



LEGAL AND REGULATORY REQUIREMENTS TO IMPLEMENT SUKUK IN ALGERIA: LEARNING FROM MALAYSIAN EXPERIENCE

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Abstract

In the last two years, Algeria has shown its willingness to introduce Sukuk into the capital market after introduction of new regulations related to Islamic banking and Takaful. Currently, there are no Sukuk regulations. Thus, Algeria may adopt best practices of Sukuk regulation like Malaysia. The paper's purpose is to examine whether Algeria can learn from Malaysia's experience in order to establish sound Sukuk regulations. The paper uses the exploratory approach to review the main existing legal documents related to Sukuk in the two countries and uses the interpretive analysis to examine legal and regulatory data. Although there are several legal divergences underpinning the legal and regulatory framework of the two countries, the Malaysian experience can be a suitable regulatory model to implement in the Algerian context with the adaptation of some rules. Relevant Algerian laws such as civil, commercial, and capital market regulations should be amended to permit adequate Sukuk issuance. Besides, Algerian regulators have to prepare sound Shariah governance and tax incentives. The study focuses on the mainland Malaysia regulatory framework that relates to Sukuk issuance and does not discuss the Labuan regulatory scheme. It is the earliest study that sets out the possibility to implement the Sukuk regulation framework in the Algerian context referring to a pioneering country like Malaysia. It contributes significantly to the legal and regulatory conceptual framework of many civil jurisdictions whose aim is to introduce Sukuk.

Keywords: *regulatory Sukuk, Algerian legal system, Malaysian legislation, civil jurisdictions.*

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1. Introduction

The growth of Sukuk issuance worldwide has encouraged many jurisdictions to underpin their legal systems with adequate legal and regulatory requirements in order to implement Sukuk. Different countries attempt to achieve regulatory efficiency of their jurisdictions to introduce Sukuk, but some issues impede the reorganisation of the current financial regulations (Al Elsheikh & Tanega, 2011). Lack of a sukuk legislative framework is the core hindrance to increase Sukuk issuance in many countries (Talahma, 2015). Defining Sukuk properly, clarifying explicitly the existence of SPVs under the company act and distinguishing Sukuk from conventional securities are among the prominent legal issues facing Sukuk (Ahmad, 2016; Alshamrani, 2014; Muneeza, 2018). Indeed, by adapting the existing laws and regulations to the required changes, the Sukuk industry will overcome different obstacles and facilitate its introduction into the capital market (Ahmad, 2016; COMCEC, 2018). Similarly, in the Algerian context, previous studies have found that amendments of the current legislations and regulations are highly recommended. Barhailiah (2013) and Nasser & BinZaid (2014) concluded that adding some articles in commercial law and capital market regulations will facilitate the issuance of Sukuk but they did not discuss deeply the legal and regulatory requirements needed to modify the existing legislations and regulations. The Algerian securities commission has recently published its willingness to authorise the issuance of Sukuk (Algerian Press, 2020). The step is intended to encourage companies to issue Sukuk in the capital

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market. however, the same commission had refused to discuss the topic of Sukuk in 2010 due to lack of legislation on Sukuk, a single ownership right hindrance and the absence of SPV type in the commercial law provisions (COSOB, 2010). In 2017, the commission had vein negotiations with the ministry of finance regarding the introduction of Sukuk regulation act (COSOB, 2017). Yet, till now, there is just the Article 93 of the Annual Financial Act of 2018, the Budget, which allows the government to issue alternative bonds implicitly based on Participatory Finance (Algerian Financial Act, 2018). Although there are multiple declarations of alternative bonds, legal and regulatory frameworks with respect to the introduction of Sukuk into the capital market are in total absence (Barhailiah, 2013; Ghezal, Hassan, & Lahsasna, 2020). Thus, the legal and regulatory requirements to establish Sukuk in the Algerian context have not been elucidated adequately. This situation may relate to insufficient studies discussing thoroughly the legal aspect of Sukuk implementation in Algeria. Since the Algerian regulators are not specialized in Islamic finance products, there is a need to know about the legal and regulatory requirements before issuing Sukuk. Here, it is important to study the best sukuk regulations in developed countries in this field such as Malaysia, which has developed its legal framework for sukuk in order to extract benefits and adapt them to the Algerian context to save time and effort.. Malaysia as the leading country in issuance of Sukuk in the world issued USD 63,627 Billion in 2019 (IIFM, 2020). *The Malaysian experience is a pioneering jurisdiction in regulating securities and updating rules since the establishment of the securities commission in 1993. The approach adopted in Malaysia is creating acts in the first place then making amendments and introducing specific guidelines (Alhabshi, 2013) which has strengthened its legal and regulatory framework.*

Therefore, the purpose of this paper is to explore the current legislations and regulations of securities in the Algerian context and find out whether Algeria can share the Malaysian experience in regulating Sukuk. This study uses interpretive analysis to analyse the legal and regulatory documents in the two countries. It is believed that this research will contribute and assist many civil jurisdictions that want introducing Sukuk into their local capital market. After introduction, the paper discusses the Malaysian Sukuk legal and regulatory framework and the allowance of the current legislations and regulations in the Islamic capital market in Algeria. Section 2 is on literature review; section 3 discusses the issues, challenges, and requirements of Sukuk issuance in Algeria and possible benchmark of the Malaysian experience; section 4, the paper concludes with main findings and some relevant recommendations.

2. Literature Review

2.1. Malaysia Sukuk Legal and Regulatory Framework

2.1.1. Historical Development

In recent years, Malaysia has developed a strong sophisticated Islamic finance regime. As an international centre of Islamic finance, it has its a unique philosophy in implementing Islamic business models in fields such as Islamic banking, Islamic capital market, and Sukuk (Ascarya & Diana, 2008; ISRA, 2015).

For nearly forty years, Malaysia has enhanced a robust regulatory system of Islamic finance in the South East Asia. Malaysian regulatory approach consists of setting up, at inception, the legal and regulatory framework underpinning any business(Alhabshi, 2013). Its approach refers to permitting both financial systems, Islamic and conventional, to work together within single regulatory institutions (Ascarya & Diana, 2008; Dewar & Hussain, 2019).

Malaysia has developed mixed legislation system based on common law and shariah law. While the common law is applied in civil court which refers to all commercial transactions and civil affairs, shariah law is applied in shariah court which refers to family dispute and inheritance (Vivien, 2017). The federal constitutions put all the items of ‘finance’ which includes Islamic banking, takaful, and Islamic capital market products under civil court that follows common law(Hasan, 2009).

2.1.2. Financial Regulatory and Supervisory Institutions

Malaysia has developed robust regulatory institutions to be a hub of Islamic financial services in the world. Such authorities and supervisory bodies are established to ensure that there are sound financial regulations to achieve an efficient, effective, and stable Islamic financial environment.(Al-Ali, 2019; Halim & Markom, 2018; ISRA, 2015):

- Bank Negara Malaysia (BNM), the central bank of Malaysia, regulates and supervises both Islamic and conventional banks as well as takaful and insurance companies. It has its own Shariah Advisory Council (SAC) exclusively for Islamic banking and takaful;

- Securities Commission Malaysia (SCM) regulates both Islamic and conventional securities and fund managers. It includes the highest authority which is SAC relate to Islamic capital market products.
- Labuan offshore financial authority regulates offshore Islamic banking, Islamic securities, and takaful at the same level as conventional products. Like other regulators institutions, it has its own SAC. In addition, its regulations are independent of the mainland of Malaysia.

2.1.3. *Sukuk Legislation and Regulation in Malaysia*

Malaysia is the leading country and most vibrant domestic Sukuk market in the world. For more than thirty years, Malaysia has developed sound and robust legislation regarding the issuance of Sukuk either onshore or offshore (Hosen, Kebir, & Foong, 2016; Oseni & Hassan, 2014). Malaysian regulatory structure contains core legislations that govern Sukuk issuance, for instance, Capital Market Services Act 2007 (CMSA) (amendment 2012); Securities Commission Act 1993 (SCA) (amendment 2015); securities industry (central depository) act 1991 (SICD); companies act 2016 repealed company act 1965 (CA) (Al-Ali, 2019; Hosen et al., 2016).

In mainland Malaysia, SCM does not only issue regulations and rules related to debt securities and the Sukuk market, but also enforces its decisions on the listed companies in the capital market (Asian Development Bank, 2016). For SC, the Malaysian regulatory approach builds on a two-tier approach. The first tier regulation for both conventional bonds and Sukuk issuers is subject to general regulatory requirements. It is related to licensing, governance, and disclosure. The second tier regulation is related to ICM products, specifically Islamic securities, Sukuk. On the other hand, SC stipulates the common regulatory requirement for both bonds and Sukuk in matters of trust deed and mandatory rating. However, Sukuk has specific requirements when it deals with the Islamic capital market (ICM) (Vivien, 2017). These requirements concern document disclosure, shariah advisers of Sukuk issuance, and the compliance of the issuer to additional shariah requirements (ISRA, 2017).

Concerning Sukuk issuance, the Malaysian legal and regulatory framework is much facilitative. Spearheaded by SCA 1993 and CMSA 2007. SC has a central role in regulating Sukuk via supportive guidelines covering essentially the Sukuk market (Vivien, 2017). The relevant legislation and regulations regarding Sukuk issuance in Malaysia include CMSA 2007, Guidelines on Sukuk, Guidelines on the Trust Deed, Prospectus Guidelines, Registration of Shariah Advisers Guidelines, and tax incentives (Al-Ali, 2019; Hosen et al., 2016).

2.1.3.1. *Capital Market Services Act*

CMSA was introduced in 2007 to strengthen the Malaysian regulatory framework as a robust capital market in South East Asia. However, it was enacted especially to gather the two branches, conventional capital market and Islamic capital market, within single legislation (Dewar & Hussain, 2019; Oseni & Hassan, 2014). The Malaysian approach is built on one regulation for both instruments.

The Malaysian regulatory scheme for Sukuk requires the pre-approval of the securities commission under subsection 212(2) of the CMSA (Capital Market and Services Act, 2007). Otherwise, the Sukuk issuer will be exempted from getting this approval from SC under the condition of subsection 213(1) of CMSA or subsection 2(1) of CMSA related to exemption from any debenture (ISRA, 2015). The categories of securities that are not subject to SC approval under subsection 212(2) are listed within schedule 5 of CMSA (Capital Market and Services Act, 2007).

2.1.3.2. *Guidelines on Sukuk*

The Sukuk regulation in Malaysia is mainly subjected to the Guidelines on Sukuk (Al-Ali, 2019). In accordance with section 377 of CMSA, SC has the authority to regulate Islamic capital market products through the issuance of guidelines specific to Islamic securities such as Sukuk (Asian Development Bank, 2016). Besides, subsection 316(3) specifies the main contents of the guideline related to Islamic securities, Sukuk (Capital Market and Services Act, 2007). Guidelines on Sukuk set out the main terms and conditions related to the issuance of, buying or sale of Sukuk which need approval from SC (ISRA, 2015). In 2015, SC launched Guidelines on Unlisted capital market products under the lodge and launch framework, known as LOLA. This guidelines are continuing initiatives issued by the SC to provide sophisticated tools to deal with the offering products and shorten the process and the time to launch Sukuk (Dewar & Hussain, 2019).

2.1.3.3. *Guidelines on Trust Deeds*

Besides guidelines on Sukuk, SC issues guidelines on trust deeds under section 258 of CMSA (Capital Market and Services Act, 2007). Indeed, CMSA stipulates a mandatory requirement to appoint a trust deed as well as a

trustee in Sukuk issuance procedures (Hassan, Mat Yaman, Othman, & Yusoff, 2012). The guideline on trust deed requires every issuer of Sukuk to enter into a trust deed, appoint a trustee, and comply with the provisions of a Trust Deed under division 4 of Part VI of CMSA. Otherwise, Sukuk issuance will be exempted from those requirements following schedule 8 of CMSA (Al-Ali, 2019).

The trustee under CMSA section 260 must be created under two main structures. First, as a trust company, which is subjected to Trust Company Act 1949; second as a corporation which is registered under company act 2016, repealed the company act of 1965. This means that the trust structure has a statutory framework to protect investors' benefits and issuers' rights. Therefore, a trustee in Sukuk plays a crucial role based on the legislation enacted and guidelines promulgated (Hassan et al., 2012).

2.1.3.4. Prospectus Guidelines

Another guideline is the Prospectus Guidelines that Sukuk must subject to. SC has issued a special Prospectus Guidelines based on section 226 and subsection 235(1) (a) to (e) of CMSA to specify the required information to be included in the prospectus of Sukuk (ISRA, 2015). The current provisions set out the definition of a prospectus under section 226 Division 3 of Part VI of CMSA (Capital Market and Services Act, 2007). The prospectus guidelines as an instrumental tool to disclose more information and regulations about the proposed issuance of Sukuk are set out in Division 2 of Part 1 of CMSA (Prospectus Guidelines, 2012).

2.1.3.5. Sound Shariah Governance

Malaysian regulators established a sound shariah governance framework to strengthen Islamic finance regulatory aspects (Hasan, 2009) vis-à-vis the main player in the capital market. Malaysia has developed strong legislation through the establishment of SC SAC as a supervisory body of mainland Malaysia since 1996 (Asian Development Bank, 2016). Unique to Malaysia, SC SAC was a great step to harmonise and ascertain Islamic financial products (Dewar & Hussain, 2019). Enacted by law and appointed by the King, SAC is the highest authority to monitor, regulate, and make decisions on all shariah transactions related to Islamic capital market products or services as mandated by the law (Capital Market and Services Act, 2007). Thus, these legal institutes related to ICM assure and protect Sukuk stakeholders.

SAC has several functions and authorities stated in the CMSA. Section 316(B) empowers SAC to apply and issue rules based on shariah principles on all products of ICM, advises SC related to ICM transactions, and provides advice on any shariah issue. Section 316(E) states that any business entity seeking the advice or a ruling must refer to SAC for shariah compliance. Section 316(F) empowers SAC to be the reference for any ruling by court or arbitrator. Section 316(G) states clearly that any rule made by SAC shall be binding on persons (Capital Market and Services Act, 2007). Furthermore, rules made by SAC prevail any other rules that come from the court which gives more certainty to both investors and issuers of Sukuk (ISRA, 2015) as stated in section 316(E).

A further guideline is the Registration of Shariah Advisers Guidelines (RSA). To issue Sukuk, the Guideline on Sukuk stipulates under Chapter 5 the requirement of appointment of a shariah adviser. RSA Guideline sets out the characteristics of the shariah adviser to fulfil in case of registration, renewal, or deregistration even he is an individual, a corporation, or a foreign shariah adviser (Registration of Shariah Advisers Guidelines, 2009).

2.1.3.6. Conducive Tax Framework

For a long time, the Malaysian tax regime has encouraged Islamic finance products especially Sukuk. Many tax incentives have been introduced to promote the issuance of Sukuk in mainland Malaysia (ISRA, 2017). Most significant tax incentives are promulgated in Malaysian annual budgets, Malaysian income tax act 1967, and Malaysian Stamp Act 1949 (Dewar & Hussain, 2019). These tax incentives include tax neutrality of issuer, originator, and SPV in the matters of tax deduction in income tax and cost of issuance. Also, profit paid to investors in Sukuk is exempt from income tax and many other exemptions (ISRA, 2017).

The legal, regulatory, and supervisory approach developed in Malaysia has put clear objectives to become a regional Islamic financial hub. Doing so, the legal and regulatory framework must be there before starting a business. It means that the business activities have developed in the presence of strong underpinning laws and regulations with more guidance to the Islamic financial services players. Thus, the Malaysian regulator does not permit any activity without enacting its legislations or regulations (ISRA, 2015).

2.2. *The Current Legislations and Regulations of Islamic Capital Market in Algeria*

Algeria is an Arab North African country. It administrates a presidential mode of government. In the past, Algeria was colonized by France, which influenced greatly its legal system. Thus, although Algeria had its independence from French colonialism since 1962, the Algerian lawmaker still uses civil law (Ramette, 2018). Therefore, the Algerian legislations including the financial legislation are inspired by civil law.

2.2.1. *The Algerian financial legislation framework*

Algeria is a constitutional republic that follows the principle of separation of the three authorities: executive, judicial, and legislative ("Constitution of Algeria," 2016). The financial regulatory authorities consist of four statutory bodies: the Parliament, ministry of finance, Central Bank of Algeria, and the capital market authority or so-called COSOB. These legal financial institutions have the full powers to enact and regulate financial business activities. However, the Parliament, the ministry of finance and the capital market authority play central role to enact laws, issue regulations and instructions related to securities (Khalafawi, 2018).

The Algerian financial legislation framework has many codes regulating financial business activities. The current legislations related to securities issuance include commercial law, civil law, capital market regulation, and tax law. These laws connect directly to the financial and commercial activities and others are complementary. The prominent laws discussed below regulate securities.

2.2.1.1. *Civil law*

Civil Law Order No. 75-58 of September 26, 1975, discusses individuals' and legal entities' affairs, their rights and different types of contracts and obligations that can be concluded among persons or entities. Under Articles 351 to 586, civil law defines many contracts such as sale contract, contract of creation a company, lease contract, entrepreneurial contract, and agency contract. From Article 572 to 589 the civil law gives details about the conditions and the effect of each of these contracts ("Algerian Civil Code," 1975). Such law does not recognise Islamic financial contracts, such as, Murābahah, Ijārah, Mushārakah, Muḍārabah, Wakālah contracts, and others, which are the underlying contracts to issue Sukuk. Therefore, without Islamic financial contracts, Algerian civil law is deficient.

On contrary, instruction No. 03-2020 from the Central Bank of Algeria mentions the different types of Islamic financial contracts which the Islamic banks are allowed to apply to their customers (Bank of Algeria, 2020).

Besides, the ownership right under civil law is single ownership of assets. Thus, the property right cannot be split as stated in Articles 674 and 675 ("Algerian Civil Code," 1975). This means that civil law does not recognise the beneficial and legal ownership of assets (Barhailiah, 2013). Therefore, asset backed Sukuk can be issued based on the provisions of civil law. However, asset-based Sukuk may face some legal impediments.

2.2.1.2. *Commercial law*

Commercial law Order number 75-59 of 26 September 1975 represents the prominent law among other laws structuring the commercial activities in Algeria. The Algerian commercial law contains numerous articles and clauses explaining the commerce functioning in general. It discusses trade commonly, exposes trade marketplace –*Al-mahal Atijari*–, illustrates judicial settlement and bankruptcy law, demonstrates commercial documents, and explains companies' law ("Algerian Commercial Code," 1975 Supp 1993).

The commercial law was amended by Legislative Decree No. 93-08, dated 25 April 1993 to add some important articles discussing types of securities and the creation of companies (Algeria Official Gazette, 1993a). This amendment has allowed the issuance of certain securities that can be issued by joint stock companies and has defined new securities to list in the capital market (Khalafawi, 2018). The main securities that can be issued exclusively by joint stock companies such as shares, investment certificates, voting right certificate, participatory securities, bonds, convertible bonds, exchangeable bonds, bonds with share warrants (Algeria Official Gazette, 1993a). However, until now there are no amendments made to discuss or define *Ṣukūk* in the commercial law (COSOB, 2010).

Both civil and commercial laws discuss the company act and the different types of companies that can be created such as Joint Stock Company. However, the type of Special Purpose Company is not recognised by the couple of laws (COSOB, 2010).

2.2.1.3. Capital market regulation

The capital market regulation is primarily enacted under the Legislative Decree No. 93-10 of May 23, 1993, relating to the stock exchange (Algeria Official Gazette, 1993b). It discusses the main structures of the stock exchange. This Legislative Decree created the independent Securities Commission– the *Commission d'organisation et Surveillance des Opérations de Bourse* or *COSOB* –, Management Company of the stock exchange and the intermediaries.

The current capital market regulations stipulate many requirements and conditions that must be presented in the notice of information or prospectus of issuing securities, or documents. The procedures are clear enough to list and trade securities. The challenge in researching on Sukuk regulations is the absence of legal provisions in commercial law as stated by the securities commission (COSOB, 2010). In this way, the securities commission has attempted to come up with special provisions for Sukuk but the discussions with the ministry of finance to elaborate a draft on Sukuk is not yet achieved (COSOB, 2017). Recently, the securities commission has announced that its interest to permit the first listing of Islamic bonds, not exactly Sukuk, from a private company into the Algerian capital market is under examination (Algerian Press, 2020).

2.2.1.4. Taxation and stamp law

The taxation and stamp law issued under Order No. 76-105 and legislated on December 9, 1976 has been subjected to several amendments and modifications. Taxation rules can be issued under annual financial law, Budget, which contains the direction of the government related to taxation in different sectors and allows eventual incentives. The current Algerian tax law is a real impediment in the matter of Value Added Tax (VAT) for the issuer and investors when they sell or buy assets. However, the taxation law exempts all the securities listed or traded in the capital market from income tax and profit paid tax.

2.2.1.5. Central Shariah supervisory

After a long time of waiting, Algeria had seen the creation of a National Shariah Supervisory Body (NSSB) in late April 2020 under the decision 20-02 from the Islamic Supreme Council (ISC). This NSSB has a role to give the certificate of shariah approval of every Islamic financial product coming from banks, insurances, companies, or government. Also, to get a certificate of approval, the NSSB requires a set of documents when it concerns introducing Sukuk or shares into the capital market (Islamic Supreme Council, 2020).

The laws discussed above have undergone several amendments that reflect the evolution of the different needs of the society and walk parallel with the innovation raised in the economic and financial framework. However, Sukuk as a new Islamic financial instrument is not referred to in the Algerian financial regulations. To that end, the next point discussed is the permissibility of Algerian regulations in implementing the Sukuk regulatory framework.

3. Methodology

This study in essence is a qualitative exploratory analysis to examine both countries' legal and regulatory frameworks that govern Sukuk issuance. The study uses a document review strategy to review the main legal and regulatory documents available to extract the main information about the existing laws and rules that may allow the introduction of Sukuk in Algeria. Similarly, Malaysia has been taken as a benchmark country by scrutinising thoroughly its experience to find out the legal and regulatory basis for issuance of laws, regulations and guidelines. This successful experience during more than thirty years may establish a relevant model to adopt in the near future in Algeria.

The data collected from these documents used in this study are essentially different laws and regulations enacted in both jurisdictions as primary sources and research articles, legal books and others that discussed Sukuk issuance in these two countries as secondary sources. To analyse these data, the study focuses on interpretive analysis. A comparative analysis was developed based on the existing legal and regulatory framework in the two countries.

4. Findings and Discussions

4.1. The Issues and Challenges of Sukuk Issuance in Algeria

In order to establish a sound Sukuk legal and regulatory framework in Algeria, it should overcome some legal impediments. Indeed, as Sukuk is a kind of securities, it has the same procedures of issuing other securities such

as shares and bonds into the capital market. However, the lack of specific regulations that govern Sukuk in the capital market not only may affect its reputation and trust among investors but also might alienate the issuers. Accordingly, numerous legal and regulatory issues hinder the development of the Sukuk market in Algeria. A set of permanent challenges still exists as stated below.

4.1.1. Lack of Sukuk Legislation in Commercial Law

The current commercial law defines shares and bonds but not Sukuk. The commercial law gives types, describes characteristics, and designs parties eligible to issue conventional securities. All of these provisions do not mention or indicate any rules relate to Sukuk (Nasser & Binzaid, 2014). This means that the issuance of Sukuk in Algeria is quite difficult due to non-existence of legal provisions.

4.1.2. Non-Presence of Islamic Finance Contracts and Possible Use of Current Contracts in Civil and Commercial Law

The contract rules in civil and commercial laws are clear enough to deal with any transactions between the parties. However, when dealing with Islamic transactions, Islamic financial contracts underpin these transactions. These contracts are absent from the provisions of both commercial and civil law which remain incomplete.

Even though the last bank of Algeria's instruction defines some Islamic financial contracts such as Murābahah, mudharaba, Ijarah, Mushārahah (Bank of Algeria, 2020), it seems to be directed to Islamic banks' products rather than to issue Sukuk. However, these contracts do not exist in civil law or commercial law. Because of this, the existing contracts mentioned in civil and commercial law may be the base of Sukuk structuring. However, there is a need to add some terms and conditions to fulfil the issuance of Sukuk.

4.1.3. Ownership of Assets Right Constraint

As of now, the Algerian regulator under civil law recognises only the single ownership right. Thus, there is no possibility to find beneficial and legal ownership of the assets in Algerian civil legislation because Algeria follows civil law system. These provisions can allow just the issuance of backed Sukuk and the transfer of assets. It means that the legal transfer from the issuer to investors needs more procedures and consumes a lot of time.

On the other hand, asset based Sukuk may face a burden legal procedures due to absence of recognition of beneficial rights under civil law. This affects the possible issuance of asset based Sukuk according to civil law.

4.1.4. Non-Recognise of SPV type in Commercial Law

Commercial law is the legislative framework of companies. While this law recognises many types of companies spearheaded by joint stock companies, the SPV Company is absent. The type of creation of orphan entities characterised by remote bankruptcy (Hassan et al., 2012) does not exist in commercial law. Furthermore, structuring an SPV as a Joint Stock Company is possible under Algerian commercial law, yet it may be burdensome to the issuer who needs fast transactions in establishing this kind of company. Overall, the establishment of SPVs needs an inclusion of legal framework in commercial law.

4.1.5. Absence of Sukuk Regulation in Capital Market

All the regulations and instructions that govern the Algerian capital market accommodate especially shares and bonds. To allow Sukuk issuance as an Islamic capital market product, there is no any specific requirement to add to the existing capital market regulations to list or trade them, but indeed, it is recommended that the presence of shariah certificate approval is quite needed (COMCEC, 2018; ISRA, 2017). The shariah approval must be dedicated to NSSB before any attempt to introduce Sukuk into the capital market (Islamic Supreme Council, 2020).

However, capital market regulation No.98/01 does not fulfil the necessary document related to Sukuk. In addition, the capital market regulation No.12/01 presents a real obstacle in the matter of conditions of registration SPVs, which needs three financial statements and making a profit for the last year and existence of pre-equity capital. But the securities commission, COSOB, is working right now on introducing the first private Sukuk without introducing any specific regulation or rule (Algerian Press, 2020). This new event in the capital market may lead the current securities regulations to accommodate Sukuk with minor adjustment of rules.

4.1.6. *Shariah Governance Challenge*

Although recently NSSB has been established in Algeria with wide authority to give certificate approval of the Islamic financial products, there is a need for a proper shariah governance framework backed by legislation powers rather than a decision from the SIC. Legislate Shariah Advisory Council under the Algerian Securities Commission as an independent body, will strengthen the position and decision of such a shariah body for all the capital market players.

4.1.7. *Absence of Tax Incentives for the Growth of Sukuk*

The existing tax framework imposes several taxes on bondholders (Kandali, 2016). Similarly, Sukuk will face the burden of taxation that will affect Sukuk issuance negatively. Also, VAT is considered a real tax impediment, especially in matters of real estate and goods transactions among intervenes.

4.2. *Malaysian Approach in Sukuk Issuance: A Benchmark and Reference*

Malaysia has two-tier approaches adopted in the capital market one for conventional and the other for Islamic securities. SCM regulates conventional bonds and Sukuk at the same time under single regulation through the issuance of different Guidelines. Thus, the legal and regulatory framework of Sukuk in Malaysia is characterised by robust rules and sound shariah architecture.

Malaysia has developed its legal framework over four decades to come up with an Islamic capital market where Sukuk can be issued. The current robust legislations and regulations have been achieved through numerous stages(Ascarya & Diana, 2008). The first stage was remarked with the enactment of the securities industry act 1983 repealed securities industry act 1973, Islamic bank act in 1983, and takaful act in 1984 had facilitated the regulatory framework of Islamic finance in Malaysia. The second stage, the establishment of the securities commission in 1993 under the securities commission act 1993 had pushed Islamic finance to another level especially after the creation of SAC in 1996. The third stage, the enactment of landmark law CMSA 2007 was the clear legislation to structure Sukuk via clear clauses such as section 212(2) and section 213(1). The CMSA 2007 consolidated securities industry act 1993 future industry act 1993 and part IV of securities commission act 1993(ISRA, 2015).

This new law, CMSA 2007, allows SC to regulate and supervise Sukuk within Malaysian ICM from acceptance to winding up through the issuance of several Guidelines(ISRA, 2017). To this end and from the beginning, SCM has upheld the Islamic finance industry focusing more on issuing Sukuk guidelines and others(Halim & Markom, 2018). These guidelines among others are the following after updating some of them(ISRA, 2017):

- LOLA guideline 2015(amendment 2017) has repealed and consolidated many guidelines and practice notes related to securities, such as Guidelines on the Offering of asset-Backed Securities, Guidelines on Private Debt Securities, and Guidelines on Sukuk. This guideline has been issued under the S377 of CMSA 2007(Guidelines on Unlisted Capital Market Products Under the Lodge and Launch Framework, 2015).
- Guideline on Sukuk and Private Debt Securities to retail investors in June 2015
- Guidelines on trust deeds in December 2012
- Prospectus guidelines updated July 2015
- Registration of shariah adviser guidelines.

These guidelines provide a clear involvement of the Malaysian Securities Commission in the forefront of regulating securities(Ismail, 2013). Meanwhile, SCM develops the Islamic finance industry in terms of preparing a sound regulatory framework to increase investor's trust.

The current Malaysian legislations have proved that Malaysia has a strong securities framework for all intervenes in the capital market. Algeria may take Malaysian experience as a benchmark to establish a sound legal and regulatory system for Sukuk issuance with fewer legal impediments. The Malaysian experience is chosen due to its updated regulations in the matter of securities since the establishment of the securities commission and the development of the Sukuk market where the regulations are more conducive than other jurisdictions.

The Malaysian CMSA 2007 authorises issuing Sukuk under sections 212 and 213. However, Algerian commercial law does not mention any definition or characteristics relate to Sukuk (COSOB, 2010). Toward the adoption of Sukuk in Algeria, the amendment of commercial law is necessary to provide underpinning legislation

to allow officially dealing Sukuk. The regulator has to add Article 715(133) to section securities that defines Sukuk, its characteristics and types.

In matter of SPVs' creation in both countries, Malaysia's legislation framework is built on the common law where the SPVs are permitted to be created under trust law. Thus, the company act 2016 includes the notion of trust and trustee as stated in section 176 and 177 (Malaysian Company Act, 2016). On contrary, Algerian commercial law does not include the Special Purpose Company in the chapter of companies. Because of this, this concludes that the Malaysian practice to create SPVs under the notion of trust is not feasible in the Algerian context. As solution, the Algerian regulator should examine the Malaysian experience in creating Trust companies or SPVs to apply into the Algerian regulatory system. To this end, the Algerian regulator can amend the company provisions under the commercial law by adding special articles to chapter five section three that clarify the role of SPVs and trustees when it is related to Sukuk issuance under limited liability corporation provisions. The abovementioned amendment, undoubtedly, will open the way to several Sukuk issuances from public and private companies.

The Algerian COSOB has the full power to propose a draft project concerning any new instruments into the capital market including Sukuk as mentioned in article 34 of the COSOB regulation N°. 93-10 (Algeria Official Gazette, 1993b). This function, in addition to several tasks that COSOB fulfils such as approving, listing and monitoring securities may allow preparing a sound regulation specific to Sukuk via issuing a guideline. The Algerian securities commission, COSOB, may follow the SCM approach in the matter of regulating conventional and Islamic instruments through issuance of specific guidelines. COSOB can regulate both conventional shares, bonds and Islamic Sukuk. COSOB can issue guidelines on special purpose company, shariah advisory committee, prospectus, and other facilitative procedures. All these regulations will improve the strength of the capital market rules towards investors.

Malaysia has accommodated a sound taxation framework for Sukuk. At inception, the income tax act 1967 has seen many amendments as deduction or exemption given to recipients involved in the Sukuk structure. Similarly, the Algerian government may consider tax revision in the form of double taxation imposed at the underlying shariah transactions in the matter of VAT that relate to Sukuk issuance. This will establish a level playing field with conventional instruments with a single VAT charge. In addition, tax neutrality related to profit on Sukuk, stamp and registration duty might foster Algerian issuers and investors to accept Sukuk as an attractive tool to raise funds.

Our demonstration that the Malaysian experience in legislation and regulation of Sukuk compared to Algerian current regulatory framework shows real need to follow best practice. Regulating Sukuk can promote a legal basis in Algeria based on Malaysian practice. It should be possible to amend the existing legislations and regulations in order to prepare an adequate legal and regulatory framework that can allow the issuance of Sukuk. The findings in this study may detect and identify the main legal hindrances that face Sukuk for the Algerian regulator, meanwhile, cancel or minimise issues by referring to pioneer experience in Sukuk regulation like Malaysia.

These findings have important implications for developing an adequate legal basis to implement Sukuk in Algeria using Malaysian experience. Algerian regulators may take the Malaysian case as a benchmark to incorporate Sukuk into commercial law and adding some conditions to the current contract provisions into civil law. Also, the Algerian regulator can learn from the SCM approach to regulate Sukuk issuance via issuing different guidelines and establish independent SAC under capital market authority. Sukuk should be exempted from any excessive or multi-tax regime to foster its growth at the same level as conventional securities.

Some of the issues emerging from these findings relate specifically to ownership of assets under civil law and the legal basis of the creation of SPV within commercial law. The former issue is more complicated to split the ownership to beneficial and legal ownership as Malaysian does. Due to the singularity of ownership under Algerian civil law, regulators cannot change it until the enactment of new legislation from the Algerian parliament. On the other hand, practitioners will hesitate to issue assets based Sukuk where the concept of beneficial ownership is not yet recognised within the provisions of civil law. The latter issue is less complicated than the former issue where practitioners may face a real legal impediment that will influence negatively the issuance of Sukuk. It can be solved through the enactment of an amendment into commercial law explain clearly the creation of SPV under the concept of trust which takes enough time or use the form of limited liability company to issue Sukuk. Otherwise, capital market authority, COSOB, may introduce regulation that details how SPV can be established.

4.3. *Malaysian Shariah Governance Framework and the Way Forward in Algeria*

Malaysia has a proactive approach to the shariah governance model (Hasan, 2009). The involvement of the SAC since its creation in 1996 has given positive reflection in the market players. SAC has strengthened its position when the CMSA 2007 has legislated its presence in a matter of making decisions and rules attached to Islamic financial products. Besides, shariah advisers for Sukuk issuance must follow certain criteria under SC RSA guidelines to be fully accepted.

Indeed, Malaysia has established a two-tier approach in the matter of SAC one for Islamic banking and the other for capital market products. This approach classifies Malaysia as advanced shariah governance jurisdiction in the world. Algeria can create a sound shariah governance framework in the same manner. Despite the fact that NSSB gives itself the authority to deliver pre-approval of issuance Sukuk before listing any Islamic products into the Algerian capital market, *the special SAC relate to COSOB should be adopted. Due to the allowance of Islamic banking windows into public conventional banking and the possible issuance of sovereign Sukuk, NSSB will need more time and experience to prove different products. This situation may slow down the introduction of Sukuk into the capital market and may raise some impediments in the matter of credibility and reputation.* Also, as SCM has required shariah advisers, *COSOB should clarify its position and instructions to stipulate the creation of a shariah adviser for each issuance of Sukuk.* An implication of these findings is the possibility that the capital market authority, COSOB, should have a strong arm in a matter of Islamic financial Products through the establishment of independent SAC under its authority and not relate to NSSB. To develop a strong Sukuk industry in Algeria, legislating SAC, certainly, will adequately promote Sukuk issuance.

The table below shows the summary of legal and regulatory requirements to implement Sukuk in Algeria based on the Malaysian experience.

ITEM	The current Algerian legal framework	The current Malaysian legal framework	Improvement needed to enact Sukuk in Algeria	F s
Sukuk Legislation	non-existing of legal provisions in the commercial law	CMSA discuss Sukuk requirements to get pre-approval from SCM: subsection 212(2), subsection 213(1), subsection 2(1) and schedule 5	Need specific description of Sukuk in commercial law	p le o A u o
Islamic Finance Contracts	Totally absent, but it may use the current contracts	Malaysia has recognised Islamic finance contracts as underpinning contract to structure Sukuk	Need adding some terms and conditions to current contracts to fulfil the issuance of Sukuk.	
Ownership of Assets	the existing of single ownership right under civil law which means non-recognise of beneficial right	Malaysia is a common law follower where beneficial and legal ownership are separated	needs more procedures and consumption of time to find adequate legislation that define beneficial and legal ownership	D th M c A f
Creation of SPV	SPV does not exist in commercial law	section 260 of CMSA indicate two possible structure: (a) a trust company under Trust Company Act 1949, (b) a corporation under Companies Act 2016 section 176 and 177	SPVs needs a legal framework to include in commercial law via amendment	tr a A
Sukuk Regulation in Capital Market	Absence of Sukuk regulations	Malaysia has issued several guidelines that regulate Sukuk: Guidelines on Sukuk(section 377 and subsection 316(3) of CMSA), Guidelines on the Trust Deed(2012) section 258, division 4 of Part VI and schedule 8 of CMSA, Prospectus Guidelines (updated July 2015) section 226 and subsection 235(1) (a) to (e) and Division 2 of Part 1 of CMSA of CMSA,	Need to amend capital market regulations No.98/01 to add Sukuk document requirements and No.12/01 to overcome conditions of SPVs registration and need some new regulations specific to Sukuk such as Registration of Shariah Advisers Guidelines	S r d r a A a - c

		Registration of Shariah Advisers Guidelines, and tax incentives		in A
Shariah Governance	Exist a decision from Islamic Supreme Council to get certificate of approval from NSSB	Section 316A state clearly that SCM may establish SAC, and Section 316B to section 316H state functions of SAC.	Legislating Shariah Advisory Council under the Algerian Securities Commission as an independent body	M p s s u C S
Tax Incentives	Tax legislation burden negatively probable Sukuk issuance	Significant tax incentives in: Malaysian annual budgets, Malaysian income tax act 1967, and Malaysian Stamp Act 1949. Include tax neutrality of issuer, originator, and SPV in the matter of tax deduction in income tax and cost of issuance. Profit paid to Sukuk holders are exempt from income tax.	Legislate tax exemptions for eventual Sukuk issuance in annual Financial Act	C r p S a

Table 1: Summary of legal and regulatory requirements of Sukuk in Algeria and Malaysia

5. Conclusion and Recommendations

The paper has discussed and explored the current Algerian securities laws and regulations toward permitting Sukuk issuance. The examination of the existing laws raises some legal and regulatory impediments that may be an obstacle to launch Sukuk in Algeria. These issues are related to the absence of both the definition of Sukuk and the SPV framework in commercial law. Also, there are weak Islamic financial contracts framework and just a single ownership right concept in civil law. Besides, the non-presence of Sukuk regulation, the need for shariah supervisory in the capital market and tax cumbersome, there are other challenges to overcome.

Malaysian experience in regulating Sukuk has been explored as a point of reference to adopt into Algeria. Malaysia is the pioneering country in issuing Sukuk in the world and its robust legislations and regulations framework. Algeria being a developing country and a new adopter of Islamic finance regulations should choose an advanced model like Malaysia, which remains the leading nation in Sukuk regulation.

There are ways to enhance the Algerian regulatory framework through amendment of the existing laws to find an underpinning legal provision to issue Sukuk. The Algerian regulator must amend the commercial law via adding Article 715(133) to define Sukuk as securities. In addition, adding Article 715(134) clarifies the characteristics and types of Sukuk. The paper has observed that commercial law should be amended to allow the establishment of SPV under the section rules of conduct of various commercial companies of the commercial law or specifying this type of company, SPVs, under special regulation of the securities commission, COSOB. Amending civil law by adding Islamic financial contracts will justify the use of these contracts to structure Sukuk.

The Algerian regulator should have a clear distinction between beneficial and legal rights of the ownership right before proceeding with any Sukuk issuance. This will regulate the possibility to transfer only the beneficial right to investors while the issuer retains the legal right. On the other hand, the Algerian securities commission has the full authority to issue regulations or guidelines as Malaysia does from time to time in order to stipulate the procedures to follow concerning Sukuk.

For Algerian capital market authority, there is a really need to amend the legislative decree No. 93-10 by introducing special shariah governance framework under securities commission, COSOB, and establishing SAC. This SAC will improve the credibility of the Algerian capital market through constituting a legal statutory council. Furthermore, The SAC will work on the application of its rules and views on top of other court views, as it is an authoritative body in the country.

Tax and stamp duty need modification if the Algerian regulator wants to flourish dealing with Sukuk in the capital market. By finding a level playing field between Sukuk and conventional securities especially the removal of the double taxation on Sukuk underlying assets such as VAT will surely encourage the issuance of Sukuk.

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