Harun Sencal & Asutay, Mehmet (2021). "Rethinking *Ḥalāl*: Hegemony, Agency and Process", in A. Utriza Yakin and Louis-Léon Christians (eds.), *Rethinking Halal: Genealogy, Current Trends, and New Interpretations*. Leiden: Brill.

Rethinking *Ḥalāl*: Hegemony, Agency and Process[1]

Harun SENCAL* & Mehmet ASUTAY**
(*) Istanbul 29 Mayis University, Turkey
E-mail: hsencal@29mayis.edu.tr
(**) Durham Centre for Islamic Economics and Finance, Department of Economics and Finance, Faculty of Business, Durham University, UK
E-mail: mehmet.asutay@durham.ac.uk

Abstract

This study critically explores the hegemony of the capitalist market system in the product development process and everyday operations of Islamic financial institutions (IFIs). The hegemony of the capitalist market system is revealed through its influential role in deciding an exception in IFIs in terms of *Shariʿa* compliance. We argue that some *Shariʿa* scholars resort to the concept of *maṣlaḥa* to legitimise the products and services otherwise impermissible according to Islamic law. Organised *tawarruq* which is a controversial instrument in IFIs is an example of such utilisation and can be considered as an exception in its original treatment, which is legitimised in IFIs by some *Shariʿa* scholars to operate in line with the principles of the capitalist market system. Although it seems that *Shariʿa* scholars are the ones who decide such an exception, it is the demand and hegemony of the capitalist market system which force them to issue such a ruling through the grafting process. After discussing the hegemonic nature of the capitalist market system, we offer a potential way to reduce its dominance through a civil society-based regulatory mechanism. In this, we propose to utilise a fuzzy logic-based evaluation system to measure the products and services in determining to what degree they are compatible with the objectives of *Shariʿa* beyond *ḥalāl*/*ḥarām* dichotomy.

Keywords: objectives of *Shariʿa*, *maṣlaḥa*, organised *tawarruq*, sovereign, exception, hegemony, fuzzy logic

1. Introduction

During the last decades, we have witnessed the competition of Islamic Financial Institutions (IFIs) with the conventional financial sector at the global scale, particularly after the 1990s. As a result of this competition, developing 'efficient' products and services with 'low transaction cost' while providing *Shariʿa* compliance at the same time has become the main challenge for IFIs. In responding to this challenge, *maṣlaḥa* (public utility) is utilised as the main justification method for the controversial products and services to sustain *Shariʿa* compliance.

While *maṣlaḥa* is not a new concept or ground in justifying a *fatwa* (issuing a ruling), we argue that, in a modern context, it has been transformed into a new meaning. The most distinguishing feature of the modern meaning of *maṣlaḥa* is that it does not have to comply with the two main sources of Islam, namely the Qurʾan and *Sunna* (tradition of the Prophet of Islam). Rather, the legitimacy of *maṣlaḥa* stems from the evaluation of a case as '*maṣlaḥa*' or public utility by *Shariʿa* scholars without any further supporting evidence from the Qurʾan and *Sunna*. Ramaḍān

[1] This chapter has never been published elsewhere and is the original work of the authors.

al-Būṭī[2] used the term 'delusional *maṣlaḥa*' (*maṣlaḥa mawhūma*) to define it due to its contradictions with the verses of the Qurʾan or *Sunna*. Some jurists have utilised delusional *maṣlaḥa* to justify exceptional cases. These cases are considered as an 'exception' since none of the school of thoughts in Islamic law approves them.

In an attempt to render justification for these exceptions, *Sharīʿa* scholars in IFIs implicitly or subalternely appeal to the principles of modernity and capitalism such as low transaction cost and efficiency (as the example of organised *tawarruq* articulates) rather than the principles of *Sharīʿa* agreed by many scholars throughout history. Another important criterion to determine an exception, particularly in the contemporary context, is the utilisation of opinion of *Sharīʿa* scholars as a collective body with different intellectual and cultural backgrounds such as the *Fiqh* Academy as a benchmark. Since such organisations are non-profit organisations with members from all around the world, they have relatively less pressure from governments and businesses compared to the IFIs based *Sharīʿa* scholars and enjoy an intellectual environment of discussing a variety of opinions to reach a conclusion. Such an exception is similar to a state of exception as defined by Schmitt.[3] We argue, therefore, the jurists, who apply delusional *maṣlaḥa,* decides an exception in the Islamic law. This state is considered as an exception since the facilitation of delusional *maṣlaḥa* means suspending the verses of the Qurʾan and *Sunna*, which are the cornerstones of Islamic law. In exploring the concept of 'exception', Carl Schmitt states that "Sovereign is he who decides on the exception."[4] Hence, by issuing a *fatwa* based on delusional *maṣlaḥa*, jurist becomes 'sovereign'. Furthermore, in reality, jurist does not issue this *fatwa* by his own will, rather it is the enforcement of the capitalist market system, which leads jurists to issue such a *fatwa* based on delusional *maṣlaḥa*. Consequently, we can argue that it is the capitalism and its unceasing demand rather than the *Sharīʿa* scholars, remains sovereign over Islamic law and IFIs in such a state of exception.

The hegemony of the capitalist financial system over the Islamic financial sector is very strong as the accelerated convergence of IFIs towards conventional institutions in terms of product and services during the last decade evidence. *Sharīʿa* scholars are not eligible to prevent this convergence even though they are the authority which renders 'Islamic' identity to IFIs. This can be explained mainly through the three important transformations have taken place in *iftā'* (act of issuing a legal opinion in Islamic law) institution from pre-modern to modern period, which are: (i) embeddedness of *Sharīʿa* scholars into the modern financial system, whether it is Islamic or not; (ii) change in the source of legitimacy of *Sharīʿa* scholars; and (iii) the relative complexity of the modern period compared to pre-modern period. Due to such transformations, we witness that the existence of *Sharīʿa* governance or *Sharīʿa* boards (SBs) in modern IFIs is insufficient to challenge the hegemony of the capitalist system.

This paper, therefore, aims to offer a potential way out of this hegemony, at least a way to moderate the outcomes of the observed convergence which is expressed as a 'social failure' in bringing the existing IFIs closer to the initial aspirations.[5] As a potential solution, this study suggests a civil society-based regulatory mechanism to evaluate the *Sharīʿa* compliance of the products and services of IFIs. Civil society refers to the organisations and institutions besides the government and business. In this civil society-based regulatory mechanism, the establishment of non-profit organisations composed of scholars from various disciplines including *Sharīʿa* scholars, political scientists, economists, *etc*. is necessary. Moreover, to

[2] Al-Būṭī, *Ḍawābiṭ Al-Maṣlaḥa fī Al-Sharīʿa Al-Islāmiyya, 412*.
[3] Schmitt, *Political Theology*, trans. George Schwab, 6.
[4] Schmitt, 5.
[5] Asutay, "Conceptualising and Locating the Social Failure of Islamic Finance," 100-9.

minimise the influence of politics and business, invited scholars should be independent scholars to overcome conflicts of interest.

Such a regulatory mechanism does not substitute but complements the role of *Shariʿa* scholars, which should go beyond the binary opposition of *ḥalāl*/*ḥarām* or permissible/impermissible and implement a fuzzy logic approach to articulate morality of *Shariʿa* in the everyday practices of IFIs. In other words, rather than deciding whether a certain product is *ḥalāl* or *ḥarām*, this mechanism should mainly aim to decide to what degree a certain product or service is compatible with the morality of *Shariʿa* in various dimensions such as environment, employee-employer relationship, production process, *etc*. The labelling such as 'suitable for vegetarians' or 'fair trade', for instance, are examples of binary dichotomies whereas energy efficiency rating of houses on a scale of 1-100 is an example of the fuzzy logic approach.

Furthermore, as the scholars in these organisations are not expected to possess the aforementioned shortcomings of the *Shariʿa* scholars in IFIs, this measure is expected to be less influenced by the competition among the commercial banks. Additionally, the number of these rating institutions should not be limited to a few, as this might also create a hegemony of these institutions. Instead, as it is the case in the *ḥalāl* certificate industry, multiple rating organisations with their set of criteria, respected and independent scholars and transparently displayed indices could help to disseminate the power.

The rest of the paper consists of six sections, including an introduction and a conclusion. In the next section, we explore the concept of sovereign and analyse the cause of the state of exception in both Western context and Islamic law. In section 3, we explain *maṣlaḥa* and its utilisation by various scholars in the history of Islamic law. In section 4, we analyse *maṣlaḥa* in modern times and how it is employed to decide a state of exception. In section 5, we offer and discuss a potential way out of the hegemony of the capitalist market system through utilisation of a fuzzy logic approach. Finally, we present the concluding remarks.

2. Sovereign and Exception

In this study, as stated above, we argue that the sovereign over IFIs is the capitalist market system. This is evidenced by the fact that it has the power of deciding an exception in *Shariʿa* compliance in the construction process of the products and services as well as institutional forms.

While the theory of sovereignty has a long tradition in Western literature, it is mostly affiliated with political power. The concept of sovereignty, as a modern theory, is first defined by Jean Bodin in the 16th century, however, the notion of the sovereign is used in former periods without implying a political power in terms of its modern meaning.[6] Bodin defines sovereignty in the later Latin edition as "The supreme power over citizens and subjects, unrestrained by law". This supreme power, according to Bodin, is absolute. It means, sovereignty is completely free from the constraint of law and is not held subject to any condition or limitation. It is yet limited by laws of God, of nature and nations. Bodin's theory of supreme power laid the foundation of the 17th and 18th-century absolutism.[7]

In the following centuries, the concept of sovereignty is theorised further by various scholars. In the 17th century, for instance, Hobbes suggested a theory of sovereignty in his book,

[6] Handler, "Towards the Sociology of Sovereignty," 425.
[7] Merriam, *History of the Theory of Sovereignty since Rousseau,* 8.

Leviathan, where he proposed a social contract and placed insecurity and fear at the centre of the covenant, which creates sovereignty.[8] With this social contract, people transfer their rights to the sovereign and authorise it, since the sovereign must have absolute authority to govern effectively.[9]

As a response to Bodin and Hobbes' sovereignty-theories, John Locke's new theory proposes the community as a source of sovereignty, in which the government plays merely the role of legitimate executor of this sovereignty. Responsibilities of this government, Locke argues, consist of the protection of life, liberty, and property. In the 18th century, Jean-Jacques Rousseau proposed another social contract, a contract which transferred sovereignty from the state to the community, to the 'people'. According to his theory of social contract, everybody makes a contract with everybody, so, "everybody becomes a ruler and ruled at the same time."[10] In order to become a member of the state, people give up their natural liberty. In this way, they place a legal limitation on governmental power instead of a moral limitation. Consequently, the individual wills combined to form the general will and in such a setting, popular assembly represents the sovereign will, while government acts solely as an executive agent.[11]

On the contrary to the 17th and 18th century where omnipotent lawgiver had been identified with a personal factor of the rule, in the 19th and 20th century, the personal element disappeared from the concept of sovereignty. As a result of such political transformation leading to democratic legitimacy and division of power, "power must be checked by the power", and as a result, "sovereignty of law should replace the sovereignty of men", leading to the split of political power.[12] According to Austin, for instance, sovereignty neither vested in the ruler, as Bodin claimed nor vested in the people, as popular sovereignty suggested. Austin defined positive law as sorts of command stem out of a political superior and claimed that this political superior is the sovereign.[13]

As for the definition of sovereignty according to Islam, Ahmad[14] argued that, in Islam, the sovereignty of Allah and it is His Authority alone should be recognised as the foundation and articulation of sovereignty, even from a legal perspective. While political science only considers the sovereignty of man in the world, in Islam, the sovereignty of Allah is at the centre of life: He governs and controls everybody. Ahmad[15] also asserts, as being the only sovereign in Islam, Allah is also the real Legislator, and His Law (Qurʾan) cannot be altered by any human, yet analogy (*qiyās*), interpretation (*ijtihād*) and consensus of community (*ijmāʿ*) can be utilised to respond to new situations which do not have an explicit solution in the Qurʾan and the Sunna.

As Ahmad[16] argues, *Sharīʿa*, or as Hallaq[17] would state, the morality of *Sharīʿa*, is at the centre of everyday life and shapes it including but not limited to the matters related to the law and finance. This is because even the scope and extent of exceptions are determined by *Sharīʿa*. In

[8] Nagan and Haddad, "Sovereignty in Theory and Practice," 443-4.
[9] Nagan and Haddad, 444.
[10] Janos Rapcsak, "Sovereignty-Past and Present," 33.
[11] Willis, "The Doctrine of Sovereignty Under the United States Constitution," 439.
[12] Schmitt, Introduction: xiii.
[13] Willis, 440.
[14] Ahmad, "Sovereignty in Islam," 244.
[15] Ahmad, 249-53.
[16] Ahmad, 245.
[17] Hallaq, *The Impossible State,* 12.

an attempt to elaborate on the concept of exception further, it is important to define it first. Schmitt characterises the exception as "a case of extreme peril, a danger to the existence of the state, or the like."[18] Schmitt further claims that the Sovereign decrees whether there is an extreme emergency or not, and if there is such a situation he decides how to handle it.[19]

As for the causes of exception, Agamben divides the Western states into two categories based on how state of exception is situated in legal tradition[20]: the first group embodies the state of exception in the text of the constitution such as France and Germany and second group does not include the state of exception into the constitution such as Italy, Switzerland, England, and the United States.[21] In both groups, whether the state of exception is explicitly defined by the constitution or not, after the state of exception has been decided, the constitution was suspended. So, it is important to determine the cause of the exception. Agamben states that the basis of the state of exception, therefore the cause of the exception, is a *necessity*.[22] An ancient maxim, *necessity has no law* is the source of state of exception. This maxim can be explained in two different meanings: "necessity does not recognise any law" and "necessity creates its own law."[23] In both meanings, necessity can be considered as the foundation for a state of exception.

In the medieval world, the theory of necessity was considered as a theory of exception which led merely releasing one particular case from the obligation of law, not to the suspension of law. Gratian, in his *Dectrum*, mentions of such cases twice and due to supreme necessity, he allows acting against the law.[24] Therefore, necessity neither a source of law nor suspends the law but only release a specific case from the literal application of the law. Therefore, in medieval times, suspension of law for the common good out of necessity was a foreign idea. On the contrary to the medieval world, in modern times, the state of exception is inclined to be embodied in law and gained an identity as a state of law.[25]

Agamben criticises writers who consider the nature of necessity as an objective situation for being naive and claims that necessity requires subjective judgment, whereby deciding the necessity (exception) as the crucial point.[26] That is the reason why Schmitt[27] advocates that it is the Sovereign who decides what 'the exception' is and how to act in 'the state of exception.'[28]

As for the Islamic law, such a state of exception is both embodied in the textual sources of *Sharīʿa* (Qurʾan and Sunna) in the form of legal licenses and left as a space for *ijtihād* of *Sharīʿa* scholars based on the objectives of *Sharīʿa* to go beyond the legal licenses. *Maṣlaḥa* or public utility, in this regard, is utilised to respond emergent cases to internalise new circumstances. Such an understanding of *maṣlaḥa* is defended by prominent scholars such as al-Ghazālī, al-Rāzī, al-Shāṭibī, among others.

The theory of *maṣlaḥa* suggested by al-Ṭūfī, on the other hand, approves disregarding scriptural rulings in case of a contradiction with *maṣlaḥa*, which remains as a minority view in

[18] Schmitt, 6.
[19] Schmitt, 6-7.
[20] Agamben, *State of Exception*, 9-10.
[21] Agamben, 10.
[22] Agamben, 16.
[23] Agamben, 24.
[24] Agamben, 24.
[25] Agamben, 26.
[26] Agamben, 29-30.
[27] Schmitt, 5.
[28] Schmitt, 6-7.

the course of Islamic history until the twentieth century. However, Jamāladdīn al-Qāsimī published the *risāla* of al-Ṭūfī to bring him to the agenda in 1906, which is followed by Rashīd Riḍā's *risāla* in al-Manār.[29] The idea was to introduce the method of al-Ṭūfī as an answer to the modern problems of life. As a result of this method, jurists would not be restricted by Islamic law. Consequently, *maṣlaḥa*, as an independent source of law, might be employed to judge on new circumstances, if it is required. Furthermore, when the ties between the concept of *maṣlaḥa* and textual rulings is severed by accepting a situation as *maṣlaḥa* even if it is contrary to textual rulings, *maṣlaḥa* is rendered as a subjective concept. On the other hand, in the theory of *maṣlaḥa* jurists such as al-Ghazālī, al-Rāzī and al-Qarāfī, the concept of *maṣlaḥa* is originated from the textual evidence implying a more objective nature.

If we consider *maṣlaḥa* as an objective concept and definition of '*maṣlaḥa'* is decided in the light of textual evidences, which necessarily means that there should not be any contradiction between the *maṣlaḥa* and the Qur'an or *Sunna*, then, we may conclude that the Sovereign (who decides what is *maṣlaḥa*) is Allah and He is alone. On the other hand, if we follow al-Ṭūfī, and his modern followers, who consider *maṣlaḥa* as an independent source of law and admit the possibility of conflict between a *maṣlaḥa* and textual evidences, we must accept *maṣlaḥa* as a subjective concept and let the jurists decide what is *maṣlaḥa* and accept their judgement as a valid ruling, even if it is contrary to the scriptural rulings. In this case, we have to announce these jurists, who decide what is *maṣlaḥa* for the public good, is the Sovereign, because they are the one who decide on the exception, which means Islamic law should be suspended due to contradiction with *maṣlaḥa*, and they can give a ruling without the constraint of Islamic law. Furthermore, we claim that jurists do not decide which circumstances constitute the *maṣlaḥa* based on their own opinions. This implies that, for example, in the case of a market economy, the enforcement of capitalism leads jurists to determine the concept of the *maṣlaḥa* in economic and financial matters.

In the next section, we will define the concept of *maṣlaḥa* and discuss the examples of how it is used by early scholars such as al-Ghazālī and al-Shāṭibī. To explain further, two examples regarding the modern practice of *maṣlaḥa* in Islamic finance are presented to demonstrate as to how *maṣlaḥa*'s subjective nature is exploited leading to the declaration of 'capitalism' as a Sovereign.

3. Maṣlaḥa in Early Times

Since the early periods of law in the Muslim history, the concept of *maṣlaḥa* is considered as a legitimate principle and applied on issuing a *fatwa*, even though it is referred with different terms.[30] We can trace the roots of the concept of *maṣlaḥa* back to the Companions of the Prophet. While the establishment of prison and issuance of currency are such examples where there is no evidence from the Qurʾan or Sunna, such practices along with others are implemented by the Companions to ensure human welfare and welfare of the society. Founders of the four schools of law, especially Imam Malik's legal opinions, stress the concept of *maṣlaḥa*. For this reason, some authorities claim that Imam Malik is the first jurist who uses the concept of *maṣlaḥa* as a practice without referring to the term *maṣlaḥa*. For instance, Imam Malik validated the payment of blood money in currency instead of camels, which was the ruling during the time of Prophet Muḥammad and Abū Bakr. He claimed that camel was mostly used in rural areas where wealth is not held in currency and allowing people to pay blood

[29] Kayadibi, "Al-Ṭūfī Centred Approach to Al-Maṣlaḥah Al-Mursalah (Public Interest) in Islamic Law," 72.
[30] Qomariyah, "Al-Ghazālī's Theory of Munāsaba in the Context of the Adaptability of Islamic Law," 13-37.

money in terms of their principal medium of exchange for the sake of accommodating people's interest.[31]

Abū Ḥanīfa, the founder of Ḥanafite school, employed *istiḥsān* for adaptability to social needs or public necessity such as validating to ask a tailor to sew clothes. Because according to analogy or *qiyās*, it is not supposed to be valid due to the possibility of an error in the final product. Al-Shāfiʿī, the founder of the Shāfiʿī school, on the other hand, rejected the use of *istiḥsān* due to lack of its basis in the main sources and its arbitrary nature. This implies that if *maṣlaḥa* (or *istiḥsān*) has grounds in main sources, he would have accepted to utilise in decision making. According to Muṣṭafā Zayd's work, *al-Maṣlaḥa*, Aḥmad ibn Ḥanbal, the founder of Ḥanbalī school, used *maṣlaḥa* as an authoritative source in his rulings, such as death penalty for the spies who cause harm to the Muslim community.[32]

In terms of intellectual and legal historical work, we may find the initial discussions of the *maṣlaḥa* in the book of Juwaynī (d. 419/1028), *al-Burhan*. In his book, Juwaynī attempted to give the first descriptions and divisions regarding *maṣlaḥa*, albeit they are not complete. We also observe that he did not mention all subjects related to *maṣlaḥa*.[33]

3.1. Al-Ghazālī and al-Rāzī on Maṣlaḥa

Al-Ghazālī (1058-1111) defines *maṣlaḥa* according to its lexical meaning: "bringing a cause of benefit or avoiding a cause of harm." But this definition of *maṣlaḥa* is oriented towards the purpose of human beings, which, therefore, is not used in the discussion of 'authoritativeness' (*ḥujjiyya*). According to al-Ghazālī, as a legal term, *maṣlaḥa* means the preservation of the purposes of the *Shariʿa*. In other words, what constitutes *maṣlaḥa* is not defined according to people's desire and expectation but on the basis of the will of Allah.[34] Therefore, according to al-Ghazālī, *maṣlaḥa* is not a completely subjective concept that depends on people's will, but more of an objective concept derived from textual evidence.

Al-Ghazālī describes the objectives of *Shariʿa* as protecting religion (*dīn*), life (*nafs*), intellect (*ʿaql*), progeny (*nasl*), property (*mulkiyya*). He further categorizes these purposes based on their effect on attaining *maṣlaḥa* or avoiding harm into three categories: necessities (*ḍarūriyyāt*), needs (*ḥājiyyāt*) and embellishment (*taḥsīniyyāt*). According to al-Ghazālī, a *maṣlaḥa* under the category of needs or embellishment has to be associated with textual evidence; otherwise, it has no legitimacy. On the other hand, if a case falls under the necessity, it can be ruled based on a *maṣlaḥa* albeit it is not supported by textual evidence. However, to issue such a *fatwa*, the jurist has to be sure of three things: necessity, certainty, and universality implying that it should be relevant to all Muslims, not just a specific group of a Muslim. If one of these three preconditions do not hold, then, jurist cannot judge on the basis of *maṣlaḥa,* according to al-Ghazālī.[35]

After a century, al-Rāzī (d. 606/1210) wrote *al-Maḥṣūl* in legal theory, in which he combined al-Ghazālī's *al-Muṣṭasfā* and Abū'l-Ḥusayn al-Baṣrī's *al-Muʿtamad*. Regarding definitions and categories of the theory of *maṣlaḥa*, al-Rāzī follows al-Ghazālī. However, he widens and presents more detail about controversial matters by providing a well-defined notion of *maṣlaḥa*

[31] Qomariyah, 19-20.
[32] Qomariyah, 25-6.
[33] Duman, "Imam Gazzali'nin Maşlaḥat Dusuncesine Katkilari," 11.
[34] Duman, 14.
[35] Duman, 17.

and places it under the methodology of legal analogy[36] and hence brought the debate and confusion under a particular methodological understanding.

3.2. Al-Qarāfī on Maṣlaḥa

Al-Qarāfī (d. 684/1285), as he stated in his book, closely follows al-Rāzī's *al-Maḥṣūl* in his discussion on the concept of *maṣlaḥa*. In consideration of the *maṣlaḥa,* he adopts two paths: the first path is the path of al-Rāzī by integrating *maṣlaḥa* into the legal analogy. He employs suitability (*munāsaba*) in the determination of ratio legis (*ʿilla*) and defines it in the same way al-Ghazālī and al-Rāzī did. In the second path, he utilises *maṣlaḥa* to derive new rulings and further expand application areas of it such as legal licence and legal precept. Contrary to al-Rāzī, al-Qarāfī also uses the principle of *maṣlaḥa* for blocking means or eliminating pretexts to unlawful ends.[37] This implies that al-Qarāfī does not only follow al-Rāzī and al-Ghazālī in the integration of *maṣlaḥa* into the legal analogy but further develops the theory of *maṣlaḥa* by considering it as a legal precept (*qawāʿid*) and employs it to derive new rulings for changing circumstances.

Legal precepts are norms and legal maxims which are extracted from the sources of the law. In the process of deriving laws by the means of legal precepts, no reference is made to the primary textual sources; rather, general legal precepts are formulated on the basis of those sources. On the contrary, the methodology of legal analogy derives the ruling for the new case directly from the sources of law. According to al-Qarāfī, attaining *maṣlaḥa* and avoiding harm is one of the legal precepts extracted from the scriptural texts.[38] In addition, al-Qarāfī, following the work of al-Rāzī, also adopt the formal interpretation of *maṣlaḥa* to provide a tangible criterion to defend *maṣlaḥa* against the subjectivity of interpretations and abuse.[39]

3.3. al-Ṭūfī on Maṣlaḥa

Al-Ṭūfī's views regarding legal theory and theology have not obtained large attention until the modern times in which his theory of *maṣlaḥa* has become the centre of interest[40], who presents his controversial ideas about *maṣlaḥa* in his commentary to the Nawawī's forty hadith. When he commented on the *ḥadīṯ* that "harm is neither inflicted nor reciprocated in Islam", he argued that *maṣlaḥa* is a superior indicant of law compared to the scriptural texts (the Qurʾan and the Sunna) and *ijmāʿ* or consensus. In case of a contradiction among these sources and *maṣlaḥa*, *maṣlaḥa* is preferred over the texts and consensus by employing *takhṣīṣ* (particularisation) and *bayān* (clarification).[41] He derives from the hadith stating that "no harm should be inflicted", an affirmative meaning that is "*maṣlaḥa* shall be safeguarded."[42]

Al-Ṭūfī elaborates his theory by considering possible cases. If all the primary sources, the Qurʾan, the Sunna, consensus and safeguarding *maṣlaḥa* agree, then ruling is given according to all of these sources. However, if any of the three indicants (the Qurʾan, the *Sunna* and *ijma*) diverges from safeguarding *maṣlaḥa*, then safeguarding *maṣlaḥa* is given priority. al-Ṭūfī, therefore, advocates that *maṣlaḥa* can be utilised as an independent source of law.

---

[36] Opwis, *Maṣlaḥa: An Intellectual History of a Core Concept in Islamic Legal Theory,* 71-116.
[37] Opwis, 131-6.
[38] Opwis, 135.
[39] Opwis, 142-4.
[40] Opwis, 194.
[41] Kayadibi, 78-9.
[42] Opwis, 198.

It should be noted that unlike al-Ghazālī and al-Rāzī, al-Ṭūfī does not employ his theory of *maṣlaḥa* through legal analogy; rather, his position can be applied to all cases except acts of worship and fixed ordinances since it is a universal indicant. Moreover, it has priority over text and consensus, if they do not safeguard *maṣlaḥa.*[43] Although al-Ṭūfī presents evidence from the Qurʾan and the Sunna to support his theory of *maṣlaḥa*, he does not provide a concrete criterion to measure it. Thus, in a specific case, a ruling based on *maṣlaḥa* is a subjective decision.[44]

3.4. Al-Shāṭibī on Maṣlaḥa

Al-Shāṭibī (d. 790/1388) suggests a new epistemic foundation for legal theory, namely, inductive corroboration, as he places his theory in comprehensive inductive surveys instead of multiple transmitted reports or *Qurʾanic* verses. According to al-Shāṭibī, to reach a certain premise, one has to conduct a broad inductive survey of a large number of probable evidence which share a common element. As a result of this survey, we can attain the foundations of *Sharīʿa*, namely universality (*kulliyyāt*). Every universal consists of particulars (*juzʾiyyāt*) and each of them affirms one meaning of that universal. Accordingly, five fundamental universals (life, property, progeny, mind and religion) are examples of such an inductive survey which are not mentioned in the text specifically. Authoritativeness (*ḥujjiyya*) of public interest is also attained through the method of inductive corroboration.[45]

As Opwis stated, Al-Shāṭibī advocates that the notion that the objective of the *Sharīʿa* is to protect *maṣlaḥa* of the people.[46] Similar to al-Ghazālī, he divides *maqāṣid* (objectives) into three categories, namely necessity, need and embellishment. As mentioned before, al-Ghazālī suggested that they consist of five universal principles, religion (*dīn*), life (*nafs*), intellect (*ʿaql*), progeny (*nasl*) and property (*mulkiyya*). Every level further includes supplementary and complementary elements. Moreover, al-Shāṭibī claims that all these categories (necessity, need and embellishment) are interrelated, which suggests that, for instance, need is complementary for necessity.

According to Opwis, in Al-Shāṭibī's theory, *maṣlaḥa* is a universal concept which leads him to evaluate attaining *maṣlaḥa* and avoiding *mafsada* is not due to human beings' *maṣlaḥa* in this world, but due to hereafter expectation. Al-Shāṭibī argues that in this world, *maṣlaḥa* does not exist in its pure form, but things are a mixture of *maṣlaḥa* and *mafsada* with different ratios.[47] In addition, due to the changing and particular nature of personal interests, we cannot employ personal interests in the decision process of what constitutes *maṣlaḥa* and *mafsada*. Hence, in the process of deciding what *maṣlaḥa* is, the human intellect is incapable of deciding without the guidance of the law, since "the law intends to properly arrange the *maṣlaḥa* of this world in order to enable thereby those of the Hereafter."[48]

Regarding the knowledge of the intention of the Lawgiver, al-Shāṭibī follows a middle path where he rejects both extremes. At one extreme, *Zāhirī* group advocates that the intention of Lawgiver is hidden from us unless he revealed His intention. At another extreme, there are two groups; one of them is *Bāṭinīs* where they claim His intention can be grasped only through the inner meaning of the texts, not by the obvious meaning of them. And the other group is who

[43] Opwis, 199.
[44] Opwis, 217.
[45] Hallaq, *A History of Islamic Legal Theories*, 166.
[46] Opwis, 261-8.
[47] Opwis, 272.
[48] Opwis, 273.

gives priority to legal theory over the texts. They defend that to grasp the intention of the Lawgiver meaning that attention should be given to the theoretical meaning of a word. Accordingly, if it differs from the text, theoretical meaning gains precedence. Jurists like al-Ṭūfī, who considers safeguarding *maṣlaḥa* should have priority over texts are an example of this group. Al-Shāṭibī, on the other hand, maintains the view that meaning should be considered with revealed texts and textual rulings should be applied considering the meanings they have.[49]

4. Maṣlaḥa in Modern Times

As discussed above, scholars utilised the concept of *maṣlaḥa* within the boundaries of *Shariʿa,* and in line with its moral principles. We can even argue that the utilisation of *maṣlaḥa* has been a tool to realise the morality of *Shariʿa* in everyday practice since it leads to *maṣlaḥa* in both this world and hereafter. However, as Hallaq[50] claims, Muslim individuals live in a world which is constructed by a different worldview. As a result, modern life has brought many issues and challenges for Muslim identity, for which there is no easy solution within Islamic law that can solve the conflicts between the two worldviews, Islamic and modern. As a result, various reformist groups emerged to respond to the challenges of modern life from an intellectual perspective. 'Religious utilitarianism' is one such group which utilises *maṣlaḥa* as their central concept in legal theory.

As part of the reformist movement, Rashid Rida (d. 1354/1935) is considered as one of the pioneer names and adheres to the theory of *maṣlaḥa* developed by al-Ṭūfī and al-Shāṭibī, who prioritised the concepts of 'necessity' and 'interest' which traditionally has limited use. Other important figures such as 'Abd al-Wahhāb Khallāf, 'Allāl al-Fāsī and Ḥasan al-Turābī also embraced this particular school. The effects of this utilitarianism in the religio-legal interpretation of Islamic norms in relation to IFIs can be observed in many spheres of life. The high influence of *maṣlaḥa* can be noticed particularly regarding the financial transactions in which *Shariʿa* scholars can be very liberal[51], while at the same time, abstain from the utilisation of *maṣlaḥa* in other spheres such as regarding social or personal issues.

We argue that jurists in the field of Islamic finance sometimes issue rulings on the basis of delusional *maṣlaḥa* even though it contradicts with scriptural texts. Since these texts are God's commands, jurists who make their judgements based on delusional *maṣlaḥa* decide to nullify God's commands. This very judgement constitutes the exception in the *Shariʿa* since the ruling based on *delusional maṣlaḥa* means scriptural texts (the Qurʾan and *Sunna*) are inadequate to provide a solution for the case at hand, and an exception should be decided for the case to solve the problem. Following Schmitt, we, hence, argue that the one who decides the exception is the sovereign. Thus, a ruling based on *delusional maṣlaḥa* announces these jurists as the sovereign through the authority of deciding exception in the law. On the other hand, we can observe in the Islamic banking industry that *Shariʿa* scholars are not necessarily willing to issue rulings based on *delusional maṣlaḥa*, but they are obliged to issue such rulings due to the compulsion of the market system and financialised economy, as Islamic banks consider themselves in competition with the conventional banks, and therefore, they feel that they must be at *par* with them. Since conventional banks operate within neoclassical norms such as efficiency, maximisation and low transaction cost, as a consequence, Islamic banks act with a compulsion that they have to essentialise efficiency as defined by neoclassical economists to sustain their growth. However, theoretically there is an important distinction between Islamic

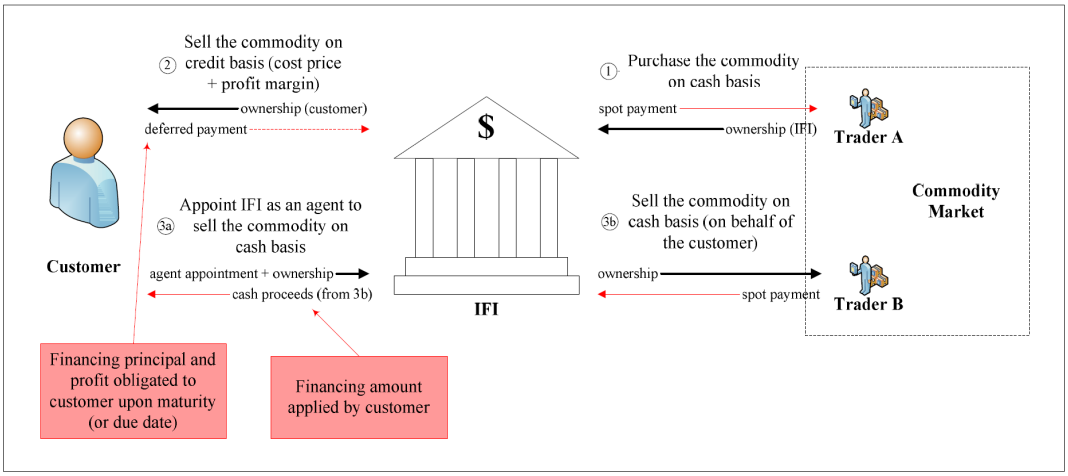
[49] Opwis, 338-9.
[50] Hallaq, *The Impossible State,* 3.
[51] Shaharuddin, "The Bayʿ Al-ʿInah Controversy in Malaysian Islamic Banking," 508.

and conventional banks in operational terms: 'Islamic bank' financing and operations have to be approved by *Shariʿa* scholars for their *Shariʿa* compliancy. Thus, in return, in reality, *Shariʿa* scholars approve contracts and operations which are constructed with neoclassical norms of efficiency, effectives, optimisation *etc*. These are the areas where *delusional maṣlaḥa* is utilised by *Shariʿa* scholars, as Islamic norms defines a moral economy beyond the neo-classical definition of what economy and finance is.[52] Consequently, it can be argued that it is the capitalism and its unceasing demand makes the market system as Sovereign over Islamic ontology through the agency of *Shariʿa* scholars in relation to Islamic banking. In order to articulate the argument through an example, the following section focuses on organised *tawarruq*, an emergent popular Islamic financial instrument, which is considered controversial in terms of *Shariʿa* compliance, while in the following section, two further examples are presented to demonstrate the utilisation of delusional *maṣlaḥa* to operate in line with the principles of the capitalist market system.

4.1. Organised *Tawarruq* as an exception

Organised *tawarruq* is a modified version of classical *tawarruq*, which is now commonly used in Islamic banking operations. Classical *tawarruq* is employed to obtain cash, especially for short-term needs. In terms of operating mechanism, in this financial transaction, firstly, *mutawarriq* or seeker of cash purchases a commodity from a seller on deferred payment. In the next step, *mutawarriq* sells this commodity in the market on cash for a lower price to a third party.[53] Although utilisation of classical *tawarruq* has been a topic of debate by jurists due to its substance which is considered as an interest-like instrument despite its form-compliancy, organised *tawarruq* as practised by Islamic banks was constructed in a more controversial structure to increase the efficiency and decrease the transaction cost in attaining short-term liquidity for the clients. The most important difference between classical and organised *tawarruq* is the removal of *mustawriq*'s or seeker of cash's involvement in the process and transferring intermediary steps to an Islamic bank. In order to construct such an efficient and low-transaction cost instrument, an exception, which is the delegation system, is transformed into a norm. Thus, organised *tawarruq* has become a norm rather than the exception, as it is as a structure is heavily utilised by Islamic banks in most jurisdictions.

Figure 1: Working Mechanism of Organised *Tawarruq*[54]



[52] Asutay, "A Political Economy Approach to Islamic Economics," 14.
[53] Dusuki, "Can Bursa Malaysia's Suq Al-Sila' (Commodity Murabahah House) Resolve the Controversy Over Tawarruq?," 3.
[54] Ghazālī, "Tawarruq in Malaysian Financing System," 70.

To contextualise the discussion, it should be noted that in terms of *Sharīʿa* permissibility of organised *tawarruq*, the OIC's International Council of *Fiqh* Academy (ICFA) in Mecca ruled organised *tawarruq* as impermissible in 2009.[55] The reasons behind such prohibition are due to the differences between classical and organised *tawarruq*:[56]

(i) The commitment by the seller in the contract of *tawarruq* by proxy to sell the commodity to another buyer or to line up a buyer makes it similar to the prohibited 'īna, whether the commitment is explicitly stipulated or is merely customary practice.

(ii) This practice leads in many cases to a violation of the *Sharīʿa* requirement that a buyer must take possession of a commodity in order for any sale after that to be valid.

(iii) The reality of this transaction is based on the bank providing cash financing with an increase to the party called the *mustawriq* through purchase and sales transactions it conducts, which are, in most cases, pure formalities. The aim of the bank from this procedure is to get an increase in what it gave in the way of financing.

ICFA's ruling against the prohibition of organised *tawarruq* has deeply affected the Islamic finance industry, which was aiming to expand this facilitatory financial instruments. As a response to the prohibition of organised *tawarruq* by ICFA, as reported by Khnifer[57], a group of *Sharīʿa* scholars occupying seats at Islamic banks' boards led by Nizam Yaquby opposed and rejected this prohibition, as they appealed to the principle of *maṣlaḥa* to legitimise the use of organised *tawarruq*. They advocated the utilisation of organised *tawarruq* due to its facilitation in providing short-term liquidity as a backbone of the IFIs and suggested that it should be permissible based on "social usefulness or social needs of the Islamic ummah."[58] In an interview with Reuters in 2009, a prominent *Sharīʿa* scholar defended the use of organised *tawarruq* on the basis of lower transaction costs.[59] Yaquby argued that carrying out the process of selling the assets through a bank would help minimise the transaction cost, who also stated that "How can Sharia allow something which is burdensome on a person … and not allow something which is organised and well done, and this man who is in dire need for cash will not suffer a lot". On the other hand, due to the controversial nature of organised *tawarruq*, some Islamic banks started to avoid organised *tawarruq* in countries[60] such as Oman or using it without advertising, while Malaysia has been using openly and extensively. As the available data evidence, in Malaysia, the use of organised *tawarruq* has increased by 104% from 2014-2016.[61]

Although there are other *Sharīʿa* compliant alternatives for organised *tawarruq* which are not announced impermissible by ICFA, they are not considered as efficient as organised *tawarruq* and riskier than it such as *salam*.[62] However, the essential issue is that the financial function of organised *tawarruq* is similar to interest-based borrowing transaction[63], which is also the cornerstone of a capitalist market economy. Hence, Islamic banks, under the pressure of the

[55] Dar and Azmi, ed., *Global Islamıc Finance Report 2016*, 305.
[56] Dar and Azmi, ed., 299.
[57] Khnifer, "Maṣlaḥah and the Permissibility of Organized Tawarruq," 7.
[58] Khnifer, 7.
[59] Islamic Finance Resource, "Organized Tawarruq Is Permissible: Sheikh Nizam Yaquby." Accessed September 6, 2016. https://ifresource.com/2009/07/23/organized-tawarruq-is-permissible-sheikh-nizam-yaquby/
[60] Parker, "Are More and More Islamic Banks Shunning Tawarruq?," Accessed September 10, 2016. https://www.arabnews.com/node/324553
[61] Bank Negara Malaysia, "The Financial Stability and Payment Systems Report 2016," 91.
[62] Khan, "Why Tawarruq Needs To Go - AAOIFI and the OIC Fiqh Academy: Divergence or Agreement?," 20.
[63] Siddiqi, "Islamic Banking and Finance in Theory and Practice: A Survey of State of the Art," 16.

capitalist market system, feel that they have to utilise organised *tawarruq* to overcome the short-term liquidity needs of their clients, and, as a consequence, in responding to the needs of Islamic banks, as a facilitation function, *Shariʿa* scholars feel obliged to announce organised *tawarruq* as legitimate based on '*delusional maṣlaḥa*' even if it is not in the boundaries of Islamic law. Thus, the sources of the motivation to use organised *tawarruq* are necessitated by the capitalist operation of the system rather than an Islamic Moral Economy (IME)[64], which essentialises asset-based financing. Thus, the permissibility of the organised *tawarruq* should be considered as an exception in this process of *Shariʿa* compliance conducted by the members of *Shariʿa* boards, which has become a norm as the practice indicates.

Such a reality brings about the issue of sovereignty in the process of '*Shariʿa* compliance'. Recalling the above discussion that Schmitt claims that the sovereign is the one who decides on the exception and its announcement as an exception, we witness that the exception turns into the default state and the sovereign changes the old constitution with a new one through exceptions. However, among others, Ahmad[65] argues that God is the only Sovereign in Islam; no other authority has the privilege of deciding exception. Thus, modern applications within the Islamic spheres indicate asymmetry in the substance while form-based compliance is assured, as in the case of Islamic banking operations.

It is well known that through the Qur'an and *Sunna*, God draws the boundaries of the *Shariʿa*. All the rulings, including necessity and *maṣlaḥa*, are given within these limits. In spite of this fact, as in the case of organised *tawarruq*, following Ṭūfī, some modern jurists have attempted to transcend these boundaries by nullifying some part of the scriptural texts and the objectives of *Shariʿa* in the quest of responding modern problems by using *maṣlaḥa* principle as an excuse, albeit none of the pre-modern jurists with the exception of Ṭūfī understood *maṣlaḥa* principle in that way.

We can easily trace the effect of this way of reasoning on Islamic banks, which operates under the capitalist market system. Since the capitalist economy favours the risk-minimising instruments, such as an interest-based loan, and therefore, it enforces Islamic banks to employ instruments which are the least risky. If risk-free (or the least risky) instruments cannot be derived within the boundaries of *Shariʿa*, *Shariʿa* scholars are expected under market hegemony to announce an exception and produce a risk-free or less-risky product based on *delusional maṣlaḥa*. Such products are not generated due to not having other alternatives, but rather a capitalist market system does not allow any other alternatives to be utilised as Islamic banks aim to be efficient and competitive.

As can be seen, the prevailing system enforces Islamic banks and *Shariʿa* scholars to engineer products, which fit the nature of capitalism. In other words, in substantiating its hegemonic nature by not allowing any other practice beyond its own in the economic and financial sphere, hegemonic nature of capitalism subjugates its own operating system on the *Shariʿa* determined Islamic financial instruments whereby 'new forms' of Islamic financial instruments are generated. It should be noted that the announcement of such an exception, as in the case of organised *tawarruq* sometimes is not a temporary solution as it should be, but becomes a default practice[66], which is supported by the Malaysian data provided above. In evidencing

[64] For further details of IME, please refer to Asutay, "Conceptualising and Locating the Social Failure of Islamic Finance," 94-7.
[65] Ahmad, 244.
[66] Hassan, "An Empirical Investigation into the Role, Independence and Effectiveness of Shariʿa Boards in The Malaysian Islamic Banking Industry," 357.

this, as reported by Hassan[67] member of the *Shariʿa* Advisory Board of Bank Negara Malaysia (the Central Bank of Malaysia) states that the Islamic finance instruments, which derived through *maṣlaḥa* or necessity continued to be employed even after there is no need for it anymore:

> Some people say we are liberal. I will say that, before any decision is made, there is a thorough study of the particular issue. We might prefer certain views to others and, in certain circumstances, the bank can go for the exception but the bank is given a time limit for that. However, sometimes the exception has become the default.

Thus, as the statement of this particular *Shariʿa* scholar indicates, 'exception' in *Shariʿa* has become the default in Islamic finance and its operation with the blessing of the *Shariʿa* scholars. In this, as the above data show, organised *tawarruq* in becoming a norm has displaced other financing instruments, which implies its 'normality' and 'commonality' in the existing Islamic financial practices.

In view of such paradigmatic change, a question might arise concerning the role and status of *Shariʿa* scholars in IFIs: If *Shariʿa* scholars have the power to provide *Shariʿa* legitimacy for IFIs, why are they unable to prevent the utilisation of (delusional) *maṣlaḥa* or other exceptional instruments in the observed converge towards conventional financial system? Although we explored the reasons for this failure in another work in detail[68], it is useful to share a summary of the findings in the next section, as the issue relates to the transformation occurred in the role and status of *Shariʿa* scholars and the source of their legitimacy.

4.2. Transformation of the Role and Status of *Shariʿa* Scholars

In our analysis of the role and status of *Shariʿa* scholars in pre-modern and modern periods, we located three main transformations regarding the role and status of *Shariʿa* scholars, which is responsible in the emergence of delusional *maṣlaḥa* based practices becoming norms in IFIs.

Firstly, in the pre-modern period, *Shariʿa* scholars were submerged into the society as society provided their legitimacy, whereas *Shariʿa* scholars in modern SBs submerged into the Islamic banking sector more due to the nature of their profession compared to their submergence into the society. Behind such transformation, there also lies the influence of capitalist ideology in education, urbanisation and city structure and other institutions of modernity in the sense of modernity as a way of life and project and social formation, which hinder submergence of *Shariʿa* scholars into the society and creates deviations. In other words, some *Shariʿa* scholars in SBs have become embedded into the modern financial system and internalised the rules and principles of capitalism as a result of the process they have gone through in modern society (particularly education system) by accepting the realism as a methodological positioning. We can observe traces of such capitalist embeddedness in the *fatwa*-giving process of such scholars who essentialise the principles of capitalism such as efficiency, maximisation, low-transaction cost and shareholder value to justify their rulings and prioritise them in the case of a contradiction between Islamic law and these principles. This can be evidenced by the practice of organised *tawarruq*, among other practices, in IFIs despite the resolution of the ICFA.

Secondly, in the pre-modern period, *Shariʿa* scholars attained their 'civil leader' status through their deep knowledge in *Shariʿa*, sustaining an exemplary way of life and having an embedded

[67] Hassan, 357.
[68] Sencal, "Essays on the Shariʿa Governance System in Islamic Banks: Disclosure Performance of Shariʿa Boards and Historical Evolution of the Roles of Shariʿa Scholars," 153-179.

relationship with the society, which bestowed upon them the power to negotiate on behalf of people with the elite-ruling class individually rather than as a class of 'learned people'. In other words, in the pre-modern period, jurist-consults attained their status individually, which could not be replaced by another scholar easily. Therefore, being local leaders and scholars, they were considered as one of the main stakeholders constraining the negotiation power of the ruling authority. However, negotiation power of the *Sharīʿa* scholars in SBs, compared to the pre-modern period, has lessened, since *Sharīʿa* scholars in SBs attain their source of legitimacy by being appointed to a specific SB and by being paid by the respective IFIs rather than deriving their negotiation power directly from the society. In other words, due to change in the social formation and social structure, leading to new social contract beyond the influence of *Sharīʿa* scholars, they have lost the negotiating power and therefore they have become exogenous 'variables' and 'unit' within the existing governance system including IFIs implying that causality in the power relations shifted in favour of IFIs. This asymmetricity, hence, leads to inadequate negotiation power of members of SBs with top-level management in IFIs. Unlike pre-modern periods, members of SBs attain their legitimacy by directing, monitoring and supervising the operations of the IFIs by being appointed by the board of directors of an IFI as a member of SB, and by being salaried by a respective IFI, not due to their role and status in the society. This situation makes members of SBs replaceable without any disruption, even maybe without any notice of any stakeholders. This is because customers usually do not seek information regarding members of SBs since, for them, the existence of a SB is sufficient condition for *Sharīʿa* compliance of an IFI. Consequently, this transformation in the source of legitimacy of jurist-consults as well as the lack of awareness about the composition of SBs by the demand side in the modern IFIs diminishes the negotiation power of members of SB with top-level management and prevents the articulation of the claims for Islamic authenticity in a robust manner.

Thirdly, the complexity of the society and everyday practices of people changed drastically compared to the pre-modern era in the Muslim world. In the pre-modern period, market exchanges and their expected outcomes, as well as the transaction structures, were simpler. Moreover, since "man's economy, as a rule, is submerged in his social relationships" [69], jurist-consults were aware of the content of these exchanges. On the other hand, capitalism has produced complex and interdependent products and services. Especially due to the globalisation, impacts of economic and financial decisions are not limited within a certain border but might have a synchronised effect in the global markets. Therefore, while foreseeing the consequences of legal rulings were easier during the pre-modern period and could be undertaken by individual scholars, interdependent and complex nature of modern world obliges *Sharīʿa* scholars to work in collaboration with other disciplines such as sociology, economics, politics, *etc*. Thus, while confirmation of a *Sharīʿa* scholar for a certain product or service is a necessary condition to fulfil the form or namely compliance with the scriptural text, it is not sufficient condition to achieve objectives of the *Sharīʿa*. The realisation of the objectives of the *Sharīʿa* requires collaboration and approval of other disciplines as well as developing the capacity to foresee the long-run and short-run outcomes of the decisions in the society. This is crucial in attaining Islamically required a comprehensive and holistic approach.

As a consequence, as explained by Asutay,[70] the hegemonic nature of pragmatism as a methodological position should be considered as a reason for the observed divergence. Due to being embedded in a market economy, some *Sharīʿa* circles and professionals in IFIs relegates the entire task and process to 'moving capital' with Islamic metaphors by ignoring the

[69] Polanyi, *The Great Transformation,* 48.
[70] Asutay, "Islamic Political Economy: Critical Perspectives on the Emergence of a New Paradigm," 18.

substance and moral implications of the form-based compliance. Therefore, delusional *maṣlaḥa* becomes a norm to lead such a pragmatic approach to facilitate decision making process by relegating the main objective to 'moving capital with Islamic metaphors'.

These three main transformations between the pre-modern and modern period make *Shariʿa* scholars very vulnerable against the hegemony of the capitalist market system and its sovereignty. In the next section, we offer a potential way out from the hegemony of the capitalist market system, at least to moderate the outcomes of the operations of existing IFIs through the utilisation of a fuzzy logic approach with the objective of moderating the consequences of the market system on IFI practices.

5. A Fuzzy Logic Perspective: A Way Forward

As discussed in the previous section, there are three main obstacles of contemporary *Shariʿa* scholarship to realise the objectives of *Shariʿa* as members of SBs, namely embeddedness of *Shariʿa* scholars in capitalist market systems, lack of negation power relative to the pre-modern period and necessity of interdisciplinary collaboration due to the complexity of products and services in the modern period. These obstacles make the approval of SBs on *Shariʿa* compliance of IFIs without elaborating and substantiating the compliance as unreliable. Although there are solutions proposed to increase the independence of *Shariʿa* scholars and making *Shariʿa* governance more effective, they are still within the institutional logics of the capitalist market system or state bureaucracy. Establishing a central *Shariʿa* board at the national level, for instance, to supervise and supersede the firm level SBs is an articulation of state bureaucracy and efforts to centralise *Shariʿa* governance further, which will deliver the same consequence as such national institutions will sustain the institutional logic of the existing system rather than questioning it for alternative solutions.

As an alternative solution, this study suggests a civil society-based regulatory mechanism to evaluate the *Shariʿa* compliance of the products and services of IFIs. This proposed regulatory mechanism does not substitute but complements the role of SBs. This regularity system should go beyond the binary opposition of *ḥalāl/ḥarām* or permissible/impermissible and implement a fuzzy logic approach towards the morality of *Shariʿa*. In other words, rather than deciding whether a certain product is *ḥalāl* or *ḥarām*, this mechanism should go beyond that dichotomy and aim to decide as to what degree a certain product or service is compatible with the morality of *Shariʿa* by considering various stakeholders currently kept beyond the decision frame such as environment, employee-employer relationship, production process, *etc*. The labelling such as 'suitable for vegetarians' or 'fair trade', for instance, are examples of binary dichotomies whereas energy efficiency rating of houses on a scale of 1-100 is an example of the fuzzy logic approach. As for IFIs, hence, in addition to determining whether a product or service is *ḥalāl* (with a binary approach), we can also measure its fulfilment of certain dimensions of the morality of *Shariʿa* with a fuzzy logic approach to evaluate to what degree it is compatible with the morality of *Shariʿa* by going beyond the *ḥalāl/ḥarām* dichotomy. For example, a product can be deemed *ḥalāl* through the *fiqhī* process, but with fuzzy logic approach when it is rated in terms of fulfilling the morality of *Shariʿa* expectations, its substantive morality score could be anything between 0% to 100%, which also responds to the current debate on *Shariʿa* complaint Islamic finance vs Islam based finance,[71] as the latter refers to 100% compliancy. Such a rating could give those investors seeking pre-dominance of the morality of *Shariʿa* in their financial and economic transactions an opportunity to go beyond the initial *ḥalāl* sphere to the *taḥsīniyyāt* or embellishment sphere in essentialising aspirations of the morality of

[71] Asutay, "Conceptualising and Locating the Social Failure of Islamic Finance," 100-9.

Shariʿa. Hence, such an arrangement can go beyond the confinement of the term and definition of '*Shariʿa* compliancy' by giving individuals the choice of the extent of *ḥalālness* that they can be comfortable with.

Such a regulatory mechanism has two superiorities over the existing SB driven *Shariʿa* governance mechanism. Firstly, a civil society-based mechanism would convert the negotiation process from top-level management *vs.* SB into IFIs *vs* stakeholders. This shift would help to solve particularly the first two obstacles, namely embeddedness and lack of negotiation power. In the first case, the conflict between top-level management and SB would be minimum, since both groups are driven with similar institutional logics, namely capitalism, which produces conformist behaviour of *Shariʿa* scholars towards the expectations of top-level management, which is mostly profit-maximisation oriented demands. In the second case, although SB resists the demands of top-level management to realise the morality of *Shariʿa* or IME oriented outcome, due to lack of negotiation power, they are forced to settle down with a moderate solution. These two cases are specific to IFIs in which top-level management prioritise the profit over the implementation of the morality of *Shariʿa*. If the opposite is the case, namely a harmony with the top-level management, then SB should be able to implement the morality of *Shariʿa* apart from the complex cases where interdisciplinary collaboration becomes a necessity. By shifting the regularity mechanism for *Shariʿa* governance partly to the civil society, the issue becomes no longer only to getting the approval of SB on a certain product or service in terms of permissibility but requires going beyond that and convince the civil society that *Shariʿa* compliance is genuine by disclosing the relevant information related to the dimensions of the morality of *Shariʿa*. Therefore, the *Shariʿa* compliance is no longer a binary decision of *ḥalāl/ḥarām* but also, after it is approved as *ḥalāl*, to what degree it is compliant with the morality of *Shariʿa* by considering the consequences of *ḥalāl* process, as in the current practice *Shariʿa* scholars only utilises the 'intentionalist' approach in their decision-making.[72] The utilisation of such a civil society-based mechanism, therefore, solves the obstacles of embeddedness of *Shariʿa* scholars and lack of the negotiation power, since it is also the stakeholders that IFIs must convince rather than *Shariʿa* scholars alone. Considering the impact of civil society in the emergence of ethical finance in the West, the importance of civil society in shaping the nature of IFIs should be considered as a viable process.

The second aspect mainly solves the third obstacle, which is the complex nature of product and services in IFIs. Even if embeddedness and lack of negotiation power is not a problem for *Shariʿa* scholars regarding the realisation of the objectives of *Shariʿa*, the complexity of the products and services and necessity of interdisciplinary collaboration in such cases might lead to an obstacle. A civil society-based regularity mechanism would be instrumental in such a case by evaluating the product or service in various dimensions of the morality of *Shariʿa* such as environmental or social impact by using the information provided by the IFI. In such a mechanism, the information provided by IFIs would be used as an input to evaluate the degree of compliance with IME for the products and services approved by SB as permissible. Based on the input, civil society organisations would have the opportunity of providing a score on a scale of 1-100 regarding IME in projects such as ZamZam Tower (the major hotel and business centre in Makkah opposite to the Kabah financed by *suqūq*) or other *suqūq* projects. Such a rating process would also have an impact on pricing and compensate for the cost of fulfilling IME requirements, which will further encourage IFIs and investors to comply with a higher score of IME. This type of encouragement is especially important, since, in the absence of such a feedback mechanism on higher compliance of IME and compensation in exchange for the

[72] Asutay, "Islamic Political Economy: Critical Perspectives on the Emergence of a New Paradigm," 1-23.

efforts of IFIs, there would not be any incentive for an IFI to implement IME. In a similar manner to Gresham law, which states that 'bad money drives out good money'; having the same face values, namely being 'ḥalāl' or permissible, IFIs with higher compliance of IME would be driven out from the market. Fuzzy logic based civil society evaluation mechanism, therefore, would provide a unique value for each product or service in line with their score in compliance with IME. While *Sharīʿa* compliant products and services with a low IME score would find customers, who are only concerned with the form of *Sharīʿa*, the product and services with higher IME scores would be compensated and survived in the market as well.

In such an arrangement, it is not expected that every IFI would aim a high score on the scale since every range within the scale of 1-100 would have a certain market share. However, this mechanism would provide an opportunity to open a niche market for those who aim to invest or do business with IFIs which achieve a high score regarding IME compliance. After the emergence of such a market, it is also the responsibility of civil society to promote and extend the share of stakeholders who aim for a higher score. We can term such an effort as IME inclusiveness or augmentation since the goal is to convince people to require IME features to be present in IFIs' operation through expecting a higher score.

As mentioned above, the proposed process resembles the process which led to the emergence of 'ethical investing' or 'socially responsible investment', which represents the market responses to the demands emerged from the civil society to have their monies to be invested in 'ethically acceptable and social impact areas'. The successful expansion of such investing areas is an indication of the power of the civil society but also indicates the flexibility of the market system for making additional inroads through market segmentation. Furthermore, since, "the newly emerging consumption practices create opportunities for imagining and expressing new forms of religious identities, both collectively and privately"[73], such segmentation as explained above through fuzzy logic will serve the expectations of 'further morally inclined Muslim individuals.' Thus, the power of civil society can overrule the imposed *Sharīʿa* hegemony and further democratise Islamic finance. Such a process might also help to overcome the observed '*Sharīʿa* arbitrage.'[74]

It is also important to recall the *ḥisba* (market regulation body through examining the moral consequences of market) experiment in the Muslim world as part of the civil society, an articulation of 'brotherhood' or 'guild' system in the Ottoman business environment (the *ahilik* system) can provide authentic examples to develop new structures to essentialise Islamic normativeness and substantive morality of Islam in economy, finance and business.

This study, however, acknowledges the difficulties and limits of a civil society-based regularity mechanism based on fuzzy logic. First and foremost, the disclosure practices of IFIs regarding the details of the products and services which is required as input to a potential IME index is insufficient, as indicated by the *maqāṣid al-Sharīʿa* (the higher objective of *Sharīʿa* being the human well-being) performance of IFIs.[75] Therefore, it requires state involvement to enhance the level of disclosure. Secondly, dimensions and potential index items should be developed in line with IME. Considering that such theoretical studies attract less attention, this might be a

[73] Özlem Sandıkcı, "Religion and the marketplace: constructing the 'new'Muslim consumer," 15.
[74] Al-Gamal, "Mutuality as an Antidote to Rent-Seeking Shariah Arbitrage in IslamicFinance," 194.
[75] (see: Aksak and Asutay, "The Maqāṣid and the Empirics: Has Islamic Finance Fulfilled Its Promise?," 197-214; Asutay and Harningtyas, "Developing Maqāṣid Al-Sharīʿa Index to Evaluate Social Performance of Islamic Banks," 13-55; Mergaliev at al., "Higher Ethical Objective (*Maqasid al-Shari'ah*) Augmented Framework for Islamic Banks: Assessing the Ethical Performance and Exploring its Determinants," 7-23; Mohamada et al., "Determinants of Maqāṣid Al-Sharīʿa-Based Performance Measurement Practices," 58-69.)

challenging task to achieve. Nevertheless, studies related to the construction of *maqāṣid*-index might be a good starting point to develop an IME index. Furthermore, such civil society-based approach can also lead to "the clash between opposing moral frameworks" among Muslims leading to a lack of consensus in deciding dimensions and potential index items.[76] Nevertheless, if these competing frameworks do not prioritise the capitalist principles over the foundational aspects of objectives of *Shariʿa*, such competition becomes fruitful in providing diversity similar to the schools of thought in *fiqh*, which has traditionally been prevailing over many centuries in the Muslim world. Thirdly, such a civil society based regulatory mechanism requires a certain degree of awareness on demand side which is necessary to sustain IME compliant products and services in the market and compensate their additional expenses to provide such product and services. Demand for sustainable products and services, organic food and fair trade suggests that such a demand for IME-based products and services is not unlikely but required effort to raise awareness.

Despite these limitations, however, it is important to strive to realise the morality of *Shariʿa* or IME in a decentralised manner and maybe with several alternative IME-based rating mechanisms to bring the IFIs and other financial institutions closer to the initial aspirations of IME. This is crucial to provide and sustain a human-centred development path by going beyond economic growth obsession so that *falāh* or salvation could be achieved and *iḥsān* or beneficence, as objectives of individuals in Islam, can be attempted in this world, which constitutes the objective of being '*khalīfa'* (the viceregency) of Allah in this world.

Conclusion

At the beginning of the 20th century, the reintroduction of al-Ṭūfī's approach to the *maṣlaḥa* by reformist scholars such as Jamāladdīn al-Qāsimī and Rashid Rida has led to the birth of a new method for the solution of modern problems, namely delusional *maṣlaḥa*, particularly in the case of facilitation of Islamic finance. The most important feature of delusional *maṣlaḥa* is that it can be contrary to the verses of the Qurʾan or the sayings of the Prophet Muḥammad, but as long as jurists consider this solution as a '*maṣlaḥa'* or public utility, it is considered as valid, as such *fatwa* is rendered on emerged issues. Since these sources of Islam are God's commands, jurists whose judgement is based on delusional *maṣlaḥa* decide when to nullify God's commands. This very judgement constitutes the exception in the *Shariʿa* since the ruling based on delusional *maṣlaḥa* means scriptural sources (the Qurʾan and the *Sunna*) are inadequate to provide a solution for the case at hand, and an exception should be decided for the case to solve the problem. Organised *tawarruq* as part of Islamic financial expansion is a good example of such an instrument which is utilised by most of the Islamic banks on the ground of delusional *maṣlaḥa* albeit it is announced as prohibited by ICFA. Some of the *Shariʿa* scholars appeal to delusional *maṣlaḥa* principle and defends that lower transaction cost by means of the organised *tawarruq* is for the public good.

Following Schmitt, we claim that the one who has the power to decide the exception is the sovereign. Consequently, a ruling based on delusional *maṣlaḥa* announces these jurists as the sovereign through the authority of deciding exception in the law. On the other hand, we can observe in the Islamic finance sector, *Shariʿa* scholars are not always willingly issue rulings based on delusional *maṣlaḥa*. But they are obliged to issue such rulings due to the compulsion of the capitalist market system, since Islamic banks operate in a capitalist system, albeit they are 'Islamic financial institutions.' Capitalism imposes its own principles, such as the importance of low transaction cost and efficiency on these institutions. But to announce these

[76] Özlem Sandıkcı, "Religion and Everyday Consumption Ethics: A Moral Economy Approach," 14.

financial institutions as 'Islamic', *Shariʿa* scholars have to approve these operations. This point is where delusional *maṣlaḥa* is utilised by *Shariʿa* scholars. Hence, we claim that it is the capitalism rather than the *Shariʿa* scholars who are declared as sovereign over Islamic ontology in relation to Islamic financial institutions.

In proposing a potential way out of this hegemony, we argue that a civil-society-based fuzzy logic approach might be utilised to open a space for the products and services that fulfil the objectives of *Shariʿa.* This can be achieved by going beyond *ḥalāl*/*ḥarām* dichotomy and examining the products and services from the perspective of their fulfilment of the various dimensions of the morality of *Shariʿa*, articulated as the objectives of *Shariʿa*. Rated independently by the civil society formed institutions, this mechanism might help IFIs to inform the stakeholders about *Shariʿa*-based nature of their products and services rather than remaining at the *Shariʿa* compliance level. It is important to note that this mechanism is not a substitute for the *Shariʿa* governance of IFIs at a firm level but a complementary feature. In this way, the institutions with a mission of implementation of the morality of *Shariʿa* might open a niche market for themselves, since they will be able to differentiate their products and services from those institutions which only strive to achieve *Shariʿa* compliance at a minimum level while following the principles of the capitalist market system.

Considering that 21st century provides us with expanded and faster communication channels along with tools to examine big data, two challenges might be overcome relatively easier in the following years. First, it will be easier to access and analyse the information provided by the companies through formal (*e.g.* company reports) and informal channels (*e.g.* advertisements and social media). Particularly tools such as blockchain powered by artificial intelligence should facilitate to collect the required information to differentiate the products and services of competitive companies. This accessibility is not limited to big enterprises but also includes small and medium-sized enterprises. Second, the diminishing transaction cost of the communication year by year helps small and medium-sized enterprises to offer a variety of products and services, including those which fulfil the objectives of *Shariʿa*. These enterprises will no longer be limited to small areas but can convey their products and services to a wider market and become part of the niche market of *Shariʿa*-based products and services. Such developments can support companies to differentiate their products and services as *Shariʿa*-based and provide the necessary information to compensate for the additional cost of being *Shariʿa*-based. Furthermore, due to such developments in the communications field, promoting the distinguishing features of these products and services and outreaching to the potential customers should be cheaper and easier in the following years.

Importantly, the Muslim customers have been moving into new sphere where Islamic ethicality has gained new dimension beyond *Shariʿa* compliancy. As part of gaining confidence in Islamic identity, the awareness in consequences of Islamic finance and halal markets beyond the fatwas of the *Shariʿa* scholars has been making important road in Muslim economic, financial and consumption behaviour. On the one hand 'Generation M, namely young Muslims changing the world'[77] with such critical awareness, and, on the other hand, market system by moving into sustainability discourse and practice has been re-grafting Islamic finance and business as it is seen in the emergence of ethical, socially responsible, impact investing and green sukuk movements within Islamic spheres.[78] Decentralised decision-making process

[77] Janmohamed, *Generation M: Young Muslims Changing the World*, 5-37.
[78] Moghul, *A Socially Responsible Islamic Finance: Character and the Common Good,* 39-81; Zamir and Mirakhor, *Ethical Dimensions of Islamic Finance: Theory and Practice,* 103-134*;* Aassouli *et al., Green Sukuk,*

through the increased social media presence has been helping the emergence of virtual civil societies which can help the fuzzy theory to work in relation to Muslim consumption pattern and endogenization of essentially Islamic norms rather than the form based and market crafted *Shariʿa* compliancy.

Bibliography

Aassouli, Dalal, Mehmet Asutay, Mahmoud Mohieldin, and Tochukwu Chiara Nwokike. "Green Sukuk, Energy Poverty, and Climate Change: A Roadmap for Sub-Saharan Africa." (2018).

Agamben, Giorgio. *State of Exception*. University of Chicago Press, 2005.

Ahmad, Ilyas. "Sovereignty in Islam." *Pakistan Horizon* 11, no. 4 (1958): 244–57.

Aksak, Ercument, and Mehmet Asutay. "The Maqāṣid and the Empirics: Has Islamic Finance Fulfilled Its Promise?" In *Islamic Finance: Political Economy, Values and Innovations*, edited by Mehmet Asutay and Abdullah Turkistani. Berlin: Gerlach, 2015.

Al-Būṭī, Ramaḍān. *Dawabit Al-Maṣlaḥa Fi Al-Shariʿa Al-Islamiyya*. Damascus: Risāla Publishers, 2005.

Al-Gamal, Mahmoud A. "Mutuality as an antidote to rent-seeking Shariah arbitrage in Islamic finance." *Thunderbird International Business Review* 49, no. 2 (2007): 187-202.

Asutay, Mehmet. "A Political Economy Approach to Islamic Economics: Systemic Understanding for an Alternative Economic System." *Kyoto Bulletin of Islamic Area Studies* 1, no. 2, (2007): 3–18.

Asutay, Mehmet. "Conceptualising and Locating the Social Failure of Islamic Finance: Aspirations of Islamic Moral Economy vs. the Realities of Islamic Finance." *Asian and African Area Studies* 11, no. 2 (2012): 93–113. https://doi.org/citeulike-article-id:13936380.

Asutay, Mehmet. "Islamic Political Economy: Critical Perspectives on the Emergence of a New Paradigm." Durham Centre for Islamic Economics and Finance Working Paper, Durham University Business School, Durham, UK (2018).

Asutay, Mehmet, and Astrid Fionna Harningtyas. "Developing Maqāṣid Al-Shariʿa Index to Evaluate Social Performance of Islamic Banks: A Conceptual and Empirical Attempt." *International Journal of Islamic Economics and Finance Studies* 1, no. 1 (2015).

Bank Negara Malaysia. The Financial Stability and Payment Systems Report 2016. Kuala Lumpur: Bank Negara, 2017.

Dar, Humayun and Nursofiza Azmi, ed., *Global Islamic Finance Report 2016: Islamic Financial Policy*, 2016.

Duman, Soner. "Imam Gazzali'nin Maşlaḥat Dusuncesine Katkilari." *Islam Hukuku Arastirmalari Dergisi* 18 (2011): 9–32.

Dusuki, Asyraf Wajdi. "Can Bursa Malaysia's Suq Al-Sila' (Commodity Murabahah House) Resolve the Controversy Over Tawarruq?" *ISRA Research Papers*, no. 10. (2010): 1-26 Retrieved from http://ifikr.isra.my/publication/-/publication/getPublicationDetail/170

Ghazālī, Nasrun Bin Mohamad. "Tawarruq in Malaysian Financing System: A Case Study on Commodity Murabahah Product at Maybank Islamic Berhad." PhD thesis., University of Malaya, 2014.

Hallaq, Wael. *A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-Fiqh*. Cambridge University Press, 1999.

Energy Poverty, and Climate Change: A Roadmap for Sub-Saharan Africa, 12-6; Richardson, "Responsible finance sukuk—can they bring societal value to a value-neutral market?," 398-425.

———. *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament*. NONE. Columbia University Press, 2012.

Handler, Benjamin. “Towards the Sociology of Sovereignty.” *Canadian Journal of Economics and Political Science/Revue Canadienne de Economiques et Science Politique* 2, no. 3 (1936): 424–30.

Hassan, Ahmad Fahmi. “An Empirical Investigation Into The Role, Independence And Effectiveness Of Shariʿa Boards In The Malaysian Islamic Banking Industry.” PhD thesis., Cardiff University, 2012.

Iqbal, Zamir, and Abbas Mirakhor. *Ethical dimensions of Islamic finance: Theory and practice*. New York: Palgrave, 2017.

Islamic Finance Resource. “Organized Tawarruq Is Permissible: Sheikh Nizam Yaquby.” Accessed September 6, 2016. https://ifresource.com/2009/07/23/organized-tawarruq-is-permissible-sheikh-nizam-yaquby/

Janmohamed, Shelina. *Generation M: Young Muslims Changing the World*. London: I. B. Tauris, 2016.

Kayadibi, Saim. “Al-Ṭūfī Centred Approach to Al-Maṣlaḥah Al-Mursalah (Public Interest) in Islamic Law.” *Islam Hukuku Arastirmalari Dergisi* 9 (2007): 71–96.

Khan, Salman H. “Why Tawarruq Needs To Go - AAOIFI and the OIC Fiqh Academy: Divergence or Agreement?” *Islamic Finance News*, September 2009.

Khnifer, Mohammed. “Maṣlaḥah and the Permissibility of Organized Tawarruq.” *Opalesque Islamic Finance Intelligence* 668, no. 8 (2010): 1–23.

Mergaliyev, Arman, Mehmet Asutay, Alija Avdukic, and Yusuf Karbhari. "Higher ethical objective (Maqasid al-Shari’ah) augmented framework for Islamic banks: Assessing ethical performance and exploring its determinants." *Journal of Business Ethics* (2019): 1-38.

Merriam, Charles Edward. History of the theory of sovereignty since Rousseau [electronic resource]. Batoche, 2001.

Moghul, Umar F. *A socially responsible Islamic finance: Character and the common good*. New York: Palgrave, 2017.

Mohamada, Muslim Har Sani, Muhammad Ahmar Alic, and Ros Aniza Mohd Sharif. “Determinants of Maqāṣid Al-Shariʿa-Based Performance Measurement Practices: The Case of Malaysian Islamic Banks.” *International Journal of Economics, Management and Accounting* 24, no. 1 (2016): 49-81.

Nagan, Winston P, and Aitza M Haddad. “Sovereignty in Theory and Practice.” *San Diego Int’l LJ* 13 (2011): 429.

Opwis, Felicitas M. M. “Maṣlaḥa: An Intellectual History of a Core Concept in Islamic Legal Theory.” PhD thesis., Yale University, 2001.

Parker, Mushtak. “Are More and More Islamic Banks Shunning Tawarruq?” Arabnews, 2009.

Polanyi, Karl. *The Great Transformation*. Boston: Beacon, 2001.

Qomariyah, Siti. “Al-Ghazālī’s Theory of Munāsaba in the Context of the Adaptability of Islamic Law.” PhD thesis., McGill University, 1994.

Rapcsak, Janos. “Sovereignty-Past and Present.” *Társadalom És Gazdaság Közép-És Kelet-Európában/Society and Economy in Central and Eastern Europe* 20, no. 1 (1998): 28–44.

Richardson, Edana. “Responsible finance sukuk—can they bring societal value to a value-neutral market?” *Capital Markets Law Journal* 14, no. 3 (2019): 394-428.

Sandıkcı, Özlem. “Religion and the marketplace: constructing the ‘new’Muslim consumer.” Religion 48, no. 3 (2018): 453-473.

Sandikci, Ozlem. “Religion and Everyday Consumption Ethics: A Moral Economy Approach.” Journal of Business Ethics (2020): 1-17.

Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago: University of Chicago Press, 2005.

Sencal, Harun. "Essays on the Shariʿa Governance System in Islamic Banks: Disclosure Performance of Shariʿa Boards And Historical Evolution of the Roles of Shariʿa Scholars." PhD thesis., Durham University, 2017.

Shaharuddin, Amir. "The Bayʿ Al-ʿInah Controversy in Malaysian Islamic Banking." *Arab Law Quarterly* 26, no. 4 (2012): 499–511.

Siddiqi, Mohammad N. "Islamic Banking and Finance in Theory and Practice: A Survey of State of the Art." *Islamic Economic Studies* 13, no. 2 (2006): 1–48.

Willis, Hugh Evander. "The Doctrine of Sovereignty Under the United States Constitution." *Virginia Law Review* 15, no.5 (1929), 437–75.

Abbreviations

IFI	Islamic financial institution
ICFA	International Council of *Fiqh* Academy
IME	Islamic Moral Economy