

COMMODITY FUTURES TRADING: ITS PERMISSIBILITY ACCORDING TO SUNNI TRADITIONALIST *IJTIHĀD* AND *IJTIHĀD MAQĀSIDI*¹

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ABSTRACT

Futures trading has become the single most voluminous mode of commerce globally since the turn of the 20th century. Its potential for wealth creation is unmatched by any other commercial transaction, and prompted the contemporary Sunni scholar, Kamali, to challenge the traditionalist (*ahl' kitab*) Sunni position that futures trading is forbidden. This paper presents a narrative of the *Shari'ah* textual sources, the traditionalist Sunni juristic reasoning (*ijtihād*), a critical analysis of Kamali's *ijtihād* and an exploration of the goals and purposes of an Islamic *Shari'ah* (*maqāsid al-Shari'ah*)-oriented approach to juristic reasoning on futures trading. The objective of this paper is to raise for reconsideration, in the light of financial globalisation, the permissibility of commodity futures trading. This comparative study of Sunni *ijtihād* involves the application of black-letter research methodology. The scope of the study is limited to commodity futures trading, as the traditional Sunni *ijtihād* pertains to such trade. It is found that Kamali advances compelling textual-based and inferred *Shari'ah* goals-based juristic reasoning (*ijtihād maqāsid*), within a contemporary socio-economic context, for qualified permissibility of commodity futures trading. In view of the phenomenon of financial globalisation catalysing unprecedented uncertainty, unwarranted risks (*mukhatarah wa al-gharar*), and excessive speculation amounting to gambling (*al-maysir*), which threatens the integrity and sustainability of the futures industry and its institutions, the writers support the qualified permissibility of commodity futures trading. It is recommended that new local policies and regulatory frameworks for the futures industry be set up by governments and futures industry regulators, with the assistance of academic researchers, to combat the negative effects of financial globalisation on futures trading. This is to protect the public interest (*maslaha al-amm*) and the Islamic *Shari'ah* goals (*maqāsid 'al-Shari'ah*).

Keywords: futures trading, financial globalization, juristic reasoning (*ijtihād*) Islamic *Shari'ah* goals (*maqāsid 'al-Shari'ah*).

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1. INTRODUCTION

Commodity futures trading is a commercial transaction between producers (sellers) of commodities (crops, livestock, oil, gold) and buyers of such commodities. They enter into a contract to deliver a commodity on a future date, at a specified price. Such trading is conducted mainly through the futures contract and/or option contract (or futures option).

A *futures contract* in a traditional commodity market setting, arises in the following situation: A (farmer – referred to as “short”), in order to guarantee a certain price for his crops (or livestock), and B (buyer – referred to as “long”) enter into a contract on 1 January 2012 under which A would sell his crops (or livestock) at a price of USD\$1,000.00 to B on 30 September 2012. B has an obligation to purchase the crops (or livestock) at this price irrespective of the market price on 30 September 2012. (Taqi Usmani, 2011). B hopes the asset price is going to increase, whilst A hopes it will decrease. A futures exchange institution acts as an intermediary in a futures contract minimising the risk of default by either party. Both parties are required to put up an initial amount of cash or margin.

In a contemporary trading setting, a *futures exchange* institution acts as intermediary in a futures (or option) contract and minimizes the risk of default by either party.²

When a futures contract is traded, it is known as an option contract (or *futures option*). An option contract arises in the following situations:-

(a) A and B (buyer – given an option to buy a futures contract) enter into a contract on 1 January, 2012 under which A grants a right to B without any obligation on B’s part. B under the contract, gets a right to purchase crops (or livestock) from A any time on or before 30 September, 2012 at a price of USD\$1,000.00 (irrespective of the market price on the day of purchase). B, however, does not have any obligation to purchase. A accepts a consideration of USD\$100.00 from B for granting him his right without obligations (Taqi Usmani, 2011). This is called a “*call option contract*” – a “*call*” is the option to buy a futures contract.

(b) A (seller - given an option to buy a futures contract) and B enter into a contract on 1 January, 2012 under which A grants a right to B without any obligation on B’s part. B, under the contract, gets a right to sell crops (or livestock) to A at any time on or before 30 September 2012 at a price of USD\$1,000.00 (irrespective of the market price on the day of purchase). B, however, does not have any obligation to sell. A accepts a consideration of USD\$100.00 from B for granting him this right without obligations (Taqi Usmani, 2011). This is called a “*put option contract*” – a “*put*” is the option to sell a futures contract.

The objectives of commodity futures trading are, to manage risks and to increase traders’ liquidity in the commodity futures market. However, when such a market is dominated

² Since the futures price will generally change daily, the difference in the prior agreed-upon price and the daily futures price is settled daily also. Money is drawn out of one party’s margin account and put it into the other so that each party has the appropriate daily loss or profit. If the margin account goes below a certain value, then a margin call is made and the account owner must replenish the margin account. This process is known as marking to market. Thus on the delivery date, the amount exchanged is not the specified price on the contract but the spot value (since any gain or loss has already been previously settled by marking to market).

by *speculators* rather than by *hedgers*, the social utility of futures trading may be called in question. A futures contract trader may be a *hedger* (includes the seller and the buyer) or a *speculator*. A hedger buys or sells a futures contract to “hedge out” the risk of price fluctuations to protect himself from diminished profits or loss. A speculator, on the other hand, enters into a futures contract with no intent to take or make actual delivery, but seeks to make a profit by anticipating commodity price movements. An observation has been made that the distinction is rather conceptual than real, as it is difficult to distinguish between the two in categorical terms – hedgers are also speculators who take a certain risk and speculate over likely price movements (Kamali, 2002). According to estimates, 100 billion drums of oil were traded in the year 2003 alone, a figure far greater than the total world production of oil. The commodity sale transaction occurs only on paper without an actual physical sale. Therefore, the price of fuel on the global market has no connection with the real supply of the commodity but with the activities of speculators (as opposed to risk managing hedgers) in search of financial gain at the expense of human impoverishment and suffering across the globe.

In the first decade of the 21st century, excessive speculation in oil futures had caused unprecedented market volatility. It had brought about an unprecedented global energy and food crisis, which had threatened not only political order but also human life. The international media at that time reported urgent calls to international institutions to regulate the oil price and transactions in the commodity. As a result of financial globalisation, the activities of international speculators who enter and exit regional futures markets at will, had cast a shadow over the ‘social utility’ of futures trading, which enable traders to manage their risks and increase their liquidity.

This paper is an academic response to the abovementioned events, which are likely to happen again, unless urgent steps are taken by governments and futures industry regulators to prevent their reoccurrence. The writers present a narrative of the Islamic *Shari’ah* textual sources, traditionalist and neo-traditionalist Sunni *ijtihād*, a critical analysis of the *ijtihād* of the contemporary Sunni scholar, Kamali and an exploration of the goals and purposes of Islamic *Shari’ah* (*maqāsid al-Shari’ah*)-oriented approach to juristic reasoning on the permissibility and legality of commodity futures trading.

2. TRADITIONALIST *IJTIHĀD* ON COMMODITY FUTURES TRADING

In the *Qur’ān*, it is revealed:

“O believers. When you deal with each other in transactions involving future obligations for a fixed period of time (*idhā tadāyantum bi daynin ilā a jalin musamman*) put them in writing. Let a scribe write down faithfully as between the parties...

(*Al Qur’an, Sūrah Al-Baqarah* (2:282).³)

³ The Presidency of Islamic Researches, IFTA, Call And Guidance (edit). 1410/1900. *The Holy Qur’ān: English translation of the meanings and commentary*. Al-Madinah, The Kingdom of Saudi Arabia: The Custodian of the Two Holy Mosques King Fahd Complex for the Printing of the Holy Qur’-an.

Dayn refers to an asset that has no tangible existence but represents a charge or a personal commitment upon another. In this context, it means a deferred liability arising from a contract involving an exchange of values. For example a contract of sale in which one value, either payment or delivery, is deferred to a future date. *Dayn* has been interpreted in a variety of ways. The verb *tadayantum*, a derivative of *dayn* indicates that the subject in issue was a recurrent social phenomenon. The linguistic usage suggests reciprocity and exchange of goods and services on a deferred liability basis (Kamali, 1996).

The text leaves no doubt as to the validity of future transactions in which the parties' rights and liabilities and due date are defined and documented clearly. The question is whether "transactions involving future obligations for a fixed period of time" in this sense, should also include futures trading. The *Qur'an* has not specified the general meaning of *dayn* or *mudāyanah* in the text, and there is no compelling evidence to warrant departure from this position.

Juristic reasoning (*ijtihād*) is permissible in areas not clearly legislated upon by Qur'anic legal provisions (*ayat ahkam*) or by the Prophetic practices (*sunnah*) legal literature (*ahādith ahkam*) (Al-Subki, 2004). Traditionalist Sunni jurists have given a variety of interpretations to the key terms, *dayn* and *tadayantum*. The preferred view would appear to be that the text's language should convey its general and unqualified meaning. According to the rules of jurisprudence (*usūl al fiqh*), a text's occasion of revelation (*sha 'n al nuzūl*) may be specific but that does not necessarily restrict its general purport and ruling. Therefore, it may be concluded that even if the text were revealed for forward sale (*bay' al salam*), its language is general and applicable to all debts. This would imply the basic legality of all deferred transactions (Kamali, 1996).

In a well-known, authentic (*sahih*) Al-Bukhari account of the Prophetic Traditions (*ahādith*), Prophet Muhammad (peace be upon him) is reported by Ja'far ibn Abi Wahshiyah reported from Yūsuf ibn Mahak, from Hakim ibn Hizam, to have said:

"Do not sell what is not with you" (*lā tabi' ma laysa 'indika*).⁴

On the basis of the abovementioned Prophetic Tradition (*hādith*), the majority of traditionalists Sunni scholars, including al - Shafi'e (d.820 CE), Hanafi scholars, al-Khattabi (d.987 CE) and al - Kasani (d.1189 CE), and Hanbali scholars, Ibn Al-Taimiyyah (d.1328 CE), and his student, Ibn Qayyim al - Jawiyyah (d.1350 CE), treat sales without ownership or possession as *void ab initio* (*bay' al-batil*).

According to Al-Shafi'e (*Al-Risalah*), if a specific object is mentioned and its delivery cannot be assured, then such sales is prohibited. Conversely, there is no prohibition if the sale does not involve a specific object where delivery is a core requirement under the normal rules of contract. Al-Khattabi (*Ma'alim al-Sunnan*) also held that the *hādith* refers only to the sale of

⁴ It involves the selling of commodities not yet in the possession of the seller, the selling of animals still unborn, the selling of agricultural produce not yet harvested, and so on and so forth. Yusuf al-Qaradawi, *Islam and Current Issues*, 1st Ed., Securities Commission, Securities, Kuala Lumpur, Malaysia, n.d., pp. 253 - 254.

specific objects where delivery cannot be assured. Al Kasani (*Bada'i*. Vol. V) on the other hand, was of the opinion that a person cannot sell what he/she does not own at the time of the sale. Ibn al-Taimiyyah (*Aun al-Ma'bud Sharh Sunan Abi Daud*) held that the *hadith* points to the sale of what is not present, and which the seller himself cannot guarantee delivery. Ibn al-Taimiyyah's view was confirmed by Ibn Qayyim al-Jawziyyah. The writers observe the juristic focus on the traditional essential elements of formation and performance of contract in the sale of specific goods.

The writers observe that the traditionalist Sunni jurists' stance is a significant departure from the Islamic Civil Transactions (*Mu'amalah*) legal principle which is based on the maxim *qawa'id al-fiqhiyyah*: "The foundation of *Mu'amalah* is permissible (*harus*), until proven otherwise" which is generally stated as "The original *hukum* of everything is permissible unless specifically prohibited by the *Shari'ah* (*al-Asl fi al-Ashya al-Ibahah*).⁵ *Qawa'id al-fiqhiyyah* literature of the four Sunni schools of thought (*madhab*) on the maxim "*al-Asl fi al-Ashya al-Ibahah*" demonstrate that this is the general sentiment in commercial transactions. It is based on the following verses in the *Al-Qur'an*:-

"Allah intends every facility for you"
(*Al-Qur'an: Sūrah Al-Baqarah* (2:143))

"He [Allah] does not want to put you to difficulty."
(*Al-Qur'an: Sūrah Al-Baqarah* (2:185))⁶

The traditionalist Sunni jurists applied the Prophetic Tradition (*hadith*) "Do not sell what is not with you," only to sale of specific goods (*buyū' al 'ayan*), and not to sale of goods by description (*buyū' al sifāt*), as the latter can be easily substituted or replaced (Kamali, 1996). These Sunni jurists have interpreted the *hadith* to mean: firstly, you cannot sell what you do not own (*ya' nī mā laysa fu milkik*) at the time of sale and secondly, you cannot sell what is not present and undeliverable at the time of sale. The effective cause/*ratio decidendi* (*'illah*) of the prohibition of sale prior to taking possession is unwarranted risk-taking and uncertainty (*mukhātarah wa gharar*) over the seller's ability to deliver to the buyer, the goods purchased (Kamali, 1996). Several issues are raised under this effective cause/*ratio decidendi*:

Firstly, no goods are delivered and no price paid at the time of formation of the contract. It is thus not a genuine sale but merely an exchange of promises made for the sole purpose of speculative profit making. Secondly, it consists of short selling the object of the contract without possessing or owning the object sold. The essence of sale should be to transfer ownership of the item to the buyer but if the seller does not own the object, ownership cannot be transferred. Thirdly, it falls short of meeting the requirements of taking possession of the

⁵ Matters pertaining to civil transactions differ from that of acts of worship (*ibadat*), because the foundation of worship is that all acts are forbidden except when otherwise determined by Islamic law.

⁶ The Presidency of Islamic Researches, IFTA, Call And Guidance (edit). 1410/1900. *The Holy Qur'an: English translation of the meanings and commentary*. Al-Madinah, The Kingdom of Saudi Arabia: The Custodian of the Two Holy Mosques King Fahd Complex for the Printing of the Holy Qur'-an.

object of sale prior to resale. Fourthly, the deferment of both counter-values to a future date transforms a future sale into the sale of one debt for another (*bay' al kāli bi al kāli*), which is prohibited. Fifthly, it involves speculation that verges on gambling, uncertainty and risk-taking (*gharar*), which cause price volatility for the object of sale. Since futures sales do not involve physical movement of goods and trading takes place on the basis of a low margin deposit of only about ten per cent of the actual price, they are open to financial speculation and excessive risk-taking resembling gambling (Kamali, 1996). However, in forward sale (*bay' al salam*) and manufacture contract (*istisnā'*), the requirement for possession (*qabd*) was waived by the express authority of Prophetic Traditions (*ahādith*) on the grounds of utility and convenience or public interest (*'maslaha al-amm'*) (Kamali, 1996).

Neo-traditionalist Sunni scholars, Muhammad Taqi Usmani (b.1943 CE) (Hanafi *madhab*), Allama Ibn Abidin, al-Mausili, Abd Allah Ibn Omar, Muhammad Ibn Adam al-Kawthari, Abd and Allah ibn Abbas, like their traditionalist predecessors, applied a literal interpretation of the textual sources, in particular the Prophetic Tradition “Do not sell what is not with you” (*lā tabi' ma laysa 'indika*), and made the following juristic assertions:

“Whoever sells foodstuff items, he must not sell it before taking its possession” (Abd Allah ibn Omar). “Deferment (*ta'jil*) in the delivery of the commodity is not permissible and will make the sale void” (Ibn Abidin, *Radd al-Muhtar ala al-Durr*) “If a person sold a commodity on the condition that its delivery will occur sometime in the future, this type of sale transaction will be considered as void because the act of deferring commodities is invalid (*batil*)” (Al-Mausili, *Al-Ikhti'yar li ta'wil Al-mukhtar*). Al-Kawthari concurred with the juristic opinions of Ibn Abidin, al-Mausili and Ibn Omar. The writers observe that the above juristic assertions were in relation to deferred transactions of traditional sale of goods and focused on the importance of performing delivery and taking possession.

Exceptionally, Taqi Usmani made a juristic pronouncement on futures trading itself, as follows: “The futures transactions as in vogue in the stock and commodities markets today are not permissible for two reasons: firstly, it is a well recognised principle of *Shari'ah* that sale or purchase cannot be effected for a future date. Therefore, all forward and futures transactions are invalid in *Shari'ah*. Secondly, because in most of the futures transactions, delivery of the commodities or their possession is not intended. In most cases, the transactions end up with the settlement of difference of prices only, which is not allowed in *Shari'ah*. Futures transactions, ... are totally impermissible regardless of their subject matter. Similarly, it makes no difference whether these contracts are entered into for the purpose of speculation or for the purpose of hedging” (Taqi Usmani, 2011). On futures options, he further declared: “According to the principles of *Shari'ah*, an option is a promise to sell or to purchase a thing at a specific price within a specified period. Such a promise in itself is permissible and is morally binding on the promisor. However, this promise cannot be the subject matter of a sale or purchase. Therefore, the promisor cannot charge the promisee a fee for making such a promise. Since the prevalent options transactions in the options market are based on charging fees on these promises, they are not valid according to *Shari'ah*. This ruling applies to all kinds of options, no matter whether they are *call options* or *put options*. Similarly, it makes no difference if the subject matter of the option sale is a commodity, gold or silver, or a currency; and as the contract is

invalid *ab-initio*, the same cannot be transferred” (Taqi Usmani, 2011). The writers observe that the risk managing purpose of futures trading is merely mentioned by Taqi Usmani without addressing the issue of its public utility. It appears as with the rest of the neo-traditionalists, his juristic focus is on the traditional essential elements of formation and performance of contract in the sale of specific goods.

3. CONTEMPORARY *IJTIHĀD* ON COMMODITY FUTURES TRADING

The contemporary Sunni scholar, Kamali, challenged the majority traditionalists’ (*ahl’kitab*) Sunni position of applying the literal interpretation of the primary sources. He criticised Islamic jurists “facile reliance on the negative positions of blind imitation (*taqlīd*)” and their “failure to relate the issue of futures trading to the normative guidance of the textual sources.” He suggested that the Prophetic Tradition (*hādīth*)’s meaning and rationale must be looked into, and the juridical meanings of “transfer” and “taking possession” (*qabd*) that have a bearing on the substance of the Prophetic statement must be explored to determine whether the rules of conventional sale apply to futures trading. In Islamic Law, possession (*qabd*) has been understood as a relatively open concept, amenable to the changing influences of commercial reality and custom, for it has meant evacuation, taking into custody, separation, measurement, identification (*ta’in or tamyiz*) and viewing (*mushadah*) (Kamali, 1996). Further, in the Prophetic Traditions (*hādīth*), the Prophet (peace be upon him) is reported to have said, “Disagreement (*iktilāf*) is a blessing amongst my community (*ummah*), and the writers observe that juristic disagreement has served to enrich the heritage of Islamic jurisprudence (*fiqh*).

Kamali re-examined the primary sources of Islamic Law and advanced two arguments: firstly, he saw a weakness in the authenticity and transmission of the abovementioned Prophetic Tradition (*hādīth*). According to him, neither Imam al Bukhari nor Imam Muslim recorded the Tradition in their authentic (*sahīh*) collections, although others, among them Abū Dāwud, Ahmad ibn Hanbal, and Ibn Habban state it was narrated by Ja’far ibn Abī Wahshiyah, from Yūsuf ibn Mahak, from Hakim ibn Hizam, whereas a fourth name, that of ‘Abd Allāh ibn Ismah occurs in other *hādīth* collections between Yusuf and Hakim. In al Mīzān, al Dhahabī stated that this intermediate name is totally unknown (*la yu’ raf*). Even the principal narrator of this Prophetic Tradition (*hādīth*), Hakim ibn Hizam, is said to be obscure (*majhūl al hāl*). Only Ibn Haban included him among the reliable narrators. While al Nasai recorded one Prophetic Tradition (*hādīth*) narrated by him, others said he is obscure. (Kamali, 1996).

Secondly, the Prophetic Tradition’s (*hādīth*) precise legal value is also open to interpretation: Does it impose a total ban (*tahrīm*), or is it an abomination (*karāhiyah*), or mere guidance and advice of no legal import? Kamali cited Al Kharib who expressed the view that this Prophetic Tradition (*hādīth*) conveys moral guidance (*irshād*) rather than a prohibition per se (Al Kharib, n.d). Kamali held it reasonable to say that the Prophetic Tradition (*hādīth*) conveys abomination and moral opprobrium (*karāhiyah*), rather than total prohibition.

In a subsequent work, Kamali reinforced the abovementioned arguments when he added that if a sale is certain and if the seller can guarantee delivery and is able to perform his obligations in due time, then such futures trading resembles forward sale (*bay’al salam*) which is permissible in Islamic Civil Transactions (*Mu’amalah*) (Kamali, 2002).

Kamali concluded that commodity futures trading falls within the basic principle of permissibility (*ibāhah*) in *Mu'amalah* with the condition that we engage in a continuous process to enhance vigilance and develop more refined safeguards against abuse, excessive speculation and *gharar* (*mukhatarah wa al-gharar*). The rationale behind this conclusion include: firstly, the Prophetic Tradition (*hādīth*) applies only to sales involving specific objects (*buyū' al ayan*), and not to goods sold by description (Ibn Qayyim al Jawziyah, n.d. & al Mubarakfuri, n.d.). Since futures trading, as a rule, apply only to the latter, it falls outside the purview of this Tradition (*hādīth*). The Tradition (*hādīth*) is concerned, not so much with ownership or possession, but with preventing uncertainty and risk-taking due to the seller's ability to deliver. Since delivery is always guaranteed by the clearing house procedures, the seller's ability to deliver is not a matter of concern in futures. This means that the Tradition is inapplicable to futures since futures trading only take place in goods by description and not specific goods. Secondly, the requirement of possession (*qabd*) in the Prophetic Tradition (*hādīth*) reviewed is confined clearly to foodstuffs and extending the same requirement to other commodities is not supported by the text. But even for foodstuff, it is most likely concerned with perishable foodstuffs that are unsuited for future transactions. Thirdly, review of trading procedures show that delivery and possession (*qabd*) are not dominant factors in futures, for they occur in about two per cent of all contracts. The question of liability and loss should be determined not by reference to possession (*qabd*), but upon the conclusion of contract. Fourthly, commercial speculation (as opposed to gambling) is basically lawful and the issue of financial speculation's propensity towards gambling (*al-maysir*) must be tackled through regulators constant supervision, to put a check on speculative risk taking and ensure that commercial speculation is genuinely reflective of the natural flow of market forces. To this end, daily trading volume and position limits may be imposed by futures exchange house rules and operative floor procedures, to contain speculation within acceptable bounds (Kamali, 1996).

Kamali distinguishes between speculation and gambling in futures trading. The main difference lies in the nature of risk and potential contribution to social good. According to Kamali, gambling involves the creation of a risk for the sake of risk. The gambler chooses to seek out risks that were not there before. Speculation consists of risks that are necessarily present in the process of marketing goods and services in a free-market economy. For example, as a wheat crop grows and is harvested, concentrated, and dispersed, the obvious risks of price changes must be taken by those who own the wheat or have a commitment to buy it. These risks would be present whether future markets existed or not. The motivation of speculators may be identical with that of gamblers, with the main difference being that future speculators reallocates risk from those who do not want it to those who do. Futures speculation thus directs the appetite for risk-taking into an economically productive channel. Future markets are basically risk-transfer mechanisms that redistribute price risk, and speculators are those who assume it. Speculation in the positive sense consists of the intelligent and rational forecasting of future price trends on the basis of evidence and knowledge of past and present conditions. Speculators in commodities are not simply gamblers, for the risks are real commercial risks. (Kamali, 1996)

Kamali's view may, however, be contrasted with that of the traditionalist Sunni scholar, Ibn al-Taimiyyah. The Prophet (peace be upon him) forbade *gharar* sales as it generally partook of gambling (*maysir*) (Ibn al-Taimiyyah, *Nazariyah*, 229, note 59). Thus a commercial transaction, such as futures trading, could be equated with gambling, if it is accompanied by the factor of *gharar*. It appears that risk-taking that involves unlawful appropriation and the gain of one party at the expense of the other, is central to Ibn al-Taimiyyah's understanding of the Qur'anic concept of *maysir* in the following verse:-

“O ye who believe!
 Eat not up your property
 Amongst yourselves in vanities
 But let there be amongst you
 Traffic and trade
 By mutual goodwill:”
 (*Al-Qur'an, Sūrah Al-An-Nisā'* (4:29).⁷

The above Qur'anic verse forbids unlawful devouring of the property of others whether in the form of usury (*ribā*) or in the form of gambling (*maysir*).

Between these two views, the writers take the conciliatory view that a distinction should be made between excessive uncertainty (*gharar fahish*), minor uncertainty (*gharar yasir*) and moderate uncertainty (*gharar mutawassit*), to determine whether futures trading tends towards gambling or otherwise, and whether it is permissible or non-permissible. Minor *gharar* and moderate *gharar* should be regarded as acceptable commercial risk-taking whilst excessive *gharar*, and unwarranted risk-taking (*mukhātarah wa gharar*), would be tantamount to gambling and therefore, not permissible.

4. RESEARCH FINDING

The writers submit that Kamali, who underscored the juristic failure to apply caliber and imagination to the dismaying economic predicament of the Muslims and to act for the benefit and prosperity of the Muslim masses (Kamali, 1996) advances an in-depth and insightful study into commodities futures trading and provides persuasive, as well as compelling juristic arguments, in keeping with the legal maxim “The foundation of Islamic Civil Transactions (*Mu'amalah*) is permissibility (*harus*) until proven otherwise,” the methodology of Islamic jurisprudence (*fiqh*), and the spirit of juristic disagreement (*iktilāf*).

The writers observe that Kamali points out “the critical importance of commercial transactions in the wealth generation and productivity prospects of contemporary Muslim countries” (Kamali, 1996). He sees futures trading as an issue of vital importance to the economic vitality of the Muslim world and anticipates that its prohibition will dampen further development of the banking and financial industry, and slow down efforts to enable Muslim financial

⁷ The Presidency of Islamic Researches, IFTA, Call And Guidance (edit). 1410/1900. *The Holy Qur'an: English translation of the meanings and commentary*. Al-Madinah, The Kingdom of Saudi Arabia: The Custodian of the Two Holy

institutions to enhance and diversify their own resources. From these observations, the writers perceive an implied element of public interest (*maslahah al-amm*), or if a more conservative interpretation is favoured, the less controversial principle of necessity (*darūrah*), underpinning Kamali's juristic exertion (*ijtihād*) interpretation. This observation is supported by Kamali's later work, "Issues In The Legal Theory Of *Usūl* And Prospects For Reform (Kamali, 2002), wherein he identified the application of "the literalist orientations at the expense of goals and purposes of Shari'ah (*maqāsid al-Shari'ah*) as a weakness of traditional Islamic legal theory and proposed to make the *maqāsid al-Shari'ah* (preservation of faith, life, lineage, intellect and property) an extension of the theory of *ijtihād* to inject flexibility and dynamism into an otherwise ossified methodology, so as to usher in a new era of *ijtihād* to make legal theory pragmatic and relevant to the concerns of modern society. Kamali's juristic arguments in favour of qualified permissibility of commodity futures trading, is not only premised on the *Shari'ah*'s textual sources, but is also perceived by the writers as an indirect application of the *maqāsid al-Shari'ah*, and is interpreted by the writers as an inferred *ijtihād maqasidi*.

Maqāsid al-Shari'ah, or the goals and objectives of Islamic law (the preservation of faith, life, lineage, intellect and property), is an important but somewhat neglected theme of the *Shari'ah* (Kamali, 2008). The *Shari'ah* is generally predicated on the benefits of the individual and that of the community, and its laws are designed to protect these benefits, facilitate improvement and perfection of the conditions of human life. The *Qur'an* is expressive of this when it singles out the most important purpose of the prophethood of Muhammad (peace be on him) in such terms as:

"We have not sent you but as a mercy to the world" (*Al-Qur'an, Surah Al-Anbiyāa* (21: 107). This is also evident in the *Qur'an*'s characterisation of itself as "a healing to the (spiritual) ailment of the hearts, guidance and mercy for the believers (and mankind)" (*Al-Qur'an, Yūnus* (10: 57)).⁸

The two uppermost objectives of compassion (*rahmah*) and guidance (*huda*) in the foregoing verses are then substantiated by other provisions in the *Qur'an* and the *Sunnah* that seek to establish justice, eliminate prejudice, and alleviate hardship. The *Qur'an* expresses, in numerous places and a variety of contexts, the rationale, purpose and benefit of its laws so much so that its text becomes characteristically goal-oriented. This feature of the *Qur'anic* language is common to its laws on civil transactions (*Mu'amalah*). In the area of commerce and *Mu'amalah*, the *Qur'an* forbids exploitation, usury, hoarding and gambling which are harmful, and jeopardises the objective of fair dealing in the market-place. The underlying theme in the broad spectrum of the law (*ahkam*) is the realisation of benefit (*maslahah*). Justice is also a *maslahah*. The *masalih* (plural of *maslahah*) thus has become another name for the *maqasid*, and the *ulama* have used the two terms almost interchangeably. The *masalih-cum-maqasid* has been classified into three categories: the essential *masalih*, or *daruriyyat*, followed by the complementary benefits, or *hajiyyat*, and then the embellishments or *tahsiniyyat*, in a

⁸ The Presidency of Islamic Researches, IFTA, Call And Guidance (edit). 1410/1900. *The Holy Qur'an: English translation of the meanings and commentary*. Al-Madinah, The Kingdom of Saudi Arabia: The Custodian of the Two Holy Mosques King Fahd Complex for the Printing of the Holy Qur'an.

descending order of importance. The essential interests of life, faith, lineage, intellect and property are essential to an orderly society as well as to the survival and spiritual well-being of individuals. Their destruction will precipitate chaos and collapse of order in society. The *Shari'ah* protects and promotes these values, and validates measures for their preservation and advancement. *Jihad* has thus been validated in order to protect religion, whilst just retaliation (*qisas*) is designed to protect life. Finally, the *Shari'ah* takes affirmative and also punitive measures to protect and promote these values by making them punishable offences, for example, the offence of theft. (Kamali, 2008)

A few centuries earlier, al-Shatibi' (d.1388 CE) (*Al-Muwafaqaat fi Usool al-Sharia*), the Andalusian Maliki scholar, emphasised the need to preserve and achieve the *maqasid 'al-Shari'ah* in the philosophy of law. To address the consequential methodological and philosophical inadequacies in Islamic theory and its need to adapt to new social and economic changes, he advocated the reconciliation of public interest (*'maslaha al-amm'*)⁹ with the *maqasid 'al-Shari'ah*, with *maqasid al-dharuriyyah* (comprised of the public imperative in the establishment of religion (*masalih al-Din*) and public interest in the establishment of worldly affairs (*masalih al-dunya*) being recognised as of particular legal and economic significance.

It follows that the *maqasid al-Shari'ah* could today be raised to support the qualified (i.e. conditional) permissibility of commodity futures trading as an economic imperative to fulfill the public interest (*maslaha al-amm*) of the Muslim community (*ummah*). However, it is observed that the *maqasid*-oriented approach to *ijtihad* with its basic concerns “with values... relatively unencumbered by technicalities” (Kamali, 2002) whilst becoming increasingly the focus of scholastic attention in the last decade, remains a means for the enlargement of the secondary sources of Islamic law and ethics that can never supersede the primary textual sources of Islamic legal theory.

Fortunately for Kamali however, he has anchored his minority position in the textual evidence, and consequently, his technically sound arguments are not to be set aside so easily. He has also consequently averted any possible critique that his *ijtihad* is in the mode of the Rationalists (*ahl'al-raqy*) scholars.

However, with all due respect, the writers submit, with the benefit of hindsight, that Kamali may be challenged on some of his optimistic findings (and non-findings) of fact that countered the element of gambling (*al-maysir*) in futures trading. The operational procedures and rules said to be observed and futures trading reduction of price volatility and the stabilizing effect on the market claimed by Kamali as part of his case (Kamali, 1996), has been revealed to be inadequate or contradicted by the energy and food crisis. The writers concede that this may be due to the unforeseeable distortion of the operation of speculative as opposed to genuine hedging risk commodities trading by global phenomena that have only just recently become comprehensible – these factors include financial globalisation movements of capital

⁹ Al-Shatibi' categorized public interest (*'maslaha al-amm'*) as *maqasid al-Shari'ah* - *maqasid dharuriyyah*, *maqasid hajiyyah* and *maqasid tahsiniyyah*.

on a global scale, the dominance of speculators (as opposed to hedgers) in futures trading, and the herd instinct of other small-time speculators and short-term regional investors. The recognition that futures trading is “the single most voluminous mode of commerce on the global scale.” suggests dynamics that are beyond the ability of any single government and national legislature to regulate and control (Kamali, 1996).

Ironically, the role played by speculators in the said energy and food crisis, may justify some to reject Kamali’s juristic *ijtihād* and the reversion to the conventional majority position that God (*Allāh*)’s prohibition of speculative trading is absolute and based on His all encompassing knowledge. But, if Kamali’s juristic arguments are accepted as sound, futures trading in commodities such as oil, may be condemned so long as a global consensus on the regulation of commodity trading is not forthcoming and to use again, paradoxically, the principle of necessity (*darūrah*) or public interest (*maslahah mursalah*) to nullify the very principles impliedly used by Kamali in his case for futures trading. This alternative stand avoids reverting to the traditionalist majority position but the writer submits that the principle of necessity (*darūrah*) or public interest (*maslahah mursalah*) are dynamic principles and that their implied justification by Kamali may itself be nullified by the converse application of the same principle of necessity or public interest, (*maslahah mursalah*) when a change of circumstances occurs that defeats the very objectives of the Islamic *Shari’ah* (*maqasid al Shari’iah*) which it purported to uphold in the first place.

5. RECOMMENDATION

In the light of contemporary events, that is, the phenomenon of financial globalization catalysing unprecedented uncertainty (*al-mukhatarah wa al-gharar*), unwarranted risks and excessive speculation amounting to gambling (*al-maysir*), that threaten the integrity and sustainability of Islamic financial institutions, futures exchanges and capital markets, the writers, in support of qualified permissibility of commodities futures trading, recommend that new policies and regulatory framework for the futures industry should be set up by governments and futures industry regulators, with the assistance of academic researchers, to address and to combat the negative effects of financial globalisation on commodities futures trading, so as to protect the public interest (*maslahah al-amm*) and the Islamic *Shari’ah* goals (*maqasid ‘al-Shari’ah*).

This is in line with the Council of the Islamic Fiqh Academy clarion call for “serious academic efforts to be undertaken in collaboration between the *Fuqaha*” (Muslim jurists) and the economists, so that it may be possible to review the existing financial markets system with its procedure and instruments and to amend the necessary amendments in the light of the recognised principles of *Shari’ah*.¹⁰ This call was made in recognition of “the role of financial markets in preserving capital and ensuring its growth” which leads “to fulfill the general human needs and discharge the spiritual and material duties relating to capital.”

¹⁰ Resolution 59 (10/6) of Financial Markets Islamic Fiqh Academy (Jeddah), Resolutions and recommendations of the Council of the Islamic Fiqh Academy 1985-2000, 1421H/2000, 1st Ed.. Jeddah, Saudi Arabia: Islamic Research & Training Institute (Islamic Development Bank).

6. CONCLUSION

It may be said that the literalist scholars saw futures trading as an exception to the legal maxim whilst the scholar, who attempted purposive (*maqasid al-Shari'h*) *ijtihad*, saw the maxim as a general rule subjected to conditions. These different juristic perspectives resulted in different *ijtihad* outcomes. The Qur'anic based legal maxim "The foundation of Islamic Civil Transactions (Mu'amalah) is permissibility (*harus*), until proven otherwise" will ultimately reconcile all Sunni jurists *ijtihad*, notwithstanding their adoption of different interpretations of the textual sources or their adoption of the literalist or purposive *ijtihad* approach. Only with reconciliation will it be possible to achieve unity within the diversity of scholastic disagreement (*ikhtilaf*) in *Mu'amalah* and to ensure the universal, immutable relevance of the Islamic *Shari'ah* in the embattled futures industry today.

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