

Conference Report

Shari'ah Objectives (Maqasid Al-Shari'ah) in Mu'amalat and Contracts

The objective of the Shari'ah or *maqasid al-Shari'ah* is to promote the welfare of human beings through safeguarding the five fundamentals: faith, life, intellect, posterity, and wealth (Al-Ghazali, 1356/1937, pp. 139-140; Chapra, 1998 & 2008). The scope and application of *maqasid al-Shari'ah* is very wide yet as Kamali (2014) asserts, it has remained underdeveloped in Islamic legal thought. It did attract some attention only in the latter part of 20th century but that too has largely remained in the realm of methodology, not so much on the applications of *maqasid* to particular subjects. Currently, *maqasid al-Shari'ah* is considered to be the guiding principle of Islamic finance, but the current discourse on *maqasid* is confined to generalities such as *dharuriyyat*, *hajiyyat* and *tahsiniyyat* without much attention paid to the particularities of *mu'amalat* and contracts that are currently in practice.

This lacunae is filled somewhat by the International Conference on 'Shari'ah Objectives (*Maqasid Al-Shari'ah*) in *Mu'amalat* and Contracts. It was jointly organized by International Institute of Advanced Islamic Studies (IAIS) Malaysia and Securities Commission Malaysia along with Islamic Banking and Finance Institute Malaysia (IBFIM) and International Shari'ah Research Academy for Islamic Finance (ISRA) and was held at IAIS auditorium on 28 & 29 January 2014 (Tuesday & Wednesday). The theme of the Conference was "Identification – Classification – Criteria and Applications to *Mu'amalat*" and its objectives were : 1) to promote a better understanding and application of *maqasid al-Shari'ah* in the light of contemporary needs; 2) to underline the significance of *maqasid al-Shari'ah* in Islamic financial transactions (*mu'amalat*); 3) to address the challenges of *maqasid*-compliance in Islamic financial institutions, and to provide solutions so as to uphold the principles and the spirit of Islamic law; 4) and to propose a unified regime of compliance for Islamic financial institutions, and governance policies which they may adhere to.

The former Prime Minister of Malaysia, Abdullah Haji Ahmad Badawi, gave the opening speech. It also included special lectures by Mohammad Hashim Kamali, Badlishah Abdul Ghani, and 23 papers on various topics. There were 9 papers on "*Maqasid al-Shari'ah* in Islamic Banking and Finance: Between Theory and Practice", 7 papers were on "*Maqasid al-Mu'amalat*: Between Theory and Practice" and 7 papers on "*Maqasid Al-Shari'ah*: Theoretical and Philosophical Perspectives." All papers were in English language. Around 300 scholars, academics, lawyers and practitioners from various related backgrounds, students and media took part in the conference. Major contributions of the conference are illustrated below :

Special Lectures

In the first special lecture "*Maqasid al-Shari'ah*: Methodology and Classifications" Dr. Mohammad Hashim Kamali discussed the methodology dealing with the definition,

conditions, classification, identification and proof of *maqasid*. He gave three reasons for the relative underdevelopment of *maqasid al-Shari'ah* in Islamic legal thought : 1) the philosophical bent of *maqasid* which did not quite fall in line with the textualist tendencies of the *Usul al-Fiqh* jurists; 2) little work has been done on relating the *maqasid* to *mu'amalat* and contracts; and 3) little attention has been paid on the applications of *maqasid* to particular subjects.

In his second special lecture on “*Maqasid Pertaining to Mu'amalat and Contracts*”, Kamali reiterated the need for the Islamic Banking and finance to observe *maqasid* in their corporate objectives and policies, and also use them to verify compliance to true Islamic principles. Fulfillment of people's needs and realisation of their benefits, he remarked, should be the general purpose of all contracts and *mu'amalat*. Besides mentioning five *fiqh*-texts-specified general objectives (*maqasid ammah*) of the preservation of wealth, he adds a sixth, namely, growth and development (*tanmiyah*). The *fiqh* treatment of *tanmiyah*, he argued, is often subsumed under *rawaj* yet *tanmiyah* merits to be a separate category because economic development and finance is instrumental to the realisation of so many other *maqasid*, which may not always fit in under *rawaj*. Hence *tanmiyah* should be separated from *rawaj*.

In the last special lecture “*Maqasid Al-Shariah to different Stakeholders of Islamic Banking and Finance*”, Badliyah Abdul Ghani quotes Qur'anic verses and Hadiths to substantiate five *maqasid al-Shari'ah*. He highlighted, afterwards, the role of different Stakeholders of Islamic Banking and Finance to facilitate *maqasid al-Shari'ah*. He recommended specific policies to this end as follows: private sector should facilitate the differing demands from customers and governments and regulators in any jurisdiction must provide an enabling environment to facilitate this.

Maqasid al-Shari'ah in Islamic Banking and Finance : Between Theory and Practice

In his ‘Government Policy, *Maqasid al-Shari'ah* and the Sphere of *Mu'amalat*’, Dr. Ahmad Hidayat Buang of University Malaya (UM) discussed theoretical aspect of *maqasid al-Shari'ah* of the government in relation to *mu'amalat* and his view is that the original moral philosophy of the *Qur'an* and *Hadith* together with the precedents of the early Four-Rightly Guided Caliphs should be the important reference to the government in the implementation of the *Shari'ah* in *mu'amalat*.

In “*Maqasid and Wasail : Purposes and Means in Relation to Maqasid*” Dr Akhtarzait Abdal Aziz of International Islamic University, Malaysia (IIUM) explored the purpose and means vis-a-vis the theory of *maqasid*. She tried to discover the relationship and position of *wasail* within the theory of *maqasid* and *sadd al-dharai* as one of the sources of *Shari'ah*. Her paper found that the terms *wasail* and *dharai* are interchangeable and the concept of *dharai* should be viewed within the wide concept of *wasail*, comprising of *sadd* and *fath al-dharai*. It is observed that the framework of *maqasid* and *wasail* could provide a practical scale of priorities within the values of *masalih* and *mafasiid*.

Eminent *shari'ah* scholar Dr Aznan Hasan of the Institute of Islamic Banking and Finance (IIBF), IIUM, talked about the current practices and relevant issues concerning the uses and applications of *Wa'ad* in Islamic banking and finance. He felt that though the practice of

wa'ad is necessary in this industry, the rules of *Shari'ah* are needed to ensure fully if the *maqasid al-Shari'ah* is to be rightly obtained. So the industry must have proper standard of *wa'ad*.

Dr. Mohamed El-Tahir El-Mesawi gave an overview and preliminary reflections on Ibn 'Ashur's Project of '*Ilm Maqasid al-Shari'ah*'. Admiring Ibn Ashur's work, El-Mesawi stated that "strong call to develop *maqasid al-Shari'ah* from merely a sub-topic in Islamic legal theory (*usul al-fiqh*) into an independent and self-contained discipline by the name of '*Ilm Maqasid al-Shari'ah*' is found in this work which can be employed in contemporary Islamic discourses on renewal and reform (*tajdid* and *islah*) in Muslim societies. He felt, however, that despite the high presence of Ashur's ideas in the increasing literature on *maqasid al-Shari'ah* both in Arabic and English, little attention has been given to the overall structure and methodological and epistemological implications of his project.

In their joint paper "*Maqasid al-Shari'ah* and Stipulation of Conditions (*Shurut*) in Contracts", Dr. Mohamad Akram Laldin and Dr. Hafas Furqani remarked smoothing wealth circulation as one of the *maqasid al-Shari'ah*. They attempted to elaborate the issue of introducing new transactions which are not contradictory to the principles of the *Shari'ah* by exploring the nature of conditions (*shurut*) in Islamic contract law, their types and classifications, and by examining their relationship with the *maqasid al-Shari'ah*. Laldin and Furqani underscored on recognizing, guarantying and protecting 'the freedom to stipulate conditions in a contract' by Islamic contract law within the spirit of realizing the MAS.

In their study on "Property Related Objectives of *Shari'ah* and their Realization in Islamic Finance", Najeeb Zada, Irum Saba, and Dr. Salim ur Rahman explored the *maqasid al-Shari'ah* with special emphasis on protection of property/wealth (*maal*). Despite the absence of the theoretical and ideological sides of the issue, they present a model/diagram explaining the hierarchy of main and sub types of property related objectives and investigate the current state of affairs with respect to Islamic finance industry. They, argued that *Shari'ah* compliance process should not only the sole concern of Islamic banking because it is not an end but a mean to achieve the sublime goal of social justice and economic well being of the human community.

In his presentation on "*Maqasid al-Shari'ah* & Islamic Finance : A Legal Practitioner's Perspective", Megat Hizaini Hassan spoke on the lawyers' involvement in Islamic finance in transactional work, dispute resolution, and regulatory advice concerning how MAS can ensure best practice to establish a balance relationship between lawyer and clients.

Maqasid al-Mu'amalat : Between Theory and Practice

In his presentation, Dr Md Nurdin Ngadimon provided examples on the application of *maqasid al-Shari'ah* in Islamic Capital Market (ICM) Products e.g. Islamic Equities, Sukuk, Islamic structured products, and *Shari'ah* compliant derivatives. In the context of ICM products, MAS in relation to protection of property may be applied in various ways, among others are via protection of property through structured and organized platform, effective regulations, efficient governance, and *Shari'ah* screening methodology. Moreover, educating individuals and upholding justice are very important to achieve *maqasid al-Shari'ah*.

In “Uqud al-Mu’awadat – (Contracts of Exchange), Bay’ Bithaman Ajil, Bay’ al-Salam and their Shari’ah-ordained Maqasid”, Dr Engku Rabiah Adawiah of IiBF mentioned a number of general *maqasid al-Shari’ah* which are applicable to BBA & *bay’ al-salam* contracts and claimed that BBA and *salam* are capable of contributing towards the protection of at least three of the five essentials, i.e., wealth, life and religion. Then, she discussed the five specific objectives relating to property and its preservation which are applicable to BBA & *bay’ al-salam*, i.e.: *al-rawaj* (wide circulation of wealth); *al-wuduh* (clarity); *hifz al-amwal* (the protection of property); *al-thabat* (firm and established); and *al-`adl fi al-amwal* (justice and fairness in property) followed by defining the detail objectives of the Shari’ah with regards to BBA and *bay’ al-salam*.

In his paper, Ahcene Lahsasna dealt with elaborating the concept and importance of *maqasid al-Shari’ah* in the area of Islamic economics and finance with a specific concern on *maqasid al-Shari’ah* in *Uqud al-Tawthiqat* (contracts of security/surety) which includes *Rahn*, *Urbun*, and *Kafalah*. *Rahn* (the object pledged to ensure payment of a debt) falls under *maqasid al-Shari’ah* in the preservation of wealth, *Urbun* (down payment) is used as an instrument of risk and portfolio management, and *Kafalah* (a pledge given to a creditor by the guarantor that the debtor will pay his debt, fine or any other personal liability) is to ensure security in the transaction.

In his paper entitled “*Uqud Al-Amanat – (Trust-Based Contracts) with Special Reference to Wadi’ah, Wakalah, Musharakah, Mudharabah and Murabahah,*” Dr. Said Bouheraoua charted out nicely the categories, characteristics and methods of establishing *maqasid*. Besides, he mentioned the higher objectives of Islamic finance and various types and forms of Islamic contracts with specific financial products. Later, he specifically studied the types of trust-based Contracts (*Uqud al-Amanat*) and elaborated four kinds of *maqasid* with regards to these contracts i.e. Religious-Based Objective (*Maqsid Dinii Aqady*), Ethical objective (*Maqsid Akhlaqi*), Social Cooperative Objective (*Maqsid Ijtima’i Akhlaqi*), and Economic Objective (*Maqsid Iqtisadi tanmawi*).

Dr. Mohammed Farid Ali in “Applications of *Hibah* in Contemporary Islamic Contracts in the Light of *Shari’ah*-Objectives (*Maqasid*) of Donation Contracts (*al-Tabarru’at*)” looked at the applications of *hibah* (gift contract) as a “supporting *shari’ah* concept” in four of the contracts proposed to Shari’ah Advisory Council (SAC) of Bank Negara Malaysia (BNM). The four contracts are : (1) Interbank *Mudarabah* Investment Contract, (2) *al-Ijarah thumma al-Bai’* Contract, (3) *Wadi’ah* Contract, and (4) *Qard* Contract. He discussed whether these modern applications of *hibah* realizes the *maqasid* of *al-tabarru’at* and *hibah* or not and proposed some terms and conditions when combining *hibah* with other transactions and contracts in order to facilitate to evade violating the original *maqasid* of the *hibah*.

Maqasid Al-Shari’ah : Theoretical and Philosophical Perspectives

In “Identification of *Maqasid* through *Nusus* and *Ijma,*” Dr. Muhammad Yusuf Saleem extended the concepts of *fasad* and *islah* to economics and argued that normal market conditions represent a state of equilibrium while monopoly and any other attempts that disturb normal market conditions amount to *fasad*. While Sheila Aion Yussof provided a survey of

methodologies in order to operationalize the *Maqasid*, she saw the future of *Maqasid* as an independent discipline, intermediate discipline or an extension of *Usul Al-Fiqh*.

In “Hiyal and Dhara’i and their Impacts on Maqasid al- Mu’amalat”, Tawfique Al-Mubarak dealt with the relationship among the three – hiyal (legal loopholes or artifices), dhara’i (means or pretenses) and *maqasid* (*Maqasid al-Shari’ah* in general and *maqasid al-mu’amalat* in particular) – and analyzed the impacts of hiyal and dhara’i on the *maqasid al-mu’amalat*. In “The Contested Issues of *Bay’ al-Tawarruq, Al-Tanazul and Wa’d* in the Light of *Maqasid al-Shari’ah*”, Ahmad Badri bin Abdullah addressed several contested issues of Islamic finance and banking products, namely *bay’ al-tawarruq, tanazul* and *wa’d*, discussed specifically in the Malaysian context. He applied the theory of MAS with its methodology of classification as the framework of his research to study the intentions of the transacting parties that are involved in these types of contracts so as to identify whether they conform to the higher MAS.

Dr. Mohamed Azam Mohamed Adil recalled the historical development of Islamic banking and financial industry in Malaysia and posed a very serious question whether Islamic banking and finance has moved away from its core objectives taking into account the *maqasid al-Shari’ah* perspectives. He emphasized on circulating wealth in the community to as many hands as possible without causing any harm to those who have acquired it lawfully. He added that not profit rather practicing equilibrium through seeking profit as well as maximizing responsibility towards society should be the main objective of Islamic banking and finance. He suggested that taking *maqasid al-Shari’ah* into consideration, Islamic banking and finance in Malaysia has to re-evaluate some of its *mu’amalat* and contracts in order to ensure they are maqasid-compliant.

As earlier stated, the conference was well attended. The papers covered most of the topic under *maqasid al-Shari’ah* and were well received. It is hoped that these papers will be available in printed form for the benefit of those who are eager to see *maqasid al-Shari’ah* fully realized.

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