Revisiting the Principles of *Gharar (Uncertainty)* in Islamic Banking Financing Instruments with Special Reference to Bay Al-Inah and Bay Al-Dayn Towards a New Modified Model[1]

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Abstract

One of the significant features of Islamic banking is the elimination of *riba* and *gharar*. However many problems arise in some of Islamic banking financing instruments when they are claimed to contain significant elements of *gharar* thus held unacceptable in certain Muslim countries. Among these instruments are *Bay al-Inah* and *Bay al-Dayn*. Currently, *Bay al-Inah* is not accepted in some countries such as the Middle East countries as it is regarded as part of interest-based transaction. However, in Malaysia, *Bay al-Inah* has been formalised as a permissible practice and is has emerged as the most important mode of transactions that stimulates the growth of Islamic transaction in Malaysia, which finally comes across the globe to be among the most successful Muslim state in the development of Islamic Finance. On the other hand, *Bay al-dayn* or the sale of debt is not unanimously accepted or validated by Muslim scholars. Even though some scholars allow it in all forms and aspects, the others either disallow it entirely or allow it under certain circumstances and with certain clauses or conditions.The paper will discuss at length on both contracts and the legal implications of the presence of *gharar* on the validity of these contracts. The views from the jurists will be critically examined to revisit the existence of gharar especially in these two Islamic banking instruments namely bay al-dayn and bay al-inah.

Keywords: Islamic Financial Instruments, Contracts, Gharar (Uncertainty), Bay al-Inah and *Bay al-Dayn*, Islamic Banking Products

1. Introduction

Gharar is an Arabic term which literally means uncertainty, ambiguity, risk, danger or peril[2]. Technically, *Gharar* refers to uncertainty in a contract that may lead to unknown consequences or results, whereby one or both parties to the contract suffer injustice.[3] *Gharar* is synonymous with al khida or fraud.[4] Mohammed Obaidullah states that Islamic scholars have broadly defined *gharar* in two ways: "First, *gharar* implies uncertainty. Second, it implies deceit".[5] Sami Al Suwailem refers to a *gharar* transaction as "equivalent to a zero-sum game with uncertain payoffs".[6]

The founders of the various schools of Islamic thought have defined *gharar* in the following words:[7]

> Hanafi—"that whose consequences are hidden"
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> Shafii—"that whose nature and consequences are hidden" or "that which admits two possibilities, with the less desirable one being more likely"
>
> Hanbali—"that whose consequences are unknown" or "that which is undeliverable, whether it exists or not."

A major factor that contributes to the existence of *gharar* is inadequate information which increases uncertainty. This occurs when elements and sub-elements of the contract are either absent or not well defined. For instance, *gharar* may occur when the subject matter of a contract is non-existent, not in possession of the owner, not deliverable,

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not clearly defined, etc.; if the consideration or price is not clearly stipulated, etc.

Mohammed Obaidullah categorizes the various expositions of *gharar* into the following:[8]

- Settlement Risk—wherein the subject matter of sale is non-existent, i.e. the seller does not have possession of the object of sale and thus delivery of the same to the buyer is uncertain, thus rendering the contract unsettled.
- Inadequacy and Inaccuracy of Information—wherein critical information pertaining to the price, subject matter, date of delivery, etc. is unknown or inadequate; also where such critical information is inaccurate due to deliberate withholding of the same by either party in an attempt to deceive or commit fraud. Ill intentions and evil motives, thus, also constitute *gharar*.
- Complexity in Contracts—wherein a single contract is made up of two or more interdependent contracts leading to conditionality in the contract which renders it uncertain and ambiguous.
- Pure Games of Chance—wherein *gharar* occurs due to the uncertainty in events or consequences of the gamble.

Whilst *riba* is strictly prohibited in the *Quran*, there is no such explicit prohibition of *gharar*. Although the *Quran* does not explicitly mention the prohibition of *gharar* contracts, various hadith of the Prophet (s.a.w.) indicate the need to avoid *gharar* in contracts. Some amount of *gharar* or uncertainty is, however, tolerable. The *gharar* that causes a contract to be invalid is major *gharar* i.e. "an uncertainty which is so great that it becomes unacceptable or it is so vague that there is no means of quantifying it".

In a commercial transaction, *Gharar* may be been divided into three type as follows:[9]

(a) Excessive Gharar (al-Gharar al-kathir) concerning the subject matter of sale i.e., sale in which the price or the subject matter are unknown, sales in which delivery is not attainable will render the transaction invalid. According to Al-Sanhuri, the contract contains excessive Gharar when the subject matter neither exist at the time of contract nor in its essence as well as in the future.

(b) Trifling Gharar (al-Gharar al-yasir) is tolerated and permissible. Al-Sanhuri is of the view that this type of Gharar exists when the subject matter is only available in essence and came into completion thereafter or when the subject matter, although non-existent at the time of contract but was certain to exist in the future are considered negligible. For example, the sale of fish in a small pond or the sale of bird in a confined space.

(c) Average Gharar (al-Gharar al-mutawassit) which falls between the two extremes may be judged differently under different circumstances.

In evaluation of Gharar, whether excessive or trifling, the jurists have been influenced by the prevailing circumstances, popular custom and their own vision and interpretation of public good or maslahah. Depending on its scale and magnitude, Gharar may render a contract totally null and void, or it may constitute the basis of indemnity and compensation.[10]

Malik define *Bay* al-*ghārār*, explicitly as aleatory transaction. Bay al-*ghārār*, according to him can be defined as a sale of an object which is not present so that the quality being good or bad is not known to the buyer. These

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[2]Muhammad Yusuf Saleem, "A Handbook on Fiqh for Economists II", p.8

[3]Muhammad Yusuf Saleem, "A Handbook on Fiqh for Economists II", p.8

[4]Mohammad Hashim Kamali, "Uncertainty And Risk-Taking (Gharar) In Islamic Law", Law Journal, Vol. 7, No. 2, 1998, International Islamic University Malaysia, Kuala Lumpur, Malaysia

[5]Muhammed Obaidullah, "Islamic Financial Services", p. 41, http://islamiccenter.kau.edu.sa/english/publications/Obaidullah/ifs/ifs.html

[6]Sami Al Suwailem, "Towards an Objective Measure of Gharar in Exchange", p. 1, http://www.isu.ac.ir/Farsi/Academics/Economics/edu/dlc/2rd/02/instructor/MeasureofGharar.pdf

[7]"Islamic Laws on Trading", http://ozrisk.net/2006/11/08/islamic-laws-on-trading/

[8]Muhammed Obaidullah, "Islamic Financial Services", p. 42-47, http://islamiccenter.kau.edu.sa/english/publications/Obaidullah/ifs/ifs.html

[9]Uncertainty and Risk Taking in Islamic law, International Conference on Takaful, July 1999, Mohammad Hashim Kamali

[10]Contracts in Islamic commercial and their application in modern Islamic financial system, http://www.islamic-world.net

are sales where there is an element of chance. Aleatory sales are common in pre-Islamic times. Eventually, the transaction of al-*ghārār* is reported to have been banned by the Prophet.

Whereas according to Ibn Manzur, *ghārār* literally means danger whereby according to al-Qurafi in his book *ghārār* also means *khadi'ah* that is cheating.[11]

The implication of the prohibition of *gharar* is that it ensures justice and fairness to all contracting parties, thus avoiding disputes and disagreements between them. The *Quran* states in Surah al Nisa,

"O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent…"

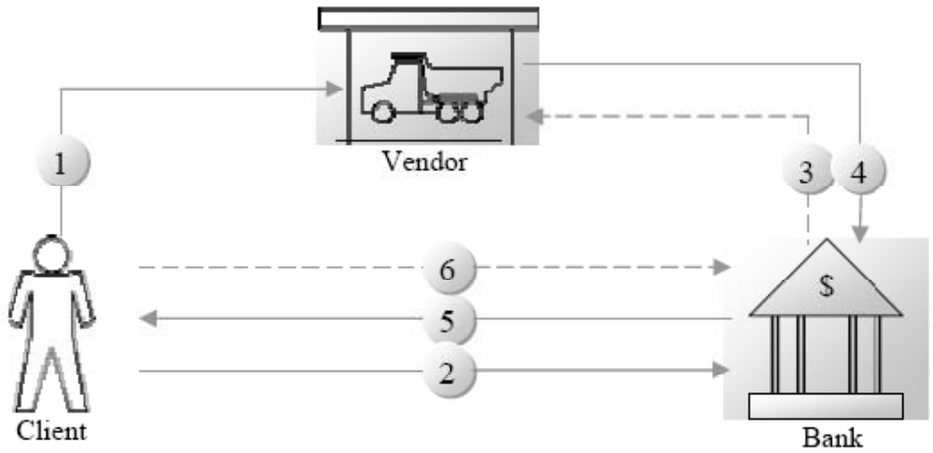
[Surah al Nisa, verse 29]

2. Bay Al Inah

In layman's terms, it refers to a contract that involves a simultaneous sale and buyback or repurchase. In a more technical definition, Bay al Inah "refers to a sale of an asset, which is later repurchased at a different price, whereby the deferred price is higher than the cash price".[12]

Imam Shafii defines it as "a credit purchase of an asset which is later sold to the original owner or a third party, whether at a deferred or spot, higher or lower price than the first contract or for an exchange of goods".[13] Al Haskafi defines it as "a deferred sale of an asset with a motive to generate profit. The debtor, then, resells the asset to the original seller at a lower price in order to settle his debt".[14]

Exhibit 2.1 **BBA-Murabaha Financing Structure II**



Dotted line indicates flow of funds.

Activity1. Client identifies and approaches Vendor or supplier of the commodity that he/ she needs, collects all relevant information;
2. Client approaches Bank for *BBA-murabaha* finance and promises to buy the commodity from the Bank upon resale at the marked-up price;
3. Bank makes payment of base price to Vendor;
4. Vendor transfers ownership of commodity to Bank;
5. Bank sells the commodity, transfers ownership to Client at marked-up price;
6. Client pays marked-up price in full or in parts over future (known) time period(s).

[11]Some jurists like Qadi Ayad said originally gharar is something that superficially shows what you like but actually you hate it. That is why it is said that al dunya mata' al ghurur (the worldly life is mere illusion. manipulated without actual awareness of the property being implicated. Taken from the book Al-Qurafi, al-Furuq, 3 Beirut, Dar al fikr(1973) p266

[12]"Shariah Resolutions in Islamic Finance", p. 64, http://www/mifc.com/0909_shariahres.htm

[13]Imam Shafi, "Al Um", v.3, Dar al Fikr, Beirut, p. 79

[14]Al Haskafi, "Al Durr al Mukhtar fi Sharh Tanwir al Absar", v.5, Dar al Fikr, Beirut, p.325

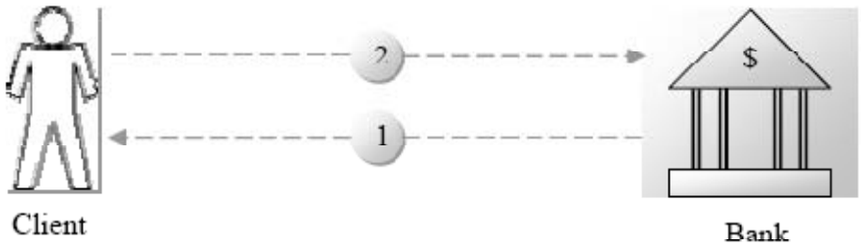
For instance, if Abdullah wishes to buy a house worth $150,000, ordinarily under a Murabaha scheme he would approach the Bank who in turn would approach the Vendor of the house. The Bank would purchase the house from the Vendor for $150,000 cash and sell it to Abdullah on a deferred basis for a cost-plus-markup amount, say $200,000. The difference between the two prices is the profit amount realized by the Bank, i.e. $50,000.

The following is an illustration of the Murabaha or BBA contract[15]:

In a Bay al Inah contract, however, the Vendor is eliminated and both contracts take place between Abdullah and the Bank resulting merely in debt creation with no real exchange or transfer of assets—Abdullah sells an asset to the Bank for $150,000 on cash basis and the Bank sells the same asset back to him for $200,000 on deferred basis. This asset may be anything whose real value may or may not be the same as the sale or purchase price. Abdullah may then use the cash proceeds of $150,000 to buy the house he wanted. The structure of the contract, thus, renders it akin to a conventional loan facility where the profit earned from the spread between the cash and deferred prices is indistinguishable from interest or *riba*.

The following is an illustration of a Bay al Inah contract and how it resembles a conventional loan contract:[16]

Exhibit 2.2 Structure of Repurchase

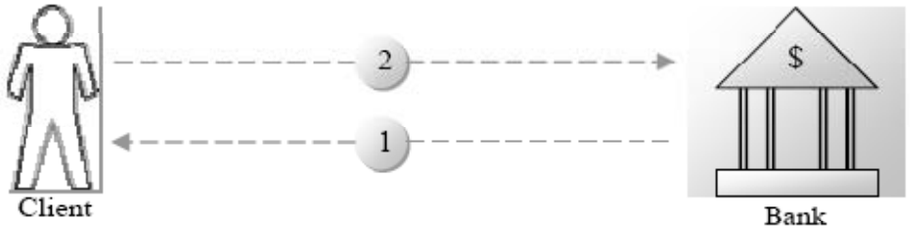


Dotted line indicates flow of funds.

Activity: 1. Client in need of an amount C sells commodity X to Bank for a price of C on a cash basis. Client buys commodity X back at an inflated price C+I on a deferred payment basis.

2. Client pays C+I on maturity to Bank.

Exhibit 2.3 Structure of Interest-Based Loan



Dotted line indicates flow of funds.

Activity 1: Client borrows an amount C now from Bank

2. Client pays C+I on maturity to bank.

[15]Muhammed Obaidullah, "Islamic Financial Services", p. 70, http://islamiccenter.kau.edu.sa/english/publications/Obaidullah/ifs/ifs.html

[16]Muhammed Obaidullah, "Islamic Financial Services", p. 104, http://islamiccenter.kau.edu.sa/english/publications/Obaidullah/ifs/ifs.html

The earlier section established that deceit also constitutes *gharar*. Thus, the element of uncertainty or *gharar* in Bay al Inah contracts is the ambiguity relating to the motives of the contracting parties which are deemed fraudulent. Generally speaking, if the parties have the intention to enter into a contract and all the conditions regarding offer and acceptance, competence of the parties, subject matter, and mutual consent are met, the contract is deemed to be valid. But the cause for concern arises when all the apparent conditions are met, but the motive behind contracting is unlawful i.e. there is a conflict between the objective of contract or muqtada al aqd and the actual motive. Thus, in the contract of Bay al Inah we find that there is uncertainty with respect to the true nature or objective of the contract entered into. Bay al Inah undermines the intention and the objective to contract.

Ibn Umar said that he heard the Prophet (s.a.w.) say "when you enter into the inah transaction, hold the tails of oxen, are pleased with agriculture, and give up conducting jihad, Allah will make disgrace prevail over you, and will not withdraw it until you return to your original religion".[17]

The scholars' viewpoints on the permissibility and validity of Bay al Inah contracts are divergent. According to the Shafii school of thought, intentions and motives don't determine the validity or otherwise of a contract. If the elements of the contract such as offer and acceptance, subject matter, capacity, consideration, etc. are met then all else is insignificant. Intention or motive would only matter if it is explicitly stated in the contract.

The Maliki, Hanafi and Hanbali jursists, on the other hand, are of the view that Bay al Inah is inherently an invalid contract. They are of the opinion that one of the crucial determinants of legality is the motive or intention of the contracting parties, as to why they are entering into a particular contract. Any contract which employs a legal device, i.e. hilah, is deemed invalid and nullified.

Thus, Ijma or consensus holds that Bay al Inah is an invalid contract.

Of concern are some qawaid fiqhiyyah, i.e. legal maxims or rules which address various issues and questions of jurisprudence, such as "Matters are determined according to intention" and "In contracts effect is given to intention and meaning and not words and forms".[18] These maxims obviously rule out the validity of Bay al Inah contracts which, on paper, have all the elements of a valid contract but in essence are devoid of sincerity and veracity.

Currently, *Bay al-Inah* is not accepted in some countries such as the Middle East countries as it is regarded as part of interest-based transaction.[19] Some of the scholars questioned the validity of Inah as it contained the element of *riba* which deviates from the true objective of Shari'ah.

Another issue arises is to prevent the combining of two sales of the same object between the same counterparties. The issue here is that the time and price differential is a mean of synthesizing a loan at interest. This is the concept of *bay al-inah* and it is forbidden by the majority of Islamic scholars who believe that the profit differential constitutes the forbidden *riba*. A large number of scholars have gone on to ban the combining of two contracts in a single contract. In fact, this is less clearly an issue if the joining of the two contracts does not result in observable or disguised *riba*.[20]

However, in Malaysia, *Bay al-Inah* has been formalized as a permissible practice. The Malaysian has experienced in adopting the concept of *bay al-Inah* in Malaysian Islamic Banking and *Bay al-Inah* is perhaps among the most important mode of transactions that stimulates the growth of Islamic transaction in Malaysia, which finally comes across the globe to be the most successful Muslim country in Islamic Finance.

On 29 January 1997, the *Shari'ah* Advisory Council of Securities Commission of Malaysia passed a resolution that allows the usage of *Inah* in the Malaysian capital market since the Shafii and Zahiri mashed viewed *Inah* as permissible. A contract valued by what is disclosed and one's intention was up to Allah to judge. They criticized the *hadith* used by the majority of the Islamic jurists as the basis for their argument, saying that the *hadith* was weak and therefore could not be used as the basis for the judgments.

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[17]Sunan Abu Dawud, Hadith # 3455

[18]"The 99 Sharia Maxims", http://islamic-world.net/economics/99_sharia_maxims.html

[19]BNM Islamic Products Information Kit, pg 3.

[20]Abdulkader S. Thomas, Stella Cox, Bryan Kraty, Structuring Islamic Finance Transactions

The requirements for *Bay al-Inah* objects and all forms of installment credit sales, *murabaha*, and *bay bithaman ajil* as well such as they must exist in corporeal forms, must be owned by the sellers, must be permissible and used in a permissible manner, they must be lien free, they must be specific and they must not be one of the specific *ribawi* items (currencies, gold, solver, wheat, barley, dates and salt).

3. Bay Al Dayn

In *Fiqh*, *dayn* refers to "a debt which comes into existence as a result of commitment to pay later. It is incurred by way of rent, sale, purchase, marriage, etc., which leaves an obligation on an individual or an organization".[21] The debt may be a sum of money or even a commodity.

Bay al Dayn, as the term reads refers literally to the 'sale of debt', with Bay meaning sale and *Dayn* meaning debt. Saiful Azhar Rosly and Mahmood M. Sanusi state that "the trading i.e. sale and purchase of debt certificates is called *bay' al-dayn*".[22]

An illustration of the creation of debt would facilitate comprehension—for instance, Abdullah sells goods worth $100,000 to Ibrahim via a deferred sale contract where Ibrahim would have to pay Abdullah the $100,000 in 3 months' time. The $100,000 is thus a debt on the debtor Ibrahim owed to the creditor Abdullah. Abdullah ordinarily would have to wait till the date of maturity, i.e. 3 months, to have access to the $100,000 in cash. During these 3 months, however, either party may want to trade the debt.

The following are some of the possible reasons that may compel the debtor to engage in the trading of debt:

1. Someone may owe him a debt and he would like to use that to settle the debt he owes to the principal creditor
2. He may have sold something on deferred basis to someone and would like to settle the debt owed to him with the debt owed by him to the principal creditor

The debtor may be in a position where he would need to trade his debt with another party. For instance, Ibrahim may purchase goods worth $100,000 from Luqman who is then indebted to the former for that amount. Ibrahim may choose to trade the debt owed to him by Luqman with the debt that he owes Abdullah.

The appropriate contract here would be *Hawalah al Dayn* i.e. the transfer of debt by the principal debtor, with express permission from the principal creditor, to another party who then becomes responsible for repaying the principal creditor.[23]

Similarly, the following are some of the possible reasons that may compel the creditor to engage in the trading of debt:

1. He may owe someone a debt and would like to use the debt owed to him to settle the former
2. He may need to purchase something and would like to use the debt due to him as price for that thing

For any of the above mentioned reasons, Abdullah may engage in debt trading with the debtor Ibrahim himself. He may also choose instead to contract with a third party, say, Sulaiman.

Again the appropriate contract would be *Hawalah*. If he sells the debt to a third party, it would amount to *Hawalah al Haqq* i.e. transfer of right whereby the creditor transfers his right to the debt from the principal debtor to the new creditor/seller.

Issue of *Gharar* in Bay' Al-Dayn (Sale of Debt)

One of the popular types of sale in which the element of *gharar* involved is the sale of debt. Many forms of sale of debt have been envisaged by the jurists. Some instances of this transaction are as follows:

1. A borrows two tons of wheat for his personal needs from B. This amount is returnable in six months. Prior to the expiration date, B sells the wheat, which is a debt on A, to C in exchange for a plugging machine to be delivered in one month. This transaction

[21] http://www.badralislamie.com.glossary/a-h.asp

[22] Saiful Azhar Rosly & Mahmood M. Sanusi, "The Application of Bay al Inah and Bay al Dayn in Malaysian Islamic Bonds: An Islamic Analysis", International Journal of Islamic Financial Services, Vol. 1, No. 2, p. 10

[23] Muhammad Yusuf Saleem, "A Handbook on Fiqh for Economists II", p.55

proceeds over an exchange of debts and is considered unlawful due to uncertainty over delivery and the resulting likelihood of gharar[24].

2. A borrows $2,000 from B for a period of one year, but before repayment is made, B suggests to A that he will rent A's house in exchange for the sum owed to B. This too involves selling one debt for another without delivery on either side. If the proposed exchange is advantageous to one party, it will also involve unlawful gain amounting to riba[25].

Bay al-dayn basically envisaged sale over an unpaid debt involving either two, or in some cases, three parties. The basic rationale of the prohibition of *bay al-dayn* was over uncertainty in its repayment. *Bay al-dayn* could proceed over a bad debt or one in which the debtor simply wanted a further delay due to his inability to pay on time. Subsequent unfavorable price changes also added to that uncertainty.

1. Bay' Al-Dayn for deferred payment

The *Shari'ah* permits the selling of the debt by its equivalent in quantity and time of maturity by way of Hawalah. This form of debt trading is accepted by all Schools of Islamic law provided it is paid in full and thus gives no benefit to the purchaser. The rationale for this ruling is that financial transactions involving debt should never allow for a payment against the length of the period of the loan, as this would be regarded as *riba* or *Bay' al-Kali bil Kali*[26], which is prohibited by the Prophet (S.A.W). There is a *Hadith* which says "Do not sell a debt for a debt", thus *Bay' al-dayn* for deferred payment is not allowed.

This is supported by Ibn Qayyim which has explained that not all varieties of bay' al-dayn are prohibited. The prohibited variety is one which involves the sale or exchange of one deferred debt for another. The reason given is that *bay' al-dayn* of this kind prolongs the liabilities of the parties for no useful purpose. However, his examination of the source evidence on *bay' al-dayn* also led him to the conclusion that "there is neither explicit nor implicit text in the *Shar'iah* on its prohibition. On the contrary, the principles of *Shari'ah* indicate its permissibility. The Prophet did not prohibit payment of one debt in exchange for other both of which are established and proven, especially if it involves only the debtor and not a third party. For this manner of clearance absolves both sides of their debts, and this is clearly permissible.

The Maliki School has also upheld the permissibility of certain types of *bay' al-dayn* prior to delivery and *qabad* when the debts involved therein do not arise from the exchange of foodstuffs and useable goods, and the transaction is also free of *gharar.*

Siddiq al Darir stated in categorical terms that "in my opinion, *bay' al-dayn* is absolutely lawful, whether the sale is to the debtor or to a third party, for cash or for credit, provided that the sale is clear of *riba* and no textual injunction has declared it forbidden[27]". He stated further that the claim of uncertainty in delivery is unwarranted if the debt is not disputed by the debtor, who admits his/her obligation and shows readiness to discharge it. This opinion seems to be in line with the recommendation made by the Malaysian Islamic Instrument Study Group, a board which was formed to advise the Malaysian Security Commissioner in matters relating to the security and share market in order to ensure its compatibility with Islamic principles. In one of its recommendations, the group reports that they have came across no consensus among jurists which forbids the practice of the sale of debt, as well as the sale of debts with debts. In fact, they found various forms of the sale of debts which are allowed by Maliki school of law. They indicates that there are differences between bay' a-kali bil al-kali which is categorically prohibited in the prophetic Hadith and *bay' al-Dayn*, sale of debts with debts. With this view, the group concluded that the sale of debt, even to a third party is permissible on the following conditions[28]:

1. The debt can be delivered.
2. No element of interest is involved.
3. The debt really exists and is in the possession of the

[24]Shaykh Siddiq Darir, *al Gharar wa Atharuh fi al (*1407/1986), 293.
[25]Cf. Hasan, *amal*, note 67, p. 290.
[26]Al-Shukani, Nayl al-Awttar, vol. 5, p. 157
[27]Atikullah bin Hj Abdullah, a critical study of concept of gharar and its elements in Islamic of business contract, p.187
[28]Atikullah bin Hj Abdullah, a critical study of concept of gharar and its elements in Islamic of business contract, p.189

seller and the purchaser is assured of a full settlement from the original debtor.

2. Bay' Al-Dayn to a third party

The sale of debt to a third party (*Bay al-Dayn li ghayr al Madi*n) would normally take place when a creditor would like to have instant cash instead of waiting for it to be fully paid up through the passage of time. Here, the creditor would sell it to any third party at a discount price on a cash payment basis. The jurists differ on the legitimacy of this practice.

According to most of Hanafi's, Hanbali's and Shafi's jurists[29], it is not allowed to sell al Dayn to non-debtor or a third party at all. Such opinions are based on the forbidden sale of al Kali Bil al Kali, sale of a *Gharar,* sale which the seller does not possess. These rules are attributed to the Prophet's (SAW) prohibition for a type of sale "Do not sell what you do not possess".

2.1 Selling Al-Dayn to a third party is allowed with conditions

As an exception Malikis, Hanafis and some Shafi's jurists[30] allowed selling *al-dayn* to a third party. They said that there is no authentic source which prohibits such kind of selling. Therefore, it should be allowed and permitted since the *Dayn* is Mustaqir (confirmed debt). Since the creditor has the right to sell it to the debtor, as well as he has the right to sell it to a third party provided the following rules must be observed:

(a) The *Dayn* must be Mustaqir (confirmed debt) and the contract must be performed on the spot, not deferred in order to avoid any relationship with the sale of a debt for a debt which is prohibited by Islamic law.

(b) The debtor must be a financially capable, must accept and recognize the sale, in order that he will not deny the sale. This condition aims to avoid any dispute between the parties, and the debtor must be easily accessible so that the creditor knows whether he has the capacity to pay his debt or not.

(c) The sale should not be based on selling gold with silver or opposite, because, any exchanges between these items necessitates the immediate possession, and if the debt is money, its price in another debt should be equal in terms of amount of quantity.

Furthermore, the selling of *al-dayn* must avoid the occurrence of *Riba* between the two debts, and must also avoid any kinds of *Gharar* which may be raised at the level of inability of the buyer from possessing what he bought, as it is not permitted that the buyer sells before actual receipt of the purchased item[31].

It is important to note that Muslim scholars have unanimously prohibited the trading of debt (bay' al-dayn) at anything other than face value. Where the price paid for a debt is not the same as the face value of that debt, the transaction would be tantamount to *riba al-Nasi'ah* and is therefore prohibited. Any profit created from the sale and purchase of a debt is *riba.*

"And whatever *riba* you give so that it may increase in the wealth of the people, it does not increase with Allah." (Ar-Rum 30:39)

Prophet Muhammad (S.A.W) said: "*That every loan entailing benefit is usury*"

Furthermore, the sale of debt to the third party is allowed based on the grounds that it is allowed to give it to the debtor and to a third party too. This opinion is based on the following arguments:

1. There is no authentic source that prohibits such kinds of selling or giving. Thus, it should be allowed and permitted.
2. Creditor has full right on possession and full right to sell it to third party.
3. Based on a legal maxim, it is allowed, which states that all transactions are permissible until they are proven non-permissible by an authentic source. So, since there is no authentic source prohibiting this transaction, then, it should be allowed.

However, Hanbali's, zahiri's and some hanafi's and shafi'i's are on the opposite side, according them, the debt whether confirmed or non-confirmed, is not allowed to be sold to a third party at all. Moreover, it is forbidden to give it to a non-debtor. This opinion is basically derived from:

[29]Al-Zuhili, Bay al Dayn in the Shari'ah, pp. 35/6
[30]Ibid, pp 36-45
[31]Such rules are based on authentic narrations of the Prophet (saw), and thus are not subjects for reinterpretations.

1. There is a hadith of prophet (phub) which clearly states, " Don't sell what you don't possess".
2. It also based on another hadith of prophet (phub) which prohibits selling or giving an item that the seller or giver is unable to deliver to the buyer or given: Don't sell the fish while they are in the water.

On the same ground, there is a hadith, which states: "The prophet prohibited the sale of a missing slave or the offspring of the offspring"

On logical grounds, this sale should not take place, since it may create a conflict between the debtor and buyer of the debt. The debtor may refuse to pay the debt. Therefore, this type of sale should not be allowed as for the benefit of both contractual parties. In fact, sale based on sale of undeliverable item as well as a sale of not possess item is actually not allowed. The sale of debt is not unanimously accepted or validated by Muslim scholars, while some allow it in all forms and aspects, the others either disallow it entirely or allow it under certain circumstances and with certain clauses or conditions.

With respect to the sale of debt to the debtor, all schools are of the opinion that such a contract is legal and acceptable. Bay al Dayn between the creditor and a third party, though, is still contentious.

Most Hanafi, Hanbali and Shafi jurists disallow sale of debt to a third party.[32] The fundamental reason for objection of such a sale lies in the fact that sale to a third party would involve elements of *gharar*. More specifically, the debt, which represents a sum of money due to the creditor by the debtor, is an unfulfilled obligation where there is no guarantee that the debtor will not default on payment, thus creating a bad debt. This uncertainty has implications for the contract between the creditor and the third party.

Some of the primary conditions for the validity of a sale contract are that the object of sale or subject matter must be in the possession of the seller and must be deliverable to the buyer. In this case, however, the uncertainty relating to the payment of the debt by the debtor means that both possession and deliverability on the part of the creditor are uncertain. Hence, if the sale of debt proceeds and the debtor defaults, the third party suffers the loss.

For instance, if Abdullah transfers the debt due to him from Ibrahim to Sulaiman, and subsequently Ibrahim defaults of the debt, Sulaiman would suffer loss and Abdullah would escape unscathed when in fact he is the principal creditor who should have borne the risk of default, and furthermore as a seller he must have had possession of the object of sale and must ensure that the object would be deliverable.

On the other hand, Malikis, Hanafis and some Shafi jurists all the sale of debt to a third party provided the debt is Mustaqir or confirmed, the contract is conducted on the spot, the debtor has financial capability to repay, and if the debt is money then its price in the other debt should be of an identical quantity.[33]

It may be concluded then that the majority opinion validates sale of the debt to the debtor himself or to a third party provided that such a trade or sale of debt occurs at the par value and not at an amount above or below that. What is still highly controversial and debatable is the sale of debt to a third party at a value other than the face value of the debt, generally at a discount.

The supporters of Bay al Dayn at premium or discount advocate that the debt is a commodity in itself and as such it can be traded like any other commodity, at a profit or a loss. Islamic law of contract requires that for anything to constitute a valid object of sale it must be deemed 'al mal' i.e. property. Furthermore, it must be deemed 'mal mutaqawwim' i.e. valuable property. Thus for debt to be considered a valid object of sale it must be backed by an asset, the process of doing so is called securitization. Securitization creates haqq mali i.e. the right to buy or sell the commodity.[34]

Those scholars who oppose selling debt at a discount to a third party claim that the debt doesn't meet the necessary requirements of subject matter; furthermore,

[32]Saiful Azhar Rosly & Mahmood M. Sanusi, "The Application of Bay al Inah and Bay al Dayn in Malaysian Islamic Bonds: An Islamic Analysis", International Journal of Islamic Financial Services, Vol. 1, No. 2, p. 10

[33]Saiful Azhar Rosly & Mahmood M. Sanusi, "The Application of Bay al Inah and Bay al Dayn in Malaysian Islamic Bonds: An Islamic Analysis", International Journal of Islamic Financial Services, Vol. 1, No. 2, p. 10

[34]Saiful Azhar Rosly & Mahmood M. Sanusi, "The Application of Bay al Inah and Bay al Dayn in Malaysian Islamic Bonds: An Islamic Analysis", International Journal of Islamic Financial Services, Vol. 1, No. 2, p. 3

the securitization process employs the contract of Bay al Inah which is inherently invalid in itself. Thus, sale of debt at an amount not equal to the face value of the debt amounts to *Riba* al Nasiah since the exchange of like items for each other necessitates the exchange of equal quantities of the two.

4. Conclusion

All in all, the concept of gharar has been proved to exist in Bay al Inah and Bay al Dayn contracts. The issue arises as to whether its existence is significant enough to render them invalid for all times to come.

There are those who argue that albeit *gharar* is a detrimental factor, there are bigger concerns that must be considered before imposing a blanket rule. They are of the opinion that in the name of the maslaha or public interest, in keeping with the objectives of the *Shari'ah*, *gharar*-laden contracts such as Bay al Inah and Bay al Dayn be allowed to exist. To back this claim they give examples of how exceptions to the law of no-*gharar* for the sake of public interest were created in the time of the Prophet (s.a.w.), such as Bay al Salam, Istisna, etc. They insist that the contracts under concern will facilitate the growth and development of Islamic economics and finance by ensuring efficiency.

The author is of the opinion that *gharar* is undoubtedly a virus that corrupts not only a contract but also the fabric of society. While there does exist a case for allowing under exceptional circumstances what is otherwise prohibited or shunned, doing so would lead to a slippery slope scenario where no definite limit is set, hence triggering an avalanche.

Finally, it is the duty of all the relevant parties involved in the Islamic banking industry to come out with any alternatives which is free from these elements or incorporate any other elements which may reduce the degree of gharar in any Islamic banking products.

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