VIEWPOINTS

The *Maqāṣid* Aspects of *Ṣukūk* (Islamic Bonds) and Civilisational Renewal (*Tajdīd Haḍārī*)

Mohammad Hashim Kamali*

The following paragraphs basically supplement this writer's discussion on the methodology of *maqāṣid* which featured in the first article of this volume, albeit with a more specialised focus. Here we shall look at the *maqāṣid* in conjunction with two themes, one of which highlights a certain violation of the *maqāṣid* in the issuance of *ṣukūk*, and the other expounding an affirmative reading of *maqāṣid* in conjunction with the larger theme of civilisational renewal. Both of these view the *maqāṣid* from slightly different angles. The discussion below features four sections.

Purposes (*maqāṣid*) Imbedded in Contracts

The purpose and *maqṣid* of an act or transaction is, to begin with, imbedded in the act itself and any search for the *maqṣid* of an act or transaction should naturally start by looking at the transaction itself. A contract of sale, for example, aims at the transfer of ownership and a marriage contract aims at procreation and companionship. These are the *maqāṣid aṣlī*, or original intents of these contracts. A sale contract that seeks to alter or depart from this purpose vitiates itself. The purpose of sale is transfer of ownership, but when sale is used for the purpose of securing *ribā*, such as in a double sale (*'inah*) which disguises *ribā* then the *maqṣid* and purpose of the transaction as well as its *'illah* are no longer self-evident. The inner or hidden intent of the *'inah* in question exists and is known to the perpetrator of *'inah* but not so to outside observers.

Most of the *ṣukūk* issuances that we see in the Islamic finance world proceed on the given assumption that they are asset-backed and proceed over real underlying assets, and also that when securitised and parcelled out into smaller segments the purchaser of *ṣukūk* acquires ownership. Now when *ṣukūk* is issued such that the underlying assets are actually not assets but unsecured receivables or equities yet

* Mohammad Hashim Kamali is the Chairman and CEO of IAIS Malaysia.

disguised in the name of real assets, then the *ṣukūk* transaction in question has departed from its original purpose and a distortion occurred that conflated the original and the disguised purposes of *ṣukūk*. This is apparently the explanation for the default *ṣukūk* or the *ṣukūk* bubble of 2008 story that plagued the *ṣukūk* universe. In many cases, companies and originators sold assets that consisted of a beneficial interest only when fearing bankruptcy and collapse. They issued *ṣukūk* based on collapsing assets, or some beneficial interest shown to be risk-averse, and they ended up with bankruptcy and default. Their lack of transparency and distortion often escaped market scrutiny and the rating agencies. The basic fault line here, and one that relates to the *maqāṣid*, is the discrepancy between the letter and the spirit of the *ṣukūk* transaction and the manner in which they are structured. A total departure has arisen, in other words, from the true purpose (*maqṣid*) of *ṣukūk*, a departure that is, from an asset-backed to an asset-based transaction disguised as *ṣukūk*. The unscrupulous financial engineering that the Islamic finance world has experienced in recent years has given rise to real issues of distancing the form from the substance of Islamic transaction amounting to distortion and interference with the original *maqṣid* of a transaction and contract.

Rationality, Cause and *Maqāṣid*

Causation and the search for cause and rationale is an integral part of rationality and an inherent trait also of the human intellect. People are naturally inclined to ask for causes and purposes of what happens to them and around them and why.

The cause and '*illah*' of an act are not unrelated to its goal and purpose – just as both the cause and purpose are also rooted in human rationality and human intellect. Yet the purpose of an act may not be the same as the cause thereof, just as a cause can also exist without any purpose. The cause of say a traffic accident may not espouse any rational purpose, nor can one say for sure that there is any purpose involved. Yet the ruling (*hukm*) that may be imposed by the authorities on the traffic offender may not even relate to the question of cause and purpose, but only to the consequences of the accident and the ensuing injury that resulted.

Note also that *maqāṣid* tend to be futuristic and look toward the ultimate goal, as opposed to the effective cause ('*illah*') which tends to look toward *status quo ante*. They differ in that respect, but the *maqṣid* strikes a note in common with '*illah*' in that both are hidden from the naked eye and need to be discovered. As already indicated, both the *maqṣid* and '*illah*' of acts and transactions are normally located in the acts themselves and discovering them is usually not difficult, but it becomes so when there is intermediacy and tampering that seek to conceal them.

***Hukm* (Ruling) and *Maqāṣid* (Purpose)**

As already indicated, a judgment or *hukm* differs from both the *‘illah* and *maqṣid* – as *hukm* can subsume both yet may supersede and go beyond them. A *hukm* cannot normally be issued without the identification of an effective cause or *‘illah*. Yet in certain circumstances a *hukm* can be issued, even when the *‘illah* is not known, by looking to the effect, consequence and purpose of an act or transaction. Referring to the traffic accident as an example again, although its cause might remain unknown, it has led to extensive damage and a judgment can still be issued by looking at its consequences. A judgment of this kind must, however, have a clear purpose (*maqṣid*) as to what it seeks to achieve, even if it does not have a known cause, or that the cause is known but is considered immaterial. A judgment may, moreover, seek to realise one or several purposes (*maqāṣid*). A punitive sentence or fines that are imposed on the perpetrator of a traffic accident may serve one or more of the following purposes: to save life, to ensure traffic regularity, to punish the violator, to raise funds for road repairs, etc. A judgment (*hukm*) as such is a composite phenomenon that subsumes a variety of factors, including the *‘illah* and *maqṣid*. It thus appears that *‘illah* and *maqṣid* can go hand in hand and co-exist but they are not identical and can exist separately, even independently, from one another. The legal text is normally informed by its purpose/s but is typically driven by the concerns of objectivity and equal application to all similar cases. It is more often the judge who plays a significant role in securing the goal and purpose (*maqṣid*) of the law in particular cases. Thus in a case, say, of fraud, petty theft, drug trafficking and bodily injury, the sentencing judge would normally want to know what purpose he wants to pursue apart from the standard application of a legal text, and would use the margin of his judicial discretion to secure it.

Tajdīd Haḍārī* and *Maqāṣid

When one speaks of *maqāṣid* in conjunction with civilisational renewal (*tajdīd haḍārī*), one is necessarily concerned with the nature and meaning of the expressions used and their subject matter, that is, of *tajdīd* and *haḍārī*, respectively. *Tajdīd* in the sense of renewal should mean just that; it cannot mean restoring something old, nor continuing with the existing status quo without any change, and making such the basis of one's action in the name of *tajdīd*. For that would negate the natural meaning and purpose of *tajdīd*. Thus it is important to know the meaning of *tajdīd* and also the context in which it is employed. When *tajdīd* is combined with *haḍārī*, it is given a civilisational context whereby *haḍārī* acts as a qualifier on *tajdīd* and gives it a panoramic outlook and scope. The composite expression *tajdīd haḍārī* would thus imply that the purely religious context in which *tajdīd* was initially

conceived and contextualised in the Islamic juridical discourse is now shifted, and to all intents and purposes, substituted by the wider context of civilisation. Some of the salient aspects of civilisation in reference, for example, to Malaysia are the language, religion and culture of its people in conjunction with the notion of common citizenship. Civilisational (*haḍārī*) in this context may also include a sense of shared history, values and customary practices that find acceptance among the various ethno-religious groups of Malaysia. And then the introduction of its parallel concept, that is, of Islam Hadhari in Malaysia, is also relevant to our understanding of *tajdīd haḍārī*. This would, in particular, draw attention to the ten sub-themes of Islam Hadhari¹ that would, in turn, inform the purpose (*maqṣid*) and objective of *tajdīd haḍārī* in its Malaysian milieu.

The ten principles of Islam Hadhari are multifarious and subsume more than one *maqṣid* or purpose, not all of which may even be pursued or realised at the same time. The scope and context of *tajdīd haḍārī* thus become exceedingly wide. To visualise the *maqṣid* side by side with *tajdīd haḍārī*, one's attention is drawn, moreover, to the identification of the purpose/s of each of the ten principles of Islam Hadhari in the light of *tajdīd* while paying attention, in the meantime, to the values that the *maqṣid* themselves may contemplate. This would, in turn, refer to an understanding of the five essential themes of the *maqṣid al-sharī'ah*, namely the *ḍarūriyyāt*, in conjunction with *tajdīd haḍārī*. To refer to the first of these ten principles, namely of faith in God and piety as an example, the questions to ask would be: how do we articulate the notions of *tajdīd* and *maqṣid* in conjunction with belief in God (*īmān*) and piety (*taqwā*) while looking, in the meantime, at the broader scenario of Malaysia's pluralist society. To give a cursory answer to this may pose some difficulty, yet relevant details of concern to some of the questions can be found in the present writer's *LAIS Malaysia: Exploring the Intellectual Horizons of Civilisational Islam* (2nd ed., Kuala Lumpur, 2009). The spiritual renewal of Islam and the essence of piety in its Malaysian milieu draw one's attention to the substance and form of religious practices and the widespread focus on ritualism at the expense sometimes of spirituality and faith. The question thus arises as to how in our mosques, schools and universities we negotiate renewal and reform into this broader civilisational understanding of the religion. One is likely to think of the kind of *tajdīd* that restores the balance between the form and substance of Islam vis-à-vis the ubiquitous manifestations of secular modernity and globalisation. Our understanding of *tajdīd* in the context of religion would have to be authentic and credible, and different to some extent, to *tajdīd* when it applies to the other nine principles of Islam Hadhari. This is because spirituality and religion are different from the concepts, for instance, of minority rights, economic development and the like. The application of *tajdīd* to religion needs to be informed by an authentic understanding of the religion in the first place but then also of exploring more

meaningful and effective methods of communication with the youth and other strata of society, as well as situations when Muslims may be a minority in a larger non-Muslim environment. How can the teaching of Islam, its meaning and purpose be contextualised in Muslim majority countries and pluralist societies in order to enhance the spirit of social harmony and respect for the different other?

Note

1. These are as follows: faith in God and piety, a just and trustworthy government, balanced economic development, a rigorous approach to the mastery of knowledge, moral and cultural integrity, protection of the rights of minorities and women, free and independent people, a good quality of life, protection of the natural environment, and strong defence capabilities.