

Islamic Banking and Finance in The Light of Maslahah and Maqasid Al-Shari 'Ah in Malaysia

Rayyanu Abdulkarim Kaita
Hassan Usman Katsina Polytechnic
rayyanukaita@student.usm.my

Abstract

In Malaysia, the Islamic Banking and Financing Operation (IBFO) has successfully established as a modern Mu'amalat product and service. The existence of IBFO is to achieve Maqasid al-Shariah that is to execute its operation without involving riba or interest. Today, Malaysia has become the largest player in the contribution of IBFO along with Saudi Arabia. Malaysia also plays an important role in the development of IBFO, especially in introducing the new product of IBFO. However, some Syariah principles of IBFO products are still disputed among Islamic scholars. Therefore, this study aims to critically discuss and examine four Islamic banking and financing (IBF) principles such as Bai' al-'Inah, al-Tawarruq, Bai' Bi Thaman Ajil, and Murabahah. Some Muslim communities could not understand these Islamic, banking principles unless they are based on the mechanism of Maslahah and Maqasid. Perhaps these mechanisms might be able to illustrate how the operations can fulfill the Muslim's needs in financing and banking. Perhaps this study also might be able to provide a clear explanation of IBFO that will lead the Islamic banking system and will continue in offering Shariah-compliant products and services to Muslims and non-Muslims

Keywords: *Islamic Banking and Financing, Bai' al-'inah al-Tawarruq, Bai' Bi Thaman Ajil, Murabahah, Maslahah, Maqasid al-shariah.*

Introduction

The establishment of Bank Islam Malaysia Berhad (BIMB) in Malaysia was the first Islamic Banking and Financing Operation (IBFO) in Asia. The main factor of this success was the collective efforts of the Muslims in avoiding *riba*, a common practice in the conventional banking system. Today, IBFO has more than 30 years of experience in providing modern banking products and services. It also offers its service to Muslims and non-Muslims; this paperwork aims to discuss the IBFO approach in the light of *Maslahah* and *Maqasid*. The *Maqasid* will be used to solve the problems in IBFO as the mechanism to achieve the *Shariah* goal. Therefore, this paperwork will explore the principles of Islamic banking and financing operations (products) and their approaches through *Maslahah* and *Maqasid* as the important mechanisms based on *Shariah*. This study will this study aims to critically discuss and examine four Islamic banking and financing (IBF) principles such as *Bai' al-'Inah*, *al-Tawarruq*, *Bai' Bi Thaman Ajil*, and *Murabahah*. Finally, suggestions will be outlined for future studies in this area.

Understanding the Concept of *Maslahah* and *Maqasid al-Shariah*

Maslahah concept is one of the important mechanisms of *Shariah* as outlined by the Holy Quran and Sunna. *Maslahah* aims to provide benefits and to protect the people—whether as an individual or a society—from harm, chaos, or destruction. *Maslahah* is also used to ensure that the suggested practice fulfills the needs of people in life to achieve the betterment of the economic aspect of *Maqasid al-Shariah*. For example, to establish an Islamic bank that can provide Islamic financial services and is different from the conventional services that offer *riba*-free services which is not accepted and considered invalid in the Islamic jurisprudence (*fiqh*).

A *Maslahah* is an important mechanism of *Shariah* in facing the challenges of social

change, needs, and development in modern times that understand the relation between Islamic law and these natures. Many scholars and writers have attempted to elaborate on the role of the *Maslahah* concept and objective of *Shariah* or *Maqasid al-Shariah* to solve the current contemporary problems. - This mechanism or concept stands for the spirit of compassion and mercy as mentioned in the Quran, “We have not sent you but as mercy to the worlds” (21:107). In another verse, one can refer to the concessions that Allah said “Allah burdens not any soul but according to its capacity” (3:286). Some scholars explained its relation to the meaning of mercy as to establish justice and avoid hardship. The perspective of the *Maqasid* is to alleviate harm and act as a protection, thus facilitating the activities through underlying Islamic values. It is also to fulfill the Muslims’ needs with the convenience requirements in achieving true well-being.

What is the meaning of *Maslahah*? *Maslahah* is defined as benefit or usefulness acknowledged by *Shariah*. It also means public interest. All of the jurists defined *Maslahah* literally as a benefit or interest, and technically as unrestricted public interest in the absence of regulation by Allah and no textual authority could be found on its validity or otherwise. For instance, the Companions decided to impose taxes (*kharaj*) on agricultural lands in the conquered territories despite of the fact that no textual authority could be found regarding this matter. In addition, Al-Ghazali defined *Maslahah* as a consideration that secures a benefit or prevents harm (prohibition). It is also defined as a consideration that is proper and harmonious with the objectives of the *Shariah*, either by securing benefit or preventing harm in a situation whereby there is no indication as to its validity. If the consideration contradicts the textual authority, it should not be considered as *Maslahah* or *Maslahah Mutlaqah* because it is not in the light of *Shariah*. *Maslahah* has a broad use in Islamic law, especially in: secondary areas such as economics, business,

halal food, and other worldly activities that require flexibility and development according to time and space. Among the first jurists who regarded Maslahah as a legal principle in the legislation were al-Juwayni, al-Ghazali, al-Razi, al-Shatibi, Schactt, Ahmad Hasan, and Kamali (Wan Azhar, 2003). There was also evidence stating that at the time of Hanafi, Maliki, and Shafie, they also applied several Maslahah practices though there was no precise definition of the principle for the consideration of Maslahah (public interest). For example, Imam Malik once said, "It is permissible to kill one-third of the people for the interests of the remaining two-thirds" (al-Zuhaili, 1986).

Kamali (2008) expanded the meaning of Maslahah to the realm of justice, which is very meaningful in the life of people in modern times. This is because the meaning taken from the Islamic law and Maqasid perspectives on the particular aspect seemed to be limited and confusing. For example, according to Kamali, Maslahah aims to achieve justice which is not only in its corrections and retributive sense of adjudicating grievances but also in the sense of distributive justice, which establishes an equilibrium of benefits and advantages to the society. He added if Shariah fails to preserve the public interest, it means that Islam has failed to serve its followers and this is surely absurd. From these points, the meaning of Maslahah that is in line with the objective of Shariah is not to impose any difficulties or inconveniences on the people but to promote goodness, benefits, and well-being. This view is aimed to express the meaning of Maslahah as the Maqasid, indirectly. Before Kamali shared his opinion about justice, al-Qurtubi illustrated the meaning of Maslahah while establishing justice. However, some cases were more related to establishing justice than to understanding the Maslahah itself. Maslahah was also recognized as Maqasid in the al-Dharuri situation or the essential level of benefits. This opinion also was approved by Dusuki and Abdullah, who stated that Maslahah sometimes connoted the

same meaning as Maqasid and scholars have used these two terms almost interchangeably (Dusuki, A. W., Abdullah, N. I., 2007). Kamali (2008) also wrote a similar meaning in his book entitled "Maqasid Al-Shariah Made Simple". He stated that the entire range of Masalih-cum-Maqasid could be divided into three categories organized in descending order of importance; beginning with the essential Masalih (daruriyyat), followed by the complementary benefit (hajiyyat) and the embellishments (tahsiniyyat). AH, categories were also related to five areas, namely faith, life, lineage, intellect, and property. According to Imam al-Ghazali, Maqasid al-Shari'ah is used to promote the well-being of all mankind, which lies in safeguarding their faith (din), human self (nafs), intellect ('aql), posterity (nasl), and wealth (mal). Based on the above facts; of discussions and conclusions, Maqasid al-Shariah consists; of three situation levels or interests (Maslahah). The first situation level is a key point that requires flexibility and adjustment to change with permanent features and mechanisms for adapting to change. This is to fulfill the needs of the people in life and it was also known as the essential interest.

What is the meaning of essential interest? According to 'Abas Husni Muhammad (1983), an essential interest or al-Dharuri is defined as the thing which must be executed for the necessary protection and benefit of the Muslim society (ummah) in life and thereafter. Kamali (2008) defined the essential interest as an interest to create a normal order in a society as well as to sustain the survival and spiritual well-being of individuals so much so that their destruction and collapse will precipitate chaos and collapse of normal order in the society. To know this level and how different it is from other levels is by understanding the level of needs through which its absence may lead to disunity and the destructive undoing of the people furthermore, what is not achieved to this level is not al-Dharuri. This can be properly conducted when

the level of needs can be distinguished. To understand the level of needs in the case of the management of purchasing needs that should be referred to, the real needs. It should be distinguished between own needs and the enjoyment of life. This is important since there have been many cases of extravagant spending in financial management. Islam forbids excessiveness in expenditures because it will lead to disunity and destructive undoing of the ummah. Therefore, a successful Muslim or man must have a high level, of sacrifice. He should know which one to sacrifice according to the priority of the needs he is facing.

Understanding the definition of needs is important to achieve, a united society. The need is a necessity that must be provided. Whereby a 'demand' or 'desire' is a supplement to the need that will just boost a level of satisfaction. However, when we did not fulfill our desires, we felt less satisfied. We can distinguish a desire and a need based on its necessity. A desire will act as a supplementary to the main function of a need. However, if we satisfy our needs, then it is acceptable. Nevertheless, Islam does not like excessiveness. People who practice excessiveness are considered friends of evil.

The underlying Maslahah is to protect the benefits acknowledged by the Shariah. If its use is absolutely prohibited by the Shariah, then it is considered an invalid Maslahah or Maslahah Mulghah. According to Tawfiq and a few Quranic verses, al-masafih al-mulghat, or the rejected benefits are disapproved in the Shariah. An example can be drawn from the Quranic verses mentioning inheritance which prescribes that generally, a share of a male (son) is as double the share of a female (daughter), though it seems it could have been beneficial to provide an equal sharing to both parties. In other cases, a person who is engaged in a product of a conventional bank or a conventional investment with transactions that clearly involves-riba is also prohibited despite the fact that riba generates

profit immorally. These cases occurred because of the misuse of the Maslahah and the Maslahah was applied in un-proper manner or approach with a lack of understanding of the Islamic law. The main factor for the abuse of the Maslahah concept was the misunderstanding (jahl) of the exact meaning of Maslahah in Shariah.

The Products of Islamic Banking and Financing Operation Based on Maslahah and Maqasid in Malaysia

Malaysia has successfully established IBF products and services based on particular approaches that refer to Islamic business principles or Muamalat contracts. Hence, Islamic scholars have attempted to adopt the particular approaches linked to the Muamalat activities to offer several Islamic banking products: and services such as al- Wadiah and al-Mudharabah, al-Murabahah and al-Musyarakah, and al-Ijarah. They also offered Islamic financing operations that fulfilled the needs, ensured that the Islamic approaches can solve the financial demands, and conducted the operations fairly. According to Asutay (2012), it is important to make reference to the norms and values of IBF as formulated by the Islamic moral economy (IME) which later projects the Islamization of the IBF.

Today, IBF has offered Islamic personal financing based on Bai' al-'Inah or Al-Tawarruq and i-Home financing based on Bai' bi Thaman Ajil (BBA). Both of the contracts are controversial products and also were rejected by some IBF- established countries. As we know, these contracts used the Maslahah concept to achieve Maqasid al-Shariah in facing the demands in financing. This study will explore the contracts of Bai' al-'Inah and Al-Tawarruq for Islamic personal financing and credit card application, while BBA and Murabahah for home financing. Both are common loan contracts that are applied by Muslim consumers and this will be discussed in the light of Maslahah and Maqasid al-Shariah

Critical Discussion of Bai' al-Inah and Al-

Tawarruq Contracts

Bai' al-'inah is a sell-and-buy-back contract that is operated with two separate transactions. Based on the analysis by Mohd Daud, Norsazaip Mohd Kamal Azman, and Sayuti (2013) discussed the Bai' al-'inah contract and stated that it is significant to the IBF operation is considered as a Maslahah concept. The question is why the contract was regarded as Maslahah since the majority of jurists had rejected this contract due to the contractual exercise that is similar to the loan agreement. It was also interpreted as the planning of two parties for cash from the customers and earning the profit to the bank, which the transaction of sale of goods is not the intention of the parties, but the highlighted questions indicated that the main issue was a trick (Helah) to practice riba. According to Shafie scholars, Bai' al-'inah is permitted as the contract has fulfilled all of the pillars or elements of the Islamic contract and is in line with Islamic law (Mohd Daud Awang, 2007).

In Malaysia, this contract which offers personal financing and credit card referred to as the Maslahah is due to two main factors. Firstly, there is an essential situation in offering these products, and secondly, any contract that is not applicable for both of the products except Bai' al-'inah and al- Tawarruq.

Several interviews set up with Muftis and Executive officers of Islamic Banks in Malaysia indicated that the implementation of Bai' al-'inah and al-Tawarruq was considered Maslahah. They also concluded that the al- Tawarruq contract is better than Bai' al-'inah contract. Bai' al-'inah is also restricted for use and used only for difficult structured products. Its practice also must be monitored by the authority bodies. The Muftis and the Shariah officers of IBF have described that the implementations of Bai' al-'inah and al-Tawarruq are in light of the Maslahah as long as they remain significant to the IBFO (Daud, Norsazali, Azman, and Sayuti, 2013). The

arguments of Maslahah can be understood through serious requirements of the IBF product such as personal loans and credit cards as a necessity to the people. If the IBF products are not offered to the people, they might get the products from conventional banks or apply for illegal loans which are clearly prohibited due to the riba practice. Furthermore, there is no contract applicable for Islamic personal financing except if Bai' al-'inah and al-Tawarruq are practiced. These contracts require all of the conditions pertaining to the sale to be fulfilled. In addition, the absence of a particular text from the hadith in order to prove the prohibition and forbid of Bai' al-'inah is incontrovertible (Awang Haji Metussin Haji 2006; Bank Negara Malaysia, 2007).

According to Fazlur Rahman Ebrahim (2005), Bai' al-'inah and Bai' ai-Dayn were largely recognized in the consumer and trade financing and need to be understood in order to fully appreciate and maximize the true potential and wisdom of Shariah. He added that a set of suitable IBF instruments need to be developed in order to meet the requirements of more diverse business activities. In the global market, the standardization, harmonization, and application of Shariah-compliant products that are based on some general principles should be promoted.

Additional evidence referred from Imam Ibn Taymiyyah about the usage of the al-Tawarruq contract. According to him, an act of obtaining cash money in a desperate situation (Dharuri) is permitted. Thus, this point of view strongly supports the usage of the al-Tawarruq and the Bai' al-'inah contracts which provide a similar approach.

The al-Tawarruq contract was concluded as a permitted contract at the 15th Conference of al-Majma al-Fiqhi al-Islami. However, on the 17th Conference, the contract of al-Tawarruq al-Munazzam was banned in the Islamic banking practices whereas the contract of al-Tawarruq al-Fiqhi remained permitted as it was stated in the classical practice (Majallah

Majma', 2003). Thus, these show that the above statements and previous discussions support the usage of the al-Tawarruq contract rather than the Bai' al-'Inah contract. In the Middle East countries, the contract of al-Tawarruq is offered alongside Islamic financing products such as personal financing at the Shamil Batik in Bahrain and credit card products at Tayseer al-Member in The National Commercial Bank (NCB) of Jeddah in Saudi Arabia. Looking at these efforts, positive feedback and an increasing number of positive demands to use the al-Tawarruq contract with other transaction services prove that Maslahah is a good practice (Mohd Kamal Azman, 2014).

According to Ahmad Zaini Othman (2006), even though the banks in Malaysia still offer financing products based on Bai' al-'Inah with specific descriptions, especially for Islamic personal financing and Islamic credit card products, all of the Islamic banks are recommending transforming all of the products based on the Bai' al-'Inah contract to the al-Tawarruq contract as an alternative nowadays. The Bank Negara Malaysia (BNM) held a discussion entitled Muzakarah Cendekiawan Shariah Nusantara from 28th to 29th June 2006 to examine and, review the law of sale of Bai' al-'Inah and al-Tawarruq in the current practice and had come to decisions as follows:

The permissibility of Bai' al-'Inah and al-Tawarruq is still being debated among jurists, however, each point of view has its own arguments. The permissible requirements for Al-Tawarruq are similar to Bai' al-'Inah. Therefore, both of them are based on the same ruling. Bai' al-'Inah contract is still a necessity in the development of Islamic finance at the national level. However, practitioners need to strengthen and streamline the operational processes and the documentation must comply with all of the criteria of Bai' al-'Inah as required (Bank Negara Malaysia, 2007).

These discussions showed that in Malaysia, the use of the al-Tawarruq contract,

which replaces the Bai' al-'Inah contract, can be considered one of the Maslahah efforts. Since 2013, all Islamic banks such as Bank Islam Malaysia Berhad (BIMB) and Bank Muamalat Malaysia Berhad (BMMB) have decided to use the Al-Tawarruq concept for credit cards and personal financing products. Although the Bai' al-'Inah is still being practiced, its usage is limited in the IBFO. Nevertheless, all of the arguments and improvements of these contracts are recognized as a good Maslahah exercise from time to time.

a. Critical Discussion of BBA and Murabahah Contracts

The Murabahah and BBA contracts are different from the conventional loan contract as their contractual capacities to earn profit and income are based on an underlying Shariah in the exchange of real goods and services. Any nonexistence of such goods invalidates the contract.

The exchange considers the substance in the pricing of the real goods rather than the financing services. Not anticipating a subsequent productive activity during the ex-post sale or credit period, the contract limits the price ceiling to the ascertained credit period agreed upon at the point of sale (Syed Musa, 2005). Murabahah involves a promising method like other contracts such as Bai' al-'Inah. However, severe criticism was posed on the BBA financing for its involvement in 'hidden' Bai' al-'Inah contracts, whereby a financier would buy and sell the products back to the customers (M. Fahim Khan & Layachi Feddad, 2005; Syed Musa, 2005; Tawfique Al-Mubaraka & Noor Mohammad Osmani, 2012).

While in BBA, the price offered from BBA is higher than the price of a normal transaction. The increment of price is allowed in case of a deferment of price in a sale contract provided there is an asset to be sold which represents the subject matter of the contract or the object of a trade. The increase in price is against the commodity but not against the money or loan, otherwise, it will be tantamount

to *riba*. A *Maslahah* can be understood if the bank ensures its benefit of the price satisfaction against the fluctuation of a financial system and the buyers have no cash to purchase a particular property of necessary needs except by applying a financial instrument. From the *Maqasid al-Shariah* perspective on practicing BBA, imposing such requirements is to ensure a win-win situation, whereby both parties obtain benefits from the transaction in a very satisfactory manner. There is an increase in the price for the satisfaction of the seller (bank) by advancing the asset against a deferred payment and a scheme of installment for the benefit of the buyer (Achene, 2013). The BBA and Murabahah sometimes will be engaging *Bai' al-'Inah*. Syed Musa (2005) on the BBA and Murabahah conditions stated that "...in financing activity, the property has become not only the object of sale but has become the basis for liquid funds to be made available to deficit units. This is particularly relevant in sell and buyback arrangements for re-financing. *Bai' al-'Inah* which has the characteristics of markup financing resembles Murabahah except that it allows the customer to be the agent and subsequent purchaser." However, the Central Bank of Malaysia has approved a 'floating-rate' BBA whereby a customer pays, a monthly installment amount that is on the higher end, but subsequently gets a rebate based on the prevailing market interest rate. This shows that the practice of a rebate is one of the conditions of a *Maslahah* requirement. Hence, this study suggests that the BBA and Murabahah contracts need to review their prices and rebates from time to time to serve benefits to all parties fairly and just.

Critical Arguments of IBFO as a Free-interest System

According to the previous analysis by the Muftis and Shariah officers of Islamic banks, it can be concluded that the implementation of the IBF products using The *Bai' al-'Inah* and *al-Tawarruq* contracts are in light of *Maslahah* as

long as it is significant to the IBFO. This question is the operation of BBA and Murabahah contracts has engaged with *Bai' al-'Inah*. The conflict according to Shariah scholars from Middle East countries argued that the Murabahah contract is trading debts at a premium or with a discount, while the Shariah scholars from Malaysia approved the use of the Murabahah contract as a sale of debt (*Bai' al-Dayn*) at a negotiated price (Mohammad Imad Ali, 2014). Referring to the practice of IBFO on the Murabahah contract, its negotiation process has used a particular structure as a *Maslahah* and as a term in the requirement of a customer. Without the structure, this may cause the customer to choose the conventional banking product as the price offered is more convenient. The arguments of *Maslahah* can be understood through a serious requirement of IBF products such as personal loan and credit card applications at a necessary level from the people. If the contracts are not offered, the people would probably apply for the services from conventional banks.

According to Achene (2013), Islamic banking is linked to the economy and business activities in the real market and it is merely not a loan extended to its client regardless of the physical movement of the asset being sold or bought. An Islamic bank is neither a loan provider nor a moneylender. The Islamic bank can take different positions in the market depending on the nature of the transaction. The Islamic bank can be a buyer or a seller in a trade transaction and it can be a partner in a case such as *musharakah*. He also added that the Islamic bank behaves as an enterprise in the market by taking different positions to earn money and generate wealth. Therefore, there is a link between Islamic banking activities and the activities of the business in the real market, whereby any banking transaction executed in the Islamic banks has an impact on the real economy which shows the contribution of the Islamic bank in the real economy sector. The link between the

Islamic bank activities and the real economy is one of the key features that, distinguish the Islamic banking entity from conventional banks.

According to Fazlur Rahman Ebrahim (2005), the creation of a bigger market in this industry is extremely important in order to ensure the growth and sustainability of Islamic banking and finance at present and in the future. New innovations of products would be meaningless if the market does not grow. Therefore, IBF needs to be dynamic and proactive in meeting the needs of the Muslim community and other communities at large to gain growing trust from them. The suggestion of Maslahah of Islamic debt financing also can be understood from the view of the economic aspect in order to achieve the Maqasid in terms of protecting the people from the practice of riba.

These statements are the main evidence that proves the implementation of IBFO is very important in the Islamic economy. All of the mentioned statements have proven the implementation of these contracts as a Maslahah in a macro aspect. On the other aspect, to ensure Islamic banking is convenient, to stand and run the business accordingly, its market must succeed in the operations through its innovation of products and that would be meaningful in the market as the demands are increasing, without making the money as the subject of business in the banking system. These contracts successfully showed that money is only a medium of exchange and there is a way of defining the value in itself (Husin Salamon, 2004). This manifestation means that Islamic banking linked to the economy and business activities in the real market through these contracts is a convenient approach among customers and bankers.

Conclusion

At the modern time, the banking system is a part of the reality of the economic nature. Therefore, an Islamic banking institution was

established to offer halal financing to Muslims. However, there are some products of IBFO have been disputed among Islamic scholars due to different practices of Islamic contracts operated in Islamic banks throughout the globe. In Malaysia, Islamic financing products use the principle of Bai' bi Thaman Ajil (BBA) and Murabahah contracts for home Islamic financing, Bai' al-'Inah or al-Tawarruq for personal financing, and credit card products. These products have enhanced the market of Islamic banking and finance. Thus, this makes Islamic financing an important role in the development of the Islamic socio-economy by providing the financial need through an Islamic approach. These products are operated based on Maqasid al-Shariah which means that the offers act as an effort in providing competitive products to fulfill the Muslim requirement on Islamic financial needs and to challenge the riba-based conventional services. The products also gain approval to run in the light of Maslahah whereby nowadays, many Muslims can buy and own their properties through the modern Islamic banking and financial system. Whereas significance of personal financing and credit card products are seen as counterweights of individual finances in order to meet the current needs, and eventually as aims to achieve a better ummah. Thus, the Maslahah and Maqasid al-Shariah are important concepts in developing the IBF operations. They are the solutions for the IBFO challenges in this development of the financing system in order to gain the betterment of the world. It also refers to the understanding of the Shariah concept which means that the Islamic approach is relevant in any time and place to achieve a healthy world.

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