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Role of Fiqh in Islamic Finance

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Abstract

Fiqh, indicating Islamic law and the tools to produce it, covers all aspects of human dealings, including ones with the Creator, as embodied in *Fiqh* of devotions, and ones between human beings themselves as embodied in other branches of Islamic law like personal status law, political law, criminal law and financial law. Islamic financial law includes the *Shariah* nominated contracts that represent the bases for all Islamic banking and finance transactions including those that have been developed and modeled after the existing ones. However, developing or endorsing a financial product is a process that requires the *Faqih* (Shariah scholar) to employ and consult a variety of *Fiqh* instruments. These instruments are also prescribed and detailed in Islamic law; however, many *Shariah* specialists and observers have protested improper use of these instruments. The paper comes to first discuss the most important proper *Fiqh* instruments available to the *Faqih* to evaluate and endorse products and transactions in Islamic finance. It then elaborates on the instruments whose use in the domain of modern Islamic finance has allegedly reflected a departure from *Shariah* rules and tools of *Ijtihad*. The objective of this paper is to shed some light on the cotemporary *Ijtihad* in *Fiqh* of Finance in light of the guidelines provided by the *Shariah* in an attempt to draw the outlines of what constitutes a proper role of *Ijtihad Fiqhi* in Islamic finance.

Introduction

Islamic law is the most flexible heavenly revealed law when compared with the other revealed laws in their original versions as the Quran tells us. Thanks to this flexibility, Islamic law or *Fiqh* can accommodate many market needs. Elements of flexibility of Islamic financial law include: Permissibility being the original rule in *Shariah*, *Shariah* rules not being all fixed or permanent for they include the *Mutaghiyyrat* (changeable), and prohibition not being of the same degree in *Shariah*. Equipped with a flexible basis for legislation, the *Faqih* 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 *Shariah* objectives of the transaction and the implication of implementing the transaction. *Shariah* also teaches the *Faqih* to prioritize these requirements when compromising some is necessary. Well-established *Shariah* concepts, however, like *Shariah* policy, public interest and necessity have been used in the modern *Fiqh*, especially in Islamic finance, to reprioritize these requirements and sacrifice some. Although these concepts are *Shariah* concepts and some are originally valid instruments in *Ijtihad Fiqhi*, applying them in the context of Islamic finance has raised major *Shariah* concerns. The following discussion touches on some of the proper *fiqh* instruments for Islamic finance, and then it elaborates on the instruments effectively in use and their *Shariah* concerns.

The Proper Fiqh instruments in Islamic Finance

Shariah equips *Shariah* scholars conducting *Ijtihad* with multiple *fiqh* instruments that help them create and endorse products. The following are the most important *fiqh* instruments available to the *Mujtahid*.¹

1. *Shariah* texts and their interpretations

¹ *Mujtahid* is the one who performs *Ijtihad Fiqhi*.

Shariah texts refer to Quran and *Sunnah*. In the area of financial transactions *Shariah* texts provide general rules and rarely provide details. This is because the nature of financial transactions changes over time (*Mutaghiyyrat*) and tends to get more complicated with the advance of age. Therefore, it will not be convenient to provide details on something changeable by nature, because these details will not be relevant to the modern applications of the contracts. The general rules provided by the *Shariah* texts, however, are sufficient for Muslim jurists to deduce *Shariah* rules for the modern transactions, because these general rules represent, in fact, principles on the basis of which right *Shariah* rules for the new financial transactions can be derived. When attempting *Ijtihad*, however, *Muslim* jurists may find that the same *Shariah* text pertaining to a financial transaction may be interpreted in multiple valid ways. In fact, this applies to most legal *Shariah* texts and explains the reasons why within the boundaries of *Shariah* existed different schools of *Fiqh*. Contemporary *Shariah* scholars do not need to restrict their *fatawa* (legal opinions) to one particular valid interpretation, or even to the interpretations made by the classic schools of *Fiqh*, as long as the interpretation they may opt for, or develop on their own, is basically valid, i.e. it is not in conflict with the established *Shariah* rules and principles, and the Arabic language can accommodate it within the context of the text.

2. Permissibility being the original ruling in Shariah

In the absences of a clear and authoritative text, things are deemed by *Shariah* to be *halal* (permissible). The prohibition, on the other hand, needs to be communicated to Muslims in definitive terms in order to be established over something. This, in fact, constitutes a vital tool in the hands of the *Shariah* scholars to endorse new Islamic banking and finance products and transactions. Any new structured products or transaction can be endorsed by *Shariah* boards as long as it is free from the prohibited elements like *Riba* (interest), *Gharar* (uncertainty) or *Ghabn* (fraud).

3. Prohibition being of different categories

Prohibition in the *Shariah* is not of the same category especially in the field of financial transactions, for there exist the so-called *haram lithatihi* (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 Riba 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.² Although sale contract is originally *halal* by virtue of some textual evidences, it is deemed *haram* if concluded during *Jum'a* prayer since engaging in the act of sale, or any other transaction, may lead to the evil of missing *Jum'a* prayer. In other words, the *haram lighairihi* is unlawful in view of its results and implications.³ 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 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 *Shariah* scholars to identify the unlawful acts that can fall under this category of prohibition, in order to look into the possibility of neutralizing them by laying the appropriate conditions that will deprive these acts of their evil-producing nature. In this regard, it can be said that the very prohibition of *gharar* (uncertainty), one of the main reasons for deeming many financial transaction unlawful, is declared by some esteemed old *Shariah* scholars not to be meant for itself, but in conjunction with its possible evil implications (*tahreem tharai'i*) like the dispute it may lead to between the parties to the

² Kamali, "Principles of Islamic Jurisprudence" p.330

³ For more details on this matter see Abozaid, Abdulazeem. (2007). "Examining the Malaysian Shariah 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.

contract.⁴ This means that *gharar* is prohibited only when evils are expected; if, however, none of the evils or harms recognized by the Shariah is to be anticipated, then the contracts involving the *gharar* can be validated. This stand may be supported by the existence of many exceptions *Shariah* make to *gharar* prohibition, like in the *Shariah* validation of *gharar*-bearing contracts like *Salam* and *Istisna*⁵, and also in tolerating *gharar* in contracts when it is minor and trivial in size.

4. Analogy (Qiyas)

Analogy is very instrumental in *Ijtihad Fiqhi*, it relates to the extension of a *Shariah* ruling of an old established case to a new case when the latter shares the same *illah* (effective cause) of the former. Since *Shariah* texts have stated the rulings of many financial transactions, the *Faqih* may make use of these stated rulings by extending 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, have been basically found to be similar in essence to gambling and games of luck, and therefore they have been ruled by contemporary scholar as unlawful, since gambling itself is stated by *Shariah* texts as unlawful. Thus, *qiyas* is a very vital and useful instrument, and it ensures consistency between *Shariah* 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*.

5. Public interests (al-Maslaha al-Mursalah)

⁴ Ibn Tayimiyah and Ibn Al-Qaiyyem have adopted this approach. Further details and discussion can be found in Al-Dareer, *Al-Gharar wa Atharahu fil Uqud*, a book published in Arabic by *Dar al-Jeel*, 2009, second edition.

⁵ 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 thought its outcome is not certain.

By definition, *Maslaha Mursalah* 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 *Shariah* rules are meant to realize public benefits. Muslim jurists have built on this fact the notion of *Maslaha*; deeming as permissible anything that realizes public interest, and as invalid or impermissible anything that brings about harm and evil. One of the basic conditions, however, for the operation of this juristic instrument is for the perceived *Maslaha* not to be in conflict with any *Shariah* text or established principles, for human perception of *Maslaha* may err, and *Shariah* texts and principles must prevail over any human legal exercise.⁶

Among the major *fiqh* schools, *Maliki* school is known to be the leading proponent of *maslaha* as one of the *Ijtihad* instruments and sources of *Shariah*. On the other hand, other *Fiqh* schools reject it as independent source of *Shariah* though they practice it, possibly under different name⁷, without theoretically admitting its authority as an independent source of the *Shariah*.⁸

Relationship between *maslaha* & *maqasid al-Shariah* (*Shariah* objectives)

Maslaha directly relates to *Maqasid al-Shariah* since the very realization of *maslaha* is the primary objective of the *Shariah*. Protection of religion, life, lineage, intellect and wealth are the five essential values of *Shariah*, and all *Shariah* rules revert to these values. Rules of

⁶ The formulation of a rule on the basis of '*al-maslaha al-mursalah*' must take into account the public interest and conform to the objectives of *Shariah*. The application of this tool must fulfill three main conditions. First, it only deals with transaction matters (*muamalah*) where reasoning through rational faculty is deemed to be plausible. Second, the interests should be in harmony with the spirit of *Shariah*. 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. Abdulazeem, "The Devotional Dimension in Interest-oriented *Shariah* Rulings" Article in Arabic, *Journal of Islam in Asia*, Volume 3, No 1, July 2006; Sobhi R. Mahmassani, *The Philosophy of Jurisprudence in Islam* (Kuala Lumpur: Open Press, 2000). 87-89.

⁷ *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 *Shariah* rules based on their inherent benefits.

⁸ Abozaid & Dasouki, "A Critical Appraisal of The Challenges of Realizing *Maqasid Al-Shariah* in Islamic Banking and Finance", P 7, *IIUM Journal of Economics and Management*, International Islamic University Malaysia, Vol. 15, No 2, 2009.

Ibadah and *Jihad*, 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 *maslaha* for human beings and thus, it is the primary *Shariah* objective.

6. Blocking the means to evil

Among the valid juristic devices that the *Mujtahid* needs to uphold while attempting *Ijtihad* on a *Shariah* issue is *Sad al-tharaiy'*, 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 *Riba* contract, whereby the original seller has advanced cash money to the buyer then claimed from him more, and the asset of sale has been used only as a tool to presumably legalize the exchange of cash (*inah* sale).

In fact, *Sad al-tharaiy'* 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 conventional finance.

Thus, *Sad al-tharaiy'* is a juristic device that excludes rather than endorses new products, but yet it is extremely vital tool to ensure the quality of the products being genuinely *Shariah* compliant and not conducive to the evils of the conventional banking and finance products.

Invalid Fiqh Instruments & Applications

Despite the valid instruments the *Shariah* equips the *Mujtahid* with when determining *Shariah* validity of contracts and transactions as detailed above, the contemporary *Ijtihad* in Islamic finance has departed from the proper tools and methodology of *Ijtihad Fiqhi* by adopting inapplicable instruments, twisting or misusing of some instruments and overlooking important instruments as detailed in the following discussion.

I. Use of inapplicable instruments

1. *Shariah* Policy (*al-Siyasah al-Shar'iyah*)

The term *Shariah* policy has recently entered the jargon of the *fatawa* related to Islamic banking and finance. Some products and transactions have in their list of *fatwa* justifications the term *Shariah* policy. So what is *Shariah* policy and is it a valid instrument in the hand of *Shariah* boards to endorse products and transactions on its basis?

a. Meaning of *Shariah* Policy

Shariah policy, or *al-siyasah al-Shar'iyah*, 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 *Shariah*. It covers a whole spectrum of issues in areas like economics, the judiciary, politics and international relations.⁹ 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.

Shariah policy involves different principles including striking the balance between what it is dictated by the circumstances and the stated *Shariah* rules. In other words, it gives the

⁹ Abozaid & Dasouki, "A Critical Appraisal of The Challenges of Realizing Maqasid Al-Shariah in Islamic Banking and Finance", P 7, IIUM Journal of Economics and Management, International Islamic University Malaysia, Vol. 15, No 2, 2009.

Muslim governor the needed flexibility to occasionally set aside an established *Shariah* rule in favor of a new rule that has *Shariah* bearing if the latter serves the public interest or the state in a better way. It may involve the temporary suspension of some *Shariah* provisions that relate to *Mubahat* (the permissible). In other words, it relates to *Maslaha* in its macro applications, and in some of its application it relates to the estimation of the general *darurah* (necessity) that is capable of rendering the prohibited things permissible or the obligatory things not mandatory. Examples for *Shariah* policy includes launching of war, signing of treaties, disallowing marriage before a certain age, enforcing mandatory education and enacting new laws.

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

Shariah policy can only be determined by the Muslim government and cannot be left to be determined by individuals, including *Shariah* scholars. This is because it relates to the management of the people and the state general affairs, which is the responsibility of the Muslim government. Assuming the responsibilities of the Muslim government by individuals opens the door to an endless evil. Basically, individuals do not have the capabilities to draw general policies, and even if they come to process them, it is feared that they may tilt the scale in their own favor and use this principle to serve their own private interests.

c. Mishandling of *Shariah* policy in Islamic finance

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

In the absence of *Shariah*-committed Muslim governments and their roles in drawing up the necessary *Shariah* policies in Islamic finance to meet the challenges facing this industry, individual *Shariah* boards and scholars have without authorization taken up this responsibility of the Muslim government and engaged themselves in practicing the *Shariah*

policy. However, the danger stems from the fact that realization of the public's interests and maintenance of *Shariah* objectives, which are the core of *Shariah* policy, will have been then placed at risk. This is because *Shariah* policy is a quite sensitive principle. When *Shariah* scholars play *Shariah* policy, their presumed transparency may be challenged and be influenced by the material gains they may derive from the *Shariah* rules they determine on the basis of their exercise of the *Shariah* policy. Obviously, *Shariah* scholars are not neutral or independent in this regard, but rather beneficiaries from the rules they may justify on *Shariah* policy basis. In other words, it is justifiably feared that this very sensitive legal tool called *Shariah* policy may be misused by the *Shariah* 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 *Shariah* boards will very likely result in having conflicting estimation of the *Shariah* policy, yielding thus conflicting rules, products and stands on what constitutes a public interest. Eventually, it is the *Ummah* in general that will suffer from this practice and the *Shariah* policy will lead to what's just the opposite goal of what it has been designed for.

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

Moreover, determining an issue on the basis of *Shariah* 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 the light of the results, implications and the changing circumstances. Therefore, it is not a simple process but rather one that requires an institution at the top government level. For this reason determining a *Shariah* policy is a joint governmental work. The Muslim ruler should

set *Shariah* policies after consultation with the *Shura* (consultation) council which houses trustful and independent consultants of different specialties and backgrounds.

Another important element that relates to the operation of *Shariah* 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 issued on *Shariah* 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 *Shariah* policy is played right by individuals, lack of enforcement will hinder its success and may turn it ineffective.

However, none of the above is observed when *Shariah* policy is determined by individual *Shariah* scholars or *Shariah* boards, and apart from that, lesson of experience have taught us that transparency is not something that can be taken for granted in any person, and *Shariah* scholars being humans and fallible are never an exception. In fact, *Shariah* 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, *Shariah* does not stop at this point. It, in fact, places rules and restrictions on the conduct and the behavior of such a person. The Muslim judge for example must be among the most trustworthy persons to be eligible for his position, but his proven 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.¹⁰

2. The Principle of Darurah (Necessity)

It is a well established principle in Islamic law that *Darurah*, which means necessity, renders the prohibited things permissible. This principle is unanimously agreed upon by all schools

¹⁰ All Fiqh schools are of the opinion that Judges cannot be paid or gifted by the parties attending their courts, and according to some Fiqh schools they cannot even accept gifts from the public. See Ibn Qudama, *Al-Mughni*, volume 10, page 118, case 8267. (published by Dar Ihia' Turath Arabi, 1985).

of Islamic law, and it constitutes a Fiqh maxim that reads “Necessities permits the forbidden” (*Al-Dharurat Tubih Al-Mahzurat*). 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 *dawabit*, which means conditions and guidelines, for the functionality of this maxim. These guidelines (*dawabit*) are of course stated in or derived from the *Shariah* texts. One of the guidelines relates to what constitutes a *darurah*. The jurists’ approach to the concept of legal *darurah* can be summarized by saying that *darurah* is something which is indispensable for the preservation and protection of the five essential values: Religion, Life, Intellect, lineage and Wealth.¹¹ This means that being in the state of *darurah* gives the *Mukallaf* (the Muslim charged with *Shariah* rules) the legal excuse to commit the forbidden when it becomes indispensable for his survival, spiritually or physically.¹²

Therefore, in order for the principle of *darurah* to be operative, the underlying act must be indispensable for the survival of the human being, i.e. it must be a necessity. However, some *Fiqh* schools have placed at par with necessity what is termed in the *Shariah* as *Hajah* (need) but only when it is public. This term refers to a human need that is not essential for the survival of human beings, but it is important for their well being. In other words, *hajah* is what a human can survive without which but only with hardship and difficulties. For example, having a car is not a necessity in *Shariah* terms, but it may be a public need in some places.

Misapplication of Darurah

Darurah has been loosely used in Islamic banking and finance to justify products that would not pass *Shariah* scrutiny test and would breach basic *Shariah* rules. The justifying argument

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

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

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* survival from the *Shariah* perspective, nor is it a public need in *Shariah* terms. If such *darurah* hypothetically exists, then it would rather legitimize dealing with conventional banks directly.

Obviously, when *Shariah* prohibits something it always provides alternatives. For example when *Shariah* prohibits *zina* it permits marriage, when it prohibits wine and pork for consumption it permits all other sorts of food and drinks. Likewise, when *Shariah* prohibits certain contracts such as contracts based on *riba* (interest) and *gharar* (uncertainty), it alternatively permits many contracts like sale, lease, *salam*, *istisna'*, *mudarabah* and *musharakah*. To economists, such contracts are even better alternatives to *riba* and *gharar*, and ultimately can help develop a prosperous and a healthy economy, while an economy that is based on *riba* and *gharar* deepens the disparity between the rich and the poor, and leads to inequitable and unjust wealth allocation in a given society. Thus, there is no *darurah* 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 *darurah* never justifies the claim of its original permissibility. Islamic banks have tolerated certain products on the basis of *darurah* then offered the same to the public as *Shariah* compliant products. Obviously, this is a betrayal of *Shariah* rules and betrayal of the clients' trust, not to mention the negative effects of such attitude on the image of *Shariah*, if not Islam in general. Promoting as *Shariah* compliant something which is not raises questions marks on the rationality of the religion by Muslim and non-Muslims alike, which may cause aversion to Islam.

II. Misuse of valid instruments

1. Misuse of Maslaha

Maslaha as a *fiqh* instrument has been overemphasized by contemporary *Ijtihad* in Islamic banking and finance. In some cases it has been treated as a priority over *Shariah* texts as well as *Shariah* established rules. Upon the existence of a conflict between a *Shariah* text or an established rule and a *Mujtahid's* perception of *Maslaha*, the latter has been sometimes given a priority over the established *Shariah* text or rule, like in circumventing the prohibition of Riba, though its prohibition is clearly established, on the basis of *Maslaha*. This work is a departure from the legal *Maslaha*, i.e. the *Maslaha* that carries a legislative power in Islamic law, for a variety of reasons:

First, the claim of a possible conflict between *Shariah* text and *maslaha* is an erroneous claim. If the *Shariah* text or rule is definitive, then it cannot be in conflict with a real *maslaha*, because all *Shariah* rules aim at realization of *maslaha*. Therefore, in this case it is the assessment of *maslaha* by the *Mujtahid* which will be deemed erroneous. In other words, the issue of a potential conflict existing between a definitive *Shariah* text and the *maslaha* is not conceivable if we are viewing *maslaha* from a *Shariah* perspective. However, if we are viewing *maslaha* 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 alone¹³. Human reasoning plays a role only in a framework guided by *Shariah*. 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.¹⁴

Second, even if such a conflict hypothetically exists, then it is the *Shariah* texts that must be given priority over *maslaha*. This is particularly true since *maslaha* derives its authority from the *Shariah* text and not vice versa. It is illogical to give priority to a branch over its parent and source of authority.¹⁵

¹³ This argument is supported by a number of Qur'ānic verses. One of which is Qur'ān 23:71. Refer to Al-'iz bin Abdelsalam, *Qua'id Al-Ahkam fi Masalih Al-Anam*, 2/161.

¹⁴ Abozaid & Dasouki, "A Critical Appraisal of The Challenges of Realizing Maqasid Al-Shariah in Islamic Banking and Finance", P 7, IIUM Journal of Economics and Management, International Islamic University Malaysia, Vol. 15, No 2, 2009.

¹⁵ Al-Zuhaili Wahbah, *Al-Waseet fi Usul al-Fiqh*, p. 361.

Third, the approach of giving priority to *maslaha* fails to distinguish between a definitive (*qat`y*) and a speculative (*zanniy*) text. If the text is definitive with regards to its authenticity (*thubut*) and meaning (*dilalah*), then the ruling it produces is final and binding; i.e. there is no room for human's perception of *maslaha* to add any interpretation to the text. While if ¹⁶ the text is speculative with regards to its authenticity or meaning, then there may be an avenue for the perceived *maslaha* 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 *maslaha* meets all of its conditions: being public not private, authentic not false, definitive not probable.¹⁷

To summarize, upon presuming an occurrence of a genuine conflict between the *Shariah* text and the *maslaha*, then priority must be given to the *Shariah* text and not the perceived *maslaha*, this is provided the *Shariah* 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 *maslaha* to reconcile with the text.

2. Twisted interpretations of *Shariah* texts & *Fiqh* statements

Some Interpretations of *Shariah* 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 some *Shariah* texts, its validity has been falsely and mistakenly attributed to some *fiqh* schools (like the *Shafi'i* school), and a groundless distinction has been made between a debt resulting from a loan contract and a debt resulting from other financial contracts; allowing selling the later but not the former. In fact, neither the validity of sale of debt nor this distinction has any *Shariah* bearing whatsoever,

¹⁶ See in Al-Ghazali, *Al-Mustasfah*, p176; Al-Bouti, *Dhawabit Al-Maslah*, p119.

¹⁷ Al-Bouti, *Dawabit Al-Maslah*, p.119.

and this position is based on twisted interpretation of *Shariah* texts and some *fiqh* statement.¹⁸

Another example is *Inah* sale, although all *fiqh* schools base the permissibility of the contract on its essence and objective, rather than its form and structure, which is the basis for the validity of the contract, cotemporary fatawa in Islamic finance have implied the opposite; considering a contract *Shariah* compliant only if its form and structure are sound from *Shariah* perspective. Not only do these fatawa contravene *Shariah* texts and principles by basing contracts permissibility 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 permissibility¹⁹ of *inah* sale.²⁰

III. Overlooking important instruments

1. Relevant *Shariah* texts

Some *Shariah* texts have been overlooked in *fatawa* on Islamic banking and finance products although they are closely related to the *fatawa* in questions. For example, *Shariah* texts very clearly state that combining between sale contracts and loan contract in one transaction is unlawful (It is prohibited to combine between sale and ²¹ "لا يحل سلف وبيع" loan), and like sale contract in this regard is any commutative contracts as elaborated by jurists.²² This is because the sale or the commutative contract in general can be used to

¹⁸ For details on this issue refer Abozaid, Abdulazeem. "Examining the New Applications of Sale of Debt in the Islamic Financial Institutions", Journal of Islam in Asia, Volume 5, No 2, December 2008. It can be downloaded from www.abdulazeem-abozaid.com

¹⁹ For details on these sales see Abozaid Abdulazeem "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 *Shariah* Objectives", Eighth Harvard University Forum on Islamic Finance, Harvard Law School – Austin Hall, USA, April 19-20, (2008).

²⁰ Abozaid, Abdulazeem. "Examining Bay' al-'inah and its New Applications in the Islamic Financial Institutions", Journal of Al-Tamaddun, Volume 4, December 2008.

<http://umrefjournal.um.edu.my/public/article-view.php?id=2318>

²¹ This Hadith is reported in many Sunnah authoritative books including: Sunan AbiDaud, (3504) and Sunan Al-Termithi, (1234).

²² Al-Dasuqi. *Hashiyah*, 3/76.

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 *Shariah* text has been totally overlooked in a variety of products, like in a product termed “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 so-called 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 cards. 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 embedded or attached 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.

2. Blocking the means to evil

Although this instrument is vital and important for identifying the *Shariah* compliant products and protecting contracts from being misused and manipulated as elaborated earlier, it has not received the due attention by *Shariah* scholars working for 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 from the shelves of Islamic banks and filtered financing deals so that no financing will be given when resulting in unfavorable implications

Conclusion

From the past discussion it can be concluded that *Shariah* has equipped Muslim jurists and scholars with useful and practical fiqh instruments that if used properly will yield sound and controversy-free transactions and products. However, due to improper implementation of these instruments, some controversial products have crept into Islamic finance and ruined the image of the industry. The main reason behind this unfortunate phenomenon is the disorder and the lack of organization in the *Ijtihad* domain despite its tremendous importance and the adverse impacts of not giving it the due attention. To reform the status quo of *Ijtihad* in the field of Islamic banking and finance, the following urgent steps are necessitated.

- *Ijtihad* in Islamic finance must be exercised by *Ijtihad* institution and not by individuals at least on the products level, whereby a truly independent centralized *Shariah* committee has the authority to endorse or reject products.
- The independent central *Shariah* committee must include besides highly qualified *Shariah* scholars economists, lawyers and financial experts, and it must have a binding authority over the individual *Shariah* boards.
- In the absence of the *Shariah*-committed Muslim government, a body comprising highly qualified intellectuals of different relevant specialties, similar to *Shura* council, can be formed to handle matters related to *Shariah* policy, and it can collaborate with the central *Shariah* committee to determine the *Shariah* policy related to Islamic finance.
- All fatawa issued by individual *Shariah* boards or scholars must be subjected to scrutiny by the centralized *Shariah* committee. Procedurally, the centralized *Shariah* committee must have the authority to conduct unannounced *Shariah* auditing visits.

- *Shariah* scholars posing on *Shariah* boards must be accredited by a special institution based on certain globally acceptable criteria, so that the *Shariah* board members who do not qualify for *Ijtihad* or *fatawa* must be taken out.

Indeed, segregation between the *Ijtihad* institution and the political system has led to chaotic approaches to *Ijtihad* and *fatawa* by individual *Shariah* scholars. This disorder did not carry much harm 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 *Ijtihad* institution.

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