THE PREVENTION OF FINANCIAL CRIME WITHIN AN ISLAMIC LEGAL FRAMEWORK

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Introduction

Financial crime has been affecting the stability of the international financial system for several decades. Consequently, the world financial system has made considerable efforts to fight all aspects of financial crime. The Islamic legal system, a major player in developing countries and a participant in developed countries, has to contribute to the establishment of a harmonised regulatory framework that builds a stable and safe international financial system.

However, in Islamic legal authorities, the phrase ‘financial crime’ does not exist. This does not mean that Islamic law does not consider crimes that may affect the economy. Indeed, Islamic law nominates certain crimes which are likely to economically or socially affect Muslim society. Moreover, Islamic law prescribes a set of principles, norms and measurements to deal with acts that are likely to affect the economy. This paper will attempt to re-read Islamic legal authorities from a contemporary viewpoint, in order to produce a modern Islamic-based legal study in relation to financial crimes. This may move forward the integration of Islamic law and international economic law.

Definitions and aspects of financial crime

In this relation, crime, literally, refers to the act of committing an offence. Crime has general and specific meanings. Firstly, the general meaning refers to any sin or transgression that it is commanded to avoid, even if it is not decided to punish the transgression by the law. For example, lying, hatred, envy, greed, meanness, scandal etc. are all prohibited, justify the anger of God and ought to have a punishment in the hereafter, although no specific punishment has been decreed for the lifetime. Thus, the general meaning of crime is connected to evil in relation to moral and ethical aspects, and does not relate to the penal code.
Secondly, there is a specific meaning, which defines those criminal acts that are within the penal code. In Islamic jurisprudence, crime is defined as an illegal act that harms an individual or his property. According to a Quranic verse, crime could have the definition of any act that is against righteousness and justice. Some define it as a name for certain prohibited acts which cause damage to people or their belongings. In other words, the term ‘crime’ refers to those criminal actions, which are prohibited by the Shariah. For which Allah prescribes a heavy or discretionary punishment. According to the above definitions, in order to define a conduct as a criminal act there must be four essential elements. First, an illicit act must be interpreted by the specific meaning of crime, which means that it ought to have a physical aspect (i.e. committing an illegal act). Thus, the general meaning alone does not establish a crime. Secondly, an act must be illegal and prohibited by the Islamic law. Thirdly, an act absolutely must be committed by reasonable human intention. Lastly, there must be a punishment, prescribed by a legal text or to be decided by a court, for any act that is described as criminal.

In Islamic law, four major financial crimes can be identified: theft, confiscation, bribery and peculation. It is necessary for this investigation to define each of these types of crime. Theft is the taking of property possessed by other people secretly and fraudulently. According to this definition, theft includes three elements. The first element is to possess another’s property without their permission. The second element is using means of sharp practice, such as secrecy and fraudulence, to achieve this intention. The third element implied from the definition is the intention of taking the possessed property from a reasonably safe place, then the intention cannot be qualified as a theft act. Similarly, stealing from the public sector or any government agency leads to a similar conclusion. Public money or communal property belongs to the whole community, which means that an individual cannot enjoy it alone. On this basis, public money must not be abused or confiscated, and officials who are in charge of the operation of a public property must not own it. Otherwise this is considered as peculation. This act is more hazardous to the national economy than stealing from individuals, as it severely affects the economy.

Confiscation is defined as taking away other people’s property by a legal act and not by defeating them using political, economic or social power. It is also to expropriate someone’s own property from him without legal right. There are other synonyms that clarify the situation of exceeding the legal right to others’ rights, which can be used to explain this meaning. For example, encroachment refers to the illegal situation of taking away another’s patent or other intellectual properties. Thus, confiscation differs from theft in two ways. The first is that the act of confiscation is done explicitly under the eyes of other people. The second difference is that, in confiscation, there is the use of political, economic or social power. Thus in this case, the intention of illegally seizing another’s property is clear and self-evident.

Bribery is also prohibited in Islamic law. It is a type of financial crime which leads to the risk of economic corruption. Basically, it refers to an incentive that is illegally given as a means of promotion in order to acquire, in return, an illegal advantage. It is a way for someone to prevent others from having their rights, or to illegally enjoy others’ rights. According to this definition, a gift presented to an official purely because of his position is considered as bribery. The intention can be ascertained through the relationship between the giver and the official, which might indicate that an official would not obtain this gift if he did not hold this position. Bribery leads to massive corruption in political and economic systems, therefore Islamic law has paid great attention to warning people about such crime. It is stated:

‘...And eat up not one another’s property unjustly [in any illegal way, e.g. stealing, robbing, deceiving etc.], nor give bribery to rulers [judges before presenting your cases] that you may knowingly eat up a part of the property of others sinfully.’

Thus, providing any financial support or any sort of gift to a ruler, an official, a civil servant, a state agency or a judge, even if there is no benefit to be claimed,
is considered as bribery. This is to let governmental transactions operate legally and without any prejudice among people. The final group of financial crimes is gaining money in illegal ways. This is described by the word 'Soht', which means any earnings that come from illegal sources or illegal works. Under this section, several acts, such as Harabah, usury, gambling, forgery, the sex trade and selling illegal products, can be considered as financial crimes. The first crime mentioned in this group is Harabah. It literally means hostilities, which is opposite to Slim or peace, because it is considered to be an out-of-law action. Legally, this description applies to any group or person who dissents from and wages war against Islamic law by breaching its rules and frightening people by threatening their safety. All definitions in this regard are extracted and interpreted from legal texts, which indicate the main elements of Harabah. These elements are disobedience of the law and doing mischief in nations and amongst safe people. The term Harabah could be used to describe banditry, highway robbery or any armed organised crime that robs others' property. It differs from other similar financial crimes, such as robbery and confiscation, in several ways. Firstly, Harabah is an organised crime that includes a planned intention, undercover work and destructive actions, such as killing, in order to expropriate others' property. Secondly, Harabah is an action that is usually operated by people who explicitly reject the law. Thirdly, it is operated by armed people who are likely to cause injury to their victims in order to achieve their objectives.

The second crime that is related to the economy and categorised as gaining money illegally is gambling. It is prohibited by the primary legal sources: Quran and Sunnah. Gambling is called Qimar or Mayer, which refers to uncertainty. The prohibition of gambling is based on Gharar: risk, which is a banned act, whether in financial or any other social transactions. Gharar is defined as a transaction whose consequences are unknown and uncertain, which leads to conflict between parties. For example, a Gharar sale is that contract of sale in which the subject matter of the sale is uncertain, such as selling a bird in the sky. This type of contract is illegal and consequently invalid. However, minor risk may be accepted in some cases and under certain stipulations, but uncertainty or major risk is rejected by the law. In this relation, Qimar, as a branch of Gharar, may be defined as a zero-sum exchange with uncertain payoffs, where there is no economic activity involved, and consequently no room to stimulate and foster the economy. Qimar is prohibited whether it is conducted as a game for fun, a business for profit or charity fundraising. The legal text that prohibits gambling has stated that there may be some advantages of gambling for some individuals, such as gaining money, but this does not justify the transactions, and on the whole there are great damages to economic and social interests. It is believed that the economic and social disadvantages from such transactions are inevitable.

The third crime in this group is usury, which is strictly prohibited by the primary legal sources: Quran and Sunnah. It is a contract of loan that includes a stipulation of interest. This could also occur together with a contract of sale; nonetheless there is a clear difference between them. Reba, or usury, literally means the increase and augmentation of something. It is legally defined as 'A contract of exchange of legally unequal consideration, or for a delay in its compensation'. It is an increase in the compensation for particular types of possessions that are exchanged by a contract of loan or a contract of sale. In the English language, there are similar descriptions. Usury is: 'The gain of anything in consideration of a loan beyond the principal or thing lent; otherwise called interest', while interest is defined as, 'The annual profit on a loan of money'. To explain this, Islamic law forbids loaning money under conditions where the amount of money to be returned is greater than the sum of the original loan. For example, loaning £10,000 and requiring £12,000 to be returned at a later date, or paying a rate as an extra charge of the original capital, would be forbidden by Islamic law. Another example of a usury sale is to sell ten grams of gold, to be exchanged at a later date for 15 grams of gold. The transaction of usury is strictly prohibited by the main sources of Islamic law; it is stated in the Quran: '... Whereas Allah has permitted trading and forbidden Reba [usury] ...'. Likewise, Sunnah has strictly warned Muslims against dealing by usury. Consequently, the unanimity of Muslim scholars is the prohibition of usury. The above examples show two categories of usury: usury in loan and usury in sale. These two categories are described as follows:

The first category consists of the interest which the lender receives from the borrower according to the condition stipulated in the contract or on the basis of their implied agreement or custom. The second category consists of: an excess which one of the contracting parties receives from the other party in addition to either of the counter value (for example, in the sale contract in addition to the price (if he is the seller) or in addition to the goods (if he is the buyer)) on the condition that the price and counter value are measured by capacity, or by weight, and are in view of custom [urf] or Islamic law [shariah] of the same kind. Usury in a loan is the increase in interest of a debt inasmuch as its discharge is delayed, for example lending a certain amount of money for a certain period and collecting it afterwards in addition to some interest. It can be the annual interest for the capital that has been lent for a certain delayed time.
Also, it could be paying more interest for a greater delay in discharging the loan.

Other types of contemporary financial crime

In the international economic environment, there are now a number of common crimes, which did not exist centuries ago, or existed only in very limited situations. These include public service abuse, economic–political corruption, white-collar crime, money laundering, organised crime and cross-border organised financial crime, forgery of currency or other financial instruments, insider dealing, etc. The emergence of unprecedented new crimes, which have not been prescribed by legal texts, does not mean that there is a lack of legal solutions. Basic principles of Islamic jurisprudence can establish an appropriate legal response by diagnosing a current case and exposing it to relevant original texts in order to set up a suitable legal decision, which is an aim of this paper.

Economic–political corruption and public services abuse are inter-related crimes, in the sense that one could lead to the other. Both have caused great damage to most states in the world, particularly the so-called ‘Third World countries’. In the Holy Quran, the story of Joseph and the King of Egypt states:

‘And the king said: Bring him to me that I may attach him to my person. Then, when he spoke to him, he said: Verily, this day, you are among the highest and fully trusted. Yusuf [Joseph] said: Set me over the store-houses of the land; I will indeed guard them with full knowledge [as a minister of finance in Egypt]. Thus did we give full authority to Yusuf [Joseph] in the land, to take possession therein, when or where he likes. We bestow of Our Mercy on whom We will, and We make not to be lost the reward of Al-Muhsinun [the good doers].’

Thus, to avoid any sort of economic–political corruption, Islam has prescribed two principles which are required in order for an individual to become involved in a public service occupation. Firstly, one should have the characteristics of guardianship, such as honesty, credibility and trustworthiness. Secondly, one should have adequate knowledge and experience as required by the occupation sought. The lack of these characteristics is likely to cause corruption. The appointment of an individual who does not have these characteristics is considered as perfidy against the nation. Economic–political corruption is a financial crime that is committed by political officials or other public service individuals or groups, through which national resources, privileges or other public advantages are abused or used for private benefit. The means of economic–political corruption include embezzlement, fraud, bribery and forgery. On one occasion the Prophet (PBUH) questioned his administrator regarding a property: ‘From where have you got this?’ the Prophet asked. ‘It is a personal gift,’ the administrator replied. ‘Would you attain it if you were sitting in your house?’ the Prophet criticised. Then, he decided that any wealth, fortune or benefit acquired from national resources, public property or attained as a result of occupying a public service position, is illegal and must cause public inquiry. All means of corruption mentioned here are principally prohibited in Islamic law due to corruption itself being an illegal conduct and forbidden by the law. Any sort of illegitimate means, even if it has not been decided by the law, is considered prohibited. To a certain extent, legitimate means are rejected if they are likely to cause corruption. This can be considered as a good example of the above-mentioned jurisprudential principle: ‘Legal method does not legalise illegal action’. Thus, all means of corruption that are known or exist in numerous contexts in the world can have similar legal conclusions.

White-collar crime is defined as ‘planned crimes that involve cheating or lying that usually occur in the course of employment’. White-collar crimes may include embezzlement, fraud, bribery and forgery from employees against their employer, whether the employer is in the private or public sector, or from businessmen against customers. However, a criminal attitude is not necessarily a direct cause of white-collar crime. There are some other grounds where employees individually commit white-collar crimes. For instance, those on low incomes could be practising illegal behaviours that they cannot afford to pay for (for example, drug addiction, alcoholism, sexual affairs, gambling). However, white-collar crime can also be carried out organisationally by groups, due to economic–political corruption. Organised white-collar crime takes place when corrupt activities occur within all or a part of a government or corporation. In Islamic jurisprudence, mere dishonesty, cheating, infidelity, faithlessness, untrustworthiness, treachery and disloyalty are all unacceptable behaviours. Moreover, perpetrators of such matters ought to have the anger of Allah and deserve to be punished in the hereafter. Yet, practising additional illegal activities, such as embezzlement, fraud, bribery and forgery, means punishment in this lifetime.

Organised crime is a long-term criminal enterprise that fraudulently works to gain money and wealth from illegal activities. Its existence is maintained by means of the use of force, threats, monopoly control, and the corruption of politicians and public servants. There are three categories of products that can be provided by organised crime. These are illegal services, illegal goods, and the illegal penetration of legitimate business and public...
authority. In each of these categories there are other identifiable crimes, which are strictly prohibited by Islamic law.

Illegal services include prostitution, gambling and executing revenge. The illegal goods category includes the sale and distribution of drugs, alcohol, counterfeit money, stolen goods and black-market products. The illegal penetration of legitimate business and public authority can occur through the use of bribery, intimidation or banditry to terrorise the public, particularly women, from developing and less-developed countries to travel to developed countries to obtain better incomes for their families.

They have been used illegally in the sex trade and drugs trafficking. This has become a major international problem, affecting the home countries of the victims. Moreover, cross-border financial crime is the developed form of national financial crime. Its form could be organised or ordinary individual crime. In relation to organised crime, the recent technological innovations and global telecommunications improvements have facilitated the joining of domestic organised crime groups with international organisations. This has become a major concern in recent years with the reduction in travel costs and the development of closer socio-economic inter-relationships. Global criminal strategies involve similar activities to those on the domestic front, such as trafficking drugs and stolen commodities. However, the more active and profitable such as trafficking drugs and stolen commodities.

Engaging, directly or indirectly, in a transaction that involves property that is proceeds of crime; or receiving, possessing, concealing, disguising, transferring, converting, disposing of, removing from, or bringing into the [territory] any property that is proceeds of crime; and knowing, or having reasonable grounds for suspecting that the property is derived or realised, directly or indirectly, from some form of unlawful activity; or where the conduct is conduct of a natural person, without reasonable excuse failing to take reasonable steps to ascertain whether or not the property is derived or realised directly or indirectly, from some form of unlawful activity; or where the conduct is conduct of a financial institution, failing to implement or apply procedures and control to combat money laundering.

In other words, it is a legal commercial operation, which aims to convert a massive amount of illegal money that has been collected as a result of illegal activities (for example, drugs trafficking, terrorist activity, prostitution or other serious crimes) into legitimate money. It is obvious that this legal operation is aimed to give such money a legal appearance, which means that it is a profit or an income from legal sources. It seems that money laundering or its legal commercial operation is not a bona fide crime. Indeed, the criminal approach is not direct criminal behaviour in this situation, but it is considered as an absolute legal incentive to justify illegal conducts. Under Islamic law it is known that any illegal act is banned if it may lead to or justify an illegal act. In this relation, if the money is proved to be gained from illegal sources, there should be a prosecution not as a result of the legal acts, but, to be more precise, because of the illegal activities (for example, drugs trafficking, terrorist activity, prostitution or other serious crimes). According to the National White-collar Crime Centre there are three steps through which money laundering can be carried out. These are placement, layering and integration. Placement is a process of negotiating for unlawful income to be deposited into banks and financial institutions. This action could take the form of direct deposits, money transfers, travellers’ cheques or money orders. In addition, there is a process of layering, through which illegal income is disconnected from its illegal activities to take on a legal appearance by creating several legal financial transactions in order to conceal all illegal activities. Moreover, the final step that legalises the illegal money is called integration. It is a process of using legal transactions – or transactions that seem to be legal by using false information, such as false accounting information – to insert illegal money in order to cover it up within a sum of legal money.

Finally, in relation to financial crime, Islamic law has an essential norm based on the prophet’s saying: ‘He who deceives is not of me’ or ‘He who deceives is not of us’. Therefore, any practice that negatively affects the market prices and stability is illegal and prohibited by the law. For example, a practice that depends on manipulation, hypocrisy, treachery or betrayal of trusteeship is not accepted and must be eliminated from Islamic society. The most well known economic-related practice that can be mentioned here is insider dealing. This specifies...
the trading of corporation shares to make a profit by using confidential information that could affect the share price. It is the illegal use of inside information from the public or private sector in order to attain substantial short-term profit. For this reason it is considered as a financial crime. Insiders leak secret financial information for their direct benefit or for others' benefit, but to attain in return some personal interest. In this way, bribery could be an essential means to motivate people within a corporation or public bodies to work as insiders. An insider can benefit directly by selling information that he is entrusted to keep secret, or by passing such information on to relatives, or by attaining money as bribery.

Conclusion

It is obvious that most, if not all, Muslim countries or Islamic states nowadays suffer significant damage as a result of financial crime and corruption. They have corrupted economies and have caused many other social and economic problems. The question that must be introduced is thus: has this situation arisen by the accurate practice of the Islamic legal system, or the reverse? Indeed, to practise Islam is not just to pray at the mosque five times a day. To be a real Muslim requires abstention from any criminal activity. Since there is a contradiction between being a Muslim, who follows the law of God, and being a criminal, who does not do so, Islamic law cannot be separated from its moral, ethical and religious principles. Otherwise its rules will be useless. In other words, the Islamic legal system cannot be secular. This is because all Islamic rules, including economic and political, are connected with the faith, beliefs and worship of Islam. Thus, Islam is not just a religion; it is a comprehensive system that includes all aspects of human life. Muslims believe that they are rewarded when they practise legal economic transactions, political reforms or social enhancements. In the same way, they deserve to be punished when they commit illegal economic transactions, political corruption or social mischief.

In relation to this subject matter, the development of anti-financial crime policies, legislation and legal procedures such as crime identification, arrest and conviction, requires that Islamic countries should reform their overall legal systems. Yet, they do not have a unified code or doctrine that applies the principles of Islamic law in a comprehensive structure. The uniformity of the legal framework for financial crimes enables an Islamic approach to be consistent or maybe harmonised with the international agreements in this area. Thus, it should be an urgent priority for Muslim scholars to develop their legal system as well as for international players to give more attention to the examination of Islamic research.

1. This study is part of a PhD thesis, titled as 'Financial Risks in Islamic Banking System and the Regulatory Role of the New Basel Accord', which is in progress under the supervision of Dr Kern Alexander at the Institute of Advanced Legal Studies.
3. There could be a punishment through Ta’zeer, imposed punishment, and through legal trial.
4. [O you who believe! Stand out firmly for Allah as just witnesses, and let not the enmity and hatred of others make you avoid justice (i.e. commit crime against them). Be just: that is nearer to piety, and fear Allah. Verily, Allah is Well-acquainted with what you do (HQ 5:8).]
7. Haddi is a punishment which is nominated by the sacred primary authorities, while discretionary punishment is left for the state legal authority to decide the punishment.
9. Thus, if an act is done by a human, but is caused by an act of God or an animal, it does not count as a crime.
11. For example, the verse ‘Verily, Allah enjoins Al-Adl (justice) and Al-Ihsan (i.e. to be patient in performing your duties to Allah), and giving [help] to kith and kin [i.e. all that Allah has ordered you to give them, for example, wealth, visiting, looking after them, or any other kind of help], and forbids Al-Fahsha (i.e. all evil deeds, e.g. illegal sexual acts, disobedience of parents, to tell lies, to give false witness, to kill a life without right), and Al-Munkar (i.e. all that is prohibited by Islamic law), and Al-Raghib (i.e. all kinds of oppression). He [Allah] admonishes you, that you may take heed’ (Nobel Quran, 16-90).
13. The word ‘passion’ corresponds to the Arabic word ‘Hajz’, which means to hold something in a safe place; see Alfaruqabady (1994, p. 653).
14. For example, the prophet has said, ‘Whoever gathered unlawful riches and then gave out in charity, he will have no reward; on the contrary he will have to bear the burden of his evil deed’. See Alakhim, op. cit.
16. The prophet has said, ‘Allah has cursed one giving bribe and one receiving it as well as the one that gives it’. See Almawsooah Al-Ihsan Al-Mawsooah Al-Ihsan Encyclopedia, section Rashwa.
17. The prophet has said, ‘If you were sitting in the house of your father or your mother would anyone give you that gift if you are truthful?’ (The Nobel Quran [2:188]).
21. The word ‘passion’ corresponds to the Arabic word ‘Hajz’, which means to hold something in a safe place; see Alfaruqabady (1994, p. 653). Also, there are some other related Prophet’s sayings.
25. The Concise Oxford Dictionary of Current English 1994 defines zero-sum (i.e. of a game) as whatever is gained by one side is lost by the other so that the net change is always zero.
27. It is reported that some winners distribute their gambling profit to needy people; nevertheless, Islamic law prohibits it as it has other social and economic disadvantages. See the above principles: legal purpose does not justify illegal method and a good end does not justify a bad start.
30. Ibid.
31. HQ [2:275, 276 and 278].
33. Ibid., p. 243.
35. HQ [12:54–56].
44. One may distinguish between the two terms ‘Muslim Country’ and ‘Islamic State’. The first refers to a country in which a majority of the population are Muslims, but does not enforce Islamic law. The second term refers to a state which does enforce Islamic law.

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