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LEGAL AND REGULATORY APPROACHES IN ṢUKŪK ISSUANCE: A COMPARATIVE ANALYSIS

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ABSTRACT

The *Ṣukūk* structure seems to be closer to bonds structure. Many jurisdictions have applied bonds rules on *Ṣukūk* to permit its issuance without a specific and adequate legal framework. Proper *Ṣukūk* legal and regulatory frameworks are quite needed to distinguish *Ṣukūk* from bonds. The purpose of this article is to compare the legal and regulatory frameworks of *Ṣukūk* issuance in different countries and to examine the core provisions that allow the direct issuance of *Ṣukūk*. This article is based on a comparative method which analyses the main legal and regulatory approaches that underpinned the issuance of *Ṣukūk* in some countries. The required data is gathered from the relevant laws and regulations of countries like Indonesia, Malaysia and U.K, law books, and articles. The findings of this article reveal that *Ṣukūk* has been regulated under two approaches, namely by enacting a separate law or amending the existing legislations. This study has also highlighted the models to follow in the event there was a need to regulate *Ṣukūk* at the same level as conventional bonds, so as to allow for *Ṣukūk* issuance. It provides a wide range of the best lessons of some jurisdictions that have implemented the regulatory framework of *Ṣukūk* in order to strengthen the local rules for *Ṣukūk* market position.

Keywords: Legal *Ṣukūk*, Regulatory *Ṣukūk*, *Ṣukūk* approach, *Ṣukūk* law.

INTRODUCTION

Ṣukūk has become the most vibrant instrument in the Islamic capital market. According to a recent report on *Ṣukūk*, the IIFM stated that global issuance had amounted to around USD 145.70 billion at the end of 2019 (IIFM, 2020). Such development in *Ṣukūk* issuances have been seen in several jurisdictions with both minority and majority Muslim populations, and sovereign and corporate entities (Tariqullah et al., 2014) which have sought to diversify the fundraisings and offerings of non-conventional instruments (Balibek, 2017). Although structuring the *Ṣukūk* is closer to the bonds process in capital markets, *Ṣukūk* issuance faces various legal issues that needs an underpinning legal framework. Such issues were related to the absence of a *Ṣukūk* definition in the existing legislations, the inadequacy of company laws to allow the creation of Special Purpose Vechicle (SPVs), the non-permit of separating ownership of the assets, the prevalence of weak bankruptcy laws to protect *Ṣukūk* holders, the absence of a Shariah supervisory board and many other regulatory problems (Ahmad, 2016; Al-Ali, 2019; Oseni, 2015; Oseni & Hassan, 2014a). In particular, most discussions on *Ṣukūk* have focused more on the economic and financial benefits in the capital market, but the legal and regulatory frameworks of *Ṣukūk* have been less discussed (Awadzi, 2015). However, interest in the *Ṣukūk* legal and regulatory aspects have increased substantially in the aftermath of the international financial crisis of 2008 (Ahmad, 2016). As a result, the need for adequate legal and regulatory frameworks has underscored the importance of differentiating bonds from *Ṣukūk* in both developed and developing jurisdictions (Balibek, 2017).

The analysis in this paper has been focused on addressing the questions of what were the legal and regulatory aspects of *Ṣukūk* issuance in

Indonesia, Malaysia and U.K. How could these provisions strengthen the legal basis of *Ṣukūk* issuance in these countries?

The objective of the study reported in this paper has been to compare the legal and regulatory frameworks of *Ṣukūk* issuance in some countries i.e. Indonesia, Malaysia and the U.K that had allowed the issuance of *Ṣukūk*. This paper also critically analysed in particular the core legal and regulatory frameworks of country specific successful cases that directly permitted *Ṣukūk* issuance.

The country specific cases discussed in this paper included those from Indonesia, Malaysia and the U.K. The choice of these country specific case studies was obvious considering their pioneering initiatives in the issuance of *Ṣukūk* with outstanding success, i.e. USD 261 billion for Malaysia, USD 70 billion for Indonesia, and USD 364 million for the U.K. (IIFM, 2020), their proactive reforms to attract Islamic finance and *Ṣukūk* in particular (Al-Ali, 2019), and their developed legislations and regulations which had allowed for Islamic finance to be introduced in their respective countries. Thus, demystifying the structure of *Ṣukūk* regulations in these jurisdictions may provide the best practices to learn from for the benefit of other countries which have not yet built their particular *Ṣukūk* regulatory framework (Balibek, 2017). This paper begins with an overview of the Capital market regulatory requirements and how *Ṣukūk* can be regulated. Then, the paper discusses the different approaches of the legal and regulatory frameworks of *Ṣukūk* that have been adopted by Indonesia, Malaysia and the U.K. After that, it compares those adopted approaches by assessing their particular advantages and identifying the disadvantages. This was carried out by examining the regulatory approach adopted and shariah compliance concerns. Finally, it summarises the main findings from these case studies.

LITERATURE REVIEW

Capital Market Regulator Requirement

While public and private entities disclose their interest to join capital markets to get benefits as a source of finance, countries are increasingly interested to establish a resilient regulatory framework of their local capital markets. They must have strong legal and regulatory frameworks related to securities and institutions. Such frameworks served to explain why developed countries had enacted strong capital market provisions focusing more on two-tiers: finding legal structure and supporting capital market institutions (Black, 1999). Therefore, an efficient and effective capital market was the result of a well-developed legislation and strong existing regulatory frameworks (Walker, 2000). Given such a legal foundation, successful operations and issuances in the capital market made it possible for companies to raise funds and offer more securities to the investors. The latter would have offered more legal protections and increased confidence to invest in local or foreign companies listed in that capital market. Besides, policymakers through the capital market regulators could intervene with the necessary legal reform from time to time in order to provide a sound, clear and fair environment to all parties involved in the capital market (Friedman & Grose, 2006). To this end, International Organization of Securities Commissions (IOSCO) presents its objectives and principles of securities regulations that are essential: i) ensure fair and efficient capital markets; ii) ensure investor protections; and iii) attempt to reduce systemic risks (IOSCO, 2008). In addition, IOSCO had discussed the issue of regulating Islamic capital market products in its report of 2004 (IOSCO, 2004).

Islamic Capital Market Regulatory Framework

Many countries have attempted to implement an Islamic capital market in their local markets to facilitate the procedures of Islamic instruments. The IOSCO is among the institutions interested in the Islamic capital market. It issued a special report entitled the Islamic capital market fact-finding to clarify that there was no need for any specific requirements to be added in the existing capital market regulations and to allow Islamic Capital Market (ICM) products to be listed or traded. However, it recommended the establishment of a shariah approval advisory (The Standing Committee for Economic and Commercial Cooperation of the Organization of the Islamic Cooperation (COMCEC,) 2018; The International Shari'ah Research Academy for Islamic Finance (ISRA), 2017). The same legal and regulatory frameworks for conventional products were also applied to ICM products. However, some countries such as Malaysia have introduced a special regulation of ICM as a form of guidelines (ISRA, 2017). Thus, to ensure the successful development of an ICM in such a jurisdiction, it needed enabling legislation through effective laws, rules and procedures (Al-Ali, 2019; Oseni & Hassan, 2014b). These key elements favour the establishment of sound ICM in respect of the well-functioning of capital market institutions that apply different laws and regulations which are binding for all participants in the market. These capital market institutions have a clear process to enact, enforce and change the current laws and rules in the market (ISRA, 2015). Certainly, in doing so, these institutions can facilitate the integration of an ICM segment into the existing capital market in many jurisdictions.

Definition of *Ṣukūk*

As a known instrument of ICM, *Ṣukūk* has many definitions according to the perspective of the various international Islamic financial institutions. The most widely accepted definition was given by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). This institution has issued a Sharīʿah Standard No. 17 entitled investment *Ṣukūk*. It has defined *Ṣukūk* as:

> "*Ṣukūk* certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or (in the ownership of) the assets of particular project or special investment activity, however, this is true after receipt of the value of the *Ṣukūk*, the closing of subscription and the employment of funds received for the purpose for which the *Ṣukūk* were issued." (AAOIFI, 2015, p. 468).

This definition seems to be accepted by many entities and financial institutions around the world. However, *Ṣukūk*, as defined above, clearly differentiates itself from bonds and shares. *Ṣukūk* is similar to shares in the ownership of underlying assets, and sharing of profit and loss. It is comparable to bonds in the debt concept or so called "I Owe You", in that an amount needs to be redeemed at maturity. *Ṣukūk* seems to be a more hybrid financial instrument and stands alone, which is different from bonds or shares.

The Origin of Ṣukūk in Medieval Islam

The word *Ṣukūk* refers to the Arabic word *'Sak'* which is the singular of '*Ṣukūk*'. *Ṣukūk*'s origin goes back to the 1st *hijry* century of Islam.

It was a written paper used to give food to military troops during the *Umayyad Caliphate* in the period of the *Caliphate Marwan Ibn Al-Hakam*. People used to sell and buy without transferring food, which had become a forbidden transaction. *Ṣukūk*, at that time, was merely a form of certificate that would allow for the transfer of an amount of food, contrary to its contemporary meaning of one's right over tangible or intangible assets (ISRA, 2017).

Legal and Regulatory Frameworks of *Ṣukūk* Issuance

A sound *Ṣukūk* market should follow a strong regulatory framework and there existed a sound shariah supervisory council under the auspices of governmental institutions (Kusuma & Silva, 2014; Wedderburn-Day, 2010). At its inception, *Ṣukūk* has been seen as similar to bonds from the view of the market practitioners, and this has led to it being treated as a securitisation of the assets process. Although *Ṣukūk* complies with shariah rules, it is still classified as under the same regulations for conventional instruments. Under these circumstances, some rules can be applied to *Ṣukūk*, while others should have proper modifications to provide the appropriate understanding (Ahmad, 2016). Therefore, the same legal and regulatory frameworks of bonds in the capital market have been applied to *Ṣukūk* (ISRA, 2017; Kusuma & Silva, 2014). Many developed and developing jurisdictions have enacted legislations and regulations to introduce *Ṣukūk* in their countries to protect investors on *Ṣukūk* with better clarifications (Al-Ali, 2019).

Legal Ṣukūk Framework

Generally, it comes from a governmental body related directly to securities, or from enactment by a group of people under a statutory institution such as the parliament. The legislation of *Ṣukūk* is seen as an official enactment of the special law of *Ṣukūk*, or an amendment of the existing laws in the parliament. *Ṣukūk* legal framework can be defined as the clarification of powers and responsibilities of the entities entrusted with raising funds (Balibek, 2017), within the context of clear and unambiguous rules (Kamil, 2014).

Regulatory Ṣukūk Framework

Such a regulatory framework entailed the involvement of a specific government body as a regulatory authority to construe the existing laws and make special rules, guidelines, and directions to be followed by the industry practitioners (Oseni & Hassan, 2014b). Generally, it comes with an extensive scope and all-encompassing details to enforce the legislation on the issuance, listing, trading, and redemption of *Ṣukūk* (Oseni & Hassan, 2014b).

Regulatory Approach of Ṣukūk

Many jurisdictions have taken steps for the ICM to incorporate a legal or regulatory framework of *Ṣukūk*, especially in the aftermath of the global financial crisis of 2008 (Oseni & Hassan, 2014b). This framework not only catered to the development and sustainability of broad rules, but also governed and regulated *Ṣukūk* without ambiguous procedures from its issuance until redemption. The purpose of having a legal or regulatory *Ṣukūk* framework has been to establish a level playing field vis-à-vis the conventional financial instruments for all participants in the capital market (Kamil, 2014). Indeed, the absence of such a framework might defeat its purpose, and would have impeded its well-functioning and growth in the market (Ahmad, 2016). Therefore, the effort of regulators has been increasingly focused on the identification of an adequate legal or regulatory framework that could help to achieve the objectives and reduce the issues concerning *Ṣukūk* (Al-Ali, 2019). In fact, there was a two-tier approach to regulate *Ṣukūk* in ICM: (a) issue separate *Ṣukūk* laws (Alsheyab, 2014) or (b) enact an amendment in the existing laws (Oseni & Hassan, 2014a). While many jurisdictions have expressed their interest in enacting a new and separate *Ṣukūk* law, others have opted for an amendment in their current legal framework or use the existing securitization structure legislation without creating a novel regulation (Al Elsheikh & Tanega, 2011; COMCEC, 2018). Consequently, choosing a statutory way via parliament has been practised in several countries according to their local market conditions, or have selected a mixed approach where conventional regulations were adapted just to get the legal leeway to issue *Ṣukūk* (Al-Ali, 2019).

Shariah Supervisory

Another pillar in the regulatory framework is shariah compliance. A few regulations stipulate the setting up of the shariah supervisory under the authority of the governmental financial body, or included within the capital securities law or other regulations. However, despite its importance in supervising Islamic financial instruments, other jurisdictions have neglected the role of the shariah supervisory in monitoring and ensuring the shariah compliance of these instruments such as *Ṣukūk*. The existence of a shariah supervisory board would provide more assurance and confidence to invest in *Ṣukūk* which was compliant with Shariah principles (Ariff et al., 2012; Balibek, 2017). Furthermore, the shariah committee of *Ṣukūk* has been highly recommended by the highest financial authority to provide a sound regulatory and adequate monitoring framework, from the stage of structuring and throughout the life of *Ṣukūk* and until its redemption (ISRA, 2017). The presence of the shariah committee has enhanced investors' confidence in *Ṣukūk* structure issuances. Also, *Ṣukūk* was subjected to shariah rules with fully backed real tangible assets, therefore the *Ṣukūk* holders would know that they were dealing with real assets, not with the face value of papers (Wilson, 2008). Besides, the shariah committee has the authority to establish a sound administration for the *Ṣukūk* market and constantly monitor shariah compliance (Kamil, 2014).

METHODOLOGY

The study is a qualitative research and is aimed at finding out the main legal approaches to implement *Ṣukūk* in some notable countries. The comparative method was the central strategy used in this research to critically discuss Indonesia's, Malaysia's, and the U.K's legal and regulatory approaches adopted to implement *Ṣukūk* in their respective local capital markets. Each of these countries approach has provided the basis to compare and contrast its respective domestic legal system with one another. The rationale behind the selection of these particular jurisdictions was their pioneering initiatives in the issuance of *Ṣukūk*, their proactive reforms to attract Islamic finance through developing adequate legislations and regulations in particular *Ṣukūk* (Al-Ali, 2019). To analyse and assess these cases, data collection was carried out through a document review of the available sources. Data sources consisted of primary sources. For instance, the relevant laws and regulations of the three jurisdictions were studied in this paper. The secondary sources comprised guidelines, rules that governed *Ṣukūk* issuance in the respective jurisdictions, journal articles, law books, websites and others.

ANALYSIS OF LEGAL AND REGULATORY APPROACHES IN ISSUING *ṢUKŪK* IN SELECTED JURISDICTIONS

Many countries attempt to implement a good *Ṣukūk* regulatory framework. This framework needs the preparation of strong laws, appropriate mandate to issue sukuk, clear property right rules between the originator and the investors, understandable Islamic contracts, and strong shariah supervisory rules (Kamil, 2014). All of these and other elements should be underpinned by adequate legal and regulatory frameworks suitable for each jurisdiction to introduce *Ṣukūk*. Indonesia, Malaysia and United Kingdom are pioneering countries in introducing new provisions that allow the issuance of *Ṣukūk*. Indonesia and Malaysia have strong needs to uphold the government budget by diversifying their sources of funds to support the government projects in building infrastructures. Another reason is the raise of using *Ṣukūk* worldwide as acceptance financial paper instead of using bonds which is not quite appreciated in such Muslim countries. However, U.K. as an international financial centre wants to attract more international investors especially from the Middle East and South East Asia.

Comparative Analysis of Legal and Regulatory aspects of *Ṣukūk* Issuance in Indonesia, Malaysia, and United Kingdom

Many jurisdictions prefer to issue separate *Ṣukūk* while others prefer the amendment of its existing laws gradually. The reasons behind this are to facilitate the procedure and encourage the issuance of *Ṣukūk* on large scale. Countries like Indonesia, Malaysia and U.K. illustrate an example of those jurisdictions which choose to undergo a legal basis that allows *Ṣukūk* issuance.

Indonesia

At its inception in Indonesia, *Ṣukūk* was regulated based on conventional finance legislations. Capital market law No. 8 of 1995 was applicable on Islamic capital market instruments (Reza, 2007). Bank Indonesia Regulation No. 5/4/PBI/2003 of 2003 was on Issuance, Sales and Purchases, and the Administration of State Debt Instruments was the main regulation covering sovereign debt instruments. The enactment of sovereign *Ṣukūk* law No. 19 of 2008 has officially authorised the Government of Indonesia to issue sovereign *Ṣukūk*. Corporate *Ṣukūk* regulation was delayed until 2015 when the Indonesian capital market authority issued the Regulation on Corporate *Ṣukūk* Issuance and Requirements No. 18/POJK.04/2015 on 10 November 2015 (Kaffah & Wirdyaningsih, 2019).

Financial Regulatory and Supervisory Institutions

Before 2014, Indonesia was governed by two main regulatory and supervisory institutions, which were the Bank of Indonesia and the Indonesian Capital Market Supervisory Agency (BAPEPAM). By-Law No. 21 of 2011, an independent entity named the Financial Services Authority of Indonesia (Otoritas Jasa Keuangan) (OJK) has been created as the main and sole financial institution mandated to carry out this role (State Gazette of the Republic of Indonesia, 2011). This financial entity took over the functions of BAPEPAM and the Bank of Indonesia starting from 31 December 2012 and 31 December 2013 respectively (ISRA, 2015). The role of the OJK is to regulate and supervise the financial and banking sectors.

Ṣukūk Legislation and Regulation in Indonesia

In 2002, the first *Ṣukūk* issuance was made by a corporate entity based on the existing regulatory framework of BAPEPAM-LK and the *fatwa* authority came from the National Shariah Board on Islamic Muḍārabah bonds (ISRA, 2015). Continuing the issuance of *Ṣukūk* in Indonesian capital market with the same rule for conventional securities, the capital market authority promulgated Regulation No. IX.K.1 related to Asset Backed Securities the so-called Collective Investment Contracts to regulate asset securitisation (ISRA, 2015). Up to 2015, the OJK had issued the primary regulation relevant to corporate *Ṣukūk* No. 18/POJK.04/2015 under the name of the *Ṣukūk* Issuance and Requirements (Retno Muljosantoso, Nur Eka Pradata, & Cameron Grant, 2018), This regulation was amended by OJK Regulation 3/POJK.04/2018, which was enacted on 26 March 2018 (Kaffah & Wirdyaningsih, 2019). Before that, on the issue of sovereign sukuk, another effective step to implement a strong regulatory framework of *Ṣukūk* in Indonesia was the enactment of the sovereign *Ṣukūk* law. The house of representatives, that is the parliament, enacted the Law on Sovereign Shariah Securities (Surat Berharga Syariah Negara) (SBSN) which known as the Sovereign

Ṣukūk Law No. 19-2008 on 7 May 2008 (State Gazette of the Republic of Indonesia, 2008). It was amended by Government Regulation 73 of 2012. This legislation of *Ṣukūk* Law has allowed the Government of Indonesia (GoI) to issue many types of *Ṣukūk* based on different contracts such as the Ijārah, Muḍārabah, Mushārakah, Istiṣnāʿ, or any other contracts (State Gazette of the Republic of Indonesia, 2008). Indeed, this law had permitted GoI for the first time to set out on its journey of raising funds through the *Ṣukūk* Al-Ijārah structure (IIFM, 2016). Thus, the purpose of this law is to open up a new funding source for the government's budget and to finance its construction projects (State Gazette of the Republic of Indonesia, 2008).

The sovereign *Ṣukūk* Law No. 19-2008 provided several solutions for the government. Before the enactment of the law, there was a legal impediment to issuing sovereign *Ṣukūk*. This stand-alone Law not only provided a legal basis and gave the mandate to the GoI for *Ṣukūk* issuance, but also created a government SPV that acted as the trustee. The government SPV used state assets for the purpose of *Ṣukūk* issuance and its redemption, as well as guiding the management of Ṣukūk directly under the Minister of Finance. In addition, the law also discussed accountability and transparency in the issuance of *Ṣukūk* (Balibek, 2017). In contrast, the private corporations were under regulation 18/POJK.04/2015 on *Ṣukūk* Issuance and Requirements issued by the OJK and which was legislated on 10 November 2015. Before the enactment of this regulation, they were still subject to Law No. 8 of 1995 of the Indonesia capital market. They followed the regulations of the OJK as there was a total absence of a separate *Ṣukūk* law for corporate entities.

Previously, the establishment of the OJK and the BAPEPAM had regulated Islamic securities in several legislative packages. In November 2006, it issued rule No. IX.A.13 and rule No. IX.A.14 related to Islamic Securities, and the covenants used in the issuance of Islamic securities in the capital market. In order to clarify how to list shariah securities in the capital market, another rule was issued under rule No. II.K.1 in August 2007 (ISRA, 2015). In addition, the Sovereign *Ṣukūk* Law No. 19-2008 has included special provisions related to the SPV. Although Indonesia follows civil law, the *Ṣukūk* law has enabled the government to issue *Ṣukūk* through an SPV company, which was generally created under the concept of the common law

(Suwadi, 2016). The purpose of such a company is that the propriety can be divided into beneficial and legal ownership. The separation of legal and beneficial ownership on the State-owned assets, and the ability to issue sovereign *Ṣukūk* is authorised as cited in Article 11 of the above Law (State Gazette of the Republic of Indonesia, 2008). The beneficial right of land and/or building is allowed to be transferred by selling or leasing from the government to the SPV while the legal title will be retained by the GoI (Balibek, 2017). Therefore, it transfers the usufruct of the underlying assets to *Ṣukūk* holders and remains the legal title under the possession of the government (Suwadi, 2016).

Malaysia

In recent years, Malaysia has developed a strong and sophisticated regulatory finance regime. The Malaysian regulatory approach consists of setting up the legal and regulatory frameworks underpinning any new business at inception, (Alhabshi, 2013). This approach prefers to allow both financial systems, Islamic and conventional, to work together within a single regulatory institution (COMCEC, 2018). Malaysia started regulating securities by enacting the Securities Industries Act 1973, which was only repealed with the new Securities Industries Act of 1983. After that, in 1993, the Securities Commission Act 1993 was established to maintain, secure and facilitate the development of Malaysian securities markets (ISRA, 2015). Malaysia has improved its robust and mature regulatory framewotk for conventional and Islamic finance for nearly 40 years.

Financial Regulatory and Supervisory Institutions

The Malaysian financial regulatory system includes two main separate schemes: The Labuan regulatory scheme and another one for mainland Malaysia. The former is an offshore financial centre with an independent regulatory authority, the Labuan Offshore Financial Authority, which was established as a separate capital market regulator from the Bank Negara Malaysia (BNM), Securities Commission Malaysia (SCM) (Al-Ali, 2019; ISRA, 2015). Besides, in each of the respective regulatory scheme, the Labuan offshore centre and the SCM in mainland Malaysia, each has its own exclusive rules, laws, and regulations to govern both Islamic and conventional products (Al-Ali, 2019).

Ṣukūk Legislation and Regulation in Malaysia

For over 30 years Malaysia has developed a sound and robust legislation and regulatory framework, applicable either onshore or offshore, which was related to the issuance of *Ṣukūk* (Oseni & Hassan, 2014a). In mainland Malaysia, the SCM and Bursa Malaysia do not only govern the Malaysian debt securities and *Ṣukūk* market, and issue regulations and rules, but also enforce their rules and regulations over the listed companies, as based on the clauses of the Capital Market Services Act 2007 (CMSA) (Asian Development Bank, 2016). Therefore, the Malaysian regulatory structure contains the main legislations that govern *Ṣukūk* issuance, such as the Capital Market Services Act 2007 (CMSA) (amendment 2012); the Securities Commission Act 1993 (amendment 2015); the Securities Industry Central Depository Act 1991 (SICD); and the Companies Act 1965 (CA)(Al-Ali, 2019). In other words, more specifically, the main legislation related to *Ṣukūk* issuance is the CMSA 2007. The CMSA was introduced in 2007 to establish Malaysia as a robust capital market in South East Asia. However, the CMSA was enacted, especially to gather the two branches, namely the conventional capital market and Islamic capital market within the same legislation. The Malaysian regulatory approach was built on a two-tier approach. The first-tier regulation is subject to general regulatory requirements which are related to licensing, governance and disclosure. These requirements must comply with both conventional bond and *Ṣukūk* issuers. The second-tier regulation is related to ICM products, specifically Islamic securities such as the *Ṣukūk*. In addition, *Ṣukūk* issuers must comply with specific shariah requirements, such as authorisation from a shariah committee or adviser, and disclosure structures on the use of proceeds, and specific reporting requirements (ISRA, 2017). The regulation of *Ṣukūk* in Malaysia requires the pre-approval of the SCM, which is in accordance with subsection 212(2) of the CMSA (Capital Market and Services Act, 2007). Otherwise, the *Ṣukūk* issuer will be exempted upon getting this approval from the SCM under the condition of subsection 213(1) of the CMSA or subsection 2(1) of the 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 the CMSA (Capital Market and Services Act, 2007).

Following section 377 of the CMSA, the SCM has the authority to regulate ICM products through the issuance of *Ṣukūk* guidelines (Asian Development Bank, 2016). Besides, subsection 316(3) specifies the main contents of the guideline related to Islamic securities, such as the *Ṣukūk* (Capital Market and Services Act, 2007). Guidelines on *Ṣukūk* set out the main terms and conditions related to the issue of offer for buying or sale of *Ṣukūk*, which needs approval from the SCM (ISRA, 2015). Besides, the guidelines on *Ṣukūk*, the SCM issues guidelines on trust deeds under section 258 of the CMSA (Capital Market and Services Act, 2007). A guideline trust deed requires every issuer of *Ṣukūk* to enter into a trust deed, appoint a trustee, and comply with the provisions of a trust deed under division 4 of Part VI (Hassan, Yaman, Othman, & Yusoff, 2012). Otherwise, *Ṣukūk* issuance will be exempted following schedule 8 of the CMSA (Al-Ali, 2019).

Another guideline that *Ṣukūk* must be subject to is the Prospectus Guideline. The current provisions set out the definition of a prospectus under section 226, Division 3 of Part VI of the CMSA (Capital Market and Services Act, 2007). The SCM has issued a special guideline based on section 226 and subsection 235(1) (a) to (e) of the CMSA to specify the required information to be included in the prospectus of *Ṣukūk* (ISRA, 2015). The prospectus guidelines discuss the instrumental tool required to disclose more information and regulations about the proposed issuance or *Ṣukūk* offering which is set out in Division 2 of Part 1 (Malaysian Prospectus guidelines, 2012). A further guideline is the Registration of Shariah Advisers Guidelines (RSA). *Ṣukūk* guidelines stipulate the requirement that there must be a shariah adviser under Chapter 2, section C (Guidelines on Unlisted Capital Market Products Under the Lodge and Launch Framework, 2015). RSA guidelines set out the characteristics of the shariah adviser to fulfil the requirements of registration, renewal or deregistration, whether the adviser is an individual, a corporation, or a foreign shariah adviser (Registration of Shariah Advisers Guidelines, 2009).

United Kingdom

The U.K. has been for a long time not only an international financial centre for conventional finance, but also among the few western countries that allow the establishment of Islamic finance services.

This harkens back to the 1980s when the government promoted Islamic finance through clear legal and regulatory steps (John & Munib, 2018). In the matter of legislations, the National Loans Act of 1968 arranges the government debt management (Balibek, 2017) while the Financial Services and Markets Act 2000 (FSMA) is the main Act on securities (Alcock, 2000).

Financial Regulatory and Supervisory Institutions

The principal financial authorities in the U.K. are divided into two main types, which are the Financial Conduct Regulatory (FCA) and the Prudential Authority (PRA). Thus, the Islamic financial institutions implemented in the U.K. are subjected to these two authorities. Basically, the FCA has the role to supervise and license all the financial institutions including Islamic banks, the PRA has the responsibility to regulate the prudential risks of banks (John & Munib, 2018). Other institutions can regulate in restricted or unrestricted manners, such as the Bank of England, the government represented by Her Majesty (HM) Treasury, and the London Stock Exchange , the latter has been one of the most viable, attracting listing of the *Ṣukūk* in western regions of Europe (Deloitte, nd).

Ṣukūk Legislation and Regulation in the U.K.

The UK's approach in implementing Islamic financial instruments and the *Ṣukūk* is specifically based on adapting the current legislation and regulations rather than coming up with a separate legislation of such instruments. Following that, several initiatives have been conducted to ensure a level playing field between Islamic financial products and conventional debt products (John & Munib, 2018). In the early 2000s, the U.K. regulator had a challenge of classifying the *Ṣukūk* under the current regulations due to specific legal structures and risk characteristics (HM TREASURY, 2008). *Ṣukūk*, at that time, had been construed as a Collective Investment Scheme (CIS) which was introduced within the Financial Services and Markets Act (FSMA 2000). If *Ṣukūk* was issued under the CIS, it might be subjected to burden control and authorisation. This situation would not be competitive for those using *Ṣukūk* compared to conventional debt securities (Her Majesty's Treasury, 2008). To this end, since 2003, the U.K. authorities have attempted to find an adequate level playing field for Islamic financial instruments. The initiatives focused more on how to propose and how to introduce underpinning tax regimes that can promote *Ṣukūk* instruments (Her Majesty's Treasury, 2008). These initiatives were construed in the Financial Act of 2003. For instance, by removing a Stamp And Duty Land Tax on certain Islamic financial products (ISRA, 2017). In 2005, another step to improve the effectiveness of the UK approach, the financial Act of 2005 classified Islamic financial instrument under the name of 'Alternative Finance Arrangements'(AFA) (Tariqullah et al., 2014) which was directed at Islamic banking and finance. The benefit of this legislation was the treatment of 'profit' similarly as 'interest'. The Financial Act 2005 was expanded to treat *Ṣukūk* as mentioned in the Financial Act of 2007 under section 53 of the so-called 'Alternative Finance Investment Bonds' (AFIB). Thus, through the enactment of this act, the same tax rules must be imposed on both *Ṣukūk* and bonds. In addition, the income of *Ṣukūk* would be construed as interest payments. Prior to this act, *Ṣukūk* profit was considered as business expenses, which meant paying taxes as a result of increasing the cost of issuance (Tariqullah et al., 2014). In February 2010, the AFIB, after consequential amendments, decisively removed any barriers or ambiguity on the regulation of AFIBs and confirmed that *Ṣukūk* must be regulated at the same level as conventional bonds (ISRA, 2015). The AFIB 2010 amendment had modified the Financial Services and Markets Act 2000 (regulated activities) Order 2010 to confirm that AFIBs should be classified under 'Specified Investments'. Also, AFIB 2010 amended the CIS Order 2001 for the purpose of excluding any forms of AFIBs from the definition of CIS and gave a new definition of AFIBs under Section 77A (Financial Services Authority, 2010). Therefore, the preparation for the legislation of sovereign *Ṣukūk* in the UK had started earlier than 2008. The enactment of the 'Alternative Finance Arrangement' in the Financial Act of 2008 under section 157, schedule 46 had authorised HM Treasury by including provisions by regulations to borrow money (HM TREASURY, 2014). After that, in 2014, the UK government promulgated the "Government Alternative Finance Arrangement Regulations" known as GAFAR (Balibek, 2017). This statutory instrument referred to as the 2014 No. 1327 had officially allowed the UK government through HM Treasury to raise money using Alternative Finance Arrangement (The Government Alternative Finance Arrangements Regulations, 2014). As a result, this legislation had permitted the UK government to issue the first sovereign *Ṣukūk* in western countries. However, corporate sukuk issuances are still without any specific regulations or rules.

Table 1 illustrates the legal and regulatory approaches for Ṣukūk issuance, with particular reference to the vibrant jurisdictions selected in the present study, which are Indonesia, Malaysia, and the United Kingdom.

Table 1

Legal and Regulatory Approaches on Ṣukūk Issuance in Indonesia, Malaysia, and the United Kingdom

	Indonesia	Malaysia	UK
Legislations and Regulations	-Regulation No. IX.K.1 related to Asset Backed Securities for corporate issuances - Rule No. IX.A.13 and rule No. IX.A.14 related to Islamic Securities -Sovereign Ṣukūk Law No. 19-2008 -Government Regulation 56 of 2008 on Sovereign Ṣukūk Issuing Companies (Regulation 56) -OJK Regulation 18/POJK.04/2015 on Ṣukūk Issuance and Requirements.	-Capital Market Services Act 2007 (CMSA). - Ṣukūk guidelines LOLA 2015. - Guidelines on trust deeds 2011. - Prospectus Guidelines; - Registration of Shariah Advisers Guidelines (RSA) 2009	-Financial Conduct Regulatory (FCA) - Financial Services and Markets Act (FSMA 2000). - Financial act of 2007 section 53 so-called 'Alternative Finance Investment Bonds' (AFIB). - AFIB 2010 (consequential amendments) amended FSMA 2000 Order 2010; - AFIB 2010 amended CIS Order 2001 under Section 77A. - Financial act of 2008 section 157, schedule 46; -Government Alternative Finance Arrangement Regulations" known as GAFAR, statutory instruments of 2014 No. 1327

(continued)

	Indonesia	Malaysia	UK
Regulatory body	OJK	Securities Commission Malaysia (SCM)	FSA
1st Issuance of Ṣukūk: Sovereign/ Corporate	Sovereign	Corporate	Sovereign
Presence of Shariah Supervisory	*Ulema* Council of Indonesia (*Majelis Ulama* Indonesia/DSN-MUI) separate from the law	Shariah Advisory Council (SAC) for SCM. Enacted within the legislation	None presence of shariah supervisory
Ṣukūk Law Approach	Separate Ṣukūk law for only sovereign issuance, and OJK regulation for corporate issuance	Embedded within the existing legislations	Amendment of the current regulations to allow government and corporations to issue Ṣukūk
Observation	Ṣukūk law 19 of 2008 is particular to sovereign issuance while corporate issuances are excluded from it and subject to OJK regulations.	CMSA 2007 regulates corporate Ṣukūk issuance and set out the main terms and conditions related to the issue of, offer for buying or sale of Ṣukūk.	AFIB 2010 facilitates the regulatory framework of corporate Ṣukūk issuance within the conventional sphere while GAFAR is more concerning government issuance.

Note. As compiled from the comparison carried out by the authors.

CRITICAL ANALYSIS OF LEGAL AND REGULATORY *ṢUKŪK* APPROACHES IN INDONESIA, MALAYSIA AND UNITED KINGDOM

The purpose of this article is to compare the legal and regulatory frameworks of *Ṣukūk* issuance in different countries, and to also examine the core provisions that directly allow the issuance of *Ṣukūk*. The efficient regulation of *Ṣukūk* in the chosen jurisdictions indicated above, will provide important insights into the degree of permissibility to introduce *Ṣukūk* into a local market (Al-Ali, 2019). All of these countries stated in the present study have taken the initiative to promulgate new legal reforms that strengthen their ability to issue *Ṣukūk* in the same level playing field with conventional instruments. From the findings of such a comparative study on the legal and regulatory framework of *Ṣukūk* issuing in Indonesia, Malaysia and U.K, it can be concluded that the existing laws in each country are more or less effective in their respective countries. This is due to the various country-specific issues and obstacles facing these jurisdictions when implementing *Ṣukūk*.

Issues and Obstacles Facing *Ṣukūk* Issuance in Indonesia, Malaysia and United Kingdom

Indonesia, since its inception, has lacked the establishment of an adequate legal framework concerning *Ṣukūk* issuances. The fundamental obstacle was the unclear underpinning *Ṣukūk* regulations (Zein, 2018) which was the direct result, in particular, of the various shortcomings in the Indonesian legal system. The legal issues were found to be the main hindrance. They included, for the government, as well as private corporations, the difficulty of assigning and transferring asset ownership to other parties. Also, there was the lack of legal protection for holders of the underlying asset, in case of default or bankruptcy of the issuers or the originators (Retno Muljosantoso et al., 2018; Reza, 2007). Another issue is with regard to asset securitisation. The capital market authority, the Badan Pengawas Pasar Modal (BAPEPAM) before 2011, had issued rule No. IX.K.1 to regulate Asset Backed Securitisation. However, this regulation had some drawbacks concerning Islamic asset securitisation, as this was used as a legal basis to issue *Ṣukūk* especially on the matter of securitisation of only debts (Reza, 2007).

Besides**,** the leasing law issued under the Presidential Decree No.61 in 1988 had become an additional issue. The problem here was related to Civil Law Article 1533 which described only debt securities. However, lease payment and lease assets were not clearly explained. Moreover, the Decree of the Minister of Finance No. Kep.Men.RI.No 1169/KMK.01/1991 on leasing procedures contained some conditions which contradicted shariah principles (Reza, 2007).

The non-recognition of Indonesian legislation of *Ṣukūk,* as an instrument different from conventional bonds created another problem for corporate issuers. Before 2008, Sharia bonds under Indonesian law was considered as debt instruments. This classification contradicted the shariah principles of *Ṣukūk*.

Therefore, unclear regulations on *Ṣukūk* has had a negative impact on the spread of the issuance of this instrument among Indonesian issuers and investors.

Despite the fact that the U.K. is a pioneer European country in the listing of the *Ṣukūk* in its London Stock Exchange (LSE), its experience in allowing *Ṣukūk* transaction had faced some drawbacks. The U.K. government believed in preparing a legal basis to issue sovereign *Ṣukūk*, as well as to exempt it from tax as the first tasks to develop this market (Her Majesty's Treasury, 2008). The variety of underlying legal *Ṣukūk* structures had caused complications to U.K regulators, for example, the difficulty to classify them under the appropriate regulatory framework (Her Majesty's Treasury, 2008). In particular, the legal hurdle was that *Ṣukūk* seemed to be regulated under the definition of a CIS in accordance with section 235 of the FSMA 2000, or as conventional bonds. If *Ṣukūk* were treated in the same way as a CIS, it would become a potential trap for Ṣukūk issuers and create a high regulatory burden as compared to conventional securities issuers. Besides, it would be mean more controls and might require authorisations from the market authority (Chance, 2010).

The issue raised here was either treating *Ṣukūk* as units in an unregulated CIS, or as units in a CIS. The former made access merely to the UK professional investors, while the latter where the assets were situated in the UK, *Ṣukūk* issuers would be treated as trustees. Therefore, *Ṣukūk* needed the approval of FSA authorisation before any attempt to issue them so as to avoid the breaching of FSMA's rules on operating a CIS (Chance, 2010). Such regulatory authorisation and other tax burdens generally put *Ṣukūk* and *Ṣukūk* issuers in a less attractive position, as compared to issuers of conventional debt securities in UK.

The Malaysian government made the country the pioneer jurisdiction to enact rules for Islamic bonds since the issuance of the Government Investment Certificate (GIC), now known as the Government Investment Issue (GII) since 1983. The concept of the GII was based on *qardh Hassan*, considered a benevolent loan, which was not tradable (Jalil, 2008). This issue led the regulator to avail itself the use of *Bai' al-'Inah* as an underlying contract that allowed tradability in the secondary market (Malaysia, 2002). This concept of *Bai' al-'Inah* was implemented in the 1990s and 2000s to structure Islamic Paper Debt

Securities (IPDS). The main challenge of these research was related to the differences of views between Islamic bankers and shariah scholars, especially in the international level where transactions based on the *Bai' al-'Inah*, which was forbidden in the Middle East. In addition, all IPDS were subjected to conventional regulations, and some special guidelines and rules. The same conventional regulations were applied to Islamic securities in the matter of disclosure and listing requirements, shareholder protections, company legislation (Vivien, 2017), which led to the thinking about the efficient legislation that framed the IPDS.

In general, the Indonesian approach consisted of allowing the issuance of *Ṣukūk* without clear rules, but it required applying the conventional bonds regulations on *Ṣukūk* issuance. Similarly, in Malaysia, the approach was to encourage the use of the IPDS without enacting legislation. The Malaysian experience focused on the conditions of using conventional securities regulations to issue the IPDS. However, the UK government's approach was to avoid any unregulated procedures of the *Ṣukūk* under FSMA 2000 provisions when launching this instrument in the UK capital market.

Mandate to Issue New Securities

Many jurisdictions prefer providing clear provisions to allow *Ṣukūk* issuance. The mandate to issue *Ṣukūk* in Indonesia was provided under the enactment of law No. 19 of 2008 on sovereign *Ṣukūk*. Article 5/1 stated in Article 4 , the provision that the government of Indonesia (GoI) has the total power to issue 'Sovereign Shariah Securities' as the main instrument of financing the state budget, especially infrastructure projects (State Gazette of the Republic of Indonesia, 2008). However, the corporate issuance mandate was not authorised until 2015 under OJK regulation No. 18/POJK.04/2015. In the UK, the Alternative Finance Arrangement has mandated HM Treasury, under the power of section 157 and schedule 46 of the Finance Act 2008 to raise money. Regulations 3 and 6 of GAFAR 2014 permitted the relevant government institutions to use the available arranged instruments. In Malaysia, the CMSA 2007 section 316 clearly allows for the issuance of Islamic securities, including the *Ṣukūk* (Capital Market & Services Act, 2007), but with the intervention of the SCM in issuing guidelines.

It can be observed that the Indonesian approach was focused at inception, on the preparation of the necessary mandate to allow sovereign issuance without putting in enough effort to develop corporate *Ṣukūk* issuance regulation until 2015. In the case of Malaysia, sovereign issuance was authorised through Bank Negara Malaysia (BNM), while corporate issuance had clearly been mandated under CMSA 2007. This Act provides total authority to the SCM to issue rules, practical notes and guidelines in relation to the *Ṣukūk*, especially ABS guidelines 2004 and *Ṣukūk* guidelines 2011, which was improved on in 2012, 2014 and 2015 (Halim & Markom, 2018; Vivien, 2017), as well as trust deed guidelines and prospectus guidelines. The UK has allowed corporate issuance through the rules of FSMA 2000. On the other hand, sovereign *Ṣukūk* took a long process to be approved under a separate legislation of GAFAR 2014.

Access to Assets

Access to assets in Indonesia has been mandated within article 10 of *Ṣukūk* law No.19. State Assets Property included lands, buildings and other assets and might be the basis of issuing sovereign *Ṣukūk* (State Gazette of the Republic of Indonesia, 2008). Using the UK's land as assets as collaterals is the basis to issue sovereign lease *Ṣukūk* (The Government Alternative Finance Arrangements Regulations, 2014). In Malaysia, the ABS guidelines did not specify the types of assets and the procedures to follow in through true sale among the parties for corporate issuers. Improvements had been introduced further in the guidelines of 2012, 2014 and 2015 (Halim & Markom, 2018).

Ownership of the Underlying Assets

The transfer of assets was forbidden in Indonesia before 2008, *Ṣukūk* law in article 11 states in a clear manner that the GoI could sell or lease only to the benefit right of state assets (State Gazette of the Republic of Indonesia, 2008). However, both the UK and Malaysian legislations are common law and they do not need to regulate provisions that allow the splitting of the assets ownership. Indeed, the company law or trust law in each country officially permits the transfer of only the beneficial ownership.

Creation of the SPV

In these countries, all of them are issuers of conventional bonds and have experience in dealing with SPVs. By establishing separate SPV entities, it ensures the legal independence of these SPVs with the assets transferred to them. Indonesia had used the Collective Investment Contract (CIC) on asset backed securitisation to mimic a trust SPV. However, whether this CIC was more effective to play the role of the SPV in issuing corporate *Ṣukūk* was the matter of possessing a separate legal personality and power to conclude contracts as well as existing of the real bankruptcy remoteness from the originator (Reza, 2007). Sovereign *Ṣukūk* law has allowed the creation of a separate sovereign SPV that is involved only in sovereign *Ṣukūk* issuance (State Gazette of the Republic of Indonesia, 2008). The government regulation 56 of 2008 on sovereign *Ṣukūk* issuing companies, has provided an essential clause to manage this entity as *Ṣukūk* issuers and trustees (Retno Muljosantoso et al., 2018).

The UK prefers to enact clear provisions on the creation of the SPV that has been formed under (i) the Companies Acts, (ii) relate to HM Treasury or (iii) independent from the treasury as stipulated in GAFAR (The Government Alternative Finance Arrangements Regulations, 2014). The SPV under the Malaysian legal framework follows the requirement of section 258 of CMSA 2007, and must comply with the provision of Division 4 of Part VI of the CMSA (Capital Market and Services Act, 2007). Exemptions are allowed, as set out in Schedule 8 of the CMSA for those entities which do not need the SPV, or the entities possess AAA credit rating (Hassan et al., 2012).

Tax Barriers

In the UK, corporate tax, income tax and capital gains tax presented main issues in the issuance of the *Ṣukūk*. Also, assets transfer from government to the SPV raised other issues related especially to Stamp Duty Land Tax, Stamp Duty Reserve Tax and Value Added Tax (Her Majesty's Treasury, 2008). These issues serve to explain the non-competitive nature of the *Ṣukūk* in relation to the conventional bonds. To this end, the UK regulator via the Financial Act of 2007 introduced a special tax framework to deal with *Ṣukūk* issuance. The amendments changed the FA 2005 by adding sections 48(A) and 48(B) which will give more tax exemptions in favour of *Ṣukūk* issuance. Malaysia as the leading country in issuing the *Ṣukūk*, has seen the tax regime being updated several times so as to keep abreast of *Ṣukūk* innovations. The Malaysian approach focuses on issuing various *Ṣukūk* types and at the same time, it has introduced various tax initiatives and incentives to promote *Ṣukūk* issuance (ISRA, 2017). The reason behind this is that debt or equity securities are charged with more taxes, which in turn, will increase the cost of their issuance. The Malaysian tax authorities have exempted *Ṣukūk* as a way to fund raising in the capital market, and also through the amendments and revisions of the three main Tax Acts which included the following: Income Tax Act 1967, Real Property Gains Tax Act 1967 and Stamp Duty Act 1949 (ISRA, 2015).

Comparative Analysis of Shariah Supervisory Roles on *Ṣukūk* Issuance in Indonesia, Malaysia and the United Kingdom

The role of the shariah board is crucial in the issuance of the SBSN in Indonesia. Requiring a *fatwa*, shariah opinion or pronouncement of compliance with Islamic principles is a prerequisite in the issuance of sovereign *Ṣukūk*, as mentioned in Article 25 of the SBSN (State Gazette of the Republic of Indonesia, 2008). The minister of finance must obtain a *fatwa* from the *Ulema* Council of Indonesia (*Majelis Ulama* Indonesia) (MUI), or the Indonesian shariah scholars before any issuance so as to assure investors of the compliance of the *Ṣukūk* with shariah rules (Rakhmat et al., 2015). Also, the MUI had issued many *fatwa* or shariah resolutions as guidance for the government and private corporate players in order to enhance the Islamic financial services industry in Indonesia (ISRA, 2015).

The Malaysian experience in the regulation of the central Shariah Advisory Council (SAC) was a great step forward in harmonizing Islamic financial products. The SAC was created in 1996 by the SCM as a supervisory body for mainland Malaysia (Asian Development Bank, 2016). Enacted by law and appointed by the King, the 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; ISRA, 2015). The SAC has several functions and authorities stated in the CMSA. To illustrate, Section 316(B) empowers the SAC to apply and issue rules based on shariah principles on all products of the ICM; advises the SCM on issues related to ICM transactions, and provides advice on any shariah matter. Section 316 (E) states that any business entity that seeks the advice or refers for a ruling must consult the SAC for shariah compliance; Section 316(F) empowers the SAC to be the reference for any ruling from the court or arbitrator either existing one or refer to it for ruling; Section 316(G) states clearly that any rule made by the SAC shall be binding on persons referred to in Section 316(E) and subject to any other rules made by the court. Based on the above functions, Malaysia has established a strong shariah legislation framework within the ICM, through the creation of the SAC under the SCM (Vivien, 2017). *Ṣukūk* stakeholders have the necessary protection in the ambit of these provisions made by the SAC related to ICM transactions. Furthermore, the rules made by the SAC will prevail over any other rules that come from the court, as these rules provided more certainty to both investors and issuers of *Ṣukūk* (ISRA, 2015).

Although the U.K has allowed many Islamic finance institutions and products to be dealt with in its legal and regulatory frameworks for Islamic finance, it is worth noting that it still lacked shariah supervisory in all official financial authorities. Nonetheless, the English courts will seek the opinion of shariah experts when it is related to Islamic financial products or when any disputes have occurred (Umar A. Oseni & Hassan, 2014a). On the other hand, the UK's FSA supports the international Islamic standards institutions such as the AAOIFI and the IFSB, where none of these standards has been effectively implemented in the U.K.'s financial regulations (Balibek, 2017). Hence, although U.K regulations are conducive enough for Islamic finance, it is still without any shariah supervisory institution that binds legal effects on the *Ṣukūk* or other Islamic financial products.

Assessment of Shariah Compliance

This is to ensure the shariah compliance of *Ṣukūk* which differs from one jurisdiction to another, but it exists in two main groups of countries. The first group where it can be found are two countries, Indonesia and Malaysia. The second group concerns the U.K. The first group consists of the pioneering countries in issuing *Ṣukūk* in the world with clear rules enacted within the principal laws to have the pre-approval of the shariah supervisory board. The second group is the country following the approach of regulating *Ṣukūk* for a level playing field, compared to conventional bonds. In the context of Indonesia and Malaysia, they have specific regulations related to the issue of shariah compliance, i.e., Article 25 of SBSN and Article 316(B) to316 (h) of CMSA. They have specific provisions in their current legislations. The

Indonesian minister of finance requires a *fatwa* from the Indonesian shariah scholar council before the issuance of any *Ṣukūk* as binding conditions. Also, the law 40 of 2007 on Limited Liability Companies stipulates the condition of engaging at least one shariah expert in each shariah business activities for corporate *Ṣukūk* issuances (Retno Muljosantoso et al., 2018). In Malaysia, CMSA 2007 states clearly under article 316 that the SAC is a high authority to regulate *Ṣukūk* in the matter of shariah compliance. Furthermore, it is compulsory to have a shariah adviser for each issuance of *Ṣukūk*, as stated in the Registration of Shariah Advisers Guidelines. The advanced shariah supervisory councils in Indonesia and Malaysia, operating within the developed *Ṣukūk* legislative framework has drawn adequate acceptance and authority to issue *Ṣukūk* and become leaders in this segment of the ICM.

However, in the U.K, as a western European country and with a Muslim minority, it has as a principal step, amended its local legislations and regulations for the purpose of having a level playing field with the conventional bonds. In line with this aim, this jurisdiction does not emphasise the pre-requisite approval of *Ṣukūk* documents from a shariah adviser, nor establish a shariah supervisory board to oversee the *Ṣukūk* issuance. The U.K approach allows the *Ṣukūk* to be contracted and interpreted based on the laws of England and Wales without any approval from a shariah supervisory. Notwithstanding the absence of legal assurance from this jurisdiction of *Ṣukūk* compliance to shariah principles, *Ṣukūk* investors are left on their own to decide on its compliance (Balibek, 2017). This may raise a shariah risk due to the evolving nature of Islamic transactions which need disclaimers of appropriate clauses into contractual documentations of *Ṣukūk* issuance (Her Majesty's Treasury, 2008).

Benefits and Strength of the New Laws and Regulations

The legal and regulatory frameworks of *Ṣukūk* in Indonesia and Malaysia have strengthened the position of *Ṣukūk* as a financial instrument that can be utilised by issuers and investors. Such a legal framework has strong support from the governmental financial institutions as a statutory institution, either through parliament or other institutions by enacting the relevant laws, while the capital market regulations add a clear use of the law enacted. Indonesia's *Ṣukūk* law has clarified many aspects that used to be an obstacle preventing *Ṣukūk* from thriving, such as the creation of the SPV and state assets transfer to fill its gap vis-à-vis the existing laws. Significantly, this had increased the sovereign *Ṣukūk* from 0.4 percent to nearly 15 percent at the end of June 2017 (COMCEC, 2018). On the other hand, corporate *Ṣukūk* regulation has opened the door for private entities to raise funds from the public. In essence, the benefit of the legislation and regulation of *Ṣukūk* in Indonesia has provided a new source of financing for the state budget and has met the requirements of the shariah financial institutions, as well as led to a more active corporate issuance in the capital market.

The legal framework adopted in Malaysia has, since its inception, been promulgating the regulation before any introduction to the business community, and making updates all the time if and when it is necessary. With in-depth terms and conditions, the applicability of *Ṣukūk* in the Malaysian legal framework was considered to be advanced due to the changes and modifications on rules and guidelines necessary to suit the legal requirements (Halim & Markom, 2018). This approach has led to Malaysia becoming a developed country in the legislation and regulation of *Ṣukūk* in the world.

The latter approach, amendment or embedded legislation, had focused primarily on amending and preparing effective legal and regulatory frameworks that would permit sovereign entities to issue *Ṣukūk* (Balibek, 2017). The UK has opted for integrating specific clauses into their local legislation and regulations to enable *Ṣukūk* issuance. This approach has been adopted by developed countries and emerging jurisdictions that newly embraced shariah compliant products (Oseni & Hassan, 2014b). Indeed, the benefits of AFIB's regulations which sought to provide equivalent treatment just as with conventional bonds, clarity of regulations and reduction of legal risk, and not being subjected to the on-going requirement of CIS regulations and to get some cost saving for the benefit of issuers (Chance, 2010; Her Majesty's Treasury, 2008).

CONCLUSION

Ṣukūk legal and regulatory frameworks are gaining increased interests in different jurisdictions which seek to prepare an adequate legal basis that allows its issuance in the capital market. In this comparative study, the aim has been to analyse the main legal and regulatory frameworks of *Ṣukūk* issuance in Indonesia, Malaysia and the U.K. These countries seemed to be advanced jurisdictions in the matter of facilitating Islamic finance instruments. The analyses of the legislation and regulations of these countries have uncovered different frameworks and approaches that have enabled the issuance of *Ṣukūk*. It has revealed approaches that might be adopted in the event that countries experienced the need to regulate *Ṣukūk* at the same level as conventional securities. On the outset, this study has shown that there were two main approaches followed by the selected countries in this study. First, Indonesia and the U.K preferred to enact a separate *Ṣukūk* regulatory framework before any issuance of sovereign *Ṣukūk* , i.e., *Ṣukūk* law in Indonesia and the GAFAR regulations in the U.K respectively. On the other hand, the regulations for corporate *Ṣukūk* were delayed until 2015 in Indonesia and were neglected in the UK. As for the second approach, Malaysia had resorted to adapting and integrating the legal basis of *Ṣukūk* first into CMSA 2007, and stopping the use of IPDS terms to allow the legal issuance of *Ṣukūk*. It was a move towards more focus on issuing *Ṣukūk* guidelines as rules. This study has made some headway towards enhancing our understanding of the various means to implement the *Ṣukūk* legal framework. Jurisdictions that seek to issue sovereign *Ṣukūk* should be following the approach conducted in Indonesia and the U.K. The alternative would mean that countries which have allowed the issuance of *Ṣukūk* should first of all rely on the existing legislations and adopt the approach taken by Malaysia with its regular updates of local regulations and amendments of the necessary laws to permit the improvement of the *Ṣukūk* legal and regulatory frameworks.

Therefore, there is a definite need for establishing adequate legal and regulatory frameworks that recognise *Ṣukūk* in the first instance. This is because the existing legislations in the three countries are insufficient to develop *Ṣukūk* issuances. Such frameworks can contain official recognitions of *Ṣukūk* or Islamic finance securities as a means to raise funds as conventional bonds. There is clearly a need to have a clear definition of *Ṣukūk*, which will exempt it from the tax burden and is subject to similar treatment as with conventional bonds. Legislation should introduce a new concept of separation of ownership, as it is stipulated in Indonesian *Ṣukūk* law for countries which follow the Civil Law, and also specify the role of the SPV vis-à-vis the underlying assets issue, which has integrated *Ṣukūk* law and embedded sovereign and corporate entities with updates from time to time. Thus, countries which are willing to issue *Ṣukūk* should engage in amending and modifying the process of local laws for continuous presence in the *Ṣukūk* market.

By amending the existing legislation, the policy makers may simply facilitate the issuance of *Ṣukūk* and fulfil the needs of issuers and investors. Indeed, the presence of legal and regulatory boundaries should be well-designed and incorporated in the local jurisdiction if the policy makers want to issue *Ṣukūk*. This information can be used to develop targeted interventions through enacting separate laws or amending the current laws. The former seems to be preferable in Muslim countries, but takes more time. However, the latter is preferred in the western and advanced Muslim jurisdictions. As a result, the purpose behind the provision of special *Ṣukūk* is to find a level playing field between *Ṣukūk* and bonds.

Shariah supervisory is quite interesting in structuring *Ṣukūk*. It should be presented in every jurisdiction that seek to issue *Ṣukūk* , as it gives more confidence and security to *Ṣukūk* investors. This is to satisfy the requirement of an increased number of stakeholders who are active in the *Ṣukūk* market. Therefore, a shariah supervisory needs to be created based on legal provisions integrated within the existing laws in order to have more enforcement.

It is suggested that before introducing *Ṣukūk*, an in-depth study similar to that proposed in this paper should be carried out on the issues and legal impediments that have always hampered *Ṣukūk* issuance. It would be interesting to compare the experiences of civil law countries to find out more about the main obstacles they faced in implementing *Ṣukūk*.

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