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Form over Substance Approach in Islamic Finance due to Darurah Concept

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Abstract

The Islamic finance system is still in its infancy stage. It has a history of around half a century in a different part of the world. Despite remarkable performance in the last two decades this new system is able to capture only 1% of the global financial market approximately. Whereas the counterpart that is the conventional system has a history of 400 years, which necessitates the application of Darurah concept in several scenarios and permits focusing on the form of the contract not on its actual substance. This on of the most important criticism made on this system. This article is intended to analyse the condition of Darurah concept for preferring the form over substance approach through application of legal stratagems in Islamic banking. This research adopts content analysis approach to achieve the above objective. The concept and principles of darurah was established as the foundation and then the scenario of Islamic finance is analysed whether this scenario qualifies for darurah principal or not. For this purpose, responses from seven Shariah advisors of Islamic financial institutions were sought and presented through thematic analysis in such a way that leads to the desired results. The researcher found that as per islamic laws it allows in some cases to focus on the form of the contract only, but adopting this approach normatively can be a wrong way in the field of islamic finance.

Keywords: Islamic Finance, Darurah concept, Shariah, principals, Banking

Introduction

The Islamic finance system is still in its infancy stage. It has a history of around half a century in a different part of the world. Despite remarkable performance in the last two decades this new system is able to capture only 1% of the global financial market approximately. Whereas the counterpart that is the conventional system has a history of 400 years¹. The capitalist system has entered its root in the Muslim and non-Muslim societies. There is lot to be achieved and faced by the Islamic finance system. There are several kinds of criticism on prevailing Islamic finance. One of which is the form over substance approach in Islamic finance resolutions and products. It means that the legal form of the contract is intended to fulfill, and the inherent substance of that particular transaction is compromised². One of the arguments given against this criticism is that the state where the Islamic finance system is competing is a situation which falls under the darurah concept.

In Islamic jurisprudence whenever there is a high degree of inconvenience many impermissible actions are allowed subject to the conditions³. The evidence of this principle can be seen in the verses of Quran as well as in hadees. But the problem is darurah concept is subjective in nature and it is not a black and white decision that can be made by a Shariah scholar. That is why many opinions are found contradicting to each other while deciding that a particular situation is a dire need or not.

Research objective

This article is intended to analyse the condition of Darurah concept for preferring the form over substance approach through application of legal stratagems in Islamic banking.

¹ Richards, Richard D. *The Early History of Banking in England*. Routledge, 2012, <https://doi.org/10.4324/9780203116067>. Routledge Library Editions: Banking & Finance.

² Harasani, H. 'Analysing the Islamic Prohibition on " Ribā ": A Prohibition on Substance or Form?' *Prohibition on Substance or Form? Arab Law Quarterly*, vol. 27, 2013, pp. 289–296 / Maurer, B. 'Form versus Substance: AAOIFI Projects and Islamic Fundamentals in the Case of Sukuk'. *Journal of Islamic Accounting and Business Research*, 2010 / Shamsudin, Mohidin Yahya, et al. 'Form and Substance in Islamic Finance: Analysis of Deferred Payment Sales'. *UMRAN - International Journal of Islamic and Civilizational Studies (EISSN 2289-8204)*, vol. 1, no. 1, Penerbit UTM Press, Nov. 2014, <https://doi.org/10.11113/umran2014.1n1.13>.

³ Aziz, Sumayyah Abdul, and Ridzwan Ahmad. 'Konsep Al-Darurah Dalam Akad Tawarruq Menurut Maqasid Al-Kulliyah: Satu Kajian Awal (Al-Darurah Concept In Tawarruq Akad According to Maqasid Al-Kulliyah: An Initial Study)'. *UMRAN - International Journal of Islamic and Civilizational Studies (EISSN 2289-8204)*, vol. 5, no. 2, Penerbit UTM Press, July 2018, <https://doi.org/10.11113/umran>, 2018.5n2.171.

Methodology

This research adopts content analysis approach to achieve the above objective. The concept and principles of darurah will be established as the foundation and then the scenario of Islamic finance will be analysed whether this scenario qualifies for darurah principal or not. For this purpose, responses from seven Shariah advisors of Islamic financial institutions were sought and presented in such a way that leads to the desired results.

Concept of Darurah

Shariah offers a Darurah principle, which is evidence of the flexibility of divine doctrine. This principle is universally agreed upon by all schools of thought. It means that a mukallaf (a person deemed by Shariah as responsible) is at times in a state that does not let the implementation of obligations of the shariah be performed⁴. It constitutes a legal maxim of fiqh: "Necessities permit the forbidden". It means that the forbidden can be un-sinfully committed when necessary⁵. The rule is derived from the verse of the Holy Quran⁶: "He has not placed upon you in the religion any difficulty"⁷ and one more verse states almost the same: "And Allah wants to lighten for you [your difficulties]."⁸ Al-Qaradawi⁹ (1978) stated that this principle may provide a good reason to engage in what is primarily deemed unlawful in Shari'a (Islamic law), considered as an exclusion.

Types of Darurah

Darurah and Hajah are two Arabic terms with different meanings:

- Darurah (ضرورة): This term refers to a necessity or an urgent need. In Islamic jurisprudence, darurah refers to situations in which a person is forced to do something that would normally be considered prohibited or haram. For example, if a person is stranded in a desert and has no food or water, they may consume non-halal food or drink in order to survive.
- Hajah (حاجة): This term refers to a need or a requirement that is not urgent or necessary. In Islamic jurisprudence, hajah refers to situations in which a person has a need or requirement that is not essential to their survival or

⁴ Aziz, Sumayyah Abdul, and Ridzwan Ahmad. 'Konsep Al-Darurah Dalam Akad Tawarruq Menurut Maqasid Al-Kulliyah: Satu Kajian Awal (Al-Darurah Concept In Tawarruq Akad According to Maqasid Al-Kulliyah: An Initial Study)'. *UMRAN - International Journal of Islamic and Civilizational Studies (EISSN 2289-8204)*, vol. 5, no. 2, Penerbit UTM Press, July 2018, <https://doi.org/10.11113/umran2018.5n2.171>.

⁵ Al Majalla Al Ahkam Al Adaliyyah, 2001; Ibn Nujaim, 1999).

⁶ Al Quran (22:78)

⁷ Al Quran (22:78)

⁸ Al Quran (4: 28)

⁹ Al-Qaradawi, Y. *Al-Halal Wal Haram Fil Islam. The Holy*. Koran Publishing House, 1978

well-being. For example, if a person wants to perform an optional prayer or fast, they may do so if they have the necessary resources and ability¹⁰.

In summary, the main difference between darurah and hajah is that darurah refers to an urgent necessity or need, while hajah refers to a non-urgent need or requirement. In Islamic jurisprudence, these terms are used to determine whether a particular action is permissible or prohibited under certain circumstances¹¹. Hajah refers to a human need that is not indispensable for the existence of human beings but is vital for their well-being. Hajah is what a human can endure without bearing hardship and difficulties. For example, having a car for transport is not a dire need in Shariah terms (Darurah), but it may be a simple need (hajah) in some places¹².

Principles regarding Darurah

In Islamic jurisprudence, the principle of Darurah (necessity) is an important concept that is taken into consideration in cases where there is an urgent need or necessity. The principle of Darurah is based on the idea that under certain circumstances, certain actions that are otherwise prohibited in Islam may become permissible. As per the Islamic law the dire need does make an impermissible action permissible, but that is only for a specific person and limited time, and this does not require nullifying the impermissibility of that action¹³.

For instance, Shariah allows the one dying due to thirst to drink wine if no other option is available, but that does not invalidate the impermissibility of wine¹⁴. So, the need does legitimize some prohibitions, but that is for a particular scenario. The fundamental act must be necessary for the life of the human, i.e., it must be a requirement, for the Darurah concept to be functional. Some fiqh schools have characteristically paralleled what is called Hajah (needed) in the Shariah to the above concept, but only when it is public.¹⁵ The following are some of the key principles regarding Darurah in Islam:

¹⁰ Aziz, Sumayyah Abdul, and Ridzwan Ahmad. 'Konsep Al-Darurah Dalam Akad Tawarruq Menurut Maqasid Al-Kulliyah: Satu Kajian Awal (Al-Darurah Concept In Tawarruq Akad According to Maqasid Al-Kulliyah: An Initial Study)'. *UMRAN - International Journal of Islamic and Civilizational Studies (EISSN 2289-8204)*, vol. 5, no. 2, Penerbit UTM Press, July 2018, <https://doi.org/10.11113/umran2018.5n2.171>.

¹¹ Makki, A., et al. 'Darurah Typology in Contemporary Health Sciences'. *Journal of Social Work and Science Education*, vol. 4, no. 1, 2023, pp. 153–166.

¹² Al-Shatbi, I. bin M. *Al-Muafaqat*. Maktabah Tauqifiyyah (1964).

¹³ Wahbah al-Zuhaili; Jamal 'Atiah, 2000

Wahbah al-Zuhaili; Jamal 'Atiah. *Tajdeed ul Islami*. Dar Al-Fikr (2000).

¹⁴ Abuzaid, A. 'Deployment of Tools of Ijtihad in Islamic Finance'. *Law Magazine of Ajan University*, vol. 1, 2015.

¹⁵ Abozaid, A. *Role of Fiqh in Islamic Finance*. Munich Personal RePEc Archive Role. 2010.

- Necessity makes the prohibited permissible: When a person is in a situation where their survival or well-being is at stake, certain prohibited actions become permissible. For example, if a person is stranded in the desert and has no food or water, they may consume non-halal food or drink to survive.¹⁶ The principle of Darurah is to be used in extreme cases only: The principle of Darurah is not to be used lightly, and is only to be invoked in extreme cases where there is no other alternative.¹⁷
- The degree of necessity determines the extent of permissibility: The extent to which a prohibited action may become permissible depends on the degree of necessity.¹⁸ For example, if a person is faced with starvation, they may only consume enough non-halal food to sustain themselves, and not more.
- The principle of Darurah does not apply to acts of worship: The principle of Darurah does not apply to acts of worship, which are considered obligatory in Islam. For example, even in a situation of extreme necessity, a person is still required to perform the five daily prayers.¹⁹

Overall, the principle of Darurah is an important concept in Islamic jurisprudence that provides guidelines for how to act in extreme situations where the preservation of life and well-being are at stake. However, it is important to note that this principle is not to be used as a justification for ignoring Islamic teachings in non-urgent situations.²⁰

It means that a mukallaf (a person deemed by Shariah as responsible) is at times in a state that does not let the implementation of obligations of the shariah be performed.²¹ Participant 5 said that in some scenarios a person has no way out

¹⁶ Ibn Nujaim, 1999

Ibn Nujaim, Z. *Al-Ashbah wa al-Nazaer*. Dar-ul-Kutub Ilmiyyah (1999).

¹⁷ Abidin, I. *Radd Al-Mukhtar Ala al-Durr al-Mukhtar*. 1998.

¹⁸ Faisal, S. F. M., et al. 'Aplikasi Kaedah Fiqh Al-Darurah Tuqaddar Biqadariha Dalam Agihan Zakat Untuk Mangsa Banjir: Application of Al-Darurah Tuqaddar Biqadariha from Islamic Legal Maxims in Zakat Distribution for Flood Victims'. *Journal of Fatwa Management and Research*, vol. 8, no. 1, 2016, pp. 79–90.

¹⁹ Arabi, I. *Ahkamul Qur'an*. Darul Kutub Tauqifiyyah, 1967.

²⁰ Isa, Noor Munirah. 'Darurah (Necessity) and Its Application in Islamic Ethical Assessment of Medical Applications: A Review on Malaysian Fatwa'. *Science and Engineering Ethics*, vol. 22, no. 5, Springer Science and Business Media LLC, Oct. 2016, pp. 1319–1332, <https://doi.org/10.1007/s11948-015-9698-1>.

²¹ Aziz, Sumayyah Abdul, and Ridzwan Ahmad. 'Konsep Al-Darurah Dalam Akad Tawarruq Menurut Maqasid Al-Kulliyah: Satu Kajian Awal (Al-Darurah Concept In Tawarruq Akad According to Maqasid Al-Kulliyah: An Initial Study)'. *UMRAN - International Journal of*

other than escaping the law. It constitutes a legal maxim of fiqh: “Necessities permit the forbidden”. It means that the forbidden can be un-sinfully committed when necessary.²²

Ijtihad-based Flexibility in Shariah doctrine through Darurah concept

Weiss²³ (1978) used the word ‘interpretation’ for ijtihād. In legal usage, he applied ijtihād to the jurists to devise a rule of law based on the sources (dalil). He discussed the theory of ijtihād in detail. He divided the Sharī‘ah into two parts: one is divine unchangeable law (Quran and Sunnah) and another flexible part through the institution of ijtihād. The ijtihād theory presumes that the rule-making process is a process of elucidating what is present but not yet self-evident. Bello²⁴ (2013) also advanced the theory by appreciating the role of ijtihād in the flexibility of Sharī‘ah and stated that the plurality of legal opinions should, therefore, be viewed as an effective sign of the versatility of the Shariah rather than as a dogmatic seal on its applicability.

Shariah offers a Darurah principle, which in fact is evidence of the flexibility of divine doctrine. The jurists severely condemned hiyal, themselves allowed the concessions based on need and public benefit.²⁵ The concept of Darurah (necessity) in Shariah provides flexibility in rulings in situations where there is a pressing need or necessity. This flexibility is based on the recognition that Islamic law is not intended to be a burden on people, but rather a means of facilitating their lives and promoting their well-being.²⁶ The principle of Darurah allows for certain acts that would normally be prohibited under Shariah to become permissible in cases of necessity. For example, the consumption of non-halal food or drink may be permissible in situations where there is no other means of sustenance available.²⁷

This flexibility is not unlimited, however, and is subject to certain conditions. The principle of Darurah is only applicable in cases of genuine

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²² *Al Majalla Al Ahkam Al Adaliyyah*, (2001) (testimony of Ottoman Courts). / Ibn Nujaim, Z. *Al-Ashbah wa al-Nazaer*. Dar-ul-Kutub Ilmiyyah (1999).

²³ Weiss, B. ‘Interpretation InIslamic Law: The Theory of Ijtihād’. *The American Journal of Comparative Law*, vol. 26, no. 2, 1978, pp. 199–212.

²⁴ Bello, A. H. Dynamic Approach to the Shari‘ah : A Case Study of " Ijtihād " and its Application in Contemporary Society. *Arab Law Quarterly* (2013)., 27(3), 259–270. <https://doi.org/https://www.jstor.org/stable/43294641>

²⁵ Ismail, M. *Legal Stratagems (Hiyal) and Usury in Islamic Commercial Law*. Dec. 2010, <http://etheses.bham.ac.uk/id/eprint/1325/>.

²⁶ Al-Shatbi, I. bin M. *Al-Muafaqat*. Maktabah Tauqifiyyah (1964).

²⁷ Kasani, A.-B. M. *Badae’ us Sanae’* (1 (ed.)). Darul Kutub Ilmiyyah (1986).

necessity, where there is no other means of avoiding harm or protecting oneself. The degree of necessity also determines the extent of permissibility, and the principle of Darurah does not apply to acts of worship, which are considered obligatory in Islam. The flexibility provided by the principle of Darurah is important in helping people to navigate difficult situations while remaining within the bounds of Islamic law. It allows for a practical and compassionate approach to be taken to individual circumstances, while still maintaining the integrity of Shariah principles.²⁸

Overlapping of Haraj and Darurah concept

In Islamic jurisprudence, Darurah (necessity) and Haraj are related concepts that deal with situations where there is a pressing need or constraint that requires a departure from normal rules or principles.²⁹

Darurah refers to situations where there is a pressing need or necessity that requires a departure from normal rules or principles to prevent harm or danger. In such situations, Islamic law permits the use of alternative means or methods that may be otherwise prohibited or discouraged under normal circumstances.³⁰ Haraj, on the other hand, refers to situations where there is a significant hardship or constraint that makes it difficult to fulfill religious obligations or comply with Islamic law. In such situations, Islamic law provides for some flexibility and permits alternative means or methods that may make it easier to fulfill obligations.³¹

Both Darurah and Haraj recognize the importance of balancing the rigors of Islamic law with the practical realities of everyday life. They provide flexibility and allow individuals to adapt to their circumstances without compromising their faith or principles.³² However, it is important to note that the use of Darurah and Haraj should be limited to cases of genuine necessity or hardship, and should not

²⁸ Abdul Aziz, Sumayyah, and Ridzwan Ahmad. '[A Reassessment of The Al-Darurah Concept in Current Islamic Finance] Satu Penilaian Semula Konsep al-Darurah Dalam Kewangan Islam Semasa'. *Jurnal Islam Dan Masyarakat Kontemporari*, vol. 13, Universiti Sultan Zainal Abidin, July 2016, pp. 106–120, <https://doi.org/10.37231/jimk.2016.13.2.182>.

²⁹ Reinhart, A. Kevin. 'Islamic Law as Islamic Ethics'. *The Journal of Religious Ethics*, vol. 11, no. 2, [Journal of Religious Ethics, Inc, Wiley, Blackwell Publishing Ltd], 1983, pp. 186–203, <http://www.jstor.org/stable/40017705>.

³⁰ Kasani, A.-B. M. *Badae' us Sanae'* (1 (ed.)). Darul Kutub Ilmiyyah (1986).

³¹ Al-Hamawi, A. bin M. *Al ashbah wa Nazaer*. Darul Kutub Ilmiyyah (1999).

³² Fisol, Wan Nazjmi Mohamed, et al. 'The Engineering of Islamic Legal Opinion (IJTIHAD) on the Maqasid Al-Shari'ah Development in the Assessment of Islamic Financial Products'. *International Journal of Academic Research in Business and Social Sciences*, vol. 7, no. 4, Human Resources Management Academic Research Society (HRMARS), May 2017, <https://doi.org/10.6007/ijarbss/v7-i4/2904>.

be abused or used in situations where there is no real need or constraint. Additionally, the extent of permissibility under these concepts depends on the degree of necessity or hardship and should not be taken as a license to act without regard for Islamic principles and values.

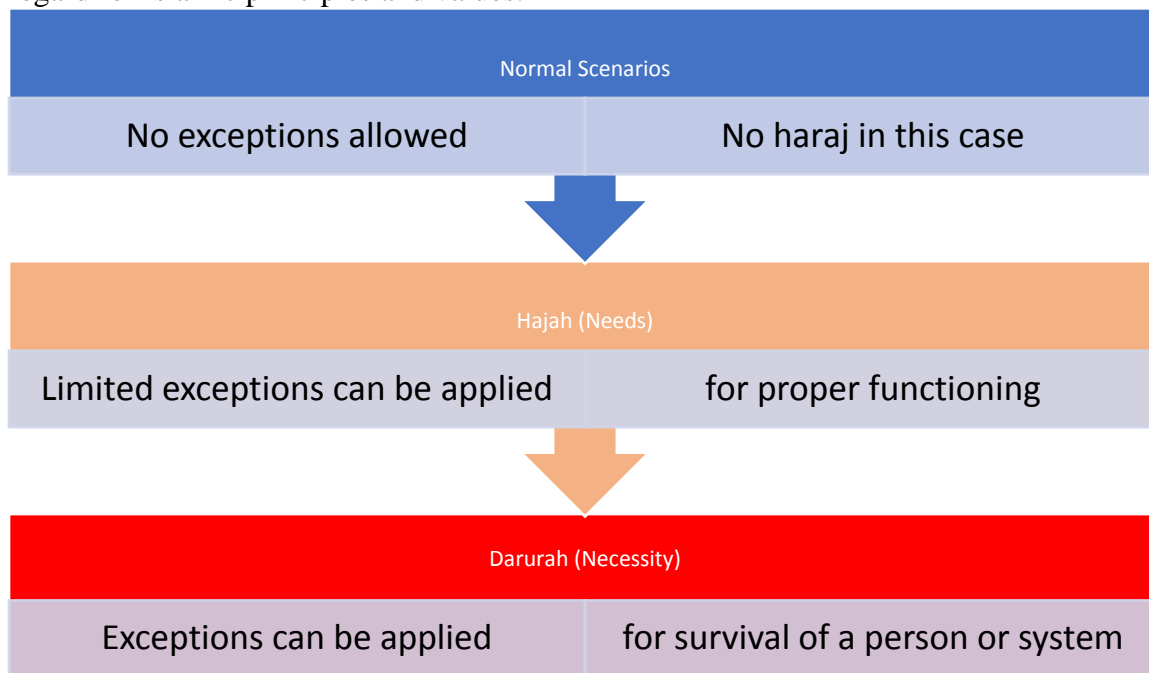


Figure 1: Cases as per severity increases

Form over substance approach in Islamic banking

Form over substance is a term used to describe a situation where the legal or formal requirements of a transaction are met, but the actual economic or commercial substance of the transaction is not achieved. In the context of Islamic banking, form over substance can occur when the structure of a financial transaction complies with the requirements of Islamic law (Shariah), but the transaction lacks economic substance or has an outcome that is not consistent with the underlying commercial reality. Here are some examples of form over substance in Islamic banking:

- Murabaha transactions: Murabaha is a common mode of Islamic finance, where a bank buys a commodity and then sells it to the customer at a higher price. This transaction is structured in compliance with Shariah, but sometimes the transaction lacks economic substance. For instance, a bank may purchase a commodity at a price that is not reflective of the market value and then sell it to the customer at a higher price, resulting in an inflated profit margin for the bank.

- **Sukuk:** Sukuk are Islamic financial instruments that are similar to bonds. They are structured in compliance with Shariah, but sometimes the underlying assets that support the sukuk lack economic substance. For example, a sukuk may be issued to finance a project, but the underlying assets that support the sukuk may not have a clear link to the project, resulting in a lack of transparency and misalignment between the financial structure and the underlying economic reality.
- **Tawarruq:** Tawarruq is a mode of Islamic finance where a customer buys a commodity on credit from a bank, then sells the commodity to a third party for cash, which is then used to pay off the credit. This structure complies with Shariah, but sometimes the commodity purchased by the customer lacks economic substance, or the sale to the third party is pre-arranged and not reflective of the actual market value of the commodity.
- **Waqf:** Waqf is an Islamic institution for charitable endowment. It is structured in compliance with Shariah, but sometimes the waqf assets lack economic substance or are not managed effectively. For example, waqf assets may be tied up in illiquid investments or poorly managed, resulting in a lack of benefits for the intended beneficiaries.

In conclusion, while Islamic banking aims to provide ethical and Shariah-compliant financial services, it is important to ensure that the transactions are not structured merely to meet the legal requirements, but also reflect the commercial reality and deliver economic substance.

Analysis of Shariah experts' views on application of Darurah in Islamic banking

The concept of need is subjective. Participant 5 thought that it is the responsibility of scholars of that time to decide that whether the person in the actual situation is in dire need of relaxation or not. Participant 7 thought that need should be considered when launching a new product that shall we launch this product as a normal product or a dire need solution. For example, a Shariah board member mentioned that the Shariah board does not provide the alternate for preference shares, because it is not a dire need of society.

Participant 6 defined dire need as need of many people in society is considered as a dire need due to the broad scope, here hajah referred to as darurah. At times a trend prevails in the market after being invented by some people, due to this vogue it becomes the need of society as a whole. Although it may not be needed by every person in society, the majority of the people will be following the same scenario, then it becomes very difficult to shut down the practice. Participant 3 introduced the need for a system based on which any

universal rule is launched, not the needs of individuals. Participant 2 emphasized that is a public need that allows the relaxation not the need of the Shariah scholar. When a layman asks a Shariah problem, he should advise him of all the permissible options; all the people of a society are not at a uniform stage of Taqva.

Some Sharia scholars, especially those who were against prevailing Islamic finance, like participants 1 and 4, argued a 180-degree opinion. They believed that in cases of an individual, we advise a stratagem, not for establishing a system. It is because an individual case is exceptional, but launching a system based on Hiyal will evade the rules of Shariah.

Participant 6 deliberated the topic haraj (inconvenience) along with Darurah. As the Quran states, there is no haraj in our Shariah. Therefore, if the person is falling in haraj (inconvenience) and wants a way out it will be firar ane riba (escaping interest), not firar ila riba (leading towards riba). Participant 10 debated on that need changes from time to time, like the Fatwa of Mufti Muhammad Shafi, that you can open a current account in the conventional banks to fulfill your need, but after the revolution of Islamic banks it should be not permissible to open accounts (current or saving) in the conventional banks; the need is fulfilled through Islamic banks and our money in conventional banks is facilitating interest-based banking.



Figure 2: Framework for allowing flexibility due to Darurah in Islamic banking.

Examples of need-based permission in Islamic banking:

- Bank Negara Malaysia in a policy paper describes an example of hardship in Takaful industry and how relaxations was applied. It says:
“As part of a general takaful operator’s risk management strategy, it may decide to share/cede out certain specialised risks such as aviation and oil and gas covers to another takaful or retakaful operator in managing its risk exposure. However, in cases where there is insufficient retakaful capacity and expertise to fully absorb the particular risk and/or it creates detrimental effects to the takaful funds, the takaful operator is allowed to cede out the risks to an insurer or a reinsurer on the basis of difficulty/hardship. This would ensure preservation of the takaful fund managed by the general takaful operator”.

- **T+2 is permissible for currency exchange (bai' al-sarf):**

Contracting parties must complete their transaction on a spot basis (T+0) in accordance with the Shariah standard for foreign currency exchange transactions (bai' al-sarf). However, due to challenges and operational limitations, the conclusion of a contract or settlement could not be done on a spot basis in the context of the current financial system. Due to the fact that it has been accepted and acknowledged as a typical commercial practise, the SAC(Shariah Advisory Committee) has permitted the settlement to be completed two (2) days (T+2) following the transaction date.
- **Using a standard nostro account:**

By collaborating on pertinent services with its conventional equivalent, an Islamic window operation runs its Islamic banking company. The Islamic window uses a standard nostro account when it has to conduct international commerce or foreign exchange operations. This is as a result of (i) the absence of Shariah-compliant Nostro accounts in other jurisdictions, (ii) the group risk management policy mandate, and (iii) maintaining transactional efficiency. Nostro account balances typically have negative or negligible returns. As a result, an Islamic window is permitted to use the nostro account as needed to resolve conflicts in its transactions with foreign counterparts.
- **Provision of insurance for Islamic lending:**

An IFI has designated a client as its agent (wakeel) to source for a takaful coverage to reduce oil and gas risk in a wakalah financing agreement. The client has performed his obligation as an agent by making all practical efforts to find a takaful coverage. However, the client has trouble obtaining takaful protection for the project due to the enormous coverage amount required to offset the risk and limited accessibility due to location restrictions, i.e., such oil and gas enterprises located outside Malaysia. As a result, the IFI acted as the project's principle (muwakkil) and permitted the customer to get insurance coverage.
- **Liquidity risk management:**

A fully operational, licenced Islamic bank has received significant capital support to grow its Islamic banking division, which has improved the division's capital and asset positions. However, its banking group requires financial support when there is a financial crisis or other stressful occurrence. As a member of the group, the licensed Islamic bank may be in a good position to offer financial support, such as by transferring extra high-quality liquid assets (HQLA) or funds to the organisation. In the event that the stress scenario worsens and becomes more severe to the detriment of the group, the

support offered is crucial to preventing the danger of contagion to the licensed Islamic bank.

- **Deferred products**

According to the maqasid shari'ah framework, the concept of darurah in deferred products like bank loans has not yet been fully assimilated. This issue is crucial because it will show if the deferred contract used in Islamic banking products that uses the darurah principle is a substitute that must be used to replace something unlawful in the form of daruriyyah (necessity of survival) or develops into a law of the nature of hajiyyah (necessity). Therefore, this alternative must adhere to the rules established by the Sharia and not go beyond the limits specified. Tawaruq Munazam is a planned tawaruq since Islamic banking is involved in choosing the sales strategy and setting up everything, even the arrangements for giving consumers cash.

Conclusion and Authors Opinion

The author opines that it cannot be denied that dire need is a subjective concept, and Sharia has considered the Darurah principle to relax district strict rulings. It is one of the prominent features of the Islamic law that it is easy to follow and near to realism; but if the environment or the system is unnatural and far away from reality, then it will be challenging for the people living in that system. This is what had happened in the banking industry. As agreed above, it is based on interest and no risk-sharing. It is unnatural and away from pragmatic economic rules which is the real Islamic economic paradigm.

However, Shariah scholars took the task to bridge this gap and find some ad hoc practical Shariah-compliant solutions for the banking industry and investment opportunities. This is the need of the era, and we can state that the whole Muslim ummah is in dire need of a practical Shariah-compliant financial system, which eventually permits the Shariah scholars to apply legal stratagems to fulfill this collective need. The same is the case in all Muslim economies including Pakistan regardless of Islamic culture and movements for 80 years. Thus, the application of legal stratagems in the Islamic banking of Pakistan is justified. Nevertheless, they have to follow the Shariah guidelines for this critical relaxing tool in order to fulfill the requirements of Ijtihad.

The logical reason for this behavior is that the Islamic banking revolution did not initiate a new system of banking, instead, it used the already established bases of conventional banking to introduce its products in the market.³³ Conventional

³³ Majeed, Muhammad Tariq, and Abida Zainab. 'How Islamic Is Islamic Banking in Pakistan?' *International Journal of Islamic and Middle Eastern Finance and Management*, vol. 10, no. 4, Emerald, Oct. 2017, pp. 470–483, <https://doi.org/10.1108/imefm-03-2017-0083>.

interest-based banking has been an integral part of society and the financing needs of people have been fulfilled by this system for four centuries.³⁴ So, it has been a corrective revolution rather than a demolish and re-built approach. The revolutionists have been more realistic than idealistic.

An IFI must develop proposed solutions backed by thorough analysis that includes options for addressing difficult circumstances, facts and justifications, justifications under Shariah, impact assessment and assumption, unintended consequences, applicable duration, mitigation measures, and exit strategies.

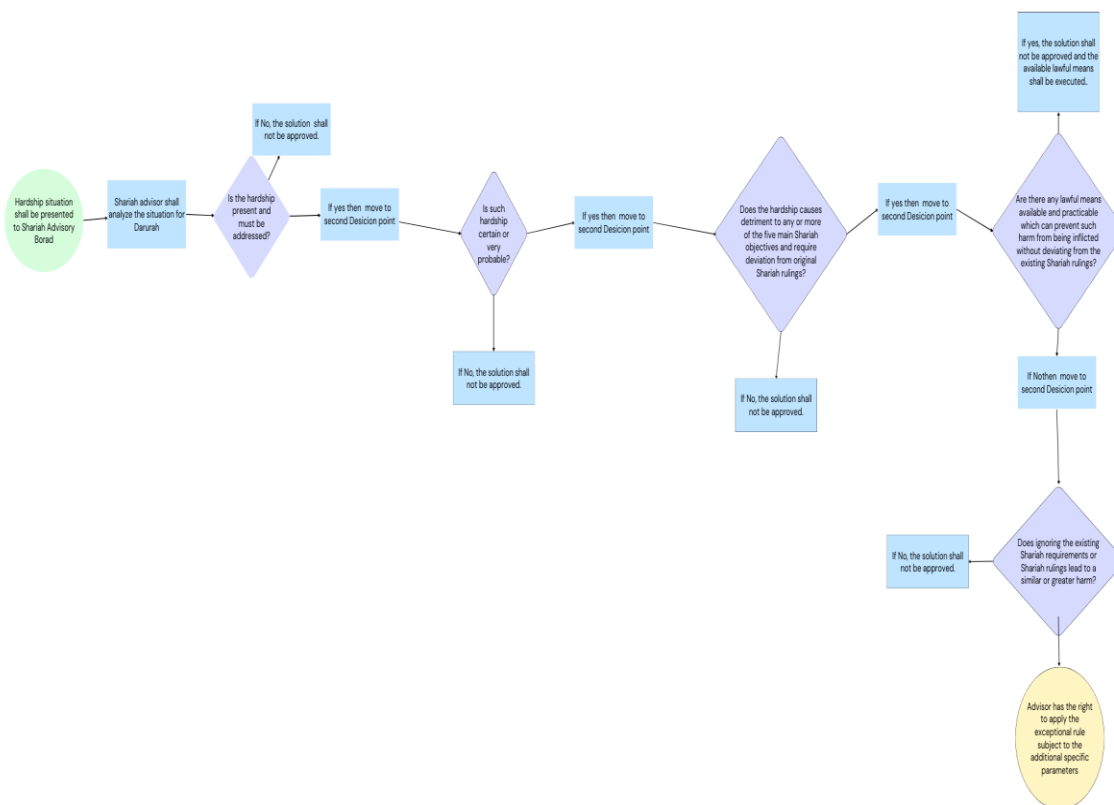


Figure 3: Flowchart for Shariah Board to allow form over substance in case of Darurah

³⁴ Greuning, H., and Z. Iqbal. *Risk Analysis for Islamic Banks*. World Bank. The World Bank, 2008.