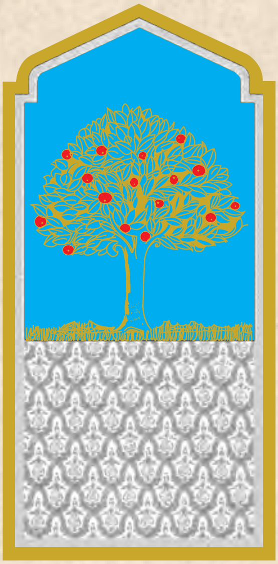

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ISLAMIC FINANCE REGULATIONS IN MALAYSIA: A MACRO MAQASIDIC APPROACH[1]

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Abstract

The research aims primarily to identify the main macro objectives of Shari'ah (macro maqasid) that the regulators are supposed to imbue in the Acts and guidelines governing Islamic Financial Institutions. Focusing on Malaysia, the research starts with the conceptual framework of Islamic finance regulations, which addresses the objectives enshrined in the Acts and guidelines promulgated. After exposing the overall environment of Islamic finance in Malaysia, the research discussed some obstacles of regulations, namely harmonization between Shari'ah and law and its potential impact on the realization of maqasid al-Shari'ah. In order to give a glimpse on further obstacles, the research briefly discussed the governance framework, the prudential and risk management regulations, and the Shari'ah standards in terms of maqasid compliance. The research found that the Malaysian expertise in Islamic regulation is very commendable but no free from criticism as some are deemed maqasid non-compliant. More importantly, the research delineated the macro maqasid entrusted with the regulators to observe and imbue in the regulations of Islamic finance. The research found that Islamic finance regulations are not completely independent from conventional ones, let alone the independence from international regulatory regimes and practices. This should call for the propounding of a theory of maqasid specific to Islamic finance focusing on regulations at macro-economic level. The study recommends the operationalization of the macro maqasid at the regulatory level first before operationalizing them at the level of Islamic financial Institutions.

Key words: macro *maqasid*, regulations, central bank, *Shari'ah* compliance**.**

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1.0 Introduction

Islamic banking regulations in Malaysia have been mostly addressed from the legal perspective. *Shari'ah* and *maqasid* perspectives have barely been noticed in academia, or clearly addressed by practioners. As regulations of Islamic banking have developed quite significantly in Malaysia, the discourse on *maqasid al-Shari'ah* appears quite eminent in view of criticism directed towards the Malaysian experience of Islamic finance. Labeled liberal and sometimes too formal at the expense of the substance, critics would not hesitate to ascertain that the spirit of Islamic finance can barely be seen in the Malaysian experience. Despite robust regulations such as IFSA2013 and a myriad of guidelines and Policy Documents issued by the Central Bank of Malaysia (BNM), the impression of other markets on Malaysia is that the *maqasid al-Shari'ah* has not been adequately embedded in the regulatory framework of Islamic finance.

Muslim Scholars in non-Malaysian markets have indirectly criticized Malaysia for adopting *'inah*, sale of debt, late payment charges (*ta'wid)*, reversed *murabahah*, binding bilateral *waʿd*, customer appointing IFI to sell asset to third party, dual agency, regulated short selling, customer as an agent to the IFI, customer selling to himself, restructuring of financing using *qalb al-dayn* and the incorporation of *ibra'* clause in the contract agreement. Those issues are highly controversial from *Shari'ah* perspective, but have been approved by the *Shari'ah* Advisory Council (SAC) and regulated in the form of Policy Documents published by the Central Bank (BNM) in 2016. On prudential regulations, Malaysia has adopted Basel III for capital requirements but that was not without debate, especially when Islamic financial Institutions in Malaysia have resorted to subordinated *sukuk* and *tawarruq* for Tier 2 capital, a practice that continues to raise *Shari'ah* debates on using these instruments to meet Tier 2 capital. Malaysia also continues to adopt the International Financial Reporting Standards (IFRS) in its accounting treatment raising some *Shari'ah* concerns for both the assets and liability sides of the balance sheet. The literature review revealed that no adequate reference has attempted to link *maqasid al-Shar'iah* with the regulations of Islamic baking in Malaysia.

The research aims at shedding light on the macro *maqasid* framework that regulations of Islamic finance in Malaysia should frame itself in. It also aims at shedding light on the *maqasid* compliance of certain regulations in broad terms. The research is qualitative in nature and will use content analysis to lay down the macro *maqasid* framework.

1.1 The conceptual frame work of Islamic finance regulations in Malaysia

Regulations for Islamic finance have been noted by some eminent Muslim Economists. Chapra and Khan are of the view that there are four reasons for regulating Islamic finance institutions, namely, systemic considerations, the protection of depositors, compliance with *Shari'ah* and the integration of Islamic finance in international financial system[2]. These reasons, however, are not sufficient to realize the objectives of *Shari'ah* of acquiring and distributing wealth. In another study, Chapra spoke about human well-being as the ultimate objective of *Shari'ah*. To him wealth is only a "means though an important and indispensable one, for realizing human well-being"[3]. This theoretical element is well substantiated in the classical theory of *maqasid al-Shari'ah* propounded by Juwayni, al-Ghazali, Shaṭibi and bin ʿAshur, among others.

Countries that adopted Islamic finance under a dual banking system have mandated their central banks or monetary authorities to regulate Islamic finance business. In particular, *maqasid al-Shari'ah,* as held by Siddiqi, are the ends that the "legislators are supposed to keep in view while making new laws to handle new situations"[4]. In a dual banking system, Central Banks's agenda is to strive to realize objectives such monetary stability, financial stability and payment system[5], which are very much in line with *maqasid al-Shari'ah* of wealth.

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[2] Umar Chapra and T. Khan, *Regulation and Supervision of Islamic Bank.* (Jeddah: IRTI, 2000), 22-23.

[3] Umar Chapra, *Islamic and the Economic Challenge*. (Herndon: IIIT, 1995), 8.

[4] Najatullah Siddiqi, *Riba, Bank Interest and the Rational of its Prohibition*. (Jeddah: IRTI, 2004), 22.

[5] Cf. these objectives in http://www.bnm.gov.my/index.php, accessed on August 29, 2018.

The Central Bank Act 2009 of Malaysia reiterated the dual banking system in Malaysia (section 27), empowering the *Shari'ah* advisory committee by requesting the court and the arbitrators to refer to SAC-BNM (section 56 (1) and considering the rulings of SAC-BNM binding on IFIs, courts or arbitrators (section 57). This development is deemed unprecedented, but the success or failure of which is yet to be truly assessed in view of the lack of precedent cases evaluating the efficiency of the Central Bank 'Act 2009 (CBA 2009). A very recent case in Malaysia unveiled the intricacies of referring cases by civil courts to *Shari'ah* Advisory council. The high court referred the case of Kuwait Finance House (KFH) Bhd v.s JRI Resources over a dispute on who should bear the maintenance cost of the assets. The dispute was triggered as the *ijarah* documents have apparent contradicting clauses on the issue. After SAC' ruling that the *ijarah* agreement are *Shari'ah* compliant, a legal dispute followed as to whether SAC's resolution is now binding upon the high court. In addressing the matter, BNM clarified that SAC has merely ascertained whether the agreement was in line with Islamic law, and that it has not usurp the functions of the courts[6].

The conceptual framework of the Islamic finance regulations in Malaysia is generally highlighted in two important documents, the 'Financial Sector blue' Print published by BNM in 2011 and Islamic Financial Services Act 2013. According to the 'Financial Sector blue' Print, the objectives of the banking regulation in Malaysia, be it conventional or Islamic, are to realize high value-added, high income economy, the development of a deep and dynamic financial market, financial inclusion for a greater shared prosperity, regional and international financial integration, internationalization of Islamic finance, regulatory and supervisory regime to safeguard the stability of the financial system. All these objectives are *maqasid* compliant, as they don't encroach upon any *Shari'ah* principle. However, achieving the same objectives in Islamic finance would exclude *riba, gharar and maysir*, which BNM and the securities commission's

[6] V. Anbalgan, "No tribunal can usurp role of judiciary, says lawyer", *Free Malaysia Today*, (2018, 28 August), https://www.freemalaysiatoday.com/category/nation/2018/08/28/no-tribunal-can-usurp-role-of-judiciary-says-lawyer/?fmt=1, accessed on August 31, 2018,

Shari'ah Advisory Councils have determined.

The second document is the Islamic Financial Services Act (IFSA 2013). Section 6 of the Acts addresses the objectives of IFSA 2013 as follows:

> "The principal regulatory objectives of this Act are to promote financial stability and compliance with *Shari'ah* and in pursuing these objectives, the Bank shall,
>
> (a) foster
>
> i. the safety and soundness of Islamic financial institutions;
>
> ii. the integrity and orderly functioning of the Islamic money market and Islamic foreign exchange market;
>
> iii. safe, efficient and reliable payment systems and Islamic payment instruments; and
>
> iv. fair, responsible and professional business conduct of Islamic financial institutions; and
>
> (b) strive to protect the rights and interests of consumers of Islamic financial services and products"[7].

The above section refers to objectives, which are in line with the *maqasid al-Shari'ah*. That is to say, the section mentions Financial stability, which aims at wealth protection (*hifẓ al-mal*), *Shari'ah* compliance (*hifz al-din*), fairness (*'adalah*), consumer protection (*hifz al-nafs wa al-mal*). The rest of the points in section 6 are the instruments used to realize those objectives. From this perspective, IFSA2013 has incorporated macro *maqasid*, which have been translated into various guidelines issued by BNM such as *Shari'ah* Governance Framework (SGF). The latter, undoubtedly, aims at the protection of religion (*hifz al-din*).

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[7] Islamic Financial Services Act (IFSA) 2013, Section 6, 30.

2.0 The Overall Environment of Islamic Finance Regulations in Malaysia

Islamic finance regulations developed in tandem with the development of Islamic finance products and services. Pioneering markets such as that of Malaysia adopted a dual banking system (conventional and Islamic) in the early 1980s and put forward prudential, Governance and *Shari'ah* regulations that aimed to realize *Shari'ah*, legal and technical compliance. To enhance Islamic banking, a set of regulations has been put in place. They can be divided into six categories:

Acts: Malaysia has enacted two major Islamic banking Acts since the inception of Islamic banking, these are Islamic Banking Act 1984 and IFSA 2013. The latter repealed the former with additional features, which will be highlighted in the next heading of this research.

Prudential and liquidity management: these are sets of regulations that tend to achieve safety and soundness via prudent measures such as capital adequacy requirements (disclosure, assessment, components, risk weighted), Basel III, credit exposure and single customer limits, securitization, Risk management etc.

Market structure and competition: this would include guidelines to regulate the position of banks vis a vis the financial market and to regulate investment banks and international Islamic banks in order to promote competition.

Consumer protection: this would include guidelines regulating base rate ceiling, personal information protection and deposit insurance.

Shari'ah Corporate Governance: This is a framework that tends to regulate the main organs of the Islamic financial institutions such as the board of directors and its main committees (Risk management, Audit, Nomination and remuneration) so that the rights and responsibilities of all stakeholders are spelt out and the *Shari'ah* principles are strictly adhered to.

Standardization of *Shari'ah* and operational requirements: these have been regulated via the Policy Documents highlighting all *Shari'ah* contracts and the supporting *Shari'ah* principles as well as the operational environment in which they should operate.

These regulations[8] are generally of two categories: *Shari'ah* and Operational/technical. The *Shari'ah* standards have observed the most sophisticated norms of standardization as well as the principles of *ijtihad* and *fatwa*. They have also considered the best practices in the market, on the basis of which *Shari'ah* clauses have been formulated in the policy documents and various views of Muslim jurists have been adopted. The technical regulations adopted local and International standards that best suit the Malaysian banking sector. Despite their sophistication, the two sets of regulations have been questioned either directly or indirectly by *Shari'ah* scholars and practitioners, a point that will be addressed later in the research.

The literature on assessing the *maqasid* compliance of Islamic banking practices is manifold. However, legal and regulatory studies on Islamic finance are still lagging behind compared with *fiqhi* studies. Besides, most studies conducted on the legal framework of Islamic finance tend to refer to the regulatory framework in a sheer mix up of the two. Many references refer to *maqasid al-Shari'ah* in a fluffy way signaling confusion with *Shari'ah* compliance.

In Malaysia, the regulatory and supervisory authority is represented by the Central Bank, Bank Negara Malaysia (BNM), as enshrined in the Islamic Financial Services Act 2013, the primary source of legislation of Islamic banking in Malaysia. Under the purview of IFSA 2013, BNM is established as the only regulator mandated to ensure *Shari'ah* compliance of Islamic banks businesses and operations. BNM also provides the legal ground for the codification of the resolutions issued by the *Shari'ah* Advisory Council (SAC) and pursues punitive measures for breaches punishable under IFSA 2013.

However, the position of IFSA 2013 vis a vis Financial Services Acts 2013 (FSA), which is conventional has raised concerns of subordination and harmonization between *Shari'ah* and law, a concern that may affect the *maqasid* compliance of Malaysian regulations for Islamic finance. This will be addressed in the following discussion.

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[8] A sample of those regulations are presented in Table 1 at the end of the article.

2.1 The obstacle of subordinating Islamic banking regulations to conventional regulations

Zulkhibri and Ghazal investigated regulations of 13 Muslim and Non-Muslim countries, including Malaysia. They concluded that regulations of Islamic banking in most of those countries are formulated in the image of conventional banking system[9]. Although the Islamic finance regulation referred to by Zulkhibri and Ghazal was repealed and substituted by IFSA 2013, i.e: Islamic banking Act 1984, the outcome of the research seems to imply that the dual banking system in Malaysia is featured by leveraging on domestic reporting and International standards. Citing challenges of harmonization at the domestic level, Zulkhibri and Ghazal call for regional harmonization[10]. Although no reference was made to *maqasid al-Shari'ah*, the challenge of leveraging and harmonization are potential factors challenging the realization of *maqasid al-Shari'ah* in Islamic finance regulations in Malaysia.

Despite the dual baking system in Malaysia, many Civil laws seem to have an overriding status over the Islamic banking practices, a factor that could prevent the realization of *maqasid al-Shari'ah* in Islamic finance. Engku Rabiah addressed the intricacies of harmonizing Civil Law and *Shari'ah* in the Islamic Financial services industry. The author pinpointed to the lack of differentiation in the Islamic finance product as a result of a no clear-cut boundaries between Civil law and Islamic banking regulations[11]. This is important to mitigate the reputational risk that could hinder the acceptability of Islamic finance by all stakeholders. In the same vein, Hakima Yaacob called for a more flexible treatment of Islamic finance cases in the Malaysian Civil Courts adjudicating Islamic banking disputes. The author also foresees certain predicaments in applying the Central Bank Act 2009 especially in International

[9] Muhamed Zulkhibri and Reza Ghazal, *Development of Islamic Banking Regulation in Selected IDB Member Countries: A Comparative Analysis,* (Jeddah: IRTI, 2015), 1.

[10] Ibid.

[11] Engku Rabiah al-Adawiah, "Constraints and Opportunities in Harmonization of Civil Law and *Shari'ah* in Islamic Financial Services Industry", in *IIiBF Series in Islamic Banking and Finance*, Younes Soualhi and Ahamed Kameel Mydin Meera (Eds.), (Kuala Lumpur: IIiBF, 2009), 7.

disputes arising from cross border transactions[12]. Similarly, Irwani[13] and Nurul Aza[14] *et al.* referred to certain non-compliance issues facing *ijarah thumma al-bayʿ* (ITAB), which operates under the purview of the Hire-purchase Act 1967. They referred to issues pertaining to *Shari'ah* framework, ownership, maintenance responsibility, deposit payment, penalty in case of default, intention and lack of understanding of parties, signing of two separate documents in sequence, and interest-based calculation of profit. According to Irwani, there is a need for a *Muʿamalat* Hire Purchase Bill independent from the Hire purchase Act 1967, though the proposal was rejected by the Attorney General. Hence, the premise of subordinating Islamic finance regulations resulting in forced harmonization, leveraging and lack of differentiation may be obstructing the realization of *maqasid al-Shari'ah* in Islamic finance in Malaysia.

3.0 Selective Islamic Finance Regulations Under Scrutiny

This part of the research briefly scrutinizes some regulations of Islamic finance in Malaysia and assess in broader terms their compliance to *maqasid al-Shar'iah*.

3.1 Governance framework

Some studies were fully dedicated to the *Shari'ah* Governance framework (SGF) issued by BNM in 2010 highlighting the main structure and the four main functions, namely Audit, Risk management, Review and Research. At the core of SGF, BNM as a regulator aims to enhance the principles of accountability, independence, justice transparency and disclosure[15] at the level of Islamic financial Institution. The said principles are imbued with

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[12] Hakimah Yaacob, *The New Central Bank of Malaysia Act 2009 (CT701).* (Kuala Lumpur: ISRA, 2009), 27.

[13] N. Irwani Abdullah, "Implementation of *Mu'amalat* Hire Purchase Bill in Malaysia: Chasing the Mirage?", *The Law Journal*, Vol.17, No.1, (2009), 2.

[14] Nurul Azma, Mahfuzur Rahman and Mohamed Albaity, "Issues and Prospects of Islamic Hire Purchase Financing: Malaysian Evidence, *The Journal of Management Research*, Vol.6, No.1, (2014), 13.

[15] Rusni Hassan, *Corporate Governance Practice in Islamic Financial Institutions,* (Kuala Lumpur: IBFIM, 2014), 22.

ethical values, which are supposed to contribute towards the realization of *maqasid al-Shari'ah* in the Islamic financial institution operations. In 2017, BNM published an exposure draft on *Shari'ah* Governance that introduced key enhancements to the existing SGF. The enhancements include strengthened board oversight on accountability and responsibilities over *Shari'ah* governance; enhanced requirements for the *Shari'ah* committee in providing objective and sound advice to Islamic financial institutions, in line with the Islamic Financial Services Act 2013 (IFSA); enhanced expectations for the board and senior management to promote a *Shari'ah* compliant culture and further integrate *Shari'ah* governance considerations in business and risk strategies; and enhanced regulatory expectations on the quality of internal control functions to ensure effective management of *Shari'ah* non-compliance risks[16]. All these are *wasaʾil* (means) to achieve a greater level of *maqasid al-Shari'ah*.

However, the realization of *maqasid al-Shari'ah* may be hindered by some obstacles at the governance level. The present SGF is unlikely to completely solve some governance issues such as the agency problem. Hasannudin is of the view that the information asymmetry arising between the Islamic bank as an agent and the investor as the principle still poses a problem in the Governance structure of Islamic banks[17]. The same is true when the bank is the investor and the client is the agent.

Poor Governance structures may cause some Islamic financial products to fade away from the market. *Muḍarabah*, for instance is yet to make a headway in the market despite IFSA 2013's clear separation between deposit and investment accounts. Moral hazards in *mudarabah* investment, according to Najatullah Siddiqi is beleaguering the trust in Islamic banks in striving to achieve their objectives[18]. This is mainly due to lack of capital protection

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[16] Bank Negara Malaysia (BNM), "Exposure Draft on *Shari'ah* Governance", (2017, November 13), http://www.bnm.gov.my/index.php?ch=en_announcementandpg=en_announcementandac=587andlang=en, accessed on August 30, 2018,

[17] A. Aziz Hasanudden, "Islamic Banking: Prevalence of Agency Problems", in *IIiBF Series in Islamic Banking and Finance*, op. cit., 202.

[18] Najatu Allah Sididqi, "*Ṣuʿubat fi Mumarasat al-Mudarabah*", in *Qadaya Muʿasirah fī al-Nuqud wa al-Bunuk al-Musāhimah fī al-Sharikāt*, Mundir

initiatives, which is confused with the prohibited capital guarantee of *mudarabah* capital. The moral hazards may be due to lack of not fully disclosing the risk associated with *mudarabah* venture. The burden of proof of negligence in case of a sharp shortfall in *mudarabah* ventures must be regulated to protect investors from the claims made by IFIs due to the complexities of modern investments. Although Sidiqqi's observation was made in 1990s, his concern is still resonating in the current Islamic banking environment where *mudarabah* investment is at its lowest level, standing at about 1.7% of total *Shari'ah* contracts used in Islamic banking worldwide[19]. To address this concern, BNM has made it mandatory for IFIs to design a risk management strategy approved by the management. The Policy Document of *Mudarabah* reads, "IFIs shall institute and implement a sound and intergraded risk management system to effectively manage risks throughout the life cycle of the *mudarabah* venture"[20].

As part of a robust governance system, the unique ethical code embedded in Islamic finance regulations is supposed to be a selling point for IFIs, locally and abroad. Shared prosperity via financial inclusion, profit sharing, and dealing with real assets and real economy are the most ethical elements of a viable *maqasid* based regulatory framework. These much championed and chanted features have barely been actualized in the present models and products of Islamic banking and finance and had received considerable criticism from renowned *Shari'ah* authorities and scholars.

With respect to oversight, the weakness of the oversight mechanism and internal control of Islamic banks in Malaysia sometimes lead to *Shari'ah* non-compliant processes and transactions. Asmadi warned against the pitfalls of pre-signing of contacts that some Islamic banks may have been engaged in, suggesting a lack of oversight in regulating this matter[21]. On the other side, some mistakes have been noted in the legal documentation of

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Qahf (Ed.), (Jeddah: IDB-IRTI, 1993), 276.

[19] World Bank-IRTI, "Global Report on Islamic Finance", (2016).

[20] BNM, "*Mudarabah Shariʿah* Standard", in *Shariʿah Standards and Operational Requirements* (Kuala Lumpur: BNM, 2017), 68.

[21] Mohamed Naim Asmadi, "Pre-Signing and Sequence in Contract Execution of Islamic Banking Products". *ISRA International Journal of Islamic Finance*, 6 (1) (2014), 108.

Shari'ah contracts applied by Islamic banks, implying a lacuna in the oversight and governance system[22].

Further, SGF places the duty of overseeing *Shari'ah* compliance on the board of directors and the management. Due to the nature of ascertaining *Shari'ah* compliance that requires deep *Shari'ah* knowledge, the Board of directors and members of management are not sufficiently equipped with *Shari'ah* knowledge, and yet they are fully accountable and responsible before the regulators who may impose heavy punishments as enshrined in IFSA 2013. This led BNM to introduce a special program named "Islamic finance for Boards of Directors", which is compulsory on all board members of IFIs, subsidiaries, windows and development institutions to complete by the end of 2020[23].

3.2 Prudential and risk management regulations

Prudential regulations are manifold. They are mainly centered on capital adequacy and risk management. According to Rifaat and Archer, IFSB set out standards for Islamic banks based on Basel Accord that would include, eligible capital, risk weighting for assets, treatment of unrestricted investment account and displaced commercial risk (DCR) in the calculation of capital adequacy[24]. Lee is of the view that risks inherent in Islamic financial institutions are different from their conventional counterparts[25]. This assertion may not be taken for granted as credit assessment, pricing and the credit risk portfolio of Islamic financial products are leveraging on their conventional counter parts, except for DCR and profit and loss sharing in *musharakah* and *mudarabah*, which are unique to Islamic finance.

[22] Mohd.Johan Lee, *Legal Documentation for Islamic Banking* (Kuala Lumpur: IBFIM, 2014), 45.

[23] The program is conducted by the International *Shariʿah* Research Academy for Islamic Finance (ISRA), cf. https://consultancy.isra.my/faqs/#, accessed on August 30, 2018.

[24] Ahmed Karim Rifaat and Simon Archer, *Islamic Finance: The new Regulatory Challenge*, (Singapore: John Wiley & Sons, 2013), 102.

[25] John Hin Hock Lee, "Inherent Risk: Credit and Market Risks", in *Islamic Finance: The new Regulatory Challenge*, Ahmed Karim Rifaat and Simon Archer (Eds.), (Singapore: John Wiley & Sons, 2013), 107.

The legal risk also poses a challenge for the regulations of Islamic finance regulations. White and King stated that the "the risk to which a party to a transaction is exposed to is the risk that either the transaction will not be enforceable against a counterparty or that any of the transactions terms will not be construed I accordance with the intentions of that party"[26]. The authors noticed that *Shari'ah* has become unwelcome as it is viewed as a liability from the perspective of legal risk exposure. While this might be true in some markets, this issue is not eminent in Malaysia except for some cases in which the court and *Shari'ah* authority had different interpretation of *Shari'ah* principles in the early development of Islamic banking in Malaysia.

In Malaysia, Sairally *et al*. (2013) found that Islamic banking institutions have been issuing mainly general obligations, subordinated and unsecured *sukuk* to meet Basel III Tier 2 Capital requirement. This, according to the researchers raise *Shari'ah* concerns on the permissibility to issue Asset based *sukuk* where recourse in case of default is made to the obligor, the right of senior *sukuk* holders to receive their return and the issue of issuing *sukuk* without collateral[27]. This would also raise issues on why the regulations would allow such operations if they are deemed harmful to the stakeholders.

3.3 Malaysia Shari'ah Standards (Policy Documents) and SAC-BNM resolutions

The Central Bank of Malaysia launched *Shari'ah* Standards in 2016, also known as Policy Documents. They have regulated *Shari'ah* rulings of *murabahah, mudarabah, musharakah, tawarruq, istisnaʿ, kafalah, wakalah, qard, wadiʿah, hibah, ijarah* and *waʿd*. They address both *Shari'ah* and operational requirements. The latter deal with governance, risk management, transparency and the role of board of directors and management in ensuring end-to-end *Shari'ah* compliance. They are mandatory on Islamic financial institutions as

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[26] Andrew White and Chen Mee King, "Legal Risk Exposure in Islamic Finance", in *Islamic Finance: The new Regulatory Challenge*, op. cit. 225.

[27] Beebe Salma Sairally, Madaa Munjid Mustafa and Marjan Muhammad, "Instruments for Meeting Capital Requirements Under Basel III: A *Shari'ah* Perspective", *ISRA Research Paper 52*, (2013), 1.

well as financial institutions providing Islamic finance products and services. SAC-BNM resolutions are also mandatory to follow in case Civil courts and arbitrators refer to them.

The *Shari'ah* standards have followed the methods of *ijtihad*, namely deducing the *Shari'ah* view from the *Qur'an*, *Sunnah* and *ijtihad* with all its instruments such as such as *qiyas, maslaḥah al-mursalah, ʿurf* and *istihsan*, and methods of textual inference (*turuq al-istinbat*). By and large, BNM *Shari'ah* Standards are in line with AAOIFI *Shari'ah* standards and drafted in the form of clauses, some of which are mandatory, but others are optional. While all schools of jurisprudence have been considered to formulate the clauses of the *Shari'ah* standards, the Shafiʿi school, being the jurisprudence of the country, has been used as a major reference. This is reflected in the sale of debt and organized *tawarruq* that finds its legitimacy in *ʿinah* transaction allowed by Imam Shafiʿi. However, Imam Shafiʿi did not allow *ʿinah* as practiced nowadays, a matter that triggered hot debates on whether Malaysia has been practicing the wrong *ʿinah* since 1984. The debate resulted in an 'amendment' in 2013 that saw the conditional sale in the second leg of the *'inah* transaction removed.

However, some differences are noted between the Malaysian *Shari'ah* standards and AAOIFI's particularly on *tawarruq*, sale of debt, late payment charges, the bindingness of bilateral *waʿd*, reverse *murabahah*, debt restructuring via *qalb al-dayn*. Malaysia has long been criticized for adopting the above issues, which are now part of the *Shari'ah* Standards published in 2016 and 2017.

Abdul ʿAzim Abu Zaid is of the view that the Malaysian *tawarruq* is not *Shari'ah* compliant as it goes against *maqasid al-Shari'ah*, and so does *ʿinah* and sale of debt. Thus, all banking and capital market products that use *'inah*, *tawarruq* and sale of debt are *Shari'ah* and *maqasid* non-compliant[28]. Sheikh Ali Qaradaghi is an ardent critic of organized *tawarruq*. According to him, "organized *tawarruq* as practiced by Islamic banks is a clear trick (*hilah*)"[29] to

[28] ʿAbd al-ʿAzim Abu Zayd, "Al-Tamwil al-Islami bayna Shakliyyat al-ʿUqud wa *Maqasid* al-Shariʿah". *Al-Tajdid*, Vol.12, No.23, (2008), 88-95.
[29] ʿAli Muhyiddin al-Qaradaghi, *al-Tawarruq al-Masrafi.* (Beirut: Dar al-Bashaʾir al-Islamiyyah, 2011), 93.

circumvent the prohibition of *riba*. Sami al-Suwailem maintains that "*tawarruq* is against *maqasid al-Shari'ah*"[30]. This is echoed in the writings of Sheikh Taqi al-Uthmani[31], (2009), Rafiq al-Misri[32] and the majority of Muslim scholars. The prohibition of *tawarruq* has been prohibited by the OIC-Fiqh Academy in 2009[33]. The position taken by the majority of Muslim scholars is that *tawarruq* is a legal stratagem (*hilah*) to circumvent the prohibition of *riba*. The literature on the issue has revealed that organiz1ed *tawarruq* is against *maqasid al-Shari'ah* of a sale transaction.

However, the regulators in Malaysia provided for the introduction of a platform that facilitates liquidity and cash financing, such as the *Bursa Suq al-Sila'*. This platform, based on organized *tawarruq*, did not receive much criticism as it has been seen as alternative to the London Metal Exchange (LME), which had raised *Shari'ah* concerns on ownership of assets and their real transfer. *Bursa* has established a system that evaded the main controversial issues against *tawarruq*, namely the ownership of the asset, its true transfer to the buyer and sequence of the transaction. Besides, the asset in *Bursa* does not go back to its original seller, but the client still appoints the IFI as an agent to sell the asset to *Bursa* in order to generate the cash flow intended from the whole operation. From the discussion above, one can derive the following observations:

1. There are concerns that Islamic finance regulations in Malaysia mirror conventional regulations, threatening the realization of *maqasid al-Shari'ah* in Islamic finance.
2. The statutory relationship between SAC-BNM and the courts under the Central Bank act 2009 and the first test of such a relationship has shown that the civil courts in Malaysia are very cautious if not reluctant to refer to SAC and bind themselves by a *Shari'ah* view.

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30 Sami al-Suwailem, *Qadaya fī al-Iqtisad wa al-Tamwil al-Islama.* (Riyaḍ: Dar Kunuz Ishbilya, 2009), 407.

31 Mohammad Taqi al-ʿUthmanai, *Buhuth fī Qadaya Fiqhiyyah Muʿasirah.* (Damascus: Dar al-Qalam, 2011), 72.

32 Rafiq al-Masri, *Fiqh al-Muʿamalat al-Maliyyah.* (Damascus: Dar al-Qalam, 2007), 122.

33 OIC *Fiqh* Academy, http://www.iifa-aifi.org/2302.html, accessed on August 28, 2018.

3. Islamic finance in Malaysia is still facing the conundrum of form vs. substance. This would raise an issue about the possibility that Islamic finance regulations in Malaysia contributed to the debate.
4. Most criticism against the Malaysian regulation have been directed to the *Shari'ah* framework represented by SAC-BNM, not focusing much on the codification of *Shari'ah* contracts and principles recently regulated, merging between *Shari'ah* compliance and best practices.

4.0 The Macro *Maqasid* Framework for Islamic Finance Regulations

The research envisages the *maqasid* framework for Islamic finance regulations at the Macro level. The latter are objectives intended by *Shari'ah* and entrusted to the ruler to realize by virtue of his vast power and authority. In the context of modern Islamic finance, the regulators are morally obligated to realize *maqasid al-Shari'ah* when enacting Acts and issuing guidelines regulating Islamic finance industry. The research argues that there wouldn't be a robust *maqasid* framework without being regulated by the central banks or monetary authorities. The "top to down" approach in realizing *maqasid* (macro *maqasid*) would be automatically reflected in the operations of the IFI (micro *maqasid*). The latter is supposed to realize the *maqasid al-Shari'ah* of justice, wealth circulation, transparency, true transfer of ownership, true acquisition of asset, shunning legal stratagem (*hiyal*), reduction of private debt and financial inclusion. The following would shed light on the components of the macro *maqasid* framework for Islamic finance regulations. We shall focus on the macro *maqasid* as the micro *maqasid* falls beyond the scope of this research.

4.1 Macro Maqasid

The realization of *maqasid* in Islamic finance requires that the regulations must be in accordance with *maqasid al-Shari'ah* of wealth. This research has identified certain *maqasid* that the regulators are supposed to observe when enacting laws and regulations. They are confirmed through a multitude of evidences from *Shari'ah* sources as well as modern financial systems and practices. These macro *maqasid* find their legitimacy from a multitude of evidences and principles in Qur'an and Sunnah as well as classical ad modern economic activities and practices. The deep articulation of these macro *maqasid* is beyond the scope of this paper, however, references to these macro *maqasid* will be made in the next subheadings. The following macro *maqasid* will be adopted to evaluate any regulation of Islamic finance in Malaysia:

(a) Sustainable development of the real economy
(b) Financial independence
(c) Efficient regulatory regime
(d) Reduction of public debt
(e) Monetary stability
(f) Financial stability
(g) Value based intermediation (VBI)

(a) Sustainable development of real economy

Economy is of two types, financial and real. The real economy is related to real assets and resources that fulfill human needs in a direct way such as consumption goods. On the other hand, financial economy is related to financial assets such as bonds, equities and right[34]. From *Shari'ah* perspective, scholars of Islamic policy (*al-Siyasah al-Sharʿiyyah*) maintain that the ruler must pursue an economic agenda that tend to construct and develop cities and nations. Numerating the main duties of a ruler, Imam Mawarda mentioned that development of cities (*'imarat al-buldan*) is an important duty that should result in in the protection of their people's interests[35]. Ibn Khaldun reiterated this feature when describing a State after being successfully established. Among those features are wealth mobilization, revenue control, public expenditure records, development of inhabitable buildings, great factories, vast cities, high

[34] Umar Khadirat, "*Al-Azmah al-Iqtisadiyyah al-ʿAlamiyyah al-Muʿasirah wa masir al-Nizam al-Raʾsumali*", in *al-Azmah al-Iqtisadiyyah al-ʿAlamiyyah al-Muʿasirah min manzur Islami,* (Herndon: IIIT, 2012), 166.
[35] Al-Mawardi, *Adab al-Dunya wa al-Din,* (Beirut: Dar Ihyaʾ al-Turath al-ʿArabi, 1979), 116-117.

structures and forming strong armies that are feared by the enemies[36]. As the *Shari'ah* provides some legislation for wealth, it tends "to create wealth for the individuals and for the entire nation"[37]. One of the most important aspects of the real economy is that it works in parallel with the financial economy. The latter is represented by its financial assets and institutions such as banks and capital market. Both should operate in harmony; otherwise, they can both vulnerable to adverse effects[38]. The factor that can undermine the real economy is the proliferation of financial instruments such as the derivative market blamed partly for the recent instability in economic markets.

(b) Financial independence:

Financial independence refers to the ability of a country to provide sufficient resources for its people so that their interests and the interests of their sovereign governments are protected and their destiny is free from the influence from internal and external factors. The *Shari'ah* tends to secure the independence of the nation in view of the principles of governance laid down in the *Qur'an* and the *Sunnah*, by virtue of being the best *ummah* that has ever emerged. Imam Mawardi states that one of the functions of the Muslim ruler is to provide his people with experts and manufacturers in order to be "sufficient and independent from others"[39]. This notion has been emphasized by Tahir bin ʿAshur who maintained that "the most important thing with regards to the wealth of a nation is to focus on the means to mobilize and protect wealth by adopting sound economic measures so that the *ummah* would be independent from seeking assistance from others at the time of need, because need is a

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36 ʿAbd al-Rahman Ibn Khaldun, *al-Muqadimmah*, (Damascus, Dar al-Balkhi, 2004), 139.

37 Fawzi Khalil, *Al-Maslahah al-ʿAmmah min Manzur Islami*, (Beirut: Muʾassasat al-Risalah, 2003), 250.

38 Fuʾad Hamdi Bsisu, "*ʿAlamiyyat al-Nizam al-Iqtisadi al-Islami wa muhaddidat nafadhihi fi dawʾ al-Azamat al-ʿAlamiyyah*", in *al-Azmah al-Iqtisadiyyah al-ʿAlamiyyah al-Muʿasirah min manzur Islami*, (Herndon: IIIT, 2012), 96.

39 Abu al-Hasan al-Mawardi, *Tashil al-Nazar wa Taʿjil al-Zafar fi Akhlaq al-Mulk*, (Beirut: Dar al-Nahdah al-ʿArabiyyah, n.d), 162.

kind of slavery"[40]. Thus, any regulation of Islamic finance in the modern world should ensure that the wealth of the nation is not stolen, weakened or exploited by foreign elements.

In modern banking practices, excessive leveraging coupled with external sovereign debts means a total submission to the lenders' terms and conditions such as decreasing subsidies and laying off workers. This has grave political and economic repercussion, namely the loss of total sovereignty and the beginning of economic woes. Needless to say, the Central bank, being the bank of the government, should enhance and strengthen its balance sheet to stabilize the financial sector.

(c) Efficient regulatory regime

Efficiency in regulating the market is a very broad topic. The task of the regulators is even daunting at the time of recession or economic crisis. The efficiency policies governing the Islamic financial sector requires the harmonious operation of three main frameworks: the *Shari'ah* framework, the legal framework and the overall economic and market framework. The *Shari'ah* frame work necessitates the establishment of the *Shari'ah* advisory function at the level of the regulators and the Islamic financial institutions. Also necessary is the *Shari'ah* governance and the remedial systems for *Shari'ah* non-compliant events must be set up. This will ensure *Shari'ah* standardization and the avoidance of *fatwa* conflict, in addition to market confidence about *Shari'ah* compliance. All these are complementary *maqasid* that will be achieved as a result.

As for the legal and regulatory framework, Islamic finance industry would be governed by the law of the land and a set of statuary guidelines in a dual banking system. The prudential regulations such as those related to liquidity and capital adequacy are applicable to both conventional and Islamic financial institutions. However, regulatory *Shari'ah* resolutions are only applicable to IFIs and Islamic windows. For an efficient legal framework,

[40] Ṭahir Bin ʿAshur, *Usul al-Nizam al-Ijtimaʿī fī al-Islam*, (Tunis: al-Sharikah al-Tunisiyyah li al-Tawziʿ, n.d), 197.

harmonization between conventional law and *Shari'ah* must be pursued.

The third framework, which is the economic and market framework takes into consideration the alignment of the regulations of Islamic finance to the economic and financial blueprint plan of a nation. In Malaysia, the central bank's 10th year blueprint focuses on certain areas such as effective intermediation for a high value added and high income economy, the development of deep and dynamic financial markets, financial inclusion for grater shared prosperity, strengthening of regional and international financial integration, internationalization of Islamic finance, a regulatory and supervisory regime to safeguard the stability of the financial system, empowering consumers and talent development to support a more dynamic financial system[41].

Three major factors may hinder the development of Islamic finance in modern banking. One is the lack of regulations in certain countries, second is the lack of important regulations such as *Shari'ah* Corporate Governance, and third is the convergence trends between conventional and of Islamic finance regulations as the latter is operating under the ambit of the former and continues to replicate conventional financial products. Regulations of Islamic finance, thus, should lay the ground for product differentiation and the enhancement of value based intermediation.

The Malaysian Islamic ecosystem has developed the necessary *Shari'ah*, legal and regulatory framework that ensures *Shari'ah* compliance. The *maqasid* compliance is still triggering debates and pushing for more refinement and enhancement.

(d) Reduction of public debt

Looking at debt-based contracts from the economic perspective, many Muslim economists have noticed that Islamic banking and finance (regulations included) has not achieved the *maqasid al-Shari'ah* of wealth laid down by scholars such as Bin

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[41] Bank Negara Malaysia (BNM), *Financial Sector Blue Print 2011-2020*, (2011, December 21), http://www.bnm.gov.my/files/publication/fsbp/en/BNM_FSBP_FULL_en.pdf, accessed on August 29, 2018.

ʿAshur (*ʿadl, rawaj, wuduh, thabat, hifz)*, Malaysia is no exception. After mentioning the positive effects of debts, Sami al-Suwailem[42] highlighted what he perceived as the harmful aspects of debt, which are the following:

i. debt syndrome leading to inflation
ii. risk averse attitude
iii. Imminence of bankruptcy if debt-to income ratio goes below solvency level.
iv. Economic instability
v. Trust erosion
vi. Domino factor
vii. Inadequate wealth distribution
viii. Debt exponential effect

Concluding from an analytical study on debt, Suweilem highlighted that "debt reduction" is one of *maqasid al-Shari'ah* championed by Ibn Qayyim Jawziyyah[43]. He also reiterated that an Islamic financial product must be both *Shari'ah* complaint and economically viable[44]. Some Muslim economists numerated the alarming rise of debt in any economic system. They include the risk of bankruptcy, volatility in the revenues, rise of delinquency rates, inflation and high public expenditure[45]. This situation may be aggravated by the mechanism of Fractional Reserve that may be blamed for the creation of money from thin air, hence deepening the debt problem. Lending activities have been framed to be a multiple of the deposits in the banks is also the norms of Islamic banks. Warning against the proliferation of debt whether in conventional or Islamic banks, Azura and Mirakhor *et al*. held that "the current fractional banking system that allows multiple amount money to be created out of a given amount of deposits received, and the development of

42 Suwailem, *Qadaya fi al-Iqtisad wa al-Tamwil al-Islami*, 13-30.
43 Ibid.
44 Ibid.
45 Anas al-Zarqa, "Al-Azmah al-Maliyyah al-ʿAlamiyyah, al-Madyuniyyah al-Mufriṭah sababan wa al-Tamwil al-Islami Badilan", in *al-Azmah al-Iqtisadiyyah al-ʿAlamiyyah al-Muʿasirah min manzur Islami,* (Herndon: IIIT, 2012), 211.

complex financial derivatives have resulted in credit expansion outpacing the growth of the real sector of the economy”[46].

(e) Monetary stability

The regulators, namely central banks are entrusted to design, implement and monitor the monetary system and work constantly for its stability. “A Central bank’s primary job, which involves making sure that the financial system functions smoothly and that the supply of money and credit from the system contributes to the nation’s economic goals”[47]. A Central Bank also plays a role in curbing inflation, protecting local currency from depreciation, and supervising local banks. With the current functions such as curbing cybercrime and regulating crypto currencies, the Central Bank is at the center of a strong economy or a fragile one. Thus, all regulations pertaining to the above functions would ultimately lead to monetary stability, hence the realization of a very viable Macro *maqaṣad*.

Further, the instruments used by central banks to achieve monetary stability include setting statuary reserve regimes to monitor credit levels, determining the discounting rate when lending to local banks, and participating in the open market to buy and sell securities[48]. From *maqasid* perspective, the above instruments are the *wasaʾil* (means) meant to achieve a particular *maqasid al-Shari’ah*. From a *maqasid* perspective, the means holds the same ruling as the objective of *Shari’ah* as will be highlighted in the last section of this article. Thus, all regulations pertaining to those instruments are intended by *Shari’ah* and are part of the macro *maqasid* under discussion, i.e. monetary stability.

The main issue that has yet to trigger deep and through

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[46] A. Othman, N. Mat Sari, S. O. Alhadshi and A. Mirakhor, *Macroeconomic Policy and Islamic Finance in Malaysia*, (New York: Palgrave Macmillan, 2017), 31.
[47] Peter S. Rose and Sylvia C. Hudgins, *Bank Management and Financial Services,* (New York: McGraw-Hill, 2010), 52.
[48] Sliman Nasar, *ʿAlaqat al-Bunuk al-Islamiyyah bi al-Bunuk al-Markaziyyah fi ẓil al-mutaghayyirat al-Duwaliyyah al-Hadithah*, (Algiers: Maktabat al-Rayyam, 2006), 118-123.

research is the role of *Shari'ah* compliant Central Bank in realizing *maqasid al-Shari'ah* in the financial system. Most central banks are *Shari'ah* non-compliant in terms of assets and operations as they deal extensively with *riba*. They have also provided an environment where conventional and Islamic financial systems converge rather than diverge. Whether Islamizing the Central Bank of Malaysia, for example, would accelerate the *maqasid* compliance of the banking system remains a fertile area of research, waiting to be simulated and tested. However, even with a non-*Shari'ah* compliant central bank, the latter's role in stabilizing the monetary system and supervising local banks is very important from *Shari'ah* perspective.

Another issue that has proven devastating to local currencies and needs robust regulations is manifested in the demand and supply of a foreign currency, especially the U.S. Dollar. When investors prefer to hold foreign currencies of strong economies at the expense of the local currency, the latter would depreciate as a result of having high demand for the foreign currency[49]. Besides, allowing companies to borrow short term foreign loans to finance long term projects would create a mismatch between short terms liabilities with long term assets when the interest rate rises[50]. This is exactly what happened to Turkey in 2018 when the local currency '*lira*' depreciated by 40%. To further enhance the monetary stability, it has to operate in consonance with the pre-requisites of financial stability. Thus, there is an interplay between monetary policy and financial stability at a macroeconomic level. IFSB-17 standard states:

> "Sound macroeconomic policies (mainly fiscal and monetary policies) are the foundation of a stable financial system. Without sound policies, imbalances such as high government borrowing and spending, and an excessive shortage or supply of liquidity, may arise and affect the stability of the financial system"[51].

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[49] Salih Salhi, *Al-Siyasah al-Naqdiyyah wa al-Maliyyah fī Itar Nizam al-Musharakah fī al-Iqtisad al-Islami*. (Cairo: Dar al-Wafaʾ, 2010), 39.
[50] Sami al-Suwailem, *al-Khatiʾah al-Asliyyah wa al-Lirah al-Turkiyyah*.
[51] IFSB-17, *Core Principles for Islamic Finance Regulations*, (2015), 9.

(f) Financial stability

Financial policy generally aims at optimizing resources in terms of a balanced wealth mobilization and allocation. This would ensure economic stability and fair distribution of resources and income[52]. For central bankers, financial stability "describes the condition where the financial intermediation process functions smoothly and there is confidence in the operation of key financial institutions and markets within the economy"[53]. This is the work of Central bankers who are entrusted to keep inflation low and stable, facilitate high and stable growth, ensure stable financial markets, stable interest rates and stable exchange rates[54]. In the context of Islamic banking, the same objectives are pursued within a set of *Shari'ah* rulings and principles. Thus, it can be argued that the objectives of the financial policy in conventional policy are similar to the objectives of financial policy in Islamic finance except that in Islamic banking, the *Shari'ah* framework must be the overriding framework.

Financial stability is one of the macro-*maqasids* of a Islamic financial system. In classical jurisprudence, the Muslim ruler is free to administer the resources of the land based on *maṣlaḥah mursalah* (public benefit). This falls under the Islamic legal maxim "Acts of those with authority over people must take into account the interests of people"[55]. According to Imam al-Mawarda, the ruling of a nation is based on four principles: physical development, guarding people, administering the army and putting in place a fair financial policy (*taqdir al-amwal*). In elaborating the latter, al-Māwardī maintains that if the financial policy is truly fair, nations become stable[56].

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52 Salih Salhi, *Al-Siyasah al-Naqdiyyah*, 30.

53 BNM, "What is Financial Stability?" http://www.bnm.gov.my/index.php?ch=fsandpg=fs_ovr_whatandac=112 accessed on August 15, 2018.

54 Stephen G. Cecchetti, *Money, Banking and Financial Markets*, (New York: McGraw-Hill, 2010), 356.

55 Jalal al-Din Al-Suyuṭi, *Al-Ashbah wa al-Nazaʾir*, (Beirut: Dar al-Kutub al-ʿIlmiyyah), 121.

56 Abu al-Hasan al-Mawardi, *Tashsil al-Nazar wa Taʿjil al-Zafar fī Akhlaq al-Mulk*, 177.

(g) Value Based Intermediation (VBI)

The Central Bank of Malaysia launched an initiative to imbue Islamic finance practices and activities with socio-economic impact elements within the framework of *maqasid al-Shari'ah*. According to the Financial Stability and Payment Systems Report 2017 "VBI aims to achieve the intended outcomes of *Shari'ah* in promoting good and preventing harm"[57]. In a strategy paper circulated by BNM in 2017, three major *maqasid* have been identified as the intended outcome of *Shari'ah* in Islamic finance. They are justice, wealth preservation, and wealth circulation[58]. The three *maqasid* have been initially identified by Imam al-Tahir bin ʿAshur as the ultimate objectives of wealth beside *wuduh* (transparency) and *thabat* (firmness)[59]. Operationally, the strategy paper links the Islamic bank activity to real economy so that IFIs could contribute to the real economy. As BNM put it,

> "Important areas of focus [of VBI] include enhanced assessments of a customer's application for financing, where the traditional credit assessment methodology would be supplemented with an assessment of the positive impact of the financing to the community and the economy. For business financing in particular, such an assessment will be based on a wider set of considerations which may include the potential for the financing to contribute towards generating sustainable employment opportunities and entrepreneurship"[60].

This new initiative undoubtedly needs a considerable deal of alignment with the existing regulations, if not new ones. It constitutes a paradigm shift in the world of Islamic finance where the discourse on *maqasid al-Shari'ah* in finance is now an important agenda of the

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57 Financial Stability and Payment Systems Report 2017, BNM, 94.

58 BNM, "Value-based Intermediation: Strengthening the Roles and Impact of Islamic Finance", (2018, Mar. 12), http://www.bnm.gov.my/index.php?ch=57andpg=137andac=612andbb=file, accessed on August 29, 2018.

59 Al-Tahir bin ʿAshur, *Maqasid al-Shariʿah al-Islamiyyah.* (Dar al-Kitab al-Lubnani, 2011), 306.

60 BNM, *Financial Stability and Payment Systems Report*, (2017), 94.

regulators, and is no more confined to *Shari'ah* scholars and fatwa authorities. Thus, VBI should translate itself into business models, development projects, new products that have clear socio-economic impact.

5.0 Regulators and Regulations as *Wasa'il* (Means) to Achieve Higher Ends (Macro *Maqasid*)

The doctrine of *wasaʾil* (means) is part of the theory of *maqasid al-Shari'ah* as propounded by Muslim jurists. Bin 'Ashur highlighted that "*wasaʾil* are the means leading to *maqasid*. The means to the best *maqsad* is the best means, and the means to the worse *maqsad* is the worse means" [61.] The means are also *Shari'ah* rulings meant to preserve higher objectives of *Shari'ah* so much so the pursuit of *maqasid* is also the pursuit of their means (*wasaʾil*). Ascertaining this doctrine, Imam Ibn Qayyim al-Jawziyyah maintained that the "*wasaʾil* have the same rulings as *maqasid*"[62]. *Wasaʾil* are of two categories, the first is a set of rulings stated in the sources of *Shari'ah*, and the second are means promulgated or formulated based on *ijtihad*. In the context of finance, the means to preserve wealth are both stated in the *Shari'ah* sources as well as formulated by people in charge of wealth, be it individual or public. In the case of the latter, the rulers are entrusted by *Shari'ah* to come up with every possible means to preserve wealth and develop it to the betterment of the community. In the banking context, the regulators are the ones that must issue regulations pertaining to the wealth of the nation. This paper argues that the regulators are the means (*wasilah*) to the preservation of wealth (*hifz al-mal*). Imam al-ʿIzz bin Abdussalam states, "There is no doubt that the appointment of judges and rulers are *wasaʾil* (means) to realize public and private benefits (*al-masaliḥ al-ʿammah wa al-khassah*). As for the appointment of assistants to the judges and rulers, it is deemed as a means to the means (*wasaʾil al-wasaʾil*)"[63].

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61 Bin 'Ashur, *Maqasid al-Shariʿah al-Islamiyyah*, 252.

62 Ibn Qayyim al-Jawziyyah, *Iʿlam al-Muwaqqiʿin ʿan Rabb al-ʿAlamin.* (Beirut: Dar al-Kutub al-ʿIlmiyyah, 1991), 3/108.

63 Al-ʿIzz bin Abd al-Salam, *Qawaʿid al-Ahkam fī Masalih al-Anam*, (Cairo: Maktabat al-Kulliyyat al-Azhariyyah, 1991), 1, 58.

In the Malaysian context, the question that needs a pause is related to the mindset of the regulator who is regulating the conventional and Islamic finance industries in the same time. Can a dual banking system achieve the macro *maqasid* articulated earlier? Is it really a dual banking system or is it a single conventional banking system under which the Islamic system is subsumed despite the separation between FSA (conventional) and IFSA (Islamic)? Can BNM achieve satisfactory levels of VBIs when wearing two hats, one conventional and the other Islamic? Can the conversion of BNM into an Islamic bank like the case of Sudan facilitate the realization of macro *maqasid*? All these questions are pertinent and require deep and further research.

Islamic banking regulations are the means that are supposed to realize *maqasid al-Shari'ah*. From a *Shari'ah* perspective, the ruler is allowed to come up with any arrangement to safeguard the interests of the ruled. Imam bin ʿAshur considered the bindingness of a contract of exchange a means (*wasilah*) not to rescinded it. He also considered the expression of a contract (*ṣighah*) as means to determine the intention of the contracting parties[64]. All these are captured in the Policy documents published by BNM in 2017. For example, *Murabahah* Policy Document states: "*Murabahah* is a sale and purchase contract, which is binding in nature. Thus, the contract shall not be terminated unilaterally by any of the contracting parties"[65].

Looking into the nature of regulations, they can be considered as *wasa'il* meant to protecting wealth (*hifẓ al-mal*), facilitating its circulation (*rawaj*), ensuring its fair mobilization and allocation (*ʿadalah*), ascertaining its firmness (*thabat*) by determining the roles and responsibilities of all stakeholders. To give a general idea of how the exiting Malaysian regulations of Islamic banking fit in the framework of *wasaʾil* (means), Table 1 summarizes the issues at hand:

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[64] Bin ʿAshur, *Maqasid al-Shariʿah* al-Islamiyyah, 257.
[65] BNM, "*Mudarabah Shariʿah* Standard", op. cit.

Table 1.

Guidelines/Exposure draft/Circular	**Nature**	***Wasaʾil* (means)**
Stress testing	Guideline	*Wasilah* for Protection of wealth
Anti-money laundering and counter financing terrorism	Guidelines	*Wasilah* for Protection of wealth
Basel III compliance	Guidelines	*Wasilah* for the protection of wealth
Capital adequacy frame works for Islamic banks	Guidelines	*Wasilah* for Protection of wealth
Capital funds for Islamic banks	Guidelines	*Wasilah* for Protection of wealth
Circular on Standardised Documentation for Description of Key Terms for Housing Loan / Home Financing Agreements	Circular	Transparency
Shari'ah Corporate framework (SGF)	Guidelines	Protection of *din*
Net stable Funding ratio	Exposure draft	*Wasilah* for the Protection of wealth
External auditor	Guidelines	*Wasilah* for the Protection of wealth
Financial reporting for Islamic financial institution.	Guidelines	*Wasilah* for the Protection of wealth
Financial Technology Regulatory Sandbox Framework	Guidelines	*Wasilah* for the Protection of wealth
Fit and proper	Guidelines	Accountability and responsibility
Guidelines on Credit Transactions and Exposures with Connected Parties	Guidelines	*Wasilah* for the Protection of wealth
Guidelines on International Islamic bank	Guidelines	Internationalization of Islamic finance
Guidelines on Investment banks	Guidelines	Development real economy via profit and loss sharing within the *maqṣad* of justice.
Guidelines on *Musharakah* and *Muḍarabah* Contracts for Islamic Banking Institutions	Guidelines	Development real economy via profit and loss sharing within the *maqṣad* of justice.
Guidelines on permitted Capital market activities by Islamic banks (2018)	Guidelines	Development real economy via profit and loss sharing within the *maqṣad* of justice.
Introduction of new products (2014)	Guidelines	*Wasilah* for the Protection of wealth and religion.
Klibor Rate setting	Guidelines	*Wasilah* for the Protection of wealth.
Leverage ratio	Guidelines	*Wasilah* for the Protection of wealth
Liquidity coverage ratio	Guidelines	*Wasilah* for the Protection of wealth
Management of customer	Guidelines	Transparency (*wuḍūh*)

information and permitted disclosure		
Operational risk	Guidelines	*Wasilah* for the Protection of wealth
Prohibited Business conduct	Guidelines	*Wasilah* for the Protection of wealth
Reference rate frame work	Guidelines	*Wasilah* for the protection of wealth
Risk-informed pricing	Guidelines	*Wasilah* for the Protection of wealth and firmness
Guidelines on Data Management and MIS frame work	Guidelines	Transparency and firmness

Source: authors' own (BNM website[66]).

6.0 Conclusion

Islamic banking regulations in Malaysia have developed and demonstrated a great deal of robustness. Despite their sophistication, the said regulations are yet to completely reflect the macro *maqasid* of *Shari'ah*, such as financial independence, financial stability and value-based intermediation. The research has specifically emphasized on the macro *maqasid* for two reasons: one because the realization of macro *maqasid* at the level of the regulators would facilitate the realization of the micro *maqasid* at the level of the Islamic financial institutions. The second reason is to need to use macro *maqasid* as the benchmark/criterion for *maqasid* compliance of the Islamic finance regulations in Malaysia.

The Malaysian regulations on Islamic finance are potentially operating within the conventional regulatory as well as the financial environment. The latter is purportedly one of the main obstacles for realizing the macro *maqasid*. However, the major criticism leveled against the Malaysian regulations has been addressed to the resolutions of the *Shari'ah* Advisory resolutions, which form one of the bases of the *Shari'ah* Standards published by the Central Bank in 2016 and 2017. The Standards are in conformity with GCC regulations and AAOIFI *Shari'ah* Standards; however, they contained the most controversial issues that divided the Malaysian and GCC market in terms of *Shari'ah* compliance. This would include, sale of debt, organized *tawarruq* and dual agency. For macro

[66] BNM, http://www.bnm.gov.my/index.php?ch=en_policyandpg=en_policy_banking, accessed on August 28, 2018.

maqasid to reign supreme in the regulatory framework Malaysia, the research recommends propounding a specific theory of *maqasid* using the macro *maqasid* discussed in this research and capitalizing on the existing VBI initiative, which is micro oriented. By incorporating macro and micro *maqasid*, the Malaysian experience in Islamic finance regulations will be ushered to greater heights.

AL-SHAJARAH

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