ABSTRACT

Islam harbours 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 sharī‘ah, also known as maqāṣid al-sharī‘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. Its most visible practical achievement is the establishment of Islamic banks meant to avoid interest and promote Islamic norms of economic behaviour and ultimately realizing the noble objectives of maqāṣid al-sharī‘ah. This paper examines the challenges of the proper realization of maqāṣid al-sharī‘ah in Islamic banking and finance. These challenges cover various issues: the proper understanding of maqāṣid al-sharī‘ah in Islamic economics; the methods of implementing maqāṣid al-sharī‘ah in Islamic banking and finance; the potential conflicts between macro maqāṣid and micro maqāṣid; and the possible abuse of maqāṣid al-sharī‘ah to justify certain financial contracts which in fact contradict the sharī‘ah texts. The paper analyses these challenges and provides examples from the current practices of Islamic banks and financial institutions.

JEL Classification: Z12, G10, K00

Keywords: Islamic economics, Islamic banking, Maqāṣid al-Sharī‘ah
1. INTRODUCTION

The 20th century spawned a movement committed to developing an Islamic variant of economics. After a long period of colonial domination of Muslim countries by Western imperialists, the movement for Islamisation in all spheres of life started to gain momentum 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 the Islamic way of life. The economic Islamisation campaign enjoyed at least tacit support of politicians and intellectuals of many Muslim countries like Malaysia, Iran, Pakistan and Sudan (Henry and Wilson, 2004).

Consequently, Islamic banking and finance emerged as one of the fastest growing industries. It spread to all corners of the globe and received wide acceptance by both Muslims and non-Muslims alike (Iqbal and Molyneux, 2005). Extensive literature proclaims that Islamic banking differs significantly from conventional banking, not only in the ways they practice their businesses, but above all, the values which guide Islamic banking operations and outlook. The values which prevail within the ambit of the *shar'ah*, are expressed not only in the details of its transactions, but also in the breadth of its role in realizing the *maqāṣid al-shar'ah* (objectives of shar'ah).

Indeed, *maqāṣid al-shar'ah* reflects the holistic view of Islam, as Islam is a complete and integrated code of life encompassing the individual and society, in this world and the hereafter. Hence, a deep understanding of the *maqāṣid al-shar'ah* entails intense commitment of every individual and organisation to realise justice, brotherhood and social welfare. This will inevitably lead to a society whereby every member cooperates with each other and even competes constructively, as success in life is to obtain *falāḥ* (ultimate happiness). Thus, mere maximisation of profits cannot be a sufficient goal for a Muslim society. Maximisation of profit must be accompanied by efforts directed to ensure spiritual health and consciousness, as well as justice and fair play at all levels of human interaction. Only development of this kind would be in conformity with the *maqāṣid al-shar'ah* (Chapra, 2000a).

Hence, the restricted view of understanding the *shar'ah* by only focusing on the legal forms of a contract needs to be changed. Instead, the ‘substance’ of the *shar'ah*, that has greater implications for the realisation of *maqāṣid al-shar'ah*, should be equally looked into especially in structuring a financial product. Otherwise, Islamic banks
are just an exercise in semantics; their functions and operations are no different from conventional banks, except in their use of euphemisms to disguise interest and circumvent the many shar’ah prohibitions.

This paper aims at analysing the challenges in realising the **maqāsid al-shar’ah** in contemporary economic 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 maqāsid shar’ah and maṣlaḥah. The concept of **maqāsid al-shar’ah** will be delineated in detail so as to shed light on its application in modern day practices of *mubārakat*. The examples of various forms of controversial products implemented will be discussed to illustrate the problems of misunderstood application of the **maqāsid** and maṣlaḥah in legitimising contracts that substantially go against the spirit of the **maqāsid al-shar’ah**.

Following this brief introduction, the next sections will illustrate the divergence of Islamic banking and finance practice from its idealised version proposed by many Muslim economists; this is followed by a discussion of the fundamental principles of **shar’ah**; the next section evaluates the application of the **maqāsid al-shar’ah** and maṣlaḥah in Islamic banking and finance; and the final section provides a summary and conclusion.

2. **OLD SKELETON IN A MODERN DRESS**

Islamic banks made their first appearance in the 1970s. Since their inception, massive efforts have been made to portray them as analogous to an ancient financial organization based on profit-loss-sharing (PLS) mechanism, particularly *mushārakah* and *muālākah*. Muslim economists including Sadr (1982); Siddiqi (1983, 1985); Chapra (2000a, 2000b); Ziauddin Ahmad (1984); Ahmad (2000); Siddiqui (2001); Haron (1995, 2000); Rosly and Bakar (2003); Haron and Hisham (2003); Naqvi (2003) and many others favour equity-based instruments and place greater social welfare responsibilities and religious commitment upon Islamic banks in order to realize the **maqāsid al-shar’ah** with respect to economic and financial transactions, including social justice, equitable distribution of income and wealth and promoting economic development and growth. These writers even go further to argue that equity-based financing is the only principle representing the true spirit of the Islamic banking system which departs significantly from the interest-based
system. Although they do not fully negate the use of other ŞÀr¡yah permissible debt-based contracts alongside the equity-based contracts, they assert that the socio-economic objectives including social justice, economic growth, efficiency and stability that Islamic economics seeks to achieve, is better served by resorting to primarily equity-based contracts. They almost consistently affirm that the Islamic banking model should predominantly be based on equity to be congruent with the spirit of ŞÀr¡yah 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 would inevitably promote small and medium entrepreneurship or micro-entrepreneurs. Unlike conventional banks with their collateral-based lending and creditworthiness paradigm that favours more established businesses and corporate clients, Islamic banks, 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 financed by Islamic banks. 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 interest elimination and the introduction of profit-sharing concepts. Entrepreneurs, for example, by associating themselves with Islamic banks will become more ethical in conducting their businesses in such a way that funds will be used properly and the sense of selfishness is reduced considerably (Haron, 1996).

2.1 IDEAL VERSUS REALITY

Despite the strong tendency in the literature to emphasise the theoretical superiority of Islamic banking based on PLS over conventional banking, the practices of Islamic banks are found to diverge in significant 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 múÊrubah and múshørakah financing have declined to almost negligible proportions (Iqbal and Molyneux, 2005; Kuran, 2004; Lewis and Algaud, 2001;
In many Islamic banks’ asset portfolios, short-term financing, notably *murābāhah* 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 the ‘*murābāhah syndrome*.’ Many Muslim economists now acknowledge that Islamic banks are avoiding risky investments. Ahmad al-Naggar, an Egyptian 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 conventional banking although the latter is clearly based on *ribā* 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 institutions. The only difference the examiner may find is in the technicalities and legal forms, while in essence, the substance is the same. 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 *bayān al-‘ayb* 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 Muslims and other critical outsiders, observe that Islamic banks in reality keep interest but just call it by another name, such as commissions or profits (*ribā*).

A more distressing scenario is when many Islamic contracts are either misused or abused. These contracts of sale are often used as a legal trick (*ta‘ārubah*) to circumvent the prohibition of *ribā*. *Bayān bithaman ‘ajil* (deferred sales contract) which is widely practiced by Islamic banks in Malaysia and Brunei, is an example of such an abuse of sale contract. While *sharī‘ah* requires a selling party to hold all liability arising from all defective goods sold based on *khīyāf al-‘ayb* rules, in practice, the
Islamic bank holds no such liability. Apparently, the Islamic bank transfers all the risks and liabilities to the customer, thereby leaving the bank with practically no risk to bear while securing profits which are fully guaranteed by way of executing a sale contract i.e. *bay' bithaman jil*.\(^2\)

Another example is the *rahn* contract, which is originally meant to be used as a means 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 a so called benevolent loan on condition that the latter provides a *rahn*; e.g. valuable jewellery to be kept by the bank as collateral; however, the problem arises when the Islamic bank charges this customer the custodianship fee of this jewellery. The amount of this charge is subject to the amount of the loan and, in practice, equivalent to the bank rate of profit.

3. THE MISGUIDED JUSTIFICATIONS

The proponents of current controversial practices of Islamic banks and financial institutions argue that Islamic banks need to be dealt with leniently 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 conventional banks and the interest-based economic systems. Otherwise, Islamic banks would be doomed to fail, and their failure is a failure of the whole Islamic economics project, which in turn affects the very project of the modern Islamic state. This necessitates a more flexible and a liberal approach when structuring the Islamic financial system, its products and services. They base their arguments on various *sharīah* concepts including *alsiyah al-shar'iyyah*, *maqasid al-sharīah*, *mašlaúah* and *éar rah*.

To further address this issue we need to examine these concepts in detail in order to have a better understanding of how to approach the contemporary issues of financial transactions. The following sections delineate some of the common tools used to construct and develop *sharīah*-compliant financial products and services.
3.1 AL-SIYASAH AL-SHARICYYAH

Al-siyasah al-shariyyah refers to the area in Islamic jurisprudence that explains rulings related to policies and approaches taken in managing and organising national policies in accordance with the spirit of the shari'ah. It covers a whole spectrum of issues in areas like economics, the judiciary, peace, international relations etc. Indeed, the concept of al-siyasah al-shariyyah entails an in-depth comprehension of the function of maslahah (public interest). Indeed, the relationship between al-siyasah al-shariyyah and maslahah emerges from the fact that Muslim rulers must govern the state and public affairs to achieve maslahah. Realization of maslahah and prevention of evil must be the basis as well as the objective of an Islamic state’s 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 economic matters, known as al-siyasah al-shariyyah al-iqtisadiyyah is a branch of al-siyasah al-shariyyah. Consequently, it is governed by the same principle, namely the realization of maslahah or specifically al-maslahah al-iqtisadiyyah, which is the duty and mission of every Muslim ruler. A government policy must not contradict shari'ah injunctions. However if there is any conflict between the two, the latter must prevail since a Muslim ruler does not have the right to overrule definitive shari'ah rulings. In other words, the 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 (qadiyyah) rulings can be overruled by al-siyasah al-shariyyah, then the sanctity of shari'ah texts will be breached. Any person may then overrule and alter any shari'ah ruling according to his own perspective and interpretation of maslahah. Hence, the shari'ah will 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-shariyyah.
3.2 MAQAÆID AL-SHAR¡CAH

MaqŒ§id al-shar¥ah are the objectives and the rationale of the shar¥ah. A comprehensive and careful examination of the shar¥ah rulings entails an understanding that the shar¥ah aims at protecting and preserving mašlaúah in all aspects and segments of life. Many shar¥ah texts state clearly the reasoning behind certain shar¥ah rulings, suggesting that every ruling in shar¥ah comes with a purpose, which is to benefit the mukalla¢. For example, when the Qur’Œ prescribes qi§Œ§ (retaliation), it speaks of the rationale of it, that applying retaliation prevents further killing “There is life for you in qi§Œ§.” Similarly, when the Qur’Œ prohibits wine it says that wine is the work of the devil as it causes quarrels and instills hatred and enmity among Muslims.

“The devil only wants to excite enmity and hatred between you in intoxicants and gambling and hinder you from remembrance of Allah and from prayer.”

In depth comprehension of the objectives of shar¥ah is important for analogical deduction and other human reasoning and its methodology (Kamali 1999). Indeed, maqŒ§id al-shar¥ah allows flexibility, dynamism and creativity in social policy (Zuhrah 1958; Mumisa 2002; Hallaq 2004). According to al-ImŒŒAl-GhazŒŒ(d.1111)

“The objective of the shar¥ah is to promote the well-being of all mankind, which lies in safeguarding their faith (d¥n), their human self (nafs), their intellect (‘aql), their posterity (na§l) and their wealth (mŒŒ). Whatever ensures the safeguard of these five, serves public interest and is desirable.” (Chapra, 2000a)

Al-ShŒŒapproves al-GhazŒŒ’s list and sequence, thereby indicating that they are the most preferable in terms of their harmony with the essence of shar¥ah. Generally, shar¥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 the condition of life 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).
A Critical Appraisal of the Challenges of Realizing *Maqāsid al-Sharī'ah*

The uppermost objectives of *šarī'ah* rest within the concept of compassion and guidance,³ that seek to establish justice, eliminate prejudice and alleviate hardship. It promotes cooperation and mutual support within the family and society at large. This is manifested in the realisation of *māṣlaūah* (public interest) which the Islamic scholars have generally considered to be the all-pervasive value and objective of the *šarī'ah* and is for all intents and purposes, synonymous with compassion. *Māṣlaūah* sometimes connotes the same meaning as *maqāsid* and scholars have used the two terms almost interchangeably (Abdel Kader, 2003). To further shed light on our discussion of the objectives of *šarī'ah*, especially with regard to their application in the preservation of public interest, the following section elaborates on the principles of *māṣlaūah*, serving as an important tool to uphold the *šarī'ah*.

### 3.3 *Māṣlaūah*

*Māṣlaūah* 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 *māṣlaūah* is *māṣlūliū* which means welfare, interest or benefit. Literally, *māṣlaūah* is defined as seeking the benefit and repelling harm. The words *māṣlaūah* and *manfa'ah* are treated as synonyms. *Manfa'ah* (benefit or utility), however, is not the technical meaning of *māṣlaūah*. What Muslim jurists mean by *māṣlaūah* is the seeking of benefit and the repelling of harm as directed by the Lawgiver or *šarī'ah*.⁹

Amongst the major schools of Islamic jurisprudence, *Imām Mālik* is known to be the leading proponent of upholding *māṣlaūah* as one of the sources of *šarī'ah*. He uses the term “*al-māṣlūliū al-mursalah*” to connote interests which have not been covered by other sources of *šarī'ah*.¹⁰ On the other hand, the majority of other jurists reject it as a source of *šarī'ah*, though they practiced it without theoretically admitting its authority as an independent source of the *šarī'ah*. However, *al-Ghazālī* (who is from the *Shī'ī* school), uses the term *istiṣlaū* (seeking the better rule for public interest) but never claims it as the fifth source of *šarī'ah*. He also restricts its application to situations that are deemed necessary to serve the interest of the public.

On the other hand, those who oppose *māṣlaūah mursalah* as one of the independent sources of *šarī'ah* argue that by endorsing this principle, it implies giving human beings a legislative authority which is premised on human perception of what is good and what is bad. Thus,
it sometimes functions in isolation from shar'ah texts even though it may be based on certain legal principles in addressing a particular issue which is not clearly mentioned in any shar'ah sources. This may imply that ma'sla'ah may indirectly nullify the textual rulings and their legislative authority.11

3.4 THE MODERN APPROACH TO MAÆLAÎ AH

The modern approach to ma'sla'ah is directly related to maqâlid al-shar'ah since the realization of ma'sla'ah itself is the primary objective of the shar'ah. Here ma'sla'ah is supposed to play a bigger role as it is an indispensable criterion when reexamining and revaluating some a'ûkûn shar'iyyah (shar'ah rulings). To comprehend this, we need to investigate the circumstances that led to this approach.

Apparently, Muslims today find themselves at a very low position, vis-a-vis other civilizations. Their past superiority in different areas and disciplines such as in the sciences and economics have been superseded by others, especially the West. Some Muslim intellectuals put the blame on religion and further argued that the shar'ah was incompatible, and mostly posed a hindrance to modern civilization. Subsequently, these people called for a revisit of aûkûn shar'iyyah on the basis of ma'sla'ah. For them ma'sla'ah can function as the sole criterion to determine whether shar'ah rulings can be maintained or altered and amended to meet the contemporary needs and interests. Moreover ma'sla'ah is also perceived as a means to specify a general text or as a qualifier to an absolute text. Their justification is that ma'sla'ah has already been recognized as one of the shar'ah sources, and recognized by prominent scholars like al-Shâbîn in his Muwãfaqû.12

3.5 EVALUATION OF THE MODERN APPROACH TO MAÆLAÎ AH

The crux of the problem in the modern approach to ma'sla'ah lies in overemphasizing ma'sla'ah and treating it as a priority over textual shar'ah sources. In other words, if there is a conflict between textual evidences and ma'sla'ah, the latter is presumed to prevail. This section evaluates some exaggerations and misconceptions in modern applications of ma'sla'ah.

First, the claim that conflict between the shar'ah text and ma'sla'ah as inevitable is an erroneous presumption. If we believe that aûkûn shar'iyyah aims at the realization of ma'sla'ah, then why
do we assume a potential conflict is inevitable between shar'ah text and maṣlaḥah? Second, even if such a conflict exists, it is the shar'ah texts that should be given priority over maṣlaḥah. This is particularly true when maṣlaḥah itself derives its authority from the shar'ah text and not vice-versa. It is illogical if one gives priority to a branch over its core and source of authority. Therefore, there is no reason for maṣlaḥah to be in conflict with the shar'ah text in any manner.¹³

Third, the approach of giving priority to maṣlaḥah fails to distinguish between the qarṣiyyah (definitive) and the ṣanniyyah (speculative) texts. If the text is definitive with regards to its authenticity (thubīt) and meaning (dilẓah), then the ruling it produces is final and binding; i.e. there is no room for human perception of maṣlaḥah to add any interpretation to the text in any way they see fit.¹⁴ While, if the text is speculative with regards to its authenticity or meaning, then there may be avenues for maṣlaḥah 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 maṣlaḥah meets all its conditions: being public not private, authentic not false, definitive not probable.¹⁵

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

According to al-Shābibi, the determination of what is beneficial and what is harmful cannot be left to human reasoning alone.¹⁶ Human reasoning plays a role only in a framework guided by the shar'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 aspects of human existence. This is because the inherent limitations in human beings posit a strong case that requires Divine guidance to ascertain what is right and what is wrong. Hence, according to Ahmad (2003), the rational faculties can and should be used to complement, support and strengthen ethics and morality defined by the shar'ah.

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

4. ISLAMIC FINANCE AND MAQĀḍĪD AL-SHARĪ'AH

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

4.1 SHARĪ'AH-COMPLIANCE: VALIDITY VERSUS PERMISSIBILITY

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

Schools of fiqh differ on the issue of determining the basis of contract validity (ṣā'ūdah). Some emphasize on its legal form while others stress on its substance and the intention of contracting parties. These differences can be attributed to the Sharī'ah texts as there are some who base their opinion on a ʿudah that “matters are determined by intention.” Based on this ʿudah, 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 al-Imām al-Shāfiʿī found it impractical to determine the validity of contracts by means of intention, as it is difficult and sometimes impossible to identify the intention of the contracting parties. Moreover, they found some Sharī'ah texts suggesting that judging things must be based on their form and appearance.
To reconcile between these two conflicting texts in a practical way, scholars distinguished between two types of ūukm (ruling): ūukm qāē and ūukm diy ūy. The former is concerned with contracts that comply with all shar yah conditions and requirements pertaining to a contract in its form and structure, while the latter is concerned with compliance of the substance or contract purpose which must be in line with the shar yah. If the contract structure is shar yah compliant, then it could be termed as a valid contract (ṣaūū). On the other hand, if all of the purposes of the contracting parties i.e. the substance of the contract are shar yah compliant, then it is termed as permissible (ūal ē). Thus, a transaction is deemed to be ēal ē when it serves the legal purpose and intention, and ṣaūū if the contract meets all contractual conditions and requirements. Consequently, a ṣaūū (valid) contract is not necessarily ēal ē (permissible).\(^{19}\)

The first approach represents the ī anaf and Sh fi position while the M ēk and Hanbal schools emphasize that validity of a contract must be based on the real intention or the substance of the contract.\(^{20}\) Apparently, the scholars of fiqh only differ in terms of determining the validity of a contract. However the fuqah ē never differed on the issue of determining the permissibility of a contract on its substance or the intentions of the contracting parties. Even al-Sh ē gave examples of instances when real intention does invalidate a contract such as selling of grapes to a winery, or selling arms to the enemy (whose intentions must be 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.

### 4.2 Controversies over Islamic financial products

The foregoing discussion has indicated that scholars generally agree that for an Islamic financial product to be deemed as shar yah compliant, the contract must be both valid and permissible. This somehow raises an issue whether current Islamic banking and finance products indeed follow the same principles.

Perhaps the most controversial product of Islamic banking and finance is ba y al-ʿnah (buy-back sale) which is widely practiced in Malaysia. Many financial applications are based on ba y al-ʿnah such as ba y bithaman ēil (deferred cost-plus sale), Islamic credit card (ba y al-ʿnah 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’ suggests, but in reality, we find the Islamic 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-ḥīrah here is resorted to as a legal device (ḥīrah) to circumvent Ṣibāl-based financing, but as far as the substance is concerned bay al-ḥīrah-based financing and the conventional Ṣibāl-based financing are the same. They serve exactly the same 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 referring to the legal form of the transaction is definitely undermining ījmāʾ (consensus of jurists) and goes against the very principles of shārīʿah and religion 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 in ensuring the compliance of the substance to the shārīʿah and not for itself. This explains why the fuqahāʾ have compromised the form in many examples but never compromised the substance.

As a case in point, let us look again at a contemporary application of Islamic pawn broking. In this financing instrument, the bank offers the client a benevolent loan by stipulating a pawn as an exchange to be deposited under the bank’s custodianship. Eventually, 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 maqāsid al-shārīʿah 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 maqāsid al-shārīʿah. Surprisingly enough, maqāsid al-shārīʿah has been used here as a justification for the adoption of such controversial transactions, though observing maqāsid al-shārīʿah must be the first factor to determine their prohibition.
4.3 MACRO MAQ.Å£ID VERSUS MICRO MAQ.Å£ID

One may think that by legalizing some controversial transactions such as bay' al-Å£ah the macro maqÅ£id are observed. What we mean by macro maqÅ£id here is the interest or benefits related to the overall well-being and welfare of the society, which has been the objective of Islamic economics for so long; whereas micro maqÅ£id relates primarily to micro issues pertaining to individual financial transactions. Obviously, in this regard, macro maqÅ£id is given more attention and it is the concern and focus rather than any micro maqÅ£id. These macro maqÅ£id 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 help observe a particular maqÅ£id of certain detailed rulings, but at the expense of the macro maqÅ£id of sharÅ£ah. Whereas the latter aims at building a strong, just economic system.

To address this issue, we need to recall our previous discussion regarding the conflict between perceived mašlaúah and sharÅ£ah texts. To recapitulate, the sharÅ£ah texts must always prevail over perceived mašlaúah. Only by acknowledging this hierarchy can the realization of mašlaúah for human beings be achieved, since we recognize the authority of the lawgiver Himself, Who is the Most Knowledgeable and the Most Wise. In other words, the determination of mašlaúah 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 the sharÅ£ah texts. In this regard, Ibn Taymiyyah says: ‘What constitutes a mašlaúah or a mafsadah is subject to the sharÅ£ah standards.’ Al-Dahlaw¥ says: ‘Our lawgiver is more trustworthy than our reasons.’

If there was any kind of mašlaúah in ribâ or its resemblance of buy-back sale-based on legal tricks, then the Lawgiver would not have considered ribâ as the worst of evils 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 sale and forbidden ribâ” (2:275) and, “God destroys/eliminates ribâ;” (2:276) and, “O ye who believe, fear God and quit what remains of ribâ 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’â€ with a notice of war from God and His Messenger.
4.4 OVERULING PROHIBITED PRACTICES ON THE GROUNDS OF ē ĀRČ RAH

ē ār’ rāh, which means necessity, unanimously renders the prohibited things permissible as this constitutes a well-established fiqh maxim in the shārīah “Necessities permit the forbidden” (al-ē ār’ rāh tubū ṭ al-maʿūṣ rāh). However, when jurists discussed and explained the applications of this fiqh maxim they mentioned what is known in Arabic as ē ār’ rūṣ, which means conditions and guidelines, for the functionality of this maxim. These guidelines are of course stated in or derived from shārīah texts. The first guideline (ē ār’ rūṣ) is: what constitutes a ē ār’ rāh. The jurists’ approach to the concept of ē ār’ rāh can be summarized by saying that ē ār’ rāh is something which is indispensable for the preservation and protection of the five essential values or maṣūṭi: Faith, Life, Intellect, Posterity, Wealth. This means the concept of ē ār’ rāh would give the mukallaf legal excuse to commit the forbidden; what is indispensable for his survival, spiritually and physically.

Applying the principle of ē ār’ rāh to the case of the Islamic bank may not be appropriate. Even if we rightly presume that such products are inevitable for the Islamic bank’s survival and long-term sustainability due to certain considerations, the argument is that the very concept of bank itself is not indispensable for the mukallaf’s survival from the shārīah perspective. If such ē ār’ rāh hypothetically exists, then it would rather legitimize dealing with conventional banks directly.

Obviously, when the shārīah prohibits something it always provides alternatives. For example when shārīah prohibits zinā it permits marriage, when it prohibits wine and pork for consumption it permits all other sorts of food and drinks. Likewise, when the shārīah prohibits certain contracts such as contracts based on ṭib and gambling, it alternatively permits many contracts like sale, lease, salam, istisna, muḍarabah and mushārakah. To economists, such contracts are better alternatives to ṭib and gambling, and ultimately can help to produce a prosperous and healthy economy. On the other hand an economy based on ṭib and gambling which is premised on exploitation, leads to disparity and inequitable wealth distribution between the rich and poor.

So, where is the ē ār’ rāh that may allow Muslims to abandon these beneficial contracts in favour of harmful and destructive ones? Legalizing a forbidden thing on the grounds of ē ār’ rāh 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 the
same excuses of ēarʿ rāḥ 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? Are there any indications to suggest a possible change?

Even in a worst case scenario, there has been a well-established ruling that when a person is given the excuse to commit the forbidden on the grounds of ēarʿ rāḥ, he can never deny the original ruling of its prohibition. Hence he cannot claim the original permissibility of his commission of the forbidden. If a person is excused to seek a ṭabʿī-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 deny the prohibition of ṭabʿī or regard it as permissible. Otherwise, such an act is tantamount to betrayal of God’s ruling since ṭabʿī impermissibility is definitive.

There is a tendency in some Islamic banks today to conveniently use ēarʿ rāḥ as an excuse to legalise certain activities such as ḥālū al-ṣuḥūrah-based transactions although all jurists agree on its impermissibility if it is used to circumvent the prohibition of ṭabʿī as discussed earlier. Even if the justification of ēarʿ rāḥ is considered valid, they should acknowledge the original ruling of the contract. Surprisingly, some use ēarʿ rāḥ as a justification for the adoption of ḥālū al-ṣuḥūrah, which implies that they admit that this sale is originally prohibited; at the same time, they justify the adoption of ḥālū al-ṣuḥūrah by claiming its permissibility through attributing it to the Šāfīʿī school. The whole situation here can be likened to a person who has already predetermined doing something shameful without any considerations, and then tries to find as many excuses as possible to justify his action.

4.5 HAS ISLAMIC ECONOMICS BEEN ISLAMISED?

In the final analysis, based on our discussion, it is very clear that Islamic economics, represented here by Islamic banking, unfortunately has not been fully Islamised since we still do not have Islamic banking in the real sense of the word. What has been achieved so far is mainly a replication of conventional banking and finance. So far the attempt to Islamise 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 shariah by transforming some of its rulings into a meaningless set of rules that is incapable of convincing the Muslim population of its rationality and wisdom. Rather, it leaves the public baffled; not able to comprehend why ribā or bank-interest is prohibited for them while bayʿ al-'amr 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?

5. CONCLUSION

This paper has deliberated on the challenges of realising maqāsid al-sharī'ah in Islamic banking and finance. These challenges include the proper understanding of maqāsid al-sharī'ah and the various tools in Islamic jurisprudence such as the māšlahah and ēārrah concepts. Failure to understand the very objectives of sharī'ah and its application to modern mu'talalah transactions lead to potential abuse of maqāsid to justify certain contracts which in fact are contradictory to the sharī'ah texts and principles. Circumventing the prohibition of ribā by means of bayʿ al-'amr for example is against the very objective of sharī'ah prohibition of ribā. Therefore, those who claim the permissibility of such transactions under the pretext of realizing maqāsid al-sharī'ah are effectively acting against the true spirit of maqāsid al-sharī'ah.

After a deep deliberation on the foregoing arguments, this paper concludes that to realise the maqāsid al-sharī'ah, Islamic banking and finance institutions must ensure that all of its transactions are sharī'ah compliant not only in its form and legal technicalities but more importantly, the economic substance which is premised on the objectives outlined by the sharī'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 maqāsid al-sharī'ah or al-sīyāsah al-shar'iyyah or ēārrah is legally wrong, leads to more harm than benefit and has fatal implications. The role of māšlahah in the sharī'ah is thus confined to making ijtihād on a particular issue in the absence of a respective definitive text, and to choosing the opinion that
is believed to serve public interest better when there is a plurality of opinions. Committing the forbidden on the grounds of necessity does not entitle one to claim its original permissibility.

In a nutshell, Islamic banks should do away with all the controversial contracts that may impede the growth and progress of the Islamic banking and finance industry. Indeed the Islamic banking system has the potential to become one of the promising sectors to realize the noble objectives of the šarīʿah, as it resides within a financial trajectory underpinned by the forces of šarīʿah injunctions. These šarīʿah injunctions intergrate Islamic financial transactions with a genuine concern for a 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 also in the values that guide Islamic banking operations and outlook. The values that prevail within the ambit of the šarīʿah are expressed not only in the minitiae of its transactions, but in the breadth of its role in society. This demands the internalisation of šarīʿah principles in Islamic financial transactions, in its form, spirit and substance. By so doing, it will help to materialise the objectives of šarīʿah in promoting economic and social justice.

ENDNOTES

1. 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 the Sudanese Islamic Bank (SIB) in implementing the mushārakah 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).

2. The practice of BBA in Malaysia is criticized by many scholars outside Malaysia due to its apparent bayʿ al-šāh structure. In brief, customers who are in need of financing would sell their beneficial ownership of the property to be financed to the banks by signing a contract called Property Purchase Agreement (PPA). After the execution of the PPA, the parties immediately execute another contract called Property Sale Agreement (PSA), to reflect the act of reselling the same property to the customer upon deferred payment,


4. For detailed discussion on the issue refer to Ibn al-Qayyim, Al-Suruq al-`ummiyyah, p.16.


6. See the Qur’ân 2:179.

7. See the Qur’ân 5:91.

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


10. The formulation of a rule on the basis of ‘al-majalis al-mursalah’ must take into account the public interest and conform to the objectives of shari`ah. According to the Maliki school, the application of this tool must fulfill three main conditions. First, it only deals with transaction matters (mu`amalah) where reasoning through rational faculty is deemed to be necessary and not relating to specific religious observance such as an act of worship (iqidah) 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 essential and necessary (`ar`ah) and not of a luxury type. Here the essential implies the preservation of five main objectives of shari`ah. For details, see Eubhyy R. Ma`umas, The Philosophy of Jurisprudence in Islam (Kuala Lumpur: Open Press, 2000). 87-89.


12. See the article published in Arabic on (www.elharakah.com) under the title “The Role of Maqasid al-Shar`ah in Managing the Public Affairs.”

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16. His argument is supported by a number of Quranic verses. One of which is Qur'ān 23:71. Refer to Al-‘iz ibn ‘Abd al-Salām, Qaw'id al-A‘lāk, 2/161.

17. This īdāh was narrated by ‘Umar ibn Al-Khaṭṭāb (ra). See ēa‘ūḥ al-Bukhārī, 1/3, īdāh No. 1; ēa‘ūḥ Muslim, 3/1515, īdāh No (1907).

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


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