

## SOCIAL IMPACT BOND (SIB): A SHARĪ‘AH APPRAISAL

Mahadi Umar Ahmad\*

Yahaya Yunusa Bambale\*\*

Mahamad Ibrahim Adam Zain\*\*\*

### ABSTRACT

Social Impact Bond (SIB) is a funding mechanism for social projects whereby the payment for the projects is anchored on meeting the outcome metrics, otherwise the investors risk losing their money. The mechanism emerged since 2010 in the United Kingdom and has quickly spread to other parts of the world. In the past, there has not been any popular *fatwā* on this mechanism from a Sharī‘ah point of view. Therefore, this article will examine the funding and payment arrangement and then conduct *takyif fiqhi* (jurisprudential adaptation) to ascertain the degree of Sharī‘ah compliance and determine the most appropriate Islamic contract most suitable under the arrangement. The article adopts a qualitative method of research by making in-depth analysis of Islamic contracts including the primary and secondary sources of Islamic law. It also relied on literature on SIB from conventional point of view and internet materials. Major findings of the research show that SIB, whilst its pay-for-success mechanism does not contain *ribā*, it contains excessive *gharar*. The excessive *gharar*, however, was found ineffective to void *al-ja‘ālah*-based SIB and *hibah li thawāb* which is the second contract similar to SIB. This is because of *hājah* and the element of gratuity respectively.

**Keywords:** Sharī‘ah, Social Impact Bond, *al-ja‘ālah*, *hibah li thawāb*, *gharar*

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\* Researcher, International Shariah Research Academy for Islamic Finance (ISRA). Email: mahadi@isra.my.

\*\* Professor of Laws, Faculty of Law, Ahmadu Bello University Zaria. Email: yybambale@yahoo.com.

\*\*\* Post-Doctoral Researcher, Institute of Islamic Banking and Finance, International Islamic University of Malaysia. Email: abuasmaa4@hotmail.com.

## BON IMPAK SOSIAL (BIS): SATU PENILAIAN SHARI'AH

### ABSTRAK

Bon Impak Sosial (BIS) adalah satu mekanisme pembiayaan untuk projek-projek sosial di mana pembayaran bagi projek-projek ini adalah didasarkan untuk memenuhi matrik hasil bagi mengelakkan risiko pelabur kehilangan wang mereka. Mekanisme ini muncul sejak tahun 2010 di United Kingdom dan telah berkembang dengan cepat ke seluruh dunia. Sehingga kini, masih belum terdapat *fatwā* yang jelas berkenaan dengan mekanisme ini dari sudut pandang Shari'ah. Oleh itu, makalah ini akan meneliti pembiayaan dan cara pembayaran dan kemudiannya melaksanakan *takyif fiqhi* (penyesuaian perundangan) untuk mengenalpasti tahap kepatuhan Shari'ah dan menentukan kontrak Islam yang paling sesuai di bawah aturan ini. Makalah ini menggunakan kaedah penyelidikan kualitatif dengan membuat analisis mendalam mengenai kontrak Islam berdasarkan sumber utama dan sekunder undang-undang Islam. Sandaran juga dibuat kepada literatur mengenai BIS dari sudut pandang konvensional dan bahan-bahan internet. Penemuan utama penyelidikan ini menunjukkan bahawa walaupun mekanisme bayaran untuk kejayaan BIS tidak mengandungi *ribā*, ianya masih mengandungi *gharar* yang berlebihan. Bagaimanapun, *gharar* yang berlebihan itu didapati tidak berkesan untuk membatalkan SIB berasaskan *al-ja'ālah* dan *hibah li thawāb* yang merupakan kontrak kedua yang sama dengan SIB disebabkan oleh *hājah* dan elemen ganjaran yang wujud dalam kedua-duanya.

Kata kunci: Shari'ah, bon impak sosial, *al-ja'ālah*, *hibah li thawāb*, *gharar*

### INTRODUCTION

Failure of project delivery as required by contracts is a global phenomenon. One of the newly initiated project delivery mechanism to arrest the menace of delivery failure is through the adoption of Social Impact Bond(s) (SIB). Specifically, it also refers to bonds over social impact projects that directly touch the life of the average person. This funding model was first introduced in 2010 as a pilot test at the Peterborough Prison, Eastern England, United Kingdom. This was intended to reduce government costs in events of reoffending prisoners. Since then, more SIBs have been developed to provide employments for the youths, mental health care, homelessness,

released prisoners' reformation, etc. It is on record that tens of thousands have benefitted from these SIBs. This system has been proven to be cost effective and save much of taxpayers' money and improve service quality. For example, The initiator of SIB, a corporation called Social Finance United Kingdom reported that, "*First Social Impact Bond in Peterborough reduced reoffending by 9% and returned investor capital with a 3% annualized return in 2017.*" It also said that, between 2016-2017 the United States market launched twelve deals that mobilised over 130 million USD in capital for equipping refugees and immigrants for future career as well as in-house treatment for families affected by drugs addition.<sup>1</sup> Furthermore, former President Barak Obama of the US included 'pay-for-success' project in his 2011, 2012 and 2013 budget with an aggregate of not less than \$100,000,000 set aside for SIB project.

Since inception, it has been a usual practice that SIB projects are funded by philanthropist investors, socially responsible investors and other investors that have inclination of community services and are pleased to be part of public-private partnership arrangement in funding projects that socially impact on the underserved segments of the society.<sup>2</sup> More importantly, one of the features of SIBs is that it is dominated by social investors, intermediary/project manager, service provider and guarantors (if available), who have inclination towards contributing to community social development.<sup>3</sup>

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<sup>1</sup> Social Finance, "Social Impact Bonds Reach Global Mass: 108 Projects Launched in 24 Countries," 2018, <https://www.globenewswire.com/news-release/2018/01/30/1314226/0/en/Social-Impact-Bonds-reach-global-mass-108-projects-launched-in-24-countries.html>.

<sup>2</sup> For example, section 257J of the UK Finance Act 2014 provides for tax relief for social investment and social enterprise that fall within the list enumerated as follows, community interest company, a community benefit society that is not charity, charity, an accredited social impact contractor, any other body prescribed or of a prescription prescribed, by an order made by the treasury.

<sup>3</sup> See Jeffrey Liebmann and Alina Sellman, "Social Impact Bonds: A Guide for State and Local Governments," *Harvard Kennedy School Social Impact Bond Technical Assistance Lab*, 2013, 10, accessed May 1, 2019, <http://projects.iq.harvard.edu/files/siblab/files/social-impact-bonds-a-guide-for-state-and-local-governments.pdf>."

With this charity-based characteristic, the investors are comfortable to forfeit their investment amount if the project fails to meet the outcome metrics. This is the aspect that requires Shari'ah appraisal, as no human being will simply risk losing his money and risk having to go to court for no valid reason. Being a new form of social project financing model, it is possible to apply the well-known principle of Shari'ah that the original presumption of things is permissibility.<sup>4</sup>

Syed Marwan and Engku Rabiah discussed the importance of SIB in economic development but the focus of the article was not the Shari'ah status of SIB.<sup>5</sup> In another article, the authors found that the development of SIB has yet to gain interest in the Muslim world.<sup>6</sup> The findings therefore confirmed the need to conduct a research on the current topic, being an existing gap. In another research, Engku Rabiah Adawiah Engku Ali, *et al*, in their research on Socially Responsible Investment Şukūk, Social Impact Bonds and Public-Private Partnerships proposed *wakālah bi al-istithmār* combined with SIB as the payment mechanism. They proposed that the better the outcome achieved will determine the rate of the profit to be paid.<sup>7</sup> The current study is attempting to examine the Islamic contract most similar to SIB, being the gap that is yet to be covered. Then, clarification for Shari'ah view on SIB would be made, from the list of Islamic contracts to be analysed to understand their similarity with SIB.

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<sup>4</sup> Al-Zarkashi Abu Abdullah Muhammad Ibn Abdullah, *Al-Bahr Al-Muhit Fi Usul Al-Fiqh*, vol. 8 (Cairo: Dar al-Kutubi, 1994), vol. 8: 8.

<sup>5</sup> Syed Azman Syed Marwan bin Mujahid and Engku Rabiah Adawiah Engku Ali, "Potential Role of Social Impact Bond and Socially Responsible Investment Sukuk as Financial Tools That Can Help Address Issues of Poverty and Socio-Economic Insecurity," *Intellectual Discourse* 24, no. Special Issue (2016): 343–364, <https://journals.iium.edu.my/intdiscourse/index.php/islam/article/view/924>.

<sup>6</sup> Syed and Ali 351.

<sup>7</sup> Engku Rabiah Adawiah Engku Ali et al., "Alternative Financing Modes For Higher Learning Institutions in Malaysia: Socially Responsible Investment Sukuk, Social Impact Bonds, and Public-Private Partnerships, ISRA Research Paper No. 102," No. 102/2018 (Malaysia, 2018), 12–20.

In addition, Jason T. Carbone and Stephen Edward McMillin reported the finding of Hochodter and Scheck with Clarkin and Cangioni, that one of the important element of social impact investment is that, in addition to the possible profit to the investors, the investment will make positive and environmental impact.<sup>8</sup> This finding supports the finding of the Engku Rabia *et al*, who proposed SIB as one of the financing modes for higher education and strengthen the aim of the current article to unravel the Shariah point of view of SIB.

Cassie Edwards found that SIBs are of significant interests to Government and other parties like Non-For-Profit organization and social investors. He found that in South Australia most SIBs projects are of remedial course as against the finding of other literature that SIBs are only focusing on preventive course.<sup>9</sup> OECD working paper raised some possible questions which what could happen to the SIB in the event of project failure? Also, the question of meeting a degree of outcome but below the limit agreed upon? To these questions and others, Liebman *et al*, found that SIB could only be better for supplementary programmes rather than core social service provision.<sup>10</sup> This point of view is a strong element to conduct Shari'ah status of SIB as pursued in this article. After reviewing the closest literature to the current topic, it was discovered that no research has treated the Shari'ah status of SIB in the manner being adopted by the current article.

Nevertheless, there is a dire need for research on the Shari'ah perspective to ascertain its legal status. This has become more demanding as the financing model is spreading everywhere around the world. For example, apart from United Kingdom and the United States, Australia had taken the lead as early as it was introduced. Social Finance reported that, SIBs are gaining traction in low-income and developing countries. It has marked a significant presence in Africa and Asia with the commitment of twenty seven million dollars

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<sup>8</sup> Jason T Carbone and Stephen Edward McMillin, "Social Impact Bonds: A Social Impact Investment Approach to Facilitating Community Development," *Perspectives on Social Work*, 2017, 7.

<sup>9</sup> Cassie Edwards, "Social Impact Bonds," (Shelter SA, Adelaide, SA, 2014), 7.

<sup>10</sup> Galitopoulou and Noya, "Understanding Social Impact Bonds," 21.

by the International Committee of the Red Cross (ICRC) in Congo, Mali and Nigeria. There is also, two million dollars in Overseas Private Investment Corporation (OPIC) program in Cameroon and the three point five million dollars of the United States AID project in Rajasthan. SIBs are being launched in Latin America through the Inter-American Development Bank that saw the development of fifteen programmes. Also, Mexico, Brazil and Argentina were at the verge of launching SIB in 2018.<sup>11</sup>

The article seeks to understand how SIBs work and study the Shari'ah view as well as ascertaining the best Islamic contract SIB could be modelled upon to make it free from any Shari'ah violation. Identifying the Shari'ah position of SIB becomes pertinent because of the OECD's sponsored research that found that SIB failure may arise from government policies while referring to examples of such failure as,

“the New York City SIB on criminal justice. The SIB terminated prematurely only three years after it started due as it did not meet the targets agreed by this time. The One Service Peterborough SIB was also discontinued earlier two years into its implementation. This occurred due to a change in government policy that introduced the programme.”<sup>12</sup>

The article begins with an introduction, which covers the literature review while section two deals with the methodology. The third section examines the nature of SIB while section four conducts an in-depth jurisprudential analysis of some Islamic contracts that shares some similarities with SIB. The last part of the article is the

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<sup>11</sup> Alisa Helbitz, “Social Impact Bonds Reach Global Mass: 108 Projects Launched in 24 Countries,” accessed April 6, 2019, [https://www.socialfinance.org.uk/sites/default/files/news/sf\\_gn\\_100\\_sibs\\_press\\_release\\_final\\_30\\_jan\\_18\\_1.pdf](https://www.socialfinance.org.uk/sites/default/files/news/sf_gn_100_sibs_press_release_final_30_jan_18_1.pdf). Helbitz.

<sup>12</sup> Stellina Galitopoulou and Antonella Noya, “Understanding Social Impact Bonds” (Paris: Organisation for Economic Co-operation and Development (OECD), 2016), 21, accessed May 1, 2019, <http://www.oecd.org/cfe/leed/UnderstandingSIBsLux-WorkingPaper.pdf>.

conclusion and recommendation with a proposal for *al-ja'ālah*-based SIB.

There is plethora of literature on SIB from the conventional perspective, whereas there are few writings available from the Islamic perspective. However, the literature from Islamic perspective focused on another area of SIB and not on the Shariah appraisal of SIB.

## **NATURE AND DEVELOPMENT OF SOCIAL IMPACT BONDS**

Social Impact Bond or (SIB) is defined as;

“An innovative financing mechanism in which governments or commissioners enter into agreements with social service providers, such as social enterprises or non-profit organisations, and investors to pay for the delivery of pre-defined social outcomes.”<sup>13</sup>

If the social outcome improves, the government commissioner repays the investors for their initial investment plus a return for the financial risks they took. If the social outcomes are not achieved, the investors stand to lose their investment.<sup>14</sup> SIBs are also known as ‘Pay for Success Bonds’ in United States and in Australia, it began to be referred to as Social Benefit Bonds since 2011 in the State of New South Wales.<sup>15</sup>

It has been argued that despite the express wording of the name, ‘bonds,’ they are not necessarily bonds, but structure of outsourcing for funding of a social project.<sup>16</sup> This argument, however, is immaterial because whether they are bonds or not the result is the same as the proceeds of the fundraising process which are invested in social projects. Therefore, it could be concluded that one of the distinctive features of SIB is the focus of social

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<sup>13</sup> Galitopoulou and Noya, “Understanding Social Impact Bonds.”

<sup>14</sup> Ibid. Galitopoulou and Noya.

<sup>15</sup> John Roman et al., “Pay for Success and Social Impact Bonds: Funding the Infrastructure for Evidence-Based Change,” 2014, 8.; Tomkinson Emma, “Definition of a Social Impact Bond | Emma Tomkinson,” accessed April 7, 2019, <https://emmatomkinson.com/sib-definition/>.

<sup>16</sup> Galitopoulou and Noya, “Understanding Social Impact Bonds.”

projects. In the opinion of the researcher, the previous and existing projects of SIBs can support the attempt to also name them ‘humanitarian intervention *sukuk*.’

### ***Features of Social Impact Bonds***

From the above definition of SIB, it could be deduced that it has the following features:

1. Most SIBs projects are projects that elicit sympathy and humanitarian intervention
2. It is outcome-based project.
3. Payment of principal and a percentage of profit are anchored on meeting the outcome metric.
4. It is called ‘pay-for-success project’ in the US, while it is referred to as ‘Social Benefit Bonds’ in Australia.
5. Investors stand to lose until performance is proven by meeting the government target.
6. Most SIB investors are philanthropist, charitable organizations like trusts, foundations who have an inclination to contribute to community service.<sup>17</sup>
7. The amount of reward for success is predetermined, hence sharing a feature of *murabahah* contract in Islamic jurisprudence.
8. Most of the projects target vulnerable individuals in the society.<sup>18</sup>
9. It is a financing arrangement and not a typical debt instrument like tradable bond or debenture.

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<sup>17</sup> See section 257J of the UK Finance Act 2014.

<sup>18</sup> Galitopoulou and Noya.



### ***Historical Development of Social Impact Bonds***

The origin of SIB dates can be traced to the United Kingdom in 2010, by a non-profit organization, Social Finance United Kingdom. The United Kingdom Ministry of Justice approved this pioneer SIB in the world to Social Finance United Kingdom to reduce the recidivism of short sentenced male prisoners at Peterborough prison. The non-profit Social Finance United Kingdom, acted as an intermediary and as the project manager raised funds from both philanthropists and social investors to fund another non-profit, St. Giles Trust as the service provider. The terms of the contract were that, the government of the United Kingdom will pay Social Finance the investment amount plus profit if recidivism falls by seven point five percent compared to other prisoners that are not receiving this service. The mode of payment was that if the outcome was achieved, the government of United Kingdom would make payment in the fourth, sixth and eight years.<sup>19</sup> The result was that it saved the government of United Kingdom about fourty four milion pounds upfront.

After the launch of the first SIB in the United Kingdom, a branch was established in the United States in 2011 and in 2012 a branch was established in Israel. In the United States, Barak Obama included funding for SIB in his 2011, 2012 and 2013 budget.<sup>20</sup> The first practical implementation of SIBs in the US was however in 2012 by the State of New York. In this SIBs programme, Goldman Sachs was the investor with nine point six million dollars.<sup>21</sup>

Furthermore, in 2013, the New South Wales signed the first Australia's Social Benefit Bonds to help children under special

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<sup>19</sup>Dear; Annie et al., *Social Impact Bonds: The Early Years* (UK: Social Finance UK, 2016), 28, accessed May 1, 2019, [https://socialfinance.org/content/uploads/2016/07/SIBs-Early-Years\\_Social-Finance\\_2016\\_Final.pdf](https://socialfinance.org/content/uploads/2016/07/SIBs-Early-Years_Social-Finance_2016_Final.pdf); Adriana Barajas et al, *Social Impact Bonds : A New Tool for Social Financing*, vol. 2014 (United States: Princeton University, 2014), 8;Adriana Barajas et al, 2014:8. Liebmann and Sellman, "Social Impact Bonds: A Guide for State and Local Governments."

<sup>20</sup> Galitopoulou and Noya, "Understanding Social Impact Bonds."

<sup>21</sup>Liebmann and Sellman, "Social Impact Bonds: A Guide for State and Local Governments."

care return safely to their families. Also, the Netherland Government launched the first SIB to tackle unemployment in Rotterdam.<sup>22</sup>

At least twenty four states in the United States, including the District of Columbia have considered or considering or are implementing SIB related projects. Of these, eleven states like Alaska, California, Colorado, Idaho, Maine, Maryland, Massachusetts, New Jersey, Oklahoma, Texas, and Utah and the District of Columbia have enacted specific legislation.<sup>23</sup>

The permeation of this social funding mechanism has grown across the globe, from United Kingdom, through most part of Europe, America, Australia, Israel, Middle East and Africa. According to a report by Social Finance Global Network, as at thirty January 2018 social impact bonds issuance reached 108 worldwide and more extended to developing and low-income countries, “which have collectively mobilized 392 million dollars in capital to reach up to 738,000 people in twenty four countries.”<sup>24</sup>

### ***Structure of SIB Projects***

Since 2010, the arrays of SIB funds have been deployed for social programmes that serve the communities and have a natural tendency to attract sympathy, empathy, and humanitarian concerns. This explains why philanthropist and social investors dominate the market of SIBs. Furthermore, to buttress this argument, the South Australian Government in its discussion in 2014, stated that only not-for-profit organisations that provide any of the following four social services

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<sup>22</sup>Social Impact Bonds Are an Innovative Way of Attracting New Investment that Benefits Individuals and Communities. See Alex Nicholls and Emma Tomkinson, “The Peterborough Pilot Social Impact Bond” (United Kingdom: University of Oxford, 2013), 5, accessed May 2, 2019, <https://emmatomkinson.files.wordpress.com/2013/06/case-study-the-peterborough-pilot-social-impact-bond-oct-2013.pdf>.

<sup>23</sup>Galitopoulou and Noya, “Understanding Social Impact Bonds.”

<sup>24</sup>Helbitz, “Social Impact Bonds Reach Global Mass: 108 Projects Launched in 24 Countries.”

would be considered for contract awarding for SIB-based project. These projects were: Out of home care, recidivism, hospital admission, and homelessness.<sup>25</sup>

It is said that SIB procedure has not mainstreamed, but the current practice has adapted project management procedures with a focus on social impact. The stages are detailed below:<sup>26</sup>

- a. Feasibility Study: This stage involves the identification of the social challenge with criteria used to assess the problem which varies from one type of social problem to the other. Also the time frame for measuring the outcome also varies based on the specific project.
- b. Structuring the Deal: This stage includes raising capital from social investors, setting the evaluation methodology, evidence of capacity of the service provider to deliver may also be required and delineating the responsibility of the performance management.
- c. The Implementation Stage: At this point, all is set for the service to be delivered within the specified timeline and towards the achievement of the outcome metric.
- d. Evaluation and measurement of the outcome: This stage is the most challenging part of the structure. Nevertheless, once the metrics agreed upon in the contract agreement are met the next stage is valid for execution.
- e. The repayment stage: This stage is determined by the immediately preceding stage, evaluation and meeting outcome. Otherwise, the investors stand to lose their investment.

Figure 1 below shows a structure of an SIB contract from commencement until delivery.

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<sup>25</sup> UK Government, "Social Impact Bonds - GOV.UK," 2012 (Shelter SA, Adelaide, SA, 2012), 8, last modified September 26, 2017 <https://www.gov.uk/guidance/social-impact-bonds>.

<sup>26</sup> Galitopoulou and Noya, "Understanding Social Impact Bonds."

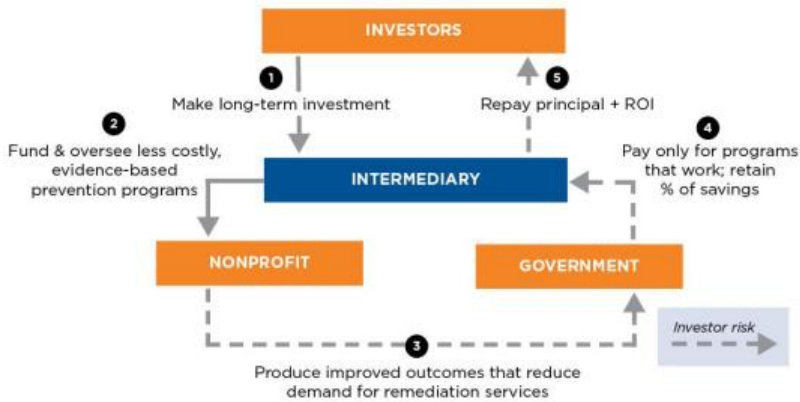


Figure 1: Major Stakeholders in social impact bond structure (Forbes, 2014, cited in Edward, n.d).

As depicted in Figure 1, the connectivity is as follows: The government enters agreement with the intermediary,

1. the intermediary raises funds from both philanthropic investors and commercial investors and then,
2. the intermediary uses the proceeds to fund the not-for-profit (NFP) project and,
3. the NFP delivers services with improved outcome to the government,
4. the government, based on the agreement on the outcome metric, pays the principal plus percentage of profit to the intermediary and,
5. the intermediary repays the principal plus percentage of profit to the investors.

The significant aspect of the above steps is that the payment of principal and return to the investors and the NFP lies in the success of the project by meeting the target set by the commissioner (government agency, e.g. supervising ministry). If the project did not meet the target the investors risk losing their capital and return or only the return as the agreement may provide. For example, there was an ongoing SIBs project in New York since 2012 and ended in 2015.

The above-mentioned project was a reduction of recidivism programme, and 3000 adolescents were being graduated on yearly basis. Goldman Sachs, a non-profit organization invested nine point six dollars million in this project, Manpower Demonstration Research Corporation, (MDRC), a non-profit organization was the intermediary, while two other non-profit organizations were the service providers. The terms of the contract were that the City will pay four point eight million dollars if recidivism is reduced by eight point five percent and eleven point seven million dollars if recidivism is reduced by twenty percent. With certainty and uncertainty involved in these terms, it was possible for Goldman Sachs to find haven through Bloomberg philanthropies who guaranteed the repayment of the first \$7.2millions to Sachs should the project fail to meet its outcome metrics.<sup>27</sup>

### ***Benefit of SIBs***

The attraction elicited by SIBs to many developed countries is an evidence of the enormous benefits. Some of the benefits include:

1. Saving of upfront cost of the government. In a research conducted by Social Finance United Kingdom and the Young Foundation in United Kingdom, the findings show that the United Kingdom government was spending an average of £20,000 for one rough sleeper, criminal justice, health cost, accommodation and employment cost. However, through SIB the government was going to save about thirty per cent of the cost.
2. Service quality is heightened. This is because the investors and the NFP are eager to meet the target set by the commissioner in order guard against loss of principal and profit.
3. NFP got opportunity to do its primary assignment.
4. Social investors satisfied their conscience for loving to serve the community.
5. Public funds redirected to other area of need.
6. SIBs do not require the government to issue debt instrument.

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<sup>27</sup> Liebmann and Sellman, "Social Impact Bonds: A Guide for State and Local Governments."

7. “*Philanthropically oriented investors get a chance to leverage their gifts with the potential to receive a profit, allowing them to reinvest those same dollars in another worthy cause.*”<sup>28</sup>
8. “*If investors do not earn a profit, they still accomplish their initial goal to make a socially beneficial investment.*”<sup>29</sup>

## METHODOLOGY

The nature of SIB and its novelty warrants theoretical study rather than empirical at this stage of Sharī‘ah appraisal. Consequently, only analytical qualitative method of inquiry will be employed with inductive method of analysis. The article will use both primary and secondary sources of Islamic law. It will also rely on literature relating to this funding mechanism in the Western countries. The source also includes published and unpublished articles, internet materials, as well as data from SIBs practitioners around the world, SIB companies and Social Finance in United Kingdom.

## SOCIAL IMPACT BOND: *TAKYIF FIQHI* (JURISPRUDENTIAL ADAPTATION)

The Islamic axiom *Al-hukb ‘alā shay far‘u ‘an taṣawwurih* which mean “sequel to determining legal status of a case is to have its picture” has emphasized the importance of Islamic jurisprudential adaptation in conventional matters. In determining the Sharī‘ah status of SIB, whether the ‘pay-for-success’ arrangement is compliant with the *Sharī‘ah* or not, there is need to do the *takyif fiqhi* (Jurisprudential adaptation). One of the legal maxims of Islamic jurisprudence says, “*In contracts what is considered are the intents and the meanings and not the forms and the letters.*”<sup>30</sup> This maxim appears to have some

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<sup>28</sup> John K Roman, “Statement on Social Impact Bonds,” (Maryland: Committee on Appropriations Maryland House of Delegates 2013), accessed May 2, 2019, <https://www.urban.org/sites/default/files/publication/24351/901558-social-impact-bonds.pdf>.

<sup>29</sup> Roman.

<sup>30</sup> Ahmad Ibn Muhammad Al-Zarqā’, *Sharh Al-Qawā‘d Al-Fiqhiyyah* (Damascus: Dar al-Qalam, 1989), 55.

similarity with the maxim of equity, which says, “*equity looks at the intent rather than the form*”. Thus, the author relies on the definition, the condition for payment and the intent of the predominant social investors involved in SIB to conduct the Islamic jurisprudential adaptation. This will be done by looking at the Islamic contracts with which SIB share similarity in the next subsection.

### ***Hibbat Li Thawāb* (Gift with intention to be compensated)**

The jurists unanimously agreed that the gift which is intended for Allah’s sake cannot be retrieved in any way.<sup>31</sup> Whereas, *hibbat li thawāb* is a gift with intention to get compensated by the receiver of the gift. What sparks attention in the resemblance between *hibbat li thawāb* and SIB is that despite the embedded intention of compensation in this gift, yet it could be categorized under gratuitous contract or a sale contract. This is notwithstanding the absence of an offer, except that the target recipient party was free to accept or reject, but if he accepts, it becomes an obligation to compensate the party offering the gift.<sup>32</sup>

The permissibility of this type of gift is upheld in the Maliki and Hanafi and Hanbali Schools, following Ibn ‘Abbas’ interpretation of Surah al-Ruum (30), verse 39. The verse is to the effect that, “*And whatever you give for interest (riba’) to increase within the wealth of people will not increase with Allah. But what you give in zakah, desiring the countenance of Allah - those are the multipliers.*”<sup>33</sup> The *ribā* mentioned in this verse is interpreted by Abdullah Ibn ‘Abbas as *hibbatul al-thawāb* and he ruled that it was permissible.<sup>34</sup> In a clearer

<sup>31</sup> Abu Al-Walid Muhammad Ibn Ahmad Ibn Muhammad Ibn Rushd, *Bidayat Al-Mujtahid Wanihayat Al-Muqtasid* (Cairo: Dar Al-Hadith, 2004), vol. 4: 117.

<sup>32</sup> Ibn Rushd, vol. 3: 191.

<sup>33</sup> Al-Quran, *al-Rum*: 39.

<sup>34</sup> Abu Abdullah Muhammad Ibn Ahmad Ibn Abu Bakr Al-Qurtubi, *Al-Jamiu Li Ahkam Al-Quran*, ed. Ahmad al-Bardoni and Ibrahim Atfis (Cairo: Dar al-Kutub al-Misriyyah, 1964), vol. 14: 36; Ibrahim Ibn Muhammad Ibn Salim Ibn Dhawyan, *Manar Al-Sabil Fi Sharh Al-Dalil*, ed. Zuhayr Al-Shawish, (Beirut: al-Maktab al-Islami, 1989), vol. 2: 24; Al-Sarakhsi Muhammad Ibn Ahmad, *Al-Mabsut*, (Beirut: Dar Al-Maarifahs, 1993), vol.

term, Ibn Kathir has reported this interpretation that Ibn Abbas, said that, *ribā* is divided into two, namely: *ribā* that is prohibited, which is the *ribā* in commercial transaction and *ribā* that is permissible, which is the gift with intention to get compensation from the recipient of the gift, but there is no reward in this type of gift, and the Prophet S.A.W was the only one specifically prohibited from this type of gift in the Surah al-Muddathir (74), verse 6. The verse says: “*And do not confer favour to acquire more*”.<sup>35</sup>

The author validates the above resemblance between *hibbatul al-thawāb* and SIB because both are charity which expected compensations are not guaranteed. The charity element in *hibbatul al-thawāb* is vivid while it is not vivid in the case of SIB except through explanation. Therefore, to prove this, there is the need to consider whether intermediaries/project managers and service providers and investors in SIB are non-profit organizations. In addition, they must also be seen to have consented upfront, prior to entering into the contract, to forfeit their rights if the outcome of the project turns out negative. Under the Sharī‘ah, anyone who gives up his right may do so at his own peril. By accepting to give up a right on the onset there is a constructive unilateral offer to give one’s own monetary assistance to the development of the community.

### ***Gharar Contract (Contract that is Shrouded in Uncertainty)***

The Muslim Jurists have defined *gharar* with various words but with meanings that are closely related. This can be seen from the meanings gathered below:<sup>36</sup>

1. Al-Sarakhsi said: “*Gharar is that whose consequences are hidden.*” While Al-Qarafī said: “*Gharar is what is not known to exist in the future.*”

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12: 52-4, 79; Ibn Rushd, *Bidayat Al-Mujtahid Wanihayat Al-Muqtasid*, vol. 3: 191.

<sup>35</sup> Ibn Kathir, Abu al-Fidā’ Ismail Ibn Umar al-Demashqi, *Tafseer Al-Quran Al-Azim* (al-Riyadh: Dar al-Taybah Li al-Nashr Wa al-Tawzi’, 1999), vol. 6: 318.

<sup>36</sup> Wahbah Al-Zuhayli, *Financial Transactions in Islamic Jurisprudence*, Trans. Mahmoud A. El-Gamal, (Damascus: Dar alFikr, 2003), vol 1: 83.



2. Al-Shīrāzī said: “*Gharar is that whose nature and consequences are hidden.*” While Al-'Isnawī said: “*Gharar is that which admits two possibilities with the worse consequence being the more likely.*”
3. Ibn Taymiyyah said: “Gharar that whose consequences are unknown”.
4. Ibn Al-Qayyim said: “*It is that which is undeliverable, whether it exists or not.*”
5. Ibn Hazm said: “*Gharar is where the buyer does not know what he bought, or the seller does not know what he sold.*”

In observing these definitions in the context of SIB and the way it works, it is possible to argue that the definition that says “*gharar is that whose consequences are hidden*” is the best applies. This is because it is not known beforehand whether the project manager will meet the outcome metrics and consequently deserve payment in favour of the investors or otherwise. This is because in SIB, the inability to meet the metric agreed upon may not only be caused by the project manager but could also emanate from the counterparty, in this case the government, just as it could also be caused by *force majeure*.<sup>37</sup> If the contract terms did not provide for obligations of each party, but simply focused on payment upon the meeting outcome then, it is a *gharar* contract by application of all the definitions of *gharar* mentioned above, except if the intent to donate to social work can be found on the investors. In such circumstance, the legal maxim that says, “*al-hum li al-ghalib*”, which means, “*a ruling is for the prevailing of the two circumstances*”, will be applicable.<sup>38</sup> In other words, if the intention of donating to a social cause dominates the intention to do pure business, then there is no issue of *gharar*. On the other hand, if the intention of pure business dominates the intention of donation to a social course then there is issue of *gharar*. This is

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<sup>37</sup> It has been mentioned above how the New York City SIB on criminal justice terminated prematurely only three years after it started due as it did not meet the targets agreed by this time. Also, the ONE Service Peterborough SIB was also discontinued earlier, after two years of implementation.

<sup>38</sup> Al-Shatibi Ibrahim Ibn Musa Ibn Muhammad, *Al-Muwafaqat*, ed. Abu Ubaidah Mash-hur Ibn Hasan Al Salman (Cairo: Dar Ibn Afan, 1997), vol. 2: 732.

because the Sharī'ah tolerates *gharar* in gifts and donations but rejects it in sales contract.<sup>39</sup>

***Ja'ālah (Promise to pay for a Named Task only if Accomplished).***

*Al-Ja'alah* is another Islamic contract that the SIB apparently shares similarity with. *Al-Ja'alah* is defined as:

“An open promise by one party to pay whoever performs a particular task a named reward. The contract is binding unilaterally on the initiator who promises the given reward, and therefore concluded unilaterally. The legal definition given by the jurists is: *al-Ja'alah* is a binding promise to pay a named compensating for performing a difficult known or unknown task.”<sup>40</sup>

*Ja'alah* is a unilaterally commissioned contract to a specified or unspecified counterparty, to perform the contract based on a payment consideration mentioned to be paid. Anybody that fails to perform the task losses to his own peril and the commissioner is not responsible for any loss of time and resources.<sup>41</sup> However, the contract must be made clear and the conditions must not be unrealizable by human reasoning.<sup>42</sup> The Islamic contract of *ja'alah* is tainted with excessive *gharar*, but the Sharī'ah tolerates it. The tendency of succeeding and failing are equal before the counterparty and yet the majority of the Muslim Scholars held this is a valid and permissible contract. Based on the feature of SIB, the investors may encounter losses or make profits, depending on the contract outcome. The researcher sees that SIB is permissible because it is similar with *al-ja'alah* as the payment in both is anchored on performing the designated task and the Sharī'ah extend the excessive *gharar* in *al-Ja'alah* so while same could be extended to SIB.

<sup>39</sup> Abu Abdullahi Muhammad Ibn Ali Al-Maziri, *Sharh Al-Talqeen*, ed. Muhammad al-Sulami (Beirut: Dar al-Gharb al-Islami, 2008), vol. 2: 229.

<sup>40</sup> Al-Zuhayli, *Financial Transactions in Islamic Jurisprudence*, vol. 1: 437.

<sup>41</sup> Abu Muhammad Muwaffaq al-Din, Abdullah Ibn Ahmad Ibn Qudamah al-Maqdisi, *Al-Mughni Fi Fiqh Imam Ahmad Ibn Hanbal* (Cairo: Maktabah Al-Qahirah, 1968), vol. 6: 94.

<sup>42</sup> Abdul-Wahab Ibn Ali Abu Muhammad, *Al-Ma'ūnah 'Alā Madhhab Ālim Al-Madinah* (Makkah: Mustapha Ahmad al-Baz, n.d.), vol. 1: 1117.

### ***Ijārah (Leasing or Rent Contract)***

SIB projects also share similarities with *ijārah* because the NFPs entered the contract agreement with the government to deliver a service on the basis that payment would only be made available on successful completion of the project and meeting the target and specifications. However, the two contracts can be distinguished as payment in *ijārah* is made according to agreement of both parties, either progressively, or in a lump sum, at the beginning or end of the service. In any case of *ijārah* the service provider is entitled to payment of any portion of service delivered. Whereas in SIBs the investors are only entitled to payment only if the service delivered meet the agreed metrics.

### ***Al-kitābah (Contractual agreement for Slave to pay his Ransom money on Instalment).***

In contract of *al-kitābah*,<sup>43</sup> the master of a slave is permitted to rescind the contract if the slave is unable to continue with the instalment payment and the slave goes back to his former civil status as full slave.<sup>44</sup> In the course of rescission of the contract the master is not required to refund any amount to the slave because a slave has no ownership right.

Jurists concluded that *al-kitābah* contains *gharar* because if he is not able to continue with payment of the instalments, he goes back to his social status and losses the instalments already advanced.<sup>45</sup> It is from this perspective that the author believes that SIBs share similarities with *al-kitābah* in the risk of losing payment if the instalment is not completely made within the specified period. Similarly, if the SIB project manager fails to meet the outcome metrics, he losses payment of principal and profit.

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<sup>43</sup> This is a contract in which a slave purchases (ransom money) himself from his master so that he gets emancipated. The money is normally paid on instalment. See Muhammad Ibn Ahmad Juzay, *Al-Qawanin Al-Fiqhiyyah*, ed. Majid al-Hamawi (Beirut: Dar Ibn Hazm, 2013), 250.

<sup>44</sup> Abu Muhammad Muwaffaq al-Din, Abdullah Ibn Ahmad Ibn Qudamah al-Maqdisi, *Umdah Al-Fiqh*, ed. Ahmad Mansur Azuz (Beirut: al-Maktabah al-Asriyyah, 2004), 87.

<sup>45</sup> Abdul-Wahab Ibn Ali Abu Muhammad, *Al-Ma'ūnah 'Alā Madhhab Ālim Al-Madinah*, vol. 1: 1463.

Also, *al-kitābah* is a contract of *tabarru'*, like what has been said above about SIBs being *tabarru'*. And in Islamic jurisprudence gratuitous contracts are built on *musāmahah* i.e., mutual overlooking of rights. This perhaps explains why there has been no reported court case involving any of the stakeholders. This confirms that it is really a contract of *musāmahah*, thus making the contract a gratuitous contract where the investors are not investors per se, but philanthropists who in turn constructively expect rewards from the government. Hence the instruments could be considered as *hibbah al-thawāb*.

### ***Maisir (gambling)***

Though there is somewhat resemblance between SIB and gambling but in the actual sense of the meaning of gambling there is no existence of such in SIB. This is because gambling is a contract that makes either of the parties to benefit at the expense of the other party. But the intention of the NFPs and the investors is to contribute to community development and get compensated by the government if they prove high performance. The project does not belong to government officials and the beneficiaries of SIB projects are the low income members of the society who owes no monetary obligation to the investors and project manager.

### ***The Preferred View is SIB is Closer to al-Ja'ālah and Hibah Li thawāb***

This subsection will conclusively make the preference that SIB is closer to *al-Ja'ālah* and *Hibah Li thawāb* than any of the above-mentioned Islamic contract. The similarity of SIB with gambling, *Ijārah* contract has been proven incorrect, but its similarity with *gharar* cannot be taken out except that the effect of *gharar* on the contract was anchored on whether the investors' intends to engage in SIB as pure business or donation to the society. The former situation will make SIB an invalid contract while the latter situation will not make it an invalid contract because *gharar* has no effect in gratuitous contract.<sup>46</sup>

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<sup>46</sup> Ahmad Ibn Idris Abu al-Abbas Al-Qarafi, *Al-Zakhirah*, ed. Sa'd A'rāb and Muhammad Bu Khubzah Muhammad Hajji (Beirut: Dar al-Gharb al-Islami, 1994), vol. 6, 244.

On the similarity of SIB to *al-kitābah*, it was argued above based on the slave that failed to complete instalments of his ransom money before the deadline. This implies that previous instalments will be forfeited to the master. Only two of the six contracts examined will remain i.e., *Hibah li thawab* and *al-Ja'alah*.

### ***Hibah li thawāb as Second In Preference after Alja'alah***

On the aspect of *hibah li thawāb* which was the first contract mentioned in the list discussed above, the authors are of the view that it appears to be one of the two contracts to which SIB has the closest similarity. Except that this Islamic contract applies more on asset than service. But since there is no Shari'ah provision that makes the type of object to be used in *hibah li thawāb* sacrosanct, the authors see that it is valid to discuss it in the context of SIB that is predominantly service delivery in projects. Therefore, the similarity is because the investors had invested with the hope of having return from the government, while they are also ready to forfeit their investment if the contract fails. It should be recalled that *hibah li thawāb* is a gift but with embedded intention for material recompense.<sup>47</sup> Based on the opinion of the authors that SIB is closer to two Islamic contracts one of which is *hibah li thawab*. Therefore, to make it Shari'ah compliant means that the government is obliged to pay for whatever quantity of outcome metric achieved by the project manager. This is because payment is obligatory in *hibah li thawāb* once it is understood that the person granting the gift was seeking for a better recompense.<sup>48</sup>

So, it could be argued that SIB is a conditional *hibah li thawāb* in the sense that if the investors meet the outcome metric, they will be paid their investment plus profit. This is the nature of *hibah li thawāb*; payment with value that surpasses or at *par* or below the value given by the person granting the *hibah li thawāb*. Conversely, it is a conditional non-*hibah li thawāb* (ordinary gift) if the investors forfeit their investment because they did not meet the outcome metric and consequently get no payment from the government commissioner. The question that may arise is whether the contract could have clear consequences in the future? The answer is that it has

<sup>47</sup> Ibn Rushd, *Bidayat Al-Mujtahid Wanihayat Al-Muqtasid*, vol. 3, 191.

<sup>48</sup> Imam Malik Ibn Anas al-Asbahi, *Al-Mudawwanah Al-Kubra* (Beirut: Dar al-Kutub al-Ilmiyyah, 1994), vol. 4, 245.

been mentioned above that SIB shares similarity with gratuitous contract and commercial contract and that this research asserts that it is closer to gratuitous contract. Gratuitous contract under which *hibah li thawāb* is one type which tolerates *gharar* up to the level of even not mentioning the price at the contract session.<sup>49</sup> In Islamic jurisprudence *gharar* is allowed in gratuitous contracts as mentioned above. This is why some jurists permit *al-jahālah* (ignorance) in *hibah li thawāb*.

### ***Al-Ja'ālah* as the Most Preferred Islamic Contract similar to SIB**

This is the most preferred contract that could be linked to SIB. The preference for *al-ja'ālah* stems from the author's view on the similarity of SIB to *al-ja'ālah* than even the preceding *hibah li thawāb* due to the following:

- a. *Al-Ja'ālah* contains excessive *gharar* and yet the Jurists permitted it because of *hājah*.<sup>50</sup> SIB should also be permitted because of *hājah* and public interest. This is because there is an advantage for SIB in the social work that positively impacts on the ordinary citizens. Despite the definition of *gharar* that applies on SIB, such *gharar* should be tolerated as an exceptional case as it was tolerated in *al-ja'ālah* in exceptional case because of *hājah* and *maṣlahah*,
- b. Ignorance of the extent of task in *al-ja'ālah* is allowed and there is nothing that prevents ignorance in the reward also so long it is mentioned.<sup>51</sup> It should be recalled that the second most effective element that invalidates a contract after *ribā* is *gharar* and *jahālah* (ignorance) but both are tolerated in *al-ja'ālah*. This is due to public need and *maṣlahah* that warrants having existence of contract like *al-ja'ālah* which other form of contract may not be useful in its place.<sup>52</sup> Therefore, the aforementioned ignorance of consequence of the contract may not invalidate an SIB.

<sup>49</sup> Ahmad Ibn Ghanim al-Nafrawi, *Al-Fawakihu Al-Dawani Ala Risalah Ibn Abi Zayd Al-Qiyrawani* (Beirut: Dar Al-Fikr, 1995), vol. 2, 158.

<sup>50</sup> Abu Muhammad Muwaffaq al-Din, Abdullah Ibn Ahmad Ibn Qudamah al-Maqdisi, *Al-Mughni Fi Fiqh Imam Ahmad Ibn Hanbal*, vol. 6, 94.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

- c. *Al-Ja'alah* is a non-binding contract which either of the contracting parties may rescind without the consent of the counterparty. However, the Muslim jurists said that the *al-ja'alah* service provider is not entitled to payment unless he accomplishes the task agreed. If not achieved, he is not entitled to a dime, the commissioner is under obligation to make his payment in proportion to the work delivered even if the commissioner wants to rescind the contract, because he has allowed the worker to commit himself. The Arabic text reads as follows:

فإذا قال: من رد علي ضالتي أو عبدي الأبق، أو خاط لي هذا القميص، أو بنى لي هذا الحائط، فله كذا وكذا. صح، وكان عقدا جائزا، لكل واحد منهما الرجوع فيه قبل حصول العمل. لكن إن رجع الجاعل قبل التلبس بالعمل، فلا شيء عليه، وإن رجع بعد التلبس به، فعليه للعامل أجره مثله؛ لأنه إنما عمل بعوض،<sup>53</sup>

It translates in English as follows:

“If he says: whoever returns my lost property or my run-away slave or he sews this shirt for me or he builds this wall for me, he shall be entitled to this or that, the contract is valid and it is a non-binding contract which allows either of the contracting parties to rescind the contract without consent of his counterparty before a work has been done. If the commissioner rescinds the contract before the commencement of the job there is no payment on him, but if he rescinds the contract after the job has commenced, he is liable to pay the service provider in proportion to the service he has provided because he worked to earn payment.”<sup>54</sup>

From the above, one will notice that he used some task such as returning lost property, run-away slave and sewing as examples and concluded that, if work has commenced, the payment will bind the commissioner otherwise there is no payment. Whereas, what is popularly known in *al-ja'alah* is that, no payment will be given until the task is accomplished.

<sup>53</sup> Ibid.

<sup>54</sup> Translated by Author.

Based on the above, it means that there is a possibility of various rulings in a project of *al-ja'alah* as accentuated by the nature of the task, if the commissioner is the one that rescinded the contract. That is, some *ja'alah* tasks can give payment after commencement even without accomplishment because such a task has measurable outcome. Conversely, some task may not deserve payment if abandoned after commencement because it has no measurable outcome. The deductible reason is value for money. Under the Sharī'ah, payment must be justified by corresponding goods or service. This is a distinguishing factor from a contract seeking to exploit the other party through falsehood. Comparatively, since most SIB contracts are projects with measurable outcome after commencement, then the government must pay for whatever work that has been done if the termination emanates from the government. The authors based their opinion on the need to pay for a measurable outcome, on one of the classical examples given, like tailoring, which is known by reasonability that it is possible to have a measurable outcome. Then by extension, if any other measurable outcome from the contemporary projects of SIB is terminated by the commissioner, after the beneficiaries have started receiving the service delivered by the provider, then there must be payment.<sup>55</sup> Therefore, the current payment practice of SIB that allows for the investment amount to be paid to investors, with the profit in proportion to the metrics, is Sharī'ah compliant.

### ***A Proposal For Sharī'ah Compliant SIB***

This proposal is based on the argument advanced by the authors, that SIB is more similar to *hibah li thawāb* and *al-ja'alah*, and that its similarity to *al-ja'alah* has an edge to that of *hibah li thawāb*. Therefore, this article proposes *al-ja'alah*-based SIB to ensure compliance with the Sharī'ah and prevent unjust treatment of the project manager and the social investors.

The proposal suggested, focuses on social investors whose intention is to make donations and not profitable causes. This element makes excessive *gharar* ineffective in the contract, and makes the transaction a Sharī'ah compliant SIB. This is explained as follows:

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<sup>55</sup> Abu Muhammad Muwaffaq al-Din, *al-Mughni*, vol. 6, 94.



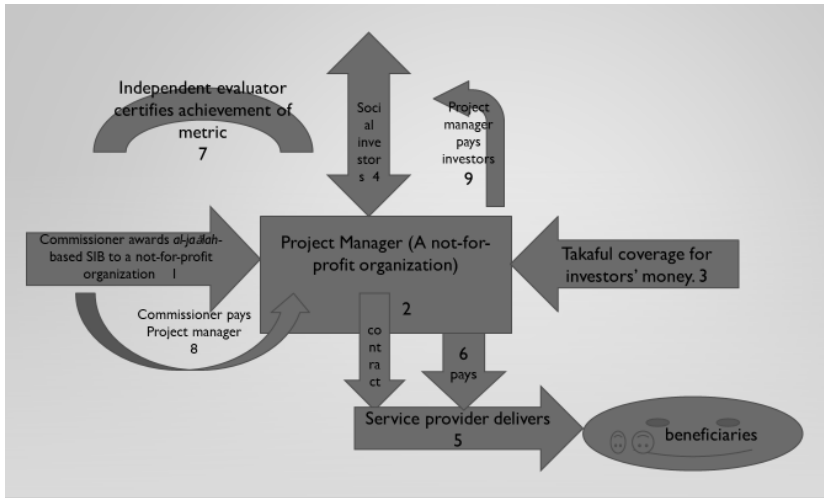
1. The relevant government agency identifies a social project that needs to be funded. For example, poverty alleviation, reduction of youth unemployment rate or improved female child enrolment in schools in some societies, preventative measures against child labour, preventative measures against human trafficking, provision of low cost to the homeless or reintegration of ex-prisoners.
2. A project manager in SIB, like a waqf institution or other charitable organizations or a reputable foundation invites social investors who are keen to invest in social welfare with explicit explanation of the social project to be delivered with the proceeds. Evidence of the social investment is issued to the investors.
3. A philanthropic third party as a partial or full guarantor in case of failure.<sup>56</sup> The role of the guarantor in this model is only relevant if the *al-ja'ālah* project is not something that has any measurable outcome when terminated before completion, as mentioned above. So, if it has a measurable outcome and was terminated before completion, then, the commissioner is obliged to pay the investors in proportion to service delivered. This is not the case in the conventional SIB because it does not provide for payment to the investors unless the metric is achieved, even if there was a measurable outcome.
4. Service provider. This is the owner of expertise engaged by the project manager to provide the required service and get paid by the project manager who later claims from the commissioner if the outcome metric is achieved and then pay the social investors their investment and available profit.
5. Independent evaluator: This is the umpire between the commissioner and the project manager. He evaluates the project to ascertain achievement of the outcome metric.

The stakeholders therefore will be the government or its commissioner, project managers (the waqf institutions), social

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<sup>56</sup> In SIBs issued by New York City in 2012, Bloomberg Philanthropies guaranteed \$7.2 million on behalf of the project manager, MDRC (a non-profit), in favour of Goldman Sachs (a non-profit) who invested a total of \$9.6 million in the project. See Liebmann and Sellman, "Social Impact Bonds: A Guide for State and Local Governments."

investors, the service providers engaged by the project manager and the beneficiaries.



**Source:** authors.

Figure 2. A figure depicting the flow of work in *al-Ja'alah*-Based SIB.

The above figure is explained below.

1. The Commissioner awards a *ja'alah*-based SIB to the project manager (a not-for-profit project),
2. The Project Manager enters agreement with service provider,
3. The Project Manager subscribes a *takaful* insurance to cover the investors' money to the limit agreed in case of failure in non-measurable outcome,
4. The social investors offer to invest in the social project,
5. The service provider delivers to the beneficiaries,
6. The Project Manager pays the service provider,
7. An independent evaluator certifies achievement of outcome metric,
8. The Commissioner pays the project manager, and
9. The Project Manager pays back the initial investment money to the investors plus profit. If the project fails but it has measurable

outcome that represents value for money, the commissioner will pay proportionately.

## CONCLUSION

The Shari'ah appraisal of SIB was conducted with a view to identifying the Islamic contract most similar to SIB. The article considered the *qā'idah fiqhiyyah* which says that "*in contracts what is considered are the intents and the meanings and not the forms and the letters.*"<sup>57</sup> It also observed the nature of most SIB investors as social investors, philanthropist, and not for-profit organizations and the law recognized them as SIB's contractors in some countries.<sup>58</sup> An Islamic jurisprudential principle was also taken into account was that, the non-commutative contracts are based on *al-Musāmahah* (mutual forgiveness).<sup>59</sup> With the custom of SIB's predominant investors being the social investors, it has become a tradition and therefore, we invoke Islamic legal maxim to that effect, which is, "*Custom is authoritative.*"<sup>60</sup> From this perspective one will say SIB is a donation to community social service that is embedded with investment with similar feature with *hibah li thawāb*. But *hibah li thawāb* discussed by the classical jurists was on gift of assets and not delivery of services, thus causing us to probe further, and found that *al-ja'ālah* was the best matching for pay-for-success feature of SIB.

<sup>57</sup> Al-Zarqā', *Sharh Al-Qawā'id Al-Fiqhiyyah*, 55.

<sup>58</sup> More importantly, it is interesting to note that in one of the SIBs issuances in New York City, all the parties, except the government and the beneficiaries were Not-for-profit organizations. These were, Goldman Sachs, the creditor; MDRC, as the intermediate; two service providers that were also not-for-profit organizations; Bloomberg Philanthropies guaranteed 7.2 million of the \$9.6 million loan. See Liebmann and Sellman, "Social Impact Bonds: A Guide for State and Local Governments."; also, see section 257J of the UK Finance Act 2014; UK Government, "Social Impact Bonds - GOV.UK," 7.; Liebmann and Sellman, "Social Impact Bonds: A Guide for State and Local Governments."

<sup>59</sup> Abu al-Husain Yahya Ibn Abu al-Khayr Al-Imrani, *Al-Bayan Fi Madhhab Imam Al-Shafie*, ed. Qasim Muhammad Al-Nuri (Jeddah: Dar al-Minhaj, 2000), vol. 3: 148.

<sup>60</sup> Al-Zarqā', *Sharh Al-Qawā'id Al-Fiqhiyyah*, 219.

The authors also understand that there is no *ribā* in the money paid by the government to the investors in SIB because the money is for the service delivered and not loan repayment with premium, notwithstanding the profit added to the initial investment amount.

However, excessive *gharar* is available in SIB but the author found that it is ineffective to void the two contracts of *al-ja'alah* and *hibah li thawāb* because excessive *gharar* is justified as acceptable in both. In *al-ja'alah*, on the ground of *hājah*, while in *hibah li thawāb* it is because of the element of gratuity, despite the expected compensation.

The article recommends that SIB be structured on the contract of *al-ja'alah* in service delivery and *takaful* be used to cover the loss that may arise. Also, the government should make regulations to delineate the project managers and areas to be used as SIB investment destination and as well as the payment structure mentioned above in Figure 2 of this research.