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Absolution (Ibra') from Discretion to Regulations: The Malaysian Experience

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Abstract:

The paper is a critical examination of the recent judicial and regulatory developments in Malaysia which saw the transition of absolution (ibra') from a discretionary power of the creditor to a mandatory rebate governed by the Central Bank's regulations. It compares and contrasts the Malaysian Regulations on ibra' with the resolutions issued by the Council of the Islamic Fiqh Academy and offers a critical evaluation of juristic opinions on ibra' and da' wata'jjal. The jurisprudential methods of analogy (qiyas) and juristic preference (istihsan) are employed to examine the application of ibra' to long-term home financing contracts. The paper argues that claiming full credit price upon termination of contract due to early settlement or default is not fair to the customers of Islamic banks. The paper concludes that a mandatory ibra' provided by the regulatory authorities such as central banks is different from the controversial conditional ibra' stipulated by the contracting parties.

Keywords: Deferred sale, Regulations, Ibra, ḍaʿ wa taʿajjal, Analogy, Istiḥsan

Introduction:

Absolution (ibra') is one of the gratuitous contracts which a creditor at its own discretion may grant to a debtor. The provision of ibra' on the condition of early settlement is a controversial issue. However, the classical debate on ibra' focuses on ordinary sale and loan contracts. In contemporary house financing contract an Islamic bank's insistence on the discretionary nature of ibra' and its refusal to grant ibra' to defaulting customers or those who decide to settle their debts earlier is not equitable. Regulatory authorities may make it mandatory for Islamic banks to grant ibra' to their customers in certain specified situations. The objective of this paper is to critically examine the provision of ibra' and its application to contemporary banking and financing contracts. The findings of this paper will also be important for the Islamic banking and finance industry where the problems arising out of deferred sale contracts call for a comprehensive investigation. The paper employs the jurisprudential methods of juristic preference (istihsan) and public interest (maslahah al-mursalah) to argue for the mandatory ibra'.

This paper begins with a discussion of conventional mortgage and sale-based house financing contract with a deferred fixed price. After referring to leading cases decided by the Malaysian courts, the paper discusses the resolutions of the Shari'ah Advisory Committee (SAC) and the subsequent issuance of regulations by the Malaysian Central Bank (Bank Negara Malaysia) on ibra'. The Resolution of the Council of the Islamic Fiqh Academy is also referred to. The paper next discusses the concept of ibra' and examines its gratuitous and discretionary nature. It discusses issues related to the provision of ibra' on the condition of early settlement and compares it with the concept of ḍaʿ wa taʿajjal. Various arguments for and against the concept of ḍaʿ wa taʿajjal are discussed next. The paper concludes that regulatory authorities may provide for mandatory ibra' in case of early settlement or upon default by a customer.

Sale for a Deferred Fixed Price:

In a conventional mortgage the bank provides a loan to a customer who intends to purchase a house. The house subsequently will be mortgaged with the bank. The customer will have to return the loan and the interest in a certain known period by instalments. If the customer wants to pay the

debt earlier he/she is contractually entitled for a rebate and the bank has no right and no reason to charge the borrower for the original loan period. In the event of a default before the end of the tenure, the bank can possess the house and auction it in the open market. In normal cases the bank would have recovered its principal amount plus the accrued interest from the date the loan is released until default happens. The bank will not make a claim against the customer for the payment of the full interest for the original un-expired period of financing. In other words, interest is not charged upfront on the unexpired tenure of the contract. The contract between the bank and the customer is a typical loan agreement where interest is charged for the actual period of the loan.

In contrast, a sale for a deferred price (Bay' Bi-thaman Ajil, hereinafter referred to as BBA) is an Islamic home-financing alternative to a conventional mortgage. In a BBA mode of financing an Islamic bank purchases a house, which a customer has identified and promised to purchase from the bank. The bank purchases the house for cash and sells it to the customer for a deferred price, which is paid in a known number of instalments. In Malaysia, a person first purchases a house from a developer after paying the down payment. He/she then sells the house to the bank through the Property Purchase Agreement (PPA) for cash. The cash is then transferred to the developer. Next, the bank sells the house to the customer through the Property Sale Agreement (PSA) for a deferred payment. The customer would pay the price through instalments in a certain agreed upon period. It is due to the requirements of a sale contract that the bank and the customer have to agree on a fixed price. The selling price includes the cost price for which the house is purchased and the profit. The bank is contractually entitled to claim the full selling price from the customer.

Problems however, arise when a BBA contract is terminated due to default or early settlement. In such cases the bank may insist on the full payment of the sale price which the customer would see as unfair. Often an Islamic bank's claim to a full price is supported with reference to the sale agreement itself where the customer has agreed to pay a certain fixed price in a certain period of instalments. The customer cannot ask for a partial reduction of the debt on the ground of default or early payment nor is the bank contractually bound to reduce the amount of debt. The consequence is serious in cases of premature termination of the BBA contract due to default or prepayment that happens in the early stages.

An Islamic bank may insist on the full settlement of the sale price and argue that ibra' could only be granted at its discretion. This argument is based on the charitable and gratuitous nature of ibra', which can only be granted at the discretion of the creditor. There are at least two arguments for the discretionary nature of ibra'. First, the discretionary grant of ibra' is in general agreement with the commands of the Quran and hadith that rights and obligations which arise from contracts must be honoured and fulfilled. Debts could be waived either partially or totally only at the discretion of the creditor. The debtor cannot claim ibra' as he/she has undertaken to pay the price. The second argument in favour of the creditor's discretion whether to grant or refuse ibra' is based on the nature of Islamic contracts. In a usurious loan the interest charged corresponds with the time the borrower takes to settle the loan. If a borrower decides to settle the loan in a shorter period the lender is bound to grant a rebate and has no right and reason to charge him for the original unexpired period. In contrast, in a deferred sale contract neither the debt can be increased due to further delays nor the borrower can claim for a reduction of the debt due to early settlement.

However, both the Qur'an and Sunnah encourage a creditor to defer his/her claim or to totally waive if a debtor is in financially strained circumstances and is not able to settle his debt in the same way as it encourages donation (sadaqah) for charitable purposes. These instructions are not in the nature of a binding command (wajib) but only convey a recommendation (mandub). Thus, a creditor may at his discretion provide ibra' to a debtor who is in financially strained circumstances either by giving them respite or totally write off the debt. They cannot be forced to grant ibra' to a debtor. The banks customers however see the banks refusal to grant ibra' and its claim to a full sale price in cases of early termination of BBA contract due to default or early settlement as unfair and unjustified. These issues finally end up in litigations where the courts were asked to decide on the amount payable by the customers.

The Courts and the BBA Contract:

The Malaysian courts have shown considerable judicial activism and were generally inclined to see that a strict adherence to BBA contract should not produce unfair results to the customers. In a series of cases the courts did not allow the banks' claim to the full sale price where the contract was prematurely terminated due to defaults (Mohamad and Trakic, 2013; Malayan Banking Bhd v Ya'kup bin Oje & Anor, 2007; Bank Islam Malaysia Berhad v Azhar Bin Osman,

2010).In a landmark judgment in 2006 the High Court reduced by RM376, 000 the amount sought by the bank from the house buyer, noting that the consequences of defaulting on an Islamic facility were far more burdensome on the debtor than a conventional loan (Affin Bank Bhd v Zulkifli bin Abdullah, 2006).The judge was of the view that when the property had been possessed and sold and the bank had obtained the amount owed, it was not right for the bank to recover the profit margin for the unexpired tenure of the facility. He observed that to allow the bank to also recover the profit margin for the unexpired tenure of the facility would means the bank would earn a profit twice upon the same sum at the same time (Affin Bank Bhd v Zulkifli bin Abdullah, 2006; Malayan Banking Bhd v Ya'kup bin Oje & Anor, 2007).In the case of Malayan Banking Bhd v Ya'kup bin Oje & Anor (2007, p.389) the High Court observed that "the fact that 'ibra'' is unilateral does not stop … the court upon default by the customer to demand that proper concessions be granted to the customer on equitable grounds". In the case of Bank Islam Malaysia Bhd v Azhar Osman & Other (2010, p.363) the judge was of the view that: "where the BBA contract is silent on issue of rebate or the quantum of rebate, by implied term I hold that the bank must grant a rebate and such a rebate shall be the amount or unearned profit".

However, in the case of Bank Islam Malaysia Bhd v Lim Kok Hoe &Anor and other appeals (2010) the Court of Appeal held that the BBA facility offered by the Islamic banks is a valid contract and the court is under duty to enforce it. The decision acknowledged the bank's right to claim the full sale price. The court observed:

In our view the BBA contracts found in the present appeals are valid where parties had freely entered into the contract which is not vitiated by any vitiating factors. The court is under a duty to enforce the contract entered into between the parties. Thus the court will give effect to the full sale price. Full acknowledgement of the right of the bank is given to enforce payment of the full sale price under the Property Sale Agreement (PSA). If some payments had been made, the sum due and payable upon termination is the balance sale price (Bank Islam Malaysia Bhd v Lim Kok Hoe &Anor and other (2010, p.647).

Ibra' from Discretion to Regulation:

The Shari'ah Advisory Council of BNM (SAC) has issued several resolutions on ibra'. As early as 2000the Council issued a resolution allowing Islamic banks to incorporate ibra' clause in their BBA contracts. The resolution was issued based on maslahah and its purpose was to allow Islamic banks "to provide ibra' to customers who make early settlement" (Bank Negara Malaysia, 2007: p. 41).In 2003 a subsequent resolution permitted Islamic banks to grant ibra' to their customers in a variable rate BBA contract. These resolutions indicated the permissibility of incorporating an ibra' clause whereby an Islamic bank would undertake to grant ibra'. It states:

In line with the need to safeguard maslahah(public interest) and to ensure justice to the financiers and customers, Islamic banking institutions are obliged to grant ibra'to customers for early settlement of financing based on buy and sell contracts (such as bai' bi thaman ajil or murabahah). In order to eliminate uncertainties pertaining to customers' rights in receiving ibra' from Islamic banking institutions, the granting of ibra'must be included as a clause in the legal documentation of the financing. The determination of ibra' formula will be standardised by Bank Negara Malaysia (Bank Negara Malaysia, 2010a; Bank Negara Malaysia 2010b; Part II: Supporting Shariah Concepts).

However, most of the cases that went to the courts concerned early termination of the BBA due to defaults by the customers where the main issue was whether or not the bank is entitled to claim the full sale price and whether ibra' if granted should be at the discretion of the banks. In order to clear the legal uncertainty surrounding ibra' in 2010 the SAC has issued another resolution. Subsequently, in 2013 BNM issued the Guidelines on Ibra' (Rebate) for Sale-Based Financing. The Guidelines observed that while a number of IFIs grant ibra' and include the commitment to provide ibra' in their financing documents others are silent on its application. This, the Bank observed, could cause confusion and emphasized the need to harmonize different practices and to "provide greater transparency and clarity" (Guidelines on Ibra' (Rebate) for Sale-Based Financing, 2013).Clause 6.1 of the Regulations further states:

IFIs are required to grant ibra' to all customers who settle their financing before the end of the financing tenure. Settlement prior to the end of the financing tenure by the customers shall include, but is not limited to the following situations:

i. Customers who make an early settlement or early redemption, including those arising from prepayments;

ii. Settlement of the original financing contract due to financing restructuring exercise;

iii. Settlement by customers in the case of default; and

iv. Settlement by customers in the event of termination or cancellation of financing before the maturity date.

These SAC's Resolutions and BNM's Guidelines that require the IFIs to grant ibra' to their customers effectively did away with the discretion of the banks with regard to ibra'. In contrast, the Council of the Islamic Fiqh Academy Resolution No. 64/2/7 does not allow the insertion of an ibra' clause in a sale agreement. Clause Four of the Resolution Concerning Instalment Sale states:

To reduce a deferred debt with the aim of accelerating its repayment, whether at the request of the creditor or of the debtor (pay less but ahead of time), is permissible in Shari'ah and does not fall within the province of Riba (which is forbidden) if it is not based on an advance agreement (Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985-2000, 2000).

Similarly clause 5/9 of AAOIFI Shari'a Standard No. 8 states: "it is permissible for the institution to give up part of the selling price if the customer pays early, provided this was not part of the contractual agreement." (Murabahah to Purchase Orderer, 2002). According to these Resolutionand Standard a creditor or a debtor may make a request to reduce a deferred debt in return for its early settlement. However, such a request may or may not be accepted by the other party. In contrast, according to the BNM's Regulations all Islamic banks "are required to grant ibra' to all customers who settle their financing before the end of the financing tenure" (Guidelines on Ibra' (Rebate) for Sale-Based Financing, 2013).

These resolutions raise questions as to whether the provision of ibra' should be left at the discretion of the parties or could also be made mandatory by the regulatory authorities. Similarly the validity of an advance agreement on ibra' and the insertion of an ibra' clause into a BBA contract could also be questioned. Similar other issues may arise as to whether the grant of ibra' be left to the discretion of the bank or a bank customer could also claim ibra' as a right when the contract is terminated prematurely due to default or early settlement. In the following pages

we will examine these and other issues in the light of Fiqh discussions on the concept of ibra' and reduction of debt in return for its full early settlement (ḍaʿ wa taʿajjal) with a view to contribute a solution.

Absolution (Ibra'):

Ibra' literally means release, relieve or abandoning. Technically, absolution (ibra') refers to a contract where a creditor waives or drops his claim in favour of the debtor. The proper subject-matter of ibra' is debt (dayn). For instance, a creditor may release the debtor, guarantor (kafil), or transferee (muhal 'alahi) either partially or totally from the payment of the debt. An absolving person may also waive his right to claim compensation for the destruction of his property. The pre-requisite for ibra' is the existence of a debt between the absolving and the absolved parties. The waiving of a right which is not established as a debt on another does not fall within the definition of ibra'. Hence, waiving a pre-emption right (Shuf'ah) is not considered ibra'. The effect of an ibra' is a partial or total absolution of a debtor from the liability.

In contrast, tanazul could be exercised with regards to the future rights that have not yet come into existence. For instance, a fund provider (sahib al-mal) may agree in advance to forego part of the future profit in favour of the mudarib. Ibra' is a gratuitous contract and essentially an act of charity (sadaqah) while tanazul is not. Furthermore, while ibra' is specifically made in favour of another, tanazul may not have a specified beneficiary. In tanazul a person simply declines to take his right. For instance, an heir may decline to claim his share in the estate of a deceased. However, tanazul and ibra' are sometimes used interchangeably.

Muslim jurists differ on whether ibra' in substance is waiving of a right or its transfer to the debtor. Most Ḥanbali jurists agree that ibra' in essence is a form of waiving or annulment (isqat) of a right (Ibn Qudamah, 1997: 10/165). According to the preferable opinion in the Maliki School and the latter Shafiʿī School the dominant aspect of ibra' is the transfer of ownership over a debt from the creditor to the debtor. According to them through ibra' a creditor in substance transfers the ownership over a debt to the debtor (Dasuqi, 2003: 5/492; Qarāfī, 2008: 5/366). The Ḥanafi jurists prefer to define ibra' as the waiving or annulment of a right although they acknowledge that ibra' also implies the transfer of debt to the debtor (Kāsāni: 2005: 7/378; Khalaf, 2008: 251-3; Al-Zuḥaylī, 2003: 2/238).

The jurists who view ibra' as a transfer of debt argue that it should result in an

immediate waiver of debt. Their opinion is based on an analogy with the sale contract where the ownership of the sold item is immediately transferred to the purchaser. In a sale contract the transfer of ownership over the sold item cannot be deferred or made dependent upon conditions. Thus, they contend that the provision of ibra' should not be deferred or made conditional upon the settlement of debt. In contrast, jurists who view ibra' as a waiver of right (isqat) argue that ibra' could be deferred or made dependent upon conditions. According to them a creditor may stipulate that the debtor would be released from 10% of the debt upon the settlement of the other 90%. (Al-Zuḥaylī, 2003: 2/249)

Muslim jurists agree that if a debtor wants to settle the debt before maturity the creditor may at his discretion grant him ibra' and take a lesser amount (Al-Zuḥaylī, 2003: 2/249). However, the provision of ibra' on the condition of early settlement is a controversial issue. The majority of the jurists are of the opinion that it is not permitted for a creditor to waive part of his debt on the condition that the debtor should pay the balance in a shorter period. Similarly, a debtor is not entitled to ask for ibra' on the ground that he would settle the debt prior to its maturity in a lump sum or in a shorter period. According to them ibra' on the condition to speed up the payment of the balance resembles usury (riba). Does the provision of ibra' on the condition of early settlement amount to riba? Should the granting of ibra' be left to the sole discretion of a creditor? Before we turn to for a discussion on these issues we first discuss the concept of ḍaʿ wa taʿajjal and examine the various arguments for and against it.

Reduce and Collect Debt Earlier (Daʿ wa Taʿajjal):

Daʿ wa taʿajjal refers to an arrangement whereby a creditor agrees to reduce the amount of debt on the condition that the debtor settles the balance immediately. Those who argue for its permissibility rely on the following ḥadith: "Narrated by Ibn 'Abbas (r.a.) when Prophet (pbAbuh) ordered the expulsion of Banu al-Nadhir (from Madinah), some of them came to the Prophet and said: O Messenger of Allah, you have ordered our expulsion while we have debts on the people which are not settled. The Prophet (pbAbuh) said: reduce your debts and have them settled immediately" (Al-Bayhaqi, 2003: ḥadith no: 10920, 6/28).

عن ابن عباس ، رضي الله عنهما : أن النبي صلى الله عليه وسلم لما أمر بإخراج بني النضير ، جاءه ناس منهم ، فقالوا : يا نبي الله ، إنك أمرت بإخراجنا ولنا على الناس ديون لم تحل ، فقال رسول الله صلى الله عليه وسلم : ضعوا وتعجلوا

The opponents of ḍaʿ wa taʿajjal doubt the authenticity of the above-mentioned ḥadith and based their case on the statement of a companion and analogy (qiyas). They claim that the chain of narration of this ḥadith includes Muslim ibn Khalid who is said to be of weak memory and as such the ḥadith is classified as weak (Dāraquṭnī, 2004: ḥadith no: 2983, 3/466).[1] From the statements of the companions (Athār) it is reported from Abu Al Menhal that he asked Ibn Omar (ra): "I was indebted to a person who told me settle the debt earlier and I would reduce the amount. Ibn Omer told me not to do it and said Caliph Omar (ra) prohibited to exchange cash with debt" (Al-Bayhaqi, 2003: ḥadith no. 11140, 6/47).

عَنْ أَبِي الْمِنْهَالِ أَنَّهُ سَأَلَ ابْنَ عُمَرَ قُلْتُ: لِرَجُلٍ عَلَيَّ دَيْنٌ، فَقَالَ لِي: عَجِّلْ لِي وَأَضَعُ عَنْكَ فَنَهَانِي عَنْهُ وَقَالَ: نَهَى أَمِيرُ الْمُؤْمِنِينَ يَعْنِي عُمَرَ رَضِيَ اللهُ عَنْهُ « أَنْ نَبِيعَ الْعَيْنَ بِالدَّيْنِ «

The opponents of ḍaʿwa taʿajjal also rely on qiyas to refute it. They argue that in ribā the amount of debt is increased due to the time that a debtor takes to settle the debt. Similarly, in ḍaʿ wa taʿajjal the amount of debt is reduced due to the fact that a debtor settles the debt earlier. In both cases it amounts to assigning a part of the debt to the time that would replace it. Ibn Qudāmah (1968: 4/39) a leading Ḥanbali jurist argues that reducing a deferred debt in exchange for its early settlement is not permitted. He says that it had been disliked by by Zayd ibn Thābit, Ibn ʿUmar, Miqdād, Saʿīd ibn al-Musayyib, Sālim, Ḥasan, Ḥammād, Ḥakam, Shāfiʿī,

1 There is a narration of a *ḥadith* which equates conditional discount in return for the early settlement of a debt with usury. The narration is as follows: "It is reported that Miqdad bin al-Aswad said: "I have lent hundred dinnar to a man for a specific time, then my name came out in the (list) of troops which the Prophet (pbAbuh) was sending around. I told the man: Pay back 90 dinar and I will forgive you 10 dinar. The debtor accepted the offer. Later I mentioned this to the Prophet (pbAbuh) and he said: Miqdad! You have eaten usury and also fed it to him." (Al-Bayhaqi, 2003: hadith no. 11141, 6/47)."

عن المقداد بن الاسود قال اسلف رجلا مائة دينار ثم خرج سهمي في بعث بعثه رسول الله صلى الله عليه وسلم فقلت له عجل لى تسعين دينارا واحط عشرة دنانير فذكر ذلك لرسول الله صلى الله عليه وسلم فقال اكلت ربايا مقداد واطعمته

However, according to al-Bayhaqi, Muhammad bin Yunus one of the narrator of the 'Hadith' was accused of fabricating the prophetic narrations. The majority of the scholars identify him as a weak narrator at least. According to Ibn al-Qayyim the *Hadith* narrated by Miqdad has weakness in its chain of narration. See Muḥammad ibn Abū Bakr al-Jawziyyah ibn al-Qayyim al-Jawziyyah, *Ighathat al-Luhfan fi Masayid al-Shaytan*. vol. 2, Qahirah: Dar al-Hadith. 1991), p. 338.

Mālik, Thawrī, Hushaym, Ibn ʿUlayyah, Isḥāq and Abū Ḥanifah.[1] Al-Mardāwī (1955:5/236) another Ḥanbali jurist while explaining the School's position on the issue notes that it is not valid for a debtor to settle a deferred debt earlier with a lesser amount. The Shāfiʿī Fiqh School has taken a similar stand. Imam Nawawi (1991:4/196) a leading Shāfiʿī jurist argues that, "If someone settles his deferred debt of one thousand by paying five hundreds in cash, it is void." Another leading Shāfiʿī jurist Imam Al-Juwaynī (2007:6/460) argues that if someone agrees to the settlement of his one thousand deferred debt for five hundreds in cash, it's not permissible. Because the creditor in this case thinks that the five hundreds in cash is better than the deferred one thousand. This in substance, he argues, is an exchange of a thousand for five hundreds which is void.

According to Al-Zuḥaylī (2003: 1/329), "the leaders of all four juristic schools" accept that reducing the amount of debt due to early settlement "if it is stipulated in a loan contract, is forbidden". They equate a reduction of a debt in return for its prepayment to an increase in the amount of debt in return for further delay. The opponents of ḍaʿ wa taʿajjal also argue that the original contract that created the debt does not entitle the creditor to the early settlement. It is therefore regarded as an additional benefit to the creditor (Samarqandi, 1994: 3/252).

The proponents of ḍaʿ wa taʿajjal, on the other hand, argue that the ḥadith on ḍaʿ wa taʿajjal is not weak. Ibn al-Qayyim argues that Muslim ibn Khalid al-Zinji is not weak in memory, as claimed by the opponents of ḍaʿ wa taʿajjal but is a trustworthy scholar from whom Imam Shāfiʿī narrated traditions (1991: 5/331-2). Ibn Taymiyyah argues for the validity of ḍaʿ wa taʿajjal on the ground that it amounts to the discharge of obligations similar to the case of a slave who negotiates his emancipation (dayn al-kitabah). (Al-Mardāwī: 1955: 5/236). Ibn al-Qayyim also refutes the opponents' analogy to equate ḍaʿ wa taʿajjal with ribā. He argues that ḍaʿ wa taʿajjal:

"is the opposite of ribā as in riba the debt is increased in exchange for extending the time while in ḍaʿwa taʿajjal there is a partial release from liability in exchange for early settlement. Thus a part of the claim is dropped in exchange for the early settlement which benefits both parties. There is no usury in the real sense, or in linguistic sense or in the customary sense (ʿurf). Those who argue for its prohibition come to this conclusion based on an analogy with riba. However, there is a clear difference between a statement either increase or settle the debt

1 The names are in the same order as mentioned in the source.

now and a statement settle the debt now and I will make 100 as a gift to you. The two statements are totally different. There is no clear text from the Qur'an and the Sunnah or consensus of opinion (ijma') or a valid analogy (qiyas) to prohibit ḍaʿ wa taʿajjal. (Ibn al-Qayyim, 1423: 5/331-332).

إن هذا عكس الربا فإن الربا يتضمن الزيادة في أحد العوضين في مقابلة الأجل وهذا يتضمن براءة ذمته من بعض العوض في مقابله سقوط بعض الأجل فسقط بعض العوض في مقابلة سقوط بعض الأجل فانتفع به كل واحد منهما ولم يكن هنا ربا لا حقيقة ولا لغة ولا عرفا والذين حرموا ذلك إنما قاسوه على الربا ولا يخفى الفرق الواضح بين قوله إما أن تربى وإما أن تقضى وبين قوله عجل لي وأهب لك مائة فأين أحدهما من الأخر فلا نص في تحريم ذلك ولا إجماع ولا قياس صحيح .

Al-Haskafi in his Dur al-Mukhtar (1415 A.H: 6/757) argues that when a debtor settles a deferred debt earlier or when a deferred debt is settled earlier from the estate of the deceased the murabahah price should be taken in proportion to the duration of the debt. For instance, a person purchased a thing for 10 and sold it to another for 20 payable in 10 months. If the debt is settled after five months or the debtor dies after five months only five should be taken from the murabahah profit and the remaining five should be left to the debtor. He argues that in a murabahah sale time acquires value if increase in a price is due to the time factor. Hence, if a full price is claimed before its due date, the amount that was increased due to time is taken without any counter-value. Ibn ʿĀbidīn in Radd-ul-Muhtar (1992: 6/757) refers to a fatwa by Mufti Abu Saʿud Effendi with regard to the necessity of discounting the unpaid balance to a debtor in a murabahah sale in return for advance payment or from his estate in case the debtor dies prior to the settlement of debt. The reason for such discounting is to show leniency. Al-Saʿdi (2005: 85) argues that ḍaʿ wa taʿajjal is beneficial to both the creditor and the debtor. The debtor may need to settle the debt before maturity and the creditor may need for various reasons to claim his right earlier. According to him the difference between riba and ḍaʿ wa taʿajjal is like the difference between a sheer injustice and a clear justice.

Ibn Rushd (2003: 2/228) while summing up the arguments for and against ḍaʿ wa taʿajjal says that Ibn ʿAbas (r.a) from the companions and Zufar from the Ḥanafi School have approved ḍaʿ wa taʿajjal while Ibn ʿUmar (r.a.) from the companions, Al-Thawri, Abu Ḥanifah and Malik have argued for its prohibition. Ibn Rushd explains that the reason for the differences between the two groups is the conflict between analogy (qiyas) and this particular ḥadith.

However, the preferable opinion, as Ibn al-Qayyim argues, is that an analogy between ribā where a debt is increased and ḍaʿ wa taʿajjal where a debt is reduced cannot be maintained. The fact that the amount of debt is increased or reduced due to the time factor does not mean that the reason (ʿIllah) for the prohibition of ribā exist in ḍaʿ wa taʿajjal. The reason (ʿIllah) for the prohibition of ribā is a stipulated excess over the principal amount that a lender receives from the borrower. In ḍaʿ wa taʿajjal such a stipulated excess does not exist and therefore in the absence of a valid analogy ḍaʿ wa taʿajjal is permissible.

Daʿ wa Taʿajjal and Ibra':

Both in ḍaʿ wa taʿajjal and ibra' on the condition of early settlement a discounted debt is settled earlier in a lump sum. In both cases a creditor accepts a lower sum than what he was initially entitled to. Both are also in substance similar to the sale of debt to the debtor himself for a discounted immediate payment. In both cases, the amount of debt is reduced in favour of the debtor and not a third party. In both ḍaʿwa taʿajjal and ibra' on the condition of early settlement a creditor waives his right in favour of a debtor and accepts a lower sum. Hence, both are the opposite of riba where the amount of debt is increased. In both cases the debtor is in a weaker financial position and if the creditor wants to receive a lower immediate settlement it could be considered as a kindness and an act of benevolence to the debtor. Both in ḍaʿ wa taʿajjal and ibra' the arrangement is mutually beneficial to both the creditor and the debtor. The creditor receives his debt prior to its due date and the debtor pays less. The creditor compensates the debtor with a discount in exchange for the early payment. The benefit to the creditor in the form of early settlement is compensated with a loss for him in the form of rebate. Hence the arrangement is mutually beneficial.

Daʿ wa taʿajjal and ibra' are also relevant to cases of default where a debtor who has initially agreed to settle the price in certain instalments duration defaults in payment. In case of default of a collateralised debt that arises from a sale contract the creditor can always use the collateral to redeem his principal. In cases of default it would be unfair to the debtor if a creditor claims the full amount of debt. This would go against the Quranic injunction which states:

If the debtor is in a difficulty, grant him time till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew". (Al-Baqarah, 2:280)

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَى مَيْسَرَةٍ وَأَنْ تَصَدَّقُوا خَيْرٌ لَكُمْ إِنْ كُنْتُمْ تَعْلَمُونَ

An Appraisal:

A BBA contract concluded by an Islamic bank and the client is not an interest-based loan. It is a sale contract concluded for a deferred fixed price which is paid by instalments throughout an agreed upon duration. The problem however arises when the BBA contract is compared with other ordinary day to day sale contracts. This would mean that the price once fixed cannot be changed except at the discretion of the creditor. However, unlike an ordinary sale contract, in a BBA contract Islamic banks while determining the price take into account the time factor. They calculate the profit portion based on the same benchmark by which their conventional counterparts calculate their interest. It would be grossly unfair to withhold ibra' in cases of early settlement and default and claim, say after one year, a price that is decided based on a 20-year instalment period. Classical discussions by the opponents of on ibra' on the condition of early settlement and ḍaʿ wa taʿajjal focused on contacts where debts were created either through interest-free loans (qarḍ) or sale contracts in which time had no visible role in the determination of the price. Applying the same rules to a BBA contract where time is taken into account in determining the price, may result in injustices to the debtor. This is particularly so when a BBA contract is terminated due to early settlement or default. In such cases a strict interpretation of contractual terms and conditions and their strict implementation would result in injustices to the debtor.

In such cases it is desirable to abandon qiyas which the majority of the classical jurists relied on to prohibit ibra' on the condition of early settlement and ḍaʿ wa taʿajjal. Justice and equity require that the principle of istiḥsan should be resorted to. Istiḥsan requires that an analogy that produces unfair results should be abandoned in favour of another rule that is closer to justice and equity. Comparing a BBA contract with the interest free loan and ordinary sale contracts and applying the rules meant for the former to the latter would produce unfair results. In such cases it is desirable to make a departure from strictly applying contractual terms that in the circumstances are inequitable. Justice and fairness requires that a full price that was intended for an initial financing period should not be claimed prematurely. Justice requires that the bank should, and not merely as discretion, provide ibra' in cases where a contract is terminated due to early settlement or default. The purpose is not to violate contractual terms and conditions but to take into account the changed circumstances that would render the strict enforcement of contractual obligations burdensome. Both in cases of early settlement and default justice and equity demand that the amount of debt should be reduced. This

is particularly relevant when the Quran encourages the creditor to give respite to the debtor.

The debt has arisen from a sale contract and the bank by granting ibra' is waiving its claim on part of its profit. Furthermore by allowing the debtor to pay his debt earlier the bank's default risk is reduced. The bank may also use the amount for other investment and financing purposes. Thus granting ibra' would benefit both the bank and the client. Denial of ibra' in cases of early settlement would also discourage the early settlement of debt and would make the parties to stay in the contract until the last instalment is paid.

An insertion of an ibra' clause in a BBA house financing contract will make the document more transparent to the customers and avoid disputes. However, it may result in providing different prices depending on the settlement period. This may amount to two or more prices in one sale and go against the Prophetic prohibition of combining two sales in one sale. A preferable way is that all banking BBA or murabaḥah contracts should have a clause that would state that in cases if a contract is terminated due to default or early settlement the regulations would be applicable.

An interesting issue that is not discussed by the classical scholars is that ḍaʿ wa taʿajjal is a command by the Prophet (pbAbuh) which he issued to the contracting parties. This excludes the discretion of the creditor. It comes as a direction from the authority and imposed on the contracting parties. Reissuance of this command could only be done by a proper authority and not by the contracting parties. Accordingly, it is possible to argue that it is permissible for the regulatory authorities to issue guidelines that would compel the banks to provide rebate to their debtors in cases where a contract is terminated due to early settlement or default. Regulatory authorities must play the role of a Muḥtasib and interfere through regulations in a contract between a bank and its customer. This will also protect the image and reputation of Islamic banking as it stands for fairness and justice. It is therefore argued that the central banks by virtue of its regulatory power could introduce regulations that would require the banks to provide mandatory ibra' and ḍaʿ wa taʿajjal. These regulations will also ensure that there is a standard treatment in the event a contract is terminated due to early settlement or default.

Conclusion:

The argument that partial waiving of a debt in exchange for its early settlement resembles usury is grounded on the basis that in substance the debt is exchanged for a lesser cash amount due to time factor. Accordingly, ḍaʿ wa taʿajjal and ibra' on the condition of early settlement was equated with ribā. The argument has its proponents and opponents both among the classical and contemporary jurists. Classical discourse on ibra' also centres on its charitable nature and emphasises on the discretion of the creditor who may either grant or refuse it.

However, the application of these arguments to banking murabaḥah and BBA contracts produces unfair results to the debtor. A banking murabaḥah or BBA contract is not an ordinary day to day sale contract. In a BBA contract the time factor plays a central role in determining the profit portion and the price. Claiming full credit price upon termination of contract due to early settlement or default is not fair. Moreover, if the provision of ibra' is left at the discretion of the bank it could be denied to the customers.

The jurisprudential principle of equity and juristic preference (istiḥsan) could be used to take away the discretion of the banks and make it mandatory for them to provide ibra' to their customers both in cases of early settlement and default. The Hadith of ḍaʿ wa taʿajjal also indicates that the Prophet (pbAbuh) commanded the debtors to reduce their debts and to claim them earlier. It is therefore permissible for the authorities to interfere in a private contract between the parties in order to ensure justice to both parties. The ḥadith provides a suitable basis for the central banks to use their regulatory power to issue detailed regulations that would require Islamic banks to provide ibra' to their customers in cases of default and early settlement. These regulations would ensure that the bank would not claim full credit price in cases of early settlement or default. This will also ensure justice to both parties to a credit sale and enable them to terminate the contract earlier in a way that is mutually beneficial.

Regulations would also encourage the early settlement of sale-based debts. The Shari'ah strongly encourages the settlement of debts and thus any measures that facilitate the settlement of debts in an equitable way, reduce debts, or release a person from debt is in line with the maqasid of Shariʿah. In the absence of any solution the parties to a credit sale would have to stay in the contract until it terminates naturally upon payment of the last instalments. The central bank must assume the role of Muḥtasib to supervise Islamic banks, ensure just prices, promote good

and prohibit unfair practices in the market. Malaysian Central Bank (Bank Negara Malaysia) has taken a bold initiative in this regard and issued detailed regulations that deserve to be emulated.

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حق الإبراء من سلطة تقديرية إلى إجراء قانوني : التجربة الماليزية

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ملخص البحث:

إن هذه الورقة تبحث عن آخر التطورات القضائية والتنظيمية في ماليزيا التي تشاهد انتقال حق الإبراء كأنه سلطة تقديرية للدائن إلى أنه إلزامية تحت نظام البنك المركزي. وقامت هذه الورقة بمقارنة بين الشروط التي وضعتها اللجان التنظيمية الماليزية حول الإبراء والقرارات الصادرة من قبل مجمع الفقه الإسلامي مع دراسة آراء الفقهاء في الإبراء وكذاك أرائهم في مسألة «ضع وتعجّل». وإن هذا البحث يستخدم القياس والاستحسان لاختبار مدى تطبيق الإبراء في عقود التمويل للبيوت لمدة طويلة. ويرى الباحث أن طلب سعر الائتمان الكامل عند إنهاء العقد بسبب عدم إمكانية المدين من سداد دينه أو بسبب تسوية مبّكرة ليست عادلة لعملاء المصارف الإسلامية. وتوصل هذا البحث إلى أن حق الإبراء المشروط من اللجان التنظيمية كالبنوك المركزية تختلف عن الإبراء المجادل التي يشترطها المتعاقدان بين أنفسهم.

الكلمات الدالة: بيع بثمن آجل، القوانين، إبراء، ضع وتعجّل، القياس، الاستحسان.