *usul fiqh*) are of the opinion that *al-talfiq and tatabbu' al-rukhas*³⁶ is permissible among ordinary

people, but today's Islamic scholars especially those in Middle East are not in favour of practicing *al-talfiq* and *tatabbu' alrukhas* in their *ijtihad*. They are more inclined to adopting deduction of *hukm* by using the method of comparative methods of *fiqh (fiqh muqaran)* and through group discussion (i.e. committee resolution), in which members of the group are made up by representative from various countries and who are free from any pressure from their governments in order to provide independent and responsible views on Islamic financial products.³⁷

In addition, Asmadi Mohamed Naim postulates that the Malaysian scholars are in favour of *al-talfiq* and *tatabbu' al-rukhas*. According to him, the Malaysian scholars have to choose either one from these two ways. First way is to continue the method of choosing any *fatwa* from any imam (*al-talfiq* and *tatabbu' al-rukhas*) without considering the proofs of other scholars when deducting the rule and put themselves as ordinary people who are permitted by *usuliyyun* to practice any *madhhabs* they like under *al-talfiq* and *tatabbu' al-rukhas* methodology. In this situation, they are free to choose any *fatwas*, which suits current financial practice (i.e. current conventional practices') by changing technical aspect of the contracts under their belief that "the basic rule in *al-muamalat* is permissible unless proven otherwise", and "when a judge gives judgment, if he is right, he will get double reward, but if he is wrong, he will get single reward". But if the Malaysian scholars choose this way, the Malaysian Islamic financial products may not be able to be accepted in the global market especially in Middle East.³⁸

Therefore, according to him, there is a need of change in approach where local scholars are required to be practicing comparative methods of *fiqh (fiqh muqaran)* when deducting *hukm* for Islamic financial system by comparing the proofs from the various contradicting views. Thorough study to subject matter must be done with the goal to achieve the nearest view to the teaching of al-Quran and Sunnah. In addition, any current issues should be highlighted among local (Malaysian) Islamic scholars and be debated. At the end, this view must be proposed for international discussion such as discussion in international *fiqh* Academy and other related councils, and this approach will help the Malaysian Islamic financial system to be acceptable by all parties.³⁹

Conclusion

The research finds that one of the disputed issues about the sale-based *Sukuk* is the use of *bay al-inah* to issue *sukuk* in the primary market. The Shariah Advisory Council of the Securities Commission Malaysia allows this practice. However, this practice has been criticized by a big number of the Middle Eastern Countries as it involves the issue of *bay' al-'inah*.

Furthermore, the research also reveals that as a result of different methods of *ijtihad* adopted in creating Islamic financial products and services (such as issuance of *sukuk* in primary market using *bay al-'inah* as in our context), there are differences between Middle Eastern scholars and the Malaysian scholars. The former adopt comparative study method of *fiqh (fiqh muqaran)* in order to identify the valid principle or nearest valid principle of *Shari'ah* for Islamic finance regardless of which (School of thought) *madhhabs* they belong to, while the latter adopts *al-talfiq* and *tatabbu' al-rukhas* method.

It is recommended that in the process of making law, the comparative study method of *fiqh (fiqh muqaran)* should be adopted, as it scrutinises all views and chooses the one nearest to principle of *Shari'ah* without inclining to any particular *madhhab* (school of thought). With this approach,

it is more likely to achieve standardization of Islamic banking and finance products and services worldwide.

References

- [¹] ISRA, *Islamic Financial System: Principles & Operations*, (Kuala Lumpur: ISRA 2012), P 390.
- [²] AAOIFI Standard 17 on Investment Sukuk.
- [³] ISRA, *Islamic Financial System: Principles & Operations*, (Kuala Lumpur: ISRA 2012), P 402-424.
- [⁴] Tahmoures A. Afshar, Compare and Contrast Sukuk (Islamic Bonds) with Conventional Bonds, Are they Compatible? *The Journal of Global Business Management*, 2013, Vol. 9.
- [⁵] ISRA, *Islamic Financial System: Principles & Operations*, (Kuala Lumpur: ISRA 2012), P 406-407.
- [⁶] Asmadi Mohamed Naim. (2007). Methodology of hukm deduction for Islamic finance between the practices adopted in Malaysian and Middle Eastern financial system. *Journal of Shariah*, 14, 23-34.
- [⁷] Al-Kasani, Abu Bakr Mas'ud al-Hanafi (2000). *Badai' al-Sanai' fi Tartib al-Sharai'*. Beirut: Dar Ihya' al-Turath al-'Arabi. v4, p. 426-427, al-Shafi'i, Muhammad Idris (1993). *Al-Umm*. Beirut: Dar al Kutub al-'Ilmiyyah. v4, 95, Ibn Qudamah, (n.d). *Al-Mughni*. Beirut: Dar al-Kitab al-'Arabi. v4. p.45.
- [⁸] Asmadi, 23-34.
- [⁹] Abu Daud: 3003.
- [¹⁰] Ibn Qudamah, (n.d). *Al-Mughni*. Beirut: Dar al-Kitab al-'Arabi, v4, p.45.
- [¹¹] al-Shafi'i, Muhammad Idris (1993). *Al-Umm*. Beirut: Dar al Kutub al-'Ilmiyyah, v3, p. 47.
- [¹²] Ibn Qudamah, v4, p.45.
- [¹³] Ahmad bin Hanbal, *Musnad Imam Ahmad*, no. 4593.
- [¹⁴] *Ibid*. no. 5304.
- [¹⁵] al-Shafi'i, v3, p.95.
- [¹⁶] *Ibid*, p.95, 96.

- [¹⁷] Al-Kasani. v4, p.427, al- Shafi'i. v4, p.98, Ibn Qudamah. v4. p.45.
- [¹⁸] Al-Qaradawi (1987). Bay' al-Murabahah Lil Amir bi al-Shira' Kama Tajrihi al-Masarif al-Islamiyyah. 'Abidin: Maktabah Wahbah. p.44.
- [¹⁹] *Ijtihad* refers to the effort of the jurist (*mujtahid*) who uses his full capability in seeking knowledge of the shari'ah rules on any issue by using deductive method. (See Zaydan, Abd al-Karim (1987). Al-Wajiz fi Usul al-Fiqh. Beirut: Mu'assasah al-Risalah).
- [²⁰] *Ijtihad istislahi* is an *ijtihad*, that investigates the objective of *Shari'ah* for the *hukm* when textual instructions are absent (See Zaydan, p.378-385, 401-409).
- [²¹] *Ijtihad bayani* is an *ijtihad*, that uses al-Quran and *Hadith* as sources for *hukm* deduction. (See Zaydan, p.401-409).
- [²²] *Ijtihad qiyasi* is an *ijtihad*, that uses analogy method. (See Zaydan, p.194-200).
- [²³] al-Shashi, Abu Ali (1982). Usul al- Shashi. Beirut: Dar al-Kitab al-'Arabi, p.300.
- [²⁴] Asmadi, 23-34.
- [²⁵] Al-Jassas (n.d) Ahkam al-Quran. Beirut: Dar Ihya' al Turath al-'Arabi, v4, p. 65, al-Lubnani, Salim Rustum Baz (1304H). Syarh al-Lubnani 'ala al-Majallah. al-Istanah: Maktabah al-Habibah. p. 25.
- [²⁶] al-Lubnani, p. 25.
- [²⁷] Haidar, Ali (1991). Durar al-Hukkam Syarh Majallat al-Ahkam. Beirut: Dar al-Jill. p.32-33.
- [²⁸] al-Zarqa, Ahmad Muhammad (1998). Syarh al-Qawa'id al-Fiqhiyyah. Damsyik: Dar al-Qalam. p. 147-150.
- [²⁹] al-Zarqa, Mustafa Ahmad (n.d). al-Madkhal al-Fiqhi al-'am. Beirut: Dar al-Fikr. p.1015.
- [³⁰] *Mufassar* from *usuliyyun* view is something, which is extended in clearness of the text and shows the meaning by itself without any probability to bring another interpretation. Thus, *mufassar* is a word or a text whose meaning is completely clear and is, in the meantime, in harmony with context in which it appears. Because of this and the high level of clarity in the meaning of *Mufassar*, there is no need for recourse to *ta'wil*. But *mufassar* may still be open to abrogation which might, in reference to the Quran and sunnah, have taken place during the lifetime of the Prophet. (See al-Shashi, p.76, Zaydan, p.343-345 and Kamali, Mohammad Hashim (1998). Principles of Islamic Jurisprudence. Kuala Lumpur: Ilmiah Publisher Sdn. Bhd).
- [³¹] *Muhkam* literary means accurate. *Muhkam* from *usuliyyun* view is the word, which appears its indication to the meaning by itself on very clear appearance, more than *al-mufassar*. It rejects other interpretation and abolishment (*nasakh*). (See al-Shashi , p.80, Zaydan, p.346-348).
- [³²] *Khabar al-ahad* or *sunnah al-ahad* is something, which is narrated from Rasulullah SAW by numbers of people that does not exceed the numbers of *al-tawatur* (to be considered as *altawatur*). (See Zaydan, p.171-173).

[³³] Asmadi, 23-34.

[³⁴] Ibid

[³⁵] Ibid.

[³⁶] *Al-Talfiq* is a way that is not approved by any Imam. It is a practice of following many *madhhabs'* views. *Tatabbui al-rukhas* means choosing any easier view of any *madhhabs*.

[³⁷] Asmadi, 23-34.

[³⁸] Ibid

[³⁹] Ibid