A Maqasid-ul-Shari'ah Analysis of the Permissible Futures Trading in Islamic Financial Markets

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Abstract - Despite the widespread use of futures contracts as a risk mitigation instrument in the current financial markets, Islamic economies commonly feel uncomfortable with it for fear of its potential clash with the Islamic law of contracts. This research aims to justify only the futures trading that contributes to reducing investors' financial risks. This paper argues that a risk-hedging futures contract can Islamically be justified if Shari'ah rules are construed in the light of its broader purpose, what is known as Maqasid-ul-Shari'a. A qualitative research methodology with a deductive interpretive approach is used in this study to analytically explore the role of Maqasid-ul-Shari'a in authorising permissible futures trading. The relevant data is collected from primary sources (Quran and Sunnah) and secondary sources (Islamic jurisprudence, textbooks, journal articles and review papers). By deploying the theory of Maqasid-ul-Shari'a, the prevalent Islamic jurisprudential approach is constructively reinterpreted to formulate general principles and guidelines under which futures trading can comfortably be approved. The study's overall findings suggest that on several counts of necessities, risk-hedging futures help Muslims preserve both the individual and the public wealth, safeguard the human self, honour and religion, facilitate their transactions and prevent future business conflicts. The Maqasid-ul-Shariah analysis of futures trading adds to the permissibility view that risk hedging futures trading should be recognised and declared as permissible not simply because they do not conflict with any prohibition or benefit the individual parties involved but also because they serve the broader interests of the public (al-masalih-al-aammah). This study is the first to analytically discuss the permissibility of futures trading under a combined reinterpreted guideline of Islamic jurisprudence and Maqasid-ul-Shariah.

Keywords - Risk mitigation; Islamic financial markets; Islamic contracts; Maqasid-ul-Shari'a

I. INTRODUCTION

Exchange-traded futures transaction has long been used as a risk mitigation instrument in the commodity and financial markets [1]-[2]. An exchange-traded futures transaction often involves a binding contract to deliver, or take delivery of, a given quantity of a commodity, or a financial instrument, at a future date, at an agreed price, or a future price to be decided later. Such a transaction reduces uncertainty about future assets and costs, facilitating efficient investment planning. Businesses, producers, and general investors use futures to plan future investments in production and trading [3]. In return for a small fee, they can fix the price of assets well ahead of the actual bargain to avoid unexpected and unwanted price changes and production costs. Also, they do not have to worry about the quality and quantity of future assets, as futures are standardised, covering only homogenous assets. They save costs and appreciate more comfort in trading futures than bargaining over the actual spot assets, which may require physical exchange and storage for vast quantities of various assets [4]. Additionally, they trade futures as standardised contracts in organised futures markets with improved fair pricing, increased liquidity, and reduced transaction costs [4].

Islamic and western economies have recognised the need for future trading [5]-[6]. As a derivative, a futures contract correlates to the main future contract and derives its value from its underlying asset [7]. Investors would routinely use futures to circumvent commercial uncertainty. For investors, futures are attractive, particularly for their capability to reconcile the two seemingly contrary goals, i.e., securing high returns and mitigating investment risks in future contracts. They do not require buying and selling the actual commodity. Instead, they can reserve buying or selling the item at a considerably lower cost. Using futures, they can further allocate their investment risks more efficiently and reduce the information asymmetry [8]-[9]-[10].

Yet, across Muslim economies, the Islamic finance industry commonly feels uncomfortable using futures contracts for fear of its potential clash with the Islamic law of contracts [11]. Many Islamic jurists and scholars have opined that Islamic law does not approve of the contract of futures as is conventional in western economies. They commonly believe that exchange-traded futures are excessively uncertain and sometimes bear interest, both of which are forbidden under the Shari'ah law. The former violates the Islamic prohibition against contractual gharar and maysir, and the latter infringes the no riba principle [12]-[13]-[14]. Despite the absence of any direct prohibition in Islamic resources against a futures contract, they declare it impermissible by way of ijtihad [15]-[16]-

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

[17]. The practice of modern futures trading at regulated exchange markets did not exist at the time of the introduction of Islam. It only evolved as late as the 19th century when the first organised futures market was developed in the United States. The new practice did not expressly match Islamic law. Hence, Islamic jurists had to exert ijtihad to check and verify the permissibility of the practice under Islamic law. They routinely made ijtihad by qiyas [18] to compare an exchange-traded futures transaction and a Bay'a (sale) contract. They concluded that a futures transaction is impermissible because it falls short of the freedom from gharar requirement for a permissible Bay'a.

Many contemporary Islamic law academics and jurists attempted to engineer some form of Islamised equivalent using the Islamic contracts of Bay'a-ul-Salam and Bay'a-ul-Istisna. The former concerns a future sale where the price for an asset is paid upfront at the time of the agreement, but the commodity is to be delivered at a future time [2]-[13]-[19]-[20]-[21]. The latter is also a future sale whereby a party undertakes to manufacture, build or construct often fixed assets, with an obligation from the manufacturer or producer to deliver them to the customer upon completion [22]-[23]-[24]. These are Shari'ah-approved contracts despite being future contracts. Although they involve the exchange of future promises, Bay'a-ul-Istisna and Bay'a-ul-Salam are treated as exceptions to the standard rules of the Shari'ah, which forbid future agreements [23]-[24]. Their permissibility relies on the justifications of public need and necessity. Yet, these Islamised futures fail the primary purpose of the futures, i.e., the hedging financing and investment from transactional risks. They are not collateral but are concluded as the central contracts and involve actual sales, not promises to future sales that do not shift the risks between the parties, as existing in conventional futures.

Hence, the current approach of Islamic finance concerning futures transactions is theoretically and practically problematic. In theory, it relies on an improper analogy between futures trading and bay'a, which forms the foundation for disallowing risk-hedging futures transactions in Islamic finance discourse. Further, it falls inconsistent with general Maqasid-ul-Shari'ah principles, such as the facilitation of commerce and the observation of 'al-masalih-al-mursalah'. The Islamised futures are incapable of achieving the future's purpose too. In practice, the absence of future transactions contributes to chaotic financial markets in Islamic economies. Potential investors will have to make investment decisions in an uncertain environment. Any such decision could be affected by any future change in the market conditions, which will, in turn, increase the risk of counterparty default and future disputes/conflicts.

However, an Islamic futures contract can serve the purpose of hedging if Shari'ah rules are adapted in the light of the broader objective of Shari'ah, what is known as Maqasid-ul-Shari'a. The term 'Maqasid-ul-Shari'ah' refers to the purpose and objective of Islamic law, i.e., the underlying purpose of the explicit rulings of Islam. However, the Islamic finance industry has been taking a minimalist approach, i.e., one that would not go beyond the explicit rulings of fiqh-ul-Shari'ah. It is dominated by practitioners who are often educated in western economies and willing to mimic such economies' practices, most notably in profit-maximisation while ensuring Islamic compliance with the minimum rulings of fiqh-ul-Shari'ah. This practice ignores the true objectives of Shari'ah that are implicit in the Shari'ah explicit rules. This paper suggests that the reduction of transactional risks is consistent with the objectives of Shari'ah, even if that might call for the use of future contracts that are routinely prohibited under the rules of Shari'ah. Seen from the angle of Maqasid-ul-Shari'ah, therefore, Islamic futures can be reconceptualised and transformed into financial instruments that can truly serve the purpose, i.e., hedging financial risks. By applying the theory of Maqasid-ul-Shari'ah, this paper seeks to justify the use of futures in the Islamic finance industry. The article does not intend to manoeuvre around Shari'ah laws, instead aims to explain the use of futures as a risk management tool under the guidance of Maqasid-ul-Shari'ah, hence, to contribute to the developing Islamic finance field.

Towards this end, the rest of the paper divides into three sections. First, it is necessary to understand the nature of futures, their mechanism and function. What are futures, how do they work, and what purpose do they serve are essential questions to raise here. These are important as they provide the reader with background information and a better understanding of the primary purpose of futures, which is to manage investment risks like other derivative instruments. Businesses routinely face different investment risks in their day-to-day running, and they use Futures to mitigate such risks. Today, risk mitigation instruments play a vital role in the development and growth of businesses and the financial sector in western economies. This is, however, absent in the Islamic finance industry (section II).

Second, Islamic finance practice has taken a prohibiting approach to Islamic law that ceases recognition of conventional futures for religious impermissibility and engineered Islamised futures allegedly to stop any non-Islamic practice across Islamic economies. The Islamic finance discourse, however, has developed beyond the incumbent prohibiting approach and embraced a minority-enabling view of the Islamic law that holds for the permissibility of the risk hedging futures transactions and that accords to the general permissibility principle of the law of muamalat. A careful review of the primary sources of Islamic law and the existing literature can help understand the foundational justifications from both approaches, either against or for future transactions. It enables one to assess their credibility better. How and why conventional futures contracts are treated as impermissible in Islamic law and how and why the Islamised futures fail

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

to function as derivative, and how this failure can be rectified through a reconsidered Islamic approach that relies on Maqasid-ul-Shari'ah are therefore relevant questions that are to be asked and addressed next (Section III).

Third, the theory of Maqasid-ul-Shari'ah suggests that in circumstances where there is an apparent inconsistency between the implicit intent and the explicit rulings of Islam over a particular matter, the former should be given priority. There are, however, interesting questions to raise and answer. What is meant by Maqasid-ul-Shari'ah, how does it differentiate from Shari'ah law, under what circumstances it may override Shariah's explicit rulings, and whether such supremacy of Maqasid-ul-Shari'ah can extend to and authorise futures trading, despite the conventionally perceived prohibition under the Islamic law (Section IV). Finally, the paper will conclude in section V.

This paper takes a qualitative legal research (doctrinal) methodology in conformity with its agenda, which is to reconsider the Islamic ruling on the impermissibility of future trading and to recommend a reformed interpretation of the applicable law of Islam in respect of such trading. Many scholars have used this methodology in scientific research to determine the problem of the study, its dimensions, aspects, and causes [25]. A qualitative method enables the researcher to locate, analyze, and evaluate relevant regulations and laws relating to futures transactions in Islamic derivative markets. It was selected for this study because it allows the researcher to investigate and understand how different laws and regulations can be interpreted and how these constructions can impact our understanding and practice within the real world [26]. A qualitative method also allows the generation of comprehensive insights into shari'ah scholars' perceptions and experiences on future transactions. In doing so, a deductive interpretive approach is used in this study to analytically explore the role of Maqasid-ul-Shari'a in authorising permissible futures trading. The relevant data is collected from primary sources (Quran and Sunnah) and secondary sources (Islamic jurisprudence, textbooks, journal articles and review papers). By deploying the theory of Maqasid-ul-Shari'a, the prevalent Islamic jurisprudential approach is constructively reinterpreted to formulate general principles and guidelines under which futures trading can comfortably be approved. The focus will be on the discovery and the prioritised application of the true objectives and the rationale of the rules of Shari'ah. Most resources re-examined in this research are either primary sources of Islam written in the Quran and narrated via Sunnah or secondary sources found in Islamic Figh. As well as these, the paper will further make use of other literature on Islamic finance to present a reconsidered and innovative interpretation of the applicable law of Islam on futures trading.

II. FUTURES

Futures is a tripartite agreement between a buyer, a seller and a commodity exchange clearing house where the parties agree to deliver or accept delivery of a specified amount of a particular commodity during an agreed period. It involves an obligation to fulfil future commitments to buy or sell. An exchange-traded futures contract is a legally binding commitment to deliver or take delivery of a given quantity of a commodity, or a financial instrument, at a future date and an agreed price [27]-[28]-[29]. By entering a futures contract, the buyer and the seller may agree to a price today for some asset to be delivered. It can be defined as an initial arrangement whereby parties promise to carry out a future transaction at a price determined at the time of the meeting. Unlike options, futures carry an obligation to exercise the contract, i.e., pay the predetermined price or deliver the commodity [30]. The UK Corporation Tax Act 2009 Section 581 defines futures as a contract for the sale of property under which delivery is to be made at a future date and at a price so agreed, even if it is left to be determined by reference to the price at which a contract is to be entered into on a market or exchange or could be entered into at a time and place specified in the contract. The agreement is standardised in all respects, except for price and terms of delivery which are settled on the exchange floor on the delivery date and based on the settlement price for that date. Standardisation of contracts allows interchangeability with all other warranties of the same delivery period [31]. The contract is registered with the clearing house, which guarantees contractual payment and delivery to every seller and buyer and which eliminates risk over contract performance [27]-[32]-[33]-[34].

It is conventionally referred to as a derivative because it earns its value from an underlying asset covenanted to become the subject of the main future contract [30]. The underlying asset could be either finance or commodity, such as agricultural commodities, metals, energy, currencies, and stock indexes. At maturity, financial futures are cleared through monetary settlement, whereas commodity futures are settled physically. In practice, all settlements take monetary form, meaning that, at maturity, buyers receive a monetary equivalent of the asset rather than an actual delivery of the asset [7]-[35].

Historically, exchange-traded futures evolved from the practice of forward contracts that were common in ancient Asia's early commodity markets [4]. Reports suggest that forward rice transactions were an established commodity trading practice among the Chinese rice producers and merchants of 2000 BC [5]. The Hammurabi code, one of the oldest deciphered writings in the world dating back to 1750, found in the ancient Mesopotamia area, has an apparent reference to forward contracts that allowed goods to be delivered on an agreed-upon price at a date in the future. The first regulated futures exchange is reported to be the Dojima rice market that formed in Osaka, Japan, in 1650 and had some, but not all, of the features of modern futures. For instance, it included standards of a four-month contract term, four grades of rice only, no physical delivery and clearance through an established clearing house but imposed no

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

margining requirement on parties to the transaction [36]. In the western world, the elementary forms of futures trading were developed as late as the sixteenth-century era when cotton traders in Liverpool and tea traders in London were using forward contracts.

Still, England's first chartered commodity trading exchange, the London Metals and Market Exchange, was not established until 1877. However, the first organised futures market was developed in the United States, where the Chicago Board of Trade (CBOT) of the Chicago Mercantile Exchange was created in 1848. This market's central traded futures contracts were three essential agricultural commodities of corn, wheat, and soybeans, which still account for the bulk of trading business conducted at the CBOT today. The futures market has proliferated worldwide, covering many other products, including cotton, cocoa, orange juice, sugar, cattle, pork, foreign currencies, treasury bonds, stocks, gold, silver, copper, platinum, and palladium. According to the Futures Industry Association statistics, the number of futures traded on exchanges worldwide in 2021 marked the fourth consecutive year of record-setting trading activity. The total volume of futures trading reached 29.28 billion contracts which accounted for a rise of 14.6% compared to the previous year, 2020. Futures exchanges in the Asia-Pacific region had the most significant increase in trading in 2021. Total volume in that region reached 30.55 billion contracts, up 10.40 billion or 51.6% from the previous year. North America, the second largest province in terms of trading volume, had 15.38 billion contracts traded in 2021, up 2.53 billion or 19.7% from the previous year. Latin America continued its rapid growth with a total trading volume of 8.89 billion contracts, displaying a 37.5% rise. Europe ranks fourth in terms of trading volume, with 5.45 billion contracts traded in 2021.

Although a futures contract is forward, it is more efficient than the latter [7]. Futures contracts are standardised and associated with fewer uncertainties in terms of contract size, maturity, product quality, place of delivery, price, etc. They are also traded in regulated capital markets. A regulated market for futures makes it easy for investors to find a fair and safe deal [7]. The exchange clearing house guarantees payment on futures, so the counterparty risk is eliminated. On the other hand, forwards are unstandardised and transacted over the counters [27]. As the market is not regulated, potential investors routinely have trouble finding a fair and safe deal [37].

Futures are generally recognised as a risk management financial instrument that offers a considerate solution to the risk/return dilemma. Businesses and investors often use futures to hedge their investments against risks. Every financial investment can attract risks and returns that are positively linked, meaning higher returns are generally associated with more significant risks. Investors seeking higher returns must make a risk-return trade-off where expected returns are maintained while risks are reduced. Often, they do so through futures as a risk management instrument. Futures routinely protect an investment from market risks, i.e., any future fluctuations in the price of a given asset. While a financial investment may often be exposed to several types of financial risks [38]-[39], futures work to hedge the investment against the market risks only. This refers to the fluctuations in the price of assets due to changes in market conditions. Price movements due to inflationary situations, variations of interest and/or currency exchange rates, demand/supply adjustments and/or renewed customer sentiments are the most common triggers of market risks. This risk is systematic and a result of the economy's exposure to the uncertainty affecting all market participants. While unavoidable, investors may manage the risk by contractually shifting it [7].

Futures are traded among three categories of investors: i) hedgers, ii) arbitrageurs, and iii) speculators. Hedgers are usually farmers and manufacturers who use futures contracts to manage the risk of price change and offset their business exposures. Locking in the futures price would mean that the hedger would eliminate the risk of price volatility either positively or negatively, i.e., enjoying a fixed price when the price moves unfavourably but missing out when the price moves favourably. Arbitrageurs seek to profit from discrepancies in the prices of identical or related futures instruments across different markets. These discrepancies occur when an asset is priced differently by multiple financial institutions.

The arbitrageurs would buy an asset at one price from the first financial institution and then almost instantly sell it to a different institution to profit from the difference in quotes. Speculators take on risk, especially anticipating future price movements, hoping to make significant gains to offset the risk. They are not interested in taking profit from the sale, saving the trouble and costs for the possession or delivery of the underlying assets. They trade futures to quickly gain from speculation about a favourable future price movement [40]. In other words, they are traders in its strict sense, i.e., making a profit out of the buying and selling of derivatives. They are the prominent players in the futures market [38]-[39]. Some commentators even viewed them as the true initiators for developing the secondary market for futures [5]-[41]. Investors from the other two categories are also likely to convert gradually into speculative traders as they see higher returns in speculative transactions. Chance points to the formers who started as hedgers but developed later into speculators [42]. Other investors may become speculators due to the bandwagon effect [38]. A common feature for all three categories of investors is the zero-sum game that underlies future trading [43]-[44]. This is where one party gains from the other party's loss and vice versa [37].

III. ISLAMIC LAW

Whether or not Islamic law permits the use of futures has been controversial in Islamic finance discourse and practice. Islamic jurists and academics have grouped into two main camps. The prohibitionists believed that futures trading violates fundamental prohibitions of Islamic law. The liberalists counterargue that futures transaction is a modern

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

innovation that Islamic law has not addressed, so it should be regarded as permissible if there is no express prohibition or violation. While both groups agree that purely speculative futures trading is impermissible, they disagree on allowing futures trading that is meant for risk hedging. The former forbids it no matter speculative or risk hedging for gharar. The latter allows the risk hedging of future transactions, which contain only commercial uncertainty rather than gharar.

A. Prohibitionist view

Classical jurists and academics took the view that futures trading is impermissible [23]-[45]-[46]. They refer to a fundamental principle of the Islamic law of contracts and contend that business and financial transactions must not involve gharar nor maysir, but futures transactions contain both [47]. Futures transactions contain selling assets that either do not exist or are not owned by the seller at the time of contracting [48]. Likewise, gharar exists where sellers do not own the underlying asset in future transactions [49]. Futures transactions are impermissible because of their association with high risk resulting from the sale of non-owned or non-possessed assets and gambling [50]-[51].

Gharar originates from the Arabic verb "*gharra*", which means al-khida and translates as 'to deceive or to be deceived' [52]. In Islamic law, it refers to any transactional risk, uncertainty and hazard incurred by one because of their lack of knowledge of material information concerning a particular business or financial transaction [53]-[54]. Quran has not referred to gharar expressly but condemned it indirectly in verses regarding gambling [55]-[56]-[57]. Quran aside, the Sunnah of the Prophet prohibits gharar in contracts [56]. In a well-known hadith, Prophet stated: "do not sell what is not with you" (la tabi ma laysa indika).

Futures trading is thought to contain gharar, especially in respect of the future's underlying asset, which might not yet exist or be owned by the seller at the time of contracting, which further affects the certainty of the pricing [58]-[59]-[60]. Gharar exists in a sale where one or both parties take excessive risks (mukhatarah) [61]. The transaction becomes void because of the prohibited gharar, and the goods exchanged under such void transaction become unlawful, making the parties liable for return/refund [62]-[63]-[64]-[65]. According to Ibn Tamiyyah, parties who hold on to such unlawful transactions are, then, deemed to have been devouring the property of others [66].

Too, futures trading is claimed to be poisoned with maysir (qimar), which is thought to be the worst form of speculation commonly known as pure gharar [2]-[47]-[49]-[50]-[53]-[67]-[68]. The Arabic word 'maysir' derives from yassira (to ease), and yassara (to succeed) means wining something too quickly or getting a profit without making an effort to earn it. Islamic jurisprudence defines it as 'taking a risk in the hope of gaining an advantage or a benefit whose materialisation is fully or substantially reliant on a game of chance' [12]-[19]-[68]-[69]. Al-Misri describes it as a combative game played by two contracting parties, each of whom undertakes the risk of loss and the loss of one means the gain for the other' [52]. Quran condemns maysir in several verses, which describe it as 'immoral gambling that sows the seed of enmity and hatred among humans. Futures transactions involve maysir because they materialise zero-sum games in which gains are matched with corresponding losses [38]. Apart from non-exchange contracts, Islamic law allows only business contracts that can offer mutual gain while containing the possibility of risk. Futures allow no room for mutual benefits. As De Lorenzo [70] claims, 'futures amount to bets on the direction the market is moving in'. It is, however, worth noting that non-exchange contracts such as gift (hiba), endowment (waqf), and unilateral promise (wa'ad) do not follow the rules of Islamic law on exchange (business) contracts. They follow different rules of non-commutative contracts that allow the donor / the promissor to transfer ownership of an asset to a counterparty without consideration. Non-commutative contracts are charity transactions, offering gain only to one party while capable of containing more significant uncertainty. As the name suggests, an exchange-traded futures transaction is a business contract of exchange, not a charity transaction.

Gharar also forms the primary rationale for the impermissibility of bay'a-ul-kali-bi-al-kali, which is further extended by analogy to exchange-traded futures transactions [56]-[69]-[72]-[73]-[74]. The bay'a-ul-kali-bi-al-kali concerns a sale whose countervalues are purely an exchange of promises. Like a bay'a-ul-kali-bi-al-kali, futures trading contains a promise-based future exchange comprising mutual deferment of both counter-values. A commitment by the seller to sell and deliver a specified asset in return for a corresponding promise by the purchaser to purchase and pay for the same, both at a specified date in the future. The promisors in such a transaction then become the debtor and the creditor simultaneously in respect of the same transaction.

As such, the transaction becomes a sale of one debt for another', which is claimed to be prohibited under the Islamic law of contracts. A sale can be valid in Islamic law if either the price or the delivery is postponed, but not both [24]-[75]-[76]. In futures sales, both counter-values are non-existent at the time of the contract [24], so they are purely exchanges of promises. It is claimed that the prohibition of such sale under Islamic law is mandated by a unanimous agreement of Islamic jurists [66]-[77]-[78]-[79]-[80], also referred to as Ijma which is a secondary source of Islamic law [81]. The Organisation of the Islamic Cooperation (OIC) and the International Islamic Fiqh Academy have also rejected the validity of any futures sale where the delivery of the merchandise is agreed to take place in the future (as a pending obligation) with the price to be paid on delivery. It is thought that such a contract is not permissible because of the deferment of both exchange elements. Still, it may be amended to meet the conditions of a permissible salam (advance payment) contract. The European Council for Fatwa and Research also confirmed this position.

As futures trading verges on gharar, it is claimed that it violates the validity requirements of a permissible sale under Islamic law. Any contract of sale under Islamic rule must take the form and satisfy the validity requirements of a bay'a

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

contract which is a nominated contract and permissible under the Figh-ul-Muamilat in Islamic law. Bay'a is one of the proprietary contracts (uqud al tamlik), and a valid bay'a involves transfer of title to the asset from the seller to the purchaser. This is also referred to as bay'a-ul-tamlik, which requires the countervalues to exist and be owned by the seller at the time of contracting to avoid gharar. Islamic jurists have defined a sale as "tamlik-ul-eain be-al-thaman-il-ma'aloom", meaning the transfer of title on a specific asset for a known price. This is also referred to as bay'a-ul-a'ayan, where the subject matter of the sale is a particular asset in rem rather than a generic obligation (kulli) [27]. If the seller does not own the specific goods before the sale, they cannot transfer ownership. Similarly, parties cannot agree on the ownership of the goods to be shared at a future time. Any form of postponing the transfer of ownership of the goods specified in the contract to a future time would transform the contract into maysir, which is prohibited [24].

In addition to these, where the goods are moveable, it is further suggested that the seller must already have the goods before resale [82]-[83]-[84], whereas in future, parties do not even intend delivery or possession [85] as transactions often complete by simply settling the differences in prices [86]. Such transactions are seen as superficial and simply on paper rather than genuine transactions [1]-[27]). They are therefore classed as short-selling, which ceases to serve any proper economic function [6]-[87]-[88].

Finally, it is worth noting that some modern scholars in this camp allow the use of Islamised futures, i.e. futures transactions that are put in a Sharia'h compliant format using substitute Islamic contracts other than the standard Bay'a. These include Bay'a-ul-Muajjal, Bay'a-ul-Salam, Bay'a-ul-Istisna, Bay'a-ul-sifah (sale of description), Sulh (compromising settlement), Muawadah (exchange) and Jualah (reward) [4]-[5]-[73]-[74]-[89]-[90]-[91]-[92]. Nonetheless, as it is explained next, such Islamised futures fail to secure the main purpose of the futures derivative, namely risk hedging, to a great extent.

B. Permissibility view

Many contemporary jurists and academics have taken a liberal view that hedger-hedger futures trading would satisfy the permissibility requirement of the Shari'ah law of contracts if the domain of the Islamic prohibitions do not unnecessarily exceed their intended framework. Islamic teachings suggest a careful distinction between two categories of intertwined relationships. One concerns faith ('aqīdah), worship (ibadat) and ethics (akhlaq), whereas the other relates to socio-economic conduct (muʿamalat). The first involves a human relationship with God whilst the second concerns the human relationship inter se. With regards to the former, believers do not have much freedom to define the terms of the relationship. There is, however, reasonable space for development and innovation in respect of the latter. For instance, Muslims are required to do daily prayer exactly as prescribed, but they are free to choose to engage in business on their own terms. Islam respects business contracts and recognises that such contracts are prima facie the creation of the evolving business practice. Many business contracts existed even before the introduction of Islam and were subsequently approved by it. Islam, however, intervened in limited circumstances to secure compliance of business practice with certain Islamic prohibitions as demonstrated in the fiqh al-muʿamalat. An example is the well-known distinction in Islamic law between the practices of Bay'a and Riba. Both existed before Islam, but Islam approved only the former and disapproved the latter. Islam, therefore, endorses a general principle of permissibility (Aṣalatul Ibaḥah) and an adapted contractual freedom through which a newly evolved commercial contract should be assumed permissible by default unless it violates the prohibitions of Islamic law. As the limitations are few and against the general permissibility principle, they will have to be applied exactly to their intended cases, rather than being applied overly and based on a generous construction. Futures contracts and trading did not exist at the time of the introduction of Islam, so the primary resources of Shari'ah have not prohibited them. Nonetheless, the Prohibitionists made the prohibition of futures trading through an unreasonably generous interpretation of resources by way of ijtihad. To put it specifically, they have been routinely making an unjustified analogy (qias) between a permissible bay'a contract and a futures transaction and prohibiting the latter accordingly. The contemporary prohibitionists, on the other hand, appreciate that the analogy between bay'a and futures is an unjustified one, yet they make the analogy between futures transactions and classical contracts other than bay'a. According to this view, futures transactions whose underlying contract takes the form of either Sulh, Juallah, Istisna or Salam could better fit with the nature of futures transactions while adhering to Islamic prohibitions [4]-[5]-[89]-[93]. Such future transactions can be permissible under those frameworks, but not bay'a. Such adapted forms of futures transactions surely ensure compliance with Islamic prohibitions; yet again, they simply miss the purpose of risk hedging, which is to enable the parties to change their mind at the expense of a small cost when future events unfold unfavourably. The ijtihad by qias approach is failing. A futures transaction is a new mode of trading that undoubtedly does not fit with the rules of the classical contracts and, as many scholars indicated, calls for a fresh response tailored considering the operative procedures of future markets [94]-[95]-[96]. Ijtihad by Aṣalatul Ibaḥah approach should replace the Ijtihad by qias approach in the context of futures transactions.

The proponent of permissibility further counterargue that a hedger-to-hedger exchange traded futures transaction not only does not associate with the forbidden transactional uncertainty (gharar) but rather such transaction reduces gharar to the minimum for three reasons [3]. First, the standardisation of contemporary futures trading requires the commodity traded to adhere to the set quality and quantity standards. Futures contracts detail the quantity of the underlying asset and are standardized to facilitate trading on a futures exchange. They guarantee a level of quality regardless of where the asset is from. For example, Crude Oil futures ensure that regardless of

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

the refinery, a buyer can be sure they will be getting the same oil standard. Likewise, one Crude Oil futures contract is normally tied with a specific quantity, so for example, on the Chicago Mercantile Exchange, each contract covers 1,000 barrels of oil. Therefore, if someone wanted to lock in a price on 10,000 barrels of oil, they would need to buy/sell 10 contracts. The futures markets are regulated by the regulatory bodies to ensure the integrity of futures market pricing, the absence of abusive trading practices or fraud, and the operation of reliable brokerage firms engaged in futures trading [27]-[32]-[33]-[34]. Second, every regulated futures market is assisted by a designated clearing house tasked with validating and finalising the futures transaction, ensuring that both the buyer and the seller honour their contractual obligations. The key role of the clearing house is to accomplish the steps necessary to validate and finalize a futures transaction. Acting as a middleman, it provides the security and efficiency that is integral to the certainty and stability of an exchange-traded futures market. The clearance procedures of the clearing house coupled with a twofold guarantee given to both the buyer and the seller in respect of the delivery of the asset and the payment of the price, virtually eliminate gharar and maysir. Third, although risk-hedging futures transactions carry the potential for loss or gain, they generally serve both parties by eliminating uncertainty regarding the intended future exchange of goods/services and price. The potential for loss or gain also remains as an incidental commercial risk which is an inevitable part of engaging in business in general and is supported by the Hadith that links returns to risk in commerce. Commercial risks are either systematic and arise out of the exposure of the economy to uncertainty (e.g., a sharp change in market prices, supply of goods or government policies affecting business) or personal and resulting from individual preferences (e.g., risk of bankruptcy due to choosing to undertake business) [89]. A provision to this is the case of a speculative futures transaction. Parties to a speculative futures transaction are not normally hedging any risk but are speculators for financial gain. The uncertainty associated with such futures transaction goes well beyond simple business uncertainty and constitutes enough gharar to essentially amount to maysir (gambling) which is certainly forbidden by Islamic law.

It is also counter argued by the liberalists [2] that the ban on unowned or unpossessed selling which is central to the prohibitionist approach is only relevant where the mabi'a (the subject matter of sale) is a specified object (a'yan) and not a generic fungible (Kulli) asset that can be ascertained, replaced, or substituted in the future [97]-[98]-[99]. Qur'an has not prohibited future transactions but rather validated such transactions. Possession (qabd) prior to sale is generally thought not to be an essential requirement of a valid sale under the Islamic law except only in relation to certain transactions. For example, possession (qabd) prior to sale and hand in hand delivery at the time of sale is a validity requirement in a currency sale (bay'a-ul-sarf) to avoid riba [3]-[27]-[100]. Also, where the transaction involves selling foodstuff, the subject matter's prior possession is considered essential to avoid gharar [79]. Even then, the foodstuff is construed to simply mean perishable food rather than the food that are traded preserved in tins or are bought and sold in standardized quantities and packages that are weighted, measured, sealed and labelled [3]-[27]-[101]-[102]. Similarly, a sell of non-existent and a sell of non-owned would not render the contract void. The former, selling non-existent goods whose existence is certain in the future, is permissible [103]-[104]. The latter, where the seller does not own the subject matter prior to sell, is considered by many Islamic jurists only non-binding (Muamelat-ul-Fedhouliah) that could be corrected by subsequent ratification of the innocent party [105]. Therefore, where the seller can ensure transfer of title and delivery, lack of ownership or possession of the subject matter at the time of contracting are no longer an issue [3]-[27].

In addition to these, the claim of Ijma and Hadith on the prohibition of bay'a-ul-kali-bi-al-kali, seem to be unsupported [3]. There are reported controversy among different schools of thought on the definition, types and scope of bay'a-ul-kali-bi-al-kali which conflict with the Ijma claim. While Hanbalies insist on Ijma, many Hanafi and Maliki jurists and Ibn Taymiyah view dayn as a permissible asset just like a tangible good capable of being bought and sold [106]. The invoked Hadith in Sunnah appears to be weak and unreliable in terms authenticity and meaning [66]-[78]. Many contemporary Islamic finance specialists have taken the view that deferring in both countervalues of a sale transaction can be justified on several counts including hajah (needs) and dharurah (necessity) [107] maslaha (public interest) [2] and ibaha (permissibility) [7]-[35]-[53]-[64]-[108]-[109]-[110]-[111]. In the absence of a Qur'anic prohibition on futures sales, the clear Qur'anic respect for sales in general, the authorisation of deferred transactions in the Islamic law of Muamilat and the absence of gharar and riba, futures trading may simply fall back to the general principle of permissibility (ibahah) [3]-[35]-[112]. If such transaction is economically rational and actually reduces the risk for both hedging parties, then surely a more relaxed interpretation of Islamic law based on Maqasid-ul-Shari'a, social welfare and public need could be justified [2]-[113]-[114]-[115].

IV. The theory of Maqasid-ul-Shari'ah

The theory of Maqasid-ul-Shari'ah has great potential to resolve the ongoing controversy among Sharia'h scholars over permissibility of risk hedging transactions in Islamic finance discourse. The gist of the theory is to construe divine laws of Islam prima facie according to their intended purpose rather than literal meaning. On several counts, it authorises risk hedging transactions despite their apparent clash with literal rulings of Sharia'h. The theory is not, however, a straightforward one. Often, the intended purpose which underpins the theory is implicit and hard to discover. The circumstances under which the theory may authorise futures trading thereby overriding the explicit rulings of Shari'ah are not clear too. This section concerns the theory of Maqasid-ul-

DOI: 10.13135/2421-2172/6800 - Published by the University of Turin
https://www.ojs.unito.it/index.php/EJIF/index

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

Shari'ah and its relevance in justifying permissibility of risk-hedging transactions.

Islam claims to have constructed a new multi-faceted order with guidelines to safeguard humans' prosperity in this world and thereafter [116]-[117]-[118]. Unlike atheism [119]-[120]-[121]-[122], it does not regard nature as a purposeless evolution but rather a system with an assigned purpose created by the creator. Everything, including economic activities, transactions, operations, and systems, should function in the same order [123]. The gist of the new order manifests in its Maqasid al-Shari'ah discourse [124]-[125]. Maqasid-ul-Shari'ah seeks to demonstrate the purpose and objective of Islamic law, i.e., the underlying purpose of the explicit rulings of Islam [118]. Maqasid-ul-Shari'ah can be vague without proper interpretation, as Islamic theorists have not agreed on how to materialise this underlying purpose. For many classical Islamic legal theorists, it is the other word for public interests. A purpose is valid as long as it preserves the interests of the public or leads to the avoidance of some mischief (mafsadah) [126]-[127]-[128]-[129]-[130]-[131]). To identify a valid purpose, they would normally classify Maqasid-ul-Shari'ah into three levels of necessity: necessities (daruraat), needs (haajiyaat), and luxuries (tahsiniyaat). These levels are set hierarchal relative to the level of their importance to humans' life, starting from the necessities as the highly essential at the bottom, the needs as the less essential in the middle and the luxuries as unessential on the top. The last two are respectively less essential and unessential for human life. For example, marriage, trade, and means of transportation are less essential as one's lack of any of these would not pose a threat to their life. Likewise, luxuries things such as using perfume, stylish clothing, and beautiful homes carry the lowest priority in one's life. The first, on the other hand, is viewed as the wholesome essentials of humans' life which is divided it into a further six categories of preservation of one's religion (din), preservation of human self (nafs), preservation of intellect ('aql), preservation of posterity (nasl), preservation of wealth (mal) and preservation of honour (erd). These necessities constitute the objective behind any revealed law, not just the Islamic law. Accordingly, an action taken in light of these necessities serves to the public interest and is therefore considered desirable' [132]. This minimalist approach: fully mirrors fiqh-ul-Shari'ah; fails to make a justified distinction between different rulings; cannot go beyond the explicit rulings of fiqh-ul-Shari'ah; and is unable to scientifically identify and accommodate the implicit objectives of Shari'ah from the original primary sources [124]. It simply echoes the traditional individualistic take on Shari'ah and would not embrace universal values, such as justice, freedom and equality in appropriate cases.

Contemporary scholarship, on the other hand, have tried to remedy these shortcomings by articulating further classifications of the concept of maqasid. To begin with, a distinction has been made between generic objectives (one-fits all) in rulings of Shariah (General maqaid) and objectives of the rulings that are group, situation, or case specific (specific or partial maqasid). While the former applies to the entire body of Islamic law [118]-[133]-[134]-[135]-[136], the latter has a much smaller scope of application targeting a specific section of rulings [137]. A further distinction has also been made between the two principal limbs of Shariah, i.e., 'act of worship' (ibadat) and 'worldly transactions' (muamalat) [138]. Literal compliance is the default methodology for ibadat, thus no need for a deduced reasoning neither to any investigation or discovery of a specific objective, as they often go beyond human reason. The latter, on the other hand, needs the consideration of purposes as it concerns the worldly business dealings and seeks to benefit the ummah [124].

The Maqasid-ul-Shari'ah discourse has been helpful in the identification of valid objectives of Shariah rulings, especially concerning worldly transactions within which futures trading falls. First, any proposed ban on futures trading must be justified, just like any other Shariah rulings regarding worldly transactions. Unlike an act of worship, futures trading requires no literal compliance. As explained earlier, the cardinal foundation of the prohibitionist approach in putting a firm ban on futures trading is gharar. Futures trading is thought to contain gharar, especially in respect of the underlying asset, which might not yet exist or be owned by the seller at the time of contracting which further affects the certainty of the pricing [139]. The prohibition's higher objective is to avoid future conflicts between contract parties. This is the Maqasid that is specific to the law of Muamalat (business). Gharar makes the entire contract uncertain, facilitates future disputes between the contract parties and creates an environment of chaos. A contract of gharar causes unnecessary transaction costs, wastes public resources and imposes upon one party unjust loss, hence, it is inefficient and unjust. The absence of a more desirable alternative, a general legal ban on such a contract would save all the concerned parties. But a futures contract is the alternative which would reduce or eliminate chaotic environment, thereby maintaining social morals. By entering into a futures contract, parties create a mutual environment of certainty in respect of their future exchange of assets and price [52]. Whatever happens to the market, the two futures contract parties have a pre-planned arrangement which will remain stable within a set period and would not be affected by any future change in the market conditions. One and the foremost factor contributing to the evolution of futures trading out of the traditional forward trading practice has been to save parties from future disputes/conflicts. The standardization of the assets and payments in terms of maturity, quantity and quality in futures trading has reduced or eliminated uncertainty, thereby saving parties from unnecessary future disputes or conflicts. It saves the parties from multiple coincidence of wants and needs, provides for a fair price to be available from the market thereby assisting the parties to avoid unfair pricing [7] and eliminates the risk of counter party default.

From a micro-perspective, futures market not only helps one party in finding the other party with opposite wants, but it also brings in confidence that the contract would be fulfilled, thus, productivity in commodities are not dampened by the risk of default of the counterparty. It also helps traders to a better wealth planning, provide liquidity strategies, and reduce

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

associated risks. From the macro-perspective, futures trading is much more cost-efficient than the spot trading and can lead to increased productivity of the businesses and to the growth of the economy.

Secondly, a cardinal objective and a general Maqasid-ul-Shari'ah is 'facilitation'; i.e., to make things easy for the people and to remove unnecessary hardships. It is generally the claim of Islam that it is a religion that alleviates suffering of the ummah (the people), so Shari'ah law consists of rules that are easy to follow and concessionary in most areas [52]. This general Maqasid applies to both the ibadat and the muamalat sections of Shari'ah equally. Quran has referred to the alleviation of hardship in Muslims' socio-economic life in several verses: "Allah has imposed no hardship (haraj) in religion", "hardship attracts alleviation" and "necessity makes the unlawful lawful". In the law of muamalat, this is particularly manifested through the ibaha (permissibility) principle which is facilitative to private transactions. The default position of Shari'ah law in muamalat has been to ratify without intervention the current and evolving business customs and practices as long as those practices and customs produce better than harm to the society (Koehler [140]). Where, harm outweighs the good, a practice is declared void, so for instance, the contracts of gharar, riba, and maysir have been explicitly prohibited in the texts of the primary sources [141]. Most Islamic scholars would agree that facilitation has been the main objective of Shari'ah in its recognition of bay'a-ul-salam despite being a deferred sale. Although a sale of non-existent is principally prohibited due to gharar, bay'a-ul-salam fulfils the higher purpose of removal of hardship and bringing ease to the people, hence it is prioritised over the primary rulings of Shari'ah. The absence of the recognition of bay'a-ul-salam would have caused the small-scale farmers to face hardships. They produced agriculture commodities which were often seasonal, and a requirement of spot sale would have leaded to the clear risk of over-supply of such commodities at the relevant season in the market therefore facilitating a sharp depreciation of the market price of such commodities which would in turn have generated disastrous consequences for such farmers. As Kamali [52] rightly observed 'futures market facilitates regular permanent, and centralised trading of commodities by bringing ease to the process of buying and selling for both parties. With the market being regulated, the guaranteed function of the clearing house, futures markets can further control any sharp price movements of the commodities as traders are often averse to engage in behaviours that involve price speculation or unreasonable risk-taking [142]. Traders can limit the exposure of the price volatility in the commodities and take a hedging position to offset any loss/gain from the spot market [143].

Third, Maqasid-ul-Shari'ah relies on the touchstone of al-masalih-al-mursalah (the public interests). A contractual arrangement would satisfy the criteria if it were to enhance the interests of the public or to the avoidance of some mischief. As Ibn Taymiyyah stated "God Most High never prohibited a contract which generates benefit to the Muslims, and which does not cause any harm to them" [52]. That is also one of the main maqasids behind the rulings of Shari'ah for the validation of both the bay'a-ul-salam and the bay'a-ul-istisna which seeks to recognise and respond to the legitimate needs of the public or parts of the public even though such may call for a compromise on the wholesale application of the gharar prohibition in respect of a sale of non-existent goods [144]. Despite involving gharar, such sales have been approved, because they do not lead to conflicts between the contract parties, instead they secure the mutual benefits of the parties under the contract.

Fourth, risk-hedging futures trading meets the necessity element of Maqasid-ul-Shari'ah on several counts. To begin with, it helps preservation of wealth of the Muslims. By using such futures, contract parties control future risks and mitigate uncertainty by fixing future assets and prices. Such futures trading enables the parties to plan an arrangement for uncertain future so that uncertainty and future surprises and disputes are reduced. The preservation of wealth would further lead to the economic growth of Muslim communities. Furthermore, it would help preservation of Muslims' honour, as contract parties minimise potential future commercial failure (insolvency / bankruptcy). They maintain and deliver their business undertakings and promises on an ongoing basis which will in turn facilitate establishment of stronger business and financial network. Also, the preservation of wealth may further lead to the preservation of human self, as parties have resources to maintain human dignity. Additionally, the healthier the business, the stronger the dedication and serving of that business to the religion and the religious purposes, as parties have resources to undertake religious duties and to develop into a better human and to contribute to their Muslim communities.

Finally, ijtihad which is unanimously considered as the most important tool for the development of Shari'ah law and responsible for responding to the pressing needs of Muslims in this ever-changing world is linked with Maqasid-ul-Shari'ah. The focus of ijtihad to date has been on finding a full match between a proposed product and the classical Figh-ul-Shari'ah with Islamic jurist mimicking one another. Many Islamic jurists may regard any innovation that has no roots in the traditional practice of the Muslim community as a form of bidʿah in Islam which is prohibited. However, ijtihad will not function properly, if the jurists keep mimicking the past, stick firm to the explicit rules of the classical Figh-ul-Shari'ah and ignore the implicit rationale behind it [145]. Most of the modern Islamic jurists make a considered distinction between permissible and impermissible bidʿah. An innovation that concerns the worldly affairs is permissible whereas an innovation in matters of religion is impermissible and a great sin. As many contemporary scholars have suggested, a new form of ijtihad should be practiced; one that can evolve with the new developments and can ensure that its application mirrors the present time [52]-[145]-[146]. Jurists must be prepared to go behind the explicit rulings of Shari'ah to discover the true rationale of such rulings and to develop into competent Shari'ah law interpreters who may then rightly engage in a re-examination of modern transactions in the light

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

of their true nature, function and purpose within the contemporary complex economic landscape [52]-[124]-[146]-[147]. This also explains why Ibn Qayyim warns of the danger of an undesirable tendency among present jurists to conform to the views of the earlier jurists:

"Shari'ah is based on wisdom and achieving people's welfare in this life and the afterlife. Shari'ah is all about justice, mercy, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Shari'ah, even if it is claimed to be so according to some interpretation" [124].

V. Conclusion

This paper deployed the Maqasid-ul-Shari'ah theory to establish a strong case for permissibility of the controversial futures transactions in Islamic finance discourse and Islamic financial markets. Futures have been widely used by investors, businesses, and traders in the contemporary financial markets for either investment risk mitigation or speculative investment. Islamic financial markets, however, have been reluctant to allow the use of futures trading, no matter risk hedging or speculative, for its perceived inconsistencies with Shari'ah law. Futures trading is thought to involve speculation and exchange of future promises both of which are prohibited in Shari'ah for gharar. Yet, the matter is unsettled in the Islamic finance discourse. Islamic jurists and academics have grouped into two main camps: prohibition and permissibility. The former which is the predominant approach took the view that futures trading violates fundamental prohibitions of Islamic law; and the latter, whilst agreeing to the contention that purely speculative futures trading should be impermissible, disagree with the prohibitionists in that futures trading that is meant for risk hedging should also be disallowed. They counterargue that risk hedging futures transactions do not contain gharar for lack of speculation. Futures transaction is a modern innovation with no comparative within the Islamic law of business. Since it is an innovative contemporary practice, an analogy cannot be drawn between futures and a contract of sale (bay'a) under Islamic business law, which does not allow exchange of future promises. Instead, Islamic law should evolve through ijtihad to recognise the new arrangement under the operative procedures of futures market. Futures trading should therefore fall within the ambit of the principle of permissibility (ibaha) and be declared permissible if there is no express prohibition.

While the existing controversy in Islamic finance discourse centers around conformity with the explicit rules of Sharia'h, both views ignore the Maqasid-ul-Shari'ah take on the matter. This paper took a Maqasid-ul-Shari'ah approach in respect of futures transactions instead. It is the first contribution to fill the stated gap in current literature on Islamic finance. It adds on to the permissibility view that risk hedging futures trading should be recognised and declared as permissible not simply because they do not conflict with any prohibition, or benefit the individual parties involved but also, they serve for the wider interests of the public (al-masalih-al-aammah). The findings of this research suggested that the current practice of Islamic financial markets that mirrors the prohibitionist view displays a great deal of inconsistencies with general Maqasid-ul-Shari'ah principles. A blind ban on futures transactions ignores necessities of Maqasid-ul-Shari'ah and contributes to chaotic financial markets and increased future disputes/conflicts. On several counts of necessities, risk-hedging futures help Muslims to preserve both the individual and the public wealth, honour, human self, and religion. Parties will have resources and credibility and will enjoy reasonable business certainty to maintain and develop wealth, undertake religious duties and develop into a better human and contribute their Muslim communities and their economic growth.

The Maqasid-ul-Shariah analysis which regards futures trading as an element of necessity aiming at securing the interests of the public is further compounded by the two higher objectives of Shari'ah, i.e., facilitation of commerce and prevention of future conflicts in business practice. It is clear from primary resources of Islam that facilitation of business has been the higher objective and default position of Sharia'h law. Where, the good outweighs the harm, a practice can be declared permissible despite it being associated with excessive uncertainty, so for instance bay'a-ul-salam contracts are generally permissible. In the case of a hedger-hedger futures trading, uncertainty is reduced to a minimum. The standardised format of contracts, the regulated market where the actual trading takes place and the clearing house's guarantee function not only reduces chaotic environment and strengthens social morals but also provides a suitable alternative to an unwanted gharar prohibition which simply voids private contracting of futures.

Despite the strong link between Sharia'h and Maqasid-ul-Sharia'h, ijtihad has been reluctant to use the norms of the latter to make more sense of the former. Many Islamic jurists may take a too cautious position and regard any innovation that has no roots in the traditional practice of the Muslim community as a form of the prohibited bidʿah. However, innovation in matters of the worldly affairs not only is permissible but also a prerequisite to Muslims' life. Most Muslims agree that it is impossible to adapt to changing conditions without introducing some forms of innovations. Obviously, hedger-hedger futures trading is not a religious activity but is a worldly matter capable of taking in desirable innovations that create easier life, reduced future uncertainty, and less hazards and conflicts. Jurists must therefore be prepared to discover the true rationale of Shari'ah rulings in order to examine modern transactions in the light of their true nature, function and purpose within the contemporary complex economic landscape.

Received: 26/05/2022 - Accepted for publication: 05/12/2022 - Published: 29/12/2022

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