Deferment of Both Counter Values in Financial Transactions Maqasid Analysis and Its Impact on Money Exchanges

Abdulazeem Abozaid

Associate Prof. HBKU, Qatar Foundation

aabozaid@hbku.edu.qa

Abstract

Shariah texts forbid deferment of both counter values in the commutative transactions. However, it is obvious that contemporary juristic opinions abide by this prohibition without appreciating its Shariah objectives. This is evident as some of these opinions unjustifiably differentiate between similar applications, or they violate the prohibition by allowing stratagems that eventually lead to having both values deferred. The paper comes to analyze the Shariah objectives of the prohibition of such transactions, and then to investigate the contemporary applications that relate to this prohibition particularly to money exchanges. Based on the identified Shariah objectives, and based on the extent of the contemporary need to these applications, the paper goes then to use that as criteria to determine the acceptable and the unacceptable applications of money exchange, indicating their positive or negative effects. The study primarily indicates that while some transactions pertaining to the point of discussion can with conditions be validated in view of various considerations, the Shariah for riba and gharar reasons cannot condone some other transactions. The paper recommends that the Shariah scholars collaborate with the Muslim economists and financial experts to reexamine the excising structures of Islamic financial law on Maqasid basis, in order to remove unnecessary rigidity and achieve genuine observance of the applicable Shariah rules.

Keywords: Shariah objectives, Islamic finance, Riba of sale, Gharar, W'ad, deferment of counter values, money exchange.

التحليل المقاصدي لمسألة تأجيل البدلين في المعاوضات وأثره في الحكم على عقود الصرف

عبد العظيم أبو زيد

أستاذ مشارك في كلية الدراسات الإسلامية بجامعة حمد بن خليفة -قطر

(سلّم البحث للنشر في 11/ 1/ 2021م، واعتمد للنشر في 25/ 3/ 2021م)

https://doi.org/10.33001/M011020211590

الملخص

وجِدت بعضُ النصوص الشرعية التي تنهى عن تأجيل البدلين في المعاوضات المالية، فوقفتْ عندها الآراء الفقهية المعاصرة في بعض التطبيقات وقوفاً ظاهرياً دون تعليل، ففرقت في الحكم بين حالات متماثلة دون قيام ما يستدعي التفريق بينهما في الحكم، وتجاوزت في بعض الحالات هذا التحريم بالدلالة على مسالك غير مباشرة تؤدي إلى ذات النتيجة من حدوث تأجيل العوضين. يأتي هذا البحث ليحقق في غايات الشريعة من أصل النهي عن تأجيل العوضين، ثم ليُحقّق في التطبيقات المعاصرة التي يقع فيها موجب النهي في تأجيل العوضين في عقود الصرف بخاصة، فيفصّل في هذه التطبيقات ويحدد المقبول منها وغيرها بناءً على تحليل مقاصد النهي في أصل المسألة من وجه، وعلى مدى الحاجة إلى التطبيق المعاصر لها، وبيانِ الآثار الإيجابية أو السلبية لذلك التطبيق. وقد توصل البحث إلى إمكان تصحيح بعض المعاملات التي تتضمن تأجيل العوضين، ولكن بشروط، بينما لا يمكن تصحيح بعضها الآخر بالنظر إلى مفاسدها المرتبطة بالربا والغرر. وأوصى البحث بضرورة

تعاون بين علماء الشريعة والاقتصاديين في مراجعة المعاملات المالية المعاصرة بما يحقق مقاصد الشريعة في الأحكام ويُجنّب مخالفة أحكامها.

الكلمات المفتاحية: مقاصد الشريعة، التمويل الإسلامي، ربا البيع، الغرر، الوعد، تأجيل البدلين، عقود الصرف.

1. Introduction

Deferment of the two considerations in a sale, i.e. selling something on the basis of description (mawsuf fi thimmah) for a deferred price is an important issue that has numerous contemporary applications, especially in Islamic banking. However, this sale is known as impermissible in the Shariah as will be discussed soon, and the prohibition relates to two reasons: gharar, due to the possibility of failure to deliver the deferred value in the future; and riba if there is an increment for the counter-value being deferred. This necessitates an analytical detailed study from both Fiqh and Maqasid perspective.

Methodology: To treat the above matters, the paper employs a qualitative research methodology that adopts textual and fiqh comparative analysis approaches. The methodology also incorporates a macro perspective for treating the subject by analyzing the issues being examined from the perspective of Maqasid al-Shariah in consideration of existing market practices and needs.

Significance & Literature Review: In fact, although the paper addresses an issue that has been addressed before, it acquires significance and value by setting the basis for what constitutes a valid sale of values that are both deferred as well as by showing areas of conflict and inconsistency in some of the contemporary stands on the matter, necessitating thus a review of these stances. Among the available studies on the issue of deferment of both counter values are:

- “The Implications Resulting from Deferment of Counter Values” (in Arabic) by M. Ra’fat Uthmān; a PhD dissertation in 426p published in 2006.
- “Deferment of Counter Values in Commutative Contracts” (in Arabic) by Yasser al-Nashmī; a PhD dissertation in 656p published in 2011.
- “Sale of Debt for Debt and Deferment of Counter Values” (in Arabic) by Yusuf Ṣālih Mahmūd; an article published in 2019.

All of the above studies provide significant details pertaining to the issue in question but overlook its Maqasid aspects in the way that should influence the Shariah rulings of the contemporary applications, and hence the important of this study.

Structure of the Paper: The paper comprises this introduction, analysis of the prohibition and then a discussion of three contemporary applications relating

to money exchanges. However, the practical applications of topic treated in this paper go beyond money exchanges to include other transactions in Islamic finance, but the limited scope of paper excludes those transactions from discussion.

2. Fiqh background

In principle, deferment of values in a commutative contract may be in one or both of the counter values; if it is in one then it is related to gharar, as well as riba if the counter-values are of the same genus and the postponed value is higher than the spot value. If the deferment is in both counter-values for the same period, the issue relates only to gharar.

As for deferring one of the counter-values only, either the commodity is sold on a deferred basis for an immediate cash payment - which is salam, or the commodity is sold on a spot basis for a deferred payment. Both involve gharar given the possibility of the debtor failing to deliver the cash or commodity that he is obliged to do. In addition, both are susceptible to an increase in one of the two values in exchange for time. The Shariah has permitted such a contractual arrangement despite its resemblance to the increase that are seen in riba, where money is increased in exchange of time.

This is because sale with a deferred price or deferred delivery (salam) may meet a general need, and they are genuine sales. The buyer who buys on a deferred payment basis is in need of the commodity and does not seek cash (like in tawarruq)[1]. Similarly, the seller in salam needs cash only to produce the sale item. In addition, salam facilitates production and provides economic and social benefits; both the buyer and seller benefit, as well as the society. On the other hands, selling on a deferred payment basis meets a general need also, as many people do not have the cash to buy on the spot. However, although the Shariah permits buying on a deferred payment basis, the Shariah does not encourage incurring debt to buy non-essential items.[2]

Hence, sale contracts on a deferred price or deferred delivery (salam) basis meet a general need recognized by the Shariah and therefore they are permitted. The gharar that is contained within these two contracts is excused

(1) Tawarruq refers to buying a commodity from one party on credit and selling it to a different party for cash as a means to obtain cash. The practice that involves collusion between the concerned parties was ruled as unlawful by the Fiqh Academy (resolution No.19/5 in its 19th session which was held in Sharjah in April 2009) since it involves a contrivance to Riba.

(2) The Shariah in general does encourage people to incur unnecessary debts; this is evident in view of the numerous Shariah texts that discourage people from borrowing, the most evident of which being the Prophet's refraining from praying the Janaza prayer on a one who passed away before repaying his debt. (See Al-Bukhari, M.I, Sahih al-Bukhari, Damascus: Dar al-Ulum, Hadith, (n.d), No. 2289.

as well as the possible increment in one of the two values (the higher price in the deferred-price sale, and the lesser price in salam), because the benefits of these contracts are greater than their harms. In contrast, the economic harms that occurs due to direct transactions in cash with increase in the deferred value (riba of a loan) are incomparable with the little harm that could occur in the Salam or the deferred payment sale.

This is in respect of deferring one value. As for deferring both counter-values, it is an issue that requires focused discussion, as follows.

3. Textual prohibition of deferment of counter values

The prohibition of selling deferred consideration for a deferred consideration is mentioned in the Hadith: "The Prophet, peace be upon him, prohibited selling al-kali' bi al-kali' (deferred for deferred)".(3) Much has been said about the authenticity of this Hadith, although the jurists were unanimous about adopting the prohibition of such a sale.(4)

It seems that the reason for the prohibition of deferring both counter-values relates to gharar with its two possible meanings, speculation (qimar) or lack of knowledge (jahala), and not due riba, as long as the time period of both deferred counter-values is the same. Speculation/gambling (qimar) occurs when the two contracting parties speculate about the future price of the commodity without the aim of a real exchange. The transaction ends in paying the difference, and not in actually delivering the sold commodity. This is what is known in our time as 'futures', where the aim is speculating on prices and not hedging against unexpected changes in the future price of the commodity. Traders sell a commodity of specified genus, type, amount, price and time of delivery in organized financial markets. At the appointed time they look at the market price; if it is lower than the agreed price, the seller profits, and the buyer pays the difference; the sale does not conclude with actual exchange of the commodity and its price, but with paying the difference. Hence, the contracting parties are akin to gamblers on the future price and are not really transacting in reality.

---

(3) The Hadith has been reported by Al-Hakim in his Mustadrak, (Beirut: Dar al Ma'rifa, 1986, 2/57) describing it as in accordance with Muslim's conditions, and by Al-Darqutni in his Sunan, (Beirut: Dar al-Kutub al-ilmiyya, 1996, 3/60, Hadith No. 269).

(4) Al-Shawkani states: "Al-Hakim considered it sound on the conditions of Muslim, but followed up by saying that Musa Ibn 'Ubayda al-Rabthi was alone [in reporting it], as al-Darqutni and Ibn 'Uday also said. According to Ahmed: "the narration is not sound for me, and I do not know this Hadith". He also said: "this Hadith is not sound, but the people held a consensus that it is not permitted to sell a debt for a debt. Al-Shafi'i said: "scholars of Hadith have doubts over its authenticity". (Al-Shawkani, M.A, Nail al-Awtar, Beirut: Dar al-Fikr, n.d., 2/56).

However, if the aim of the contract is hedging, then the two contracting parties would execute the contract to fix the price of the commodity that will be effectively exchanged on the agreed future date. Herein the buyer is driven by his concern about the commodity's price rising in the future and wants to fix its price, while the seller is worried that the price may fall in the future and also wants to fix the price. In this situation, there is no speculation/ gambling (qimar), although there is excessive gharar due to the deferment of both counter-values as one or both parties may fail to deliver the agreed value. In this regards, the Shariah exempts deferring the payment of the price to meet a need, as people may not be unable to pay the price in cash. The Shariah also excuses gharar in deferring the sale item in a salam contract to meet a need as people are in need of cash to finance the costs of production, not to mention that salam contract in essence facilitates production, which benefits the economy. Hence, the needs of people are met by deferring the payment of the price in the deferred payment sale and are also met by deferring delivery of the sale item, as in salam. Thus, the Shariah excuses gharar that accompanies deferring one of the counter-values, in view of it being a public need.

As for deferring the two counter values, no genuine need existed to justify it, especially that the gharar (gharar jahala) involved therein would be then double sided and excessive. There was no general need for this in the past, while in our time with financial transactions getting more complex, there is a need amongst manufacturers and traders to ensure that resources continue to be supplied for their industry or trade with a pre-determined price. Hence, the need has arisen for deferring both counter-values for sake of hedging, while the gharar emerging from the possibility of the two parties not fulfilling their contractual obligations may be significantly minimized nowadays, especially if the transaction is conducted in organized financial markets that guarantee the implementation and fulfilment of contractual obligations.

Moreover, there are some juristic reasoning (ijtihad) that allow a delay of both counter-values in some financial transactions. Hanbalis, for instance, do not condition in some ijarah contracts, where the leased asset is only described in the contract and delivered in the future, immediate payment of rent.(5) Hence, such ijarah contains deferment of both counter-values.(6) In certain cases of istisna' some Hanafis also permit a delay in both counter-values.(7)

(5) Al-Bahuti, M, Sharh Muntaha Al-Iradat, Beirut: Dar al-Fikr, n.d. 2/252.

(6) Contrary to the Hanbalis, the majority of Fiqh schools invalidate such contact due to deferment of both counter values. Ibn Rushd, M. A., Bidayat al-Mujtahid wa Nihaya al-Muqtasid", Beirut: Dar al-Fikr., 2014, 2/182.

(7) Ibn Abideen, M.A., Radd al Muhtar 'ala al Durr al Mukhtar (Hashiya Ibn Abideen)", Beirut, Lebanon: Dar Ihya al-Turath al-'Arabi, 1998, 4/170.

If it is permissible to rent an asset that is not specific (ghayr mu'ayyan) but specified on the basis of description (mawsf fi al-thimma), and not owned by the lessor but he is likely able to deliver it, then it is also possible to permit the sale of something non-specific but clarified by description and is likely to be delivered. This is especially so given that ijarah is a kind of sale as the jurists deem it 'sale of usufruct' (bay' al-manafi'), and ijarah is not different from sale in this regard. The usufruct does not exist at the time when the contract is signed just as a sale item is non-existent at the time when the contract is signed.

In addition, the contemporary application of istisna' contract contains a delay in both counter-values in a contract that is binding on both parties from the moment it is signed. OIC Fiqh Academy permits such istisna', while it is obvious that it involves delay of both counter-values (OIC Fiqh Academy Resolution No. 65/1992). One of the common applications of such istisna' is sale of real estate properties before or during their construction.

Thus, if we accept the aforementioned Hanbali ijtihad (in ijara) and the contemporary ijtihad that istisna' contract is binding from the moment it is signed, and we also acknowledge the general need nowadays for a hedging and the absence of excessive gharar in modern-day transactions due to the guarantees of it being implemented, then we should also accept deferment of counter-values in a sale contract. This is as long as its execution is guaranteed and the aim of the contract is hedging, not price speculation.

In fact, the prohibition of gharar is connected to the amount of its harm and whether or not it is greater than the need for it, which is why a small amount of gharar is excused. If a need has been identified in a contract that contains gharar, and it is not used as a means towards speculation, and it may not lead to animosity and argumentation between the contracting parties, then it is possible to tolerate it. Ibn Taymiyah states: "the harm of gharar is less than that of riba, which is why leniency is given to it [i.e., gharar] when the need for it arises, such as selling property 'jumlatan' [i.e. without specification of what it contains]... or selling pregnant or milking animals [at a higher price despite the uncertainty of the pregnancy or the milk].[(8)]

4. Contemporary applications of deferring the counter-values in transactions

If to adopt the above conclusion, i.e. acceptability of deferring both counter

(8) Ibn Taymiyah, A, Al-Qawaid al-Nuraniyah, Riyadh: Dar Ibn Jawzi, n.d, p. 172.

values in transactions but with the aforementioned conditions, then the following transactions are perceived to benefit from such stand.

A) Application 1: Fixing the currency exchange rate for hedging purposes

Deferring the counter-values in currency exchange contracts, just as in other ribawi monies, comes under the direct prohibition in the Hadith of 'Ubada Bin al-Samit: "[when exchanging] Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt – [it has to be] equal for equal, hand to hand [payment to be made on the spot]. If those commodities differ, sell as you wish provided that payment is made on the spot". On the other hand, deferring other non-ribawi money comes under the prohibition of selling deferred for deferred (bay' kali' bil kali'), which has been discussed above. The objective perceived for prohibition in both cases, the ribawi and non-ribawi monies - is to free the transaction of gharar and to block the means to price speculation. This objective is even more evident particularly in the sale of currencies, because of their importance to the stability of the economy, so they should be surrounded with various rulings to ensure their protection against possible manipulation by speculators.

However, fixing the price of currency for hedging purposes has become a commercial need in our time, especially in the view of the currencies price fluctuations and their possible dependence on other currencies, such as the dollar and the euro in international trade. As Islamic banks play the role of a commodity trader, they needs to fix the price of currencies to cover their future financial liabilities.[9] The Islamic banks may also need to fix the price of a currency in advance for their own mutual payment obligations.

The Shariah texts prohibit fixing the price of currency beforehand in a binding exchange agreement, because the texts on sale of currencies are explicit in conditioning taking delivery (taqabudh) of the two counter value. Although the currencies were gold and silver at the time, but these texts relate to currencies in general and not particularly to these two metals: gold and silver.[10] Hence, taking immediate delivery (taqabudh) in sale of currencies is necessary.

The economic wisdom in conditioning taking immediate delivery (taqabudh) in currencies in general is perceived in two things:

- Firstly, to block the means to circumvent riba of loans through a currency

(9) Such as in Murabaha LC, especially the USANCE LC where the bank has the option to delay payment of the price for some time.

(10) For more details on this issue, see Abozaid, Abdulazeem, Fiqh al-Riba, Beirut: Al-Risala Publishing House, 2004, p.325.

contract. For example, if the price of a dinar equates to 10 dirhams, while 10 dinars spot are sold (loaned) for 120 dirhams deferred for a month, the seller (lender) gains 20 dirhams.

- Secondly, to prevent speculation on currencies through their deferred sale, as speculation on currencies may badly hit the economy. Speculation on currency leads to instability of the currency value, which may affect the three economic functions of money as a store of value, a means of exchange and a unit of account. It may also lead to a sharp decline in the currency value in a way that severely hits the economy, as occurred in the Asian Crisis back in 1997. Thus, the Shariah is strict in selling money for money, and to curb speculation it conditions its sale for other money on a spot basis.

- **Is a mutual promise on a future currency exchange a sound and acceptable alternative to a deferred currency contract?**

Fiqh Academy passed a resolution prohibiting deferred currency sale and prohibiting mutual promises on a currency without distinguishing between binding and non-binding mutual promises.

However, some Shariah standards(11) issued on sale of currency prohibit a binding promise between two contracting parties but permit a binding promise by one party only. These standards do not differentiate between whether the aim of currency sale is for price speculation or for hedging purposes. The standard passed by AAOIFI states: "a mutual promise in trading currencies is prohibited if it is binding on both parties, even if it is to hedge against the risk of change in value. As for a promise from one party, it is permissible, even if it is binding." (12)

The question here is whether the ruling of this standard is practical and sound, and whether there is any practical difference between a promise that is binding on one party and a promise that is binding on both parties?

The bank that seeks to hedge, according to what the standard states, needs to find someone who can give it a binding promise of paying the desired currency for a specific price, without the bank being obliged to implement this currency exchange, in order to avoid binding both parties. In other words, according to the standard, the bank that wants to hedge must have a right to leave the

(11) Some financial institutions issued recently Shariah standards in an attempt to streamline the Islamic finance industry.

(12) AAOIFI Shariah Standard No.1 (2/9/A).

transaction with the other party that is bound by the promise. However, it is natural that with this right the bank wishing to hedge will withdraw from the agreement on the currency exchange, and conduct a currency exchange in the market if it finds a more suitable currency rate. On the other hand, it will choose to implement the currency exchange agreement with this party only in case the market rate on the execution day is better for it than the fixed rate in the mutual promise. However, in reality, will there be any party willing to oblige itself to a currency exchange price without the other party being equally obliged!

In truth, whoever enters into a future currency contract is either a speculator on the prices or a hedger. At the contract's essence, parties may enter into an agreement on a deferred currency for hedging purposes if they have mutual obligations; both require the currency of the other party and fear an increase in its price in the market. When the aim is to speculate on prices, both parties have contrary expectations - one expects the price to increase while the other expects it to decrease.

The party (the client) that enters into a mutual promise on the currency exchange with the Islamic bank seeking to hedge is himself seeking either to hedge or to speculate. Since obliging both parties is unacceptable according to the Standard (AAOIFI), the agreement will not serve his (the client's) either purpose, due to not obliging the other party (the bank). Hence, the agreement to execute future currency exchange on mutual promise basis, but with obligating one party only, is impractical, as the non-obliged party will enforce the agreement only if it serves its own interest, depriving thus the other party of the change to achieve his purpose in hedging or speculating.

Therefore, a mutual promise on a currency that is only binding on one party is not a practical solution because the second party that gives a promise to the Islamic bank does not benefit at all, as with this one-sided promise, he cannot hedge or speculate. As a result, the Islamic bank will not be able to find a client that will be willing to give it a binding promise, so that the bank can hedge against unfavorable change in the currency exchange rate. The alternative to this impractical solution is to have an agreement between two Islamic banks to support each other by the assisting bank giving a binding promise of currency exchange to the other bank to provide it with the currency it needs. However, by looking at the current practice, this assistance is rare, as the majority of Islamic financial institutions in reality use instead an alternative arrangement

of formalistic contract structure that leads in the end to mutual obligations to exchange two currencies in the future at a pre-determined price. The tawarruq contract is most commonly used for this purpose.

Before looking at the alternative arrangement based on tawarruq we turn to an important matter that is related to mutual promises on currency: the prohibition of this mutual promise (which is the subject of this contract) if it is meat to achieve something prohibited. While the act of exchanging one currency for another that is done at one time in the future is permissible in its essence, being obliged to do it in the future is prohibited. For this reason the jurists allowing mutual promises upon currency exchange in the future conditioned it with being non-binding. If the act of the exchange were prohibited in itself, the jurists would never have allowed the mutual non-binding promises to execute it, as promising to do an impermissible act is impermissible, similar to the promise between a lender and a borrower for the latter to give to the former an increment upon the original amount of debt. Thus, the jurist would never allow a binding promise to execute currency exchange in the future, simply because future currency exchange is impermissible. In fact, the Shafi'is allowed the promise to execute currency exchange only because it is a part of the nature of promise not to be binding. If it was binding in itself or was made as such, they would never allow it.[13]

On this basis, the statement absolutely permitting mutual promises on currency in Islamic banking practice, as the Standard does, is incorrect, even if it is not binding on either parties. This is because the act of currency exchange based on a mutual promise could be impermissible at its core, such as if two parties promise a deferred exchange of ten dirhams after a month for twenty riyals paid after two months despite the dirham and the riyal being similar in value. This exchange, upon which the mutual promise is made, contains riba due to an increment in the deferred value, which is impermissible, making the mutual promise upon it impermissible too. If, however, the mutual promise is on the exchange of two currencies at one deferred time, then since such act of exchange is permissible in itself, i.e. exchanging ten dirhams for twenty riyals at one time, then having a mutual promise to do the same should be also permissible.

Another issue is that a promise that is binding on only one party, which the Standard permits, is not acceptable under analysis, because it negates an essential condition (from the conditions) of sale, which is mutual consent

(13) Ibn Hazm, M.A, Al- Muhalla, Beirut: Dar Al-A'faq Al-Jadidah, n.d, 2/513.

(taradi) in contracts - between both parties when forming a contract. This is a condition in the Hadith: “sale is based on mutual consent”.(14) The party bound by the promise may not be agreeable to the contract when the future time comes. Probably if he was given a choice of not entering it, he would not, while his consent before that is of no consideration, because mutual consent is a condition while initiating the contract as stated in the Hadith. The consent in khiyar al-shart or the choice that accompanies ‘urbun sale, occurs during the contract, not before it, so even none of these is an exception.

In addition, a mutual promise that is binding on one party in a currency exchange contract makes the mutual promise closer to being a contract. No jurist allowed this among those who permitted a mutual promise on currency exchange. In fact, it makes the mutual promise the same as a contract if there is a benefit for the party that is not bound to execute the currency exchange.

In sum, the suggestion of a mutual promise on currency exchange contracts as a legitimate solution to the problem of hedging in deferred currency is not a practical solution. This position in general leads to falling into prohibitions. Besides, the resolution that permits it in the (AAOIFI) Shariah Standards does not condition it with the aim of hedging, which opens the door for using it for price speculation also, which is definitely unacceptable as discussed above.

As for relying on tawarruq sale to enable hedging the price of the deferred currency, apart from the permissibility or otherwise of tawarruq,(15) it is costly and opens the door to being used for price speculation as well. This is what in practice occurs in financial markets, as observers know. Financial derivatives depend on tawarruq-based structures for price speculation on currency exchange.

In addition, the tawarruq contract is simply a formality that makes no sense. When it is used for this purpose, it leads to a binding deferred currency exchange for both parties. If biding deferred currency exchange is impermissible in the Shariah as discussed, the Islamic banks that use tawarruq and similar contracts for deferred currency exchange are actually committing this prohibition. However, if to these banks the aim of hedging in currency exchange is legitimate, and tawarruq is used only as a means to achieve this permissible aim, then it is better for these banks to execute deferred currency

(14) Reported by Ibn Hibban in his ‘Sahih’, (Beirut: Al-Risala, 1993, No. 307); Ibn Majah in his Sunan (Beirut: Dar al-Fikr, n.d, Book 12, No. 2185).

(15) Tawarruq has been ruled as unlawful by the Fiqh Academy (resolution No.19/5 in its 19th session which was held in Sharjah in April 2009) since it involves a contrivance to Riba.

exchange explicitly rather than trying to circumvent the prohibition by using these highly controversial contracts. Such contract (tawarruq) adds noting to the Islamic banking industry but unnecessary complexity and cost, and it harms the image of the Shariah and the reputation of Islamic banking.

Possibly the most acceptable solution, if there is a real need for financial institutions to hedge against price changes of currencies, is to allow for them explicitly what has been allowed implicitly. That would be better than using detrimental circumventions that are unsound and open to categorically unlawful uses. Especially given that the Shariah rulings of transactions have effective causes that can be rationally understood as discussed, yet these circumventions do not have rational meanings, as they do not lead to any intrinsic benefit but rather lead to greater impermissibility.

From another perspective, there appears to be no Shariah reason for the prohibition of a deferred currency contract if the aim is genuinely hedging, unless the aim is just to block the means to a possible intend of speculation. By contrast, the rationale of the other deferments in currency exchange is all clear as highlighted. If one of the two counter values is paid spot while the other is deferred, or if both are deferred but with a difference in time periods, then the prohibition is to prevent circumventing riba of loans by increasing the deferred value. If both counter-values are deferred together for a single time period while the aim is price speculation on the future price of the currency, then this is gambling.

This inability to rationalize the prohibition a deferred currency contract where there is no suspicion of riba or gambling comes in line with what al-Mawardi said generally about riba: “As for riba due to a delay or deferment without an increment, it is small sin, because it amounts to an invalid contract [for failure to meet the formality requirements of the contract], and they [the jurists] clarified that [involving in] invalid contracts incur small sins only”. (Al-Bujairami, 1987)[16].

Ibn Qayyim also indicates to this meaning in general by saying that real riba that is prohibited is riba that is an increment due to a deferment. (Ibn al-Qayyim, 1973, 2/154)[17]. It is also reported that some of the companions of the Prophet (pbuh), such as Ibn Abbas, Usamah Bin Zayd, Zayd Bin Arqam and Abdullah bin Zubayr, though commonly known as attributable only to Ibn

(16) Al-Bujairimi, Sulaiman, Hashiya al-Bujairimi, Beirut: Dar al-Ma’rifa, 1987, 2/15.

(17) Ibn al-Qayyim, I’lam al-Muwaqqi’in ‘an Rabb al’Alameen, Beirut: Dar al-jeel, 1973, 2/154.

'Abbas, that they only considered riba in an increment for deferment.[18]

Regardless of these opinions and positions, it is clear that a new wisdom has appeared in our time for prohibiting deferring counter-values when selling types of ribawi money with each other, such as currencies. The wisdom of the prohibition is to prevent price speculation and gambling that occurs in contemporary financial markets as mentioned, so the prohibition is to block the means to this end.

Based on the aforementioned, since the prohibition of not having immediate delivery (taqabud), with no increment, is meant only to block some means to unlawful ends (tahreem thara'i), and that it is a small sin in itself according to some scholars, such as al-Mawardi, then it is possible to consider allowing a future currency contract only between two hedging parties, such as Islamic banks.

There is no need to use an ill-reputed transaction such as tawarruq to achieve the same result, or to apply the mechanism of mutual promises as this does not solve anything as discussed above, especial that those two devices open the door for price speculation as elaborated earlier.

Permitting a currency contract between hedging parties is less risky than giving a general permission to mutual promises on future money exchange or to a tawarruq-based deferred currency exchange. These techniques involve Shariah cautions such as possibly leading to price speculation on the currency, which is a matter that has dangerous economic consequences, and is a considerable reason for prohibiting the deferment of counter-values in our time.

B) Application 2: Excusing delay in spot currency contracts

An issue that relates to the issue of immediate delivery (taqabud) in currency exchange is the issue of delay occurring in spot currency contracts, where there is no actual intention of deferment of the transaction. Although the Shariah texts are clear on the condition of immediate delivery (taqabud) in counter-values in currency exchange, such as selling gold for gold or for

(18) Ibn Qudama, Al-Mughni, Beirut: Dar al-Fikr, n.d, 4/134. However, in contrast to this stand attributable to Ibn Abbas, Al-Hakim reports the story of Abi Sa'id with Ibn 'Abbas, where Ibn 'Abbas changes his opinion stating: "May Allah reward you with paradise O Abu Sa'id. You reminded me of an issue that I had forgotten. I ask Allah for forgiveness and repent to Him". Hence, Ibn 'Abbas no longer deemed this transaction permissible. Al-Baihaqi also reported something similar. See Al-Hakim, Al-Mustadrak, 5/43; Al-Baihaqi, Al-Sunan, Makka al-Mukarrama: Maktabat Dar al-Baz, 1414H, 5/286, Hadith No. 10289.

silver, or anything else that is fit for currency in our present day, some of the modern-day applications of selling currencies and converting them may require permitting constructive delivery (qabd hukmi), i.e. not actually receiving them in-hand. Examples include bank depositing the counter-value of the other currency in the client's account, taking the counter value through a payable check, and receiving the price of gold or silver when sold by a credit card. The current applications of currency sales may also necessitate excusing delay if an unforeseeable delay occurs in the international transactions due to having holidays in the country of one of the two contracting parties, or due a difference in time zones.

However, based on the above view on the rationale of conditioning the immediate delivery (taqabud) in the sale of currencies, and the juristic stands of on the prohibition being only to block the means towards riba, i.e. not a consequential sin in itself, then there could be nothing wrong with delaying delivery of one of the values in the exchange of non-deferred currencies, as long as there is need for it. This is so unless or until scholars or economists may identify a considerable wisdom or need to necessitate the immediate delivery (taqabud) in these transactions.

The same can be argued for buying gold or silver or replacing old for new from the same seller, as in the following discussion.

C) **Application 3: Trading off gold/silver and selling it in instalments**

Gold comes in three main forms: i) gold-ore - its natural state before being minted; ii) minted gold: when it is minted into a currency (such as a dinar); and iii) crafted gold, such as jewelry for embellishment. The texts referring to riba in gold do not differentiate between its different forms. The jurists' rulings encompass all forms of gold, and the reason for riba in gold indicates the inclusion of all forms of gold, because to them the effective cause ('illa) is having in gold the 'essential attribute of pricing' (jawhariyya al-thamaniyya). Had they deemed the 'illa pricing (al-thamaniyya), gold-ore and jewellery would have been exempted. However, they identified the 'illa as 'the essential attribute of pricing' so much so to include gold-ore and jewelry.[19] Even when gold is not used as currency its metal is suitable for that purpose, hence gold processes the essential attribute of pricing, and the same applies to silver.

(19) See Ibn al-Humam, Fateh Al-Qadeer, Beirut: Dar Ihya' al-Thurath al-Arabi, n.d, 5/149; Al-Dasuqi, Hashiyat al-Dasuqi, Cairo: Dar Iyah al-Kutub al-Arabia, n.d, 3/41; Ibn Qudama, Al-Mughni, 4/136.

According to rules of gold (and silver), if gold jewelry is sold on instalments the sale is invalid. If old gold is traded for new gold of a different amount, as is commonly done, the transaction is also invalid. As for the first case, it fails on the condition of immediate exchange (taqabud) in the sale of gold for gold (riba al-nasia) since currencies also share the same rules of gold. As for the second case, it fails on the condition of similarity in amount in the sale of gold for gold (riba al-fadl). These two conditions are meant to prevent circumventing the prohibition on riba of a loan in the metal that is the genus of prices (jins al-athman) which has strong pricing attribute, even if it is no longer used for pricing. When spot gold is sold for a greater amount deferred, like 20g spot gold for 25g deferred gold, the sale contains in essence riba of a loan. The two conditions are also meant to block the means to price speculation in a metal as economically important and significant as gold or silver.

However, if gold is jewelry and bought and sold for being used as jewelry, some jurists, such as Ibn al-Qayyim, holds that it no longer is a ribawi commodity, such that riba of gold only occurs when gold is used for pricing. If it is not used for pricing but rather as jewelry, the rules of riba do not apply, according to this opinion.

Ibn al-Qayyim's opinion deserves attention and further consideration. Gold-crafting is a human effort that increases the value of the gold. The value of this effort could be worth the same price of the actual gold or even more in some cases. This additional factor to the gold (craftsmanship) may increase the price of gold significantly and take gold out of circulation as a currency and thus, removes gold jewelry outside the realm of riba.[20]

In fact, beside jewelry and ornaments, gold could be crafted for other reasons such as making electronic chips and medical accessories. One of these items could be sold for multiple times the actual price of gold, because of its artistic medical or historical value. It then becomes unsuitable to be treated in the same way as a gold currency in regards to buying it for cash and prohibiting instalment payments of its price, or trading it for gold. The rules of riba aim to protect the 'origin of prices' from volatility and being manipulated. These uses take gold out of its pricing function, even if it is only temporarily in some cases.

By considering the objectives of the rules of riba in the case of gold, the researcher is of the opinion that gold-craft (siyagha) removes gold - and silver

(20) Ibn al-Qayyim, I'lam al-Muaqqi'in, 2/160.

by extension - from being a ribawi commodity, albeit with the following conditions:

1. Gold that is crafted is bought in order to use it for that purpose. If jewelry is sold, for example, not to be used as jewelry, but to mint it or to store it, the rules of riba apply to it.
2. The uses of crafted gold must be permissible (halal), not impermissible (haram) such as jewelry for men, or eating and drinking from utensils made of gold or silver (i.e., this position should not lead to impermissible uses).
3. That is does not become a means/legal-trick (hila) to loan with riba, by buying crafted gold on a deferred basis with the aim of selling it on a spot basis for a lower price to gain liquidity.
4. That crafted gold is not sold with the aim of it being melted because by not considering its crafted form it returns to being considered as gold-ore and the rules of riba apply to it. This is because its state of being crafted removes it from being considered a ribawi commodity [according to this opinion], and if it is no longer considered as being crafted it returns it to its original ruling. For example, people may sell their used gold to a gold-smith for cash and the gold-smith buys it from them without considering its particular form - as though he buys gold-ore. Here it is necessary to pay the price so that both values are delivered spot.

The default position regarding these conditions is to return to the original ruling of gold being subject to the rules of riba. Not subjecting gold to the rules of riba due to being crafted is a specific case. If this state is not achieved, gold returns to its original ruling.

It is obvious from the above conditions that the matter is tied to the intention of the contracting parties. It is not possible to generalize it to cover all conditions and people. Rather, the ruling of this issue differs from one circumstance to another depending on the intention and purpose of contracting parties, or one of them. Hence, the ruling is diyani (a matter of halal and haram between man and God).

This position achieves the benefit of allowing crafted gold to be bought on instalments if a person needs to, such as for a wedding dowry. Besides, it

drops from consideration the need to sell old gold for cash before buying new gold when wanting to exchange old gold for new gold. The formality of selling old gold for cash and then buying new gold for cash does not achieve a known Shariah objective, nor is it of any benefit.

However, this position cannot be challenged by the Hadīth where the Prophet, peace be upon him, instructed one of the Companions, who exchanged low quality dates with high quality dates, to sell the low quality for dirhams first and then to buy the good quality with those dirhams: “sell al-jam’a (low quality dates) with dirhams then buy janib (high quality dates) with dirhams”. Making analogy to this case [both gold and dates are ribawi commodities, which subjects them to the same Riba rules] is incorrect, because selling low quality dates for money and then using the same money to buy the good quality dates attains an actual Shariah objective, unlike selling old gold for money and then using the money to buy new gold. This objective is to refer to the market to know the value of the low and good quality dates. Barter could lead to ghabn (disadvantage) for one of the parties, which is overcome by referring to the market and conducting two separate contracts: sale followed by purchase. Overcoming ghabn is required especially when selling ribawi money, which is basically essential money that people should have access to without incurring ghabn or gharar. In barter exchange, there is no reference to the market price, as it is based on the extent of the need of the owner of one item for the other item, and the other party could profiteer from this need. Selling old gold for cash and then buying new gold with cash from the first sale does not achieve any apparent Shariah objective; since the price of the gold metal is the same, used or unused, and both are exchanged at the gold market rate known to both parties.

Conclusion

The above discussions show clearly that some contemporary Fiqh opinions related to the issue of postponement of the two counter values should be revisited. They should consider the relevant Shariah objectives since failure to do so may yield inconsistent stands of Fiqh issues and sometimes unnecessary stringency or disregarding of Shariah rules.

- The paper also reaches the following important primary results:

- The customary practices of people may play an important role in identifying the Shariah objectives behind its financial rules, and they may also reshape the Shariah rules based on the identified objectives.
- The Shariah texts forbidding the deferment of counter values in financial transactions aim to avoid uncertainty in contracts and to cut the way to circumvent Riba or manipulate the price of commodities through excessive speculation.
- The identified Shariah objectives of the provisions relating to the postponement of counter values suggest that it is possible to tolerate fixing the exchange rate in future money exchanges for hedging purposes, excusing delay in spot currency contracts and excluding crafted gold or silver from the rules applicable to ribawi commodities. However, this is circumscribed with conditions that eliminate the damage associated with postponing counter values in those financial transactions.

Finally, the paper urges the Shariah scholars to collaborate with the Muslim economists and financial experts to restudy Islamic financial law on Maqasidi basis, so that the wisdom of the Shariah in this particular branch of law becomes clear and evident. This should help standardize Islamic financial law, achieve better commitment to the law and reap the benefits this law came to realize for people.

Translation of Arabic References:

1. Abozaid, Abdulazeem (2004), "Fiqh al-Ribā", Beirut: al-Risāla Publishing House.
2. al-Bahūtī, M. Y. (n.d), "Sharḥ Muntaha al-Irādāt", Beirut: Dār al-Fikr.
3. al-Bayhaqī, A. H. (1414), "Sunan al-Bayhaqī", Makka al-Mukarrama: Maktabat Dār al-Bāz.
4. al-Bujairimī, S. M. (1987), "Ḥāshiyat al-Bujairimi", Beirut: Dār al-Ma'rifa.
5. al-Bukhārī, M. I. (n.d), "Ṣaḥiḥ Al-Bukhārī", Damascus: Dār al-'Ulūm.
6. al-Dāraqutnī, A.U. (1996), "Sunan al-Dāraqutnī", Beirut: Dār al-Kutub al-'ilmiyya.
7. al-Dasūqī, M. A. (n.d), "Ḥāshiyat Dasūqī", Cairo: Dār Iḥya al-Kutub al-'Arabia.
8. al-Ḥākim, M. A. (1986), "Al-Mustadrak 'ala Saḥiḥayn", Beirut: Dār al Ma'rifa.
9. al-Shawkanī, M. A. (n.d), "Nayl al-Awtār", Beirut: Dār al-Fikr
10. Ibn 'Ābidīn, M. A. (1998), "Radd al Muḥtār 'ala al Dur al Mukhtār (Ḥāshiya Ibn 'Ābidīn)", Beirut, Lebanon: Dār Iḥya al-Turath al-'Arabī.
11. Ibn al-Qayyim, Sh. M. (1973), "I'lām al-Muwaqqi'īn 'an Rabb al'Ālamīn", Beirut: Dār al-jīl.
12. Ibn Ḥazm, A. A. (n.d), "Al-Muḥalla bi al-āthār", Beirut: Dar al-Āfāq Al-Jadīdah.
13. Ibn Ḥibbān, M. B. (n.d), "Al-Ṣaḥiḥ", Beirut: Al-Risāla, 1993.
14. Ibn Humam (n.d), "Fatḥ Al-Qadīr", Beirut: Dār Iḥya al-Turath al-'Arabī.
15. Ibn Majah, M. Y. (n.d), "Al-Sunan", Beirut: Dār al-Fikr.
16. Ibn Qudāmah, K. A., (n.d), "Al-Mughnī wal Sharḥ al-Kabīr", Beirut: Dar al-Fikr.
17. Ibn Rushd, M. A. (2014), "Bidāyat al-Mujtahid wa Nihayat al-Muqtasid", Beirut: Dar al-Fikr.
18. Ibn Taymiya, A. A. (n.d), "Al-Qawā'id al-Nurāniyah", Riyādh: Dār Ibn Jawzī
19. Fiqh Academy (n.d), "Resolutions of the Fiqh Academy affiliated to Organizations of Islamic Countries".
20. AAOIFI (2015), Shariah Standards, Auditing and Accounting Organization for Islamic Financial Institutions, Riyādh: Dār Al-Maimān.