Sharī'ah Evaluation of Contemporary Sovereign and Quasi-Sovereign *Ijārah Ṣukūk*: A Case of Pakistan, Bahrain, and Malaysia

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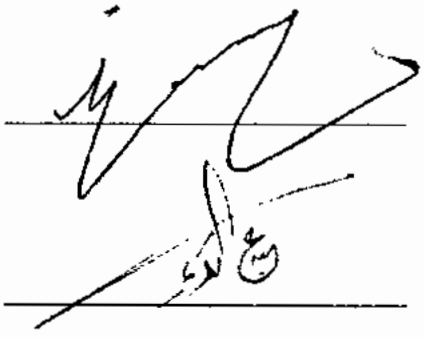

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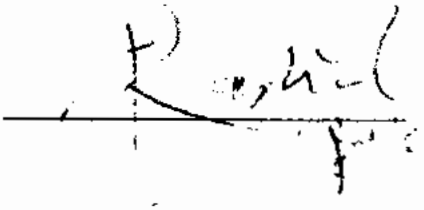

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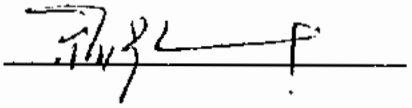

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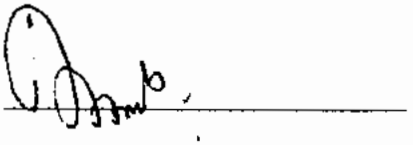

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List of Abbreviations

AAOIFI	Accounting and Auditing Organization for Islamic Financial Institutions
BNM	Bank Negara Malaysia
CBB	Central Bank of Bahrain
IFI	Islamic Financial Institutions
IFSB	Islamic Financial Services Board
IIFM	International Islamic Financial Markets
IIFS	Institutions offering Islamic Financial Services
INCEIF	International Center for Education in Islamic Finance
ISRA	International Sharī'ah Research Academy
SBP	State Bank of Pakistan
SCM	Securities Commission Malaysia
SECP	Securities and Exchange Commission of Pakistan
GOP	Government of Pakistan
ICM	Islamic Capital Market
IIFA	International Islamic *Fiqh* Academy
M1, 2, 3	Motorway 1, 2, 3
NIBAF	National Institute of Banking and Finance
OIC	Organization of Islamic cooperation
PDSCL	Pakistan Domestic *Ṣukūk* Company Limited
PISCL	Pakistan International *Ṣukūk* Company Limited
SPV	Special Purpose Vehicle

Abstract

Ṣukūk have been contributing significantly to the growth and development of Islamic finance globally and have successfully retained the focus and interest of researchers, academicians, and professionals since recent decades. Innovation and financial disruption have created a spectrum of financial products and practices that have been deployed in *ṣukūk* industry across different regions. The study distinctively showcases thematic Sharīʿah appraisal of contemporary structures and issuing documentation (prospectus) by incorporating opinions of leading Sharīʿah scholars and practitioners. The study is structured on grounded theory to explore thematic aspects of structured responses collected on Sharīʿah compliance of sovereign and quasi-sovereign *ijārah ṣukūk* from Pakistan, Bahrain, and Malaysia. Themes of Sharīʿah issues are identified through content analysis and expert surveys and vigorously deliberated in light of Islamic instruction and precepts to assess and conclude the level of Sharīʿah compliance in *ṣukūk* industry across sample regions.

The study finds asset ownership (beneficial vs. legal), the status of SPV, asset-based/backed *ṣukūk*, recourse and disposal rights, purchase undertaking of *ijārah ṣukūk* on its face value at the time of redemption and fee on third party guarantee, as major debates over Sharīʿah compliance of quasi and sovereign *ijārah ṣukūk* in *form*. The study concludes that Sharīʿah compliance of quasi and sovereign *ijārah ṣukūk* in its *form* is harmonized, converging and largely acceptable. The study further augments Sharīʿah appraisal by evaluating the substance of sovereign *ijārah ṣukūk* through the lens of *maṣlaḥah and maqāṣid* and concludes the presence of divergent opinions for being subjective and being discussed in different perspectives and constraints. The

study finds a striking need to align and streamline competing views of different stakeholders on an institutional level to produce sound, trustworthy and viable solution-based research work for the various stakeholders of the industry. The institutional and collective *ijtihād* would pave the way for the sustainable development of *ṣukūk* industry and shrink the trust deficit among stakeholders.

Keywords

Ṣukūk, Sharī'ah, Compliance, Sovereign, *Ijārah*, Prospectus, SPV, Ownership, Undertaking, Guarantee, *Bai' al-mu'ajjal* , *Ḥiyal*, *Maqāṣid*

Chapter One: Introduction

Ṣukūk, the Islamic investment certificates as an alternative to conventional securities have been emerged as a popular product of the Islamic financial industry and got the attraction of the Muslim and the western world alike. Especially over the last decade, *ṣukūk* has gained exponential growth through the provision of a real-time solution to governmental institutions and other corporations by acting mainly as a funding source for a large-scale project (International Sharī'ah Research Academy for Islamic Finance [ISRA] & Routers, 2017).

Ṣukūk has played a vital and leading role among various instruments of the Islamic capital market (IIFM, 2016). The issuance of prevailing Ṣukūk structure as per Sharī'ah guidelines is among the core objectives of Islamic Banking and which in turn may definitely assist the establishment of an Islamic economy (Usmani, 2007, p. 2).

The introduction is further divided into six sections i.e. background of the study, importance of sovereign *ṣukūk*, the research statement, objectives and research questions, and plan of the study, respectively.

1.1 Background of the Study

Islam is not a combination of some specific beliefs (*'aqāid*) and worships (*'ibādāt*) only, rather it is a complete code of life. It has brought guidance and commands for all spheres of human life, and all these principles and commands are as significant as the soul for a human body. It is a fact that without the rectification of socio-economic dealings as per Sharī'ah principles, we cannot present the real picture of Islam to the world. Therefore, every Muslim needs to have complete awareness about

Sharī'ah related issues in his respective field (Ibn-Abideen, 1992). An important point however needs to be clarified that the wellbeing pursuits of Islamic teachings are meant for the whole of mankind and not only for the Muslims (Usmani, 2010).

Broadly, the Islamic framework consists of beliefs (*'aqā'id*), worships (*'ibādāt*), financial dealings (*mu'āmalāt*), social life (*al-mu'āshrat*) and ethical values (*al-akhlāq*). No doubt, all of these constituents carry their significance but *mu'āmalāt,* (financial dealings) keeps their identity and maintains their status owing to specific relationship to the livelihood of mankind. *Mu'āmalāt* being important for the whole community rather than individuals, they leave their impact on a massive scale (Al-Sarakhsi, (2010); Al-Magrabi, 1992). *Mu'āmalāt* and their philosophy have proved resilient to the occurrence of the global crisis that only the asset-based financial system can work in the best interest of the economies in their domestic and international contexts.

The sale of debts has been identified as the main culprit for invoking the Great Financial Crisis (2008). Multiple rapping of heaps of debts connected with Collateralized debt obligation (CDO) that triggered the recent financial crisis (GFC 2008), was marginally possible if the sale of debt would have been abandoned (Usmani, 2010). The appetite for debt has been associated with the financial fragility of economic agents throughout history and is a root cause of major financial crises, including the 2008 global financial crisis and the 2011–2013 Eurozone debt crisis (Safari et al., 2014, p.196).

The prevailing global financial crunch did not decrease the demand and popularity of Sharī'ah compliant securities. It is rather increased for Islamic financial institutions The International Monetary Fund (IMF) and World Bank are keenly

observing the Islamic financial sector and a lot of studies have been conducted in this regard till now (Jobst et al., 2008). Therefore, to attain this hallmark, the Islamic financial system is being practiced by western economies also from the last few decades. While on the other side the experts and specialists in this area such as economists, Sharī'ah scholars, finance, and legal experts are putting their joint efforts, despite their limitations to mark this Devine system as a sound and viable financial system. For this purpose, several financial and legal bodies have been established in the various jurisdictions of the world particularly in Muslim countries.

Trading, agriculture, manufacturing, and services are the four major spheres of *mu'āmalāt* (financial dealings). In the current scenario, the Islamic financial industry has been evolved gradually into three major areas which cover a substantial portion of the market such as Islamic banking, *takāful,* and Islamic financial markets. In this regard, the World bank presented that in the last decade, the Islamic finance industry has undergone exponential growth reaching a growth rate of 10-12% annually. By the end of 2015, the total cost of Sharī'ah-compliant assets was reached US$2 trillion. This is covered mainly by banking and non-banking financial arrangements, capital and money markets, and insurance (World Bank, 2015).

1.2 Importance of Sovereign *Ṣukūk*

There are different Islamic financial instruments and tools are being practiced under the umbrella of various modes of financing. However, the most prominent and projecting instruments of this financial industry are called *ṣukūk.*

Especially over the last decade, *ṣukūk* has gained exponential growth through the provision of a real-time solution to governmental institutions and other corporations by acting mainly as a funding source for a large-scale project (ISRA & Routers, 2017).

Ṣukūk, nowadays, is believed to be the most attractive option in terms of Islamic financial activities. With the steady growth of the *ṣukūk* market, issuers are increasingly looking for more flexible and more efficient structures. This is particularly true for sovereign *ṣukūk*, which comprise the majority of domestic *ṣukūk* issuance. Sovereign *ṣukūk* represent more than 70% of domestic *ṣukūk* over 2009-2014 (IIFM, 2014; Al-Suwailem, 2015).

Sovereign *ṣukūk* "which are called in Arabic (الصكوك السيادية) issued by governments (through their central banks or monetary agencies or similar entities) normally with intent to generate funds. The funds are usually used to finance budget deficits and/or public projects, among others. Examples of sovereign *ṣukūk* include Malaysia Sovereign *Ṣukūk*, Bahrain Sovereign *Ṣukūk* and Government of Pakistan (GoP) *ijārah ṣukūk"*. Quasi-sovereign *ṣukūk* "which are called in Arabic (الصكوك شبه السيادية) issued by agencies (state-owned companies, publicly owned corporations) that have government backing e.g. *ṣukūk* issued by Pakistan stone development company (Pakistan) and Saudi Electricity Company (Saudi Arabia), etc." (Investment & finance, 2017).

Ṣukūk denotes a kind of Islamic financial certificate that may hold undivided partial ownership in certain ways. For instance, this partial ownership may present in debt, property, project, business, and investment. And thus may specifically termed as *ṣukūk al-murābaḥah* , *ṣukūk al-ijārah, ṣukūk al-istiṣnā'* , *ṣukūk al- mushārakah* or *ṣukūk al-istithmār* respectively. Thus, technically speaking, it may be inferred that both *ṣukūk* and conventional bonds are different financial instruments as the latter is just the promise for the repayment of loans at a certain time in the future. To add further,

AAOIFI (2007) describes *ṣukūk* in a very comprehensive way that *ṣukūk* are "certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or (in the ownership of) the asset of particular projects".

In literature, *ṣukūk* has been discussed in terms of its multiple types, for example, *ijārah* (leasing), *wakālah* (agency), *mushārakah* (partnership), *istiṣnā'* (build-to-order projects), etc. Among these, *al-ijārah* (leasing) is the most widely issued and discussed instrument in the Islamic financial markets (Kahf, 1997; Abdel-Khaleq & Richardson, 2006; Siddiqi, 2006; kamali, 2007; Usmani, 2007; Wilson, 2008; Yean, 2009; Hammad, 2011; Riazuddin, 2011; Safari, et al, 2014; Godlewski, Turk & Weill, 2016).

Ijārah ṣukūk (صكوك الإجارة) are "certificates of equal value which are issued by the owner of an existing property or asset either on his own or through a financial intermediary, to lease it against a rental from the subscription proceeds. When the subscription process is completed, the *ṣukūk* holder becomes the owner of the underlying asset. After subscription, the underlying becomes owned by the *ṣukūk* holders. The usufruct (*manfa'ah*) owner may also present an *ijārah ṣukūk* for any property/asset. The purpose may be to give it on lease against rentals ... *ijārah ṣukūk* is also known as *ṣukūk al-ijārah*" (Investment & finance, 2017).

1.3 Statement of Problem

To brand more viable and sound financial instrument the *ijārah ṣukūk* have been facing since its inception, a critical assessment and reservations on Sharī'ah aspects in particular from prominent contemporary Muslim scholars such as (Usmani, 2007; Elgari, 2011; Mansoori, 2011; Laldin, 2012; Ayub, 2014; Al Suwailem, 2015; Ayub, 2017).

Divergent and competing Sharī'ah opinions on different aspects of *ṣukūk* issuance and structuring have created immense curiosity among stakeholders of *ṣukūk* market. Lack of Sharī'ah harmonization and consensus regarding issues in *ṣukūk* offering hamper the potential and sustainability of *ṣukūk* market and create a trust deficit among market players. The phenomenon is grounded in distinctive Sharī'ah instructions emerging from different schools of thoughts of Islamic *fiqh* across regions like Pakistan, Bahrain, and Malaysia. There is an immense need to identify Sharī'ah issues regarding *ṣukūk* as surfaced in stated regions to evaluate Sharī'ah compliance of *ṣukūk* in their form and substance.

Considering the above-stated discussion and scholarly arguments by renowned Sharī'ah experts, the structuring of *ijārah ṣukūk* and its Sharī'ah compliance has some debatable areas such as beneficial ownership, presence of special purpose vehicle (SPV), asset-based and asset-backed ṣukūk, sale and purchase undertakings, recourse right, multiple parallel contracts, *bai' al-mu'ajjal, ḥiyal*, and *makhārij*, etc.

To the best of our knowledge, no study has evaluated the above-stated issues to the sovereign and quasi-sovereign *ijārah ṣukūk* structures particularly through qualitative (interview-based) research methods from the Pakistani, Bahraini, and Malaysian regions.

Consequently, based on this one can argue that there is an immense need to evaluate the Sharī'ah issues of prevailing sovereign and quasi-sovereign *ijārah ṣukūk* structures by focusing on these regions.

1.4 Research Objectives

Based upon the foregoing discussion, the objectives have been framed as under:

1. To identify themes of Sharī'ah issues and debates based on the contemporary literature related to the sovereign and quasi-sovereign *ijārah ṣukūk* in Pakistan, Bahrain, and Malaysia.
2. To examine Sharī'ah legitimacy of various components of the *ṣukūk* issuance, such as ownership of the underlying asset, special purpose vehicle (SPV), the transmission of asset-related benefits to the investor, green shoe option, the process of redemption, combination of inconsistency contracts, buy-back arrangement, contractual requisites, etc.
3. To examine the relationship of *ṣukūk* issuance with the societal needs and any coherence with the requisites of Islamic economic objectives.
4. To obtain and analyze the views of various stakeholders, such as Shari'ah experts, (Sharī'ah advisors of different Islamic financial institutions), practitioners from various regulatory and financial bodies that are involved in the *ṣukūk* structuring and issuance, and intellectuals/academicians (from academic institutions, particularly, in respect of the concerns raised in objective No. 2 above and conclude the resolution and strategy addressing all such issues.

1.5 Research Questions

Based on the above objectives, the present study would focus on the following research questions;

1. Are the contemporary sovereign and quasi-sovereign *ijārah ṣukūk* structures Sharī'ah compliant?
2. Is the use of parallel contracts permissible as generally seen in the case of *ṣukūk* issuance?
3. Do the *ṣukūk* holders gain complete ownership in real assets, in case of *ṣukūk* being issued for establishing new ventures?
4. Is the concept of beneficial ownership as effective as real ownership while establishing rights and liabilities regarding the underlying asset?
5. Is the presence of the Special Purpose Vehicle (SPV) comply with the Sharī'ah requisites?
6. Is the concept of third party guarantee involved in quasi-sovereign *ijārah ṣukūk* structures and what is the Sharī'ah status of 'charging fee in this context?
7. Does the *bai' al-mu'ajjal* of near to maturity GOP Ijārah *ṣukūk* to the State Bank of Pakistan comply with the Sharī'ah parameters?
8. Is the green shoe option, practiced in the issuance of sovereign *ijārah ṣukūk* valid as per Sharī'ah rules?
9. Is the contemporary sovereign *ijārah ṣukūk* issuance fulfilling the higher objectives of Sharī'ah and not fall under the category of stratagems (*ḥiyal*)?

After merging the above nine research questions into five research areas by including various sub-questions inappropriate heads and sub-heads to develop a comprehensive survey is as follows:

Research Area # 1

The first research area explains the issues related to 'asset ownership' which is consisted of further, sub-sections; such as 'beneficial and legal ownership', 'issues related to special purpose vehicle (SPV) regarding asset-based and asset-backed *ṣukūk'*, 'restrictions and undertakings such as 'purchase undertaking' and 'purchase of *ijārah ṣukūk* on its face value at the time of redemption, 'asset disposal and recourse right', 'asset due diligence and management of the *ṣukūk* asset, etc.

Research Area # 2

The second research area consists of the concept of 'guarantee', and 'third party guarantee in quasi-sovereign *ijārah ṣukūk* structures' and the 'Sharī'ah status of 'charging a fee on it'.

Research Area # 3

The third research area has explained the issue of 'combination of contract in parallel contract in sovereign and quasi-sovereign *ijārah ṣukūk* structures in Pakistani, Bahraini and Malaysian regions.

Research Area # 4

The fourth section has discussed the issues related to 'GoP *ijārah ṣukūk* based on *bai' al-mu'ajjal* and asset appraisal options such as 'green shoe option' in sovereign and quasi-sovereign *ijārah ṣukūk* structures specifically in the Pakistani region.

Research Area # 5

The fifth research area is described the important and argumentative issue of '*ḥiyal and makhārij*' by discoursing the '*maqāṣid* al- Sharī'ah (higher objective of Islamic law of contract) in the context of sovereign and quasi-sovereign ijārah *ṣukūk* structures. Furthermore, this section also summarized the whole debate of this research work titled, 'Overall Sharī'ah compliance' of sovereign and quasi-sovereign *ijārah ṣukūk* structures in Pakistani, Bahraini and Malaysian jurisdictions.

1.6 Study Plan

The present study is completed in seven chapters by following the structure recommended by Perry (1998) for a doctoral thesis. Each chapter is explained as follows.

In the first chapter, titled "Introduction", the study introduces the research topic together with the statement of the problem, objectives, development of research questions, and the significance for the present research work.

The second chapter, titled "Sharī'ah Rulings for *ṣukūk*" explained the various definitions of *ṣukūk* and its categorization. The other section elaborated the Sharī'ah principles for *ṣukūk*. For instance, it mainly covered the conditions regarding the parties to the contract and its subject matter. Likewise, the relevance of various Sharī'ah contrasts i.e. *ribā* (interest), *gharar* (uncertainty) and *qimar* (gambling), Prohibition of Combining Two Transaction in One in *ṣukūk* and key Shari'ah rulings on *ṣukūk* issuance and trading would be shortened in this section.

The next Third chapter, named "an Overview of *Ṣukūk* Markets" is presented a bird's eye view of the Ṣukūk market that is currently the most evolving part of Islamic Capital Market (ICM). The development of *ṣukūk* market is particularly discussed in the

context of Pakistan, Bahrain, and Malaysian regions regarding sovereign and quasi-sovereign *ijārah ṣukūk* structures.

The fourth chapter, titled "Literature Review", includes a detailed review of the literature of the sovereign *ijārah ṣukūk* and their concerned Sharī'ah issues such as asset ownership (beneficial and legal ownership), undertakings (Purchase undertaking, disposal, and recourse rights, etc.), Special Purpose Vehicle (SPV), Third-party guarantee and charging a fee on it, combination of contracts by using parallel contracts, GoP *ijārah ṣukūk* based on *bai' al-mu'ajjal*, *ḥiyal* and *makhārij* concerning higher objectives of Sharī'ah, etc. Moreover, this also presents the gap identification along with the theoretical framework for the current research.

The next fifth chapter of the thesis will cover the areas like research method and methods for collection of data, sample description and data analysis tools and techniques and questionnaire development, etc.

The sixth chapter, titled "Sharī'ah evaluation of associated Sharī'ah issues in sovereign and quasi-sovereign *ijārah ṣukūk* structures" addresses several Sharī'ah issues such as 'asset ownership' (beneficial and legal ownership), 'issues related to SPV regarding asset-based and asset-backed *ṣukūk*', 'restrictions and undertakings such as 'purchase undertaking' and 'purchase of *ijārah ṣukūk* on its face value at the time of redemption, 'asset disposal and recourse right', 'asset due diligence and management of the *ṣukūk* asset, etc. Similarly the concept of 'guarantee', and 'third party guarantee in quasi-sovereign *ijārah ṣukūk* structures' and 'charging a fee on it' and the issue of 'combination of contract in parallel contracts'.

Likewise, the issues related to 'GoP *ijārah ṣukūk* based on *bai al-muajjal*' and 'asset appraisal' (green shoe option, etc.) and the issue of '*ḥiyal and makhārij*' by discoursing the'*maqāṣid* al-Sharī'ah' (higher objective of Sharī'ah), etc. in sovereign and quasi-sovereign *ijārah ṣukūk* structures in an explanatory way by also discussing the related offering circulars (prospectuses) with the help of interview-based data analysis diagrams from Pakistani, Bahraini and Malaysian respondents.

The final chapter, named "Discussions and Recommendations", will present the conclusive remarks and discussions regarding the significant findings of this thesis, and the last section summarized the whole debate of this research work titled, 'Overall Sharī'ah compliance of sovereign and quasi-sovereign *ijārah ṣukūk* structures for Pakistani, Bahraini and Malaysian jurisdictions'. It will further present the future implications and study-based recommendations.

The current chapter has presented the basic framework for the study with the help of a sound introduction and study background. Through this chapter, by presenting the problem statement, the main area of concern is made highlighted. Moreover, a clear study direction is provided with the help of an explanatory research question (research areas) and clear objectives. The next chapter reviews the relevant important details regarding sovereign *ṣukūk* issuance and general Sharī'ah rules for *ṣukūk*.

Chapter Two: Sharī'ah Rules related to *Ṣukūk*

Generally, authors categorize the Islamic financial markets (ICM) into the following segments such as Ṣukūk markets, Sharī'ah compliant stocks, Islamic fund management, Islamic private equity, and venture capital, Islamic derivatives, hedging markets, and Islamic structured investment products. The title of the current research work is related to the first one '*ṣukūk* markets'. In the subsequent section, the various aspect of *ṣukūk* such as the definition of *ṣukūk*, its classification and significance particularly concerning *ijārah ṣukūk*, and related Sharī'ah rules would be elaborated.

2.1 Definition of *Ṣukūk*

Fundamentally *ṣukūk* can be defined as, "an Islamic financial certificate representing undivided, partial ownership in a debt (*ṣukūk*), property (*ṣukūk*), project (*ṣukūk*), business (*ṣukūk*), or investment (*ṣukūk*)". Therefore, technically speaking, it is actually unlike the conventional bonds that are prevailing in the market having a mere significant feature of debt repayment at a certain date in the future (Investment & finance, 2017). The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) defined *ṣukūk* as

> *"Investment ṣukūk are certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or of the assets of a particular project or specific investment activity; however, this is true after receipt of the value of the ṣukūk, the closing of subscription and the employment of funds received for the purpose for which the ṣukūk were issued"* (AAOIFI, 2007, Articles 2/303).

The Islamic Financial Service Board (IFSB, 2009) defined the investment *ṣukūk* (in its Capital Adequacy Requirements for Ṣukūk, Securities and Real Estate Investment *as*

> *'Certificates' with each sakk representing proportional undivided ownership right intangible assets, or a pool of predominantly tangible assets, or a business venture (such as a muḍārabah). These assets may be in a specific project or investment activity following Sharī'ah rules and principles.*

The Securities Commission Malaysia (SCM, (2014) in its guidelines on *ṣukūk* defined *ṣukūk* as *"Certificates of equal value which evidence undivided ownership or investment in the assets using Sharī'ah principles and concepts endorsed by the SAC".*

The Securities Exchange Commission of Pakistan (SECP, 2015) in its Statutory Regulation and Obligation (S.R.O) # 112 (I), section Q, defined *ṣukūk* as follows:

> *"An instrument of equal value representing an investment of the Ṣukūk holders in the capital of the issuer to the extent of undivided share in the ownership of the identified tangible assets, usufruct and services or the ownership of the assets of particular projects or special investment activity based on characteristics and structures including participatory mode approved by the Sharī'ah Advisor".*

Although these definitions may differ in certain aspects, apparently it can seem that all these (AAOIFI, IFSB, and SECP) defined the ownership particularly to tangible assets while intangible assets not mentioned here although to some extent has taken into consideration the progress made in the practice of *ṣukūk* issuance which has over time, included intangible assets such as mobile air time vouchers, (i.e. Meezan Bank Ltd

'Mobile airtime *ṣukūk*' with the collaboration of Ufone in Pakistani region) intellectual property rights, etc.

However, Islamic Sharī'ah Research Academy (ISRA, 2015, p.413) defined in such a following way:

> *"The term 'sakk' means any certificate evidencing an undivided ownership right or interest, wholly or partly, in a Sharī'ah-compliant tangible asset, intangible asset, usufruct, commodity or business as a going concern, or a participation right in any Sharī'ah compliant* profit-*sharing venture, or a Sharī'ah compliant financial asset, or any combination thereof through a mixed portfolio of various assets, provided that the financial asset portion of the mixed portfolio of the assets should not be exchanged except at par value".*

ISRA's definition seemed more inclusive than other above definitions as it includes intangible as well as financial assets. Nonetheless, As per the researcher, it would be accepted in the Malaysian jurisdiction while the other Jurisdiction's definitions such as Bahrain (AAOIFI) and Pakistan (SECP) might not be recognized as trading in 100% financial assets such as receivables and debts (i.e. *murābaḥah ṣukūk*) though at face value is not legitimate till now by their concerned Sharī'ah councils. In the beginning, the better option which might be accepted for each Sharī'ah council and board is that to include the only word of 'intangible assets, which is acceptable by the tri Sharī'ah councils such as AAOIFI, IFSB, and SECP. Of course, the matter of 'financial assets' may be acceptable (in some form) soon by these jurisdictions such as the numerous rough drafts regarding the 'sale of debt, by AAOIFI has been equipping

in the light of ongoing discussions and suggestions by the various jurisdiction's Sharī'ah scholars from 2015 till now in this regard.

2.2 Historical Back Ground of *Ṣukūk*

The Arabic word *ṣukūk* is the plural of the word sakk, meaning "certificate" or "order of payment".

During the era of late Islamic caliphates, the word "sakk" has been frequently reported in their official and business documents. During those early eras of Muslim rulers, *ṣukūk* have been used as an authentic paper certificate depicting financial obligations stemming from various commercial ventures. (Saeed, and Salah, 2014). It has been narrated in the various famous books of the *aḥādīth* such as:

عن أبي هريرة، أنه قال لمروان: أحللت بيع الربا، فقال مروان: ما فعلت؟ فقال أبو هريرة: أحللت بيع الصكاك، وقد نهى رسول الله صلى الله عليه وسلم عن بيع الطعام حتى يستوفى ، قال: فخطب مروان الناس، «فنهى عن بيعها ، قال سليمان: فنظرت إلى حرس يأخذونها من أيدي الناس. ـ(Al-Muslim, Hadith, 1162)

Narrated by Abu Hurayra ﷺ that he said to Marwan, Do you make usury *halal*? He replied: I did not authorize the sale of usury *halal*. Then Abu Hurayra ﷺ said: Do you make trading in *ṣukūk* Halal? However, the Messenger of God (May God bless him and grant him peace), prohibited the sale of food until it was possessed. He said: Hence, Marwan gave a speech to the people, "Ultimately, he forbade selling them," Suleyman said: Consequently, I looked at guards that they took from the hands of people.

The term *ṣukūk* that is mentioned in this narration refers to certificates, more specifically or grain coupons, which were remitted to soldiers and public servants during the time of Marwan ibn al-Hakam and entitled the *ṣukūk* holders to the receipt of commodities/ the *ṣukūk* matured. However, it was noted that the *ṣukūk* holders used to trade that *ṣukūk* before they took delivery of the commodities at the time of maturity. This resulted in the underlying assets that the *ṣukūk* represented before their ownership- a transaction Sharī'ah. The transaction is also associated with the trading of debt, that is, the transfer of money at various prices, leading to the occurrence of ribā. As such, the trading of this maturity date was disapproved by scholars at that time. Nonetheless, the fact that represented the value of an underlying asset- in this case, commodities or grains-was disputed. From this narration, therefore, the use of *ṣukūk* in classical literature is noted. (Ṣukūk, ISRA, 2017)

The historical findings show *Ṣukūk* as a production of scholars of the Islamic caliphate who for the sake of commercial purposes. It occurred primarily in the era when the Turkish rulers wanted to borrow a huge amount of monetary funds to stable the devastated empire as a result of five crusades that occurred in the state. (Safari, et al, 2014, p. 6)

2.3 Classification of *Ṣukūk*

(ISRA, 2017, P. 102) specified that there are three main bases used for classifying various categories of *ṣukūk*. The most common classifications rely on the following bases:

- Ṣukūk based on underlying Sharī'ah contracts;

- Şukūk based on technical and commercial features; and
- Şukūk based on the nature and type of the assets.

The summary of these bases is depicted in Figure 1.

Figure 1: Bases for *Şukūk* Classification

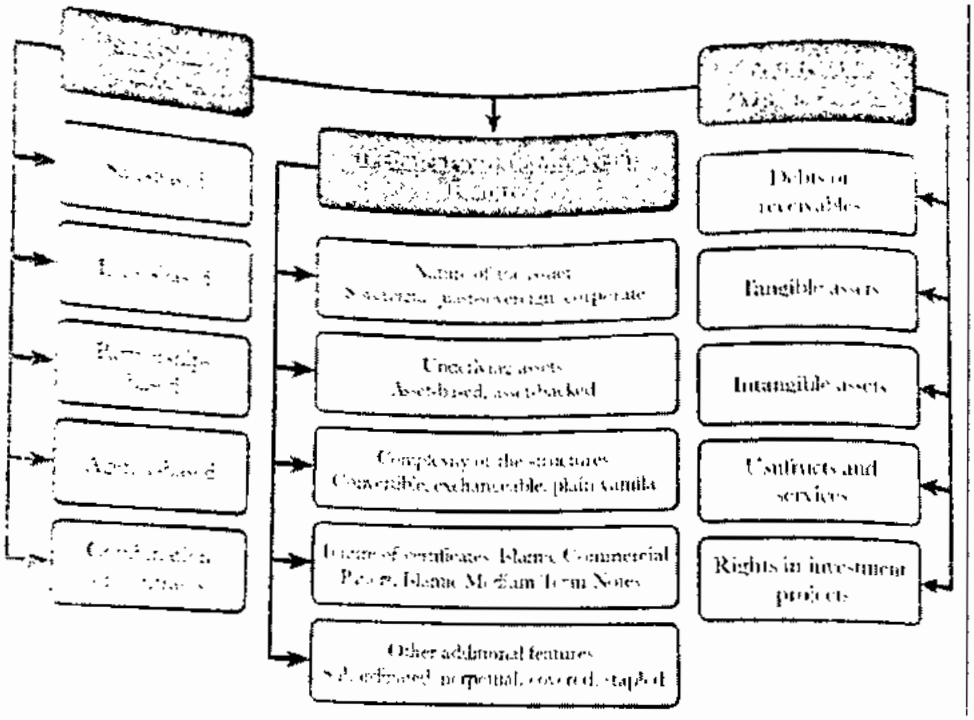

Figure 1

Source: (ISRA, 2017)

The above discussion regarding *şukūk* clearly states that it is the underlying Islamic contract that classified *şukūk* into different categories. To name the various classification of *şukūk* are sale-based, lease-based, partnership-based, and agency-based, etc. along with this classified şukūk, the *şukūk* may be categorized into various kinds Besides the contract-based classification, *şukūk* can also be classified based on other

features such as (i) kind of various issuers, for instance, corporate, etc; (ii) technically and commercially nominated *ṣukūk*, for instance, asset-backed, convertible and subordinated one, etc. Furthermore, *ṣukūk* may also be categorized as per nature and kind of property being presented by respective *ṣukūk*. Examples of such *ṣukūk* are debt-based, services, usufructs, and special investment activities in *ṣukūk*.

2.4 Definition of *Ijārah Ṣukūk*

Ijārah ṣukūk (صكوك الإجارة) structurally depend upon the *ijārah* contract. It can be simplified as that usufruct of an identified property would be transferred from the owner lessor to another person as lessee for the consideration of a pre-agreed payment during a predetermined lease period. Now the lessor is responsible for the complete set of liabilities that may arise from the ownership of assets. It is because the corpus of the leased asset is rem, and held under the ownership of the lessor. Although, all the liabilities arising thereby, due to asset usage must be born by the lessee of the asset. Thus the complete set of those rights and obligations that may arise because of the contract of *ijārah* will be automatically applied to *ijārah ṣukūk*. It is because, as already mentioned, here the significant underlying contract is "*ijārah* contract" and thus called as *ṣukūk* al-*ijārah* in the literature.

Investment & finance (2017) defined *ijārah ṣukūk* as follows:

> *"Ijārah ṣukūk are certificates of equal value which are issued by the owner of an existing property or asset either on his own or through a financial intermediary, for leasing against a rental from the subscription proceeds. After subscription, the underlying becomes owned by the ṣukūk holders. Ijārah ṣukūk could also be issued by the owner of the usufruct (manfa'ah) of an existing*

property/ asset (or a specified future property/ asset) to lease it against a rental being the subscription revenues. After subscription, the usufruct passes into the ownership of the ṣukūk holders. In the same token, the underlying could be the services of a specified party, whether existing now or in the future. After subscription, the ṣukūk holders become the owners of such services".

ISRA (2017, p. 296) described as "*Ijārah ṣukūk are securities representing the ownership of a leased as usufruct or services, entitling the bearer of such ṣukūk to the rental receivable from the leased asset, usufruct or services as well as the obligations arising from such asset, usufruct or services".*

SCM, (2015) defines *ijārah ṣukūk* as "*Certificates of equal value evidencing the certificate holder's undivided ownership of the leased asset and/or usufruct and/or services and rights to the rental receivables from the said leased asset and/or usufruct and/or services"*

IIFM, (2018, p. 81) defined *ṣukūk al- ijārah* as follows:

"Al-Ijārah Sukūk is defined as, certificates of equal value that represent undivided ... generating utilities.

(In other words, it is an Islamic certificate for the buying and leasing of assets by the investors to the issuer and such Ṣukūk shall represent the undivided beneficial ownership/interest in the asset held by the trustee on behalf of the investors)".

2015) stated the *ijārah ṣukūk* as applying to tangible assets, usufructs, and services. It ... rious types of *ijārah ṣukūk* in its Sharī'ah Standard No. 17 (3/1-3/2) as follows:

2.4.1 Certificates of Ownership in Leased Assets

The owners of the leased or tangible property have the authority to issue these certificates of equal value to give on lease. These may also be the certificates drawn on the owner by any respective financial intermediary stating the owner to sell and get its value via subscription. Later on, the certificate holder becomes the owner of the asset.

2.4.2 Certificates of Ownership of Usufructs of Existing Assets

These are of two types mentioned below;

2.4.2.1

Certificates of equal value issued by the owner of an existing asset either on his own or through a financial intermediary, to lease the asset and receive the rental from the revenue of subscription so that the usufruct of the as a subscription so that the usufruct of the assets passes into the ownership of the holders of the certificates.

2.4.2.2

Certificates or equal value issued by the owner of the usufruct of an existing asset (lessee), either on his own or through a financial intermediary, to sublease the usufruct and receive the rental from the revenue of the subscription e rental from the revenue of the subscription so that the holders of the certificates become the owners of the usufruct of the asset.

2.4.3 Certificates of Ownership of Usufructs of Described Future Assets

"These are certificates of equal value issued to lease out tangible future assets collecting the rental from the subscription revenue so that the usufruct of the described asset passes into the ownership of the holders of the certificates".

2.4.4 Certificates of Ownership of Services of a Specified Party

"These are certificates of equal value issued to provide services through a specified provider (such as educational benefits in a nominated university) and obtain the service charges in the form of subscription income so that the holders of the certificates become owners of these services".

2.4.5 Certificates of Ownership of Described Future Services

These are certificates of equal value issued to provide future services through a described provider (such as educational benefits from a university, without naming the educational institution) and obtain the fee in the form of subscription Income so that the holders of the certificates become owners of the services.

It is worth mentioning that in this study the definition of the ijārah *ṣukūk* which is stated by AAOIFI's Sharī'ah standard would be adopted and preferred due to its acceptability and tolerability almost in all of the stated regions.

2.5 Categories of *Ijārah Ṣukūk*

In the light of AAOIFI (2015) definition, it is particularly noted that *ijārah ṣukūk* has been classified under three categories such as (i) ṣukūk for the ownership of tangible assets (ii) ṣukūk for the ownership of usufruct (iii) ṣukūk for the ownership of services. The description of these categories of *ijārah ṣukūk* is being explained in the subsequent lines.

2.5.1 *Ṣukūk* for the Ownership of Tangible Assets

2.5.1.1

Ownership of tangible asset that is leased out in operating or financial leases (i.e. leases involving tangible assets, *ijārah* al-ayn). In this category, the *ṣukūk*

holders will own the tangible asset and the rental income in the type of lease payments.

2.5.1.2

Ownership of tangible asset that is promised to be leased or that is described with specifications (i.e. forward leases involving tangible assets). In this case, the *ṣukūk* holders will own the tangible asset when it is completed and the rental income in the type of lease payments.

2.5.2 *Ṣukūk* for the Ownership of Usufructs

2.5.2.1

Ownership of usufructs from a particular present source (i.e. leases involving usufructs of existing assets, *ijārah* al- *manfa'ah*). Here the *ṣukūk* holders will own the usufruct of a tangible asset that can be identified by seeing it or that can be pointed to, or by any other means that will cause it to be distinguished from all else.

2.5.2.1

Ownership of usufructs from a future source described with specifications fie, forward leases involving usufructs of described future assets). Ṣukūk holders will own the usufruct of a tangible future asset, and that usufruct becomes a debt which the lessor is obliged to provide.

2.5.3 *Ṣukūk* for the Ownership of Services

2.5.3.1

Ownership of services from a particular present source (i.e., leases involving services of a specified party, *ijārah al-khidamat*). Ṣukūk holders will own service provided by a specified provider i... which can be identified by seeing it or that can be pointed to, or by any other means that will cause it to be distinguished from all else.

2.5.3.2

It is noteworthy that despite AAOIFI's categorization which is based on the underlying leased assets, in practice, most *ijārah ṣukūk* are structured based on the underlying Sharī'ah principles such as sale and leaseback, and head-lease and sublease also known as lease and leaseback (ISRA, 2017. p. 444).

Some authors described the types of *ijārah ṣukūk* in such a way, that there are three main types of *ijārah ṣukūk*, namely, (i) sale and leaseback, (ii) head-lease and sublease, and (iii) lease of usufructs. Normally, under the sale and leaseback *ijārah ṣukūk*, two main structures are being discussed, including *ṣukūk ijārah muntahiyyah bi al tamlik* (lease ending with the transfer of ownership) and *ṣukūk ijārah mawsufah fi al-dimmah* (forward lease) (ISRA, 2017. p. 307).

Sale and Leaseback: *Ṣukūk Ijārah Muntahiyyah bi al-Tamlik*

This represents the asset-based *ṣukūk* whereby the ownership of the asset gets transferred to the source from where the asset was once purchased and it happens at the end of the lease agreement. This includes the certificate issuance (as issued by lease owner or SPV) for selling assets and thus receiving their value via subscription

payments. Later on, the *ṣukūk* holder becomes the owner of the received property. Where as, at the same time, the purchase undertaking is made by the owner of the asset at a certain specified date in the future. The purchase taking may take place at face value, market value, or any other agreed price of the property.

On the other hand, the *ṣukūk* holders promise to sell the asset (through a sale undertaking) back to the entity from whom they purchased it at its face value, or market value, or at a price agreed upon with the original owner at the time of the sale. This type of *ṣukūk* is most commonly used in Pakistani jurisdiction, for example, The 'Second Pakistan International Ṣukūk' (PISC) USD 1 Billion 2014 to 2019. Furthermore, the detailed review of this category would be discussed in the coming chapter 6 namely; A critical review of associated issues of Contemporary sovereign and quasi-sovereign *ijārah ṣukūk* structures.

Sale and leaseback: *Ṣukūk Ijārah Mawsufah fī al Dhimmah* (Forward Lease)

This represents the certificate issuance by the owner or related party to the asset, usufruct, or service where these respective parties get an authority to sell their property and later receive its value as subscription proceeds. Later on, the *ṣukūk* holder becomes the owner of the asset. In nutshell, this kind of *ṣukūk* depends specifically on the provision of a tangible asset, usufruct, or service having some specific characteristics for lease purpose.

This type of transaction works in a way that the asset to be leased (for example, machinery or building) does not yet exist at the time of the contract is concluded, or it is still under construction, for example, 'Syarikat BORCOS Shipping *Ijārah* Ṣukūk' (Malaysian based company) MNT of RM 340 Million 2008 to 2017.

The issuer offers the project for subscription in the form of *ijārah ṣukūk*. This may comprise of both *istiṣnā'* (construction) and *ijārah wawsufah fi al dimmah* (forward lease) contracts where certain specifications of the asset are significantly and mentioned. These characteristics involve the asset's structure, services, approximated incoming proceed via the lease payment. Each *ṣukūk* holder has undivided beneficial ownership of the asset.

However, the concept of beneficial ownership and its related issues would be elaborated in the second last chapter namely; a critical review of associated issues of Contemporary sovereign and quasi-sovereign *ijārah ṣukūk* structures (ISRA, 2017. P 314-315).

Head-Lease and Sublease *Ijārah Ṣukūk*

Within a sale and leaseback setting, instead of using "sale and purchase agreement", A head-lease structure may also be implied. For instance, long-term right is provided to the trustee under this where the trustee is allowed to another sublease contract. Nonetheless, such kind of ijārah *ṣukūk* arrangement is normally used where there are existing severe legal and procedural hindrance in the application of sales and leaseback *ṣukūk* arrangement. For instance Government of Bahrain Ṣukūk 2014.

Lease of Usufruct *Ijārah Ṣukūk (Manfa'ah Ṣukūk)*

Under this *ṣukūk* structure, the usufruct of the assets (either existing assets or described future assets) passes into the ownership of *ṣukūk* holders for a specified period. The *ṣukūk* holders obtain the ownership of such usufructs in exchange for an agreed amount of money they pay to the issuer. Some relevant examples of such usufructs are; the right of utilizing one hour of air travel to a particular place; the right

of staying at a hotel for a particular day and the right to a certain duration of telephone calls in future etc. An example of the Manfa'ah *ṣukūk* is the USD 390 million *intifā' ṣukūk* issued in 2003 for developing the Zam Zam tower located nearby the Masjid al-Haram in Makkah (ISRA, ICM/Ṣukūk, 2017.P. 324).

2.6 Basic *Ijārah Ṣukūk* Structure

The most common *ijārah ṣukūk* structure in the present market is sale and leaseback. In this case, the obligor sells his asset to obtain financing and then leases it back for his personal use. Subsequently, the obligor of the *ṣukūk* certificates is the seller of the leased asset, while the subscribers to the *ṣukūk* are the buyers of the asset. Next, the purchase price of the property is determined by the funds that are generated and mobilized via subscription. Furthermore, the significant steps that are involved in the structuring of *ṣukūk* are mentioned below.

1. First of all, SPV takes possession of the asset and the obligor is the seller here
2. The SPV after taking possession of the asset further fund it through *ṣukūk* issuance. This presents the beneficial ownership of the SPV in the asset.
3. Thirdly, *ṣukūk* holders make payments to the SPV.
4. Later on, this cash payment is provided to the seller (by SPV) to purchase the asset. The purchased asset is then given to the originator who acts as a lessee. The originator, who acts as a lessee, remains responsible to make regular payments to SPV.
5. On receiving periodic lease payments, the SPV distributes it among the *ṣukūk* holders as coupon payments.

6. At reaching future maturity date, the respective asset is sild back to the obligor at the payment of cash
7. Finally, at the same time, cash payment is given to the *ṣukūk* holders by the SPV to redeem *ṣukūk*.

The following figure 2 is a diagrammatic illustration of GOP *ijārah sukūk*.

2.6.1 Diagrammatic Illustration of GoP *Ijārah Ṣukūk* structure M-2- (2016-2021)

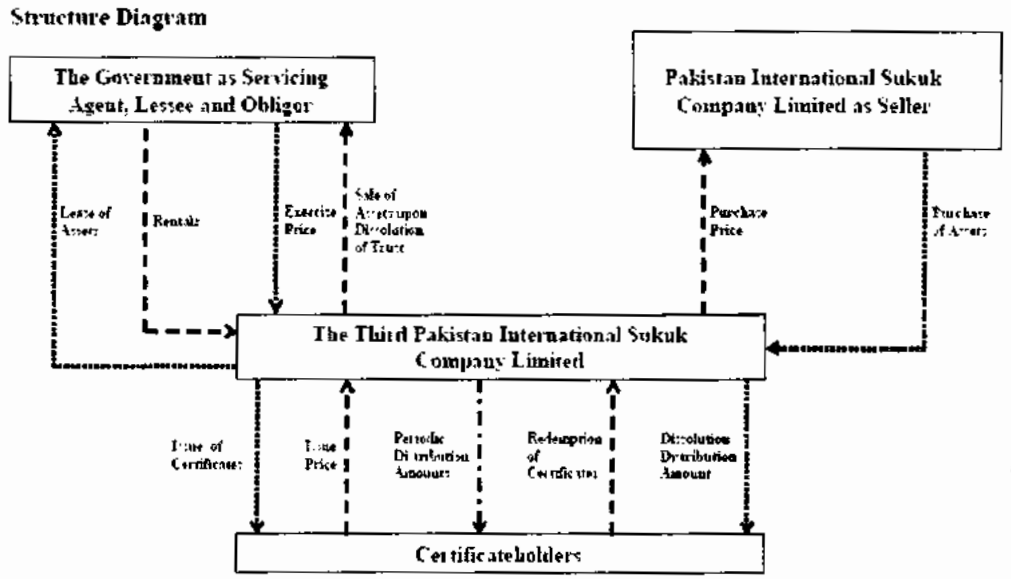

Figure 2

Source: GOP Ijārah Ṣukūk Structure-SBP

Explanation of the GoP Ijārah Ṣukūk Structure M-2- (2016-1021)

The assets to be purchased by the Trustee on the Issue Date will be a certain part of the land comprising the M-2 Motorway around 185.3 km, specified as such in Part 1 of the Schedule to the National Highway Authority Act 1991 (Act No. XI of 1991) of Pakistan, as amended, together with all constructions, superstructures, flyovers and interchanges made thereon as at the issue date (together, the Assets).

The comprehensive explanation of the *Ṣukūk* Prospectuses highlighting its structure and operational sequence is mentioned below.

i) Initially "*Ṣukūk* Investors" are recognized through placing an auction by State "Bank of Pakistan (SBP)".

ii) After this, the *ṣukūk* holders perform a "Ṣukūk Subscription Undertaking", whereby all the *ṣukūk* investors present their willingness to the *ṣukūk* subscription as issued by "Pakistan International Ṣukūk Company Ltd (PISCL)". At this stage, the *ṣukūk* holders also perform another task and that is the appointment of an Islamic Financial Institution (IFI) whose main task is to purchase the underlying asset on behalf of the *ṣukūk* holders.

iii) At the third step, the appointed Islamic Financial agent by *ṣukūk* holders made an agency agreement with SBP (paying agent). As per this agreement, SBP is supposed to receive proceeds from the *ṣukūk* holders, collect rentals from GoP and disburse those proceeds to the *ṣukūk* holders. It also acts as "Reference Agent and Registrar for the Investors"

iv) After the agreement with the paying agent, the appointed investment agency (IFI) will execute a 'Purchase Agreement' with GoP. This agreement is executed via the 'Ministry of Finance (MOF)' whereby specified portions in respective assets are taken by the investment agent. This purchase price is always equivalent to the *ṣukūk* issue amount as agreed by the *ṣukūk* holders previously. Hereby, SBP subsequently releases the purchase amount to the vendor's account on behalf of investment holders.

v) Later on, the ownership of the specified portion of the asset after purchase, is usually transferred to the investment holders whereas registration title and the possession of the asset remain with PISCL. Following this, the 'Declaration of Trust' will be carried out by PISCL, declaring that registration title is being held by the PISCL on behalf of investors. After this transferring of ownership, a document would be presented to the GoP and Investment agency that would demonstrate the legal confirmation regarding the transference of related risk and rewards to the investors along with the purchased asset. Along with this, Additionally, "under the Declaration of Trust, SBP-BSC may also be made delegate for specified purposes".

vii) At the next step, the appointed Investment Agent would execute an '*Ijārah* Agreement' with GoP ("as Lessee acting through MOF"). As per this agreement, the identified and purchased portion of a certain asset is usually leased to GoP for a specific period (that is usually three complete years). This agreement is performed against certain lease rental payments made following the terms and conditions of the "*Ijārah* Agreement". In accord with this, GoP is supposed to nominate an affiliate, for instance, NHA (nominee), who, on the behalf of government performs the task of asset usage, maintenance, and regulation. There occurs a new "Ijara Agreement" for every new intended Ṣukūk issuance.

viii) Following this, Investment Agent enters into a 'Service Agency Agreement' with GoP. Hereby GoP is supposed to perform services about the respective leased asset against minor services charges.

ix) GoP (again via MOF) would present an undertaking stating the responsibility to own the assets at the exercise price on its maturity date or in case of default and asset termination. This very Price is equivalent to the starting purchase price with an addition of due rental if any. At the occurrence of certain events, for instance, the arrival of the maturity date, a default of termination of the asset, a "Sale and Purchase Agreement" would be done between GoP and appointed investment agent with an intent to record evidence of asset purchasing by GoP. This agreement is again executed via MOF. Following this, the legal title of the asset would be delivered from PISCL to (GOP) or any of its nominees as nominated under the above-mentioned agreement.

x) Finally, GoP would execute a 'Cost Undertaking' whereby it is supposed to clear all the dues related to applicable fees and expenses and also make ensure the provision of any arising indemnity related to the issue of Suku.

xi) This whole sequence of procedural activities regarding Ṣukūk issuance are thoroughly monitored by the "Islamic Banking Department" of "State Bank of Pakistan". This department is liable to closely supervise the proper execution of the procedure as per Sharī'ah guidelines and ensure to meet all the legal formalities as per designed Sharī'ah structure throughout the tenure of Ṣukūk issuance and its performance.

Rate of Return (Fixed Rentals)

Against the certain part of the land comprising the M-2 Motorway around 185.3 km bids of $ 2.4 bn were received for the $1bn issuances and a profit rate of 5.5% would be charged in terms of fixed rentals to use the M-2 Motorway. It is worth stating that in the majority of cases the rate of return is fixed but in some early issuance in

particularly in the Pakistani region is a mixture of fixed and variable rates of return based on the floating benchmark.

It is might be relevant to clarify the major differences between the *ṣukūk* and bond at this stage in the following lines as described by (ISRA, 2017, p.11).

2.6.2 Features of Ṣukūk that Distinguish it from Bond

The bond issuer issues bonds to raise financing. Bonds holders pay face value and receive a bond certificate. The relationship between the bond issuer and bond holder is that of a debtor and creditor. On the other side the key features of *ṣukūk* are as follows:

i. They represent the proportionate ownership of the underlying asset.
ii. They are directly linked with real sector activities.
iii. They are structured using Sharī'ah-compliant contracts.
iv. They can be of various tenures, structured as short-, medium-, long-term, and even perpetual instruments.
v. They pay regular returns to *ṣukūk* holders in the form of profits and rents.
vi. The *ṣukūk* proceeds should be used in Sharī'ah- compliant activities.
vii. The trading of *ṣukūk* in the secondary market needs to comply with Sharī'ah requirements.
viii. They can be rated, listed and cleared by clearinghouses.
ix. They can be issued in various denominations and currencies, and target various markets-
x. They can be rescheduled or restructured.

2.7 Importance of *Ijārah Ṣukūk*

In the following lines, the most important studies from 1997 to 2017 would be quoted concerning the importance and significance of *ijārah ṣukūk* in the both private and public sectors.

Kahf (1997) mentioned that "The *ijārah* bonds are more amenable to be used in open market operations by an Islamic central bank as compared to both common stocks and *sanadat al muqāraḍah*. An Islamic central bank does not use debt-based bonds for its open market operations, simply because either such bonds do not exist in the Islamic economy, or are not subject to market pricing".

Ali (2004) elaborated "*ijārah ṣukūk* are the latest product in the market that is rapidly gaining ground in the capital market. It has emerged as a different asset class among Islamic financial products. It has gained acceptance among Sharī'ah scholars and is high in demand by large investors and Islamic financial institutions. On the supply side, many governed have found it useful to raise funds for their financial needs and long-term financing of big projects. Corporate entities are also finding it useful to generate funds for their projects specific needs".

Kamali (2007) elaborated that "the Securitization of *ijārah* gained momentum in the last few years with the issuance initially of the Malaysian Global *ṣukūk* of USD 600 million in June 2002. This was followed by the USD700 million State of Qatar Islamic *ṣukūk* in 2003 and the USD250 million Bahrain Monetary Agency's *ijārah ṣukūk* in early 2004. Saudi Arabia, Pakistan and the IDB, etc., have added to the list".

Wilson (2008) indicated that "*ṣukūk* al *ijārah* is a prominent and vast coverage instrument among the different types of *ṣukūk*. "This examination includes Murabahah and *ijārah*-based *ṣukūk*, the former offering a fixed return, and the latter, the most

popular form of *ṣukūk*, a variable return". It is described in the literature that introducing sovereign *ṣukūk* (almost 20 years back)was a significant contribution in the capital market and it has gained huge popularity since then (Haroon & Nursofiza, 2008).

Mansoori (2011) mentioned that "The standard gives examples of fourteen different types of investment *ṣukūk* such as *ijārah ṣukūk*, Salam *ṣukūk*, Mudarabah *ṣukūk*, Mushārakah *ṣukūk*, etc. Out of these, *ijārah ṣukūk* is the most popular Islamic investment certificates which is rapidly gaining ground in the capital market".

While narrating the significance of ijārah *ṣukūk*, Riazuddin (2011) described that these *ṣukūk* not only fulfill the SLR requirements of the Islamic banks but also satisfies the conventional banks. It has become an immensely attractive mode of investment for individuals. Recently, a remarkable increase in the popularity of ijārah *ṣukūk* has been witnessed that may serve as a permanent replacement of long-term debt categories.

Hammad (201I) described; "Some economic researchers have mentioned that *ṣukūk ijārah* should be considered a distinctive tool for the monetary policy of nations in this era. That is because governments need securities with relatively stable prices for use in their monetary policies, which seek to regulate the amount of money available to the public. They can sell those securities when they wish to reduce the amount of money available in the market and purchase them when they want to increase the currency supply".

It is further stated that due to the ever-increasing *ṣukūk* market, the investors are now more interested to look for increasingly flexible and effective *ṣukūk* arrangements (Al-Suwailem, 2015). That specifically hold very true for sovereign *ṣukūk* comprising

the major portion of domestic *ṣukūk* issuance in the market with an approximate share of 70 percent with in a period of seven years (i.e. 2014 to 2020) (IIFM, 2014).

Godlewski et. al. (2016) presented their finding regarding Ṣukūk al *Ijārah*; "We use the event study methodology to measure abnormal returns for a sample of 131 *ṣukūk* from eight countries over the period 2006-2013 and find that *ijārah ṣukūk* structures exert a positive influence on the stock price of the issuing firm. Second, such evidence would also give insights into the evolution of *ṣukūk* in the future. Namely, the finding of a better investor reaction to *ijārah ṣukūk* in comparison to other *ṣukūk* types would suggest increasing domination of this type of *ṣukūk* in the future".

ISRA (2017, p. 302) stated that "*ijārah ṣukūk* has been the second most common *ṣukūk* structure after *murābaḥah ṣukūk* that has been issued from 2010 to 2014. It can be issued by a range of issuers without much difficulty. For instance, central government, government-related entities, municipalities, or any other asset user, private or public, can issue this type of *ṣukūk*. It can also be issued by financial intermediaries or directly by users of the leased assets".

In the light of above-cited studies, it is concluded that the popularity of *ijārah ṣukūk* can be accredited to various factors; some have described it as the *ṣukūk* structure that acts as an impetus for the development of other *ṣukūk* structures, whilst others highlight its simplicity, high degree of flexibility and its favor with Sharī'ah scholars as to the key contributing factors. This is evident as *ijārah ṣukūk* has fewer Sharī'ah non-compliance issues than other types of *ṣukūk* in the market such as *mushārakah, mudarabah, and murabahah ṣukūk*, etc. These Characteristics make *ijārah* relatively straightforward to adapt for use in the underlying structure for a *ṣukūk* issuance.

2.8 General Sharī'ah Requirements for *Ṣukūk*

Ṣukūk, as Islamic financial instruments, are Sharī'ah compliant transactions. Their structuring, issuance, reporting, and trading are required to comply Sharī'ah principles, rulings, and parameters. Moreover, it is necessary to follow Sharī'ah rules in other aspects of *ṣukūk*, like risk management and governance as well. Just as any transaction needs to conform to the law of the land be considered legal in a jurisdiction, *ṣukūk* are also required to be Sharī'ah compliant, so that they can be considered legal from the Islamic law perspective.

Indeed, failure in fulfilling Sharī'ah requirements would not only affect the credibility of those instruments but also put in question the integrity a reputation of the issuer or originator: consequently, it would result in a negative impact on the whole *ṣukūk* market. For instance, as mentioned in the earlier part of this study titled, 'Background of the Study' when prominent scholar Shaykh Taqi Usmani expressed his reservations on the Sharī'ah compliance certain structures of *ṣukūk* in 2007, it led to serious consequences in the *ṣukūk* market, including a major slump in *ṣukūk* issuance in 2008. That is why it is important to emphasize the Sharī'ah compliance aspect of *ṣukūk*. Sharī'ah principles and rules regarding *ṣukūk* can either be in the form of requirements or the form of prohibitions. Together, they offer a complete framework of Sharī'ah compliance for *ṣukūk*. This will be discussed in the next section.

(ISRA, 2017, p. 148) stated that generally, the approach of Islamic law is broad and wide concerning contracts and financial transactions. One of the Islamic legal maxims depicts this notion as follows:

الأصل في العقود والشروط الجواز والصحة

The original ruling in contracts and their conditions is permissibility and validity. (*Al-fatāwá*, 29/133)

The same institution further elaborated that "from the above maxim, it can be construed that in financial transactions everything is deemed *mubah* (permissible) unless it is proven to be *haram* (prohibited)". Besides the wide scope of this approach, it does not mean, however, that something not prohibited is necessarily good. The Qur'an differentiates between what is permissible and what is not only permissible but also good; hence the phrase *ḥalāl and tayyib* (permissible and good). Therefore, the financial instrument should be structured with the same understanding.

With this background, the following section discusses general Sharī'ah principles and parameters that are relevant to the structuring and issuance of *ṣukūk*. Since *ṣukūk* are generally structured using exchange based contacts, such as sale and lease, partnership-based and agency-based contracts, Sharī'ah rulings on such contracts are equally relevant to *ṣukūk*. Accordingly, the section also examines Sharī'ah prohibitions that should be avoided in *ṣukūk* structuring and issuance, namely, *ribā* (interest), *gharar* (uncertainty). *mayser* (gambling) and *safqatayn fi safqah or bayatayn fi bayah* (the combination of two transactions in one).

There are mainly three pillars of a *ṣukūk* transaction, which are: (i) Form of the transaction (offer and acceptances (ii) Contracting parties (e.g., issuer and subscribers/investors); and (iii) Subject matter of transaction (e.g., the underlying asset of *ṣukūk* and proceeds). Each of these pillars has specific conditions that are required to be fulfilled for a *ṣukūk* transaction to be valid. They are mentioned below:

2.8.1 Requirements for the Form of a *Ṣukūk* Transaction

The form of contract, which is known in Arabic as *sighah*, deals with the phrasing of *ijab* (offer) and *qabul* (acceptance). Offer and acceptance are imperative factors of a *ṣukūk* transaction because they must represent the intentions of the parties of that transaction to create a legal relationship. Therefore, the wordings of intention must indicate a correlation among the minds of contracting parties, which is achieved through offer and acceptance. The conditions in Sharī'ah for valid offer and acceptance are that they must be clear, in conformity with each other, and their communication must be undisrupted. This is supported by the Articles No. 103-104 mentioned in the *Majallah al-Ahkām al-Adliyah* as follows:

العقد التزام المتعاقدين وتعهدهما أمرا و هو عبارة عن ارتباط الإيجاب بالقبول . الانعقاد تعلق كل من

الإيجاب والقبول بالاخر على وجه مشروع يظهر أثره في متعلقهما

A contract, in fact, bound two or more parties to contract to undertake and perform specific act. A contract is actually comprised of two main elements; offer and acceptance. "The conclusion of the contract consists of connecting offer and acceptance legally in such a manner that the result is clear".

In the context of *ṣukuk*, the invitation to subscribe to *ṣukūk* from the issuer is considered as an offer, which is normally done through the issuance of the prospectus of *ṣukūk*. Subsequently, the acceptance is formed once the investors subscribe to the issuance and the issuer confirms their subscription. Therefore, all the Sharī'ah principles of offer and acceptance should be observed in the *ṣukūk* issuance and subscription.

Due to the already mentioned criteria regarding the structure of the contract, AAOIFI stated that it is mandatory to stipulate in the prospectus, all necessary legal positions and rights, and duties of the parties to the contract. It is also necessary to clarify the Sharī'ah contract which the *ṣukūk* is based upon; specific conditions of that Sharī'ah contract should be stipulated as well. Moreover, the prospectus must neither specify any condition that violates any Sharī'ah injunction nor state any clause that goes against the objectives of the underlying Sharī'ah contract.

2.8.2 Requirements for the Parties of a *Ṣukūk* Transaction

From an Islamic law perspective, there are primarily three conditions for contracting parties in a transaction. They are:

(i) There must be at least two contracting parties. In other words, the multiplicity of the parties is a condition for a contract. Similarly, a *ṣukūk* transaction requires at least two parties to be involved. It cannot be carried out by even one proxy from all the parties, even though the proxy is a legal and eligible party to carry out transactions in its capacity. Similarly, a legal entity is considered as a real person in this context (Usmani, 2015, P. 157. vol.1).

(ii) All the parties must be of legal age, sane, and possess the faculty of intelligence, so that they may carry out transactions with full responsibility and be liable for their actions. In the context of *ṣukūk*, the conditions for contracting parties are typically satisfied. Issuers of *ṣukūk* are usually corporate entities, governments, supranational bodies, or international organizations. Those who are involved in the issuance, offer, subscription, or trade of *ṣukūk*, are not only required to attain legal age and intelligence, but they have to possess a certain level of knowledge and fulfill certain

criteria of competency to obtain approval from securities commissions for being involved in such sophisticated transactions (Usmani, 2015, P. 147.).

(iii) All contracting parties should carry out the transaction with their free will, without any compulsion. Similarly, in *ṣukūk* issuance and trading, all the parties involved must act with full consent. They are not allowed to use illegal means or their power to influence other parties to realize extra gains. Moreover, they are prohibited from utilizing even their position or status to impose unjustified terms and conditions on other parties, compelling them to abide by such terms and conditions although there are some exceptions in special scenarios such as state has a right to take the property of individual without his consent in the interest of common public such as in the case of sovereign *ijārah ṣukūk* issuance by giving him the fair market value of that property (Zohayli, 1980; Usmani, 2015, p. 234).

As for the Sharī'ah status of parties involved in a *ṣukūk* transaction, it is based on their rights and obligations arising from the type of contract used. Accordingly, AAOIFI (2015) in Sharī'ah Standard No. 17 (5/1/4-5/1/5) recognizes the two main contracting parties in *ṣukūk* issuance as the issuer and the subscribers. Their relationship is mainly determined by the Sharī'ah contract used in structuring *ṣukūk* and its Sharī'ah status. Once the contract of *ṣukūk* is concluded, its legal effects would be applied to the contracting parties.

2.8.3 Requirements for the Subject Matter of a *Ṣukūk* Transaction

The subject matter of *ṣukūk* transaction consists of the underlying asset or investment project of these as well as the *ṣukūk* proceeds. The *ṣukūk* proceeds can be treated as the price is an exchange contract (i.e. in sale-based and less-based *ṣukūk*) or

as investment capital (i.e. in partnership-based and investment agency-based *ṣukūk*) depending upon the type of *ṣukūk*. On the other hand, the underlying asset of *ṣukūk* can be considered as the object of exchange and the venture or investment as the subject of partnership or agency agreements. (ISRA, 2016, p.151)

2.8.4 Requirements for the Assets, Ventures, and investments of *Ṣukūk*

There are various conditions stated by contemporary Muslim jurists in the Islamic law of contract for the object of an exchange transaction. Some of the conditions are general, while some are specific, based on the nature of particular Sharī'ah contracts. Particularly (Zohayli, 2001, p. 33-35; & Usmnai, 2016, p. 261) discussed them with contemporary application of this current era. Similarly, the specific conditions for an underlying asset of *ṣukūk* are mainly founded on the nature of the Sharī'ah contract used in structuring the *ṣukūk*. Now in the following lines, the relevant general conditions regarding assets of exchange-based *ṣukūk* are summarized:

1. The asset must be a valuable property from Sharī'ah law perspective. This means that its value and benefits have been established based on the custom of the people and also recognized as *al-māl al-mutaqawwim* (valuable property) by Sharī'ah.

2. It must be a legally valid object or thing. Accordingly, the benefits derived from that object should also be legally recognized in Sharī'ah. On the contrary, impermissible goods or usufructs cannot be considered as the underlying asset of *ṣukūk*, such as wine, pork, and pornography.

3. It must be privately owned by the party of a *ṣukūk* transaction, or at least the party must have the ability to own it before its delivery.

4. The ownership of the party over the asset of *ṣukūk* must be valid. Valid ownership, from the Sharī'ah perspective, is the right to utilize an item without any lawful constraint. It is also taken to mean that there should not be any third-party rights over the object; otherwise, the transaction would be invalid.

5. The existence of the asset is necessary at the time of contract, or at least before the time of delivery. Thus, a non-existent asset cannot qualify as the underlying asset of *ṣukūk*.

6. The underlying asset of *ṣukūk* must be deliverable. It should be noticed that the conditions of existence of the asset and the ability of the party of a *ṣukūk* transaction to privately own it also play a significant role in the deliverability of the asset. Therefore, any asset that is undeliverable cannot be the underlying asset of *ṣukūk*.

7. The asset, its nature and characteristics, and quality and quantity should be known to all the parties of the *ṣukūk* transaction beyond any dispute.

8. The asset must be suitable and aligned with the nature of the Sharī'ah contract used in structuring the *ṣukūk*. For example, perishable goods cannot be considered as the underlying asset of *ijārah ṣukūk*.

9. The use of the assets must comply with the Sharī'ah requirements (ISRA, 2017, p. 153-154).

Moreover, as long as an asset satisfies the above criteria, it is eligible to serve as the underlying asset of *ṣukūk*, regardless of its form. Because of that, AAOIFI 2015 in Sharī'ah Standard No. 17 5/1/2 allows the object of *ṣukūk* to be in a tangible form, like commodities, land, buildings, or intangible forms, like usufruct, rights, services, or a mixture of both forms.

2.8.5 Requirements of Asset Pricing of *Ṣukūk*

There is another requirement that has been discussed by scholars is related to the determination of the selling price of an underlying asset of *ṣukūk*. The basic concept behind such a requirement is to avoid any *ghabn fāḥish* (deception or fraud) in asset pricing. (ISRA, 2016, Ṣukūk, p. 154). The further detail of this issue would be elaborated in chapter five of this research work with the section titled, 'The Issue of Asset Appraisal and Green Shoe Option'.

2.8.6 Requirements for Valid Clauses in a *Ṣukūk* Transaction

In any *ṣukūk* transaction, there are some conditions imposed by Islamic law itself; they should be adhered to to establish a valid transaction. Other conditions can be proposed by the parties involved in the *ṣukūk* transaction. The basic rule of Islamic law for such contractual stipulations is permissibility. It is supported by the *hadith*.

المسلمون على شروطهم ، إلا شرطا حرم حلالا ، أو أحل حراما[1]...

> Muslims honour the conditions (that they agree to), except a condition that prohibits what is lawful or makes lawful what is prohibited (Al-Tirmidhiah, 1352)

Although the parties of the transaction are allowed to stipulate any condition because that they are upon, as mentioned in the above hadith, there are some parameters for the validity of clauses from the Sharī ah perspective that can be included in a *ṣukūk* transaction. They are described as follows:

[1] Corrected by Al-Bani https://dorar.net/hadith/sharh/30123

1. A clause that is explicitly mentioned in the Qur'ān or Sunnah as an invalid one is considered Void.

2. A clause that violates clear injunctions of Sharī'ah is void.

3. A clause that overwhelms the rationale and objective of the Sharī'ah contract used in the structuring of *ṣukūk* is void.

4. A clause that is not accepted as a market practice or custom is void.

5. A clause that unduly favors any of the counterparties or the subject matter of a *ṣukūk* transaction is void. (ISRA, 2016, Ṣukūk, p. 155)

In *ṣukūk* structuring and issuance, *ṣukūk* must be free from inappropriate void classes and conditions. AAOIFI 2015) in its Sharī'ah Standard No. 17 5/1/8/3) mentions that the prospectus of *ṣukūk* should not include any cause that contradicts the objectives and rules of Sharī'ah contracts used in structuring *ṣukūk*'

2.9 General Sharī'ah Prohibitions for *Ṣukūk*

The main reason behind all the incorporated forms of prohibitions in Islamic law of contracts is the prevalence of justice and party. The illicit forms of exchange encumber the triumph of the Maqasid al- Sharī'ah (objective of Islamic law); that is why different types of unmerited and exploitative commercial practices are prescribed in Sharī'ah. These prohibitions are established by Islam to shield the benefit of the weaker community and thus promote fairness and equality. This not only ensures the combined interest of both parties but also supports the society's well-being generally. This also helps to reduce the economic gap between rich and poor thus stabilizing the society by promoting harmony and justice. Due to the above-mentioned concerns, "the prohibitions of riba (interest), gharar (certainty), maysir (gambling), and other practices,

like safqatayn fi safqah or bay'atayn fi bay'ah (the combination of two transactions in one) have been enacted by Islamic Law of contracts". They are discussed as follows.

2.9.1 Prohibition of Ribā

Ribā is one of the important elements that would render a *ṣukūk* transaction void. This concept is identical to the concept of usury or interest. Imam Jassas defined riba as follows:

القرض المشروط فيه الأجل وزيادة مال على المستقرض

> The term *qarḍ* (loan) is a conditional period and extra money for the borrower (Ahkam al Jassas, 557:1).

It means an increment in lending or borrowing over and above the principal amount that is agreed between the contracting parties. It may be described via a scenario, for instance, a person whose name is Ali decided to give a loan of Rs.100 to another person named zain. Now here Ali will be called a creditor and zain is a debtor. Ali gave this loan on the condition that zain will pay back 110 Rs, instead of 100 Rs. This is called riba al *ribā* or riba al Qur'ān. It is strictly prohibited in the Qur'ānic verses. Although, there is one other type of riba which is narrated in *hadith*. It is called as *ribā al-faḍl* or *ribā al-nasi'ah.*

It is stated in the Ḥadīth narrated by Abu Saeed Khudri ﷺ.

الذهب بالذهب، والفضةبالفضة، و البربالبر، والشعيربالشعير، والتمربالتمر، والملح بالملح، مثلا بمثل، سواء بسواء، يدا بيد ...

> Gold [is to be paid) for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, like for like, and equal for equal, [payment should be made) hand to hand... (Muslim, Ḥadīth no. 4034-4035)

The above narrations have been depicted that *riba* occurs in both debt transactions (*ribā al-nasi'ah*/ Qur'ān) and sale contracts (*ribā al-faḍl*/ Sunnah).

2.9.2 Relevance of Ribā in Ṣukūk

As discussed above receiving or paying interest on a debt falls under *riba*, and thus, is categorically prohibited under Islamic law. A conventional bond is a certificate representing the liability of its issuer to pay the principal amount of the loan along with interest to the bondholders. Because of that, the IFA-OIC in its Resolution No. 6011/6 dated March 1990 resolved that conventional bonds and other interest-bearing securities are impermissible instruments. Their issuance purchase and trading are accordingly not allowed.

Extending the analogy to *ṣukūk*, if *ṣukūk* are structured in a way similar to a conventional bond, then it would also be declared as impermissible. That why the IFA-OIC in its Resolution No. 178 4/19) dated April 2009 resolved that it is not allowed in an investment *ṣukūk* (*mushārakah* or *muḍārabah* for the *ṣukūk* manager to pre-assure or to have a pre-understanding that he would loans or donations to the *ṣukūk* holders if the actual profit was short or the expected profit. Allowing this would make the profit fixed and guaranteed, without exposing the *ṣukūk* holders to the liability or risk of the investment. Hence, their profit would become an increase in the investment principal amount without any compensation, which is tantamount to *riba*. Similarly, AAOIFI 2015) in Sharī'ah Standard No. 17 (5/2/2) mentions that the issue of *ṣukūk* can redeem

negotiable *ṣukūk* at market value or any agreed price on the date of redemption; however, the redemption of *ṣukūk* at the nominal value is not allowed.

The Standard (5/1/8/7) repeats that the issuer of *ṣukūk* cannot assume any obligation to compensate the *ṣukūk* holders up to the nominal value of *ṣukūk*, nor can he guarantee a certain percentage of profit. It is because this will cause the profit to be fixed and guaranteed, thus the profit would become an increase in the principal amount (investment) without any compensation, which resembles an interest-based transaction. Moreover, the proceeds of *ṣukūk* should not be utilized in *riba*-based activity AOIFI (2015) Sharī'ah Standard No. 17 (5/1/8/4 & 5/1/8/5) requires that the proceeds raised through the *ṣukūk* issuance be utilized in Sharī'ah compliant investments or projects.

2.9.3 Prohibition of Gharar

Gharar is another prohibition in which transaction that is categorically proscribed in Sharī'ah. As narrated in the Ḥadīth as follows:

نهى رسول الله صلى الله عليه وسلم عن بيع الغرر

> The Messenger of Allah (peace be upon him forbade sale by *gharar* transactions. (Muslim, hadith no.1513)

It literally means risk (al-khatr) uncertainty, fraud. Generally, *gharar* refers to uncertainty, ambiguity and high risk, the unknown, and even ignorance. Gharar technically means:

> *"Something for which the probability of getting it and not getting it are about the same, some said: something whose acquisition is uncertain and its true nature and quantity is unknown."* (Mujam ISRA, 2010, p. 131)

The above definition infers *gharar* as something hidden and regarded as uncertain by both parties of the contract either on the nature of the object of the contract or the outcome arising from the contract.

In the context of *ṣukūk*, *gharar* can be understood as the uncertainty like the object or the characteristics of the subject matter of the transaction which affects the outcome of that transaction. Gharar is an element of risk or hazard arising from information asymmetry that could render a *ṣukūk* transaction void it can lead to deception, fraud, dispute, and conflict of interest among parties of the *ṣukūk* transaction. Gharar may arise in a variety of forms, which are listed below:

- Uncertainty related to a contract or a structure of a *ṣukūk* transaction
- Uncertainty in the underlying asset of *ṣukūk*; or Uncertainty in price

Generally, *gharar* is discussed concerning its two types (i) *Gharar yasir* (minor uncertainty) and *gharar fāḥish* (excessive uncertainty). The first type of gharar is allowed as per Sharī'ah while the second type of *gharar* is prohibited by Sharī'ah as stated in the earlier hadith. (ISRA, 2015, p.95)

2.9.4 Relevance of Gharar in Ṣukūk

In the context of *ṣukūk*, any kind of ambiguity and lack of transparency in the documentation that may lead to a dispute among the contracting parties be considered as uncertainty in the *ṣukūk* transaction. For instance, of sale-based *ṣukūk* offers a third-party guarantor for the payment of the price the underlying asset of *ṣukūk* to the *ṣukūk* holders, but it does not specify certain person or entity to provide the guarantee within the *ṣukūk* prospectus. This would cause gharar that would invalidate the transaction.

Moreover, gharar may exist in the structure of *ṣukūk*, it's underlying and price. That is why, to ensure that *ṣukūk* are free from impermissible gharar, many standards and resolutions have been proposed, and rules have been enacted. For instance, AAOIFI (2015) in Sharī'ah Standard No. 17 5/1/8) emphasizes that the prospectus of *ṣukūk* should offer full disclosure of necessary information and that the transaction is transparent.

It requires that the prospectus include all contractual conditions, rights, obligations, and statuses of parties involved in *ṣukūk* issuance and structuring. It should also explicitly mention the Sharī'ah contract used in the structure of *ṣukūk* and the commitment of all the parties involved to follow rules and principles of Sharī'ah in the [illegible] *ṣukūk* and implementation of the project throughout the investment period. It should additionally disclose information about the underlying assets and utilization of *ṣukūk* proceeds (ISRA, 2017, p. 160).

2.[illegible] Prohibition of Maysir

Maysir is another prohibition in *ṣukūk* transactions imposed by the Sharī'ah. It is a type of *qimar* (gambling). Maysir is explicitly condemned by the Sharī'ah as Allah says in the Qur'an:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ إِنَّمَا ٱلۡخَمۡرُ وَٱلۡمَيۡسِرُ وَٱلۡأَنصَابُ وَٱلۡأَزۡلَٰمُ رِجۡسٞ مِّنۡ عَمَلِ ٱلشَّيۡطَٰنِ فَٱجۡتَنِبُوهُ لَعَلَّكُمۡ تُفۡلِحُونَ
إِنَّمَا يُرِيدُ ٱلشَّيۡطَٰنُ أَن يُوقِعَ بَيۡنَكُمُ ٱلۡعَدَٰوَةَ وَٱلۡبَغۡضَآءَ فِي ٱلۡخَمۡرِ وَٱلۡمَيۡسِرِ وَيَصُدَّكُمۡ عَن ذِكۡرِ ٱللَّهِ وَعَنِ ٱلصَّلَوٰةِ
فَهَلۡ أَنتُم مُّنتَهُونَ.

"O you who have believed, indeed, intoxicants, gambling, [sacrificing on stone altars [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful. Satan only wants to cause

between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and prayer. So will you not desist (Qur'ān, 5: 90-91)."

As per Sharī'ah the term *maysir* is being used for all kinds of gambling activities. However, it can be defined as a competition or game where a bet is placed such that the loser has to pay something to the winner. It is considered a zero-sum game in that one party's gam is equivalent to another's loss. It is also defined as betting on pure uncertainty or carrying out a transaction where the gain is conditional upon risk or chance from both sides of the exchange.

2.9.6 Relevance of Maysir in Ṣukūk

From the above discussion, it can be construed that any transaction that involves excessive *gharar* and gaining at the expense of others falls under the scope of *maysir*. If these two elements are found in a *ṣukūk* transaction, then it would become a gambling instrument. That is why it is vital to ascertain that any *ṣukūk* transaction is free of those two elements. For example, if *ṣukūk* are structured in a way that they resemble a game of chance or even to replicate conventional financial derivatives, they would not be allowed to be issued and traded (ISRA, 2017, p. 162).

2.9.7 Prohibition of Combining Two Transaction in One

Another prohibition that Sharī'ah has enacted is transaction. This case is expressed in the classical literature of terms *safqatayn fi safqah* (the combination of two transactions in one) or *bayatayn fi bayah* (the combination of two sales in one). In classical literature, scholars have described and interpreted the concept in many ways as mentioned below.

1. A seller sells an object with two different prices, where one is a spot price and the second is a credit price which is higher than the spot price, two prices are mentioned in one sale or the same object buyer accepts the offer without confirming one price.

2. It is a combination of a sale and loan in one transaction. For example, a seller sells a product with a condition that the buyer would lend him some money on loan (ISRA, 2017. p. 158).

The combination of two transactions in one is prohibited based on various narrations, one of which states:

نهى رسول الله ﷺ عن يعتين في بيعة[2]

> The Messenger of Allah peace be upon him forbade two sales one sale Al-Tirmidhi, Ḥadīth no. 1231).

2.9.8 Relevance of Combination of Two Transactions in One in Ṣukūk

The issue of the combination of two or more transactions in one is strongly related to *ṣukūk*. It is a fact that *ṣukūk*, as Islamic financial instruments, are not an exception from the typical sophistication of financial engineering. Combining two transactions in one has become a vital factor in *ṣukūk* structuring, that is why *ṣukūk* are usually structured by combining two or more transactions. However, it should be noted that in structuring *ṣukūk*, it is crucial to ensure that such structure does not fall under the scope of the prohibition of the combination of two transactions in one. In other words, it should be ascertained that *ṣukūk* does not meet the prohibition criteria mentioned above.

Further detail regarding this issue would be discussed in chapter no.5 with the section titled, 'parallel contracts' and 'Concerned Undertaking'.

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[2] Corrected by Al-Bani www.islamweb.net/ar/fatwa/112322/

Key Sharīʿah Rulings on *Ṣukūk* Issuance and Trading

Besides the Sharīʿah compliance framework, there are some important Sharīʿah parameters and rulings that should be observed in *ṣukūk* structuring, issuance and trading. They relate to the issues of negotiability of *ṣukūk*, delivery and possession of underlying assets of *ṣukūk*, and ownership of underlying assets.

2.9.9 Negotiability of Ṣukūk

Ṣukūk by default have to be Sharīʿah-compliant in terms of their underlying contracts, assets, issuance, trading, redemption, and utilization of proceeds. However, it is important to note that not every Sharīʿah-compliant finance instrument or *ṣukūk* in particular, is negotiable. Sharīʿah compliance with a financial instrument does not automatically make it negotiable. Thus negotiability is a separate aspect that merits an independent discussion.

The negotiability of *ṣukūk* can be affected by the nature of underlying assets or contracts used in them. That is why AAOIFI (2015) in Sharīʿah standard No.17 9 (4/4) states that the trading of *ṣukūk* is affected by the rulings that are relevant to the trading of rights they present.

Further detail regarding the possession and ownership of underlying asset issues would be discussed in chapter no.5 with the section titled, 'Asset Ownership'.

The very chapter provided significant support to this research thesis through present an outlook of different definitions of *ṣukūk* its categories and significance, particularly concerning *ijārah ṣukūk*. Furthermore, general Sharīʿah rulings for *ṣukūk* such as conditions related to contracting parties and subject matter of *ijārah ṣukūk* and relevance of various Sharīʿah contrasts i.e. *riba* (interest), *gharar* (uncertainty), *qimar*

(gambling), the prohibition of combining two transactions in one in *ṣukūk* and key Sharī'ah rulings on *ṣukūk* issuance and trading are also briefly explained and shortened in this section.

The upcoming part of the thesis will highlight the literature review. later on, it will present a sound theoretical framework for the very study as per the research gap and mentioned review.

Chapter Three: An Overview of *Ṣukūk* Markets

3.1 Significance of *Ṣukūk* for the Public Sector

Diaw et.al. (2014) stated that "As developing countries, Muslim nations have a large demand for infrastructure projects, such as schools, hospitals, roads, water, electricity, etc. However, in most cases, the governments in developing countries do not have sufficient revenues to fund these types of projects which are vital for sustainable development. To meet this form of demand, Iqbal and Khan (2004) suggest the utilization of Build-Operate-Transfer (BOT) and its variants along with the Ṣukūk structures as a better alternative to the conventional financing which is based on interest.

The reason for that is, at least, twofold: first, given that Ṣukūk and Islamic financing, in general, are based on real assets, they are expected to enhance the stability of the financial institutions and markets. This feature ensures a stronger connection between the financial sector and the real sector of the economy and renders the system less prone to speculative activities which are the cause of many crises. Second, such a policy consisting of financing government expenditure through Islamic financial instruments is expected to discipline public expenditure as the availability of finance without an asset will be very limited. As a result, greater prudence will be introduced in the overall macroeconomic management as well as in the efficiency of microeconomic units operating in an economy.

Indeed, *ṣukūk* have already been used as a tool for macroeconomic management in some Muslim countries. Referring to the Sudanese experience, Eltegani (2005) mentions that *ṣukūk* can be used by governments as well as the Central banks for

monetary policy and liquidity control. Thus, when *ṣukūk* are sold to the public money is withdrawn from the market, and this has its effect on the money supply. Money withdrawn will be kept by the Central Bank. On the other hand, when the need arises such money or part of it will be poured again into the market by buying *ṣukūk*".

The global *ṣukūk* market is set to grow at a compound annual rate of around 15 percent to reach $2.7 trillion by 2030, according to investment management firm 'Franklin Templeton'. Global *ṣukūk* issuance stood at over $477 billion at the end of last year such as the following chart illustrates the details.

Figure 3: Overall Growth of *Ṣukūk* Market (2000-2019)

Over USD 477 Billion to Date

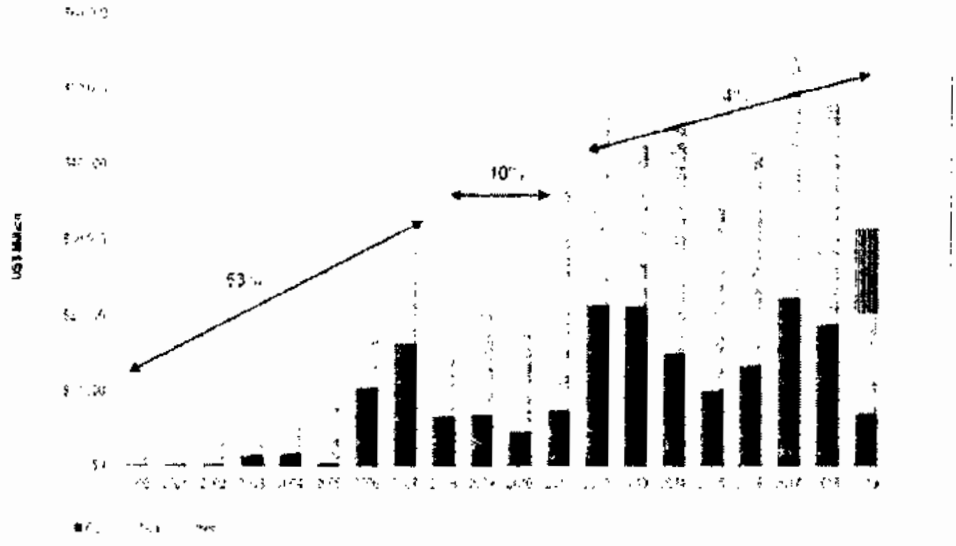

Figure 3

Source: Franklin Templeton

According to International Islamic Financial Market (IIFM), total global *ṣukūk* issuance amounted to USD 123.15 billion in 2018. As illustrated in Chart 1A on the next page, global *ṣukūk* issuance has shown a modest increase of +5% from USD 116.7

billion in 2017 to USD 123.15 billion in 2018. The steady issuance volume during 2018 was mainly due to sovereign *ṣukūk* issuances from Asia, GCC, Africa, and certain other jurisdictions while Malaysia continues to dominate the *ṣukūk* market through the share of countries like Indonesia, UAE, Saudi Arabia, and to some extent from Turkey increased as well.

Figure 4:Total Global Ṣukūk Issuance (Jan 2001- 2018)

Figure 4

Total Global *Ṣukūk* Issuance USD 11, 01,502 in Millions

Source: IIFM *Ṣukūk* Database

3.2 Distribution of Global Ṣukūk Issuance by Issuer Status

Overall sovereign Ṣukūk issuances are the main contributor of the global Ṣukūk market growth and there is a pickup in sovereign issuances in 2018, as indicated by IIFM in its previous report, the sovereign issuers led by Saudi Arabia, Indonesia, Malaysia, Turkey continue to provide a strong foundation to the Ṣukūk market. As of the end of 2018, total sovereign Ṣukūk issuance since inception stands at USD 606.3 billion, which is around 55% of all global Ṣukūk issuances. Chart 3A on the next page shows the trend of sovereign Ṣukūk issuances since the year 2001.

3.3 Sovereign *Ṣukūk* Evolution

Sovereign *Ṣukūk* Sovereign *ṣukūk* have been a catalyst for the *ṣukūk* market. They are issued by a national government or sovereign entity to raise financing for developing mainly infrastructural projects. Sovereign *ṣukūk* serve as an alternative source of capital to the government and can be denominated in local and foreign currency depending on the government's requirements. The first sovereign *ṣukūk* issuances were esham financial certificates) issued by the Ottoman Empire to finance public debt since 1775; *muqāraḍah* bonds issued by the Government of Jordan in 1978 and participation term certificates issued by the Government of Pakistan in 1980. Then, the Government of Malaysia issued the Government Investment Issues Certificates (GIC based on the concept of *qarḍ ḥasan* benevolent loan in 1983, which was followed by the issuance of *mushārakah* bonds- called the Turkish Revenue Sharing Certificates (Gelir Ortakligi Senetleri or GOS) by the Government of Turkey in 1984. At a later stage, the more prominent sovereign issuances then started with the Government of Bahrain's Ṣukūk in 2001. (ISRA, 2017, p. 111)

Figure 5: Global Sovereign *Ṣukūk* Issuances (Jan 2001- Dec 2018)

All Tenor, All Currencies, In USD Millions

Figure 5

Total Sovereign *Ṣukūk* Issuance USD 606,391Millions

Source: IIFM *Ṣukūk* database

The trend in the global sovereign issuances is encouraging in the sense that it shows that the *ṣukūk* market has a strong base that is unwavering in the face of economic shocks.

3.4 Quasi-Sovereign *Ṣukūk*

Quasi-sovereign *ṣukūk* refer to *ṣukūk* issued by a semi-government or parastatal entity and are similar to sovereign *ṣukūk*. They may carry explicit or implicit government guarantees. Notable quasi- sovereign *ṣukūk* include Saxony- Anhalt *ṣukūk* issued in 2004 by the Federal State of Saxony-Anhalt in Germany, representing the first Western country to tap into the Islamic capital market: Khazanah Exchangeable *ṣukūk* issued by Khazanah Nasional Berhad (Khazanah) via Rafflesia Capital Ltd in 2006 (the world's first exchangeable *ṣukūk* and subsequently Nakheel *ṣukūk* issued in 2006; and DP World *ṣukūk* issued in 2007. Furthermore, a few more Khazanah exchangeable Ṣukūk issued in 2007, 2008, 2012, 2013, 2014, and 2016. (ISRA, 2015, Ṣukūk, P. 113)

Figure 6: Global Quasi-Sovereign *Ṣukūk* Issuances (Jan 2001- Dec 2018)

All tenor, all currencies, In USD millions

Figure 6

Total Global Quasi Sovereign *Ṣukūk* Issuance USD 158,864 Million

Source: IIFM *Ṣukūk* Database

The quasi-sovereign issues between 2003 and 2011 mainly came from the Finance Ministry of the Malaysian government, Khazanah Nasional, and the Saudi-based Islamic Development Bank (IsDB). Since then several quasi-sovereign from various jurisdictions including as Malaysia based PLUS Berhad, Saudi Electricity Company, DP World, Saudi Aramco, Tenaga Nasional Berhad, Arab Petroleum, Saudi Arabian Mining Company etc. IsDB lead pack of multilateral issuers while World Bank, African Finance Corporation, Khazanah Nasional, etc., have issued Ṣukūk to fund their activities while Malaysian based International Islamic Liquidity Management Corporation is a regular and only issuer of Short Term Int'l Ṣukūk.

It is interesting to note that in both the international and domestic Ṣukūk markets, the mix of sovereign/quasi-sovereign, corporate and FIs issuers has been

following a consistent pattern though in 2018 the share of quasi-sovereign has dropped by USD 4.248 billion as compared to 2017.

Figure 7: Structural Break-up of International *Şukūk* Issuances by Issuer-All Tenors (USD Millions)

Sovereign *Şukūk* Issuances (Jan 2001-Dec 2018)

Figure 7

Source: IIFM *Şukūk* Database

Figure 8: Sovereign Şukūk Issuances (Jan 2001-Dec 2018)

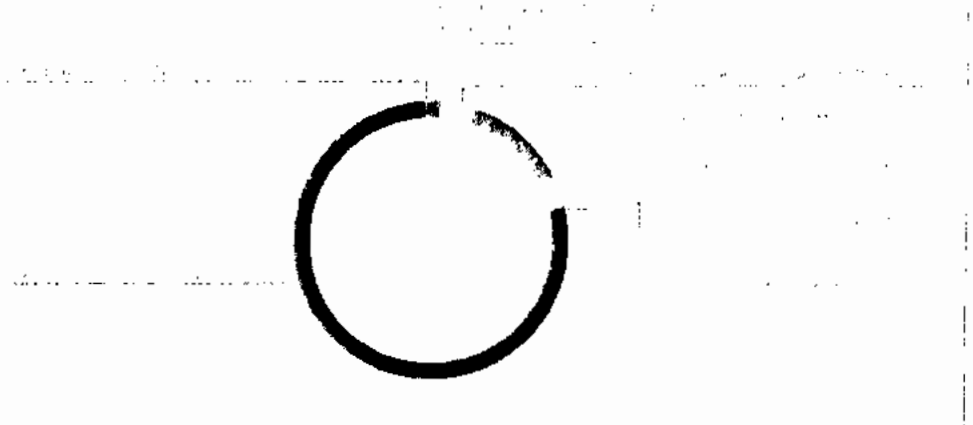

Figure 8

Source: IIFM *Şukūk* Database

Now in the following lines specifically sovereign and quasi-sovereign *ṣukūk* issuance to Pakistani, Bahraini and Malaysian jurisdictions would be discussed. The following table illustrates the regional break-up of the total international *ṣukūk* issuance among Pakistan, Bahrain, and Malaysia during the period Jan 2001 – Dec 2018.

Table 1: International Issuances among Pakistan, Bahrain, and Malaysia (Jan 2001 - Dec 2018)

Table 1

Country Name	No of Issues	Amount USD Millions	% of Total Value
Pakistan	4	3,600	1.43%
Bahrain	102	11,430	4.55%
Malaysia	107	63,653	25.32%

The above table highlights that Malaysia has a challenging presence in the international *ṣukūk* market commanding 25.32% of the international issuance concerning Pakistan and Bahrain.

Now in the following lines, the important details regarding *ṣukūk* market for Pakistani, Bahraini, and Malaysian regions would be explained one by one.

3.5 Government of Pakistan *Ṣukūk* Issuance

Ṣukūk market in Pakistan provides an opportunity for both government and corporations to raise funds in a Sharī'ah compliant manner. Specifically, given that Pakistan has identified the country's infrastructure needs in its Medium-term Development Framework, financing for carrying out such developmental projects can be achieved through the issuance of *ṣukūk*. However, the industry needs to address

challenges like lack of short term and long term *ṣukūk* of high quality, absence of a secondary market for traceability, identification of assets for sovereign *ṣukūk* and disclosure of usage of *ṣukūk* proceedings to fully exploit the potential of *ṣukūk*.

The expansion and progression of *ṣukūk* industry require coordinated efforts from all stakeholders including issuers, regulators, and investors for increasing depth of the *ṣukūk* market. Given the commitment of the government for promotion of Islamic banking and finance in the country, and various steps were taken by the high-level Steering Committee for promotion of Islamic banking in Pakistan for supporting Islamic capital markets in the country, going forward the *ṣukūk* market in Pakistan is likely to grow further (State bank of Pakistan, 2019).

3.5.1 Pakistani *Ṣukūk* Market in General

Since its emergence in 2005, the Pakistani Ṣukūk market is reported to issue four international sovereign and 113 domestic *ṣukūk*. Their respective worth is USD 3.6 billion and Rupees 1231.51 respectively. The comprehensive detail of this *ṣukūk* is given below.

Table 2: Status Wise *Ṣukūk* Issuance in Pakistan

Table 2

Listing Status	Number of Issues	Amount in Billion Rs
Privately Placed	101	1167.58
Listed	12	63.93
Total	**113**	**1231.51**

3.5.2 Overall Domestic *Ṣukūk* Market in Pakistan

Overall 113 *ṣukūk* have been issued in the domestic market by December 31, 2018. In the domestic market, overall 113 *ṣukūk* are issued in the market till the end of

2018. Out of these total 113 Ṣukūk, 19 are owned by the Government of Pakistan while the rest are issued by other quasi-sovereign corporations. The main investment holders in this *ṣukūk* are commercial banking, mutual fund, and employee funds. Major investors in *ṣukūk* are commercial banks, mutual funds, employee funds, and other financial institutions. Most of the times, such *ṣukūk*s are privately held although around 11 percent of these are listed corporate *ṣukūk* (Table 1).

3.5.3 Mode Wise Break-up of *Ṣukūk*

Ṣukūk may be categorized depending upon the certain mode. For instance, in terms of *ṣukūk* structure, *mushārakah* is the most commonly known domestic *ṣukūk* structure prevailing in the market with 58 issues. The next widely used *ṣukūk* is *ijārah ṣukūk* and up till now, its 28 issues are prevailing in the market. But from the Value perspective, *ijārah* is taking the lead role as it covered 74.2 percent value of overall *ṣukūk* issuance. The prominent cause of *ijārah ṣukūk* dominance is the fact that all the GoP *Ṣukūk* are *ijārah ṣukūk* and are relative of larger value as compared to its other counter *ṣukūk* issues in the market. The main reason of *ijārah ṣukūk* having a major share in the overall market is that all GoP *ṣukūk* are *ijārah* based which are generally of larger value as compared to other *ṣukūk* issued in Pakistan.

Figure 9: Mode wise breakup of Domestic Şukūk (about value)

Figure 9

Source: IIFM Şukūk Database

3.5.4 Entity Wise *Şukūk* Issuance

Concerning entity based *şukūk* issues, it is revealed that corporate *şukūk* holds the prominent and biggest share in overall *şukūk* issuance till 2009. Later on, a fall in the share of corporate *şukūk* is observed and GoP *şukūk* have emerged and taken the major share since then. By the end of 2018, there happened a minor decline in the performance of sovereign *şukūk* but still, it is holding approximately 70 percent of total *şukūk* issuance in Pakistan. Following this comes the quasi-sovereign and corporate *şukūk* having percentage share of 17.2 percent and 12.5 percent respectively.

Table 3: Entity wise & year wise breakup of *ṣukūk* volume (percent share in total *ṣukūk* amount)

Table 3

Year	Corporate	Sovereign	Quasi – Sovereign
2006	7.2	0.0	92.8
2007	55.5	0.0	44.5
2008	48.6	14.0	37.4
2009	43.3	29.0	27.7
2010	27.1	55.7	17.2
2011	15.9	72.7	11.4
2012	11.5	79.3	9.2
2013	10.7	78.5	10.8
2014	9.2	78.3	10.7
2015	8.9	79.3	11.5
2016	10.5	74.2	16.9
2017	12.5	71.9	17.6
2018	9.2	70.3	17.2

Source: State Bank of Pakistan (SBP)

3.5.5. Government of Pakistan (GOP) Ijārah Ṣukūk

Pakistan Domestic Ṣukūk Company Limited (PDSCL), a public sector company, has been issuing GoP Ṣukūk in the domestic market since 2008 and all of these *ṣukūk* have been issued based on *ijārah*. Until December 2018, there occurred 19 auctions of GoP *ṣukūk*. These *ṣukūk* were issued based on a variable rental rate and fixed rent rate. Among those *ṣukūk*, 16 *ṣukūk* costing Rs 669 billion belonged to variable rent rate (Table 3) and the remaining three costing Rs 268 billion belonged to fixed rental rate. It can be seen from Table 4 that all *ṣukūk* were supposed to be matured by December

2019. It is a noteworthy point that all *ṣukūk* in variable rent type got matured at the end of December 2018 (IIFM, 2018, P.171-172).

3.5.5.1 Corporate Ṣukūk

Since 2008, there has been observed the downfall in the issuance of corporate *ṣukūk*.. corporate *ṣukūk* of value Rs 351.17 billion reported to be issued by December 2018 (table 5).

3.5.5.2 International Ṣukūk

Till the end of December 2018, four international *ṣukūk* were issued by Pakistan. Their respective value for the first issuance is USD 600 million and for the last three are USD 1,000 million each. (Table 6). These four *ṣukūk* with a life span of five years gained the significant attraction of the investors.

The first international *ṣukūk* by Pakistan is floated in the market in 2005 followed by the other three in the year 2014, 2016, and 2017 (see Table 2). This initial international *ṣukūk* was registered at the Luxemburg stock exchange having a worth of USD600 million. A semi-annual floating rate of return (LIBOR+ 220 bps) was attached to this *ṣukūk* that made it attractive for the investors. This *ṣukūk* is issued with an approximate value of USD 1.2 billion. Likewise, the second international *ṣukūk* as offered by Pakistan also gained the remarkable attention of the investors. It is evident from USD 2.3 billion subscriptions that is five times greater than the original estimated amount of USD500 million, as the target for a certain timeframe.

3.5.6 Legal and Regulatory Framework

As per section 66 of the companies Act 2017, ṣukūk are supposed to be issued either by public placement or through a private offering. For almost the last decade,

Ṣukūk are floated in Pakistan's market under private placement. The main investment holders in these Ṣukūk are conventional banks and its counterpart, endowment funds, insurance corporates, and some other companies. The head approval from SECP is not necessary if the *ṣukūk* is being placed privately. However, the respective issuer is bound to follow the *ṣukūk* (Privately Placed) Regulations, 2017 for the private placement of *ṣukūk* and the Private Placement of Securities Rules, 2017. But as far as the issuance of *ṣukūk* publically is concerned, it is mandatory to seek SECP approval. (IIFM, 2018, P. 171; SBP, 2019)

3.5.7 Future Glance

The prospects of the *ṣukūk* market in Pakistan seem to be very bright. The governmental developmental plans and crucial infrastructure requirements are seeking continuous investments by the investors, both domestically and internationally. In this whole scenario, *ṣukūk* can be an important source for fund generation purposes and may exploit to its full potential

3.6 Government of Bahrain *Ṣukūk* Issuance

Bahrain has earned its name as an innovator as far as the establishment of new Islamic financial products is concerned. Bahrain commenced its sovereign *ṣukūk* issues in 2001. Since then, its capital *ṣukūk* market is flourishing vary enormously and Bahrain issues these *ṣukūk*s, both short and long term, quite frequently. Not only is this, out of total governmental financing requirements, 19 percent made possible through this Ṣukūk market alone. Thus it can be concluded that the importance of these Islamic instruments in determining the country's performance (Bahrain) is inevitable as it may address the country's deficit effectively and also support its prospects. Coming in the

next section is a summarized overview of the most famous and significant Islamic Instruments of Bahrain's capital market.

3.6.1 Salam Şukūk

Till 2018, 213 issues of Salam *ṣukūk* are presented by the kingdom of Bahrain. Fixed-rate tender procedure is adopted for its issuance and regulation. CBB Monetary Policy Committee is usually the deciding factor about what profit margin should be set for certain *Salam ṣukūk* instruments.

3.6.2 Short term Ijārah Şukūk

These *ṣukūk* were first introduced in the Islamic capital market of Bahrain in early 2005. And to date, 125 *ijārah ṣukūk* have been issued. Short-term *ijārah ṣukūk* are floated in the market each month with a maturity period of six months. Fixed-rate tender procedure is utilized for its issuance and regulation.

3.6.3 Long term Ijārah Şukūk

These *ṣukūk* were first introduced in the mid of 2001. And till date 25 *ijārah ṣukūk* have been issued. Ministry of Finance demanded their issuance.

3.6.3.1 Long term Ijārah Şukūk (Domestic)

These *ṣukūk* were first introduced in the mid of 2001. And till to date, 21 *ijārah ṣukūk* have been issued. It's based on assets owned by the Government of Bahrain.

3.6.3.2 Long term Ijārah Şukūk (International)

These *ṣukūk* were first introduced in the year 2008. On 28th March 2018; the Kingdom of Bahrain successfully priced a USD 1,000 million *ṣukūk*. It was mainly constituted of two main modes that are; 51% *ijārah* and 49% Commodity Murabahah. It gained a tremendous reach to potential investors globally. All over the world (more than

100 investors), the investors showed strong interest in these *ṣukūk*. This can be depicted through USD 2.1 billion orders. The comprehensive detail of each of these *ṣukūk* is given in the below table.

Table 4: CBB's Long Term Islamic Ṣukūk Issuances (International in USD)

Table 4

Issue Type	Issue No.	Issue Date	Maturity Date	Return rate	Issue Amt
Ijārah Sukuk	LI/14	19-Mar-08	19-Mar-13	75 BPS over 6M Libor	350 Million
Ijārah Sukuk	LI/15	17-Jun-09	17-Jun-14	6.247	750 Million
Ijārah Sukuk	LI/18	22-Nov-11	22-Nov-18	6.273	750 Million
Ijārah/Murabah	1	12-Oct-16	12-Feb-24	5.624	1 Billion
Ijārah/Murabah	2	20-Sep-17	20-Mar-25	5.25	850 Million
Ijārah/Murabah	3	05-Apr-18	5-Oct-25	6.875	1 Billion

Source: IIFM

3.6.4 Islamic Ṣukūk Liquidity Instrument (ISLI) and Wakalah Liquidity Management Instrument (WLMS)

This instrument was introduced in mid-2008 with a basic intent to support Islamic banks to sustain their liquidity conditions. It is governed by the usual sale and purchase transaction. Moreover, with the same intent, another Islamic liquid instrument was introduced by the Bahrain kingdom (CBB) named *wakālah* liquidity management instrument. Its main target was to promote the liquidity condition and overall sustainability of Islamic retail banks not only to maintain the decreasing liquidity but also it absorbs the excess of this and shift it towards the central bank of Bahrain (IIFM,

2018, p. 133). The current duration of the Wakalah is Overnight & One Week which is available every Tuesday for Islamic retail banks.

3.6.5 Future Prospects

However, Bahrain's sovereign *ṣukūk* issuances are primarily supposed to meet the financing need of the domestic capital market but the greater frequency of issuance and the remarkable performance record made it accessible to the relative world's active capital market. Its success may be depicted from the fact that almost 1/5th of the total financing needs of Bahrain is getting fulfilled through these *ṣukūk* issuances. Considering the facts and details as mentioned earlier the prospect of the *ṣukūk* capital market of Bahrain seems to be bright.

3.7 Government of Malaysia *Ṣukūk* Issuance

3.7.1 Infrastructure for Şukūk Market

Malaysia has a remarkably sound *ṣukūk* market. The credit goes to the country's rsified experience in Islamic finance. It has a well-developed regulatory framework in terms of issuance, reporting, selling, and buying, and settlement systems. Along with this a sound Sharī'ah governance system is existing in Malaysia that ensures the regular and smooth working of the Islamic capital market. For instance, Sharī'ah Advisory Councils (SAC) of Bank Negara Malaysia (BNM) and the Securities Commission Malaysia (SC) are like the soul corporates that perform the supervisory role and ensure the instant provision of regulatory guidelines regarding the flourishment of Islamic finance in the country. Malaysia has another international business and financial center named Labuan International Business and Financial Centre (IBFC). Labuan IBFC serves as a gateway for cross-border *ṣukūk* issuances in the Asia Pacific region and internationally.

3.7.2 Global şukūk Issuance and Global şukūk Outstanding by Domicile

Malaysia continued to stand as a major investor in the world's *şukūk* market covering almost 50.5 percent of the overall international *şukūk* listing. For the first half of 2018, Malaysia retained its position as the world's leading issuer with a 41% share, an increase from 33% a year ago. In the recent era, Malaysia launched a huge worth of *şukūk* having a value of USD 22.4 billion with a net increment of 9 percent. This increase reflected a flow in corporate issuance across a broad range of sectors as well as an increase in the volume of short-term Islamic Treasury bills issued by the Central Bank of Malaysia. (IIFM, 2018, P. 133; BNM, 2019)

Figure 10: Global *Şukūk* Issuance

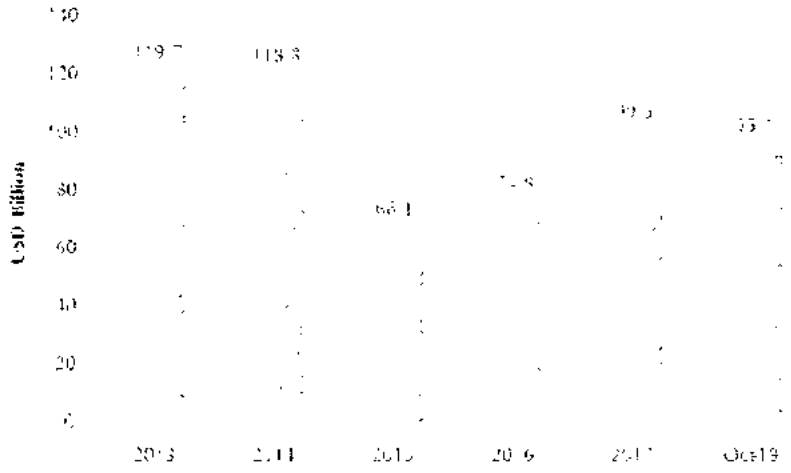

Figure 10

Source: Malaysia International Islamic Financial Centre (MIFC)

Figure 11: Global *Ṣukūk* Outstanding by Domicile

Figure 11

Source: Malaysia International Islamic Financial Centre (MIFC)

The domestic *Ṣukūk* market in Malaysia continues to serve as an important and attractive platform for government and corporate entities to raise long-term funds for various economic, business, and infrastructure development needs. The country's financing needs regarding various mega developmental projects are being effectively met through its active and sound domestic *ṣukūk* market. It is an effective pathway for long-term fund generation by governmental institutions and other big corporates of the country. During the first six months of 2018, governmental institutions and other big corporates launched *ṣukūk* worth amounted to RM 99.36 billion. It comprised 52.02% of overall *ṣukūk* issuance.

3.7.3 Size and Composition

Its LCY bond market flourished enormously in the year 2019 with a quarterly rate of 2.9 percent and 7.6 percent y-o-y. By the end of 2019 (Q1), Malaysian's bond market attained a worth equal to MYR1, 441 billion (as illustrated in Table 1). The comparison between Q4 2018 and Q1 2018 is demonstrating that the q-o-q growth rate remained higher for Q1 whereas the growth rate was in reverse. This is made possible

through the combined efforts of the Malaysian government and other corporate sectors via their respective investment of 53.1% and 46.9% in the overall bond market. For the year 2019 (Q1) out of total investment share, 61 percent was covered by *ṣukūk* only having a net worth of MYR879 billion. A detailed overview of these details is given in the table below.

Table 6: Size and Composition of the Local Currency *Ṣukūk* and Bond Market in Malaysia

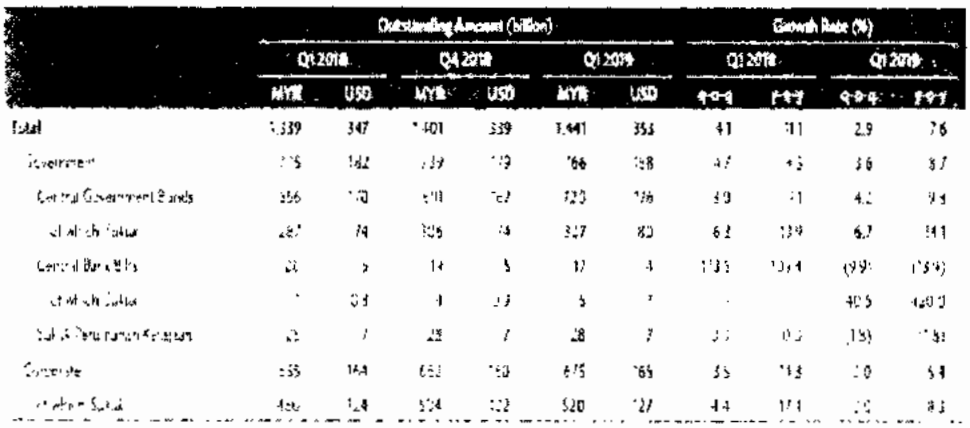

Table 6

Source: Asian Bond Monitor (p. 82)

3.7.4 Regulatory Up-Gradation and Benefits

To keep the steady growth of the country's *ṣukūk* market, the government ensures the sound scrutiny and uplifting of the regulatory framework regularly. As an incentive initiative, the Malaysian government has increased the investment budget for the Islamic debt capital market of the country.

This would attract potential investors ultimately leading to the market's expansion. As another promotional measure, the government has decided to extend tax breaks that occur on additional expenses for the upcoming three years commencing from the year 2019. This seems to help attract potential investors and boost their confidence. the Ministry of Finance has also decided to set up a dedicated committee with an intent to supervise and promote such efforts.

Moreover, for the sustained development and promotion of the secondary *ṣukūk* market, the government has taken various important steps. For instance, under an "exempt regime" the *ṣukūk* holders, both national and international, are not required to provide for the paper to be quoted or traded over the exchange. Over-the-Counter (OTC) trade would become possible under such promotional measures. The trading would occur on an Over-the-Counter (OTC) basis. To foster and increase the existing investment options Malaysian's government also provided the Exchange Traded Bonds and ṣukūk (ETBS) that are the bonds and ṣukūk listed and traded on the stock market. This chapter has enhanced the base for the current study by providing an overview of ṣukūk markets and Sharī'ah rulings for ṣukūk. This chapter has been categorized into two sections. The first part of this chapter has provided an overview of the fastest-growing segment of the Islamic capital market (ICM): the ṣukūk market. It starts by discussing several definitions of the term ṣukūk, followed by providing an overview on the growth and development of ṣukūk market particularly in Pakistani, Bahraini, and Malaysian regions regarding sovereign and quasi-sovereign ijārah ṣukūk structures up to now. Similarly, various classifications of ṣukūk are briefly discussed.

Chapter Four: Literature Review

4.1 Sharī'ah Issues in *Ijārah Ṣukūk*

Apart from the specific Sharī'ah issues that would be highlighted in each category of *ijārah ṣukūk* incoming section. However, this section further particularizes scholars' general concerns regarding *ijārah ṣukūk*. Despite remarkable popularity and demand in the domestic and global market, the *ṣukūk* used to face some serious reservations from its beginning. As a relatively young asset class in the global capital market, the *ṣukūk* market inevitably faces problems typical of its early stage of development. In this relation, some Muslim scholars have questioned its level of compliance with the Sharī'ah law; particularly on how they are structured.

In the light of the Sharī'ah issues related to the sovereign and quasi-sovereign *ijārah ṣukūk* structures, the literature review might be categorized into the five followings heads and sub-heads.

4.I.1 Asset Ownership (Beneficial and Legal Ownership)

The prominent Sharī'ah scholar Shaykh Taqi Usmani stated that if the sukūk are issued for new ventures it must be ensured that they have complete ownership rights in the underlying assets (Usmani, 2007, p. 14).

Wedderburn (2010) specified that "Like the Malaysia *ṣukūk*; the Pakistan *ṣukūk* involved a sale and leaseback structure. An interesting feature of the Pakistan *ṣukūk* (and of the Bahrain *ṣukūk* before it) was that the *ṣukūk* assets were sold in a true sale (where the legal title to the assets concerned passed to the issuer) as opposed to the kind of beneficial ownership distinguishing the Malaysian *ṣukūk*. This appears to have been one of the last of the true-sale, unsecured *ṣukūk* transactions, with subsequent issues

reverting to the Malaysian formula and typically conveying only a beneficial, unregistered ownership interest in the underlying assets".

ISRA, (2015, p. 163) cited that ownership is one of the argumentative issues in *ṣukūk* structuring because it gives rise to a serious question of whether the *ṣukūk* holders have complete ownership in the *ṣukūk* asset or not.

ISRA (2017, p. 295) mentioned that "The limited Sharī'ah complications of the structure have further made it among the most preferred *ṣukūk* structure since the early days when the *ṣukūk* market emerged. Moreover, these *ṣukūk* have been the subject of some criticism when it comes to their implementation and they have met certain difficulties during the process of their development related to lease-based *ṣukūk*".

4.I.1.2 Asset-Based and Backed Ṣukūk, (SPV), Undertakings (Purchase Undertaking and Recourse Right, etc.)

Abdel-Khaleq and Richardson (2006) mentioned that the investment laws often result in the need for innovation, particularly as far as true sale issues are concerned. For example, in the context of an *ijārah* based *ṣukūk* structure, there needs to be a true sale by the originator of the assets in question to the *ṣukūk* issuer, with such a sale followed by a leaseback of the assets to the *ṣukūk* issuer.

Alshelfan (2014) concluded in this context that "executing a true sale is a crucial element in Ṣukūk operation, as it constitutes a real transfer of ownership from the originator to the Ṣukūk holders via the SPV. Nevertheless, some Ṣukūk issuances do not execute a true sale, as with asset-based Ṣukūk issuance, due to the absence of property law and bankruptcy law under civil law regimes".

ISRA (2015, p. 426) stated that "Another matter that was carefully considered is the use of an SPV in the *ṣukūk* structure. In an *ijārah ṣukūk*, there is a requirement to

have trustees, which will acquire the assets then lease them to the lessee, and issue the *ṣukūk* to raise the funds required for the acquisition of the assets".

Elmaki and Ryan (2010) mentioned that as per some legal opinions, in the case of default in asset-based *ṣukūk* the *ṣukūk* holders will have recourse to the obligor/originator rather than recourse to the real asset.

It is explained by Hidayat (2013) that in the case of issuance of asset-based sukuk, the actual underlying asset can still be seen in the assets category of the originator's balance sheet. Here, the complete legal entitlement and ownership of the asset remain with the originator the *ṣukūk* holders only enjoys the rights of partial beneficial ownership. Due to this fact, very limited ownership remains with the *ṣukūk* holder. To say otherwise, the *ṣukūk* holders, do not have the authority for selling the respective asset to any other party. Moreover, they can only avail recourse to the original obligor of the asset.

The literature also highlights the significant happenings that contributed towards the evolvement of *ṣukūk*. As described by scholars, the emerging roots of today's *ṣukūk* can be seen in asset-backed model and as per this model, the *ṣukūk* holder can enjoy ownership control on the underlying asset. This also fulfills the basic Sharī'ah condition of having complete ownership as compared to its counterpart i.e. in asset-based model. With the latter model, the *ṣukūk* holders rank *pari passu* with unsecured creditors. There exists a scenario of negative pledge regarding all global bonds. This pledge does not allow the borrowing party to issue any future bond. That is not in pari passu with existing unsecured bonds. (Haneef,2009)

Diaw et. al. (2014); and Haneef (2009) identified the three hallmarks in the development of the *ṣukūk*. He showed that Ṣukūk evolved from asset-backed model, where the *ṣukūk* holders have ownership rights over the underlying asset, as per Sharī'ah requirements, to asset-based model. With the latter model, the *ṣukūk* holders rank *pari passu* with unsecured creditors. Indeed, for all international bonds, there is a negative pledge which restricts the borrowing entity from issuing any bond in the future that is not in *pari passu* with existing unsecured bonds.

According to Adawiah et. al. (2015) in a few models, for instance asset-based *ṣukūk* doesn't enjoy the right of asset disposal especially in case of default. This fact gives rise to basic contention regarding such structures. Because, this negates the very general ruling that *ṣukūk* holders being the complete owner of *ṣukūk* should have full authority to deal with it freely. As a result, a debate surfaces regarding the fact that full ownership is given to the *ṣukūk* holder or not. In case of failure to transfer complete ownership, the existing relationship may be seen just as of lender and borrower that ultimately stems some significant shariah objections.

The same issue has been explored by Al-Suwailem (2016), where he explained that in *ijārah* based *ṣukūk* doest not allow the investors to become the full legal owner of the asset and due to the same fact, these *ṣukūk* are taken as asset-based *ṣukūk* rather than its contrary.

As per ISRA (2017, p. 67) declaration, the award of first asset-based *ṣukūk* exhibiting hundred percent physical assets along with the absence of an actual sale of the underlying asset to *ṣukūk* holders, goes to Ijara *ṣukūk*. The *ijārah* model is evolved, firstly in Malaysia, due to these existing flaws in asset-backed *ṣukūk* structure.

4.I.2 Third party guarantee and issue of charging a fee on it

It is debated by Al-Amine (2008) that in theoretical terms, as per Islamic principles, a third-party guarantee without fee or any consideration is allowed. Whereas, practically speaking, the However, guaranteeing the principal in *ṣukūk* Mushārakah, or *ṣukūk* Muḍārabah or *ṣukūk ijārah* is difficult. In fact, in case the government becomes the guarantor, the respective property cannot be used for the benefit of private organizations and it may be deemed as non-permissble. Similarly, it is very difficult for the private organization to become a guarantor without any fee.

Safari et. al. (2014, p. 102) A very renowned Islamic scholar named Shaykh Muhammad Taqi Usmani while presenting his debate about *ṣukūk* explained that about 85 percent of the existing *ṣukūk* does not comply with the basic shariah principles. This failure of shariah compliance stems from the fact that they seemed to be asset-based in nature rather than asset-backed. Among other points that strengthen this failure is the ensured return on the face value of sukūk at maturity date. The other notable fact is the absence of transferring of asset ownership to *ṣukūk* holders.

Similarly, another related debate regarding the third party guarantee is raised by Diaw et al. (2014).

It is also presented in the literature that practically, it is very problematic to fulfill the ownership conditions of the *ṣukūk* holders (Saeed and Salah, 2014). It may be deemed as a premium justification regarding the realistic viewpoint of *ṣukūk* practitioners in general. Heavy taxes and non permissibility regarding governmental asset disposal make it even more complicated for many issues to transfer asset entitlement to SPV and thus making it rather impossible to practice. Consequently, practically, the legal ownership of the assets is not even transferred to the SPV.

The IFA-OIC in a resolution on this matter issued at its 15th session, held in Muscat, Oman on 6-11 March 2004, stated, "It is not permitted for the *ṣukūk* issuer or the manager to guarantee the original price of the *ṣukūk* or its profit; and if the lease assets are destroyed or damaged, the *ṣukūk* holders shall bear the loss" (Bouheraoua et al., 2015; ISRA, 2017, p. 314).

ISRA (2017, p. 113) mentioned the way that the quasi-sovereign *ṣukūk* may carry explicit or implicit government guarantees.

Abdelrahman (2019) stated that "In several important cases, the guarantee of Ṣukūk's nominal value and their rate of return was further supported by sovereign entities (e.g. the governments of Malaysia, Bahrain and Qatar, etc.). Guarantees given by sovereigns are claimed to be Sharia permissible, which is not true. In principle, the State in an Islamic system should not be involved in projects which the private sector is capable of carrying. If it is argued that the State should establish the infrastructure projects or undertake some big or strategic projects, because of the inability of the private enterprise, the question that would arise is: why through Ṣukūk in particular? Why not by other means of finance? "

4.I.3 Combination of Contracts in Parallel Contracts

Al-Amine (2008) analyzed the structure of various combined contracts in the light of *bai' al-wafā, bai' al-istighlal*, and *bai al-ʿīnah*, etc. and it is found that all these transactions are controversial and accepted by only a minority of Muslim jurists. Those who reject them consider these forms of a transaction as mere ḥiyal (legal tricks) meant to circumvent the prohibition of interest-based lending. Thus, even though the form may

As per Diaw et. al. (2014) statement, these days, it is a very frequent practice to develop a *ṣukūk* structure having a required cash flow with the help of combining many other shariah endorsed contracts.

ISRA (2017, p. 311) *ijārah ṣukūk* is comprised of another significant element wherea *ṣukūk* holder is bound to lease the respective asset back to the obligor after the asset is sold to them. So basically, this involves two basic steps. Firstly, the asset is sold to *ṣukūk* holder along with its usufruct and secondly, the same asset is given to the obligor on lease. This whole process is just equivalent to the repurchase of the usufruct by the obligor. There are controversial viewpoints of Sharī'ah scholars regarding the permissibility and lawfulness of this very procedure.

4.I.4 GoP Ijārah *Ṣukūk* based on *bai' al-mu'ajjal*

Khaleequzzaman et. al. (2016) elaborated that Similarly, the OMO of GOP *ijārah ṣukūk* has helped to sell these Ṣukūk (nearing maturity) held by the Islamic banks to SBP through credit sale (*bai' al-mu'ajjal*) by adding T-bills related rate as one year's cash flow, even beyond the date of maturity. The transaction is neither valid in letter nor spirit as the profit is earned on receivable after the date of maturity.

Ayub (2017) addressed that "The treasury products like interbank Bai, al-Mu'ajjal of Ṣukūk (organized *tawarruq*), etc. are being used aggressively by some IBIs for clean lending to conventional banks. The regulator needs to further fix up the framework and emphasis upon the Sharī'ah scholars that the increasing use of controversial modes has adversely affected the image and true identity of Islamic banking and finance. One such built-in flaws are removed, the main responsibility would lie on the Sharī'ah scholars who are sitting on the "driving seat" and who could

lead Islamic banks not only to get rid of ribā in the letter but also lead for the transformation of the national and the global finance to infuse in its morality and Divine ethics and to make it beneficial for mankind".

4.I.5 *Ḥiyal* and *Makhārij* by Discoursing the *Maqāṣid* al- Sharīʿah

Siddiqi (2006) declared in this context that the Ṣukūk plays a positive role in the mobilization of savings on a vast scale. They benefit investors as well as those who have projects to finance that bear the promise of eventually generating sufficient revenue to meet the costs yet leave a surplus. "Their proliferation increases the efficiency of the financial system. We have already alluded to many controversies surrounding fiqh rulings about certain Islamic financial products like Ṣukūk and Tawarruq. Furthermore, we need a clearer understanding of ṣukūk versus conventional bonds in terms of economics, irrespective of their permissibility".

Usmani (2007) elaborated while discussing the higher objectives of Islamic law "To this point, this entire study has been conducted from the perspective of Islamic jurisprudence. However, if we consider the matter from the perspective of the higher purposes of Islamic law or the objectives of Islamic economics, then Ṣukūk in which are to be found nearly all of the characteristics of conventional bonds are inimical in every way to these higher purposes and objectives. The noble objective for which Riba was prohibited is the equitable distribution among partners of revenues from commercial and industrial enterprises. The mechanisms used in Ṣukūk today, however, strike at the foundations of these objectives and render the Ṣukūk the same as conventional bonds in terms of their economic results".

Elgari (2011) declared that in case the relationship between the issuer and ṣukūk-holder is that of the lessor (ṣukūk -holder) and lessee (issuer), the issue is easy. Sharī'ah Advisory Boards have endorsed the permissibility of the promise of purchase; i.e., the lessee promises to purchase the leased asset. It cannot be said that the ṣukūk has by that become like a conventional bond because that is debt certificate; as for this bond, it is the ownership of a leased asset. Islamic banking has been accused of having an orientation that is "conventional banking with an Islamic face", meaning that whatever products it offers resemble conventional products; they have merely restructured the contractual relationships between the parties so that they comply with Sharī'ah requirements on a purely formal level. It is a stinging and painful accusation, but the description is, to a certain extent, not too far from the truth.

Mansoori (2011) stated that "The transaction neither meets the requirements of sale (possession remains with originator) nor *ijārah* (for example, all major/minor maintenance charges are borne by the lessor). Such transaction is similar to *bai' al-wafā'* and International *Fiqh* Academy has declared it invalid. To make *ṣukūk* transaction Sharī'ah compliant, these issues must be addressed, otherwise, it will remain a replication of the bonds. In the present form, many sovereign *ṣukūk* are mere stratagems to circumvent riba".

Laldin (2012) declared that considering the previous incidences regarding *ṣukūk* related issues, an urgent call is made by the shariah scholars to re-evaluate the *ṣukūk* structuring. Moreover, in 2009, the default of various *ṣukūk* also led to the urgency to re-look into the basic *ṣukūk* model and its functionality. Few more unnoticed shariah and law-related *ṣukūk* issues have been highlighted by the concerned authorities for its

re-examining purpose not only by shariah scholars but also other parties of interest who are already or have an intent to participate in any *ṣukūk* in future.

Soualhi (2015), further explained that gambling, usury, uncertainty, and dealing in unlawful goods are not permissible as per Islamic financial principles. Islamic finance always encourages a sound financial and monetary system that will increase justice and the overall well-being of all concerned stakeholders and the community as a whole. It promotes total welfare at both micro and macro levels. This very basic intent is dependent upon a few significant conditions, premiumly, to follow Sharī'ah tenets (*maqāṣid* al-Sharī) that covers the roots of mega Islamic finance in general.

Al-Suwailem (2016) further strengthend this discussion by claiming that due to consistent uprise in the overall sukuk market, the need for more reliable and more flexbile sukuk models is accelerated. The sukuk issuers are now more intensively looking for such efficent and practical sukuk structures. It is specifically happening for sovereign sukuk issuance. During the era of 2009-2014 , the sovereign sukuk presented almost 70 percent of total domestic sukuk issuance (IIFM, 2014) However, the sustainability of currently used structures for sovereign *ṣukūk* issuance is quite questionable.

Abdelrahman, (2019) claimed that Irrespective of the fact that who is the issuer of *ṣukūk*, whether sovereign, semi-sovereign or private sector, the amendment of basic shariah principle with just an intent to facilitate the development of devices to guarantee *ṣukūk* is not permissible. As far as, the shariah tenets are taken into consideration, the guarantee provided by the sovereigns regarding the capital of *ṣukūk* are even worsened as compared to its counterpart, i.e, private entities. This is the reason when the loss

related to special purpose vehicle (SPV) regarding asset-based and asset-backed *ṣukūk'*, 'restrictions and undertakings such as 'purchase undertaking' and 'purchase of *ijārah ṣukūk* on its face value at the time of redemption, 'asset disposal and recourse right', 'asset due diligence and management of the *ṣukūk* asset, etc.

Research area # 2

The second consists of the concept of 'guarantee', and 'third party guarantee in quasi-sovereign *ijārah ṣukūk* structures' and the 'Sharī'ah status of 'charging a fee on it'.

Research area # 3

The third research area has explained the issue of 'combination of contract and parallel contract in sovereign and quasi-sovereign *ijārah ṣukūk* structures in Pakistani, Bahrani and Malaysian regions.

Research area # 4

The fourth section has discussed the issues related to 'GoP *ijārah ṣukūk* on *bai' al-mu'ajjal* basis and asset appraisal options such as 'green shoe option' in sovereign and quasi-sovereign *ijārah ṣukūk* structures specifically in the Pakistani region.

Research area # 5

The fifth research area is described the important and argumentative issue of '*ḥiyal and makhārij*' by discoursing the issue of '*maqāṣid* al- Sharī'ah (higher objective of Islamic law of contract) in the context of sovereign and quasi-sovereign ijārahh *ṣukūk* structures.

Furthermore, this section also summarized the whole debate of this research work titled, 'Overall Sharī'ah compliance' of sovereign and quasi-sovereign *ijārah ṣukūk* structures in Pakistani, Bahraini and Malaysian jurisdictions.

The next chapter will discuss the research methods and data analysis tools and techniques for current research work.

Chapter Five: Research Methodology and Data Analysis

This chapter primarily covers the detailed plan for the qualitative assessment of the related Sharī'ah issues in sovereign and quasi-sovereign *ijārah ṣukūk* structures as proposed in the previous chapter. The chapter is divided into five sections. The first section primarily explains the type of analysis approach briefly and the second section covers the development of a questionnaire for the current research work. Similarly, the third section addresses the data collection method including the description of the population and sampling plan, data sources, and procedures for data collection. While the fourth section discusses the data analysis tools and techniques used in this study and data analysis details, and the last section summarizes the chapter discussion.

This chapter is discussing the interpretation of structured interviews conducted with the Sharī'ah scholars, academicians, and practitioners from Pakistani, Bahraini, and Malaysian regions. The interview recorded in the form of audio was first transcribed into text and arranged and sorted in NVivo 12 computer-assisted qualitative data analysis software (CAQDAS). The sixth stage process of thematic analysis by Braun and Clarke (2006) (i.e. familiarizing yourself with your data, generating initial codes, searching for themes, reviewing themes, defining and naming themes, and producing the report) was followed to analyze the transcribed information.

5.1 Section one: Thematic Analysis Approach

Themes or patterns within data can be identified in one of two primary ways in the thematic analysis (Braun & Clarke, 2006): in an inductive or 'bottom up' way (Frith & Gleeson, 2004), or in a theoretical or deductive or 'top down' way (Boyatzis, 1998).

An inductive approach means the themes identified are strongly linked to the data themselves (Patton, 1990) (as such, this form of thematic analysis bears some similarity to grounded theory). In this approach, if the data have been collected specifically for the research (e.g. via interview or focus group), the themes identified may bear little relation to the specific questions that were asked of the participants. They would also not be driven by the researcher's theoretical interest in the area or topic. Inductive analysis is therefore a process of coding the data without trying to fit it into a preexisting coding frame, or the researcher's analytic preconceptions. In this sense, this form of thematic analysis is data-driven. However, it is important to note, that researchers cannot free themselves of their theoretical and epistemological commitments, and data are not coded in an epistemological vacuum (Braun & Clarke, 2006).

In contrast, a 'theoretical' thematic analysis would tend to be driven by the researcher's theoretical or analytic interest in the area and is thus more explicitly analyst-driven. This form of thematic analysis tends to provide less a rich description of the data overall and a more detailed analysis of some aspects of the data. Additionally, the choice between inductive and theoretical maps of how and why a researcher coding the data is also important. You can either code for a quite specific research question (which maps onto the more theoretical approach) or the specific research question can evolve through the coding process (which maps onto the inductive approach). Keeping in view the theoretical and analytic interest in the research question of this study, a deductive or top-down thematic analysis approach by Boyatzis, 1998 would be applied.

Therefore, the present research work would be done the second type of thematic analysis approach named 'theoretical' thematic analysis which tends to be driven by the researcher's theoretical or analytic interest in the area and thus more explicitly examination is driven. This form of thematic analysis tends to describe the data overall and a more detailed analysis of some aspects of the data, keeping in view the theoretical and analytic interest in the research question of this study, is a deductive or top-down thematic analysis approach.

Furthermore, this form of thematic analysis bears some similarities to grounded theory. The study is structured on grounded theory to explore thematic aspects of structured responses collected on Sharī'ah compliance of sovereign and quasi-sovereign *ijārah ṣukūk* from Pakistan, Bahrain, and Malaysia. Themes of Sharī'ah issues are identified through content analysis and expert surveys and vigorously deliberated in light of Islamic instruction and precepts to assess and conclude the level of Sharī'ah compliance in *ṣukūk* industry across sample regions.

5.2 Second section: Development of Questionnaire

In this section, the detailed structured questionnaire would be explained which was the main source to conduct the interviews from the concerned personals in that three countries (Pakistan, Bahrain, and Malaysia).

Title of the Study:

Sharī'ah Evaluation of Contemporary Sovereign and Quasi-Sovereign *Ijārah Ṣukūk*: A Case of Pakistan, Bahrain, and Malaysia

The questionnaire is as follows:

General Sharī'ah compliance

1. Are the contemporary sovereign and quasi-sovereign *Ijārah ṣukūk* structures Sharī'ah compliant in general?

Asset Ownership

2. Do the *ṣukūk* holders gain complete ownership in assets, in case of *ṣukūk* being issued for establishing new ventures?

Beneficial ownership and legal ownership

3. Is the concept of beneficial ownership as effective as real ownership while establishing rights and liabilities regarding the underlying asset?
4. Up to what extent the concept of beneficial ownership fulfills the Sharī'ah requirements concerning asset-based and asset-backed *ṣukūk*?
5. How much legal ownership is compulsory to attain the absolute ownership of an asset regarding sovereign and quasi-sovereign *Ijārah ṣukūk* structures?

Concerned undertakings to asset ownership

6. Is the two unilateral undertaking (*wa'dan*) in terms of sale undertaking by the *ṣukūk* holders in case of early redemption or

default and purchase undertaking at the time of maturity by the originator acceptable in the light of Sharī'ah prospect?

7. Are the bilateral promises (*Muwa'adah*) for sale and purchase undertakings on the same subject matter tolerable as per the law of Sharī'ah in current sovereign *Ijārah ṣukūk* transactions?
8. Is the linkage of asset disposal and recourse right (limited or complete recourse) to the creditworthiness of the originator acceptable as per Sharī'ah rulings?
9. What is the basis for authorization to sell out the *ijārah ṣukūk* on its face value rather than market value at the time of redemption?

Special Purpose Vehicle (SPV)

10. Is the presence of the Special Purpose Vehicles (SPV) complies with the Sharī'ah requisites?
11. Is this a trusted entity (SPV) that can ensure the interest of the *ṣukūk* holders while it is generally owned and controlled by the sovereign's agencies/bodies?

Guarantee

12. Is it permissible by the government to play its role as a third-party guarantor regarding timely payments of rentals in the case of quasi-sovereign *Ijārah ṣukūk* structures?
13. Is it permissible to charge a fee for a third-party guarantee for timely payments of rentals in case of quasi-sovereign *Ijārah ṣukūk* structures?

Parallel Contracts

14. Is the use of parallel contracts permissible, as generally seen in the case of *ṣukūk* issuance?

Asset Appraisal Issues

15. Is the increase in pricing of underlying *Ijārah ṣukūk* asset due to Green Shoe option or oversubscription can be availed and justified according to Sharī'ah principles?

Renewal issues

16. Do the GoP ijārah *ṣukūk* on *bai' al-mu'ajjal* basis complies Sharī'ah parameters?

***Ḥiyal* (stratagem) and *Makhārij* (legal exist for a hardship)**

17. Are these all above concerns about sovereign and quasi-sovereign *Ijārah ṣukūk* structures fall under the category of ***makhārij*** or *ḥiyal*?

Higher objectives of Islamic Law of contract

18. Are the higher objectives of Islamic economics being observed in all Islamic financial transactions relating to sovereign *ijārah ṣukūk* structures?

5.3 Third Section: Data Collection Method, Population and Sampling Plan and Details of Interviews

The researcher personally stayed in two countries (Pakistan and Malaysia) while the third country (Bahrain) cannot be visited due to some visa constraints. Ultimately, interviews were conducted by taking the appointments with concerned Sharī'ah scholars, academicians, and practitioners via telecommunication sources such as what's

app or direct phone calls and email responses, etc. All interviews were recorded with the help of a micro recorder and call recorder software. Total twenty-seven structured interviews were conducted (out of forty-one respondents) through convenience sampling technique with the most related personals from Pakistani, Bahraini, and Malaysian jurisdictions.

Table 6 exhibits an overview of each informant (interviewee) with the duration of the interview.

Table 5

Malaysia						
Respondents	**Alias**	**Age**	**Position**	**Education**	**Experience**	**Residence**
Informant 1	Prof 1	59	Prof and Executive Dirctor	PhD	22	KL
Informant 2	Prof 2	55	Prof	PhD	20	KL
Informant 3	IBP-1	50	Head Islamic Bnking	MBA	15	KL
Informant 4	Prof 3	50	AP	PhD	15	KL
Informant 5	Prof 4	61	Prof and President	PhD	23	KL
Informant 6	Prof 5	40	Research Fellow	PhD	09	KL
Informant 7	Prof 6	37	Research Fellow	PhD	07	KL
Informant 8	IBP-2	53	Head Islamic Bnking	MBA	18	KL
Informant 9	Prof 7	57	AP	PhD	17	KL
Informant 10	Prof 8	42	AP	PhD	11	KL
Informant 11	Prof 9	55	Prof	PhD	19	KL
Informant 12	Prof 10	53	Prof	PhD	15	KL
Pakistan						
Informant 13	IBP-3	52	Head IBD	MBA	18	Karachi
Informant 14	Prof-11	63	Rsearch Director	PhD	23	ICT
Informant 15	SA-1	55	SA-Teacher	MBA/Mufti	17	Karachi
Informant 16	SA-2	49	SA-Teacher	PhD/Mufti	13	Karachi

Informant 17	SA-3	52	SA-Teacher	Mufti	17	Karachi
Informant 18	SA-4	53	SA-Teacher	Mufti	15	Lahore
Informant 19	SA-5	52	SA-Teacher	PhD/Mufti	17	Karachi
Informant 20	IBP-4	49	Group Head Sh.Audit	M.Phil	11	Lahore
Informant 21	SA-6	51	SA-Teacher	PhD/Mufti	13	Karachi
Informant 22	Prof-12	57	Asso.Prof	PhD	15	Islamabad
Informant 23	SA-7	53	SA-Teacher	Mufti	17	Karachi
Informant 24	Prof-13	65	Prof- VP	PhD	25	Islamabad
Behrain						
Informant 25	SA-8	61	SA	Shaykh	21	Bahrain
Informant 26	SA-9	59	AS	Shaykh		Bahrain
Informant 27	IBP-4	51	Group Head	MBA	13	Bahrain

5.4 Fourth Section: Data Analysis Tools and Techniques and Data Analysis Details

Empirical data was interpreted by using NVivo 1 software. Auto coding technique of NVivo was used at the initial stage keeping in view the uniformity of structured interviews in each interview. The category was defined based on already developed questions in the structured interviews. The data in each category was further mined and various concepts (themes) and their sub-concepts (sub-themes) were identified and interpreted. Figure 11 is the screenshot of NVivo software exhibiting the way themes were coded in the relevant nodes (containers in NVivo to code relevant data against in each theme)

Figure 11: Nodes Hierarchy of Themes Identified

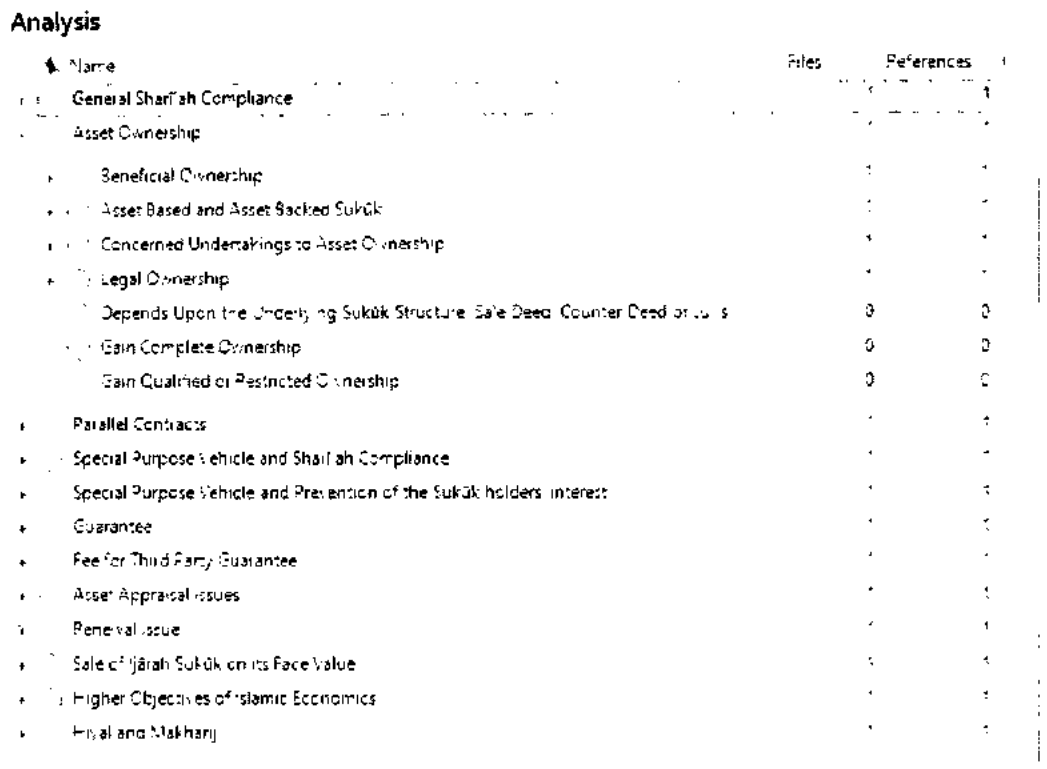

Figure 11

The above nodes hierarchy covers all those research areas which are discussed in the present research work by dividing them into various heads and sub-heads such as the research area # 1 explains the issues related to 'asset ownership' which is consisted of further, sub-sections; such as 'beneficial and legal ownership', 'issues related to special purpose vehicle (SPV) regarding asset-based and asset-backed *ṣukūk'*, 'restrictions and undertakings such as 'purchase undertaking' and 'purchase of *ijārah ṣukūk* on its face value at the time of redemption, 'asset disposal and recourse right', 'asset due diligence and management of the *ṣukūk* asset, etc.

Likewise, research area # 2 is consisting of the concept of 'guarantee', and 'third party guarantee in quasi-sovereign *ijārah ṣukūk* structures' and the 'Sharī'ah

status of 'charging a fee on it' and the research area # 3 is explained the issue of 'combination of contract in parallel contract in sovereign and in quasi-sovereign *ijārah ṣukūk* structures in Pakistani, Bahraini and Malaysian regions and research area # 4 is discussed the issues related to 'GoP *ijārah ṣukūk* based on *bai' al-mu'ajjal* and asset appraisal options such as 'green shoe option' in sovereign and quasi-sovereign *ijārah ṣukūk* structures specifically in Pakistani region.

However, research area # 5 is described the important and argumentative issue of '*ḥiyal and makhārij*' by discoursing the '*maqāṣid* al- Sharī'ah (higher objective of Islamic law of contract) in the context of sovereign and quasi-sovereign ijārah *ṣukūk* structures. Furthermore, this hierarchy also summarized the whole debate of this research work titled, 'Overall Sharī'ah compliance' of sovereign and quasi-sovereign *ijārah ṣukūk* structures in Pakistani, Bahraini and Malaysian jurisdictions.

Now, in the following chapter, the Sharī'ah evaluation of these issues by considering the relevant *ṣukūk* prospectuses with the help of above parent and child nodes (themes) would be elaborated.

Chapter Six: A Critical Review of Associated Issues in Sovereign and Quasi-Sovereign *Ijārah Ṣukūk* Structures

This chapter primarily covers the detailed Sharī'ah analysis in an explanatory way of associated issues such as asset ownership (beneficial and legal ownership), Special purpose vehicle (SPV) with context to asset-based and backed *ṣukūk*, asset recourse right and due diligence conditions, purchase undertakings such as the purchase of *ijārah ṣukūk* on its face value, third party guarantee in quasi-sovereign *ijārah ṣukūk* structures' and the Sharī'ah status of charging a fee on it, the combination of contracts, GoP *ijārah ṣukūk* based *bai' al-mu'ajjal*, *ḥiyal* and *makhārij* concerning higher objectives of Islamic law of contract, and overall Sharī'ah compliance in sovereign and quasi-sovereign *ijārah ṣukūk* structures regarding Pakistani, Bahraini and Malaysian regions by also discussing the offering circulars (prospectuses) with the help of related qualitative data analysis diagrams. Hence, this chapter is divided into five sections (research areas).

Section one is consist of three sub-sections as follows; (i) beneficial and legal ownership, (ii) issues related to SPV regarding asset-based and asset-backed *ṣukūk*, asset disposal right, asset due diligence and management of the *ṣukūk* asset, etc. (iii) restrictions and undertakings such as purchase undertaking and purchase of *ijārah ṣukūk* on its face value at the time of redemption.

Section two describes the concept of guarantee, and third party guarantee in quasi-sovereign *ijārah ṣukūk* structures and the Sharī'ah status of charging a fee on it. Similarly, section three explained the issue of the combination of contracts and parallel

contracts. The section fourth discussed the issues related to GOP *ijārah ṣukūk* based on *bay' al-mu'ajjal* and asset appraisal issues such as green shoe option etc.

While section fifth is divided into three sections; section # (i) is described the important and argumentative issue of *ḥiyal and makhārij* and section # (ii) further discoursing the issue of higher objectives of Islamic law of contract in this context.

First of all, the issue of underlying asset ownership (beneficial and legal) in sovereign and quasi-sovereign *ijārah ṣukūk* structures would be elaborated as follows:

6.1 Asset Ownership

Despite this tremendous growth, there are some serious Sharī'ah issues still arguable among the Sharī'ah scholars who are the point of reference on the Sharī'ah compliance of all activities of Islamic financial sector. Among the argumentative issues in *ṣukūk* structuring is that of ownership. Since *ṣukūk* represents its holder's ownership over a certain underlying asset, it gives rise to a serious question of whether the *ṣukūk* holders do own the underlying asset of the *ṣukūk* i.e. beneficial ownership in *Ijārah ṣukūk* particularly in sovereign and quasi-sovereign *ṣukūk* issuance.

The most cited study of Shaykh Taqi Usmani ﷺ particularized that the ownership must be ensured while making the structures for *ṣukūk* prospectuses such as *"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"* (Usmani, 2007, p. 14).

After that, the Accounting and auditing organizations of Islamic financial institutions (AAOIFI) has passed a resolution with clear instructions regarding this immense issue in *ṣukūk* structures. AAOIFI pronounced that "In line with Sharī'ah

principles, Ṣukūk must represent proportionate ownership by the *ṣukūk* investors in the relevant underlying assets, projects, rights and/or services. Ownership must entail both the rights and obligations of the investors/owners" (Lahsasna & Idris (2008).

Furthermore, Islamic Sharīʿah Research Academy also mentioned that *"ṣukūk have been structured to represent ownership interests in the underlying assets. However, following such defaults such as Ingress ṣukūk, there have been much confusion in the market regarding the concept of 'ownership of the assets and the respective rights attributed to ṣukūk holders."* (ISRA, 2017, p. 310)

Section one is consisting of the following segments: first, ownership, its major types, and beneficial ownership focusing on its characteristics in Sharīʿah as well as in conventional laws (common law and civil law). Second, an exploratory Sharīʿah analysis would be done by examining the classical and current literature on beneficial ownership. Third, relevant qualitative (interview-based) data analysis diagrams concerning associated Sharīʿah issues in sovereign and quasi-sovereign *ijārah ṣukūk* would be examined by considering the concerned prospectuses and offering documents (sale/counter deed), etc. Fourth, concluding remarks and findings of this study would be particularized.

6.1.1 Ownership from the Sharīʿah perspective

Ibn Manzoor, (1956); and Fairuzabadi, (1953) both are defining the literary meanings of *milkiyyah* (ownership) almost in the same sense by using different words:

"احتواء الشى والقدرة على الاستبداد به" / "احتواه قادرا على الاستبداد به"

Ownership is referring to the state of containing a thing, and the ability to dominate and dispose of it.

6.1.1.1 Ownership in the view of classical Muslim jurists

The classical literature of Islamic economics and finance has given several similar definitions of ownership (al-milkiyyah) with a little bit of variation. The following lines have a remote look at some selected but important definitions of ownership as articulated by the jurists of various Fiqhi schools of thought in the light of Islamic commercial jurisprudence.

According to *Ḥ*anfi Jurists:

Imam Kasani (1989) is a prominent *ḥ*anfi scholar stated in this regard

الملك هو الا ختصاص بالمحل في حق الصرف

Ownership is a specific right for the owner over the asset to dispose of the property in an absolute manner.

According to Imam Ibn Nujaim (1968):

الملك هو عبارة عن القدرة والاستيلاء على التصرف في المال الا لمانع

Ownership is a legal ability (or authority) given primarily to a person that allows him or her to dispose of a property except if there is a legal impediment.

According to *majallah al-ahkam al-adliyah* (/125, 1989)

الملك ما ملكه الإنسان سواء كان أعيانا أو منافع

Ownership means anything owned by a human being, be it a specified property ('ayn), or usufruct of a property (*manfa'ah*).

According to Mālikī jurist:

Imam Al-Qarafi (1998) a prominent scholar of the Mālikī school of thought views it as

انه حكم شرعى في العين او المنفعة يقتضي تمكن من يضاف اليه من انتفاعه بالمملوك

والعوض عنه من حيث هو كذالك

It means ownership is a legal ruling (i.e. authority) over an asset or usufruct given to someone that allows him to benefit the owned item and to accept compensation of it as well.

According to Shāfi'ī jurists:

Imam Al-Subki (1991) is a well-known Shafi jurist who elaborated in this context that

هو حكم شرعى يقدر في عين او منفعة يقتضى تمكن من ينسب اليه من انتفاعه

Ownership is a legal ruling over an asset or usufruct given to someone that allows him to benefit from it and to accept compensation of it as well".

Imam Zrakshi (1989) mentioned in this regard that

هو القدرة على التصرفات التى لا تتعلق بها تبعة ولا غرامة دنيا ولا اخرة

Ownership is a legal ability (or authority) given primarily to a person that allows him or her to dispose of a property that is not related to any liability or penalty neither in this world nor in the hereafter.

According to Ḥanbalī jurist:

Imam Ibn Taymiyyah (2002) is an eminent Hambli scholar who defines it as

هو القدرة الشرعية على التصرف في الرقبه

Ownership is a legal ability justifying the right of disposal of the asset.

It may be inferred by the above-mentioned jurists' definitions that the relation between the person and property is governed by milkiyyah. The owner is entitled to a variety of exclusive rights. For instance, the right to get benefitted from a property, the right to get compensation in case the contravention arises, and the right of asset disposal. However, the cases, that are not legally acceptable are exempted from this. Ownership matters are always directed by the related provision of law and are further determined by the owner's legal capacity. In a nutshell, keeping in view the different aspects of milkiyyah. Namely, these are (i) authority, (ii) scope, (iii) subject matter, (iv) restrictions, and (v) consequences of ownership.

In the light of the above definitions of ownership by classical Muslim jurists, one may be stated that technically, ownership can be understood as a legal nature of something that has a consequent effect, a relationship between an owner and the owned property, and looking at its legal effects on the owned property. It is noteworthy that here the details regarding limits and boundaries (if and buts) of the above-mentioned definitions will not be discussed because it may differ for nature of owned assets, type of owner, and the particular prevailing social circumstances of any society, etc. which is beyond the subject of the current study.

6.1.1.2 Ownership in the view of Contemporary Muslim scholars

In the following lines, ownership will be written down in the views of some prominent contemporary scholars such as; Shaykh Abu Zohra رحمه الله (1976) stated in this context that

هوالعلاقة التى اقرها الشرع بين الانسان والمال وجعله مختصابه بحيث يتمكن الانتفاع به بكل الطرق السائغة له شرعا و في الحدود التى بينها الشرع الحكيم

It means ownership is a legal ruling (authority) given to someone over an asset that allows him exclusively to benefit the owned item by using all its inclusive and exclusive means which are given to anyone by Islamic Sharī'ah.

Shaykh Ahmed Mustafa Zarqa (1998) explained it as

الملك هو اختصاص حاجزشرعا يسوغ صاحبه التصرف الا لمانع

Ownership is a legal exclusive (*ikhtisas*) right for the owner to dispose of the property except if there is a legal impediment.

Shaykh Wahba Al-Zuhayli (1985) mentioned in this regard

اختصاص بالشى يمنع الغيرمنه ويمكن صاحبه من التصرف فيه ابتداء الا لمانع شرعى

Ownership is 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.

From the above whole discussion, it may be summarized that classical Muslim jurists and contemporary scholars have given several similar definitions of ownership with a little bit of variation but all these are in their own accord and harmony although differ in their structure. The reason is that it is a difference of words between clarity and

ambiguity, exclusive and inclusiveness but the core theme is the same by all, that is ownership is a legal association between a human and owned property (Abu Zohra; 1987; Zohayli, 1985; Siddiqi; 1985; and Fahad, 2003).

It is worth mentioning that Islamic law sometimes imposes some restrictions on the owner's right to asset disposal and management, in which case the owner may be unable to exercise full ownership rights. This is to address special situations such as in the case of an interdicted individual, a minor, or an incapacitated person. Ownership can still exist despite the restriction enjoyment is temporarily and/or circumstantially incomplete.

Perhaps in recognition of this dichotomy between the general definition of ownership and possible restrictions on its actual definition of enjoyment in specific circumstances, scholars tend to classify ownership into two categories: Complete/absolute ownership (*milk al-tamm*) and incomplete/partial ownership (*milk al-naqis*). For example, according to Al- Abbadi (1974: 274), Abu Zahrah (1996: 67-68), and Nazih Hammad (2008: 441), the concept of ownership may be categorized as per the extent of ownership rights, namely to say complete and incomplete ownership. A complete ownership is "the ownership that covers both corpus of property as well as its usufructs" (Abu Zahrah, 1996:67; Hammad, 2008; 441). It enables one to dispose of an asset by sale or by gift. On the other hand, incomplete ownership can be defined as the ownership of either the property but not of its usufruct, or vice versa. It gives the following: (i) title ownership right only to the asset (*milkiyyah al-raqabah*) without the ability to dispose of; or (ii) the ownership of benefit/usufruct (*milkiyyah al-manfa'ah*);

or (iii) the ownership right to personal benefit (*milkiyyah al-intifā'* (Abu Zohra, 1987/96-68; Zohayli, 1985; ISRA, 2015).

In the light of incomplete ownership, it may be stated that Islamic law allows segregation of ownership in certain circumstances as a source to fulfill the needs of human beings. Hence, Islamic law allows for segregation of ownership in certain circumstances as a means to meet the needs of people. In this regard, we can see at least two instances from classical Fiqh where one asset may be owned by two different owners, each with a specific set of rights. The first instance is the recognition of duality in ownership in the discussion of the jurists on complete and incomplete ownership.

The second instance is in the concept and application of *waqf* (endowment). *Waqf* clearly illustrates that an ownership right can be split. Although the jurists have differences of view on the issue of whether the settlor (*wāqif*) in waqf loses his ownership of the waqf assets or not, their views imply that the rights of ownership over the waqf asset are split between two different entities. On the one hand, *raqabah* is owned by God (as per the view of Hanbali and Shāfi'ī scholars), or by the settlor (according to Ḥanafī and Māliki Schools). On the other hand, the right to enjoyment (*haqq al-intifā'*) belongs to the waqf beneficiaries (Kahf, 2000).

Now in the following lines, the legal status of beneficial ownership will be discussed to make a clear understanding in this regard.

6.1.2 Ownership from the legal point of view

In the beginning, both ownership and beneficiary is being defined separately then the concept of beneficial ownership would be analyzed by elaborating its legal aspect.

Black's law dictionary (2004, p. 3503-4) defines ownership as *"The bundle of rights allowing one to use, manage, and enjoy the property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control"*. The Ownership rights are general, permanent, and heritable. *"Possession is the de facto exercise of a claim; ownership is the de jure recognition of one.* A thing is owned by me when my claim to it is maintained by the will of the state as expressed in the law; it is possessed by me when my claim to it is maintained by my own self-assertive will. "Ownership is the guarantee of the law; possession is the guarantee of the facts. It is well to have both forms if possible, and indeed they normally co-exist."

Nonetheless, the main thing in the sight of law is, right to possess regardless one may or May not have the actual or constructive control. ii) Ownership does not always mean absolute dominion; it may be in the form of partial ownership in some scenarios.

6.1.2.1 Beneficiary from a legal point of view

It would be more helpful to elaborate on the beneficiary after discussing the ownership in the legal regime as both ownership and beneficiary are the immutable component for beneficial ownership. Hence: "a beneficiary is a person for whose benefit property is held in trust; esp., one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.), or to receive something

as a result of a legal arrangement or instrument. i) Person to whom another is in a fiduciary relation, whether the relationship is one of agency, guardianship, or trust. ii) A person who is initially entitled to enforce a promise, whether that person is the promisee or a third party" (Black's law dictionary, 2004, p. 468).

After taking a bird view of ownership and beneficiary in the legal regime now it would be better to discuss the concept of 'beneficial ownership in the sight of conventional law.

6.1.2.2 Beneficial ownership from a legal perspective

The term beneficial ownership has its roots in the English common law, whereby the dichotomy is recognized for legal ownership and beneficial ownership. Other terminologies that have been used interchangeably with the term 'beneficial ownership' are "beneficial interest", "beneficial title", "equitable ownership" and "equitable interest". Beneficial ownership or interest has been defined in contemporary legal literature either in a general manner or in a more specific context of trust arrangements or investment in securities (ISRA, 2015).

Black's law dictionary (2004, p. 3504) defines beneficial ownership as a "beneficiary's interest in trust property, also termed equitable ownership." The same dictionary further defines a beneficial owner in the context of investment in securities as 'the actual owner of the securities and the rightful recipient of the benefits accorded; the beneficial owner is often different from the titleholder (generally a financial institution holding the securities on the behalf on the client)'. Hence, it is stated that "A corporate shareholder's power to buy or sell the shares, though the shareholder is not registered on the corporation's books as the owner".

As per the dictionary of Cornell University, (2006) beneficial ownership is said to be "*a trust arrangement whereby the beneficial owner of a security has a power to vote on and influence decision regarding that security, and receive the benefits offered by the security, though in street name the security may be held someone other than the true owner, such as a broker for safety or convenience reasons*"

This is thus clear that the beneficial owner is the person who is known as the owner of the property in the equity no matter if the legal title relates to some other person. In securities law, the term refers to someone who is a shareholder even though a broker may hold legal title to the shares"

Based on these definitions, this is made evident that in the sight of the law, a beneficial owner is believed to be the real owner who is entitled to enjoy the benefits of the assets, although he does not have legal title to the assets. In the business or commercial context, the term "beneficial owner has been defined by Chaiban and Kanh (2004) as follows:

الشخص أو المنشأة الذي يتمتع بحق الانتفاع بورقة مالية أو عقار أو ممتلكات أخرى سواء كان أو

لم يكن هو المالك الذي يظهر اسمه في سجل أو صك الملكية

> The (beneficial owner) is a person or institution that enjoys the beneficial right in security, real estate, or other assets, whether or not he is the owner whose name appears in the register or certificate of ownership.

In the legal context, the term beneficial ownership or its other synonyms or related terms has been defined in contemporary legal literature either in a general

manner or in a more specific context of trust arrangements and/or investment in securities. Black law Dictionary (2004, para. 1) for example defines " beneficial interest" generally as "profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control."

The following lines summarize the differences between beneficial ownership and ownership of the legal title.

Beneficial Ownership vs. Legal Ownership from Legal Point of View

Beneficial Ownership

1. A beneficial owner is a person who is known as the owner of the property in the equity no matter if the legal title relates to some other person. Interchangeably used with other terminologies, such as: "beneficial interest", "beneficial title", "equitable ownership", and "equitable interest".
2. The beneficial owner enjoys the benefits from the asset.

Legal Ownership

1. The legal title owner is someone who is legally registered as the title owner of the asset whose ownership is evidenced by registration or record.
2. It can also be referred to as a registered or record owner.
3. Poorest can be included by integrating *Zakāh* with microfinancing

It would be more beneficial to have a bird view of beneficial ownership concerning Pakistani, Bahraini and Malaysian laws as the current study is related to these three jurisdictions. Needless, to discuss its actual position in contemporary laws is

not much relevant to our topic, however, to take a clear and better understanding even we take a remote look. Hence in the following lines, this crucial issue would be discoursed to above mentioned three legal regimes.

6.1.2.3 Beneficial ownership as per Pakistani, Bahraini, and Malaysian laws

6.1.2.3.1 Pakistani Law

It should be clarified that in the Pakistani regime English Law is dominant on institutional and state-level although some other institutions are working independently i.e. Islamic Ideology Council, Federal Sharī'ah Court, and Sharī'ah Appellant Bench, etc. to give their judgments as per Sharī'ah Rulings.

The concept of beneficial ownership is somehow remained disputed in the legal fraternity being positive or negative. Although its application relates to different peculiar circumstances, however, this is an admitted position that must have some legal backing. It can be easily observed that this concept is lending in provisions of "Trust Law 1882", "Property Law 1882", "Public Debt Act 1944", "Companies Ordinance 1984", "Asset-Backed Securities Act 1999", "Asset-Backed Securities Regulations by State Bank of Pakistan (SBP) 2004", "Companies Act 2017", "Benami Act 2017", "Ṣukūk regulation (SRO) 2015 and 2017 by Securities Exchange Commission of Pakistan (SECP)" etc. All those are related to moveable (tangible or intangible) or immovable property.

In short, the above-mentioned Pakistani laws might be categorized into two categories. The first type is related to reporting and disclosure of beneficial ownership such as "companies ordinance1984", "companies act 2017", "securities act 2015" and "Benami act 2017", these four laws discussed beneficial ownership in this regard.

Furthermore, the former three laws just elaborated beneficial ownership/ interest while the last one (Benami act 2017) also defined and explained the beneficial ownership (Zaidi, 2017).

The second type is related to the transfer of beneficial ownership for trust entities, immovable property, and other relevant issues in this context. Consequently, there are three laws as "transfer of property act 1882", "trust act 1882" and "companies (asset-backed securitization) rules 1999" which are discussing and explain this matter.

The reading of relevant provisions very clearly suggests to the reader the proper place of a beneficial owner in the sense of positive or negative and sometimes, it seems that the legislature has intentionally avoided the word criminal to use for a beneficial owner. Having said that in the corporate sector mostly the security holders are termed as the beneficial owner. Not being *Benamidar* or frontman rather the holder of the benefits of the said security. In other words, it is not wrong to say that a normally beneficial owner symbolizes an actual owner in different scenarios.

It is a noteworthy point that the above second kind is related to the issue of beneficial ownership in *ṣukūk* issuance. However, normally in Pakistan, these sovereign Ṣukūk are legally backed by the Public Debt Act 1944. However, this act only discusses the issue of borrowing on the governmental level to principles of conventional finance rather than Islamic finance. Thus, details regarding the issue of beneficial ownership, etc. are not mentioned here. However, with the help of other supportive documents such as Ṣukūk prospectuses, etc. the Sharī'ah status of any issuance can be analyzed. However, the detailed and thorough analysis in this context would be discussed in the section on relevant Ṣukūk prospectus issuance.

6.1.2.3.2 Malaysian law

As per the Pakistani legal regime, the Malaysian legal regime is also led by English Law. However, various bodies are working independently to harmonize and standardize the Islamic and conventional laws such as Law Harmonization Committee, etc. established by (BNM) Bank Negara Malaysia. Three main legal provisions are existing in Malaysia that supervises and regulate commercial buying and selling. To name, these are "National Land Code 1965 (NLC)", "Contracts Act 1950 (CA)" and "Law of Equity".

Here is a note worth pointing that is; Torrens system is a registration system that governs NLC (National Land Code 1965). According to NLC, the transference of ownership is supposed to be completed through the registration process at the land office of the area. Under the National Land Code 1965 (NLC), the transfer of ownership of land would be completely done via registration at the Land Office. Where as for Sabah and Sarawak, a memorandum of transfer can be enough evidence. Registration is not required to transfer ownership in the case of Sabah and Sarawak. Essentially, NLC emphasizes the aspect of land registration of title in Malaysia. Regarding this, the answer to this is the use of the law of equity as NLC does not recognize the concept of beneficial ownership.

However, equity may be applied to NLC especially when it comes to commercial law. When the legal title has not been transferred to the new owner (i.e. the purchaser of the land), then what is the status of the beneficial owner from the legal perspective?

Regarding this scenario, the answer lies in the concept of bare trust. It is narrated in the literature that bare trust can be taken as an applicable concept (George, 1999). The theme of bare trust has its roots in the equity ruling. Technically speaking, the bare concept originates when a sale contract is finalized before delivery of possession or without transferring the formal title. Therefore, in doing so, the vendor acts as a trustee of equity, and being a trustee on behalf of the purchaser it holds the equity, till the time, the formal title is not transferred to the purchaser of the equity (Rashid & Hingun, 1999).

According to Ghani et. al. (2015), here the purchaser becomes the beneficiary owner (either via payment of a full price or via transferring instrument), whereas the vendor acts as a bare trustee until the time title got registered. s

It is also narrated that, the main intent behind the usage of the concept "Bare Trust" is to differentiate between the beneficial legal owner of the property and the other non-beneficial owner. Although both the owners are legal owner. The only difference that exists between these two is that the former one can enjoy the benefit of the property, whereas the latter seemed not to be. Legally, according to common law, ownership is supposed to be divisible among various people. Therefrom, these above-mentioned terms arouse. Given that, it is clear that the term beneficial ownership is used in the equity law when it is made linked to equitable ownership unlike in the case of legal ownership.

Commonly speaking, the concept of legal ownership is similar to the concept of the trustee in trust law. To say otherwise, it is a fact that the beneficial owner despite the missing legal title generally owns the major ownership right and attributes.

6.1.2.3.3 Bahraini law

Like most Arab Muslim countries, the Kingdom of Bahrain is also dominantly governed by Civil Law. Therefore, unlike Common law, Civil law does not have provisions for a trust that forms the basis for the introduction of beneficial ownership in Common and English law (Mikail, 2016). However, to overcome this situation, they have the concept of "concession rights" (*haqooq al imtiyaz*). It has taken some form of beneficial ownership. However, in English law, beneficial ownership means "all risk and reward except title".

Furthermore, the Bahraini kingdom also introduced some rules regarding trust entities such as Mohammed Ayman Al Tajer (Director, Financial Institutions Supervision, at the CBB) stated that

> "Many of the region's wealthy, whether individuals or business groups are sophisticated investors, who are willing to embrace innovative products and wealth management solutions utilizing the trust as a structure. The creation of a trust, in a well-regulated environment such as Bahrain, will broaden the available options for the transfer of business, property or other assets from one generation to another."
>
> Dr. Graham Journeaux (Chairman and Chief Operating Officer of Bahrain-based Ohad Trusts) also said trust arrangements can be particularly useful for corporates and large conglomerates in the Middle East region. "The trust vehicle can provide an additional comfort level for financial instruments, such as *ṣukūk* (Islamic bonds), mutual funds, and securitization structures, by segregating the assets from the issuer's counter-party risks" (http://www.cbb.gov).

In short, although Civil law does not have provisions for a trust that forms the basis for the introduction of beneficial ownership trust arrangements can be particularly useful for corporates and large conglomerates in the Middle East region. In this way, the issue of beneficial ownership can be managed and addressed in various financial instruments particularly in sovereign *ṣukūk* issuance.

It is stated in the light of the above discussion regarding Pakistani, Malaysian, and Bahraini legal frameworks and regimes that unlike Common law, Civil law does not have provisions for the trust that forms the basis for the introduction of beneficial ownership in Common and English law. Furthermore, as per common law, the beneficial owner generally has the most ownership attributes, although he does not have the legal title in certain scenarios. After the bird view of three concerned legal regimes, now in the coming section, the status of beneficial ownership as per Sharī'ah rules would be discussed.

6.1.3 Beneficial ownership from Sharī'ah perspective

Adawiah et. al (2015); ISRA (2015) identified that in this recent era, the issue of separation between the legal title and beneficial ownership has been examined either directly or indirectly by many leading Islamic finance bodies and institutions such as OIC Islamic Fiqh Academy (OIC-IIFA), AAOIFI, Sharī'ah Advisory Council of Bank Negara Malaysia (SAC-BNM) and Sharī'ah Committee of Rajhi Bank in the Kingdom of Saudia Arabia (KSA). The following lines would be taken a bird view in this regard.

As per Islamic Financial Services Board (IFSB), a mandatory feature of ownership is that the ownership right must be transferred from the issuer to the original

investor. Also according to this, the registration title may necessarily not be among other ownership rights of the property. This transference of ownership rights may merely be just the combination of some ownership rights, for instance, allowing the purchaser to take the place of the originator and to perform duties on his behalf, related to property and other liabilities related to the asset. Some other rights that may be granted to the purchaser include possession right as in case of default and reach to the physical asset (ISRA, 2015).

According to OIC Fiqh Academy, legal and beneficial ownership must be scrutinized according to Sharī'ah guidelines and the same process must be used for its recognition. Regarding this, the Sharī'ah Advisory Council of Bank Negara Malaysia has the same stance as OIC Fiqh Academy. Although, the above discussion made it very evident that beneficial ownership bounds the buyer to all the attached liabilities and rights of the bought property (BNM, 2010, p. 6).

AAOIFI (2010) mentioned in para 4/1 with the head of 'characteristics of investment *ṣukūk*' that, *"Investment ṣukūk are certificate of equal value issued in the name of the owner or bearer to establish the claim of the certificate owner over the financial rights and obligations represented by the certificate."*

Similarly, it is also mentioned in the standard of *murābaḥah* to purchase order para (8/5/4), *"It is permissible for the bank to defer registration of the title in the client's name as security for payment of the deferred price. The bank must however provide a document that establishes the ownership of the client over the goods."*

In both statements, AAOIFI Sharī'ah Board has acknowledged beneficial ownership in an implied and implicit manner that both legal and beneficial ownership are recognized from the Sharī'ah perspective.

SAC of BNM (2010, p. 6) more specifically, discussed the beneficial ownership in the context of *Ijārah* assets. The SAC, in its 29th meeting dated 25 September 2002, resolved, *"That the lessor is the owner of the leased asset although his name is not registered in the asset's title."*

The resolution was based on the Sharī'ah recognition of both legal title and beneficial ownership. The SAC recognized that in products based on *ijārah* the lessor has the beneficial ownership although the asset is not registered under his name. The council further stated that *"Such beneficial ownership may be proved through the documentation of the ijārah agreement concluded between the lessor and the lessee and presumably the purchase agreement between the seller and lessor/purchaser"* (Adawiah et al., 2015).

It should be noted that the resolutions that recognized ownership come with a clear condition that the beneficial ownership must result in all rights and liabilities attached to the purchase being attributed to the buyers, albeit short of the legal title.

In contrast, some scholars have the opinion that the concept of beneficial ownership is not complying with Sharī'ah parameters by adding such conditions which negate the essence of real ownership. Hussain Hamid Hassān (n.d.) deemed beneficial ownership to be impermissible because an owner must have complete ownership of an asset to have the right of disposal and to justify his/her earnings from it. Al-Amine (2011, p.1 19-20) is of the view that beneficial ownership violates the concept of

ownership in Islamic law because "ownership in Islamic law is beneficial as well as legal and there is no way of separating the two" (Adawiah et al., 2015, p. 121).

Similarly, Al-Suwailem (2015) stated (while discussing the asset ownership) that;

> *"This leads to complex legal procedures for ṣukūk issuance to avoid the "true ownership" of such assets. Hence, ṣukūk were transformed from being "asset-backed," i.e., representing the true and legal ownership of the underlying assets, to being "asset-based," whereby ṣukūk holders do not fully and legally own the underlying asset...This violates the basic Sharīʿah requirements of a valid sale transaction. As a result, such ṣukūk are not fundamentally different from conventional bonds. They are explicitly described in the ṣukūk documents as "unsecured". This contradicts the claim of "purchase" and "ownership" of the underlying assets.*

Hence, Al-Suwailem also considered that the separation between the legal and beneficial ownership is against the basic Sharīʿah requirements of a valid sale transaction.

Based on the above-cited studies one may argue that still there are serious concerns among the Scholars about the legitimacy of beneficial ownership concerning *ṣukūk* structures and there is an immense need to analyze this important issue. Therefore, in the following lines, this crucial issue would be elaborated on with a further explanation. For sovereign and quasi-sovereign *ijārah ṣukūk* structures, the issues related to beneficial ownership might be categorized into three heads such as i) Sharīʿah issues, ii) compliance of accounting and auditing issues, and iii) governing and

administrative issues. Now in the following lines, these associated issues would be discussed one by one.

6.2 Application of Beneficial and Legal Ownership in Sovereign and Quasi-Sovereign *Ijārah* Ṣukūk and its Sharī'ah Status

Customarily, ownership is discussed by Muslim jurists in the context of transferring *Haq al tasuruf al- hurat al tasuruf*, (right to dispose-off) *manfa'ah* (right to take benefits) and liabilities, etc. to the other parties. While, in the last two centuries the ownership is discussed in vast and broader perspective eventually different types of ownership has been evolved such as individual ownership, public ownership, legal entity ownership, Benami property, etc. In majority cases, in sovereign and quasi-sovereign *ṣukūk* issuance, due to governmental, legal, and system constraints concerning strategic nature assets, it becomes much difficult to transfer the ownership in its genuine classical shape and context. Hence, scholars have to come with a solution via introducing this type of structure which meats a certain level of Sharī'ah compliance in this regard.

6.2.1 Sharī'ah Issues

Therefore, there is an extra need to discuss whether ownership in Sharī'ah and conventional law has the same meaning and effects or has a different view.

The legal and Sharī'ah issues regarding asset ownership (beneficial and legal) might be elaborated for two aspects; (a) legal status of ownership as per Sharī'ah and (b) Sharī'ah (*Fqhi)* status of ownership in the context of *ḥurīat al-taṣarruf*

(right to dispose-off the asset). *ḥurīat al-taṣarruf*

The next paragraph would be particularized the legal status of ownership as per Sharī'ah with the help of appropriate examples.

It should be noted that in Sharī'ah there is no difference between legal and beneficial ownership. Ownership is ownership; the origin of beneficial ownership is solitary English law means it is just a type of legal ownership. Hence, to clarify the Sharī'ah status of any ownership, it should be tested based on Islamic jurisprudence. If it fills the *ahkam* (commands) for *milkiyah* and *tamlikat* (ownership) or in another way the *shrout* (conditions) related to the sehat e bai (validity of a sale transaction) and *nafaz* e bai (consequences of a sale transaction) are fulfilled, then the transfer of ownership is a compulsory element for the sale contract. As it has been discussed earlier that beneficial and legal ownership etc. terminologies are being created and found out only in the legal regime rather than in the Islamic Sharī'ah regime.

Furthermore, in this recent era also to attain the legal title as per law is not compulsory in every case; normally, it is required in the case (transaction) of mega projects or heavy size assets. Ultimately, it can be stated that such types of conditions which are imposed by the law of land regarding some special cases, how may affect the Sharī'ah legitimacy in a contract in a general manner? The subsequent lines give two relevant examples in this context as follows:

(i) Registration of marriage is part of *nikah* (marriage) or an *intizami* (administrative) or legal matter? In other words, this shart (condition) is for *musbit lil hukam* (to prove a matter) or *muzhir lil hukam* (to disclose a matter). The clarification of this matter is very important because now the question is raised that whether marriage without registration (although here Nikah has been taken place in the presence of

witnesses) is valid in the sense of Sharī'ah or not. If the answer is 'not' then ultimately, the status of living this couple as husband and wife will remain unlawful as per Sharī'ah. Consequently, if we consider this condition is compulsory in the law of land only, of any territory and not compulsory as per Sharī'ah rulings. It means the matter of registration of a marriage is just for disclosing the matter in a legal paradigm of any territory. In another way, it can be stated that the condition of registration is only for the Izhar e Aqd (to disclose the matter), and not compulsory for the Ineqad al- *'aqd* (to prove the matter).

Furthermore, no one ever adopted this view that registration is compulsory regarding this matter, although it would be considered as a violation of the law according to the legal point of view.

(ii) There is another case (predominantly in Pakistan and other Muslim countries such as Saudi Arabia, Egypt, and gulf countries) regarding the ownership to sell the motorcycle/automobile based on an open letter without registration. According to law, the first buyer is considered the owner of that motorcycle, furthermore, when the last purchaser goes to the regulator and presents the ownership evidence/documents in front of them, they transfer the ownership to this last custodian of an open letter. Although this type of matter is being banned and discouraged by the regulator and recommended to do this via proper registration but still practiced by the public, ultimately these sale and purchase transactions are *nafiz/munaqid* and have its related commands i.e. inheritance and *Zakāh*, etc. in the sight of Sharī'ah. Therefore, the boundaries of both Sharī'ah and conventional laws must be considered carefully to find out the factual result in any prevailing scenario.

In the light of the above segment, one may conclude that retaining the legal title is a need-based phenomenon, not a mandatory requirement as per Sharī'ah. In another way, legal ownership is not the authentic representation for the actual ownership in every case, because sometimes a person has a legal title of a subject but he does not consider the actual owner and the same in vice versa scenarios, in the sight of Sharī'ah. It should be clear that fatwa sometimes differentiates the actual and legal ownership.

Furthermore, AAOIFI's Sharī'ah standard related to *murābaḥah* to purchase order para (8/5/4) has also discussed as mentioned earlier, this object that if there is beneficial ownership and not legal ownership or legal ownership is not representing the complete ownership attributes then there should be a counter deed which represents the actual ownership for the Ṣukūk holders (AAIOIF, 2010). As this deed is a legal document, hence, it is enough to present sale consequences that are based on this transaction. However, if there is no difference between legal and beneficial ownership then there is no need for this type of counter deed.

The following lines also summarize and strengthen the above view regarding the status of legal ownership in the light of the respondent's view with the help of related parent and child themes and nodes.

Theme-I: Legal Ownership

Legal Ownership (LO) was identified as the Fifth theme under the frame of 'Sharī'ah Evaluation of Contemporary Sovereign and Quasi-Sovereign *Ijārah* Ṣukūk'.

Figure 12: NVivo Project map of the parent node of the sub-theme "Legal Ownership" (LO) and relevant child nodes

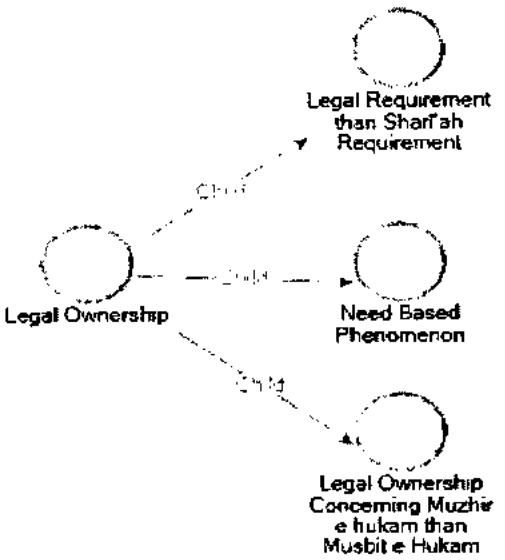

Figure 12

The first dimension under the theme *of Legal Ownership (LO)* was *Legal Requirement than Sharī'ah Requirement (LRtSR). It was shown based on the respondent's views.* For example, informant-11, 13, and 24 have the same in this regard.

The second dimension under the theme *of Legal Ownership (LO)* was the Need-Based Phenomenon (NBP). It was revealed that legal ownership is a need-based phenomenon and not a compulsory thing in every situation. Normally this need is accrued in the case of mega projects and big dealings. Therefore, people are doing their daily routine financial matters without registering them. The same case is the context of sovereigns there is no need to register such Ṣukūk in the department of land registry etc. For example, informant-08 has the same view in this context.

The third dimension under the theme of *Legal Ownership (LO)* was *Legal Ownership Concerning Muzhir lil-hukam than Musbit lil-hukam (MH-MH).* It means that legal ownership is used to demonstrate the legal status of anything while the actual

status is judged and proved only based on underlying contract and Ṣukūk structure, which is the domain of Sharī'ah. The conditions which are imposed by the law of land cannot affect the legitimacy of Sharī'ah in a contract. With the help of the two following examples, it can be examined and understood in a better way i.e. registration of marriage is the part of *Nikah* or an *intizami* (administrative) or legal matter)? In other words, this condition (*Shart*) is for *musbit lil hukam* or *muzhir lil hukam*? For example, informant-19 has the same view in this context.

Now in the coming lines, the second aspect; Sharī'ah (*Fqhi)* status of ownership in the context of *ḥurīat al-taṣarruf* (right to dispose-off the asset) would be argued.

In the classical literature, the concept of *ḥurīat al-taṣarruf* with respect to ownership rights is being discussed by Sharī'ah scholars repeatedly. What is meant by this? Is it *mutlaq* (absolute) or *muqyyad* (restricted)? It means that an owner would have absolute ownership rights or it might be restricted in certain cases and scenarios?

In the following paragraph, this matter would be elaborated on with the help of three relevant examples. **First,** person A buys a flat in a housing society that has a certain layout design. Can he change the outer or inner shape and theme of that owned flat as per his wish? He cannot change the basic structure of this type of building. **Second**, everyone is bound to follow the restrictions rules to build any building up to certain levels without the prior approval of concerned authorities. **Third**, a government can put the condition on the owner of the oil reservoirs land that you have to sell the oil to the government at a certain price and cannot sell to any third party.

After discussing the legal and *Fqhi* status of ownership in the context of ownership rights (*ḥurīat al-taṣarruf)*, it might be clear that the concept of restricted or

qualified ownership is practically acceptable as per Urf in the presence of restrictions by the provincial or federal level regulatory institutions, even though by the individuals from common public. No one said that this is unlawful and unjustified and against the rights of ownership. Furthermore, it demonstrates that the meaning of *ḥurīat al-taṣarruf* is not absolute while it might be restricted in certain scenarios as per the need of *urf* (prevailing custom) and *maṣlaḥah* (public interest), etc. Therefore, in the light of restricted or qualified ownership, it might be concluded that the concept of beneficial ownership is not against the essence and spirit of ownership as per Sharī'ah rulings.

6.2.2 Compliance of accounting and Auditing issues

The representation of Ṣukūk transactions as off or on the balance sheet is a famous issue in this regard. A question can be put and raised that to record the sold item as on balance sheet is compulsory by Sharī'ah? In other words, bookkeeping as per the counter/sale deed of Ṣukūk prospectuses is compulsory? The answer is No. To keep the sold item in books as per counter deed or accounting standard is just an accounting, administrative, or recommended matter and not a mandatory condition by Sharī'ah.

However, it is recommended that there should be coherence between accounting standards and Sharī'ah principles but it does not mean that once a sale has been executed through counter or sale deed, it might be nullified due to any discrepancy in accounting treatment. No doubt, true reflection of any financial transaction into books of accounts is necessary by conventional accounting standards but it should be understood that due to this type of discrepancies or misrepresentation the effects of a true sale cannot be nullified.

It is worth mentioning that the lawyers, accountants, and credit rating agencies present their view as per their exposure, while the Sharī'ah scholars have to bound to discuss the matters in the context of *halal* (legitimate) and *haram* (illegitimate) rather than good, best or acceptable practices of the market. In short, this type of beneficial ownership contract is valid as per Sharī'ah. Someone might have disagreed with this view but it is a fact that this matter cannot be nullified as per Sharī'ah.

6.2.3 Governing and legal issues

To discuss the beneficial ownership concerning governance and administrative constraints is also an important issue. However, a little bit of literature has been written in this regard. Sometimes, transferring the assets from concerned authorities to the Special Purpose Vehicle (SPV) seemed a problematic task among the associated ministries for sovereign and quasi-sovereign *ṣukūk* issuance.

Such as the Government of Pakistan (GoP) *ijārah* M3 *ṣukūk* with the underlying assets of National Highway Authority (NHA) land are to be issued. By law, this type of strategic asset cannot be moved from the balance sheet of the originator (NHA) to the *ṣukūk* holders. Consequently, due to this legal constraint, the *ṣukūk* prospectus statements start normally in this way, such as 'under the guaranteed provision, etc. (Relevant *ṣukūk* prospectuses statements should be added here)

This means by way forward these assets are transferred to the concerned department. Furthermore, a concerned authority such as the ministry of telecommunication (NHA) is not enthusiastic and take an interest to accommodate such type of accounting treatments due to legal and practical constraints.

There might be a solution in this regard that there is a need to create a specific SPV regarding all Pakistan strategic assets by the way of legal fencing and then all the sensitive assets would be legally parked in it. In this way, the asset would be possibly moved from the obligor balance sheet to the SPV but remains legally owned by the government of Pakistan as SPV is wholly owned by the government as mentioned in the offering circular statement (Relevant *ṣukūk* prospectuses statements should be added here) and ownership will be held by SPV as a trustee in the interest of *ṣukūk* holders. Ultimately, here the government has retained the first priory right to purchase this asset at the time of maturity. This argument can be further clarified with help of an example.

If a person has shares of a company, he has the right to claim his proportional amount against these shares. But he cannot claim to sell a specific asset against his proportionate in the total asset of that company, as the concept of going concerned in joint-stock companies' veto this practice. The same thing is in the context of ownership in sovereign or quasi-sovereign *ṣukūk* can be recognized concerning the retention of the priority right from the government as the sovereigns are governed and ruled under the perspective of going concerned. Moreover, a separate legal trust entity can be incorporated for the whole country reservoirs e.g. oil, coil, and gas, etc. rather than to create various SPVs on the occasional basis.

The offering circular of GOP International *ijārah ṣukūk* (M2 Motorway) dated December 2014, in the section titled; 'summary of the offering' stated that;

"Each Certificate will evidence ***an undivided ownership interest in the Trust Assets*** *(as defined below), subject to the terms of the Declaration of Trust and the Conditions...".*

The offering circular of GOP domestic *ijārah ṣukūk* (M1 Motorway) in the section titled, 'Annexure C' Para no 5, Stated that;

"Pursuant to the 'Purchase Agreement' ownership of the asset will be transferred to investors while the registered title will remain with NHA. NHA will execute a Declaration of Trust in favor of the investors to the effect that the NHA is holding the registered title in trust for the investors. ***Once the ownership of the asset is transferred to the investors****, a document (schedule 3 of the purchase agreement signed by PDSCL (as investment agent and purchaser) and GoP acting through the ministry of finance (as seller)".*

The following lines also summarize and strengthen the above view regarding the status of beneficial ownership in the light of the respondent's view with the help of related parent and child themes and nodes.

Theme-2: Beneficial Ownership

Beneficial Ownership (BO) was identified as the third theme in the research study.

Figure 13: NVivo Project map of the parent node of the theme "Beneficial Ownership" (BO) and relevant child nodes.

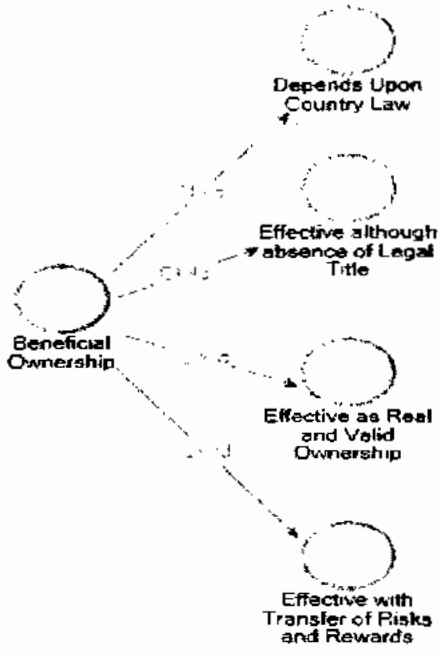

Figure 13

The first dimension under the theme *of* Beneficial Ownership (B0) was *Depends upon country law (DCL).* It was revealed that the validity and authenticity of beneficial ownership depend upon the local law of any jurisdiction. So, it may vary based on concerning country law. But from Sharī'ah point of view, it is necessary to transfer all the associated risks to the other party. For example, informant-9 has the same in this regard.

The second dimension under the theme of Beneficial Ownership (B0) was *Effective although the absence of Legal Title (EALT).* It was revealed as per the views of informants that beneficial ownership is a type of valid ownership in the context of Contemporary Sovereign and Quasi *Ijārah ṣukūk* structures as here all the related rights and liabilities are shifted to another party except the legal title. Furthermore, most Arab and Muslim countries that follow the civil court system and don't follow the common

law don't have the concept of beneficial ownership but they have the concept of "concession rights" (*Haqooq al-Imtiyaz*). It has taken some form of beneficial ownership. Butt still; there is no issue to create such type of ownership for Sharī'ah. For example, informant-25 and 02 have the same view in this regard.

The third dimension under the theme of Beneficial Ownership (B0) was *Effective as Real and Valid Ownership (ERVO)*. It was shown based on empirical data that beneficial ownership is a type of real and valid ownership although there is legal isolation. It must be clear that the role of registration is to prove and show a matter in the legal domain and documents only while the actual status of this matter depends upon the related Sharī'ah requirements. So, if any matter fulfills the concerned Sharī'ah requests then it will be considered valid albeit there might be legal isolation on any level. For example, informant-19 has the same view in this context.

The fourth dimension under the theme of Beneficial Ownership (BO) was *Effective with Transfer of Risks and Rewards (ETRR)*. It was revealed that the main thing is to evaluate the ownership in the context of Sovereign *ṣukūk* structures is to transfer the related risks and rewards. Therefore, it is enough to shift risks and rewards to the other party for valid ownership. For example, informant-01 has the same view in this regard.

Now in the subsequent lines, the sub-section # (ii) of section one would be examined the issue of Special Purpose Vehicle/Company (SPV/SPC) in the context of asset-based and asset-backed *ṣukūk* and other relevant issues such as asset disposal and

recourse right and asset due-diligence, etc. by concerning sovereign and quasi-sovereign *ijārah ṣukūk* structures.

6.3 Application of Beneficial Ownership for SPV in Sovereign and Quasi-Sovereign *Ijārah* Ṣukūk and its Sharīʿah Status

The issue of Special Purpose Vehicle or Company (SPV/SPC) is also significant particularly as per the sovereign and quasi-sovereign *ijārah ṣukūk* issuance. Numerous significant studies have been cited in chapter three titled, 'Literature Review' some of them mentioned as follows;

Islamic Sharīʿah Research Academy (ISRA) elaborated that *"**Another matter that was carefully considered is the use of an SPV in the ṣukūk structure.** In an ijārah ṣukūk, there is a requirement to have a trustee, which will acquire the assets then lease them to the lessee, and issue the ṣukūk to raise the funds required for the acquisition of the assets"* (ISRA, 2015, p. 426).

Similarly, Safari, et al., (2014, p. 109) cited that;

> *"**This point is relevant to the ijārah ṣukūk structure. As a result of this, the transfer of the beneficial ownership of the assets from the originator to the SPC is not sufficient anymore**, and one might even question the extent to which the transfer of merely beneficial ownership from the SPC to the ṣukūk holders is sufficient. Above, however, we noted that the transfer of legal ownership from the SPC to the ṣukūk holders is almost impossible from a practical perspective."*

In the same way, various sovereign *ijārah ṣukūk* prospectuses (i.e. in the Pakistani regime) are stated in this regard as follows:

The offering circular of GOP domestic *ijārah ṣukūk* (M1 Motorway) in the section titled, 'Annexure C' Para no 5, Stated that;

> *"Pursuant to the **'Purchase Agreement' ownership of the asset will be transferred to investors while the registered title will remain with NHA.** NHA will execute a Declaration of Trust in favor of the investors to the effect that the NHA is holding the registered title in trust for the investors. Once the ownership of the asset is transferred to the investors, a document (scheduled 3) of the purchase agreement signed by PDSCL (as investment agent and purchaser) and GoP acting through the Ministry of finance (as seller) should be executed to prove **that the possession of the assets is handed over to PDSCL as agent for and on behalf of the investors which will legally confirm that all the risks and rewards of the assets have passed on to the investors**. Under the **Declaration of the Trust, NHA will delegate its duties and powers under the trust to PDSCL, except for holding the registered title to the Trust Assets**..."* (GoP *ijārah ṣukūk* M1, p. 1).

In the same way, the offering circular of GOP domestic *ijārah ṣukūk* (Jinnah International Airport, Karachi) in the section titled, 'Annexure C' with the head of 'Facility Structure Synopsis-Explanations' # (ii) specified that;

> *"**A Special Purpose Company (SPC), wholly owned by the ministry of finance, the government of Pakistan, has been formed to act for and behalf of ṣukūkholders, namely, Pakistan Domestic Ṣukūk Company Limited** (the "SPC")... The SPC will enter into a purchase agreement with Civil Aviation Authority (CAA) or the government of Pakistan ("GOP") **for purchase of a***

certain pre-identified tangible asset, *such as Airport land for the first ṣukūk issue ("ṣukūk asset")...* ***pursuant to a Declaration of Trust, the CAA (as trustee) will declare its responsibilities towards the ṣukūkholders...*** " (GoP *ijārah ṣukūk* JIA, p. 1)

6.3.1 Sharī'ah Status of Special Purpose Vehicle (SPV)

There is an important question regarding SPV and SPC particularly concerning sovereign and quasi-sovereign *ṣukūk* issuance is being discussed among the Sharī'ah scholars stated as follows:

Is SPV a special independent, autonomous, and self-regulated entity or not?

This debate might be directed towards two interpretations. **One may argue** that as per nature it is a very special entity, established only for a specific need and determination, for a certain time frame; afterward, it would be abolished such as the following statement of the offering circular also reflects this substance.

Pursuant to Article III of the Issuer's memorandum of association *(the Issuer Memorandum), the Issuer has been formed solely to participate in the transactions contemplated by the Transaction Documents.* ***Since its establishment, the Issuer has not engaged in any material activities other than those regarding or incidental to the issue of the Certificates*** *and the matters contemplated in this offering circular and the Transaction Documents and the authorization of its entry into the other transactions and documents referred to in this offering circular to which it is or will be a party.* ***The Issuer has no prior operating history or prior business and will not have any substantial liabilities***

other than in connection with the issue of the Certificate. *The Issuer has* ***no subsidiaries and no employees.***

Furthermore, it is owned by the parent and originator as mentioned earlier that sovereign *ijārah ṣukūk* structures are also stated such statements which disclose the ownership of the originator for SPV i.e. ***"The Issuer is wholly owned by the Government"*** means the SPV will be wholly owned by the originator (GOP *ijārah ṣukūk* M1-M2-M3-JIA).

It looked like that its conception is based on an artificial governance mechanism such as here the obligor itself establishes this type of entity from time to time as per his need. Similarly, the assets are shown 'on balance sheet items as well as consolidated financial statements are also prepared and mingled with the parent company.

Al-Suwailem (2015) stated that "from an accounting perspective, the assets used to issue the *ṣukūk* are not transferred from the balance sheet of the obligor or the seller, because of the undertaking to buy them back at nominal value. This undertaking is a debt obligation on the obligor. With this debt on the balance sheet, the assets cannot be transferred from the seller's balance sheet. But the presence of these assets on the obligor's balance sheet is inconsistent with a genuine sale transaction".

In other words, it is just like performing a financial transaction by a person to himself by introducing and involving diverse artificial mechanisms. All such things portray a picture of artificialized separation rather than actualized identification to the child (SPV/SPC) and parent company (obligor/originator). Hence, SPV should be separated and disconnected from the originator concerning all its managerial and technical matters.

The second one may be stated that actually, there are two aspects to scrutinize this matter such as (i) SPV as an essential and indispensable part of its parent company and obligor (ii) SPV as an independent separate legal entity from its parent and obligor. **Firstly,** the matter of "SPV as an essential and indispensable part of its obligor or parent company" would be elaborated. The presence and backing of 'parent company, in the case of a group of companies and 'government of Pakistan' in the case of Pakistan International or Domestic Ṣukūk Company (PISCL/PDSCL) is just as symbolic ownership that legally does not affect rights and liabilities of child entity such as every child company has its rights and obligations irrespective of parent company even though the financial statements also segregate the child company from the parent entity. Likewise, the creation of such types of SPVs has the immense edge of bankruptcy remoteness which saves to shaking the financial side of the parent company and obligor. Although, in totality, it would be given a joint symbolic name in the case of 'group of companies' but on an arm and distance basis, every child entity and government-owned institutions perform its functions in its capacity.

Secondly, the point of "SPV as an independent separate legal entity from its parent and obligor" would be going into detail. Indeed, as per law a company has a legal personality and may thus sue and be sued, may make contracts, may hold property in its name and has the legal status of a natural person in all its transactions entered into in the capacity of a juridical person. Similarly, in the case of sovereign *ṣukūk* issuance, a special purpose company or vehicle (SPC or SPV) is created i.e. Pakistan International Ṣukūk Company, as a public limited company (in its capacity as issuer and its capacity as trustee).

Additionally, as per the acceptance of a company and entity as a 'jurisdictional person' by the contemporary Muslim jurists of OIC-IFA also might be led to recognize these types of SPVs and child entities as independent and separate entities from its parent and obligor. Eventually, it can be stated that in the case of the group of companies, every child entity has been segregated from the parent company by its rights and liabilities as mentioned earlier, in the same way, the 'SPV' in sovereign *ṣukūk* issuances such as Pakistan International or Domestic Ṣukūk Company Ltd (PISCL or PDSCL) is being segregated and isolated for its rights and liabilities particularly in quasi-sovereign *ṣukūk* issuance towards Government of Pakistan such as each ministry of any government considered as a separate legal entity and standing apart from other ministries.

Furthermore, this matter might be clarified with the help of other relevant examples.

(i) State Bank of Pakistan (SBP) performs various functions in its independent capacity on different occasions irrespective of the part of the government of Pakistan i.e. in the case of public borrowing plays its various roles as a paying agent and custodian etc.

(ii) Bank of Punjab ('BoP' which is a financial institution of the Pakistani government) sometimes arranges the funds for the Punjab government in its individual and self-governing banking capacity regardless of the part of the government of Punjab and Pakistan.

Also, it should be noted that in the past the concept of *waqf* (endowment fund) and *bait al-mal* (house of money) (which is the base of this phenomenon as mentioned by the Shaykh Taqi Usmani and other prominent scholars) were also used to perform

their various functions in the same time as an independent and autonomous body under the Muslim estate. Particularly, in the case of bait al-mal being public property, all the citizens of an Islamic state have some beneficial right over the *bait al-māl*, yet, nobody can claim to be its owner. Still, the Baitul-mal has some rights and obligations. Imam Al-Sarakhsi, the well-known Ḥanafī jurist mentioned:

وأما الحديث فإنما استقرض رسول الله – صلى الله عليه وسلم – لبيت المال حتى روي أنه قضاه من إبل الصدقة، وما كان يقضي ما استقرضه لنفسه من إبل الصدقة، وبيت المال يثبت له، وعليه حقوق مجهولة.

> The Baitul-mal has some rights and obligations which may be undetermined (Al-Sarakhsi, 33/14).

At another place the same author narrates:

In case the government of an Islamic state runs short of money (having no amount left in *kharaj* department of the *bait al-māl*) to make salary payments to his soldiers, it may take money from the sadaqah (*zakāh*) department and may clear the salary payments. But in this case, this whole amount would be considered as debt on *kharaj* department, which needed to be paid later on (Al-Sarakhsi, 33/14).

Furthermore, Shaykh Taqi Usmani stated in this regard by summarizing the discussion as follows:

> *"It follows from this that not only the bait al-māl but also the different departments therein can borrow and advance loans to each other. The liability of these loans does not lie on the head of state, but the concerned department of Baitul-mal. It means that each department of bait al-māl is a separate entity and in that capacity, it can advance and borrow money, maybe treat a debtor or a*

creditor, and thus can sue and be sued in the same manner as a juridical person does. It means that the Fuqaha of Islam have accepted the concept of juridical person in respect of bait al-māl." (Usmani, 2005)

In the light of the above clarification particularly with the instance of *bait al-māl*, as mentioned above that each department of *bait al-māl* is a separate entity, and in that capacity, it can advance and borrow money, maybe treated a debtor or a creditor, etc. as a juridical person. In the same manner, it might be revealed that SPV has its own identity and distinctiveness as an independent legal entity from its obligor and parent. Finally, now it can be stated that there is a separation between SPV (child entity) and obligor (parent entity).

Despite all the above, it should be noted and clarified that such a type of special entity is created to meet the need of a specific sector in this dynamic global financial sector such as in the case of sovereign *ṣukūk* issuance a government uses it for budgetary purposes. Ultimately, they need to establish such types of SPVs (legal entities) to overcome the governing as well as technical limitations.

There might be a better solution than it should be established one specific SPV on the country level than various SPVs titled as First, Second, and Third Pakistan International or domestic Ṣukūk Companies at different occasions regarding all Pakistan strategic assets and country reservoirs such as oil, coil, water, and gas, etc. by the way of legal fencing. In this way, the sensitive nature assets might be also legally marked in it or one other special entity (SPV) can be created for all such types of sensitive assets which are mostly related to the ministry of defense in a state. Such as the Malaysian

government also has been introduced this type of special entity on the country level with the help of Khazana Nasional Berhad

There is another example to the Pakistani region as the government of Pakistan has been launched the 'lifestyle apartments' in the capital city Islamabad, Sector G13 for the government employees which are managed via SPV registered in SECP as unrelated parties

Thus based on the above discussion one can conclude that SPV is an independent, separate legal entity. Hence, there is no issue concerning underlying asset ownership because the related clauses of ijārahh *ṣukūk* prospectuses also declared that the possession of the assets is handed over to SPV (PDSCL/PISCL) as agent for and on behalf of the investors which will legally confirm that all the risks and rewards of the assets have passed on to the investors. Furthermore, it is worth mentioning that as per the technical aspect and focusing on the governance mechanism of SPV/SPC, it might be stated that the creation and incorporation of an SPV is a contractual, operational, managerial, or governing issue rather than Sharī'ah issue.

The following lines also strengthen this view regarding the status of SPV in the light of the respondent's view with the help of related parent and child themes and nodes.

Theme-3: Special Purpose Vehicle and Sharī'ah Compliance

The theme # 11 identified under this research study was Special Purpose Vehicle and Sharī'ah Compliance (SPV-SC). Figure 33 is providing an overview of the parent theme (parent node) and sub-themes (child nodes) identified

Figure 14: NVivo Project map of the parent node of the theme "Special Purpose Vehicle and Sharī'ah Compliance" (SPV-SC) and relevant child nodes

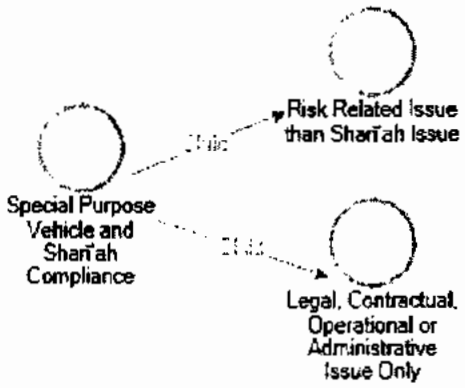

Figure 14

The first dimension under the theme of Special Purpose Vehicle and Sharī'ah Compliance (SPV-SC) was Risk-Related Issue than Sharī'ah Issue (RRItSI). It was revealed that the matter of SPV creation as a bankruptcy-remote is a risk-related issue rather than Sharī'ah related issue. Eventually, it is not against the Sharī'ah principles.

For example, informant-25 has stated that sometimes in sovereign *ṣukūk* it is difficult to make an entity i.e. trust and orphan entity, etc. because govt. has restriction to transfer the title of the asset to any institution. So, here we can ensure and secure the trust of *ṣukūk* holders in one way and another. It is not against the Sharī'ah principles.

The Second dimension under the theme of Special Purpose Vehicle and Sharī'ah Compliance (SPV-SC) was Legal, Contractual, Operational, or Administrative Issue (LCOAI). It was revealed by the respondents that to establish an SPV in any specific Ṣukūk structure is an administrative, operational, and legal issue than Sharī'ah issue. So, there is no issue in this regard.

For example, informant-01and 05 have stated that it is a contractual matter. As here the based on the prospectus and other legal documents i.e. trust deeds etc. all these concerns are resolved. In the case of NHA and WAPDA, the SBP assigns this duty to its department via creating an SPV to manage the things (debt calculations and receipts, etc.)

Now, another question might be raised that how an SPV can ensure the interest of related parties, though both parties (investors/*ṣukūk*holdrs and originator/government) have a different interest from each other, eventually, it might be led to a conflict of interest.

One may answer this question in this way that the President of Pakistan as a Constitutional Head of the State perform his obligations and responsibilities in different capacities and it is not against the Sharī'ah rulings such as a natural person can indulge in various activities at the same time as per considering his diverse individual capacities such as it is shown in the following section named 'parties' of the offering circulars as follows;

> *The **President of the Islamic Republic of Pakistan for and on behalf of the Islamic Republic of Pakistan** (in its capacity, the **Lessee**), Pursuant to the Lease Agreement, the Lessee will lease from the **as lessee** Lessor, and the Lessor will lease to the Lessee, the Lease Assets following the terms of the Lease Agreement...**The President of the Islamic Republic of Pakistan** for and on behalf of the Islamic Republic of Pakistan (in its capacity as obligor, the **Obligor**)... **The President of the Islamic Republic of Pakistan** for and on behalf*

of the Islamic Republic of Pakistan (in its capacity as servicing agent, the ***Servicing Agent)***...

Therefore, unlike the natural person, a legal and jurisdictional person can also perform various activities in its diverse individual capacities. Furthermore, the governing default mechanism and nature of SPV also ensures the interest of both parties as the various concerning contractual and legal documentary bindings are discussed and elaborated these types of matters in detail such as the following lines of the offering circular regarding 'Declaration of trust' (SPV) particularized this object.

Pursuant to the Declaration of Trust, the Trustee holds certain assets (the Trust Assets) consisting of ***(a) all of the Trustee's rights, title, interest and benefit, present and future,*** *in, to and under the Lease Assets;* ***(b) all of the Trustee's rights, title, interest and benefit, present and future, in, to and under the Transaction Documents...*** ***(c) all monies standing to the credit of the Transaction Account from time to time;*** *and* ***(d) all proceeds of the foregoing, on trust absolutely for the holders of the Certificates pro-rata according to the face amount of Certificates held by each holder in accordance with the Declaration of Trust and these Conditions***... (M2, p. 30)

The following lines also strengthen the above view regarding the prevention of *ṣukūk* holder's interest concerning SPV in the light of the respondent's view with the help of related parent and child themes and nodes.

Theme-4: Special Purpose Vehicle and Prevention of *Ṣukūk* holder's Interest

The theme # 12 identified under this study was Special Purpose Vehicle and Prevention of the *ṣukūk* holder's Interest (SPV-PSI). Figure 34 is providing an overview of the parent theme (parent node) and sub-themes (child nodes) identified.

Figure 15: NVivo Project map of the parent node of the theme "Special Purpose Vehicle and Prevention of the Ṣukūk holder's Interest" (SPV-PSI) and relevant child nodes

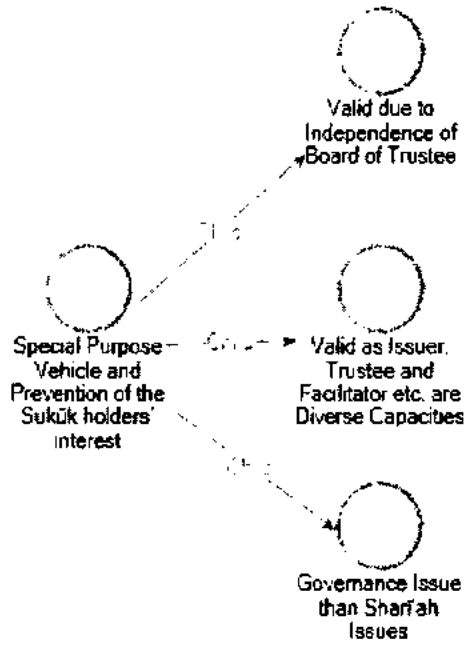

Figure 15

The first dimension under the theme of Special Purpose Vehicle and Prevention of the Ṣukūk holder's Interest (SPV-PSI) was Valid due to the Independence of Board of Trustee (VIBT). It was revealed that SPV is run by an independent board of trustee

and this board is liable and responsible to the Ṣukūk holders and performing its operations in the care of their beneficiaries which are called Ṣukūk holders. Therefore, there is no conflict of interest regarding their beneficiaries' interests.

For example, informant-15 has the same view stated that SPV is acting as a trustee and this trust is a separate and independent entity from the obligor who intake the interest of subscribers. Consequently, there is no objection as per Sharī'ah rulings.

The second dimension under the theme of Special Purpose Vehicle and Prevention of the Ṣukūk holder's Interest (SPV-PSI) was Valid as Issuer, Trustee and Facilitator, etc. are Diverse Capacities (VITFDC). It was revealed that although SPV performs various roles i.e. acting as an Issuer, Trustee and Facilitator, etc. all these roles are indifferent and diverse capacities and it is not against the Sharī'ah principles. Furthermore, all these activities ensure and segregated with the help of different supportive documents.

For example, informant-11 has explained that an entity can act in different capacities as Issuer, trustee, facilitator. eventually, there is no harm.

The third dimension under the theme of Special Purpose Vehicle and Prevention of the Ṣukūk holder's Interest (SPV-PSI) was Governance Issue than Sharī'ah Issue (GSI). It was revealed that creating an independent entity in the name of SPV is a governance issue than a Sharī'ah issue.

For example, informant-06 has described that it is a governance issue not more a Sharī'ah issue. Furthermore, this issue can be resolved with the help of other supportive legal documents.

Now in the coming lines, the issue of asset-based and asset-backed *ṣukūk* in sovereign and quasi-sovereign ijārahh *ṣukūk* structures would be elaborated.

6.4 Application of Beneficial Ownership for Asset-Based and Asset-Backed Ṣukūk and its Sharī'ah Status

6.4.1 Asset-Based Ṣukūk

Haneef (2009) identified the three hallmarks in the development of the *ṣukūk*. He showed that "Ṣukūk evolved from asset-backed model, where the *ṣukūk* holders have ownership rights over the underlying asset, as per Sharī'ah requirements, to asset-based model. With the latter model, the *ṣukūk* holders rank *pari passu* with unsecured creditors. Indeed, for all international bonds, there is a negative pledge which restricts the borrowing entity from issuing any bond in future that is not in *pari passu* with existing unsecured bonds".

Diaw, et al., (2014) stated that "The main contention stems from the fact that in some structures (i.e. asset-based *ṣukūk*), the *ṣukūk* holders don't have an outright right to dispose of the asset, especially upon the occurrence of the event of default. This seems to be against the basic principle that *ṣukūk* holders, as full owners of the *ṣukūk* asset, should be able to deal with it freely. This triggers a debate on whether or not full ownership is transferred to the *ṣukūk* holders. If full ownership is not transferred, the relationship between the *ṣukūk* holders and originator-obligor may be constructed as merely that of lender-borrower this can lead to a serious Sharī'ah issue".

Al-Suwailem (2016) has also raised certain Sharī'ah issues in *ijārah* based *ṣukūk* and stated that the investors do not legally own the asset and that is why such *ṣukūk* are turned from 'asset backed' to 'asset based'.

(ISRA, 2017, Şukūk, P.67) mentioned that "*ijārah ṣukūk* issue also made history by becoming known as the first asset-based *ṣukūk* structure-requiring 100% physical asset but without a true sale of the underlying asset to *ṣukūk* holders. This structure was developed as a solution to the challenges faced by an asset-backed *ṣukūk* structure in Malaysia. As Malaysia sought to develop an international *ṣukūk*, it was to copy with the negative pledge condition prevailing under international bonds."

Till now, no proper definition for "asset-based" *ṣukūk* is developed. It means that there is a lack of a widely accepted definition of this sort of *ṣukūk* in literature. This phrase is flexibly attached to various *ṣukūk* structures that are issued and prevailing in the market. Ordinarily speaking, the phrase "asset-based" may refer to the class of *ṣukūk* structures whereby the role of assets in the determination of a legal relationship is although limited but very significant and inevitable. It may also depict the rights and duties of the concerned parties to contract. The presence of these assets specifically supports the notion (and is quite general to Islamic finance) that is; the *ṣukūk* structures must be connected to the existing economy through asset-based transactions (Diaw, et al., (2014).

While making a comparison between asset-based *ṣukūk* withasset-backed-*ṣukūk*, it is narrated that the actual under lying asset remains there on the balance sheet of the originator both before and after the issuance of the *ṣukūk* structure. Moreover, the *ṣukūk* holder only avails the partial beneficial ownership to the *ṣukūk* whereas, the original title and ownership remain with the originator.

From the legal point of view, it may also be said that within an asset-based *ṣukūk* no "true sale "happens because the underlying asset always remains legally attached to

the originator of the *ṣukūk* structure. Due to this, *ṣukūk* holder's avail only limited ownership of the *ṣukūk* structure. For instance, he does not have the authority to sell the respective asset to any third party. Also there is always the recourse to the originator (Hidayat, 2013).

On the contrary, within an asset-based *ṣukūk*, for instance, *ṣukūk* al *ijārah,* there is ordinarily a sale and leaseback arrangement between the originator and the issuer. Hereby, the owner of an asset is referred to as the originator whereas Special Purpose Vehicle SPV is usually the issuer. Later on, SPV acts on the behalf of the investor. Within this type of *ṣukūk* structure, the owner of the asset normally allows only partial beneficial ownership or an equal amount of benefit in the assets to SPV.

The originator remains the one who holds the actual title to the *ṣukūk*. It is also the originator who may present a bare trust or may even be a bare trustee. It may be to announce that the legal title of the asset is kept in trust, both for the benefit of the *ṣukūk* holder or trustee. Moreover, at the happening of default of maturity, this *ṣukūk* is supposed to be held back by the originator or the issuer. They undertake to purchase the asset back upon happening of these two events.

Moreover, technically speaking, the rights of *ṣukūk* holders become limited in case of default. For instance, the trustee of the *ṣukūk* holders is bound to sell the asset to the lessee which leaves the *ṣukūk* holder with a position of the unsecured creditor for the given sale price.

There have remained raised concerns regarding the scrutiny of the matter that, whether or not, there exists a real sale between the SPV and the originator. There are a few points to make it elicit that there occurs no true sale between the originator and the

SPV. For instance, the legal title being absent, the ever-existing purchase undertaking, and compulsion for selling.

But still, as far as, old narrations regarding the beneficial ownership under English and Shari'ah law are concerned, it seems arguable that the above notion is not true. We can say that there occurs a true sale between the originator and the SPV, However, only one part of the beneficial ownership is availed by the buyer. And the legal title and part of ownership rights remain with the seller. As explained previously, the beneficial owner retains the legal title to the *ṣukūk* structure. Therefore, they may become the true partial owner of this set.

In ijārah *ṣukūk*, the present undertaking is an independent undertaking that is one-sided and is not legally linked to the prior sale originator and SPV. So the undertaking does not remain an issue of concern within an ijārahh *ṣukūk* view. The lessee (also known as originator) depending on his will has the authority to make a unilateral undertaking independently to get back the asset from the owner at a certain date in the future. This arrangement is similar *muntahiyah bi al-tamlik.*

Although, as reported, (in GoP *ijārah ṣukūk* prospectuses) is believed to have an ownership right on the underlying asset. Thus, the position and rights of the owner are determined by the terms and conditions settled at the time of issuance. For instance, within this type of *ṣukūk* arrangement, the *ṣukūk* holder does not enjoy the authority to sell out *ṣukūk* asset to a third party (in case of default of obligor). Normally, they have only the right to tell the trustee to request a meeting for *ṣukūk* holders. There, they may exercise their rights of notice issuance to the obligor as per its undertaking to purchase assets at maturity or default date. Here, we can see that the enjoyment of the ownership

right by the *ṣukūk* holders is restricted by specific terms on the right to the disposal of the asset that has been agreed upon by both parties.

Consequently, it is legally believed that asset-based *ṣukūk* holder does not possess any true recourse to the assets. The only recourse that they possess is the recourse to the originator (Elmaki and Ryan, 2010). The above discussion presents the crux of the arguments among Shari'ah scholars who thereafter questioned the usage of beneficial ownership in such *ṣukūk* arrangements. The basic conflict arises from the point that in some *ṣukūk* arrangements, the *ṣukūk* carrier does not possess any outright right to sell out the held asset, for instance, at happening of a default scenario. This is what actually against the very base principle that is; the *ṣukūk* carrier must be presented with freedom to deal with the respective *ṣukūk* instrument.

Now, this may start a debate on the existence of full or partial ownership in the *ṣukūk* arrangement. This triggers a debate on whether or not full ownership is the *ṣukūk* holders. If full ownership is not transferred, the relationship between the *ṣukūk* holders and originator-obligor may be constructed as merely that of lender-borrower and this can lead to serious Sharī'ah issue it we believe that there is no full transfer of ownership within this, then it may lead to a real Shari'ah conflict. Because in such case the relation of *ṣukūk* holder and originator may be seen merely as a lender and borrower.

As a result, it is believed that such kind limitations regarding rights to dispose of an asset hinder the freedom of the *ṣukūk* holder to enjoy the instrument completely. However, at the same time, this does not mean denying the ownership.

The ownership as per the sales and purchase contract that exists between the *ṣukūk* holder and the obligor is still there. Nonetheless, this ownership is actually (milk

nāqis). It is because such ownership is not governed by strict legal laws but rather it is mutually decided between the *ṣukūk* holder and the originators as per their contractual terms and conditions.

Furthermore, the offering circular of GOP domestic *ijārah ṣukūk* (M1 Motorway) in the section titled, 'Annexure C' Para no 5, also revealed this matter as follows;

> *"Pusuant to the **'Purchase Agreement' ownership of the asset will be transferred to investors while the registered title will remain with NHA**. NHA will execute a Declaration of Trust in favour of the investors to the effect that the NHA is holding the registered title in trust for the investors... **Under the Declaration of the Trust, NHA will delegate its duties and powers under the trust to PDSCL, except for holding the registered title to the Trust Assets...**"*(GoP domestic *ijārah ṣukūk* M1, p. 1).

In short, it might be concluded based on the above discussion that although beneficial ownership originally is as good as complete ownership (milk tāmm) but in asset-based *ṣukūk* the beneficial ownership is incomplete ownership (milk nāqis) or restricted ownership or qualified ownership for financial structuring reasons, which include the contractual restriction on *ṣukūk* holders (being the beneficial owner) from disposing of the asset during the *ṣukūk* tenure and upon the occurrence of an event of default.

6.4.2 Asset-Backed *Ṣukūk*

Like conventionally known asset-backed securities (ABS), Asset-backed *ṣukūk* are Islamic securities complying with Sharī'ah guidelines and have their legal format and definition. For an asset-backed *ṣukūk*, it is held " "true sale of an asset between an originator and an SPV where the legal ownership will be transferred the SPV". This is a noteworthy point that "true sale" in an ABS perspective represents: "securitization transaction that entails a legal isolation of the asset from the originator to the SPV to achieve bankruptcy remoteness and full asset- backing and step-in rights with potentially no recourse by the ABS holders to the originator, after the true sale or securitization transaction". The purchaser who gets a subscription to the ABS structure offered undivided ownership of the backed-up inflows and outflows of cash flows. Although the purchaser gets this proportionate ownership, the actual legal title remains with the SPV. Within such a scenario, SPV becomes a trustee with an actual legal title on behalf of the ABS holder (the beneficial owner) of the asset.

In terms of ownership, we can see that the asset-back *ṣukūk* holders only have beneficial ownership of the underlying legal title is held by the SPV, which is acting as an agent for the stakeholders. Does this mean that they have ownership over the asset? As we have seen that ownership is generally treated in law to be as good as real. In asset-backed *ṣukūk*, we conclude that the *ṣukūk* holder's complete ownership (milk tanım) over the asset backing the subscribed from the SPV, although technically, they only beneficial ownership and legal title is retained by the SPV. This is because there is no restriction on the *ṣukūk* holders' enjoyment of their ownership rights. Although the *ṣukūk* holders are supported to act through the SPV and a trustee, the *ṣukūk* holders can

make their own decisions as outlined in the trust in terms of disposal management of the underlying asset. Moreover, the SPV has to act based on the instructions of the trust.

Furthermore, another significant fact strengthens the above discussion. This is the attribute of "Bankruptcy remoteness" as held by asset-backed *ṣukūk*. Technically speaking, it may be interpreted as a fact that the assets which backed the *ṣukūk* remain isolated from the original issuer. That is why, even if the originator becomes bankrupt, the profit returns of the *ṣukūk* holders never stop until the respective assets are generating a return. At the same time, in case of the poor performance of the underlying asset or if the asset is not generating enough return then *ṣukūk* holders will be the eventual party who got affected unless the original issuer provides some support to refrain from bankruptcy (Dusuki & Mokhtar, 2010).

The following table 7 also depicts a clear difference between asset-based and asset-backed *ṣukūk*:

Table 6

Asset-Backed Ṣukūk	**Asset-Based Ṣukūk**
o Complete ownership rights (transfer of Legal title and beneficial ownership) transfer to the *Ṣukūk* holders. o Investors enjoy asset-backing o They can take control over the asset in the event of default o They have the edge of bankruptcy remoteness.	o Legal title remains with SPV and restricted (beneficial ownership) rights transfer to the *ṣukūk* holders. o Investors are not able to enjoy asset-backing o They have only recourse to the originator's creditworthiness than the asset.

Therefore, it may be concluded that within asset-backed *ṣukūk*, complete ownership rights regarding the underlying asset is given to the *ṣukūk* holders without considering the state (for instance: a bankrupt) of the originator. And also, the performing state of

the underlying property will determine the profit margin (payments) of the *ṣukūk* holders. In other words, in the event of default, the *ṣukūk* holders would be able to recover their exposure by taking control of and ultimately realizing the value from the asset.

While in asset-based *ṣukūk*, the originator typically undertakes to purchase the asset from the issuer at maturity of *ṣukūk*, or upon a pre-defined early termination event, for an amount equal to the principal repayment. In such a repurchase undertaking, the true market value of the underlying asset is irrelevant to the *ṣukūk* holders.

The following lines also summarize and strengthen the above view regarding the status of beneficial ownership for asset-based and asset-backed *ṣukūk* in the light of the respondent's view with the help of related parent and child themes and nodes.

Theme-5: Asset-Based and Asset-Backed Ṣukūk

Figure 16: NVivo Project map of the parent node of the sub-theme "Asset Based and Asset-Backed" (AB-AB) and relevant child nodes.

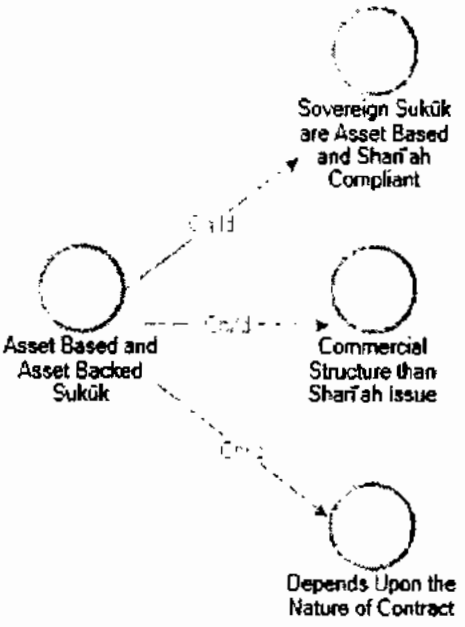

Figure 16

The first dimension under the theme of Asset Based and Asset-Backed (AB-AB) was sovereign *Ijārah ṣukūk* are Asset Based and Sharī'ah Compliant (SIS-ABSC). It was revealed that normally sovereign *Ijārah ṣukūk* are asset-based but in the presence of *tamkin and takhliyah* (to give the right of use and benefit) for *ṣukūk* holders, although there are some restrictions put by the government still these are acceptable and Sharī'ah compliant. For example, informant-07 has stated that; In the case of asset-backed there is no issue while in the case of asset-based there are some issues as the title is remaining to the originator. But in Malaysia due to legal constraints, the sovereign asset cannot be transferred to a group of people. Based on tamkin and *takhliyah* means full rights are transferred to the buying party. Although there are some restrictions are made but still it is Sharī'ah compliant.

The second dimension under the theme of Asset Based and Asset-Backed (AB-AB) was Commercial Structure than Sharī'ah Structure (CS-SS). It was explored based on data that the classification of asset baked and asset-based is shaped by concentrating conventional bond structure. It is not a Sharī'ah division. Consequently, the main thing is the presence of relevant attributes of ownership to judge the ownership in sovereign *Ijārah* Ṣukūk structures. For example, informant-02 has specified that;

It is not more like the Sharī'ah issue. It is more commercial structure, how to classify it. It is just like bond securitization. In Asset-backed the true sale is done. They have no recourse to the originator but have recourse to assets only. In *Ijārah* normally it is called asset-based.

The third dimension under the sub-theme of Asset Based and Asset-Backed (AB-AB) was Depends upon the Nature of Contract (DNC). It was publicized based on empirical data that this matter can dig out with the help of an underlying contract that this Ṣukūk structure is asset-based or asset-backed. For example, informant-25 indicated that; It depends upon the nature of the contract.

Furthermore, informants- # 08, 14, and 19 elaborated in this regard that; Asset-backed is a better option. But in sovereign *ṣukūk*, this division becomes meaningless as every sovereign has run on the concept of going concerned and there is no chance of default normally. Only sovereign guarantee or backing is enough in such type of *ṣukūk* and asset-based and backed is not linked to it.

In subsequent sub-topics, further discussion would be stated on the restrictions put on the *ṣukūk* holders in dealing with the underlying *ṣukūk* asset, and their effects on the nature of the *ṣukūk* holders' ownership of and recourse on the asset.

6.4.3 Sharī'ah Issues relating to Recourse in Asset-Backed and Asset-Based *Ṣukūk*

The meaning of Recourse is "a legal right to claim". Its opposite is "without Recourse" which means "one party has no legal claim against another". (ISRA, ICM, 2015, p.167)

According to Elmaki and Ryan (2010), "As a result, some legal opinions suggest that the holders of asset-based *ṣukūk* will have no real recourse to the asset, but rather, their main recourse is actually to the obligor-originator".

Adawiah et. al. (2013, p. 26) explained that a backed asset that is utilized for launching asset-based *ṣukūk* keeps its appearance on the balance sheet of the original issuer (the originator). That is, the original issuer still holds the complete legal title and ownership. The *ṣukūk*holders are just presented with only partial beneficial ownership. Consequently, *ṣukūk* holders are left with very minimal ownership rights, for instance, they are unable to send the respective property to any third party and are always bound to recourse it to the original issuer.

It has been seen in the preceding discussion that the recourse available to the *ṣukūk* holders in asset-based *ṣukūk* can be very different from the recourse available in asset-backed *ṣukūk*, although basic contract underlying both types of *ṣukūk* may be similar, i.e. the sale of assets by the originator to the SPV. In asset-based *ṣukūk* originator transfers partial beneficial ownership only to the SPV. In asset-backed *ṣukūk*, the originator transfers both legal as well as full beneficial ownership of the asset to the SPV, such that the asset is legally isolated from the originator.

However, in asset-based *ṣukūk*, the *ṣukūk* holders typically do not have direct recourse to the asset but have recourse to the originator-obligor, principally due to the existence of the purchase undertaking and other guarantees or pledges in the *ṣukūk* structure. In asset-backed *ṣukūk*, the *ṣukūk* holders also have recourse to the asset backing the *ṣukūk* mainly due to the absence of purchase undertaking and sale provisions in the trust deed.

The difference in the recourse available to these two types of *ṣukūk* can be seen, especially upon the occurrence of default by the obligor. This, for example, has been clearly illustrated in the two Tamweel *Ṣukūk* issuances: (i) an asset-backed *ṣukūk* (the USD210 million *ṣukūk* in 2007 that was not affected by the insolvency and financial problems of the originator, Tamweel PJSC, because the *ṣukūk* holders had recourse to the underlying *ṣukūk* asset); and (ii) an asset-based *ṣukūk* the USD300 million convertible *ṣukūk* in 2008 that was directly affected by the insolvency and financial problems of the originator-obligor, Tamweel PJSC, because the *ṣukūk* holders ultimately had recourse to Tamweel, not the underlying *ṣukūk* asset due to the existence of the purchase undertaking) (Howladar, 2009: p. 32).

Based on the elaboration above, it can be concluded that recourse to the *ṣukūk* asset is not necessarily influenced by the issue of *ṣukūk* holders' ownership of the legal title of the *ṣukūk* as rather, the determining factor is whether or not there is any restriction on the *ṣukūk* holders' enjoyment of their beneficial ownership right in the *ṣukūk* asset.

In asset-backed *ṣukūk*, there is no or very minimal restriction, so they can have full recourse to the *ṣukūk* asset. In asset-based *ṣukūk*, there are substantial restrictions in

terms of the *ṣukūk* holders' right to disposal and management of the *ṣukūk* asset due to the existence of a purchase undertaking and/or other restrictions. Instead, they have to exercise the purchase undertaking given by the obligor at the time of the *ṣukūk* issuance, i.e., they will have to sell the *ṣukūk* asset to the obligor at the exercise price agreed between them.

It is worth stating that there is another term called 'Limited Recourse' mentioned in offering circulars in the scenario of default and total loss event etc. as the following lines explain this matter.

Limited Recourse and Non-Petition

> ***The proceeds of the Trust Assets are the sole source of payments in respect of the Certificates****... Each of the Obligor and the Lessee (each as defined in Condition 5.1) is obliged to make certain payments under the Transaction Documents directly to the Trustee and the Delegate will have direct recourse against the Obligor and the Lessee to recover such payments...* ***No amount whatsoever shall be due and payable in respect of the Certificates except to the extent those funds for that purpose are available from the Trust Assets.***

This means the charge against the underlying asset would be up to extant of that asset value not to the principal amount. It is true and correct because in the case of complete recourse the principal amount would be guaranteed by the obligor which is not true and it would eliminate the spirit of Islamic law such as in the case of conventional credit the security is not limited to the that asset value but other than hypothecation and guarantees etc. are also taken to minimize the risk.

The following lines also summarize and strengthen the above view regarding the Sharī'ah status of asset recourse to asset-based and asset-backed *ṣukūk* in the light of respondent's view with the help of related parent and child themes and nodes.

Theme-6: Asset Disposal and Recourse Right

Figure 17: NVivo Project map of the parent node of the theme "Asset Disposal and Recourse Right" (ADRR) and relevant child nodes

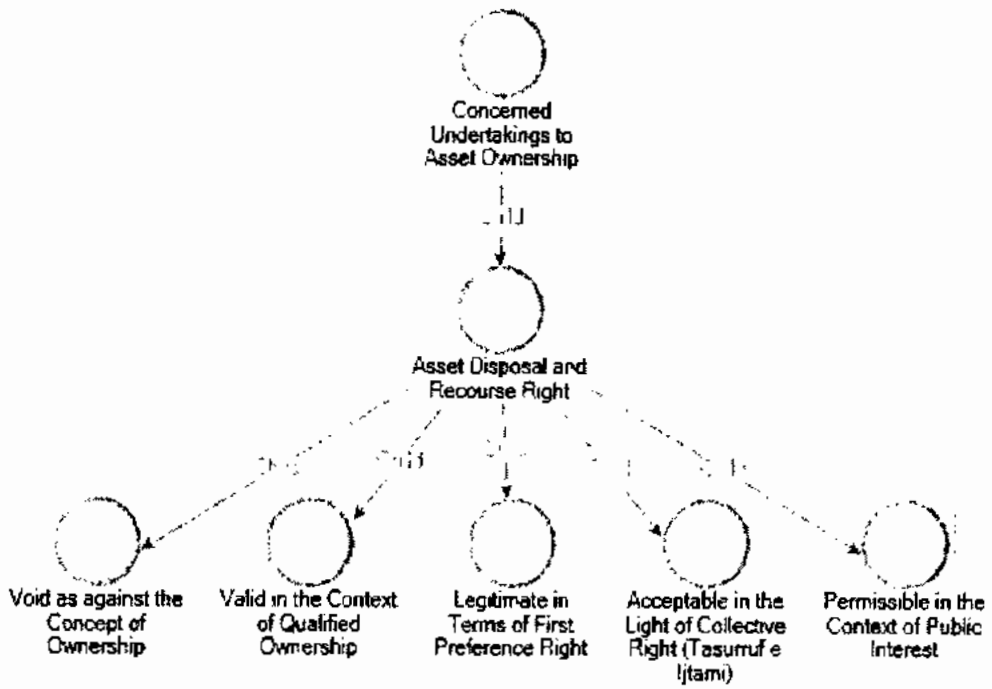

Figure 17

The first dimension under the theme of Asset Disposal and Recourse Right (AD-RR) was Void as against the Concept of Ownership (VaCO). It was revealed that restrictions regarding asset disposal and recourse are against the concept of ownership and the *ijārah* contract. In other words, the name of this Ṣukūk structure should be changed to an innovative and suitable name. Though, it may be permissible in the

context of public interest, etc. For example, informant-6 has stated that; this condition is against the concept of ownership. Now it will not be an *Ijārah* transaction. You have to change the name of this innovative product. And give a new name. Though, it may be permissible based on *Maslahah* (Public interest) etc.

The second dimension under the theme of Asset Disposal and Recourse Right (AD-RR) was Valid in the Context of Qualified Ownership (VQO). It was revealed based on empirical data that restrictions regarding asset disposal and recourse rights are legitimate as these fall under the category of qualified ownership, which is a valid and acceptable form of ownership regarding current era modern financial transactions. For example, informant-19 has expressed that: It means the meaning of *hurayat al- tasurraf* is not absolute but it is restricted as per in different scenarios with context to prevailing practices (*'urf*). Here this thing is related to the concept of qualified ownership. If you have the shares of any company, you have the right to claim the prorated percentage of your amount against these shares. But you cannot claim to sell the specific asset against your proportionate in the total asset of that company as here the concept of going concerned in joint-stock companies to disallow this practice. The same thing is in the context of ownership in sovereign Ṣukūk as the sovereigns are governed and ruled under the viewpoint of going concerned as well.

The third dimension under the theme of Asset Disposal and Recourse Right (AD-RR) was Legitimate in terms of First Preference Right (LFPR). It means in the context of recourse of quality and first preference right etc. such types of conditions are allowed in the light of diverse Fiqhi rulings. For example, informant-05 and 07 have specified that; Basically, in principle sale should be absolute without recourse for the

owner. But there are many writing in the past, as in the light of different schools (Ḥanbalī, Shāfi'ī, and Ḥanafī) allowing the seller and buyer to agree among themselves regarding recourse of quality and to purchase the asset on priority than others, etc.

The fourth dimension under the theme of Asset Disposal and Recourse Right (AD-RR) was Acceptable in the light of Collective Right/Tasurraf e Ijtimai (ACR). The respondent has the view that these restrictions can be acceptable and justified in sovereign Ṣukūk structures based on the collective right.

For example, informant-17 has described that; As per in joint-stock companies there is no right to recourse for an individual to sell his specific proportionate asset to receive the amount but when he was entering into the contract, he knew and agreed that right to sale the asset itself is limited here and he preferred the collective right of all his partners and shareholders on his right. The same case is in sovereign Ṣukūk; here the government gives a collective right (*tasurruf al-ijtami*) to the *ṣukūk* holders. It is a promise and does not affect the contract. It does not mean that here sale is not complete possession did not exist due to restricting the ownership rights. Nature of possession reflects the nature of assets. So, sovereign *ṣukūk* assets are the same as joint-stock companies.

The fifth dimension under the theme of Asset Disposal and Recourse Right (AD-RR) was Permissible in the Context of Public Interest (PPI). The respondent has the view that these restrictions can be acceptable and justified in sovereign Ṣukūk structures concerning *maṣlaḥah* and *maṣāliḥ mursalah* (public interest). For example, informant-04 has stated that; some people said that purchase undertaking is very resembled bond. But there is a difference because in *Ijārah* there is the existence of

assets (ship, aircraft, road, etc.) while in bond only debt is created. Based on Public interest (*Siaasa al-Sharī'ah and Maslahah*) the govt. can put some restrictions on the asset, it is permissible.

It is recognized that such restrictions on the right to asset disposal do render the enjoyment of *ṣukūk* holders of their assets incomplete. Nonetheless, this does not mean that ownership is denied altogether. There is still ownership under the sale and purchase contract between the *ṣukūk* holders (purchaser) and the originator (seller) of the asset. However, the ownership is incomplete (milk nāqis) not by strict provisions of the law but by way of contractual terms that had been mutually agreed to between the *ṣukūk* holders and their obligor.

In short, it is argued that although beneficial ownership originally is as good as complete ownership (*milk al-tāmm*), in asset-based *ṣukūk* the beneficial ownership is incomplete ownership (*milk al-nāqis*) or restricted ownership or qualified ownership for financial structuring reasons, which include the contractual restriction on *ṣukūk* holders (being the beneficial owner) from disposing of the asset during the *ṣukūk* tenure and upon the occurrence of an event of default (Dusuki & Mokhtar, 2010: 11).

6.4.4 Sharī'ah Issues relating to Asset Due Diligence in Asset-Backed and Asset-Based *Ṣukūk*

Investopedia explains the due diligence (financial or legal) in a manner that 'Financial due diligence is "an investigation or audit of a potential investment or product to confirm all facts that might include the review of financial records. Due diligence refers to the research done before entering into an agreement or a financial transaction with another party while 'Legal due diligence is the process of

collecting, understanding and assessing all the legal risks associated during memorandum and article (M&A) process" (Investopedia, 2019).

Reuters, (2009) coted the statement of Yusuf Talala DeLorenzo to Nakheel *ṣukūk* default that *"If there are lessons to be learned here, it is that due diligence is all-important. Compliance to sharia in its structuring does not ensure the success of a ṣukūk or any product or business,"*

Dusuki and mother (2010) suggested that in other words, "the recourse for the *ṣukūk* holders is the asset itself and not the Originator. Also, there was a right of disposal over the *ṣukūk* asset. Now the asset becomes vital, as the *ṣukūk* holders can only rely on this in case of default. Therefore, a very detailed due diligence was conducted on both aspects: the legal transferability of the asset and financial capacity of the asset to pay the *ṣukūk* holders".

Kamali and Abdullah, (2014, p. 40) mentioned that however what needs to be explained to shariah scholars is that in the current beneficial ownership structures the purchaser cannot sell the assets or dispose of them; he cannot perform any due diligence concerning assets or even inquire about them.

It should be noted it is a market practice that all international bonds have a standard negative pledge that restrains the bond issuers from issuing any bond, not pari passu with ensuring unredeemed unsecured bonds (Kamali & Abdullah, (2014, p. 40).

Normally, Due diligence committee comprising the Issuer, Lead Arranger, Legal representative, and Reporting Accountant to ensure timely, sufficient, and accurate disclosure of all material statements, information, and documents submitted to the securities commission (SC) and provided to Investors and other relevant participants.

The following clauses of GoP Ijārah ṣukūk prospectuses are described very evidently this matter effectively and efficiently;

> **Status of the Government's Obligations:** *The payment obligations of the Government under the Transaction Documents are direct, unconditional, and (subject to the provisions of Condition 4)* ***unsecured obligations of the Government and (subject as provided above) rank and will rank pari passu, without any preference among themselves****, with all other present and future unsecured and unsubordinated External Indebtedness (as defined in Condition 13) of the Government.* ***The due and punctual performance of the obligations of the Government with respect thereto is backed by the full faith and credit of the Government.***
>
> **Governing Law:** *The* ***Purchase Agreement and the Lease Agreement*** *will be* ***governed by, and construed following the laws of Pakistan****. The* ***Purchase Undertaking, the Declaration of Trust, the Agency Agreement, the Servicing Agency Agreement, the Substitution, and Transfer Undertaking, and the Certificates*** *(including any non-contractual obligations arising out of or in connection with the same), will be* ***governed by and construed by, English law****.*

The following lines also summarize the above view regarding the Sharī'ah status of asset due diligence to asset-based and asset-backed *ṣukūk* in the light of respondent's view with the help of related parent and child themes and nodes.

Theme-8: Concerned Undertaking – Asset Due Diligence

Figure 18: providing an overview of the parent theme (parent nodes) and sub-themes (child nodes) identified

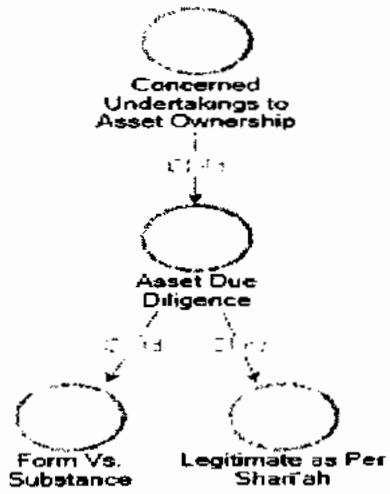

Figure 18

The first dimension under the theme of Asset Due Diligence (ADD) was Form vs. Substance (Fvs.S). It was revealed that although the apparent form complies and justifiable by Fiqhi rulings but as per substance it should be reconsidered. For example, informant-6 was of the view that;

Accounting treatment is something not related very strongly to the real transaction. As here a lot of issues are raised. So here focus will be on substance than apparent form, which means economic or legal form not bothered here. But now accounting has become a very integrated part of the firms. So ideally it should be avoided and not be mentioned on the balance sheet of the obligor. Now a day these financial statements represent the situation of any company. So substance must be complying with the form.

The second dimension under the theme of Asset Due Diligence (ADD) was Legitimate as Per Sharī'ah (LapS). It was revealed that conditions regarding asset due diligence both financial and legal are permissible as per Sharī'ah rulings. Subsequently, here the Ṣukūk holders as an owner will be responsible, which shows the compliance of the structure. For example, informant-25 was of the view that; The owner means Ṣukūk holders will be responsible. Consequently, it is legitimate in light of Sharī'ah requirements.

Based on the above it can be concluded that although accounting treatment is something not related very strongly to the real transaction and the *ṣukūk* parties (buyer and seller) are agreed upon to those conditions, so, as per Sharī'ah rulings, there is no issue. But the fact is that now accounting has become a very integrated part of the firms. Hence ideally it should be avoided and not be mentioned on the balance sheet of the obligor and all relevant and important information must be disclosed clearly.

Now in the following lines, the sub-section # (iii) of section one would be elaborated concentrating application of *wa'd* (purchase undertaking) in sovereign and quasi-sovereign *ijārah ṣukūk* issuance and its Sharī'ah status.

6.5 Application of *Wa'd* (Purchase Undertaking) in Sovereign and Quasi-Sovereign *Ijārah Ṣukūk* Issuance and its Sharī'ah Status

6.5.1 Purchase Undertaking (*Wa'd* to Purchase)

Generally, *wa'd* is translated as a promise. Ibn 'Arafah (1989) defined the *wad* as "*an expression by the person who gives it to do something good in the future.* Similarly, al-A'yni describes *'the expression of intent to deliver something good in future."*

There is a difference of opinion among classical Muslim fuqaha (jurists) that fulfillment of a promise is mandatory and enforceable by law or not. The majority of jurists uphold that fulfilling a promise is highly recommended and urged by the Sharī'ah however neither mandatory nor enforceable through courts of law. On the other side, a number of the Muslim jurists such as Samurah bin Jundab ﷺ, Umar ibn 'Abd al-'Aziz, ibn Shubrumah, Hassan al-Basri, Ibn Arabri, and Imam Bukhārī opined that fulfilling a promise is not only morally binding but also enforceable by law. (Usmani, 2015, vol, 1, p.79, 89)

The middle opinion upheld by the Ḥanafīs and the Mālikīs looks more towards the effect of such a promise. Hence, the Ḥanafīs maintain that a promise is binding if it is tied up (*mu'allaq*) with the occurrence of a certain/specified condition (shart). This is to prevent detriment or fraud on the promise. The Mālikīs opine that though a promise is generally not binding if the promisor had the promise to incur some expense or undertake some labor or liability based on the promise, this promise is mandatory upon him. The court may enforce the promise if sufficient provided by the plaintiff that he has suffered losses due to the promise given to him by the defendant (ISRA, 2015, p.171).

The OIC Islamic Fiqh Academy (OIC-IFA) stated in this regard as follows:

الوعد يكون ملزمة للواعد ديانة إلا لعذر، وهو ملزم قضاء إذا كان معلقا على سبب، ودخل الموعود في كلفة نتيجة الوعد. ويتحدد أثر الإلزام في هذه الحالة إما بتنفيذ الوعد، وإما بالتعويض عن الضرر الواقع فعلا بسبب عدم الوفاء بالوعد بلاعذر

A promise is obligated for the promisor *dīyanatan* (morally) except for an excuse, and it is obligatory by law if it is commented on a reason, and the promised entered into the cost of the result of the promise. The effect of the obligation, in this case, is determined either by the implementation of the promise or by compensation for the actual harm caused by the failure to fulfill the promise without excuse.

Usmani (2015, p. 91) mentioned two bases to differentiate the promise which is binding by law (*wa'd mulzim qada'an*) and the promise which is non-binding as per legal consequences (*wa'd gair mulazim qada'an*) are described as follows:

First: This should be done by the Islamic state via proper legislation, hence in this way the concerned law would be able to define those promises which are considered as 'binding promises' in the sight of the law.

Second: That the fulfillment of the promise has a cost for the promisee, and it will be borne by the promise. Furthermore, the promisor declared in his promise that this promise would be obligatory for him as per law and he has to write down it or ready anybody as a witness in this regard.

He further stated that those verses and hadiths which are indicated the obligation to fulfill the promise by religious perspective (*dīyanatan*) would be considered a base to make the promise as a binding act and what was obligatory religious perspective (*dīyanatan*), it can be made compulsory as per legal consequences (*qada'an*) with the help of governmental legislation, because the obedience of the estate is also obligatory in those matters which are *mubāḥ* (not obligatory) in ordinary circumstance while in the case of obligatory matters it would be compulsory and binding on priority basis to follow the governmental rules. Moreover, in the absence of proper legislation, the status

of a promise can also be changed into a binding promise due to public interest, as stated by the Ḥanafī jurists.

6.5.2 Differences between *Wa'd* (Unilateral Promise) and *Muwa'adah* (Bilateral Promise)

Wa'd (Unilateral Promise) means an undertaking by a person to act in the future that relates to other individuals. In other words, *Wa'd* is a promise by one party (unilateral) to another party to do certain things, such as a promise to sell or buy, in the future. In the light of Sharī'ah rulings, the promise given by a party (promisor) is considered a unilateral binding promise (*wa'd al-mulzim*) that obliges him to perform the promise, whereas the other party who receives the promise (promisee) can decide whether to exercise the option or discontinue the arrangement. This kind of *wa'd* is allowed in Sharī'ah since the wad is unilateral, and binds only the seller as the promisor (ISRA, 2015, p. 171).

Al-Hattab (1992) described *muwa'adah* (bilateral promise) as both parties promising to each other to do something where the impact or implications of such promises will be on both parties. The bilateral promise indicates two parties acting upon each other. Ultimately, it cannot happen without the involvement of both parties.

The OIC Islamic Fiqh Academy allowed the unilateral binding promise but not allowed bilateral promise due to its resemblance with the sale on the future date where each of them is bound by the contract at a later date. Unlike the unilateral binding promise as here only one party is committed from both parties; eventually the second is

not bound by it. In this way, it can be separated from a sale contract (*'aqd al-bai'*) (Usmani, 2008, p. 94)

ISRA (2015) stated regarding the 17th meeting of OIC Islamic Fiqh Academy in the context of *muwa'adah* that the original ruling on *muwa'adah* is its bindingness from a religious perspective (*diyanatan*) on both contracting parties without any legal consequences. Muwa'adah from both parties to conclude a contract to circumvent the prohibition of riba like mutual understanding to do *'īnah* or bilateral promises to do sale and loan is prohibited by Sharī'ah. However, *muwa'adah* can be made judicially binding according to local law or international trade regulation if there is an urgent public need to such effect. This resolution focuses on the prohibition of *muwa'adah al-mulzimah* (binding bilateral promise) in *murābaḥah* contracts and does not refer to another type of Sharī'ah contract (ISRA, 2015, p. 172).

Similarly, according to AAOIFI's (2010) resolution on Murabahah for the Purchase order, it is not permitted for the contract document to include a binding bilateral promise or other means that carry the same effect on the two contracting parties. AAOIFT (2010) however has permitted the option of condition (*khiyar al-shart*) that preserves the option of cancellation of the contract for either or both of the contracting parties subject to certain agreed conditions.

In contrast, (Usmani, 2015, p. 96) permitted bilateral promises in special cases as per the need (*ḥājāt*) of the public. He stated in this regard as follows; *"However, in some cases, bilateral promises are might be needed by both parties especially in international trade and supply agreements."* (Usmani, 2015, p. 96)

He further explained the difference between the consequence of bilateral promise and sale on a future date as follows;

The contract is not completed and finalized in the case of bilateral promise; (i) as here the subject matter (*maqud aliyah*) is not transferred to the other party, and (ii) ownership is not yet transferred to him, and (iii) price (*thman*) of subject matter (*maqod aliyah*) is not considered debt (*dayn*) on him, and (iv) commands (*ahkam*) related to debt (*dayn*) concerning *zakāt* are not applied to him, and (v) commands related to inheritance (*mīrath*) in case of his death are also not related to him. Furthermore, if anyone from both parties is not able to fulfill this promise on the due date by providing genuine reason he can not be bound to accomplish the contract or give plenty. On the other side, in the case of sale on a future date, if anyone is not able to fulfill the contract on the due date, he would be bound to finalize the contract and cannot be given any favor except the right to return the commodity (*iqalah)* by mutual consent of both parties. While in the case of bilateral binding promise the court has only the right to charge plenty to him based on the actual loss but still he can not be forced to complete the contract.

The above basis provides a clearer difference between the consequences of a contract (which has to immediately transfer the subject matter from one party to another party) and a bilateral promise either binding or non-binding (Usmani, 2015, p. 97-98).

In the light of the above discussion, one may conclude that as per original rules *mawa'adah* has a different consequence to a sale contract. it is difficult to consider it as a contract. However, based on *maṣlaḥah*, in some special cases, it might be considered a contract.

6.5.3 Application of Purchase Undertaking in Sovereign and Quasi- Sovereign *Ijārah Ṣukūk* Structures

Government of Pakistan (GoP) *Ijārah Ṣukūk* MI issued on 29 January 2013, Rs. 600 Billion mentioned in the section of "Terms and Conditions" of the offering circulars as follows:

> *The Government (in such capacity, the **Obligor**) will enter into a purchase undertaking (the **Purchase Undertaking**) to be dated on... in favour of the Trustee and the Delegate, pursuant to which it will **unconditionally and irrevocably undertake to purchase, or procure the purchase of, the Lease Assets from the Trustee on the Scheduled Dissolution Date**... or, if earlier, on the due date for dissolution... at the Dissolution Distribution Amount...*
>
> *Pursuant to purchase undertaking the Exercise Price payable following the terms of the Purchase Undertaking, and unless the Certificates are previously redeemed or purchased and canceled, the Trustee will apply the Exercise Price to redeem each Certificate at the Dissolution Distribution Amount and the Trust will be dissolved by the Trustee on the Scheduled Dissolution Date.*
>
> *In relation to each Certificate, means the aggregate of **(a) the outstanding face amount of such Certificate; and (b) all accrued and unpaid Periodic Distribution Amounts in respect of such Certificate.***
>
> *Furthermore, the Trust may only be dissolved before the Scheduled Dissolution Date upon the occurrence of (a) a Dissolution Event which*

*is continuing; or (b) a **Total Loss Event**. A **'Total Loss Event'** is the total loss or destruction of, or damage to the whole of, the Lease Assets or any event or occurrence that renders the whole of the Lease Assets permanently unfit for any economic use and (but only after taking into consideration any insurances or other indemnity granted by any third party in respect of the Lease Assets) the repair or remedial work in respect thereof is wholly uneconomical.*

There is another term **'asset substitution'** and transfer undertaking has been discussed in these offering circulars. The purpose of this condition is that.....

*Pursuant to the Substitution and Transfer Undertaking entered into by the Trustee in favour of the Government, the Government has the right to oblige the Trustee to transfer the Lease Assets specified in a Substitution Notice (as defined in the Substitution and Transfer Undertaking), the identity of which shall be determined by the Government in its sole and absolute discretion (the **Substituted Lease Assets**) against the transfer to the Trustee of the ownership in and to certain new assets (the **New Lease Assets**). The Government will be obliged to certify that the value of the New Lease Assets is not less than the value of Substituted Lease Assets on the relevant Substitution Date (as defined in the Substitution and Transfer Undertaking). In order to effect the substitution, the Trustee and the Government will enter into a Transfer Agreement (as defined in the Substitution and Transfer Undertaking) to effect the transfer of the Substituted Lease Assets and the New Lease Assets.*

There is another term **'relevant lease asset'** has been discussed in these offering circulars. The purpose of this condition is that..... **(P. 54-M2-Second PISCL)**

> The Obligor will undertake in the Purchase undertaking that if it fails to pay all or part of any Exercise Price when due (the **Outstanding Exercise Price**), it will irrevocably, unconditionally, and automatically continue to lease the Relevant Lease Assets from the Trustee and act as servicing agent in respect of the Relevant Lease Assets with effect from the date immediately following the due date for payment of the Outstanding Exercise Price on the terms and conditions, *mutatis mutandis*, of the Lease Agreement and Servicing Agency Agreement until payment of the Exercise Price in full is made by it. For this purpose, Relevant Lease Assets means the Lease Assets.
>
> *The payment obligations of the Government under the Transaction Documents are direct, unconditional, and (subject to the provisions of Condition 4)* ***unsecured obligations of the Government*** *and (subject as provided above)* ***rank and will rank pari passu, without any preference among themselves,*** *with all other present and future unsecured and unsubordinated External Indebtedness (as defined in Condition 13) of the Government.* ***The due and punctual performance of the obligations of the Government with respect thereto is backed by the full faith and credit of the Government.***

There is another term 'purchase of certificate' by the head of "purchases" that has been discussed in these offering circulars. The purpose of this condition is that;

> *The issuer or the government (itself or acting through an agent) may at any time purchase certificates in any manner at any price.* ***Such***

certificates may, at the option of the issuer or the government, as the case may be, be held, resolved, or surrendered to the principal paying agent for cancellation. *Any certificates so surrendered will forthwith be canceled and accordingly may not be reissued or resold* (P. 41-M2-Second PISCL).

6.6 Application of *Wa'dān* (Two Unilateral Promises) via Purchase and Sale Undertaking in Sovereign and Quasi-Sovereign *Ijārah Ṣukūk* Structures

In some practices, there are *ṣukūk* arrangements that use two undertakings or *wa'dan* (two unilateral promises) a purchase undertaking and a sale undertaking, whereby certain conditions are stipulated to be exercised by the obligor and the trustee on behalf of *ṣukūk* holders. Among the Sharī'ah concerns relating to this arrangement is whether the two undertakings fall under *wa'dan* which leads to two different impacts, or replicates the effect of *muwa'adah* where the two undertakings and to the same result. If the two different undertakings lead to two different results, the arrangement satisfies the requirement of *wa'dan*.

However, if the two different undertakings lead to the same result, it requires an in-depth analysis of the conditions in the undertakings to ensure that they do not resemble *muwa'adah al-mulazimah* instead of wad or *wa'dan*. The practice of *wa'dan* has been widely applied in *ṣukūk* structures through a purchase undertaking and a sale undertaking. For instance, the Global Ṣukūk *Ijārah* issued on 29 January 2013 by Sime derby amounting to USD 1.5 billion incorporated both purchase and sale undertakings as quoted in Box 4.1.

6.6.1 Purchase Undertaking

Sime Derby shall execute an undertaking on the date of the establishment of the program, in favour of the trustee (the 'purchase undertaking'). Upon maturity of the certificates issued in respect of a series or upon an earlier date for the dissolution of the Trust established in respect of such Series following the occurrence of a Dissolution Event, the purchase undertaking provides the trustee, on behalf of certificate holders, with an option to require Sime Derby (as 'obligor') to purchase the Assets relating to a series at a predetermined Exercise Price.

6.6.2 Sale Undertaking

The Trustee shall execute an undertaking on the date of the establishment of the program in favour of Sime Derby (in the capacity as Obligor) (the 'Sale Undertaking'). Sime Deby, according to the Sale undertaking, is provided with an option.

(a) to require the Trustee to sell the Assets relating to a Series at the exercise price where:

(i) dissolution of the trust is to occur following the exercise of an optional dissolution call option by Sime Derby (if such option is specified as applicable in the final terms of the certificates), and

(ii) dissolution of the trust is to occur following the exercise of the right to redeem the certificates upon the occurrence of certain tax events as specified in the terms and conditions of the certificates.

(b) to require the Trustee to transfer to Sime Derby a proportion of the Assets corresponding to certificates purchased by Sime Derby or any of its subsidiaries and which are to be canceled in return for the Trustee canceling such certificates.

Based on these clauses about the purchase and sale undertakings, it is safe to conclude that these undertakings are wa'dān instead of *muwa'adah*. This is because each undertaking refers to different events and leads to different consequences -- though both undertakings lead to the dissolution of the *ṣukūk*, the exercise price payable upon such dissolution pursuant to each undertaking is different (ISRA, ICM, 2015, p.175). The following respondent's views also support the above-stated lines.

Theme-9: Sale and Purchase Undertaking

Figure 19: NVivo Project map of the parent node of the sub-theme "Sale and Purchase Undertaking" (SPU) and relevant child nodes

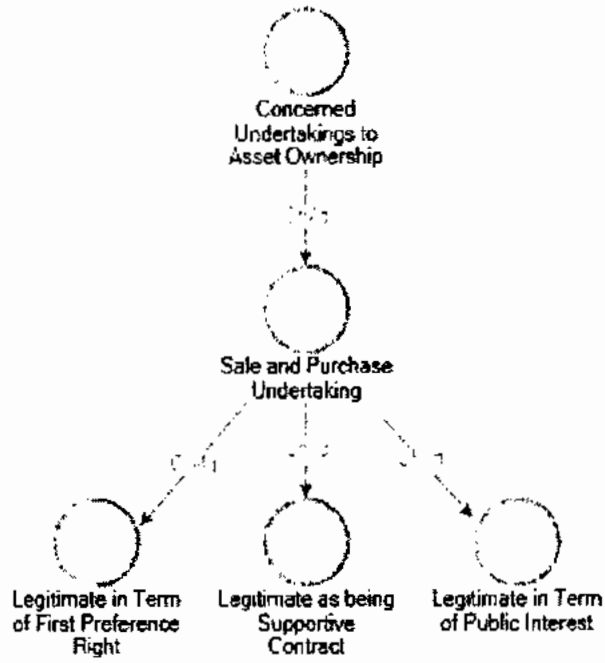

Figure 19

The first dimension under the theme of Sale and Purchase Undertaking (SPU) was Legitimate in terms of first preference right (LFPR). It was revealed that although apparently, sale and purchase undertaking looks against the consequences of ownership, despite some Sharī'ah basis which proves the legality of such type of undertakings in sovereign *ijārah ṣukūk* structures i.e. recourse of quality, preemption right (*shufa'a*), and first preference right, etc. It means the seller has the priority right to purchase the asset if the buyer will intend to sell out this asset. For example, informant-05 was of the view that:

Basically, in principle sales should be absolute without recourse for the owner. But there are many writing in the past, as in the light of different schools (Ḥanbalī,

Shāfiʿī, and Ḥanafī) allowing the seller and buyer to agree among themselves regarding recourse of quality and to purchase the asset on priority than others, etc.

For example, informant-07 was of the view that;

Based on asset nature, it is allowed. Although in the apparent form it is against the ownership rules of Sharīʿah. As you have the complete right to the owned asset to dispose of it without any restriction. But it is just like preemption right (Shufa'a) which is for a neighbor to secure it.

The second dimension under the theme of Sale and Purchase Undertaking (SPU) was Legitimate as being Supportive Contract (LSC). It was explored based on data that sale and purchase undertakings are just falling at the level of promise rather than a contract. Therefore, there is no issue in this regard. Furthermore, this type of clause can be included in sovereign Ṣukūk structures based on parties' will and public interest, etc.

For example, informant-17 was of the view that;

It is just a promise. Sprit of law is the name of the will of the parties. So, if the parties are agreed to restrict some specific rights. Then the court accepted it. So, based on *ṣukūk* prospectus, etc. it would be fulfilled the law and Sharīʿah requirements. It is stated by Mustafa Zarqa that "al Aqd Sharīʿah tul-Muta'aqidyn".

The third dimension under the theme of Sale and Purchase Undertaking (SPU) was Legitimate in terms of Public Interest (LPI).

For example, informant-04 was of the view that; Some people said that purchase undertaking is very resembled bond. But there is a difference because in *Ijārah* there is the existence of assets (ship, aircraft, road, etc.) while in bond only debt is created.

Based on Public interest (*Sia'asa al-Sharī'ah* and *maṣlaḥah*) the govt. can put some restrictions on the asset. So, it is permissible.

Theme-10: Bilateral Promise (*Muwa'adah*)

Figure 20: NVivo Project map of parent node "Bilateral Promise/Muwa'adah" (BP) and relevant child nodes

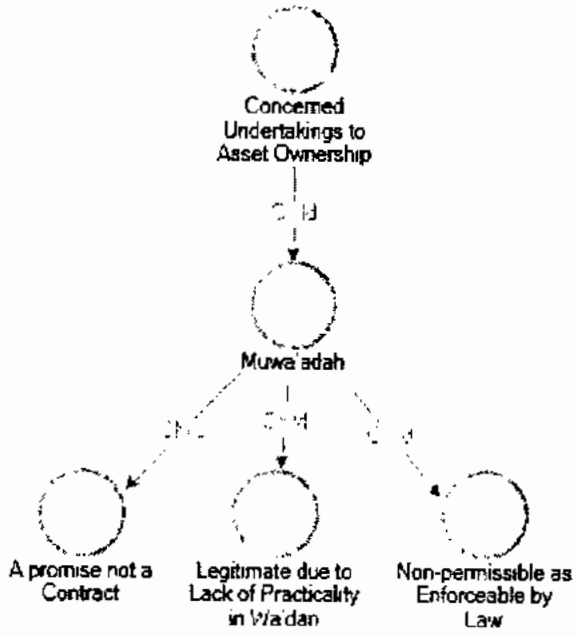

Figure 20

The first dimension under the theme *of Bilateral Promise/Muwa'adah (BP)* was *A Promise, Not a Contract.*it was discovered that Muwa'adah means bilateral promise is not the contract. Despite bilateral promise, it has a lesser form and one step blow from

the contract. Eventually, it is not a contract of future sale and does not fall under the category of call or put options.

For example, informant-02 was of the view that;

> *wa'd and Muwa'adah is not contract. Muwa'adah has a resemblance (Shibah) with the contract. Despite this, it is just a promise and support contract. So, there is no issue. However, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) have a different view.*

For example, informant-05 was of the view that:

> *Interestingly, the topic of wa'd may not much relevant to business dealings in the past but in this modern era, it is very much relevant to financial transactions i.e. in the case of global transactions (investor) you cannot recourse to the third party easily. You have to put in as many protections as possible. Having said that there is no Sharī'ah violence, no capital guarantee, etc., all products are Sharī'ah compliant. In this conflict, wa'd has become available to facilitate both parties' originator and issuer as well. In the case of ṣukūk al ijārah sale and leaseback, and repurchase clauses, etc. all these fall under the category of Wa'adn or Mua'adah than a contract. Because here we are entering the contract and just make a promise before the one step of the contract finalization. Hence it is as per Sharī'ah rules and guidelines.*

For example, informant-18 was of the view that;

> *As per our opinion, muwa'adah is also allowed. Arab scholars and AAOIFI do not allow it. We try to fulfill our needs in this type of future dealings through*

unilateral contracts. But in the case of muwa'adah it is not a contract of future sale and does not fall under the category of call or put options.

The second dimension under the theme *of Bilateral Promise/Muwa'adah (BP)* was Legitimate *due to the Lack of Practicality in wa'dan (LLPW).* It was revealed that a bilateral promise is permissible because it is not a contract. Furthermore, the sometimes unilateral promise is not practically acceptable in every case. So, there should be a space to adopt bilateral promise. For example, informant-6 was of the view that;

In Malaysia, muwaa'dah is also permissible because it is not a contract but Middle Eastern scholars don't accept it. Either the value or counter value is not exchanged. This means the form does not comply with the substance of the contract.

The third dimension under the theme of *Bilateral Promise/Muwa'adah (BP)* was *Non-Permissible as Enforceable by Law (NPEL).* It was revealed based on the respondent's view that it is not permissible as it is enforceable by law. Consequently, there is no difference between bilateral promise and contract both have the same consequences. For example, informant-22 was of the view that;

It is a sort of agreement as here the subject matter is the same in both promises and every party is bound to execute it so, eventually, it is an agreement rather than just a two unilateral promise. The Law of land is recognized as a contract than a unilateral promise.

6.7 Application purchase of *Ijārah Ṣukūk* on its face value than market value and its Sharī'ah Status in Sovereign and Quasi-Sovereign *Ijārah Ṣukūk*

Normally, *ijārah ṣukūk* are purchased (as per purchase undertaking) on its pre-determined face value rather than market value as the partnership based Ṣukūk are prohibited to sale on face value. What is the underlying cause for this difference?

The IFA-OIC in a resolution on this matter issued at its 15th session, held in Muscat, Oman on 6-11 March 2004, stated, "It is not permitted for the *ṣukūk* issuer or the manager to guarantee the original price of the *ṣukūk* or its profit; and if the lease assets are destroyed or damaged, the *ṣukūk* holders shall bear the loss" (Bouheraoua et al., 2012; ISRA, 2017, p. 314).

Kamali and Abdullah (2014, p. 143-144) stated that "However, given the fact that in many *ṣukūk ijārah* structures the assets underlying the *ṣukūk* are unlikely to have been the subject of a legal sale initially, it is submitted that the main purpose of the contract has changed to create a payment obligation on the originator. Thus, in the event of the corporate going bankrupt, this claim can be 'accelerated', and hence investors should have a claim to this amount from an investor perspective, such claim should rank at the same level as other unsecured creditors, both conventional and Islamic. Ṣukūk investors here have no prior claim over the *ṣukūk* assets. Thus, one may argue that even the purchase undertaking in *ṣukūk ijārah* is not immune from criticisms if there is no true sale of the assets at the outset."

AAOIFI (2008) resolution states the following: "It is permissible for a lessee in a *ṣukūk al-ijārah* to undertake to purchase the leased assets when the *ṣukūk* are extinguished for its nominal value, provided he (lessee) is not also a partner, mudārib, or investment agent."

It is clear from the above statement that a purchase undertaking in which the exercise price is calculated by reference to the face value of the underlying assets is permissible under *ṣukūk ijārah*. This is because, under an *ijārah* contract, the originator usually "sells the asset to the SPV and then leases it back from the SPV for the *ṣukūk* term. The purchaser bears the risk of the asset throughout the life of the *ṣukūk* and he has the option but not the obligation to sell it.

It is, therefore, permissible for the originator to undertake to purchase the tangible asset at the value on the maturity date, during the life of the *ṣukūk* the *ṣukūk* holders would still bear the risk of the asset. If the asset is destroyed in some way during this period the originator will not be under an obligation to buy the asset. The *ṣukūk* originator will not be under an obligation to buy the asset. The *ṣukūk* holders should have full control over the *ṣukūk* assets and there is nothing in the sale and purchase agreement that restricts their ownership or curtails their rights.

GoP Domestic *Ijārah* Ṣukūk (M1 motorway) annexure "C" in the "Structure-Explanation" and the point no.11, p.3 stated that;

> *"GoP (acting through Mof) will provide a* ***purchase undertaking in favour of the Trustee to purchase the Assets at the Exercise price at maturity or upon on Event of Default.*** *The* ***Exercise price*** *shall be* ***an amount equal to the Initial Purchase Price for the Assets plus any other amount due and payable by the GoP,*** *the Exercise Price will also be liable* ***to pay all amounts as per the Ijārah Agreement at maturity or upon an event of default****".*

This matter would be elaborated with the help of respondent's views as follows:

Theme-11: Sale of *Ijārah Ṣukūk* on its Face Value

Figure 21: *NVivo Project map of the parent node of the theme "Sale of Ijārah Ṣukūk on its Face Value" (SIS-FV) and relevant child nodes*

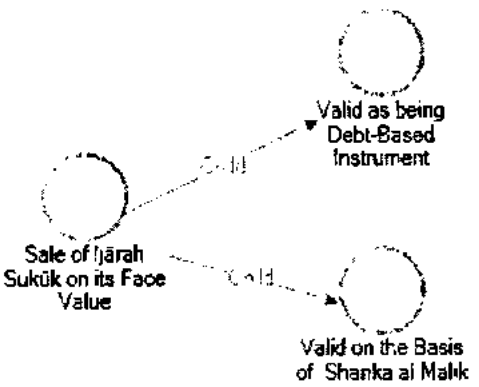

Figure 21

As per the first and second dimensions respectively '*Valid as being Debt Based Instrument'* and '*Valid based on Sharika al Milk'* under the theme of *Sale of Ijārah Ṣukūk on its Face Value (SIS-FV),* it is allowed because here the parties have the relation of lessee and lessor than *Sharik* (partner). Eventually, both are trying to mitigate their risk on the future date. So, they negotiate the price in the beginning. Both are strangers/*al-ajnabi* for each other. It is not just like partners as in the case of *mushārakah* and *muḍārabah*, it is legitimate in the context of the dayn (debt created in the result of any consideration or right) So, there is no more issue in this regard. Furthermore, it was revealed that the sale of *ijārah ṣukūk* on its face value at the time of maturity is valid as this matter is related to *sharikaẗ al-amwāl* than *sharikaẗ al-ʿaqd.* Consequently, there is no Sharīʿah violation. Such as the following respondent's views also shown this view;

For example, informant 5 and 2 were of the view that; *It is allowed because here the parties have the relation of lessee and lessor. Both are trying to mitigate their risk on the future date. So, they negotiate the price in the beginning. Both are strangers (al-ajnabi) for each other. It is not just like partners as in the case of mushārakah and muḍārabah.*

For example, informant-25 was of the view that; *It is debt, so there is no issue as it is different from the guarantee on mudarabah capital.*

The second dimension under the theme of *Sale of Ijārah Ṣukūk on its Face Value (SIS-FV)* was *Valid based on Sharika al Milk.* It was revealed that to sell the *ṣukūk* al *ijārah* on its face value at the time of maturity is valid as this matter is related to *sharikaẗ al-amwāl* than *sharikaẗ al-ʿaqd.* For example, informant-16 was of the view that;*Yes, based on sharikaẗ al-milk it is allowed.*

Now in the following lines the 'section # two' of this research work named 'third-party guarantee and charging fee on it in quasi-sovereign ijārah *ṣukūk* and its sharīʿah status' would be described.

6.8 Application of Third-Party Guarantee and Charging Fee on it in Quasi-Sovereign *Ijārah Ṣukūk* and its Sharīʿah Status

Al-Amine (2008) argues that "theoretically, a benevolent third-party guarantee without fee or consideration can be acceptable in Islamic law. However, in practice guaranteeing the principal in *ṣukūk* Mushārakah, or *ṣukūk* Muḍārabah or *ṣukūk Ijārah* is problematic. This is due to the fact, **that if the guarantee is provided by a**

government it shall be declared non-permissible to use the property of the whole community for the benefit of private entities. Likewise, it is hardly conceivable for a private entity to provide a benevolent guarantee to another entity without a consideration".

Diaw, et al., (2014) rose an important issue that has drawn the attention of scholars is the third-party guarantee present in many *ṣukūk* structures.

Abdelrahman, (2019) stated that "In several important cases, the guarantee of Ṣukūk's nominal value and their rate of return was further supported by sovereign entities (e.g. the governments of Malaysia, Bahrain and Qatar, etc.). Guarantees given by sovereigns are claimed to be Sharia permissible, which is not true. In principle, the State in an Islamic system should not be involved in projects which the private sector is capable of carrying. If it is argued that the State should establish the infrastructure projects or undertake some big or strategic projects, because of the inability of the private enterprise, the question that would arise is: why through Ṣukūk in particular? Why not by other means of finance? ".

ISRA, Ṣukūk, p. 113 (2017) stated that Kafālah is a very important contract that ensures the preservation and security of the rights and obligations of the contracting parties. However, it is an optional contract to be used when needed to strengthen the business dealing. A kafala contract can be used and combined with other contracts like *qarḍ* or sale etc. Hence, it is also used to take a guarantee in quasi-sovereign *ijārah ṣukūk* structures to secure the payment leasing of the equipment or other type of rentals. Quasi-sovereign *ṣukūk* refer to *ṣukūk* issued by a semi-government or parastatal entity

and are similar to sovereign *ṣukūk*. They may carry explicit or implicit government guarantees.

On the basis of above cited studies, one can be stated that the issue of third party guarantee and charging fee on it must be argued in detail to clear the actual position of this matter as per the doctrine of Islamic Law.

6.8.1 Definition of *kafālah*

Kafalah means responsibility. Generally, it means a guarantee whereby it combines one *dhimmah* (liability) with another person's *dhimmah* . Therefore, it can be taken as a contract-based whereby the guarantor takes the responsibility to pay off any arising liability, on behalf of the guarantee.

kafālah has a few applications in Islamic finance such as in *murābaḥah*, *ijārah*, salam, and guarantee in documentary credit. Hence, it is also used to take a guarantee in *ijārah ṣukūk* structures to secure the payment leasing of the equipment or other type of rental (ISRA, 2015, p. 143).

6.8.2 Ujrah for *kafālah*

Ujrah refers to rental or fees for usage of labour and benefits. In the current economic context, it may be applied to salaries, wages, fees, commission, and the like. The majority of past Islamic jurists from the four schools of law (Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī) were of the view that the charging of fees on *kafālah* is not permissible such as Ibn al Munzir ﷺ stated in this regard:

"أجمع كل من نحفظ عنه من أهل العلم أن الحمالة (وهي الكفالة) بجعل يأخذه الحميل (أى الكفيل لاتحل ولاتجوز"

There are is an *ijmā'* (consensus and harmony) among the scholars that to take a reward (charge fee/commission) on *kafālah* is not allowed.

This view is based on the argument that a *kafālah* contract falls under *'uqud tabarru'at* which is voluntary and benevolent. Hence, no fee is to be charged. The OIC Islamic Fiqh Academy the Sharī ah Council of AAOIFI also resolved that *ujrah* on kafalah/*ḍamān* is not permissible. However, the guarantor may claim for actual expenses incurred on the guarantee (ISRA, 2015, p .144; Usmani, 2015, p. 1102, 1108).

Zuhayli (1989, p. 161) has the view that to charge *ujrah* on kafalah is permissible as he stated in his book as follows;

لكن إن شرط الكفيل تقديم مقابل ..... جاز دفع الأمر للضرورة أو الحاجة العامة لما يترتب على عدم الدفع من تعطيل المصالح، كالسفر للخارج للدراسة أو للارتزاق... ونحوها، و أساس القول بالجواز فيه أن الفقهاء أجازوا دفع الأسير الحاجة لأداء القربات والطاعة من تعليم قرآن وممارسة الشعائر الدينية.....لكن يجب عدم الاستغلال أو المغالاة في اشتراط المقابل، مراعاة لأصل مشروعية الكفالة وهو التبرع" .

When there is a condition that the *kafālah* bears a fee, the said condition is considered valid based on *maṣlaḥah* and society's needs such as traveling abroad to study or make a living, etc. He supported his views with qiyās, referring to fees that are permissibly collected on utilizing someone's reputation and also on performing incantation using Qur'ānic verses... However, it should not be exploited or overstated by requiring consideration, taking into account that the origin of the legality of the guarantee, which is *tabarru'*.

The following lines explain this matter in the light of offering circulars.

*The **Servicing Agency Agreement** provides that if the **obligations of the Servicing Agent thereunder are not strictly complied with and as a result, any insurance proceeds credited to the Transaction Account are less than the Insurance Coverage Amount** (as defined therein) unless the Servicing Agent proves beyond a reasonable doubt that (i) it has not breached, or for any reason failed to comply with, the relevant insurance-related provisions of the Servicing Agency Agreement and (ii) **that such shortfall is not in any way attributable to its negligence, the Servicing Agent shall be responsible for paying the Total Loss Shortfall Amount into the Transaction Account by no later than close of business on the 31st day after the Total Loss Event has occurred.***

The above conditions related to Trust Dissolution or Total Loss Event are might be secure the Ṣukūk holders' interest and considered as supportive and necessary conditions etc. but the matter of insurance coverage should be clarified and explained.

The coming paragraph of offering circulars elaborates the way of insurance coverage in the scenario of a total loss event.

*'**Insurance Coverage Amount**' means **an amount equal to the aggregate of (a) the face amount of all Certificates for the time being outstanding**; (b) **all accrued and unpaid Periodic Distribution Amounts relating to such Certificates**; (c) **an amount equal to the Periodic Distribution Amounts relating to such Certificates which will accrue during the period beginning on the date on which the Total Loss Event occurs** and ending on the 31st day following the date on which a Total Loss Event occurs; and (d) **without***

duplication and double counting, an amount equal to any Servicing Agency Expenses outstanding under the terms of the Servicing Agency Agreement concerning the Lease Assets.

In the context of the above paragraph of offering circulars, the better option is to use the Takaful cover than conventional insurance cover. However, these insurance covers are might be justified in the absence of takaful facilities on this mamga scale or due to other legal or regulatory constrains. The following views of the respondents also elaborated the above matter.

Theme-11: Guarantee

Figure 22: *NVivo Project map of the parent node of the theme "Guarantee" and relevant child nodes*

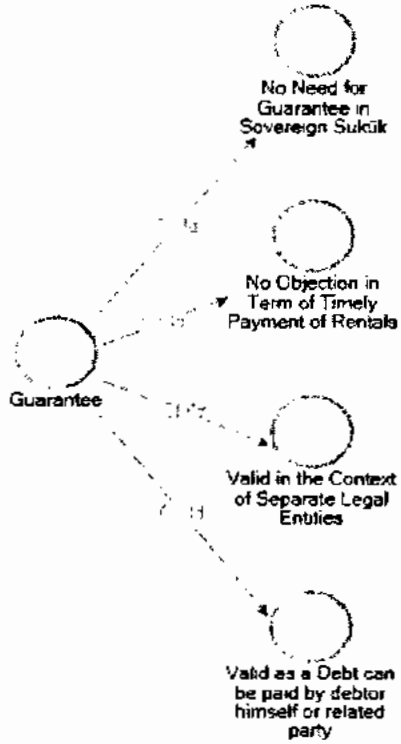

Figure 22

The first dimension under the theme of *Guarantee* was *No Need for Guarantee in Sovereign Ṣukūk (NNGSS)*. It was revealed based on data that in sovereign Ṣukūk structures there is no need for guarantee because here the government has its worth and guarantee. For example, informant-08 was of the view that:

> *There is no guarantee in sovereign ṣukūk. As here the sovereign itself is a guarantee. So, there is no need for a guarantee.*

The second dimension under the theme of *Guarantee* was *No Objection in terms of Timely Payment of Rentals (NOTPR)*. It was revealed that in the context of quasi-sovereign *Ijārah Ṣukūk* structures there is no issue to take this type of guarantee as here the guarantee is just related to the timely payment of rentals and it is one of the important responsibilities of a lessee to pay the rentals on their due dates. For example, informant-25 was of the view that:

> *In Ijārah there is no harm for guarantee because here the amount is debt, it has to pay to me.*

The third dimension under the theme of *Guarantee* was *Valid in the Context of Separate Legal Entities (VSLE)*. It was revealed that in the case of quasi-sovereign *Ijārah* Ṣukūk structures to take the guarantee from an independent institution by the govt. is valid by considering them as separate legal entities. For example, informant-11 was of the view that:

> *Some legal entities which are created independently, as 'khazana' in Malaysia, issued the SRI Ṣukūk and govt. guaranteed it, by viewing it as a separate legal independent entity i.e. HSBC (Amana). In this context it is permissible.*

For example, informant-14 was of the view that:

This matter is linked to Musharakah and Mudarabah ṣukūk. While in the context of Ijārah Ṣukūk, if the central govt. guarantees the timely payment of WAPDA, Railway, NHA, etc. then it would be satisfactory and acceptable for the local or international investors. So, there is no issue. However, various departments of any govt. are considered as separate legal entities in their rights and liabilities. So, they should be considered separate from the govt.

For example, informant-15 was of the view that:

In the context of limited liability and legal entity as in the case of a group of companies, every child entity has been segregated by its rights and liabilities. So, it should be considered separate in this context as well. This means if we considered it as a legal entity then it should be considered as an independent entity from its parent. So, the same case is in the sovereign Ṣukūk.

The fourth dimension under the theme of *Guarantee* was *Valid as debt can be paid by Debtor himself or Related Party*. It was revealed that in the case of sovereign-*ṣukūk* al *ijārah* there is no issue because here the guarantee is just for the payment of *Dayn* and it is permissible as per Sharī'ah and *Madyoon* himself, his concerned or any third party can guarantee for the payment of the debt. This means there is a difference between the guarantee of *Dayn* and capital.

For example, informant-21 was of the view that:

In the case of a partnership, ṣukūk govt cannot guarantee to protect the capital as here the govt. will be considered as a Fariq/party in case of quasi-sovereign because here the benefit/manfa'ah of govt is related to this contract. While in the case of ṣukūk al ijārah there is no issue because here the guarantee is just

for the payment of Dyn and it is permissible. Madyoon himself, his concerned, or any third party can guarantee the payment of the debt. This means there is a difference between the guarantee of Dayn and capital. Furthermore, this guarantee is not for every matter in general. This means if there is any destruction occurs in ṣukūk assets without the negligence of the lessee (WAPDA) it will not be paid by the government.

Now in the coming lines, the crucial issue of charging a fee on the third-party guarantee in quasi-sovereign ijārahh ṣukūk structures would be clarified with the help of the respondent's views.

Theme- 12: Fee for Third Party Guarantee

Figure 23: NVivo Project map of the parent node of the theme "Fee for Third-Party Guarantee" (FTPG) and relevant child nodes

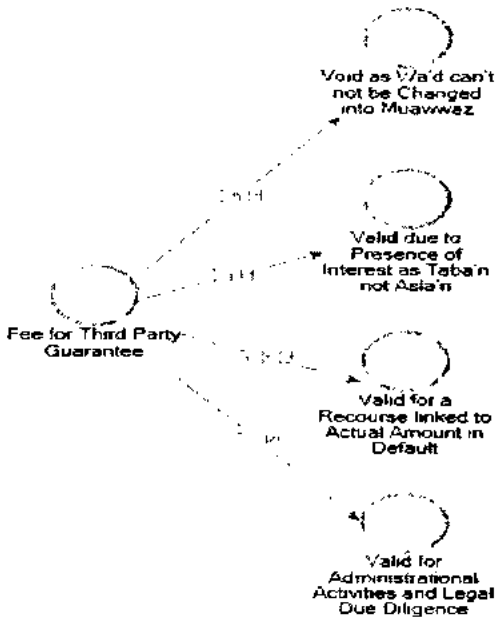

Figure 23

The first dimension under the theme of *Fee for Third-Party Guarantee (FTPG)* was *Void as a promise (wa'd) can't be changed into Muawwaz*. It was revealed the actual expense based on *Amaliyat* (working activities) can be excluded and charged. But it does not mean that the status of zaman has been changed and *Muawwaz* of *Zaman* is allowed. In short, the position of promise and *wa'd* cannot be changed into Muawwaz but to remain non-commutative. For example, informant-11 was of the view that:

> *There is no third-party fee in this guarantee; still, if we are going to discuss this matter then the actual expense based on working/amaliyat can be charged. But it does not mean that the status of zaman has been changed and muawwaz of zaman is allowed and here the charges should not be linked to the guarantee's amount but it can be in the form of lump-sum or based on slabs that have a very clear different impact from linking to the certain percentage i.e. case study of a company. The need of industry should be linked to the above-mentioned level not in a generic way by changing the status of zaman into a commutative contract then there is no reason to say insurance is illegitimate as per Sharī'ah rules. In short, the position of promise and wa'd should not be changed into muawwaz but to remain non-commutative. The same case is in the distribution of loan amount to the needy people, an entity can exclude its real expense but it cannot be linked to the loan disbursed amount despite the fact this would be a ḥīlah for receiving interest on the name of service charge. Therefore, when we cannot charge the amount on a loan, how we can charge a fee on a promise to give a loan?*

The second dimension under the theme of *Fee for Third-Party Guarantee (FTPG)* was *Valid due to the Presence of interest as Taba'n, not Asla'an*. It was shown based on data that in the case of fee on third party guarantee the presence of interest is *Taba'n, not Aslan*. So, there is no issue as per Sharī'ah rulings. For example, informant-05 was of the view that;

> *Here the interest is Taba'n, not Asla'an. So, it should be permissible. As takaful in the case of deficit of takaful fund, the operator gives loan to the pool. It is permissible due to taba'n. In Kafalah, wakālah, takāful, etc., here the loan is Taban'n so it is not being banned by scholars.*

The third dimension under the theme of *Fee for Third-Party Guarantee (FTPG)* was *Valid for a Recourse Linked to Actual Amount in Default*. It was revealed that the fee for a third-party guarantee is allowed but it is conditional to the recourse linked to the actual amount in default. For example, informant-04 was of the view that;

> *In the case of default, there are two opinions. 1st, you have to recover just that amount that you have paid in beginning means the same amount is recovered and recourse. It is just like Taabi', not in Asal. So, it should be permissible. But if you received more than you have paid i.e. 500 $ on 100$ guarantee. It is just like a benefit on a Qard transaction.*

The fourth dimension under the theme of *Fee for Third-Party Guarantee (FTPG)* was *Valid for Administration Activities and Legal Due Diligence*. It was revealed that the matter of charging a fee on third-party guarantees must be linked to

administrational activities and legal due diligence only. For example, informant-25 was of the view that;

> *As per AAOIFI the fee will not only be for guarantee but is allowed for other activities i.e. Administration, legal due diligence and work have done, etc. But some scholars allowed it based on the modern contracts and change the nature of the guarantee.*

Now the 'section # three' named 'application of combination of contracts and its sharī'ah status in sovereign and quasi-sovereign ijārah *ṣukūk*' would be elaborated as follows;

6.9 Application of Combination of Contracts in parallel contracts and its Sharī'ah Status in Sovereign and Quasi-Sovereign *Ijārah Ṣukūk*

6.9.1 Combination of Contracts

As hybrid instruments can be structured through the combination of contracts. Hence, a hybrid contract mixes the elements of a few contracts or various instruments to design a specific Sharī'ah compliant structure to serve a specific purpose in the Islamic capital market (ICM). Usually, a hybrid structure combining various Sharī'ah contracts has been used to facilitate the issuance of *ṣukūk* (ISRA, 2015, p.153).

AAOIFI (2010) defines a combination of contracts as: "an agreement between two or more parties to put together two or more contracts with different features and legal consequences and viable transaction. In this case, all obligations and legal consequences arising from the combined contracts are to be realized as a single obligation". This case is expressed in the classical literature of terms *safqatayn fi safqah* (the combination of two transactions in one) or *bayatayn fi bayah* (the the combination of two sales in one) (ISRA, 2017, p. 153).

6.9.2 Prohibition of Combining Two Transactions in One

The provisions that seem to reject the concept of a combination of contracts (combining two transactions in one) are stated in Sunnah literature evidenced by several famous versions of hadith. One such hadith reads to the effect reported by Ibn Masoud ﷺ:

نهى رسول الله صلى الله عليه وسلم عن صفقتين في صفقة واحدة[3]

The Prophet ﷺ has prohibited concluding two contracts in one' (Musnad al-Ahmad, vol, 6 p. 324: Hadith: 3783).

In another hadith, it was reported by Abu Huriyra ﷺ:

نهى رسول الله صلى الله عليه وسلم عن يعتين في بيعة[4]

The Messenger of Allah (ﷺ) prohibited two sales one sale (Al-Tirmidhi, hadith: 1231)

The scholars differed in their interpretation of these hadith which particularized the term *safqatayn fi safqah* (the combination of two transactions in one) or *bayatayn fi bayah* (a combination of two sales in one) and one such interpretation is that to conclude a contract by stipulating another contract in it. It is adopted by the writer of Hidayah and also preferred by Imam Ibn al Hammam in his book Fath al Qadir. Furthermore, Imam Shafi said about the meaning of hadith *bayatayn fi bayah* (the combination of two sales in one). It means to conclude a contract that revolves between deferred payment with a higher price and cash with a lower price, and the parties to the contract separated without certainty on which of the two bargains the contract was

[3] Corrected by Al-Bani http://www.qaradaghi.com/chapterDetails.aspx?ID=332
[4] Corrected by Al-Bani www.islamweb.net/ar/fatwa/112322

finalized. Based on this majority of classical jurists have the view that the condition of *safqatayn fi safqah* (the combination of two transactions in one) is not allowed (Usmani, 2015, p. 506).

However, Imam Malik ﷺ differentiated the various contracts in this regard. Eventually, he divided the combination of contracts into two categories permissible combination and non-permissible combination. For example, it is permissible by him to combine the contract of Bai (sale) and *ijārah* (lease) in one contract and not allowed to combine the Bai (sale) and Jua'alah (reward-based task). The reason is that 'every two contracts which are opposite and contradictory to each other by nature,' could not be combined in one contract, and in the case of vise versa it would be permissible to combine them in one contract. Ultimately, a combination of sale and *ju'ālah* is not allowed by him as ignorance (*jahalah*) is an essential part of *ju'ālah* contract while the *bai'* (sale) doesn't accept the *jahalah*. In contrast, the base of *ijārah* contract leads to the elimination of *jahalah* (ignorance) and *gharar* (uncertainty). Hence, bai (sale) and *ijārah* (lease) both are can both be combined in a contract (al khurashi: 4; 7).

Based on this it might be identified that the *'illah* (underlying cause) of the prohibition of combing of two contracts in one contract near to Imam Malik is 'to combine such two contracts which are opposite and contradictory to each other by nature' and otherwise it would be allowed. However, the majority of classical jurists who did not allow such type of combination banned it due to inconsistency with the *muqtad'a al-'aqd* (the legal consequence of the contract), (Usmani, 2015, vol, 1, p.506).

Furthermore, the effective reasons for the prohibition are the occurrence of riba (interest) or the existence of *gharar* (excessive uncertainty or ignorance) which might

be led to Niza'a (quarreling) between the contracting parties. Hence, the rationale behind the impermissibility of the combination of loan and exchange contracts such as a sale contract is the existence of riba where the lender (who is also a seller) will factor the interest of the loan in the sale price for the buyer (who is also a borrower) to pay to him.

This arrangement is deemed as *ḥīlah* (legal trick) to impose interest on the borrower and is strictly prohibited by Islamic law. Apart from a combination with a loan contract, two contracts in one bargain are also prohibited due to the existence of uncertainty and ignorance which may lead to injustice and will oppress the transacting parties. For these reasons, Sharī'ah does not allow the combination of loan and sale contracts and combination of contracts in one bargain, especially when the structure involves contracts of exchange of value (ISRA, 2017, p. 444; Usmani, 2015, p. 510).

Furthermore, by considering another aspect that *safqatayn fi safqah* (the combination of two transactions in one) is the type of *shart al za'aid* (supplementary and additional condition) in a sale contract and such type of *shurot* (conditions) are considered permissible according to Ḥanafī jurists based on *'urf* (prevailing custom). Hence, they allowed 'sale of a shoe with the condition of putting lasses in it.' They said although apparently, it should not be allowed due to *qiyās* (general principles) as it is a sale with the condition of *ijārah*. However, based on *istiḥsān* (juristic preference) it would be considered permissible due to urf (customary practice).

Usmani (2015) concluded the above debate in this way that there is a lot of business dealings has been done by the public in this contemporary era which is a combination of several *khidma't* (services) in a contract; some of them has to link *ijārah*

contract while others are related to the sale contract. For example, travel agencies related to *Ḥajj* and *'Umrah* provide several services only through a single contract i.e. matters related to visa and passport, traveling either by air or by road, residence in hotels and other places, eating schedule, and so on. All these contracts (sale and *ijārah*) are interlinked and stipulated to each other.

Despite all of these, it is done regularly among the Muslim people because it is not a cause of *jahalah* (ignorance) and *gharar* (uncertainty) which leads to *Niza'a* (quarrel) between the parties. Hence, based on *istiḥsān* (juristic preference) it would be considered permissible based on urf (customary practice) although apparently, it should not be allowed due to *qiyās* (general principles) as it is a stipulation of several *ṣafaqat* (contracts) in one *ṣafqah* (contract) (Usmani, 2015, p. 513).

6.9.3 Exception from the Ruling of Combination of Two Transactions in One

It is noted that not all types of combinations of various transactions are disallowed. Scholars understood the hadith of the combination of two transactions in one and its ruling of prohibition in a specific context. The criteria of the combination of various transactions in one, which includes (i) imposition of the second transaction as a condition to the first transaction; (ii) prearrangement or prior agreement among the contracting parties to combine two transactions in one; and (iii) ambiguity of the transaction outcomes at the point of concluding the contract, offer a good understanding to know precisely which transaction qualifies for such prohibition and which does not.

Therefore, most contemporary scholars are of the view that only a structure that meets the criteria should be disallowed based on the prohibition of the combination of

two transactions in one, while any structure that does not fulfill such criteria should not be disallowed on the same basis (ISRA, 2015).

6.9.4 Relevance of Combination of Two Transactions in One in *Ṣukūk*

The issue of the combination of two or more transactions in one is strongly related to *ṣukūk*. It is a fact that *ṣukūk*, as Islamic financial instruments, are not an exception from the typical sophistication of financial engineering. Combining two transactions in one has become a vital factor in *ṣukūk* structuring, that is why *ṣukūk* are usually structured by combining two or more transactions. However, it should be noted that in structuring *ṣukūk*, it is crucial to ensure that such structure does not fall under the scope of the prohibition of the combination of two transactions in one. In other words, it should be ascertained that *ṣukūk* does not meet the prohibition criteria mentioned above. Thus, as long as they do not fulfill those criteria, they cannot be declared as prohibited due to the combination of two transactions in one.

Given that, AAOIFI (2015) in Sharī'ah Standard No. 25 (2/1) defines the permissible way of the combination of transactions as Combination of contracts is a process that takes place between two parties or more and entails the simultaneous conclusion of more than one contract.

AAOIFT (2015) Sharī'ah Standard No. 25 further elaborates that as long as a transaction in *ṣukūk* is permissible on its own, general conditions of validity are adhered to, and all specific conditions of each transaction are satisfied, it is permissible to arrange more than one transaction in a way that gives a beneficial a legitimate combined outcome. This is permissible unless there is an injunction in Sharī'ah that entails its

prohibition on an exceptional basis. Because of the permissible combination of transactions can be structured:

1. When one transaction is not imposed as a condition for the other transaction regardless of the prevalence of a prior agreement or prearrangement.

2. When there is no prearrangement or prior agreement among the contracting parties for combining more than one transaction, regardless of whether one transaction is imposed as a condition for the other transaction

3. When the outcome of the contract and the rights and obligations of the contracting parties are confirmed and clearly understood at the time of conclusion of the contract (ISRA, 2017, p. 444).

There are some key Sharī'ah considerations to be taken into account in structuring *ṣukūk* based on hybrid contracts.

A key issue when combing Sharī'ah contracts is to ensure that the overall structure avoids any linking of the contracts which will give rise to the issue of inter-conditionality between them. Furthermore, whether these contracts are compatible should also be considered. It should also be ensured that hybrid contracts did not lead to transactions prohibited by Sharī'ah, such as interest-based loans (ISRA, 2015, p. 153).

Based on the above discussion, it might be clarified that to use the technique of parallel contract in sovereign Ṣukūk structures is legitimate and permissible in the light of different *Fiqhi* rulings and Sharī'ah principles as described by various Sharī'ah councils and scholars.

Now the issue of combination of contracts by using parallel contracts would be elaborated vis-à-vis sovereign and quasi-sovereign *ijārah ṣukūk* structures as follows;

6.9.5 Combination of Contracts in Parallel Contracts and its Application concerning Sovereign and Quasi- Sovereign *Ijārah Ṣukūk* Prospectuses

Primarily in this segment, a general diagrammatic illustration and structural explanation of GoP ijārah *ṣukūk* would be presented to demonstrate that how such a complex structure is completed by involving various parallel contracts to execute this type of transaction.

Diagrammatic Illustration (M2-3)

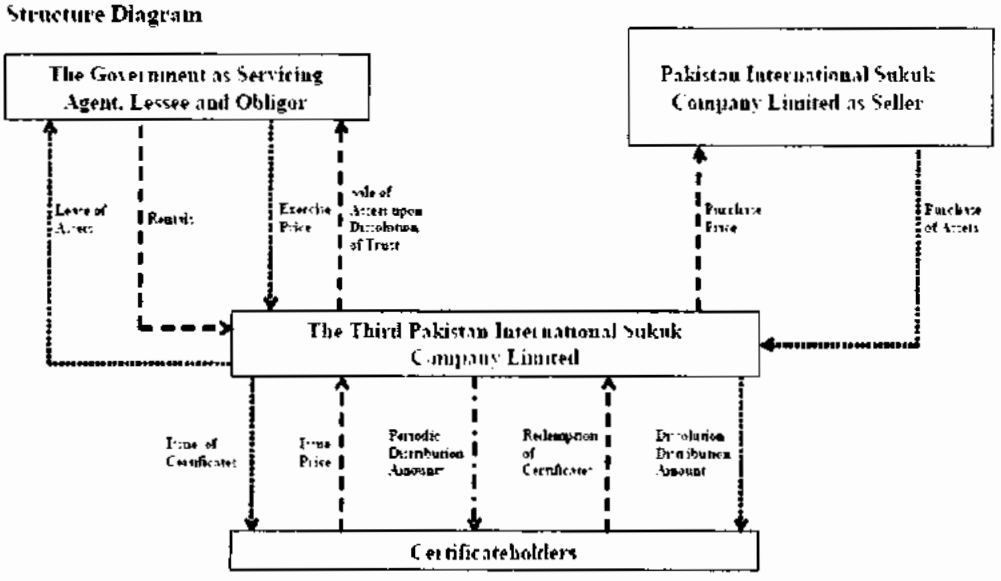

Figure 24

Source: SBP

6.9.6 A Brief Structural Explanation of the *Ṣukūk* Prospectuses

The comprehensive explanation of the *Ṣukūk* Prospectuses highlighting its structure and operational sequence is mentioned below.

vi) Initially "*Ṣukūk* Investors" are recognized through placing an auction by State "Bank of Pakistan (SBP)".

vii) After this, the *ṣukūk* holders perform a "Ṣukūk Subscription Undertaking", whereby all the *ṣukūk* investors present their willingness to the *ṣukūk* subscription as issued by "Pakistan Domestic Ṣukūk Company Ltd (PDSCL)". At this stage, the *ṣukūk* holders also perform another task and that is the appointment of an Islamic Financial Institution (IFI) whose main task is to purchase the underlying asset on behalf of the *ṣukūk* holders.

viii) At the third step, the appointed Islamic Financial agent by *ṣukūk* holders made an agency agreement with SBP (paying agent). As per this agreement, SBP is supposed to receive proceeds from the *ṣukūk* holders, collect rentals from GoP and disburse those proceeds to the *ṣukūk* holders. It also acts as "Reference Agent and Registrar for the Investors"

ix) After the agreement with the paying agent, the appointed investment agency (IFI) will execute a 'Purchase Agreement' with GoP. This agreement is executed via the 'Ministry of Finance (MOF)' whereby specified portions in respective assets are taken by the investment agent. This purchase price is always equivalent to the *ṣukūk* issue amount as agreed by the *ṣukūk* holders previously. Hereby, SBP subsequently releases the purchase amount to the vendor's account on behalf of investment holders.

x) Later on, the ownership of the specified portion of the asset after purchase, is usually transferred to the investment holders whereas registration title and the possession of the asset is remain with PDSCL. Following this, 'Declaration of Trust' will be carried out by PDSCL, declaring that registration title is being held by the PDSCL on behalf of investors. After this transferring of ownership, a document would be presented to the GoP and Investment agency that would demonstrate the legal confirmation regarding the transference of related risk and rewards to the investors along with the purchased asset. Along with this, Additionally, "under the Declaration of Trust, SBP-BSC may also be made delegate for specified purposes".

vii) At the next step, the appointed Investment Agent would execute an '*Ijārah* Agreement' with GoP ("as Lessee acting through MOF"). As per this agreement, the identified and purchased portion of a certain asset is usually leased to GoP for a specific period (that is usually three complete years). This agreement is performed against certain lease rental payments made following the terms and conditions of the "*Ijārah* Agreement". In accord with this, GoP is supposed to nominate an affiliate, for instance, NHA (nominee), who, on the behalf of government performs the task of asset usage, maintenance, and regulation. There occurs a new "Ijara Agreement" for every new intended Ṣukūk issuance.

viii) Following this, Investment Agent enters into a 'Service Agency Agreement' with GoP . Hereby GoP is supposed to perform services about the respective leased asset against minor services charges.

ix) GoP (again via MOF) would present an undertaking stating the responsibility to own the assets at the exercise price on its maturity date or in case of default and asset termination. This very Price is equivalent to the starting purchase price with an addition of due rental if any. At the occurrence of certain events, for instance, the arrival of the maturity date, a default of termination of the asset, a "Sale and Purchase Agreement" would be done between GoP and appointed investment agent with an intent to record evidence of asset purchasing by GoP. This agreement is again executed via MOF. Following this, the legal title of the asset would be delivered from PDSCL to (GOP) or any of its nominees as nominated under the above-mentioned agreement.

x) Finally, GoP would execute a 'Cost Undertaking' whereby it is supposed to clear all the dues related to applicable fees and expenses and also make ensure the provision of any arising indemnity related to the issue of Suku.

xi) This whole sequence of procedural activities regarding Ṣukūk issuance are thoroughly monitored by the "Islamic Banking Department" of "State Bank of Pakistan". This department is liable to closely supervise the proper execution of the procedure as per Sharī'ah guidelines and ensure to meet all the legal formalities as per designed Sharī'ah structure throughout the tenure of Ṣukūk issuance and its performance. The following diagram of the respondent's views also clarifies this matter in this context.

Theme-13: Parallel Contracts

Figure 24: *NVivo Project map of the parent node of the theme "Parallel Contract" (PC) and relevant child nodes*

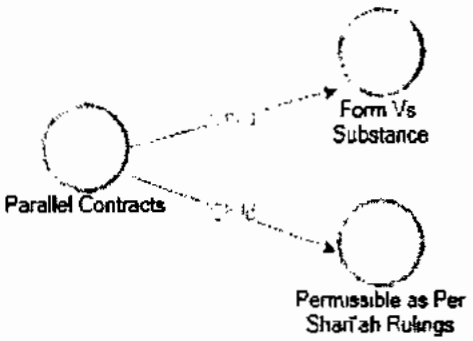

Figure 25

The first dimension under the theme of *Parallel Contract (PC)* was *Form vs. Substance (Fvs.S)*. It was revealed by the respondent that although it complies with form as per spirit, it should be reconsidered. It is just a paperwork difference but practically there is no single example is found for the independence of each contract in this so-called independent parallel contract scheme till now. For example, informant-06 was of the view that:

> *Comply with form but as per spirit, it should be reconsidered. In the context of paperwork, it may be separated but as a result, these are combined and dependent on each other.*

The Second dimension under the theme of *Parallel Contract (PC)* was *Permissible as Per Sharī'ah Rulings (PSR)*. It was revealed by the respondent that to use the technique of parallel contract in sovereign and quasi-sovereign *ṣukūk* structures is legitimate and

permissible in the light of different *Fiqhi* rulings and Sharī'ah principles. So, there is no more issue in this context. For example, informant-05 was of the view that;

> *Interestingly, the topic of Wa'ad may not much relevant to business dealings in the past but in this modern era, it is very much relevant to financial transactions i.e. in the case of the global transactions (investor) you cannot recourse to the third-party easily. You have to put in as many protections as possible. Having said that there is no Sharī'ah violence, no capital guarantee, etc., all products are Sharī'ah compliant. In this conflict, wa'd has become available to facilitate both parties' originator and issuer as well. In the case of ṣukūk al ijārah sale and leaseback, and repurchase clauses, etc. in the form of parallel contracts, all these fall under the category of wa'adn or mua'adah than a contract. Because here we are entering the contract and just make a promise before the one step of the contract finalization. Hence it is as per Sharī'ah rules and guidelines.*

For example, informant-24 was of the view that;

> *Two reciprocal promises are permissible which are linked into two different contexts i.e. in the case of Ijārah mintahiyah bit tamlik, purchase undertaking in the case of default and sale undertaking in the case of completion of tenure.*
>
> *Now, the muwa'adah is also allowed in the opinion of many scholars* such as Ibn *Hazm* said that *"al-muwadah lisa ba'an".*

Now in the subsequent lines **section # four** of this research work titled as Sharī'ah issues related to GoP *ijārah ṣukūk* based on *bai' al-mu'ajjal* would be discussed.

6.10 Sharī'ah Issues related to GoP *Ijārah Ṣukūk* based on *bai' al-mu'ajjal*

It is pertinent to note that this product, 'titled' 'GoP *ijārah ṣukūk* based on *bai' al-mu'ajjal*' is particularly related to the Pakistani region. A brief note is stated to clear the process flow of this innovative product. According to this sovereign *ijārah ṣukūk* would be sold some time before maturity to the SBP for one year on a credit basis (bai al muajjal) in such a way the seller bank would add one year's T-Bills related rate to the face value and rentals receivable by that time. This all is done through a proper bidding process under the supervision of SBP. The question is raised that to sell the *Ijārah ṣukūk* asset a few days before maturity on credit sale basis is Sharī'ah compliant or not?

There is a difference of opinion in this regard. It might be categorized into three views. The first viewpoint, it is not Sharī'ah compliant neither in letter nor in spirit and the second viewpoint revealed that although the apparent form of the contract is Sharī'ah compliant, there is an issue concerning substance while as per the third group's view it is Sharī'ah compliant either in form or in substance.

Now in the following lines, these views would be elaborated in more detail one by one. As per the first view, the reasons why the product is not Sharī'ah compliant even in the letter are as below;

> *b) ... In the present case, the impression that the sale of the subject matter (ṣukūk) is for the credit period of one year is problematic as ṣukūk as evidence of ijārah practically cease to exist on the maturity date- may be one or two days after the deal;*
>
> *c) The subject matter or ijārah ṣukūk represents any assets purchased from the GoP (through SPV), then taken on lease from the GOP up to December 31, 2015, for example; on the maturity date: i) the subject matter will transform into*

a receivable, and ii) the corporeal asset will be sold back to the GoP as per undertaking; d) Ijārah ṣukūk that mature at an agreed date and hence are to be redeemed cannot be sold for any period after maturity because then they represent receivable and the holders have to get cash (Ayub, 2015).

In the light of the above paragraph, the main theme might be revealed; that the *ijārah ṣukūk* that mature at an agreed date and hence are to be redeemed cannot be sold for any period on credit sale basis after maturity because then they represent receivable and the holders have to get cash means the subject matter will transform into a receivable and these receipts and scripts are just an obligation of debt and not represent any real asset. Subsequently, it is not allowed to sell any receivable and debt instrument on a cash or credit basis other than face value as per Sharī'ah rulings.

Now in the subsequent lines the reasons why the product is not Sharī'ah compliant in spirit concerning first and second (partly) group's view are mentioned;

"It *may or may not be tawarruq in a specific sense, but it is necessarily a trick for investing cash by way of invalid trading and ultimately a means to provide the funds mobilized for Islamic business/banking to the interest-based system"* (Ayub, 2015).

It means the liquidity that was to be received by the IBI's upon maturity of *ṣukūk* is moped up by the State Bank of Pakistan (SBP) a few days earlier than the maturity on one year's mark-up basis. After that SBP as manager of public debt (of GoP), injects the liquidity in the market by selling the T-Bills in the market that are purchased by the interest-based banks. In such a way it might be provided a venue to

financial tawarruq which is harmful to the whole Islamic financial sector. It is further elaborated as below:

> *"The purpose of any contract and its underlying cause should not be contrary to the fundamental principles of Islamic law of contract and hence the objective of Sharīʿah. Here the objective is to continue earning on liquidity after the termination of ijārah and maturity of ṣukūk; as practically the receivable is sold to get a return, it is nothing but riba"* (Ali, 2015).

The above two statements very clearly point out that the stated *ijārah ṣukūk* plus credit sale based transection is totally against the spirit of Islamic law of contract and objective of Sharīʿah. The coming views of the second group's respondents also publicized this understanding that the apparent form of the contract is complying with Sharīʿah requisites but objectionable as per the spirit and essence of the contract.

Hence, it can be stated in the light of first and second views that to extend the tenure of *ijārah ṣukūk* by involving credit sale is not as per Sharīʿah parameters neither in the form (as per the first view) nor in substance (as per both first and second views). The better option is to avail the facility of extension via release or short-term *Salam ṣukūk* to overcome the liquidity problems.

As per the third view, both form and substance of this credit sale are complying with Sharīʿah requirements as the *ṣukūk* holders are the owners of the asset till maturity of *ṣukūk* and asset will be sold back to the GoP as per purchase undertaking. Ultimately, the *ṣukūk* holder IBI's executed a sale-purchase contract with GoP before the maturity of *ṣukūk* and GoP would be liable to pay the deferred sale price as per agreed maturity. As per Sharīʿah rulings, when one purchases an asset it can use it in any Sharīʿah

compliant way including selling the same in the market. Therefore, there seems to be no Sharī'ah problem with the transaction. Furthermore, it is not an obligation of debt as the underlying asset is still existing hare. When *iqtina'* (cash sale as per purchase undertaking) is allowed at the end of the period, in the same way a credit sale should be also allowed.

The proponents also strengthen and reinforce their arguments by saying that there is a difference between permissibility (jawāz) and desired level (Taqwá). The role of Sharī'ah scholar is based on the Sharī'ah principles by meeting minimum level and next phases of excellence are comes under the role of Muballigh and Da'aei etc. it should be separated from each other.

They also stress that things are evolved on a gradual basis, for example; a new Muslim has to be performed *ṣalāh* as much he can perform in his capacity, even though he doesn't know the *tajweed, qirat,* and *wajabat,* etc of prayer. The reason is that in this way one day he will be able to perform at the required level of Sharī'ah. The same case is with these institutions over time we may be able to bring them in the right direction. You have to set the tolerance ratio. On a sudden basis/overnight, we cannot change the thing. However, the likes of such products should be discouraged and the size of such transactions should be capped at a certain percentage.

In the following section, this debated issue would be elaborated as presented by the respondents. The following diagram which is extracted from the respondent's views also depicts the above diverse opinion.

Theme-14: Renewal Issue

Figure25: *NVivo Project map of the parent node of the theme "Renewal Issue" (RI) and relevant child nodes.*

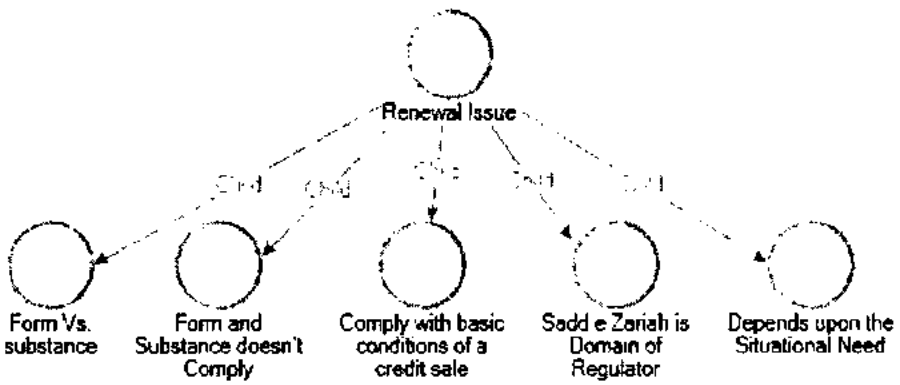

Figure 26

The second dimension under the theme of *Renewal Issue (RI)* was *Form and Substance doesn't comply*. It is revealed that in this case the form and substance both are not meet the Sharī'ah requisites. Eventually, it must be reconsidered.

For example, informant-14 was of the view that;

It is not allowed as both form and substance are not complying with Sharī'ah requisites.

For example, informant-22 was of the view that;

As the productivity of this ṣukūk is to be seized on a certain date then how it can be extended by adding a form of credit sale. It may be better if this liquidity excess was managed via release than credit sale.

The first dimension under the theme of *Renewal Issue (RI)* was *Form vs. Substance*. It was revealed that to avail the facility of credit sale at the time of maturity of sovereign *Ijārah* Ṣukūk is compiled in the form of a credit sale but it is objectionable as per the substance of the contract.

For example, informant-24 was of the view that;

The form of transaction is justified and as according to Sharī'ah. However, it is objectionable as per substance. Here release was a better option. It is uncommon Bai. The question is that why did the SBP purchase this asset at a higher price?

For example, informant-16 was of the view that; *Up to some limit, it is true but not at all. However, it is permissible but we cannot negate the substance. The opinion of both groups should be honorable for each party.*

The third dimension under the theme of *Renewal Issue (RI)* was *Comply (either in form or in substance) with Basic Conditions of a Credit Sale.* It was revealed based on respondents' views that the renewal mechanism in sovereign *Ijārah* Ṣukūk structures via the state bank of Pakistan complies with the basic conditions of a credit sale. So, there is no Sharī'ah issue in this regard. For example, informant-19 was of the view that;

> *It is permissible; there is no issue as per Sharī'ah rules. When Ijārah and iqtina' (cash sale at the end) are allowed, so, what is the basis of prohibition for this deferred sale i.e. 20 billion-plus (profit of next one year) while the remaining 50 million at the time of maturity has to be paid by the government of Pakistan to the ṣukūk holders.*

They also argue that it is not just a debt transaction. It is an asset-based transaction. Provided that at inception there is no agreement on a credit basis (when we design the *ṣukūk* and we offer *ṣukūk* in IPO, s and these things) but on a particular time (maturity) it is possible such as in the case of *bai' al-salam,* it is not allowed in beginning to deal with Muslim Fie, but after a particular time if they both (buyer and

seller) are agreed it can be done. Therefore, if it can be done in *Salam* which is all debt then it can be done in Ṣukūk which are asset-based on a priority basis (*min tariq ul-oula*).

For example, informant-25 was of the view that; *Ok, if we allow the resale of this Ṣukūk that represents the ownership in the asset, and let us assume that the maturity time has come and now we want to sell ownership to SBP under purchase undertaking. We have no cash now. It is not just a debt transaction. It is an asset-based transaction. Provided that at inception there is no agreement on a credit basis (when we design the ṣukūk and we offer ṣukūk in IPO, s and these things) but on a particular time (maturity) it is possible i.e. in Bai al Salam it is not allowed in beginning to deal with Muslim Fie, but after a particular time if they both agreed it can be done. So, if it can be done in Salam which is all debt then it can be done in Ṣukūk which are asset-based (min tariq ul oula) on a priority basis.*

To the second part of the argument (not complying with the substance of credit sale) the proponents argue that Sharī'ah scholars give an opinion within Jawaz and Adam e Jawaz and not enter into gray areas. However, to ban anything based on *mafsadah* (harm) or gray area, etc. is the domain of the state. Moreover, the permissibility of the *bai' al-mu'ajjal ijārah ṣukūk* depends upon the situational need of the current financial market. Ultimately, it must be on dire need-based and not tolerable forever. We have to build a balanced approach while analyzing things.

For example, informant-21 was of the view that; *It is as per Fiqhi boundaries. It is not against the Sharī'ah rulings. We give an opinion within Jawaz and Adam e Jawaz and do not enter into gray areas. However, to ban anything based on Mafsadah*

or gray area, etc. it comes under the boundary of the state. Mufti has not this type of Ikhtiyar. Yes, if the state recognizes to ban anything based on Mafsadah etc. it can.

For example, informant-23 was of the view that; *The apparent form is according to Sharī'ah. However, it may be different as per substance. But we have to think with context to ground realities and the need of the market. We can manage the concerned issue with the proper control mechanism. It must be on a dire need-based. Not permissible for everyone. We have to build a balanced approach while analyzing things. Reforms are automatically shaped via the evolutionary process. We should give space to the market to take the breath and evolution. Legislation (with the recommendation) is the domain of govt. A Mufti has to bring to the minimum level. There is a lot of difference between our previous and current practice. Now we are moving to a better level. So, due to this situational need, we should leave the market to evolve.*

Now in the subsequent paragraph the second part of section # four named 'asset appraisal issues i.e. green shoe option etc.' would be stated as follows.

Theme- 15: Asset Appraisal Issues (Green Shoe Option)

Figure 26: *NVivo Project map of the parent node of the theme "Asset Appraisal Issues (Green Shoe Option)" (AAI) and relevant child nodes*

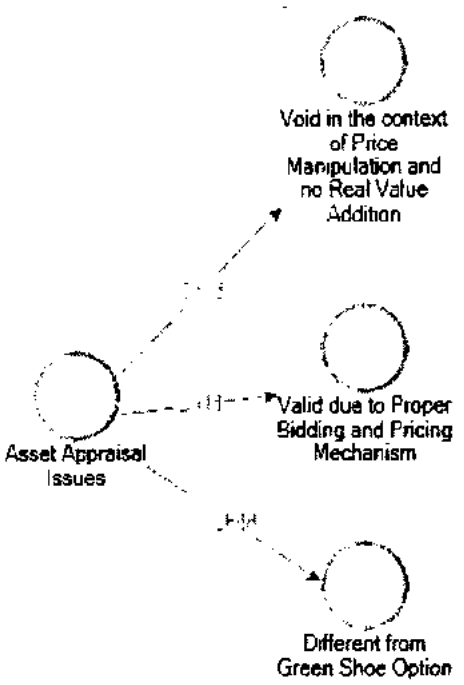

Figure 27

This case is also related to the Pakistani region specifically. The case was in 2005 Motorway land (M1) based *ijārah ṣukūk* were issued with the worth of 500 m$ but due to oversubscription, it was increased to 600 m$. There are two opinions in this regard. The first opinion is that in this case, it was not a bidding or auction process as mentioned in the prospectus but in actual it was the issuance of certain numbers of *ṣukūk* i.e. 1000 *ṣukūk* worth 500 million rupees. Though it could be divided on prorate basis of total numbers of received applications or first come first basis, etc. it was done only based on oversubscription or demand and supply phenomenon which was not justifiable as per Sharī'ah rulings as the price cannot be changed without any value addition in *ṣukūk* asset. Hence, this practice was a violation of the Sharī'ah compliant way.

The following view of the respondent the first dimension under the theme of *Asset Appraisal Issues (AAI)* is *'Void in the Context of Price Manipulation and no Real*

Value Addition' also endorses this view. For example, informant-22 was of the view that:

> *In this case, it was not a bidding or auction process as mentioned in the prospectus but in actual it was the issuance of certain numbers of ṣukūk i.e. 1000 ṣukūk worth 500 million rupees. It could be divided prorate basis of total numbers of received applications or first come first basis etc. but only based on oversubscription or demand and supply phenomenon. It should be noted that the price cannot be changed without any value addition in the ṣukūk asset.*

While as per the second opinion the whole process of any *ṣukūk* issuance is based on the fair and regulated mechanism of bidding such as the second and third dimensions under the theme of *Asset Appraisal Issues (AAI)* are *'Valid due to Proper Bidding and Pricing Mechanism' and 'Different from Green Shoe Option'* revealed in the light of respondents' views that the whole process is based on the fair and regulated mechanism of bidding particularly in corporate Ṣukūk while in the case of sovereign and quasi-*ṣukūk* there is no need for this type of pricing guidelines and normally, pricing guidelines is a corporate issue while here the government itself issues the *ṣukūk* in its independent capacity.

Furthermore, any real increase in price due to the demand and supply phenomenon is justifiable and legitimate as per Sharīʿah. Additionally, this matter is different from the green shoe option as it is used to avail of the leverage facility. Subsequently, there is no Sharīʿah violation. Such as the following respondent's views revealed this opinion. For example, informant-14 was of the view that:

There is no Sharī'ah issue. It is a fair and clear matter as the whole market involves in it.

For example, informant-18 was of the view that; *If the valuation is increased based on actual and not on the fake asset then it is a demand and supply phenomenon and it is on the base of the bidding process, so, there is no issue.*

For example, informant-02 was of the view that; *There are pricing guidelines for Ṣukūk in SCM. In sovereign, the pricing is not regulated by a regulator, here the govt. itself issuing the ṣukūk and has not this type of limitations. ormally, pricing guidelines are a corporate issue.*

For example, informant-15 was of the view that; *Underlying asset has its worth of that authorized limit of the amount. Although in start it may be issued less than the assigned limit i.e. 8 billion is issued out of 10 billion assets worth. While green shoe option in shares is separate from this as that was availed to enhance the leverage need.*

Now in the coming lines the **part one of section # five** of this study named 'Sharī'ah status of contemporary sovereign and quasi-sovereign *ijārah ṣukūk* in the light of *ḥiyal* and *makhārij* would have discoursed as follows.

6.11 Sharī'ah Status of Contemporary Sovereign and Quasi-Sovereign *Ijārah Ṣukūk* in the light of *Ḥiyal* and *Makhārij*

Siddiqi (2006) declared in this context that the Ṣukūk plays a positive role in the mobilization of savings on a vast scale. They benefit investors as well as those who have projects to finance that bear the promise of eventually generating sufficient revenue to meet the costs yet leave a surplus. "Their proliferation increases the

efficiency of the financial system. We have already alluded to many controversies surrounding fiqh rulings about certain Islamic financial products like Ṣukūk and Tawarruq. Furthermore, we need a clearer understanding of Ṣukūk versus conventional bonds in terms of economics, irrespective of their permissibility".

Mansoori (2011) stated that "The transaction neither meets the requirements of sale (possession remains with originator) nor *ijārah* (for example, all major/minor maintenance charges are borne by the lessor). Such transaction is similar to bai'al-wafā' and International *Fiqh* Academy has declared it invalid. To make *ṣukūk* transaction Sharī'ah compliant, these issues must be addressed, otherwise, it will remain a replication of the bonds. In the present form, many sovereign *ṣukūk* are mere stratagems to circumvent riba".

Hammad (2011) elaborated in this regard that the problem is as follows: the agreement for the issuance of this financial product constitutes a contractual arrangement comprised of several contracts and promises with interrelated parts staged in sequence. They are designed on a certain pattern in accord with conditions that govern them as a single transaction that cannot be broken up or separated. The aim is to realize a specific funding function and specified objective that both contracting parties wish to achieve. Considering all that, it is clear to me that this product is a form of *'īnah* that is being used to conceal interest-based lending by a trick.

Al-Suwailem (2016) further elaborated this discussion; "With the steady growth of the *ṣukūk* market, issuers are increasingly looking for more flexible and more efficient structures. This is particularly true for sovereign *ṣukūk*, which comprise the majority of domestic *ṣukūk* issuance. Sovereign *ṣukūk* represent more than 70% of

domestic *ṣukūk* over 2009-2014 (IIFM, 2014). Yet, the prevailing structure used to issue sovereign *ṣukūk* is not sustainable".

Abdelrahman, (2019) claimed that "Devices which would allow for guaranteeing Ṣukūk by twisting of Sharia rules are not acceptable whether Ṣukūk are issued by sovereigns, semi sovereigns, or by the private sector. Guarantees given by sovereigns to Ṣukūk's capital or its returns are even worse than those given by the private sector when Sharia tenets (Maqasid) are considered. This is because, in case of loss, public revenues would be used in favor of the *ṣukūk* holders who, nevertheless, are only a section".

As a result of all above debated issues as mentioned in the previous sections and sub-sections (# 1, 2, 3, 4) of this research work, it is obviously, used to enquired by the stakeholders that the structuring of Islamic financial products particularly sovereign and quasi-sovereign *ijārah ṣukūk* structures (as a result of pragmatic approach rather than an idealistic approach) fall under the category of *ḥiyal* (stratagems) or *makhārij* (legal way out from a hardship)?

In the subsequent section, this crucial issue would be elaborated briefly concerning sovereign and quasi-sovereign *ijārah ṣukūk* issuance.

6.11.1 *Ḥiyal*: Meaning and Forms

"Ḥiyal is the plural of ḥīlah. Hilah literally means an artifice, device, expedient, and stratagem, a means of evading a thing or of affecting an object. The word is used in several technical meanings". (Encyclopedia of Islam, vol, 3, p. 510)

Technically it may be described as the "use of legal means for extra-legal ends that could not, whether themselves are legal or illegal, be achieved directly with the means provided by the sharīah. It enables persons, who would otherwise have had no choice but to act against the provisions of sacred law, to arrive at the desired result while conforming to the letter of the law. Thus, *ḥiyal* (legal artifices) constitute legal means by which one can arrive at judicial outcome otherwise prohibited by the law". (Mansoori, 2011, p. 1)

It is worth mentioning that Qur'ān and *sunnah* indicated and quoted both permissible and impermissible *ḥiyal* (Usmani, 2008). In the beginning, the prohibited *ḥiyal* are stated in the light of the Qur'ān and Sunnah. Hence the Qur'ān stated this matter as follows:

وَلَقَدْ عَلِمْتُمُ ٱلَّذِينَ ٱعْتَدَوْا۟ مِنكُمْ فِى ٱلسَّبْتِ فَقُلْنَا لَهُمْ كُونُوا۟ قِرَدَةً خَٰسِـِٔينَ

> Certainly, you know those among you who transgressed in (the matter of) the Sabbath. We said to them, "become opes, abased" (2:65)

Usmani (2005) explained in his book named 'The Nobel Qur'ān' regarding the matter of '*Sabbath'* that *Sabbath* means Saturday. It was prescribed for the Israelites as a sacred day to be devoted to worship. Economic activities were prohibited for them on that day. A group of them, living near a sea-shore, violated the prohibition by engaging themselves in fishing for that purpose, they invented, at first, some dever pretenses, but gradually they started doing it openly. As a punishment, they were metamorphosed into apes and swine. This episode belongs to the time of Dawūd (David) and is more fully described by the Holy Qur'an in Surah Al-A'raf 7:163-166.

Similarly, the narration of the Holy prophet ﷺ is elaborated in this regard as follows:

لعن الله اليهود حرمت عليهم الشحوم فحملوها فباعوه

The Holy Prophet ﷺ cursed the Jews that Allah had forbidden fat on them, but they melted and started selling. (Al-Bukhari, Ḥadīth: 20)

Consequently, the above both revealed texts discouraged and prohibited the use of those *ḥiyal* which are used to evade the commands of Allah. Now, in the following lines, permissible *ḥiyal* are coted in the light of the Qur'ān and *Sunnah*. Therefore, the Holy Qur'ān stated in this regard as follows;

وَخُذْ بِيَدِكَ ضِغْثًا فَاضْرِب بِّهِ وَلَا تَحْنَثْ

And (We said to him,). Take (a bundle of) thin twigs in your hand, and strike with it, and do not violate your oath. Surely, we found him very enduring... [38:45]

The wife of Ayyub served him throughout his sickness but once *Iblis* (Satan) appeared to her in the form of a doctor. She asked her to treat her husband. *Iblis* who pretended to be a doctor put a condition that if her husband was cured by his treatment she would have to say that her husband was cured by him (i.e. the doctor). Inclined to accept her condition, she told Ayyub about it. Ayyūbe told her that it was *Iblis* who wished her to commit *Shirk*. Since she seemed somewhat inclined to accept his suggestion, Ayyūb was grieved to know that *Iblis* had access even to his wife. Overcome with grief, he swore an oath that, after being cured, he would beat his wife

with one hundred sticks. When he was cured by Allah Ta'āla he was worried about how would he bear his faithful wife who served him throughout his illness. Allah Ta'ala directed him to fulfill his oath by taking a bunch of one hundred small sticks and striking her only once with the bunch. This was a special concession given to Ayyub to save him from breaking his oath on the one hand and to save his wife, on the other, from undue infliction (Usmani, 2005).

Similarly, the narration of Holy prophet ﷺ is elaborated in this regard as fallows:

عن أبي هريرة رضي الله عنه أن رسول الله صلى الله عليه وسلم استعمل رجلا على خيبر فجاءه بتمر جنيب فقال رسول الله صلى الله عليه وسلم أكل تمر خيبرهكذا قال لا والله يا رسول الله إنا لنأخذ الصاع من هذا بالصاعين والصاعين بالثلاثة فقال رسول الله صلى الله عليه وسلم لا تفعل بع الجمع بالدراهم ثم ابتع بالدراهم جنيبا

Narrated by Abu Hurairah رضي الله عنه that the Messenger of God ﷺ appointed a man on Khaybar (for *Zakāh* etc. collection), once he came with janeeb (superior quality dates). The Prophet ﷺ asked him, is every date of Khyber like this? He said, No, by God, O Messenger of God, we take the *Saa'a* (a weight of measurement) from this with the two *Saa'a* and the *Saa`in* (two weight of measurement) by the three. Therefore, the Prophet ﷺ said that do not do this type of transaction but you have to sell that *busar* (inferior quality dates) in the exchange of dirhams, then buy the *janeeb* (superior quality dates) in exchange for that dirham (money) (Al-Bukhari, Ḥadīth: 2201, 2089).

This is an example of clever use of the law is an indirect exchange of superior dates with inferior dates, suggested in the hadith narrated by Abu Hurayra رضي الله عنه.

The requirement of Islamic la w in the exchange of dates with dates is that dates on both sides should be equal. Now if a person wants to exchange its inferior quality dates with superior quality, it has to ignore the quality difference, and exchange is based on equality in weight on both sides. Any difference in the quantity will make the transaction, a transaction of riba al-fadł. The solution to this problem is to sell inferior quality in the market and buy from the proceeds of sale required superior quality. In this way, the parties can overcome a difficulty without jeopardizing the letter of Islamic law.

Consequently, the above-revealed texts provide a legal way out from hardship employing *ḥīlah* in a manner that is not used to evade the commands of Allah.

Juristic schools vigorously differ on the legitimacy of *ḥiyal*. The Ḥanafīs and Shafi's take the most lenient position. They declare them valid. Even the subversive artifices are valid in these schools although immoral. Hanbali jurists have taken a balanced position on the issue. They allow only those legal devices that provide a way out from a difficult situation and consequently overcome inconvenience in law. Maliki jurists condemn *ḥiyal* and declare them invalid. They even block ways that may lead to evil. They call it *sadd al-dharī'ah* (Mansoori, 2011, p.5).

In the following lines, we will discuss the approaches of schools for the treatment of *ḥiyal* in some detail. Imam Khassaf an eminent *Ḥanafī* Jurist stated in this regard as fallows:

لا بأس بالحيل فيما يحل ويجوز، وانما الحيل شيء يتخلص به الرجل من المآثم والحرام ويخرج به إلى الحلال، فما كان من هذا أو نحوه فلابأس، وإنما يكره من ذلك أن يحتال الرجل في حق الرجل حتى يبطله أو يحتال في باطل حتى يموهه و يحتال في شيء حتى يدخل فيه شبهة . فأما ما كان على هذا القبيل الذي قلنا فلا بأس بذلك ...

There is nothing wrong with tricks (*ḥiyal*) when it is related to permissible and legitimate ends. Ultimately, *ḥiyal* are something that a man can rid himself of a sinful and unlawful matter and take him to the lawful act. Hence, there is no objection in this regard. Yes, it is disliked, when a person defrauds another person until he nullifies it or cheats it until he camouflages it and swindles something until makes it suspicious. However, such type which we have been discussed earlier, there is nothing wrong with that... (Al-Khassaf, kitab-ul *ḥiyal*, p. 4).

Similarly, Imam Sarkhsi a renowned *Ḥanafi* scholar satated in this context as follows:

الحاصل : أن مايتخلص به الرجل من الحرام أو يتوصل به إلى الحلال من الحيل فهو حسن وإنما يكره ذلك أن يحتال في حق الرجل حتى يبطله ، أو في باطل حتى يموهه، أو في حق حتى يدخل فيه شبهة، فما كان على هذا السبيل فهو مكروه وما كان على السبيل الذي قلنا أولا فلا بأس به."

In conclusion: Of course, every way which gets rid of a person from *haram* (forbidden) and brings him to *halal* (permissible), is considered as *hasan* (good deed) and it would be *Makhrooh* (disliked) if it used to defraud a person so that he can invalidate it, or cheats it, until he camouflages it, or in a right until he comes under suspicion. Hence every method which is used in this way would be measured as *Makhrooh*. Otherwise, it would be permissible and has no objection as we have been discussed in the earlier lines" (Al- Sarkhsi, Al-Mabsut, p. 209, 1989).

Imam ibn-al Qayyim a well-known *Hanbali* scholar who is know as a big opponent of *ḥiyal* is also divided *ḥiyal* into permissible and non-permisisble and not decleared them invalid at all. Hence, he stated while explain the third form of *ḥiyal* as follows:

القسم الثالث : أن يحتال على التوصل إلى حق أو على دفع الظلم بطريق مباحة لم توضع موصلة إلى ذلك بل وضعت لغيره، فيتخذها هو طريقا إلى هذا لمقصود الصحيح ، أو قد يكون قد وضعت له لكن تكون خفية ولا يفطن لها.....

The third section: If a person adopts a *ḥila* to come to a right or to push the injustice in a permissible way that was not connected to him but rather to others. Hence, he takes it as a way to this for the correct intention or it may have been laid for him but it is hidden and does not recognize it (then it would be permissible) ... (Al-Qayyim, vol, p. 1989)

6.11.2 Types of *Ḥiyal* in General Perspective

In the light of the above literature, *ḥiyal* might be categorized into three forms. **Firstly**, those *ḥiyal* which are unlawful to do them, and the effect, if any, that one has, also does not appear for what purpose they are intended as per Sharī'ah. This occurs in two forms;

First, to indulge in a *haram* (forbidden thing) activity by just changing the apparent form of that thing without any factual change in reality. Such as the above two coted examples **(i)** the matter of '*Sabbath'* as it was prescribed for the Israelites as a sacred day to be devoted for worship. Economic activities were prohibited for them on that day. A group of them, living near a sea-shore, violated the prohibition by engaging themselves in fishing for that purpose, they invented, at first, some dever pretenses, but gradually they started doing it openly. As a punishment, they were metamorphosed into apes and swine, and **(ii)** the matter of 'fat' as it was forbidden for Jews, but they started to use it, just changing it into melting form. Ultimately, it was causing them to curse Allah ﷻ because, in reality, there is no genuine change was occurred by converting fat into melting form.

Second, to use such *ḥila* in which trying to change both apparent form and reality of that matter but the method that is chosen not legitimate in the sight of Sharī'ah. For example, a person gifts his *Zakāhtable* assets to his wife (without giving her possession of that assets) a few days ago, before the completion of a year. This matter would be nullified in the sight of Sharī'ah as the method which was selected as *ḥīlah* not acceptable as per Sharī'ah because *hiba* (gift) cannot be completed until the

related thing is being possessed to the concerned party. Furthermore, he also would be considered a sinner because he commits this misconduct to escape the *Zakāh*.

Secondly, those *ḥiyal* which have an effect according to Sharī'ah for what purpose they are intended, although it would be considered as a sin due to dishonesty (*niyyah al-fasidah*) of that person in this matter. For example, a person gifts his *Zakāhable* assets to his wife by giving her the actual possession of those assets, a few days ago, before the completion of a year. In this scenario, *Zakāh* would not be obligatory for him because he has no *zakātable* asset at the time of completion of a year. However, this act would be assumed a sin to escape *Zakāh*.

Thirdly, those *ḥiyal*, where the *ḥilal* is not even a sin, and the Sharī'ah effect also appears, for what purpose they have intended means that matter would be considered as a legitimate and legal way out in the sight of Sharī'ah. Such as the above two cited examples from the revealed texts **(i)** the matter of Hazrat Ayyub ﷺ, as he swore an oath that, after being cured, he would beat his wife with one hundred sticks. When he was cured by Allah Ta'āla he was worried about how would he bear his faithful wife who served him throughout his illness. Allah Ta'āla directed him to fulfill his oath by taking a bunch of one hundred small sticks and strike her only once with the bunch. This was a special concession given to Ayyub to save him from breaking his oath on the one hand and to save his wife, on the other, from undue infliction, and **(ii)** the 'matter of exchange *janeeb* with *busar*' as per the requirement of Islamic law in the exchange of dates with dates is that dates on both sides should be equal.

Now if a person wants to exchange its inferior quality dates with superior quality, it has to ignore the quality difference, and exchange is based on equality in

weight on both sides. Any difference in the quantity will make the transaction, a transaction of *ribā al-faḍl*. The solution to this problem is to sell inferior quality in the market and buy from the proceeds of sale required superior quality. In this way, the parties can overcome a difficulty without jeopardizing the letter of Islamic law (Mansoori, 2011, p. 44; Usmani, 2009, p. 175-177).

The above all discussion was a deliberate and principled debate about *ḥiyal* in a general perspective. However, **the jurists have discussed distinctly and separately those *ḥiyal* which are related to *ribvi* transactions means which are designed to avoid the prohibition of *ribā*.**

6.11.3 *Ḥiyal* related to *Ribvi* (Interest Based) Transactions

Hence, if there is a way to avoid riba and a person wants to get the same financial benefits i.e. profit ratio etc. same as riba, and consequently, that much profit may be obtained through a legitimate matter which is not artificially created, but it is itself intended, and all the related Sharī'ah terms and conditions of the matter have been fulfilled, and all the requirements of the Sharī'ah also have been followed, it is not called *ḥila*, nor is there any significant difference in its *jawāz* and *in'qād* (validity and holding) among the jurists.

Even though, when jurists discuss the various forms of riba, they do not mention it as *ḥīlah* at that place. For example, 'sale on deferred payment' and '*murābaḥah al-mu'ajjalah,* etc.' as this type of sales (*buyū'*) are itself intended and not artificially created. Hence, here the parties execute a proper sale and purchase transaction on deferred payment, and the profit ratio may be finalized as per the market trend.

Ultimately, this matter would be legitimate in the sight of Sharī'ah (Usmani, 2009, p. 178,179).

On the other side, if the matter which is created to avoid riba is not self-intended but it is artificially created to justify the matter, even if it's related Sharī'ah terms and conditions have been fulfilled. There are three clear stances among the classical Muslim jurists. In the following lines these opinions are described as follows;

(i) According to Imam Mālik, this matter has been artificially created and the ultimate goal is to achieve the *maqāṣid* (abjective) of *ribā*. Hence, it would not be validated even though the terms of Sharī'ah appear to be fulfilled, and **(ii)** according to Imam Shafi'i, who states that the Sharī'ah has given separate orders for the validity and permissibility (*sehat* and *jawāz*) of every matter; we cannot call a legitimate case invalid simply because it is intended to achieve the purposes of an invalid case and **(iii)** the Ḥanafīs' position is in the midst of them, and that is, if that artificial matter has no practical effect at all, then it would be considered illegitimate, but if it has any practical effect that makes it different from riba then that matter will be valid and legitimate.

The above three opinions and stands can be further clarified in the case of *bai' al-'inah*. *Bai' al-'inah* is to sell a property on credit for a certain price and then to buy it back at a price less than the sale price on a prompt payment basis, both the transaction take place simultaneously in the same session of the contract. For example, A sells a commodity to B for Rs. 100/- on a one-year's credit. A then buys the commodity back for Rs 80/- from B on immediate payment (cash price). In this case, A and B have to build a relation of creditor and debtor rather than buyer and seller as here A is a creditor

and B is a debtor, A has an advanced loan of Rs. 80/- under the cover of the sale transaction in which he earns a surplus of 20 rupees.

The majority of Muslim Jurists (including Mālikīs and Ḥanafīs) consider this transaction invalid because the intended objective of the transaction opposes the objective laid down by the lawgiver. This form of transaction, in their view, is nothing more than a legal device aimed at circumventing the obstacle posed by the prohibition of riba. It is a fictitious deal in a usurious loan transaction that ensures a predetermined profit without actually dealing in goods or sharing any risk. While as per the opinion of Imam Shāfi'ī it is a valid sale because all the related *shrut al-sehat and jawāz* (conditions for validity and permissibility) for a valid sale are fulfilled here and it is the external form of contract and not the underlying intention that determines the validity of a contract or otherwise. (Al -Shāfi'ī, Kitab-al Umm, 1989, p. 44,)

Anyway, the steps those are taken to prevent riba the jurists have three viewpoints in this regard and sometimes this difference of opinion also might be a cause of blame and criticism by the sentimental people of the parties. Hence, who support the stand of *Maliki* School; they blame and scream to Shāfi'īs and *Ḥanafis* that they are the supporter of *ḥiyal*. Even though Imam *Bukhari* wrote the chapter of *ḥiyal* (*kitab-al ḥiyal*) in his book in the same style, and on the other side, some Shāfi'īs and *Ḥanafis* objected to *Malki's* view point that it is based on misconduct; as a result, one lawful thing (*ḥalal*) is forbidden (*ḥaram*).

But the fact is that the scholars on both sides have strong arguments, and none of them can be said to be false and should not be discouraged. Imam Shatabi ﷺ has a very balanced discussion on this topic. Even though his view is the same about the *ḥiyal* and

deferred sales as he owns the *Maliki* school of thought, but he strongly described Ḥanafīs and Shafi'i's position in front of people of their profession (school of thought). Therefore, he tells them that it is too much to say that their position is weightless (Usmani, 2009, p. 188, 189)

Imam-al Shatibi ﷺ a prominent Mālikī scholar, holds a high position in the debate of higher objectives of Sharī'ah concerning *ḥiyal* and *makhārij* stated as follows;

"ومن ذلك مسائل بيوع الآجال، فإن فيها التحيل إلى بيع درهم نقدا بدرهمين إلى أجل، لكن بعقدين كل واحد منهما مقصود في نفسه ، وإن كان الأول ذريعة؛ فالثاني غير مانع لأن الشارع إذا كان قد أباح لنا الانتفاع بجلب المصالح ودرء المفاسد على وجوه مخصوصة، فتحرى المكلف تلك الوجوه غير قادح، وإلا كان قادحا في جميع الوجوه المشروعة، وإذا فرض أن العقد الأول ليس بمقصود العاقد، وإنما مقصوده الثاني، فالأول إذا نزل منزلة الوسائل، والوسائل مقصودة شرعا من حيث هي وسائل، وهذا منها، فإن جازت الوسائل من حيث هي وسائل ، فليجز ما نحن فيه، وإن منع ما نحن فيه، فلتمنع الوسائل على الإطلاق، لكنها ليست على الإطلاق ممنوعة إلا بدليل، فكذلك هنا لا يمنع إلا بدليل...

وهذه جملة ما يمكن أن يقال في الاستدلال على جواز التحيل في المسألة، وأدلة الجهة الأخرى مقررة واضحة شهيرة؛ فطالعها في مواضعها. وإنما قصد هنا هذا التقرير الغريب لقلة الاطلاع عليه من كتب أهله؛ إذ كتب الحنفية كالمعدومة الوجود في بلاد المغرب و كذلك كتب الشافعية وغيرهم من أهل المذاهب ومع أن اعتياد الاستدلال لمذهب واحد ربما يكسب الطالب نفورا وإنكار المذهب غير مذهبه من غير اطلاع على مأخذه، فيورث ذلك خرازة في الاعتقاد في الأئمة الذين

أجمع الناس على فضلهم وتقدمهم في الطالب نفورا وإنكارا لمذهب غير مذهبه من غير اطلاع على مأخذه، فيورث ذلک خرازة في الاعتقاد في الأئمة الذين أجمع الناس على فضلهم وتقدمهم في الدين واضطلاعهم بمقاصد الشارع وفهم أغراضه، وقد وجد هذا كثيرا "

This includes referring to the sale of deferment, in which it refers to selling dirhams in cash for two dirhams for a term/period, but with two contracts each of them is intended for himself, and if the first is an excuse, then the second is not an objection because the Sharī'ah, if it permits us to take benefit by attaining benefits and avoiding harm in some specific ways, hence, if a *mukallaf* (person in charge) adopts those specific ways it would not be prohibited, otherwise he is disgraced in all legitimate ways (devices). And if it is assumed that the first contract is not intended by the contractor, but rather the second intended, then the first is if it comes down to the status of the *wasa'yl* (means), and the means are legally intended (*al-maqsood*) in terms of the means and this (situation) is also from them... and the means not at all prohibited except by evidence, similarly, it can not be prohibited in this case but only due to evidence.

This is all that can be said in inferring the permissibility of *ḥīlah* in any matter and the evidence of the other party (Mālikī school of thought) is clear and famous, so look at it in its places. However, the purpose to write such a strange report due to lack of access to Ḥanafīs' books, as Ḥanafī's literature is non-existent in the countries of the Al-*Maghreb* (المغرب), as well as the books of the Shafi'is and other people of the schools of thought. This inherits an embrace of belief in the *imām*, who are unanimous in their virtues and their progress and has a deep understanding in the area of higher objectives of Sharī'ah... (Al-Shatibi, al-*muwafaqat*, 1989, p. 30)

This is the description of the *ḥiyal* which the jurists have described. This shows how carefully the jurists analyzed everything and everything is kept in its proper place, not where the name of the *ḥiyal* came, they become in anger, without seeing the nature of it. Even though, in the context of those *ḥiyal* which are not permissible in their *madhab* (school of thought) such as in the case of *bay' al-'īnah*, normally, they used the word of *makhrooh* (dislike) rather than called it *haram* (forbidden) (Usmani, 2009, p. 194).

Furthermore, (Mansoori, 2011) also declared; "there are certain legal devices which do not frustrate the purpose and spirit of the law. They are clever uses of law to achieve legitimate ends such as 'Penalty for Default in Islamic Banks' and 'hedging against future devaluation in Islamic Banks' would be considered as makhārij in Islamic financial sector".

In the following section, this arguable and contentious issue would be elaborated for sovereign and quasi-sovereign ijārah ṣukūk structures as revealed by the respondent's views.

Theme -16: *Ḥiyal and Makhārij*

Figure 27: *NVivo Project map of the parent node of the theme "Ḥiyal and Makhārij" (HM) and relevant child nodes*

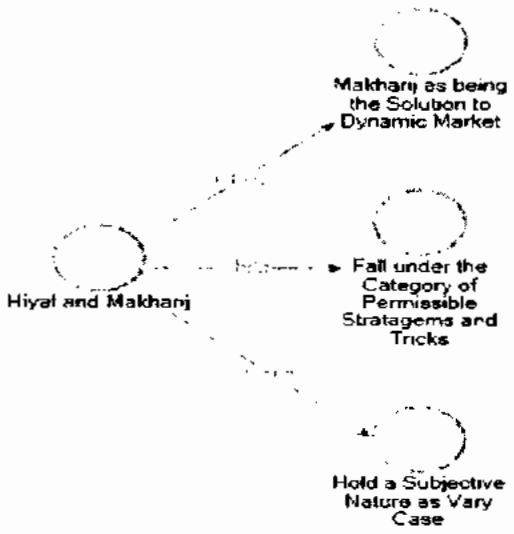

Figure 28

The first dimension under the theme of *Ḥiyal and Makharij (HM)* was *Makharij as being the Solution to Dynamic Market.* It was revealed based on empirical data that due to legal and regulatory and tax requirements etc. these Makharij have come as a solution for the current dynamic market. Hence, it should be flexible in the context of the contemporary financial transaction by caring about the Sharī'ah requirements as well.

For example, informant-01 was of the view that; *Due to legal and regulatory, and tax requirements, etc., these Makharij have come as a solution for the current dynamic market. But it must be meet the minimum criteria by Sharī'ah and in the light of Ijtihadi Aḥkam as Fiqh is very dynamic. So, it should be flexible with context the contemporary transaction by caring the Sharī'ah requirements.*

For example, informant-05 was of the view that; No *doubt, it is Makharijh, and we can use the term halool than ḥiyal, as it is derived from halal.*

For example, informant-14 was of the view that; *Exceptions are not hiyal but these are permissible forms any prohibited i.e. Bai Salm etc. and the Makhraj is a better name than hila.*

For example, informant-23 was of the view that; *These are Makharij. We have to be thought out of the box and try to present the solution in light of four schools of thought. We cannot bring whole the Ummah on Ḥanafi Fiqh.*

For example, informant-04 was of the view that; *All ṣukūk have belonged under the category of Makharij as ṣukūk holders bear the associated risk. Based on this we are making the difference between bond and ṣukūk.*

The second dimension under the theme of *Ḥiyal and Makharij (HM)* has belonged *to the Category of Permissible Stratagems and Tricks*. It was revealed that these *ḥiyal* and tricks are fallen under the category of permissible stratagem and tricks. Eventually, there is no more issue in this context.

For example, informant-16 was of the view that; *It is makhārij and jaiz ḥiyal. When we want to implement the things at the macro level ultimately, the level of compromise increases automatically, due to conversion of the transaction from individual to public level (domestic, national, and international levels). Such as in the era of the Ottoman Empire Murabahah practice was used at daily rates rather than Musharakah and Muadarabah financing.*

The third dimension under the theme of *Ḥiyal and Makhārij (HM)* was *holding a Subjective Nature as vary Case*. It was revealed that due to the subjective nature of *ḥiyal* and *makhārij*, it might vary on case to case basis. However, it can be tested on a case basis and it is difficult to make a one-line statement that these are valid or void concerning modern financial transactions.

For example, informant-02 was of the view that; *It is very subjective. It is varying from a case to case basis.*

Now in the coming lines the **part two of section # five** named 'Sharīʿah status of contemporary sovereign *ijārah ṣukūk* as per the higher objective of Islamic law of contract' would be elaborated.

6.12 Sharīʿah Status of Contemporary Sovereign *Ijārah Ṣukūk* as per the Higher Objectives of Islamic Law of Contract

Usmani (2007) elaborated while discussing the higher objectives of Islamic law "To this point, this entire study has been conducted from the perspective of Islamic jurisprudence. However, if we consider the matter from the perspective of the higher purposes of Islamic law or the objectives of Islamic economics, then *Ṣukūk* in which are to be found nearly all of the characteristics of conventional bonds are inimical in every way to these higher purposes and objectives. The noble objective for which Riba was prohibited is the equitable distribution among partners of revenues from commercial and industrial enterprises. The mechanisms used in Ṣukūk today, however, strike at the foundations of these objectives and render the Ṣukūk the same as conventional bonds in terms of their economic results".

(Elgari, 2011) declared that in case the relationship between the issuer and Ṣukūk-holder is that of the lessor (*Ṣukūk* -holder) and lessee (issuer), the issue is easy.

Sharī'ah Advisory Boards have endorsed the permissibility of the promise of purchase; i.e., the lessee promises to purchase the leased asset. It cannot be said that the Ṣukūk has by that become like a conventional bond because that is debt certificate; as for this bond, it is the ownership of a leased asset. Islamic banking has been accused of having an orientation that is "conventional banking with an Islamic face", meaning that whatever products it offers resemble conventional products; they have merely restructured the contractual relationships between the parties so that they comply with Sharī'ah requirements on a purely formal level. It is a stinging and painful accusation, but the description is, to a certain extent, not too far from the truth.

Laldin (2012) declared that "Thus there was a call for a re-examination of *Ṣukūk* structure particularly after the chairman of the AAOIFI, s Sharī'ah board. Default in several *ṣukūk* in 2009 also triggered the need to re-examine the *ṣukūk* structures and the industry as a whole. Some unsettled Sharī'ah and legal issues in within Ṣukūk have been raised that need to be examined further and also to be acknowledged by parties in different jurisdictions who are already involved with *ṣukūk* or intend to associate with them in the future".

Soualhi (2015) elaborated that, "Islamic finance prohibits usury, gambling, uncertainty, and trading in unlawful goods. It also establishes a financial system that enhances justice and welfare for all stakeholders at macro and micro levels. This value proposition hinges upon many requirements, especially the observance of Maqāṣid al-Sharī'ah that permeates the very essence of Islamic finance."

It is an ongoing debated and contested issue that the products of the Islamic financial sector are aligned with the higher objective of Sharī'ah or not? There are

numerous studies have been conducted with different aspects by using several methodologies to analyze the Sharī'ah authenticity of Islamic Financial products in general and particularly for *ṣukūk* structures. Shaykh Abū Ghuddah coated the general *maqāṣid* of contracts as being, "justice for exchange contracts, intactness for options (*khiyārāt*), fairness and integration for partnership contracts (*mushārakah*), benevolence (*iḥsān*) for donation contracts, and *security* for surety instruments" (Soualhi, 2015).

Regardless of the importance of these objectives, they seem to be drawn from a *fiqh* perspective. Among the strong critics posed by Shaykh Taqi Usmani in the context of Islamic law and jurisprudence stated that most *ṣukūk* held "nearly all of the characteristics of conventional bonds" and were therefore "inimical in every way to the higher purposes and objectives" of Islamic economics (Usmani, 2008, p. 13).

Munzar kahf described the principles of a *Sharī'ah* contract, namely satisfaction, equitable rights, ethical dimension, and transacting in real business activities (kahf, 2011). However, these principles themselves are interrelated with the objectives of *Sharī'ah* contracts; an interrelation that may blur the difference between principles and objectives (*maqāṣid*). Sāmī al-Suwaylim would consider *'īnah* and organized *tawarruq* as tricks to circumvent the prohibition of *ribā,* despite the validity of the combined contract when applied separately (Suwaylim, 2009). This is an approach that Nazīh Ḥammād does not subscribe to as long as the asset in *tawarruq* does not return to the original seller (Nazīh, 2007).

The Accounting and Auditing Organisation for Islamic financial organization (AAOIFI) has authenticated *al-ijārah al-muntahiyah bi-al-tamlīk* (Islamic hire-

purchase) based on the binding promise (*wa'd)*, which Sheikh Ibn Biyyah considers against *Maqāṣid al-Sharī'ah* (Soualhi, 2015).

(Mansoori, 2011) declared that the products of bai' *al-'inah*, *tawarruq*, commodity *murābaḥah* and sale and lease back *ṣukūk* frustrating the spirit and purpose of law and higher objective of Sharī'ah.

AAOIFI has also endorsed *murābaḥah* to the purchase ordered while Sheikh Muṣṭafā al-Zarqā considers the agency agreement between the Islamic bank and the customer to procure the asset from the supplier a mere formalism (*ṣūriyyah*) that renders the contract close to conventional financing (al-Zarqā, 2012).

Soualhi (2015) specified in his worthy research work 'application of Sharī'ah contracts concerning *maqāṣid* perspective' that it is clear there are different opinions on what exactly is a *maqāṣid*-based contract. Furthermore, the *maqāṣid* itself has been debated in such a way that it has created more confusion in the marketplace.

6.12.1 *Maqāṣid al*-Sharī'ah vis-à-vis Islamic Finance

In the light of the above-cited studies, it might be stated that "The idea or doctrine of *maqāṣid* or higher objectives of Islamic law have captured the attention of increasing numbers of modern Muslim scholars for solving contemporary issues. This idea provides a guide and framework for the Process of ijtihad to solve issues conforming to the human interest while complying with the will of the Lawmaker."

Ibn Ashur defined *maqāṣid* as "the deeper meanings and inner aspects of wisdom (*ḥikmah*) considered acts of wisdom (*ḥikmah*) considered by the Lawgiver in all or most of the areas of legislation." He also explained the importance of the knowledge of *maqāṣid* al-Sharī'ah for mujtahids not only in understanding and interpreting the texts

Sharī'ah, but also to find solutions to the new problems facing Muslims and on which those texts are silent (ISRA, 2011, IFS, p.166).

6.12.2 Definition of *Maqāṣid al-*Sharī'ah

Maqāṣid means intention, objective, purpose, aim and ends. *Maqāṣid* al-Sharī'ah, therefore, can be translated as objectives of the Sharī'ah. *Maqāṣid al-Shari'ah* refers to the goals and objectives of Islam as a system of life that constitutes standards, criteria, values and divine revelation (way) to be applied in practical life to solve human problems and guide the direction of human life. More narrowly framed, *maqāṣid al-Sharī'ah* refers to the underlying purposes upon which Sharī'ah is established.

In the financial sphere, *maqāṣid* al-Sharī'ah is considered the grand framework that provides guidelines and directions for ensuring the realization of *maṣlaḥah* (benefit) and the prevention of *mafsadah* (harm) in all financial contracts. However, these objectives remain theoretical until they are brought into the dominion of reality through the application.

To quote Ibn Ashur (2001: 273):

> *"From a comprehensive thematic analysis of textual sources of the Shari'ah about the objectives in tashri', as well as from the general rules and specific proofs, it is clear for us that the all-purpose goal of the Shari'ah is to preserve the social order (hifz nizām al-ummah) and ensure its healthy progress by promoting the well-being and righteousness (salah) of that which prevails in it, namely the human species. The wellbeing and virtue of human beings consist of the soundness of their intellect ('aql); their deeds (amal) as well as the goodness of the things of the world where they live that are put at their disposal".*

6.12.3 Categories of *M*aqāṣid al-Sharīʿah

Muslim scholars divided *Maqāṣid al-*Sharīʿah based on many considerations. What concerns us concerning the *ṣukūk* market particularly sovereign and quasi-sovereign *ijārah ṣukūk* issuance is their division of *maqāṣid* based on their application. Accordingly, they divided them into three main categories: (i) *ḍarūriyyāt* (essentials), (ii) *ḥ*ajiyyat (complementary), and (iii) ta*ḥ*siniyyat (embellishments).

First: *Ḍarūriyyāt* (Necessities or Essentials)

They are defined as interests of lives that people essentially depend upon, comprising of the five aforementioned objectives of Sharīʿah: religion (di), life (*nafs*), intellect (*ʿaql*), posterity (nasal), and wealth (mal). These are essentials serving as bases for the establishment of welfare in this world and the hereafter. If they are ignored, then coherence and order cannot be established and *fasad* (chaos and disorder) will prevail in this world, along with obvious loss in the hereafter.

Some scholars argue that though the five *ḍarūriyyāt* are essential for human welfare, necessities are not confined to this five *maqāṣid*. Hence, they propose additional *ḍarūriyyāt* such as equality, freedom, and the protection of the environment.

Second: *Ḥājiyyat* (Need or Complementary)

These are interests that supplement the essential interests, and whose neglect leads to her but not to a total disruption of the normal order of life. In other words, these interests other than the five essentials, are needed to alleviate hardship or facilitate life, so that life may be from distress and predicament. An example is seen in the sphere of economic transactions Shari ah validated certain contracts such as *salam* sale and that of lease and hire (bära of the people's need for them, notwithstanding a certain anomaly attendant in both.

Third: *Taḥsiniyyāt* (Embellishments)

The embellishments and accompaniments refer to interests whose realization leads to refinement and perfection in the customs and conduct of people at all levels of achievement. For example, Sharī'ah encourages charity to those in need beyond the level of the obligatory zakáh. In customary matters and relations among people, Sharī'ah encourages gentleness, pleasant speech, manner, and fair dealing. Other examples include permission to use beautiful, comfortable things to eat delicious food; wear fine clothing, and so on.

On the relationship between *ḍarūriyyāt*, *ḥājiyyāt* and *taḥsiniyyat*, al-Shatibi and other scholars stressed the following:

- Dahariyyat are fundamental to hājiyvat and tahsiniyvāt.
- Deficiency in *ḍarūriyyāt* brings deficiency to hajiyyat and *taḥsiniyyat* in an immutable manner.
- Deficiency in *ḥājiyyāt* and tahsiniyvät does not necessarily affect *ḍarūriyyāt*.
- An absolute deficiency in *ḥājiyyāt* and *taḥsiniyyat* may bring deficiency to some extent in *ḍarūriyyāt*.
- To keep up hājiyvat and *taḥsiniyyat* for the proper maintenance of *ḍarūriyyāt* is desirable.

However, the demarcation made by the scholars between the three categories remains interrelated. There is much overlapping and integration between them. Hence, to treat any of the objectives as discrete would be rather naive. The categorization of these *maqāṣid* serves as the main framework governing human lives in this world to achieve ultimate happiness in the hereafter (ISRA, 2015, p. 79, 80).

The above-mentioned theoretical aspects of *maqāṣid al-* Sharī'ah is regarded as the foundation for any application of *maqāṣid* in daily life including Islamic finance particularly in sovereign and quasi-sovereign *ṣukūk* issuance. As a Sharī'ah-oriented *ṣukūk* structures, the sovereign and quasi-sovereign *ijārah ṣukūk* structures are vigorously expected to be guided by the objectives of Sharī'ah. There are at least two reasons for establishing the right objectives for it. First, the objectives will be used by the management or policymakers of the Islamic capital market particularly sovereign and quasi-sovereign entities in formulating corporate objectives and policies. Secondly, these objectives serve as an indicator of whether the particular entity (sovereign and quasi-sovereign) is upholding true Islamic principles.

In this regard, the examination of the fifth *maqāṣid* (objective), namely the *'hifẓ al- māl* (preservation of wealth) is worth discussing.

6.12.4 Preservation of Wealth (*Hifẓ al- māl*)

It is a fact among Islamic scholars that the preservation of wealth is one of the fundamental and universal principles of Sharī'ah, falling under the *ḍarūriyyāt* category. Naturally, Sharī'ah whose aim is to preserve and promote human social order would also have high regard for wealth. Many Qur'ānic verses and Sunnah texts are evidencing that property and wealth have an important status and position in Islam. Sharī'ah introduces many rulings aimed at realizing the preservation of wealth in both material and socio-psychological dimensions which elaborates the dimensions of *maqāṣid al-*Sharī'ah in Islamic finance are as follows:

1. Preservation of wealth through the protection of ownership.
2. Preservation of wealth from damage.

3. Preservation of wealth through its circulation.

4. Preservation of wealth through its value protection.

In the context of the Islamic capital market particularly *ṣukūk* market, various products offered to investors are in line with the *maqāṣid al-* Sharī'ah. For example the issuance of *ijārah ṣukūk* (sovereign or quasi-sovereign) to finance government projects such as the construction of highways and airports etc. servers these five dimensions. This is because the ownership of the *ṣukūk* holders is protected, the contribution to the countries' development is obvious, the amount contributed is saved from being spoiled or damaged, the project guarantees a real circulation of wealth through the maximum number of the participants and the project contributes to the real economy that protects the value of the wealth (ISRA, 2015, p. 82).

In the following section, this contentious issue would be elaborated concerning sovereign and quasi-sovereign *ijārah ṣukūk* structures as presented by the respondents.

Theme-17: Higher Objective of Islamic Economics

Figure 28: *NVivo Project map of the parent node of the theme "Higher Objective of Islamic Economics" (HOIE) and relevant child nodes*

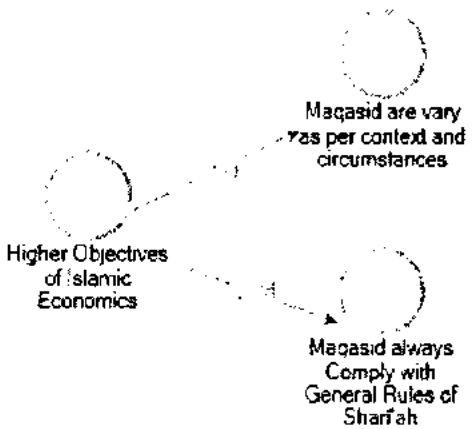

Figure 29

The first dimension under the theme of *Higher Objective of Islamic Economics (HOIE)* was *Maqāṣid are varies as per Context and Circumstances (MV-CC)*. It was revealed that the higher objective of Sharīʿah are changed according to the context and circumstances. Therefore, this device should be tested by carrying the diverse nature of *Maqasid*.

For example, informant-02 was of the view that; *It also looked in the context of the level of priority, as ḥājiyyāt, ḍarūriyyāt, and taḥsiniyyat*.

For example, informant-08 was of the view that;*maqāṣid al-Sharīʿah is changed according to the context and circumstances, so, if people practicing the participatory modes in the market then someone who wants to introduce the ijārah munthia bit-tamlik type of contract, and then it may call as ḥila. While, the whole market practices the interest-based instruments very openly then trying to introduce this type of instrument is called Makharij, as now we don't have any other option.*

The second dimension under the theme of *Higher Objective of Islamic Economics (HOIE)* was *Maqasid always Comply with General Rules of Sharīʿah*. It was revealed that as the higher objectives of Sharīʿah are derived in the light of Sharīʿah principles and commands. Consequently, it is not against the rules of Sharīʿah and these are always Comply with general rules of Sharīʿah.

For example, informant-25 was of the view that; *Maqāṣid are derived from Sharīʿah and not against the rules of Sharīʿah.*

Chapter Seven: Discussion and Recommendations

7.1 Discussion

This study tried to determine the Sharī'ah evaluation of contemporary sovereign and quasi-sovereign *ijārah ṣukūk* structures in Pakistani, Bahraini, and Malaysian jurisdictions.

This chapter discusses the major findings of this research study by providing necessary literature support however, the limited availability of the previous literature on the studied relationships restricts the way for in-depth literature-related discussion.

By merging the nine research questions into five research areas in various sub-questions (via appropriate heads and sub-heads) to develop a comprehensive survey of contemporary sovereign and quasi-sovereign *ijārah ṣukūk* is mentioned below.

Now in the upcoming lines, the findings of the present research work would be discussed one by one as follows;

7.1.1 Research Area # 1

This research area is consist of three sub-sections as follows; (i) beneficial and legal ownership, (ii) issues related to SPV regarding asset-based and asset-backed *ṣukūk*, asset disposal right, asset due diligence and management of the *ṣukūk* asset, etc. (iii) restrictions and undertakings such as purchase undertaking and purchase of *ijārah ṣukūk* on its face value at the time of redemption.

In the light of the above lengthy discussion of sub-section # (i) of section one, in the previous chapter, one may conclude that retaining the legal title (in the context of beneficial ownership) in sovereign and quasi-sovereign ijārah *ṣukūk* structures is a need-based phenomenon, not a mandatory requirement as per the law of Sharī'ah. In

another way, legal ownership is not the authentic representation for the actual ownership in every case, because sometimes a person has a legal title of a subject but he does not consider the actual owner and the same in vice versa scenarios, in the sight of Sharī'ah. It should be clear that fatwa (Sharī'ah opinion) sometimes differentiates the actual and legal ownership.

Furthermore, AAOIFI's Sharī'ah standard related to *murābaḥah* to purchase order para (8/5/4) has also discussed as mentioned earlier, this object that if there is beneficial ownership and not legal ownership or legal ownership is not representing the complete ownership attributes then there should be a counter deed which represents the actual ownership for the Ṣukūk holders (AAIOIF, 2010). As this deed is a legal document, hence, it is enough to present sale consequences that are based on this transaction. However, if there is no difference between legal and beneficial ownership then there is no need for this type of counter deed.

Hence, it can be shortened that the concept of beneficial ownership (under English law as well as the Sharī'ah resolutions by the OIC Islamic Fiqh Academy, AAOIFI Sharī'ah Standards, the SAC of BNM) is not against the Sharī'ah ruling and it is clear that the sale of assets where only the beneficial ownership is transferred (with related risk and reward) is recognized under Sharī'ah as cited in the various studies such as (ISRA, 2015, p. 166; Adawiah et al., 2015; Ghani et.al., 2017; Ghani et al., 2021).

Furthermore, as per the *Fqhi* status of ownership in the context of ownership rights (*ḥurīat al-taṣarruf)*, it might be identified that the concept of restricted or qualified ownership is practically acceptable as per *Urf* in the presence of restrictions by the provincial or federal level regulatory institutions, even though by the individuals

from common public. No one said that this is unlawful and unjustified and against the rights of ownership. Likewise, it demonstrates that the meaning of *ḥurīat al-taṣarruf* is not absolute while it might be restricted in certain scenarios as per the need of *urf* (prevailing custom) and *maṣlaḥah* (public interest), etc. Therefore, in the light of restricted or qualified ownership, it might be concluded that the concept of beneficial ownership is not against the essence and spirit of ownership as per Sharī'ah rulings.

In other words, to keep the sold item in books as per accounting standard is just an accounting, administrative, or recommended matter and not a mandatory condition by Sharī'ah. No doubt, true reflection of any financial transaction into books of accounts is necessary by conventional accounting standards but it should be clarified that due to this type of discrepancies or misrepresentation the effects of a true sale cannot be nullified.

However, it is recommended that there should be coherence between accounting standards and Sharī'ah principles but it does not mean that once a sale has been executed through a counter or sale deed, it might be nullified due to any discrepancy in accounting treatment. Furthermore, the *ṣukūk* assets are disclosed as the off-balance sheet items and details are described in the foot notes, etc. eventually, the originator cannot use this asset to take further financing (borrowing) facility.

Last but not least that the respondent's views from Pakistani, Bahraini, and Malaysian regions and clauses of the related sovereign and quasi-sovereign *ijārah ṣukūk* prospectuses also clarified that the concept of beneficial ownership (with the transfer of related risks and rewards) is acceptable as per the Sharī'ah rulings.

Now the sub-section # (ii) of section one would be summarized by discussing the status of SPV concerning asset-based and asset-backed *ṣukūk*, asset recourse and disposal rights and asset due diligence, etc. This section is further divided into three sub-parts as follows; a) Status of SPV, b) Issues related to asset-based and asset-backed *ṣukūk*, c) Issues related to recourse right and asset due diligence, etc.

(a) Status of SPV

As for the matter of SPV, it might be scrutinized by considering two aspects i.e.

(i) SPV as an essential and indispensable part of its parent company and obligor or

(ii) SPV as an independent separate legal entity from its parent and obligor.

Firstly, the matter of 'SPV as an essential and indispensable part of its obligor or parent company' would be elaborated. The presence and backing of 'parent company, in the case of a group of companies and 'government of Pakistan' in the case of Pakistan International or Domestic Ṣukūk Company (PISCL/PDSCL) is just as symbolic ownership that legally does not affect rights and liabilities of child entity such as every child company has its rights and obligations irrespective of parent company even though the financial statements also segregate the child company from the parent entity. Likewise, the creation of such types of SPVs has the immense edge of bankruptcy remoteness which saves to shaking the financial side of the parent company and obligor. Although, in totality, it would be given a joint symbolic name in the case of 'group of companies' but on an arm and distance basis, every child entity and government-owned institutions perform its functions in its capacity.

Secondly, the point of "SPV as an independent separate legal entity from its parent and obligor" would be deliberated. Indeed, as per law a company has a legal

personality and may thus sue and be sued, may make contracts, may hold property in its name and has the legal status of a natural person in all its transactions entered into in the capacity of a juridical person. Similarly, in the case of sovereign *ṣukūk* issuance, a special purpose company or vehicle (SPC or SPV) is created i.e. Pakistan International Ṣukūk Company, as a public limited company (in its capacity as issuer and its capacity as trustee).

Additionally, as per the acceptance of a company and entity as a 'jurisdictional person' by the contemporary Muslim jurists also might be led to recognize these types of SPVs and child entities as independent and separate entities from its parent and obligor. Eventually, it can be stated that in the case of the group of companies, every child entity has been segregated from the parent company by its rights and liabilities as mentioned earlier, in the same way, the 'SPV' in sovereign *ṣukūk* issuances such as Pakistan International or Domestic Ṣukūk Company Ltd (PISCL or PDSCL) is being segregated and isolated for its rights and liabilities particularly in quasi-sovereign *ṣukūk* issuance towards Government of Pakistan such as each ministry of any government considered as a separate legal entity and standing apart from other ministries.

Furthermore, this matter might be clarified with the help of other relevant examples.

(i) State Bank of Pakistan (SBP) performs various functions in its independent capacity on different occasions irrespective of the part of the government of Pakistan i.e. in the case of public borrowing plays its various roles as a paying agent and custodian etc.

(ii) Bank of Punjab ('BoP' which is a financial institution of the Pakistani government) sometimes arranges the funds for the Punjab government in its individual and self-

governing banking capacity regardless of the part of the government of Punjab and Pakistan.

Also, it should be noted that in the past the concept of *waqf* (endowment fund) and *bait al-mal* (house of money) (which is the base of this phenomenon as mentioned by the Shaykh Taqi Usmani and other prominent scholars) were also used to perform their various functions in the same time as an independent and autonomous body under the Muslim estate. Particularly, in the case of bait al-mal being public property, all the citizens of an Islamic state have some beneficial right over the *bait al-māl*, yet, nobody can claim to be its owner. Still, the Baitul-mal has some rights and obligations. Imam Al-Sarakhsi, the well-known Ḥanafī jurist mentioned;

وبيت المال يثبت له، وعليه حقوق مجهولة.

> The Baitul-mal has some rights and obligations which may be undetermined (Al-Sarakhsi, 33/14).

At another place the same author narrates;

In case the government of an Islamic state runs short of money (having no amount left in *kharaj* department of the *bait al-māl*) in order to make salary payment to his soldiers, it may take money from the sadaqah (*zakāt*) department and may clear the salary payments. But in this case, this whole amount would be considered as debt on *kharaj* department, which needed to be paid later on (Al-Sarakhsi, 1992, p. 33/14).

Furthermore, Usmani (2005) stated in this regard by summarizing the discussion as follows:

> *"It follows from this that not only the bait al-māl but also the different departments therein can borrow and advance loans to each other. The liability*

of these loans does not lie on the head of state, but the concerned department of Baitul-mal. It means that each department of bait al-māl is a separate entity and in that capacity, it can advance and borrow money, maybe treat a debtor or a creditor, and thus can sue and be sued in the same manner as a juridical person does. It means that the Fuqaha of Islam have accepted the concept of juridical person in respect of bait al-māl."

In the light of the above clarification particularly with the instance of *bait al-māl*, as mentioned above that each department of *bait al-māl* is a separate entity, and in that capacity, it can advance and borrow money, maybe treated a debtor or a creditor, etc. as a juridical person. In the same manner, it might be revealed that SPV has its own identity and distinctiveness as an independent legal entity from its obligor and parent.

Likewise, ISRA (2015, p. 166) stated in this context that when an SPV that has acquired beneficial ownership over the asset later issues would represent real ownership of the asset, albeit being described as beneficial interest holders of the *ṣukūk* will be construed under Sharī'ah as owners of the asset, although it is held on trust by the seller who acts as a bare trustee.

Based on this arrangement, it can be stated that the *ṣukūk* holders have complete ownership (milk tāmm) over the asset though they are the registered owners as far as the legal title is concerned, provided that there are no substantial restrictions put on the liberty of the *ṣukūk* holders to deal with the asset. If the *ṣukūk* documents contain such substantial restrictions, the *ṣukūk* holders would still have ownership over the asset albeit incomplete (milk nāqis).

Despite all the above, it should be noted and clarified that such type of special entity is created to meet the need of a specific sector in this dynamic global financial sector such as in the case of sovereign *ṣukūk* issuance a government uses it for budgetary purposes. Ultimately, they need to establish such types of SPVs (legal entities) to overcome the governing as well as technical limitations.

However, the matter of SPV by performing various activities in different capacities from both originator and *ṣukūk* holders side might be summarized in this way that, unlike the natural person, a legal and jurisdictional person can also perform various activities in its diverse individual capacities. Furthermore, the governing default mechanism and nature of SPV also ensures the interest of both parties as the various concerning contractual and legal documentary bindings are discussed and elaborated these types of matters in detail such as the related clauses of the offering circular regarding 'Declaration of trust' (SPV) clearly stated this object. Hence, it can be concluded that there is no Sharī'ah concern in this regard.

(b) Asset-Based and Asset-Backed Ṣukūk

As for as the matter of asset-based and asset-backed *ṣukūk* is concerned it might be summarized as follows;

Like conventionally known asset-backed securities (ABS), Asset-backed *ṣukūk* are Islamic securities complying with Sharī'ah guidelines and have their legal format and definition. For an asset-backed *ṣukūk*, it is held 'true sale of an asset between an originator and an SPV where the legal ownership will be transferred the SPV'. This is a noteworthy point that "true sale" in an ABS perspective represents: "securitization transaction that entails a legal isolation of the asset from the originator to the SPV to

achieve bankruptcy remoteness and full asset- backing and step-in rights with potentially no recourse by the ABS holders to the originator, after the true sale or securitization transaction".

While making the comparison between asset-based *ṣukūk* with asset-backed-*ṣukūk*, it is narrated that the actual underlying asset remains there on the balance sheet of the originator both before and after the issuance of the *ṣukūk* structure. Moreover, the *ṣukūk* holder only avails the partial beneficial ownership to the *ṣukūk* whereas, the original title and legal ownership remain with the originator in asset-based *ṣukūk*.

From the legal point of view, it may also be said that within an asset-based *ṣukūk* no "true sale "happens because the underlying asset always remains legally attached to the originator of the *ṣukūk* structure. Due to this, *ṣukūk* holder's avail only limited ownership of the *ṣukūk* structure. For instance, he does not have the authority to sell the respective asset to any third party. Also, there is always the recourse to the originator (Hidayat: 2013, p. 26).

On the contrary, within an asset-based *ṣukūk*, for instance, *ṣukūk* al *ijārah,* there is ordinarily a sale and leaseback arrangement between the originator and the issuer. Hereby, the owner of an asset is referred to as the originator whereas Special Purpose Vehicle SPV is usually the issuer. Later on, SPV acts on the behalf of the investor. Within this type of *ṣukūk* structure, the owner of the asset normally allows only partial beneficial ownership or an equal amount of benefit in the assets to SPV.

The originator remains the one who holds the actual title to the *ṣukūk*. It is also the originator who may present a bare trust or may even be a bare trustee. It may be to announce that the legal title of the asset is kept in trust, both for the benefit of the *ṣukūk*

holder or trustee. Moreover, at the happening of default of maturity, this *ṣukūk* is supposed to be held back by the originator or the issuer. They undertake to purchase the asset back upon happening of these two events.

Moreover, technically speaking, the rights of *ṣukūk* holders become limited in case of default. For instance, the trustee of the *ṣukūk* holders are bound to sell the asset to the lessee which leaves the *ṣukūk* holder with a position of an unsecured creditor for the given sale price. They have remained raised concerns regarding the scrutiny of the matter that, whether or not, there exists a real sale between the SPV and the originator. There are a few points to make it elicit that there occurs no true sale between the originator and the SPV. For instance, the legal title being absent, the ever-existing purchase undertaking, and compulsion for selling.

But still, as far as, old narrations regarding the beneficial ownership under English and Shari'ah law are concerned, it seems arguable that the above notion is not true. We can say that there occurs a true sale between the originator and the SPV, However, only one part of the beneficial ownership is availed by the buyer. And the legal title and part of ownership rights remain with the seller. As explained previously, the beneficial owner retains the legal title to the *ṣukūk* structure. Therefore, they may become the true partial owner of this set.

In *ijārah ṣukūk*, the present undertaking is an independent undertaking that is one-sided and is not legally linked to the prior sale originator and SPV. So the undertaking does not remain an issue of concern within an ijārahh *ṣukūk* view. The lessee (also known as originator) depending on his will has the authority to make a unilateral

undertaking independently to get back the asset from the owner at a certain date in the future. This arrangement is similar *ijārah muntahiyah bi al-tamlik.*

Although, as reported, (in GoP *ijārah ṣukūk* prospectuses) is believed to have an ownership right on the underlying asset. Thus, the position and rights of the owner are determined by the terms and conditions settled at the time of issuance. For instance, within this type of *ṣukūk* arrangement, the *ṣukūk* holder does not enjoy the authority to sell out *ṣukūk* asset to a third party (in case of default of obligor). Normally, they have only the right to tell the trustee to request a meeting for *ṣukūk* holders. There, they may exercise their rights of notice issuance to the obligor as per its undertaking to purchase assets at maturity or default date. Here, we can see that the enjoyment of the ownership right by the *ṣukūk* holders is restricted by specific terms on the right to the disposal of the asset that has been agreed upon by both parties.

Consequently, it is legally believed that asset-based *ṣukūk* holder does not possess any true recourse to the assets. The only recourse that they possess is the recourse to the originator (Elmaki and Ryan, 2010). The above discussion presents the crux of the arguments among Shari'ah scholars who thereafter questioned the usage of beneficial ownership in such *ṣukūk* arrangements. The basic conflict arises from the point that in some *ṣukūk* arrangements, the *ṣukūk* carrier does not possess any outright right to sell out the held asset, for instance, at happening of a default scenario. This is what actually against the very base principle that is; the *ṣukūk* carrier must be presented with freedom to deal with the respective *ṣukūk* instrument.

Now, this may start a debate on the existence of full or partial ownership in the *ṣukūk* arrangement. This triggers a debate on whether or not full ownership is the *ṣukūk*

holders. If full ownership is not transferred, the relationship between the *ṣukūk* holders and originator-obligor may be constructed as merely that of lender-borrower and this can lead to serious Sharī'ah issue. As a result, it is believed that such kind limitations regarding rights to dispose of an asset hinder the freedom of the *ṣukūk* holder to enjoy the instrument completely.

Adawiah et al., (2015) concluded in this regard that, although beneficial ownership originally is as good as complete ownership (milk tāmm) but in asset-based *ṣukūk,* the beneficial ownership is incomplete ownership (milk nāqis) or restricted ownership or qualified ownership for financial structuring reasons, which include the contractual restriction on *ṣukūk* holders (being the beneficial owner) from disposing of the asset during the *ṣukūk* tenure and upon the occurrence of an event of default.

Hence, based on the above discussion, it might be concluded that the owner as per sales and purchase contract that exits between the *ṣukūk* holder and the obligor is still there. Nonetheless, this ownership is actually (milk nāqis). It is because such ownership is not governed by strict legal laws but rather it is mutually decided between the *ṣukūk* holder and the originators as per their contractual terms and conditions.

(C) Recourse Right and Asset Due Diligence etc.

As for as the matter of recourse right and asset due diligence etc. in asset-based and asset-backed *ṣukūk*, it can be concluded that recourse to the *ṣukūk* asset is not necessarily influenced by the issue of *ṣukūk* holders' ownership of the legal title of the *ṣukūk* as rather, the determining factor is whether or not there is any restriction on the *ṣukūk* holders' enjoyment of their beneficial ownership right in the *ṣukūk* asset.

In asset-backed *ṣukūk*, there is no or very minimal restriction, so they can have full recourse to the *ṣukūk* asset. In asset-based *ṣukūk*, there are substantial restrictions in terms of the *ṣukūk* holders' right to disposal and management of the *ṣukūk* asset due to the existence of a purchase undertaking and/or other restrictions. Instead, they have to exercise the purchase undertaking given by the obligor at the time of the *ṣukūk* issuance, i.e., they will have to sell the *ṣukūk* asset to the obligor at the exercise price agreed between them (ISRA, 2015; Adawiah et al., 2015).

However, by considering the matter of asset due diligence, it can be stated that although accounting treatment is something not related very strongly to the real transaction and the *ṣukūk* parties (buyer and seller) are agreed upon to those conditions, so, as per Sharī'ah rulings, there is no issue. But the fact is that now accounting has become a very integrated part of the firms. Hence ideally it should be avoided and not be mentioned on the balance sheet of the obligor and all relevant and important information must be disclosed clearly. As Reuters, (2009) coted the statement of Yusuf Talala DeLorenzo to Nakheel *ṣukūk* default that *"If there are lessons to be learned here, it is that due diligence is all-important. Compliance to sharia in its structuring does not ensure the success of a ṣukūk or any product or business"*.

Now in the following lines, the sub-section # (iii) of section one would be elaborated concentrating on the application of *wa'd* (undertakings such as purchase undertaking and purchase of *ijārah ṣukūk* on its face value at the time of redemption) in sovereign and quasi-sovereign *ijārah ṣukūk* issuance.

Based on the thorough discussion about the *wad, wadain, and muwa'adah* in the previous chapter, it can be concluded that as for as the matter of *wa'd* (Unilateral

Promise) or *wa'dan* (two unilateral promises-non bindings), all contemporary scholars from the Pakistani, Bahraini and Malaysian regions are agreed towards its permissibility while the matter of *muwa'adah* (bilateral promise) has the difference of opinion among the scholars. The Bahraini scholars considered it as a contract and did not allow it while the Pakistani and Malaysian scholars are allowed it and considered it one step below from the contract by explaining that *muwa'adah* has not the same legal effects same as the contract consequences.

As per the author's view that *muwa'adah* should be allowed in special circumstances as its consequences do have not a complete resemblance with the effects of a contract. As Usmani (2015, p. 96) permitted bilateral promises in special cases as per the need (*ḥājāt*) of the public especially in international trade and supply agreements. He further explained the difference between the consequence of bilateral promise and sale on a future date as follows;

The contract is not completed and finalized in the case of bilateral promise; (i) as here the subject matter (*maqud aliyah*) is not transferred to the other party, and (ii) ownership is not yet transferred to him, and (iii) price (*thman*) of subject matter (*maqod aliyah*) is not considered debt (*dayn*) on him, and (iv) commands (*ahkam*) related to debt (*dayn*) concerning *zakāï* are not applied to him, and (v) commands related to inheritance (*mīrath*) in case of his death are also not related to him. Furthermore, if anyone from both parties is not able to fulfill this promise on the due date by providing genuine reason he cannot be bound to accomplish the contract or give plenty.

On the other side, in the case of sale on a future date, if anyone is not able to fulfill the contract on the due date, he would be bound to finalize the contract and

cannot be given any favor except the right to return the commodity (*iqalah)* by mutual consent of both parties. While in the case of bilateral binding promise the court has only the right to charge plenty to him based on the actual loss but still he cannot be forced to complete the contract.

The above basis provides a clearer difference between the consequences of a contract (which has to immediately transfer the subject matter from one party to another party) and a bilateral promise either binding or non-binding (Usmani, 2015, p. 97. 98).

In the light of the above discussion, one may conclude that as per original rules *mawa'adah* has a different consequence to a sale contract. it is difficult to consider it as a contract. However, based on maṣlaḥah, in some special cases, it might be considered as a contract.

As for the matter of sale of sovereign and quasi-sovereign ijārah *ṣukūk* at the time of maturity or in the event of default on their face value, it might be concluded in the way that to give a purchase undertaking regarding buying of underlying ijārah *ṣukūk* asset on its face value at the time of maturity or on the event of default permissible as per the Sharī'ah rulings because both (*ṣukūk* holders and originator) are trying to mitigate their risk on the future date. So, they negotiate the price in the beginning. Both are strangers (al-ajnabi) to each other. It is not just like partners as in the case of mushārakah and muḍārabah. Such as AAOIFI (2008) resolution described that "it is permissible for a lessee in a *ṣukūk al-ijārah* to undertake to purchase the leased assets when the *ṣukūk* are extinguished for its nominal value, provided he (lessee) is not also a partner, mudārib, or investment agent".

Now the research area # two third party guarantee in quasi-sovereign *ijārah ṣukūk* structures and the Sharī'ah status of charging a fee on it would be explained as follows;

7.1.2 Research Area # 2

This research area describes the concept of guarantee, and third party guarantee in quasi-sovereign *ijārah ṣukūk* structures and the Sharī'ah status of charging a fee on it.

Based on the above discussion in the previous chapter one might be concluded it by following several deductions;

First: in the context of quasi-sovereign *Ijārah* Ṣukūk structures there is no issue to take this type of guarantee from any third party (originator/govt or its any independent institution) as here the guarantee is just related to the timely payment of rentals and it is one of the important responsibilities of the lessee to pay the rentals on its due dates. In other words, in the case of sovereign-*ṣukūk al ijārah,* there is no issue because here the guarantee is just for the payment of *dayn* (debt). After all, as per Sharī'ah, a guarantee can be exercised (for the payment of the debt) from *madyoon* (the debtor) himself, his related party, or any third independent party. This means there is a difference between the guarantee of *dayn* and capital. Hence there is no issue as per Sharī'ah rulings in this regard.

Second: In the case of quasi-sovereign *ijārah ṣukūk* structures to take guarantee from sovereigns or any institution of the government is also valid by considering it as an independent, separate legal entity.

Third: In the context of *ujrah* on *kafalah* (fee on guarantee) the said condition is considered valid based on *maṣlaḥah* and society's needs such as traveling abroad to

study or make a living etc. matters, as it is permissible to charge a fee on utilizing someone's reputation and also on performing incantation using Qur'ānic verse. However, it should not be exploited or overstated by requiring consideration, taking into account that the origin of the legality of the guarantee, which is *tabarru'* (the act of benevolence) such as mentioned by Wahba Zohayli (Zohayli, 1989, p. 161).

It means the actual expense based on *amaliyyat* (working activities) can be excluded and charged. But it does not mean that the status of *zaman* has been changed, and *muawwaz* of *zaman* (consideration against the guarantee) is allowed because here the position of promise and *wa'd* not be changed into Muawwaz but it remains as a non-commutative (*tabarru'*). The same case is in the distribution of loan amount to the needy people, an entity can exclude its real expense but it cannot be linked to the loan disbursed amount despite the fact this would be a *ḥīlah* for receiving interest on the name of service charge. Therefore, when we cannot charge the amount on a loan, how we can charge a fee on a promise to give a loan?

In another way, due to the presence of interest *as taba'n, not asla'an* (the element is found in the sub-section, not in the key contract) ultimately, it would be considered as a valid transaction.

Now the research area # three' named 'application of combination of contracts and its Sharī'ah status in sovereign and quasi-sovereign ijārah *ṣukūk*' would be elaborated as follows.

7.1.3 Research Area # 3

This research area explained the issue of combination of contracts and parallel contracts.

As hybrid instruments can be structured through the combination of contracts. Hence, a hybrid contract mixes the elements of a few contracts or various instruments to design a specific Sharī'ah compliant structure to serve a specific purpose in the Islamic capital market (ICM). Usually, a hybrid structure combining various Sharī'ah contracts has been used to facilitate the issuance of *ṣukūk* (ISRA, 2015, p. 153).

AAOIFI (2010) defines a combination of contracts as: "an agreement between two or more parties to put together two or more contracts with different features and legal consequences and viable transaction. In this case, all obligations and legal consequences arising from the combined contracts are to be realized as a single obligation". This case is expressed in the classical literature of terms *safqatayn fi safqah* (the combination of two transactions in one) or *bayatayn fi bayah* (the combination of two sales in one) (ISRA, 2017, p. 153).

The scholars differed in their interpretation of these hadith which particularized the term *safqatayn fi safqah* (the combination of two transactions in one) or *bayatayn fi bayah* (a combination of two sales in one) and one such interpretation is that to conclude a contract by stipulating another contract in it. It is adopted by the writer of Hidayah and also preferred by Imam Ibn al Hammam in his book Fath al Qadir. Furthermore, Imam Shafi said about the meaning of hadith *bayatayn fi bayah* (the combination of two sales in one).

It means to conclude a contract that revolves between deferred payment with a higher price and cash with a lower price, and the parties to the contract separated

without certainty on which of the two bargains the contract was finalized. Based on this majority of classical jurists have the view that the condition of *safqatayn fi safqah* (the combination of two transactions in one) is not allowed (Usmani, 2015, p. 506).

However, Imam Malik differentiated the various contracts in this regard. Eventually, he divided the combination of contracts into two categories permissible combination and non-permissible combination. For example, it is permissible by him to combine the contract of Bai (sale) and *ijārah* (lease) in one contract and not allowed to combine the Bai (sale) and Jua'alah (reward-based task). The reason is that 'every two contracts which are opposite and contradictory to each other by nature,' could not be combined in one contract, and in the case of vise versa it would be permissible to combine them in one contract. Ultimately, a combination of sale and *ju'ālah* is not allowed by him as ignorance (*jahalah*) is an essential part of *ju'ālah* contract while the *bai'* (sale) doesn't accept the *jahalah*. In contrast, the base of *ijārah* contract leads to the elimination of *jahalah* (ignorance) and *gharar* (uncertainty). Hence, bai (sale) and *ijārah* (lease) both are can both be combined in a contract (al-khurashi: 4; 7).

Based on this it might be identified that the *'illah* (underlying cause) of the prohibition of combing of two contracts in one contract near to Imam Malik is 'to combine such two contracts which are opposite and contradictory to each other by nature' and otherwise it would be allowed. However, the majority of classical jurists who did not allow such type of combination banned it due to inconsistency with the *muqtad'a al-'aqd* (the legal consequence of the contract), (Usmani, 2015, p. 506).

Furthermore, the effective reasons for the prohibition are the occurrence of riba (interest) or the existence of *gharar* (excessive uncertainty or ignorance) which might

be led to Niza'a (quarreling) between the contracting parties. Hence, the rationale behind the impermissibility of the combination of loan and exchange contracts such as a sale contract is the existence of riba where the lender (who is also a seller) will factor the interest of the loan in the sale price for the buyer (who is also a borrower) to pay to him.

This arrangement is deemed as *ḥīlah* (legal trick) to impose interest on the borrower and is strictly prohibited by Islamic law. Apart from a combination with a loan contract, two contracts in one bargain are also prohibited due to the existence of uncertainty and ignorance which may lead to injustice and will oppress the transacting parties. For these reasons, Sharī'ah does not allow the combination of loan and sale contracts and a combination of contracts in one bargain, especially when the structure involves contracts of exchange of value (ISRA, 2017, p. 444; Usmani, 2015, p. 510).

Furthermore, by considering another aspect that *safqatayn fi safqah* (the combination of two transactions in one) is the type of *shart al za'aid* (supplementary and additional condition) in a sale contract and such type of *shurot* (conditions) are considered permissible according to Ḥanafī jurists based on *'urf* (prevailing custom). Hence, they allowed 'sale of a shoe with the condition of putting lasses in it.' They said although apparently, it should not be allowed due to *qiyās* (general principles) as it is a sale with the condition of *ijārah*. However, based on *istiḥsān* (juristic preference) it would be considered permissible due to urf (customary practice).

Usmani (2015) concluded the above debate in this way that there is a lot of business dealings has been done by the public in this contemporary era which is a combination of several *khidma't* (services) in a contract; some of them has to link *ijārah*

contract while others are related to the sale contract. For example, travel agencies related to *Ḥajj* and *'Umrah* provide several services only through a single contract i.e. matters related to visa and passport, traveling either by air or by road, residence in hotels and other places, eating schedule, and so on. All these contracts (sale and *ijārah*) are interlinked and stipulated to each other.

Despite all of these, it is done regularly among the Muslim people because it is not a cause of *jahalah* (ignorance) and *gharar* (uncertainty) which leads to *Niza'a* (quarrel) between the parties. Hence, based on *istiḥsān* (juristic preference) it would be considered permissible based on urf (customary practice) although apparently, it should not be allowed due to *qiyās* (general principles) as it is a stipulation of several *ṣafaqat* (contracts) in one *ṣafqah* (contract) (Usmani, 2015, vol, 1, p.513).

It is noted that not all types of combinations of various transactions are disallowed. Scholars understood the hadith of the combination of two transactions in one and its ruling of prohibition in a specific context. The criteria of the combination of various transactions in one, which includes (i) imposition of the second transaction as a condition to the first transaction; (ii) prearrangement or prior agreement among the contracting parties to combine two transactions in one; and (iii) ambiguity of the transaction outcomes at the point of concluding the contract, offer a good understanding to know precisely which transaction qualifies for such prohibition and which does not.

Therefore, most contemporary scholars are of the view that only a structure that meets the criteria should be disallowed based on the prohibition of the combination of two transactions in one, while any structure that does not fulfill such criteria should not be disallowed on the same basis (ISRA, 2015).

AAOIFT (2015) Sharī'ah Standard No. 25 further elaborates that as long as a transaction in *ṣukūk* is permissible on its own, general conditions of validity are adhered to, and all specific conditions of each transaction are satisfied, it is permissible to arrange more than one transaction in a way that gives a beneficial a legitimate combined outcome. This is permissible unless there is an injunction in Sharī'ah that entails its prohibition on an exceptional basis. Because of the permissible combination of transactions can be structured:

1. When one transaction is not imposed as a condition for the other transaction regardless of the prevalence of a prior agreement or prearrangement.

2. When there is no prearrangement or prior agreement among the contracting parties for combining more than one transaction, regardless of whether one transaction is imposed as a condition for the other transaction

3. When the outcome of the contract and the rights and obligations of the contracting parties are confirmed and clearly understood at the time of conclusion of the contract (ISRA, 2017, p. 444).

There are some key Sharī'ah considerations to be taken into account in structuring *ṣukūk* based on hybrid contracts.

A key issue when combing Sharī'ah contracts is to ensure that the overall structure avoids any linking of the contracts which will give rise to the issue of inter-conditionality between them. Furthermore, whether these contracts are compatible should also be considered. It should also be ensured that hybrid contracts did not lead to transactions prohibited by Sharī'ah, such as interest-based loans (ISRA, 2015, p. 153).

Based on the above discussion, it might be clarified that to use the technique of parallel contract in sovereign Ṣukūk structures is legitimate and permissible in the light of different *Fiqhi* rulings and Sharī'ah principles as described by various Sharī'ah councils and scholars. Furthermore, it also complies with form as well as the substance and spirit of Islamic law of contract. It is not just a paperwork difference because here the nature of the transaction is different from a classical and formal single transaction-based contract as there is no other way to bypass the concerned laws and authorities to execute such transactions up to this mega level dealings.

In the subsequent lines, the research area # four related to GOP *ijārah ṣukūk* based on *bay' al-mu'ajjal* and asset appraisal issues such as greenshoe option etc. would be stated as follows.

7.1.4 Research Area # 4

Theis research area addresses the issues related to GOP *ijārah ṣukūk* based on *bay' al-mu'ajjal* and asset appraisal issues such as greenshoe option etc.

First: In the light of the above debate from both groups in the former chapter # 6 regarding 'GoP *ijārah ṣukūk* based on *bai' al-mu'ajjal*' it might be concluded in the light of most of the research participants, it is a sale transaction than a just transaction of an obligation of debt. A different view was that as the *ṣukūk* are being redeemed the next day and the asset purchased back by the GOP, it should not be considered as a valid sale. The preferable way was to re-lease the underlying assets and/ or renewal the *ṣukūk*.

Second: Provided that, at inception, there is no agreement on a credit basis (when this *ṣukūk* structure is designed and *ṣukūk* are offered for IPO's) but on a

particular time (maturity) it is possible to sell it on a credit basis. For example, in the case of *bai al-salam,* it is not allowed in beginning to deal with *Muslim fee* (subject matter of sale), but after a particular time if they both (buyer and seller) are agreed it can be done with mutual consent. Therefore, if it can be done in *salam* which is all debt then it can be done in *ṣukūk* which are asset-based on a priority basis (*min tariq al-Oula*).

Third: The apparent form is according to Sharī'ah and it might be different concerning substance. However, the likes of such products should be discouraged and the size of such transactions should be capped at a certain percentage on the dire need-based phenomenon. Ultimately, it should be managed with proper control mechanism and linked to be on dire need-based.

Furthermore, variation in the arguments from both proponents and opponents might be caused due to different backgrounds. As the Sharī'ah scholars are focusing on a minimum level of *jawāz* (permissibility) and *'adam al- jawāz* (non-permissibility) and make a clear difference between desired level and minimum tolerance level of permissibility. Normally the Fatwa (legal opinion) discusses and focuses on the minimum level and links the desired level to in the segment of recommendation and suggestions etc.

While on the other side the economists are used to reading the model of efficiency, perfection, and optimum level, etc. So, they try to analyze the legitimacy with the eye of economic perspectives such as prosperity, productivity, and economic activity, etc., and economic and regulatory desires are normally prepared in the context of the best perspective. Ultimately, sometimes they differ from the Sharī'ah scholar's

opinion. As both groups have different scales to measure and analyze things. Everyone has their background exposures, mentality, and attitudes and is influenced by the concerned exposure and environment. It might be called legitimacy vs. economic and regulatory requirements.

Fourth: concerning 'asset appraisal issue' it is concluded that the whole process is based on the fair and regulated mechanism of bidding particularly in corporate *ṣukūk* while in the case of sovereign and quasi-*ṣukūk* issuance there is no need for this type of pricing guidelines and normally, pricing guidelines is a corporate issue while here the government itself issues the *ṣukūk* in its independent capacity. Furthermore, any real increase in price due to the demand and supply phenomenon is justifiable and legitimate as per Sharī'ah. Additionally, this matter is different from the greenshoe option as it is used to avail of the leverage facility. Subsequently, there is no Sharī'ah violation.

In the following lines, research area # five regarding the issue of *ḥiyal and makhārij* by discoursing the issue of higher objectives of Islamic law of contract would be elaborated.

7.1.5 Research Area # 5

This research area is divided into three sections; section # (i) is described the important and argumentative issue of *ḥiyal and makhārij* and section # (ii) further discoursing the issue of higher objectives of Islamic law of contract in this context. Furthermore, section # (iii) the (last section of the present study) summarizes the chapter discussion by considering the overall Sharī'ah compliance in sovereign and quasi-sovereign *ijārah ṣukūk* structures in Pakistani, Bahraini, and Malaysian regions.

Section # (i) of the research area # five by arguing the issue of *ḥiyal and makhārij* in sovereign and quasi-sovereign *ijārah ṣukūk* structures is summarized as follows;

Theoretically, it might be described as the "use of legal means for extra-legal ends that could not, whether themselves are legal or illegal, be achieved directly with the means provided by the Sharī'ah (Mansoori, 2015).

In the light of the above literature of prior chapter # 6, *ḥiyal* might be categorized into three forms.

1. Those *ḥiyal* which are unlawful to do them, and the effect, if any, that one has, also does not appear for what purpose they are intended as per Sharī'ah. This occurs in two forms;

First, to indulge in a *haram* (forbidden thing) activity by just changing the apparent form of that thing without any factual change in reality. Such as the above two cited examples **(i)** the matter of '*Sabbath'* as it was prescribed for the Israelites as a sacred day to be devoted for worship. Economic activities were prohibited for them on that day. A group of them, living near a sea-shore, violated the prohibition by engaging themselves in fishing for that purpose, they invented, at first, some dever pretenses, but gradually they started doing it openly. As a punishment, they were metamorphosed into apes and swine, and **(ii)** the matter of 'fat' as it was forbidden for Jews, but they started to use it, just changing it into a melting form. Ultimately, it was causing them to curse Allah ﷻ because, in reality, there is no genuine change was occurred by converting fat into a melting form.

Second, to use such *ḥila* in which trying to change both apparent form and reality of that matter but the method that is chosen not legitimate in the sight of

Sharī'ah. For example, a person gifts his *Zakāhable* assets to his wife (without giving her possession of that assets) a few days ago, before the completion of a year. This matter would be nullified in the sight of Sharī'ah as the method which was selected as *ḥīlah* not acceptable as per Sharī'ah because *hiba* (gift) cannot be completed until the related thing is being possessed to the concerned party. Furthermore, he also would be considered a sinner because he commits this misconduct to escape the *Zakāh*.

2. Those *ḥiyal* which have an effect according to Sharī'ah for what purpose they are intended, although it would be considered as a sin due to dishonesty (*niyyah al-fasidah*) of that person in this matter. For example, a person gifts his *Zakāhable* assets to his wife by giving her the actual possession of those assets, a few days ago, before the completion of a year. In this scenario, *Zakāh* would not be obligatory for him because he has no *Zakāhable* asset at the time of completion of a year. However, this act would be assumed a sin to escape *Zakāh*.

3. Those *ḥiyal*, where the *ḥilal* is not even a sin, and the Sharī'ah effect also appears, for what purpose they have intended means that matter would be considered as a legitimate and legal way out in the sight of Sharī'ah. Such as the above two cited examples from the revealed texts;

(i) The matter of Hazrat Ayyub ﷺ, as he swore an oath that, after being cured, he would beat his wife with one hundred sticks. When he was cured by Allah Ta'āla he was worried about how would he bear his faithful wife who served him throughout his illness. Allah Ta'āla directed him to fulfill his oath by taking a bunch of one hundred small sticks and striking her only once with the bunch. This was a special concession

given to Ayyub to save him from breaking his oath on the one hand and to save his wife, on the other, from undue infliction, and

(ii) The 'matter of exchange *janeeb* with *busar*' as per the requirement of Islamic law in the exchange of dates with dates is that dates on both sides should be equal.

Now if a person wants to exchange its inferior quality dates with superior quality, it has to ignore the quality difference, and exchange is based on equality in weight on both sides. Any difference in the quantity will make the transaction, a transaction of *ribā al-faḍl*. The solution to this problem is to sell inferior quality in the market and buy from the proceeds of sale required superior quality. In this way, the parties can overcome a difficulty without jeopardizing the letter of Islamic law (Mansoori, 2011, p. 44; Usmani, 2009, p. 175-177).

The above all discussion was a deliberate and principled debate about *ḥiyal* in a general perspective. However, the jurists have discussed distinctly and separately those *ḥiyal* which are related to *ribvi* transactions means which are designed to avoid the prohibition of *ribā*.

Hence, if there is a way to avoid riba and a person wants to get the same financial benefits i.e. profit ratio etc. same as riba, and consequently, that much profit may be obtained through a legitimate matter which is not artificially created, but it is itself intended, and all the related Sharī'ah terms and conditions of the matter have been fulfilled, and all the requirements of the Sharī'ah also have been followed, it is not called *ḥila*, nor is there any significant difference in its *jawāz* and *in'qād* (validity and holding) among the jurists.

Even though, when jurists discuss the various forms of riba, they do not mention it as *ḥīlah* at that place. For example, 'sale on deferred payment' and '*murābaḥah al-mu'ajjalah,* etc.' as this type of sales (*buyū'*) are itself intended and not artificially created. Hence, here the parties execute a proper sale and purchase transaction on deferred payment, and the profit ratio may be finalized as per the market trend. Ultimately, this matter would be legitimate in the sight of Sharī'ah (Usmani, 2009, p. 178,179).

On the other side, if the matter which is created to avoid riba is not self-intended but it is artificially created to justify the matter, even if it's related Sharī'ah terms and conditions have been fulfilled. There are three clear stances among the classical Muslim jurists. In the following lines these opinions are described as follows;

(i) According to Imam Mālik, this matter has been artificially created and the ultimate goal is to achieve the *maqāṣid* (abjective) of *ribā*. Hence, it would not be validated even though the terms of Sharī'ah appear to be fulfilled, and **(ii)** according to Imam Shafi'i, who states that the Sharī'ah has given separate orders for the validity and permissibility (*sehat* and *jawāz*) of every matter; we cannot call a legitimate case invalid simply because it is intended to achieve the purposes of an invalid case and **(iii)** the Ḥanafīs' position is in the midst of them, and that is, if that artificial matter has no practical effect at all, then it would be considered illegitimate, but if it has any practical effect that makes it different from riba then that matter will be valid and legitimate.

The above three opinions and stands can be further clarified in the case of *bai' al-'inah*. *Bai' al-'inah* is to sell a property on credit for a certain price and then to buy it back at a price less than the sale price on a prompt payment basis, both the transaction

take place simultaneously in the same session of the contract. For example, A sells a commodity to B for Rs. 100/- on a one-year's credit. A then buys the commodity back for Rs 80/- from B on immediate payment (cash price). In this case, A and B have to build a relation of creditor and debtor rather than buyer and seller as here A is a creditor and B is a debtor, A has an advanced loan of Rs. 80/- under the cover of the sale transaction in which he earns a surplus of 20 rupees.

The majority of Muslim Jurists (including Mālikīs and Ḥanafīs) consider this transaction invalid because the intended objective of the transaction opposes the objective laid down by the lawgiver. This form of transaction, in their view, is nothing more than a legal device aimed at circumventing the obstacle posed by the prohibition of riba. It is a fictitious deal in a usurious loan transaction that ensures a predetermined profit without actually dealing in goods or sharing any risk. While as per the opinion of Imam Shāfi'ī it is a valid sale because all the related *shrut al-sehat and jawāz* (conditions for validity and permissibility) for a valid sale are fulfilled here and it is the external form of contract and not the underlying intention that determines the validity of a contract or otherwise (Al- Shafi, 1989, p. 44).

Anyway, the steps those are taken to prevent riba the jurists have three viewpoints in this regard and sometimes this difference of opinion also might be a cause of blame and criticism by the sentimental people of the parties. Hence, who support the stand of *Maliki* School; they blame and scream to Shāfi'īs and *Ḥanafis* that they are the supporter of *ḥiyal*. Even though Imam *Bukhari* wrote the chapter of *ḥiyal* (*kitab-al ḥiyal*) in his book in the same style, and on the other side, some Shāfi'īs and *Ḥanafis*

objected to *Malki's* viewpoint that it is based on misconduct; as a result, one lawful thing (*ḥalal*) is forbidden (*ḥaram*).

But the fact is that the scholars on both sides have strong arguments, and none of them can be said to be false and should not be discouraged. Imam Shatabi □ has a very balanced discussion on this topic. Even though his view is the same about the ḥiyal and deferred sales as he owns the Maliki school of thought, but he strongly described Ḥanafīs and Shafi'i's position in front of people of their profession (school of thought). Therefore, he tells them that it is too much to say that their position is weightless (Usmani, 2009, p. 188, 89).

Imam-al Shatibi a prominent Mālikī scholar, holds a high position in the debate of higher objectives of Sharī'ah concerning *ḥiyal* and *makhārij* stated as follows;

This includes referring to the sale of deferment, in which it refers to selling dirhams in cash for two dirhams for a term/period, but with two contracts each of them is intended for himself, and if the first is an excuse, then the second is not an objection because the Sharī'ah, if it permits us to take benefit by attaining benefits and avoiding harm in some specific ways, hence, if a *mukallaf* (person in charge) adopts those specific ways it would not be prohibited, otherwise he is disgraced in all legitimate ways (devices). And if it is assumed that the first contract is not intended by the contractor, but rather the second intended, then the first is if it comes down to the status of the *wasa'yl* (means), and the means are legally intended (*al-maqsood*) in terms of the means and this (situation) is also from them... and the means not at all prohibited except by evidence, similarly, it cannot be prohibited in this case but only due to evidence.

This is all that can be said in inferring the permissibility of *ḥīlah* in any matter and the evidence of the other party (Mālikī school of thought) is clear and famous, so look at it in its places. However, the purpose to write such a strange report due to lack of access to Ḥanafīs' books, as Ḥanafī's literature is non-existent in the countries of *al-magrib* (المغرب), as well as the books of the Shafi'is and other people of the schools of thought. This inherits an embrace of belief in the *imām,* who are unanimous in their virtues and their progress and has a deep understanding in the area of higher objectives of Sharī'ah ... (Al-Shatibi, 1989, p. 30)

This is the description of the *ḥiyal* which the jurists have described. This shows how carefully the jurists analyzed everything and everything is kept in its proper place, [illegible] the *ḥiyal* came, they become in anger, without seeing the nature of it. Even though, in the context of those *ḥiyal* which are not permissible in their *madhab* (school of thought) such as in the case of *bay' al-'īnah*, normally, they used the [illegible] of *makrūh* (dislike) rather than called it *haram* (forbidden)... (Usmani, 2009, p.19).

Furthermore, (Mansoori, 2011) also declared; "there are certain legal devices which do not frustrate the purpose and spirit of the law. They are clever uses of law to achieve legitimate ends such as 'Penalty for Default in Islamic Banks' and 'hedging against future devaluation in Islamic Banks' would be considered as makhārij in Islamic financial sector".

In the light of the above-detailed description from the renowned Sharī'ah scholars, one might be concluded that in the context of sovereign and quasi-sovereign nature *ijārah ṣukūk* structures, due to legal and regulatory constraints and tax requirements, etc. these

makhārij have come as a solution for the current dynamic market. Hence, they must fulfill the minimum criteria by Sharī'ah as *aḥkām al-ijtihadiyyah* might be useful for unusual circumstances i.e. *istihsan* (juristic preference), *urf (*prevailing custom*), umoom al-balwa* (common problem) and *maslaha al-mursalah* (public interest), etc. in the light of Shariah principles as *fiqh* is very dynamic. So, it should be flexible concerning the contemporary transaction by caring about the Sharī'ah requirements. Hence, most sovereign and quasi-sovereign *ijārah ṣukūk* are fallen under the category of *makhārij* as *ṣukūk* holders bear the associated risk which is the basis of the difference between bond and *ṣukūk*.

Likewise, these are *makhārij* and *Jaiz* (permissible) *ḥiyal*. When the things are needed to be implemented at the macro level ultimately, the level of compromise increases automatically, due to conversion of the transaction from individual to public level (domestic, national, and international levels). Such as in the era of the Ottoman Empire *murābaḥah* used to practice daily rates rather than *mushārakah* and *murābaḥah* financing on the governmental level.

Furthermore, it is worth mentioning that it is a very tricky and complex matter as it is very subjective. Subsequently, one may give a judgment about the structure of a product unlawful considered it as *ḥīlah* and stratagem by concentrating certain aspects while others may pass it legitimately by considering it *makhraj* and legal way out in the light of some other aspects. Therefore, to pass out a statement regarding any matter, it must be judged very keenly and carefully.

Now in the coming lines, section (ii) of research area # five is further discoursing the issue of *ḥiyal* and *makhārij* considering the higher objectives of Islamic law of contract in this regard.

The main objective of Sharī'ah is to govern human lives and to protect the interests and benefits *(maṣlaḥah)* of the people. *Maslahah* in the Islamic perspective means what is good and beneficial in the eye of Sharī'ah.

Muslim scholars divided *maqāṣid al*-Sharī'ah based on many considerations. What concerns us concerning the *ṣukūk* market particularly sovereign and quasi-sovereign *ijārah ṣukūk* issuance is their division of *maqāṣid* based on their application. Accordingly, they divided them into three main categories: (i) *ḍarūriyyāt* (essentials), (ii) *ḥ*ajiyyat (complementary), and (iii) ta*ḥ*siniyyat (embellishments) as follows;

Ḍarūriyyāt (Necessities or Essentials) means interests of lives that people essentially depend upon, comprising of the five aforementioned objectives of Sharī'ah: religion (di), life (*nafs*), intellect (*'aql*), posterity (nasal), and wealth (mal). These are essentials serving as bases for the establishment of welfare in this world and the hereafter. If they are ignored, then coherence and order cannot be established and *fasad* (chaos and disorder) will prevail in this world, along with obvious loss in the hereafter.

Some scholars argue that though the five *ḍarūriyyāt* are essential for human welfare, necessities are not confined to this five *maqāṣid*. Hence, they propose additional *ḍarūriyyāt* such as equality, freedom, and the protection of the environment.

Ḥājiyyat (Need or Complementary) means interests that supplement the essential interests, and whose neglect leads to her but not to a total disruption of the normal order of life. In other words, these interests other than the five essentials, are

needed to alleviate hardship or facilitate life, so that life may be from distress and predicament. An example is seen in the sphere of economic transactions Shari ah validated certain contracts such as *salam* sale and that of lease and hire (bära of the people's need for them, notwithstanding a certain anomaly attendant in both.

Taḥsiniyyāt (Embellishments) means the embellishments and accompaniments refer to interests whose realization leads to refinement and perfection in the customs and conduct of people at all levels of achievement. For example, Sharīʿah encourages charity to those in need beyond the level of the obligatory *Zakāh*. In customary matters and relations among people, Sharīʿah encourages gentleness, pleasant speech, manner, and fair dealing. Other examples include permission to use beautiful, comfortable things to eat delicious food; wear fine clothing, and so on.

However, the demarcation made by the scholars between the three categories remains interrelated. There is much overlapping and integration between them. Hence, to treat any of the objectives as discrete would be rather naive. The categorization of these *maqāṣid* serves as the main framework governing human lives in this world to achieve ultimate happiness in the hereafter (ISRA, 2015, p. 79, 80).

The above-mentioned theoretical aspects of *maqāṣid al-* Sharīʿah is regarded as the foundation for any application of *maqāṣid* in daily life including Islamic finance particularly in sovereign and quasi-sovereign *ṣukūk* issuance. As a Sharīʿah-oriented *ṣukūk* structures, the sovereign and quasi-sovereign *ijārah ṣukūk* structures are vigorously expected to be guided by the objectives of Sharīʿah. There are at least two reasons for establishing the right objectives for it. First, the objectives will be used by the management or policymakers of the Islamic capital market particularly sovereign

and quasi-sovereign entities in formulating corporate objectives and policies. Secondly, these objectives serve as an indicator of whether the particular entity (sovereign and quasi-sovereign) is upholding true Islamic principles.

In this regard, the examination of the fifth *maqāṣid* (objective), namely the *'hifz al- māl* (preservation of wealth) is worth discussing. It is a fact among Islamic scholars that the preservation of wealth is one of the fundamental and universal principles of Sharī'ah, falling under the *ḍarūriyyāt* category. Naturally, Sharī'ah whose aim is to preserve and promote human social order would also have high regard for wealth. Many Qur'ānic verses and Sunnah texts are evidencing that property and wealth have an important status and position in Islam. Sharī'ah introduces many rulings aimed at realizing the preservation of wealth in both material and socio-psychological dimensions which elaborates the dimensions of *maqāṣid al*-Sharī'ah in Islamic finance are as follows;

i) Preservation of wealth through the protection of ownership and ii) Preservation of wealth from damage and iii) Preservation of wealth through its circulation and iv) Preservation of wealth through its value protection.

In the context of the Islamic capital market particularly *ṣukūk* market, various products offered to investors are in line with the *maqāṣid al-* Sharī'ah. For example the issuance of *ijārah ṣukūk* (sovereign or quasi-sovereign) to finance government projects such as the construction of highways and airports etc. servers these five dimensions. This is because the ownership of the *ṣukūk* holders is protected, the contribution to the countries' development is obvious, the amount contributed is saved from being spoiled or damaged, the project guarantees a real circulation of wealth through the maximum

number of the participants and the project contributes to the real economy that protects the value of the wealth (ISRA, 2015, p. 82).

Based on the above it might be concluded that the higher objective of Sharīʿah are changed according to the context and circumstances. Therefore, this device should be tested considering the diverse nature of *maqāṣid* particularly in the context of the level of priority i.e. *ḥājiyyāt*, *ḍarūriyyāt*, and *taḥsiniyyat*. In this way, a balanced and appropriate conclusion might be driven.

Furthermore, the higher objectives of Sharīʿah are derived in the light of Sharīʿah principles and commands. Consequently, it is not against the rules of Sharīʿah and these are always Complying with general rules of Sharīʿah. Now in the following lines, the last section of this study would be elaborated.

Section (iii) of research area # five is described the status of overall Sharīʿah compliance in sovereign and quasi-sovereign ijārahh *ṣukūk* structures in Pakistani, Bahraini, and Malaysian regions.

It can be concluded from the present research work that overall sovereign and quasi-sovereign *ijārah ṣukūk* structures are Sharīʿah compliant in Pakistani, Bahraini, and Malaysian jurisdictions. However, it might be varied as per jurisdiction and case-to-case basis. The following parent and child nodes also depict this matter in this context.

Theme-18: General Sharī'ah Compliance

Figure 29: NVivo Project map of the parent node of the theme "General Sharī'ah compliance (GSC) and relevant child nodes

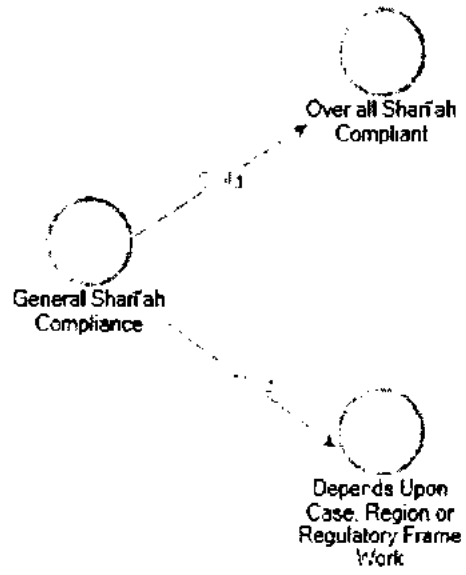

Figure 30

GSC was found to be one of the key concepts under the frame of Sharī'ah Evaluation of Contemporary Sovereign and Quasi-Sovereign *Ijārah* Ṣukūk: A Case of Pakistan, Malaysia and Bahrain (SE-CS-QS-IS-AC-PMB). It was revealed in the empirical material that Sharī'ah Evaluation of SE-CS-QS-IS-AC-PMB can be categories into two major dimensions:

1. Overall Sharī'ah Compliant
2. Depends Upon Case, Region, or Regulatory Frame Work

The first dimension under the theme of *General Sharī'ah Compliance* was *overall Sharī'ah Compliant (OSC)*. It was revealed in the interview data that the overall Ṣukūk

structures are Sharī'ah compliant in Bahraini, Malaysian and Pakistani regions as these are endorsed by their relevant Sharī'ah boards and councils and it as an innovative product and has unique attributes, therefore, their Sharī'ah compliance should be examined in that context.

For example, informant-23 was of the view that; *There are standards, committees, and Sharī'ah boards that have regularized these structures. So, due to the presence of a regulated framework, we can say these are Sharī'ah complaints.*

For example, informant-14 was of the view that; *As a whole when we discussed ṣukūk, they referred to the redeemable capital equity type (quasi-equity) instrument. In general, it is understood that this ṣukūk are Sharī'ah compliant. All sovereign Ijārah ṣukūk are Sharī'ah compliant, as those are based on underlying ṣukūk asset.*

For example, informant-25 was of the view that; *It is a hybrid security. We have to realize the nature of this instrument. As Ijārah mintahia bitmalik is a combination of a financial and operational lease. So, it fulfills the Sharī'ah requirement.*

The second dimension under the theme of *General Sharī'ah Compliance* was *Depends upon Case, Region, or Regulatory FrameWork (DCRRF).* It was revealed in the interview transcript data that *General Sharī'ah Compliance* is based on the underlying Ṣukūk structure, region, and regulatory framework, etc.

For example, informant-02 was of the view that; *It depends upon the Ṣukūk structures. Most countries that have common law differentiated beneficial and legal ownership.*

For example, informant-6 was of the view that; *Some structures based on the case, region, within a region or country vise have particular Sharīʿah issues. Same Sharīʿah Committee may on two same ṣukūk structures; one of them might have Sharīʿah issues while the other structure has no any type of issues.*

Therefore, in the light of respondents' views, it can be concluded that overall sovereign and quasi-sovereign *ijārah ṣukūk* structures are Sharīʿah compliant in Pakistani, Bahraini, and Malaysian regions. However, it might be varied as per jurisdiction and case to case basis.

In other words, the study concludes that Sharīʿah compliance of quasi and sovereign *ijārah ṣukūk* in its *form* is harmonized, converging and largely acceptable. The study further augments Sharīʿah appraisal by evaluating the substance of sovereign *ijārah ṣukūk* through the lens of *maṣlaḥah and maqāṣid* and concludes the presence of divergent opinions for being subjective, in nature and being discussed in different perspectives and constraints.

7.2 Recommendations

This study highlights the Sharīʿah issue related to the sovereign and quasi-sovereign *ijārah ṣukūk* structures from Pakistani, Bahraini and Malaysian jurisdictions. The study examined various issues in this regard such as 'asset ownership', 'issues related to SPV regarding asset-based and asset-backed *ṣukūk'*, 'restrictions and undertakings such as 'purchase undertaking' and 'purchase of *ijārah ṣukūk* on its face value at the time of redemption, 'asset disposal right', 'asset due diligence, etc. The role of 'guarantee', and 'third party guarantee in quasi-sovereign *ijārah ṣukūk* structures' and the 'Sharīʿah status of 'charging fee on it' and the philosophy of 'combination of

contracts and parallel contracts' which is commonly used in such *ṣukūk* structurings. Also, this research considered, the issues related to 'GoP *ijārah ṣukūk* based on *bai' al-mu'ajjal*' and the issue of '*ḥiyal and makhārij*' by discoursing '*maqāṣid* al- Sharī'ah'.

However, variation in the arguments from both proponents and opponents might be caused due to different backgrounds. As the Sharī'ah scholars are focusing on a minimum level of *jawāz* (permissibility) and *adam al-jawāz* (non-permissibility) and make a clear difference between desired level and minimum tolerance level of permissibility. Normally the Fatwa (legal opinion) discusses and focuses on the minimum level and links the desired level to in the segment of recommendation and suggestions etc.

While on the other side the legal advisors and financial experts, and credit rating agencies and economists, etc. are determining the matter as their own exposure i.e. economists are used to scrutinize things in the context of the model of efficiency, perfection, and optimum level, etc. So, they try to analyze the legitimacy with the eye of economic perspectives such as prosperity, productivity, and economic activity, etc., and economic and regulatory desires are normally prepared in the context of the best perspective. Ultimately, sometimes they differ from the Sharī'ah scholar's opinion. As both groups have different scales to measure and analyze things. Everyone has their background exposures, mentality, and attitudes and is influenced by the concerned exposure and environment. It might be called legitimacy vs. economic and regulatory requirements.

There is an immense need to align and streamline both groups' exposures on an institutional level to produce sound, trustworthy and viable solution-based research

work for the various stakeholders of the industry. For example, Bank Negara Malaysia (BNM), and International Center for Islamic Economics and Finance (INCEIF), and ISRA are trying to contribute to such type of joint effort at different levels. In the same manner, particularly, in Pakistan, the SBP with the collaboration of the National Institute of Banking and Finance (NIBAF) by involving the dynamic personals from the academia and industry can align and streamline the exposures of various groups to produce a rich and trustworthy research work.

Otherwise, everyone used to prove his wisdom and superiority in the fort of the opponent. As a result, the students of Islamic finance and the common public are also confused to judge who is on the right path while attending the seminars and conferences and reading material in this regard.

However, future researchers might focus on other types of *ṣukūk* such as *mushārakah*, *muḍārabah*, *salam* and *istiṣnā'*, and *wakālah* model, etc. Likewise, the targeted sector for the present research work is the governmental sector from Pakistan, Bahrain, and Malaysia. However, similar research could be conducted in other countries such as other Muslim countries (i.e. Dubai, Saudi Arabia, Turkey, and Indonesia, etc.) and European countries (i.e. United Kingdom, Germany, and Australia, etc.) as these jurisdictions have been issued such type of sovereign and quasi-sovereign *ṣukūk* issuance.

Likewise, in the future, the same kind of research may be conducted in a different industry set up, for instance, the financial industry, telecommunications industry, and health sector, etc. The corresponding Sharī'ah related issues may be explored in those respective industrial setups. Furthermore, the very research is

executed using a statistical representative sample with a qualitative sampling design, while the future intended research may be performed by opting for quantitative sampling designs with larger sample sizes.

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