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The Form over Substance Debate in Islamic Finance: Is Aligning Islamic Finance More Proactively with the Ethical Finance Space the Way Forward?

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ABSTRACT

This paper has been written from the author's perspective of an Islamic finance transactional lawyer who has been involved in the sector since the early 1990s. The current position of Islamic finance is considered along with some of the challenges it is facing and whether more proactively positioning itself in the ethical finance space offers some attractions.

The paper briefly considers some issues surrounding Islamic economic theory and the *maqasid al-Shari'ah*, as these should underpin the role and mission of any Islamic financial institution.

The historical context of the growth of modern Islamic finance is considered including the way in which the doctrine of necessity has been used. The parameters in which Islamic finance has had to operate and how this has affected the way it has developed are discussed along with a review of some of the most commonly used Islamic finance products.

The 'form over substance' debate is considered (including the use of *hiyal*) along with some parallels with conventional finance and the need to engage in further research and analysis of the *maqasid al-Shari'ah* in the context of developing Islamic finance.

The issue whether Islamic finance is somehow more inherently ethical than conventional finance is reviewed. Some existing conventional finance initiatives and platforms are considered to see if Islamic finance could use them. Other practical steps in the ethical finance space which could be further developed by the Islamic finance sector are also discussed.

Finally the impact on an IFI's organisational structure by a decision to re-focus or re-brand its products and services as being more aligned with the ethical finance space is analysed.

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I. INTRODUCTION

This paper has been written from my perspective as a transactional lawyer who has been involved in Islamic finance since the early 1990s.

The growth in Islamic finance has been impressive over the last 20 years, but there is a debate about the direction Islamic finance has taken and whether it should continue along the same trajectory. This debate centres around whether existing Islamic finance products mimic conventional interest based products and whether there is too much emphasis on form over substance.² At the heart of this debate is whether or not Islamic finance, as currently structured, is in the best position to achieve the *maqasid al-Shari'ah* (the objectives of the Shari'ah).³

II. MAQASID AL-SHARI'AH AND OTHER KEY SHARI'AH CONCEPTS

A. *Maqasid al-Shari'ah* and Islamic Economics

From a practitioner's perspective there will usually be very little consideration of *maqasid al-Shari'ah* when it comes to a transaction. For the bankers and the various service providers the pressure is to complete the transaction as soon as possible. All the focus is on closing the financing: to get the term sheet and the structure approved by the customer and the Shari'ah advisers, to agree the documents and to get the required fatwa. All these pressures mean that this is not the time to decide what is meant by *maqasid al-Shari'ah*.

However, if the rationale of an Islamic financial institution (IFI) is to fulfil the *maqasid al-Shari'ah* then it must clearly articulate what this means (and engage with its personnel, service providers, customers and other stakeholders about its meaning) because everything it does should be guided by this key principle.

From an Islamic finance perspective, in an ideal world an Islamic economic environment would be established, but this would require a political process. The second stage would see the introduction of various Islamic activities and a central one would be Islamic finance.⁴ However, this is not the position and Islamic finance is having to operate in an environment that is not grounded on Islamic economic theories.

One commentator's observations on the difficulties facing IFIs are instructive:

In reality, research and analysis of problems within the context of 'what ought to be' under 'optimum Islamic conditions' is desirable and necessary as an inseparable part of an ideal Islamic economy and society. However resolving different economic problems in non-ideal circumstances is an inseparable part of the Islamic approach.⁵

² These Islamic finance products are often referred to as 'debt-based' products and this term is used in this paper as a short-hand reference to such products where the return is tied to a conventional interest rate benchmark. There is, however, no prohibition as such in the Shari'ah about incurring a debt.

³ There is no uniformity in the English transliterations of Arabic words in the sources referred to in this paper, so the spelling in the source referenced has been left in the form used in that source.

⁴ See Asutay, M (2012) 'Conceptualising and Locating the Social Failure of Islamic Finance: Aspirations of Islamic Moral Economy vs the Realities of Islamic Finance' (11) *Asian and African Area Studies* 97.

⁵ Ahmed, A-R (2002) 'Methodological Approach to Islamic Economics: Its Philosophy, Theoretical Construction and Applicability' in Ahmed, H (ed) *Theoretical Foundations of Islamic Economics* (1st Edition) Islamic Development Bank, Islamic Research and Training Institute, p 50.

We cannot analyse these problems on [an] ideal basis, seeking ideal solutions in non-ideal conditions and expect to get our thought through in practice. We have to think of an Islamic treatment to non-Islamic situations.⁶

There is a general consensus that the weakening of the Church in the West led to the rise of an economic model (capitalism) that became decoupled from religious thought. Adam Smith is usually described as the creator of modern economic thought with the publication of his book *Inquiry into the Nature and Causes of the Wealth of Nations*.⁷ His position was that freedom and self-interest would, as if guided by an ‘invisible hand,’ create order and harmony with resources being channelled to those areas and things on which society placed greatest value.

However, often it is forgotten that Adam Smith first came to prominence through his work *The Theory of Moral Sentiments*.⁸ His conclusion was that people had a natural ‘sympathy’ for others. This sympathy would lead them to change their behaviour patterns if needs be to maintain harmony within society. There is an apparent conflict between the notion of ‘self-interest’ and ‘sympathy’ but Smith’s explanation was as follows: ‘How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.’⁹

Nonetheless, the popular (but incorrect) view of Adam Smith’s theory is one of unbridled self-interest leading to the desired results.

Marxism can also be seen as an extension of an economic theory de-linked from religion where the allocation of scarce resources was to be undertaken by collectives and central planning.

The end result has been the creation of ‘economic man’ whose actions can be reduced to a desire to maximise wealth and want satisfaction – ie, the main concern being self-interest. Self-interest, competition and profit motive became the pillars of capitalist philosophy.¹⁰

There is no single definition of Islamic economics, but while there are differences amongst Islamic economists as to whether conventional economic tools, research and analysis can be used,¹¹ there is common agreement that Islamic economics is different, as it is grounded on and bound by the principles of Islam. Chapra maintains the following:

The underlying philosophy of Islam is fundamentally different from the secularist approach of both Capitalism and Marxism. It aims at creating a balance between the material and the spiritual needs of human beings and between self-interest and social interest. While there is nothing basically wrong in serving one’s self-interest there has to be some kind of a mechanism to ensure that the individual does not cross the limit and transgress the rights of others.¹²

⁶ Ibid, p 51.

⁷ Smith, A (1776) *An Inquiry into the Nature and Causes of the Wealth of Nations* Printed for W Strahan and T Cadell.

⁸ Smith, A (1759) *The Theory of Moral Sentiments* Printed for A Millar.

⁹ The Adam Institute webpage provides further information on this issue and is available at: <http://www.adamsmith.org/introduction/>.

¹⁰ Chapra, M (2011) ‘The Economic Problem: Can Islam Play an Effective Role in Solving it Efficiently as well as Equitably?’ *IRTI Working Paper Series 1432-01*, Islamic Research and Training Institute, p 2.

¹¹ Ahmed ‘Methodological Approach’ supra n 5, p 30.

¹² Chapra ‘The Economic Problem’ supra n 10, p 3.

Is the mechanism to ensure these limits are not crossed to be found in the technical conformity of a financing structure or the outcome of that financing structure in meeting the objectives of the Shari‘ah? Another interesting question is who should set or define these limits?

Khan puts it this way by reference to Siddiqui: ‘the essentials of [the] theory of Islamic economics are rooted in the *Qur’an* and Sunnah and the implications and implementation of these essentials are to be searched in other Islamic sources like *Fiqh*, *Usool Fiqh* and Islamic history.’¹³

A slightly different approach is taken by Professor Mehmet Asutay who prefers to use the term ‘Islamic moral economy’ to more clearly differentiate this economic model from conventional economics. His view is that: ‘the entire objective of IME and also its operational aspect of Shari‘ah is to serve “human well-being” which is the main and essential aim of all efforts within the *tawhidi*¹⁴ framework.’¹⁵

From all of this it can be seen that the Islamic economic model is inextricably connected to Islam which, in turn, explains why that economic framework and its associated commercial and financial activities must have the fundamental goal of meeting the *maqasid al-Shari‘ah*. Having said that, there is an argument that the outcomes in achieving the *maqasid al-Shari‘ah* are outcomes that can be found in many religions and beliefs; the components of *maqasid al-Shari‘ah* can be said to be based on natural justice which is shared with humanity universally. As will be explored later, this is why it is possible to place Islamic finance in the centre of the ethical finance spectrum which is shared by many other players.

B. What Are *Maqasid al-Shari‘ah*?

The purpose of this article is not to provide a comprehensive review of the Shari‘ah principles that underpin the concept of *maqasid al-Shari‘ah*; whole books and detailed articles are devoted to this subject.¹⁶ There is, however, a perception that research into and a detailed consideration of *maqasid al-Shari‘ah* has been somewhat neglected.¹⁷

¹³ Khan, M (2002) ‘Fiqh Foundations of the Theory of Islamic Economics: A Survey of Selected Contemporary Writings on Economics Relevant Subjects of Fiqh’ in Ahmed, H (ed) *Theoretical Foundations of Islamic Economics* (1st Edition) Islamic Development Bank, Islamic Research and Training Institute, p 61.

¹⁴ See Gimaret, D entry for Tawhid in Bearman, P; Bianquis, T; Bosworth, CE; van Donzel, E; and Heinrichs, WP (eds) *Encyclopaedia of Islam, Second Edition* available at: http://dx.doi.org/10.1163/1573-3912_islam_SIM_7454: ‘in the true sense of the term, the act of believing and affirming that God is one and unique (*wāhid*), in a word, monotheism. For the Muslim, it is believing and affirming what is stated by the first article of the Muslim profession of faith: “there is no other god but God” (*lā ilāha illā llāh*).’

¹⁵ Asutay ‘Conceptualising and Locating the Social Failure’ supra n 4, p 96.

¹⁶ See generally (this is not an exhaustive list): Abdelkader, D (2003) ‘Modernity, the Principles of Public Welfare (Maslaha) and the End Goals of Shari‘a (Maqasid) in Muslim Legal Thought’ (14) *Islam and Christian-Muslim Relations* 163; Auda, J (2011) ‘A Maqasidi Approach to Contemporary Application of the Shariah’ (19) *Intellectual Discourse* 193; Dasouki, A; Abozaid, A (2007) ‘A Critical Appraisal of The Challenges of Realizing Maqasid Al-Shari‘ah in Islamic Banking and Finance’ (15) *IJUM Journal of Economics and Management* 143; Dusuki, A; and Bouheraoua, S (2011) ‘*The Framework of Maqasid Al-Shari‘ah (Objectives of the Shari‘ah) and Its Implications for Islamic Finance*’ Research Paper 22/2011 International Shari‘ah Research Academy for Islamic Finance (also published as Dusuki, A; and Bouheraoua, S (2011) ‘The Framework of Maqasid Al-Shari‘ah (Objectives of the Shari‘ah) and Its Implications for Islamic Finance’ (2) *Islam and Civilisational Renewal* 316); Ibrahim, YS (2006) ‘Rashid Rida and Maqasid al-Shari‘a’ *Studia Islamica* 157; Jackson, SA (2006) ‘Literalism, Empiricism and Induction: Apprehending and Concretizing Islamic Law’s *Maqasid Al-Shari‘ah* in the Modern World’ *Michigan State Law Review* 1469; Kamali, M (ed) (2012) *Maqasid al-Shari‘ah, Ijtihad and Civilisational Renewal* International Institute of Islamic Thought; Kamali, MH (2008) *Maqasid al-Shariah Made Simple* International Institute of Islamic Thought.; Rifa’i, SLM (2004) ‘The Legal Doctrines of Maqasid Al-Shari‘ah with Particular Reference to the Works of Imam Al-Shatibi: Historical and Practical Dimensions’ *School of Law, SOAS* PhD Thesis University of London - this thesis contains a detailed description of the development of *maqasid* in Islamic legal history (including by reference to al-Shatibi and other scholars), the significance of *maslaha* in the writings of al-Shatibi and a detailed review and analysis generally to al-Shatibi’s approach to *maqasid* and *maslaha*.

¹⁷ Kamali ‘Maqasid Al-Shari‘ah Made Simple’ supra n 16, p 1.

The *maqasid al-Shari'ah* and *maslaha* need to be developed in order to deal with new issues that modern life faces. One commentator puts it this way:

With the emergence of the rapidly changing industrial modern society, the classical frame of the analysis is no longer workable or acceptable. Therefore, it is imperative to ease the disparity between the reality of life and the nature of stagnation in legal [Shari'ah] theories. It is generally contended by modern Islamic reformists that a new methodological dimension of *Usul al-fiqh* would ease this dichotomy. The doctrine of *maqasid* will facilitate this new methodology of *Usul*.¹⁸

While there seems to be agreement that the ultimate aim of *maqasid al-Shari'ah* is to serve the interests of mankind and to save them from harm, there are different ways in which *maqasid al-Shari'ah* have been defined.¹⁹ Written resource material usually refers to various prominent scholars such as Abu Hamid Al-Ghazali (who talks about five essential objectives), Imam al-Shatibi and Ibn 'Ashur (although there are others) when discussing this concept.²⁰

Many do not view Al-Ghazali's five essential objectives as being the end of the matter. Ibn Taymiyah for example did not limit the *maqasid* categories. His view was that all aspects of the Shari'ah were part of its scope and strongly criticised those who limited *maqasid* just to the five elements.²¹

Other objectives that have been put forward include protection of honour (*al-'ird*), fulfilment of contracts, preservation of the ties of kinship, honouring the rights of one's neighbour, social welfare and support, freedom, human dignity and human fraternity, etc. and indeed there is an argument that the *maqasid al-Shari'ah* is an open-ended list of values.²²

In terms of Islamic finance, Ayoub has used this approach as part of his argument that some derivative products should be allowed.²³

Overall the aims of the Shari'ah include the need for compassion and guidance that seek justice in society, the elimination of prejudice and the alleviation of hardship.²⁴ One

¹⁸ Rifa'i 'The Legal Doctrines' supra n 16, p 40.

¹⁹ Dusuki and Bouheraoua supra n 16, pp 3-5. Also see Kamali 'Maqasid Al-Shari'ah Made Simple' supra n 16, pp 7-8.

²⁰ Dusuki and Bouheraoua supra n 16, pp 3-5. Some extracts from this work which refer to these key scholars include:

'Abu Hamid al-Ghazali (d.1111CE) defined maqasid by stressing the Shari'ah concern with safeguarding five objectives [...]. The very objective of the Shari'ah is to promote the well-being of the people, which lies in safeguarding their faith (din), their lives (naf), their intellect ('aql), their posterity (nasl), and their wealth (mal). Whatever ensures the safeguarding of these five serves public interest and is desirable, and whatever hurts them is against public interest and its removal is desirable.'

'According to Imam al-Shatibi: The primary goal of the Shari'ah is to free man from the grip of his own whims, so that he may be the servant of Allah by choice, just as he is His slave [in matters about which he has] no choice.'

'Ibn 'Ashur (1973) [...] defines maqasid from a broader angle: The overall objective (maqasid 'amm) of Islamic legislation is to preserve the social order of the community and to insure its healthy progress by promoting the well-being and virtue (salah) of the human being. The salah of human beings consists of the soundness of their intellects and the righteousness of their deeds, as well as the goodness of the things of the world in which they live that are put at their disposal.'

²¹ Rifa'i 'The Legal Doctrines' supra n 16, p 85.

²² Kamali 'Maqasid Al-Shari'ah Made Simple' supra n 16, pp 11-12 where reference is made to the contributions made by Taj al-Din 'Abd al-Wahhab ibn al-Subki, Taqi al-Din ibn Taymiyyah, Ahmad al-Raysuni and Yusuf al-Qaradawi.

²³ Ayoub, S (2014) *Derivatives in Islamic Finance – Examining the Market Risk Management Framework*, Edinburgh University Press. Ayoub mentions that Al-Razi was of the view (at p 11) that 'the Shari'ah should also seek truth in the domain of high probability (i.e., considerable certainty) rather than be bounded by the requirement of absolute certainty, which may never be achieved.' In addition Ayoub maintains (at p 11) that 'Al-Razi felt that the application of *Maslaha* to the five essential elements, while important, is unnecessarily restrictive; accordingly, he proposed the inclusion of the concepts of need (*Haja*) and improvement (*Tahsin*) in the sphere of *Maslaha*.'

commentator also refers to the fulfilment of ‘human well-being.’²⁵ Another commentator has taken the position that, regardless of the technical differences between the differing interpretations, most definitions of *maqasid al-Shari‘ah* have a common thread:

[they] are focussed on realisation of benefits for human beings, that is, for the individual and society, indeed for all people, regardless of any distinction of status, colour and creed, both in this life and the Hereafter. [...] Protection of religion is one of the essential *maqasid*, yet our general reading of the source evidence informs us that the lives and properties (also among the essential *maqasid*) of non-Muslims are sacrosanct and that justice and fair dealing under the Shari‘ah are inclusive of both Muslims and non-Muslims alike. [...] *Maqasid* can thus subsume all monotheistic religions as well as the contemporary human rights law, albeit with minor reservations.²⁶

The Shari‘ah can be sub-divided into its general purposes and specific goals that deal with particular activities.

The general objectives of the Shari‘ah can be sub-divided into three categories, namely the *daruriyyah* [essentials], *hajiyyah* [complementary] and *tahsiniyyah* [embellishments].

Daruriyyah can be regarded as covering the essential parts of life which comprise *din* [religion], *nafs* [life], *aql* [intellect], *nasl* [posterity] and *mal* [wealth]. Some scholars, while agreeing that these are essential for human welfare, also believe that there are additional *daruriyat* such as equality, freedom and protection of the environment.

Hajiyyah covers supplementary interests to the essential elements. So if these things are missing a person can suffer hardship but their life is not totally disrupted.

Tahsiniyyah refers to things that help people to lead more refined lives. For example, the Shari‘ah encourages people to engage in charitable acts beyond the obligatory *zakah*.²⁷

Another approach has been to classify *maqasid* into general purposes (*al-maqasid al-‘ammah*), particular goals (*al-maqasid al-khassah*) and partial purposes (*al-maqasid al-juz’iyyah*). Using this approach examples of general purposes include: ‘Realisation of benefit (*maslahah*), prevention of harm and corruption (*darar, mafsadah*), building the earth (*i‘mar al-ard*), administration of justice, and removal of hardship (*raf‘ al-haraj*) are examples of the general purposes of Shari‘ah.’²⁸

However, in considering a modern interpretation of the *maqasid al-Shari‘ah* (and especially in relation to Islamic finance) there needs to be a focus on producing outcomes that are ‘concrete.’ In commenting on abstract universals one commentator said that Ibn Taymiyah’s position was that: ‘[they] exist only in the mind and that the only meaningful manifestation or application of a concept, value, or principle is in the concrete.’²⁹

So, to the extent that the *maqasid al-Shari‘ah* are used to try and develop Islamic finance, what will be needed are ‘concrete’ outcomes that are practical and can be adopted by the Islamic finance sector.

²⁴ Dusuki and Bouheraoua supra n 16, p 4.

²⁵ See Asutay ‘Conceptualising and Locating the Social Failure’ supra n 4, p 96.

²⁶ Kamali ‘Maqasid Al-Shariah’ supra n 16, p 7.

²⁷ For a more detailed discussion of the concepts described in this section refer to Dusuki and Bouheraoua supra n 16.

²⁸ Kamali ‘Maqasid Al-Shariah’ supra n 16, p 18.

²⁹ Jackson ‘Literalism’ supra n 16, p 1480.

C. The Importance of *Maslahah*

The concept of *maslahah* must also be considered in the context of *maqasid al-Shari'ah*. One author maintains that *maslahah* have: 'been instrumental in the development and application of Islamic law to keep pace with the socioeconomic change.'³⁰ Some commentators make the point that sometimes scholars use the terms *maqasid al-Shari'ah* and *maslahah* almost interchangeably.³¹

It can sometimes be difficult to understand the differences between the two concepts but one commentator has explained it this way:

Briefly, the *maqasid* command a degree of objectivity and permanence that may or may not obtain in the *masalih*. [...] the *masalih* also tend to be circumstantial and liable to change according to time and place. Al-Shatibi has thus described the *maslahah* to be relative and circumstantial (*nisbi, idafi*) for the most part. To enact a law may be beneficial at one time and not so at another, and even at one and the same time it may be beneficial under some conditions but not so under different ones. The *maqasid* have, on the other hand, a quality of constancy and permanence that may be lacking in *maslahah*. Hence the *maqasid* provide criteria of validity for *maslahah* and stand a degree above it.³²

Shatibi's definition of *maslahah* is that it: 'concerns the subsistence of human life, the completion of man's livelihood, and the acquisition of what his emotional and intellectual qualities require [of] him in an absolute sense.'³³

Al-Ghazali's view of *maslahah* is:

it is essentially an expression referring to the acquisition of benefit or the repulsion of injury or harm, but that is not what we mean by it because acquisition of benefits and the repulsion of harm represent human goals, that is, the welfare of humans through the attainment of these goals. What we mean by *maslahah*, however, is the preservation of the ends of the Shari'ah.³⁴

If something helps promote and preserve the five aims of *maqasid al-Shari'ah* (using Al-Ghazali's definition) this will be seen to have *maslahah*.

D. The Impact of the Concept of Vice-Regency

Alongside (but directly inter-linked with) these concepts, is the notion that humans are Allah's vice-regents, so they (and the institutions in which they work) must act with justice. One commentator put it like this:

individuals are perceived to be the viceregent of God on the Earth, namely *khalifah*, and expected to fulfil their duties within the social, economic, financial and other realms and to make their decisions through a moral filter. In other words, since

³⁰ Khan 'Fiqh Foundations' supra n 13, p 64.

³¹ Dusuki and Bouheraoua 'The Framework' supra n 16, p 5. Also see Kamali 'Maqasid Al-Shariah' supra n 16, p 5; Dusuki and Abozaid 'A Critical Approach' supra n 16, p 151; and Abdelkader 'Modernity' supra n 16, p 170.

³² Kamali 'Maqasid Al-Shariah' supra n 16, pp 17-18.

³³ See Khan 'Fiqh Foundations' supra n 13, p 64, where he refers to the work of Masud who reproduces Shatibi's definition.

³⁴ Dusuki and Bouheraoua 'The Framework' supra n 16, p 6.

individuals are considered to be the representative of God on Earth, they are expected to fulfil such roles and responsibilities.³⁵

Chapra argues that this principle has five key implications.³⁶ The first is that there is a 'fundamental unity' amongst mankind and which extends to the 'equality and dignity' of everyone. Secondly, mankind does not own the world's natural resources; he is just a trustee. According to Chapra: 'He must acquire them only rightfully and then in accordance with the terms of the trust to serve not only his own self but also his family, other human beings, all other creatures, and the environment. It is not becoming of him to act in a selfish manner or to use these resources wastefully or lavishly.'

Chapra's third observation draws a distinction with classical economic theory and he stresses that the:

right attitude towards other human beings, all [being] members of God's family, is not 'might is right,' [nor a] struggle to serve just one's own 'self-interest,' and 'survival of the fittest,' but rather of brotherhood and equality, love and affection, and mutual care and cooperation with the objective of fulfilling the basic needs of all, developing the entire human potential, and enriching human life in such a way as to become a 'blessing for mankind' in keeping with the Qur'anic vision.

His final observations are that each human is born free and is not subservient to anyone (other than Allah) and that each 'human being is accountable before Him and must, therefore, lead a life in keeping with his status as *khalifah* of God.'³⁷

It is sometimes thought that the Shari'ah prohibits the acquisition of wealth but the prohibition is rather on the manner in which wealth is obtained and spent.³⁸

Another commentator puts it this way when discussing vice-regency:

The *maqasid* contemplates a welfare-oriented vision of Islamic civilisation for the whole of humanity through their obvious prioritisation of human welfare interests as are featured in the list of essential *maqasid*, the *daruriyyat*. [...] Establishing a just social order, promotion of the human intellect through education and scientific advancement, promotion of a strong family unit, creation of wealth and its legitimate acquisition and transfer are integral to humanity's mission of viceregency and advancement of human civilisation (*'umran*).³⁹

Overall the concept of vice-regency can be seen as being directly connected with 'socioeconomic justice.'⁴⁰

³⁵ Asutay 'Conceptualising and Locating the Social Failure' supra n 4, p 96.

³⁶ Chapra 'The Economic Problem' supra n 10, p 6.

³⁷ This and the preceding quotations: Ibid.

³⁸ Ibid. Chapra says:

There is no point in shunning the 'good things that God has provided' (al-Qur'an, 7:32). He must enjoy life. It is not the enjoyment of life that stands in the way of spiritual uplift, it is the way this is done. It is not wealth itself, which is bad; it is the way it is acquired and the way it is spent. There is nothing wrong in enjoying life within the framework of the values for righteous living through which Islam seeks to promote human well-being and to become a blessing for mankind.

³⁹ Kamali 'Maqasid Al-Shariah' supra n 16, p 15.

⁴⁰ Chapra 'The Economic Problem' supra n 10, p 7. Chapra's view on socioeconomic justice is that this concept can be broken down into three areas. Firstly social equality applies equally to everyone. Secondly the resources that have been made available by Allah must be open to everyone (which means monopolies are not acceptable). Lastly, as begging is the option

Continued.../

III. SO WHERE DOES THAT LEAVE AN IFI?

While an IFI will not be operating in an Islamic economic system as envisaged by the economic theorists, it should still try, as far as possible, to fulfil the *maqasid al-Shari'ah*. The mission and goals of an IFI should be based on the principles underpinning the *maqasid al-Shari'ah* (such as those expounded by Al-Ghazali) together with the principles of *maslahah*, vice-regency and socioeconomic justice.

These are the critical foundations on which an IFI should be built and which will impact its structure and management as well as the types of financial and investment products and services it offers. Part of that process also should be the creation of indicators which identify whether or not these core Islamic principles are being complied with. There is of course a need to ensure that, at the same time, an IFI remains commercially viable but there is an argument that the scales have shifted too far towards commercial expediency.⁴¹

It is not enough for IFIs to limit the application of Islamic economics to merely prohibiting *riba* through the use of formulistic strategies. Instead, what is required is a holistic approach that looks at the substance of what they are doing in the context of the *maqasid al-Shari'ah*.⁴² Therefore, in the context of the 'form over substance' debate, the fundamental principles to be found in Islamic economics (or Islamic moral economics) need to be clearly understood and expounded in order to address this issue.

IV. THE CURRENT STATE OF PLAY

A. The Initial Drive to Develop Mainstream Modern Islamic Finance

From personal experience, in the 1990s there was a real sense amongst the Shari'ah scholars that, while there had been a lot of theoretical work in the area of Islamic economics, something urgently needed to be done to provide a real practical alternative for Muslims, as they were often completely outside the banking system.

It was considered that it was imperative to encourage the development of the Islamic finance sector even if sometimes the Shari'ah basis of a product's approval was (at least in part) based on the principle of necessity (*al-dharura*), otherwise expressed as *al-dharurat*

of last resort, people should try and use their own efforts to get their basic needs and Muslim societies, therefore, should create conditions to allow this to happen.

⁴¹Dusuki and Bouheraoua 'The Framework' supra n 16, p 12 which discusses the particular need for IFIs to follow the objectives of the Shari'ah:

As a Shari'ah-oriented business entity, the Islamic bank is vigorously expected to be guided by the objectives of the Shari'ah. There are at least two reasons for establishing the right objectives for any IFI. First, the objectives will be used by the management or policy makers of the IFI in the process of formulating corporate objectives and policies. Secondly, these objectives serve as an indicator as to whether the particular IFI is upholding true Islamic principles. Indeed, one of the biggest challenges to IFIs today is to come up with products and services that are Shari'ah compliant or legitimate from an Islamic viewpoint without undermining the business concerns of being competitive, profitable and viable in the long run.

⁴² See Asutay 'Conceptualising and Locating the Social Failure' supra n 4. He has a useful summary of the Islamic value and norms based nature of an Islamic bank. The conclusion Asutay reaches (at p 100) is that the principles to be found in Islamic moral economics cannot, in the case of Islamic banks, be limited just to 'the prohibition of *riba* in the sense of Shari'ah or 'form' compliancy, but importantly it essentialises "substance" as defined by IME [Islamic moral economics].'

tubih al-mahdhurat (necessity allows forbidden things)⁴³ because, over time, products could be improved or replaced. The principle of necessity under the Shari‘ah is too complex to be analysed in detail in this work. However, it should be recognised that this principle is based on the juristic principle that ‘necessity permits that which is forbidden’ and is derived from various verses in the Quran.⁴⁴

Muslim jurists have, however, set out various conditions that must be met before the principle of necessity can be used.⁴⁵

One area of debate in terms of moving Islamic finance forwards is whether the reliance on the principle of necessity should be re-visited. The verses in the Quran that refer to necessity all mention that being compelled to do something through necessity is subject to various conditions such as there not being ‘wilful disobedience, nor transgressing due limits.’⁴⁶ Perhaps there is a need for further reflection and debate on the use of necessity? Some issues may include the following:

- Has the principle of necessity been used to present Islamic finance as an alternative to save humanity from the evils of a *riba* based system of financing but perhaps with not enough emphasis on the limits that underpin the principle of necessity?⁴⁷

⁴³ The term is defined as ‘necessity.’

⁴⁴ Ali, AY (2002) *The Meaning of the Holy Qur‘an* Amana Publications.

2.173 - He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of God. But if one is forced by necessity, without willful disobedience, nor transgressing due limits, - then is he guiltless. For God is Oft-forgiving, Most Merciful.

6.119 - Why should ye not eat of (meats) on which God’s name hath been pronounced, when He hath explained to you in detail what is forbidden to you - except under compulsion of necessity? But many do mislead (men) by their appetites unchecked by knowledge. Thy Lord knoweth best those who transgress.

6.145 - Say: “I find not in the message received by me by inspiration any (meat) forbidden to be eaten by one who wishes to eat it, unless it be dead meat, or blood poured forth, or the flesh of swine, - for it is an abomination - or, what is impious, (meat) on which a name has been invoked, other than God’s”. But (even so), if a person is forced by necessity, without willful disobedience, nor transgressing due limits,- thy Lord is Oft-forgiving, Most Merciful.

16.115 - He has only forbidden you dead meat, and blood, and the flesh of swine, and any (food) over which the name of other than God has been invoked. But if one is forced by necessity, without wilful disobedience, nor transgressing due limits, - then God is Oft-Forgiving, Most Merciful.

⁴⁵ These conditions can be summarised as follows:

1. Resorting to a forbidden will not lead to a greater forbidden.
2. The necessity must be present not future.
3. Resorting to the forbidden but to the minimum needed for survival.
4. There is no other alternative which is less forbidden in degree.
5. The forbidden remains forbidden, only the use is permitted due to the necessity.

For a detailed discussion of the principle of necessity see: Al-Mutairi, MZ (1995) *Necessity in Islamic Law* PhD Thesis University of Edinburgh.

⁴⁶ Ali ‘The Meaning; supra n 44, 16:115.

⁴⁷ Grounds which were sometimes mentioned in fatwas which the author has seen which used the necessity or public good approach included some or all of the following: (i) the need to assist countries and people who wish to invest in Shari‘ah products and companies following Islamic principles; (ii) the need to develop Islamic finance (which is still in its infancy) as an alternative and viable financing system; (iii) legal constraints derived from the applicable governing law that impact on a particular product or transaction; (iv) when there is a co-financing involving conventional finance, the fact that often the Islamic finance tranche will be smaller and so less able to dictate the structure of the transaction; and (v) the prevailing conditions and affairs of the Ummah and the need to remove them from the unjustness and oppression of *riba*.

- Is relying on necessity as the basis for allowing certain Islamic finance products, structures or provisions the best way to establish foundations for the long-term viability of Islamic finance?
- Are there, as will be discussed later, different ways in which Islamic finance can grow?

Having said all of this, while it is valid to scrutinise the role of Shari‘ah scholars, it is easy to forget how off-the-radar Islamic finance was until the mid to late 1990s. While some may have misgivings about the current products, it cannot be denied that the approach taken by the Shari‘ah scholars has enabled the modern Islamic finance sector to become established and to grow significantly over the last 15 to 20 years.

B. The Environment in Which Islamic Finance Has Had to Develop

The unease that many feel about various Islamic finance products centres on the way in which very technical and legalistic (from a Shari‘ah perspective) arguments have been used to approve products. Generally, the criticism is that there has been too much focus on the form, rather than the substance. One argument is that the real analysis should be whether the transaction is ‘wholesome.’⁴⁸

However, any evaluation of the current state of play has to recognise that there have been, and continue to be, significant challenges for IFIs in carving out a place for themselves.

1. Systems Based on Conventional Economic Theory

Islamic finance has had to operate in an economic, legal, tax, accounting and regulatory environment that was geared only to deal with conventional finance based on conventional economic theory. Laws and regulations in the financial space reflect the dominant economic culture, which is primarily focused on loans with interest. While many countries have amended their laws and regulations to accommodate Islamic finance the usual path is merely to treat rent or profit in an Islamic finance transaction as if it were interest. In effect tax authorities must be convinced that the economic outcome of paying profit or rent is the same as interest and often will specify the types of Islamic finance products that must be used in order to benefit from a level playing field in terms of deductibility.⁴⁹ In addition, tax laws usually do not treat equity contributions and equity returns (such as with a *musharaka* or *mudaraba*) on a par with interest in terms of deductibility.

2. How the Dominant Economic System Affects Mind-Sets

A second important challenge is the way the dominant economic system affects the mind-set of customers, bankers and service providers. Often without realising it, their attitudes and frame of reference will be influenced by the norms and expectations embedded in that

⁴⁸ Asaria, MI (2015) ‘From Halal to Halal and Tayyib’ *Institute of Islamic Banking and Insurance Lecture* Institute of Islamic Banking and Insurance. Asaria is of the view that it is not enough for Islamic financial products to be checked to see if their form is Shari‘ah compliant but rather the question is whether the product, in the round, can be justified when viewed against a wider social perspective and whether it is *tayyib* [wholesome].

⁴⁹ In the UK for example, to address the risk that Shari‘ah compliant financing structures would be treated differently in terms of tax, the UK government introduced the alternative tax regime which was originally contained in the Finance Act 2005 and which, for companies, is now contained in the Corporation Tax Act 2009. There are provisions dealing with *Murabaha* (s503), *Musharaka* (s504), *Mudaraba* (s506) and *Sukuk* (s507).

dominant economic culture. So, for example, while *riba* is something that most Muslims want to avoid, the concept of sharing the potential financial upside with a bank is often not that attractive. Indeed there is an argument that as so many Islamic banks offer ‘debt-based’ financing, it is even more difficult for an IFI to change its market position to only offer products that are based on sharing the risk and the rewards. Would customers vote with their feet and move to another IFI that continued to offer ‘debt based’ products and, if so, are they doing this because their point of comparison is conventional banks that do not share in the increase in value of, for example, a house that is being financed?

3. *The Effect of These Two Factors*

It is easy, therefore, to see how the interplay of these two factors made it easier, in the beginning, to create Islamic finance products that did not look too different from conventional products. However, and while accepting that compared with conventional finance, modern Islamic finance is still very new, it is right that serious questions should be asked now whether there should be continued reliance on the current range of products.

If Islamic finance is to show it is clearly distinct from many conventional financial products and financial institutions, relying on the status quo in terms of existing products is not a viable option and the longer the current status quo continues, the more difficult it will be to show this clear differentiation.

C. Existing Islamic Finance Products

Is the unease that many Islamic finance products ‘mimic’ the economic outcome of conventional debt-based products valid? In and of itself mimicry need not be a problem, unless what is being mimicked is forbidden. Most legal systems (including the Shari‘ah) have laws and rules which are there to protect its citizens and to achieve social good. Similarly it is also perfectly possible that the underlying aims of conventional finance products can be measured against a similar yardstick of protecting consumers and achieving social good so that products (and the institutions offering them) could be said to be ethical, fair and just; and so worth mimicking.

Proponents of Islamic finance often argue that, unlike conventional financial products, Islamic finance is based on ‘real’ assets with a real risk:reward paradigm and this narrative is often accepted by third parties.⁵⁰ It should be noted, however, that there is no intrinsic Shari‘ah rule that a person should take all risk in a transaction; the concept is one of risk sharing.

However, in practice is there a difference between conventional finance and many Islamic finance products when it comes to ‘real’ assets and risk sharing? In my experience these products are often structured so the risk is transferred back to the customer and, if there is a default, the IFIs or investors do not actually have (or want) recourse to the assets. Accordingly, outsiders often find it difficult to see what the real difference is between Islamic finance and conventional finance.

Take a customer wanting to buy a piece of machinery. If a conventional loan is used the customer will hold legal title, probably provide security over the machinery and repay the loan with interest. The bank will not participate in any financial gain the customer makes

⁵⁰ United Nations Conference on Trade and Development (2011) ‘Services, Development and Trade: The Regulatory and Institutional Dimension - Expanding Trade Opportunities for Developing Countries’ United Nations Conference on Trade and Development. Paragraph 41 of this report refers to Islamic finance’s ‘asset-based and risk sharing nature’ and is an example of how third parties perceive Islamic finance to be different (at least at a theoretical level).

using the machinery and it will not share in the risk if the machinery does not make money for the customer. The bank's upside is limited to the interest on the loan. Its risk is that the customer will not be able to pay but, to cover off that risk, it will take security (usually over the machinery).

How does a *murabaha* financing of the same machinery differ from the conventional financing? Scholars would say that the financial return comes from a trade with the IFI owning a real asset (the machinery) which it is selling. Technically this is true but, in terms of the economic risk:reward paradigm, regardless of any technical analysis (ie, the form of the transaction), it is hard for an outsider to see what is the real economic difference. It is true that the Islamic financier will (fleetingly) own the asset, but usually the customer buys the machinery as the undisclosed agent of the IFI, and legal title will instantly pass to the customer from its principal (the IFI). The IFI is owed a debt which includes a profit element that (as it is calculated using a conventional interest rate benchmark) will produce the same economic outcome as interest charged by the conventional bank. The IFI will not participate in any financial gain the customer makes using the machinery nor will it share in any losses if the machinery makes no money for the customer. It also faces the same customer credit risk and so will also usually take security over the machinery to cover off that risk.

On this examination, with both a conventional financing and a *murabaha* financing of the machinery, there is a 'real' asset involved in the 'real' economy and the economic outcome is the same. Therefore, it is understandable that many struggle to see how there is a clear distinction between the two products.

Ijara (leasing) is the other common financing product. Is this structure more distinctive? With most *ijara* products the Islamic financier will not take full legal title.⁵¹ Instead it will acquire an unregistered or a beneficial interest, which is then leased back to the customer. Critically, the IFI will not usually look to access the leased asset (as owner) if there is a default (although it may do so through a mortgage or pledge over the legal title). Normally, the key document is the purchase undertaking in which the customer promises to buy back whatever ownership interest has been sold to the Islamic financier for a price that equals the purchase price (less any partial payments) and any outstanding variable rent. The IFI will not take any risk of the asset value declining or share in the upside if the asset value increases.

With *musharaka* and *mudaraba* models the IFI would be entitled to its share (as partner or co-owner) of the profits arising from the *musharaka* or to its share of the profits as investor with a *mudaraba*. However, in many structures the IFI's profit share is reduced by an incentive fee paid to the customer (as the managing partner or as the *mudarib* [manager]) so that, after this payment, the IFI's return equals the interest rate that would have been payable under a conventional loan.

There are very few asset-backed *sukuk* where investors take the asset risk. As a general rule if there is no true sale the investors will not have full legal title to the assets. Generally, for most *sukuk* there will not be a full transfer of the legal title and somewhere in the structure will be a mechanism so that, on a default, the investors' remedy will not be to the assets. Instead there will be a right to compel the originator to buy back whatever ownership interest was sold to the investors at a price that equates to the original principal amount paid for that ownership interest (less any partial payments) and any outstanding variable payment (variable rent, profit, etc).

⁵¹ It appears that Oman is encouraging IFIs to have full legal title to the leased asset transferred into their name. The High Shari'a Supervisory Authority issued a circular (IBD/IB/2015/303) on 22 November 2015 which refers to IFIs taking ownership of leased assets where that ownership 'has to be evidenced appropriately with local laws.' At present how this will be enforced is not certain.

Interestingly, there is an argument that project finance in which project risks are ring-fenced within a special purpose company, and where the returns payable to financiers or investors are primarily dependent on the success of the project, is more in tune with the Shari‘ah concept of sharing risk to obtain a reward.

Overall, however, with many Islamic finance products it is difficult to show that the economic outcome or the risk-reward outcome is really that different from their conventional finance counterparts.⁵² However, all of these products will have obtained fatwas and so, in that sense, it would be incorrect to say they are not Shari‘ah compliant.

There are various analogies that Shari‘ah scholars use to argue there is a difference. One example is that if you have a glass of alcohol and a glass of milk, just because the milk is in a glass this does not mean it is alcoholic. The glass is supposed to represent an interest rate benchmark. All of these types of analogies, though, suffer from the same defect because they do not compare the right things. The ‘economic outcome’ and the societal impact of the two finance products should be compared. If a loan of \$100 with \$5 interest is deemed to be defective from a Shari‘ah perspective because (amongst other things) the \$5 of interest is harmful to the customer and society as a whole, having a commodity *murabaha* financing where the \$5 profit is calculated by reference to the same interest rate benchmark will produce exactly the same adverse economic outcome for the consumer and society as a whole. The only way that the outcome can be justified is by arguing that the technical form of the documents (which will usually involve the IFI holding title to the asset for a few seconds or treating an *ijara* as a normal rental activity) is such that there is deemed to be a ‘real’ trading activity and with any profit or rental being derived from that real trading activity.

Commentators such as Dusuki and Abozaid argue that some modern Islamic finance products: ‘have maintained the legality of the form but neglected the legality of the substance, despite the fact that the objective of form is to help in ensuring compliance of the substance of the *Shari‘ah* and not for itself.’⁵³

Ultimately for the Islamic finance sector the issue really is whether the current Shari‘ah financial products are the best that can be crafted. This impacts on how an IFI develops its mission statement about what Islamic finance means for it. In turn this requires an analysis of what Islamic finance should achieve within an Islamic economic paradigm and the fulfilment of the *maqasid al-Shari‘ah*.

⁵² See Dusuki and Abozaid ‘A Critical Appraisal’ supra n 16, p 147, where the authors discuss the structuring of Islamic finance products using an interest rate benchmark and the difficulties that this causes in terms of public perception. In addition, they are of the view (at p 160) that: ‘if the economic substance of a given transaction is identical to that of the prohibited transaction, (such as the one in which the bank or financier acts as a creditor not as a trader of real property) then this must render the transaction impermissible regardless of its legal form.’

⁵³ Dusuki and Abozaid ‘A Critical Appraisal’ supra n 16, p 156.

V. A FORMULISTIC APPROACH OR A MORE HOLISTIC APPROACH?⁵⁴

Viewed positively the ‘form over substance’ concerns could stimulate a healthy and open discussion about whether the *maqasid al-Shari‘ah* could be achieved through new structures based on a different approach. Currently the arguments used to differentiate Islamic finance products from conventional products focus on the form or the structure of the documentation package where there are often a myriad of documents. Each document will be Shari‘ah compliant but, when conjoined, will produce an economic equivalency to its conventional counterpart.

It is also interesting to note that the debate within the Islamic finance sector about *maqasid al-Shari‘ah* and the need to achieve socio-economic justice is in some ways mirrored by a similar debate taking place within the conventional finance sector.

These issues are explored in further detail below as is the question of what areas of *maqasid al-Shari‘ah* might be open to further research and development in the context of Islamic finance.

A. The Use of *Hiyal*⁵⁵ and the Concept of *Daman*

Some argue that Islamic finance has relied too much on *hiyal* where the existence of overly complicated structures and a multitude of documents can be seen as the outward manifestation of *hiyal*.⁵⁶

Using this analysis the real intention behind, for example, a *murabaha* financing can be questioned. The IFI is not really a manufacturer or supplier which is entering into a trade. The parties know that the real reason for the transaction is that the customer wants finance. Habil makes the point that in a transaction there should be an ‘essential safeguard of *daman* (“liability” or “contractual liability”).’⁵⁷ Habil’s contention is that the principle of ‘*daman*’ requires the presence of a ‘justified liability’ and, at the same time, no ‘unjustified liability’ in order for *riba* and *gharar* to be excluded.⁵⁸ Habil questions whether the IFI is under any *daman* with many Islamic financings.

So, in the context of a conventional loan, Habil’s contention is that arguably the real problem is that, on one hand, the borrower has an ‘unjustified liability’ to pay back principal and interest whereas, on the other hand, the lender has no corresponding liability.⁵⁹ In comparison, the seller in a trade transaction takes on certain responsibilities (such as if the goods are defective or are stolen).

However, there is an argument that many *hiyal* are used to create *daman* on the part of the IFI, ‘albeit transitory, remote and fictional.’⁶⁰ The introduction of *daman* into the structure is used to justify the IFI’s return where the IFI is characterised as a trader or lessor.

⁵⁴ See Kamali ‘Maqasid Al-Shariah’ supra n 16, p 31 where he says: “‘A *maqasidi* approach to jurisprudence”, as Jasser Auda commented, “is a holistic approach that does not restrict itself to [any] one narration or partial ruling, but rather refers to general principle[s] and common ground.’

Also see Auda ‘A Maqasidi Approach’ supra n 16, p 214 where he refers to the need for a new *ijtihad* that would create applications of the *Shari‘ah* that are holistic or multidimensional.

⁵⁵ *Hiyal* can be translated as legal artifices. The singular is *hila* and the plural is *hiyal*.

⁵⁶ See Habil, A (2007) ‘The Tension between Legal Values and Formalism in Contemporary Islamic Finance’ in Ali, S (ed) *Integrating Islamic Finance into the Mainstream Islamic Finance Project* Islamic Legal Studies Program, Harvard Law School p 109 for an interesting discussion about the use of overly complicated structures and a multitude of documentation evidencing *hiyal*.

⁵⁷ *Ibid*, p 112.

⁵⁸ *Ibid*, p 114.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*, p 115.

However, this *daman* is then cut back through various strategies such as indemnities, disclaimers or the creation of additional obligations on the customer, with the end result that these obligations can then be set off against the obligations of the IFI. So this approach means that the *hiyal* is merely a stratagem to artificially create the type of *daman* that is found in a true trade transaction but with other parts of the stratagem effectively cancelling out all (or just about all) of the IFI's 'justified liability.'⁶¹

Ultimately Habil has this view: 'Islamic finance should perhaps focus more on its underlying values and less on cumbersome, convoluted techniques.'⁶²

B. Are There Similarities with the Debate about the Direction of Conventional Finance?

The suggestion that Islamic finance should pause, step back and reflect about its future path can in some ways be seen as part of a global discussion about the aims of finance and its relationship with achieving social good.

Professor Robert Shiller suggests that, in the conventional finance space, there must be a review of how finance is made available.⁶³ He also argues that new corporate entities must be created which can channel funds for social good purposes.⁶⁴ In his view these new types of investments would create a different outcome: 'the story is not over after one makes the donation, as it is with conventional charitable contributions. One now has a psychological stake, akin to ownership, in the nonprofit.'⁶⁵

Interestingly, the UK has legislated to allow the formation of new types of 'profit-with-purpose' businesses, such as community interest companies and community benefit societies. There have also been changes to the tax laws to assist their operations.

Shiller also argues that one can differentiate between certain types of debt and that: '[there] is a legal concept according to which not all debt is evil, only so-called odious debt: debt that does not originate in free and informed contracting between the parties, or debt that is not managed in a humane way.'⁶⁶

His conclusion is that there is such a thing as 'salubrious debt' which he defines as follows: 'debt that is designed by the lender to have a salutary effect in terms of social welfare. Such debt has conditions, either as part of its covenants or in associated agreements and understandings, that are designed to provide healthy incentives to borrowers or other relevant parties.'⁶⁷

In order to achieve this, however, and to ensure that 'debt is used to solve basic human problems' major changes in the regulatory space and financial innovation would be required.⁶⁸ He also has something to say about financial contracts which should be more

⁶¹ Ibid, p 116.

⁶² Ibid, p 117.

⁶³ See Shiller, R (2012) *Finance and the Good Society* Princeton University Press.

⁶⁴ Ibid, p 205. Shiller refers to a new kind of organization – the Participation nonprofit. He describes it like this:

It would be a nonprofit, aimed at a public purpose such as running a hospital, but in a different sense. The participation nonprofit would raise money by issuing shares, but buying shares in it would be a charitable contribution for tax purposes. Selling shares in it would have no tax consequences as long as the proceeds were donated to other charitable causes, such as by buying shares in other participation nonprofits. The shareholder could sell the shares and consume the money from the sale, but such actions would be subject to a substantial tax penalty.

⁶⁵ Ibid.

⁶⁶ Ibid, p 157.

⁶⁷ Ibid, p 158

⁶⁸ Ibid

‘democratic and nuanced, with the rights of mankind redefined in more basic terms.’⁶⁹ In addition he is of the view that: ‘[the] business world should be less constrained by pre-written, standardised financial contracts and be more imaginative in its definition of such agreements.’⁷⁰

This sentiment could just as easily be transferred to the current range of Islamic finance contracts which are often seen as too complex and document heavy. The reason for this can, with some justification, be traced back to the focus on the form rather than the substance of the transaction.

C. What Areas Might be Considered when Re-Analysing *Maqasid al-Shari‘ah* in the Context of Islamic Finance?

The Shari‘ah can be described as divine law and the attempts by mankind to understand that divine law is classified as *fiqh*. Human interpretations of the Shari‘ah through *fiqh* rulings are ‘uncertain and merely probable suppositions as to what God’s law truly is.’⁷¹

So, if there is no on-point revealed text, then human interpretation of the primary sources will be required. The effort of a qualified Shari‘ah scholar in interpreting the Qur’an and the Sunnah is called *ijtihad*, a complex subject, the detailed analysis of which is beyond the scope of this paper.⁷² Early on in Islam the objectives of the Shari‘ah played an important part in developing rules and deciding cases. If a rule, even if found in a primary source, no longer met an objective, it was either suspended or not followed.⁷³ One commentator discusses instances of the Companions of the Prophet (PBUH) moving away from the text of a *hadith* in favour of its purpose taking into account the then current circumstances and which covered the change of position in distributing spoils of war, price controls and inheriting from

⁶⁹ Ibid, p 150

⁷⁰ Ibid

⁷¹ Vogel, FE and Hayes III, SL (1998) *Islamic Law and Finance - Religion, Risk, and Return* Kluwer Law International, p 32.

⁷² *Ijtihad* can be considered as exerting efforts to derive a rule based on the overall guidance contained in the primary sources. There are various tools that are available in undertaking this task and the scholar will decide which tool or tools will be used taking into account the issue under consideration and all other relevant factors. A non-exhaustive list of these tools that can be used when there is no direct guidance available in the two primary sources includes:

1. Consensus (*ijma‘*)
2. Analogy (*qiyas*)
3. Individual welfare (*istislah*)
4. Efficient and attractive/preferable (*istihsan*)
5. Extracting good (*jalb al-masalih*)
6. General or public welfare, benefit or interest (*al-masalih al-mursalah*, also sometimes referred to as *maqasid al-Shari‘ah*)
7. Avoiding harm (*dar‘ al-mafasid*)
8. Closing the back-door so that the means must conform to the *maqasid al-Shari‘ah* and, if it does not, then it must be blocked (*sadd al-dhara‘i*)
9. Changing rules due to changing of time and circumstances (*taghayyur al-zaman wa al-makan*)
10. Custom (*al-‘urf*)
11. Choice (*ikhtiyar*)

⁷³ Baltaji, M (1970) *Methodology of Umar bin Khattab in Legislation; An in-depth Study of Umar’s Fiqh and His Approaches* Dar al-Fikr al-Arabi (in Arabic). This scholar has traced 26 examples in the ruling of the Second Caliph, Umar, where he has abandoned the rule because its application would result in more harm than good. For instance, he suspended the punishment for theft prescribed in the Quran itself on the ground that there was famine in Madina and people were compelled to steal food to feed themselves or their children. He refused to distribute the booty of the defeated armies among the Muslim soldiers (as mentioned in the Quran and as practiced by the Prophet) and instituted the payment of salaries to establish a permanent Islamic army.

a non-Muslim.⁷⁴ Another author mentions the suspension of the prohibition on Muslim marriage to Jewish or Christian girls.⁷⁵

These examples show it is possible that a specific requirement of the Sunnah: 'is either relaxed or given an alternative interpretation, or even reversed to its opposite, in order to realise the higher purpose and goal of the Shari'ah. [...] Ibn Taymiyyah [...] concluded that the textual commands and prohibitions of the Shari'ah do not overrule their *maslahah* and *maqasid*-based understanding and import.'⁷⁶

Ijtihad, guided by the primary sources, produced progressive rules of the Shari'ah early on. However, this dynamic approach was abandoned for various reasons and *fiqh* became confined to interpreting the primary sources based on the opinions of the early schools of law.⁷⁷ The prevalent view was that the door on *ijtihad* had been closed. Having said this there continued to be prominent scholars who practiced *ijtihad* and, in the modern setting, many scholars take the view that 'the "door of *ijtihad*" is not closed and never was.'⁷⁸

There is an argument that the legal theory of *usul al-fiqh* has produced an outcome where the focus has been on 'analysing the text at the expense often of the overall goal and objective of the Shari'ah.'⁷⁹

The same commentator also argues that: 'the *usul* methodology has also become burdened with technicality and literalism' and that in recent decades there has been:

an awareness that the methodologies of *usul al-fiqh* and *ijtihad* are, on the whole, predicated on medieval society values, retrospective, and somewhat slow to relate effectively to modern legislative processes, science, technology, industry and commerce. By contrast, the *maqasid* are goals and purposes that look to the future and permit innovative approaches to the Shari'ah and contemporary issues.⁸⁰

So, it is against this backdrop that the development of modern Islamic finance and its relationship with the *maqasid al-Shari'ah* needs to be considered.

The initial product development focused on *murabaha* and while there were (and still are) reservations about this structure, it rapidly became popular (and continues to be so). The next development was in relation to *ijara*.

There is a view that, in the development process, the Shari'ah scholars were reluctant to diverge from *fiqh* on points of past consensus. As Vogel puts it: 'As long as a new approach can be subsumed by a legal conception from the past (for example, if it can be understood as a lease or a sale), the rules of the past tend to be applied.'⁸¹

Was it the result of going down this path (rather than applying *ijtihad* to find new forms of contracts) that led to the production of Islamic finance products that took conventional finance products which were 're-engineered' to produce an economic outcome similar to a loan with interest?⁸² Is this the root cause of how the 'form over substance' debate began?

⁷⁴ Kamali 'Maqasid Al-Shariah' supra n 16, pp 12-14.

⁷⁵ Rifa'i 'The Legal Doctrines' supra n 16, p 67.

⁷⁶ Kamali 'Maqasid Al-Shariah' supra n 16, pp 14-15.

⁷⁷ The main Sunni schools are: Hanafi, Maliki, Shafi'i and Hanbali. The main Shi'a schools are Ithna 'Ashari, Ja'fari, Zaidi and Ismaili.

⁷⁸ Vogel and Hayes III 'Islamic Law and Finance' supra n 71, p 34.

⁷⁹ Kamali 'Maqasid Al-Shariah' supra n 16, p 1.

⁸⁰ Ibid, p 2.

⁸¹ Vogel and Hayes III 'Islamic Law and Finance' supra n 71, p 35.

⁸² Ibid, pp 35-36. Vogel makes the following observation: 'In Islamic finance *ijtihad* has not usually been employed for fresh interventions anyway, but for evaluating and modifying existing conventional financial or banking practices [...]. In such

Continued.../

As Asutay mentions, logically Islamic finance would have been established after an Islamic economic environment had come into existence but this has not been the reality and, therefore, has affected the way in which the development of Islamic finance products has taken place.⁸³

In terms of how Islamic finance should achieve *maqasid al-Shari'ah* is there an argument that further analysis is required about how the financial, legal and economic systems (and other facets of modern life) operate to see if, through *ijtihad*, new rules and products can be crafted?⁸⁴

An approach based on a revitalisation of *maqasid* is an area that, both in the wider sense and in relation to Islamic finance, could offer new solutions. One commentator has explained his thinking as follows:

Our attempt to open the scope and theory of the *maqasid* suggests the use of *maqasid* as criteria, in a broad sense, for evaluation of all rulings and decisions of concern to the Shari'ah – especially those of fatwa and *ijtihad* in conjunction with new issues. Traditional Islamic scholarship accorded this status to *usul al-fiqh* which is used as criteria of the validity for juridical decision-making and research. We now propose to assign this role to the *maqasid* [...]. The purpose is to strike a balance between the rules of the Shari'ah and its higher goals and purposes while ensuring in the meantime that our formulas and methods do not engage in burdensome technicalities. [...] Human welfare should remain as the mega-purpose of the Shari'ah.⁸⁵

Another commentator is of the view that contemporary scholarship: 'has also introduced new universal *maqasid* that were directly derived from the scripts, rather than from the body of *fiqh* literature in the schools of Islamic law. This approach, significantly, allowed *maqasid* to overcome the historicity of *fiqh* edicts and represent the higher values and principles of the scripts.'⁸⁶

Another view is as follows: 'So the connection between Public Welfare [*maslaha*] and the End Goals of Shari'a [*maqasid*] and modernity is that they allow religious scholars to exercise human reasoning more freely thus permitting the analysis and adjustment of old customs to the needs of modern life.'⁸⁷

Therefore, if a dynamic application of the *maqasid al-Shari'ah* were adopted, it might be possible to create new solutions, products and services for the Islamic finance sector. As part of that process a range of issues could be considered and some of these could include:

cases *ijtihad* often takes the form of deciding whether the transaction can be reconciled with Islamic revealed texts and *fiqh* principles.'

⁸³ Asutay 'Conceptualising and Locating the Social Failure' supra n 4, p 97.

⁸⁴ Vogel and Hayes III 'Islamic Law and Finance' supra n 71. Vogel makes the following observation which many would argue is still relevant today:

Clear departures from old rules are extremely rare. Scholars rarely invent new terms, alter the definition of old ones, introduce new legal constructions, or criticize the methods or thought processes of the old scholars. They do not systematically refer to specific intervening changes in technology, institutions, economics, or law as guides or motives to review, amend, or replace old rule. They are mostly content to work with existing rules in ways that would be largely familiar to scholars of the past. p 35.

⁸⁵ Kamali 'Maqasid Al-Shariah' supra n 16, p 28.

⁸⁶ Auda 'A Maqasidi Approach' supra n 16, p 198.

⁸⁷ Abdelkader 'Modernity' supra n 16, p 172.

- What is the effect of the fractional reserve system in the context of how IFIs must operate?
- Taking into account the modern economic and financial systems and the nature of modern currencies, is it correct that, in all circumstances, money cannot be seen as being a store of value?
- Is there merit in re-examining what is meant by *riba*?⁸⁸ For example, taking into account that *maqasid al-Shari'ah* promotes the preservation of wealth, have the effects of devaluation and inflation been adequately examined in the context of the modern economic and financial world?
- In relation to derivative products, can a derivative product that hedges against a real economic risk faced by a company be permitted on the basis that such a hedging tool reduces uncertainty (*gharar*) in relation to the operations of the company?⁸⁹
- Is the use of *qiyas* by reference to pre-modern Islamic contracts (such as *murabaha* and *ijara*) correct in all cases? In relation to *qiyas* one commentator has said:

A rigid adherence to *qiyas* in certain cases may lead to unsatisfactory results, hence a recourse may be had to *istihsan* in order to obtain an alternative ruling that is in harmony with the objectives of the Shari'ah.⁹⁰

Is there room to explore whether the needs and requirements of modern finance are so different from pre-modern Islamic contracts that those pre-modern contracts should not be used to create Islamic finance contracts through the application of analogy?⁹¹ What an IFI is doing is providing finance and its purpose is not really seen by anyone as entering into trading transactions; it is not a real estate owner, the owner of aircraft or ships and so on. Perhaps the use of *ijtihad* would enable new finance products to be created that still comply with the Shari'ah but more truly reflect the financial nature of the transaction, rather than straight-jacketing the transaction into a trading structure. A side benefit would likely be that the structure and the documents would be simpler and more transparent.

- If a proposed financial product is found to be beneficial in some areas and not in others then, using *ijtihad*, are there solutions (rather than relying on a form approach) that can make the product acceptable?

⁸⁸ Ibrahim 'Rashid Rida and Maqasid al-Shari'a' supra n 16, p 191 where he refers to Rida's analysis of *riba* and in which he mentions 'Abduh's fatwa that 'apparently allowed taking interest in a savings account established through post offices in Egypt.' This clearly was a contentious fatwa.

⁸⁹ Ayoub 'Derivatives' supra n 23. Ayoub's examination of the possible role for Islamic derivatives is, in large part, based on how Islamic finance can deal with unmanaged market risks that are faced by businesses operating in the real economy.

⁹⁰ Kamali 'Maqasid Al-Shari'ah Made Simple' supra n 16, p 23.

⁹¹ See Ayoub 'Derivatives' supra n 23, pp 104-105, where, in the context of analysing the negative view taken by Islamic standard setting institutions in relation to derivatives, he argues that derivatives are: '[a] "new type of contracts" without specific proscriptions in the scripture, which takes it out of the purview of *Qiyas* with pre-modern contractual forms as a source for the analogy.'

VI. WHAT PRACTICAL STEPS CAN BE TAKEN?

A. The Challenge

The challenge is to advance the current parameters of Islamic finance but without destroying or weakening the Islamic finance sector. Arguments about the relative newness of Islamic finance and that institutional investors only want fixed rate products cannot be used as an excuse to prevent the Islamic finance industry from evolving and establishing a distinctive narrative and market position.

A suggested approach is two-fold:

- firstly, as has been discussed above, there is a need to revisit what is meant by the *maqasid al-Shari'ah* when developing Islamic finance and crafting new structures and products; and
- secondly, there is the issue of the existing debt-based products - these are not going to disappear overnight and, indeed, if this happened, the Islamic finance sector would disappear.

Therefore, the challenge is to look at ways in which new products (arguably more aligned with the *maqasid al-Shari'ah*) can be introduced while at the same time exploring how to make existing debt-based products more acceptable, rather than solely relying on the overly technical and legalistic form over substance rationale.

B. Is Islamic Finance Intrinsically More Ethical?

Ethics and morality are nothing new of course. In the Western context, in Greco-Roman times there were many philosophers such as Plato and Aristotle who considered these issues. This area of philosophy is beyond the scope of this paper; however it is interesting to note that in the ancient world ethics was more to do with the concept of human happiness and something distinct from morality.

One author explains it this way: 'All philosophical schools [in Antiquity] were concerned with the vital questions of how to live a good life and how to achieve happiness by pointing out what the appropriate actions were. [...] Modern morality is different in that its focus is on the basic question of how one should act.'⁹²

Nonetheless the same author concludes that ultimately it is not really possible to separate the two:

The upshot is, however, that the vital question of how to live a good life cannot be separated from the essential question of how one should act. Conceptually and phenomenologically, both questions are intimately interwoven and a complete ethical theory will always be concerned with both issues, independently of whether the theory is of ancient or modern origin.⁹³

⁹² Gordon, JS *Modern Morality and Ancient Ethics* Internet Encyclopedia of Philosophy available at <http://www.iep.utm.edu/anci-mod/>.

⁹³ Ibid.

Regardless of the terminology, mankind has and probably always will be interested in asking what is meant by ‘good’ behaviour that leads to the best outcome for themselves and society as a whole.

In the context of Islamic finance, should it be classified as ethical finance or religious finance? Under the Shari‘ah this distinction would not be recognised as this question is predicated on the assumption that you can have a secular form of ethics and one based on religious beliefs. From a Shari‘ah perspective everything that one does is predicated on Islam, so there is no possibility to bifurcate ethics into a religiously based set of ethical principles and a secular based set of ethical principles. The reality is that if you were to draw a circle representing ethical finance, a separate Islamic finance circle would overlap the ethical finance circle to a very great degree.

It is also interesting to note that the author has often heard proponents of Islamic finance argue that it is intrinsically more ethical than conventional finance. This position, however, is simplistic. There are many examples of conventional finance institutions that have adopted an ethical approach and of the wider conventional banking sector trying to promote ethical practices. Ethical finance⁹⁴ is attracting more attention amongst conventional financiers and investors.⁹⁵ An example of a conventional bank that has positioned itself in the ethical space is the Co-operative Bank. While it has had its problems, it has redefined the ethical basis on which it operates after taking into account its members’ input. While the bank operates on a loan with interest basis, many of its principles are ones that would easily fit within the goals of an IFI.⁹⁶

Organisations such as the Islamic Finance Council UK have held ethical finance roundtables and interfaith ethical finance roundtables which have highlighted that there are many common areas that are shared in the ethical finance space across the religions and also with certain sectors of conventional finance.⁹⁷

So, while Islamic finance products and services which are crafted to fulfil the *maqasid al-Shari‘ah* would rightly be seen as being ethical (and, for example, fitting within the sustainable, responsible and impact investment (SRI) space and the environment, social and governance (ESG) space), the claim on ethicality is not something that is inherently limited to Islamic finance. A more nuanced approach is needed.

C. Can Existing Initiatives in the Conventional Space Offer Some Solutions?

As there are areas of overlap between the conventional finance and Islamic finance spaces, are there existing conventional finance initiatives that fit, at least in part, with the ethics and goals (as outlined in the *maqasid al-Shari‘ah*) of the Islamic finance sector and, if so, can

⁹⁴ The term ‘ethical finance’ is used in this paper to cover a range of products and services that fall under the general rubric of ‘ethical finance.’ These include areas such as environment, social and governance issues, social impact investment, social impact bonds, green bonds, social investment and impact funds, etc but all of which have the common aim of being ethical in the broadest sense of the word and seek to have a positive impact on society. While seeking profits and driving innovation are still valid reasons for a business activity, there would be an additional factor of seeking to improve society.

⁹⁵ For example the European Fund and Asset Management Association (EFAMA) is planning to look more deeply into new categories of bonds (such as green bonds and social bonds) as well as impact investing: Wagner, J (2015) ‘The EU, sustainability and asset managers: ESG Magazine talks with Alexander Schindler, President, European Fund and Asset Management Association’ *ESG Magazine*: 24.

⁹⁶ The seven goals at the heart of its Ethical Policy are: acting with honesty and transparency; being a responsible bank that treats customers fairly; promoting human rights and equality; promoting economic and social development in Britain; protecting the environment; supporting international development; protecting animal welfare. Available at: <http://www.co-operativebank.co.uk/assets/html/bank/ebooks/ethical-policy/index.html>.

⁹⁷ The Islamic Finance Council UK is based in the UK and has hosted ethical finance roundtables in Edinburgh and London, including an Interfaith Ethical Finance Roundtable at the House of Lords on 24 September 2013 and initiatives with the Church of Scotland in 2016. Its web page is available at: <http://www.ukifc.com/services/ethical-finance/>.

they be used or adapted (including the creation of discrete Islamic finance platforms) to help move Islamic finance into a different direction?⁹⁸ While creating discrete Islamic finance platforms and initiatives should be considered there is also merit in the Islamic finance sector co-operating with its conventional counterparts to maximise leverage in generally promoting the ethical finance space.

Some examples include:

- UNEP Finance Initiative;
- Principles for Responsible Investment;
- Environmental Bankers Association;
- Equator Principles; and
- Climate Bonds Initiative.

1. United Nations Environment Programme – Finance Initiative (UNEPFI)⁹⁹

UNEPFI is a partnership between the United Nations Environment Programme and the global financial sector. It was created in the context of the 1992 Earth Summit and its mission is to promote sustainable finance. Its website states that there are over 200 financial institutions (banks, insurers and investors) that are working with UNEP.

Financial institutions which wish to become members must sign up to the UNEP Statement of Commitment by Financial Institutions on Sustainable Development. The website states that: ‘By signing up to the Statement, financial institutions openly recognize the role of the financial services sector in making our economy and lifestyles sustainable and commit to the integration of environmental and social considerations into all aspects of their operations.’

In terms of the Middle East, the Maghreb and Turkey, there is only one member in Morocco, one in Egypt and three in Turkey, none of which are IFIs. This is perhaps surprising when the aims of the UNEPFI are considered.

2. Principles for Responsible Investment

This initiative, which was set up with the support of the United Nations, focuses on responsible investment which is described as:

an approach to investing that aims to incorporate environmental, social and governance (ESG) factors into investment decisions, to better manage risk and generate sustainable, long-term returns.¹⁰⁰

⁹⁸ An example of a new initiative that includes Islamic finance is the Responsible Finance Institute. Its web page is available at: <http://www.rf-institute.org/>. Its vision is: ‘To integrate principles and solutions of the socially responsible banking, insurance and investment (‘responsible finance’) sectors, including the ethical and socially responsible principles of Islamic finance, into the global economic system to support equitable, inclusive and sustainable economic development.’ Its mission is: ‘To identify a neutral, nonpartisan and universal value proposition that encourages convergence of responsible finance practices. By highlighting the shared standards around principles that govern the sector, Islamic finance will further contribute to a more diverse and representative thinking around the growth, trajectory and development of responsible finance.’

⁹⁹ UNEP Finance Initiative - its web page is available at: <http://www.unepfi.org/>.

Much of what PRI is about easily fits within the construct of Islamic finance ethics.

3. *Environmental Bankers Association*¹⁰¹

This association was established in 1994. Its web page says it was formed: in response to heightened sensitivity to environmental risk issues, and the need for environmental risk management, sustainable development, and due diligence policies and procedures in financial institutions.

Its vision is to: ‘[e]nhance visibility and awareness of environmental risk management’s global role in promoting environmentally sound lending and fiduciary activities, sustainable development, and new concepts of social responsibility for the financial services industry.’

4. *Equator Principles*¹⁰²

The Equator Principles are aimed at large infrastructure and industrial projects which can have an adverse effect on people and the environment. The preamble to the Equator Principles includes the following:

We, the Equator Principles Financial Institutions (EPFIs), have adopted the Equator Principles in order to ensure that the Projects we finance and advise on are developed in a manner that is socially responsible and reflects sound environmental management practices. We recognise the importance of climate change, biodiversity, and human rights, and believe negative impacts on project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable they should be minimised, mitigated, and/or offset.

Elsewhere it states: ‘We will not provide Project Finance or Project-Related Corporate Loans to Projects where the client will not, or is unable to, comply with the Equator Principles.’

The organisation's website indicates that, in terms of the Middle East, the Maghreb and Turkey, there is only one member in Oman, one in the UAE, once in Bahrain, one in Egypt and one in Morocco. None of these is a stand-alone Islamic financial institution. These principles easily fit within the values and aims that should underpin Islamic finance.

5. *Climate Bonds Initiative*¹⁰³

This initiative is aimed at promoting climate and green bonds. Its website states:

Green bonds were created to fund projects that have positive environmental and/or climate benefits. The majority of the green bonds issued are green ‘use of proceeds’ or asset-linked bonds. Proceeds from these bonds are earmarked for green projects but

¹⁰⁰ ‘What is responsible investment?’ available at: <https://www.unpri.org/about/what-is-responsible-investment>.

¹⁰¹ Details of the objectives and activities of the Environmental Bankers Association are available at: <http://www.envirobank.org/?MissionPurpose>.

¹⁰² Equator Principles III, Equator Principles, 2013 available at: http://www.equator-principles.com/resources/equator_principles_III.pdf.

¹⁰³ More details about the Climate Bonds Initiative are available at: <https://www.climatebonds.net/>.

are backed by the issuer's entire balance sheet. There have also been green 'use of proceeds' revenue bonds, green project bonds and green securitized bonds.

The Climate Bonds Standard is described as follows: 'it is a screening tool for investors and governments which allows them to easily prioritize climate and green bonds with confidence that the funds are being used to deliver climate change solutions.'

There are various standards which are currently available. These include solar, wind, low carbon buildings and low carbon transport.

6. *UN Sustainable Development Goals and the Dubai Initiative*

In 2015 the United Nations issued seventeen Sustainable Development Goals which are aimed at ending poverty, protecting the planet and ensuring prosperity for all. These goals fit into the Islamic finance narrative and, in particular, its aim of promoting social justice. In November 2016 the Dubai Declaration of financial institutions in the United Arab Emirates on sustainable finance was issued (Dubai Declaration). The preamble refers to the UAE government's commitment to the Paris Climate Agreement and also to the Sustainable Development Goals. The Dubai Declaration recognises the important role that the finance sector can play in enabling a climate-resilient, inclusive green economy and sustainable development. The financial institutions which adhere to the Dubai Declaration agree to take certain steps within their organisations and the way in which they conduct their activities to achieve the goals described in the Dubai Declaration.

This type of initiative clearly offers scope for IFIs to be involved although, according to a recent press report, only one of the nine signatories to the Dubai Declaration is a fully fledged IFI (although some of the others have Islamic finance 'windows').¹⁰⁴

D. A More Proactive Monitoring Process

At the start of a financing, part of the Shari'ah review is whether the activity that is being financed falls within one of the prohibited categories – such as alcohol, gambling, pork etc. Has this turned into a box ticking exercise? Perhaps there should be a more rigorous investigation about the customer. Even if the financed activity is *halal* does the customer meet various criteria that show it is a good citizen and socially responsible? For example, if the customer has been routinely fined for environmental pollution, should the finance be made available even if the financed activity is *halal*? Is this a 'wholesome' activity and a customer who should be financed?

If the initial analysis of the activity and the customer is acceptable, should that be the end of the story? To bolster the position that Islamic finance is rooted in the *maqasid al-Shari'ah*, the concept of *khalifah* and socioeconomic responsibility, there is a strong argument that during the financing both the customer and the financed activity should be re-validated. If that process leads the IFI to conclude that the customer or the financed activity is no longer *halal*, the IFI should have the right to call in the finance, although it will be very important that the monitoring process is transparent and fair to give comfort to the customer that this right will not be used arbitrarily.

The concept of a breach of 'socially responsible' covenants is not without precedent. The Equator Principles have a section which provides that the customer will covenant to comply with: 'all relevant host country environmental and social laws, regulations and

¹⁰⁴ Anon (2017) 'Dubai Declaration on sustainable finance welcomes first and only fully-fledged Islamic financial institution' (14) *Islamic Finance news* 22 February 2017.

permits in all material aspects.’ In addition the customer must also comply with the various applicable Equator Principles ‘during the construction and operation of the Project.’

If the customer breaches these covenants then attempts will be made to work with the customer to resolve the matter (including granting a grace period) failing which the financier: ‘reserves the right to exercise remedies, as considered appropriate.’¹⁰⁵

So, while there may be resistance to these types of socially responsible covenants, there is a precedent for them in the conventional finance space. This is an area IFIs should consider implementing. This is especially true with the existing ‘debt-based’ products where some of the existing criticism may be deflected to a degree if an IFI could show that it had an on-going policy of reviewing financings and investments (as well as its customers) to make sure the IFI was actively promoting the *maqasid al-Shari‘ah* and that the IFI was centrally placed in the ethical finance space.

E. A Unified Approach

The introduction of new policies and requirements in relation, in particular, to existing debt-based products may meet customer resistance. If an IFI were to begin this process alone it would carry the risk that some part of its customer base might desert it. That is why it is important, for both individual IFIs and the sector as a whole, that IFIs (or, at least initially, the major players) band together and agree new principles and policies that (perhaps on a staged basis) will be implemented by them.

This collaborative approach would also give the Islamic finance sector a greater voice in the ethical finance movement. One author has put it this way:

An ethics-based approach would also enable Islamic finance to take its rightful place in, contribute more meaningfully with, and cooperate with, the rest of the ethical finance movement. [...] Coordinated activity in a more cohesive ethical finance movement could give Islamic finance much more of a moral conscience role in world finance [...].¹⁰⁶

Criticism should be expected, but it should not be underestimated how many corporate customers want to be seen as good citizens and how many individuals are not adverse to socially responsible finance and investments. Open up any annual report of a major company nowadays and there will usually be a section detailing its engagement with ESG or corporate social responsibility principles.

F. What New Areas Could Islamic Finance Investigate?

While it is likely that debt-based products will continue to be popular for the foreseeable future, there are other areas which would seem to fall naturally within the ethical make-up of Islamic finance.

1. Social Impact Finance

Social impact financing offers opportunities. At its core is the idea that financing can be made available to promote social aims but with the return not necessarily being tied to a

¹⁰⁵ Equator Principles III supra n 102. See the section entitled ‘Principle 8: Covenants.’

¹⁰⁶ Foster, NHD (2016) ‘The Financial Sharia as Law and as Ethics: A Suggestion’ *SOAS Law of Islamic Finance Working Papers Series No 10*, available at: <https://www.soas.ac.uk/cimel/workingpapers>.

conventional interest benchmark. Usually this type of financing involves a contract with a governmental agency in which it outsources work that it previously performed. In return there will be a performance benchmark. If that benchmark is reached the agency will pay an amount to the service provider. However, if the performance benchmark is not met, then the service provider will not be paid anything (or will be paid a very reduced amount). Assessment of the performance is made by an independent third party.

The service provider that takes on this outsourced activity will often raise funds from investors through instruments called ‘social impact bonds.’ While this is still a niche market it is one that has attracted interest in both the US¹⁰⁷ and the UK.

The UK’s Cabinet Office has issued a ‘Guidance on the template contract for social impact bonds and payment by results’ which states:

A social impact bond (‘SIB’) is a funding mechanism which enables:

- A public authority to commission innovative services that attempt new approaches to delivering desirable social outcomes and to share the risk of exploring those new approaches.
- Service providers to benefit from increased flexibility in delivering agreed outcomes. It will not bear the cashflow impact of payment being deferred until the outcomes are known, but may (potentially) take a share of the risk and/or reward in respect of whether the services it provides deliver the desired outcomes. It is anticipated that the service provider will be a voluntary, community or social enterprise organisation with the technical skills, but not the capital reserves, to deliver a contract on a wholly, or largely, payments for outcomes basis.
- Investors to finance activity designed to achieve significant social outcomes by providing working capital to voluntary, community and social enterprise providers to deliver services. Investors assume a large part of the risk that the interventions they fund will be successful. If interventions succeed, the investors will, in addition to enabling these outcomes, receive a financial return on their investment.

Malaysia has also introduced the concept of ‘sustainable and responsible investment Sukuk.’¹⁰⁸ It has described various requirements for the issuance to retail investors of this type of *sukuk* including setting out acceptable projects (such as preserving and protecting the environment and natural resources, conserving the use of energy, promoting the use of renewable energy, reducing greenhouse gas emission and improving the quality of life for the society).

The blending of the traditional ‘debt-based’ *sukuk* structures with social impact investing could give rise to some interesting possibilities. As the underlying principle behind a social impact bond is that payment is linked to a social good benchmark, *sukuk* could be

¹⁰⁷ A useful summary of the use of social impact bonds in the US has been prepared by the Center for American Progress. It is available at: <https://www.americanprogress.org/issues/economy/reports/2014/02/12/84003/fact-sheet-social-impact-bonds-in-the-united-states/>.

¹⁰⁸ Guidelines on Issuance of Private Debt Securities and Sukuk to Retail Investors (SC-GL/5-2015), Securities Commission Malaysia, June 2015: https://www.sc.com.my/wp-content/uploads/eng/html/resources/guidelines/bondmkt/guidelines_retailsPDS_sukuk_150615.pdf.

structured so that investor returns are payable solely by reference to such a benchmark (rather than a conventional interest rate benchmark) or, if there is still a conventional rate benchmark, to have the profit return and/or payment of the original investment reduced if the social good benchmark is reached. This approach is closely tied to achieving a direct social good which should be of interest to the Islamic finance sector. Clearly this would not be attractive to the usual fixed income *sukuk* investor but there are other investors interested in the ESG space that could be targeted.

2. *Green Sukuk*

Green bonds were created to fund projects that have positive environmental and/or climate benefits. The majority of green bonds that are issued are green ‘use of proceeds’ or asset-linked bonds. Proceeds from these bonds are earmarked for green projects but are backed by the issuer’s entire balance sheet. There have also been green ‘use of proceeds’ bonds, ‘use of proceeds’ revenue bonds, green project bonds and green securitized bonds.¹⁰⁹

There are clear parallels between the goals underpinning conventional green bonds and the *maqasid al-Shari‘ah* which could be adapted to form the basis of green *sukuk*. Financing projects that have a positive environmental or climate benefit clearly fits with the *maqasid al-Shari‘ah*. There are already initiatives to explore how this conventional banking tool can be used to offer green *sukuk*.¹¹⁰

There are still issues relating to green bonds that are a work-in-progress, such as how a project will be classified as being ‘green.’ Another issue is whether green bonds are ‘about what you do rather than who you are.’¹¹¹ In other words, should the focus just be on the project or should it also consider the green track record of the promoter or owner? These concerns are just as relevant for green *sukuk*.

The certification of a green bond or a climate bond requires a verification procedure which is robust enough to create confidence in the market-place. With green *sukuk* there would be an additional verification process involving the Shari‘ah scholars. Shari‘ah scholars do not have the expertise to decide whether *sukuk* meet the complex technical requirements for them to be classified as green and so systems would need to be established so that they could rely on a verification process undertaken by qualified ‘green’ experts.

As the number of global investors that have a mandate to invest in socially responsible bonds grows, green bonds and green *sukuk* will be an attractive proposition and is an area where significant growth is likely.¹¹² Nonetheless there are challenges in trying to develop a green *sukuk* market and it is apparent that at present, for a variety of reasons, the market has not taken off.¹¹³

A final consideration is if green *sukuk* are just structured as debt-based instruments using a conventional interest rate benchmark, will this be a missed opportunity to expand the Islamic finance product base so it is more aligned with the *maqasid al-Shari‘ah*?

¹⁰⁹ See <https://www.climatebonds.net/market/explaining-green-bonds>.

¹¹⁰ Anon (2015) ‘The grass is always greener? Environmental Sukuk take the stage’ (12) *Islamic Finance news* 18 March 2015.

¹¹¹ Hyatt, U (2015) ‘Green Bonds: What’s Right, What’s Wrong’ CFA Institute.

¹¹² See Climate Bonds Initiative website: ‘Investors with \$45trn of assets under management have made public commitments to climate and responsible investment - green bonds can help them achieve their pledges in fixed income.’

¹¹³ See Anon (2016) ‘Green Sukuk: Still on the Starting Blocks?’ (13) *Islamic Finance news* 3 August 2016, which describes some of the challenges some of which relate to wider issues than those specifically related to Islamic finance – such as government buy-in to environmentally friendly policies, the education of investors and the nuances involved in the *sukuk* market.

3. Musharaka and Mudaraba Financing

While the popularity of *musharaka* and *mudaraba* (at least in the international markets) has diminished since the 2008 AAOIFI Statement (which reiterated the principle that it is not possible to pre-agree a future purchase price for a *musharaka* or *mudaraba* interest), the development of these models should be encouraged because they are based on equity rather than debt.

Developing these structures would be predicated on them not using an incentive fee payable to the *mudarib* or managing partner (being the customer) solely for the purpose of reducing the investor's return to an amount the investor would have received in interest under a conventional financing. The return to the investor or Islamic financier would depend on the success or failure of the investment.

There are challenges for investors or IFIs with these financings. IFIs are geared up to be banks and so these types of equity investments often do not sit comfortably within their existing structures, their cost of financing models and, in many cases, the laws and regulations under which (as banks) they must work (and which often give more favourable treatment to debt rather than equity). It may be that these activities would have to be performed through a corporate entity which was not a bank. Different personnel would probably be needed whose background and experience would enable the entity to actively engage with and monitor its investment.

However, there is a real imperative to consider and encourage these equity-based solutions if the message is to be reinforced that Islamic finance is different from many conventional banks.

4. Peer-to-Peer Financing

The growth in new forms of financing, such as peer-to-peer financing, is offering new opportunities and challenges to the entire banking sector, whether that is conventional or Islamic finance.

These new forms of alternative financing are growing quickly and are attracting institutional investors. This new type of financing offers a wide spectrum for innovation including business models and the use of new technological solutions.¹¹⁴

This form of innovative finance is seen as addressing the need to make finance available to companies and individuals who are perhaps excluded from the traditional banking sector; with corporates this will often be SMEs which, since the recent financial crisis, are no longer seen by many banks as attractive propositions. This form of finance also involves a real sharing of investment risk which many would argue should be an inherent component of Islamic finance.¹¹⁵ Nonetheless, the risks with these new products need to be carefully investigated because, while risk sharing should be encouraged, those risks need to be quantifiable.

¹¹⁴ Wardrop, R; Zhang, B; Rau, R; and Gray, M (2015) 'Moving Mainstream – The European Alternative Finance Benchmarking Report' Cambridge University, EY. This describes the growth of and the challenges facing the alternative finance sector in Europe.

¹¹⁵ See the report on crowdfunding that appeared in *Islamic Finance news* on 10 June 2015 (Volume 12, Issue 23).

5. Other Possibilities

While Islamic microfinance has existed for a long time, there is room for this area to be expanded. There is often a high cost associated with the provision of this type of finance because the overheads associated with monitoring the finance and collecting payments can be high; the customers may often be spread over wide areas and it is important to monitor that the funds are being used for the intended productive purpose rather than being used to buy consumables.

This type of finance fits squarely within the *maqasid al-Shari'ah* as it relates to improving the social and economic welfare of the disadvantaged and IFIs should be considering how they can expand their activities in this area.¹¹⁶ To date, however, this is an area that has not been fully explored by the Islamic finance sector.¹¹⁷

Waqf organisations (religious, educational or charitable organisations set up through endowments) face hurdles in using their assets to generate sustainable income so they can fulfil the objects for which they were formed. There are challenges even for conventional charities raising finance and there are often special challenges for *waqf* organisations depending on the jurisdiction in which they are formed or operate. There would seem to be opportunities to craft creative finance solutions for *waqf* organisations. There is an obvious interplay with *zakat* and there are possibly solutions using models based on *sukuk* and also *qard hasan* [loan without interest]. This is still an area where the intellectual capital of the Islamic finance sector has not been fully deployed and, bearing in mind the social goals behind *waqf* organisations, is a natural fit within the Islamic finance space.¹¹⁸

For example, investment funds which aim to provide microfinance or to fund *waqf* organisations could be structured so that investors could contribute all or part of their *zakat* (with an instruction or an option to forego all or part of the profit generated by the investment). Where investors' funds were not *zakat* sourced, the fund could be structured so investors had the right to forego all or part of their original investment and/or profit or, as with social impact bonds, the return could be reduced if certain social good benchmarks were met.

VII. HOW A CHANGE IN FOCUS WILL AFFECT AN IFI'S ORGANISATIONAL STRUCTURE

An IFI that decides to shift all or part of its focus away from debt-based Islamic finance products will face various challenges. Indeed many of these challenges will also be faced by a conventional financier that decides to reposition itself in the ethical finance space.

It is likely that considerable effort will be required as there will be many obstacles (both external and internal). External obstacles include, for example, laws, regulations, taxes and cost of fund issues. However, there will also be significant internal obstacles. Many IFIs have been organised as banks and now have a set of products (mainly *ijara* and *murabaha*) that are tried and tested. So the default position for most IFIs (from the top downwards) will

¹¹⁶ Asutay 'Conceptualising and Locating the Social Failure' supra n 4, pp 98-99, in which he says that: 'ethicality in this value proposition [Islamic moral economy] in the original sense is not only the prohibition of *riba* (interest) but relates to the larger social and economic development issues.'

¹¹⁷ See Hanif, A; and Richardson, E (2013) 'Shari'a-compliant Microfinance' in Basu, R; and Boyle, C (eds) (2013) *Microfinance – A Practitioner's Handbook* Globe Law and Business 63-85. That chapter includes the following (at p 65): 'Nevertheless, CGAP [Consultative Group to Assist the Poorest] has itself stated that "Islamic microfinance has the potential to expand access to finance to unprecedented levels throughout the Muslim world".'

¹¹⁸ Anon (2015) 'Financing the *waqf* sector' (12) *Islamic Finance news*.

be to continue using these products to maintain market share and to meet budgets (whether at an organisational, departmental or personal level).

A. Why Is It Difficult to Change?

It should not be underestimated how difficult it is to change organisations and, in particular, their culture. One change management commentator has put it this way:

[changing] an organisation's culture is one of the most difficult leadership challenges. That's because an organization's culture comprises an interlocking set of goals, processes, values, communications practices, attitudes and assumptions. The elements fit together as a mutually reinforcing system and combine to prevent any attempt to change it.¹¹⁹

A change programme will create uncertainties and after an initial period of excitement it is likely that employees will start to think of a multitude of reasons why the changes should not be implemented. As two commentators put it: 'This is to be expected. For people to change their ways of thinking and working, it is necessary to let go of their old metrics, benchmarks and certainties, before fastening on the new ones.'¹²⁰

The typical reaction to a strategy for change has also been labelled as 'consent and evade.'¹²¹

B. The Impact of Consumers in Shaping an Organisation

In considering what an organisation should look like a starting point is to consider what customers want and how the organisation can best deliver this. Up until the 1950's a sales philosophy prevailed where companies produced something they thought the customer wanted and then tried to sell it to them, often using advertising and hard sell techniques. In the 1960s there was a sea change that saw the introduction of a marketing philosophy which started in the US and then gravitated to the UK.¹²² This philosophy meant a company had to actively find out what the customer wanted (usually through market research) and then developed products or provided services to meet that demand. Arguably companies subsequently reasserted a degree of control through the growth of more sophisticated advertising techniques which helped mould customers' perceptions about what they wanted. However, there is now a view that the balance of power is shifting back to the consumer due to the growth of the internet and social media. Now the collective voice of consumers has the power to influence how companies react to the marketplace.¹²³

But what is the dynamic behind Islamic finance? Many corporates and capital market investors do not have any faith-driven desire for products to be Shari'ah compliant. A *sukuk* investor will often regard *sukuk* as just another asset class which diversifies its asset portfolio.

¹¹⁹ Denning, S (2011) 'How Do You Change an Organizational Culture?' *Forbes*.

¹²⁰ Macleod, D and Brady, C (2008) *The Extra Mile: How to Engage Your People to Win* Financial Times Prentice Hall, p 140.

¹²¹ *Ibid*, pp 114-116.

¹²² The author majored in Marketing as part of his Business Studies Degree from Bradford University (1971-1974) and recalls the interest at that time in what was seen to be a new way of doing business.

¹²³ Hagel, JI; Brown, JS; and Davison, L (2010) *The Power of Pull - How Small Moves, Smartly Made, Can Set Big Things in Motion* Basic Books, p 46: 'Digital technologies are also increasing the power that all of us have as customers. We can now access a much broader range of vendors and obtain much more detailed information about the quality of their goods and services. As customers gain power, they capture greater freedom from vendors, who now must deliver even more value to customers or face losing them to even more aggressive competitors.'

However, a retail consumer or retail investor is much more likely to be concerned about Shari‘ah compliance.

If one applies a marketing approach to Islamic finance then, to the extent that a customer or investor is really exercised by the need for Shari‘ah compliance, many will find it difficult to articulate what they want (in terms of Shari‘ah compliance) beyond not wanting to pay interest and not wanting to be involved in the usual list of *haram* activities. Many will only be able to articulate that they want the IFI and its products and services to be ethical in the broadest sense.

C. The Additional Layer of Shari‘ah Input

The involvement of Shari‘ah scholars creates an additional layer of complexity when compared with conventional finance products and services. For many customers and investors their decision about whether or not something is Shari‘ah compliant depends on whether there is a satisfactory *fatwa* [Shari‘ah pronouncement or opinion] from one or more Shari‘ah scholars whose views they respect. However, with the growth of the internet and social media it is likely that the current form over substance debate will lead to more questions about the technical way in which many products have been structured so that the mere existence of a fatwa may not be enough.

The reality is that most customers and investors do not have the detailed knowledge of the Shari‘ah (as it is applied to financial products and services) which makes it difficult for them to raise effective counter-arguments with the Shari‘ah scholars.

D. The Impact of Social Media

The importance of the internet and social media should not be underestimated when it comes to the expansion of the dialogue about what the Shari‘ah means and also, more specifically, what it means within the Islamic finance space.¹²⁴ There is the distinct possibility that in this digital space voices will be heard attacking the current Islamic finance structures where the Shari‘ah arguments supporting these adverse positions are not coherent or correct, but will still be believed. The Islamic finance sector, therefore, needs to be aware of this new reality and consider how to move Islamic finance forward to defend itself against such criticisms. In this sense, the power of digital communications is also likely to affect the way in which the Islamic finance sector has to respond to the demands of its consumer base. IFIs will be no different from other commercial enterprises which, if many current change management

¹²⁴ Kadri, S (2011) *Heaven on Earth – A Journey through Shari‘a Law* The Bodley Head, p 262 which contains interesting general commentary about how, in the past, the pace of change in legal interpretation (of the Shari‘ah) has invariably been gradual. However, Kadri makes the point that technology now means local interpretations of the Shari‘ah have gone global and:

countless thousands of Muslims are daily cutting, pasting and instant-messaging centuries of legal scholarship across the blogs and social networks of cyberspace. The workings of online *ijtihad* are utterly uncontrollable. Its practitioners vary in experience and intelligence as much as they differ by age and sex [...] many must be thinking more deeply about how twenty first century humanity stands in relation to God – and in ways yet unknowable, the Islamic community’s structure is being transformed.

These general comments can also be seen to be relevant about the way in which the public is looking at and discussing whether Islamic finance products are Shari‘ah compliant. The power of social media as part of this discourse should not be underestimated.

commentators are correct, means they will have to accept that the consumer has regained a degree of control over corporate providers.¹²⁵

E. Top-down Approach or Not?

There are many organisational change commentators who stress that a top-down approach to organisational change will usually not work. Rather it is important to interact with the various stakeholders to understand properly how an organisation must change to meet the on-going challenges in the business environment. Unlike a conventional bank, an IFI has the additional challenge of articulating what the *maqasid al-Shari'ah* mean and how their meaning should be translated into both the products and services it offers and the way it should be organised.

Using something other than a top-down approach means there should be an open and on-going debate which must include the Shari'ah scholars. That debate should include the 'form over substance' approach that has been prevalent so far. There are some who doubt whether the Shari'ah scholars would be willing to engage in such a debate in a positive manner but this is far from certain and there is indeed the possibility that some of them would welcome this.¹²⁶

F. The Crucial Role of Employees in the Success of a New Strategy

When an IFI formulates a change strategy it will need to engage with its customers, shareholders and other outside stakeholders but a successful implementation will ultimately depend on the employees. It will be important to get them aligned with the strategy which means getting them to understand what their job is and why it is important.¹²⁷ Then it is critical to get them engaged which means getting them to want to do what is expected of them to achieve the new strategy.¹²⁸ There are many factors that impact on whether employees will be engaged with a change of strategy, one of which is whether the company has high ethical standards.¹²⁹

Interestingly some commentators argue that, before considering a strategy, it is essential that the company go back and refocus on the core purpose for which it was formed.¹³⁰ So, in the context of an IFI, this re-focusing exercise naturally will gravitate to what the *maqasid al-Shari'ah* mean, what is the basis of their purpose, and what is their *raison d'être*. Indeed there is a strong argument that to get employees fully engaged (and thereby increase the chances of a strategy succeeding) there has to be a purpose beyond just the mere generation of ever higher profits. As two commentators put it: 'People must feel that a consequence for their efforts is manifested in something worthwhile.'¹³¹

In many cases people have elected to work in an IFI precisely because they feel engaged by Islamic finance and the *maqasid al-Shari'ah*. So creating a strategy that more

¹²⁵ Denning, S (2015) 'How to Make the Whole Organization Agile' *Forbes*. Denning has called his change management philosophy 'Agile' and in his article he says, in part, that with Agile: 'the role of the manager is to enable those doing the work to contribute their full talents and capabilities to generate value for customers and eliminate any impediments that may be getting in the way. [...] Agile is neither top-down nor bottom-up: it is outside-in. The focus is on delivering value to customers. The customer is the boss, not the manager.'

¹²⁶ Irfan, H (2015) *Heaven's Bankers* Constable, p 280, in which he refers to many Shari'ah scholars venting their concerns and their frustration about being prevented from changing things due to the constraints placed on them by the CEOs and boards of directors of IFIs.

¹²⁷ Macleod and Brady 'The Extra Mile' supra n 120, pp 20-23.

¹²⁸ Ibid, pp 23-25.

¹²⁹ Ibid, p 33 where there is a reference to a report which found that an important factor in encouraging employee engagement is whether the company has high ethical standards.

¹³⁰ Macleod and Brady 'The Extra Mile' supra n 120, pp 117-119.

¹³¹ Ibid, p 245.

closely aligns an IFI with the ethical finance space will probably mean there will be less resistance from employees to aligning themselves with the new strategy and then, subsequently, to be engaged in making sure there is a successful outcome.

This quest for being involved in something worthwhile also ties in with the increasingly common view that business leaders must re-establish trust (with all stakeholders and not just with employees) and also make sure that an organisation contributes to societal needs and public priorities.¹³² An IFI which clearly articulates that its activities are aligned with the *maqasid al-Shari'ah* will be able to craft a narrative that it is an organisation that can be trusted and is one that is committed to social good and justice. In doing so it will be able to position itself as being in the forefront of this new trend and to more successfully achieve the alignment and engagement of its employees, which is of critical importance.

VIII. CONCLUSION

This paper has been written based on my experience over the last 25 years and, where it might be perceived as being critical, the criticism is intended to be constructive.

It is recognised that some IFIs are taking steps to promote ethical behaviour (both internally and externally) but there is a need for Islamic finance to craft a more distinctive 'brand' to facilitate the understanding, promotion and, ultimately, the development of Islamic finance so it can reach its full potential.

As suggested earlier, there should be further discussion, analysis and research into the *maqasid al-Shari'ah* as it relates to Islamic finance so that perhaps new Islamic finance products and services can be created that achieve the *maqasid al-Shari'ah* but in a way that reflects the underlying financing nature of what is being offered and also avoids overly structured and complex structures and documents. Ultimately the focus should not just be on the form of the documentation (which provides justification that the financing is not the same as a loan with interest) but whether the financing is oppressive, exploitive or unfair to the customer (or indeed the IFI) taking into account all of the factors surrounding that transaction.

How Islamic finance can clearly and positively position itself in the ethical finance space should be explored as a way of providing a distinctive narrative about how Islamic finance is different from many forms of finance. Islamic finance has made great strides over the last 20 years and the possibilities available to the sector in the ethical finance space which are aligned with the *maqasid al-Shari'ah* offer the chance for Islamic finance to develop in new and exciting ways.

¹³² Kell, G (2016) 'Low Trust-High Demand for Ethical Leadership' Huffingtonpost.

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