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Article: **Beneficial Ownership in the Sharī'ah and Modern Law: A Case of Sovereign and Quasi-Sovereign Ijārah Şukūk Structures in Pakistan, Bahrain, and Malaysia**

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Author(s): Muhammad Shoaib Cheema¹, Tahir Mansoori¹, Imam Uddin²
Abdul Karim Usman¹

[Journal QR](#)



Affiliation: ¹International Islamic University, Islamabad, Pakistan
²Department of Accounting & Finance Institute of Business Management (IoBM), Karachi, Pakistan

[Article QR](#)

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Muhammad Shoaib

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Beneficial Ownership in the *Sharī'ah* and Modern Law: A Case of Sovereign and Quasi-Sovereign *Ijārah Sukūk* Structures in Pakistan, Bahrain, and Malaysia

Muhammad Shoaib Cheema¹, Tahir Mansoori¹, Imam Uddin² and Abdul Karim Usman¹

¹International Islamic University, Islamabad, Pakistan

²Department of Accounting & Finance,
Institute of Business Management (IoBM), Karachi, Pakistan

Abstract

The concept of beneficial ownership has been used extensively in sovereign and quasi-sovereign *ijārah sukūk* structuring. This paper aims to examine the concept of beneficial ownership in the light of Islamic jurisprudence, common law and civil law systems. It overviews the laws related to beneficial ownership in the Pakistani, Bahraini, and Malaysian legal regimes. It further carries out the *Sharī'ah* appraisal of beneficial ownership focusing on its chief characteristics. The findings of this study posit that the legal status of ownership as per the *Sharī'ah* is a need-based phenomenon and not a mandatory requirement. Hence, if a particular transaction complies with the *ahkam* (commands) for *milkiyah* and *tamlikat* (ownership), then transfer of ownership is a compulsory element for sale consequences. Moreover, it also explains that the use of beneficial ownership in sovereign and quasi-sovereign *ijārah sukūk* structures is acceptable in principle because the valid sale transaction that occurs transfers the ownership to the latter. Hence, it is described in *sukūk* prospectuses as 'beneficial interest'. Finally, it may also be justifiable in the context of *hurīat al-tasarruf* (right to dispose-off the asset) and 'qualified ownership'.

Keywords: Beneficial Ownership (BO), *Ijārah Sukūk* (IS), Legal Title (LT), *Sharī'ah* Appraisal (SA)

Introduction

Beneficial ownership based *ijārah sukūk* has become a popular product in the Islamic finance industry during the last few years. This has given rise to a scholarly debate on its legitimacy and validity, both from the *Sharī'ah* and

legal perspectives. Accordingly, its legitimacy has become the subject matter of modern Islamic legal discourse concerning the underlying asset's ownership. In fact, scholars have divergent views on it. In the view of some scholars, it is an alien and uncommon concept and Islam doesn't acknowledge this concept; whereas, others express contradictory views. Despite all this debate, it is a fact that the application of beneficial ownership has become a common practice in the Islamic financial sector, particularly in the designing of *ijārah sukūk* structures (Ghani et al, 2015; Ghani et al, 2021).

According to an estimate, total international *sukūk* issuance in 2019 was USD 145.70 billion. Since the inauguration of *sukūk* issuance, year 2019 hit the highest value for its yearly global issuance (IIFM, 2020). During the last decade, *sukūk* experienced exponential growth as a real-time solution available to government institutions and other corporations by acting mainly as a funding source for any large-scale project (ISRA & Routers, 2017).

Sukūk is believed to be the most attractive option in terms of Islamic financial activities. Al-Suwailem (2015) stated: “With the steady growth of the *sukūk* market, issuers are increasingly looking for more flexible and more efficient structures. This is particularly true for sovereign *sukūk*, which comprise the majority of domestic *sukūk* issuance. Sovereign *sukūk* represented more than 70% of domestic *sukūk* over 2009-2014” (IIFM, 2020).

Sovereign *sukūk* (known in Arabic as الصكوك السيادية) are issued by government institutions with the main purpose of raising funds. These funds are normally utilised to cover budget deficit or to finance other government projects. Sovereign *sukūk* include Malaysia Sovereign *sukūk*, Bahrain Sovereign *sukūk* and Government of Pakistan (GoP) *ijārah sukūk*. Quasi-sovereign *sukūk* are (known in Arabic as الصكوك شبه السيادية) basically known to be government backed *sukūk*. They are issued by state-owned organisations, for I nstance, Pakistan Stone Development Company (Pakistan) and Saudi Electricity Company (Saudi Arabia) (Investment & finance, 2017). The fact of the matter is that ownership in Pakistani, Bahraini, and Malaysian sovereign *ijārah sukūk* structures is primarily beneficial (ownership).

Against this background, this study seeks to evaluate the *Sharī'ah* status of beneficial ownership. It also highlights the *Sharī'ah* and other legal issues pertaining this concept and how contemporary scholars have addressed these issues.

This study is organized as follows: Section I provides an overview of ownership in the light of classical and modern Islamic jurisprudence. Section II depicts the laws related to beneficial ownership in three jurisdictions, that is, Pakistani, Bahraini, and Malaysian legal regimes and concludes with a comparison of beneficial ownership with the ownership of the legal title. Section III elaborates the *Sharī'ah* analysis of beneficial ownership highlighting its features as per the *Sharī'ah*. Moreover, this section also explains the position of beneficial ownership in sovereign and quasi-sovereign *ijārah sukūk* prospectuses and offering documents (sales or counter deeds). Section IV comprises the concluding remarks, recommendations and limitations of this study.

Section 1. Ownership: Legal and *Sharī'ah* Perspectives

The classical literature of Islamic economics gives several similar definitions of ownership (*al-milkiyyah*) with only slight variations. The following passages present a concise summary of some selected but important definitions of ownership, as articulated by the jurists of various *Fihi* schools of thought in the light of Islamic commercial jurisprudence.

As per the definitions expounded by various jurists, the relationship between a person and a property is actually governed by the concept of “*milkiyyah*” in Islam. It provides certain rights to its owner, for instance, benefiting from the asset, to get paid if contravention happens and the asset disposal right. However, the owner may not exercise these rights if any legal hindrance arises thereby. Briefly, the concept of “*milkiyya*” covers five major aspects. These are: (i) authority, (ii) scope, (iii) subject matter, (iv) restrictions, and (v) consequences of ownership (Al Kasani, 1998; Ibn Nujaim, 1968; *Majallah al-ahkam al-adliyah*, 1989; Al-Qarafi, 1998; Al-Zrakshi, (1994), Ibn Taymiyyah, (1977).

Likewise the classical Muslim scholars, contemporary Muslim scholars also give several similar definitions of ownership with slight variations. All of these give the same meanings although they differ in their words and

the core theme is the same, that is, ‘ownership is a legal association between a human being and an owned property’ (Al Zarqa, 1998; Al Zuhayli, 2003; Siddiqi, 2006; Fahad, 2003).

Based on the above, it might be stated that theoretically “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.” Moreover, the details regarding the limits and boundaries of the above mentioned definitions may differ due to the nature of the owned assets, types of owners, and the prevailing social circumstances, which remain beyond the scope of the current study.

It is worth noting that only a few scenarios prevent owners to enjoy full ownership rights due to the restrictions imposed by the *Sharī‘ah* law. For instance, referring to the sovereign *ijārah sukūk* structures, asset management and disposal rights of certain owners are restricted by the *Sharī‘ah* in order to protect the rights of a minor, an incapacitated or an interdicted individual. In fact, in these special situations, ownership remains there although it is timely incomplete.

These special circumstances made the Islamic thinkers categorize ownership into two types: “complete / absolute ownership (*milk al-tamm*)” and “incomplete / partial ownership (*milk al-naqis*)”. The same distinction was supported by various scholars who divided ownership into the two above mentioned types, as per the extent of owner’s rights (Al- Abbadi, 1974; Abu Zahrah, 1996; Hammad, 2008).

A complete ownership is “the ownership that covers both the corpus of property as well as its usufructs.” This provides the owner with the asset disposal right, whether through sale or via gift. Contrarily, incomplete ownership may be termed as the ownership of property exclusive of its usufruct or it may be otherwise. It implies the following: (i) title ownership right only to the asset (*milkiyyah al-raqabah*) without the ability to dispose of it, (ii) ownership of benefit / usufruct (*milkiyyah al-manfa‘ah*), and (iii) ownership right to personal benefit (*milkiyyah al-intifā*) (ISRA- ICM, 2014).

Referring to incomplete ownership, it is worth mentioning that under specific situations the *Sharī‘ah* law allows the segregation of ownership

with an intent to facilitate human beings in fulfilling their needs. In this regard, classical *Fiqh* contains two main examples. The first is the case whereby the same asset may be possessed by two different owners, each having a unique right to property. The jurists recognize this as duality in ownership.

The second scenario emerges from the definition and application of the *waqf* model. *Waqf* is known as “endowment”. In a *waqf*, the right to own the asset may be segregated between two different entities. However, there is difference of opinion among jurists regarding the fact that the settlor (*waqif*) needs to loose his/her right to own the asset or is it otherwise. Likewise, *raqabah* is either owned by God (according to Hanbali and Shāfiī scholars) or by the settlor (as per Hanafi and Māliki schools). Contrarily, the right to enjoy (*haqq al-intifā'*) is given to *waqf* beneficiaries (Kahf, 2000).

In the following lines, the legal standing of beneficial ownership is discussed.

The term “beneficial ownership” has its roots in the English common law system; whereby, a dichotomy is recognized between “legal ownership” and “beneficial ownership”. Other terms used interchangeably with this term include “beneficial interest”, “beneficial title”, “equitable ownership” and “equitable interest”. According to ISRA (2014), the term “beneficial ownership” is represented in the current literature either in a general sense or in a special context such as trust arrangements or investment in securities.

It would be more beneficial to have a bird’s eye view of the concept of beneficial ownership and its application in Pakistani, Bahraini and Malaysian legal regimes, as the current study covers these three jurisdictions. Its actual position in contemporary laws is not very relevant to our topic; however, for a clearer and better understanding we may take a remote look at it. Hence, in the following passages, this crucial issue is discussed in the context of the above mentioned three legal regimes.

Section 2. Beneficial Ownership in Pakistani, Bahraini, and Malaysian Legal Regimes

In the Pakistani legal regime, English common law is dominant at both institutional and state levels. Although, some institutions such as Islamic

Ideology Council, Federal *Sharī‘ah* Court, and *Sharī‘ah* Appellant Bench, work independently to decide matters as per the rulings of the *Sharī‘ah*.

The concept of beneficial ownership remains disputed in the legal fraternity as being positive or negative. Although, its application relates to the existence of peculiar circumstances, it still is an admitted position that must have some legal backing. It can be observed easily that this concept is lending in the provisions of “Trust Law 1882”, “Property Law 1882”, “Public Debt Act 1944”, “Companies Ordinance 1984”, “Asset-backed Securities Act 1999”, and “Asset-backed Securities Regulations by (State Bank of Pakistan, 1999; Companies Act, 2017; *Benami* Act, 2017; Şukūk regulation, 2015) Securities Exchange Commission of Pakistan (SECP)”. All these are related to both moveable (tangible or intangible) and immovable property.

In short, the above mentioned Pakistani laws might be categorized into two types. The first type is related to the reporting and disclosure of beneficial ownership, such as “Companies Ordinance 1984”, “Companies Act 2017”, “Securities Act 2015” and “*Benami* Act 2017”. These four laws discuss beneficial ownership in this regard. Furthermore, the first three laws elaborate beneficial ownership / interest, while the last one (*Benami* Act 2017) also defines and explains it (Zaidi, 2015).

The second type is related to the transfer of beneficial ownership to trust entities, immovable property, and other relevant issues. Consequently, there are three laws including “Transfer of Property Act 1882”, “Trust Act 1882”, and “Companies (Asset-backed Securitization) Rules 1999”, which discuss and explain this matter.

The reading of the relevant provisions very clearly suggests to the readers the status of a beneficial owner as either positive or negative. Sometimes, it seems that the legislature has intentionally avoided the word ‘criminal’ to use for a beneficial owner. In the corporate sector, mostly, security holders are termed as beneficial owners, that is, the holder of the benefits of the said security and not being *Benamidar* or forntman. In other words, it is not wrong to say that a beneficial owner symbolizes an actual owner in different scenarios under normal circumstances.

It is pertinent to note that the above mentioned second type is related to the issue of beneficial ownership in *ijārah sukūk* issuance. Normally, in Pakistan, sovereign *sukūk* are legally backed by the Public Debt Act 1944. However, this act only discusses the issue of borrowing at the government level based on the principles of conventional finance, rather than Islamic finance. Thus, details regarding the issue of beneficial ownership are not mentioned in it. Conversely, with the help of other supportive documents such as *sukūk* prospectuses, the *Sharī'ah* status of any issuance can be analyzed.

Similar to the Pakistani legal regime, the Malaysian legal regime is also based on the English common law. However, various bodies are working independently to harmonize and standardize Islamic and conventional laws, such as the Law Harmonization Committee established by Bank Negara Malaysia (BNM). Three main legal provisions exist in Malaysia that supervise and regulate commercial buying and selling. These include “National Land Code 1965 (NLC)”, “Contracts”, and the “Law of Equity”.

To add further, “Torrens System” is known as a registration system that basically supervises NLC. The latter explains that it is the land office of the respective area where ownership rights are transferred via a proper registration process. However, the memorandum of transfer is deemed to be the sole evidence in case of Sabah and Sarawak. In this case, a proper registration process is not essential for ownership transferrance. This registration process via land office is highly emphasized in Malaysia. This is because of the application of equity law since beneficial ownership is not recognized by NLC (Ghani, 2021).

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 (the purchaser of the land), then what is the status of the beneficial owner from the legal perspective?

In 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 equity ruling. Technically speaking, the bare trust concept originates when a sale contract is finalized before the delivery of possession or without transferring the

formal title. Therefore, the vendor acts as a trustee of equity. Being a trustee on behalf of the purchaser, the vendor holds the equity until the formal title is transferred to the purchaser of the equity (Rashid & Hingun, 1999). Hence, the purchaser becomes the beneficiary owner (either via the payment of a full price or via a transferring instrument), whereas the vendor acts as a bare trustee until the title is registered.

Like most Arab Muslim countries, the Kingdom of Bahrain is governed predominantly by civil law. There are no provisions regarding ‘trust’ in civil law, which holds the basis for beneficial ownership in common law (Mikail, 2016). To overcome this situation, they have the concept of “concession rights” (*haqooq al imtiyaz*) which is a related form of beneficial ownership. However, in English common law, beneficial ownership induces “all risk and reward except title”.

Furthermore, the Kingdom of Bahraini has also introduced some rules regarding trust entities. Mohammed Ayman Al Tajer (Director, Financial Institutions Supervision, at the CBB) stated, “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 counterparty risks” (Trade Arabia and Business News Information, 2007; Central Bank of Bahrain , 2016).

Interestingly, though there are no provisions regarding trust in civil law that provide the basis to introduce beneficial ownership, still, trust arrangements are quite popular in large corporations of the Middle East. Moreover, as stated in the common law, beneficial ownership grants maximum ownership attributes to the owner, even though it doesn’t hold true in certain scenarios. The issue of beneficial ownership can be managed and addressed using various financial instruments, particularly via sovereign *ṣukūk* issuance.

The differences between beneficial ownership and the ownership of the legal title are summarized as follows. A beneficial owner is a person who is known as the owner of the property in the equity, even if the legal title is retained by another person. The term “beneficial owner” is interchangeably

used with other terms, such as "beneficial interest", "beneficial title", "equitable ownership", and "equitable interest". It indicates that the beneficial owner benefits from the particular asset. In contrast, the legal title owner is someone who is legally registered as the title owner of an asset and whose ownership is evidenced by the registration or record. This person can also be referred to as the registered or recorded owner.

After the review of three concerned legal regimes, in the coming section the status of beneficial ownership as per the *Sharī'ah* rules is discussed.

Section 3. *Sharī'ah* Evaluation of Beneficial Ownership

ISRA (2015) stated, “among the contentious issues in *Ṣukūk* structuring is that of ownership. Since *Ṣukūk* represents its holders’ 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*.”

ISRA, (2017) also declared, “*Ṣukūk* have been structured to represent ownership interests in the underlying assets.” However, following such defaults such as ingress *ṣukūk*, there has been much confusion in the market regarding the concept of the ‘ownership of the assets’ and the respective rights attributed to *ṣukūk* holders.

The issue of separation between 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-IFA), 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) (ISRA, 2014).

Ghani, (2015) stated, “Beneficial ownership should be considered as real ownership since it is exclusively used in registration and legal documentation because *Sharī'ah* has allowed the transfer of ownership based on the sole basis of contract.”

Contrarily, beneficial ownership has been criticised by some scholars on the grounds that it does not meet significant *Sharī'ah* parameters due to certain restrictions. These /restrictions, in fact, negate the feel of real ownership in a given asset. Hussain Hamid Hassān (n.d.) considered beneficial ownership as impermissible on the grounds that in order to enjoy

the asset disposal right, complete ownership is inevitable. Only then, one can justify his earnings from beneficial ownership. Al-Amine, (2011) was 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” (Adawaih et al., 2015).

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

“This leads to complex legal procedures for Şukūk issuance to avoid the “true ownership” of such assets..... This contradicts the claim of “purchase” and “ownership” of the underlying assets.”

Hence, Al-Suwailem also stated that “the separation between legal and beneficial ownership is against the basic *Sharī‘ah* requirements of a valid sale transaction.”

Based on the above-cited studies, one may argue that there are serious concerns shown by the scholars about the legitimacy of beneficial ownership via *şukūk* structures. Hence, it is essential to analyze this important issue.

For sovereign and quasi-sovereign *ijārah şukūk* structures, issues related to beneficial ownership might be categorized into three heads including i) legal and *Sharī‘ah* issues, ii) compliance and audit issues, and iii) governance and administrative issues. In the following passages, these associated issues are discussed one by one.

Customarily, ownership was discussed by classical Muslim jurists in the context of transferring *haq al-tasuruf and hurat al-tasuruf* (right to dispose-off), *manfa‘ah* (right to take benefits), and liabilities to other parties. While, during the last two centuries, ownership has been discussed in a vast and broader perspective. Eventually, different types of ownership have evolved, such as individual ownership, public ownership, legal entity ownership, and *Benami* property.

In most cases of sovereign and quasi-sovereign *şukūk* issuance, due to governmental, legal, and system constraints concerning the strategic nature of assets, it becomes difficult to transfer ownership in its genuine shape and context. Hence, scholars have to come up with a solution by introducing /a structure which meets a certain level of *Sharī‘ah* compliance in this regard.

The subsequent paragraphs discuss whether the concept of ownership in both the *Sharī'ah* and conventional law have the same meaning and effect or diverge from each other.

Legal and *Sharī'ah* Issues

Legal and *Sharī'ah* issues regarding asset ownership (beneficial and legal) should be elaborated for two reasons: a) legal status of ownership as per the *Sharī'ah* and b) *Sharī'ah* (*Fqhi*) status of ownership in the context of *hurriyat al-tasurruf* (right to dispose-off the asset). The next paragraph particularizes the legal status of ownership as per the *Sharī'ah* using appropriate examples.

Legal Status of Ownership as per the Sharī'ah

It should be noted that in the *Sharī'ah*, there is no difference between legal and beneficial ownership. Indeed, the origin of the concept of beneficial ownership lies with the English common law, which means that 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 any other way the *shurūṭ* (conditions) related to *sehat al-bai* (validity of a sale transaction) and *nafaz al-bai* (consequences of a sale transaction) are fulfilled, then the transfer of ownership is a compulsory element for a sales contract.

Furthermore, it is not compulsory to attain the legal title as per law in every case; normally, it is required in the case (transaction) of mega projects or big assets. Now the question arises about the effect of the types of conditions imposed by the law of the land regarding some special cases on the *Sharī'ah* legitimacy in a contract in a general manner. Subsequent examples in this context are as follows:

- The matter of marriage registration is just an *intizami* (administrative) or a legal matter in any region. It means that it is just for disclosing the matter in a legal paradigm of any territory. In other words, the condition of registration is only for *izhar al-'aqd* (to disclose the matter to the concerned authorities) and is not compulsory for *ineqad al-'aqd* (to validate the matter based on the *Sharī'ah*). Hence, if a

nikah (marriage) is performed following the *Sharī'ah* rulings without registering it with the concerned authority, it would be legitimate and lawful as per the *Sharī'ah*, although such non-registration would be considered a violation of the law according to the legal point of view. It means the registration of marriage is considered here as a *shart* (condition), which is helpful for *muzhir lil hukam* (to disclose a matter) and not for *musbit lil hukam* (to validate a matter as per the *Sharī'ah*).

- There is another case (predominantly in Pakistan and in other Muslim majority countries such as Saudi Arabia, Egypt, and Gulf countries) regarding ownership, which is to sell a vehicle (motorcycle or automobile) based on an open letter without registration. According to the law, the first buyer is considered the owner of the particular vehicle. Furthermore, when the last purchaser goes to the regulators and presents to them the ownership evidence / documents, they transfer the ownership to the last custodian of the open letter. Although, this type of transaction is banned and discouraged by the regulators, who recommend to do proper registration, still it is practiced by the public. Ultimately, these sale and purchase transactions are *nafiz / munaqid* and have their related rules, that is, inheritance and *zakah*, in the light of the *Sharī'ah*.

One may conclude from the above segment that retaining the legal title is a need-based phenomenon, not a mandatory requirement as per the *Sharī'ah*. Indeed, legal ownership is not the authentic representation of actual ownership in every case. Sometimes a particular person retains the legal title of a subject but is not considered as the actual owner and vice versa in the *Sharī'ah*. It should be noted that *fatwa* (*Sharī'ah* opinion), sometimes, differentiates between actual and legal ownership. Therefore, the boundaries of both the *Sharī'ah* and conventional laws must be drawn very carefully to find out the factual result in any prevailing scenario.

Furthermore, para (8/5/4) of AAOIFI's *Sharī'ah* standard related to *murābahah* to purchase order has discussed that if there is beneficial ownership and not legal ownership or in case if legal ownership does not represent complete ownership attributes, then there should be a counter deed representing the actual ownership for *ṣukūk* holders (AAOIF, 2010).

This deed would be considered as a valid and legitimate document. hence, it is enough to represent sale consequences based on this transaction. However, if there is no difference between legal and beneficial ownership, then there is no need for the said counter deed.

Sharī'ah (Fqhi) Status of Ownership in the Context of Hurriyat al-tasurruf (Right to Dispose-off the Asset)

The concept of *hurriyat al-tasurruf* concerning ownership rights states that it might be *mutlaq* (absolute) or *muqyyad* (restricted). It means, in general, the owner has absolute ownership rights of an asset (right to dispose of), although these rights might be restricted in certain cases and scenarios.

This matter is elaborated with the help of two relevant examples given below.

- Conditions and restrictions imposed by the cooperative housing schemes for building structures (design or layout / inner or outer shape) and building levels for the buyers to comply with are considered valid and justified. Hence, the buyers cannot change the basic structure of building and are bound to follow the pre-set rules. It means that as per the *Sharī'ah* rulings, ownership rights might be restricted (*muqyyed*) in special scenarios and situations.
- A government can put the condition on the owner of the land having oil reservoirs that enforces the owner to sell the oil to the government at a certain price and does not allow the owner to sell it to any third party.

It demonstrates that the concept of *hurriyat al-tasurruf* (right to use) is not absolute at all times and it might be *muqyyad* (restricted) in special scenarios as per the need of *urf* (prevailing custom) and *maṣlahah* (public interest). Therefore, keeping in view the conditions 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 the *Sharī'ah* rulings.

Compliance and Audit issues

The representation of *ṣukūk* transactions as off or on the balance sheet is a famous issue in this regard. It may be questioned that whether to record

the sold item on the balance sheet is regarded compulsory by the *Shari'ah*? A sale can be valid in light of the *Shari'ah* without employing bookkeeping, which means that recording the sold item in the books is just an accounting or legal or recommended matter and not a mandatory condition imposed by the *Shari'ah*.

No doubt, true entry of any financial transaction into the books of accounts is necessary by conventional accounting standards, although it should be understood that due to any type of discrepancy or misrepresentation the effects of a true sale cannot be nullified. However, it is recommended that there should be mutual coherence between accounting standards and *Shari'ah* principles. Although, 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, that is, the representation of *shukūk* transactions as an off-balance sheet item.

Governing and Administrative Issues

For beneficial ownership, governance and administrative constraints also comprise an important issue. Sometimes, transferring assets from the concerned authorities to the Special Purpose Vehicle (SPV) becomes a problematic task for the associated ministries involved in sovereign and quasi-sovereign *shukūk* issuance. Such as the Government of Pakistan (GoP) *ijārah* M3 *shukūk* with the underlying assets of National Highway Authority (NHA) land.. By law, this type of strategic asset cannot be moved from the balance sheet of the originator (NHA) to the *shukūk* holders. Due to this legal constraint, the *shukūk* prospectus statement starts normally in the following way: ‘under the guaranteed provision’. Sometimes, the concerned authority, such as the NHA, is not enthusiastic to accommodate such type of accounting treatments due to legal and practical constraints.

There are 11 different *sukūk* structures on which Pakistani sovereign and quasi-sovereign *ijārah sukūk* issuance is based. The researcher was unable to acquire the concerned prospectuses from the Malaysian and Bahraini jurisdictions due to the non-availability or confidentiality of these documents. Some important paragraphs from the Pakistani sovereign *ijārah sukūk* structures are stated below regarding beneficial and legal ownership.

The offering circular of GOP International *Ijārah Şukūk* (M2 Motorway), dated December 2014, in the section titled ‘summary of the offering’ states, “*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...*” (GOP *ijārah şukūk* circular, p. 9) (The Second PISCL). The offering circular of GOP Domestic *Ijārah Şukūk* (M1 Motorway, 2006) in the section titled ‘Annexure C’ (para no 5) states,

“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)...”

In simple words, it might be stated that legal ownership remains with the NHA, while beneficial interest (ownership) is transferred to the investors (*şukūk* holders) via Pakistan Domestic *Şukūk* Company (PDSCL). All related risks and rewards are hence borne by the *şukūk* holders. It has been discussed earlier that these prospectuses and counter deeds are based on the documents for the underlying *şukūk* assets regarding asset ownership. Ultimately, it might be stated that ownership exists in the context of beneficial ownership or interest, which is accepted as per the *Sharī'ah* rulings.

The concluding remarks of this study are summarized below.

Section 4. Concluding Remarks and Findings

This study presented the *Sharī'ah* evaluation of contemporary sovereign and quasi-sovereign *ijārah şukūk* structures of Pakistani, Bahraini, and Malaysian jurisdictions vis-à-vis the issue of beneficial ownership as an underlying asset, which is a prerequisite feature in *sukūk* structures. This is especially true for *sukūk al-ijārah*.

The above discourse points to the following deductions:

1) From the legal perspective, the separation between beneficial ownership and ownership of the legal title is recognized in the English common law, which is applicable in both the Pakistani and Malaysian regimes. English common law is dominant at both institutional and state level in both countries, although some other institutions work independently.

Moreover, there are several laws in Pakistan regarding beneficial ownership, such as “companies ordinance”, “companies act”, “securities act”, “*Benami* act”, “transfer of property act”, “trust act”, and “companies (asset-backed securitization) rules”, which discuss and explain this matter.

Likewise, three main legal provisions including “National Land Code (NLC)”, “Contracts Act (CA)” and “Law of Equity” exist in Malaysia that supervise and regulate commercial buying and selling concerning this matter.

In brief, both Pakistani and Malaysian legal regimes follow the legal traditions derived from the English common law. In these legal traditions, beneficial ownership is generally treated as good as real ownership and the relevant laws depict this matter very clearly.

Like most Arab Muslim countries, the Kingdom of Bahrain is predominantly governed by civil law. There are no provisions regarding trust in civil law which may become the basis to introduce the concept of beneficial ownership, as in the common law. To overcome this situation, the jurists have introduced the concept of *haqooq al-imtiyaz* (concession rights). These rights take some form of beneficial ownership. However, in the English common law, beneficial ownership means “all risk and reward except title”. Furthermore, the Bahraini kingdom has also established and introduced rules regarding trust entities to tackle such scenarios.

2) For sovereign and quasi-sovereign *ijārah šukūk* structures, the issues related to beneficial ownership might be categorized into three heads: i) legal and *Sharī‘ah* issues, ii) compliance and audit issues, and iii) governance and administrative issues. Moreover, legal and *Sharī‘ah* issues regarding asset ownership (both beneficial and legal) have two aspects: a) legal status of ownership as per the *Sharī‘ah* and b) *Sharī‘ah* (*Fqhi*) status

of ownership in the context of *hurriyat al-tasurruf* (right to dispose-off the asset).

The related paragraphs with the help of appropriate examples depicted that the legal status of ownership as per the *Sharī'ah* is a need-based phenomenon and not a mandatory requirement. In contrast, as per the *Sharī'ah* rulings, if any transaction complies with the *ahkam* (commands) for *milkiyah* and *tamlikat* (ownership) or in any other way the *shrout* (conditions) related to *sehat al-bai* (validity of a sale transaction) and *nafaz al-bai* (consequences of a sale transaction) are fulfilled, then the transfer of ownership is a compulsory element for the sale consequences, albeit with the non-presence of legal title in some scenarios.

3) The use of beneficial ownership in sovereign and quasi-sovereign *ijārah sukūk* structures is acceptable in principle because the valid sales transaction that occurs between the originator and the SPV effectively transfers ownership (via constructive possession) to the latter; hence, it is described in *sukūk* prospectuses as 'beneficial interest'. However, beneficial ownership may be tantamount to incomplete ownership (*milk al-naqis*) when substantial restrictions are imposed on the *sukūk* holders' enjoyment of their rights, such as restrictions on the right to asset disposal. However, it might be justified in the context of *hurriyat al-tasurruf* (right to dispose-off the asset) and 'qualified ownership'.

The concept of *hurriyat al-tasurruf* (right to use) is not absolute and it might be *muqyyad* (restricted) in special scenarios, as per the needs of *urf* (prevailing custom) and *maṣlahah* (public interest). Therefore, in 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 the *Sharī'ah* rulings.

Limitations and Recommendations for Future Research

This study focused on the *Sharī'ah* issue related to beneficial ownership in underlying *sukūk* assets, keeping in view the sovereign and quasi-sovereign *ijārah sukūk* structures in Pakistani, Bahraini, and Malaysian jurisdictions. Moreover, the 'issues related to SPV regarding asset-based and asset-backed *sukūk*', restrictions and undertakings such as 'purchase undertaking', 'asset disposal right', and 'asset due diligence' could not be

discussed in this research work. So, future researchers might focus on these important issues.

Furthermore, this research was executed using the explanatory method. Future research may be performed by opting for a qualitative (interview-based) sampling design.

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