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Critical Review of the Tools of *Ijtihād* Used in Islamic Finance

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Abstract

Sharīʿah *covers all aspects of human dealings, including Islamic financial law and its Fiqh nominated contracts, essentially the basis for all Islamic banking and finance transactions. These contracts are either readily found in the classic books of Islamic law or modified versions adopted to suit the modern financial needs. In some cases they are a combination of more than one contracts designed to serve a particular financing purpose, like the contract of Ijārah Muntahia Bittamlik (lease ending with transfer of ownership) where the transaction starts with lease and ends with sale. This paper attempts to discuss the most important Ijtihād instruments that can be used by the faqih (jurists) to evaluate and endorse products in Islamic finance. It then elaborates on the instruments that are in use in the modern Islamic finance, and which reflect a departure from* Sharīʿah *rules and tools for Ijtihād (the process of deriving* Sharīʿah *rules for the new incidents from the* Sharīʿah *sources). The objective of this paper is to shed light on the cotemporary Ijtihād in Fiqh of finance in light of the guidelines provided by the* Sharīʿah *in an attempt to draw the outlines of what constitutes a proper use of Ijtihād instruments in Islamic finance.*

Keywords: *Ijtihād*, Islamic Finance, *Maṣlaḥah*, *Maqāṣid*, *Ḍarūrah*, Sharīʿah Policy.
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KAUJIE Classifications: A6, A5, B4.

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1. Introduction

Islamic law is believed by Muslim scholars to be the most flexible heavenly revealed law when compared with the other revealed laws in their original versions. Thanks to this flexibility, Islamic law can accommodate all genuine and useful needs of the market. Elements of flexibility of Islamic financial law include: Permissibility, as the de-facto original position in Sharīʿah; and Dynamism, *as* Sharīʿah rules being not all fixed or permanent for they include the *Mutaghiyyrat* (changeable); and the prohibitions in Sharīʿah, for not being all of the same degree. Equipped with a flexible basis for legislation, the *faqih* (Muslim jurist) is provided with general guidelines that help him reach sound and acceptable rulings. These guidelines teach the *faqih* to observe while judging or developing a transaction: the structure of the transaction, the essence of the transaction, the general as well as the particular Sharīʿah objectives of the transaction and the implications of implementing the transaction. Sharīʿah also teaches the *faqih* to prioritize these requirements when compromising some is necessary. Well-established Sharīʿah concepts, however, like Sharīʿah policy, public interest and necessity have been used in the modern *Fiqh* (Islamic law), especially in Islamic finance, to reprioritize these requirements and sometimes to unjustifiably sacrifice some. Although these concepts are Sharīʿah concepts and some are originally valid *Ijtihād* instruments, applying them in the context of Islamic finance has raised major Sharīʿah concerns. The following discussion outlines some of the valid *Ijtihād* instruments for Islamic finance, and then it elaborates on the instruments effectively in use and their Sharīʿah concerns.

2. The Proper *Ijtihād* Instruments in Islamic Finance

Sharīʿah equips Sharīʿah scholars conducting *Ijtihād* with multiple *Ijtihād* instruments that would help them structure and endorse products. The following are the most vital *Ijtihād* instruments at the disposal of the *Mujtahid* in the field of Islamic financial law.[1]

2.1. Sharīʿah texts and their interpretations

Sharīʿah texts refer to the Quran and the *Sunnah*. In the area of financial transactions Sharīʿah texts provide general rules and rarely provide details. This is because the nature of the financial transactions changes as they may get more

[1] *Mujtahid* is the one who performs *Ijtihad*, i.e. the process of deriving the Sharīʿah rules from their sources. Al-Zuhaili, 1993, "Al-Waseet if Usul Fiqh". Vol. 2, p 67.

sophisticated over time. Therefore, it would not be convenient to provide details on the inherently changeable contracts, because these details would not be possibly relevant then to the modern applications of these contracts. The general rules provided by the Sharī'ah texts, however, are sufficient for Muslim jurists to deduce Sharī'ah rules for the modern transactions. When attempting *Ijtihād*, however, *Muslim* jurists may find that the same Sharī'ah text pertaining to a financial transaction may be interpreted in multiple valid ways. In fact, this applies to most legal Sharī'ah texts, and it explains the reasons why within the boundaries of Sharī'ah existed different schools of *Fiqh*. Contemporary Sharī'ah scholars do not need to restrict their *fatwas* (legal opinions) to one particular valid interpretation advocated by a particular *Fiqh* school, or even stay within the interpretations made by the classic schools of *Fiqh*, as long as the interpretation they may opt for, or develop on their own, is meeting the basic requirements of validity. That is, the interpretation is not in conflict with the established Sharī'ah rules and principles, and the Arabic language admits this interpretation within the context of the text.[2]

2.2. Permissibility being the original ruling in Sharī'ah

One of the well-established *Fiqh* maxims is "permissibility is the original norm in Sharī'ah". Accordingly, all matters are deemed permissible in the absence of prohibiting texts.[3] This, in fact, constitutes a vital tool for the Sharī'ah scholars to endorse new Islamic banking and finance products and transactions. Any new structured products or transaction will be deemed as permissible as long as it is free from the prohibited elements like interest, *gharar* (uncertainty) or *Ghabn* (fraud).

2.3. Prohibition being of different categories and degrees

Prohibition in the Sharī'ah is not of the same category especially in the field of financial transactions, for there exist in Sharī'ah the so-called *haram lizatihi* (unlawful in itself) and *haram lighairihi* (unlawful in consideration of something else). The first prohibition is applicable to cases where the evil is embedded in the very act, like in *Ribā* where charging interest is an evil in itself, or in gambling where it involves unjustified seizure of others' properties. The second prohibition relates to acts that are originally lawful but made unlawful owing to the presence of certain conditions, like sale contract when concluded during *Jum'a* (Friday) prayer. [4] Although sale contract is originally *halal* (lawful) by virtue of some textual

[2] Al-Zuhaili, Wahba, 1993, "Al-Waseet if Usul Fiqh". Vol. 2, p 125.
[3] Ibn Nujaim, (undated), "Al-Ashbah Wal Nazooir", p66; Al-Seotui, undated, "Al-Ashbah Wal Nazooir", p60.
[4] Kamali, 1999, "Principles of Islamic Jurisprudence" p.330.

evidences, it is deemed *haram* (unlawful) if concluded during *Jum'a* prayer since engaging with sale, or any other transaction/activity , may lead to the evil of missing the *Jum'a* prayer. In other words, the *haram lighairihi* is unlawful in view of its results and implications.[5] Being so, there is an avenue for acts under this category of prohibition not to be regarded unlawful if they can be construed as non-leading to the perceived cautions. This means, based on the rationale and reason of this prohibition, that if care is exercised for the act not to be conducive to the feared evil, then the act may be regarded as lawful. This in fact adds to the flexibility to Islamic law and functions as a relaxing instrument particularly within the framework of Islamic financial contracts.

However, it remains the responsibility of Sharī'ah scholars to identity the unlawful acts that can fall under this category of prohibition. This is in order to look into the possibility of excluding them by laying the appropriate conditions that will liberate these acts from their evil-producing nature. In this regard, it can be said that the very prohibition of *gharar* (uncertainty) is declared by some esteemed old Sharī'ah scholars not to be meant for itself, but in conjunction with its possible evil implications (*tahreem dharai'i- prohibition in view of evil implications*) like the dispute it may lead to between the parties to the contract.[6] This means that *gharar* is prohibited only when evils are expected; if, however, no evil or harm to be expected, then the contracts involving *gharar* may be deemed as lawful. This stand may be supported by the existence of many exceptions Sharī'ah made to *gharar* prohibition, like in validating *gharar*-bearing contracts like *Salam* and *Istiṣnā'*[7], and also in tolerating the minor *gharar* in all sorts of contracts.

2.4. Analogy (Qiyās)

Analogy is very instrumental for *Ijtihād*, it relates to the extension of a Sharī'ah ruling of an old established case to a new case when the latter shares the same effective cause (*illah*) of the former. Since Sharī'ah texts have stated the rulings of many financial transactions, the jurist (*faqih*) may make use of these stated rulings

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[5] For more details on this matter see Abozaid, Abdulazeem. (2007). "Examining the Malaysian Sharī'ah Guidelines for Islamic REITs", a paper presented at the International Conference on Islamic Capital Market, which was organized by *Muamalat* Institute & Islamic Research and Training Institute in Jakarta, August 27-29.

[6] Ibn Tayimiyah and Ibn Al-Qaiyyem have adopted this approach. Further details and discussion can be found in Al-Dareer, *Al-Gharar wa Atharauhu fil Uqud*, a book published in Arabic by *Dar al-Jeel*, 2009, second edition.

[7] Other examples include *Khayar al-Shart* (option of stipulation), and the sale of pregnant animals. In the first case, the contract is uncertain to the contractor who grants this option to the other and in the second case a part of the price goes implicitly to the pregnancy though its outcome is not certain.

by applying the same to the new transactions if they are found to be sharing the same *illah*. For example, the modern day financial derivatives, when used for hedging, become similar in essence to gambling and games of luck, and therefore they have been ruled by contemporary scholars as unlawful since gambling itself is stated by Sharī'ah texts as unlawful. Thus, *qiyās* is very vital and useful instrument, and it in fact ensures consistency between Sharī'ah and reason. The challenge however is, to certain extent, in identifying the *illah* and to larger extent in assessing the similarity of the new case with the old case; a process that jurists have termed as *tahqiq al-manat*.

2.5. Public interests (Maṣlaḥah Mursala)

By definition, *Maṣlaḥah Mursala* refers to any interest that is deemed to be beneficial to the society and which has no textual evidence on its authority or otherwise. It is a juristic device whose authority has been established based on the fact that all Sharī'ah rules are meant to realize public benefits. Muslim jurists have built on this fact the notion of *Maṣlaḥah*; deeming as permissible anything that realizes public interest and as invalid or impermissible anything that brings about harm and evil. Among the major *Fiqh* schools, *Maliki* School is known to be the leading proponent of *maṣlaḥah* as one of *Ijtihād* instruments and sources of Sharī'ah. On the other hand, other *Fiqh* schools reject it as independent source of Sharī'ah though they practice it, possibly under a different name[8], without theoretically admitting its authority as an independent source of the Sharī'ah.[9]

One of the basic conditions, however, for the operation of this juristic instrument is for the perceived *Maṣlaḥah* not to be in conflict with any Sharī'ah text or established principles, because the human perception of *Maṣlaḥah* may err, and Sharī'ah texts and principles must prevail over any human legal exercise.[10]

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[8] *Istihsan*, for example, which is adopted by the Hanafi school, leads in some of its applications to the same end result of Maslaha; it endorses Sharī'ah rules based on their inherent benefits.

[9] Abozaid & Dasouki, 2009, "A Critical Appraisal of The Challenges of Realizing *Maqāṣid* Al-Sharī'ah in Islamic Banking and Finance", P 7, IIUM Journal of Economics and Management, International Islamic University Malaysia, Vol. 15, No 2.

[10] 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 Sharī'ah. The application of this tool must fulfill three main conditions. First, it only deals with transaction matters (*mu'āmalah*) where reasoning through rational faculty is deemed to be plausible. Second, the interests should be in harmony with the spirit of Sharī'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) and not of a luxury type. For more details, see Abozaid, 2006, "The Devotional Dimension in Interest-oriented Shari'a Rulings" Article in Arabic, Journal of Islam in Asia, Volume 3, No 1,; Sobhi R. Mahmassani, 2000, "The Philosophy of Jurisprudence in Islam", (Kuala Lumpur: Open Press, P. 87-89.

Relationship between *maṣlaḥah* & *maqāṣid al*-Sharī'ah (Sharī'ah objectives): *Maṣlaḥah* directly relates to *Maqāṣid al*-Sharī'ah since the very realization of *maṣlaḥah* is the primary objective of the Sharī'ah. Protection of religion, life, lineage, intellect and wealth are the five essential values of Sharī'ah, and all Sharī'ah rules revert to these values. Rules of *Ibādah* (devotions), for example, relate to the protection of religion. Islamic rules of financial transactions, on the other hand, relate to the protection of wealth. Protection of all these essential values is the ultimate *maṣlaḥah* for human beings and thus, it is the primary Sharī'ah objective.

2.6. Blocking the means to evil[11]

Among the valid juristic devices that the *Mujtahid* needs to uphold while attempting *Ijtihād* on a Sharī'ah issue is *Sadd al-dharaiy'*, which means blocking the means to evil before it materializes. A particular transaction could be lawful in itself but in view of its goal or outcome it may lead to evil and thus, it should be ruled as unlawful. Leasing a real estate property, for example, to a company that will use it as a gambling casino is unlawful though the lease contract in essence is lawful; this is in view of the implication of this lease contract, which is in this context facilitating the evil of gambling. Another application is sale contract when executed in a way that renders it an interest-bearing loan. Selling an asset on credit basis then buying it instantly on the spot for a cash price and in collusion with the buyer is effectively a *Ribā* contract, whereby the original seller has advanced cash money to the buyer then claimed more from the same, and the asset of sale has been used only as a tool to presumably legalize the exchange of cash (*'īnah* sale).

In fact, *Sadd al-dharaiy'* is of a special importance in Islamic finance since it protects it from the invasion of products that have a valid structure but an unlawful essence. It, in other words, helps ensure the identity of Islamic finance being genuinely distinguished from that of the conventional finance.

Thus, *Sadd al-dharaiy'* is a juristic device that excludes rather than endorses new products, but yet it is an extremely vital tool to ensure the quality of the products being genuinely Sharī'ah complaint and not conducive to the evils of the conventional banking and finance products.

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[11] The authority of *Sadd al-dharaiy'* (blocking the means to evil) as a means to invalidate acts is disputed by schools of Islamic legal thoughts. Malikis and Hanbalis accept it while Hanafis and Shafi'is reject it. Al-Zuhaili, Mohammad Mustafa, 1991, "Usful Fiqh al_Islami", p217-218.

3. Invalid *Ijtihād* Instruments & Applications

Despite the valid instruments that the Sharīʿah equips the *Mujtahid* with when determining the Sharīʿah validity of contracts and transactions as detailed above, the contemporary *Ijtihād* in Islamic finance has sometimes departed from the proper tools and methodology of *Ijtihād* by adopting inapplicable instruments, twisting or misusing of applicable ones and by overlooking important instruments. This is detailed in the following discussion.

3.1. Use of inapplicable instruments

3.1.1. Sharīʿah *Policy (al-Siyasah al-Shar'iyyah)*

The term Sharīʿah policy has recently entered the jargon of the *fatwas* related to Islamic banking and finance. Some products and transactions have in their list of *fatwa* justifications the term Sharīʿah policy. So, what is Sharīʿah policy and is it a valid instrument for endorsing products and transactions on its basis?

a. Meaning of Sharīʿah *Policy*

Sharīʿah policy, or *al-siyasah al-Shar'iyyah,* in its broad sense refers to the area in Islamic *Fiqh* that explains rulings related to policies and approaches taken in managing and organizing national policies in accordance with the spirit of the Sharīʿah.[12] It covers a whole spectrum of issues in areas like economics, the judiciary, politics and international relations.[13] It is the management of the public and general affairs of the Muslim state in accordance with the public interests and the interest of the Muslim state.

Sharīʿah policy involves different principles including striking the balance between what it is dictated by the circumstances and the stated Sharīʿah rules. In other words, it gives the Muslim governor the needed flexibility to occasionally set aside an established Sharīʿah rule in favor of a new rule recognizable by the Sharīʿah if the latter serves the public interest in a better way. It may involve the temporary suspension of some Sharīʿah provisions that relate to *Mubahat* (permissible things). In other words, it relates to *Maṣlaḥah* in its macro applications, and in some of its application it relates to the estimation of the general

[12] For detailed definition of Sharīʿah policy refer to Al-Juwaini, 1980, "Ghiyath al-Umam", P 14.
[13] Abozaid & Dasouki, 2009, "A Critical Appraisal of The Challenges of Realizing *Maqāṣid* Al-Sharīʿah in Islamic Banking and Finance", P 7, IIUM Journal of Economics and Management, International Islamic University Malaysia, Vol. 15, No 2.

ḍarūrah (necessity) that is capable of rendering the prohibited things permissible or the obligatory things not mandatory.

b. Who is to determine the Sharīʿah *policy?*

Sharīʿah policy can only be determined by the Muslim government and cannot be left to be determined by individuals including Sharīʿah scholars. This is because it relates to the management of the people and the state's general affairs, which is the responsibility of the Muslim government. Assuming the responsibilities of the Muslim government by independent individuals opens the door to some evils. Naturally, if individuals are empowered to do so, they may produce conflicting policies. It is also possible that they will serve their own interests rather than the public interests.

c. Mishandling of Sharīʿah *policy in Islamic finance*

Sharīʿah *scholars assuming the Muslim government's responsibilities in determining* Sharīʿah *Policies in Islamic finance*

In the absence of Sharīʿah-committed Muslim governments and their roles in drawing up the necessary Sharīʿah policies in Islamic finance to meet the challenges facing this industry, individual Sharīʿah boards and scholars have taken up this responsibility of the Muslim government and engaged themselves in practicing the Sharīʿah policy. However, the danger stems from the fact that realization of the people's interests and the maintenance of Sharīʿah objectives, which are the core of Sharīʿah policy, will have been then placed at risk. This is because Sharīʿah policy is a quite sensitive principle. When Sharīʿah scholars[14] ply Sharīʿah policy, their presumed transparency may be potentially challenged and be influenced by the material gains that they may derive from the rules they determine on the basis of their exercise of the Sharīʿah policy. Obviously, Sharīʿah scholars are not neutral or independent in this regard, but rather beneficiaries of the very rules that they justify on Sharīʿah policy basis. In other words, it is justifiably feared that this very sensitive legal tool called Sharīʿah policy may be misused by the Sharīʿah boards to tolerate unlawful transactions that would please their employers (Islamic banks) under the pretext and the claim that these transactions serve the public interest or the economies of the Muslim countries. Besides, competitions between banks and lack of coordination among Sharīʿah boards will

[14] Particularly, those who are paid for their advice by the financial institutions or by the parties to the contract.

very likely result in having conflicting assessments of the Sharīʿah policy, yielding thus conflicting rules, products and stands on what constitutes a public interest. Eventually, it is the *Ummah* as a whole that will suffer from this practice and the Sharīʿah policy will lead to what is just the opposite of what it has been designed for.

It is for these two reasons that the Islamic Sharīʿah gives the power of determining Sharīʿah policy to the Muslim government and not to individual bodies or entities. In fact, it is a tool in the hands of politicians, as the name indicates, and not in the hands of anyone else, and the absence of Sharīʿah-observant Muslim government does not give the right to Sharīʿah people to assume responsibilities which cannot be theirs.

Moreover, determining an issue on the basis of Sharīʿah policy is not simple; it is a process that involves observing different considerations such as the degree of urgency, measuring the harms against the benefits expected and the implications on all levels. It may also involve setting a timeframe that needs to be observed and possibly amended in light of the results, implications and the changing circumstances. Therefore, it is not a simple process but rather a one that requires an institution at the top government level. For this reason determining a Sharīʿah policy is a joint governmental work. The Muslim ruler should set Sharīʿah policies after consultation with the *Shūrá*[15] council which houses trustful and independent consultants of different specialties and backgrounds including the Sharīʿah scholars.

Another important element that relates to the operation of Sharīʿah policy is the enforcement of the policy, for the absence of the enforcement power may lead to opposite results. In the context of Islamic banking and finance, if not all of the financial institutions abide by the rules determined on Sharīʿah policy basis, disorder and chaos will prevail, and these institutions will fail to play their perceived economic role in the society. Thus, even when the Sharīʿah policy is plied right by individuals, lack of enforcement will hinder its success and may turn it into a sheer evil.

However, none of the above is observed when Sharīʿah policy is determined by individual Sharīʿah scholars or Sharīʿah boards, and apart from those conditions of the operation of Sharīʿah policy, lessons of experience have taught us that transparency is not something that can be taken for granted in any person, and

[15] *Shūrá* means consultation.

Sharī‘ah scholars being humans and fallible are not exception. In fact, Sharī‘ah dictates that transparency and credibility must be sought in anyone who is to hold an office attending to public affairs and needs, but being a practical and realistic religion, Sharī‘ah does not stop at this point. It, in fact, places rules and restrictions on the conduct and the behavior of such a person. A Muslim judge, for example, must be among the most trustworthy persons to be eligible for his position. However, his proved trustworthiness never gives him the right to take fees or accept gifts from the parties attending his court, for this may trigger his instinctively sinful human nature and thus influence his judgment and cause him to deviate from the path of justice.[16]

3.1.2. The Principle of Ḍarūrah (Necessity)

It is a well-established principle in Islamic law that *ḍarūrah*, which means necessity, renders the prohibited things permissible. This principle is unanimously agreed upon by all schools of Islamic law, and it constitutes a *Fiqh* maxim that reads “Necessities permit the forbidden” (*Al-Ḍarūrat Tubih Al-Mahzūrat*). It means that the forbidden can be un-sinfully committed when necessary. However, when jurists discussed and explained the applications of this *Fiqh* maxim they mentioned what is known in Arabic as *dawābit*, which means conditions and guidelines, for the functionality of this maxim. These regulations (*dawābit*) are stated in or derived from the Sharī‘ah texts. One of these guidelines relates to the very concept of *ḍarūrah* or what really constitutes a *ḍarūrah*. The jurists’ approach to the concept of legal *ḍarūrah* can be summarized by saying that *ḍarūrah* is something which is indispensable for the preservation and protection of the five essential values: Religion, Life, Intellect, lineage and Wealth.[17] This means that the concept of *ḍarūrah* would give the *Mukallaf* (the Muslim charged with Sharī‘ah rules) the legal excuse to commit the forbidden when it becomes indispensable for his survival, spiritually and physically. [18]

Therefore, in order for the principle of *ḍarūrah* to be operative the underlying act must be indispensable for the survival of human being, i.e. it must be a necessity. However, some *Fiqh* schools have placed at par with necessity what is termed in the Sharī‘ah as *hajah* (need) but only when it is public. The term *hajah*

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[16] Ibn Qudama, 1985, “Al-Mughni”, 10/118.

[17] Al-Shatibi, (undated), “Al-Muwafaqat”, 2/10.

[18] Majallat Al-Ahkam Al-‘adliyyah, (undated) section 22; Ibn Nujaim, Zainulddin, (undated), “Al-Ashbah Wal Naza’ir”, 1/105-107; Al-Seyoti, Jalaulddin, (undated). “Al-Ashbah Wal Naza’ir”, p.84-92; Al-Kurdi, Ahmad, 1986, “Al-Madkhil Al-Fiqhi”, p.48.

refers to a human need that is not essential for the survival of human beings, but it is important for their wellbeing. In other words, *hajah* is what a human can survive without, but only with hardship and difficulties. For example, having a car is not a necessity in Sharīʿah terms, but it could be a public need in some places.

3.1.3. Misapplication of Ḍarūrah

Ḍarūrah has been loosely used in Islamic banking and finance to justify products that would not pass Sharīʿah scrutiny test and would breach basic Sharīʿah rules. The justifying argument predicates on the submission that such products are indispensable for the survival and long-term sustainability of Islamic bank due to certain uncontrollable considerations. Very clearly, this argument presumes that the very concept of banking is a necessity in itself, while in the actual fact banking is not indispensable for the *mukallaf's* (obligor's) survival from the Sharīʿah perspective, nor is it a public need in Sharīʿah terms. If such *ḍarūrah* hypothetically exists, then it would rather legitimize dealing with conventional banks directly.

Obviously, when Sharīʿah prohibits something it always provides alternatives. For example when Sharīʿah prohibits *zina* it permits marriage, when it prohibits wine and pork for consumption it permits all other sorts of food and drinks. Likewise, when Sharīʿah prohibits certain contracts such as contracts based on *ribā* (interest) and *gharar* (uncertainty), it alternatively permits many contracts like sale, lease, *salam, istiṣnāʿ, mudarabah and musharakah*. To economists, such contracts are even better alternatives to *ribā* and *gharar*, and ultimately can help develop a prosperous and healthy economy, while an economy that is based on *ribā* and *gharar* deepens the disparity between rich and poor, and leads to inequitable and unjust wealth allocation in a given society. Thus, there is no *ḍarūrah* that may allow Islamic banks to abandon these beneficial contracts in favour of harmful and destructive ones.

Moreover, tolerating a sinful activity on the basis of *ḍarūrah* never justifies the claim of its original permissibility. Islamic banks have tolerated certain products on the basis of *ḍarūrah* then offered the same to the public as Sharīʿah compliant products. Obviously, this is a betrayal of Sharīʿah rules and a betrayal of the clients' trust, not to mention the negative effects of such attitude on the image of Sharīʿah if not Islam in general. Promoting as Sharīʿah compliant something that is not so, raises question marks on the rationality of the religion by Muslim and non-Muslims alike and may cause aversion to Islam.

3.2. Misuse of valid instruments

3.2.1. Misuse of Maṣlaḥah

Maṣlaḥah as a *Fiqh* instrument has been overemphasized by contemporary *Ijtihād* in Islamic banking and finance. In some cases, it has been treated as a priority over Sharī'ah texts and Sharī'ah established rules. Upon the existence of a conflict between a Sharī'ah text (or established rule) and a *mujtahid's* (*faqih's*) perception of *maṣlaḥah*, the latter has been sometimes given a priority over the established Sharī'ah text or rule. This work is a departure from the legal *maṣlaḥah*, i.e. the *maṣlaḥah* that carries a legislative power in Islamic law, for a variety of reasons:

First, the claim of a possible conflict between Sharī'ah text and *maṣlaḥah* is an erroneous claim. If the Sharī'ah text or rule is definitive, then it cannot be in conflict with a real *maṣlaḥah*, because all Sharī'ah rules aim at realization of *maṣlaḥah*. Therefore, in this case it is the assessment of *maṣlaḥah* by the *mujtahid* which will be deemed erroneous. In other words, the issue of a potential conflict existing between a definitive Sharī'ah text and the *maṣlaḥah* is not conceivable if we are viewing *maṣlaḥah* from a Sharī'ah perspective. However, if we are viewing *maṣlaḥah* from a human perspective then the conflict is plausible, but the determination of what is beneficial and what is harmful cannot be left to human reasoning alone[19]. Human reasoning in that regard plays a role only within the framework guided by Sharī'ah (Nyazee 2000). This is because, the inherent limitations of human beings posit a strong reason which requires Divine guidance to ascertain what is right and what is wrong.[20]

Second, even if such a conflict hypothetically exists, then it is the Sharī'ah text that must be given priority over *maṣlaḥah*. This is particularly true since *maṣlaḥah* derives its authority from the Sharī'ah text and not vice versa. It is illogical to give priority to a branch over its core and source of authority.[21]

Third, the approach of giving priority to *maṣlaḥah* fails to distinguish between a definitive (*qat`y)* and a speculative (*zanniy*) text. If the text is definitive with

[19] His argument is supported by a number of Qur'ānic verses. Refer to Al-'iz bin Abdelsalam,1999, "Qua'id Al-Ahkam fi Masalih Al-Anam", 2/161.
[20] Abozaid & Dasouki, 2009, "A Critical Appraisal of The Challenges of Realizing *Maqāṣid* Al-Shari'ah in Islamic Banking and Finance", P 7, IIUM Journal of Economics and Management, International Islamic University Malaysia, Vol. 15, No 2.
[21] Al-Zuhaili Wahbah, 1993, "Al-Waseet fi Usul al-Fiqh", p. 361.

regards to its authenticity (*thubut*) and meaning (*dalalah*), 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.[22] While if the text is speculative with regards to its authenticity or meaning, then there may be an avenue for the perceived *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 of its conditions: being public not private, authentic not false, definitive not probable.[23]

To summarize, upon presuming an occurrence of a genuine conflict between the Sharī'ah text and the *maṣlaḥah*, the priority must be given to the Sharī'ah text and not to the perceived *maṣlaḥah*, this is provided the Sharī'ah text is definitive in terms of authenticity and meaning. If, however, there is a justifiable doubt over the authenticity or the meaning of the text, then there is an avenue for the perceived *maṣlaḥah* to reconcile with the text.

3.2.2. Twisted interpretations of Sharī'ah *texts & Fiqh statements*

Some Interpretations of Sharī'ah texts that came in the form of *Fiqh* statements made by some *Fiqh* schools have been twisted to help legitimize certain problematic Islamic banking and finance products. For example, although sale of future debt to a third party is ruled as unlawful by all *Fiqh* schools based on Sharī'ah texts. Its validity has been incorrectly attributed to some *Fiqh* schools (like the *Shafi'i* school), and an unsupported distinction has been made between a debt resulting from a loan contract and a debt resulting from other financial contracts; allowing the later and forbidding the former. In fact, both the validity of sale of debt and this distinction have no ground whatsoever, and this position is based on incorrect interpretation of Sharī'ah texts and some *Fiqh* statement.[24]

Another example is *'īnah* sale. Although all *Fiqh* schools base the permissibility of the contract on its essence and objective, rather than on its form and structure, which is the basis for the validity of the contract, cotemporary *fatwa*s in Islamic finance have implied the opposite; considering a contract Sharī'ah compliant only if its form and structure are sound from Sharī'ah perspective. Not only do these *fatwa*s contravene Sharī'ah texts and principles by basing contracts permissibility

[22] See in Al-Ghazali, 1413H, "Al-Mustasfa", p176; Al-Bouti, 1982, "Dawabit Al-Maslah", p119.
[23] Al-Bouti, 1982, "Dawabit Al-Maslah", p.119.
[24] For details on this issue refer to Abozaid, Abdulazeem, 2008, "Examining the New Applications of Sale of Debt in the Islamic Financial Institutions", Journal of Islam in Asia, Volume 5, No 2, December. It can be downloaded from www.abdulazeem-abozaid.com

on their form and structure rather than essence and objective, but some of them attribute also such erroneous stand to the *Shafi'i Fiqh School* when they claim that this school rules the permissibility[25] of *'īnah* sale.[26]

3.3. Overlooking important instruments

3.3.1. Relevant Sharī'ah *texts*

Some Sharī'ah texts have been overlooked in *fatwa*s on Islamic banking and finance products, although they are closely related to the *fatwa*s in questions. For example, Sharī'ah texts very clearly state that combining between a sale contract and a loan contract in one transaction is unlawful *"la yahillu salaf wa bay'"*[27] (It is prohibited to combine between sale and loan), and like sale contract in this regard is any commutative contracts as elaborated by the jurists.[28] This is because the sale or the commutative contract in general could be used to cater to interest in the loan contract. For example, interest can be catered to in sale contract by demanding a price that is higher or lower than the market value, like in the lender colluding with the borrower to give him an interest-free loan but conditional on the latter buying from the former something at higher than the market value, or selling him something at lower than the market value.

However, this Sharī'ah text has been totally overlooked in a variety of products. For example, in a product named "Islamic Pawn Broking". Herein, the bank provides a so-called interest-free loan but conditional on the borrower providing valuables that will be safeguarded by the bank against fees, so that the bank can profit from the loan indirectly through the fees charged on the safekeeping of the valuables. Another product is the service-based Islamic Credit Cards, the issuing bank provides the card credit on interest-free loan basis; however, it charges the card holder for the embedded services as well as the extra services coupled with the card, like the free stuff the card holder may be entitled to when subscribing to the

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[25] For details on these sales see Abozaid, Abdulazeem, 2008, "Contemporary Inah is it a sale or usury*"* a book published in Arabic by Dar Al-Multaqa, Aleppo, Syria, 2004; Abozaid Abdulazeem. *"Contemporary Islamic Financing Modes between Contracts Technicalities and Shari'ah Objectives"*, Eighth Harvard University Forum on Islamic Finance, Harvard Law School – Austin Hall, USA, April 19-20.

[26] Abozaid, Abdulazeem, 2008, *"*Examining *Bay'-al-'inah* and its New Applications in the Islamic Financial Institutions*"*, Journal of Al-Tamaddun, Volume 4, December.

[27] This Hadith is reported in many Sunnah authoritative books including: Sunan Abi Daud, (3504) and Sunan Al-Termithi, (1234).

[28] Al-Dasuqi, (undated), "Hashiyah", 3/76.

card. This practice is basically valid, but provided the fees are against the services and not the loan. To ensure it is so, the market value of these services must not be lower than the fees charged on the card. However, in practice it is much lower, which means that the fees are meant to cater to the interest over the loan.

3.3.2. Blocking the means to evil

Although this instrument is vital and important for identifying the Sharīʿah compliant products and for protecting contracts from being misused and manipulated as elaborated earlier, it has not received the due attention by Sharīʿah scholars giving *fatwa*s to Islamic banks. This is evidenced by the existence of products criticized for being genuinely no different from the conventional products, and by the misapplication of some Islamic finance products to the degree of distortion. Had this instrument been observed and applied, it would have removed these practices form the shelves of Islamic banks and filtered financing deals so that no financing would be given when resulting in unfavorable implications.

4. Conclusion

From the above discussion it can be concluded that Sharīʿah has equipped Muslim jurists and Scholars with useful and practical *Fiqh* instruments that if used properly will yield sound transactions and products. However, some of these instruments were misused, others were overlooked and some inappropriate instruments were also introduced.

These practices have been responsible for the invasion of some controversial products into Islamic finance and to the misapplication of some other products. This phenomenon has been in fact the natural result of the disorder and the lack of or weak Sharīʿah governance in Islamic banks. Despite the great importance of *Ijtihād* and *fatwa* in the field of Islamic finance and their serious implications, this area has not received the due attention. In fact, the situations call for the following urgent reforming steps:

- *Ijtihād* in Islamic finance must be exercised by *Ijtihād* institution and not by individuals at least on the products level, whereby only an independent centralized Sharīʿah committee shall have the sole authority to endorse or reject products.
- The independent central Sharīʿah committee must include besides highly qualified Sharīʿah scholars economists, lawyers and financial experts, and it must have a binding authority over the individual Sharīʿah boards.

- In the absence of the Sharīʿah-committed Muslim government, a body comprising highly qualified intellectuals of different relevant specialties, similar to *Shūrá* council, can be formed to handle matters related to Sharīʿah policy, and it can collaborate with the central Sharīʿah committee to determine the Sharīʿah policy related to Islamic finance.
- All *fatwa* issued by individual Sharīʿah boards or scholars must be subjected to scrutiny by the centralized Sharīʿah committee. Procedurally, the centralized Sharīʿah committee must have the authority to conduct unannounced Sharīʿah auditing visits.
- A centralized qualified institution must create accreditation criteria for Sharīʿah scholars, accredit who can sit on the Sharīʿah boards of financial institutions, and exclude the Sharīʿah specialists who do not qualify for *Ijtihād* or *fatwas*.

Indeed, segregation between the *Ijtihād* institution and the political system has led to chaotic approaches to *Ijtihād* and *fatwas* by individual Sharīʿah scholars. This disorder did not carry much of evil before, but with the advance of Islamic banks it produced serious damages. The same disorder and confusion, however, will inevitably take place even in other fields of the Muslims' affairs when they get the chance to be applied on institutional level, because the roots of the problem are the same; mainly the rupture between the political system and the *Ijtihād* institution.

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