

STUDYING THE BASICS OF ISLAMIC SECURITIES (SUKUK) AND ITS PLACE IN LEGAL SYSTEM OF IRAN

F. Dorri

Department of private law, faculty of human science, Khorramshahr Branch
Islamic Azad University, Khorramshahr, Iran

ABSTRACT

Among the most important topics in the field of financial rights, issues of financial institutions attract many attentions. Investigation of the issues has particularly importance in Islamic law because the legislator forbids certain types of transactions - interest, usury, damage, etc. Bonds are introduced as a way and method in interest free banking. This paper tries to study the problems of interest free banking and the effects of removing interest in legal perspectives. Then, the study defines and investigates the current successor to the bonds, or securities; by concentration on the problems of bond, the study introduces new definition and essential tools in replacing new system of securities. One of the most important topics in Islamic banking studies is the assessment, explanation, legitimacy and nature of new financial products. One of the new financial instruments is rental certificates (Sukuk). Explaining the nature of these certificates, as new types of contracts, is important because it has no background in legal system of Iran, as the most advanced Shiite country, and scholars have never examined the nature, legitimacy, descriptions and effects of the certificates. The present study focuses on the legal foundations of Islamic securities (Sukuk).

Keywords: Securities, Sukuk, legal foundations, Iran

Introduction

Bonds are one of the important and efficient tools in changing assets to securities. Simply, the financial process in bonds carries out in this way: the financial enterprise borrows its necessary asset directly from the public costumers, then it pays the interest for borrowing at specific times, finally it returns the borrowed money at the maturity (Sewell, 2007, p. 31).

According to Islamic rules, demanding and paying interest is sinful. Therefore, countries whose majorities of its inhabitants are Muslim cannot respond to their financial needs by using classic debt markets (interest based). Hence, there is a great demand for the development of a debt market successor in these countries, which shall conform to the standards and laws of Islam. Since the constitution of Islamic Republic of Iran insists that all regulations must be consistent with religious rules, the interest-free banking act was codified in 2004. Accordingly, issuing bonds was stopped because it had been based on fixed interest rates (usury). However, for the first time in 1991, Tehran municipality has sold tax-

increment financing bond in a project named Navab; but bonds were a phenomenon resulted from Third Development Plan (Saidi, 1388).

It is possible to say that tax-increment financing bonds are in fact bonds conforming to Islamic Banking Act. The nature of tax-increment financing bonds can be explained based on signing a civil partnership. In participatory system, which has various types, owner of saving affords a part or all assets of a financial institution and shares in the gains and losses according to an agreement with the employer instead of paying him the money as a debt and achieving interest. At the end of each fiscal period, the profit is divided between the owner of capital and the economic agent (The employer) after deducting the costs and based on the agreed contract. Some characteristics of tax-increment financing bonds are similar to common bonds.

Nowadays, tax-increment financing bond is one of the most important financial tools that its removal from the financial markets of a country seems very difficult and even impossible. Tax-increment financing bonds do not use only in financing process, but

buying and selling of state tax-increment financing bonds by the central bank is considered as the main tool of monetary policy through open market operations. Bank authorities' involvement in the state markets of tax-increment financing bonds to regulate the monetary based on economical liquidity needs is called open market operations (Pruden & Rice, 2005, p. 38).

A tax-increment financing bond is a document for an investment in an outlined project between two parties, which they will share the acquired benefits according to conditions mentioned in the document. Nevertheless, common bonds are contracts between a lender and borrower for which a certain interest is assured and the borrower can spend the money in any economic activity he would like. Although tax-increment financing bond has carried out some functions of common bond and has replaced it partly in some aspects, it has always been under the influence of certain factors and has defects. Some of the defects and bugs, which bring about reduction of public acceptability, can result from specific factors such as the costly nature of the bonds, corporate commitment to guarantee the payment of principal and profit amount in return for issued participation papers before the maturity date and lack of transactions consistent with real interest rate of investment. In addition, public advertising on-account interests, which are in fact the realized interests, can question them as usury in terms of religious affairs. Moreover, there is no secondary active market for tax-increment financing bond in Iran. The bugs in the structure of the bonds are one of the main reasons for lack of active secondary market for tax-increment financing bonds (Kazemi, 2003). Explaining the legal nature of rental bonds, as an innovative form of contracts, is important because it has no background in legal investigations of Iran, and topics such as legitimacy, nature descriptions and effects of the bonds does have not been introduced to the parties of the contract.

However, the technical and economic aspects have been discussed. In any case, some scholars have studied the religious aspects of the securities in their juridical investigations. The present paper aims to study the foundations of Islamic securities (Sukuk) and determine its place in the legal system of Iran.

The Concept and Origin of Sukuk

The issuing of first Islamic bonds dates back to 1980s (Arsalan, 2007, p. 204). At that time, Islamic banks had tried hard to overcome the problems related to the liquidity in their banking systems. In July 1983, Central Bank of Malaysia, as a pioneer in his field, avoided using government securities or Treasury bill because they had paid interests to customers; instead, it used some interest-free bonds called Governmental Investment Certificates. The interest rate for these bonds did not follow a certain pattern, and the focus was more on quality considerations. They regarded various factors like macroeconomic conditions, inflation rate and return rates of other similar securities to determine the rate of return; in this regard, the doubt about sinfulness of interest was removed, and Muslims began to buy this type of bonds (Pahlavan & Razavi, 2007, p. 10).

In 1990s, the concerns about using Islamic financial tools had increased due to the development of various structures of financial transactions by Islamic banks. Doing so, financial experts alongside religious scholars began to study proper strategies. The idea of issuing rental bonds was introduced for the first time in a famous article titled "Budget deficit and instruments of public borrowing in Islamic system" by Monzer Kahaf in 1997; then, the issuing was begun after related investigations (ibid, 23).

As an Islamic financial instrument, the term Sukuk was first suggested in juridical meeting of Islamic Development Bank (IDB) in 2002. Then, Accounting and

Auditing Organization for Islamic Financial Institution (AAOIF) began to introduce fourteen different types of Sukuk. One of the most important presented Sukuk was Ijarah Sukuk (rental sukuk). Ijarah Sukuk is in fact a kind of securities that makes the holder a condominium owner of some part of the asset, the benefit is assigned to the sponsor by costumer based on the rental agreement (Soroush, 2007, p. 15).

In Ijarah Sukuk, the right to use benefits of asset, or some parts of asset, is transferred to someone else by the owner for the rent. The length of the rental agreement is determined, and they can pay the rent in the beginning, the end or with monthly, quarterly or annual maturities. Since Ijarah Sukuk is securities that show the condominium ownership of a person, one can trade them in a secondary market and at prices determined by market agent (Soroush, 2007, p. 16).

According to clause 1 of Article 1 of Lease Bonds Terms, Ijarah Sukuk (rental bonds) are securities that represent the ownership of joint holders in an asset based on the issued papers of a leased bonds (Securities and Exchange Organization, 2007, p. 7).

In general, issuing Sukuk bonds is a result from the process of converting contracts to securities in which an interface acquires an asset and issues some bonds based on the assets; it shows the beneficiary holders of the securities in those assets. As a result, the main requirement for issuing Sukuk is the existence of tangible assets on the balance sheet of the institution that is trying to mobilize its financial resources (Najafi, 2006, p. 32).

The value of issued securities in form of Sukuk reached \$ 24 billion in the world during the first half of 2007, which is more than its total value in the previous year (Dolati, 1388: 154). Meanwhile, Ijarah Sukuk has absorbed 70 to 80 percent of Sukuk bonds financing.

Elements of Ijarah Sukuk

For issuance of any Ijarah Sukuk at least three financial institutions is essential: sponsor, interface and trustee. Sponsor is a legal person that the issuance of Ijarah Sukuk is carried out to fulfil his financing needs, and he can take action to hire assets that are base of Sukuk issuance from the interface as the representative of investors. Interface is a financial institution constructed as an attorney of Sukuk holders only to transfer assets to the sponsor and issue the the bonds. Trustee is also a legal person that takes the responsibility of monitoring the whole process as the attorney of investors to maintain their benefits within the executive regulations of issued Ijarah Sukuk (Securities and Exchange Organization, 2007, p. 2).

Experience of other Countries in Using Sukuk

International Sukuk in Malaysia

The first Islamic finance tool issued at the international level was Malaysia International Sukuk. Malaysia International Sukuk was first issued at the price of \$ 600 million in 2002. Its target was not only Islamic investors in East Asia, but also traditional investors in Europe, Asia and America as well. The bonds were listed in the Luxembourg Stock Exchange.

Considering Sharia Malaysian Sukuk was first issued by International Islamic Financial Markets Supervisory Committee. 51 percent of these securities were sold to Middle Eastern investors and 30 percent of them were sold in Asia. Many Middle Eastern investors contributed to the market, and attempted to increase the growth of the capital market and cooperation between Islamic countries through financial instruments accepted by the World.

The other bonds that were issued at international level in form of Islamic securities are those Sukuk offered at price of \$ 150 million in the international stock, Labeau. Malaysia had remained the highest

global sukuk issuer by issuing 64.6 percent of total issuance in the world (MIFC, 2010). Sukuk bonds of Malaysia are issued in the currencies of other countries, and hence the country's capital market has developed into more world-class Islamic currency Markets. The issued Sukuk bonds, those that are in foreign currencies, are provided by the Federal Government of Malaysia, Khazanah Nasional Bhd Company and Nomura Holdings Inc during the first eight months of 2010. In 2010, equivalent to 15 new Sukuk issued in Malaysian Stock Exchange, which is amounting to 70.5 billion RM (Malaysian currency) (Ministry of Finance Malaysia, 2010-2011). Moreover, this country had arranged the world's largest Sukuk issuance to the value of 1.25 billion, equivalent to 3.86 Malaysian ringgits, in June 2010, which has the efficiency rate of 3.928.

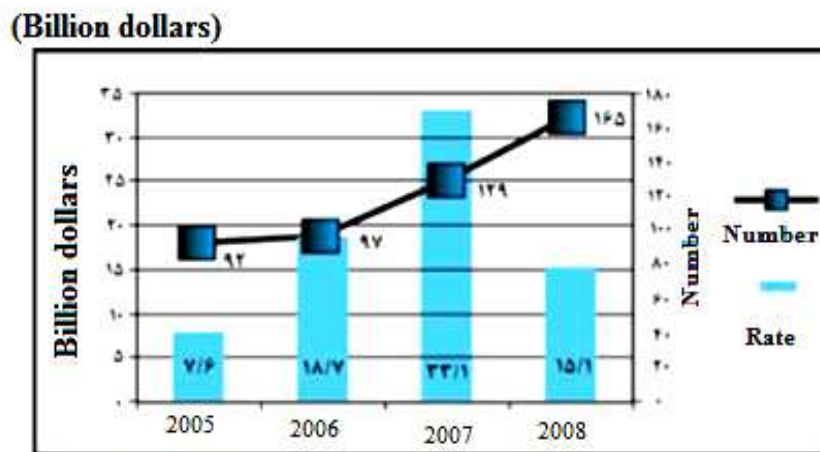
International Sukuk in Qatar

The Qatari government started to release \$ 700 million Sukuk in 2003, which its maturity was the year 2010. In this regard, Qatar international Sukuk has introduced itself as a specific financial tool in Qatar. It is the first experience of Qatar in issuance of international Islamic bonds, which were presented by the government. S&P institute has granted the bonds an A+ rate and HSBC has started to modify it.

International Sukuk in Jordan

Jordan state decided to issue five-years Sukuk at price of \$ 750 million during 2010-011. The government's target was presenting the Islamic bonds with 3.875 interest rate, of course fixed rate that the interest would be paid once in each six months. The bonds were issued by a coalition of international banks JP Morgan, Credit Suisse, HSBC and Arab Bank (Jordan Ministry of Economy, p. 2010).

Figure 1: Global Sukuk Index



Source: <http://www.zawya.com>

Table 1: List of various Islamic Sukuk issued by different financial institutions

Issuers of Sukuk	Date	The Issuer Contry	The amount of issuing according to dollar equivalent	Maturity Interest
Joint Stock Company of Commercial real estate	2005	Kuwait	100	6-month Libor +1.25-5 years
Investment Joint Bank	2004	Bahrain	91.5	1.25 percent, 2-years Euro and Libor
RH Company	2005	Malaysia	23	10.5 years
Marine Sukuk Consortium	2005	Malaysia	207	6.25 to 8.75 fixed percent 5 to 13 years
Collaborative Sukuk Company	2005	Malaysia	27	5 years
Sukuk Issuing Company Ltd	2006	Pakistan	134	6-month Libor + 0.35 percent 7 years
PCFC Sukuk	2006	UAE	3500	10.125 to 7.125 percent, 2 years
Trust Staging	2004	Germany	120	Euro and Libor 6 month + 1 percent for five years
Kardan Agency (cooperative) Ltd	2004	England	27.3	6 percent fixed, five years
Arkapita Joint Stock Company Ltd	2003	Bahrain	75	-

Source: Bank Monetary Institute Autumn 2006

The above table indicates that the use of Islamic financing tools have great popularity not only in Islamic countries but also in other countries.

Tables 1 and 2 show the global level of Sukuk issuers, year of issuance and the volume of released securities. Moreover,

Figure 1 describes the volume of issued securities from 200 to 2006 separating the state and joint items. Obviously, the companies' tendency to use this type of financial tool has enhanced increasingly during recent years.

Table 2. State Issuers of Sukuk Securities

State Exporters	Date of Issuance	Volume of Securities (Million Dollars)
Malaysian Global Sukuk	2002	600
Dubai Global Sukuk	2004	1000
State of Qatar	2003	700
State of Pakistan	2005	600
State of Bahrain	2003	250
Islamic Development Bank	2003	400
State of Sachsen in Germany	2004	100

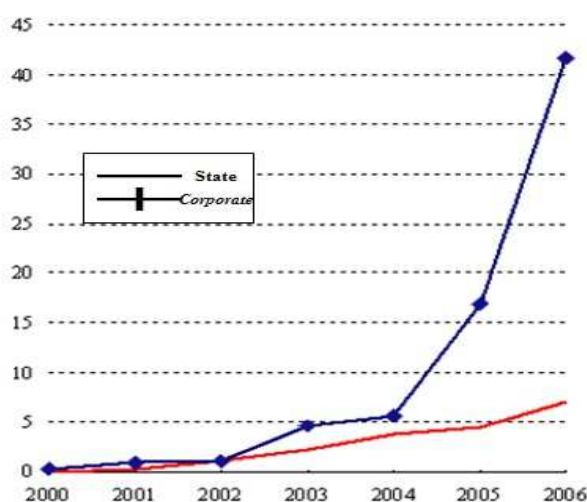
IMF Working Paper.2007

Table 2. Corporate Issuers of Sukuk Securities

<i>Corporate Issuers</i>	<i>Country</i>	<i>Date of Issuance</i>	<i>Volume of Securities (Million Dollars)</i>
Standard Charter Bank	Malaysia	2004	100
Sukuk Courses in Bahrain	Bahrain	2005	152
Real Commercial Sukuk	Kuwait	2005	100
Ranta Abangan Sukuk Investment	Malaysia	2006	2029
Nakhil Group	UAE	2006	3520
Dubai Airport	UAE	2006	3500
Dar International Sukuk	Saudi Arabia	2007	1000
Al-Dar	UAE	2007	2530

IMF Working Paper.2007

Figure 2. State and Corporate Sukuk Issuance from 2000 to 2006 (Billions Dollars)

*IMF Working Paper.2007*

Sukuk Securities as Lawful Tools in Free interest Banking law

When a new financial tool is introduced to a specific economical condition, it needs various elements to succeed. These elements are effectiveness and acceptance. In order to predicate whether Sukuk securities are successful financial instrument in Iran or not, the elements must be studied carefully.

On question that rises in this regard is, “Is Ijarah Sukuk consistent with free interest banking?” As it was mentioned, these securities are issued without any proof for being usury, and fully comply with the regulations of free interest banking, and consequently with religion; no one has ever questioned the legitimacy of its structure or content of the securities.

The next question that must be considered is the acceptance of the securities by public. Due to its appropriate efficiency, high

amount of fixed benefits, real liquidation in the established secondary markets and legitimacy in religious perspectives, the securities can catch the public attention, especially the microfinance investors unwilling to various risks. Beyond, international ranking institutions are able to consider Sukuk securities, like rental securities, in their ranking processes. Therefore, they have easily the capability to be released in international markets.

Regarding the tendency of firms seeking financing to these securities, we can say that they will welcome the securities because of their low cost and because they need not to redeem the securities before their maturity. In addition, the issuance of all securities, including rental Sukuk, causes a firm to do not encounter new partners, and it is not necessary for the firm to let others influencing its management power for the money earned through the sale of Sukuk. In the law of some countries, the interests paid to the holders of securities are considered as the current costs of the company, and its amount will be deducted from the incomes. Consequently, the company taxes will decrease. About the tendency of corporate shareholders in stock exchange for issuing Sukuk, we can predict that using the procedure of issuing Sukuk to finance of a company will increase the profits until the profitability rate of company is higher than the rate of Sukuk interests regarding a fixed amount of asset. Hence, the market value of company will increase because the market value of shares will be increased; this process goes on until the shareholders of company believe that the issuance of Sukuk securities does not endanger their assets. In fact, a shareholder demands this favorable situation.

Legal Clarification of Participation Securities (Sukuk)

The legal legitimacy of rental securities is proved according to the principle of freedom (will governance) and article 10 of civil law.

Although the earlier jurisprudents were doubtful to imply this meaning from the principle of freedom, contemporary jurisprudents do accept the principle. They believe that the titles of contracts are not confiscatable because the legislator has not invented a new method in trades, but the legislator has a signing function. It conveys that it confirms the common methods of commerce in a community. In other words, "the holy religion has not created a new reality in commerce, but it signs the common trends of public and tradition, and it confirms all methods and procedures in the common markets, and verifies the method by announcing "freedom in contracts" (Shariati, 2007).

Article 10 of Civil Law

It argues that certain contracts are not enough in legal systems for fulfilment of personal needs in private law, and legitimacy of consent in private contracts is inevitable, unless the consent requires a condition that opposes imperative rules, public order and good moral. The idea has reflected in Article 10 the Civil Code of Iran (Jafari Langroodi, civil rights, 144/1). According to the article, "private contracts, if do not oppose to the exact text of law, are valid for those who have signed it. In fact, the principle clears the path for fulfilment of probable needs in a community.

Article 10 authorizes the necessity of private contracts disregarding all specified patterns. For instance, if the parties of a contract increase or decrease terms of a commitment, one cannot claim that they have performed a peace contract, while this behavior can be justified according to Article 10 (Haeri, 1991, p. 117).

It seems that the former rationalization complies with religious orders and foundations, but by accepting the principle of freedom, setting the related issues of securities to a subclass of rental contracts makes to some extent nonsense because the essence of rules titled as peace contracts in Article 10 is very different from those rules related to the legitimacy of securities. In

order to adopt rental bonds to this legal obligation, it is necessary to pay attention to the requirements for new contracts, which are, A) agreement, B) consistency with the imperative rules, C) consistency with the text of the law and D) compliance with public order and good moral.

Paying attention to the processes of rental bonds reveals that the above items are necessary in the contracts. As it was mentioned, consent is an obligatory condition; all trades and transactions must be performed with the agreement of parties, it should be compatible with imperative rules, the text of law, public order and good moral.

Beyond, the legislator claims in the draft of the law: the contract is signed between the parties within the framework of Article 10 of Civil Code and its provisions suspends to the acceptance of provisions of the law, the provisions excluded from the common regulations for relationship between landlords and tenants. Thus, according to the principle of freedom in contracts and Article 10 of Civil Code of Iran, issuance and sale of rental securities will be allowed and legitimate.

Authenticity Conditions of Contracts

For the authenticity of contracts, there are two types of conditions: first, the general conditions, which is necessary for all kinds of contracts disregarding their topic and subject; second, specific conditions, which are vary in different contracts (Shahidi, 2010, p. 28).

General Conditions: General conditions, the same as other contracts, follow the provisions of Article 190 of civil law and include the intention of parties and their consent, qualification of parties, the presence of object of trade and legitimacy of rental securities contracts. Phrases 7, 1, 2 and 11 of guidelines for issuance of rental securities have paid attention to these provisions.

Specific Conditions: it is noteworthy to mention that in terms of some characteristics rental bonds are similar to many other securities like common bonds and tax-increment financing bonds. In this regard and regarding the lack of available backgrounds for rental bonds in legal considerations, it is necessary to use the principle of criterion-unity and investigate the specific features of rental bonds.

1. Rental bonds must be considered as securities

Article 1 of the recipe for issuance of rental bonds stipulates that the bonds must be considered as securities: Rental bonds are exchangeable securities that will be issued according to this recipe.

2. The definition of securities

According to phrase 24 of article 1 for Law on the Securities Market adopted in December 2005, "Securities are any kind of paper or document guaranteeing the exchangeable financial rights for owner of an object, or its benefit; it will determine the object and subject of trade. Some lawyers believe that securities are representative documents for contribution of institutes, or for long-term loans that are exchangeable. The documents, which are mostly exchanged in stock markets, are called Tites de Bourse (Setodeh Tehrani, 2003, p. 207/3).

2.1. Instances for securities

Some laws of securities characterize the securities, or present their definition of securities. In this respect, some instances of securities are:

Bonds (according to article 2 of Diffusion of Treasury Bills and Securities Act & Article 52 of Trade Act), tax-increment financing bonds (according to article 1 of ways of Issuance tax-increment financing bonds and its administrative regulations & article 2 of Diffusion of Treasury Bills and Securities Act), shares (phrase 2 from article 1 of Establishment of the Securities Exchange adopted in 1966), investment

certificate (according to phrase A of article 1 of Development of New Financial Instruments and Institutions Act approved to facilitate the performance of principle forty-four of Iran constitution) and Rental bonds (according to phrase A of article 1 in Issuing Instructions for Rental bonds).

2.2. The effects of considering rental bonds as securities

Securities are exchangeable:

Apart from second phrase in first article of Establishment of Stock Exchange Act, first article of Issuing Instructions for rental bonds has stipulated the legality of exchanging the bonds. It means that after issuance not only securities are valid for the parties but also they have a real price, and therefore are exchangeable among individuals. It also shows that the existence of real person is not the main reason for issuance of securities to avoid transferring the bonds. In article 24 of Amendment Trade Act, the legislator talks about the contribution sheet: sharing sheet is an exchangeable document that represents the number of shares whose owner has participated in a joint stock company.

Securities have a certain price:

Reading second phrase in first article of Establishment of Stock Exchange Act, the word exchangeable bears in mind the feature of having a certain price. Price is prerequisite for any financial transaction, and trade will not be defined without price. Article 24 in Amendment Trade Act recalls the rate of contribution and commitments that reveals the financial commitment of shareholder; as well, it speaks of the commercial feature of shares, which in fact insists on both features: to have a price and to be exchangeable. Provisions 29, 30, 32 and the next ones state having a price implicitly or explicitly, and provisions 39, 40 and 41 refers to the facilities in exchanging the shares (Momen, p. 55).

Rental securities guaranty a certain price:

The recipe for issuing rental bonds, in phrase F of article 1, announces, "A real person will guaranty paying the rent and cost of the leased asset purchases by supervisor to interface institution."

According to this article, voucher's commitments include guaranty paying the rent by supervisor to interface institution and guaranty paying the cost of the leased asset purchases by supervisor to interface institution. The legislator has considered the two commitments for voucher because all legitimate rental contracts in issuance of rental bonds, which are accepted in this law, are determined to two items: "hire purchase agreement" and "lease with authority to sell an object in the maturity of lease to a certain price" (article 13 the recipe for issuing rental bonds). According to fifth article of the recipe for issuing rental bonds, supervisor bears the responsibility to introduce a voucher, the introduction is obligatory. The first clause of the article claims that the voucher must be independent from the sponsor, the independency will be confirmed by sponsor's auditor.

Legislator does not confined the conditions to only the real aspect of person for characterizing the voucher in rental bonds contracts, and by stipulating article 5 in the recipe for issuing rental bonds, he provides that the guarantor must be determined solely from the following institutions:

1) Banks, 2) Credit and financial institutions supervised by the Central Bank of Iran, 3) Insurances, 4) Capital financing companies, 5) Investment Companies and 6) Public institutions approved by the organization.

Pursuant to Article 1 paragraph A of the recipe for issuing rental bonds, rental bonds are securities with the name. The recipe does not talk about the effect of mentioning name in the bonds anymore. Therefore, it seems reasonable to include these bonds subject to the provisions of Trading Act.

Conclusion

In the literature of financial management, the main function of designing securities is financing for the objectives of financial institutions issuing bonds. Obviously, for issuance, all securities must have acceptable and confident bankroll to attract the security buyers' trust. Any financial trends or expected future cash flow, fixed assets, current assets of all types, financial and non-financial rights and the like can be used as bankroll. The present study argues that capital and its providing methods, as one of the most important concerns of financial economics, is fulfilled by changing the assets to securities, which may be carried out through using borrowed bonds. Borrowed bonds are forbidden in Iran due to religious and legal reasons. Hence, it is necessary to find replacements for borrowed bonds. One of the replacements is Islamic securities or Sukuk bonds.

In order to show the legitimacy of issuing and exchanging Islamic securities (Sukuk), the study has begun to make a comparison with rental and peace contracts; then it investigates the religious and legal principles including the principles of freedom, will-governance and article 10 of civil law. It has proved that Sukuk is legitimate as a subtitle in any of the above principles. In this survey, some of the differences of Sukuk from the rental contracts were explained; it is deduced that we must consider rental as new and uncertain form of contracts, as subtitle in peace contracts, or as a provision in article 10 of civil law. Doing so, the study cares about

the following item to investigate the consistency of rental bonds with the article of law. 1) conditional probability of conflict and hostility on contract and conditional probability of contracts in peace agreements, 2) impeding essentials of peace contracts as a certain contract and 3) incompatibility of the legitimacy prerequisites of this contract with essentials of peace contract (the broad scope of definition and changes in conditions, features and effects of the contract according to article 10 of civil law). The investigation reveals that there are some trivial differences between the legal situation of the bonds and peace contracts according to article 10 of civil law. Then, the general and specific conditions of the bonds were briefly evaluated. It should be noted that this paper is a primary look at nature and legal status of a new financial tool called Islamic securities. Nevertheless, it is necessary to conduct deep investigations and extensive studies in this area because: first, Islamic financial instruments, especially the types of securities, and the tendency of Islamic communities and investors to this new entity have grown rapidly in financial markets of Islamic and even non-Islamic countries. Second, it is important to describe the religious and legal aspects of this instrument and other similar financial instruments (other types of securities) - especially in comparison with Shiite jurisprudence within the legal framework of countries such as Iran, which is located at the beginning of the path.

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