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EDITORIAL

It is with great pleasure that I present to the reader the July 2017 issue of IAIS Malaysia's flagship journal, *Islam and Civilisational Renewal*. This issue contains six substantive articles and four viewpoints, in addition to several event reports and a book review.

I myself write the first substantive article, entitled 'Actualisation (*taf'il*) of the Higher Purposes (*maqasid*) of Shari'ah'. In this article, I explore the ways in which the higher purposes, or *maqasid*, of Shari'ah can be applied and actualised. I have identified some of the weaknesses in the way the *maqasid* have been positioned in the conventional methodology of *usul al-fiqh*. I also make suggestions on how the *maqasid* should relate to *fiqh*, *usul al-fiqh* and *ijtihad* respectively. The actualising aspect of *maqasid* is expounded through a detailed examination of the ways the *maqasid* relate to their means (*wasail*). The narrative I have developed then proceeds to offer numerous illustrations of the *maqasid*-oriented *fatwas* of both classical and contemporary scholars on various issues of concern to the actualisation of *maqasid*.

The second article, entitled 'Environmental *Fitrah* in The Light of a Systemic Approach to Shari'ah and Science' is jointly written by Ahmad Badri Abdullah and Shahino Mah Abdullah. The authors argue that the principle of environmental preservation (*hifz al-bi'ah*) via the *maqasid al-shari'ah* has unresolved ambiguities with regard to its actual implementation in dealing with the phenomenon of global warming and world climate change. They suggest an alternative conception of environmental preservation by drawing a connection to the Shari'ah's objective of preserving *fitrah*. In the Islamic intellectual tradition, *fitrah* lays an intelligible foundation for the *maqsad* of environmental protection, which the authors have sought to develop through their engaging new research.

The third article, entitled '*Waqf* in Bosnia and Herzegovina during the 20th and 21st Century' is presented by Jasmin Omercic. This article investigates the socio-economic role of *waqf* in Bosnia and Herzegovina from the 20th century onwards. The overview of the evolution of Bosnia and Herzegovina *waqf* institutions advanced here underlines various abuses of these institutions and helps chart the way forward. A contemporary challenge is to reconstruct *waqf* with the emergence of Islamic Economics. The author observes that the *Waqf* Directorate of Islamic Community of Bosnia and Herzegovina (WD-ICBIH) has initiated reforms since 1995 to revive the socio-economic role of *waqf* and integrate it into Bosnia and Herzegovina development.

The fourth article, entitled 'Re-emergence of Shari'ah Penal Law in Northern Nigeria: Issues and Options' is jointly authored by Dr. Hanafi A. Hammed and Professor Wahab O. Egbewole. As the title suggests, the writers discuss the current

state of affairs surrounding the initiative to re-introduce Shariah Penal law in Northern Nigeria. They argue that the narrative of this effort began with the quest for political legitimacy as well as for religious purity by the former governor of Zamfara state. Despite the positive response of several states to this initiative, the federal government of Nigeria has, however, declared Shari'ah to be incompatible with the constitutional guarantee of freedom of religion. The northern governors responded by highlighting that the same constitution vested in states concurrent powers to establish their own court systems. The writers then set out to look into the constitutional provisions that guarantee freedom of religion side by side with several judicial decisions in Nigeria and abroad, where the right to practice one's religion has been vindicated.

The fifth article, entitled 'Boko Haram's Claim to an Islamic Caliphate: Is it Creditable?' is presented by Abdul Gafar Olawale Fahm. The central issues examined here are Boko Haram's declaration of an Islamic caliphate in Nigeria and the manner in which the group has gone about their activities by imposing Shari'ah law and persecuting and kidnapping young girls. The author asserts that it is timely to enquire into both the workings of the early caliphate and the role an Islamic state should play in the world today. This article's ultimate aim is to counter Boko Haram's approach to the caliphate by juxtaposing its actions with the exemplary leadership displayed by the pious caliph, Umar bin Abdul Aziz. An attempt has also been made to assess the impact of the Boko Haram insurrection and any lessons that can be drawn from it.

Our sixth and final substantive article, entitled 'Kesan Pertukaran Agama Ibu bapa Terhadap Status Agama Anak' (The Effect of Parents' Conversion on the Religion of a Child) is jointly written by Mohamed Azam Mohamed Adil and Rafeah Saidon. This insightful piece articulates the need to respect the legitimate interest of a spouse who converts to Islam to dissolve his or her marriage when such was solemnized and registered under the civil law. Civil courts, according to the authors, must be given the room to entertain and ultimately make a final determination on the petition to dissolve marriage brought up by the Muslim spouse. With regard to the religion of a child, the authors have made recommendations that include the possibility of establishing a mediation tribunal.

Turning to our four viewpoints, the first is by Shanino Mah of IAIS Malaysia. Entitled 'Smart Energy Consumption Could Preserve Natural Resources', the author stresses the need to reduce fossil fuel dependency by introducing the right energy mix as well as observing 'green practice' through 'energy efficiency' implementation.

In our second viewpoint, Muhammad Adha Shaleh of IAIS Malaysia presents us with 'Community Engagement and the Creation of Social Capital'. He signals some important directions for the vitality of community engagement in the creation of social capital. Certain obstacles would have to be removed, and when properly done so, community engagement in environmental programmes can elevate a nation's reputation, as well as build public trust and confidence.

Abdul Karim of IAIS Malaysia contributes our third viewpoint entitled, ‘Reducing Polarisation in the World’. He highlights the need to reduce polarisation between Muslims and non-Muslims by promoting a better understanding of Islam and an improved climate of understanding across the board. Muslim institutions of learning would also need to pay attention as there can be little progress without a thoughtful approach and all inclusive awareness.

For our final viewpoint, Apnizan Abdullah writes a piece entitled ‘Charities in Malaysia: Demarcation of Federal and State Jurisdictions’. She is of the view that jurisdictional issues would arise when Islamic charitable concepts (except *waqf*), such as *sadaqah*, *infaq* or *hibah*, are applied within the Federal jurisdiction because of overlapping powers between the Federal and State Governments. She argues that it is timely to revisit the current state of our regulatory regime governing charities so that certain Islamic philanthropic concepts can be extended and enjoyed by both Muslims and non-Muslims.

In addition to the substantive articles and viewpoints, this issue of the *ICR* also reports on four important events. The first event, held on 9 May 2017 at IAIS Malaysia, was a ‘Seminar on Muslim Intellectuals, Freedom and Creativity’, and featured three speakers, Mohammad Hashim Kamali, Ali Gheissari and Syed Farid Alatas. The issue of intellectual creativity in Islam is connected with the concepts of *tajdid islam* and *ijtihad*, which the panelists addressed in considerable detail, generating a lively discussion.

The second event, held on 22-23 May 2017, was entitled ‘Training Programme: Shari’ah Standards on *Murabahah*, *Tawarruq*, *Ijarah*, *Rahn*, *Qard* and *Wa’d*’. This event was organised to keep participants abreast with the latest updates on the Shari’ah standards of the respective contracts. The training was conducted by two IAIS Malaysia research fellows, Mohammad Mahbubi Ali and Apnizan Abdullah. Based on the overwhelming response of the participants, the training programme was a success. Participants came from different sectors, including Islamic banking and financial institutions, higher education institutions, commodity *murahabah* brokers and research institutes.

The third event was a round table discussion on ‘Islam and Human Capital Development’. The discussion was held in Oxford, UK, and co-organised by the Legacy Association of Tun Abdullah and Oxford Centre for Islamic Studies (OCIS). It was held on 2 June 2017, in conjunction with Tun Abdullah Badawi’s visit to the Centre. Dr Mohamed Azam Mohamed Adil represented IAIS Malaysia in the event.

This issue of the *ICR* ends with a review of Mohammad Hashim Kamali’s *The Middle Path of Moderation in Islam: The Qur’anic Principle of Wasatiyyah*, written by Jabal M. Buaben of the Sultan Omar ‘Ali Saifuddin Centre for Islamic Studies. Buaben succinctly summarises the gist of Prof Kamali’s book and commends the author for his ability to explain complex ideas and technical jargon in a simple and lucid manner.

As a final word, I would like to extend my heartfelt appreciation to all our contributors. They have produced an outstanding body of thought provoking work. I am confident that policy makers, scholars and other interested parties will find this issue enlightening and useful.

Mohammad Hashim Kamali
Editor-in-Chief

FOCUS ARTICLE

ACTUALISATION (*TAF'IL*) OF THE HIGHER PURPOSES (*MAQASID*) OF SHARI'AH

*Mohammad Hashim Kamali**

Introductory Remarks

The higher purposes, or *maqasid*, of Shari'ah are applied and actualised through their means (*wasail*). Since the *maqasid* are not applied directly, they are usually a step further removed from actual practice. For the *maqasid* to be actualised, the first step would naturally be to identify the *maqasid* one is having in mind. This would give rise, in turn, to a question as to how is the *maqasid* or purpose of Shari'ah actually identified, and which method, if any, is used toward that end. The *maqasid* are divided into several types. According to one of its classifications, they are divided into two types: *maqasid* of the Lawgiver (*maqasid al-Shari'*) which are mostly identified by the Shari'ah, and human purposes (*maqasid al-mukallaf*), which anyone can determine and identify for themselves. The Lawgiver's purposes are identified in the Qur'an or hadith either directly or by allusion. Sometimes the text makes numerous references to something without actually saying that it is a Lawgiver's purpose. When all such references are put together, their combined reading concurs on a certain purpose or *maqasid*. This process is known as induction (*istiqrar*) which is a generally accepted method for the identification of *maqasid*. A learned scholar of Shari'ah would know, for instance, that trustworthiness (*amanah*), truthfulness (*sidq*), justice, compassion, good character (*adab, husn al-khuluq*), unity among the faithful (*wahah*) and God-consciousness (*taqwa*) are among the *maqasid* of Shari'ah even if the text does not specifically say so. *Istiqrar* partakes in *ijtihad*, so it would be reasonable to say that *maqasid al-shari'ah* are identified by the scripture or by *ijtihad*.

The human purposes do not necessarily involve a juridical methodology and approach. Human beings make numerous decisions based on purely practical purposes which may or may not relate to shariah purposes. With reference to pursuit of knowledge, for instance, the Lawgiver's purpose of knowledge and education is knowledge of God and proper manner of worshipping Him and also

to explore and understand His creation. The human purpose of education may be to earn a university degree in order to secure employment. In a similar vein, the Shari'ah purpose of marriage is procreation of the human species, but the human purpose of the same for an elderly couple may only be to find companionship. The two classes of purposes are often interrelated: in such cases the Shari'ah only specifies that the human purposes do not violate *maqasid al-shari'ah*. It may be helpful to illustrate in a few examples how the Shari'ah and human purposes interact and are actualised in combination with one another:

1. Bringing of ease and removal of hardship (*taysir, raf' al-haraj*) is one of the recognised *maqasid* of Shari'ah that characterises Islam's approach generally but more so perhaps with reference to temporal affairs, say in education and teaching. The question of how is this to be actualised and through what means may be responded to as follows: Scholars and teachers should speak with simplicity in line with the receptivity of their audience's level of understanding, cultural characteristics and needs. Is it mere information or also improvement of character and combating of a particular mischief? A lecture given in a village is not the same as one delivered in a metropolis, and one that is given to a group of scholars is also not the same as one that addresses the general public. A speech that seeks to rectify existing deviations should also be focused on its purpose and avoid complex theoretical preliminaries.¹ All of these may be said to be the means toward actualising the Shari'ah purposes of *taysir* in the dissemination of knowledge.
2. Another recognised purpose of Shari'ah is cooperation (*ta'awun*) in good works, which is grounded in both scripture and precedent and commands high merit in the Islamic order of values. This is actualised, in turns, by means, not only of helping those in need of it in time of calamity and distress, but also by means of long term measures that sustain the effort, and widen its network through inviting others to join hands. The means (*wasilah*) toward that *ta'awun* may also be the establishment of philanthropic foundations, adoption of correct and better targeted policies that respond to people's needs, and also informing them of the value that Islam attaches to charitable work. As can be seen in this illustration, several means are utilised to secure and actualise the same purpose, that is, of cooperation in good works.²
3. Should our purpose be to raise public awareness of the *maqasid* themselves, as we think that individuals and organisations ought to be better informed of *maqasid* and pay greater attention to them, then we need to identify the means by which this can be effectively done. One

would evidently be to engage with the media to give greater exposure about the *maqasid*. Another would be to identify capable persons to write not only learned essays for academic publications on *maqasid* but also brief, succinct and targeted pieces for print media outlets. Yet another possible means would be to hold seminars and conferences. And finally if one were to think that the Arab countries should do better in this regard, one would need to find ways and means to engage with them in Arabic and identify areas to focus one's efforts. One may even do that in the selection of *maqasid* themselves, simply because *maqasid* occur in so many varieties. If one aims at the *daruriyyat* category of *maqasid*, then which one does one take as a matter of priority and so forth.

4. With reference to Islamic banking and finance (IBF), there is a groundswell of opinion among both the Shari'ah advisors and industry professionals on the need to inject the *maqasid* of Shari'ah into the fabric of IBF and that doing this is necessary if one were to protect the credibility of IBF from further erosion. IBF practices are said to have moved further away from the spirit of Shari'ah by following their conventional counterparts for a long time. IBF has furthermore followed the rules of *fiqh* in a formalistic way often at the expense of their purposes. IBF practitioners apply, in other words, the *fiqh* rules but are in disconnect with the *maqasid* of those rules. There is clearly a demand for a *maqasidi* approach to overcome the shortcomings of this *fiqhi* literalism in the IBF practices. But when turning to the *maqasid* blue print, it also tends to fall short of providing the needed input in the form of pragmatic tools to rectify the aberrations, partly because the *maqasid* have remained somewhat too theoretical to be of much help to practitioners. Most of *maqasid* are theoretical in that they do not have substantive rules of their own. Rather the *maqasid* can tell us how the *fiqh* rules should be applied, not to replace those rules. That said, one may still need to explore the resources of *maqasid* further to make a better appraisal of their relationships with the *fiqh* and *usul al-fiqh*, which is what we propose to do. One obvious question would be how to identify the valid Shari'ah purpose of a *fiqh* rule, transaction or contract.

To identify one's purpose and specify the means to actualise it may or may not always involve recourse to Shari'ah sources, but only to rational common sense methods, which is why some scholars maintain that *maqasid* can be identified by the human intellect (*al-'aql*) and also innate human nature (*al-fitrah*). When a *maqasid* is identified, the next step would be to ascertain the suitable means for its actualisation. The means that one chooses must not be disproportionate or too indirect for the purpose and that it is also permissible under Shari'ah. Both

the means and ends must be lawful. For a serious discrepancy between them can lead to distortion, or manipulation through the use of a legal trick (*hilah*) to obtain an unlawful end through a seemingly lawful means.³ This would introduce complication and invoke, in turn, application of the *usul al-fiqh*'s notion of 'blocking the means' (*sadd al-dhara'ir*). In short, actualisation (*taf'il*) of *maqasid* is about identification of purposes and means by which they are actualised.

This paper begins with the definition and meaning of *maqasid* and proceeds to ascertain three discernible tendencies regarding their scope: reductionist, expansionist, and the moderate approach of *wasatiyyah/i'tidal*. Then we address the question as to whether the *maqasid* may be recognised as a proof or source of Shari'ah in its own right. Can one, in other words, extract a ruling (*hukm*) of Shari'ah directly from the *maqasid*, or should one always follow the *usul al-fiqh* approach? Responding to these questions would help the reader to know more clearly what to expect of the *maqasid*. We often speak of the *maqasid* but when it comes to actual practice, we apply the *fiqh* rules. Can one just ignore the latter and refer directly to *maqasid*? Then we explore the relationship of *maqasid* to the Qur'an and hadith, and to *usul al-fiqh* respectively. We also ascertain the roles respectively of the human intellect ('*aql*) and innate human nature (*fitrah*) in the identification of *maqasid*. Our following review of the means and actualisation of *maqasid* elucidates this subject through several illustrations. *Maqasid*-based *ijtihad*, or *ijtihad maqasidi*, is also discussed in a succeeding section, which is followed, in turn, by a conclusion and a set of actionable recommendations.

Definition and Meaning of *Maqasid*

Maqasid is the plural of *maqasid*, from the root word *qasada* (to intend), or that which one intends to reach one's objective or purpose. Muslim scholars have given different definitions to *maqasid*. The renowned Andalusian Ibrahim al-Shatibi (d. 790/1388) who wrote much on the *maqasid* did not actually define it. Commonly cited definitions of *maqasid* are those of Muhammad Tahir ibn 'Ashur (d. 1974), Muhammad al-Zuhayli, Yusuf al-Qaradawi and Ibn Bayyah, all of whom describe *maqasid* as the "wisdom and meaning" that underlie the rulings (*ahkam*) of the Lawgiver. Ibn 'Ashūr defined the general objectives (*maqāsid 'āmmah*) of the Shari'ah as "the deeper meanings (*ma'ānī*) and inner wisdom (*ḥikam*) that the Lawgiver has contemplated in respect of all or most of the Shari'ah ordinances."⁴ For Qaradawi, "*maqasid al-shariah* refer to the final ends and purposes (*al-ghayat*) aimed at by the textual commands, prohibitions and permissibilities, and the detailed rulings (*al-ahkam al-juz'iyyah*) seek to realise them in the life of competent individuals, families and communities of the Muslim *ummah*."⁵ Simply put, *maqasid* is another term for the meaning and

wisdom sought by the textual rulings of Shari'ah. Qaradawi's definition clearly seeks to relate the *maqasid* closely to the detailed textual rulings of Shari'ah in their totality. The *maqasid* are thus to be found in the *ahkam* and have no separate existence outside them. For 'Abd Allah Bin Bayyah, *maqasid* refer to "the spirit of Shari'ah, its meanings, wisdom, purposes and objectives." These meanings arise from the original address of the Lawgiver (*min khitab al-shari' ibtida'an*), as well as those arrived at through inferences and interpretations.⁶ Bin Bayyah's definition not only relates the *maqasid* closely to the text but is inclusive of rational inferences from the textual sources that can also determine and identify the *maqasid*. Muḥammad al-Zuhaylī defined *maqasid* as "the ultimate goals, aims, consequences and meanings which the Shari'ah has upheld and established through its laws, and consistently seeks to realise, materialise and achieve at all times and places".⁷

Approaches to Maqasid: Reductionism, Expansionism and Moderation (*tafrit*, *ifrati*, *i'tidal*)

Three tendencies are noticeable in the contemporary discourse on *maqasid*, one of which is the neo-Zahiri approach which tends to be reductionist (*tafriti*) of *maqasid* and confine them to the clear text and immediate meaning and purpose thereof. For a *maqasid* to exist, in other words, there must be a clear text to say so. The second tendency is expansionist (*ifrati*) that exaggerates in the identification of *maqasid* at the expense even of scripture-creating and identifying new *maqasid* without clear supportive evidence. The third and the correct approach is the moderate (*wasati*) approach opting for *maqasid* that find support in the scripture and valid precedent. For instance, elimination of harm (*raf' al-darar*) is a valid Shari'ah purpose which has wide-ranging applications and there are guidelines on how a harm can be correctly measured and evaluated - and that is how moderation is also ascertained. A careful approach to moderation is to be guided by valid precedent, knowledge and good judgment.⁸

There is general agreement that the Qur'an and hadith are the most authoritative sources of *maqasid*, but there is disagreement as to whether rational inference from these sources can also introduce and identify *maqasid*, and if so, to what extent.

The five essential *maqasid*, namely of protection of religion, life, intellect, lineage and property are the salient purposes of Shari'ah by general consensus. Prominent scholars, including Shaykh Muhammad al-Ghazali (d. 1996), Yusuf al-Qaradawi, Ahmad al-Raysuni, Isma'il Hasani, and Ahmad al-Khamlishi have added justice, equality, freedom, social and economic rights to the higher purposes of Shari'ah upon saying that the five essential *maqasid* were based on

the *ijtihad* of Abu Hamid al-Ghazali (d. 508/1111) based on his reading of the prescribed penalties (*hudud* and *qisas*) and the value points the Shari'ah sought to protect through them.⁹ Other scholars have included human dignity, mercy and compassion, unity, and fraternity (*ukhuwwah*) to the range. Support for most of these can be found in the Qur'an and hadith, yet many text book writers have excluded them on the analysis that they are too general and need to be specified and related to particular cases. Khadimi and Raysuni have also spoken of adding fundamental human rights and protection of the environment to the list of essential *maqasid* but registered differences of opinion as to whether most of these can be subsumed under the five *daruriyyat* through a wider reading thereof. Protection of life would thus include human dignity and basic rights as well as the right to environmental safety. A great deal of human dignity and environmental protection can also be subsumed under the protection of religion and that of property. One can add, they say, separate headings for these new *daruriyyat*, or else subsume them under the existing five.¹⁰ In our view, adding these new headings under the *daruriyyat* is likely to dilute an existing consensus over the five *daruriyyat*, hence it may be preferable to seek fresh consensus for these new additions. Jamal al-Din 'Atiyah (d. 2016) has made an attempt to include most of them either under the higher objectives of Shari'ah or place them under his expanded classifications of the *maqasid*.¹¹

It is reasonable and moderate to note what some commentators have observed that the *maqasid* should not be confined to *ijtihad* and *mujtahidin*; it should be possible instead for everyone who can utilise the resources of *maqasid* in due proportion to their knowledge and experience to do so. For the *maqasid* are guidelines to purposeful thinking, analysis and evaluation generally, not confined to any particular discipline as such. Every researcher, interpreter, mufti, and judge could gain from the knowledge of *maqasid al-shari'ah*.¹² Clear goal identification then becomes a strategy of thinking that enhances one's resources and guides one's progress in meaningful ways. This is what is often lacking on the part of many competent researchers in the economic and development fields – they construct the economic aspect at the expense, however, of human development, and may even be inflicting harm. One may also find people who defend individual rights often at the expense of community rights; food experts introduce and promote food and beverage varieties at the expense, at times, of harming people's physical and even moral health. Individuals and states may be constructing one thing but destroying another – which is what is happening in the space and weapon technologies and some of the questionable scientific advances.

¹³

'Atiyah has aptly noted that traditional Islamic scholarship in the area of theology (*ilm al-kalam*) has almost totally ignored the potential contributions

of *maqasid*, whereas contemporary opinion actually demands this. He adds that the prospects of extending the *maqasid* to theology have increased in the light of enhanced scholarly contributions in recent decades that pave the way toward that end.¹⁴

A similar neglect of the *maqasidi* approach is noted in the field of politics. Since leadership is a religious imperative, establishing a system of rule is one of the *maqasid* of Shari'ah. Thus it is suggested that *siyasah shar'iyah* (Shari'ah-oriented polity) that subsumes political leadership must be guided by the ethical norms of Islam. This has not, however, been the case in the longer history of Islamic government.¹⁵

A debate has also arisen as to whether *maqasid* constitute a proof of Shari'ah side by side with the other recognised proofs, and if so, can a ruling of Shari'ah be founded on *maqasid* and acted upon without looking at any other evidence. Subhi Mahmassani's affirmative response to this question came under scrutiny, however, by 'Allal Fasi (d. 1964). In his *Falsafat al-Tashri' al-Islami*, Mahmassani had recognised the *maqasid* as an additional proof (*dalil*). Al-Fasi's response is that the *maqasid* is not another proof the like, for example, of natural law and natural justice in western jurisprudence - on which a judicial decision may be based. *Maqasid* is not a proof in itself, but one which stands with every other proof and a part thereof. Al-Fasi added that the Shari'ah consists of laws and rules (*ahkam*) which have their own purposes; *ahkam* are also sometimes taken from *maqasid*. Anyone learned in Shari'ah should read the text and laws of Shari'ah in the light of their purposes so that his or her understanding becomes deeper, coherent and mature. The Qur'an is the first proof, together with its *maqasid*, which is also true of the Sunnah. Analogy (*qiyas*) is also a proof that must stand on its purpose. Some instances of analogy are found to have departed from its rationale and *maqasid*, in which case a correction is attempted by recourse, for instance, to juristic preference (*istihsan*) or consideration of public interest (*istislah*) so as to integrate the proper *maqasid* therein. In the event where an issue is encountered for which no relevant text or analogy is found, reliance on *maqasid* will be greater. Recourse is to be had in that case to broad and general guidelines of the scripture to extract a ruling in the light of their *maqasid*.¹⁶

Ibn 'Ashur thought that the *maqasid* should be given an independent status. This was not entirely without precedent as earlier scholars, including the Maliki scholar Shihab al-Din al-Qarafi (d.684/1283), Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah of the Hanbali school had made comments that pointed in the same direction.¹⁷ A critic suggested, however, that al-Shatibi had not given the *maqasid* an independent status when he discussed the *maqasid* in the fourth of his four-volumed *al-Muwafaqat* and treated it as an extension of *usul al-fiqh* for the other three volumes are on *usul al-fiqh*. Al-Shatibi had, in other words, accentuated

the importance of *maqasid* without claiming that it is either separate from or independent of *usul al-fiqh*.¹⁸

Bin Bayyah's opinion on the relationship of *usul al-fiqh* to *maqasid* is that they are inseparable from one another, albeit that *maqasid* is a distinctive chapter in the larger matrix of *usul*, alongside other chapters such as *istislah*, conflict and preference (*al-ta'arud wa'l-tarjih*) and *qiyas* etc. Having discussed both Ibn 'Ashur and Bin Bayyah, Raysuni is inclined to side with the former, adding that *maqasid* is being taught, in recent decades, as a separate course in many countries and universities including Morocco, Algeria, Mauritania, Pakistan, Saudi Arabia, al-Azhar of Egypt and many more and is treated as a distinctive subject in its own right.¹⁹ In our view teaching a separate course on *maqasid* is not a proof of its independence from *usul al-fiqh*. We take the view that it is a distinctive discipline of shariah without claiming, however, that it is independent.

Maqasid, Scriptural Sources and Usul al-Fiqh

Traditionally textual interpretation (*tafsir*) and analogy (*qiyas*) served the principal vehicles of delivering the meaning of the scripture and its analogical extension to similar cases. Yet the scope of this exercise was restricted by a plethora of conditions that *usul al-fiqh* attached to almost every aspect of interpretation and analogy.²⁰ The *usul* methodology subsumed the *maqasid* mostly under the effective cause ('*illah*), saying that the cause and rationale of a ruling also indicates its purpose. Thus we read in a legal maxim: "The effective causes of Shari'ah rules indicate the purpose of the Lawgiver and should be followed whenever they are known."²¹ Yet in our view subsuming the *maqasid* under '*illah* would effectively place the *maqasid* back under the umbrella of conventional *usul al-fiqh*.²² What we propose instead is to read the '*illah* and *maqsad* together and draw appropriate conclusions from them in the construction of *ijtihad*, but not to subsume the one under the other. To subject the *maqasid* to the *usuli* process of *ta'lil* (search for the '*illah*) is also not straightforward. For it is not easy to identify the '*illah* to begin with, and then also that '*illah* and *maqsad* are different in certain respects: '*illah* is usually tied to status quo ante and it looks to an existing *hukm*, whereas a purpose (*maqsad*) also looks to the future and seeks to extend the Shari'ah beyond existing precedent. The *maqasid* are also evolving and changeable in tandem with the progress of science and civilisation. '*Illah* is a more restrictive concept by comparison.

We propose therefore that '*illah* and *maqsad* should inform rather than substitute one another. To illustrate, the Qur'an enjoins just retaliation (*qisas*) in terms of 'life for life (*al-nafsu bi'l-nafs*),' in one place (al-Maidah, 5:45), but also provides that the law of *qisas* is meant to protect life (al-Baqarah, 2:179). The former expounds the '*illah* and the latter expounds the purpose and wisdom

(*hikmah*) of the law of *qisas*. In the event where several persons collude in murdering one, an '*illah*-based approach will make only one person liable to *qisas*, which is not satisfactory, as it was shown, in fact, during the time of 'Umar al-Khattab in a murder case in Yemen. He concluded after much deliberation that people's lives cannot be protected unless all who colluded in the murder of one are made liable to *qisas*. This position is sound as it reads the '*illah* together with the *maqсад* or *hikmah*, and it represents a standard Islamic law in both its Sunni and Shia branches. A similar example may be the punishment of apostasy, which is provided in the hadith, "One who changes his religion shall be killed." This is a much-debated text, but if the ruling of this hadith is based only on its '*illah* (i.e. change of religion), it will be less than satisfactory and could even lead to distortion. But if one reads the hadith in its proper context, and note that the Prophet uttered it in response to a situation expounded also in the Qur'an: the head of a tribe would embrace Islam and all of his tribe would follow suit early in the day and would renounce it collectively by the day's end with the intention to weaken Islam – he would understand the reason of the Prophet's utterance of that hadith. The purpose of the hadith was to protect Muslim unity and penalise acts of treason that seek to destroy Islam. A dry '*illah*-based reading of the hadith should therefore be informed by its purpose. This purpose is incidentally indicated in another hadith, which made apostasy liable to death by one who 'boycotts the community' (*mufariq li'l-jama'ah*) and attacks its unity and leadership.

Reflecting on al-Shatibi, he did not resort to *ta'wil* (search of the correct '*illah*) in his construction of the theory of *maqasid*. When he proposed induction (*istiqrā'*) as an identifier of *maqasid*, for instance, he was of the view that induction cannot be subsumed under *ta'wil*. In rational terms, induction could also be extended to ideas and values that society may embrace in the course of history and time. Thus when one says that the essential *maqasid* should also include human rights or protection of the environment, one can find support for them in the sources of Shari'ah in a way that can hardly be tied to the '*illah*. Then more recently when Ibn 'Ashur and some other scholars added rationality, and innate human nature ('*aql* and *fitrah*) as additional identifiers of the *maqasid*, the whole of their effort was geared toward equipping the theory of *maqasid* with its own methodology and approach rather than subjecting it to any *usul al-fiqh* method, including the '*illah*.²³

Twentieth century scholarship has actually sought to expand the scope of *maqasid* from a purely juristic context to the wider arenas of modernity and civilisation.²⁴ The *maqasid* should naturally have a higher profile as a goal-setter and determinant of values. The *usul al-fiqh* can be seen in a fresh light as a facilitator of *maqasid* by providing it with ideas and resources to help with the actualisation of *maqasid*. Yet the *usuli* doctrines are almost all in the nature of probabilities and have not been recognised as the final arbiters of goals and values.

Hasan Jabir elaborates on this to say that the Qur'an is the most authoritative source of the *ahkam*. While the *usul al-fiqh* shows the ways of extracting rules from that source, *usul al-fiqh* is by itself not enough without the aid of *maqasid* - if the Qur'an and Sunnah were to guide the way of the Muslim *ummah* to new times and climes. For this would necessitate studying the primary sources in light of the broader universals of *maqasid*.²⁵ Moreover, since the *maqasid*, as a discipline, consist of an articulation of the spirit and purpose of Shari'ah, it helps to guide the *usul al-fiqh* doctrines by removing or minimising instances of apparent conflict and burdensome elaborations therein. The *maqasid* also aspires to greater consensus among the wider spectrum of schools and scholars of Shari'ah - even of other traditions and ideologies.²⁶

The idea of *maqasid* has in reality been the prime mover in bringing the letter and spirit of the law closer together. With regard to the consolidation of hadith, for instance, unlike the Qur'an which is equipped with detailed information on the occasions of its revelation (*asbab al-nuzul*), most of the hadith do not elaborate their own occasion and context. This is often left to the speculation of the narrator and jurist. By paying attention to the *maqasid* and the overall knowledge of the subject, hadith scholars were able to sift through and isolate much of the superfluous material in hadith.²⁷ *Maqasid* can also play the same role as criteria of evaluation of legal rulings obtained through interpretation and *ijtihad*. The *ijtihadi* rules of Shari'ah and fatwa are changeable with the change of time. Almost all jurists understand, as Ibn Qayyim al-Jawziyyah explains, that justice is not done by the formal application of law regardless of circumstances that may present pressing situations of necessity and need. A competent scholar therefore assesses a situation and decides whether or not there is a need for an exception to the law. With knowledge of the purposes and objectives of the law, the scholar would know whether there is a need for fresh *ijtihad*, or for grant of relaxation (*rukhsah*) to formal application of the law.

Human Intellect ('*aql*) and Innate Human Nature (*fitrah*) as Identifiers of *Maqasid*

Can human intellect and judgment validate the *maqasid* side-by-side with the text – or even in the absence of a clear text? Different responses have been given by both the early and contemporary jurists. Few would agree that '*aql* alone can validate the *maqasid* without any textual evidence. Most jurists have agreed, on the other hand, that reason can evaluate human conduct on temporal affairs, but that reason cannot provide a reliable basis of evaluation on devotional matters (*'ibadat*).²⁸ The discourse on this point tends to run parallel, for the most part, with the one that has arisen concerning the proof of *maslahah*. Al-Ghazali has

observed: "It is by means of '*aql* that people know the benefits of this world."²⁹ Credibility is given, however, he added, to the intellect of those with sound judgment and knowledge of the custom and culture of society. 'Izz al-Dīn 'Abd al-Salām (d. 660/1262) observed that "temporal benefits and harms are mostly known and identified by '*aql*, not only in the Shari'ah of Islam, but in most other traditions. A person of sound judgment would know, even before the existence of a revealed text, that realisation of pure benefit or prevention of pure harm is praiseworthy. Learned scholars in most traditions would also agree on the prohibition of murder, theft, adultery and the like. As for the benefit or harm of concern to the hereafter, these can only be known by means of transmitted proof (*naql*)."³⁰ Ibn Taymiyyah's view on the authority of '*aql* is similar but it adds a reference to innate human nature (*al-fiṭrah*)³¹ that also plays a role in the identification of *maqasid*. The Shāfi'ī school holds unrestricted reasoning (*istidlāl*) as a valid basis of judgment even if it cannot be traced to a proof text, provided that it operates close to the meaning and spirit of those proofs.³² Imām al-Shāfi'ī referred to the precedent of Companions saying that whenever they could not find a textual ruling on a matter they would resort to *istidlāl*.³³

Human intellect is informed by the senses, but has the capacity to go beyond the data of the senses, although it falls short of the wider reaches of revelation (*wahy*). The intellect performs a number of functions. It perceives that which is unseen based on that which is seen, derives universals from particulars, recognises self-evident truth, and associates causes and effects. It is a criterion of responsibility, and the criterion by which God Most High has honoured humankind above the rest of His creation. It is also the only means by which humans can know the essence of responsibility and *taklif*. Human reason is therefore a credible basis of judgment in the absence of revelation, provided that the judgment arrived at is in harmony with the general spirit and guidance of the revealed scripture.

Innate *Human Nature* (*fiṭrah*)³⁴ is a Qur'anic term denoting a human disposition that inheres in every person and thus is universal by the fact of its commonality. The Qur'anic assignment of the vicegerency of man in the earth (*istikhlāf*—al-Baqarah, 2:30) makes everyone carrier of a Divine trust and mission to build the earth. *Fiṭrah* thus refers to the innate nature of God's trusted vicegerents, all of whom partake in a sparkle of the Divine (Q 38:72), and excel in ranks over the rest of His creatures (al-Isrā', 17:70). This is also manifested in Islam's designation of itself as *dīn al-fiṭrah*, a religion that strikes harmony with enlightened human nature. *Fiṭrah* is intuitive but matures with insight and experience. Ibn Sina (d. 1037) equated *fiṭrah* with '*aql* when he spoke of intuitive intellect (*fiṭrah*) endowed in someone who is brought into this world without prior exposure to society. Then he perceives and comprehends concrete realities and customs. He admits, however, that not everything affirmed by *fiṭrah* is true;

what is true is the capacity of innate human reason to discern value, good and bad, in what is perceived by the senses.³⁵

Natural *fitrah* is thus an inherent endowment, and Islam bears essential harmony with it. The natural *fitrah* in our human make-up is not all of it known to us, but our intellect can learn much from our inner organism and bodily architecture, genetic, cellular and intercellular communication, and physiological interactions in and between organs. *Fitrah* is not sufficiently studied for us to know how it communicates with our intellect. We do not know well enough the physiological workings of our mental faculties within our *fitrah*. One can assume, however, that when they go against one another, knowingly or otherwise, a corrective is likely fall due.³⁶ It goes against the *fitrah* of a young child of two, for instance, to be pushed into premature tutoring, for children ought to learn by playing; it also goes against our *fitrah* to be deprived of our natural needs for sleep, family ties and friendship.

Whereas rationality is testable through closer scrutiny, *fitrah* is not so clearly testable due to our insufficient knowledge of it. Social custom and consensus of people of sound nature may be said, however, to be a reasonably reliable external indicator of *fitrah*.

Ibn 'Ashur linked the *maqasid* to *fitrah*, quoting a Qur'anic text, and concluded that both the Shari'ah and its *maqasid* bear harmony with *fitrah*:³⁷

And so, set thy face steadfast towards the one true faith, turning away from all that is false, in accordance with the natural disposition (*fitrah*) which God has endowed in humankind. Allow no change to alter (or corrupt) what God has endowed (al-Rum, 30:30).

Fitrah also refers, according to Ibn 'Ashur, to the natural disposition (*khilqah*) and the natural order (*nizām*) that God endowed in every creature. The human *fitrah* consists both of inward and outward manifestations. Walking on two feet is just as much an aspect of man's physical *fitrah* as is his intellect and reason. Similarly, relating effects to their causes and drawing conclusions from them is an intellectual *fitrah*. In sum, the Shari'ah objectives, or *maqasid*, according to Ibn 'Ashur, are mostly embedded in man's innate *fitrah*.

Actualisation of *Maqasid* and the Role of *Wasā'il*

The whole of Shari'ah consists of purposes (*maqasid*) and the means (*wasā'il*, also known as *mukammilāt*) that seek to attain them. A *wasīlah/mukammil* is the means that helps to achieve the particular *maqasid* it is attached to, be it essential (*daruri*), complementary (*haji*) or a desirable (*tahsini*). When a suitable means is used to secure a correctly identified purpose, the latter is actualised as a result. Means and accomplishers are sometimes, but not always, identified by the Shari'ah directly or through the fulfillment of certain causes and conditions.

Where means are liable to change with the change of circumstances, whereas purposes tend to command greater stability and permanence.³⁹ Yet it is the means that help to establish the relevance of the *maqasid* to a particular context or circumstance. The *maqasid* are also desired in themselves, whereas the *wasā'il* are not. Moreover, the means are subsumed by their purposes, depending on the strength or weakness of the relationship between them. If the means in question is indispensable to securing its relevant purpose, then according to a legal maxim, "That without which a *wajib* (obligatory command) cannot be accomplished also becomes a *wajib*." This maxim refers to means that is instrumental to its end but not to one that may be related only to a subsidiary or incidental aspect thereof.⁴⁰ The reverse of this is also true in that the means to *haram* also partakes in *haram*. Unlawful means cannot therefore bring about lawful results - both the purpose and its means must be lawful.⁴¹

The means to a certain purpose may have been identified in the text of the Qur'an or hadith, failing which it is identified through rationality and *ijtihad*. To illustrate the means/accomplisher of an essential purpose, the Qur'an (al-Baqarah, 2:283) enjoins that a future obligation (*dayn*) should be reduced into writing. This is to ensure protection of property (*hifz al-mal*), which is one of the essential *maqasid*. Documentation in this case is the means toward the protection of that purpose, and both are textually identified.

Accomplisher of a purpose signifies a complementary means or factor in securing a purpose. To illustrate this point, we refer to contractual options (*khiyārat*, sing. *khiyār*) that can be appended to a sale's contract. Upon concluding a sale, for instance, the purchaser may stipulate an option that he will ratify the deal in three days. Inserting an option into a sale contract serves as an accomplisher (*mukammil*) of the sale, which ensures that it is free of uncertainty and misrepresentation (*gharar*) - sale itself being a complementary (*haji*) purpose of Shari'ah. To illustrate the accomplisher of a *tahsini*, or a desirable *maqsad*, in relationship to the permissibility of sale, one may refer to market regulations requiring, for instance, that only clean and lawful food may be offered for sale.⁴²

The means must not exceed nor overrule its purpose. To take our previous example of sale and option again, the purpose of an option is to prevent uncertainty and *gharar* in a sale, but if one were to exaggerate and demand total exclusion of *gharar*, it would be difficult to achieve and may even obstruct the sale. For a slight *gharar* is unavoidable and is usually tolerated in a sale. To give another example, the existence of counter-values in an exchange contract is desirable - as it accomplishes the purpose of sale very well. Yet if this were to be demanded in a contract of lease (*ijarah*) on the assumption that this is just another type of sale, it would nullify the deal - as only one of the two sides of the contract is usually present in *ijarah*, not both.⁴³

An instance of excessive and exaggerated use of the means can be seen in the IBF practices, for instance, of *murabahah* (cost plus profit sale) and *bay' bi-thaman aajil* (deferred payment sale), which are primarily trading tools, or *wasal*, yet both are so frequently being used as means, not of trading, but of financialisation reduced into paper transactions and exchange of documents, and procurement of *riba*-oriented revenues. This is tantamount to excessive, even distorted, uses of means for procurement of questionable purposes. The main part of the narrative of dissatisfaction we have depicted regarding the IBF practices is due, in our view, to careless and distorted uses of the *wasal* and *maqasid*. We have also seen excessive reliance in the IBF practices on *bay'al-inah*, which is widely seen as a disguise to *riba*. In Malaysia, a corrective measure was taken by Bank Negara Malaysia, which issued orders in 2014 that *bay'al-inah* should be substituted by *tawarruq*. Unlike *bay'al-inah* which is concluded between two parties, *tawarruq* involves a third party intervention. Since then, *tawarruq* has become even more pervasive than *murabahah* for the same purpose: financialisation and disguised *riba*. The end-result is about the same, and so is the public criticism of the IBF practices.⁴⁴

When there are numerous means for the realisation of one and the same purpose, the one that is most efficient and direct must be selected. Should there be several equally good means available to realise a particular *maqсад*, then more than one means may be selected. The Shari'ah thus provides certain guidelines with regard to the selection of means, this being an area where flexibility and choice exists for a competent person, such as a scholar or judge, to make appropriate choices in light of the attendant circumstances.⁴⁵ No text has given a definitive list of the means and purposes, which is why we proceed to provide a few additional illustrations that help to develop a certain insight into the subject matter.

An instance of *ijtihad* in the selection both of the means and purpose was the *ijtihad* of caliph 'Umar al-Khattab in his treatment of the spoils of war. The issue was whether the fertile lands of Iraq that the Muslim fighters had conquered should be distributed among them. For the Qur'an had entitled the warriors to it (Cf., al-Anfal, 8:41). Yet the caliph did not distribute the said land in due regard to another Qur'anic ruling that wealth 'many not be concentrated among the wealthy' (al-Hashr, 59:7). 'Umar interpreted the two verses so as to say that the former (on war booty) referred to movable assets, not to land. He reasoned that distributing that land would turn the Muslim warriors into settled land-owners, which was not an appropriate option at that time. He consequently let the land remain with their owners, but they had to pay the *kharaj* tax.⁴⁶

The caliph thus used *ijtihad* in the selection of both the purpose and its means. It would be possible to distribute the war booty according to the first verse in surah al-Anfal on the assumption that this was how wealth was distributed to

prevent its concentration, but his *ijtihad* followed a different path, and no one has opposed him on this. The initial means would have been distribution of the war spoils but the caliph used taxation as an alternative means of preventing undue concentration of wealth among the wealthy.

Another example was the moratorium on the prescribed punishment of theft that caliph 'Umar al-Khattab imposed during the year of drought in Madinah. This also entailed a temporary suspension of a Qur'an verse for a broader Qur'anic purpose, namely justice. For imposing the said punishment seemed unjust during the famine. The means (*wasilah*) used here was suspension of punishment – which involved, once again, a measure of reflection and *ijtihad*. The initial purpose was justice and the means toward it was implementation of the prescribed punishment, but the caliph used suspension of that same punishment instead as the means to attain justice.

In yet another example, 'Umar al-Khattab made a decision to impose *zakah* on horses, despite the Prophet's clear instruction that exempted horses from *zakah*, as horses were used in *jihad*. However due to change of time and the fact that horses had become valuable assets for their wealthy owners, they were required to support the poor through the payment of *zakah*.⁴⁷

Next we look at instances of contemporary *ijtihad* that either proceed on the basis of *maqasid* or were strongly influenced by it. These illustrations may also help to provide insight into our discussion over the independence or otherwise of *maqasid* and how they relate to, or interact with, their means. But first, a word about *ijtihad maqasidi*.

Ijtihad Maqasidi

Ijtihad maqasidi is a relatively new phrase that has found expression in the works of twentieth century scholars, including Raysuni, 'Atiyah and the Shia scholar Mahdi Shamsuddin, who recommend a certain expansion of the *usuli ijtihad* to embrace the wider idea of *ijtihad maqasidi* also known as *ijtihad maslahi*. In this effort, the scholar/*mujtahid* develops new rulings based on his understanding of *maslahah* and *maqasid*, provided that he/she is endowed with a comprehensive knowledge of Shari'ah, its priorities, methods of conflict resolution and so forth. When *ijtihad maqasidi* is recognised as a valid form of *ijtihad*, it will, to a large extent, subsume and overshadow the argument for the independence or otherwise of the *maqasid* as a proof of Shari'ah separately from *usul al-fiqh*.

With reference, for instance, to the protection of intellect (*hifz al-'aql*), which is an essential Shari'ah purpose, one may include, the introduction of modern sciences into the educational programmes of institutions of learning, as well as the use of new methods of enquiry that promote the faculty of intellect. This

would mean actualisation of *hifz al-‘aql* in a novel way rather than sticking to the hallowed example of prohibition of wine-drinking given as a means of protection of intellect. It may also mean that the religious madrasahs would be more open, as many have already been so, to the reform and modernisation of their teaching programmes.⁴⁸

The leading Lebanese scholar, Mahdi Shamsuddin has also stressed in this connection the importance of inference (*istinbat*). Thus, he wrote that the Qur’an and Sunnah provide us with important sources of *istinbat*, but the modalities of inference have been exceedingly restricted by the *usuli* stipulations, which need to be revised and made more receptive to the influence of new developments in education and science. A wider understanding of *istinbat* is therefore recommended. Two areas of interest highlighted in this connection are the legal maxims of *fiqh*, which can be a rich resource for *maqasid*-based *ijtihad*.⁴⁹ The other and even more important is the general principles of the Qur’an, such as justice, being good to other, human dignity, and equality etc., which have been sidelined, on the whole, in the *maqasid* discourse through the *usuli* restrictions on rules of interpretation, or through stipulations attached to the application of *istihsan*, *istislah*, and *qiyas*.⁵⁰

With reference to *qiyas*, Raysuni, Hasan al-Turabi (d.2016) and Shamsuddin have looked into the prospects of how a more flexible reading of *qiyas* can be attempted to connect *qiyas* with the *maqasid*. The prohibition of liquor drinking in the Qur’an (al-Ma’idah, 5:90), for instance, has been rather narrowly constructed in traditional *usul al-fiqh* manuals. The respective writers took a fresh look at *qiyas* through a combined reading of the *usul al-fiqh* and *maqasid* so as to extend the rationale of the text to new subjects and areas. One of the *maqasid al-shari’ah*, namely the protection of intellect is thus used to prohibit all substances that compromise the intellectual faculty of a person even if the substance in question is not an intoxicant: Irrational ceremonies and superstitious practices in the name of ancestral legacy, and use of amulets for curing illnesses etc., are also to be proscribed. Moving further, one may even refer to broader textual dispensations on the elimination of harm and prejudice (*darar*) to arrive at the same conclusion, without necessarily stretching the meaning of the particular text on drinking.

Maqasid-based Ijtihad: Case Studies

Instances of *maqasid*-based *ijtihad* that revise certain *fiqhi* positions in the light of new realities are found in some of al-Qaradawi responses to particular questions, which may be summarised as follows.⁵¹

Christmas greeting

1. A PhD student from Germany wrote to Qaradawi informing him that he is a practising Muslim alongside many others. Was it permissible for them to send Christmas greeting cards to their non-Muslim friends and neighbours and also exchange gifts with them: “We receive gifts from them and it is discourteous if we do not respond in a similar fashion.”

In his response Qaradawi began with quoting the Qur'an where Muslims are permitted to act justly and be good to those who have not been aggressive toward them, but which also prohibited them from doing so if the non-Muslims had been aggressive toward Muslims (Cf., al-Mumtahanah, 60:8-9). Qaradawi added that the prohibition in this verse contemplated the polytheists of Makkah who committed acts of aggression toward the Prophet and his Companions. The verse so referred to advises the believers to be good (*tabarru*) to all non-aggressors, which means something better than a measure-for-measure response. Al-Qaradawi also cited the hadith in which Asma' the daughter of Abu Bakr came to the Prophet and asked him about the fact that her mother, who was an associator (*mushrikah*) at the time, keeps on showing her affection – should she also reciprocate in the like manner– to which the Prophet responded that she should. The Qur'an also refers to non-Muslims “and if they greet you then you greet them with a greeting more courteous or equal.” (al-Nisa', 4:86). Al-Qaradawi discussed Ibn Taymiyyah's restrictive views on this in some detail but then commented: “Had Ibn Taymiyyah lived in our time” and saw how the world has shrunk and Muslims are in constant interaction with non-Muslims, he might have revised some of his views. Al-Qaradawi also relied on the point that many Christians themselves celebrate Christmas as a social occasion rather than a particularly religious one.

What we have seen here is a recourse directly to the Qur'an, especially to the *maqsad* of fairness and good relations with peaceful non-Muslims. The means (*wasilah*) at issue was exchange of Christmas cards and gifts. Qaradawi offered a fresh interpretation that delivered the desired response and purpose.

Inheritance

2. In another question, a Muslim convert asked Al-Qaradawi whether a Muslim may inherit from a non-Muslim, adding that he was a British Christian and embraced Islam ten years earlier. His mother died and left a little inheritance which he refused to take based on the ruling that Muslims and non-Muslims may not inherit one another. Now his father also died and left a big estate behind of which he was the sole heir. British law entitled him to all of it. Should

he refuse it and leave it to non-Muslims while he was in need of it himself and could spend it on his Muslim family and other Islamic welfare objectives?

Al-Qaradawi responded that the majority position on this was based on the hadith according to which Muslims and non-Muslims do not inherit from one another. This has also been the practice of Companions and upheld by the leading schools of Islamic law. Some of the leading Companions, including ‘Umar al-Khattab, Mu’adh b. Jabal and Mu’awiyah Abu Sufian entitled the Muslims, however, to inherit from non-Muslims but not vice versa. Al-Qaradawi wrote that he also preferred this latter position even if the majority have not supported it, just as he also preferred the Hanafi interpretation of the hadith whereby ‘*kafir*’ in the hadith at issue is understood to mean a *harbi* at war with Muslims, but not all non-Muslims. He further added that the criterion and purpose of inheritance was material assistance (*al-nasrah*) and not unity in faith. This is why a *dhimmi* does not inherit a *harbi* even if they are of the same religion. To entitle a Muslim to inherit from his non-Muslim relative will also help prospective converts not to turn away from Islam for reasons only of losing their inheritance rights.⁵²

In this ruling, assistance is the purpose; the means (*wasilah*) is inheritance of a Muslim from a non-Muslim relative, and the *hukm* (ruling) so issued actualises that purpose.

Organ donation

3. Is it permissible to graft a part of the human body into that of another who is in dire need of it with the donor’s consent?

Qaradawi’s response: There are two views on this, one prohibitive and the other permissive. The former maintains that the norm of Shari’ah is that a Muslim does not have the right to destroy or mutilate a part of his own body (cf., al-Baqarah, 2:195), and also the renowned hadith: “all that belongs to a Muslim is prohibited to another Muslim, his blood, his property and his honour.” This is unlike personal property whose owner is entitled to give, sell, or donate as he wishes. The permissive view maintains that the criterion or purpose here is the greater benefit that may accrue the proposed donation especially when the harm is minor or negligible to the donor but which may well save the recipient’s life. Modern medicine has also changed the conditions of earlier times whereby grafting or mutilation of a body part could be fatal to the donor, which is no longer the case. Hence the prohibition collapses when the fear of fatality is no longer present.⁵³

Al-Qaradawi concludes: “we concur with the permissive position provided that the surgical operation is carried by qualified and skilled physicians as there is greater benefit and saving of human life therein.”⁵⁴

In this *maqasid*-based *ijtihad*, the purpose is saving life, and transfer of a body part through surgical mutilation is the means. The affirmative ruling or *fatwa* so issued actualises the purpose in question.

Cloning

4. Questions have arisen with regard to cloning and other modes of genetic engineering applications. In response, we may say that if our study of the nature of cloning leads us to the conclusion, as it has in fact, that human cloning tends to fundamentally alter human nature and the God-ordained design of the human constitution, then it will broadly be considered a violation and prohibited. This may briefly be explained as follows: Whereas the normal child has twenty-three chromosomes from the mother and twenty-three from the father, a cloned child has twenty-three chromosomes from just one person. The Qur'an on numerous occasions refers to the natural way of human creation from a male and a female, and entitles the child to both mother and father. Human cloning violates these Qur'anic postulates. Another aspect of concern over cloning and other human genetic engineering applications, or eugenics, would be that science could become an instrument of discrimination whereby those who have access to means can eventually select their genealogies.

The two leading *maqasid* that are relevant here are protection of life, (*hifz al-nafs*) and protection of lineage (*hifz al-nasab*), and the means (*wasilah*) in the picture is human cloning. Both must be lawful and bring benefit. The means here interferes with the integrity of both these purposes and fails to actualise them in a shariah compliant way.⁵⁵

5. The Shari'ah response may be totally different to other aspects of scientific developments. For instance, if new methods of fact finding, such as the DNA analysis, can resolve confusion over paternity, or identification of the war dead and those who die in a plane crash, or in the depth of open seas - this will serve in a better way the Shari'ah objective of the preservation of lineage (*hifz al-nasab*), and observance of the ties kinship (*sillat al-rahim*) in the family, who may need to know the facts of death of their deceased relatives.

In this illustration, the purpose is clearly stated to be the protection or preservation of lineage, and the means (*wasilah*) here is the use of DNA analysis, which is also applied in a lawful way, and the purpose is duly actualised through the affirmative ruling we have arrived at.

6. Finally, one may pass a permissive fatwa or ruling in regard to another technological application that concerns the *maqasid*. For instance, if computerised timing and location indicators can show, as they do indeed, the direction of Qiblah and determine precise time and location in unknown places and in outer space for prayer and fasting, this will evidently help to promote and protect religion (*hifz al-din*), which is one of the *daruriyyat*, and would demonstrate an instance of harmony between shariah and science. A Shari'ah purpose has been served here through the use of computer, which is the means (*wasilah*) in this example, and its application is also clear of impermissible elements. The person who prays in outer space, or one who observes the fasting of Ramadan in this way would have actualised the *maqasid* in question. The affirmative ruling here serves to actualise the said *maqasid*.

Conclusion and Recommendations

The foregoing illustrations serve to show that the argument for the recognition of *maqasid* as a separate or independent proof of Shari'ah is not entirely devoid of substance. The focus of independence in this case is from the *usul al-fiqh*, which has traditionally dominated the *maqasid* and subsumed it under its various other proofs (*adillah*), such as juristic preference (*istihsan*), general custom ('*urf*), consideration of public interest (*istislah*) and even analogy (*qiyas*). Each of these are separate formulas for *ijtihad*. Then there should be no issue if one adds the *maqasid* also as separate proof or heading to the list without, however, suggesting that the *maqasid* should replace the *usul al-fiqh*.

Islamic banking and finance is clearly a show-case of the contemporary discourse on the actualisation of *maqasid*, due partly to its extensive market presence and the public's engagement with its operations. It is also due to global financial crises that IBF became the centre of attention as a possible alternative. That said, the *maqasid* discourse is by no means confined, as the examples we have given clearly show, to the IBF or to *mu'amalat*.

Public opinion has clearly been provoked to expect that the IBF regulatory authorities to bring in important reforms to integrate *maqasid* into the IBF operations. However, there has also been scepticism that Islamic banks are unlikely to be the prime movers of the expected reforms, dominated as they are by the capitalist model. It has even been said that banks are not an ideal institutional model for operationalisation of profit and loss sharing, equity based and *riba*-averse principles of the Islamic economy and finance.

This weaker presence of *maqasid* in contemporary IBF practices can be shown perhaps by the Shariah Governance Framework (SGF) that Bank Negara

Malaysia introduced in June 2011 and has energetically pursued it ever since. BNM has been active to make shariah the governing principle of IBF in Malaysia more comprehensively than before. This was a significant reformist step under the circumstances. Yet it is also clear that the *maqasid* discourse has been conspicuously absent in the spate of SGF related publications on perimeters and operational modalities of the various *fiqh* contracts - and then also in the Islamic Financial Services Act in 2013 that followed suit. Instead, the focus in all of this has basically been on the regulatory and procedural aspects of IBF without assigning any visible role to the *maqasid*. Six years down the line, public demand for the implementation of *maqasid* in the IBF sector has not subsided; one might even say it has become more pronounced because only a *maqasid*-anchored IBF is likely to curb the ubiquitous dominance of the capitalist model.

Transition to a *maqasid*-anchored IBF, if and when it becomes a reality, would require careful preparation. It would also require, proactive and innovative leadership, and a supportive institutional attitude. It is also likely to be a journey without a clear end as it can take progressive stages of refinement. In such an eventuality, the system would still be operating the existing *fiqh* contracts, simply because the *maqasid*, as a discipline, does not offer a substantive *fiqh* of its own. The changes will most likely be in the *maqasid*-anchored regulatory regimes and how the existing *fiqh* contracts are practiced in the IBF institutions.

If there is a transition to a *maqasid*-anchored IBF in Malaysia, one would expect that it would focus, in its initial stages at least, on the primary and general (*asliyyah*, 'aamah) purposes of the *fiqh* contracts, or at least those that are most commonly criticised for their neglect of the *maqasid*. One would presumably need to know and be able to identify what exactly are the primary and general purposes, say of *murabahah* (cost plus profit sale), *bay' bithaman aqil* (deferred payment sale) etc. For only then can one meaningfully attempt to address and rectify their respective shortfall on the *maqasid*. This would also entail fresh research to identify the primary objectives of the commonly-practiced *fiqh* contracts.

Moving away from the IBF, *maqasid al-shariah* also holds the promise of offering a counter-narrative in the application of Shari'ah law to minimise the erosive effects of the prevailing materialist culture, its capitalist underpinnings, and globalisation (largely of western values) that have also aroused public criticism and demand among the Muslim masses for authenticity. This demand was spearheaded by the Islamic revivalist discourse in the latter part of twentieth century that called for changes to bring law and government in post-colonial Muslim countries closer to their Islamic heritage. Ironically, flagrant violations of the higher purposes of Shari'ah on the protection of life have been committed by the very protagonists of Islamic revivalism, who became increasingly radicalised and violent.

Based on the foregoing, we now propose the following by way of actionable policy recommendations:

- A purpose-oriented approach and utilisation of the resources of *maqasid* are important simply because issues keep arising with the rapid advancement of science and civilisation. With regard to contemporary human rights, for instance, many questions have arisen that require fresh responses, and they relate closely to the *maqasid*.
- Twentieth century Islamic scholarship has enhanced the hitherto underdeveloped methodology of *maqasid*. It is justified to say therefore, that a ruling of *ijtihad* can be founded on *maqasid* by a duly qualified scholar who is knowledgeable of the jurisprudence of *maqasid*, *fiqh* and *usul al-fiqh*.
- *Maqasid al-shari'ah* arises from the Shari'ah and does not have a separate existence. Shari'ah is a unified whole but has many separate yet interrelated branches and disciplines. The *maqasid* may be recognised as a separate proof of Shari'ah, which recognition should not in any way derogate or negatively affect the integrity of Shari'ah.
- *Ijtihad maqasidi* should be recognised as a valid form of *ijtihad*. For it is in many ways the end result of the scholarly efforts for a revised methodology of the *maqasid*. Many of the instances of *ijtihad* we have reviewed above are in fact of *ijtihad maqasidi*.
- The proponents of *maqasid* who argued for a more open approach to their identification also sought to find an easier access to the primary sources of Shari'ah away, to some extent, from the technicalities of *usul al-fiqh*. Easier access to these sources through revised methods of interpretation and inference merit recognition and support.
- *Usul al-fiqh* and *maqasid al-shari'ah* should be seen as complementary to one another. Such complementarity should also acknowledge and allow an expanded role and scope for the *maqasid* in the formulation of new rules.
- A distinction should be drawn between practical purposes (*maqasid 'amaliah*) and juridical purposes (*maqasid al-shar'iah*). This is a near parallel distinction, perhaps, to an existing binary classification of purposes into those of the human purposes (*maqasid al-mukallaf*) and those of the Lawgiver (*maqasid al-shari'*). In temporal affairs of concern to the individual and society, such as government policy on economic affairs and international relations etc., rationality and *fitrah* can be

accepted as identifiers and determinants of means and purposes, provided they do not in any way violate the scriptural sources of Shari'ah.

- Notwithstanding the complementarity of the various parts of Shari'ah, space should be created for an expanded version of *maqasid* beyond, for instance, the five headings of *daruriyyat*. It is also proposed that new additions on key significance to *maqasid* such as protection of the natural environment and basic human rights, should be recognised individually on its own merit, and not necessarily subsumed under an expanded reading of one or the other heading of *daruriyyat*.
- Purposes and means are in changeable relations to one another such that a means can turn into a purpose and vice versa depending on their role and the context in which they operate. Care should therefore be taken to ensure that one is not mistaken for the other, and that the way purposes and means relate to one another is clear of exaggeration, distortion and neglect.
- Notwithstanding the proposed complementarity of *usul al-fiqh* and *maqasid*, it is proposed, nevertheless, that the scope of interpretation and inference (*istinbat*) should not be subjected to the restrictive requirement of traditional *usul al-fiqh*, nor should the *usuli* concept of effective cause ('*illah*) limit the more dynamic outlook of the *maqasid*.
- The use of questionable means for the procurement of *maqasid* have become frequent and often misleading. Due care is therefore called for to avoid distortion in the pursuit and enforcement of alleged but unproven *maqasid* through questionable means.
- Initial reformist steps in IBF may well consist of minimising instances of replication of the conventional products and practices. Thus it is proposed that the IBF regulatory authorities and decision-makers make necessary preparation, planning and implementation time lines for the purpose.
- Any transition to a *maqasid*-anchored IBF should have clearly defined targets as the *maqasid* are internally diverse and may need to be separately implemented for each of its various divisions.
- Every country and jurisdiction should find its own bearings with the *maqasid al-shari'ah* and avoid generalisation. The macro and micro aspects of *maqasid*-based decision making should be adequately informed by, and coordinated with, one another.

Notes

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1. Cf., Nur al-Din Mukhtar al-Khadimi, *Fusul fi'l-Ijtihad wa'l-Maqasid* (Cairo: Dar al-Salam li'l-Nashr wa'l-Tawzi', 2010/1431), 176.
 2. Ibid., 177.
 3. Typical examples of such tricks include the double sale of *'inah* (to buy e.g at \$80 now and sell back at \$100 with the price payable in one year's time) which effectively amounts to charging the prohibited interest (*riba*). Exaggeration occurs when the normal order of priorities is ignored. For instance, a Muslim woman who observes the *hijab* is permitted in the meantime to expose herself during a medical examination to a stranger, or non-muhrim, physician. If she insists, on the other hand, not to do so and runs the risk of death, that would be an exaggeration that consists of confusing a *tahsiniyat* rule of *fiqh* by raising it to the level of *daruriyyat*.
 4. Muhammad al-Tahir Ibn 'Ashur, *Maqāsid al-Sharī'at al-Islāmiyyah*, ed. Muhammad al-Tahir al-Messawi (Amman: al-Basa'ir li-'l-Intaj al-'Ilmi, 1998), 171.
 5. Yusuf al-Qaradawi, *Dirasah fi-Fiqh Maqasid al-Shariah: Bayn al-Maqasid al-Kullīyyah wa'l-Nusus al-Juz'īyyah* (Cairo: Dar al-Shorouq, 2012), 20–1.
 6. 'Abd Allah bin Mahfuz bin Bayyah, *Mashahid min al-Maqasid* (Riyadh: Dar Wujuh, 2010/1431), 165.
 7. Muḥammad al-Zuhaylī, *Maqāsid al-Sharī'ah: Asās li-Huqūq al-Insān* (Doha: Ministry of Awqāf and Islamic Affairs of Qatar, 2003), 70.
 8. Al-Khadimi, *Fusul*, 191–2. See also Muhammad al-Shatiwi, 'Manhajīyyatu maqasid al-shariah bayn as'ilat al-madi wa as'ilat al-waqi', in ed. Mohamed Salim El-Awa, *Taf'il Maqasid al-Shariah fi Majal al-Siyasi, Maju'ah Buhuth* (London: Mu'ssasah al-Furqan li'l-Turath al-Islami, 2014), 79–81.
 9. Cf., al-Khadimi, *Fusul*, 190. See also 'Abd Allah al-Qasimi, *Madkhal 'Aam li-Dirasat al-Maqasid* (Cairo: Dar al-Kalimah li-Nashr wa'l-Tawzi', 2015/1436), 16–7.
 10. Al-Khadimi, *Fusul*, 56–7; Ahmad al-Raysuni, *Muhadarat fi Maqasid al-Shari'ah* (Cairo: Dar al-Kalimah li'l-Nashr wa'l-Tawzi', 2014/1435), 178.
 11. Cf., Jamal al-Din 'Atiyah, *Nahwa Taf'il Maqasid al-Shari'ah* (Damascus: Dar al-Fikr, 2001/1422), 187.
 12. Ahmad al-Raysuni, *al-Fikr al-Maqasidi* (Morocco: Manshurat al-Zaman- Kitab

- al-Jayb, 1999), 99 & 115.
13. Cf., 'Atiyah, *Nahwa Taf'il Maqasid*, 230.
 14. 'Atiyah, *Nahwa Taf'il Maqasid*, 229.
 15. Cf., Isma'il al-Hasani, *Nazariyyat al-Maqasid 'ind al- Imam Ibn 'Ashur* (Herndon, VA: International Institute of Islamic Thought, 1995/1416), 407.
 16. Al-Raysuni, *Mahadarat*, 123-4.
 17. Al-Qarafi observed that "the foundations of shariah are of two types, one is the *usul al-fiqh* and the other the legal maxims of *fiqh*, which are numerous and enormously helpful in ascertaining the wisdom and underlying meanings (*asrar al-shar' wa hikamuh*) of shariah." (*al-Furuq*, vol. 1-2, p. 3). As an explanatory note, it may be said that at that time, legal maxims were an integral part of the *maqasid* but have since been recognised to belong mainly to *fiqh*. Ibn Taymiyyah observed that in addition to the rulings (*ahkam*) of shariah that are evidently important, the wisdom and meanings (*al-hikam wa'l-ma'ani*) on which they are founded is the most noble of all shariah sciences (*min ashraf al-'ulum*). Ibn Qayyim pointed at the textual injunctions of shariah are inclusive of comprehensive purposes and one who masters them would not need to rely on speculative evidences, opinion and analogy (Ibn Taymiyyah and Ibn Qayyim as quoted in Jamal al-Din Atiyah, *Nahwa Taf'il Maqasid al-Shariah*, 235).
 18. Al-Shatiwi, *Manhajyyatu Maqasid*, 87.
 19. Ahmad al-Raysuni, *Muhadarat fi Maqasid*, 272.
 20. See for details on analogy and the rules of interpretation, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003).
 21. The Arabic version is: '*ilal al-ahkam tadullu 'ala qasd al-shari' fiha fahaythuma wajadat ittaba'at*'.
 22. See for detail Mohammad Hashim Kamali, *Maqasid, Ijtihad and Civilisational Renewal*, Occasional Paper Series 20 (London and Kuala Lumpur: IAIS Malaysia and IIIT London), 32-3,
 23. By methodology is meant the definition of *maqasid*, its conditions of validity, methods of identification, classifications, and how it relates to means and accomplishes (*wasa'il*) and so forth.
 24. Cf., Mazin Muwaffaq Hashim, *Maqasid al-Shariah: Madkhal 'Umrani* (Herndon VA, International Institute of Islamic Thought, 2014/1435), 91.
 25. Cf., Hasan Jabir, *al-Maqasid al-Kulliyyah fi daw' Qira'ah al-Manzumiyyah li'l-Qur'an al-Karim* (Beirut: Dar al-Hiwar, 2011), 107; Hashim, *Maqasid: Madkhal 'Umrani*, 108-109.
 26. Cf., al-Raysuni, *Muhadarat*, 291. See also Islamic Education Trust Nigeria, *Shari'ah Intelligence* (Kuala Lumpur: Interactive Dawah Training, 2015/1436), 207.
 27. Cf., *Shari'ah Intelligence*, 189.
 28. This is the view of al-Juwaynī, al-Sarakhsī, al-Sulamī and Ibn Taymiyyah. It is also noted that since Imam Mālik accepted *maṣlaḥah mursalah* as a basis of law and judgment, he can be assumed to have accepted '*aql* as a proof also of *maqāṣid*. See for details Zahir al-Dīn bin 'Abd al-Rahmān, *Maqāṣid al-Shari'ah fi-Ahkam al-Buyu'* (Kuala Lumpur: International Islamic University Malaysia Press, 2009), 10.

29. Abū Hāmid al-Ghazālī, *Ihyā' 'ulūm al-dīn* (Cairo: al-Maktabat al-Tijāriyyat al-Kubrā, n.d.), 4:115.
30. 'Izz al-Dīn 'Abd al-Salām, *Qawā'id al-Ahkām fī Masāliḥ al-Anām*, ed. 'Abd al-Laṭīf 'Abd al-Raḥmān (Beirut: Dār al-Kutub al-'Ilmiyyah, 1999), 1:8.
31. Cf., 'Abd al-Raḥmān, *Maqāṣid al-Shari'ah*, 104.
32. Imām al-Ḥaramayn al-Juwaynī, *al-Burhān fī Uṣūl al-fiqh* (Doha: Dār al-Qalam, 1978), 2:114.
33. Ibid., 2:117.
34. We understand *fitrah* as innate human nature, although *fitrah* can refer to innate nature generally, not necessarily confined to human nature as such. Compare (Q al-Rum, 30:30) as discussed in the next page below.
35. Abū 'Ali Ibn Sīnā, *Kitab al-Najāt fī 'l-Ḥikmah al-Manṭiqiyyah wa'l-Ṭabī'iyyah wa'l-Ilāhiyyah*, (Beirut: Dār al-Āfāq al-Jadīdah, 1985), 99.
36. Cf., Mohammad Hashim Kamali, 'Reading the Signs: A Qur'anic Perspective on Thinking,' *Islam and Science* 4, 2 (2006): 141-65. See also Elma Berisha, 'The Qur'anic Semio-Ethics of Nature,' *Islam and Civilisational Renewal* 8, No.1 (2017): 58.
37. Ibn 'Āshūr, *Maqāṣid*, 58.
38. Ibid., 266.
39. 'Abd Allah Bin Bayyah, *Maqāṣid al-Shari'ah fī'l-Mu'āmalāt*, Lecture series no. 6, *al-Maqasid Research Centre in the Philosophy of Islamic Law*, London, 2008, 52 and 54. See also al-Shaikh-Ali & Khan, *Ibn Ashur Treatise*, 18.
40. Cf., Atiyah, *Towards Realisation*, 109. See also for a discussion of *Maqasid* and *Wasa'il*, Mohammad Hashim Kamali, "Goals and Purposes of Islamic Law," in ed., Imam Feisal Abdul Rauf, *Defining Islamic Statehood* (New York and Basingstoke UK: Palgrave Macmillan, 2015), 200-34 & 228-30.
41. Sayf al-Din 'Abd al-Fattah, *Nahw Taf'il al-Numuzij al-Maqāṣidi fī'l-Majal al-Siyasi wa'l-Ijtima'i*, in al-Maqāṣid Research Centre, *Maqāṣid al-Shari'ah wa Qadaya al-'Asr*, 187-8.
42. Cf., Riyad Mansur al-Khalifi, 'al-Maqāṣid al-shar'iyyah wa atharuha fī'l-fiqh al-mu'amalt al-maliyyah,' *Majallah Jami'ah al-Malik 'Abdulaziz al-Iqtisad al-Islami* 17, 1 (2004/1425): 14.
43. Al-Shatibi, *Muwāfaqāt*, 13-14; see also al-Khalifi in the previous note at 16.
44. See for a critical assessment of the ubiquitous tawarruq practice, Mohammad Mahbubi Ali, 'Toward Islamic Banking without Tawarruq,' *Islam and Civilisational Renewal* 8, No.2 (2017): 260.
45. See for details, Ibn 'Āshūr, *Maqāṣid al-Shari'ah*, 419-20.
46. See for detail Yusuf al-Qaradawi, *Dirasah fī Fiqh Maqasid al-Shari'ah: Bayn al-Maqasid al-Kulliyyah wa'l-Nusus al-Juz'iyyah* (Cairo: Dar al-Shuruq, 2012), 173.
47. Ibid., 177.
48. Al-Raysuni, *al-Fikr al-Maqasidi*, 96, also cited in 'Atiyah, *Nahwa Taf'il*, 191.
49. Legal maxims such as "Harm must be eliminated," "Necessity makes the unlawful lawful," "Necessity is to be measured according to its [true] proportions," and "credibility is attached to purposes and meanings, not to words and forms," can enrich the contemporary expositions of human rights from an Islamic perspective. Atiyah, *Nahwa Taf'il*, 190-1) has discussed Mahdi Shamuddin's views in some

detail. See also al-Khadimi, *Fusul fi'l-Ijtihad*, 55.

50. Cf., 'Atiyah, *Nahwa Taf'il Maqasid*, 189-91. See also al-Khadimi, *Fusul fi'l-Ijtihad*, 152.
51. Al-Qaradawi, *Dirasah fi Fiqh Maqasid*, 276-275.
52. Al-Qaradawi, *Dirasah fi Fiqh al Maqasid*, 280-1.
53. This also illustrates the maxim that "the *ahkam* of shariah are founded on their effective causes and collapse when the effective cause is no longer obtained." Fear of fatality is the effective cause in this case.
54. Ibid., 229-32.
55. See for details Mohammad Hashim Kamali, *Shariah Law: Questions and Answers* (Oxford: Oneworld Publications, 2017), 185-9.
56. Ibid.

ENVIRONMENTAL *FITRAH* IN THE LIGHT OF A SYSTEMIC APPROACH TO SHARI'AH AND SCIENCE

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Abstract: In the context of global warming and world climate change, Muslim nations across the globe are no exception in grappling with catastrophic and multifaceted environmental crises. In dealing with this phenomenon, Muslim scholars have been promoting a laudable principle of environmental preservation (*hifz al-bi'ah*) via the *maqasid al-shari'ah*, however not without unresolved ambiguities with regard to its actual focus and real implementation. This article provides an alternative conception of environmental preservation by drawing a connection to the well-established Shari'ah's objective of preserving *fitrah*. While the mainstream discourse of preserving *fitrah* primarily deals with human's innate dispositions, this article suggests its expansion to a wider scope of nature's innate properties, drawn upon from the resource of scientific discourse in systems thinking. Through a comparative analysis on Islamic sources and systems thinking literatures on nature, the article proposes that 'nature's ability to sustain life through systemic interconnections', constitutes the important aspect of *fitrah* that necessitates preservation, even enhancement. Finally, through the suggested conception of environmental *fitrah*, the article discusses some pressing issues of Genetically Modified (GM) foods, and climate change in order to delineate the feasibility of systems thinking approach that may lead to reasonable policy recommendations.

Keywords: *maqasid al-shari'ah*, *fitrah*, environmental protection, systems thinking, living earth.

Introduction

Muslim countries are currently suffering from serious environmental crises due to multifaceted factors. A large part of the crisis is due to the little attention to environmental care and protection in mainstream Islamic teachings. Modern Muslim societies have somehow departed from their traditional culture of environmental consciousness and concern. As far as environmental protection is concerned, it is unfortunate to note that modern Muslim nations across the globe are putting economic progress as the sole aim of their development programme, often at the expense of environmental sustainability. This is evident in the latest Pollution Index 2017: Muslim countries like Lebanon, Egypt, and Bangladesh score among the highest in the world in terms of pollution rate.¹ It shows that the

ideal aspect of Islamic teaching on environmental protection and its real practice in the Muslim countries are dauntingly at dissonance. Therefore, ascertaining prompt measures and their execution are of high priority in order to develop and nurture Muslim societies as a sustainably designed community whereby their social life, economy, infrastructures, and technology properly attune to nature's inherent ability to sustain life.

In response to this development, contemporary scholars have added a modern Shari'ah objective namely the preservation of environment in addition to the five main essentials (*daruriyyat al-khamsah*) of *maqasid al-shari'ah*, primarily to showcase Islam's environmental concern and commitment.² Nevertheless, until recently, this new concept has remained under-developed; its actual focus has yet to be thoroughly elaborated, particularly in facing complex and interconnected environmental crises to date.

This article draws attention to the concept of natural disposition, widely known as *fitrah* in Islamic intellectual tradition, to lay an intelligible foundation for the *maqasid* of environmental protection. It calls for an expansion to the scope and definition of the word *fitrah* which refers to human's innate abilities and inclinations in Islamic tradition; and to also include the environmental element and its embedded dispositions. This proposal finds support from classical as well as modern renditions of *fitrah*, particularly that of 'Allal al-Fasi and Ibn 'Ashur who suggested preserving *fitrah* as the central aim of Islam and its teachings as they linked the Shari'ah's objectives to human nature.

This article also draws attention to a synergistic interaction between science and religion that may postulate what actually constitutes the natural disposition of the environment, which is the focal point of the said objective. Therefore, by developing a focused conception of nature's intrinsic dispositions, it would enable related parties to translate them into specific action plans as well as problem solutions for complex environmental crises that are currently besetting the Muslim nations.

The Meanings of *Fitrah* in the Islamic Tradition: From Exclusive to Inclusive Concept

Linguistically '*fitrah*' originates from its root, '*fatara*', which means to originate something, therefore it is arguable that the word hints to acts exclusively attributable to Allah.³ It is noteworthy that there is a chapter in the Qur'an entitled '*al-Fatir*' (The Originator) which predominantly carries the theme of calling upon human being to duly observe natural creation surrounding them in the pursuit of recognising the Omnipotence and Wisdom of its Creator. Moreover, the only verse with the word '*fitrah*' in the Qur'an reads as follows:

And so, set thy face steadfastly towards the [one ever-true] faith, turning away from all that is false, in accordance with the natural disposition which God has instilled into man: [for,] not to allow any change to corrupt what God has thus created-this is the [purpose of the one] ever-true faith; but most people know it not.

The term *fitrah* in this verse, Asad argued, denotes man's innate capability to rightly discern between truth and false as well as to recognise God's existence and oneness.⁴ *Fitrah* is also used in the Qur'an and Sunnah to mean the religion of Islam and a substitute as such for the word 'religion'.⁵ Ibn Qutayba however, in commenting the *hadith*: 'every baby was born on the foundation of *fitrah*', contested the opinion, arguing that Islamic theological doctrine does not assert that all children are born Muslim, rather they are adorned with spiritual and inclination towards the Truth and goodness.⁶ In other words, an analysis of the main Islamic sources could signify that *fitrah* normally connotes the original disposition of human being and its intrinsic qualities.

On another note, Islamic intellectual heritage over the span of centuries has vastly contributed to different aspects of human innate psychological properties. Classical Muslim theologians and philosophers paid extensive attention to *fitrah* as an epistemic concept. There is a wide array of views among Muslim classical scholars with regard to human natural dispositions in the light of free will and responsibility. A cursory analysis of Islamic sources, as Qarni suggested, shows that there are at least three vantage points on this⁷; i) *fitrah* as a state of intrinsic goodness and evilness ii) *fitrah* as a state of neither goodness nor evilness iii) *fitrah* as human's state of innate goodness, mainly propounded by Ibn Taymiyyah.⁸

In the modern context, disputes have emerged among scholars on the concept of Islamic naturalism. It is in fact the impetus of Muslim reformists project that evinces an appeal toward modernity so as to defend the feasibility of Islamic law in the modern world.⁹ 'Allal al-Fasi, a Moroccan independence leader and religious scholar made a significant contribution to the modern conception of *fitrah*, as he represented a complex and open-ended initiative to draw connections between *fitrah*, revealed law and the role of politics. He propounded the idea that human beings have common innate qualities and Islam is the guiding path for this disposition. Therefore, he argued that the Shari'ah will not decree anything in conflict with man's innate nature.¹⁰ It is worth noting as well that, al-Fasi, as well as other modernist thinkers, have substantially departed from the classical theologians and philosophers regarding *fitrah*. He offered a more fluid and wide conception of *fitrah* than those of the philosophers, denoting human disposition as a necessity to obtain sound knowledge in order to present Islam as a religion that appeals to modern Muslim communities.¹¹

Furthermore, Ibn 'Ashur (d.1974), also subsumed *fitrah* into the larger edifice of *maqasid al-shari'ah*. Despite providing an all-encompassing meaning of *fitrah* i.e. the natural disposition and order of God's creations, Ibn 'Ashur's focus, like his predecessor al-Fasi, is more on human innate abilities and inclinations. Ibn 'Ashur equated *fitrah* with rational faculty or sound moral judgement, which is engraved in the human soul, that affirms moral laws. Thus, it signifies man's ability to exercise rationality in matters pertaining to their belief and moral systems. Like al-Fasi, he also maintained that safeguarding *fitrah*, maintaining acts resulting from it, as well as restoration of its original state are cardinal directives in Islamic teachings. Anything that leads to the preservation of *fitrah* would be an order of the Shari'ah while its violation necessitates prevention or even prohibition. To establish a close relation between *maqasid* and *fitrah*, Ibn 'Ashur argued that:

maqasid are built on the Islamic Shari'ah's greatest characteristic, namely *fitrah*.¹²

The grounding of *maqasid al-shari'ah* in human *fitrah* in the modernist discourse has opened another horizon in Islamic legal discourse whereby new findings on human psychology occupy its foremost attention.

Notwithstanding the classical and modern conceptual disputes over the meaning of *fitrah*, in the light of current environmental crises, it is an urgency now to expand the concept, encapsulating elements beyond mere human self, i.e. to encapsulate as well the intrinsic quality and order of the natural environment. The Qur'anic discourse on this subject matter hints on this wider concept of *fitrah*. In fact, there are contemporary Muslim scholars who have set forth a fertile ground for this expansion.

Kamali argues that the Qur'an conveys Islam as the primordial religion (*din al-fitrah*), not only to men and women, but also to the whole cosmos at large.¹³ There is also a chapter in the Qur'an, as mentioned earlier, with the title *al-Fatir*, a word that shares the same root with '*fitrah*', calling the believers to duly observe natural creation surrounding them. In this wider perspective, Badawi and 'Abd al-Haleem for instance, defined *fitrah* as the genesis of creation, the original unadulterated nature of things or in other words the unassailable natural disposition.¹⁴ As mentioned earlier, Ibn 'Ashur's conception of *fitrah*, in its wider sense, supports this in that it connotes the natural disposition and order of God's creations.¹⁵ It is interesting to note how al-Fasi, when he was describing the role of Shari'ah in maintaining the *fitrah*, he referred to it by using an ecological metaphor:

The law before all else is the correction and refinement of nature, just as gardening is the correction and refinement of trees.¹⁶

Taylor suggested that *fitrah* might refer to the essential nature of God's creation and in its widest sense refers to God's pattern i.e. the natural order by which He created the universe.¹⁷ In essence, by referring to these arguments, it could be argued that, '*fitrah*' may engulf a much wider scope of meaning that transcends human innate quality, encapsulating the essential characteristics of natural environment, which calls for further elaboration from the scientific field.

The Conception of *Fitrah* from the Outlook of Natural Science: A Proposal

The Western worldview sees nature through an anthropocentric and mechanistic outlook, devaluing nature merely as a physical resource for human being, which is devoid of any intrinsic value, purpose or meaning. Through this worldview, nature, as a passive and subservient entity in the universe, needs to serve humans at any cost for their benefits and well-being. In this context, Baconian and Newtonian ideas underpin the materialistic, atomistic and reductionist worldview. It was Bacon who promoted human domination of nature through exploitation and manipulation to unearth its truth and further human's end, while the latter laid the foundation for a mechanistic outlook of nature which is purely physical, operating with a set of predictable physical laws that is devoid of any purpose.¹⁸ This fundamental understanding of nature, aside from influencing the field of natural science, permeated other domains such as economics, social thought, as well as management sciences.¹⁹

Given its pervasive influence, the mechanistic outlook of nature has eventually triggered environmental crises on a global scale as the culmination of climate change, deforestation, desertification, hazardous waste and pollutions. These crises in turn threaten the very composition of life on earth. In other words, due to narrow assumptions about the essential characteristic of nature, the modern man sees nature as an exploit for the pursuit of their 'well-being' and 'progress', two concepts that eventually brought about industrial productions, consumerist culture, acquisition of mineral resources, as well as over reliance on technology.²⁰

Systems Thinking and the Conception of Nature: A Paradigm Shift

Systems thinking emerged in mid-twentieth century when suspicions arose with regard to the assumption of Newtonian physics and Darwinian evolution, the two pillars of modern science. It marked the paradigm shift in Western scientific thought as it transcends conventional science and unveils the underlying order and complexity of nature and social life.²¹ The emergence of systems thinking also marks the end of the 'Machine Age' and the onset of 'System Age' as the two

underpinning pillars of the former, namely reductionism and mechanism were replaced by the latter's principle of teleology. According to Ackoff, the end of the 'Machine Age' and the beginning of the 'System Age' could be dated back to the 1940s, when philosophers, mathematicians, and biologists worked together in the pursuit of defining a new intellectual framework during the post-war period.²² In other words, systems thinking denotes the paradigm shift in the scientific community as Senge had described it as follows:

The essence of the discipline of systems thinking lies in a shift of mind – seeing relationships rather than linear cause-effect chains, and seeing processes of change rather than snapshots.²³

System thinking has developed as a field of inquiry and practice in the 20th century from multiple origins such as biology, chemistry, anthropology, physics, psychology, mathematics, management, and computer science. Much of the works in systems thinking have brought together scientists from different disciplines to transfer methods from one to another and work across disciplinary boundaries.

The word “system” comes from the Greek *'sunistanai'* which means, “to cause and to stand together”. A system is a perceived whole in which all the parts interact with one another towards a common purpose.²⁴ Systems thinking is thus a methodology to perceive the connection between the components of a whole entity. It is an approach to problem solving which perceives ‘problems’ as part of a wider and dynamic system. It requires profound understanding on the relations, interactions, and behaviours of subsystems that designate the characteristics of a system. Concepts such as organic, holistic, and ecological signify the systems view of life and nature.

According to the systemic perspective, nature is not a gigantic lifeless machine. Instead, it is an indivisible and dynamic whole, with parts which interrelate, and which are conceivable as patterns of the cosmic process. In other words, systems thinking has a pivotal role in framing nature as a holistic system. This is crucial as the ‘conversation’ between man and nature necessitates special cognitive tools and language. As a framing device, systems thinking functions as a tool that enables the understanding of reality, especially in generating meaning and purpose of our engagement with the ‘reality’, thereby encouraging greater responsibility towards the environment.²⁵

A defining feature of framing nature through the systemic perspective is the recognition and appreciation of the multiple interrelationships and interdependencies of all elements in the world's structure. In the span of decades, systems thinkers initiated several attempts at framing the natural world in terms of a system. In 1970, Jay Forrester drafted a world model namely ‘World1’, based

on systems dynamics method to depict contemporary global problems. In his 1971 book, *World Dynamics*, he introduced a revised model namely 'World2'. The model has led to publication of a controversial report entitled *The Limit to Growth*, an important document that uses systems analysis to examine key variables like resources, population, industrial output, food supply and pollution, so as to forecast the future of industrialised modern societies. In 1992, the same team revised the report and refined Forrester's model into 'world 3/91' model, and the most current refinement of the model is the Donella Meadow's 'world 3/03' model in 2004.²⁶

Another popular expression of systems thinking as the framework for environmental responsibility and sustainability is that of Fritjof Capra. Capra's conceptualization of nature is based on living systems theory, which is more scientific than other systemic approaches given its roots in biology and chemistry. The two main characteristics attributable to living systems, according to Capra are self-regulation and emergent properties²⁷, the defining traits of all living organisms as well as the earth itself. In describing the earth as a living and self-regulating entity, Capra draws attention to the work of James Lovelock, an atmospheric chemist who was commissioned by the United States National Security Agency (NASA) to detect life on Mars in the 1960s.²⁸ During the task, Lovelock found that the detection of life on any planet is feasible through an analysis of the chemical composition of its atmosphere. He also found that earth's atmosphere exhibits a special state, as it contains gases such as oxygen and methane which normally react to each other but coexist proportionately, forming a mixture of gases far from chemical equilibrium. This, Lovelock argued, marks the presence of life on Earth. He also found that even though the solar temperature has increased by 25% since the advent of life on Earth, the Earth's surface temperature has remained stable at a level which is conducive for life, evincing self-regulatory ability of a living entity. In 1972, Lovelock introduced his living Earth theory by the name of 'Gaia hypothesis'. In 1974, with another scientist, Lynn Margulis, Lovelock refined his theory by formulating a feedback cycle, interlinking living creatures (plants, animals, microorganism) with the non-living elements (rock, ocean, atmosphere) to depict their common role in regulating Earth's climate, ocean salinity, as well as other planetary aspects.²⁹ Therefore, Gaia hypothesis, Capra argues, is a systemic way of seeing life and nature, indicating a substantial departure from conventional science.³⁰

The ideas of interconnected nature and even a living, self-regulating earth are not at all foreign to Islamic intellectual and scientific traditions. Ziauddin Sardar contended that the unity of nature is a recurrent theme in the Qur'an, so much so that the description of natural phenomena in the Qur'an invariably hints at an ordered, well-knit and predictable nature.³¹ Ismail al-Faruqi laid a religious

foundation for the living earth theory by arguing that, if the universe is really the unfolding fulfillment of natural laws, which are among the commandments of Allah, it should represent, in the Muslim eye, 'a living theatre' operating by God's decree.³² In the same vein, Katanegara drew attention to classical Islamic expositions of the world as a living entity.³³ Jalal al-Din al-Rumi for instance, clearly regarded the universe as alive, organic, and intelligent, with the ability to love and be loved.³⁴ The Brethren of Purity (*Ikhwan al-Safa*) in their well-known epistles (*Rasa'il*), regarded the universe as the great man (*al-insan al-kabir*), an entity possessing a single soul (*al-nafs al-kulliyah*) that permeates all its part, akin to the soul residing in human body.³⁵ It is interesting to note that, like Rumi and *Ikhwan al-Safa*, Capra when describing the systems view of life, concluded that instead of being a machine, nature as a whole, exhibits human nature i.e. unpredictability, sensitivity to its surrounding world, and responsiveness to small fluctuations.³⁶ The shared metaphor of nature as a human macrocosm among classical Muslim scholars and systems scientists reinstates the significance of applying the concept of *fitrah* to the innate properties of the environment, even if originally it merely implied man's intrinsic disposition.

Systems thinking sheds light on nature's innate disposition from the scientific standpoint, the one that we would like to propose here as 'the ability of nature to sustain life through its systemic interconnections'. This framework in turn can be used as guides for actions and policies towards solving environmental issues, and also towards the adoption of an environmental code of ethics.

Issues and Challenges in Preserving *Fitrah* in Contemporary Context: Beyond Pragmatism

The practical relevance of environmental *fitrah* proposed here can be seen in two case studies: (1) genetically modified food; and (2) climate change.

Genetically Modified Foods

Genetically modified organisms (GMOs) refer to plant breeding method via genetic engineering mechanism. GM method is unique, in the sense that the selective breeding (artificial selection) of the chosen male and female organisms of different traits will sexually reproduce and have offspring together in order to develop particular phenotypic traits (characteristics).³⁷ This artificial selection technique aims at genetic improvement. Charles Darwin celebrated this achievement as a springboard to introduce and support his theory of natural selection. Later on, selective breeding became a precursor to the modern concept of genetic modification. In the case of GMO for instance, scientists may infuse one or more added genes to an organism, move or even turn off any of its gene to achieve desired traits.

The original purpose of GMO production technology was to improve the output of agricultural products, due to the disproportionate increase of global food demand relative to its supply. Other purposes include the improvement of species resistance to pathogens or parasites; promoting better resilience to environmental challenges (such as high temperature); and forging growth to food conversion. These have been scientifically considered as positive measures to increase plant endurance and crop production.³⁸ Nonetheless, GM may also be abused for commercial gain through flesh character determination, reproduction control, organism behaviour modification, as well as fertility and viability control. These mechanisms do not merely modify the outward characteristics of organisms, but also alter their very nature and function. The activity does not only involve plant species, but also animals. In fact, the attempt to modify animal genes preceded that of crops although genetically modified (GM) crops were the first to receive global demand due to their commercial value. The most common GM crops currently available in the US market are corn, soybean, cotton, canola, alfalfa, sugar beets, papaya, squash, potato and apple.³⁹

Environmental groups, such as GreenPeace, have been campaigning against GMO products. According to GreenPeace, studies show that genetically engineered crops harm the environment and pose potential risks to human health. David Wolfe, an environmentalist and entrepreneur, claimed that GM foods are linked to numerous health problems, and when animals eat them, the GMOs can remain in their byproducts like eggs and milk. He added that even though GM foods are able to produce bigger animals, their monstrous size is actually hazardous to their well-being. Intensive breeding has transformed these animals into “super-breeds” in order to produce the most meat. However, the increase in size does not always signify better health for these animals. For instance, some GM cows have been developing breathing problems, chickens have been suffering from bone and joint deformities, and pigs are getting arthritis. Moreover, these animals are being treated inhumanely especially during their breeding process in the factory farms. Factory farming has also been receiving criticism from activists due to inhumane treatment of animals and unhygienic conditions of those industrial farms. GMO food is also hazardous to human health in the sense that new antibiotic and virus resistances may well be connected with the widespread GMO products in the market.⁴⁰

According to *Time Health*, the approval of GMOs for commercial use in the 90s has increased their production dramatically ever since. More than 90% of all soybean cotton and corn acreage in the US currently are genetically engineered crops. The land use of GMO crops is significantly increasing over the years, since 1996.⁴¹

Recent statistics reveal that food production and consumption produces considerable greenhouse gases.⁴² According to “Inventory of U.S. Greenhouse

Gas Emissions and Sinks: 1990-2015”, agriculture contributes 9 percent of 2015 greenhouse gas emissions.⁴³ Another report revealed a different figure by mentioning that agriculture and food production contributes up to 29 percent of global greenhouse gas emissions. Figure 1 shows that agricultural activities may cause greenhouse gases (GHG) emissions, one of the contributors to global warming which in turn triggers climate change. Conversely, climate change could also lead to the increase of temperature that causes drought or heavy rainfall that may destroy crops. This could lead to restriction of global acreage for cultivation. In general, Figure 1 shows the cycle of consequences from poor agricultural management and the impact of climate change towards global acreage for cultivation which then limits the global food production.

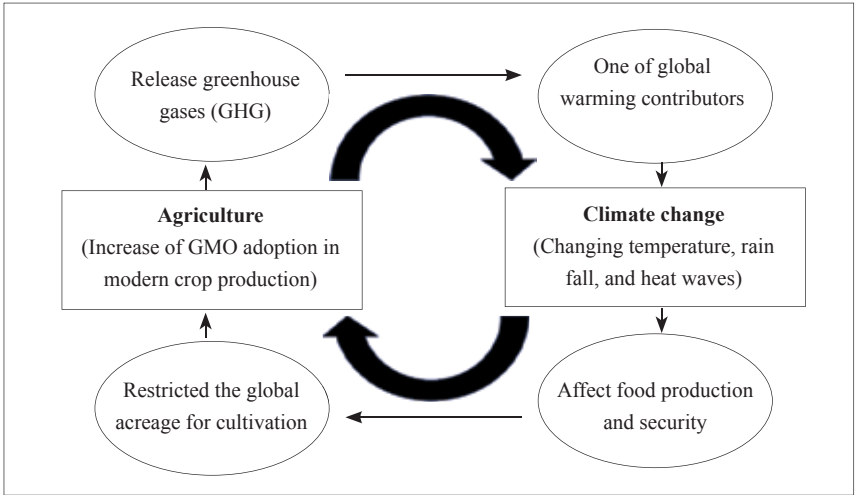


Figure 1: Environmentalist view of agriculture and climate change interrelated process.

Given the rapid development of GMO technology, the question then arises: have the fundamental problems of GMO foods been sufficiently addressed by contemporary *fatawa* (legal opinions)? In the Malay Archipelago (Malaysia, Brunei and Indonesia), Muslim scholars seemingly pay more attention to the genetic material (DNA) used in producing GM foods. Malaysia’s first fatwa on this matter, for instance, issued in July 1999 mentioned that, GM products must not contain swine gene; otherwise the foods/drinks are considered unlawful (*haram*) based on a clear ruling in the Qur’an (Baqarah 2:173):

He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah. But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him. Indeed, Allah is Forgiving and Merciful.

For the Islamic council, the use of swine DNA by any means of modification process will never comply with the transformation process of *istihalah* and remain forbidden (*haram*) in any condition. Moreover, since there are many other available options of *halal* food and drink for Muslims, GM products are yet to attain legality from the state of *darurah* (necessity). The decision is based on the legal maxim, “preventing harm takes precedence over securing benefit”. Other applicable maxims (*qawa'id*) are “all things are permissible unless proven to be unlawful” and “when the lawful and unlawful are mixed up, the unlawful prevails”. The latest *fatwa* of June 2011 stated: “It is not permissible to use genes from *halal* animal that is not properly slaughtered according to Shari'ah compliant method. The production of GMF that may bring harm to human health and unknown long-term risks on the environment is also prohibited”.⁴⁵ The *halal* standards for GMF in Malaysia, Brunei, and Indonesia are as follow:

Malaysia and Brunei Darussalam: “Foods and drinks containing products of genetically modified organisms (GMOs) or ingredients made by the use of genetic material of animals that are non-halal by Shariah law are not halal” (MS1500:2009, 3.5.1.6 and PBD24:2007, 3.1.6). The Brunei standard uses “*Hukum Syara*” in place of Malaysia standard’s “Shariah law”.

Indonesia: HAS23201 differs in wording, but contains similar message “For microbial materials from recombinant microbes then... the microbes should not use gene[s] derived from pigs or humans” (4.3e).

Thus far, the Islamic council in Malaysia emphasises two main concerns related to the production of GM foods; firstly, the prohibition of swine DNA material, and secondly, the slaughtering technique of *halal* animal from which their genes are used. While the status of halal food becomes the main concern of the Muslim scholars, more fundamental drawbacks of GM products do not really capture much of their attention. Due consideration on the broader ethical aspect of GMO production is crucial, especially its related by-products, potential side effects on human, and other arising issues. The proposed Islamic principle of preserving environmental *fitrah* i.e. the nature’s ability to sustain life, could perhaps provide a lucid framework to substantially address the issue.

The most pressing setback of GMO enterprise, according to a systemic framework, is its reductionist approach, predominantly focusing on technological advancement and business models while disregarding environmental and social impacts. This enterprise is the product of the modern paradigm that views living organisms as machines. Facing a complex reality of living organisms, Capra

argues that the average success in genetic modification experiment is only 1% due to the inaccessible living background of the host organism to the conventional approach of current biotechnologies. Biologist nowadays are just beginning to shift their focus from genetic structure of organisms to their complex metabolic network, an area which until recently is little known to them. Moreover, as all plants, including the transgenic crops, are embedded in a complex ecosystem, scientists know very little about this ecological networks and surrounding to the extent that they have little information with regard to the ensuing biological process of a GMO plant once it becomes part of the entire ecosystem.⁴⁶

One of the viable measures to reduce the overreliance on GM products is, among others, to allow for 'the return' of ecological farming system as it promotes sustainable agriculture practices by the introduction of symbiotic farming species. Ecological farming entails a systemic approach that recognises the environmental *fitrah* of life sustenance, providing methods by which the regeneration of ecosystem is possible like the prevention of soil erosion, water infiltration and retention, carbon sequestration in the form of humus, and promoting biodiversity. This farming system is in line with the struggle of environmentalists to conserve the environment as well as that of scientists who could play their role to provide scientific advancement in boosting the crop production without manipulating their intrinsic nature. Accordingly, ecologically oriented farming should be seen as Shari'ah-compliant agricultural technique as it is capable of preserving the environment by conserving its *fitrah*. Considering the agricultural activities have been causing, to some extent, a climate change (contribute up to one-fourth global greenhouse gas emission),⁴⁷ the next section will discuss on climate change, their causes, and consequences.

Climate Change and Clean Energy

According to MIT Technology Review, climate change represents one of the major causes for the increasing reliance on the GMO.⁴⁸ Climate change restricts the expansion of global acreage for cultivation. Nevertheless, crop production increase is a pressing necessity to meet the ever increasing global food demand. Even though the use of chemical pesticides and fertilisers is crucial to support high crop yields, these chemicals also negatively impact the environment by polluting the groundwater. Therefore, as the conventional ways to increase crops production are no longer feasible, GMO production technology becomes an alternative method to produce sufficient quantity of foods worldwide.

It could be argued then, that the violation of *fitrah* in the GMO production technology is just a symptom of another environmental *fitrah* violation, namely global climate change. So, what is climate change? Originally, earth's atmosphere

contains important greenhouse gases, mainly water vapour that consists of small amount of carbon dioxide (CO₂), methane (CH₄) and nitrous oxide (N₂O). The greenhouse gases function as a thermal blanket for the planet to absorb heat from the sun and to keep its surface warm in order to support life on average of 15 degrees Celsius (°C). It is one of the natural causes for global warming that enables life. However, the current expansion of global warming is a serious environmental issue that may affect humans and other living organisms on earth. It occurs when the earth's atmosphere and surface are gradually heated due to the trapped thermal infrared (IR) radiation that fails to escape into the outer space. This is attributable to the increase of greenhouse gases that form a thick blanket to the earth. It keeps the planet's warm surface above what it would be without its atmosphere, and this process is the fundamental cause of the greenhouse effect. In the span of Earth's history, the climate has varied in different patterns which implies a natural trend.⁴⁹ However, the existence of past global warming does not necessarily suggest that current global warming is natural. Climate scientists have unanimously agreed that the main cause of the current global warming is due to human activities that expand greenhouse effects rather than natural phenomena.⁵⁰

In the natural environment, methane is the most potent greenhouse gas. However, CO₂ is the most significant since it exists in the largest concentration and has longer life-time than methane. Recently, human activities continue to increase CO₂ concentration and contribute to the emission of chlorofluorocarbons (CFCs) that have heat-trapping potential, thousands of times greater than CO₂. The CFCs have been banned in most parts of the world because they also degrade the earth's ozone layer. However, since their concentrations are much lower than that of CO₂, none of these gases adds as much warmth to the atmosphere as CO₂ does. There are at least ten key indicators of a human fingerprint on climate change: 1) human emits a large amount of CO₂ weighted 30 billion tonnes per year, 2) more fossil fuel carbon in the air, 3) falling oxygen level in air, 4) more fossil fuel carbon in coral, 5) less heat escaping out to space, 6) more heat returning to earth, 7) the earth warms faster at night than during the day, 8) cooling in the upper atmosphere or stratosphere, 9) rising of the boundary between troposphere and stratosphere or tropopause, and 10) cooling of the higher atmosphere layer or ionosphere leading to the shrinking of thermosphere. These fingerprints have been the observing points of scientists for a few decades and now become the proven evidences of climate change phenomenon.

It is clear that, high concentration of CO₂ emission to the environment is the main cause of global warming that led to climate change. So, where is the origin of the CO₂ emission? The increase in CO₂ emission is actually caused by energy-driven consumption of fossil fuels. It originates mainly from electricity production

(25%), industry (21%), transportation (14%), commercial and residential building (6%), a sum of agricultural activities, land use and forestry (24%), and other energy (10%).⁵¹ A large fraction of carbon dioxide (CO₂) emissions worldwide comes from electricity generation using carbon based fuels, followed by the sum of agricultural activities, land use and forestry. Both sectors, energy production and agriculture, contribute up to half of global greenhouse gas emissions that could always lead to global warming and climate change. Moreover, most of the CO₂ emissions from burning fossil fuels stem from electricity production, industry, transportation, commercial and residential buildings which made up to 66 percent of global CO₂ emission.⁵²

Therefore, the world is in dire need for clean and efficient energy to curb the impacts of climate change. The transition from fossil fuels to renewable energies, for example, could be the best measure to reduce greenhouse effect and at the same time reduce the impacts of climate change. With proper energy and waste management, these clean energies are safe from hazardous elements, economical that bring about stable market prize, and social benefits. One example is solar photovoltaic power system; a system that converts sunlight directly into electricity. Solar energy radiates infinitely from the sun. It is clean, free, natural and has zero carbon emission. It is considered by many scientists as a future energy resource and alternative to fossil fuels. In terms of social benefits, solar energy industries have offered jobs to people in European Union countries, China, Japan, USA and Malaysia. In Malaysia for example, there is RM45 million budget for MySuria programme which aims to uplift the economic opportunities of B40, the bottom 40 percent household group. Through this initiative, more than 1,600 houses have installed solar panels to generate electricity that is to be sold directly to Tenaga Nasional Berhad (TNB) where each participant will be able to earn an extra monthly income up to RM600.⁵³

Globally, Muslim scholars from around the world have taken an initiative to combat global climate change during the Islamic Climate Change Symposium in Istanbul by releasing the Islamic Declaration on Climate Change. The declaration first calls on policymakers responsible for crafting the comprehensive climate agreement to be adopted in Paris to come to “an equitable and binding conclusion”. And secondly, it urges people and leaders from all countries to commit to 100 percent renewable energy and a zero-emissions strategy as soon as possible, and to recognise that unlimited economic growth is not a viable option. Seyyed Hossein Nasr, in an interesting message delivered at the event to Muslim world leaders, adopted the notion of the living nature:

In the Islamic point of view, nature is alive. It's conscious. It follows God's laws. And what we're doing is breaking those laws in the name

of our own earthly welfare, and now we're destroying the very habitat that God created for us."

Moreover, he maintained that the main value of the declaration will be to remind Muslims that "nature is not just a machine; it has a spiritual meaning".

The transition from conventional power resources to renewable energy is fundamental to Islamic based sustainable development, as the protection of life (*hifz al-nafs*) and the protection of environment (*hifz al-bi'ah*) are predicated upon the assumption that they offer the balances between economic and social development and the environment. Besides, the principle of building the earth (*i'mar al-ard*) also mentioned in the Quran (Q 11:61): "He it is who created you from the earth and made it your assignment to build it", and its significance has been rekindled in the hadith, "The world is green and pleasant and God has put it under your charge to see how you will manage" (Khatib al-Tabrizi). According to Kamali, Islam advises its followers to practise moderation (*wasatiyyah*) in the use of resources including energy and water. Since the world is facing a climate issue and humanity runs the progressive shortage of energy, generating renewable and safe energy from natural resources such as from the sun rays is highly recommended from the Islamic point of view. It can be understood from this point of view that one should share and manage the resources responsibly by taking into account the well-being of the community through protection of the environment. The rising issues, in relation to GMO-based agriculture and global climate change, as discussed in this paper may be addressed by the implementation of ecologically-oriented farming and the transition to renewable energy.

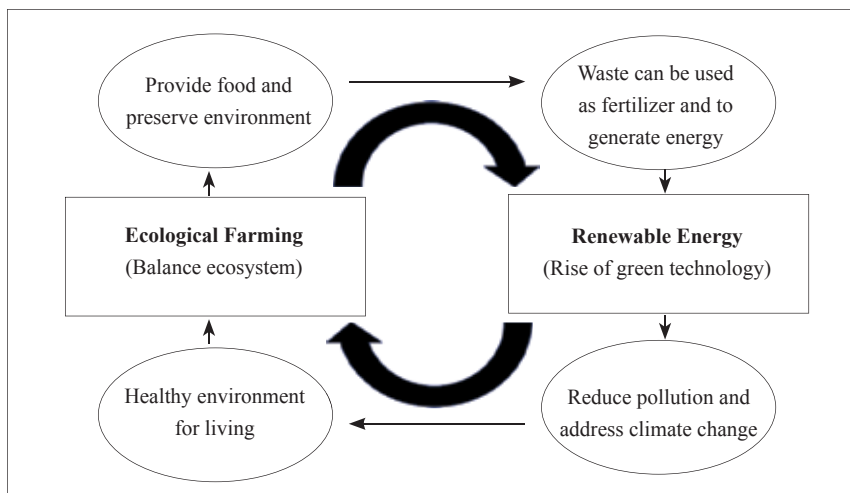


Figure 2: Ecological farming and renewable energy form a natural fit

From the above figure, it can be seen that ecological farming and renewable energy complement each other in the pursuit of sustainability. It shows an enhancing or positive feedback loop of the mutual interaction between ecological farming and renewable energy. Firstly, technological advancement is mainly utilised to address landfill issue from the agricultural sector and to generate greener energy that could reduce environmental pollution and curb climate change. Secondly, the green practices embedded in ecological farming are taking place in agricultural sectors (crop cultivation and husbandry) which then provide healthy foods. This could also reduce pollutants including carbon emission and concurrently, converse environmental wellbeing.

Conclusion and Policy Recommendations

The pursuit of sustainable development and environmental protection in Muslim countries can only succeed with substantial support from their own intellectual and cultural traditions. In the wake of *maqasid al-shari'ah* as the epistemological reference for Muslims, not only in reforming Islamic law, but also in charting development programmes; it should be able to provide a clear path to the desired future of Muslim communities. As far as the environment is concerned, this article draws reference from the resources of classical and modern discourse of *fitrah*, as well as the scientific discourse in systems thinking, to outline an intelligible aspect of environmental protection i.e. to preserve and enhance nature's ability to nurture and sustain life through its systemic interconnections. Streamlining development programmes, public policies and new technologies with this salient principle of environmental *fitrah* is the pivotal responsibility of every segment in Muslim societies. In doing so, this article proposes several policy recommendation as follows:

- Environmental *fitrah* is essentially systemic due to many interconnections in the nature. Systems thinking seems to be the only valid approach to environmental study.
- On issues on specialised nature such as GMO and climate change etc., Shari'ah position is strongly influenced by scientific evidences and expert opinions, provided that there is no contradiction to its basic principles.
- Scientists and Shari'ah scholars should liaise with one another to ensure that they move in tandem with the basic principle of Shari'ah and science.
- Policymakers and society leaders need to be fully aware of the fact that the environmental intrinsic nature (*fitrah*) is ultimately systemic i.e.

consists of closely interrelated elements to the extent that distractions on any of its parts can directly influence the other. Therefore, environmental crises are also systemic in nature and they demand for holistic and all-encompassing solutions.

- A follow up measure post ‘Paris Agreement’ and ‘Islamic Declaration on Climate Change’ is needed to create an efficient delivery mechanism that may trigger awareness among Muslims and non-Muslims on the importance of preserving environmental *fitrah*.
- Governments need to provide ample support to pilot programmes in promoting ecological farming similar to solar power programmes such as MySuria. As a sustainable agricultural system, it must be proven viable in order to ensure food security. This pilot programme can be an attempt to raise public confidence, so that this agricultural system can be widely accepted, practised and commercialised.
- More support is necessary to encourage the use of renewable energy technology among society members. It can begin with a wide array of educational activities, promoting ecoliteracy among society members through various avenues, followed by generous incentives for those who opt to pursue greener and sustainable lifestyle.

Notes

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WAQF IN BOSNIA AND HERZEGOVINA IN THE 20TH AND 21ST CENTURY

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Abstract: This paper investigates the socio-economic role of *waqf* in Bosnia and Herzegovina from the 20th century to date. Bosnia and Herzegovina *waqf* endured through various political fortunes and improved the social and economic circumstances of Muslims. A contemporary challenge is to reconstruct this *waqf*. A new development is the emergence of Islamic Economics. Since 1995, the *Waqf* Directorate of the Islamic Community of Bosnia and Herzegovina (WD-ICBIH), the main authority over *waqf*, initiated reforms to revive the socio-economic role of *waqf* and integrate it into Bosnia and Herzegovina development. The study identifies the challenges facing the *Waqf* Directorate and the development of Islamic Economics in Bosnia and Herzegovina. The emergence of Islamic Economics and Islamic Banking and Finance, in cooperation with the Bosnia Bank International, presents opportunities to the *Waqf* Directorate to achieve its vision and mission. Some avenues for *waqf* integration into Bosnia and Herzegovina development qualify as commendable efforts of reform, indicate a feasible future for the *Waqf* Directorate, and gradually address various challenges. The paper concludes with actionable policy recommendations.

Keywords: Bosnia and Herzegovina, Bosnia Bank International, development, integration, Islamic Economics and Banking and Finance, *waqf*.

Introduction

The institution of *waqf* plays an important role in the Muslim world. Many scholars point to the massive *waqf* institutions of the Osmanli¹ Caliphate.² Unfortunately, Muslim intellectuals neglected the institution of *waqf* for decades. In the middle of the 20th century, the Muslim world awakened. Intellectual efforts, like Islamic Economics, development, inspiring various missions to rescue the Muslim mind from the Western worldview and to reassert the Islamic perspective.³ With that, Muslims rediscovered *waqf*'s historical role. A few countries established ministries for religious affairs or *waqf*. *Waqf* authorities initiated agendas of *waqf* integration into the socio-economic fabric via Islamic Economics.⁴

During colonial times, Bosnia and Herzegovina *waqfs* became a source of foreigners' development. Many were destroyed and forcefully converted into parks, cemeteries, houses, roads etc. In the 19th century, the development of

the Bosnian *waqf* reached its climax under the Osmanli Caliphate. However, as a result of ill-advised efforts at reform, it gradually declined.⁵ Under Austria-Hungary and subsequent regimes, which did not recognise the *waqfs* under a *waqf* authority, Bosnian Muslims had to close the *waqf* institution. Even the ongoing existence of Muslim Bosnia was thrown in doubt. The phenomenon of Bosnian *waqfs*' history in the last century contrasts with the current state of WD-ICBIH. The revival of this neglected institution is a remarkable achievement. An overview of the evolution of Bosnia and Herzegovina *waqf* institution from 20th century to date should help highlight various abuses of this institution and help chart the way forward. It is likewise important to appraise the present WD-ICBIH *waqf* agenda from the perspective of Islamic Economics. This paper attempts to achieve these objectives. It also identifies various challenges facing WD-ICBIH and Islamic Economics and concludes with actionable policies.

WAQF IN BOSNIA AND HERZEGOVINA FROM 1887 UNTIL 1995

Bosnian Waqf Under Austria-Hungary Rule (1878-1918)

Osmanli control of Bosnia, established in 1463, ended in 1878, when the Berlin Congress delegated rule over Bosnia to Austria-Hungary. The Congress guaranteed religious freedom but the Austria-Hungary legislative system confined the Shari'ah and Osmanli Canonical law to personal affairs. This significantly affected the Bosnian Muslims.⁶ That was evident from the very beginning of Austria-Hungary rule in Bosnia and Herzegovina.⁷ Nonetheless, Bosniaks integrated into the Austria-Hungary system with relative ease, especially upon the establishment of the Islamic Community of Bosnia and Herzegovina (ICBIH) in 1882. But Austria-Hungary could not ignore the *waqf* institution; *waqf* properties under Austria-Hungary legislation became like any property. In response, Bosnian Muslims demanded recognition of *waqf* as distinct Muslim property. On 25 March 1883, a temporary *waqf* institution named the 'Land *Waqf* Commission (Zemaljska Vakufska Komisija)' was formed to register all *waqfs* in the country under the supervision of an Austria-Hungary Commissioner. *Waqf* property was actually defined as the property of the ICBIH in an 1883 document known as 'Ordinance on the Organisation and the Competence of Shari'ah Courts' (Naredba o Ustrojstvu i Djelokrugu Serijatskih Sudova). In 1894, the 'Land *Waqf* Directorate (Zemaljska Vakufska Direkcija)' was established under direction of an Austria-Hungary Government Delegate.⁸

The Austria-Hungary government even determined the duties of the Land *Waqf* Directorate: to set *waqf* taxes, rules and regulation of managing *waqf*, select *waqf* personnel and resource managers. The *waqf* institution was headed by the Austria-Hungary government, followed by the Land *Waqf* Directorate.

Lower levels were composed of '*kotars*' (similar to municipalities), each headed by a Shari'ah judge. Members of each *kotar* were imams of the local mosques, school *mudarris* (teachers, professors) and members of the *majlises* (see Figure 1).⁹

Even though Austria-Hungary treated the *waqf* institution as separate from the Islamic Community, Bosnian Muslims considered it part of the ICBIH and a centuries-long source of absolute autonomy.

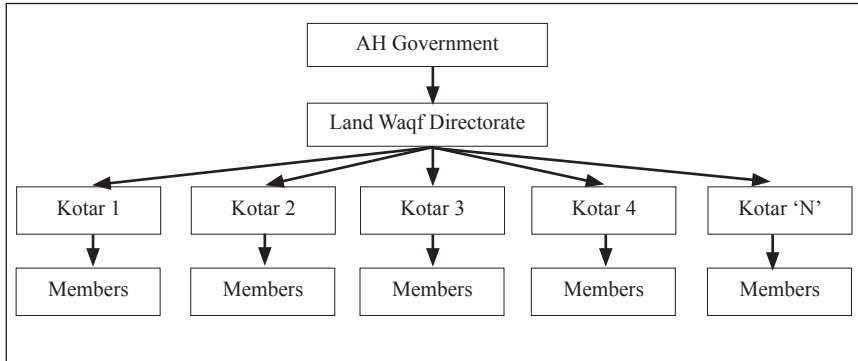


Figure 1. Organisational Chart of Waqf Institution under Austria-Hungary¹⁰

Today, ICBIH is the strongest organisation in Bosnia and Herzegovina. If this is true for the 21st century, one can imagine the strength and impact of ICBIH post-1882, recognised by Austria-Hungary. Muslims, generally, became individualistic under the new legislative system and antagonistic to the Osmanli Caliphate, which in their view committed treason. The above-explained formation of the *waqf* institution was quick. However, a few years of *waqf* absence was enough to worsen socio-economic conditions. Many family *waqfs* were abolished, leaving families without financial support. *Waqf* may not guarantee a good Muslim life but its importance to the community should not be underestimated. *Waqf* also stabilised the lives of non-Muslims who found shelter under *waqf*.¹¹ In general, it served as a safety net for Bosnian Muslims. Once broken, they were left unprotected. They did all they could to strengthen the Islamic Community and *waqf* institution through educational reforms, publishing of journals, and even an attempt at establishing a *waqf* bank.

Education saw the preservation of *medresas* (high schools) and *rushdiyye* (Osmanli secular schools), the transformation of *mektebs* (elementary schools) into *mekteb-i ibtidai*, the formation of *mekteb-i nuwwab* (school of Shari'ah Judges) etc. Syllabi were adapted to circumstances. These reforms determined the future of the institution of *waqf* and produced its human capital. The quality

of the reforms motivated Muhammed Abduh (1849-1905) to apply similar reforms in Egypt. These reforms took place in parallel with the publication of journals like *Bosnjak*, *Behar*, *Misak*, whereby the public was educated about the *waqf* institution and ICBiH activities. A disadvantage faced by Muslims was their fragmentation into three groups: the traditionalists striving for the Osmanli Caliphate, the modernists striving for life under Austria-Hungary, and the moderates seeking balance.¹²

During these developments, Austria-Hungary interfered in *waqf* affairs with rising frequency. This hindered Muslims from acting according to Islamic principles. After a forced conversion of a young girl to Christianity, Fata Omanovic, in Mostar, the Muslims embarked upon a movement to pass the ‘Statute for Autonomous Administration of Islamic Religious and *Waqf-Mearif* Affairs’ under the leadership of the Mostar mufti, Ali Fehmi Dzabic. In 1909 the statute was signed, whereby all *waqf* properties were officially transferred to the Islamic Community, controlled and headed by a *Waqf-Mearif* Council (Vakufsko-Mearifski Sabor) (see Figure 2). This became the basis of the legal status of all future *waqf* institutions.¹³

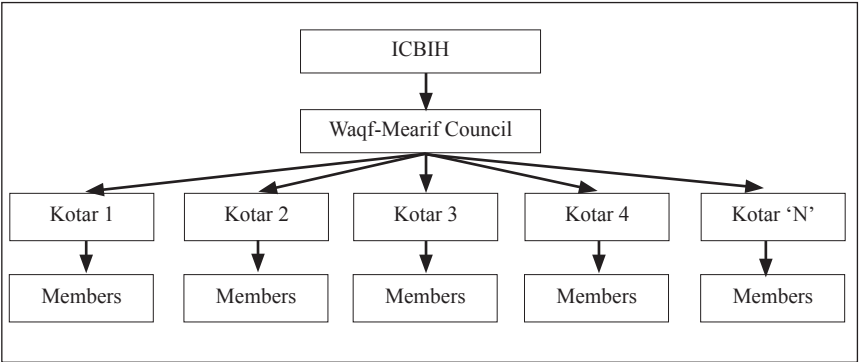


Figure 2. Organisational Chart of Waqf Institution after the passing of the Statute for Autonomous Administration of Islamic Religious and Waqf-Mearif Affairs¹⁴

A year earlier, in 1908, Austria-Hungary annexed Bosnia and Herzegovina. The new status of *waqf* gave Bosnian Muslims the satisfaction, security, and motivation to become active citizens under Austria-Hungary. In 1910 there were 10,463 landowners, 136,854 free peasants, 79,677 customary tenants, and 31,416 tenants of own land. Bosniaks made up 91.15 percent landowners, 55.65 percent free peasants and 4.58 percent tenants with own land. The Muslims attempted to open a *waqf* bank, an initiative first proposed in 1906, to revitalise the *waqf* in the new system. Due to *riba* in the conventional economic system, Muslim minority status,

and difficult conditions, Istanbul issued a *fatwa* permitting temporary payment of interest. Various events then led to the outbreak of World War I in 1914.¹⁵

Bosnian *Waqf* Under the Kingdom of Serbs, Croats and Slavs (1918-1930)

Muslims experienced persecution after World War I, under the Kingdom of Serbs, Croats and Slavs. The name itself indicated non-recognition of Bosniak-Muslims as a community. Many *waqf* properties were confiscated and distributed, mainly to immigrant Serbs. The *waqf*-mearif statute was declared null and void. The Agrarian Reform Laws – Reform of Agriculture and Colonisation of Bosnia and Herzegovina, Section 3c¹⁶ – gave the state full control over all ICBIH property. Section 4 awarded the ownership of all buildings to the state. Section 8(1) and (2) restricted private ownership to 10 or 30 hectares.¹⁷ The director of WD-ICBIH, Senajid Zajimovic, warned that these measures would encourage more crime. Statistical records indicate that 393 *waqf* properties were appropriated and destroyed. This included 75 graveyards, 108 shops, 118 houses and gardens, 90 orchards, several plots of arable land, a number of valleys and 2 *madrasahs*.¹⁸

Bosnian *Waqf* Under Alexander Karadordevic's Kingdom of Yugoslavia (1930-1943)

Waqf under the Alexander Karadordevic's Kingdom of Yugoslavia experienced severe destruction. The Islamic community was governed by the Constitution of the Islamic Religious Community of the Kingdom of Yugoslavia dated 9 July 1930 and 24 October 1936.¹⁹ However, the Ministry of Justice had jurisdiction over *waqf*. At this time, the Yugoslav Muslim Organisation struggled for Muslims to gain rights over *waqf* through government representation. Formally, *waqf* did not exist. Informally, however, it was financing the ICBIH. The Islamic community's benefits from *waqf* had to be kept secret to forestall state persecution. A value of 16.5 million of *waqf* land (16.4 dunums), or 27 percent of the Bosnian land area, was forcibly appropriated under the Kingdom of Yugoslavia.²⁰ The events included:

1. The confiscation of 95 percent of the land of large owners, based on the "Memorandum of the Associations of former owners' serfdom-begluku's counties in Sarajevo", sent to Royal Governor Paul on 27 September 1938;
2. A Banja Luka decision in 1939, which deprived 107,000 dunums of the Gazija's *Waqf* in the Teslic and Tesanj area of which 1/3 is arable land and 2/3 is forest land;
3. The destruction of 24 mosques, dating to the early Osmanli Caliphate, in Sarajevo;

4. Extensive Serb settlements took place and the land under the homes of seizers was privatised.

Bosnian Waqf Under Tito's Yugoslavia (1943-1990)

During this period, Shari'ah courts and law officially disappeared from the lives of Bosnian Muslims. As before, circumstances did not allow for a smooth management of the *waqfs*. In the recently-founded Socialist Federal Republic of Yugoslavia in 1943, the Bosnian Muslims were recognised as a constituent people and an ethnic group. However, religion and religious symbols, including the scarf and traditional wear, were prohibited in public. Nationalisation, expropriation and confiscation of *waqf* properties were all legalised under a number of severe laws.²¹ Even Islamic affairs were administered by the state. A new Constitution of the Islamic Religious Community of the Federalist People's Republic of Yugoslavia replaced the old one as of 26 August 1947. The Constitution of ICBIH was adopted on 13 July 1959. Under Article 25, Paragraph 9 of the 1959 Constitution, *waqf* was placed under the jurisdiction of the Presidency of IC, which was to cooperate with the local community (*jama'at*). On 5 November 1969 a newer Constitution of the Islamic Community of the Socialist Federal Republic of Yugoslavia was passed to revise jurisdiction over *waqfs*.²² Transgressors against the state would be punished. The Sarajevo Process (Sarajevski Process) in 1971 sentenced several Muslim intellectuals to jail and death. Muslims were deprived of their *existenzgrundlage* (existential basis). Muslims survived but the *waqf* institution was temporarily closed due to a lack of financial support.²³

Available statistics indicate that from 1945 until 1990, the regime confiscated 11,342 *waqf* properties (shops, graveyards, houses and flats, buildings, construction areas). This amounted to 30.342.496 m². The monetary value of confiscated flats alone amounted to 167,400,000.00 KM (85,846,153.85 EUROS). The value lost in the construction sector amounted to 576,600,000.00 KM (295,692,307.70 EUROS).²⁴ These numbers reveal the scale of the damage inflicted on the *waqf* institution in Bosnia.

Bosnian Waqf From 1990 Until 1995

The 1990s marked the breakup of Yugoslavia into several nations. Bosnia and Herzegovina obtained independence in 1991, which led to genocide from 1992 until 1995. While the Constitution of the Islamic Community in the Socialist Federal Republic of Yugoslavia of 12 September 1990 defined *waqf* as a property of ICBIH, no formal *waqf* institution remained in existence. Moreover, the war destroyed all records of *waqfs*. After the war the ICBIH formed the *Waqf* Directorate, which revealed that during the 1990s, Serb and Croat war

criminals damaged 2191 and destroyed 875 *waqf* properties. The percentages of destroyed and damaged *waqfs* per building type were as follows: 80.68 percent congregational mosques, 46.50 percent small neighbourhood mosques, 9.12 percent Qur'an schools, 60.00 percent dervish lodges, 48.89 percent mausoleum shrines and 38.88 percent buildings of religious endowments.²⁵ When the Osmanlis left, there were around 5,000 registered *waqfs*. When estimating the number of subsequent damaged and destroyed *waqfs*, it can be said that no *waqf* was left untouched.

Bosnian *Waqf* From 1995 Until Today

The *waqf* institution, known as the WD-ICBIH, was officially reinstated on 14 June 1996, by a decision of the Council of ICBIH (Sabor Islamiske Zajednice u Bosnia and Herzegovina) no: 2486/96. *Waqf* was recognised as a foundation whereby international law protects any misappropriation or damage to *waqfs*, e.g. the Law on Associations and Foundations and the widely recognised Human Rights and Freedoms documents. Two additional laws were passed to protect *waqf* and prevent damage:²⁶

1. Laws on Prohibition of Sale of Common Property, although lease was permitted, and
2. Laws on Special Protection of Sacred Objects and Places.

The Constitution of the Islamic Community of 1998, in Article 28, identified *waqf* as a property of the ICBIH. Article 32 declared the *Waqf* Directorate as the manager of *waqf* properties. The function of *waqfs* was to contribute wherever they were functional. Some of the chief activities of the *Waqf* Directorate were to produce a *waqf* register (a new *waqf* database started in 2010 and data is still collected). Additional responsibilities were the stipulation of rules for doing *waqf* (this took place in 1889 and was updated in 2000 and 2011), and the initiation of the process of *waqf* restitution under a special Coordination Council (Koordinacijski Odbor) etc. On 22 May 1999, a Statute of the *Waqf* Directorate determined three organs to manage *waqfs*: Local Islamic Community, Special Judicial *Waqf*, and *Mutawallis* (see Figure 3).²⁷

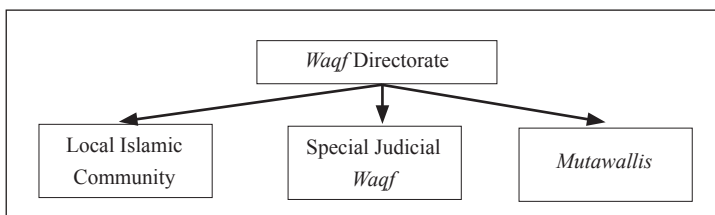


Figure 3. *Waqf* Directorate Organs of *Waqf* Management in Bosnia and Herzegovina

The *Waqf* Directorate is part of ICBIH’s organisational structure²⁹ and one of the strongest institutions of ICBIH (see Figure 4). The highest authority of ICBIH is *Raisu-l-Ulama* (*reisu-l-u’lema*³⁰) who is the President of the *Riyasat* (the main executive body of ICBIH and the Grand Mufti or supreme authority in the ICBH). The *Waqf* Directorate is accountable to the *Riyaset*.

Waqfs, membership fees, *zakah*, *sadaqat al-fitr*, *qurban*, revenue of profit-generating agencies, funds, gifts, testaments etc. finance the above structure. The ICBH maintains contact and cooperates with Bosniak and other Islamic communities, institutions, and organisations the world over. Figure 5 shows the ICBIH organisational chart with institutional bodies outside of Bosnia and Herzegovina.³² It promotes the integration of peace and justice through religious dialogue.³³ The institutional bodies in Figure 5 (*muftiluks*, *majlises*, *jama’ahs*) contribute to the *waqf* properties; usually through donations (cash).

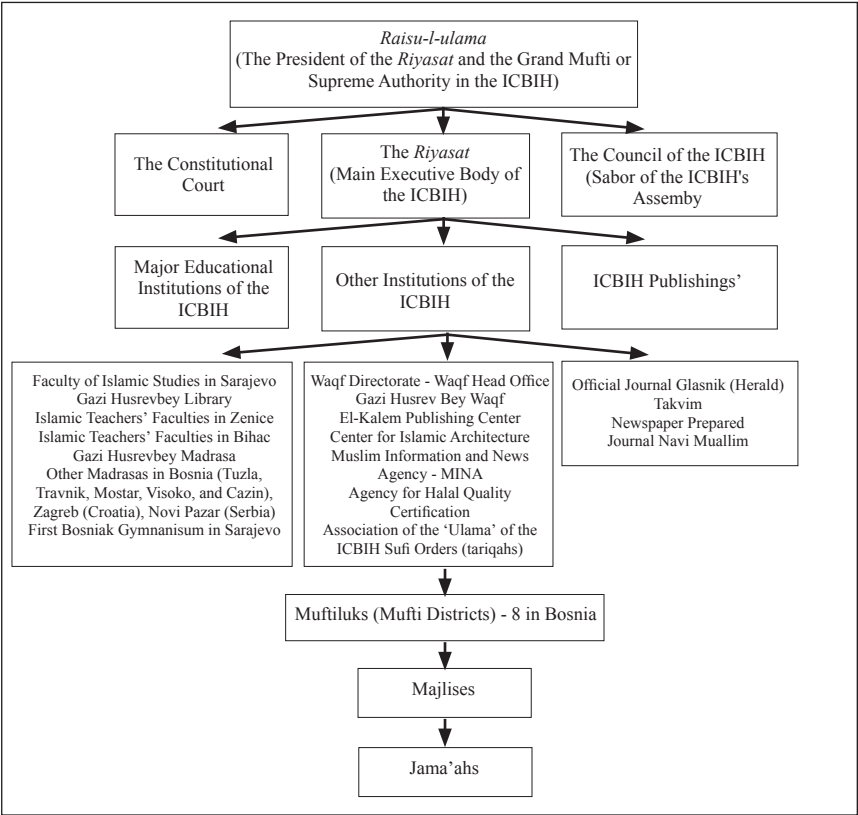


Figure 4. Organisational Chart of the ICBIH from 1995 until today³¹

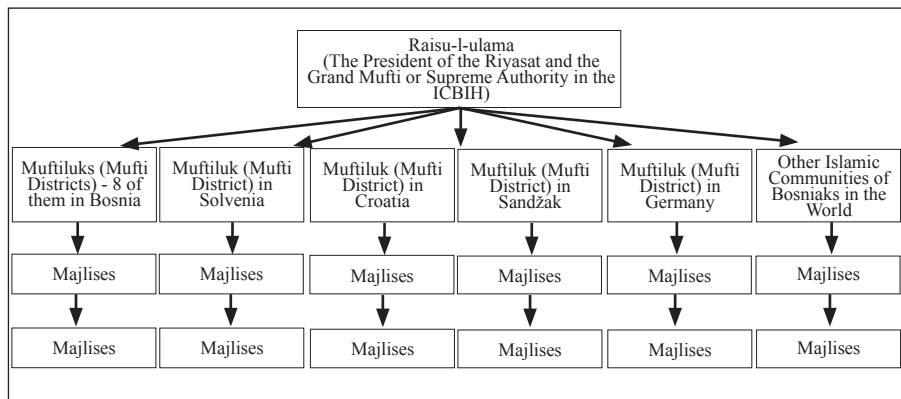


Figure 5. ICBIH Organisational Chart with Institutional Bodies outside of Bosnia and Herzegovina³⁴

The activities of the *Waqf* Directorate revived the institution of *waqf*, and repaired or rebuilt many damaged and destroyed *waqfs*. However, not much has been achieved in the development of *waqf* institutions, largely due to a lack of funds.

When Nezim Halilovic was the director of the *Waqf* Directorate, statistical information from 1995 until 2007 indicated losses of confiscated flats at 64,350,000.00 KM (33,000,000.00 EUROS). The losses for confiscated construction areas amounted to 221,650,000.00 KM (113,666,666.70 EUROS).³⁵ The amounts would have been higher if all confiscated or destroyed properties were included. Comparable up to date statistical information is not yet available. However, the main reason for focusing on the period 1995 to 2007 for selected *waqf* properties is to emphasise the damage caused to the *Waqf* Directorate. Based on statistical information during the time of the previous director of *Waqf* Directorate in 2008, the *waqf* properties consisted of 1144 mosques, 570 masjids, 1030 shopping lots, 3027 graveyards, 1570 houses and apartments, 886 buildings and 4829 parcels of land. Summed up, there were 13056 *waqf* units.³⁶

As of 2015, the total number of *waqf* units is 19,236. From those, 1560 were entered into the new database of the *Waqf* Directorate. For easier analysis and clearer overview, eight general categories were created: lands, valleys, orchards (9,500 units), religious objects (4,653 units), parks, streets, gardens and other habitats (1,928 units), houses and flats (1,610 units), business objects and offices (892 units), shops, and stores (599 units), utilities (28 units) and educational objects (26 units).³⁷ Compared to *waqf* units in 2008, there were 6,180 additional *waqfs* in 2015. A significant rise in the number of *waqfs* is evident but the contributions and benefits from those *waqfs* are not known. The categories reveal that the potential in Bosnian *waqf* resides in the agricultural and industrial sectors due to a large

number of land parcels, valleys, and orchards. Based on the statistics, different *waqf* lands, as of 2015, totalled 39,481,894 m².³⁸ As most land areas are not utilised, the *Waqf* Directorate incurs significant losses annually. Religious objects constitute a considerable part of *waqfs* and less emphasis may be given to the development of this category. Renting and other business related activities could be profitable ventures considering the number of houses, flats, business objects and offices. Lastly, education seems to be an underdeveloped sector. The supply of human capital is not sufficient to develop the *waqf* institution faster, which partially explains the perception that *waqf* properties tend to be underutilised.

The partially realised plan of the *Waqf* Directorate in Bosnia and Herzegovina in 2011 helped establish detailed tasks for the future. These include protecting the *waqf* in Bosnia and Herzegovina and its diaspora, preserving the continuity of the *waqf*, the digitalisation of the *waqf* registry, intensification of efforts for *waqf* restitution, setting all *waqfs* into function, assisting the ICBiH in utilising *waqfs* in the country for socio-economic development, raising the performance of *waqf* to international levels, improving and monitoring the *waqfs*, integrating *waqf* into the economy, (for example via leasing *ijarah*), re-activating dormant *waqfs*, increasing political participation, and promoting research and development of the *waqf* through education.³⁹

THE INSTITUTION OF WAQF AND ISLAMIC ECONOMICS IN BOSNIA AND HERZEGOVINA

Ignorance About the Bosnian *Waqf* Tradition

Most Bosnians are ignorant of Bosnian *waqf* history. History is not particularly interesting for many Bosnians. Foreigners show greater interest in Bosnia's traditional treasures. Most Bosnians perceive mosque-complexes as ordinary architecture while foreigners wonder with awe about the philosophy behind such architectural design. For example, foreigners are impressed that the shops, *hamams*, coffee houses, trade checkpoints etc., surrounding the 16th century Ferhadija mosque sustained social needs through the *waqif*, Ferhat Beg Sokolovic. This is only one among many other complexes like the famous Ghazi Husrev Bey Mosque, library, shops, *madrassa* etc. in Sarajevo. This enabled Bosnian Muslims to live harmoniously with neighbours of different religious denominations for centuries. Lack of awareness about this tradition prevents *waqf* integration in Bosnian development today. It blurs the link with Islamic Economics and prevents the understanding that principles of Islamic Economics guided such *waqf* development. The systematic, unified and integral method of socio-economic life is an objective of Islamic Economics and the need for Muslims to learn from their *waqf* tradition is essential for Islamic science.⁴⁰

Political Conditions in Bosnia and Herzegovina

The Dayton Peace Agreement is the constitutional arrangement of Bosnia and Herzegovina. It is unique and complex with its tripartite system of representation for all three Bosnian ethnic groups. This system must accommodate everyone's interests. It efficaciously settled the conflict, established workable socio-economic relations under the supervision of the Office of High Representative. Though not the best solution, it was the only one possible.

While this political system enables greater *waqf* involvement in the socio-economic development of Bosnia and Herzegovina, legislative impediments prevent the *waqf* properties' restitution. Public satisfaction as well as the pace of development remain low.⁴¹ There is little political will to return the government owned *waqfs* to the *Waqf* Directorate through legislation on restitution that would be in accord with international law. This law would spur the WD-ICBIH with powers to claim compensation for forcibly taken, damaged and destroyed *waqfs* to boost *waqf* development. But rising political complexities make it unlikely for this to happen.

Legislation of Islamic Economics For *Waqf* Development

There is no legal framework for Islamic bank operation in Bosnia and Herzegovina. Islamic Economics cannot be legally recognised due to the constant exercise of veto powers in parliament. The Bosnia Bank International and ICBIH are potential bodies to develop *waqf*. This challenge facing the Islamic Economics industry in Bosnia and Herzegovina is similar to that in Kuwait, Qatar, or Malaysia in the past. Once Bosnia and Herzegovina resolves this, *waqf* may be integrated more fully into development.

Problem of Nationalisation, Restitution and Registration

Waqf restitution is politically complicated. The *Waqf* Directorate had the opportunity to recover many *waqf* properties from their owners but the new owners often did not know their apartment was *waqf*. The lack of alternative solutions temporarily permitted owners to stay in the *waqf*. The *Waqf* Directorate asked for other ways of compensation but the lack of financial resources kept the issue of most flat ownership cases unresolved.⁴²

Vakufnama (*Waqf* Certified Document) Dilemmas

Many *vakufnamas* were lost during the 20th century. This complicated the process of *waqf* restitution. Some *vakufnamas*, mostly those of confiscated *waqf*

properties, did not suffice to return the *waqf*. There are even those *vakufnamas* whose *waqf* was destroyed and damaged. No funds exist to rebuild those *waqf* and the state refuses to take responsibility for the actions of previous regimes.⁴³

Human Resources

Human resources are crucial for every institution. Inadequate skills cause slow *waqf* development, thus the *Waqf* Directorate's projects cannot be implemented. Elsewhere, personnel are technologically more advanced and exposed to global trends. This enables more efficient and effective engagement, trainings via group discussions, seminars, conferences etc. whereby new trends and experiences are exchanged. Zajimovic and Halilovic identified this as one of the major drawbacks of the *Waqf* Directorate.⁴⁴ The same accounts for development of Islamic Economics in Bosnia and Herzegovina.

Management of *Waqf*

Abuse of *waqf* properties by *mutawallis* (managers) was common in all Muslim societies. During the 16th to 18th centuries when *waqf* complexes were built, *mutawallis* treated *waqf* like personal property. No oversight existed, no cooperation with and no feedback was given to anyone. That led to the gradual decline of the *waqf* institution. Good *tanzimat* reforms found resistance from *mutawallis*. The formation of Ministries of *Awqaf* (including the *Waqf* Directorate in Bosnia and Herzegovina) also did not resolve the problem. No substantial change since 1995 is evident in Bosnia and Herzegovina. Policies that foster restitution of *waqf* properties in Bosnia and Herzegovina and its institutional integration, nationally and internationally, with multiple projects of *waqf* reparation, rebuilding, expansion, innovation, modernisation etc. must also improve efficiency and effectiveness of *waqf* management and overall control of *waqf*.⁴⁵

WAQF INTEGRATION IN BOSNIAN DEVELOPMENT

Waqf integration into Bosnia and Herzegovina development requires effort by the Bosnian Muslim population to revitalise the institution of *waqf*. This requires a dynamic approach. The potential is present but the question is whether available resources are utilised efficiently. A variety of options to integrate the *waqf* into the development of a country is available.⁴⁶ Education is the the starting point of every change. Suitable education can raise the awareness of the public concerning *waqf* and Islamic Economics as a framework for *waqf* development in Bosnia and Herzegovina.

***Waqf* Integration via Education**

The statistics of *waqf* properties in Bosnia and Herzegovina indicate that the educational sector has been neglected since the 1990s. Personnel well-versed in the field of contemporary *waqf* are, however, required to plan, direct and execute development. Herein lies the future of Bosnia and Herzegovina *waqf*. The educational platform for *waqf* integration through Islamic Economics and vice versa may be intensified via “The Centre for Islamic Economics, Banking and Finance” of the Sarajevo School of Economics and Business.⁴⁷ Muslim awareness about the Bosnian *waqf* tradition gets promoted in this way.

The European Association for Islamic Economics, Banking and Finance recently organised a conference in collaboration with the Centre, named “New Challenges for Islamic Economics and Finance Development,” at the Gazi Husrev Bey Library, itself a *waqf*.⁴⁸ This points to ICBIH’s interest in exploring Islamic Economics as well as banking and finance. Both the ICBIH and the Centre want *waqf* assets to be fully utilised to achieve the objectives of Shari’ah (*maqasid Shari’ah*). This would be the result of proper education.⁴⁹ The integration of *waqf* within the educational process enhances the development of *waqf*, promotes greater justice and contributes to healthier socio-economic relations.

Complementarity Potentials of *Waqf* Integration via Islamic Economics

Islamic economic thinking in Bosnia and Herzegovina requires proper understanding of Islamic economic principles. This requires familiarity with the Islamic worldview, which shapes the Islamic economic worldview.⁵⁰ This is not new to Bosnians. These principles motivated the attempt to establish a *waqf* bank in 1906. However, the historical circumstances distorted the peoples’ mentality and blurred their direction in life. That is why integration of *waqf* needs an educational platform like the centre mentioned above, to instil the basic principles of Islamic Economics found in the Islamic worldview and familiarise the public about the scope, content and potential of the two fields of study.

The current leadership of the *Waqf* Directorate strives to make *waqf* the socio-economic basis of ICBIH. Islamic Economics’ socio-economic welfare objectives do not differ from that of *waqf*. Therefore, the *Waqf* Directorate and Bosnia Bank International should become partners in furthering socio-economic development. This relationship of Islamic Economics and *waqf* reveals a potential of complementarity. The WD-ICBIH can exploit this relationship to develop *waqf* via Bosnia Bank International through, for example, agricultural projects. However, such partnerships should differentiate *waqf* assets from other assets of the bank, as in reality banks are profit-oriented.⁵¹

Magnitude of Bosnian *Waqf*

The historical development of *waqf* in Bosnia reveals the magnitude of Bosnian *waqf* and its significant potential for education and the economy. *Waqf* cannot be fully integrated without fulfilling the Islamic economic criteria of internal-integrity and relational-unity.⁵² This would improve *waqf* management, human capital, and raise public knowledge about *waqf* and Islamic Economics.

Trust as a Condition of *Waqf* Implementation

Trust is essential for development. Trust has played a vital role in Bosnian socio-economic development via *waqf* since Bogumil times. The adoption of Islamic economic reasoning (with criteria of internal-integrity and relational-unity)⁵³ can increase knowledge about Bosnia's *waqf* tradition, improve management and human capital, expedite *waqf* restitution and recovery of many *vakufnamas*, and promote Islamic Economics among others.

The *Waqf* Directorate's Role in Complementing *Waqf* and Islamic Economics

Since the 1990s the *Waqf* Directorate in Bosnia and Herzegovina has reminded the people of the role of *waqf* in the lives of Bosnian Muslims and non-Muslims via periodical activities and projects. The *Waqf* Directorate Council constantly works on identifying priority areas in Bosnia and Herzegovina for projects of *waqf* revival, ultimately aiming at national and international integration of Bosnian *waqf* through policies that meet social needs, provide better management and cooperate with *waqf* institutions elsewhere in the Muslim world. It calls for potential stakeholders to join its mission to help society by strengthening the *waqf* and to raise Muslim awareness of the hereafter.⁵⁴ The vigour of the *waqf* institution is again evident due to its present-day ambitions. It has the potential to bring about a vibrant Islamic socio-economic transformation.

Understanding the Bosnian Muslim Tradition: Tolerance, Dialogue and Integration

Islamic Economics and *waqf* have the potential to benefit from the Bosnian Muslim tradition, where the *waqf* plays an important role. People of different religious denominations lived harmoniously in Bosnia, as recorded by historians, even prior to the advent of Islam. It was when Islam spread in Bosnia that communal solidarity reached its climax.⁵⁵ This treasure trove of experience of peaceful co-existence in a multiethnic, multilingual or multitribal environment was depleted by decades of conflict. However, from 1995, this tradition has begun to revive. It has now reached the stage where, for example, the Bosnian tradition

of Islam is viewed as an exemplar of the so-called 'European Islam' by Alibasic, having the following four characteristics: (1) secularised Islam – since Austrian-Hungarian rule in 1878; (2) power sharing; (3) democracy and pluralism; and (4) nationalised Islam. However, there is room for a fuller integration between the West and East. For this reason the Grand Mufti, Mustafa Cerić (b.1952), called for a religious dialogue in Europe. He proposed the formation of a European Muslim Authority to bring Muslims and non-Muslims together by endorsing the Draft Law on Freedom of Religion and Legal Status of Churches and Religious Communities in Bosnia and Herzegovina. Karić defied the 'Clash of Civilisations' hypothesis of Samuel Huntington, being antithetical to the 'fault lines' between religions, favouring instead peaceful and fruitful coexistence.⁵⁶ These are just a few examples of how the Bosnian Muslim tradition contribute to multifaceted integration.

Potential Within Islamic Banking

A study of Islamic Banking in Bosnia and Herzegovina using the SWOT matrix showed the general performance, prospects, and extent of Islamic economic reasoning (see Table 1.1).⁵⁷

The strengths of Islamic banking in Bosnia and Herzegovina (see Table 1.1) match the Islamic economic objectives of interest elimination, faster and better customer service, and God conscious educated personnel. The weaknesses of Islamic banking are in line with the drawbacks of Islamic Economics more generally: limited competitiveness compared to conventional banking due to extra costs, weak efforts at development, and aversion to high-risk borrowing and investing for faster expansion. The opportunities of Islamic banking in Bosnia and Herzegovina reflect the Islamic Economics emphasis on innovation and creativity, conducive to a large Muslim population, a growing economy and a stable banking system.

The strengths and opportunities of Islamic banking create a favourable environment not only for Islamic Economics development but also for *waqf*. *Waqf* can play a major role in realising the aims of Islamic Economics. For example, a good *waqf* framework may replace microcredit organisations and enhance employment. *Waqf* and microcredit organisations provide various strategies for development by means of socially-beneficial projects. If that succeeds, partnership contracts (*murabahah*, *musharakah* and *mudharabah*) may be utilised to mitigate the risk factors. The *Waqf* Directorate and Bosnia Bank International organise periodical seminars and conferences to attract investors. Meetings between the two are often reported in the Bosnia Bank International monthly newspaper. For example, the *Waqf* Directorate organised a forum in 2015 to envision models

Strengths	Weaknesses
• interest-free banking • speed of service delivery • the quality of special services • well-trained employees	• more expensive loans • shorter working hours • small number of ATMs
Opportunities	Threats
• different (innovative) set of products • Muslim population in Bosnia and Herzegovina • a good rating of the founders • growing economy in Bosnia and Herzegovina • stable banking system in Bosnia and Herzegovina	• tax and law system • insufficient knowledge amongst clients about the principles of Islamic banking • hostile environment • microcredit organisations as a competitor

Table 1.1 SWOT Matrix (Awareness about Islamic Banking in Bosnia and Herzegovina)⁵⁸

of *waqf* integration in development and called for the establishment of a *waqf* bank.⁵⁹

Conclusions and Recommendations

This paper discussed the 20th century fortunes *waqf* and the prospects for a 21st century revival. Over the coming years, 19,236 *waqf* properties 39,481,894 m² in land size and the emergence of Islamic Economics with Bosnia Bank International may have an integrative future in Bosnia and Herzegovina. The WD-ICBIH aims again to make *waqf* the socio-economic basis of Islamic life. Gradual *waqf* integration into Bosnia and Herzegovina development addresses some challenges and shares the story of Bosnia and Herzegovina *waqf* with other Muslim and non-Muslim countries.

We end this paper with several actionable policy recommendations. The *Waqf* authorities should:

- Engage with others internationally via seminars, conferences, publications, inter-institutional exchange of employees and students.
- Promote the idea of *waqf* diversified usage such as *waqf*-financed education (like Turkish *waqf*-financed universities).

- Establish strong networking with alumni of all Bosnia and Herzegovina Islamic educational institutions as an avenue of cash *waqf* mobilisation, exchange of experience and communication in general.
- Develop an integrated IT *waqf* system.
- Have an industry approach, like that of Western institutions part funded by endowments e.g. Oxford, Harvard.
- Raise social awareness via research projects on *waqfs*.
- Most importantly, re-evaluate the use of current resources to maximise socio-economic benefits through more frequent consultation with experts of diversified educational backgrounds for eventual greater *waqf* development.

Appendix A

Waqf Properties in Bosnia and Herzegovina Based on Type, *Waqf* Directorate, 2015

No	Category	Details (Type)	Units
1	Lands, Valleys, Orchards	Construction Lands (Građevinsko Zemljište) Valley from 1 st to 6 th Class (Livada od I do VI klase) Non-Fertile Lands (Neplodno zemljište) Fields (Njiva), Fields from 1 st to 8 th Class (Njiva od I do VIII klase) Arable Land (Oranica), Arable Land from 1 st to 8 th Class (Oranica od I do VIII klase) Other non-Fertile Land (Class Ostalo neplodno zemljište) Pastures from 1 st to 6 th Class (Pašnjak od I do VI klase) Plum Orchard (Šljivik) Forests from 1 st to 8 th Class (Šuma od I do VIII klase) Vineyards (Vinograd) Orchards (Voćnjak) Orchards from 1 st to 6 th Class (Voćnjak od I do VI klase) Garden 1 st and 2 nd Class (Vrt I II klasa) Land with Business Building (Zemljište uz privrednu zgradu) Land with non-Business Building (Zemljište uz vanprivrednu zgradu) Land with Building (Zemljište uz zgradu) Land with Building for Physical Culture (Zemljište uz zgradu fizičke kulture) Land with Building of Islamic Community (Zemljište uz zgradu vjerske zajednice)	9500
2	Religious Objects	Mosques (Džamija), Worship Houses (Bogomolja) Charnel House (Gasulhana) Turbah (Turbe) Graveyards (Groblje) Maktab Remnants (Ruševine mejtefa)	4653
3	Parks, Streets, Gardens and other Habitats	Walls (Zidine) Parks (Perivoj) Pasars (Pijaca) Streets (Ulica), Gardens (Bašča) Hill (Brdo) ?? (Do) Gardens (Dvorište) Economic Gardens (Ekonomsko dvorište) Ravines (Jaruga) Hiatus (Jaz) Canals (Kanali) Local Pathways (Lokalni put) Storage Area (Magazište) Maydan Stones	1928

		(Majdan kamen) Maydan Sand (Majdan pijeska) Swamps (Močvara) Enbankment (Nasip) Non-Classified Pathway (Nekategorisani put) Parks (Parkovi) Brook (Potok) Approach Roads (Prilazni put) Access Road (Pristupni put) Road (Put) Road without signs (Put bez oznake) Rivers (Rijeka) Trench (Rov) Underbrush (Šikara)	
4	Houses and Flats	(Two-Room Flat) Dvosoban stan, Economic Court (Ekonomski dvor) Public Dwellhouses (Javne zgrade) Commesariat (Karaula) Houses (Kuća) Houses and Gardens (Kuća i dvorište) Houses and complementary Buildings (Kuća i zgrada) Houses and Land (Kuća i zemljište) Flats Building (Stambena zgrada) Flats (Stanovi) Three Room Flat (Trosoban stan), Buildings-Zgrada Building and Housing Area (Zgrada i kućište), Housing (Kućište) Buildings and Gardens (Zgrade i dvorišta)	1610
5	Business Objects and Offices	Complementary Business Buildings (Pomoćna zgrada u privredi) Buisness Building (Poslovna zgrada) Eco-Industry Business Building (Poslovna zgrada u privredi) Non Eco-Industry Business Building (Poslovna zgrada u van privredi) Business Areas (Poslovni prostor) Post Office (Pošta), Industry Related Buildings (Privredna zgrada) Business-Flats Buildings (Stambeno poslovna zgrada) Electricity Station (Trafostanica) Waterpower Complex (Vodoprivredni objekat) Buildings of the Islamic Community (Zgrada vjerske zajednice) Garden of Business-Dwelling House (Dvorište stambeno-poslovne zgrade) Factory Area (Fabrički krug) Construction Areas (Gradilište) Stone-breaking Area (Kamenolom) Stone-Breaker (Kamenjar) Stone-breaking area (Krš, kamenjar) Sand Factory (Pjeskara) Open Pit (Površinski kop) Market Area (Sajmište)	892

6	Shops, and Stores	(Shops) Dućan, Garages (Garaža) Studio (Garsonjera) Storerooms (Magaza), Complementary Room (Pomoćna prostorija) Complementary Buildings (Pomoćna zgrada) Complementary Complex (Pomoćni objekat) Cattle House (Štala) Parking (Parking)	599
7	Utilities	Wells (Čatrnja), (Water Taps) Česma, Fountains (Fontana) Bathrooms (Kupatilo) Mill with mill mashine (Mlinište sa mlinom) Other complementary buildings (Ostale pomoćne zgrade) Monument (Spomenik) Concrete Foundations (Temelj) Toilet (Toalet) Water Mill (Vodenica) Watersupply Reservoir (Vodovod (rezervoar) Water Trough (Pojilo)	28
8	Educational Objects	Madrasah at Mosque (Medresa uz džamiju), Maktabs (Mektebi) Schools (Škola)	26
TOTAL UNITS (UKUPNO)			19236
1560 Entered <i>Waqf</i> Units into the Data Base (Information System) of <i>Waqf</i> Directorate (1560 Unešenih u Informacioni Sistem Vakufske Direkcije)			

Source: *Waqf* Directorate of Islamic Community of Bosnia and Herzegovina (ICBIH), 8th August 2015

Appendix B

Highlights of *Waqf* Land Registered in the Data Base of *Waqf* Directorate as of 2015 (Zbirni Prikaz Vakufske Imovine u Bosnia and Herzegovina Unesene u Informacioni Sistem Vakufske Direkcije u 2015 Godini)

Type of <i>Waqf</i> Land	Land size in m ²
Land in Use (IMOVINA U UPOTREBI)	39,146,187 m ²
Nationalized <i>Waqf</i> (NACIONALIZOVANA)	326,252 m ²
Transformed <i>Waqf</i> (TRANSFORMISANA)	882 m ²
Muqata Waqf (MUKATA)	4,379 m ²
Destroyed <i>Waqf</i> (UNIŠTENA)	3.738 m ²
Erased <i>Waqf</i> (BRISANO)	456 m ²
Total (Ukupno)	39,481,894 m²

Source: *Waqf* Directorate of Islamic Community of Bosnia and Herzegovina (ICBIH), 8th August 2015

Notes

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1. The term Osmanli is preferred over Ottoman due to the fact that the Caliphate was named in honour of 'Osman'. This is a correction of the terminology used in research on the Osmanli Caliphate. Unfortunately, even native Turks still use the name Ottoman due to the widespread usage of the word by Western scholars. However, authentic scholars of Osmanli history and history in general attempt to correct this misuse of terms.
 2. Timur Kuran, 'The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System,' *Law and Society Review* 35, no. 4 (2001): 841-98; Mohammed Boudjellal, 'The Need for a New Approach to the Role in Socio-economic Development of Waqf in the 21st Century,' *Review of Islamic Economics* 12, no. 2 (2008): 125-36.
 3. Syed Muhammad Naquib Al-Attas, *Prolegomena to the Metaphysics of Islam* (Kuala Lumpur: Penerbit UTM Press, 2014), 1-25.
 4. Murat Çizakça, *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present* (Istanbul: Boğaziçi University Press, 2000), 1-100; Mohamed Aslam Mohamed Haneef, 'Islam, the Islamic Worldview and Islamic Economics,' *IIUM Journal of Economics and Management* 5, no. 1 (1997): 39-66; Muhammad Arif, 'Toward a Definition of Islamic Economics: Some Scientific Considerations,' *Journal of Research in Islamic Economics* 2, no. 2 (1985): 79-93.
 5. Kinross Lord, *The Ottoman Centuries: The Rise and Fall of the Turkish Empire* (New York: William Merrow, 2002), 250-380.
 6. Fikret Karčić, *The Bosniaks and the Challenges of Modernity: Late Ottoman and Hapsburg Times* (Sarajevo: El-Kalem, 1999), 10-45; Dzevada Šuško, 'Percepcija Bošnjaka na Zapadu (Perceptions about Bosniaks in the West),' *Internacionalni univerzitet Sarajevo (International University Sarajevo)*. Available at: <http://cns.ba/cns-izdanja/percepcija-bosnjaka-na-zapadu-dzevada-susko/>. (Accessed on: 15 June 2017); Noel Malcolm, *Bosna: Kratka Povijest Bosnia: A Short History* (Novi Sad: Budućnost, 2011), 150-300.
 7. 'Bosnia and Herzegovina' has been the name of the country since 1878. During the Osmanli Caliphate, it was Bosnia only.
 8. Fikret Karčić, *Studije o Serijatskom Pravu i Institucijama (Studies of Shari'ah Law and Institutions)* (Sarajevo: El-Kalem & Center of Advanced Studies (CNS), 2011), 1-150; Čajlaković Muhamed, 'Nastanak i Razvoj Institucije Vakufas Posebnim Osvrtom na Vakuf u BiH (Creation and Development of Waqf Institution with Special Reference on Waqf in BiH),' *Glasnik Riyaset* (Herald Riyaset), no. 3-4 (2009): 240-56.
 9. Enis Durmišević, 'Vakufi u Različitim Političkim Sistemima-Odnos Vlasti Prema Vakufima, Posebno Nakon Agresije na BiH (Waqf in Different Political Systems – Government Stance Towards Waqf Especially After Aggression on BiH),' *Novi Muallim* (New Muallim) 12, no. 47 (2011): 15-24.

10. Ibid., 15-24.
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 29. The Constitutional Court is the main judiciary body while the Council of the ICBIH (Sabor or the ICBIH's assembly) is the main legislative body of ICBIH. Major educational institutions of the ICBIH are listed in the table below. In

general, the institutions date from the early 15th century to the 20th century. Each institution has a programme. Other centres and institutions of the ICBH are also listed in the table below. Those date from the early 16th century to the 21st century. Each has a certain autonomy and reports to the ICBH authorities. Some known publications of the ICBH are mentioned in the table as well. All started publication in the 20th century. There are other smaller publications by listed educational institutions and other centres of the ICBH. The local, cantonal and municipality structure of the ICBH has 8 *muftiluks* (or mufti districts) in Bosnia. Each *muftiluk* has several *majlises*, a group of a number of *jama'ahs* (each having a mosque). *Jama'ah* is the smallest body of ICBH present in almost every village, and city in BiH. Some villages and cities have more than one *jama'ah*.

30. *Reisu-l-u'lema* is the highest Bosnian Muslim religious authority and spiritual leader.
31. The local cantonal, municipality and international structure of the ICBH constitutes 8 *muftiluks* in Bosnia and one in Slovenia, Croatia, Sandžak (Serbia), Germany and other Bosniak Islamic Communities in the world.
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33. Alibasic, 'The Profile of Bosnian Islam,' 123.
34. Ibid.
35. Halilovic, 'Historijat vakufa u BiH (History Highlights about Waqf in BiH).'
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38. For more details about types of *waqf* land, please refer to Appendix B.
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RE-EMERGENCE OF SHARI'AH PENAL LAW IN NORTHERN NIGERIA: ISSUES AND OPTIONS

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Abstract: It was in quest of political legitimacy as well as religious purity that former governor of Zamfara state, Senator Sani Ahmed Yerima, started a crusade in 1999 to re-establish Shari'ah. That initiative immediately found spacious reverberation with many Muslims. For the clerics, it was an opportunity to restore a religious and moral heritage that had been suppressed after colonial conquest. Many people saw Shari'ah as an instrument for achieving a just, safe, compassionate and less corrupt society. Thus, the Zamfara government's actions were soon taken up by other states, whose governors followed with varying degrees of enthusiasm. The federal government, however, declared Shari'ah to be incompatible with the constitutional guarantee of freedom of religion. The northern governors responded by highlighting that the same constitution vested in states concurrent powers to establish their own court systems. The writers develop this narrative and look into the constitutional provisions that guarantee freedom of religion and international and national judicial decisions where the right of religion has been vindicated.

Keywords: Islamic Law, Shar'iah, Multi-religious State, Secularism, Freedom of Religion

Introduction

Religion in Nigeria plays a prominent role in the life of the people. Some people believe that it is their cradle of light, wisdom and knowledge. Faith is increased through the study of scripture and prayer. Religious leaders in northern Nigeria are feared, respected and loved. They mediate situations that have defied several remedies. Initially, everybody worshipped whatever they wished until the introduction of Islam in the northern part of the country¹ in the early seventeenth century. As of today, Islam has become well-established in the northern states, with central mosques in almost all the state capitals.²

Before the advent of the British, Shari'ah and local customary law applied across the territories that would become Nigeria. After colonisation, the British introduced English Law. This did not, however, completely abrogate the existing legal systems; Shari'ah remained the dominant legal system under the Sokoto Caliphate, which operated in the northern region subject to trifling limitations

imposed by the British.³ On the eve of Nigerian independence, however, the British sought to limit the scope of Shari'ah. Finally, in 1967, it was formally excluded all together from the legal system of independent Nigeria when the Islamic Court of Appeal was abolished. However, some aspects of Shari'ah continue to be used at village level as part of Area or Customary Law.⁴

In 1978, the issue of Shari'ah resurfaced in the context of drafting a new civilian constitution. Heated debates focused on using the word 'secular' to describe the state and on the proposed creation of a federal-level Shari'ah Court of Appeal. Eventually, the matter was resolved through concession: the court was not created and the new constitution prohibited the adoption of any single religion by the state, but with the word 'secular' being dropped.⁵ Then in 1999, in quest for political legitimacy as much as for religious purity, the former governor of Zamfara state, Senator Sani Ahmed Yerima, started a campaign to restore Shari'ah. His initiative instantly found wide resonance with many Muslims.⁶ For the clerics, it was an opportunity to restore a religious and moral heritage that had been suppressed after colonial conquest,⁷ while many other people saw Shari'ah as an instrument for achieving a just, safe, compassionate and less corrupt society.⁸ Thus, the Zamfara government's initiative was quickly taken up by other states, whose governors followed with varying degrees of enthusiasm.⁹ Nevertheless, the federal government declared Shari'ah to be incompatible with the constitutional guarantee of freedom of religion. The far northern governors responded that the same constitution vested in the states concurrent powers to establish their own court systems.

International debate on Shari'ah in northern Nigeria has been distorted by such headline-grabbing events as the stoning of Amina Lawal Kurmi¹⁰ for adultery (*zina*) in 2002, despite Lawal's conviction being ultimately overturned on the basis of an argument made within Islamic law. Likewise, in the case of Saffiyatu Hussain T/Tudu v. A.G Sokoto State,¹¹ the appellant was found guilty and convicted of adultery by the Upper Shari'ah Court, Gwadabawa, Sokoto State, contrary to sections 128 and 129 of the Shari'ah Penal Code 2000 of Sokoto State. Thus, although she was sentenced to the *hadd* punishment of *rajm* (stoning to death), the Shari'ah Court of Appeal set aside the conviction of the lower court and discharged the appellant.

Overall, such extreme punitive measures are very rare, with most serious crimes continuing to be dealt with by normal secular law courts. In many areas, minority Christian populations still consider imposition of Shari'ah to be a restriction of their rights, for example to public music and alcohol consumption. It also raises fears amongst Christians that they may be subjected to the principles of Shari'ah against their will. However, over the years, critics have been reassured by the restraint shown by northern governors in their application

of harsher punishments (*hudud*). Although the exact effect of Shari'ah on non-Muslims varies across the region (chiefly because it has not been widely applied in some states), Christians tend to be free both to drink alcohol (if they do so in private) and use secular courts. In many cases, the authorities have made efforts to underline the common benefits that may derive from Shari'ah, especially given that many people, including Christians, have little faith in the state's justice system and its ability to build bridges with Christian communities.¹²

Why has the introduction of the Shari'ah generated so much heat? What does the introduction of Shar'iah mean to those who oppose it and what implications are there for non-Muslims?¹³ It is important to visit the past in order to make sense of the current situation – and, indeed, if it is to be hoped that any plans can be made for the future of Nigeria. There is a maxim: those who do not learn from their past mistakes are condemned to repeat them.

Freedom Of Religion And Limitations

Nigeria has a long history of state-imposed religion. Kingdoms based on indigenous beliefs often fused religion with temporal leadership, imposing the state's religion on its subjects. Following this tradition, at the beginning of the nineteenth century, a Fulani Muslim scholar, Usman dan Fodio, conquered the Hausa states, taking over much of northern Nigeria. He imposed Shari'ah and exercised loose control over a surrounding emirate commonly called the Sokoto caliphate. This kingdom remained intact until the British imposed colonial control after 1900. Under the British practice of indirect rule, however, Shari'ah and other local customs and institutions continued to function; colonial officials only prohibited severe Shari'ah penalties like death by stoning and amputations.¹⁴

At the outset of independence, the Nigerian Constitution incorporated the principle of the separation of religion and state while also upholding the religious freedoms of both individuals and communities. In practice, however, freedom of religion was often violated during the early independence years, with widespread discrimination based on religion in state employment and investment.

The 1999 constitution, like the charters that preceded it, was adopted only after debate on the issue of religion. Some Muslim leaders sought a prominent position for Shari'ah, while other Nigerians argued for a purely secular state. The result was a compromise that essentially left the existing arrangement intact, the new constitution stating: "The Government of the Federation or of a State shall not adopt any religion as State religion."¹⁵ But under Nigeria's federal system, the constitution does allow individual states to establish their own courts for matters not covered by federal law. It also allows states to establish their own Shari'ah Court of Appeal for civil matters.¹⁶ Another provision which has been subject to differing interpretations states that "every person shall be entitled

to freedom of thought, conscience, religion...and freedom...to manifest and propagate his religion or belief in worship, teaching, practice and observance.”¹⁷ Advocates of a more robust Shari’ah approach in Nigeria claim that practicing Shari’ah is integral to Islamic “worship, teaching, practice, and observance” and therefore should be allowed under this clause. Many Christians and secularists argue that official and institutionalised Shari’ah violates both their freedom of religion and the separation of religion and state.

After the restoration of civilian rule in 1999, advocates of Shari’ah began to assert themselves at the state level. In 2000, Ahmed Sani, governor of Zamfara state in the northwest, oversaw the implementation of a new law that extended Shari’ah to criminal matters. President Obasanjo did not challenge the move, prompting 11 other northern states to follow suit by adopting some form of Shari’ah criminal code. Although these codes only applied to Muslims, they exacerbated friction between religious groups, friction that in some cases broke into communal violence, killing hundreds of people.

Shari’ah is not uniform across the Muslim world. Within Sunni Islam, there are four major schools of jurisprudence (Hanafi, Maliki, Shafi’i and Hanbali) all of which developed around the turn of the first millennium. In Nigeria, the Maliki School is dominant. It is considered a more flexible variant than the others. All four schools, however, adhere on some level to the punishments for major crimes (*hudud* offences) described in the Qur’an or the sayings of the Prophet Muhammad, including death by stoning for adultery, eighty strokes for false accusation and amputation for theft, etc. Flexibility arises from the standards of proof involved and the particular circumstances of a crime. In Nigeria, there is also variation between states and individual courts concerning how Shari’ah is interpreted and applied, partly because the new criminal system was erected so quickly. Furthermore, defendants retain their right to appeal to the federal courts. As mentioned, there have been at least two cases of women who have been sentenced to death by stoning for extra-marital sex, only to have their sentences overturned on appeal.

The laws of a nation should not impose religious tenets on every citizen while also using state infrastructure to compel compliance. Hence, international human right instruments and the constitutions of various African states all guarantee the right to freedom of thought, conscience and belief, in addition to freedom of religion.¹⁸ Obviously, this secular approach carries the danger of various religious groups challenging state legislation when it is deemed to run contrary to their ideals. For example, in the United States case of *Smith v. Board of School Commissioner of Mobile County*,¹⁹ the court refused to accede to a request that a number of school textbooks be withdrawn from the school system because they allegedly promoted secular values.²⁰ By contrast, in 2015 the United

States Supreme Court ruled in favour of a Muslim woman, Samantha Elauf, who filed a law suit after she was denied a job at an apparel company, Abercrombie and Fitch, because she wore *hijab* (headscarf) for religious reasons. The court handed victory to the US Equal Employment Opportunity Commission (EEOC), which sued the company on her behalf.

The judiciary in Nigeria has interpreted this right to freedom in a number of cases, with the tone being set by Ayoola JSC in *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*,²¹ where his lordship emphasised that law has the role of ensuring “fullness of liberty when there is no danger to public interest,” which the Nigerian courts interpreted as emphasising freedom of religion. The courts in Nigeria have generally tilted more towards a ‘free exercise clause’ than a ‘non-establishment clause.’ The limitation of a free exercise clause is enshrined in section 45 of the constitution, where freedom in the interest of public defense, public safety, public order, public morality or public health “for the purpose of protecting the rights and freedom of others” has always been cautiously allowed.²² In *Provost, Kwara State College of Education, Ilorin & Ors v. Bashirat Salu & Ors*,²³ the Court of Appeal held that denying female Muslim students of the college the right to wear *niqab/hijab* under the pretext of protection of public safety, public order and the right of others violated the free exercise clause in section 38. It was also established that the free exercise clause²⁴ can only be restricted by the constitution itself or by law(s) made in protection of section 45,²⁵ not mere policy.

Nevertheless, the High Court of Lagos State, in *Asiyat Abdulkareem & Ors v. Lagos State Government & Ors*,²⁶ held that female Muslim students who wear *hijab* infringe the rights of non-Muslim students who will feel inferior to those *hijab* wearing students. The Court of Appeal sitting in Lagos, however, set aside this judgment.²⁷ Similar to this, for security reasons the government of Chad banned people from wearing the full-face veil following two suicide bomb attacks in 2015. The Chad government accused Nigerian militant Islamist group Boko Haram of the bombings, which killed more than twenty people. The Chadian Prime Minister, Kalzeube Pahimi Deubet, stated that the veil was used as camouflage by the militants and said security forces would burn all full-face veils sold in markets.²⁸

It is hoped that these cases will guide African countries in their pursuit of a relatively neutral path of secularism, in conformity with the secularism that is required of the modern state.

The Re-Emergence of Shari'ah Penal Law in Northern Nigeria

Twelve states in northern Nigeria have adopted the new Shari'ah legal system.²⁹ The Shari'ah courts in these states have jurisdiction over several new offences beyond personal law, including theft, unlawful sexual intercourse, robbery, defamation, and drinking alcohol. The Shari'ah courts may impose punishments in accordance with the provisions of the Shari'ah Penal Code Law (SPCL), which include: death, forfeiture and destruction of property, imprisonment, detention in a reformatory, a fine, caning (flogging), amputation, retaliation, blood money, restitution, reprimand, public disclosure, boycott, exhortation, compensation, closure of premises, and warnings, amongst others.³⁰ The adoption of SPCL attracted international attention and generated controversy within Nigeria. One concern is that SPCL violates basic human rights and human dignity, especially regarding equality before the law, equal protection of the law, torture, and degrading and inhuman punishment. Within the Nigerian legal system, SPCL raises questions about certainty of law, supremacy of law, separation of state and religion and strict standards of evidence and proof.³¹

The introduction of SPCL in the Nigerian legal system has been attributed to the rising influence of fundamentalist groups.³² The awakening of stronger Islamist tendencies in northern Nigeria has been closely linked to the successful Iranian Revolution against the Pahlavi dynasty over two decades ago. The emergence of an Islamic government under the leadership of Ayatollah Khomeini inspired Muslims across the globe, particularly amongst the youth, who saw Islam as a viable alternative to the bi-polar system of capitalism and communism. In the heartlands of Sunni Islam, a new rhetoric soon emerged; aimed at counteracting the Shiite threat posed by Iran, it sought to create a new generation of Sunni fundamentalists determined to produce an Islamic revolution based on the Sunni tradition of keeping to the path of the pious forebears (*salaf as-salih*).³³ The Muslim Brothers in Nigeria, for example, were a Sunni Islamic sect that, inflamed by the success of the Iranian people, joined with Ibrahim El-Zakzaky, an economics student at a northern Nigeria university, in his struggle for an Islamic State in Nigeria. The Muslim Brothers' close association with Iran, and the fact that several of their members were given scholarships by the Iranian government to study at the city of Qom, led inevitably to greater influence from Shiite doctrines. El-Zakzaky was himself seen as a Shiite, a fact that led to the disintegration of his movement. Nevertheless, a splinter group was formed, led by some of El-Zakzaky's most loyal supporters, including Abubakar Mujahid (in Zaria), Aminu Aliyu Gusau (in Zamfara) and Ahmad Shuaibu (in Kano). This group maintained that its disagreement with Zakzaky was purely doctrinal because they rejected Shiite theology. They remained committed, however,

to the revolutionary process of Islamisation while remaining faithful to Sunni orthodoxy.³⁴

As suggested above, independence did not change Nigerian dependence on an imposed British legal system or the hostility directed towards anything Islamic, including the introduction of an Islamic Banking system. Even today, Islam, its adherents and institutions have become daily objects of ridicule in the mass media and the focus of surveillance by security agencies. What we have is not a great nation at harmony with itself, but groups of people of diverse worldviews and cultures lacking any serious cohesion: a conceited Christian minority on one hand, an alienated, discontented but unyielding Muslim majority on the other, all living in a country whose economy is wholly controlled by Western imperialism.³⁵

In this context, the struggle for SPCL was reflective of a need for “independence to live according to our convictions, values and culture, the independence to operate, the socio-economic, legal educational and political systems we believe in, understand and respect, the independence to associate with who we wish, how we wish and when we wish.”³⁶ It was further postulated that section 38 of the 1999 Constitution guarantees freedom of religion.³⁷ A Muslim firmly believes that submission to the Will of Allah is inchoate if he chooses or is made to follow some part of His injunctions (i.e. personal law) while abandoning others (the penal system). Professor Yadudu argues that sections 4, 6, 277, and the Second Schedule to the 1999 Constitution establish both the right to new Shari’ah Courts, the expansion of their jurisdictions and the right to enact laws that draw inspiration from religious and non-religious norms. In consonance with these provisions, the SPCL represents an Islamic penal system, enacted in a written law and with specific punishments prescribed. Yadudu further argues that the Nigerian Constitution did not declare Nigeria to be a secular state, meaning that any state initiatives implementing the Shari’ah cannot be said to have violated Section 10 of the constitution prohibiting any state from adopting any religion as a state religion.³⁸ He also contends that any suggestion that the Shari’ah should be reviewed or reformed will attract a severe rebuke from Muslims, who will see the effort as, at best, revisionist in character or, at worst, an attempt to meddle with Allah’s injunctions.

In some northern states, implementation of Shari’ah has been driven by an Islamic law enforcement agency popularly called *hisbah*. These enforcement organisations are composed mainly of locally-recruited young men. They have been most active in Kano and Zamfara states, rather than the other states. Their role is to ensure observance of Shari’ah and report breaches to the police. In some respects, their introduction followed a similar logic to the emergence of vigilante groups or non-official security providers in other parts of the country

– namely, a deep public distrust of the federal police and a desire to seek other means of justice. *Hisbah* apprehends offenders, hands them over to the police, but does not prosecute them because it is not constitutionally empowered to do so.³⁹ These organisations operate with the consent and support of state governments, although the strict nature of that support, as well as mechanisms for accountability, vary from one state to another.⁴⁰ In some, the government pays a small salary and provides uniforms, vehicles and offices at both the state capital and local government secretariats. In others, they are less organised and unpaid. Kano has the most developed organisation due to the activities of former governor Shekarau. Its *hisbah* has 9,000 members who receive stipends. It also has an active censorship board and committees to look at public morality issues. In some states, new *hisbah* members undergo a training programme with a brief outline of their duties and the limits of their powers. Introduction of the *hisbah* has raised controversies. In February 2006, the federal government accused the Kano state government of seeking foreign funding to turn it into a parallel police force. Kano *hisbah* officials denied this accusation and maintained that there is a difference between *hisbah* and the police.

In the early years of its operation, there were reports of *hisbah* violence. Operatives would sometimes assault women they judged to be indecently dressed, destroy alcohol merchants' shops and deal severe punishment to anyone alleged to have insulted Islam. However, there were no reports of extrajudicial killings⁴¹ and, with time, both the enthusiasm and human rights abuses associated with the early years declined. More recent controversies have centred on more prosaic issues, such as whether men and women can mix on public transport. The Kano *hisbah* tried to stop this, following a state proclamation banning women from riding motorbikes and travelling in taxis, but failed to consider that people are forced to share transport due to cost. The state government has since introduced rickshaw motorbikes so that male drivers can legally transport female passengers, but in reality the Shari'ah restrictions have been quietly dropped.⁴² *Hisbah* operatives are now most likely to describe their work in terms of social mediation. They encourage (or impose) out-of-court settlements regarding land, marriage and inheritance disputes, while also facilitating reconciliation of family issues. In this way, they have reduced the need for local people to resort to the police and the courts to settle disputes. They encourage forgiveness and reconciliation based on Islamic principles and as assisted by the Nigerian Police Force. They even serve as traffic wardens, help regulate markets and aid in the Hajj exercise. Although they have the authority to make arrests, they generally relinquish suspects to the police, who have the power to prosecute suspects before a Shari'ah court. *Hisbah* officials consider the flexibility of this approach and Shari'ah openness to forgiveness and financial restitution to victims to be advantages. While some

locals and other observers may object to such moral policing, it has undoubtedly achieved some success at this level.

However, there are several Muslim voices critical of Shari'ah and the *hisbah*. Contrary to the initial expectations that Shari'ah would curb corruption in government, enhance socio-economic welfare, reduce crime and ensure more efficient dispensation of justice, it has actually done little to remedy these problems.⁴³ Although crime statistics in Nigeria are very unreliable, there is little evidence that Shari'ah has reduced overall criminality in the twelve Shari'ah states. The Federation of Muslim Women's Associations in Nigeria expressed early concern that, although the criminal aspects of Shari'ah were being carried out, the injunctions to create a more just society were being ignored.⁴⁴ However, despite these shortcomings, many see these very discussions as part of what Shari'ah has brought about – a debate over the rule of law and equality.⁴⁵ Shari'ah can therefore be understood as an extension of other less prominent forms of civilian protest, such as the Islamic anti-corruption organisation and the Muslim League for Accountability.⁴⁶ The introduction of Shari'ah and the activities of the *hisbah* have raised the question of women's rights in the region, too.⁴⁷

Controversy of Nigeria as a Secular or Non-Secular State

As discussed, there is no unanimity about the secular or non-secular nature of Nigeria. Although many have maintained that Nigeria is secular, others prefer to affirm it as multi-religious. Even though each side attempts to support their argument with constitutional provisions, to date no Nigerian constitution has expressly referred to Nigeria as either secular or multi-religious. The two expressions are mere interpretations. However, because it could be argued that secularism denotes un-belief in Allah, for Muslims the only available option would be to consider Nigeria as multi-religious.⁴⁸

Statutorily, the Preamble of the 1999 Constitution states that Nigeria is under God.⁴⁹ The Nigerian National Anthem contains a prayer to “God of Creation” to “direct our noble cause.” The religious demography of Nigeria, however, makes it impracticable for either Islam or Christianity to be made the religion of the state; unlike in most other countries, where an overwhelming majority professes a single religion, no religion predominates in Nigeria:⁵⁰ 50.5% of Nigerians are Muslim, 48.2% Christian and the remaining 1.4% animalists.⁵¹ Consequently, religious pluralism is more suitable than secularism.

As cited above, section 10 of the Constitution of the Federal Republic of Nigeria provides: “The Government of the federation or of a state shall not adopt any religion as a state Religion.”⁵² Based on this constitutional provision, some people say Nigeria is secular. Nevertheless, the phrase ‘secular state’ is not used anywhere in the constitution. Moreover, there is no reported Nigerian case where

secularism has been given judicial interpretation. Rather, the above provision represents what is regarded as the 'primary rights on the freedom of religion template'. The other appendage rights which aid in the protection of religion are freedom of association,⁵³ right to private and family life,⁵⁴ right to freedom of press and expression,⁵⁵ and right to freedom of movement.⁵⁶ All accumulatively protect the rights of Nigerians to practice their faith. These provisions are complemented with or by International Legal Instruments.⁵⁷

Secularism is commonly regarded as an ideology holding that religion should not constitute the basis of politics or, in the extreme, that religion has no place in public life. Essentially, secularism seeks to preserve the religious neutrality of government and culture.⁵⁸ Wikipedia defines a 'secular state' as:

a state or country that purports to be officially neutral in matters of religion supporting neither religion nor irreligion. A state also claims to treat all its citizens equally regardless of religion; and claim to avoid preferential treatment for a citizen from a particular religion/non religion over other religion/non religion. Secular state does not have a state religion or equivalent, although, the absence of a state religion does not guarantee that a state is secular.⁵⁹

The question is, does section 10 of the 1999 Constitution fulfil this picture of a secular state?⁶⁰ Apart from the clear wording of section 10, the margin note to the section reads, "Prohibition of State Religion." It can therefore be inferred that the intention of the drafters of the constitution was indeed to separate state from religion. The state must not allow any religion to influence its official decisions or be promoted with state funds.⁶¹

It should be noted that the recognition of freedom of religion⁶² and freedom from discrimination⁶³ on account of a person's religion are further efforts to make Nigeria secular. The drafters of the 1999 Constitution submitted on the same section 10 as follows:

It may be argued in the light of this provision that religious symbols (Indigenous or received) have no place on public lands, national edifices, currency, flag, coat of arms, anthem, pledge and other national symbols. By this section, Nigeria is declared to be a secular state and therefore cannot join any organisation that has a religion-based Constitution.⁶⁴

On this basis, Nigeria appears to be secular. Certainly, its constitution has not adopted any religion as the country's official creed. Nevertheless, a non-secular state can be defined as one where religion is experienced on an everyday level in civil life, although without necessarily forming part of the government.⁶⁵ On a superficial reading of this definition, Nigeria does appear to be non-secular –

although it cannot be considered a religion-based state in the fashion of countries like Afghanistan, Saudi Arabia or the Vatican City.

Issues And Options

i. Multi-religious

The principle of freedom of thought, conscience and religion is well established in international human rights law as a principal norm of a modern democratic and pluralistic society, with all international and regional human rights treaties including a provision on this fundamental right.⁶⁶ According to the Human Rights Committee (HRC), religious freedom maintains the rights of the individual to embrace and manifest any belief or religion without restriction, which includes the right to change religious affiliation.⁶⁷ Restrictions on religious freedom cannot be justified by the fact that the state recognises one religion as its official religion.⁶⁸ Baderin explains that “while the principle of religious freedom is theoretically recognized by Muslim states, the scope of its practical application is narrower than that of international human rights law.”⁶⁹

Oloyede has echoed this argument and cautioned that neither a state religion nor secularity should be imposed on Nigeria. He stated: “Nigeria is a multi-religious state and no attempt ought to be made to impose either a state religion or secularity on any part of Nigeria. We have called attention to the hypocrisy and futility of secularity or secularism even in countries generally regarded as secular.”⁷⁰

The three systems of law in the country – common, Islamic and customary – are provided for by the constitution and should be allowed to operate without any major conflict. It is our opinion that every Nigerian should be free to choose either customary or Islamic law, both of which should be applicable and enforceable in matrimonial matters in any part of Nigeria in order to promote national unity and integration.

ii. True or Pseudo-Federalism

The federal system is based on the principle of independence within interdependence. It is a system that enshrines a form of political integration based on a bond, at once voluntary and restrictive, between several regional territorial entities, a bond which ensures that, in spite of political diversity, the whole will remain unified as a super state. Federal principles are therefore concerned with self-rule as well as shared rule, with the constituting states exercising jurisdiction in matters within their territory and competence, so long as these matters do not adversely affect the rights of other constituting member states. In a broad

sense, federalism involves the vinculum of individuals, groups and politics in lasting but limited union, in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrates of all parties.⁷¹ A federal system is therefore made up of a general government (not a central government) called the federal government, to which are added regional or state governments. Political, legal and other derivative powers are divided such that the general and regional governments co-ordinate while being independent, such that each is sovereign in its own sphere, including in the right to adopt a religion as a state religion, contrary to the provision of the constitution.⁷²

A federal state, therefore, is not a sovereign state as a supreme omniscient political power is not established within it, only shared powers. The power relation between the federating units (federated states and the federal state) is therefore that of different and co-ordinated orders of government, not of multiple tiers with hierarchically subordinate powers. A federal government is merely a government charged with particular functions and defined by a specific relationship to individuals. It is, as such, equal in status to the regional or state governments to which it is linked constitutionally. These last are, in turn, local authorities and bearers within the federal state of the collective rights established in particular territories by the history, culture and peculiarities of the regions they represent.⁷³ Nevertheless, the states recognise and submit to the federal government's authority and the superior value functions which have been entrusted to it, thereby bringing the country into line with the international political order. Establishing an armed force, the national economy, immigration, postal service and external affairs, are functions delegated to the federal government so that the country can participate and gain from the world political order.

Nigeria was founded as a federal state by its founding fathers. Nevertheless, the Nigerian House of Commons, during a debate about the country's constitution, resolved that the latter should provide greater regional autonomy and remove the power of intervention from the federal government in matters that could, without detriment to the other regions, be placed entirely within regional competence. They also recommended that the regional legislatures become sovereign, so that no other body in Nigeria can have the authority to alter their decisions on subjects relevant only to themselves, including in matters of faith. The implications of this are that each region could develop its own constitution and laws, reflecting its own values, customs, history, and social mores, including religion.

Conclusions and Recommendations

The paper concludes with the following recommendations:

- There is a need to reform the newly-introduced Shari'ah Penal Code Law (SPCL) in order to address the issue of strict standards of proof and evidence in all offences, especially those that carry the death penalty.
- Offences and their punishments must be founded on written law and not be by judicial discretion, as suggested in some provisions of the SCPL.
- There should be a separation of powers between the executive and the judiciary so as to respect the independence of the judiciary and allow it to serve justice.
- The Nigerian legislature must strive to enact independent law on freedom of religion issues, instead of relying on the current vague principle of freedom of thought, conscience and association.
- The new Shari'ah legal system should be certain and respect the principles of fundamental human rights, including: right to a fair hearing; right to be represented by self or a counsel of one's choice; right to an interpreter when the accused does not understand the language of the court; and the principle of '*nulla poene sine lege*' (a person shall not be convicted of a criminal offence unless that offence is defined and a penalty prescribed in written law).
- The leadership of Nigeria's two dominant religions, under the aegis of the Christian's Association of Nigeria (CAN) and the Supreme Council for Islamic Affairs of Nigeria (SCIAN), must cultivate the habit of living harmoniously in order to ensure sustained peace in Nigeria.
- The new Islamic legal regime lacks the legal certainty and the facility to recruit judges capable of administering it. Judges, lawyers, court staff and the police need to be oriented and trained. There is a pervasive lack of public awareness as to the provisions of this new Islamic legal system.
- The law should not be contrary to natural justice, equity and good conscience.
- Nigerian citizens must make a concerted effort to develop genuine freedom of religion through a cross-root socio-cultural approach at the micro level, instead of expecting the government to ensure that freedom for them.

Islam is not a religion in the limited sense of the word, but a complete way of life, having within it a complete legal system, Shari'ah. It is only fitting that this be applied amongst Muslims.

The application within domestic laws of provisions derived from international conventions, such as the Universal Declaration of Human Rights, is a step towards recognising the inherent dignity and equality of all members of the human family as a foundation for freedom, justice and peace in the world. Violations of human rights often result in barbarous acts which outrage the conscience of humankind. Regardless of the customs, religion, tradition and unique history of a society, human standards and respect for human dignity and the worth of a person are universal aspirations.

The government should have the power and obligation to provide infrastructure for the well-being of individuals. An individual's spiritual well-being, however, should be left to that individual and his Creator, as long as doing so does not infringe upon the rights of others.

Notes

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1. The history of Nigeria's regions and states is complex and confusing. Nigerians frequently use the term "the North" to designate the old Northern Region, an entity inherited from colonial powers and in place until the creation of new states in 1967. This region covered over half of the country, going as far south as the current capital, Abuja. The term no longer has any official use.
 2. 'Total Facts about Nigeria: Religion in Nigeria and Worship'. Available at: <http://www.total-facts-about-nigeria.com/religion-in-nigeria.html> (Accessed on: 10 June 2015).
 3. A. H. Bello, 'Shari'ah and Prospects for Islam in Eastern Nigeria,' ed. S. K. Rashid *Islamic law in Nigeria* (Lagos Islamic Publications Bureau, 1986), 75.
 4. H. B. Yusuf, 'Managing Muslim-Christian Conflicts in Northern Nigeria: A Case Study of Kaduna State,' *Islam and Christian Muslim Relations* 18, no. 2 (2007): 237-256.
 5. Toyin Falola and Mathew Heaton, *A History of Nigeria* (Cambridge: Cambridge University Press, 2008), 77-93.
 6. For an early view, see Murray Last, 'La charia dans le Nord-Nigeria,' *Politique Africaine* 3, no. 3 (2000): 141-152. He pointed out that many ordinary people saw the 1999 extension of Shari'ah as an opportunity to regain the lost glory of the caliphate era.
 7. Crisis Group interview, Imam Mohammed Sani Isa, Kaduna, 12 June 2009.
 8. Crisis Group interview, Aminu Mohammed Dukku, lecturer, sociology department, Bayero University, Kano. 23 June 2009. Several Crisis Group interlocutors stressed that they saw Shari'ah as a response to social immorality

- and associated low-level criminality.
9. See Shekarau, 'The Implementation of Shari'ah in a Democracy: The Nigerian Experience,' keynote address, *International Conference on the Implementation of Shari'ah in Democracy: The Nigerian Experience*, Abuja, July 2004.
 10. Amina Lawal v. The State [2003] NNLR, 488.
 11. Ibid., 439.
 12. Crisis Group interviews, Head of the Supreme Council of Shari'ah in Nigeria, Kaduna, June 2009; Christian Leader, Kaduna July 2009. One person pointed out that, in Kano, Christians tend to accept Shari'ah because they know they are a small minority, while this is not the case in Kaduna, for example. Crisis Group interview, community activist, Kano, October 2010.
 13. M. K. Banu Az-Zubair, 'Federalism, Shari'ah and Nigeria Constitution,' Available at: nigeriaworld.com/nigeria/odili/messageboard/naijapersonalwebpages/naijanet.com (Accessed on: 11 June 2015).
 14. Democracy Web, 'Comparative Studies in Freedom,' Available at: <http://democracyweb.org/note/94> (Accessed on: 10 June 2015).
 15. Section 10 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
 16. Ibid., 275-9.
 17. Ibid.
 18. See Section 38 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Article 21 (1) (b) & (c) of the Constitution of Ghana, 1992.
 19. 827 F. 2d 684.
 20. N. Nsereko, 'Religion, the State and the Law in Africa,' *Journal of Church and State*, No 28 (1986): 28.
 21. (2001) 6 NWLR (Pt 710); [2001] 3 SC, 76.
 22. I. O. Oloyede, W. O. Egbewole and H.T. Oloyede, 'The Operational Complexities of Free Exercise and Adoption of Religion Clauses in the Nigerian Constitution,' Paper delivered at the *African Consortium for Law and Religion Studies*, Namibia, 17-19 May 2015, 15.
 23. CA/IL/49/2006 delivered on 18 June 2006.
 24. Section 38 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
 25. Outlining defense, public order, morality, health and protection of the rights of others.
 26. Suit No. ID/151/13 delivered on 17 October 2014, 13-4.
 27. Miss Asiyat Abdulkareem (Minor) & 2Ors v. Lagos State Government & 3Ors CA/L/135/2015. Available at: gaklawco.org/wp-content/uploads/2015/11/Asiyat-Abdulkareem-Ors-v-LASG-ors-CA.pdf (Accessed on: 30 05 2017).
 28. Nigerian Tribune, 'Chad Bans Islamic Face Veil after Suicide Bombings,' [Thursday, 18 June 2015], 48.
 29. Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Zamfara and Yobe.
 30. H. Ibrahim, 'Reflections on New Shari'ah Law in Nigeria,' prepared in cooperation with the Africa Policy Studies Program at Council on Foreign Relations, [June 2004], 3, Available at: <http://www.cfr.org/content/publications/attachments/Reflection-on-the-New-Shari'a-in-nIGERIA.pdf> (Accessed on 12

- June 2015).
31. Ibid, 4.
32. S. L. Sanusi, 'Fundamentalist Groups and The Nigerian Legal System: Some Reflections.' Available at: <http://www.whrnet.org/fundamentalisms/docs/doc-wsf-sanusi-nigeria-0311.rtf> (Accessed on: 12 June 2015).
33. Ibid.
34. I. Hauwa, 'Reflections on the New Shari'ah Law in Nigeria,' Available at: http://www.google.com/search?q=Ibrahim+hauwareflection+new+Shariah_law+in+Nigeria&ie=utf-8&ae=ytf-8?> (Accessed on: 12 June 2015).
35. I. Sulaiman, 'The Islamic Political System and the Political Future of Nigeria.' Paper delivered to the *National Conference on the Political Future of Nigeria*, Ahmadu Bello University, Zaria, 1-3 August 1-3, 1986.
36. Ibid.
37. A. Yadudu, 'Benefits of Shari'ah and Challenges of Reclaiming a Heritage: The Nigerian Muslim Forum' *UK Holding at Commonwealth Conference Centre*, London, 14 April 2001/20 Muharram 1422H.
38. Ibid.
39. Crisis Group interview, Dr Saidu Ahmed Dukawa, Director General of *hisbah* in Kano State, May 2010
40. This analysis of the *hisbah* is based on Crisis Group interviews with: members of *hisbah* boards and ordinary *hisbah* officials, both in Kano and Kaduna during May and October 2010; academics, Kano, October 2010; the head of the Supreme Council of Sharia in Nigeria, Kaduna, June 2009. Also see F. L. Adamu, 'Gender, Hisbah and the Enforcement of Morality in Northern Nigeria', (2008).
41. International Crisis Group Working to Prevent Conflict World Wide. Northern Nigeria: Background to Conflict, Africa Report, No. 168, [20 December, 2010], 17.
42. Similar tensions occurred in Gusau, Zamfara, see Last, 'La charia dans le Nord-Nigeria,' 22. 84 Crisis Group interview, Imam Mohammed Sani Isa, Kaduna.
43. In Kano state, a probe instituted by the government in December 2004 indicted the former governor, Rabi'u Musa Kwankwaso, and ordered him to refund almost a billion naira (about \$6.6 million). Similarly, in November 2009, a commission of inquiry ordered the former governor of Bauchi state, Adamu Mu'azu, to refund 1.6 billion naira (about \$10.3 million), which he allegedly misappropriated. See "Ex-governor, others to refund N18bn", *The Nation*, 13 November 2009. The former governor of Jigawa state, Saminu Turaki, and of Sokoto state, Attahiru Bafarawa, are being prosecuted by the Economic and Financial Crimes Commission (EFCC) on charges of corruption involving 36 billion naira (\$240 million) and 15 billion naira (\$100 million), respectively. Figures made available to Crisis Group by legal department of EFCC, Abuja, May 2010.
44. H. B. Yusuf, (N.5), p. 251.
45. S. L. Sanusi, 'Politics and Sharia in Northern Nigeria', in *Islam and Muslim Politics in Africa*, ed. Benjamin Soares and Rene Otayek (New York: Palgrave MacMillan, 2007), 177-188.
46. This small organisation campaigns for better use of public resources, for election campaigns to be run on issues rather than on religious or ethnic lines, and for women to exercise their right to vote. Crisis Group interview, head of the Muslim

- League for Accountability, Kaduna, August 2009.
47. *Hisbah* groups frequently include women, who tend to limit their policing to family matters. Around 1,500 of Kano's 9,000-strong corps (or 17 per cent) are women.
 48. Oloyede et al., *The Operational Complexities of Free Exercise*, 12.
 49. Constitution of the Federal Republic of Nigeria, 1999, (Promulgation) Act Cap. C23 Laws of the Federation of Nigeria, 2010.
 50. Ishaqa et al., 13.
 51. The Pew Forum on Religion and public Life provided these statistics in 2003. Available at: www.state.pew-forum.org/world-affairs/countries/countryID=150 (Accessed on: 6 May 2015).
 52. The Constitution of the Federal Republic of Nigeria, 1999 (as amended).
 53. Ibid., Section 40.
 54. Ibid., Section 37.
 55. Ibid., Section 37
 56. Ibid., Section 41.
 57. Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Right, 1966, African Charter on Human and peoples right, 1981, etc.
 58. M. J. Shola, 'Secularism and Politics of religious Balancing.' Available at: www.irmagard-conix-stiftung.de/fileadmin/user-upload/pdf (Accessed on: 14 June 2015).
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 61. Ibid.
 62. Section 38 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
 63. Ibid. Section 42.
 64. The 1999 made simple for everyone's use, (1st Edn), published by Juriscope- You and the Law Series.
 65. Ibid.
 66. See B. Mashood, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2005).
 67. Human Right Committee, General Comment 22, U.N. DOC.HRI/GEN/1/Rev.1, (1994), pars 3-5 in Moataz Ahmed EL Fegieri, 'Islamic and Freedom of Religion: The Case of Apostasy and its Legal Implications in Egypt,' *Muslim World Journal of Human Right* 10, no. 1 (2013): 26.
 68. Ibid.
 69. B. Mashood, 'A Macroscopic Analysis of Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruent?' in *International Law and Islamic Law*, ed. Baderi Mashood (Survey: Ashgate, 2008).
 70. Ibid.
 71. M. K. Banu Az-Zubair, 'Federalism, Shari'ah and Nigeria Constitution,'

Available at: [nigeriaworld/nigeriaweb/odili/message board/naija personal webpages/naijanet.com](http://nigeriaworld/nigeriaweb/odili/message_board/naija_personal_webpages/naijanet.com) (Accessed on 11 June 2015).

72. Section 10 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
73. Ibid.

BOKO HARAM'S CLAIM TO A 'CALIPHATE': IS IT CREDIBLE?

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Abstract: As Boko Haram tries to establish a new caliphate, while imposing Shari'ah law and persecuting and kidnapping young girls, it is timely to enquire into both the workings of the early caliphate and the role an Islamic state should play in the world. The aim of this paper is both to counter Boko Haram's approach to the caliphate and examine the administration of Umar bin Abdul Aziz (715-717CE). The article is qualitative, permitting a descriptive and historical approach. This study examines Umar bin Abdul Aziz as a devoted Muslim who set new standards for what a Muslim ruler should be like. This study suggests that, despite Muslim dreams of a 'return of the caliphate', this concept means different things to different people. While Boko Haram violently struggles for power, Islam encourages sovereignty based on honour and gained through better actions and faith.

Keywords: Caliphate; Boko Haram; Leadership; Umar bin Abdul Aziz; Islamic State

Introduction

There have been a number of studies of the Nigerian group known as Boko Haram, most of which have focused on the group's terrorist acts, especially in Nigeria's north-eastern region. In particular, Boko Haram's activities have been discussed in the context of the state's response to it.¹ In addition, scholars have examined attempts by the group to impose religious ideology through terrorism.² The activities of Boko Haram have also been linked to the question of insecurity.³ But if Boko Haram is fighting to overthrow the Nigerian government and create an Islamic state, as reported in Chothia's *Who are Nigeria's Boko Haram Islamists?*⁴ and Cook's *Boko Haram: A New Islamic State in Nigeria*,⁵ the question arises, in what manner should an Islamic state be governed? In other words, is there an Islamic approach to governing a sovereign land?

The name 'Boko Haram' is derived as follows: the word *boko* in the Hausa language means 'book' (mostly in the sense of a Western book) and *haram* is an Arabic loanword meaning 'forbidden'. The group got this name from the local residents of its base at Maiduguri due to its strong disgust of Western education, which it believes is corrupting Muslims. However, the name the group uses to refer to itself is *Jama'atu Ahlissunnah lidda'awah wal Jihad* ('The Group of the People of the Prophet's Teachings for Propagation and Jihad'). Until 2009, the

group was led by Mohammed Yusuf, who during that year died in the custody of the Nigerian Police Force.⁶

Given the level of atrocities committed by Boko Haram (such as suicide bombings, maimings, and the killing of ordinary citizens), it seems the lengths they will go to in achieving their dastardly aims knows no limit. Nigerians as a whole have been subjected to extraordinary levels of trauma and anxiety due to indiscriminate Boko Haram attacks. One of the major atrocities committed by the group, which shocked the world, was the kidnapping of more than 250 schoolgirls from Chibok. In a video released by the group, their leader Abubakar Shekau announced that he would sell the girls, since he regarded them as war booty.⁷ This led to an outcry from the international community, civil society and even social media.

The atrocities committed by the group have had a significantly negative effect on the Nigerian populace. During the peak of its activities, the group killed an estimated 4,000 people, thereby making it one of the deadliest terrorist groups in the world.⁸ Both the United Nations and the Nigerian government have reported that Boko Haram-related violence has affected more than 10.7 million people, 2.4 million of whom are currently displaced, with the vast majority (1.5 million) of the latter being children.⁹ Although the group has focused on a wide range of targets, its victims are often impoverished civilians in the Muslim populated north-eastern part of Nigeria.

The central issues examined by this article are the declaration by Boko Haram of an Islamic caliphate in Nigeria and the manner in which the group has gone about their activities.¹⁰ The caliphate as an institution emerged after the demise of the Prophet Muhammad in 632CE and proved central to Islam and Islamic political thought from the seventh to the twentieth centuries. As both a political and a religious idea, its relevance appears to have waxed and waned according to circumstance.¹¹ Certainly, the caliphate is one of the most contested of Islamic institutions today, with contemporary debate often revolving around its applicability in modern times.¹² Of all Islam's caliphs, one of the most significant was Umar bin Abdul Aziz. He is sometimes counted among the Rightly-Guided Caliphs, after Abu Bakr, Umar, Uthman, and Ali, even though he ruled after them. Umar bin Abdul Aziz became Caliph in Safar, 99 AH, and ruled for two years and five months. During his reign, justice was tasted everywhere; he settled all disputes and introduced praiseworthy innovations in administering the Islamic state.

This article looks at Boko Haram's struggle for control in north-eastern Nigeria and juxtaposes its actions with the exemplary leadership displayed by Umar bin Abdul Aziz. Through analytical and historical approaches, the article highlights issues that are pertinent to the development of a modern Islamic state. It also attempts to assess the impact of the Boko Haram insurrection and

what can be gleaned from the lessons of past Muslim rule. Its assessment of the effectiveness of past Muslim rule, especially that of Umar bin Abdul Aziz, will add to the growing literature on the caliphate and the contemporary Islamic state.

Boko Haram and the Struggle for Power

Boko Haram's struggle is directed against the Nigerian government. In achieving its aims, the group uses various means, ranging from suicide bombings to kidnappings. The group has not stated in clear terms what its political plans and programmes are, or how the organisation is structured. Videos emanating from the group often show Abubakar Shekau as leader. Since the group operates under furtive circumstances, the level of its public support and the number of its operatives are difficult to ascertain. However, there are indications that the group receives local and international support in their struggle for power.¹³

Boko Haram have shown cruelty, using propaganda based on violence in their struggle against the Nigerian government. Its use of violence can be seen in its various videos, which capture beheadings and throat-slittings. The group began its operations by attacking the security forces in the country, those people with links to the government, as well as anyone else who actively opposed them. They have since moved on to women and children.

The group's struggle for power reached its peak when it declared Gwoza in Borno state as the capital of their caliphate. In getting to that stage in their melee, they had already murdered Christians and Muslims opposed to their aims. For example, the group killed the emir of Gwoza, Shehu Mustapha Idrissa Timta, on May 30, 2014.¹⁴ As of September 2014, Boko Haram is still able to operate freely in a territory about the size of Rhode Island.¹⁵ School students in particular have faced their brutish attacks, with male students being killed and female students kidnapped for ransom or servitude.¹⁶

As a result of the group incessantly killing and maiming innocent citizens, it is becoming obvious that their aim is not purely religious, but rather stems from a desire to control and rule the people. Nevertheless, the group's ideology claims to be against the constituted government of the country, tending instead towards the establishment of Islamic order. This is what has transformed the group from a mere proselytizer of the faith into a clandestine network that confronts the authorities, leading to irregular warfare.¹⁷

The radical approach of Boko Haram in its struggle for control is also moulded by its Nigerian setting. The country's history of poor administration, as well as extraordinary destitution in the north, plays into the narrative of the radical group. As a result, the group combines a partisan and sweeping Islamic agenda with violence. Its expressed objective in the struggle for power is the establishment of a Shari'ah-compliant caliphate. However, the group demonstrates little

enthusiasm for really administering or actualising economic improvement in the territories it controls.

Reactions to Boko Haram's Control

The battle between the Nigerian government and Boko Haram has led to severe humanitarian crisis. Many individuals have fled their homes, especially in the northern part of Nigeria, with many others being exiled to neighbouring countries. As a result, Boko Haram is seen as a disturbance on the grounds that their insurrection has made life more wearisome. Economic exercises have been destabilised, free movement through the country has been disrupted, and the increased presence of policemen has brought more dishonesty and intimidation.¹⁸ Indeed, where sections of society, specifically parts of the youth, are known to support the campaign or message of Boko Haram, their support is often based on Boko Haram's willingness to attack loathed Nigerian government authorities.

The general public attitude to the group and its message has nevertheless been mostly negative. For instance, when references are made to attacks by the group, it is frequently emphasised how innocent individuals suffer. Many who are directly affected by the violence perpetrated by Boko Haram have expressed a desire to be allowed to carry on with their normal lives rather than be drawn into the unnecessary political-cum-religious gimmicks of the group. It is important to state here that the populace facing attack by the group are still as committed to Islam and Shari'ah as before, with their main concern being the curbing of social vices discouraged by the religion.¹⁹ Even though Boko Haram has brought these issues back onto the political agenda, its manner of dealing with them has led to other problems, including killing fellow Muslims for matters as trivial as playing cards, selling *haram* meat or even drinking in beer parlours. Such outrageous implementation of Islamic Law has estranged numerous Muslims, prompting many Muslim scholars to draw attention to the fact that betting and drinking, albeit illegal in Islam, do not carry capital punishment.

Although it has been noted that Boko Haram has, at times, carried out attacks at certain times and places in order to avoid hitting ordinary citizens, when attacking Christians, the radical group has often killed indiscriminately. Christian places of worship have been attacked during Sunday worship services, when men, women and children have been killed in order to create the greatest impact. As Wole Soyinka, in an article written in reaction to the indiscriminate killings of Boko Haram, notes: "when you get a situation where a bunch of people can go into a place of worship and open fire through the windows, you have reached a certain dismal watershed in the life of the nation."²⁰

Apart from the normal military counter-insurgency, a major step taken by the people in their fight against Boko Haram has been the establishment of paramilitary

groups (popularly called vigilantes groups), which later metamorphosed into the Civilian Joint Task Force. This Task Force has been more effective than the Nigerian military, especially due to the incidences of mutiny, refusal to fight and desertion found among the latter. This means, however, that locals have often had to rely on the vigilantes when fighting Boko Haram. The vigilantes are people drawn from the local population and at times know members of Boko Haram in their districts.

Islamic scholars and human rights officials from various parts of the world have also denounced the killings and kidnappings committed by Boko Haram. The leaders of the Council on American-Islamic Relations (CAIR) and the Council of Muslim Organizations (CMO), for instance, held a joint press conference calling for the immediate release of those kidnapped by Boko Haram. The research institute and human rights committee of the Organisation of Islamic Cooperation (OIC) has echoed these denunciations.²¹ Not to be left out, religious leaders and officials in Nigeria have sharpened their tone of condemnation. Sanusi Lamido Sanusi, the Emir of Kano, called on Muslims to fight against Boko Haram, saying: “These terrorists slaughter our boys and abduct our girls to force them into slavery... People should not sit idle and say prayer is the only solution. People should be made aware of the importance of being in a state of preparedness and make sure they acquire what they need to protect themselves. We should be ready to give our lives.”²²

A Brief Note on the Life of Umar bin Abdul Aziz

Umar bin Abdul Aziz bin Marwan bin Hakam was born in Hilwan, Egypt, around the year 62 AH, when his father was Governor of Egypt.²³ His mother was Umar bin Khattab’s granddaughter – this is, the daughter of Asim bint Umar bin Khattab.²⁴ After he memorised the Qur’an at a young age, his father sent him for further education in Madinah. There he was known to frequent the gatherings of scholars such as Ubaydullah bin Abdullah. It was from the scholars of Madinah that he learned theology, eventually enjoying such a high reputation for his knowledge and virtue that he came to be regarded as being amongst the religious scholars himself. Indeed, many well-known scholars used to live in his company as students.

After the death of his father, Umar bin Abdul Aziz married Fatima, the daughter of Caliph Abdul Malik bin Marwan. When Walid bin Abdul Malik became caliph, he made Umar bin Abdul Aziz the Governor of Madinah. During this period as Governor, many scholars and learned men were known to gather around Umar. His fame rested on his choosing to govern in accordance with the injunctions of Islam.²⁵ He established the council of legal scholars in Madinah and used to attend to the affairs of expeditions in consultation with them. The

people of Iraq, who often felt dissatisfied with the harsh policies of their own Governor, Hajjaj, sought refuge in Umar's domain. When Hajjaj wanted Umar to repatriate them to Iraq without delay, Umar refused to take any action. As a result, Hajjaj complained to Walid bin Abdul Malik and Umar was deposed from his position as Governor of Madinah and asked to stay in Syria.²⁶ It was stated that, when Umar left Madinah in 93AH, he looked back at the city and cried, telling his servant: "I dread that it was Madinah which banished us," meaning that he felt Allah had expelled him from Madinah for his own bad conduct.²⁷

When Walid bin Abdul Malik wanted to revoke the nomination of Sulaiman as his successor in favour of his own son, Umar bin Abdul Aziz vehemently opposed the move, resulting in his imprisonment.²⁸ Remaining in prison for three years, he was finally released based on someone's recommendation. When Sulaiman did finally succeed Walid, he felt obliged to Umar for his sacrifice. He therefore made Umar his chief adviser and nominated him in his will as the next caliph.²⁹

Umar bin Abdul Aziz's Attitude and Contribution towards Islam

Umar was a dedicated Muslim who wanted all other Muslims to also follow the Islamic way of life. He himself set the pattern for such life by living simply and via the example of the Rightly Guided Caliphs.^{30,31} That is why he was called 'Umar the Second' or the 'Fifth Righteous Caliph'.

Umar bin Abdul Aziz became Caliph in the month of Safar 99AH, and remained in power until his death on the 25 Rajab 101AH. He died at Dayr Sim'an in Hims after ruling for two years, five months and four days.³² He was buried on a plot of land bought from a Christian monk at a monastery in the *jund* of Hims.³³ As mentioned, he is regarded as *al-khalifa al-'adil*, an exemplar of Muslim virtue, piety, equity, and humility. He has been accepted as a genuine caliph, unlike the other Umayyads, who some historians only regard as *muluk* (kings).³⁴ Also, it was said that he was an Imam whose method of prayer perfectly reflected that of the Prophet Muhammad. Whenever he led the prayer, he perfected bowing and prostrating before Allah, not spending a long time standing, sitting or kneeling.³⁵ He set new standards of what a Muslim ruler should be like by avoiding show and ostentation. He also enjoined the idea of simplicity and austerity in all matters pertaining to the state.

When Raja bin Haiwa read Sulaiman bin Abdul Malik's will, Umar was heard saying "To Allah do we belong and to Him is our return," a statement often quoted by Muslims when a calamity befalls someone. He was visibly shocked and dismayed with his appointment and said: "I never invoked Allah to make me the Caliph."³⁶ Upon his appointment, he gathered the people and gave a speech. In giving his speech he praised God and said:

O people! There is no Book after the Qur'an and there is no Prophet after Muhammad. I am not going to initiate anything new but I am supposed to complete (what has been left incomplete). I am not a *mubtadi* (initiator) but a *muttabi* (follower) and I am by no means better than you. Yes, my load is heavier. One who runs away from a tyrannical king, cannot be a tyrant himself, remember obedience to any creature against the divine commandments is not lawful.³⁷

From this quotation it is clear that he understood that the burden of the entire community had been placed upon him. That is why he was known to be very particular in the use of money from the public treasury. He also went to the extent of asking his wife, Fatimah, to surrender all her ornaments to the state treasury, which she willingly did.

Not long after he became Caliph, Umar bin Abdul Aziz issued instructions that the usual practice of reviling Ali bin Abi Talib in the Friday sermons be stopped. He also restored the garden of Fedak to the family of Ali, as well as other properties which had been illegally taken by the previous rulers.³⁸ He also attempted to ease the lot of converts to Islam by decreeing that, upon conversion, a person should no longer be subject to the poll tax. This command led to many people embracing Islam during his reign. This was because he believed that the Prophet was sent to mankind as a mercy and not as a tax gatherer, therefore the discrimination between Muslims should stop. He also went further to state that no Muslim should be allowed to purchase land from a non-Muslim in order to protect the interests of the minorities living within Muslim territories.³⁹

His Exemplary Justice

Umar bin Abdul Aziz showed exemplary understanding of the concept of justice in Islam. He was considered unusual and innovative in his approach to controlling the Muslim empire. When compared to his predecessors and successors, he was more in line with both the spirit and letter of the Qur'an.

His most critical amendment to the practice of previous rulers was to equalise the treatment of non-Arab and Arab Muslims. Prior to his reign, non-Arab troops, for example, were frequently not permitted equal rights with respect to war booty, land, and salary as their Arab colleagues. In wider society, non-Arab Muslims also had different rights with regards to taxes (mentioned above). After Umar, however, no Muslim would be treated differently from another.⁴⁰

Other than enhancing the status of non-Arab Muslims, Umar bin Abdul Aziz sought to build up greater equity between different Arab groups within the caliphate. He also appointed new and capable men to the most important

official positions.⁴¹ In other words, Umar appointed relative unknowns whose sense of responsibility and commitment to his reform programme could be relied upon, thereby modifying the past approach of assigning Syrians or others closely connected with the Umayyad house.

Although Umar bin Abdul Aziz has been accused of favouring Muslims over adherents of other religions, his appointments only sought to enhance the solidarity and devotion of Muslims to their caliphal benefactor. Judging from the policies toward non-Muslims pursued in the following centuries, Umar can be regarded as exalting Islam rather than the superiority of the Arab conqueror.⁴² However, the edict ascribed to Umar commanding that all non-Muslims be purged from the administration of the state is intractable. Indeed, a wider range of reading confirms that Umar did indeed take measures which might have adversely affected non-Muslim bureaucrats under the Umayyads.⁴³ Umar's general approach, it appears, was to put into practice a system which acknowledged the right of anyone who wished to accept Islam to do so, give them the opportunities concomitant with the status of a Muslim, but while also averting a complete collapse in the income of the government.⁴⁴

Overall, it can be said that Umar bin Abdul Aziz was more interested in assisting those who wished to come into the fold of Islam than with effecting the territorial expansion of the Muslim caliphate. Thus, rather than attack the Byzantine emperor Leo III, he extended a kind invitation to embrace Islam. He also restored half of the kingdom of the former crown prince of Sind after his acceptance of Islam. In addition, when Jarrah bin Abdullah, the Governor of Khorasan, wrote to Umar about the roughness and undisciplined nature of the people in Khorasan, Umar responded that straightening them out with the sword was not an option; justice automatically reforms the people, and should therefore be propagated amongst them instead.⁴⁵

Basically, after being chosen as caliph, Umar engaged in activities that would end injustice, oppression, and tyranny, all of which had crept into the Muslim community.

His Policies

Umar bin Abdul Aziz's exposure to the prominent *fuqaha'* and *muhaddithun* of his time greatly influence his policies as caliph. Due to the political and social maladies of his time, Umar embarked on projects entailing social justice and political reform.

For example, during the caliphate of the Banu Umayyads, the most fertile land and villages had been taken by them beyond their dues. As a result, other Muslims were deprived of their rights, with few daring to protest. Umar, however,

seized any properties unjustly taken by his kinsfolk and either returned them to their rightful owners or donated them to the *Baytul-Mal* (public treasury). As the Umayyads lost their undeserved properties, the high status and grandeur they had enjoyed in comparison with other tribes began to change into equality and impartiality.

Not only was Umar very cautious about benefiting from the *Baytul Mal* himself, but he also frequently wrote to his governors, reminding them to also be very careful in this regard. For instance, he deposed Yazid bin Muhallab and had him imprisoned, allegedly for too blatantly feathering his own nest while governor.⁴⁶

Although he chose an ascetic life for himself, Umar paid high salaries to his governors and state officials in order to make it easier for them not to take bribes and engage in other forms of corruption. He encouraged his governors to build forts of justice in their cities and purify the roads by removing oppression from them, instead of concentrating on building mere vainglorious structures.⁴⁷

He was known for his kindness to animals and issued orders protecting their rights. He also introduced business ethics, forbidding his governors and state officials from engaging in business or trade in the areas of their jurisdiction, lest such should lead to injustice and corruption.⁴⁸

His Sense of Responsibility

Umar bin Abdul Aziz's sense of responsibility is evident from various narrations about his virtues and habits. In one narration, he informed his wife about his desire to eat grapes, saying that, if she had some money, she should lend it to him so he could buy some. His wife replied in the negative, saying: "you are the chief of believers and you haven't got enough money to purchase grapes." Umar responded by saying, "it is better to carry away the longing for grapes buried in my heart than eating abrasions of chains in hell tomorrow."⁴⁹ In another narration, it was stated that whenever Umar wanted to punish someone, he used to keep them in custody for three days first as a precautionary measure, so that he might not punish them in a state of anger or in haste.

When he reduced the expenditure of his family, members of his family complained. He said to them, "my wealth is not sufficient to continue your previous expenditures. As for the public treasury, you have as much right to it as any other Muslims has."⁵⁰

Umar also showed a good sense of responsibility when dealing with the Khawarij revolt in Khorasan. He wrote to the Governor of Iraq, Abdul Hamid bin Abdul Rahman, ordering him not to engage the rebels unless they shed blood or cause corruption to spread in land. Even if they did act in that manner, the Governor should only intervene so as to prevent those actions. Meanwhile, Umar

also wrote to the chief of the Khawarij, stating that “I have been informed that you rebelled in anger for the sake of God and His Prophet. But you have no better right to that than I do. Come to me, then, so that I may discuss the matter with you: if we are in the right, you will join (the community) in what the people (believe); but if you are in the right, we will reconsider our position.” The chief of the Khawarij wrote back to Umar saying: “You have been fair, and I am therefore sending you two men who will confer and debate with you.”⁵¹ This gesture on the part of Umar prevented clashes with the Khawarij during his reign. In fact, the Khawarij decided not to undertake any revolutionary steps against his authority, effectively suspending all their activities during his caliphate. This was because they recognized from his manner and approach towards them his high sense of responsibility to all members of the Muslim community under his domain.

Conclusion

An attempt has been made in the foregoing discussion to evaluate both the declaration of an Islamic caliphate by Boko Haram and the exemplary leadership of Umar bin Abdul Aziz as a Muslim Caliph who, in spite of the short time he served as a Muslim leader, was able to make a significant contribution to the Islamic world.

It has been established that, notwithstanding his brief rule, Umar bin Abdul Aziz was able to set the standard for what a Muslim ruler should be like. He lived a simple life based on the same pattern as the Rightly Guided Caliphs. Under his direction, he restored the status of converts to Islam by decreeing that upon embracing Islam a person should no longer be subject to the poll tax. To the present writers, this was the greatest achievement of Umar. He also stopped the practice of cursing Ali bin Abi Talib during Friday sermons.

Umar, as we have noted, also showed a deep understanding of Islam when carrying out various reforms during his reign. Compared to his predecessors, he was more in line with both the spirit and letter of Islam. In the area of policies, the caliph was very cautious about benefiting from the public treasury and frequently wrote to his governors admonishing them to act likewise and not oppress the people in their domain. Thus, through his example he showed how much he abhorred repression and tyranny.

Finally, the great sense of responsibility displayed by Umar bin Abdul Aziz was one of his most lasting achievements, setting the Islamic caliphate of his day in line with the ideals of the Rightly Guided Caliphs. That is why, during the period of his caliphate, many people embraced Islam enthusiastically. All-in-all, his accomplishments attest to his greatness as a Muslim leader of the classical period. Umar's personality was the embodiment of what Islam is; it can be deduced from his life that, the closer a ruler or group comes to Islam, the greater

the positive response from the people. Therefore, the extreme ruthlessness with which Boko Haram go about their activities cannot help the group in its struggle for power. Rather, a strong feeling of brotherhood, solidarity, and justice would lead to more positive results. This is a more practical and realistic approach, which is why Islam demands a sovereign land be ruled with honour, through better actions and faith.

Based on the above study, the following policy recommendations are offered:

- Any Islamic caliphate system should be based on the exemplary leadership displayed by Umar bin Abdul Aziz.
- Under an Islamic caliphate system all kinds of oppression should be jettisoned. Rather what should be in place is more care and concern for the less privileged.
- Any leader of an Islamic state should be well grounded in the teachings of Islam in order to reflect the true spirit of the religion.
- The main function of an Islamic state is to show and spread feelings of brotherhood, solidarity and justice wherever Islamic rule is established.

Notes

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KESAN PERTUKARAN AGAMA IBU BAPA TERHADAP STATUS AGAMA ANAK

*Mohamed Azam Mohamed Adil**
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Pendahuluan

Dalam konteks masyarakat berbilang kaum di Malaysia, isu penentuan agama dan hak penjagaan kanak-kanak sering menjadi perbincangan apabila salah satu pihak yang perkahwinannya didaftarkan di bawah Akta Pembaharuan (Perkahwinan dan Perceraian) 1976 (Akta 164) memeluk agama Islam. Pemeluk agama Islam oleh salah seorang pasangan ini menjadi asas kepada pembubaran perkahwinan. Bagi pihak yang beragama Islam, ia akan ditentukan oleh Mahkamah Syariah dan bagi pihak bukan Islam oleh Mahkamah Sivil. Tetapi sehingga pihak yang tidak memeluk Islam memfailkan petisyen perceraian di Mahkamah Sivil, perkahwinan itu dianggap kekal. Ini menyebabkan masalah kepada pihak yang memeluk agama Islam untuk memohon penceraian di Mahkamah Syariah. Mahkamah Syariah hanya dapat merungkai perkahwinan tersebut tetapi tidak dapat mengesahkan perceraian itu kerana pihak yang tidak memeluk Islam tidak memfailkan perceraian di Mahkamah Sivil.

Hal ini menjadi lebih rumit apabila pihak yang memeluk agama Islam menukar agama anak atau jagaannya yang di bawah umur kepada Islam tanpa pengetahuan dan persetujuan pihak yang bukan Islam. Seterusnya, pihak yang beragama Islam juga menuntut hak penjagaan anak di Mahkamah Syariah.

Justeru itu, satu Rang undang-undang bagi pindaan Akta 164 (RUU 164) telah diusulkan di Dewan Rakyat pada 21 November 2016 untuk menangani isu pertukaran agama kepada Islam oleh salah seorang pasangan yang berkahwin.

RUU 164 ini mencadangkan bahawa hak untuk memfailkan petisyen perceraian haruslah juga diberikan kepada pasangan yang telah menukar agama di bawah seksyen 51(1) Akta 164. Ini kerana sebelum ini, hak di bawah Akta 164 ini hanya diberikan kepada pasangan yang kekal dalam agama asal. Oleh itu, isu timbul apabila pasangan yang kekal pada agama asalnya tidak membuat sebarang petisyen ke Mahkamah Sivil, maka perkahwinan mereka dianggap masih sah di bawah Akta 164.

Apabila perkahwinan mereka masih dikira sah, maka menjadi suatu kesulitan bagi pasangan yang menukar agama untuk menuntut haknya seperti nafkah, hak penjagaan anak dan hak pembahagian aset bersama.

Kesulitan juga bakal timbul apabila kedua-dua pasangan membuat permohonan kepada dua mahkamah yang berbeza iaitu Mahkamah Sivil dan Mahkamah Syariah. Keadaan menjadi lebih rumit apabila kedua-dua mahkamah mengeluarkan arahan yang berbeza.

Mahkamah Syariah juga tidak dapat mengeluarkan arahan untuk membatalkan perkahwinan sivil di bawah Akta 164 kerana kuasa untuk melakukan sedemikian hanyalah terletak pada Mahkamah Sivil.

Pindaan ini memuatkan pada Klausa 7 di mana satu seksyen baru iaitu seksyen 88A dimasukkan mengenai status agama kepada anak salah seorang ibu bapanya memeluk Islam. Seksyen ini menyatakan bahawa anak tersebut hendaklah kekal dengan agama asal sebelum pertukaran agama berlaku melainkan kedua-dua ibu bapa bersetuju dengan pertukaran agama anak tersebut serta dengan persetujuannya jika dia sudah berumur 18 tahun.

Cadangan memasukkan seksyen baru ini telah menimbulkan kegelisahan orang Islam kerana anak bawah umur daripada perkahwinan sivil akan kekal sebagai bukan Islam walaupun telah diislamkan oleh salah satu ibu bapa atau penjaga sehingga mencapai umur 18 tahun. Akhirnya, pihak kerajaan telah menarik balik RUU 164 ini pada 6 April 2017.

Kesan Ke Atas Pemelukan Islam Oleh Salah Seorang Daripada Perkahwinan Sivil (Akta 164)

Secara umumnya, dalam Islam, perkahwinan hendaklah terdiri daripada pasangan beragama Islam kecuali bagi wanita kitabiyyah (Seksyen 10, Enakmen Undang-undang Keluarga Islam Selangor 2003).

Apakah kedudukannya sekiranya salah seorang daripada pihak pasangan bukan Islam yang mendaftarkan perkahwinannya di bawah Akta 164 memeluk agama Islam? Seksyen 46(1) Enakmen Undang-undang Keluarga Islam Selangor 2003 dan enakmen di negeri lain memperuntukkan:

“Pemelukan Islam oleh salah seorang pasangan bukan Islam, secara tersendiri, tidak menyebabkan perkahwinan itu terubuh kecuali ia disahkan oleh Mahkamah Sivil”.

Peruntukan ini jelas menunjukkan bahawa Mahkamah Syariah mempunyai kuasa prerogatif dalam membuat pengesahan perceraian ke atas sesuatu pasangan. Masalah yang timbul dalam kes yang melibatkan pemelukan agama Islam oleh salah satu pihak yang perkahwinannya didaftarkan di bawah Akta 164, pengesahan perceraian oleh Mahkamah Syariah tidak diiktiraf oleh Mahkamah Sivil dan ini tidak mempunyai apa-apa kesan terhadap perkahwinan asal.

Akta 164 memperuntukkan pemelukan Islam sebagai sebab untuk pembubaran perkahwinan. Seksyen 51 Akta 164 memperuntukkan:

“Apabila salah seorang kepada perkahwinan itu memeluk agama Islam, pihak yang satu lagi yang tidak memeluk agama Islam boleh memohon petisyen perceraian.

Dengan syarat bahawa tiada petisyen boleh dibuat di bawah Seksyen ini sebelum tempoh tiga bulan tamat dari tarikh pemelukan tersebut”.

Peruntukan dalam Akta 164 ini mengundang beberapa masalah. Ini kerana, peruntukan di atas tidak terpakai ke atas pihak yang beragama Islam. Justeru, Seksyen 51 hanya memberi hak kepada pihak yang bukan beragama Islam sahaja untuk memfailkan petisyen perceraian di Mahkamah.¹ Ahmad Ibrahim adalah orang pertama yang menulis mengenai keperluan meminda seksyen 51 Akta 164 bagi memberi keadilan kepada pihak yang memeluk agama Islam untuk memfailkan petisyen perceraian di Mahkamah Syariah.² Ini kerana pihak yang beragama Islam tidak boleh memfailkan petisyen perceraian di bawah Seksyen 52 Akta 164 (perceraian melalui persetujuan kedua belah pihak) dan Seksyen 53-54 Akta 164 (keruntuhan rumahtangga yang tidak boleh diselamatkan lagi) meskipun pemelukan agama Islam dianggap sebagai salah satu asas tersebut. Melihat kepada fakta dalam peruntukan Seksyen 51 yang menganggap pemelukan Islam sebagai punca perceraian, dan melihat kepada peruntukan Seksyen 3 Akta 164, adalah mustahil untuk melihat kepada peruntukan lain dalam Akta 164 sebagai asas kepada perceraian kerana ia hanya terpakai kepada pihak yang bukan beragama Islam.³ Justeru itu, adalah elok Seksyen 51 Akta 164 ini dipinda bagi memberikan hak kepada salah satu pihak yang memeluk agama Islam untuk memohon petisyen perceraian.⁴

Memandangkan bahawa Akta 164 dan EUKIS 2003 mengiktiraf pemelukan agama sebagai asas kepada perceraian, siapakah yang berhak ke atas penentuan agama dan hak penjagaan kanak-kanak tersebut? Undang-undang manakah yang terpakai dan bidang kuasa mahkamah mana, Mahkamah Sivil atau Mahkamah Syariah?

Pemelukan agama Islam oleh salah satu pihak yang berkahwin di bawah Akta 164 dan kemudiannya berkait dengan pertukaran agama kanak-kanak serta perebutan hak penjagaan kanak-kanak berikutan pertindihan bidang kuasa antara Mahkamah Sivil dan Mahkamah Syariah serta peruntukan yang tidak jelas dalam isu ini telah menimbulkan polemik yang tidak berkesudahan.

Dalam kes *Muhammad Ridhuan Abdullan (Pathmanathan a/l Krishnan) lwn Indira Gandhi* (2015)⁵ kedua-dua pihak yang beragama Hindu telah berkahwin mengikut Akta 164. Mereka dikurniakan tiga orang anak, Tevi Darsiny (12

tahun), Karan Dinish (11 tahun) dan Prasana Diksa (11 bulan) tatkala pihak isteri (Indira) memfailkan semakan kehakiman.

Pada 11 Mac 2009, suami (Pathmanathan) memeluk agama Islam dan dikenali sebagai Muhammad Riduan. Berikutan pengislamannya, pada 8 April 2009, Muhammad Riduan telah memperolehi hak jagaan anak melalui arahan *interim ex-parte* terhadap ketiga-tiga anak tersebut. Kemudian, beliau telah mendapat hak jagaan anak secara tetap melalui arahan Mahkamah Syariah Ipoh pada 29 September 2009.

Semasa suami memeluk Islam, dua orang anak mereka tinggal bersama Indira dan yang bongsu tinggal bersama Muhammad Riduan.

Pada April 2009, pihak isteri menerima beberapa dokumen daripada pihak suami yang menerangkan bahawa ketiga-tiga anak-anaknya telah memeluk agama Islam pada 2 April 2009 dengan bukti Sijil Pemelukan Islam yang dikeluarkan oleh Pengarah Jabatan Agama Islam Perak (JAIP). Terdapat juga dokumen yang menunjukkan bahawa Pendaftar Muallaf telah mendaftarkan ketiga-tiga anak tersebut sebagai orang Islam.

Indira kecewa dan tidak berpuas hati dengan tindakan pihak suami lalu memfailkan permohonan semakan kehakiman di Mahkamah Tinggi Ipoh memohon antara lain supaya Mahkamah membatalkan sijil-sijil pemelukan Islam anak-anaknya kerana bercanggah dengan Seksyen 99, 100 dan 101 Enakmen Pentadbiran Agama Islam Perak 2004 (selepas ini Enakmen 2004). Seterusnya pihak isteri memohon supaya sijil-sijil tersebut diisytiharkan tidak sah dan terbatal serta tidak mempunyai kesan disebabkan *ultra vires* kerana tidak selari dengan peruntukan dalam Bab IX dan secara khusus seksyen 106(b) Enakmen 2004; seksyen 5 dan 11 Akta Hak Jagaan Anak-anak 1961; dan Perkara 12(4) dibaca bersama Perkara 8(2) Perlembagaan Persekutuan. Tuntutan tambahan dan secara alternatif, pihak isteri memohon deklarasi bahawa setiap anak tersebut tidak memeluk agama Islam mengikut undang-undang.

Pada 25 Julai 2013, Pesuruhjaya Kehakiman membenarkan permohonan pihak isteri. Ketiga-tiga sijil pemelukan Islam yang dikeluarkan oleh Pengarah JAIP diketepikan dan diisytiharkan batal, tidak sah dan tidak mempunyai apa-apa kesan.

Muhammad Riduan membuat rayuan di Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi Ipoh. Dalam keputusan majoriti 2-1, Mahkamah Rayuan membenarkan Rayuan Muhammad Riduan yang telah mendapat pengesahan agama Islam bagi tiga orang anak-anaknya seperti yang tertera dalam sijil pemelukan Islam yang dikeluarkan oleh Pengarah JAIP.

Dalam membuat keputusan tersebut, Hakim Balia Yusof Hj. Wahi bersama Hakim Badariah Sahamid memutuskan bahawa hanya Mahkamah Syariah yang mempunyai hak bidang kuasa eksklusif untuk memutuskan pertikaian yang berkaitan

dengan agama seseorang itu dalam isu pemelukan Islam. Ini terutamanya dengan melihat kepada Enakmen 2004 yang mengandungi peruntukan berkaitan proses pemelukan, bidangkuasa Mahkamah Syariah Negeri dan kuasa yang diberikan kepada Pendaftar Muallaf Negeri yang mengeluarkan sijil pemelukan Islam.

Dalam hujah bertentangan, Hakim Hamid Sultan Abu Backer memutuskan bahawa Mahkamah Tinggi Ipoh masih mempunyai kuasa untuk menentukan isu pemelukan kerana peruntukan yang berkaitan pemelukan dalam Enakmen 2004 tidak semestinya terletak di bawah Mahkamah Syariah. Hanya seksyen 50 Enakmen 2004 yang berkaitan dengan Mahkamah Syariah Negeri mempunyai kuasa melebihi apa yang diberikan kepada Mahkamah Tinggi Sivil. Hakim Hamid Sultan seterusnya mengatakan bahawa Enakmen 2004 menghendaki tiga anak tersebut mengucap dua kalimah syahadah di hadapan pegawai agama, tidak seperti apa yang telah berlaku di mana pemelukan Islam oleh anak-anak tersebut hanya dibuat oleh pihak bapa iaitu Muhammad Riduan.

Dalam kes *Eeswari Visuvalingam lwn Kerajaan Malaysia*,⁶ perayu telah berkahwin dalam bulan November 1950 mengikut kepercayaan agama Hindu. Perkahwinan tersebut telah didaftarkan di bawah undang-undang Sivil pada 15 November 1950. Pada 16 Jun 1978 suami perayu telah memeluk agama Islam. Suami perayu adalah pesara kerajaan. Malangnya, suami perayu meninggal dunia pada 7 January 1985. Perayu mendakwa bahawa beliau berhak ke atas pencen suaminya mengikut seksyen 15 Akta Pencen 1980. Jabatan Pencen menolak permohonan perayu untuk mendapatkan pencen terbitan kerana berlainan agama. Perayu membawa kes ini ke Mahkamah Tinggi dan keputusannya ialah sama dengan Jabatan Pencen. Perayu membawa kes ini ke Mahkamah Agung. Mahkamah Agung memutuskan bahawa perkahwinan perayu dengan suaminya adalah sah mengikut undang-undang sivil semasa kematian suaminya. Justeru, perayu berhak mendapat pencen terbitan.⁷

Dalam kes *Pedley lwn Majlis Agama Islam Pulau Pinang*,⁸ Hakim Wan Adnan memutuskan bahawa perkahwinan orang bukan Islam tidak secara automatik terungkai dengan salah seorang daripada mereka memeluk Islam. Ia hanya memberi hak kepada pihak yang bukan Islam untuk memfailkan petisyen pembubaran perkahwinan di bawah undang-undang sivil. Semasa memutuskan penghakiman, Hakim Wan Adnan merujuk kepada keputusan Kadi Besar yang mengatakan bahawa perkahwinan tersebut adalah terbubar di bawah undang-undang Islam. Walau bagaimanapun, Hakim Wan Adnan memutuskan bahawa keputusan Kadi Besar itu tidak menjejaskan kedudukan plaintif daripada segi undang-undang personal di bawah undang-undang sivil.⁹

Terdapat pihak yang memeluk agama Islam tetapi tidak bertanggung jawab kerana menggunakan seksyen 51 Akta 164 untuk mengelak daripada membayar nafkah. Ini dapat dilihat dalam kes *Letchumy lwn Ramadason*¹⁰ di mana plaintif

yang membuat petisyen telah mendapat perintah perceraian daripada Mahkamah atas alasan responden telah menghilangkan diri. Pesuruhjaya Kehakiman mengarahkan responden membayar RM200 sebulan sebagai bayaran nafkah. Pihak responden seterusnya memohon perintah mengenenipkan perintah tersebut atas alasan bahawa dia telah memeluk agama Islam. Tambahan pula, mengikut undang-undang Islam, pihak yang bukan Islam tidak berhak menuntut nafkah kerana tidak turut serta memeluk agama Islam semasa iddah. Mahkamah Tinggi memutuskan bahawa memandangkan seksyen 3 (1) Akta 164 tidak terpakai ke atas pihak yang beragama Islam dan responden telah memeluk agama Islam, Akta 164 tidak terpakai ke atasnya.¹¹

Walau bagaimanapun, keputusan yang dibuat dalam kes *Letchumy* telah diketepikan dalam kes *Tan Sung Mooi v Too Miew Kim*.¹² Mahkamah Agung memutuskan bahawa kedua-dua pihak adalah bukan Islam semasa perkahwinan dan perkahwinan itu dilangsungkan mengikut kepercayaan agama bukan Islam. Memandangkan bahawa petisyen pembubaran perkahwinan itu didaftarkan dibawah seksyen 76 dan seksyen 77 Akta 164 yang melibatkan pihak bukan Islam dan secara langsung berkaitan dengan pembubaran perkahwinan, sudah tentulah Mahkamah sivil yang merupakan mahkamah yang kompeten untuk mendengar dan menentukan tuntutan sampingan lain. Fakta bahawa responden telah memeluk agama Islam setelah pembubaran perkahwinan dibuat adalah tidak penting kerana ia berlaku sebelum tuntutan sampingan lain itu didengar di mahkamah.

Mahkamah Agung juga memutuskan bahawa walaupun Perkara 121 (1A) mengeluarkan bidang kuasa Mahkamah Tinggi daripada mendengar perkara yang termasuk dalam bidang kuasa Mahkamah Syariah, tetapi Mahkamah Syariah tidak mempunyai bidang kuasa terhadap orang bukan Islam. Justeru itu, Perkara 121 (1A) Perlembagaan Persekutuan tidak memberi kesan ke atas bidang kuasa Mahkamah Tinggi untuk mendengar permohonan di bawah seksyen 76 dan seksyen 77 Akta 164.¹³

Apakah Agama Kanak-Kanak Mengikut Agama Ibu Atau Bapa Yang Memeluk Islam?

Dalam undang-undang Islam, para *fuqaha* telah berijmak bahawa apabila kedua ibu bapa memeluk agama Islam, secara automatik agama kanak-kanak bawah umur juga adalah Islam.

Permasalahan yang timbul apabila hanya satu pihak yang memeluk agama Islam dan pihak yang satu lagi kekal sebagai bukan Islam telah membawa kepada perbincangan yang menarik dalam perbahasan fiqh. Para fuqaha telah berijmak bahawa agama seseorang kanak-kanak adalah mengikut ayahnya yang

beragama Islam. Ini termasuk apabila bapanya memeluk agama Islam. Walaupun begitu, pandangan majoriti yang terdiri daripada mazhab Hanafi, Syafi'i dan Hanbali berpendapat agama bagi kanak-kanak adalah mengikut pihak yang memeluk Islam tanpa mengira ibu atau bapa. Walau bagaimanapun, mengikut mazhab Maliki, agama seseorang kanak-kanak adalah mengikut bapanya sekiranya bapa yang memeluk agama Islam. Ini kerana identiti dan keturunan nasab adalah melalui bapa.¹⁴

Apakah Kanak-kanak Boleh Memeluk Agama Islam?

Para fuqaha juga tidak sepakat sama ada seseorang kanak-kanak boleh memeluk sesuatu agama termasuk agama Islam. Ramai fuqaha berpandangan bahawa kanak-kanak boleh memeluk agama Islam berdasarkan fakta terdapat para sahabat Nabi Muhammad SAW yang memeluk agama Islam semasa usia kanak-kanak. Antara mereka ialah Ali bin Abi Talib, Zubayr bin al-Awwam, Abdullah ibn Umar dan Asmak binti Abu Bakar.¹⁵

Imam Abu Hanifah dan anak muridnya, Muhammad Hassan al-Syaibani berpendapat bahawa pemelukan Islam atau murtad oleh kanak-kanak mumayyiz adalah sah. Bagaimanapun, Abu Yusuf berpandangan, ianya hanya sah dalam pemelukan Islam tetapi tidak sah dalam kes murtad. Zufayr Hudhayl, seorang lagi anak murid Imam Abu Hanifah berpandangan bahawa seseorang kanak-kanak tidak boleh memeluk Islam atau keluar Islam kerana belum cukup umur baligh. Ianya hanya sah apabila kanak-kanak itu mencapai umur baligh. Hujah Zufayr ialah kanak-kanak bawah umur tidak mempunyai kelayakan untuk memilih agama.¹⁶

Dalam satu Hadis popular “Setiap anak dilahirkan dalam keadaan fitrah. Ibu bapalah yang akan menentukan sama ada dia seorang Yahudi atau Kristian sehingga dia berkemampuan untuk menerima atau menolaknya”.¹⁷ Justeru itu, kanak-kanak tidak boleh menentukan agama. Ini ditambah pula bahawa kanak-kanak itu fitrah (bersih daripada dosa) dan tidak ditaklifkan (dipertanggungjawabkan) tanpa mengira amalan sama ada dia seorang Islam atau tidak. Hadis ini menyebut ibu bapa.

Secara umum agama seseorang kanak-kanak adalah mengikut agama ibu bapanya yang Islam. Tetapi keadaan berbeza sekiranya berlaku pertikaian antara ibu atau bapa dalam menentukan agama kanak-kanak itu. Oleh yang demikian, cara yang terbaik dalam menangani kemelut ini ialah dengan menyerahkan kepada mahkamah/tribunal untuk membuat satu ketetapan yang menjurus kepada keadilan dan kebajikan kanak-kanak tersebut.

Penentuan Agama Kanak-kanak Bawah Umur

Undang-undang di Malaysia telah mewujudkan peruntukan undang-undang bagi pertukaran agama seseorang kepada Islam. Peruntukan sedemikian didapati pada enakmen di peringkat negeri iaitu dalam undang-undang pentadbiran Islam negeri. Undang-undang tersebut pada mulanya merupakan sebuah peruntukan yang ringkas. Enakmen yang paling awal hanya menyatakan bahawa Majlis Agama Islam hendaklah mendaftarkan setiap individu yang menukar agamanya. Ini bermakna seseorang tidak boleh menukar agamanya melainkan ianya dilakukan selaras dengan peruntukan enakmen terbabit, iaitu seseorang individu yang belum mencapai usia akil baligh tidak dibenarkan sama sekali untuk menukar agamanya, dan setiap pertukaran agama perlu didaftarkan di bawah Majlis Agama Islam.¹⁸

Meskipun begitu, penentuan agama kanak-kanak bagi salah satu pihak yang memeluk agama Islam juga masih menjadi persoalan besar dan tidak berkesudahan kerana ia melibatkan satu pihak yang memeluk agama Islam dan satu lagi bukan Islam. Ia menjadi polemik apabila kabinet pada 23 April 2009, antara lain memutuskan bahawa pengislaman kanak-kanak bawah umur 18 tahun hendaklah mendapat persetujuan kedua ibu bapa kanak-kanak tersebut. Sekiranya persetujuan tidak tercapai antara salah satu pihak yang masih enggan memeluk agama Islam dan satu pihak yang memeluk agama Islam, agama bagi kanak-kanak tersebut adalah mengikut pihak yang bukan Islam kerana asal perkahwinan adalah mengikut bukan Islam.¹⁹

Ia sekali lagi menjadi polemik apabila Rang Undang-undang Pentadbiran Islam Wilayah Persekutuan 2013 dibentangkan untuk bacaan kali pertama di Dewan Rakyat. Peruntukan yang menjadi isu di sini ialah dalam Seksyen 107 Rang Undang-undang Pentadbiran Islam Wilayah Persekutuan 2013 mengenai keupayaan untuk memeluk agama Islam. Kanak-kanak yang bukan beragama Islam boleh memeluk agama Islam sekiranya dia waras dan sudah mencapai umur 18 tahun. Bagi kanak-kanak berumur kurang dari 18 tahun, ia perlu mendapat izin ibu **atau** bapa **atau** penjaganya.²⁰

Isu ini sekali lagi kecoh dan mendapat bantahan apabila kerajaan membawa usul pindaan ke atas Akta 164 pada 21 November 2016 di Dewan Rakyat bagi memasukkan peruntukan baru Seksyen 88A (1) yang memperuntukkan:

“Apabila pihak kepada perkahwinan memeluk agama Islam, agama kanak-kanak dari perkahwinan itu akan kekal mengikut agama pihak-pihak yang berkahwin sebelum pemelukan Islam, kecuali apabila kedua-dua pihak kepada perkahwinan itu bersetuju terhadap penukaran agama kanak-kanak kepada Islam, tetapi ia tertakluk kepada hasrat kanak-kanak tersebut apabila ia mencapai umur 18 tahun.”

Manakala seksyen 88A (2) memperuntukkan:

“Apabila pihak-pihak kepada perkahwinan itu menganut agama lain sebelum pemelukan salah satu pihak kepada Islam, kanak-kanak kepada perkahwinan itu haruslah bebas kekal dalam agama salah satu dari pihak agama asal sebelum pemelukan agama Islam tersebut.”

Dalam konteks di Malaysia, Perkara 12 (4) Perlembagaan Persekutuan memperuntukkan “Bagi maksud Fasal (3), agama bagi seseorang yang berumur kurang daripada lapan belas tahun adalah ditetapkan oleh ibu bapa atau penjaganya”. Melihat kepada versi dalam Bahasa Inggeris, ia menyebut perkataan ‘parent’ yang membawa maksud ibu atau bapa. Sekiranya perkataan ‘parents’ ditulis dengan jelas, ia membawa maksud ibu bapa.

Para ahli perundangan dan akademik membuat tafsiran yang berbeza mengenai perkataan ‘parent’ dalam Perkara 12(4) Perlembagaan Persekutuan. Bagi yang menyokong ia membawa maksud kedua ibu bapa, mereka merujuk kepada Perkara 160 Perlembagaan Persekutuan dalam tafsiran ‘his’ (dia lelaki) meliputi ‘her’ (dia perempuan). Begitu juga perkataan ‘parent’ hendaklah juga difahami secara jamak iaitu ‘parents’. Interpretasi ini didokong oleh Shaad Saleem Faruqi, Majlis Peguam Malaysia dan pertubuhan-pertubuhan NGO termasuk juga parti-parti komponen BN seperti MCA, MIC dan Gerakan.²¹

Persatuan Peguam Muslim Malaysia (PPMM) dan Persatuan Peguam Syarie Malaysia (PGSM) berhujah bahawa penentuan agama kanak-kanak secara unilateral adalah selaras dengan keputusan dalam kes *Susie Teoh*²² di mana Mahkamah Persekutuan memutuskan bahawa penentuan agama seorang kanak-kanak bawah 18 tahun adalah dengan kebenaran ibu atau bapa atau penjaganya.²³

Ini disusuli dengan kes *Subashini a/p Rajasingam lwn Saravanan a/l Thangthoray & Anor*²⁴ di mana Mahkamah Persekutuan memberi takrifan ‘parent’ sebagai salah seorang daripada ibu atau bapa. Dengan itu, pengislaman anak oleh bapa yang memeluk Islam adalah sah. Ini tidak dipersetujui oleh Majlis Peguam kerana pada kaca mata mereka hujah yang mengatakan hanya cukup salah seorang ibu atau bapa dalam memberi keizinan agama seseorang kanak-kanak berlawanan dengan Perkara 12 (4) Perlembagaan Persekutuan dan keputusan Mahkamah Persekutuan tersebut adalah khilaf. Ini kerana pada pandangan mereka, Mahkamah Persekutuan tidak mengambil kira takrifan dalam Perkara 160 Perlembagaan Persekutuan.

Perlu dimaklumkan bahawa buat masa sekarang terdapat negeri yang memperuntukkan keperluan keizinan ibu dan bapa, dan terdapat juga negeri yang hanya memperuntukkan keperluan keizinan ibu atau bapa dalam pengislaman kanak-kanak bawah 18 tahun.

Sebagai contoh di negeri Selangor, Seksyen 117 Enakmen Undang-undang Pentadbiran Agama Islam Selangor 2003 mensyaratkan keizinan ibu dan bapa atau penjaga dalam memeluk Islam kanak-kanak bawah 18 tahun.

Manakala bagi Wilayah Persekutuan, Kedah dan Perak tidak mensyaratkan persetujuan ibu dan bapa atau penjaga. Cukup dengan persetujuan salah satu dari ibu atau bapa atau penjaga dalam perkara ini. Ini dapat dilihat dalam Seksyen 95 Akta Pentadbiran Undang-Undang Islam Wilayah-Wilayah Persekutuan 1993, Seksyen 80 Enakmen Pentadbiran Undang-Undang Islam Kedah 2008, dan Seksyen 106 Enakmen Pentadbiran Agama Islam Perak 2004.

Meskipun begitu, ketetapan yang dibuat oleh Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia kali ke 87 pada 25 Jun 2009 memutuskan bahawa apabila salah seorang ibu atau bapa memeluk Islam, agama anak di bawah umur adalah mengikut Islam dan hak penjagaan anak tersebut hendaklah diletakkan di bawah ibu atau bapa yang beragama Islam. Apa yang menarik perhatian ialah Muzakarah Jawatankuasa Fatwa tersebut memutuskan bahawa Perkara 12(4) Perlembagaan Persekutuan yang memperuntukkan bahawa agama seseorang di bawah 18 tahun adalah mengikut ketetapan oleh ibu **atau** bapa tidak perlu dipinda. Keputusan fatwa ini telah diikuti oleh Sabah, Sarawak dan Pahang. Malangnya kesemua fatwa tersebut tidak diwartakan.²⁵

Mengambil kira bantahan dan tentangan daripada para mufti, ulama dan pertubuhan Islam, kerajaan telah menangguhkan bacaan kedua terhadap pindaan Akta 164 pada sidang Dewan Rakyat pada 6 April 2017. Penangguhan ini adalah bagi membincangkan semula isu pertukaran agama kanak-kanak secara unilateral. Ini bagi mendapat maklum balas daripada pakar agama, badan bukan kerajaan dan ahli politik.²⁶

Hak Penjagaan Anak Menurut Undang-undang Islam dan Undang-undang Sivil

Seksyen 51 Akta 164 menganggap pemeluk Islam sebagai punca perceraian. Justeru itu, adalah mustahil untuk melihat kepada peruntukan lain dalam Akta 164 sebagai asas kepada perceraian kerana ia hanya terpakai kepada pihak yang bukan beragama Islam.²⁷

Memandangkan Akta 164 dan EUKIS 2003 mengiktiraf pemeluk agama Islam sebagai asas kepada perceraian, siapakah yang berhak ke atas hak penjagaan kanak-kanak tersebut? Undang-undang manakah yang terpakai dan bidang kuasa mahkamah mana, Mahkamah Sivil atau Mahkamah Syariah? Apakah hak penjagaan anak diserahkan kepada pihak yang memeluk Islam kerana faktor agama?

Dalam konteks undang-undang Islam, para fuqaha berpandangan bahawa apabila sesebuah perkahwinan itu terungka, hak milik penjagaan kanak-kanak adalah diberi kepada ibunya. Secara fitrah, ini adalah hak mutlak ibu dan kelayakan itu melihat kepada “keperluan” anak kepada ibu berbanding kepada bapa. Tambahan pula, ibulah yang lebih mempunyai perasaan belas kasihan dan bertimbang rasa berbanding bapa kerana secara fitrahnya hubungan anak adalah lebih rapat dengan ibunya kerana ibu yang menyusukan anak, mempunyai sifat lebih sabar, mempunyai pengetahuan yang lebih tentang keperluan anak daripada segi pendidikan dan membesarkannya. Atas alasan-alasan di atas, ibu yang merupakan seorang yang diberi keutamaan dalam penjagaan kanak-kanak.²⁸

Para *fuqaha* menyimpulkan bahawa hak penjaga kanak-kanak bukan hanya melihat kepada keperluan harian dan menjaganya sahaja, malah mereka hendaklah bertanggungjawab dalam memutuskan semua perkara yang kanak-kanak itu tidak dapat membuat keputusan untuk dirinya yang melibatkan pembangunan dirinya dan pendidikan untuknya.²⁹

Prinsip ini telah dimasukkan ke dalam undang-undang keluarga Islam di Malaysia. Sebagai contohnya, seksyen 82(1) Undang-undang Keluarga Islam Selangor 2003 memperuntukkan:

“Tertakluk kepada seksyen 83, ibu seharusnya menjadi orang yang lebih berhak dari orang lain dalam hak penjagaan kanak-kanak kecil semasa dan selepas perkahwinan”.

Manakala seksyen 82(2) menyenaraikan mereka yang berhak ke atas penjagaan kanak-kanak mengikut keutamaan, sekiranya ibu hilang kelayakan hak penjagaan kanak-kanak mengikut hukum Syarak. Walaupun begitu, di hujung seksyen berkenaan, ia memperuntukkan sesiapa yang berhak ke atas penjagaan kanak-kanak itu tidak sama sekali menyebabkan kebajikan kanak-kanak tersebut terabai.³⁰

Bagi memastikan kepentingan kanak-kanak terpelihara, Mahkamah Syariah juga diberi kuasa untuk menentukan siapa yang berhak ke atas penjagaan kanak-kanak. Dalam hal ini, Mahkamah Syariah, dari semasa ke semasa, boleh memutuskan hak penjagaan kanak-kanak diberi kepada mereka yang tersenarai dalam peruntukan seksyen 82(2) atau memberi hak penjagaan tersebut kepada sesiapa dan pertubuhan yang pada pandangan Mahkamah dapat menjaga kebajikan kanak-kanak tersebut.³¹

Bagi orang bukan Islam, mereka tertakluk kepada Akta Penjagaan Kanak-kanak 1961 dan Akta 164. Sebagai contohnya, seksyen 3 Akta Penjagaan Kanak-kanak 1961 memperuntukkan penjaga kepada kanak-kanak hendaklah semestinya mempunyai hak penjagaan yang bertanggungjawab dalam bantuan, kesihatan dan pendidikan kanak-kanak tersebut.

Di bawah seksyen 88(1) Akta 164 memperuntukkan bahawa mahkamah pada bila-bila masa boleh mengarahkan hak penjagaan seseorang kanak-kanak diletakkan kepada bapa atau ibunya atau saudara maranya atau pertubuhan atau seseorang yang layak. Seksyen 88(2) Akta 164 mensyaratkan, dalam menentukan siapa yang berhak menjaga kanak-kanak ialah dengan melihat kebajikannya.

Dari sini dapat dikatakan, kedua-dua undang-undang Islam dan Sivill meletakkan syarat kebajikan kanak-kanak merupakan kriteria utama dalam penentuan hak penjagaan kanak-kanak.

Hak Penjagaan Kanak-kanak Ke Atas Salah Satu Pasangan Yang Memeluk Islam

Dalam persoalan pemeluk Islam, isu yang timbul ialah siapakah yang berhak ke atas penjagaan kanak-kanak apabila salah seorang pasangan bukan Islam memeluk agama Islam. Para fuqaha berbeza pendapat sama ada pihak yang diberi hak penjagaan kanak-kanak hendaklah menganut agama Islam atau sebaliknya. Tidak terdapat dalil yang jelas kecuali satu hadith yang diriwayatkan oleh Abdul Hamid bin Jaafar yang meriwayatkan bahawa Ibn Sinan telah memeluk agama Islam tetapi isterinya enggan mengikut jejak langkahnya. Isterinya pergi berjumpa Rasulullah SAW. Baginda bersabda:

“Anak perempuan aku, dia telah makan”. Rafi berkata: “Anak perempuan aku”. Rasulullah SAW berkata kepada beliau: “Duduk di sebelah”. Dan baginda berkata kepada mereka: “Panggil anak perempuan itu”. Kanak-kanak perempuan itu cenderung kepada ibunya”. Rasulullah SAW berkata: “Ya Allah. Pandulah anak perempuan”. Anak perempuan itu kemudian cenderung kepada bapanya dan bapanya mengambilnya”.³²

Hadith di atas tidak mengatakan bahawa pihak yang tidak memeluk Islam tidak berhak terhadap hak penjagaan kanak-kanak kerana tidak terdapat arahan sedemikian oleh Rasulullah SAW. Hadith di atas menunjukkan bahawa Rasulullah SAW lebih cenderung bahawa anak itu tinggal bersama dengan bapanya yang masuk Islam bimbang anaknya dapat dipengaruhi oleh emaknya yang bukan Islam dalam aspek akidah.

Menurut mazhab Syafi'e dan Hanbali, penjaga kanak-kanak hendaklah beragama Islam. Sekiranya tidak, gugurlah haknya sebagai penjaga.³³ Menurut Sayid Sabiq, pandangan ini merujuk kepada ayat 141 Surah al-Nisa':

“Allah tidak akan memberi kejayaan kepada orang kafir terhadap orang yang beriman”.

Hujah yang diberikan ialah, sekiranya kanak-kanak itu diberikan kepada penjaga bukan Islam, adalah dibimbangi ia akan mempengaruhi kepercayaan kanak-kanak itu dan tidak membesarkannya mengikut ajaran Islam.³⁴ Hal ini ditekankan dalam Undang-undang Keluarga Islam di Malaysia. Sebagai contohnya, Seksyen 83 Undang-undang Keluarga Islam Selangor 2003 mensyaratkan hanya pihak yang beragama Islam sahaja yang berhak menjadi penjaga kanak-kanak tersebut. Tambahan pula Seksyen 84 Undang-undang Keluarga Islam Selangor 2003 memperuntukkan bahawa hak penjagaan kanak-kanak itu akan hilang sekiranya penjaganya murtad.

Walau bagaimanapun, mengikut mazhab Hanafi dan Maliki, syarat beragama Islam bukan menjadi kriteria untuk mendapat hak penjagaan kanak-kanak. Pihak yang tidak memeluk agama Islam boleh mendapat hak penjagaan anak dengan syarat yang ketat di mana kanak-kanak tidak dipengaruhi agama lain seperti membawanya ke gereja, mengajar ajaran bukan Islam atau menyuruh kanak-kanak tersebut memakan babi dan minum minuman keras.³⁵

Terdapat sesetengah Negara Islam yang membenarkan ibu atau bapa yang bukan Islam menjadi penjaga kepada kanak-kanak Islam. Ini dapat dilihat dalam Seksyen 162 Undang-undang Status Personal Algeria (*Algeria Personal Status Law*) yang memberi hak penjagaan kanak-kanak kepada ibu yang bukan beragama Islam dengan syarat ia hendaklah membesarkan anaknya mengikut Islam. Ini juga dapat dilihat dalam Seksyen 192 Undang-undang Personal Kuwait (*Kuwait Personal Status Law*) yang memperuntukkan hak penjagaan kanak-kanak boleh diberikan kepada ibu atau bapa yang bukan Islam sehingga kanak-kanak itu memahami agama atau sehingga kanak-kanak itu membiasakan diri dengan agama selain Islam meskipun ia tidak memahami agama tersebut. Tetapi kanak-kanak itu hanya boleh tinggal bersama ibu atau bapanya yang bukan beragama Islam sebelum mencapai umur 5 tahun. Kedua-dua undang-undang di Tunisia (Seksyen 59) dan Maghribi (Seksyen 108) mempunyai persamaan dalam menetapkan bahawa ibu atau bapa yang bukan Islam akan hilang kelayakan menjadi penjaga kanak-kanak itu sekiranya melebihi umur 5 tahun kecuali dipercayai ibu atau bapanya tidak membesarkannya secara bukan Islam.³⁶

Persoalannya, pandangan mana yang sesuai untuk diterima pakai di Malaysia? Terdapat dua pandangan dalam hal ini. Bagi sesetengah penulis dan pengkaji, melihat kepada Malaysia yang mempunyai masyarakat yang majmuk, pandangan daripada Mazhab Maliki dan Hanafi boleh dipertimbangkan untuk menjamin hubungan harmoni antara ibu dan bapa.³⁷ Mengikut pandangan ini, agama ibu atau bapa bukan satu-satunya faktor penentuan hak penjagaan kanak-kanak. Justeru itu, sekiranya salah satu pihak memeluk agama Islam, kesemua faktor hendaklah diambil pertimbangan dan mahkamah dalam menentukan siapa yang berhak menjaga kanak-kanak akan melihat kepada kebajikan kanak-kanak

tersebut. Adalah menjadi tanggung jawab pihak yang tidak memeluk agama Islam menunjukkan imej yang baik mengikut Islam supaya dapat menarik kanak-kanak tersebut kepada agama Islam.³⁸

Pandangan kedua yang terdiri daripada pandangan mazhab Syafi'e dan Hanbali mensyaratkan ibu atau bapa yang memeluk Islam mempunyai hak penjagaan kanak-kanak. Pandangan ini nampaknya lebih kuat dan lebih memberi manfaat kepada anak tersebut. Memberi hak penjagaan kanak-kanak kepada ibu atau bapa yang tidak memeluk agama Islam hendaklah dielakkan atas justifikasi kebajikan kanak-kanak tersebut. Ini kerana, kanak-kanak dalam peringkat usia yang sangat muda mudah terpengaruh dengan keadaan sekeliling dan ajaran agama penjaga yang bukan Islam. Sepatutnya, kanak-kanak itu didedahkan dan disesuaikan dengan ajaran agama Islam supaya dia menjadi seorang Islam sejati apabila dewasa nanti. Memberi hak penjagaan kanak-kanak kepada penjaga bukan Islam untuk tempoh tertentu seperti yang diamalkan di sesetengah negara Islam adalah tidak digalakkan memandangkan kanak-kanak itu akan lebih rapat dengannya dan mengambil balik hak tersebut dari penjaganya akan mencetus emosi dan psikologinya.³⁹ Justeru itu, untuk mengelakkan kemungkinan berlakunya konflik, adalah dicadangkan Mahkamah memberi kepada penjaga bukan Islam hak penjagaan kanak-kanak pada kedudukan yang kecil (*a narrower custody order*) dengan hanya memberinya peluang menjaga (memelihara) kanak-kanak tersebut (bukan hak hadhanah). Oleh itu, pihak yang memeluk Islam mempunyai hak secara langsung dalam membesarkan anaknya mengikut Islam.⁴⁰

Mahkamah Sivil sekarang nampaknya mengambil pendekatan memberi hak penjagaan bersama kepada kedua ibu bapa walaupun salah satunya bukan beragama Islam. Pendekatan ini dapat dilihat dalam kes Sharmala a/p Sathiyaseelan lwn Dr. Jeyaganesh a/l C Mogarajah. Mereka berdua berkahwin pada 5 November 1998 mengikut adat resam agama Hindu dan perkahwinan mereka didaftarkan di bawah Akta 1976. Empat tahun kemudian, suami (Dr. Jeyaganesh) memeluk agama Islam dan seterusnya juga menukar agama anak-anaknya. Sharmala memohon kepada Mahkamah Tinggi Sivil hak penjagaan anak-anak tersebut.

Dalam penghakimannya, Hakim Faiza Thamby Chik telah memberi hak bersama penjagaan anak-anak itu kepada kedua ibu bapa tetapi emak mempunyai hak menjaga dan mengawal anak-anaknya yang meliputi penjagaan seharian dan bertanggungjawab menjaga mereka. Hakim Faiza mengatakan bahawa hak penjagaan anak-anak itu diberi kepada kedua ibu bapa agar mereka bersetuju terhadap isu-isu berkenaan anak-anak seperti pendidikan, pilihan terhadap agama dan harta. Ini mengambil kira Seksyen 5 Akta Penjagaan Kanak-kanak 1961. Meskipun begitu, hakim berkenaan meletakkan kaveat bahawa anak-anak itu adalah seorang muallaf dan hak bersama yang diberi kepada Sharmala (ibu) akan

hilang sekiranya terdapat alasan yang munasabah yang mempercayai bahawa si ibu akan mempengaruhi agama anak-anaknya atau memberi mereka makan babi dan sebagainya.

Melihat kepada fakta penghakiman kes di atas, dapat dikatakan bahawa penghakiman ini berlandaskan undang-undang Islam tetapi malangnya Hakim Faiza tidak mencadangkan atau mengesyorkan garis panduan bagaimana untuk memastikan ibu yang bukan Islam mematuhi larangan yang diperintahkan oleh Mahkamah. Adalah juga dapat dipertikaikan kaveat yang dikeluarkan kerana ia seolah-olah bercanggah dengan alasan pemberian hak bersama penjagaan anak-anak kepada kedua ibu bapa yang membawa maksud kedua-dua mereka hendaklah bersetuju dengan keputusan yang melibatkan kedua kanak-kanak mereka termasuk cara pendidikan, pilihan agama dan sebagainya. Keputusan ini tidak konsisten dengan keputusan kes *Chang Ah Mee*⁴² yang menyaksikan bahawa emak mempunyai hak penjagaan kanak-kanak walaupun bapanya telah memeluk agama Islam. Tambahan pula, bapa tidak berhak memaksa anak itu ke sekolah agama dengan alasan terdapat ayat dalam al-Quran yang menyebut tidak ada paksaan dalam beragama.⁴³

Dalam kes *Subashini a/p Rajasingam lwn Saravanan a/l Thangthoray & Anor*⁴⁴ pihak suami telah menukar agamanya kepada Islam. Beliau telah memfailkan prosiding di Mahkamah Syariah untuk membatalkan perkahwinan asalnya dan juga memohon hak penjagaan ke atas anak lelaki yang turut bertukar agama menganuti Islam. Pihak isteri juga telah memfailkan petisyen bagi membatalkan perkawinan mereka dengan merujuk kepada seksyen 51 Akta 164.

Mahkamah Persekutuan memutuskan bahawa Mahkamah Sivil tidak dibenarkan untuk memutuskan sesuatu yang bercanggah dengan perintah yang dikeluarkan oleh Mahkamah Syariah secara sah serta melalui bidang kuasanya yang sah. Pihak isteri yang telah mendapat perintah mahkamah bagi mengekalkan prosiding pihak suami mengenai pertukaran agama anak lelaki sulung mereka di Mahkamah Tinggi Syariah.

Bagi mengelakkan berlakunya ketidakadilan ke atas pihak isteri yang tidak bertukar agama tersebut dan ke atas anaknya, perkahwinan orang bukan Islam tidak dikira terbatal hanya kerana berlakunya pertukaran agama oleh salah seorang daripada pihak pasangan. Pihak suami boleh menjadi responden bagi prosiding perceraian di Mahkamah Tinggi Sivil. Walau bagaimanapun, pihak isteri yang merupakan orang bukan Islam, tidak mempunyai kedudukan di sisi Mahkamah Syariah yang menghadkan bidang kuasanya hanya ke atas orang Islam sahaja.

Mahkamah memutuskan bahawa pihak suami atau isteri mempunyai hak untuk menukarkan agama anak tersebut kepada Islam dan penukaran agama bagi anak lelaki sulung berkenaan yang dijalankan di bawah Enakmen Selangor tidak bertentangan dengan Perkara 12 (4), Perlembagaan Persekutuan.

Dalam kes *Viran a/l Nagupan lwn Deepa a/p Subramaniam*⁴⁵ kedua-dua pihak adalah pasangan Hindu yang telah berkahwin mengikut undang-undang sivil. Viran kemudiannya memeluk Islam dan mengguna pakai nama Izwan Abdullah dan mengislamkan dua anaknya Sharmila (Nurul Nabila) dan Mithran (Nabil) tanpa pengetahuan ibunya pada bulan April 2013. Izwan memohon kepada Mahkamah Syariah hak penjagaan dua anaknya tersebut. Mahkamah Syariah telah membuat keputusan untuk menyerahkan hak penjagaan dua anak tersebut kepada Izwan.

Deepa kemudiannya memohon kepada Mahkamah Tinggi Sivil Seremban memohon hak penjagaan dua anaknya daripada suaminya. Pada 7 April 2014, Mahkamah Tinggi Sivil memutuskan supaya kedua-dua anak tersebut diserahkan hak penjagaan kepada ibunya yang bukan beragama Islam. Hakim Zabariah Mohd dalam masa yang sama turut mengesahkan permohonan S. Deepa untuk membatalkan ikatan perkahwinan dengan bekas suaminya yang telah memeluk Islam pada tahun 2011. Mahkamah tersebut juga turut memberi hak untuk melawat anak-anak mereka secara berkala kepada bapa berkenaan. Izwan telah membawa kes ini ke Mahkamah Rayuan.

Selang beberapa hari, bapa kanak-kanak tersebut, Izwan telah ‘menculik’ dua anaknya daripada pangkuan ibunya. Pihak bapa memberi alasan bahawa beliau mempunyai hak penjagaan dua anak tersebut kerana dia telah mendapat hak penjagaan tersebut daripada Mahkamah Syariah terlebih dahulu.

Izwan membawa kes tersebut ke Mahkamah Rayuan menuntut hak penjagaan dua orang anak yang telah diislamkan olehnya. Mahkamah Rayuan memutuskan bahawa ia mempunyai bidang kuasa mendengar kes pertikaian yang melibatkan dua pihak yang berlainan agama di mana perkahwinan asalnya di bawah undang-undang sivil. Mahkamah Rayuan seterusnya memutuskan bahawa kedua-dua anak Izwan dan Deepa diserahkan kepada Deepa mengambil kira kebajikan mereka. Tidak berpuas hati dengan keputusan ini, Izwan memfailkan rayuan di Mahkamah Persekutuan menuntut hak penjagaan kedua-dua anaknya yang beragama Islam.

Mahkamah Persekutuan memutuskan untuk mengekalkan keputusan Mahkamah Rayuan bahawa platform yang sepatutnya mendengar pertikaian ini ialah Mahkamah Sivil walaupun salah satu pihak yang terlibat adalah orang Islam. Mahkamah Persekutuan memutuskan bahawa Mahkamah Sivil mempunyai bidang kuasa dalam pembubaran perkahwinan dan penentuan hak penjagaan kanak-kanak. Ini kerana, kedua-dua pasangan yang terlibat mendaftar perkahwinan di bawah Akta 164 dan segala isu yang berkaitan selepas itu hendaklah diselesaikan di Mahkamah Sivil. Menurut Mahkamah Persekutuan lagi, Mahkamah Syariah tidak mempunyai bidang kuasa walaupun ke atas pihak yang memeluk Islam.

Apa yang menarik dalam kes ini ialah Mahkamah Persekutuan sebelum membuat keputusan siapa yang lebih berhak mendapat hak penjagaan kanak-kanak telah memanggil kedua-dua anak Izwan dan Deepa, Nurul Nabila (11 tahun) dan Nabil (8 tahun). Dalam keputusan yang “adil” ini, anak lelaki diserahkan hak penjagaan kepada si bapa dan anak perempuan kepada si ibu. Mahkamah Persekutuan seterusnya memutuskan bahawa anak lelaki tersebut masih boleh berhubungan dengan ibunya melalui telefon dan anak perempuan juga boleh berhubungan dengan bapanya melalui cara yang sama. Cuma hak untuk berjumpa anak ditentukan di hujung minggu setiap dua bulan tanpa boleh bermalam.

Kesimpulan dan Cadangan

Daripada perbincangan di atas, dapat disimpulkan bahawa selagi pihak yang tidak memeluk agama Islam tidak memfailkan petisyen pembubaran perkahwinan di Mahkamah Sivil, selagi itulah pembubaran perkahwinan tersebut dianggap tergantung walaupun pihak yang memeluk agama Islam mendapat pengesahan bahawa perkahwinan tersebut terbubar di Mahkamah Syariah.

Bagi mengelak polemik ini dan juga konflik bidang kuasa antara Mahkamah Sivil dan Mahkamah Syariah, adalah dicadangkan agar seksyen 51 Akta 164 dipinda bagi memastikan keadilan terlaksana ke atas kedua-dua pihak ibu bapa sama ada yang menukar agama dan juga bagi yang tidak menukar agamanya.

Manakala cadangan pindaan ke atas seksyen 88A Akta 164 boleh ditangguhkan kerana tidak berperlembagaan dan bercanggah dengan Perkara 12(4). Begitu juga berlaku ketidakseragaman peruntukan dalam mendapat keizinan bagi pemeluk agama Islam bagi kanak-kanak bawah umur dalam enakmen pentadbiran undang-undang Islam negeri-negeri. Ada yang memperuntukkan persetujuan ibu **atau** bapa/penjaga, dan ada juga ibu dan bapa/penjaga.

Penyelesaian kepada pertikaian ini bukanlah satu perkara yang mudah. Ia memerlukan kerjasama semua pihak terutama ibu bapa/penjaga dan peruntukan undang-undang yang melihat kepada kebajikan kanak-kanak tersebut.

Seharusnya juga, hakim Mahkamah Syariah hendaklah bersidang bersama hakim Mahkamah Sivil apabila kes mengenai undang-undang Islam dibangkitkan dalam Mahkamah Sivil. Hakim Mahkamah Syariah boleh dipinjamkan ke Mahkamah Sivil apabila ada keperluan. Sedikit pindaan perlu dibuat kepada Perkara 122B, Perkara 123 Perlembagaan Persekutuan dan Akta Mahkamah Kehakiman 1964.

Pertikaian hak dalam menentukan agama dan hak penjagaan kanak-kanak juga boleh diselesaikan melalui satu tribunal yang mengambil pendekatan mediasi. Panel yang dilantik mestilah terdiri daripada pihak yang beragama Islam dan

bukan Islam. Ini dapat mengurangkan konflik antara pihak yang terlibat malah dapat mengelakkan konflik bidang kuasa antara Mahkamah Sivil dan Mahkamah Syariah dalam memutuskan tuntutan yang dikemukakan.

Notes

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VIEWPOINTS

Smart Energy Consumption Could Preserve Natural Resources

*Shahino Mah Abdullah **

Energy plays an important role in our lives. It comes in several forms which can be utilised to keep people warm during cold weather, provide foods, improve transportation, and increase productivity. When energy is utilised efficiently, it brings great comfort to our lives. However, energy consumption has been increasing in recent decades as the world population keeps growing. According to a United Nation (UN) report, the current world population of 7.4 billion is projected to increase by 1 billion over the next 10 years and reach 9.6 billion by 2050. Besides population, the standards of living for many people in developing countries is increasing, which in turn results in growing energy demand.

As a developing country, Malaysia is not immune to this growing energy demand. The Energy Commission reported that energy consumption in Malaysia is showing an increasing trend year by year. The country's energy output is primarily generated from burning limited fossil fuel resources such as coal, natural gas, and oil. The burning of fossil fuels releases large amounts of carbon, a well-known significant greenhouse gas that causes global warming. This not only hugely impacts the environment, but also incurs great costs for Malaysia, which relies heavily on this resource. It was reported on 1 April 2017 that Malaysia's power generation industry spent RM15.1 billion to generate 120,059 Gigawatt-hours (GWh) of electricity for 8.45 million customers in Peninsular Malaysia. To get a clear picture of fossil fuel dependency, the International Energy Agency's report, 'World Energy Outlook 2007', states that between now and 2030, global energy needs are expected to grow, and that fossil fuel will remain the dominant source.

In order to reduce fossil fuel dependency, energy mix is introduced as an alternative measure to face shortage. Some countries that have already started to harvest energy from alternative resources, like the United Kingdom for example, have successfully reduced their energy consumption in comparison to what it was in the 1970s, despite an extra 6.5 million people living there. In Malaysia, this energy mix strategy has successfully reduced oil dependency from 87% in 1980,

to less than 1% today. However, since the energy mix is only based on other fossil fuels, dependency on coal and natural gas has increased to 87% for both, while less than 10% comes from hydroelectric. Surprisingly, Malaysia is one of the top ten coal importers in the world even though, at the same time, it is one of the world's top ten liquefied natural gas (LNG) exporters. This dependency on fossil fuels can no longer last for the Malaysian energy sector, thus the quest to seek other alternative sources of energy is crucial.

Recently, the government of Malaysia started to consider nuclear energy as part of the national energy mix. The proposal to have a nuclear power plant has been taken into consideration since the country's energy consumption keeps increasing, while the main energy source, fossil fuels, is running out. According to the Eleventh Malaysia Plan (11MP) 2016-2020 under 'Anchoring Growth on People' agenda, it is stated that 'the usage of nuclear power as an alternative energy resource will be explored'. The Malaysian Nuclear Agency added that, 'Malaysia will further explore the deployment of nuclear power as an option for electricity generation for post-2020 in Peninsular Malaysia'. It is almost confirmed that Malaysia will be having a nuclear power plant sooner rather than later, Minister in the Prime Minister's Department, Datuk Nancy Shukri has stated that Malaysia's nuclear power programme will kick off after 2030, subject to the approval of the atomic energy regulation bill by Parliament.

Currently, the implementation of nuclear energy as part of the energy mix faces a few challenges, as the government and related agencies need to convince the public about the safety of nuclear power, to identify the source of financing for a nuclear programme, to obtain approval for a plant site and acquire public support on locality. It can be seen that the government of Malaysia is struggling to fulfil the country's energy demand, which involves complicated processes of building nuclear power facilities. From the writer's point of view, the search for alternative energy resources is an endless journey if the energy consumption is 'allowed' to increase without implementing 'green practices'. According to Dr Shaikh Mohd Saifuddeen, a senior fellow from the Institute of Islamic Understanding Malaysia (IKIM), 'green practices' are practices that can lead to more environmentally friendly and ecologically responsible decisions and lifestyles, which can help protect the environment and sustain its natural resources for current and future generations. In his presentation during the *International Seminar on Islam and Green Technology 2016* at the International Institute of Advanced Islamic Studies (IAIS) Malaysia, he stated that we can have all the renewable energy and green technology that we can utilise and develop, but without green practices there will still be wastage.

Therefore, we could act responsibly by considering 'green practice' through 'energy efficiency' implementation in order to reduce the rise of energy

consumption. Basically, ‘energy efficiency’ is the goal to reduce the amount of energy required to provide products and services. This is one of the best measures which we could take on our own initiative, to address the issue of increasing global energy demand. Moreover, around 22% of Malaysia’s energy consumption is from the residential and transportation sectors, which involve energy consumption by ordinary people like us. Instead of considering alternative source of energy such as nuclear, at this moment we have an option to choose an alternative way of life that practices ‘energy efficiency’. Among ‘energy efficiency’ practices, we could consider changing inefficient appliances with more efficient ones; reduce the loads of mechanical appliances that require more operating energy; upgrade building insulation and roofing, have good air ventilation to support natural cooling; and use energy-saving control systems in most electrical appliances, when possible. This might need some upgrading to our homes, but the investment will definitely give positive returns without involving large amounts of cost. We can start such practices by ensuring our next purchases are of ‘energy efficient’ products and equipment. It should be noted that this responsibility must also be taken by those who are from the commercial and industrial sectors, as they make up 78% of total energy consumption in Malaysia. These practices are actually in line with the Islamic teaching to be moderate in the use of resources, to be assiduous in their use and avoid extravagance (Q al-A’raf, 7:85). It is always our challenge, and not only the government’s, to address the issue of increasing energy consumption. Self-awareness and timely initiative through ‘energy efficiency’ implementation plays an important role in conserving existing resources for future generations.

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Community Engagement and the Creation of Social Capital

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Since the concept of sustainable development gained traction in the early 70s, there has been demand for new approaches, perspectives, and practices to the conservation of natural resources. The proposition that much of our modern environmental policies need citizen participation is widely accepted. In line with this standpoint, several concepts have emerged. They are shaped by Faith-Based Environmental Conservation, theoretical developments on environmental governance of the commons (e.g. Community Based Natural Resources Management), and social capital. The first and the second concepts indicate the integration of religious principles and social ecological wisdom into natural resources management. The third concept captures the idea that social bonds, norms, cultures, knowledge, attitudes, and information channels are central for a sustainable environment. In a highly organised group, where social capital is strong, the pace towards environmental sustainability has been expedited by successes in community-based programmes.

However, that generalisation of ‘good cases’ often does not point out a practical grounding explaining what makes social capital so successful. Recent years have shown the pivot of community engagement as being an effective route to the protection of natural resources. This macro-level phenomenon is considered by field-based researchers as a prelude to the creation of social capital. It draws public participation and collective interventions in the planning and designing of environmental management plans and activities. Much of its focus is investing in collective actions, as people cooperate at localities, for a better structure to guard common resources. In relation to this point, there is interest about community roles in environmental protection, which has reached a new plateau in Malaysia. As interest surged in recent years, fresh perspectives on community-centred activities have emerged, and collaborative partnership between the state and local communities have been lubricated. One case study in Terengganu saw a collaboration between NGOs and religious departments that produced Friday sermons carrying the wildlife conservation theme. In this manner, the concept of community engagement offers an idea: to start the initial process of creating, piloting, and developing a small structure for a better environmental care. In other words, it offers a realistic step by step grounding towards the implementation of large scale conservation projects.

There is, however, one key issue that can be seen as a barrier to initiating community engagement activities – reluctance to engage in short-term projects. This issue is hard to refute. The compelling logic is that citizens and communities perceive short-term and time-specific projects as unsustainable, lacking the continuity to benefit both people and their environment. Most of these sorts of projects demotivated people to commit actively as they make no long-term benefits to them. Another excuse for non-participation is ‘the long standing focus’ on state regulations and market-based policies, without the long run strategies for community engagement efforts.

However, as our urbanisation, population and modernisation have increased, and as degradation, exploitation and pollution have accelerated, the responses seem starker. Citizens and communities are bound either to wait for top-down regulations to prevent further damages or they engage. The latter is, in principle, an important and a highly vital catalyst especially to the implementation of sustainable natural resource management. Furthermore, many field-based studies that were carried out in small scale societies worldwide had provided background for an innovative concept of community engagement. The studies consistently recognised that it is easy to increase social capital because valued relation promotes peoples’ compliance with rules and keeps down monitoring costs. Also, with frequent communication and reciprocal arrangements between group members, and with small group size structure, members of the society can manage natural resources collectively. As a result of these concerted community engagement efforts, there has been an increasing number of cases that show high-level bio-diversities and biological growth in local areas.

Although we have argued that community engagement activities potentially benefit community-led environmental projects, this idealistic vision may not be the panacea. Despite its validity in today’s pressing environmental issues, and despite many implicit case studies inciting us to believe in its environmental and social payoff, it seems to focus on the net impact of social capital. We should not be too optimistic about its popularity and accuracy. Rather we should remember that there is a higher level of concern, and that is to help a nation’s stock of social capital through community engagement. Thus, this concern leads us to stress the value of environmental knowledge, the value of effective institutions, and the need for adequate funding for community-based projects. A recognition of the following three external catalysts is required to reach the wider goal of community engagement.

First, citizens/communities may not always have the knowledge to anticipate that what they are doing may be harmful to the ecosystem. Thus, there is a need for them to collaborate with scientists who hold the trove of knowledge for a better implementation of conservation projects.

Second, citizens may not always correctly predict climate change, and they do not have the power to restrain the pressures of national, regional, and global markets. These are partly the reasons for their reluctance to engage in conservation projects. The logic is simple: no community believes it can have a big impact on national, regional and global phenomena. Thus, effective higher level institutions are needed to complement local institutional arrangements.

The third value offers a more pragmatic vision for a long and sustainable community engagement project. With enough funding from government or the private sector, it leads to a favourable cooperation by community members, for the protection of the environment, both in the short and in the longer terms. State support for community-based projects can assist in facilitation. In turn, there are chances of bridging divides, building trust and developing mutual understanding between communities and other stakeholders.

This viewpoint signals some important directions for the vitality of community engagement in the creation of social capital. In general, the participation of citizens in any environmental project, and in resources care plans, is handicapped by the lack of proper facilitation, environmental knowledge and financial support. But, if these challenges are properly addressed, community engagement in environmental programmes can salvage nation's reputation, as well as build public credibility, trust and confidence.

To conclude, we have seen that community engagement approaches corroborate citizen participation in resource care. Much of its concern is to catalyse the formation of sustainable resources care. It seems to effectively initiate low cost environmental governance, and perhaps can offer a quick route to a better environmental outcome in the future. To date, it has affected the levels of social, cultural and natural capital worldwide. Such growth – both in academic discourses, and actual implementations – is certainly worth a closer look.

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Reducing Polarisation in the World

*Abdul Karim Abdullah **

There are wars happening in Syria, Iraq, Afghanistan, and Yemen. A million Muslims have died in Afghanistan. Another million Muslims are reported to have died in Iraq. More people are dying and being displaced in Syria, and Yemen.

After the demise of the caliphate in 1924, it appears that polarisation between Muslims and non-Muslims is getting worse. The clash of civilisations is fast becoming a grim reality. Even the polarisation between Muslims is not decreasing.

The Qur'an states, "Invite (all) to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious: for thy Lord knoweth best, who have strayed from His Path, and who receive guidance." (16:125)

Radical factions have been wreaking havoc. They have arrogated to themselves the right to 'interpret' Islam for all. Yet what presents itself as an 'interpretation' is, more often than not, a *misinterpretation*.

Radical fringes display hatred of people whose main fault is being *different*. It is important to restrain extremists before they perpetrate greater damage and injury. Problematic preconceptions, for example the binary division of the world into a realm of peace (Islam) and an abode of war (everywhere else), are used.

The Arab Spring promised change for the better. Instead it brought misery and destruction. In Egypt, the Morsi government alienated significant parts of the population with its erratic behaviour. When it tried to pursue retribution against the military, its nemesis took over. By contrast, the attempted uprising against authorities in Turkey failed. Both nations now find themselves at different ends of the political spectrum. Hopefully, they will get nearer rather than drift further apart.

In Europe, the political temperature is rising. Xenophobic, nationalistic parties are registering growing support. The ill-wishers and enemies of Islam are pleased to see this happen, as it serves their interests.

It appears that ISIS initially received Western backing in the hope that they would turn against the Syrian regime. When ISIS instead began beheading Western prisoners and its enemies in Syria and Iraq, it became difficult to support ISIS.

Another reason for misunderstandings is that different people see Islam differently. The discourse of jihadism *falsifies* Islam. There is a need for a *better* understanding.

The way to reduce polarisation is to focus upon what Muslims share (the Qur'an) rather than where differences arise (divergent explanations of what transpired in the past). In this way, the Muslim ummah should be able to recapture the universal understanding of Islam and address the deep problems it is now facing. What is required is to follow the middle path of *wasatiyyah* or moderation.

Political Islam has brought greater harm than benefit. It needs to be recalled that there is no exhortation in the Qur'an to establish an "Islamic state." The primary task of the Prophet Muhammad was to spread a message of peace. Islam and Islamism are two different things. Islam is a way of life, not a political teaching.

There is excessive focus on externalities and insufficient emphasis on substance. People are too concerned with the way people dress rather than with how to alleviate poverty, reduce ignorance, and enhance good governance and people's welfare.

It is important for Muslim institutions of learning to emphasise *thinking*. After all, the protection of the intellect (*'aql*) is among the chief purposes of the Shari'ah. There can be little progress without a thoughtful approach. Exchanges of views can help reach common ground on important issues.

There is a need for a *rational* approach. Extremists denigrate reason, as to do so helps them maintain their sway over fanatical followers. The Qur'an states, "Surely the worst of beasts in God's sight are those that are deaf and dumb and do not reason." (8:22). Elsewhere, it states "And it is not for a soul to believe except by permission of Allah, and He will place defilement upon those who will not use reason." (10:100).

In the final analysis, it needs to be recalled that the "pen is mightier than the sword." The Qur'an states, "Allah does not change the condition of a people until they change their own condition..." (13:11) The right way to defend Islam is by explaining it properly, including its higher purposes. At the same time, it is important to follow up with excellent behaviour.

Notes

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Charities in Malaysia: Demarcation of Federal and State Jurisdictions

*Apnizan Abdullah**

Charity is indeed a universal value that all religions highly encourage, subject to rules or customs. Its impact on the socio-economic conditions of society is undeniable. In Malaysia, the laws governing charities are piecemeal. Some charities are governed by the Federal Government, some are exclusively in the hands of the States, and some are concurrently regulated by both the Federal and State Governments. This jurisdictional demarcation is stipulated in Article 74 of the Federal Constitution and its Ninth Schedule.

Primarily, the general laws on charities, except for *waqf* and Hindu endowments, are governed by Item 15 (c) of List I (Federal List) of the Ninth Schedule of the Constitution. *Waqf* and other charities concerning Muslims are administered independently by the State Governments as prescribed by Item 1 of the List II (State List) in the same Schedule. Hindu endowments, on the other hand, are governed under a pre-independence law, known as Hindu Endowment Ordinance 1906. Charities in Sabah and Sarawak are governed under a shared power arrangement between the Federal and State Governments, as stipulated in Item 15 of List IIIA (Supplement to the Concurrent List) of the Ninth Schedule.

Charities in Malaysia are mostly executed via the establishment of non-profit organisations (NPOs). According to the Financial Action Task Force (FATF), “non-profit organisation” refers to a “legal person or arrangement or organisation that primarily engages in raising or disbursing funds for charitable, religious, cultural, educational, social or fraternal purposes or for the carrying out of other types of good works.” NPOs may be designated as either a foundation, trust fund, company limited by guarantee, or as a society or organisation. Some are governed by the Federal Government while others are supervised by the States. Yayasan Pembangunan Ekonomi Islam Malaysia (YAPIEM), National Cancer Council Malaysia (MAKNA), Koperasi Belia Islam Malaysia Berhad, Institute of Strategic and International Studies (ISIS) and IAIS Malaysia are examples of NPOs established under the power of the Federal Government.

State-based NPOs, on the other hand, are established under the relevant State Enactments. These enactments are passed by States by virtue of the Trusts (State Legislatures Competency) Act 1949. The Tok Kenali Trust Fund Enactment 1992 and the State Heritage Trust Fund Enactment are instances of State Enactments that govern the establishment and management of State NPOs, in this case

the Tok Kenali Trust Fund in Kelantan and Tabung Pegawai-pegawai Masjid in Terengganu respectively. Islamic charitable acts, such as *zakat* (obligatory giving), *hibah* (gift), *waqf* (endowment), and *nazr* (vow), are also under the care of State Governments through the supervision of their Islamic Religious Councils (IRCs). This is because their subjects are Muslims. It is crucial to mention that the charities governed by the State Governments may vary from State to State since each of the latter possesses exclusive power over these matters. This power is to be exercised without any interference from the Federal Government.

Jurisdictional issues would arise when Islamic charitable concepts (except *waqf*), such as *sadaqah*, *infaq* or *hibah*, are applied within the Federal jurisdiction. This is due to the fact that such concepts may be construed to be governed by both the Federal and State Governments. Fundamentally, *sadaqah*, *infaq* or *hibah* are Arabic terms that connote the general meaning of charity, alms-giving or gifts. Constitutionally, general charities fall within the power of the Federal Government. Tacit exclusions are only made over *waqf* and Hindu endowments, both of which are specifically governed by the States and their relevant governing laws, as previously elaborated. *Sadaqah*, *infaq* or *hibah* shall be governed by State Governments only when the subjects are Muslims, since the States shall only have power over Muslims. This position is clearly stipulated in Item 1 of List II of the Ninth Schedule of the Constitution. But, how would the current law react when a non-Muslim wishes to take part in an Islamic act of charity, such as *sadaqah*, *infaq* or *hibah*?

Generally, Islam allows non-Muslims to participate in *waqf*, *sadaqah*, *infaq* and *hibah*. As far as *waqf* is concerned, however, the express exclusion made by the Federal Constitution via Item 15(c) of List 1 of its Ninth Schedule portrays a clear perception that *waqf* is a matter falling exclusively under the jurisdiction of the States. This means that the Federal Government cannot interfere with the administration of *waqf* under the States, implying that, because the States cannot have jurisdiction over non-Muslims, the latter may not participate in *waqf*. However, other Islamic concepts of charity not explicitly excluded from being under the power of the States could be applied within the ambit of the Federal jurisdiction, especially when the donors or beneficiaries come from various religious backgrounds. Since Malaysia is a multiracial country, it is timely to revisit the current state of our regulatory regime governing charities so that certain Islamic philanthropic concepts can be extended and enjoyed by both Muslims and non-Muslims.

Notes

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SIGNIFICANT EVENTS AND DEVELOPMENTS

Roads and Routes: New Opportunities, Fresh Challenges

*Mohammad Manzoor Alam**

The context

With apology to Charles Dickens, we are living in the “best of times”, and we are living in the “worst of times”. This is an age of high level of prosperity for an ever-growing number of people worldwide, and alongside it, astonishingly fast growing inequality (the greatest in history in terms of numbers). Over the last two decades India has pulled millions of people out of poverty, one of the rarest of such feats. However, India still remains home to the world’s largest number of the poor. Nearly one out of the world’s five poorest persons lives in India, thus negating the country’s spectacular economic growth that has benefited the top ten percent of the country disproportionately more than the rest.

One of the “best of times” features of our age is that we have inherited a globe that is getting increasingly tightly knit with each passing day. The globe has virtually shrunk to the dimensions of a village in earlier ages where everybody in the village was a shout away, within hearing distance, that is. Today, with advanced telecom, we can talk to friends and family at the farthest places in real time, seeing them talking to us comfortably on our telephone screens. We can move millions of dollars from one bank at “one end” of the earth with one command on our phone or computer in seconds, to another bank at “another end” of the earth.

With the collapsing of distance because of air travel we can go to Western Europe from India, attend a meeting and return home within 72 hours, something that would have taken 72 days a century ago. It is far easier to take foodstuff from one distant place to another. Humanitarian relief - food, medicine, doctors, paramedics, tents and other necessities - reach disaster-affected areas from thousands of kilometers within hours and large numbers of lives are saved with international co-operation and co-ordination. And, tragically, people are killed in large numbers with the same speed and accuracy with missiles launched from hundreds of kilometers away within minutes as these missiles travel at a far greater speed than sound. Even bomber planes can fly across countries and continents, bomb targets and return to their countries.

In Afghanistan, B-52 bombers flew in straight from their bases in the United States, unleashed their lethal payload on human targets below, took a U-turn and flew back to their bases in the US without landing anywhere for refueling. If only such high-tech, long-winded technology could be used to help humans rather than harming them, we wonder. Alas!

These killing machines have made war impersonal. We don't see the death agony of victims - non-combatant women, children and the old - which abolishes any chance of sympathy arising in our human heart. The unmanned US cruise missiles that unloaded the deadliest bombs on Afghan and Iraqi populations with devastating effect were not launched from US bases in Iraq or Afghanistan, but from the United States itself. They were not launched by military personnel, but by very young men and women sitting at computer terminals sending commands to the software fitted in those missiles stored thousands of kilometers away. Those commands precisely pointed out targets for these missiles fitted with GPS devices. For the computer operators it was no different from playing a computer game - only the victims were real humans. That is one dimension of living in the "worst of times".

Our times (which have both the "best" and "worst" features) are rightly seen as the age of fast-advancing science and technology. But the point is that science and technology cut both ways: they heal as much as they kill. This reminds me of a cartoon I saw in my school days. It talked about a headline in a newspaper that announced: "Eight people cut to pieces by train". In an accident eight people trying to cross rail line came under a rushing train and were "cut to pieces". After that headline in the cartoon somebody was shown saying: "I wonder whether a train is a carriage or a butcher's knife". Well, in that case it turned out to both. Science and technology are both healers and killers. They can help as well as harm. What I am saying is germane to the discourse on roads and routes in a globalised, high-tech, precariously positioned 21st century world. What I am saying is the context to the text that will follow.

Roads and routes

Roads and routes are parts of maps, connecting places, as often distant and overseas, as local. And map-making is a function of power: national sovereign power as well as colonial power. Being associated with power they are as likely to be contested by rival powers as to be accepted happily by different states. In the earlier ages, the contours of European states used to change virtually on a yearly basis because of continuous wars and territory conquered and lost by kings.

The contours of European states got relatively stable after the Treaty of Westphalia when those states began to be identified as nation states rather than

kingdoms and principalities. The conflicts between European states in the 19th century were more about territories in Africa or elsewhere in Asia. The infamous “scramble for Africa” was a conflict between European states for colonial dominance over Africa.

All this needed frequent drawing and redrawing of maps and charting of roads on land and mapping of sea routes. The twentieth century saw the emergence of another kind of routes for passengers and cargo (and often military purposes): air routes. Roads and routes have been great game changers. They bring the world closer and help trade development and exchange of scientific, religious and cultural ideas. This is evident from the rise of Muslims as great land and sea power and their dominance of sea lanes and international land routes, most of which they had developed.

However, their dominance was limited mainly to Indian Ocean, Pacific Ocean, Arab Sea, Red Sea and Mediterranean. The deeper and more stormy Atlantic was not tamed by their ships sailing on wind power. The Muslim sea craft were also smaller compared to European ships that replaced Muslim naval power in the late 16th century. The loss of control of sea routes to Europeans meant loss of trade, prosperity and, ultimately, freedom.

As I have mentioned already, maps and roads, and routes created on those maps, can be a great advantage for people and countries, but they can also be a perennial destabilising factor. I will give a few examples here. The Durrand Line dividing Pakistan and Afghanistan is not recognised by many Afghans. Matters are not helped by the same Pakhtoons living in Pakistan’s North-West Frontier Province and in Afghanistan. Pakhtoons, who are the dominant tribe in Afghanistan and Pakistan’s NWFP, claim that their homeland was divided between Afghanistan and what is Pakistan today by scheming British colonists. As the Durrand Line is an unnatural border they would not recognise it.

Similar is the case with McMahon Line which divides India and China. The Chinese reject it wholesale, complaining that the British map maker McMahon drew an “unnatural” border between India and China, without the consent of the latter during British colonial rule over India. Hence China would not accept it.

India has declared that Kashmir, at least the Indian part of J&K state, is an “integral” part of India. Pakistan, which has a sizeable part of Kashmir under its administration, insists that Kashmir is a disputed territory. The US and European Union also take it as a disputed territory. However, Western publications (including the now defunct print edition of *Encyclopedia Britannica*) have been regularly confiscated by the Indian customs because maps in them show Kashmir as a disputed territory. The issue got further complicated when Pakistan parceled away some of the former J&K territory to China in a border settlement. The man who drew the line between India and Pakistan, the British mapmaker Cecil

Radcliff, is held responsible for drawing an imperfect border between the two countries.

The British historian John Key calls the border between India and East Pakistan (now Bangladesh) as “a line drawn on water” as a long stretch of the border passes over river waters that often shift course, frequently changing landmarks. It has not been strange to find areas in India or Bangladesh going to the other country after rivers change course every few years.

The colonial powers have devastated people, countries and societies while leaving. The partition of Palestine under Balfour Declaration to create Israel has created a festering wound that refuses to heal. Since the British mandate divided Palestine to create Israel the area has not seen a day’s peace, nor did India’s partition create peace.

Good versus evil

As far as the history of discovery of new sea routes is concerned, more evil than good has befallen the humankind. A comparison between the Muslim seafarers and oceanographers and European discoverers of new sea routes like Marco Polo and Christopher Columbus is illustrative. These two left behind more evil than good.

With the discovery and colonisation of Australia by Europeans almost the entire aborigine population of the continent was wiped out. The survivors of the European scourge were few and far between. Even today the scant population of aborigines lives on the margins of Australian society.

European conquistadors from Spain destroyed the entire Maya, Aztec and Inca civilisations of South America. Millions were wiped out by the Spaniards. The epidemic of small pox, not known to the peoples of the Americas, was brought in by Europeans. It killed millions. Sexually-transmitted diseases (STDs) brought in by Europeans devastated entire populations in the Americas.

Compared to the devastation wrought by Europeans’ depredations the work of other explorers was far more benign. The case of the Chinese explorer Zheng He, also known as Cheng Ho, Ma Sanbao and Ma He, provides an interesting contrast. Following is an abridged version of the *Encyclopedia Britannica* entry on Zheng He.

In Chinese language Ma stands for Muhammad. Born in a Hui (Chinese Muslim) family in 1311, he led seven expeditions, the first being in 1405. He was commanding 52 ships with 27,800 men in them. The fleet visited Champa (South Vietnam), Siam (Thailand), Malacca (Melaka) and Java, and then through the Indian Ocean to Calicut (Kozhikode) on the Malabar coast of India and Ceylon (Sri Lanka). He returned to China in 1407.

On his second voyage (1408-9), Zheng He again visited Calicut, stopping in Kochin along the coast to the south. He encountered treachery from king Magonakkara of Ceylon. He defeated the king's forces and took him back to Nanjing as a captive.

The same year in October he set out on his third voyage. This time he sailed to Hormuz on the Persian Gulf. On his return in 1411 he touched at Samudra, on the northern tip of Sumatra.

On his fourth voyage Zhen left China in 1413. After stopping at the principal ports of the area, he proceeded westward from India to Hormuz. A detachment of the fleet cruised southward down the coast of Ambia, visiting Dhofar in Oman and Aden in Yemen. A Chinese mission visited Makkah and continued to Egypt. The fleet visited towns along the east coast of Africa of what are now Somalia and Kenya and almost reached the Mozambique channel. On his return to China in 1415 Zheng brought to China envoys from more than 30 states of South Asia and Southeast Asia to pay tribute to the Chinese emperor.

Zheng's seventh and final voyage left China in the winter of 1431. He visited the states of Southeast Asia, the coast of India, the Persian Gulf, the Red Sea and the east coast of Africa. Zheng died in Calicut in 1433 and the fleet returned to China that summer. These missions had an effect of extending China's influence over maritime Asia over half a century. In their wake Chinese emigration increased, resulting in Chinese habitations in Southeast Asia and the accompanying tributary trade, which lasted until the 19th century.

Now contrast this to what Columbus wrought in the Americas. The fate of this small sample from the relatively small island of Haiti on the American continent is representative of what befell the indigenous people over the entire continent. The following are excerpts from the remarkable work of historiography, *A People's History of the United States*, by Howard Zinn.

In two years, through murder, mutilation, or suicide, half of the 250,000 Haitians were dead. (P. 5)

By 1515 there were perhaps 50,000 Indians left. By 1550 there were 500....1650, none of the Arawaks left on the island. (P. 5)

...from 1494 (Columbus had come first time in 1492) to 1508 over three million people had perished from war, slavery and the mines. (P. 7)

Zinn takes to task historians who underplay the brutalities unleashed by Columbus on hapless indigenous people of the Americas. "This historical distortion is more than technical; it is ideological; it is released into a world of contending interests, where any chosen emphasis supports (whether the historian means it or not) some kind of interest, whether economic or political or national or sexual." (P.8)

Zinn points out that the Western lionisation of Columbus is carried out by ignoring bitter truths of history. “To emphasise the heroism of Columbus and his successors as discoverers and to de-emphasise their genocide, is not a technical necessity but an ideological choice. It serves unwittingly to justify what was done.” (P.9)

We must not forget that devastation and death of millions upon millions of indigenous people in the Americas was the direct result of Western discovery of new sea routes. The Australian continent fared no better after the European conquistadors landed on the continent. We must also remember that the Western aggression has gone nowhere as is evident from the invasion of Afghanistan and Iraq by Western powers. Over five million people, almost all Muslims, have died directly or indirectly because of the supposed war on terror: Robert Fisk, the best journalist to cover West Asia, had warned before the America-led war that five million people, almost all Arabs and Muslims, would be consumed by the war.

The New Great Game

To understand the new Great Game, we have to know what the old Great Game was about. It was about the “game” of great European powers involving intense rivalry between them to capture countries in Asia, Africa and the Americas, along with Australia to subjugate the locals and loot their resources using cunning, intimidation and extraordinary violence. All their diplomatic and military resources were used to this end. People of the colonised countries were set against each other in the classical divide-and-rule tradition. When such empires were finally dismantled, the colonists left behind highly divided and bitter countries. French colonial power left Vietnam divided and American genocidal aggression kept Vietnam divided. The lust for colonial control was behind World War I and World War II, which devastated Europe and, to some extent, Asia and Africa, and left Germany divided, which took East and West Germany nearly four decades to unite.

After a couple of centuries of mischief, the West (Europe and America) are tired now. It is the time of the rise of China and India as well as other Asian and African countries. This is something that the old war-mongers, practitioners of treacherous diplomacy, the dominant military-industrial complex and its globally spread networks do not like greatly. The West, according to Samuel P. Huntington, is in “relative decline” vis-à-vis China, India, Brazil and others, while according to Robert D. Kaplan, the United States is in “elegant decline.” The West wants to manage its decline (if not arrest it altogether) by setting the rising countries against each other and by redrawing the Middle East map, dividing the larger and so far the more influential countries like Saudi Arabia, Iraq, Syria and Egypt

into three countries each so that there is no challenger left to cause worry to the Zionist state of Israel. And to make sure that Pakistani nuclear weapons do not reach Arab states, particularly Saudi Arabia, to counter Israeli intimidation they have also got plans for destabilising Pakistan, divide it into three parts and snatch away its nuclear weapons. According to periodically leaked reports American and Israeli commandos have been training together in Nevada, perfecting techniques for the eventual nuclear weapons snatch operation.

Now, does all this not look like the old Great Game? Soon after the fall of the Soviet Union in late 90s and the conclusion of the cold war with a US victory, the West, led by America, began preparations for a long war against the Muslim world, causing unrest and civil war in Muslim countries by setting different groups within countries against each other and also by pitting one Muslim country against the other. As if on a cue, within three years of the disintegration of the Soviet Union, in 1999 came Samuel P. Huntington's *The Clash of Civilizations and the Remaking of World Order*, virtually setting the Western agenda of war against the Muslim world. Huntington made this mischief look like a natural and inevitable course of things to follow. According to this plan the Western Christianity (excluding the Orthodox Christianity) were inevitably to clash with the Muslim world. China and the Muslim world were seen as allies in this scheme. It is of help to remember that Huntington did not treat Orthodox Church of East Europe as pitted against Islam. Even during the Crusades, the Orthodox Christianity was not a part of the Catholic onslaught on Muslims. As we notice, there is a continuity in the theme: those who were not a party to the original Crusade are not a party to the new Crusade either. I call it Crusade advisedly. In the initial moments of the putative "war on terror" even President George W. Bush called it a Crusade. After a worldwide furor he changed it to "Infinite Justice", which caused another groundswell of protest, because Infinite Justice is associated with the Day of Judgment.

Whether we call the present war on Muslim world a Crusade, "Infinite Justice," or "Enduring Freedom" (another name given to the present war by President George W. Bush), or the more secular "war on terror," it remains essentially a Crusade against Muslims. That this was going to be so was evident from US Deputy Secretary of State Paul Wolfowitz's offhand remark before the launch of the "war on terror" that it was going to be a decade-long war and up to 60 countries would be brought in its ambit. It is not that difficult to guess which would be those "about 60 countries". Think about the membership of OIC and you would know who those countries are.

It is important to keep in mind that Huntington's book was not merely an academic work, but a justification and ideological ground work for the war against the Muslim world. His work directly fed into the US strategic planners'

discourse. This was further enhanced by the report of Project for a New American Century (PNAC), a work that was vehemently opposed by George Bush the Senior as a highly dangerous and incendiary project. The authors of this project, mostly Jews with roots in Israel, sat quiet during the Clinton presidency as President Clinton had other priorities. When Bush the Junior became the US president the PNAC got the fool in the White House they were looking for to launch a war against the Muslim world.

The “war on terror” is generally understood to be unleashed by 9/11, which is not the whole truth. Two French journalists published a sensational book, based on deep investigation soon after the anti-Muslim Crusade began. They had discovered that the United States had planned to wage war against the Muslim world in any case, beginning with Afghanistan. 9/11 was only a coincidence.

The war plan had been made against Afghanistan because the Taliban had refused to pay heed to American threat regarding licence to an American energy company, Unocal, to tap Afghan gas resources. The American delegation had clearly warned Mullah Omar, “If you do what we tell you to do, we will cover you with a carpet of gold. If you refuse it, we will bury you under a carpet of bombs.” The Taliban did not prefer the “carpet of gold.”

There is a genuine doubt among Muslims about the nature of 9/11. Its officially declared offenders had all risen from the aftermath of the jihad in Afghanistan against Soviet occupation. That was a time when all kinds of converts from Europe had entered the inner circle of the jihad. It is not unusual for Western intelligence services to enter such organisations via conversions and give the organisations advice that would be disastrous. We have also to keep in mind that in the past America had got its own citizens attacked with guns by its intelligence services and blamed Cubans for it before launching a war against Cuba.

The current “anti-terror” war began with US official declaration that it would be a decade long and cover up to 60 countries. This war has often been termed as the World War III and has jumped the deadline for its end by half a decade. Now they are saying it could continue for another 30 years. Earlier this year, President Clinton told *Esquire* magazine that the war could continue for another 25-30 years.

Robert Kaplan, like Huntington, has furthered the Western war agenda with his book *Monsoon*. Like Huntington, he also wrote a shorter version of the book in *Foreign Affairs* in 2004. His mischief is clear: he wants the worlds powers’ attention to shift to the Indian Ocean because 90 per cent of the world’s Muslims live here, against whom the war is being waged for one and a half decades and could continue for another three decades.

Why the Indian Ocean?

Before answering this question, let us consider the following facts. We are living in an era of “civilisational clash”, as formulated by Samuel Huntington and duely implemented by the United States and its Western allies. In other words, it is a clash envisioned, planned and enforced by Western Christianity (which does not include East European Orthodox Church or other Churches in Africa, Asia and Latin America). The second most important ideological and strategic pillar of this crusade after Huntington’s work is Robert Kaplan’s identification of the Indian Ocean Region (IOR) as the most strategically significant location for Western powers. There are some clearly stated and some not so clearly stated reasons for America’s and the West’s “rebalancing to the IOR.”

Among the less clearly stated is Kaplan’s innocent-sounding “90 per cent Muslims live here”. These are the people who were indicated right at the start of the new Crusade by Paul Wolfowitz as living in the targeted “about 60 countries”. For the players of the old Great Game this region is going to stage the new Great Game. This is also an area of fast-spreading Chinese influence in the Indian Ocean as well as in the littoral states. According to Huntington, the Sinic (Chinese) civilisation is going to be an ally of the Islamic in the clash of civilisations. The Chinese influence in the region and beyond has to be contained by allying with India, Japan (which has a dispute with China in the China Sea) and Vietnam (which, too, has a dispute with China over the Spratly Islands in the China Sea).

Six years ago Kaplan seemed to be hopeful of a coming clash between India and China in the Indian Ocean, with the United States as a mediator between the two. How “honest” the US is as a mediator has been seen in the Palestine-Israel dispute. Happily, this prediction has not come true and China and India have not needed US mediation. Thank God!

Instead, a healthy pattern of competition and cooperation has emerged between the two growing powers. Indian and Chinese navies have worked in tandem to counter piracy, terrorism and smuggling. The littoral states have worked in cooperation for disaster relief and cooperated in keeping the passages open.

The most important feature in the area is the development of Gwader port in Baluchistan, Pakistan. This Chinese project intends to develop a new energy hub and a swank city like Dubai. The port and allied infrastructure alone costs \$46 billion. China wants to create a massive energy pipeline through Afghanistan and Central Asia, and beyond. The energy and other goods from Central Asia would come via Afghanistan and Pakistan to well-connected high ways to China. This project, a shining example of China’s success, is creating a heartburn to America and its allies.

Instead of supporting this futuristic energy and development belt, the New Silk Road through sea and land, America has formally shown support to an Iranian port in Chabahar, another energy belt bypassing Pakistan with the support of India, which has pledged \$500 million to it. An interesting point here is that America, which would not have hesitated to launch a nuclear attack on Iran till recently (before Iran agreed to stop nuclear enrichment), is now supporting Iran to thwart China.

The Indian Ocean and the Chinese energy belt is going to be a focus of international attention for decades ahead. The people in this area have to avoid falling in the trap of the New Great Game of the US and its allies. They have to work together for disaster relief, counter piracy, smuggling and terrorism with greater cooperation and keep away from Western manipulation.

Notes

- * *Mohammad Manzoor Alam* is Chairman of Institute of Objective Studies, New Delhi (India).
- 1. Charles Dickens, *A Tale of Two Cities* (London: Chapman and Hall, 1859).
- 2. Alvin Toffler, *Future Shock* (New York: Random House, 1970).
- 3. News reports from the war.
- 4. S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New Delhi: Penguin Books, 1997).
- 5. John Keay, *Midnight's Descendants: South Asia from Partition to the Present Day* (London: William Collins, 2014).
- 6. Robert D. Kaplan, *Monsoon: The Indian Ocean and Future of American Power* (New Delhi: Random House, 2011).
- 7. Robert Fisk's regular columns in 2001.
- 8. S. P. Huntington, 'The Clash of Civilizations?' *Foreign Affairs* 72, no. 3 (1993).
- 9. Robert D. Kaplan, 'Centre stage for the Twenty-first century: Power plays in the Indian Ocean', *Foreign Affairs* 88, no. 2 (2009).
- 10. Robert D. Kaplan, 'Pakistan's Fatal Shore', *The Atlantic Monthly* (May 2009).
- 11. 'Zheng He, Chinese Explorer,' *S. V. Encyclopaedia Britannica*.
- 12. Howard Zinn, *A People's History of the United States* (New York: Harper Collins, 1999).

Seminar on Muslim Intellectuals, Freedom & Creativity (IAIS Malaysia, 9 May 2017)

Mohammad Hossein, IIUM

The seminar was held on 9 May, 2017 at IAIS Malaysia, and featured three speakers, Prof. Mohammad Hashim Kamali, Prof. Ali Gheissari and Prof. Syed Farid Alatas. The moderator was Dr. Mohamed Azam Mohamed Adil. The event, co-organised by IAIS Malaysia, the National University of Singapore, and the Iranian Embassy, was held from 10 am to 1 pm.

Prof. Kamali emphasised that by creativity we mean creativity primarily in the *human sciences*. Apart from religious injunctions, creativity and freedom among intellectuals may also be understood as part of culture, since culture is important for freedom of expression, alongside a religious understanding that promotes creativity.

Judging by the history of freedom and creativity in the Muslim world, it can be seen that the *madhahib* themselves were originally expressions of creativity, although later they were used to suppress it. Although religion is generally associated with restrictiveness and authoritativeness, Islam started in a free environment and as a movement for justice. In fact, *Hijrah* can be seen as a phenomenon where the Prophet sought more freedom.

In this regard, traditionalism has been a restrictive force against freedom of thought, especially in questions pertaining to *ijtihad* and its application. A good example would be the existence of allegorical versus literal *tafseer*. The issue of *bid'ah* is also a good point illustrating how creativity is viewed in Muslim society. A quote by Shatibi is a good indication of this, “The *bid'ah* of today becomes the *maslaha* of tomorrow.”

According to Prof. Ali Gheissari, the issue of intellectualism in Islam is connected with the concepts of *tajdid* and *islah* in Islamic terminology, which denote a process of re-thinking based on a return to the original principles of the religious texts. This understanding is comparable to the European Reformation, which also sought a return to the basic principles and values of the Bible, i.e. a return to fundamental values.

In the Islamic world, the present-day fundamentals are different to those of the medieval period in that the modern drive towards the process of *tajdid* has been influenced by external factors, not home-grown efforts at reform. An example would be Jamal Uddin Afghani, whose activities are widely analysed in various books on the subject. Afghani identified the problem of the Muslim Ummah as being a lack of philosophy, i.e., Muslim intellectualism died due to the death of philosophy. While scholars of the same era as Afghani did not see the

problems of the Muslims in this manner, Afghani's approach was well received and highlighted due to the fact that his concept of "Muslims lacking knowledge of philosophy" went well with the narrative of the Orientalists and the Oriental historians who similarly insisted that Muslim backwardness was due to the death of philosophy.

Farid al-Atas argued that consideration of the state of universities in Malaysia is important in a debate about academic freedom and creativity. There is an obsession with ranking and publishing research, which inadvertently impacts creativity. Plagiarism is rife, and students are exploited for purposes of research publications through unethical means, whereby they are forced to publish with supervisors who contribute little or nothing to such publications.

The response by Muslim intellectuals has been parochial instead of creative. An example is the trend of Islamising knowledge. According to Farid al-Atas, it is flawed and contrary to the Islamic tradition of knowledge, since the concept of Islamic knowledge is problematic.

Moreover, Muslim intellectualism today tends to be confined to the scientific methodology of induction and deduction. In the medieval tradition, there are additional kinds of inquiry, such as dialectics and poetics, which are largely ignored today by Muslim intellectuals, and would allow for more creativity if used.

**Training on Shar'iah Standards:
Murabahah, Tawarruq, Ijarah, Rahn, Qard & Wa'd
(IAIS, Malaysia, 22-23 May 2017)**

Mohammad Mahbubi Ali

Shari'ah compliance is the backbone of Islamic Financial Institutions (IFIs). Ensuring such compliance is imperative in order to maintain the confidence of both our stakeholders and the public. Therefore, inadequate attention to the whole process of Shari'ah compliance could have negative repercussions for IFIs, including massive withdrawal of capital, de-recognition of income and possible legal penalty upon conviction of wrong doing.

In striving towards end-to-end Shari'ah compliance in Malaysia, the Bank Negara Malaysia (BNM) has embarked on a number of commendable initiatives to reinforce Shari'ah compliance in IFIs and to enhance the country's Shari'ah regulatory framework. Notably, these initiatives include the issuance of Shari'ah standards and their operational requirements, featuring the relevant, applicable contracts and principles for IFIs. The main objective of Shari'ah compliance is

to facilitate IFIs in developing their products in accordance with the tenets of Shari'ah and to enhance harmonisation among IFIs in Malaysia with respect to Shari'ah related matters.

Recognising the importance of this field for Malaysia, the International Institute of Advanced Islamic Studies (IAIS) Malaysia organised a two-day workshop. This training programme highlighted the latest and most insightful updates pertaining to the Shari'ah standards on *murabahah*, *tawarruq*, *ijarah*, *rahn*, *qard*, *wa'd* and *hibah* contracts. The workshop, which was held on 22-23 May 2017, exposed participants to the most recent regulatory requirements for Islamic finance in Malaysia. In this regard, participants learned about BNM's Shari'ah standards and its key operational requirements.

IAIS Research Fellows, Dr Mohammad Mahbubi Ali and Mrs Apnizan Abdullah, facilitated the training. Participants came from a range of sectors, including Islamic banking and financial institutions, higher education institutions, legal firms, commodity *murabahah* brokers and research institutes. The event received positive responses from participants, demonstrating a strong demand for similar training programmes in the future. Participants received their certificates of attendance at the end of the programme.

Round Table Discussion: Islam and Human Capital Development (United Kingdom, 2 June 2017)

Muhammad Fakhrurrazi Ahmad

On 2 June 2017, the Legacy Association and Oxford Centre for Islamic Studies (OCIS) co-hosted a round-table discussion, in conjunction with Tun Abdullah Badawi's visit to the Centre. The discussion was chaired by the Director of the Centre, Dr Farhan Nizami, and attended by guests from different academic fields.

The theme was *Islam and Human Capital Development*. Presenters included Prof. Dato' Dr Mohd Yusof Othman (Director, Institute of Islam Hadhari, UKM), Prof. Datuk Dr Azizan Baharuddin (Director-General, Institute of Islamic Understanding Malaysia), Associate Prof. Dr Mohamed Azam Mohamed Adil (Deputy CEO, International Institute of Advanced Islamic Studies Malaysia) and Dr Ai Kawamura (Researcher, Kyoto's University Islamic Studies Centre). The panelists from the Centre included Dr Talal Al-Azem, Dr Salman Syed Ali and Dr. Basil Mustafa.

Prof. Dato' Dr Mohd Yusof Othman explained the Islamic perspective of human resource development. Dr Talal Al-Azem in turn discussed the *maqasid*

(objectives) of human development. Prof. Datuk Dr Azizan commented on the performance of Muslims in science and technology and encouraged the rejuvenation of STREAM (science, technology, religion, engineering, art and mathematics). Assoc. Prof. Dr Mohamed Azam explained the roles of Islamic think tanks in advancing Islamic studies, enhancing cross-civilisational dialogue, supporting the development of Muslim women and youth, and supporting the growth of Islamic Finance and Economics.

Dr Salman Syed Ali discussed the possible roles of *madaris* (religious schools) in Islamic Finance training especially if they were to add curricula such as the AAOIFI Standards. According to Dr Ai Kawamura, Islam has universal characteristics which could be adapted through the collaboration of Muslim and Japanese institutions.

Dr Basil Mustafa promoted the appreciation of spirituality and the art of values-based leadership, especially as learnt from the teachings of the Prophet Mohammad (SAW). After the discussion, Dato' Dr Syeikh Afifi Al-Akiti conducted a tour of the Centre for the Malaysian delegation. This was followed by an *iftar* at the Oman Hall.

BOOK REVIEW

Kamali, Mohammad, Hashim: The Middle Path of Moderation in Islam - The Qur'anic Principle of Wasatiyyah

Foreword by Tariq Ramadan

(New York: Oxford University Press, 2015). xi + 320 pp.

ISBN: 978-0-19-022683-1

by Assoc. Prof. Dr Jabal M. Buaben, SOASCIS, Universiti Brunei Darussalam

This work comes from the pen of a mature, seasoned and prolific writer of contemporary Islamic Thought and Practice. With a core specialization in Islamic Law and Jurisprudence, Professor Hashim Kamali always exudes wisdom hat capable of stimulating the mind.

In our contemporary era of chaos, where Islamic Religious Thought has been held to ransom by individuals and groups, both State and Non-State actors parading themselves as the spokespersons for the faith community, this book is opportune. It is a welcome relief to explore one of the core principles of Islamic Thought, one that is often only paid lip service.

In the blurb on the back cover, many eminent scholars from around the globe voice their appreciation of the excellent critical scholarship Kamali always brings to bear on his writings.

In the foreword, Tariq Ramadan's appraisal is profoundly admirable. He says, among other things that:

“Kamali relies on the school of Law as much as the School of *Maqasid* [the higher objectives of Islam] to illustrate that in relation to rules, not only is everything in Islam based on moderation but that the very understanding of the higher objectives of Islam relies on moderation too.” [p. viii]

One is tempted to ask a rhetorical question that if the very essence of Islam is rooted in moderation [*wasatiyyah*], why does Islam (and Muslims) continue to have such bad press? A sincere and sober reflection would reveal that people who claim to subscribe to Islam and call themselves ‘Muslims’ are part of the problem! The understanding many Muslims have of the core values of Islam leaves much to be desired. This is exactly why Hashim Kamali's book is crucial

at this time, both for specialists and non-specialists alike, to keep the task of public education going.

Digging deep into the Scriptural Sources and the rich variety of intellectual heritage amongst major scholars of repute, the author reminds the reader of the essential precept in Islam that diversity is always a blessing, and hence no individual human being is the epitome of all Islamic Thought and Life.

The book is divided into two main parts and a total of twenty-three chapters, in addition to an Introduction. Part One focuses on a conceptual analysis and takes up seven chapters, while the second part is made up of fifteen chapters. The seeming ‘imbalance’ of the two parts has a definite rationale to it. Part two is more concerned with what one might describe as ‘the application of the whole principle of *wasatiyyah*’. After all, what is the worth of a principle if it is not properly understood and applied? This ties in very well with the Islamic understanding of ‘Faith’ [Belief, *Iman*] itself. It must always be applied in real life; otherwise, it is as good as worthless. *Iman* [Faith, Belief] must therefore necessarily be cemented in ‘*Amal* [practice, action], to produce *Falah* [success] in the hereafter. That is why the Qur’an is replete with reminders about this. [See: 2: 2-3; 61:2-3; 103:3 *et passim*].

The near-universal application of the concept of *wasatiyyah* [moderation] is hammered home right at the beginning, in the introduction. Kamali writes:

“‘Moderation’ is primarily a moral virtue of relevance not only to personal conduct of individuals but also to the integrity and self-image of communities and nations. Moderation is an aspect, in its Qur’anic projections, of the self-identity and worldview of the Muslim community, or Ummah, and also features prominently in almost all major world religions and civilizations.” [p. 1]

This questions the ‘state of mutual ignorance’ often used to describe the situation of Interfaith Relations. If people of Religious Faith and those of none were to take this perception to heart, this world would be a far better place. The crucial importance of Interfaith (and we must immediately add Intra-faith) relations and Intercivilizational Dialogue have become even more pertinent in our time. It is the dissonance between the concept and its application which is the worrying element in the whole scenario.

Kamali cites a statement from Abd al-Latif al-Farfur reflecting on the importance of *wasatiyyah* for Muslim Unity. This is where intra-faith dialogue becomes critical because, without that, Interfaith dialogue and the subsequent global-level dialogue of civilizations would be more than impossible to uphold.

In the conceptual analysis, the author cites numerous passages from the Qur’an and the Hadith and the works of classical and contemporary Scholars to

take the reader through a well-crafted section. With his usual characteristic desire for constant clarification, Kamali boldly points out that: "...moderation...does not imply any compromise on religious principles, nor on basic religious duties, in order to please or appease others." [p. 14] He then states: "On the contrary, *wasatiyyah* means confidence, right balancing and justice." [p. 14]

Here, he is at pains to disassociate himself from those who link 'moderation' to appeasement and a lop-sided application of fundamental religious precepts.

With copious references to the Qur'an, the Hadith and the opinions of mainstream Muslim Exegetical Scholars of yore, Kamali takes the reader on a real journey, slowly but methodically exploring the implications of *wasatiyyah*.

The book, unlike many others, does not leave one wondering whether there have been any modern, contemporary deliberations on the subject. Many a time, one reads a piece with opinions so distanced in history that one wonders whether these classical reflections have much relevance for the modern world. Kamali, however, taps into the wisdom of recent thinkers like Muhammad Abduh, Yusuf al-Qaradawi, Mustafa Kamal al-Tunisi, Muhammad Tahir Ibn 'Ashur, Ahmad al-Raysuni, Ismail Raji al-Faruqi and Ibrahim al-Shimri.

The applicability feature in the second part of the book examines many issues *vis a vis wasatiyyah* including: justice, religiosity, *tasawwuf*, the environment, jihad, gender issues, the individual's general character, renewal and reform and the ubiquitous issue of globalisation.

He makes a bold statement thus:

"I believe the Islamic advice of *wasatiyyah* merits attention by the Muslims but also the wider humanity, mainstream media, and world leaders in the midst of a multitude of misinformation depicted and propagated in the name of Islam." [p.235]

The noble ideal that, as human beings on earth we have a 'shared responsibility' to live in peace and harmony is reflected throughout the book and reiterated in the Concluding Chapter, in which Kamali outlines twenty-four clear, specific and attainable goals as recommendations for the world.

Without any shadow of a doubt, this is a timely piece for the whole of humanity, helping it to reclaim its rightful place on earth, as the Creator intended.

Despite the host of technical concepts that abound in the book, the author's commitment to explaining each of them in simple language, makes the work very readable. Both specialists and those without expertise in Islamic Law and Jurisprudence or the Qur'an and Hadith would find it enlivening to read.

CALL FOR PAPERS

Islam and Civilisational Renewal (ICR) invites scholarly contributions of articles, reviews, or viewpoints which offer pragmatic approaches and concrete policy guidelines for Malaysia, the OIC countries, civic non-governmental organisations, and the private corporate sector. The principal research focus of IAIS is to advance civilisational renewal through informed research and interdisciplinary reflection with a policy orientation for the wellbeing of Muslim communities, as well as reaching out to non-Muslims by dialogue over mutual needs and concerns.

Our enquiry and recommendations seek to be realistic and practical, yet simultaneously rooted in Islam's intellectual and spiritual resources, Muslim political and social thought, inter-faith exchanges, inter-civilisational studies, and global challenges of modernity.

ICR invites contributions on the following topics:

- issues of good governance and Islamic law reform in Muslim societies
- science, technology, development and the environment
- minorities and culture-specific studies
- ethical, religious or faith-based issues posed by modernity
- inter-faith, inter-civilisational, and Sunni–Shi‘ah dialogue and rapprochement.

ICR is published in English and it is essential that to help ensure a smooth peer-review process and quick publication all manuscripts are submitted in grammatically correct English. For this purpose, non-native English speakers should have their manuscripts checked before submitting them for consideration. The Editorial Board holds the right to make any necessary changes in the approved articles for publication upon consultation with the writers.

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