

MAQASID AL-SHARIAH PERSPECTIVES ON THE IMPLEMENTATION OF HIRE-PURCHASE ACT 1967 IN MALAYSIA WITH REFERENCE TO AL-IJARAH THUMMA AL-BAI' FINANCING CONTRACT

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Abstract

This study aims to critically examine the meaning of the *Al-Ijarah Thumma al-Bai'* (AiTAB) contract and hire-purchase (HP) contract. It is also to explore several issues regarding the procedures of the Malaysian Hire-Purchase Act 1967 and its contradiction to the *Shariah*. There are three main issues that were highlighted; transferring of ownership, right and liability, and charges. The *Maqasid al-Shariah* framework is a compatible approach for this study to solve these issues which does not only to harmonise both contracts but also in morally aspect. The findings of this study demonstrate how *Maqasid al-Shariah* should employ HP contract issues that might not be contradicted to AiTAB in developing a better understanding between AiTAB and HP practices as Islamic banking product.

Keywords: *Al-Ijarah Thumma Al-Bai'*, Malaysian practice of hire-purchase, *Maqasid al-Shariah*

Introduction

In Malaysia, Islamic banks have vehicle financing since 1983. According to Abdullah and Dusuki (2006), Islamic vehicle financing was introduced by Bank Islam Malaysia Berhad (BIMB) as an Islamic financial product. As a significant instrumental and operational development in Islamic Banking and Finance (IBF), the engineering of Islamic financing facilities to purchase cars and other automobiles responded to emerging demands in the market.

In Malaysia, the Islamic banks offer Islamic vehicle financing through two particular financial instruments or products, namely *Al-Ijarah Thumma Al-Bai'* (AiTAB) and *Bai' Bithaman Ajil* (BBA). According to Idris (2011), AiTAB is offered by the following Islamic banks; Bank Muamalat, RHB Bank, CIMB Bank, Al-Rajhi Bank, Kuwait Finance House, Hong Leong Islamic Bank, and Amlslamic Bank. While BIMB and Bank Rakyat offer the financing through BBA. These two products are enforced with different approaches; AiTAB is a sale contract as an option upon the last payment, however, BBA is an absolute sale contract.

This paper, hence, analyses the AiTAB contract in terms of its implementation under the Hire-Purchase Act 1967 of Malaysia (HPA 1967), a law developed for conventional HPA application with the objective of identifying the compatibility of its provisions with the *Shariah*. Thus, this paper provides a critical assesment of AiTAB and hire-purchase (HP) contracts as practised in Malaysia to identify the *Maqasid al-Shariah* implications of their practice.

AiTAB as an Islamic contract should be practiced under *Shariah*, with reference to *fiqh muamalat* principles and conditions, which are referred to the terms *al-ijarah* and *al-bai'* accordingly. When a customer signs the contract with a bank, the ownership of the asset still belongs to the bank (the owner). The customer then

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becomes the hirer and is given an option to purchase the asset at the end of the instalment through a sales contract to obtain ownership.

However, the application of AiTAB contract is not similar to HP contract under the HPA 1967, a law relating to conventional hire-purchase. The question is then, how may an AiTAB contract be formulated for Islamic financing under the HPA 1967? In other words, since the HPA 1967 was not constructed according to *Shariah* requirements, the issue is whether the provisions of the HPA 1967 constitute convenient conditions that are already in accordance with the *Shariah*. The result of such analysis and assessment will identify whether the concerned law should be amended to ensure that it is *Shariah*-compliant.

Methodology

The research design for this study is based on library research; which means the data are collected from variety of library information related to the HP and AiTAB. The resources are including books, journal papers, proceedings, *Shariah* resolution, and HPA 1967. This study aims to determine whether the existing HP contract called combination between lease and sale contract are consistent with the *Maqasid al-Shariah* requirements. Subsequently, the data has been examined inductively, deductively, and comparatively to determine how the *Maqasid al-Shariah* spirit can solve the issue of HP contract from the Islamic perspective. In addition, this study also investigates the current practice of Islamic banking in offering hire-purchase-i contract for vehicle financing and potential barriers to adhere to *Maqasid al-Shariah* and how the HPA 1967 may affect the contract practically. The data also is regarding to the issues of hire-purchase in Islamic banks including right of the parties, effect of the contract, payment of *al-ijarah* and selling, status of ownership, and charges. This paper also discusses on the investigation of the *Maqasid al-Shariah* spirit in solving the issues of current practice of hire-purchase in Islamic banks. Generally, all methods used to examine the status of the conventional HP contract and HPA 1967 are based on Islamic perspective.

The Meaning of AiTAB and Conventional Hire-Purchase

The HP contract is a modern purchasing method practiced in all over the world as deferred payment schemes or instalments, including a banking product. In Malaysia, this contract is executed under a conventional law known as the HPA 1967, which covers the purchase of items such as automobiles and other vehicles, and as well as household appliances and furniture. This contract is not exactly considered as a sales contract or a lease contract as the owner is allowed to take back or repossess the asset and the hirer is given a right to purchase the asset upon agreement with particular terms.

Banking institutions introduced hire-purchase financing for vehicle because it is a necessary need to the people as a consumer banking. Therefore, when Islamic banks were established, they successfully introduced the same instrument in the form of AiTAB but based on different underlying principles. According to Abdullah and Dusuki (2006), BIMB was the first bank to introduce the AiTAB facility in Malaysia. Its operation was then extended to conventional banks under the Islamic Banking Scheme (IBS), which was pioneered by three anchor banks; Malayan Banking Berhad

(Maybank), Bank Bumiputra Malaysia Berhad, and Bank Rakyat. Consequently, BMB set up a consultancy to assist other banks and financial institutions to conduct the IBS, thus expanding AiTAB operations to financial institutions and cooperative societies. Starting from 2005, conventional banks that have initially offered Islamic banking products via Islamic windows have set up distinct Islamic banking subsidiaries. In Malaysia, AiTAB or the Islamic hire-purchase (IHP), is one of the most popular Islamic banking products offered by Islamic banks for asset financing, and it includes a financing method of transaction for automobile purchasing. The question is then, what is an AiTAB contract compared to HP contract under HPA 1967?

The Meaning of AiTAB from Muslim Scholars' Point of Views

Under Fiqh, there is no particular reference to divine law or *hukm* for HP contract because the necessity of an *al-ijarah* contract for purchasing purposes did not exist according to the previous Muslim scholars (Nawawi, 1991). However, there were Muslim scholars provided opinions about the combination of a hire contract and a sales contract which allows the combination of a transaction between hire and sales separately (Al-Jaziri, 1990). This means that the hirer has an option to buy the same asset or good in this transaction which seems reasonable and acceptable according to the Muslim scholars. However, in present times, the trading of the contract exists because it is unlikely for most people being affordable in buying certain goods in cash, unless given the option of deferred payments schemes, and HP contract is one of them (Awang, 2000). Nowadays, there are some Muslim scholars have opinions that agree with the Islamic HP contract which is known as AiTAB. The term 'hire-purchase' is also known as *Syira al-Isti'jar* in Arabic (Awang, 2000).

As part of the Islamic legal tradition, Al-Shankiti (1992) states that a hire-purchase occurs when two parties, specifically the owner (e.g. banking institutions) and its customers or hirers, agree to such a dealing. The bank will sell a certain asset at a particular price without transferring possession to the banking customer directly but with both parties having agreed that the transfer of ownership will happen once the banking customer satisfies all the instalments or payments within a certain period. This is considered a valid contract under *Shariah*, giving equal rights to both parties. Shabir (1996) stated that *al-ijarah muntahiyah bi al-tamlik* is a contract whereby the bank leases an asset (e.g. a car) to a customer (hirer) within a certain period with specified payments and with the hirer having the option to purchase the asset at the end of the instalment. Consequently, the hire-purchase combines two contracts which the customer agrees in the first contract to hire the asset from the owner at a certain amount with an agreed period of time. The hirer also signs for an option to purchase the asset in the future. When the hire period comes to an end, the hirer will sign a second contract to buy the asset or vehicle from the bank as an owner at a price that has been agreed on by both parties (Yacop, 1996). According to Ramli and Onn (2007), AiTAB is one of the categories of *al-ijarah* that concludes with the sale of the asset, whereby the legal title of the leased asset will be transferred to the hire as a banking customer after a certain period of time. In further exploring the meaning, Jalil (2013) states that AiTAB is also known as AiTAB transaction and it is a *Shariah*-approved HP contract. Hence, AiTAB which defined as 'hire goods and then purchase', is also sometimes known as *al-ijarah muntahiyah bit tamlik* or *al-ijarah wa*

iqtina' implying that the lease ends with a transfer of ownership after a certain agreed period of time has passed (Jalil, 2013). The rental in the lease agreement includes a sum of gradual payment for the price of the asset (Glossary, 2013).

Generally, AiTAB is a hire-purchase under Islamic law and it is a combination of two contracts which are *al-ijarah* and *al-bai'* (Awang, 2000). Nonetheless, there are some scholars viewed the HP or AiTAB contract as a sales contract. This opinion is hold by Ibrahim (1987) and his opinion refers to the legal maxim in such terms clearly as '*in contract, effect is given to intention and meaning and not the words and forms*'. To sum up, most of the Muslim scholars tend to consider the trading of AiTAB as valid under Islamic law, as long as the contracts fulfil all the underlying *Shariah* requirements, which should be the case for both parts of the instrument, namely for the *al-ijarah* (leasing contract) and *al-bai'* (sales contract). Thus, the combination is valid as long as the terms and conditions of each contract are referred to the *Shariah* accordingly.

Defining Hire-Purchase under Hire-Purchase Act 1967 of Malaysia

Based on conventional law, HP contracts were introduced in the 19th century based on earlier cases of hire-purchase in England in 1893 to 1895 (Awang, 2000). According to common law, the hire-purchase agreement is a contract under which the goods are let on hire and the hirer has the option to purchase it in accordance with the terms of the agreement (Goode, 1970). In a more formal manner, "*under common law, a hire-purchase transaction is a contract whereby one party called 'the owner' lets the goods on 'hire' to another party and agrees that the 'hirer' may either return the goods when he no longer needs them and terminate the hire-purchase agreement, or elect to purchase the goods on completion of the necessary payments agreed in the contract*" (Buang, 1996).

With reference to conventional law, hire-purchase contracts, by definition, include the sales agreement instead of having two separate contracts as practiced under Islamic law. It is designed in this fashion because almost all hires are expected to make all payments with the final instalment. In the case of a default, the term allows the bank as an owner to repossess the assets under the HPA 1967.

It should be noted that the first case that was considered a HP contract was the case of *Helby vs Matthews* ([1895] AC, 471) because the hirer had the option to terminate the contract (Awang, 2000). In the case of *Lee vs Butler* ([1893] 2 QB, 318), it was not considered a HP contract since the buyer absolutely agreed to purchase the asset (Awang, 2000). Therefore the case of *Helby vs Matthews* as the first case was accepted as a hire-purchase transaction by Lord Shand who stated that "*the agreement showed the hirer had not imposed any obligation when he returned the piano to the owner*" ([1895] AC, 483), which was also supported by Lord Mac Naghten ([1895] AC, 481). As the cases suggest, the hirer seemed to not have the intention to purchase despite being initially willing to buy with sincerity.

Under conventional law, the hire-purchase has been a method of transaction for the purpose of purchasing assets. It is designed as a leasing and a sales contract. The sales contract stipulates that the customer will purchase the asset with deferred payment method and, in good faith, will obtain ownership of the asset once he has made all the agreed payments. However, some banking customers have failed to

make the payments of hire-purchase contract, thus raising problems for transferring the ownership to the hirer due to a failure in making the payments, thus a hire-purchase is implemented (Awang, 2000). Under conventional law, it is also indicated that the agreement of the contract is that an owner (bank or company) will lease or rent the asset to the hirer with the option of purchasing the asset. The hirer can also terminate the hire-purchase agreement if he is not able to buy the asset. The owner will then take back the asset and it will have been considered to have been a good rental.

In exploring the nature of HP contracts, it should be noted that it is neither just a sales contract nor is it just a hire contract because both contracts are vastly different. Under the hire contract, the hirer is not given an option to purchase, instead the asset should be returned to the owner when the contract period is over (Yusoh & Abd. Rahman, 1996).

Regarding to the Malaysian case under the HPA 1967, if the asset is repossessed to the owner, the hirer still has the option of purchasing the asset upon fulfilling certain requirements. The term stipulates that the objective of this contract is for purchasing purposes, but it is considered optional for the hirer to purchase. This means that the customer uses the lease contract with the intention to purchase. Therefore, the effect in a HP contract is different compared to sale contract and lease contract which it is without immediate effect to transfer the ownership to the customer. The contract is first used as a lease contract and then the customer is given an option to purchase the rented asset at the end of the payment upon satisfying the price (SM Hussain, 1995). A different view suggests that the contract is a combination of a trust and sales contract (Goode, 1970).

Understanding the Trading of Hire-Purchase and AiTAB Contracts in the Malaysian Legal Environment

Based on the above definitions, both AiTAB and HP contracts have similar contents in nature and purpose but are based on different principles. Both contracts aim to protect the contractual parties' rights whereby the seller receives the full price and the buyer has the option of purchasing the asset at the end of the instalment as agreed in the initial contract. The protection objective illustrates how the trading combines two contracts to achieve its ultimate goal as a purchasing transaction. Therefore, the AiTAB must conform to the basic requirements of the *Shariah* such as; (a) it must adhere to the essential elements of *al-ijarah* and *al-bai'* contracts and must meet the necessary conditions of each contract, and (b) it must avoid the relevant *Shariah* prohibitions (Jalil, 2013). However, the HPA 1967 provides the definition of a HP contract based on conventional law, which may or may not comply with *Shariah* terms. Therefore, this paper will identify the characteristics of the contract, as there is a need to understand its implementation in Malaysia.

The AiTAB's definition states that two contracts are undertaken separately, namely a leasing contract and a subsequent purchase contract. These combined contracts being *al-ijarah* and *al-bai'*, each has a different law³. *Al-bai'* means the

³ The sale contract results in the transfer of asset ownership to the buyer, whereas in the *al-ijarah*, the hirer can only benefit from the asset without obtaining possession and must return the asset to the lessor when the period is over.

transfer of ownership to the buyer once the price is received by the seller, but in *al-ijarah*, the hirer is able to utilise the benefit of goods while the lessor reserves the right of the wage or rent (Muhammad, 1984). Therefore, the trading of AiTAB needs to refer to Islamic law as leasing and sales based on muamalat principles have different rights and responsibilities. The AiTAB trading is classified as *Shariah*-compliant by Bank Negara Malaysia (BNM), the central bank of Malaysia, under the condition that all transactions are based on underlying *Shariah* requirements. With AiTAB, the owner of the asset leases it to the hirer for periodical instalments such as monthly rental (not monthly payment as sum of price). In addition, the hirer is given an option to purchase the asset at the end of the instalment with a sales contract, which will transfer the asset ownership to the hirer (Jalil, 2013). Thus, in this type of business transaction, the owner of the goods leases them to another person for a specific rental and a specified period of time as mentioned earlier (Saleem, 2007). In this process, the hirer is usually required to pay a monthly rental that has been pre-determined and the hirer has the option to buy it at the end of the rental period. The purchase of goods is evidenced in a separate sales contract at a mutually determined price. If the owner is so determined, he can sell the goods to the hirer as a *hibah* (gift), meaning at zero price, at the end of the hire-purchase agreement. The consideration of *hibah* is based on *maslahah* (public interest), as a reference to the transfer of ownership to the hirer and is considered as *Shariah*-compliant in fulfilling people's need through the instalment method of purchasing.

A hire-purchase under the HPA 1967 is practised as a banking facility whereby whenever a customer signs an agreement with the bank for vehicle financing, he will have the option of purchasing it from the bank at the last payment for an agreed price with all the rental payments made constituting a part of the price. This shows that the objectives of both transactions are the same as being a business and a trade activity. The important element that should be emphasised during the trading of this contract is to clearly understand both parties. Malaysians understand the exercise of particular terms and conditions that are agreed upon in an agreement. As a result, customers understand the meaning and implementation of conventional HP contracts and AiTAB contracts which is both of contracts based on different spirit between Islamic-based and conventional-based. However, some still deem AiTAB to be no different to HP contracts offered by conventional banks except in name only and that the perception is not true because AiTAB does not involve interest, whereas interest is applicable to conventional HP contracts, as a conventional loan, in all calculations including price, charges, and penalties. Therefore, the implementation of HP contract under HPA 1967 means that when a customer signs a HP contract, he will be affected by the terms of the HPA 1967 as a hirer until he has paid all instalments and becomes the asset owner, and then should he decide to purchase the asset.

Generally, the nature of both of HP contracts whether AiTAB or conventional hire-purchase that both of them are similar purpose of contract and there are two contracts have implemented such as sale contract and lease contract and lastly, the transferring of ownership will be executed when the all instalments has paid. Therefore, the based on deep understanding, the researchers believe that the conventional HP contract could be harmonised in its implementation to become Islamic contract or AiTAB itself if it is executed completely.

Definition of *Maqasid al-Shariah*

Maqasid al-Shariah is a term that is derived from two words; *maqasid* is the plural form of *maqasid* which means 'purpose', and the latter word *Shariah* refers to the Islamic legal form. According to the interpretation of Imam al-Ghazali, the *Maqasid al-Shariah* aims to promote the well-being of human beings, which lies in safeguarding their faith (*din*), their human self (*nafs*), their intellect ('*aq*l), their posterity (*nas*l), and their wealth (*mal*) (Al-Mubarak & Osmani, 2010). Through a functionalist approach, al-Zuhayli, a contemporary Muslim scholar, describes the *maqasid* as the ultimate goal that aims for consequences and meanings which the *Shariah* upholds and establishes through its laws and consistently seeks to realise, materialise, and achieve them at all times and places (Kamali, 2011).

The fundamentals of *Shariah* generally focus on the well-being of both individuals and the community and the law is designed to protect those benefits and to facilitate the improvement and betterment of the quality of life. From the *maqasid* understanding, Kamali (2008) highlights that the spirit of justice is a manifestation of God's mercy as well as an objective of the *Shariah*. This study aims to utilise *Maqasid al-Shariah* as a methodological framework to critically examine AiTAB and HP contracts as a compatible approach with *Shariah* and some suggestions to include *Shariah* term in HPA 1967.

AiTAB Contract Based on *Maqasid al-Shariah*

Maqasid al-Shariah is an important methodological form in Islamic law, providing a process of developing interpretivism in responding to the challenges of social changes in modern times. Many contributors, therefore, consider the role of *maqasid* as being the process of solving contemporary problems faced in everyday life. Since *maqasid* is defined as 'human well-being', whatever activities are undertaken, including finance, have to be in line with the 'human well-being objective', and this, by definition, also includes the hire-purchase as well. Therefore, its construct must also prioritise *maqasid* alongside aiming for financial efficiency, hence, both supply and demand conditions must be in line with the *maqasid*. In addition to *maqasid*, another process related to the fiqh form is *maslaha*, which seeks public interest or benefit. However, Islamic ethics necessitates *maslaha* to be in line with *maqasid*.

This section, hence, aims to identify the AiTAB contract based on *maqasid* using the HPA 1967's provision to protect customers' rights. Under Islamic law, the spirit of protection must be applied to both parties to ensure justice for all. The *maslaha* method means the protection of *masalih* (plural of *maslaha*/benefit) and the prevention of *mafasid* (plural of *mafsada*/corruption). Therefore, the use of *maslaha* and *Maqasid al-Shariah* forms should be applied in the construction of IBF products and in producing economic and financial outcomes. To understand IBF operations in light of *Shariah* law through *maslaha* and *Maqasid al-Shariah* requires not only *fiqhiyyah* knowledge but also the understanding of the reality of economic operations and outcomes of the financial and economic activities (Awang, Asutay, & Jusoh, 2014). Therefore, the procedures of HP contracts based on the HPA 1967 need to be analysed using Islamic principles and *maqasid* in order to understand the reality of this contract.

Understanding *Maqasid al-Shariah* for AiTAB and Hire-Purchase Contracts

With reference to the spirit of *maslaha* and *Maqasid al-Shariah*, the purpose of the AiTAB agreement is actually to purchase an asset through involving the above mentioned two contracts, namely the *al-ijarah* and *al-bai'*. The function of *al-ijarah* contract is for the protection of the owner's rights, in the case where the hirer fails to fulfil the instalments, whereby the owner has the right to repossess the asset which he still owns under the leasing contract. At the same time, the contract also protects the hirer's rights when an agreement in the contract gives him the option to purchase the asset at the end of the instalment period based on a mutual agreement to achieve justice and a win-win situation. It should be noted that during the specified leasing period, the customer is only considered as the hirer. Therefore, the exercise of the contract must follow the divine law (*al-hukm*) of *muamalat*, whether it is *al-ijarah* contract or *al-bai'* contract due to each contract being effective for a certain duration during the HP contract. With the spirit of *maslaha*, both parties must stay true to their purpose of entering into the contract with the aim to purchase. This means that some of the implementation upholds the sales spirit, such as the hirer becoming responsible for any defects occurring to the assets during the period of leasing. Next, all the prohibited elements must be avoided by the agreement, such as with interest or *riba* practices and any unclear additional charges. With the spirit of *maslaha* and *maqasid*, Islamic banks that offer the product should also maintain the well-being of the hirer as the *maqasid* suggests, alongside aiming for efficiency in fulfilling *maslaha*.

As a result, in AiTAB issues, the use of *maqasid* mechanisms offers a precise explanation to the people about particular divine laws and the values of *muamalat* principles (*ahkam al-muamalat*). The *Shariah* does not allow the exercise of AiTAB that mixes *muamalat* principles regarding *al-ijarah* and *al-bai'* with uncertain principles. Therefore, all the terms of the contract must comply with *Shariah* such as price, charges, rights, and liabilities. Some of the items regarding rights and liabilities as mentioned earlier could be suggested to both parties under a mutual agreement based on *maqasid* to achieve justice and fair results. For example, the hirer agrees to take responsibility of the maintenance cost as he has the right to purchase the asset at the end of the contract. *Maqasid* also stipulates that interest must be avoided in all circumstances and conditions, even if it is at a low figure of 1% or any number lower than the Islamic charges.

It is a common conviction that the hire-purchase under the HPA 1967 does not contradict the objective of the *Shariah*. This argument considers conventional hire-purchase as a valid contract based on '*urf*' due to its common implementation, which is supported by *Shariah* references. For example, the AiTAB facility should not be prevented from adopting these rules and incorporating them in the agreement, even in terms of management as it is permitted to refer to the conventional hire-purchase and the prevailing practice ('*urf*') at a particular place; as long as such practices are not against *Shariah* principles (Abdullah & Dusuki, 2006). A similar argument put forward earlier by Awang (2000) states that AiTAB contract trading under the HPA 1967 can be referred to as an '*urf*' concept. However, some contenders reject this opinion. By implementing *maslaha* and *maqasid*, the essence of conventional hire-purchase does not contradict *Shariah*. Despite this opinion, it does not mean that all the conditions of the HPA 1967 are completely complied with *Shariah* requirements. Therefore, this

paper also aims to review certain crucial issues regarding the provisions of HPA 1967, focusing on approaches of the Act based on *Maqasid al-Shariah*, as discussed in the following section.

Critical Exploration on Issues of Implementation of AiTAB Contract under Hire-Purchase Act 1967 in Malaysia

As stated, this paper aims to review the issues related to the AiTAB contract as a product of Islamic financing and the HPA 1967 as the law governing the contract based on the conventional spirit such as with regards to interest practices, unrestricted sources, and goods which may involve *haram* (prohibited) items, and the status of a mixed contract that is unclear to *Shariah* law, especially when financing is terminated in the middle of the agreed period. This could raise issues of rights and liabilities between the owner and the hirer and also incur charges under conventional law. The question is how the HPA 1967 aims to protect the contractual parties' rights for ensuring that it is *Shariah*-abiding? At the same time, we understood that the *Shariah* conditions are definitely not observed under the HPA 1967.

However, most of the Muslim scholars stated that not all of the HPA 1967's provisions contradict to *Shariah* requirements as well as that some people may argue that the HPA 1967 is 90% in line with *Shariah* principles (Jalil, 2013). Jalil (2013) also added that the HPA 1967 does not completely contradict with Islamic law principles. Hence, according to Haneef (1997), the hire-purchase scheme regulated by the HPA 1967 is not entirely contradict to *Shariah* principles. Regarding to the conflict of hire-purchase regulation, there are suggestions to harmonise the HPA 1967 with *Shariah* principles such as findings by Idris (2011) which reported that there is a need to ameliorate our present operational practice especially with regard to litigation, repossession, and auction practices. Therefore, positive approaches will be suggested for HPA 1967 to be based on Islamic principles and values to achieve *Maqasid al-Shariah*.

In addition, Malaysia's automobile financing acquired 30% of financing. Unfortunately, the issues of bankruptcy indicated that most incidents of bankruptcy in Malaysia arise from the sale and purchase of vehicles, making up 26.54% of the total cases between 2007 to 2014 (Yuen, 2014).

In this section, we will discuss the issues regarding the provision of HPA 1967 for HP contract from the view of the *Shariah* position as mention above with focus on the subject matter and the aforementioned act. Three main issues have been highlighted; 'ownership in terms of transfer process, right and liability, and charges. The use of *maqasid* is an efficient concept that may overcome these issues, especially for offering AiTAB as Islamic vehicle financing. Therefore to achieve the goal of study, the understanding of *maqasid* spirit must correspond to and be consistent with its reality and its scope in human activities and life. The *Maqasid al-Shariah* will be referred to measure how far the implementation of the contract can achieve justice for the people. Therefore, this study investigates the HPA 1967 through *Maqasid al-Shariah* with the objective to suggest improvements to the Act that may prevent further abuse in HP and AiTAB contracts.

i. Issues of Ownership and Repossession

The HP and AiTAB contracts are introduced as alternative approaches towards the purchasing contract in which a deferred payment is applied with particular features, and they have also become one of the financing products in the banking industry for both Islamic and conventional operations for vehicle financing or loans. In Malaysia, both contracts are implemented under the HPA 1967. The purpose of the HPA 1967 is to protect the customer's rights (customer as a hirer/buyer) while achieving the purpose of the transaction. During the contract period, the bank as the owner has the authority to regain the asset according to the Act. Conventional banks use the Act as a reference for all associated issues which occur, even including the meaning of the contract. In this case, according to Section 4 of the HPA 1967, the hirer is given the option to buy the asset by fulfilling all the instalments with the consideration that the price has been fully paid. Therefore, the contract of HP will be complete at the end of the instalment. It also could be applied over the full settlement price at any time during the *al-ijarah* period. If the the hirer or banking customer fails to pay two-month instalment, the bank as the owner is allowed to regain the asset according to the terms of the HPA 1967. In fact, the banking customer as a hirer status is unauthorised to sell or hire the asset to another person because he is merely a lessee, unless he has paid all instalments as the provision has provided under HPA 1967.

The question here is who is considered as the owner status under HPA 1967 and why is ownership not tranfered to the banking customer or company customer after the completion of the HP contract? At the same time, there are some people argue that the HPA 1967's provision is unjust because it allows repossession by the bank or company when the asset has been sold to the other customer as the third party by the customer as the second party.

Under *Shariah*, the repossession practice is valid because it is considered an *al-ijarah* contract where asset ownership still remains under the bank or company. The customer will only become the owner when he fulfils all the instalments, of which the last instalment will implement an *al-bai'* contract. It is referred to as the *muamalat* law due to the meaning of this contract with regards to the two contracts, namely *al-ijarah* and *al-bai*. The same result would be judged in the case of the AiTAB if the customer is unable to fulfil all the instalments and the asset is to be sold to another buyer to prevent huge risks. Indeed, the *Shariah* accepts the situation because during the *al-ijarah* contract, the customer is able only to gain benefit from the asset and not earn ownership. Therefore the provision of Section 4 of the HPA 1967 is acceptable according to the underlying *Shariah*.

The following issue is that the HPA 1967's provision provides the contract that includes two contracts in one agreement. This means that there is no need to draw a sales contract during the last payment, and the customer only needs to fulfil all payments to have the ownership transfered to him as stated in the terms of the Act. But many Muslim scholars suggest that the AiTAB must be executed over both the involved contracts (*al-ijarah* and *al-bai*) separately (Ramli & Onn, 2007). This situation was proven in the previous issue where the customer still acts as a hirer until he fulfils all his instalments. Jalil (2013) has also used the argument to refer to Al-Zuhayli's view on the contract in that if the transaction is comprised of two contracts at the same time on the same subject matter, such as leasing the contract and selling the contract

concurrently, it would not be allowed by the *Shariah*. This ruling has been regulated for the AiTAB contract by the *Shariah* Advisory Council of BNM's resolution (Fatwa of AiTAB by BNM), which considers the following: the option to execute a sale contract at the end of the lease tenure is a feature of the AiTAB and *ijarah muntahia bi al-tamlik* that is permissible and practised in the market. This option does not contradict the *Shariah* as the *al-ijarah* contract and the sale contract are executed independently (Bank Negara Malaysia [BNM], 2010). Based on this opinion, if the two contracts are combined together, the HP contract will be invalid. This is aligned with the implementation of the AiTAB contract with separate contracts as practised in the Islamic way (Jalil, 2013).

However, there are some scholars who have different view regarding the implementation of AiTAB contract separately where it might be based on '*urf*' as a sale contract through the last payment. This view is based on the *maqasid* mechanism which perceives the practice to be compatible with the *Shariah*. With the *maqasid* spirit, for this issue, this paper suggests educating people to understand the meaning of the Islamic contract, which could be done through three situations; writing, sayings, or any actions based on the '*urf*' mechanism. In this case, the sales contract will be considered as expired over the payment of the last instalment as an action of sales contract. According to Tag El-Din and Abdullah (2007), when a hirer has paid this last instalment, he is automatically exercising an option to purchase. In this situation, the valid intention of the parties at a practical level is a problem. If the issue refers to *muamalat* law, the action is one of three validity methods to implement the *aqad* or contract. This automatically uses the contract of sales according to the spirit of the *maqasid*. This practice of the HP contracts is valid as long as the asset is the same and without making the payment of rental and prices with the same meaning (Awang, 2000). This suggestion will solve the issue of the separation of contracts. The researchers also agrees with the implementation of *maqasid* in AiTAB practice based the '*urf*' concept. Therefore, some of the provision of HPA 1967 suggested to add the term *Shariah* which may cover all practice of the HP contract under HPA 1967 to become Islamic contract.

The second issue is on how to determine the status of a customer. That is whether he is a hirer or a buyer since he is a hirer based on the contract but at the same time he has the intention of purchasing the asset with a mutual agreement while also agreeing to take responsibility over the asset, such as with regards to the costs of repair and *takaful*. The issue here is, however, the status of the customer, whether as a hirer or a buyer, with his commitments to the instalment of the financing. During the contract, the customer agrees to take responsibility over the asset such as cost of repair, *takaful*, and other such matters. Thus, the issue is that the contract appears to be more like a purchasing financing contract. Therefore, it is suggested that a contract of sales will be applied based on the percentage of instalment payments. Thus, the option of purchasing will be achieved at a particular percentage, such as at 70% of financing. When this percentage is achieved, the customer becomes the owner. The researchers suggests the hirer must pay a down payment with a high percentage, such as 30% or 40%, so that it will only take a few years to become the owner. It also can solve many issues of financing with the bank. This is based on the Islamic moral economy (IME) concept which will be explained later. Then this is no doubt that 40%

of down payment is rather than 0% of down payment in inculcating the people to plan their financial into the hire-purchase practice.

Regarding of this issue, Malaysia has faced many issues of bankruptcy due to vehicle financing including AiTAB financing. Most incidents of bankruptcy in Malaysia arise from the sale and purchase of vehicles, making up 26.54% of the total cases between 2007 to 2014 (Yuen, 2014). According to Datuk Abdul Rahman Putra Taha, Director General of Insolvency Malaysia Department of Insolvency said, the statistics show that from 2013 until February 2017, a total of 23,191 bankruptcies has been recorded due to inability to pay a car loan (Ong, 2017). In responding to this issue, this paper has a different opinion with regards to the spirit of *maqasid* due to cases in which Islamic banks have to review the amount of down payment from 0% to a new term of financing of 30%. If the product is applied with a good amount of down payment, it considers the hirer do not have problems in fulfilling the instalments within a short period and leaving a smaller balance after one to two years. These implementations are based on the *maqasid* spirit and aim to discourage customers from obtaining full-financing, which is more *mafasid* and with apparently many cases having occurred with this financing. The suggestion is to ensure that the hirer has the ability to fulfill the payments successfully. It also emphasises the moral aspect as an important reference in Islamic financing, such as that the IBF institution assumed by the Islamic moral economy (IME) should provide stability to the financial system and should also be a moral compass for capitalism (Asutay, 2012). In fact, IME might be able to empower the individual financial system through the Islamic financial planning in fulfilling their need. The researcher point out this concept in this discussion due to it's purpose is very compatible with the spirit of *maqasid Shariah*.

It can therefore be concluded that the provision of the HPA 1967 is in convenience with the *Shariah* in terms of the nature of the contract. Thus, *maqasid* is used very practically in reference to '*urf*' for the HP contract in fulfilling the meaning of the AiTAB contract. This spirit cannot be achieved without the understanding of a widespread *Shariah* spirit. Then, the HPA 1967 also showed its protection covering both sides. Therefore this paper suggests that HP or AiTAB contracts can continue to be offered to the people because it is a very useful contract to respond to people's need. However, what the people have to understand is that the contract is not an absolute *al-ijarah* contract or sales in term of approaches and methods. But in terms of consequences, both contracts must be used in practice so that the transaction complies with the *Shariah* requirements. Therefore all the decisions of the contract should acknowledge both sides with a mutual agreement with the spirit of justice based on *maqasid*. Therefore, the hire-purchase's name is not contradict to *Shariah* but its practice must be based on *muamalah* law due to the tranfering ownership is valid in *Shariah*.

ii. Issues of Rights and Liabilities

The provisions of the HPA 1967 has determined the rights and liabilities in implementing HP or AiTAB contracts. According to conventional law, both elements (the rights and liabilities) become effective as a ruling when the agreement is signed. This practice was stated in the HPA 1967 through a particular form. Section 4 of the HPA 1967 states that the agreement should be conducted by both parties where they

have to meet and fill the form to agree to the conditions related to their rights and abilities. This spirit was also mentioned in the Contract Act 1957, Section 10. The question regarding HP or AiTAB contracts is then, how to implement this practice properly with two different contracts adhering to *Shariah* law? Therefore, this paper aims to examine the associated provisions of the HPA 1967 that contradicts *al-ijarah* contracts in *muamalat* such as once the asset is sold to a new customer (third party) by the hirer. So how to determine the price status in the case of the termination of contract during the hiring period, the responsibility of any costs of the asset to customer as a hirer under the AiTAB during the *al-ijarah* contract, or the responsibility for bearing maintenance costs (for example repair costs) resting with the lessor (owner) unless the agreement provides otherwise. In the HPA 1967, the market practice states that the hirer is to bear the maintenance costs.

Regarding the price issue that is related to Section 15 (5) (b) (c), the provision provides particular effects to the hirer when the asset is sold to a new customer. It states that the first customer (hirer) reserves the right to the surplus of the price if the price is more than the balance. Otherwise if it is lower than the balance, he must be responsible for paying the loss. This situation questions how to address this case in an *al-ijarah* contract. This provision indicates that the consequence does not adhere to the *muamalat* principle.

For the above issue, this paper firstly refers to the *Shari'ah* Resolutions in Islamic Finance (SRI) by the Central Bank of Malaysia, which states that vehicle financing based on the AiTAB may apply the concept of assignment of rights or liabilities as provided under the HPA 1967 as it does not contradict the *Shariah* as Islam recognizes the transfer of rights and liabilities based on mutual agreement by the parties (BNM, 2010). However, it also means that *Shariah* allows a hirer to transfer his rights and liabilities under the hire-purchase agreement to another person. In the case of the termination of contract during the hiring period (the asset will be sold to a new customer), there are two different prices that will arise depending on whether it exceeds the surplus of the sale or is less than a certain amount. SRI has suggested that the surplus will be considered a *hibah* or gift, but if the sale price is a deficit then the first hirer is responsible to pay the amount (BNM, 2010). Therefore, to be *Shariah*-compliant, an AiTAB must conform to the basic requirements of the *Shariah* such as; (a) it must adhere to the essential elements of *al-ijarah* and *al-bai* contract and must meet the necessary conditions of each contract, and (b) avoid the relevant *Shariah* prohibitions. For the lesser amount contract case, this paper suggests the payment of the difference will use the penalty concept due to the breach of agreement as exchange for conventional hire-purchase practice in different amount in lost. This practice is not allowed if executed based on a promising concept because the promising as a *riba* which does not comply with the *muamalat* principle. Therefore it has been suggested over a particular process based on a mutual guarantee so that the contract can continue to be offered to the people to fulfil their needs in their everyday life. This suggestion is considered as the *maqasid* understanding to achieve justice among the contracting parties. According to Awang (2000), based on the freedom principle, both parties have the optional tool of whether they want to continue with the HP contract or cease it with acceptable reasons. Otherwise the contract must only be terminated on very strong grounds, such as one of them not being able to fulfil

the conditions of the contract (Awang, 2000). This consideration seeks to ensure the good relationship between the involved parties and avoid losses on both sides. The other good practice in the termination process of hire-purchase is the notification practice which is compatible with the spirit of *Shariah*. This suggestion also aligns with the Islamic legal maxim in such terms as '*Harm shall not be inflicted nor reciprocated*' (Awang, 2000).

The researcher also suggests implementing the sales contract of HP contract based on the good percentage of payments. For example, if the parties agree in considering the automotive sales contract will be done when the instalments achieved 50% or more than that. This way, the status of the customer as a hirer becomes as the owner clearly. This means that if the payment is less than 50%, then it follows the previous suggestion by the SRI resolution. This opinion perceives that when more than 50% of the instalment has been paid, it indicates that the customer has chosen to purchase the asset, however this option must be agreed by both of parties based on their agreement. In fact, this suggestion is not included under HPA 1967 but it is valid if referring to the law of contract. This suggestion also aims to protect both parties and to avoid an unclear meaning in the contract practice. Indeed, without the spirit of justice, this contract should not be implemented because it will lead to many problems and cases among the people in the contractual exercise and financing operation. This paper also suggests that the government needs to stipulate that authoritative bodies must handle these cases much like arbitration bodies. All of these opinions are suggested based on the *maqasid* spirit to fulfil people's needs and comply with the Islamic law of *muamalat* or *Shariah* rules.

Therefore Islam emphasises on the rules in Islamic law of *muamalat* in all contract. The rules are put under *Fiqh al-Maliyyah* as explained by Al-Zuhayli (1989) that the elements of contractual formation are the substance, which forms a contract and without them the contract will not be formed. These elements consist of four things; the pronouncement of the contract, the contracting parties, the place of the contract, and the subject of the contract. According to Awang (2000) in the HP contract, both parties must fulfil their responsibilities as they have agreed in the agreement. Therefore, the commandments and conditions of contract must be observed by both sides with respect to the freedom concept of contract. So in the *al-ijarah* contract, the delivery of goods means that the goods' requirements must be implemented accordingly, including the duration of *al-ijarah*, the payment must be made clearly and to perfection, the goods must be in good condition, and the parties must be well-informed in the agreement. Therefore, if the goods are not able to be used by the customer then the contract is void. For example, a damaged vehicle cannot be rented because there is no benefit. In fact, these spirits also refer to the importance of the basic Islamic contract. Indeed, there are many Islamic norms and values such as mutual consent, fairness and justice, and keeping promises. These spirits are mentioned in the text, "*O you who believe! Do not unjustly consume your belongings among yourselves, but do trade by mutual consent, and do not kill your people, Surely, Allah is Merciful to you*" (Quran 4:29). It also means that the obligations of the contract must be implemented with respect to the rights and liabilities of both sides. According to al-Baijuri (1994), the contract must be executed by offer and acceptance because it should be done with mutual consent. Then the

spirit of mutual agreement is validity in *Shariah* as long as both parties give their consent to give and take the rights and abilities of the AiTAB agreement. Therefore the offer and acceptance practice (*ijab* and *qabul*) is considered as proof of confirmation to the contract and all terms in it. This obligation with the mutual consent spirit can be understood by the text which declares that “O you who believe! Fulfil your obligations, lawful to you is the eating of the beasts of cattle except those which are narrated to you, and forbidden to you is hunting while you are in a state of pilgrimage; surely Allah commands what He intends” (Quran 5:1). There is a similar order in the text (Quran 17:34), which relates to divinity in the management of an orphan’s property. The main factor in meeting the *Shariah* requirement is that the agreement must be accepted by the Islamic ruling of contract as long as no force or aggression was involved. Based on all of the statements and arguments, both sides of the HP contract are bound to their agreement. Therefore, all the terms subjected in the agreement should be met with its consequences received. This paper strongly agrees with this practice, which is a method of purchasing with a deferred payment approach through a mutual agreement in the spirit of justice.

The HPA 1967 also provides a provision that allows the bank to regain the asset if the hirer fails to pay the instalment in the particular time, and this must be done with a proper notification submission. According to Jalil (2013), the repossession of goods by the owner would be due to the failure of the hirer to pay two consecutive instalments or the last instalment. The hirer is given certain rights and the owner has to follow the proper procedure provided in the HPA 1967. If the owner does not follow the procedure provided in the Act, the repossession of the goods will be void or invalid and he will be liable for an offence. The repossession practice according to the HPA 1967 must be informed to both sides clearly. In Islam, the owner (bank or company) is allowed to regain the asset of the AiTAB because he still has ownership based on the *al-ijarah* contract. The hirer must return the asset to the owner when the contract expires. This condition was stated in the law of *al-ijarah* in *muamalat*. According to al-Zuhayli (1989), the asset of a leasing contract (the key of home or shop) must be returned to its owner. Therefore, in the HP contract, initially all parties must agree to all terms and they should honour the conditions. This also means that the contract cannot be terminated without acknowledge to involved parties or denied the rights of involved parties. So, the HPA 1967’s provision of particular notification by writing is in line with *Shariah* law. As we know the *al-ijarah* contract is considered a required contract (*‘aqad lazim*), which is not allowed to be canceled by only one party unless there is an acceptable excuse (al-Hasari, 1991). The *Shariah* emphasises the method in the formation of the contract to ensure justice and well-being among the people. Therefore, the *Shariah* does not reject this provision, but it accepts the practice to avoid any cruelty and injustice. The *Shariah* also accepts the procedures of the possession practice using written negotiation. This practice will be conducted through a meeting by both sides to decide their decision with mutual agreement. So the argument against the possession practice without negotiation is untrue.

Section 7 of the HPA 1967 provides certain implied conditions and warranties for the protection of the hirer against irresponsible owners of goods. But Section 7 (2) b and 7 (3) stipulate the negative term of protection where the customer is denied his rights regarding to damaged of second-hand goods. This may lead to losses to the

customer and it may seem like the contract is practicing corruption like gambling. In Islam, this issue should be referred to as the *khiyar* principle, which gives the customer the option of whether or not to continue with the contract or terminate it. In *muamalat* law, the conditions of the goods must be informed to the customer in terms of its characteristics or quality. According to Al-Muti'i (n.d.), it is not permissible to sell goods with uninformed substance. This prohibition practice covers all business contracts. It means that the delivery of goods must be informed to both parties with mutual agreement. It is also based on the term of the contract spirit expressed that "*if the condition of denying the delivery of goods is to be revoked a contract*". We know that the benefit of assets in the *al-ijarah* contract is the result of the payment of rent. But at the same time, the assets must be approved by the *Shariah* as declared in the hadith of al-Tarmizi, such as in "Surely that Allah and His messenger forbade the trade of alcoholic, dead animals, pigs and idol. The people asked him, "*O Allah's Messenger! What about fat of dead animals, for it was used for greasing the boats and the hides, and people use it for lights? He said, it is illegal,*" (Al-Tarmizi, n.d). Ramli and Onn (2007), suggests that an asset to be leased under the AiTAB contract must be deemed *halal* by *Shariah*. It must not involve *haram* (prohibited) elements, such as gambling, alcoholic beverages, or swine. In comparison, in the HP contract there is no such prohibition on *haram* assets from being made the subject matter of the HP contract.

As we know, that the HPA 1967, has been established for the protection purpose of the hirer. In Section 12 (3) provides that the hirer can get an order from the court to deliver the asset to a third party if he cannot take it from the owner without the acceptable reason. Its purpose also might be understood in Section 17 (1) that prevents the owner from selling the asset without written notification from the hirer within 21 days. Therefore both parties must decide their position in the contract. Either they would like to continue the contract or terminate it properly. These sections is in line with the *Shariah* or Islamic law of *muamalat* due to ensure justice and well-being among the people as mention before. Therefore, the *Shariah* does not reject these provisions, but it accepts the practice to avoid any cruelty and injustice. In Section 18 and 19, a method is provided for the hirer/customer to get back the assets with the following conditions:

- (i) The hirer has to pay the outstanding amount to the owner under the hire-purchase agreement
- (ii) The hirer has to pay the compensations for the breach of agreement including the costs of intake of the asset and its delivery

Regarding the extra costs imposed on the hirer, that is not considered as corruption or cruelty but instead as protection for the owner. The provision also requires the hirer pay the outstanding amount within 21 days. For an additional suggestion, this case could be referred to a negotiation body to decide the decision based on the spirit of justice with mutual agreement from both parties. It is also suggested that if the hirer definitely has no ability to continue the contract, then it must be terminated as a lease contract. The asset must be returned to the owner and the paid instalment is considered as a monthly rental based on contract of lease as understood of the

meaning of hire-purchase practice. This result is acceptable in both Islamic and conventional ruling unless interest is involved, which unlawful in Islam.

Based on these above issues, the *maqasid* spirit not only explains the reasons and actions to solve the problem but it also shows the meaning of this contract as a special approach. It also shows that in the contract, there is mutual guarantee to achieve the goal of both contracts by using some *Shariah* terms like legal maxims and ulama's opinion. These spirits refuse any provisions that merely protect one party in the contractual agreement because it is not in line with the *Maqasid al-Shariah*.

iii. Issues of Interests, Charges and Penalties

The issue of interest is the main factor that causes the Act to not achieve 100% *Shariah* compliance. Hence, some scholars say that the HPA 1967's provisions have almost complied with *Shariah* requirements. According to Jalil (2013), the HPA 1967 is very developed and comprehensive and is adaptable in the present time as a fair and reasonable law protecting both the interests of the owner and the hirer in reasonable terms. The majority of the provisions provided in the HPA 1967 can be adopted into Islamic hire-purchase law (AiTAB) as they are not contradictory with *Shariah* principles (Jalil, 2013). In a similar view, Abdullah (2009) stated that the HPA 1967 provisions clearly spell out procedural rules and requirements which aim to make a hire-purchase transaction a success, and at the same time, to protect the hirer and guarantors by imposing certain duties onto the owner. These rules are clearly in line with the spirits of the *Shariah*, which promotes justice and forbids oppression while engaging in commercial transactions. Therefore, the AiTAB facility should not be prevented from adopting these rules and incorporating them in the agreement. Even in terms of management, it is permitted to refer to the conventional hire-purchase and the prevailing practice ('*urf*') at a particular place, as long as such practices are not against the *Shariah* principle.

The implementation of interest in the HPA 1967 concerns the price, charges, and penalties. For example, Section 34 (C) of the HPA 1967 provides for the practice of interest or *riba*. The company or banking institution offers the HP contract to customers at a price with interest (Mahmood, 1998). This issue also was highlighted by Abdullah and Dusuki (2006) who stated that the HP contract, despite being one of the most demanding facilities of Islamic banks, the AiTAB is unfortunately lacking with regards to its *Shariah* regulatory framework (it means that necessary need to established AiTAB Act). One of it is that the basic operation of AiTAB in fact is similar to the conventional hire-purchase, with the only difference being in the issue of interest (*riba*) and issuance of acceptance ('*aqd*') letter. With regards to the determination of fixed rate, standard documentation, and formation of agreement, the AiTAB transaction follows the same spirit of the HPA 1967. It was also discussed by Jalil (2013), when he compared the HPA 1967 with the *muamalat* bill which was suggested in 2000 where the bill is divided into nine parts and has six schedules. As a positive development, the bill abolishes the provision for interest (*riba*) in the HPA 1967. The HPA 1967 provides provisions for the payment of interest (*riba*) in Section 34 (c), in the Sixth Schedule on the 'terms charges' and in Section 2, under the 'Statutory rebate'. The Second Schedule of the Muamalat Hire-Purchase Bill (MHPB) provides that the Islamic hire-purchase law will operate based on interest-free Islamic

transactions of *al-bai al-murabahah*. This provision is very important because Islam prohibits interest in any business or social transaction.

It should be noted that *Shariah* does not allow the practice of interest but allows the concept of profit for business operations. The practice of interest refers to a profitable unilateral practice and is unjust repression in the financial system as described previously. The HP contract does not actually need to implement the interest concept. The customer is required to pay the rental in instalments and at the end of the period, he has the option to purchase the asset. This way the banking institution has obtained their profit. But this contract must ensure that it can be useful to all of the parties precisely in fulfilling the people's need as an Islamic financing product.

Regarding the practice of charges and penalty under HPA 1967, they contradict with the *Shariah* or Islamic law of *muamalat*. In fact, in Islamic law of *muamalat* these practices are not prohibited but they have not involved the interest. For example of charge practice in *muamalat* is in the *mudharabah* contract, the manager is allowed to take a particular amount for his work in conducting the business. Islamic law also accepts the penalty practice, when one party defaults on his agreement and causes the other party to bear additional costs due to the default. This practice can be refer to Islamic history where Islamic governments appointed an *al-muhtasib* to be responsible for decisions on disputes in business. They are also responsible for ensuring the protection of human rights and to resolve the problem. Their power in the implementation of *Shariah* is to educate the people and correct the offender by imposing a fine in accordance with their intellect and in particular cases to refer it to the Caliph (Al-Mawardi, 1978). Therefore, the charges and penalties are not rejected in the *muamalat* practice. However the problem in this study is that the provision of the HPA 1967 implements the interest concept in charges and penalties.

With regard to these issues, the HP contract is not rejected because it does not exist in *muamalat* principles but because some of its practices are in contradiction with the *Shariah* such as the interest practice. Therefore, if the issues can be solved then the contract is considered acceptable as an Islamic contract. Its meaning also can be referred to a general understanding of the Qur'anic text of 2:275 as it shows that the *Shariah* emphasises the norms and values of justice and avoids the concept of corruption. The text also affirms that interest is prohibited in any trade. *Shariah* has also prohibited all of the wrong practices in the business transactions as mentioned in the previous issue. All of these arguments are based on the *maqasid* spirit to ensure the well-being of the people.

5. Conclusion

The HP and AiTAB contracts are designed with features for asset purchasing. It is not considered as sales contract or lease contract under the conventional law nor the Islamic law. Therefore, the implementation of the AiTAB contract must apply each involved contract such as lease contract and sale contract with their conditions for a certain period accordingly. This paper uses the *maqasid* mechanism as an aim to measure the acceptability and validity of the HPA 1967 in light of *Shariah* as a protective law.

Generally, the provisions and its consequences in terms of protection under HPA 1967 may be adopted in Islamic law over a particular explanation based on the spirit of mutual consent, a win-win situation, and a mutual guarantee with the spirit of justice as both sides agree to a *Shariah*-based agreement. With the use of the spirit, all the practices will have the perfection of all elements of an Islamic contract, as the *Shariah* requires. *Maqasid* suggests the solution to the HPA 1967's issues but certain issues remain invalid in the eyes of the *Shariah*. Therefore this paper suggests the interest practice must be absolutely abolished. It also suggests that the protection concept must cover both parties with fair and justice. This study believes that the contractual formation of AiTAB can be the best approach towards financing in light of *Shariah* law with the protective spirit and values of the Islamic moral economy (IME). Based on the above comparison, it can be concluded that this Islamic HP or AiTAB can use the HPA 1967 if it is customised with *Shariah* principles through the *maqasid* spirit and the rules of Islamic law of *muamalat* as an Islamic financing product.

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