

## The Practices of Islamic Finance in Upholding the Islamic Values and the Maqasid Shariah<sup>1</sup>

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### **Abstract**

*This paper aims to analyse the views of Shariah scholars regarding Islamic values and objectives of Shariah (Maqasid Shariah) and to examine whether they are implemented in the construction of Islamic finance products. This paper employs written and face-to-face interviews using open-ended questionnaires to study the understanding of our respondents on the discussed matters. Questionnaires were distributed to several respondents from various Islamic financial institutions and universities in Malaysia. This study found that our respondents agreed on the importance of fairness, transparency and Maqasid Shariah in Islamic finance. However with respect to current Islamic finance practices, they opined that some banks did not uphold these values in their products and operations.*

**Key Words:** *Islamic Finance, Islamic Banking, Values, Maqasid Shariah.*

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### **Introduction**

In Islamic teaching, choice refers to the selection of goods and services that is deemed permissible (*halal*). When making a decision, a Muslim must obey and observe the *Shariah* because it will lead him/her to the achievement of *Falah*. The general principle of decision making in Islamic finance is that reference should be made to the *Quran* and *Sunnah* for seeking guidance on any issue. Both the *Quran* and *Sunnah* provide general principles and broad guidelines about *Ibadah* (worship), *Munakahat* (marriage), *Jinayah* (criminal) and also about the matter of Islamic finance. The *Quran* does not provide specific *Surah* (chapters) on financial matters but scattered thoughts about it all over in the *Quran*. This is also similar to the *Sunnah* in that there is no single source about finance in the Prophetic lectures on finance (Chapra, 2000).

Islam does not reject the role of reason in decision-making but recognizes the limitations of reason and complements the role of reason with revelation. (Hasan, 1998) The role of reason needs to be guided by the

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*Quran* and *Sunnah* to ensure that everyone's well-being is realized and that social harmony is not hurt in the process of everyone serving their own self-interests. The human interpretation of *Quran* and *Sunnah* is open to examination, and these sources provide direct guidance only for a small number of questions. The dominant part on certain matters such as economics and financial decisions require application of human reason and intellect within the overall divine framework. In newly emerging finance issues, the following Islamic sources will have to be used; *Ijma'* (consensus), *Qiyas* (analogy) and other secondary sources such as *Urf* (custom) and *Maslahah 'Ammah* (public interest). The discussion on the value selection in Islamic finance also can be guided by several rulings in *Fiqh* maxims such as "*La Darar Wa La Dirar*" (do not inflict injury nor repay one injury with another) and other maxims that have become the most important principles guiding the development of values in Islamic finance.

It is the task of the Muslim scholars to refer to these sources and also to the *Fiqh* maxims to determine solutions consistent with these values, and any solution that contradicts with the revelation should be rejected for Islamic finance. Because of the importance, *Shariah* scholars should not ignore Islamic values and *Maqasid Shariah* in developing rules and regulations and Islamic banking products. This is because many Islamic banking products, especially those structured in Malaysia may have complied only with the basic form and explicit structure of Islamic contract but may not fulfil the substance and the spirit of *Shariah*.

The impacts of ignoring Islamic values and *Maqasid Shariah* are obvious when Malaysian Islamic financial products are unacceptable in the global market, and some these products cannot be traded in few countries. In addition to that, various parties have made statements criticizing the products and the practices in offering these products. These critics were not merely from people outside the industry, but came from those who are involved within the industry. Shaykh Taqi Usmani made the most critical commentary years ago, when he criticised Sukuk products by announcing that 85 per cent of Sukuk issuances were not in line with *Shariah* rulings. Dusuki (2009) also supported this statement by claiming that the liquidity facility and purchase undertaking in many Sukuk transactions do not conform to the *Maqasid Shariah* due to the element of guarantee to the investor; in Islam it is unlawful to lend money when actual profits are less than expected. He also added that Islam prohibits the practice of repurchasing of assets at face value in the case of purchase undertaking.

Apart from that, there have been criticisms on the *Bai' Bithaman Ajil* (sales with deferred price) – BBA home financing in Malaysia when many said that this facility does not differ much from conventional home financing (Rosly, 2008). In structuring this facility instead of charging the customer interest, Islamic banks in Malaysia charged a profit derived through a sales contract, which is permitted in Islam, but disappointedly the profit rate in BBA home financing in Malaysia depends upon the market interest rate. In addition to that, monthly instalments in Islamic banks are calculated using the similar method as conventional banks; that is, the standard amortisation mathematical model (Meera & Razak, 2005).

According to Razak and Mohammed (2008), customers are unhappy with the implementation of *Bai Bithaman Ajil* home financing in Malaysia due to a) its pricing; because most customers believe that the BBA price is higher than the price of a conventional home loan, and b) problems in *Shariah* matters connected with early settlement and customer default because the BBA financing facility is constructed based on the profit rate and is fixed until final settlement. Hence in the both cases, customers have to pay unearned profit even though the tenure is not reached or matured. Such was shown in the court decision in *Zulkifli vs Affin Bank* (Hassan, 2009). Dahlan and Al Junid (2011) studied whether the practices of BBA Home Financing in Malaysian banking industry complied with Islamic law in protecting the right of the contracting parties. They found that the current BBA home financing practices contradicted the teachings of Islam because these financing practices contained elements of *gharar al-fahish* (exorbitant uncertainty) especially when the housing units are abandoned because this involves the issue of ownership. The ownership of the purchaser over the abandoned house is considered incomplete (*milk ghair al-tam*) and does not give any absolute power to the purchaser to sell the house to an Islamic bank.

Sharifah (2004) claims, in her thesis, that some Islamic banks do not take into consideration the social obligation during the process of product pricing. Moreover some Islamic banks also charge many types of penalties in the case of default, and thus their product seems not much different from those of conventional banks. In the more recent literature, Dusuki and Abdullah (2010) have stressed that in most writings and discussions on Islamic banks suggested that those banks were focusing on profitability of Islamic banking industries and discussions on social obligations of Islamic banking rarely occurred. On the other hand, Asmadi (2010) found that the practice of pre-signing in Malaysian Islamic banks may not suit the best practices, which have been described clearly in textual evidence, and some international standards have also rejected such practices.

Based on this background, need exists to study whether Islamic values and *Maqasid Shariah* are put into practice in offering Malaysian Islamic financial products. Therefore, this paper attempts to analyse the views of *Shariah* scholars regarding the practices of Islamic finance and their connection with the values of *Shariah* and its objectives (*Maqasid*).

The remainder of the paper proceeds as follows. Section 2 highlights the concept of *Maqasid Shariah* and its implementation in Islamic finance. Data and research methodology are presented in Section 3. The results of this paper are explained in Section 4 and the conclusions are presented in Section 5.

### Maqasid Shariah: Review of Literature

*Maqasid Shariah* is an Arabic term, which is a combination of two words, *Maqasid* (direction) and *Shariah* (Islamic law). Technically the term refers to the objectives drawn from the divine texts, and, according to Al-Ghazali (1998), the basic purpose is to secure the benefit of people and to protect them against evils. Islam intends to preserve the well being of the individual and society, and therefore it gives special attention to religion (*din*), life (*nafs*), dignity (*nasl*), intellect (*aql*) and wealth (*mal*).

These five elements are important and Islam emphasises them, and subsequently Islam propagates the ways to protect them as well as looking at the consequences to those who are neglecting them, or accumulating them in non-legitimate ways. The sequence of these elements is not to show preference in protecting them but to show that any negligence or inability in acquiring and protecting one of the elements will harm the humanity of humans (Al-Syatibi, 1991 and Asmadi, 2003).

For instance, while Islam advocates acquiring wealth, Islam also determines the way for humans to accumulate wealth in ethical manners because absolute human desires will only drive human towards disastrous ends, greed, and enslaving others in achieving personal gains (al-Hasani, 1995 and Asmadi, 2003). According to Laidin (2012) in his paper 'The Shariah Objectives in Contemporary Sciences', the objectives of Shariah in financial transaction can be categorised into five objectives and they are related each to the other.

These include 1) continuity of the circulation of the wealth, 2) continuity of the investment of wealth, 3) achieving comprehensive communal prosperity, 4) financial transparency and 5) validation of financial ownership. In addition, Dangulbi (2012) found that objectives of Islamic banks in educating the individual, establishing justice and promoting welfare are in line with *Maqasid Shariah* and from these objectives he develops a model that can be used to measure the performance of Islamic banks which incorporate *Maqasid Shariah* in their valuations.

In describing the specific *Maqasid Shariah* in contracts, scholars have said that every contract in financial contracts has its specific objectives or *Maqasid Juz`i*. It can be defined as the ultimate aim for the specific rule when Allah Almighty has enacted such rule. Therefore, thorough analyses must be done to demonstrate the *Maqasid Juz`i* of the following contracts:

1. Sale contracts; for a valid sale of good contract to take place in Islamic law, certain conditions are to be met. The contract must fulfill several essential elements (buyer, seller, subject matter and *aqad*) to ensure transparency and to reduce the potential for disputes. These elements are bound to certain conditions in Islamic law. In addition, a sale transaction in Islam involves the transfer of ownership and it cannot be separated from the risk of related loss. If the assets remain with the sellers, they have to bear the risk until the assets are transferred to the buyers. At the same time as quality, both parties should know the quantity and specifications of the subject matter. Thus the *Maqasid* of sale purchase contract is a means to exchange subject matter and obtain ownership in a sincere way in order to fulfill human needs of many matters.
2. *Ijarah* or leasing contract; the contract accommodates the needs of a human to use the asset without holding its ownership. In other words, the legal right belongs to the owner, i.e., lessor but the beneficial right belongs to lessee. The validation of the leasing contract is subject to the existence of the asset; therefore, the owner has to ensure that the asset is safe and available to be used at all time. In the meantime, the lessee is liable to maintain the performance of the asset in order to keep it fit to use. In essence, *Shariah* separates the responsibilities of the owner and the lessor. However, if the total damage is derived from the negligence of lessee, he is held liable for the loss. Therefore the *Maqasid* of leasing contract is to provide the specific benefit of the asset against a predetermined rental amount where the owner and the hirer have their own obligations to safeguard and to maintain the subject matter.
3. Partnership contracts; In *Musharakah* and *Mudharabah* partnership contracts, the partners share risk on the basis of their capital contribution and effort, and these contracts are developed based on a principle in which the rate of return on capital varies in accordance with the variations in the return of the business (Rosly, 2008). Thus any stipulation to guarantee the capital and fix the profit is prohibited because profit must come together with liability. Hence the *Maqasid* in partnership contract is risk sharing, and the element of trust is important in these contracts. Apart from that, some scholars also opine that a partnership contract is an ideal model to be implemented in Islamic banks, and it helps to create more value added to the economy and indeed contributes to economic growth.

## Data and Methodology

Originally this paper was part of research entitled “Supreme Islamic Quality Systems-Islamic Financial System”, in which, among others, we analysed standards and guidelines which relate to Islamic finance and banking. At the same time we also carried out study that focused on the views of *Shariah* scholars regarding Islamic financial practices.

We conducted two types of interviews; written interviews and face-to-face interviews in studying the perception and the understanding of respondents on values, *Maqasid Shariah* and Islamic finance practices. In addressing the objectives as identified in this paper, we only focused and reported on methodology, research design and findings that related to them.

We distributed questionnaires to respondents from various Islamic financial institutions in Malaysia to support our findings. The respondents, who participated in our written interviews, consisted of 18 people holding several posts in Islamic banks such as Assistant Manager, *Shariah* Advisor, Head of *Shariah* Department and *Shariah* Executives.

In addition, we also distributed the questionnaires to lecturers at several universities. By getting feedback from those persons who are directly involved in managing, consulting or constructing Islamic financial products, we believe that this would provide us with in-depth information on this study. The list of respondents is shown in Table 1.

Table 1: List of Respondents

Respondent	Post	Institution
R1	Head of <i>Shariah</i> Department	Islamic Bank
R2	<i>Shariah</i> Department	Islamic Bank
R3	Head of <i>Shariah</i> Department	Islamic Bank
R4	Assistant Manager	Islamic Bank
R5	<i>Shariah</i> Committee	Islamic Bank
R6	<i>Shariah</i> Advisor	Islamic Bank
R7	<i>Shariah</i> Advisor	Islamic Bank
R8	<i>Shariah</i> Advisor	Islamic Bank
R9	<i>Shariah</i> Advisor	Islamic Bank
R10	Lecturer	University
R11	Head of <i>Shariah</i> Department	Islamic Bank
R12	Lecturer	University
R13	Lecturer	University
R14	<i>Shariah</i> Advisor	Islamic Bank
R15	<i>Shariah</i> Executive	Islamic Bank
R16	<i>Shariah</i> Executive	Islamic Bank
R17	<i>Shariah</i> Executive	Islamic Bank
R18	<i>Shariah</i> Executive	Islamic Bank

Even though, our respondents were small in number, the sample size is not a concern for as Robson (2002) noted that there is no set number of interviews needed for a flexible design study. According to Sosulski & Lawrence (2008) a population is selected because researchers consider them as good sources of information that will advance a study toward (a reasonable) goal. This method entails the researcher selecting relevant respondents based on his prior knowledge of the population in order to meet specific study objectives. In addition, this study developed the questionnaire using structured open-ended questions asking similar questions to the respondents and providing space and time for them to answer either verbally or in writing.

Face-to-face interviews had been made with 6 *Shariah* advisors who were directly involved in the Islamic finance industry to seek and discuss thoroughly the practices and issues regarding discussed matters. The respondents were selected by using snowball and purposive sampling techniques (Silverman, 2000 and Neuman, 2003). On average, every interview took approximately 60 minutes, and they were recorded and transcribed into text to be analysed. With regards to our research objectives, two values have been selected as focal points in questionnaire, Part A: fairness and transparency. These two values were drawn from the values of Islamic financial system as discussed in much literature (Dusuki & Abdullah 2010, and Rosly, 2008). In addition, we also focused on the *Maqasid Shariah* in Part A. Then these two values and *Maqasid Shariah* become our main focus in Part B, which concentrated on the questions regarding Islamic financial products and practices.

## Discussion and Findings

### Islamic Values and Maqasid Shariah

This section highlights the findings of the interviews regarding Islamic values and *Maqasid Shariah*, which became our main focus of discussion.

#### Fairness

Fairness is one pillar in the objective of *Shariah* and can achieved by giving the same opportunities to every one. By upholding this value, bias and discrimination can be eliminated because everyone in a

financial system, buyer or seller, will get what he or she deserves. When we suggested that the fairness in Islamic banking means that both customer's and banks' rights are protected, and customer was enabled to use banking products at a reasonable price, almost all respondents agreed with the statement. However, a few of them disagreed and stressed that a reasonable price is not a necessary element, hence it is not necessary that the fairness must contain the element of a reasonable price. One said that no evidence from the source of *Shariah* suggests that we have to put a reasonable price in order to be fair and uphold justice. Hence, forcing a higher price does not mean that Islamic bank is unfair. Therefore, when this study specified the issue of pricing by asking whether the price of existing Islamic banking products should be fair, many respondents agreed with the statement and stressed that the price should be fair. They added that the implementation of a fair price normally depends on how *Shariah* advisors advised the management.

### Transparency

Generally, transparency is an important pillar in the objective of *Shariah* in avoiding disputes among people. All respondents agreed that transparency in business transaction means that both parties, i.e., customer and bank, have sufficient information about products. However respondents differed in terms of items that should be included in a business contract so that this contract could be considered to be a transparent contract. In addition, although the majority agreed that transparency exist in Islamic banking system, they still say that elements of non-transparency existed in a few banks. This is in line with study done by Noraini et al. (2009) which found that the level of reporting of Islamic banks, especially in their annual reports, was not adequate to provide sufficient transparency

### Maqasid Shariah

Almost all respondents agreed that *Maqasid Shariah* means the ultimate objective of *Shariah* is in enacting the faith, ruling and regulation. A few stressed that *Maqasid* should not be used to undermine the clear prohibitions of *Shariah*, and this also has been highlighted by Dusuki & Abdullah, 2010. The reason is due to the fact that some scholars used '*Maqasid*' to permit prohibited matters such as *riba* (interest) and *maysir* (gambling)

However, a few respondents were confused between two issues; those were *Maqasid Shariah* and *maslahah*. As *Maqasid Shariah* is the ultimate objective behind the revelation of the rulings, the *Maslahah Mu'tabarrah* (recognised *maslahah*) is normally referred to as something that is not mentioned in the revelation. Hence, scholars deduce the ruling through analysing the quantum of benefits and perils derived from it. The preference is to avoid the perils and evils. They strongly supported the idea that *Maqasid Shariah* is important in forming standards and guidelines for Islamic finance and banking, although a few skeptics thought there was a possibility that prohibited things are permitted under the name of *Maqasid*.

Responding to the issue as to whether the products and services offered in Islamic banking conformed to Islamic values and its *Maqasid*, a significant number of respondents were not sure about its conformity. According to them, the roles of Islamic banks duplicate the roles of conventional banks in many things. In addition we also asked specific questions on *Maqasid* conformity as follows:

- i. Do the standards and guidelines about beneficial ownership transfer conform with *Maqasid Shariah*?

The respondents were conflicted about the conformity, and those who agreed with the practice of beneficial ownership believed that this was a temporary approach and needed to be revisited.

- ii. Does tagging the pricing in Islamic banking with BLR contradict with *Maqasid Shariah*?

A significant number of respondents in written interviews were inclined towards rejecting this practice. For them tagging to BLR does not represent the actual cost of the transaction but rather reflects the movement

of interest rate. However, in face-to-face interviews, a few insisted that the practice generally was permissible in Islamic law as there is no other benchmark and the calculation of Base Financing Rate (BFR) does not contain elements prohibited in Islam.

iii. Are the capital protected structures in *Musyarakah* and *Mudharabah* products against the *Maqasid Shariah*?

Our respondents expressed their concern about the 'capital protected structure' practice, and they stressed that the permissibility or prohibition of these products depends on how Islamic banks structured the products. Therefore, any structure that gives priority to one of the parties may fall under prohibition.

### **The Practices in Islamic Finance**

This section is meant to detail respondents' views on specific principles which have been used as underlying contracts in Islamic financial products.

#### **Murabahah (Sales Contract)**

Few respondents suggested that the ultimate aim of *Murabahah* is to allow customers to receive something without paying cash. In addition, respondents in written interviews disputed the pricing issue in *Murabahah* products on its conformity to the *Maqasid*, and some of them were unsure how far *Murabahah* pricing went in answering the objective of *Shariah*. Through face-to-face interviews, our respondents opined that the current practice in *Murabahah* pricing is that the price is *Shariah* compliant and fulfils the *Maqasid* preference as long as the customers agree with the price.

Our respondents agreed that ownership transfer occurred in current *Murabahah* products even though there was no legal ownership transfer. According to them, beneficial ownership transfer is sufficient to fulfil *Maqasid Juz'i* of *Shariah*; however, it needs to be revisited from time to time. In contrast, a few said that beneficial ownership itself is not sufficient to fulfil *Maqasid* as the consequences of beneficial ownership were not on par with legal ownership transfer. Apart from that, the respondents also insisted that the original objective of *Shariah* in permitting *Murabahah* is to enable obtaining assets, therefore, if current Islamic banking practice is used to get cash, instead of assets, this practice does not fulfil *Maqasid Shariah*.

#### **Ijarah (Leasing Contract)**

The respondents agreed that the *Maqasid Juz'i* in *Ijarah* is subject to leniency of *Shariah* in obtaining benefit of an asset without owning it and facing ownership risk. In the mean time, the owner is able to get income and profit from that asset.

Respondents in written interviews disputed the pricing issue in *Ijarah* products with respect to its conformity with *Maqasid*. Some of them were not sure how far *Ijarah* pricing went in answering the objective of Islamic economics, and through face-to-face interviews, our respondents viewed that *Ijarah* pricing is *Shariah* compliant and fulfils the *Maqasid* preference as long as the customers agree with the price. In addition, the respondents agreed that ownership transfer occurred in current *Ijarah* products. Similar to *Murabahah* practice, the beneficial ownership transfer is sufficient for them to fulfil *Maqasid Juz'i* but it needed to be revisited from time to time.

#### **Musyarakah (Profit and Loss Sharing Contract)**

Our respondents agreed that *Maqasid Juz'i* in *Musyarakah* is a combined effort in getting profit. However respondents in written interviews were unsure about the pricing issue in *Musyarakah* products with respect

to its conformity with *Maqasid*. They were unsure how far *Musyarakah* pricing answered the objective of Islamic economics but thought that it depended on the structure of the products. Furthermore, almost all respondents rejected the practice of capital guarantee in *Musyarakah*, saying this practice was not in line with *Maqasid Shariah*.

Furthermore, they agreed that tolerance ratio (5%, 10%, 25%) is good practice in Islamic finance and treated this as a *rukhsah* because existing customs prove that we are unable to avoid non-*Shariah* compliant investment products. However, they opined that the non-compliant portion should be purified and the portion of non-compliant elements should be decreased from time to time to uphold the true spirit of Islamic investment.

### Mudharabah (Profit Sharing Contract)

The respondents agreed that *Maqasid Juz'i* in *Mudharabah* was a combined effort between two parties to own and to get profit. However, some respondents questioned whether current *Mudharabah* pricing adhered to the principle of justice in transaction. They were not sure how far *Mudharabah* pricing answered the objective of Islamic economics. Furthermore, our respondents also challenged the permissibility of stipulating the incentive fee in a *Mudharabah* product in an event in which the profit ratio was above the normal Islamic banking profit rate. Some disagreed with this practice, and this will ensure the rights of both parties are protected. In addition to that, a few respondents were unsure about how far the ownership transfer in *Mudharabah* venture has taken place in current Islamic banking transactions, and they opined that this depends on the structure of the products.

### Conclusion

After more than three decades of the first birth of Islamic bank (Bank Islam Malaysia Berhad), Islamic banking in Malaysia nowadays needs not rely on *Shariah* compliant products by making 'cosmetic' changes to fulfill *Shariah* requirements. They should shift to *Shariah*-based products which also encourage the real spirit of *Shariah*. The industry players have to move forward in changing their policies to speed up the implementation of *Maqasid* based Islamic financial system. It is not an ideal system in that it is sometimes difficult to be implemented, but that is the way that the Islamic finance should be.

This paper analyses the views of *Shariah* scholars regarding the practices of Islamic finance and their connection with the values of *Shariah* and its objectives (*Maqasid*). Generally, this study found that *Shariah* scholars are in a consensus that Islamic financial system must uphold the Islamic values and *Maqasid Shariah* in its philosophy. However they are still not satisfied with Islamic finance practices, in upholding Islamic values and *Maqasid Shariah* especially in *Murabahah*, *Ijarah*, *Musyarakah* and *Mudharabah*. Though they agreed that certain practices in Islamic finance are *Shariah* compliant, they insisted that various matters should be revisited in order to uphold Islamic values and *Maqasid Shariah*.

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