

THE JUSTIFICATION OF *MAQASID AL-SHARI'AH* THROUGH THE DOCTRINES OF *USUL AL-FIQH* AND *QAWA'ID AL-FIQHIYYAH*: A STUDY ON SECURITIZATION PROCESS

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Abstract: *Maqasid al-Shari'ah* is a divine knowledge that had been embodied in the commands of syara' through the revelation of Al-Quran and hadith. The strong relationship between this science with the doctrines *usul al-fiqh* (UF) and *qawa'id al-fiqhiyyah* (QF) could not be denied as demonstrated by our traditional scholar in their books. Hence, the understanding of this knowledge also might be achieved through the doctrines and maxims. This paper attempts to demystify how the securitization process complied with *maqasid al-shari'ah*. The primary data of this study is collected through several interviews with the experts consisted of academicians, scholars and practitioners in the industry. This study finds that asset securitization despite deemed as a new innovation in Islamic finance, is a process which fulfills the requirements of *maqasid al-shari'ah* (MS) by adopting the concept of *al-rahn* or pledge in Islamic transactions law, acts as a mean for wealth expansion aligned with *hifz al-mal* concept, protecting the right and ownership of the asset and adhered to the requirements in Islamic asset securitisation. Although the process is seemed new and complicated in *mu'amalat* law, it however fulfils the requirements of MS and considered as *shari'ah* compliance process that adopted broadly in current market practices.

Keywords: *Maqasid Al-Shari'ah, Usul Al-Fiqh, Qawa'id Al-Fiqhiyyah, Securitisation*

Introduction

Securitization is process adopted by *sukuk* instrument in issuance process by converting the asset of originator in pool of asset in order to obtain a liquidity from investor which proved by the certificates of entitlement. This procedure is widely accepted in Islamic finance industry even though the idea was taken from the conventional practice innovated in the seventies as a pledge to pay back the money invested by investors.

As understood in *Islam*, majority of the commands and injunctions in *shari'ah* law, especially in *mu'āmalat* are aimed for their objectives or *maqāsid*. The objectives of *shari'ah* or *maqāsid al-shari'ah* are always associated with *hikmah* (wisdom), *'illah* (cause) and *sabab* (reason). Since, the ruling should be aligned with *maqāsid*, every process or transaction that approved under *shari'ah* compliant product also must adhered to the requirements. However, looking to the complex nature of securitization added with broad scope of *maqāsid al-shari'ah*, the doctrines of *usūl al-fiqh* and *qawā'id al-fiqhiyyah* is the best tools could be deployed in justifying the aim of this study.

UF and QF are the sciences established by the scholars where the former assists jurists to come out with the ruling for *mukallaf* deriving from the text of Al-Quran and hadith through several cognitive process, and the latter helps jurists to compile the ruling based on the themes, maxims, principles and parameters by matching their similarities in the attributes. Therefore, the achievement of MS may be justified based on the principles embodied in the two disciplines.

Literature review

Muslim scholars agreed that the sale is permissible and the permission stands on good sense as it allows each individual to meet their needs by cooperating with others. Therefore, the general rule in sales in permissibility (Mahmoud A. El-Gamal and Muhammad S. Eissa, 2003). Sale is the primary mean in realizing a justice environment by promoting wealth earning activities, where Islam had formulated certain parameters and standards in order to achieve the objectives (Zaharuddin Abd. Rahman, 2011 a).

In another aspect, *gharar* is prohibited in effort to prevent disputes between the contracting parties (Al-Saati, 2003). According to Vogel (1998), there are two views on the reason of *gharar* prohibition. One is to avoid 'enmity', in which case a broad scope of risky transactions becomes valid. The other is that it is prohibited to avoid 'ignorance or non-existence'. The wisdom of the *gharar* prohibition is to ensure justice and fairness to all contracting parties, thus avoiding disputes and disagreements between them (Siti Salwani, n.d). Hashim Kamali (1999) denotes the significance in eliminating excessive uncertainty is to avoid any abuse in commercial transactions and contracts.

One of the main pillar in the contract is the offer and acceptance where the objective is to visualize their consensus in executing that particular transaction whereby it may result the wealth transference between them. Through *ijāb* and *qabūl*, the transparency of wealth is obtained and expected to prevent any dispute when every party could distinguish their rights precisely from another. By implementing transparent transactions, it might inculcate mutual consent between buyer and seller (Zaharuddin Abdul Rahman, 2011 b).

In the discussin on *khiyār rukyah* in sale transaction, it will mitigate the chance of disputes occurrence between the contracting parties in particular, and generally for any people who takes part in any sale process. As a result, the establishment of peace and harmony atmosphere in the market might be realized and it will grant the stability of the economic development in that particular place (Zaharuddin Abdul Rahman, 2011 a).

For the business partnership venture, *mudōrobah* encourages the corporation between capital povidier and entrepreneur, engagement in business and trade activities, inculcates the good

business ethics like trust, improves the level of performance and efficiency, creates employment, alleviates poverty and beggar activities simultaneously improves the level of community living (Ahcene Lahsasna, 2013).

In brief, the fundamentals of Islamic financial transactions are based on promoting *maslahah* for the individual as buyer and seller in minor scope, whereas at major scale for the interest of the society, besides avoiding negative elements such as deceptive, enmity, dispute and others.

The Methods in Establishing *Maqāsid Al-Sharī'ah*

There are two common methods used in establishing *maqāsid al-sharī'ah*:

First: Thematic inferences (al-istiqra)

The first method in establishing *maqāsid al-sharī'ah* which is the most crucial process, consisted of the thematic inferences (*al-Istiqrā*) of *maqāsid al-sharī'ah* that lie behind its various dispositions and measures (*tasarrufat*) (Ibnu 'Ashur, 2006). Al-Shatibi (2003) proposed the way to apply *al-istiqrā* is through collective thematic reading of a variety of textual proclamation in *Al-Qurān* and *hadith* to derive conclusions about the purposes of the *sharī'ah*.

Ibnu 'Ashur (2006) explained the methods of *al-istiqrā* is executed by two ways:

- a) Conducts an exhaustive examination of the provisions and commands which their '*illah* (effective cause) is known. This type will result in an inductive inference of the rationales affirmed by the methods of identification and confirmation of '*illah*. For instance, in the sale, we know the unlawfulness of deceit (*ghubn*) and realize that the rationale is to banish cheating among the seller and buyer in the market, it clearly stated in the prophetic tradition in which he told the man who told him that he was always being cheated in sales:

“When you enter a transaction say: No trickery”¹

After knowing the causes, we could then infer from the list of evidences one simple goal which is the abolition of uncertainty (*gharar*) and substantial risk in transactions. There remains, therefore, no disagreement that any exchange entails risk or ambiguity in the price, the commodity or the time of the transaction is void.

- b) The second type consists of examining the numerous textual proofs of *sharī'ah* commands and rules that have the similar '*illah* which represents an objective that is intended by the Lawgiver. For example, the Prophet prohibits hoarding foodstuff in his *hadīth*: ‘He who hoards is a sinner’². From the statement of the Prophet, we may see the '*illah* of prohibition is the prevention of the shortage of foodstuffs in the market. Thus, we may infer that the circulation and availability of foodstuff and the facilitation of access to it is one of *maqāsid al-sharī'ah*.

¹ Al-Bukhari. *op.cit.* Kitāb al-Buyu'. Bab Ma Yukrahu min al-Khida' fi al-Bai'. No. 2117. p. 339.

² Al-Naisaburi, Muslim bin Hajjaj, A.H. 2006. *Sahīh Muslim*. Beirut: Dar al-Ihya al-Turath al-'Arabi. . Kitāb al-Musaqah wa al-Muzara'ah. Bab Tahrim al-ihthikar fi al-aqwat. No. 1605. Volume 3: p. 1227.

The validity of *al-istiqla*' methodology had been supported by many prominent scholars in *usūl al-fiqh*. Al-Baidhowi (1999) said: 'From *al-istiqla*', it shows that Allah regulates His law to us for the human well-being'. Ibnu Al-Qayyim (1999) commented on the need of thematic inference in understanding law in every aspect and section by saying:

'When we have confirmed that *al-istiqla*' effectively guides scholars in producing principles in judgment and brings the knowledge benefit, we also confirm that this methodology in establishing judgment is continuously applied to every aspects in *sharī'ah* law, from this methodology too, the role and functions of *qiyās* and the means to practice *ijtihād* might be understood, thus, we apply it according to its requirements, for further discussion pertinent to the judgment whether is *wājib* or not is submitted to the understanding and knowledge of the jurist.

A-'Izz Ibnu 'Abd al-Salam (2003) agreed with the role *al-istiqla* when he says: "If we do extensive reading and observation to the objective in *Al-Qurān* and *hadīth*, verily, we should be able to be convinced that Allah commands all good deeds in major or minor part, and Allah prohibits us from committing all bad deeds whether in major or minor part, thus, the good deed commanded by Allah suitable to be imagined as enjoining benefit and avoiding harmful whilst the bad deed is in other way around by enjoining harmful and avoiding benefit'

Second: Understanding the 'illah of the commandments and prohibitions.

Despite this method is related to the previous method in general, this method actually specifies the way to understand the effective cause behind Allah's command and prohibition or the mean to know the '*illah* itself. This method is known among jurists as "The ways to ensure the validity and reliability of '*illah*'" (*masālik al-'illah*)³ in a particular issue.

Maslahah as a Doctrine in *Maqāsid Al-Sharī'ah*

Masālih is the plural word for *maslahah*, could be classified into three major different criteria. Firstly, they can be divided into three kinds, according to their impacts on and necessity for the existence of the community: *doruriyah*, *hājīyah* and *tahsīniyah*. Secondly, with regard to their relation with the totality of the community or its group and individuals, they can be divided into particular (*juz'iyyah*) and universal (*kulliyah*) *masālih*. Thirdly, they can be divided into certain (*qat'iyyah*), probable (*zanniyah*) and illusionary (*wahmiyah*), according to the evidence supporting their importance for the existence of both the community and individuals (Ibnu 'Ashur, 2006).

Al-Shatibi (1999) explained further meaning for *maslahah dorūriyyah* (compulsory interest) is the essential element for the human's religion and his worldly life, the absence of this element might disturb the stability of human life and brings harmful, disorder and eventually leads to neglectful life.

³ *Masalik Illah* is the ways used by jurist to confirm accuracy of '*illah* through its attributes in particular issue or the ways used to verify the '*illah*. Source: Al-Zuhaili. *op.cit.* p. 661.

Allah regulates the five pillars in Islām, the declaration of faith and trust, performing *solat*, *zakāt* or alms-giving, fasting during *Ramadhan* and pilgrimage to Mecca⁴. Then, Allah urges *mukallaf* to perform worship (*ibādah*) to strengthen human spiritual to Allah, firming the religion awareness in human self, realizing the religion practice in our daily life, individually and collectively, conveying the message of Islām and its divine guidance to entire world and introducing people with the beautiful of *Islām* in order to pull them out from the misbehaving to the Allah's guidance (Al-Zuhaili, 2013).

The Element of *Raf'u al-Haraj* in *Maqāsid al-Sharī'ah*

Another principle in *maqāsid al-sharī'ah* is the element of difficulty elimination which known in *usūl al-fiqh* and *qawā'id al-fiqhīyyah* as *raf'u al-haraj*. Literally, *al-haraj* means narrow (الضيق) and hardship, while the jurist's definition is everything leads to hardship and ⁵(الشدة) difficulty to body, life, wealth whether in immediate or future (Ya'qub Abdul Wahab, 2001). The other jurists define it as providing easiness to the human agent (*al-taklīf*) by avoiding them from any element of hardship in the *sharī'ah* law verdicts (Adnan Muhammad, 1993).

From *Al-Qurān* and *hadīth*, there are many evidences uphold this holy principle, such in this verse for general pronouncement of difficulty elimination:

The meaning: He has chosen you and has not placed upon you in the religion any difficulty⁶. In particular, Allah announces an exemption for weak and sick people from striving themselves with their properties for the sake of Allah in the verse as below:

The meaning: There is not upon the weak or upon the ill or upon those who do not find anything to spend any discomfort when they are sincere to Allah and His Messenger⁷.

Another evidences that related to this principle which addresses easiness, hardship relief and lessening the difficulty are:

The meaning: And Allah wants to lighten for you) your difficulties) ; and mankind was created weak⁸.

In congruent with *Al-Qurān*'s message, number of *hadīths* also expressed the same form of principle and they could be summarized by thematic inference through all text and law decision concluded by our jurists (Al-Yubi, 1998). Ibnu 'Abbas narrated a *hadīth* regarding to this subject, he said:

ان الله شرع الدين فجعله سهلا سمحا , ولم يجعله ضيقا

The meaning: Verily Allah regulates this religion (Islām) by bringing along easiness and toleration, not promoting hardship⁹.

⁴ From the hadith narrated by Al-Bukhari and Muslim: Islam is established on five main pillars, The confession that is only Allah the God to be worshipped and Muhammad is the messenger of God, performing Solat, alms-giving (Zakāt), fasting in *Ramadhan* and pilgrimage to Mecca. Source: Al-Bukhari. *op.cit.* No. 8. p. 25.

⁵ Al-Jauhari, Ismail bin Hammad. 1990. *Al-Sihhah*. Beirut: Darul Ilmi Lil Malayin. Volume 1: p. 305.

⁶ Al-Qurān. Al-Hajj 22: 78.

⁷ Al-Qurān. Al-Taubah 9: 91.

⁸ Al-Qurān. Al-Nisa 4: 28.

⁹ Al-Thabrani, Sulaiman bin Ahmad. 1983. *Al-Mukjam Al-Kabir*. Cairo: Maktabah Ibnu Taimiyah. No. 11532. Volume 11: p. 213.

There are two types of hardship that frequently appear in our life. First, the hardship which can be borne by normal human ability without any threat on our body, life and property in short or long term, this kind of hardship is a normal condition in this temporary world where Allah has reminded us that world life period is a test for Muslim (Al-Faqih, 2003).

Second, the hardship that exceeds the previous level of difficulty that normally human might not be able to bear this condition considering his capacity as a normal human and it can jeopardize his body, life, property or other compulsories, if the hardship couldn't be eliminated, such as fasting continuously without eating for more than 2 or 3 days or performing hajj by walking along the distance from far country like Malaysia. This type of hardship needs to be eliminated in promoting easiness and upholding the fair and modesty in Muslim's life (Ibid).

The Element of *al-Taisir* in *Maqāsid al-Sharī'ah*

The principle covers the big sphere of *sharī'ah* law from *al-ibadah* to the *al-jinayat*, from protecting the relationship between servant and his God to the relationship among creation in this universe. This phenomenon indicates how keen Islāmic law protects human well-being consistently by promoting to easiness in human life and flexible way to achieve happiness in life of this world together with the Hereafter.

The appearances of *al-taisir* in Islamic divine law system could be monitored through three topics below:

1. *Al-Taklīf* (The obligation upon human)

As the fundamental in Islamic law, Allah does not obligate upon human duties that couldn't be performed which exceed his ability as weak creation and removes all burdens and shackle that Allah hampered upon nations before Islam. It is expressed through his verse:

The meaning: And relieves them of their burden and the shackles which were upon them¹⁰.

Then, Allah only commands the practices or obligations within the ability of human in performing it for the purpose of hardship removal, he says four times¹¹ in *Al-Qurān* in addressing this principle:

The meaning: Allah does not charge a soul except (with that within) its capacity¹².

The verse clarifies that entire norm and form in Islamic law is suitable and applicable for mankind to achieve their life objectives, happy and joyful, without any hardship and difficulty in their duties as God's servant between all parties in their life, the creator and creation.

2. *Al-Rukshah* (Concession)

The best definition for *al-rukshah* is by Al-Baidhowi (1999):

الحكم الثابت على خلاف الدليل لعذر

¹⁰ Al-Qurān. Al-‘Araf 7: 157.

¹¹ Al-Qurān. Al-Baqarah 2: 286, Al-Qurān . Al-Baqarah 2 : 233, Al-Qurān . Al-An’am 6 : 152, Al-Qurān . Al-Tholaq 65: 7.

¹² Al-Qurān. Al-Baqarah 2: 286.

The meaning: The judgment established in contradiction with its evidence for an excused reason.

Al-rukshah is an opposite attribute for the particular judgment evidenced by textual sources by allowing the prohibited practice, or leaving the obligation under certain circumstances (Muhammad Rafat Sa'id. 2003). It covers every lessening, reduction and concession in performing the standard stated in *sharī'ah* law due to contingency situations or circumstances that bring hardship and difficulty such sick, travelling, under constraint and other acceptable excused reason (Al-Solabi, 2002).

In clarifying the above definition, the following examples should be addressed like lessening *raka'at* for compulsory prays to two *raka'at* in travelling in order to reduce the level of difficulty in journey, allowing sick people to break his fasting or absent in Friday's prayer, permission to eat forbidden food like pork in the event of famine or other's property with indemnity for the desperate person (Al-Yubi, 1998).

Through this fundamental, we can conclude that *sharī'ah* law is founded on the principle of difficulty elimination and hardship removal to realize human well-being by providing easiness in their life practices (Al-Solabi, 2002).

3. *Al-'Afw (Forgiveness)*

This attribute sometime could be embedded under the categories of *al-rukshah*. However, it is also could be able to stand independently, supporting by the prophetic tradition:

إن الله وضع عن أمتي الخطأ والنسيان وما استكرهوا عليه

The meaning: Truly Allah forgives unintentionally fault, forgetter and under constraint person among my follower¹³.

Among the examples of *al-'afw* practices are the little amount of blood, wound or unseen pollutant on clothes are forgiven for having them in praying due to the difficulties to avoid them from the clothes, also considering to its tiny size or amount. A small pool of water that have been affected by the smelly dead animal body that lies close to the pool, it is also allowed for us to use the water for washing or ablution in spite of its unpleasant smell, because it is among the forgiven items which won't be considered as dirt or pollutant seeing where it only affected by the smell not physicality of dead body (Al-Faqih, 2003).

As a conclusion, these three categories of the forms of difficulty elimination were completely discussed and clarified by our scholars and jurists with some disagreement in certain parts. However, the purpose of this principle is still remained consonant with the objectives of *sharī'ah* as guidance to the human in promoting benefit and avoiding hardship.

Blocking the Means (*Sadd al-dhara'i*) in *Maqāsid Al-Sharī'ah*

Sadd al-dhara'i is another element that could assist jurists in strengthening the fundamental of *maqāsid al-sharī'ah* in the sense of ascertaining particular means or ways those should be

¹³ Ibnu Majah, Muhammad bin Yazid. 1998. *Sunan Ibnu Majah*. Beirut: Dar al-Jil. Kitāb Al-Tholaq. Bab Tholaq al-Mukrih wa al-nasssi. No. 2045. Volume 3: p.440.

blocked and hindered, whereby it could not be found in textual sources, as the tool to achieve the purpose in protecting human well-being (Al-Muqrin, t.t). Al-Syaukani (2000) defined *sadd al-dharā'i* as 'the form of problem apparently seems permissible', is used as a mean to the prohibited action or practice'. While Al-Qarafi (2003) defined it as stopping substances or means to the harmful impact in order to avoid it, wherever the permissible and legal action be used as a mean to harmful implication or forbidden practice, it must be blocked¹⁴.

In spite this method was extensively used by Maliki's jurists, whilst Al-Hanafi and Al-Syafi'e's scholars rejected it as the valid methodology in regulating and judging Islamic law, but they are being reported in certain circumstances where it is being applied – in their books – to produce law decisions with restrictions accordingly (Al-Muqrin, t.t). Al-Shatibi (2003) addressed that taking of *sadd al-dharā'i* as guidance tools in legislating *sharī'ah* law is accepted by all jurist in general form. The agreed points in *sadd al-dharā'i* are, first, blocking any mean to harmful and negative effect despite the blocked mean contains benefit from another view, secondly, this term is normally used to indicate blocking mean to forbidden act, in the opposite way, it would not to be used to allow any means to benefit and permissible practice (Zayyad, 2008).

In *maqāsid al-sharī'ah*, the consequence of any actions must be taken into consideration before the judgment is made, and it as a fundamental in *sadd al-dharā'i*. This statement is supported by the evidences of *Al-Qurān* and *hadīth* above in elucidating the concept of *sadd al-dhara'i* through *Al-Qurān* and *hadīth*. Then, the jurists among companions had followed this methodology in establishing legal opinions, if there is any new scenario or event that never been happened in the era of Prophet Muhammad (SAW). For instance, the decision to compile *Al-Qurān* in one single book in the era of first caliphate, Abu Bakr Al-Siddiq, that has been endorsed and agreed by the consensus of companions seeking the preservation of *Al-Qurān* verses and shunning dispute upon the validity of that holy book in the future (Al-Muqrin, t.t).

Islamic Securitisation

Islamic securitisation is defined as the process of transferring company's asset that consisted of tangible and intangible asset to the financial paper or certificate brings an undivided portion of ownership on the behalf of the asset's originator with the provision that the asset must be in the form of physical assets, services, receivables and non-zero risk fixed income securities (Fathurrahman, 2008).

SC Malaysia defines the asset securitization as 'a process of issuing securities by selling financial assets identified as the underlying asset to a third party with a purpose to liquidate financial assets for a cash or as an instrument to obtain new funds at a more attractive cost, compared to obtaining funds through direct borrowing from financial institutions'(Securities Commission Malaysia, 2007).

The definitions of securitisation from economic scholars are as follows:

- a. Muhammad Obaidullah (2007) defines it as 'a process that involves pooling, packaging and transformation of financial assets into securities'.

- b. Andreas Jobst (2007) defines asset securitisation as ‘the process and the result of issuing certificates of ownership as pledge against existing or future cash flows from a diversified pool of assets (reference portfolio) to investors’.

From both definitions above, securitisation is a process of transforming the existing asset including physical asset and liquid asset to securities form where allows it to be easily traded in primary or secondary financial market.

In adapting securitisation concept in Islamic institutions, it must undergo two fundamental stages in verification process. The stages aim to ensure the compliancy of the process to the *shari’ah* requirements. First, the type of assets securitised and the generation of investment returns must be approved and accepted by *shari’ah* law. Second, structure of the transaction must be free from any interest income element and investors be rewarded for the risk they take for the investment (Andreas Jobst, 2007).

Therefore, the AAOIFI standard for *sukūk* securitisation must be tradable, not represents receivables or debts, with exceptional in the case of any financial entity sells or trades or its assets or having existing financial obligation which normally in the form of debts, incidental to physical asset or usufruct, were included unintentionally (AAOIFI, 2010).

Despite the idea was derived from the conventional practice, islamic securitisation is deemed different to its conventional counterpart from the procedure aspects. First, the securitisation is only realized from an existence asset not debt. Second, the profit might not be determined upfront but it depends on the asset performance in profit making. Third, there is no capital guarantee in Islamic securities but the venture between originator and investors based on partnership where the profit and loss are shared based on the portion of capital contribution. Fourth, the asset and service must be securitised and marketed in the market in accordance to the islamic principles such as the pricing, deferment and others (Abdul Kader Zaituni and Sulaiman Nassir,2012).

Securitisation is the process created for some purposes and reasons as to selling debtor’s debt, liquidity enhancement for low risk investment, profit increment. The purposes could be realized if the fund is managed by securities’ originator (Walid Hadi, 2011).

The reasons behind issuers’ preference to a securitisation method in raising fund for their business purposes are as follows:

- a. Increase earning on capital by removing the asset and liability from its balance sheet with the retained profit.
- b. Instance fund raising rather than financing or wait for the receivables.
- c. Access more liquidity from securitizing illiquid asset with cheaper method of raising money.
- d. Diversifying the company funding resources by selling the securities globally hence encourages the local economic development especially for the emerging economic or Islamic economies that possess passive wealth (potential to be securitised).
- e. Securitisation could put the company in safe situation whereby the fund raised is similar to secured loan besides enjoys with certain restriction avoidance such as originator’s negative pledges, borrowing restrictions and cross defaults if the SPV or securities’ buyer is an outsider from the originator’s group.

- f. Securitisation provides cost effective method of financing for the developing economics as well as Islamic economics despite of operating within the interest-based loan framework.
- g. It encourages economic growth of the specific industry, financial market and boosts the whole economic position. It might be obtained by the establishment of robust economic sector, the accounting standards, the global rating standards, a listed stock exchange, the fair and just governing law that promotes the viability of transaction simultaneously creates big demand from investors.
- h. This method allows company to raise fund to unlimited amount compared to bank financing service. Even though, it depends on the price of asset securitised that can be managed and controlled by the originator (Maha Hanaan Bala, 2011).
- i. For government bodies, this method might reduce the average cost of financing budget compared than issuing government debt securities that usually cost highly.

However, *sukūk* market today had experienced the problem in asset securitisation when the number of this instrument that undergone proper securitisation are not many (Mohammad Imad Ali, 2014). Jobst (2007) stipulates conditions for the Islamic securitisation process:

- i. The underlying asset that to be securitised must be clearly identified.
- ii. The securitisation brings the similar risk and return that to be shared together between the investors and the users of funds.
- iii. The pool of assets must comply with the *sharī'ah* requirements in securitisation where *ribā*, *gharar*, prohibited business activities and anything deemed as unethical must be avoided. For instance, receivables, debt and cash should not be accepted in the process.
- iv. No element of guarantee in return is allowed.
- v. The right of investors to gain ownership on the asset must be defined clearly.
- vi. Speculative purposes in the securitisation is strictly unaccepted.
- vii. If the securitisation involved with the insurance, *sharī'ah* compliant insurance or *takāful* is preferable.
- viii. If the process needs to be supported by credit enhancement, it must be approved by authorised *sharī'ah* adviser.

The parties that involved in securitisation process are originator, issuer, trustee, obligor and credit enhancer¹⁵.

¹⁵ It refers to a method where a company attempts to improve its credit worthiness in a debt based transaction, by convincing the lender that the borrower might fulfill its obligation through additional collateral, insurance, or a third party guarantee. This process normally makes the overall credit rating of the company might be upgraded.

Source: <http://www.investopedia.com>. Retrieved on December 2015.

The table below describes the stages in executing asset securitisation by the said participants.

Table 1: The Stages in Securitisation Process ¹⁶.

| Stage | Process |
|---|---|
| First: Marking the asset | The originator identifies potential asset to be securitised through valuation and evaluation process. |
| Second: Parking the asset into SPV | The asset will be pooled before transferring them to the SPV by 'true sale' in order to remove the asset from the bankruptcy list or known as bankruptcy remote. |
| Third: Issuances of securities | SPV issues tradeable securities whereby the price is determined by the interest rate. |
| Fourth: Investment into securities | Investors purchase the securities. |
| Fifth: Obligations throughout the tenure of the securities | The trustee that acts on behalf of investors monitors the obligor's performance, divides up the profit resulted from the investment to investors on pro rata basis and may call for a meeting if the any event occur that impacts the securities such as default. |

The Analysis from Respondents' Feedbacks

1. The securitisation is the method used in raising fund directly from investors where there are another way to fulfil the purpose could be chosen. So, the level of need to the structure is determined by the need of the originator, it might be either *dorūriyāt* or *hājiyāt* (Muhammad Taqiyuddin and Syed Adam, 2015). For any governments or authority bodies that need funds in developing important infrastructure that may contribute to the improvement of social economic sector is considered as *dorūriyāt*, while if the need is lesser than *dorūriyāt* level, such as for business development in creating job opportunities, it might be *hājiyāt* (Mohd Nazri, 2015).
2. Even though the concept of securitization was founded by western market, in general view, it does not contravene with the *sharī'ah* fundamentals if the assets are eligible for the securitization (Shamsiah Muhamamd, 2015). According to the standard endorsed by authorities like SC or AAOIFI, without any speculation acts. The practice also is similar to the concept of *al-rahṅ* in islamic law that aims for the cash facility in order to generate more income and redeem back the asset after certain tenure.
3. Securitization in ICM is implemented within the secured framework and guidelines that preserves the rights of the company's owners and its shareholders that consisted of the elements of *hifz al-māl* (Syed Adam, 2015).

Hifz al-māl in securitization may be viewed through the guidelines that stipulates:

- a) Only *sharī'ah* compliant asset might be accepted as Islamic securitization.
- b) Only the structures that approved by *sharī'ah* scholars might be implemented as the underlying structure in the securitization process.

¹⁶ John Board. *op.cit.* pp. 141-142.

4. The optimization of asset or wealth usage also could be considered as *hifz al-māl* whereby it may add the value of the asset by investing them (through securitization) that entails the profit creation (Syed Othman Al-Habshi, 2015).
5. Due to the several factors such as lack of legal and regulatory framework, lack of historical data in forecasting risk profile and behaviour, lack of marketability and liquidity management of *sukūk* and the dispute between scholars regarding the compliance of securities to *sharī'ah* requirements¹⁷, *masyaqqah* is inevitable in the securitisation process where some of *sharī'ah* principles might be breached such as *gharar* and *jahālah*.
6. The process is for *maslahah* without determining whether it is *hājīyāt* or *dorūriyāt* but for them the mean is also *maslahah* (Hanafiah, Amir Shahrudin, Syed Othman Al-Habshi and Said Adekunle, 2015).
7. Since the process is executed according to the *sharī'ah* guidelines and principles, they justified that the process follows the *sharī'ah* principles, under the mean *al-aslu fī al-syurut wa al-'uqud al-jawaz* (Luqman Abdullah, Hanafiah, Amir Shahrudin, Syed Othman Al-Habshi and Said Adekunle, 2015).

The Summary

From the summary of analysis above, there are several parameters could we derived from it.

1. The securitised asset must be adhered to the Islamic securitization guidelines and must avoid any *gharar* and *jahālah* in the process in order to protect the other's right on the asset.
2. The process also must be executed in the safety condition that safeguards the ownership of the shareholders as the asset owner, with the clear and transparent conditions without breaching any *sharī'ah* fundamentals and prevailing governing law.
3. The securitisation is done for *maslahah* of the company or originator.
4. Any potential *mafsadah* through the process is the deterrence to *maqāsid al-sharī'ah*.
5. *Maslahah* in the securitisation also justified by *al-aslu fī al-syurut wa al-'uqud al-jawaz* that allows any contracts could be concluded, without breaching any *sharī'ah* fundamentals as mentioned above.
6. Utilization the asset for the business growth and benefits is *maslahah* under *hifz al-māl*, as the main *maqāsid al-sharī'ah* in wealth.

The Conclusion

The roles of UF and QF are deniable in justifying *maqāsid al-sharī'ah*, in this paper, focusing on the securitization process where today as part and parcel in *sukūk* issuance. Briefly, as long as the process is adhered to the guidelines it is considered achieve *its maqāsid*, other than the concept of *al-rahn* that was adapted in it. The doctrine of promoting *maslahah* and *mafsadah* avoidance is the main justification tools Therefore, despite the process is deemed as the new application in financial market, it is accepted from the *fiqh* view as well as achieve the objectives of *sharī'ah*.

¹⁷ John Board. *op.cit.* p 140.

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