

## **Tools of *Usul al-Fiqh* in Realizing *Maqasid al-Shari'ah* in *Sukuk* Structures in Malaysia: An Initial Analysis**

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### **Abstract**

The tremendous growth that has been experienced by *sukuk* market since a decade indicates that the trend of high preference among *sukuk* players towards the product of Islamic capital market in local and international market, respectively. Despite the remarkable performance, issues and critics from the scholars on this instrument regarding to its compliancy with *shari'ah* guidelines and requirements are also inevitable. Therefore, this article tries to explore the element of *maqasid al-shari'ah* in *sukuk* in order to ensure the instrument is always on the path of *shari'ah* and avoid any deviant from its objectives. The methodology of this study is through document analysis on classical and modern literatures regarding to the topic of *maqasid al-shari'ah* and *usul al-fiqh*, as well as *sukuk*. The general finding of this article shows that every *sukuk* structure needs to consider the *usul al-fiqh* tools in realizing *maqasid al-shari'ah* in its application simultaneously fortifies its status in the list of financial *shari'ah* compliant products.

### **Keywords:**

*Maqasid al-Shari'ah, sukuk structure, usul al-fiqh*

### **INTRODUCTION**

*Sukuk* has experienced tremendous growth since 1990 when Shell MDS, a foreign-owned and non-Islamic company issued 125 million *sukuk*. The trend in issuing *sukuk* by corporate company was followed ten years later by the big conglomerate in Malaysia Kumpulan Guthrie Berhad with the worth of USD 150 million, also as the first global corporate *sukuk* and has matured at 2006 under the concept of *Sukuk Ijarah*. The *sukuk* securities markets have grown rapidly, with both public issues and private sector issues, and have been a very popular fund raising mode in Malaysia since 2000 ( Mohamad Ariff and Shamsheer Mohamad, 2012 ).

*Sukuk* are still in an early stage of development relative to conventional capital markets. *Sukuk* often share the same pool of investors as conventional bond- that is, conventional investors subscribe to

*sukuk* not necessarily because of *Shari'ah* compliance or ethical aspects, but for commercial considerations ( Rahail Ali and Imran Mufti , 2011 ).

*Sukuk* is extremely flexible product that can be used to create a variety of instruments, ranging from straight unsecured debt to subordinated issues that can count towards the lower tier two capital of Islamic banks. *Sukuk* also provides access to an incremental investor base that cannot participate in conventional bond issues. In order to sustain issuance momentum, a greater diversify of structures, issuers and investors must be found while increasing awareness among traditional bond investors ( YavarMoini, 2011 ).

### ***Maqasid al-shari'ah* at Glance**

The science of *maqasid al-shari'ah* was started with the revelation of *Al-Quran* on our beloved prophet Muhammad ( PBUH ) supporting with his tradition either action, word or recognition. It wasn't explored by the early Muslim scholars or innovated by contemporary geniuses but *maqasid al-shari'ah* is the genuine and pure knowledge of Islam which has been mentioned through many verses of *Al-Quran* and prophetic traditions about reason and wisdom underlying the Islamic guidance and conjunction either in worship or economic discussion as well as in entire part of Islamic law ( Al-Khodimi, 1998 ).

*Maqasid* ( the plural of *maqasid* means objective ) *al-shari'ah* are the objectives, spirit and the rationale of the *shari'ah*. A comprehensive and careful examinations of the *shari'ah* rulings entails an understanding that *shari'ah* aims at protecting and preserving public interests ( *maslahah* ) in all aspects and segments of life. So, *shari'ah* laws in general are designed to protect these benefits, and to facilitate improvement and perfection of human lives' conditions on earth. This fact suggest that we are required to maintain *maqasid al-shari'ah* when implementing *shari'ah* rulings, and to observe these *maqasid* when deducing rulings for the new arising matters ( AbdulAzeem Abo Zaid, 2010 ).

The very objective of the *shari'ah* is to promote the well-being of the people, which lies in safeguarding their faith ( *din* ), their self ( *nafs* ), their intellect ( *aql* ), their posterity ( *nasl* ) and their wealth ( *mal* ). Whatever ensures the safeguard of these five serves public interest and is desirable and whatever hurts them is against public interest and its removal is desirable ( AliyaDahiru Muhammad, 2010 ).

'Alal al-Fasi draws wide picture that covers each angles in *maqasid al-shari'ah* as 'the overall objective of *shari'ah* is to populate and civilize the earth and preserve the order of peaceful coexistence therein, to ensure the earth's ongoing well-being and usefulness through the piety of those who have been placed there as God's vicegerents, to ensure that people conduct themselves justly, with moral probity and with integrity in thought and action, and that they reform that which needs reform on earth, that they tap its resources and plan for the good of all ( Al-Raisuni, 2005 ).

Ridhwan A.A ( 2013 ) concludes that *maqasid al-shari'ah* is principle that provides answer to the question that we need to know and a similar question about Islamic law. It also include the wisdoms or inner aspects behind rulings, for instance in enhancing social welfare, which one of the wisdom behind charity and developing consciousness or piety of God. *Maqasid* also good ends that the laws aim to achieve by blocking, or opening particular means.

Today, this science still in infant stage and need for the extensive development effort where it can be the guidance of scholars today in finding the solution for problems, issues and challenges that seem keep on increasing and compounding time to time. Furthermore, the science of *maqasid* also will protect the universality of *shari'ah* law and ensure the acceptance of people globally in various sectors and fields of interest( MohdShahid, M.N, 2013 ).

### ***Maqasid al-shari'ah* in Islamic Finance**

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

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

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

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

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

AhceneLahsasna and M. KabirHasan( 2011 ) address some guidelines in understanding *maqasid al-shari'ah* in Islamic finance industry. Among them are:

1. The objective of *maqasid al-shari'ah* is noble in sectors of economics, finance and business transactions.
2. The implementation of *maqasid al-shari'ah* in business would create communal prosperity and happiness and satisfaction in society.
3. The nobleness of *maqasid al-shari'ah* concept which also perceived as universal goal.

4. *Maqasid al-shari'ah* contributes to the balance between the private interest, by fulfilling the demands of the member in the society according to their self-interest, and the public interest, by catering to the needs of society and leading to welfare programmes.
5. All members involved in finance, business and economic activities are responsible in implementing the duty of *maqasid al-shari'ah*.
6. The implementation of *maqasid al-shari'ah* is only can be done after taking into account some mechanisms and processes in the field of finance, business and economic activities.
7. *Maqasid al-shari'ah* helps to overcome the issues and problems in those fields since it is about essences and real attributes rather than names and forms.
8. It enhances the financial market and banking system by creating eloquent progress in both market place, domestic and international.
9. It also recommended to introduce *maqasid al-shari'ah* as complementary tools to understand finance and banking as well as the applications of business transactions simultaneously contributes to the rapid development of the Islamic banking and finance.

*Maqasid al-Shari'ah* means the objectives aimed by the Lawgiver from the legislated law to the mankind and it constitutes the concept of enjoining benefits and avoiding difficulties ( *Jalbu al-Masalih and Dar'u al-Mafasid* ) worldly and the hereafter.

The example of *maqasid al-shari'ah* in financial transaction in Islam is through the prohibition of *riba* ( usury ) Allah says :

O you who have believed, fear Allah and give up what remains [due to you] of interest, if you should be believers. And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you may have your principal - [thus] you do no wrong, nor are you wronged( Al-Quran. Al-Baqarah2 :278-279 ).

From these two verses, Allah denounces obviously the prohibition of usury or *riba* in all financial transaction in all types of *riba* that have been explained later by prophetic traditions since it is an oppression to the poor and needy people who needs financial assistance, and we as a Muslim are prohibited from acting injustice to all human regardless of their religion or race for human well-being and granting their life's stability ( Zaharuddin Abdul Rahman, 2011 ).

The another type of prohibited sale is intervention in sale ( *al-bai' 'la bai' akhihi* ) . Prophet Muhammad says in one of his traditions: 'Don't practice intervention sale on his brother sale and don't send proposal of engagement to girl that already have engaged with other'. Imam Al-Dahlawi( 2005 ) says:

“ The intervention sale may harm other traders in market and create unhealthy trading culture among them. When the former seller is negotiating with buyer and he almost conclude the contract, intervention from the latter seller – to postpone the contract - may be perceived as cruel and unjust behaviour. It definitely ruins the stability of interaction between parties in trade market, also might lead to intolerant of rivalry and spread the malice among traders”.

Briefly, *maqasid al-shari'ah* in financial transactions and finance is to protect the rights of every party involved in the contract in the sense of their capital, profit gaining simultaneously promoting the transparency and trust in the relationship as the specific approaches, while for the general

approach, it aims to promote just and fair in financial dealings in harmonizing the relationship between customer and trader in the market as the condition to achieve *al-falah* ( successful ) and Allah's sake.

### **Sukuk Structures**

In Malaysia, there are various types of *sukuk* structures which are approved by Securities Commission ( SC ) as an underlying principles in *sukuk* *modus operandi*. The categorization and sub-division of *sukuk* that based on the underlying contracts are divided into four major concepts :

1. Sale based *sukuk* ( exchange contracts ) :
  - *Bai' bithaman 'ajil* ( BBA ) *sukuk*
  - *Murabahah* *sukuk*
  - *Salam* *sukuk*
  - *Istisna'* *sukuk*
2. Lease based *sukuk* ( exchange contracts ) :
  - *Ijarah* *sukuk* ( lease )
  - *Ijarah muntahiyah bi al-tamlik* ( hire and purchase )
  - *Ijarah mawsufah fi al-zimmah* ( future contract )
3. Partnership based *sukuk* ( participation contracts ) :
  - *Musharakah* *sukuk* ( partnership / joint venture )
  - *Mudarabah* *sukuk* ( profit sharing )
4. Agency based *sukuk* :
  - *Wakalah bi al-istismar* ( investment agency ).

### **The Parties in Sukuk Structure**

Basically, any *sukuk* regardless to its underlying structure, needs a number of parties in ensuring its operation is going smoothly and accepted by regulatory body. First, special purpose vehicle ( SPV ) that helps to market the *sukuk* must be established as an independent entity from the obligor including its tax status and liabilities. It is a separate legal entity from the obligor and typically has segregated ownership from the obligor ( Rahail Ali and Imran Mufti, 2011 ). The main roles of SPV are to raise capital as investment funds, reinsure and transfer risks as the insurance companies do and acquire and hold asset as holding or leasing companies ( Manuela Belmontes and Tahir Jaweed, 2011 ).

Second, the party who always be the main advisor in structuring the debt securities for the company which tends to issue a *sukuk* is lead arranger or principal advisor. Other than that, other advisor such as *shari'ah* advisor is also needed to advise the issuer on the appropriate and acceptable concepts and principles to be used in the issuance ( Bank Negara Malaysia and Securities Commission, 2009 ). Third, the delegate trustee is the independent arbiter for the stakeholders in any *sukuk* transaction, neither related to the obligor group nor merely an SPV. This delegate who called as trustee plays an important role on a behalf of *sukuk* holders which specializes in performing trustee duties ( Sema Kandemir and Daniel Rankin, 2011 ).

Forth, the variety of agents those are appointed by the issuer to undertake administration on its behalf. Normally, it will be taken by the same corporate group despite they are working in different capacities of responsibilities and places. These agents also normally related to the delegate trustee. Among the duties of the agents are make any payment relation to the *sukuk*, keep a register of *sukuk* holders and calculate the payment due to the *sukuk* holders (SemaKandemir and Daniel Rankin, 2011 ).

Fifth, the applicable governing law that governs each transaction document in *sukuk* operation. In *sukuk* practice today, English law tends to be the normal choice for large transactions( Rahail Ali, 2009 ). Other than that are the main stakeholders of the *sukuk* like *sukuk* originator, issuer and the holder.

Sixth, Financial guarantee institution ( FGI ) provides an assistance in raising credit rating by *sukuk* issuance. Issuers will need to pay a premium, commensurate with the perceived risk of the issuer to the FGI who will undertake to pay the interest and capital repayment in the event that the issuer fails to do so ( Bank Negara Malaysia and Securities Commission Malaysia, 2009 ).

Also related to the topic of *sukuk* structure is the steps to be taken in operating the instrument. Different structures of *sukuk* bring different steps and flows that need to be executed in the practice. However, the common things can be listed as below :

1. The *sukuk* pricing method that is used to determine the market value of *sukuk* by either a fair value ( of a similar security in the market ) or the negotiated price between the buyer and seller by using the methods that are applied in conventional bond price determination such as the Yield to Maturity ( YTM ) curve pricing, the Individual Quotation Approach, the Model Approach and the Hybrid approach ( MeorAmriAyub, 2012 ).
2. Listing the *sukuk* usually increases the issuer's reputation and prestige where the step will put the issuer to a disclosure standard that displays a level of transparency as to the issuer's business, financial position and prospects. However, a deep secondary market for *sukuk* is yet to be established and recently *sukuk* transactions mostly are conducted by over the counter that may be perceived by public with the lack of transparency to public and investors ( RogenFrankhauser, 2011 ).
3. In Malaysia, any *sukuk* ( excluding Islamic asset-backed securities ) to be issued is required to do the rating process by a credit rating agency. It allows investors to make informed investment decisions and enhances confidence in the market ( Securities Commission Malaysia, 2009 ).
4. Sale and leaseback is a process when the owner of asset sells the asset at market value to an investor or financier on cash-basis, and immediately leases it back from the buyer in order to retain possession, title and use ( Wan Abdul Rahim Kamil, 2012 ).
5. In *sukuk istisna'* ( construction ), the issuer shall execute an *istisna'* purchase agreement with the financier, under which issuer agrees to construct and deliver to the financier the identified *istisna'* asset in consideration of an agreed *istisna'* price. Then, buy and sell back the *istisna'* asset to the financier to the issuer delivery of the asset under the *istisna'* sale ( Securities Commission Malaysia, 2009 ).

6. Purchase undertaking is done at maturity period when the lessee in *sukukijarah* agree to purchase the leased asset and the proceed will use to redeem the *sukuk* from it holders ( Securities Commission, 2012 ).

### **An Initial Analysis Using *Usul al-Fiqh* Tools in *Sukuk* Structures**

We have discussed previously about the parties in the *sukuk* structure and the steps to be taken in order to relate each party with its role to another. By connecting them, the complete structure could be established and working based on the sequence and priority of their roles and function in *sukuk* applications.

From the view of *maqasid al-shari'ah*, many prominent Islamic economists, like Chapra, Ahmad and Siddiqui and Naqvi have asserted that Islamic banking and finance is a subset of the overall Islamic economic system, which strives for a just, fair and balanced society as envisioned and deeply inscribed in *maqasid al-shari'ah*.

1. Accordingly, the many prohibitions are to provide a level playing field to protect the interests and benefits ( *maslahat* ) of all parties involved in market transactions and to promote social harmony ( AsyrafWajdi, 2008 ). Ibnu 'Ashur explained the meaning of *maslahat* by saying :  
 "It is An attribute of the act whereby righteousness and goodness ( *solah* ) takes places , that is to say utility and benefit ( *naf* ) always or mostly for the public or individuals. By "always" I refer to the *maslahah* that is absolute and regular, while by "mostly" I mean the *maslahah* is predominant in most of the cases. As for the expression " for the public or individuals" it means that *maslahah* is of two kinds , namely public interest ( *maslahah 'ammah* ) and private interest ( *maslahah khassah* ) . As for *mafsadah*, it is the opposite of *maslahah* , meaning that it is an attribute of the act whereby corruption or harm happens always or mostly to the public or to individuals".
2. One of the objectives of *Shari'ah* is to achieve comprehensive communal prosperity in the society. In order to achieve that, every member in the society should enjoy a reasonable satisfaction and maximum security while all types of harm and hardship must be either removed from the society or minimized. It is understood that that preventing harm is a result of putting into practice most of the objectives of *Shari'ah* in business and finance, because those objectives lead to the achievement of security in society ( AHCENELHASNA, 2013 ).  
 Harm ( *al-dorar* ) is defined by the jurist as every action that entails a damage on oneself, his property, body, dignity and emotional. Another jurist adds the attributes of the wealth as 'purified wealth', the body must be 'protected body' and the 'preserved dignity' ( Abdul KadirJaafar, 2006 ).
3. Al-Raisuni ( 1995 ) addresses that *al-Istihsan* is protection of *maslahah* and 'adalah ( justice ). This means the scholar should always alert with the objective of *Shari'ah* in judging any *fiqh* issue by preserving both, *maslahah* and 'adalah. When in the circumstance of *maslahah* is being neglected, *al-Istihsan* will guide the scholar to perform *ijtihad* ( independent opinion ) in order to open an opportunity to avoid hardship and harm. When the text is understood in the way of bringing hardship or difficulty, or *qiyas* ( analogical deduction ) is comprehended in contrast with the spirit of *Shari'ah* law whereby *maslahah* and 'adalah are neglected, Hence,

the understanding upon the text and the *qiyas* should be revised by the concept of *al-Istihsan* where it relied on the general principles of *Shari'ah* law.

In summary, *al-Istihsan* aims to protect *maqasid al-Shari'ah* whether by leaving *qiyas* and finding another method that more appropriate for the sake of *maslahah* or promoting leniency in judgment in general and particular condition or creating flexibility and neglecting rigidity or implement tolerant and eliminate hardship or shifting to easiness in facing difficulty ( Al-Sarakhsi, 1978 ).

4. Al-Qarafi ( 1972 ) explains that *al-zari'ah* ( plural for the word *al-zara'i* ) is needed to be blocked in certain circumstance and also compulsory ( *wajib* ) to be opened or not recommended ( *makruh* ) to be allowed , where sometime it is recommended ( *mandub* ) to be encouraged, . This is because *al-zari'ah* is a mean whereby the mean to the prohibited practice is prohibited as well as, the mean to the compulsory act also considered compulsory ( *wajib* ) such walking to the mosque for *jum'ah* prayer and al-haj is compulsory looking to the *hukmof jum'ah* prayer and *al-haj* themselves.

Al-Yubi( 1998 ) demystifies that the concept of *sad al-zara'i* is always reflects to its *ma'al* ( consequence ) . The consideration on *ma'al al-af'al*( the consequence of action ) is one of the significant *maqasid in Shari'ah* law.

5. Taking *ma'al al-af'al* into the account of *Shari'ah* law is a significant step in determining any particular action whether it is complying with the *Shari'ah* requirements or vice versa. Therefore, Islamic scholars not judge on one action or practice based on weak assumption or aimlessly unless after they have considered and measured with the scale of *Shari'ah* the impact of the action consequently. The purpose is for creating *maslahah* and avoiding *mafsadah*. Sometime, the action is seemed non-permissible but the consequence of it might be in contrast where it can uphold the principle of creating *maslahah* and avoiding *maslahah*, so it is unacceptable to judge it merely relied on its form and substance. However, this duty is very difficult to perform it accurately except for whom experts in the sciences of Islamic jurisprudence with the branches of knowledge and it is applied in the path of *maqasid al-Shari'ah*( Al-Shatibi, 2003 ).

## CONCLUSION

*Sukuk* structures have been endorsed by various regulatory bodies as *shari'ah* compliant instruments after there were examined and analyzed thoroughly under the *shari'ah* scholars inspections. The approval made these structures in line with other *shari'ah* based products such as *mudarabah* ( profit sharing ) and *ijarah* ( leasing ) which aim by their application to fulfill *maqasid al-shari'ah*. Thus, the suitable *usul-fiqh* judgment tools as suggested above, are needed in analyzing these structures in effort to ensure their objective won't deviance from the ultimate goals regulated by the Lawgiver in Islamic finance. By neglecting some role of the tools, wrong judgment and inaccurate decision will be resulted from it and may affect the view on the structures based on *maqasid al-shari'ah*.

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