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Eddy Yusof, Ezry Fahmy and Kan, Zusuff

International Centre for Education in Islamic Finance (INCEIF),
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Appraisal on End Products and Services Offered by Islamic Banks from *Maqasid Shari'ah* Perspective

Ezry Fahmy Bin Eddy Yusof

ezryfahmy@yahoo.com

&

Zusuff Kan

zusuff@gmail.com

Abstract

Question arises whether the products and services offered by the Islamic financial institutions (IFIs) genuinely meeting the requirement of *Shari'ah*. At present, not only *Shari'ah* advisors have been appointed to scrutinize and endorse the new products and services. In fact, majority of the IFIs have established units or departments to ensure the documentations, legal and *Shari'ah* framework, the process and procedure, and implementation are in line with the precept of *Shari'ah*. IFIs not only must avoid *riba*, but as well as other important elements such as *gharar*, deception, inequality, duress in developing and executing the end products of IFIs in order to ensure justice and social welfare prevail. This could only be achieved if the products and services approved uphold the importance of *Maqasid Shari'ah*. This paper will evaluate the key value chain in product approval process, role of *Shari'ah* advisor in approving products and services in IFIs as well as to raise possible issues and challenges related to the value chain. This paper will also look into the importance of *Maqasid Shari'ah* in product approval process as it is a vital element to be considered so as to avoid legal conflicts, litigation risk, instability (reputational risk) to the IFIs, tarnish the image of so called *Shari'ah* compliance products, uphold justice (contracting parties) and more importantly the pure teaching of Islam.

Key words: Islamic financial institutions, *Shari'ah* committee, *Maqasid Shari'ah*.

1.0 Introduction

The Islamic Finance industry has been growing at a double digit figure. The number of Islamic banks and Takaful operators has grown few times more than what was in existence 3 years ago. Job opportunities in Islamic finance industry has increased throughout the world and there is a huge demand for talents who are competent in the discipline of *Shari'ah*, *Fiqh Muamalat*, *Usul Fiqh* and Islamic Economics. This has brought a new phenomenon in the banking industry that is to have religious principles and values as a part and parcel of their business. Today every Islamic banks and Takaful operators (in Malaysia) are required to appoint *Shari'ah* advisors and setup *Shari'ah* committees in order to support the requirement of the business.

1.1 Relationship between Shari 'ah and Islamic Finance

Hashim Kamali (1999) asserts that *Shari'ah* bears a stronger affinity to revelation and it is literally define as “the right path” or “guide”. Imam Shatibi defined *Shari'ah* as comprising both ‘the acts of the heart as well as overt acts’.¹ The divine *Shari'ah* thus indicates the path to righteousness; reason discovers the *Shari'ah* and it relates its general directives to the quest for finding solutions to particular or unprecedented issues.² The *Shari'ah* provides clear ruling on the fundamentals of Islam which encompasses its basic moral values and practical duties such as prayers, fasting, legal alms (*zakat*), *hajj* (pilgrimage to Mecca). It also covers the civil transactions such as dealings between human beings including business transactions. Thus, *Shari'ah* provides a guideline on what are permissible and impermissible in all aspects of life including the business transaction or in this case Islamic finance.

Today, many new innovations or products that were meant to facilitate business transaction or trades have been approved to ease business dealings. Generally, the products are either using the top down approach meaning as per direction of the top management or from down to top approach that is to look from the requirement of the people or market and structure an appropriate products that are compliant with the *Shari'ah* ruling. In order to ensure that these products are

¹ Fazlur Rahman. (2002). Islam (2nd ed). Chicago:University of Chicago Press.

² Mohammad Hashim Kamali (1999), The Oxford History of Islam; Law and Society. New York:Oxford University Press.

Shari'ah compliant, the service of *Shari'ah* advisors are sought after to verify and endorse the products before it is being promoted to the general masses or potential customers.

This process requires the *Shari'ah* advisors to perform *ijtihad*³ and issue fatwas (legal rulings) based on the sources of *Shari'ah*. A typical process in the banking sector would require the *Shari'ah* advisor to first validate the propose structure, then the legal documentations before other component such as pricing, risk and etcetera at the bank level. Once approved by the *Shari'ah* committee and the management, it will be sent to Bank Negara Malaysia where series of validation right from the Department of Islamic Banking and Takaful and then approval or disapproval by *Shari'ah* Advisory Council of Bank Negara Malaysia.

2.0 Maqasid *Shari'ah* and Its Importance

Maqasid al-Shari'ah (The Higher Objectives and Intents of Islamic Law) is an important topic that has been discussed by many great Muslim scholars⁴ and it is treated as an important discipline to master especially to the people engaging in issuing *ijtihad*. This field has often been attributed to Imam Shatibi as he had devoted to discuss about *Maqasid al-Shari'ah* in great length.

Meanwhile, another great Muslim scholar, Ibn Ashur defines the general objectives of Islamic Law as:

“The general objective of Islamic Law are the meanings and wise purposes on the part of Lawgiver which can be discerned in most or all of the situations to which the Law applies such that they can be seen not to apply exclusively to a particular type of ruling. Included here are the occasions for the Law's establishment, its overall aim, and the meanings can be discerned throughout the Law. It likewise

³ Imam Shatibi defines *ijtihad* as a process in which one exhausts one's effort to one's capacity in order to acquire exact or probable knowledge to reach judgment in a given case (4:113). He (Imam Shatibi) discusses *fatwa* as a form of *ijtihad*, to distinguish it from *qada* or *hukm*. Source: Shatibi Philosophy of Islamic Law.

⁴ Among the scholars that has been discussing about the subject of *Maqasid al-Shari'ah* are Imam Abu Mansur al-Maturidi (d. 333 AH/944 AC), Abu Bakr al-Qaffal (d. 365 AH/ 975 AC), Abu Bakr al-Abhari (d. 375 AH/ 985 AC), Al-Baqillani (d. 403 AH/ 1112 AC), Imam al-Juwayni (d. 478 AH/1085 AC), Abu Hamid al-Ghazali (d. 505 AH/1111 AC), Fakr al-Din al-Razi (d. 606 AH/1209 AC), Sayf al-Din al-Amidi (d. 631 AH/ 1233 AC), Ibn al-Majid (d. 646 AH/ 1248 AC), Al-Baydawi (d. 685 AH/1286 AC), Isnawi (d. 772 AH/1370 AC), Ibn al-Subki (d. 771 AH/ 1369 AC), 'Izz al-Din ibn 'Abd al-Salam (d. 660 Ah/ 1261 AC), Ibn Taymiyyah (d. 728 AH/ 1327 AC).

includes objectives which are not observable in all types of rulings, although they are observable in many of them.”⁵

Ibn ‘Abd Salam held that Islamic Law in its entirety may be interpreted in terms of the benefits which it brings and the harm which it prevents. He further explains the former point by saying:

“The entire Law consists of interest: either it prevents that which would cause harm or achieves that which would bring benefit. Hence when you hear God say, “O ye who have believed!”, reflect carefully on whatever admonition follows His summons, and you will be certain to find some good which he is urging you to do or some evil against which He is cautioning you. In His book God sets forth the sources of harm which certain rulings urge you to avoid and the benefits which other rulings urge you to pursue.”⁶

Imam Shatibi expanded the discussion on The Law Giver’s Higher Objectives in establishing the law and categorise it into 3 levels namely essentials (*al-darurat*)⁷, exigencies (*al-hajiyat*)⁸ and embellishments (*al-tahsiniyyat*)⁹. He explained that the fundamentals of jurisprudence are founded on the universals of the Law. Universal here refers to the 3 levels (essentials, exigencies and embellishments). He then asserts (in *Al-Muwafaqat*) that “The Muslim community-and indeed, all religions are in agreement that the Law was established to preserve the 5 essentials namely, religion, human life, progeny, material wealth and the human faculty of reason”.

These are the key considerations that the *Shari’ah* advisor should take into account before approving a particular product apart from the *Aqd*. This requires the *Shari’ah* advisors to look into the cause and effect because there are instances

⁵ Ahmad Al-Raysuni. (2006). Imam Al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law. The International Institute of Islamic Thought. p. xxii.

⁶ Ahmad Al-Raysuni. (2006). Imam Al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law. The International Institute of Islamic Thought; Qawa’id al-Ahkam, Vol 1, p.8.

⁷ *Dharurat/dharuriyat*: It is also named as necessity. These are things which are essential for the achievement of human being’s spiritual and material well being. If these essentials are missing, the result will be imbalance and major corruption in both world and the next. Moreover, to the extent that they are lacking, there will be greater or lesser corruption and disturbance in people’s lives.

⁸ *Hajiyat*: These are interest which, when fulfilled, contribute to relieving hardship and difficulty and creating ease in the lives of those accountable before the Law.

⁹ *Tahsiniyyat* These are interest which is less important than essentials and exigencies; however, they function to enhance and complete their fulfillment; embellishments include things such as commendable habits and customs, the observance of rules of etiquette and high moral standard.

where the product might pass the test of *Aqd* but does not fulfil the intention of the Law Giver. Since the *Shari'ah* emphasises on justice, cooperation, risk sharing, removing of harm and to achieve public benefit, which are directly fall into the ambit of *Maqasid al-Shari'ah*, products which realises these goals (as mentioned earlier) should be use as a basis in product approval process.

At present, the market (Islamic banking) in Malaysia is flooded with a product approved by many *Shari'ah* advisors on the basis of either *darurah* or simply using the argument “the school of Shafie” allowed the practice. Asyraf Wajdi (2008) sums it up in his writing:

“There is a tendency in some Islamic banks today to conveniently use *darurah* as an excuse to legalise certain activities such as *bay' al-Inah* based transaction although all jurist agree on its impermissibility if it is used to circumvent the prohibition of *riba*...Even if it the justification of *darurah* is considered valid, they should acknowledge the original ruling of the contract and not simply altering it and attributing it to the *Shari'ah*.”¹⁰

Meanwhile, the true nature of the Islamic finance based on real trade and risk sharing are not being advocated by the Islamic financial institutions (IFIs). Statistics from Bank Negara Malaysia indicates that the amount used for equity based is less than 5 %. In fact, huge amount are being allocated for debt based instrument such as *bay' al-Inah* or more commonly known as BBA (Bay' Bithaman Ajil in Malaysia).

Our research as so far trigger more questions rather than answer towards the end product that pass through the series of validation and endorsement from *Shari'ah* committee (commercial bank level), the higher management of respective Islamic bank and the *Shari'ah* Advisory Council of Bank Negara Malaysia (SAC BNM).

2.1 Some Questions and Exploratory Findings

Is there a competency issue? –Then why are products which are clearly impermissible from *Shari'ah* point of view being endorse as being *Shari'ah*

¹⁰ Asyraf Wajdi Dusuki. (2008). Islamic Finance: An Old Skeleton in A Modern Dress, Article entitled: A Critical Appraisal on the Challenges of Realizing *Maqasid al-Shari'ah* in Islamic Banking and Finance. International *Shari'ah* Research Academy:Malaysia. p. 19.

compliant. Is *darurah* sufficient to be used as a basis to approve such contracts? Have they exhausted other forms of *Muamalat* contracts? Are they having difficulty to grasp the financial and legal terms used in pricing the products and documentation? Why is it so difficult to access the write up on justification of each and every product? Isn't transparency important?

Based on our informal discussion with talents involved in reviewing products in IFIs, it was found that the current structure of the *Shari'ah* committee or *Shari'ah* officer is limited towards reviewing the products. Meaning these people who are considered more knowledgeable in *Shari'ah* are not the ones spearheading the initiative of coming up with new products. Since banking has a tendency in transferring risk rather than sharing it, it makes equity base products unpopular thus low utilisation.

Another question mark that we feel important to raise is whether the endorsement in the yearly annual report where the *Shari'ah* advisor claims that "we hereby confirm that all the business activities fulfil the *Shari'ah* requirement". Personally, we have a doubt; because it lacks the criteria of being independent. Our premise is that, the *Shari'ah* officer/advisor works in the organisation, get paid by the organisation and were the one who approves the many products offered by the bank. Therefore, it does not seem right to have people from inside to make such claim. As a comparison, even the annual financial reports are being validated by an external auditor not an insider.

3.0 Role of *Shari'ah* Advisor in the *Shari'ah* Compliant Product.

Malaysian rules and regulations have spell out several provisions in relation to the establishment of *Shari'ah* Supervisory Board (SSB) in the Islamic financial institutions in Malaysia. The existence of SSB is one of the most important governance mechanisms of an Islamic Financial Institution (IFI) to ensure the Islamic Financial Institutions (IFIs) are compliance with *Shari'ah*.

It is important for the SSB to understand their roles and responsibilities as well as the process of how an SSB should review the performance of a given IFI. The roles and responsibilities of the SSB of IFIs as define by the AAOIFI connotes a greater duty of not only endorsing and approving the Bank's products but ensuring its compliance through directing, supervising and importantly reviewing its

operations. This actually has no difference than the definition in IBA 1983 whereby the function of the *Shari'ah* committee is more than just an advisory role on the bank's operation¹¹. Thus the SSB are considered to be responsible in most aspects of the bank's operational.

The *Shari'ah* scholars who act as advisors grounded in endorsement of all products and services of their respective IFIs, without whom the compliance of the product to the *Shari'ah* would be questionable¹². This critical role is indiscriminate to all financial products, be it banking, takaful, capital markets, wealth management and so forth. According to the AAOIFI standard, *Shari'ah* advisers can be defined primarily as "specialised jurists, particularly in *fiqh muamalah* and Islamic finance, entrusted with the duty of directing, reviewing and supervising the activities related to Islamic finance to ensure they are in compliance with *Shari'ah* rules and principles. The views of the *Shari'ah* adviser shall be binding in the specific area of supervision".¹³

As what explained above whereby the roles and responsibilities of the *Shari'ah* scholars as SSB in respective IFIs has a lot to do with ensuring the operational side of IFIs are *Shari'ah* compliance. Therefore, indirectly the *Shari'ah* advisor control what do's and don'ts in the IFIs operational sides and their authority in approving products and services more or less determine the path of the IFIs in terms of growth and sustainability. Consequently, there should be no chance for conflict of interest between the *Shari'ah* advisor and the IFIs!

3.1 Issues on Products Approval

The Guidelines on the Governance of *Shari'ah* Committee for the Islamic Financial Institutions by Central Bank of Malaysia stated clearly the duties and responsibilities of the SSB. Among the duty and responsibility that is relevant to be highlighted in this discussion is their duty on endorse and validate relevant documentations, while on the Islamic financial institutions side, they need to adopt the *Shari'ah* Committee's advice and ensure that product documents be validated.

¹¹ Mohd Hairul et. al.(2009) The Practice of *Shari'ah* Review as Undertaken by Islamic Banking Sector in Malaysia. International Review of Business Research Papers. 5(1). p. 294-306.

¹² Aznan Hasan. (2009) How *Shari'ah* boards add value. Retrieved on March 8, 2010 from <http://www.thefreelibrary.com/How+Shari'ah+boards+add+value.-a0212386367>

¹³ AAOIFI, Accounting and Auditing Organization for Islamic Financial Institutions. (1999), Governance Standard for Islamic Financial Institutions. No. 1 - Shari'a Supervisory Board: Appointment, Composition and Report.

However, surprising to note that after having three decades of IFIs yet we can observe that they use the same terms of banking and finance as in case of conventional banking system which is an alarming fact. These terms and words might also be responsible for keeping the conventional thinking and working approach in Islamic Banking. This is where the issue of having our own Islamic framework before starting the first step to be considered as an essential elements and it is obviously overlooked.

In additions, issue rises here is when there is shortage of appropriately qualified scholars raised concerns over the ability of SSBs to provide rigorous supervision. This shortage of qualified scholars leads to the obvious question of training of *Shari'ah* advisors. There are various opinions on what qualifications are required for an individual to be prepared for the duties of a *Shari'ah* advisor¹⁴. Considering the fact that many of those educated in religious education, may not be too well-versed in banking and finance knowledge, the advisors may require additional training time for such education. Thus the Islamic financial institutions sector needs to address these concerns to ensure that the system remains viable in the long run and does not compromise on issues related to transparency and quality of *Shari'ah* supervision as well as approval of products that will eventually affect the Islamic financial institution's image.

Interesting to note is that the current situation regards to all products and services available in the Islamic finance industry was approved by both *Shari'ah* Committee as well as the SAC of Bank Negara Malaysia (BNM)¹⁵. However when the approval rises controversial issues, plus the awareness of the public regarding the products and services that the Islamic financial institutions offer, they started to pin point each other for approving such products. Therefore, the public feel cheated and lead many misconceptions from the public about how *Shari'ah* compliant is the Islamic financial system are? Islamic financial institutions now offer Islamic mortgages, Islamic car loans, Islamic credit cards, Islamic time deposit and

¹⁴ Abbas, Mirakhor. (2008). Shortage of Scholars Troubles Islamic Banks. International Herald Tribune.

¹⁵ The SAC of Bank Negara Malaysia (BNM) was established on 1st May 1997 as the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business, which is based on *Shari'ah* principles and is supervised and regulated by Bank Negara Malaysia.

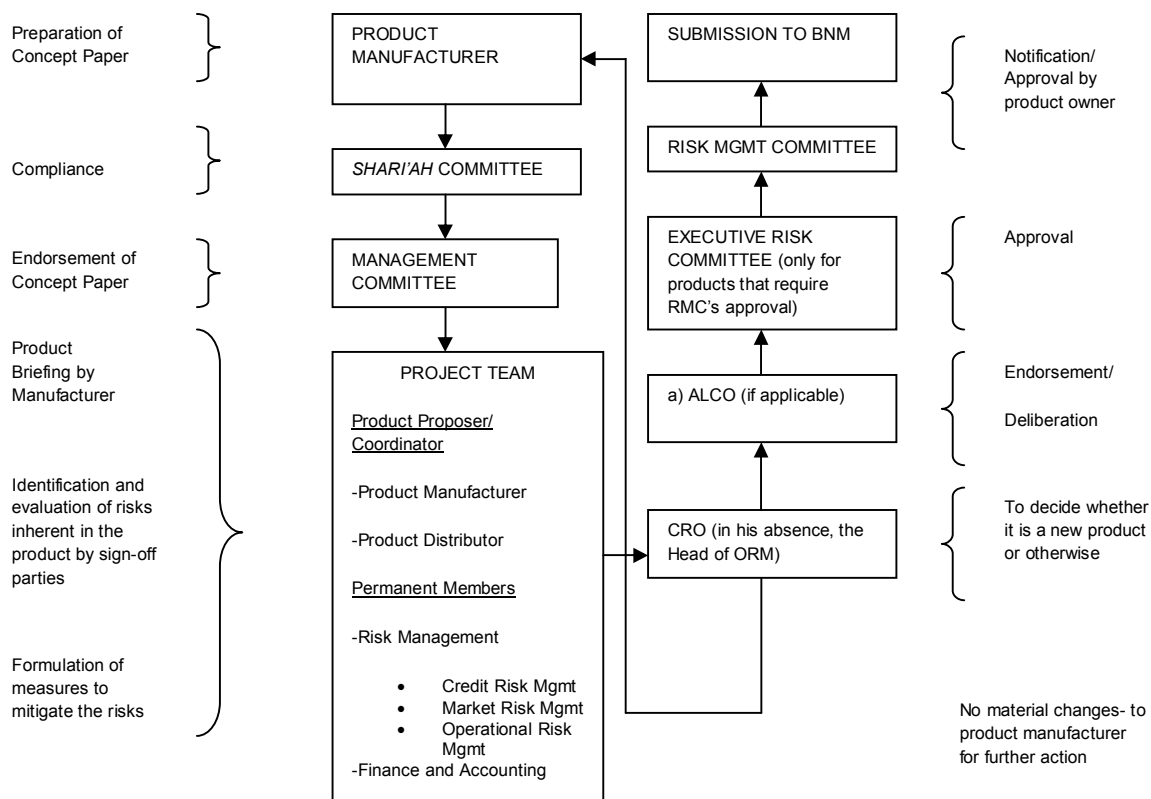
guaranteed return accounts, Islamic insurance and some even offer Islamic managed and hedge funds.

Many people started to believe that the products offered are dressed up in Arabic terminology, such as *Mudarabah*, or *Ijarah*, if it looks and feels like a mortgage, it is a mortgage and to say anything else is semantics. Many cases prove that in some cases a product is deemed *Shari'ah* compliant in one market and not in another. And this is what happens in the case with Malaysian products, which are often deemed not *Shari'ah* compliant in the more austere Gulf.

In February, Sheikh Muhammad Taqi Usmani created a storm in the industry when he remarked that a good number of Islamic bonds, or sukuk, were not *Shari'ah*-compliant; while High Court judge Justice Datuk Abdul Wahab Patail, in a written judgment dated July 16, ruled that the application of the *Al-Bai Bithaman Ajil* (BBA) contracts in the Arab-Malaysian Finance Bhd versus Taman Ihsan Jaya cases were contrary to the Islamic Banking Act 1983 (IBA). Not enough with these two cases, the industry was shaken again by a fatwa by The International Council of Fiqh Academy, a leading industry body driven by the Organisation of Islamic Conferences, recently declared organised *tawarruq* impermissible, reasoning that it contains elements of interest-based lending. All these issues took local Islamic financial institutions by surprise and shaken the industry badly since people start to question whose to be blame out of these matters?

Therefore, before we discuss further on what are the effect of products and services that offer by the Islamic financial institutions from the *Maqasid al-Shari'ah* perspective, let us review the root cause of how a particular products being develop before it can be sell to the market and reach the public.

4.0 How is the Product Approvals Process Being Applied



Note: TAT for the sign-off for ALL products in 3 working days after product briefing

Source: Based on understanding of Central Bank of Malaysia Guidelines on Introduction of New Products

Flowchart 1. The Product Development, Sign-Off Process and Approval Process

From the flowchart above, theoretically if the SSB refuses to endorse a product in particular financial institution under their supervision, the financial institution should automatically remove that product from their portfolio. Moreover in theory, the SSB would perform a religious audit unto all accounts. However, the reality is more complicated.

Hussain Gulzar Rammal (2006) proves that surveys conducted by researchers in Islamic financial institutions has revealed that in many cases the review is treated as a routine matter, with boards approving decisions already made

by the bank's management. Issue need to be highlighted here is how to overcome some of the issues related to the lack of trained and qualified *Shari'ah* advisors, and how could we help to improve the quality of *Shari'ah* supervision¹⁶.

4.1 Basis of *Shari'ah* Approval : At a Glance

We will concentrate on the compliance part from the flow chart above whereby the SSB are responsible to go through a particular product; this is a stop centre where the SSB or the *Shari'ah* department is responsible to review the products of its underlying concept use or in other words is the authenticity form *Shari'ah* principles. Later on the products will get *Shari'ah* creditability as they are approved by a person having appropriate knowledge of *Shari'ah*. In addition, supposedly the *Shari'ah* Advisor approves the product purely on the basis of *Shari'ah* rulings, thus, to assure that his approval is unbiased.

This process is understandable as not an easy task; the review may take some time since there are a lot of things that need to be taken into consideration especially when it regards to sanctity of primary or secondary source of *Shari'ah*, this involve consideration of primary source (*Quran* and *Sunnah*), consideration of secondary source (*Ijma*, *Qiyas*, *Ijtihad* so forth), and also consideration of local laws and acceptable to market (without compromising with *Shari'ah* principles). Besides that, acceptance of common practice (if not against *Nas*), is it understandable to clients, is there a proper risk mitigation involve, and as well as it should be less expensive to client (in other words product should be competitive to conventional banking). This is where the part whereby the SSB should firstly consider whether is it acceptable to copy, convert or create a products and services.

The bases of *ijtihad* or *fatwa* made by the SSB in approving products vary according to the capacity of the *Shari'ah* scholars in doing their analysis. The *Shari'ah* scholars may reflects their rigidity and inflexibility (*al-tadyik wa al-tashaddud*) in making *Shari'ah* decisions, or excessive flexibility (*al-Tasahul*) in making *Shari'ah* decisions.

Akram Laldin (2010) explains several factors that driven the *Shari'ah* scholars in making such *Shari'ah* decisions. The rigidity and inflexibility in making *Shari'ah*

¹⁶ Hussain Gulzar Rammal. (2006). The Importance of Shari'ah Supervision in Islamic Financial Institutions. Corporate Ownership and Control. 3 (3). p. 204-208.

decisions according to him may due to (1) fanaticism towards a particular *mazhab*, views or scholars, (2) depending on the literal meaning of the text (*al-Qur'an and Sunnah*) without referring to its objectives (*maqasid*) and (3) Unnecessarily propagating the usage of *sadd al-dharai'i* (blocking the means to evil) in disputed issues. He further explains on excessive flexibility (*al-Tasahul*) on *fatwa* and *ijtihad* that occurs because of other 3 factors that are; (1) excessive utilisation of the principle of *maslahah* and *darurah* which might lead to misuse of these two principles, (2) choosing the facility (*tatabbu' al-rukhas*) and taking the easiest view of the mazahib (*al-talfiq bayn al-mazahib*) and (3) finding legal devices (*al-tahayul al-fiqhiyyah*) in order to justify certain rulings (Akram Laldin, 2010).

On the other hand, the ideal *Shari'ah* decision would be where the scholars shall investigate the issues and arrive at a decision without compromising the fundamentals of *Shari'ah*.

4.2 A critical appraisal on the IFIs end products

There are many writings by scholars, academician and practitioners on products and services offer by Islamic financial institutions, some include critiques and suggestion for improvements, some of this writings suggesting the IFIs to differentiate themselves with the conventional because the idea of having an IFI is so that the Muslim can deal with a proper Islamic *muamalah* transactions that are free from interest-based system, thus there is indeed a need for the current Islamic banks to be like Islamic social banks as what the idea proposed¹⁷. While interesting to note some authors have no faith on the current banking system that merely follows the conventional framework- from the fractional reserve up to its end products that are deem to be totally non *Shari'ah* compliance¹⁸.

With respecting all views on the current arguments and controversial issues rises, this is important discussion that lack research and literature, specifically looking at the end products effects on the *Maqasid al-Shari'ah* although there are a lot of writings that touch on the importance of the *Maqasid al-Shari'ah*. Sadly to note

¹⁷ Mehmet Asutay. (2007). Conceptualisation of the second best solution in overcoming the social failure of Islamic finance: Examining the overpowering of homoislamicus by homoeconomicus. *IIUM Journal of Economics and Management*, 15, 1-17.

¹⁸ Nik Mahani Mohamad. (2008, May). Persoalan Perbankan Islam. *Millenia Muslim*, 69, 32-35.

that the current IFIs only realize and would like to take into consideration only after the issue strikes them, thus there is no proactive measurement to be taken earlier by the IFIs. The "fatwa-hunting" syndrome which boils down over IFIs in justifies some of the operational *ribawi* aspects of secular transactional forms¹⁹.

IFIs try to achieve the results as what the conventional gain now, thus the IFIs try to offer every product, in so called *Shari'ah*-compliant manner, as what the conventional does. Consequently, the sources of income generation may become *Shari'ah*-compliant but the objectives of Islamic finance have been neglected and left behind.

Let us focus to some of reality examples happened related to the end products by IFIs, for example the issue of end products. Among the controversial instrument in Malaysia is the *Bai' Bithaman Ajil* (BBA) facility used for Islamic home financing. Thus the mere availability of Arabic terms in an agreement does not mean that the transaction is Islamic and falls under the ambit of *Shari'ah*, the Islamic law. The problems arise from BBA Home financing practiced by Islamic banking in Malaysia come from the agreements and the operational aspect as a whole. Among the *Shari'ah* issues arises in the operational matters in BBA Home financing practiced in Malaysia are the *bay al-Inah* concept, and the absence of *Shari'ah* principle such as "*al-Ghurm bil ghum*" (no reward without gain), "*al-Kharaj bid Dhaman*" (any benefit must be accompanied with liabilities), and *al-Iwad* (counter value). The absence of these principles lead to critics by the scholars and academicians argues that the BBA home financing consist of *bay al-Inah* that is tantamount to *riba*. Due to this *Shari'ah* issues rises from this particular instrument, many court case relate to this products are yet to be resolve²⁰!

Not only the products embedded with *Shari'ah* risk, but the core attributes of Islamic Economic System i.e. Justice and Social Welfare etc. are overlooked by the IFIs. The conventional thinking of banking has an existence in IFIs and only profit maximization concept is being considered rather than the concept of profit maximization with social welfare.

¹⁹ Foster J. (2009). *How Sharia-compliant is Islamic banking?* Retrieve on 2010, 13 March from <http://news.bbc.co.uk/2/hi/business/8401421.stm>

²⁰ Jasri Jamal. (2009). *Bay' Bithamin Ajil : Analisis Kes-Kes Yang Diputuskan di Mahkamah Tinggi Sivil*. The 3rd Islamic Economics Conference 2009: USIM. Unpublished.

4.3 Retract previous Ijtihad?

When a certain products or services offer by IFIs spread into the market, but if it is later on deem as non-*Shari'ah* compliance products, the regulator which is BNM or Securities Commission (SC) should play their role to use their authority rather than wait and let the IFIs follow the market demand. This is what they consider as market driven approach rather than regulatory approach. Even there are a lot of products that are questionable, we never heard so far any of the scholars that previously approved such products give any statements that they have done a mistake or at least retracted their *ijtihads* and *fatwas* back, in contrast they can speak good Arabic and can quote all the relevant *Quranic* verses and tons of *Hadith* to support their contentions.

However, it is interesting to note that the Caliph Umar ones give an instructions to Abu Musa al-Asha'ri given in a letter are noteworthy where he said that,

“After giving judgment, if upon reconsideration you come to a different opinion, do not let the judgment which you have given stand in the way of retraction; for justice may not be disregarded and you are to know that it is better to retract than to persist in injustice”²¹.

This is a serious matter that all related parties need to be taken into consideration to make sure the Islamic finance industry be on the right path. If not, this is what happened when we neglect or not even question the most fundamental issue at all, namely, just precisely we can see many papers only relate on how do IFIs generating cash.

5.0 Recommendations

Some recommendations are made to the policy makers and *Shari'ah* advisors that have direct relationship and have the opportunities in improving the Islamic finance and banking industry compare to others.

a) Policy Makers

²¹ M. Hanif Lakdawala. (1999). Muslim Intellectual Inertia and Ijtihad. Islamic Voice. 13 (2). No,146.

- i. Need to take the leadership role by indentifying the needs of the people via *Maqasid al-Shari'ah* principle. They have the data to gather the findings on what are the necessities of the people. E.g. all newlywed couples will need a shelter for the new form family, therefore, from *Maqasid al-Shari'ah* perspective; it might be that the 1st house is a necessity. So, policy makers must assist in making it easy to achieve the goal of upholding public welfare and utilise the appropriate contract to realise the objective. Another e.g. would be, why are there so many demands for personal financing using *bay al-Inah*, what is the reason behind the utilisation by customers? The author's hypothesis would be these people are either having genuine difficulty to repay debt of meeting basic needs or they just do not know the proper way of spending. If it is the former, than *Zakat* and *Sadaqah* institution will have to play their role and do not wait for the 8 asnaf to look for you instead be proactive in searching them. Moreover, there is no point of having piles of money remain idle.
- ii. Utilise equity based contract. It has been discussed in many literatures that equity based contract such as *Mudarabah* and *Musyarakah* requires people who are competent and trustworthy. To get honest people will not be easy, and we acknowledge the difficulty. Nevertheless, the government can be the pioneer in utilising the equity based model through its development projects and impose strict regulation to compensate the level of trust.
- iii. Reform education system. Malaysia has long been known to be exam oriented and subjects related to Islam have always been dull and lack element of critical thinking. Imagine if subjects like *Usul Fiqh*, *Qawaid Fiqhiyyah*, Islamic Economics, *Maqasid al-Shari'ah* are being introduced at secondary levels and students are thought how to think critically and argue with facts and manners (*akhlak*). This will make the new generation of people understand and wanting to have the real Islam way of running the economy.
- iv. To move the legal framework to the one that is based on *Shari'ah*. So far, there have been many obstacles trying to make the Islamic transaction work due to the duality of system and difference in land and tax law. Recently, the new Central Bank Act 2009 has been introduced which allows the SAC BNM having the upper hand in case of disputes relating to Islamic Finance. The

authors personally feel that this will only be a temporary solution, and it closes the door for people to challenge the decision made earlier by *Shari'ah* committee and SAC BNM because they are the one who approve all the products. But what if they are found to be wrong, will they be willing to retract their decision or fatwa? Does the Act (Central Bank Act 2009) make them infallible?

b) *Shari'ah* Advisor

- i. Need to strategise and be proactive. They should drive the banking industry towards equity base. Be more proactive in educating the people inside the organisation on the real objective of *Shari'ah* and the need to share the risk. After all, economic finding in the G7 countries has shown that the real rate of return in real economy is always higher than interest rate. Why earn less when your organisation can earn more?
- ii. Competency gap. A more systematic approach is required to identify the required competency i.e. *Shari'ah*, economics, accounting and law. Then, every *Shari'ah* officer/advisor will know where they stand and what should area of expertise needed to be improved.
- iii. Stand United. Imagine if all the *Shari'ah* advisors stand united and refuse to endorse *bai al-Inah*. The bank will have to abide and move towards the direction advice by the *Shari'ah* advisors and they can suggest products which carry the spirit of risk sharing and not transfer.

c) Consumer

- i. Equip yourself with knowledge. Imam Ali r.a. once said, “knowledge protects you while wealth needs your protection”. Therefore, it is compulsory for the consumer to equip themselves with knowledge in Islamic *mu'amalat* to ensure that all their acts are within the ambit of *Shari'ah* and save themselves from the grave punishment of engaging in *riba*.
- ii. Boycott or put pressure. If there is no viable alternative approved by the *Shari'ah* advisor, the consumer should exercise their right by boycotting the products and services offered by the Islamic banks. If the consumer stands united, sooner or later they will have to abide by the wishes of the customer.

5.0 Conclusion

Islamic finance is the new trend or new business opportunity but for Muslims, it is an answer to the economic epidemic and its part of our way of life. The role of *Shari'ah* officer/advisor/committee in product approval process is crucial as they act as the last line of defence. The products that they endorse will have direct impact as the role is seen as if they are speaking or deciding on behalf of God.

There has been good things done by the policy makers and the practitioners but at the same time some damage has been done. We do accept that human beings make mistakes but it must be followed with accountability. If a previous decision made was wrong, corrective action must be undertaken.

Since the paper tries to look at the issue from *Maqasid al-Shari'ah* perspective, we feel there must be a policy shift. What we have today is because of the decision that we made previously. In order to make Islamic Finance a success, the understanding at the grass root level is the key. Gait and Worthington (2008)²² consumers also identify bank reputation, service quality and pricing as being of relevance rather than religious conviction which is a key factor in the use of Islamic finance. This is indeed worrying because despite all the hype of Malaysia being acknowledged as the front runner in Islamic Finance, the people seems to be lagging behind in their understanding on Islamic finance.

We can take the example of the first generation build by Prophet (pbuh) whereby they were successful because they understand the benefit of Islam and they wanted it. The process started with education and gradual transformation and the Qur'an commands us to enter Islam in total. Taking bits and pieces will not exhibit the beauty of Islam and therefore change is a must. As Gorringer (1999) quotes from Herman Daly in his *Beyond Growth* stated:

“The need for justice in Economy... Sustainable development will require a change of heart, a renewal of the mind, and a healthy dose of repentance. These are all religious terms, and that is no coincidence because a change in the fundamental principles we live by is a change so deep that is essentially religious, whether we call it that or not (p.92).”

²² Alsadek Gait and Worthington. A. (2008). An empirical survey of individual consumer, business firm and financial institution attitudes towards Islamic methods of finance. *International Journal of Social Economics*. 35(11). p. 783-808.

Those who involve directly with the *Shari'ah* compliance products must remember that when it connotes the terminology of *Shari'ah* compliance, a renowned scholar named Ibn Qayyim once writes:

“*Shari'ah* is based on wisdom and achieving people's welfare in this life and the afterlife. *Shari'ah* is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the *Shari'ah*, even if it is claimed to be so according to some interpretations.”²³

The key issue is the structure and thinking of Islamic banking that has been built on the structure and thinking of conventional banking²⁴. We may prefer the word 'reset' where everything build based on the Islamic frame rather creates something to adopt Islamic but rather in Orientalist frame. There is no other solution for IFIs to be on *Shari'ah*-compliance track other than to deconstruct the very loaded modern meanings of "banking", "money", "economy", and "trade". Otherwise, Islamic Banking with mix of Western-Christian and Western-Orientalists will continue to explode into the lives of every citizenry of this world.

We must come to an agreement that all the issues that we have been discussing so far lead us back to the basic, which is the epistemology of banking as well as the economy in accordance to the real Islamic way of doing things which are *Muamalat* (Islamic transaction) and *tadbir al manzil* (Islamic economics). This in turn would ensure that Islamic financing remains a viable option in the long run.

²³ Taha Abdul Rauf Saad. (1973). Ibn al-Qayyim. I'lam Al-Muwaqi'een (Eds.). Beirut: Dar Al-Jeel.

²⁴ Syed Nayyar Azam Saifi and Muhammad Zeeshan Farrukh. (2009). The Prevalent Practices Of Islamic Banking. The 3rd Islamic Economics Conference 2009: USIM. Unpublished.

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