

# SHARIAH-COMPLIANT TO SHARIAH-BASED FINANCIAL INNOVATION: A QUESTION OF SEMANTICS OR PROGRESSIVE MARKET DIFFERENTIATION\*

By

Associate Professor Dr. Engku Rabiah Adawiah Engku Ali<sup>©</sup>

## 1. REVISITING THE ISLAMIC FINANCIAL SYSTEM

### 1.1 Islamic Financial System. What is it?

What is the Islamic financial system? In a layman's term, it can be explained as a financial system that conforms to the Islamic principles, rules and injunctions which are conveniently referred to as the "Shariah". Thus, in short, we can say that Islamic financial system is a financial system that complies with the Shariah.

### 1.2 What is the Underlying Ethos?

What is the underlying ethos of the Islamic financial system? The root of the root ethos is of course the belief in the One God, "*tawhid*" of Allah s.w.t. Emanating from this concept of *tawhid* is the belief that Allah is the Creator, and that He creates the whole universe; the heavens and the earth, including mankind. Following this, comes the belief system that perceives mankind as creatures and servants of Allah who have two main roles in their life on this earth, i.e.:

- to serve Allah, obey and worship Him (the concept of *'ubudiyyah*); and
- to be His vice-gerent (*khalifah*) in managing the universe and its resources.

In the light of the two roles above and in the specific context of wealth and finance, man is regarded as Allah's vice-gerent who has been entrusted to use and manage the wealth and resources in this universe responsibly, in accordance with the rules and

---

\* Paper prepared for the 4th SC-OCIS Roundtable, 9 -10 March 2013, Ditchley Park, Oxford, United Kingdom. This paper is still as draft and not final. It should not be quoted except with the expressed permission of the author.

<sup>©</sup> A member of Shariah Advisory Council of the Securities Commission Malaysia and an Associate Professor at International Islamic University Malaysia.

injunctions of Allah that he must obey. The rules and injunctions of Allah are the Shariah; which are prescribed, not to punish or cause hardship to mankind, but to facilitate what is good and prevent what is harmful to them. The belief in the One God whose most dominant attribute is mercy (*rahmah*) necessitates the belief that Allah prescribes the Shariah for mankind as a guide and mercy (*hudan wa rahmah*) and not as a burden or unnecessary shackle. As Muslims, we believe that obedience and compliance to the Shariah is convenient and good, and is the true path to real salvation and felicity (*al-falah*) in the life of this world, as well as in the hereafter. I am always inspired by a statement by Abu Ishaq Al-Shatiby that I think is relevant to reinforce this belief and conviction:

"فإن الله وضع هذه الشريعة المباركة حنيفة سمة سهلة حفظ فيها على الخلق قلوبهم وحبها لهم  
بذلك فلو عملوا على خلاف السماح والسهولة لدخل عليهم فيما كلفوا به ما لا تخلص به  
أعمالهم"<sup>1</sup>

“Surely Allah made this blessed righteous Shariah accommodating and convenient and thus won the hearts of the people and instill in them love (and respect for the law). Had they acted against convenience and facility, they could not have honestly performed their obligations”.

In essence, the ethos underlying the Shariah principles in commerce and finance “reforms” the way people perceive wealth, its creation, management and distribution. Since Allah s.w.t. creates the entire universe, to Him belong all things. This ethos inculcates the concept of wealth as a trust and *amanah* from God that necessitates the accountability factor on man who are entrusted to use and manage the resources based on prescribed norms, rules and principles.

### 1.3 What Are The Core Principles?

In brief, the core principles laid down by the Shariah in regard to wealth, commerce and finance are:

- all wealth and resources originally belongs to God and man is entrusted to use and manage them responsibly – the concept of wealth as a trust and *amanah* from God

---

<sup>1</sup> الشاطبي، الموافقات في أصول الشريعة، ج 2، ص 136، دار العصرية (2000)، بيروت.

- wealth and resources must be protected against loss, wastage and extravagant use
- private individual rights to wealth and resources are recognized and protected under the Shariah, except for certain assets that are essential (*daruri*) to the general public, and subject to a re-distributive system of *zakah* on the wealthy so that wealth and resources do not circulate among the rich only
- personal accountability of individuals for their wealth, specifically as to how they acquire the wealth and on what do they spent the wealth for
- regulation of transfer and transmission of wealth; where this should not be realized by unjust or wrongful means, instead, there should be trade by mutual consent amongst the parties
- precaution against over-obsession by wealth and acts of transgressions due to uncontrolled desire or greed for wealth
- the prohibition of unjust and oppressive practices, such as *riba*, gambling (*maysir*), cheating (*khid`ah/gharar*), ignorance/uncertainty in contract (*jahalah/gharar*), hoarding (*ihtikar*), monopoly, market manipulation, etc.
- the promotion of honesty, transparency, justice and fairness in commercial dealings
- recognition of the sanctity of contract, the requirement to faithfully fulfil all contractual obligations and establishment of measures to safeguard the contracting parties' interests in the contract
- encouragement of fair trade and commerce, and other recognised means of wealth creation

All these core principles of Shariah in commercial and financial matters, if observed properly, will ensure a just, balanced, stable and vibrant financial system that provides avenue for the creation of fair and just profits to the capital owners and suppliers, while at the same time, protects the poor and the less able.

## 2. SHARIAH COMPLIANT VS SHARIAH BASED

Whenever I read or listen to discourses on the topic of “Shariah-Compliant” vis-à-vis “Shariah-based” Islamic finance, the first thing that comes knocking on my mind is; “is there a need for such differentiation between the two?” If something is compliant to the Shariah, should it not be considered as Shariah-based too? Is not Shariah compliance itself based on Shariah precepts and injunctions? Is it possible to be Shariah-compliant without being Shariah-based; or vice versa? Thus, to differentiate the two appears to my mind, quite paradoxical.

What is meant by Shariah compliance? In general, Shariah compliance means adherence and conformity with the Shariah principles. In the context of Islamic financial transactions, this means that all the financial transactions must comply and conform to Islamic law and rules of commercial transactions (*ahkam fiqh al mu`amalat*). These law and rules on the other hand are derived and deduced from the primary sources of the Shariah (that are Divine in origin), i.e., injunctions of the Quran and the directives and practices of the Prophet s.a.w, normally referred to as the Sunnah; as well as the secondary sources of Shariah that are based on human interpretation and reasoning, whether at the strongest level of *ijma`* (consensus of all jurists), or in the form of *qiyas*, *istihsan*, *istishab*, *istislah* etc. Thus, it is submitted that Shariah compliance originates from a Shariah base or a Shariah framework of principles, injunctions, directives, rules and prohibitions. It follows that if an act is Shariah-compliant, it should be considered as Shariah-based as well. If Shariah compliance is to be differentiated from Shariah base, what is the basis of such differentiation?

Perhaps, a more relevant issue to be addressed is a re-examination of whether we really achieve Shariah compliance in the real context of specific injunctions and its application to a specific act in question. In this regard, the issue of understanding the Shariah injunctions and directives becomes very pertinent because a correct understanding of the Shariah injunctions will lead to the ability to properly comply with the said injunctions. On the other hand, a wrong or inaccurate understanding of the Shariah injunctions will result in an inability to properly comply with the injunctions, or in other words, it can result in non-compliance.

In relation to this, scholars have discussed about understanding the meanings and intents of the Shariah injunctions. This can come within the domain of discourses on wisdom (*hikmah*), cause (*sabab*), rational ('illah), and intents (*maqasid*) of the law and the Law-Giver in imposing the Shariah injunctions on us. In this regard, Al-Shatiby said that: “The original status in dealings is consideration of meanings”. He further said that: “Everyone who goes after Shariah injunctions (*takalif*) for other than what they are meant for, he has contradicted the Shariah, and everyone who contradicts it (the Shariah), then, his act that is in contradiction is invalid (*batil*). And everyone who goes after injunctions that have not been prescribed by the Shariah for him, then his act is invalid. The fact that an act that is in contradiction (with the Shariah) is invalid is clear-cut; verily all Shariah injunctions (*al-mashru`at*) are ordained to realize good (*masalih*) and prevent evil (*mafasid*), if these are not complied with, it is not possible for those actions that are non-compliant to neither realise good nor prevent evil”.

Thus, instead of differentiating Shariah compliance with Shariah base, I think it is more appropriate to re-look at what we mean by Shariah compliance in the context of the analysis of the intent of the All-Wise Law-Giver when He prescribed the Shariah injunctions in the first place. To me, it is more of an issue of aligning the intent of human-being in his attempt to comply, with the intent of the Law-giver, who is the Most Omniscient and Wise, who is Allah s.w.t. In order to do this, we need to re-look at the rules and principles in the specific context of the issue at hand. For this purpose, I will try to analyse a few issues that have been the main bones of contention in recent discourses.

## **2.1 Contract of Exchange vs Contract of Sharing? Debt vs Equity?**

Now there is this recurrent debate about which is to be preferred, contract of exchange (all forms of sale and lease) or contract of sharing (e.g. *mudarabah* and *musharakah*)? Or is there a preference of equity instrument over debt instruments?

If we examine the Shariah sources in this regard, what is clear is that, both contract of exchange and contract of sharing are allowed. Did the sources mention that one category of contract is preferred over the other? As far as I know, there is no such

indication. When this is the case, why do we want to suggest a preference of one over the other?

As far as the sources are concerned, they laid down clearly that both contracts are allowed; while at the same time, caution against pitfalls that can occur in the implementation of such contracts. For example, in regard to sale, caution is made against *gharar* or information dissymmetry, cheating (*khid'ah*) for example in weights and measurements, price manipulation (e.g. *tanajusyh, talaqqi al-rukban*), etc. At the same time, the sources categorically say that sale is not *riba*, and thus, sale is permitted but *riba* is prohibited. The sources also praise honest trade and exchanges. In regard to sharing or partnership contracts, caution is made against betrayal and breaches of trust by the partner/s, because the essence of sharing is *amanah* (trust) which is fiduciary in nature. At the same time, the sources praise partnerships and indicate that honest partnerships are blessed by Allah s.w.t.

The fact that both contracts are allowed by the Shariah indicates that both contracts have their benefits and if used properly by avoiding the pitfalls cautioned against, will allow for fulfillment of valid needs of people. The permissibility of both types of contracts also indicates that should they be prohibited, it will cause hardship to people. This is due to the fact that these contracts have functions that meet specific needs and contingencies in the life of people that necessitates their permission by the Shariah.

Therefore, there is no need to suggest a Shariah preference of one contract over the other because each contract has its own function which is recognized by the Shariah.<sup>2</sup> What is more relevant is to see that the implementation of the contracts avoid all the pitfalls that the Shariah cautions us against. This is important to ensure real compliance of the practices to the rules and principles as intended by the Law-Giver. Has there been an alignment of the intent of people and the intent of the Law-Giver in the implementation of the permissible contracts?

---

<sup>2</sup> Preference of one contract over the other based on economic, commercial or individual expediency is acceptable. The Prophet s.a.w. said to the effect: "You know better the matters of your worldly life". However, to suggest a Shariah preference is not tenable because of lack of Shariah evidence to support that conclusion.

## 2.2 Aligning The Intent of The People With The Intent of The Shariah

This is where the essence of the problem lies. Take for example, a sale contract. It is essentially a contract that allows for the exchange of counter-values between consenting parties (seller and buyer). The main purpose of the buyer is to acquire ownership of the purchased asset, for which, he pays a consideration. This matches the purpose of the seller who accepts the consideration in return of him transferring ownership of the asset to the buyer. This transaction allows for individuals to exchange their properties with each other.

When we use sale contracts in Islamic banking transactions for example, we need to look at this feature and purpose of sale contract. Thus, if *murabahah* sale is used to allow the customer to acquire ownership of an asset, I think it is still in line with the intent and purpose of sale contract as allowed under the Shariah. The fact that the bank makes profit based on cost plus mark-up is also acceptable because this is based on willing consent by the customer who is the buyer. The fact that the bank allows the customer to pay the *murabahah* price on deferred payment terms is also acceptable because the Shariah generally allows sale prices to be paid deferred or spot (except for *ribawi* items that can only be exchanged for spot).

One may then ask: is it allowed to differentiate between spot price and deferred price? The bank purchases at the cost price which is the spot price and sells to the customer at cost plus mark-up for deferred payment. Is it not a recognition for the time-value of money? Scholars had discussed this issue at length. They agreed that time has a role in the determination of price of goods (*li al zaman hazzun fi al thaman*). This is based on the market forces' recognition of the dynamics of time in the pricing of goods because it has consequences on liquidity and production cycle; not to mention the risks and costs associated with deferment. Thus, markets in general differentiate spot price from deferred price, in as much as they differentiate advance / forward price from spot price, based on real economic considerations of real market dynamics. Thus, the practice of differentiating spot price from deferred price is generally acceptable by the markets, as well as the Shariah.

However, it is also a fact that modern Islamic banking normally benchmarks the deferred price in the *murabahah* sale with a mechanism that mimics conventional cost

of funds. This to my mind is the crux of the problem that needs to be re-examined. Thus, it is not the issue of *murabahah* or *murabahah* price per se, but, more of the pricing of *murabahah* according to conventional interest-based bench-mark, and not real economic reasons and real market considerations.

When the scholars allow the differentiation of spot price of goods from the deferred price, it is because it reflects the dynamic market forces and economic considerations underlying production and exchanges. However, to differentiate the spot price from the deferred price based on factors that are reflective of interest rates or conventional cost of funds, to my mind, can distort the pricing mechanism of the real markets or real economy. I am not an economist. I am saying this as a layman. Based on my observation, interest rates and conventional cost of funds are arbitrary and purely a price of money for money (due to the time factor). The rates are not based on the economic fundamentals underlying markets and production channels that facilitate the production and exchange of goods. Thus, the conventional pricing benchmarks are detached from the market dynamics of real economy. To use them to price goods sold on *murabahah* basis can be said to be a distortion to the pricing mechanism of the real market for goods and may disrupt the intended benefits that would be achieved by exchange contracts that do not suffer from pricing distortion.

Therefore, to my mind, the problem lies in the pricing mechanism that mimics conventional cost of funds or interest rates, not in the *murabahah* contract or its differentiation of spot and deferred price. If the pricing mechanism in the *murabahah* is based on the real market dynamics, it will not be a distortion of market price; and this would allow for the attainment of the benefits (*maslahah*) for which sale in made permissible.

It seems that the intention in doing the sale contract in this manner is to mimic the conventional product, not in form, but in terms of economic effects and behaviours. This may not be in line with the intent of the Law-Giver in permitting sale contracts and prescribing their rules and conditions, that is, to meet people's need to mutually exchange properties and counter-values based on a pricing mechanism that is dictated by real economic sectors and markets.



We have seen earlier the statement by Al-Shatiby which asserts that: an act that contradicts the purpose for which it has been prescribed by the Shariah is invalid and considered as contradicting the Shariah and thus, will not be able to attain *maslahah* nor prevent *mafsadah*. Thus, in the context of sale contracts as practiced by Islamic banks, we need to re-align our intent in the use of the sale contracts with the intent of the Law-Giver in permitting sale contracts in general. Then only can we enjoy and reap the *maslahah* intended from the contract, or avoid the *mafsadah* that the contract is intended to prevent.

### 2.3 Form vs substance: the Issue of Legal Tricks (*hiyal*)<sup>3</sup>

Another recurring debate is the issue of form vs substance. The main issue is whether some of the Islamic financial transactions are genuine, or are they mere legal tricks (*hiyal*) to circumvent a Shariah requirement or prohibition. The polemic on *hiyal* (its plural – *hiyal*) or form versus substance is an old polemic where there have been different approaches by the four schools of Islamic law on this issue.<sup>4</sup> Those who take a more positive view consider the *hiyal* as legal (*hiyal Shar`iyyah*) arguing that the transactions are positive solutions (*makharij*) to meet the need of the people, whilst the others look at the practice in a negative light and consider it as a mere legal trick to legalize an otherwise illegal or prohibited deal.

An example of such a polemic is the use of sale contracts to “finance cash or liquidity”. In modern Islamic finance, the sale contracts used normally involve either *bay` al `inah* or *tawarruq* arrangements. This is not just a modern day issue. In the past, in addition to *bay` al `inah* or *tawarruq*, other mechanisms such as *bay` al wafa`* or *bay` al `uhdah* had also been widely used in some regions of the Muslim community to meet cash or liquidity needs of the people.<sup>5</sup>

---

<sup>3</sup> Most of the examples and arguments in this sub-topic are adopted from Engku Rabiah Adawiah, “Bay` al `inah and Tawarruq: Mechanisms and Solutions”, paper presented at *Muzakarah Cendekiawan Syariah Nusantara 2006*, organised by Bank Negara Malaysia, Langkawi, 28 - 29 June 2006; later published in the book, *Muzakarah Cendekiawan Syariah Nusantara 2006 Bay` al `Inah dan Tawarruq: Isu-isu dan Penyelesaiannya Dalam Konteks Kewangan Islam*, Bank Negara Malaysia, 2007.

<sup>4</sup> On the one hand, the Hanafis and Shafi`i is generally take a positive view on *hiyal* while the Malikis and Hanbalis generally take a negative and opposing view.

<sup>5</sup> This arrangement was said to be first devised in the fifth century of Hijrah by the jurists of Balakh and Bukhara to help the people of the time to get liquidity to pay their debts and meet other pressing financial obligations. Under this arrangement, the person needing liquidity will sell his asset to the second party for cash payment, whilst securing a promise with the buyer that the original seller retains the right to buy-back or redeem the asset by paying its full nominal price.

Apparently, the purpose of sale contracts, as mentioned earlier, is to allow for exchange of counter-values between a willing buyer and a willing buyer, resulting in transfer and acquisition of ownership respectively. However, in cash or liquidity facility transactions offered by Islamic banks, the sale contracts are entered into, ultimately not for the above purpose, but to facilitate attainment of cash or liquidity; for which, the user of liquidity will pay a higher price on deferred payment.

When this happens, can we conscientiously say that our intent in doing the permissible transaction is in line with the intent of the Law-Giver in allowing the transaction? If the intent is not in line with that of the Law-Giver, then, we will not be able to achieve the *maslahah* or good benefits intended from that transaction; nor can we avoid the *mafsadah* or evil against which the transaction is intended to prevent.

Having said so, it is however admitted that the issue above is not as simple and straightforward as we would have wanted it to be. Identifying the intention of the Law-Giver in itself is considered by some to be relatively subjective, though some may argue that it can be objectively ascertained by a careful reading and analysis of the Shariah texts. Ascertaining the intents of people is also not straightforward. Scholars discussed about expressed or manifest intent (*iradah zahirah*) and hidden intent (*iradah batinah*), where only the manifest intent can be positively ascertained, whilst the hidden intent remains a guess. Thus, some schools of Islamic law rely on the manifest intent instead of hidden intent to ascertain the status of a contract; where they argued that legal judgment can only be given on the basis of manifest intention (*iradah zahirah*), and not the hidden intention (*iradah batinah*) that is a matter only to be judged by God Almighty. On the other hand, some other schools accept hidden intent if there is strong inference of its existence by surrounding circumstances.

To illustrate this, let us examine *bay` al `inah*. In *bay` al `inah*, the transaction is a sale contract by form. The original objective (*muqtada al `aqd*) of a sale contract is to transfer ownership by the seller (*tamlik*) and to acquire ownership by the buyer (*tamalluk*). Yet, in *bay` al `inah*, the circumstances (*qara`in al ahwal*) suggest that the parties actually (in substance) are not interested in the transfer and acquisition of

ownership in the sale contract; but on the exchange of cash for deferred repayment of a higher amount, hence, arguably opening a backdoor (*hilah*) to *riba*.

Similarly, a *tawarruq* transaction also involves sale transactions as its main contractual form. Nevertheless, the party (*mutawarriq*) in a *tawarruq* transaction is not actually (in substance) interested in the transfer or acquisition of ownership of the asset under sale; but rather in getting the cash needed while at the same time enjoying the facility of paying in deferred terms the price of the goods bought. Does this mean that *tawarruq* is also a “*hilah*” to get cash and circumvent the prohibition of *riba*?

Likewise, in *bay` al wafa`*, the seller who is in need of cash sells the asset to the buyer with the promise that the seller has the right to redemption of the asset and the buyer cannot sell the asset to other parties. Thus, in form there is a sale contract. Yet, in substance it looks like a loan (*qard*) contract with pledging (*rahn*) of the asset by the debtor to the creditor. Does this mean that *bay` al wafa`* is a *hilah* to allow the creditor the benefit of the property which will not otherwise be allowable in a normal loan and *rahn* structure?

An analysis of the polemic in the acceptability of all the above transactions, be they *bay` al `inah*, *tawarruq*, *bay` al wafa`* and others, reveals that the crux of the problem is the different perceptions that the jurists have to the reality and status of a transaction that is used purely to facilitate liquidity; as opposed to the original objective of the transaction in question (*muqtada al aqd*). In short, all the transactions described above suffer from the same controversy – are they real Islamic solutions to the need of the people; or are they just legal tricks (*hiyal*) to circumvent what are otherwise prohibited under the Shari`ah? Even if they are *hiyal*, can we consider them as legal *hiyal* because they are used to meet the need of people?<sup>6</sup>

The Hanafis and Shafi`is who generally approve the use of *hiyal* argue that as long as the *hiyal* do not deny the rights of people or involve falsehood (*batil*), they should be accepted and are in line with the law of the Shari`ah. In fact, Al Sarakhsi<sup>7</sup> strongly argued that “*Hiyal* as they are produced by the Imam is permissible according to

---

<sup>6</sup> Those who allow for legal *hiyal* consider them as solutions (*makharij*) and not *hiyal* per se.

<sup>7</sup> Shamsuddin Al Sarakhsi, “Kitab al Hiyaal” in *Al Mabsut*, Dar al Ma`rifah, Beirut, vol. 27, p.209.

*jumhur* of the scholars, and those who detest that (the use of *hiyal*), did so due to their ignorance and lack of observation (*taammul*) of the Quran and Sunnah”. He also quoted a number of instances in the Quran and Sunnah of the use of *hiyal* to overcome any possible contravention of the strict legal rules.<sup>8</sup> Nevertheless, both the Hanafis and Shafi`is acknowledged that there are certain types of *hiyal* which are prohibited, such as denouncing one’s religion in order to terminate a marriage contract; or discouraged, such as making a gift to a near relative just before the end of year (*hawl*) to avoid payment of zakat.<sup>9</sup>

On the other hand, the Malikis and Hanbalis strongly object to the use of *hiyal* and consider them as defying the rules of Shari`ah. Ibn Qayyim for example, strongly criticized the jurists who advocated the use of *hiyal* in Islamic law in a lengthy discussion in his book *I`lam al Muwaqqi`in*.<sup>10</sup> In fact, Ibn Qayyim considered *hiyal* as “fraud against Allah (*mukhada`ah lillah*) and therefore prohibited (*haram*)”. He further explained that fraud (*khida`*) can be of two types: first, to make an act appear to be different from the purpose for which it is originally meant for; and second, to make a saying appear to be different from the purpose for which it is originally coined for; and concluded that they include *hiyal* that are prohibited.<sup>11</sup>

Given the two opposing views above, one may expect difficulties in finding a reconciliation or harmonisation between them. Thus, in discussing the issue of substance versus form, this polemic on the status of *hiyal* remains a challenge.

Nonetheless, in the light of our earlier discussion on the need to re-align the intent of people with the intent of the Law-Giver, we need to address this issue properly. In general, contracts are allowed for people to achieve the original purpose for which the contracts are being transacted. When the contracts are used to achieve this purpose, the probability of people getting the intended benefits is high. Thus, we should strive

---

<sup>8</sup> For example, the Quranic verses advising Prophet Ayyub a.s. to adopt a clever stratagem to overcome his oath to beat his wife a 100 times; and the stratagem resorted to by Prophet Yusuf a.s. to detain his brother Bunyamin in Egypt according to the law of his brethren, etc. See Shamsuddin Al Sarakhsi, “Kitab al Hiyal” in *Al Mabsut*, Dar al Ma`rifah, Beirut, vol. 27, p.p.209 – 215.

<sup>9</sup> These examples were given by the Shafi`is; see Al Qazwini, *Kitab al Hiyal fi al Fiqh*.

<sup>10</sup> See Ibn Qayyim, *I`lam al Muwaqqi`in*, vol. 2, p.p. 157 – 174, Maktabah Dar al Bayan, Damascus.

<sup>11</sup> Ibid. at p.157. He also quoted the example of Ashab al Sabt to illustrate the grave implications of *hiyal* to circumvent the prohibitions of Allah s.w.t.

to align our purpose with that of the contract, as intended by the Law-Giver when the contract is allowed in the first place.

However, in exceptional circumstances where there is a genuine need to depart from the original purpose in the use of permissible contracts, or when the use of contracts for its original purpose can cause hardship on people, perhaps some concessions (*rukhsah*) can be allowed temporarily to prevent hardship on people. After all, the Shariah is prescribed to bring facility to people, and not to cause hardship. When things become hard or choices become very narrow, facility is given to ease the hardship. Yet, these concessions should be allowed restrictively, only when genuinely necessary, because ideally, we should strive to align our purpose to the original purposes of the Shariah as a general scheme of things. Eventually, the attainment of *maslahah* and prevention of *mafsadah* can only be achieved when there is alignment of the purpose of people with the purpose of the Shariah, be it the specific purpose or the general purpose.

### **3. ISLAMIC FINANCE AND FULFILLMENT OF *MAQASID AL SHARIAH***

#### **3.1 Alignment with Maqasid al Shariah**

Based on the discussions above, it is clear that there is a need to re-align our purpose and intent with the purpose and intent of the Shariah (*maqasid al Shariah*). We should always remind ourselves that Islamic banking and finance is seriously religious in substance. Its commercial aspects are supplementary and complementary to the core religious and Shari`ah-based substance. It is therefore timely for us to step back and re-evaluate the practices of Islamic banking and finance to see whether in the long run they are in harmony with the original objectives of their introduction, i.e. Shari`ah compliance and achievement of *maqasid shar`iyyah*. To quote Al Ghazali:

"نعني بالمصلحة المحافظة على مقصود الشرع ومقصود الشرع من الخلق خمسة وهو أن يحفظ عليهم دينهم ونفسهم وعقلهم ونسلهم ومالهم فكل ما يتضمن حفظ هذه الأصول الخمسة فهو مصلحة وكل ما يفوت هذه الأصول فهو مفسدة ودفعها مصلحة"<sup>12</sup>

"By *maslahah*, we mean safeguarding the objective of the Shari`ah, and the objective of the Shariah in people is five, which lies in safeguarding their faith, their life, their intellect, their posterity and their wealth. Whatever ensures the safeguarding of these five basics serves public interest (*maslahah*) and whatever denies these basics is *mafsadah*, where its prevention is *maslahah*."

Based on the quote above, it is clear that the protection of wealth is one of the basic objectives of the Shariah. In this regard, Ibn `Ashur<sup>13</sup> details out five constituents of this objective, i.e.:

- Easy accessibility to wealth and resources, where wealth is widely distributed (الرواج)
- Clarity in property rights (الوضوح)
- Protection of properties (حفظ الأموال)
- Stability and consistency in the recognition of property rights (الثبات)
- Justice and fairness in property transactions (العدل في الأموال)

Has Islamic banking and finance contributed adequately in achieving the objective of wealth protection and its five constituents? It is not for me to provide a "yes" or "no" answer to this question. Answering the question requires an honest self-evaluation by all of us. In general, some of us may say that the Islamic finance industry has been able to meet some of the objectives of the Shariah, if not all. Yet, some of us may say that it has failed to achieve the objectives of the Shariah in most circumstances. Well, to me, it is like trying to describe a half-filled glass; you can describe it as half-full, or half-empty.

Nevertheless, I believe that with sincerity and continuing efforts, realizing the *maqasid* of *Shari`ah* is not an impossible task. As long as we ourselves are convinced

<sup>12</sup> الغزالي، المستصفى من علم الأصول، ج 1، ص 416-417، مؤسسة الرسالة، بيروت.

<sup>13</sup> Muhammad Al-Tahir bin `Ashur, *Maqasid al Shari`ah al Islamiyyah*, verified edition by Dr Tahir Al-Mesawy, (2<sup>nd</sup> edition - 2001), Dar al Nafa'is, Jordan, p.p. 464 -477.

that to be in line with the Shari`ah and its *maqasid* is leading to convenience and harmony, and not hardship and disintegration, all the hard work towards realizing the ideal will not be as painstaking and difficult as it would have been without the conviction.

### 3.2 Practical Steps towards Realizing Maqasid al Shariah?

The first step towards realizing maqasid al Shariah is to identify and understand them.

*Maqasid al Shariah* has some special characteristics. They are as follows:

- *Maqasid al Shariah* are the basis of Shariah injunctions
- *Maqasid al Shariah* are all-encompassing (*kulliy*) and general (*`am*)
- *Maqasid al Shariah* are established by conclusive evidence (*qat`iy*)

After identifying the *maqasid*, we need to give due consideration to them in structuring and analyzing the Islamic financial instruments. Essentially, we must first look at the specific Shariah text that relates to the given financial transaction. Then, we need to identify the general objective/s intended by the Shariah injunction in the text. Finally, we need to develop and lay down the general rules and principles (*qawa`id kulliyah*) on the financial transaction based on what we understand from our analysis of the Shariah rule and the *maqasid al Shariah* that we want to establish from that transaction.<sup>14</sup>

In essence, the *maqasid al Shariah* will be the underlying consideration and policy in our analysis of Islamic financial products. This can be said to be a *maqasid*-based or policy-oriented evaluation of the way we do Islamic finance. To implement this, a five steps approach is proposed:<sup>15</sup>

- Understand the specific Shariah injunction in the text within the context of the general objectives of the Shariah (*maqasid kulliyah*)
- Understand the reality of the circumstances on the ground (*fiqh al-waqi`*); a *fiqh* opinion can change with the change in the reality of the circumstances that it seeks to address

---

<sup>14</sup> See Yusuf al-Qardawi, *Al-Qawa`id al-Hakimah li Fiqh al-Mu`amalat*, p. 14.

<sup>15</sup> The five steps approach is adapted from Yusuf al-Qardawi, *Al-Siyasah al-Shar`iyyah fi Daw'i al-Shari`ah wa maqasidiha*, p. 227.

- Understand the balance (*fiqh al-muwazanat*) between good (*maslahah*) and bad (*mafsadah*)
- Understand the priority of things (*fiqh al-awwaliyyat*)
- Understand change (*fiqh al-taghyir*) and their consequential effects

#### **4. THE WAY FORWARD: A REFINED PARADIGM FOR ISLAMIC FINANCIAL INDUSTRY?**

I envisage a refined paradigm for the Islamic financial industry. This refined paradigm should be built on the following pillars:

##### **4.1 Conviction in Islamic Finance Value Proposition**

First we ourselves must have a conviction in the value proposition of Islamic finance. This conviction should emanate from our knowledge and understanding of what Islamic finance entails, its characteristics, products and behaviours. Then, we need to propagate and promote Islamic finance value proposition to the public in general by building their confidence and faith in the Islamic financial system and its benefits. To achieve these two, we need to:

- Have a clear vision as to what are the attributes and behaviours of the Islamic financial products that we want
- Have active participants and players who support and are involved in the initiation, implementation and promotion of the Islamic financial products
- Have Islamic financial products that are dynamic and proven in term of their performance

##### **4.2 Prioritization based on *Maqasid al Shariah* Analysis**

We need to give priority to real economic activities that aim at improving the quality of the five basic essentials, i.e. religion, life, intellect, posterity and wealth. Further prioritization should be made on the actual use of resources based on the level of needs, i.e. whether it is direly necessary (*daruriyyat*), necessary (*hajiyyat*) or complementary (*tahsiniyyat*). A correct prioritization in the use of economic resources will allow for optimal use of the resources based on need analysis; and will



prevent wastage and extravagant use that benefits a few, at the expense of more urgent basic necessities of the wider population. Moreover, prioritizing exercise will allow for more efficient and comprehensive planning in the use of resources based on *maqasid al shariah* considerations.

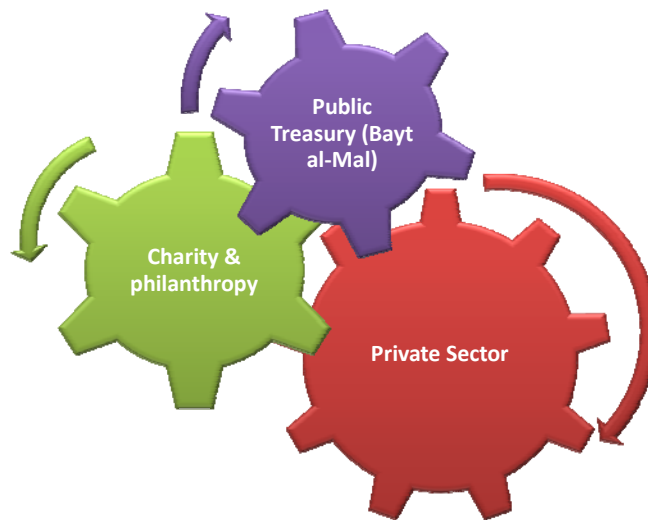
#### **4.3 Plotting Islamic Finance into the Big Picture of Islamic Economic System**

Islamic finance should not be viewed in isolation. It should be viewed in the bigger picture of Islamic financial and economic system as a whole. Focusing only on Islamic finance will cause us to lose sight of the big picture, thus, will not allow for a comprehensive, all-encompassing and balanced system of Islamic economic to be developed. In relation to this, we need to draw the big picture, its core components and sub-components. The following sub-topic will attempt to visualize the Islamic financial system rubrics, in the wider context of the Islamic economy and eco-system. By doing this, it is hoped that we are able to plan better so that we will not end up developing only one or some sides of the spectrum, while leaving the rest as not developed or under-developed. Without a balanced development of all aspects of the Islamic economic system, we will end up having handicaps in our system and thus, will not be able to realize the full potential of the system as intended by the Shariah in prescribing it for us.

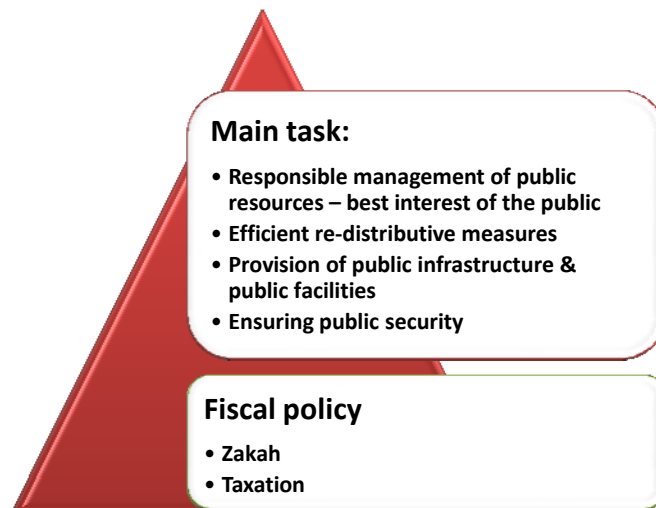
### **5. THE RUBRICS OF AN ISLAMIC FINANCIAL SYSTEM WITHIN THE ISLAMIC ECONOMIC SYSTEM**

What are the main rubrics of an Islamic financial system in the wider framework of an Islamic economic system? What are the core components? How do we define the Islamic finance eco-system? The following diagrams seek to illustrate the rubrics as I envision them.

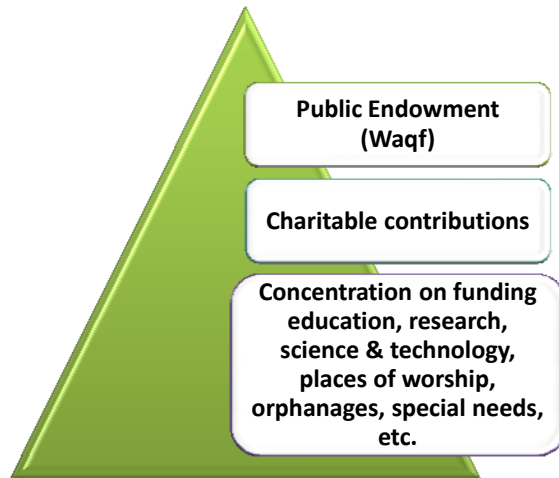
## Islamic Economic System: Core Components



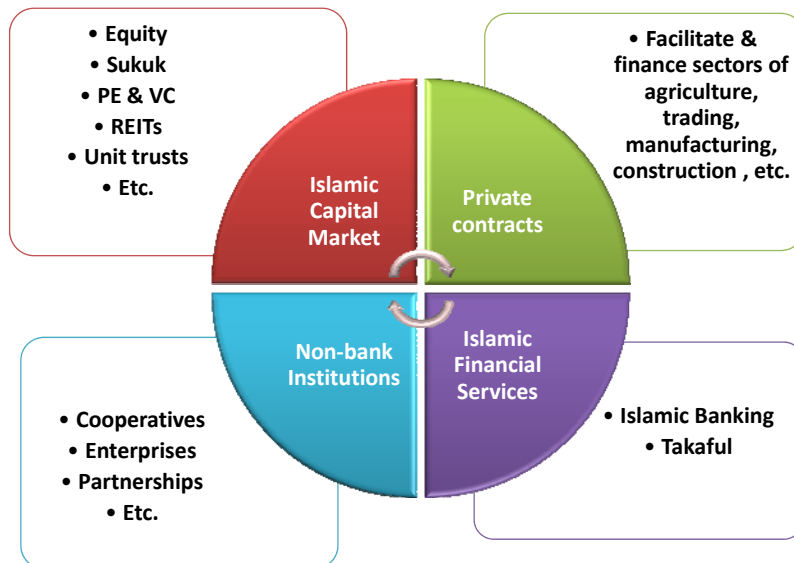
## Core Components of the Public Treasury



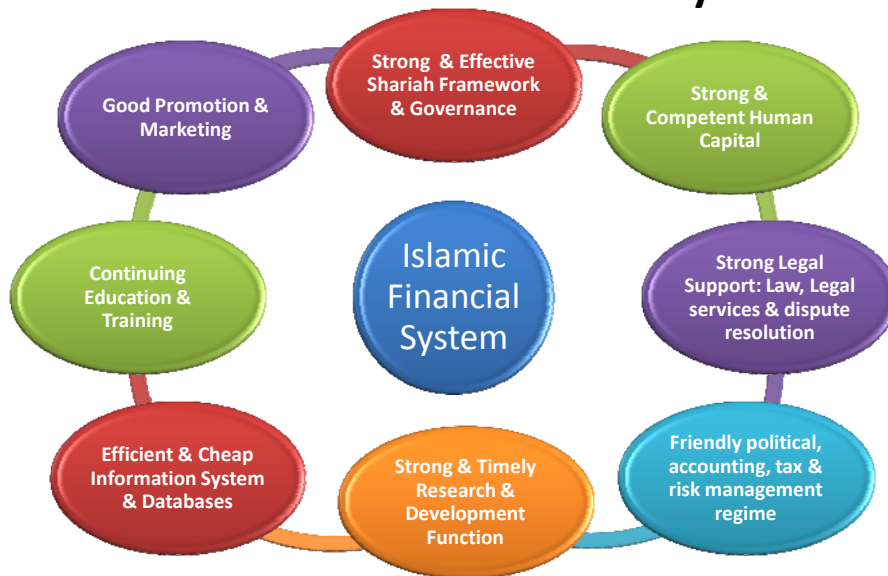
## Core Components of Charity & Philanthropy



## Core Components of the Private Sector



## The Eco-system Necessary For A Healthy & Sustainable Islamic Financial System



## The Eco-System in Which Islamic Economic System Co-Exists

