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sdMechanisms of Activating *Sukuk* in Islamic Financing: Their Contents and Jurisprudential Problems آليات تفعيل الصكوك في المالية الإسلامية مضامينها واشكالاتها الفقهية

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Abstract:

This research attempts to answer some of the jurisprudential problems related to Islamic sukuk, as they are one of the financing tools that can be used in the financial system in Algeria to fill the existing or expected deficit in the state's general budget and development financing, and also to use them as an effective tool of monetary policy, the reconstruction of endowment properties, and the care of... Investments and small and medium enterprises decided by the government in Algeria.

Keywords: Sukuk (cheques); finance; Islamic; transactions.

الملخص:

يحاول هذا البحث الإجابة عن بعض الإشكالات الفقهية المتعلقة بالصكوك الإسلامية باعتبارها أحد الأدوات التمويلية التي يمكن الاستناد به في النظام المالي في الجزائر لسد العجز الحاصل أو المتوقع في الموازنة العامة للدولة والتمويلات التنموية، واستخدامها أيضا كأداة فاعلة من أدوات السياسة النقدية، وتعمير الممتلكات الوقفية، ورعاية الاستثمارات والمؤسسات الصغيرة والمتوسطة التي تقررها الحكومة في الجزائر.
الكلمات المفتاحية: الصكوك، مالية، إسلامية، المعاملات.

Introduction:

Islamic sukuk are in nature financing instruments and a financial product employed to bring about real savings and collect the funds necessary to finance infrastructure projects of economic and social feasibility and are used as well in



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investment projects in all fields of development. Sukuk, in various Islamic forms, can also be used to mobilize short-term deposits for the development and financing of such projects. Since in reality the application of sukuk encountered some islamically legal obstacles and problems, it is necessary to investigate these issues in accordance with the rules and provisions of Sharia, which will answer the following problematic: What are the contents of sukuk in terms of considering them bank notes of common value in the ownership of assets already existing or will be created from the outcomes of subscription, and issued in accordance with a legitimate Islamic contract and take its provisions, and we will answer the questions related to their circulation and recovery if the issuing source requests their recovery.

This research has been divided into an introduction and three sections:

First, what are sukuk and their characteristics?

Second: The islamically legitimate requirements of sukuk in banking

Third: The legal contents of the sukuk and their legal problematics.

We also included a conclusion in which we stated our results and recommendations.

Section 1: What are the sukuk and their characteristics?

Part I: Definition of sukuk

In the dictionary, *صك* is a book, and its plural forms are "أصكٌ وصكوك وصكاك" , and a *صك*, and it is a document with money or something like." We also say *صكه صكا* which means "He pushed him with force." In the Quran, Allah says in Atharyat chapter, verse 29, : "فصكت وجهها" , that is she slapped it in wonder. It is also called a check that is issued by banks, and so on. ¹

In banking terminology, sukuk are tradable securities for a given duration that prove the ownership of their holders of an asset that generates periodic income. (Al-Karry, 2009, p.2)

Sukuk are also defined as "documents or certificates (securities), nominal or bearer, of equal value, representing common equity in assets, objects, benefits, services or financial rights, or a combination of some or all of them when issued or used for subscription. Their holders shall share the net profits and losses of the assets it represents." (El-Jarhy, 2010, p.7).

¹- See Al- Kamus Al-Muheet, Lissan Al-Arab, "صك" entry.



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It is also defined by contemporary academies and research: "As an investment instrument based on the division of capital on equal shares, by issuing title deeds to capital on the basis of units of equal value, registered in the names of the owners as having common shares in the capital and what is transferred to it in proportion to their respective ownership (Islamic Fiqh Academy).

The sak is considered one of the financing instruments, it is more like a bond and a stock, so that the definition of a bond by economists is "a cheque that includes a promise by the bank or company and the like to the holder, to pay a fixed amount on a certain date for an often estimated interest because of a loan contracted by a joint stock company, a government body or an individual" or it is a document of a specified value whose issuer undertakes to pay periodic interest on a specified date to the bearer. (Zaatry, 2008, p. 496)

The stock is the amount of a shareholder in the company's capital, and the stock is a sak that is given to the shareholder and will be a means of proving his rights in the company (Ashareef, ND), which is defined by Siddiq Mohammed Al-Darir as: "The right of the associate in the company, and it also means the sak establishing this right." (Zaatry, 2008, p. 496).

Sukuk are defined in the Shariah standard as: "documents of equal value that represent common shares in the ownership of objects, benefits or services, or in the assets of a particular project or private investment activity, after the value of the sukuk has been collected, and the subscription has been closed and they have been used in what they were issued for (As-Shareef, ND).

It should be noted here that this definition relates to investment sukuk rather than to the absolute sukuk as it may be identical to the stock and the bond in that it secures the right of ownership of its holder. In this regard, the Algerian legislator of the Commercial Code in article 715,74 bis considers that the bonds of the shareholding are debt bonds, of which the salary consists of a fixed part contained in the contract and a variable part calculated on the basis of the nominal value of the bond. The variable part is the subject of a special organization whose limits are precisely defined (Commercial Code, Article 715 Bis, p. 205).

Section II: Characteristics of sukuk

The sukuk have several characteristics, the most important of which are: They are a document issued in the name of its owner or holder in categories of



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equal value to prove the owner's right to the financial rights and obligations it represents. It represents a common share in the ownership of assets intended for for investment, objects, benefits, services or a combination thereof, moral rights, rights, debts and money, and does not represent a debt owed by its holder to its issuer.

- They are issued based on a legal contract with criteria regulating their issuance and trading.

- Their trading is subject to the terms of trading what they represent.

- The owners of the sukuk shall participate in the profits in accordance with the agreement set out in the prospectus and shall bear the loss in proportion to the sukuk owned by each of them.

Among the characteristics stipulated by the Shariah experts in relation to investment sukuk we find that they:

- Have a nominal value specified by law or prospectus.

- Investment sukuk are of equal value, rights and obligations.

- Non-acceptance of the sukuk for fragmentation against the company.

- The liability of the holders of sukuk is limited to the value of their sukuk, in the sense that each owner of sukuk is liable to the value of his sukuk.

- The owner of the sukuk is a participant in the assets of the sukuk, and therefore has the right to the control and the like, and the right to file a claim of responsibility on administrators and the right to share profits and reserves and to waive the sukuk, and to manage it except in what is prohibited by law, or commitment to them it through the prospectus, the right of pre-emption and the right to share the assets of the project when liquidated.

- Absence of warranty of the manager (speculator, agent or managing partner).

- The sukuk should share the profits according to the specified percentage and bear the loss as much as the share represented by the sak, and prevent the holder from obtaining a predetermined percentage of its nominal value or a lump sum, etc.

- Take full investment risk.

- Bear the burdens and consequences of ownership of the assets represented in the sukuk whether the burdens are investment expenses, depreciation, maintenance expenses, or insurance contributions.

Part 1: Mechanisms for the activation of instruments and their requirements in the financial system



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Banking Regulating This means that the activities of Islamic banks shall be governed by specific laws and legislations issued by the official and competent authorities in the state, so that a special law shall deal with all provisions relating to Islamic banks, including the provisions of their establishment and control. The failure to enact laws in this area will lead to many problems in the controlling, supervising, accounting and auditing standards, and the relationship with the various institutions operating in the Algerian banking market as well (Nasser, 2009). The experience of Islamic finance banking in Algeria, despite the delay in its application in the financial and economic system, has tried to impose itself as much as possible, represented by the services of Al Baraka Bank of Algeria, which was established on 6/12/1990, after the issuance of the Monetary and Credit Law, which opened the way for the private and foreign sector to establish banks within the framework of financial legislation; Al Salam Bank was established on 20/10/2008, and was accredited as a financial institution providing a range of financial activities and services in accordance with the provisions of Islamic Sharia, and after that the way was opened for the Islamic banking system initiated by the official authorities after the reform in the financial and economic field that our country has known. Regulation No. 20-02 of 15 March 2020 was issued by the Bank of Algeria, which defines the operations related to Islamic banking and the rules of its practice by banks and financial institutions, and its articles regulating Islamic products state the following: Banking transactions related to Islamic banking relate to the following products: Murabaha (المراجحة), musharaka (المشاركة) (participation), mudaraba (المضاربة) (speculation), ijara (الإجارة), silm (السلم), istisna' (الاستصناع) deposit accounts, deposits in investment accounts. Although these products have been legalized in the same order as stipulated in the said law, it did not mention products related to investment instruments such as sukuk, their issuance and trading, and their activation in attracting capital and promoting economic development, and other development goals.

Islamic Legal Requirements of Sukuk in Banking

The reality of bank financing today is that it does not meet all the needs and requirements of the banking market at the local level because it deals with traditional instruments such as bonds and treasury bills to attract savings and provide liquidity and manage it. It is known that these instruments are not in



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accordance with the provisions of Sharia; therefore, the mechanisms of activating Islamic sukuk in all their contracts can be used as an alternative in the financial system to fill the deficit in the state budget and development financing, and use them as an effective tool of monetary policy, the reconstruction of endowment properties (الوقف), and the sponsorship of investments and small and medium enterprises planned by the government in Algeria. We can say that the sukuk as instruments are technically based on the following mechanisms:

1- Subscription:

It can be achieved through the financial institutions to make subscribe new companies, as well as the private subscription to increase the capital of existing companies in exchange for remuneration commissions.

2-Buying and selling securities:

It can be achieved through the Islamic bank by buying and selling securities for its customers in return for a commission (Douaba, 2012, p. 146).

2- Management and formation of securities portfolios: It can be achieved through management and formation of securities portfolios for its clients in return for a remuneration Commission.

4- Securities Saving: The bank may save the securities of its customers in return for a commission (p. 147).

The financial requirements of the sukuk provided for international Sharia standards may be adopted as in the Shariah standard No. 17, which states the following:

In terms of the relationship between the parties of the issuance contract: The relationship between the parties of the issuance contract is determined according to the type of contract and its legal status and it consists in the property of the leased assets, and the sukuk of ownership of the benefits of the various types of objects or the benefits of objects described in the contract and others.

Property Sukuk of Leased Assets: The issuer of such sukuk is a seller of a leased kind, or a kind whose leasing is promised, and their subscribers are their buyers, and the result of subscription is the purchase price, and the holders of such sukuk own those assets and are responsible for donating their profits and losses, based on participation among them (El-Ma'ayeer El-Shar'iyah, Standard No. 17).

Property Sukuk of the Benefits of the Objects Described in the Contract:

The issuer of those sukuk is a seller of the benefits of the object described in the contract, and their subscribers are buyers of them, and the results of the



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subscription are the price of that benefit, and the holders of these sukuk possess those benefits in common in case of gain or loss (p. 240).

3. Ownership of Services Sukuk by a Particular Party:

These are documents of equal value issued for the purpose of providing the service by a source described in the contract like the benefit of education from a university whose specifications are determined without naming them, and the payment of the fare from the proceeds of subscription, and those services become owned by the holders of the sukuk (p. 240).

4. Selm Sukuk (صكوك السلم) are documents of equal value issued to collect the selm capital, and the selm commodity becomes the property of the sukuk holders (p. 240).

5. Sukuk El'istisna ' (صكوك الاستصناع): They are documents of equal value issued for the use of their outcomes of subscription in them in the manufacture of a commodity, and then the manufactured commodity becomes owned by the sukuk holders (p. 241).

6. Sukuk Murabaha (صكوك المراجعة): They are documents of equal value issued to finance the purchase of Murabaha commodity and then the commodity of Murabaha becomes owned by the holders of the sukuk (p.241).

In Terms of the Relationship between the Issuer and the Holders of the Sukuk

It is based on the following:

Asset and liability-based sukuk: These are sukuk that provide their bearers with well-anticipated incomes, such as selm, Istisna and ijara sukuk.

Sukuk that are based on investment in capital: These are the sukuk whose incomes are determined on the basis of the participation in profit and loss as per the contract such as sukuk of participation and speculation (صكوك المشاركة) (Kamel, p. 70).

The International Islamic Fiqh Academy, held in its nineteenth session in the Emirate of Sharjah (United Arab Emirates) on April 26-30, 2009, recommended that Islamic banks should be committed to seeking solutions that meet economic needs and abide by Sharia provisions. Since the legal framework for the process of issuing sukuk is one of the essential elements that play a vital role in the success of the processes of issuing sukuk, it is to achieve that role that the legislative authorities of the member states create the



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appropriate legal framework and environment governing the process of issuing sukuk through the enactment of legal legislation that will take care of and verify the various aspects of the processes of issuing sukuk and achieve economic efficiency and Islamic legality credibility in a practical way.¹

The Jurisprudential Contents of Sukuk and their Legal Problems

Part 1: The Problematic of Capital Guarantee or Profit in Loan Sukuk

This issue is considered one of the most important differences that distinguish the Islamic legal dealing between investment sukuk such as speculation, ijara and selm, and between bonds and stocks, as their interest is guaranteed, in addition to the guarantee of capital. Unlike the previous formulas, it is based on the principle of sharing profit and loss, as well as equality between participants, speculators or investors.

This is the first opinion of most Islamic jurisprudence scholars, which is adopted in the Sharia standards by some Shari'a supervisory bodies, that there is no guarantee on the capital of the instruments or on the revenues derived from their activities. This condition is not valid and must not be met because it violates the rules and the requirements of contracts. It can be said that the criteria for issuing and owning the sukuk have some provisions concerning the sukuk in terms of incorporation; Investment in sukuk is an investment in real property in which sukuk holders bear the risk of the assets invested in them as a result of the issuance of their sukuk, such as funds, portfolios and stocks, and not instruments of interest-bearing debt owed by their issuer to the bearer. It follows from this that:

A. The sukuk holders bear the loss and receive the profits resulting from the assets in which they have invested the revenues of the issuance of their sukuk.

B. The issuer or manager of the sukuk or the user of the revenues of the issuance of the sukuk with a real investment contract such as speculation, participation and investment procuration shall not guarantee to the holders of the sukuk the nominal value of these sukuk nor a specified revenue, otherwise the issuance and the contract on which it is based shall be void.²

Qura Daghi outlined the guarantees considered in Islamic investment jurisprudence as follows:

¹- See his decision on the website of the Islamic Fiqh Academy.

<https://www.iifa-aifi.org/ar/2300.html>

²- See Dubai's Islamic Financial Standards in conformity with Islamic legislation, standard No. 2 (The Issuance, Property and Trading of *Sukuk*), p. 11.



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1- Guaranteeing the speculator or similar investors in case of infringement or violation of the restrictions and obligations imposed by the legislator on the speculator in his contracts and actions, or his management of the project or violation of the terms or trade custom.

2 - Making proof of non-infringement, default or violation of conditions or commercial custom by the speculator in the case of evidence that raises doubt about him, so that if he cannot prove it, he shall be considered a guarantor. This is the legal opinion of the Malikite jurists who require two conditions to believe the speculator if he claims loss: one of them is to make him swear that he had lost. Secondly, there must be no evidence to deny this claim. Sharh El-Kebir states: "a speculator must swear that he had lost even if he is not accused thereof, and this is the most famous legal opinion, unless there is evidence of the contrary" (Daghi, p.406).

It is necessary to do everything required by the latest developments of this age such as the feasibility study and reliance on experts and so on, so that if he violates these matters required by the rules of investment in our time, he shall be a guarantor. This requirement is more confirmed in the issuance and investment of sukuk in various funding formats. Legal Islamic treatment requires financial institutions to request their clients requesting financing to submit feasibility studies that identify the project or activity in which the financing is invested, the capital required, the feasibility, risks and expected revenues of the investment. Upon issuance of the sukuk, the issuer, the sukuk holders' agent and the experts of the field shall prepare a feasibility study according to the technical specifications of the feasibility study. The author of the study shall be responsible for the fact that it has been prepared honestly and shall be responsible for its results, including the expected revenues. If there is a loss or the results of the feasibility study are not met, does this result in the guarantee of that loss? Hassan answered this question by saying that he had found an opinion in Islamic jurisprudence saying that deception by speech is like deception by action. A group of them limits the liability to the guarantee of loss, which is undercapitalized without profit. However, there are those who violate this principle and do not apply the Islamic financial industry in general and the sukuk in particular (Hassan, ND, p.187).

Part 2: The second opinion.



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A group of modern scholars and researchers went on to argue that it is permissible to require security by the trustee on condition, and that it is a matter of accepting the conditions as long as the matter is not stipulated, that is, they chose it for themselves, and among those who said that we find Hammad, who dealt extensively with this issue and reported the opinions and sayings of Islamic jurists. His conclusion was that the requirement of guarantee is valid and binding, which is also the opinion of Qatada, Othman, Obeid Allah ibn Al-Hassan Al-Ambarein and Dawood Al-Dhaheri and imam Ahmad in a narration and the Malikites in the unknown hadith, and as we know, in the rules of the Malikite rite it is permissible to rely on the unfamous opinion over others if there is a support for it as a current custom, interest or what was customarily done. Imam El-Ouancherissi stated in his book "Idah Al-Massalik" (إيضاح المسالك) as regards the rule of requiring what a judgment requires otherwise, which does not require corruption, is it considered or not? It is a guarantee that he will not be able to make a mistake, nor will he be able to make a mistake.

The opinion that Hammad has reached is that the guarantee of trustees is permissible and that it is valid and binding if that condition does not lead to the discharge of the trusteeship contract of its content and denature it and then take it as a pretext to deal with usury. If that happens, then imposing a guarantee on the trustee would not be permissible and would be just like all other reprehensible tricks aimed at invalidating the intent of the legislator in its provisions, as the lesson in the contracts is for purposes and meanings and not for words and style wordings (Hammad, 2000, p. 55).

If the assets in the sukuk bulletin are money, they shall apply to them the exchange rules when trading or the provisions of the sale of debts if they become debts, as stipulated in the resolution of the Islamic Fiqh Academy under No. 137 (14/3):¹

A- If the money of the loan (القراض) collected after the subscription and before the start of work with the money is still money, then the trading of mukarada sukuk shall be considered as exchange of cash for cash and the terms of exchange apply.

B- If the money of the borrowing (القراض) becomes debts, they shall apply the provisions of dealing with debt for the trading of sukuk of borrowing.

¹ - The decision of the Islamic Fiqh Academy. <https://www.iifa-aifi.org/ar/2148.html>



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C- If the money of the loan (مال القراض) becomes mixed assets of money, debts, objects and benefits, then it is permissible to trade the sukuk of borrowing (صكوك المقارضة) according to the agreed price, provided that the majority in this case will be property in kind and benefits. If the majority is money or debts, take into account trading according to the Sharia provisions. In all cases, the trading must be duly recorded in the records of the issuer ..

In view of the above, the conditions for the circulation and recovery of sukuk must take into account the following restrictions:

It is permissible to trade in the property sukuk of leased assets or the ones promised for leasing from the moment they are issued after the holders become proprietors of the assets until the end of their term.

It is permissible to trade in the property sukuk of benefits of objects in kind (assets) determined prior to the re-leasing of such objects. If re-leased, the sukuk would represent the wage, which is a debt on the second lessee, and trading shall then be subject to the provisions and restrictions of debt disposal.

It is not permissible to trade in property sukuk of benefits of property in kind described in the contract before determining the assets from which they are to be used, except with respect to the debt disposal restrictions. If they are determined, it will be permissible to trade in them.

It is permissible to trade in service ownership sukuk that are discharged from a particular party before the re-lease of those services. If the lease is done a second time, the sukuk will be representative of the salary and are then a debt on the second tenant, then the trade shall be subject to the provisions and restrictions of the disposal of the debt.

Conclusion:

The research concluded with the following results:

Sukuk are a document issued in the name of their owner or holder in equal categories of value to establish the owner's right to the financial rights and obligations they represent. They represent a common share in the ownership of assets intended for investment, be they objects, benefits, services or a combination thereof, and also from moral rights, debts and money, and do not represent a debt owed by their holder to their issuer. The sukuk based on assets and obligations, are those sukuk which provide their holders with well-anticipated revenues, such as selm, Istisna and ijara sukf,uk.

Sukuk based on capital investment:



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These are sukuk whose revenues are determined on the basis of the participation in profit and loss of the contract, such as the sukuk of participation (صكوك المشاركة) and speculation (صكوك المضاربة). Sukuk as instruments must be based on the necessary legal Islamic requirements such as subscription, sale and purchase of securities, management and formation of securities portfolios and their custody, etc.

Investment in sukuk is an investment in real property in which sukuk holders bear the risk of the assets in which the outcome of the issuance of their sukuk has been invested such as investment funds and portfolios as well as stocks, and cannot be considered instruments of interest-bearing debt owed by their issuer to the holder.

The issuer of the sukuk, the manager of the sukuk or the user of the revenues of the issuance of the sukuk by a real investment contract, such as speculation, participation and the investment procuration, may not guarantee to the holders of the sukuk the face value of the sukuk or a specified revenue, otherwise the issuance and the contract on which it is based shall be void.

It is permissible to require the guarantee on the trustees and that is valid and binding, if that condition does not lead to the emptying of the trust contract of its content and voiding it from its truth, as Nazih Hammad holds.

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