

# Do Equity-Based *Ṣukūk* Structures Fulfil the Objectives of Sharī'ah (*Maqāṣid al-Sharī'ah*)? \*

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## Abstract

The Islamic capital market is an important component of the overall Islamic financial system especially in providing an element of liquidity to otherwise illiquid assets. Like their conventional counterpart, Islamic capital markets complement the investment role of the Islamic banking sector in raising funds for long-term investments. These long-term investments are facilitated through various Sharī'ah contracts and instruments ensuring efficient mobilization of resources and their optimal allocation. One of the most popular instruments used today in the Islamic capital market is *ṣukūk*. Various structures of *ṣukūk* based on *ijārah*, *mushārah*, *muḍarabah* and hybrid forms have evolved. However, these innovations have raised many Sharī'ah issues and controversies. This paper argues that some innovations which try to achieve the same economic outcome as conventional instruments distort the vision of Islamic economics based on justice and equitability. These visions are deeply inscribed in the objectives of Sharī'ah, also known as *maqāṣid al-Sharī'ah*. This distortion stems from the restricted view of understanding Sharī'ah, by only focusing on the legal forms of a contract rather than the substance especially when structuring a financial product. The overemphasis on form over substance leads to potential abuse of Sharī'ah principles in justifying certain contracts which are in fact contradictory to the letter of the Sharī'ah and ultimately undermines its higher objectives. In the final analysis, the paper concludes that the substance of a contract that has greater implications for realisation of *maqāṣid al-Sharī'ah* should be equally looked into. Otherwise, Islamic finance just works like an exercise in words naming its functions and operations and is really no different from conventional finance, except in its use of euphemisms to disguise interest and circumvent the many Sharī'ah restraints and prohibitions.

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## I. Introduction

Over the past decade or so the Islamic financial sector has grown and gained strength by the creation of various support and infrastructure institutions, and it has expanded from being a banking-based industry to a wider domain, incorporating capital market-based products and services. Indeed, the Islamic capital market, like its conventional counterpart, is an important component of the overall Islamic financial system. It facilitates the transfer of investible funds from economic agents possessing financial surplus to those requiring funds (Ali, 2008). In other words, the Islamic capital market provides an element of liquidity to otherwise illiquid assets. This is achieved by selling a wide array of products ranging from *Shari'ah*-compliant securities to bond-like structures known as *ṣukūk*.

Perhaps one of the most notable achievements of Islamic capital markets is in the growth of the *ṣukūk* market around the globe. The increased popularity of *ṣukūk* in recent years stems from the need of governments and corporations to tap funds from the Islamic capital markets through *ṣukūk* issuances. However, the tools used to develop and structure the *ṣukūk* must comply with *Shari'ah* values and principles, distinguishing it from conventional instruments. Indeed, the extant literature proclaims that the Islamic financial system differs significantly from the conventional system, not only in the ways it functions, but, above all, in the values which guide its whole operation and outlook. The values which prevail within the ambit of the *Shari'ah* are expressed not only in the minutiae of its transactions but in the breadth of its role in realizing *maqāṣid al-Shari'ah* (the objectives of the *Shari'ah*).

Indeed, *maqāṣid al-Shari'ah* reflects the holistic view of Islam, its nature as a complete and integrated code of life, and embracing the individual and the society, the life in this world and the hereafter (Dusuki and Abozaid, 2007). Hence, a deep understanding of *maqāṣid al-Shari'ah* entails the intense commitment of every individual and organisation to justice, brotherhood and social welfare. This will inevitably lead to a society whose members cooperate and compete with each other constructively to achieve success in life, which is attainment of the ultimate happiness (*falāḥ*). Mere maximization of profits cannot, therefore, be a sufficient goal for a Muslim society. Maximization of output must be accompanied by efforts to ensure spiritual health at the inner core of human consciousness and justice and fairness at all levels of human interaction. Only development of this kind would be in conformity with *maqāṣid al-Shari'ah* (Chapra, 2000a).

The introduction of an enabling Islamic capital market environment and its improvement through various *Sharī'ah*-compliant product innovations like *ṣukūk* has been a positive step. However, some structures which attempt to achieve the same economic outcome as conventional bonds distort the *maqāṣid al-Sharī'ah*. This distortion stems from a restricted view of the *Sharī'ah*, focusing only on the legal form of a contract rather than its substance, especially when structuring a financial product. The over-emphasis on form over substance leads to potential abuse of *Sharī'ah* principles in justifying certain contracts which in fact contradict *Sharī'ah* texts, and ultimately undermines the higher objectives of the *Sharī'ah*.

This paper aims at analysing the challenges of realizing *maqāṣid al-Sharī'ah* in the Islamic capital market, focusing on *ṣukūk* instruments. Particular examination is undertaken of the application of one of the most popular *ṣukūk* structures, namely, equity-based *ṣukūk* in the light of *maqāṣid al-Sharī'ah*. For that reason, the concept of *maqāṣid al-Sharī'ah* will be first delineated in detail so as to shed light on its application to the contemporary practice of *ṣukūk*.

The following sections will evaluate the application of the *Sharī'ah* instruments, especially with respect to *maqāṣid al-Sharī'ah* and *maṣlahah* in Islamic finance; discuss the polemics of equity-based *ṣukūk* structures, particularly the use of credit enhancement mechanisms to replicate fixed-income bond characteristics; analyse how debt-resemblance features of equity-based *ṣukūk* may distort the noble objectives of Islamic economics in the light of *maqāṣid al-Sharī'ah*; and, finally, provide a summary and conclusion.

## II. Objectives of the *Sharī'ah*

*Maqāṣid al-Sharī'ah* means the objectives and the rationale of the *Sharī'ah*. A comprehensive and careful examination of *Sharī'ah* rulings entails an understanding that the *Sharī'ah* aims at protecting and preserving public interests (*maṣlahah*) in all aspects and segments of life (Ibn al-Subkī, *al-Ibhāj*, 3/52; *al-Shātībā*, *al-Muwāfaqāt*, 2/2). Many *Sharī'ah* texts state clearly the reasoning behind particular rulings, suggesting that every ruling comes with a purpose, which is to benefit the *mukallaf* (accountable person). For example, when the *Qur'ān* prescribes *qiṣāṣ* (retaliation), it speaks of the rationale for it, that applying retaliation prevents further killing: “There is life for you in *qiṣāṣ*” (*Qur'ān*, 2: 179). Similarly, when the *Qur'ān* prohibits

wine it says that wine is among the works of the devil, as it causes quarrels and instils hatred and enmity among Muslims: “Satan only wants to excite enmity and hatred between you in intoxicants and gambling and hinder you from remembrance of God and from prayer” (Qur’ān, 5: 91).

Full comprehension of the objectives of the *Shari‘ah* is important for analogical deduction and other human reasoning and its methodology (Kamali, 1999). Indeed, *maqāṣid al-Sharī‘ah* allows flexibility, dynamism and creativity in social policy (Hallaq, 2004; Mumisa, 2002; Zuhrah, 1958). According to Imām al-Ghazālī (d.1111 CE), “The objective of the *Sharī‘ah* is to promote the well-being of all mankind, which lies in safeguarding their faith (*dīn*), their human self (*nafs*), their intellect (*‘aql*), their posterity (*nasl*) and their wealth (*māl*). Whatever ensures the safeguarding of these five serves public interest and is desirable” (Chapra: 118).

Al-Shāṭibī approves al-Ghazālī’s list and sequence, thereby indicating that these objectives are the most preferable in terms of their harmony with the essence of the *Shari‘ah*. Generally, the *Shari‘ah* is predicated on benefits to the individual and to the community, and its laws are designed to protect these benefits and facilitate the improvement and perfection of human conditions on earth. This perfection corresponds to the purposes of the Hereafter. In other words, each of the worldly purposes (preservation of faith, life, posterity, intellect and wealth) is meant to serve the single religious purpose of the hereafter (Nyazee, 2000).

The uppermost objectives of *Shari‘ah* rest within the concepts of compassion and guidance, which as attributes referred in the Qur’ān (21:107 and 10:57). It seeks to establish justice, eliminate prejudice and alleviate hardship. It promotes cooperation and mutual support within the family and community at large. This is manifested in the realisation of *maṣlaḥah* (public interest), which the Islamic scholars have generally considered to be the all-pervasive value and objective of the *Shari‘ah* and is, to all intents and purposes, synonymous with compassion. *Maṣlaḥah* sometimes connotes the same meaning as *maqāṣid*, and scholars have used the two terms almost interchangeably (AbdelKader, 2003). To further shed light on our discussion of the objectives of *Shari‘ah*, especially with regard to their application in the preservation of public interest, the following section elaborates on the principles of *maṣlaḥah*, which serve as important tools to uphold the *Shari‘ah*.

### 2.1. *Maṣlahah*

*Maṣlahah* is one of the juristic devices that have always been used in Islamic legal theory to promote public benefit and prevent social evils or corruption. The Arabic word *maṣlahah* (pl. *maṣāliḥ*) means welfare, interest or benefit. Linguistically, *maṣlahah* is conceived as the securing of benefit and repelling of harm. The words *maṣlahah* and *manfa'ah* are treated as synonyms. *Manfa'ah* (benefit or utility) is not, however, a technical meaning of *maṣlahah*. What Muslim jurists mean by *maṣlahah* is the seeking of benefit and the repelling of harm as directed by the Lawgiver through the *Sharī'ah* (Nyazee, 2000: 161).

Amongst the major scholars of Islamic jurisprudence, Imām Malik is known to be the leading proponent of upholding *maṣlahah* as one of the sources of *Sharī'ah*. He uses the term “*al-maṣāliḥ al-mursalah*” to connote interests which have not been covered by other secondary sources of *Sharī'ah*.<sup>1</sup> On the other hand, the majority of other jurists rejected it as a source of *Sharī'ah*, although they practiced it without theoretically admitting its authority as an independent source of the *Sharī'ah*. Al-Ghazālī (from the *Shāfi'ī school*) is representative of this approach. He acknowledges *istiṣlāḥ* (seeking the better rule for public interest) as a consideration for legal judgment while denying it the status of a fifth source of *Sharī'ah*. He also restricts its application to situations in which its application is deemed necessary to serve the public interest.

Those who opposed *maṣlahah mursalah* as one of the independent sources of *Sharī'ah* argued that endorsing this principle implies giving human beings a legislative authority premised on human perceptions of what is good and what is bad. Thus, it sometimes functions in isolation from *Sharī'ah* texts even though it may be based on a principle derived from an inductive reading of those texts in addressing a particular issue which is not clearly mentioned in any *Sharī'ah* sources. This may imply that *maṣlahah* may indirectly nullify the textual rulings and their legislative authority (Ibn 'Āshūr, 1366 A.H.; 86; al-Zuḥaylī, 1993: 361).

### III. Islamic Finance and *Maqāṣid al-Sharī'ah*

The preceding sections have elaborated on the fundamental principles of the *Sharī'ah*, particularly in dealing with mundane affairs of human beings. Our next focus is to evaluate the application of *Sharī'ah* instruments, especially with respect to *al-maṣāliḥ al-mursalah* and *maṣlahah*, to issues

of Islamic banking and finance. Indeed, one of the biggest challenges of the Islamic banking and finance industry today is to come up with products and services that are *Shari'ah*-compliant or legitimate from an Islamic point of view without undermining the business aspects of being competitive, profitable and viable in the long run.

### 3.1. *Shari'ah* compliance: Validity versus permissibility

The first question that needs to be raised is what should be the basis for deciding whether a product is *Shari'ah*-compliant or not? In other words, what are the approaches in *fiqh* for determining whether a contract is valid and permissible from *Shari'ah* perspectives?

Schools of *fiqh* have differed on the basis of determining contract validity (*ṣiḥḥah*). Some emphasize its legal form while others stress its substance and the intentions of the contracting parties. Both views have a basis in the *Shari'ah* texts. The latter approach is based on a *ḥadīth* that “deeds are determined by intention” (narrated by *Umar ibn al-Khaṭṭāb*, See *Ṣaḥīḥ al-Bukhārī*, 1:3, *ḥadīth* no. 1; *Ṣaḥīḥ Muslim*, 3:1515, *ḥadīth* no. 1907). Based on this *ḥadīth*, *niyyah* (intention) is an essential element that affects the validity of all contracts, i.e. it must be determined by considering the purpose or substance of the contract, not by just looking at its form or structure alone. However, some scholars, like Imām al-Shāfi'ī, found it is impractical to determine the validity of contracts by means of intention, as it is difficult and sometimes impossible to identify the intention of the contractors. Moreover, they found some *Shari'ah* texts suggesting that judging things must be based on their form and appearance (for further details see: Abozaid, 2004).

To reconcile these two conflicting texts in a practical way, scholars distinguished between two types of *ḥukm* (ruling): *ḥukm qaḥā'ī* and *ḥukm diyānī*. The former regards the contract in external terms, to what extent it complies with all *Shari'ah* conditions and requirements pertaining to a contract's form and structure. The latter concerns the extent to which the substance or purpose of the contract is in compliance with the *Shari'ah*. If the contract structure is *Shari'ah*-compliant, then it could be termed as a valid contract (*ḥalāl qaḥā'an*). On the other hand, if all the contractors' purposes, i.e. the substance of the contract, are *Shari'ah*-compliant, then it is termed as permissible (*ḥalāl diyānatan*). Thus, a transaction is deemed to be *ḥalāl diyānatan* when it serves the legal purpose and intentions of the

*Sharī'ah* and *ḥalāl qaḥā'an* if the contract meets all contractual conditions and requirements. Consequently, a *ṣaḥīḥ* (valid) contract is not necessarily *ḥalāl* (permissible) (al-Shāfi'ī, 1319 A.H., 4:114; al-Ghazālī, *al-Mustaṣfā*, 2:36.)

The first approach represents the *Ḥanafī* and *Shāfi'ī* position while *Mālikīs* and *Ḥanbalīs* emphasize that validity of a contract must be based on the real intention or the substance of the contract.<sup>2</sup> Apparently, the scholars of *fiqh* differ on the basis for judging the validity of a contract; however, even those who were more inclined to formal criteria did not entirely discount the issues of contract substance and the contractors' intentions. Even *al-Shāfi'ī* gave examples of instances when real intention does invalidate a contract, such as selling grapes to a winery or selling arms to an enemy whose intention is to attack the Muslims. This implies that the emphasis on the form or expressed intention is more applicable when the real intention is difficult to determine. Therefore, for a contract to be accepted as *Sharī'ah*-compliant it must be valid both in its legal form and its substance (*ḥalāl qaḥā'an waḥalāl diyānatan*).

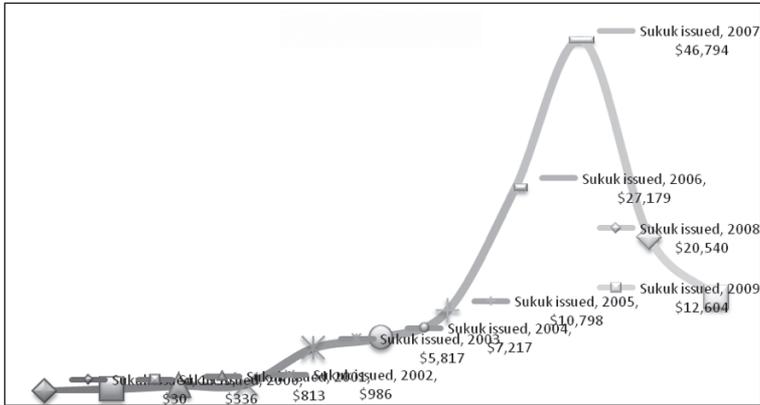
#### IV. The Polemics Regarding Equity-Based *Ṣukūk*

The foregoing discussion has indicated that scholars are agreed in principle that, for an Islamic financial product to be deemed as *Sharī'ah*-compliant, the contract must be valid both in its legal form and its substance (*qaḥā'an wa diyānatan*). This raises the issue of whether the current practice of equity-based *ṣukūk* is compliant in this sense. Before critically examining this instrument in the light of the objectives of *Sharī'ah*, the following section delineates the concept and practice of equity-based *ṣukūk* in the current Islamic capital market transaction.

##### 4.1. Emergence of the *ṣukūk* market

The *ṣukūk* market is a fairly new development in the Islamic capital market. The first issuance of *ṣukūk* was Shell MDS (Malaysia) in 1990. There were no active issuances by other players or countries until the year 2001, in which a number of institutions issued *ṣukūk*, including Majlis Ugama Islam Singapore (MUIS), Government of Bahrain and the first global corporate *ṣukūk*, issued by Guthrie Malaysia. This was the beginning of an active *ṣukūk* market. Total *ṣukūk* issued as of 5th August, 2009 amounted to US\$133 billion. Figure 1 depicts the growth of the *ṣukūk* market.<sup>3</sup>

Figure 1: Growth of the *Ṣukūk* Market (US\$'000)



Literally, *ṣukūk* means certificates. While technically, it refers to securities, notes, papers or certificates with features of liquidity and tradability. The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) (2008b) defines “investment *ṣukūk*” (*ṣukūk al-istithmār*) in its *Shari‘ah* Standards, Standard 17(2) as:

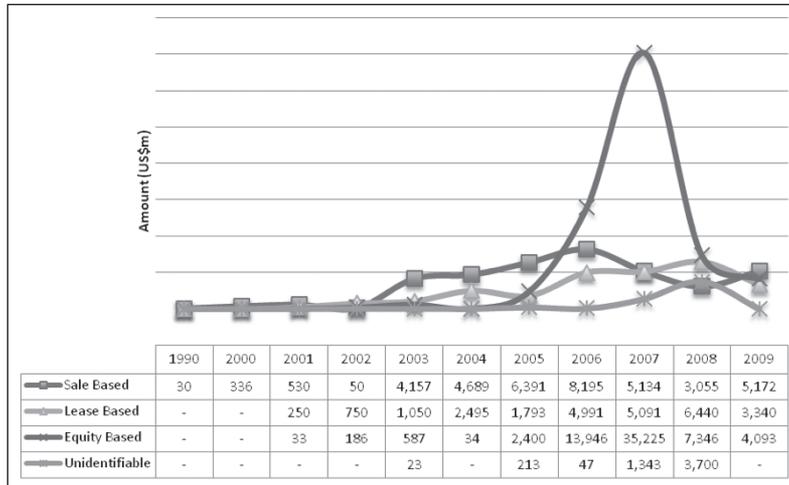
Investment *ṣukūk* are certificates of equal value representing undivided shares in ownership of tangible assets, usufructs and services (in the ownership of) the assets of particular projects or special investment activity; however, this is true after receipt of the value of the *ṣukūk*, the closing of subscription and the employment of funds received for the purpose for which the *ṣukūk* were issued.

The investment *ṣukūk* under AAOIFI’s definition are said to represent undivided shares in ownership of tangible assets, usufruct, services, assets of particular projects, or special investment activity. Notice that AAOIFI’s definition does not mention financial assets or debt receivables as possible asset classes that can be represented by the *ṣukūk*. This exclusion is mainly due to fact that AAOIFI does not recognize the validity of sale of debt.

*Ṣukūk* can be structured in various forms. The types of *ṣukūk* issued can take various structures depending on the underlying *Shari‘ah* principles, such as *baybithaminājil*, *murābaḥah*, *salam*, *istiṣnā*, *ijārah*, *mushārahah*, *muḥārabah* and *wakālah* (Kamil, 2008). These can be further grouped into three main clusters – sale-based *ṣukūk* (comprised of *bay bithamin ājil*,

*murābahah*, *salam*, *istiṣnā*), lease-based *ṣukūk* (*ijārah*) and equity-based *ṣukūk* (*mushārahah*, *muḥārabah* and *wakālah*). Figure 2 illustrates the trend of each cluster issued.<sup>4</sup>

Figures 2: Trend in Types of *Ṣukūk* Issued



As depicted in Figure 2, in the year 2007, equity-based *ṣukūk* was the most popular type of *ṣukūk* issued. It represents 75% of *ṣukūk* issuance in 2007. However, there was a huge drop of equity-based *ṣukūk* in 2008. This may be partly attributed to the AAOIFI pronouncement to be discussed below. It cannot be confirmed that the AAOIFI pronouncement caused the *ṣukūk* market to decline; nonetheless, based on the data above, the pronouncement may have had some influence.

#### 4.2. Equity-based *ṣukūk*

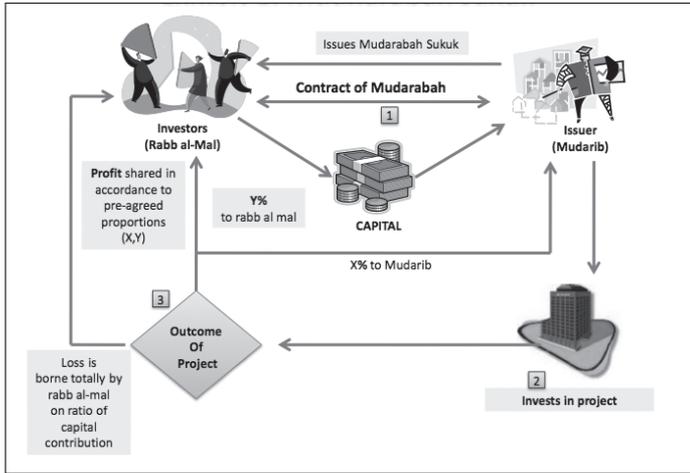
Equity-based *ṣukūk* as currently structured and issued in the market normally take the form of participatory contracts (*‘Uqūd al-mu‘āwanah*), namely *muḍārabah* and *mushārahah*. In the case of *muḍārabah*, the originator will be the managing partner of the venture without contributing any capital, only their skills and expertise. The Malaysian Securities Commission's *Guidelines on the Offering of Islamic Securities 2004* (hereafter referred to as the *IS Guidelines 2004*) in Para 1.05 (a) defines *muḍārabah* as:

A contract which is made between two parties to finance a business venture. The parties are a *rabb al-māl* or an investor who solely provides the capital and a *muḍārib* or an entrepreneur who

solely manages the project. If the venture is profitable, the profit will be distributed based on a pre-agreed ratio. In the event of a business loss, the loss shall be borne solely by the provider of the capital. (Securities Commission Malaysia, 2004)

Exhibit 1 shows a simple diagram of a *muḍārabah ṣukūk* transaction structure:

Exhibit 1: *Muḍārabah ṣukūk*



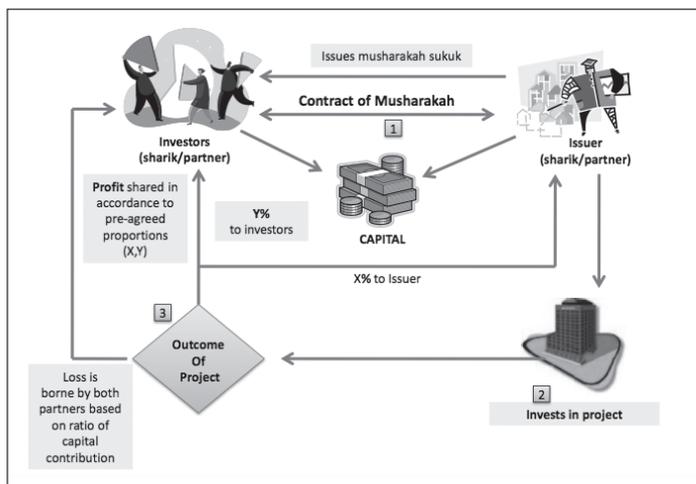
As depicted in Exhibit 1, the issuer will first call for investors to participate in the *muḍārabah* contract. The issuer acts as the manager or *muḍārib*, and the investors are the capital provider or *rabb al-māl*. The *muḍārabah ṣukūk* are issued by the issuer to evidence the proportionate capital contribution by the investors (*rabb al-māl*) to the *muḍārabah* and their subsequent rights in the *muḍārabah* project or investment activities. The issuer as *muḍārib* will then invest the *muḍārabah* capital in an agreed project. Normally, the *muḍārabah* project has already identified projected cash flow, and this allows the issuer to indicate an expected rate of profit to the investors upon initial issuance of the *muḍārabah ṣukūk*. The expected rate of profit should be calculated based on a pre-agreed profit-sharing ratio that is tentatively applied to the projected return of the project. After the project starts to generate profit, the issuer will apply the profit-sharing ratio and pay the profit share of the investors as periodic coupon distribution, normally at the expected profit rate. However, if the project suffers loss, it will be borne solely by the investors, except when the loss is caused by the negligence or mismanagement of the *muḍārib*.

Similar to the concept of *muḍārabah ṣukūk*, *mushārahah ṣukūk* is also an equity-based *ṣukūk*. Both *ṣukūk* do not represent debt receivables, but rights in specific investment projects or assets. In the case of *mushārahah*, the originator can be an equity partner in the venture that will be formed, by contributing capital in cash or kind. The *IS Guidelines 2004* defines *mushārahah* as:

A partnership arrangement between two parties or more to finance a business venture whereby all parties contribute capital either in the form of cash or in kind for the purpose of financing the business venture. Any profit derived from the venture will be distributed based on a pre-agreed profit-sharing ratio, but a loss will be shared on the basis of equity participation. (Securities Commission Malaysia, 2004)

Exhibit 2 depicts a basic illustration of a *mushārahah ṣukūk* transaction structure:

**Exhibit 2: *Mushārahah ṣukūk***



In a *mushārahah ṣukūk* transaction, both the issuer and investors will contribute to the capital of the *mushārahah* project. The *mushārahah* project is normally managed by either the issuer or a third party, as the case may be. Alternatively, a *mushārahah ṣukūk* transaction can also be structured with all investors contributing capital in a *mushārahah* project and then appointing the issuer as their agent to manage the *mushārahah*. This structure can

also be classified as investment agency *ṣukūk* (*ṣukūk wakālah bi istithmār*) (Engku Rabiah, 2009).

Based on the explanation above, it is clear that *muḍārabah* and *mushārahakah ṣukūk* are conceptually equity-based and are not debt instruments. The *muḍārabah* and *mushārahakah ṣukūk* represent the *ṣukūk*-holders' proportionate rights over the investment project and its revenue. Thus, the secondary trading of equity-based *ṣukūk* on the secondary market is not generally a sale of debt (unless it can be shown that the investment project has been liquidated and all its assets are in the form of cash or receivables).

It should be noted that it is not permissible to guarantee the capital or profit in an equity-based *ṣukūk* transaction. In *muḍārabah ṣukūk*, for instance, the *muḍārib* is considered as the manager and trustee (*amīn*) of the *mushārahakah* fund and its project (Engku Rabiah, 2009). Therefore, the *muḍārib* is not to be made responsible for losses unless due to negligence, mismanagement and dishonesty leading to losses. However, it is permissible for an independent third party to give a guarantee for preservation of *muḍārabah* capital.<sup>5</sup>

In both structures, the issuer will issue certificates evidencing the capital contribution of the investors in the *mushārahakah* and the 'indicative rate of profit'. The indicative rate of profit is derived from the application of the pre-agreed profit-sharing ratio to the expected or projected net profit of the *mushārahakah* venture. This indicative profit is not and cannot be guaranteed because, according to the rules of *mushārahakah*, any financial loss must be borne by all *mushārahakah* investors in proportion to their respective investments. However, as with *muḍārabah*, it is permissible for an independent third party to give a guarantee for preservation of *mushārahakah* capital.

### 4.3. Paradox in structuring equity-based *ṣukūk*

As illustrated in the preceding section, the fundamental characteristics of equity-based *ṣukūk* are rooted in two basic features; firstly, the capital cannot be guaranteed; and secondly, the periodic returns are also dependent on actual profits made and can be variable. However, these strict *Sharī'ah* prescriptions for equity-based *ṣukūk* structures may not be attractive to risk-averse investors with a conventional mind-set. In particular, the characteristics of *muḍārabah* and *mushārahakah* do not meet the risk appetite of investors who mainly expect capital preservation and fixed-income instruments as commonly featured in conventional bond instruments (Ghani, 2009).

Over time, the structure of equity-based *ṣukūk* has evolved into debt-based obligations, whereby various 'credit enhancement' strategies were introduced to the *muḍārabah* and *mushāarakah ṣukūk* structures to achieve capital protection and predictable periodic returns similar to other fixed-income or bond instruments. These enhancements basically give fixed income and capital preservation features to the equity-based *ṣukūk*. The following provides brief descriptions of various mechanisms of credit enhancements in *ṣukūk* structure:

(i) ***Liquidity-facility arrangement***

This is an undertaking given by the Obligor (the entity which needed the funding) that if there is insufficient cash to pay the returns to *ṣukūk*-holders, the Obligor will provide cash to ensure smooth profit payment. This liquidity is normally provided either in the form of a loan or other *Shari'ah*-compliant facility such as *tawarruq*.<sup>6</sup> For example let's say the *ṣukūk* raised was RM500 million and the expected return was 7%. In year 1, the actual return was only 5%. The Obligor then would provide additional 2% by way of liquidity facility to ensure the *ṣukūk*-holders get the 7% return.

(ii) ***Purchase undertaking at a fixed formula***

This is another credit enhancement mechanism whereby the Obligor will promise that at maturity or in the event of default he will buy back the *ṣukūk*-holder's interest in the partnership assets at par/face value (outstanding principal + accrued but unpaid profit), regardless of whether that value exceeds that of their face value or not. For example, say if the *ṣukūk* issued was for RM800 million and expected profit was 6% each year with 5-year maturity. At the end of year 5, the Obligor will buy back the *ṣukūk*-holder's share at the price of RM800 million + 6% return (for year 5).

(iii) ***Capping of profit with incentive payments***

The *ṣukūk*-holders will agree to forego any excess profit beyond the benchmark (i.e. the expected return). If, for example, the expected return is 6.5%, and the actual return (based on the profit-sharing ratio) was 10%, the *ṣukūk*-holders will only take 6.5% and give the excess to the Obligor for good performance.

(iv) ***Non-distribution of expected profit constituting event of default***

This is also known as the non-payment clause which says that if the Obligor fails to pay profit (or any amount due) this will be considered as default.

Obviously from the brief descriptions above, the various credit enhancements embedded in *şukūk* structures resemble conventional bond features. These innovations inevitably aim to achieve the same economic outcome as conventional bonds. Consequently these fixed-income enabling mechanisms embedded into equity-based *şukūk* have been the subject of strong criticisms by various parties in terms of their compliance with the *Shari'ah* requirements of *muḍārabah* and *mushārahah* contracts.

In particular, the *Shari'ah* Board of Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) published a statement in February 2008 suggesting that *mushārahah* and *muḍārabah şukūk* with credit enhancement mechanisms as practised by the market were not congruent with *şukūk* principles (AAOIFI, 2008a). More specifically, AAOIFI's pronouncement highlighted two main issues with regard to equity-based *şukūk*; namely the usage of liquidity facility and the purchase undertaking at par to redeem the *şukūk*.<sup>7</sup> Box 1 highlights the AAOIFI's pronouncement in February 2008, which is relevant to equity-based *şukūk*.

**Box 1: AAOIFI's Pronouncement on Equity-Based Şukūk (extract)**

**Third:** It is not permissible for the Manager of *şukūk*, whether the manager acts as *muḍārib* (investment manager), or *sharīk* (partner), or *wakīl* (agent) for investment, to undertake to offer loans to *şukūk* holders, when actual earnings fall short of expected earnings. It is permissible, however, to establish a reserve account for the purpose of covering such shortfalls to the extent possible, provided the same is mentioned in the prospectus. It is not objectionable to distribute expected earnings, on account, in accordance with Article (8/8) of the AAOIFI *Shari'ah* Standard (13) on *muḍārabah*, or to obtain project financing on account of the *şukūk* holders.

**Fourth:** It is not permissible for the *muḍārib* (investment manager), *sharīk* (partner), or *wakīl* (agent) to undertake {now} to re-purchase the assets from *şukūk* holders or from one who holds them, for their nominal value, when the *şukūk* are extinguished, at the end of their maturity. It is, however, permissible to undertake the purchase on the basis of the net value of assets, their market value, fair value or a price to be agreed, at the time of their actual purchase, in accordance with Article (3/1/6/2) of AAOIFI *Shari'ah* Standard (12) on *sharīkah* (*mushārahah*) and Modern Corporations, and Articles (2/2/1) and (2/2/2) of the AAOIFI *Shari'ah* Standard (5) on Guarantees. It is known that a *şukūk* manager is a guarantor of the capital, at its nominal value, in case of his negligent acts or omissions or his non-compliance with the investor's conditions, whether the manager is a *muḍārib* (investment manager), *sharīk* (partner) or *wakīl* (agent) for investments.

In case the assets of *şukūk* of *al-mushārahah*, *muḍārabah*, or *wakālah* for investment are of lesser value than the leased assets of "Lease to Own" contracts (*ijārah muntahiyah bitamlīk*), then it is permissible for the *şukūk* manager to undertake to purchase those assets - at the time the *şukūk* are extinguished - for the remaining rental value of the remaining assets; since it actually represents its net value.

As highlighted in Box 1, AAOIFI actually reiterated its existing standard on investment *ṣukūk* especially on the usage of liquidity facility and the purchase undertaking at par (AAOIFI, 2008b). From a *Sharī'ah* point of view, *ṣukūk* structured on a *muḍārabah* and *mushārahah* basis should not embed any form of guarantee, neither on the return nor the principal, as it is viewed as a trust-based instrument that has strong equity-like features.

As described earlier, the use of liquidity facility, sometimes called a 'top-up' facility, when actual earnings fall short of expected earnings in the *ṣukūk* structure resembles a bond feature, wherein the *ṣukūk* manager (Obligor), who is either an entrepreneur (*muḍārib* in *ṣukūk muḍārabah*) or investment partner (*sharik* in *ṣukūk mushārahah*), agrees to advance a sum of money to ensure that *ṣukūk*-holders get their full payment of the expected return on a periodic basis. The undertaking of the manager (obligor) to offer loans to the *ṣukūk*-holders at times when actual returns fall below the (promised) rate of return are tantamount to the prohibited sales linked to credit. It is well known that Prophet Muhammad (*pbuh*) prohibited sales linked to credit. The same was related by Imām Mālik in his *al-Muwatṭa'*, on the authority of trusted narrators (*bālighān*), and by Abū Dāwūd and al-Tirmidhī, whose version reads, "A sale and a loan are not lawful." Al-Tirmidhī added, "This is a good and a sound *ḥadīth*" (Usmani, 2008).

Furthermore, under most equity-based *ṣukūk* structures, it involves either the sale of assets (*shirkat al-milk*<sup>8</sup>) with a promise by the *ṣukūk* manager (Obligor) to repurchase the assets based on the *wad* principle,<sup>9</sup> or *ṣukūk*-holders just injecting capital into the business operation of the *ṣukūk* manager. In *mushārahah*, the Obligor will provide capital in kind while in *muḍārabah* the Obligor does not have to provide any asset. In all these structures there will be *wad* in the form of a purchase undertaking by the Obligor (at the beginning) to re-purchase the assets/shares from *ṣukūk*-holders for their nominal value at a certain agreed price. This would ensure that the principal/capital invested by the *ṣukūk*-holders remains intact. In other words, *ṣukūk*-holders shall rest assured that their capital will be guaranteed at maturity since the purchase undertaking allows *ṣukūk* assets to be redeemed at par, hence achieving the same economic outcome as a conventional bond.

#### 4.4. Substance and form

Apparently, the credit enhancements that have been described in the preceding section involve arrangements and commitments, which, if taken on their own, are perfectly acceptable and permissible. Such arrangements

include promises or undertakings (*wad*) to do a certain act in the future, such as to give a loan or to buy assets, or to give incentive payments for jobs well done, *etc.* The original permissibility of such undertakings is the main reason why these structures and arrangements received endorsement by the *Shari'ah* advisors concerned.

However, when taken in the context of the whole process of *shukūk* issuance, periodic distribution payments and redemption upon maturity, these otherwise innocent promises and undertakings clearly look like devices to achieve capital preservation and predictable rates of return on investment (similar to conventional bonds/debt instruments), which cannot be achieved directly in the *muḍārabah* and *mushārah* contracts (Engku Rabiah, 2009). Thus, the issue is whether such practices amount to tricks (*hiyal*) to circumvent certain prohibitions by using legalistic devices and arrangements.

However, as discussed earlier, the legal form is not sufficient to certify and justify the permissibility of a contract, although it may be perceived to be so for validity. Therefore, to claim permissibility merely based on the legal form of the transaction definitely undermines *ijmā'* (consensus of jurists) and goes against the very principles of *Shari'ah* and religion in general. The use of credit enhancement strategies like purchase undertaking in structuring *shukūk* to enable the guarantee-resembling features of conventional bonds has obviously maintained the legality of the form (*ḥalāl qaḥā'an*) but neglected the legality of the substance (*ḥalāl diyānatan*), despite the fact that the objective of the form is to help ensure the compliance of the substance with the *Shari'ah* and it is not meant as an aim in itself.

If properly observing *maqāṣid al-Shari'ah* entails observing the rationale and the spirit of the texts, then observing only the form and the structure of contracts functions against the rationale and spirit of *maqāṣid al-Shari'ah* (Usmani, 2008). Surprisingly enough, *maqāṣid al-Shari'ah* have been used here as a justification for the adoption of such controversial transactions, whereas observing *maqāṣid al-Shari'ah* ought to be the primary incentive to determine their prohibition.

### **V. Macro-*maqāṣid* versus Micro-*maqāṣid***

One may think that by legalizing and structuring instruments that replicate conventional transactions, such as embedding a fixed-income enabling mechanism in equity-based *shukūk* by way of purchase undertaking, the macro-*maqāṣid* are observed. What we mean by macro-*maqāṣid* here is the interest or benefits related to the overall well-being and welfare of

the economic system, which has been the objective of Islamic economics for so long; whereas micro-*maqāṣid* only relates to certain micro-issues pertaining to certain individual financial transactions. Obviously macro-*maqāṣid* are more important matters for concern and observation than any micro-*maqāṣid*. These macro-*maqāṣid* manifest themselves in structuring an Islamic economy and pushing it forward to compete with and supersede the conventional banks, at least in the Muslim countries. We may argue that maintaining the permissibility of certain transactions helps to achieve the particular *maqāṣid* of certain detailed rulings but at the expense of the macro-*maqāṣid* of *Sharī'ah*, or more specifically, the *maqāṣid* of the Islamic law of transactions, since the latter aims at building a strong, just economic system.

Apparently, over-emphasizing debt-based instruments in the economy would not help to remove injustice, harm, inequity and inefficiency, the removal of which is enshrined among the objectives of the *Sharī'ah*. It is an established fact that mere debt creation and proliferation via various debt-based instruments accentuates inequality, as it redistributes wealth in favour of suppliers of finance, irrespective of actual productivity of the finance supplied (Mirakhor, 1995; Siddiqi, 2004). Moreover, a monetary system based merely on debt creation and speculative finance based on debt creates *fasād* (harm) that results in inequity in the distribution of income and wealth and contributes to greater instability in the economy (Siddiqi, 2007). Therefore, debt-based instruments like those resulting from fixed-income enabling mechanisms embedded into *ṣukūk* sever all links with the real assets which they could have been associated with in the beginning of *ṣukūk* issuance. This process inadvertently shifts the transaction from that of the asset market to the money (debt) market, where the underlying signalling and equilibrium mechanisms are no longer linked to the real market.

It is important to note that debt as an individual transaction is not illegal from a *Sharī'ah* point of view.<sup>10</sup> However, when viewed from a larger perspective on the role of debt in modern-day transactions, it is apparent that it can cause harm to the entire society, so different rulings need to be asserted. It has been an accepted principle in Islamic jurisprudence that priority is given to public interest (*maṣlahah 'āmmah*) over individual interests (*maṣlahah khāṣṣah*). Therefore the benefits of debt-based instruments (such as equity-based *ṣukūk* with the embedded credit enhancers) must be overruled in certain circumstances, given the huge public benefits of not proliferating debt.

On a different note, we also need to address the common confusion with regards to perception of potential conflict between a perceived *maṣlahah* and a *Sharī'ah* text. Essentially, the *Sharī'ah* texts must always prevail over the perceived *maṣlahah*. Only by acknowledging this hierarchy can the realization of *maṣlahah* for human beings be truly achieved, since we recognize the authority of the Lawgiver Himself, Who is the Most Knowledgeable and the Most Wise. In other words, the determination of *maṣlahah* in terms of what is beneficial and what is harmful cannot be left to human reasoning alone. Instead, as Muslims, we should reverently affirm what has been prescribed by the Lawgiver in the *Sharī'ah* texts. This is because the inherent limitations of human beings require Divine guidance to ascertain what is right and what is wrong. In this regard, Ibn Taymiyyah says: "What constitutes a *maṣlahah* or a *mafsadah* is subject to the standards of the *Sharī'ah*" (Ibn Taymiyyah, n.d., 8:129). Al-Dahlawī states: "Our Lawgiver is more trustworthy than our reason" (Al-Dahlawī, 1413 A.H., 1:13)

If there was a preponderant *maṣlahah* in *ribā* or what resembles it of guaranteed return and principal in the equity-based *ṣukūk* structure, then the Lawgiver would not have declared *ribā* as such a serious evil and one of the gravest sins that invokes a severe curse and declaration of war by the Almighty. The Qur'ān says: "But God has permitted trade and forbidden *ribā*" (2:275) and, "God blights *ribā*;" (2:276) and, "O you who believe, fear God and give up any outstanding dues from *ribā* if you are indeed believers; but if you do not, be warned of war from God and His Messenger" (2:278-279). No other sin is prohibited in the Qur'ān with a notice of war from God and His Messenger.

## VI. The Misguided *Ḍarūrah*

*Ḍarūrah*, which means (short term) necessity, renders prohibited things permissible, as was unanimously affirmed by scholars and summarised in the well-established *fiqh* maxim, "Dire necessity makes the forbidden permissible" (*al-ḍarūrāt tubīḥ al-maḥḍūrāt*). However, when jurists discussed and explained the applications of this *fiqh* maxim they mentioned what is known in Arabic as *ḍawābiṭ* (parameters) for its functionality. These parameters are, of course, stated in or derived from the *Sharī'ah* texts. The first guideline (*ḍābiṭ*) defines what constitutes a *ḍarūrah*. The jurists' assessment can be summarized by saying that *ḍarūrah* is something which is indispensable for the preservation and protection of the five essential values or *maṣāliḥ*: faith, life, intellect, posterity and wealth (Al-Shāṭibī, n.d., 2/10). This means that the *ḍarūrah* that would give the accountable person

(*mukallaf*) legal excuse to commit the forbidden is what is indispensable for his survival, spiritually and physically.<sup>11</sup>

Applying the principle of *ḍarūrah* to the case in question would not sanction the rendering of a unanimously forbidden transaction permissible so as to apply it in Islamic finance. Even if we rightly presume that, due to certain considerations, such products are inevitable for the Islamic bank's survival and long-term sustainability, it could be argued that the very concept of the bank itself is not indispensable for the *mukallaf's* survival from the *Shari'ah* perspective. If such *ḍarūrah* hypothetically exists, then it would rather legitimize dealing directly with conventional finance.

Undoubtedly, when *Shari'ah* supervisory boards, academic councils, and legal seminars have given permission to Islamic banks to carry out certain operations that more closely resemble stratagems than actual transactions, such permission was granted in order to facilitate, under difficult circumstances, the figurative turning of the wheels for those institutions when they were few in number and short of capital and human resources. It was expected that Islamic banks would progress in time to genuine operations based on the objectives of an Islamic economic system and that they would gradually distance themselves from what resembled interest-based enterprises (Usmani, 2008).

What is happening at the present time, however, is the opposite. There is a tendency in many Islamic financial institutions today to conveniently use *ḍarūrah* as an excuse to legalize certain transactions, such as the feature of guaranteed profit and principal in equity-based *ṣukūk* structures, although all jurists agree on its impermissibility. Oftentimes, the so-called Islamic products are rushed to market using ploys that sound minds reject and that evoke the mirth of enemies (Usmani, 2008). Even if the justification of *ḍarūrah* is considered valid, they should acknowledge the original ruling of the transaction and not simply alter it and then attribute it to the *Shari'ah*.

Even in a worst-case scenario, there is a well-established ruling that when a person is given the excuse to commit the forbidden on the grounds of *ḍarūrah*, he can never deny the original ruling of its prohibition. Hence he cannot claim the original permissibility of his commission of the forbidden. For example, if a person is excused to seek a *ribā*-based loan due to the occurrence of an extreme urgency and the absence of any possible alternative source of finance, under no circumstances can he deny the prohibition of *ribā* or regard it as permissible. Otherwise, such an act is tantamount to disbelief in God's ruling, since the impermissibility of *ribā* is definitive.

So, where is the *ḍarūrah* that may allow these *ṣukūk* to be structured in a way that abandons the genuine principles of *ḍarūrah* in favour of a harmful and destructive one? Legalizing a forbidden thing on the grounds of *ḍarūrah* is supposed to solve a problem not create a bigger one. Islamic banks have been in the business for more than three decades, and so far they still offer the same excuses of *ḍarūrah* and the impracticality or impossibility of adopting lawful business contracts, due to the existence of certain obstacles and deterrents. The questions are: Do these obstacles and hindrances still exist after more than three decades of Islamic banking development? Are there any indications to suggest a possible change? How has this excuse of *ḍarūrah* affected the behaviour of Islamic banks in product innovation?

In the final analysis, the entire practice of Islamic finance has to be studied not only from the perspective of legal forms in Islamic jurisprudence. More importantly, the true success of Islamic finance will be measured by the extent to which its practitioners can integrate the social goals with the mechanics of financial innovation. That, in turn, requires a holistic understanding of the economic reasoning underlying classical jurisprudence, which is contained in *maqāṣid al-Sharī'ah*.

However, if we examine the current structure of *ṣukūk* from the perspective of those *maqāṣid*, then those *ṣukūk* in which are found nearly all of the characteristics of conventional bonds are inimical in every way to these higher purposes and objectives of the *Sharī'ah*. Obviously, Islamic finance was not introduced so that it could offer the same products and engage in the same operations as the prevalent interest-based finance. Instead, the purpose was to gradually open up new horizons for business, commerce and banking that would be guided by social justice in accordance with the principles established by the *Sharī'ah*. Once Islamic finance outgrows its formulaic current mode of operation and assumes a new identity based on substantive objectives of *Sharī'ah*, it will eventually become more authentic and allow the industry to serve Islamic ideals.

## VII. Conclusion

This paper critically evaluates, in light of the objectives of *Sharī'ah* (*maqāṣid al-Sharī'ah*), the practice of equity-based *ṣukūk*, which is one of the main Islamic capital market instruments for mobilizing Islamic funds. The study focuses on the issue of credit enhancement mechanisms used in structuring *muḍārabah* and *mushārahah*-based *ṣukūk*, namely the use of liquidity facility and purchase undertaking. These credit enhancement mechanisms used in *ṣukūk* today, however, strike at the foundations of these objectives and

render the *ṣukūk* exactly the same as conventional bonds in terms of their economic results.

After deliberation on the foregoing arguments, this paper concludes that the widespread use of credit enhancement mechanisms, namely the liquidity facility and purchase undertaking at par, does not conform to the *maqāṣid al-Shari'ah*. Most of the mechanisms adopt *Shari'ah* principles like *wad*, which is perfectly *Shari'ah*-compliant if we look at it as a stand-alone element in equity-based *ṣukūk*; however, when we look at the combined effect of *wad* and its price, it plays the role of guarantee because it provides the investors with recourse to the Obligor. This assertion substantially supports the pronouncement by AAOIFI that the two strategies in combination are unlawful. AAOIFI has made a very clear indication that on the issue of liquidity facility, it is unlawful for a manager to lend money when actual profits are less than expected. Nevertheless, AAOIFI allows setting up a reserve from actual profit realized for the purpose of smoothing out the profit distribution. With regards to purchase undertaking-strategy, AAOIFI asserts that it is unlawful for a manager, whether a *muḍārib* or a partner or an agent, to commit to repurchase an asset at face value. Instead, their resale must be undertaken on the basis of the net value of the assets or at a price that is agreed upon at the time of purchase.

The paper also argues that the restrictive approach to understanding *Shari'ah* by only focusing on the legal forms of a contract needs to be changed. Instead, the substance, which has greater implications for the realization of *maqāṣid al-Shari'ah*, should be given equal consideration, especially when structuring a financial product. Otherwise, Islamic banks will appear as mere producers of names and labels, their functions and operations essentially no different from conventional banks, except in their use of euphemisms to disguise *ribā* and circumvent various *Shari'ah* prohibitions.

Therefore, Islamic banking and finance must ensure that all of its transactions are *Shari'ah*-compliant, not only in their forms and legal technicalities but, more importantly, in their economic substance, which should be premised on the objectives outlined by the *Shari'ah*. As discussed, if the economic substance of a given transaction is identical to that of the prohibited transaction, such as the one in which the bank or the financier acts as a creditor not as a trader of real property, then this must render the transaction impermissible, regardless of its legal form.

In a nutshell, Islamic banks should do away with all the controversial contracts that may impede the growth and progress of the Islamic banking

and finance industry. Indeed, the Islamic banking system has the potential to become one of the promising sectors for realizing the noble objectives of the *Shari'ah*, as it resides within a financial trajectory underpinned by the forces of *Shari'ah* injunctions. These *Shari'ah* injunctions interweave Islamic financial transactions with genuine concern for a just, fair and transparent society at the same time as prohibiting involvement in illegal activities which are detrimental to social and environmental well-being. There are fundamental differences between Islamic banking and conventional banking, not only in the ways they practise their business, but, above all, in the values which guide Islamic banking's whole operation and outlook. The values that prevail within the ambit of the *Shari'ah* are expressed not only in the minutiae of its transactions, but in the breadth of its role in society. This requires the internalization of *Shari'ah* principles on Islamic financial transactions in respect of their spirit and substance, not just their contractual form – doing so will help to realize the *Shari'ah* objectives of promoting economic and social justice.

## NOTES

1. The formulation of a rule on the basis of *al-maṣāliḥ al-mursalah* must take into account public interest and conform to the objectives of *Shari'ah*. According to the Maliki school, the application of this tool must fulfil three main conditions. First, it only deals with transactions (*mu'āmalāt*) where reasoning through rational faculty is deemed to be necessary. That would exclude its application to acts of worship (*'ibādah*) which are strictly subject to the primary sources of the *Shari'ah*. Second, the interests should be in harmony with the spirit of the *Shari'ah*. In other words it must not be in conflict with any of its main sources. Third, the interests should be of essential (*ḍarūrah*) or necessary (*ḥājjah*) nature and not in the class of embellishments. Here the essential implies the preservation of the five main objectives of *Shari'ah*. For details, see Mahmassani, (2000: 87-89).
2. Ibn 'Ābidīn, *Radd al-Muḥtār*, 5:48; *al-Dasūqī, al-Ḥāshiyah*, 3:76; al-Qarāfī, *al-Furū. q.*, 3:268; Mohammad Ali, *Tahdhīb al-Furū. q.*, 3:275; Ibn Juzay, *al-Qawānīn al-Fiqhiyyah*, p. 140; Al-Shāfi 'al-Umm, 4:114; Ibn al-Qayyim, *'Ilām al-Muwaqqi'īn*, 3:109-121; Ibn Ḥazm, *al-Muḥallā*, 10:180.
3. Based on the *ṣukūk* Database provided by IFIS, accessed on 5th August, 2009.
4. Based on the *ṣukūk* Database provided by IFIS, accessed on 5th August, 2009.
5. Refer to AAOIFI *Shari'ah* Standard No. 5 on Guarantees, Clause 7/6: "It is permissible for a third party, other than the *muḍārībor* investment agent or one of the partners, to undertake voluntarily that he will compensate the investment losses of the party to whom the undertaking is given, provided this guarantee is not linked in any manner to the *muḍārabah* financing contract or investment agency contract."
6. *Tawarruq* is actually a sale contract whereby a buyer buys an asset from a seller with deferred payment and subsequently sells the asset to a third party for cash at a price less than the deferred price, for the purpose of obtaining cash (Dusuki, 2007).

7. The pronouncement highlighted six issues. The first two discussed the tradability of *ṣukūk*, while the last one made recommendations to Shari'ah Boards. For detail of the pronouncement, refer to (AAOIFI, 2008a).
8. In *mushārahah ṣukūk* utilizing the *shirkat al-milk* structure, the Obligor will usually have a portfolio of assets that are being leased out to clients. The *ṣukūk*-holders via the trustee will buy part of this portfolio and become the joint owner with the Obligor. On the other hand, *ṣukūk* which is based on *shirkah al-‘aqd*, the *ṣukūk*-holders just inject capital into the business operation of the *ṣukūk* manager either in cash or in kind.
9. *Wad* is an Arabic word which literally means ‘a promise’. The value of the *wad* in *Shari'ah* is similar to the value of a social promise in Common Law. The promise may have moral force in that breaking it may provoke opprobrium (social blame), but it does not entail legal obligations or legal sanctions. However, The Islamic Fiqh Academy (based in the Kingdom of Saudi Arabia) has decided that the *wad* is “obligatory not only in the eyes of God but also in a court of law” when: it is made in commercial transactions; it is a unilateral promise; and it has caused the promisee to incur liabilities. Also it is a requirement that the actual sale—if the promisee was in respect of selling a certain asset—be concluded at the time of exchange of the offer and the acceptance (known in Arabic as *majlis al-‘aqd*) and not at the time of the *wad*. The promisee also has the possibility to claim actual damages from the promissory if the latter backs out on a *wad*. Refer to (OIC Fiqh Academy, 1409H).
10. Although debt is legitimate from the *Shari'ah* viewpoint, it is considered undesirable and hence should be avoided, for fear one may not be able to repay his debt. The Prophet (peace be upon him) always cautioned about the negative repercussion of debt. He was even reported to have declined praying over a dead man who was still indebted. In an authentic ḥadīth on the issue, Salamah ibn al-Akwa‘ reported that a deceased man was brought to the Prophet (peace be upon him), who asked, ‘Is there any debt against him?’ The companions replied, ‘Yes.’ The Prophet asked, ‘Has he left anything (behind to repay the debt)?’ The Companion replied, ‘No.’ The Prophet (peace be upon him) told them, ‘Pray over your companion.’ Abū Qatādah volunteered, ‘Messenger of God, (the debt) is on me.’ Then only did the Prophet (peace be upon him) pray over the deceased. (See al-Bayhaqī, *Ma‘rifat al-Sunan*, vol. 10, p. 96.)
11. *Majallat al-Aḥkām al-‘Adliyyah*, section 22; Ibn Nujaym, Zayn al-Dīn, *al-Ashbāh wa’l-Naḍā‘ir*, 1:105-107; al-Suyūṭī, *al-Ashbāh wa al-Naḍā‘ir*, pp. 84-92; al-Kurdī, Aīmad. *al-Ma-dkhal al-Fiqhī*, p. 48.

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