Structuring Sukuk within the Shari'ah Framework for the Nigerian Islamic Capital Market

Aishat Abdul-Qadir Zubair*

Abstract

Sukuk, as an Islamic financial instrument, has gained significant prominence in the global financial landscape as a viable alternative to *conventional bonds. This paper delves into the critical aspect of structuring Sukuk within the Shari'ah framework, exploring the principles and methodologies that underpin their development and issuance. Sukuk, in essence, represent the intersection of Islamic finance and Shari'ah, embodying principles of ethical finance, risk-sharing, and asset backing. The primary objective of this paper is to provide a comprehensive understanding of the Shari'ah-compliant structuring mechanisms and considerations that guide Sukuk issuance. In doing so, the paper highlights the importance of transparency and compliance with Islamic jurisprudence in Sukuk structuring. Furthermore, the paper examines the various Sukuk structures that have emerged over the years, such as Sukuk al-Ijarah, Sukuk al-istisna and others. It also discusses the challenges and complexities associated with Sukuk issuance, most importantly as it relates to its Asset-Based and Asset-Backed classification. The research draws on an extensive review of literature, regulatory guidelines, and case studies to illustrate the practical application of Shari'ah principles in structuring Sukuk. It also examines the evolving landscape of Sukuk markets worldwide, as well as their role in infrastructure development, corporate financing, and sovereign fundraising. This paper emphasizes the pivotal role of Shari'ah compliance in Sukuk structuring, highlighting the need for a harmonious balance between financial innovation and adherence to Islamic ethics. It contributes to the growing body of knowledge in Islamic finance by providing a comprehensive guide for practitioners, scholars, and policymakers involved in the Sukuk market, ultimately fostering the sustainable growth of ethical finance within the global financial system.*

Key Words: Shari'ah; Asset-Based Sukuk; Asset-Backed Sukuk; Sukuk al-Ijara

1. Introduction

Capital Markets are an integral part of any financial industry, and therefore, Islamic capital markets are integral to the overall development of the Islamic Finance Industry. *Sukuk* is a class of products that has often been in the limelight in the global Islamic capital markets, including Nigeria. Hence, *Sukuk* is a tremendous potential financial and risk management tool for the Nigerian government. Financial management tools in the sense that are used to gather finances for the long-term financial needs of the government, such as the construction of roads, airports, and rail. Risk management tool in the sense that there is little or no risk attached to this Islamic finance product because they are tied to an asset, and therefore the risk is that of the asset, and this is widely accepted to be of negligible risk.[1]

* Department of Islamic Law, Faculty of Law, Kwara State University, Malete. aisha.zubair@kwasu.edu.ng / ayyeesha@gmail.com

The extant literature unequivocally establishes *Sukuk* as a pivotal, ethically grounded instrument within Islamic finance, offering a credible alternative to conventional bonds by adhering to the core principles of Shari'ah.[2] Vogel & Hayes and Ayub have underscored the paramount importance of genuine Shari'ah compliance – manifested through tangible asset-backing, authentic risk-sharing, and transparency – as the defining characteristic and non-negotiable foundation for *Sukuk* legitimacy and resilience.[3] While some studies reveal a versatile toolkit of underlying contracts (*Uqud*) enabling *Sukuk's* adaptation across diverse sectors,[4] They also critically highlight significant controversies and divergent practices, particularly concerning structures perceived to mimic conventional debt or dilute risk-sharing in certain jurisdictions.[5] Despite the demonstrable benefits of *Sukuk*, including its potential for financial inclusion and stability.[6] Other studies consistently identify persistent challenges related to asset suitability, risk assessment, regulatory harmonization, standardization, and investor protection.[7] However, while regional variations in controversial contractual practices are acknowledged.[8] There remains a significant gap in comprehensive, comparative analysis that systematically maps these divergent structures across key global markets and critically evaluates their specific implications for standardization efforts and the overarching goal of Shari'ah harmonization. Therefore, the ongoing evolution and future robustness of the *Sukuk* market depend critically on addressing such gaps through rigorous research, continuous scholarly discourse, robust regulatory frameworks, and diligent attention to the foundational nexus between Shari'ah principles and practical issuance, which this current study will be addressing.

With the Nigerian Islamic Capital Market growing really fast and the issuance of sovereign, quasi-sovereign and corporate *Sukuk*, there is an urgent need to address the shari'ah implications of the structure of *Sukuk* to be issued. This is most imperative because if *Sukuk* is not structured correctly, it will defeat the purpose it is meant to serve, being an Islamic finance product free of interest, and being easily likened to a conventional bond.

The legal issues that form the focus of this study are the legality of the division of ownership in Islamic jurisprudence into Legal and beneficial ownership. This stems from the dichotomy that exists in the significant difference between structuring *Sukuk* along the lines of Asset-Based *Sukuk* or Asset-Backed *Sukuk*. Another equally important legal issue that forms the

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[1] IIFM, *Overview of the Global Sukuk Market' in Sukuk Report: A Comprehensive Study of the Global Sukuk Market* 3rd Edition (Bahrain: International Islamic Financial Market, 2013).

[2] El-Gamal, M.A., *Islamic Finance: Law, Economics, and Practice.* (Cambridge: Cambridge University Press, 2006). AAOIFI, *Shari'ah Standards* (Bahrain: AAOIFI, 2015).

[3]Vogel & Hayes, Islamic Law and Finance: Religion, Risk, and Return. Kluwer Law International, 1998. Ayub M.B., *Understanding Islamic Finance* (Chichester: John Wiley, 2007).

[4]Jobst A.A., "The Economics of Islamic Finance and Securitization." IMF Working Paper, May 2007. IFSB, *Islamic Capital Markets: Principles & Practices.* (IFSB, 2017).

[5] El-Gamal, M.A. *Islamic Finance: Law, Economics, and Practice*. (Cambridge: Cambridge University Press, 2006).

[6] Siddiqi, M.N., **"**Islamic Banking and Finance in Theory and Practice: A Survey of State of the Art" *Islamic Economic Studies,* Vol. 13, No. 2, 2006

[7] Syahida A & Umar O, "Towards a Sharī'ah Compliant Equity-Based Crowdfunding For The Halal Industry In Malaysia." *International Journal of Business and Society*, Vol. 18 S1, 2017, 223-240.

[8] Oseni, U., Hassan, M., "Regulating the governing law clauses in Sukuk transactions". *J Bank Regul* 16, 2015, 220-249. https://doi.org/10.1057/jbr.2014.3.

focus of this current study is the examination of the Shari'ah implications of the various types of *Sukuk* based on the contract, most importantly, the implications of their sale in the primary and secondary markets under the Shari'ah.

The primary objective of this paper is to provide a comprehensive understanding of the *Shari'ah*-compliant structuring mechanisms and considerations that guide *Sukuk* issuance. In doing so, the paper highlights the importance of transparency and compliance with Islamic jurisprudence in *Sukuk* structuring. Furthermore, the paper examines the various Sukuk structures that have emerged over the years, including *Mudarabah*, *Musharakah*, *Ijarah*, and *Wakalah*, and their adaptability to different industries and sectors. It also discusses the challenges and complexities associated with *Sukuk* issuance, most importantly as it relates to its Asset-Based and Asset-Backed classification.

2. Structures of *Sukuk*

The growing sophistication of structures of *Sukuk*, aside from the well-known traditional structures, is one of the vital growth factors underpinning a vibrant *Sukuk* market. The implication of this, therefore, means that market development and innovation are of utmost relevance in the present-day *Sukuk* market.[9] Before this study goes into details of the different types of structures that are available for *Sukuk* generally, it is imperative to state here that one structure is usually interwoven with different contracts and often structures. That is, an *Ijarah Sukuk* structure may have an *Istisnah* contract in it aside from its primary structure of *Ijarah*. In addition, different contracts, such as trust agreements, agency agreements, and the like, are also found in *Sukuk* structures.

There are different *Sukuk* investment structures, which can be further reclassified into four broad groups. A) The Debt-Financing Structures versus the Equity-Financing Structures, B) the Contract of Exchange versus the Contract of Participation, C) Tradable *Sukuk* at a Market Price versus Transferable *Sukuk* at Face Value, D) Asset-Based *Sukuk* versus Asset-Backed *Sukuk*.[10] The above table shows that the group A *Sukuk* structures could be named differently depending on factors considered while structuring the same, such that it could be a debt-financing structure, a contract of exchange structure, a tradable *Sukuk* at a market price structure, or even an asset-based *Sukuk*. This is also true of the Group B structures, which could be an equity-financing structure, a contract of participation structure, a transferable *Sukuk* at face value structure, and an asset-backed *Sukuk* structure. Thus, the nomenclature keeps changing depending on the name employed for use. Nevertheless, they all refer to the same meaning for the various structures that belong to each group.

3. Asset-Based Versus Asset-Backed *Sukuk*

[9] Bank Negara Malaysia, *Financial Stability & Payment Systems Report, 2007* (Kuala Lumpur: Bank Negara Malaysia (Central Bank of Malaysia), 2008).
[10] Salim A, *Raising Capital on Sukuk Markets: Structural, Legal and Regulatory Issues* (New York: Palgrave Macmillan, 2019).

In the case of an asset-based *Sukuk*, the asset is owned by the *Sukuk* holders through the SPV. As a result, they would be required to maintain and insure the asset. The rental payments provide the return, and the *Sukuk* is redeemed at a pre-agreed-upon price. Because the obligor is also the lessee, *Sukuk* holders have recourse to him in the event of failure. As a result, this type of *Sukuk* is more equivalent to debt or bonds. In essence, the *Sukuk* holders do not have recourse to the *Sukuk* asset but to the issuer.[11]

Asset-backed *Sukuk* has the characteristics of equity finance because the SPV owns the asset. The SPV assumes all of the risks and rewards of ownership. As a result, if the gains do not materialize, the *Sukuk* holders suffer losses. Furthermore, redemption for *Sukuk* holders is at open market value, which may be nothing.[12]

This is because the investors are not owners of the *Sukuk* assets but are lenders to the issuer of such *Sukuk*. Therefore, their earnings are in regular payments, usually fixed percentages based on interest rates (LIBOR). This leads us to the argument of whether or not there exists a dichotomy between Legal and beneficial ownership under Islamic law as it exists under Common law.

It is believed that because of the legal regime being operated in most jurisdictions issuing *Sukuk*, i.e., the common law/civil law rather than Islamic law, and perhaps the need for acceptance and recognition of Islamic finance products such as *Sukuk* to fit into the existing legal framework without much need to amend the provisions of the existing law, the *shari'ah* scholars' legal practitioners and *Sukuk* structure advisers devised a means using the common law of trust.[13] When someone holds an asset in trust for someone else, the latter can be considered the beneficial owner of the asset held by the former under common law. A trust deed executed (often unilaterally) by the settlor establishes the connection between the trustee and the beneficiary. The trust deed can also be written to allow the trustee and beneficiaries to form a connection through the trustee's issuance of a trust instrument to the beneficiary or class of beneficiaries. For instance, a settlor can create a trust over a house under a trust deed and appoint a trustee to issue trust instruments to a class of beneficiaries. Investors who purchase trust instruments will instantly become trust beneficiaries and be considered pro-rata owners of the house held on trust by the trustee. The trust deed can also be constructed to allow trust instrument holders to transfer trust instruments to others on a willing-buyer/willing-seller basis. The holders of the trust instrument will be entitled to a pro-rata portion of the rental income produced from the residence held on trust if the trustee leases the house to a tenant for a fixed or variable rental term.[14]

Thus, the concept of ownership is regarded as *Milk* or *Milkiyyah* (ownership) under the *Shari'ah* and has been given several meanings, such as: "A legal connection (*Ittisal Shari*) between a person and an asset, such that he is free to transact with it and exclude others from

[11] Abu Umar F. et al., 'Post Default Sukuk Restructuring: An Appraisal of Shariah Issues', *International Finance Review* (2018).
[12] Bhandari Sunil, 'Islamic Finance-Theory and Practical Use of Sukuk Bonds' (2013) *ACCA* p.34
[13] Muhd Ramadhan F.E, Muhamad N.H and Mohd F.M, 'Shariah Issues in Sukuk' <https://www.maybank2u.com.my/iwov-resources/islamic-my/document/my/en/islamic/scoe/knowledge-centre/research-paper/Shariah_%20Issues_in_Sukuk.pdf > accessed on 16 June 2022
[14] *Ibid.*

dealing with it (the asset)".[15] These exclusive rights (Milk Tamm) enjoyed by a property owner under Islamic law are thus the meaning of the concept of ownership. *Sukuk* certificates signify absolute ownership (*Milk Tamm*) of the underlying assets.

Thus, there are arguments as to the existence of dual ownership (i.e., legal and beneficial) in Islamic law, or to put it succinctly, the arguments are with regard to whether or not there exists a dichotomy between the two concepts, i.e., legal and beneficial ownership under Islamic law. The proponent of its existence brings forth robust evidence, as the other group also proffered evidence that there can only be one single owner of an asset. The first group regards as permissible the registration of the title of Mr. A's property in the name of Mr. B, who is not the actual owner. This is possible in cases where the jurisdiction's legal regime permits or requires this for specific purposes. The proponent of this group includes the *Shari'ah* Committee of Rajhi Bank, the Kingdom of Saudi Arabia, *the Shari'ah* Advisory Council of Bank Negara Malaysia, and the AAOIFI *Shari'ah* Standard 2010. This group also permits the usage of beneficial ownership in transactions in Islamic finance. On the other hand, the second group views the legitimacy of applying for beneficial ownership in transactions as alien to Islamic law and does not permit it. Scholars that fall under this second group include Hussain Hamid Hassan and Bashir Al-Amine.[16]

4. Debt-Financing Contracts (Contract of Exchange)

These are *Sukuk* structured in line with contracts of exchange. Examples of such *Sukuk* are: *Murabahah; Istisna`; Salam; Ijarah; Wakala; Tawarruq*. These are otherwise referred to as Asset-based *Sukuk*, the most commonly issued *Sukuk* globally.[17] In their case, cash flows from the issuer/originator, which means the Investors have only limited recourse to the originator, not the asset itself. In other words, the underlying asset does not generate income in these types of *Sukuk* structures, and thus, at the expiry of the tenure, rather than the issuer redeeming the asset at its face value, the market value that may be nonexistent is used.[18]

4.1 Sukuk al-Ijarah

In its pure Arabic term, this ***Sukuk Milkiyyah Al-Maujudaat Al-Mu'ajjarah*** translates as: "certificates of ownership in leased assets." The leased assets could be a ready tangible asset or a promised future tangible asset that could only be available at a later period.[19] Closely related to this is another mode of *Sukuk*, which is termed *Sukuk* ***Milkiyyah Al-Mana fi'a,*** which translates as certificates of ownership of usufructs. Hence, investors have undivided shares in the usufructs resulting from such an underlying asset.

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[15] Rasool H., 'Sukuk Islamic Bonds' <http://www.LearnIslamicFinance.com> accessed on 8 March 2014
[16] Al-Amine M.A, *Global Sukuk Market and Securitisation Market* (Netherlands: Brill, 2011).
[17] Salim A, *Raising Capital on Sukuk Markets: Structural, Legal and Regulatory Issues* (New York: Palgrave Macmillan, 2019).
[18] *Supra* note 7
[19] Ahcene L.M, Kabir H, Rubi A, *Forward Lease Sukuk in Islamic Capital Markets: Structure and Governing Rules* (New York: Palrave Macmillan, 2018)

In its literal form, *Sukuk al-Ijarah* is known as a lease arrangement whereby rentals will be paid to the Lessor (*Sukuk* holders) regularly based on the enjoyment and availability of the usufructs on the *Sukuk* asset by the Lessee, the issuer. The term "*Ijarah*" is thus one of the Islamic contracts that can be used in structuring *Sukuk* according to the Securities and Exchange Commission.[20] It defined the concept as: "An Islamic lease contract implying the sale of an asset /usufruct or service against a definite sum."[21] In its simplest form, *Sukuk al-ijarah* can best be defined as *a Sukuk* certificate evidencing ownership of the usufructs of leased assets. *Sukuk al-Ijarah* has become very popular in the global Islamic finance market as it can be said to have been 'tested and trusted.' Many market operators have chosen the *Ijarah Sukuk* in most of their transactions, and government and corporate entities have embraced its use. This level of acceptability is because it is believed to be the least controversial of the many other structures available; it has little or no risk. This feature made it gain popularity amongst issuers, which led to several issuers using the *Ijarah* structure.[22]

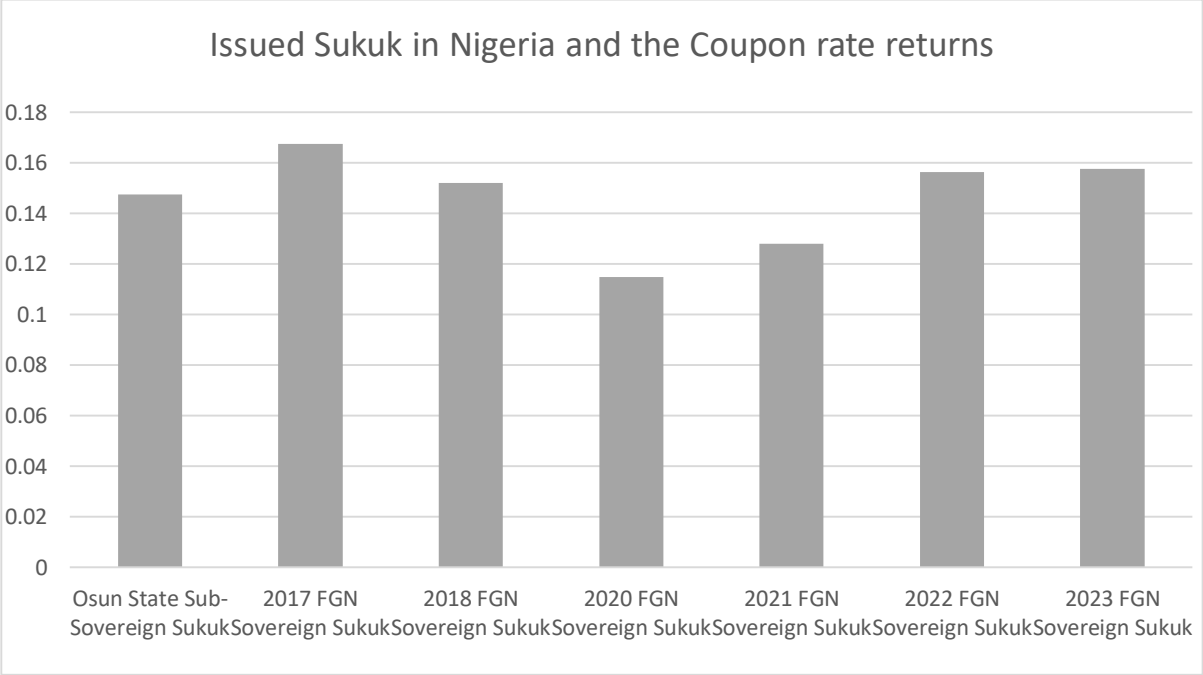
As far back as 1997, the idea of having a *Sukuk* structure, such as *Ijarah Sukuk*, has been proposed in many works of literature.[23] This is said to help achieve long-term financing for non-revenue-generating public projects.[24] This is mainly because the *Ijarah* structure is more in use than any other *Sukuk* structure. It is thus described as: "the classical *Sukuk* structure from which all other *Sukuk* structures have developed."[25] *Sukuk al-Ijarah* is said to account for 33% of issuance, and this remains the dominant structure for *Sukuk* issuance in many jurisdictions, including Nigeria.[26] It is important to note that something central to all the FGN Sovereign *Sukuk* that have been issued so far in Nigeria is that they all have employed the structure of *Ijarah*, which is believed to be less controversial and widely accepted globally. The 2017 FGN Sovereign *Sukuk*, the 2018 FGN Sovereign *Sukuk*, the 2020 FGN Sovereign *Sukuk*, the 2021 FGN Sovereign *Sukuk*, the 2022 FGN Sovereign *Sukuk* and the 2023 FGN Sovereign *Sukuk*. The reason for this is the fact that this structure is acceptable to investors because of its lower risk, and AAOIFI has approved the use of the structure as *Shari'ah-compliant*.[27]

The nature, i.e., the major legal and economic features of *Ijarah Sukuk*, is of such importance because it distinguishes it from the other structures of *Sukuk*; hence, they will be mentioned in minor detail. *Ijarah Sukuk* allows for synchronization among other types of contracts, like the *Istisna* contract, *Wakalah* contract, trust deed contract, and many other types of contracts, depending on the peculiar *Ijarah* structure being used. Furthermore, it allows for

[20] Rules on Sukuk Issuance in Nigeria New Rules/Amendments to The Rules And Regulations Of The Securities And Exchange Commission 2013
[21] Sec. 493 of the SEC Rules
[22]'Zawya 'Collaborative *Sukuk* Report' <https://www.scribd.com/document/30625876/Zawya-Collaborative-Sukuk-Report> accessed on 15 August 2019
[23] Monzer K, 'The use of Assets *Ijarah* Bonds for Bridging the Budget Gap' (1997) 4(2) *Islamic Economic Studies*
[24] Salman Syed Ali, 'Islamic Capital Market Products: Development and Challenges' (1425H/2005) 9 Islamic Development Bank Group & Islamic Research and Training Institute.
[25] Clifford C, *Dubai International Financial Centre Sukuk Guidebook* (2009)
[26]'Supra note 20
[27] *Ibid.*

flexibility in the contract agreement, such as rental payments, which could be fixed as agreed by the parties either monthly, bi-monthly and annually, as well as bi-annually.

The innovation of more products has led to expanding this particular structure to suit the particular situation of each Issuer that wants to use this structure. Thus, some critical methods used in *the Sukuk Ijarah* structure are more advanced than just leasing property between an issuer and the *Sukuk* holders.[28] First, there could be a third party involved in providing the asset. The asset would be leased out to the Issuer by the *Sukuk* holders. Secondly, there is the method where only the Issuer and the *Sukuk* holder would have a sale and lease back arrangement, and thirdly, there is a situation where the underlying asset is securitized through a sale to the *Sukuk* holders from the Issuer. Finally, there could be a forward lease arrangement for investors who wish to start enjoying the proceeds of their investment before the actual completion of the asset.[29]



Source: Author

4.2 Sukuk al-Istisna

This structure is similar to *Sukuk al-Salam* because they are both exceptions to the general rule of the availability of the subject of any sale transaction before it can be valid. It is further considered not popular because it is deemed not to comply with certain *Shari'ah* principles. For example, trading this type of *Sukuk* in the secondary market will be akin to the trading of debt since the asset is not yet in existence.[30]

[28]Mokhtar&Thomas, *Ijarah Sukuk* (2009),pp.145-146 <https://books.google.com.ng/books?id=I5CxAQAACAAJ> accessed on 04 December 2019

[29] Muhamed N.A and Radzi M.R, 'Implication of *Sukuk* Structuring: The Comparison on the Structure of Asset Based and Asset Backed Ijarah Sukuk' Paper presented at the 2nd international conference on business and economic research October 2011 proceeding.

[30] Alam N, Gupta L, and Shanmugam B, *Islamic Finance* (New York: Palgrave Macmillan, 2017).

Hence, it is also referred to as "Islamic Project Bonds." This type of *Sukuk* may be structured in two ways. First, the issuer may be the manufacturer himself, whereby the investors will pay him money to manufacture the goods for which he will issue the *Sukuk al-Istisnah* certificates to them. Second, the issuer may contract a manufacturer in a separate *Istisnah* contract before issuing the *Sukuk al-Istisnah* certificate to the *Sukuk* holders, and this is what is known as parallel *Istisnah*.[31] One of the *Shari'ah* issues surrounding this form of *Sukuk* investment is that it may not be tradeable in the secondary market because it will still be considered a debt until the property is deemed completed and handed over to the investor.

4.3 Sukuk al-Murabaha

Sukuk Murabaha is defined as: "certificates of equal value which evidence undivided ownership or interest on the asset, including the rights to the receivables arising from the underlying contracts of exchange."[32] This is yet another mode of structuring *Sukuk* in this modern financing age. However, it is less commonly used in the *Sukuk* market due to several factors. It only becomes a better option when it is impossible to employ the use of a tangible underlying asset for the investment.[33] This structure employs the general principle of "Deferred Trading Principle (DTP)," which is more specifically related to the Price deferred sale principle.[34]

The *Murabahah* certificates, therefore, represent equal value and ownership by the *Sukuk* holders of commodities bought, for which the *Sukuk* was meant to finance. The financier, hence, gets a regular income stream from the customer plus a profit margin, which is calculated with the principal sum to be payable by the customer over an agreed period. The asset delivery is on the spot, while the payment is deferred. Hence, this is the exact opposite of *the Salam* transaction.

The same idea is adapted from the above to suit the purpose of *the Sukuk al-Murabaha* structure. Here, the Trustee is the financier while the Originator is the customer who pays on a deferred basis a markup sale (i.e., principal plus margin profit). Thus, the right of ownership held by the *Sukuk* holders is the right to receivables (debt). Hence, they are not tradeable in the secondary market because of the requirement of the Islamic principles that debts are not tradeable. The *Sukuk* certificate held by *Sukuk* holders "essentially represents entitlements to shares of debt receivables from the purchaser of the underlying *Murabaha*."[35]

With this structure, the person who sells the commodity for which the *Murabahah* certificate is issued is the Issuer and the Seller. At the same time, the *Sukuk* holders are the purchasers, and the cost price of the commodity becomes the *Sukuk* funds, which the issuer

[31] *Supra* note 15.
[32] Sec. 569 of SEC Rules.
[33] *Supra* note 23. See also, Redmoney, 'How do you apply *Murabahah* in Structuring Sukuk contracts (cost plus or deferred payment *Sukuk*)?' *Islamic Finance News* (April 2014).
[34] Ali Arsalan Tariq, 'Managing Financial Risks of *Sukuk* Structures' (United Kingdom: Dissertation, Loughborough University, 2004).
[35] *Supra* note 23. see also Brian K, 'How do you apply *Murabahah* in Structuring *Sukuk* contracts (cost plus or deferred payment *Sukuk*)?' Islamic Finance News (April 2014).

refunds in instalments.[36] In addition, the Issuer, who is also the seller of the commodity, could also be appointed as the buying agent. This step ensures that the commodity is sold back to the issuer/originator.

The most well-known *Shari'ah* issue with this *Sukuk* investment is that it may not be admissible for trade in the secondary market. However, if this structure forms a component in a hybrid structure, for example, *Sukuk al-Ijarah* with an underlying *Murabaha* structure or *Sukuk al-Musharaka* with an underlying *Murabaha* structure, it may be allowed.[37] Thus, it is said that:

> *"Sukuk* certificates derived from an underlying *murabaha* structure may still be negotiable if the *murabaha* receivables form a small proportion (exact percentages may vary depending on the transaction and the analysis of each *shari'ah* scholar) of a larger portfolio of *sukuk* assets comprising mostly other negotiable instruments such as *sukuk al-ijara, sukuk al-musharaka,* and/or *sukuk al-mudaraba."*[38].

Also, if the structure is meant for an investor class of "buy-to-hold" in smaller deals, it may be allowed because they are more immune to trading in the secondary market, which is not allowed for this mode of the structure under the *Shari'ah*.[39]

4.4 Sukuk Al-Salam

As a general rule, for any transaction/sale to be compliant with the Shari'ah, the subject matter of the transaction must be in existence, and it must have the seller either physically or constructively. However, since for every general rule, there is always an exception, the Al-Salam Contract is one such exception to this general rule. However, even as this type of transaction is allowed under the Shari'ah, specific requirements are being put in place to ensure that all elements of Gharar are wholly eradicated from the transaction. One of such requirements is related to the assets: The Salam Assets cannot be (i) gold, silver, or any currency if the Salam capital was paid in gold, silver, or any currency; (ii) any asset or item for which the Originator may not be held responsible (e.g., land or trees); and (iii) any asset or item whose value can change according to subjective assessment (e.g., precious stones). This is based on the requirements set out in the AAOIFI Shari'ah Standard on Salam and Parallel Salam.

The assets sold under this structure are therefore known as al-Muslam fihi, for which their execution/delivery is made at a future date. This feature, therefore, employs the use of the general principle of "Deferred Trading Principle (DTP)," for which its specific is that of Object Deferred Sale.

This structure is based on the Islamic concept of "Al-Salam," which means forward sale. Salam is an Islamic finance product closely related to the conventional product of futures contracts. It has been defined as:

Al-Salam is essentially a transaction where two parties agree to carry out a sale and purchase of an underlying asset at a future date, but at a price determined and fully paid for at a future date.

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[36] *Supra* note 15.
[37] *Supra* note 23
[38] *Id*
[39] *Id*

Hence, the use of this structure by Sukuk issuers is relatively low compared to other widely accepted structures, like Sukuk al-Ijarah. Apart from the above reason, it is not allowed for such a structure to be traded in the secondary market because this will amount to the sale of debt, as the seller is still indebted to the buyer for the delivery of the asset.

This Sukuk structure is also known as Islamic short-term securities. It usually has a life span of 3 months to a 1-year maximum maturity date. Therefore, it is beneficial for getting short-term funds for easy utilization, unlike the other structures whose term ranges from 5 to 30 years' maturity tenor. Moreover, this mode of Sukuk is usually continuous and not a one-time issuance.

Essentially, to qualify as a Shari'ah-compliant product, the amount must be agreed upon at the commencement of the transaction and paid in full. The real essence of allowing this type of transaction under the Shari'ah is to allow businesses with working capital financing, such as farmers. Traditionally, Al-Salam transactions were meant for farmers who needed cash to work and sell during harvest time. Among the conditions for allowing this type of transaction is that the payment must be made in cash at the commencement of the transaction. The early payment, therefore, is beneficial to the seller. He gets the full payment for the sale, and in addition, it is paid in cash and not deferred. Therefore, it is only the delivery of the goods that is deferred (future).

The other requirement for any Al-Salam transaction to be characterised as being Shari'ah compliant is related to the underlying asset. First, it must be a standardised asset that is identifiable, quantifiable, and of determinable quantity. Closely related is the requirement that the asset must not exist when commencing the transaction. Instead, it must be an asset that can be procured by the seller in the future.

A typical example of Al-Salam transactions usually entered into by banks is thus given. First, Islamic Bank A enters into a Salam contract with Manufacturer X to produce 100 tons of Iron at a future date at a specified amount paid to Manufacturer X on the spot. Second, Islamic Bank A enters into another agency contract with Agent B to sell those manufactured tons of Iron at a margin as soon as they are ready for delivery by Manufacturer X. The difference between the amount paid for the Tons of Iron and the amount sold is the profit made by Islamic Bank A.

The understanding in the above transaction is translated into the Al-Salam Sukuk structure with some minimal alterations. In this case, the Issuer becomes the seller of the underlying asset, while the investors will be the buyers who pay the cash at the commencement of the transaction. The Issuer thus undertakes to supply the underlying asset on a specified date in consideration for the advanced payment made by the investors. In furtherance, the investors, primarily banks, appoint the Issuer, who can be the government if it is a sovereign issue, as the agent to market the underlying asset once it is supplied through its distribution channel. The Issuer will also make a counter undertaking, i.e., the government, in case of sovereign issue, to market the supplied asset at a markup price that will provide the necessary returns to the Al-salam Sukuk investors. This Sukuk structure has been likened to a short-term government treasury bill as it is usually issued for that purpose. The underlying asset in the Sukuk al-Salam structure is owned by the buyers, who are the investors. In all of these arrangements, it is possible to have an SPV that will get the

advanced payment made by the investors and mobilise the payment of the returns to the Sukuk holders.

4.5 Sukuk al-Wakala

According to the SEC Rules, "*Al-Wakala*" is one of the accepted principles and concepts that can be applied to Islamic funds. It is "a contract which gives the power to a person to act on his behalf, as long as he is alive, based on agreed terms and conditions."[40] Agency *Sukuk* means that the Investors/principals appoint an agent/trustee to manage their investments in a *Sukuk* investment.

The above definition, therefore, makes this structure similar to a *Mudarabah* structure where capital is provided by one partner (*Rab al Mal*) and managerial skills are provided by the other partner. The difference, however, lies in the fact that profit is not shared in the *Sukuk al-Wakala* structure as it is shared in the *Mudarabah* structure.[41]

It is imperative to note that a 30% threshold is placed on the minimum requirement of tangible assets that must be included in the pool of financial assets meant for the *Sukuk* investment.[42] This is referred to as the "tangibility criteria."[43] The AAOIFI Shari'ah Standard board provides for this. This structure would thus be only helpful for financial institutions with loads of commodity *Murabaha* and *Istisna* investments in their pool of assets, as this structure enables them to mix several asset classes to form an investment *Sukuk*.

In this structure type, the Wakeel gets his fees for the *Wakala* services rendered to the Trustee. Paying his fees is necessary for the structure to qualify as a true *Sukuk al-Wakala*. AAOIFI sets other requirements for this structure to comply with the *Shari'ah* related to the type of asset Wakeel will be investing in. The pool of assets in which the Wakeel will invest must by all *Shari'ah* standards be *Shari'ah* compliant such that the companies whose equities will be invested in must be engaged in halal business as its primary business; the company's ratio of conventional debt to equities is also put into consideration; and finally, the requirement that any asset that is not compliant with the *Shari'ah* at any point in time during the tenor of the *Sukuk* must be removed.[44]

4.6 Sukuk Tawarruq

According to the *Fiqh* Encyclopedia of Kuwait (*al-Mawsu'ah al-Fiqhiyyah Al-Kuwaytiyyah), Tawaruq* is "buying a commodity with deferred payment and selling it to a person other than the buyer for a lower price with immediate payment."[45] There are three different types of *Tawarruq*: the first is the one that is based on an individual arrangement, and it is called *Al-*

[40] Sec 493 of the SEC Rules
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Supra* note 23
[45] Department of Islamic Research and Encyclopedias, *Al Mausu'ah Al Fiqhiyah Al Kuwaitiyah* (Darut Tawfikiya Lit Turas, Egypt: Kuwait Ministry of Awqaf and Islamic Affairs, 2012)

Tawarruq al-Fardi; the second is the one that is arranged by the seller, while the third is the one done by the banks. Regarding the first, the seller is unaware of the second transaction between the buyer and the one who buys the goods and pays immediately for a reduced price. While in the second type, the first seller acts as an intermediary between the buyer and the *Mutawariq*; he also pays the buyer, unlike in the individual *Tawaruq*, where the buyer receives the money directly from the person he sells to. The third type of *Tawarruq*, i.e., the *Al-Tawarruq al Masrafi* (banking *Tawarruq*), is akin to the second type of *Tawarruq* (organized *Tawarruq*) except that Murabahah precedes it.

However, its legality is met with several conditions and disagreements amongst scholars. Some scholars allow the first type of *Tawarruq*, which is on an individual basis where the first and original seller is unaware of the transaction that follows his sale, and prohibit the organized *Tawarruq* because they believe it is a form of legal trick to circumvent the prohibition of *Riba*.[46] While some scholars allow it on an individual basis only and forbid it in the organized *Tawarruq* and banking *Tawarruq*. Other scholars allow it even in the banking system because, according to them, *Tawarruq* becomes the general rule in the verse of the *Qur'an* where Allah says: "Allah has permitted trade and forbidden *Riba*."[47]

This structure is issued based on sale-based *Sukuk*; the underlying contract used for structuring *Sukuk al-Tawarruq* is a commodity *Murabahah*, *Tawarruq*, or monetization contract. Just as the underlying contracts have been criticized above by scholars who believe it is a means that leads to *Riba* and a legal trick to circumvent the prohibition of *Riba*, the *Sukuk al-Tawaruq* has also been condemned by the Organization of the Islamic Conference (OIC) Fiqh Academy in April 2009, because according to them, the pre-arrangement makes synthetic, similar to *bay' al- 'Innah*.

However, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) outlines several parameters to ensure the actual application of *Tawarruq*. It prohibited the linkage between the contracts for the commodity to be purchased based on deferred payment and the sale of the same commodity on the spot.

Furthermore, the practice whereby the client, for some regulatory purpose, delegates or appoints the institution (where he initially bought the commodity) as its agent to sell on his behalf, that same commodity is only allowed where the client has received the commodity first, whether actually or impliedly. Hence, the contract is strictly prohibited as a mode of investment or financing except in extreme cases, like when an institution faces a liquidity shortage that could lead to loss to its investors. In such a case, the specific terms and conditions are to be followed.[48] AAOIFI encourages the use of other structures instead of *Tawarruq*. An example of such an issued *Sukuk* was the *Sukuk* issued by Cagamas Berhad, a national mortgage corporation in Malaysia, in 2007, known as the Cagamas *Sukuk* commodity *Murabahah* 2007.

[46] ISRA, *Islamic Financial system principles, and operations* 228 (Malaysia: Pearson custom publishing, 2012)
[47] Qur'an, Surah Al-Baqarah (2:275)
[48] *Supra* no 15

5. Equity-Financing Structures (Contract of Participation)

These are *Sukuk* structured in line with contracts of participation. Examples of such structures are *Sukuk al Musharakah*, *Sukuk al Mudarabah*, *Sukuk al Muzara`ah*, *Sukuk al Musaqah*, and *Sukuk al Mugharasah*. Unlike debt-financing structures, cash flow is from the assets securitized. Thereby, recourse in case of default is to the asset itself and not to the originator or issuer, as we have it under debt-financing structures. Also, at redemption, the asset is transferable at face value.

5.1 Sukuk al-Mudarabah and al-Musharakah

Al-Musharakah and *Al-Mudarabah* are similar in principle, which is why this study will discuss them together. *Al-Musharakah* is from the word *Sharikah*, which means a partnership between two or more parties where they all contribute towards the partnership, whether in the form of cash or kind and where they all agree to the mode of sharing profits and losses using the proportion of each party's contribution. *Al-Mudarabah*, on its part, is also a partnership whereby cash/capital is provided by a partner known as the *Rabb al-Mal*. In contrast, the Managerial skill is provided by the other partner, the *Mudarib*. Hence, the two structures employ the same mode of operation in their application to *Sukuk*, and the investors hold a unit in the Trustee's unit in the partnership (he could be the partner in *the Musharakah* venture, and he could be the *Rab al Mal* in the *Mudarabah* venture). The periodic returns are shared among the *Sukuk* holders through the Trustee.

According to the Securities and Exchange Commission, the term "*Al-Musharakah*" is thus one of the acceptable structures that can be applied in *Sukuk*. It is "a partnership between two parties or more to finance a business venture where parties contribute capital either in cash or kind, and share the management. Any profit derived from the venture shall be distributed based on a pre-agreed profit-sharing ratio, but a loss shall be shared based on equity participation."[49]

Al-Mudarabah is one of the accepted principles and concepts that can be applied to Islamic funds, according to the Securities and Exchange Commission. It is defined as: "a contract between two parties to finance a business venture. The parties are a *Rab al mal*, an investor who solely provides the capital, a *Mudharib*, or an entrepreneur who solely manages the project. If the venture is profitable, the profit will be distributed based on a pre-agreed ratio. If there is a business loss, it should be borne solely by the capital provider."[50]

This structure could be in two forms such as participation certificates; which is a situation where all the partners are investors having an equal share in the partnership property while they may appoint one of them as the manager of the partnership, and *Mudarabah* certificates, where they employ the *Mudarib* contract strategy where one of the partners will be the *Mudarib* while the rest of the partners will be the *Rab al-Mal*.[51]

[49] Sec 493 of the SEC Rules
[50] See also Sec. 569 of the SEC Rules.
[51] *Id.*

There could also be *Sharikat al-Aqda* (Contract/business plan partnership) and *Sharikat al-Milk (*ownership of asset partnership, i.e., they become co-owners of a joint asset).[52] Since *Sukuk* generally requires the availability of an underlying asset, the *Sharikat al-milk* will be a better option for *Sukuk* structure managers. Another possible form of the *Sukuk-al-Musharakah* structure is the *Musharakah Mutanaqisah* (diminishing *Musharakah)*. In this structure, the partners start off having co-ownership in the assets. However, as the transaction period commences, the ownership of one of the partners (usually the Trustee) diminishes gradually and returns to the Originator, who becomes the sole owner at the expiration of the tenor of the *Sukuk*.

Because of the risk inherent in all *Sukuk* structures, each structure has its risk-mitigating measures, and *the Sukuk al-Musharakah* structure is no exception. Structural enhancements, such as maintaining a reservation account where excess profit is being kept and used in case of shortfalls in payment, and having a third party providing *Shari'ah*-compliant funding, can be used in the *Musharakah* arrangement.[53]

6. Conclusion

This study has examined the critical challenge of structuring *Sukuk* within the strict confines of the Shari'ah framework to foster the sustainable development of the Nigerian Islamic capital market. The analysis confirms that while Nigeria possesses immense potential—driven by a large Muslim population, a growing economy, and significant infrastructure needs—this potential remains largely untapped due to structural, regulatory, and awareness gaps. The successful sovereign *Sukuk* issuances by the Debt Management Office (DMO) have demonstrated proof of concept and strong investor appetite. However, for the market to mature and attract broader participation, particularly from sub-national governments and corporate entities, a more robust approach is required.

The foundational finding is that Shari'ah compliance is not a mere legal hurdle but the very raison d'être of *Sukuk*. Any structure that compromises on the underlying Shari'ah principles (prohibition of *Riba*, *Gharar*, and *Maysir*) risks losing investor confidence and the ethical legitimacy that distinguishes it from conventional bonds. The research highlights that asset-backing, a tangible underlying asset, and a genuine transfer of risk are non-negotiable. Also, the study identifies specific *Sukuk* structures as particularly suitable for the Nigerian context. *Sukuk al-Ijarah* (lease-based) and *Sukuk al-Musharakah* (partnership-based) are the most feasible. *Ijarah* is favoured for its clarity, familiarity, and suitability for public infrastructure projects (like roads and bridges). *Musharakah*, while more complex, is ideal for long-term, profitable ventures and private equity-style financing, offering a true risk-sharing alternative. However, a significant impediment is the absence of a dedicated legal and regulatory framework for Islamic finance. The existing laws, designed for conventional debt instruments, create ambiguities around asset

[52] *Supra* no 23
[53] *Id.*

ownership, taxation (double taxation on asset transfers), and investor protection in the event of default. This legal uncertainty increases the cost and complexity of issuance.

To address these findings and catalyse the growth of the Nigerian *Sukuk* market, the following concrete recommendations are proposed. The National Assembly, guided by the SEC and CBN, should pass legislation that explicitly recognises and regulates Islamic financial instruments. This framework should clearly: a)Establish a special purpose vehicle (SPV) regime that efficiently holds assets for Sukuk issuances; and b) most importantly, develop a "Sovereign Sukuk Programme": The DMO should transition from one-off *Sukuk* issuances to a multi-year, multi-currency *Sukuk* programme. This would provide yield curves for pricing, ensure market consistency, and signal a long-term government commitment.