

Harmonising legality with morality in Islamic banking and finance: A quest for *Maqāṣid al-Sharī'ah* paradigm

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Abstract: Scholars in Islamic Finance Industry (IFI) have been calling for the integration of Islamic morality with legal theories in the industry. Among the reasons for this call is an unethical trend in product innovation. Implementing Islamic banking and financial practices would require adopting their undergirding Islamic legal and moral frameworks. Departing from these foundations of Islamic law could render the activities conducted under its name religiously unacceptable. Many approaches have been put forward to achieve this cause. One of the most complex yet subjective approaches is the quest for *Maqāṣid al-Sharī'ah*. This paper critically examines the feasibility of harmonising morality with legality in Islamic finance. In doing so, it will reveal what constitutes morality and legality in Islamic legal theory, and critically examine the approaches of Muslim classical scholars in fusing the two elements together for the realisation and actualisation of the very objectives of *Sharī'ah*. Questions of the relationship between morality and legality are raised, and samples of Islamic finance products are evaluated to expose their moral and legal dimensions. Lastly, the role of *Maqāṣid al-Sharī'ah* in the process of harmonisation is discussed with some observations and reservations on the practicality of their implementation.

Keywords: Harmonising morality with legality; Islamic ethics; Islamic finance industry; Islamic legal theory; *Maqāṣid al-Sharī'ah*.

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Abstrak: Pemikir-pemikir dalam Industri Kewangan Islam (IFI) telah menyeru untuk menggabungkan moral Islam dengan teori-teori perundangan industri. Antara sebab-sebab panggilan tersebut adalah kerana terdapatnya trend yang tidak etika dalam penemuan inovasi produk. Implimentasi perbankan Islam dan amalan kewangan memerlukan penerimaan perundangan Islam dan rangka bentuk moral. Namun, asas perundangan Islam berkemungkinan dapat memberikan aktiviti-aktiviti yang dilakukan di bawah nama agama tidak akan diterima. Banyak pendekatan telah dianjurkan untuk mencapai tujuan tersebut. Salah satu daripadanya pendekatan yang kompleks tersebut, walaupun subjektif adalah merupakan usaha *Maqāṣid al-Sharī'ah*. Kertas kerja ini secara kritisnya mengkaji kebolehan mengharmonikan moral dengan perundangan kewangan Islam. Dengan melaksanakannya, ia akan menunjukkan apa yang terkandung moral dan dalil dalam teori perundangan Islam. Selain daripada itu, kertas kerja ini secara kritisnya mengkaji pendekatan-pendekatan sarjana Muslim terdahulu dalam menggabungkan kedua-dua elemen tersebut untuk merealisasikan dan mengaktualisasikan tujuan *Sharī'ah*. Persoalan tentang perkaitan antara moral dan dalil disuarakan. Selain daripada itu, contoh-contoh produk kewangan Islam dinilai bagi didedehkannya secara moral dan mengikut dalil. Akhir sekali, peranan *Maqāṣid al-Sharī'ah* dalam proses mengharmonikannya turut dibincangkan berdasarkan beberapa pemerhatian dan reservasi terhadap amalan dan implimentasinya.

Kata Kunci: Mengharmonikan moral dengan dalil; etika Islam; industri kewangan Islam; teori perundangan Islam; *Maqāṣid al-Sharī'ah*.

As a result of the global financial recession, new and alternative approaches to curbing the prevailing economic problems have begun to circulate amongst both economists and the public. The Islamic financial system has emerged as a possible solution to the mayhem. However, implementing Islamic banking and financial practices would require adopting their undergirding Islamic legal and moral frameworks. Departing from these foundations of Islamic law could render the activities conducted under its name religiously unacceptable, and thus perhaps philosophically problematic. It is crucial to understand these foundations in order to better consider the viability of incorporating an Islamic approach to finance into mainstream practices.

Ethics and morals are the core of Islamic law including commercial transactions. The principles underlying the Islamic ethical system revolve around the unity of God, Who commands human beings to behave morally and to be law-abiding citizens overserving justice and kindness (*al-'adl wa-al-ihsān*). The Islamic economic model is hence

also based on fairness. For instance, everyone involved in an Islamically-sanctioned business transaction is entitled to be fully informed of the nature of a substance being bought or sold, and must not be misled or cheated.

While pursuing economic well-being is encouraged in Islamic law, engaging in dealings that involve prohibited substances such as alcohol, pork-related products, and gambling is legally and morally forbidden in Islam. In addition to these instances, certain commercial behaviours or activities such as usury and *gharar* (ambiguous dealing) are also prohibited, owing to the Islamic moral value of not compounding financial problems on people or not exploiting the concepts of destitution and desperation to solve a problem (Izutsu, 2002).

Islamic moral standards and resulting approaches to finance and banking is thus a subject worth exploring, especially with regard to how they can gain acceptance within the western conventional economic system. As these two systems interact, challenges naturally arise. Abdul Kader and Ariff (1997, p. 273) observe, "There is a real danger of Islamic banks emulating the conventional ones even at the risk of losing sight of the socioeconomic goals set by Islamic paradigm". Among these risks, Abdul Kader and Ariff explain that Islamic banks share a, "kitchen with conventional ones which would inevitably lead to the mix of funds and investment of *halal* [permissible] with *haram* [forbidden]."

Another obstacle is that Islamic banks have to struggle to maximise their profits, as the shareholders expect good dividend payouts at the end of the year regardless of how the profits are made. Although maximisation of profit is not an issue in Islamic commercial law, it is morally unacceptable when resulting from monopoly and oligopoly (Agil & Ghazali, 2005, pp. 118-119), which are essentially encouraged in the Western capitalist-leaning system. So what of the international nature of business, and does this apparent conflict of moral standards put the systems at odds?

The emergence of the Islamic bank in modern Islamic history appeared in Egypt in 1963, followed by other Arab Muslim countries (Saleh, 1992, p. 108). The intention was to exterminate the interest-based banking systems and replace it with the Islamic practices of interest-free loans and elimination of unlawful gain prohibited in Islamic law (Saleh, 1992; Elfakhani et al., 2007, p. 116). This philosophy suggests that any

product offered by the Islamic finance industry must conform to this original spirit in order to gain credibility and sustainability.

The fast growth of Islamic financial products urgently necessitates tight regulations to ensure the stability of this growth and simultaneously preserve the core ideals that have spurred the emergence of the industry. Close observation of the Islamic economy may suggest that its thriving may not result from incorporating morality into business, but conceivably because of marginal immorality in business practices. As Islamic finance has been booming since the recession in the West, many questions have been raised, such as why has the Islamic economy not been affected and what is the role of the Islamic economy in reviving the global economic downturn? What is certain is that the Islamic ethical framework is quite distinctive from the secular model.

The secular mode of ethical decisions places emphasis on positivistic approaches at the expense of transcendence, which is the core of ethical decision making in Islam (Saeed & Ahmed, 1998, p. 344). In Islam, all human activities are considered acts of devotion to God (Qur'ān, 6:162), including behaviour and performance in the business domain. As Saeed and Ahmed (1998, p. 345) rightly observe, "Islamic ethics is deeply ingrained in all Islamic concepts and is part and parcel of all Qur'ānic commandments." The Islamic texts whose principles and regulations shape Islamic business ethics are both substantive and interpretative. The former is divine revelation as it appears in the Qur'ān and the authentic sayings of Prophet Muhammad (S.A.W.), while the latter is of human origin such as the interpretation of the Muslim scholars as dictated in the books of *fiqh* (jurisprudence).

In addressing the problem of moral dilapidation in the Islamic Finance Industry (IFI), experts have been calling for harmonising Islamic moral norms with legal theories to achieve the purpose of Islamic law. They stress that Islamic objectives in banking and finance cannot be realised by clinging alone to legal aspects of the law and undermining the moral philosophy underpinning the *Sharī'ah*. In order to achieve the harmonisation of legality and morality in IFI, many approaches are presented, among these approaches is the quest for *Maqāsid al-Sharī'ah*.

This paper critically examines the feasibility of harmonising morality with legality in Islamic finance. In doing so, it will reveal what constitutes morality and legality in the Islamic legal theory, and

critically examines the approaches of Muslim classical scholars in fusing the two elements together for the realisation and actualisation of the very objectives of *Sharī'ah*. Questions of relationship between morality and legality are raised, and samples of Islamic finance products are evaluated to expose their moral and legal dimensions. Lastly, the role of *maqāsid al-Sharī'ah* in the process of harmonisation is discussed with some observations and reservations on the practicality of their implementation. Legal analysis is used to examine what connotes and denotes legality and morality among the Muslim classical jurists, while context analysis is employed to access the approaches of the Islamic Banking and Finance Industry in harmonising legality with morality in business. Samples of some products in which legal and moral norms are fused together to achieve *Maqāsid al-Sharī'ah* are referred to.

The Islamic legal system

The Islamic legal system is a comprehensive system based on the *Sharī'ah*. *Sharī'ah* is a comprehensive law governing Muslim ritual and social life. It is primarily derived from the Qur'ān and Sunnah of the prophet, and complemented by secondary sources such as *ijmā'* (consensus), *qiyās* (analogical reasoning), *istihsān* (juristic preference), *istiḥāb* (presumption of continuity), *maṣlaḥah mursalah* (unrestricted public benefit), and *'urf* (custom) (Hallaq, 1999, pp. 1-35). Like any other legal system, the modern Islamic legal system is not immune to contradictions. This is because, while the substance is divine, the implementation requires human innovation. As each Muslim adopts a different school of Islamic jurisprudence, there exists artificial contradiction as to what constitutes legality or morality in legislation. For example, Saudi Arabia's legal system is based on the Hanbali School while Malaysian Islamic law prefers the Shāfi'ī's School. The different opinions of each school on a certain issue in Islamic finance will definitely affect the way each country will develop its laws on that such issue (Vogel, 2000; Kamaruddin, 2012). A country like Saudi Arabia makes Islamic law the state law, whereas Malaysia applies Islamic law in some areas along with conventional law at the national level. However, each state is given power to apply State law where Islamic law can be more visible and applicable (Shuaib, 2012).

The most challenging problem in contemporary Islamic banking and finance is the issue of the moral value of the law, and whether it is

part of the law or not. Dusuki (2008) and Ahmed (2011a, 2012) argued that the failure factor of the current practice of Islamic banking and finance is the absence of morality in business. However, this is perhaps due to human fallibility to comprehend the purpose of the law and not because Islamic commercial law has a corrupt nature.

For the classical Muslim jurist, Islamic law is the reference point of all activities for Muslims. *Sharī'ah* is the divine law revealed in the Qur'ān and explained by the actions, speech, and tacit approval made by Prophet Muhammad (S.A.W). Until recently, *Sharī'ah* has been known in the West as "Islamic law," which combines divine revelation and manmade interpretation. Perceiving *Sharī'ah* as a divine law implies that human reasoning is inadmissible, which is the position of many Western scholars such as Crone (2004). She suggests that humans have no "right to create obligations that invoke the divine." This is true to some extent, but she challenges certain aspects of the legal theory in Islamic law, as will be developed later. On the other hand, allowing *Sharī'ah* to be ruled by human reasoning also poses the danger of subjecting it to manmade laws, which inevitably reduces its divine capacity and allows subjective positivism.

If *Sharī'ah* is the substantial code of laws revealed in the core sources of Islam, the search for ways through which those can be implemented in real life gives *locus standi* for the emergence of *fiqh*. *Fiqh* is the understanding and implementation of the rules and substance of the *Sharī'ah*. This human understanding of *Sharī'ah* is considered to be "a process rather than a consolidated body of knowledge" and is "somewhat and sometimes subjective, since it represents the personal understanding of a scholar" (Doi, 1997, pp. 101-102). Thus, no one can claim a monopoly of thought and wisdom, nor absolute right of understanding. Consequently, the emergence of different schools of Islamic jurisprudence occurred as a natural result of diversity in understanding and interpreting the *Sharī'ah* (Mahmassani, 2000, p. 33).

Due to humans' limited capacity to comprehend God's wisdom in enacting laws, man's interpretation of *Sharī'ah* may be prone to errors. To minimise such shortcomings and avoid heretical misunderstandings, proper methodologies and procedures for the extrapolation of laws have been established.

Legal and moral discourse in Islamic legal theory

Uṣūl al-fiqh stands for legal theory in Islamic law. Unsystematically explored in the first years of the Islamic civilisation, the science of *Uṣūl al-fiqh* (principles of Islamic jurisprudence) began to be logically constructed only around the middle of the second century of *al-Hijrah* (AH) by Imam al-Shāfi‘ī (Schacht, 1950, p. 12). *Uṣūl al-fiqh* is a science that epitomises the richness of Muslim scholarship on Islamic legal theory. The most difficult task of an *uṣūlī* (a scholar of *Uṣūl al-fiqh*) is to ferret out the illocutionary and perlocutionary acts in the texts. Thus, *uṣūl al-fiqh* has to tell us what *amr* (imperative obligation) and *nahy* (imperative prohibition) stand for in the texts. In doing so, it stipulates the hierarchical orders from which specific rules can be derived, exploring the values of *Sharī‘ah* (*al-aḥkām al-sharī‘yyah*) (Kamali, 2005; Hallaq, 1999). *Uṣūl al-fiqh* emerged to regulate the deduction of rules from the concept of *fiqh*. In light of this, terms such as *wājib* (obligatory), *mandūb* (commendable), *makrūh* (detestable), *ḥarām* (prohibited), and *mubāḥ* (indifferent) were introduced (al-Ghazālī, 1993, p. 23; al-Sam‘ānī, 1999, vol. 1, p. 62; al-Shinqīṭī, 2001, pp. 12-27). These legal hierarchies have bearings on the way and manner in which Muslims of today differentiate between legal and moral imperatives in Islamic law.

In a legal sense, the *wājib* (obligatory) act entails reward or recompense when it is committed by someone with legal capacity (*mukallaḥ*) while *ḥarām/muḥarram* incurs punishment when it is committed by the same person (Hallaq, 2009, p. 84, al-Ghazālī, 1993, p. 23; al-Sam‘ānī, 1999, vol. 1, p. 62; al-Shinqīṭī, 2001, pp. 12-27). In other words, the two classes of legal norms come with punishments either in this world or in the hereafter (or both) for non-compliance. The three remaining norms do not attract any punitive measure in a strict legal sense, as will be illustrated later. The ultimate aim of *Sharī‘ah* is neither to punish nor to inflict harm on any human but to regulate and reform a society at the brink of destruction (Qur’ān, 3:170). This statement does not negate the importance of law enforcement but shows the holistic approach of *Sharī‘ah* to human fallibility. For instance, in the *Musnad* of al-Imām al-Shāfi‘ī, *Muwatta’* of al-Imām Mālik, and *Musnad* of al-Imām Ḥanbal, it is reported that Ṣafwān ibn Umayya came to Medina, and while he was sleeping in the mosque, a man stole the cloth beneath his head he used as a pillow. Ṣafwān brought the man to Prophet Muhammad, and the Prophet ordered his hand to be amputated.

Şafwān was shocked and he asserted that amputation of the man's hand was not his aim, but rather, just to report the theft and requested that the cloth to be given to the thief as a gift. The Prophet replied, "You should have done that before you reported him" (al-Shāfi'ī, 1400H, vol. 1, p. 335; Mālik, 1985, vol. 2, p. 34, Ḥanbal, 2001, vol. 24, p. 15).

This story illustrates that yes, forgiveness is encouraged in Islam, but the law must also be enforced when it is broken. Şafwān has the legal right to report the crime against him as well as the moral obligation to forgive the perpetrator. The Prophet (S.A.W.), however as a leader and law enforcer, is legally obliged to enforce the law but has no moral right to undermine its *status quo*. Legal and moral distinctions thus follow from the legal theory when the scholars of *uṣūl al-fiqh* extract what is legal and what is moral from the various sacred and historical texts. They logically present what they understand about the *Sharī'ah* law/value. They define *Sharī'ah* law as the locution or communication from the Lawgiver concerning the conduct of the *mukallaf* (a person in full possession of his faculties and thus responsible for obeying the law), which consists of a demand (*ṭalab*) either in the form of a command (*amr*) or a disapproval (*nahy*) (al-Shinqīṭī, 2001, p. 11).

When a demand to do or not to do something is established with a definitive proof, it becomes either obligatory (*wājib*) or prohibited (*ḥarām/muḥarram*). Neglecting a deed in the former category or committing one that falls in the latter incurs punishment. When a demand cannot be utterly proven with a decisive indicant (*qat'iyyah dalālah*), it becomes either recommended (*mandūb*) or detestable (*makrūh*). From the hierarchical classification, scholars could easily differentiate between what is legal and moral. However, this distinction has no root in the first century of Islam. Hallaq (2009, p. 84) writes, "Islamic law... has all-encompassing interest in human acts. It organises them into various categories ranging from moral to the legal, without however making such distinction". Indeed, *Sharī'ah* in the epoch of the first generation was not treated or conceived of as "Law" as it is understood today. Where the "State permits and forbids, and when it does the latter, it punishes severely upon infraction," it does that on positive law theory, where the right to forbid and to permit resides in human hands. This runs contrary to the notion of *Sharī'ah*.

The Prophet made it clear when he saw some immoral activities, "I do not fear anybody, but I do not want to approve except what God

has approved and I do not want to disapprove except what God has disapproved” (al-Shāfi‘ī, 1400H, vol. 1, p. 29 cf Qur’ān, 66:1). This holistic approach is also evident in the attitudes of his companions towards the law of Allah.

Abū Dāwūd reported that Ibn ‘Abbās said that, “the people of Jāhiliyya [the Age of Ignorance, or era prior to the advent of Islam] used to consume some edible things and to leave others by their will (perhaps prohibits them). God sent His prophet with His book. He makes something halal and the others haram. He is silent on other things as a mercy.” Then Ibn Masūd recited Qur’ān 6:145 (Abū Dāwūd, *ḥadīth* 3800, vol. 13, pp. 354-355).

This is true of Ibn Abbās, who was initially defiant of the prohibition of a type of usury called *ribā al-faḍl* (usury of exchange with surplus) until he was reminded or remembered the *ḥadīth* of the Prophet in which the action was forbidden. According to al-Shinqīṭī (1995), once Ibn ‘Abbās heard the *ḥadīth*, he strongly forbade it.

Al-Shāfi‘ī had the same attitude toward many issues that did not appear to him as *ḥarām*. He paid more attention to the legalistic aspects of transaction than their moralistic ones. For instance, al-Shāfi‘ī insisted that the sale of *‘inah/tawarruq* (reverse *murābaḥah*) is valid since it does not contradict the text. He ruled out impinging on the vicious intention of merchants in their dealings. He says:

The fundamental principle I uphold is that any contract that is apparently done in a valid way, I do not pronounce it invalid with any suspicion (*emphasis*) nor on the basis of the custom of the two contacting parties. I will pronounce it valid based on what is apparent. However, I dislike their intention if such intention, if declared, will render the selling invalid. As I dislike for a man to buy a weapon to kill with it, but it is not prohibited for the seller to sell it for whom it appears to have had intention of using it for committing a crime of murder, because he may not use it for such crime, as such I could not pronounce the selling invalid... (al-Shāfi‘ī, 1990, vol. 3, p. 75).

He illustrates thus,

If a man bought a commodity from another man and he possessed it and the price (of sale) is deferred to a specific

time, there is nothing wrong for the original seller to buy it back from someone who bought it from him or from another person (if the actual commodity has been sold out to another person) whether with a lower price or higher than the price he bought it or even with debt... the first sale has nothing to do with the second sale (al-Shāfi'i, 1990, vol. 3, p. 79).

The impact of the legal theory manifests itself in the way jurists (*fuqahā'*) present their arguments in jurisprudential literature. Their discernment emanates from the fact that not all scholars will perceive a text as clearly decisively implying obligation or prohibition. The rationale used to determine a decisive indicant could rely on the language in use or the cause (*'illah*) of the law (Hallaq, 2009, p. 61). For example, the word "*ghaṣb*" (usurpation), which to the Hanafi School must involve the "unlawful removal of property from its original place," is merely a seizure of property in the Hanbali School. As scholars define this term differently in each school, they will also arrive at different decisions regarding the recovery of damages resulting from the act of *ghaṣb*.

Because of the myriad of discerning features among schools of Islamic jurisprudence, some Oriental scholars assume that *fiqh* cannot be called "Islamic law" and is not equal to Western jurisprudence (Johansen, 1999, p. 45). Contrary to this assertion and drawing from Schacht's portrayal of the characteristics of Islamic law and Max Weber's assertion of its rationality, Johansen opines that, "the imposition of ethical and religious categories on the legal subject provides *fiqh* with a substantive rationality which has enabled it to form a coherent legal system" (p. 55). The problem with their assertion stems from the fact that the jurists who established legal scholarship and had their own students, did not impose their views on people directly. Rather, incumbent rulers were accountable for imposing certain legal schools (*madhhab*) on his subjects (Weiss, 1998, p. 8). Bernard also suggests that in the early Islamic era, there was nothing like law as it is understood today. It is assumed that influential scholars and those who took *Sharī'ah* beyond law were the ones who eventually established what we know today as "Islamic" law based on their personal reasoning, as "the textual canons of Islam were as yet not fully defined" (Weiss, 1998, p. 8). And thanks to the rulers who championed particular brands of legal philosophy, the legal and moral views of each school became integral parts of the law enforced in particular times and places. Johansen describes imposing

ethical and religious categories on the legal system as a “process of Islamization” (Johansen, 1999, p. 56), which could be argued was more a process of politicisation.

Commenting on this legal-moral infusion, Schacht (1983, p. 203) writes that both, “religious and moral considerations are an essential part of the systematic structure of Islamic law”. But in another place, Schacht raises curiosity about this idea. He did not invent the claim from his whims and caprices, but follows Max Weber in his assumption that Islamic law was based on mere rationality. Weber’s conclusion, as summarised by Gerber, is that Islamic law is a totally unpredictable system. Since there were no rules or enforceable laws, nobody could ever know what the judge (*qāḍī*) was basing his decision on. Thus, it is an arbitrary system that denies basic human rights and is inherently corrupted (Gerber, 1994, pp. 176-177). Gerber’s depiction of the Islamic law during the classical Islamic medieval period is not absolutely true.

The fact that the classical jurists used independent reasoning does not necessarily mean they separated their application into a different sphere of jurisdiction. Ethical and legal norms, for the most part, have gone hand in hand since the inception of the Islamic normative legal process, but there could be some disputes about this. The Prophet and his companions were the judges in Medina of many ethical and legal issues as relayed above.

Legal and moral questions in contemporary Islamic banking and finance

Moral decline in business is worrisome. Many critics of the modern financial industry attribute the global financial crisis to a decline in ethical orientation and moral inclination. The Islamic commercial law, which includes banking, finance, and contract law, has had its framework written and documented by great scholars who patiently dedicated themselves to addressing issues on both legal and moral levels, because humans do not cease to question the relationship between the law and morality in their daily activities. Perhaps the most difficult task men have to face, whether by religious or mundane law, is coping with the obligation to adhere to the moral principles underlying their religion’s philosophy. This was true even for such capable minds such as Aristotle and Plato who struggled with questions of law and morality in their time.

Many contemporary economists and academics have criticised the current state of Islamic banking and finance partially based on moral questions. Ahmed (2012) and many others such as Holden (2007), Hamoudi (2007), and Dusuki (2008) have registered different concerns about the trends of Islamic banking and finance. Holden (2007) describes Islamic finance as “legal hypocrisy”. Hamoudi (2007) brands it “semantic fantasy” and Usmani (2007) challenges contemporary *sukūk* (the Islamic equivalent of bonds) as mimics of conventional bonds devoid of Islamic spirit.

The observations of these scholars revolve around a professional’s pragmatic approach in the field of Islamic banking and finance. Ahmed (2011a, 2012) evaluates this by linking the failure of the Islamic banking and finance industry to practitioners’ sticking to the legalistic letter of the law while distancing themselves from the spirit of the law, or moral responsibility (Ahmed, 2012, p. 20). He points out that the current practice of Islamic finance is that the legalistic forms of contracts are fulfilled but the substance and spirit are not (Ahmed, 2012, p. 20). He then identifies three typologies of Islamic finance products in the market: (1) *Sharī‘ah*-based product (SBP), (2) *Sharī‘ah*-compliant product (SCP), and (3) pseudo-Islamic product (PIP).

Sharī‘ah-based products are expected to integrate both legal and moral levels of Islamic law to fulfil the objectives of *Sharī‘ah*. If a *Sharī‘ah*-compliant product will only fulfil the legal requirement in form and not the substance does not achieve *Sharī‘ah*’s moral aims. It does not consider the end result of the contract or its possible resulting effects on others. The pseudo-Islamic product will fulfil the form but not the substance. Such pseudo-Islamic products are designed in conformity with the legal requirement of *Sharī‘ah* but devoid of the spirit of *Sharī‘ah*. In such cases, legal artifice (*hīlah*) is used to circumvent the spirit of Islamic law, for example in the case of *tawarruq* (Ahmed, 2011b).

Indeed, understanding the hierarchy of values in Islamic law will ultimately shed light on the legal and moral implications of the contemporary Islamic banking and finance. To determine if a product is legally or morally *Sharī‘ah*-compliant, there is a need to examine the locution of the text based on inductive and deductive interpretation. This will provide a true picture of whether a product can be branded

Sharī'ah-compliant or not. If it fulfils the obligatory (*wājib*) and refrains from prohibited (*ḥarām*) elements but violates the recommended (*mandūb*) features and contains the detestable (*makrūh*) elements, such a product cannot be described as non- *Sharī'ah*-compliant in a real sense. Since the legal requirements have been fulfilled, it is considered legally *Sharī'ah*-compliant, however, it could be morally non-*Sharī'ah*-compliant. There could be other ways in fusing the two values in order to achieve the complete spirit of Islamic law. This could be done through harmonising legality with morality.

***Maqāṣid al-Sharī'ah* for harmonising legality with morality in Islamic banking and finance**

Many approaches have been used to harmonise legality with morality in Islamic banking and finance, each of which clings to each other to achieve the purpose of harmonisation. Two of these approaches are the *Maqāṣid al-Sharī'ah* paradigm and legislating morality.

Maqāṣid al-Sharī'ah paradigm

Scholars who have written on *Maqāṣid al-Sharī'ah* initially focused on the legal aspects of the science (Larbani & Mohammed 2011). Ibn 'Āshūr is considered to be one of the scholars who called for independency of the science of *Maqāṣid al-Sharī'ah*. Since the theory of *Maqāṣid al-Sharī'ah* had been discussed in a legal capacity, Ibn 'Āshūr took the science further to the stage of comprehensiveness. He developed the idea of applying the theory in all aspects of Islamic law including the financial transactions. From this openness and unrestricted application of *Maqāṣid al-Sharī'ah*, scholars of different disciplines have seen *Maqāṣid al-Sharī'ah* as a way out from the restrictive nature of Islamic law presented in classical literature.

Maqāṣid al-Sharī'ah literally means the objectives of Islamic law. The ultimate goal of *Sharī'ah* is to realise justice and integrate virtue in a society. It is meant to protect the five necessities. According to al-Raysūnī, (1992, p. 7), “*maqasid al-shariah* are the ultimate goals for which *Sharī'ah* is meant to achieve for the benefit of mankind”. This benefit is divided into three categories, *darūriyyāt*, *ḥājjiyyāt* and *taḥsīniyyāt*. To broaden the scope of *Maqāṣid al-Sharī'ah* in contemporary times, Dusuki (2010) incorporates concepts of compassion and guidance into the discourse to promote essential parts of the objectives of Islamic law.

Recently, *Maqāṣid al-Sharī'ah* has been applied to various disciplines including economics and finance (Larbani & Mohammed, 2011). Mohammed (2006) critically evaluated the roles of *Maqāṣid al-Sharī'ah* in Islamic banking and finance and CSR. He questioned nonchalant attitudes and a slow moving of Islamic Banking (IB) in maximising the theory of *Maqāṣid al-Sharī'ah* in improving the industry and in achieving the purposes of the industry. He observed that IB can use *Maqāṣid al-Sharī'ah* in promoting the welfare of the *ummah*. Discoursing the role of *Maqāṣid al-Sharī'ah* in promoting welfare, Mohammed alludes to the fact that Muslim wealth must be fairly distributed and invested in order to serve the very purpose of *Sharī'ah*.

As good as the theory, the *Maqāṣid al-Sharī'ah* approach is deemed to be a perfectly subjective measure. *Maqāṣid al-Sharī'ah* is an untidy doctrine referred to in many legal and theological terms, such as “*maṣlahah*, *maṣāliḥ al-mursal*,” and is considered by some contemporary scholars as a way of harmonising the legal and moral dimensions of Islamic law.

The theory of *Maqāṣid al-Sharī'ah* was wittily alluded to by al-Ghazālī (d. 505/1111), Ibn Taymiyyah (d. 728/1327), Ibn Qayyim al-Jawziyyah (d. 751/1350) and their contemporaries in a vague style. Without any dispute, al-Shāṭibī's (d. 780/1388) work on this theory adds very significantly, though not empirically, to the essentiality and relevance of this doctrine to the contemporary needs. The core spectrum of *Maqāṣid al-Sharī'ah* is *maṣlahah* (whether general/*‘āmmah* or private/*khāṣṣah*). *Maṣlahah* is achieved by promoting the essentials (*darūriyyāt*), the complementary (*hājīyyāt*) and the beautification (*taḥṣīniyyāt*) (Ahmed, 2011a).

Arguing the case for morality in Islamic banking and finance, Ahmed (2011b) suggests incorporation and injection of *Maqāṣid al-Sharī'ah* into the industry. He argues, “The overall aim of Islamic law is to promote welfare or benefit (*maṣlahah* pl. *masalih* [sic]) of mankind and prevent harm (*mafsadah*)” (Ahmed, 2011b, p. 18). Thus, Islamic commercial law goes beyond fulfilling legal requirements.

As good as this paradigm is, there is more to observe in its capacity to justify the harmonising between legal and moral concerns in Islamic banking and finance. The gesture of *Maqāṣid al-Sharī'ah* is legally subjective where its originator, as a principle, had not given us

a practical example. What is meant to be *Maqāṣid al-Sharī'ah* in one context may not be the same in another. For example, if I arrived at a conclusion that the sale of *tawarruq* solves the problem of masses in a particular location and time for political and welfare reasons, my conclusion would be morally wrong in another context where there is no need for such a sale to be approved. Thus, what is morally acceptable in harmonising legality with morality in one country may be immoral in another. Such is the case in the disparity on *tawarruq* between Malaysia and the Gulf Cooperation Council. Although Malaysian Islamic legal theory is based largely on the Shāfi'ī's School which allows *bay' 'īna/tawarruq* and does not see anything wrong in the issue since the contract has fulfilled the legal requirements (al-Shāfi'ī, 1990, vol. 3, p. 75), all other schools disagreed with al-Shāfi'ī and prohibited *bay' 'īna/tawarruq* (Ibn Qudāmah, 1968, vol. 4, pp. 133-134).

Lastly, under consideration of *maqāṣid*, the problem that could be envisaged is that from the formations of Islamic jurisprudence, “nobody (among the scholars) can decide which of the solutions suggested by them is the true one, they all admit that qualified scholars are obliged to use their own reasoning in order to arrive at the best legal and ethical norm available to them” (Johansen, 1999, p. 66). This by no means suggests that there is no decisive legal and ethical deduction from the text towards what those scholars inclined to and consensually agreed upon. The result of this paradigm leads to the opinion of legislating morality. If morality is turned legal, one has no choice but to obey the legislated norm.

Legislating morality

If morality in Islamic legal theory stands for recommendable actions for which the actor will be rewarded if he/she does it, it means non-compliance with morality in Islamic legal theory incurs no blame. However, since the reason for emergence of Islamic banking and finance was to “revitalise Islamic value” (Ahmed, 2011b, p. 4) to repeal the conventional financial system which was based on prohibited *ribā*, the need for a holistic approach to realise this vision becomes paramount. To achieve the purpose of Islamic value that depicts the *Maqāṣid al-Sharī'ah*, legislating morality is deemed to be a convincing approach tentatively. The call for legislating morality is not alien to all legal systems. Geisler and Turek have alluded to this in their terrific

work *Legalising Morality* (1998). Legislating morality means that the authority under which an institution is operating will enforce what is considered to be non-binding rules in order to achieve the binding ones. The controversy surrounding the permissibility of contracts of *'īnah* and *tawarruq* can be resolved through legislating morality. Due to the fact that Malaysia follows the Shāfi'ī School in which the contract of *'īnah/tawarruq* is allowed, this contract can be prohibited through legislating morality based on *Maqāṣid al-Sharī'ah*. Siddiqi (2007) explains how *tawarruq* financing products are economically deceitful. He enumerates some harmful aspects of the contract, including the following:

- It leads to creation of debt whose volume is likely to go on increasing
- It results in exchange of money now with more money in the future, which is unfair in view of the risk and uncertainty involved
- It leads, through debt proliferation, to gambling like speculation
- In a debt-based economy, the money supply is linked to debt with a tendency towards inflationary expansion
- It results in inequity in the distribution of income and wealth
- It results, through debt finance, to inefficient allocation of resources
- It contributes, by consolidating debt financing, to raising anxiety levels and destruction of the environment (Siddiqi, 2007, p. 6)

Mansour et al. (2015) also allude to the deceitfulness of *tawarruq* saying that as a result of this contract, “the real economy becomes less connected to financial markets, which impairs wealth creation for the whole society” (p 70). If these harmful aspects of *tawarruq* can be scientifically proven, it follows that legislating morality is germane to the objective of *Sharī'ah*. Thus, an issue that is controversial in nature due to a lack of conclusive and direct evidences can be prohibited. In Islamic law, the prevailing principle is that *dar' al-mafāsid muqaddam 'alā jalb al-maṣāliḥ* (warding off of evils is given preference over acquisition of benefits) (al-Raysūnī, 1992, p. 267). *Tawarruq* may be proportionally proven to have been economically beneficial, however, its evils upon the public at large are more heavily considered.

Legislating morality may be problematic in terms of determining whose moral interpretation should be fundamental to the approach

(Geisler & Turek, 1998). In other words, is it legal to impose morality on people? The aforementioned *ḥadīth* of the Prophet clearly states that he does not want to prohibit what God does not prohibit so that what is given flexibility in Islamic law would not become legally binding to commit or omit. The Qur'ān also has warned, “And do not say about what your tongues assert of untruth, ‘This is lawful and this is unlawful,’ to invent falsehood about Allah. Indeed those who invent falsehood about Allah will not succeed” (Qur'ān, 16:116).

With these considerations, Aldohani (2011) insists that moral obligations can be imposed through a legal process, and that this approach is not new. Discretionary punishment and decision-making are simply given to the state when deciding on matters not explicitly mentioned in source texts. There also exists a legal pool for the legislation to settle controversial issues by way of consensus, and to decide on lawfulness or unlawfulness of a particular action.

Going beyond legality, a moral obligation can be transformed into a legal one by appealing to justice. Justice in the sense that both promisor and promisee in a *Shari'ah* contract have agreed to act according to the dictate of the principle of the law in question. Johnson (1975, p. 316) states:

The promisee thus has a kind of moral property which he can use in getting actual performance. He can appeal to the sense of justice of the promisor, or, failing that, he can demonstrate to others that there was such a promise and rely on their sense of justice, depending upon them to exert pressure of various kinds on the promisor. At this point it becomes evident why promising is governed by fairly explicit constitutive conventions.

In Islamic law, Muslim jurists differ on the status of promise (*wa'd*) in Islamic law. They all agreed that a promise must be fulfilled out of moral obligation. However, they disagreed on its obligatory status. A promise could be considered as a contract, which God in the Qur'ān enjoins Muslims to fulfil as stated in verse 5:1, “You who believe, fulfil contracts” [cf. Qur'ān 4:33,16:91]. “These verses mainly illustrate the moral obligation imposed by Islamic law, where parties are compelled to commit to their contractual duties” (Aldohani, 2011, pp. 85-86).

Abdullah (2010) has extensively discussed the status and implication of promise (*wa'd*) in contemporary Islamic banking. There are debates on whether *wa'd* is binding or non-binding. *Wa'd* (promise) in classical Islamic jurisprudence is a unilateral promise from a buyer to buy a commodity which is not binding in nature. However, the extension of the use of *wa'd* in contemporary banking and finance makes the concept more complicated. Muslim jurists have unanimously agreed that if a *wa'd* is deceitfully done, the promisor has committed a sin which incurs expiation (*kaffārah*) (Qur'ān, 2:225). However, if the *wa'd* is done with good intention, the scholars disagreed on whether it is obligatory to fulfil or recommendable. Five views can be extracted from the debate on this issue (Abdullah, 2010). One balanced view considers the effect of this promise on the promisee. If the promise, if unfulfilled, will result to harm on the promisee, the promise must be imposed on the promisor. This segment can be translated to be legally binding on a promisor if it is the case that breaching this promise will badly affect the promisee. Thus, a bilateral letter of undertaking in contemporary Islamic banking and finance can be enforceable if there is gross harm on the other party.

Moreover, looking beyond individual benefit in omitting or committing an action, legislating morality becomes appropriate when public benefits are given preference. Under the principle of *maṣlahah*, which is the rudiment of *Maqāṣid al-Sharī'ah*, public benefit is given preference over personal benefit (al-Shāṭibī, 1997, vol. 3, p. 89). If some products and practices in Islamic banking and finance are proved to be harmful to the public, regardless of its fulfilment of the legal requirement (*wujūb*), legislating the prohibition of such products and practices will be imperative to achieve the *Maqāṣid al-Sharī'ah* of "*jalb al-manāfi'* and *dar' al-mafāsīd* (acquiring benefits and warding off evils).

However, many constraints could render morality to be unjustly legislated. One of these is the certainty of the rule extrapolated from the text. The other way around might be the spirit of Islamic law in some circumstances where what has been legislated or inferred from the text as being forbidden retrospectively could turn to be less than forbidden.

Conclusion

Following this discussion of the approaches of classical Muslim jurists to the relations between law and morality and scanty examples of modern practices, it appears that more can be done in harmonising legality

with morality. The efforts of the Malaysian government are laudable in legalising morality through its Islamic financial regulation. The recent Islamic Financial Services Act 2013 sets a remarkable example where some issues disagreed upon in Islamic law are streamlined through legal enactment. Also noticeable is the effort of the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) based in Bahrain. From time-to-time, AAOIFI debates issues engulfed by the Islamic banking and finance industry through workshops, seminars, and researches which come together to form a policy for all stakeholders. However, it has little power of enforcement. Nevertheless, its efforts can be taken as legislation by individual countries where Islamic banking and finance is operated.

Maqāṣid al-Sharī'ah may be challenged on the grounds of an unrestricted scope. In some cases, it could be used to circumvent the rule under the pretext of *ḍarūrah*, and in fact, what is deemed *wājib* (obligatory) could become *ḥarām* (prohibited) in one situation and vice versa.

By and large, before morality can be incorporated into Islamic financial practice, we need to start by inculcating the moral teachings of Islam into the hearts of all shareholders, bankers, financial analysts, economists, policymakers, and even *Sharī'ah* scholars. This can be done on both micro and macro levels. On the micro level, individuals need to know their legal and moral obligations as well as rights, learned through constant studies of legal texts with an open mind and help of a spiritual guide. Once belief (*īmān*) has entered into someone's heart, performing good deeds (*ṣāliḥāt*) naturally follows.

On the macro level, policymakers have a duty to enforce Islamic law in both legal and moral dimensions through the institution of *ḥisbah*, whose jurisdiction covers both voluntary and official capacities (*taṭawwu'* and *ilzām*). The former will be initiated through corporations and the latter will be executed through the legal process.

The question remains, how could this process be possible in foreign countries unfamiliar with Islamic law, and how feasible is it? This question begs for an answer in another independent paper seriously written with objectivity and a realistic sense devoid of emotion and utopia.

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