

Wealth Planning Parameters Based on *Maqāṣid Al-Sharī'ah* According to Ibn 'Āshūr's View: A Preliminary Study¹

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Abstract

Making an early planning on properties owned is indeed something that is encouraged in Islam. However, the absence of a specific guideline in the implementation of wealth planning has caused several issues. The consequences of these issues have resulted in the failure to enforce the intended wealth planning. In some cases, after being tried in court, the wealth plans have been declared as void by the court. Therefore, this study aims to suggest the appropriate parameters which may be used as the basis and guidelines by property owners, especially Muslims, in ensuring compliance of wealth planning with the correct methods and requirements of Islamic law. Generally, this study adopts a qualitative approach with content analysis to obtain the required information and data. The results of the study reveals that the discussion of *maqāṣid al-sharī'ah* involving *tabarru'* contracts by Ibn 'Āshūr in his book *Maqāṣid al-Sharī'ah al-Islāmiyyah* is suitable to be used as the basis and main consideration for the formation of wealth planning parameters for Muslims. The application of wealth planning parameters based on *maqāṣid al-sharī'ah* may help Muslims in particular to make proper wealth planning that complies with the principles of syariah, while at the same time realizes the wishes and expectations of the property owners therefrom.

Keywords: Wealth planning, Inheritance, Parameter, *Maqāṣid al-sharī'ah*, Ibn 'Āshūr.

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Introduction

Wealth planning refers to a form of planning that can be implemented by a person while he is still alive. This encompasses on how he acquires, manages and distributes his wealth to his heirs and beneficiaries at his discretion. This has to be fair in all manner. Through this early planning he will be able to control, monitor and utilize the wealth for the recipient, himself and his family during his life and after his passing (Yaacob, 2016: 171-172).

Waṣīyyah (will), *hibah* (gift), *waqf* (endowments) and *amanah* (trusts) are among the main instruments that can be used by Muslims in planning the properties owned by them. Previous studies have suggested that the application of these wealth planning instruments has to be expanded among the society at large as it has brought more benefits not only to the owners but also to their heirs, other interested non-heirs and the other Muslims generally (Daud, M. Z., Rosland, A., and Hasbulah, M. H, 2015: 69-88). Apart from that, an early planning on wealth may avoid any unwanted problems and risks in future such as wealth disputes, disagreement among heirs, unclaimed estates, wealth freezing and more. This will indirectly make estate planning as one of the best alternatives to be used in resolving synonymous issues involving the administration of deceased's estates of Muslims in Malaysia that has long been prevalence.

As a consequence to the above, society is indeed encouraged to make early plannings on properties owned during their lifetime without being too dependent or completely dependent on the system of division of estate after death (*farā'id*) which will be managed by their heirs who are left behind. Such assumption is indeed erroneous because as an owner and trustee of the asset, every person should plan on how their assets can continuously provide benefits even after their death. However, in order to ensure that the objectives and benefits of the wealth planning are achieved, property owners must first understand the proper method of wealth planning. Zakaria, Hasbullah and Mahad Musa (2017: 14-20) explained that in the context of wealth planning, a good understanding of the real purpose of doing it is required before it is applied. This is to ensure that the application of wealth planning instruments as mentioned before is not misused for any purpose that is contrary to Islamic law. This is due to the fact that there are several instances where even though wealth planning has been made by the property owner during his lifetime, it has not been implemented as intended by the owner and deemed invalid due to several factors by the court.

This is apparent in the case of *Saharain bin Nordin vs Noraidah binti Nordin*, whereby the respondent who is the biological child of the deceased, the late Hjh. Sapiah @ Safiah binti Ahmad, has claimed that her late mother had given her a piece of land and a one-storey terrace house to her before she died as gifts. However, the appellant, who is also the biological son of the deceased, has challenged the validity of the *hibah* and appealed the whole decision of the judge of the Syariah High Court to the Syariah Court of Appeal. After

examining all the pillars and conditions of *hibah*, the court ruled that all the necessary elements had been met except for the pronouncement of *ijāb* and *qabūl* which could not be stated and proved clearly. On that basis, the Syariah Court of Appeal has ruled that the *hibah* was invalid and void even though the respondent has submitted two witnesses who are her own relatives. However, the credibility of the witnesses has been disputed due to the possible existence of conflict of interests with any of the disputing parties (Bachik, 2020).

In addition, the gift of property or asset during life without adhering to the proper procedures may backfire and cause setbacks to the giver himself. This is due to the fact that as has always been reported in the newspapers there are many cases where property owners were neglected by their children after transferring all their properties to the children before their death. For example, the case involving an 83-year-old, Daut @ Md Kassim Jali who was said to have been abused and neglected by his own children after he transferred all his assets worth more than RM4 million to them (Bachik, 2020).

Similarly, in the context of *waṣīyyah*, there are also issues whereby the *waṣīyyah* made by the testator cannot be executed optimally or decided to be void by the Syariah court which has the jurisdiction in deciding the validity of the *waṣīyyah* made by the Muslims in Malaysia. These include cases involving *waṣīyyah* exceeding one-third of the value of the properties, (MLJ, 1975: 70)² *waṣīyyah* to the heirs who are the beneficiaries of the deceased's estates (FMSLR, 1915: 204),³ *waṣīyyah* made with the intention of denying the rights of certain heirs (JH, 1983: 217)⁴ and other related cases.

Based on these scenarios, there is definitely a need to establish a parameter that can be used as a basis and provides guidelines to Muslims in making proper wealth planning on their properties. This is to ensure that the objectives and benefits expected from the planning will eventually be realized and thereby avoiding conflicts and undesirable difficulties to all parties. Thus, this study aims to establish wealth planning parameters and will focus by using the principle of *maqāṣid al-sharī'ah* as its basic discussion.

1. The Concept of Wealth Planning

The word "planning" has been defined as the deed, action or an effort of doing something (Kamus Dewan, 2007: 1280). It is also defined as a process of determining objectives, followed by the process of finding and evaluating various available alternatives towards achieving the intended objectives (Mohamed, 1994: 8).

On the other hand, wealth means anything that has a value and can be compensated for by anyone who damages or destroys it (al-Zuḥaylī, 1985: 42). In addition, wealth is also defined as human being's natural desire which can be kept for a required period of time (Ibn 'Ābidīn, 2003: 10).

² Amanullah bin Haji Ali vs Hajjah Jamlilah (1975) 1 MLJ 70.

³ Sheikh Abdul Latif and Ors vs Sheikh Elias Bux (1915) 1 FMSLR 204.

⁴ Siti Binti Yatim vs Mohamed Nor Bin Bujal (1983) 3 JH 217.

In a nutshell, wealth planning can be translated as a process which involves all the efforts and actions taken by the property owner during his lifetime to distribute his wealth to his desired beneficiaries, regardless whether to his heirs or non heirs through the methods allowed by syariah.

Planning is indeed a key element in determining the smoothness and successfulness of a thing to be done. A good and systematic planning ensures that something can go according to its plan and successful either in this world or the hereafter. Allah s.w.t. said in Surah al-Ḥashr 59: 18:

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَارْتَبُوا لَهُ نَفْسَكُمْ مَا قَدَّمْتُمْ لِغَدٍ ۚ وَاتَّقُوا اللَّهَ ۚ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ

“O you who have believed, fear Allah. And let every soul look to what it has put fourth for tomorrow - and fear Allah. Indeed, Allah is Acquainted with what you do”.

In addition, Prophet (b.u.h) also said:

إِغْتَنِمْ خَمْسًا قَبْلَ خَمْسٍ: شَبَابَكَ قَبْلَ هَرَمِكَ، وَصِحَّتَكَ قَبْلَ سَقَمِكَ، وَغِنَاكَ قَبْلَ فَقْرِكَ، وَفَرَاغَكَ قَبْلَ شُغْلِكَ، وَحَيَاتَكَ قَبْلَ مَوْتِكَ.

“Take advantage of five before the coming of five: your youth before your old age, your health time before your illness, your wealth before your poverty, your free time before your busy time and your life before your death (al-Naysābūrī, 2002: 341).

The above hadith is clearly a form of reminder especially to Muslims to always be vigilant and not to be careless despite of everything that he possesses. In fact, the opportunity in our life should be used to plan properly for the good and benefits of the future. This includes making plans for the distribution of wealth to ensure that it will be beneficial in this world and the hereafter.

As has been explained before, there are generally a few methods that can be adopted in the context of wealth planning which can be referred to as wealth planning instruments such as *waṣīyyah*, *hibah* (gift), *waqf* (endowments) and *amanah* (trusts). Each of these instruments is different from the other and this can be seen through the five main aspects, namely syariah rulings implementation, contract effective date, amount of inheritable wealth, the recipient eligibility and the time the contract is sealed. A good understanding of the concept of wealth planning including these existing instruments is indeed a requirement before it can be applied. (Kamarudin and Nor Muhamad, 2018: 8-16).

Waṣīyyah is one of the main instruments of wealth planning, which refers to the granting of an ownership after death by way of *tabarru'* (donations), whether it involves the granting of real property (*'ayn*) or usufruct. (al-Zuḥaylī, 1985: 8) “*Hibah*” meanwhile is a gift of

ownership from one party to another without any form of consideration (*'iwaḍ*) ('Alī Ḥaydar, 2003: 389), where it is done voluntarily during the lifetime of the grantor and without any coercion or undue influence (al-Zuḥaylī, 1985: 5). The main difference between these two instruments is *waṣiyyah* takes effect after the death of the testator, while *hibah* is effective immediately during the life of the grantor. In addition, there is no restrictions and limitations on the amount of the property to be granted and on who shall become the beneficiary of the *hibah* (al-Jazīrī, 2003: 257-264). Meanwhile, *waṣiyyah* is only limited to one third of the property and cannot be given to the heirs of the deceased who is entitled to the estate of the deceased unless with the consent of the other heirs of the testator (al-Nawawī, 2005: 352).

Waqf, on the other hand, means the act of withholding and preserving a property's usufruct by maintaining its physicality (*'ayn*) and the right of *taṣarruf* is taken away from the *wāqif* (person making the *waqf*) and others. *Waqf* should be for charitable or religious purpose allowed by syariah towards goodness, virtueness and to become closer to Allah s.w.t. (al-Zuḥaylī, 1985: 154-155). In the contemporary application of *waqf*, it can be established either by dedicating real estate, furniture or fixtures, other movable assets and liquid forms of money and wealth like cash and shares which are allowed by syariah (SA Shaikh, AG Ismail, MHM Shafiai, 2017: 5-14).

Amanah in Islam is a general concept that refers to a responsibility that must be borne and implemented by a person in charge according to the rulings entrusted. In general, amanah can be divided into three aspects, namely amanah between the servant and His creator, amanah among human beings and amanah to own self ('Alī Ḥaydar, 2003: 225). While Amanah or trust in the context of wealth planning refers to the appointment of a trustee who is responsible for maintaining and managing the trust property in accordance with the terms and conditions set by the property owner (Halim and Ahmad Bustami, 2017: 310-335). In addition, a trust property is also defined as a property entrusted to one or more persons or certain trust bodies to be administered in trust on behalf of another person, body or organization, the public or the government. This trust property can be created either for a certain period of time or in perpetuity, depending on the terms and conditions of the trust made (Abdullah Muhammad, 2016: 123-132).

2. Maqāṣid al-Sharī'ah (The Objective of Shariah)

Maqāṣid al-sharī'ah is generally a combination of two words, namely *maqāṣid* and *sharī'ah*. *Maqāṣid* is a plural word derived from the word *maqṣad* (objective) which is taken from the verb *qaṣada*, which literally means straight path (Ibn Manẓūr, n.d.: 353).

Sharī'ah, on the other hand, literally refers to the path and the way that leads to the source of water. While in terms of terminology, syariah is defined as what is prescribed and revealed by Allah s.w.t. to his servants, which refers to the various laws applicable to Muslims (Zaydān, 2012: 38).

In discussing *maqāṣid al-sharī'ah*, Imām al-Shāṭibī explains that every law prescribed by Allah s.w.t. is basically intended to benefit the human beings, which includes in this world and the hereafter (al-Shāṭibī, 2004: 238).

On the other hand, Imām al-Ghazālī explained that what is meant by *maqāṣid al-sharī'ah* is closely related to the preservation of the five main basic things or also referred to as *ḍarūriyyāt al-khams*, which includes the preservation of religion, life, intellect, lineage and property. Every single thing that has the element of preservation of these five main things is referred to as *maṣlaḥah*, while every thing that brings harm to it is considered *mafsadah*. In addition, avoiding all forms of action that can invite damage to the five things is also categorized as *maṣlaḥah* (al-Ghazālī, n.d.: 328).

According to al-Raysūnī, Ibn 'Āshūr was the earliest contemporary Islamic scholar who gave a specific definition to the term *maqāṣid al-sharī'ah* (al-Raysūnī, 1995, 18). Ibn 'Āshūr generally divides *maqāṣid al-sharī'ah* into two aspects, namely *maqāṣid al-'āmmah* and *maqāṣid al-khaṣṣah*. *Maqāṣid al-'āmmah* carries the meaning of the intentions and wisdoms that Allah s.w.t. stresses in all or most of the things prescribed and not specified to certain syariah laws only (Ibn 'Āshūr, 2011: 251). *Maqāṣid al-khaṣṣah* meanwhile refers to the rules that are the purpose of syariah to realize *maqāṣid* that benefits human beings or to preserve their common good in certain matters (Ibn 'Āshūr, 2011: 251).

Specific definitions of the term *maqāṣid al-sharī'ah* are also made by other Islamic scholars, one of them is Wahbah al-Zuḥaylī who defines *maqāṣid al-sharī'ah* as the meanings and goals that is apparent in each or most of the prescribed laws. In addition, *maqāṣid al-sharī'ah* also carries the meaning of the objectives and secrets set by Allah s.w.t. in every of the prescribed Islamic laws. Wahbah al-Zuḥaylī places *maqāṣid al-sharī'ah* as a very important knowledge to be mastered, especially by the mujtahids in an effort to deduce the law from the sources of syariah and also to understand the divine texts of syarak. In addition, understanding the *maqāṣid al-sharī'ah* is also important to all because only through it, the underlying secrets of the ruling of a law can be known and appreciated (al-Zuḥaylī, 1986: 1017).

As for the wealth planning, its relationship with *maqāṣid al-sharī'ah* is clear especially from the aspect of preservation of property (*ḥifẓ al-māl*) which is one of the five main objectives of syariah or also referred to as *ḍarūriyyāt al-khams* (the five necessities) (al-Ghazālī, n.d.: 328). In addition, the concept of wealth planning also coincides with what was stated by Imām al-Shāṭibī in explaining *maqāṣid al-sharī'ah* or the main purpose of the revelation of syariah which was to produce goodness and benefits to the mankind. The benefits are not only focused on worldly aspects (*maṣāliḥ al-dunyawiyyah*), but also includes *masalih al-ukhrawiyyah* which is beneficial to the life hereafter (al-Shāṭibī, 2004: 223, 238). These two aspects, which include *masalih al-dunyawiyyah* and *maṣāliḥ al-ukhrawiyyah*, can generally be achieved through the implementation of wealth planning which is closely related to the application of *tabarru'* contracts such as *hibah*, *waṣiyyah*, *waqf*, *ṣadaqah* (charity) and etc. These are indeed practices

that are encouraged and have been promised with great rewards by Allah swt. In addition, wealth planning can ensure the sustainability of the property owned to benefit either the property owner himself or other individuals even after the passing of the property owner.

3. Methodology

This study generally adopts a qualitative approach with content analysis design. Data collection is through the method of document analysis, especially involving Ibn 'Āshūr's book entitled *Maqāṣid al-Sharī'ah al-Islāmiyyah* as well as other related works such as books and journals articles. The data obtained are then analyzed descriptively to achieve the set objective of forming an Islamic wealth planning parameter.

4. Wealth Planning Parameters Based on *Maqāṣid Al-Sharī'ah*

Based on the research conducted, this study found that the discussion of *maqāṣid al-sharī'ah* involving *tabarru'* contracts by Ibn 'Āshūr in his book *Maqāṣid al-Sharī'ah al-Islāmiyyah* is suitable to be used as a basis in establishing wealth planning parameters. This is due to the fact that the main instruments of wealth planning are made up of *tabarru'* contracts which refer to a contract that requires the giver not to take any form of consideration on the donation, charity or gift made and the recipient is not required to provide any form of consideration for the donation, charity or gift received. (al-Sanhūrī, n.d., 162) It can also be easily explained that *tabarru'* is a contract that does not require any form of consideration between the two contracting parties unlike a sale and purchase agreement and others which are categorized as *mu'āwadhah* contract.

The objectives of syariah involving the *tabarru'* contracts expressed by Ibn 'Āshūr are streamlined to the context of wealth planning practices in establishing the parameters or guidelines to ensure that the planning done complies with the following requirements of syariah:-

First *maqṣad*: *Tabarru'* contract is to be increased because it brings *maṣlahah* or benefits which includes general *maṣlahah* and specific *maṣlahah* (Ibn 'Āshūr, 2011: 488).

The first *maqṣad* mentioned by Ibn 'Āshūr shows that the implementation of *tabarru'* contracts such as *waṣiyyah*, *hibah* and *waqf* has been proven to have resulted in *maṣlahah* or benefits to human beings, which includes specific *maṣlahah* and also general *maṣlahah*. In creating specific *maṣlahah*, Allah s.w.t. has indeed promised huge and everlasting reward to individuals who undertakes *tabarru'* contracts during their lifetime. This is described in a hadith narrated by Abū Hurairah (May Allah be pleased with him):

أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: إِذَا مَاتَ الْإِنْسَانُ انْقَطَعَ عَمَلُهُ إِلَّا مِنْ ثَلَاثَةٍ: صَدَقَةٍ جَارِيَةٍ، أَوْ عِلْمٍ يُنْتَفَعُ بِهِ، أَوْ وَلَدٍ صَالِحٍ يَدْعُو لَهُ (رَوَاهُ مُسْلِمٌ)

The Messenger of Allah (b.u.h) said "When a man dies, his deeds come to an end except for three things, *ṣadaqah jāriyah* (ceaseless charity, a

knowledge which gives benefits or a virtuous descendant who prays for him (for the deceased).” (Muslim, 2006: 1631)

Additionally, the application of *tabarru'* contracts may indirectly create benefits to various parties. This can be seen through the implementation of *waqf* by Saidina 'Umar r.a. of his land in Khaibar. The *waqf* land had been donated in the name of Allah s.w.t. and its benefits were channeled to various parties, including the poor, relatives, travellers, those who were fighting in the name of Allah and for the purpose of emancipation of slaves. This is clearly stated in a hadith narrated by Ibn 'Umar (May Allah be pleased with both of them):

عَنْ ابْنِ عُمَرَ رَضِيَ اللَّهُ عَنْهُمَا قَالَ: أَصَابَ عُمَرُ بِحَيِّرِ أَرْضًا، فَأَتَى النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَ: أَصَبْتُ أَرْضًا لَمْ أُصِبْ مَالًا قَطُّ هُوَ أَنْفَسَ مِنْهُ، فَكَيْفَ تَأْمُرُنِي بِهِ؟ قَالَ: إِنْ شِئْتَ حَبَسْتَ أَصْلَهَا وَتَصَدَّقْتَ بِهَا. فَتَصَدَّقْ عُمَرُ أَنَّهُ لَا يُبَاعُ أَصْلُهَا وَلَا يُوهَبُ وَلَا يُورَثُ فِي الْفُقَرَاءِ وَالْفُرْقَى وَالرَّقَابِ وَفِي سَبِيلِ اللَّهِ وَالصَّيْفِ وَابْنِ السَّبِيلِ، لَا جُنَاحَ عَلَيَّ مَنْ وَلِيَهَا أَنْ يَأْكُلَ مِنْهَا بِالْمَعْرُوفِ أَوْ يُطْعِمَ صَدِيقًا غَيْرَ مُتَمَوِّلٍ فِيهِ.

“Umar acquired a piece of land in Khaibar, then he came to see the Prophet (b.u.h) and said: I have got a piece of land, where I have never acquired a better property than this, how am I to do with it? The Prophet (b.u.h) said: If you wish, you can keep it as an endowment to be used for charitable purposes. Then 'Umar gave the land to charity with a condition that it could not be sold, gifted or inherited and the charity was for the poor, the kinsmen, the emancipation of slaves, jihad, guests and and the travellers. It is not wrong for the administrator to eat part of the yield in a reasonable manner or to feed his friend sufficiently” (al-Bukhārī, 2002: 2772)

The same also involves other *tabarru'* contracts such as *waṣiyyah* and *hibah*. The permissibility of *tabarru'* contracts should be taken advantage by all Muslims, especially in undertaking wealth planning with the aim of ensuring that the wealth or the usufruct therefrom continues to bring benefits on a wider scale to the general public, especially the poor and the needy. Property owners should be sensible and wisely assess his surrounding situation, with regards to his family members and relatives who are financially unstable and need assistance to survive. Through the application of contracts or instruments of *hibah* and *waṣiyyah*, property owners can make provision of the property owned to those in need to ensure their end needs are met and guaranteed.

In the process of planning their wealth, both aspects which was emphasized by Ibn 'Āshūr i.e. the general *maṣlaḥah* and specific *maṣlaḥah* are to be taken into consideration by the property owner. The planning should not focus on the specific interest for the benefit of the owner of the property solely, but it should also consider the interests of the community as

well, particularly the heirs and other interested party who may be left behind. This is to ensure that the wealth planning implemented does not cause any harm or adverse implication to any party. Avoiding any form of harm or *mafsadah* is also a form of *maṣlahah* of syariah which is also one of the objectives of syariah (al-Shawkānī, 2000: 990). The prohibition from committing something that could cause harm is in line with the words of the Prophet (b.u.h):

لَا ضَرَرَ وَلَا ضِرَارَ

“Do not attempt something that is harmful and do not harm others” (Ibn Mājah, 2340)

Second *maqṣad*: The implementation of *tabarru'* contracts must be done voluntarily, that is, at the sole discretion of the giver and without any form of doubt or concerns over the gift made (Ibn 'Āshūr, 2011: 489).

Generally, this bequeath of property through *tabarru'* is referring to the giving of property owned without any consideration or return to the giver. Thus, the importance of this *maqṣad* is to avoid regretfulness to the property owner on the bequest made which may create negative perceptions to others against committing the good deed.

Therefore, there are two main elements in the implementation of *tabarru'* contracts which have to be fulfilled in order for a *tabarru'* contract to be legally valid, namely *al-taḥwīz* (the receipt of property by the recipient) and *al-ishhād* (testimony). Most of the scholars consisting of Imām Abū Ḥanīfah and Imām al-Shāfiī' made *al-tanjīz* (implementation) as one of the valid conditions in the implementation of *tabarru'* contracts. Thus, a *tabarru'* contract is considered not to be enforceable as long as the property is not given to the specified recipient. In addition, during this period the giver will continue to possess the right whether to proceed with the contract or otherwise (Ibn 'Āshūr, 2011: 490).

The same applies to the condition of *al-ishhād* (testimony) that a *tabarru'* contract is unenforceable or ineffective as long as it is not witnessed by any qualified individual or party. This is as described in a hadith:

عَنِ النَّعْمَانِ بْنِ بَشِيرٍ قَالَ: تَصَدَّقَ عَلَيَّ أَبِي بِبَعْضِ مَالِهِ فَقَالَتْ أُمِّي عَمْرَةُ بِنْتُ رَوَاحَةَ: لَا أَرْضَى حَتَّى تُشْهَدَ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَاَنْطَلَقَ أَبِي إِلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لِيُشْهَدَهُ عَلَى صَدَقَتِي، فَقَالَ لَهُ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَفَعَلْتَ هَذَا بِوَلَدِكَ كُلِّهِمْ؟ قَالَ: لَا، قَالَ: اتَّقُوا اللَّهَ وَاعْبُدُوا فِي أَوْلَادِكُمْ. فَرَجَعَ أَبِي، فَرَدَّ تِلْكَ الصَّدَقَةَ.

Nu'mān bin Bashīr narrates: My father has given me alms in part of his property. Then my mother 'Amrah binti Rawāḥah said: I am not satisfied with the gift until it was witnessed by the Messenger of Allah (b.u.h). So my father went to see Rasulullah (b.u.h) for him to be a witness. Then

Rasulullah (b.u.h) asked my father: Did you make this gift to all your children? My father replied: No. Rasulullah (b.u.h) said: Fear Allah and be fair to your children. So my father went home and decided to take back the gift (Muslim, 2006: 1623).

In the current context, these two elements mentioned by Ibn 'Āshūr which is *al-tahwīz* (acceptance of property by the recipient) and *al-ishhād* (testimony) is actually interpreted as the documentation process. A document refers to written or documentary evidence. Through this method, both elements can be explicitly or expressly stated in writing. The reality today is that the documentation involving wealth planning plays a significant role especially in proving that the gift and transfer of ownership of the property made to the recipient cannot be disputed or challenged by any party in the future (Mohd Sa'afie and Muda, 2018: 1-7).

In addition, this will indirectly demonstrate the importance of appointing a qualified party in implementing the wealth planning process, especially to ensure the continuity of the wealth planning documents and a seamless implementation of the process without any untoward difficulties. There are instances where the wealth planning has not been properly documented, thereby rendering it invalid and unenforceable and resulting in disputes amongst the heirs. For example, in the case of *Ibrahim bin Haji Abu Bakar vs Mohd Sah bin Mohd Ali*,⁵ the Plaintiff, Ibrahim bin Haji Abu Bakar has filed an application for a confirmation of *waṣīyyah* and *hibah* on the property of Azhari bin Mohd. Ali, a land HSD 389 PT 1885 measuring 9582 square feet located in Mukim Pekan, Jalan Rompin Lama, Pekan, Pahang. The plaintiff was a grand nephew of Azhari who died on 27 April 1982 and he claimed that the land HSD 389 Lot 1885 be transferred to him on the grounds that the deceased wanted to give and bequeath the land to him. However, the defendants, who are the heirs of the deceased, objected to the claim on the grounds that they did not know of the existence of the *waṣīyyah* and the gift referred to by the Plaintiff. Hence, they had applied for the estate to be distributed according to *farā'id* law only. However, the Plaintiff has tendered a statutory declaration, affirmed by eleven deponents before the Commissioner of Oaths No. A203 on December 29, 1989. The plaintiff has also brought a total of five witnesses and four of them are those who had affirmed the statutory declaration to support the evidence in the affidavit. Based on the testimony of the witnesses presented, the court ruled that the Plaintiff had failed to prove that the deceased had made a *waṣīyyah* to give the land to the Plaintiff during his lifetime. The court also found that although the Plaintiff had tendered a statutory declaration containing the words of the deceased in verbatim, the statutory declaration was not executed by the deceased thus, it was not considered to be a will (*waṣīyyah*). This is compounded by the Plaintiff's delay in making the claim which was made only after 7 years of the deceased's death. Therefore, the court confirmed that the Plaintiff had failed in his claim and the land was divided according to *farā'id* law.

⁵ Ibrahim bin Haji Abu Bakar against Mohd Sah bin Mohd Ali (2000) 14 JH 279.

Third *maqṣad*: Expansion of the rules of implementation of *tabarru'* contracts according to the wishes of the giver (Ibn 'Āshūr, 2011: 492).

In general, the third *maqṣad* means that the implementation of these *tabarru'* contracts is flexible in nature, where it can be prepared according to the wishes of the property owner himself. In the context of wealth planning, property owners may utilize *tabarru'* contracts provided by Islamic law to plan for the distribution of property to his desired beneficiary(ies) without having to be bound by faraid which already had a specific ruling on the recipients to inherit the property and their respective shares or proportions .

For example, the permissibility of *waṣiyyah* has provided a prospect for Muslims to plan to give his property only after his death or in other words the *waṣiyyah* shall take effect only after the owner of the property or the testator dies. Basically, one is allowed to perform *taṣarruf* on the property he owns as long as he lives and the right is lost immediately upon his death (Ibn 'Āshūr, 2011: 492).

In the context of wealth planning, the availability of various methods and instruments of *tabarru'* contracts has given the property owners the choices to decide the best instrument suitable to them. For example, *hibah* allows the property owner to give a certain amount of his property either to his heirs or non heir like adopted children. This is different for a *waṣiyyah* which is only allowed to be made to non heirs to an extent of one-third of the property only, but its enforcement is after the death of the testator, unlike *hibah* where it is effective immediately during the life of the grantor. Through *waqf*, property owners can ensure that their property will continue to be utilized and used for charitable purposes. Meanwhile, an instrument of trust enables the property owner to appoint any individual or any trusted party as a trustee who will manage his property according to the stipulated terms.

Notwithstanding the availability of various instruments, property owners should also possess the ability and knowledge to select the most suitable instrument to suit his proposed plan. In selecting the suitable instrument, an assessment on the background and affordability of the property owner are two important aspects to be considered. Besides that, property owners may also seek the assistance from the experts in wealth planning to ensure that the selected instrument fits the wishes of the property owner thereby achieving the desired objectives. The existence of various property management and planning institutions in the country is seen as a positive step where it can indirectly serve as a point of reference for the public when undertaking the wealth planning process. The instruction to refer to the experts in a specific field is in line with the words of Allah s.w.t. in Surah al-Naḥl 16:43:

فَاسْأَلُوا أَهْلَ الدِّكْرِ إِن كُنتُمْ لَا تَعْلَمُونَ

“So, ask the people of the message if you do not know”.

Fourth maqṣad: Not to use *tabarru'* contracts as a ploy to remove other people's property, especially those related to the rights of heirs and creditors (Ibn 'Āshūr, 2011: 493).

This fourth *maqṣad* is closely related to the first *maqṣad* which explains that these *tabarru'* contracts are *maṣlaḥah* which may lead to good and may avoid any form of evil and harm. The Arab society in the past (*jāhiliyyah*) was more inclined towards giving their property to their noble leader amongst them to win their praise to the extent that they have left out their heirs to inherit their property especially their wives and daughters. As a result, Allah s.w.t. had initially directed that *waṣiyyah* was mandatory to be made to parents and relatives but was subsequently abrogated with the revelations of the verses in the Quran relating to Islamic law of inheritance (*farā'id*) which explain in details the respective shares of the heirs over the estate of the deceased. Although the mandatory order was abrogated, *waṣiyyah* is still being widely practiced and encouraged in Islam whereby the *waṣiyyah* can only be made to the non-heirs who cannot inherit the property under *farā'id* and limited to only one-third of the property, unless with the consent of the other heirs of the testator (al-Nawawī, 2005, 352). This is according to the words of the Prophet (b.u.h): (al-Bukhārī, 2002: 2742).

عَنْ عَامِرِ بْنِ سَعْدٍ ، عَنْ سَعْدِ بْنِ أَبِي وَقَّاصٍ رَضِيَ اللَّهُ عَنْهُ، قَالَ: جَاءَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَعُودُنِي وَأَنَا بِمَكَّةَ، وَهُوَ يَكْرَهُ أَنْ يَمُوتَ بِالْأَرْضِ الَّتِي هَاجَرَ مِنْهَا، قَالَ: يَرْحَمُ اللَّهُ ابْنَ عَفْرَاءَ، قُلْتُ: يَا رَسُولَ اللَّهِ، أُوصِي بِمَا لِي كُلِّهِ ؟ قَالَ: لَا، قُلْتُ فَالشَّطْرُ، قَالَ: لَا قُلْتُ: الثُّلُثُ، قَالَ: فَالثُّلُثُ، وَالثُّلُثُ كَثِيرٌ، إِنَّكَ أَنْ تَدَعَ وَرَثَتَكَ أَغْنِيَاءَ خَيْرٌ مِنْ أَنْ تَدْعَهُمْ عَالَةً يَتَكَفَّفُونَ النَّاسَ فِي أَيْدِيهِمْ ...

'Amir bin Sa'd narrates, Sa'd bin Abi Waqqas narrates: The Prophet (b.u.h) came visiting me while I was (sick) in Mecca, ('Amir the sub-narrator said, and he disliked dying in the land, whence he had already migrated). The Prophet said, May Allah bestow His Mercy on Ibn Afra. I said, O Allah's Apostle! May I will all my property? He said, No. I asked, Then may I will half of it? He said, No. I said, One third? He said: One third, and even one third is too much. It is better for you to leave your inheritors wealthy than to leave them poor begging others...

In the context of wealth planning, property owners should not use these existing instruments such as *hibah*, *waqf*, *waṣiyyah* and trusts as a ploy to circumvent the application of *farā'id* law or in other words to deny the right of any heirs from inheriting the property in the future. The fact is, the welfare of each heir is an aspect that needs to be taken into consideration by the property owner in wealth planning process. This is as explained in the hadith mentioned earlier on the importance of looking after the welfare of heirs and not to leave them in an undesirable living condition. In the current context, this can be seen in the case of *Siti Binti*

Yatim vs Mohamed Nor Bin Bujal,⁵ where the deceased has made a *waṣiyyah* to give all his property to his son, Mohamed Nor Bin Bujal. The purpose of the *waṣiyyah* was to prevent his wife from acquiring all parts of his property on the grounds that his wife had been given enough property during his lifetime. Therefore, Bujal's *waṣiyyah* which prioritized his son and denied his wife's rights was held to be invalid.

According to Ibn 'Āshūr, it has become common practice where these *tabarru'* contracts are used as a ploy in the context of property inheritance as well as debt repayment (Ibn 'Āshūr, 2011, 493). Although the implementation of this *tabarru'* contract is good and is encouraged in Islam, it cannot be used as a way to legalize something that is strictly prohibited by Islamic law such as denying the right of heirs in inheritance or denying creditors the right to recover their debts. Therefore, it is important to apply this *maqṣad* in implementing the *tabarru'* contracts to prevent it from being misused for any purpose that is contrary to Islamic law.

This is due to the fact that the basic objective of syariah is to achieve goodness or *maṣlaḥah* to human beings, which includes *maṣlaḥah* in the world and also *maṣlaḥah* in the hereafter (al-Shāṭibī, 2004, 238). Thus, in the context of property planning, any purpose or intention that leads to evil or may cause harm to any party is against the objectives of syariah law and thus is strictly prohibited. This includes undertaking wealth planning with the intention of avoiding debt repayment obligations. The fact is, for every debt that is owed, it is obligatory to be paid even if the creditor has died and the obligation will not diminish at all even if the debtor performs a charitable deed which Allah has promised with huge reward in the hereafter. This coincides with the words of the Prophet (b.u.h):-

نَفْسُ الْمُؤْمِنِ مُعَلَّقَةٌ بِدَيْنِهِ حَتَّى يُقْضَى عَنْهُ

"The soul of a believer depends on his debt until he pays it off" (al-Tirmidhī, 1996: 1079).

Al-Shawkānī argues that the above hadith is to prompt all heirs to pay off the debts of the deceased which is *muqayyad* in nature for anyone who owns property. Al-'Irāqī, on the other hand, argues that the affairs of the deceased are suspended where there is no judgement on him of either he will be in peace or in pain in his "life after death" until his debts are paid off, that is, whether the deceased leaves property for the payment of the debt or vice versa (al-Mubārakfūrī n.d.: 193). The importance of settling all debts can also be seen through the words of the Prophet (b.u.h):

يُعْفَرُ لِلشَّهِيدِ كُلِّ ذَنْبٍ إِلَّا الدَّيْنَ

"Forgiven for those who are martyred for all their sins unless they have a debt" (to human beings) (Muslim, 2006: 1886).

Conclusion

Based on the above discussion, it can be concluded that the wealth planning parameters established based on *maqāṣid al-sharī'ah* involving *tabarru'* contracts as expressed by Ibn 'Āshūr are suitable to be adopted as guidelines for property owners in wealth planning process. The use of these parameters is to ensure that the wealth planning made is in line with the requirements of Islamic law and will indirectly help towards achieving the expected objectives and benefits. Among the parameters proposed are that wealth planning must be done towards producing benefits that will include specific benefits directed to the property owner himself and to other interested party in general. Any planning made on the property owned must be fully and legally documented with the creation of a document in writing or printed. In the process of selecting the appropriate wealth planning instrument to be used, the aspect of evaluating the background and affordability of the property owner should also be taken into consideration and to seek the assistance of the experts in property planning. Further, the property planning must not be used as a ploy to avoid the application of *farā'id* law or intended to deny the rights of any heirs to their inheritance. Finally, property planning must not be used as a mean to escape from the obligation to pay off debts. However, in addition to making these property planning parameters as the bases, property owners also need to ensure that every pillar and condition related to the instruments used, whether *waṣīyyah*, *hibah*, *waqf* or trust must be fully complied with.

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