

# The Role of Five Major *Shari'ah* Legal Maxims ( *Al-Qawaid Al-Kubra* ) in the Establishment of *Maqasid Al-Shari'ah* in Islamic Financial Products: A Discussion on Some Cases

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## Abstract

*Maqasid al-shari'ah* is the science in Islamic jurisprudence that combines the elements of *usul al-fiqh* and *qawa'id al-fiqhiyah*. This article limits the discussion of *maqasid al-shari'ah* only on the role of *qawa'id al-fiqhiyah*. It aims to analyze some of the *shari'ah* legal maxims that are founded based on the understanding of *maqasid al-shari'ah*, and simultaneously contribute in building the science in the Islamic finance sector. The methodology used is content analysis from the ideas of traditional as well as contemporary scholars by focusing on the five major *shari'ah* legal maxims (*al-qawaid al-kubra*) with reference to the some cases applied in Islamic finance practices today. The study finds that the science of *qawaid al-fiqhiyah* plays significant role in establishing the objectives of *shari'ah* in general view and contributes ideas and opinions in designing the methodologies, parameters and characteristics for the comprehensive formation of *maqasid al-shari'ah* in modern Islamic finance products.

**Keywords:** *Qawaid al-Fiqhiyah*, *Maqasid al-Shari'ah*, Islamic Finance

## 1. Introduction

*Maqasid al-shari'ah* is the objectives aimed by the *shari'ah* law in ruling the act and human behavior in various areas in human life starting from ritual practice to governance in political system. For the sake of pursuance the effort contributed by previous prominent scholars in *maqasid al-shari'ah* such as Al-Shatibi, Al-Izz Ibnu Abd Al-Salam and other, the intensive study in spreading *maqasidic* view in governing human act should be done, particularly, in the area of Islamic finance. In realizing this purpose, some scholars have determined that the science of *qawaid al-fiqhiyah*, or in modern term known as *shari'ah* legal maxims, plays significant role in establishing and fostering the science of *maqasid al-shari'ah* when some of the legal maxims are seemed to be related with the science or to preserve *maslahah* (Ahcene Lahsasna, 2013).

## 2. *Maqasid al-shari'ah* in Islamic Financial Transactions

*Maqasid al-shari'ah* in financial transactions generally is categorized as specific objectives, namely *maqasid al-khassah* which only applied in specific disciplines (Asyraf Wajdi Dusuki and Said Bouheraoua, 2011). Muslim jurists have classified at least five main dimensions to be achieved for wealth preservation which is one of the main elements in *maqasid al-shari'ah*. First, preservation of wealth through the protection of ownership, second, through its acquisition and development, third, through damage protection, forth, its circulation and fifth through protection of its value ( Asyraf Wajdi Dusuki and Said Bouheraoua, 2011 ).

As far as the wealth preservation is concerned in *maqasid al-shari'ah*, there are five elements need to be reflected and protected in order to achieve the objectives.

First, marketability of the wealth (*rawaj*), second, preservation of the wealth (*hifz*), third, durability of the wealth (*thabat*), forth, transparency of the wealth (*wuduh*) and fifth, equity of the wealth (*'adl*) (Ibnu 'Ashur, 2006). In the other hand, the prevention steps also need to be done in wealth preservation such avoids any harm element on the wealth, protects other's wealth from any damages, replacement of the damaged wealth, shuns eating other's wealth in a wrong manner, avoids wastage of wealth, ensures the safety of wealth and prevents any dispute on it (Abdul Wadud Mustafa, 2010).

*Maslahah* (benefit) is one of the ultimate goal for all aspect in Islamic law including the finance where the law itself in entirety aims at promoting *maslahah*. The *maslahah* aimed and projected must be real, genuine and possible to be achieved and may promote *maslahah* for to the larger section of the society and prevents them from hardship and harmful (Mustafa Omar Muhammad, 2010).

The implementation of *maqasid al-shari'ah* in financial transactions leads to subsequent outcomes:

1. Avoiding any harmful element to faith of human agent (*al-mukallaf*), soul , intellect , lineage and his wealth.
2. Prohibition of any economic activity or project that potentially spoils the natural environment in society.
3. Introducing well-planned project for economic development and expansion with the consideration to *fiqh al-awlawiyat* (the science of prioritization) , in specific , compulsories (*daruriyat*) may be prioritized than necessities (*hajiyyat*) and embellishment (*tahsiniyat*) and so on.
4. The principle of harmful avoidance might be the first selection than benefit creation in case of equal

circumstance between these two *maslahah*'s characteristics, and the higher possibility of benefit creation is prioritized than the lower one of harmful avoidance (Abdul Wadud Mustafa et al. 2010).

### 3. The *Shari'ah* Legal Maxim: The Origin of The Customary and Transactional Relation are refer to Its Rational Meaning (*Al-Aslu fi Al-Mu'amalat Al-iltifat ila Al-Ma'ani*)

The Islamic legislative law is not judged merely on its appearance or external aspect, but the inner aspect such as wisdom, meaning, reason, secret and causes also are taken into reflection in judging particular issue or case, which have been derived from the collective of the inner aspects of many parameters (*dhowabit*), foundations (*usul*), methodologies (*qawa'id*), special parameters (*dhowabit khassah*) and general methodologies (*qawa'id 'ammah*). For examples, analogical deduction (*qiyas*), juristic preference (*istihsan*), consideration of public interest (*istislah*), general destructive (*'umum al-balwa*) and customary practice (*'urf*) are formulated from the understanding of inner aspects of evidences as well as the cases or issues studied (Umar Abdullah Kamil, n.d).

Since there was a consensus among jurists that every single form in Islamic law is revealed and commanded for the human well-being in the life of two world, nevertheless, to understand the wisdom through the commands is varies from one to another. First, which have been mentioned explicitly in the text of divine guidance, Al-Quran verses or prophetic traditions, and could be comprehended directly from it. Then, type of rule that needs an effort and deep reflection in deriving the meaning whereas the third type is only Allah the Most Wise God who knows the wisdom behind that injunctions and couldn't be achieved by the human capacity of intellect (Zayyad Muhammad Ahmidan, 2008)

Ibnu 'Ashur summaries the jurists' opinions pertinent to the discussion above into three categories:

1. A category that is necessarily rationalised, and this includes those commands whose underlying causes are stipulated or alluded to in the textual sources of *shari'ah*, or something of this kind.
2. A category of commands that are purely devotional, which includes all those commands whose underlying causes are beyond human grasp.
3. A category that stand midway between categories 1 and 2 above. It includes all those commands whose underlying causes are covert but which the jurists can arrive at by rational inference, though they might disagree on the inferred causes (Ibnu 'Ashur, 2006).

The elaboration of the maxim can be explained as follows:

*Al-aslu*: The general principle that been extracted and derived from the general evidence (Qutb Mustofa Sano, 2000).

*Al-mu'amalat*: The definition of *Al-Mu'amalat* have been discussed in the beginning of this chapter whereas the financial transaction is embedded under the big theme of *al-mu'amalat*. Muhammad Uthman Shubair (2001) explains it as 'set of organized Islamic law deals with financial transactions'.

*Al-ma'ani*: wisdom or rationale, it is the wisdom purposed in every command from Allah upon human. It also can be categorized in the synonym of objective, wisdom and benefit, and sometimes been used as alternative to '*illah*' or effective cause (Muhammad Uthman Shubair, 2001).

Thus, in general, every injunction and command in Islamic financial transaction is necessarily rationalised and the wisdom behind it might be extrapolated by the capacity of human intellect.

Imam Al-Shatibi enlightens the rational of this maxim by following arguments:

First: From thematic inference process, we understand that the Lawgiver reveals to us this perfect system of life, *al-shari'ah*, with the purpose of human well-being creation, and so do with every single form of human practise law is tantamount to the concept above. You will see that single thing would be prohibited due to nothingness of human interest in it and conversely, it would be permitted if the benefit is there (Al-Shatibi, 2003).

Among the examples he noted are:

Allah says in Al-Quran:

وَلَكُمْ فِي الْقِصَاصِ حَيٰوةٌ يَاۤؤَيُّهَا الَّذِيۡنَ اٰتٰنَا الْحِكْمَ  
تَتَّقُوۡنَ

The meaning:

And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous<sup>1</sup>.

In prophetic tradition, Prophet Muhammad said: The judge is discouraged to make a judgement while he is angry (Al-Baihaqi, 2003). He is also reported to say: No harmfulness to other and no reciprocal harmfulness (Muhammad Uthman Shubair, 2001). Then, he was reported by companions to prohibit uncertainty sale (Muslim bin Hajjaj, 2006). He added: We didn't find the easiness to understand the objective of any particular command

<sup>1</sup> Al-Quran . Al-Baqarah 2 : 179 .

in worship topic like we understood in the chapter of human practise law (Al-Shatibi, 2003).

Second: The Lawgiver constantly clarifies causes and wisdoms in legislating the law of human practise, and the reasons mentioned are acceptable by human understanding . Therefore, we concluded that the Lawgiver aims to achieve the purposes not absolutely relies on the text. In contrast, the majority of law in ritual practices chapter relies on the text and purely devotional (Al-Shatibi, 2003).

Third: Rationalization of Allah's command was known for periods of time till be the reference of groups of jurist since the concept grants benefit for them. Then, they utilize this concept in general to another area of knowledge and it found suitable and applicable to them. This is the circle undergone by philosophers and thinkers through centuries. The revelation of Islam to mankind with the mission of completing the perfectness of human behaviour (*akhlak*) , for this reason , there are many forms of law and lifestyle that have been practiced before Islam or in *jahiliyah* period, are endorsed and approved in Islamic law considering the objectives and wisdoms behind them, such *al-diyat*<sup>2</sup> , *al-qasamah*<sup>3</sup> , Friday's gathering for reminder and advise , loan contract , changing the *Kaa'bah's* cover, etc (Al-Shatibi, 2003).

#### 4. The *Shari'ah* Legal Maxims and *Maqasid Al-Shari'ah* in Financial Transactions

The legal maxims of Islamic jurisprudence (*al-Qawa'id al-Fiqhiyah*) which are treated by many scholars as the *maqasid* literature, are statements of principle that are derived from the detailed reading of the rules of *fiqh* (Islamic jurisprudence) on various themes. These detailed expositions enabled the jurists, at a later stage of development, to reduce them into abstract statement of principles (Abu Umar Faruq Ahmad *et al.*, 2010). The legal maxims are designed to facilitate a better understanding of the *shari'ah* and their development in a general sense is parallel with that of the *fiqh* itself.

The science of legal maxims is different from the science of *usul al-fiqh* (methodology in Islamic jurisprudence) in that the maxims are based on the *fiqh* itself. A maxim is defined as 'a general rule which applies to all of its related particulars', and it is reflective of a consolidated reading of the *fiqh* and it is in this sense different from what is known as *al-dobitoh* (a controller / parameter) which is somewhat limited in scope and controls the particulars of a single theme or chapter of *fiqh* (Mohammad Hashim Kamali, 1998).

The most comprehensive and broadly based of all maxims are known as '*al-qawa'id al-fiqhiyyah al-asliyah*' ( the normative legal maxims ), and they apply to the entire range of Islamic jurisprudence without any specifications whereas others might apply to a particular area of Islamic jurisprudence , such as devotional matters , civil transactions , contracts , litigations and court proceeding ( Mohammad Hashim Kamali, 1998 ).

The first maxim in '*al-qawa'id al-fiqhiyyah al-asliyah*' ( the normative legal maxims ) , namely , *al-umur bi maqosidiha* ( acts are judged by the intention behind them ) is a comprehensive maxim that has implications that the scholars have discussed in various areas , among them is commercial transactions. This maxim means every practise, verbal or physical action, brings different impact and judgment from *shari'ah* view relied on human agent's intention and objective (Abu Umar Faruq Ahmad *et al.*, 2010).

This legal maxim captures many cases which deal with the intention and form of substance. It can be explained such , the liability of a person who finds somebody's good lying on the way and picks it up will be contingent upon the intention with which he has picked it up. If he intends to hand it over to the owner and has made it known to others he will be treated as a trustee and will not be required to indemnify the owner in case the property is destroyed while in his possession. But if he has kept it as the owner he would be treated as a usurper, *ghasib*, and will be required to indemnify the owner in case the property is destroyed (Ahcene Lahsasna, 2013).

One of its sub legal maxim , so called , ' contracts are to be understood in relation to their intention and substance , not by the words and phrases (*al-'Ibratu fi al-'uqud li al-maqasid wa al-ma'ani la li al-alfaz wa al-ma'ani*) with the example , in case the bank declares their policy of financing customers on non-interest bases , it would be necessary to do so not merely continue the same practice and seeking to rationalise it in Islamic terms by changing the relevant nomenclature such as calling it ' buy back' or 'mark-up' (Abu Umar Faruq Ahmad *et al.*, 2010).

The second general legal maxim '*al-yaqinu la yazulu bi al-shak*' (certainty is not overruled by doubt) , which means doubt may not reject certainty judgment because it is established by clear evidence and prove , and it is not acceptable if it can be overruled by uncertainty or the proof which the strength is lower than the latter in order to eliminate harmful and difficulty (Muhammad Ridhwan Ab. Aziz, 2013). The application of this maxim in financial transaction or its contract can be viewed through this example, a partner has no right to assume a

<sup>2</sup> *Al-Diyat* is an amount of money paid to the family or guardian or inheritor of the victim who has been murdered intentionally or accidentally by the murder. It also can be defined as 'blood-money'. Source : *Mausu'ah Kasyaf Istilahat al-Funun wa al-'Ulum* by Muhammad bin Ali Al-Tihanawi, Volume 1: p.813.

<sup>3</sup> *Al-Qasamah* is an oath that presented in grouping by family members of the murder victim without trusted evidence such witness or confession from the murder but with the existence of indication on the suicide such blood in murderer's shirt. It is also translated in English as 'compurgation by oath. Source: *Mukjam Lughat al-Fuqaha* by Muhammad Rawas Qal'aji and Hamid Sodiq Qunaibi.p.362.

minimum rate of profit earned by this business partner and claim his share in that profit as different from the amount stated to have been actually earned by the partner. The sub-rule provides that in case the working partner declares a certain amount of profit no more will be presumed unless the contrary is proved to be a fact (Abu Umar Faruq Ahmad *et al.*, 2010).

The principle reads '*la darara wa la dirar*' (Harm may neither be inflicted nor be reciprocated) guides to the establishment of third general maxim, namely, '*al-dararu yuzal*' (wrong is to be undone) (Muhammad Ridhwan Ab. Aziz, 2013). As we understand from previous chapter, the purpose of Islamic divine guidance is to promote human well-being, and one of the means to that purpose is harmful elimination. This maxim provides a guideline to regulate the entire financial system in such a way that prohibits harm imposition and discourages retaliation (Abu Umar Faruq Ahmad *et al.*, 2010). Other applications with regard this maxim in fulfilling *shari'ah* objectives, it is not allowed to sell defected items to others because they cannot be used and caused harm and damage to them after payment is being made (Ahcene Lahsasna, 2013).

There are some principles that embodied under the maxim above, first, '*al-darar yudfau*' *bi qadri al-imkan*' means harm is to be repelled as far as possible, therefore, a person should spend his maximum effort and capacity to remove the injury by using different ways and means available, with the example, the permissibility of the financial restriction on the financial affair of a person is to preserve the rights of the creditors (Ahcene Lahsasna, 2013). Second, the maxim '*al-darar la yuzalu bi mislihi*' is defined as harm is not to be removed by the like of it. The implementation of this maxim which in line with one of *shari'ah* objective is to eliminate harm that constitutes difficulty in human life could be viewed in risk management of Islamic financial institutions where it must not use conventional risk management tools, which can invoke higher risk such as using derivatives or securitization technique like Credit – Default Swaps (CDS) and Mortgage Backed Securities (MBS), which are proven to have detrimental effects on society in the long-run. Third, the maxim says '*yutahammal al-darar al-khas li daf' darar 'am*' means to repel public harm, private harm is to be tolerated. For instance, the financing companies that manufacture illicit drugs or engage in activities detrimental to the public must be avoided even at the expense of undermining individual profit (Asyraf Wajdi Dusuki and Said Bouheraoua, 2011). Dealing with bankruptcy case, it is allowed to sell the bankruptcy debtor's asset who is under custody for the interest of the creditors because the injury of selling the asset of the debtor is a private injury, and by not selling the asset of the debtor we prevent the creditors from getting their right which is public injury. In fixing prices for staple food items, it is allowable to do so if there is a monopoly or increase of price without valid reason. It is also allowed to force the monopolist to sell his commodity if he refuses to sell his commodity to the public (Ahcene Lahsasna, 2013).

The evidences that support the concept of harm elimination or difficulty mitigation is a definitive point in Islam (Al-Shatibi, 2003). Accordingly, one of the general *shari'ah* legal maxim in upholding the notion is difficulty begets facility, known in a fiqh terminology as '*al-masyaqqah tajlibu al-taisir*' (Muhammad Ridhwan Ab. Aziz, 2013). This maxim applied in daily human life whichever in general practices or in specific and limited activities. In universal view, Islam allows benevolent loan, asset borrowing and property leasing in order to fulfil the needs of community that consists of needy and inadequate materially people where provide them utilization of other's property in a form of cash money or tangible and intangible asset (Al-Nadawi, 1999). This precisely fulfils the necessity of members in society and assures their well-being despite in circumstance of deficiency. In a smaller scope, minor uncertainty (*gharar yasir*) in trading is allowable such as in buying farm or pregnant livestock, and it is difficult for the buyer to know exactly each type and quantity of plant in the farm, so do with the pregnant livestock's buyer may not measure definitely condition of its foetus. However, these types of sales are permissible for human's benefit in fulfilling their necessities as reflection to this legal maxim (Al-Nadawi, 1999).

In connection with *gharar* topic, major uncertainty namely *gharar fahish* may spoil the contract if it is intended by any contractual party for the reason of avoiding any disputable subject in contract and encouraging unjust behaviour in trading, unlike minor counterpart which contributes to hardship in transaction and not purposely aimed by them, it won't nullify the sale. Thus, our scholars unanimous with the sub-maxim limited for this topic, so called, the contract is null and void by having major uncertainty not with the minor one<sup>4</sup>.

Among the special characteristics of *maqasid al-shari'ah* is universality, not only in the different places, but also in distinct times and periods. Hence, Islamic law approves some of the customary practices that have been practised for years or generations with few modification by eliminating deviant elements upon Islamic view that make it more suitable with high aspect of morality and ethicality as in Islamic divine guidance, that demanded by truly happiness and harmonic life for mankind in changeable environment and surrounding (Al-Nadawi, 1999). The legal maxim *al-'adat muhakkamah* means 'the customary practice' is a judgement in determining the

<sup>4</sup> The term of maxim in Arabic is '*Tafsudu Al-'uqud bi al-gharar al-yasir duna al-kasir*'. Source : Athiyah 'Adlan 'Athiyah Ramadhan. 2007. *Mausu'ah Al-Qawa'id Al-Fiqhiyah Al-Munazzamah li Al-Mu'amalat Al-Maliyah Al-Islamiyah wa Dauruha fi Taujih Al-Nuzum Al-Mu'asirah*. Alexandria : Dar al-Iman. p .150.

*shari'ah* view on it in their common daily practices and transactions that also known among them , provided , it doesn't contravene with any *shari'ah* evidence and principle , and scholars not unanimous in opposing and objecting the custom, so it can be considered acceptable in *shari'ah* jurisprudence and taken as *shari'ah* parameter in case of inexistence other parameter derived from *shari'ah* sources (Athiyah Adlan, 2007). For instance, tenant should pay the rental payment in early of the month where this custom have been practised since many years moreover it acceptable although they realize it makes them to pay for unutilized usufruct yet whether it in the form of monthly payment or yearly (Muhammad Sodqi Al-Burno, 2003). The objective of taking custom as a mechanism in ruling process, in general , is to bring fairness – accepted through their understanding-between parties involve in contract for them to agree with mutual consent on the system utilized in that particular transaction (Muhammad Bakr Ismail, 1997).

For the securitization of contractual parties' right, besides avoiding disputable cause between them and upholding the prohibition of taking another's wealth incorrectly, the legal maxim '*al-jahalalah al-mufdiyah ila al-niza' ufsidu al-'uqud*', brings the meaning ' the disputable ambiguity in contract could spoil it' ensures any contract is always accompanied by the principle of fairness and just (Athiyah Adlan, 2007). It was Derived from the prophetic tradition:

نهى رسول الله صلى الله عليه وسلم عن المحاقلة و المزابنة

The meaning: Prophet forbids from *al-muhaqalah* (grains in ears are sold for dry grain ) and *al-muzabanah* (the exchange of fresh fruits for dry ones) (by containing an uncertainty in the exchange item with the price and tantamount to *riba* transaction) (Al-Darimi, 2000)

The present legal maxim establishes a principle on how the wealth should be accumulated, along with the different types of avenues that should be used in business and finance, to ensure a *shari'ah* compliant process is complete. Making a profit and accumulating of wealth is permissible in *shari'ah*. However, this objective should be based on permissible means such as sale, *murabahah*, *salam*, *mudarabah*, *wakalah* and the like, but it is not allowed to use non permissible means such as gambling and interest to generate profit and accumulate wealth (Ahcene Lahsasna, 2013)

## 5. Discussion on Some Cases

### 5.1 The acts are determined by the intention ( *al-umur bi maqasidiha* )

In the practice of Islamic finance today, albeit some people claims that the Islamic financial products are deemed identical to its conventional structure, the structure of IFI's product actually is designed intentionally to avoid taking or charging *riba* obviously under the concept of 'I owe U'. For example, *Bai' bithaman ;Ajil* (deferred payment) although charging customer as the way to gain profit, it is not like the *riba* based where they are charging directly from the debt, conversely in *BBA*, the bank buys the subject of sale before selling it with mark-up price to the customer. As a result, the both structure are similar to each other in charging 'profit' from their customer, however, two things make *BBA* differs to conventional method, first, the structure as explained before and secondly, the intention of *riba* avoidance as the sign of obeying the God's commandment.

### 5.2 The harm element should be eliminated ( *al-doror yuzal* )

As we understand, the philosophy of Islamic law is to eliminate any harm upon human's believe, intellect, dignity, body and wealth and promote leniency and easiness. Therefore, the practice of Base Financing Rate (BFR) and Effective Profit Rate (EFR) in Islamic banking institutions recently are expected to eliminate the volatility of interest rate furthermore in the period of economic uncertainty where the global are facing today. The combination between two rates above give an opportunity to the Islamic banking customer to plan and manage their financial commitment properly, simultaneously as the risk management tool for individual as well as organization.

### 5.3 The hardship begets facility ( *al-masyaqqah tajlibu al-taisir* )

In Islamic finance, there are many impediments and obstacles were founded in order to realize totally Islamic financial system covering the form and substance of each contract and supported by the spiritual stewardship. Furthermore, in some circumstances, the application on Islamic finance law is perceived contradicts with the governing law in business or banking matters. For instance, the case of *Dato' Nik Haji Mahmud bin Daud vs. Bank Islam* (1996) where the court found that there was no transfer of ownership effected in the case, whereby had not transgressed the Kelantan Malay Reserve Enactment 1920, that means the land said is never been transferred its ownership to the bank as the seller in *BBA* contract. The judgment has somehow equated the *BBA* contract with the conventional interest loan which in contradiction with the *shari'ah* requirement in ownership transfer.

In this context, there is a difficulty in applying all requirement listed in the practise of *BBA* since it also subjected to another law or enactment like the case above. If we suggest the act of land code need to be changed in order to accommodate the requirement of *BBA*, it may leads to the contentious debate between regulators and Islamic bankers. As far as the hardship elimination is concerned, the maxim of 'the hardship begets facility' is

suitable to be applied in this case or the similar, in effort to achieve the *maqasid al-shari'ah* to offer lenient and easiness in Islamic financial system.

#### 5.4 Harm prevention should be given the priority than promoting the benefit (*dar' al-mafasid awla min jalbu al-masali*)

The financial system is always overwhelmed by many type of risks. Among the risk that are shared together by both financial system, Islamic and conventional are market risk, liquidity risk, currency risk, withdrawal risk, legal risk and others (Habib Ahmad and Tariqullah Khan, 2007). *Shari'ah* non-compliance risk is among the unique risk that need to be concerned and focused by Islamic bankers, thus, every decision and product should be endorsed under the *shari'ah* governance requirements and guidelines.

In the case of *shari'ah* stock screening process, the guidelines that always been revised by the regulator, for instance Securities Commission Malaysia (SC), was introduced in order to ensure the investor's money is not channelled to the non-compliant activities where it will trigger the act that promotes sinful business activities (M.h Khatkatay and Shariq Nisar, 2007). Other that, the concept also provides a clear platform for Muslim investors to invest into companies that run the permissible activities in the businesses (Securities Commission Malaysia, 2009).

The benchmarks used by authority bodies are different one to another such as the used by Securities Commission Malaysia, Kuala Lumpur *Shariah* Index and Dow Jones Islamic Market Index. In ensuring the accuracy of screening result using the benchmark, Securities Commission Malaysia does the revision twice a year on the benchmark where usually effected the previous result. Despite the new benchmark will exclude some of the stock which are in the list of *shariah*-compliant stock based on previous benchmark that leads to the lessening of *shariah* stocks and its capital in capital market, but the principle and value of *shariah* must be given the priority where it may avoid Muslim's wealth from invested in the suspicious sectors which is considered as harming their wealth.

#### 5.5 The customary practice is a judge (*al-'adat al-muhakkamah*)

The financing activity is among the core business of Islamic banking other than investment and deposit taking. All Islamic banking in the world impose the profit rate on financing facility based on rates, so called, London Interbank Offered Rate (LIBOR) or Kuala Lumpur Interbank Offered rate (KLIBOR). Using the rates above doesn't mean Islamic banks also duplicate the concept of interest bearing products from the conventional banks, but it is the recognized customary practice by Islamic financial institutions as their benchmark in rate calculation.

#### 5.6 The agreement between Muslim can be determined through their agreed conditions stipulated in the contract.

This maxim was derived from the prophetic tradition ( *المسلمون عند شروطهم* ) means ' the agreement between Muslim is concluded based on their conditions' (Al-Daruquthni, 2004). The role of this maxim in the Islamic finance today is to enable every conditions and requirements that been stipulated in every transaction or procedure in order to smoothen the process. This validity to practise this *hadith* is subjected to allowable conditions and requirements only, when there is any forbidden element comes in such as *riba* or major *gharar*, the condition is consider null and void due to its contravention with the fundamentals in Islamic finance.

This maxim also promotes the leniency and easiness to every party that involves in Islamic finance sector to stipulate any condition for them to protect their wealth and rights,

#### 5.7 In the presence of two evils, the one whose injury is greater is avoided by the commission of the lesser ( *إذا تعارض مفسدتان روعي أعظمها ضررا بارتكاب أخفهما* )

This maxim aims to protect *maslahah* by accepting the commission of the evil but the lesser rather than the greater which is expected to cause more evils to the public. The selection of evil is based on the measurement of its impact, the one which has limited impact scope of impact is preferred in order to prevent the worse (Ahcene Lahsasna, 2013).

The financing scheme in Islamic financial institutions before 2009, BBA or deferred payment was the prevailing practice in that time and was accepted by almost Islamic banks. Then, *tawarruq* came into the market that was adopted before by IFI in middle east countries in order to introduce new method of financing rather than buy and sell back under BBA or *al-'inah* concept between two parties only which was criticized by middle east scholars. For the purpose to strengthen the *tawarruq* foundation, *bursa al-sila'* was established as the platform for the banks access the liquidity for the financing purposes. Despite, the *tawarruq* applied is categorized under the controversial method which known as *tawarruq al-munazzam* ( organized *tawarruq* ), but the evil or the controversial point is lesser than BBA and *al-'inah*. Therefore, the number of IFI that shifted their financing scheme to *tawarruq* is increasing time to time. This scenario is aligned with the maxim above in effort to protect the *maqasid al-shari'ah* where the evil and harm are eliminated as far as possible.

## 6. Conclusion and Suggestion

From the discussion above, we found that the science of *shari'ah* legal maxims is interrelated to the *maqasid al-*

*shari'ah* in general view, with the fundamentals those aim to uphold *maslahah* and shun harm and damage, promotes leniency in human interest and relationship, provides solution in desperate and emergency circumstances and strive to decrease the level of evil and controversial practice. Therefore, the modern Islamic financial products are also included in sharing the realm of the legal maxims that help scholars to establish *maqasid al-shari'ah* in Islamic finance in which basically could be derived through *istiqla* (thematic inference) and *ijtihad* (independent opinion) as long as it does not contravene with the fundamentals in *shari'ah* law of financial transactions.

From that point, there is a chance for researchers and scholars in Islamic economics to explore and establish new comprehensive discipline in *maqasid al-shari'ah* in Islamic finance that will be based on the foundation of *usul al-fiqh* (the science of Islamic jurisprudence law) and *qawaid al-fiqhiyah*. This new science hopefully may distinguish accurately the separate line between the three elements above and contribute to the revelation of the wisdom of God's commandments from the two main sources of Al-Quran and prophetic traditions.

In addition to the idea above, the parameters (*dhowabit*) of *maqasid al-shari'ah* in Islamic finance is also needed to be designed accurately by reflecting to the requirements and the natures of our financial system today likely to the effort that had been done by our previous scholars by listing the parameters with the sample of cases to enlighten reader's understanding on it. Besides, it also may keep the flexibility of Islamic law in every age and easily accepted by the people, by pouring the benefit to people in guiding them in obtaining a blessing from Allah in their wealth.

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