



**COMPLIANCE OF ISLAMIC BANKING LAW WITH SHARIAH
REQUIREMENTS: CASE OF TAJIKISTAN**

**CONFORMIDADE DA LEI BANCÁRIA ISLÂMICA COM OS
REQUISITOS DA SHARIAH: CASO DO TAJIQUISTÃO**

MAHMADRUZI SHOEV

Egyptian University of Islamic Culture Nur-Mubarak – Kazakhstan

<https://orcid.org/0000-0001-6017-8191>

mahmadruzi.shoev@mymail.academy

ABDULAZEEM ABOZAIID

Hamad bin Khalifa University – Qatar

<https://orcid.org/0000-0003-0552-0067>

abdulazeem.abozaid@mymail.academy

ABSTRACT

The Islamic banking sector in countries which has introduced Islamic Banking, showing greater resilience during recent two global financial crises than conventional banking sector, remains notably stable with less financial impact on its financial operation and nonperformance financing obligation. It is worth to mention the National Bank of Tajikistan, the regulator body of the country, has intention to change the existing laws related to Islamic financing sector as well as the regulations which has been introduced by it. This study aims to help the regulatory in assessing Tajikistan's Islamic banking law and its operating legal framework for compliance with Shariah principles, particularly Shariah standards outlined by the Accounting and Auditing Organisation for Islamic Financial Institutions. Our research is limited to analyzing the law related to Islamic Banks and National bank regulations however it will not be including other laws such as taxation law, custom law, land & property law where it is requiring to a comprehensive research of those laws. The results indicate that aligning financing laws with the Shariah principles contributes to a robust financial sector and will be creating a more attractive investment environment for inviting investors from Islamic countries, particularly Persian Gulf countries. However, given the nascent stage of Islamic banking in Tajikistan, it is imperative for the national government and banking regulator to foster a competitive financial landscape in collaboration with neighbouring states. This involves creating a level playing field to attract investors and promote sector development within the Islamic banking framework where the result will be the country with the best investment climate among all Muslim countries, particularly among other central Asian countries, for Islamic financing and inflow of capital to the economy of the country.

Keywords: Banking; Compliance; Law; Regulation; Shariah.

RESUMO





O setor bancário islâmico nos países que introduziram o sistema bancário islâmico, demonstrando maior resiliência durante as duas recentes crises financeiras globais do que o setor bancário convencional, permanece notavelmente estável, com menos impacto financeiro em suas operações financeiras e obrigações de financiamento não cumpridas. Vale a pena mencionar que o Banco Nacional do Tajiquistão, o órgão regulador do país, tem a intenção de alterar as leis existentes relacionadas ao setor financeiro islâmico, bem como os regulamentos que foram introduzidos por ele. Este estudo tem como objetivo ajudar o órgão regulador a avaliar a lei bancária islâmica do Tajiquistão e sua estrutura legal operacional para conformidade com os princípios da Shariah, particularmente os padrões da Shariah delineados pela Organização de Contabilidade e Auditoria para Instituições Financeiras Islâmicas. Nossa pesquisa se limita a analisar a lei relacionada aos bancos islâmicos e às regulamentações do banco nacional, mas não incluirá outras leis, como a lei tributária, a lei de costumes, a lei de terras e propriedades, quando for necessária uma pesquisa abrangente dessas leis. Os resultados indicam que o alinhamento das leis de financiamento com os princípios da Shariah contribui para um setor financeiro robusto e criará um ambiente de investimento mais atraente para convidar investidores de países islâmicos, especialmente os países do Golfo Pérsico. Entretanto, dado o estágio inicial do sistema bancário islâmico no Tajiquistão, é imperativo que o governo nacional e o órgão regulador do setor bancário promovam um cenário financeiro competitivo em colaboração com os estados vizinhos. Isso envolve a criação de condições equitativas para atrair investidores e promover o desenvolvimento do setor dentro da estrutura bancária islâmica, cujo resultado será o país com o melhor clima de investimento entre todos os países muçulmanos, especialmente entre outros países da Ásia Central, para o financiamento islâmico e a entrada de capital na economia do país.

Palavras-chave: Bancário; Conformidade; Lei; Regulamentação; Shariah.

1 INTRODUCTION

In the wake of the last two global financial crises, it became evident that existing financial systems had significant vulnerabilities. This prompted decision-makers worldwide, including in Central Asian countries, to seek more stable and crisis-resistant alternatives to promote economic development. The implementation of Islamic banking, as observed in recent decades in Central Asia, aligns with this global trend. Islamic banking aligns with sustainable development goals and builds resilience against financial crises, as it avoids involvement in high-risk speculative “gambling” types products such as options and derivatives.

Tajikistan, along with other Central Asia countries, was part of the Soviet Union for 70 years, and before that, it was part of the Russian Empire or influenced by it. Consequently, its legal framework has been influenced by Russian and Soviet civil law. During the Union of Soviet Socialist Republics (USSR) era, the dissemination of Islamic knowledge was sharply restricted, leading to a dearth of expertise in the country's





banking sector regarding the regulations governing Islamic financial transactions under Shariah law. For instance, a key difference between Islamic and conventional banking is that *riba* (interest, usury) is considered sinful and *haram* (forbidden) under Islam, based on the Quran. Therefore, as this knowledge proliferated in Tajikistan after independence, many devout Muslims grew hesitant to participate in this aspect of conventional banking.

Tajikistan, along with Kazakhstan and Kyrgyzstan, has already adopted aspects of Islamic banking, either through dedicated legislation or modifications to the existing conventional banking laws. However, in all three countries, both types of current Islamic banking laws and practices have compliance issues with Shariah principles and rules, such as the treatment of liability of agent under agency, and require amendments to existing Islamic banking laws to further develop the sector. Thus far, there have been few studies about Islamic financing and Shariah in these contexts; understanding this topic needs more evidence-based research. Thus, the attempt here is to understand how to build Islamic banking legislation in Tajikistan, in compliance with Islamic (Shariah) rules and regulations. This study derives insights from Tajikistan's existing Islamic banking laws, legislators and regulatory bodies, the ways Islamic financing products are dealt with, and the relationship between Islamic financing laws and other legislation such as civil law.

2 LITERATURE REVIEW

Limited studies exist in the Tajik context on Islamic financing in general and Islamic financing legislation and its implementation or its degree of compliance with Shariah standards of Accounting and Auditing Organization of Islamic Institutions (AAOIFI) (2017) rules in particular. This may be due to a lack of knowledge of Islamic laws or practical banking implementation among scholars. Hence, a literature review was conducted on materials written by scholars from outside of Tajikistan, to find answers to the following questions:

- Why is Islamic finance on the rise in post-colonial market-building in Central Asia and Russia?
- What are the perceptions of Islamic microfinance among microfinance clients in Kyrgyzstan and Tajikistan?





According to Hoggarth (2016), in Central Asia, the introduction of Islamic finance in the post-colonial era revolutionised the discourse among the state, economy, and the Islamic religion by collapsing the materialistic and symbolising the status quo. Further, Hoggarth states that the reason for the rise of Islamic banking is that these nations preferred to establish their financial strategy and identities by moving from their colonial inheritance to a multi-dimensional financial system. Despite the 84-million-strong Muslim population in the region, she argues that the advent of Islamic banking is not for 'the appeasement of religious groups', but is part of the project of the development of faith identity. In our opinion, she is wrong, as it is not acceptable for Muslims to segregate faith identity from financial or non-financial deeds or transactions. Thus, we assume that her conclusion is due to a lack of knowledge of the principles of Islam.

Hoggarth (2016) further analyses the justification for expanding Islamic financing in Central Asian countries, rooted in the creation of a multi-dimensional economy, away from the influence of the Russian system and connecting to global Islamic economics. Interestingly, however, Islamic financing is on the rise in Russia itself as an alternative source of investment after the imposition of sanctions by Western countries. It is also helping attract investment from Islamic countries into the Russian economy, such as via the Kazan Summit, an annual meeting to discuss the economic relations of Russia with the Islamic world, and by expanding the role of Muslims in the economic and political life of Russia, as made evident, for example, by the participation of Chechens in the Ukraine war.

Hoggarth (2016) mentions a line of academic writing against mixing religion and the market, as it may lead to unrest in society. A negative relationship exists between the growth of Islamic banking and the 'civil disobedience' of religious groups (Gresh, 2007). Hoggarth further states that an important reason for introducing Islamic banking in Central Asian countries could be political – to reach back and establish continuity with the culture and history of the country prior to colonisation.

Sabi (2016) starts with a brief history of the development of Islamic banking and the importance of the role of microfinancing in the global elimination of poverty. It is worth mentioning that Islamic banking law is also applicable to Islamic microcredit organisation and conventional microcredit organisations which has an Islamic window. Further, the author explains some principles and products of Islamic financing and the restrictions that apply to it. She mentions high levels of interest among Tajiks in Islamic





finance (84%) and Islamic microfinancing products (Tajikistan 52%). Further, she notes that Tajik (and Kyrgyz) people could not differentiate between Islamic and conventional microcredit financing, and they were also unaware of the prohibition on interest.

However, few Tajiks (44%) show interest in moving to Islamic microfinance if it offers the same services and terms and conditions as conventional microfinancing. In Kyrgyzstan, people are less actively religious but show more preference for Islamic microfinance than in Tajikistan, which Sabi attributes to the respective levels of democracy in the two countries and respondents' sense of freedom to express their opinions. In our opinion based on consultation with Tajik Muslim scholars, conversely, the main reason for this inconsistency or paradox lies in the behaviour of Tajik people towards local Muslim scholars, who consider their opinion to be above any foreign Muslim scholars' *fatwa* (decision/opinion). For instance, one Tajik Muslim scholar, Mawlana Muhamadi, during a personal meeting with the present authors, permitted the taking of interest-based loans from conventional banks or microfinancing organisations, as he considered Tajikistan and other Muslim countries in the former USSR to be lands of 'Darul-Harb' (territory or countries at war with Muslims) and followed some Hanafi scholars who permit *riba* in Darul-Harb. Overall, this research paper shows that awareness about Islamic microfinance and its products is low, and the demand for these products is lower than expected in Tajikistan and Kirgizstan compared to other Muslim countries in the Persian Gulf countries. Increasing this demand could be a means to attract new customers and could also be a source of funding for Islamic financing institutions such as the Islamic Development Bank.

Tajikistan has separate Islamic banking laws along with the civil law. From my experience working with Islamic banks in Tajikistan, the current law for Islamic banking needs detailed codification, including Islamic principles for financial transactions and administrative procedures for conducting these activities. In the case of the common law, the system has more room to manoeuvre in terms of evidence/witness roles. The principal source of Islamic banking law is Islamic jurisprudence, contracts, and transactions. This law will give the provisions in a legal document more weight, irrespective of other considerations such as materiality or fairness.

3 RESEARCH METHODOLOGY





This legal research employs a comparative review of Tajik Islamic banking law and Tajik National Bank regulations to find out their relevance to Shariah standards of AAOIFI requirements, the primary source of Islamic law principles, and the existing practice of other Muslim countries, such as Malaysia and Oman, and the neighbouring Central Asian Muslim countries of Kazakhstan and Kyrgyzstan. The principles and rules of Islamic finance and banking are regulated under Islamic commercial law, which is derived from two sources – primary and secondary. The primary sources are based on revelation: the Quran and Hadith. The secondary sources are based on human interpretation and reasoning; they are derived from primary sources, such as analogy with existing rules and Muslim scholars' consensus and customs, and shall not contradict them. When a decision or comment related to a specific case is not found in the Quran or the traditions of the Prophet Muhammad (Peace be upon Him [PBUH]), then the accepted methodology is to undertake legal reasoning and interpretation to find the answer.

4 DISCUSSION

The Islamic banking law of Tajikistan was adopted in 2014 (Assembly of Representatives of the Supreme Assembly of the Republic of Tajikistan, 2014). However, noncompliance issues were detected, and the government is seeking to reform the law by hiring a consulting company. The fundamental legal scenario around this is discussed in detail below.

The existing Islamic banking law permits Islamic banks to discount bills and conduct banking operations under conventional factoring and forfeiting products. Article No 4. 'Islamic Banking Operation and Other Transactions of Islamic Credit Institutions', outlines banking and finance activities that can be operated by Islamic credit institutions as follows:

- 1) Attracting and receiving Islamic deposits, Islamic savings, or investment accounts from legal entities or individuals;
- 2) Opening and maintenance of clients' accounts (whether Islamic deposits, Islamic savings, or investment accounts), correspondent accounts of banks and nonbank credit institutions, as well as bank accounts for precious metals and stones;
- 3) Cash transactions: acceptance, conversion, changing, exchange, packing, and custody of banknotes and coins;





- 4) Remittance operations: execution of transfer services for money transfer orders of legal entities and individuals;
- 5) Accounting operations: discount of bills of exchange and other promissory notes of legal entities and individuals;
- 6) Financing of business: extending cash to Islamic credit facilities or Islamic financing facilities (whether secured or not), without limitation;
- 7) Consumer, mortgage, and interbank Islamic financing;
- 8) Factoring;
- 9) Forfeiting.

The above article determines permissible activities and operations for an Islamic bank, while the law Subsections 5, 8, and 9 permit the discounting of a loan, bill of exchange, factoring, and forfeiting. All the mentioned products in their nature involve selling debt through discounting.

The products mentioned above directly contradict two Hadiths (Sayings) of the Holy Prophet (PBUH) that prohibit such types of transactions. In the first Hadith, the Holy Prophet said: ' وَعَنْ عَبْدِ بَنِ الصَّامِتِ - رَضِيَ اللَّهُ عَنْهُ - قَالَ: قَالَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - { } 'الذَّهَبُ بِالذَّهَبِ، وَالْفِضَّةُ بِالْفِضَّةِ، وَالْبُرُّ بِالْبُرِّ، وَالشَّعِيرُ بِالشَّعِيرِ، وَالتَّمْرُ بِالتَّمْرِ، وَالْمِلْحُ بِالمِلْحِ، مِثْلًا بِمِثْلٍ، سِوَاءً بِسِوَاءٍ، يَدًا بِيَدٍ، فَإِذَا اِخْتَلَفَتْ هَذِهِ الْأَصْنَافُ فَبِيعُوا كَيْفَ شِئْتُمْ إِذَا كَانَ يَدًا بِيَدٍ { } رَوَاهُ مُسْلِمٌ 1. 1 - صحيح. رواه مسلم (1587) (81) .'

Narrated 'Ubadah bin as-Samit (RA), Allah's Messenger (ﷺ) said:

Gold is to be paid for with gold, silver with silver, wheat with wheat, barley with barley, dates with dates, and salt with salt, same quantity for same quantity and equal for equal, hand to hand (i.e. payment being made on the spot). If these classes differ, sell as you wish as long as payment is made on the spot. (Imam Muslim Ibn al-Hajjaj, 2002).

The point of the aforementioned saying is that one of the countervalues in an exchange is currency and the other is receivable currency, which is not present at the time of making a contract.

Referring back to the law, Subsection 6 refers to 'extending cash'. Islamic banks can only extend cash as an interest-free loan. The main way that an Islamic financial institution can earn income is through the buying and selling of goods and services, or profit earned from participating in a risk-bearing partnership business through *mudrabah/wakala* (trust fund management). In the case where the Islamic Bank 'extends cash', directly, and then charges money over and above that amount, whether





we call it profit or interest, it falls under the prohibition on interest as per the Quran and Hadith. Modern scholars have also prohibited discounting/forfeiting/factoring, as it leads to the selling of the debt. In this context, AAOIFI has issued a Shariah Standard No. (16): Commercial Papers, which contain parameters for Islamic financial institutions prohibiting discounting the obligation or selling the debt. The standard states that:

6/1 It is not permissible to discount commercial papers, but it is permitted to pay an amount that is less than the value of the paper to the first beneficiary before the date of maturity.

6/2 It is not permissible to sell commercial paper that has not become due for an amount similar to its value (*riba al-nasi`ah*) nor for an amount that is more than its value (*riba al-nasi`ah plus riba al-fadl*).

Section 5 of the Islamic banking law permits factoring and forfeiting for Islamic financial companies. From the Shariah principles and rules, the Hadith of the Prophet (PBUH) is also applicable to Islamic financial companies and Islamic banking. Section 18 of the Islamic banking law, on permitted banking operations, mentions:

(18) Purchase and sale for its own account or for the account of customers of:

Money market instruments (including checks, bills of exchange, promissory notes, and certificates of deposits);

Foreign currency;

Stocks and other transferrable securities;

Forward contracts, swap agreements, futures, options, and other derivatives relating to currencies, stocks, bonds, precious metals and stones, or exchange or Islamic financing rates.

The above article permits dealing through the sale and purchase of money market instruments such as bills of exchange, promissory notes, and certificates of deposits (CDs). According to the Hadiths of the Holy Prophet (PBUH) as narrated by Abdullah Son of Omar, the Prophet (PBUH) prohibited the selling of debts for debts. Imam Malik (2007) says in his book *Muwatta*: 'Delay for the delay is (means) to sell a debt against one man for debt against another man' (p. 211). Additionally, due to this prohibition on selling debt, not prohibited under the Islamic banking law of Tajikistan are the purchase or sale of futures contracts and swap agreements, futures, options, and derivatives. These transactions contradict the main principle of Islamic banking and finance – the prohibition on selling item without owning them which fall – under the





principle of, 'Do not sell what you do not own' (Imam Hafiz Abd Abdur Rahman Ahmad bin Shu'aib bin 'Ali An-Nasa'i, 2007); as Ibn `Abbas narrates, the Messenger of Allah (PBUH) said: 'If anyone buys a grain, he should not sell it until he takes possession of it'. (Sulaiman's son Harb said: 'Until he receives it in full'. Musaddad added, 'Ibn `Abbas said: And I think that everything is like grain'; Sunan Abu Dawud, Hadith No. 3497 (Abu Dawud al-Sijistani, 2009)) Notably, the scholars exclude from the prohibition in light of other Sayings of the Holy Prophet (PBUH) *salam* (selling agricultural goods before it is harvested by the selling, where the buyer will pay to the seller in advance before harvest) and *istisna* (is selling goods which will be produced before it is a production where the buyer will pay the seller in advance for goods) sales as well as the sale of specified goods and services such as a forward lease.

In light of the above two Hadiths of the Holy Prophet (PBUH), also prohibited by him, in the researcher's opinion, but permitted by the Islamic banking law of Tajikistan, are gambling and no ownership transfers between buyer and seller. In addition, regarding Shariah rules for selling of currencies, the Holy Prophet said in the Hadith of Abu Sa'id al-Khudri (Allah be pleased with him): 'Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, salt by salt, like by like, payment being made hand to hand. He who made an addition to it, or asked for an addition, in fact, dealt in usury'. The receiver and the giver are equally guilty (Mishkat al-Masabih, Hadith No. 2809). The two abovementioned Hadiths (PBUH) prohibit one-sided dealing but provide an alternative solution for currency transactions, which must be spot-based transactions, and also prohibit getting an extra amount in exchange for the same currency. Moreover, derivative and option transactions involve *gharar* (ambiguity) and thus are similar to gambling; most interpreters of the Quran consider these types of transactions to come under the *gharar* prohibition:

O, you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful.

Gambling is prohibited where one party will gain on the loss of some other party. In the context of the prohibition of transactions that contain *gharar*. Abu Huraira (Allah be pleased with him) reported that Allah's Messenger (may peace be upon him) 'forbade a transaction determined by throwing stones and the type (of the transaction) which involves some uncertainty' (Bulugh al-Maram, Hadith No. 861 (Ibn Hajar al-Asqalani, 1996)). Modern Muslim scholars also conclude that derivatives and options





are prohibited in light of the above verse of the Quran and the Hadiths of the Holy Prophet (PBUH). In this respect, AAOIFI's Shariah standard is mentioned under Shariah Standard No. 20, which said under 'Sale of Commodities in Organized Markets' regarding futures, as 5/1/2, 'The Shariah rule for futures contracts. It is not permitted according to Shariah to undertake futures contracts either through their formation or trading'. Regarding the prohibition of options transactions, in which a right is bestowed for the purchase or sale of an identified item at a determined price and a determined period under the same standard of AAOIFI, it is stated that: '5/2/2 The Shariah rule for options. The Shariah rule for options indicated above are not permitted either with respect to their formation nor trading' (Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), 2017).

Derivatives do not consist of any offer and acceptance; hence, according to the International Fiqh Academy these transactions shall be considered prohibited and also the subject matter of the transaction will not be compensated. For Swaps transactions, the Shariah standard says:

Swaps are agreements between two parties for the temporary exchange of determining financial assets, material assets or interest rates. In some cases, the sale of a commodity or deferred currency takes place without the transaction resulting in any exchange of the commodity, while in other cases there may be an option, in return for a counter-value, that gives the owner the right to execute or not to execute the contract.

In light of the above standard definition for swap deals, Shariah standard No. 5/3/2 states the following: 'Shariah rule for swaps': 'Swaps are not permitted in the forms in which they are practiced in commodity exchanges' (Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), 2017).

Swaps are prohibited because they involve the sale of money for money unequal in amount and deferred, which relates to the *riba* of sale. Furthermore, swaps involve a gambling element, since one of the counter-values is uncertain and variable; it may change in the interest of one of the contracting parties at the expense of the other. The legislation also has some other technical issues, where it only permits Islamic banks and financial companies' financial leasing. Islamic financial institutions are limited to financial leasing, which will limit their range of business operations, as Islamic banks cannot compete with conventional banks in those sectors. The Shariah standards permit all types of leasing, provided that the Islamic financial institute





possesses a property, which is subject to lease or usufruct before it leases it to the customer. Article 19.3 of Islamic banking law on charging fees for licensing where the law uses the term 'Islamic microcredit funds'. Notably, Shariah will not permit crediting or lending money to customers; hence, it is required to amend the wording of the law to use the term 'microfinancing', which is broader.

In Chapter 4 of the law for operating Islamic banking and financing, Article 24.4.10 discusses 'Determining terms and size of salary payment for the members of the Committee of Financial Services (Shariah Board)'. The mentioned law directly considers the Shariah board member as 'staff' of the financial institution, although the Shariah board is an independent body, not staff; other articles under 24.4 do not mention the independence of the Shariah Board. A financial institution may pay rewards or fees to Shariah board members, but irrespective of the situation, the Shariah board member shall not be a member of the bank staff, and the board must be an independent body to fulfil its responsibility.

The banking law of Kazakhstan, Article 52-2.2, states: 'The Council on Islamic Financing Principles is an independent body appointed by the general meeting of shareholders of Islamic Bank under the recommendation of the Board of Directors' (Parliament of the Republic of Kazakhstan, 2009). In contrast, the Islamic banking law of Tajikistan required amendments to provide full independence to the Shariah board to fulfil its responsibilities properly, in particular, to participate in dispute settlement between customers and Islamic banks based on practices in Malaysia and Bahrain. Generally, commentary on Islamic banking law in Tajikistan uses conventional banking terms, such as debit/credit, lender, and borrower. In principle, however, Islamic financing involves buying and selling goods and usufruct in partnership; thus, it does not mean giving or lending cash. Therefore, these terms required amendments for the law to follow the nature of Islamic banking and finance. Furthermore, the law does not mention a mechanism for developing new products for Islamic banks or financing companies.

5 GUIDANCE OF THE NATIONAL BANK OF TAJIKISTAN

The guidance issued by the National Bank of Tajikistan (2019) violates Shariah principles and rules of Islamic banking. The guidance is advisory, not compulsory, for Islamic institutions to consider while they develop agreements with customers. We





found that similar issues exist also in guidance issued by the National Bank of Kyrgyzstan. Some Shariah compliance issues are as follows:

Under the first section of guidance related to definitions and terms, the guidance defines a late penalty amount, which is a penalty for non-payment of an instalment by the customer. The definition does not determine that a financial institution has the right to obtain only actual losses from the paid amount and any remaining amount shall be spent on charity causes approved by the Shariah Board, as would be needed for Shariah compliance, that the late payment amount received by the bank shall not go to the profit and loss account of the bank. The guidance states: 'Fine: in relation to funding, it means fines, which Islamic credit companies charged from their customers for late payment instalments without confirming the real damage'. The extra amount received above the principal amount is considered interest; as the Holy Prophet (PBUH) said: Any debt which returns with a benefit, the received benefit above the principal amount is considered *riba*. It was narrated that Yahya bin Abu Ishaq Al-Huna'i said:

I asked Anas bin Malik:

What if a man gives his brother a loan, then (the borrower) gives him a gift?' The Messenger of Allah (ﷺ) said: 'If anyone of you borrows something then he gives (the lender) a gift or gives him a ride on his riding-beast, he should not accept the gift or the ride unless they used to treat each other in that manner beforehand (Imam Muhammad Bin Yazeed Ibn Majah Al-Qazwini, 2014).

According to Shariah standard, it is impermissible to accept the gift from the borrower and any type of benefit unless there is precedent in the relation between lender and borrower, it is not for the sake of the loan, and without amendment repayment of the debt obligation. International Fiqh Academy issued a similar opinion. Therefore, the guidance must insert wording forfeiting the extra amount in charity causes which do not bring any direct and indirect benefits for the Islamic financing institute.

According to Shariah standards, it is not permissible to accept a gift from the borrower or any type of benefit. Unless there is a precedent in the relationship between lender and borrower, it cannot be accepted for the sake of the loan and is without the obligation of repayment. The International Fiqh Academy (1990) issued a similar opinion. Therefore, the guidance must insert wording forfeiting the extra amount in





charity causes, which do not bring any direct or indirect benefits for the Islamic financing institute.

Another noncompliance issue with the above definition of the penalty is that the guidance mentions actual losses but does not exclude opportunity profit and cost of funding, whereas in conventional banking, the 'opportunity profit and cost of funding' is considered a normal expense. Under Islamic banking, however, it is not acceptable to charge those expenses to the customer. The basis for this requirement is the abovementioned Hadith of the Holy Prophet narrated by Annas Ibni Malik, which prohibits all types of excess in cash and kind by the obligor to the lender. Furthermore, AAOIFI's Shariah standard justifies the impermissibility of charging above the actual costs, equivalent to excess in the principal amount; again, the International Fiqh Academy also issued a resolution on non-permissibility of charging those costs.

The guidance mentioned a rebate amount under the Murabaha product agreement, which the bank will give to its customer, but it fails to comply with Shariah by not mentioning that the bank shall not include it in the agreement or shall not issue a promise or a commitment in any form, either document or verbal, on payment of rebate to the customer in case of early payment of the principal amount by the customer. The non-precondition discount is permissible in the agreement without any commitment or promise, which is considered an unconditional gift from the seller. It is vital to mention that the 'term' of financing does not have any rule concerning the extension of debt or its discounting. According to the Hadith of the Holy Prophet (PBUH), in the case of Ubay ibn Ka'b (may Allah be pleased with him) and his debtor they could 'Write off a portion of your debt' (Muhammad ibn Isma'il al-Bukhari, 2000), a ruling again reflected in a resolution by the International Islamic Fiqh Academy (1992).

The guidance in Article 2.10 of the Murabaha agreement, proposed by the regulatory bank, states that ownership of goods shall pass to the customer after the final instalment payment, whereas per the Shariah standard of AAOIFI, it must be transferred immediately after signing of the Murabaha (SPA) contract. The justification of the Shariah standard is that such a term in the agreement contradicts the nature of the 'effect' of the sale purchase agreement (Murabaha agreement), where the consequence must be ownership transfer of the subject of the sale to the purchaser. Therefore, it is prohibited to stipulate the condition of delay ownership in the agreement to the final instalment payment. It is worth mentioning that the same issue exists in law,





where ownership shall remain with the seller of the Murabaha, in the legislation of the Kyrgyz Republic (National Bank of the Kyrgyz Republic, 2006).

The Shariah issue in the proposed agreement in Appendix 1, Article 7, mentions that in case of any dispute, parties are aware that given the price of selling, the goods mentioned in the (Murabaha) agreement will have the initial (not final) price. The abovementioned clause contradicts AAOIFI's Shariah standard on Murabaha, where the justification is to avoid uncertainty and lack of knowledge, and it is also against the nature of Murabaha, where it is a trust sale. Hence, the parties are required to determine the price, cost, and profit in the Murabaha agreement, and these shall be fixed and not considered the initial price of Murabaha.

6 CONCLUSION

The adoption of Islamic banking legislation in Tajikistan represents a positive step towards establishing a stable financial sector. As detailed above, Islamic banking and finance have specifics that contradict the conventional financial system. However, the current legal framework lacks essential components specific to Islamic banking and financial. This includes the treatment of Islamic banks as trading companies, which have a right to conduct all types of trading activities and participate in partnership relations while receiving deposits from their customers, to finance these customers who need financing. The Islamic banking sector is at the beginning of its development in the country, the region, and some other parts of the world; hence, the government and regulatory bodies have to focus on the following to build a competitive financing sector, which will be attractive to foreign and local investors. The following conclusions can be drawn from the evidence presented:

As aforementioned, Islamic financing is at the early stage of its development. Hence, the regulatory body shall build mechanisms in the laws and regulations that accept and adjust to new growth in the sector, so that it will not be necessary to go through lengthy procedures of amendment of laws to accept changes and develop new products.

Governments are required to create one level field of play in terms of tax treatment and other duties between conventional financing and Islamic financing, for





all types of Islamic banking products. Otherwise, Islamic banking will be more expensive and less attractive for investors and the bank's customers

As aforementioned, the Islamic financing sector is in the development stage and will certainly face claims and disputes between companies and their customers. How will regulatory bodies handle those potential disputes? The existing legislation does cover this issue. Moreover, the existing judges in Tajikistan are not aware of Islamic principles or rules; thus, how do they give opinions on Islamic banking matters? At this stage, the government should train professional judges and related personnel who can handle Islamic finance cases in court, with good knowledge of Shariah principles and rules. However, until that stage is reached, the responsibility for dispute settlement shall be transferred to the Tajikistan National Bank's Shariah Board, or at least its opinion must be accepted in court by judges, for matters related to Islamic banking and finance. Additionally, the Shariah Board of the National Bank (Central Bank) of Tajikistan shall have the authority to review and approve the regulation of the National Bank before it is announced and participate with other government bodies to amend the legislation related to Islamic banking and finance. The regulatory body has to learn from Bahrain and Malaysia regarding the role of the Shariah Board of Central Bank (National Banks) in dispute settlement. Another solution can be the establishment of an Islamic arbitration centre for dispute settlements on matters and cases related to Islamic financing.

It is crucial for the Islamic financing sector to establish a working group to amend existing legislation, particularly the non-Sharia compliance clause. The National Bank of Tajikistan has to implement similar policies to amend the regulations, which contain non-Shariah compliance clauses and terms.

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