

***Al-Dharā'i'* and *Maqāṣid al-Sharī'ah*: A case study of Islamic insurance**

Akhtarzaita binti Abdulaziz*

Abstract: This paper aims at exploring the concept of *al-dharā'i'* in its broad meaning, both at the preventive and proactive levels (*sadd* and *fath al-dharā'i'*). The application of *al-dharā'i'* at both levels plays a significant role as a practical mechanism towards the realisation of *maqāṣid*, due to the cause-effect relationship between means and objectives. Thus, the legality or the *Sharī'ah* value of an act could be determined based on its possible results in procuring benefits and/or preventing harm. Islamic Insurance has been considered a new development in *fiqh al-mu'āmalāt*. The current debate is not on the question of legality of insurance as a concept and practice but rather to provide an Islamic model of insurance that conforms to the criteria of the *Sharī'ah* that helps realise its objectives. Due to the unavailability of direct texts on this issue, some practical aspects of insurance depend largely upon the predominance of either beneficial or evil ends. This paper will, therefore, look into some controversial issues prevailing in insurance practice and an attempt will be made to review the issues within the framework of realisation of *Maqāṣid al-Sharī'ah* via the application of *dharā'i'* both at preventive and proactive levels.

Keywords: *dharā'i'*, *Maqāṣid al-Sharī'ah*, *Takaful* Model, Islamic insurance, insurable interest

Abstrak: Makalah ini bertujuan meneroka konsep *al-dharā'i'* dalam erti kata yang lebih meluas, baik di peringkat pencegahan dan proaktif (*sadd* dan *fath al-dharā'i'*). Penggunaan *al-dharā'i'* di kedua-dua peringkat memainkan peranan penting sebagai mekanisme yang praktikal dalam merealisasikan *maqāṣid*, berdasarkan hubungan sebab-akibat antara kaedah dan tujuan. Dengan demikian, kesahan atau nilai sesuatu perbuatan daripada segi

*Dr. Akhtarzaita binti Abdulaziz is Assistant Professor in the Department of Fiqh and Usūl al-Fiqh, Kulliyah of Islamic Revealed Knowledge and Human Sciences, International Islamic University Malaysia. E-mail: drzetty@yahoo.com

Sharī'ah boleh ditentukan berdasarkan kemungkinan hasil-hasilnya dapat memberi manfaat dan/atau menghalang bahaya. Insuran Islam dianggap sebagai perkembangan baru dalam *fiqh al-muāmalāt*. Perdebatan masa kini, bagaimanapun, bukan tertumpu kepada persoalan kesahan insuran sebagai konsep dan amalan, tetapi untuk menyediakan satu model insuran Islam yang menepati kriteria *Sharī'ah* bagi membantu merealisasikan objektifnya. Oleh kerana kekurangan teks langsung terhadap isu ini, beberapa aspek insuran yang praktikal amat bergantung kepada pengutamaan penghasilan yang memanfaatkan atau memudaratkan. Makalah ini akan melihat beberapa isu kontroversi yang lazimnya wujud dalam amalan insuran, dan usaha akan dilakukan untuk meninjau isu-isu dalam rangka merealisasikan *Maqāṣid al-Sharī'ah* melalui perlaksanaan *dharā'i'* di peringkat pencegahan dan proaktif.

Kata kunci: *dharā'i'*, *Maqāṣid al-Sharī'ah*, Model Takaful, insuran berasaskan Islam, faedah yang dijamin

Being a legal system based on God's final Revelation to mankind, Islamic Law or *Sharī'ah* encompasses all aspects of human needs and is suitable for application to all people under all circumstances till the Day of Judgement. In some important respects, the textual sources of the *Sharī'ah* (the Qur'ān and Sunnah) provide only general rules and universal principles, thus, allowing wide room for intellectual investigation and consideration of the needs and conditions of different locations and times in order to implement those rules and principles. Accordingly, *ijtihād* has been defined as the effort made by jurists in the quest for knowledge of the *Sharī'ah* legal rulings through interpretation. The classical jurists developed a specific methodology consisting of methods, rules and technical tools of interpretation and inference to deal with the textual sources of the *Sharī'ah*. Known as *uṣūl al-fiqh*, this methodology serves the purpose of systematic study and understanding of the texts and proper derivation of legal rulings (*aḥkām*, sing. *ḥukm*) from their relevant proof. One of those methods and tools is the theory of Means or *Dharī'ah*. The jurists, however, disagreed on its reliability as a source of legal rulings.

The meaning of *dharī'ah*

The word *dharī'ah* (pl. *dharā'i'*) signifies the means or way of obtaining an end or attaining a goal. There are two positions in

defining the technical meaning of *dharī'ah* as a source of derivation of legal rulings:

1. The position of most classical jurists: They defined *dharī'ah* in a narrow sense to indicate those ways or means that are lawful but could lead to prohibited ends or unlawful results. For example, Ibn Rushd, the Grandfather, defined *dharā'i'* as being "things which are apparently permissible but are used as a means to something prohibited" (Ibn Rushd, n.d, vol.2, p.524). According to Imam al-Shāṭibī, the rule of *dharā'i'* is "to use a benefit (*maṣlahah*) as an expedient to attain a harmful thing (*mafsadah*)" (Al-Shāṭibī, 1999, vol.2, p.556).

Thus, according to his view, the rule of *dharā'i'* means prohibiting a lawful act owing to the possibility of its leading to an unlawful result. It is important to mention here that not all lawful acts must be forbidden on the ground of likelihood of harmfulness ensuing from them. In this connection, the jurists divided lawful acts into three categories:

- a. Those that rarely lead to harmful results, like planting grapes that could rarely lead to wine making.
- b. Those that usually lead to harmful results, like the sale of grapes to a winery and the sale of weapons to a known criminal.
- c. Those in which there are equal probabilities of harm and benefit. For example, marrying a woman with the intention to divorce her in order to enable her to remarry her former husband.

The first type does not fall within the purview of the rule of *dharā'i'*, and an act that rarely leads to harmful results would not be prohibited. The jurists disagreed regarding the remaining two categories. According to Mālikīs and Ḥanbalīs, they may be prohibited because they could lead to harmful results. However, al-Shāfi'ī rejected this view, saying that what is permissible could not be prohibited on the ground of the likelihood that it might lead to a harmful result.

2. The second position is to define *dharā'i'* in a wider and broader sense, covering all means whether they lead to

harmful or beneficial results. This means to prevent all means leading to harmful consequences (and is known as *sadd al-dharā'i'*) or to open and encourage all possible means to beneficial ends (which is known as *fath al-dharā'i'*). Some classical jurists and the majority of contemporary scholars take this position. It should be noted here that the classical jurists agreed that beneficial acts must be encouraged, yet they did not lay sufficient emphasis on this aspect in their discussion on this issue. Rather, they mainly focused on *sadd al-dharā'i'* or blocking the means. As the prevention of evil assumed more prominence in their discussions, the other part of the rule or doctrine of *dharā'i'*, or the opening of the means to beneficence (*fath al-dharā'i'*) did not receive equal treatment from the jurists in their writings.

However, jurists like al-Imām al-Qarāfī viewed *dharā'i'* in its broad meaning mentioned earlier. Thus, he defined *dharā'i'* “as being all means leading to specific ends.” To this definition he added: “It should be noted that just as *dharā'i'* must be blocked (when they lead to unlawful results), they also need to be opened, as they might be required (*wājib*), repugnant (*makrūh*), recommended (*mandūb*), or permissible (*mubāh*). Likewise, *dharī'ah* simply denotes the means; hence, just the means to what is prohibited must be prohibited, so too the means to what is obligatory must also be obligatory” (Al-Qarāfī, 1993, p.448). This broad and comprehensive definition of *dharā'i'* including the two aspects of both *sadd al-dharā'i'* and *fath al-dharā'i'* has been adopted by most contemporary jurists, such as Muhammad Abū Zahrah, Wahbah al-Zuhaylī, Abdullah al-Juday, etc. (Abū Zahrah, n.d., p.228).

***Dharā'i'* and *maqāṣid*: The cause-effect relationship**

The idea or doctrine of *Maqāṣid al-Sharī'ah*, or higher objectives of Islamic Law, has gradually captured the attention of increasing numbers of contemporary Muslim scholars who see in it a springboard for solving contemporary issues. This idea provides a guide and framework for the process of *ijtihād* in its endeavour to guide and framework for the process of *ijtihād* in its endeavour to solve issues creatively while complying with the will of the Lawgiver. Thus, *Maqāṣid al-Sharī'ah* as an independent discipline can be

as a philosophy of law or a value system governing the *Sharī'ah* legal rules and reflecting the Islamic worldview in all its dimensions. Ibn 'Āshūr defined *Maqāšid al-Sharī'ah* as “the deeper meanings (*ma'ānī*) and inner aspects of wisdom (*ḥikam*) considered by the Lawgiver (*Shāri'*) in all or most areas and circumstances of legislation (*aḥwāl al-tashrī'*)” (Ibn 'Āshūr, 2006, p.67). He also explained the importance of the knowledge of *Maqāšid al-Sharī'ah* for the Mujtahids not only in understanding and interpreting the texts of the *Sharī'ah* but also to find solutions to the new problems facing Muslims on which those texts are silent (Ibn 'Āshūr, 2006, pp.5-10).

Basically, the main objective of *Sharī'ah* is to govern human life and to protect the interests and benefits (*maṣlaḥah*) of people. *Maṣlaḥah* in the Islamic context and perspective means what is good and beneficial in the eye of *Sharī'ah*. According to al-Ghazālī, the higher objectives of Islamic Law consist of two types:

1. Religious or spiritual (*dīnī*) objective pertaining to the Hereafter: This purpose, which revolves around the preservation and promotion of religious faith (*ḥifẓ al-dīn*), is the utmost and ultimate purpose of the *Sharī'ah*. In its aggressive or positive aspect, the interest of religion is secured by facilitating ritual worship of God and establishing the pillars of Islam such as fasting, prayers, pilgrimage, and paying *zakāh*. In its defensive aspect, *jihād* is stated as a means to defending *dīn*, as it prevents the established pillars of Islam from being undermined or destroyed.
2. Worldly objectives (*dunyawī*) pertaining to mundane affairs of this world: This type includes all worldly interests and encompasses four major objectives. In accordance with their importance and order of priority, these objectives consist of the preservation and promotion of human life (*ḥifẓ nafs*), intellect (*ḥifẓ al-'aql*), progeny and offspring (*ḥifẓ al-nasl*), and property (*ḥifẓ al-māl*). Upon close examination of the *Sharī'ah* rulings, one can safely conclude that they individually and collectively point out to the realisation and protection of all these interests. As an example of the protection of human life, Islam has instituted a severe

punishment for murder by imposing the death penalty. As for the protection of progeny, it is realised through the institution of marriage and healthy family life. Islam encourages its followers to get married and have a family as a means to ensuring a balanced upbringing and a good life for the offspring, and preventing human beings from committing such evil acts like adultery, fornication and cohabitation.

Human interests in all spheres of life can be classified into three levels according to their importance and impact on people's lives and existence. Each one having its proper function in human life, these levels are strongly related to one another. The first and basic level of human interests consists of the *ḍarūriyyāt* or necessities (Al-Shāṭibī, 1999, p.324). All the five objectives comprising the preservation and promotion of the universals of *dīn*, *nafs*, *'aql*, *nasl* and *māl* belong to this fundamental level. They constitute indispensable interests on which the life of human beings depends. If these are violated or undermined, the whole of human life would be subjected to corruption, disorder, injustice and, ultimately, destruction.

The second level of interests, which comes next to the *ḍarūriyyāt*, consists of the *ḥājīyyāt* (Al-Shāṭibī, 1999, p.326). These interests include what is needed to alleviate hardship and to bring ease and comfort in human life. Without them, people will suffer distress and difficulty in their observance of the *Shari'ah* rules, though this is far less than the harm resulting from the disorder and corruption affecting the universals. This level includes all aspects of human affairs and applies to all spheres of legislation, whether in ritual worship, customary and daily life practices, contractual dealings or sanctioning and penalties. In other words, the *ḍarūriyyāt* serve to support and strengthen the necessities. Life can still exist without this level of interest but human beings will face difficulties and hardships in life. The provision to break fast during the month of Ramaḍān in the case of illness or a long difficult journey reflects this clearly.

The third level of interests is known as *taḥsīniyyāt* or complementarities. This level includes everything that promotes human well-being and makes people's life more comfortable (Al-

Shāṭibī, 1999, p.327). The *taḥsīniyyāt* are not indispensably needed so that without them human life becomes deficient or the rules of the *Sharī'ah* inoperative. Their role is rather to improve and facilitate the quality of life and make the observance of the law easier and more comfortable. Ignoring this category is not detrimental to the *darūriyyāt* or *ḥājīyyāt*, although it relates to the same areas of Islamic legislation. Shāṭibī defined this level as adopting what conforms to the best of customs and, thus, avoiding those manners that are repulsive (unacceptable) to wiser people.

All these three levels are inter-related to each other. The first level comprises the core and vital interests or ultimate objectives whose realisation and preservation constitutes the main purpose of the *Sharī'ah*. The other two levels are subordinate to the first, and serve the consolidation and advancement thereof.

As can be seen from the foregoing brief exposition, the theory of *maqāsid* presents us with a comprehensive picture of the threefold order of the objectives of the *Sharī'ah* and a general philosophy governing its rules and provisions. It, thus, provides a systematic view of the human social order as envisioned by Islam, the scale of values determining the priorities and preferences of Islamic Law and the criteria for policy-making in society.

Accordingly, the notion of *dharā'i'* in its broad sense as explained above is closely related to the theory of *Maqāsid al-Sharī'ah*, by virtue of the cause-effect relationship between means and objectives. Hence, the Lawgiver legalised certain acts or prohibited others on the basis of the benefit or harm they could lead to. Any act or type of conduct that is likely to result in something contrary to the objectives of *Sharī'ah* must, therefore, be prevented, even though in itself, it is lawful in the first place. Similarly, any means that could possibly lead to beneficence must be legalised and encouraged in order to realise the *maqāsid* or objectives of the *Sharī'ah*, no matter how implicitly mentioned in the texts.

Thus, allowing a clear measure of flexibility in Islamic Law, the rule or theory of *dharā'i'* also conforms to the spirit of the *Sharī'ah* and serves the purpose of realising its objectives. While the *maqāsid* or objectives are eternal and unchangeable, the rule of *dharā'i'* is flexible and its implementation might take different forms from one situation to

another, as it is based on the judgement of the possible results of actions leading to either evil or good. Likewise, *sadd al-dhar'i'* plays its role as a defensive or preventive tool in order to safeguard the *maqāsid* by actively blocking whatever means that could hinder the realisation of legal purposes. On the other hand, *fath al-dharā'i'* is also important to proactively enhance the achievement of the lawful goals of *Sharī'ah* by positively legislating all possible lawful means in accordance with the prevailing circumstances.

The next section of this article will examine the application of the theory of *dharā'i'* in certain aspects of Islamic insurance. It is important, therefore, to give a general description of *Maqāsid al-Sharī'ah* pertaining to wealth acquisition and property management. This is because the application of *dharā'i'* in this field will totally depend on the consideration of the higher objectives of the law in this regard. A set of goals and objectives must be clearly defined before it is possible to explore the means or ways to achieve those goals.

***Maqāsid al-Sharī'ah* in wealth acquisition and management**

Wealth is part of Allah's bounty to His servants. Islam lays great emphasis on the importance of wealth management and protection to ensure that property is acquired and spent properly as allowed by the *Sharī'ah*. Among many others, the following Qur'ānic verse provides proof of the positive attitude of Islam towards wealth: "Do not hand over to those of weak understanding your properties which Allah has made a mean of support for you" (4:5). This verse shows how Islam acknowledges material wealth as a vital need of human life. While commenting on this verse, Imām al-Rāzī stated: "(This verse means) your life will not be established without such properties" (Al-Rāzī, 1990, p.151).

As can be seen above, from their comprehensive analysis of the *Sharī'ah* legal rules based on induction (*istiqrā'*), the jurists inferred and established five fundamental and vital needs of human life whose protection is given utmost priority by the *Sharī'ah* through its different rules and forms of legislation. As already pointed out, those needs revolve around religion, life, intellect, lineage and property (al-Ghazālī, 1997, vol.1, p.217). Thus, the protection of wealth or property is part of the ultimate goals of the *Sharī'ah*.

In his book on *Maqāṣid al-Sharī'ah*, Ibn 'Āshūr (2006, pp.279-293) explained in some detail the *Sharī'ah* objectives regarding wealth and property. He identified five criteria that the *Sharī'ah* observes in this respect. These criteria constitute the goals of the *Sharī'ah* that have to be realised in wealth acquisition and management. They consist of *rawāj* (wide circulation of properties), *wuḍūh* (transparency), *ḥifẓ* (protection), *thabāt* (certainty) and *'adl* (justice). Since the third goal (protection) may not be considered to be something specific as it actually reproduces the general purpose pertaining to the five fundamental universals (*al-kullīyyāt al-darūriyyah*), only the other four goals, as explained by Ibn 'Āshūr, will be discussed in the next section. However, it is important to add another aspect to the protection and management of wealth and property, namely, the purpose of *takassub* and *istithmār* (acquisition and investment).

***Rawāj* or wide circulation of wealth**

This goal means that wealth and property should be circulated among the general public and actively transferred from one hand to another in the form of expenditures and investments (Al-'Ālim, 1991, p.497). For this, the *Sharī'ah* approves many forms of financial and economic transactions such as contracts of sale, lease, partnerships and many more in order to facilitate the proper circulation of wealth and transfer of property ownership among the public. Thus, it is not allowed in the *sharī'ah* to purposely keep wealth in all its forms idle. Allah says: "And for those hoarding gold and silver and do not spend them in the way of Allah, announce unto them a most grievous penalty" (9:34). After explaining the parties eligible to be given shares of *fay'* and *ghanīmah*, the Qur'ān states in another verse that the reason for the distribution is to prevent limited circulation of wealth among the rich without allowing the whole public to benefit from it.¹

***Wuḍūh* or transparency**

Wuḍūh or transparency means that all financial transactions must be conducted in such a manner that all parties are clear about all important facts of the transactions, thus, avoiding all causes of disputes, clashes or damages to any party (Al-'Ālim, 1991, p.497). It is for this reason that the Qur'ān recommends Muslims to keep all future transactions in record. Thus, Allah says: "O you who believe, when you deal with

each other in transactions involving future obligations in a fixed period of time, reduce them into writing” (2:282). The purpose of writing down a debt transaction is to make all information regarding the transaction clear and transparent in terms of subject matter, obligations and rights of all parties, so that this will serve as a reference in cases of dispute. This is particularly relevant to contemporary financial transactions that are always in the form of formal contracts duly signed by the parties concerned.

***Thabāt* or certainty**

This purpose means that the rights of a party or parties to the ownership of property must be certain and there should be no doubt to those rights, unless there is certain public interest which could prevent individual privilege (Al-Hasanī, 1995, p.117). This implies three elements: i) the right of individuals to ownership, ii) freedom of disposal of property within the boundaries of the *Sharī‘ah* requirements, and iii) guarantee of the privilege of ownership and prevention of encroachment on a person’s rights without the owner’s consent (Ibn ‘Āshūr, 2006, pp.291-292).

The Qur’ān has explicitly guaranteed the right of ownership in which respect Allah says: “O you who believe, do not take the properties among you by illegal means unless by way of trade and mutual consent” (4:29). This provides clear evidence that it is an objective of the *Sharī‘ah* to guarantee the freedom of ownership and there is no way that the right can be transferred to others unless by contract of exchange or charity by the consent of the owner.

***‘Adl* or justice**

Justice is both a general principle of the *Sharī‘ah* and one of its higher objectives. Allah says: “Allah commands justice and good deeds and liberality to the relatives and He forbids all shameful deeds, injustice and rebellion” (16:90). Being one of the *Sharī‘ah* goals in financial transactions and dealings, justice means to put wealth and property in its proper places, as commanded by the Creator. This includes the right to acquire wealth, to discharge all the duties related to wealth and to find the wisest way to spend or to invest it (Al-‘Ālim, 1991, p.527).

***Takassub* and *istithmār* or acquisition and investment**

Takassub means to exert oneself to gain what would help to satisfy one's needs, whether by physical labour or mutual consent with others (Ibn 'Āshur, 2006, p.276), whereas *istithmār* means the efforts made to increase the value of the properties through lawful means sanctioned by the *Sharī'ah* (Sano, 2000, p.20). Thus, *takassub* means to earn wealth and property, while *istithmār* means to add value to the existing wealth and property. These two aspects are strongly related to the purpose of wealth and property management. To achieve them, the *Sharī'ah* has approved numerous types of contracts and transactions. It is stated in the Qur'ān: "And when the prayer has been performed, then you may disperse through the land and seek for the bounty of Allah" (62:10). This underlines the obligation on all Muslims to earn a living. In a ḥadīth, the Prophet (SAW) pointed out people's duty to make efforts in order to enhance and increase the value of wealth and property; "Whoever possesses a piece of land must cultivate it or give it to another Muslim; if he refuses, the land may be seized from him" (Al-Bukhārī, 2000, vol. 5, p.209).

The five things explained above constitute the main objectives that should govern all financial transactions and economic dealings in Islam. It should be emphasised here that the application of the concept of *dharā'i'* in its broad meaning (both as *sadd al-dharā'i'* and *fath al-dharā'i'*) aims at preventing all means which run against these five objectives and other established rules of the *Sharī'ah*, like *ribā* (usury or interest) and *gharar* (risk or uncertainty). Similarly, it aims at encouraging and opening all means that could enhance the realisation of these five objectives as far as they are lawful.

The next section deals with Islamic insurance or *takāful* and an attempt will be made towards applying the concept of *dharā'i'* in its broad sense to some practical aspects of insurance.

Insurance in Islam: The *Takāful* model

Insurance is one of the contemporary and recent developments in financial and economic activities. Therefore, the classical jurists did not discuss it. However, the philosophy behind the insurance industry is not totally absent from the basic Islamic teachings. Generally,

insurance policy is a contract of mutual financing in which one party is expected to be protected materially against an unexpected loss by the other party, in consideration of the payment of a particular amount of premium (Ma'sum, 2003, p.25). Insurance is, therefore, a contract of exchange between two parties whereby the insured buys protection from the insurer at a price (premium) against a prescribed risk.

Contemporary Muslim jurists have discussed the above model of insurance in a series of discussions held since 1976. Most of them are of the opinion that conventional insurance is not allowed in Islam mainly because of the elements of *ribā* and *gharar*. Below are some conferences held to discuss this issue and the resolutions they reached.

- a. The First Conference on Islamic Economy, Mecca, 1976: Conventional insurance as practiced today does not comply with the spirit of *Shari'ah* and does not fulfill the requirements which might render it permissible.
- b. 10th Conference of Prominent Muslim Scholars, Saudi Arabia, 1977: Confirmed by consensus of opinion that conventional insurance in all its types is not permissible, whether it is life insurance or general insurance (on property).
- c. The Islamic Fiqh Academy, Jeddah, 1985: Confirmed that conventional insurance is prohibited due to the uncertainties (*gharar*). The committee suggested as an alternative an insurance system based on cooperation and *hibah* (*takāful*) (Mahmood, 1991; Masum, 2003).

Thus, the alternative for conventional insurance is a model of mutual insurance or known as *takāful*.² Unlike in the case of conventional insurance, *takāful* or mutual insurance policy is not a contract of exchange. Rather, it is a contract of mutual *hibah* or gratuity. In Islamic Law, the elements of *ribā* and *gharar* are prohibited in exchange contracts (*'uqūd mu'āwadah*) and not operative in a contract of gratuity or *hibah*. In *takāful*, the policyholders are both the insurer and the insured as they collectively and mutually guarantee each other against the stipulated risks.

The relationship between the parties can be described as follows:

The relationship among the policyholders

All the policyholders are bound by the contract of partnership and *hibah*. They jointly own the funds in accordance with their contributions and undertake to mutually protect each other on the basis of *hibah*.

The takāful operator and the policyholders

The relationship can be viewed from two sides. Firstly, in its role as manager of the *hibah* funds and insurance claims, the company acts as an agent on behalf of the participants. Second, in its role as manager of the investment of the total funds accumulated, the *takāful* operator may play the role of *mudrib* or entrepreneur in a *muḍārabah* contract or an agent with a fee. Thus, two models of *takāful* come into being: *muḍārabah*-based *takāful* as practiced by *Syarikat Takaful Malaysia Berhad* in Malaysia and *takāful* based on *wakālah* or agency as in *Takāful Ta'āwunah*, practiced by Bank al-Jazeera in Saudi Arabia.

Syarikat Takaful Malaysia Berhad: A mudharabah model

Syarikat Takaful Malaysia Berhad (STMB) is the first *takāful* operator in Malaysia to be incorporated on 20 November 1984. Being the operator, STMB accepts payment of *takāful* contributions (premiums) known as the *ra's al-māl* or the capital from the participants who are as the *rabb al-māl* or the capital provider in a *muḍārabah* contract. The ratio of profit-sharing among the parties shall be determined upfront in the contract (BIRT, 1996, p.9).

STMB offers two types of *takāful* schemes: The first is Family *Takāful* or Islamic Life Insurance. The second is general *Takāful* or the Insurance on properties in relation to material loss or damage inflicted upon the property consequent upon a catastrophe or a disaster (BIRT, 1996, p.69). Under the Family *Takāful*, the instalments of *takāful* contributions paid by the participants are be divided and credited by the company into two separate accounts:

1. The Participants' Account constituting most of the contributions.
2. The Participants' Special Account constituting the *tabarru'* proportion. It is from this account that the company shall pay the *takāful* benefits to the heirs of the participants who die before the maturity of the scheme (Ahmad, 1991, p.193).

Application of *dharā'i'* to some selected practical aspects of *takāful*

This section attempts to apply the principle of *dharā'i'* and to show its role in the realization of *Maqāsid al-Sharī'ah* in some practical aspects of *takāful* as discussed above. The discussion will include both *sadd al-dharā'i'* and *fath al-dharā'i'*.

Takāful as a means to preventing ribā in insurance practices

The structure of *takāful* based on mutual help and solidarity will eliminate the *ribā* element in insurance. As is clear from the above, *takāful* is actually a hybrid of contracts of partnership and *hibah*. The amount granted to a participant who encounters the risk insured is a donation agreed upon upfront by all participants collectively. Thus, it is not a consideration for the premium paid. Consequently, there is no requirement of hand-to-hand and equal value exchange as required for money for money exchange. Conventional insurance is *ribā*-based, as it is a contract of exchange of money in the future subject to the occurrence of the risks and at different value.

Takāful as a means to prevent gharar-transaction in insurance

Gharar or risk and uncertainty is prohibited in Islamic financial transactions. The existence of *gharar* may render a transaction invalid for lack of information. Al-Qarāfī stated that there are seven aspects of *gharar* that can possibly affect transactions. They are *gharar* in the existence of the subject matter of a contract, *gharar* in the acquisition of the subject matter, *gharar* in genus, *gharar* in type, *gharar* in amount and *gharar* in the identification of the subject matter (Al-Qarāfī, 2001, vol. 3, p.1051).

Gharar in the conventional insurance practice may occur in at least three of the seven categories listed by al-Qarāfī. First is *gharar* in existence, where the existence of the obligation of the insurance company to pay for the claim is not certain as it depends on the occurrence of the risk specified. Second is *gharar* in acquisition,

where the policyholder is not certain at the time of the contract whether he will acquire the consideration for which he is paying the premium as the consideration again depends upon the occurrence of the insured risks. Third, *gharar* in amount is where both the insurance company and the policyholders are not certain about the amount of the premium that must be paid by the policyholders.

Takāful or mutual insurance can eliminate the element of *gharar* in insurance for two reasons: First, it is a gratuity contract ('*aqd tabarru'*) and not an exchange (sale) contract in the opinion of the Mālikī jurists (Al-Qarāfī, 2001, vol. 3, p.284). However, according to Shāfi'ī jurists, there is no difference between the two types of contract in the sense that both of them can be invalidated due to *gharar*. Second, even according to Shāfi'ī jurists, *gharar* can also exist in a contract of *tabarru'*. In the case of *takāful*, the element of *gharar* can be eliminated. *Gharar* in existence, acquisition and amount are not present in *takāful*, as the participants are certain that they will acquire the *takāful* benefits in proportion to their contribution plus the surplus from *hibah* fund, if any.

Under the Family *Takāful* scheme, it is agreed by the parties that the *takāful* benefits shall be paid to the participants or their heirs, in the following manner:

1. If the participant dies before the maturity of the plan, the heirs will be granted:
 - a. The total amount of *takāful* instalments paid by the deceased from the date of his first instalment up to his death.
 - b. His share of the profits from the investment of his paid contributions credited to his Participant's Account (PA) according to the *muḍārabah* ratio.
 - c. The outstanding *takāful* amount which would have been paid by the deceased had he survived, calculated from his death up to the maturity date. This amount shall be recovered from the Participants' Special Account fund or the *Tabarru'* fund (PSA) (Ahmad, 1991, p.194).

2. If the participant survives the maturity date, he will be given:
 - a. The total amount of *takāful* instalment paid by the participant during the tenure of his plan.
 - b. The share of the profits from the investment credited into his PA.
 - c. The net surplus allocated to the participant.

***Takāful* as a means to realise the five objectives pertaining to wealth and property**

As for *fath al-dharā'i'*, *takāful* or insurance based on cooperation and mutual help can undeniably provide an effective means towards realisation of *Maqāṣid al-Sharī'ah* in financial transactions and wealth and property management. With a well-defined structure and plan, all the five objectives of *rawāj* (wide circulation of property), *wuḍūh* (transparency), *thabāt* (certainty), *'adl* (justice) and *takassub* and *istithmār* (acquisition and investment) can be achieved.

As shown earlier, the threefold structure of the Family *Takāful* can be considered an effective means to realise the objectives of *rawāj* and *takassub/istithmār*, by saving regularly (via paying specified instalments), investing these savings with a view to earning profit in *Sharī'ah*-compliant economic activities, and availing the cover of the payment of *takāful* benefits to the heirs and dependants in the case of death before the maturity (Ahmad, 1991, p.192).

In the event a participant wants to surrender the policy or discontinue the plan, he shall be entitled to the surrender benefit. This benefit consists of the proportion of his *takāful* instalments paid and credited to his PA plus the profit from such installments. There is no forfeiture in the Family *Takāful* plan, as in conventional insurance. However, he shall not be entitled to be refunded from the PSA fund.

After the *'aqd* or the contract has been made by the “proposer” (intended participant) and the *takāful* company, all the important clauses of the contract are recorded in the *takāful* certificate (BIRT, 1996, p.53). Before the issuance of the certificate, the *takāful* operator will issue a cover note, especially in the case of General *Takāful*. A cover note is a temporary document for the participant to be used as

proof to make a fair claim against the risk if it occurs before the permanent *takāful* certificate is issued (Masum, 2003, p.249). All the above arrangements and stipulations are means to realise the purpose of transparency, certainty and justice.

***Takāful* and the concept of *uberrimae fidei* or utmost good faith**

The concept of *uberrimae fidei* or agreement of utmost good faith in insurance means that the parties to the policy or *takāful* plan must disclose the truth of the facts or the matters affecting the policy (Ma'sum, 2003, p.200). Under the law, it is assumed that insurance contracts are entered into by all parties in good faith, meaning that they have disclosed all relevant facts and intend to carry out their obligations. Where lack of good faith can be proved, such as fraudulent application to obtain insurance, the contract may be nullified (Rubin, 2000, p.533). Under section 28 of the 1984 *Takaful Act*, it is the participants' duty to disclose in the proposal form fully and faithfully all the facts which they know or ought to know, otherwise the *Takāful* Certificate issued may be void (BIRT, 1996, p.74). As indemnity provided in *takāful* contract is based on the mutual responsibility of all participants, it is inherently a duty of each of them to disclose all material facts affecting the contract in order to achieve the objectives of transparency and justice. Failure to disclose might render the possibility of benefiting from the *tabarru'* funds fraudulently at the expense of other participants.

***Takāful* underwriting**

Insurance underwriting is the process by which *takāful* operators consider and decide whether to accept participation of cover made by a "proposer" and the terms to be imposed. It is the process of examining, accepting or rejecting insurance risk and classifying those selected in order to charge the proper premium for each. Generally, the purpose of underwriting is to distribute the risk among a pool of insureds in a manner that is equitable for the insureds and profitable for the insurer (Rubin, 2000, p.536). The concept of underwriting is no less important in *takāful*, due to the solidarity and mutual assistance spirit inherent in *takāful* itself. Thus, the purpose of underwriting for Family *Takāful* is to maintain equity among the participants. In this case, each participant contributes to a common fund (*tabarru'* fund) from which *takāful* benefits will be paid to any participant suffering from the risks defined. Therefore,

each participant should contribute according to the expected loss probabilities that he might transfer to the fund. The *takāful* company should estimate the expected loss exposure presented to it by the participant and charge a rate or percentage to be attributed to the *tabarru* fund which is commensurate with that exposure (Ahmad, 1991, p.193).

In the case of STMB in its Family *Takāful* scheme, the *tabarru* proportion is worked out by the actuaries taking mortality by age into account using the method and techniques of determination as in the conventional insurance. The *tabarru* ' proportion varies from two percent to nine percent of the instalments to be credited into PSA (Ahmad, 1991, p.194). Though it originates from conventional insurance practice to ensure the insurance company's adequacy to compensate for the loss occurred, the process of underwriting can also be applied in *takāful* practice. *Takāful*, being a mutual insurance and mutual help in protection against loss, requires a reliable step in determining the fund's adequacy and capability in providing protection against loss for all members. This in return is an effective means towards the goals of transparency and justice, as the underwriting process provides transparency in determining the *tabarru* ' portion and ensures that any participant will not take from the fund more than what he deserves at the expense of other participants.

***Takāful* and the insurable interest**

Insurable interest means the financial interest a person has in the subject matter of the cover. For its validity, insurance requires that the insured shall be so related to the subject matter of the insurance that he will benefit from its survival or will suffer from loss or damage to it or may incur liability in respect of it (BIRT, 1996, p.64). The participant must stand in a relationship with the subject matter of the *takāful* whereby he benefits from its safety and well-being or freedom from liability and would be prejudiced by its damage or the existence of liability (BIRT, 1996, p.64). A policy without an insurable interest is like a gambling contract that is clearly prohibited in Islam, by which a participant hopes for a chance to gain instead of providing a mutual cooperation for security against a risk (Ma'sum, 2003, p.156).

However, under the 1984 *Takaful Act*, there was no expressed condition for insurable interest for a *takāful* plan. In the case of Family *Takāful*, whereby the insurable interest is the life itself, the question of requirement for insurable interest might not arise, as the participant in this case seeks to protect his and his family's interest. In *takāful*, the insured are themselves the insurers, and thus the element of gambling or the intentional self-inflicted harm will not be operative for lack of insurable interest (Mahmood, 1991, p.293). Above all, the insurance benefit in a *takāful* policy shall be distributed on the basis of the Islamic law of inheritance, as it is considered as part of the participant's legacy.³ The nominees in the policy are considered as mere trustees to administer the distribution of the *takāful* benefit after the participant's death.

The stipulation to administer the insurance benefit in accordance with the Islamic law of inheritance and will is no doubt on par with the goal of *thabāt* or certainty of the deserving parties rights to the inheritance as prescribed by the Qur'ān and Sunnah after one's death.

Conclusion

The concept of *dharā'i'* should be understood in a broad meaning. In the classical literature dealing with the concept of *dharā'i'*, the jurists' emphasis was more on blocking the means to evil things than on opening the means to beneficence. Apart from that, opening the means to good can also operate through the general principle of *al-ibāḥah al-ašliyyah* established in Islamic Law, meaning that all material things and dealings are originally permissible. However, the application of *fath al-dharā'i'* provides a more flexible and effective means to achieve the *Maqāshid al-Sharī'ah* by looking into the end result or consequences of an act or rule.

Insurance as a new development in Islamic financial system and wealth management is an example of issues that require the application of the concept of *dharā'i'* in a broad sense with the ultimate view of achieving the five objectives of the *Sharī'ah* in wealth and property management as discussed above. The foregoing discussion has tried to show the relevance of the application of both *sadd al-dharā'i'* and *fath al-dharā'i'* in some practical aspects of insurance based on the *takāful* model as practiced by STMB.

Endnotes

1. It reads as follows: “In order that it may not (merely) make a circuit among the wealthy among you” (al-Ḥashr:7).
2. Takaful Act, 1984, Section 2 defined Takaful as: A scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aids and assistance to the participants in case of need, whereby the participants mutually agree to contribute for that purpose.
3. For a *fatwā* on this issue see *Malaysian Law Journal* (1974), 1.

References

- Abū Zahrah, M. (n.d.) *Uṣūl al-fiqh*. Cairo: Dār al-Fikr al-Arabī.
- Ahmad, S.W. (1991). Islamic insurance in Malaysia. In Ariff, M. (Ed.), *The Muslim private sector in Southeast Asia*. Singapore: Institute of Southeast Asian Studies.
- Al-‘Ālim, Y.H. (1991). *Al-maqāṣid al-‘ammah lil-Sharī‘ah al-Islāmiyyah*. Virginia: IIT.
- Al-Bukhārī, M. (2000). *Ṣaḥīḥ al-Bukhārī*. Beirut: Dār al-Fikr.
- Al-Ghazālī, A.H. (1997). *Al-mustaṣfā min ‘ilm al-uṣūl*. Beirut: Dār Iḥya’ al-Turāth al-‘Arabī.
- Al-Ḥasanī, I. (1995). *Naẓariyyat al-maqāṣid ‘inda al-imām Muḥammad al-Ṭāhir Ibn ‘Āshūr*. Herndon, Virginia: International Institute of Islamic Thought.
- Al-Juday, A. (2000). *Taysīr ‘ilm uṣūl al-fiqh*. Beirut: Mu’assasah al-Rayyān.
- Al-Qarāfī, S. (1993). *Sharḥ tanqīḥ al-fuṣūl*. Cairo: Maktabat al-Kulliyāt al-Azhariyyah.
- Al-Qarāfī, S. (2001). *Al-furūq*. Ali Jumah et al (Eds.). Cairo: Dār al-Salām.
- Al-Rāzī, F. (1990). *Al-tafsīr al-kabīr*. Beirut: Dār al-Kutub al-Ilmiyyah.
- Al-Shāṭibī, I. (1999). *Al-muwāfaqāt*. Beirut: Dār al-Ma‘rifah.
- Al-Zuḥaylī, W. (1998). *Uṣūl al-fiqh al-Islāmī*. Damascus: Dār al-Fikr.
- BIRT. (1996). *Takaful (Islamic insurance), concept and operational system from practitioners perspective*. Kuala Lumpur: BIMB Institute of Research and Training.
- Hugh, C. (1987). *Witherby’s dictionary of insurance* (2nd ed.). London: Witherby & Co. Ltd.
- Ibn ‘Āshūr, M. (2006). *Treatise on Maqāṣid al-Sharī‘ah*, trans. M.T. El-Mesawi. London-Kuala Lumpur: The International Institute of Islamic Thought, al-Maqāṣid Research Centre and Islamic Book Trust.

- Ibn Rushd, A.W. (n.d.). *Al-muqaddimāt al-mumahhidāt*. Beirut: Dār Ṣādir. vol. 2.
- Mahmood, N.R. (1991). Takaful: The Islamic system of mutual insurance – The Malaysian Experience. *Arab Law Quarterly*, 6, 281-286.
- Mohd Masum Billah. (2003). *Islamic and modern insurance: Principles and practices*. Kuala Lumpur: Ilmiah Publishers.
- Rubin, H.W. (2000). *Dictionary of insurance terms* (4th ed.). New York: Barron Educational Series.
- Sano, K.M. (2000). *Al-Istithmār: Aḥkāmuhu wa-ḍawabiṭuhu fī al-fiqh al-Islāmī*. Amman: Dār al-Naf'is.