

Applications of *Maqasid al-Shari'ah* and *Maslahah* in Islamic Banking practices: An analysis

Tawfique Al-Mubarak*

Qatar Faculty of Islamic Studies, Qatar Foundation,
Doha, Qatar, tawfiqueam@gmail.com

Dr. Noor Mohammad Osmani,

Dept. of Qur'an and Sunnah Studies, IRKHS,
International Islamic University Malaysia, abusajid@yahoo.com

Abstract:

Islamic Banking system has developed more than thirty years ago. Throughout its history, beside its successes, it assumed much controversies and criticism in its run to win the hearts of the Muslim clients. Established with the objective of providing an interest-free (*riba*-free) banking service, it has so far been criticized to open several other back-doors to *riba*-based transactions, despite its immense success in creating an alternative to the conventional banking system. This paper aims to analyze some of the contemporary Islamic Banking products and practices in the light of *maslahah* and *maqasid al-Shari'ah* in order to propose a better banking system for the Muslims. It also shows how the preference of '*macro-maqasid*' over the '*micro-maqasid*' is not a perfect justification for many such Islamic Banking practices. The paper suggests that *Bai' al-'Inah*, along with few other contemporary practices like *Bai' Bithaman Aajil* (BBA) and *ijarah Sukuk* needs to be thoroughly revised before being offered as a *riba*-free product, as it does not comply with the *maqasid* of Islamic Economic and Banking principles – economic development, social wellbeing, individual freedom and equality, elimination of injustice and poverty, etc.

Key words: *Bay'*, economic development, *Maslahah*, *Maqasid al-Shari'ah*, Islamic Banking.

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Introduction:

Islamic banks have started more than thirty years ago, with the inception of *Mit Ghamr* project initiated by Ahmed al-Naggar in the early sixties. The project was based on the ‘profit-loss sharing’ (PLS) system of Islamic economics. However, the first commercial Islamic bank to run was in Dubai, the Dubai Islamic Bank, in 1975. Since then, the Islamic Banking industry has developed with much greater pace and zeal.

After thirty years from the inception, today, among the major questions faced by the Islamic Banks (IBs) and Islamic Financial Institutes (IFIs) are the questions of *riba*, *gharar* and ethical investments, which have created much debate, even from within. Practices like *bai’ al-‘inah*, *bai’ al-dayn*, *Bai’ Bithaman ‘Ajil* (BBA), *rahn* and many such contracts have been criticized to be simply a ‘backdoor’ to *riba* or an alternative to the *riba*-based conventional banking transaction.

This paper attempts to discuss few of these contracts, within the scope, and analyze it in the scale of *maslahah* and *maqasid al-Shari’ah*, to propose to the Islamic banking system more trustworthy and ethical investments.

***Maslahah*: The demand of time**

With the changing nature of human civilization and needs, Islam accommodated the incorporation of permanent features to adapt these changes. *Maslahah*, considering its benefits, are aimed to shape the human needs, hence is such a tool which allows creativity, dynamism and flexibility in terms of social policies.

Literally, *maslahah* means ‘benefit’ or ‘interest’,¹ ‘welfare’, or ‘advantage’; or (المنفعة) in Arabic. Within the range of *usul al-fiqh*, the *masalih* (plural of *maslahah*) are considered to be of three broad categories, from the viewpoint of the availability of any textual reference.

¹ This is as Kamali proposes in his book. See: M. Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic text society, 2003), 351.

The *masalih* which are acknowledged and accredited by a textual reference are known as *al-masalih al-mu'tabarah*, while the *masalih* which are rejected outright are referred to as *al-masalih al-mulghat*, and the *masalih* which are neither accredited nor denied of, are considered as *al-masalih al-mursalah*.

Al-masalih al-mu'tabarah or benefits acknowledged by the Shari'ah are those which are vividly expressed in the Shari'ah texts, and approved its benefits. As examples, the commandment for Jihad, which is aimed to safeguard the *Deen*,² and the provision of *qisas* (retaliation for murder), which aims to protect human lives,³ and the punishment prescribed for adultery and slander, which are to protect human dignity; the *ibadah* of *salat* (prayers) protects one from the lewdness and iniquity⁴, are mentionable. These benefits, even if not mentioned in the texts explicitly, are deduced with analogical reasoning.⁵

On the other hand, *al-masalih al-mulghat* or the benefits which are rejected are also clearly mentioned in the texts, and that are disapproved in the Shari'ah. Examples can be drawn from the verse of inheritance,⁶ which prescribes that generally the share of a male (son) is as double the share of a female (sister). Though it seems to have been beneficial to provide equal shares for both parties, Almighty Allah with His profound knowledge has rejected that benefit for a greater benefit.⁷ Similarly, transactions with *riba* (interest, sometimes also used for 'usury') are also prohibited⁸ despite the fact that *riba* enables one to make profit.

The point of discussion here, *al-masalih al-mursalah*, are those benefits which are neither mentioned explicitly in favour, nor denied outright in the textual scriptures. In a clearer definition, Khallaf mentions it as "The benefits which the lawgiver did not impose as a rule to

² The term *Deen* (دين) is usually thought to have meant 'religion' in Islam. Yet, both are not the same, in fact *Deen* is much broader than 'religion'; hence not translated here as 'religion'. However, *Deen* can somehow represent the essence of the term '*religionswissenschaft*'. The objective of commanding for Jihad is expressed in Surah al-Baqarah (2): 193, among other verses.

³ The benefit of *qisas* has been explicitly mentioned in the Qur'an; in Surah al-Baqarah (2): 179.

⁴ Al-Qur'an, Surah al-'Ankabut (29): 45

⁵ See Abd al-Karim Zaydan, *Al-Wajeez fi Usul al-Fiqh* (Beirut: Mu'assasat Qurtubah, 1987), 236-7.

⁶ Al-Qur'an, Surah an-Nisaa (4): 11

⁷ That is equity and responsibility. Of course Allah, SWT, knows the reasons better.

⁸ Al-Qur'an, Surah al-Baqarah (2): 275

be implemented, and neither there is any textual indication acknowledging it nor rejecting it.”⁹

Similarly, Wahbah Zuhayli, considers these as benefits characterized to be compatible with the attitudes and objectives of the Shari’ah, by promoting benefits and repelling harms.¹⁰ Allamah Yusuf al-Qaradawi, in justification of the *masalih*, writes “if the *masalih* can prevail in the *ibadat* which are primarily aimed at worshipping (Allah), why should there not be *masalih* in the earthly matters shaped by lifestyles and relationships between individuals, families, societies and nations?”¹¹ Therefore, the Shari’ah is laid down with benefits for the human beings in general, which are later developed and discussed extensively under the notion of *maqasid al-shari’ah*.

Maqasid al-Shari’ah: a brief sketch

Maqasid al-Shari’ah, or the objectives of Shari’ah, are designed to “promote benefits and repel harms.”¹² Nyazee mentions Imam Shatibi’s view on the objectives as “... to free man from the grip of his own whims and fancy, so that he may be the servant of Allah by choice, as he is one without it.”¹³ These objectives, though not expressed clearly, but are indicated in every law in the Shari’ah, as we have mentioned earlier about the benefits of *salat*, *Jihad*, *qisas* and others.

Imam Ghazali, one of the earliest scholars to discuss this issue, has categorized the objectives into two primary categories; the *deeni* (related to *deen*) and the *dunyawi* (related to this material world). The *dunyawi* purposes are further divided into four types, which are all

⁹ Abd al-Wahab Khallaf, *Ilm Usul al-Fiqh* (Cairo: Maktabah al-Da’wah al-Islamiyyah), 84.

¹⁰ For a better understanding in Wahbah Zuhayli’s words:

”... أي المنفعة المطلقة: هو الوصف الذي يلائم تصرفات الشرع ومقاصده، ولكن لم يشهد دليل معين من الشرع بالاعتبار أو الإلغاء، ويحصل من ربط الحكم به جلب مصلحة أو دفع مفسدة عن الناس...”

See Wahbah Zuhayli, *Al-Wajeez fi Usul al-Fiqh* (Beirut: Dar al-Fikr al-Mu’asir), 92.

¹¹ Yusuf al-Qaradawi, *Madkhal li-dirasatil-Shari’ah al-Islamiyyah* (Beirut: Mu’assasat al-Risalah, 1993), 54.

¹² Wahbah Zuhayli, *Al-Wajeez*.

¹³ Imran Ahsan Khan Nyazee, *Theories of Islamic law* (Islamabad: IIIT and Islamic Research Institute, 2005), 235.

individually meant to serve the single *deeni* purpose. The four *dunwayi* purposes are protection of *nafs* (life), *nasl* (lineage), *'aql* (intellect), and *maal* (wealth).¹⁴

Furthermore, these *maqasid* are categorized into three broad categories, the *daruriyyat* (essentials), the *hajiyyaat* (supporting), and the *tahseeniyyaat* (embellishments).¹⁵ The *daruriyyat* are those which are undoubtedly necessary, with no exception, for the benefits of *deen* and *dunya*, and the absence of which will lead to chaos. Allamah Qaradawi discussed these *daruriyyat* into two main divisions, i.e. those which are necessary to be safeguarded, and those which are necessary to be eliminated. However, Imam Shatibi considers the five essentials mentioned above among the *daruriyyat*. Allamah Qarafi and many other scholars have added a sixth essential, namely *'ird* (dignity);¹⁶ which, however, can be considered within the scope of *nafs* (life). Kamali suggested examples which include encouragement of work and trading activities for smooth flow of living and economic development, and similarly commandment of education is for the interest of intellectual wellbeing, advancement in science, arts and cultures.¹⁷

The *hajiyyaat* are the interests which are required for the betterment of the society, absence of which though may not create chaos, however may lead to hardship and difficulty. Since¹⁸ many Hanafi followers view unnecessary movement in the *salat* as invalidators of prayer, and therefore do not opt to switch off their ringing handphones with musical ringtones¹⁹ while they are in the prayer. With this, they are causing disturbance to their as well as other's prayers, hence in this case it can be considered as *hajiyyaat* to switch off a ringing handphone while one is praying.

¹⁴ Ghazali, *Shifa al-Ghalil*, in Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence* (e-book: Advanced Legal Studies Institute), 165.

¹⁵ Shatibi, *Muwafaqat*, Vol.1, p. 243, in Qaradawi, *Madkhal*, p.55.

¹⁶ Ibid.

¹⁷ Hashim Kamali, "Al-Maqasid al-Shariah: The Objectives of Islamic Law", *The Muslim Lawyer Journal*, 3, No.1, (April-June, 1998), 2; available at <http://www.aml.org.uk/journal/3.1/Kamali%20-%20Maqasid.pdf>; internet.

¹⁸ This example mentioned is from a common practice in the Indian Subcontinent, and that the author have experienced.

¹⁹ In this case, the harm they are causing is severe. Primarily playing music, which is *haraam*, in the masjid render it greater *haraam*; secondarily, playing music, a *haraam* thing, during the *salaat*, an *ibadah*; and third, creating chaos in the others' prayers and concentration, distracting people from *khushu'* and *khudhu'*.

The *tahseeniyyat* are interests are beautification leading to a desirable status. These are, for example, shaping oneself with the noblest characters and attitudes, and maintaining *ihsaan* at every stage.

Conditions of *Masalih*:

Although the Shari'ah accepts benefits, and opts for ease, however does not accept all that leads to a benefit. The benefits are bounded by some guidelines to accommodate it in the Shari'ah. In a very brief manner, these conditions are:²⁰

1. Not to contradict an established *hukm*: when a ruling has been enacted by the Shari'ah, there can be no *maslahah* to be considered against it, as the (new) *hukm* would then be *maslahah mulghat*.
2. There can be no *maslahah* to create a new *ibadah*, nor to add any *rukun* or *shart* of any established *ibadah*, nor to eliminate some parts of any *ibadah*.
3. *Maslahah* should be based on a *qat'ee* (definitive) references, and not *zanni* (speculative).
4. When a *hukm* is enacted, the *maslahah* of that *hukm* should be greater than the *mafsadah* of it, neither equal nor less.
5. The *maslahah* should be a general (كَلِيَّة) and inclusive *maslahah*, not limited and specific (خَاصَّة) to some individual or group.
6. The *maslahah* should be compatible with the Shari'ah standards of *maslahah*, and reasonably understood.

The current Islamic Banking practices in the light of *maqasid al-shari'ah*:

The foundations of Islamic economics, the parent science of Islamic Banking, are based on the concepts of economic wellbeing, universal brotherhood and justice, equitable distribution

²⁰ See Sulaiman al-Ashqar, *Al-Waadhih fi usul al-Fiqh* (Jordan: Dar al-Nafais, 2004), 150-1.

of income, and freedom of the individual within the context of social welfare.²¹ These objectives promote for a society of well being, where every individual and organization commits to justice, equity, and freedom. None of these foundations promote a mere profiteering and material gain with no concern for the ultimate *falah* in the Hereafter. Similarly, the foundations of Islamic Banking promote a balanced life between the life here and Hereafter. Thus this development can only be achieved in a conformity with the *maqasid al-Shari`ah*.²²

This implies the necessity on the Islamic Banks to develop products based on the overall welfare and a greater perspective from the *maqasid al-Shari`ah* framework, and not simply focusing on the legal forms of the products. Dusuki and Abozaid commented in this regard,

“...Instead, the substance that has greater implications to the realisation of *maqasid al-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.”²³

With a meticulous analysis, it can be visible that the current practices of the Islamic banks are, in many cases, not in conformity with the *Shari`ah* required standards. Many Muslim economists, for example, favor equity-based instruments and place greater social welfare responsibilities and religious commitments, in order to realize *maqasid al-Shari`ah* for equitable distribution of wealth and promoting economic development and growth,²⁴ whereas most of the Islamic banking products range from *Bai` Bithaman `Ajil* (BBA), *Bai` al-Dayn*, Islamic credit card with *Bay` al-`Inah* contract, *Tawarruq*, and many such other contracts. Therefore, it has become one of the biggest challenges of time, to come up with products which are not only Islamic compliant, but are also Shari`ah compliant, i.e. compliant with the

²¹ See M. Umar Chapra, *Objectives of the Islamic Economic order* (Leicester: Islamic Foundation UK, 1979).

²² M. Umar Chapra, *The Future of Economics: An Islamic Perspective* (Leicester: The Islamic Foundation UK, 2000).

²³ Asyraf Wajdi Dusuki and Abdulazeem Abozaid, “A Critical Appraisal on the Challenges of Realizing Maqasid al-Shari`ah in Islamic Banking and Finance,” *IJUM Journal of Economics and Management*, 15, no.4 (2007): 143-165.

²⁴ See A. Ahmad; K. Ahmad, “Economic Development in Islamic Perspective Revisited”, *Review of Islamic Economics*, 9, (2000): 83-102, “Islamic Finance and Banking: The Challenge and Prospect,” *Review of Islamic Economics*, 9, (2000): 57-82; M. Umar Chapra, *The Future of Economics*; M. N. Siddiqi, *Issues in Islamic Banking* (Leicester: The Islamic Foundation UK, 1983).

maqasid al-Shari'ah, without violating the business natures of being competitive, profitable and viable in the long run.

To understand how much *maqasid al-Shari'ah* oriented the above mentioned products are, we can analyze some of those contracts in the following discussion.

Bai' Bithaman 'Ajil (BBA) contract:

The *Bai' Bithaman 'Ajil* (BBA) contract, which is very close to *Murabaha* or *Bai' Mua'ajjal*, provides the buyer the benefit of a deferred payment, whereby it implies a sale on a cost plus basis. The BBA contract has gained overwhelming popularity in the South-East Asian region, and turned to a basic contract in the Islamic Banks. Obaidullah mentions a simple difference between the BBA contract and the *Bai' Murabaha*, that in the BBA contract both the parties may or may not know the cost and the mark up price of the product; however, in the *murabaha* contract, it is a binding for both the parties to be aware of the cost and the mark up (profit) price.²⁵ The BBA contract has been a subject of much controversy around the world, to the effect that the Council of Islamic Ideology in Pakistan has mentioned in its report *Elimination of Interest from the Economy* writes on *bay' muajjal* in this manner:

*“However, although this mode of financing is understood to be permissible under the Shari'ah, it would not be advisable to use it widely or indiscriminately in view of the danger attached to it of opening a back door for dealing on the basis of interest. Safeguards would, therefore, need to be devised so as to restrict its use only to inescapable cases.”*²⁶

BBA contracts profit rates, usually in the home financing or in car finances, are unfortunately identical to the interest rates. And in cases where the BBA profit rate is fixed, which raises other questions, is usually higher than the interest based loans of the conventional banks, and volatile for the long-run contracts. The bank according to the BBA contract, although should be liable for the risks of the property sold, many banks do not take any risk at all as it only owns the property for a minimum period of time possible, usually a few minutes or less. This

²⁵ M. Obaidullah, *Islamic Financial Services* (Jeddah: King Abdul Aziz University, 2005), 68.

²⁶ The Council of Islamic Ideology, *Elimination of Interest from the Economy*, revised edition (Islamabad: Government of Pakistan, 2002), 21.

is a direct violation of the principle “*Al-kharaju bil-dhaman.*” Similarly, in cases of default the bank does not bear any responsibility, as it does not own the property anymore! On the same stance, the bank does not provide any choice or *ikhtiyar* to the customer in case of defects. Violation of the principles of “*Al-kharaju bil-dhaman*” renders it to the same state of *riba*.

On the other hand, BBA financing is calculated based on the market interest rate, as its bench-mark.²⁷ Although there is no Shari’ah restrictions to profit being the same as interest rate, however it further leads to other *mafasid* which does not comply with the *maqsad* (objective) of eliminating injustice, inequality and poverty, which were primary objectives behind the elimination of *riba*. Such *mafasid* mainly includes profiteering based on the floating rate of interest and roll over on the profit based on the market condition, which is strictly impermissible in the Shari’ah. *Murabaha* or BBA based financing products are fixed rate product and do not allow for a roll over. It is indeed alarming to learn that the Central Bank of Malaysia has approved a ‘floating-rate’ BBA where the customer pays a monthly instalment amount that is on the higher end, but subsequently gets a rebate based on the prevailing market interest rate.²⁸

Another severe criticism posed at the BBA financing is its involvement in ‘hidden’ *bay’ al-Inah* contracts, where the financier buys and sells the products back to the customer. *Bay’ al-Inah* has been severely criticized by majority scholars, including many Malaysian scholars, especially where it is widely practiced. A further detail on this product is to be discussed in the forthcoming pages.

Similarly, as the Islamic banks are simply imitating²⁹ the conventional banking system, based on the Fractional Reserve System, Islamic banks are also, in this way, making money ‘out of

²⁷ For further details, see Dzuljastri Abdul Razak, Mustafa Omer Mohammed, and Fauziah Md Taib, “Customer’s Acceptance on Islamic Home Financing: Empirical Evidence on *Bai Bithaman Ajil* (BBA) in Malaysia”, paper presented at *IUM International Accounting Conference IV (INTAV)*, Marriot Putrajaya Hotel, 24-26 June, 2008.

²⁸ Ahamed Kameel Mydin Meera and Dzuljastri Abdul Razak, *Islamic Home Financing through Musharakah Mutanaqisah and Bai’ Bithaman ‘Ajil contracts: A comparative analysis* (KL: ISRA, 2009), 3.

²⁹ They are imitating because most of the products are the same products with simply a different name, and a little variance in terms of terms and calculations. Dusuki and Abozaid also view similarly. See. Dusuki and Abozaid, “A Critical Appraisal”, 147.

thin air' violating the principles of equal distribution, societal welfare, justice, on the way to create a higher default rate, debt loans and similar other greater *mafasid*.³⁰

***Rahn* or Pawn Broking against a *qardh*:**

Another example of the imitating Islamic banking practice is the *rahn*, which is a sort of documentation of debt in its original sense. But in the modern Islamic banking practices, it is widely known as a synonym for Pawn Broking, and a tool to generate profit in the business. In this transaction, the Islamic bank will provide its customer with a *qardh* (benevolent loan) on condition that the customer guarantees it with a *rahn*; e.g. a valuable jewellery to be kept by the bank as collateral. This would not have been a problem had the bank not asked for a custodianship fee against the *rahn*. "The amount of this charge is subject to the amount of the loan and, in practice, equivalent to the bank rate of profit" writes Dusuki and Abozaid.³¹ In fact, *qardh* contracts cannot be conditioned to a *manfa'ah* (benefit), unless it has been willingly offered by the borrower which is known as *husnul-qadha* in the Shari'ah literatures. Any *qardh* conditioned to a benefit/favor is considered as *riba*.³² This, indeed, violates the fundamental *maqasid* (objectives) of *hifz al-deen* primarily, and secondarily the *maqasid* of establishing Islamic Banks, i.e. dealing with interest-free monetary policies for the Muslims, providing economic welfare, social equality, and a free flow of money among the citizens.

***Bai' al-'Inah*:**

Bai' al-'Inah is a sale and buy-back arrangement with fixed mark-ups. A *murabaha* can change into *Bai' al-'Inah* if the identity of the seller is not different from its customer; this is when the bank purchases a commodity from its client on a spot basis and sells it back to the client at a cost-plus price and on a deferred basis.³³ This practice has gained some popularity in the South East Asian region, despite the fact that it has been rejected outright in almost all other Muslim countries by the Islamic scholars. One of the main reasons behind its prohibition is that its rate of profit is indistinguishable from the rate of interest in the

³⁰ See Ahamed Kameel and Dzuljastri, *Islamic Home Financing*, 5; also Ahamed Kameel Mydin Meera, *The Theft of Nations* (Subang Jaya: Pelanduk publications, 2004).

³¹ Asyraf Wajdi Dusuki and Abdulazeem Abozaid, "A Critical Appraisal", 148.

³² For further information on *qardh* and its conditions please see Wahbah Zuhaily, *Al-Fiqhul Islami wa Adillatuhu*, (8 volumes) (Beirut: Dar al-Fikr, 1997), 3974-9.

³³ M. Obaidullah, *Islamic Financial Services*, 103.

conventional banks. And the ultimate consequence of this transaction is that it transforms into a pure *riba*-based transaction in the guise of *bay'*.

While most of the Southeast Asian scholars deem it permissible on the basis of Imam al-Shafi'i's opinion, most other scholars do not find it permissible at all. In fact, it is considered an alternative to *riba*. In fact, Imam al-Shafi'i's opinion is only his personal view and not based on any authentic Shar'i sources. Imam al-Shafi'i considered a contract valid as long it fulfilled the conditions and pillars, no matter what intention was hidden.³⁴ However, some of the contemporary Shafi'i scholars, like al-Sharbini al Khateeb and al-Ramlee, have expressed detestation (*karahah*) for such a trade as it defeats the person in need.³⁵ Contrary to this view, all other scholars based their opinions on the consensus of the jurists (*ijma'ul fuqaha*) that it invalidates the contract by the usage of a legal device (*hilah*) to validate an interest-bearing loan. Ibn Qayyim prohibited *Bai' al-`inah* quoting the following Hadith that the Prophet Muhammad (pbuh) is reported to have said:

“A time is certainly coming to mankind when they would legalise *riba* under the name of *bai'* (trade/sale).”³⁶

There are also a number of scholars who expressed impermissibility of *bay' al-`inah* based on the following Hadith which warns the Muslims of disgrace prevailing over them for transaction on *bay' al-`inah*:

“إذا تبايعتم بالعينة وأخذتم أذناب البقر، ورضيتم بالزرع، وتركتم الجهاد سلط الله عليكم ذلا لا ينزعه حتى ترجعوا إلى دينكم”³⁷

³⁴ Saiful Azhar Rosly and Mahmood M. Sanusi, “The Application of Bay' al-`Inah and Bay' al-Dayn in Malaysian Islamic Bonds: An Islamic Analysis”, *International Journal of Islamic Financial Services*, 1, No.2 (1999), 8-9.

³⁵ Al-Nawawi, *Rawdatul-Talibeen*, cited in Taqi Usmani, *Verdicts on at-Tawarruq and its Banking Application*, Available at: <<http://www.isra.my/articles/islamic-banking/tawarruq.html>>, Access Date: 19th August, 2010, p. 6.

³⁶ See, Abu Umar Faruq Ahmad, *Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia*, (Florida: Brown Walker Press, 2010), 243-4.

³⁷ This is an authentic (*saheeh*) Hadith, narrated by ‘Abdullah ibn ‘Umar, and compiled by Shaikh al-Albany, in *al-Silsilah al-Saheehah*, No.: 11. For a detailed authenticity of the Hadith, see *Al-Mawsu'ah al-Hadeethiyah*, available at: <<http://www.dorar.net/enc/hadith/%D8%A5%D8%B0%D8%A7%20%D8%AA%D8%A8%D8%A7%D9%8A%D8%B9%D8%AA%D9%85%20%D8%A8%D8%A7%D9%84%D8%B9%D9%8A%D9%86%D8%A9/pt&page=1>>, no. 18.

The transactions based on *bai' al-'inah* violate many fundamental objectives of Islamic Banking practices. The *mafasid* that are caused due to *bai' al-'inah* overwhelm the *masalih*. To enlist a few, primarily, the lender or the bank is creating a 'debt' in the economy leading to higher speculation, and putting the overall economic system in an unfair risk-bearing and uncertain condition. Secondly, there is no sale and trade in real terms; it's only some paper work allowing exchanges of parties, and not real trade. This hinders the *maqsad* of equal distribution in income. Third, as mentioned earlier, this is a different form of validation of *riba* through a legal device (*heelah*). Fourth, the contract does not require the bank to own the article for sale for such a period of time that would imply the liability side on the bank, as the bank usually owns the article for a few minutes or less. The profit that the bank is gaining without possessing the ownership and liability is antagonistic to the rights to profit, as the principles of "*Al-Kharaju bil-Dhaman*" demands. In fact, this implies the profit as an increase without ownership liability. Again, in case of default, based on the same concept, the bank cannot demand the article back, nor any compensation for it as it does not own it. However, unfortunately, the case is just the opposite in practice. Fifth, since the article for sale is only brought to be sold for the need of some cash, the market price of the article need not resemble the price offered by the bank; on this ground it is nothing other than *zulm* on the customer. Majority of the *fiqh* schools are in agreement that the *bai' al-'inah* contract is invalid, and is tantamount to *riba*.

Tawarruq, an extension of the *bay' al-'inah* contract, although deemed permissible as long as it is not the organised *tawarruq (tawarruq munazzam)*,³⁸ being a debt-based financing scheme its *mafasid* overwhelms the *masalih*. Siddiqi noted that the *mafasid* of such a debt based financing scheme at least includes:

- Leading to creation of debt whose volume is likely to go on increasing.
- Resulting in exchange of money now with more money in future, which is unfair in view of the risk and uncertainty involved.

³⁸ "OIC Fiqh Committee ruled organized Tawarruq impermissible", available at:

<<http://www.isra.my/fatwas/commercial-banking/financing/tawarruq/429-oic-fiqh-academy-ruled-organised-tawarruq-impermissible.html>>

- Through debt proliferation it leads to gambling like speculation.
- Through debt finances it leads to greater instability in the economy.
- In a debt-based economy, the money supply is linked to debt with a tendency towards inflationary expansion.
- Resulting in inequity in the distribution of income and wealth.
- Through debt finances it results in inefficient allocation of resources.
- It contributes, by consolidating debt financing, to raising anxiety levels and destruction of environment.

Based on the Shari'ah principles of preference over the overall *masalih* and prevention of *mafasid*, it can be concluded that debt based finances like *bay' al-inah* and *tawarruq* should be thought over once again before sanctioning it for the society.

***Sukuk* and the current practices:**

Based on the Islamic financial concepts, *sukuks* issued could be based on different forms of contracts, ranging from *mudharabah*, *musharakah*, *murabahah*, *ijarah*, and others alike. In this limited scope, we can take only the *mudharabah sukuk* into consideration for analysis of its current practices. The *mudharabah sukuk* are based on the *mudharabah* contracts, whereas the *sukuk* are issued by the *mudharib* to invest in an agreed project, and the investors (*rabb al-maal*) with their *sukuk*, agree upon a shared profit to be distributed at the time of maturity of the *sukuk*. As managers, the *mudharib* shoulders the responsibilities of the management, and remains liable for any loss due to negligence, or mismanagement. In this contract, the profit is not guaranteed, neither the loss, yet it can be expected at an approximate figure. As a result, the capital invested is not guaranteed, and the periodic returns are also dependent on the profits and are variable. These features are not meant for risk-averse investors, making the *sukuk* contract a less popular contract. However, the *sukuk* providers have come up with the provision of 'credit enhancement' to attract investors. Such 'credit enhancement' facilities include liquidity facility arrangement by the obligor, purchase undertaking at a fixed profit formula, and capping of profit with incentive payments are simply a few to name. This

provides security to guarantee income and the preservation of capital to the *sukuk* investors.³⁹ In the Shari'ah perspective, it is a violation of the *mudharabah* principle to comply with such 'credit enhancement' facilities as practiced by the market. The Shari'ah supervisory board of the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) have decreed that providing liquidity facility and purchase undertaking at par value by the *sukuk* providers are not permissible in the Shari'ah. The Shari'ah board further advised the Islamic Financial Institutions to invest more on a profit-loss sharing basis in order to achieve the *maqasid al-Shari'ah*.⁴⁰

Preference of 'Macro *Maqasid*' over the 'Micro *Maqasid*':

It can be argued that the facilities devised from the contracts like BBA, *rahn*, *bai' al-'inah*, *tawarruq* and others, are serving the *maqasid al-Shari'ah* at a macro level, i.e. providing a flow of economic activities in the overall economic system. On the same ground, the micro *maqasid*, which are the *maqasid* related to individuals and individual financial transactions, are overlooked for a greater benefit. However, these cannot be considered as part of the *maqasid al-Shari'ah* for the following reasons:

- In the first place, for its violation of clear text (*nass*) on prohibition of *riba*, and promotion of *zulm*.
- Secondly, as mentioned earlier in the conditions of *maslahah* that the *maslahah* should be greater than the *mafsadah*, neither less nor equal; whereas the *mafsadah* of these contracts have been clarified earlier, which are undoubtedly massive.
- Third, prevention of a *mafsadah* does not always guarantee a *maslahah* by nature; it can in many cases be a lesser *mafsadah*. In this case, only for the sake of competing with the conventional banks, as substitutes these Islamic banking products cannot be considered as *maslahah*. In fact, the evaluations earlier in this paper have proven those to be a greater *mafsadah* in disguise of *maslahah*.

³⁹ Asyraf Wajdi Dusuki, *Challenges of realizing Maqasid al-Shari'ah (Objectives of Shari'ah) in the Islamic Capital Market: Special focus on Equity-Based Sukuk* (KL: ISRA, October 2009), 15-8.

⁴⁰ Accounting and Auditing Organisation for Islamic Financial Institutions, AAOIFI's Shari'ah resolution on *Sukuk*, (February, 2008), Available at: <http://www.aaofi.com/aaofi_sb_sukuk_Feb2008_Eng.pdf>, Access Date: 30th September, 2010.

- Fourth, there should be no confusion in preferring the ‘macro *maqasid*’ over the ‘micro *maqasid*’. However, the so called ‘macro *maqasid*’ here needs of revised for the sake of the true macro *maqasid* which represents the overall society.

Conclusions and recommendations:

Islamic banking practices in the current trend have been facing tremendous challenges from its counterpart conventional banking system. To keep up in the run, with satisfactory services and products for the clients, the Islamic banks have come forward to offer very similar, in many cases ‘same’ though, products many of which are in serious criticism from a Shari’ah perspective. On the scale of *maqasid al-Shari’ah* these products often do not fulfil any or many of the *maqasids*, hence itself creates a *mafsadah* and prevents from upholding the *maqasid* as required to be. For instance, with the intrusion of *riba*-based transaction in disguise, it creates a clear barrier on the way to fulfilment of the objective of protecting *deen*, as well as *maal*. Similarly, in many cases, the investments issued from the Islamic banks to establish companies and landmark properties, are not appropriate from the stance of *maqasid al-Shari’ah*, and hence are approved at the cost of stakeholder’s losses. Developing huge structures with funding from Islamic banks and IFIs does not comply with the *maqasid al-Shari’ah*, rather proper care for environment, for the stakeholders, considering socio-economic developments should be incorporated as necessary elements in the consideration of such decisions for funding. Obviously, Shari’ah does not promote development for the cost of human lives, and hardship in living. On the same run, Islamic banks should also encourage investments in bio-diversity projects, natural power plants, and environmental friendly investments.

As mentioned earlier, about the paradoxes of BBA and other contracts, Shari’ah has also come up with solutions and alternatives to those contracts. Home financing, car loans, and other loan contracts can be based on *Musharakah Mutanaqisah* (diminishing partnership) instead of the debated BBA contract. Similarly, credit cards can be issued under the *qardh hasan* or even *rahn* contract (without charging for the custodianship fee).

It is also true that the Islamic banks are financial institutions, which are primarily aimed at making money; hence they try to make money from every opportunity available. As a result the contracts based on Profit-Loss Sharing, the *mudharabah* and the *musharakah*, have declined in almost negligible form.⁴¹ This in fact requires revised understanding of the Islamic Economic and Banking system and its *maqasid*.

⁴¹ Timur Kuran, "Islamic Economics and the Islamic Subeconomy", *Journal of Economic Perspectives*, 9, 4 (Fall 1995): 155-173.

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