

OWNERSHIP TRANSFER OF SOVEREIGN ŞUKŪK ASSETS: ANALYSIS OF PERTINENT ISSUES FROM SHARIAH PERSPECTIVE

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ABSTRACT

Şukūk, a widely used Sharī'ah-compliant tool in Islamic finance, has shown its effectiveness towards global socio-economic growth and development in recent times. However, one of the significant challenges faced by the market is the transfer of ownership of şukūk assets to şukūk holders, mainly due to legal restrictions, particularly in sovereign şukūk issuance. The study explores the concept of ownership in Sharī'ah and discusses pertinent contemporary issues in the sale contract as a means of transferring ownership of sovereign sukuk assets. This research employs a qualitative doctrinal methodology to scrutinize literature pertaining to ownership through a Sharī'ah lens. The analysis centers on the attributes of ownership and methods of acquisition, while also delving into significant Shariah considerations surrounding the transfer of sovereign sukuk ownership, as well as divergent perspectives on terms within sales agreements. Deepening the Shariah perspective of ownership transfer for sustainable Sukuk issuance is the sine qua non for alignment between the Shariah and regulatory requirements. This study found that the clarity on the Shariah position of the ownership of Sukuk holders will ensure tradability, security, and protection of Sukuk holders, hence actualizing the sustainable Sukuk issuance in the Sukuk markets. These findings shed light on the challenges and considerations surrounding the transfer of ownership in the şukūk market, providing insights into the role of legal constraints and the importance of aligning transactions with Sharī'ah principles.

Keywords: Sovereign Sukuk, Ownership transfer, Sukuk issuance, Shariah perspective.

1. INTRODUCTION

Ṣukūk is one of the innovative instruments in Islamic capital market to fund long-term financing in a Shari‘ah compliant way (Comcec, 2018). It provides an alternative for corporations and governments in funding national and international development projects to the predominantly interest debt-based instruments of bonds (Busari & Abdulaziz, 2019; Sa‘ad et al., 2022). The success of its development in the global arena is a result of exhaustive efforts from Islamic financial institutions and contemporary Shari‘ah scholars at various levels to provide a substitute for ribā-based instruments to meet the ever-increasing demand for large-scale Shari‘ah-compliant financing. Despite the unprecedented achievements of ṣukūk market, it is not free from challenges one way or the other (Abdul-Rahman & Mohd Nor, 2016). Transfer of ownership in ṣukūk assets from originator or obligor to ṣukūk holders or their legal proxy Special Purpose Entity (SPE) is among the challenges facing the ṣukūk market. This paper discussed the concept of ownership, its characteristics, and the means of its acquisition from the Shari‘ah perspective (Zolfaghari, 2017). The paper explicates transfer of ownership and Shari‘ah issues and scholars’ views relating to the imposition of conditions in the sale contract. The paper is structured in six sections. Section one involves an introduction. Section two highlights the research methodology while section three explores the concept of ownership from Shari‘ah perspective. Section four examines the transfer of ownership in ṣukūk assets followed by section five which presents a discussion of findings. The final section highlights the conclusion and recommendation of the study.

2. LITERATURE REVIEW

Sovereign ṣukūk remains one of the potential effective financial instruments used in raising finances for government projects based on Shariah principles. However, ownership transfer of underlying assets in sovereign ṣukūk seems one of the complex issues, because of the related legal, financial, and Shariah considerations (Ghzal, et al., 2022). The concept of ṣukūk is rooted in underlying asset that represent ownership of the ṣukūk holders in the investment, expected generate returns through profit-sharing or rental income. The validity of ṣukūk based on the principles of ownership of the underlying asset by the sukuk holder on one hand and beneficial use of fund invested on the other based on a specific Islamic financial contract. Islamic (Radzi & Muhamed, 2019). The establishment of asset ownership is significant in its juristic validity. Usmani (2002) emphasizes that for a financial transaction to be valid in Islam, it needs to be grounded in the ownership of physical assets. Therefore, the transfer of ownership of sovereign assets must be carefully structured to align with Shariah principles.

A key issue in the transfer of ownership of sovereign sukuk assets is the distinction between effective and beneficial ownership. While sukuk holders may have a right to the proceeds generated by the assets, effective ownership may remain with the sovereign. This distinction can lead to complications, especially when the government decides to repurchase the assets before the bonds mature (Oseni, 2015). The study by Trackic, (2022) highlight the importance of having clear ownership definitions from a Shariah perspective. This clarity is essential not only to prevent potential disputes but also to ensure that all transactions adhere to Islamic law. When ownership rights are ambiguous, it can lead to misunderstandings and conflicts among parties involved. By establishing clear ownership guidelines, the integrity of the transaction is upheld, fostering trust and compliance within the framework of Islamic finance (Hussain, 2015).

The beneficial ownership from sovereign *ijārah ṣukūk* is compatible with *Shari'ah* principles because the ownership status is based on need rather than strict requirements. However, valid sales must involve ownership transfer, and beneficial ownership is justifiable regarding the right to dispose of assets and qualified ownership (Cheema, 2021). In Sukuk investment, one of the challenges of the market is not limited to Shariah and legal compliance issue but includes the challenges of maintaining investor confidence. Furthermore, the principle of *gharar*, which means excessive uncertainty, is vital in these transactions. Islamic finance prohibits dealings that involve too much uncertainty, making it important for ownership transfers to be clear and well-defined to minimize risks. In the case of sovereign *ṣukūk*, the terms related to ownership transfer need to be clearly outlined in the offering documents so that all parties understand their rights and obligations (Nehad & Khanfar, 2016). Considering the challenge of Shariah compliance issues, the role Shariah advisory board cannot be overemphasized in ensuring compliance throughout the lifecycle of the *ṣukūk*. This board assesses the ownership transfer structure and ensures that all transactions conform to Islamic principles. Hence, a robust Shariah governance framework can improve transparency and lessen the chances of disputes arising from unclear ownership rights (Haddad, & Souissi, 2022).

Ownership transfer of sovereign *ṣukūk* assets involves various complex issues that require careful Shariah consideration. It's vital to establish clear ownership rights, address potential *gharar*, manage sovereign risk, and adhere to Shariah governance to facilitate successful implementation and acceptance of sovereign *ṣukūk*. This study focuses on explicating the concept of ownership in shariah and its application in sovereign sukuk amid several pertinent shariah issues.

3. METHODOLOGY

This research utilizes a qualitative doctrinal methodology for conducting literature reviews and juristic analysis. The doctrinal research methodology involves the systematic evaluation and examination of legal sources, such as statutes, case law, and legal literature, with the aim of understanding and interpreting legal principles and concepts (Bhagyamma G, (2023). The study primarily investigates the concept of ownership in Islamic jurisprudence, its fundamental attributes, and the procedures of acquisition assets like sukuk within the framework of Shari'ah. The study delves into essential Shariah-related matters pertaining to the transfer of ownership of assets, particularly focusing on sovereign sukuk. Moreover, it assesses the varying juridical perspectives concerning the incorporation of stipulations in sales agreements.

4. RESULTS & DISCUSSION

4.1 Ownership From Shari'ah Perspective

The word ownership in Arabic language (*al-milk* or *al-milkiyyah*) is derived from the three pattern letters *mīm*, *lām* *kāf* (م، ل، ك). These letters literarily indicate power (*al-quwwah*) over something and soundness (*al-ṣiḥḥah*). Technically, the word *al-milk* used for ownership:

ملك الإنسان الشيء يملكه مَلِكًا، والاسم المَلِك؛ لأنَّ يده فيه قُوَّةٌ صَحِيحَةٌ؛ والمَلِك: ما مُلِكَ من مَالٍ

"When a person owns something, he possesses it with ownership, and the term 'ownership' is used because his control over it is strong and sound. 'Ownership' refers to what is possessed in terms of wealth."

The reason for using the word *al-milk* for ownership is because the owner of something hand possesses a strong and soundness disposition over the subject. Moreover, *al-Milk* in Arabic means property owned (Ibn Fāris, n.d., 5: 351-352). Power and soundness are the two key literary indications of *al-Milk* which is similar to the technical meaning of the right to possession and the legal soundness of property ownership. The two attributes from a lexical perspective are generally applied to wealth or property as indicated in several Arabic linguistic literature.

In Islamic economics, the concept of ownership is designed to prevent unfair control over property by individuals, the public, or the state. It ensures that wealth is distributed equitably, allowing each group to manage and own

resources fairly, which can help address and resolve current economic issues (Busari, et al., 2023; Gojali, 2023). Ownership (*al-milkiyyah*) signifies a legal relationship between a person and property, giving the person specific rights to manage that property, provided there are no legal restrictions. Such rights are granted through Islamic law, which designates humans as stewards of property to be used in line with Islamic teachings (Abdul Razak & Saupi, 2017).

According to Al-Khafif (1996: 19), there are varying viewpoints among Shari'ah scholars regarding the term *al-milk*, leading to the emergence of diverse definitions based on their perspectives and opinions. These perspectives can be categorized into two groups:

The First perspective scholars viewed *al-milk* from its origin and reality (*wāqi'* and *mansha'*) while the second perspective defines *al-milk* based on the descriptive (*wasf*) or legal (*hukm*).

The first approach defined *al-milk* as an exclusive and preventive right over an object.

الاختصاص الحاجز (restrictive jurisdiction)

Ownership according to Al-Ghaznawī, (2011) in *al-Qudusī al-Hāwī*, indicates that the concept of ownership has provided the legal owner an exclusive right to use and dispose of the subject. It additionally hinders anyone else from utilizing the subject, unless authorized by the owner acting as their representative or allowed by Shari'ah law. This approach opines that ownership right encapsulates subjects like assets, usufructs, and services of whether it is compulsory or voluntary. According to Khafif (1996), it can be inferred from the connotation of the term with precision (*ikhtisāṣ*) that ownership is obligatory.

(الملك اللازم) i.e. The sales contract stands in contrast to voluntary ownership (الملك غير اللازم) borrowing contract (الإعارة). Regarding the second aspect based on the descriptive and legal approach, Al-Qarāfī defined *al-milk* as

"حكم شرعي أو وصف شرعي مقدر في العين أو في المنفعة يقتضي تمكين من يضاف إليه من الانتفاع بالملكوك ومن المعاوضة به"

"Islamic legal ruling or attribute prescribed upon asset or usufruct that allows its owner to either make use of it or receive a commission from it." The definition highlights the fundamental principle that ownership is a legal rule in Islamic law, enabling the owner to utilize the subject while adhering to the

constraints set by the Shari'ah. This definition demonstrates that ownership is governed by the principles of Shari'ah and must be determined under Shari'ah principles, including juristic preference.

(المصلحة المرسله), analogy (القياس), customary practice (العرف), public interest (الاستحسان), and others. From the Shari'ah perspective, *al-milkiyyah* (ownership) comprises three essential elements: the core principles of Shari'ah (ḥaqīqah Shar'iyyah), the subject and consequences of ownership, and the relationship between the owner and the object owned. In this context, ownership in the Shari'ah framework refers to an Islamic legal ruling that governs the association between owners and the objects they possess, granting the owner an exclusive right to initiate the disposal of the object without any hindrance, unless proven otherwise (al-Muṣliḥ, n.d.: 36). By taking into consideration the perspectives and methodologies of scholars regarding the definition of ownership, it can be asserted that both views are pertinent for gaining a comprehensive understanding of the attributes and features of the concept of ownership in Shari'ah. However, (al-Khafīf, 1996) argues the first approach seems more comprehensive than the latter. Nevertheless, regardless of the extent of comprehensiveness of the former approach, it remains subject to the rules and attributes provided by Shari'ah principles. Furthermore, a critical examination of the two approaches suggests an inference of correlation between the technical meaning and lexical meaning of *al-milk*. Hence, the first approach tends to stick to the first two lexical meanings which is authority (القوة) since the terms exclusiveness and preventions denote having authority over an object. The second approach which emphasizes Islamic legal ruling or Shari'ah attributes correlates with the second lexical meaning namely soundness (الصحة). The reason for this is that the validity of authority and the exclusive right over an asset rely on the legitimacy of those rights, which can only be determined within the scope of Shari'ah.

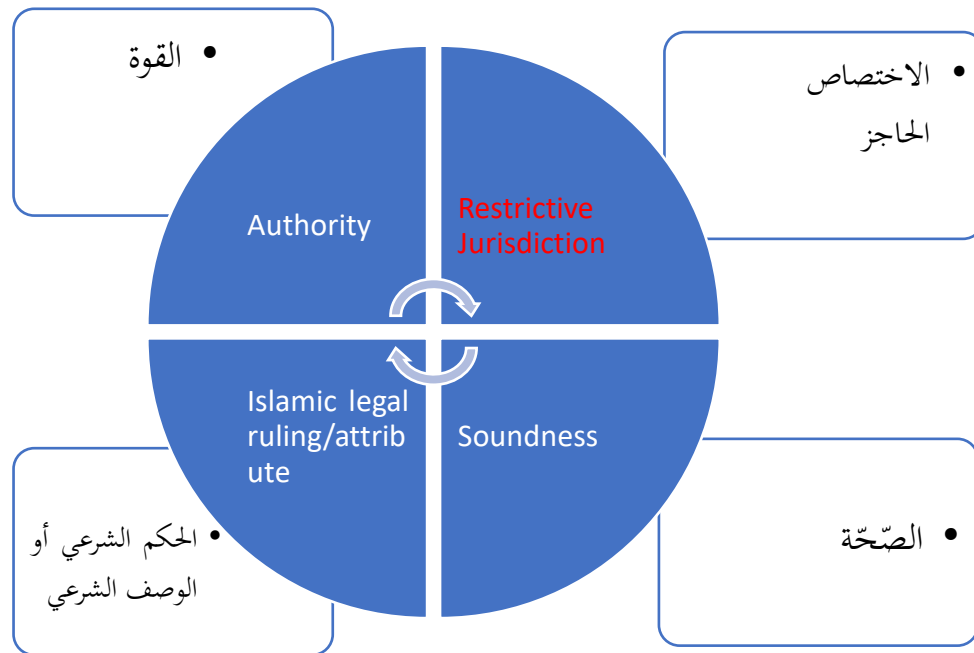


Figure 1: Alignment between Lexical and Technical meaning of Al-Milkiyyah (Ownership)

4.2 Type Of Ownership in Its Real Essence and Nature

Ownership by looking at its nature and real sense of meaning is of two types namely, complete ownership and incomplete ownership. Complete ownership refers to having ownership of the asset and its usufruct respectively. Incomplete ownership relates to having ownership of either asset only, or usufruct only, or having permission to use.

4.2.1 Characteristics of Complete Ownership

- i) The entitlement to exercise various forms of disposal and legal rights related to the assets in accordance with the principles of Shari'ah. It also involves all rights to the asset and its usufructs.
- ii) It implies the meaning of first ownership.
- iii) It is not subject to timing.
- iv) It is subject to transfer but not relinquishment of ownership.
- v) The owner is not liable for causing defects to the asset (al-Muslih, A., n.d.: 137). Incomplete ownership gives the owner ownership right to the asset, or beneficial ownership, and the right to usefulness. Thus, it could be either ownership of an asset alone called legal ownership (*milkiyyah al-*

raqābah); or beneficial ownership (*milkiyyah al-maunfa'ah*); or right to usufructs (*milkiyyah al-intifā'*). The characteristic of incomplete ownership depends on the types highlighted above.

4.2.2 Characteristics of Incomplete Ownership

In the ownership of an asset alone, legal ownership involves subjectivity of the ownership to transfer but not cancellation; it is perpetual in nature and not subject to timing; it can be separated from beneficial ownership; the exercise of legal ownership is subject to banishment if it harms the beneficial ownership; it ends up being complete ownership. Beneficial ownership is attached to the benefit of an asset; it is subject to several restrictions such as time, place, and manner of benefit; it can be inherited. Concerning the right to usufructs, it is characterized under rights to usufruct without ownership; it is a personal right (al-Muṣliḥ, A., n.d.: 143-157).

4.2.3 Means To Acquire or Own Assets

There are two main classical perspectives on the definition of assets (*māl*) in Islam: the majority (*Mālikī*, *Shāfi'ī*, *Ḥanbalī*) opines that non-physical benefits (*manāfi'*) are considered assets, while the *Ḥanafī* view argues that assets must have tangible attributes.

4.2.4 Asset (*Māl*) from *Sharī'ah* Perspective

The decision on what constitutes an asset from *Sharī'ah* point of view can be largely traced back to the debate of classical scholars on the concept of *māl* which can be grouped into two namely majority view (i.e. *Mālikī*, *Shāfi'ī*, and *Ḥanbalī*) and *Ḥanafī* view Bouheraoua et al. (2013). The basis of debate is whether *manfa'ah* can form part of *māl* or not. Thus, *Ḥanafī* opined that *māl* categorically must have physical features. Therefore, things without physical features are not *māl*. However, most classical scholars hold that *manāfi'* (usufructs/ things without physical features) are *māl*. *Ḥanafī* argues that the attribute of *māl* is confined to the source of wealth which needs protection and preservation and *manāfi'* is not stable. Most scholars argue that *manāfi'* (usufructs) are wealth on their own as physical assets are not the main target but rather their usufructs. The *Sharī'ah* itself recognizes *manfa'ah* as it places in the position of wealth is the contract of *ijārah* (Al Mawsū'ah, 1996, 36: 31-32).

4.2.5 Means to Acquire/Own Asset (*Māl*)

Al-Haskafī named three ways to acquire assets namely transfer (النقل) such

as a sale contract or *hibbah* (الهبة); (النيابة) representation such as (الإرث) inheritance; (القبض) possession such as having real control over the asset by placing hand on the asset or having constructive control i.e. placing net for hunting. Al-Suyūṭī mentioned eight causes of ownership namely, inheritance, exchange contract, *hibbah*, will, *waqf*, booty (*al-ghanimah*), *iḥyā'* (revival of idle land), *ṣadaqāt* (charities) (al-Mawṣū'ah, 2000, 39: 38-39).

4.3 The Ownership In *Ṣukūk* Assets

This section discusses the ownership of *ṣukūk* assets in line with the essential elements of ownership highlighted above. Before delving into that, the following paragraph explains the feature of *ṣukūk* issuance and its Sharī'ah requirements.

4.4 Feature of *Ṣukūk* Issuance

The following are the main features of *ṣukūk* issuance with reference to direct ownership requirements of *ṣukūk* assets:

- i) Trust Structure: Constitutive document: A trust deed; is a declaration of trust document, which entails terms and conditions of *ṣukūk* issuance, and appointment of trustee (known as SPV)(Hassan et al., 2012).
- ii) The Trustee: Under the trust deed, SPV is delegated by *ṣukūk* holders to hold rights and covenants on behalf of *ṣukūk* holders. In practice, the SPV delegates the trustee role to professional bodies(Hassan et al., 2012). In the GCC region, where the concept of trust is not acknowledged, the practice of appointing a co-agent has been employed.
- iii) Ownership: In English law, ownership is divided into two; legal and beneficial ownership(Bank Negara Malaysia, 2020). Transfer: The proposed *ṣukūk* assets can be transferred through various means. In the case of tangible assets, the transfer is typically accomplished through a sale or long-term lease. For contractual interests, the transfer can be achieved through assignment, novation, or the establishment of a declared trust over the assets(Zakaria et al., 2015). As for the sale, though it is preferable to others it gives rise to tax implications i.e. stamp duty and registration duties under local law. However, there are related terms to transfers like "Lease" which is a substitute for sale, but it defeats the risk of transfer as the leased asset reverts to the lessor at the end of the lease contract. Also, the term "Assignment" is related to the transfer of current and future intangible assets in written form and signed by the

assignor appended with written notice to the debtor. The term “Novation” is another means to transfer contractual rights and obligations through initiation of new contract with the involvement of one or more new parties, while the former contract is extinguished.

Special Purpose Vehicle (SPV): The SPV plays an incredible role in ascertaining the independence and insolvency remoteness in *ṣukūk* issuance. Thus, the real issuer of *ṣukūk* would be SPV with a separate legal personality without any association with the originator or *ṣukūk* issuer. The purpose of this is to prevent the court from asserting that the Special Purpose Vehicle (SPV) is under the control of the originator (Soleimani & Shadab, 2020). Also, to avoid insolvency remotely, *ṣukūk* assets and obligations have been isolated from those of the originator. SPV has a mandate to entertain limited transactions to prevent third-party enforcement action against SPV's assets (Alkhan, 2016). In terms of jurisdiction, to avail of tax benefits, the Special Purpose Vehicle (SPV) is established in a low-tax or no-tax jurisdiction like the Cayman Islands, Jersey, or Guernsey. This is done to prevent tax-related liabilities on the part of the issuer or SPV (Owen D. Kurtin, 2023). As for property ownership, in some countries the legal limits imposed on real property and on shares in local companies and in particular on sovereign assets to control the foreign participation in ownership of SPV. Such restrictions may not be imposed in respect of the home state of the assets (Bank for International Settlements, 2023). *Ṣukūk* structures are streamlined to meet various economic objectives of the originator, and the interests of investors and to conform to Shari'ah requirements. AAOIFI provides fourteen (14) different Shari'ah instruments to accord those various economic interests. This indicates that no unified or single instruments are applied in *ṣukūk* issuance. However, the need for standardization of Islamic financial market practices and legal documentation such as Shari'ah compliant rating and indexing standardization is immense to enable investors not just in the Muslim world but in non-Muslim countries as well. As having Islamic financial tools listed in international financial markets necessitates suitable listing regime. Thus, national regulatory authorities need to tailor their existing frameworks with Islamic financial instruments, in particular, *ṣukūk* to avoid uncertainty and undue decision-making (Itam@Ismail et. al., 2022). The Securities Commission (SC), empowered by the SC Act 1993 (498), has established several guidelines for the issuance of *ṣukūk*. As part of this effort, the SC has introduced a framework for the issuance of foreign currency denominated *ṣukūk*, aiming to facilitate such issuances in foreign currencies. When it comes to sovereign *ṣukūk*, which involves cross-border transactions, an important and timely question arises regarding the permissibility, from a Shari'ah perspective, of selling sovereign assets under government administration to foreign investors or even to local investors (Suwadi & EPM Vermeulen, 2016). Similarly, in the case of sovereign *ṣukūk*

where underlying assets are public property owned by the government would it be allowed to transfer such property to *ṣukūk* holders including foreign *ṣukūk* holders?

4.5 *Shari'ah Fundamental Requirements for Ṣukūk Issuance*

Ṣukūk transactions must adhere to the principles of *Shari'ah*. The adherence to *Shari'ah* principles is the primary factor that sets *ṣukūk* apart from conventional bonds. In fact, according to the AAOIFI *Shari'ah* Standards, the characteristic of investment is attributed to *ṣukūk* specifically to distinguish it from shares and bonds. *Ṣukūk* represents ownership in assets, benefits, and services. The requirement for *Shari'ah* compliance primarily encompasses four areas: documentation, structuring, investment, and administrative and operational matters (Busari & Aminu, 2021; Kunhibava et al., 2021). Thus, the proposal form and contractual agreement must conform to *Shari'ah* requirements. Similarly, the process of packaging or structuring pools of assets that comply with *Shari'ah* principles, with or without credit enhancement, into securities should satisfy this mandate using diverse *Shari'ah* instruments including but not limited to *ijārah*, *mushārah*, *muḍārah*, *istiṣnā'*, *murābahah*, etc. The ownership is shaped to cater to the needs of issuers and the interests of investors through the application of relevant *Shari'ah* contracts such as *ijārāh*, *mushārah*, *muḍārah*, *murābahah*, *salam*, *istiṣnā'*, *wakālah*, *mughārasah*, *muzārah*, *musāqāh*, and others. Furthermore, as part of the structuring process, protective measures known as credit and liquidity enhancement schemes may be implemented. These measures include the establishment of a spread account, issuance of a bank letter of credit, pool insurance, mono-line insurance covering up to the entire pool size, and the provision of third-party guarantees which must conform with *Shari'ah* requirements (Bank Negara Malaysia, 2019).

4.6 *Ṣukūk Underlying Assets*

It is a fundamental requirement of underlying assets in *ṣukūk* issuance to be *Shari'ah* compliant. This mandate has been stated in SAC-SC's resolution in its 7th meeting dated 1st December 1995. This is due to the underlying asset being the subject matter of the transaction (*maḥal al-'aqd*) in which legal rulings and effects of the contracts are manifested. It must have intrinsic value valid in *Shari'ah*, and be subject to delivery (ISRA, 2011: 195). Therefore, Zarqā (2004: 426) mentioned in the seven general conditions of *Shari'ah* contracts that: the subject matter of the contract should be subject to the intrinsic rule of the contract. Any object that is not recognized as *māl* in *Shari'ah* is not qualified to be the subject matter. On that note, SAC-SC (2007: 77) pronounced that the use

of assets in *ṣukūk* issuance falls into the category of *māl* principle in Shari'ah, albeit the term *māl* is more comprehensive than an asset as it could be tangible assets or intangible assets; and movable or immovable assets (Bāshā, Muḥamad Qadrī, 1308: 3-4).

4.7 Transfer Of Ownership In *Ṣukūk* Assets

As highlighted above, the subject of ownership in Shari'ah can be assets, tangible and intangible, usufructs, services, and others. Keeping this in consideration, it is crucial to ascertain the underlying assets of *ṣukūk*. *Ṣukūk* are certificates that represent a proportional undivided ownership right in tangible assets, a predominantly tangible asset pool, or a business venture (IFSB, 2009: 3). Thus, the identification of assets under the subject sale contract is very important because each asset carries different rules. One of the ways to identify it is through the common classification of *ṣukūk* itself namely asset based *ṣukūk* and asset backed *ṣukūk*. The asset-backed *ṣukūk* refers to *ṣukūk* that meets the requirements for being an asset-backed structure while asset-based *ṣukūk* relies very much on the creditworthiness of the originator and not the underlying asset of the *ṣukūk* structure (IFSB, 2009, 4). However, the choice of *ṣukūk* structure is subject to various factors which include among others the character of the underlying assets, taxation and regulatory considerations, targeted investor base and Shari'ah scholar's views. In the course of a way out, the issue of legal and beneficial ownership emerges in *ṣukūk* market. Beneficial ownership is defined in the Black Law Dictionary as "*profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from legal ownership or control*" (cited in ISRA, 2015: 164). In contrast to beneficial ownership, legal ownership pertains to a situation where an individual holds the legal title to a property on behalf of another party, such as trustees and record owners, for their benefit. (ISRA, 2015: 164). The ownership issue does not lie in whether beneficial ownership or legal ownership is transferred, the key issue is the incorporation of some conditions in the Principal Terms and Conditions (PTC) of a prospectus that empty the true nature of beneficial ownership.

4.7.1 Transfer of Ownership through the Sale Contract (*Bay'*)

The ownership implies that *ṣukūk* holders can sell *ṣukūk* assets legally and the originator/issuer either sovereign or quasi-sovereign has transferred the ownership of *ṣukūk* assets to *ṣukūk* holders. However, in the case of sovereign issuers whether it is allowable to truly transfer public property to *ṣukūk* holders. To reply to this question, it would be adequate to identify the sovereign asset underlying *ṣukūk*, or is such an asset subject to ownership?

In response to the question above, Abū Zahrah (n.d.: 73) highlighted two assets that are not legally [in Shari'ah] allowed to own/have as individual property. First, is an asset or property specified for public use such as bridges, roads, borders, fortresses, and ports but once such assets lose their subjectivity for public use, they become a subject for ownership. Second, assets that are subject to sale due to Shari'ah permission due to necessity or dire need or public interest such as real estate *waqf* or wealth from *bayt al-māl* (state treasury wealth). Originally such assets were not subject to sale contracts, but they are allowed in certain circumstances as highlighted. Further if is subject to ownership, do *ṣukūk* holders have the right to dispose of the assets or not? And being public property, it is permissible for the government to reclaim the assets considering foreign elements in the case of sovereign *ṣukūk*. For example, in *ijārah ṣukūk* which is mostly used in sovereign *ṣukūk* issuance would it be possible to transfer the ownership of the public property to *ṣukūk* holders? In practice, there are some scenarios where there are legal obstacles in setting up a Special Purpose Vehicle (SPV) to meet the ownership obligations which, may in turn hamper the transfer of beneficial title or ability of *ṣukūk* holders to exercise their rights over the underlying assets of *ṣukūk* in particular in the event of default of originator (IFSB, 2009: 4).

4.7.2 Conditions in Sale Contract

As highlighted above in the basic concept of ownership in Shari'ah, it is timely to examine ownership in *ṣukūk* issuance. In asset-based *ṣukūk*, whether secured or unsecured, the holders do not possess actual ownership of the underlying assets. In the event of foreclosure, their entitlement is limited to the amount of debt owed to them and nothing more. However, in asset-backed *ṣukūk*, the *ṣukūk* holders have rights solely to the securitized assets and not to the originator (Asyraf and Shabnam, IRP/8/2010: 21). The utilization of the asset-based *ṣukūk* structure is prevalent in sovereign *ṣukūk* issuance, and this restriction is justified by various reasons, including but not limited to legal constraints on foreign ownership of specific assets (Muhd Ramadan Fitri Ellias et al., 2013: 2). This posed a question of whether it is allowable to stipulate a condition to repurchase the asset sold to this buyer from Shari'ah perspective? If yes, to what extent is it allowable? This question can be seen in two dimensions; first is to investigate the condition itself and second to examine the subject which the condition falls on. The maxim says: that the original rule of conditions is validity and permissibility unless proved otherwise (Ibn Taymiyyah, 2005: 190). Many texts from Qur'an and Sunnah support the fulfillment of a promise. But if such a condition occurred, is it a valid or invalid condition?

Al-Shubaylī, Y. (2013: 8) explained that the scholars are of two views on this matter. First, the condition is invalid. This is the view of the majority of scholars, including four schools of thought. The basis for this argument is as follows: *Ḥadīth* Abdullah ibn ‘Amr: “The Prophet-PBUH- prohibits sale attached to condition” (al-Ṭabarānī No. 4358.) *Ḥadīth* ‘Āishah: “Any condition contrary to texts of the book of Allah is void...”

Furthermore, they contended that this condition conflicts with the consequences of the sale contract, specifically the right to dispose of the asset or subject matter. Secondly, the advocates of this perspective, such as Ibn Taymiyyah and Ibn Qayyim, maintain that the condition is valid and does not contradict the effect of the contract.

The basis of their argument is that *ḥadīth* ‘Amr ibn ‘Awf “Muslims are bonded by their conditions”. Also, *ḥadīth* Abdullah ibn ‘Umar: “Anyone who purchases palm tree after being pollinated, the fruits of the palm tree belong to the seller except if the buyer requests it by condition” (Muslim, No. 1543). The Māliki school further clarifies that if the seller includes a condition in the contract that benefits them, such as riding a horse after the sale or remaining in the sold house for a specified period, both the sale contract and the condition are considered valid. (Ibn Juziy, 1397-A.H-: 409). According to Imām Shaykānī (2004: 505), conditions attached to a contract do not automatically render the contract void unless the condition itself is either invalid or valid. If the condition is valid but creates uncertainty (*gharar*) that hinders the mutual interest, which is a fundamental aspect of Sharī‘ah transactions, then such a condition becomes invalid due to its association with what is prohibited.

Also, Ibn Taymiyyah (2005: 265) said: The rationale for this justification is that any action associated with evil should be prevented but if there is any interest outweighing such evil i.e. *gharar* such interest should prevail. Also, if in the course of preventing this *gharar*, greater evil will occur undoubtedly, the lesser can be admitted avoiding the greater evil. If such restrictions are not imposed, the public property may be lost or diverted from its intended purpose to serve the interest of the public. Would this restriction contravene the concept of ownership from Sharī‘ah perspective, as highlighted earlier, ownership is of two types complete and incomplete ownership, this restriction can degrade the degree of ownership but it still protects the main attributes of ownership. The attributes are to have the right to take money for purchasing the asset and to guarantee the asset against defects (al-Shubaylī, 2013: 11-12). The principles of ownership and rulings of sale must be satisfied in the structuring of *ṣukūk*. In particular, sovereign *ṣukūk* in which *ijārah* contract has been extensively used such as Malaysian *ijārah*-sovereign *ṣukūk*, Bahrain *ijārah*-sovereign *ṣukūk*, Pakistan *ijārah*-sovereign *ṣukūk* and Ras Al-Khaimah *ijārah*-sovereign *ṣukūk*

(Wedderburn-Day, A., 2010: 332). The same also goes for *ṣukūk mushārakah* which is mainly structured as asset based.

In contemplating of some fictitious sale contract both Ibn Taymiyyah and his student Ibn Qayim had said the following:

لقد بين الإمام ابن تيمية - رحمه الله - مقصود العقد إذ قال: "...الله سبحانه شرع العقود أسبابا إلى حصول أحكام مقصودة، فشرع البيع سببا لملك الأموال بطريق المعاوضة، والهبة سببا لملك المال تبرعا... فحقيقة البيع والهبة ومقصودهما المقوم لهما الذي لا قوام لهما بدون انتقال الملك من مالك إلى مالك على وجه مخصوص، وملك المال هو القدرة على التصرف فيه بجميع الطرق المشروعة..."

This means: Allah has made commercial contracts a means to achieve the intended legal ruling. As such a sale contract is legitimized to own wealth via an exchange contract and *hibbah* is a means to own wealth via donation. The true nature of sale and *hibbah* and the goal behind them without which they lost their essence is the transfer of ownership from the original owner to the buyer in the sale contract or to the donee in *hibbah* (gift) contract..."

Similarly, Ibn Qayyim said:

"إنما شرع البيع لمن له غرض في تملك الثمن وتملك السلعة، ولم يُشرع قط لمن قصد به ربا الفضل أو النساء، ولا غرض له في الثمن ولا في المثلث ولا في السلعة، وإنما غرضهما الربا"

This means: the sale is legalized for those who aim for ownership of money and assets. It is never legitimized for those who intend to deal in *ribā* transactions who never aim either for money or subject matter or commodity but whose ultimate goal is *ribā*.

4.7.3 Bay‘ Al-Wafā‘

Similar to this arrangement is *bay‘ al-wafā‘*; a sale contract wherein the buyer returns the goods when the seller repays the price of the sold goods. The common bond in this contract is that the buyer is obliged to comply with the conditions of the contract. Most classical scholars disallowed this transaction, while some medieval scholars of Ḥanafī and Shāfi‘ī allowed it. This is because it is based on customary practices and needs to be kept away from *ribā*. A transaction of such nature and good intention would be a valid contract. However, it is inconsistent with the general rule, but it could be considered due to customary practice as in the case of *istṣnā* (contract of manufacturing). *Bay‘* is valid as the buyer has full access to utilize the optimum benefit of the subject but he has been only restricted from selling to another free buyer (*al-Mawsū‘ah*

al-Fiqhiyyah, 1427: 9:260-261).

If *bay' al-wafā'* is allowed by some scholars despite that the need and interest considered are on an individual basis, what if the public interest is attached to the asset? Put together, the rationale for selling the asset is for the public interest i.e. liquidity to establish infrastructure projects nationwide.

4.8 *Siyāsah Shar'īyyah (Islamic Governance Policy)*

Also, the government can stipulate conditions to secure public assets from being lost to private ownership, especially in sovereign *shukūk* where foreign elements evolve. These conditions are permissible under *siyāsah shar'īyyah*. Among the pieces of evidence is Ibn Taymiyyah (1983: 38) which highlights the duty of the ruler/government, thus: "... the government must lawfully take wealth and place it in the right place, and it should not deprive the owners what is rightful to them..."

Sharī'ah recognizes private ownership, and it is the main reference for any restriction on the ownership as the ownership is a right given by Allah to His servant. Ownership can be restricted for two main reasons:

- i) Prevention of hardship.
- ii) Securing cooperation.

The two reasons conform to every objective of Sharī'ah; realization of human interests and prevention of hardship. Thus, contemporary scholars are of two views with respect to the imposition of restrictions on private ownership. The basis for permissibility is to secure public interest and prevent hardship. Therefore, if the difficulties in private ownership are much higher than the hardship in its restriction, the latter should be considered. The legal maxim says:

التَّصَرُّفُ عَلَى الرَّعِيَّةِ مُنَوِّطٌ بِالْمَصْلَحَةِ

"The authority to act on behalf of citizens depends on their interest" The government should act in the interest of the public and prevent anything that obsoletes this interest. Meanwhile, the government aims at issuing sovereign *shukūk* to institute certain projects the benefit of which will come first to the public not to inflict harm to the public. In that regard, another legal maxim says:

يُتَحَمَّلُ الضَّرَرُ الْخَاصُّ لِدَفْعِ الضَّرَرِ الْعَامِ

"The individual harm can be tolerated to prevent public harm"

The maxim applies to issues where two evils are inevitable to occur, but the lesser one can be endured to avoid the bigger one. When the government stipulates certain conditions that restrict the ownership over sovereign asset underlying *ṣukūk* to secure the public interest in the asset, say if the condition is to sell the asset back to the originator, not anyone else, no doubt that *ṣukūk* holders are uncomfortable because the ownership right has been restricted. However, this discomfort, to a greater extent, is less compared to the loss of public property entirely which dampens the public interest and puts the whole public in difficulty and discomfort.

In short, the government is tasked under *siyāsah shar‘iyyah* to preserve the public interest no matter what and to intervene in private property to avoid harm and injustice, to realize the primary objective of Sharī‘ah which is the realization of the well-being of humanity.

4.9 ‘Aqd Tamalluk al-Zamanī (Time Sharing)

Another aspect to justify the imposition of a certain condition that restricts the ownership in sovereign *ṣukūk* assets is a contract of time sharing (*‘aqd tamalluk al-zamanī*). It is a contract whereby one owns common shares either through the purchase of certain assets owned in common or through the lease of usufructs of certain assets in consecutive periods or through the lease of an asset for a specified period in which usufructs of sold asset or benefits of the leased asset can be uninterruptedly accessible by way of time sharing with an option to choose in some circumstances due to specific time allocated for each purchaser.

Thus, the OIC-Fiqh Academy has pronounced the resolution as follows:

- (a) It is permissible to purchase common shares in an asset or lease common shares in certain usufructs for a specified period based on mutual agreement between the owner of the asset or usufruct to use it at different times and places for a certain duration. The purchase of the unit can be made directly between the buyer and seller and through the sector assigned to manage the common property. There is nothing wrong in circulating the common shares held for sale, purchase, gift, inheritance, pledge, and others.
- (b) It is imperative to fulfill all Sharī‘ah requirements related to contract and *ijārah* in the application of time sharing.

- (c) The lessor is required to take care of major maintenance of the asset while the operating maintenance rests on the lessee. In the case of the sale contract, the owner bears the ownership risk within the period.
- (d) There is nothing wrong in exchanging the common share between the legal owner and beneficial owner irrespective of whether the exchange is concluded between the owners directly or through the company in charge of the exchange. Considering the above resolution of OIC Fiqh Academy, it is permissible to exchange the asset in sovereign *ṣukūk* between the original owner (issuer) and *ṣukūk* holder in a certain period.

The incidental question related to the above discussion would be whether public property is subject to private ownership in the first place.

The answer to this question is closely related to the concept of *iqṭā'* (government), hence, the government is allowed to transfer public property to private property, just like in the case of *iqṭā'*. However, Imām al-Māwardī mentioned a term that is quite important in respect of *iqṭā'* when he said:

“وَإِقْطَاعُ السُّلْطَانِ مُخْتَصٌّ بِمَا جَازَ فِيهِ تَصَرُّفُهُ وَنَقْدَتُ فِيهِ أَوْامِرُهُ”

(al-Māwardī, 1989: 248)

This means the government award is attached to an object under the authority and control of the government. And no doubt that sovereign *ṣukūk* assets belong to the government. The government has the right to transfer it from public property to private property if the public interest can be realized by doing so.

4.10 *Ḥaqq Hikr (Right to monopolize Waqf Landed Property)*

It is a contract in which *waqf* property is leased for a long-term period to a lessee. As discussed by Ibn 'Ābidīn, it is a kind of lease contract to prevent others from taking over the *waqf* property unjustly by use of a long-term lease known as (*ḥikr*).

By examining the characteristics of *ḥaqq al-ḥikr*; its nature and relation with the issue at hand would be very much understood. The following are some characteristics of *ḥaqq al-ḥikr*:

- (a) It is solely related to *waqf* property

- (b) The right in the concept of *hikr* is extended to the heirs of the person who holds the right to *hikr* after his demise.
- (c) The right to *hikr* has a long-term duration of up to ninety-nine years (99yrs) (Akram, 2008: 196-199).

The person who holds the exclusive usufruct right over the *waqf* property does not have full ownership right over the property except building, and plantation he has on the land. Therefore, the ownership right of *waqf* property remains intact.

Considering the concept of *hikr*, it is allowed to transfer an asset belonging to the government to someone to have the exclusive right to make use of the asset for a certain period without putting the interest of the public in vain.

Both *'aqd al-tamalluk al-zamanī* (time sharing) and the concept of *hikr* signifies the transfer of assets while the legal ownership remains intact, the consideration given to *hikr* is preserved *waqf* property from being lost, while in the case of time sharing is to provide a chance to exchange benefit of the asset. It is perhaps to realize the two different objectives above, both contracts are considered valid. Meanwhile, if the two objectives are visible in one contract, such contract should be considered legitimate such as a condition placed in a sale contract that involves sovereign *şukūk* assets.

5. CONCLUSION

Şukūk is the most widely used Shari'ah compliant tool in Islamic finance and has demonstrated its viability to cater to various economic interests and development projects across the jurisdictions of both the Muslim world and non-Muslim countries. Despite all the ground records the *şukūk* market secured in a couple of years, one of the core challenges facing the market is the transfer of ownership of *şukūk* assets to *şukūk* holders which has to do with legal constraints imposed in many jurisdictions, especially on sovereign *şukūk* issuance. The paper has discussed the concept of ownership and its characteristics in Shari'ah as well as assets that are subject to ownership. All assets are recognized in Shari'ah except in two scenarios where the asset is meant for public use i.e. bridge, roads, borders, fortress, ports, and assets like *waqf* or wealth from *bayt al-māl* (state treasury wealth). However, both can be subject to ownership once their status changes or due to necessity dire need, or public interest such as real estate. The sale contract is a means to transfer the ownership of sovereign *şukūk* assets irrespective of whether the right being transferred is legal or beneficial or both provided in the intended purpose in both or either legal or beneficial ownership is uninterruptedly satisfied. The

condition incorporated in the sale contract is ordinarily not disallowed so long the mutual interests and ultimate goal of the legitimacy of the contract remain intact. In view of the above, alignment between Shariah requirements and the existing laws should be effective in enabling laws and laws on transactions and the presence of reliable dispute forums including courts with qualified and competent judges and experts in alternative dispute resolution including Shariah experts.

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