

The Challenges of Realizing *Maqasid al-Shari`ah* in Islamic Banking and Finance

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ABSTRACT

Islam harbors an economic vision that holds the key to a social order capable of providing social justice along with economic prosperity. This vision is deeply inscribed in the objectives of Shari`ah, also known as Maqasid al-Shari`ah. Consequently the doctrine of Islamic economics entered debates over the social-welfare role of Islam. It has somehow pursued the goal of restructuring economies according to perceived Islamic teachings and principles. Beyond its most visible practical achievement is the establishment of Islamic banks meant to avoid interest and promoted Islamic norms of economic behaviour and ultimately realizing the noble objectives of Shari`ah. This paper examines the challenges of the proper realization of Maqasid al-Shari`ah in Islamic banking and finance. These challenges emerge from different aspects; the proper understanding of Maqasid Al-Shari`ah in Islamic economics; the methods of implementing Maqasid Al-Shari`ah in Islamic banking and finance; the potential conflicts between Macro Maqasid and Micro Maqasid; and the possible abuse of Maqasid al-Shari`ah to justify certain financial contracts which in fact contradicts the Shari`ah texts. The paper analyses all these challenges and provides examples from the current practices of Islamic banks and financial institutions.

INTRODUCTION

Twentieth century spawned a movement committed to developing an Islamic variant of economics. After the long period of colonial domination of Muslim countries by Western imperialists, the movement for Islamization in all spheres of Muslims lives has started to gain momentum of support and acceptance. These movements started in the Middle East and had influenced neighbouring continents to promote what was claimed as a turning back to the actual and complete practice of Islamic way of life. The economic Islamization campaign had enjoyed at least tacit support of politicians and intellectuals of many Muslim countries like Malaysia, Iran, Pakistan and Sudan (Henry & Wilson, 2004). The movement to Islamize economics had further received a second wind during the Arab oil boom of the 1970s, when Saudi Arabia and other wealthy monarchies of the Arabian Peninsula felt compelled to demonstrate a commitment to Islamic causes (Kuran, 2004) .

Consequently, Islamic banking and finance has emerged as one of the fastest growing industries. It has spread to all corners of the globe and received wide acceptance by both Muslim and non-Muslim alike (Iqbal & Molyneux, 2005). Extant literature proclaims that Islamic banking differ significantly from conventional banking, not only in the ways they practice their businesses, but above all the values which guide Islamic banking whole operation and outlook. The values which are prevailed within the ambit of Shari`ah, are expressed not only in the minutiae of its transactions but in the breadth of its role in realizing the Maqasid al-Shari`ah (objectives of Shari`ah).

Indeed, Maqasid al-Shari`ah reflects the holistic view of Islam which has to be looked at as a whole not in parts as Islam is a complete and integrated code of life and its goal encompasses the whole life, individual and society; in this world and the Hereafter. Hence, a deep understanding of Maqasid al-Shari`ah entails intense commitment of every individuals and organisations to justice, brotherhood and social welfare. This will inevitably lead to a society whereby every member will cooperate with each other rather than compete, as success in life is to obtain the ultimate happiness (falah). Thus mere maximisation of profits cannot, therefore, be sufficient goal of a Muslim society. Maximisation of output must be accompanied by efforts directed to ensure spiritual health at the inner core of human consciousness and justice and fair play at all levels of human interaction (muamalah). Only development of this kind would be in conformity with the Maqasid al-Shari`ah (Chapra, 2000a).

Hence, the restricted view of understanding Shari`ah, by only focusing on the legality forms of a contract need to be changed. Instead, the substance that has greater implications to the realisation of *Maqasid Shari`ah* should be equally emphasised especially when structuring a financial product. Otherwise, Islamic banks are just appeared as an exercise of semantics; their functions and operations are really no different from conventional banks, except in their use of euphemisms to disguise interest and circumvent the many Shari`ah prohibitions.

This paper aims at analysing the challenges of realising *Maqasid al-Shari`ah* in the contemporary *muamalah* transactions particularly with respect to the development and operation of Islamic banking and finance. These challenges stem from the improper handling and sometimes misleading application of various tools of Islamic jurisprudence including *Maqasid al-Shari`ah* and *maslahah*. The concept of *Maqasid al-Shari`ah* will be delineated in details so as to shed lights on its application to the modern days practice of *muamalah*. The examples of various forms of controversial Islamic banking products implemented will be discussed to illustrate the problems of misunderstood application of maqasid and maslahah in legitimising contracts that substantially go against the spirit of maqasid al-Shari`ah itself.

OLD SKELETON IN A MODERN DRESS

Islamic banks made their first appearance in the 1970s. Since its first inception, massive efforts have been made to portray them as analogous to an ancient financial organization based on profit-loss-sharing (PLS) mechanism, particularly *musharakah* and *mudarabah*. Muslim economists including Sadr (1982); Siddiqi (1983, 1985); Chapra (2000a, 2000b) Ziauddin Ahmad (1984); Ahmad (2000); Siddiqi (2001); Haron, 1995, 2000; Ahmad, 2000; Rosly and Bakar (2003); Haron and Hisham (2003); Naqvi (2003) and others favours equity-based instruments and places greater social welfare responsibilities and religious commitments upon Islamic banks in order to realize the Maqasid al-Shari`ah with respect to economic and financial transactions, including social justice, equitable distribution of income and wealth and promoting economic development and growth¹.

These writers even go further to argue that equity-based financing is the only principle representing a true spirit of Islamic banking system which departs significantly from the interest-based system. Although they do not fully negate the use of other Shari`ah permissible debt-based contracts alongside the equity-based contracts, they do assert that the socio-economic objectives including social justice, economic growth, efficiency and stability which the Islamic economics seeks to achieve is better served by resorting to primarily equity-based contracts.

These writers almost consistently affirm that Islamic banking model should predominantly be based on equity to be congruent with the spirit of Shari`ah and overall Islamic worldview. In their opinion for Islamic banks to be different from conventional banks, they must aim at promoting Islamic norms and values as well as protecting the needs of Islamic society as a whole without undermining its commercial viability.

For example, the replacement of interest-based financial intermediation by PLS modes of financing inevitably promote small and medium entrepreneurship or micro-entrepreneurs. Unlike conventional banks with their collateral-based lending and

¹ See (A. Ahmad, 2000; K. Ahmad, 2000; Chapra, 2000a, 2000b; Haron, 1995, 2000a; Haron & Ahmad, 1999; Naqvi, 2003; Rosly & Bakar, 2003; Sadr, 1982; Siddiqi, 1983, 1985; Siddiqi, 2001).

creditworthiness paradigm, favouring more established businesses and corporate clients, Islamic banks on the other hand, with their emphasis on PLS instruments are compatible with the needs of micro-entrepreneurs. Hence, small entrepreneurs with viable projects that are normally shunned by conventional banks due to insufficient collateral might be perceived otherwise by Islamic banks². Therefore, according to Haron (1996), the Islamic banking system will become an efficient model in mobilising and allocating resources in the economy as a result of the interest elimination and the profit-sharing concepts. Entrepreneurs, for example, by associating themselves with Islamic banks will become more ethical in conducting their business in such a way that funds will be used properly and the sense of selfishness is reduced considerably (Haron, 1996).

Ideal versus Reality

Despite the strong tendency in the literature to emphasise theoretical superiority of Islamic banking based on PLS over conventional banking, the practices of Islamic banks are found to diverge in important ways from the intellectual doctrines underpinning their role in the economy. Almost all Islamic banks across the globe today resort to the second line fixed return techniques or debt-based instruments. Observers point out that the use of PLS instruments, namely *mudarabah* and *musharakah* financing have declined to almost negligible proportion (Iqbal & Molyneux, 2005; Kuran, 2004; Lewis & Algaud, 2001; Yousef, 2004). In many Islamic banks' asset portfolios, short-term financing, notably *murabahah* and other debt-based contracts account for the great bulk of their investments. Yousef (2004) refers to the strong and consistent tendency of Islamic banks to utilise debt-like instruments in the provision of external finance as '*murabahah syndrome*'. Many Muslim economists now acknowledge that Islamic banks are avoiding the risky investments. Ahmad al-Naggar, an Egyptian banker whom Islamic economists credit with founding the first Islamic bank (Mit Ghamr, Egypt), characterizes the existing Islamic banks as terrible failures. Their operations differ only cosmetically, he says, from those of conventional banks. Indeed, only a minuscule portion – generally well under 5 percent – of the assets of Islamic banks consist of loans based on genuine profit-loss-sharing (Kuran, 2004).

There is a strong tendency for Islamic banking today to be modelled after the conventional one although the latter is clearly based on *riba* or interest, which Islam totally rejects. A thorough and rational examination of some basic financing modes as practiced by some Islamic banks and financial institutions will prove that they are no different from those offered and practiced in the conventional banks and financial

² Al-Harran (1990) contends that the ideal operation of the Islamic bank is to emphasise the project viability and usefulness together with the intrinsic trustworthiness of a person while placing collateral at a very minimum significance. As such, the small saver, investor, trader and producer become more important, rather than merely focusing on individuals who are financially well-off or with collateral worthiness. For example, the experience of Sudanese Islamic Bank (SIB) in implementing the *musharakah* financing concept to small rural farmers in Sudan has proven without doubt that such profit-loss sharing technique is applicable and can bring benefits to the rural community. For details refer to (Al-Harran, 1990).

institutions. The only difference the examiner may find is in the technicalities and legal forms while in essence, the substance is the same.

In conventional banks and financial institutions the return is called interest while in their Islamic counterparts the return is called profit (*ribh*), but the substance is the same evil one. In the Islamic banks and financial institutions, the contracts are abused and misused; sale contract for example is originally meant to obtain commodities and services, however in practice the contract of sale is used as a legal trick (*hilah*) to circumvent the prohibition of *riba*. Bay' Bithaman 'Ajil (BBA) which is widely practiced by Islamic banks in Southeast Asia, particularly Malaysia is one example of such an abuse of sale contract. Another example is *rahn* contract, which is originally meant to be used as a mean of documenting a debt. But in some Islamic banks it is used to generate profit under a transaction called Islamic Pawn Broking. In this transaction, the Islamic bank will provide its customer with so called benevolent loan on condition that the later provides a *rahn*; e.g. a valuable jewel to be kept by the bank as collateral; however, the problem arises when the Islamic bank charges this customer for the so called safe-keeping of this jewel. The amount of this charge is subject to the amount of the loan and, in practice, equivalent to the bank rate of profit!

Perhaps one of the plausible reasons why the ideal way of Islamic banking has not really been materialized is due to the absence of political will in the Muslim world to establish real Islamic economics. It is very easy to understand why in many parts of the Muslim world, the existing political structures are not specifically geared towards realizing an Islamic society, an Islamic state or an Islamic economics. Of course, economics cannot work in isolation from politics, and hence any economical reform entails a political decision. The government must issue certain legislations to support the establishment and the development of Islamic economics. Otherwise, Islamic economics will not be able to survive or even to see brighter future. It is important for Muslim government to really appreciate and comprehend the philosophy and principles underlying Islamic economics and financial transactions. Failure to understand this may result erroneous practices of Islamic banking and finance. It may also impede the smooth running of Islamic banking and financial institutions which are strictly required to comply with Shari'ah.

For example, due to the fact that the central bank guarantees all kinds of deposits in the Islamic banks even if the deposit is for investment purposes, the latter is forced to resort to risk-free and fixed-rate financing instruments, such as BBA and *murabahah* instead of *equity*-based financing. This hinders Islamic banks from getting involved in real economic activities that ensure prosperity and progress to the economy. No wonder why investment accounts in some Islamic banks are hardly differentiated from the wadi'ah accounts; both capitals are effectively guaranteed, and both practically offer a fixed rate of profit as the eventual profit rate of the investment account is very close to, if not equivalent to, the indicative rates³. Moreover, both capitals are

³ Indicative rate is a rate that is commonly used by Islamic banking institutions in Malaysia functions as an indicator to investors and depositor who intend to invest or deposit their money in Islamic banks. The indicative rate uses profit rate declared by every Islamic banking institution for

guaranteed, and the profit rate of the investment accounts is not considerably higher than the wadi'ah account. Such practices may eventually lead to convergence between the Islamic economics and conventional economics confining differences only to terms and forms while the substance is the same evil one.

THE MISGUIDED JUSTIFICATIONS

The proponents of current controversial practices of Islamic banks and financial institutions argue that Islamic banks need to be dealt with leniency especially at its infancy stage. Thus the main reason for allowing Islamic banks to practise certain controversial contracts is to facilitate their development and to ensure sustainability and viability amid the hegemony and prevalence of the conventional banks and the interest-based economic systems. Otherwise, Islamic banks would be deemed to fail, and their failure is a failure of the whole Islamic economics which in turn affecting the very project of the modern Islamic state. This necessitates a more flexible and a liberal approach when structuring Islamic banking products and services and system. They base their arguments on various Shari'ah concepts include *Al-Siyasah Al-Sha'iyah*, *maqasid al-Shari'ah*, *maslahah* and *dharurah*.

To further address this issue we need to examine these concepts in details in order to have a better understanding on how to approach the contemporary issue of financial transactions. The following sections delineated some of the common tools used to construct and develop Shari'ah-compliant financial products and services.

Al-Siyasah Al-Shar'iyah

Al-Siyasah al-Syar'iyah refers to the area in Islamic jurisprudence that explains ruling related to policies and approaches taken in managing and organising the national policies in accordance with the spirit of Shari'ah. It covers spectrum of issues which include areas like economics, judiciary, peace, international relations etc.⁴ Indeed, the concept of *Al-Siyasah al-Shari'yah* entails in-depth comprehension of the function of *maslahah* (protection of public interest). Indeed, the relationship between *Al-Siyasah Al-Shar'iyah* and *maslahah* emerges from the fact that the Muslim rulers must govern the state and public affairs according to *maslahah*. Realization of *masalah* and prevention of evil must be the basis as well as the objective of an Islamic state ruling, which should be embedded as part of the noble mission and responsibility to apply Shari'ah and impose its rulings.

The management and administration of economics matters or known as *Al-Siyasah Al-Shar'iyah Al-iqtisadiyyah* is a branch of *Al-Siyasah Al-Shar'iyah*. Consequently, it is governed by the same principle, namely the realization of *maslaha* (*al-maslaha al-*

assets hold by them as the basis of computation. In mudharabah contract, the actual profits distributed will only be known after the contract has matured based on an agreed profit-sharing ratio.

⁴ Wizarah al-Auqaf wa al-Syu'un al-Islamiyah, *Al-Mausu'ah al-Fiqhiyyah*, Kuwait, 1990, vol. 25, pp.294-210, Ahmad al-Husary, *Al-Siyasah al-Iqtisadiyyah wa al-Nuzum al-Maliyyah fi al-Fiqh al-Islami*, Maktabah al-Kulliyat al-Azhariyyah, Cairo, p.12.

iqtisadiyyah), which is the duty and mission of every Muslim ruler. A government policy must not contradict to Shari`ah injunctions. However if there is any conflict between the two, the latter must prevail since a Muslim ruler does have the right to overrule a definitive *Shari`ah* rulings⁵.

In other words, Muslim ruler is neither authorised to permit the forbidden nor to forbid the permissible. If he does so then his governance is illegitimate and must not be observed even with proclamation of preservation of *maslahah*. This is because his mission is to apply the *Shari`ah* rulings in its totality and not to alter the well-established *Shari`ah* rulings on the ground of his own perception of *maslahah*.

If the definitive *Shari`ah* (*qat`iyyat*) rulings can be overruled by *Siyasah shar`iyyah*, then the sanctity of *Shari`ah* text will be breached. Any person may then overrule and alter any *Shari`ah* ruling according to his own perspective and interpretation of *maslahah*. At the end of the day, *Shari`ah* can no longer be claimed as a divine law, rather a man-made law since it can be altered and adjusted according to people's perceptions. Therefore, changing the definitive *Shari`ah* rulings or tampering with *Shari`ah* texts is not within the purview of the functionality of *Al-Siyasah Al-Shar`iyyah*. No one has the authority to legalize the forbidden, be him a scholar or a ruler.

Maqasid Al-Shari`ah

Maqasid Al-Shari`ah is the objectives and the rationale of the *Shari`ah*. A comprehensive and careful examination of the *Shari`ah* rulings entails an understanding that *Shari`ah* aims at protecting and preserving public interests (*maslahah*) in all aspects and segments of life.⁶ Many *Shari`ah* texts state clearly the reasoning behind certain *Shari`ah* rulings, suggesting that every ruling in *Shari`ah* comes with a purpose, which is to benefit the Mukallaf. For example, when Quran prescribes Qasas (retaliation), it speaks of the rationale of it, that applying retaliation prevents further killing “*There is life for you in Qasas*”.⁷ Similarly, when Quran prohibits wine it says that wine is the works of devil as it causes quarrel and instills hatred and enmity among Muslims “*Satan only wants to excite enmity and hatred between you in intoxicants and gambling and hinder you from remembrance of Allah and from prayer*”.⁸

A depth comprehension of the objectives of *Shari`ah* is important for analogical deduction and other human reasoning and its methodology (Kamali 1999). Indeed, *Maqasid al-Sharī`ah* allows flexibility, dynamism and creativity in social policy (Zuhrah 1958; Mumisa 2002; Hallaq 2004). According to Imam Al-Ghazāli (d.1111) “*The objective of the Shari`ah is to promote the well-being of all mankind, which lies in safeguarding their faith (dīn), their human self (nafs), their intellect (‘aql), their*

⁵ For detailed discussion on the issue refer to Ibn al-Qayyim, *Al-Turuq Al-Hukmiyyah*, p.16.

⁶ - Ibn al-Subki, *Al-Ibhaj*, 3/52; Al-Shatibi, *Al-Muwafaqat*, 2/2.

⁷ - Surat Al-Baqarah, Ayah No 179.

⁸ - Surat Al-Ma'idah, Ayah No 91.

posterity (*nasl*) and their wealth (*māl*). Whatever ensures the safeguard of these five serves public interest and is desirable.” (Chapra 2000a, p.118)

Al-Shatibi approves al-Ghazali’s list and sequence, thereby indicating that they are the most preferable in terms of their harmony with the essence of Shari`ah. Generally, Shari`ah is predicated on benefits of the individual and that of the community, and its laws are designed so as to protect these benefits, and facilitate improvement and perfection of human lives’ conditions on earth. This perfection corresponds to the purposes of the Hereafter. In other words, each of the worldly purposes (preservation of faith, life, posterity, intellect and wealth) is meant to serve the single religious purpose of the Hereafter (Nyazee 2000).

The uppermost objectives of *Shari`ah* rest within the concept of compassion and guidance⁹, that seeks to establish justice, eliminate prejudice and alleviate hardship. It promotes cooperation and mutual supports within the family and society at large. This is manifested in the realisation of *maslahah* (public interest) which the Islamic scholars have generally considered to be the all-pervasive value and objective of the *Shari`ah* and is to all intents and purposes synonymous with compassion. *Maslahah* sometimes connotes the same meaning as *maqasid* and the scholars have used the two terms almost interchangeably (AbdelKader 2003). To further shed light on our discussion of the objectives of *Shari`ah*, especially with regard to their application in the preservation of public interest, the following section elaborates on the principles of *maslahah*, serving as an important tool to uphold *Shari`ah*.

Maslahah

Maslahah is one of the juristic devices that have always been used in Islamic legal theory to promote public benefit and prevent social evils or corruption. The plural of the Arabic word *maslahah* is ‘*masalih*’ which means welfare, interest or benefit. Literally, *maslahah* is defined as seeking the benefit and repelling harm. The words *maslahah* and *manfa`ah* are treated as synonyms. *Manfa`ah* (benefit or utility), however, is not technical meaning of *maslahah*. What Muslim jurists mean by *maslahah* is the seeking of benefit and the repelling of harm as directed by the Lawgiver or *Shari`ah*¹⁰.

Amongst the major school of Islamic jurisprudence, Imam Malik is known to be the leading proponent of upholding *maslahah* as one of the sources of *Shari`ah*. He uses the term “*al-masalih al-mursalah*” to connote interests which have not been covered by other sources of *Shari`ah*¹¹. On the other hand, the majority of other jurists reject it

⁹ These attributes correspond to the verses of the Qur’an, (21:107 and 10:57).

¹⁰ Cited in Nyazee, “Jurisprudence,” 161.

¹¹ The formulation of a rule on the basis of ‘*al-masalih al-mursalah*’ must take into account the public interest and conform to the objectives of *Shari`ah*. According to Maliki’s school, the application of this tool must fulfill three main conditions. First, it only deals with transaction matters (*muamalah*) where reasoning through rational faculty is deemed to be necessary. Unlike that of relating to religious observance such as an act of worship (*ibadah*) which is strictly subject to the main sources of *Shari`ah*. Second, the interests should be in harmony with the spirit of *Shari`ah*. In other words it must not be in conflict with any of its main sources. Third, the interests should be of essential and necessary (*darurah*)

as a source of *Shari`ah*, with the exception of Imam Al-Tufi from Hanbali's school and Imam Al-Ghazali from Shafi'i's school who accepted it. However, Al-Ghazali uses the term *istislah* (seeking the better rule for public interest) but never claim it as the fifth source of *Shari`ah*. He also restricts its application to situation which is deemed to be of necessary to serve the interest of the public.

On the other hand, those who opposed the *maslaha mursala* as one of the independent sources of *Shari`ah* argue that by endorsing this principle, it implies giving human being a legislative authority which is premised on human's perception of what is good and what is bad. Thus, it sometimes functions in isolation from *Shari`ah* text even though it may be based on certain legal principle in addressing a particular issue which is not clearly mentioned in any *Shari`ah* sources. This may imply that *maslahah* may indirectly nullify the textual rulings and their legislative authority.¹²

The Modern Approach to *Maslahah*

The modern approach of *maslaha* directly related to *Maqasid al-Shari`ah* since the realization of *maslaha* itself is the primary objective of the *Shari`ah*. Here *maslahah* is supposed to play a bigger role, as it is an indispensable criterion when reexamining and reevaluating some *Shari`ah* rulings (*Ahkam Shar'iyyah*). To apprehend this matter, we need to investigate the circumstances that led to this approach.

Apparently, Muslims nowadays are at their lowest position of civilization. Their past superiority in different areas and disciplines such as sciences and economics have been superseded by others especially the West. Some Muslim intellectuals put the blame on their religion for their adversity and further argue that *Shari`ah* is incompatible and most of the time posed a hindrance to modern civilization. Subsequently, these people called for a *revisit* of *Shari`ah* texts and rulings (*Ahkam Shari'yyah*) on the basis of *maslaha*. For them *maslaha* can functions as the sole criterion to determine whether a *Shari`ah* rulings can either be maintained or altered and amended to meet the contemporary needs and interests. Moreover *maslahah* is also perceived as a mean to specify a general text or as qualifier to an absolute text. Their justification is that *maslaha* has already been recognized as one of the *Shari`ah* sources, and recognized by prominent scholars like Al-Shatibi in his *Muwafaqat*.¹³

Evaluation of the modern approach to *Maslahah*

The crux of problem in the modern approach to *maslahah* lies in an attempt to overemphasize *maslahah* and treats it as a priority over textual *Shari`ah* sources. In other words, if there is a conflict between textual evidences and *maslahah*, the latter is

and not of a luxury type. Here the essential implies the preservation of five main objectives of *Shari`ah*. For details, see Sobhi R. Mahmassani, *The Philosophy of Jurisprudence in Islam* (Kuala Lumpur: Open Press, 2000). 87-89.

12 - Ibn 'Ashur, *Maqasid al-Shari`ah*, p. 86; Al-Zuhaili Wahbah, *Al-Waseet fi Usul al-Fiqh*, p. 361

13 - See the article published in Arabic on www.elharakah.com under the title "The Role of Maqasid al-Shari`ah in Managing the Public Affaris".

presumed to prevail. This section evaluates some exaggerations and misconceptions in modern application of *maslahah*.

First, the claim that conflict between *Shari`ah* text and *maslahah* as is inevitable was an erroneous presumption. If we believe that *Shar`iah* rulings (*Ahkam al-Shari`yyah*) aims at realization of *maslahah*, then why do we assume a potential conflict is inevitable between *Shari`ah* text and *maslahah*?

Second, even if such a conflict exists, then it is the *Shari`ah* texts should be given priority over *maslahah*. This is particularly true especially when *maslahah* itself derived its authority from the *Shari`ah* text and not vice versa. It is illogical if one to give priority to a branch over its core and source of authority. Therefore there is no reason for *maslahah* to be in conflict or even oppose to the *Shari`ah* text in any manner.¹⁴

Third, the approach of giving priority to *maslahah* fails to distinguish between the definitive (*qat`iyyat*) and the speculative (*dzanniyyat*) texts. If the text is definitive with regards to its authenticity (*tsubut*) and meaning (*dilalah*), then the ruling it produces is final and binding; i.e. there is no room for human's perception of *maslahah* to add any interpretation to the text in any way they see fit.¹⁵ While if the text is speculative with regards to its authenticity or meaning, then there may be avenues for *maslahah* to further interpret and give meaning to the text in a way that does not hinder its realization. This is acceptable as long as the perceived *maslahah* meet all its conditions: being public not private, authentic not false, definitive not probable.¹⁶

Fourth, the issue of potential conflict between a definitive *Shari`ah* text and the *maslahah* is not conceivable if we refer *maslahah* to the *Shari`ah* point of view. However, if we are referring *maslahah* to human point of view then the conflict is plausible. Since legitimacy of *maslahah* rests upon the human's perception alone, the rulings are inevitably required continuous alteration and modification according to people's expectation and belief.

According to Al-Shatibi, the determination of what is beneficial and what is harmful cannot be left to human reasoning alone¹⁷. Human reasoning plays a role only in a framework guided by *Shari`ah* (Nyazee 2000). Islam recognises the role of reason and experience in theorising economic behaviour and business activities only in a manner that embraces the transcendental aspect of human existence. This is because, the inherent limitations of human beings posit a strong reason which requires Divine guidance especially to ascertain what is right and what is wrong. Hence, according to

14- Al-Zuhaili Wahbah, *Al-Waseet fi Usul al-Fiqh*, p. 361.

15- See: Al-Ghazali, *Al-Mustasfah*, p176; Al-Bouti, *Dhawabit Al-Maslah*, p119.

16 - Al-Bouti, *Dhawabit Al-Maslah*, p119.

¹⁷ His argument is supported by a number of Qur`anic verses. One of which is Qur`an 23:71. Refer to Al-`iz bin Abdelsalam, *Qua'id Al-Ahkam fi Masalih Al-Anam*, 2/161.

Ahmad (2003), the rational faculties can and should be used to complement, support and strengthen ethics and morality defined by *Shari`ah*.

Nevertheless, upon presuming an occurrence of a genuine conflict between the a *Shari`ah* text and the *maslahah*, then as Muslims we have to follow the text and ignore the perceived *maslahah*, simply because being Muslims requires us to abide by all the *Shari`ah* rulings regardless of whether we are convinced or aware of their usefulness. Furthermore, there is a devotional dimension (*ibadah*) in every single *Shari`ah* ruling even if it is not directly related to ritual practices such as prayer and fasting. Therefore, observing the *Shari`ah* conditions and requirements on contracts or transactions is also a form of *ibadah*, while omitting one of them is an offence that may result in invalidating the contract, let alone its impermissibility.

ISLAMIC FINANCE AND MAQASID AL-SHARI`AH

The preceding sections have elaborated on the fundamental principles of *Shari`ah* particularly in dealing with mundane affairs of human being. Our next focus is to evaluate the application of the *Shari`ah* tools especially with respect to *maqasid al-shari`ah* and *maslahah* in Islamic banking and finance. Indeed, one of the biggest challenges of Islamic banking and finance industry today is to come up with products and services that is *Shari`ah* compliant or legitimate from Islamic point of view without undermining the business aspects of being competitive, profitable and viable in the long run.

Shari`ah-Compliant: Validity versus Permissibility

The first question that need to be raised is what should be the basis in justifying whether a product is *Shari`ah* compliant or not? In other words, what are the approaches in *fiqh* when determining whether a contract is valid and permissible from *Shari`ah* perspectives?

Schools of *fiqh* differed on the issue of determining the basis of contract validity (*sahih*). Some emphasizes on its legal form while others stress on its substance and the intention of contracting parties. This difference of opinion can be attributed to the *Shari`ah* texts as there are some who based their opinion on a hadith that “matters are determined by intention” (إنما الأعمال بالنية)¹⁸ . Based on this Hadith, validity of all contracts must be determined by *niyyah* (intention), i.e the purpose or substance of the contract, not by just looking at its form or structure alone. However, some scholars like Imam Shafi`i found it is impractical to determine the validity of contracts by means of intention, as it is difficult and sometimes impossible to identify the intention of the contractors. Moreover, they found some *Shari`ah* texts suggesting that judging things must be based on their form and appearance.¹⁹

18- This Hadith was narrated by Omar bin Al-khattab (ra). See *Sahih al-Bokhari*, 1/3, Hadith No 1; *Sahih Muslim*, 3/1515, Hadith No (1907).

19- For more details on this matter see *Contemporary `Inah is it a sale or usury* by Abdulazeem Abozaid, p 47.

To reconcile between these two conflicting texts in a practical way, scholars distinguished between two types of *hukm* (ruling): *hukm Qada'i* and *hukm Diani*. The former concerns with contract that complies with all Shari'ah conditions and requirements pertaining to a contract in its form and structure, while the later concerns with compliance of the substance or contract purpose which must be in line with the *Shari'ah*. If the contract structure is *Shari'ah* compliant, then it could be termed as a valid contract (*sahih*). On the other hand if the contractors' purpose of the contract is *Shari'ah* compliant, then it is permissible (*halal*). Thus, a transaction is deemed to be *halal* when it serves the legal purpose and intention, and *sahih* if the contract meets all contractual conditions and requirements. Consequently, a *sahih* (valid) contract is not necessarily *halal* (permissible).²⁰

The first approach represents the Hanafis and Shafi'i's position while Malikis and Hambalis emphasize that validity of a contract must be based on the real intention or the substance of the contract.²¹ Apparently, the scholars of fiqh only differ in terms of basing the validity of a contract. However fuqaha never differed on the issue of basing the permissibility of a contract on its substance or the contractors' niyyah. Even Shafi'i gave examples of instances when real intention does invalidate a contract such as selling of grapes to a winery, or selling arms to enemy whose intentions to attack the Muslims. This implies that the emphasis on the form or expressed intention is more applicable when the real intention is difficult to determine. For example, in the case of *nikah muhallil*. In the absence of expressed intention, only God knows the true intentions of a man.

Controversies of Islamic Financial Products

The foregoing discussion has somehow indicated that scholars are generally agreed that for an Islamic financial product to be deemed as *Shari'ah* compliant, the contract must be both valid and permissible. This somehow raised an issue whether the current Islamic banking and finance products are indeed following the same principles.

Perhaps the most controversial product of Islamic banking and finance is *bay' inah* (buy-back sale) which is widely practiced in Malaysia. Many financial applications are based on *bay' al-'inah* such as *Bai' Bithaman Ajil* (deferred cost-plus sale), Islamic credit card (*bay' al-'inah* model), Islamic private debt securities (IPDS) and Islamic overdraft facility. In all these applications the Islamic bank is supposed to act as a trader selling or buying as the word 'bay'' suggest, but in reality we find the Islamic

20- Al-Shafi'i, *Al-Um*, 4/114; Al-Ghazali, *Al-Mustasfah*, 2/36.

21- Ibn Abedeen. *Hashiyat (Rad al-Mukhtar ala al-Dur al-Mukhtar)* 5/48; Al-Dasuqi, *Hashiyah* 3/76; Qurafi, *Al-Furuq*, 3/268; Mohammad Ali, *Tahzeeb al-Furuq*, 3/275; Ibn Juzai. *Al-Qawanin Al-Fiqhiyyah*, p140; Al-Shafi'i, *Al-Um*, 4/114; Ibn al-Qaiyyem, *I'lam al-Muaqi'een*, 3/109-121; Ibn Hazm, *Almuhallah*, 10/180.

bank merely acting as a financier who provides money without taking any risk and without being involved in the investment process, if any.

Bay` al-`inah here is resorted to as a legal device (*hilah*) to circumvent riba-based financing, but as far as the substance is concerned *bay` al-`inah*-based financing and the conventional riba-based financing are the same, they serve exactly the same contractors' purposes, and share exactly the same economic substance and consequences, albeit their form may be different.

However, as discussed earlier, the legal form is not sufficient to certify and justify the permissibility of a contract although it may be perceived otherwise for validity. Therefore, to claim permissibility by merely based on the legal form of the transaction, is definitely undermining *Ijma'* (consensus of jurists) and go against the very principles of *Shari'ah* and religions in general. Some contemporary practices in Islamic banking and finance have maintained the legality of the form but neglected the legality of the substance despite the fact that the objective of form is to help ensuring the compliance of the substance with the *Shari'ah* and it is not meant for itself. This explains why fuqaha have compromised the form in many examples and never compromised the substance.

As a case in point let us look at a contemporary application of '**Islamic Pawn Broking**'. In this financing instrument, the bank offers the client a benevolent loan and stipulates a pawn in exchange to be deposited under its custody, the bank generates profits out of this benevolent loan transaction by levying a custodial fee for the safe keeping of the pledged asset. Ironically, this custodial fee is equivalent to the interest rate imposed on such a loan.

If observing *maqasid al-Shari'ah* naturally entails observing the rationale and the spirit of the texts then observing only the form and the structure of the contracts functions against the very concept of *maqasid al-Shari'ah* from the contract. Surprisingly enough, *maqasid al-Shari'ah* have been used here as a justification for adoption of such controversial transaction though observing *maqasid al-Shari'ah* must be the first factor to determine their prohibition.

Macro Maqasid versus Micro Maqasid

One may think that by legalizing some controversial transactions such as *bay` `inah* the macro maqasid are observed. What we meant by macro maqasid here is the interest or benefits related to the overall well-being and welfare of the economic system, which has been the objectives of Islamic economics for long; whereas micro maqasid only relates to certain micro issues pertaining to certain individual financial transactions. Obviously macro maqasid is more important to be concerned and observed than any micro maqsad. These macro maqasid manifest themselves in structuring an Islamic economy and pushing it forward to compete with and supersede the conventional banks at least in the Muslim countries. On the other hand, we may argue that maintaining the prohibition of certain transactions helps observing a particular maqasid of certain detailed rulings but at the expense of the macro maqasid

of Shari'ah, or more specifically, the maqasid of the Islamic law of transactions, since the later aims at building a strong just economic system.

To address this issue, we need to recall our previous discussion regarding the conflict between perceived *maslaha* and Shari'ah text. To recapitulate, the Shari'ah texts must always prevail over the perceived *maslahah*. Only by acknowledging this hierarchy, the realization of *maslaha* for human beings can be achieved since we recognized the authority of the lawgiver Himself, Who is the Most Knowledgeable and the Most Wise. In other words, the determination of *maslahah* in terms of what is beneficial and what is harmful cannot be left to human reasoning alone. Instead, as Muslims we should put high recognition to what has been prescribed by the Lawgiver in Shari'ah text. This is because, the inherent limitations of human beings posit a strong reason which requires Divine guidance especially to ascertain what is right and what is wrong. In this regard, Ibn Taymiah says: 'What constitutes a *maslaha* or a *mafsadah* is subject to the Shari'ah standards'²². Al-Dahlawi says: 'Our lawgiver is more trustworthy than our reasons'.²³

If there was any kind of *maslaha* in *riba* or its resemblance of buy-back sale-based on legal tricks, then the Lawgiver would not have considered *riba* as the worst of evil and one of the gravest sins that invoke a strongest curse and declaration of war by the Almighty. The Qura'an says: "But God has permitted the sale and forbidden the *Riba*" (2:275) and, "God destroys/eliminates the *Riba*;" (2:276) and, "O ye who believe, fear God and quit what remains of the *Riba* if ye are indeed believers; but if ye do it not, take notice of war from God and His Messenger" (2:278-279). No other sin is prohibited in the Qur'an with a notice of war from God and His Messenger.

Overruling the prohibited practices on the grounds on *Dharurah*

Dharurah, which means necessity, unanimously renders the prohibited things permissible as this constitutes a well-established Fiqh maxim in the Shari'ah "Necessities permits the forbidden" (*Al-Dharurat Tubih Al-Mahzurat*). However, when Jurists discussed and explained the applications of this fiqh maxim they mentioned what is known in Arabic as *dhawabit*, which means conditions and guidelines, for the functionality of this maxim. These guidelines (*dhawabit*) are of course stated in or derived from the Shari'ah texts. The first guideline (*dhabit*) is: what constitutes a *dharurah*. The jurists' approach of the concept of *dharurah* can be summarized by saying that *dharurah* is something which is indispensable for the preservation and protection of the five essential values or *masalih*: Faith, Life, Intellect, Posterity, Wealth.²⁴ This means the concept of *dharurah* would give the *Mukallaf* legal excuse to commit the forbidden; what is indispensable for his survival, spiritually and physically.

Applying the principle of *dharurah* to the case in question would not in any way imply that rendering the unanimously forbidden transaction to be permissible so as to apply

22- Ibn Taimyah, *Al-Fatawah*, 8/129.

23-Al-Dahlawi, *Hujattullah al-Balighah*, 1/13.

24 - Al-Shatibi, *Al-Muwafaqat*, 2/10.

them in Islamic banks. Even if we rightly presume that such products are inevitable for the Islamic bank's survival and long-term sustainability due to certain considerations, then the argument is that the very concept of bank itself is not indispensable for the Mukallaf's survival from the Shari'ah perspective. If such *dharurah* hypothetically exists, then it would rather legitimize dealing with conventional banks direct.²⁵

Obviously, When Shari'ah prohibits something it provides alternatives; when it prohibits zina it permits marriage, when it prohibits wine and pork for consumption it permits all other sorts of food and drinks. Likewise, when Shari'ah prohibits certain contracts such as contract based on riba and gambling, it alternatively permits many contracts like sale, lease, *salam*, *istisna'*, *mudarabah* and *musharakah*. To economists, such contracts are the better alternatives for riba and gambling, and ultimately can help to produce a prosperous and a healthy economy. On the other hand economy based on riba and gambling which premised on exploitation, leads to disparity and inequitable of wealth distribution between rich and poor. So, where is the *dharurah* that may allow Muslim to abandon these beneficial contracts in favour of harmful and destructive one. Legalizing a forbidden thing on the grounds of *dharurah* is supposed to solve a problem not to create a bigger one. Islamic banks have been in the business for more than three decades, and so far they still offer the same excuses of *dharurah* and the impracticality or impossibility of adopting lawful business contracts, due to the existence of certain obstacles and deterrents. Do these obstacles and hindrances still exist after more than three decades of Islamic banking development. Are there any indications to suggest a possible change?

In worst case, it is a well-established ruling that when a person is given the excuse to commit the forbidden on the grounds of *dharurah*, he can never deny the original ruling of its prohibition. Hence he cannot claim the original permissibility of his commission of forbidden. If a person is excused to seek a riba-based loan due to the occurrence of an extreme urgency and the absence of any possible alternative source of finance, under no circumstances can he denies the prohibition of riba or regards it as permissible. Otherwise, such an act tantamount to betrayal of God's ruling since riba impermissibility is definitive.

There is a tendency of some Islamic banks today to conveniently use *dharurah* as an excuse to legalise certain activities such as *bay' al-'inah*-based transactions although all jurists agree on its impermissibility if it is used to circumvent the prohibition of riba as discussed earlier. Even if the justification of *dharurah* is considered valid, they should acknowledge the original ruling of the contract and not simply altering it then attributing it to Shari'ah. The whole situation here can be likened to a person who has already predetermined doing something shameful without any considerations, then he tries to find as many excuses as possible to justify his action. Very likely such a person is prone to give conflicting justifications.

25 - Majallat Al-Ahkam Al-'adliyyah, section 22; Ibn Nujaim, Zainulddin, *Al-Ashbah Wal Naza'ir*, 1/105-107; Al-Seyoti, Jalaulddin, (911 H). *Al-Ashbah Wal Naza'ir*, p.84-92; Al-Kurdi, Ahmad. *Al-Madkhal Al-Fiqhi*, p.48.

Has Islamic Economics been Islamized?

In the final analysis, based on our discussion, it is very clear that Islamic economics unfortunately is far from being fully Islamized since we still do not have Islamic economics in the real sense of its word. What has been achieved so far is just a replication of the conventional banking and finance. So far the attempt to Islamize the transactions of banking and finance has been focusing on its forms and technicalities, while the economics substance is hardly differentiated from that of conventional banking and finance.

Undoubtedly, implementing controversial transactions has defamed our *Shari'ah* by transforming some of its rulings into a meaningless set of rules that is incapable of convincing Muslim population of its rationality and wisdom. Rather, it leaves the public in baffled; not able to comprehend why *riba* or bank-interest is prohibited for them while *bay' al-'inah* is permissible, although both share the same economic and social implications. Why is it illegal for the Muslim to seek an interest-based loan from a conventional bank while it is legal for him to seek a 'loan' from the Islamic bank whereby he is required to pay higher on the so-called deferred sale BBA product.

For example, the bank sells you an asset for RM30,000 and you owe the bank RM33,000, a year from now; after you sell back the same asset to bank. This arrangement is an example of *bay' al-'inah* which is acceptable from the standpoint of Islamic banking practice in Malaysia but looks to the outsider like a simple loan at 10 percent interest. Repaying by five yearly instalments of RM7,913.92 would be equally acceptable and also implies an interest rate of 10 per cent. In fact Islamic bankers use the same financial computation just like other bankers to calculate present and future values of investments. Hence, at the end of the day, unconvinced Muslim and other critical outsiders, observe that Islamic banks in reality keep interest but just call it by another name, such as commissions or profits (*ribh*).

CONCLUSION

This paper has deliberated on the challenges of realising *maqasid al-Shari'ah* in Islamic banking and finance. These challenges emerge from different aspects including the proper understanding of *maqasid al-Shari'ah* and the various tools in Islamic jurisprudence such as *maslahah* and *dharurah* concept. Failure to understand the very objectives of *Shari'ah* and its application to modern *muamalah* transactions lead to potential abuse of *maqasid* to justify certain contracts which in fact contradictory to the *Shari'ah* text and principle. Circumvention the prohibition of *riba* by means of *bay' al-'inah* for example is against the very objective of *Shari'ah* of *riba* prohibition. Therefore, those who claim the permissibility of such transactions under the pretext of realizing *maqasid al-Shari'ah* are effectively acting against the true spirit of *maqasid al-Shari'ah*.

After a deep deliberation on the foregoing arguments, this paper concludes that to realise the *maqasid al-shari'ah*, Islamic banking and finance must ensure that all of its

transactions are *Shari`ah* compliant not only on its legal technicalities and forms but more importantly the economic substance which is premised on the objectives outline by *Shari`ah*. As discussed, if the economic substance of a given transaction is identical to that of the prohibited transaction, such as the one in which the bank or the financier acts as a creditor not as a trader of real property, then this must render the transaction impermissible regardless of its legal form. The adoption of these prohibited transactions on the grounds of *Maqasid al-Shari`ah* or *Siyasah Shar`iyyah* or *Dharurah* is legally wrong, leads to more harms than benefits and has fatal implications. The role of *maslaha* in the *Shari`ah* is confined to making *ijtihad* on a particular issue in the absence of a respective definitive text, and to choosing the opinion that is believed to serve the public interest better when there is a plurality of opinions. Committing the forbidden on the ground necessity does not entitle one to claim its original permissibility.

In the final analysis, Islamic banks should do away all the controversial contracts that may impede the growth and progress of Islamic banking and finance industry. Hence, the restricted view of understanding *Shari`ah*, by only focusing on the legality forms of a contract need to be changed. Instead, the substance that has greater implications to the realisation of *Maqasid Shari`ah* should be equally looked into especially when structuring a financial product. Otherwise, Islamic banks are just appeared as an exercise of semantics; their functions and operations are really no different from conventional banks, except in their use of euphemisms to disguise interest and circumvent the many *Shari`ah* prohibitions.

Indeed Islamic banking system has the potential to become one the promising sector to realize the noble objectives of *Shari`ah*, as it resides within a financial trajectory underpinned by the forces of *Shari`ah* injunctions. These *Shari`ah* injunctions interweave Islamic financial transactions with genuine concern for just, fair and transparent society at the same time as prohibiting involvement in illegal activities which are detrimental to social and environmental well-being. There are fundamental differences between Islamic banking and conventional banking, not only in the ways they practice their business, but above all the values which guide Islamic banking whole operation and outlook. The values as prevailed within the ambit of *Shari`ah* are expressed not only in the minutiae of its transactions, but in the breadth of its role in society. This demands the internalisation of *Shari`ah* principles on Islamic financial transactions, in its form, spirit and substance. By so doing, it epitomises the objectives of *Shari`ah* in promoting economic and social justice.

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