

# ARTICLES

## THE SHARI'AH PURPOSE OF WEALTH PRESERVATION IN CONTRACTS AND TRANSACTIONS

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**Abstract:** This article is presented in two parts, the first of which reviews both the preservation of wealth (*hifz al-mal*) as one of the five essential *maqasid* in the category of *daruriyyat* and its sub-division into the four headings of circulation, clarity, stability/proof, and justice (*rawaj, wuduh, thubat, 'adl*). To this we add, based on the evidence we present, development (*tanmiyah*) as a fifth division. The second part looks into the *maqasid* of contracts, a subject that has remained somewhat under-developed in the existing *fiqh* of *mu'amalat*, which is why we propose that this aspect of the jurisprudence of contracts be further developed through new addition and research. This would be a long-term undertaking mostly beyond the scope of this paper. Nevertheless, an attempt has been made to provide the basic contours for any future research which would be necessary if one were to develop the *maqasid al-Shari'ah* discourse from a more theoretical proposition, as it is now, into practical tools for testing the conformity or otherwise of particular contracts with their Shari'ah-designated purposes.

### Introductory Remarks

Since its beginnings in the 1970s, Islamic Banking and Finance (IBF) has been challenged by a crisis of identity, which is why the industry became totally preoccupied with establishing its physical presence and focused on quantitative development. The nascent industry had to make compromises on proper adherence to Shari'ah. Forty years on, Islamic financial institutions (IFIs) began to be self-critical and attend to criticisms that they need to upgrade their Shari'ah-compliancy performance, not only in terms of technicalities and forms, but also regarding its achievements in fulfilling the goals and purposes of Shari'ah (*maqasid al-Shari'ah*). The IFIs are expected to adhere to the *maqasid* for at least two reasons. First, the *maqasid* can be used by the IFI management and policy makers in the formulation of corporate objectives and policies. Second, these objectives serve as indicators whether the particular IFI is upholding true Islamic

principles. Among the challenges facing IFIs today is the problem of coming up with innovative products and services that comply with the higher purposes of Shari'ah without undermining the business concern of being competitive and profitable.<sup>1</sup>

One of the overriding objectives of all contracts in Shari'ah is fulfillment of people's needs and interests. The purposes of contracts vary widely according to contract type and the signatories' purposes and interests, some of which are focused on specific objectives at the expense of general ones. The *fiqh* texts often expound the essential requirements (*arkan*) and conditions (*shurut*) of nominate contracts (*'uqud al-musamma*). The primary purposes of contracts are often implied in their nomenclature and may also be determined by the text, consensus or *ijtihad*. Yet since the text assigns consent as the governing principle of all contracts, customary practice and changing realities of commerce may justify creation of new contract varieties to realise purposes that cannot be fulfilled by existing ones, with new contracts being consequently integrated into the *fiqh al-mu'amalat*. Past examples of such additions are *murabahah*, *tawliyah*, *wadi'ah* and *bay' al-wafa'*, to which were added, more recently, *murabahah* to the purchaser order, *ijarah muntahiyah bi tamlik*, diminishing partnership (*musharakah mutanaqisah*), credit cards, and futures contracts.<sup>2</sup> Some of these are explained in the following pages.

The requirements and conditions (*arkan wa shurut*) of contracts are not *maqasid* in themselves but means and accomplishers that realise, when duly fulfilled, certain *maqasid*. This is rather a challenging area of our discussion, as current practices of Shari'ah contracts in IFIs have sometimes involved doubtful innovations, not only in regards to contract combinations but also insertion of all manner of stipulations, often without developing a proper *maqasidi* discourse concerning them. Many of the new contracts we have seen in recent decades have combined, for instance, *ijarah* with sale, *musharakah* with sale, *murabahah* with *wa'd* and/or *wakalah*, credit with service fee and/or *murabahah* respectively. Ibrahim al-Shaal thus wrote that "all of these composite contracts have been introduced in response to people's needs, notwithstanding many reservations that have been voiced concerning them. But in the final analysis, realisation of people's needs and benefits will be the criterion of assessment." Al-Shaal went on to refer to Ibn Taymiyyah's view to the effect that what has been made permissible by scripture or *ijma'* also means permissibility of their concomitants, provided that none are violative of Shari'ah principles. There being no prohibitive text on any of these new permutations and additions, what remains is therefore permissibility, or *ibahah*.<sup>3</sup>

Fulfillment of people's needs and benefits is thus a primary Shari'ah purpose the IFIs should be pursuing, and this much cannot be denied, even if

it means resorting to composite contracts or insertion of stipulations. Another way of looking at the composite contracts is to verify the permissibility of each of its component contracts and the manner in which they are combined with their consequent results. If no violation is seen in the overall consequences of composite contracts and transactions, then the principle of *ibahah* will justifiably apply. In the event of ambiguity and manipulation, relevant issues need to be identified and addressed, which may well require closer scrutiny, analysis and research into *fiqh* principles as well as the *maqasid* and the means and methods employed in order to secure them. But since the existing *fiqh* literature does not always provide sufficient details on the *maqasid* of contracts, innovative research may need to be undertaken by qualified researchers.<sup>4</sup>

The existing *fiqh* literature on contracts falls short of integrating the *maqasid* into the fabric of its detailed rulings, and when it does integrate them, the exercise is not given sufficient visibility and prominence. Yet the existing information on nominate contracts, their conditions (*quyud wa shurut*), how and when they become void or voidable (*batil, fasid*) and their consequences, sometimes referred to by rather intricate expressions such as *hukm al-'aqd* (ruling of contract), *athar al-'aqd* (effect of contract), and *mawdu' al 'aqd* (subject matter of contract) often prove to be interesting and relevant to the purposes/*maqasid* of those contracts. Yet available information on these themes tends to be synoptic and scattered, with the task of consolidating them requiring a degree of juristic acumen and knowledge of market practices. Some of the sections of the existing *fiqh* literature on the contract of sale that provide relevant information for our purposes include conditions and stipulations (*quyud wa shurut*), combining sale with a condition (*bay' wa shart*), and combination of different contracts under one transaction, such as of two sales in one (*bay'atayn fi bay'ah*) or of two bargains in one (*sifqatayn fi sifqah*) and so forth. It is not always self-evident as to which parts and segments of this information relate to the purposes/*maqasid* of the contract in question.

Bearing in mind the shortage of *fiqh* literature on the *maqasid* of particular contracts and the technical nature of the subject, a good grasp of the general objectives of Shari'ah pertaining to property (*mal*) and contracts of sale would provide the researcher with a good sense of direction and equip him with the tools necessary to probe into the *fiqh* literature to enhance the existing stock of information on the purposes/*maqasid* of contracts.

### **Maqsid of Preserving Wealth (*Hifz al-Mal*)**

One of the essential *maqasid* of Shari'ah pertaining to property and transactions is preservation of existing, as well as creation of new, wealth for the benefit both

of the individual and the larger community, which may be through profitable trade, labour that leads to creation of assets, or both. Labour may consist of personal effort applied by someone without capital to someone else's capital to earn profit. One who is capable of productive labour may lack sufficient capital to match his productive potential, while a capital owner may be unable to use their capital for productive purposes without the labour and skill of another person or organisation. The Shari'ah thus validates a variety of transactions and contracts, some labour-based, others capital-based, and still others which combine both, to ensure beneficial utilisation of labour and capital in a just manner. The Shari'ah aims at increasing labour-based contracts, just as it also encourages financial transactions involving exchange of goods, but while regulating them such that the workers are protected and that the rules of equivalence in exchange transactions are duly observed.<sup>5</sup>

Fiqh textbooks on *mu'amalat* specify the following as the general objectives (*maqasid 'ammah*) of the preservation of wealth: circulation (*rawaj*), clarity (*wuduh*), stability (*thubat*), and justice (*'adl*), to which one may add a fifth, namely, growth and development (*tanmiyah*). These are discussed as follows.

### 1. Currency and circulation (*rawaj*)

*Rawaj* as a *maqсад* of Shari'ah means availability and movement of goods and services in the market and their widest possible distribution amongst people. Shari'ah facilitates circulate in various ways including contracts, transactions and unilateral acts that regulate transfer of wealth and services in the community through as many hands as possible. Transfer of wealth and ownership may be during the lifetime of its owner or after the owner's death. Authority for *rawaj* is provided in the Qur'an (al-Baqarah, 2:282), especially in the phrase "*tijaratan hadiratan tudirunaha baynakum* – ready merchandise which you transfer directly to one another." The same message is conveyed elsewhere when the text refers to those who carry their merchandise and "travel in the earth in quest of Allah's bounty" (al-Muzammil, 73: 20). In several other places the Qur'an warns against accumulation of gold and silver for their own sake, just as it forbids hoarding, profiteering and monopoly of essential goods in a few hands. Circulation and currency is also served by Islam's obligatory provisions on *zakat* (legal alms), *sadaqah* (voluntary charity), and *kaffarat* (expiations) as well as its persuasive and supererogatory measures concerning charitable endowments, gifts, donations and bequests.<sup>6</sup>

In order to facilitate circulation of wealth through trade and transaction, the Shari'ah grants concessions by relaxing some of the strict rules of contracts – for example, by not requiring both of the counter-values to be present at the time of

contract, such as in the case of deferred and forward sales (*bay' bi-thaman aajil* and *salam*) or in manufacturing contracts (*istisna'*). These contracts have been validated due to people's need, notwithstanding a measure of irregularity in them. The requirement, on the other hand, of taking possession (*qabd*) in normal sales, especially of foodstuffs, also serves the purpose of physical availability, hand-to-hand exchange and circulation. A transaction is sometimes made permissible on the grounds of public interest (*maslahah*) notwithstanding a degree of harm or *mafsadah* — such as turning a blind eye to uncertainty and risk (*gharar*) in some agricultural contracts, including sharecropping (*muzara'ah*), plantation contracts (*mugharasah*) and irrigation/gardening contracts (*musaqat*), which are not devoid of a degree of ambiguity in the quantitative aspects of the exchange. Validating sales by description of the subject matter (*buyu' 'al-awsaf*), such as sale based on a catalogue, would also fall under this heading.<sup>7</sup>

Market availability and circulation of essential foodstuffs, in addition to prevention of unwarranted gain over them, are the main purposes of the Shari'ah in the sale and purchase of the six usurious (*ribawi*) commodities and sale of currencies (*al-sarf*), which must be on spot, equal-for-equal and hand-to-hand. The requirement that they be equal-for-equal was especially meaningful in the barter sales that were common during the early days of the advent of Islam, the purpose of fair exchange in such transactions. One of the most important facilitators of *rawaj* was the assignment of gold and silver as units of value, and its substitution later by fiat money. This was due to the fact that barter trade and exchange of goods for goods were cumbersome and hindered the easy flow of trade, goods and services among people. The Shari'ah provisions on currency exchange (*al-sarf*) and usury (*riba*) are also aimed at strict observance of the principle of equivalence in exchange transaction.<sup>8</sup>

It is with the purpose of facilitating trade that the *fiqh* rules on *mudarabah* (also known as *qirad*) do not permit too many specifications, such as limiting the business manager (*mudarib*) to trade in a particular variety of wheat, rice etc., nor even that he should only do business with a particular individual or group. *Mudarabah* should also not be limited to a tight time schedule, say one year, with automatic dissolution thereafter. Inserting any such restriction would vitiate the *mudarabah* contract. The basic reason for all of this is to facilitate fair exchange, freedom of trade and enterprise as well as circulation of goods and services in the economy.<sup>9</sup>

Needless to say that circulation is sought only of permissible goods and services which are not harmful to society. The Shari'ah normally prohibits hoarding, but not always, especially at times of oversupply. When hoarding is done, whether by government agencies or private individuals, it is in order to protect the balance of supply and demand in the market.<sup>10</sup> Hoarding should not,

however, be confused with saving and warehouse safe-keeping (*iddikhar*) for future use, which is not only lawful but a valid purpose (*maqsad*) in its own right.<sup>11</sup> As already mentioned, wealth is not a goal in itself but a means, however important, towards meeting other essential needs by individuals and groups. Wealth, its protection and circulation are on the whole instrumental for realisation of the civilisational objectives of Islam, which is to protect the earth and build a just social order therein. Yet in the event of a possible conflict between wealth and such other *maqasid* as the preservation of life, safety of one's family, mental and intellectual wellbeing, wealth takes a lower order of priority and may well be sacrificed to ensure preservation and safety of other higher values. In that case wealth becomes a means to securing a higher *maqsad*.

Other ways and means by which the Shari'ah encourages circulation include its provisions on spending (*infaq*- cf., Q 3:92; 17:29; 25:67) for family and social welfare purposes – hence its provisions on obligatory maintenance (*nafaqat*) between close relatives, transfer of property through inheritance, and the obligatory alms (*zakah*).

In sum, *rawaj* as a Shari'ah purpose is accomplished in various ways, especially through transactions and contracts. The ultimate *maqsad* of *rawaj*, however, still remains the fulfillment of people's needs and benefits. *Rawaj* is thus both a *maqsad* in itself and also a means (*wasilah*) to other higher purposes.

## 2. Clarity (*wuduh*)

Almost all the exchange contracts, and most unilateral dispositions of property (*mal*) by way of gift, charitable endowment, and bequest, proceed over assets that are specified in terms of quantity, quality and other material attributes. Clarity and specification are therefore essential for the preservation of *mal* and exchange of goods and services among people. Lack of clarity can cause conflict among people, which the Shari'ah seeks to prevent, just as it prevents ambiguity and confusion in the ownership of *mal* and transactions over it. It also seeks to prevent infliction of harm and destruction of property. These are the main attributes of *wuduh* and the provisions concerning it in Shari'ah transactions and contracts.<sup>12</sup> Ownership is protected by clarity in its modes of acquisition and transfer through mutual agreement, contracts of exchange, unilateral commitment (*iltizam*), inheritance, and the owners' freedom to transact with unconditional consent. Ownership rights are also protected against unfounded claims through documentation, witnessing, judicial order, reconciliation and other means of proof that become particularly important in the event of the death of one of the contracting parties. The Qur'an thus enjoins that a deferred obligation (*dayn*) must be reduced into writing and testified to by upright witnesses (al-Baqarah

2: 282). Lack of clarity in ownership, contracts and transactions can lead to destruction of life and property, which is why clarity is of the utmost importance to prevent conflict. It is particularly important to ascertain clarity in deferred transactions that materialise upon expiry of a period of time.<sup>13</sup>

*Wuduh* is a sub-theme of the preservation of property (*hifz al-mal*), both of which are ascertained, in the negative sense, through a series of Shari'ah prohibitions against theft, fraud, bribery and gambling, under pains of punishment. The Shari'ah also makes provisions against the infliction of harm (*darar*) to property, mismanagement and waste, unfair pricing, destruction and loss, subjects which receive much attention in the Qur'an and Sunnah, as well as in the writings of jurists (*fuqaha*). The renowned hadith-cum-legal maxim: '*la darar wa la dirar*' (harm is neither inflicted nor reciprocated in [the name of Islam]) is a clear text on the prohibition of harm. Unlawful acquisition of wealth through civil wrong and a tort that may not qualify for punishment may call for compensation and payment of damages by judicial order.<sup>14</sup>

Wealth is further preserved through the protection of its value. To be able to protect the value of assets, it is also necessary that the assets and their values be clearly quantified and known. The Qur'an thus enjoins due fulfillment of trusts (*al-amanat* – 4:58) and forbids withholding from the people "that which rightfully belong to them" (al-A'raf, 7:85). The expression '*la tabkhasu*' in this verse means undervaluing of other people's assets, especially through trickery and deception. The basic concept of trust or *amanah* proceeds over knowledge and clarity in ownership, subject matter and value. Other Shari'ah provisions, such as guarantee, agency and surety (*kafalah*, *wakalah*, *damanah*), earnest deposit (*hamish jiddiyyah*), and pawn taking (*al-rahm*), also aim at the preservation of wealth and ownership rights through quantitative clarity, clear identification of the persons and right holders therein and those who may bear obligations regarding the assets concerned. Clarity also ensures an unhindered flow of trade and transactions in the market place. Clarity and accuracy through correct methods and procedures thus become important aspects and means of *hifz al-mal*.

### 3. Stability and Proof (*thubat*)

Stability and proof in the preservation of wealth are ascertained through a regime of law, contracts and transactions that establish a stable environment for ownership and the exchange and transfer of goods and services among people. People are thus assured of the continuity of their rights and how to go about investment, transfer and other usages of *mal* for the fulfillment of their needs and interests.<sup>15</sup> This was part of the reason why Islam did not substantially change the

pre-Islamic regime of ownership; many of the contract and transaction varieties that prevailed before the advent of Islam survived to a large extent afterwards, the Shari'ah only seeking to change what was objectionable in them. The Prophet (pbuh), thus offered the people the assurance: "Whoever owned a house or land at the time of Jahiliyyah shall remain its owner after the advent of Islam. But any new assignment made after the advent of Islam shall be subject to the apportionment rules of Islam."<sup>16</sup> After his migration to Madinah, the Prophet assigned land to certain individuals for reasons of proper utilisation of land and according to a set of new rules that are well known, featuring in his own conduct and hadith, as well as in the juristic manuals of *fiqh*.

Imam Abu Hamid al-Ghazali (d.1111) was asked a question concerning the wealthy but wasteful and extravagant owners who spent their assets in corrupt and self-indulgent pursuits- could they be stopped and penalised for that, or could their wealth be expropriated into the public treasury on grounds of *maslahah*? His response was that this could not be done as the Shari'ah has not authorised expropriation of people's properties, even if they spend them on wasteful and corrupt activities. This is because punishment can only be imposed on criminal behaviour; there is no authority to punish people through expropriation of their wealth because of how they spend it, so long as it has been lawfully acquired in the first place.<sup>17</sup>

That same purpose of stability is sought by a set of definitive rules and procedures that make contracts binding, provided they are based on valid consent and free of unlawful stipulations. Contracts are binding even when unforeseen circumstances make their fulfillment difficult for one of the parties. The latter cannot simply decline to comply but would normally have to obtain the other party's consent, or else a court order, to enable him to cease performance. This may be granted only in exceptional situations, when performance becomes totally unfeasible due to a drastic change of conditions and considerations of equity and justice – a subject that features prominently under the Shari'ah law doctrine of *istihsan* (juristic preference).<sup>18</sup>

It is also a duty of the ruling authorities to protect people's properties through policy initiatives, procedural rules and legislation falling under the doctrine of Shari'ah-oriented policy, or *siyasa shar'iyyah*. Rules and procedures may thus be introduced to ensure regularity in trade and market activities. Legal and procedural uniformity and standardisation in the issuance, for example, of fatwa and regulatory initiatives to enhance certainty and predictability in the flow of trade and transactions may thus be subsumed under *siyasa shari'iyyah*. The Qur'an is expressive of concern for the prudent management of property, as in the verse: "Do not give (hand over) to those who are weak of judgement your property with which God has (entrusted you) for their support, but let them

have their sustenance and clothe them with its proceeds...” (al-Nisa’, 4:5). Elsewhere God Almighty praises those who spend and are “neither extravagant nor niggardly but strike a just balance between the two” (al-Furqan, 25:67). It is for this purpose also that the Shari’ah authorises interdiction under court order (*al-hajr*) of the idiot (*safih*) who may own wealth without having the prudent judgment to manage it. This too serves the purpose of ensuring stability in the management of wealth.

In sum, *thubat* is the end-goal and *maqsad* of the rule of law and the procedural safeguard that seeks to establish certainty and predictability of ownership rights and due fulfillment of contracts. Although a *maqsad* in its own right, *thubat* may at times serve as a means (*wasilah*) towards establishing clarity or *wuduh*, as discussed above. *Thubat* is also a means towards the over-riding *maqsad* of ensuring smooth flow of trade and transactions in the market place and of preventing conflict among people. If one were to relate *thubat* and *wuduh* with one another, one might say that the rules of Shari’ah, government ordinance and policy measures provide for stability in the use and management of property, but in order to be effective that stability needs to have clarity. It thus becomes obvious that the ways and means by which the Shari’ah ensures *hifz al-mal* are inter-related and are not expected to work independently of one another.

#### 4. Justice (*‘adl*)

Justice ensures protection of the rights of owners and equitable distribution of wealth and opportunities in society. This will in turn translate into the preservation of wealth as well as its development and growth in a secure environment. With reference to property and financial transactions, justice means, according to Ibn ‘Ashur, that people enjoy equality before the law in their economic activities and ownership rights. It also means that the right-bearer can access and control, in action and in words, directly or through representative, without any hindrance or delay, all that which duly belongs to him.<sup>19</sup>

It is instructive to note that in his effort to protect normal flow of supply and demand in the market of Madinah, the Prophet turned down a request made by his Companions, at a time of price hikes in Madinah, to introduce price control (*al-tas’ir*). His response was that fixing commodity prices would prove unjust for the suppliers.<sup>20</sup> Reports indicate that the Madinan market suffered from perennial supply irregularities as suppliers had to travel long distances to reach the market, which would explain why the Prophet declined to impose any price control. It is also reported that decades later during the time of Successors, the Seven Jurists of Madinah permitted price control under changed circumstances, for reasons, as reports indicate, that price control would most likely curb market distortion and

help restore normal trading conditions. The Imams Abu Hanifah, Shafi'i and a number of other jurists have, nevertheless, considered the permissive stance of the Successors as an exceptional ruling, for price control essentially stands in conflict with the freedom of economic activity and trade.<sup>21</sup>

The Shari'ah prohibition of *riba* on credits and loans (*riba al-nasi'ah*) is predicated essentially on preventing money lenders and capital owners from taking advantage of the needs of borrowers, and its prohibition of the *riba* of excess (*riba al-fadl*) in exchange transactions is meant to prevent disparity of counter-values in trading, especially in the six essential goods specified in the hadith. Justice demands that wealth is obtained through fair means, namely through lawful work, trading of goods and services, gift and inheritance and the like. Justice was also the main purpose when the Prophet prohibited price bidding (*al-najash*) by a disinterested catalyst, just as he also forbade the buying of goods from caravans before they reached the market (i.e. *talaqqi al-rukabn*), and the sale of fruit prior to emergence of its goodness—all of these were aimed at protecting normal flow of supply and demand as well as a regime of fair pricing for sellers, buyers and other market participants. Barter sale (*muqaydah*), especially of foodstuffs in direct exchange, is also proscribed due to inaccuracy in valuation; the owner is advised instead to sell first and then buy what he needs with the money so earned.<sup>22</sup> The Qur'an is furthermore emphatic on accuracy in weights and measurements (*al-kayl wa'l-mizan*- cf., al-Mutaffifin, 83:1; al-Rahman, 55:8), on giving to people what duly belongs to them (al-A'raf, 7:85), and on due fulfillment of trusts (*al-amanat* — cf., Q 2: 283; al-Nisa', 4:58; al-Mu'minun, 23:8). Yet it also enjoins the believers not to forget the spirit of being good to one another, to be forbearing and lenient, as in the verse: "And do not forget to show kindness to each other - *wa la tansawu al-fadla baynakum*" (Q 2: 237).<sup>23</sup>

Muslim jurists have also taken justice as their principal objective when demanding conformity to the principle of equivalence in exchange contracts (*'uqud al-mu'awadat*). Whenever one of the two counter-values is laden with *gharar* or *riba*, the contract is most likely invalidated. The prohibition in *mudarabah* to the effect that the capital provider should not ask the investment manager (*mudarib*) for a specific amount or sum of profit is also predicated on considerations of justice and freedom of enterprise. Justice similarly requires a fair distribution of risks between contracting parties in line with the directive of the hadith-cum-legal maxim that "revenue goes with liability for loss – *al-kharaj bi'l-daman*."<sup>24</sup> According to another directive from the hadith: "It is not permissible for a Muslim to sell to his brother something defective without declaring it to him."<sup>25</sup> This hadith provided authority, in turn, for the *fiqh* provisions on option of defect (*kiyar al-'ayb*) which entitle the buyer to an option to return the goods sold to him if they turn out to have a hidden and undeclared defect.

In conducting its business activities, the IFI is expected, as Umer Chapra has aptly observed, not to act as a self-centred utility-maximising economic agent but to strike a balance between the rights and responsibilities of the individual and those of the larger community.<sup>26</sup> Prominent Islamic economists, including Chapra, Nejatullah Siddiqui, and Habib Ahmad subscribe to the view that Islamic banking is a subset of the overall Islamic economic system that strives for a just, fair and balanced society as envisioned in *maqasid al-shari'ah*. Via the many prohibitions against gambling, excessive risk taking and speculation etc., the Shari'ah aims to provide a level playing field for all participants in market transactions and promote social harmony. Earning profit is commendable provided it conforms to the principles of fair trade and justice enshrined in the Shari'ah. The ethical guidelines of Islam against greed, prodigality and waste also go a long way to substantiate its objectives of social harmony and justice.

As already mentioned, justice is an overriding *maqсад* of Shari'ah in the category of *maqasid 'ammah* (general purposes) that permeate all aspects and areas of Shari'ah beyond technicalities and procedures. In a renowned hadith, it is provided that "Muslims are bound by their stipulations," which entitles all Muslims to enter contracts, insert stipulations therein, and commit themselves in ways that may bring them benefit and earn them lawful profit. Ibn Qayyim al-Jawziyyah (d.751/1350) went on record to say that any measures taken in order to secure justice are deemed to be a part of Islam and the Shari'ah, even if the measures so taken are not stipulated in the existing rules of Shariah. This also means that any new contract variety introduced in the market, and duly concluded among competent persons to advance the cause of justice, would be deemed Shari'ah-compliant. Contracts and stipulations therein must, furthermore, observe the general objectives (*maqasid 'ammah*) of Shari'ah and their own specific purposes (*maqasid khassah, juz'iyah*).

When a contract contravenes its own specific purpose or the general Shariah objective of justice, it would be deemed *ultra vires*. This is also the purport of the renowned legal maxim of *fiqh* that "credibility in contracts is attached to their meanings and not to their wording and apparent structures."<sup>27</sup> To manipulate contractual stipulations through technical arrangements and combinations in such a way as to contravene the higher goals of justice and fairness would be looked at, as the maxim before us indicates from the viewpoint of its overall effect and meaning, and not its wording and technical structure, as not Shari'ah-compliant.

All the other purposes discussed above, such as *rawaj, wuduh, thubat* etc., are specific purposes (*maqasid khassah*) in relationship to *hifz al-mal* and may be utilised whenever appropriate in the service of establishing a better and fairer and a more just regime of contracts. Whereas *rawaj* and *wuduh* etc., each pertain

to certain aspects of the Shari'ah pertaining to *mu'amalat* and contracts, justice is a general objective that applies to the whole of Shari'ah in all areas.

It remains to be added that the Islamic conception of justice is not based on a dry logic of compliance to rules for the sake of rules, but is meant rather to uphold a vision of justice that is comprehensive and all-encompassing, tempered also with considerations of equity and good conscience (*ihsan, fadl*). A mere conformity to rules that end up in an unfair result is thus likely to be less than acceptable to Shariah.

Since justice is a general objective, or *maqsad 'am*, of the Shari'ah as a whole, it is also sought beyond the sphere of contracts, through a variety of other Shari'ah provisions, for example, on *zakat, ihsan* (benevolence), *tabarru'* and *sadaqah* (charity), as well as the giving of benevolent loans (*qard hassan*), on which the existing *fiqh* literature provides extensive guidelines. One should not, for instance, give charity if doing so would deprive one or one's family of the essentials of life, nor should one go to *'umrah* if one has to repay a loan that is due for payment and so forth.

## 5. Growth and Development (*tanmiyah*)

Growth and development (*tanmiyah*) is not listed as a separate purpose in the conventional *fiqh* treatment of the sub-headings of *hifz al-mal*, but tends to have been subsumed under circulation and currency (*rawaj*). Yet development (*tanmiyah*) merits a separate category in its own right because it is instrumental to the realisation of so many other purposes the Shari'ah advocates, which may or may not always fit in under the rubric of circulation (*rawaj*). The Qur'an often refers to property and commerce (*mal* and *tijarah*) as bounty and adornment (*fadl, khayr, zinah*) and asks the believers to traverse the earth and seek means of livelihood (al-Baqarah, 2:198; al-Hashr, 59:8; al-Muzammil, 73:20). This is evidently focused on acquisition and generation of new wealth for the bounty of Allah is not gained only through consumerism or through hand to mouth existence, but through an assiduous attitude of undertaking productive activity that may involve movement and travel to distant locations. Building a humane civilisation (*'umran*) is also a Qur'anic assignment (Hud, 11:61) and an integral part, as such, of human vicegerency in the earth. Dignity (*karamah*), another attribute and prerogative of humankind, emanates in God's love and grace for the children of Adam, which is also one of the *maqasid* of Shari'ah (cf., al-Isra' 17:70). Dignity is a comprehensive theme that needs to be substantiated through human conduct, assiduous pursuit of knowledge, and comprehensive material and moral excellence. Dignity is also not a destination, but a continuum that knows no specific end; it is intimately connected to material welfare and excellence in

scientific achievement. The acquisition of wealth and its development (*tanmiyah*) become integral to sustaining the substance of that dignity in the course of time. These are among the objectives (*maqasid*) of Islam that necessitate, not only preservation and circulation of existing wealth, but of generating more through work, profitable trade and investment.

Development and growth through trade and investment are also among the specific purposes of certain contracts, such as *musharakah*, *mudarabah*, and *murabahah*.<sup>28</sup> All legitimate means and mechanisms that facilitate growth and development of property would thus fall within the purview of *tanmiyah*.<sup>29</sup> The Qur'an in numerous places invites the faithful to exert themselves in lawful work and trade. It is interesting also to note that the Prophet, pbuh, ordered the guardians of orphans to "trade over the property of orphans so that it is not swallowed by obligatory charity (*zakat*)."<sup>30</sup> The second caliph, 'Umar ibn al-Khattab, conveyed the same message when he asked the Muslims to take good care in the upkeep of what they have and improve their properties: "Anyone among you who owns barren land should develop it and anyone with other assets should also try to improve and upgrade them."<sup>31</sup> The caliph is quoted to have said on another occasion: "O people! Improve your living conditions, for in doing so you will not only improve your own lives but also of those who are close to you."<sup>32</sup> This might explain why some early *ulama* among the predecessors considered diligence in keeping one's assets in good condition to be a mark of the probity (*muru'ah*) of a person. It is through wealth that one is enabled to protect oneself, one's family and one's standing in the community, as well as to fulfill one's religious duties and ultimately to live a life with dignity. Through wealth, one can attain the benefits both of this world and the next.<sup>33</sup> Qutub Sano and Ibrahim Naqashi have thus drawn the conclusion from their readings of the Qur'an and hadith that "a Muslim who has *mal* in excess of his basic and essential needs is under an obligation to invest it either himself or through someone representing him, failing which he becomes liable to punishment in the hereafter, if he has no excuse not to comply with this obligation."<sup>34</sup>

Although growth and development is one of the *maqasid* of property, the ways and means that lead to its realisation are unspecified and open-ended, depending on one's capabilities, environment, state of the economy and pro-active network of community support. Food security may also be included under *tanmiyah*, just as one may add saving, deepening and diversifying the market, import and export activities, opening new employment opportunities, environmental safety and cleanliness, development of the agricultural sector and health benefits. One researcher has gone so far as to say, based on his study of the emphatic tone of the Qur'anic dispensations on environmental care, that environmental safety and cleanliness is a means of seeking closeness to God Most High. His pleasure can

be earned through care for the living environment, not only for the benefit of one's fellow humans, but for all of God's earthly creatures whose welfare is made an important part of the vicegerency of man in the earth.<sup>35</sup>

The two purposes of *rawaj* and *tanmiyah* are closely related and supplement each other as investment subsumes an orderly market and circulation of goods and services. Yet *rawaj* and *tanmiyah* are not identical, for *rawaj* can proceed on existing wealth and not necessarily require creation of new wealth. But by adding *tanmiyah* to *rawaj*, the scope is expanded for creation of new wealth.

Lastly, the concept of development/*tanmiyah* we have advanced here is not found in Western liberal capitalism, which is based on market economy, profit maximisation, and consumerism and which has failed the larger part of humanity. One billion people now live in extreme poverty, while the top 200 wealthy individuals have more income than the lowest 2.5 billion. Financial crises and collapse of financial markets, climate change risks, arms races and conflicts have accelerated. The scale and intensity of ecological degradation in the last five decades is unsurpassed in the entire history of humanity. The Western development model has deprived local and indigenous people of the right to preserve their resources that support human-centred development. This is because the Western model is premised on hegemony, and no matter how it is defined and redefined, as Ziauddin Sardar noted (2006), it fragments, dislocates, and destroys societies based on traditional worldviews. This troubled scene is compounded further by a global intellectual discourse dominated by such notions as clash of civilisations, end of history, and other shock doctrines. The capitalist economy is subservient, as Anil Sakya commented, to "the institution of unlimited desire." This leads to competition, exploitation, human suffering and social violence.<sup>36</sup>

The rest of this paper discusses the *maqasid* of contracts, highlighting in particular possible conflict of interests between the purposes of the contracting parties and those of the Lawgiver/Shari'ah, but also raising questions as to identification of the purpose/*maqasid* of particular contracts as a new extension of the *fiqh* of contracts.

### **Maqasid of Contracts**

The overriding goal and purpose of all of contracts in Shari'ah is fulfillment of people's needs and welfare. "Realisation of benefits and prevention of harm – *jalb al-masalih wa dar' al-mafasid*" is thus the governing principle of financial transactions and contracts in Shari'ah. Contracts are not the *maqasid* by themselves but a means toward the realisation of their related benefits. People's material needs are met through utilisation, circulation and transfer of wealth, and

contracts provide appropriate means of meeting these objectives. Many of these contracts, especially *musharakah*, *mudarabah*, *ijarah*, and *salam* were in vogue in pre-Islamic Arabia and were subsequently either ratified or rectified in the light of people's welfare and justice. Any *Riba*, gambling, harm or injustice detected in certain varieties of sale and other contracts were consequently prohibited or subjected to certain requirements. As for new converts to Islam who had existing commitments and were already involved in *riba*' and other exchange transactions, permission was granted for them to take their capital sum but to abandon the rest (cf. al-Baqarah, 2:278). In mixed situations which presented a combination of benefits and harms, the more predominant were taken to prevail, and in cases of unavoidable conflict, reasonable concessions were attempted on grounds of public welfare and justice.

Islam also aimed to facilitate cooperation (*ta'awun*) in good works and aversion to hostility and sin (cf. al-Ma'idah, 5:2). Trade and transactions were to proceed on the basis only of mutual consent, and Muslims were to avoid "wrongful appropriation of other peoples' properties" (al-Baqarah, 2:188). Fulfillment of contracts became a Shari'ah obligation (al-Ma'idah, 5:1), and excessive risk and uncertainty in exchange transactions was proscribed.

Contracts and transactions fall under *mu'amalat*, which are clearly differentiated from the dogma, devotional and moral ('*aqidah*, '*ibadah*, '*akhlaq* respectively) aspects of Islam. Yet the *mu'amalat* are not entirely separate due mainly to the all-encompassing influence of the Islamic concepts of *tawhid* and the *maqasid*. Contracts and transactions are thus partially influenced by the ideals of dogma and morality. This is to be noted in the rules of *halal* and *haram*, the requirements of justice and fair dealing, and the important role played by the element of intent, meaning and purpose (*qasd*, *niyyah*) of transactions, which have strong moral overtones. The ethical advice of Islam in transactions is manifested in the general appeal of the hadith "you are not a true believer unless you love for your brother that which you love for yourself," and the ethical principle deriving from it to "treat the people the way you would like them to treat you – '*aamilu al-naasa bima tuhibbu an tu'amiluk*.'"<sup>38</sup>

One of the several classifications of *maqasid*, namely the one which draws a distinction between *maqasid* of the Lawgiver and those of competent persons (*mukallaf*), needs to be brought into the picture in our discussion of the higher goals of contracts. This is important as, in the view of the present writer, a great deal of the criticism addressed to contemporary IBF operations stem from the increasingly widening distance seen between the *maqasid* of Shari'ah and the objectives of the private contracting parties as well as those of the IFIs. Individuals and institutions often embrace purposes that are not in consonance with the *maqasid* of the Lawgiver even if they are often made out to be. A genuine

harmony of these would be, in our view, what the *maqasid* debate is all about. How can one attempt to address this issue of the growing gap between the *maqasid* of Shari'ah and those of individuals and institutions would, to a great extent, relate to our understanding and clarity of the *maqasid* of Shari'ah of the various transactions and contracts that are commonly practiced by IFIs.

All of the principal varieties of contracts known to Shari'ah (i.e. the nominate contracts) as well as the more recent additions over the last few decades, subscribe to certain objectives, most of which are determined by the Shari'ah, by the clear text, consensus, or *ijtihad*-cum-expert opinion. Some of them are more authoritative and others are less so depending on the kind of text or authority on which they are founded. Those that are founded in *ijtihad* and market development or established commercial practice (*'urf*), may still be subject to different interpretations which can, however, be verified and made authoritative by virtue of the command of a lawful government or the *ulu'l amr* through policy guidelines or legislation. This is the corollary of the renowned legal maxim of *fiqh* that "the command of the imam removes (or puts an end to) disagreement."<sup>39</sup>

As for the *maqasid* of the *mukallaf*, the general advice recorded by *fiqh* scholars is that these should be approximated, as far as possible, and harmonised with the objectives of the Lawgiver, or *maqasid al-Shari'ah*. They should not in any case contradict the Shari'ah-ordained purposes of these well-recognised contracts. But what are these purposes is still a question that arises in reference to particular contracts, say of *musharakah*, *murabahah* and the like. Has the existing *fiqh* of *mu'amalat* identified the *maqasid* of particular contracts? This question can only receive a partial answer and must be the subject of further research.

There are thus uncertainties in both these categories of *maqasid* under review, although perhaps less so with regard to *maqasid al-Shari'ah*, which commands a degree of objectivity and has also been, to a large extent, discussed and identified in the *fiqh* discourse on contracts. It is ironic, however, that the *fiqh* texts are on the whole reticent on addressing the *maqasid of Shari'ah* in their detailed discussions of nominate contracts. These are only occasionally addressed under the rubrics respectively of *athar al-'aqd* (effects or consequences of contract), and *ahkam al-'aqd* (rulings of contract), rather than the more direct expression perhaps of say *maqasid al-'aqd*. These terminological specifications are not well-explained but one may speculate, as *fiqh* terminologies usually opt for clarity and concreteness, that they have external manifestations and can be proven by evidence rather than to terms and expressions that relate to hidden intention and state of mind. With reference to contracts, the *maqasid al-mukallaf*, in our estimation, are sometimes referred to by such other expressions as *ba'ith al-'aqd* (motive behind contract), *mawdu'al-'aqd* (subject matter, or main purpose of a contract), and intent (*qasd*), the last of which is on the whole not declared, nor even required to be declared,

by the contracting parties.<sup>40</sup> These terminological ambiguities naturally make the task of the uninitiated researcher somewhat difficult. Our perusal of the *fiqh* texts confirm that the two expressions, *athar al-'aqd* and *mawdu' al-'aqd*, are on the whole interchangeable and refer to the goals and purposes of contracts, or the end result that the contracting parties seek to secure by signing a particular contract. These two expressions are akin to what we understand by particular purposes (*al-maqasid al-khassah*) which are concerned with the different themes, areas and chapters of *fiqh*, as well as to the purpose/s of particular contracts.

In a 63-page article on contracts (*al-'Aqd*) in the 45-volume *Fiqh Encyclopedia* (of Kuwait – cf., volume 30 ), *athar al-'aqd* is discussed in less than one page. It is noted that *athar al-'aqd* refers to the basic purpose (*al-maqsud al-asli*) of a contract, which varies with reference to different contract types. The relevant passage may be summarised as follows.<sup>41</sup>

In proprietary contracts (*'uqud al-milkiyyah* or *tamlikat*), such as sale, *hibah*, and loan (*qard*), the purpose (*athar*) of a contract is transfer of ownership from one contracting party to another when the essential requirements and conditions (*arkan wa shurut*) of a contract are duly fulfilled, be it with consideration (as in the contract of sale in which ownership of the object of sale is transferred from seller to buyer, and that of the price from buyer to seller) or without consideration (as in a gift or a bequest that materialises after the death of a testator).

In usufructuary contracts (*'uqud al-manfa'ah*), the purpose of a contract is the transfer of usufruct for a consideration (as in *ijarah*), or without a consideration (as in gratuitous lending, *i'arah*, and bequest).

In suretyship contracts (*'uqud al-tawthiq*, or *tawthiqat*), such as a contract of guarantee, pawn-taking or mortgage (*al-rahm*), the purpose is fortification of debt by joining a new *dhimmah* with that of the debtor, or of retention of pawn until the payment of debt.

In the contract of assignment (*hiwalah*), the purpose is transfer of debt from the *dhimmah* of the debtor to that of a third person.

The purpose of a depository contract (*'aqd al-ida'*) is the safe keeping of the deposit in the hands of a depositee.

The purpose of a marriage contract is procreation as well the legitimisation of the mutual enjoyment of each spouse by the other.

Every nominate contract in Shari'ah seeks to realise a legitimate purpose/s that is mainly determined by the Shari'ah, although the parties themselves may combine and pursue other goals that are harmonious with the basic Shari'ah-ordained purposes.

We may not be able to delve further into identification of the *maqasid* of some or all the nominate contracts in this chapter, beyond perhaps saying a little more on the subject of motive of the contracting parties and its relevance to the

*maqasid* of contracts. The subjective intent and purpose, in effect an undeclared purpose, that an individual or financial institution may be pursuing is what we believe has come under criticism in IFIs practices. Hence a discussion of it follows.

### Motive and Purpose (*ba'ith* and *maqсад*) Distinguished

In an attempt to get a clearer idea of the *fiqh* discourse on the *maqasid* of contracts, we may begin by quoting a passage from a prominent 20<sup>th</sup> century jurist, the late Mustafa Ahmad al-Zarqa, who itemises the essential requirements of contracts that include the existence of 1) contracting parties and 2) an object of the contract (*mahal al-'aqd*), and its subject-matter (or *mawdu' al-'aqd*). He continues to write concerning this last:

As for the *mawdu' al-'aqd*, it signifies the typological goal (*ghayah al-naw'iyyah*) or basic purpose (*al-maqсад al-asli*) of a contract which the Shari'ah has envisaged for it in the first place. This purpose is characteristically constant, undifferentiated and unchangeable, regardless of the change of time and circumstance, but it (*mawdu' al-'aqd*) does vary with reference to different contract types. Thus the *mawdu'* (purpose) of every contract of sale is transfer of ownership of the object of sale to the buyer for a consideration, and in *hibbah* (gift) it is transfer of ownership without a consideration. The purpose of *ijarah* is transfer of ownership of the usufruct of the leased object for a consideration, whereas the purpose of every contract of *i'arah* (gratuitous lending) is transfer of ownership of the usufruct without a consideration and so forth.<sup>42</sup>

Al-Zarqa differentiates the personal motive/purpose of the contracting parties from that of the Shari'ah-ordained *mawdu'* (objective, or *maqсад*) of a contract. The latter is different from personal motive (*al-ba'ith*, or *al-gharad*) as the latter is liable to much variation. The *ba'ith* of sale for some people may be their need for the money they get from the sale, or because they have no use for the object or even dislike what they want to sell. Another person may be selling his assets in order to escape the demands of his creditor, the right of a legal heir, or taxation and so on. Hence the *ba'ith* (motive and purpose) of individuals and contracting parties vary, whereas the typological purpose (*mawdu'*) only varies in various contract types.

Al-Zarqa is of the view that the Shari'ah validity or otherwise of a subjective purpose (*ba'ith* or *gharad*) has important ramifications for contracts and many a *fiqh* scholar has recognised this. This is also the view, as al-Zarqa expounds, of

the late Abd al-Razzaq al-Sanhuri (d.1974) whose views on this can be found in his renowned work, *Nazariyyat al-'Aqd*.

Another prominent 20<sup>th</sup> century scholar, Shafiq Shahatah, has, however, maintained a totally different view on the relevance of subjective purposes to the *fiqh* validation of contracts. To quote Shahatah: "The truth is that personal motive and purpose has not been an issue of concern to the jurists (*fuqaha*) so much so that many of them went on record to say that a sale is valid even if the motive/purpose behind it is to use the sale object *for* an illegitimate purpose."<sup>43</sup>

Mustafa al-Zarqa disagrees with this, even if it is placed within the context of Hanafi *fiqh*, and he refers to examples where Hanafi scholars have taken into consideration the legality or otherwise of motive in their rulings on contracts. A reference is also made to the Maliki-Hanbali positions that clearly endorse the importance of intent and motive in contracts, so much so that illegality of intent could render certain contracts (such as marriage) null and void. Al-Zarqa supports this view and says that it is in harmony with the clear purport of the legal maxim: "*al-umur bi-maqasidiha*" - credibility in all (human) affairs is attached to their purposes. This maxim is derived from the renowned hadith that: "actions are [judged] by their [underlying] intentions – *innama al-a'malu bil-niyyat*."

Without wishing to delve any further into this discussion, suffice it to say that the intentions and motives of individuals and the ways people go about realising them are difficult to ascertain and to control. All that the law can be reasonably expected to do is to lay down objective criteria that can ascertain and measure their manifestations and consequences. This has been attempted by the basic requirements and conditions of each of the various nominate contracts, and the *fiqh* discourse also on the validity or otherwise of stipulations that may or may not be inserted therein.

One may add further that the question of motive, *ba'ith*, and subjective purpose are essentially a moral issue. It is certainly desirable that motives and intents be aligned with the *maqasid al-shari'*, namely the Shari'ah-ordained purposes of contracts. This kind of alignment is a strict Shari'ah requirement in matters of dogma and worship (*'aqidah* and *'ibadah*), but is only recommendable in civil transactions or *mu'amalat*. At issue here are firstly respect for the freedom of contract, and secondly an unhindered flow of trade and transaction in the market place. In *mu'amalat* matters, the contracting parties are to faithfully observe the essential requirements and conditions of the contract they conclude, which is deemed sufficient to align the *maqasid* of the Lawgiver with those of the *mukallaf*. Faithful observation naturally excludes distortion, tricks and stratagems that tamper with the general and essential purposes of Shar'iah (*maqasid 'ammah wa daruriyyah*) as well as the more specific purposes (*maqasid khassah*) pertaining to the contract type. The better offer objective and verifiable criteria for basic

harmony with the broader range of the *maqasid* of Shar'iah pertaining to transactions and contracts.

## Conclusion

Most of the foregoing *fiqhi* discourse was presumably advanced in pre-industrial times and the learned Sheikh Mustafa al-Zarqa seems to intimate his critical view of a certain neglect of the moral purposes of contracts. The moral purpose of a contract is tantamount to its higher Shari'ah purpose/*maqsad*. There is truth though in the position the *fiqh* scholars have taken in drawing a certain distinction between the moral and legal aspects of contracts. One must avoid the temptation of taking the *maqasid* and the moralistic discourse so far as to impinge on basic liberties, including the freedom of contract, while also being too intrusive into the motives of people in commercial transactions. We take also from what has been said the message that legal control is not sufficient, that law alone may fall short of addressing the issue of full alignment between the purpose and motive contracting parties and those of the Shari'ah and the Lawgiver. That said, we also note that the traditional *fiqh* discourse may now seem to relate somewhat poorly to the institutional world of Islamic banking and finance (IBF) and its market behaviour. If Shari'ah contracts and transactions are utilised in ways that arouse public concern over indulgence in *riba'* activities through the back door, so to speak, or of breaking the Shari'ah-designated spirit and purpose of a contract through indirect approaches and use of lawful means in order to obtain unlawful ends, then in our view one may bring into the picture, a little more assertively perhaps, the Shari'ah blueprint on *maqasid* as well as the concept of *sadd al-dhara'i* (obstructing the means to procuring unlawful ends) so as to align IBF practices a little more closely with the *maqasid al-Shari'ah*. A clearer identification of the purposes of contracts would also show the way for proper application of *sadd al-dhara'i* to carefully define and identify issues of public concern.

When the purposes/*maqasid* of contracts, be they general or more specific, primary or secondary, definitive or speculative (*'aamah – khassah, asli –far'i, qat'i-zanni* respectively), are more clearly identified, they can be adopted into policy guidelines by Islamic financial institutions (IFIs). This effort will have the effect of making the *maqasid* into a more practical proposition. What we have now is a broad theoretical blue print of the *maqasid* that can only provide a guide for policy at the leadership level, which falls short, of providing a testing criteria for practitioners and IBF operators. To test the erroneous application of *murabahah* or *musharakah* with a view to identifying whether or not they were applied in disregard of the *maqasid*, one would need more specifically to

know what the *maqasid* are in each case. There is general interest in the IBF in making the *maqasid* operative but the interest remains somewhat theoretical in the absence of particular information on the *maqasid* of particular contracts. This area of *fiqh* of *mu'amalat* thus remains somewhat underdeveloped and it is hoped that students and scholars of Shari'ah, IBF financial engineers and practitioners will take up further research and penetrate the subject further to bring greater clarity to our understanding of the identification of the *maqasid* of particular contracts.

## Notes

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1. Cf., Ashraf Wajdi Dusuki and Said Bouheraoua, 'The Framework of Maqasid al-Shari'ah and its Implication for Islamic Finance,' *Islam and Civilisational Renewal* 2, no. 2 (2011): 322.
  2. Mustafa Ahmad Al-Zarqa, *al-'Uqud al-Musammata fi'l-Fiqh al-Islami: 'Aqd al-Bay'* (Damascus: Dar al-Qalam, 1999/1420), 8–9. See also 'Ali al-Kafif, *Ahkam al-Mu'amalat al-Shar'iyyah* (Bahrain: Bank al-Barakah al-Islami, n.d), 261.
  3. Ibrahim 'Ali Ahmad al-Shaal, 'Maqasid al-Shari'ah al-Islamiyyah fi'l-Mu'amalat al-Maliyyah 'inda Ibn Taymiyyah,' in IIUM conference proceedings, *Maqasid al-Sharia' wa Subul Tahqiqiha fi'l-Mujtama'at al-Mu'asirah*, vol. 2, 29.
  4. Relevant details on many of these *fiqhi* topics can be found in the Seventh Volume of *al-Mawsu'ah Fiqhiyyah of Kuwait*.
  5. Cf. Muhammad al-Tahir Ibn 'Ashur, *Maqasid al-Shari'ah al-Islamiyyah*, ed. Muhamad al-Tahir el-Mesawi, 2<sup>nd</sup> ed. (Amman: Dar al-Nafa'is, 2001/1421), 479–80.
  6. Cf., 'Izz al-Din bin Zughaybah, *Maqasid al-Shari'ah al-Khassah bi'l-Tasarrufat al-Maliyyah* (Amman: Dar al-Nafa'is, 2010), 253.
  7. *Ibid.*, 270.
  8. See for details Ibn 'Ashur, *Maqasid al-Shariah a-Islamiyyah*, 454f.
  9. *Ibid.*, 269.
  10. *Ibid.*, 266.
  11. Cf., 'Abd Allah Bin Bayyah, *Maqasid al-Shari'ah fi'l-Mu'amalat*, Lecture series 6 (delivered at the University of Alexandria, February 2008) (London: Markaz Dirasat Maqasid al-Shari'ah al-Islamiyyah, 2008), 28.

12. Cf., Muhammad 'Uthman Shabir, *al-Madkhal ila Fiqh al-Mu'amalat al-Maliyyah* (Jordan: Dar al-Nafa'is, 2010), 183.
13. *Ibid.*, 185.
14. Cf., Yusuf Adam al-Badani, 'Maqasid al-Shariah wa Atharuha fi'l-'Uqud: 'Aqd al-Ijarah Muntahiyah bittamlik Numuzijan,' paper presented at the *International Conference on Islamic Banking and Finance*, International Islamic University Malaysia, 15-16 June 2010, 20.
15. Cf., Yusuf Hamid al-'Alim, *al-Maqasid al-'Ammah li'l-Shariah al-Islamiyyah*, (Cairo: Dar al-Hadith, n.d), 496.
16. Imam Malik ibn Anas al-Asbahi, *al-Muwatta', kitab al-aqdiyah, bab al-qada fi qism al-amwal*, hadith no. 35. See also Ibn Ashur, *Maqasid al-Shari'ah*, 476.
17. Quoted in Ibn Zughaybah, *Maqasid*, 274.
18. *Ibid.*, 286.
19. Ibn Zughaybah, *Maqasid*, 298 quoting in support also the views of Tahir ibn 'Ashur from his Qur'an commentary, *al-Tahrir wa'l-Tanwir*, vol. V/94.
20. *Ibid.*, 294.
21. Cf., Ibn Zughaybah, *Maqasid*, 294.
22. Cf., *Ibid.*, 311.
23. *Ibid.*, 312.
24. The Mejelle, Art. 85. See for details, S.M. Hasanuzzaman, *The Economic Relevance of the Shari'ah Maxims (al-Qawa'id al-Fiqhiyyah)* (Jeddah: Scientific Publishing Centre, King Abdulaziz University, 2007), 41.
25. Ibn Hanbal, *Musnad Imam Ahmad ibn Hanbal*, ed. Ahmad Shakir, hadith no. 15955. Also recorded in al-Hakim, *al-Mustadrak 'ala a'-Sahihayn*, ed. Mustafa 'Abd al-Qadir (Beirut: Dar al-Kutub al-'Ilmiyyah, 1990/1411), vol. 2, 18.
26. Muhammad Umer Chapra, *Islam and the Economic Challenge* (Leicester: The Islamic Foundation, 1992) as quoted in Dusuki and Bouheraoua, 'Framework of Maqasid al-Shari'ah,' 327.
27. Cf., Shabir, *al-Madkhal ila Fiqh al-Mu'amalat*, 206. This maxim is also included in the select legal maxims that appear in the introductory section of the *Ottoman Mejelle*.
28. Cf., Shabir, *al-Madkhal ila Fiqh al-Mu'amalat*, 205.
29. Cf., Naqashi, 'Amaliyyat al-Taskik,' in IIUM Conference Proceedings, *Maqasid al-Shariah*, vol. 2, 64.
30. Imam Malik, *al-Muwatta'*, Kitab al-Zakat, Bab 'Zakat Amwal al-Yatama', vol I, 251, hadith no. 12.
31. Abu 'Ubayd Qasim bin Salam, *al-Amwal*, ed. Muhammad Khalil Hiras (Qatar: Idarah Ihya Dar al-Turath), 484 as quoted in Shabir, *al-Madkhal ila Fiqh al-Mu'amalat*, 71.
32. *Ibid.*, 72.
33. *Ibid.*
34. Mustafa Qutub Sano, *al-Istithmar, Ahkamuh wa Dawabituh fi'l-Fiqh al-Islami* (Amman: Dar al-Nafa'is, 2000/1420), 34.
35. Faridah Zuzu, 'Maqsid Hifz al-Bay'ah wa Atharuhu fi 'Amaliyyat al-Istikhlaf,' in IIUM conference proceedings, *Maqasid al-Shari'ah wa Subul Tahqiquha*, vol. 2, 404-5.
36. As quoted in Mohammad Hashim Kamali, 'Islam and Sustainable Development,'

*Islam and Civilisational Renewal* 7, no. 1 (2016): 8.

37. Muayy al-Din al-Nawawi, *Riyad al-Salihin*, hadith no.118, 113. This hadith is recorded by both al-Bukhari and Muslim.
38. See for details Shabir, *al-Madkhal ila Fiqh al-Mu'amalat*, 19f.
39. The Arabic version of this legal maxim simply reads: *amr al-Imam yarfa' al-khilaf*.
40. Note also that the commonly employed *fiqh* term for the subject matter of contract is *mahal al 'aqd*.
41. Wizarat a-Awqaf wa'l-Sh'un al-Islamiyyah, *al-Mawsu'ah al-Fiqhiyyah* (Kuwait 1994/1414), vol. 30, 239.
42. Mustafa Ahmad al-Zarqa, *al-Madkhal al-Fiqhi al-'Aam* (Damascus: Dar al-Qalam, 1998/1418), vol. 1, 400-1.
43. Shafiq Shahatah, *al-Nazariyyah al-'Aamah li'l-Iltizamat fi'l-Sharah al-Islamiyyah*, 48 as quoted by al-Zarqa, *al-Madkhal al-Fiqhi al'Aam*, vol. 1, 401.