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LAW OPINION

Sukuk: A new frontier for infrastructure financing in Bangladesh

SHIYKH MAHDI

THE Islamic finance industry has experienced phenomenal growth and expansion in Bangladesh. With estimated assets worth $31 billion, market research on Islamic finance has positioned Bangladesh as 17th among 131 countries. It is, therefore, no surprise that the Islamic banks hold about 24% of the total asset of the local banking sector, despite not having a diverse range of products to offer. Exploring some of the most significant financial products widely prevalent in the market (e.g. sukuk) is crucial for Bangladesh, as it has no formal footprint in here yet.

Sukuk is an Arabic term for 'financial certificates', which is commonly referred to (albeit mistakenly) as "Islamic Bonds". Sukuk, however, differs from bonds in concept and structure.

Since the traditional interest-paying structure of bond financing is not permissible in Shariah, sukuk offers an alternative. To put it in context, let's say the issuer of a sukuk is a company/statutory body intending to raise capital for a bridge construction project. It offers sukuk certificates to the investors for purchasing at a fixed price (BDT 1 lac each) for a specific period (10 years). Capital raised from the sukuk is then invested in the project through a sale-lease structure. Subsequently, the issuer starts to distribute profits generated from the project to the sukuk-holders on a regular basis. At maturity (after 10 years), the issuer buys back the sukuk at face-value (BDT 5 lac) from the investors. The investors get their money back with certain returns.

In effect, sukuk-holders temporarily attain beneficial ownership over the asset whereas the bondholders only have debt obligations by the issuer without any underlying asset. Furthermore, the return of investment in sukuk comes as 'profits' (bonds generate 'interests').

The meager presence of sukuk in Bangladesh till date is reflected by the limited application of short-term Government Islamic Bonds and perpetual Islami Bank Mudaraba Bonds. As an effective financing option, the full potential of sukuk is yet to be unlocked.

Among other compelling arguments (e.g. market potential in Bangladesh, the 4th largest Muslim majority country in the world with a successful Islamic banking industry), formal recognition of sukuk (legally and financially) is imperative for its' proven track-record in infrastructure projects financing.

To fulfill the realistic aspiration of becoming an upper-middle-income country by 2031, studies by the World Bank suggests that Bangladesh need an investment of about $300 Billion for infrastructural development. Numerous infrastructure development projects around the world, specially in Malaysia, the Gulf and in Africa has been successfully financed through sukuk. Accommodating sukuk as a source of project finance might turn out as a game-changer.

However, this mechanism has some challenges in Bangladesh. Despite having a thriving industry, Bangladesh is yet to formulate a comprehensive legal and regulatory framework for Islamic finance (except for a regulation for the banking sector). In absence of comprehensive guideline for specialised sectors like sukuk, the steppingstone could be the modification of some key laws e.g. the Companies Act, the Income-Tax Ordinance, the Registration Act, the Bankruptcy Act, the Trust Act, and the Securities laws and regulations.

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To incentivise the investment in debt securities (e.g. bonds), NBR provides tax benefits to the individual investors but not to the corporates e.g. banks, insurances, and financial institutions. Moreover, facilitating special tax treatment for sukuk transactions is imperative in line of the global best practice, since the Shariah obligations of sukuk often entail complex structures that trigger taxes in different layers.

Bangladesh is reported to have the second-highest number of Shariah scholars on finance (Malaysia being the first), and the Islamic banks currently rely on a self-governed Shariah Board for compliance issues. With formal institutionalisation and legal mandate, disputes on the Shariah standards of sukuk transactions can be averted. Interestingly, the leading case on sukuk till date (2004 EWCA Civ 19) was initiated when a renowned Bangladeshi company (Beximco Pharma) defaulted on an international sukuk with a Bahraini bank and raised the issue of Shariah standard as a defense.

The remarkable growth of the Islamic banking industry in Bangladesh without a comprehensive legal and regulatory facilitation is a curious case. This also indicates a huge opportunity for a well-planned execution of sophisticated financial products like sukuk in the local market, which will boost infrastructural development.

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GLOBAL LAW UPDATE

Let's act to prevent human trafficking

THE 30th July is observed globally as the World Day against Trafficking in Persons. Originated in 2013, the day recognises the massive problem of human trafficking. Human trafficking is a human rights violation of the most serious nature and affects countries around the world.

Article 3 paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines 'Trafficking in Persons' as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation". This year, the theme of the Day is "Human Trafficking: call your government to action"

Bangladesh has ranked in the Tier 2 Watch List as per the reports of the US Department of States for the third consecutive year. The country does not fully meet the minimum standards required to combat trafficking in persons, but has been making considerable efforts to do so by initiating National Plan of Action and initiating investigations. However, one of the more pressing concerns in the country is the case of trafficking within the Rohingya refugees. No governmental efforts have been undertaken to address the trafficking of Rohingya despite persistent claims. The absence of a proper legal framework on the matter also greatly hinders the Rohingyas' access to justice. The report further states that the Government of Bangladesh has been cooperating with counter-trafficking efforts of NGOs.

With a view to preventing and penalising human trafficking, the government enacted the Prevention and Suppression of Human Trafficking Act of 2012. The 2012 Prevention and Suppression of Human Trafficking Act (PSHTA) criminalises sex and labour trafficking and prescribed penalties of five years to life imprisonment and a fine of not less than 50,000 Bangladeshi Taka. However, the effectiveness of this Act has been minimal. The conviction rate under the Act is extremely low. According to police reports, the conviction rate between 2013 and 2019 is 0.4%. Only 25 out of the total cases filed resulted in convictions. Moreover, no tribunal as required by the Act has yet been formed, significantly reducing the access to justice for trafficking in persons.

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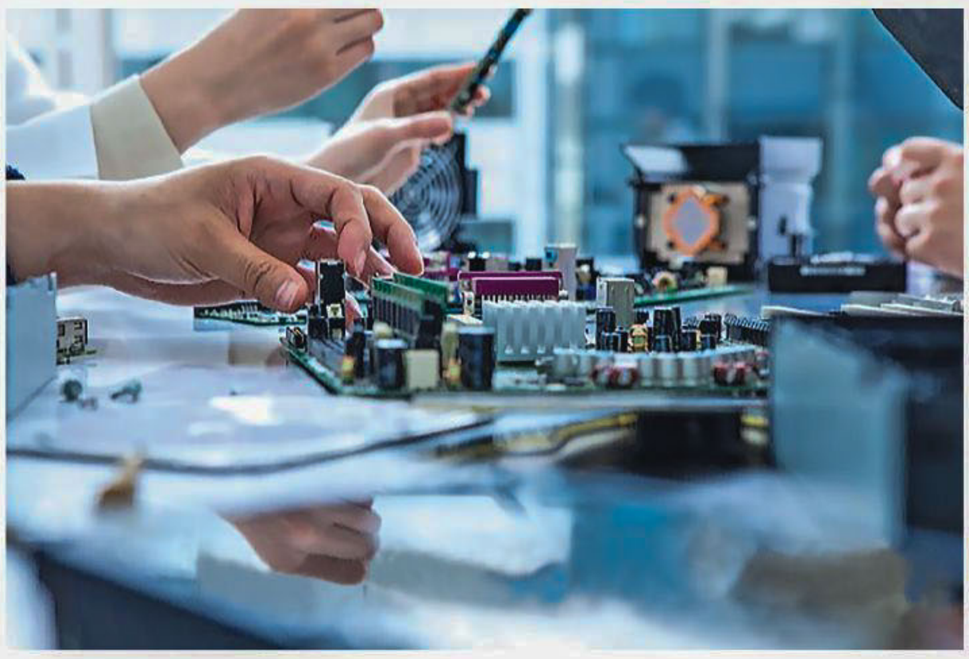
LAW VISION

TIME TO ADOPT INTELLECTUAL PROPERTY POLICY FOR UNIVERSITIES

MOHAMMAD ATAUL KARIM

BANGLADESH has continuously been ranking in poor position at global and regional innovations index. Despite the noticeable progress in many areas, including ICT sectors, the scenario of innovations and creativity remain dissatisfactory. What factors are possibly responsible for such condition? One may appropriately argue that our university education is not practical needs and goals oriented rather more on obtaining theoretical knowledge and achieving formal degree at the end. The lack of labs, infrastructures, funds, poor academic and research culture may also be designated as contributing factors which do not encourage creativity and innovations in the young minds. Moreover, there is almost non-existent collaboration between the industry and the university. Till date, there is no specific legislation governing IP policy at educational or research institution and our universities do not have their own intellectual property policy either.



As per the University Grants Commission (UGC) website, as many as 45 public, 103 private and three international universities are currently operating in Bangladesh. Regrettably, very few Technology Transfer Offices (TTO's), are in operation at our university (TTOs at University of Dhaka and BUET with limited scale of activities). In 2018, Bangladesh has adopted national IP policy which stipulates the need of and plan for establishing the TTOs and Technology and Innovation Support Center (TISC) at the public and private institutions. Furthermore, the UGC of Bangladesh, as part of the project of the World Bank has drafted IP Policy for University which is still in Draft stage. It reflects the major rules and regulations of IP policy and technology transfer at the university. It postulates the provisions for IP cell and TTOs at the university, responsibilities of faculties, students and supporting staffs, rules for assignment and authorisation of IP. It particularly mentions the rules for university ownership of IP created by employees in the course of employment or funding by university, few situations for inventor's ownership if university is not interested or if it is created beyond the course of employment and third-party ownership in case of funding and research collaboration.

Many countries have already put into practice of TTOs and IP policy for public funded research. The US Bayh-Dole Act 1980 is one of the leading legislations which transfers the ownership of IP arising out of public funded research to the university and thereby empowering university to license to third party. Denmark, Japan and Germany have abolished 'professor's privilege' and adopted rules for institutional IP while inventors or authors have right to royalty. The significant reforms have been taken place in China, Canada and the UK in this regard. The UK has guided the Lambert Model Agreements for IP management resulted in university and industry collaborated projects. While appreciating relevant issues, we must not forget that there are number of challenges and criticisms as well on adopting IP policy for university. How far ethically it is appropriate to grant exclusive rights to university in a public funded research? Isn't it double benefits given for one project? How far institutional or academic IP really helps in actual invention or creativity unless accompanied by actual technology transfer? Despite the criticisms and challenges, university IP policy guided by the central legislation has been proved to be a viable option in many countries. It may be concluded that if appropriate IP Policy for university has been put into practice in Bangladesh, it may be conducive for technology transfer between university and industry may also create a sound creativity and innovations atmosphere at the universities and research institutions.

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PEOPLE'S VOICE

On the legal framework of VAT

Imposition of levy at a high rate as well as penalty in mere non-compliance would result in injustice.

KHANDOKER M. S. KAWSAR

FROM 1st July 2019, the new Value Added Tax and Supplementary Duty Act (VAT & SD Act) of 2012 has been activated. The law is well-drafted and if implemented through the proper activation of the VAT Online system, it can reduce corruption in the revenue scenario of Bangladesh. Some features of the Act are pro-business. For example, the VAT registration and monthly return submission can be done online without requiring the people to face the officials regularly. Further, the increase of mandatory registration threshold from 80 lac to 3 crores is a happy moment for many businesses. Furthermore, the businesses are free from price declaration, and thus, they are free from undue hassles. In the new Act, transfer of stock from one unit to other is VAT free, previously which used to create an opportunity to harass the businesses and their vehicles. Transfer of goods or services from one branch to another separately registered branch of the same economic activity is no longer treated as supplies, therefore not liable to VAT. The VAT and SD Act prohibits the Commissioner from sending the case on remand for reconsideration, saving time and cost of adjudication. Amendment opportunity to submitted VAT return is a remarkable development.

However, some changes made by the new Act are problematic. Determination of Fair Market Value instead of price declaration and taking of rebate are the issues that will create complexities. Tax refund to foreign tourists is a good addition, whereas VAT on e-commerce and capital of SEC listed Companies (specially for multinationals) are bad additions. Some changes of the new Act are very technical. Multiplicity of VAT rates is a big loophole of the new Act. 5%, 7.5%, 10% and 15% slabs will create complications in VAT administration. The businesses will try to prove them under one slab, whereas the VAT officials will try to prove them under another slab, resulting in huge anomaly.

Clarifications regarding offences relating to revenue matters and their punishments is a very vital issue, as wrong determination of offences and non-compliances are the main causes of backlog of millions of revenue cases. The term 'evasion' should be defined and considered as 'offence'. Mere 'non-compliance' or 'irregularities' should not be considered as 'evasion', therefore not punishable like offence. There should have a causal link among the offence and its intention. Imposition of levy at a high rate as well as penalty in mere non-compliance would result in injustice and will give rise to increasing litigation and obstruct a huge amount of government revenue.

Therefore, it is recommended that the terms 'offences', 'punishments', 'irregularities', 'non-compliance' should be more clarified through SROs. Furthermore, at least five benches should be formed in the High Court for hearing of the cases in revenue issues. Lastly, it is recommended that Alternate Dispute Resolution (ADR) mechanisms should be activated.

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