



The Foundations of Islamic Finance and The *Maqāṣid al-Sharī'ah* Requirements

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Abstract

The emergence of Islamic finance as a system of thought and practice is timely in the midst of world crisis and the uncertain proposals for solving it. It is hoped that Islamic finance offers a coherent perspective for understanding real economic problems as well as a genuine alternative to the very foundations of how economics and finance should be managed to actualize human prosperity. In addressing those expectations and challenges, sufficient attention to the foundations should be given to develop solid conceptual scheme of a new finance in Islamic perspective and to resolve the tensions in the current development. This paper attempts to discuss the foundations of Islamic finance and the requirements in developing Islamic finance from the basic principles of *maqāṣid al-Sharī'ah* (the objectives of *Sharī'ah*). Islamic finance, in this perspective, must realize its full potential as a system, not merely a lawful means in doing financial business or a stopgap means of surviving the crisis. It must go beyond that to provide the guidelines for managing a good economy, stimulating growth and development, realizing socio-economic justice and promoting employment and stability as implied in the objective of *Sharī'ah* (*maqāṣid al-Sharī'ah*).

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1. Introduction

Islamic finance attempts to rearrange the modern financial practices to be in line with *Sharī'ah* principles and requirements. The industry has grown considerably and has a global reach. We contend such trend is not only triggered by fact that the banking and finance operation is now satisfying the Islamic law requirement (*Sharī'ah* compliant) but also because of the objectives and values it promotes. Islamic banking and finance brings Islamic visions of economy in the financial sphere in the effort of realizing human wellbeing (*maṣlahah*) and a just and fair order of society. The financial practices are arranged to meet those objectives.

Maqāṣid al-Sharī'ah constitutes the objectives of the *Sharī'ah* as a system of life and comprises the basic philosophical foundations that give guidelines and justifications for Islamic finance's *raison d'être* in contemporary times. In Islam, finance is viewed as part of the *Sharī'ah*. Adherence to *maqāṣid al-Sharī'ah* as the grand objective of Islam is necessary for developing genuine and indisputable 'Islamic' finance. This dimension should be given attention and treat as indispensable element in developing solid foundations of Islamic banking and finance.

The paper attempts to discuss the issue of *maqāṣidal-Sharī'ah* and its role in developing the foundations of Islamic finance. This is done by exploring the goals of *Sharī'ah* which signify the philosophy and goals that Islam propagates in the effort of establishing an Islamic financial system. The paper also aims to shed some lights that *maqāṣidal-Sharī'ah* should be treated as one of the main parameters in having *Sharī'ah* compliant finance.

2. Islamic Finance: *Raisons D'etre* and Direction

The emergence of Islamic finance as a system of thought and practice in the twentieth century could be viewed as triggered by two fundamental reasons; the 'legalistic' and 'systemic' drivers. The approach taken in developing Islamic finance structure, instruments and contracts is very much reflecting these two main drivers. Its future progress we could say is also based upon them.

First, the emergence and establishment of Islamic banking and finance has been basically pushed by the desire to have a 'legal' (*ḥalāl*) form of financial services. The purpose in this regard is to cleanse economic and financial practices from interest (*ribā*), gambling (*maysir*), uncertainty (*gharar*) and other prohibited (*ḥarām*) elements commonly found in financial services.

Central in this perspective is the view that interest is the *riba* that is prohibited in Islamic law. This understanding of the prohibition of *riba* as a legal issue restricted to interest and less an economic problem or even a systemic and civilizational problem has resulted in a pragmatic approach being taken in developing Islamic finance by retaining a conventional finance structure with all its ramifications except interest which is deemed as the crux problem. For that reason, El-Gamal (2006: 8) describes Islamic finance as a "prohibition-driven industry" whereby "Islamic finance is not constructively built from classical jurisprudence, rather, Islamic alternatives or modifications of conventional practice are sought whenever the latter is deemed forbidden." Iqbal and Mirakhor (2007: 1) describe this as a 'piecemeal approach' that tends to view different aspects of the system not as totalities and hence might create further confusion at the conceptual and tension at practical levels.

Second, Islamic finance emerged with the purpose of arranging economic life in an Islamic way. There was a consciousness amongst contemporary Muslims of the need to rearrange everyday socio-economic aspects of life in line with Islam's injunctions and within the overall framework and system of Islam as well as to provide indigenous solutions to the problems of the *Ummah*.

The emergence of Islamic finance is viewed as a 'systemic' effort to have an Islamic financial system as well as a 'systemic' response to the fragile foundation of modern financial system and response to the everlasting crisis created in capitalist financial system. The effort attempts to restructure the financial and banking system of the world on alternate foundations inspired by Islamic values/principles. The Islamic financial system is expected to respond to the present adverse situation of the world and its unfair financial system, which is exploitative, discriminatory and unjust in its allocation of resources. Robertson (1998: 54) articulated these concerns "People are increasingly experiencing the workings of the money, banking and financial system as unreal, incomprehensible, unaccountable, irresponsible, exploitative and out of control."

In this agenda, efforts are directed to transforming the financial and banking system, and ultimately the whole economy, so that they will conform to the Islamic spirit, principles and objectives. The concern is not merely to secure the narrow legal compliance of banking and finance practices by screening negative elements in conventional financial practices but a more active and substantive movement of systemic reforms toward inspiring a good financial system enshrining Islamic values and principles as implied in the concept of *maqāsid al-Sharī'ah*.

3. Foundations of Islamic Finance

With that objective, we should revisit the Islamization of finance approach. The replication of conventional structure and products and modification with Islamic contracts should be done using the Islamic conceptual scheme and foundations as developed in Islamic epistemological foundations. In other word, Islamization should start from the Islamic worldview or Islamic philosophical foundation as the reference point, instead of jumping directly to the body of knowledge or modern financial practices. Changing and modifying the forms and structures of conventional products is not sufficient without changing anything in substance. The foundations of finance developed from the Islamic principles, philosophy and value system would be the basis in our interaction with conventional finance in order to select and scrutinize the theory/components that are in line, neutral or against the Islamic frame of reference in our effort to develop a genuine Islamic finance.

While the industry has grown considerably over the last decades and it is expected, in the forthcoming decade, a more sophisticated form and structure of Islamic banking and finance practices will emerge and flood the market, query whether the development is moving in the right track as was hoped during its

initial establishment, is still valid to be asked. Some discrepancies of ideals and realities as well as gap expectations to have a genuine Islamic finance or a real alternative to modern finance of are yet to be fully satisfied and hence require our attention.

This is important to be addressed as the ongoing concern about the 'Islamicity' or 'authenticity' of Islamic finance; its proper direction; and the discrepancy between the ideals and realities of Islamic economics and finance still persistent. The scholars and industry players should always bear those expectations in order to keep customers' confidence and to keep the industry in the right direction.

This would require us to contemplate the appropriate foundations and structure of an Islamic financial system that would assist in realizing the objectives of Islam in financial sphere. The challenge remains in developing a new perspective on finance at the conceptual level and as a practical system. The foundational requirements in developing Islamic finance would range from formal issues related to appropriate products and instruments to serve the goals; the human capital involved in the industry; to the systemic matters of concept, paradigm, goals, structure and directions of an Islamic financial system.

The lack of attention to this fundamental area has resulted in body of Islamic finance literature that, despite its size, seems to lack of conceptual or theoretical unity and coherence. Islamic finance has yet to arrive at a program of comprehensive development by rethinking the foundation of finance from the Islamic perspective. This would include all the queries regarding financial goals, framework and instruments from the Islamic perspective. Emphasis on the technical and operational aspects has limited the discussion in the legal sphere using formalistic approach to develop products that satisfy the requirements of Islamic law as most narrowly construed. Consequently, the substantive structural change leading to a thorough transformation of money, society, finance and the economy has not yet been possible. Likewise, the bigger picture of an Islamic financial system having distinct goals and, therefore, distinct financial instruments to serve those goals has still not elegantly been produced. Islamic finance today is simply pursuing the conventional goals of efficiency and profitability by modifying the external structure.

We contend this approach arises from incongruent perspectives in understanding the bigger picture of economics in Islam or the Islamic system of life as implied in the concept of *maqāṣid al-Sharī'ah*. Islamic finance products essentially should be structured in line with the nature of the system and in light of Islam's economic vision and goals. That is only natural. Consider the evolution of mainstream finance: its products have been developed to serve the very purpose of the capitalist economic system. *Instruments are designed to serve ends*. The present practices however do not really reflect this, as financial products in Islamic finance seem to be reverse engineered; i.e., the existing conventional products are modified to meet Islamic legal requirements while maintaining the same objectives as the financial capitalist system.

Serious work in the foundational area of Islamic banking and finance that can produce the much needed conceptual foundations and frameworks is necessary. Developing a body of knowledge and Islamising modern financial practices cannot be done properly unless we have a clear and coherent philosophical foundation that emanates from an Islamic worldview. It is only with this sound philosophical base for Islamic finance that the body of knowledge can sustain itself or provide genuine Islamic alternatives to contemporary financial practices and the indigenous solutions requested.

The second driver of the emergence of Islamic finance in contemporary context, as we have discussed, essentially contends that Islamic finance emerges for a bigger purpose of creating a just/fair financial system that would ensure fair and equitable mobilization and distribution of resources; remove and prevent exploitation of man by man; fair and transparent financial practices with ethical triumph.

The mission should move beyond removing interest in the system, but removing all forms of *ribā* in the economy. This is because *ribā* prohibition is not limited to interest on loans. Instead, it is a comprehensive concept that encompasses all factors of production and distribution, such as capital, land and labour whereby one party attempts to gain benefit at the expense of the other party without giving a reasonable counter value (*iwaḍ*) (Abu Sulayman, 1998: 99). *Ribā* is forbidden on the ground that it fosters the unjust acquisition of wealth at the expense of social justice, the equitable distribution of wealth and the wellbeing of the community (Choudhury, 2012). *Ribā* transfers risk onto one party and shields the other from it and guarantees it a fixed return. In a loan, *ribā* transfers risk to the debtor, by requiring him to pay back the money lent with increment. Certain sales, especially those involving delayed payment, can be structured to transfer all risk to the buyer without the seller assuming risk (*ghurm*) or liability (*damān*) or effort (*kasb*).

This spirit is very much implied in the concept of *maqāṣid al-Sharī'ah*. Therefore, the mission in developing Islamic finance should essentially be done with this broader understanding of *Sharī'ah* (i.e., not as law *per se* but as a system of life) and pursuing the higher objectives of *Sharī'ah*. In this, *maqāṣid al-Sharī'ah* would act as the framework and guideline as well as the basis and foundations in developing an Islamic financial system.

4. *Maqāṣid* Requirements in Developing Islamic Financial System

Maqāṣid al-Sharī'ah is translated as the objectives of the *Sharī'ah*. *Maqāṣid al-Sharī'ah* is the goals and objectives of Islam as a system of life that constitutes standards and criteria, values and guidance based on divine revelation (*wahy*) to be applied in practical life to solve human problems and guide the direction of human life. More narrowly framed, *maqāṣid al-Sharī'ah* is the underlying purposes upon which the *Sharī'ah* is established.

Maqāṣid al-Sharī'ah is firmly related to human interest by providing for a good order of life and wellbeing (*maṣlahah*). Therefore, the discussion of *maqāṣid* would essentially embrace all dimensions of human life in the individual and community spheres, the micro and macro dimensions, as well as religious (*dīn*) and worldly (*dunya*) matters. The *Sharī'ah* would ensure the benefits to the individual and to the community, and all its rulings are designed to protect those benefits and facilitate improvement and perfection of the conditions of human life on earth (Laldin, 2008: 72).

That perspective would open our perspective and give us insights in how Islamic finance should be developed and structured. Some other dimensions in the *maqāṣidic* approach in developing Islamic financial system are as follows.

4.1. In the maqāṣidic orientation, the Sharī'ah compliance in Islamic finance does not mean a mere satisfaction of the minimum legal requirement of Islamic jurisprudence. Instead, Sharī'ah compliance means to structure and orient Islamic finance in the Islamic spirit and value system and achieve the ideals and purpose of Islam in the financial sphere

This embarks from the understanding that *Sharī'ah* is essentially a wider concept than that of Islamic law/rulings/jurisprudence. *Sharī'ah* should not be reduced to the domain of law (*aḥkām*) that regulates practical aspects of human life: personal, societal, state or international relationships and hence reducing the *maqāṣid al-Sharī'ah* concept in the framework of the objectives of Islamic law or the objectives of Islam in legislation.

Instead, *Sharī'ah* is a system of life that encompasses all aspects of the creed and belief system (*aqīdah*), the legislation and rulings (*aḥkām*) in man – God relationship (*'ibādah*) and man – man relationship (*mu'āmalah*) as well as the system of ethics and moral (*akhlāq*) (Al-Qaradawi, 2007: 16-22). *Sharī'ah* in this perspective covers the entire spectrum of Islamic life that include belief, moralities, virtues and principles of guidance, economic, political, cultural and civilizational matters that concern not only the Muslim community but the entire humanity (Berghout, 2006: 55). *Sharī'ah* is the entire worldview of Islam that consists of the body of Divine guidance, its structure and format and also constructs (Abdul Rauf, 2002: 3).

Maqāṣid is therefore a comprehensive concept that explicates the very ideals/objectives of *Sharī'ah* related to human life. *Maqāṣid al-Sharī'ah* should not be reduced in merely identifying *Sharī'ah* objectives in legal/law dimension. The *maqāṣid* discussion in financial sphere should always refer to the general objective of *Sharī'ah* that give grand framework and direction of how financial transactions should be arranged in Islamic economic system. *Maqāṣid al-Sharī'ah* is considered as the grand framework that provides guidelines and directions for ensuring the realization of *maṣlahah* (benefit) and the prevention of *mafsadah* (harm) in all financial contracts (Laldin and Furqani, 2012). The *Sharī'ah* compliance should be structured within the framework of the pursuance of *maqāṣid al-Sharī'ah* which would take care the legal compliance in Islamic financial transactions and the commitment to Islamic ideals, principles and goals.

4.2. In developing a sound Islamic financial system, an integrative approach and comprehensive perspective on the overall Islamic vision in financial sphere is required

Economics and finance in the Islamic worldview is considered to be part of Islam as a grand system of life. Thus, the spirit, teachings, norms and guidelines of the religion are perceived as embracing all its dimensions. The economic-financial realm is discussed within this framework. At the higher level, there are macro-goals that Islam attempts to promote, such as social justice, equality and the symbiotic cooperative community; at the micro level, Islam attempts to promote individuals having the necessary characteristics to be able to realize those goals in practice. The whole enterprise of *maqāṣid al-Sharī'ah*, according to Ibn 'Āshur (2001: 273), aims to preserve the social order (*ḥifẓnizām al-ummah*) and ensure its healthy progress by promoting the human wellbeing and righteousness (*salāḥ*).

As a new system of thought addressing human economic life, Islamic economics, banking and finance is challenged with reforming the adverse situation of the human economy; supplementing what is lacking in current practices; and offering a new, better perspective in guiding man to achieve ultimate wellbeing. The multifaceted crisis confronting humanity—as manifested in the gap between material welfare and other dimensions of wellbeing, massive poverty and injustice, ecological destruction, etc.—reflects that the current economic system is not really working to answer those issues and, therefore, a new alternative is expected.

This would require a comprehensive understanding of Sharī'ah in a multi-disciplinary perspective transgressing the legal compliance technicalities so that we could strategize how the industry should be structured and the Islamic vision in financial sphere could be applied. At the same time, this would invite all stakeholders; *Sharī'ah* scholars, philosophers, economists, sociologists, and et cetera to join the march of developing an 'Islamic' financial system.

4.3. *Maqāṣid al-Sharī'ah in Islamic finance refer to the overall goals and meaning that the Sharī'ah aims to achieve from its philosophy, principles and rulings related to the financial activities and transactions*

While we agree that observing the philosophical underpinning of legal rulings is important, *maqāṣidic* discussion would extend the subject-matter to *why* and *for what* purposes the contracts and financial activities are allowed or banned. Therefore, the discussion of *Sharī'ah* in Islamic finance does not halt at what contracts are permitted or prohibited, what elements should be observed or what mechanisms to be followed to make the contracts *legally* valid as the current practice in *Sharī'ah* compliant finance. Instead, the *maqāṣid* discussion will open up horizon of *raison d'être* why we need to develop Islamic finance at the first place, what goals to be realized and to which direction we are going to bring the industry. In this perspective, *maqāṣid* would enter into the whole framework, processes, and operations of Islamic finance (Laldin and Furqani, 2012).

This perspective would set a new perspective of finance, comprehensive changes in framework and approach, provide unconventional (if not out of the box) solutions in satisfying financial needs, and would enter and cater the larger number of society in the mobilization of resources and realizing wellbeing.

4.4. *To understand maqāṣid prior to outlining the guideline or setting up the practical rules (ahkam al-Shar'iyyah) is important in order to get correct output in an ijtihad process of structuring financial contracts and to determine the operational framework and direction of Islamic finance*

The *maqāṣid al-Sharī'ah* is derived from the ultimate source of the Qur'an and Sunnah which explicitly or implicitly declare the purpose of *Sharī'ah* in human life. In this endeavor, intellectual reasoning (*'aql*) is significant. The texts (*nuṣūṣ*) themselves should be read in an integrative and comprehensive way in conjunction with their rationale, objective and purpose so that a balance between process and purpose, form and substance, literal interpretation and substantive understanding in formulating the law in financial transactions could be achieved.

Ijtihad in the *maqāṣidic* approach would not only take care the 'correct mechanisms' in technical-procedural sense of product structuring but most importantly able to capture the essential spirit in substantiating the ideals/spirit and to apprehend noble goals in practical legal rulings (*aḥkām al-shar'iyyah al-'amaliyyah*) and hence product structuring (Kamali, 2008: 22). *Maqāṣid al-Sharī'ah* observation will open up the horizon in understanding texts (*nuṣūṣ*) in relation to the context of practical realities and view the *Sharī'ah* as unity in which the detailed rules to be read in general framework and detailed actions to be set in line with bigger goal.

The Islamic finance practice that is largely concerned with technical/operational issues of having products or contracts that comply Islamic legal requirements is viewed as not sufficient. Likewise, modification of the existing (non-*halal*) conventional products to meet Islamic legal requirements while maintaining the same objectives as the financial capitalist system is not adequate in achieving higher purposes of having a breakthrough in financial services in Islamic perspective. This is because, *Shari'ah* emphasis on fair distribution of wealth to large number of society as well as fair and just practices in resources mobilization. Such approach has led to replication of all conventional banking and finance products in Islamic forms/structure while, to some extent, maintaining the capitalist spirit. This trend in conceptual and practical movement of Islamisation of finance made present Islamic finance is still unable to release itself from the dominant framework of debt-based finance *ala* capitalism (Furqani, 2011: 8).

Moving forward, in the attempt of producing a genuine Islamic finance as shaped by Islamic objectives, effort should be put on producing financial instruments that are consistent with and serve the higher objectives. Islamic finance needs to be optimized to ensure both the financial and ethical quality of financial products supplied to the public. The *maqāsid* essentially invites our creativity to design contracts that would suit our needs and objectives of life. Islamic banks and financial institutions should observe *maqāsid* in their corporate objectives and policies and also use them to verify compliance to true Islamic principles.

In this light, Islamic finance's progress will be monitored by how well it realizes the *maqāsid* in producing a good economy marked by the spirit of brotherhood (*ukhuwwah*) and cooperation (*ta'āwun*), social equality and social justice (*'adālah*), just and fair allocation of resources, elimination of poverty, protection of the environment and helping society in achieving wellbeing (*maṣlahah*). The reputation of Islamic financial institutions is as dependent on its development agenda and moral standing as it is on its financial acumen. A note by Abdullah and Chee (2010: 2) in the beginning of their book *Islamic finance: Why it makes sense* reminds us: "it is not about finding billion-dollar petroleum projects or becoming the next Islamic finance multi-millionaire. Rather, it is to do with alleviating poverty and wealth gaps around the world." The potential of Islamic finance in helping the people of the world to achieve true wellbeing and shaping the world with lofty values of justice, fairness and cooperation will be meaningless if we do not direct Islamic finance in its proper systemic direction. Incorporating those concerns in developing Islamic finance would help ensure better financial returns while making the sector more sustainable.

5. Conclusion

To address the challenges in our attempt to develop meaningful Islamic finance, the attention in the foundations should be renewed and discussed in a more comprehensive perspective. The attempt is to establish a financial system based on Islamic principles and values.

The purpose to develop an Islamic financial system is not for producing a *Shari'ah* compliant finance in a strict legal compliance meaning; instead it should be done in the broader notion of *Shari'ah* that requires our attention into the whole dimensions of human life and human wellbeing. Likewise, the effort to develop an Islamic finance system is not directed to address the shortcomings of the mainstream conventional system, but more essentially, it is an effort to manifest the Islamic worldview or, more specifically, its visions in the economic and financial sphere.

That perspective in developing Islamic financial system would invite Islamic intellectual community (both scholars and practitioners) to be creative and innovative in developing the operational system, determining the direction of industry and contributing to the society. This at the same time will speed up the evolutionary process of Islamic finance towards becoming a solid system of thought and a viable practical system.

The current trend in conceptual and practical development of Islamic finance that want to re-shape the industry in accordance with the higher objective of *Shari'ah* instead of a mere *Shari'ah* 'legal' compliant should be appreciated. Further research in this fundamental area should be done so that a meaningful Islamic banking and finance could be produced. It is only with this sound philosophical base for Islamic economics, banking and finance that the body of knowledge can sustain itself or provide genuine Islamic alternatives to contemporary economic and financial practices and the indigenous solutions requested.

Scholars and practitioners should keep that spirit alive, for people have become very critical of the development of Islamic economics, banking and finance, and they demand more than replicating and modifying existing practices and labeling them Islamic. The 'Islamic' title carries the expectation of a

financial system and practices that are truly based on Islamic principles and serve the noble goals prescribed by Islam (*maqāṣid al-Sharī'ah*). Having *Sharī'ah*-compliant products is certainly not the endpoint in our effort to develop an Islamic financial system. Proper instruments are the means in our effort to achieve the objectives (*maqāṣid*) of the *Sharī'ah*. The paradigm should be shifted from a narrow understanding of the *Sharī'ah*, concerned only with formal legal compliance, to a much broader and deeper understanding of the *Sharī'ah* as encompassing the totality of human life.

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