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Sukūk Al-Ijārah: The Call for a New Framework

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Abstract:

Sharīʿah legitimacy of sukūk has been a subject of intense debate and discussion among the religious scholars. Their key objection on sukūk al-ijārah is that the real ownership is missing and it heavily relies on *hiyal* i.e., stratagems to legalize ribā, which frustrate the higher objectives of the Sharīʿah. The objective of this research is to improve the structure of sukūk-al- ijārah and to endow with an alternative for it, which will be beneficial for public at large. The major research questions involve investigating real or beneficial ownership, ribā, bayʿ al- wafa, bay al- istighlal and bayʿ al īnah, etc., in sukūk. Qualitative, descriptive and analytical legal research methods have been employed. The main conclusion drawn from the study indicates that there are several elements which are rendering sukūk un-Islamic and are stratagem to legalize ribā. It is suggested that the removal of these un-Islamic elements can render sukūk truly Islamic.

Keywords: Sukūk al-ijārah, Sharīʿah legitimacy, Sukūk un-Islamic, Ribā, Hiyal, Islamic Finance, Sharīʿah compliance

INTRODUCTION

Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) in its Sharīʿah standard defined the kinds of sukūk and elaborated rules to trade in them. Ijārah sukūk are the latest product in the market that is gradually increasing its roots in society. They are used by the governments and corporate entities for mobilizing funds (Ali, 2005).

AAOIFI (n.d.) defined ijārah certificates as: "These are certificates of equal value issued either by the owner of leased asset or a tangible asset to be leased by promise, or they are issued by a financial intermediary acting on behalf of the owner with the aim of selling the asset and recovering its value through subscription so that the holders of the certificates become owners of the assets." The

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certificates can be issued in ownership of usufruct of existing assets, ascertained future assets, services of the specified party and ascertained future assets.

The work of some great scholars who worked on sukūk is critically evaluated. The eminent scholars namely Muhammad Taqi Usmani, Salam Syed Ali, Dr. Muhammad Tahir Mansoori and Muhammad Ayub etc., highlighted important Sharīʿah related issues in sukūk that triggered the further research through instant dissertation consequently, a new and alternative model of sukūk-al- ijārah adhering principles of Sharīʿah is proposed.

METHODOLOGY

The research is based on primary and secondary sources. Relevant material from primary sources is collected from the holy Qur'ān, translations of Hadith literature and statutory provisions of the relevant legislation. Other secondary sources like books, journals, reports, thesis, dissertations, articles, newspaper, web resources, databases, scholarly commentaries, policy papers, government's notifications & circulars etc. were also used. A few notable public and educational institutions, libraries of Islamabad were also visited to collect concerned data. Qualitative, descriptive and analytical legal research was also done in it by investigating the models of sukūk.

SUKŪK AND ITS LEGAL STATUS IN SHARĪʿAH

The Paradox of Ownership in Sukūk

Sukūk being a revolutionary product in Islamic finance has underlying assets, involving the issue of ownership. The issue arises when there is a gap between real ownership and beneficial ownership. The principles of Islam lay great importance on ownership rights. In Arabic, the word "milkiyyah" or "milk" (Baʿalbaki, 1980) is used for ownership: meaning holding a thing and ability to exploiting it. Technically, ownership is defined in a wider horizon (Ghani & Lahsasna, 2015). This section will analyze the Sharīʿah definition of ownership, the rights originating from it, as well as the real and beneficial ownership. It will also focus on the co-ownership, as in sukūk: the sukūk holders have an undivided share in the ownership. Subsequently, it will evaluate the annexed issues related to ownership in sukūk, by piercing the veil of sukūk. For Sharīʿah analysis of ownership in sukūk, it is mandatory to comprehend the concept of ownership in Islam comprehensively.

Is ownership a complicated issue or became complex in sukūk? For this, one must consider the definition of ownership in Islam by four eminent schools of thought. Hanafī scholars laid emphasis on the right of disposal in ownership and declared it essential unless, there is any legal barrier (Al-Humam, 1990; Nujaym & Ibrāhim, 1968). Some Hanafīs described it as: exercising the right of exclusive freedom over property including right to put a restriction on others (Al-Sharīʿah, n.d.). Whereas Al-Qarafi, an eminent scholar of Mālikīs described it as: an authority to get the benefit over an asset and to accept any compensation for it (Al-Qarafi, 1998). Al-Subki also defined it in terms of getting usufruct over asset (Al-Subki, 1991). Some Shāfīs such as Abu Shuja' has defined it as a legal exclusivity over a useable item. Ibn Taymiyyah defined it as "a legal ability justifying the right of disposal of the asset" (Taymiyyah, 2002).

By analyzing all the above-mentioned definition, it is evident that ownership requires the right to use and right of disposal. The Profound analysis shows that ownership is linked with the right to possess, use, sell, donate and to give it as a gift. If there is any legal obstruction, then only these

rights can be delayed. Otherwise, the owner has and can exercise all of these rights. It is also obvious that right to use and disposal is the primary purpose of ownership.

The controversial issue here is beneficial ownership which is originated from the common law (htt3), is practiced now a day. It is also known as "a sale that falls short of a real sale," in which some of the rights are not transferred from the seller to buyer. Right of sale to the third party which is attached to the ownership of property will be profoundly scrutinized here. "A sale that falls short of a real sale" is defeating the primary purpose of law i.e. the transfer of ownership. It could be used for the fraudulent purpose i.e. the buyer understands himself as an owner which in fact, is not a legal owner (Abdullah, n.d.-a). From a long time, it is criticized that Islamic banking replicates conventional banking (Ayub, 2007; Beck et al., October 2010). The focus of criticism is often on beneficial ownership in financial products. The criticism emphasizes that in sukūk, Sharīʿah concept of ownership is violated and consequence in contradicting maqāsid-al-Sharīʿah (Al-Amine, 2012).

Beneficial ownership restricts the right of disposal of an asset. Is it complying with Sharīʿah?

The issue will be investigated by Fiqh analysis. By takyif fiqhi of moveable property, it is observed that beneficial ownership is allowed in rahn. On the other hand, some Hanafīs allows it as bayʿ al wafā whereas, others don't allow it. There is a difference of opinion on al-shurut al-taqyidiyyah, three different views are observed. The majority of fuqaha disapprove al-shurut al-taqyidiyyah on the ground that Prophet Mohammad (PBUH) disapprove sale with a condition and it is not in line with original repercussion of contract of sale i.e. muqtada al-aqd.

By takyif fiqhi of immoveable property, it is found that the core theory revolves around the possession (qabd). In immoveable property it is effective when he can access and use the goods, devoid of restrictions (i.e. takhliyyah wa tamkin). Here in immovable property, the concept of a beneficial ownership is observed in trust. Whereas, in Islamic finance it is recommended that it should be observed by case to case in designing Islamic financial products i.e. by deeply investigating every contract and issue (Ghani & Lahsasna, 2015). Therefore, the instant research will focus deeply on investigating the issue in line of Sharīʿah.

Not only real sale but beneficial sale is also exercised in sukūk. In asset-backed sukūk there is real sale whereas, in asset-based sukūk there is a beneficial ownership (Abdullah, n.d.-a). IFSB explain that in asset-backed sukūk, the sukūk holders have a right of recourse to the asset in event of default and have to bear the losses in case of destruction of the asset. The legal ownership of the assets exists in asset-backed sukūk in which the originator has no right of recourse to asset. All of 3 conditions i.e. Profit and loss structure, real sale requirement and real ownership, are prevalent in asset-backed sukūk. Therefore, these are considered as Sharīʿah complaint (Hasan, 2013).

Asset-backed sukūk also attract little criticism upon it that there is no direct transfer of ownership to investors but these are transferred indirectly as contrast to securitization. Here the assets are considered as the mere receivables (also known as debts) in Sharīʿah principles. So, there is mere trading in debts rather instead of assets which consequence in exploitation of asset. Here the recourse lies to SPV and its assets rather than originator. At this point, it is recommended that measures should be taken to implement AAOIFI standard in real sense (Kamali & Abdullah, 2014).

On the other hand, in asset-based sukūk, the sukūk holders have recourse to the originator or to the issuer not asset and have no real ownership of asset. The dividend is measured by the ratio of

investment rather than the ratio of profits attained. Sharīʿah scholars criticizes asset-based sukūk as there is no interest of sukūk holders in underlying asset, restriction lies on disposal of asset and sukūk holders have no right to exercise due diligence on the asset (Hasan, 2013). Scholars are of view that asset-based sukūk are in fact a duplicate of conventional bond because rights of investor are not protected in it. Moreover, the investors are getting the cash flow instead of the asset which can generate the cash flow. AAOIFI resolution in 2008 was against the asset-based sukūk (Kamali & Abdullah, 2014). The transaction is not through underlying assets then the money which is generated here is simply against money.

As discussed above the Sharīʿah analysis depict that the sukūk holders should deal freely with the asset including the right of disposal. Hanafīs scholars and Ibn Tammiyyah specifically mentioned the right to disposal in defining the ownership. After criticism of Sheikh Taqi Usmani on ownership, AAOIFI held resolution in 2008 in which it is recommended that all of the rights of ownership (including right to use and sell) necessitate in sukūk to be transferred (htt4). The documentations should also be maintained and the manager shouldn't keep it as his own assets in harmony with Articles (2) and (5/1/2) of the AAOIFI Sharīʿah Standard (17) on Investment sukūk (n.d.).

One of the objectives of Sharīʿah is the protection and preservation of property (Abdullah, n.d.-a). Islam recognizes the right of people to own property. Applying the real rights of ownership on ijārah sukūk, it is illustrated that theoretically ijārah sukūk involves real sale of the asset rather than generating mere fictitious right to get rents. Risk also transfers with ownership complying with hādīth "al-kharaj bi al- damān". It is further explained that in case of any destruction the loss is equally divided in co-owners up to their share in ownership. If it is truly used by the market players, then the profit and loss ensure compliance with Sharīʿah. (htt4).

As in beneficial ownership, there is certain restriction including the right to sell the asset to the third party. It has gravest implications to the buyer in case of bankruptcy of originator. Investor faces this issue in asset-based sukūk unlike asset-backed sukūk. Moreover, it generates the issue of liquidity (Abdullah, n.d.-a) that makes the instrument less tradable in market, hence, lacking investor's confidence to invest in it. Global financial crisis in which number of sukūk defaulted gave evidence that number of people were not aware of the fact that they were not the legal owners. In fact, they were beneficial owner. Moreover, they couldn't differentiate between legal and beneficial ownership. Therefore, investor's protection was vague (Kamali & Abdullah, 2014).

Musha and Sharikāt Al Milk

The ownership is further linked with co-ownership. Modern scholars linked the ordinary shares with the concept of musha (means undivided share in the joint property). In co-ownership, each owner is holding each and every particle of property jointly. The khalt or mixing of capital is prerequisite in every form of partnership. Moreover, all rights go back to your old way in sharikah al milk when partnership comes to an end or becomes fāsid (Nyazee, 1998).

Co-ownership is categorized into ayn and dayn. Following are the necessary conditions for co-ownership:

1. Each co-owner can only use and dispose of his own share. He is stranger with respect of other co-owner and cannot use and dispose of the share of co-owner. The only exception is house which can be used by both.

2. In case of khalt where the capital is mixed the co-owner cannot sell the co-owner cannot sell his own joint share without the permission of other. If the share is not mingled properly then the co-owner can sell his own joint share without the permission of other.

The logic behind this condition is that ownership is undivided (musha) and every co-owner owns property in each and every particle. This opinion is held by Majallah whereas modern scholars permit selling of such shares without partition (Nyazee, 1998).

3. The rules of wadīah (deposit) are applicable here in co-ownership (Nyazee, 1998). In wadīah, the one who is holding the trust property is liable only if the property is destroyed by him by negligence (Ashraf, 2006). The same rules will be applied here in co-ownership, if one co-owner deposits the property to any third person without obtaining or seeking the permission of co-owner then liability is borne in case of destruction of property.
4. Joint receipt of revenue amounts to sharikāt at milk in such revenue.
5. If someone has taken debt, then the co-owners can demand it jointly or severally.
6. Rules of sharikāt-al-milk are applicable to an ayn if the debt is possessed by one partner. Moreover, period of debt cannot be postponed without the permission of co-owner.

In law, sharikāt-al-milk is referred as co-ownership which is applied in sukūk.

CRITICAL ANALYSIS OF SUKŪK

Despite gravest criticism on ownership in asset-based sukūk focusing on ijārah sukūk, the sukūk (particularly ijārah sukūk) is further criticized on other vital issues which are discussed below;

Guarantee in Sukūk

The issue arises when the guarantee is given by the originator against any shortfall (Al-Amine, 2008). AAOIFI Sharīʿah standard (n.d.) depicted that the third-party guarantee is allowed but it should be given without any consideration. Following issues arises in guarantee in sukūk that are analyzed in dissertation;

- What if the guarantee is given by public unit for sake of encouragement of investments in a country? Is it allowed?
- Whether guaranteeing the capital amounts to ribā?

There are two opinions by contemporary Muslim scholars on this issue;

1) The first group is of view that in sukūk al ijārah, sukūk al mudārabah and sukūk al mushārakah, guarantee the principal pave the road to ribā. As it is also against the mudārabah contract where guaranteeing is prohibited by all schools of thoughts.

As for as guarantee by government is scrutinized, the group is of view that such guaranteeing is impermissible because the property of government belongs to community and is trust in hands of government. It shouldn't be open to financial risks for some entities. Moreover, from practical point of view, benevolent guarantee by any individual or entity is impossible because no one will give guarantee without any specific interest or consideration (Al-Amine, 2008).

2) The other group argues that the guarantee by the third party is permissible. They gave the following arguments in this regard.

As Islamic law prescribes everything is permissible except prohibited. So, guaranteeing by the third party is not prohibited in the text. Moreover, they argue that as long as the third party possesses independent personality to contracting party he can guarantee the capital. If this guarantee is from partner of mudārabah then it is not allowed.

Here the proponents argue that the in both of these cases SPV are autonomous legal entities in terms of financial liability from guarantors. Therefore, such guarantee by a third party is permissible whereas, the opponents stated that it is ribā al-duyun on basis of following arguments. By this guarantee, the money which is invested in the trust certificate will be fully redeemed on date of maturity. Moreover, the certificates holders are getting here fixed periodic returns regarding trust certificates.

The proponents argue that all such transactions are interest based where the guarantee is given by the issuer or any interested party and sukūk holders are getting fixed periodic returns. In both of these cases the guarantors are not mere third parties and haven't given the gratuitous guarantee but they have vested interests in issuance of these sukūk. From the consequences of this guarantee the fund is collected for purchase of sukūk which otherwise will not be achievable (Al-Amine, 2008).

Sale and Lease Back Structure

This deal of sale and lease-back arrangement is evident in sukūk al-ijārah i.e., the customer is in need of finances, he has ownership in asset, and therefore, he sells the asset. After sale, the asset will be lease back to originator against rentals for usufruct of assets. The arrangement is permissible in Islam only in cases of dire need but generally, this practice should be evaded. Moreover, in major business and Islamic finance, there is restriction that they should not adopt it for key approach of business. Besides, it is said that the Islamic banks can accommodate the customer who wants to get free of ribā and doesn't have any further substitute.

The ruling evidently depicts that sale and leaseback arrangement should be used in exceptional cases which should conform to the Sharīʿah rules. As discussed earlier sale and lease back is allowed in dire need, can be used for investment in new assets as well as converting the conventional instruments involving elements of ribā into Islamic financing. The sale agreement should be made prior to lease agreement in such transaction. It is recommended by some scholars that for avoidance of Bay-al-Inah the lease assets can be sold back after some reasonable time in which the value of property has altered.

Sale by Lessor

Lessor can sell the asset to any third party, in that case, the sale will be valid and the ijārah may carry on. It necessitates the ownership should be transferred, a mere right to receive rentals is not allowed. The new lessor can fully exercise all the rights attached to asset and has to bear the liability. It ensures the secondary market on basis of ijārah. All the risks have to borne here by the lessor.

Destruction of Assets

In case of overall destruction of assets, the sukūk holders are bound to bear the losses as per share in the ownership of assets. Hence, ijārah sukūk may generate a quasi-fixed return since there might be default or some unexpected expenses that could not be envisaged in advance. As such, the amount of rent given in the contractual relationship represented by ijārah sukūk represents a maximum return subject to deduction on account of unexpected expenses (Ayub, 2007).

As AAOIFI allowed sale and lease back in sukūk al ijārah (htt4). Here following controversial issues will be determined:

- It will be analyzed that whether such sale and leaseback amounts to bayʿ al wafā, bayʿ al īnah,bayʿ al- istighlāl and ribā or not?

Bayʿ Al Wafā

Bayʿ al wafā is defined as the seller sells the property with the condition to buy back the property in case of payment (Al-Amine M. A.-B., Sukūk Market: Innovation and Challenges, 2008). Here in ijārah sukūk, the seller is in need of cash, for cash he sells out his property and when he is able to returns the cash he will buyback the property from the buyer. The asset is leased to the seller and the rent is collected as installments ends into ownership giving effect similar to ijārah muntahiya bi al-tamleek (in which lease contract ends into ownership) is analogous to bayʿ al wafā (Al-Amine, 2008). Bayʿ al wafā is considered as a defective sale by Hanbalī, Mālikīs, early Shāfīs and Hanafīs jurists. They gave the rationale that in such sale legal modes are used as a cover-up to indulge in forbidden practices in Sharīʿah. Moreover, they argue that the apparent sale is just like the loan and the use of property is interest (ribā) collected over the loan hence prohibited. Incredibly this structure is again enforced in sukūk where money is generated over the usufruct by leasing back the asset to the seller but the modern scholars allowed it.

Generally, in Islamic jurisprudence, there is no objection to selling the property to the person from whom he has bought but it shouldn't be in single contract (Gamal, 2006). The reason is depicted in the hādīth of the holy Prophet SAWW that prohibited joining two sales in one contract (Mansoori, 2003). The separate contracts can be concluded in this regard. We cannot call it sale if it is in a single contract because absolute rights of ownership are not transferred in original by restricting the right of sale (Gamal, 2006).

International Islamic Fiqh Academy declared it Invalid by giving rationale that it put limitation on absolute exercise of proprietary right as the owner cannot dispose of the property as he has no right to sell and right to give property as gift but in actual, he bound to sell it to the first seller on face value. Therefore, this transaction is parallel to loan transaction. The property is mortgage here to the lender from which he is getting benefits. It is a recognized fact that any benefit drawn out of mortgage property is ribā. In this transaction the second sale i.e. buyback of assets is in actual return of loan to lender (Mansoori, 2011).

Bayʿ Al- Istighlāl

It is also known as exploitation sale and sale of usufruct (Mansoori, 2011). It is a sale in which the right of redemption is created by the seller. The seller here takes the property on lease and uses the proceeds (htt5). After paying the price he will get back the property. The opponents consider that it is parallel to sale and lease back structure in sukūk (Al-Amine, 2008).

Bayʿ Al- Inah

Here sale and lease back is also viewed as a kind of bayʿ al īnah (Al-Amine, 2008) in which two sales are joined together: one is spot sale and other is deferred sale (that is with higher price). Here difference between two prices amounts to ribā. The invalidity of īnah is based on the hādīth No. 1232 (At-Tirmidhi, 2007) and hādīth No. 13, 25 (Al-Albani, 1985).

On basis of these issues, it is argued by opponents that such sale and leaseback arrangement in sukūk is subterfuge or a trick to legalize ribā (Al-Amine, 2008).

ISSUE: IS UNILATERAL PROMISE TO PURCHASE HAS BINDING IMPLICATIONS?

Wad or Purchase Undertaking in Sukūk

As discussed, that AAIOFI 2008 resolution mandated real sale and transfer of all rights in ownership, pre AAOIFI period depicts that some issuer relied on wad but pro AAOIFI period depicted some decline in it but still some issuers never observed AAOIFI recommendations. It demonstrates the mind set of people that they do prefer asset-based sukūk. Purchase undertaking is an irrevocable promise in the contract to buy to assets from SPV at maturity. It is normally on par value which is, in fact, guaranteeing the returns of principal replicating conventional bonds. When any asset is buy back at par value then the risk associated with asset is not actually borne by the buyer i.e. the risk of loss to the capital. Therefore, it secures the capital against the risk (Al-Amine M. A.-B., Sukūk Market: Innovation and Challenges, 2008). The legal presumption with sukūk is that there can be no guarantee that capital will be returned to investors. Instead, they have a right to the real value of the sukūk assets, regardless of whether their value exceeds that of their face value or not. Modern day sukūk, however, guarantee by indirect means sukūk holders principal.

The practice of Issuer granting such purchase undertaking has been heavily criticized by the scholars and perhaps the most notable one is by Taqi Usmani (Ellias et. al., 2013). He criticized that it is not allowed to buy assets at par value but can be allowed at market value or money agreed at time of re purchase. The justification for the ruling of "unlawful" with regard to the binding promise by one of the partners to purchase the assets of the partnership at face value is that this is the same as a capital guarantee, which is unlawful (Usmani, 2007). AAOIFI stated in 2008 that repurchase can be on market value. This rule was made to eliminate the element of “price fixing” (Ellias et al., 2013).

By applying Islamic normative theory of profit, it is determined that the risk is the vital element of profit making and not bearing risk amounts to interest. It is observed in asset-based sukūk the investor wants to secure money, fixed returns and no risk in assets. All of these elements are crucial component of conventional bonds. These sukūk are not functioning at the market level of Islamic institutions but by the institutions having mindset of conventional banks. Usmani criticism also highlighted those transactions involving lack of transfer of ownership, fixed returns based on percentage of capital instead of profits and capital guarantying are characteristics of bonds (Ellias, 2013). If these are found in any form of sukūk then there is no difference between bond and sukūk rather than nomenclature.

It is criticized in sovereign ijārah sukūk that in Islamic banking the intention of government to create SPV is to ensure buy back arrangement only. The government usually sells the rentable assets by unilateral promise to buy back the assets on maturity if the SPV requests. Here it is critically scrutinized that SPV is established by the government, therefore entirely dependent on the government or can be named as “dummy” works solely for government. Therefore, SPV is under an obligation to exercise the right to sell the assets back to government on par value even the market price is poles apart to par value. In this way, the unilateral promise has the binding implications in practice (Ali, 2005). This matter is clearly depicted in WAPDA sukūk where unilateral promise has the binding implications open to Sharīʿah criticism (Israr, 2012).

Sayyid Tahir also objected on the first step in ijāra sukūk i.e. the creation of SPV. It is criticized that the SPV and originator are not two autonomous people as required by Sharīʿah. The initial step is

void ab initio and doesn't require supplementary steps. Here the creation of an SPV merely for the purpose of the lease and buy back of asset is suspicious (Forum, 2015). The difference is merely the difference in nomenclature i.e. the markup with rentals. For instance, on repurchase of any asset makeup is taken but here sale and repurchase agreement is made and the "rentals" are received which is, in fact, a markup. Therefore it resembles with the prohibited tricks mentioned in Holy Qur'ān al- A'rāf 162 – 166 (Forum, 2015). So, what is need of SPV here? A well-organized structure can be designed to execute unilateral promise without an SPV (Ali, 2005).

Pricing of Sukūk

As benchmarking became common in Islamic finance, though it is permissible but for determination of returns it is not correct to rely upon benchmarking. Ijārah sukūk requires the rentals should be received on basis of underlying asset but practically it is generated by linking to benchmarking irrespective of nature of property, jurisdiction and market value. Hence it is criticized that return is reflecting not the underlying asset but prevailing interest rate. For Instance: If there are two properties (i.e. asset). Both of them are different from each other in respect of nature, use, jurisdiction and market value of property. What is required here? Here the returns or the rentals will be different of both properties but here in sukūk same return will be paid because of benchmarking i.e. to prevailing interest rate. Hence, such practice is objectionable (Ali, 2005).

From the commerce point of view, benchmarking holds numerous issues. Firstly, profits are guaranteed here in a sense that even before ascertainment of profits fixed amount is ensured. Secondly, the profits are confirmed even before actually incurred. Thirdly, the amount of profit depends something other than actual profits. Lastly, here the capital is also assured. All of these elements are depicted in conventional lending. Sukūk murābaha which is issued by buyer assures that he will pay the deferred price of the sold item. It is depicted that in sukūk murābaha, the benchmark rate is implied in markup. The formula to determine the markup is similar to that of interest in conventional lending. Consequently, the price of the asset in murābaha is on same footing to that of loan.

There are two risks arise in Islamic financing i: e interest risk and floating rate risk. It is argued that the benchmarking determines only profits not interest rate but they ignored various issues i. e. amount is determined even before profit incurred, amount is determined not as a share of profit but on basis of share in capital which is similar to lending and the originator assures capital and profit. The distribution of profit should be on basis on actual profit incurred.

The aforesaid mentioned activity neglects the principle of risk sharing. Here when to profits is guaranteed then the loss sharing will not be even possible. The assurance of pre-determined profits and capital guarantee in sukūk is linked with debt like instrument. It therefore hardly comes as a surprise that income and capital guarantees expose originators to the risk that commonly faces lenders: the risk of default. From macroeconomics point of view, the benchmarking amounts to price fixing which is injustice in Sharī'ah. Price fixing causes hardship and eliminates competition in market. Therefore, it is illegal in various jurisdictions including Pakistan (Abdullah, n.d.-a).

Is Floating Rate Permissible in Sukūk?

From benchmarking a critical issue is raised regarding floating rate of rent in ijārah sukūk. In ijārah contract, the rent can be floating or variable (Usmani, 1998). In floating ijārah (for avoidance of

injustice and disputes in long term lease) it is suggested to use a well-known benchmark in which upper limit should be used for elimination of gharar in order to avoid market fluctuations (htt6). In sukūk, it is criticized to link the rentals in ijārah with the floating rate of benchmarking to an interest based index. Usmani criticized by rendering this practice to ribā (Safari et al., 2014). He criticized that it is an excessive interest. It is recommended by the Sharīʿah scholars to develop alternative Islamic benchmarking to overcome estimation and pricing procedure. The new benchmark should not rely on interest (htt7). In order to overcome the ribā issue, government sukūk may possibly be analyzed through macroeconomic signs and corporate sukūk could be analyzed based on the company performance indicators (Safari et al., 2014).

Similarities with Bonds

In sukūk al-ijārah, the cash is actually given against the cash by having a sale and leaseback arrangement along with temporary ownership in it. SPV is merely created to facilitate the buyback and leasing principle whereas, the control remains with the originator. In the whole arrangement the returns are replicating the conventional bonds on the basis of principle of borrowing and lending. The sukūk here resemble bonds due to following features:

In bonds, the bond holder doesn't have an ownership but they are in actual an interest-bearing paper (Usmani, 2007). Similarly, in sukūk al-ijārah the real rights of ownership are missing. A mere piece of paper is given to the sukūk holders consequence in right to get returns by making sale and lease arrangement. Moreover, the income generated has no link with the productivity of underlying assets is a vital characteristic of bond. The scrutiny of sukūk shows that sukūk holders get the returns written in contract irrespective of actual profit and loss (Siddiqi, 2006).

It is, therefore, concluded that the existing model of sukūk is fabricated in a manner that is not Sharīʿah-compliant. The practical application of sukūk is similar to conventional bonds. Moreover, it is a hilah to legalize ribā. Hence, only giving it notion of Islamic cover cannot render it Islamic.

PROPOSED MODEL OF SUKŪK

Islamic capital market is the backbone of the economy (McMillen, 2013). Sukūk, an innovative model is developed to raise the Islamic capital market by considering principles of Islam. They were issued over the globe and currently it became a popular source of economy of Islamic capital market (Adam & S.Thomas, 2004). In fact, it has changed the dynamics of the Islamic finance (htt). Considering facts and figures, it is considered as the fastest growing instrument in the Islamic capital market. For that reason, this expansion necessitates Islamic banking. Even though; the popularity is not only common in the Islamic banks but also in the commercial and International banks (Bellala & Masood, 2013). Moreover, the current "Sukuk (Privately Placed) Regulations, 2017" in Pakistan is a great step towards the development of sukūk market. On the other hand, the capital market is governed by the issuance of bonds, shares and other investments.

Sukūk were advertised through the religious notions provides the exemption that the process will follow transparency in near future (htt8). It is criticized that most of the sukūk don't comply with Sharīʿah standard. The product has a purpose of attracting investments from banks which are resistant to risk-taking. Moreover, these products are not designed to attract genuine risk-taking investors and banks who want real investment in line with Sharīʿah. Unfortunately, these products are designed in such a way that replicates conventional bonds by giving a Sharīʿah cover. These are

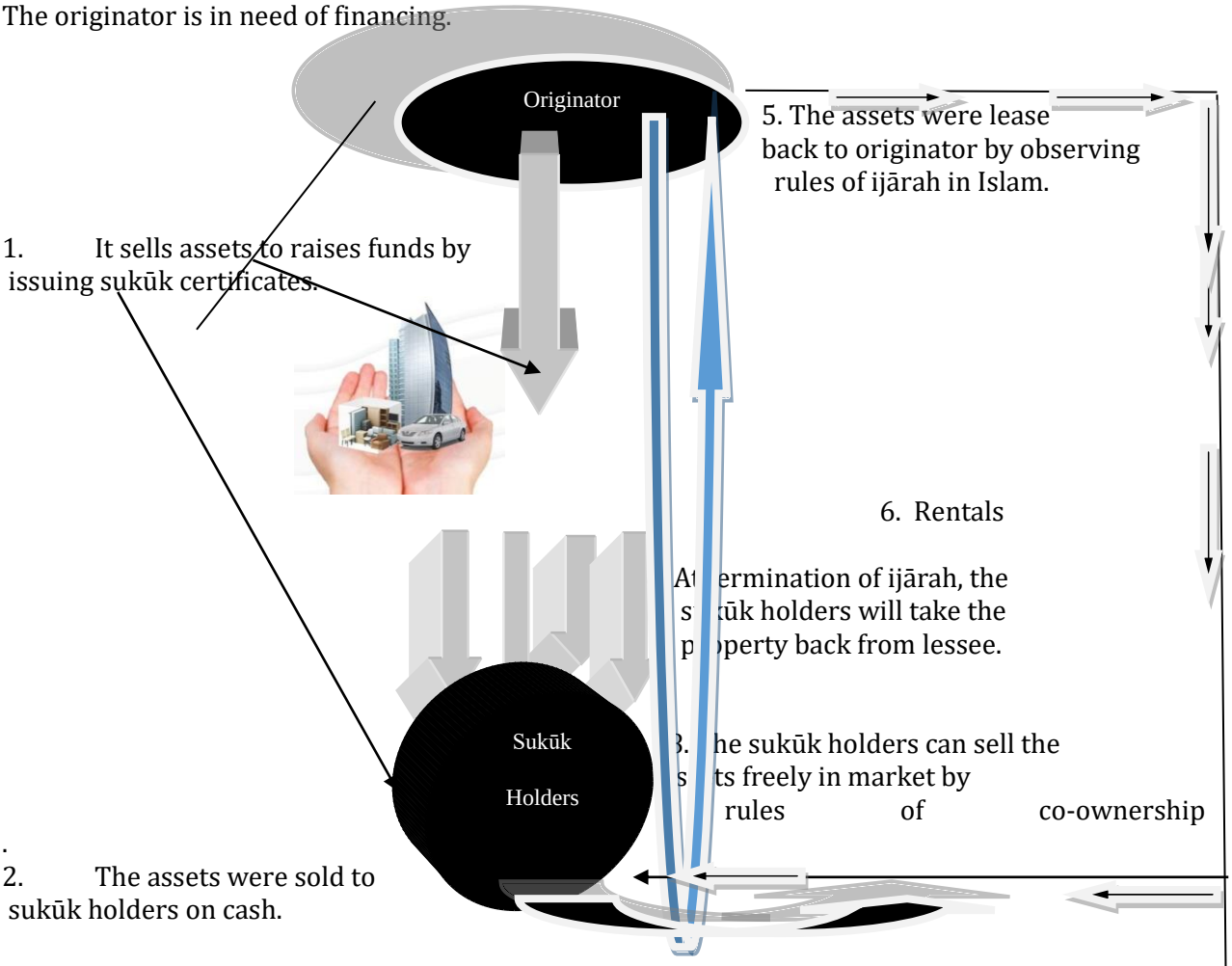
composed in complex way consists of different contractual structures which in individual level are Sharīʿah compliant but at composite level contradicts the objectives of Sharīʿah (Ali, 2008).

The close scrutiny of sukūk highlighted numerous issues which are injurious to Islamic finance. Ijārah sukūk is targeted from all axes as are musharkah and equity sukūk. The situation of sukūk seems to be in disguise. Hence, the necessity is to develop a new model against ijārah sukūk (which was the focus of instant dissertation) conforming the principles of Islam.

Existing Structure

In existing structure of sukūk al-ijārah, the originator issues the sukūk through SPV to the sukūk holders (discussed-above). The criticism on the structure is very harsh and critical Sharīʿah evaluation pinpoints numerous Sharīʿah issues. Summing up the issues, from the creation of SPV to maturity of sukūk the whole thing is disapproved. The new model will try to discard these issues through Sharīʿah compliance.

The originator is in need of financing.



4. All the rights annexed to ownership are transferred to sukūk holders.

9. The originators are barred to purchase the property for any reason, in order to avoid stratagem to legalize ribā.

New Model of Sukūk (The model is made by the author).

New Structure

The structure commences with the originator i.e. let's assume the government who is in need of finances. It is the necessity of the government to raise the funds; in this regard the Islamic capital market is a major sector. For raising funds, the originator i.e. the government issues sukūk al-ijārah. As discussed, sukūk is the certificate of an undivided share of ownership in assets or usufructs etc. While it is difficult to transfer the ownership of assets belonging to the government to the public, therefore the originator must issue the sukūk over an asset which it is planning to privatize in near future. The rationale behind it is to avoid the issues of ownership in near future. For this purpose, there is no need to create an SPV. The issuance of sukūk is to be solely done by the originator. The originator after issuance of sukūk transfers its ownership to sukūk holders in the real sense so that the risk may pass with the ownership. The transfer of ownership should not only confine to transfer in books of accounts but actual transfer of ownership. In this sense, AAOIFI recommendations regarding the transfer of ownership will be observed in true spirit.

After transfer of ownership, the originator can take it back on the lease from the sukūk holders. In Islamic law, the sale and lease back is only allowed in dire cases. Here it is allowed on the ground that raising funds on the halāl way to avoid ribā is the necessity of originator, so it can be considered a dire need. In the instant ijārah agreement, all the rules of ijārah should be observed comprehensively. The rentals should not be variable and must originate out of the underlying asset. The major maintenance of property should be done by lesser whereas the minor and day to day maintenance is to be held by the lessee. As when in an Islamic instrument more than one principle is tied up, there is factor of un-Islamic elements. So, the instrument should be observed profoundly. The rentals shouldn't be tied to conventional benchmarking but based on fixed rental by following the jurisdiction, nature of the asset and its usufruct. During this period, the asset risk is to be borne by the owner. At end of the lease, the asset should be transferred back to the sukūk holders. If the originators further want the usufruct of the assets, by making a fresh ijārah agreement can take asset on the lease. However, at termination, the sukūk holders should take possession of asset back from the lessee.

Sukūk holders are free to trade the asset in the market. As sukūk mostly issue to more than one person, the rulings of musha' must be observed to trade in the market. Sukūk holders should be restricted to sells the asset back to the originator in order to avoid bayʿ al wafā, bayʿ al īnah and a stratagem to ribā-based model. However, it can be traded freely in the market. For credit rating of sukūk, an alternative Islamic credit rating agency should be established. This model is specifically made for the issuance of sukūk al ijārah by Government but can be applied to other issuers as well.

Illustration

The new model is illustrated by giving practical example and possibility. Here let's assume the government of Pakistan is need of financing. The government has assets i.e. metro buses and wants to privatize them as it is already running on the subsidy but it needs its usufruct for a time period. Here the government can issue the sukūk over the asset to sukūk holders and take it back on lease for a period of time (The Islamic principles of the lease as discussed above should observe here). Consequently, the funds will rise through Islamic capital market i.e. sukūk without contradicting any Sharīʿah principles. The Islamic capital market and the economy will boost up. At the end of the lease period, the possession of asset should be transferred back to the lessor/owner. The sukūk

holders by observing the rules of co-ownership can trade freely in the market. The government will be restricted here to buy the asset back, in order to, avoid bayʿ al wafā, bayʿ al īnah and a stratagem to ribā-based model.

General Advantages of New Model

The new model will act as a new blood in the field of Islamic finance. It will serve the purpose of fund raising by complying Sharīʿah requirements concerning contracts and transactions. It will eliminate the element of ribā in the transaction. As a consequence, the Islamic capital market will flourish.

CONCLUSION

In the light of the instant research, it is therefore concluded that sukūk being an innovative instrument and as Islamic products has brought revolution in Islamic capital market and is considered as the fastest growing instrument in the Islamic capital market. The AAOIFI rulings of sukūk were the consequence of great efforts by the scholars. Unfortunately, there are several elements which are rendering it un-Islamic and a stratagem to legalize ribā as discussed in the dissertation. The removal of these un-Islamic elements can render sukūk truly Islamic. Sukūk can be considered Islamic as long as it truly complies with the principles of Islam. Otherwise, non-compliance can shape it a worse form of bond. Dr. Tahir Mansoori also recommended that issues in sukūk should be addressed to free it from a mere replication of conventional bonds.

On the basis of discussed facts and figures, most of the sukūk were issued by the government sector i.e., ijārah sukūk which is criticized as hilah to permit ribā. To resolve the un-Islamic elements in ijārah sukūk, the new model is given in the dissertation. The new model, if truly followed, will aid in the escalation of the Islamic capital market. Being an innovative Islamic model, it will mobilize the funds in all the sectors. There should be Islamic credit rating agency to rate the instrument by accessing the instrument on the principles of Islam. Furthermore, In Pakistan, "Sukuk (Privately Placed) Regulations, 2017" is a great step taken by the government of Pakistan but the need of an hour is to formulate a uniform and consolidated law for the government and private sector. In this regard, the recommendations of the instant research should be considered.

RECOMMENDATIONS

1. The sukūk based on already existing assets and future projects must be distinguished for the real transfer of ownership keeping in view the Sharīʿah perception of sale and ownership.
2. Sukūk should be issued on the assets which the government is going to privatize in near future (discussed-above).
3. The new advised model: an outcome of the dissertation should be considered by the relevant authorities for the issuance of sukūk.
4. The prospectus must contain the real transfer of ownership rights to sukūk holders. Furthermore, the transfer should also pursue in book accounts.
5. Bayʿ al wafā and bayʿ al īnah should be avoided by adopting recommended structure of sukūk.
6. To mitigate risk in sukūk, takaful can be made a part of sukūk transaction.
7. The returns of the sukūk should be based on an actual productivity of underlying assets.
8. There should be the consolidated law for the government and private entities for the issuance of sukūk.

9. The Sharīʿah rules of co-ownership i.e. musha should make a part of the law in order to regulate sukūk al-ijārah in the secondary market.
10. The conversion of sukūk into shares should be prohibited to eradicate discrepancy between sukūk and shares.
11. To secure risks in sukūk, the benevolent third party can give the guarantee as par AAOIFI rulings but the government shouldn't give the guarantee in this respect. The guarantee shouldn't be given to ensure the return of principal amount.
12. Investors should be protected by disclosing the sukūk structure as well as its Sharīʿah and legal consequences.
13. The government of Pakistan should issue a specific accounting standard to regulate sukūk market, by considering the distinctive feature of sukūk.
14. The government of Pakistan should establish a proper forum for regulating and stimulating the trade of sukūk in the market. The regulatory forum must have qualified Sharīʿah scholars for effective implementation and observance of maqāsid al Sharīʿah in contracts.
15. For credit rating, an alternative Islamic credit rating agency should be established.
16. An alternative interest free benchmarking should develop to promote the real Islamic financial market.
17. To regulate Islamic capital market, the need of an hour is an alternative Sharīʿah compliant model. In this regard, the gates of jurisprudential research should be opened for innovation and promotion of diversity in Islamic capital market.

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