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Corporate Ownership and Governance Structure of Corporation in Supporting Sustainability: The Shariah Perspective

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Abstract
Sustainability is a current phenomenon that is highly concerned by numerous parties. It is argued that company law needs for a reform in both corporate ownership and corporate governance structures within the company by revisiting duties and responsibilities of directors and shareholders in realizing this sustainability agenda. Nevertheless, such reform is not clearly addressed in the Malaysian company law, particularly under the Companies Act (CA) 2016. At the meantime, many discussions affirm the agenda of sustainability from Islamic perspective under the realm of *maqasid al-Shariah*. Hence, companies undertaking Shariah compliant businesses have initiated on de-liberating some possible actions in exploring this agenda. Yet, the discussion reverts to the corporate ownership and corporate governance structure of these companies which are governed under the CA 2016. In addition, little discussion has focused on corporate ownership and governance structure of *sharikah* under Shariah and to what extent it facilitates the agenda of sustainability. Therefore, this article aims to discuss two folds. First, what is the scope of sustainability under the conventional standard and its position from Islamic perspective. Second, how business corporate ownership and governance structure of a company, mainly premised on the roles and duties of directors and shareholders, can play the important roles in support of sustainability under the CA 2016, and its comparison from *sharikah* under the Shariah. This comparison is essential to highlight certain aspects that can be adopted for Shariah-compliant business entities in Malaysia particularly in achieving the sustainability agenda.
Keywords: Sustainability, Malaysian COMPANY LAW, SHARIKAH, SHARIAH.

Introduction

Sustainability or sustainable development is a present trend that is highly concerned by numerous parties. The sustainability agenda is mainly propagated by the idea that corporation or company must be responsible in conducting, managing and balancing the economic, social and environmental impacts of its business activities. There arises an argument that company law needs for a reform in corporate ownership structure and corporate governance within the company by directly focusing on revisiting duties and responsibilities of directors and shareholders in realizing this sustainability agenda (Sheehy, 2022). However, the Malaysian company law does not clearly address this reform on the basis that the provisions on the directors' duties to support the agenda are not expressly governed in the Companies Act 2016 (CA, 2016).

At the meantime, there emerges numerous significant discussions which affirm the agenda of sustainability from Islamic perspective under the realm of *maqasid al-Shariah* (Objectives of Islamic law). Consequently, companies undertaking Shariah compliant or Islamic businesses have commenced on deliberating some possible actions in exploring this agenda. Yet, the same concern roots back to the corporate ownership and corporate governance structure of these companies which are governed under the CA 2016. In addition, little discussion has focused on corporate ownership and governance structure of *sharikah* (Islamic partnership) under Shariah and to what extent it can facilitate the agenda of sustainability. Therefore, this article aims to discuss two issues. First, what is the scope of sustainability under the conventional standard or mainstream and its position from Islamic perspective. Second, how business corporate ownership and governance structure of a company, mainly premised on the duties of directors and shareholders, can play the important roles in support of sustainability under the CA 2016, and its comparison from *sharikah* under the Shariah.

Methods of Study

This paper adopts qualitative, doctrinal and comparative legal and Shariah analysis that is solely based on the library mode of research. It also used primary and secondary data. The primary data for legal study was obtained from the CA 2016 and relevant cases laws whereas the primary data for Shariah study was obtained from the Quran and Hadith. The secondary data for both legal and Shariah studies comprises of legal and Shariah articles, books and journals written by the legal and Shariah scholars.

Literature Review

According to the recent study conducted by Abd Aziz and Abd Ghadas (2021), corporate governance for a Shariah-compliant corporation that emphasizes on mutual participation and assistance among all stakeholders for the benefit of society is different from its conventional practice. However, the study does not examine the operation of current corporate ownership and governance framework under the common law identical to Shariah compliant corporation nor the linkage between the former with sustainability agenda. In addition, Laldin and Djafri (2021) emphasizes the need for revisiting Islamic finance system to support sustainable development. However, the discussion is only confined to Islamic banking products and services that are silent on how corporation and its corporate law play a role in adhering to this agenda including its comparison with Islamic perspective. On this basis, this study intends to fill this gap.

Sustainability under Conventional Mainstream

The term "sustainability" has no clear definition despite it has been thoroughly discussed for the past thirty years (Myers & Czarnezki, 2021). Sjafiell & Bruner (2019) describe "sustainability" in the commercial aspect as follows

"Business and finance creating value in a manner that is environmentally sustainable, in that it ensures the long-term stability and resilience of the ecosystems that support human life; socially sustainable, in that it facilitates the achievement of human rights and other basic social rights, as well as good governance; and economically sustainable, in that it satisfies the economics needs necessary for stable and resilient societies".

Based on the above definition, it can be said that sustainability is rest upon the three pillars of environmental, economic, and social welfare.

Corporate Ownership and Governance Structure under Malaysian Company Law and Its Relation to Sustainability

The Malaysian Company Law is mainly based on common law. The fundamental legal principle of a company as a separate legal entity distinct from its directors and members is derived from *Salomon v Aron Salomon& Co Ltd (1897) AC 22*. This legal principle affects corporate ownership structure and corporate governance as the main components of the company.

a. Corporate Ownership Structure of Company vis a vis Shareholders

Corporate ownership relates to shareholders or members of a company. Shareholders are persons who owns shares in the company bestowed with statutory legal rights attached to the shares such as right to earn declared dividend and right to vote in a general meeting and to appoint or remove directors. Having the latter right enables them to exercise control over the board in the management of the company (Sulaiman & Othman, 2018)

b. Governance Structure within the Company

Corporate governance often pertains to the role of companies in society and the organization of affairs within companies (Sheehy, 2005). It is closely linked to the concept of separation of ownership and control between the members as the owners of the company and the directors who manage the company and have control over it. Moreover, the corporate governance and separation of ownership and control discussions arise from the division of powers between the directors and members of the company. The debate of this division persists due to the common law principle that the shareholders could not interfere nor override the board's management decisions (*Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame [1906] 2 Ch 34*).

The corporate governance discussion also gives rise also to shareholder-stakeholder debate (Sheehy, 2005). Sjåfjell argues that the shareholder primacy becomes the main obstacle to the sustainability agenda due to its lacking social embeddedness, favoring merely financial wealth for the benefit of small elite (Sjafiell et al., 2015). Scholars, regulators, and the company law practitioners have supported shareholder primacy that the company suits to create wealth leaving the distribution of wealth leading to social disparity harming to society to other areas of laws (Sheehy, 2022).

c. Duties of Directors and Roles of Shareholders in Relation to Sustainability

The fiduciary duty of directors to act in the best interest of the company is statutorily governed under Section 213(1) of the CA 2016 which states that "a director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith in the best interest of the company".
Regarding the above provision, the term 'in the best interest of the company' is illustrated under the common law that directors are obliged to act in the best interests of the company as a whole. As held by Evershed M.R. in *Greenhalgh v Cinema Ltd [1951] Ch 286*, the phrase "the company as a whole" does not mean the company as the company as a commercial entity separated from the corporators. It refers to the financial well-being of the shareholders as a general body (Grantham, 1998) According to Sulaiman & Othman (2018), this view supports the shareholder primacy on the basis that as the capital providers, the shareholders' interest will be the only consideration be taken by the directors in discharging their duties for the best interest of the company.

However, the recent practice of Malaysian company law permits directors to consider other stakeholders' interests (such as employees, creditors, environment etc.) rather than the shareholders per se. However, this stakeholder primacy is not expressly governed under the CA 2016 simply because it is sufficiently covered in cases laws (Sulaiman & Othman, 2018). For Deva (2010), the stakeholder-duty must be imposed on the directors for two reasons. First, the scope of their duties should not be limited to shareholders otherwise they would not consider the stakeholders' interests in the decision-making process. Second, externalizing the stakeholders' interests will result into negative societal consequences in a sense that the board's decision making would cause harm to them. In this regard, Sheehy (2022) viewed that the duties of directors must be redistributed to other stakeholders having interest of sustainability and justice so that social decision-making responsibilities can be achieved.

In respect of the roles of shareholders to support sustainability, it is argued that Section 195, a newly provision introduced in the CA 2016, bestows the shareholders' right to review the board by requiring the chairperson to provide the opportunity for members to question, discuss, comment, or make recommendations on the company management (Abdul Razak et al., 2021). Additionally, this new provision not only allows them to interfere in the company management but also makes the separation of ownership and control or division of powers between these two organs blurred (Salleh et al., 2019). Yet such recommendation will only be binding if it is in the company's best interest and such right of recommendation is granted in the company's constitution. Yet, this provision though seems ideal for shareholder activists to address sustainability agenda, it may be impractical as the consideration of best interest of the company shall be solely decided by the board not the members (Abdul Razak et al., 2021)

2. Islamic Perspective on Sustainability

In Islam, religious matters and other aspects of life cannot be applied the same way in the west as Islam is a way of life. Hence, practicing Islam involves every single aspect of life which unexceptionally includes sustainable development (Tri Nugraha & Bimantara, 2021). It is stressed that sustainable development is not uncommon to Muslims as numerous Quranic verses and hadiths illustrate the framework relating to spiritual and physical welfare of humanity including environment, which gives a model for justice and equity. In fact, Islam views that everything on the earth is created for humanity and a blessing from Allah to human beings. Yet, such blessing comes with conditions which carry responsibilities (Aburonia & Sexton, 2006)

According to Rkiouak (2016), the Islamic approach to sustainability is premised on *maqasid al-Shariah*. *Maqasid al-Shariah* is defined as:
"The objectives of Shariah that need to be achieved by anyone who adhered to the religion Islam. The main objective of Shariah is to ensure that all evil is prohibited; but all good is promoted so that no one will be harmed" (Hassan et al., 2021)

It aims to promote the well-being of all mankind which rests on preserving five elements from harm namely *al-din* (faith), *al-nafs* (human self), *al-`aql* (intellect*), al-nasl* (posterity) and *al-mal* (wealth) (Hassan, 2006)

a. Business in Islam and Its Relation to Sustainability

Islam encourages Muslims to participate in economic activities such as lawful business and lead life through spending in accord with their needs. Yet, all these business activities are subjected to moral filter that can achieve sustainability (Hassan, 2016).

Extensively, Saba et al (2021) highlighted that Shariah comprehensively includes all aspects of life including economic and financial principles, covering legal, moral principles of contracts and theories of economic behavior that demonstrate the individual-market activities. To make the natural market forces operate in an equitable manner, it must be controlled so that equal distribution of wealth throughout the economy to accommodate the needs of all fairly is attained. In addition, from the perspective of *maqasid al-Shariah* in preserving *al-mal* particularly in financial activities, among the specific objectives of preserving *al-mal* in Islam are *rowaj* (inclusivity i.e. circulation of wealth in the community) and *`adl* (fairness). These specific objectives take into consideration of the benefits and interests of the ummah in totality (Ahmad & Al-Maisawi, 2016). Apart from that, Laldin & Djafri (2021) articulated that Islam promotes the preservation of environment that entails preserving its resources by utilizing and maintaining them properly and by forbidding their extravagant use and destruction unnecessarily. Scholars regarded this environment preservation as *maqasid taba`i* (secondary objective) to the objective of preservation of *al-mal*. However, they both stress that this preservation goes beyond all the essential objectives of Shariah in a certain perspective.

1. Ownership Structure and Decision-Making Process in Sharikah and Mudharabah as Islamic Business Entities under Shariah

Islam recognizes a broad forms of business structures for investment, commercial and profitable purposes (Abd Ghadas & Ali, 2012). *Sharikah* and *mudharabah* are among these examples. Siddiqi defines *sharikah* as *participation of two or more persons in a certain business with defined amounts of capital according to a contract for jointly carrying out a business and for sharing profit and loss in specified proportions*. He also provides the definition of *mudharabah* as *one party provides capital and the other utilizes it for business purposes under the arrangement that profit from the business will be shared according to a specified proportion* (Siddiqi, 1985)

a. Sharing of Ownership and Participation Right in Management of Sharikah and Mudharabah

Under *sharikah al-mal* (property partnership), the classical scholars unanimously agree that the partners must provide capital which must exist and be present at the commencement of *sharikah* (Al-Khayyat, 1994). They held different opinions on the pre-requisite of co-ownership of the capital for *sharikah* prior to its execution. According to majority of classical scholars, joint ownership of capital is not a necessary ingredient for its existence though such joint ownership is important for the continuation and existence of *sharikah*. By contrast, Shafi`e scholars view that joint capital contribution must be established prior to the formation of *sharikah*. Such joint ownership in capital must be made for granting each other permission to transact in one's share. This is also to ensure their joint liability for the capital from the inception of *sharikah* (Sadique, 2009). For Nyazee (2006), *sharikah* is based on aggregate concept where the capital of *sharikah* is held in joint ownership by the partners.

In addition, the partners of *sharikah* must be capable of conferring and bearing *wakalah* (agency). Each partner permits the other to transact on his behalf in all transaction activities. In this sense, every or all partners may contribute to work and are entitled to participate in the management. However, they may agree that the management be carried out by one of them. If such condition is stipulated, the sleeping partner shall only be entitled to profit in proportion to his capital (Usmani, 1999). For Al-Shubaili (2020), in terms of decision-making process, every decision taken by the partners must be with their agreement and their consent. Under *mudharabah*, according to Hanafi madhab, the capital and assets of *mudharabah* still belong to *rabbul mal* as he has *milk al-roqobah* (actual ownership over such property). Such capital is passed to the *mudharib* to manage it on his behalf. Such management of business is delegated to the *mudharib* under *milk al-tasarruf* (ownership of doing disposition/transaction). On this basis, the *rabbul mal* is impeded to participate in the management (Al-Khafif, 2009)

However, the classical scholars have different opinions on whether the *rabbul mal* is permitted to work along with *mudharib* in the management of *mudharabah* business. Salman (2007) recorded that most of the classical scholars clarified that the independence of *mudharib* to manage the *mudharabah* business using *rabbul mal's* capital is a stipulated condition that must be respected. Thus, it is not valid to stipulate the owner can work alongside the *mudharib* as it contradicts the essence of *mudharabah* and hence becomes null and void, By contrast, several classical scholars argue that the owner may stipulate his work with *mudharib*. so long such stipulation does not contravene *muqtadha al`aqd* of *mudharabah*. This is because such permissibility is based on that *mudharabah* does not negate his ownership to the capital by which only his right of *tasarruf* is passed on to the *mudharib*.

b. Duties of Partners in Relation to Sustainability

The scholars did not directly discuss the duties of partners to support sustainability in conducting their business. However, the discussions on the obligations to pay *zakat* as a social philanthropy in *sharikah* and *mudharabah* are well recorded. For example, all the classical scholars agree that the partners of *sharikah* are obligated to pay *zakat* in respect of their capital and profit in the *sharikah*. However, they disputed on whether joint ownership does give effect to the *zakat* payment. According to majority scholars, *zakat* is obligated upon the partners individually when their sharing portions fulfil the conditions of *zakat*. Shafi`e scholars differently viewed that joint ownership is subjected to *zakat* just like aggregate property. When it reaches *nisab*, *zakat* is obligated therein despite the partners' portion does not meet *nisab* (Qari, 2013). This view is taken by numerous contemporary Muslim scholars in arguing that the company as a legal entity is obligated to pay *zakat* (Ramli & Ghadas, 2019). In addition, they also agree that *zakat* of capital and profit is obligated upon the *rabbul mal*, who is the owner of capital and assets in the *mudharabah* (Qari, 2013)

Findings and Analysis

The above discussions found that the corporate ownership structure within the company entails the right and power of shareholders to exercise their control right i.e. voting right attached to their shares in a general meeting. Nonetheless, having such control right does not mean that the shareholder has right to participate in the business management of a company. (Abd Ghadas & Ibrahim, 2007)

Notwithstanding the above, although the board have exclusive power to decide in the management, their duties to act in the best interest of the company are eventually constrained for the benefit of maximizing shareholders' financial wealth. Although the stakeholder theory is considered in several cases laws, it is still within the board's discretion and such consideration must be aligned with the benefit of shareholders (Deva, 2010). Hence, no doubt that the directors' duties toward the stakeholders particularly sustainability is hardly imposed to due this strong corporate norm. The sustainability agenda which falls under the stakeholder primacy is impeded because of the unreadiness of company law to cater other externalities within the corporate governance of a company (Sheehy, 2022). For Sulaiman & Othman (2018), allowing the directors to consider their interests is in law different from making this consideration obligatory upon the directors.

From Shariah perspective, sustainability has its foundation under the framework of *maqasid al-Shariah*, especially under preservation of al-mal. It reverts social solidarity and sharing of prosperity among the society. Islam does positively support business, provided that it must comply with the specific *maqasid al-Shariah* relating to property such as *`adl, rowaj* and social solidarity. At the end, the sustainability aims to serve the religion and benefit the ummah collectively.

For business ownership and governance structure within *sharikah* and *mudharabah* and how it could achieve sustainability, it fulfils both micro and macro perspectives, First, from micro perspective, every Shariah contract must fulfill its pillars and conditions as well as its *muqtadha al-`aqd* (objective of contract). *Sharikah* entails profit sharing, risk taking and risk sharing as the consequences of *sharikah*. Uniquely, all partners of *sharikah* share ownership of capital, asset and profit and have right i.e. to participate in the management equally. Usmani (1999) Their decision-making is in fact based on consensus. In fact, this decision-making process is line with the concept of *shura* in achieving sustainability (Hassan, 2016). In addition, their relationship is based on *wakalah* so that they represent and transact each other on their behalf. In *mudharabah*, *rabbul mal* still owns the capital and assets but delegates the right of management to the *mudharib* according to Hanafi madhab. Although *mudharib* can decide matters based on the interest of *mudharabah, rabbul mal* can still voice his view. Interestingly, some scholars allow *rabbul mal* to participate in the management of *mudharabah* together with the *mudharib* although some do not allow it.

Second, from macro perspective, all partners as well as *rabbul mal* are obligatory to pay zakat of their capital and profit as the owners of the business inseparable from them. This evidence shows that business under Islam is different from the conventional one in that it does not only permit profit acquisition but promotes social prosperity and distribution as well. It is observed that although the classical scholars did not discuss specifically the application of sustainability in business, the above literatures show that it considers the aspect of sustainability from social perspective. All in all, the obligation and responsibilities are mandated on them collectively being part of their Islamic business ethics.

Conclusion

In conclusion, the company law is not prepared to address sustainability agenda simply because the shareholder primacy becomes the norm within the corporate governance of company coupled by its ownership structure which attains to this end. Although the reform of the duties of directors and shareholders are suggested, the CA 2016 does not well address it which hinders movements towards sustainability. The same concern applies to Shariah compliant companies which also adopt this corporate structure within its legal system.

In contrast, Islam depicts *sharikah* a commendable business vehicle in realizing sustainability agenda under the realm of *maqasid al-Shariah*. *Sharikah* entails unity of ownership and management among the partners, who are collectively responsible to conduct a business that manifests a social and economic benefits to society. The authors suggest that companies conducting Shariah compliant businesses could considerably apply this business concept into its corporate ownership and governance structures in achieving the sustainable business. Such application would at least complement *maqasid al-Shariah* which highly emphasizes on equality, justice, social and sustainable impacts toward the ummah as a whole.

Suggestion

This study urges further research in exploring a suitable new business model that is structured with *sharikah* principles to support sustainable development in accordance with *maqasid al-Shariah* in more details.

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