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'ĪNAH AS A MODE OF FINANCING: AN ANALYSIS OF ITS VALIDITY AND VIABILITY FROM AN ISLAMIC LEGAL PERSPECTIVE

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The validity of banking transactions based on īnah remains a hotly contested issue by Islamic scholars the world over. While many of them consider such financing essentially similar to that of conventional banks, those involved in the practice produce in their defence the recognition of the legal validity of īnah by jurists of the Shāfi i school. Imām al-Shāfi i has generally upheld the validity of sales inclusive of a similar transaction in his famous *al-Umm* without referring to the term īnah. Other jurists of his school have referred to it by using this term and have upheld its validity in some of its forms, frequently categorising it under offensive types of sale. Critics contest the appropriateness of adhering to the position upheld by Shāfi i jurists in the context of today's bank financing where this could be an easy means of dealing in interest, and refute the possibility of the conditions necessitated for the permissibility of īnah even under that school being realisable in a banking facility. The discussion of īnah in this paper attempts to analyse the nature of the transaction referred to as īnah according to different schools of Islamic law and their ruling on īnah and related transactions, scrutinising the arguments for and against the validity of īnah. It examines the nature of recognition awarded to īnah by the Shāfi i jurists, and explores whether īnah as conceived by Shāfi i jurists is suitable for adoption as a mode of financing by Islamic banks.

Background

Islamic financial institutions have widely adopted transactions that are purportedly īnah based as a means of financing, owing to the

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ease and convenience provided by this mechanism that does not demand any significant departure from the financing process practised by conventional banks. Through this and other means that are similar, the Islamic banking sector has been able to emulate the established conventional banking system in almost all major fields of financing and attain considerable growth and expansion, without facing many of the problems pertaining to developing acceptable financing products. In order to understand the reason for the controversy surrounding ʻīnah and objections to its application in banking and financing, it is necessary to consider its relevance in the context of the prohibition of ribā (interest) in Islam. It could be said that the criticism of ʻīnah is directly related to the express prohibition of ribā in all its forms in Shariʻah. The Islamic economic theory regards lending and borrowing on interest to be highly detrimental to the social, economic and ethical wellbeing of the human society. Dealing in interest is severely condemned in the Qur'an and Hadith, to the extent that those who refuse to desist from claiming interest dues have been issued a proclamation of war by Allah SWT and his messenger (Sal.). Instead, it encourages goodly loans or loans without interest, where funds are advanced to those in need, with the intent of earning the pleasure and reward of Allah SWT. Adopting lending as a mode of earning has been categorically prohibited, which should take place solely on a non-profit basis. For the purpose of earning and multiplying wealth, it has upheld trade and commerce as the ideal means. Rules of commercial transactions and the nature of disapproved modes of trade and exchanges where ribā could be involved are explained in prophetic traditions and extensively elaborated by Muslim jurists, so as to facilitate avoidance of ribā. For financing, Islam encourages equity based modes of shirkah and mudārabah where the fruits of the venture, where there are any, are equitably distributed. The financiers may not reserve a predetermined amount of profit beforehand, who necessarily have to accept liability proportionate to the loss. Thus, in an Islamic setup, lending on interest may not by resorted to for the purpose of financing or as a means of earning a return in any situation.

However, lending on interest forms the primary mode of financing for the modern banking industry. In almost all varieties of financing done for different periods and to fulfil diverse financing needs, the mode employed would involve the advancement of funds, to be repaid by the borrower with an interest premium, as agreed between them or imposed by the bank. In the current scenario of banking and commerce dominated by the prevalent monetary theory stressing the time value of money and the resultant modes of financing based on lending solely on interest, lending without entitlement to a return sounds futile, and even detrimental. In the case of Islamic banks, financing through Islamically recommended modes, by and large, has still not gone beyond the theoretical stage. This is partially due to the unwelcome prospect of sharing loss necessarily where the venture results in loss, which is taboo in banking terms, and other operational constraints. Banks' involvement in trading in assets and commodities directly for earning profit too is considered next to inconceivable in the current banking environment. This is because the banking institution is primarily identified in the conventional banking industry as a lending concern and a financial mediator, whose role is strictly confined to dealing in money and money related services. Islamic banks, which operate under the near total sway of the conventional banking industry, are yet to gain sufficient individuality to break away from established norms regarding what is banking and what is not. Thus, a main avenue left for Islamic banks for earning revenue is to attempt to get involved in the trading process within the limitations imposed by the prevalent banking establishment. This entails a distant relationship with commodities and assets where some documentary and financial aspects alone are handled by the bank, avoiding too close a contact with them by way of their procurement, storing etc., as is usual in full-fledged trading activities.

Islamic banks have adapted the cost-plus method of sale, termed murābahah in Islamic legal literature, as the primary mode of such limited involvement in trade. Murābahah is a mode where the purchase of assets is financed. The bank, by becoming a trader selling commodities on deferred payment basis, facilitates the procurement

of assets to those unwilling to make a cash investment for doing so, earning a profit in the process. The bank limits its involvement in the transaction to gaining ownership of the asset from an external source through purchase, bearing its liability and risk for some time, and its sale on deferred payment to the client, leaving all material aspects such as negotiation, taking delivery, storing etc. to another party, usually the client himself, under an agency from the bank.

Despite of the fact that many of the schools of Islamic law as well as numerous contemporary scholars have upheld the validity of the murābahah contract, it is still a subject of debate among many as far as its implementation by different banks is concerned. The objections mainly centre on the level of the bank's involvement in the transaction. Critics consider the bank's ownership and possession of the asset, mostly carried out through an agency awarded to the client, not accentuated enough to warrant the earning of a trading profit through the transaction. Due to the remote nature of the bank's involvement, the manoeuvre is criticised as a process that is tantamount to lending and earning interest, which is further fuelled due to the return earned by the bank always being calculated based on the period taken for repayment, at a rate similar to current interest rates for similar facilities. Added to these, it is well known to those practically involved that instances of misuse are fairly high, where the procedure often involves fictitious transactions, sometimes with the connivance of a supplier or on the basis of false invoices, simply for the purpose of gaining cash. Thus, proper implementation of murābahah would be only possible with a higher level of involvement by the bank in the material aspects of the transaction, which banks, by nature, seem reluctant to do.

Hence murābahah, when properly applied, will not provide the client with immediate cash. It could only be utilised where purchase of assets is involved, and cannot be used as a financing tool directly. However, for obtaining liquidity, murābahah could be extended to involve a further sale, where the client himself sells the commodity procured on murābahah to another willing buyer on cash, thus fulfilling his need for liquidity. This is known as tawarruq, and is generally accepted by jurists, as long as the bank is not involved in

facilitating the subsequent sale of the asset by the client in any way, and has not entered into any agreement or understanding with the client for the purpose. If the subsequent sale by the client to a third party for gaining cash is prearranged where the bank too plays a role in facilitating it, it is known as *tawarruq munazzam* or coordinated tawarruq, censured by many contemporary experts and scholarly bodies as a transaction that could entail ribā.

For the purpose of facilitating liquidity in a less indirect manner at a profit to the bank, nevertheless, without resorting to direct lending, some banks have adopted another method that is even more disputed than the above two modes. This method is claimed to be structured on the basis of a twin-transaction process referred to as *bay al- īnah* or the īnah sale by Muslim jurists. The īnah sale primarily comprises two sale transactions with the involvement of an asset, facilitating the procurement of immediate cash by the seeker of liquidity. Unlike tawarruq where three parties are involved, here the two contracts take place between two parties only. An asset is sold on deferred payment, delivered to the buyer, and then repurchased by the seller himself at a lower cash price, thus resulting in the other obtaining the necessary cash. The legitimacy of the theoretical procedure of īnah itself is a subject of difference among jurists. While some have justified it on the basis of the validity of the sale transactions that are apparently unrelated to each other, solely taking the text of the contracts into consideration leaving the context, a majority have gone to the extent of ruling the process totally invalid even when each transaction takes place spontaneously without there being any intention other than the sale contracts, based on the principle of closing of avenues that could lead to ribā.

Jurists of different schools of Islamic law have discussed the validity of īnah from diverse perspectives. Although not all have used the term īnah, the central transaction dealt with is a credit sale, followed by a cash purchase at a lower price, taking place between two parties. A number of variations of this transaction have been considered by jurists, with different combinations of credit and cash sales, money and commodities, lower and higher prices etc. A detailed discussion of these could unnecessarily lengthen our analysis, as they

pertain to topics such as ribā in credit (*ribā al-nasī'ah*) and ribā in exchanges and trade(*ribā al-bay*), required nature of possession of counter values in trading transactions, and ribā in currency exchanges (*ribā al-sarf*), among others. A comprehensive treatment of the legitimacy of īnah would also call for a discussion of aspects such as the admissibility of hiyal or legal stratagems, the significance of motive and intention in contracts, *sadd al-dharā'i* or closing of avenues, and original permissibility of transactions (*ibāhah asliyyah*) etc. that are individual subjects in themselves exhaustively discussed in Islamic law, to which īnah, by nature, is intrinsically related. Our purport being a review of the admissibility of īnah as far as it is pertinent to financing carried out by banks today, some of such areas are omitted or only briefly mentioned, concentrating mainly on aspects of īnah relevant to financing.

Nature of īnah as outlined in Islamic legal literature

The term īnah, it its literal application, carries the meaning of *salaf*, or contracting a loan. It is used in this meaning to refer to purchasing on credit.[1] It could also be a derivative of the term *ayn*, which among various other meanings also stands for present assets, i.e. cash. Thus, it denotes an instance where one purchases an asset for its subsequent sale on cash that is needed by him, when he does not have an asset to sell.[2] It is also said that the term is derived from i ānah or assistance, as a person is assisted through this process to fulfil his need.

Some hadiths reported from the Holy Prophet (Sal.) are found to mention the term īnah. However, the soundness of these ahādīth is a subject of difference among experts of hadith. One of them is narrated by the prophetic companion Abdullah ibn Umar (Rad.) as follows. "When men become frugal with money (lit. gold and silver coins) and trade on the basis of īnah, and (when they) follow the tails of cows and leave jihad in the path of Allah, Allah will send down a trial that he would not remove until they revert to their religion." Another version of the hadith says: "When you trade on īnah, and take hold of the tails of cows and become contented with farming leaving jihad, Allah will impose on you (such) ignominy that he would not remove until you return to your religion."[3]

With regard to the technical meaning of īnah, jurists of different schools of Islamic law have put forth various definitions, which, although differing in details, are observed to be similar in essence. Thus, many of the descriptions given by jurists for īnah agree on the sale of a commodity on credit and after delivery, its repurchase for a lesser cash price.[4] The Hanafi jurist Ibn Ābidīn describes īnah as the sale of an item at profit on deferred payment, for its subsequent sale by the borrower at a lesser price, for settling a debt.[5] The process of īnah according to Māliki jurists as follows: to sell a commodity at a known price on deferred payment, and to purchase it subsequently from the purchaser at a price that is less.[6] The Hanbali jurist Ibn Qudāmah describes it as where a commodity is sold to a person for a deferred price, and then purchased from him at a lower cash price.[7] Hanbali jurists have also used the term īnah to indicate sale on credit in general.[8] According to Shāfi ī jurists, it is to sell an item at a higher, deferred price and to deliver it, thereafter purchasing it from the purchaser at a lower cash price, so that the higher amount remains a debt on him.[9] The term has also been used by Shāfi i jurists in a different context to mean a sale taking place through the display of a sample only.[10]

It could be noted here that the sense understood by Ibn Ābidīn does not specify to whom the commodity is sold in the second sale, and therefore, the application of the term īnah could also include an instance where it is sold to a third party other than the original seller. This is referred to as tawarruq, which has been discussed separately by many jurists, due to the significant difference in the issue brought about by the change of the final purchaser. Thus, this definition could be termed ambiguous, in that it is not confined to treating the īnah sale alone, where the ultimate buyer is invariably the original seller who had sold the item in the first place. Apart from the larger scope of the Hanafi definition, the meaning given to īnah by other jurists is observed to be largely identical, despite of some variation in details and conditions. These do not involve the tawarruq mode directly, although it could come under the purview of īnah by extension. Thus, the basic īnah contract in these is seen to comprise two transactions of sale, the first being at a deferred price, while the second is at a

lower cash price. The process of īnah, without reference to its name, as described by the noted Hanafi jurist al-Kāsāni does not differentiate between the first sale taking place on credit terms or cash. What is relevant is whether the price had been paid or not. Thus, when a person sells a commodity on cash or credit terms and the purchaser takes possession of it, however, does not pay him immediately, the seller in this instance is not allowed to repurchase the item for an amount less than the previous price.[11]

Māliki jurists have defined īnah in a different sense. According to them, īnah means the sale of a commodity to a person who had sought it from the seller for purchase while the seller did not have it, after the seller purchases it for himself from a third party. This refers to an instance where someone places an order or request for a particular item with a trader who is not in possession of the item at that time, so has to purchase it from elsewhere for supplying. When the requested item, after having being bought by the trader from elsewhere for himself, i.e. in his own name and not as the agent of the person placing the order, is sold to the person who had initially placed the order, this is known as an īnah sale in the parlance of Māliki jurists. As for the type of sale in question that is referred to as īnah by jurists of the other schools, it is categorised by Māliki jurists under *buyū al-ājāl* or deferred (payment) sales. *Buyū al-ājāl* are defined by them as the purchaser selling on cash what he had purchased on credit to the previous seller himself or his deputy.[12] This is more or less equivalent to the definition given by others to īnah.

Hanbali jurists, as mentioned above, have also used the term īnah to indicate sale on credit in general. It is reported of Imām Ahmad that he used considered it offensive (makrūh) that one should carry out sale contracts on deferred payment all the time. Where a person resorts to credit sales as well as cash sales, it would not be offensive. This is because sale on credit is usually resorted to for the purpose of benefiting from the higher price that could be fixed in view of credit. However, Hanbali jurists have clarified that such a sale is not prohibited, and that it would be makrūh only when the seller has an alternative trade. Therefore, the term īnah seems to have

been used both for the twin sale in question as well as for credit sale by Hanbali jurists.[13]

Describing his principle relevant to īnah, Imām al-Shāfi i says in al-Umm: when one purchases a commodity from another and takes its delivery, and the price happens to be on deferred terms, it is not objectionable for him to sell it to the person from whom he had purchased it or to someone else, for a cash price less than his purchase price or higher, or on credit, or against another commodity.[14] Imām al-Shāfi i has not referred to īnah by name here. The Shāfi i jurist al-Nawawi, mentioning īnah by name, has defined it as selling a commodity for a deferred price and delivering it to the buyer, and then purchasing it before receipt of the former price at a cash price lower than the former price. The reverse of this transaction is also termed īnah by Shāfi i jurists. Thus, īnah also refers to the sale of an asset at a low price in cash and after its delivery to the buyer, to purchase it at a higher deferred price, irrespective of whether the payment for the first sale was received or not.[15]

Variations of īnah: the universally condemned and the disputed

The discussion of īnah by jurists of different schools of Islamic law reveals that they had mainly dealt with three forms of this specific process. The first is where the parties make an explicit statement of their intention to enter into a twin contract. The parties expressly declare through the contract that the vendor in the first contract that takes place on deferred payment will repurchase the asset at a cash price lower than the former deferred price. In essence, the contract could read as follows: I sell this commodity to you on credit for one hundred and twenty, so that I will purchase it back from you for one hundred. This form is declared to be invalid and impermissible by the consensus of all jurists from all schools of Islamic law.[16]

In the second form of īnah, the parties enter in to a twin sale, i.e. the commodity is sold to the second party on credit, is delivered to him, and thereafter the seller repurchases it at a cash price lower than the former credit price, without there being any condition in the contracts that necessitate it. The contracts in this case are

independent, each being a complete and full-fledged contract not made conditional to the other, which results in the creation of legal consequences in the form of rights and obligations on the parties, and is carried out to its end through formal and unconditional transfer of possession of the traded asset. What is referred to as īnah by the jurists in their discussions pertaining to its validity etc. is this form. This is called the two party īnah because the whole transaction takes place between two parties. Jurists of the Shāfi i school hold this type offensive, however, valid, while others hold it invalid.

In another variation of īnah, there are three or more parties involved. In the presence of the seeker of īnah, i.e. the person who is in need of liquidity, a person purchases an asset from another and takes possession of it, thereafter selling it to the seeker of īnah on credit, at a price higher than the initial cost. The seeker īnah, after purchasing the asset, sells it back to the original seller at a lower cash price. This process has also been referred to as a variety of īnah, however, has been considered to be of lesser significance.[17] Some forms of this process appear to correspond with what is known as tawarruq, where, however, the initial purchase is carried out by the seeker of liquidity.

Cash sale preceding credit sale:īnah in reverse order

The sale on credit is seen to take place before the cash sale in the normal process of īnah as discussed by most jurists. Here, the person who would ultimately be the provider of liquidity initially sells an asset belonging to him to the other on deferred payment basis and delivers it. The asset finds its way back to the original seller when it is repurchased by him at a cash price, usually less than the price fixed for the initial sale, resulting in the other obtaining cash. The process could take place in the reverse form too. The cash sale could precede the credit sale, where roles would be reversed. In this scenario, the ultimate provider of liquidity does not sell an asset initially, which is brought in to the transaction by the other party. Contrary to the first form, i.e. the īnah proper, the provider of liquidity first purchases the asset on cash terms and takes its delivery, thus facilitating the other to acquire cash. Thereafter, it is repurchased by the seller on

credit terms, usually for a price exceeding the price paid initially. Shāfi i jurists, who use the term īnah to denote this format as well, hold it valid[18], while jurists of the other schools have ruled it invalid. However, where the second sale is made a condition to the first, i.e. the first contract being finalised with the requirement that the second contract should follow, the process is invalid by the consensus of all jurists.[19] Therefore, if the contract says, "I purchase this cloth from you for such and such a price so that you would purchase it from me on credit," this contract is held impermissible by unanimity. Hanbali jurists have declared that impermissibility of this contract could be limited to where the parties have previously agreed to carry out the transactions in this manner. If the contracts take place without such agreement, they would not be held unlawful based on the overall permissibility of trading contracts, due to the absence here of the format of īnah prohibited in hadith.[20]

Legality of īnah in different schools of Islamic law

The discussion of jurists on the validity of īnah, i.e, the second form mentioned above, is attempted to be summarised here. As mentioned above, here two separate contracts independent of each other take place unconditionally, and each contract is finalised with the delivery of the asset to the other party, together with the fulfilment of all other general requirements for the validity of sale contracts. Shāfi i jurists, the main proponents of īnah, have described the broad principle endorsed by them in this regard as follows. When a person sells a commodity on cash or credit terms and hands over possession, and the parties separate with mutual pleasure about the contract, it is permissible for him to purchase it from the previous buyer for an amount equal to, higher, or lower than the former price, of the same currency as before or different, paid cash or on credit, after receiving payment for the previous sale or before it. This principle is acknowledged by the companions Ibn Umar and Zayd ibn Arqam (Rad.), the majority of the successors to the companions, (i.e. *tābi īn*), and the majority of jurists.[21] On this basis, according to the authoritative position upheld by the Shāfi'i jurists, the two independent contracts, jointly referred to as īnah, are held valid,

however, offensive. This is so, even when one of the two parties are known for the practice of īnah, as according to the principle upheld by Shāfi i jurists, the intention of the parties, even when it happens to be unacceptable, does not result in the invalidity of the contract, unless such intention is given expression in the contractual text. Therefore, even where the circumstances indicate their intention to carry out a second sale, this will not necessitate the invalidity of the contract.[22] However, according to some other Shāfi i authorities, when a party is known to practice īnah, the second sale becomes conditional in the first by virtue of custom, thus resulting in both contracts becoming invalid.[23] It is important in this connection to note that Shāfi i jurists have differentiated between the validity of a contract and its permissibility, as shall be presently discussed.

In Māliki legal literature, īnah is categorised under *buyū al-ājāl*, where various possible forms pertaining to two sales taking place in succession involving different combinations of prices and periods are discussed. Nine possible variations are described here, two of which are differed on by jurists, while there is unanimity pertaining to the rest. These nine types are formed in the following way. When one sells a commodity on deferred payment and thereafter purchases it again, the price in the second transaction could be deferred for a period equal to the first, shorter than it, or longer. In each of these situations, the price of the second transaction could be equal to that of the first, lower than it, or higher. The types where jurists have differed are, (a) where the price of the second transaction is lower than that of the first, and is on cash basis, and (b) where the price of the second transaction is higher than that of the first and is deferred for a longer period. Imām Mālik, and other Medinite jurists hold these formats invalid. They consider the second transaction along with the first, and regard the grounds strong enough to suspect that the purpose is to exchange an amount of money with a higher amount that is deferred, which forms a prohibited ribā contract. Thus, the transaction acts as a medium for attaining what is prohibited, and becomes invalid. In the remaining types, this suspicion cannot arise, and are therefore permissible.

In the position maintained by Hanafi jurists, according to Imām Abū Hanīfah, if the two prices are such that ribā could be applicable

such as gold and silver, and are identical in type, e.g. gold, it is not allowed for him to repurchase the sold commodity except at a price equal to the first, without any increase or decrease. If the price of the first sale was of such that ribā is not applicable, such as commodities, he may repurchase the sold commodity for a price higher than the initial price or lower. If the two prices belonged to different types where ribā is applicable such as gold and silver, disparity between them, although analogically permissible, is unlawful based on istihsān.[24]

Hanbali jurists affirm that when a person sells a commodity on credit and thereafter repurchases it at a price less than the price of his former sale, the transaction is invalid. The reason is that this could serve as an avenue leading to ribā; one could seek to legalise the sale of one thousand against one thousand five hundred by involving an asset in this manner. However, if the price of the second transaction is equal to the that of the first or is higher, it is permissible. The above ruling applies where the commodity had not diminished in any manner after its sale. If it had diminished, it could be purchased at any price, as any decrease in the price could be against the loss of value in the asset, and not for the purpose of ribā. If the purchase is against another asset, or the first sale was against an asset and the commodity is then repurchased for cash, it is permissible, due to the fact that ribā is non-applicable between money and commodities. If the first sale is on cash, and the second sale takes place through another currency also on cash, it is permissible, although considered unlawful by Imām Abū Hanīfah on the basis of *istiḥsān*.[25]

Juristic criticism of īnah

Īnah is disapproved as a transaction that could involve ribā by the overwhelming majority of Muslim jurists. Although the exact format intended by each and the specific reasoning adopted could be different, as shall be discussed below, the basic rationale in its condemnation apparently is its easy misuse for the purpose of disguising a ribā contract. Invalidity of īnah, i.e. the purchase of what one had sold on credit at a lower cash price, has been reported from a number of prophetic companions, and a considerable number

of jurists. This position has been reported of the companions Ibn Abbās, Ā'ishah and al-Hasan (Rad.), and by their followers such as Ibn Sīrīn, al-Sha abi and al-Nakha i. It is the ruling of the early jurists Rabī ah, Abd al- Azīz ibn Abī Salamah, al-Thawri, al-Awzā i and Ishāq. The founders of three of the main schools of Islamic law, namely, Imām Mālik, Imām Abū Hanīfah and Imām Ahmad, together with many other jurists of their schools, hold the īnah sale invalid.[26] The Hanbali jurist Ibn Taymiyyah and his follower Ibn al-Qayyim have strongly denounced īnah in their works.[27] A fair number of contemporary Islamic scholars and writers have upheld its invalidity. Adopting īnah based modes, especially in the context of banking transactions for the purpose of financing, has been censured by many contemporary bodies of sharī ah scholars such as the Jeddah based Islamic Fiqh Academy and the Islamic Banking Conference, and sharī ah supervisory boards of a number of Islamic banks such as the Kuwait Finance House, Faisal Islamic Bank of Bahrain, and Dar al-Māl al-Islāmi, among others[28].

Jurists who recogniseīnah

While Shāfi i jurists affirm that the broad principle mentioned above, which includes the īnah format in question as well as many other forms, to be generally conceded by some prophetic companions, the majority of the successors to the companions (i.e. *tābi īn*) and the majority of jurists, as far as the specific īnah format is concerned, it is known to have been expressly recognized by the prophetic companions Ibn Umar and Zayd ibn Arqam (Rad.), jurists of the Shāfi i and the Zāhiri schools, and the early jurist Abū Thawr. The Hanafi jurist Abū Yusuf also has considered it acceptable, and is reported to have said that many of the companions practised it, and did not count it as ribā.[29] The proponents of īnah insist on regarding the sales involved as individual transactions that are not overtly linked to each other, and thus should be valid, due to their principle that covert intentions do not affect the validity of contracts. In recent times, the Shari'ah Advisory Board of the Securities Commission of Malaysia has recognised īnah and some other disputed modes as permissible principles in the Islamic capital

market in Malaysia. The Islamic banking industry in Malaysia carries out a large part of its financing through methods claimed to be based on *īnah*.

Arguments against the validity of înah and responses to them

Those who negate the validity of īnah, i. e. the overwhelming majority of Muslim jurists, have supported their position with both textual as well as rational evidences.[30] The famous hadith produced in denouncing *īnah* is the hadith reported of A'ishah (Rad.), where she has rebuked another prophetic companion for involvement in a trading transaction corresponding to īnah. This hadith is as follows. Abū Ishaq al-Sabī i reports from his wife that she visited Ā'ishah (Rad.). The slave-mother[31] of the child of Zayd ibn Arqam (Rad.) too entered with her and addressed Ā'ishah (Rad.) saying, "mother of believers, I sold a slave to Zayd ibn Arqam for eight hundred silver coins deferred until receipt of the grant, and I purchased him (again) for six hundred cash". Ā'ishah (Rad.) told her, "It was an evil purchase that you did, and an evil sale; convey to Zayd that his jihad in the company of the Messenger of Allah (Sal.) is annulled, unless if he repents."[32] A slightly different chain of the hadith is mentioned by al-Māwardi in his al-Hāwi[33], where the hadith is reported by the son of Abū Ishaq al-Sabī i from his mother Āliyah bint Ayfa who says that she set out on Hajj with Umm Habbah, and that they entered into the presence of Ā'ishah (Rad.) and greeted her, whereupon she asked from where they were. They said that they were from Kūfah, at which she seemed inclined to turn away. Umm Habbah told her, "Mother of believers, I had a slave girl, whom I sold to Zayd ibn Arqam for eight hundred silver coins deferred until receipt of the grant. He wished to sell her, so I purchased her from him for six hundred silver coins cash … etc. At the end of this narration it is mentioned that Umm Habbah asked whether she could retrieve her capital, to which Ā'ishah (Rad.) responded by reciting the Qur'anic verse appearing in the context of the prohibition of ribā, which is, "One who receives the admonition of his Lord at which he desists, i.e. from dealing in ribā, what transpired before would be (judged in) his (favour)".[34]

Evidence of the invalidity of the transaction is derived from the above hadith as follows. In the hadith, Ā'ishah (Rad.) has stated that it could bring about the annulment of his jihad, in spite of the fact that no apostasy had taken place. Such a ruling could not be based on her conjecture. Such severe censure could only emanate from her having heard it from the Holy Prophet (Sal.). Thus, it could be considered that condemnation of the transaction has been originally confirmed through a prophetic utterance. This bears out that the transaction is invalid, as contracting an invalid transaction is a sin. The harsh terms used by Ā'ishah (Rad.) in condemnation of this transaction and her description of it as evil also would be correct only if the transaction was invalid, as a valid transaction cannot be evil. Such condemnation would be justifiable only if the transaction described is prohibited and is a sin.

The hadith narrated of Ā'ishah (Rad.) being the strongest argument against īnah, proponents have attempted to answer it in detail. They observe that the hadith belongs to the category of mujmal, i.e. which are brief and require explanation for proper comprehension. It could not be concluded with certainty that the condemnation of Ā'ishah (Rad.) was directed at the nature of the transaction due to considering it to be involved with ribā. Imām al-Shāfi i has stated in his al-Umm that it is quite possible that the condemnation was due the period of deferment in the first sale being indefinite.[35] It was not known for certain when the grant was to be received, and this made period unknown, which would lead to the invalidity of the sale. Some narrators in the chain of narrators of this hadith are not known with certainty. The woman who reports this hadith is unknown to scholars of hadith, probably due to which Imām al-Shāfi i has expressed his doubts regarding its soundness. The Zāhiri scholar Ibn Hazm states in al-Muhallā that it is not established that the wife of al-Sabī i had been present during the incident. He has narrated some versions of the hadith where it is reported by her from another woman. The son of al-Sabī i too is not regarded as a sound narrator by experts of hadith. According to Ibn Hazm, the battles taken part in by the companion Zayd (Rad.) were so many that it is not conceivable that anything except apostasy could invalidate them.

Zayd ibn Arqam (Rad.), the Medinite companion, had participated in all battles in the company of Holy Prophet (Sal.) except for Badr and Uhad, that is, in seventeen battles, and was present on the occasion of Hudaybiyah taking the pledge that finds mention in the Qur'an, which says that Allah was pleased with the believers who took that pledge.[36] If it is claimed that the hadith only censures the second sale, it would not be correct, because some versions of this hadith records the words '*sharayti*' which means 'sold'. Thus, the sale, and the ensuing purchase based on it, both have been condemned. Imām al-Shāfi i states that even if it is conceded that Ā'ishah (Rad.) had disapproved of the cash purchase of what was previously sold on credit, the matter then would be one of difference of opinion among prophetic companions. Ā'ishah (Rad.) and the companion Zayd ibn Arqam (Rad.) would be understood to have different opinions pertaining to the transaction. Where companions differ, Qiyas or analogy would be resorted to, which is found to be supportive of the position taken by Zayd (Rad.). This is because a person is free to sell what belongs to him to any person he wishes. Thus, a sale to the person from whom it was bought originally too would be permissible. Thus, Imam al-Shāfi i has denied the ascription of this narration to Ā'ishah (Rad.). The companion Zayd ibn Arqam (Rad.) would only have done what he sees correct, in which event there is no reason for Ā'ishah (Rad.) to consider that his devotions had become valueless, in spite of holding a view to the contrary. According to Ibn Hazm, even if the action of Zayd (Rad.) were wrong, he would still be rewarded for it, as he had done it based on his own considered judgment, for which a jurist is rewarded.

Denouncing īnah, opponents have cited the hadith narrated by Ibn Umar (Rad.) mentioned above. This hadith is as follows: "When men become frugal with money (lit. gold and silver coins) and trade on the basis of īnah, and (when they) follow the tails of cows and leave jihad in the path of Allah, Allah will send down a trial that he would not remove until they revert to their religion." According to another version of the same hadith: "When you trade on īnah, and take hold of the tails of cows and become contented with farming leaving jihad, Allah will impose on you (such) ignominy that he would

not remove until you return to your religion."[37] These narrations are taken to mean that trading on the basis of īnah is a reason that could bring about disgrace and humiliation for Muslims. This strongly worded warning indicates that trading on the basis of īnah is impermissible. Otherwise the repercussions mentioned in the hadith could be unfounded. The hadith indicates that adhering to the factors mentioned in the hadith is close to a departure from the religion, as return to religion is mentioned thereafter. This highlights the gravity of īnah, and that it is a serious offence that calls for such punishment. Opponents argue that although īnah is cited here in company with some permissible acts, this is not rare in hadith.

Responding to the hadith narrated by Ibn Umar (Rad.), proponents of īnah have drawn attention to the unsound nature of the hadith due to its weak chain of narrators. The hadith expert Ibn Hajar has conceded that there is some weakness in it.[38] Therefore, the hadith is not worthy of being cited in support. It cannot be proven that the usage of the term īnah in the hadith is in relation to the mechanism in question, as the term carries other meanings such as credit sale in general, resulting in the term becoming ambiguous. In addition, īnah is referred to in this hadith together with other activities such as farming, which are permissible without any doubt. The context of the hadith indicates that the censured aspect is over involvement in worldly activities, while disregarding the obligation of striving for the cause of religion, and individual condemnation of each activity mentioned is hardly intended. Thus, at most, this hadith could indicate that īnah and other activities such as farming would be condemned when they lead to abandoning jihad, and the hadith on its own could not be cited in support of the prohibition of īnah.

Another hadith cited by the opponents of īnah is the narration reported by Abū Hurayrah (Rad.) which states: "One who effects two sales in a single sale should take the lower of the two, or ribā".[39] Opponents claim that the transaction indicated in this hadith includes the sale of īnah, because here two sales take place, with the same contractors. When the commodity is sold of credit for a higher amount and then repurchased for a lower price on cash, it could be referred to as two sales taking place on a single occasion. If the seller

claims the higher price, it would be ribā, therefore, only the lower amount could be taken.

Those who endorse the validity of īnah point out that the hadith's reference to īnah is not precise. It could be explained to imply many other transactions as well. It is not correct to say that the īnah process involves two sales taking place in unison. Each sale in īnah is an independent contract carried out, wholly separate from the other. Imām al-Shāfi i has forcefully underscored this point. The commodity owned by the purchaser through the first transaction could be used by him in any manner he wishes; he could consume, gift, donate or sell it to anyone he wishes, apart from selling it at price lower or higher than the price at which he had bought it initially on credit. If the latter is prohibited, it could be extended to justify the prohibition of its consumption as well.[40]

In condemnation of īnah, another narration forwarded is the saying recorded by al-Awzā i that states, "A time will come over people when they will seek to permit ribā through sale." This narration is held to signify the prohibition of contracts that are in the form of sales, while the purpose happens to be ribā. The hadith refers to this process as seeking to permit, which could only take place with regard to what is prohibited. Therefore, the overt form would be disregarded, taking the objective and purpose of the transaction into consideration. The prohibition of ribā is not intended to cover its appearance and wording only; the reality and the essence of ribā is intended in the prohibition. Proponents of īnah argue that the hadith is *mursal*, i.e. the name of the companion who reports it from the Holy Prophet (Sal.) is not cited in the chain of narrators, thus making the hadith unsuitable for reference. However, others have upheld its validity in spite of its *mursal* nature.

Opponents have also referred to an incident involving Ibn Abbās (Rad.), where he was questioned about īnah pertaining to silk. He is reported to have said that "Allah cannot be deceived; this is of what Allah and his messenger have prohibited". According to another narration, he was asked about a person who sold a silk cloth to another for hundred, and then purchased it again for fifty on cash, whereupon he said, "Silver coins against silver coins unequal in quantity, with a

silk cloth come in between them." The purpose of the īnah sale happens to be exchange of money in unequal quantities, with the commodity acting only as a formality. Therefore, the contract is one of ribā. The parties do not wish to own the commodity through the contract, and do not have any interest therein. The purpose and objective solely happens to be to exchange one hundred for one hundred and twenty, with the commodity only being involved for the purpose of deception. Leaving the contractors, even an outsider who observes the contract would conclude that the parties are not interested in the contract per se.

One of the main arguments of those who oppose īnah is that the transaction embodies *shubhah* or suspicion of ribā. In other words, the transaction, although not explicitly involving any lending or borrowing on interest, strongly indicates the involvement of ribā. Once the commodity is out of the transaction at the end of the twin contracts, now the two prices are offset against each other, and there invariably would be and excess in the first price that is not matched with a counter value in the second price. This is the precise meaning of ribā. However, the excess could only be perceived when both the contracts are considered together. Therefore, when the contracts are taken in isolation, they indicate what is described as suspicion of ribā. Suspicion of ribā is counted as equal to real ribā with regard to prohibitions, as a precautionary measure.[41] Māliki jurists have in essence looked at the transaction in the same manner, and argued that it could be used as an avenue towards legalizing ribā. [42] Thus, the transaction could be utilized for the purpose of exchanging money and other monetary items such as gold and silver in unequal quantities involving deferment. As this is an avenue leading to an offensive end, it should be closed, as required by the principles adhered to by Māliki jurists.

Proponents observe that the above factors would become relevant only when the two contracts are taken together, while there is no justification for doing so. Each transaction is complete in itself, and happens to be free of conditions that could bring about invalidity. There is no reason to consider the second contract to be part of the first, as the first is concluded giving the parties full right over their

respective counter values with delivery and transfer of possession of the asset etc, as shown above. Therefore, the contracts should be permissible.

Arguments of those who validateīnah and responses to them

Proponents of īnah transaction who see it as two individual transactions that are valid and not conditional to each other have cited in their support evidences based on the Qur'an, the sunnah and logical reasoning. Fundamentally, they have drawn support from the Qur'anic verse that expounds the permissibility of trade, as against the prohibition of interest.[43] The expression used here to denote permissibility of trade is indicative of universality or generality, embracing all types of trade. Thus, all types of trade, as long as they are not expelled from this universality by valid textual evidence, would remain within the boundaries of permissibility. The transaction īnah, comprising trading transactions, too, would remain permissible, as there is no evidence to establishing the contrary. The Holy Qur'an states that "what has been prohibited on you has been described to you,"[44] while the prohibition of īnah is not mentioned in any established text.

Opponents point out that the validity of each transaction would not necessarily involve the validity of the process when the two transactions are combined with each other. Thus, where two valid transactions are joined, the ruling could be different, as the factor of combination, too, plays a role in determining the validity or otherwise of transactions, even when they had been valid prior to it. The case of a sale transaction taking place together with a contract of lending could be cited as an example. This process, referred to as *bay wa salaf* in hadith, has been prohibited by the Holy Prophet (Sal.), despite of the fact that sale and lending both are valid transactions when treated individually. Similarly, opponents have also cited the example of two sisters who are married to a single person. Combining two sisters in marriage is prohibited at the same time, i.e. one may not marry the sister of his wife while the latter is still his wife. This is despite of the permissibility of marrying each individually. Proponents point out that there is no valid reason for considering the two transactions of īnah as forming a single transaction, as each takes place individually.

The hadith that deals with an instance where the Holy Prophet (Sal.) had advised a person to adopt a trading mode instead of resorting to a method that involves *ribā al-fadl* forms a strong argument in favour of those who recognize the validity of legal stratagems for purposes legal in themselves, and also of īnah. This is a famous hadith recorded by al-Bukhāri and Muslim reported by the companion Abū Sa īd al-Khudri (Rad.). It narrates that a man from the region of Khaybar who had been contracted the upkeep of a plantation came to the Holy Prophet (Sal.) with some dates of good quality. When the Holy Prophet (Sal.) asked him whether all dates of Khaybar were of similar quality, the man replied in the negative, and added that they used to obtain a measure of better dates against two measures of ordinary dates, and two measures against three measures. The Holy Prophet (Sal.) forbade him from doing that, and directed him to sell the low quality dates against silver coins, and then purchase better dates against silver.

This hadith indicates the permission of employing the described method for avoiding involvement in ribā overtly or covertly; the medium of a sale is employed, which fulfils all conditions and prerequisites of sales, free of factors that result in its invalidity. The intention of procuring dates of better quality as the end result of the transaction has not been considered to invalidate the structure in question. Therefore, this shows the lawfulness of sale transactions where different purposes are intended when the medium utilised is acceptable and is free of riba in any explicit or implicit manner. The īnah transaction, being free of any unacceptable condition or clause that results in the invalidity of the transactions or their resulting in ribā, should, therefore, be permissible. Moreover, when the Holy Prophet (Sal.) required the companion to sell the low quality dates against silver coins and thereafter purchase dates of higher quality, he was not directed that both transactions should not be contracted with the same individual, i.e. the seller of higher quality dates. Thus, sale to the seller from whom one is to purchase later was not prevented, in spite of the fact that the money paid by the seller in the former sale was to return to him in the second. Thus, this hadith has been produced in support of the permissibility of īnah sale.[45] Critics

of īnah observe that the hadith in question is of the category referred to in Islamic jurisprudence as general (mutlaq). It may not be understood to involve different sub entities at the same time, but may concern only what is most relevant. Therefore, it may not be cited in support of the permissibility of purchase from one to whom a sale was made previously.[46]

The case for īnah is also bolstered through incidents involving prophetic companions others. A narration regarding the companion Ibn Umar (Rad.) is produced in this regard. Al-Bayhaqi has recorded that a man sold a saddle to another, who did not pay for it immediately. The purchaser of the saddle desired to sell it, whereupon the man who sold it wanted to purchase it at a price less than the price he had sold it for initially. Ibn Umar (Rad.) was asked about it, who did not consider it objectionable, saying, "Even if he sells it to another, he would sell for a price similar to the first or less." An incident essentially similar has been narrated regarding the *tābi i* (i.e. one who had associated with prophetic companions) Shurayh too.[47] These two narrations indicate that the companion Ibn Umar (Rad.) and Shurayh had upheld the transactions described, which are equal to īnah. Opponents argue that these are matched by the narrations concerning Ā'ishah, Ibn Abbās and others (Rad.), which support the condemnation of īnah.

Proponents have questioned the appropriateness of casting suspicions at the intention of the parties involved. The parties to the twin transaction process known as īnah had embarked on a course of action which outwardly is permissible. The intention of attaining anything prohibited does not find explicit mention in the contracts concerned. Therefore, it would not be correct to invalidate their contracts on the assumption that they had intended to achieve what is prohibited in essence. It is on this basis that Imam al-Shāfi i says in al-Umm: "the principle I adhere to is that with regard to every contract that is valid in its external form, I do not consider it invalid due to suspicion or on the basis of any practice prevalent among the traders; I hold their intention offensive, if the intention was such that were it to be revealed, it would have resulted in the invalidity of the contract."[48] Opponents contend that adhering to the external

manifestation of the contract would be correct in the absence of any other indication that point to the contrary. In the case of īnah, the indication is present, in the form of the customary practice of the people that gives a clear indication of the intentions involved. The legal norm "What is customary is similar in force to an explicit condition". Thus, the strong indication provided in this sense invalidity of the transaction to be based on external evidence, rather than the outcome of mere suspicion.

Proponents of īnah have pointed out that the validity of īnah is borne out by qiyas or analogy, as had been cited earlier in connection with the reason for Imām al-Shāfi i's preference of the ruling established by the practice of Zayd ibn Arqam (Rad.). This concerns an instance where one purchases a commodity that he had sold earlier, after the passage of some time (possibly involving the complete settlement of dues from the previous sale). In this instance, the purchase is held valid.[49] Thus, comparison with this situation dictates that the purchase after a short while too should be permissible, as the length of the interval taking place after a previous sale is not materially relevant to the validity of a subsequent purchase. Another analogy possible here is that of a person selling what belongs to him to anyone he wishes through a valid contract of sale at any price, as had been cited earlier in the broad principle adhered to by Imām al-Shāfi i.

Analysis of the permissibility of înah based on the above evidences

A perusal of the jurists' debate on the validity of īnah reveals that there exists complete unanimity on the fact that when the contracts are related to each other through explicit reference to the other contract in the contractual text, they would be invalid and unenforceable. The juristic difference only pertains to instances where the contracts are not conditional to each other and the contractual texts do not indicate the intention to carry out another contract. The difference on this matter is observed to be based on the different juristic approaches adopted by each party, that are intrinsically related to broad legal principles that apply over a vast area of law. Thus, the legal position on īnah is not a matter that has been decided in

isolation, based on factors peculiar to īnah itself. Rather, the methodology of deriving legal rulings adopted by jurists, which is profoundly affected by their position on fundamental issues such as the admissibility of hiyal or legal stratagems, the significance of motive and intention in contracts, *sadd al-dharā'i* or closing of avenues, the legal validity of fictitious contracts and original permissibility of transactions (*ibāhah asliyyah*), is seen to have dictated their position on īnah as well.

However, it could be noted that on the whole, those who oppose īnah have done so primarily on the assumption that there exists an agreement between the parties to carry out the two sales in that order, so that the process results in one of the parties invariably ends up obtaining immediate cash against a future obligation settle a higher amount. In forming this assumption, they have taken into consideration the implicit reason for the succession of the two contracts one after the other, and have decided that the accompanying indication here is strong enough to forbid such contracts altogether, even where there is no reason to believe that the parties had entered into an explicit or implicit agreement to carry out the contracts in this particular manner. Thus, īnah is prohibited by them on the basis of *shubhah al-ribā* or suspicion of interest, or for the purpose of closing of avenues leading to what is prohibited, even where the contracts involved happen to be complete in every way, free of legal shortcomings in the form of invalid conditions or the transactions being conditional to each other, and transfer of possession takes place after every contract in an acceptable manner through the commodity being delivered to the other party.

On the other hand, the proponents of īnah have primarily assumed that there necessarily need not be an agreement between the parties to carry out the transactions one after the other, any assumption to that effect being casting unwarranted suspicion on the transaction of Muslims, and consider that when the contracts themselves are free of any factor dictating its invalidity such as unlawful conditions, linking between transactions etc, they should be upheld as valid, any foul intention being a matter that would not affect the validity of the contract. From this basis, their position is

seen extended to include situations where there are circumstantial indications that the parties intend to carry out two transactions in succession, and that the first contract, although complete in all necessary ingredients, is not supposed to be the final. With regard to such situations, the proponents have adhered to their original position on the influence of intention on the validity of contracts, questioning the soundness of the principle of closing of avenues. They insist that in spite of any external evidence to a link between them, the contracts, although offensive, would still be valid, as long as the contractual texts are externally free from any illegal factor such as mention of one contract in the other, and requirements such as transfer of possession are duly fulfilled. If the parties had intended that the contracts should serve only as a pretext without being in earnest about the legal consequences of the contracts, this aspect alone would not have any bearing on the validity of the contract. The contracts, when complete legally, would be valid and enforceable, despite of any intention to the contrary on the part of the contractors.

However, would it be Islamically permissible for the parties themselves to enter into such contracts relying on their legal validity? Here the proponents of īnah, Imām al-Shāfi i in particular, have produced the unique legal theory of differentiating between permissibility (*jawāz*) and validity (*sihhah*) which is discussed below.

The relevance of intention toīnah

An important aspect that had contributed to the different positions held by jurists pertaining to īnah is that of motive or intention. As mentioned above, opponents resort to invalidating the contracts of īnah primarily based on the foul intention assumed to be held by the participants to īnah, taking the end result of the two contracts, when taken together, into consideration. Proponents suffice with looking at the external manifestation of the intentions in the form of the contractual texts, that to them are the only legally acceptable pronouncements about the motives and intentions of the parties, and validate the contracts, refusing to give credence to any unrelated factor in this regard, treating it as imputation. Thus, the contract of īnah is invalid according to jurists of the Hanafi, Māliki and Hanbali

schools, as it is considered a process that, despite of its legal appearance, conceals an inner motive of earning ribā. The Hanafi jurist Muhammad ibn al-Hasan has expressed his strong reservation about īnah, regarding it as an evil mode developed by devourers of ribā.[50] The Māliki jurist Ibn Juzay, in his discussion of invalid sales, describes īnah as a display of what is permitted for attaining what is not permitted.[51] Hanbali jurists, too, prohibit sales where the motive is attaining what is prohibited.

It should be known here that with regard to taking motive of the contractors into consideration in determining the validity of contracts, Islamic legal schools are seen to have followed two major trends. In the case of the Shāfi i school, as well as the Hanafi school to some extent, motive of the contractors is not considered relevant to the validity of a contract. Thus, these schools only consider the external intent of the parties, as manifested through the contractual text, in deciding a contract's validity, so as to safeguard the basis of constancy in transactions. Looking at the motive and purpose of participants in each contract would unnecessarily jeopardise contractual basis, in addition to being undeterminable with any certainty. Thus, as long as the motive is not regarded to be materially relevant until it is explicitly stated in the contract, and the contract is held valid, if it is externally legal. Even where the parties intend to achieve something prohibited through a lawful contract, this motive alone would not dictate the invalidity of the contract, because realisation of the prohibited aspect, being something related to the future, is not certain to occur. However, while the contract is valid, it would be regarded to be prohibited or censured, i.e. harām or makrūh, depending on the nature of the parties' motive. This means that entering into such contracts is unlawful, the participants committing a sin making them liable to divine wrath and punishment. On this basis, the Shāfi i school considers the sale of grapes to a wine presser valid, when the purported aim is not spelled out in the contract. In spite of the validity of the contract, however, the sale is unlawful or harām, provided the seller knows of the ultimate use intended or is reasonably assured of the fact. Where he only has suspicions that the grapes would be used for that purpose, it would

be offensive or makrūh. Similar are cases such as the sale of weapons to a robber, selling of material that could be used for gambling or manufacture of musical instruments, renting of premises for a gambling den, and employment for carrying and dealing in liquor.[52]

On the same basis, Shāfi i jurists hold the sale contracts comprising īnah to be valid, when they are free of factors dictating invalidity. Therefore, where the participants' motive in the contracts is earning ribā, the contracts serving only as a pretext the reality of which is not intended, it would be harām or makrūh, due to the foul intention. However, the unlawfulness of this contract in this instance would not interfere with its validity as long as the foul motive is not explicitly stated in the contract. Therefore, if the parties had carried out the transactions earnestly, fully understanding and prepared to undertake the ensuing duties and liabilities at each stage, the contracts would be valid and lawful according to Shāfi i jurists.

Hanafi jurists, however, despite of their practice of deciding the legality of a contract solely on the basis of its own merits, and considering external factors to be effective only to the extent of making it unlawful or offensive without affecting its validity,[53] have regarded the transaction of īnah in a different light. They regard hiyal or legal stratagems to be fundamentally permissible as the decisive factor is the contractual text itself. However, according to them, īnah is invalid, the reason being suspicion of the presence of ribā or *shubhah al-ribā*. They hold that suspicion in the matter of ribā is tantamount to its reality with regard to prohibitions, as a necessary measure of precaution.[54]

Jurists of the Māliki and the Hanbali schools hold that consideration of the motive and intent of the parties is essential in determining the validity of a contract. According to them, a contract involving an illegal motive is invalid, provided the other party is aware of it or is in a position to be reasonably assured of it due to circumstantial indications that point at an evil motive, such as a gift made by the enemy to the commander of a battalion, and gifts to government officials. Based on this position, Māliki and Hanbali jurists have decreed the invalidity of the contract in the examples previously mentioned. Thus, īnah transaction is invalid, as here the

mode of sale is used for the purpose of entering into ribā based contracts, while not having any interest in the purchase and sale of commodities *per se*. Since it serves as a medium for attaining a prohibited and illegal contract, it is forbidden, so as to close an avenue that leads to harām.[55]

On the basis of above juristic positions adhered to by the jurists of Hanafi, Māliki and Hanbali schools, sales that resemble the īnah format are prohibited by them, even where each sale happens to be entirely spontaneous. Therefore, after selling a commodity on credit, or according to Hanafi jurists, also before receiving the price in a cash sale, the seller is not allowed to repurchase it from the buyer, even if the idea to repurchase it occurred after the first sale and there was no motive of ribā, the parties only wishing to enter into a lawful transaction of sale for a second time. If the second contract is finalised, Māliki and Hanbali jurists rule both contracts invalid, while Hanafi jurists invalidate the second contract. Shāfi i jurists regard both contracts validly formed in all such situations except where one contract is explicitly related to the other in the contractual text or comprises any invalidating factor such as the seller not having complete ownership or possession at the point of sale. As far as their permissibility is concerned, this would depend on the motive of the parties.

Suitability of īnah as a financing mode

It can be observed from the above exposition that the overwhelming majority of jurists declare īnah to be invalid judging it as a mode that could be easily misused for legitimising ribā, while its recognition by Shāfi i jurists mainly centres on safeguarding transactional rights of a person in his own property and removing unnecessary restrictions in this regard. It should be acknowledged that the danger perceived by those who denounce īnah is palpably real, and could not be brushed off as imaginary or unconfirmed. The Shāfi i position avoids providing any direct solution to this justifiable concern, apart from leaving the intentions of the participants to themselves, to be accounted for in the divine presence if found to be foul. In spite of this, insisting on the validity of *taqlīd*, i.e. following the ruling of an

accepted jurist without delving into his evidences, could īnah be justified as a valid mode of financing for banks in today's context? The answer would be in the negative, as substantiated below.

As pointed out earlier, Islamic banks of today operate under the near total dominance of the conventional interest based banking industry. Banking operations, by choice or under compulsion, are carried out according to the norms and practices of conventional banking. The senior personnel involved as a rule come from the conventional field after long years of engagement with interest based lending. Thus, the temperament of Islamic banks is observed to be to do business along conventional lines as far as possible, except when compelled otherwise. If the mode of īnah is allowed, it would provide an extremely convenient way of practising debt financing along conventional lines, which would at once engulf the whole Islamic financing system and would prove to be the death knell of other genuine modes. Weaning the system from īnah, without doubt, would be next to impossible. The conversion to Islamic banking would only involve a cosmetic change from interest based lending, adopting some transactions that are not intended primarily, but are only carried out as a formality. Realising the social and economic benefits that come in the wake of implementing a full-fledged Islamic banking system based on genuine modes of financing would remain a distant dream.

The above-described position assumes that in spite of all the evils it entails, īnah could be properly implemented in financing by banks, without violating any of its prerequisites. However, a close consideration would reveal that īnah, after all, is not practicable as a financing tool in a banking environment. This is because the foundation of its recognition by Shāfi i jurists lies at the independent nature of the constituent contracts, and each contract fulfilling all requirements pertaining to sales. At the time of effecting the first sale, any intention of contracting a second sale should strictly remain an intention. It may not be expressed in the contractual texts in any way. If in addition to the mere legal validity of the contracts, the parties, being Muslims, desire to avoid divine wrath and make the transactions permissible too, they should treat the contracts as genuine sales that result in authentic legal consequences on each, and be fully

prepared to bear them, even for a short period. If they regard the transactions as a mere formality devoid of any reality that acts as a cover to interest based lending and borrowing, the contracts would still be valid, however, the parties would be committing a serious sin. Furthermore, as underscored by Imām al-Shāfi i, from a strictly legal point of view, the second transaction is entirely spontaneous, as the first contract does not envisage it overtly. He has stressed that the second sale does not form part of the first in any manner. After concluding the first sale, the purchaser, by virtue of having become the legitimate owner of the asset unconditionally, could consume it if he wishes, gift it, destroy it, or do anything else with it entirely at his free will.[56] The second transaction would be recognised as legal only where the first results in his entitlement and ability to dispose of the asset in any manner without restriction. If the first sale does not result in such unrestricted rights of the purchaser to the asset purchased, the transaction would not be legal. In addition, the seller's unrestricted and unconditional possession of the asset transacted on is a vital requirement for the validity of sale contracts. Each sale, especially the first, should end with delivery of the asset to the purchaser and his taking possession of it in a recognised manner that gives him control over it. As clearly stipulated by the Shāfi i jurist al-Ghazāli in *al-Wasīt*, an asset, be it movable or unmovable, may not be sold until its possession is gained.[57] As īnah can only be resorted to based on unquestioning adherence to the Shāfi i ruling on the issue, it is but proper that the Shāfi i ruling on delivery and possession in sale transactions be followed here, so that the transaction succeeds at gaining legitimacy at least in that school. The Shāfi i ruling on possession is clear: in movable items, possession requires moving them, i.e. away from their original location; in the case of unmovable assets, possession takes place through providing the purchaser unrestricted access to them; if the asset is situated elsewhere, it is also necessary that the period required for reaching it should elapse.[58]

Considering the above from a banking perspective, it is clear that fulfilling them in a banking environment is impracticable. Maintaining the independent nature of each contract as required

cannot be conceived in bank financing. Irrespective of whether the mode employed is īnah proper, where the bank would initially sell an asset belonging to it on credit, or the reverse of īnah, where the client would sell his own asset to the bank initially, in both instances, documents related to the first contract would necessarily include some mention of the second contract at some point. This is because the bank selling an asset belonging to it to the client without any assurance of his resale, or its purchase of an asset from him without a binding assurance of his repurchase of the same, being considered risky and unsafe according to the norms of banking practice. A probable reason, as also mentioned above, is that banks, by nature, are handicapped at regarding themselves as traders, and are naturally averse to genuine trading operations. In the case of reverse of īnah, the bank would not be willing to undertake the purchase of an asset belonging to the client without an accompanying obligation on him to repurchase it, as the risk of owning an asset without proper investigation as to its value and marketability would be too great. Thus, in either mode, the contractual texts, in addition to various other documents, are bound to refer to the two contracts together, thus resulting in the contracts becoming overtly linked. This fact alone is amply sufficient for the invalidity of īnah even according to its sole proponents, the Shāfi i jurists. With such linking of the transactions, the prospect of each contract resulting in the purchaser's complete right to utilise the asset as he pleases would be irrecoverably lost. The purchaser would be restricted from doing anything with the asset other than its resale to the seller. Thus, far from being an unconditional sale, the first transaction would become a sale with an unrelated condition, or *bay wa shart*, clearly prohibited in hadith. As a result, the spontaneity necessarily expected of each contract for the validity of īnah would become non-existent. As far as delivery of the asset and ensuring its possession by the seller prior to each sale is concerned, although not impossible, it is extremely doubtful whether banks would be keen to fulfil this requirement.

Therefore, it is amply obvious that īnah, even as allowed by Shāfi i jurists, is not a practicable mode of financing as far as banking institutions are concerned. In spite of this all too evident fact, if īnah

is attempted to be adopted by banks, the requirements for its validity, some of them being unfeasible in a banking context as shown above, would necessarily be disregarded. Thus, being utterly devoid of its reality, it would invariably become a patently fictitious procedure. The providers of the facility, where they are Muslims, as well as its users would only be painfully aware of the false nature of the whole process.

A major reason for the above is the fact that hiyal or legal stratagems such as īnah are not meant to be adopted as standard techniques in trade or finance. Hiyal, i.e. its permissible types, are in essence meant to be used as means of obtaining relief by those who find themselves in restricted circumstances, without overtly violating directives of sharī ah. This means that the application of hiyal, by their nature, is limited to individuals in specific unwelcome situations. Mass application of hiyal as standard modes of financing or otherwise was never intended or recognised. As jurists have explained in this regard, although it is allowed to resort to some accepted form of hiyal for removing legal constraints occasionally, it is totally impermissible to adopt them in a manner that leads to the infringement of the *maqāsid* of sharī ah.[59] Hence, īnah, even as allowed by Shāfi i jurists, was never meant for mass application in an environment dominated by ribā based lending. Adopting īnah in such situations could only complement interest based lending, and could move implementation of genuine financing modes further away from realisation.

Notes

1 *Lisānul Arab*, vol. 13, p. 306.

2 *Al-Nihāyah fī Gharīb al-Hadīth*, vol. 3, p. 334.

3. These hadith are respectively reported by Ahmad and Abū Dāwūd. See al-Shawkāni, *Nayl al-Awtār*, vol. 5, p. 206.

4. Ibn Qudāmah, *al-Mughni*, vol. 4, p. 259.

5. Ibn Abidīn, *Radd al-Muhtār,* vol. 7, p. 613.

6. *Mawāhib al-Jalīl,* vol. 6, p. 293.

7. *al-Mughni*, vol. 4, p. 277.

8. *al-Mughni*, vol. 4, p. 128.
9. *Mughni al-Muhtāj,* vol. 2, p. 39.
10. *I ānah al-Tālibīn*, vol. 3, p. 11.
11. al-Kāsāni, *al-Badā'i* , vol. 5, p. 198.
12. *Al-Sharh al-Saghīr*
13. Ibn Qudāmah, *al-Mughni*, vol. 4, p. 128.
14. *Al-Umm*, vol. 3, p. 68.
15. Al-Sharwāni, *al-Hawāshi*, vol. 4, p. 323.
16. Al-Kāsāni, *al-Badā'i* , vol. 5, 199, Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, p. 116, Al-Nawawi, *al-Majmū* , vol. 9, p. 248, Ibn Hajar, *Fath al-Bāri*, vol. 4, p. 401, Ibn Qudāmah, *Mughni al-Muhtāj*, vol. 4, p. 127.
17. Tafsīr al-Qurtubi, vol. 3, p. 361, al-Nihayah fī Gharīb al-Hadith, vol. 3, p. 334.
18. Al-Nawawi, *Rawdah al-Tālibān*, vol. 3, p. 416, al-Sharwāni, *al-Hawāsh*i, vol. 4, 323.
19. Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, p. 116.
20. Ibn Qudāmah, *al-Mughni*, vol. 4, p. 128.
21. Al-Māwardi, *Kitāb al-Hāwi*, vol. 5, p. 287.
22. A brief discussion on the relevance of intention to the validity of contracts according to Muslim jurists, all important under the topic of īnah, follows towards the end of the article.
23. Al-Nawawi, *Rawdah al-Tālibān*, vol. 3, pp. 417, 419, al-Sharwāni, *al-Hawāsh*i, vol. 4, 322, al-Sharbīni, *Mughni al-Muhtāj*, vol. 2, p. 39.
24. Al-Māwardi, op. cit., Ibn Humām, *Fath al-Qadīr*, vol. 6, p. 436. *Istihsān* is a juristic principle resorted to by Hanafi jurists, which broadly means the jurist upholding a ruling that is different from the one dictated in similar circumstances by normal evidence and reasoning, due to special grounds deemed relevant by him.
25. Ibn Qudāmah, *al-Mughni*, vol. 4, p. 127.
26. Ibn Qudāmah, *al-Mughni*, vol. 4, p. 127.
27. Ibn al-Qayyim, *I lām al-Muwaqqi īn*, vol. 3, p. 181.

28. See for details A *Compenidum of Legal Opinions on the Operation of Islamic Banks*, p. 154-156.
29. Al-Māwardi, op. cit., *Bidāyah al-Mujtahid*, vol. 2, p. 106, Ibn Humām, *Fath al-Qadīr*, vol. 5, p. 425.
30. Abdullah ibn Ibrāhim al-Mūsā, "al-Tamwīl bayn al- īnah wa al-Tawarruq", 14th annual scientific conference, Faculty of Shari ah and Law, University of United Arab Emirates.
31. In Arabic *umm walad*. A slave woman who bears a child through her master enjoys special privileges, discussed in detail in manuals of Islamic law. She may not be sold by the master thereafter, and upon the death of her master, gains freedom.
32. Recorded by al-Dāraqutni (hadith No. 2983), al-Bayhaqi, vol. 5, p. 330.
33. Al-Māwardi, op. cit.
34. Holy Qur'an, 2: 275.
35. *Al-Umm*, vol. 3, p. 79.
36. *Al-Muhallā*, vol. 9, p. 49.
37. These hadith are respectively reported by Ahmad (hadith No. 4825) and Abū Dāwūd (hadith No. 3462). See al-Shawkāni, *Nayl al-Awtār*, vol. 5, p. 206.
38. *Al-Taqrīb*, p. 100.
39. Abū Dawūd, hadith No. 3461.
40. *Al-Umm*, vol. 3, p. 79.
41. Al-Kāsāni, op. cit.
42. Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, p. 141.
43. Holy Qur'an, 2: 275.
44. Holy Qur'an, al-An ām, 119.
45. Ibn Hajar, *Fath al-Bāri*, vol. 4, p. 466.
46. Al-Kāsāni, op. cit.
47. Al-Bayhaqi, *al-Sunan al-Kubrā*, vol. 5, p. 331.
48. *Al-Umm*, vol. 3, p. 75.
49. Ibn Hajar, *Fath al-Bāri*, vol. 4, p. 468.

50. Al-Kāsāni, vol. 5, p. 233.
51. Ibn Juzay, *al-Qawānīn al-Fiqhiyyah*, p. 171.
52. Wahbah al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh*, vol. 4, p. 186.
53. Al-Kāsāni, *Badā'i al-Sanā'i* , vol. 5, p. 233.
54. Al-Kāsāni, *Badā'i al-Sanā'i* , vol. 5, p. 198.
55. Wahbah al-Zuhayli, op. cit.
56. *Al-Umm*, vol. 3, p. 79.
57. Al-Ghazāli, *al-Wasīt*, vol. 3, p. 148.
58. Al-Nawawi, *Rawdah al-Tālibīn*, vol. 3, p. 516.
59. Muhammad Taqi Usmani, *Fiqhi Maqālāt*, vol. 2, p. 259.