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**WAQF LAND DEVELOPMENT FOR PRIVATE TAHFIZ
SCHOOLS IN THE STATE OF PERLIS, MALAYSIA:
PROCEDURES AND ADVANTAGES**

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ABSTRACT

Waqf is a state matter subject to state laws, given the position of the State Islamic Religious Council (SIRC) as the ‘sole trustee’ of waqf properties in their respective states. In legal terms, any party that intends to apply waqf and any waqf activities established in Private Tahfiz Schools (PTS) requires the permission of the SIRC. Accordingly, this

study aims to examine the legal procedures for developing PTS on waqf land in Perlis, Malaysia, including the advantages of acquiring the permission of Perlis Islamic Religious and Malay Customs Council (MAIPs). The qualitative research methodology was applied in this research, which featured the doctrinal approach in examining state enactments, past studies, and semi-structured interviews involving several respondents who had extensive experiences with the subject under study. Subsequently, analysis was conducted on the collected data through the content analysis technique. The implications from this research offer numerous advantages for PTS in Perlis to ensure its sustainability. This study offers a clear understanding to individuals who intend to implement waqf in their PTS in Perlis, Malaysia.

Keywords: Waqf, development, land, procedures, private tahfiz school, State Islamic Religious Council (SIRC).

INTRODUCTION

The Overview of Tahfiz Schools in Malaysia

Tahfiz educational institutions have been established mainly to teach students to memorize and recite the entire Qur'an (Misbahrudin et al., 2021). In Malaysia, tahfiz educational institutions are one of the popular fields of Islamic studies, receiving interest among parents and children. Abdullah and Safazilah (2016) demonstrated that parents have started to realize the positive values of having their children surrounded by Qur'an settings and education. As a result, the demand of the society for religious education of the tahfiz stream is remarkably high (Mohd Nawi et al., 2021).

Tahfiz schools in Malaysia are funded either by the government or private ownership. Specifically, the Government Tahfiz School (GTS) is funded and managed by the federal government through the Department of Islamic Development Malaysia (JAKIM) and the state government through SIRC (Misbahrudin et al., 2021), while the Private Tahfiz School (PTS) is managed by individuals, organizations, or corporate bodies. Notably, PTSs have high autonomy as they lead the centres on their own while updating the government on their policy, allowing them to obtain numerous state initiatives (Bani et

al., 2017). Additionally, they are funded by various sources including private capital, non-governmental organizations, community assistance in the form of charity, endowment, and waqf to ensure financial sustainability.

Two types of PTSs are present: registered or unregistered PTS. Specifically, the registered PTSs are commonly under the ownership of the State Islamic Religious Department (JAIN) and the Department of Islamic Development Malaysia (JAKIM). This PTS is monitored and receives government assistance funds in line with the allocation of the annual national budget. RM50 million was allocated in 2020 for registered GTS and PTS (Mohamad Akhir et al., 2019). According to Yusop et al. (2020), the amount received from either the federal government, state government, or government agencies varies between PTS and depends on the number of students. Although the amount received may not be sufficient, it still contributes to the development of the PTS, indicating the benefits of registering the PTS despite the insufficient funds for the overall operation of a PTS. Overall, waqf is considered one of the ideal instruments for PTS survival (Hussin et al., 2021). The practice of waqf builds a charitable culture as the donors benefit from the reward of eternal and continuous rewards. It also strengthens one's connection to Allah Subhanahu Wa Ta'ala (SWT) (Mahamood et al., 2018).

Considering that waqf is one of the appropriate mechanisms for the development of PTS, the founders of PTS are subject to state regulatory enactments of the SIRC where the PTSs are situated. As the enactments of the states have recognized SIRC or MAIN as the 'sole trustee' of waqf properties in their respective states, all matters related to waqf in the PTS should gain approval from SIRC (Hussin, 2021). For example, a few founders of PTSs in the Northern Region such as Perlis, have registered their land under SIRC to gain permission before the implementation of waqf in their institutions. However, this step is not carried out by some of the founders, given that the registration of land under MAIPs before establishing the PTS is not mandatory in the state of Perlis.

Definition of Waqf

According to Cizacka (2000), the term 'waqf' (plural awqaf) is derived from the Arabic root verb 'waqafa', which means "to cause something to stop and stand still". It also denotes detention,

prevention, and restraint. In English, the term ‘waqf’ is translated as ‘religious endowment’, although this translation may not convey the sense of devotion and grace associated with waqf in Islam (Mohsin, 2016). Technically, waqf means ‘to make a property the inalienable property of its owner while making its yield and usufruct a charitable donation to specified beneficiaries’ (Bouheraoua & Ansary, 2010). It also denotes “a dedication of property either in express terms or by implication, for any charitable or religious object, or to secure any benefit to human beings” (Mahamood & Ab Rahman, 2015).

The Department of Awqaf, Zakat, and Hajj, Malaysia (JAWHAR) exemplifies waqf as a private possession or asset in any form that has been placed under an injunction from any transaction, which includes sale, inheritance, *hibah*, and *wasiyyah* while its physical source remains intact and unchanged. Moreover, waqf connotes philanthropic dedication of property or benefits in perpetuity for general and specific purposes. It is a voluntary act that shares a similar nature with charitable acts such as donation, *sadaqah*, *zakat*, or any other charitable acts (Mohamad, 2015). Che Seman et al. (2017) summarised waqf as a property that has been restrained (from use) or maintained from the original endowed asset where the benefits flow to the public.

Waqf is classified into two types: general waqf and special waqf. Specifically, waqf khas is a waqf that is realized for a specific philanthropic purpose. Furthermore, it may involve the donation of land for a mosque or cemetery and is created for the public good, which is in contrast to waqf am. This type of waqf is remarkably more flexible due to its ability to include a wide range of items, such as waqf goods or services (Dahlan et al., 2022). Looking into the Malaysian context, Syed Abdul Kader (2015) argued that no uniformity is present in the definition of waqf in Malaysia, which led to the following definition of waqf in the administration of Islam enactment:

“Any property from which its benefit or interest may be enjoyed for any charitable purpose whether as wakaf ‘am or wakaf khas by Hukum Syarak but does not include a trust which is defined under the Trustee Act 1949 [Act 208]”.

Based on this definition, waqf refers to the subject matter of waqf, which refers to waqf property. This definition is in line with the description of waqf in the state of Perak, which is as follows:

“Any property from which its usufruct or benefit or both may be enjoyed for any charitable purpose, whether as general waqf or special waqf, according to the Sharia law but does not include a trust which is defined under the Trustee Act 1949 [Act 208]”.

In Selangor and Terengganu, the definition of enactments waqf is as follows:

“To surrender the title of any property from which its benefit and interest may be enjoyed, to surrender the benefit or interest which may be enjoyed from any property or to contribute the expertise and services from which its benefit or interest may be enjoyed whether as general waqf or special waqf, by Sharia principles, but does not include a trust which is defined under the Trustee Act 1949 [Act 208]”.

Based on the definitions, it could be indicated that waqf in these sections refers to the act of the contributor in granting his assets as waqf instead of the waqf assets. The definition of waqf under both enactments is more comprehensive as it also includes the provision of expertise and services. These descriptions of waqf are in line with the definition of waqf presented in JAWHAR’s Management Manual on the waqf law model–JAWHAR Law Model (JAWHAR, 2008). Moreover, the explanation of waqf in the JAWHAR Law Model follows the description of waqf under the Sharia, which denotes the act of the donor performing waqf instead of the waqf property (Syed Abdul Kader, 2015). Mahamood (2017) agreed that the incorporation of a provision of expertise and services in the waqf’s definition is in line with Islamic law. This condition is attributed to the useful services and expertise that are recognized as property in Islamic jurisprudence, which is currently practised in several HEIs in Malaysia. To illustrate, lecturers who examine the thesis of master or doctoral candidates relinquish the honorarium payable to them and endow it as waqf.

Understanding Waqf from the Qur’an and Hadith

Muslims are required to follow the rules of Islam as stipulated in the Qur’an and Hadith. Even though no specific term for waqf is yet to be found in the Qur’an, numerous verses inculcate Muslims to donate

their properties as waqf (Babacan, 2011). Furthermore, the Islamic scholars in four madhabs have demonstrated that several verses in the Qur'an encourage believers to carry out good actions (Yaacob, 2013). The following meanings of Qur'an verses undoubtedly inspire Muslims to perform good deeds towards the path of Allah (SWT) to gain blessings. Accordingly, the seventh verse in Surah Al-Hadid is as follows:

“Believe in Allah and His Messenger and spend out of that in which He has made you successors. There will be a great reward for those who have believed in you and spent.”

The meaning of Surah Al-Hajj, verse 77, is expressed as follows:

“O you who believe! Bow down, prostrate yourselves, serve your Lord, and do good that you may succeed.”

Considering the previously highlighted verses, it could be indicated that Allah has ordered humankind to spend their wealth to aid others. This action is a part of worship for Allah. Allah (SWT) further emphasizes the meaning of Surah Al-Nahl, verse 97, through the following statement:

“Whoever works righteousness, man or woman, and has faith, verily, to him will We give a new life, a life that is good and pure and We will bestow on such their reward according to the best of their actions.”

Based on this verse, it can be indicated that Allah (SWT) will recompense all believers generously for all their good deeds regardless of their gender. Allah (SWT) is the Most Gracious and the Most Merciful; the act of waqf is not constrained solely to Muslim men, however, it is also open to women. Allah (SWT) stated through Surah Al-Imran, verse 92:

“By no means shall you attain to righteousness until you spend (benevolently) out of what you love; and whatever thing you spend, Allah surely knows it.”

It is indicated from this verse that Muslims will not be rewarded unless they are willing to provide their best to others. With appropriate use

of waqf assets, Allah will grant continuous rewards to the parties who sincerely perform waqf even after their death. A wide range of Hadith verses has indicated that the formation of waqf was momentarily encouraged by Allah's Apostle (PBUH). For this reason, several of his companions have established waqf for the benefit of the public (Anwar, 2017). Accordingly, a specific Hadith directed his companion to contribute to waqf in the event of Umar who sought advice from the Prophet (PBUH) regarding the land that he acquired in Khaibar and the Prophet (PBUH), which is as follows:

“Give it in charity (e.g., as an endowment) with its land and trees on the condition that the land and trees will neither be sold nor given as a present, nor bequeathed, but the fruits are to be spent in charity.”

The above Hadith verse has emphasized that upon the establishment of waqf, it must be protected from being sold, inherited, or *hibah*. Moreover, this aspect is demonstrated through another Hadith reported by Abu Hurayra, the Prophet (PBUH) stated:

“When a man dies, only three deeds will survive him: continuing alms, profitable knowledge, and a child praying for him.”

The Hadith supports the command of Allah through Surah Al-Imran, verse 92, where waqf is interpreted as *sadaqah jariyah* through which the donor enjoys endless rewards from Allah (Anwar, 2017).

The Legal Framework of Waqf in Malaysia

Cizakca (2016) thoroughly discussed the evolution of the waqf administration in Malaysia from pre-1950 until the recent development, which led to the establishment of JAWHAR in 2004 and the formation of the Malaysian Awqaf Foundation in 2008 under the Trustees (Incorporation) Act 1952. Before 1950, waqf was administered and managed by community leaders or respected individuals including the kadi, imam, bilal, and the penghulu. However, the lack of a proper governance framework resulted in the loss of some waqf properties. Nevertheless, during British occupation in the 17th century, official trustees were appointed either by the British-led administration or the states' religious councils to administer and manage waqf properties

in the Straits Settlements, including the Federated and Unfederated Malay States.

After 1950, such as Independence Day, the management of waqf properties fell under the jurisdiction and power of the respective state religious councils (Syed Abdul Kader & Dahlan, 2017). Accordingly, Article 74 (2) of the Federal Constitution presents the following statement. Legislations governing waqf have been introduced under this article along with the State List of the Ninth Schedule.

“...Waqfs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities, and charitable institutions operating wholly within the State...”

The Islamic State Department will enforce all the legislations accordingly. Selangor is one the earliest states to enact the laws on waqf under the laws on the administration of Islamic Sharia of 1952 (Cizakca, 2016). These laws have successfully acknowledged SIRC as a government institution that possesses regulatory powers to manage waqf properties. This was followed by other states including Malacca in 1959, Kedah in 1962, Perlis in 1963, Perak in 1965, and Johor in 1978 (Cizakca, 2016; Syed Abdul Kader & Dahlan, 2017). With the increasing concern regarding waqf, improvement in the law would be crucial. For example, the law for the administration of the religion of Islam in 1952 in Selangor was amended in 1989. Known as the Administration of Islamic Law Enactment 1989, this law sought to incorporate all laws related to the administration of the religion of Islam in Selangor. In 1999, a special enactment relating to waqf was passed, which was the Selangor Waqf Enactment 1999 (Mohamad et al., 2012). Notably, this enactment is vital as a source of reference to restructure the waqf administration in Selangor. To be updated with the current development in Selangor, another amendment was carried out in 2015, including the Wakaf (State of Selangor) Enactment 2015 (Enactment 15). Subsequently, several other states instituted their waqf legislations with some administrative and substantive provisions, namely Wakaf (State of Sabah) Enactment 2018, Terengganu Waqf Enactment 2016, Wakaf (Perak) Enactment 2015, Wakaf (State of Malacca) Enactment 2005, and Wakaf (Negeri Sembilan) Enactment 2005.

Johor administered laws related to waqf based on the Johor Wakaf Rules 1983. These laws offer more comprehensive definitions for waqf and the main constituents for the establishment of waqf, which include waqif (donor), mawquf (the waqf property), and mawquf alaih (the beneficiaries). In the case of the states that do not apply specific waqf enactments, the provisions in the state Administration of Muslim Law enactments are applied (Syed Abdul Kader & Mohamad, 2014).

The Implementation of the Basic Waqf Concept in PTS

Stakeholders are described as “any group or individual who can affect or is affected by the achievement of the organization’s objectives” (Abdullah & Ismail, 2017). Specifically, stakeholders of waqf in PTS comprise the giver (waqif), sole trustee, waqf administrators, and beneficiaries (Ministry of Higher Education, 2016). Before the subsequent discussion, identifying the stakeholders of waqf in PTS is crucial. Meanwhile, the givers (waqif) are the parties who voluntarily participate in donating the movable or immovable properties that are lawfully owned by them to PTS for the benefit of other parties (beneficiaries). Waqf allows the givers to demonstrate their submission to Allah through charitable deeds.

SIRC acts as the sole trustee of waqf assets and holds the authority to grant permission for PTS to be waqf administrator. Furthermore, every state enactment related to waqf employs a provision where SIRC is selected as the ‘sole trustee’ of all waqf properties, which may be either general waqf or special waqf. In this case, SIRC acts as a regulator and governing body that manages waqf in each state. Ali Hamdan (2016) stated that the power of SIRC in terms of waqf granted by the law consists of registration, property holdings, vesting of waqf land, the appointment of a waqf manager, withdrawal of waqf manager’s nomination, and development of waqf property among others.

The role of SIRC as a sole trustee is apparent in several decided cases, such as the case of *Ismail Bin Wahab vs. Majlis Agama Islam Melaka & 3 Ors*. In this situation, the court determined that SIRC, as a sole trustee, has the authority to manage, develop, expand, lease out, and preserve the land and distribute waqf to the beneficiaries who are in need. Moreover, SIRC has the authority to defend the position of waqf

assets in the court proceedings. This aspect was also demonstrated in the case of *Majlis Agama Islam Selangor vs. Hicom Gamuda Development Sdn. Bhd. & Anor.* In this case, SIRC initiated an action against a developer to seek the court's confirmation about the status of waqf for a cemetery to be developed by the developer in Kota Kemuning, Selangor. To approve the appeal by the Majlis, the Majlis was made the sole trustee of the waqf, leading to a cause of action against the respondents in determining whether the waqf is supported based on Sharia regulations (Syed Abdul Kader et al., 2018).

Waqf administrators are authorized by SIRC to establish a sustainable infrastructure, which would collect, raise, use, manage, invest, and develop waqf funds and distribute waqf proceeds as per the agreement between the PTS and the respective SIRC. In line with this, Hassan and Abdul Rashid (2015) highlighted that waqf managers are required to carry out careful and professional management of the waqf assets as emphasized by the law. Ultimately, beneficiaries are considered the primary actors in the establishment of waqf at PTS. In a broader context, the administrators of waqf in PTS must consider the other aforementioned stakeholders by practising good governance for its sustainability. To achieve this outcome, the prominent features of good governance in the management of waqf, such as accountability, transparency, integrity, efficiency, and several principles of governance from the Quran and Sunnah, should be executed in PTS.

The Position of the Waqf Trustee

Besides the donor and the beneficiary as the primary parties in the establishment of waqf, the waqf trustee (*mutawalli*) is a trustworthy party who is generally responsible for managing, maintaining, protecting, and developing the waqf assets for the benefit of the Muslim community. Several authors have observed the evolution in the appointment of *mutawalli* from the individually appointed *mutawalli* in ancient times to officially appointed *mutawalli* in some Muslim countries and the current institutional *mutawalli* in modern Muslim and Muslim-minority nations (e.g., India and Singapore) (Syed Abdul Kader et al., 2017). However, Saleem (2010) argued that in modern times, solely allowing government-run institutions (e.g., SIRC and the Ministry of *awqaf*) in other countries to be *mutawalli* for all the waqf properties is not feasible. Other institutions including universities, religious schools, hospitals, non-governmental organizations (NGOs),

and other charitable institutions should be allowed to determine the role of *mutawalli* in contributing to the socio-economic development of the Muslim communities.

The Concept of Nazir, Mutawalli, and Qayyim under Sharia

It was highlighted in most literature on waqf that various terms are used to describe a waqf trustee, with the common terms including *mutawalli*, *nazir*, and *qayyim*. The term *mutawalli* is frequently used for all the trustees although the term *nazir* or *nazir-al-waqf* is interchangeably used with *mutawalli* and *mutawalli-al-waqf*, respectively, for the person or institution that is responsible for waqf management or administration (Syed Abdul Kader et al., 2017). For this reason, the *mutawalli* is also described as “the nazir (overseer)” for the waqf that safeguards its goods and the rights of the beneficiaries in line with the terms spelled out by the *waqif* and principles of Islamic law.

Thus, *mutawalli* generally refers to the person or institution involved in the affairs of waqf and acts either as a manager, administrator, regulator, or supervisor. *Mutawalli* can also be defined as a person, a group of people, or an institution appointed by the sole trustee or other trustee board to manage and develop the waqf property (Abd Mutalib & Maamor, 2016). To be more specific, Syed Abdul Kader et al. (2017) elaborated on *nazir*, *mutawalli*, and *qayyim* based on the following factors:

- a) The mode of appointment,
- b) Nature of the *mutawalli*, and;
- c) The functions assigned or carried out by the concerned *mutawalli*.

Trustee Terms Based on the Mode of Appointment

Two forms of *mutawalli* are present, namely original/primary *mutawalli* (*al-mutawalli al-asli*) and subsequent/secondary *mutawalli* (*al-mutawalli al-far'i*). Specifically, original *mutawalli* refers to a situation when the *waqif* selects the *mutawalli* based on the condition specified in the waqf deed. However, if the *waqif* does not appoint any *mutawalli*, the judge would perform the appointment on his behalf. This is followed by the subsequent *mutawalli*, who is appointed by the original *mutawalli*, while the secondary *mutawalli* takes the

position based on the declarations, authorization, conditions, and delegation of the authorities to him in the waqf deed. This type of *mutawalli* is known as *qayyim*. While a person assumes the position of the *mutawalli* by the operation of law (e.g., principles of Islamic law), the appropriate term to be used to describe him is *nazir*. The operation of law generally indicates that the most qualified person to assume the position of the *mutawalli* is the *waqif*, considering that his position is the closest to the waqf (e.g., the *mawquf*). He is also the most knowledgeable about the reasons for the waqf and the ideal method of achieving its aims for the benefit of the *mawquf alaih*.

Trustee Terms Based on The Nature of Mutawalli

The appointment of trustee based on the nature of *mutawalli* can be observed in two situations. In the first situation, when an individual, a group of individuals, or an institution assumes the position of *mutawalli* in a private capacity, *mutawalli* would be the proper term to refer to him. As for the second situation, if the *mutawalli*'s functions are performed by a person, a group of individuals, or a state institution/authority in an official capacity, it is proper to refer to them as *nazir*.

Trustee Terms Based on the Functions Assigned or Carried Out by the Concerned Mutawalli

This situation could be observed when the *waqif* is required to appoint both *mutawalli* and *nazir* to carry out different roles in his waqf deed. A person would be referred to as a manager or *mutawalli* if he is appointed to oversee the day-to-day activities of the waqf. On the other hand, the *nazir* would be the supervisor (*mushrif*) who is responsible for coordinating *mutawalli*'s activities. Overall, it could be seen that *nazir* is a proper term for those who are not directly involved in managing the affairs of the waqf. However, the term *mutawalli* refers to a person who directly manages the waqf regardless of the availability of the person to report to.

The Trusteeship of Waqf Under Malaysian Laws

Considering that waqf in Malaysia is a state matter as demonstrated in Article 74 (2) of the Federal Constitution, the SIRC becomes the sole trustee for managing the waqf assets across the states. Furthermore, an analysis conducted by Syed Abdul Kader et al. (2017) on several

provisions in three waqf enactments, namely Selangor Waqf Enactment 2015 (Section 4), Perak Waqf Enactment 2015 (Section 27), and Terengganu Waqf Enactment 2016 (Section 4), indicated that SIRC as the sole trustee has the authority to appoint another person to administer and manage waqf funds. However, as highlighted in the enactments, the sole trusteeship of waqf is imprecise in terms of its possibility to assign the role of the *nazir*, *mutawalli*, or *qayyim* to the institution conferred with the title.

Nazir, *mutawalli*, or *qayyim* are practically used in Malaysia to describe the waqf trustee based on its respective ranking (Mahamood, 2017). *Mutawalli* is commonly used for all of these terms. Furthermore, these three terms are used interchangeably, leading to a significant challenge in differentiating between them due to their same functions. Therefore, these concepts must be clarified, as suggested by Syed Abdul Kader et al. (2017). The earliest author on waqf in Malaysia highlighted that the waqf administration is under the control of *nazir*, *mutawalli*, and *qayyim*. He defined *nazir* as “a single person supervising the administration”. *Nazir* is also described as the manager or administrator of waqf (Othman, 1982).

As the authorized institution appointed by the SIRC, the PTS becomes the waqf administrator, manager or trustee of the waqf property. Therefore, PTS should observe both Sharia and law-related matters to ensure the preservation of waqf until the Day of Judgement. Accordingly, Gaudiosi (1988) addressed the importance of the waqf trustee in every waqf creation for the improvement of waqf as per the requirement in the waqf deed.

RESEARCH PROBLEM

As previously mentioned, it is not a requirement for the PTS founder in the state of Perlis to register their PTS under JAIN or waqf under MAIPs before operating it. To illustrate this point, they are still able to operate a PTS without the approval of both state authorities. Currently, no specific enactment has been stipulated on this matter, and no punishment could be enforced on founders of PTS who fail to register their PTS and their land as waqf land under MAIPs. As a result, some founders of PTSs opted out of registering their waqf land as they accelerated the opening of their PTS due to external interest by

parents and their children. Besides, J1 observed that their institutions were not registered due to the complex procedures involved and the avoidance of being controlled by JAIN.

Several founders of PTSs were not aware of the procedures involved in registering their PTSs. This condition forced MAIPs to arrange regular visits and campaigns that advised them on the procedures of PTSs registration. As a result, the number of registered PTSs increased despite the refusal from several individuals, as stated by J1. In contrast, unregistered PTSs are challenging to be monitored by MAIPs. In some cases, these unregistered PTSs operated through the profits they earned from the exploitation of PTS children by forcing them to beg for donations and collect cash waqf illegally. Issues of fraud and abuse of power and resources were also present, which negatively impacted the PTSs image. To illustrate, fraud is committed by some PTS founders by declaring that they have registered with JAIN; however, no registration record is found after verification.

Based on the evidence recorded in this study, the objectives of this study were fulfilled to educate PTS founders on the knowledge of the legal procedures and the method through which PTSs should operate in line with Malaysia's laws. In limiting the scope of this study, a sole focus was placed on the legal procedures involving the registration of land as waqf land under MAIPs for the establishment of a PTS. Besides, the advantages of waqf land registration under MAIPs were also highlighted.

METHODOLOGY

The qualitative methodology, which involves doctrinal and fieldwork approaches, was employed in this study. Data were obtained from library research and semi-structured interviews with the respondents in Perlis, Malaysia. The interview was conducted to obtain information and answers from respondents in various methods, such as personal means or face-to-face interviews, telephone interviews, and focus group interviews (Murgan, 2015). Furthermore, the selected respondents comprised MAIPs officers (M1), PTS Founder (S3), and the State Islamic Religious Department (JAIN) (J1). The selection of the respondents was based on their area of specialization, added knowledge, and experiences in management and matters related to

waqf in their institutions. The data collected from the respondents were not directly referred to; however, they were changed to a unique numbering code for safeguarding and ensuring the respondents' confidentiality. Subsequently, the transcriptions of all interviews were manually conducted verbatim, followed by an analysis of the transcribed data through the content analysis method.

RESULTS AND DISCUSSION

Procedures for Developing PTS on Waqf Land

Every state enactment involves a provision that recognizes SIRC as the 'sole trustee' of all waqf assets located throughout the state (Syed Abdul Kader & Ishola, 2018). As the sole trustee of all waqf properties, SIRC can delegate the administration and management of waqf either to a committee or an officer appointed by the SIRC. Considering the PTS context, MAIPs could also appoint the founder of PTS in Perlis to manage their PTS either as *nazir*, *mutawalli*, or *qayyim*, as per the discussion in the introduction section. Nevertheless, all the relevant legal procedures, particularly the Sharia and law-related procedures, should be complied with beforehand.

The management of waqf, zakat, and Baitul-Mal in some states, including Perlis, is conducted by the same committee or officer (Abu Bakar et al., 2018). Other states including Melaka and Selangor delegate separate committees to manage each of the three divisions (waqf, zakat, and Baitul-Mal) (Hussin, 2020). As the sole trustee of waqf in Perlis, MAIPs is responsible for managing the administration of waqf property to ensure that the management and administration of waqf runs smoothly, as highlighted in the Administration of the Religion of Islam Enactment 2006 (Abu Bakar et al., 2018). In line with this, MAIPs plays a significant role in instilling the spirit of waqf among the community including the development of PTS on waqf land, as shown in Section 89 of Administration of the Religion of Islam Enactment 2006.

Based on the interviews, M1 stated that any individuals or organizations who intend to donate their assets to MAIPs ought to follow certain procedures outlined in the Administration of the Religion of Islam Enactment 2006. The *waqif* is required to fill in a

special form stating the purpose of donating the land either to general waqf or special waqf. If a *waqif* intends to donate land to establish a PTS or a religious school, the waqf is known as special waqf, which the land is established for a particular charitable purpose (Dahlan et al., 2022). Moreover, the names of witnesses should be displayed on the application. A review will be made on the waqf application regarding the land status, ownership, and land suitability. However, if the land is not suitable for the development of special waqf, MAIPs would advise *waqif* to convert to general waqf as an alternative. This would be followed by the transfer of the land under the name of Yang Dipertua MAIPs and its endorsement as waqf assets.

If a PTS is built on the land before the waqf donation, the procedure would be slightly complicated. The difficulty takes place when the conditions of registration of PTS are not fulfilled as prescribed by JAIN. In this case, the management of the PTS should follow the specified procedures. If the PTS founder attempts to endow land that is built with certain buildings, both the land and building would be considered waqf properties. Based on the National Land Code (Revised 2020), any land that has been endowed or transferred comprises any elements attached to the land.

M1 highlighted the issue regarding the agricultural status of the land to be endowed despite the donor's attempt to build a school. In this case, MAIPs do not force the *waqif* to change the conditions and status; MAIPs would approve their application and proceed to build the school as attempted by the *waqif*. However, with enforcement from the land department, the *waqif* would be presented with a notice to change the conditions of the land. This process will be implemented in several stages as it involves costs and premiums to the land. MAIPs will also attempt to apply to be relinquished. In other cases, waqf land may also be offered to be developed by selected PTS. In this situation, the development costs would be determined by the founders based on their financial capabilities, while agencies such as foundations and community contributions are present to support the development costs. In addition, MAIPs would also assist in recovering some of the required costs. There are also cases in which the land to be endowed is not adequately large to build a PTS. In this situation, MAIPs would attempt to find other lands to be combined to ensure that the land size is suitable for the construction of the PTS. However, if no other land is available, then MAIPs will advise the *waqif* to develop the land as general waqf.

Advantages of Developing PTS on the Registered Waqf Land

M1 elaborated that in Perlis, it is not an obligation for any PTS to endow the land to SIRC before establishment. The most crucial requirement is to ensure that the safety of the PTS is verified by local authority agencies to gain approval before its operation. If the land is endowed and subsequently registered with JAIN, PTS will receive benefits such as supervision on the maintenance and monitoring process. If the PTS requires certain funds for maintenance, MAIPs will channel the budget to maintain the waqf assets annually. MAIPs is also able to assist in the arrangement for the Sijil Pelajaran Malaysia (SPM) teaching staff at PTS schools that do not conduct SPM examinations.

One PTS, known as Maahad Tahfiz Darul Sunnah, was selected as the case study in Perlis. This PTS is registered with JAIN and MAIPs based on the Perlis regulatory framework. Based on the interview, S3 acknowledged the importance of registering the PTS in line with the stipulated law. Furthermore, the registered PTS is under the supervision and administration of MAIPs, which are also known as Baitumal. The PTS indirectly receives certain funds in the form of *fisabilillah* as the tahfiz school is considered *asnaf* and is entitled to receive the zakat portion, which includes *fisabilillah asnaf*. With the permission granted by MAIPs, Maahad Tahfiz Darul Sunnah can collect waqf funds legally.

CONCLUSION

In summary, the understanding of waqf concepts and their principles is imperative for its conceptualization in PTS. The implementation of waqf in PTS is more difficult compared to other charitable instruments such as an endowment and trust, due to the guidelines that should be followed in Sharia and the legal framework. The waqf trustees appointed by SIRC need to observe Sharia and law-related matters to ensure the continuous preservation of waqf until the Day of Judgement. While the registration of waqf land is not an obligation for PTS in Perlis, this process would bring more advantages to PTS. The waqf registration process should be more simplified and straightforward to encourage the founders of PTSs to register their land under MAIPs.

Currently, a section under the National Land Code stipulates that the size of the land is not a measurement or indicator for the approval process. However, granting permission or vice versa is subject to the

jurisdiction of the state government. In Perlis, this circumstance is not practised. Any land submitted for approval that is less than one acre in size would be transferred to the state government for review. If MAIPs attempt to reapply, they are required to pay for the premium. Besides the highly complex transfer process, there is a need for an effective method to simplify the process. Based on the discussion, a more effective method of registration would encourage PTS founders to register their land as waqf land under MAIPs. As a registered institution, the PTS would acquire numerous advantages in ensuring the sustainability of the PTS and delivering benefits to the students.

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SHARIAH ISSUES OF OWNERSHIP AND POSSESSION OF ASSET-BASED *SUKUK* STRUCTURE: A SHARIAH SCHOLARS' PERSPECTIVE

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ABSTRACT

Sukuk serves as an instrument in the global Islamic financial market, which has experienced expansion in recent years. Despite this notable growth, *Sukuk* encounters Shariah-related concerns pertaining to the possession of underlying assets. This study investigates the Shariah perspective on *Sukuk* investors without full ownership or possession of the underlying asset under asset-based *Sukuk*. This study adopted a qualitative method and used primary and secondary data sources. Primary data was gathered from eight participants through semi-structured interviews with Shariah experts in Malaysia and Nigeria. NVivo 10 was used to analyse the data thematically. This study used relevant resources such as respected journals, textbooks, newspapers, and other relevant sources for secondary data. Our findings show that the *Sukuk* holders must take possession of underlying assets during

the duration of the project. Therefore, it is illegal for a person to sell assets that he or she does not own. A complete ownership transfer must occur, allowing *Sukuk* investors to lease the asset back to the government or issuer. The findings also reveal that the legal system of the country where the *Sukuk* was issued is one of the factors that restricts investors from receiving the underlying asset of *Sukuk*, particularly in asset-based *Sukuk*. The study's consequences include that the stakeholder's issue is *Sukuk* under Shariah legislation, attracting investors to participate in Shariah-compliant investments. Moreover, it is recommended that investors use underlying assets during *Sukuk* projects to avoid *gharar*.

Keywords: *Sukuk*, possession, asset-based, legal system, Shariah-compliance.

INTRODUCTION

Sukuk stands out as one of the Islamic financial products that has experienced rapid and unparalleled growth across various countries over the past decade (Paltrinier et al., 2019; Raza & Ashraf, 2019; Nasr et al., 2016). In Shariah-compliant finance, *Sukuk* is an alternative to traditional bonds (Godlewski et al., 2016), and has gained practical acceptance in both Muslim and non-Muslim nations (Paltrinieri et al., 2019). According to Bello et al. (2018), *Sukuk* became a new phenomenon in the international financial market after the global meltdown. It is an alternative method of raising funds to address the financial crises of governments and firms and improve economic expansion and sustainability. Muborakbekovich (2021) stressed the importance of the *Sukuk* market because it attracts potential investors from government and corporate entities to invest in the *Sukuk* business.

Smaoui and Nechi (2017) mentioned that *Sukuk* allows private and public entities to diversify their financing needs and expand their capital pool to fund new projects and achieve sustainable growth. Biancone and Radwan (2018) identified *Sukuk* as an effective approach for financing large-scale projects, a method that was historically challenging for financial institutions or individual investors to implement. Financial institutions and Islamic banks can manage their liquidity by investing in *Sukuk*, which allows them to acquire *Sukuk* when they have excess liquidity and sell it on the secondary

market when it lacks liquidity. Similarly, Smaoui and Nechi (2017) showed that *Sukuk* growth energises financial inclusion and impacts economic growth positively.

With the rapid expansion of Islamic finance products, particularly *Sukuk*, many Western countries have recently allowed Islamic financial operations (Ghezal et al., 2022). For example, the United Kingdom is the hub of the Islamic finance capital of the West. *Sukuk* is similar to a government bond used to raise funds instead of traditional bonds (Djafri et al., 2021). Meanwhile, the German government established the first full-fledged Islamic bank in 2017 (Bhavin & Saad, 2017). In addition, the Japanese government has issued a directive that allows Islamic banking products to operate in the country (Djafri et al., 2021).

From 2010 to the third quarter of 2017, the most significant estimation of *Sukuk* issued was reported in 2012. In addition, the third quarter of 2017- 2013 saw the most significant number of *Sukuk* issuances. However, the market saw a decrease in *Sukuk* issuance in 2016 concerning value and quantity. This phenomenon has been ascribed to the diminished oil prices and the allure of conventional bonds (Al-Ali, 2019). The global *Sukuk* market distribution in 2017 indicated that Asian countries accounted for 72.1 percent of global *Sukuk* issuance, followed by the GCC (23.3%), European countries (2.36%), and African countries (2.2%). On the other hand, countries that contributed to the universal *Sukuk* market were Malaysia as the leading country with a total share market of 62.4 percent, followed by the United Arab Emirates (UAE, 7.3%), Saudi Arabia (9.7%), Indonesia (6.4%), Bahrain (2.8%), Qatar (2.6%), and Türkiye (2%) (IIFM, 2018; Al Asari, 2018).

Furthermore, from 2001 to 2017, Malaysia played a dominant role as the biggest *Sukuk* issuer in both international and domestic markets, with USD 612 billion, followed by Saudi Arabia (\$95 billion), the UAE (with an unlimited amount of \$95 billion), and Indonesia (\$63 billion). The universal *Sukuk* percentage of 68.9 percent belonged to Malaysia and Indonesia, as Malaysia accounts for 62.5 percent and 6.4 percent of Indonesia (COMCEC, 2018; Paltrinieri et al., 2019; IIFM, 2018). This shows that the UAE has 27.01 percent, thus maintaining leadership in the global *Sukuk* market. Malaysia follows this (25.77%) and Saudi Arabia (19.67%) (IIFM, 2021).

However, with this development, the *Sukuk* is bedvilled by Shariah's challenges and legal issues of possession in *Sukuk* structures. There are debates among Islamic scholars on *Sukuk* offered in many markets (Benaicha et al., 2019; Utami et al., 2019). Significant challenges have emerged relating to Shariah's compliance with the *Sukuk* (Hosen, 2016; Safian, 2017; AbdulKareem et al., 2022). The investors' ownership and possession of the underlying asset were questionable. By definition, 'possession' or 'ownership' refers to an asset's physical or constructive acquisition and ownership. The transfer of ownership involves the physical conveyance of the item from the seller to the buyer, while the transfer of possession encompasses a symbolic conveyance of the asset through tamkin, enabling the buyer to assume possession, along with other mechanisms aimed at removing impediments that could hinder the purchaser from taking control 'Possession' refers to acquiring Shariah-compliant *Sukuk*, either constructively or physically, on the Islamic capital market (ICM) (Yosoualhi, 2017; Ghezal et al., 2022).

There have been questions about whether all *Sukuk* holders have possessed or owned completely the underlying asset of the *Sukuk* before selling it in the ICM. Asset-based *Sukuk* is an example of this, in which the underlying asset of the *Sukuk* does not leave the originator's balance sheet after being purchased by *Sukuk* investors. This led to arguments over Shariah's compliance with asset-based *Sukuk* that is not owned or possessed by investors. Most Shariah scholars have ruled out that the asset-based *Sukuk* structure is not Shariah-compliant because investors should possess the underlying assets. As an unresolved issue among Shariah scholars and practitioners, this deviation from Shariah has raised the critical question of how *Sukuk* investors, with full ownership or possession, will follow the provisions of Shariah compliance with the contract. Hence, this study intends to investigate the Shariah viewpoint of *Sukuk* investors without full ownership or possession of the underlying asset of *Sukuk* under asset-based *Sukuk* based on Islamic jurisprudent evaluation. This issue is related to the country's legal system, where the *Sukuk* was issued.

LITERATURE REVIEW

Sukuk is defined by the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) as 'certificates of equal value

representing undivided shares in the ownership of tangible assets, usufructs, and services or (in the ownership of) the assets of particular projects or special investment activity' (AAOIFI, 2010, p. 298). Furthermore, it is similarly defined as 'certificates of equal value put to use as common shares and rights of intangible assets, usufructs, and services or as equity in a project or investment activity' and this definition is supported by many researchers (Ahmed & Elsayed, 2018; Olaide & AbdulKareem, 2021; Smaoui & Khawaja, 2017; Godlewski et al., 2016; Asutay & Hakim, 2017; Mahmud et al., 2019). *Sukuk* investors are interested in the underlying asset of *Sukuk*, a project, an enterprise business, which enables them to receive incomes generated from the projects (Hasan et al., 2019). In Islamic finance, the *Sukuk* is the most important financial instrument. Western investors perceive *Sukuk* as a debt-like fixed-income instrument; conversely, Muslim investors opt for *Sukuk* due to its adherence to Islamic principles, aligning with their financial requirements, in contrast to conventional bonds *Sukuk* can also meet the needs of investors who want to diversify their equity holdings with low-risk bonds. *Sukuk* is a more cost-effective business borrowing option than syndicated loans (Radzi, 2018; Rafay et al., 2017). It can aid in expansion, mergers, procurement, and international operations (Rafay et al., 2017).

The rapid growth of *Sukuk* issuance is fuelled by several factors, such as the increased recognition of *Sukuk* instruments by universal financial experts, the increase in Islamic investment liquidity (IIL) searching for *Sukuk*, increase in retail and corporate interest in Islamic finance, and the increased standardisation of unsecured Islamic structures. In general, the *Sukuk* industry's development factors remain stable. Universal growth of *Sukuk* increased slightly from 3.4 percent in 2014 to 3.5 percent in 2015, owing to lower expansion, supportive cash-related conditions, and continuous universal exchange growth (Barghouthi et al., 2020). Furthermore, S&P Global (2022) mentioned that they "expected stronger *Sukuk* issuances and further expanded market shares during the modest recovery of core Islamic finance economies to boost Islamic finance assets by around 10 percent to 12 percent over 2021 to 2022." *Sukuk* is a Shariah compliance instrument that compliments the traditional bonds, which contain two main differences. There are three prerequisites for *Sukuk* to be considered a Shariah compliance instrument: (1) the *Sukuk* certificate must represent ownership of intangible assets, usufructs, or services from income-generating projects; (2) payments to *Sukuk* investors

come from projects after tax; and (3) the repayment of an asset value at maturity date should follow the current market price of the *Sukuk* asset and not the first invested amount. *Sukuk* has various strictures, and financiers are not limited to creating their varieties. However, the primary parties in *Sukuk* issuance are the originator, SPV, and investors purchasing *Sukuk* certificates (Zolfaghari, 2017; Rajapakse & Senarath, 2019).

The functions of *Sukuk* have evolved, and a fundamental description of the current *Sukuk* is that it serves as a financial instrument enabling key stakeholders to raise substantial funds from investors. This can be accomplished by constructing a new *Sukuk* structure with underlying assets. Lenders and borrowers are involved in the traditional bond process, whereas *Sukuk* investors and issuers are involved through Islamic contracts. To issue a *Sukuk*, issuers must secure assets. *Sukuk* investors who are interested in buying or subscribing to a *Sukuk* investment will receive a certificate as proof of asset ownership. *Sukuk* investors are eligible to receive money that is equal to the value of the underlying asset of the *Sukuk* upon maturity. The *Sukuk*'s asset value can fluctuate depending on the value of the underlying asset. These characteristics distinguish *Sukuk* from bonds (Razak et al., 2019).

Based on commercial and technical *Sukuk* features, Hasan et al. (2019) classified *Sukuk* into asset-backed and asset-based structures. The underlying asset of the *Sukuk* structure remains on the originator's balance sheet after the issuance of asset-based *Sukuk*. The originator owns the asset, and the asset's beneficial ownership is given to the *Sukuk* holder, while the issuer retains legal ownership. According to Ahmed et al. (2019) and Hosen (2016), the asset-based *Sukuk* structure does not reflect an actual asset sale. This is because such *Sukuk* holders do not own the underlying asset. This equally makes the *Sukuk* holder have no legal right to sell the asset to a third party other than the originator of the *Sukuk* asset. Sulaiman (2020) stated that *Sukuk* holders under the asset-based *Sukuk* have full ownership or possession of underlying assets that do not belong to investors. Naifar and Hammoudeh's (2016) asset-based *Sukuk* structure incorporates tangible assets that might not be legitimately admitted to being possessed or entirely owned by the *Sukuk* investor. This *Sukuk* structure awards only beneficial ownership to the investors of *Sukuk* and indicates that investors of *Sukuk* do not have full recourse to the *Sukuk* assets of the *Sukuk* project, which are not utilised as collateral.

On the other hand, an asset-backed *Sukuk* structure is the transfer of the underlying asset of the *Sukuk* from the originator to the *Sukuk* investors, who are paid from the income generated by the underlying asset of a *Sukuk* project (Nada et al., 2016). Investors in asset-backed *Sukuk* can sue the issuer if the issuer defaults. Furthermore, the underlying asset has been transferred from the originator's balance sheet to the investors' (Tasniaa et al., 2017; Nada et al., 2016). According to Senarath Rajapakse and Rajapakse (2019b), in an asset-backed *Sukuk*, the obligor transfers legal ownership of the underlying asset to a third party, usually a Special Purpose Vehicle (SPV). The SPV acts as a trustee for the *Sukuk* holder, issuing a *Sukuk* certificate and collecting a fee from the holders. *Sukuk* holders are the legal owners of asset projects, and any proceeds from *Sukuk* investments based on project performance go to the holders. Similarly, a *Sukuk* asset has been transferred from the originator's balance sheet to the *Sukuk* holders' balance sheet. Indeed, in the event of default, the *Sukuk* investor, as the legal owner, has the exclusive right to sell the *Sukuk* to recoup the money without going through the obligor (Ahmed et al., 2019). As a consequence, the most critical distinction between asset-backed and asset-based financing lies in the treatment of the asset in the event of default.

Shariah's Position of *Sukuk* Holders without Owning or Possessing an Underlying Asset. First, the issue to be discussed is selling what someone does not own. To validate any selling contract in Islam, the object matter must be exited and owned by the seller. Selling an asset unowned or possessed by the seller is a form of *gharar* (uncertainty), as guided by hadiths. In addition, such a transaction where the asset is not owned or possessed by the seller could lead to a Shariah issue, namely beneficial ownership in asset-based *Sukuk*, which could trigger a problem in case the issuer defaults and *Sukuk* holders have not possessed or owned the underlying asset of *Sukuk* (Nada et al., 2016). Some hadiths mentioned the prohibition of reselling the asset before taking possession (Rahman, 2020). *Qabd* implies receipt or possession of something so that the new buyer can carry out the contractual disposition of the asset without any hindrance (Alam et al., 2017). An asset possession gives the *Sukuk* investor the authority to lease the asset back to the originator. However, unfortunately, under the asset-based *Sukuk*, an underlying asset is not possessed or owned by the investors.

Aziz and Ahmad (2018) viewed the qabd as everything that leads to ownership of goods and permits the use of commodities, which is based on the common local practices without having to hold the commodity on the hands or hold legal ownership. ISRA (2018) defines qabd as the possession of a specific asset, either constructively or physically. Regarding the possession status in a sale contract, Hanafi scholars do not view possession as an essential sale requirement, but as a subsidiary condition instead (Majallah Section 262). It is legally permissible to defer it to a later date, with the exception being transactions involving ribawi items, where qabd is essential as a prerequisite for a valid contract. The Malik scholars confined the application of the hadith on possession to food grains, implying that some other class of items, such as palm oil and cotton, may be sold before collection. Ibn Umar cited Prophet Muhammad (PBUH) as saying, “Whoever buys food, he should not resell it before he takes possession of it” (Sunan Abu Dawud; Rahman, 2020; AAOIFI, 2010).

Additionally, there is no argument among Muslim scholars that possession of ribawi food items (e.g., wheat, dates, notably, salt, and barley) is a condition for their sale. Concerning non-ribawi food, on the other hand, the Maliki scholars have two opinions: (1) it is prohibited without prior possession, and (2) it can be sold without prior possession (Guelida et al., 2022). From the Shafi’e scholars’ perspective, possession is the primary condition for property types. They strictly adhere to the literal meaning of a hadith mentioned as quoted, “Do not sell anything until you receive it,” to the degree that even selling out immovable objects must fulfil the possession prerequisite before resale (AAOIFI, 2010). In any case, the perspective of the Shafi’e school is not applied by the other schools, which do not compel possession before a resale in the event immovable objects such as land. Most Islamic scholars’ jurisprudence holds that the reason for disallowing sales before taking possession is mainly due to the presence of gharar, which may lead to misunderstanding among the transacting parties. This resulted from the worry that the goods may not be delivered because of damage or other issues. Along this line, Islam prohibits any transactions, including bay al ma’dum, as the delivery of the subject matter cannot be performed and may cause gharar (Rahman, 2020).

The purchaser must subsequently take ownership of the underlying asset, and it is also necessary to evaluate the underlying asset’s liability for loss and damage. The risk connected with the underlying asset is

the buyer's responsibility, as long as the asset is under his control (Uddin & Ahmad, 2020). Offers and acceptances can be transmitted verbally or by other means that elicit the contracting parties' approval. Apart from security and registration, this agreement does not need to be written and documented; however, Shariah recommends keeping a record of the contract (Ribadu & Rahman, 2019; AbdulKareem et al., 2023). As owners of the underlying asset, *Sukuk* holders must be able to trade with the *Sukuk* asset freely. This establishes the concept of ownership and possession from a Shariah perspective, which states that *Sukuk* holders must have unrestricted access to the underlying asset. In contrast, the *Sukuk* holder has no legal right to sell the underlying assets, especially in the event of default. This condition sparks a discussion among Shariah scholars about whether the *Sukuk* holder receives ownership of the *Sukuk* or if the relationship between the *Sukuk* holder and the originator is simply like a creditor and a debtor (Uddin et al., 2015).

There are two categories of ownership based on the Shariah principle: (1) complete ownership and (2) incomplete ownership. Complete ownership entails unrestricted rights to legally dispose of them if the asset still exist. In addition, it is impossible to eliminate an asset's ownership right, as it may render the property ownerless (Alaro, 2017; Ghani, 2017).

Ownership, according to Al-Zuhayli (2003, p. 1126), is an exclusive association of the owned thing with its owner, giving the owner the freedom to deal with what he owns in any way that is not legally barred. When a property is legally acquired, the proprietor holds the exclusive right to use and manage it, provided there are no legal impediments to their operations. This right is not applicable to children and individuals with mental health issues, as they do not possess such rights.

This condition prohibits others from exploiting the property without legal permission, such as a guardianship agency (Ghani, 2018). Furthermore, from an Islamic perspective, Hammad (2008, p. 2) defined ownership as a legal claim by a person over an item, to the degree that he is free to transact with it and restrict others from interacting with it. It was also mentioned that ownership and other rights must be established appropriately. More importantly, these rights are based on Islamic law. Legal rights are assigned to the property's vicegerent, who uses the property according to Islamic beliefs (Abdul Razak & Saupi, 2017).

According to Lahsasna et al. (2018), the underlying asset ownership must be transferred and registered in the name of the *Sukuk* holder, not just written to enjoy the asset benefit. When a payment is completed, the issuer issues a certificate, which serves as proof of ownership of the underlying asset. *Sukuk* holders have the right to claim their investments even if they go bankrupt. However, if the investment is damaged, only the *Sukuk* holder will take the loss in proportion to the percentage of the asset they own to justify the profit earned from the *Sukuk* investment. The existing literature demonstrated that scholars had diverse opinions on these phenomena, up to the point that some scholars stated that most *Sukuk* structures did not comply with Shariah. Future studies can further investigate these issues in advanced countries in the *Sukuk* market, Malaysia in particular, and provide some lessons for other countries practicing *Sukuk*, especially Nigeria, and how to make Nigeria lead in Islamic finance, particularly *Sukuk* in the African region.

METHODOLOGY

The main objective of this study is to investigate Shariah scholars' viewpoints of *Sukuk* investors about not having full ownership or possession of the underlying asset under asset-based *Sukuk* based on Islamic jurisprudent evaluation. To accomplish the study's objective, a series of in-depth interviews was conducted with Shariah scholars in Malaysia and Nigeria. The research employed a qualitative approach that incorporated both primary and secondary data. Researchers use three types of interviews in the qualitative approach: unstructured, semi-structured, and structured, which can be conducted online, over the phone, or in person (Arsel, 2017; Schober, 2018). Several research methodologies are called triangulation, which harmonises the aim for which another may reward one.

Various data collection methodologies and triangulation-assisted data analysis were conducted to meet the research objective. In social research, semi-structured interviews are the most extensively used method for gaining an in-depth understanding of social occurrences (Dzwigol, 2020; Alam, 2021). A list of questions was created for respondents regarding the issues under the specified investigation. Furthermore, this strategy elicits information from interviewees about their own experiences and understanding of the topic (Saunders et al., 2016). On the other hand, a semi-structured interview technique

might provide a more in-depth perspective or information based on pre-arranged questions about diverse situations (Knight et al., 2018).

Purposive sampling was used to select the study participants. Although the sample size was small, it is considered normal under the qualitative approach because the participants were chosen based on criteria identified as significant in addressing the phenomenon (Creswell & Poth, 2018). A few aspects considered in selecting the participants of this study were their experience and education related to the phenomenon. These participants hold different positions in Islamic jurisprudence (*fiqh*), and some were Shariah supervisory members of other countries. Before performing the analysis, verbatim transcription was performed for the interviewees. In addition, the NVivo 10 programmes were used to speed up the coding, sorting, and storage of transcripts for analysis. In-depth interviews with eight people were conducted. Based on a guide by Kegler et al. (2019), the participants were coded according to their country of origin to ensure data confidentiality. Participants from Malaysia were referred to as SSMs, while those from Nigeria were referred to as SSNs.

Malaysia and Nigeria were chosen as case studies; both countries have common law jurisdiction. Moreover, Malaysia is considered mature in the Islamic finance industry in terms of the management by the government in the issues of legal and beneficial ownership in *Sukuk* structures without contradiction with Islamic law. Nigeria, as an infant in Islamic finance (*Sukuk*), can learn from Malaysia's experiences. Similarly, Malaysia and Nigeria do not need to enact provisions that allow legal ownership based on the common law in each country, permitting the transfer of only beneficial ownership of assets. Shariah scholars were chosen because of their experience and education related to Islamic finance, particularly in *Sukuk*. These Shariah scholars held different positions in Islamic jurisprudence, and of them were Shariah supervisory members of different countries.

FINDINGS AND DISCUSSIONS

Status of Possession

The participants shared a wealth of knowledge about Shariah issues related to asset-based *Sukuk* arrangements, including ownership and possession. As mentioned previously, Shariah scholars have

differing views on whether *Sukuk* holders must completely control the underlying asset in asset-based *Sukuk*. Most participants, however, agreed that *Sukuk* holders must own the underlying asset before leasing it back to the issuer. As one of the participants (SSN 3) emphasised:

“In every Sukuk structure, owners must fully possess the assets during the project’s tenure. There must be a transfer of full ownership that will give the Sukuk holders the right to lease the asset back to the government or the issuer. The issuer will pay rent to SPV as a trustee on behalf of the investors, which will be resold back to the issuer on maturity or any triggered event. However, if Sukuk owners do not have the right to the assets, the contract is not Shariah-compliant. Regarding absolute ownership of Sukuk assets, the holders must be eligible to own the asset. When it comes to total ownership, investors must own something. The prophet (PBUH) says, ‘You cannot sell what you do not own’ and therefore, the Sukuk holders must own assets before they can be sold back to the issuer.”

In the same view, participant SSN 1 supported the claim:

“According to Shariah, ownership and possession are the best means of claiming profit or dividing it from what an investor owns. Shariah ownership qualifies investors to earn dividends or profits. Similarly, there is no issue if investors earn profit or dividends in asset-based Sukuk. A parameter can be used to determine whether investors possess or own the asset. For instance: (1) It has to look at who bears the brunt in any event of loss, whether the Sukuk holders or the originator. If it is structured so that someone claims the profit but is not liable for the loss, In that case, this is different from the kind of ownership recognized by Shariah to qualify an investor to earn a profit. (2) Another parameter to determine who is entitled to the underlying asset If an asset is sold today, who is entitled to the proceeds? This parameter can be used to determine whether Sukuk holders own assets as Shariah requires.”

In line with this discussion, Ghani et al. (2021) posited that Islamic regulation emphasises the ownership of assets. This means that the possession of an asset guarantees its utility by the owner's. In corroborating this, Rahman (2020) and Lahsasna et al. (2018) affirmed that all transactions must comply with Shariah rules and regulations. This implies immediate possession of the assets after the contract is concluded. The *Sukuk* holder must possess the asset before being hired back by the *Sukuk* issuer.

Furthermore, participant SSM 3 bolstered other participants' arguments on the issue of possession of underlying assets of asset-based *Sukuk* by stating:

“Full possession of assets is a requirement in Shariah. When referring to underlying assets, the Sukuk owner does not fully possess the asset. First, it must differentiate between possession and the rights of Sukuk holders. No matter the type of Sukuk, be it ijarah, musharakah, or mudarabah, there must be a sale of the underlying asset and a transfer of ownership. Shariah recognises the transfer of ownership, in which there must not be a restriction for Sukuk holders regarding the underlying assets. The current practice in the market is that in some transactions, the issuer places certain restrictions on the property, and the Sukuk holder needs proper due diligence regarding the asset. This restriction or condition should be removed to ensure that the investors have ownership and possession of the asset, whether registered under the investors' names or not.”

From the previous discussion, one can assert that ownership and possession are crucial aspects of asset-based *Sukuk* structures. The right to possession or ownership provides the *Sukuk* holder with the authority to dispose of the underlying asset to the *Sukuk* issuer or a third party. Therefore, the *Sukuk* holder should possess the underlying asset before renting it to the issuer (Lahsasna et al., 2018). The claims by Lahsasna et al. (2018) and AbdulKareem et al. (2023), further supported by participant SSN 2, are as quoted:

“The issue of ownership and possession of the asset from the issuer to the Sukuk holders is another concern in the Sukuk structure in the case of default. There are different

interpretations of the AAOIFI and SAC of Malaysia. The AAOIFI stipulates that there must be a specific transfer of ownership from the issuer to the Sukuk holders and possession of the asset. For instance, in the East Cameroon Sukuk case, there was a disagreement between the issuer and the Sukuk holders that the underlying asset needed to be correctly transferred to the Sukuk holders after some years. It is not full possession transfer of ownership. This type of anti-crisis terminology in the AAOIFI standard opined that there must be a specific transfer of full ownership of the asset, unlike the SAC of Malaysia, which allows the transfer of ownership in some assets that belong to the government.”

This situation gave such investors the right to claim the underlying asset back in case of default by the issuer; similarly, it afforded gharar in the contract. Conclusively, it is agreed from the interviews of the study that any *Sukuk* structure shall be as follows:

1. To ensure Shariah compliance with *Sukuk* transactions, investors should own and possess underlying assets;
2. To avoid gharar in the case of default, investors should own and possess the underlying assets;
3. To investigate *Sukuk* structures efficiently and effectively to prevent any possible non-Shariah compliance; and
4. Shariah scholars are the backbone of Islamic finance by providing a better and clearer *fatwa* before issuing the *Sukuk*.

Impact of the Legal System

The importance of ownership and possession in *Sukuk* structures has been established. Similarly, Guelida et al. (2022) found the significance of ownership in any Islamic finance product as the authors focused on *waqf*. However, the participants discovered another aspect that has hampered *Sukuk* owners' ability to hold or possess the underlying assets of the *Sukuk* in several jurisdictions. They stated that one of the obstacles preventing investors from owning the underlying assets of *Sukuk* is the legal system of the country where the *Sukuk* is issued, particularly in the common law jurisdiction system. The legal system was crucial in preventing *Sukuk* holders from obtaining complete possession or ownership of the asset. Participants in SSM 4 stressed

that, as quoted, “there is no problem or harm regarding *Sukuk*. If the asset does not belong to the investors because, at inception, they are informed that the asset belongs to the government. The asset belongs to the public if the investors agree with the issuer; everything has been put up front. Therefore, this is a limitation of the public asset, as the investors have no possession but have the right to lease the asset back to the issuer. The fact is that this is public property, and only some structures have this issue. It is only a specific structure involving government assets that involves the public interest.”

In line with the abovementioned opinions, the legal structure under which *Sukuks* are created is a barrier to *Sukuk* investors’ complete possession and ownership of the project’s underlying asset. SSM 2 remarked, as quoted, “*Sukuk* investors do not possess the underlying asset. It usually happens in sovereign *Sukuk*, where the underlying asset belongs to the country. For example, in an airport or ministry building, all of these assets are generally not allowed to go to other parties. However, within *Sukuk*’s tenure, all the rights and liabilities of these assets belong to the investors. Investors do not have the right to sell these assets to a third party. Only the government has the right to repurchase it from investors.”

According to the IFSB (2009), the control of the underlying asset of *Sukuk* is contingent on the legal system under which *Sukuk* is issued. In addition, the right of investors to have *Sukuk* assets does not compulsorily include the registered title. Ownership possession could be a simple collection of ownership attributes that permit the *Sukuk* holder to step into the originator’s shoes or perform responsibilities related to ownership, in addition to the view that the legal system is an obstacle for some investors to have full possession or ownership of the underlying asset (AbdulKareem et al., 2023). According to SSM 2, as quoted, “It is the owner’s right to have ownership and possession of the asset as stated by Shariah, but the government limits the transfer of ownership. Based on the government regulation on the property, because it is very strategic, this issue is interrelated with government policy and the *masalah* of the country. All these must be considered when the *Sukuk* structure is peculiar to countries with a common law system.”

Another participant also supported the view that it depends on the country’s law, whether common law or civil law, where the *Sukuk* is issued. SSN 3 added, as quoted, “to have possession of the underlying

asset of *Sukuk* or full ownership of the *Sukuk* asset. It depends on the law of the country where *Sukuk* was issued, either common law or civil law. This is to be clarified under which law the *Sukuk* is structured. For instance, in Malaysia, legal ownership is not transferred in the case of reserved land. Therefore, if the *Sukuk* is structured based on this land, the *Sukuk* investors will not have legal ownership. Sometimes, Shariah law needs to be revised for contracts with certain assets. Hence, a country's custom can be applied if it does not contradict Shariah's principle. Therefore, purchasing *Sukuk* based on common law is not prohibited."

In addition, SSM 1 emphasised that the legal system in which *Sukuk* has been issued plays a critical role in any *Sukuk* structure, as quoted: "This is not a concern because investors have recourse to the underlying asset if *Sukuk* holders are legally recognised as owners. In addition, investors have liability on the asset under the condition of claimed profit, as indicated by Shariah. Hence, there is no restriction on them doing whatever they want. This proves that investors own the asset. If the originator defaults on paying investors monthly and quarterly payments and the ownership of the asset is still with the originator, the court will recognise the beneficiary of the investment even if the registration is under the originator; since the court recognises beneficial ownership, there is no big problem."

According to Alaro (2016) and AbdulKareem et al. (2023), English law divides ownership into beneficial and legal categories. This posed a new issue for Shariah experts regarding the legality of the underlying asset of *Sukuk*. This is corroborated by SSN 3's view, as quoted: "For me, there is no problem as far as the legal system of the country where *Sukuk* are issued recognised beneficial ownership without having a legal owner and possession of the asset, so there is no problem." In support of this view, SSM 5 also asserted that "*Sukuk* owners not having full possession of the underlying asset but whose rights are preserved and maintained have no serious issue. It is not necessary to register the asset under the name of the *Sukuk* holders; the name can be registered under the trustee as beneficial ownership."

However, in asset-based *Sukuk* structures, legal ownership of the asset does not belong to the *Sukuk* investors, similar to the legal system of common law in some jurisdictions, such as Malaysia and Nigeria. In the realm of the common law system, a clear distinction is drawn between

legal and beneficial ownership. Conversely, in jurisdictions governed by civil law, the delineation between legal and beneficial ownership is not a point of contention. In these civil law contexts, it is plausible that the nuanced issue of ownership and possession concerning asset-based Sukuk structures may not arise. This underscores the divergent legal frameworks and potential implications for Sukuk arrangements in different jurisdictions.

In a nutshell, the study's findings revealed that the legal system of the country where the *Sukuk* was issued played an essential part in ensuring that *Sukuk* owners were able to obtain control of the underlying asset. As a result, we may conclude that:

1. There are issues of lack of absolute ownership or full possession of government assets that are available to the public.
2. This occurs based on the *Moslah* of the country.
3. To maintain Shariah compliance with the contract, investors should assume the liability of assets for the contract period, and
4. This issue occurs in the *Sukuk ijarah* only because investors must take equity-based *Sukuk* ownership based on their contribution to the *Sukuk* projects.

The *Sukuk* issuer must critically observe Shariah requirements in every *Sukuk* structure, particularly the issue of possession and ownership of the underlying assets of *Sukuk*, so that it will not lead to non-Shariah compliance, such as issuing gharar in the underlying asset. Modern Islamic finance transactions prioritise ownership structures that comply with Shariah principles, which often involve shared ownership, asset-backed financing, and partnerships. These arrangements ensure that possession and ownership are aligned with Islamic values, thereby avoiding interest-based transactions and excessive uncertainty while promoting economic fairness and ethical conduct.

DANA GAS AS A CASE STUDY OF BENEFICIAL OWNERSHIP IN *SUKUK* STRUCTURES

In asset-based *Sukuk* structures, beneficial ownership and possession are crucial in Islamic finance, particularly *Sukuk*. An actual case study

demonstrates this structure very well, which is known as the Dana Gas *Sukuk* dispute case in 2017. Dana Gas, an energy company based in the UAE, raised USD 920 million by issuing a *Sukuk* in 2007. This *Sukuk* was set up as a *mudarabah* certificate, a typical *Sukuk* structure in which investors contribute capital and the issuer manages the funds while sharing profits and losses.

In 2017, Dana Gas declared that according to the most recent interpretations of Islamic finance rules, the 2007 *Sukuk* was no longer Shariah-compliant. They claimed to restructure the *Sukuk* on more advantageous terms for the company because the *Sukuk* had become illegal due to modifications made to Islamic finance standards. According to Dana Gas, the *mudarabah* structure failed to give the *Sukuk* holders actual beneficial ownership and possession of the underlying assets of *Sukuk*. Investors in a *mudarabah* should partake in the actual profits and losses of the underlying assets under Islamic financial principles. The *Sukuk* structure, however, included clauses that fixed the returns, making it to look like a conventional bond. This led to concerns regarding the validity of *Sukuk* holders' ownership rights in the underlying assets. The *Sukuk* holders, on the other hand, asserted that Dana Gas's attempt to restructure the *Sukuk* amounted to a breach of contract and a contravention of Shariah rules because they were, in fact, the beneficial owners of the underlying assets. They thought that Dana Gas was trying to back out of its commitments and lower the payouts to *Sukuk* holders.

Eventually, the lawsuit was heard in courts in several countries, including the United Kingdom and the UAE. The results of this case greatly impacted the *Sukuk* market and the Islamic finance industry. In the end, a settlement was achieved in which Dana Gas consented to honour its original *Sukuk* obligations and pay a greater profit rate to the *Sukuk* holders. The Dana Gas *Sukuk* case study highlights the significance of beneficial ownership and possession in asset-based *Sukuk* structures. Transparency in *Sukuk* contracts must ensure that investors truly possess beneficial ownership and possession of the underlying assets, as required by Islamic finance principles. This case study underscores the paramount importance of aligning Islamic financial products with Shariah principles, emphasizing the need to maintain investor confidence and uphold market integrity. Additionally, it sheds light on the challenges and intricacies associated with navigating issues of possession and beneficial ownership within

asset-based *Sukuk* structures. The exploration of these complexities offers valuable insights into the dynamic landscape of Islamic finance and its intersection with legal and Shariah considerations.

SUMMARY AND CONCLUSION

This study examines the Shariah perspectives of *Sukuk* investors who still require complete ownership or possession of the underlying asset in asset-based *Sukuks*. The findings showed that *Sukuk* holders must take possession of the underlying assets because it is illegal for someone to sell something they do not own. Furthermore, all *Sukuk* investors must fully acknowledge the underlying assets of the project's duration. A complete ownership transfer must occur, allowing *Sukuk* investors to lease the asset back to the government or issuer. The issuer will pay rent to the SPV as a trustee on behalf of the investors, who will then resell the bonds to the issuer at maturity or at any other time. *Sukuk* holders must own the asset before it may be sold back to the issuer, as quoted from the Prophet Muhammad (PBUH), "You do not sell what you do not own." According to Shariah, possession is the best way to claim profits from what one has, but investors cannot claim anything if they do not have possession, as Prophet Muhammad (PBUH) explained.

The findings also revealed that the legal system of the country where the *Sukuk* was issued is one of the reasons that prohibits investors from getting the underlying assets of the *Sukuk*, particularly in asset-based *Sukuk* structures. According to the participants' consensus, *Sukuk* can be sold from the originator to the *Sukuk* holders without the originator acquiring control of or holding the underlying asset of the *Sukuk*. The primary issue under Shariah is that investors can only benefit by bearing responsibility, yet because *Sukuk* holders benefit from the project, they must also take responsibility. Moreover, the purchaser must then take possession of the underlying asset and it is imperative to determine the liability of the underlying asset regarding the loss and damage. As long as the investors own the underlying asset, they are responsible for any risk (Uddin & Ahmad, 2020). Those who do not bear any responsibility are not qualified for compensation and income, as the Prophet disallowed the profit earned without taking risk and liability (Agha & Sabirzyanov, 2015; AbdulKareem et al., 2023).

One criticism of the current *Sukuk* structure is that the owner has yet to be transferred entirely or possessed by the *Sukuk* holder. As a result, it is critical to push the *Sukuk* issuer and the government to give *Sukuk* holders complete possession and ownership of the underlying asset over the project's duration. The stakeholder's influence would end non-Shariah compliance, which Shariah experts are fighting for. Similarly, to finally address the issue of possession and beneficial ownership in asset-based *Sukuk* structures in Malaysia and Nigeria, it is vital to strengthen regulatory oversight, enhance legal frameworks, and encourage awareness of Islamic finance principles among stakeholders. Additionally, IFIs should adopt Shariah-compliant and transparent possession and beneficial ownership in *Sukuk* structures to ensure the integrity of operations and transactions.

This research acknowledges certain limitations that warrant consideration. Primarily, the study faced constraints in reaching a broader spectrum of influential figures in the Islamic finance business within the given time frame. However, it is noteworthy that those few figures who were approached during this limited period displayed eagerness in sharing valuable insights, contributing significantly to the richness of knowledge and experience incorporated into the study. Secondly, a small sample size (eight participants) could only provide limited data and discussions. Finally, this research was focusing only on the Shariah issue of ownership and possession in asset-backed *Sukuk* arrangements. A valuable suggestion for future research involves employing a triangulation of quantitative and qualitative approaches to delve deeper into the issue, particularly in a different jurisdiction. This multifaceted methodology could offer a more comprehensive understanding and nuanced insights into the subject matter.

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