

Sadd Ul Dharai And Modern Financial Contracts: Re-Defining Limits

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Abstract

Various Islamic financial contracts have been utilized for business transactions, investments, and dispute resolution, particularly in bank-related business operations for regulatory purposes. However, the expansion of the banking sector has led to numerous legal challenges. As a result, the demand for an Islamic legal system with a specialized approach is increasing. Conducting contracts in a traditional, non-Islamic manner can harm both customers and banks, as it raises the risk of entering into interest-based agreements. It is forbidden to use legal tools or any other means to further the illicit interests of clients. However, there are legal ways to convert illegal tactics into lawful ones. The application of Islamic financial contracts that support illicit means is prohibited by the principle of *Sadd ul Dharai*. This research study aims to prevent financial contracts from using any illicit tactics. There is no room for doubt or error when applying *Sadd ul Dharai* to these financial arrangements to ensure business is conducted in an Islamic manner. Islamic banks prohibit illegal contracts and use only lawful strategies with all legal instruments.

Keywords: Sadd ul Dharai, legal fiction, Islamic financial contracts, interest, illegal means.

Introduction:

The concept of *Sadd ul Dharai* is based on the idea of preventing evil before it occurs. It means refraining from permissible actions if they lead to harm. While the actions themselves may not be *haram*, they are prohibited if they result in *haram* outcomes. There are many classical jurisprudential opinions on this issue. For instance, some jurists consider the contract of *Tawarruq* impermissible. According to Imam Malik, it is permissible to give money to the enemy of Islam spreading *shar*. In contracts like *Ijarah*, purchasing immovable property for gambling, buying grapes for wine production, and engaging in forward contracts involving *riba*, or *Bai o salaf* due to its potential to lead to *riba* are all considered impermissible.

Additionally, giving a gift to a creditor, buying weapons during times of conflict, hoarding food (*ihtikar*) to the detriment of public interest, and digging a well in a public pathway are all examples of contracts deemed impermissible because they lead to harm (*Mafsadah*). *Heelah* and other legal devices are not the same as *Sadd ul Dharai*. While ill intentions are present in *Heelah*, *Sadd ul Dharai* leads to prohibited actions instead of bad intentions. I will

discuss the methods that are currently used in financial contracts. For example, in banking, particularly in conventional banks, commercial and financial contracts are based on *riba* through the use of *Heelah* and *Sadd ul Dharai*. It's crucial to apply *Sadd ul Dharai* to financial contracts and to examine how it's applied in contemporary Islamic banks. Financial contracts are agreements involving commodities, securities, interest rates, currencies, or other variables. Banks engage in various contractual arrangements, and *Sadd ul Dharai* is applied to these transactions to prevent the use of illicit instruments. Each contract law is unique, leading to different ways in which illegality can be involved.¹

Research Methodology

This study utilizes a qualitative, descriptive methodology. To gather information, the researcher examined relevant sources such as books, journals, research papers, articles, and case laws. The data has been organized and analyzed in the Chicago research style throughout the work. The gathered data was then evaluated within the context of Islamic law.

Analysis

Meaning of *Sadd ul Dharai* in Islamic Jurisprudence:

The plural form of the word "Dharai" is "Dhariah," which signifies a means to an end, regardless of whether the aim is good or bad, legal or illegal. Conversely, "*Sadd ul Dharai*" literally translates to "obstructing the lawful means to a lawful end." In contrast, the phrase "*Fath al Dharai*" translates to "permitting the unlawful means to a lawful end."²

Application of *Sadd ul Dharai* on modern financial contracts:

1) On Guarantee contract:

Since an agency contract would violate the spirit of trust, *Sadd ul Dharai* does not apply to trust agreements.³ Additionally, *Sadd ul Dharai* prohibits capital guarantees in *Murabaha* and *Musharikha* contracts, as these guarantees are seen as assurances for loan disbursement, leading to *riba*. This practice is forbidden by *Sadd ul Dharai*. However, documentary credits and letters of guarantee, which involve service-related costs, are exceptions. According to *Sadd ul Dharai* agency, and personal guarantees cannot be combined in a single contract simultaneously.⁴

2) *Murabaha* to the purchase ordered:

Sadd ul Dharai doesn't allow:

Sadd ul Dharai prohibits several practices to avoid activities considered harmful or exploitative. First, it disallows any business connection between the customer and supplier to prevent *Bai ul inah*, a forbidden practice. Second, it forbids one partner from buying the share of another partner as it results in a buyer guaranteeing the other's share, leading to *riba* (usury). Third, the re-pricing of *Murabaha* transactions is prohibited as it leads to the sale of debt. Additionally, it disallows the collection of commitment fees and commissions. The customer cannot

¹ Hafiz Muhammad Fakhru Din and Sheraz Ahmad, "asree masail ki hal mi sadd al dharai and fath ul dharai" *International Research Journal on Islamic Studies (IRJIS)* 3, no. 02 (2021): 160, doi:10.54262/irjis.03.02.u10.

² Imran A. Nyazee, "*Islamic Jurisprudence*," - (Morrisville: Lulu.com, n.d), 248.

³ *Shari'ah Standards: Full Text of Shari'ah Standards for Islamic Financial Institutions as at Safar 1437 A.H. - December 2015 A.D* (2015), 249 and 430.

⁴ Hussein Elasrag, "*Understanding Islamic Finance*," (Hussein Elasrag, 2022), 169-170.

guarantee the risk of transportation. Charging extra money for delays is also prohibited, as it constitutes *riba*. Lastly, delays in the transfer of ownership are not permitted.⁵

3) **On *Ijarah* and *Ijarah Muntahi bittamlik*:**

***Sadd ul Dharai* does not allow in the contract of *Ijarah*;**

Sadd ul Dharai several restrictions on *Ijarah* (leasing) contracts to prevent impermissible activities. First, it prohibits releasing a leased asset or initiating a new lease contract with another lessee while the first lease is still active, as this leads to impermissible sales and multiple leases of the same asset. Leases must involve the usufruct of an asset owned by the lessor, and leasing an asset that the lessor does not own is prohibited. The subject matter of the lease must be the usufruct of a tangible asset, not a perishable item. Additionally, the lessee should not be held liable for any loss unless it results from negligence or misconduct. The lessor cannot impose major maintenance responsibilities or defect repairs on the lessee. Rental payments should not be regarded as debt, and rescheduling payments in exchange for higher returns is not allowed. Deferment of payments that increase the lease amount is also prohibited, as it leads to *riba* (usury).

Combining lease and sale contracts is not permitted because their obligations and liabilities are not interconnected. Lastly, ownership stipulations rental payments should not be regarded as debt, and rescheduling payments in exchange for higher returns is not allowed. Deferment of payments that increase the rental payments should not be regarded as debt, and rescheduling payments in exchange for higher returns is not allowed. Deferment of payments that increase the lease amount is also prohibited, as it leads to *riba* (usury). Combining lease and sale contracts is not permitted because their obligations and liabilities are not interconnected. Lastly, ownership stipulations lease amount is also prohibited, as it leads to *riba* (usury). Combining lease and sale contracts is not permitted because their obligations and liabilities are not interconnected. Lastly, ownership stipulations set for a future date are disallowed, as sale contracts cannot depend on future conditions.⁶

4) **On *Salam* contract:**

***Sadd al Dharai* does not allow in the contract of *Salam*;**

Sadd ul Dharai imposes several restrictions on *Salam* contracts to avoid impermissible activities. Capital must not be in the form of debt, as this constitutes a sale of debt, which is prohibited. Failure to deliver the capital on the agreed date introduces uncertainty, leading to *riba* (usury).⁷ The sale of the subject matter of *Salam* before taking possession is prohibited. Additionally, setting a price for the subject matter of *Salam* that is higher than the market value is not allowed. Any stipulation on payment that exceeds the principal amount of the debt is forbidden. Specifying a particular commodity or product also leads to uncertainty and is thus prohibited under *Sadd ul Dharai*.

5) **On *Istisna'a* contract:**

***Sadd ul Dharai* does not allow in the contract of *Istisna'a*;**

⁵"Shariah Standards," 130,131.

⁶ "Shariah Standards," 151-158.

⁷ Beng S. Chong and Ming-Hua Liu, "Islamic Banking: Interest-Free or Interest-Based," *SSRN Electronic Journal*, 2005, 6-7, doi:10.2139/ssrn.868567.

Sadd ul Dharai imposes several prohibitions on *Istisna'a* contracts to prevent impermissible activities. Renewing an exchange of offer and acceptance after the subject matter has been prepared is not allowed. If the institution acts merely as a financier for the *Istisna'a* contract between the supplier and purchaser, the true *Istisna'a* contract is not concluded, leading to *riba* (usury). Any defect in the manufactured goods invalidates the contract. The contract must not involve *riba* transactions or *inah* sales. *Istisna'a* contracts cannot be concluded without specifying the manufactured or constructed item. Drawing up an *Istisna'a* contract based on a *Murabaha* contract is also prohibited. Setting the date of payment in return for consideration leads to *riba* and is not permitted.⁸

6) On *Sharika's* contract:

Sadd ul Dharai imposes specific prohibitions on *Sharika* contracts to ensure compliance with Islamic principles. Fixing remuneration for a partner is not allowed. Deferring the statement of the profit ratio until the profit is realized introduces uncertainty, which is prohibited. It is forbidden to stipulate a loss for one party. Profits cannot be distributed before deducting expenses and expenditures. Specifying a lump sum profit amount for one partner is also prohibited. Guaranteeing the capital (asset of the partnership) is not permitted, including any promise by a partner to buy the capital at face value upon termination of the partnership contract. Issuing preferred shares that are inconsistent with profit-sharing principles is not allowed.⁹

7) On *Mudarabah* contract:

The application of *Sadd ul Dharai* does not allow in the contract of *Mudarabah*;

Sadd ul Dharai imposes several prohibitions on *Mudarabah* contracts to avoid impermissible activities. Providing money in return for a pre-agreed payment (rent) to someone willing to invest it is not allowed, as this constitutes a debt with *riba* (renting out money). Considering debts as the capital in *Mudarabah* involves *riba*. A lack of knowledge about the subject matter nullifies the contract. Agreements that allocate profits solely to the *Rabb ul Maal* (capital provider) or solely to the *Mudarib* (investment manager) are prohibited, as they prevent the proper sharing of profits and lead to *riba*. The capital provider cannot stipulate a condition requiring the *Mudarib* to work with a specific person. Restrictions preventing the *Mudarib* from making loans, gifts, or charitable donations are also not allowed.¹⁰

8 On *Sukuk*:

Regarding *Sukuk*, *Sadd ul Dharai* imposes certain restrictions to prevent impermissible activities. Trading *Salam* certificates are not allowed as they are subject to the rules of debt trading. Similarly, trading in *Murabaha* certificates is prohibited because these certificates represent monetary debt against the buyer. *Sukuk* involving *Bai ul inah* and *Bai ul dayn* is also prohibited.¹¹

9 On loan (*Qard*):

⁸ "Shariah Standards," 193-195.

⁹ "Shariah Standards," 233 and 226.

¹⁰ "Shariah Standards," 244, 246 and 248.

¹¹ "Shariah Standards," 320.

Regarding loans (*Qard*), *Sadd ul Dharai* imposes several prohibitions to avoid impermissible activities. Stipulating any excess with a *Qard* leads to *riba* and makes the agreement invalid. Compensation is prohibited if it is stipulated. Requiring a gift upon repayment of a *Qard* is forbidden, as it leads to *riba*. Any stipulation of material benefit is also prohibited.¹²

10) **On *Wakalah* (agency):**

Regarding *Wakalah* (agency), *Sadd ul Dharai* imposes specific prohibitions to ensure compliance with Islamic principles. Combining agency and guarantee in the same contract is prohibited, as it leads to *riba*. An agent cannot represent both parties in a contract. If an agent breaches the contract by altering the price agreed upon between the principal and the agent, the agent will bear the loss, leading to *riba*. The agency is also prohibited from activities forbidden by *Shariah*, such as theft or conducting *riba*-based business. Additionally, appointing an agent for acts like prayer, fasting, giving evidence, or taking an oath is not allowed.¹³

11) **On *Tawarruq* contract:**

Regarding *Tawarruq* contracts, *Sadd ul Dharai* enforces several prohibitions to prevent impermissible activities. Selling a commodity back to the person from whom it was bought on credit is prohibited. Not taking possession of the commodity before selling or purchasing it is also not allowed. Combining *Tawarruq* with agency contracts is prohibited, as is the stipulation of agency within *Tawarruq* contracts. Additionally, *Tawarruq* is prohibited if the commodity is not transferred to the buyer from the seller.¹⁴

12) **On Gift:**

Regarding gifts (*Hibah*), *Sadd ul Dharai* prohibits guaranteeing a gift.

13) **On *Bai ul inah*:**

Regarding *Bai ul inah*, *Sadd ul Dharai* imposes several prohibitions to prevent impermissible practices. *Bai ul inah* is considered problematic because it involves *Bai al Nasiah* (a type of credit sale), which is prohibited. It also leads to *riba* (usury), which is forbidden.¹⁵ *Bai ul inah* is prohibited because it achieves illegal ends through legal means.¹⁶

Additionally, selling an item on credit and then repurchasing the same item at a lower price constitutes a method of converting an unlawful transaction into a lawful one, which is not allowed.¹⁷ Regarding *Bai ul inah*, *Sadd ul Dharai* also prohibits the use of legal devices to circumvent its restrictions.¹⁸ *Bai ul inah* is disallowed because it involves blocking the means to an illicit end, a principle known as *Sadd ul Dharai*, which aims to prevent any actions that could lead to prohibited outcomes.¹⁹

14) **On *Bai bil Wafa*:**

¹² "Shariah Standards," 345,353,354.

¹³ "Understanding Islamic Finance," 2012, 348,349. doi:10.1002/9781119209096.

¹⁴ "Shariah Standards," 540,541.

¹⁵ "Shariah Standards," 464.

¹⁶ "Understanding Islamic Finance," 230.

¹⁷ *Encyclopedia of Interest Free Banking: Banking in Islam* (2010), 4.

¹⁸ Raquib Zaman, "Riba and Interest in Islamic Banking: An Historical Review," *The Foundations of Islamic Banking*, 2011, 73, doi:10.4337/9781849807937.00021.

¹⁹ Habib-ur-Rahman, "Islamic Financial Instruments," (2003), 268.

In *Bai bil Wafa* transactions, *Sadd ul Dharai* prohibits making a condition to resell the house for the initial sale.²⁰

15) On *Takaful* (Islamic insurance):

In *Takaful* (Islamic insurance), *Sadd ul Dharai* enforces several prohibitions to ensure compliance with Islamic principles. Insurance that does not involve mutual assistance is not allowed. *Riba* (usury), *Gharar* (excessive uncertainty), and gambling are prohibited. The exchange of premiums and the sum insured in a manner that leads to *riba* is prevented by *Sadd ul Dharai*.²¹ Transactions based on *riba* are excluded under *Sadd ul Dharai*. The stipulation of transferring property ownership with commercial benefits tied to uncertain events is also not allowed. Non-cooperative insurance practices are prohibited by *Sadd ul Dharai*.²²

16) On *Wadiah*:

Regarding *Wadiah* (safekeeping), *Sadd ul Dharai* makes it lawful to reward the *Wadiah* amount with a *hibah* (gift).²³

17) On *Bai Muajjal* (credit sale):

In *Bai Muajjal* (credit sale) contracts, *Sadd ul Dharai* prohibits uncertainty regarding the time of payment. It also forbids selling one commodity at two different prices.²⁴

18) On *Musawama*:

Regarding *Musawama* (negotiated sale), *Sadd ul Dharai* does not require the institution (bank) to disclose details such as the cost price or profit margin to the client.²⁵

19) On *Bai al Urboon*:

In *Bai al Urboon* (earnest money or down payment), *Sadd ul Dharai* disallows *urbun* due to concerns about *Gharar* (excessive uncertainty). Retaining or forfeiting *urbun* is considered a means to an unlawful end and is therefore prohibited.²⁶

20) Two bargains in one sale and conditional sale:

In the context of two bargains in one sale and conditional sales, *Sadd ul Dharai* imposes the following restrictions:

1. Sales involving two conditions or even a single condition are prohibited.
2. Any unjustifiable profit that favors one party is not allowed.
3. Gambling in any form within a sale is prohibited.
4. Combining contracts that are conditional upon each other is not permitted.²⁷

21) On Combination of contracts:

²⁰ Raquib Zaman, "Riba and Interest in Islamic Banking: An Historical Review," *The Foundations of Islamic Banking*, 2011, 74, doi:10.4337/9781849807937.00021.

²¹ Habib-ur-Rahman, "Islamic Financial Instruments," 419.

²² "Shariah Standards," 482-489.

²³ Joshi, D.R., "Encyclopedia of interest Free Banking: Banking in Islam," 10.

²⁴ Rahman, Habib, "Islamic Financial Instruments," 208.

²⁵ Ayyub, Muhammad, "Understanding Islamic Finance," 238.

²⁶ "Shariah Standards," 36.

²⁷ Ayyub, Muhammad, "Understanding Islamic Finance," 145.

Regarding the combination of contracts, *Sadd ul Dharai* prohibits using *Muataah* (a specific type of contract) as an excuse to justify *riba* (usury). This prohibition is based on the principle of *Sadd ul Dharai*, which aims to prevent practices that could lead to *riba*, even if the intention behind the use of *Muataah* is good. Additionally, the application of *Sadd ul Dharai* requires that any use of such contractual arrangements must not serve any need or lawful interest that justifies circumventing these prohibitions.²⁸

22) On cards:

For payment cards, specific prohibitions apply under *Sadd ul Dharai* principles. For debt cards, charging interest arising from transactions is strictly prohibited. In the case of charge cards, paying interest due to delays is not allowed, and any conditions imposed on the cardholder that are deemed impermissible are considered invalid. Similarly, for credit cards, revolving credit facilities that involve interest are prohibited. These restrictions are in place to ensure compliance with Islamic financial principles and prevent *riba* (usury) and other prohibited practices.²⁹

Conclusion

Sadd ul Dharai is a crucial legal term and source within Shariah law, meaning to block all lawful means when they lead to unlawful ends. Conversely, *Sadd ul Dharai* means to open all unlawful means when they lead to lawful ends. Islamic law prohibits many actions through the *Quran* and *Sunnah*, but some matters are decided by jurists. Every action has both benefits and harms and if the benefit outweighs the harm, the benefit prevails in the public interest. While it is not feasible to provide research guidelines for every activity based on Islamic law, efforts have been made to address issues arising in modern Islamic banking. This research analyzes several points like *Sadd ul Dharai* serves as a legal source to block lawful means leading to unlawful ends and to open unlawful means leading to lawful ends in the public interest. Public interest and benefit are prioritized, with *Sadd ul Dharai* distinguishing between blocking means and legal devices. If an act is lawful but results in an unlawful outcome, it is prohibited. The authenticity of *Sadd ul Dharai* is supported by the *Sunnah*, as seen in the prohibition against creditors accepting gifts. Providing money to the enemies of *Islam* to release a Muslim prisoner is considered lawful. Killing hypocrites is forbidden to avoid accusations against Muslims of killing their companions. The suspension of *Hadd* penalties for theft is permissible if it prevents weakening Muslim forces.

Excluding a woman from inheritance due to a fatal illness is lawful. If means lead definitively to evil, they are prohibited, such as digging a well in a public path. Liability is enforced on wrongdoers, but if the possibility of mischief is rare, the act is not prohibited. Cultivating grapes is not banned, and giving evidence in cases of murder or theft is lawful to save lives or property. Where there is no dominant possibility of evil, the act is not forbidden. *Bai ul Ajal* leads to *riba* (usury) and is thus prohibited based on blocking the means to an unlawful end. Imam Abu Hanifa and Imam Shafi prohibit a woman's marriage to a man solely to satisfy sexual desires, and *Khalwat* (private meeting) between a male and female that could lead to close relations is prohibited. The application of *Sadd ul Dharai* is not universal but varies

²⁸ "Shariah Standards," 459 and 465.

²⁹ "Shariah Standards," 21-28.

case by case. Modern Islamic banks sometimes use prohibited legal fictions to permit *riba* transactions, which cancels the original legal rulings made by Allah and prevents the objectives of Shariah. Modern Islamic banking employs various contracts to manage business, applying the rule of blocking the means to prohibit unlawful ends. Financial contracts like *Murabaha*, *Musharikha*, *Gift*, *Bai al Wafa*, and *Bai al Urboon* serve as alternatives to conventional financial contracts. These contracts differ in nature and application, and the application of *Sadd ul Dharai* to modern financial contracts renders some elements permissible and others impermissible, aiming to exclude *riba*, and *gharar* (excessive uncertainty), and ensure certainty.

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