ABSTRACT

In Malaysia, Sharīah scholars at the supervisory levels have advocated *bayʿ* al-ṣīnaḥ as a mode of finance. Under the label of *al-bayʿ*, the contract of *al-bayʿ* al-ṣīnaḥ contains interest-bearing features, such as earning a contractual return without the implication of risk and value-addition. Seeking a broader consensus on the permissibility of *bayʿ* al-ṣīnaḥ is thus critical. This study shows that Malaysian Sharīah scholars outside the supervisory bodies do not fully support *al-bayʿ* al-ṣīnaḥ. The survey indicates that *bayʿ* al-ṣīnaḥ can be applied under a state of ērār ʿrāh or when the mašlaḥah of the Muslim people is under threat, which is not the case in Malaysia. Since Sharīah scholars in Middle-Eastern countries have condemned *bayʿ* al-ṣīnaḥ, it is crucial that a diversification policy is pursued to invite greater participation of global Islamic funds in Malaysia.

JEL classification: G10, Z12

Key words: Islamic financing, *Bayʿ* al-ṣīnaḥ, ribā

1. PROBLEM STATEMENT

The application of *bayʿ* al-ṣīnaḥ in Malaysian Islamic financial markets has been substantial. The contract is considered valid (ṣaūd) by the Sharīah Board of Bank Negara Malaysia and the Securities
Commission. They argued that $bay^c\text{ al-\text{\c¥nah}}$ is allowed by the ShŒfic¥ school of $fiqh$ (madhhab). Since the school of $fiqh$ of Muslims in Malaysia is predominantly ShŒfic¥, it follows that the use of $bay^c\text{ al-\text{\c¥nah}}$ as a mode of finance is permissible. Therefore, $bay^c\text{ al-\text{\c¥nah}}$ is popular in many banking facilities such as personal financing, overdraft, and deposits. In the money market, Islamic treasury notes and the $Khazanah$ benchmark bonds have intensively applied $bay^c\text{ al-\text{\c¥nah}}$. An even greater application is found in the Islamic capital market involving the issuance of Islamic private debt securities (IPDS) by large corporations.

Although it appears that a consensus on $bay^c\text{ al-\text{\c¥nah}}$ has been made at the supervisory level, the views of Shar¥ah scholars outside of Bank Negara and the Securities Commission are not readily available. These views are crucial to further examine whether there is a consensus on the issues underlying al-\text{\c¥nah} contract among Malaysian fuqahŒ. It is therefore, imperative to seek the views of fuqahŒ in the academic, religious and legal worlds to ensure that the opinion of the ulamŒ at the supervisory level is in congruence with the rest of the religious community in Malaysia.

This paper attempts to analyze these views by way of a survey conducted on a sample of sixty eight respondents, most of whom hold a university degree in Shar¥ah. Having an intimate knowledge of the Shar¥ah is essential, especially when the requirement for the product to be globally viable is no longer an option but a necessity for Malaysia. With traditional portfolio investments leaving the country, 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 (fuqahŒ), most of whom belonging to the MŒlik¥, îanbal¥ and îanaf¥ schools of $fiqh$. It is critical that Islamic financial instruments in Malaysia are designed to attract these investors as well. Insisting on a Shar¥ah standard based on one school of $fiqh$ alone may not be in the interests of Malaysia as this may isolate the country from global Islamic finance.

2. $BAY^C AL^{-CINAH}$ (BI) AS A FINANCIAL INSTRUMENT

The contract of $bay^c\text{ al-\text{\c¥nah}}$ (BI) is used to obtain cash, just as in a standard loan. Using $bay^c\text{ bithaman Gîl}$ (BBA) can only end with the purchase and ownership of an asset, which the borrower will not be
interested in. It does not provide cash balances that people can use freely at their disposal. But obtaining cash is only possible through an interest-free loan, which is not commercially viable. As a business entity an Islamic bank seeks to maximize profit, so giving interest-free loan (qarè al-úasan) will not achieve this objective. Since banks are willing to fund a transaction at a price and customers are ever willing to pay this price, Islamic bankers have devised a product to help people who want cash to get it without the implication of ribŒ

The bayc al-c¥nah transaction is normally executed with relative ease. Suppose Mr. Salleh wants a $10,000 loan for which he is willing to pay a price, but not one similar to the ribŒin a loan. Here, the bank will sell asset X to Mr. Salleh at a credit price, say $15,000, which he pays by installments. Then, at the same instant, Mr. Salleh, who now owns asset X, sells it back to the bank for $10,000 payable on a cash basis.

In this manner, he gets the $10,000 in cash, while the bank makes a $5,000 profit over the period of financing. Each party gets what it wants without the implication of ribŒ The product is based on two contracts of sale and purchase (al-bayc), namely: (a) al-bayc bithaman â€œjil (deferred), and (b) al-bayc al-mu‹laq (cash sale) with the credit sale executed following the cash sale. It is therefore pertinent to examine the views of Muslim jurists on transactions involving bayc al-c¥nah.

Juristic opinions on bayc al-c¥nah can be divided into two categories, namely those represented by: (a) the îanaf¥, îanbal¥ and MŒlik¥ schools of fiqh, and (b) the ShŒfic¥ school of fiqh.

Corporate finance has applied bayc al-c¥nah through bond issues on a large scale. Like any debt contract, corporate bonds give lenders legal claims on both capital and interest income. Through bayc al-c¥nah, creditors are also given full capital protection and guaranteed profits. By issuing Islamic bonds (sanad), the safety, liquidity and risk-free features of conventional bonds are kept intact without explicitly implicating interest as ribŒ.

The actual application of bayc al-c¥nah here is critical to claim Shar¥ah legitimacy. The same process is applied as found in banking. Say, the issuer wants to raise $500 million to finance project X. The issuer will identify its own assets worth $500 million (e.g. plant and machinery, stocks, real estate, etc.) for the purpose of sale to investors. Upon the bayc al-mu‹laq sale, the issuer gets the cash it wants. Repayment is made by way of al-bayc bithaman â€œjil sale by the
investors to the issuer at a mark-up price. The margin consists of the annual profit investors want from the BBA sale multiplied by the installment period. For example, if the annual profit is 6 percent per annum with a 10 year tenure, the margin is equal to $300 million (0.06 x $500 million x 10).

Bond issues were made as if they constituted physical assets or property (al-mūqāl). This is because in the bayʿ al-ʿawālīd process, the buy-back al-bayʿ bithaman al-jil contract allows the issuer to take back possession and ownership of the assets. These assets are then securitized to make way for the bond issues as a mode of payment. Thus, Islamic asset securitization is only possible by applying the ʿawālīd sale, consisting of bayʿ al-muḍāq and bayʿ bithaman al-jil. If this securitization process is not executed, the structure of Islamic bond issues would be identical to conventional bonds, thus implying ribā.

It is thus critical to further examine the views of the fuqahā on bayʿ al-ʿawālīd in order to see whether the disagreements are based on fundamentals (uṣūl) or merely subsidiary issues (furūʿ). It is generally known that the former is forbidden (ūmar) while the latter which constitutes ikhtilāf, is allowed (īal).  

3. FUQAHĀ VIEWS

The following discussion is on comparative fiqh, from which eight statements were formulated in order to explore the views of contemporary Sharīʿah degree holders who do not hold supervisory duties in Malaysian Islamic financial institutions. The statements are given in Table 1.

al-Shāfiʿī and Dawʿd al-Ḥirṣī found the contract of bayʿ al-ʿawālīd to be valid, but abhorrent (ṣaʾūṣa maʿṣa karʿawā). This is because the ʿawālīd contract has to satisfy all the requirement of a valid contract. In other words, the ʿawālīd sale is valid by the fulfillment of the external evidence required by all contracts of sale (al-bayʿ). The intention (niyyah) of the contracting parties has no effect on the validity of the sale. The intention is not considered since there is no means to know it, unless the intention is expressed explicitly. In the Shāfiʿī and the Ḥirṣī schools of fiqh only the external intention of the contracting parties is considered. Therefore, the ʿawālīd sale is valid on the basis of the verse: (wā ʿūlla Allāh al-bayʿ). They do not consider the succession of two contracts of sale as sufficient evidence to prove the
existence of a *ribawi* intention.\(^5\) A b’ Y’suf, from the *anafi* school, considered this sale as valid without abhorrence. Mu’ammad ibn al-‘asan al-Shaybah had a slightly different view. He perceived this sale as valid with abhorrence.

On the other hand, the *Mālikis* and *Ibadis* regard this contract as void.\(^6\) According to both schools of *fiqh*, the motive of the contracting parties determines the legality or illegality of the contracts. In the *cūnah* sale under consideration the motive of the parties is illegal and therefore the sale is not valid because it constitutes a legal device (*‘ulah*) to secure a loan with interest. This despicable act should be averted at all costs if one desires to observe the *Shariah* wholeheartedly.\(^7\)

The above view is based on a report of an incident between Zayd ibn Arqam and C• ‘ishah.\(^8\) Jurists supporting the *cūnah* sale also apply analogy (*qiyas*) on the means/expedients (*dhar*). But this is prohibited by the consensus (*ijma*) of the *fuqaha*. In both cases, the unlawful intention constitutes the motive of the contract.\(^9\) They concluded that the *cūnah* sale is a mechanism to legalize *ribawi*.\(^10\) Anything that can be used as a means to commit a prohibited act is prohibited.\(^11\)

The invalidity of *bayc al-cūnah* is also evident in a *hadith* reported by Ibn cUmar that the Prophet (pbuh) said: “Whenever you do business transactions by way of *bayc al-cūnah*, and you follow your cattle and get engrossed with your agricultural pursuit (and because of that) you neglect your *jihād*, Allāh shall cause ignomy upon you and that it shall not cease until you return to your religion”.\(^12\) A b’ ʻanfah said that this contract is void (*bīl*) if it does not involve a third party, who either deals with the original seller or buyer. However, A b’ ʻanfah in this case appears to have changed his previous view in which he concluded the *cūnah* sale is *sauiū*.\(^13\)

Based on the above discussion, we can conclude that the objection on the validity of *bayc al-cūnah* is based on the following reasons:

a. It is a legal device (*‘ulah*).

b. The presumed wrongful intention to commit *ribawi* transaction. This is explained by the *hadith* which says, “all actions are judged by intention.”\(^14\)

c. The reported opinion of C• ‘ishah against Zayd ibn Arqam.

d. The reported *sauiū* *hadith* narrated by Ibn cUmar.
However, al-Shafi’i rejected the hadith regarding Zayd ibn Arqam and 'ishah, saying that the hadith is not established (thabit). Even if it is authentic, al-Shafi’i denied it for the following reasons:

a. 'ishah’s condemnation of the qanah sale is based on the view that the payment on the sale is deferred into some unknown or unspecified period. Sale with deferment in payment is not valid.

b. The incident involved two companions and if there are disagreements between the companions, Shafi’i methodology is to take the opinion of whom we can use analogy (qiyas) with. In this case it is on Zayd’s side. In other words, while it is clear that Zayd acted contrary to the meaning of the hadith, this does prove that the companions themselves were not of the same opinion. When this happens, analogy (qiyas) is applied.

4. THE EFFECT OF INTENTION ON THE VALIDITY OF CONTRACTS

Since bayc al-qanah involves the intention (qasd or niyyah) of the contracting parties, it is pertinent to have a deeper look into this issue. In a nutshell, there are two views regarding intention in any kind of contract. The first one is the view of the Hanafi and Shafi’i who consider only the external intention and not the internal motive. In other words, all contracts are considered valid if the external desire of the contracting parties is fulfilled. This view is based on the fact that if the internal desire or intention is taken into account, it will ruin the principle of stability or solidity of transaction (istiqrar al-tacmul). This is because internal desires are concealed or hidden such that it is impossible to know them. As desire differs from one person to another, the requirement to explicitly announce the niyyah in contractual obligations executed cannot be considered.

As a result, the motive has no effect on a contract, unless it is stated explicitly. The qanah contract is thus valid and effective since all aspects of the sale are fulfilled. Nevertheless, Shafi’i asserted that when the intention or motive is unlawful, the contract is considered abominable or abhorrent (makarh) and thus, by extension prohibited (urfm), albeit technically valid.
The Mālikīs, Iṣhāqīs, Zaydi, and the Shiites supported the second view. They take into consideration the internal intention or desire of the contracting parties. Consequently, they consider all contracts containing unlawful intentions as void, provided that the second party knows the intention of the first party. The external evidence is discounted if the internal intention is found to conflict with the external evidence. In this case, it is apparent that the buyer and seller in the qānah sale have both executed a contract of sale but only to serve as a legal device (úmah) in order to legalize a ribawi contract. In fact, there is no intention by both buyer and seller alike to purchase the goods for genuine reasons such as consumption. Therefore, the contract is prohibited on the basis of blocking the means (sadd al-dharih).

With regard to the Shafi’is and Zaydi view that the validity of a contract depends on the external form of the agreement, the opponents of qānah sale rejected this argument. This is because the external intention of the contracting parties is considered only if there is no presumption or indication that the intention is opposite to the external evidence. When there is clear evidence from customary practice that the real intention of the parties is in violation of the Shari’ah, the contract is considered void.

In short, the prohibition of baye al-qānah – according to the second opinion – is based on the argument that the contract is a means for the taking of rib. Other jurists state that all kinds of bay’ al-ajal are not permissible, since the real intention is not to realize the objective of the sale but to secure a ribawi credit facility. In this manner, the contract of sale or al-bay is used merely for the purpose of lending and borrowing money via the ûmah mechanism.

5. îLAH AND BACKDOOR TO RIB

In the Qur ’an, Allah says: (wa ulla Allâ al-bay wa úarrama al-rib). Allah prohibits rib and He blocks the means that lead to rib Individuals indulging in rib are compelled to use ûmah. The best ûmah uses sale (bay) since Allâ has permitted sale in the Qur ’an. It is used as a camouflage to hide the real intention of the contracting parties. Consequently, a number of ûmah on rib are applied in the name of sale (al-bay). One of these ûmah is baye al-qānah. It is regretted that baye al-qānah has been endorsed as a solution by the
fuqahā in the Malaysian supervisory bodies.\(^{30}\) In Islamic fiqh, bayrī al-cūnah is regarded as a typical úiyal rībaw. Although bayrī al-cūnah has satisfied the basic requirement of trade and commerce (al-bayrī), in essence it still resembles a contract of loan with interest.\(^{31}\)

On this point it is worthy to look at the eminent jurist Ibn Taymiyyah who divided sales into three groups. These sales are executed according to the buyer's intentions, namely:

a. 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;

b. that he purchases the goods in order to trade with them; then this is trade, which God has permitted;

c. that the reason for purchasing the goods is neither the first nor the second, then the reason must be dirham (money) which he needs, and it was difficult for him to borrow, so he purchases the goods on credit (with an increased dirham) in order to sell it and take its price. This, then, is cūnah which is úarūm according to the most eminent of the jurists.\(^{32}\)

The above statements can be further understood by setting them in a modern context. For example, a bank customer looking for a loan will purchase a fictitious asset from the bank with no intention of being a consumer. Instead he or she turns into a trader, which is not his or her profession. In this new role as a trader, the customer sells the fictitious asset back to the bank, which not only a trader but a financier. If the bank is a trader, it must have stocks of the fictitious asset for the purpose of sale, but regretfully it has only one, which will be used many more times to execute new bayrī al-cūnah sales.

Finally, the views held by the Malaysian fuqahā representing both Bank Negara Malaysia and the Securities Commission are predominantly Shīficūs. However, the fuqahā who do not have supervisory duties may not share the same view. This may be possible even though Malaysian fuqahā subscribe to the Shīficū school of fiqh. The next section will provide an empirical finding concerning the views of the fuqahā outside the supervisory bodies. The method applied attempts to explore new frontiers in determining juristic opinions, although no claim shall be made to consider this method authentic or binding in making legal rules (aůkūm sharīyyah).
6. DATA AND ANALYSIS

The eight statements on *bayr al-Cnah* were distributed both manually and electronically. Respondents include *mufti*, members of Shariah Advisory Committee (outside Bank Negara and the Securities Commission), Islamic bank executives, lecturers and government officers. Sixty eight respondents participated in the survey. Since this study is exploratory in nature, the number of respondents is considered sufficient to give a valid result. Examining their knowledge on *bayr al-Cnah* is done by way of defining their respective preferences on the Likert scale.

6.1 GENERAL CHARACTERISTICS OF THE SAMPLE

Most of the respondents are academics in Islamic studies, but they do not necessarily deal with *fiqh al-mucŒmalŒt*. They include lecturers at both public and private universities, executives or officers in religious departments and students with diplomas in Islamic studies. All respondents have a basic knowledge on what constitutes *bayr al-Cnah*. This is to guarantee that they understand the given statements and so make their responses valid. The authors feel that the composition of the respondents is quite representative of what a *fuqahŒ* should be. The majority of the respondents hold at least a Master’s degree, 16.2 percent hold Ph.Ds in Islamic studies, 20.9 percent of the respondents hold Bachelor degrees and the remainder have diplomas.

The eight statements in the questionnaire are listed in Table 1. This was to avoid misunderstanding of the given statements so as to provide clarity to the respondents. The questions were also distributed in the Malay language. However, some Arabic terms such as *bayr al-Cnah*, *úiyal*, etc., were not translated into Malay in order to preserve their originality since the meanings can be misleading when translation is made literally.

7. MEAN AND STANDARD DEVIATION

This study utilizes a simple statistical approach. It seeks to gather a consensus among respondents by way of extracting their views on several issues related to *bayr al-Cnah*. Any observation made is not binding, as the determination of legal values (*qiyam sharŒïyyah*) is
TABLE 1
Description of Statements

<table>
<thead>
<tr>
<th>Statement Number</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>In doing any transaction, <em>niyyah</em> plays the most important role – more important than the <em>lāf</em> of the contract itself. <em>Niyyah</em> determines whether the contract is valid or not.</td>
</tr>
<tr>
<td>2</td>
<td>Contractual fixed return on loan is disallowed because it is <em>rib&lt;sup&gt;ū&lt;/sup&gt;</em>.</td>
</tr>
<tr>
<td>3</td>
<td>Charging a mark-up above the cost/capital in sale is permissible because it is profit.</td>
</tr>
<tr>
<td>4</td>
<td><em>Bayʿ al-c¥nah</em> is a kind of sale which uses <em>u¥lah</em> to avoid the involvement in <em>ribaw</em> transaction.</td>
</tr>
<tr>
<td>5</td>
<td><em>u¥lah</em> is permissible on <em>målålal¥ah</em> basis.</td>
</tr>
<tr>
<td>6</td>
<td><em>u¥lah</em> is permissible on <em>ēar´rah</em> basis.</td>
</tr>
<tr>
<td>7</td>
<td><em>Bayʿ al-c¥nah</em> is permissible because it enables consumers to obtain cash/capital without involving the <em>ribaw</em> contract of loans.</td>
</tr>
<tr>
<td>8</td>
<td>The authenticity of the <em>u¥ad¥th</em> regarding the prohibition of <em>bayʿ al-c¥nah</em> (the story of Zayd ibn Arqam and C&lt;sup&gt;1&lt;/sup&gt; i ´ishah) is dubious.</td>
</tr>
</tbody>
</table>

under the purview of *ijmŒc* (juristic consensus) and *ijtihŒd* (juristic independent thinking).

In this study, a high mean with low standard deviation on the given statement would imply a consensus reached by the respondents. As generally acknowledged, a mean only pinpoints the center of the data. Thus, using the mean alone can be meaningful only if the dispersion is small. However, if the measure of dispersion is large, it indicates that the data is not clustered closely. Therefore, the mean is not reliable; that is, it is not representative of the data.

Thus, the degree of disagreement among the respondents, as measured by the standard deviation is a significant aspect of the study.
One cannot casually conclude that Muslim jurists have a common understanding on a specific issue by merely looking at the mean without paying equal attention to the dispersion around the mean. It would be like walking across a lake with an average depth of 4 feet, but some portions are as deep as 400 feet. Thus, if a high mean gives a large standard deviation as well, it is pertinent to further explore why that is the case.

The next section describes the mean and standard deviation for each question with some insights on the preferences given by the respondents. A mean of between 4 and 5 would indicate a high level of agreement of the given statement, while a mean between 1 and 2 would imply the opposite. Likewise, a high standard deviation between 4 and 5 shows that the degree of disagreement is substantial.

A statement with a high mean (e.g. 4) and low standard deviation (e.g. 1) indicates that respondents have reached a strong consensus on the given statement. However, if the standard deviation is also high (e.g. 4), the mean of 4 implies that a strong consensus among respondents is not evident. The same is true for statements with low means but high standard deviations, where the disagreement among respondents is not substantial or conclusive enough to indicate that the decision is unanimous.

8. RESULTS AND ANALYSIS

In Table 2, each statement in the questionnaire is listed with its mean and standard deviation. The standard deviation is used to measure the extent of disagreement among the respondents on the issues forwarded. A high standard deviation simply means that the sample observations are not clustered closely around the mean. When this happens the dispersion of the opinions around the mean is considered high and thus expounds a greater amount of variability. It is therefore a crucial tool to further explore the opinions of fuqahā on Bayt al-ṣināḥ, whether or not a nearly unanimous consensus was made.

Table 2 shows the mean scores and standard deviations. The means range from a high of 4.2727 for statement 2 to a low of 3.1818 for statement 8. The standard deviation ranges from a low of 0.6302 to a high of 1.3366. Statement 1 has the highest standard deviation (1.3366), while the lowest is for statement 8 (0.6302).
8.1 THE NIYYAH (INTENTION) FACTOR IN ECONOMIC BEHAVIOR

Statement 1 examines the role of intention (niyyah) in determining the validity of a contract. Statement 1 has the highest standard deviation compared to all other questions in the survey. From Table 3, the respondents seem to hold quite different views regarding this matter. This is not surprising since the traditional jurists themselves had some disagreement on the legal ruling of *bay'a al-c¥nah*.

There is a spectrum of views regarding the role of niyyah in determining the validity of a contract. Although it can be assumed that

TABLE 2
Initial Statistics of Statements

<table>
<thead>
<tr>
<th>Statement</th>
<th>N</th>
<th>Mean</th>
<th>Std. Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>68</td>
<td>3.7206</td>
<td>1.3366</td>
</tr>
<tr>
<td>2</td>
<td>66</td>
<td>4.2727</td>
<td>0.9535</td>
</tr>
<tr>
<td>3</td>
<td>67</td>
<td>4.1940</td>
<td>0.8745</td>
</tr>
<tr>
<td>4</td>
<td>68</td>
<td>4.0441</td>
<td>0.7810</td>
</tr>
<tr>
<td>5</td>
<td>68</td>
<td>3.6029</td>
<td>0.9641</td>
</tr>
<tr>
<td>6</td>
<td>68</td>
<td>3.6912</td>
<td>0.9964</td>
</tr>
<tr>
<td>7</td>
<td>67</td>
<td>3.7612</td>
<td>0.9706</td>
</tr>
<tr>
<td>8</td>
<td>66</td>
<td>3.1818</td>
<td>0.6302</td>
</tr>
</tbody>
</table>

TABLE 3
Statement 1 - Niyyah is of the utmost importance

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid Totally Disagree</td>
<td>5</td>
<td>7.4</td>
<td>7.4</td>
<td>7.4</td>
</tr>
<tr>
<td>Disagree</td>
<td>13</td>
<td>19.1</td>
<td>19.1</td>
<td>26.5</td>
</tr>
<tr>
<td>Not Sure</td>
<td>3</td>
<td>4.4</td>
<td>4.4</td>
<td>30.9</td>
</tr>
<tr>
<td>Agree</td>
<td>22</td>
<td>32.4</td>
<td>32.4</td>
<td>63.2</td>
</tr>
<tr>
<td>Totally Agree</td>
<td>25</td>
<td>36.8</td>
<td>36.8</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Total 68 100.0 100.0

Std. Dev = 1.3366
Mean = 3.7206
the respondents adhere to the شهी school of فقه (ماذحة), the mean for statement 1 is 3.706. It implies that in general, the respondents agreed with the view that نيّة indeed has influence over the validity of a contract. In Table 3, it is shown that the majority of the respondents (69.2 percent) tend to agree with the statement. It appears that there is some inconsistency between the assumptions that these Malaysian Muslims belong to the شهी school of فقه and the فقه opinions they respectively hold. On the issue of نيّة, most respondents took the positions of the عناية, مغلك and عنبال schools of فقه instead of شهية.

Considering the relatively low standard deviation associated with this statement, it is believed that a conclusion based solely on the mean score is adequate to measure the degree of agreement among the respondents. Some respondents did hold tightly to the شهية school of فقه. But the authors feel that the relevant authority cannot overlook the view supporting the importance of نيّة in determining the validity of a contract. The finding has shown that a minority (26 percent) of the respondents was supportive of the opinions forwarded by the scholars at the supervisory councils.

Therefore, we can conclude that a significant amount of disagreement on this matter does exist. Policy-makers should take notice of this finding and should see that the validity of بایع al-عنه has not actually received the general consensus of the فقه in the study. The high mean score apparently suggests that the نيّة factor does matter. To some extent this suggests that a large number of respondents may have subscribed to the مغلك, عنبال and عناية schools of فقه on this matter.

8.2 FIXED RETURN ON LOAN (QARë) IS RIB•

In Statement 2, there is a general consensus that a fixed return on a loan is not permissible in Islam. The mean is 4.2727 with a relatively low standard deviation of 0.9535. Four respondents did not agree with the statement. This might be attributed to a misunderstanding of the statement itself.

For example, the Prophet (pbut) encouraged debtors to pay their debt well. It is a virtuous act to pay more than the principle loan, but Islam only allows this practice on payments made on maturity, i.e., at
the time of repayment with no fixed interest rate. Some respondents may relate this úadʿth to Statement 2. However, the statement is a straightforward one, which Muslim scholars with Shārīyah expertise are expected to respond well to. The fact that the mean score is above 4 proves that the level of understanding of the respondents on the concept of Islamic loan (qarāʿ al-ūāsān) is high. In fact, this statement has the highest degree of agreement compared to the rest of the statements in this survey. With the exception of statements 3 and 4, this is the only statement that gains a mean score of more than 4.

8.3 FIXED RETURN FROM SALE (AL-BAYC) IS NOT RIBañ

Statement 3, that charging a mark-up above the cost or capital in sale is permissible because it constitutes profit, received almost the same responses as Statement 2. The standard deviation is 0.8745 and the mean is 4.1940. The responses to this statement are given in Table 5.

In Malaysia, this issue is considered to be a basic one which should be known to every Muslim. Since the respondents are generally knowledgeable in the Shārīyah, it is assumed that they are fairly familiar with this issue, which the figures do indicate. However, using al-bayc as an alternative to ribā may prove distasteful when úiyal is applied under the label of trade and commerce (al-bayc). Indirectly, it provides a license to use al-bayc to legitimize ribā by way of the Shāhī sale.
Similarly when profits are made from *bayc al-mu'ajjal* or *bayc bithaman* by way of time value rather than risk and effort (*iqwa*), its legitimacy is also suspect.34

### 8.4 *BAYC AL-INO* IS A LEGAL DEVICE TO BYPASS THE QU'RANIC PROHIBITION OF RIBA

Table 6 shows the responses for Statement 4, which states that "*Bayc al-ino* is one type of sale that uses *uqab* to avoid the involvement in *riba* transactions". Controversy regarding the application of *uqab* has existed since the beginning of *fiqh*. In essence, *bayc al-ino* is a *uqab* device whose aim is to facilitate the conduct of business covered by *Sharah* prohibitions but which can be evaded by way of legal tricks.

The implementation of *bayc al-ino* gives the contractual parties some room to obtain cash or capital without involving themselves in explicit *riba* transactions. The respondents tend to agree with the statement’s proposal. In other words, they have unanimously agreed that *bayc al-ino* is a legal device made to bypass *riba*. The high mean score associated with this statement proves this point. Statement 4 has a mean of 4.0441, with a low standard deviation of 0.7810. The level of disagreement is therefore among the lowest in the survey.
About 86.7 percent of the respondents agreed with the statement while only 2.9 percent totally disagreed and 10.5 percent were not sure about the statement.

8.5 FULFILLING PUBLIC INTEREST (MA‘ALAIH) MAKES WAY FOR THE PERMISSIBILITY OF ‘ILAH (LEGAL DEVICE)

Statements 5 and 6 examine the subject of the permissibility of ‘ILAH, which is associated with bay‘ al-‘ILAH. In Statement 5, the respondents were presented with the proposal that mašla‘ah is the basis of the permissibility of ‘ILAH. The standard deviation for this statement is 0.9641 and the mean is 3.6029.

| TABLE 6 |
| Statement 4 - Bay‘ al-‘ILAH is ‘ILAH |

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totally Disagree</td>
<td>2</td>
<td>2.9</td>
<td>2.9</td>
</tr>
<tr>
<td>Not Sure</td>
<td>7</td>
<td>10.3</td>
<td>10.3</td>
</tr>
<tr>
<td>Agree</td>
<td>43</td>
<td>63.2</td>
<td>63.2</td>
</tr>
<tr>
<td>Totally Agree</td>
<td>16</td>
<td>23.5</td>
<td>23.5</td>
</tr>
<tr>
<td>Total</td>
<td>68</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Std. Dev. = 0.7810
Mean = 4.0441

| TABLE 7 |
| Statement 5 - ‘ILAH is Permissible on Mašla‘ah Basis |

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totally Disagree</td>
<td>3</td>
<td>4.4</td>
<td>4.4</td>
</tr>
<tr>
<td>Disagree</td>
<td>6</td>
<td>8.8</td>
<td>8.8</td>
</tr>
<tr>
<td>Not Sure</td>
<td>14</td>
<td>20.6</td>
<td>20.6</td>
</tr>
<tr>
<td>Agree</td>
<td>37</td>
<td>54.4</td>
<td>54.4</td>
</tr>
<tr>
<td>Totally Agree</td>
<td>8</td>
<td>11.8</td>
<td>11.8</td>
</tr>
<tr>
<td>Total</td>
<td>68</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Std. Dev. = 0.9641
Mean = 3.6029
In Table 7, it is shown that more than 50 percent of respondents agreed with the statement. It is interesting to observe that 20.6 percent of respondents were unsure about the validity of the given statement while 13.2 percent disagreed. This may be explained by the grave nature of maṣlaūah. Šaib ibn Shāb defines maṣlaūah as “that which concerns the subsistence of human life, the completion of man’s livelihood, and the acquisition of what his emotional and intellectual qualities require of him, in the absolute sense”.35 He further says that the primary objective of the Lawgiver is the maṣlaūah of the people. The obligation of Sharīah concerns the protection of the maqāid of the Sharīah, which in turn aims to protect the maṣœliū of the people.36 Such a definition of maṣlaūah may not give legitimacy to bayr al-ṣınah when its facilities are not meant to fulfill the subsistence of human life but to meet in some cases the interests of rich corporations and individuals, whose unprecedented appetite for fixed income instruments has been the norm. This is true in the Islamic public debt securities (IPDS) business when companies are compelled to issue fixed rate coupon bonds such as murūbaūah notes issuance facility (MuNif) rather than ones with variable rates of return such as šuk`k al-ijūrah.

8.6 PERMISSIBILITY OF Î ILAH ON THE BASIS OF Ė ARÇ RAH

This is an important component of the survey since arguments made to legitimize bayr al-ṣınah on the basis of Ėar raḥ are common. It is thus critical to examine what Ėar raḥ really means. The Ėar raḥ category consists of five: ḍīn (religion), nafs (self), nasl (family), mal (property) and ‘aql (intellect). Following al-Shāb’s definition, Ėar raḥ (necessity) is a legal objective which is indispensable for sustaining religious and worldly interests, neglect of which may disrupt the worldly interests or may corrupt, impede or destroy life in this world and salvation and rewards in the hereafter.37 It is one component of the maqāid, the other two being úajyx (needed) and tausīnľ (commendable). Without the maṣœliū Ėar riyah, the maṣœliū of the dīn and dunya is disrupted. In other words, inability to sustain the maṣœliū of the dīn means disrupting the maṣœliū of the world. The disruption of the maṣœliū Ėar riyah results in the destruction and termination of life in this world. In the hereafter, it means losing salvation and blessings.
Statement 6 lays down ḍarʾ rāḥ as the reason for the permissibility of ḥalā. The result is almost the same as the previous one. The mean score is 3.6912 for this statement compared to 3.6029 for the former statement and the standard deviation is 0.9964. Our findings indicate that generally, most respondents agreed with the statement, namely 66.1 and 8.8 percent agreed and disagreed, respectively. The problem at hand is to assess whether Islamic banking will cease to operate without ḍayr al-ṣīnah. In the ḍarʾ ṭary argument, without ḍayr al-ṣīnah, it follows that the maṣūlu of the Muslims is set to disappear. However, this has been the case since Islamic finance has not fully exploited all the available classical financial contracts such as salam, ʿistisnaʿ, ʿaqidah and mushārakah to achieve the same business objectives. Resorting to ḍayr al-ṣīnah only reflects the inability to alter financing behavior in line with Qurʾānic norms.

8.7 OVERALL CONSENSUS ON THE PERMISSIBILITY OF ḍAYR AL-ṣĪNAH

Statement 7 says that “Ḥayr al-ṣīnah is permissible since it enables consumers to obtain cash or capital without involving ṭibawḥ contract of loan”. Here the standard deviation is 0.9706, which is nearly 1. It is not surprising to see that there are some respondents who did not agree with the statement. Since the statement itself is one of the main areas of disagreement between Malaysian supervisory jurists and the Middle-Eastern, it is expected to see some of the respondents sharing similar
views with the Middle-Eastern jurists, especially those who studied in the Middle-Eastern universities.

One of the respondents gave his comments in which he stated that: the jumh’r or the majority of Middle-Eastern fuqahá especially those in the International Fiqh Committee in Jeddah do not support this contract. The opinion of the Shafi’is in the permissibility of this contract is based on the fact that the implicit intention or niyyah cannot be used to invalidate the contract. It is therefore permissible to sell grapes to a wine-maker as long as the intention is not known. However some jurists do not permit this kind of sale to a buyer whose work is already known (as a wine-maker). But in the modern-day business transactions, the intention is no longer implicitly hidden. It is very obvious that the intention of the buyer and seller is to obtain cash money at a price.

However, the majority of the respondents agreed to some extent that bay’ al-qahah is permissible based on the stated motive and other reasons as well. The mean score for this statement is 3.7612, i.e., with 73.5 percent supporting the statement. But our finding saw that the agreement is not unanimous since the mean score is less than 4.

The last statement on bay’ al-qahah looks at the authenticity of the úadith, which is used as the main basis for the prohibition of bay’ al-qahah. The úadith is the incident concerning the dispute between Zayd ibn Arqam and ِi’shah.38 In this úadith, the wife of Zayd ibn Arqam

<table>
<thead>
<tr>
<th>Statement 7 - Bay’ al-qahah is permissible</th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid Totally Disagree</td>
<td>2</td>
<td>2.9</td>
<td>3.0</td>
<td>3.0</td>
</tr>
<tr>
<td>Disagree</td>
<td>7</td>
<td>10.3</td>
<td>10.4</td>
<td>13.4</td>
</tr>
<tr>
<td>Not Sure</td>
<td>8</td>
<td>11.8</td>
<td>11.9</td>
<td>25.4</td>
</tr>
<tr>
<td>Agree</td>
<td>38</td>
<td>55.9</td>
<td>56.7</td>
<td>82.1</td>
</tr>
<tr>
<td>Totally Agree</td>
<td>12</td>
<td>17.6</td>
<td>17.9</td>
<td>100.0</td>
</tr>
<tr>
<td>Total responded</td>
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<td></td>
</tr>
<tr>
<td>Total</td>
<td>68</td>
<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Std. Dev. = 0.9706
Mean = 3.7612
said to Có’shāh: “I have sold a slave to Zayd ibn Arqam for eight hundred dirhams to be paid in the future. I then bought him (the slave) back at a price of six hundred dirhams – in cash.” Có’shāh said: “Vile indeed was your selling and vile indeed was your buying. Tell Zayd that he had forfeited God’s blessing of his jihād with the Prophet unless Zayd repented.”

TABLE 10
Statement 8 - îadśth Authenticity is Dubious

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid Disagree</td>
<td>6</td>
<td>8.8</td>
<td>9.1</td>
<td>9.1</td>
</tr>
<tr>
<td>Not Sure</td>
<td>44</td>
<td>64.7</td>
<td>66.7</td>
<td>75.8</td>
</tr>
<tr>
<td>Agree</td>
<td>14</td>
<td>20.6</td>
<td>21.2</td>
<td>97.0</td>
</tr>
<tr>
<td>Totally Agree</td>
<td>2</td>
<td>2.9</td>
<td>3.0</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>66</td>
<td>97.1</td>
<td>100.0</td>
<td>-</td>
</tr>
<tr>
<td>responded</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Missing value</td>
<td>2</td>
<td>2.9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>68</td>
<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Std. Dev. = 0.6302
Mean = 3.1818

Statement 8 has the lowest standard deviation of 0.6302 while its mean is slightly above 3 (which means respondents were not sure), i.e., 3.1818. It is interesting to note that a large number of the respondents (66.7 percent) are not sure about the statement, which is not surprising. The authors do not assume that respondents have detailed evidence (dalāl) on the permissibility or prohibition of bayc al-cinah. It is possible that some of the respondents may not have enough time to study the aûadśth or spend more time reading about the debate concerning it.

9. CONCLUSION

Based on the above findings, there seems to be a general agreement among respondents that bayc al-cinah is not desirable but remains acceptable when it is proven that society is living in a state of èar’ rah. Our findings also show that using bayc al-cinah is permissible when the ma∫la∫ah of the people is under threat. But the general feeling...
among respondents has been non-supportive of bay\textsuperscript{c} al-\textsuperscript{n}ijah when the niyyah factor is invoked. In this way, the majority view is in line with the \textit{M \textshy{ul}k\textit{y}} \textit{\textshy{an}b\textit{y}} and \textit{\textshy{an}af\textit{y}} schools of \textit{fiqh} although they also belong to the \textit{Sh\textshy{ul}k\textit{y}} school of \textit{fiqh}. This study shows that the application of bay\textsuperscript{c} al-\textsuperscript{n}ijah is tolerated only under restrictive conditions such as \textsuperscript{e}ar\textsuperscript{r}ah and protecting public interest (\textit{ma\textshy{j}l\textshy{a}\textshy{u}ah al-\textsuperscript{n}ijmah}). But as Islamic banking and finance in Malaysia is not under these threats, rationalizing bay\textsuperscript{c} al-\textsuperscript{n}ijah has been an inaccurate policy option. There are many more alternatives open to Islamic financial practitioners in promoting genuine and \textit{\textshy{u}iyal\textshy{-}free} products such as \textit{salam}, \textit{isti\textshy{n}ah}, \textit{mu\textshy{a}rabah} and \textit{mush\textshy{a}rah}. Indeed, the survey confirms \textit{\textshy{m}\textshy{\textshy{a}m} Sh\textshy{ul}k\textshy{y}}'s view that bay\textsuperscript{c} al-\textsuperscript{n}ijah can only be practiced on a limited scale. Unfortunately, his view has been reinterpreted by the fuqah\textit{a} at the supervisory level to imply a general theory, which unfortunately leads to its wholesale application in the Malaysian Islamic financial market. There is, therefore, an urgency to look at this issue more seriously at the policy level if one desires to attract more Middle-Eastern funds into the Malaysian shores. Moreover, exploiting \textit{rib\textshy{a}b} under the disguise of \textit{al-bay\textsuperscript{c} al-\textsuperscript{n}ijah} will smear the sense of justice that Islam desires to promote in economic life. Using bay\textsuperscript{c} al-\textsuperscript{n}ijah in Islamic banking and finance will force the system to inherit the diseases of capitalism and the injustices it brought to mankind.

ENDNOTES

3. Ibid., 470.
4. Meaning: But Allah hath permitted trade (\textit{al-Qur\textshy{\textit{\textshy{n}}}, 2: 275}).
5. \textit{al-Mi\textshy{\textshy{s}r}y}, (1991), 174.
6. \textit{Waf\textshy{a}} (1984), 41; \textit{Wiz\textshy{a}h al-Awq\textshy{a} wa al-Shu\textshy{\textshy{r}}\textshy{\textshy{n}} al-Isl\textshy{\textshy{a}}\textshy{niyyah}} (1989). Interestingly, the majority of writers, traditional and contemporary, discuss bay\textsuperscript{c} al-\textsuperscript{n}ijah in the category known as \textit{al-buy\textshy{c} al-fas\textshy{d}ah}, which literally means deficient or irregular sales. This is according to the categorization
made by the ḥanafīs. They classify contracts into ṣa`ūd (valid), fāsid (deficient) and bā’il (null and void). Deficient contract is such a contract which fulfills its pillars but misses one or more of the conditions of validity (shur‘a· al-ṣiḥah) – see al-Zuhayliṣ (1989), 423-5; M’süz (1994), 280; WafŒ (1984).


8. #F 9’DJ (F* #JA9 B’D*—: /D* H#F’ #E HD/ 2J/ (F #1BE H*E1#*G 9DI 9’&4) 16J ‘DDG 9FG’ AB’D* #E HD/ 2J/ (F #1BE—: %FJ (9* :D’E’EF 2J/ (F #1BE (+E’FE’&) /1GE %DI ‘D97’1 +E ‘4*1JG EFG— (3*E’&) /1GE -#J ‘DQ) - AB’D* 9’&4) —: (&3E’ 41J* H(&3E’ ‘4*1J* #(D:J 2J/ #FG B/ #(7D ,G’/G E9 13HD ‘DDG 5DI ‘DDG 9DJG H3DE %F DE J*)—.

   Meaning: The wife of Zayd ibn Arqam said to C• ‘ishah: I have sold a slave to Zayd ibn Arqam by eight hundred dirhams to be paid in the future. I then bought him (the slave) back at a price of six hundred dirhams – in cash. C• ‘ishah said: Vile indeed was your selling and vile indeed was your buying. Tell Zayd that he had forfeited God’s blessing of his jihŒd with the Prophet unless Zayd repented. (al-Zuhayliṣ, vol. 4, 1989, 469).

9. In this case, C• ‘ishah opined that the sale of the slave by the wife of Zayd ibn Arqam to her husband, Zayd by way of bacya· al-ṣiḥah is rībŒ and because of that Zayd shall forfeit God’s blessing of his jihŒd with the Prophet unless Zayd repented. (al-Zuhayliṣ, vol. 4, 1989, 469).

10. Ibid.


12. 9F ‘(F 9E1 B’D—: /3E9* 13HD ‘DDG 5DI ‘DDG 9DJG H3DE JBHD—: %0’ *(‘J9*E (‘D9JF) H#:0.E #0F’ ‘D(B1 H16J*E (‘D219 H*1C*E ‘D,G’/3D7 ‘DDG 9DJCE 0D’QK D’ JF29G -*I *1,9H’ %DI /JFCE—.

   There are other aúŒŒŒh related to the prohibition of bacya· al-ṣiḥah such as,

9F ‘D#H2’9I 9F ‘DF(J 5DI ‘DDG 9DJG H3DE #FG B’D—: DJ#*JF 9DI ‘DF’3 2E’F J3*-DHF ‘D1(‘ (‘D(J9 H(JFGE’ -1J1)—.

   Meaning: There will be a time where the people deem rībŒ as permissible with sale using al-ṣiḥah. (al-ShawkŒnŒ, 1995, 233-4).
Juristic Viewpoints on Bay' al-`inah in Malaysia: A Survey


24. al-Zuhayl, Vol. 4 (1989), 470; There is a legal maxim which says, “The crucial factors (the ones that are considered) in contracts are the intentions and not the terms or names” (ÇáÚÈÑÉ Ýí ÇáÚÞæÏ ááãÞÇÕÏ æÇáãÚÇäì áÇ ááÃáÝÇÙ æÇáãÈÇäì). However this maxim is not adopted by the Shafi`is. See al-Suyuti, (1998), 204-5.


27. î Yah can be defined as presenting an external permissible deed to avoid a legal rule (úukm shar`i) or using a permissible deed to achieve an unpermissible one. It is translated as stratagem. See Ji Qalaj (1986); and î ammad CQgibi (1988), 189.

29. There were many jurists who condemned the use of *ú¥lah in any means. Ibn Taymiyyah regarded the use of *ú¥lah as cheating AllŒh and insulting His verses (Ibn Taymiyyah, 2000).


31. Ibid., 174.


36. Ibid., 151.

37. Ibid., 276.

38. The úadth is given in footnote 8.

REFERENCES


Juristic Viewpoints on Bay'a al-ṣiḥah in Malaysia: A Survey


