The *Fatāwá* in Islamic Banking and Financial Industry: Explaining the Use of Ḍarūrah (Dire Necessity) and Ḥājah (Need) Maxims

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**Abstract**

Sharīʿah objectives in relation to people are to secure interest of all and avert harm/hardship from them. These objectives have been taken care of in different Sharīʿah rulings. Regarding economics and finance, the principle of prevention of harm has been especially observed in the sphere of various Islamic contracts and business transactions. This study focuses on the use of maxims relating to ḍarūrah (dire necessity) and ḥājah (need), which redress the harm from people. Based on these maxims, Sharīʿah scholars / committees have often been issuing the license of legality to several Islamic banking and financial transactions and products. The objective of the paper is to explain whether ḥājah and ḍarūrah are amalgamated concepts, and to find out the extent to which the maxims of ḥājah and ḍarūrah are being exploited in Islamic banking transactions and products. In so doing, the paper, through a literature review, differentiates ḥājah from ḍarūrah. Analyzing the transactions and products as being used in Islamic finance industry, paper asserts that ḥājah, rather than ḍarūrah, is being entertained, and exploited to some extent. The paper also puts forward some suggestions for the stakeholders of Islamic banking and financial industry.

**Keywords:** Sharīʿah legitimacy, ḍarūrah, ḥājah, Islamic banking, Islamic finance products

**KAUJIE Classification:** A6, B4, C2, C3, L2, K0,

**JEL Classification:** I3, L14, Z12

1. **Introduction**

Sharīʿah is a vast encyclopedia of juristic rulings along with the mechanism and maxims relating to relaxation (*rukḥṣah*) and permissibility (*ibāḥah*) for odd situations. It was not a cakewalk for contemporary Islamic banking to reach its current position. It had to go through many difficult stages. New world of Islamic finance emerged facing different hurdles regarding its products, operations, contracts, and transactions. Sharīʿah scholars faced many juristic challenges to guide the institutions how to meet their needs in the light of Sharīʿah. Keeping the newly engineered financial products Sharīʿah compliant, avoiding or removing the complexities and hardships is a difficult task.

Islam is the religion of relief (*yuṣr*) that facilitates human being in different fields of life under the Divine guidance (Al-Shatibi, 2: 210). Benefits, interests, and needs of human being are the main part of Sharīʿah objectives. The classical jurists analyzed the Sharīʿah objectives parallel to the hardships which could be faced in obtaining these objectives. They

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ranked Sharīʿah objectives according to the severity of hardships and named them ḍarūrah (unavoidable necessity) or ḥājah (less essential desires) accordingly. They also developed different principles and rules consequently. Many matters are in practice after extracting the license of legality under the Sharīʿah principles of ḍarūrah and ḥājah. However, there is confusion about such matters whether they belong to the category of ḍarūrah or ḥājah, or none of the two and what could be the suitable verdict (ḥukm)?

1.1. Background

Contrary to conventional economic system, it is a unique feature of Islamic economic system that all of its affairs are covered under the Divine principles. It is mandatory that Sharīʿah principles must be followed in true spirit and not circumvented. Therefore, a fatwá is required to justify every new embryonic matter in Islamic paradigm. Fatwá is known as the issuance of Sharīʿah opinion on behalf of the Holy prophet (PBUH) (Al-Shatibi, 5: 253). Contemporary Islamic banking emerged as an alternative of interest-based banking system. It brought new challenges to the Islamic world with respect to Sharīʿah compliance and permissibility of operations and offerings of Islamic banks (IBs) and Islamic financial institutions (IFIs). Fatwá in Islamic finance is a legal device through which a competent Sharīʿah scholar extracts from Islamic sources any rulings on ambiguous matters through a process of ijtihād in the light of principles of Islamic jurisprudence (Lahsana, 2012). Fatwá is a device that plays a vital role in ensuring that Islamic financial principles are being followed in IBs and IFIs in true spirit of Sharīʿah (Laldin, Khair & Parid, 2012). All IBs and IFIs are bound to follow the fatwá given by their Sharīʿah advisor/Sharīʿah board regarding their operations, products and services (AAOIFI, 2010, SS No. 29, clause 6/1, p: 510).

Over the last four decades, Islamic financial engineers have been playing a vital role in the development of new contracts to meet the need of newly emerged Islamic finance Industry (IFI). In so doing, they ask for fatwá from their Sharīʿah board to keep newly developed transactions and products Sharīʿah compliant, and the Sharīʿah boards guide them accordingly in the light of Sharīʿah principles. The critics like Ahmed and Dzuljastri (2005), Serena and Tufyal (2007), Abozaid and Wajdi (2007), Wajdi (2009) and Zakariyah (2012) are accusing Sharīʿah boards of exploiting the Sharīʿah maxims of ḍarūrah and ḥājah to circumvent the Sharīʿah prohibitions of ribā and gharar. Such criticism is defaming Islamic banking and finance industry (IBFI) and creating false perception about it among people. According to Abozaid & Wajdi (2007), Islamic banks exploited the Sharīʿah maxim of ḍarūrah in their fatwá to get a legal excuse for products impermissible otherwise, e.g., bayʿ bi-thaman ajil (deferred sales contract) and Islamic Pawn Broking. They argued how Islamic banks can launch products using maxim of ḍarūrah while people can survive without those products. If it is presumed that such products are necessary for the survival and long-term sustainability of IBFI due to certain considerations, then the argument is that very concept of bank itself is not indispensable for the people’s survival from the Sharīʿah perspective. If the maxim of ḍarūrah supposedly exists in dealing with Islamic banks, then it would rather approve the dealing with conventional banks directly on the same grounds (Abozaid & Wajdi, 2007). Majid (2011) says that takāful operators are using ḍarūrah principle to get the

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3 Generally, English word “Need” means ḥājah and Necessity means ḍarūrah, without which one could not pull-on.
legal excuse to commit prohibited deeds like obtaining covers from reinsurance companies of the conventional system.

The purpose of this study is to explain whether ḥājah and ḍarūrah are amalgamated concepts, and to find out the extent to which the maxims of ḥājah and ḍarūrah are being exploited in Islamic banking transactions. The paper also highlights how to remove the obstacles of the impermissibility in many financial matters and to smooth the regulatory process for IBFI. It critically analyzes the banking and financial transactions and products that were pointed out by critics.

2. Ḍarūrah (dire necessity) and Ḥājah (need)

According to Al-Shatibi (1997), maqāṣid do not go beyond three categories: al-ḍarūriyyāt, al-ḥājīyāt, and al-tahsīnjīyāt (embellishments) (Al-Shatibi, 2:17). This is the preference order, which facilitates the process of choosing and preferring one over the others, in case there is a conflict between them. This can be named as al-Shatibi’s theory of maqāṣid preference. The first two categories are subject to relaxation to preserve the maqāṣid al-Sharīʿah in a broader way, and it depends upon the situation and severity of matter. Therefore, this paper is limited to the first two categories only. In fact, the embellishments are not subject to rukḥṣah and al-takhfff, so they do not fall under the scope of the paper.

2.1. Ḍarūrah

Ḍarūrah, which represents the state of emergency, generally renders the prohibited things permissible as this constitutes a well-established fiqh maxim in the Sharīʿah “Necessities relax prohibitions”. Classical and modern scholars consider ḍarūrah either in specific sense or in general sense.⁴⁵

Al-Suyuti (1990) explains ḍarūrah as follows: “A person reaches such a situation that if he does not indulge in prohibited deed, he will die or reach close to death (then it would be ḍarūrah)”. Hamawi (1985) confirmed this definition with bit different words. According to Al-Shatibi (1997, 2:17), “As for ḍarūriyyāt, the meaning is that they must seek to establish interests of the dīn (hereafter) and this world, so that if they are missing, the interests of this world lose their harmony. In fact, their absence leads to corruption and trials as well as to the loss of life. In the Hereafter, it leads to the loss of success and blessings and reversion to manifest loss.

From the first definition, it becomes clear that one can indulge in prohibited activities entertaining the concept of ḍarūrah only to save one from death. To convey this concept of ḍarūrah, usually examples of pork or prohibited carrion are presented in the literature. In this scenario, ḍarūrah becomes limited to the situation of īḍṭirār.⁶ Consequently, it does not remain an appealing definition of ḍarūrah, because it ignores the equally important matters other than life, like the other Sharīʿah objectives - narrows the vast concept of ḍarūrah into the life preservation. The second definition is not confined to just life, rather it includes all

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⁴ Abubakr Al-Jassas (370H), Ibn al-Arabi (543H), Imam Fakhruddin Razi (606H), Al-Qartabi (671H), and Al-Suyuti (911H).
⁵ Imam Ghazali (505H), Al-ʻiz bin Abdussalam (660H), Al-Shatibi (790H), Shaikh Abd al-Wahhab Khallaf (1375H), Abu Zahrah (1393H) (p:43), Shaikh Mustafa Zarqa (1419), Wahbah Al-Zuhaili (Nzariyyah, p: 73), and Al-Raisuni (Muhadarat, p: 189-191).
⁶ Īḍṭirār is a state of being forced or being coerced in which one’s death is certain otherwise.
fields of life and all those cases where life is not in danger, but there is a big loss and trouble to life through affecting property, intellect, religion, and progeny.

Al-Raisuni (1995) explained al-Shatibi’s view that al-ḍarūriyyāt are things which are necessary for the achievement of human beings’ spiritual and material wellbeing. If these essentials are missing, the result will be imbalance and major chaos in both this world and the hereafter. Moreover, their lacking will cause greater or lesser corruption and disturbance in people’s lives (P: 146). Abu Zahrah (1957) commendably explained the concept of darūrah in following way: the necessity regarding life is to preserve the life and organs and all that without which life cannot be sustained, while necessity regarding the property and progeny is that without which property and progeny cannot be preserved.

2.2. Ḥājah

Al-Shatibi (1997, 2: 21) defined ḥājah in the words, “Complementary interests; people need them in terms of expansion and also to remove the hurdle often leading to severity and hardship which cause the loss of objective. If these interests are not observed, people will face severity and hardship, though, which will not reach at the level of total disruption of the public interest”. He further says that ḥājah is also acknowledged for ʿibādāt (worships), ʿādāt (Customs), jināyāt (punishments), and muʿāmalāt (contractual matters). Al-Zuhaili (1975) also explained and differentiated the ḥājah from darūrah. According to him, ḥājah is considered beneficial to alleviate the hardships and severity from people, but its absence does not pose a threat to the life (Al-Zuhaili, p: 53). However, it is Ibn ʿAshur (1984) who defined ḥājah comprehensively. According to him, “ḥājah consists of what is required by the people for the realization of their interests and the proper execution of their affairs. The social order would not, in fact, collapse, but will not function properly, if it is ignored. Likewise, ḥājah is not on the level of darūrah.

In simple words, the ḥājah is subordinate to darūrah (Zarqa, p: 209) and it grants legal excuse from hardship, so that one can enjoy a life free from distress and predicament. According to Al-Raisuni (1995, P: 146), al-ḥājīyyāt are the interests which, when fulfilled, contribute to relieving hardships and difficulty and creating ease in the lives of mukallaafīn (those who are accountable before the law).

3. The Difference between Darūrah and Ḥājah

In addition to the above discussion, we indicate the following differences between darūrah and ḥājah:

1. The relaxation granted in case of ḥājah remains everlasting, but it would remain temporary in case of darūrah (as necessities are estimated according to limits there under) (Zarqa, p: 209). Al-Zuhaili (1975, P: 274-275) also confirmed the opinion that relaxation granted in case of ḥājah remains everlasting.

Darūrah can be effective in permitting things which are prohibited by default (ḥarām bi al-dhār) such as using alcohol, and eating pork, while ḥājah can be effective only in things which are prohibited by external factors (ḥarām bi al-ghaīr) such as to say prayer in a snatched land is permissible (Abu Zahra, p: 42-45). OIC Fiqh Council (2000) passed the resolution no. 50/1/6: House is a basic human need (ḥājah). This need should be fulfilled
through legitimate means by lawful (ḥalāl) money. The method of advancing loans on interest adopted by the real estate and housing banks or other financial institutions is prohibited under Sharīʿah, no matter how high or low the interest rates may be, because this method is based on ribā (usury) transaction and it cannot be allowed on the basis of ḥājah, because ḥājah cannot make ḥarām bi al-dhāt things permissible.

2. According to Ibn al-Qayyim (1991, 2: 107-09), ḥājah makes permissible what is prohibited as a protective measure (sadd al-dhariʿah) for public interest, while what is prohibited by clear text can only be permitted by virtue of darūrah.

3. Ḍarūrah provides a legal excuse regarding matters, which are announced ḥarām by Qurʿān and Sunnah. The case of ḥājah is different in a way that it grants legal excuse in matters which often do not contradict with Qurʿān and Sunnah, but with general principles (qawāʿid ʿāmmah)

4. Ḍarūrah includes ḥājah, but not vice versa, as Al-Shatibi (1997; 2: 31) says that an imbalance in the domain of ḥājīyyāt does not dictate an imbalance in darūriyyāt, but its complete imbalance may cause partial disturbance in darūriyyāt. While a little disorder in darūriyyāt will lead to complete imbalance in ḥājīyyāt.

From this discussion, it becomes clear that darūrah and ḥājah are not amalgamated concepts. Both have different conditions and applications. Researchers and critics should think on these guidelines in their analysis and Islamic financial engineers should keep these prerequisites in their view before entertaining the ḥājah maxim.

4. Elevation of Ḥājah to the Level of Ḍarūrah

Islamic jurists are of different opinions whether both, or only ḥājah ʿāmmah could be elevated to the level of darūrah. In the opinion of Al-Juwayni (1997, 2:79-80), ḥājah ʿāmmah is considered equal to darūrah when it is collective and universal. He denied such elevation of ḥājah khasṣah in favor of individuals. Al-ʿAnzi (2015) said that only ḥājah ʿāmmah can make a ḥarām thing permissible, if it is close to ḥalāl like ijārah, otherwise it cannot make it permissible the prohibited like eating pork, taking one’s property through unfair means, and adultery. Such acts cannot be allowed on the basis of ḥājah, because all these deeds are far from the state of ḥalāl. Therefore, the principle of Al-Juwayni is not in absolute term. Al-Zarkashi (1985) says that ḥājah khasṣah also makes prohibited things permissible and calls for relaxation in the original law and justifies departure from it. Later, Al-Sayuti (1990, p: 88) combined both qawāʿid, that of Al-Juwayni and Al-Zarkashi and presented new qawāʿid that ḥājah, whether general (ʿāmmah) or specific (khasṣah), is considered as darūrah. Ibn Nujaim (2011, P: 114) also adopted the same view of Al-Sayuti in his Al-Ashbah. Ḥājah khasṣah is the need faced by a particular community or the peoples of particular profession as the need faced by the people of Bukharah to obtain loans through redeemable sale (Majallah, P: 19). Unlike darūrah, the hardship in case of ḥājah is not so extreme as to endanger life or limb (Mansuri, 2007; P: 106).

After it has been established that ḥājah, either general or specific, sometimes reaches at the level of darūrah to extract the permissibility (ibāḥah) in matters that are ḥarām bi al-
ghaîr, and still such strong ḥājah will remain ineffective in harâm bi al-dhât matters or things like ribâ. If anything is considered ḥājah equal to darūrah in any special case, it would be subject to the rules of darūrah which constitute that provision of relaxation would be temporary, not for ever. Al-Shunqaiti (2007, 3: 97), a Hanbali Scholar, is of the view that zakāh payment can be delayed if its spot payment may cause loss in asset of a person. He built his view on the basis that such situation is ḥājah equal to darūrah in favor of the person. Therefore, he can delay in zakāh payment until threat of loss is removed, because that was a temporary permission as darūrah grants temporary permissions only.

5 Use of Ḥājah Maxim in Islamic Banking and Finance

Social, economic, and financial matters of classical as well as modern times always propped up by Sharīʿah rules of relaxation which are derived from primary sources of Islam. Some financial transactions and contracts in which ḥājah is being entertained are given below;

1. To avoid buy back in Murābahah to Purchase Order (MPO), it is not recommended for Islamic banks to appoint the client as an agent because "a party cannot become buyer and seller in same contract" (Al-Kasani, P: 31). AAOIFI Sharīʿah standard considers it permissible in the situation of need (ḥājah) (AAOIFI, 2010, SS No. 8, clause 3/1/3, p: 119). In case of appointing the third party as agent, Islamic banks apprehend that client of MPO (orderor) might refuse to buy promised item if he disliked and it would be injurious to the banks. Therefore, AAOIFI considered it genuine ḥājah for Islamic bank to appoint its client as agent to buy ordered goods and called for relaxation in original law of prohibition.

2. The jurists have difference of opinion regarding the permissibility of opening documentary credit. According to opponent jurists, documentary credit pertains to the category of delaying counter values in ribāwī items, which is not permissible in Sharīʿah (AAOIFI, 2010, SS No. 14, P: 266). However, documentary credit has become essential part of international trade and it facilitates the payments. Two-dimensional risk is involved in it that can be mitigated through the documentary credit and counter parties remain satisfied through this device. Keeping in view this importance, AAOIFI considered documentary credit permissible on ḥājah basis.

3. According to AAOIFI Sharīʿah standard, it is necessary to cease or dispose of the impermissible transaction immediately and it is not allowed to delay. However, at the same time, AAOIFI allows this delay if it is necessary (darūrah) or pressing need (ḥājah) (SS No. 6, clause 2/1 and 3/ff, p: 83-84). Usually conversion of conventional bank to an Islamic bank takes some time. Therefore, AAOIFI Sharīʿah standard used the term darūrah in this regard. Such delay can be become pressing need (ḥājah equal to darūrah) which would be limited to the extent of magnitude of the need. That is why, AAOIFI Sharīʿah standard says “any dealing with conventional banks must be limited to the magnitude of the need to do so” (SS No. 6, clause 3/ff, p: 84).

4. Application of juʿālah in exploration for minerals, extraction of water, collection of debt, brokerage, discoveries, innovation and designs, is permissible on the basis of general need (ḥājah ‘āmmah), because it was basically permitted as a reward for the return of runaway slave, as is mentioned in Sunnah. That is the reason that some of
jurists restricted it with runaway slave situation only. According to AAOIFI’s SS, it is allowed based on general need (ḥājah ʿāmmah) (AAOIFI, 2010, p: 278-285).

5. Dealing in commercial papers, bill of exchange, promissory note, and bank cheque, is permissible on the basis of ḥājah. Commercial papers are loan-based instruments and belong to the category of suftījah (AAOIFI, 2010, SS No. 16, P: 299) which is an instrument in which a creditor stipulates another place for the settlement of the loan (Salim, 2013). Imam Al-Shafi‘i (204H) considered it illegal. Malikis considered it permissible, if it is necessary for the protection of property otherwise it would be impermissible (Al-Zuhaili, 1985). Hanbali jurists allowed it if executed without any consideration in other city (Ibn Qudamah, 1997). Hanafi considered it disliked (makrūḥ), if it is stipulated with loan (Al-Sarakhsi, 1989). According to Ibn Taymiyyah (728H), there is no text (naṣṣ) against or in favor of the permissibility of suftījah, so it is necessary to maintain its permissibility (ibāḥah), especially when there is a general need (ḥājah) for it (AAOIFI, 2010, SS No. 16, P: 296).

6. According to classical Ahnaf, a unilateral promise is not binding. Yet, according to Ibn Abdin (1992) promises some times are considered binding because of ḥājah of people (Ibn Abdin, 5: 84). In case of non-binding promise in MPO, a client can cause a harm to an Islamic bank by refusing to buy after Islamic bank buys an asset on his order in murābaḥah. That is why, in today’s banking and financial contracts, unilateral promises are taken as binding on promising party because of such ḥājah.

7. Jurists, based on ḥājah, allowed financial penalty in case of failure of the debtor in paying when due. Nadwah al-Barkah (2002) passed a resolution according to which creditor should relax the borrower regarding time, if the liability to pay has resulted from any sale contract or exchange transaction subject to deferred payment, the debtor can be asked to pay fine in unjustified late payment (P: 103) which has to be credited to charity account (SBP, 2008) as some Maliki jurists say that a delaying borrower should be obliged to pay for charitable activities (AAOIFI, 2010, p: 40). The OIC Fiqh Council (2000), however, resolved that penalty provision would be ineffective when a client proves that he could not pay on time due to a reason beyond his control, or when he proves that the bank incurred no loss as a result of his breach of the contract (Resolution No. 109 (3/12). Now the question is whether aggrieved party can be compensated by this penalty amount or not? Chapra and Khan (2000) mentioned a view of some scholars who allow taking penalty from defaulter in case of unjustified delay, but they also allow passing on the penalty amount to the aggrieved party as compensation, if penalty is imposed by a court. According to one resolution of Al-Barakah seminar, bank can be compensated for its actual loss caused by client’s delay (Al-Barakah, 2002, p: 65-66), but cannot be paid the ‘opportunity cost’. The point to be made here is that penalty clause application is permitted on the basis of ḥājah.

8. Kafālah bi al-dark is also considered permissible on the basis of ḥājah. Kafālah bi al-dark is a guarantee by seller, that he will return the price of object if someone claims on that object. This guarantee may also be from third party in favor of seller that he will offset the loss of buyer in case of claim by real owner (Mansuri, 2007 p:113).
6. Misuse of Ḥājah maxim in Islamic Banking and Finance

6.1. Wa’dān based Islamic foreign exchange forward contracts

The term wa’dān means that two parties makes two unilateral and independent promises to each other in a particular deal and their respective fulfillment depends on two independent conditions. This concept is applied in foreign exchange forward contracts in Islamic finance. In fact, it was Nadwah al-Barkah (1981) who issued fatwā “If two promises are binding on both parties, then it falls within the prohibition of selling a debt for a debt and is, thus, not permitted. However, if it is not binding on either party then it is permitted”. Of course, they did not provide any Sharīʿah base of this fatwá. However, Aznan et al. (2008) suggested to entertain Ḥājah ʿāmmah maxim to get legal excuse for the product of Islamic foreign exchange forward contract based on wa’dān (promises by the both contracting parties). Ahmad et al. (2014) also confirmed it and commented that this wa’dān based product has become the pressing need (Ḥājah ʿāmmah) for the public in general, so this product should be allowed only on the basis of Ḥājah and this permission should be limited to hedging purpose only. Aznan et al. (2008) and Ahmad et al. (2014) did not provide rationale for allowing the contracts based on promises by the both exchange parties. It is not possible that two promises in same contract and same dealing will remain unilateral and independent of each other. Their interdependency implicitly does exist in case of the same contract. Binding nature on the both sides implies that a contract has been allowed vide a strategy, that otherwise was prohibited. Practically, these two promises constitute bilateral promises which lead to a contract. In this way, it leads to the situation of contingency between the contracts. Holy Prophet (PBUH) prohibited two contracts in one contract (Al-Sa‘n‘āni, 1983). Ḥājah can be employed only if there is no opposite explicit text, while there is a certain text (Sunna) against it. Therefore, wa’dān based Islamic foreign exchange forward contracts should not be granted the license of permissibility using the Ḥājah maxim, particularly, because the IFIs have started using the same for investing in financial derivatives without the need for hedging and without fulfilling the conditions of underlying contracts (Anwer, Z; and Habib, F; 2019).

6.2. Bayʿ al-muʿajjal of GOP Ijārah Ṣukūk

Government of Pakistan (GOP) has been issuing fixed rental rate GOP ijārah Ṣukūk for about a decade. For the three years maturity period Ṣukūk, Jinnah International Airport Karachi (JIAK) was sold to special purpose vehicle (SPV). GOP got same terminal on lease with the binding promise to purchase the JIAK at the end of lease. SPV issued ijārah Ṣukūk and sold them to Islamic banks and the money paid to GOP. GOP Ijārah Ṣukūk were also tradable in secondary market, but it was rare for Islamic banks to sell them because they wanted to hold till maturity to retain investment giving them secure return. As GOP did not issue new ijārah Ṣukūk, and did not renew the old one, practitioners and treasury officials of Islamic banks got worried that liquidity of Islamic banks would remain idle and un-invested after GOP Ijārah Ṣukūk matured. As discussed in the JIBM Discussion Forum (2015, P:181-182), a way out was suggested to the Sharīʿah Board of SBP according to which Ṣukūk would be sold, sometime before maturity, to the SBP for the period of one year on credit basis (bayʿ al-muʿajjal) in such a way that the seller bank would add one year’s T-bills related rate to the face value and the rental receivable by that time. He further contended that if Ṣukūk could be sold on credit for one year, the same could be for any maturity e.g. five or even ten tears.
According to Asim et al. (2018), SBP allowed the bayʾ al-muʾajjal of GOP Ṣukūk keeping in view the need (ḥājah) of Islamic financial institutions with respect to liquidity management. The concerns of scholars seem apparently to be valid because basic purpose of this credit sale of GOP Ṣukūk is to earn from the receivable. But, the issue is that earning on receivables / debts amounts to ribā. In that case, it is only a subterfuge (ḥīlah) to circumvent the prohibition of ribā and is being adopted in the name of ḥājah to invest Islamic banks liquidity. Ayub (JIBM Discussion Forum, 2015) indicated that it was irrational sale contract of Ṣukūk - when Islamic banks don’t remain owner of the asset after maturity and asset is re-purchased by GOP, how Islamic banks can get rental over same asset for any period after maturity while knowing that the even the subject of the sale would not be in their possession and risk. Moreover, GOP Ṣukūk represented debt receivable upon maturity, and not an asset for a valid sale. Therefore, GOP Ṣukūk cannot be traded after maturity except only on ḥawālah basis. On the other hand, in credit sale of GOP Ṣukūk, the seller banks added one year's T-bills related rate to the face value and rental receivable by that time (p: 181-186).

Salman Syed Ali, Senior Research Economist at IRTI, IDB, Jeddah, as a discussant on the matter says, in this regards, “Any party that is buying the ṣukūk just before its maturity date (i.e. the date of its automatic transformation into cash) and it is willing to pay a higher amount (than the cash receivable from retirement of ṣukūk) if allowed to make the payment on a deferred time; it is violating aḥkām al-ṣarf (rules of ribā al-ṣafīl). Hence, sale of ṣukūk just before maturity on a price contractually deferred beyond the maturity date of the ṣukūk is prohibited”. “However, a planned buy very near to the maturity date such that the ṣukūk are held only for a short time with intact tangible underlying asset and for a longer planned time without a tangible underlying asset while earning a return falls under prohibition zone”. “The open market operation (OMO) arrangement has been made to keep the money invested to earn a return beyond the maturity date, into a period when the ṣukūk have transformed from representing a real asset to pure cash (or cash receivable or liquid) asset. This intension is not simply hidden, but made explicit in the policy evidenced by the arrangement to do it regularly and on a large scale. Thus, the arrangement is not Sharīʿah compliant”, he adds. (JIBM Discussion Forum, 2015; P. 188-190).

Particularly, the following concern expressed by Syed Ali is worth noting: “A seemingly small move by the SBP to accommodate an incidental need of return-generating short-term liquid asset for Islamic banks is going to create a hole that will open the floodgates of wrong practices and undermine some core values of Islamic finance”. We reiterate, therefore, that ribā belongs to the category of ḥarām bi al-dhāt, and need (ḥājah) cannot be invoked for granting legal excuse in ḥarām bi al-dhāt matters. Therefore, sale of GOP Ṣukūk on the basis of bayʾ al-muʾajjal should not have been granted license of legality.

7. Way Forward

According to Mansuri (2007), jurists generally leave ḥājah maxim to the person or institution facing the situation and it leads towards the manipulation of this maxim. He suggests that to avoid such manipulation of ḥājah maxim, in legislation, it seems appropriate that a competent body of Muslim scholars, instead of few scholars, should frame concessionary laws, based on ḥājah ascertaining its necessity and magnitude (p:117).
Mostly such exploitations and manipulations of Sharīʿah maxims and principles are caused by Sharīʿah advisors / committees that might not be having enough knowledge of modern economics and finance. There may be other factors like pressure by the management of the banks and the conflict of interests of Sharīʿah board members with concerned bank. This matter is related to regulatory authorities that must focus on developing separate and foolproof regulations for Islamic banking and financial institutions so that the maxim of ḥājah is not entertained to circumvent the prohibitions. It is also matter of concern for the Sharīʿah scholars, because such practice is adversely affecting their credibility into the public. They have to equip themselves with enough knowledge in the field of modern banking and finance.

Further, the Sharīʿah advisory system has to play its role properly. Sometimes, such products are allowed in the name of need and ʿijtihād that clearly violate Sharīʿah principles. Adherence of the principles of Islamic finance must be ensured. Ayub (2016) expressed concern on flexible approach of the Sharīʿah advisors issuing fatāwā for launching of products like currency Salam and Running Mushārakah as replica of bill-discounting and the conventional overdraft, respectively. He concluded that regulators needs to focus on policies to control the Sharīʿah advisors regarding replication of conventional interest based prohibited products, because it is damaging the credibility of Islamic finance.

To develop strong Islamic financial industry, it is suggested for the regulatory authority that hiring of Sharīʿah board members must not be left on the discretion of the concerned Islamic bank. Sharīʿah advisors / board members must be paid through central bank to make their fatāwā unbiased. It would enhance financial inclusion, and credibility of Islamic banks and would be helpful in enhancing their customer base.

There must be proper educational criteria at degree level and scholars having conventional economics, banking and finance education as well as proper Sharīʿah education should be preferred. The existing criterion for eligibility of Sharīʿah board members says “adequate understanding of banking and finance in general and Islamic finance in particular” (SBP, 2018). It leaves loophole, because “adequate understanding” cannot be judged and can be compromised. Therefore, degree level (BS/MS/PhD) education in economics/Banking/Finance/Islamic banking & Finance must be required along with solid research work/papers/book and degree of Shahādat al-ʿālamīyah (Sharīʿah education).

8. Conclusion

Ḍarūrah and ḥājah are not amalgamated concepts. Each concept has its own prerequisites, which must be met before entertaining the related Sharīʿah maxim. Islamic financial engineers, regulators, researchers and critics should keep in view this difference between these two concept before developing financial product, regulation, research and criticism, respectively. However, some of Islamic banking transactions and products have been found exploiting the maxim of ḥājah. Day by day changing business environment, circumstances, values, culture, custom (ʿurf), needs and life style are witness that nothing is subject to status quo. Today, business and trade matters are different and more complex as compared to the
classical times. Islamic sources are very rich and flexible enough to meet the need of every
time. Accordingly, it becomes necessary to carefully consider the financial needs of modern
times at both individual and institutional levels, so that new Sharīʿah rulings regarding
business, trade, economics and financial matters remain within the Sharīʿah parameters and
serve the maqāṣid al-Sharīʿah.

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