



Unlawful Incomes by Islamic banks in Malaysia: An Analysis of Juristic Methods of Purification

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Abstract: Islamic banks as a matter of principle should not engage in any risky business activities in the process of which they can procure unlawful incomes. Nevertheless, bank as a corporate entity dealing with people of diverse cultures and International companies is bound not to be able to stay away from transactions which could avoid being tainted with unlawful and objectionable incomes. As to how Islamic banks in Malaysia should treat such an income, Islamic law contains some juristic guidelines on the basis of which, some operational rules could be deduced. Accordingly, this study is an attempt to articulate juristic mechanisms by which Islamic banks in Malaysia can weed out the unlawful incomes from their asset.

Keywords: *Unlawful income, Purification, Islamic banks, riba-based transaction*

INTRODUCTION

The internal critics of Islamic banking contend that this entity in another gateway for a capitalist banking system as in practice, it receives unlawful incomes in the same way as conventional banks. For instance, it not a full proof against riba-based transactions. Moreover, some of its products are claimed to have been developed based on disputable and controversial contracts from an Islamic vantage point.¹ Furthermore, Islamic banking, which operates under the widely established conventional banking system, has to deal with conventional riba-based activities especially when there are transactions involving foreign currencies. In facilitating such transactions, Islamic banks have to open a nostro account² in a foreign bank to keep their reserves of foreign currency with a fixed interest.³ In addition, the transformation of banks from conventional to an Islamic financial entity is hard come by without secretion of unlawful incomes into its overall revenue. Accordingly, if that is scenario, any such unlawful income generated by the banks cannot be owned by it based on Islamic principle of ownership.⁴ Now the option for the bank to rid itself of such an earning is termed as purification of non-halal income in the Malaysian context. To this end, it has developed its own mechanisms which this paper is going to enumerate for the purpose of evaluating their compliance with the Shari'ah.

ESSENTIAL FEATURES OF AN ISLAMIC BANK

The most distinguishing features of an Islamic bank, which demarcate it from a conventional bank, is to be free of the most deadly forbidden elements of riba, uncertainty (*gharar*) and gambling, and to avoid conducting other unlawful tradings.⁵ First, riba means growth in something or addition in the amount of principal.⁶ In a banking context, riba can be defined as an addition in the principal of loan in which the addition is based on the time value whereby no intervention has been made to cause the growth.⁷ It means that accumulation of wealth is done without effort. Another opinion is that riba applies to any benefit obtained from giving a loan or extension of loan payment or what is now known as interest.⁸

It can be inferred that *riba* is classified on the basis of time value and quantity factors that produce excess in transaction without counter value. Each category of *riba* is strictly banned in Islam. The rationales behind the strict prohibition are elucidated in many literatures. It can, therefore, be inferred that, the main rationale as to why Islam severely prohibits *riba* is mainly due to the basic teaching of Islam which is to develop harmony and equality among all human beings⁹.

However, there is a claim that the practice of *riba* is unavoidable in modern banking system as the economy will not be successful without practicing it. It also creates confusion as to what extent the prohibition is applied whether the prohibition is meant to be imposed on the compounding *riba* only or including the simple *riba*.¹⁰ The statement of the Federal *Shari'ah* Court of Pakistan as quoted by Brian shows that the concept of *riba* covers both usury and interest regardless of whether it is excessive or at a minimum rate. With regard to the claim saying that the practice of *riba* is unavoidable in this current banking system, it is said that the claim is a delusion and a wrong misinterpretation of the reason that all commands given by Allah (SWT) are within the capacity of human beings, thus *riba* is an avoidable practice¹¹

Secondly, *gharar* implies hazard, risk and uncertainty.¹² Many opinions have been provided by Muslim scholars for a better understanding on *gharar*. According to the Hanafi jurists, *gharar* implies something that has consequences which are uncertain or concealed.¹³ Maliki jurists, stated that *gharar* could occur in two situations which relate to the existence of the subject matter and its quantity or weight.¹⁴ Shafi'e jurists view *gharar* as a bargain whereby the subject matter is concealed in which its future result is unknown.¹⁵ Hanbali jurists, however view *gharar* as uncertainty of a subject matter to be delivered whether the subject matter is in existence or non-existence.¹⁶ Thus, based on the views, it can be said that *gharar* occurs mainly due to unspecified subject matter which leads to uncertain result in transaction.

According to Abdullah Alwi, *gharar* is a sale of good which is not in presence. Similarly, it is understood that *gharar* entails unknown result and outcome to the contracting parties.¹⁷ This includes any transaction that is unclear in nature. Siddiqi attributes unclear transactions as those practices which occurred during the Prophet's (SAW) time which have been regarded by him as *gharar*.¹⁸

Kamal et.al observe that some of the transactions that contain *gharar*. According to them, selling goods that the seller is unable to deliver, selling known or unknown goods against an unknown price, selling goods without proper description and selling goods without specifying the prices contain *gharar*. They further add that, making a contract conditional on an unknown event that happens at an unspecified time, selling goods on the basis of false description and selling goods without allowing the buyer to properly examine the goods, all involve element of *gharar*.¹⁹

The concept of *gharar* includes the inexistence of the subject matter, its unavailability to deliver, unknown quantities involved, unrevealed timing of completion, uncertain deliverability and unspecified price which can invalidate Islamic banking transaction. This can be further elucidated for instance in the case of selling birds in the sky and fish in the sea, selling goods with unknown prices and unknown quantity and selling undetermined goods.²⁰

From these examples, *gharar* has been classified into major (*fahish*), i.e. (*gharar* is so significant and with no means of quantifying) and minor (*yasir*) *gharar*, i.e. (*gharar* is insignificant and able to be ignored as it does not lead to dispute) for the reasons that today's life is full of situations where information is deficient and it sometimes is impossible to avoid but tolerable to a certain level.²¹ The rationales behind these *gharar* prohibitions are to avoid injustice, inequality, hatred and devouring of other's wealth which eventually could create disputes among the contracting parties. Siddiqi views the prohibitions are made to prevent unfairness and to realize the *maqafid Shari'ah* (objectives of *Shari'ah*).²² This is also to create satisfaction between both parties and ensure that the income is lawful for consumption.²³

Thirdly, gambling (*maysir*) in the Islamic parlance refers to all forms of activities where procurement of money depends entirely on chance or luck; no effort is incorporated in generating the money for instance through lottery or lucky draw.²⁴ In the *Qur'an* (5: 90)²⁵, the prohibition of gambling is further laid down. Siddiqi in his study on Islamic banking in theory and practices, stresses that people fail to distinguish the difference between gambling in games of chance like betting in a horse race, games of cards, spinning the roulette wheel and gambling in the ordinary business life. According to him, chances in business life involve risks and uncertainties (*gharar*) that one has to take upon in sales, purchase, investment and production. Financial risks involved in gambling can be illustrated in derivatives for example forward, future and option transactions.²⁶ Similarly, Metwally says that the prohibition also covers gambling in forward transactions.²⁷

Muhammad Iqbal points out that gambling mostly occurs in insurance products where the concept is like buying and selling a guarantee for safeguarding customers from bad occurrence in the future.²⁸ He further adds that excessive *gharar* contained in the subject matter will amount to gambling. For al-Qarîwî, gambling brings ill feelings like frustration, disappointment and anger to either party, loss of property without proper exchange, an addiction which could finally cause bankruptcy and non-productive person.²⁹ In other words, the prohibition of gambling is not because of the nature but its resultant effects economically and socially. It directs the saving towards unreal investment, allowing the basis for "liquidity preference" for

gambling and encouraging instability in short term investment. Besides, it creates hatred, enmity and hostility among the society and prevents Muslims from performing prayers and remembering Allah (SWT).³⁰

Finally, other unlawful trading which an Islamic bank should eschew includes trading in alcoholic drinks, selling pork and dead animals and manufacturing statues. Islam stresses on the sanctity and validity of contracts in transactions where sincerity and good intention of getting blessings from Allah (SWT) are inserted, emphasizing on morale principles in conducting business and promoting the concept of risk sharing in generating income.³¹

The adherence to *Shari'ah* principles will help strengthen the brotherhood and cooperation among the contracting parties, develop justice in economy and ignite strength in spiritual and moral values as well as preserve the objectives of *Shari'ah*.³² As mandated by Bank Negara Malaysia (BNM), all Islamic banks operating in Malaysia have to ensure their operations, transactions, activities and products are in accordance with the prescribed Islamic principles as well as the statutory guidelines imposed by Bank Negara Malaysia (BNM) for compliance; otherwise, purification is needed.

THE QUESTION OF UNLAWFUL INCOMES IN ISLAMIC BANKS IN MALAYSIA

Ideally, as Islamic banks normally do not involve in clear cases of unlawful business ventures which involves universally agreed forbidden acts as we referred. Nevertheless, unlawful incomes still mistakenly procures through some impermissible means like

1. invalidity of product itself,
For instance, the invalidity of product arises due to the existence of *Shari'ah* non-compliant contract in the structure of products either by invalid contract combination or inappropriate selection of contract in developing and supporting new products.³³ Syed Hussein in his study on combination of contracts in *Shari'ah* argues that it is forbidden to combine two contracts in one deal.³⁴
2. unfulfillment specific pillars of contract,
3. Insertion of alien condition in a contract,
4. Interest-based activities
5. Wrong execution of contracts
6. Unlawful business operations and unlawful documentation in supporting a particular product.³⁵

This is in accordance to several *Ādiths* as narrated by MĒlik, AĪmad and Al-AĪbahĒnĒ.³⁶ Combination of contracts refers to the agreement between parties to put together two or more contracts with different features and legal consequences to become a new transaction or contract.

The second element that causes invalid product is inappropriate selection of types of contract to govern or support the product.³⁷ Engku Rabiah Adawiyah concludes that many forms of contractual agreements that exist in the current practice of Islamic banks are debatable and controversial for example, *bay' NĪnah*, *tawarruq* and *bay' al-wafa* as they contain *Īiyal* (legal tricks to legalize *riba*). If the products use such contracts it will result invalidity.³⁸

Moreover, another avenue leading to the occurrence of unlawful income is due to the defects in in the pillars of contract, such as the status of the subject matter (*maĀlal al-a'qad* or *maulu' al-NĀqd*) in terms of its permissibility, availability and deliverability.³⁹ According to Ahmad Hidayat, *gharar* will occur in the subject matter of a contract if one of these three elements does not exist. He further explains that a subject matter must be free from lack of knowledge (*jaĀlala*) in its specification; character and quantum; free from inability to deliver and also the non-existent element to be *Shari'ah*-compliant.⁴⁰

As for the main pillar considered important in the discussion, the subject matter refers to an asset for which the contract is concluded. Without an asset as a subject matter, a contract is considered null and void. The asset in a subject matter can be either in tangible form such as goods although not yet in existence, wealth and money or intangible like works, rights and usufruct. Whether the asset is tangible or intangible, the validity of conditions of the assets as a subject matter in a contract needs to be observed for *Shari'ah* compliance. In other words, the subject matter should be permissible and legal, specified or determined, deliverable and existent.⁴¹

In relation to this, Mohd Daud asserts that subject matter includes both the asset and price of which have to be lawful, existent, deliverable and precisely determined. He further discusses that aspects inherent in the lawfulness are the condition that the asset must be legally owned, permissible to trade, which means the object must not be prohibited by Islam nor against the norm and morality and also inherent is the condition that the purpose (*sabab*) of entering the contract must not violate the concept of justice and fairness.⁴² In terms of existence of subject matter, Islamic law requires the asset as a subject matter to be present in the time of contract.⁴³ In addition, the asset must have capability to be handed over. According to al-ShaybĒnĒ as cited in Ahmad Hidayat's book, the existence of the subject matter must be associated with the ability to deliver otherwise it still be considered non-existent. Ahmad Hidayat added, in terms of specification, Islamic law requires the asset to be well specified to avoid disputes however this kind of disputes could be avoided if

the buyer is given the right to choose what object he wants to buy.⁴⁴ This is based on the Hanafi's and Maliki's view that a buyer must be given the right to specify (*khiyar al-ta'ayin*) the items he wants to buy.

Additionally, at times invalid conditions are added to the initial contract which are against the nature or concept of products. It means that extra conditions which are not part of the contract are inserted in a product for the contracting parties' security that go against the concept of the product and the rules and regulations of *Shari'ah*. An alien conditions inserted into a contract governing a certain product could generate NHI.⁴⁵ For instance, capital guarantee is inserted in *mudharabah* product. The insertion could be considered *Shari'ah* non-compliant as it violates the nature of *mudharabah*. A majority of Muslim scholars advocate that there is no capital guarantee in *mudharabah* due to the status of the *mudharib* (entrepreneur) in *mudharabah* is like a trustee (*yad am'nah*) who will not bear any financial loss unless if it is caused by his negligence and ignorance.⁴⁶ Any condition that conflicts the *muqatal'at al-Naqd* (requirement of contract) causes the contract null and void.⁴⁷ This condition leads to excessive *gharar* because the *mudharib* is burdened with two kinds of losses which is unfair. First, loss of effort and the second is loss of money as the *mudharib* has to compensate the capital of the provider.⁴⁸

However a study shows that many Islamic products fail to comply with the said basic principle. The study on *mudharib's* guarantee with reference to the Small Medium Enterprise (SME) found that Islamic banks in particular require entrepreneurs of SME to secure the capital invested in *mudharabah*. This is to secure the capital invested given that among the factors contributing to the failure of SMEs in successfully conducting their businesses are merely due to negligence and corruption in the capital invested. This study further elucidates that for any *mudharabah* to take place, there will be always mutual risk, meaning that, both the capital provider and entrepreneur should bear the risk of losses; loss of capital for the capital provider and loss of effort and time for the entrepreneur. Thus capital guarantee in *mudharabah* does not show such mutual risk and this inadvertently is against the principles of *mudharabah*.⁴⁹

Apart from *mudharabah*, another example is the imposition of guarantee in BBA⁵⁰ products to secure the obligation of debt and to ensure that customers buy the property after the property has been purchased by the financier through the Property Purchase Agreement (PPA).⁵¹ As for AITAB⁵² and *ij'arah*, imposing guarantee in the case of damage and securing default in payment results in invalidity. The profits gained are thus impermissible as this is against the concept of original *ij'arah*.⁵³

Another important issue that could lead to *Shari'ah* non-compliant products is when there is an insertion of late payment charges.⁵⁴ A majority of Muslim scholars agree that charge on late payment is impermissible because it resembles *riba* where the profits are simply obtained through time value basis. In current practice of Islamic banking, this condition is inserted into the products like *murabahah*⁵⁵, *istisna'*⁵⁶, BBA, *ijarah*⁵⁷ and AITAB to ensure the commitment of paying instalments. According to Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), the imposition of *gharamah*⁵⁸ (penalty) on the reluctant customers to compensate loss of income or loss due to change of value of the debt currency is not applicable. However AAOIFI observes that it is applicable to solvent debtors and guarantors as to ensure their commitment to payment with a condition that a clause to give some of the charged amount to charity is made under the supervision of *Shari'ah* committee of the bank.⁵⁹ This is called *ta'widh*⁶⁰ (compensation). Although both are applicable, only *ta'widh* could be considered as income because it is considered an actual loss while *gharamah* must be channeled to charity.⁶¹ This is because *ta'widh* is stipulated to cover the costs that are related to the late payment while *gharamah* is merely to prevent negligence and to assure the creditors or banks of timely payment and not for income.

Besides, under the pressure to stay competitive, the banks may be tempted to engage in *Shari'ah* non-compliant business activities which would be a clear contradiction of its aim as "a banking business whose aims and operations do not involve any element which is not approved by Islam".⁶² *Shari'ah* Governance Framework for Islamic Finance Institutions issued by BNM clearly underlines the responsibility of Islamic banks to ensure that all their products and services, business dealings, business units, support unit and general operation activities meet the requirements of *Shari'ah*.⁶³ All banking business operations should be in accordance with Islamic precepts and it is ranging from product structuring, documentation and contract execution until the business practice through dress codes and image.⁶⁴

However there is a claim that some Islamic banks do not heed on *Shari'ah* compliance in their business operation. Zulkifli mentions that some practitioners and bankers do not realize the conflict between *Shari'ah* and legal standing, especially on letter of offer that involves many exchange contracts (*Ūnuq'Ed muŪwawad'at*).⁶⁵ This claim is supported by Ūsm'En' who observes the lack of concern is due to the deficiency of clear perception of relevant rules and principles of *Shari'ah*. He added that this situation, if remains will lead to weak business operations in Islamic banking as it may lead to further confusion between Islamic banking and conventional banking system that is based on interest. Worse, it can create a *Shari'ah* non-compliant operation that leads to NHI.⁶⁶

A report from *AmTak'ful* seems to support the opinion of Ūsm'En' where the lack of concern on *Shari'ah* compliance is believed to be result of deficient knowledge in Islamic banking operations, thereby

resulting in unclear perception as being claimed. According to the report, *Shari'ah* non-compliant banking business operation has been observed in situations like human errors in executing transaction⁶⁷, failures to comply with policies and procedures as well as lack of basic *Shari'ah* knowledge and awareness among the staffs, officers and managers of business divisions.⁶⁸ The report also believes that the situation of *Shari'ah* non-compliance will cause mistakes in handling Islamic business operations.

Another study observes that the lack of concern on *Shari'ah* compliance is due to the low level of *Shari'ah* appetite, ethics, behaviour and attitude among the staffs, officers and managers that tend to operate Islamic banking business in bad manner. All of these errors, whether the occurrence is intentional or unintentional, may affect the profit generated or at least bring negative and bad implication to the image of Islamic banks. It is suggested that to have a consistent *Shari'ah* compliance in operations of Islamic banking the recruitment of staffs and officers has to be done in serious manner with emphasis on *Shari'ah* appetite, ethics, good behaviour and attitude to develop *Shari'ah* strength from the Islamic bank's internal dimension.⁶⁹

As an option to reduce the issue of *Shari'ah* non-compliance in Islamic banking operations whose sources vary, Daud Vicary Abdullah⁷⁰, who was the first Managing Director of Hong Leong Islamic Bank, opines that a review on the policies and procedures of Islamic banking business activities, products and services as well as the accounting treatments are necessary. Other than that, staff recruitment in particular has to be done with emphasis on *Shari'ah* knowledge, especially knowledge related to Islamic business transactions. The recruitment process should also consider the Islamic manner of the person.⁷¹

It is, therefore, necessary to ensure that the operations of Islamic banks are carried out properly according to *Shari'ah* principles, as stated in Islamic Banking Act 1983. It is also of paramount importance to ensure that the operation is in accordance with the objectives and philosophies or the concepts prescribed by Islamic banks to avoid *Shari'ah* non-compliance which may affect the profits. With this end in view, a body called *Shari'ah* Advisory Council (SAC) of BNM has been established under section 51 of the Central Bank of Malaysia Act 2009, to issue rulings on financial matters and advise banks on *Shari'ah* issues relating to Islamic banking operations.⁷²

To top it all, Islamic bank may also be involved in interest-based activities when dealing with conventional banks. This is looking at the fact that most of the economic systems in Muslim countries are conventional, which totally rest upon interest. This situation somehow forces Islamic banks to deal with the conventional system through depositing their money and borrowing from conventional banks to operate businesses.

It is a basic principle of Islam that whatever aids the unlawful is itself unlawful. For this reason, Prophet Muhammad (SAW) had cursed a person who writes the document of interest, a person who witnesses it as well as a person who consumes the interest.⁷³ Islam however, with its deep concern on justice, does not confine the punishment on the lender alone, but also on the writer as well as the witness on the interest agreement.

Nevertheless in certain situations demonstrating a real need in dealing with conventional activities, for example in the case of borrowing money on interest due to *dharurah* (pressing need), Islam allows its followers to do so. Similarly, if an individual has no choice other than conventional banks to keep his money and keeping it from harm, the dealing is permissible based on the fact that Islam encourages protection of property.⁷⁴ In addition, even Islamic banks nowadays have no other choice to maintain survival since they have to deal with interest-based banking business to worth in the complex dual economic system. This refers to the legal maxim which says necessity dictates exceptions. In line with this, al-Qarīfī outlines some requirements to meet the pressing needs which are as follows:⁷⁵

1. The need should be real as if life will not be possible without meeting it, for example food, clothes, money and medical treatment, to name a few.
2. There should be some limitations to the exact amount needed. For example, if ten ringgit is enough, borrowing eleven ringgit is not allowed.
3. If one borrows money on interest, he should find ways to escape from this predicament. If there is no other way, he can continue borrowing but with serious feeling that he does not like the action.
4. He must continue to hate the action and regret doing it until Allah (SWT) opens the door for him to escape.

These principles are actually applicable to all situations of pressing needs and not merely confined to dealing with interest-based activities. However, a person with pressing needs cannot consume the interest since it is a sin and it requires removal. From the discussion, it can be categorised that all the sources of NHI in Islamic banks could be the result of either from internal or external factors, which are related to the knowledge of the bankers and the situation of pressing needs.

Based on the discussion, it implies that Islamic banking will generate a portion of NHI through the invalidity of contracts that govern certain products, contracts that do not fulfil the pillars and the conditions, unlawful deposits as well as unlawful business banking operations and the interest received from

conventional banks. The development of a new product which involves the combination of more than one contract also creates NHI income if the rules and regulations for combining the contracts are not fulfilled. Contracting parties who are engaged in a contract should observe the pillars and conditions stipulated on each pillar for validity. Some of the contracts applied in Islamic banking are debatable and require clear Islamic rulings to determine the status of legality. Only after confirming the status, the existence of NHI can be identified. The identification of such income is very crucial for the purification process.

JURISTIC METHODS PURIFYING THE UNLAWFUL INCOMES

Classical Muslim jurists have made efforts in clarifying the purification of NHI in their respective works. Most of their discussions actually do not directly focus on the purification of NHI in Islamic banking but mostly refer to impure money or properties that are obtained through means not acceptable by *Shari'ah* such as stealing, *hirabah* and *ghasb*. Likewise, the discussion generally emphasizes on individuals' responsibility of purifying the non-halal money or property rather than the responsibility of organizations, institutions, companies, corporations and entities. However, previous discussions have shed light to the need of NHI purification by all Islamic banks in Malaysia.

Building on the above, contemporary Muslim scholars have discussed purification of non-halal income from modern sources. According to them one has to purify such income in order to avoid the sins of keeping the unlawful money and preventing them from utilising it. Al-Zarqa says that revenue from lottery, trading of pork, alcohol and other prohibited materials should be accumulated in a specific account, to set apart from permissible revenues, and then it should be handed over to the poor and needy or channeled to charity for the benefits of Muslims.⁷⁶ Meanwhile, al-Zu'ayli⁷⁷ opines that the absolute method to free oneself from engaging in non-halal property is by channeling the property to the poor or giving charity for the benefits of Muslims.⁷⁷

According to both traditional and contemporary Muslim Jurists, all non-halal properties, profits and money must be purified and could not be kept, utilised and consumed for personal benefit.⁷⁸ They are required to be disposed of as to avoid the possessor from committing a sin. In general, money gained through illegal means should be returned to the real owner. In case the real owner has died, the heirs have the right to own the said property or money. If the heirs are unknown, the property has to be given to charity especially to the needy and poor. In situations where the real owner is unknown, the property is required to be channeled to charity for public interest.⁷⁹ This has been practiced by social organizations especially Islamic banks to purify their income.

Al-Ghazzali⁸⁰ in his discussion on the purification of non-halal money asserts that the impure money or property obtained, for example, through stealing should be returned to the real owner. This is in the case if the real owner is still alive and known. In the event that the real owner has passed away, the property or money is required to be returned to the heirs and if the heirs are unknown, the NHI holder has to wait for their presence. While waiting for the heirs, any kind of increment or profit made from the stolen property should be kept and accumulated for the heirs. If they still do not claim it, then the property should be disposed of to charity. He further explains that, if a property is obtained illegally and does not belong to a specific person but rather it belongs to Muslims in general.⁸⁰

Similar to al-Ghazzali⁸¹, Ibn Taymiyah has outlined Imam Ahmad's and Hanafi's opinions which state that the impure property must be donated to the poor and needy whenever it is hard to find the real owner.⁸¹ This is said to be the consensus among the four *madhahib*. Other than the poor and needy, the beneficiaries should include *zakah* recipients, persons who help others in performing *haj* (pilgrimage) and persons who strive in the cause of Allah (SWT). The property can also be handed over to suitable authorities that have the ability to manage it with fairness and justice.

In relation to the donation as discussed by Ibn Taymiyah, al-Mawardi⁸² in *al-Mawardi al-Kabir*, says that donation should be given first to immediate relatives. It is also deemed desirable or considered recommendable to donate to non-Muslim as long as they are poor, orphaned or prisoner of war.⁸² This is based on the Quranic injunction (*Qur'an*, 76: 8)⁸³. Al-Mawardi⁸⁴ says that non-halal property or money could be disposed to charitable bodies like *bayt al-mal* if the owner is unknown.⁸⁴

Al-Bahuti⁸⁵, discusses received property (*al-maqbûl*) via invalid contract (void). He opines that the property received is invalid. According to him, the treatment of the non-halal property is to return it to the real owner although a contract has been made with the permission of the contracting parties.⁸⁵ This is because the property is still in the ownership of the real owner. Contemporary Muslim scholars have also discussed purification of non-halal income or money and its treatments. According to them, one has to purify such income in order to avoid the sins of keeping the unlawful money and preventing them from utilising it. In line with this, al-Zarqa⁸⁶ says that revenue from lottery, trading of pork, alcohol and other prohibited materials should be accumulated in a specific account, to set apart from permissible revenues, and then it should be handed over to the poor and needy or channeled to charity for the benefits of Muslims.⁸⁶

Wahbi SulaymĒn al-AlbĒnĒ opposes the opinion of al-ZarqĒ regarding the permissibility of dealing with *riba*-based bank. According to him, the depositor should immediately withdraw the money from the bank and repent to Allah (SWT). The interests obtained from the deposited money should be taken out for the sake of the poor and needy, not to leave it for the benefit of the banks as the poor is more deserving. The depositor is not entitled to the interest because it is unlawful thus, no right for personal consumption is bestowed upon him.⁸⁷

Meanwhile, al-ZuĒylĒ opines that the absolute method to free oneself from engaging in non-halal property is by channeling the property to the poor or giving charity for the benefits of Muslims. However, according to him, no reward could be expected from such action and the charity channeled should not be used for building mosques. The use of non-halal property for building mosques and performing pilgrimage however is a disputed matter among Muslim scholars.⁸⁸

In addition, al-ZarqĒ further says that all interests paid by conventional banks are unlawful but the depositor must take them and hand them over to the poor and needy. This has been practised by social organizations especially Islamic banks.⁸⁹ Another Muslim scholar, JĒd al-Ēaq ĒAIĒ JĒd al-Ēaq discusses the purification of profits generated from *ribawi* transactions. The profits should be purified by channeling it to the poor or charity with the intention to build mosques, hospitals, roads and schools for the benefit of Muslims. He adds that, leaving the interest with the bank is forbidden for fear that the property or profit may be utilised by the banks in activities that do not comply with Islamic rules and regulations, which could harm the superiority and the dignity of the religion as well. According to him, the majority of Muslim jurists are of the opinion that unlawful properties could not be utilised and thus should be given to the original owner if he is known and alive. However, if he has passed away, then the *mal* is for his heirs. If the heirs are absent, waiting for their presence and giving them all the profits accrued from the *mal* is most required. In a situation where the NHI is not owned by a person, rather it is owned by many people, the process of identifying them could lead to difficulty. As such it should be channeled for Muslims' benefits.⁹⁰

According to GhanĒyim, illegal property possessed by an individual requires purification by returning it to the real owner or giving compensation in case the property is damaged. He adds that regarding income which is mixed with *ribawi* transactions, the identified portion of non-*halal* money or property should be purified through donation to suitable authorities for the benefit of all Muslims.⁹¹

CONCLUSION

Islamic banking has a possibility to generate a portion of non-halal income through invalidity of contracts that govern certain products, contracts that do not fulfil the pillars and the conditions, unlawful business banking operations and the interest received from conventional banks. The development of a new product which involves the combination of more than one contract also creates non-halal income if the rules and regulations for combining the contracts are not fulfilled. Contracting parties who are engaged in a contract should observe the pillars and conditions stipulated on each pillar for validity. Some of the contracts applied in Islamic banking are debatable and require clear Islamic rulings to determine the status of legality. Only after confirming the status, the existence of NHI can be identified. The identification of such income is very crucial for the of purification process. However, it depends on the seriousness of the Islamic banks undertaking the process of purging non-*halal* income and upholding the principles of corporate good governance in their operational procedures.

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⁵ Saad Abdul Sattar al-Harran, "Time for Long-Term Islamic Financing", in *Leading Issues in Islamic Banking and Finance*, ed. Saad Abdul Sattar al-Harran (Petaling Jaya: Pelanduk Publication (M) Sdn. Bhd, 1995), 25.

⁶ Ibn Qudamah, *Al-mughni*, ed. Khitab, Sayyid and Øadiq (Al-Qahirah: Dar al-Hadith, 2004), 385.

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⁹ Ahmad Nabil Saleh, (1992) *Unlawful Gain and legitimate Profit in Islamic Law: riba, gharar and Islamic banking* (London: Graham & Trotman, 1992). Sudin Haron, *Islamic Banking Rules and Regulations* (Selangor: Pelanduk Publication (M) Sdn. Bhd., 1997). Mohammad Nejatullah Siddiqi, *Riba, Bank Interest and the Rationale of Its Prohibitions* (Jeddah: Islamic Research and Training Institute, 2004).

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¹⁵ Al-Nawawi, Abu Zakariya Ya'ya, *al-MajmuÑ shar' al-muhadhdhab* (Madinah al-Munawwarah: Maktabat al-Salafiyah, 1925).

¹⁶ Mu'ammad ibn Abi Bakr Ibn Qayyim, *Zad al-mÑad hadyu khayr al-Nibad* (Bayrut: Dar al-Fikr. 2003)

¹⁷ Hasan, *Sales*, 66.

¹⁸ Siddiqi, *Riba, Bank Interest and the Rationale of Its Prohibitions* (Jeddah: Islamic Research and Training Institute, 2004)

¹⁹ Kamal Khir et al., *Islamic Banking: A Practical Perspective* (Petaling Jaya: Pearson Malaysia Sdn. Bhd., 2008).

²⁰ Zaharuddin Abdul Rahman, *Contracts & The Products of Islamic Banking* (Kuala Lumpur: CERT Publications Sdn Bhd., 2010).

²¹ Siddiqi, *Riba, Bank Interest and the Rationale of Its Prohibitions* (Jeddah: Islamic Research and Training Institute, 2004). Kamal Khir et al., *Islamic Banking*, 25.

²² Siddiqi, *Riba*, 50

²³ Abdul Rahman, *Contracts*, 34

²⁴ Siddiqi, *Riba*, 58

²⁵ Surah al-Maidah: 90

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- ³⁰ Ahmad Hidayat Buang, *Studies in the Islamic Law of Contracts: The Prohibition of Gharar* (Kuala Lumpur: International Law Book Service, 2000): 38 ; Metwally, *Economic Consequence*, 944-45.
- ³¹ Al-Qardawi, *The Lawful and The Prohibited*, 283-86; Mohd Masum Billah, *Islamic Law of Trade and Finance: Some Contemporary Issues* (Kuala Lumpur: IIUM Press, 2001); Wahbah al-Zu'aylî, *Al-fiqh al-Islâmî wa adillatuh* (Bayrut: Dar al-Fikr, 2003).
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- ³⁵ Muhammad Taqi Usmani, *An Introduction to Islamic Finance* (New York: Kluwer Law International, 2002); Zaharuddin Abdul Rahman, Wang, *Anda dan Islam: Halal dan Haram dalam Kewangan dan Perbankan* (Kuala Lumpur: Truewealth Sdn. Bhd., 2008).
- ³⁶ There are four *hadiths* that seem to reject the combination of contracts. The first *hadith*, narrated by Malik, disapproves combining a loan contract and a sale contract. The second *hadith*, reported by Ahmad Ibn Hanbal, disapproves two sales in one contract (*bay'natayn fî bay'nah*), and similar to this is the *hadith* that prohibits two contracts in one deal (*safqatayn fî safqah*). *Hadith* reported by Al-Asbahani disapproves a sale that is circumscribed with a condition (*bay' wa al-sharî*).
- ³⁷ Engku Rabiah Adawiyah Engku Ali, "Bay' Inah and Tawarruq: Mechanisms and Solutions", in *Essential Readings in Islamic Finance*, ed. Mohd Daud Bakar and Engku Rabiah Adawiyah Engku Ali (Kuala Lumpur: CERT Publications Sdn Bhd, 2008), 165; Abdulazeem Abozaid, "Contemporary Islamic Financing Modes Between Contract Technicalities and Shariah Objectives", *Islamic Economic Studies* 17, no. 2 (2010): 55-75, accessed December 15, 2016, <http://www.irti.org>.
- ³⁸ Engku Ali, *Bay Inah and Tawarruq*, 165-168.
- ³⁹ Siddiq Mohammad al-Ameen al-Dhareer, *Al Gharar in Contracts and Its Effect on Contemporary Transaction* (Saudi Arabia: Islamic Research and Training Institute and Islamic Development Bank, 1997); Mirza Vejzagic, "Future Contracts: Islamic Contract Law Perspectives", Paper presented at the 5th Islamic Banking, Accounting and Finance Conference 2012 (iBAF 2012), Faculty of Economics and Muamalat (FEM), Universiti Sains Islam Malaysia, October 2-3, 2012; Muhammad Tahir Mansuri, *Islamic Law of Contracts and Business Transactions* (New Delhi: Adam Publishers and Distributors, 2007).
- ⁴⁰ Buang, *Contracts*, 113-133.
- ⁴¹ Usmani, *Introduction to Islamic Finance*; Al-Zuhayli, *Al-fiqh al-Islami*; Amirul Afif Muhamat, Mohamad Nizam Jaafar and Norfaridah Ali Azizan, "An Empirical Study on Banks' Clients' Sensitivity Towards the Adoption of Arabic Terminology amongst Islamic Banks", *International Journal of Islamic and Middle Eastern Finance and Management* 4, no. 4 (2011): 343-354.
- ⁴² Bakar, *Contracts in Islamic Commercial Law*, 51.
- ⁴³ Abu Bakr Mas'ud ibn Ahmad al-Kasani, *Badai' al-sanai' fî tartib al-sharai'*, (al-Qahirah: Dar al-Hadith, 2005), 138-39.
- ⁴⁴ Buang, *Contracts*, 116.
- ⁴⁵ Asyaf Wajdi et al., "A Framework for Islamic Financial Institution to Deal with Shariah Non-compliant Transaction", *ISRA Research Paper*, 42 (2012): 30.
- ⁴⁶ Ibn Qudamah, al-Mughni, 5; Ibn Rushd, Abu al-Walîd Mu'ammad ibn Aîmad, *Bidayah al-mujtahid wa nihayah al-muqta'id* (Bayrut: Dar al-Kutub al-Îlmiyah, 2004), 22; Al-Mawardi, 2003: 332).
- ⁴⁷ Ibn Taymiyah, Taqi al-Din Abu al-ÎAbbas ibn ÎAbd al-Salam, *al-Halal wa al-haram wa ba'û qawaidihima fi al-muamalat al-maliyah* (Bayrut: Maktabah al-matbu'at al-Islamiyah, 1995), 256
- ⁴⁸ Ibn Rushd, 2004, 23
- ⁴⁹ Ashraf Md. Hashim and Lokmanul Hakim Hussain, Jaminan Mudharib di dalam Kontrak Mudharabah Ekuiti Sebagai Asas Pembiayaan: Peluang dan Cabaran, *ISRA* (2011): 18, accessed December 7, 2016 <http://www.ifikr.isra.my>.
- ⁵⁰ BBA is referred to as the sale and purchase transaction for the financing of an asset on a deferred and installment basis with a preagreed payment period. Refers to Securities commission Resolution, 2007.
- ⁵¹ Saiful Azhar Rosly, *Critical Issues on Islamic Banking and Financial Markets (Islamic Economics, Banking and Finance, Investments, Takaful and Financial Planning)* (Indiana: Author House, 2005).
- ⁵² AITAB is a financing products that enable customers to lease assets from Islamic financial institutions with an option to acquire the leased assets at the end of the lease tenure. Refer to Bank Negara Malaysia Resolutions, 2010.

- ⁵³ AAOIFI, *Shari'a Standards for Islamic Financial Institutions* (Bahrain: Accounting and Auditing Organization for Islamic Financial Institutions, 2010).
- ⁵⁴ AAOIFI, *Shariah standard*; BNM, *Shariah Governance Framework for Islamic Finance Institutions* (Kuala Lumpur: Bank Negara Malaysia, 2010), accessed December 7, 2016 <http://www.bnm.gov.my>.
- ⁵⁵ Murabahah refers to a sale and purchase of an asset where the acquisition cost and the mark-up are disclosed to the purchaser. Refer to Bank Negara Malaysia Resolutions, 2010.
- ⁵⁶ Istisna' is a contract of sale and purchase involving manufacturing, producing or constructing a particular asset according to certain terms and specifications as agreed between the seller, the manufacturer/developer and the customer. Refer to Bank Negara Malaysia Resolutions, 2010.
- ⁵⁷ Ijarah refers to a lease or commission contract that involves an exchange of usufruct or benefits of an asset or a service for rent or commission for an agreed period. Refer to Bank Negara Malaysia Resolutions, 2010.
- ⁵⁸ It is a compensation on the actual loss incurred due to default in payment while the latter is a penalty charged on customers due to delay in making payment irrespective of occurrence of actual loss. Refer to AAOIFI (2010).
- ⁵⁹ AAOIFI, *Shariah Standard*.
- ⁶⁰ It is a compensation on the actual loss incurred due to default in payment.
- ⁶¹ BNM, *Shariah Governance Framework*.
- ⁶² Islamic Banking Act 1983
- ⁶³ BNM, *Shariah Governance Framework*.
- ⁶⁴ Wajdi et al., *Framework for Islamic Financial Institutions*
- ⁶⁵ Zulkifli Hasan, "A Shariah Perspective on the "Letter of Offer" as Practiced by the Islamic Financial Institutions: A Comparative Study with the Malaysian Law of Contract", *Malaysian Journal of Shari'ah and Law* 1, no.1: 56-7.
- ⁶⁶ Usmani, *Introduction to Islamic Finance*, 9-10.
- ⁶⁷ Error execution of transaction such as human error in making disbursement to customers or commence collecting payments from customers is being made before the contracts are concluded. If the *Naqad* is concluded later than the date of disbursement or the contract of agreement is advertently never been perfected the contract is considered not concluded hence any profit derived from that contract is subject to purification until the date of agreement is perfected.
- ⁶⁸ AmTakaful, 2012.
- ⁶⁹ BMMB, *Indahnya Perbankan Islam: Proses Pematuhan Syariah dalam Perbankan Islam* (Kuala Lumpur: Bank Muamalat Malaysia Berhad. 2010): 5, accessed December 7, 2016 <http://www.muamalat.com.my>.
- ⁷⁰ Daud Vicary Abdullah is the Global Leader of Deloitte's Islamic Finance Group. He has been in the Finance and Consulting Industry for more than 35 years, with experience in Asia, Europe, Latin America, and the Middle East. Refer to <http://www.deloitte.com>.
- ⁷¹ BMMB, *Indahnya Perbankan Islam*, 5.
- ⁷² BNM, *Shariah Governance Framework*.
- ⁷³ Al-Qardawi, *The Lawful and the Prohibited in Islam* (London: Al-Birr Foundation, 2003).
- ⁷⁴ Al-Baz, ĤAbbas AĤmad bin MuĤammad, *Ahkam al-mal al-haram wa dawabit al-intifa' wa al-tasarruf bihi fĤ al-fiqh al-Islami* (Urdun: Dar al-NafĤis, 1999).
- ⁷⁵ Al-Qardawi, *The Lawful and Prohibited in Islam*.
- ⁷⁶ Al-Zarqa, Mustafa, *Fatawa Mustafa al-ZarqaĤ* (Dimashq: Dar al-Qalam, 2004).
- ⁷⁷ Wahbah, *Al-fiqh al-Islami wa adillatuh*, 85.
- ⁷⁸ Al-Bahuti, Mansur ibn Yunus, *Kashaf al-qina' an matn al-iqna'* (Bayrut: Dsr al-Kutub al-Ĥilmiyah, 1997), 253-257; Ghanayim, Muhammad Nabil, *Qadaya muĤasirah dirasah fihiyyah ijma'iyyah* (Al-Qahirah: Dar al-Hidayah. 2003), 146-147.
- ⁷⁹ Wahbah, *al-Fiqh al-Islami wa adillatuh*, 80-102.
- ⁸⁰ Al-Ghazzali, Muhammad bin Muhammad, *Ihya' Ťulum al-din* (Bayrut: Dar al- Ma'rifah, n.d).
- ⁸¹ Ibn Taymiyah, Taqi al-Din Abu al-ĤAbbas ibn ĤAbd al-Salam, *al-ĤalĤal wa al-ĤarĤam wa baĤĤu qawĤĤidihimĤ fi al-muĤamĤlat al-mĤliyah* (BayrĤt: Maktabah al-mĤlibĤĤat al-IslĤmiyah, 1995).
- ⁸² Al-MĤwardĤ, AbĤ al-Ĥasan ĤAIĤ ibn MuĤammad ibn ĤabĤĤb, *Al-ĤĤwĤ al-kabĤĤr* (BayrĤt: DĤr al-Fikr, 1994).
- ⁸³ *Surah al-Insan*: 8. Allah (SWT) says, "And they give food in spite of love for it to the needy, the orphan and the captive."
- ⁸⁴ Al-MĤwardĤ, AbĤ al-Ĥasan ĤAIĤ ibn MuĤammad ibn ĤabĤĤb, *al-AĤĤm al-sulĤĤniyah* (Al-QĤhirah: DĤr al-HadĤth, 2006).
- ⁸⁵ Al-Bahuti, *Kashaf al-qina'*, 253-257.
- ⁸⁶ al-ZarqĤ, Fatawa Mustafa al-Zarqa.
- ⁸⁷ Ibid.
- ⁸⁸ Wahbah, *Al-fiqh al-IslĤmĤ wa adillatuh*, 80-102.
- ⁸⁹ Al-ZarqĤ, *FatĤwĤ MuĤĤafĤ al-ZarqĤĤ*, 123-124.
- ⁹⁰ Al-Ĥaq, JĤd al-Ĥaq ĤAIĤ JĤd, *BulĤĤth wa fatĤwĤ IslĤmiyyah fĤ qalĤĤyĤ muĤĤĤirah* (al-QĤhirah: DĤr al-ĤadĤth, 2005).
- ⁹¹ GhanĤyim, *QalĤĤyĤ muĤĤĤirah*, 146-147.