

Analysis on the Thoughts of Imam Abu Hanifah and Imam Syafi'i on the *Ijtihad* Method for *Sukuk* Instrument

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Abstract

The paper aims to analyse the thoughts of Imam Abu Hanifah and Imam Syafi'i on sukuk instruments. This paper is divided into two parts. The first part presents the need yet destructive forces of globalization and free trade era in today's civilization dominated by a capitalistic system which had inadvertently caused global financial crisis and accelerated the issue on poverty, knowledge deficiency and moral decadence. These destructive forces have led to the rise of the Islamic economy concept, amongst others on the need for sukuk instruments. The discussion focuses on sukuk instrument as sukuk has an important role in free trade to fulfill the increased extraordinary economic needs of Islamic countries as well as to realize the economic needs of the entire world. The second part of the paper then analyses the legal aspects of sukuk being a subject of ongoing debate among the experts of Islamic law that seemingly has a negative tendencies on the development of sukuk. The group that rejects sukuk are influenced by the qiyas (analogical) method of Imam Syafi'i who assumed that sukuk has the conventional elements of risk (gharar) and gambling (maisir). The group that accepts sukuk is influenced by the thoughts of Imam Abu Hanifah who assumed that sukuk is a case of individual interpretation and judgment of Islamic law that should go through the *ijtihad* method. It is found that both schools of thoughts in essence accepted sukuk as an Islamic financial instrument. This is because Imam Abu Hanifah relied on the *istihsan* method whilst when Imam Syafi'i digressed from the qiyas method and used the *takhsis* theory, the resource levels of legal sources theory and the language approach theory. These theories relied by Imam Syafi'i are all in essence the *istihsan* theory according to Imam Abu Hanifah.

Keywords: Imam Abu Hanifah; Imam Syafi'i; *ijtihad* method; sukuk instrument

Abstrak

Kertas kerja ini bertujuan untuk menganalisa pemikiran Imam Abu Hanifah dan Imam Syafi'i berkenaan instrumen sukuk. Data yang diperolehi untuk kertas kerja ini diperolehi menerusi kajian perpustakaan dengan menggunakan analisis tekstual. Perbincangan di dalam kertas kerja ini dibahagikan kepada dua bahagian utama. Bahagian pertama bermula dengan latarbelakang terhadap kemunculan sukuk sebagai sebahagian daripada sistem kewangan Islam yang baru. Di sini perbincangan menjurus kepada definisi dan sejarah perkembangan instrumen sukuk serta menyampaikan tentang kepentingan peranan sukuk dalam dagangan bebas untuk memenuhi keperluan ekonomi negara-negara Islam dan juga keperluan ekonomi seluruh dunia menerusi konsep *Rahmatan li al-'amin*. Bahagian kedua kertas kerja ini pula menganalisa sukuk daripada aspek hukum di mana sukuk masih menjadi subjek perbahasan yang berterusan di kalangan pakar undang-undang Islam yang seolah-olah mempunyai kecenderungan negatif terhadap perkembangan sukuk. Golongan menolak sukuk, dipengaruhi metod qiyas Imam Syafi'i membuat andaian bahawa masih terdapat unsur-unsur lazim (gharar dan maisir) dalam sukuk. Golongan menerima sukuk pula dipengaruhi pemikiran Imam Abu Hanifah, membuat andaian bahawa sukuk adalah berdasarkan kepada tafsiran perseorangan dan hukum Islam yang seharusnya mengikut kaedah *ijtihad*. Walau bagaimanapun apabila analisis lanjut dilakukan didapati bahawa pada dasarnya pemikiran Imam Abu Hanifah dan pemikiran Imam Syafi'i menerima sukuk sebagai instrumen kewangan Islam. Ini adalah kerana Imam Abu Hanifah bergantung kepada kaedah *istihsan* manakala Imam Syafi'i keluar daripada kaedah qiyas dan menggunakan teori *takhsis*, teori tahap-tahap sumber hukum dan teori pendekatan bahasa. Teori-teori ini yang digunakan oleh Imam Syafi'i adalah semua pada dasarnya teori *istihsan* menurut Imam Abu Hanifah.

Kata kunci: Imam Abu Hanifah; Imam Syafi'i; kaedah *ijtihad*, instrumen sukuk

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1.0 INTRODUCTION

Many new economic concepts had begun to appear of late. One of the new economic systems of Islam is the sukuk instrument. Sukuk has an important role and will increase its significance in today's free trade as sukuk affects the monetary and real sector. It is also deemed as the alternative solution to the capitalist system which has the tendencies to be involved in *maisir* (gambling), *gharar* (risk), and *riba'* (usury) in both the money market and capital market. The need of sukuk is in the *dzaruriyyah* (urgent) level. Majority of Muslim countries especially in the ASEAN will use sukuk in the global market as they are poised to become a center of Islamic finance at the international level. But, there is still a debate among the experts of Islamic law on the legal aspects of sukuk. Therefore, *ijtihad* is carried out as stipulated by the rules of Imam Abu Hanifah and Imam Syafi'i who are the "founding fathers" of the Islamic jurisprudence. Thus this paper will explain how the *ijtihad* method of Imam Abu Hanifah and Imam Syafi'i derived the rulings pertaining to sukuk instrument because these two imminent scholars of Islamic jurisprudence are the pioneers that provided the stepping stone for the development of Islamic law internationally.

2.0 THE DEFINITION OF SUKUK

In this discussion, the etymological and terminological definitions of sukuk will be presented. The meaning of sukuk when associated with the aspects of Islamic laws gives rise to a debate amongst Islamic economists and Islamic jurists as sukuk is an implicit Islamic financial instrument that cannot be obtained explicitly from the divine texts. Thus the epistemological formulation of sukuk is achieved through a combination of *dalil al-al-naql* (revealed knowledge) and *dalil al-naqli* (man-made knowledge) by using the *ijtihad* method. As such it is pertinent that the definition of sukuk is discussed as a prelude to this paper.

2.1 The Etymological Definition of Sukuk

The term of sukuk derived from holy Qur'an in Surah at-Dzariyah: 29 "تَكَفَّرَ بِرَأْسِهَا" (interpreted as "Then she smote her forehead..."). According to the experts on interpretation on the above verse, sukuk means to put the tip of one's finger and hand over one's forehead to calm down the mind as an incredible miracle obtained against one's self (Qurtubi, 2005).

According to Imam Al-Nawawi (a scholar of the Imam Syafi'i persuasion) the word sukuk is derived from the word كُفْرًا; plural form is كُفْرًا which means ownership, value, benefits and services for specific projects or activities of certain investments. It is also referred to the documents containing the loan agreement (Nawawi, 1992).

Some scholars say that sukuk is derived from the Arabic language. كُفْرًا كُفْرًا كُفْرًا Means writing. (Nawawi, 1992). In Arabic dictionaries, كُفْرًا; plural form is كُفْرًا means documents, charters, certificates, records of evidence, proof of ownership (Munawwir, 2007). Furthermore based on the Arabic encyclopedia, كُفْرًا or the plural form كُفْرًا means legal instruments or checks.

In the Arabic term sukuk is used to refer to bonds based on Islamic law principles. Sukuk can also be interpreted as the stock certificates or proof of ownership that has the same worth. Although the etymological meaning of sukuk above are

different, however in essence they are the same, that is, sukuk refers to a document that contains an agreement in trade.

2.2 The Terminological Definition of Sukuk

The term sukuk had actually existed since the time of Caliph Mu'awiyah. However the literal and meaning of sukuk which became a discipline of study was formulated by Imam Al-Nawawi, a jurist from the Syafi'i school of thought. According to him sukuk refers to securities or stock certificates issued by the national leaders (rulers) to the person entitled to receive food items or objects who then they sell these securities or stock certificates before receiving the goods (Nawawi, 1992).

According to the advice of the Indonesian Religious Scholars Council No. 32/DSN-MUI/IX/2002, sukuk means: letter or certificate of long-term securities which are based on Islamic law issued by the security issuers to the bond issuers that require the issuer to pay the income to the bondholders in the form of production sharing or margins or fees, and the payment back of funding obligations as they mature (Scholars, 2006).

Sukuk is therefore terminologically understood as a financial certificate in the form of a written certificate that shows ownership of a project or investment. This is consistent with what has been concluded by Asem Albuolayan (n.d.) which had stated that sukuk is generally in the form of commercial notes that proved the property of investors to the issuers (Nurdin, 2006).

There is also other terminological definition of sukuk which refers to certificates or documents of equal value to the part or all of the ownership of tangible assets to generate revenue, and services in the ownership of certain projects or special investment activity. The certificate is valid upon the receipt of the sukuk while the due to receive full funding is based on the purpose of the sukuk. (Khitab, 2009)

Sukuk is thus the certificate evidencing the indebtedness of the issuer. It can also be used for certificate evidencing the ownership of investors in the underlying asset, such as *Ijarah*, finance and deposit *sukuk*. (Nurdin, 2006).

The above definition of sukuk are seemingly different, but the theory and system are same, that is, sukuk are deemed as securities with a value of benefits and services for specific projects asset or activities of specific investments. Through the Syariah transaction, the certificate is valid upon the receipt of the sukuk while when the maturity date is due, the receipt of full funding in accordance with the purpose of sukuk is thereby required.

The above definitions of sukuk suggests that although literally there are differences nonetheless the theories and systems are the same that is a letter of beneficial value and effort on an asset of a project or an ascertained investment activity through the syaria'h transactions with the profit sharing system and non-sharing, the certificate is validated after receiving the value of the sukuk at the time of maturity by receiving the full fund in accordance with the aims of the sukuk.

As such terminologically there are some similarities and differences between sukuk and bond. Among the similarities that sukuk and bond share a common trait is that both refer to certificates that prove the involvement of someone in the activity of business. However the difference between sukuk and bond is that bonds are more specific as bond merely acts as certificates that proved the indebtedness of a person. On the other hand sukuk are certificates that encompass all economic

activities whether those responsibilities are in relations to a form of debt or non-debt.

■3.0 THE DEVELOPMENT OF SUKUK THEORY

The birth of sukuk took place simultaneously with the development of Islam. It is the period when Islam conquered Romans in Palestine (the West) and the United Nations of Persia, Iraq – Iran (the East), assembling the people to embrace the religion of Allah. The presence of Islam is to eliminate the element of ‘Asabiyyah (rabid ethnic, racial and regional). There is no difference in the term of sukuk among Arabic, Roman, Persian, and Hindi, etc as the only compliance is under the banner of monotheism “There is no God except God”. (Al-Nasrati, 1998). After the period of the Caliphate Rashidun, the rule of the Muslims shifted from Medina to Damascus in Iraq. Thus Iraq became the centre of Islamic civilization with multi-ethnicity. This led to the differences of thoughts in various aspects such as in politics, economics, culture and theological aspects. In the economic aspect the differences caused progress to be made rapidly, which positioned sukuk as a part of the financial instrument which was introduced into the system of governance and the economic activities at the global level. Even the existence of sukuk instrument became the subject of debates among the scholars and the leaders during the Umayyad Dynasty which coincided with the time of Caliph Marwan. (Al-Nawawi, 1998). Thus from here it is significant to look into the past and examine the development of sukuk which can be broadly categorized into three main periods:

3.1 Period of Glory (150-350 H)

The glorious period of Islam (150-350 H), in the historical literature of Islam was in the field of the sciences, politics, economics and civilization. Succeeding the power transition from the Umayyad to the Abbasid Dynasty, economics and international trade transactions had been using the sukuk system in the term of السفتجة, notes, bonds (exchange) which essentially referred to the transfer of debt in which the implementation was in the future, or the giving of property to another person taken in a certain place (Muhammad). Sukuk developed rapidly and many countries were involved as it was applied in the agreement to protect one country from the grip of another country by giving gifts or a district of a country. In conjunction with the year 313 H the Governor (chief minister) of Egypt and Governor of Syria gave سكوك/سفاتج (bond) for about 147000 dinar to the Central Government in Baghdad. Sukuk was also applied in trade transactions to give the different province’s their shares with السفاتح or sukuk through their representatives (Al-Aziz, 1995).

3.2 Period of Decline (360-650 H / 13 M)

During the period of taqlid (or followers) which is also known as the period of decline (360-650 H / 13 M), internal conflicts within Muslims in the political field caused the collapse of the Abbasid Dynasty’ into the hands of Hulaku Khan. However in the scientific field especially related to the development of fiqh (legal rulings) and usul fiqh (jurisprudence), this period also evidenced a period of growth (al-Qadim) and maturation (al-Jadid) which later contributed to the evolution of the academic disciplines and the formulation of the concept of knowledge. In the area of sukuk instrument the scholars discussed it as follows:

(i) Scholars of the Hanafi persuasion called it bai’u al-gaibah, and

(ii) Scholars of the Maliki called it bai’u ‘ala al-barnamih.

However Abu Zakariyyah Yahya bin Syarif al-Nawawi from the Shafiite school of thought (w. 676) defined and explained the differences among the scholars on the sukuk instrument (Al-Nawawi, 1998). as sukuk was not a dilalah al-nass (explicit in the text of scripture) but it was dilalah al-isyari (implicit in the text of scripture). The Shafiite did *istinbath al-Ahkam* on the issue of sukuk development (masa’il mauqu’iyyah) with the spirit of ijtihad as endowed by their imminent cleric. With the definition of sukuk as explained by Imam Nawawi, sukuk became its own discipline as an Islamic Financial Instrument. Furthermore sukuk had been applied in the period of Caliphate Muawiyah and during the Abbasid Dynasty.

3.3 Period of Resurrection (661-728 H / 13 M)

Imam Ibn Taymiyyah and Ibn al-Qayyim al-Ma’ad inspired the resurrection period (661-728 H) (Badran, 2002). Both of them managed to open the public interest in Islam to go back to al-Qur’an and al-Sunnah, with the declaration of a renewal to the madhhab (schools of thoughts). It is intended as a movement to reduce tensions of fanaticism in certain sects.

It was during this period that discussion of division of labor and specialization emanated. In turn this led to an emphasis on trade and exchange, the existence of well-regulated and properly functioning markets through their effective regulation and supervision (hisbah), and money as a stable and reliable measure, medium of exchange and store of value. This resulted in complications arising due to the debasement of currencies by governments in the later centuries to tide over their fiscal problems which had the effect of bad coins driving good coins out of circulation (al-Misri, 1981, pp. 54 and 66). The Muslim world saw the expansion of domestic and international trade, and thus developed a financial system, which was able to mobilize the “entire reservoir of monetary resources of the mediaeval Islamic world” for financing agriculture, crafts, manufacturing and long-distance trade (Udovitch: 1970).

By the time of Abbasid Caliph al-Muqtadir (908-32), the Muslim world had started performing most of the basic functions of modern banks (Fischel, 1992). They had their markets, something similar to the Wall Street in New York and Lombard Street in London, and fulfilled all the banking needs of commerce, agriculture and industry (Duri, 1986). It was during this period that the use of checks (*sakk*) and letters of credit (*hawala*) were promoted (M. Chapra, 2008).

But in the political aspects, the period ended with the defeat of the Muslims in the Ninth Crusade (1271AD-1272AD) with victory on the side of the Christian factions. Thus, the Western countries started the movement against imperialism and colonialism towards the Muslim countries in all aspects including economic aspects.

3.4 Post Colonisation Period (1950s – present day)

The movement of the Western world, in fact, caused oil crisis in 1970’s and neo-liberalism (1983-1984 and 1997-1998). This crisis was caused by the rally of currency and capital market (not the real sector crisis) (Hadi, 2010). And the worst financial crisis happened in America in 2008 that implied a global crisis as a result of the capitalist system with a system of interest. This phenomenon made the Islamic jurists to provide a ruling that the interest system of the capitalist through bonds, stock

system and others are illegal (Khitab, 2009). They provided solutions by formulating the Islamic economic system and the system of sukuk instruments.

In 1980, Pakistan launched a kind of sukuk as substitute for stock or bonds. The concept however was not named sukuk. The calculation of earnings is based per 6 month tenure with the expectation of the mid and long term range. In 1983, Malaysia issued the financial market law containing the investment of financial certificate through Islam Malaysia Berhad Bank. (Mansur, 2009). In February 1988, Organization of the Islamic Conference (OIC) confirmed the sukuk system through fiqh academic with its clear laws (Wilson, 2001). The Islamic Jurisprudence Council (IJC) issued an instruction supporting the development of *sukuk* (Azmi Omar, Muhammad Abduh & Raditya Sukmana, 2013). Indonesian Council of Religious Scholars (MUI) also issued an instruction of using bonds based on Syari'ah principles (Scholars, 2006).

In 1999, Egypt issued investment and partnership sukuk. In 1999, Iran issued partnership sukuk. (Scholars, 2006). Malaysia continued and developed the Islamic Banking policy of 1983 in 1993 and 2004. In 2001 and 2004 Malaysia launched the Global Corporate Sukuk in the International Islamic Financial Market while Bahrain issued Ijarah and Salam sukuk. In 2002 and 2004, Qatar issued the Islamic sukuk in general. Sukuk grew continuously not only in the Muslim countries but even in the countries with minority of Muslims also applied sukuk system such as the Saxony-Anhalt in Germany. These certificates attracted the global investors who ignored the Islamic ideology. Yet the most important thing is that there are Islamic features found on the certificates (Tariq, 2004). Albeit the positive growth and development surrounding sukuk nonetheless its legal aspects are still debated as some scholars refused to recognize sukuk in the Islamic Financial system because sukuk is formulated by the human mind. In addition, the basic theory of sukuk is a debt transaction which is used as a media to transfer the investor's property to the sukuk issuers (Abu Bakar, 2009).

■4.0 THE CAUSAL ROOT ON THE DEBATE OF SUKUK THEORY

Scholars agree that the bonds or share through the conventional system are illegal. But, the legality of sukuk instrument is still debated by the legal experts. However these differences had started from the period of the Companions of the Prophet Muhammad s.a.w.. as stated in the book Sahih Muslim bi Sharki al Nawawi who had traced the roots of this difference on sukuk in the period of the Companions of the Prophet Muhammad s.a.w. between Abu Hurairah and Caliph Marwan, the last caliph of Bani Umayyah.

It was reported that "Abu Hurairah said to Marwan: You have legalized the sale and purchase of *riba*. Marwan said: I did not do it. Abu Hurairah said: You justified sukuk transactions. The prophet forbade the sale of foods so that the food can be accepted. Marwan said: In front of people, prohibiting the sale and purchase through sukuk instruments" (Nawawi, 1992).

In comprehending the dialogue between Abu Hurairah and Marwan, the above type of sale can be seen being practiced among the Companions of the Prophet Muhammad s.a.w.. The Companions were involved in the sale and purchase activities in which people bought the goods and sold them before receiving the objects.

In addition Umar bin Khattab was reported to have refused such practice and said: Do not sell food items until the objects

are there. But following that Umar bin Khattab was said to have asked Hakim bin Huzam to sell food items although the object was not there (Nawawi, 1992). These two incidences showed the apparent conflicting thoughts of Umar bin Khattab. First was Umar's ban on the sale and purchase of food items when the sale transaction of the object did not exist, the first purchaser cannot sell to the object to the second buyer. Second was when Umar bin Khattab had asked Hakim to sell food items to other people although the object was not there. However the second instance was based on a single transaction that took place only once.

There seems to suggest that the diversity of thoughts on this matter between Umar bin Khattab and Abu Hurairah. However this diversity in thoughts could be reconciled as the differences are a matter of theory and that both thoughts bear the same meaning and have a similar point of reference.

The prohibition of Abu Hurairah to Marwan on sukuk was on the sale of food as the object of the sale transaction. The discussion was restricted to food items solely and not on other type of sukuk. While according to Umar the legality of purchasing food items as the objects of the sale transactions can be divided into two types. The first type is legal when the sale and purchase of food item is based on a one-time transaction. However for the second type, if the transactions occurred two times, then legally it cannot be allowed.

From the above discussion, it was found that the prohibition of Umar bin Khattab and Abu Hurairah to sell food items without the existence of the objects was not comprehensive to all other objects. The reasoning (*ilat*) behind the prohibition is because it is feared that the food could not be kept for long. When the acceptance of the food item is not made within a short food period of time, the food would rot. This is called as *bai'u garar* (fraudulent trading). Thus the transactions of other items (other than food) in which the objects cannot be seen is allowed according to Umar bin Khattab and Abu Hurairah. Thus transactions based on the sukuk instrument are valid and legal according to the thoughts of Umar bin Khattab and Abu Hurairah.

Evolution of this practice from the time of the Rightly Guided Caliphs to the time of the *Tabi' tabi'iun* continued until the sciences of Islamic ruling became a systematic field of study especially during the time of the four schools of thoughts in the Sunni sect. The debates and legality on sukuk was deliberated during the time of Imam Shafi'i and Imam Abu Hanifah. Each imminent scholar had devised his own *ijtihad* method to arrive at the rulings on sukuk.

■5.0 IJTIHAD METHOD OF IMAM ABU HANIFAH AND IMAM SYAFI' I ON SUKUK

The discussion in this section examines the views of Imam Abu Hanifah and Imam Syafi'i pertaining to the legal aspects of sukuk instruments. Intrinsically the *ijtihad* of Imam Abu Hanifah and Imam Syafi'i are based on *masadir al-ahkam al-muttafaq'alaih* (al-Qur'an and al-Hadith) and consensus. However Imam Abu Hanifah also uses custom or tradition (*'urf*) of the particular community.

Both of these imminent scholars have different paradigms of thoughts Imam Abu Hanifah used rationality, *istihsan* as a method of *ijtihad* in formulating the laws in the event the *qiyas* method is not in line with the *maqasid al-Syar'i* by using rationality as the yardstick to determine the relevant scripture texts with the reality of the society through the inductive approach (*istidlal al-hukm*).

In the meantime Imam Syafi'i thinks textually and used qiyas as the sole method of ijthad. According to him, although qiyas and ijthad are terminologically different they are nonetheless intrinsically the same. He referred to the text of scripture as the absolute truth. Sense (Rationality) is only as a bridge to determine the legal conclusion by deductive theory (istinbath al-hukm). Thus Imam Syafi'i rejected and abandoned the istihsan method because the legal formula of istihsan method is through the sense (rational) approach (Al-Syafi'i, 1997). Since the instruments of sukuk are not available in isyarah al-nas (implicit in the text) just ibarah al-nas (written in the text), thus sukuk in the views of Imam Abu Hanifah and Imam Syafi'i should use the ijthad approach (Razi, 1986; Zahrah, 1997).

The succeeding section examines the thoughts of Imam Abu Hanifah and Imam Syafi'i on sukuk instruments.

5.1 Analysis of the Ijthad Method of Imam Abu Hanifah on Sukuk

The thoughts of Imam Abu Hanifah on sukuk instruments can be found in the formulation of legal rulings (fiqh) and ijthad method (usul fiqh). In dealing with the formulation of the legal rulings, the term sukuk according to Imam Abu Hanifah could be equated with *bai'u al-ghaibah* (sale without available items) whilst according to Imam Malik al-Barnamij, sukuk is a written document containing the value of the object or place (Al-Bugha, 1993). *Bai'u al-ghaibah*, *bai'u al-barnamij* and sukuk transaction are essentially same, i.e., the sale and purchase of unavailable good but only its description and characteristics. According to Imam Abu Hanifah and Imam Malik, in the book on al-Adillah al-Mukhtalaf referring to the writings of al-Hidayah, allowed the sale and purchase of objects that are al-ghaibah or al-barnamij, whether the item is described and characterized or not on the basis of *khiyar ru'yah* (specifying options after looking at the things) for the buyer. Imam Abu Hanifah said: Anyone who bought something and does not know the object the legal rulings of the transaction was valid however after *khiyar al-ru'yah* the parties can have the option to proceed or cancel the sale transaction. However Imam Malik explained that the object should be described and characterized, if not, the object becomes invalid. (Al-Rusdani, 2000). In al-Adillah al-Mukhtalaf Fiha based on the book on al-fath explains that *khiyar ru'ya* is valid, whether the object is suitable or not suitable and parties have the options to proceed or cancel with the sale transaction (Al-Rusdani, 2000).

Imam Hanafi supports the conclusion of the legal rulings on *Bai'u al-ghaibah/al-barnamij/sukuk*, based on evidence of al-aql (Reason). When one does not know a thing during the sale transaction it does not create a conflict with the existence of *khiyar al-ru'ya* as the sale transaction can be rejected. So, it does not produce *dzarar* (danger). Surely there will be a danger if there is no *khiyar al-ru'ya* since there is no opportunity to see it (al-hidayah wa syuruhu). Thus, if the sukuk instruments (object properties, dimensions, scales and forms of design) are clear during the sale transaction, the sukuk is visible and it is not *ghair-al-musyadah* (invisible) then the sale transaction is allowed. Support of this proposition is evidenced based on the Hadith of al-Naql as follows:

Meaning:

Anyone buying something that does not see the object, the law of its sale and purchase is legal. But, it should use *khiyar* (option): when the buyers inspect the object, they can cancel and reject it

(Al-Bugha, 1993).

In *istidlal al-hukm* (obtaining proposition) of the sukuk instrument, it was found that the thoughts of Imam Abu Hanifah was inclined to the istihsan method as a way out of to the formulation of legal rulings since the qiyas method was found not to fit in with *maqasid al-syar'i*. According to the general principles on the theory of qiyas, containing the meaning that all forms of transactions whose objects are not tangible, including sukuk instruments, are not valid. This is based on the Hadith which bears the following meaning:

“Do not sell something that the object does not appear in front of you (at the time of the contract). Abi Dawud”
(Sulayman, 1998).

However the hadith narrated by al-Bukhari and Turmudzi contains legal rulings on trade transactions, in which the object is non-existent, as valid such as the contract through *salam*, *istisna'* and *ijarah*. Again based on another Hadith which bears the following interpretation:

The prophet said “who will book your reservations in size and scale inform the notified until the deadline” al-Bukhari (Al-Bukhari, 2000).

As an explanation the hadith gives a concession to an agreement for the sale and purchase of something which is non-existent with the *salam* contract. Turmudzi (Turmudhi, 1999).

In responding to these two apparently conflicting ahadith, Imam Abu Hanifah used ijthad, without referring to the general rules or qiyas but instead used the istihsan method. This is because the formulation of law of qiyas method was considered contrary to the *maqasid al-syar'i*. Thus, qiyas was rejected and istihsan bi al-nas, istihsan bi al-ijma' and istihsan bi al-'ur were used in its place. This is elucidated in further detail below:-

Istihsan bi al-nas in sukuk transaction is equated with 'aqd *salam*. This is because when the sale transaction occurs, the object does not exist (only its description and characteristics). According to the qiyas method or the general rules, this is an invalid transaction. However, Imam Abu Hanifah used istihsan bi al-nas with the texts (al-Hadith al-Bukhari) coupled with the *rukhsah* (lenient) consideration whilst the qiyas method was ignored.

In *Istihsan bi al-ijma'*, sukuk transaction is equated with 'aqd *istisna'*. During the sale transaction the object does not exist (only its description and characteristics) thus according to the qiyas method or the general rules the sale transaction is invalid. However, Imam Abu Hanifah used istihsan bi al-ijma', whilst the qiyas method was rejected, by using *ijma'* evidences. Based on the words of Imam Abu Hanifah:

... we leave qiyas theory and we take *ijma'* proposition with the consideration that has been done by the former people since the days of the prophet Muhammad until now and with consideration.

(Abu Bakar, 2009).

In *Istihsan bi al-darurah* sukuk transaction is equated with 'aqd *ijarah*. This is because the object does not exist during the sale transaction only its benefits (*usufruct*). Thus according to the qiyas method or the general rules, this sale transaction is invalid. However, Imam Abu Hanifah used istihsan bi al-darurah, abandoned the qiyas method and used *ijarah* contract, in considering human needs and emergencies (*darurah*) (Abu Bakar, 2009).

From the examination above, the legal rulings (fiqh) and the ijthad method (usul fiqh), show that Imam Abu Hanifah allowed sukuk. He resorted to ijthad when faced with common assessment through qiyas method that the product is considered

as unfulfilling the maqasid al-syar'iyah. Thus Imam Abu Hanifah used istihsan theory by leaving the general principles or the qiyas method and used a method whose influence is stronger and suitable with the maqasid al-syar'i that is based on the explicit texts (al-Qur'an al-Sunnah), ijma' and 'urf. Essentially this is known as raf' al-kharaj wa daf' al-masyaqqat li al-maslahah al-'ammah (the removal of difficulties and the rejection of objection for the benefit of the general).

Having laid down the position of sukuk based on the ijthad method of Imam Abu Hanifah, the next section will then examine the ijthad method adopted by Imam Syafi'i on sukuk instrument.

5.2 Analysis of the Ijthad Method of Imam Syafi'i on Sukuk

The thoughts of Imam Syafi'i on sukuk instruments can be found in both the formulation of legal rulings (fiqh) and ijthad method (usul fiqh). In dealing with the formulation of legal rulings (fiqh), the sukuk instrument is equated with bai'u al-ghaibah, al-barnamij. In his book al-Umm, Imam Syafi'i was asked about the value of something written in the document, whether that this is described and characterized or otherwise. His Qaul al-qadim (Old Sayings) gave an opinion that khiyar al-ru'ya is allowed while qaul al-jadid (New Sayings) is not allowed, even with khiyar al-ru'ya. (Al-Bugha, 1993) There appears to be two different opinions of Imam Syafi'i on this issue. Thus other external factors are needed to justify and strengthen one of these two opinions.

It was reported to have said that Imam Syafi'i used the following hadith as evidence for his proposition which bears the following interpretation:

Verily the prophet Muhammad prohibit the sale and purchase of garar (Fraud) (Al-Nawawi, 1998).

In istidlal al-hukm (making proposition) of sukuk instruments, Imam Syafi'i had ideas which were similar to Imam Abu Hanifah. These ideas were analogous to aqd al-salam, istisna' ijarah, and al barnamij (sale and purpose program) because they were premised on the same theory that is the sale transaction in which the object does not exist:-

First, the sukuk instrument is equated with aqd al-salam. Both of these sale transactions are based on a trade transaction without the object. In the formulation of Imam Syafi'i through the qiyas method or general rules, the sale transaction is not allowed. However Imam Syafi'i diverged from the qiyas method (by depending on the Hadith narrated by Abi Daud that prohibit the sale and purchase without object) and applied the takhsis method (excluded by the hadith narrated by al-Bukhari and Turmuzi) that allowed the aqd al-salam or sukuk with rukhsah consideration. This view is strengthened by his speech contained in his book al-Umm:

Verily Allah permits mortgage transaction and salam (made to order). When the prophet Muhammad allowed aqd al-salam on date palm that is 2 years old, while the dates are still sometimes wet. This shows that, he let aqd al-salam on the wet dates as security of its premature time to maturity and its quality. This is because the contract is for two years whilst parts of it have not reached the age of two and the time had remained to be unspecified.

Second, the sukuk instruments are equated with 'Aqd al-Istisna' with the same rules and systems although the object is not in existence during the sale transaction. However the price has been agreed to in the transactions. This has been the consensus (ijma') of the scholars. Imam Syafi'i established ijma' as one of the sources of Islamic laws in which evidence of proof must be applied. Ijma' is considered as the third source of

law after al-Qur'an and Hadith. He made mentioned of this in his book, al-Risalah:

"...We used consensus (ijma') before qiyas, applying ijma' proposition and qiyas is the weakest compared with al-Qur'an and al-Hadith, because of the consideration of emergency. Thus, it is not allowed to use qiyas while there is a hadith..."

(Al-Syafi'i, 1997)

Indeed, ijma' is regarded as the decisive argument for something, as there cannot be an error of the knowledgeable people when they agree. Thus the agreement becomes a decisive argument (Al-Syafi'i, 1997).

Third the sukuk instrument which is equated with akad ijarah. Both of these transactions occur without an object. These types of transaction refer to the benefits of the hired object between 'ajir (lessor) and musta'jir (tenants) in which the musta'jir have the right to take the benefit until the specified agreed time. It was considered as a sale and purchase (Al-Syafi'i, 1997).

The opinion of Imam Syafi'i on the above is based on this explicit text as follows:

"...if they give suck for you, give them their due payment...."

(Surah al-Talaq (65) : 6)

"One of the two women said: O my father! Hire him! For the best (man) that canst hire is the strong and the trustworthy."

(Surah al-Qasas (28) : 26)

He (Sya'aib) said: Verily, I would marry thee to one of these two daughters of mine on condition that thou hire thyself to me for (the term of) eight pilgrimages. Then if you complete ten, it will be of your own accord, for I would not make it hard for you. Allah willing, you will find me of the righteous.

(Surah al-Qasas (28) : 27)

6.0 ANALYSIS OF THOUGHTS ON IMAM ABU HANIFAH AND IMAM SYAFI'I

Imam Abu Hanifah and Imam Syafi'i each used different methods of thinking in terms of istidlal al-hukm and instinbath al-hukm on their views pertaining to sukuk instrument. In legalizing and putting the sources of sukuk, Imam Abu Hanifah thought more rationally and contextually using ijthad method by including the social realities and social welfare. His thoughts are based on the social facts developed in the community and thereafter he took a reference from the texts of scripture. Revelation is considered as a reference after knowing the facts through the use of reason. Then, the combination of social reality, revelation, and reason will result in the formulation of legal rulings. So, Imam Abu Hanifah developed an inductive approach (istidlal al-hukm) as a thinking paradigm in any legal setting process. (Zahrah, 1997). Sense was the measure of truth to the text of scripture which is to be implemented. This is the reason why Imam Abu Hanifah made istihsan as the preferential ijthad method.

On the other hand, the ijthad method of Imam Syafi'i had issued the legal rulings of sukuk from the textual way, emphasizing the authoritative quotation that only Allah knows the needs and rights of human being and which cannot merely be based on human judgment. The use of human rationality is limited or only part of the principle on using revelation. Sense is

only used as a media to equate the sukuk instrument as a new issue which was not included in the implicit text such as with 'aqd al-salam, al istisna' and al-ijarah (which are found in the texts) or to set new questions by applying the principles on using revelation through the principles of qiyas. Thus Imam Syafi'i developed a deductive approach in any legal setting process. According to him, the implicit text has the absolute truth that should be implemented in the reality of society. It is the reason why Imam Syafi'i made qiyas as the only ijthad method (Al-Syafi'i, 1997).

Although the ijthad method of Imam Abu Hanifah and Imam Syafi'i through istinbath al-ahkam and istidlal al-hukm respectively on the sale and purchase transaction are used as a reference to formulate the legal rulings on sukuk however when faced with a common assessment method in the qiyas theory in which the legal rulings do not fulfill maqasid al-syar'iyah, the thoughts of Imam Abu Hanifah (through istihsan bi al-nas, istihsan bi al-ijma', and istihsan bi al-dzarurah methods) and the thoughts of Imam Syafi'i (through takhsis theory, legal resource theory, and using language approach) are different literally. They bear nonetheless terminologically the same meaning. These two imminent scholars accepted sukuk as an Islamic financial instrument.

7.0 CONCLUSION

The analysis on the ijthad methods of Imam Abu Hanifah and Imam Syafi'i on the sukuk instrument has given the opportunity for the conclusion to be written in a few points as follows.

First, the definition of sukuk although both in the etymology or terminology sense is different, it nevertheless supports the same meaning: Etymologically: sukuk is from the word الصكوك the plural form of الصك which means ownership, value, benefits, and services for specific projects or investment activities such as those through the syari'ah transactions which used the system of the profit and welding sharing. The certificates are valid upon the receipt of the sukuk while due to receive full funding would be in accordance with the purpose of the sukuk.

Second is pertaining to the history of sukuk. Sukuk existed since the caliph Umar bin Khattab. Thereafter it was debated during the Umayyad Caliphate. During the Abbasid Caliphate, the name of sukuk was changed into السفتجة and became a distinct discipline of knowledge (360-670 H / 13 M) in which the Hanafi persuasion gave a term of sukuk with bai'u al ghaibah, the Maliki's called it with bai'u 'ala al-barnamih, whilst Abu Zakariyyah al Nawawi and the Syafi'i school of thought (w. 676) called it sukuk.

During the resurrection period (661-728 H) which saw the end of the Muslims defeat, the West with the movement of imperialism and capitalism which was regarded as the icons of the conventional system caused a crisis in the 1970s, 1983-1984, 1997-1998 and the worst in 2008. This phenomenon opened the awareness of Islamic law experts to formulate Islamic economic system and the sukuk instruments. The sukuk developed not only in the Muslim countries but also in some countries that have minority of the Muslim population.

Third is with regards to the ijthad method. Imam Abu Hanifah and Imam Syafi'i have different thoughts in formulating the legal rulings of sukuk instrument. The thoughts of Imam Abu Hanifah were more rationally inclined and contextually derived.

He developed the inductive theory (Istidlal al-hukm) by using istihsan method whilst the thoughts of Imam Syafi'i were textually (authoritative quotation) based. He developed the deductive theory (istinbath al-hukm) by developing and expanding the qiyas method.

Fourth is on the formulation of the legal rulings. The thoughts of Imam Abu Hanifah and Imam Syafi'i to determine the relevant legality of sukuk instruments are analogous to the aqd al-salam, aqd al-istihna', and aqd al-ijarah, because the sale and purchase of these transactions are without the object.

These two imminent scholars abandoned qiyas method. Imam Abu Hanifah used istihsan bi al-nas, istihsan bi al-ijma', and al-istihsan bi al-darurah theory. In the meantime Imam Syafi'i used takhsis method, the levels of legal rulings (masadir al-ahkam), and basic understanding on the language. Although terminologically the ijthad method of these two imminent scholars is different, however the formulation of legal rulings on sukuk by Imam Abu Hanifah, through istidlal al-hukm, and Imam Syafi'i, through istinbath al-hukm allowed the sukuk instruments based on Islamic legal rulings.

Fifth, the cooperation amongst the experts of Islamic legal rulings and Islamic economists to formulate an Islamic economic system through the formulation of ijthad by resorting to istidlal al-hukm (inductive) and istinbath al-hukm (deductive) based on the text of the scriptures whilst taking into account the phenomenon permeating the society.

It is hoped that this article has achieved to remind its readers, albeit with its flaws and weaknesses. As such should any error be found as part of human nature yet should there be any good ideas it is hoped that it can be expanded and further developed.

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