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Abstract

Purpose:

This study examines the extent to which traditional juristic approaches to determining intention in Islamic law are altered in the institutional framework and standard setting project of the Malaysian state.

Methodology:

The study used the transnational law theory, which views normativity as culturally, socially and religiously embedded. The development of norms, customs, and laws is also contingent on self-maximizing behavior. The SAC's interpretation of the *bayʿ al-ʿīnah* standard is a case study of this approach to the development of law.

Findings:

This study shows that traditional approaches to determining the validity of an Islamic contract have been displaced by the institutional logic of the state, which prioritizes uniformity and certainty in law and reflects liberal, Western and capitalistic values. Islamic standard setting is part of the state's objective to uniformize law due to the globalization of financial markets. The normative collisions in the standard-setting project produce a new jurisprudence based on the state's uniform and purposive determination of a contract's validity.

Originality:

Few works, if any, have examined the interaction of the state's institutional environment with jurists' traditional approaches to determining contractual intention. Most scholarship assumes the

decisive role of market forces but the role of law and institutions in this context is under-researched.

Practicality:

Further research on institutional frameworks is needed to conceptualize how Islamic commercial principles and ethics can be incentivized in the state's systems.

Keywords:

intention, institutions, Islamic contract law, contractual interpretation, law and economics, Malaysian common law, standardization

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1. Introduction

In contrast to modern legal systems, where rules of interpretation are primarily applied in relation to contractual breaches, Islamic law focuses on the validity of contracts prior to any dispute or adjudication. Theoretically, this methodological difference is essential since traditional Islamic law (*fiqh*) relies on Muslim scholars' determination of a contract's validity. Moreover, in the Islamic legal tradition, the process of validating contracts relies on establishing a genetic connection between the contract and the holy sources, the Qur'ān and the Sunna, as well as the written corpus of classical juristic texts (*fiqh*) that Muslim jurists developed over the course of many centuries. These sources, rules, and principles, including the prohibition of interest (*ribā*), excessive risk (*gharar*), and gambling (*maysīr*) are culturally, socially, and religiously embedded in Muslim law and society. They are the basis for modifying, adapting, and bestowing Islamic legitimacy on contemporary contracts many of which are routinely used in conventional finance.

In this paper, we examine the role of contractual intention in Bank Negara Malaysia's (BNM) Sharīʿa Advisory Council (SAC) standard setting project. This study assesses jurists' determination of intention in this uniform law project and examines the extent to which traditional approaches to intention are altered in the institutional framework of the Malaysian state.

The standard setting project depends on two operations to standardize Islamic law. The first is the SAC's uniform interpretation of *fiqh* to produce default contractual terms. The second operation requires courts to interpret the standards uniformly. Both operations are interlinked conceptually and practically.

This paper shows that traditional approaches to determining the validity of an Islamic contract have been displaced by the institutional logic of the state, which prioritizes uniformity

and certainty in law and reflects Western and capitalistic values. Islamic standard setting reflects the state's objective of uniformizing laws due to the globalization of financial markets.

Islamic standard setting results in the interaction of local, national, and global normative orders which merge and conflict in dynamic and novel combinations (de Sousa Santos, 2020) in the Malaysian institutional context. These interactions and conflicts produce new "legalities" or normativities that reflect the values and debt-based logic of neoliberal capitalistic accumulation. The normative collisions in the standard-setting project produce a new jurisprudence based on the state's uniform and purposive determination of a contract's validity. In the second operation, Malaysian common law courts are statutorily empowered to determine intention according to the common law's *laisser-faire*, commercially pragmatic principles of contractual interpretation.

We examine the SAC's interpretation of the *bayʿ al-ʿīnah* standard as a case study since it is a conceptual building block for creating debt-based transactions from deferred sales contracts and is therefore related to several pivotal contracts used in the industry such as the *tawarruq*, the *murābaḥa* and the *bayʿ bi-thaman ajīl* (Rosly & Sanusi, 2001; Ishak, 2018; Al-Nahari et al., 2022). Indeed, some classical jurists blur the discussion of the *bayʿ al-ʿīnah* with the *tawarruq*, implying that those who permit the *ʿīnah* would also allow the *tawarruq* (Ahmed and Aleshaikh, 2014). In Malaysia, both transactions continue to be used (Istianah, 2020; Ishak, 2018) but the *tawarruq*'s growing importance is such that Islamic banks are referred to as "*tawarruq* banks" (Ahmad *et al.*, 2020).

The state's displacement of the traditional modus to determine a contract's validity underscores the fundamental role of the state's institutional framework in the production of

contemporary Islamic financial jurisprudence. This study underscores the need for focused research concerning the incorporation of Islamic knowledge and lawmaking in the institutional context of the state.

The study was divided into two parts. Part 1 provides a brief background on the role of intention in contractual interpretation and its significance in Islamic law. In Section 1.1, we provide a general introduction to the role of intention in Islamic law. In Section 1.2, we consider the role of intention in the context of jurists' interpretation of the validity of an Islamic contract. Part 2 considers the operations involved in standard setting and its effects on the determination of intentions by contemporary Malaysian jurists. In Section 2, we analyze the state's uniform regulatory logic, which is the "rules of the game" by which SAC jurists' determine a uniform contract's validity. In Section 2.1, we focus on the SAC's interpretation of the *bayʿ al-ʿīnah* and consider the "legalities" which arise in the SAC's pragmatic approach to interpretation. In Section 3, we examine Malaysian courts' modus for determining intention, highlighting the institutional basis of Anglo-Muslim law, which displaces traditional Malaysian jurisprudence. Finally, we offer concluding remarks.

Part 1

1.1. The Role of Intention in Islamic Law

Language is an imperfect method of communication, and its meanings are not always clear. When language is used in connection with the creation of legal rights and obligations that have legal consequences, the law must formulate methodologies to identify the meaning of words (Nicholls, 2005). In most legal systems, doing so involves determining the intention of the

speaker or writer in the context in which the words are used (Dworkin, 1986). Context is important, as there are no value-free facts or methods of obtaining them that are void of the historical and cultural context (Nelken, 2009).

Moreover, the hearer or reader (interpreter) of language endows words with what they perceive them to mean. The interpreter brings his or her historical consciousness to the act of interpreting a text or speech. Although this historical consciousness does not necessarily determine the meaning of the text to the interpreter, it cannot be disregarded completely. One's historical consciousness embodies opportunities and opinions that may help the interpreter understand a particular text (Gadamer, 2010). Words do not have a 'meaning' independent of the person who expresses them and the person to whom they are directed (Nicholls, 2005).

Classical Muslim jurists were familiar with the epistemological challenges posed by language. Jurists viewed an individual's intent as 'a constitutive element of human actions,' which was simultaneously a means to assess actions, whether religious or secular.[1] They recognized that forms of expression vary significantly and that intentions can be difficult to discern.

Similar to jurists in other legal traditions, Muslim jurists face an interpretive problem in discovering intention. They solve this problem by focusing on the outward manifestations of human activity, including writing and speech acts (Messick, 2001). However, words can have several meanings (*maʿānī*). When one intends a meaning, one singles out a particular meaning from other possible meanings. The speaker's meaning 'comes alive in an actual speech situation' (Weiss, 2006).

Intent (*niyya*) is 'a fundamental concept of the whole of Islamic religious law, be it concerned with worship or with law in the narrow sense' (Schacht, 1964). The significance of

niyya is indicated by the placement of a *ḥadīth* at the beginning of al-Bukhārī's *ḥadīth* compendium: 'Works are rendered efficacious only by their intentions' (*innamā al- āʿmāl bi-l-niyāt*).[2] Ṣubḥī Maḥmaṣānī, a modern Lebanese legal scholar (d. 1407/1986), emphasizes that every human action derives from a person's will or his or her choice of action. Intention is 'the will directed towards the action, or the directing of the will towards the action' (Maḥmaṣānī, 1961).

In Sūrat al-Anʿām, Q. 6:95, the word *al-nawā,* derived from the Arabic root n-w-y, refers to the date pit, fruit kernel or the core of something. This definition indicates that *niyya*, which is derived from the same root, is located at the heart of something. The word *niyya* appears frequently in the canonical *ḥadīth* collections, albeit without its technical meaning.[3] According to the jurists, *niyya* is located in the heart (*qalb*), which is the site of the mind or intellect (*ʿaql*) (Al-Qarāfī, 1988; Powers, 2015).[4] Thus, *niyya* is both internal and inaccessible. It is an interior phenomenon, an action of the heart that lacks external or objectively observable characteristics.

1.2. Intention in the Islamic Contract

Qarāfī (d. 684/1285) noted that *muʿāmalāt* (transactions) are legal commands that require the performance of an act for which a simple performance suffices to bring about benefits thereto. The performance of the *muʿāmalāt* can bring worldly benefits and rewards to the hereafter, irrespective of the parties' intentions (Al-Qarāfī, 1988). In contrast, the performance of *ʿibādāt* (worship) generates benefits in the hereafter only if the actor's *niyya* is sound (Powers, 2015).

The law of social transactions, *fiqh al-muʿāmalāt,* comprises the rules that regulate civil actions. While jurists attributed great significance to intent in the performance of *ʿibādāt*, they

largely assumed intent in civil acts.[5] According to Chafik Chehata, the role of intent in the validity of a contract in the Ḥanafī *fiqh* of contract (*al-ʿaqd*) is 'so little taken into consideration that the sale of an object is clearly considered to be valid even if the ends it serves are illegal (Arabi, 1997; Chehata, 1969).' We also find this understanding of the marginal role of intent in the following passage from al-Shāfiʿī's *al-Umm* (Al-Shāfiʿī, 1961):

> No contract is nullified except by its own terms […] Sale contracts are not nullified on grounds of pretext or evil intention (*niyyat sūʾ*) […] Thus, if a man buys a sword intending to kill with it, the sale is permissible; though the intention is not admissible, it does not invalidate the sale […] The book [the Qurʾān], followed by the Sunna and the general principles of Islam, all indicate that contracts have legal effects according to their manifest content and are not invalidated by the intention of the parties.

Some contemporary Muslim scholars, such as Wahbah al-Zuḥaylī, argue that the Ḥanafīs and the Shāfiʿīs apply an objective approach to contracts that gives legal weight to external elements such as speech acts or writing. The cause or motive does not affect the validity of the contract unless declared. For example, if someone intends to commit a sinful act, but this is not expressed in the contract, then the act is reprehensible (*makrūh*) or prohibited (*ḥarām*) for the Ḥanafīs and Shāfiʿīs. However, from a legal perspective, the contract is valid (*ṣaḥīḥ*) (Al-Zuḥaylī, 2004; Zahra, 1996, p.213).

In contrast, Mālikīs and Ḥanbalīs lend more weight to the underlying motives or intentions of the contract even if these are not immediately apparent.[6] They invalidate a contract whose cause (*qaṣd*) or *niyya* is prohibited on the condition that the opposing party knows about this intention or has strong evidence of it (Al-Zuḥaylī, 2004, p.217). Al-Shāṭibī (d. 790/1388), a Mālikī jurist, explained this approach as follows (Al-Shāṭibī, 1997):[7]

Deeds are to be judged by intentions, and objectives are taken into account when considering acts of worship and social transactions. The evidence for this is plentiful, but it suffices to say that objectives distinguish between custom (*ʿāda*) and [what is] worship (*ʿibāda*).

The concept of intent is less technical and less concise in transactions than it is in worship. Classical jurists' views on the role of intent in contracts differed, leading modern scholars to adopt a binary classification of the positions adopted by the *fiqh* schools: objective or subjective.

The following discussion addresses the state's project to develop uniform Islamic standards and the ways in which the rationality of this type of uniform law, which is a result of globalization, has radically altered jurists' methodologies for determining the validity of an Islamic contract.

Part 2

2. Uniform Law and the Interaction of Normative Orders

Scholars interpret the effects of the state's regulation of the sharīʿa in different ways. During the colonial period in Malaysia (1511-1963), Islamic courts were assigned a lower status than secular civil courts. However, colonial authorities treated the sharīʿa as a legal system capable of adjudicating civil disputes, and any limitations imposed by colonial era policies were offset by these courts' regularization. Some scholars consider the state's regulation of the sharīʿa as an example of how 'a theoretically immutable law can in fact be amended in practice' (Anderson, 1959). Contemporary law reformers continue to use statutes to administer Islamic

law, resulting in modernist versions of Islamic rules that are roughly symmetrical with the secular equivalent (Horowitz, 1994). However, the Islamic and nationalist political impulse of the early to mid-twentieth century reflected a desire to see that statutory code was 'recognizably Islamic' (Hill, 1988). Muslims have frequently criticized the state's incorporation of the sharīʿa in modern statutory codes on the grounds that the code's abstract language may obfuscate its Islamic identity. Indeed, one of the most prominent and influential scholars of Islamic law in our time argues that "traditional *sharīʿa* can surely be said to have gone without return" (Hallaq, 2004).

In 1997, the SAC was established as the highest sharīʿa authority for Islamic financial institutions in Malaysia. The Central Bank of Malaysia Act 2009 (hereinafter "CBA 2009") endows the SAC with the authority and purpose of ascertaining Islamic law for the purposes of Islamic financial business (CBA, 2009, S 16B (1)). Therefore, Muslim jurists are statutorily empowered under the CBA 2009 to standardize and advise on Islamic contracts to facilitate the country's burgeoning Islamic Finance industry, which now comprises 41 percent of the total banking loans in Malaysia (Fitch Ratings, 2023). The Malaysian state seeks to incorporate Islamic finance into its institutional framework to enforce commercial contracts uniformly. Institutions are the 'rules of the game in a society' or the laws, conventions and norms that constrain human interaction. Institutions provide a structure in which exchange is incentivized, irrespective of whether it is of a political, economic, or social nature (North, 1990). The way in which societies evolve or even the differential performance of economies over time can be explained by the effects of institutional change. Moreover, cultural knowledge, such as technological knowledge, is embedded in institutions, organizations and contracts and helps to define and explain changes in economic structures (Ahmed, 2012).

The Malaysian standard-setting project is part of a century-old project to create "uniform" commercial contracts. Uniform law is part of globalization, is characterized by the global convergence of rules, and is heavily influenced by the ideals of Western ideology, including liberal democracy and capitalism (Andersen, 2007). In contemporary international trade and finance, the orthodox opinion is that legal convergence creates legal certainty and bridges gaps between the laws of different legal communities (Ogus, 1999). Therefore, a driving force behind uniform law is the pursuit of profit, which lies at the core of all trade and finance, but is balanced with cultural values to differing extents. One of the most expensive ancillary costs of trade and finance is that of contractual negotiations and drafting. When contracting parties use similar rules, negotiations are easier as the legal consequences of terms are better understood, saving money (Andersen, 2007). Of course, savings come at the cost of legal diversity, which displaces some classical understandings of Islamic principles, rules, and ethics.

At the macro-level, the unification of laws creates a common legal understanding, fostering new markets and allowing industry to flourish. States like Malaysia which engage in the global economic system develop the "mechanisms necessary for the reconstitution of certain components of national capital into "global capital"" and seek to accommodate foreign capital by providing new types of rights or entitlements (Sassen, 2007). These mechanisms include standard-setting, legislative acts, court rulings and executive orders.

Uniform law requires two operations that, while functionally separate, are conceptually interrelated. The first concerns standard setting, which is "the task of creating broadly suitable default rules and/or 'labelling' widely used contract terms and clauses with standard meanings (Scott, 2000)." The second operation concerns the uniform interpretation of contractual terms

such that the parties' risk allocations are "correctly" interpreted (Scott, 2000). Standards help facilitate uniformly enforced commercial contracts, but the words used to minimize legal differences are insufficient. Notably, standards only become meaningful when applied in a particular context because standardized rules do not ensure applied uniformity in law (Andersen, 2007). The problem of uniform interpretation has been addressed in Malaysia's Anglo-Muslim law and is briefly examined in Section 3.

Standard-setting is meant to produce legal uniformity, legal certainty, consistency, and predictability. These legal parameters reflect "legal liberalism" as they are designed to uphold the liberal-democratic state (Tamanaha, 1995) and foster capitalistic accumulation. Legal certainty fosters business activity because it implies that the law will be consistently applied to similar cases. Predictability is the quality that allows the subjects of law to foresee the law's application to particular forms of conduct. Consistency, although closely related to predictability, 'focuses less on the outcome of a particular adjudication by comparison with what the law is generally understood to be and more on the relative outcomes of different adjudications that apply the same law' (MacNeil, 2009). The state's assignment of a standard meaning to standards reduces many errors that would otherwise occur in parties' incomplete contracts. Standards provide a "menu of signals" that parties can choose to simplify and reduce the costs of contracting (Scott, 2000).

Islamic standards are meant to achieve these aims in the areas of legal documentation, dispute resolution, regulatory requirements, accounting and auditing requirements, sharīʿa compliance, and marketing, and to create Islamically acceptable products for cross-border transactions in the era of globalization (Bakar, 2002). Standards reduce transaction costs,

mitigate legal action, improve legal documentation, reduce the time and effort required of Sharīʿa scholars, and foster consumer confidence in the industry (Ercanbrack, 2019).

Some authors assert that deep contradictions exist between "society-wide institutionalized rationalities" in the increasingly fragmented and pluralistic legal interactions of the global economy (Fischer-Lescano and Teubner, 2004). When local, national, and global normative orders interact, they are never impervious or closed off from one another. They are dynamically evolving sub-systems that interact with other normative orders in complex and heterogeneous ways, and which may come to mimic, resemble, ~~c~~onflict with one another or even define themselves in relation to each other (Twining, 2000; de Sousa Santos, 1995). The porosity of semi-autonomous social systems in a globalizing world does not enable them, regardless of their type or size, to operate as closed-off silos (Ercanbrack, 2015).

Standardization is incentivized by market forces and the demands of modern legal systems that prioritize uniformity, hierarchy, clarity, and comprehensiveness (Ercanbrack, 2019). These demands conflict with Islamic law's intrinsic diversity, which results from the juristic methodology of casuistically deriving law from the sacred sources (*uṣūl al-fiqh*). A Muslim jurist derives his interpretation of Islamic law from the sources to the best of his abilities (*ijtihād*). However, because this interpretation is only probable and hence fallible, the result is a diversity of opinions in *fiqh* concerning legal issues (Weiss, 1978). Indeed, one cannot speak of a single Islamic legal system (Grasshoff, 1899) let alone a hierarchical system (Vogel, 2019). The great diversity of Islamic law, evident in both the variety of schools and their differing positions on

most legal issues, creates uncertainty about the rights and remedies of the parties, the terms of financial and commercial risk allocation, and the legal documentation in Islamic finance contracts.

Standardization represents a break from this understanding of the sharīʿa by allowing the state to determine a singular version of the law.[8] Traditional Islamic law, 'being a doctrine and a method rather than a code […] is by its nature incompatible with being codified, and every codification must subtly distort it' (Schacht, 1960). Therefore, standardization generates new "legalities" or new normativities that result from the incorporation of Islamic rules in the state's uniform and hierarchical institutional framework. These legalities are imbued with new cultural and legal meanings, representing a new jurisprudence and altered methodologies for developing the Islamic contracts.

The Malaysian SAC jurist, Mohd Daud Bakar, the former chairman of the SAC, has written widely about his methodological approach to Islamic finance lawmaking. In surprisingly candid terms, Baker describes a new methodological approach that differs from classical interpretation techniques (Bakar, 2016). He writes:

> Intuitively speaking, I tend to believe that the modern Shariah scholars are no longer influenced by these different classical juristic techniques of interpretation, as much as by a new set of variables that tend to dictate and color the new juristic and intellectual personalities of the modern times. […]. Apparently, there could be a new set of thinking processes that influence the way contemporary Shariah scholars decide on most of the issues. I believe that the previous set of methodologies of interpretation, which were operating in the past, had little impact on the last layer of the juristic thinking process

before issuing an opinion or a fatwa in our contemporary times. This intellectual exercise needs another focus and structured treatment that is clearly not discussed in this book.

Arguably, this new set of variables references the institutional context of contemporary financial markets, which results in a whole host of new legalities. The institutional basis of modern finance has supplanted the traditional role of scholars' determination of intention in the Islamic contract.

The following discussion examines the SAC's methodology for incorporating sharīʿa principles in Islamic standards by drawing on the *fiqh* and sharīʿa sources.

2.1. The New Legalities of Islamic Standards

Interpretation is always purposive in the sense that the interpreter imposes a purpose on an object or practice "to make of it the best possible example of the form or genre to which it is taken to belong" (Dworkin, 1986). The pragmatic approach to contractual interpretation, which characterizes Malaysian jurisprudence, reflects a purposive, utilitarian approach to contemporary *fiqh* that is cognizant of institutional frameworks and market forces.

On October 26, 2010, the SAC introduced a resolution that provides sharīʿa guidelines and rules for transacting the *bayʿ al-ʿīnah*. On a functional level these guidelines provide a template for achieving financial objectives without violating the prohibition of *ribā* (interest), and the SAC standard is framed and transacted in a way that reflects jurists' desire to establish an organic connection between the sharīʿa and the promulgated standard. Using al-Shāfiʿī's formalist interpretation of the transaction, the SAC relied on the towering authority of the architect of the *uṣūl al-fiqh* to authenticate its standard. The SAC guidelines for the *bayʿ al-ʿīnah* provide the following:

Two sales contracts concluded separately and independently, with no interrelation with one another, and using the pronunciation of offer and acceptance in accordance with the sharia are important elements in *bayʿ al-ʿīnah* transactions, which are consistent with the requirements of the below verse. Therefore, the two sales agreements between the seller and the buyer in *bayʿ al-ʿīnah* transactions are valid in Sharīʿa based on the above elements. This interpretation relies on the Qurʾān which states that: '[...] Allah SWT has permitted trading and forbidden usury (Q: 2:275) [...]' (BNM, 2010).

The SAC referred to al-Shāfiʿī, his school, which is the dominant *madhhab* in Malaysia, and several Ḥanafīs to authenticate this finding. It states:

- Various Shāfiʿī scholars and several Ḥanafīs, such as Imām Abū Yūsuf, have concluded that *bayʿ al-ʿīnah* is valid.
- Al-Shāfiʿī stated his position on the legality of *bayʿ al-ʿīnah* in his *al-Umm* as follows:

When a person sells an asset in a certain period and the buyer receives it, […] it is valid if he buys back the asset from the party to whom he sold the asset at a lower price.

- Furthermore, Imām Subkī quoted the statement of al-Shāfiʿī as follows:

When a person sells an asset in a certain period and the buyer receives it, it is valid if he buys back the asset from the one who bought it at a lower or higher price, either on credit or for cash, because it is a different sale from the first sale (BNM, 2010).

The guidelines produce a rule for addressing the prophetic *ḥadīth* on 'two sales in one', which prohibits transacting sales contingent on one another (Mālik).[9] Parties are directed to structure the terms and conditions of each contract such that they are not connected to one another. The SAC states:

- The purchases of assets and subsequent sales of the asset under *bayʿ al-ʿīnah* must be concluded in two clear and separate agreements that comply with the following elements:
  - […] Written documentation of both sale and purchase agreements must be prepared and represented by two separate sets of documents.
- The sale and purchase agreements must not stipulate any terms and conditions or create an obligation for both transacting parties to repurchase or resell the subject matter of sale […].
- The execution and signing of both sets of sale and purchase agreements must be conducted at different [times…].
- Neither [party] to [a] *bayʿ al-ʿīnah* transactions shall endorse both sets of sale and purchase agreements by pre-signing these documents.
- No contracting party in [a] *bayʿ al-ʿīnah* transaction should provide either a written or verbal promise to repurchase or resell the subject matter of sale (Islamic Banking and Takaful Department, 2012; The Securities Commision, 2023).[10]

The new legality differs from the majority (*jumhūr*) of jurists, who interpret the 'two sales in one' *ḥadīth* as prohibiting a contract in which the offer contains one price for immediate payment and a higher price for a deferred payment.[11] If the buyer chooses one of the two options and concludes the contract, it is considered valid (Qaradāghī, 1995). However, if the contract is concluded without a clear choice between immediate and deferred payment options, the sale is prohibited. The cause (*ʿillah*) of the prohibition is *gharar* (uncertainty) (Qaradāghī, 1995).

The resolution addresses another *fiqh* concern, namely, the Prophet's injunction: 'do not sell what you do not own/have' (Qaradāghī, 1995). In this regard, the resolution is as follows:

> The ownership [of] the subject matter of sale in [a] *bayʿ al-ʿīnah* transaction must be effectively transferred from the seller to the purchaser. The transfer of ownership results in the purchaser's [sic] having absolute rights and control over the asset under permissible [sharīʿa] mechanisms […] and customary trade practices (*ʿurf tijārī*). The purchaser obtains the ownership right in the underlying asset through either physical possession (*al-qabḍ al-ḥaqīqī*) or constructive possession (*al-qabḍ al-ḥukmī*).[12]

According to the standard interpretation, the prophetic *ḥadīth* prohibits a contract in which the offer includes both an immediate and deferred price (Qaradāghī, 1995). By contrast, the SAC resolution reinterprets the *bayʿ al-ʿīnah* as a sale and repurchase. Note, however, that the majority interpretation of the *ḥadīth* is a sale with two prices: one for immediate payment and the other for a deferred price (BNM, 2010). Similarly, the purpose of the prohibition on selling something one does not own is to prevent uncertainty (*gharar*) and disputes. The SAC's resolution does not address this standard interpretation of the *ḥadīth* and thus creates a new legality that avoids jurists' objections to the *bayʿ al-ʿīnah*.

Ḥanafīs, Mālikīs, and Ḥanbalīs reject the *bayʿ al-ʿīnah* because they consider it a circumvention of *ribā* (Al-Zuḥaylī, 2004, p.467).[13] In contrast, Shāfiʿīs accept the transaction on the grounds that intentions are hidden and jurists should not speculate about them when opining on the validity of a contract.

However, the standard omits al-Shāfiʿī's discussion of intention, which is the basis for his approval of the *bayʿ al-ʿīnah*. The SAC's resolution is directed at another objective: ensuring that the two subcontracts that constitute the *bayʿ al-ʿīnah* transaction are formally independent.

The meaning of the resolution is to facilitate a financial tool that resembles a loan with interest.[14]

Al-Shāfiʿī distinguished between the contract's validity and the context of the transaction. He implied that the context may lead one to speculate on the intentions of the contracting parties and, consequently, to opine on the validity of the contract. However, one should not do so because, despite there being two transactions, there is no evidence of a connection between them. Shāfiʿī holds that people should be allowed to buy and sell, as they please within the framework of the law and the terms of their contracts. People's hidden intentions should not be investigated by referring to their habits, occupations, or other external signs (Al-Shāfiʿī, 1961). Ironically, the written, step-by-step, uniform format of the SAC's regulation of *bayʿ al-ʿīnah* demonstrates that the two ostensibly separate transactions are connected. Had the state not standardized the *bayʿ al-ʿīnah*, the transaction might conform with the unorganized transaction that is compatible with the *fiqh* of al-Shāfiʿī's *madhhab*. The SAC guidelines foster a new interpretation of al-Shāfiʿī's methodology for determining intent, framed according to the institutional objectives of the state.

Although the SAC made no official reference to the Islamic principles of *ḍarūra* (necessity) and *maṣlaḥa* (utility, benefit) as legal bases for developing the *bayʿ al-ʿīnah* standard, some researchers argue that the transaction is *maṣlaḥa* for the people and Islamic banks (Ishak, 2019). *Maṣlaḥa* can be understood as an attribute of an act that brings benefits to the public or an individual (Ibn ʿAshūr, 2001). Derived from the understanding that the main objective of the *sharīʿa* is to realize the *maṣlaḥa* of humanity, the principle underpins much of the modern *ijtiḥād* which seeks to address modern challenges in which classical *fiqh* does not provide a ready answer (Opwis, 2005). Realizing the *maṣlaḥa* of humanity is the essence of *maqaṣid al-sharīʿa* (objectives of *sharīʿa*) (Al-Nahari *et al*., 2022). Al-Ghazālī (d. 505/1111) developed the

conceptual structure of *maqaṣid al-sharīʿa* in which he argued that God's intention to reveal the divine law was to preserve for humankind the five essential elements of their well-being for humankind: religion, life, intellect, offspring, and property (Opwis, 2005). The preservation of these five elements is considered necessary (*ḍarūra*) and receives the highest rank in al-Ghazālī's framework. Less important *maṣalīh* are classified as needs (*hajīyyat*) or improvements (*taḥsīnīyyat*) (Al-Ghazālī, 1993).

However, the main problem associated with these principles or their contemporary iteration (e.g. Ibn ʿAshūr, 2001) is defining a *maṣlaḥa* or necessity (*ḍarūra*) that permits what was originally prohibited. For example, al-Ghazālī argues that despite the clear prohibition of killing Muslims in the Qurʾān and Sunna, it becomes permissible to kill Muslim prisoners used by the enemy as shields if this would certainly save the larger Muslim community from harm. According to the *ḍarūra* principle 'necessities permit the prohibited', but the complexity of identifying *ḍarūra* or the ranking of conflicting benefits has increased manyfold in modern times.

While the preservation of wealth is classified as one of the above-mentioned five objectives, the different reasoning researchers employ to determine the applicability of these principles depends on whether context is considered. While it is generally agreed that the prohibition of *ribā* is a main objective (*maqṣad*) that falls under *ḍarūrīyyat* (necessities), some researchers conclude that no financial transaction can be licensed based on *ḍarūra* (al-Nahari *et al*., 2022), reflecting the prioritization of the principle *sans* context. Other researchers claim that the *bayʿ al-ʿīnah* can be legitimated under the principle of *maṣlaḥa* because it facilitates necessary commercial transactions (Shaharuddin, 2012), providing a much-needed liquidity mechanism for Islamic banks (Md. Hashim *et al*., 2015; Iqbal and Mirakhor, 2007) and meets

contemporary loan and investment demands (Van Greuning and Iqbal, 2008). Arguably, a traditional Islamic financial system that does not allow interest or any type of transaction that circumvents this prohibition is not competitive within the institutional framework of modern financial markets. Therefore, the development of SAC debt-based Islamic standards that can be uniformly enforced in the state's legislative framework represents a jurist's choice between allowing *ribā or* reinterpreting juristic opinions to formally adhere to the prohibition by developing contractual circumventions.

In 2007, the controversy surrounding the *bayʿ al-ʿīnah* prompted the BNM to discourage Islamic banks from using this instrument as the contractual basis of their products (Ishak, 2018). However, the transaction remains a regulated instrument in Malaysian financial markets and while its direct usage in markets may have declined, the transaction continues to be used in different guises.

3. Uniform Interpretation in Anglo-Muslim Law

The second operation by which the state achieves regulatory uniformity in commercial contracts is to create a legal framework that uniformly interprets standards. This process of interpretation is conceptually linked to the first and is thus a part of the contemporary approach to determining a contract's validity. A 'textualist' or plain-meaning interpretation of the express terms produces a uniform interpretation of standards (Scott, 2000). Malaysian common law courts normally meet this standard by applying a common law approach that assesses the meaning of the words used by the parties in written contracts according to the so-called 'reasonable person'. In *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* (2016) the Federal Court confirmed that the principles provided in the landmark English case, *Investors*

Compensation Scheme Ltd v West Bromwich Building Society (1998), are the foundation of Malaysian principles of contractual interpretation ("Investors compensation scheme Ltd v West Bromwich building society," 1997).[15]

The 'reasonable person' principle closely resembles the principle of *pacta sunt servanda,* which holds parties to their mutual agreements and is conceptually related to the freedom of contract, which is a highly valued doctrine in common law. In *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* (2016), the court indicated that the 'reasonable person' principle limits the extent to which courts will imply terms into a contract even if these terms appear to be 'fair' (Tay, 2020, p.244).

Malaysia's former colonial ruler, Great Britain, superimposed its law on Malaysian native legal systems, resulting in a situation in which different bodies of law were available for different population groups.[16] The country's legal system, including its statutory law, includes a peculiar mix of common law and Islamic legal principles commonly referred to as Anglo-Muslim law. The concepts, categories, modes of analysis and hierarchies reflect English law, whereas aspects of *fiqh* regulate Muslim subjects in the domains of inheritance, *waqf*, family law, and Islamic financial matters (Ercanbrack, 2019). Islamic finance disputes are addressed in secular civil law courts.[17]

Malaysia's Anglo-Muslim law is well suited to facilitate, regulate and interpret SAC standards because of its hybrid, albeit secular, character, modes of reasoning, and commercial pragmatism. Anglo-Muslim law provides a methodological basis for creating uniform law and developing Islamic finance laws transnationally. Islamic finance transactions have not always been enforced in Middle Eastern jurisdictions because of the elements of Islamic law in their civil and commercial law codes. For example, the Dubai Court of Cassation 898-927/2019 held

that a *murābaḥa* financing arrangement in name alone was insufficient to be a lawful Islamic *murābaḥa* financing transaction. The Court looked to Malikī jurisprudence to determine relevant rules and principles. In *Dana Gas PJSC No.* (2632/2018), which was before the courts in the Emirate of Sharjah, the United Arab Emirates (UAE), were concerned about whether the UAE courts would invalidate the *sukūk* due to conflicts with the UAE Civil Code.

Some Malaysian judges interpret Islamic contracts according to their diverse understanding of what constitutes Islamic law (Hasan and Asutay, 2011).[18] In *Bank Kerjasama Rakyat Malaysia Berhad v Fadason Holdings SDN BHD & Ors* (2005), which involved a default on a *bayʿ al-ʿīnah* credit facility, the High Court identified Islamic banking legislation as the applicable law, including the Islamic Banking Act 1983 and the Banking and Financial Institutions Act 1989.[19] The 1989 Act, the court noted, defines Islamic financial business as "any financial business, the aims and operations of which do not involve any element that is not approved by the religion of Islam". Similarly, the Islamic Banking Act 1983 defines Islamic financial business as "banking business whose aims and operations do not involve any element that is not approved by the religion of Islam". Defining 'element' as 'a necessary, basic and fundamental assumption or principle,' the court identified the prohibition of *ribā* in loans as a primary element of *fiqh al-muʿāmalat.* Assessing the BBA's purchase and sale transactions individually, without knowledge of the context of these transactions, the court agreed that the BBA's individually transacted contracts did not contain any elements contrary to the Islamic religion. However, when considered in context, there could be no doubt that the transactions constituted a *bayʿ al-ʿīnah.* Justice Abdul Wahab Bin Patail adopted Ḥanbalī jurist Ibn Qayyim al-Jawzīya's subjective approach to the interpretation of legal ruses (*ḥiyāl*):

> It is impossible for the Law of the Wisest of the wise [God] that He would forbid a harmful dealing [*ribā* or usury], curse its perpetrators, and warn them of a war from God and his Messenger, and then allow a ruse to result in the same effect with the same harm and added transaction costs in constructing the ruse to deceive God and His Messenger. This cannot be in accordance with the law because *ribā* on the ground is more facile and less harmful than *ribā* with a tall ladder at which the two parties conduct *ribā* […] ("Menta construction Sdn Bhd v Lestari Puchong," 2015).

Despite acknowledging the SAC's approval of the *bayʿ al-ʿīnah*, the court held that its jurisdiction could not be delegated or transferred 'to another authority, body or person.' Invoking its jurisdictional authority, the court decided that the *bayʿ al-ʿīnah* as transacted in the case contained the element of *ribā* not approved by the religion of Islam and hence that portion of the credit facility was not recoverable ("Menta construction Sdn Bhd v Lestari Puchong," 2015). However, the court's decision jeopardized the state's uniform law project in relation to its thriving Islamic finance industry. [20] The state could not achieve the legal benefits of the standardization project without a judiciary willing to enforce a standardized version of the law.

However, in most Islamic contract disputes, Malaysian courts have enforced agreements between parties according to their interpretation of the reasonable person's understanding of the parties' intentions, which is capable of producing a more or less uniform interpretation of contractual standards.[21] Many disputes have centered on the interpretation of the *bayʿ bi-thaman ājil* (BBA), which is an instrument to transact the *bayʿ al-ʿīnah* in both retail and capital financial markets (Razak et al., 2008). In Malaysia, it is the predominant contract used for home purchases (Razak et al., 2008). In *Bank Islam Malaysia Berhad v Adnan bin Omar* (1994), the defendants argued that the BBA credit facility was not valid under sharīʿa ("Bank Islam

Malaysia Berhad v Adnan bin Omar," 1994). The court enforced the transaction according to its terms and conditions, noting that the parties had agreed to the *bayʿ bi-thaman ājil* transactions and were fully aware that the transactions implied the granting of a loan. Furthermore, the courts rejected several other lawsuits in which the interpretation and application of the sharīʿa related terms in contractual documents were challenged. In *Bank Islam Malaysia v Lim Kok Hoe & Anor*, the Court of Appeal rejected the High Court's ruling and re-established legal certainty ("Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors", 2008, pp.839-840). The court reprimanded the trial judge's subjective comparison of a BBA contract and a convenitonal loan, noting that 'the law applicable in a BBA contract is no different from the law that is applicable in a conventional loan agreement' ("Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors", 2008, p.840(1)).

Malaysia has designed an industry-specific regulatory system for Islamic finance that incorporates Islamic law and finance in its institutional framework. Legislation is essential to the uniform law project for Islamic finance because courts interpret Islamic contracts according to legislative provisions and Islamic financial institutions are brought under the regulatory framework of the state. The Malaysian legislator, wary of other courts adopting similar subjective interventionist approaches to Islamic contract disputes, has shored up the uniformity of the industry's legal foundations. Section 56 of the "CBA 2009" provides that questions concerning the sharīʿa in any court or arbitration must take into consideration SAC standards or refer any question to the SAC for their "ruling" (CBA, 2009, S 56(1)(a)-(b)). Rulings are binding on Islamic financial institutions (CBA, 2009, S 57).

4. Concluding Remarks

The traditional role of jurists' determination of a contract's validity has been replaced by the uniform regulatory logic of the state, which highlights the absence of legal diversity in contemporary Malaysian Islamic finance and distorts the normativity of Islamic law. In the Malaysian institutional framework, the traditional values and ethics of Islamic contract law are very difficult to realize. Without the development of institutional frameworks that incentivize Islamic principles, Islamic transactions will reflect a legal liberalism and capitalistic market ethos. More research needs to be conducted on developing Islamic institutions that can facilitate Islamic contracts according to Islamic epistemologies. The roles of *maṣlaḥa* and *ḍarūra* in this endeavor is particularly important.

The market-based legalities that are produced in Islamic standards and which are enforced uniformly in Malaysian courts with the aid of supportive legislation, have altered the normativity of traditional principles, rules, and ethics. The essential insight of this study is that the institutional logic of the state's uniform law project distorts the normative meaning of traditional Islamic law and its juristic methodologies for determining a contract's validity.

While the Malaysian approach has been subject to much criticism, it has fostered an innovative, market friendly jurisprudence and institutional framework that private parties can use to avail themselves of contemporary Islamic products. Malaysian government initiatives such as the Value-Based Intermediation scheme as well as green or ESG based *sukūk* initiatives, offer a pathway for developing Islamic institutions that foster equity investment and other Islamically acceptable transactions. However, the fundamental role of law that this study highlights suggests that the Malaysian approach may be the most pragmatic approach for

developing Islamic finance law within the constraints of contemporary institutional frameworks and global financial markets.

Notes

[1] We use 'intention' and 'intent' interchangeably.

[2] This *ḥadīth* is found in the collections of al-Bukhārī, Muslim, al-Nasāʾī, al-Tirmidhī, and Ibn Māja. Quoted from *EI*^{2} s.v. *Niyya* (A.J. Wensinck).

[3] Wensinck, *supra* note 2.

[4] In *al-Mughnī* we read: 'And the meaning of *niyya* is intent, and its location is the heart' (*wa maʿnā al-niyya al-qaṣd wa maḥalluhā al-qalb*). Ibn Qudāma, *al-Mughnī*, 15 vols. (Dār ʿĀlam al-Kutub, 1997), 2:132.

[5] Wensinck, *supra* note 2.

[6] On the positions of the four Sunni schools on contractual intent, see below.

[7] Standardized versions of the sharīʿa are not without precedent. Ibn al-Muqaffaʿ (d. 759 CE), a high government official under the Abbasids, proposed to Caliph al-Manṣūr (d. 775 CE) that the sharīʿa should be standardized. The caliph rejected his proposal. Further, in 1877, the Ottoman state promulgated the Majalla, the first modern codification of the Ḥanafī law of obligations. The Majalla remained in effect in the former territories of the Ottoman Empire well into the twentieth century.

[8] Muslim jurists classify the *ḥadīth* as weak: 'Yaḥya related to me from Mālik that he heard that the Messenger of God, may God bless him and grant him peace, forbade two sales in one sale.'

[9] The SAC issued the latest update on *Bayʿ al-ʿīnah* in December 2023; it contained no substantive change to what is referenced above.

[10] On this *ḥadīth* and others regarding 'two sales in one', see Qaradāghī (1995).

[11] Circular 7.

[12] According to Abū Ḥanīfa, *bayʿ al-ʿīnah* is valid when the transaction involves a third party. See Al-Zuḥaylī, *supra* note 22 at 467.

[13] In al-Shāfiʿī's day, there were no banks, financial organizations, or regulators such as the SAC. Shāfiʿī was not in a position to consider the transaction in view of the SAC's standardized guidelines.

[14] Confirmed in "SPM membrane switch Sdn Bhd v Kerajaan Negeri Selangor" (2016).

[15] In 1867, Britain established a formal Crown colony comprising the port cities of Penang, Singapore, and Malacca.

[16] Federal Constitution of Malaysia, Art. 121.

[17] From 2003-2009, 90 percent of litigation involving Islamic finance was related to the BBA transaction.

[18] *Bank Kerjasama Rakyat Malaysia Berhad v Fadason Holdings SDN BHD & Ors* [2005] (Civil No: D4-22A-380-2005) 2 [2]. See Islamic Banking Act 1983, Malaysia; and Banking and Financial Institutions Act 1989, Malaysia.

[19] At the end of 2022, Islamic banking assets comprised 41% of total banking loans in the Malaysian economy. Thus, the IMF has determined that Islamic finance and banking is systemically significant in Malaysia and requires a commensurate regulatory treatment.

[20] As highlighted in "Bank Kerjasama Rakjat Malaysia Berhad v. Emcee corporation" (2003).

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