



## Centre of Islamic and Middle Eastern Law (CIMEL)

### SOAS Law of Islamic Finance Working Papers Series

|                    |  |
|--------------------|--|
| <b>Title</b>       | Islamic Financial Intermediation: Revisiting the Value Proposition - the Role of Law |
| <b>Author/s</b>    | Nicholas HD Foster <sup>1</sup>  |
| <b>Affiliation</b> | SOAS, University of London   |

#### ABSTRACT

The value proposition: comply with the sharia and fulfil the financial needs of society in an ethical way. The issue: some people feel that it does neither.

What is the role of law in the value proposition? Here are a few thoughts.

|                      |              |
|----------------------|--------------|
| <b>Paper No</b>      | 4            |
| <b>Date Accepted</b> | 22 July 2013 |

---

<sup>1</sup> The rights of Nicholas Foster to be identified as the author of this work have been asserted in accordance with s 77 and s 78 of the Copyright, Designs and Patents Act 1988. This paper is a slightly modified version of the paper submitted to the Harvard/LSE Workshop 2012. This paper is intended as a basis for discussion. Its brevity, its lack of references and the absence of qualifications to simplistic statements are deliberate.

## Table of Contents

|      |   |   |
|------|---|---|
| I.   | TWO DISTINCTIONS                                | 3 |
| II.  | EXPECTING TOO MUCH OF LAW                       | 3 |
|      | <b>A. Society, Its Normative Orders and Law</b> | 3 |
|      | <b>B. The Maqasid Suggestion</b>                | 4 |
| III. | NOT USING LAW ENOUGH                            | 4 |
| IV   | CONCLUSION                                      | 4 |

## I. TWO DISTINCTIONS

Consider two distinctions: *law - legal system* and *law – sharia-fiqh*. ‘Law’ is a body of rules. ‘Legal system’ is the law plus infrastructure – eg institutions which make, apply and teach the law. In Islamic Finance, a distinction is made between *law* and *sharia/fiqh*. Law is Western-style law; *sharia/fiqh* is not generally called law.

When one discusses ‘the law’, one can make the mistake of forgetting or underestimating the infrastructure, leading to a danger of assuming that the law is somehow free-standing and self-generating. This can happen in Islamic Finance, because, although justifiable, the distinction between law and *sharia/fiqh* can hide the fact that financial *fiqh* is law.

## II. EXPECTING TOO MUCH OF LAW

### A. Society, Its Normative Orders and Law

A society contains bodies of rules of various types, such as morality, business ethics and law. Call these ‘normative orders’. They have the capacity to generate, amend and enforce norms within their remit. If a call were made that an area of activity should comply with a certain set of norms (a call for moral reform, in other words), the way to achieve would be to use a wide range of mechanisms to transform a range of normative orders which would, having been transformed, enforce the new set of norms.

The call for Islamic Finance to meet the requirements of the value proposition is such a call, but *Islamic Finance is not a society, it is an industry*. Some social-type processes go on within the people involved in the industry, but they do not make it a society. The processes are not societal and, notably, it does not have normal societal normative orders.

What it does have is the *sharia* and its legal expression, the classical *fiqh*, on the basis of which everything else has been developed: financial *fiqh*, mechanisms created as substitutes for normal societal mechanisms (AAOIFI, IFSB, national sharia bodies), etc.

However, the sharia contains, as regards finance, only general principles. The body of rules in which those principles have been actualised, the financial *fiqh*, is, despite religion being built into it, still law. In the right environment, law can reflect and help maintain religion and morality, and so contribute to the desired general environment. It cannot do any of this alone. Other normative orders and societal mechanisms are necessary. In other words, law by itself cannot provide an entire moral foundation even if, as with the case of the financial *fiqh*, it is deeply informed by morality.

The problem is exacerbated in Islamic Finance because not only is financial *fiqh* not formulated in a society, the legal system of the classical *fiqh* no longer exists. Some elements of a new system can be identified, but it is far from fully-fledged.

Furthermore, law will necessarily be subject to other forces which will mould it to some extent. As an example, take the form over substance issue. Law cannot deliver pure A if the predominant forces in its environment push towards B. So if a desire to produce *halal* transactions meets pressure to conform with conventional products, bankers' wish to protect themselves from risk, and the lawyers' duty to protect their clients, then the results will reflect the balancing of those forces.

## **B. The *Maqasid* Suggestion**

It follows that the suggestion that Islamic Finance should be re-founded on the *maqasid* is not yet practicable. One might use general principles such as the *maqasid* to develop a normative order which can deal with concrete cases, but general principles cannot do so by themselves. Furthermore, outside a society and its mechanisms for producing such a normative order, it is difficult to produce such an order at all, and impossible to produce one that is fully legitimate, ie accepted by society at large, because it has not formed inside that society.

Even if one does manage to develop such an order, it will inevitably resemble a legal system, its rules will be law-like. They will therefore be malleable and, so long as it has to function in an environment dominated by forces pushing in a different direction, the same problem will recur. One comes back to where one started from. All that will have been done will be to replace the present financial *fiqh* with something which produces the same result.

## **III. NOT USING LAW ENOUGH**

In some areas, the pressing issue is not so much that there is too great a reliance on law, or something close to it such as codes of conduct, but that it is not used enough. For an industry which prides itself on its value proposition, the unsophisticated state of consumer protection, stakeholder involvement and governance is surprising.

As work proceeds on improving the situation, and more law and law-like norms are used, the considerations outlined above will also come into play in these areas, creating similar issues to those sketched above.

## **IV. CONCLUSION**

It need hardly be said that fulfilling the requirements of the value proposition is far from easy. However, a better awareness of the nature of the difficulties concerning the usual way in which such a set of norms would be implemented in a society, the differences between that situation and that confronting us in Islamic Finance, and the nature of what is available, could well be helpful.