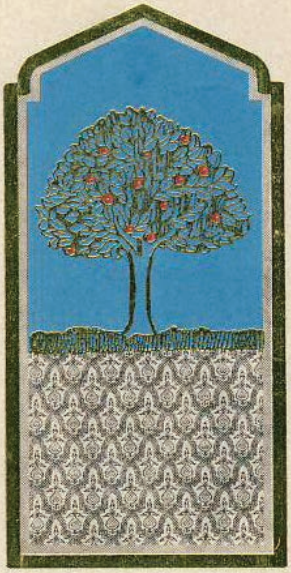

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THE LEGAL AND BENEFICIAL OWNERSHIP CONUNDRUM IN SOVEREIGN *ṢUKŪK* STRUCTURING

Umar A. Oseni

Abstract

The past decade has witnessed the dynamics of ṣukūk *structuring amidst legal complexities in cases involving enforcement of the rights of investors or* ṣukūk *holders in the event of default. This paper examines the legal and beneficial ownership in a typical sovereign* ṣukūk *structure and the specific rights of the parties under the existing practice and classical Islamic legal framework. The issue of public property often used in sovereign* ṣukūk *as the underlying asset of the transaction leaves much to be desired. Through a systematic content analysis, this study uses the qualitative legal research method to analyse a number of sovereign ṣukūk structures gathered from available* ṣukūk *prospectuses. The study finds that the nature of legal and beneficial ownership in* ṣukūk *transplanted from the conventional bonds structuring is different from the type of ownership envisaged in Islamic commercial law. It is found that the modern structure of* ṣukūk *products only allows for beneficial ownership to be conferred on* ṣukūk *holders, and this does not contradict any principle of Islamic law when one considers the true nature of beneficial ownership under common law. Though it literally falls short of a true sale in Islamic law in the event of default, a closer look of the legal structure reveals the true nature of beneficial ownership. The mere fact that* ṣukūk *holders can have recourse against the underlying asset justifies the conferment of true ownership. Nevertheless, the stakeholders may still need to consider the use of public property as the underlying asset of a sovereign* ṣukūk. *With the increasing interest of emerging economies in* ṣukūk *to meet their long-term financing needs, this study is expected to guide the global Islamic finance industry on* Sharī‘*ah and legal issues relating to sovereign* ṣukūk.

Keywords: Sovereign *ṣukūk*, ownership rights, *ṣukūk* structuring, Islamic finance

1. INTRODUCTION

In 2014, two major milestones were recorded in the history of sovereign *ṣukūk*.[1] Beyond the original frontiers of Islamic finance, there were two major European *ṣukūk* issuances within the year in the United Kingdom and Luxembourg respectively. While the UK government issued a £200 million *ṣukūk* using *ṣukūk al-ijārah* structure in July 2014, the Luxembourg government also issued a £200 million *ṣukūk* in October 2014 which was based on the *ṣukūk al-ijārah* structure.[2] For Luxembourg, there was a delay in the *ṣukūk* issuance as there was a need to enact the *Ṣukūk* Law (Law 6631 on sale and buy-back transaction of real estate assets) to provide the basis for the issuance of the first sovereign *Sharī'ah*-compliant bond within the Eurozone.[3]

Though the Islamic financial products and services have spread beyond the original frontiers of Islamic finance as since witnessing tremendous growth in the past decade, there remains a key challenge of operating under conventional legal systems which have some alien legal principles not known to traditional Islamic law. In fact, Grassa & Gazdar clearly demonstrated how legal origins shape the nature of Islamic finance and its development across the world.[4] One such area affected is the type of ownership conferred on

[1] This study was carried out under the research grant scheme of the Islamic Research and Training Institute, Islamic Development Bank (IRTI-IDB), Jeddah. The author acknowledges IRTI-IDB for its immense financial support. JEL classification: G21 G28 K12 K41.

[2] Linklaters, "GCC Quarterly Review – Q3 2014," 2014, http://www.linklaters.com/pdfs/mkt/dubai/GCC_Quarterly_Review_Q3_2014.pdf.

[3] The Law was finally passed into a law on 9th July 2014 which prepared the grounds for the issuance of the sovereign *ṣukūk* in Luxembourg.

[4] Rihab Grassa and Kaouthar Gazdar, "Law and Islamic Finance: How Legal Origins Affect Islamic Finance Development?," *Borsa Istanbul Review* 14, no. 3 (2014): 158–66.

the investors in *ṣukūk* transaction.[5] This has led to the legal and beneficial ownership conundrum when it comes to issues affecting the underlying assets of a *ṣukūk* issuance, particularly in the event of default or near default that may trigger debt restructuring.[6] The enormity of this challenge is further exacerbated with the increasing interest in *ṣukūk* products across the world, particularly in jurisdictions that are of civil or common law origin. For instance, the exact form of the common law concept of trust is not in any way recognised under civil law.[7]

A shared primary objective of both the conventional and Islamic financial systems is access to credit facilities and consumer protection, which includes investor protection. Investor protection is primarily secured through adequate legal protection for investors, particularly in the equity market.[8] This is a core element also in the debt market where liquidity is paramount for financing projects. To this end, La Porta, et al, contend that "when investors finance firms, they typically obtain certain rights or powers that are generally protected through the enforcement of regulations and laws."[9] Such rights enable the investors to gain more information about accounting and disclosure issues which then provides a good knowledge base for them to exercise other relevant rights when required.[10]

With a focus on *ṣukūk*, this study examines the rules relating to legal and beneficial ownership of underlying assets in *ṣukūk* transactions. It goes without saying that in the global *ṣukūk* market, the majority of the issuances are sovereign *ṣukūk* which are generally asset-based. From the economic perspective, such asset-based

[5] A Roger Wedderburn-Day, "Sovereign Sukuk: Adaptation and Innovation," *Law & Contemporary Problems* 73, no. 4 (2010): 325–33.

[6] Umar A. Oseni, "Dispute Management in Islamic Financial Institutions: A Case Study of near Sukuk Defaults," *Journal of International Trade Law and Policy* 13, no. 3 (2014): 198–214.

[7] George Gretton, "Trust and Patrimony," in *Scots Law into the 21st Century: Essays in Honour of W.A.Wilson*, ed. Hector MacQueen (Edinburgh: W. Greens / Sweet & Maxwell, 1996), 182–92.

[8] Andrei Shleifer and Daniel Wolfenzon, "Investor Protection and Equity Markets," *Journal of Financial Economics* 66, no. 1 (2002): 3–27.

[9] Rafael La Porta et al., "Investor Protection and Corporate Governance," *Journal of Financial Economics* 58, no. 1 (2000): 6.

[10] Ibid., 6 – 7.

sovereign *ṣukūk* are not in any way different from conventional bonds.[11]

This study begins with a brief overview of the major differences between asset-based and asset-backed *ṣukūk* when it comes to the structuring of sovereign *ṣukūk*. The study proceeds from the following assumptions and premises: first, the nature of legal and beneficial ownership in *ṣukūk* transplanted from the conventional bonds structuring is different from the type of ownership envisaged in Islamic commercial law; second, the modern structure of *ṣukūk* products only allows for beneficial ownership to be conferred on *ṣukūk* holders, which is often considered as falling short of a true sale in Islamic law; and third, even though some scholars have likened the English law of trust to such structures as *waqf* and other concepts, the underlying principles and the nature of the concepts differ in great detail. However, such practical differences do not render the trust model non-*Sharīʿah* compliant. This study therefore examines the extent this conundrum could be resolved within the context of the modern legal systems which ultimately govern Islamic financial transactions. Primarily, this study relies on both legal and *Sharīʿah* analyses in arriving at its conclusion.

2. CONCEPTUALISING THE OWNERSHIP CONUNDRUM IN *ṢUKŪK*

The literature on sovereign *ṣukūk* and the nature of legal and beneficial ownership in asset-backed *ṣukūk* transactions can be better understood through a three-pronged review of relevant studies. To this end, the relevant literatures are based on the following categorization: the nature and types of ownership in Islamic law, legal issues in *ṣukūk* in Islamic finance, sovereign *ṣukūk* and ownership in *ṣukūk* and remedies available to the *ṣukūk* holders in the event of default.

[11] Bill Maurer, "Form versus Substance: AAOIFI Projects and Islamic Fundamentals in the Case of Sukuk," *Journal of Islamic Accounting and Business Research* 1, no. 1 (2010): 32–41; Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice* (Cambridge: Cambridge University Press, 2006).

2.1 The nature of ownership in Islamic law

In Islamic law, ownership is different from possession since it is possible to own a property without having its full possession at a material time, as it is possible to have possession of a property without necessarily being the owner. In his detailed work, al-Bari defines ownership as the right to possess, sell, use and donate a property which belongs to the person who possesses such a right to exclusion of others.[12] A more precise definition is given by Al-Zuhayli where ownership (*al-milkiyyah*) is defined as a definitive legal relationship "between a human being and property, which renders the property specifically attached to him, and which gives the owner the right to deal in that property unless there is a legal impediment to a specific dealing".[13] Therefore, subject to any legal impediment, ownership in Islamic law is absolute and the rule of exclusivity applies. Al-Zuhayli considers the best definition of ownership as "an exclusive association of the owned item with its owner, which gives the owner the right to deal in what he owns in any way that is not legally forbidden."[14]

From the above definition, it is evident that the element of exclusivity is emphatically recognized as a core element of ownership in Islamic law.[15] The implication of the element of exclusivity is that others are prevented from using or dealing with the property except with express legal authorization.[16] In situations where there is legal authorization which confers some rights on another party to deal with the property such as in cases of guardianship or agency, the appointed parties only derive their rights from the original owner and merely act as proxy for the owner; hence, the original owner of the property still has the exclusive

[12] Abdul Hamid Mahmud Al-Bari, *Dawabit Al-Fiqhiyyah Al-Milkiyyah* (Cairo: Matabi'al-Ittihad al-Dawli Li al-Bunuk al-Islamiyyah, 1982).

[13] Wahbah Al-Zuhayli, *Al-Fiqh Al-Islam Wa Adillatuh (Islamic Jurisprudence and Its Proofs): Financial Transactions in Islamic Jurisprudence*, trans. Mahmood El-Gamal, vol. 2 (Damascus: Dar Al-Fikr, 2002), 417.

[14] Ibid.

[15] Muhammad Yusuf Saleem, *An Introduction to the Theoretical Foundations of Islamic Transactions*, 3rd ed. (Selangor, Malaysia: Ilmiah Publishers, 2012), 69–77.

[16] Ala al-Din Abu Bakr Bin Mas'ud Al-Kasani, *Bada'i' Al-Sana'i' Fi Tartib Al-Shara'i'* (Beirut: Dar al-Kutub al-Ilmiyyah, 1986).

ownership of the property under the law.[17] In the case of a child who has an appointed guardian to deal with a property, the legal ownership of the property vests in the child even though he or she has a temporary legal impediment. Once such a legal impediment is removed, the child will then have full rights to deal with the property exclusively without the need of a guardian.[18]

In espousing the broad nature and definition of ownership in Islamic law, the usufruct or benefit derived from a property and legal rights can also be a subject of ownership. This is recognized in the definition of ownership in Article 127 of *The Mejelle* where ownership is defined as "anything owned by a human being, be it a specified property (*'ayn*), or usufruct of a property (*manfa'*)".[19] A broad classification of ownership may categorise the concept into private and public ownership depending on the subject matter of ownership and how it is acquired. Furthermore, Al-Zuhayli classified ownership into two broad categories according to the rights acquired by the owner of the property.[20] The two categories are complete ownership (*al-milk al-tāmah*) and partial ownership (*al-milk al-nāqis*).

According to Abu Zahrah, the definitions of ownership above which emphasise on exclusivity in use, disposal and enjoyment of full rights in the property represent what is referred to as complete ownership;[21] hence, a complete ownership may be defined as the type of exclusive ownership in property where the owner enjoys full legal rights associated with the title to the property and the consequential benefits derivable from the property such as the

[17] Nazura Abdul Manap, Ahmad Azam Mohd Shariff, and Safinaz Mohd Hussein, "Database: Its Position Under Islamic Law of Property," *The Social Sciences* 9, no. 3 (2014): 228–38.

[18] Muhammad Abu Zahrah, *Al-Milkiyyah Wa Nazariyyah Al-"aqd Fi Al-Shari"ah Al-Islamiyyah* (Cairo: Dar al-Fikr al-'Arabi, 1996).

[19] Charles Robert Tyser, D. G. Demetriades, and Ismail *Ḥaqq*i Effendi, *The Mejelle : Being an English Translation of Majallah El-Ahkam-I-Adliya and a Complete Code on Islamic Civil Law* (Kuala Lumpur: The Other Press, 2007).

[20] Al-Zuhayli, *Al-Fiqh Al-Islam Wa Adillatuh (Islamic Jurisprudence and Its Proofs): Financial Transactions in Islamic Jurisprudence*.

[21] Abu Zahrah, *Al-Milkiyyah Wa Nazariyyah Al-"aqd Fi Al-Shari"ah Al-Islamiyyah*.

usufruct.[22] On the other hand, partial ownership involves an incomplete legal ownership of the property which limits the full rights or benefits derivable from such property.[23] There are three unique types of partial ownership in Islamic law. These are ownership of the property alone, personal usufruct ownership, and easement rights (*ḥaqq al-irtifāq*).

There is a tendency to easily attribute complete ownership to what is known as legal and beneficial ownership under the common law. Partial ownership has also been likened to a situation where there is legal ownership without beneficial ownership or vice versa. The foregoing classification might not be appropriate when one considers the nature of two diametrically diverse legal systems involved. Meanwhile, complete or total ownership can be established in four different ways under Islamic law. These are commonly accessible property, contracts, succession, and derivation from owned property. For the purpose of this study, the type of ownership contemplated is acquisition of ownership through contracts. Nevertheless, within the context of the modern discourse of ownership, one may reconsider the definition of a sale which is one of the precursors to the conferment of ownership. The nature of sale itself will determine what type of ownership is conferred through the sale contracts.

For Imam Al-Nawawī, a sale contract involves the exchange of a specified commodity owned by a person for another which involves an exchange of ownership. Apart from just an exchange of ownership, Ibn Qudāmah emphasizes that the new owner must take the possession of the subject matter of the contract. For the Hanafi jurists, a property that is capable of being the subject matter of a sale contract must be such that it is desired by people generally and must possess such a quality that would make it possible to save it for future use. Though the foregoing definitions may preclude rights, services, and usufructs from being considered as commodities that can be owned, the majority of jurists contend that rights, services and usufructs can potentially form the subject matter of valid sale

[22] Steven D. Jamar, "The Protection of Intellectual Property under Islamic Law," *Capital University Law Review* 21 (1992): 1079–1106.

[23] Abdullah Ahmad Ibn Qudamah, *Al-Mughni* (Cairo: Maktabah al-Kaherah, 1968).

contracts and can be owned as commodities. The reason behind the argument of the majority of the jurists is that in any commodity, the only thing desirable is the usufruct or utilitarian value derivable from such a physical object.[24] This might be one of the justifications for some modern *Sharī'*ah scholars who argue that the legal and beneficial ownership conundrum does not affect the *sharī'*ah validity of the *ṣukūk* transaction. The very nature of beneficial ownership under the common law and equity confers all economic benefits on the beneficial owner which generally includes the right to the income accruing from the property and proceeds of sale or a share of such income or proceeds.[25] Subject to some variations in local legislations, beneficial ownership generally entails ultimate economic ownership of the property.

2.2 Property Ownership Rights and *Ḥaqq al-Ikhtiṣāṣ*

In conceptualizing the nature of rights under the modern legal systems, particularly the English legal system, it is pertinent to examine some distinction Muslim jurists have made in issues relating to ownership or quasi-ownership. This has led to a concept known as *ḥaqq al-ikhtiṣāṣ* in Islamic law which simply represents the right of lien which is generally by operation of law. In respect of a property and its ownership, the right of lien is often expressed as *thubita alayhā ḥaqq ikhtiṣāṣ* which means a property on which a lien has been established against it. Before distinguishing between *manfa'ah* (usufruct) in a property and *ḥaqq al-ikhtiṣāṣ*, it may be appropriate to clearly define what a legal lien on a property connotes. The *Black's Law Dictionary* defines a lien as: "A qualified right of property which a creditor has in or over [a] specific property of his debtor, as security for the debt or charge or for performance of some act. In every ease in which property, either real or personal, is charged with the payment of a debt or duty, every such charge may be

[24] Mahmoud A. El-Gamal, *Dr. Wahbah Al-Zuhayli's Al-Fiqh Al-Islam Wa Adillatuh (Islamic Jurisprudence and Its Proofs): Financial Transactions in Islamic Jurisprudence (Vol. 1)*, ed. M. S. Eissa (Damascus: Dar Al-Fikr, 2001), 5–6.

[25] David J. Bederman, "Beneficial Ownership of International Claims," *International and Comparative Law Quarterly* 38, no. 4 (1989): 935–46.

denominated a lien on the property".[26] Such a right in form of a charge on the underlying property operates as a security for the discharge of the debt through repayment.

In Islamic jurisprudence, *ḥaqq al-ikhtiṣāṣ* is a right which a person has when a specified place is identified with him in a market, especially where such a person transacts his normal business. In such a situation, such a place becomes unique to him to the exclusion of any other person, and no other person will therefore be allowed to subsequently occupy the place. This traditional definition of *ḥaqq al-ikhtiṣāṣ* in Islamic jurisprudence gives a rather different meaning from the legal definition of lien given above. It therefore appears that *ḥaqq al-ikhtiṣāṣ* in traditional Islamic jurisprudence is conceptualized as a right of exclusivity rather than that which may ultimately lead to ownership in some special circumstances. Rather than using the term "lien" for *ḥaqq al-ikhtiṣāṣ*, one may prefer the term "exclusive appropriation" as used by Kamali.[27] The use of the term "*ikhtiṣāṣ*" from the perspective of an exclusive right in property ownership is derived from al-Darīnī's definition of *ḥaqq*.[28] Al-Darīnī defines *ikhtiṣāṣ* as "an exclusive appropriation or power over something or a demand addressed to another party which the *sharī'ah* has validated in order to realize a certain benefit".[29] Such an exclusive right to the property may include the right of easement, beneficial right to use, legal right to claim ownership against anybody, and right to prevent any interference to the property through the judicial process. From an initial consideration, this form of ownership may not be appropriate for the structuring of *ṣukūk*. However, a closer look reveals the possibility of relying on this concept in structuring *ṣukūk al-ijārah* – the most prevalent form of sovereign *ṣukūk*. A further validation of

[26] Bryan A. Garner and Henry Campbell Black, *Black's Law Dictionary* (St. Paul, MN: Thomson/West, 2004).

[27] Mohammad Hashim Kamali, "Fundamental Rights of the Individual: An Analysis of Haqq (right) in Islamic Law," *The American Journal of Islamic Social Sciences* 10, no. 3 (1993): 345.

[28] Fathi Al-Darīnī, *Al-Haqq Wa Mada Sultan Al Dawlah*, 3rd ed. (Beirut: Mu'assasat al-Risalah, 1984).

[29] Cited in Kamali, "Fundamental Rights of the Individual: An Analysis of Haqq (right) in Islamic Law," 345.

this preliminary conclusion might be necessary when both Sharī‘ah and legal scholars jointly explore the potentials of the concept.

2.3 Legal Issues in *Ṣukūk* in Islamic finance

Unlike the literature on the nature of ownership in Islamic law, when it comes to legal issues in *ṣukūk* within the context of Islamic finance, there are few authoritative sources due to the dearth of expertise in core legal issues. Some of the existing studies which claim to analyze legal issues in actual fact do not really delve into the legal dynamics underpinning the *ṣukūk* transactions. Nevertheless, the related literatures are increasing by the day and most of them have some elements of law in them, even though they are not originally legally oriented.[30] In this section, the focus will be on the following legal issues: legal and regulatory framework for *ṣukūk*, structure of the *ṣukūk* transaction, the status of the Special Purpose Vehicle (SPV), contract enforceability, dispute resolution, and bankruptcy issues.

Although not all *ṣukūk* issuance are cross-border transactions, most of the major *ṣukūk* issuances are usually cross-border where there is less or informal regulation which subjects the entire transaction to the laws of several jurisdictions that are connected to the transaction. From the *Sharī*‘ah perspective, the entire transaction in cross-border *ṣukūk* is often subject to the endorsement of the ad hoc *Sharī*‘ah advisors appointed to review all the contractual documents used in *ṣukūk* issuance. Nazar explores the compatibility of *ṣukūk* structuring with objectives of Islamic finance and economics considering a number of legal and regulatory aspects.[31]

[30] For instance, some of the most recent works on *ṣukūk* include: Rafisah Mat Radzi and Mervyn K. Lewis, “Religion and the Clash of ‘Ideals’ and ‘Realities’ in Business: The Case of Islamic Bonds (*Sukuk*),” *Thunderbird International Business Review* 57, no. 4 (2015): 295–310; Maram Ahmed, “Islamic Project Finance: A Case Study of the East Cameron Project,” *The Journal of Structured Finance* 20, no. 4 (2015): 120–35; Essia Ries Ahmed, Md Aminul Islam, and Ku Halim Ku Ariffin, “An Empirical Analysis on Legitimacy of Sukuk: An Insight of Malaysian Sukuk,” *Asian Social Science* 11, no. 13 (2015): 84–97; Abdul Gahfar Ismail, “Public Private Partnerships: Lesson from Sukuk,” *IRTI Working Paper Series*, 1435-04 (Jeddah, 2013).

[31] Jhordy Kashoogie Nazar, “Regulatory and Financial Implications of Sukuk’s

The study identifies the fluid legal framework in some of the leading Arab countries where the underlying properties of the *ṣukūk* structures are located. This creates the challenge of enforceability as clearly identified by McMillen where he argued that there are still some challenges which need to be addressed in relation to "whether and to what extent the *Shari'ah* or *Shari'ah*-compliant transactions can be enforced in jurisdictions in which the *Shari'ah* is not incorporated to any extent in the secular law of the land ("purely secular jurisdictions"), as well as in jurisdictions in which the *Shari'ah* is incorporated to some extent in the secular law of the land ("*Shari'ah*-incorporated jurisdictions")."[32] It goes without saying that issues relating to enforceability lead to the question of the origin of the legal systems, particularly those in the GCC region which have been largely influenced by different major world legal systems from the colonial era up to date.[33]

From the perspective of *ṣukūk* structuring and the extent of innovation within the global Islamic finance industry, Wilson identifies a number of legal and related financial innovation challenges and concludes that "Islamic scholars have shown their willingness to apply the principles of ijtihad or legal adaptation to the ṣukūk now being traded, but the finance specialists have arguably failed the industry to date.[34] In financial terms the current *ṣukūk* offerings simply mirror their conventional equivalents".[35] To a large extent this argument is valid, and on top of that, the lawyers who prepare the *ṣukūk* documentation have not helped matters. The legal specialists are the cause of the current predicaments in which the *ṣukūk* industry finds itself. This has led to a series of defaults in the industry and triggered some challenges on how such defaults or near

Legal Challenges for Sustainable Sukuk Development in Islamic Capital Market," in *8th International Conference on Islamic Economics and Finance* (Doha: IAIE & IRTI, 2011).

[32] Michael J T Mcmillen, "Contractual Enforceability Issues: Ṣukūk and Capital Markets Development," *Chi J Intl L* 7, no. 2 (2006): 432.

[33] Jody Waugh and Ahmad Al Awamleh, "Recognition and Enforcement of Islamic Finance in the Middle East," *Business Law International* 15, no. 1 (2014): 35–44.

[34] Rodney Wilson, "Innovation in the Structuring of Islamic Sukuk Securities," *Humanomics* 24, no. 3 (2008): 170–81.

[35] Ibid., 180.

defaults could be properly managed.[36] The rights of the *ṣukūk* holders are not also protected as a result of the foreign legal principles applied to the *ṣukūk* structures which tend to be contradicting in some situations.[37] This is why preference is often given to legal compliance than to *Sharī'ah* compliance in structuring *ṣukūk* in most jurisdictions. As argued by Abdel-Khaleq & Richardson, even though the overall structure of *ṣukūk* should ordinarily be *Sharī'ah*-compliant, "opinions of local counsel are more likely to focus on the effectiveness and validity of the transaction documents under the civil code and other relevant regulations than on their compliance with *Shari`ah*".[38] This is the reality in the industry in the modern *ṣukūk* market which calls for some reforms in the way and manner some of the products are structured. Nevertheless, one must also bear in mind that Islamic finance and its various products and indeed the Islamic finance industry as a whole does not operate outside the current legal and financial framework; hence, the industry is expected to comply with the legal and financial principles of the conventional framework which may sometimes be alien to the original objective of Islamic finance and economics.[39]

2.4 Ownership and Sovereign *Ṣukūk*: Remedies Available to *Ṣukūk* Holders

Some of the underlying problems faced by the modern *ṣukūk* market include issues relating to ownership and whether there has been actual true sale. Ownership is important because it determines the way and manner other principles relating to the underlying property will be applied in the event of default or even at the end of the tenor.

[36] A. Oseni, "Dispute Management in Islamic Financial Institutions: A Case Study of near Sukuk Defaults."

[37] Umar a Oseni and M Kabir Hassan, "Regulating the Governing Law Clauses in Sukuk Transactions," *Journal of Banking Regulation* 16, no. 3 (2015): 220–49.

[38] Ayman H Abdel-Khaleq and Christopher F Richardson, "New Horizons for Islamic Securities: Emerging Trends in Sukuk Offerings," *Chicago Journal of International Law* 7, no. 2 (2007): 416.

[39] Umar A. Oseni, "Towards Restructuring the Legal Framework for Payment System in International Islamic Trade Finance," *Journal of International Trade Law and Policy* 12, no. 2 (2013): 108–29.

This brings to bear the question of ownership in both asset-backed and asset-based *ṣukūk*. Initially, in the Islamic Financial Services Board's Capital Adequacy Standard (IFSB-2), two broad categories of *ṣukūk* were identified namely, asset-based *ṣukūk* [40] and equity-based *ṣukūk*[41]. IFSB recognizes the nature of complete or total ownership conferred on the *ṣukūk* holders as evident in Islamic law.[42] This presupposes that "the *ṣukūk* holders assume all rights and obligation attached to the asset" as argued by Dusuki & Mokhtar.[43] This theoretical presumption does not reflect the actual practice in the *ṣukūk* market since most of the *ṣukūk* structures do not reflect true ownership on the part of the *ṣukūk* holders as required under the *Sharī'ah*. To address this challenge, IFSB released its Guidelines on *Capital Adequacy Requirement for Ṣukūk, Securitisations and Real Estate Investment* (IFSB-7). IFSB-7 introduced a new framework which categorized *ṣukūk* structures into three main categories. These are asset-backed structure, pay-through *ṣukūk* structure, and pass-through *ṣukūk* structure. While the first category is obviously the asset-backed type, the last two categories are asset-based *ṣukūk* structures.[44]

Despite the new categorization of the *ṣukūk* structures, one may still wonder whether the new framework has helped to solve the ownership conundrum which is fundamental in the overall *ṣukūk* arrangement. One may recall that by late 2007 when Shaykh Taqi Usmani criticized the way and manner *ṣukūk* products were being issued, where he maintained that over 85% of the *ṣukūk* traded in the

[40] This is the type of *ṣukūk* where "the underlying assets offer fairly predictable returns to the sukūk holders, such as in the case of *salam*, *istisnā'a* and *ijārah*." (IFSB, 2005).

[41] This is the type of *ṣukūk* where "the returns are determined on a profit and loss sharing in the underlying investment, which does not offer fairly predictable returns (e.g. *mushārakah* or *mudārabah* for trading purposes)". (IFSB, 2005).

[42] Islamic Financial Services Board, "Guiding Principles for Corporate Governance for Institutions Offering Only Islamic Financial Services (Excluding Islamic Insurance (Takaful) Institutions and Islamic Mutual Funds)" (Kuala Lumpur: Islamic Financial Services Board (IFSB), 2005).

[43] Asyraf Wajdi Dusuki and Shabnam Mokhtar, "Critical Appraisal of *Shari'ah* Issues on Ownership in Asset-Based Ṣukūk as Implemented in the Islamic Debt Market.," *ISRA Research Paper*, No. 8/2010, 2010.

[44] Ibid.

Islamic finance industry were not Sharī'ah-compliant,[45] there was an immeidate response from the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) which issued new guidelines on *ṣukūk*. One of the major areas identified in the 2008 guidelines relate to ownership. Usmani in his widely quoted statement advised that "Ṣukūk should be issued for new commercial and industrial ventures. If they are issued for established businesses, then the Ṣukūk must ensure that Ṣukūk holders have complete ownership in real assets."[46]

Consequently, in the 2008 AAOIFI guidelines, it was emphasized that "Ṣukūk, to be tradable, must be owned by Ṣukūk holders, with all rights and obligations of ownership, in real assets, whether tangible, usufructs or services, capable of being owned and sold legally as well as in accordance with the rules of *Shari'ah* ... The Manager issuing *Ṣukūk* must certify the transfer of ownership of such assets in its (*Ṣukūk*) books, and must not keep them as his own assets".[47] It is however unfortunate to observe that even in the post-2008 period, there has not been much changes in the way the *ṣukūk* are structured.[48] In a study on the effect of the criticism on the structuring of *ṣukūk* before and after the AAOIFI pronouncement with particular reference to controversial issues such as transfer of ownership, pricing and guarantee element, it found that there were insignificant changes and concluded that the pronoucement did not have much effect on the industry,[49] hence, the need to re-examine the dynamics of legal and beneficial ownership in *ṣukūk* while focusing solely on sovereign *ṣukūk*.

[45] Muhammad Taqi Usmani, "Sukuk and Their Contemporary Applications," in *AAOIFI Shari'a Council Meeting, Manama, Translated from the Original Arabic by Sheikh Yusuf Talal DeLorenzo* (Manama, Bahrain: AAOIFI, 2007).

[46] Ibid., 14.

[47] Accounting and Auditing Organization for Islamic Financial Institutions, *Al-Ma'ayir Al-Shar'iyyah (Sharī'ah Standards)* (Manama, Bahrain: AAOIFI, 2014).

[48] Saad Azmat, Michael Skully, and Kym Brown, "The Shariah Compliance Challenge in Islamic Bond Markets," *Pacific-Basin Finance Journal* 28 (2014): 47–57.

[49] Asmadi Mohamed Naim, "The Effects of New AAOIFI Standards on Sukuk in Choosing the Most Authentic Islamic Principles," *Journal of Islamic Accounting and Business Research* 4, no. 1 (2013): 77–93.

3. LEGAL AND BENEFICIAL OWNERSHIP: COMMON LAW, CIVIL LAW AND ISLAMIC LAW COMPARED

For a better understanding of the dynamics of legal and beneficial ownership and how these concepts come into play in the structuring of *ṣukūk*, it might be necessary to provide a general background of legal and beneficial rights, and how they are established in the law of trust. This section also examines the civil law traditions whether a concept as that of a trust is available. Such analyses will be juxtaposed with the Islamic legal traditions on ownership which might be different from the other two presumably dominant legal systems.

3.1 Common Law

The origin of the commonly used structure in *ṣukūk* structuring where legal right is conferred on the trustee and the beneficial right is given to the *ṣukūk* holders is a core common law concept generally known as trust. In order to establish a working definition for trust, this study adopts the definition provided in the Convention on the Law Applicable to Trusts and on their Recognition of 1985 (Trust Convention) which is relevant to *ṣukūk*, particularly when it is structured as a cross-border product. Article 2 of the Trust Convention defines trust as the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. This definition is similar to the definition given by Oerton who defines trust as:

> .. an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called beneficiary or *cestui que trust*), of whom he may himself be one, and any one of whom may enforce the obligation. Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust.[50]

[50] Richard T. Oerton, *Underhill's Law Relating to Trusts & Trustees* (London:

The above definitions may be contextualized within the purview of *ṣukūk* to understand the application of English trust law in the Islamic finance industry. One of the key Transaction Documents in legal documentation for *ṣukūk* is the Declaration of Trust. Others may include Agency Agreement; Deed of Covenant; Head Lease; Procurement Undertaking; Purchase Undertaking; Servicing Agency Agreement; Sublease; and Surrender Undertaking, depending on the mode of financing used in structuring the *ṣukūk*. The Transaction Documents mentioned above are typically used for the *ṣukūk al-ijārah* structure and were specifically used in the recent HM Treasury UK Sovereign Ṣukūk PLC. issued on June 30, 2014.

Article 2 of the Trust Convention identifies the following characteristics of a trust: *first*, the assets constitute a separate fund and are not a part of the trustee's own estate; *second*, title to the trust assets must stand in the name of the trustee or in the name of another person on behalf of the trustee; and *third*, the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. These three characteristics might not successfully pass the litmus test of Sharī'ah compliance. For instance, the trustee has the power to dispose of the assets if the terms of the trust permit that. This creates a problem of ownership particularly in asset-backed *ṣukūk* and further raises the question of true ownership. It is trite under the common law and Islamic law that one cannot validly sell that which does not belong to someone.[51] A valid title in an asset is passed to a bona fide purchaser

Butterworths, 1970), 3; David Hayton, Paul Matthews, and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 18th ed. (London: LexisNexis, 2010).

[51] In Islamic law, a general principle which is based on the hadith literature is: *lā tabīḥ mā laisa 'indak* (You cannot vend what you do not own). For a general analysis of this principle, see Mohammad Hashim Kamali, *Islamic Commercial Law: An Analysis of Futures and Options* (Cambridge: Islamic Texts Society, 2000). In common law, a Roman maxim in sales of goods provides: *nemo dat quo non habet* (No one can convey what he does not own). For a detailed analysis of this maxim, see Andrew P. Bell, *Modern Law of Personal Property in England and Ireland* (London: Butterworths, 1989); Richard A. Epstein, "Notice and Freedom of Contract in the Law of Servitudes," *S. Cal. L. Rev.* 55 (1981): 1353–68; Edward M. Swartz, "The Bona Fide Purchaser Revisited: A Comparative Inquiry," *Boston*

for value when the seller is conferred with the ownership rights in the asset. Even if one concedes that *Sharī'ah* scholars have permitted the English law categorization of legal right and beneficial right as the hallmarks of trust law to govern *ṣukūk* transactions due to the fact that the entire Islamic finance products should ordinarily comply with existing legislations, this aspect requires further scrutiny because it touches on a fundamental principle of *Sharī'ah*. A spot-on solution to the power to sell conferred on the trustee is to restrict such powers through the trust instrument as provided by section 9 of the English Trustee Act 2000. In fact, some Trust legislations in some common law jurisdictions across the world expressly provide for the power of the trustee to sell a trust asset. For instance, section 17 of the Malaysian Trustee Act of 1949 (Act 208) provides that "*No sale made by a trustee shall be impeached by any beneficiary* upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was rendered inadequate."[52]

3.2 Civil Law

Under the civil law mostly applicable in continental Europe, the trust law as conceptualized under the common law is not recognized. One may therefore revisit the debate whether there is room for English law of trust in the civil legal regime. A similar concept is introduced in some civil law jurisdictions such as France. The *fiducie* concept was introduced under Chapter 14 of the French Civil Code in 2007. This concept is based on the Roman law concept of *fiducia* which draws significantly from similar institutions from other civil law jurisdictions and of course, the English trust law (Emerich, 2009). Article 2011 of the French Civil Code of 2007 defines *fudicie* as "a contract according to which a settlor transfers all or part of its assets, rights or securities to a fiduciary that, in maintaining them separately from its own *patrimoine,* acts according to a specific objective for the benefit of its beneficiaries or the settlor itself".[53] This structure does

University Law Review 42, no. 4 (1962): 403.

[52] Emphasis added.

[53] Valerio Forti, "Comparing American Trust and French Fiducie," *Colum. J. Eur. L. Online* 17 (2011): 32.

not really represent the kind of ownership anticipated in *ṣukūk* from the Islamic law perspective and has not been used for *ṣukūk* structuring generally. In fact, there was a move to modify the *fiducie* concept in 2009, but the move was struck down by the Constitutional Council on procedural grounds.[54] This development is well articulated by Koessler:

> In 2009, a legislative proposal was put forward to change the fiducie in order to accommodate Islamic finance and to allow the creation of ṣukūks under French law (one of the requirements being that the person in possession of a ṣukūk must have a property right in the underlying asset). This was fairly unproblematic in England, where a trust is used and the possessor of the ṣukūk instrument is granted equitable ownership over the assets. Article 16 of the law would have modified the fiducie so as to create a property right for the benefit of the beneficiary (a so-called 'economic property right'), which is distinct from the 'legal property'.[55]

One may argue that even though the French Constitutional Council struck down the proposal, it was a blessing in disguise as the *fiducie* model or its modified version which would have be similar to the English trust law would not have mirrored the true ownership rights recognized under the *Sharī'ah*.

3.3 Different Concepts, Different Principles: Is There Any Prospects for Harmonization?

As demonstrated above, the common law and civil law concepts of ownership are not the same, as there are significant differences in the nature of ownership conferred on the investors. From the onset, it is important to clarify that when it comes to the ownership of a

[54] Décision no. 2009-589 DC du 14 Oct. 2009 [Constitutional Council] as cited in James Koessler, "Is There Room for the Trust in a Civil Law System? The French and Italian Perspectives," *SSRN*, 2012, 10, http://ssrn.com/abstract=2132074 or http://dx.doi.org/10.2139/ssrn.2132074.
[55] Ibid., 9.

property, common law allows a person to be the legal owner of a property, while at the same time conferring on another the beneficial (equitable) ownership of the same property. On the other hand, civil law does not recognize this dual ownership but there is a gradual move towards convergence and harmonization of laws in some jurisdictions in Europe and some political entities in North America such as Louisiana.[56] Nevertheless, it is always believed that "English law does not readily fit into civilian pigeon-holes ...it does not follow that a system which has the trust must have an English pigeon-hole for it."[57] This may also be true for the discussion on ownership in Islamic law *vis-à-vis* its application under a civil or English legal system. Islamic law concepts do not perfectly fit into the English or civil pigeon-holes, as concepts such as ownership of property and securitization are based on different underlying principles.

There are a number of civil law-inspired legal systems in the Arab world where Islamic financial services and products are booming. And on top of that, most transactions in such jurisdictions such as UAE and Bahrain are structured in common law fashion since the majority of the solicitors handling mega *ṣukūk* projects are English law firms.[58] It is therefore evident that the practical application of Islamic finance has not only provided for convergence in the financial system[59], but it has also provided an uncommon avenue or a rare opportunity for convergence of laws between the three major world legal systems.

[56] Kathryn Venturatos Lorio, "In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation," *Southwestern Law Journal* 35, no. 5 (1982): 973–1011.
[57] Gretton, "Trust and Patrimony," 182.
[58] Waugh and Awamleh, "Recognition and Enforcement of Islamic Finance in the Middle East."
[59] Ibrahim Warde, *Islamic Finance in the Global Economy* (Edinburgh: Edinburgh University Press, 2000), 81.

4. SOVEREIGN *ṢUKŪK*: BETWEEN ASSET-BASED AND ASSET-BACKED *ṢUKŪK*

4.1 Revisiting the Different Types of *Ṣukūk* Structures

From the very early period when the earliest *ṣukūk* were structured, the differences between asset-based and asset-backed *ṣukūk* have generated controversy among the major stakeholders in the Islamic finance industry such as the *Sharīʿah* scholars, lawyers, economists, finance experts, and of course the Islamic finance academics who sometimes analyze things from different prisms. The general practice is that when the *ṣukūk* issuance is asset-based, the investors only have beneficial ownership in the underlying asset while asset-backed *ṣukūk* confers on the investors full legal ownership.

> It must be remembered that asset-based structures were created due to market pressure and competition as well as legal constraints ... such as the inalienability of property to foreigners in most Gulf jurisdictions. Asset-based *Ṣukūk* are a viable financing solution for corporations and banks who are unwilling to dispose of their physical assets by way of true sale to an SPV, inter alia due to risk management considerations. From an investor's perspective, asset-based *Ṣukūk* is a Sharia compliant alternative to bonds. The *Ṣukūk* holder generally has no asset risk but credit risk.[60]

The popular categorization of *ṣukūk* to asset-based and asset-backed has been extended by IFBS-7 which provides three distinct legal structures of *ṣukūk*. These are an asset-backed *ṣukūk* structure, an asset-based *ṣukūk* structure, and a "pass-through" asset-based *ṣukūk* structure.[61] For the first category, since the major

[60] Osman Sacarcelik, "Overcoming the Divergence Gap Between Applicable State Law and Sharia Principles: Enhancing Clarity, Predictability and Enforceability in Islamic Finance TransactionsWithin Secular Jurisdictions," in *8th International Conference on Islamic Economics and Finance* (Doha: IAIE & IRTI, 2011), 2.

[61] Islamic Financial Services Board, "Islamic Financial Services Board (IFSB)'s Capital Adequacy Standard for Institutions (Other than Insurance Institutions)

risk involved relates to the underlying asset, the *ṣukūk* holders bear the risk, as they are considered the owners of the asset. For the second category, which is asset-based, no true ownership is passed to the *ṣukūk* holders. The major risk involved is credit risk. In the asset-based structure, subject to the prevailing legal framework, beneficial ownership rights conferred on the *ṣukūk* holders will not result in a right of possession in the event of a default, but a right of recourse against the originator.[62] This is similar to the "asset-based priority credit system" in secured transaction law under the conventional financing system.[63]

Legal uncertainties subsist in different jurisdictions across the world, and this has tremendously affected the structure of some of the *ṣukūk* products and the respective rights of major stakeholders in any issuance. The nature and structure of the Special Purpose Vehicle or Entity (SPV or SPE) might be different under different legal systems. For instance, in some jurisdictions, including in those countries where some *ṣukūk* have been issued previously, "there may be legal obstacles to setting up an appropriate type of SPE which can meet the conditions for the fiduciary responsibilities mentioned above. In such legal environments, it may not be possible to transfer beneficial title in the assets to the investors or to ensure that the investors are able to exercise these rights (for example, to repossess *ijārah* assets) in case of default. In such cases, it is not feasible to create a structure for issuing non-recourse asset-backed securities (ABS)".[64] There is no doubt that ownership is essential in such structuring. So, when the investors are not, or cannot, exercise such right of recourse in asset-backed *ṣukūk*, the implication of that is that they were not the original true owners of the asset. Therefore, the right of recourse would enhance the ownership right of the *ṣukūk* holders; hence, such may be tantamount to the true ownership envisaged in Islamic law.

Offering Only Islamic Financial Services" (Kuala Lumpur, 2009).

[62] Ibid., 7.

[63] Yoram Keinan, "The Evolution of Secured Transactions," *University of Michigan Law School Working Paper* (Michigan, 2000).

[64] Islamic Financial Services Board, "Islamic Financial Services Board (IFSB)'s Capital Adequacy Standard for Institutions (Other than Insurance Institutions) Offering Only Islamic Financial Services," 4.

4.2 Protection in the Event of Default: What Structure is Best for the Investors?

In order to determine what structure is more suited to the interest of the investors, a number of issues need to be closely examined. A reference to the AAOIFI standards on *ṣukūk* and the 2008 guidelines reflects a desired level of awareness among investors who are now exposed to the different types of *ṣukūk* structures. It thus appears that AAOIFI gives preference for equity-based structures such as *ṣukūk al-mushārakah* and *ṣukūk al-muḍārabah* in order to distinguish *ṣukūk* from the conventional bond which is nothing, but a debt. The purpose of such a suggestion is to protect the rights of the investors while ensuring compliance with the *Sharīʿah*. Similar protection is available in asset-backed *ṣukūk* structure where investors are duly protected in the event of a default, as they can have recourse to the underlying asset. This was clearly demonstrated in the East Cameron Gas *Ṣukūk* judgment.[65] However, some jurisdictions still have some restrictions on recourse against assets in their territories. The asset-backed *ṣukūk* structure provides the investors an ownership share of the underlying asset which may represent the much desired true sale. However, the challenge remains whether the legal title in the underlying asset is transferred to the investors or not. Nevertheless, it is not a precondition of a valid sale under the *Sharīʿah* to transfer the title through registration once a valid sale has been made. It has, however, been argued that asset-based structures may be more suitable where it is practically impossible to transfer the title of an underlying asset.[66] There are some jurisdictions with restrictions on foreign ownership of certain classes of assets such as real estate. In such situations, an asset-backed *ṣukūk* structure might not be appropriate from practical aspects.

[65] Faizal Ahmad Manjoo, "The 'Ping-Pong' of the Asset Backed/Asset-Based Sukuk Debate and the Way Forward," in *Islamic Finance: Issues in Sukuk and Proposals for Reform*, ed. Mohammad Hashim Kamali and Abdul Karim Abdullah (United Kingdom: International Institute of Advanced Islamic Studies and the Islamic Foundation, 2014), 11–28.

[66] Radzi and Lewis, "Religion and the Clash of 'Ideals' and 'Realities' in Business: The Case of Islamic Bonds (Sukuk)."

In the recent case of *In re Certain Funds, Accounts, and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Group LLC*, 14 Civ. 1801 (NRB)[67], the petition involved an application to the U.S. District Court for the Southern District of New York for an *ex parte* order to obtain discovery from the auditors of the SPV which is Golden Belt 1 Ṣukūk Company BSC in order to utilize the documents in pending international judicial proceedings. Fortress Investment Group invested in *ṣukūk* and held the largest interest in the Golden Belt 1 *Ṣukūk*. Saad Group was the obligor of the *ṣukūk* transaction when the *ṣukūk* defaulted and could not make periodic payment to the *ṣukūk* holders. Expectedly, the default triggered a number of international judicial proceedings. Some such proceedings include a Statement of Claim against Saad Trading in the Negotiable Instrument Committee of Saudi Arabia. There are also pending liquidation and insolvency proceedings in the Cayman Islands and Bahrain against the Saad Group.

For the case before the District Court in New York, the court denied the petitioners' application for discovery of documents based on the following reasoning *inter alia*:

> Petitioners also argue that their significant financial stake in the GB1 *ṣukūk* makes them an interested party. However, the case they cite in support of this argument ... dealt with a parent company seeking discovery for aid in foreign litigation in which its subsidiary was a party. Although petitioners hold twenty percent of the *ṣukūk* certificates, they are not in a parent-subsidiary relationship with the party that is actually litigating before the Saudi NIC, and their only involvement with the case is to "monitor the progress."[68]

Though the Golden Belt 1 Ṣukūk Company BSC's right was merely a recourse against the originator and not the underlying asset since the *ṣukūk* was asset-based, it opened the Pandora's Box of international *ṣukūk* litigation and how the asset-based *ṣukūk* structure is easily

[67] 2014 U.S. Dist. LEXIS 95578
[68] Ibid.

open to abuse which leads to a situation where the courts will merely consider the transaction as a conventional bond offering.

4.3 Sovereign *Ṣukūk* and the Sale of Publicly-owned Property

According to the IFIS Database, as of November 9, 2014, a total number of 2,277 sovereign *ṣukūk* were issued by 56 issuers since September 20, 2001 when the Government of Bahrain issued the first sovereign *ṣukūk* based on the *ṣukūk al-ijārah* structure. Within this period, the total amount of sovereign ṣukūk alone was US$463 billion which was about 54.69% of the total amount (US$846 billion) of *ṣukūk* issued since inception. This shows the increasing relevance of sovereign *ṣukūk* in economic and infrastructural development in both Muslim-majority countries and western jurisdictions.[69] The recent *ṣukūk* issuances in the UK and Luxembourg and the increasing interest in tapping into the *Sharī'ah*-compliant funds in the hands of Muslim investors support the thesis that there will continue to be innovation and adaptation in the global *ṣukūk* market which makes it a point of duty for the stakeholders to ensure things are done in the proper way.

Regardless of the break throughs recorded in the *ṣukūk* market, one may wonder whether some key *Sharī'ah* principles are complied with when it comes to the transfer of ownership of a publicly-owned property to *ṣukūk* holders in an asset-backed *ṣukūk* structure of a sovereign *ṣukūk*. When the underlying asset of such sovereign *ṣukūk* is public property such as the piece of land used in the Government of Bahrain *Ṣukūk* of 2001, can such public property be transferred to the *ṣukūk* holders even if there is a binding promise to repurchase the property? In the sovereign *ṣukūk*, part of the Manama Airport (a public property) was sold to a Special Purpose Vehicle through a Sale and Purchase Contract. There was a trust declaration in the underlying asset where the SPV held the asset for the benefit of the *ṣukūk* holders. The *ijārah* contract contained a promise (undertaking) to buy back the underlying and a promise to purchase by the Government of Bahrain (the lessee). This prevented any sale to a third party.

[69] Wedderburn-Day, "Sovereign Sukuk: Adaptation and Innovation."

In the *hadith* regarding common or shared property, the Prophet emphasised that "Muslims are partners in three things: water, pasture and fire, and their price is unlawful."[70] This implies that public property cannot be owned by an individual and may not be subject to alienation since it is owned by the entire citizenry and managed by the state. Nowadays, natural resources and underground treasures (*rikāz*) may also be considered as underlying assets of *ṣukūk* such as the East Cameron *Ṣukūk*.[71] These might be considered as state property which cannot be easily privatized. Military equipment may also be regarded as state property which might not easily be converted to private property. It is reported that one fifth of military equipment captured from the enemies were converted to state property. Utilizing such sensitive state assets for sovereign *ṣukūk* might just be a way of circumventing the mandatory provisions of the law. In the entire prophetic precedents reported in the *hadith* literature, there are no instances where the Prophet sold or permitted the sale of a public land for the purpose of financing public needs. It is reported that 'Umar bin Al-Khattāb once said: "The property and fortunes of Bani Al-Nadir were among the riches endowed by Allah, the exalted Almighty, to His messenger without any fighting by the Muslims. Therefore, those riches were purely at the disposal of the messenger of Allah. He separated one year's provision for his household, leaving the rest for covering public expenses and needs, especially those related to the military effort in the way of Allah, the exalted and the most glorified."[72] Some of these property and fortunes included vast swath of land which were considered public property. There is no known record of a direct sale of a state-owned land. Hence, it might not be proper to utilize sensitive public property

[70] This hadith (No. 2472) is classified as *ḍa'if* (weak) in hadith literature. However, another similar narration provides: "Three things cannot be denied to anyone: water, pasture and fire" (Hadith No. 2473). This latter hadith is classified as *ṣaḥīḥ* (sound) hadith. See Muhammad Ibn Majah, *English Translation of Sunan Ibn Majah*, ed. Huda Khattab, trans. Nasiruddin Al-Khattab, vol. 3 (Riyadh: Darussalam Publications, 2007), 414–415.

[71] Manjoo, "The 'Ping-Pong'of the Asset Backed/Asset-Based Sukuk Debate and the Way Forward."

[72] Abu Al-Fida' Ismail Ibn Kathir, *Ibn Al-Sira Al-Nabawiyyah (Vol. 2)* (Beirut: Dar Al-Fikr, 1978), 153.

as the underlying assets for sovereign *ṣukūk* even if there is a binding undertaking to repurchase the asset.

4.4 Waiver of Immunity for Sovereign Assets: Any Sharī'ah Implication?

It is common to include a "waiver of immunity" clause in the Transaction Documents of sovereign *ṣukūk*. It is important to add that such a clause is not only used in sovereign *ṣukūk*, it can be used for any type of *ṣukūk* depending on the underlying assets. In the landmark decision of the UK Supreme Court in *NML Capital Limited v. Republic of Argentina,*[73] the court held that sovereign immunity cannot be invoked by states when they are faced with the enforcement of an adverse foreign judgment in England in commercial cases. This has been the practice when a judgment creditor seeks to enforce a judgment against a particular asset belonging to a state situated in England in cases involving international bond markets. Conversely, in order to protect its foreign economic interest and seek reciprocity, it appears the United States Supreme Court prefer to adopt strict interpretation to the provision of sections 1609 and 1610(a) of the Foreign Sovereign Immunities Act of 1976 (FSIA) which limit execution on property of a foreign state to "property ... in the United States ... used for a commercial activity in the United States" as held in *The Republic of Argentina (Petitioner) v NML capital Ltd. (Respondent)*[74]. In fact, it was revealed in the judgment of the US Court of Appeal in the case that Argentina expressly waived any claim to immunity in the main bond agreements as held in *NML Capital Ltd. v The Republic of Argentina*[75]. It therefore follows that regardless of whether the immunity waiver clause is included in the *ṣukūk* agreements, it might be impossible to have recourse to sovereign assets in some countries such as the US, even though the Supreme Court judgment in the above case differentiates between "jurisdictional immunity" and "execution immunity". It is the latter which the US FSIA protects while the former is often waived.

[73] [2011] UKSC 31.
[74] 573 U.S. (2014)
[75] 695 F.3d 201 (2012)

Though the English decisions above are not really be the focus of this study, they are, however, relevant in understanding the use of certain clauses and the likely interpretation that will be given to them in the event of a similar case involving *Sharīʿah*-compliant transactions. Having said this, one cardinal question to be addressed from the *Sharīʿah* perspective is whether there is recourse for a publicly-owned property of a state which is situated in another state. Such property is expected to be public property. So the question that arises is similar to the question discussed in the above subsection on whether such sovereign property can be sold. A public property is utilized for the benefit of the whole public and belongs to all. The US Supreme Court emphasized in *The Republic of Argentina (Petitioner) v NML Capital Ltd. (Respondent)* that "It is the sovereign nature of the property and its use that gives rise to the immunity in each instance, not who raises the immunity claim".[76] This might be relevant in grounding the principle of sovereign immunity in Islamic commercial law in general, and the process of structuring sovereign *ṣukūk* products.

5. DOES THE SHARĪʿAH RECOGNIZE THE CURRENT TRUST MODEL USED IN SOVEREIGN *ṢUKŪK*?

It is important to begin with the basic assumption that the nature of the prevalent sovereign *ṣukūk* transactions was not known during the early days of Islam, and one cannot simply identify such a practice during the period. However, experts have tried to draw some parallels which might not perfectly describe the modern complex *ṣukūk* market. It is therefore expedient to examine the views of the major stakeholders who have shared their views in earlier studies. However, before that, it may be helpful to consider the validity of the *Sharīʿah* of the trust model used in sovereign *ṣukūk*. In addressing this issue, this study relies on the permissibility, or otherwise, of adopting foreign legal formants or embarking on a legal transplant in areas not generally covered in the *Sharīʿah*. In his exegesis of the relevant legal texts on the imperativeness of adopting a legal system that is

[76] [2013] WL 122883.

based on the Qur'an and sunnah,[77] Imām Muḥammad al-Amīn al-Shanqītī clarified the import of the relevant verses. He emphasized that not all man-made systems contradict the *Sharīʿah* and thus divides man-made legal systems into two major categories administrative and legislative systems.[78] The first category of legal formants relates to the administrative system which deals more with legal rules, laws, and institutions put in place to ensure that society and transactions undertaken by people are done in an orderly manner without violating any *Sharīʿah* principle. Such legal innovations, even though, some might have been borrowed from foreign legal

[77] Some of the legal texts in the Qur'an on this subject matter include the following verses [Translation of Sahih International]:
Qur'an 10:59: "Say, "Have you seen what Allah has sent down to you of provision of which you have made [some] lawful and [some] unlawful?" Say, "Has Allah permitted you [to do so], or do you invent [something] about Allah?""
Qur'an 5: 48: "And We have revealed to you, [O Muhammad], the Book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth. To each of you We prescribed a law and a method. Had Allah willed, He would have made you one nation [united in religion], but [He intended] to test you in what He has given you; so race to [all that is] good. To Allah is your return all together, and He will [then] inform you concerning that over which you used to differ."
Qur'an 5: 49: "And judge, [O Muhammad], between them by what Allah has revealed and do not follow their inclinations and beware of them, lest they tempt you away from some of what Allah has revealed to you. And if they turn away - then know that Allah only intends to afflict them with some of their [own] sins. And indeed, many among the people are defiantly disobedient."
Qur'an 5: 50: "Then is it the judgement of [the time of] ignorance they desire? But who is better than Allah in judgement for a people who are certain [in faith]."
Qur'an: 4:60: "Have you not seen those who claim to have believed in what was revealed to you, [O Muhammad], and what was revealed before you? They wish to refer legislation to Taghut, while they were commanded to reject it; and Satan wishes to lead them far astray."
Qur'an 4: 65: "But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission."

[78] Muḥammad al-Amīn Al-Shanqītī, *Aḍwā'u Al-Bayān Fī īḍāḥī Al-Qur'ān Bi Al-Qur'ān*, ed. Bakr Abdullah Abu Zaid, vol. 4 (Jeddah: Dar al-Alam Al-Fawa'id li al-Nashr wa al-Tawzi', n.d.), 109.

systems, are considered as part of the promotion of general public interest (*maṣlaḥah āmah*).[79] In this regard, one may argue that the SPV structure which is bankruptcy remote and the trust model are meant to facilitate and guarantee the investments of the *ṣukūk* holders. These are part of the administrative issues that need to be regulated which do not necessarily contradict the *Sharīʿah*. On the other hand, the second category constitutes the legislative systems where laws are made to contradict clear-cut Sharīʿah provisions such as laws promoting *ribā.*[80] This second category is what is referred to in the verses in the Qur'an which is beyond the scope of this study.

Though this study has given some likely indications on the validity of the current practice of declaration of trust in sovereign *ṣukūk* in the eyes of the *Sharīʿah*, there is a need for further exploration of the issue. Although *Sharīʿah* principles for ensuring a "true sale" in a typical *ṣukūk* transaction is necessary, the general operations of a special purpose vehicle established for the purpose of a particular *ṣukūk* is generally regulated by common law principles. With the Torrens system of land registration operational in some common law jurisdictions like Malaysia, Australia, Canada, and Singapore, where land ownership can only be transferred through the registration of title, the issue of true ownership is further complicated.[81]

The thin line between the legal and beneficial ownership rights created in a trust declaration relates to the simultaneous rights of the parties over the underlying property. While the trustee's rights over the property are considered as rights *in rem* (enforceable against all third parties), the beneficiaries, i.e., *ṣukūk* holders, hold the beneficial ownership rights over the property, and as such, their rights are enforceable against the legal owner or trustee as rights *in personam*. The influence of the Torrens system of registration of land title requires that when the underlying property in the *ṣukūk* transaction is a registrable property, i.e., land holdings or real property, the legal ownership in such property will be conferred on the trustee by virtue

[79] Ibid., 4:110.
[80] Ibid., 4:110–111.
[81] Theodore BF Ruoff, *An Englishman Looks at the Torrens System* (Sydney: Law Book Company of Australasia, 1957).

of registration of title to such land. However, the beneficial ownership conferred on the *ṣukūk* holders is by virtue of the declaration of trust in the Subscription Agreement.

Thus, generally, beneficial ownership is also known as equitable ownership since the former was introduced in the Courts of Equity to mitigate the hardship of common law. The Chancellor of the Court of Chancery in medieval England invoked its equitable jurisdiction as part of its general administrative powers to provide relief for a party that has experienced the hardship of common law. Therefore, in order to protect the rights and interests of a person to a property, the concept of beneficial ownership was introduced by the Court of Chancery through a trust obligation. Hence, when a property is sold to a buyer, the seller holds the property on trust for the benefit of the buyer who is the beneficiary. So in equity, the beneficial owner is the real owner of the property and can enforce his rights over such property against the trustee. With this background in mind, the views of *Sharī'ah* and legal scholars will enrich the discussion on the use of the current trust model, particularly in sovereign *ṣukūk* transactions.

In a lead paper, Haneef maintained that the concept of trustee and ownership were both recognized in the Qur'an and sunnah, and as such, there should not be any problem with the adoption of the trust model in *ṣukūk* transactions.[82] After reviewing related verses on the concept of ownership and trusteeship (*khilafah*) in Qur'an 4:126, 67: 15, and 57:7, he concludes that:

1. *Sharī'ah* recognizes Allah as the absolute owner of all properties and humans merely trustees.
2. The concept of legal and beneficial ownership (as applied in Common Law) is not incompatible with *sharī'ah*.
3. *Sharī'ah* also ought to recognize that when a seller sells a property, the seller is obliged to hold on trust the property for the benefit of the buyer (the beneficiary). The seller becomes a

[82] Rafee Haneef, "Legal and Beneficial Ownership - Law Perspective," in *9th International Sharah Scholars Forum Contemporary Issues in the Application of Islamic Finance: Beneficial and Legal Ownership and Takaful in Light of Islamic Concept of Cooperation* (Kuala Lumpur: International Shariah Research Academy for Islamic Finance, 2014).

bare trustee, holding the legal title for the beneficial owner (the buyer).

4. To say "*Sharī'ah* does not recognize beneficial ownership" is contrary to the letter and spirit of *Sharī'ah.*
5. In a *mudaraba*, the *mudarib* holds the *mudaraba* assets on trust for the *rabb al-mal*.
6. Almost all *ṣukūk* offering are done through a trust deed, where the *ṣukūk* issuer acts as a trustee for the trust assets (e.g., landed assets), and the *ṣukūk* holders become the beneficiaries of the trust assets. *Ṣukūk* evidences the beneficial ownership of the trust assets.[83]

One additional issue considered is the registration of the trust assets in the name of the *ṣukūk* issuer, particularly in sovereign *ṣukūk* where in most cases the assets are originally public properties. On top of that, what about the "real owners", i.e., the numerous *ṣukūk* holders who are the equitable owners of the assets? Haneef believes there is no need to even register the trust assets in the name of the *ṣukūk* issuer because of the increased transaction costs involved in such registration which may include, depending on the jurisdiction, stamp duty, value added tax, registration fees, property gains taxes, etc.[84] One must bear in mind the unique nature of Islamic finance transactions such as *ṣukūk*. At the end of the maturity date, the underlying assets will be transferred back to the originator and such transfer of assets goes with the transfer of title and will involve similar costs. Therefore, in order to avoid numerous costs which will affect the overall pricing of the *ṣukūk*, and to ensure the principle of *ḥifẓ al-māl* is upheld in structuring a *Sharī'ah* compliant transaction that is in line with *maqāṣid al-sharī'ah*, the majority of modern jurists prefer to not register the trust assets in the name of the issuer.

Similarly, Elgari agrees with the line of argument above and further buttresses his standpoint with a number of proofs from Islamic juriprudence and related views expressed by early Muslim jurists with regard to the very essence and nature of ownership in

[83] Ibid.
[84] Ibid.

Islamic law.[85] First, in *Al-Furūq* by Al-Qarāfī, the difference between the legal maxim on ownership (*milk*) and the one on legal disposition (*taṣarruf*) is that though the two maxims are quite similar, it is possible for a person to own a property without the dispositionary rights. For example, someone who is legally interdicted (*maḥjūr ʻalayhi*) or have legal guardianship of children may own a property, but not be able legally dispose of it. On the other hand, one may be conferred with the dispositionary rights of a property without necessarily having the legal ownership of it. For example, in the case of the executor of a will, an agent or even a judge, there are situations where they are legally empowered to dispose off certain properties on behalf of others, even though they do not ordinarily legally own such properties. This justifies the trust declaration which involves numerous *ṣukūk* holders and the trustee who manages the property on their behalf.[86] Second, Elgari further argues that in the Islamic jurisprudential rules relating to slavery (*fiqh al-raqīq*), the majority of Muslim jurists agree that when an authorized engage in commercial transactions and owns certain properties, such properties even when registered in the name of the slave, still falls under the general ownership of the master.[87]

Third, Elgari further justifies the *ṣukūk* structure involving a trust declaration by the concept of *adl* (trustee-arbitrator) widely recognized by Muslim jurists in *rahn* (mortgage) contract which is a collateral security and enforcement mechanism.[88] Such collateral put under the custody of a trusted third party is kept as a trust for the eligible party, and it serves as a collateral.[89] Ibn ʻArabī contends that when such a collateral falls under the custody of the

[85] Mohamed Ali Elgari, "Al-Tatbiq Al-Milkiyyah Al-Naf'iyyah Wa Al-Milkiyyah Al-Qanuniyyah Fi Al-Tamwil Al-Islami," in *9th International Sharah Scholars Forum Contemporary Issues in the Application of Islamic Finance: Beneficial and Legal Ownership and Takaful in Light of Islamic Concept of Cooperation* (Kuala Lumpur: International Shariah Research Academy for Islamic Finance, 2014).

[86] Ibid.

[87] Ibid.

[88] Ibid.

[89] Michael J T McMillen, "Islamic Shari'ah-Compliant Project Finance: Collateral Security and Financing Structure Case Studies," *Fordham International Law Journal* 24, no. 4 (2001): 1216.

trustee-arbitrator, the mortgage is redeemed literally since the trustee-arbitrator represents the rightful party and he merely acts as an agent for such a party.[90] Fourth, what may be regarded as a simulated or pre-emptive sale (*bay' al-talji'ah*) is another justification of the legal and beneficial ownership structure in a *ṣukūk* transaction. This form of sale is generally fictitious and is purposefully meant to serve a specific temporary purpose in order to achieve a higher goal. In this kind of transaction, the seller pretends to sell a particular commodity while in actual fact nothing was sold. This simulated or pre-emptive transaction is often undertaken when there is a looming threat to the property which may be as a result of seizure by a creditor on the orders of the court or compulsory acquisition or confiscation by the state. The Muslim jurists are not unanimous as to the legal validity of this kind of transaction. While the Shafi'i jurists consider *bay' al-talji'ah* as a valid sale, Hanbali and Hanafi jurists contend that such a sale is not valid in the eyes of the law.[91]

From a different angle, Al-Quradāghī dissects the relevant issues and identifies similar concepts like *ikhtiṣāṣ* and goes on to specifically address the way modern Islamic banks undertake *murābaḥah* transactions, whether the underlying asset is a real property or movable property.[92] The Islamic banks do not necessarily register the property in their names first before selling such property to the customer. Such property is usually sold to the customer and finally registered in his name without any prior registration that may increase transaction costs and create unnecessary and avoidable difficulties.[93] Al-Quradāghī argues that it is sufficient to merely sign the Sharī'ah contract once all essential

[90] Abubakar Ibn 'Arabi, *Ahkam Al-Qur'an (Vol. 2)* (Lebanon: Dar al-Kutub al-Ilmiyyah, 2008), 38.

[91] Ali Mohyi al-Din Al-Quradaghi, "Al-Milkiyyah Al-Qanuniyyah Wa Al-Milkiyyah Al-Naf'iyyah Min Manzur Shar'i Wa Qanun: Al-Itar Al-'Am Wa Al-Tahdiyat Al-Ra'isah," in *9th International Sharī'ah Scholars Forum: Contemporary Issues in the Application of Islamic Finance-Beneficial and Legal Ownership* (Kuala Lumpur: International Shariah Research Academy for Islamic Finance, 2014).

[92] Ibid.

[93] Ibid.

elements are fulfiled such as offer and acceptance.[94] This is to avoid unnecessary transaction costs and fees involved in the registration of the title to the property when ownership is transferred twice. Nevertheless, it is noted that jurisdictions in Malaysia and the United Kingdom, etc. have realized this important distinction between Islamic bank and conventional bank products and have amended their laws accordingly to cater for such specifics of Islamic banking products. While such law reforms and procedures are introduced to facilitate *murābaḥah* transactions since ownership changes in a matter of a few seconds or minutes, there is still a lingering problem as regards *ṣukūk* transactions. Orginally, the *Sharī'ah* would expect the *ṣukūk* holders to hold both the legal and beneficial ownership in the underlying asset. Al-Quradāghī, however, concludes that since the requirements for complete ownership under the *Sharī'ah* are present in beneficial ownership with the exception of formal registration of the title, the *ṣukūk* holders can possess beneficial ownership of the underlying assets without violating any fundamental principle of the *Sharī'ah*. In such a situation, he argues that a mere legal ownership might still be conferred on the *ṣukūk* issuer which does not in any way affect the validity of the transaction.[95]

One fundamental condition which Al-Quradāghī introduces into the discourse is the issue of non-registration of the title of the underlying asset and its effect on the rights of the *ṣukūk* holders, particularly in the case of an eventual default and right to recourse. He argues that if it is assumed non-registration of the title in the name of either the issuer or the *ṣukūk* holders does not contradict the validity of the contract legally, there must be a right of recourse against third parties and such condition must be stipulated in the *Ṣukūk Prospectus* so that prospective investors will be aware of all the circumstances surrounding transactions[96] In addition, if the *Prospectus* provides that the legal ownership does not pass to the *ṣukūk* holders as a result of non-registration of the title to the property or it is not known whether such legal title will pass or not, then relevant clauses should be included in the *Prospectus* to the effect

[94] Ibid.
[95] Ibid.
[96] Ibid.

that the legal title signifying ownershp passes to the *ṣukūk* holders in accordance to the *Sharī'ah.* And even if such clauses are not included, the legal title of ownership stands transferred to the *ṣukūk* holders in accordance to the *Sharī'ah*.

6. CONCLUSION

From the foregoing analysis, one may conclude that the entire Islamic financial services industry and the *ṣukūk* market, in particular, are subject to the overbearing legal principles of the legal system under which they operate. Different legal systems shape and revise the nature of some core principles in Islamic law, particularly the nature and extent of ownership.[97] To what extent such foreign principles might be adopted to ensure Islamic finance products such as *ṣukūk* remain not only *Sharī'ah*-compliant, but also economically viable and competitive in a polarised global financial system depends on the position of *sharī'ah* on issues involving adoption of foreign legal principles and commercial concepts. The guiding principle should be the spirit that propelled the growth of Islamic banking in Malaysia in the early period which is well articulated by Ibrahim.[98] While referring to the Islamic banking industry, he contended that "where the normal banking practices do not clash with the Islamic principles, the Islamic banks have adopted the current banking practices and procedures. Where any clash arises, the Islamic banks have devised their own practices and procedures to accomplish their banking activities".[99] This practice seems to have been extended to the Islamic capital markets with special reference to *ṣukūk*. However, with the increasing rate of defaults, it becomes difficult to continue to adopt contemporary bond markets and procedures, particularly when it has become glaring that most of those preparing the *ṣukūk* documentation and the lead arrangers are products of conventional bonds market.

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[97] Umar A. Oseni, "Craig R. Nethercott & David M. Eisenberg (eds): Islamic Finance: Law and Practice," *European Journal of Law and Economics* 36, no. 1 (2013): 231–35.

[98] Ahmad Ibrahim, "Legal Framework of Islamic Banking," *Journal Undang-Undang: IKIM Law Journal* 1, no. 1 (1997): 1–29.

[99] Ibid., 1.

The way forward is for the stakeholders in the Islamic financial services industry to go back to the drawing board and come up with an acceptable model which will not violate core principles of sale contracts and transfer of ownership in Islamic law. Though the existing SPV model does not contradict the *sharīʿah*, issues relating to ownership may require further considerations. Pricing matters will have to be considered, too, in order to come up with not just an economically viable model, but also a *Sharīʿah*-compliant product that will stand the test of time. Issues involving *ṣukūk* requires a close consideration of harmonization of laws and financial principles and products where necessary. Based on recent trends, it seems there is more focus on raising funds and integration into the global financial system, but less concern for Sharīʿah compliance. As argued by Muhammad Al-Amine, even though there is nothing wrong in seeking acceptability by international financial institutions, the priority of *ṣukūk* issuers and originators should be *Sharīʿah* compliant to ensure "the growth of real economy and socio-economic development of the society."[100]

This study is timely, as it is comes at a time where some stakeholders in the global Islamic finance industry, such as AAOIFI, have realized the need to review and revise some controversial practices in the industry. The Secretary General of AAOIFI recently announced that AAOIFI is "looking at the possibility of developing clearer guidance on *ṣukūk* that will incorporate accounting, legal, technical and tax-related aspects."[101] *Ṣukūk* has been identified as one of the four *Sharīʿah* standards that will be revised. As a result of this study, it is expected that some form of harmonization of laws should take place in leading jurisdictions issuing sovereign *ṣukūk*. Such harmonization of laws should take into consideration the unique nature of ownership in Islamic law which confers on the *ṣukūk* holder, who is supposed to be a co-owner of the underlying asset, the right to sell or transfer the asset to a third party.

[100] Muhammad Al-Bashir Muhammad Al-Amine, "Ṣukūk Market: Innovations and Challenges," *Islamic Economic Studies* 15, no. 2 (2008): 21.

[101] Accounting and Auditing Organization for Islamic Financial Institutions, *Al-Ma'ayir Al-Shar'iyyah (Sharīʿah Standards)*.

However, the *Sharī'ah* justification proffered by modern Muslim jurists should be enough to lay this controversy to rest. The conclusion remains that the legal and beneficial ownership bifurcation of ownership rights particularly in sovereign *ṣukūk,* does not contradict *Sharī'ah* principles as there are numerous justification for such arrangements in Islamic jurisprudence. After all, the Torrens system, which requires registration of legal rights in a landed property, was not known during the early days of Islam. However, since it has been established that such a practice does not contradict any fundamental principle of the *sharī'ah* and seeks to fulfil *maṣlaḥah*, hence, it has been adapted to be part of the *sharī'ah* to facilitate project funding and promote infrastructural development. Nevertheless, reasonable safeguards must be introduced either through contractual arrangement or legal provisions to ensure that the rights of the investors are protected. In the case of sovereign *ṣukūk*, they must have recourse against the issuer/originator in the event of a default, even if it implies that they will be selling the property exclusively to the issuer/originator. However, the problem of utilizing a public property as the underlying asset of a sovereign *ṣukūk*, though convenient, may pose some jurisprudential and practical challenges in the case of default.