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The Feasibility of Issuing Şukūk under the Current Laws and Regulations in Algeria

Kelayakan Mengeluarkan Şukūk di bawah Undang-undang dan Peraturan Semasa di Algeria

Mohamed Ghezal*, Rusni Hassan **, and Ahcene Lahsasna ***

Abstract

The growth of Şukūk market has been nothing short of phenomenal. Many countries and corporations are looking to raise funds using Şukūk. However, several countries face legal impediments and regulatory constraints. Muslim countries such as Algeria is still yet to develop unique regulation to implement Şukūk due to current conventional legal and regulatory hindrances. Thus, this paper aims to critically examine the feasibility of the current laws in issuing Şukūk. This research is an exploratory study that utilizes qualitative analysis for the review of commercial and financial laws to find out the key elements from the current legal system in Algeria and examine whether it can permit the introduction of Şukūk. The study finds that the legislative provisions in commercial law, civil law, and other regulations, which are general in nature, are facilitative to the issuance of Şukūk. However, the current regulations in the capital market constitute an obstacle to the listing of Şukūk in the Algerian capital market. The research suggests initiating amendments to the current legal and regulatory provisions to allow the issuance of Şukūk as a preliminary step and then issuing a Şukūk law in the second phase. The contribution of this research is highly significant to the literature in the field of Şukūk regulation, and it can be a reference to policy makers to understand the modifications needed for the current Algerian legal system to pave the way for Şukūk issuance in the country.

Keywords: Şukūk, Legal and regulatory framework, Algeria.

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Abstrak

Pertumbuhan pasaran Şukūk sedang berkembang sepenuhnya. Banyak negara dan syarikat mencari dana menggunakan Şukūk. Walau bagaimanapun, beberapa negara menghadapi halangan undang-undang dan kekangan peraturan. Negara Islam seperti Algeria masih belum mengamalkan peraturan baru untuk melaksanakan Şukūk disebabkan halangan dan undang-undang. Oleh itu, matlamat kertas ini adalah untuk mengkaji peruntukan undang-undang semasa di Algeria secara mendalam dan mengkaji cara mengatasi isu pengawalseliaan dalam memperkenalkan Şukūk. Penyelidikan ini adalah bersifat eksploratif dan menggunakan kaedah kualitatif dengan menganalisa dokumen-dokumen tertentu untuk mengetahui elemen utama peraturan semasa di Algeria bagi memastikan Şukūk dapat diperkenalkan. Kajian mendapati bahawa peruntukan dalam undang-undang komersial, undang-undang sivil dan peraturan-peraturan lain adalah umum dan tidak mencerminkan peruntukan khas yang membantu dalam penerbitan Şukūk. Penulis mencadangkan untuk memulakan pindaan kepada teks undang-undang dan undang-undang semasa untuk membolehkan penawaran Şukūk sebagai langkah diperingkat permulaan dan kemudian mengeluarkan undang-undang Şukūk dalam fasa kedua. Sumbangan penyelidikan ini sangat penting dalam bidang kesusasteraan undang-undang Şukūk dan mampu menjadi rujukan kepada pembuat dasar untuk mengenalpasti perubahan yang harus dilakukan terhadap sistem perundangan semasa di Algeria. Ini adalah bagi memastikan sukuk dapat ditawarkan dengan baik.

Kata Kunci: Şukūk, rangka kerja undang-undang dan peraturan, Algeria.

Introduction

Şukūk is one of the most important financial instruments traded in Islamic financial markets. Its expansion and the increase in the number of countries and companies issuing it in the world have drawn the interest of other investors and issuers alike. The Şukūk issuance for the year 2018 was estimated at \$ 123.15 billion, which was a slight increase of 5% over the year 2017,¹ Malaysia, Indonesia, and Saudi Arabia were among the top issuers.

Many Muslim and non-Muslim countries have issued sovereign and corporate Şukūk with and without amendment to their local legislations. The presence of significant regulatory structures in such jurisdictions may facilitate the smooth introduction of Şukūk in capital markets² whereas, the absence of such regulations will decrease the trust and create uncertainty. Indeed, Şukūk has been introduced in many countries

¹ IIFM, IIFM Annual Sukuk Report: a comprehensive study of the global sukuk market, 8th edition, Bahrain, 2019, p.20.

² Ahmad Abu Umar Faruq, "Regulation, performance and future challenges of Sukuk: The evidence from Asian markets." In *Advances in Islamic Finance, Marketing, and Management: An Asian Perspective*, 27-48. Emerald Group Publishing Limited, 2016.

after setting up a law related to *Ṣukūk* or amending their legal and regulatory framework to officially regulate the issuance of these securities.

Among the countries that have changed their laws are Malaysia, Indonesia, Turkey, Tunisia, Pakistan, Luxembourg, the United Kingdom, Nigeria, Morocco, Jordan, and others³. More efforts from policy makers, regulators, and *Sharī'ah* board members should be made to improve the current legislation and overcome various legal impediments that face promoting *Ṣukūk*. While some countries still face multiple legal challenges and obstacles preventing the issuance of *Ṣukūk*, Algeria is one of these countries that is starting the stage of searching for a legal framework that would allow it to introduce this instrument into the local financial market.

In Algeria, the discourse on *Ṣukūk* started with Lachemi Siagh⁴ in 2008 when he declared in an international conference that Algeria must have a new legal system to facilitate *Ṣukūk*⁵ issuance. After that, in 2010, the first statement issued by an Algerian financial authority –*COSOB*⁶– reported that the Algerian legislator did not recognise *Ṣukūk* as financial securities in both commercial and civil laws.

Following the aforementioned statement, many others attempted to discuss the legal issues that can be faced in the introduction of *Ṣukūk*. Research conducted by Baraihli (2013) and Nasser and Benzid (2014) studied the possibility of issuing *Ṣukūk* in Algeria within the current legal framework. The authors found that there is many legal, regulatory, and taxation impediments that affect the development and growth of a *Ṣukūk* industry in Algeria. They added that a new *Ṣukūk* law or amending the existing clauses in several legislations such as commercial law, civil law, tax law, consumer protection law, and currency and credit law should be made before any issuance of *Ṣukūk*. However, Mebtoul (2017) carried out some investigations into the possibility of issuing *Ṣukūk* in the capital market in Algeria. The author interviewed 100 rich traders. He investigated the future adoption of interest-free bonds or what is so-

³ IFSB. Islamic financial services industry stability report, Kuala Lumpur, Malaysia, 2018, p.128.

⁴ An international expert, He was the manager of consulting company STRATEGICA FINANCE Algeria.

⁵ Ali Titouche, "New legal framework needed to develop Sukuk in Algeria" (French). accessed October 12, 2019. <https://ribh.wordpress.com/2008/04/19/un-nouveau-cadre-juridique-est-necessaire-pour-developper-les-sukuk-en-algerie/>

⁶ *Commission d'Organisation et de Surveillance des Opérations de Bourse*.

272 The Feasibility of Issuing *Ṣukūk* under the Current Laws and Regulations in Algeria

called *Ṣukūk*. The results found that 95% of potential investors categorically will refuse to buy those interest-free bonds based on 0% interest⁷ if the government issue them soon.

Another study, Ghezal (2014) examined the experience of three Arab countries' – Jordan, Egypt, and Tunisia – *Ṣukūk* law. He concluded with recommendations of enacting new law of *Ṣukūk* that can help *Ṣukūk* issuance in Algeria⁸. Likewise, the draft of a proposed law prepared by the Algerian Supreme Islamic Council (SIC) submitted to the people's National Assembly at the end of 2017. The proposed law was based on the creation of private *Ṣukūk* law. However, the suggestion is merely an amendment of the commercial law under the section of financial securities. Algerian Supreme Islamic Council (2018) proposes to add four articles to the former law as follows: Article 715(133), Article 715(134), Article 715(135), and Article 715(136). These articles define publication of the underlying contract, *Ṣukūk* revenue, and specific terms to *Ṣukūk* respectively.

The issue of introducing *Ṣukūk* in Algeria continued to be a topic of discourse in drafting the Finance Law of 2018. The former Prime Minister mentioned the possibility of issuing Islamic *Ṣukūk* during the year 2018 as one of the non-traditional financial instruments⁹. However, the year 2018 witnessed the financing of the government budget deficit by printing money¹⁰, and the *Ṣukūk* issuance process was not completed. The director of the Algiers Stock Exchange attributed this delay to the preparation of the legal rules and provisions related to the issuance pro-

⁷ Abderrahmane Mebtoul, "What will be the impact of the launch of a new interest-free bond loan, based on Islamic finance, to be launched by the Algerian Ministry of Finance?" *Réflexion*, March 5, 2017.

⁸ Ghezal, Mohamed. 2014. "The Jordanian, Egyptian, and Tunisian experience in issuing the Islamic Sukuk Law and the possibility of Algeria to benefit from it " International Conference on Innovation and Financial Engineering Products and Applications between Traditional Financial Industry and Islamic Financial Industry, Sétif, Algeria, 28-29.

⁹ Al-Watan newspaper, (Meziane RABHI), L'émission d'obligations islamiques autorisée- Issuance of Islamic bonds permitted-, Algeria, date of 24/09/2017.

¹⁰ Unconventional financing was limited to printing money by the central bank for the government for a period of five years 2018 to 2022, while the issuance of sukuk was not provided until further notice.

cess¹¹. As a result, the mature regulatory framework for integrating Şukūk into the Algerian financial regulations is not in sight yet as some legal hindrances need to be resolved in the first phase.

Therefore, concerning Algerian conventional financial regulations, whether they are ready to accommodate the specificities of Şukūk and issue them under the current regulations without legal impediments. This study does not investigate all the issues involved in Islamic finance regulation in Algeria. Rather, it focuses on critically examining the provisions of the prevailing laws in Algeria and the way to overcome the regulatory issues in introducing Şukūk. To achieve this objective, this empirical research adopts a qualitative approach focusing on document review of different Algerian conventional laws and regulations that relate directly to financial securities. To this end, this paper is structured into many sections. Following an introduction, the second is dedicated to review the current literature in the field of the legal and regulatory framework of Şukūk. The third section after that explains the methodology applied to achieve the objective of this study. The discussion and analysis of the issues of the existing laws in Algeria and its ability to accommodate Şukūk is more detailed in the fourth section while the fifth section concludes this research.

Literature review

Legal issues and challenges in issuing Şukūk

The legal and regulatory framework of issuing Şukūk is a precondition to the development of Şukūk market. The presence of a comprehensive regulatory structure in any jurisdiction may facilitate the smooth Şukūk introduction in the capital market¹² and the absence of advanced regulation will decrease the trust in the market.

Şukūk is continuing to gain attention of issuers and investors as the fundamental instrument within the Islamic capital market worldwide to raise funds or invest in (IIFM 2019). It has developed quickly due to conducive rules and regulations that were set up to ensure investors' trust in the capital market. Nonetheless, there is several legal impediments that remain unsolved in some Muslim and non-Muslim countries¹³. This situ-

¹¹ OuldHamouda Wassila, "Stock Exchange of ALGIERS Towards issuance of sukuk." *Horizon newspaper*, Algeria, March 13, 2018.

¹² Abu Umar Faruq. "Regulation, performance and future challenges of Sukuk: The evidence from Asian markets", 3.

¹³ IFSB. Islamic financial services industry stability report, 128.

274 The Feasibility of Issuing Şukūk under the Current Laws and Regulations in Algeria

ation may have arisen from the assumption that Şukūk can be accommodated in the existing conventional bonds' legal framework¹⁴. For this case, strong regulations are required to be enacted to regulate issuing, listing, and trading Şukūk in the capital market and setting up an appropriate litigation procedure in case of disputes relating to Şukūk default¹⁵.

Capital market authorities (CMA) in different countries have enacted new provisions and rules for dealing in Şukūk¹⁶. Examples of CMAs' regulations include Şukūk law No. 30/2012 by the government of Jordan in 2012¹⁷ and Turkey's law No. 4749 in 2012 related to public finance and debt management regulation to permit Şukūk issuance¹⁸. Other nations enacted additional provisions to permit the issuance of Şukūk such as UK's Government Alternative Finance Regulations in 2014 (GAFR) (S.I. 2014/1327)¹⁹, and in the same year of 2014 Luxembourg supported its capital market regulations with issuing of Şukūk Law²⁰.

The rise of Şukūk as an investment or financial instrument in capital markets has been slowed by some legal impediments in some jurisdictions. According to Nazar (2011), Lahsasna & Lin (2012) and Tariqullah et al (2014) found that the rise of utilizing Şukūk as financial tools in capital markets has led to a few cases of litigation. The authors

¹⁴ COMCEC. "The Role of Sukuk in Islamic Capital Markets." Ankara: Standing Committee for Economic and Commercial Cooperation of the Organization of Islamic Cooperation (COMCEC), 2018, 37.

¹⁵ Talahma, Khalid Ibrahim. "Islamic Bonds (Sukuk): Opportunities and Challenges." *Asper Rev. Int'l Bus. & Trade L.* 15, 2015, 393; IFSB. Islamic financial services industry stability report, 129.

¹⁶ Ali, Rahail, and Kamal Mustafa, "standardisation and regulation." In *Sukuk and Islamic Capital Markets: A Practical Guide*, edited by Rahail Ali. (London: Globe Law and Business, (2011), 165.

¹⁷ Sweileh Mohammed Fakhri. "A Reading of the Jordanian Islamic Sukuk Law in Light of the Sharī'ah Standard of Sukuk and the Egyptian Sukuk Law (Arabic)." In *Sukuk and Islamic Finance Tools Conference*. Yarmouk University Jordan, 2013, 7.

¹⁸ Balibek, Emre. 2017. "Establishing a Legal Framework for Sovereign Sukuk Issuance: A Public Debt Management Perspective." *World Bank Group, Washington, DC*, 13.

¹⁹ Morrison Scott. *Law of Sukuk: Sharī'ah Compliant Securities*. (London: Sweet & Maxwell, 2017), 236.

²⁰ Awadzi Elsie Addo. *Designing Legal Frameworks for Public Debt Management*. (International Monetary Fund, 2015, 29.

examine some areas of conflict between western law and Sharī'ah which include bankruptcy, true sale, SPV, and Şukūk standardisation²¹. Unlike Wan Abdulla Rahim (2012) endeavoured to identify general rules that must be presented in such jurisdictions to reinforce the Sukūk legal framework²². The findings of Nazar (2011) and Tariqullah (2014) are important in identifying Şukūk structures that suffer from a lack of legal provisions and the existing regulations that are less supportive of Şukūk issuance. Nevertheless, they suggest arriving at sound regulations that facilitate the issuance of Şukūk. Moreover, they added that efforts from policy makers, regulators, and Sharī'ah board members should be made to improve the current financial legislations of those jurisdictions which want to issue Şukūk.

Besides that, Andreas Jobst et. al. (2008) and Balibek (2017) discuss existing challenges confronting Şukūk introductions by the sovereign government who want to issue Şukūk. For example, they argued that seasonal in issuing Şukūk in some countries should overcome legal impediments in their legislations. They found that the rules and regulations of issuing Şukūk under commercial, capital market and Sharī'ah provisions should be compatible with the local country's laws. Likewise, other researchers suggest that more endeavours are required for encouraging and facilitating Şukūk issuance to reduce areas of conflict between Sharī'ah and governing laws²³.

²¹ Lahsasna, Ahcene, and Lee Sze Lin. 2012. "Issues in Islamic capital markets: Islamic bond/Sukuk." 3rd International Conference on Business and Economic Research (3rd ICBER 2012) Proceeding, p 496; Tariqullah, Khan, Elsiefy Elsayed, and Eunkyoungh Lee. 2014. "legal and regulatory issues in issuing sukuk in south korea lessons from developed countries'experience." p 16; Nazar, J. K. (2011). Regulatory and financial implications of Sukuk's legal challenges for sustainable Sukuk development in Islamic capital market. In H. A. E.-K. e. al. (Ed.), *Ethics, Governance and Regulation in Islamic Finance*. Doha, Qatar: Bloomsbury Qatar Foundation; p 5

²² Kamil, Wan. Abd. Rahman, *Understanding sukuk*. Kuala Lumpur: IBFIM, 2014, p 129.

²³ See: Oseni, Umar A., and M. Kabir Hassan, *Regulating the governing law clauses in Sukuk transactions*, 25; Jobst, Andreas, Peter Kunzel, Paul Mills, and Amadou Sy, *Islamic bond issuance: what sovereign debt managers need to know*, *International Journal of Islamic and Middle Eastern Finance and Management* 1 (4), 2008, p 339; Kusuma Ketut Ariadi, Anderson Caputo Silva, *Sukuk markets: a proposed approach for development*, (The World Bank, 2014), p 21.

Current Algerian Financial Legislation

After independence from the French colonialization in 1962, Algeria has adopted the Roman civil law²⁴. The existing Algerian financial services framework consists of commercial code, civil code, capital market regulations, currency and credit law, and securitisation law. These prominent laws are further explained below:

1. Commercial law established under the order No. 75-59 of 26 September 1975 represents the overarching law where it contains different provisions relating to the creation of commercial companies, different types of securities, bankruptcy rules, and others. This law was modified by Legislative Decree No. 93-08 of 25 April 1993 to follow the development of the Algerian capital market.

2. Civil law established under order No. 75-58 of September 26, 1975 stipulates personal and civil affairs, their rights, and different civil contracts.

3. The capital market regulation established under the Legislative Decree No. 93-10 of May 23, 1993 governs the functions and roles of the stock exchange²⁵.

4. Currency and Credit law N 03-10 dated august 26, 2003 repeal the previous currency and credit law No.90-10 of April 21, 1990²⁶. This law was enacted to clarify the responsibilities and the authorities given to the Central Bank of Algeria (CBA).

5. Securitisation law number 06-05 enacted on March 12, 2006²⁷ was established to help commercial banks in managing their liquidity via packaging their mortgage loans into securities through securitisation.

The laws mentioned above are the main constituents of the Algerian financial services framework. Several amendments have been enacted to reflect the change in social necessities and the advancement of information technologies.

²⁴ .Ramette, Vincent, "Algerian Legal Research", 2018, Retrieved from <https://www.nyulawglobal.org/globalex/Algeria1.html>

²⁵ Algeria Official Gazette, "Legislative Decree No. 93-10, dated 23 May 1993, concerning the Stock Exchange", Vol(34).

²⁶ Algeria Official Gazette, 2003, Ordinance No. 03-11 of August 26, 2003 on Money and Credit. (52).

²⁷ Mortgage securitization law, 2006, Algeria: Official Gazette of the Democratic and Popular Algerian Republic Retrieved from www.legislation.gov.lb

Methodology

This research adopts the exploratory qualitative method. The exploratory study is adopted when the situation is unknown and the concept is unclear to the researcher²⁸. Due to the lack of information about the solutions adopted to solve a particular problem or a phenomenon, a thorough investigation is needed to find out the core elements of that phenomenon²⁹. Furthermore, the study aims to examine the adequacy of the current Algerian financial regulations to facilitate the issuance of *Şukūk*. An in-depth exploratory research is adopted to examine the primary resources of laws and regulations and secondary resources of research and books to identify areas in the prevailing laws and regulations that may hinder the introduction of *Şukūk* in the Algerian capital market.

The data collection is based on a document review analysis. This type is suitable to detect the sources of the main legislation that are applicable to issue securities in the Algerian context. Where the source of data is secondary, the existing published and unpublished documents from different books on law, journal papers, regulations, and many laws relate to financial framework constitute relevant documents. It provides helpful legal textual resources in the matter to reach the objective of this research³⁰. The Algerian finance laws consist of commercial, civil, banking, securitisation, companies, as well as the capital market regulations. The importance of these sources of data gives a picture of the current laws whether they allow or not to implement *Şukūk* in the Algerian regulatory framework.

Findings and Discussion

The prevailing laws and regulations in Algeria are characterized by uncertainties regarding the Islamic financial industry in general and *Şukūk* in particular. The current Algerian legal provisions do not mention the concept of *Şukūk*, especially in the commercial and civil law, as stated in the report of the Stock Exchange Authority –COSOB³¹.

²⁸ Uma Sekaran, *Research methods for managers: a skill-building approach*, (Wiley, 1984), 127.

²⁹ Robert A. Stebbins, *Exploratory research in the social sciences*. Vol. 48: (Sage, 2001), 89.

³⁰ Alan Bryman, *Social research methods*, 4th edition Ed, (Oxford university press, 2012), 389.

³¹ COSOB, annual report 2010, 29.

Current legal and regulatory obstacles to issue Şukūk in Algeria

The main legal impediments facing the issuance of Şukūk in Algeria are as follow:

- Issuing Şukūk as a financial instrument in the Commercial Law.
- Absence of Islamic financial contracts in Algerian commercial and civil law.
- Ownership of assets according to the Algerian commercial and civil laws.
- Establishing Special Purpose Vehicles according to the commercial law.
- Regulations for issuing securities in the capital market.

Issuing Şukūk as a financial instrument in the Commercial Law

Commercial law is one of the legal pillars for the issuance of securities in Algeria. The amendments that were carried out in 1993 by the Algerian legislators on the commercial law came to add some articles like Article 715. These amendments established the legal infrastructure for the issuance of securities and the establishment of a stock exchange³².

Nonetheless, the current Algerian commercial law is devoid of any definition related to Islamic investment or Şukūk. Article 715(30) gives a special definition of the securities issued by joint stock companies and the possibility of being listed and quoted on the stock exchange and represents a share of the company's capital or the right of indebtedness.

It is noteworthy that both the shares and the various types of bonds mentioned in the commercial law are not compatible with the characteristics of Islamic Şukūk in terms of asset ownership and indebtedness. This means that the current commercial law lacks an explicit definition of the term investment Şukūk and the parties involved in the issuance process. Therefore, it is necessary to enact a law or add legal provisions to enable the issuance of Şukūk.

³² Algeria Official Gazette, "Legislative Decree No. 93-08, dated 25 April 1993, amends and supplements Order No. 75-59 of Commercial Law." Vol (27), 1993.

Absence of Islamic finance contracts in Algerian commercial and civil law

The absence of Islamic commercial contract law in the Algerian commercial law constitutes a major impediment to the issuance of *Ṣukūk*. Without clear definitions for the main underlying contracts, the legal framework for the issuance of *Ṣukūk* will be lacking. However, the Algerian legislation mentioned commercial contracts such as guarantee, agency, commercial leases, and other conditions related to these contracts from articles 30 to 77 and 169 to 202 of the Commercial Code³³. Furthermore, the Civil Code mentioned some contracts from Article 351 to 586 like sale, company, civil leasing, contracting, and agency³⁴.

Regardless of the mentioned contracts' compatibility with Islamic financial contracts, they remain incomplete and do not address many of the terms and conditions that must be fulfilled to issue *Ṣukūk*. For example, in the Civil Code, in the lease contract in articles 467 to 537³⁵ there is no detailing of the types, terms and conditions of an Islamic lease.

Ṣukūk can be mainly structured in fourteen structures mentioned in the *Sharī'ah* standards by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)³⁶. Therefore, Algerian commercial and civil law make it clear that they are not familiar with the definitions and conditions of Islamic financial contracts governing this type of contract. Without laws that define and govern these contracts in a clear manner, the issuance of *Ṣukūk* will not be possible from a legal perspective.

Ownership of assets according to the Algerian commercial and civil laws

The Algerian legislation recognized under articles 715(61) to 715(63) of the Commercial Code state that the ownership of shares can be divided into two parts, namely the right to vote, which is a non-

³³ Algerian Commercial Law, 2007, Algeria pp. 9-18 and pp. 42-55, online edition available at: <https://www.joradp.dz/TRV/ACom.pdf>

³⁴ Algerian Civil Law, 2007, Algeria, pp. 57-97, online edition available at: <https://www.joradp.dz/trv/acivil.pdf>

³⁵ Ibid, 73-88.

³⁶ The structures of the Sukuk that were approved by the Accounting and Auditing Organization for Islamic Financial Institutions in Standard 17 on *Sharī'ah* Standards represented in: structuring Sukuk of *Murābahah*, *Muḍārabah*, *Mushārahah*, *Salam*, *Istiṣnā'*, and Sukuk of all kinds of *Ijārah*, agriculture, *Wakālah*, and *Wakālah Investment*.

280 The Feasibility of Issuing Şukūk under the Current Laws and Regulations in Algeria

financial right, and a certificate of investment, which represents a financial right³⁷. While the legislation in the civil law confines the ownership to only one legal property including the right to enjoy and dispose of the property with its core elements but does not include the possibility of separation as stipulated in Articles 674 and 675 of the Civil Code³⁸. The rights to the asset cannot be transferred independently or what is known as the unit of financial disclosure of the thing and it is indivisible³⁹.

The Algerian legislation did not separate the ownership of the property into beneficial and legal ownership but made it a single restricted property⁴⁰. Algeria adopts the civil law system, unlike English common law which separates legal title and beneficial title since the eighth century, the Algerian legal system does not.⁴¹. But there is an exception in the commercial law about shares where a separation between the ownership shares as a right to vote and the ownership of shares as a certificate of investment could, generally, be a legal basis for the issuance of Şukūk. However, this will only be possible after legalising certain aspects like the transfer of the assets at the issuance and maturity.

Therefore, these legislative texts in the commercial and civil law are largely general and do not reflect special provisions that help in the issuance of Islamic instruments that take into account the smooth transfer of assets from one party to another.

Establishing Special Purpose Vehicles according to the commercial law

Special purpose vehicles (SPVs) are important in issuing Şukūk as they enable the issuance of Şukūk under a legal company financially independent from the originator, acting as a bankruptcy remoteness vehicle. The SPV is entrusted to the assets transferred to it by the originator

³⁷ Algerian Commercial Law, p 203.

³⁸ Algerian Civil Law, p 110.

³⁹ Badreddine Barhailiah, *"The inclusion of Islamic instruments in Algerian regulation (Arabic)."* The Second International Forum for Islamic Financial Industry, Mechanisms to rationalize the Islamic financial industry, High School of Commerce, 8 and 9 December 2013, Algiers, p 19.

⁴⁰ It means that property right is one which composes of beneficial and legal ownership and they cannot be separated one from the other.

⁴¹ Gary Watt, *Trusts and Equity*, 8th Ed, New York, (Oxford University Press, 2018), p 8-9.

for the benefit of *Ṣukūk* holders⁴². The provisions of the Algerian commercial law in part five Articles 592 to 594 and Articles 715(82) to 715(85) related to commercial companies do not mention this type of special purpose vehicle⁴³. Similarly, the existing COSOB Regulation No. 12/01 through Articles 30 to 44 does not mention any legal rule indicating the incorporation of a special purposes vehicle.

However, Law No. 06-05 date of 02/20/2006 on Securitization of Mortgage Loans in Article 10 indicates that the Securitization Institution⁴⁴ has the power to issue securities in the capital market on the basis of the purchase of mortgages due by banks and financial institutions and then securitizing them into negotiable securities in the stock market⁴⁵. The work of the securitization institution and its characteristics are very similar to that of an SPV. The Algerian legislator indirectly recognizes the establishment of these types of companies under different classifications and designations⁴⁶. Regardless, they are incompatible with the issuance of *Ṣukūk* based on *Sharī'ah* provisions and standards⁴⁷.

It is also not possible to issue *Ṣukūk* under a joint-stock company because the law requires it to have an initial capital according to Article 594 of the Commercial Code, or at least five million DZD⁴⁸ in the case of an IPO. It also requires the company to have at least seven shareholders. These requirements cannot be achieved by special purpose vehicles that are established as orphan companies under the originator⁴⁹.

⁴² Manuela, B., & Tahir, J, the role of SPV issuer, In R. Ali (Ed.), *Sukuk and Islamic Capital Markets: A Practical Guide*, (Globe Law and Business, 2011), London, p 76-89

⁴³ Algerian Commercial Law, p 137-249.

⁴⁴ In Algeria, the SRH mortgage refinance company was established on November 27, 1997. It is a financial institution accredited by the Bank of Algeria, whose main objective is to refinance housing loans granted by accredited financial intermediaries.

⁴⁵ Mortgage Securitization Law, (Official Gazette of the Democratic and Popular Algerian Republic, 2006), Algeria, p 13.

⁴⁶ Badreddine Barhailiah, "*The inclusion of Islamic instruments in Algerian regulation (Arabic)*", p 21.

⁴⁷ Sulaiman Nasser, and Rabia BinZaid, "*Islamic Sukuk as a tool for financing economic development and the extent to which they can be used in Algeria(Arabic)* ", International Conference on Innovation and Financial Engineering Products and Applications between Traditional Financial Industry and Islamic Financial Industry, 2014, Sétif, Algeria, p 27.

⁴⁸ Algerian Dinars symbole.

⁴⁹ Balibek., "Establishing a Legal Framework for Sovereign Sukuk Issuance: A Public Debt Management Perspective, p 19.

282 The Feasibility of Issuing Şukūk under the Current Laws and Regulations in Algeria

Furthermore, if Şukūk are issued under the umbrella of bonds, other obstacles arise like that the SPV must have at least two annual financial statements in accordance with Article 715(82), which is not possible in the case of Şukūk issuance.

Regulations for issuing securities in the capital market

Regulation of the capital market in Algeria began in 1993 with the issuance of Executive Decree No. 93/10, which clarifies the functions, members and role of the various entities active in this market⁵⁰ by an organization represented by the Management of Movable Values Company –*Société de Gestion de Bourse de Valeurs*–(SGBV)⁵¹ and the Committee for the Regulation and Control of Stock Exchange Operations (COSOB)⁵²– *Commission des Observations et Surveillances des Opérations de Bourse*–. A set of regulations governing the stock and bond market have been issued. It was expected that many companies would enlist on the stock exchange, but this did not happen, and currently, there are only six securities of stocks and bonds listed on the exchange⁵³.

The Commission – COSOB- has a role to play in the preparation of a memorandum as stipulated in Article 34 of Executive Decree No. 93/10. The draft of şukūk regulations could be proposed by the capital market authority which may facilitate the handling of Şukūk.

The Commission Regulation No. 98/01⁵⁴ clarified the most important documents to be submitted by the issuing company to the Commission. However, some documents that usually come with issuance of Şukūk are not mentioned. For instance, Islamic financing contracts on which the structure of the Şukūk is based is not mentioned.

Concerning the issuance of Şukūk, some regulatory obstacles must be overcome before the process of listing and trading. Articles 30 to 44 of the Commission Regulation No. 12/01 regarding the conditions of acceptance of securities at the main market level present several obstacles that prevent the possibility of listing Şukūk. These obstacles include: the existence of three financial statements of the issuing company

⁵⁰ Algeria Official Gazette, "Legislative Decree No. 93-10, dated 23 May 1993, concerning the Stock Exchange", Vol(34).

⁵¹ Frenche abbreviation means *Société de Gestion des Valeurs de Bourse*.

⁵² Ibid, Article 3.

⁵³ SGBV website: <http://www.sgbv.dz/> seen date of 11/01/2019. At 15:18.

⁵⁴ COSOB, *COSOB Instruction No. 98-01 of April 30, 1998 relating to the admission of securities to trading on the stock exchange*, (COSOB, 1998), Algiers.

–SPV here– making profits during the past years, proving the existence of a separate department internal audit, with a capital of at least 5,000,000.00 DZD and at least 150 shareholders in the issuing company –SPV. These conditions cannot be achieved by a joint share company under the Algerian Commercial Company Law. Thus, the current regulations are specifically focused on traditional financial instruments such as shares and bonds, as stated in Article 77 of the COSOB regulation No. 12-01⁵⁵.

Absence of a central Shari'ah body

One of the obstacles arising from the absence of a centralized Shari'ah supervisory body is the non-uniformity of fatwa which is paramount for investors as the absence of a unified fatwa structure might reduce trust and consistency and by consequence, predictability in the market. Moreover, the absence of such a central body under the authority of the CMA and controlled under its authority may lead to an imbalance in the role of the capital market resulting in loss of investors' confidence in it⁵⁶.

The Algerian lawmaker through the Currency and Credit Law was able to make a full framework for Islamic finance in general and a special framework for the Shari'ah Board to monitor Islamic financial products and *Shukūk* in particular⁵⁷. However, the Bank of Algeria preferred, instead of a full law, to issue an amendment as Regulation No. 18-02⁵⁸ on *Participatory Finance*.

In the Regulation No. 18-02 Article No. 4, is not decisive on the existence of a supreme central Shari'ah advisory body that control and approve the products issued by Islamic banks, but rather refers Islamic banks to a competent national body and did not name it clearly⁵⁹. It is

⁵⁵ COSOB, *COSOB Regulation No 97-03 of November 18, 1997, amended and supplemented by the COSOB regulation No 12-01 of January 12, 2012 relative to the general regulation of the stock exchange*, (COSOB, 2012), Algiers.

⁵⁶ Al Elsheikh, A. A. A., & Tanega, J, *Sukuk structure and its regulatory environment in the Kingdom of Saudi Arabia*, p 190-192.

⁵⁷ Nasser and Binzaid, *"Islamic Sukuk as a tool for financing economic development and the extent to which they can be used in Algeria(Arabic) "*, p 26.

⁵⁸ The bank of Algeria issued the regulation No. 18-02 to regulate and authorise officially the Islamic banking in Algeria.

⁵⁹ Algeria Official Gazette, *"Regulation No. 18-02 of November, 2018 on the conditions for the exercise of bank operations in the area of participatory finance by banks and financial institutions."* (2018), Vol (73), p 19.

284 The Feasibility of Issuing Ṣukūk under the Current Laws and Regulations in Algeria

understood that the Supreme Islamic Council (SIC) is intended. The latter proposed the formation of a supreme advisory body to accompany Islamic financial institutions in Algeria before issuing the regulation No.18-02⁶⁰.

One of the important fact about the issuance of Ṣukūk is that Ṣukūk is issued and structured by financial and banking institutions, which leads to raising the issue whether the Ṣukūk is subject to Bank of Algeria regulations in the absence of a Sharī'ah advisory body or the authority and laws of the Securities Commission, COSOB. Therefore, there are possible divergences in the powers of the Bank of Algeria— the banking supervisory authority— and the Regulation of Stock Exchanges and the Supreme Islamic Council.

Possible Legal Solutions for the Application of Ṣukūk in Algeria

The higher authorities of the country through the government may make some amendments and add some articles. Such amendments, as a first stage, can be to the commercial and civil law, the currency and credit law, the mortgage law, and then through the Commission Regulation by issuing regulations specifying how the Ṣukūk will be listed on the Algiers Stock Exchange⁶¹. These amendments may include:

- 1- A third paragraph should be added at the sub-section No. 6 of Section 11 (Transferred Values Issued by Joint Stock Companies) from Chapter Three "Joint Stock Companies from the Commercial Law" which includes the following articles:
 - adding an Article 715(133) may provide a special definition of a Ṣukūk as it is an investment in securities of equal value and represents common ownership right for the assets on which this Ṣukūk is based.

⁶⁰ Supreme Islamic Council (SIC), "Statement of the Supreme Islamic Council on "Islamic Banking", 2018, Algiers.

⁶¹ Barhailiah, "The inclusion of Islamic instruments in Algerian regulation (Arabic)", p 27; Nasser and Binzaid, "Islamic Sukuk as a tool for financing economic development and the extent to which they can be used in Algeria(Arabic) ", p 27; Mohamed Ghezal, "The Jordanian, Egyptian, and Tunisian Experience in Issuing the Islamic Sukuk Law and the Possibility of Algeria to Benefite from It ", p 30.

- adding an Article 715(134) may present the various characteristics of the *Ṣukūk* to distinguish it from shares and bonds.
- 2- A new section entitled "Islamic Finance Contracts" should be created at the level of the Commercial Law in which all possible contracts are detailed to build upon in structuring Islamic *Ṣukūk* as stated in the AAOIFI Standards.
 - 3- A sixth chapter entitled "Special Purpose Company" should be added from Part One "in the rules of conduct of various commercial companies" of the Commercial Law. This chapter details the establishment and the legal form of this type of company, tax exemptions in the case of the transfer of assets to and from this company, and the assets that can be obtained besides other things.
 - 4- Establishing a centralized special purpose vehicle to facilitate issuing sovereign *Ṣukūk* and identifying the institutions undertaking the commercial and administrative activities of the SPV⁶².
 - 5- An eighth section should be added in the Bankruptcy Law which focuses on the separation of the financial assets of the special purpose vehicle and the originator and how to protect the rights of *Ṣukūk* holders against other creditors in front of the court⁶³. Provisions should be added to clarify how *Ṣukūk* investors could protect their interests in the event of bankruptcy.
 - 6- With regards to the unified property stated in civil law, the Algerian legislation must add a new article explaining the possibility of dividing an object or property into the right of enjoyment and disposal–beneficial– on the one hand, and the legal right on the other hand with respect to the assets to be securitised. This will allow for having legal and beneficial ownership and facilitate the transfer of assets.
 - 7- The Mortgage Law No. 06-05 should be amended to expand the securitization of mortgages for housing to include the various contracts of Islamic finance such as *Murābahah* and *Ijārah* in order to provide a mechanism for liquidating Islamic assets. Also, a sub article should be added to the second article of the Securitization of Mortgage law, known as *Islamic securitisation*. It should

⁶² Ghezal, "The Jordanian, Egyptian, and Tunisian Experience in Issuing the Islamic Sukuk Law and the Possibility of Algeria to Benefite from It ", p 27.

⁶³ Nasser and Binzaid, "Islamic Sukuk as a tool for financing economic development and the extent to which they can be used in Algeria(Arabic) ", p 31.

286 The Feasibility of Issuing Ṣukūk under the Current Laws and Regulations in Algeria

include its characteristics, how to list and trade it, and the financial institutions that are allowed to issue it⁶⁴. The addition of an article in Law No. 06-05 allows the securitisation of state-owned assets in preparation for the future issuance of sovereign Ṣukūk that permits the securitization institution to act as a special purpose company.

8- The Central Bank of Algeria's currency and credit council⁶⁵ shall establish a central Sharī'ah advisory board rather than the commission market authority –COSOB–⁶⁶ to facilitate the approval of Ṣukūk structure.

According to Article 34 of Chapter II on the Roles and Powers of the Commission stated in the Legislative Decree No. 93-10⁶⁷ that the Commission may submit a draft legislative regulation related to Ṣukūk to the Presidency of the Government. It may detail all regulatory procedures for listing, trading, and redemption of Ṣukūk, the work of financial intermediaries, Sharī'ah advisors' approval of issuance, special purpose vehicle's workings, and standardized offering prospectus template⁶⁸.

Conclusion

In this study of the legislative and regulatory challenges of Ṣukūk issuance in Algeria, an analytical exploratory study has been conducted on the most important laws, legislations, and regulations directly related to Ṣukūk issuance. Overall, legislative provisions in commercial and civil law and capital market regulations are mainly general and do not reflect special provisions that help in the issuance of Ṣukūk.

This study has shown that generally many legal impediments are faced in the introduction of Ṣukūk. Firstly, there is no legal basis for the definition of Ṣukūk in Algerian commercial law. Secondly, there is a total absence of Islamic financial contracts provisions in the Algerian commercial and civil law. Thirdly, The Algerian legislation has not sepa-

⁶⁴ Ibid.

⁶⁵ the Council of Currency and Credit (C.C.C), his missions are determining and supervising monetary policy body, agreement of new savings and loan products, conditions of agreement and opening of banks.

⁶⁶ Ghezal, *"The Jordanian, Egyptian, and Tunisian Experience in Issuing the Islamic Sukuk Law and the Possibility of Algeria to Benefite from It"*, p 25.

⁶⁷ Algeria Official Gazette, 1993, "Legislative Decree No. 93-10, dated 23 May 1993, concerning the Stock Exchange", Vol (34).

⁶⁸ Ghezal, *"The Jordanian, Egyptian, and Tunisian Experience in Issuing the Islamic Sukuk Law and the Possibility of Algeria to Benefite from It"*, p 25.

rated ownership into beneficial and legal titles but has made it a unique property as stated in the Civil law.

The second major finding was that the establishment of special purpose vehicles in Algeria is not possible. Also, investors are not fully protected in the bankruptcy law as it does not clearly stipulate their right on the securitised asset. Lastly, the absence of the central Sharī'ah advisory body could lead to uncertainty and a lack of investors' confidence.

Through the solutions presented earlier, it is highly recommended to initiate amendments to the current legislative and regulation texts allowing the issuance of *Ṣukūk* at a preliminary stage. Extensive research is needed to better understand when the legal sukuk framework can be implemented in the Algerian context.

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288 The Feasibility of Issuing Şukūk under the Current Laws and Regulations in Algeria

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