

Methodologies In Shariah Decision-making

Muamalat activities form part and parcel of Islam as a way of life in regulating the *ummah*. Therefore, it has developed Shariah principles based on Al-Quran and Al-Sunnah as the main references that can be used in explaining the ever-changing human needs. In response to these muamalat-related needs and practices, the Shariah is not confined to making reference to only Al-Quran and Al-Sunnah. Instead, the Islamic jurists' *ijtihad* has also been given due importance in certain matters where both these primary sources (Al-Quran and Al-Sunnah) do not specifically elaborate them. The scope of the *ijtihad* is certainly founded on these two primary sources and takes into account the practical aspects of life, which is consistent with the spirit of Shariah.

The understanding of the objectives of Shariah or *Maqasid Shar'iyah* is essential for the development of the Muslim *ummah* in all areas of life, particularly in the area of muamalat. Accordingly, the Shariah has laid down a good foundation, as has been provided by the legal maxim: "The original ruling for a matter is permissibility". Based on this premise, as a general principle, muamalat activities are originally permissible in Islam unless there is an evidence of some prohibited elements involved in such activities, which would then effectively change the original ruling.

In the process of identifying the legality or compliance of a financial instrument with Shariah, the Islamic jurists must have the understanding of the conceptual

and implementation aspects of the instrument. This is in line with a legal maxim that states a ruling is decided based on the understanding (of the issue at hand) (الحكم على شيء فرع عن تصوره), For this purpose, there is a need for a close collaboration between the industry practitioners and Islamic jurists who would collectively assess the Shariah-compliance aspect of a particular instrument.

Understanding of Shariah Principles in Muamalat

Generally, Shariah means Islamic law. It refers to all rules and regulations that Allah Subhanahu Wata`ala (SWT) has legislated and are founded upon the primary sources, namely Al-Quran and Al-Sunnah. In order to apply these rules based on the primary sources, the Islamic jurists will endeavor to formulate rulings based on their knowledge and understanding of the primary sources, which are supported by other secondary sources like *qiyas*, *maslahah*, *istihsan*, *istishab*, *sadd zari`ah*, *`urf*, *maqasid shar`iyyah*, *siyasah shar`iyyah* and many more.

The *ijtihad* of Islamic jurists is known as the science of Islamic jurisprudence, which is "an endeavor undertaken by the mujtahid in formulating a particular rule and value of a subject matter that is not clearly explained whether by the Al-Quran or Al-Sunnah".

In the context of *Ijtihad*, Shariah and Islamic jurisprudence will be interpreted to have the same meaning, although from academic perspective there are some differences between the two. Yet, both are in the same discipline which discusses Allah SWT's rules, regulations and legislation in matters of worship, family, financial, criminal, state administration, international relation and others.¹

Since the basis of Islamic jurisprudence is also Al-Quran and Al-Sunnah, the rulings derived through the exercise of *ijtihad* of Islamic jurists are also considered as Shariah rulings because they are based on the same sources. Therefore, Islamic jurists define Islamic jurisprudence as "a science that explains the Shariah rulings which are derived from the detail evidences or authorities". This means that jurisprudential rulings which are resolved and endorsed by the Islamic jurists are part of the Shariah rulings.

¹ Yusuf al-Qaradhawi, *Madkhal li Dirasah al-Shariah al-Islamiyyah*, Maktabah Wahbah, Cairo, 1997, p.7, 9, 21-23; Ali al-Khafif, *Ahkam al-Muamalat al-Shar`iyyah*, Dar al-Fikr al-'Arabi, Cairo, 1996, p.3-4

Due to the fact that clear and specific Shariah rulings as laid down in Al-Quran and Al-Sunnah are relatively few, the need to the scholars' *ijtihad* is extremely important, particularly in the area of Islamic financial transaction.

Sources of Shariah

The sources of Shariah are divided into two: primary sources and secondary sources.

Primary Sources

Al-Quran and Al-Sunnah are the primary sources of Shariah. This is based on the command from Allah SWT to the Muslims to refer to these sources in order to solve any issues arising in their daily lives. Allah SWT says:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولَى الْأَمْرِ مِنْكُمْ فَإِن تَنَزَعْتُمْ فِي شَيْءٍ فَردوه إِلَى اللَّهِ وَالرَّسُولِ

"O you who believe! Obey Allah SWT and obey the Prophet (Muhammad), and those charged with authority among you. And if you differ over anything among yourselves, refer it to Allah SWT (Al-Quran) and the Prophet (Al-Sunnah)." (*Surah al-Nisa': 59*)

Allah SWT also says:

وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ فَانْتَهُوا

"And whatever the Prophet has given you – take it; and what He has forbidden you (from doing) – refrain from it." (*Surah al-Hasyr: 7*)

Secondary Sources

Apart from the two primary sources which are Al-Quran and Al-Sunnah, *ijtihad* or the interpretations of Islamic jurists over issues pertaining to people's life which are founded on the general principles as stated in both primary sources, become the basis and sources of rulings in Shariah. The *ijtihad* or interpretations are classified as secondary sources of Shariah. The secondary sources include *ijmak*, *qiyas*, *maslahah*, *istihsan*, *istishab*, *sadd zari'ah*, *urf*, *maqasid shar'iyyah*, *siyasah shar'iyyah*, *ta'wil*, *istiqra'* and many more which have been accepted in Islamic jurisprudence.

The basis for these secondary sources is a *hadith* of Prophet Peace Be Upon Him (PBUH), when he appointed Muaz as a judge in Yemen. The Prophet PBUH asked Muaz on several essential principles that he would use for judgement while in Yemen. The Prophet PBUH said: "O Muaz, on what basis would you use when you

make a judgement?" Muaz replied that he would make a judgement based on the text of Al-Quran. The Prophet PBUH then asked him, "What if you do not find the matter in question in Al-Quran?" Muaz replied that he would judge based on the decisions made by the Prophet PBUH. The Prophet PBUH asked him again, "What if I had never decided on such matter?" Muaz then replied that he would resort to *ijtihad* using his individual wisdom and understanding without transgressing the boundary (set by Al-Quran and Al-Sunnah). Muaz's response on how he would decide the cases which require his rulings was endorsed by the Prophet PBUH by saying, "Praise to Allah SWT who has given guidance to the Prophet and to the Prophet's representative (Muaz)".²

The following briefly explains some of the common secondary sources used in arriving at Shariah rulings.

***Ijmak* (الإجماع)**

Ijmak means a unanimous agreement among the *mujtahidun* of a Muslim community on any Shariah ruling in a particular period following the demise of the Prophet PBUH.³ However, it is difficult to classify a particular Shariah ruling as *ijmak* considering the wide coverage of Islamic territory and the emergence of the various school of thoughts among the Muslim community. Therefore, the majority of Islamic scholars are of the opinion that *ijmak* only happened during the period of the companions of Prophet PBUH before they migrated to other territories. As such, the claim that *ijmak* had occurred after such period is quite difficult to be accepted.⁴

***Qiyas* (القياس)**

Qiyas refers to likening a new case in question without textual evidence to an original ruling which is supported by explicit legal text which shares the same cause (*illah*). Thus, Imam Shafii regards *qiyas* as a basis for exercising *ijtihad*.⁵ It has been regarded as a legal source, which contributes significantly in deciding new unresolved issues.⁶

2 Hadith narrated by Abu Daud and Tirmizi

3 Abu Zuhrah, *Usul al-Fiqh*, Cairo, p.185

4 Ibid, p.188-189

5 Ibid, p.204

6 Mustafa Ahmad Al-Zarqa', *Al-Madkhal al-Fiqhi al-Am*, Dar al-Fikr, Beirut, 1968, vol.1, p.68

Maslahah (المصلحة)

Maslahah means deciding a ruling based on the principle of general public interest in issues which do not have clear and specific ruling from legal text of either Al-Quran or Al-Sunnah.⁷

Generally, Islamic jurisprudence emphasises the principle of *maslahah* in enforcing any rulings. Therefore, any matter that will bring about public benefits and fulfill their needs would usually be accompanied by legal text in the form of an order to do something. However, if it would cause harm to the general public, then the legal text would come in the form of a prohibition.⁸

Istihsan (الإستحسان)

Istihsan refers to setting aside an established ruling backed by *dalil* (evidence) on a matter in favor of an alternative ruling which is stronger and more convincing than the first ruling, based on the support by *dalil*.⁹

Istishab (الإستصحاب)

Istishab refers to the presumption of continuity of the original ruling as long as there is no other *dalil* to establish the contrary.¹⁰

Sadd Zari`ah (سد الذريعة)

Sadd Zari`ah signifies an approach used to prevent any means to evil in order to avoid from forbidden acts. It is regarded as an early preventive measure to keep away a Muslim from committing actions prohibited by Allah SWT.¹¹

`urf (العرف)

`urf is defined as established norms and common to the majority of people in a community either in the form of sayings or doings.¹² It is a common customary practice which is collectively accepted and applicable as a legal basis of ruling as long as it does not contradict the Shariah ruling.¹³ In the context of Islamic banking and finance, *`urf iqtisadiy* (a common business practice) is considered as a basis of Shariah rulings.

7 Ibid. p.90

8 Izzuddin b. Abd. Salam, *Qawaid al-Ahkam*, Dar al-Makrifah, Beirut, vol.1, p.24

9 Al-Zuhaili, *Usul al-Fiqh al-Islami*, Dar al-Fikr, Damsyik, 1886, vol.2, p.738, Abu Zuhrah, *Usul al-Fiqh*, p.245, Abdul Wahab Khallaf, *Masadir al-Tasyrik al-Islami fi ma la Nassa fihi*, Dar al-Qalam, Kuwait, p.245

10 Abu Zuhrah, *Usul al-Fiqh*, p.276

11 Ibid, p.268

12 Mustafa Ahmad Al-Zarqa', *Al-Madkhal al-Fiqhi al-Am*, vol.1, p.131

13 Al-Zuhaili, *Usul al-Fiqh al-Am*, vol.1, p.131

Maqasid Syar'iyah (المقاصد الشرعية)

Maqasid Syar'iyah refers to the objectives which are being sought to be realised by the Shariah when deciding on a ruling aimed at protecting the human being's interest.¹⁴ These objectives are the primary aspects that are very important for human lives, and are also known as *dharuriyyah al-khams* (the five necessities). They cover religion, life, intellect, lineage and wealth.¹⁵

Ta'wil (تأويل)

Ta'wil means an effort to delineate the Shariah principles based on evidence (*dalil*) without being restricted by its literal meaning. The implicit meaning will be accepted if it is soundly backed by other evidences which elucidate what Shariah necessitate the denotation to be.¹⁶ This is imperative as it reflects the all-embracing meaning of a *dalil* and is needed to understand the requirements of Shariah for the *dalil*, because sometimes it emphasises more than its literal meaning. In such instance, it requires substantiation that a particular *dalil* may also has another meaning which is different as compared to the literal meaning.

Istiqra' (الإستقراء)

Istiqra' means a comprehensive examination of a matter before a definite ruling is made on the issue. This methodology involves exploratory exercise of the applications of general *dalil* on the relevant subdivisions of the ruling and followed by providing exceptions, if any.¹⁷

Siyasah Syar'iyah (السياسة الشرعية)

Siyasah Syar'iyah refers to a discipline in Islamic jurisprudence that discusses the rulings related to policies and approaches taken in managing the national administrative structure and its people consistent with the spirit of the Shariah. It deals with the issues of federal and local administration, economy, judiciary, peace, global affairs, etc.¹⁸

14 Ahmad al-Raisuni, *Nazariah al-Maqasid 'inda al-Imam al-Syatibi*, The International Institute of Islamic Thought, Herndon, 1992, p.7

15 Mustafa Ahmad al-Zarqa', *Al-Madkhal al-Fiqhi al-Am, Dar al-Qalam*, Damascus, 1998, vol.1, p.102

16 Al-Duraini, *Al-Manahij al-Usuliyah*, Muassasah al-Risalah, Damascus, p.189

17 Wizarah al-Auqaf wa al-Syu'un al-Islamiyyah, *Al-Mausu'ah al-Fiqhiyyah*, vol. 4, p.77, Al-Zuhaili, *Usul al-Fiqh al-Islami*, vol.2, p.916

18 Wizarah al-Auqaf wa al-Syu'un al-Islamiyyah, *Al-Musu'ah al-Fiqhiyyah*, Kuwait, vol.25, p.294-310, Ahmad al-Husary, *Al-Siyasah al-Iqtisadiyyah wa al-Nuzum al-Maliyyah fi al-Fiqh al-Islami*, Maktabah al-Kulliyat al-Azhariyyah, Cairo, p.12

Application of Shariah in Developing Islamic Finance

The approach taken by Shariah as explained above clearly shows that Islamic financial instruments are developed based on the comprehension and the deduction process from the primary sources (Al-Quran and Al-Sunnah). These comprehensions and deductions are also known as the process of *ijtihad* of Islamic jurists.

In this process, if there is any practice of modern financial system that needs to be applied in Islamic financial system, then the main methodology that should be taken is by referring it to the primary sources. The process of *ijtihad* will play a role when there is no specific or direct ruling from the two primary sources.

For example, the contract of pledge is a contract mentioned in Al-Quran as *al-rahn*. Allah SWT says: "And if you are on a journey and cannot find a scribe (to record the debt), then a pledge (should be) taken".¹⁹

An example of contract which is not specifically mentioned in Al-Quran is the contract of *mudharabah*. However, its permissibility is derived from Al-Sunnah as narrated by Ibnu `Abbas who said, "Abbas bin Abdul Mutalib used to stipulate a condition whenever he gave his money in a *mudharabah* that the entrepreneur will not take his money across any sea, into any valley, or buy any animal with a soft belly, and if the entrepreneur were to do any of those actions, then he be given compensation. The Prophet PBUH heard of this practice and permitted it".²⁰

An example of a contract not mentioned either in Al-Quran or Al-Sunnah is the contract of *bai` wafa'* (sale with condition). *Bai` wafa'* is a contract of guarantee (*aqd tauthiqiy*) applied in the form of sale. In this contract, both contracting parties have the rights to request back their own counter-values.²¹ This means that when the sale is based on *wafa'*, the seller has the right to get the sold goods returned to him by paying back the price of the goods in full to the buyer.²²

19 Surah Al-Baqarah:283

20 Hadith narrated by al-Tabari.

21 Mustafa al-Zarqa', *Al-Madkhal al-Fiqh al-Am*, vol.1, p.544.

22 Nazih Hammad, *Mukjam al-Mustalahat al-Iqtisodiyah*, p.86.

The permissibility of *bai` wafa`* does not only exemplify the creativity of Islamic jurists in addressing the needs of business community at that time, but it also reflects the important role of Islamic jurists in resolving contemporary issues based on *ijtihad*. In the context of *ijtihad*, the difference of opinions is inevitable. On the ruling of *bai` wafa`*, there are diverse opinions from various schools. The Malikites, Hanbalites and *mutaqaddimun* (the early generations) of Hanafites and Shafiites are of the opinion that *bai` wafa`* is not permissible since the sale is not the ultimate intention in the contract of *bai` wafa`*. Instead, the ultimate objective is a legal trick to circumvent the prohibition of *riba*.²³

The *mutaakhirun* (the later generation) of Hanafites and Shafiites permit *bai` wafa`* by justifying it as an effort to avoid *riba*. The permissibility is based on the pressing needs of the society and has been established as a common norm (*urf*) to communities in most places.²⁴

Shariah Compliance Aspects

To ensure that all Shariah resolutions are accurately and effectively implemented, the roles of certain parties in coordinating and managing Shariah issues are inevitable. This is to ensure that the development of Islamic financial instruments is progressing smoothly and orderly.

One of the crucial institutions in shaping the development of Islamic finance is the financial regulatory authority. This authority is normally the central bank of a state or the capital market supervisory institution. The role played by the supervisory authority is very crucial not only from the legal point of view but also from the Islamic financial product development perspectives. From the legal perspective, the supervisory authority needs to ensure that the operation of Islamic financial system is always well protected and secured. From the product development perspective, supervisory authority needs to provide clear guidelines on product that needs to be developed.

Besides the supervisory authorities, the roles played by Shariah advisors are also important. This is due to the fact of symbiotic relationship between Islamic finance, the Shariah scholars and the experts in modern finance. Hence, there is a need to

23 Yusuf Kamal, *Fiqh Iqtisad al-Suq*, Dar al-Wafa', Cairo, 1996, p.195, 'Ali al-Khafif, *Ahkam al-Muamalat*, p.399.

24 Ba'lawi, *Bughyah al-Mustarsyidin*, Dar al-Ma'rifah, p.133, Ibnu Nujaim, *Al-Bahru al-Rai'iq*, 6th Edition, p. 8-9.

synergize the human capital who specialize in their respective areas particularly the financial experts and Shariah scholars. Therefore, Shariah advisors need to be appointed by institutions adopting Islamic finance as their activities.

The role played by Shariah advisors is very pertinent particularly in ensuring that every instrument offered complies with the Shariah principles. Other roles include ensuring that the development of Islamic finance in relation to policy-making and product development, which must be done in a manner that conforms to Shariah principles.

In exercising their duties and functions as Shariah advisors, the institution needs to provide a team or secretariat to support administrative and research related activities. The secretariat should conduct preliminary research on Shariah matters of the arising issues so that Shariah advisors can have a holistic view before making a resolution. The preliminary research conducted by the secretariat will lead to a more comprehensive discussion by the Shariah advisors since every issue raised needs to be substantiated by Shariah justifications.

In the context of Islamic banking and takaful, every resolution made by the Shariah Advisory Council of Bank Negara Malaysia; comprising members who are qualified in Shariah, economics, laws and finance is regarded as a collective *ijtihad*. It has been considered as one of the sources of ruling that become a general guidance on Shariah ruling on any contemporary financial transaction in the country.

Based on the explanation above, the combination of revealed sources and human intellect would make Shariah dynamic, flexible, developed and capable of addressing issues related to human life at any point of time. However, the human intellect and *ijtihad* must always be in line with the general prescriptions of the revealed sources and cannot transgress beyond such prescriptions.

In resolving contemporary issues on muamalat, the Islamic jurists have taken into account very seriously the fundamental aspects of the tradition of *istinbat al-ahkam* (derivation of Shariah rulings) such as *halal*, *haram*, *riba*, *gharar*, *maslahah* and *maqasid shar'iyah*. However, in performing their responsibilities, the Shariah scholars always adopt a balanced approach between theoretical and practical aspects, and between complying with Shariah principles and *`urf iqtisadiy* (the common practice of economic activities).

In this context, the Islamic jurists normally apply the principle of “flexibility” which requires changes in ruling based on the guidance of Al-Quran and Al-Sunnah. Allah mentioned in Al-Quran, “... Allah SWT never intends to cause difficulty on you..”²⁵ The Prophet PBUH also said in a hadith: “...make ease and do not create difficulties...”²⁶ There is also a popular legal maxim that: “Neither denies nor refutes changing a ruling based on changes in time”..²⁷

Mustafa al-Zarqa’ emphasizes that this method provides a clear message that rulings will change with the change of culture and people’s way of life. In business, the way it is conducted will continuously change relative to the development of time and human’s civilization.²⁸ Another legal maxim states that, “certain aspects which become a practice among traders will be binding on them”..²⁹

Ibnu al-Qayyim also stated that the failure to accurately respond to these changes would result in injustices. Subhi Mahmassani has quoted the words of Ibnu al-Qayyim, “... the interpretation of law should be changed according to the changes in time, space, condition and tradition...neglecting these facts will bring about injustices to Shariah and would result in more harms and difficulties. Nevertheless, Shariah which is known to protect the interest of human being will never tolerate such consequences”..³⁰

25 Surah Al-Maa’idah: 6

26 Hadith reported by Bukhari and Muslim

27 *Undang-undang Sipil Islam*, Article 29, DBP translated version, 1990

28 Mustafa Ahmad al-Zarqa’, *Al-Madkhal al-Fiqhi al-Am*, Dar al-Fikr, Beirut, 1968, vol.2, p.923.

29 Wahbah al-Zuhaili, *al-Nazariyat al-Fiqhiyyah*, Dar al-Qalam, Damsyik, 2005, p.191

30 S.Mahmassani, *The Philosophy of Jurisprudence in Islam*, Translated by Farhad Ziadeh, Hizbi, 1987, p.107.