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Law Majalla

AHMAD IBRAHIM KULLIYYAH OF LAWS
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FOREWORD BY THE EDITOR

Alhamdullilah

"*You see the believers as regards their being merciful among themselves and showing love among themselves and being kind, resembling one body, so that, if any part of the body is not well then the whole body shares the sleeplessness (insomnia) and fever with it.*"

(Sahih al-Bukhari)

On taking on the responsibility of heading this tenure, I recognised that teamwork and collective responsibility would be integral to the development of Law Majalla. The success of Law Majalla in multiple avenues, with our foremost success in the publishing of the 2024 edition, lies in the efforts of each member and advisor of this club.

Within this edition, we are honoured to feature an article from Encik Mohamed Hanipa Maidin, an Academic Fellow attached to AIKOL. Furthermore, we are honoured to receive articles and submissions from AIKOL's graduate and undergraduate students. Their contributions to both this journal and the academic field are deeply appreciated.

The articles which are featured in this journal touch on a range of topics, such as the gig economy to the exploration of *waqf* property management in Perak and Johor. Hopefully, this would provide the reader with more insight into these academic topics.

In the culmination of this edition, it would be remiss not to honour several people who have made it possible.

To our distinguished advisor, Assoc. Prof. Dr Maizatun binti Mustafa, we extend our deepest gratitude for her support and

guidance throughout the development of this journal. To AIKOL, we deeply appreciate the support that allowed this journal to flourish. Additionally, we would like to thank all who have contributed to the making of this journal, without which it wouldn't have existed.

To future members of Law Majalla, it is integral to preserve the teamwork and collaborative spirit of this journal. Although there might be bumps along the road, all members must strive for the overall betterment of this organization, which in turn contributes to society at large.

All in all, I sincerely hope Law Majalla will continue to flourish and continue to be a valuable contributor to the field of legal academia.

Nur Iman Nabihah Binti Muhammad Eirfan
Editor to the Law Majalla
Volume 11, 2024

CONTENTS

Foreword by the Editor	*Nur Iman Nabihah Binti Muhammad Eirfan*	v
The Gig Economy and Its Social Protection in Light of International Labour Law and Malaysian Law	*Mohamed Hanipa Maidin*	8–25
Non-Gazetted *Fatwas* as a Persuasive Authority in *Shariah* Courts	*Ahmad Fhirhad Ahmad Fuad*	26–55
Legal Framework and Practices in *Waqf* Property Management: A Case Study of the State of Perak and the State of Johor	*Alya Afiqah Binti Noorismadi* *Dea Farah Faghira Binti Tia Iskandar* *Nursyafikha Binti Kamarrudin* *Tasnim Binti Mohd Fuad*	56–92
Is Malaysia an Islamic State?: A Study of the Islamic Concept of State and Its Application in the Constitutional Framework of Malaysia	*Aeshah Adlina Binti A. Karim* *Ahmad Ali Bin A. Karim*	93–128

11 2024 LM 8-25

THE GIG ECONOMY AND ITS SOCIAL PROTECTION IN LIGHT OF INTERNATIONAL LABOUR LAW AND MALAYSIAN LAW

Mohamed Hanipa Maidin[1]

ABSTRACT

Gig economy is generally associated with flexibility. It is often known as a free market system in which temporary positions are common and platform companies would hire independent workers for short-term commitments. The platform companies tend to strictly view gig workers as independent contractors rather than employees. Ergo, this article seeks to discuss the nature and the special features of the gig workers as well as the brief history of the gig economy. It will equally canvass on the issue of the legal status of gig workers under the current or existing labour law regime at the international level as well as under the Malaysian employment law. Finally, this article intends to highlight some of the key future challenges which might be faced by all the relevant players in protecting the rights of the gig workers under the current regime of labour law.

Keywords: Gig economy, Gig workers, Malaysia, Independent contractors, Employees.

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[1] Mohamed Hanipa bin Maidin is a former Deputy Minister of Law and a two-terms Member of Parliament. He was also a practising lawyer. Currently, he is an Academic Fellow at the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University, Malaysia.

EKONOMI GIG DAN PERLINDUNGAN SOSIALNYA DALAM PERSPEKTIF UNDANG-UNDANG BURUH ANTARABANGSA DAN UNDANG-UNDANG MALAYSIA

Mohamed Hanipa Maidin

ABSTRAK

Ekonomi gig lazimnya dikaitkan dengan fleksibiliti. Ia sering dikenali sebagai sistem pasaran bebas di mana jawatan sementara adalah perkara biasa dan syarikat platform akan mengupah pekerja bebas untuk komitmen jangka pendek. Syarikat platform cenderung melihat pekerja gig sebagai kontraktor bebas dan bukannya pekerja. Oleh itu, artikel ini bertujuan untuk membincangkan sifat dan ciri-ciri istimewa pekerja gig serta sejarah ringkas ekonomi gig. Artikel ini juga akan mengkaji isu status undang-undang pekerja gig di bawah rejim undang-undang buruh semasa atau sedia ada di peringkat antarabangsa dan juga di bawah undang-undang pekerjaan Malaysia. Akhir sekali, artikel ini bertujuan untuk menekankan beberapa cabaran utama masa depan yang mungkin dihadapi oleh semua pihak yang berkaitan dalam melindungi hak pekerja gig di bawah rejim undang-undang buruh semasa.

Kata Kunci: Ekonomi gig, Pekerja-pekerja Gig, Malaysia, Kontraktor bebas, Pekerja-pekerja.

1.0 INTRODUCTION

The 'gig economy' is normally understood as a nascent phenomenon.[2] But the future of work seems to be determined by this new model of economy which may include crowd-work[3] and 'work-on-demand via apps."[4]

Apart from its "official" denomination, this new economy is also dubbed as an "on demand" or "sharing" economy.[5] Occasionally it is also called as "platform economy" or "collaborative economy."[6] One thing is for sure; the gig economy has offered unparalleled flexibility and opportunities for workers and businesses.

Gig economy is generally associated with flexibility. The flexibility in their hours and place of work, is relatively alluring to workers who may be home-bound due to disability or other

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[2] Janine Berg and Valerio De Stefano" Regulating Work in the 'Gig Economy, "Work in Progress, September 25, 2017, https://iloblog.org/2015/07/10/regulating-work-in-the-gig-economy/. There are, however, some opinions which believe it is not really a recent trend in the employment sector. See note 11 below.

[3] Crowd-work is work that is performed on on-line platforms by groups of individual workers, responding to on-line calls.

[4] 'Work on-demand via apps' essentially refers to workers who perform duties such as providing transport, cleaning, home repairs, or running errands and these workers only learn about these jobs via mobile apps bur the jobs are performed locally.

[5] Skyler Brown et al., "Protecting Workers' Rights in the Gig Economy: AI and Digital Labour Platforms," ILO Research Externship, n.d., https://global.lehigh.edu/sites/global.lehigh.edu/files/2_ILO_UN_Ex_Machina_Final_Draft.pdf.

[6] Antonia Asenjo Cruz, Rishabh Kumar Dhir, and Alberto Coddou, *The Platform Economy and Transformations in the World of Work: The Case of Delivery Platform Workers in Santiago, Chile*, November 2023, https://doi.org/10.54394/jcvg2192.

circumstances. As far as platform companies are concerned, the new technology would enable businesses and individuals to mobilise workers on a 'pay-as-you-go' basis, at the click of a button.[7]

Thus, a gig economy is often known as a free market system in which temporary positions are common, and organizations hire independent workers for short-term commitments.[8]

By hiring gig workers who are only treated as "independent contractors" per se via a "contract for service", the employment sector is invariably tempted to stray the gig workers away from the usual employer-employee relationship. And such a status- independent contractor- is generally viewed not to be protective to the gig workers especially in terms of their job security.

Be that as it may, this note primarily seeks to discuss this issue in light of international labour law as well as under Malaysian law of employment. In doing so, the discussion on this issue will be structured in the following orders. Firstly, we intend to discuss the nature and the special features of the gig workers as well as the brief history of the gig economy.

Secondly, we will discuss the legal status of the gig workers under the current or existing labour law regime at the international level as well under the Malaysian employment law. Thirdly, we seek to highlight a slew of future challenges which might be faced by all the relevant players in protecting the rights of the gig workers under the current regime of labour law.

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[7] Katie Terrell Hanna, Ben Lutkevich, and Alexander S. Gillis, "What Is the Gig Economy?: Definition from TechTarget," WhatIs, April 30, 2025, https://www.techtarget.com/whatis/definition/gig-economy.

[8] Hanna, Lutkevich and Gillis, "Gig Economy."

2.0 THE NATURE OF THE GIG ECONOMY AND ITS BRIEF HISTORY

The common understanding seems to believe that the gig economy is relatively a new employment model which does not possess the "standard employment relationship" (SER) feature.[9]

Despite common understanding that the gig economy is often understood as a new economy some scholars, however, believe that the employment model as reflected in the gig economic template is not strictly a new invention. Brian Wallace, for instance, is of the view that gig jobs are much older than one may possibly think.[10] Some writers even construed the gig economy as "old wine in a new bottle."[11] In his critical analysis of the gig economy from theoretical and historical perspective, Jim Stanford, *inter alia*, writes:

"[..] *apart from the specific nature of digital methods of communication, work allocation, supervision and payment, the work practices and relationships embodied in modern digital platform businesses do not seem 'new' at all*."[12]

In the early birth of capitalism, a system known as "putting out" (also called as the 'domestic' or 'cottage' system) was quite prevalent in Europe. This employment model seems to carry the

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[9] SER refers to work performed in the framework of full-time, formal and open-ended (non-time-bound) arrangements in a subordinate employment relationship.

[10] Brian Wallace, "The History and Future of the Gig Economy," LinkedIn, December 8, 2019, https://www.linkedin.com/pulse/history-future-gig-economy-brian-wallace.

[11] Alex De Ruyter and Martyn Brown, *The Gig Economy*, June 30, 2019, https://doi.org/10.2307/j.ctvnjbff3.

[12] Jim Stanford, "The Resurgence of Gig Work: Historical and Theoretical Perspectives," *The Economic and Labour Relations Review* 28, no. 3 (September 2017): 382–401, https://doi.org/10.1177/1035304617724303.

same "DNA" as the present gig system. In both systems, they recognise the application of several flexible and subcontracted work strategies.[13]

In actual fact, on demand work and piece-work compensation—the outstanding feature of the gig economy—have been commonly applied in many industries, given their utility (in certain situations, not all) for ensuring that employers only pay for work they actually need and receive.[14] In the same vein, requiring producers to supply their own capital equipment is a long-standing feature of work in many industries, including transportation, resource harvesting, construction and personal services.[15]

A slew of literature on this topic seems to have reached a tacit consensus that the phrase "gig" emanated from jazz musicians in 1915 when the term was coined by them. Apparently, the jazz musicians employed this term as a form of characterisation of a single musical performance or a one-off event. The word "gig" is also described as an acronym for "God is Good," the enchanting phrase used by those jazz musicians in expressing their utmost gratitude to God for having been offered paid work.[16]

Hence this very term generally denotes a short-term, or freelance work arrangement. Translated into *lingua franca* of the gig economy, it is invariably defined by a labour market that entails temporary, short-term, or freelance work arrangements.

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[13] Stanford. "The Resurgence of Gig Work."

[14] Stanford. "The Resurgence of Gig Work."

[15] Stanford. "The Resurgence of Gig Work."

[16] In the introduction of their book "The Gig Economy," Alex De Ruyter and Martyn Brown have highlighted the historical pathway to the emergence of the word "gig."

3.0 THE LEGAL STATUS OF GIG WORKERS IN MALAYSIA AND OTHER JURISDICTIONS

The ongoing debates in ascertaining the real legal status of the gig workers have been dominating the employment law for quite some time. As far as the legal question as to the status of gig workers: whether they should be treated as employees and be accorded legal protections or as mere independent contractors[17] is concerned, that has not been universally or satisfactorily resolved yet.

Hence, we may safely say that the nub of the question has invariably been whether the relationship between a tech platform or company that facilitates gig work, and the gig worker can (or should) be classified as employer and employee.[18]

Be that as it may, in ventilating such a delicate issue, we shall approach it by considering two separate jurisdictions—Malaysia and other jurisdictions—and seeing as to how they view the gig workers' status under the law.

We shall begin with the legal status of gig workers in Malaysia first and in turn we shall discuss their legal status in a few selected jurisdictions as well.

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[17] Sometimes they are also called "freelancer," "self-employed," "contractor," and "independent workers."

[18] Keph Senett, "What Is the Gig Economy in Canada?," Money.ca, August 9, 2023, https://money.ca/employment/what-is-the-gig-economy-in-canada.

A. In Malaysia

The number of gig workers in Malaysia is quite substantial in that as of 2020 alone, such workers, according to the statistics of the World Bank, constituted about 26% of the Malaysian workforce.[19]

Though there are few employment laws which are currently enforceable in Malaysia, there are essentially two primary existing legislations which are very relevant as far as the legal status of the gig workers in Malaysia is concerned. And these laws are the Employment Act 1955 (Act 265) and the Industrial Relation Act 1967 (Act 177) respectively.

Hitherto, gig workers have not been duly recognised as employees/workmen in Malaysia. And such a legal position is undergirded by the Malaysian high court in the case of *Loh Guet Ching v Myteksi Sdn Bhd (berniaga atas nama Grab)*.[20]

Apparently, in *Loh Guet Ching*,[21] the Malaysian court was not ready to confer e-hailing drivers a legal status as workmen under the definition of the Industrial Relations Act 1967. The court, on the contrary, only viewed their legal status as not more than independent contractors, and thus the relationship between Grab and its drivers was treated as a contractual relationship like any other commercial agreement.[22]

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[19] Gig Workers — Where Do They Stand?," Drew Network Asia, n.d., https://www.drewnetworkasia.com/newsroom/malaysia-gig-workers-where-do-they-stand/.

[20] Judicial Review Application No. WA-25-296-10/2020. Unfortunately, there is no reported judgement of the High Court.

[21] Judicial Review Application No. WA-25-296-10/2020.

[22] Judicial Review Application No. WA-25-296-10/2020.

In placing the gig workers in the "box" of independent contractors, the Malaysian law still cannot run away from this perennial debate about a contract of service and contract for service trap. Such a distinction is invariably deemed to be significant and relevant by Malaysian courts in ascertaining an individual's legal position.

Ergo, in Malaysia, individuals who are under a contract of service will be considered as employees for the purposes of the Employment Act 1955 and the Industrial Relations Act 1967 respectively. On the contrary, individuals who are under a contract for service—such as the gig workers—will only be treated as independent contractors and they will not be treated as employees for the purposes of those two aforementioned employment laws.

Apparently, in drawing such a line of demarcation, more often than not, the Malaysian court will factor in the existence or the absence of the element of control in such an employment.[23] The gig workers are treated as independent contractors due to the fact they merely entered a contract for service with the entity which hired them and the hiring entity is said to have no control over such gig workers.

There seemed to be a glimmer of hope in 2021 for gig workers in Malaysia when the then Deputy Human Resources Minister of Malaysia indicated in Parliament that the proposed Employment (Amendment) Bill 2021 was in the pipeline whereby gig workers would in effect be included into the definition of "employees"

[23] See the case of *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 whereby the Malaysian Court of Appeal drew such a line of demarcation.

under the Employment Act 1955.[24] Unfortunately, hitherto the proposed amendment has not been in picture yet.

B. In other jurisdictions

United States

Let us begin our discussion on the legal status of gig workers in the United States first. What has the court in America found about their legal status? In *O'Connor v. Uber Technologies, Inc.*,[25] a class of California Uber drivers challenged their independent contractor status under California law. Hence, the Plaintiffs who were and former Uber drivers, filed putative class actions alleging that Uber violated various federal and state statutes by, among other things, misclassifying drivers as independent contractors rather than employees.

In that case, a three-judge panel ruled in favour of Uber in that case thus reversing the class certification in which Uber drivers or the gig workers argued they should be categorised as employees rather than independent contractors. The judges thus nullified the decision on the ground that Uber's arbitration clause prohibits class action.

In his commentaries on *O'Connor v. Uber Technologies, Inc.*,[26] Henry Ross had this to say:

"*Of course, a company's representation that an individual is an independent contractor and not an employee is not the*

[24] Instead of employees, they are called "freelancer," "self-employed," "contractor," and "independent workers."

[25] Case No. 13-cv-3826-EMC.

[26] Case No. 13-cv-3826-EMC.

determinative factor in the independent contractor analysis. Rather, the facts surrounding the individual's labor (e.g., hours, permanency of the relationship, skill) are determinative."[27]

Canada

Based on a survey made by the Canadian government, it is estimated that 17% of Canadian workers are currently engaged in the gig economy and that more than 40% of Canadian millennials have participated in "the gig economy" over the past five years. And interestingly, women are more likely than men to be gig workers—9.1% and 7.2% respectively.[28]

According to Keph Sennet, in Canada, the gig workers in that country still have no legal definition as to their status. Hence hitherto their legal status has remained as contractors without the same benefits or rights as employees.[29] It goes without saying that if they are classified as employees, they are definitely entitled to a plethora of employment benefits such as minimum wage, overtime, and regular breaks, not to mention health insurance or vacation pay. Contractors are not.

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[27] Henry Ross, "Ridesharing's House of Cards*: O'Connor v. Uber Technologies, Inc.* and the Viability of Uber's Labor Model in Washington," *Washington Law Review* 90, no. 3 (2015): 1431–69.

[28] Sung-Hee Jeon, Huju Liu, and Yuri Ostrovsky, "Measuring the Gig Economy in Canada Using Administrative Data," *Canadian Journal of Economics/Revue Canadienne d'économique* 54, no. 4 (November 2021): 1638–66, https://doi.org/10.1111/caje.12558.

[29] Senett."What Is the Gig Economy in Canada?"

United Kingdom

Like other jurisdictions, the gig economy has equally transformed the United Kingdom's employment landscape such as the rise of digital platforms, increasing demand for flexible work, and shifts in consumer behaviour have fuelled its growth. However, there are reasonable concerns revolving on worker rights and the economic impact of this rapidly growing sector. And such concerns apparently have spurred new regulatory changes in the United Kingdom's employment law.

To her credit, the UK Government and Employment Tribunal, in particular, have, relatively speaking, swiftly responded and duly adapted to this employment transformation. They have taken a slew of required steps by introducing, for instance, several regulatory modifications with the sole aim at protecting gig workers.[30] Such regulatory changes, for example, include clarifying employment status, ensuring access to minimum wage and benefits, implementing health and safety measures, and enforcing transparency and accountability among gig employers.

In the UK, Uber drivers—being the gig workers—had brought Uber, the San Francisco-based company, to the court and the case went up to the UK Supreme Court. And these gig workers recorded victories at all stages of the trial. In its unanimous decision, the UK Supreme Court ruled that Uber drivers should be classified not as independent contractors but as workers

[30] The GPS Team, "United Kingdom's Gig Economy: New Regulations and Their Implications," Global People Strategist, April 24, 2025, https://www.globalpeoplestrategist.com/united-kingdoms-gig-economy-new-regulations-and-their-implications.

entitled to basic employment protections like the minimum wage and paid annual leave.[31]

And such a landmark verdict, according to Wilfred Chan, has sparked off movements around the world so much so US. Secretary of Labor, Marty Walsh, said that gig workers should be considered employees, a sign that the tide is turning.[32]

Chile

The government of Chile does not let the *laissez-faire* capitalism, reflected in the gig economy, to be given a free hand to dictate terms in the employment environment. In ensuring the gig workers' safety net is not unduly threatened, the government seems to be ready to adhere to Keynesian economic policy by justifying government intervention through public policies.
The Chile government has, therefore, taken initiatives such as by proposing a regulatory framework in Chile via a legislation known as Act No. 21.431 which seeks to distinguish between "dependent digital platform workers" and "independent digital platform workers.[33] By having this new law, the government of Chile attempts to protect both dependent and independent worker categories, as well as specific rights that are distinct for each category.[34]

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[31] Wilfred Chan, "The Workers Who Sued Uber and Won - Dissent Magazine," Dissent Magazine, May 2, 2023, https://www.dissentmagazine.org/online_articles/the-workers-who-sued-uber-and-won/.

[32] Chan. "The Workers Who Sued Uber and Won."

[33] Cruz, Dhir, and Coddou. *The Platform Economy and Transformations in the World of Work*.

[34] Cruz, Dhir, and Coddou. *The Platform Economy and Transformations in the World of Work*.

Hence, the new law also guarantees the right of independent workers by insisting the platform company to duly practise a culture of transparency in terms-of-service agreement. The law also prohibits any unilateral modification by platform companies, with the intention of addressing the power imbalances between workers and platforms.[35]

4.0 THE FUTURE CHALLENGES OF GIG ECONOMY

There are, nevertheless, a few key challenges which need to be efficiently addressed by all the key players who participate in this relatively new brand of economy. In securing the protections of gig workers many have proposed for gig workers to unionise. Truth be told, this is indeed a sound and wise recommendation. Nonetheless there seems to be a slight problem with this tremendous idea. Assuming gig workers were to be allowed to unionise, would there be a secured guarantee that they would be able to form a union and in turn access to basic labour protections through this channel of collective representation?

Judging by the nature of the gig workers' operation, it seems to be a tall order for gig workers to organise themselves in any union due to a slew of factors. As we are fully aware, mostly the gig workers are unknown to each other, and they are also geographically dispersed. Finally, they may not necessarily engage in gig work on a permanent basis.[36] Hence all these

[35] Cruz, Dhir, and Coddou. *The Platform Economy and Transformations in the World of Work*.

[36] Employment and Social Development Canada, "What We Heard: Developing Greater Labour Protections for Gig Workers," Canada.ca, March 22, 2023, https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/labour-standards/reports/gig-workers-what-we-heard.html.

factors may possibly operate as a stumbling block for the proposed unionisation to be duly materialised.

Establishing a union and in turn becoming a member of such a union would be definitely advantageous to gig workers as they may be able to organise or engage in collective bargaining- an effective tool in employment law.

In protecting the rights of the gig workers there are also proposals from some quarters for the gig workers to be duly insured. Taking into account the risk involved to some gig workers, the idea that the gig workers need to be duly protected by insurance policy would, in my view, be a complete no-brainer. Though gig work may provide a hell of a flexibility, it will also expose the job, at least some jobs, such as ridesharing, to a litany of risks.

At the moment, we may safely say that in the absence of a safety net of traditional employment benefits, such as workers' compensation or employer-provided insurance, the gig workers themselves ought to take proactive steps to safeguard themselves.

As the size of gig workers in most of the countries around the globe are rapidly growing, this in iteself will definitely generate more income to such countries. Therefore, it is high time for the government to be extremely sensitive and serious about protecting the rights of such workers. After all, most of them belong to low-income earners.[37]

[37] Philippa Kelly, "Half of UK Gig Economy Workers Earn below Minimum Wage, Study Reveals," The Guardian, May 11, 2023, https://www.theguardian.com/global-development/2023/may/11/half-of-uk-gig-economy-workers-earn-below-minimum-wage-study-reveals; in this article the author reveals that more than half of gig workers in the UK are earning less than the minimum wage whereas the nature of their work has put their safety at risk.

Majority of gig workers invariably face common risks such as accidents, injuries, liability claims, property damage, and even lawsuits. And in the absence of appropriate insurance coverage, in all likelihood, such risks could turn into financial woes to most of them.[38] Be that as it may, there are suggestions for gig workers to be duly covered under the following insurance policies:[39]

- Personal Motor insurance;
- General liability insurance;
- Professional liability insurance (also known as errors and omissions insurance); and
- Health insurance

As far as Keph Sennett is concerned, being covered by insurance for gig workers is a bigger issue than one might think. That is why, according to him, some content creators, like writers, are required to carry liability insurance and for workers with dependents, critical illness and disability insurance are essentials. Under such circumstances, in his opinion, at a very minimum, gig workers should protect themselves with some sort of business insurance.[40]

In some countries like the United States, gig workers may gain access to unemployment insurance with the passage of the CARES Act of 2020,[41] yet some are still not covered.

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[38] UNISON Insurance Broking Services Pvt Ltd, "The Growing Importance of Insurance Needs in the Gig Economy." LinkedIn, June 10, 2023, https://www.linkedin.com/pulse/growing-importance-insurance-needs.

[39] UNISON Insurance Broking Services. "The Growing Importance of Insurance Needs in the Gig Economy."

[40] See notes 17 and 26 above.

[41] The CARES Act or the Coronavirus Aid, Relief, and Economic Security Act is a $2.2 trillion economic stimulus bill passed by the 116th U.S.

Given the fact that gig workers are often viewed as independent contractors rather than employees, it is not clear whether the platform companies are willing to spend money for such a scheme.

To rub salt to the wound, most gig workers merely earn meagre and erratic incomes, making it much harder for them to qualify for consumer loans and mortgages from financial sectors thus they lack many of the protections and benefits other workers enjoy.

Finally, the future challenges which may continuously hit the gig economy would be the unresolved ambiguous employment status of gig-economy workers.[42]

Apparently, this has become a source of major concern for critics of the platform model. While the challenge of correctly classifying different types of workers is itself not a nascent phenomenon, the involvement of new technology-driven business models, linked to more elaborate working arrangements, has probably aggravated existing definitional tensions.[43]

As we have highlighted in our earlier discussion, platform companies tend to stick to their firm and uncompromising stand that those working via their apps are merely independent contractors. After all, they argue the contractors choose when and

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Congress and signed into law by President Donald Trump on March 27, 2020.

[42] Joshua Healy, Daniel Nicholson, and Andreas Pekarek, "Should We Take the Gig Economy Seriously?," *Labour & Industry: A Journal of the Social and Economic Relations of Work* 27, no. 3 (July 3, 2017): 232–48, https://doi.org/10.1080/10301763.2017.1377048.

[43] Healy, Nicholson, and Pekarek. "Should We Take the Gig Economy Seriously?".

where to work and must invest their own capital (e.g. a car or bike) to set up in operation.

Apparently there has been ongoing hostility to any move which seeks to suggest that independent contractors should be legally reclassified as employees. Such a reclassification, in the eyes of platform companies and their ardent supporters, would only destroy the platform economy.[44] This challenge needs to be immediately addressed and if possible both parties would be able to reach a win- win solution. Perhaps as a point of departure, the Chilean model could be profoundly considered.

5.0 CONCLUSION

Despite the fact there is an opinion which contends that as soon as the present slack labour market improves there would be a strong possibility that ready supply of workers could dry up hence such a scenario may severely hit the gig economy. I, on the other hand, tend to argue that this new brand of economy would be here to stay and remain relevant.

As the number of gig workers in all states in the world has shown a sharp rise, the global community has to be fully ready to accept this phenomenon as *fait accompli* and in turn learn how to adapt to it. In such circumstances, all the governments around the globe should not remain idle and act as mere fence sitters witnessing this phenomenon. At times, they may need to act if such an act is badly needed.

[44] Healy, Nicholson, and Pekarek. "Should We Take the Gig Economy Seriously?".

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NON-GAZETTED *FATWAS* AS A PERSUASIVE AUTHORITY IN *SHARIAH* COURTS

Ahmad Fhirhad Ahmad Fuad[1]

ABSTRACT

This study examines the extent to which non-gazetted *fatwas* are referred to by judges in the *Shariah* Courts prior to the issuance of rulings or judgments. In addition to classical Islamic texts, *fatwas* serve as an important source of reference for judges in the decision-making process. In Malaysia, *fatwas* may be categorized into three types: gazetted *fatwas*, non-gazetted *fatwas*, and *mufti*s' opinions. Gazetted *fatwas* are widely relied upon by judges and are legally binding on all Muslims within a state. Conversely, non-gazetted *fatwas* are not legally binding; they remain ungazetted within a particular state although they may have been gazetted elsewhere. This research adopts a qualitative methodology, drawing upon academic journal articles, statutory provisions, legal enactments, and case law. The findings reveal that non-gazetted *fatwas* continue to be referred to by judges as a guide in exercising *ijtihad* before delivering final decisions. Furthermore, non-gazetted *fatwas* play a complementary role in facilitating judicial decision-making, thereby contributing to more equitable rulings and helping to alleviate the problem of case backlogs in the *Shariah* Courts.

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Keywords: Applications, Non-Gazetted *Fatwas*, *Shariah* Courts, Persuasive Authority, Cases.

FATWA TIDAK DIWARTAKAN SEBAGAI AUTORITI BERSIFAT PERSUASIF DI MAHKAMAH *SHARIAH*

Ahmad Fhirhad Ahmad Fuad

ABSTRAK

Kajian ini meneliti sejauh mana *fatwa* tidak diwartakan dirujuk oleh hakim di Mahkamah Syariah sebelum pengeluaran keputusan atau penghakiman. Selain daripada kitab-kitab, *fatwa* merupakan sumber rujukan penting bagi hakim dalam proses membuat keputusan. Di Malaysia, *fatwa* boleh dibahagikan kepada tiga jenis: *fatwa* yang diwartakan, *fatwa* yang tidak diwartakan, dan pandangan *mufti*. Fatwa yang diwartakan banyak dirujuk oleh hakim serta mengikat dari segi undang-undang ke atas semua orang Islam dalam sesuatu negeri atau dibawah *locus standi*. Sebaliknya, *fatwa* yang tidak diwartakan tidak mengikat dari segi undang-undang; ia kekal tidak diwartakan dalam sesebuah negeri walaupun mungkin telah diwartakan di negeri lain. Kajian ini menggunakan metodologi kualitatif dengan merujuk kepada artikel jurnal akademik, peruntukan statut, enakmen undang-undang, dan kes-kes terdahulu. Dapatan kajian menunjukkan bahawa *fatwa* tidak diwartakan terus dirujuk oleh hakim di Mahkamah Syariah sebagai panduan dalam melaksanakan *ijtihad* sebelum membuat keputusan akhir. Selain itu, *fatwa* tidak diwartakan berperanan sebagai pelengkap dalam memudahkan proses membuat keputusan kehakiman, sekali gus menyumbang kepada penghakiman yang lebih adil dan membantu mengurangkan masalah kes-kes yang tertunggak di Mahkamah Syariah.

Kata Kunci: Aplikasi, Fatwa Tidak Diwartakan, Mahkamah *Shariah*, Autoriti Persuasif, Kes-Kes**.**

1.0 INTRODUCTION

Malaysia's legal system reflects a unique form of legal pluralism, shaped by its colonial history and constitutional framework. The Federal Constitution formally recognises Islam as the religion of the Federation, while also providing for the coexistence of civil and *Shariah* courts. This recognition has entrenched parallel systems of law, with *Shariah* law applying exclusively to Muslims in matters of personal status, family law, inheritance, and certain offences under state enactments.[2]

The *Shariah* Courts, established under state jurisdiction in accordance with the Federal Constitution, primarily deal with matters concerning Muslims, including family law, inheritance, and religious endowments. The amendment to Article 121 of the Constitution was intended to safeguard the authority of these courts by preventing civil court intervention in areas reserved for *Shariah* jurisdiction. Nevertheless, the position of the *Shariah* Courts continues to generate debate, as questions remain over their equality with civil courts and the extent of their jurisdiction. Issues such as overlapping authority in *waqf* and estate administration cases illustrate the challenges of legal pluralism in Malaysia, where federal and state jurisdictions intersect.[3] Thus, while the constitutional framework affirms the exclusivity of *Shariah* courts, jurisdictional conflicts persist, highlighting the need for clearer legal demarcation and stronger institutional support.

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[2] Shad Saleem Faruqi, "Legal Pluralism in Malaysia: Navigating the Civil and *Shariah* Systems," *FULCRUM*, May 5, 2025, https://fulcrum.sg/legal-pluralism-in-malaysia-navigating-the-civil-and-shariah-systems/

[3] Nuarrual Hilal Md. Dahlan and Abdul Rani Kamaruddin, "Civil 'Jurisdiction' of *Shariah* Court in Malaysia—Should It Be Expressed or Implied? A Reflection" (paper presented at *Persidangan Kebangsaan ke-2 PPSPP*, Universiti Kebangsaan Malaysia, Bangi, September 5–6, 2005).

Within this framework, one of the key sources that informs and guides the *Shariah* courts in their decision-making is the *fatwas*.[4] These phrases are derived from the word "fatā" (فَتَى), which refers to a young guy who is robust, healthy, and active. The idea that when a *mufti* gives a *fatwa* on an obscure or doubtful situation, the *fatwa* serves to cement and enhance the ruling, giving it authority and clarity, is what connects it to *fatwas*.[5] The *mufti* provides the *fatwas*, which is a solution to the issue according to Islamic law. However, the response provided by the *mufti* is not regarded as a *fatwa*s if the query was unrelated to Islamic regulations.[6] *Fatwa* is not an easy legal choice, also known as enacting a law without a basis.[7] This can also be more easily understood, it is an Islamic concept of *al-ifta'* which means the process of issuing decrees on a certain matter or dispute, and the outcome of the process is called a *fatwa*.[8] As practiced in

[4] *Fatwa* is a legal opinion issued by Islamic scholars in response to a query about religious or worldy matters. See Muhammad I. Mehmood, "*Fatwas* in Islamic Law, Institutional Comparison of *Fatwas* in Malaysia and Pakistan: The Relevance of Malaysian *Fatwas* Model for Legal System of Pakistan," *Arts and Social Sciences Journal* 6 (2015): 118, https://doi.org/10.4172/2151-6200.1000118.

[5] Pejabat Mufti Wilayah Persekutuan, "Bayan Linnas Siri ke-179: Metodologi Jawapan Hukum dan Fatwa Mufti Wilayah Persekutuan," 1 June 2019, accessed November 3, 2025, https://www.*mufti*wp.gov.my/en/artikel/bayan-linnas/3440-bayan-linnas-siri-ke-179-metodologi-jawapan-hukum-dan-*fatwa*-*mufti*-wilayah-persekutuan#_ftn1.

[6] Mohd, Wan, Wan Nur, and Abdul Hanis Embong. 2018. "*Fatwas* as a Disseminator of Islamic Laws among Community of Malaysia." *International Journal of Academic Research in Business and Social Sciences* 8 (11): 516–21. http://dx.doi.org/10.6007/IJARBSS/v8-i11/4925.

[7] Setyaningsih, "*Fatwas* Institutions in Islamic Law," *Awang Long Law Review* 5, no. 1 (2022): 314–20, https://doi.org/10.56301/awl.v5i1.566.

[8] Mohd Zakhiri Md Nor, Hairuddin Megat Latif, Md Rejab Md Desa, Al Hanisham Mohd Khalid, and Mohammad Azam Hussain, "Legal Position of *Fatwas*: Observations from Selected Jurisdictions" (paper presented at the

Malaysia, a *fatwa* is a legal opinion on matters of Islamic law issued by a qualified *mufti*.[9] While non-binding in nature, *fatwas* play an important role in guiding Muslims and shaping legal understanding. In Malaysia, their legal effect depends on whether they are gazetted by the state authority as stated in Section 49 of Administration of The Religion of Islam (State of Selangor) Enactment 2003. A gazetted *fatwa* carries binding force and must be recognized by the *Shariah* courts, whereas a non-gazetted *fatwa* remains advisory and functions only as persuasive authority. This distinction highlights the varied role of *fatwas* in Malaysia's *Shariah* legal framework and their influence in judicial decision-making.

The term *fatwa* is not explicitly defined in any of the State Enactments in Malaysia. Nevertheless, these enactments contain provisions concerning the legal effect of a gazetted *fatwas*, which is binding upon Muslims in the respective states, as provided under section 49 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 In Malaysia, *fatwas* may be classified into gazetted *fatwas*, non-gazetted *fatwas*, and the personal opinions of *mufti*s. Among these, only gazetted *fatwas* possess legal enforceability, while the others serve merely as advisory references.[10] This research focuses on non-gazetted *fatwas*, which, although not legally binding, continue to influence judicial practice in the *Shariah* courts. In Selangor alone, there

Seminar on Law & Society [SOLAS 2016], School of Law, Universiti Utara Malaysia, December 6, 2016).

[9] *Mufti* refers to a Muslim authority who issues opinions in response to questions posed to him on questions regarding *Shariah* rulings. Burak, G. . "*Mufti*." In The [Oxford] Encyclopedia of Islam and Law. Oxford Islamic Studies Online, http://www.oxfordislamicstudies.com/article/opr/t349/e0095 (accessed 22 September 2025).

[10] Muhammad Afham Suhaimi, Muhammad Amnan Idham, and Wan Mohd., "The Sighah *Fatwas* and Its Significance in Malaysia," *International Journal of Academic Research in Business and Social Sciences* 14, no. 12 (2024): 3308–3319, https://doi.org/10.6007/ijarbss/v14-i12/24306.

are currently about 120 *fatwas* still pending gazettement, reflecting procedural delays and administrative challenges.[11] Since *Shariah* law falls under state jurisdiction, the recognition and treatment of *fatwas* vary across Malaysia, leading to differences in judicial approaches. In some cases, judges have even referred to *fatwas* issued in other states as persuasive authority, demonstrating both the flexibility and the inconsistencies in the application of non-gazetted *fatwas* within the Malaysian *Shariah* legal system.

This research adopts a qualitative approach, focusing on the analysis of secondary sources to examine the non-gazetted *fatwas* in *Shariah* Court judgments in Malaysia. The study relies on academic journal articles, statutes, enactments, and reported case law as its primary sources of data. Through documentary analysis, these materials are reviewed and interpreted to identify how judges use non-gazetted and the variations in their acceptance across different states in Malaysia. Practically, non-gazetted *fatwas* are still referred to by some judges in *Shariah* Courts across Malaysia in judicial decision making in order to ensure fairness and justice.

2.0 PROBLEM STATEMENT

Malaysia practices a dual legal system comprising civil law and *Shariah* law, which consequently separates the jurisdiction of the courts into civil courts and *Shariah* courts. Unlike civil courts, *Shariah* courts do not follow the principle of binding precedent in their judgments. Judges in the *Shariah* courts rely on their knowledge and understanding of specific cases or circumstances,

[11] Jabatan *Mufti* Negeri Selangor, "Keputusan *Fatwas* Tidak Diwartakan," accessed June 10, 2025, https://www.*mufti*selangor.gov.my/keputusan-*fatwas*-tidak-diwartakan/10/.

commonly referred to as *ijtihad*,[12] when making decisions. In other words, *Shariah* judges apply *ijtihad* as part of their judicial reasoning. While judges are qualified to exercise their own *ijtihad*, they may also refer to *fatwas*, whether gazetted or non-gazetted, as a basis for their judgment. However, there is currently no clear or comprehensive legal framework to guide judges on how and to what extent these *fatwas* can be used in judicial decision-making. The extent to which non-gazetted *fatwas* are considered and treated as authoritative by *Shariah* judges remains an area that warrants further academic exploration.[13] This is important because any ambiguity that exists may lead to a lack of transparency, especially in the decision-making process. This can be observed when cases with similar facts result in different outcomes or judgments, which indirectly leads to inconsistency in rulings.

Therefore, this study aims to explore the extent to which non-gazetted *fatwas* are referred to by judges in the *Shariah* courts when making decisions, particularly in situations where certain *fatwas* are absent within the jurisdiction of a state. This inquiry also seeks to ensure that judicial decisions remain aligned with the principles of *Shariah*.

3.0 OBJECTIVES

1. To delve in the picture of *fatwas* in Islam.

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[12] *Ijtihad* refers to total expenditure of effort made by a jurist for the purpose of obtaining the religious rulings. Saim Kayadibi, "*Ijtihad* by Ra'y," *American Journal of Islam and Society* 24, no. 1 (2007): 73–95, https://doi.org/10.35632/ajis.v24i1.417.

[13] Mohd Kamel Mat Salleh, Mohd Al Adib Samuri, and Mohd Izhar Ariff Mohd Kashim, "The Position of *Fatwas* and *Mufti* Opinion as Authority in Malaysian Sharia Court," *Journal of Contemporary Islamic Law* 1, no. 1 (2016): 1–23, https://doi.org/10.26475/jcil.2016.0101.0123.

2. To examine the application of non-gazetted *fatwas* on decision made in *Shariah* court in Malaysia.

3. To analyse *Shariah* court cases in which non-gazetted *fatwas* have been accepted and referenced as a source of non-binding authority in judicial decision-making.

4.0 METHODOLOGY

This study adopts a qualitative research method to explore and understand the acceptance of *fatwas* as references for judges in decision-making. The researcher primarily relies on documentary analysis, which includes reviewing academic journal articles, legal statutes, enactments, and case law. Selected legal cases are analysed to illustrate the practical application and limitations of the non-gazetted *fatwas* influence on decision-making in *Shariah* courts. Additionally, the study examines relevant cases to analyse how non-gazetted *fatwas* have been referred to and influenced the making of judgments. This methodology provides a deeper and more contextual understanding of the limitations of non-gazetted *fatwas* in influencing judicial decisions.

5.0 LITERATURE REVIEW

5.1 Review of the Relevant Theory

Shuaib states that the process for issuing a *fatwa* is equally structured, involving multiple layers of deliberation among the *Mufti*, the *Fatwas* Committee, the Religious Council, and finally the Sultan, whose consent is required for the *fatwa*'s gazettement.[14] This collective approach ensures careful

[14] F. S. Shuaib, "Strengthening Administrative Institutions of Islamic Law in Malaysia: An Overview," *Jurnal Syariah* 16, no. 3 (2008): 443–464, https://ejournal.um.edu.my/index.php/JS/article/view/22752

consideration before any legal or religious guidance is issued, reinforcing the role of *fatwas* as authoritative sources in *Shariah* court decisions.

Suhaimi, Idham and Khairuldin states that, in Malaysia, *fatwas* are important in guiding Muslims and are divided into three types: gazetted, non-gazetted, and personal opinions. Gazetted *fatwas* are official, approved by the Sultan, published in the State Gazette, and legally binding. Non-gazetted *fatwas* come from the *mufti* or council but are not published, so they don't have legal force, though they are still respected. Personal opinions are informal answers to simple questions and not considered official *fatwas*. Only gazetted *fatwas* are enforceable in court and law.[15]

Abdul Rashid and Jamsari emphasizes that, institutionally, the *mufti* holds a prominent role in the governance of Islamic affairs.[16] For example, the Federal Territories *Mufti* Office, which was established as an independent institution under the Prime Minister's Department in 1998, operates with administrative autonomy. This institutional development underscores the central and evolving role of *mufti*s within Malaysia's Islamic legal framework.

5.2 Critical Analysis of the Previous Writing

Adli *et al*. states that in contemporary times, *fatwas* serve as a primary reference for the Muslim community on various legal

[15] Muhammad Afham Suhaimi, Muhammad Amnan Idham, and Wan Mohd Khairul Firdaus Wan Khairuldin, "The Sighah Fatwa and Its Significance in Malaysia," *International Journal of Academic Research in Business and Social Sciences* 14, no. 12 (2024), E-ISSN: 2222-6990.

[16] Abdul Rashid and Jamsari, "Sejarah Penubuhan Pejabat Mufti Wilayah Persekutuan," *in Prosiding Nadwah Ulama Nusantara (NUN) IV: Ulama Pemacu Transformasi Negara, November 25–26, 2011.*

and religious matters. In Malaysia, the responsibility of issuing *fatwas* lies with the respective *Mufti* authorities, namely the State *Mufti* Departments in each state and the Federal Territories *Mufti*'s Office in the Federal Territories, all of which are led by their respective *Muftis*.[17] *Fatwas* are generally divided into two categories: gazetted and non-gazetted. The current structure of the *Mufti* Department, which functions specifically to formulate and issue *fatwas*, reflects a more formalized and institutionalized approach compared to the past. Historically, the position of *Mufti* was incorporated within the Department of Islamic Affairs (JAIN) or placed under the purview of the State Islamic Religious Council (MAIN). However, today, *fatwas*-related affairs are handled independently by the *Mufti* Department, separate from other Islamic administrative bodies. An exception exists in the state of Kelantan, where the *Mufti* has traditionally operated outside the jurisdiction of both the Department of Islamic Affairs and the State Islamic Religious Council.

Mohd Kamel, Samuri, and Kashim emphasize that *Shariah* judges in Malaysia possess the capacity to exercise *ijtihad* as independent legal reasoning especially in resolving disputes without necessarily depending on the guidance of a *mufti*. Nevertheless, the study highlights the importance of ensuring that the court is aware of relevant *fatwas*, especially those directly related to the legal issues under consideration. In this regard, *Syarie* lawyers play a crucial role by presenting pertinent *fatwas* during proceedings. Their involvement not only informs the court but also enriches the discourse surrounding *fatwas* and

[17] Jannah Hassan Adli, Wan Mohd Khairul Firdaus Wan Khairuldin, Nadhirah Nordin, and Wan Khairul Aiman Wan Mokhtar, "Maqasid Al-*Shariah* in the Gazetting of *Fatwas* in Selangor: An Analysis," *International Journal of Academic Research in Business and Social Sciences* 14, no. 12 (2024), E-ISSN: 2222-6990.

enhances their recognition and application within judicial deliberations.[18]

5.3 Identification of Gaps in the Literature

While existing research highlights the significant role of *fatwas* and *muftis* in Malaysia's Islamic legal system, most studies focus on their administrative processes and the formal mechanisms behind issuing them. However, there's a noticeable lack of exploration into how extensive these opinions of *mufti*s actually come into play in the courtroom, especially when it comes to the reasoning and judgments made by *Shariah* court judges. Furthermore, very few studies address the practical challenges involved in integrating non-gazetted *fatwas* into judicial decisions. This gap in understanding is crucial for a deeper insight into the relationship between religious authority and judicial discretion within Malaysia's dual legal system. This study aims to bridge that gap by examining the parameter of non-gazetted *fatwas* and how it has influenced the judges in *Shariah* courts in deciding.

[18] Mohd Kamel bin Mat Salleh, Mohd Al Adib bin Samuri, and Mohd Izhar Ariff bin Mohd Kashim, "The Position of Fatwa and Mufti Opinion as Authority in Malaysian Sharia Court," *Journal of Contemporary Islamic Law* 1, no. 1 (June 2016): 1–23, https://doi.org/10.26475/jcil.2016.0101.0123.

6.0 MAIN DISCUSSION AND ANALYSIS

PRESENTATION OF ARGUMENTS:

6.1 Position of the *Shariah* Courts in Malaysia

Malaysia operates under a dual legal system, comprising civil law and *Shariah* law. *Shariah* law applies exclusively to Muslims and is administered by the *Shariah* Courts, which fall under the jurisdiction of state governments as provided under Article 74(2) and the Ninth Schedule, State List (List II) of the Federal Constitution. The *Shariah* Courts are empowered to hear matters involving Muslims, particularly those related to family law, inheritance, religious endowments (*wakaf*), zakat, and offences under Islamic law, as outlined in state enactments.

The 1988 inclusion of Clause (1A) into Article 121 of the Federal Constitution, which clearly states that the civil courts shall not have jurisdiction over matters falling within the purview of the *Shariah* Courts, further strengthened and clarified this division of judicial authorities. The purpose of this specific provision's introduction or amendment is to protect the standing of *Shariah* courts and to stop civil courts from interfering in cases that belong to the *Shariah* courts, as specified in the State List (List II) of the Federal Constitution's Ninth Schedule.[19]

[19] Federal Constitution of Malaysia.

Despite the provision in Article 121(1A) of the Federal Constitution, which affirms the jurisdiction of the *Shariah* courts, scholars continue to debate the status and authority of these courts in Malaysia. Some scholars argue that the *Shariah* courts should be regarded as equal to the civil courts, while others view them as merely specialized tribunals with jurisdiction limited to Muslims in the country.[20] Cases like *Subashini A/P Rajasingam v Saravanan A/L Thangathoray*,[21] in which the parties were married under the Law Reform (Marriage and Divorce) Act 1976 and had two children, demonstrate these jurisdictional conflicts. Following his conversion to Islam, the husband and one child sought for divorce and custody at the *Shariah* High Court, where he was given temporary possession. Section 51 of the same Act was then used by the non-Muslim wife to file for divorce and custody in the civil High Court. This led to a dispute between the civil and *Shariah* courts over whether Article 121(1A) prohibited the civil court from getting involved in cases that were already before the *Shariah* court or if the civil court still had jurisdiction over a legal marriage after one of the parties converted to Islam. The case brought to light the persistent conflict between the two courts' jurisdictions in custody and mixed-faith marriage cases.

[20] Md. Dahlan and Kamaruddin, "Civil 'Jurisdiction' of *Shariah* Court."

[21] [2008] 2 MLJ 147.

A comparable issue emerged in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*,[22] where, subsequent to the death of a Muslim man, the civil High Court deliberated whether funds in joint bank accounts with his third wife formed part of the deceased's estate or constituted valid gifts (*hibah*) under Islamic law. The High Court followed Islamic law and determined that no *hibah* existed, however the Court of Appeal asserted that the determination of whether the assets formed a legitimate *hibah* was exclusively within the authority of the *Shariah* Courts. The Court of Appeal, invoking Article 121(1A), ruled that the civil High Court lacked jurisdiction over the dispute, annulled its previous orders, and asserted that issues regarding gifts among Muslims should be adjudicated according to Islamic law by the *Shariah* Courts, with civil courts enforcing the *Shariah* rulings in estate administration.

In the context of Muslim estate administration, the distribution of a deceased Muslim's estate typically begins in the *Shariah* Courts, which have jurisdiction to determine the lawful heirs and their respective shares according to *fara'id*, issuing a *fara'id* certificate that serves as the legal basis for estate distribution. Once the certificate is obtained, the civil High Court may become involved to handle the administrative aspects of the estate, such as appointing executors, collecting assets, or distributing property. However, disputes can still arise regarding the classification of assets or the identification of beneficiaries, for example when jointly held property or incomplete estate records create uncertainty about which assets should be distributed and in what shares. Such situations illustrate how, despite the clear mandate of *Shariah* Courts over *fara'id* matters, civil courts often become involved to resolve administrative issues, highlighting the ongoing interaction between the two court systems.

[22] [2007] 5 MLJ 101.

In summary, Malaysia's dual legal system sometimes creates a conflict of jurisdiction between civil and *Shariah* courts. The *Shariah* Courts have clear authority over matters concerning Muslims, such as family law, inheritance, and *fara'id* distribution, but civil courts often get involved when it comes to handling the administrative side of estates or resolving disputes over assets and beneficiaries. Even after the 1988 amendment of Article 121, cases like *Subashini A/P Rajasingam v Saravanan* and *Latifah bte Mat Zin v Rosmawati* show that these conflicts can still arise. This highlights how, in practice, the two court systems continue to interact, sometimes uneasily, when their responsibilities intersect.

6.2 Application of *Fatwas* in Islamic Law in Malaysia

The process of issuing a *fatwa* in Islamic jurisprudence follows four essential stages. Each step is carefully designed to ensure that the ruling is accurate, contextually appropriate, and firmly grounded in the principles of Islamic law.[23]

***Al-Taswir* (Gaining a Clear Picture):** At this stage, a *mufti* who receives a question from a *mustafti*[24] must clearly understand the question being asked. The *mufti* should consider several important aspects such as time, place, the individual involved, and the surrounding context or circumstances. This stage is guided by the legal maxim "*al-hukmu 'ala al-shay' far'un 'an*

[23] Pejabat *Mufti* Wilayah Persekutuan, "Irsyad Usul Fiqh Siri ke-74: Kaedah dan Peringkat Pengeluaran *Fatwas*," December 22, 2023, https://*mufti*wp.gov.my/en/artikel/irsyad-usul-fiqh/5814-irsyad-usul-fiqh-siri-ke-74-kaedah-dan-peringkat-pengeluaran-*fatwas*.

[24] *Mustafti* means someone seeking a *fatwas* from a *mufti*. Ahmad Saiful Rijal Bin Hassan, "The *Mufti*-Mustafti Approach to Religious Rehabilitation," *Counter Terrorist Trends and Analyses* 7, no. 3 (April 2015): 14–20, http://www.jstor.org/stable/26351337.

tasawwurihi," meaning that judgment depends on a proper understanding of the issue.

***Al-Takyif* (Classification):** Once the issue is clearly understood at the second stage, known as *al-takhṣīṣ*(specification), once the issue has been clearly understood by the *mufti*, it will be classified into a specific category. This process ensures that the *mustafti* receives an accurate and appropriate answer that aligns with the nature of the issue presented.

***Al-Hukm* (Legal Determination):** At this stage, which serves as the phase of clarification and determination of the ruling (*hukm*), relevant information will be gathered along with the supporting *nas*.[25] The issue will then be discussed with the *fatwas* committee or panel involved in the decision-making process. The decision is often made with the support of a *fatwas* committee to ensure accuracy and consistency.

***Al-Ifta'* (Issuance of the *Fatwas*):** This is the final stage in the process of issuing a *fatwas*, after the matter has gone through the three preceding stages. Every answer and *fatwas* issued by the *mufti* must consider *qat'i* textual evidence, other relevant *shar'i* sources, and the principles of *maslahah*.[26] This ensures that the *fatwas* issued is aligned with reality and serves as an effective solution to the issue at hand.

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[25] *Nas* refers to the words of the *Quran*, and *Sunnah* of the Prophet S.A.W whose meanings are so clear and fixed that they do not bear any other meaning and they are authentic in their existence.

[26] *Qat'i* refers to definite or uninterpretable. See Lalu Supriadi Bin Mujib, Khairul Hamim, and Setiyawan Bin Gunardi, "The Concept of Qath`i and Zhanni and Its Implication to Religious Behavior Among Muslim Communities in Lombok," *Al-'Adalah* 17, no. 2 (2021): 269–94, https://doi.org/10.24042/adalah.v17i2.6975.

The Federal Territories *Mufti* Office, for example, may use various approaches while pursuing the same fundamental goals in accordance with time and current events. However, certain decisions are unchangeable no matter how much time or location passes.[27] The *mufti* plays a central role in this process by drafting the *sighah,*[28] which is the formal text and structure of a *fatwas*, or legal opinion. The *sighah* can only be officially issued by the appropriate *Fatwas* Committee, either at the state level or for the Federal Territories, after the relevant law or ruling has been reviewed and determined. A proper *sighah* includes five key parts which are: the title, an introduction with meeting details, the background of the issue, supporting evidence, and the final ruling. *Fatwas* are issued through a formal process, either during the National *Fatwas* Committee Meeting with the involvement of the Conference of Rulers or through the National *Fatwas* Committee Deliberation without their involvement. This structured approach ensures the credibility of the *mufti* and the legitimacy of the *fatwas*. The Department of Islamic Development Malaysia (JAKIM) recognizes *fatwas* only if they follow these official procedures in accordance with Malaysian law. This careful process highlights the important role *sighah fatwas* play in developing Islamic law, promoting public welfare, and guiding legal matters in Malaysia.[29]

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[27] Pejabat *Mufti* Wilayah Persekutuan, "Bayan Linnas Siri ke-179: Metodologi Jawapan Hukum dan *Fatwas Mufti* Wilayah Persekut uan", 1 June 2019, https://www.*mufti*wp.gov.my/en/artikel/bayan-linnas/3440-bayan-linnas-siri-ke-179-metodologi-jawapan-hukum-dan-*fatwas-mufti*-wilayah-persekutuan.

[28] *Sighah* refers to any form of response provided by a *mufti* to address a specific question posed. Suhaimi, Idham, and Mohd, "The *Sighah Fatwas* and Its Significance," 3312.

[29] Mohd Azmi Suhaimi, Mohd Anuar Idham, and Wan Mohd, "The Sighah *Fatwas* and Its Significance in Malaysia," *International Journal of Academic Research in Business and Social Sciences* 14, no. 12 (2024): 3308–16, http://dx.doi.org/10.6007/IJARBSS/v14-i12/24306

However, the *fatwas* issued by them are not necessarily followed by other states as Islamic affairs are under a state's jurisdiction. The National *Fatwas* Committee only acts as an advisory body.[30] The National *Fatwas* Committee under JAKIM does not possess the authority to gazette *fatwas*. Its role is limited to issuing persuasive recommendations, which individual states may choose to adopt. For a *fatwas* to carry legal force, it must be formally gazetted by the respective state authorities in Malaysia. In Malaysia, *fatwas* issued by the *Mufti* or State Islamic Council through their respective *Shariah* Committees are generally divided into three categories as follows:-[31]

The first category includes official *fatwas* that are either issued by the *Mufti* or approved by the *Shariah* Committee and then published in the State Government Gazette. Once gazetted, these *fatwas* are legally binding and recognized by the courts and all relevant parties within that state.

The second category consists of *fatwas* that are issued by the Council or the *Mufti* individually but not gazetted. These *fatwas* are not legally binding and cannot be enforced on anyone. They are usually issued as personal guidance or clarification for individuals seeking advice on religious matters. However, if the Sultan or, in some states, the Council gives approval, these *fatwas* can later be processed and gazetted to give them official legal status.

The third category refers to general legal explanations given by the *Mufti* or his assistants. These are not new rulings but rather

[30] Farhanin A. A., N. A. Pauzai, M. Makhtar, and K.-N. Asari, "The Role and Position of *Fatwas* in Malaysian Court" (paper presented at the *International Conference on Islamic Law and Society IV*, Universiti Sultan Zainal Abidin, May 10–11, 2017)

[31] H. Kasan, "Institusi *Fatwas* Dalam Perundangan Negara: Satu Penilaian Menurut Siasah Syar'iyyah", *Jurnal Pegajian Umum 2* (n.d.):37-63.

clarifications of existing Islamic teachings that may not be widely known. This is the most common form of *fatwas*. It is not binding and cannot be gazetted. Interestingly, some state laws such as those in Melaka, Penang, Selangor, and Perak only recognize a *fatwa* as official if it has been formally gazetted.

Once a *fatwa* is gazetted, it becomes effective and binding upon all Muslims residing in the respective state and must be recognized by all *Shariah* courts within that state.[32] For example, the state of Selangor provides the following provision:[33]

Section 49. Gazetted *Fatwas* Are Binding.

(1) Once published in the Gazette, a *fatwas* shall be binding on every Muslim in the state of Selangor as part of their religious teachings, and it shall be their religious duty to adhere to and follow the *fatwas*, unless Islamic law permits them not to follow it in matters of personal practice.

(2) Any *fatwas* shall be recognized by all Courts in the state of Selangor on all matters stated in the *fatwas*.

In conclusion, the application of *fatwas* in Malaysia undergoes a rigorous and complex process before it can be gazetted, enforced, and made binding upon the citizens of a particular state. While the National Council for Islamic Affairs, as the national-level body, is responsible for discussing and issuing *fatwas* at the federal level, its authority is limited to issuing recommendations without the legal power to gazette them. The authority to gazette a *fatwa* lies with the respective state, subject to the consent of the

[32] S. G. Abdul Rahman, *Proses Penyediaan Fatwas di Malaysia: Peraturan dan Amalan*, in *Garis Panduan dan Piawaian Pengeluaran Fatwas Peringkat Kebangsaan* (Nilai: Universiti Sains Islam Malaysia, 2012).

[33] Administration of the Religion of Islam (State of Selangor) Enactment 2003 (Selangor, Malaysia).

Sultan or the Yang di-Pertuan Agong (for the Federal Territories), who serves as the Head of Islam in each state. Due to the procedural requirements and intricacies involved in issuing *fatwas*, a substantial number remain ungazetted, pending final approval at the state level. In Malaysia, whether or not a *fatwa* has been gazetted determines its legal standing. Only gazetted *fatwas* have binding power and are enforceable in *Shariah* courts, whereas ungazetted *fatwas* function as scholarly instruction. This distinction emphasises how crucial the Federal Territories *Mufti* Office and the State *Fatwas* Committee are to completing the *sighah* and making sure the decision complies with Islamic law before it becomes formally enforceable.

7.0 CRITICAL EVALUATION OF ISSUE

7.1 Non-gazetted *Fatwas* Act as a Persuasive Authority in *Shariah* Courts

Unlike gazetted *fatwas*, which are legally binding on the citizens of a particular state and are frequently referred to by *Shariah* court judges in their rulings, non-gazetted *fatwas* do not carry binding legal authority. However, judges in the *Shariah* courts sometimes still refer to non-gazetted *fatwas* as persuasive references when deliberating complex or novel legal issues. This practice is partly because the primary distinction between a gazetted and non-gazetted *fatwas* lies in the formal approval or consent of the Head of State. In terms of scholarly content and legal reasoning, both types of *fatwas* may carry significant weight.

According to data from the Department of the *Mufti* of the State of Selangor, there are currently 120 *fatwas* that remain pending

and have yet to be gazetted.[34] This situation underscores the importance of addressing procedural delays and ensuring that valuable juristic opinions are formally recognized for more consistent application within the *Shariah* legal system. All Islamic Religious Administration Enactments in Malaysia, except for Kelantan, recognise *fatwas* as authoritative on matters expressly stated within those enactments. However, in actual judicial practice, *Shariah* Courts adopt various approaches in determining the authoritative status of *fatwas* in their decisions.[35]

Typically, judges structure their legal reasoning in a hierarchical order, starting with references to the *Quran*, followed by the *Hadith*, classical juristic texts (*turath* books), gazetted laws such as the Islamic Family Law Enactments, and then national or gazetted state *fatwas*. These are often followed by references to legal commentaries and previously decided cases. From this order of references, it can be concluded that *fatwas* generally occupy the fifth level of legal authority.

This indicates that while *fatwas* are frequently referred to in court decisions, they are not consistently treated as primary legal sources.[36] Despite not being legally binding, *fatwas* continue to play a significant role in guiding judges in the *Shariah* courts toward fair and balanced decisions. In several cases brought before the *Shariah* courts, judges have referred to non-binding authorities, including non-gazetted *fatwas*, in order to reach a just decision based on the specific circumstances of the case. This can be observed in the case of *Najim Alden Mohammad Said v*

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[34] Jabatan *Mufti* Negeri Selangor, "Keputusan *Fatwas* Tidak Diwartakan," accessed on June 10, 2025, https://www.*mufti*selangor.gov.my/keputusan-*fatwas*-tidak-diwartakan/10/.

[35] N. S. T. Urus and A. Azhar, "The Application of *Fatwas* in Court Decision Making," *International Journal of Law, Government and Communication* 3, no. 9 (2018): 83–94.

[36] Urus and Azhar, "The Application of *Fatwas* in Court Decision Making," 92.

Nadiah Abdul Aziz,[37] where the court agreed with a gazetted *fatwa* issued by the Kelantan State Fatwa Council on 14 June 1998, which said that marriages conducted using a *wali taḥkīm* are invalid as they do not meet the stipulations of *Shariah*. According to this, the judge determined that the marriage between the applicant and the respondent in Singapore was illegal, as it was performed with a *wali tahkim* and witnessed by those who lacked comprehension of the *ijab* and *qabul* articulated during the ceremony. This case illustrates how the court may utilise a published *fatwa* as an authoritative reference in making its determination. This illustrates that non-gazetted *fatwas* serve as persuasive instruments in aiding courts to reach just and equitable determinations.

7.2 Cases Where Non-Gazetted *Fatwas* Were Used in Judgements

Generally, judges refer to various sources before making a decision, and they will not issue a ruling on matters they lack knowledge about, as stated in the hadith *From Buraidah bin al-Hasib, the Prophet PBUH said:*[38]

الْقُضَاةُ ثَلَاثَةٌ: وَاحِدٌ فِي الْجَنَّةِ، وَاثْنَانِ فِي النَّارِ، فَأَمَّا الَّذِي فِي الْجَنَّةِ فَرَجُلٌ عَرَفَ الْحَقَّ فَقَضَى بِهِ، وَرَجُلٌ عَرَفَ الْحَقَّ فَجَارَ فِي الْحُكْمِ، فَهُوَ فِي النَّارِ، وَرَجُلٌ قَضَى لِلنَّاسِ عَلَى جَهْلٍ فَهُوَ فِي النَّارِ

Meaning:
"*The judges are of three types: one will be in Paradise and two will be in Hell. The one who will be in Paradise is the judge who knows the truth and judges accordingly. The judge who knows*

[37] [2013] 1 CLJ (Sya) 124.

[38] *Sunan Abū Dāwūd* 3573 (The Office of the Judge, Kitāb al-Aqdiyā'), Sunnah.com, accessed September 10, 2025, https://sunnah.com/abudawud:359.

the truth but acts unjustly in his judgment will be in Hell. Likewise, the judge who passes judgment among people in ignorance will also be in Hell."

(Narrated by Abu Dawud, Hadith No. 3573)

This hadith pertains to the application of non-gazetted *fatwas*, highlighting the significance of knowledge and equity in the process of judicial decision-making. Judges must approach non-gazetted *fatwas* with a clear understanding and genuine intent, ensuring that their reliance on these opinions is consistent with established legal principles and does not result in injustice. The hadith also highlights that judges bear responsibility before Allah for the precision and impartiality of their decisions, regardless of whether they pertain to gazetted or non-gazetted *fatwas*. Therefore, the application of non-gazetted *fatwas* should be directed by a sincere quest for truth and compliance with *Shariah*, rather than by convenience or individual interpretation.

Typically, the sequence of references begins with the *Quran*, followed by the *Sunnah*, classical juristic texts (*kitab turath*), applicable laws, and finally *fatwas*, particularly gazetted *fatwas*. This sequence clearly indicates that *fatwas* also play a significant role in judicial decision-making.

However, judges may also refer to non-gazetted *fatwas* as guidance, especially in cases where no specific gazetted *fatwas* address the issue at hand or where the issue is new or unprecedented. In practice, this allows the courts to benefit from scholarly opinions and helps uphold justice in the process of decision-making.

There are several cases in which judges have referred to or applied non-gazetted *fatwas* in their judgments, as illustrated below:-

In the case of *Najim Alden Mohammad Said v Nadiah Abdul Aziz*[39], the Kuala Lumpur *Shariah* High Court, on 14 October 2010, dismissed the applicant's request to recognise a marriage that took place in Singapore on 23 April 2001. The marriage had been conducted with a *wali taḥkīm* (representative guardian), an Indian national named Sayid Abdussalam al-Bukhari Assaadi, and was witnessed by individuals who did not understand the language used during the ceremony. To support its decision, the court referred to a non-gazetted *fatwa* issued by the Kelantan State *Fatwa* Council on 14 June 1998, which stated that marriages involving a *wali taḥkīm* in states where Islamic courts are present (*syauqah Islamiah*) are considered invalid under *Shariah*. Even though this *fatwa* was not binding in Kuala Lumpur, the judge still gave it due consideration, particularly because it was rooted in a respected Islamic legal text, *Mughnī al-Muḥtāj*. This case highlights how *Shariah* judges may still refer to non-gazetted *fatwas* from other states, especially when there is no specific local *fatwas* available, recognising the scholarly value such opinions can offer in guiding their decisions.

In the case of *Wan Shahriman Wan Suleiman & Anor v Siti Norhayati Mohd Daud*,[40] the Kuala Lumpur *Shariah* High Court was asked to decide whether an *ex gratia* payment made by the government to the family of a deceased former civil judge should be treated as part of the deceased's estate and distributed according to *fara'id* (Islamic inheritance law). On 1 April 2010, the court ruled that the payment was a *hibah* (gift) rather than inheritance property, and therefore not subject to *fara'id*. To clarify the legal nature of such payments, particularly in relation to schemes such as KWSP, SOCSO or government death compensation, the court referred to a *fatwa* issued by the Selangor State *Fatwa* Committee. The *fatwa* stated that KWSP

[39] Sunan Abū Dāwūd 3573.

[40] [2010] 1 CLJ (Sya) 85.

savings are considered part of a person's estate and must be distributed according to faraid, but the court distinguished *ex gratia* payments as being different in both nature and purpose. Although the *fatwa* was issued in Selangor, the judge in Kuala Lumpur accepted it as a credible and persuasive legal reference. The case was later appealed, and the Kuala Lumpur *Shariah* Court of Appeal overturned the original decision based on stronger factual evidence. Nevertheless, the case remains important as it highlights the flexibility of *Shariah* courts in referring to *fatwas* from other states while preserving judicial independence in evaluating each case on its own merits.

In *Halijah Abdul Rahman v Zambree Baharom*[41] [2009] 1 CLJ (Sya) 402, the Seremban *Shariah* High Court heard a case concerning a divorce declared through a text message (SMS). The case began at the Lower *Shariah* Court in Port Dickson, where the husband had sent a message stating, "*kalau awak keluar jumpa jantan jatuh talak tiga*," which the court initially interpreted as a clear (*ṣarih*) pronouncement of divorce that did not require further intention. However, the presiding judge later expressed doubt and referred the matter for review at the High Court. The central issue was whether a divorce conveyed via SMS should be treated as equivalent to a written pronouncement, and whether it still required clear intention. To resolve this, the judge referred to a *fatwas* issued by the National *Fatwas* Committee (MKI) during its 59th *Muzakarah* on 27 August 2003. The *fatwas* clarified that divorces through SMS are valid only if they are accompanied by intention, and all such cases must be confirmed by the *Shariah* Court. It also considered written forms of divorce such as SMS, email, or fax as *kinayah* (implicit), meaning they require intention to be valid. Although the *fatwas* had not been gazetted in Negeri Sembilan, the judge accepted it as a persuasive and credible source of legal guidance. The court then ordered a rehearing to determine whether the husband

[41] [2009] 1 CLJ (Sya) 402.

genuinely intended to divorce. This case demonstrates the willingness of *Shariah* court judges to refer to non-gazetted *fatwas*, especially from the MKI, when facing contemporary issues, and reflects the judiciary's commitment to ensuring that justice is based on careful, informed interpretation.

Based on the cases mentioned above, it is evident that judges in the *Shariah* courts have referred to non-gazetted *fatwas* when deciding certain matters. This practice highlights that, despite not having binding legal authority, non-gazetted *fatwas* still play a valuable role in shaping judicial reasoning. They act as persuasive sources that provide juristic insight, especially in cases where statutory law or gazetted *fatwas* may not offer sufficient guidance. Therefore, non-gazetted *fatwas* continue to assist judges in delivering more informed, fair, and contextually appropriate decisions within the framework of Islamic law.

8.0 RECOMMENDATION

Based on the discussion above and observations, it is worth considering that the process of *fatwas* recognition in Malaysia could be made more efficient. In many states, *fatwas* must undergo the process of gazettement before they carry official authority. While this procedure provides formal legal force, it can also be time-consuming, involve administrative costs, and potentially delay the courts' ability to respond to urgent or evolving issues.

A more flexible approach would allow *fatwas* to be implemented and utilised more swiftly, particularly in situations that require timely resolution. Simplifying the procedures while still respecting the constitutional role of the Sultan as Head of Islam in the state could help avoid unnecessary delays. Such improvements would also ensure that valuable juristic opinions

are not left pending or underutilised while awaiting formal gazettement.

Enhancing the recognition and accessibility of non-gazetted *fatwas* would further enable *Shariah* judges to use them as guiding references in cases where no gazetted *fatwas* directly address the issue. In turn, this would strengthen judicial consistency and support fairer and more balanced decision-making in the *Shariah* courts.

9.0 CONCLUSION

In conclusion, *fatwas* play a vital role in Malaysia's *Shariah* legal system. They are not only tools for guiding Muslims in their daily lives but also important references that assist judges in the courtroom. While gazetted *fatwas* carry binding force, non-gazetted *fatwas* still matter greatly, as they often provide much-needed guidance in cases where the law is silent or unclear. Their use in practice shows that the strength of a *fatwas* lies not only in its formal status, but also in its ability to respond to real issues faced by the community.

Recognising the value of non-gazetted *fatwas* would help the *Shariah* courts function more efficiently and fairly. Judges would be better equipped to handle new or complex disputes, litigants would face fewer delays, and decisions would be more consistent across the states. This would also build greater confidence among the public in the *Shariah* courts, showing that the system is responsive to their needs while staying faithful to Islamic principles.

Ultimately, the *Shariah* legal system in Malaysia stands at a point where it must continue balancing tradition and modern demands. Strengthening the role of both gazetted and non-gazetted *fatwas* is part of that journey. By appreciating their relevance and ensuring they are used wisely, the courts can uphold justice more

effectively, remain true to their religious foundations, and continue to serve the Muslim community in a way that is timely, fair, and compassionate.

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LEGAL FRAMEWORK AND PRACTICES IN *WAQF* PROPERTY MANAGEMENT: A CASE STUDY OF THE STATE OF PERAK AND THE STATE OF JOHOR

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ABSTRACT

Waqf has been an integral part of *Muslim* society for centuries, representing a form of charity highly encouraged in Islam. Over the years, Malaysia has introduced numerous initiatives to improve the efficiency and transparency of *waqf* property management, leveraging modern administrative practices and technologies. However, as *waqf* administration falls under state jurisdiction governed by State Islamic Religious Councils, diverse legal frameworks across states have led to inconsistencies in enforcement, administration, and development. This has resulted in underdeveloped *waqf* properties due to financial constraints, lack of expertise, and the absence of specific laws on *waqf* governance. This article addresses the research question: How can

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inconsistencies in *waqf* property management across Malaysian states, particularly in Perak and Johor, be resolved to unlock their socio-economic potential? Using the qualitative methodology, it aims to critically examine the legal frameworks and management practices in these two states, highlighting key differences in governance—Perak benefits from a dedicated *Waqf* Enactment, while Johor operates without specific *waqf* laws. Despite these differences, both states face similar challenges, including limited resources, lack of expertise, and low public awareness. The findings suggest adopting a unified legal framework, enhancing public participation through innovative fundraising methods, and strengthening governance structures to align *waqf* management with its intended socio-economic objectives.

Keywords: *Waqf*, Property, Management, Legal Framework, Practices, Perak, Johor.

RANGKA UNDANG-UNDANG DAN AMALAN DALAM PENGURUSAN HARTA WAKAF: SATU KAJIAN KES NEGERI PERAK DAN NEGERI JOHOR

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ABSTRAK

Wakaf telah menjadi sebahagian penting dalam masyarakat Muslim selama berabad-abad, mewakili satu bentuk amal yang sangat digalakkan dalam Islam. Malaysia telah melaksanakan pelbagai inisiatif untuk meningkatkan kecekapan dan ketelusan pengurusan harta wakaf dengan menggunakan amalan dan teknologi pentadbiran moden. Namun, kerana pentadbiran wakaf di Malaysia terletak di bawah bidang kuasa negeri yang dikawal oleh Majlis Agama Islam Negeri masing-masing, kepelbagaian kerangka undang-undang antara negeri telah membawa kepada ketidakkonsistenan dalam penguatkuasaan, pentadbiran, dan pembangunan harta wakaf. Akibatnya, harta wakaf kekal tidak dibangunkan disebabkan oleh kekangan kewangan, kekurangan kepakaran, dan ketiadaan undang-undang khusus mengenai tadbir urus wakaf. Artikel ini menjawab persoalan penyelidikan: Bagaimanakah ketidakkonsistenan dalam pengurusan harta wakaf antara negeri di Malaysia, khususnya di Perak dan Johor, dapat diatasi untuk meningkatkan potensi sosio-ekonomi wakaf? Kajian ini menggunakan kaedah kualitatif, yang menganalisis secara kritikal kerangka undang-

undang dan amalan pengurusan di kedua-dua negeri tersebut, dengan menekankan perbezaan utama dalam tadbir urus—Perak mempunyai Enakmen Wakaf yang khusus, manakala Johor beroperasi tanpa undang-undang wakaf yang jelas. Walaupun terdapat perbezaan ini, kedua-dua negeri menghadapi cabaran yang serupa, termasuk kekurangan sumber, kepakaran, dan kesedaran awam. Hasil kajian mencadangkan penggubalan kerangka undang-undang yang seragam, peningkatan penyertaan awam melalui kaedah pengumpulan dana yang inovatif, dan pengukuhan struktur tadbir urus untuk menyelaraskan pengurusan wakaf dengan objektif sosio-ekonomi yang dimaksudkan.

Kata Kunci: Wakaf, Harta, Pengurusan, Rangka Kerja Perundangan, Amalan, Perak, Johor.

1.0 INTRODUCTION

Waqf is no longer an obscure term or application anymore among society, particularly in Muslim-majority countries. In literal meaning, waqf derives from the Arabic word '*waqafa*' which means "to stop" or "to withhold." The concept of waqf is an intersection between religion and law. It is deeply rooted in the Islamic jurisprudence that has been the practice of many Muslims around the world for many centuries. Generally, *waqf* refers to a donation or gift, typically intended to serve the community or to support Islamic causes. In essence, a person irrevocably and voluntarily endows his property for religious purposes, and this is often seen as an act of worship to Allah. The moment the property is transferred as *waqf*, it is symbolised as transferring it to Allah for the benefit of the public or private individuals. The waqf property in question can take various forms, reflecting the numerous classifications of properties. However, this paper will focus primarily on the management of immovable *waqf* property in the states of Perak and Johor while exploring the legal framework as well as making a comparison between the two jurisdictions. The proper management of *waqf* property is pivotal to generating income for the public and the Muslim community. It has a massive potential to advance Malaysia's socio-economic development and to strike a balance and reduce income disparities. Regrettably, *waqf* organisations in Malaysia appear to fall short in their potential to significantly boost the economic growth and overall progress in managing and maintaining waqf properties. Maintaining *waqf* property can be done in many ways, such as preserving, managing, fixing, or improving the *waqf* building, infrastructure, equipment, utilities and others. The main goal is to exceed or maintain the current standards of the property's upkeep and accessibility. Exceeding the standards can be achieved by introducing new technologies and development to the *waqf* property. Furthermore, another way to manage the *waqf* property can also be done by renting the *waqf* property to generate income. A well-managed *waqf* property can expect a

hefty sum of income that can be distributed to the beneficiaries of the *waqf*.

Accordingly, this discourse will concentrate on the legal framework governing the management of *waqf* property within the states of Perak and Johor exclusively. A critical analysis will be conducted on the authority vested in each state to administer *waqf* property, as well as the procedural and legal requirements necessary for applications concerning the development of such property. This discussion further seeks to delineate the similarities and differences in the management of *waqf* property between Perak and Johor, thereby offering our recommendations and perspectives on the relevant legal framework. The article adopts a qualitative research methodology, primarily drawing on doctrinal research through statutory provisions, academic journal articles, and official online portals.

2.0 LEGAL FRAMEWORK AND ITS PRACTICE: THE *WAQF* PROPERTY MANAGEMENT IN PERAK

2.1 The Law Governing and Power to Manage the *Waqf* Property Management in Perak

As for the management of *waqf* property in Perak, the laws governing it are laid down in the Islamic Administration Enactment (Perak) 2004 and the *Waqf* Enactment (Perak) 2015. In Perak, the Council of the Islamic Religion and Malay Customs Perak (MAIPk) serves as the sole trustee for *waqf* property development, whether general *waqf* or special *waqf*. The authority of MAIPk includes the management of *waqf* property, encompassing its establishment, development, acquisition, and

overall administration.[5] This can be seen where MAIPk has the power to establish a company or corporation or appoint any persons on such terms and conditions as determined by MAIPk to manage the *waqf* property.[6] There is also the *Waqf* Management Committee that was established by MAIPk to administer the management and registration of *waqf* property in Perak.[7] Thus, the MAIPk not only has the power to govern the *waqf* process but also has the sole power to acquire and develop the *waqf* property according to the Islamic rulings. No person can manage general or specific waqf without the written permission of MAIPk, or else it will amount to an offence with a punishment of a fine not exceeding five thousand ringgit or imprisonment not exceeding three years, or both.[8] This undoubtedly shows that the MAIPk has the sole power to manage waqf property.

2.2 Requirements and Procedures for the Management of *Waqf* Property in Perak

It is essential to discuss the elements of *waqf* under *Shariah* first before delving into the requirements under respective states. The four pillars of *waqf*: *waqif*,[9] who must be competent, mature, and acting voluntarily; *mawquf,*[10] which must be lawful, owned, and

[5] Amelia Nur Abdul Nazeri and Asmak Abdul Ab Rahman, "Peranan Wakaf Dalam Pembangunan Ekonomi Di Negeri Perak," *Jurnal Fiqh* 18, no. 1 (June 24, 2021): 169–216, https://doi.org/10.22452/fiqh.vol18no1.6.

[6] S.27(2) of the *Waqf* Enactment (Perak) 2015.

[7] S.30-31 of the *Waqf* Management (Perak) 2015.

[8] S.43 of the *Waqf* Enactment (Perak) 2015.

[9] *Waqif* means a person who surrenders or hands over his property to be used as *waqf* property.

[10] *Mawquf* means the endowed property.

endowed permanently; *mawquf 'alaih*,[11] who must be clearly identified and aligned with Islamic objectives; and *sighah*,[12] which must be explicit and witnessed. Additionally, three conditions must be met: permanence of the *waqf*, legitimacy of its purpose under Islamic law, and specificity of the intended use and beneficiaries. These *Shariah* requirements are reinforced by Perak's *Waqf* Enactment 2015, under which all *waqf* property must be registered with MAIPk to ensure compliance with both legal and religious obligations.[13]

The property that is intended as *waqf* shall, as soon as practicable, be registered under the name of *Majlis* in any form or manner as determined by the MAIPk in order to make a valid *waqf* property in Perak, as it is the requirement for MAIPk to manage the property.[14] Nevertheless, it is imperative to note that a *waqf* property that has been registered under the name of *Majlis* can no longer be transferred, gifted, or inherited to anyone since it had been bestowed as MAIPk's property to be managed for the purpose of *waqf*.[15] It is also important for the *waqif* to fulfil the requirement to make the *waqf* property in order for the MAIPk to manage the *waqf* property without any hiccups. It is where the *waqif* must attain the age of *baligh*, sound mind, is not declared a bankrupt, and consent to surrender his property as a *waqf* for any charitable purposes according to *Hukum Syarak*.[16] In addition, a *waqf* property shall be created by way of *sighah*

[11] *Mawquf alaih* refers to a person, institution, or association that is entitled to receive benefits, interest, or profit from a *waqf*.

[12] *Sighah* means the expression of offer and acceptance.

[13] Department of Awqaf, Zakat and Hajj. "Definition of *Waqf*."

[14] S.7(1) of the *Waqf* Enactment (Perak) 2015.

[15] S.4 of the *Waqf* Enactment (Perak) 2015.

[16] S.3 of the *Waqf* Enactment (Perak) 2015.

before not less than two witnesses in accordance with *Hukum Syarak*.[17] All of these requirements need to be fulfilled to construct a valid *waqf* property to give power to MAIPk to manage it.

The manner stipulated by the MAIPk to register the *waqf* property may vary according to the type of property, either immovable property or movable property. If it involves movable property such as shares and cash, it can be done online through the official portal of *Waqf* Perak *Ar-Ridzuan*, which is one of the departments under the MAIPk that governs the matter pertaining to the *waqf*. However, if it involves immovable property such as land or buildings as the *mawquf alaih*, the application process may involve two main authorities or transaction laws, which are the aforementioned *Waqf* Enactment (Perak) 2015 that vested the power to MAIPk based on its procedures stipulated and adherence to the National Land Code 1965 or registration by the land administer authority.[18] Since the *Waqf* Enactment (Perak) did not explicitly mention the procedures for *waqf* of immovable property and there are no procedures stipulated by the MAIPk itself, such reference must be made to the Manual of *Waqf* Land Management by the Department of *Awqaf*, *Zakat,* and *Hajj* (JAWHAR) where this manual is applicable to all state religious authorities as long as it is not contrary to the state's *waqf* enactment, including Perak, as JAWHAR can be considered a trustee of the 9th Malaysia Plan *Waqf* Property together with the joint venture by the state Islamic religious council like MAIPk.[19]

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[17] Mohammad. "The Concept And Objective of *Waqf*."

[18] Kader, S. Z. S. A., and Nor Asiah Mohamed. "Legal framework for management of waqf land in Malaysia." *Shariah* Law Reports 4, no. 1 (2014).

[19] Waqf Law and Fatwa, Official Portal Department of *Awqaf, Zakat Dan Hajj* (JAWHAR)." n.d. Official Portal Department of *Awqaf, Zakat Dan Hajj* (JAWHAR). https://www.jawhar.gov.my/en/waqf/waqf-law-and-*fatwa*/.

Next, the procedure for MAIPk to register or manage the *waqf* property starts with the *waqif* filling out all the necessary information or details needed, such as his personal information and the details regarding the *waqf* property. It is crucial that MAIPk first verify whether there are any issues with the said land or building, such as caveats, court orders concerning charges, or delays in the payment of land tax or quit rent, which may impose legal restrictions on transferring the land as *waqf* assets, based on the information provided by the *waqif*. It must be noted that once the property has been deemed as *waqf* assets, it will be vested as MAIPk's property as soon as it is registered under the written law relating to land.[20] It can also be seen that MAIPk has the responsibility to comply with the procedure laid out relating to land[21] to transfer the said property as *waqf* assets, and it must be carried out by the *Waqf* Management Committees immediately after giving the approval notice to the *waqif*.[22] Therefore, it can be deemed that this is the procedure or mechanism for MAIPk to manage the *waqf* property.

2.3 The Management of *Waqf* Property through Development in the State of Perak

2.3.1 *Waqf* Property Management in the Education Sector

Waqf property is developed to promote the development of the education sector in Perak. However, MAIPk only focuses on

[20] S.79 of the Islamic Administration (Perak) Enactment 2004.

[21] S. 416C of the National Land Code.

[22] Department of *Waqf*, *Zakat* and *Hajj* (JAWHAR). (2006). Manual of *Waqf* Land Management (First Edition ed.). Department of *Waqf*. *Zakat* and *Hajj* (JAWHAR), Office of the Prime Minister. https://e-penerbitan.jawhar.gov.my/ManualPengurusan/Wakaf/mptw/book.html.

building and funding religious Islamic schools known as either 'maahad tahfiz' or 'pondok' on these waqf properties. Another project done under the development of the education sector is building hostels for University of Sultan Azlan Shah (USAS) students because there has been a shortage of places for them to stay. Besides, renting a house outside of the campus is expensive and inconvenient for the students. The development also took place because USAS was founded by MAIPk. In March 2016, the first five-story hostel in USAS was successfully built by Sri Kancil Development Sdn Bhd with funds provided by MAIPk. The total cost of the project was RM13.5 million, and most of it was covered by Maybank Islamic. Nevertheless, the students need to pay for the maintenance of the hostel themselves.

2.3.2 *Waqf* Property Management in the Health Sector

Management of *waqf* property also extends to the health sector, including the construction of a medical haemodialysis centre on *waqf* land to provide dialysis treatment to patients at a more affordable price. The reason why MAIPk decided to build a haemodialysis centre is because there have been many cases each year where *zakat* is given to patients with kidney diseases. Each year, the number of patients varies from 600 to 750 people. The project is being carried out by MAIPk in collaboration with *Pusat Perubatan Ar-Ridzuan* and construction works will be handled by Z.R. Construction Sdn Bhd.[23] The project was finished in December 2021 and was launched by Tan Sri Mohd Annuar bin Zaini, *Yang Dipertua* MAIPk. The construction of the medical centre took approximately over three years to complete. The total cost of the project was RM3.3 million which was administered by *Kumpulan Perubatan Ar-Ridzuan* (KPAR), a subsidiary of *Kemajuan Ekonomi Islam Negeri Perak*, a wholly owned

[23] Nazeri, Natasha and Rahman. Peranan Wakaf.

corporation of MAIPk. Other sources of funds to build and maintain the health centre includes money from *zakat* payment.[24]

2.3.3 *Waqf* Property Management in the Economic Sector

In the economic sector, *waqf* property has been managed to facilitate those in need, especially those in the B40 class with the lowest income earners. The *waqf* housing project was proposed to elevate the living standard of the people of Perak. There are two types of houses under the purview of MAIPk. The first type of houses are houses built by MAIPk themselves. The second type is houses that were donated for the purpose of *waqf* by *waqif*. These houses are leased to those in need at a low price. These houses are located around Perak including Taiping, Bagan Serai, Ipoh, Bandar Tambun and more. The income generated from the lease will be given to MAIPk for any maintenance. The surplus income will be used for other *waqf* housing projects. The last project is the *Waqf* Business Centre (WBC), which is to create more job opportunities in business. The shop lots will be rented with a low rate, and the income generated will be used to make more premises for more vendors to join in. Currently, there is one WBC that was successfully built, located at *Masjid Al-Hidayah*, Behrang, allocating about six vendors.[25]

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[24] Liyana."*Majlis Perasmian Pusat Hemodialisis Waqaf Perak Ar-Ridzuan, Manjung Majlis Agama Islam Dan 'adat Melayu Perak.*" Maiamp.gov.my. 2024. https://www.maiamp.gov.my/index.php/info/berita/1806-majlis-perasmian-pusat-hemodialisis-waqaf-perak-ar-ridzuan.

[25] Liyana."*Majlis Perasmian Pusat Hemodialisis Waqaf Perak.*"

2.3.4 Problems and Solutions Pertaining the *Waqf* Property in Perak

The management of *waqf* property in Perak faces many challenges in its operation that hinder the effective administration, development, and utilisation of these assets for public benefit. This predicament is a result of several issues that arise, including mismanagement of funds, inadequate database management, financial and human resource limitations. As a result, many waqf assets are improperly managed, limiting their potential contributions to vital sectors such as education, healthcare, and social welfare.[26] These issues need to be addressed, as they will undermine the original intent of *waqf* to provide long term social and economic benefits to the public. In light of these challenges, the objective of this study is to identify and analyse the legal and administrative obstacles that hinder the effective management of *waqf* property in Perak and the solutions taken by the administration to combat this issue.

The main reason for ineffective management of *waqf* property in the state of Perak is due to the lack of management funds and lack of planning to develop the unoccupied lands and properties. This is because the project needs a large amount of manpower and is undoubtedly expensive to execute, especially if it involves large properties. Preferably, all staff involved need to have expertise in managing *waqf* properties. Before a project can be implemented, top management's approval is crucial. All these problems can cause *waqf* property management's delays. According to the Department of *Awqaf*, *Zakat* and *Hajj* (JAWHAR) and Department of Islamic Development Malaysia (JAKIM) statistics, the states of Perak, Johor, and Pahang have the largest

[26] Liyana."*Majlis Perasmian Pusat Hemodialisis Waqaf Perak.*"

land of *waqf*.[27] The total of *waqf* real estate in Perak is recorded at 2817 lots of land. It is based on a study where a total of 51% of the *waqf* property in Perak is left stagnant and undeveloped, which is contrary to the *waqif*'s intention. No income is being generated from these *waqf* properties even though it should be used for the public's benefit.[28]

In addressing the issue of lack of manpower and expertise, appointment of a specific *mutawalli*[29] that can provide the requisite skills, knowledge, and expertise to enhance the efficiency of the development and management of all *waqf* property in Perak. This dedicated corporation could serve as a specialised entity focused on various aspects of *waqf* management, including financial planning, property development, legal compliance, and community engagement. By leveraging the expertise of professionals in these areas, MAIPk can ensure that *waqf* properties are not only well-managed but also optimised for maximum community benefit. In Singapore, *Majlis Ugama Islam Singapura* (MUIS) acts as the administrator of all *waqf* properties under the law. However, they adopt the concept of *nazara* with MUIS supervising WAREES, an institution appointed by MUIS act as the *mutawalli* that oversee the management of waqf properties in Singapore. This concept is adopted as WAREES possesses the focused expertise in managing waqf properties, and MUIS can supervise the process as a whole to ensure efficiency and transparency in the

[27] Latiff Azha et al., "The Practice and Management of Waqf Education in Malaysia," Procedia - Social and Behavioral Sciences 90 (October 2013): 22–30, https://doi.org/10.1016/j.sbspro.2013.07.061.

[28] Latiff Azha et al., "The Practice and Management of Waqf Education in Malaysia."

[29] *Mutawalli* refers to the person or institution that manages *waqf* property.

management of waqf property in Singapore. This has also been adopted in the state of Johor as will be discussed later.[30]

MAIPk had addressed the issue of financial constraint by starting a fundraiser for the development projects that have the potential for success. The fund is *'Dana Wakaf Perak Ar-Ridzuan'* (WPAR). WPAR has three main components, which are project funding, cash *waqf*, and investment in collaboration with Maybank Islamic. The public at large can donate to fund the projects done by MAIPk by choosing their preferred project at their website. In 2024, the current projects that are ongoing on these *waqf* lands are WBC, *waqf* hostel of USAS, *waqf* Islamic schools and *waqf* for a medical haemodialysis centre. The funding needed for these projects ranges from RM10 million to RM20 million per project. Even so, funding by the public is not enough to cater to the issue of financial constraint, and this could take a while for the *Majlis* to reach its goal. This is evident in the table below:

***WAQF* PROJECT(S)**	**TOTAL OF TARGETED FUNDRAISE (RM)**	**TOTAL OF FUND RAISED (RM)**
Cash *Waqf*	No Limit	17,405,797.78
Waqf for student hostel of USAS	15,000,000.00	5,866,695.95 (39.11%)

[30] Haji-Mohiddin. 2015. "WAQF DEVELOPMENT in MALAYSIA and SINGAPORE: A COMPARATIVE STUDY Use Policy." Edited by HAJAH, MAS, and NOORAINI. Durham E-Theses. Durham University: Durham theses. https://etheses.dur.ac.uk/11118/1/final_submission-_WAQF_DEVELOPMENT_IN_MALAYSIA_AND_SINGAPORE_.pdf?DDD2+=.

Waqf business centre (WBC)	20,000,000.00	344,598.84 (1.72%)
Waqf for Islamic schools (*maahad tahfiz/pondok*)	No Limit	1,457,213.42
Waqf for a medical haemodialysis centre	10,000,000.00	1,073,242.04 (10.73%)
TOTAL (RM)		**26,147,548.03**

Table 1: Total fundraise by 'Dana Wakaf Perak Ar-Ridzuan' (WPAR) as of May 2024.[31]

Based on the table above, MAIPk has only successfully raised almost 40% of the targeted fundraise amount. However, some of the projects only raised almost 2% of the total targeted funds. It is a slow process, and the *Majlis* needs to find other means to acquire more funds, such as cash *waqf* and investments. To combat this issue, promotion by MAIPk and WPAR must be done to increase public awareness of the significance of funding it, as it will benefit the public in the long run. A study was conducted on 312 people of the Perak Muslim Community in 2018 on their awareness and involvement level towards *waqf* in Perak. Only 56.7% of the respondents are aware of the existence of WPAR in Perak. Interestingly, 74.4% of the respondents are aware that WPAR has many delayed projects due to lack of financial resources. This shows that the people of Perak are either

[31] *Majlis Agama Islam dan Adat Melayu Perak.* 2024. *"PROJEK-PROJEK WAQAF AR-RIDZUAN."* Wakafperak.gov.my. 2024. https://wakafperak.gov.my/portal/index.php/ms.

unaware or uninterested in funding WPAR.[32] Even so, there are several more contemporary methods that are adopted by MAIPk to raise funds, such as share *waqf*, *sukuk*, and corporate *waqf*.[33] Another component of WPAR is cash *waqf,* which is used for the management of *waqf* property and to fund the *waqf* projects done by MAIPk in Perak. This is for the people to donate without specifying a project to fund for. Based on the table above, many people tend to donate their money in cash *waqf*. The last component is investment supported mainly by Islamic banking institutions such as Maybank Islamic.[34]

Most of the *waqf* properties in Perak are used for religious purposes, such as for the development and construction of mosques and Islamic cemeteries. *Waqf* property should be managed, including education, health, and economic aspects to generate more income and benefit the society instead of focusing solely on religious purposes. This can be overcome by educating the people on the importance of *waqf* in developing the *Muslim* society. However, in the recent development of *waqf* property management, many developments towards other sectors have increased as mentioned before.[35]

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[32] Fidlizan Muhammad et al., "The Awareness Level among the Perak Muslim Community towards the Perak Ar-Ridzuan Waqf/ Tahap Kesedaran Masyarakat Islam Di Perak Mengenai Wakaf Perak Ar-Ridzuan," *Sains Humanika* 11, no. 3 (August 29, 2019), https://doi.org/10.11113/sh.v11n3.1524.

[33] Muhammad et al., "The Awareness Level among the Perak Muslim Community towards the Perak Ar-Ridzuan Waqf."

[34] Muhammad et al., "The Awareness Level among the Perak Muslim Community towards the Perak Ar-Ridzuan Waqf."

[35] Muhammad et al., "The Awareness Level among the Perak Muslim Community towards the Perak Ar-Ridzuan Waqf."

3.0 LEGAL FRAMEWORK: THE *WAQF* PROPERTY MANAGEMENT IN JOHOR

3.1 The Law Governing and Power to Manage the *Waqf* Property Management in Johor

The management of *waqf* property in Johor is solely stipulated under the Administration of the Religion of Islam (State of Johor) Enactment 2003.[36] It announces that the power in managing the *waqf* is vested upon the *Majlis* as the sole trustee of all *waqf*.[37] It is maneuvered by the *Waqf* Department, placed under the Johor Islamic Religious Council (MAINJ).[38] It confers full authority to the *Majlis* in managing all property subjected under the enactment by vesting under it once registered and requires the submission to be witnessed by two adult members.[39] The property must remain under the *Majlis* instead of *Baitulmal* as a segregated fund to be utilised for the nearest intended purpose under its prepared scheme. However, the *Majlis* may direct the property to form part of *Baitulmal* if needed. The *Majlis* is also mandated to publish in the Gazette on a list of *waqf* properties managed under it.[40] The prime obligation of the *Waqf* Department is to act as the trustee of *waqf* in managing,

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[36] Nasrul Hisyam Nor Muhamad et al., "Wakaf Di Negeri Johor: Latar Belakang Dan Potensi (Waqf in State of Johor: Background and Potential)," *UMRAN - International Journal of Islamic and Civilizational Studies* 6, no. 2–2 (October 7, 2019), https://doi.org/10.11113/umran2019.6n2-2.380.

[37] S.89 of the Administration of the Religion of Islam (State of Johor) Enactment 2003.

[38] Muhamad et al., "Wakaf Di Negeri Johor: Latar Belakang Dan Potensi, p.5.

[39] S.90 of the Administration of the Religion of Islam (State of Johor) Enactment 2003.

[40] S.95 of the Administration of the Religion of Islam (State of Johor) Enactment 2003.

administering, and preserving the *waqf* monies and properties according to terms specified. Thus, its jurisdiction covers three main scopes, namely in administering the *waqf* properties, registering and managing it according to the stipulated directions.[41]

On this issue, it is a setback that Johor used to stand as the pioneer state to enact a specific enactment on *waqf* back in 1973; however it was later repealed and its substance was integrated into the Administration of the Religion of Islam (State of Johor) Enactment 2003 elaborated earlier.[42] Regardless, though there is no sole enactment on *waqf* in Johor, which may concentrate on the rules of *waqf* specifically, the Johor *Fatwa* Department actively and attentively governs on the emerging issues concerning *waqf* management in Johor. Firstly, it is proven through the gazetted *fatwa* which had served as the landmark reference in ascertaining the issues of *waqf* land by the judicial. It is displayed in the Johor gazette, including the validity of *waqf*[43] and the appointment of *nazir*[44] in managing the *waqf*.[45]

Secondly, the *Fatwa* Department closely supervises the *waqf* management in Johor and ascertains the validity of the authority's decision. To quote, recently, a land in Pontian which was given by its prior owner as *waqf*, was allowed by the department to be labelled as *waqf* land.[46] Thirdly, the department

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[41] Majlis Agama Islam Negeri Johor. 2015. *"E-Wakaf Johor - Utama."* E-Wakaf Johor. 2015. http://web.e-wakafjohor.gov.my/v2/.

[42] Muhamad et al., "Wakaf Di Negeri Johor: Latar Belakang Dan Potensi, p.5.

[43] Johor Gazette [J.P.U. 57 (1996)].

[44] Johor Gazette [J.P.U. 27 (1992)].

[45] Ahmad Hidayat Buang. 2002. "Analisis Fatwa-Fatwa Semasa Syariah Di Malaysia," *Jurnal Syariah* 10(1): 48.

[46] Jabatan Mufti Johor. 2023. "Sistem Al-Irsyad JMJ." Jabatan Mufti Johor. https://said.johor.gov.my/perkhidmatan/paparan_detail_*fatwa*.php?id=991.

also diligently entertains countless issues pertaining to *waqf* in Johor and even delivered its judgment on such matters. It is portrayed in the recent ruling in 2020 on the issue of managing a *waqf* land for the different intended purpose by its giver.[47]

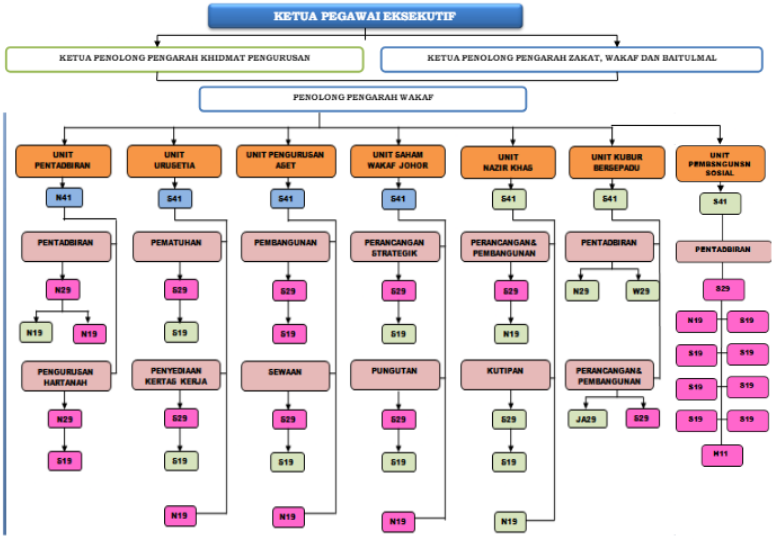

Diagram 1: Organisation of Waqf Management in MAINJ.[48]

Interestingly, Johor had delegated the power of administering corporate *waqf* specifically to *Waqf An-Nur* Corporation Berhad (WANCorp) by appointing it as the special *nazir*, through the Memorandum of Understanding in 2009.[49] This subsidiary of

[47] Jabatan Mufti Johor. 2020. "Sistem Al-Irsyad JMJ." Jabatan Mufti Johor. https://said.johor.gov.my/perkhidmatan/paparan_detail_*fatwa*.php?id=214.

[48] Muhamad et al., "Wakaf Di Negeri Johor: Latar Belakang Dan Potensi, p.6.

[49] Abd. Shakor Borham and Siti Mashitoh Mahamood, "Wakaf Korporat Johor Corporation Dan Sumbangannya Dalam Memenuhi Tanggungjawab Sosial Islam Di Malaysia: Satu Tinjauan," *Journal of Techno-Social* 5, no. 2

Johor Corporation (JCorp) had the full authority to exercise its power under the 2003 Enactment, and JCorp may directly utilise its shares in other companies for the corporate *waqf*.[50] This allows the corporate *waqf* to be diligently handled by the professionals towards the assimilation and the sharing of benefits and power in *waqf* management.[51]

3.2 Requirements and Procedures for the *Waqf* Property Management in Johor

For a *waqf* to be legally acknowledged and recognized as *waqf* property, several stringent criteria must be met, encompassed within the four essential pillars of *waqf*. First and foremost, there must be a *waqif*, the individual who initiates the *waqf*. Secondly, the *mawquf*, referring to the property intended for endowment, must be designated for perpetuity, emphasising its enduring nature. In addition to it, the purpose of the *waqf* must be explicitly defined, ensuring clarity in the objectives and aims of the endowed property. Thirdly, the *mawquf 'alaih*, or the beneficiaries of the *waqf*, must be clearly identified. Finally, there must be a *sighah*, the formal declaration of offer and acceptance of the *waqf* property, which can be articulated either explicitly or implicitly. Only upon the fulfilment of these

(2013): 61–77, https://doi.org/https://publisher.uthm.edu.my/ojs/index.php/JTS/article/view/1387.

[50] Borham and Mahamood, "Wakaf Korporat Johor Corporation Dan Sumbangannya, p 68.

[51] Aimi Fadzirul Kamarubahrin, Abdullah Mohammed Ahmed Ayedh, and Khairil Faizal Khairi, "Accountability Practices of Waqf Institution in Selected States in Malaysia: A Critical Analysis," *International Journal of Economics, Management and Accounting* 27, no. 2 (December 31, 2019): 331–52, https://doi.org/https://doi.org/10.31436/ijema.v27i2.664.

foundational elements can a *waqf* be deemed legally valid and recognized.[52]

The Johor's enactment has emphasised that every *waqf* shall be registered in the name of MAINJ as the sole trustee of the *waqf* property.[53] A reference to other written laws, such as the National Land Code, is pivotal in dealing with the procedure in managing *waqf* property. The Department of *Awqaf*, *Zakat* and *Haji*, Malaysia (JAWHAR), had also established a Manual for Management of *Waqf* which solely focused on the management of *waqf* land.[54] This manual is applicable to all State Islamic Religious Councils in Malaysia, including MAINJ.

To legally recognise such land as *waqf* land, the applicant must declare for *waqf* purposes in front of the *waqf* officer at MAINJ. Then, the applicant is required to fill out the *Waqf* Application Form and *Waqf* Declaration. The applicant also shall disclose all the information needed, including his personal information and the asset's information. Once approved, there will be a thorough inspection of the land's status to verify the authenticity of the information. Here, MAINJ will investigate any legal restrictions such as caveats, judgement orders, or delays in the payment of tax or quit rent. If such issues are identified, the applicant is responsible for resolving these problems before furthering the *waqf* property management process. This ensures that all

[52] Majlis Agama Islam Negeri Johor. Web. https://www.maij.gov.my/#.

[53] S.89 of Administration of the Religion of Islam (State of Johor) Enactment 2003.

[54] Department of *Waqf*, Zakat and Hajj (JAWHAR). 2006. Manual of *Waqf* Land Management (First Edition ed.). Department of *Waqf*, Zakat and Hajj (JAWHAR), Office of the Prime Minister. https://e-penerbitan.jawhar.gov.my/ManualPengurusan/Wakaf/mptw/book.html.

regulatory and legal requirements are met, facilitating smooth and lawful management of the *waqf* property.[55]

Once the information's accuracy is confirmed and no encumbrances are found, MAINJ will conduct a site visit to verify the location and measure the land. MAINJ will then compile an investigation report on the property and present it to a committee for approval. The *Majlis* will later notify the applicant of the successful application. The registration may be done through transfer of title by submitting Form 14.[56] The second way is by state surrender and re-alienation that requires the applicant to submit Form 12A for the surrender of the whole land or Form 12B for the surrender of a part of the land.[57] Thus, the land is now registered under the name of MAINJ and is regarded as *waqf* land.

On the other hand, the procedures for purchasing cash *waqf* in Johor encompass four distinct methods, each designed to facilitate accessibility and convenience. The most common approach involves making a purchase at the MAINJ counters, strategically located in every district office. Not only that, MAINJ has further innovated by introducing mobile counters for cash *waqf*, easily accessible on the road. Additionally, contributors can also send their donations via postal money, providing a traditional yet effective method of participation. On the other hand, to accommodate those residing outside Johor who wish to support *waqf* development, MAINJ has expanded its services online through the dedicated portal *'e-Wakaf Johor.'*[58]

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[55] Kader, S. Z. S. A., and Nor Asiah Mohamed. "Legal framework for management of *waqf* land in Malaysia." *Shariah* Law Reports 4, no. 1 (2014).

[56] S.215 of the National Land Code.

[57] S.195 of the National Land Code.

[58] *Majlis Agama Islam Negeri Johor.* (2015). *e-Wakaf Johor*. Web.e-Wakafjohor.gov.my. http://web.e-wakafjohor.gov.my/v2/.

Prospective donors must first register on the portal, after which they can make purchases via FPX, which is the standard online payment method. Shares can be acquired in the donor's name or on behalf of others, with the minimum purchase at RM10 per unit.[59]

3.3 The Management of *Waqf* Property through Development in the State of Johor

The management of *waqf* property in Johor is widely handled through three paramount modi. Firstly, '*Saham Wakaf Johor (SWJ)'* is favourably utilised by MAINJ through the cash *waqf* method. It allows the people to purchase and own a share at the minimum price of RM10 per unit.[60] Through this fund, MAINJ would make use of it to manage the *waqf* property according to the organised plan,[61] such as to develop and construct realty, *waqf* land, office buildings, shoplots, farms, and investments.[62] The second type is 'Corporate *Waqf*', managed exclusively by WANCorp. It is guaranteed by JCorp and is obliged to either distribute the units owned by JCorp or the dividends of each share

[59] *Majlis Agama Islam Negeri Johor. e-Wakaf Johor*.

[60] Noh Gadot, "Konsep Saham Wakaf Johor Dan Perkembangannya Di Malaysia," *Journal of Fatwa Management and Research* 16, no. 2 (October 2, 2019): 1–14, https://doi.org/10.33102/j*fatwa*.vol16no2.1.

[61] Gadot, "Konsep Saham Wakaf Johor Dan Perkembangannya Di Malaysia,", p 4-6.

[62] Nur Alya Sabreena Nor Azlan et al., "Pembiayaan Pembangunan Tanah Wakaf Di Negeri Johor," *Research in Management of Technology and Business* 1, no. 1 (2020): 782–99, https://doi.org/https://publisher.uthm.edu.my/periodicals/index.php/rmtb/article/view/583.

for the benefit of the people.[63] JCorp's share is deemed the core fund for *waqf* management,[64] and it would be exhausted for the management of *waqf* property by dividing as such: 70% to JCorp, 30% to MAINJ, namely 25% for healthcare, education, and mosques, while the remaining 5% is for MAINJ.[65] The third type is the mainstream type known as '*Waqf* Property.'Any individual would approach any MAINJ counter in their district to *waqf* their property, which allows MAINJ to manage the property by developing it accordingly. This includes the right of MAINJ to lease out the *waqf* property above in order to yield its benefit.[66]

3.3.1 *Waqf* Property Management in the Education Sector

Through the aforementioned methods, the funds would be managed in order to advance the education sector in Johor. The streamline collection under SWJ is to advance in education through the construction and continuous maintenance of school buildings and hostel buildings. As attached below, the hostel building was erected for the accommodation of Johor students there, while the '*Darul Furqan* Building' is for the educational centre focused on Islamic knowledge.[67]

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[63] Azlan et al., "Pembiayaan Pembangunan Tanah Wakaf Di Negeri Johor," p 66-68.

[64] Khairil Faizal Khairi et al., "Share Waqf (Corporate Waqf) as an Alternative Financial Instrument in Improving the Communities and Nation Welfare," *SSRN Electronic Journal*, 2014, https://doi.org/10.2139/ssrn.2448122.

[65] Khairi et al., "Share Waqf (Corporate Waqf) as an Alternative Financial Instrument."

[66] Khairi et al., "Share Waqf (Corporate Waqf) as an Alternative Financial Instrument*,"* p 793.

[67] Khairi et al., "Share Waqf (Corporate Waqf) as an Alternative Financial Instrument*,"* p 11.

PROJECTS	TOTAL OF TARGETED FUND (RM)	TOTAL OF FUND RAISED (RM)
SUCCESSFUL PROJECTS		
Waqf Hostel Building in Jordan	10,000,000.00	10,000,000.00
Darul Furqan *Waqf* Building	6,000,000.00	6,000,000.00
ONGOING PROJECTS		
Waqf Islamic School in Johor	163,251,274.00	26,863,950.00
Waqf International Science Tahfiz Secondary School	30,000,000.00	3,416,660.00

Table 2: Projects under Saham Wakaf Johor.[68]

The attribute of WANCorp for the education sector focuses on the construction and renovation of schools and the repair of infrastructures in schools, which required RM72,100.00 in 2022 alone.[69] Meanwhile, the last method of '*waqf* property' had allowed MAINJ to manage the given land and house in Segamat to build '*Maahad Tahfiz Darul Hadis*' and many other lands inclined towards the construction and perseverance of *tahfiz* schools and schools.[70]

3.3.2 *Waqf* Property Management in the Health Sector

The fund is managed for health purposes as well. SWJ is proactively unlocking accessibility in the health sector, centred

[68] Khairi et al., "Share Waqf (Corporate Waqf) as an Alternative Financial Instrument," p 11.

[69] Khairi et al., "Share Waqf (Corporate Waqf) as an Alternative Financial Instrument," p 67-68.

[70] Khairi et al., "Share Waqf (Corporate Waqf) as an Alternative Financial Instrument," p 67-68.

on the haemodialysis service as visualised in the table below. It has been assisting patients suffering from kidney failure for years and recorded the assistance for 3,463 patients in 2021 and 3,980 patients in 2022.[71]

PROJECTS	TOTAL OF TARGETED FUND (RM)	TOTAL OF FUND RAISED (RM)
SUCCESSFUL PROJECTS		
Saham *Waqf* Building in Johor Bahru for Dialysis Centre	6,000,000.00	6,000,000.00
ONGOING PROJECTS		
Waqf Dialysis Machine	4,500,000.00	584,290.00

Table 3: Projects under Saham Wakaf Johor.[72]

Observing the WANCorp management of 'corporate *waqf*' in 2022 too, it had utilised RM382,250.00 for the health sector through its renovation and maintenance of '*Waqf An-Nur* Clinics.'[73] Under the third method, MAINJ had managed the *waqf* property by leasing it out as well, as in the obligation of '*Sinar* Haemodialysis' to pay the rental payment to MAINJ for the management of the Haemodialysis Centre in Batu Pahat.[74]

[71] Khairi et al., "Share Waqf (Corporate Waqf) as an Alternative Financial Instrument," p 67-68.

[72] Khairi et al., "Share Waqf (Corporate Waqf) as an Alternative Financial Instrument," p 67-68.

[73] "Laporan Tahunan Tahun 2022 Waqaf An-Nur Corporation," Waqaf An-Nur Corporation Berhad, 2022. https://waqafannur.com.my/en/laporan-tahunan.

[74] "Laporan Tahunan Tahun 2022 Waqaf An-Nur Corporation," p 793.

3.3.3 *Waqf* Property Management in the Economic Sector

In this sector as well, MAINJ properly managed the funds acquired through SWJ initiatives to assist the economy of Johor. It can be seen through the successful project of purchasing a shop lot unit in Nusajaya as the business centre among Johor people there through the acquired fund of RM1,573,566.00.[75] In 2022, WANCorp had consistently contributed to the economic sector by utilising RM72,050.00. From this fund, it had rented the business sites and premises under the projects of 'Commercial Fund Business' and 'Taman Bukit Dahlia *Waqf* Community Centre.'[76]

3.3.4 *Waqf* Property Management in the Religious Sector

Most importantly, the *waqf* property is managed for the advancement of Islam and to assist the practice of *Muslims'* lives. Firstly, the SWJ fund is utilised for a few projects involving the construction of mosques. The 'Mosque *Waqf* in Cambodia' which costs RM4,000,000.00 aids the underprivileged *Muslims* there while concurrently building a firm Islamic foundation in Cambodia. The same is pictured in the '*As-Syafie* Mosque *Waqf*' project to rebuild the mosque in Palestine, costing RM1,000,000,00. Another management is through the 'Eden Street Australia House Lot' project, whereby the house was purchased from RM3,436,000.00 *waqf* fund as the religious

[75] "Laporan Tahunan Tahun 2022 Waqaf An-Nur Corporation," p 793.

[76] "Laporan Tahunan Tahun 2022 Waqaf An-Nur Corporation," p 793.

centre for Malaysian *Muslims* in performing *ibadah* and other religious activities.[77]

The WANCorp's fund is substantially exhausted for this purpose, up until RM1,466,977.00 in 2022. It was used to fund the maintenance and religious activities through its *An-Nur* Mosques located in seven areas as well as maintenance, renovation, and repair works in other mosques and *surau,* both in and outside Johor.

In the '*waqf* property method', it may be observed that certain property is given by the individual for the religious purpose specifically. As such, the land in Kg Telok Rimba, Tangkak, was registered as *waqf* property for the building of a *surau* by MAINJ Tangkak, meanwhile, a land in Kg Gembut Sedili is to be managed by MAINJ Kota Tinggi as *Muslims'* grave.[78]

3.3.5 *Waqf* Property Management in the General Welfare Sector

Here, WANCorp had specified the second largest portion for the welfare fund, stressing the needy people who struggled in the calamities and had lost their houses, as well as general assistance for their living.[79] In the management of *waqf* property through the third modus, the vast majority of the properties were given for the general welfare of the *Muslims.* To illustrate, MAINJ Johor Bahru had managed the given 500 square feet house for the general welfare, along with numerous other properties in each

[77] "Laporan Tahunan Tahun 2022 Waqaf An-Nur Corporation," p 10.

[78] "Laporan Tahunan Tahun 2022 Waqaf An-Nur Corporation," p 10.

[79] "Laporan Tahunan Tahun 2022 Waqaf An-Nur Corporation," p 60-66.

district. A portion of land in Pontian also had been reserved for the establishment of orphanages and nursing homes in Pontian.[80]

3.4 Problems and Solutions Pertaining the *Waqf* Property Management

The administration of *waqf* property in Johor is fraught with issues like the absence of legislation specifically addressing *waqf* but using the broader Administration of the Religion of Islam (State of Johor) Enactment 2003. In fact, a specialised *waqf* enactment of 1973 was repealed, and its relevant provisions were subsumed into the 2003 enactment, but in a limited capacity with only seven provisions.[81] This amalgamation has birthed significant challenges in *waqf* management, as it lacks the comprehensiveness and specificity needed to address the unique aspects of *waqf* administration in Johor. The provisions focus predominantly on the powers of the *Majlis* and issues related to the capital, restrictions, publication, and construction of *waqf* property. As a result, the scope and depth of *waqf* administration under the current legal framework are severely constrained.

Consequently, the proper management of *waqf* property remains elusive and largely unfamiliar to the community in Johor. This ambiguity poses significant challenges for legal practitioners, who struggle in determining the extent to which property in Johor can be designated as *waqf* and the precise mechanisms for doing so. Therefore, there is an urgent need for a dedicated governing law, or a specific enactment focused solely on *waqf* property management. These laws should include clear practices,

[80] "Laporan Tahunan Tahun 2022 Waqaf An-Nur Corporation," p 60-66.

[81] S. 89-95 of the Administration of the Religion of Islam (State of Johor) Enactment 2003.

procedures, and strong internal controls.[82] If the enactment process is time-consuming and laborious, MAINJ should create temporary guidelines for *waqf* management by reference made to JAWHAR in creating a manual for managing *waqf* land, which provides much-needed clarity and direction in the meantime.

Besides, the crucial problem is the failure to develop the *waqf* land due to limited funds to finance the development of *waqf* land by its lack of financial management.[83] MAINJ failed to impose a high rate and rental sum from the land due to the uncoordinated system in managing the *waqf* land. To aid this, MAINJ had to apply for financing from financial institutions, but there is no bank that would willingly provide for such because of the high risk with a low return of profit.[84] Other factors include the less-valued location, limited size, and the incompatibility of the land and the environment to develop it into the intended purpose.[85]

To counter this, MAINJ should revise its source of funding, and the types of financing used.[86] It is also better to collaborate with any governmental agencies and Islamic banks. MAINJ may also progressively rely on other sources of income, such as *waqf* cash and *waqf* shares. MAINJ should also consider reorganising its system to establish a well-structured development plan, ensuring

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[82] Rahmawati Mohd Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties in Malaysia with References to Johor," *International Journal of Asian Social Science* 11, no. 7 (2021): 345–54, https://doi.org/10.18488/journal.1.2021.117.345.354.

[83] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties, p 783-785.

[84] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties, p 794-796.

[85] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties, p 794-796.

[86] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties, p 350.

tasks are executed methodically rather than in a disorganised manner. Here, MAINJ may work with any development planning experts such as the Malaysian Public Works Department.[87] MAINJ must also provide an enhancement in collecting rental payment by imposing stricter enforcement towards lessees and assigning a debt collector.[88] MAINJ should also merit each land before accepting it as a *waqf* land in order to determine the profitability by appointing qualified consultants.[89]

Lastly, the minimal level of awareness and understanding regarding the *waqf* property management among the people. Thereby, few promotional strategies had been executed in combating this concern, including the constant advertisements on the general information regarding *waqf* in Johor through digital media such as social media, websites, and radio stations, namely IKIM and SINAR.[90] It had also been disseminated through brochures and pamphlets at the counters, mosques, governmental agencies, and public areas, billboards near the highway, and through *Jumuah Khutbah*.[91] MAINJ had also published a manual book to guide the people in *waqf* and prepared a moving counter for the public.[92]

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[87] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties, p795.

[88] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties."

[89] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties," p 350.

[90] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties," p 12-13.

[91] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties," p 11-13.

[92] Yusoff et al., "An Analysis towards the Sustainability and Management of Waqf's Properties," p 12-13.

4.0 ANALYSIS AND DISCUSSIONS

4.1 Similarities in the Management of *Waqf* Property in the state of Perak and Johor

While the administration of *waqf* varies across Malaysian states due to the decentralisation of Islamic law under state jurisdiction, Perak and Johor exhibit notable similarities in their *waqf* management practices. Primarily, the authority to manage *waqf* properties is centralised within the respective State Islamic Religious Councils: MAIPk in Perak and MAINJ in Johor. This power to manage is explicitly codified in their respective legislations, namely the *Waqf* Enactment Perak 2015[93] and the Administration of the Religion of Islam (State of Johor) Enactment 2003.[94]

Both states follow the basic Islamic principles and requirements on *waqf* despite different governing authoritative bodies. The essential pillars of *waqf* are generally the same, where it consists of *waqif, mawquf, mawquf 'alaih*, and *sighah*. First, the requirement of a *waqif* is that he must be of sound mind, *baligh*, not be declared bankrupt, and consent voluntarily. Second, the *mawquf* must be known, is not prohibited in *Shariah*, and he shall be the sole owner of the asset. Third, the *mawquf* 'alaih must be clearly identified, and not made for a purpose that is contrary to *Shariah*. Fourth, the *sighah* can be made in writing, verbally, or in any form that indicates the disposition of property for *waqf* purposes.[95]

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[93] S. 27(1).

[94] S. 89.

[95] Kenanga Investors Berhad. n.d. "Principle of Waqf." Kenanga Investors Berhad. https://www.kenangainvestors.com.my/principle-of-waqf-pillars-of-waqf.

Another similarity that can be found is that both procedures on *waqf* property management, especially in regard to immovable property, appear to be almost the same. This is due to the fact that both states require the property to be transferred to the *Majlis* via adherence to the National Land Code 1965. The procedure for both states is subject to the Manual of *Waqf* Land Management that was created by JAWHAR which is applicable in all states' religious authorities.[96]

The *waqf* property is generally focused predominantly on three sectors, which are education, health, and economic development. In the education sphere, both states focus on Islamic education institutions and student accommodation facilities. For instance, Perak has successfully developed hostels for USAS students, while Johor has invested in various educational infrastructure projects through its Saham Wakaf Johor initiative. In the health sector, both identify that haemodialysis centres are a crucial priority due to the increasing demand for treatment, especially among the needy. This is seen in Perak's medical haemodialysis centre, developed in collaboration with *Pusat Perubatan Ar-Ridzuan*, and Johor's *Sinar* Haemodialysis facility in Batu Pahat. In terms of economic development, business centres are erected in both states, which serves as an opportunity for the needy to set up their businesses with minimum costs incurred. Perak has done it through its WBC initiative and Johor through various commercial developments.

The common issue that both states face in regard to the issues on the management of *waqf* property. Both states lack financial resources and funds and seek many avenues to address the issue, such as funding, *sukuk* shares, and others. This had resulted in many *waqf* properties being left stagnant and underdeveloped. On top of that, there has been a lack of manpower and expertise

[96] Kenanga Investors Berhad. n.d. "Principle of Waqf."

in order to execute big projects under the planning of both MAIPk and MAINJ. Even though several solutions have been initiated by both states, the problem persists.[97]

4.2 Differences in the Management of *Waqf* Property in the state of Perak and Johor

The management of *waqf* property in Perak and Johor reveals notable differences in their legislative frameworks. Perak has a defined and specific statute for managing its *waqf* properties since it not only relies on the *Islamic Administration (Perak) Enactment 2004* but also has the *Waqf Enactment (Perak) 2015,* where it provides detailed provisions offering a comprehensive legal structure for *waqf* administration and development. This dual enactment approach ensures a robust and clear regulatory environment for *waqf* management in Perak. In contrast, Johor's approach is only generally without any specific enactment for *waqf*.[98] This enactment includes provisions for *waqf* management in a broader legislative framework. However, Johor also adequately relies on the additional governance by the Johor *Fatwa* Department on several matters. Generally, the Department assists in managing *waqf* properties by addressing issues such as the validity of *waqf* and delivering judgements on these matters. Regardless, Johor's legal framework for *waqf* may appear less specialised compared to Perak's dedicated enactment, potentially affecting the specificity and clarity of *waqf* property management in the state.

In terms of the minimum limits for shares of *waqf* or cash *waqf* contributions, Perak adopts a more flexible approach, allowing contributions to *waqf* or cash *waqf* without any minimum limit.

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[97] Kenanga Investors Berhad. n.d. "Principle of Waqf."

[98] S. 89-95 of the Administration of the Religion of Islam (State of Johor) Enactment 2003.

This inclusive policy encourages broader participation from donors of all economic backgrounds, enabling even small contributions to be pooled for the development of *waqf* properties. On the other hand, Johor imposes a minimum unit requirement for cash *waqf* contributions, stipulating that donors must purchase at least RM10 worth of units. This minimum threshold may standardise the contributions but could potentially limit the participation of individuals who might find even this amount prohibitive. Consequently, while Perak's approach promotes inclusivity and wider community involvement, Johor's strategy ensures a baseline level of financial input for each *waqf* unit.

A unique approach by MAINJ should be appreciated whereby it had placed the management of corporate *waqf* under a special *nazir*, namely WANCorp. The Enactment 2003 had not elaborated on the eligibility, but it was approved through agreement with MAINJ. It can proudly be declared as the first state to embark on this type of *waqf* and the institution. In Perak, MAIPk may appoint any organisation to manage the corporate *waqf* scheme; however, MAIPk retains its sole power in administering the corporate *waqf* currently and only pursues collaboration with other entities.

The advancement of technology in the Perak's *waqf* management is growing progressively compared to Johor since MAIPk exhausted the online usage of cash *waqf*. MAIPk has developed two applications to allow the payment of cash *waqf*, namely 'SnapNPay' and 'GoPayz,'with an attractive interface. MAIPk also accepts the payment directly through the 'Maybank2u' website. Unfortunately, MAINJ failed to stand in parallel here since they are yet to develop any applications to assist the transactions. MAINJ fully relies on the traditional way and the least utilisation of online payment through FPX on websites only, though such a method is also prepared by MAIPk. The website

of *'Waqaf Ar-Ridzuan*' serves a better interface and updated information, unlike 'e-*Wakaf* Johor.'

5.0 CONCLUSION

In conclusion, the comparative analysis of *waqf* property management between Perak and Johor underscores the significant differences and unique approaches each state adopts to uphold Islamic endowments. Perak's distinct advantage that should be the example for every state to practise it lies in its specific *Waqf* Enactment (Perak) 2015, which provides a detailed and specialised framework, ensuring comprehensive governance and transparency in managing *waqf* properties. However, as in the practicality and development for the *waqf* property in both states, both states showcase how tailored strategies and efficient management can lead to the successful development of *waqf* properties, ensuring that these endowments continue to fulfil their intended charitable and social purposes. The practical achievements in Perak and Johor highlight the potential of *waqf* properties to drive economic growth and improve the quality of life for their communities, reinforcing the essential role of *waqf* in contemporary Islamic finance and social welfare. We suggest that the state should add more collaboration with other corporations to pool resources and expertise for *waqf* development projects and allocate funds specifically for the maintenance and development of *waqf* properties to ensure they remain in good condition and continue to generate income. We would also suggest for Johor to have its own specific enactment on the management of *waqf* property. Thus, it can be concluded that both states had done their best to maximise the socio-economic impact of *waqf* property and ensure that these assets are utilised efficiently through development and effectively to fulfil their intended charitable and social purposes.

11 2024 LM 93-128

IS MALAYSIA AN ISLAMIC STATE?: A STUDY OF THE ISLAMIC CONCEPT OF STATE AND ITS APPLICATION IN THE CONSTITUTIONAL FRAMEWORK OF MALAYSIA

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ABSTRACT

Islam does not provide a rigid set of rules that a government must follow to establish a state in accordance with the *shariah*. Rather, scholars and jurists alike have extracted several key principles fundamental to the establishment of an Islamic concept of state. This article aims to identify these fundamental principles or concepts which form the basis of an Islamic state, analyse their application in Malaysia and evaluate if Malaysia is, at its core, an Islamic state. In essence, it attempts to encourage a more holistic interpretation of our constitution and the legal frameworks of our country and find ways to further strengthen the position of Islam as the religion of the Federation in accordance with our constitution. This article employs both a qualitative research methodology through textual analysis and doctrinal legal research methodology by primarily referring to

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legislations, case laws, journal articles and dissertations. From this study, it is evident that the purpose of establishing a state in Islam, which is to form a strong central government to safeguard and promote the *shariah*, can be found within the purposes of the establishment of Malaysia. Further, the main principles of a state in Islam are not contravened by the principles of the Federal Constitution, with some of them even forming the basic principles of the constitution. Thus, it can be deduced that Malaysia is, contrary to what has often been purported, fundamentally an Islamic state. However, efforts must be taken to further strengthen its position and harmonise the law in contemporary practice with the *shariah*.

Keywords: Islamic State, Constitutional Interpretation, Madinah Constitution, Islamic Constitutional Law, Malaysia.

ADAKAH MALAYSIA SEBUAH NEGARA ISLAM?: KAJIAN KONSEP KENEGARAAN ISLAM DAN PENERAPANNYA DALAM KERANGKA PERLEMBAGAAN MALAYSIA

Aeshah Adlina Binti A. Karim
Ahmad Ali Bin A. Karim

ABSTRAK

Islam tidak mengekang pentadbiran kerajaan kepada satu peraturan khusus untuk mengasaskan sebuah negara mengikut syarak. Sebaliknya, para pemikir dan faqih telah menggariskan beberapa prinsip utama yang menjadi asas kepada konsep negara Islam. Tulisan ini bertujuan untuk mengenal pasti prinsip dan konsep yang menjadi asas kepada seubah negara Islam, membuat analisis tentang penerapannya di Malaysia serta melihat sama ada Malaysia, pada asasnya, ialah sebuah negara Islam. Pada dasarnya, ia cuba menggalakkan takrifan perlembagaan dan kerangka perundangan negara secara lebih syumul, serta mencari cara untuk terus memperkukuhkan lagi kedudukan Islam sebagai agama bagi Persekutuan selaras dengan perlembagaan kita. Tulisan ini menggunakan kaedah kajian kualitatif melalui analisis teks dan kaedah kajian perundangan doktrin, terutamanya dengan merujuk kepada undang-undang bertulis, undang-undang kes, tulisan jurnal dan disertasi. Melalui tulisan ini, jelas sekali bahawa tujuan menubuh sebuah negara Islam, iaitu penubuhan pusat pentadbiran kukuh untuk memelihara dan memartabatkan syariah, boleh didapati dalam tujuan penubuhan Malaysia. Malah, prinsip utama sebuah negara di dalam agama Islam tidak dicanggah oleh

prinsip-prinsip Perlembagaan Persekutuan, dan ada juga yang menjadi sebahagian daripada prinsip asas perlembagaan. Maka, kita boleh mendapati bahawa Malaysia secara asasnya ialah sebuah negara Islam, bukan sebaliknya seperti yang selalu diperkatakan. Walau bagaimanapun, usaha untuk terus memperkukuhkan kedudukannya serta mengharmonikan undang-undang amalan kontemporarinya dengan syariah masih perlu diambil.

Kata Kunci: Negara Islam, Takrifan Perlembagaan, Piagam Madinah, Undang-Undang Perlembagaan Islam, Malaysia.

1.0 INTRODUCTION

What constitutes an Islamic state has been critically discussed throughout the times. Many academicians, scholars and jurists have opined on their views of what makes a state 'Islamic'. Although some parallel themes can be found between them, albeit some taking a rather radical or extreme viewpoint, no two jurists have come up with an exact same model or set of rules for an Islamic state. Particularly, this is because Islam does not provide a rigid set of rules or government models which must be adhered to. Imam al-Juwayni opines that a state must address the needs of its people which would differ according to time and situation.[3] Thus, Islam only provides general guidelines to ensure that state leaders will not rule according to their whims and fancy while its details are left for their *ijtihad*.

These guidelines range from general guidelines ordaining how a government should carry on their conduct, to more fundamental principles upon which the foundations of a state are built. Some general guidelines have been explicitly provided such as the concept of *shura* ordained in Surah *ash-Shura* verse 38,[4] Surah

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[3] Hassan Sulaiman, Alwi Alatas, Abdul Bari Awang, and Mahamed Fathy El-eletrebi, "The Objectives and Principles of Islamic Governance: Perspective of Imam Al-Juwaynī (Tujuan Dan Prinsip Tadbir Urus Islam: Perspektif Imam Al-Juwaynī)." *Journal of Islam in Asia (E-ISSN 2289-8077)* 17 (1) (2020): 222–48. https://doi.org/10.31436/jia.v17i1.924.

This view is shared by Professor Hashim Kamali. See Mohammad Hashim Kamali. "Characteristics of the Islamic State," Islamic Studies 32, no. 1 (1993), 17-40.

[4] *Quran* 42:38. Translation by Abdullah Yusuf Ali: Read together from verse 36, those "who (conduct) their affairs by mutual Consultation" are amongst the people who believe and put their trust in Allah.

Ali Imran verse 159,[5] and the practice of the Prophet Muhammad s.a.w and his companions. Other general guidelines are not as overtly given, rather have been inferred from the practices of the Prophet Muhammad s.a.w., his companions, and what has been approved or disapproved by them, as well as by analysing them from the perspective of preserving and promoting the '*maqaṣid ash-shariah*'. These more implicit guidelines are found in the likes of, for example, the necessary qualities and characteristics of a head of state. In these areas, jurists are more prone to hold differing opinions. However, it must be borne in mind that different views do not necessarily negate one view in favour of another. Thus, why it is important to understand and analyse the concept of an Islamic state to better understand and apply these views in our present day to build stronger Islamic states.

The question of whether Malaysia is an Islamic state has also been the subject of much debate by scholars, academicians, legal practitioners and the public alike. Although the Federal Constitution has expressly provided that Islam is the religion of the Federation,[6] some believe that traces of colonialism hinder Malaysia from becoming a true Islamic state. Others believe in the contrary. However, much of the debate has been solely focused on the interpretation of Article 3 of the Federal Constitution and their evaluations of the intentions of our forefathers[7] without giving much weight to the interpretation or

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[5] *Quran* 3:159. Translation by Abdullah Yusuf Ali: "... and consult them in affairs (of moment). Then, when thou hast Taken a decision put thy trust in Allah."

[6] Federal Constitution, Art. 3(1): "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."

[7] "MLC: Malaysia is not an Islamic State, says Tommy Thomas," Malaysian Bar, accessed November 2, 2024,

definition of an 'Islamic state' itself. In fact, common errors seem to be made on what makes Malaysia not an Islamic state is the limited jurisdiction of the Syariah Courts.[8] Distinguishment must be made between Syariah Courts, i.e., an overt manifestation of *shariah* enforcement, and the *shariah* itself.[9]

Thus, this article seeks to discuss a few of the fundamental principles or concepts which form the basis of an Islamic state and compare them to the state in Malaysia, analyse their application in Malaysia, or lack thereof, and evaluate if Malaysia is, at its core, an Islamic state. Guidelines will be primarily drawn from the views of Imam al-Juwayni and al-Mawardi as well as contemporary scholars such as Professor Hashim Kamali. At the end of this paper, an analysation will be made on ways to move forward and further promote the implementation of *shariah* in Malaysia.

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https://www.malaysianbar.org.my/article/news/bar-news/news/mlc-malaysia-is-not-an-islamic-state-says-tommy-thomas.

[8] Malaysian Bar, "Malaysia a secular State," July 18, 2007. https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-statement-malaysia-a-secular-state.

[9] In *Nik Elin Zurina bt Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan*, [2024] 2 MLJ 140, Chief Justice Tengku Maimun in the introduction to the court's decision mentioned that the civil courts, in carrying out its criminal jurisdiction, also enforces *ta'zir* punishments. This in hand proves that, although ideal, *shariah* need not be implemented with a label declaring itself to be a form of Islamic law, rather it suffices that its implementation is in line with the *shariah*. (The introduction to the court's decision was not reported in the Malayan Law Journal. For the original summary judgement, see: "Ringkasan Penghakiman Nik Elin," Pejabat Ketua Pendaftar Mahkamah Persekutuan Malaysia, accessed November 2, 2024, https://www.kehakiman.gov.my/sites/default/files/2024-02/Ringkasan %20Penghakiman%20Nik%20Elin.pdf.)

2.0 PROBLEM STATEMENT AND OBJECTIVE OF ARTICLE

The debate surrounding the status of Malaysia as an Islamic state or otherwise highlights the grave misconception that a state may only be Islamic if it labels its laws as "Islamic law." At the same time, a narrow interpretation of the Federal Constitution hinders us from seeing beyond a secular view of constitutional interpretation. Hence, a better understanding of the definition and concept of Islamic state must be brought forth, and a more holistic interpretation of the constitution must be adopted.

This article aims to identify the fundamental principles or concepts which form the basis of an Islamic state, analyse their application in Malaysia and evaluate if Malaysia is, at its core, an Islamic state. In essence, it attempts to encourage a more holistic interpretation of our constitution and the legal frameworks of our country.

3.0 METHODOLOGY

This article employs a qualitative research methodology through textual analysis of past writings in academic journals and dissertations. At the same time, this article also uses a doctrinal legal research methodology with the primary sources referred to being legislations and case laws, and the secondary sources being journal articles and dissertations. This method provides the necessary data to understand the fundamental principles or concepts which form the basis of an Islamic state and analyse their application in Malaysia.

4.0 LITERATURE REVIEW

Numerous works have been done on the long-standing debate concerning whether Malaysia is or is not an Islamic state. While most of these writings approached the question from a legal, political or sociological perspective, a significant gap remains in which these works rarely delve into an analytical study of the constitutional framework which aligns with Islamic constitutional principles.

Abdul Rashid Moten[10] provided an in-depth study on the debate in his writing, "Malaysia as an Islamic State: A Political Analysis."[11] To provide a comprehensive view on the subject, Abdul Rashid began his writing by giving a clear definition of what is meant by an Islamic state. According to him, in lieu of a clear definition in the *Quran*, an Islamic state is a state that incorporates the principles of governance as provided in the *Quran*. This includes elements or principles of *tawḥīd*, *shariah*, *'adālah*, *al-ḥurriyyah* (freedom), *al-musāwāt* (equality) and *shūrā* (consultation). Abdul Rashid also details how Islamic polity has evolved over the centuries, each version adapted to the needs of the people in that particular place and during that particular time. While he recognised that the Madinah and *Khilāfah* models were the ideal models of an Islamic state, Abdul Rashid quoted Ibn Taymiyyah who argued that it is impossible to replicate such idealism. Thus, the definition of an Islamic state is not to be held to such high regard or standards. Rather, it is sufficient that it integrates the fundamental principles of Islamic

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[10] Abdul Rashid Moten is a political scientist who completed his PhD at the University of Alberta in Canada. He is currently attached to the International Islamic University Malaysia (IIUM) as a Professor in the Department of Political Science.

[11] Abdul Rashid Moten, "Malaysia as an Islamic State: A Political Analysis," *Tafhim* 1 (2) (2015): 1–69. https://doi.org/10.56389/tafhim.vol1no2.1.

governance in its political system.[12]

To do away with the opposite view on the debate, i.e., that Malaysia is an Islamic state, Abdul Rashid also provided a comprehensive definition of what constitutes a secular state. On this matter, he detailed the three prevalent models of secular states[13] and why Malaysia cannot fit into any of these three models.

Finally, Abdul Rashid tackled the question of whether Malaysia is an Islamic state by looking into the features of Malaysian governance and whether they align with the characteristics of the Islamic political system. This was done by examining Malaysia's legal system, *shariah* institutes, electoral system, monarchical system, and the adoption of principles of accountability, *shūrā*, freedom and equality. In short, Abdul Rashid concluded that although "it cannot be denied that Malaysia's "Islamic state" status did not measure up to the requirements as rigidly specified by the earlier 'Ulama.' This would simply mean that there is ample room for improvement." and that "To judge such a modem state as alien to Islamic principles, despite its professing and practising to be an Islamic state, is not in conformity with Islamic teachings."

Abdul Rashid's study is perhaps one of the most comprehensive

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[12] Abdul Rashid Moten, citing Sayyid Abu A'la Mawdudi, wrote, "Sayyid Abul A'la Mawdudi defined the Islamic political system as "nothing more than a combination of men working together as servants of Allah to carry out His will and purpose". Since the system is founded upon the Islamic vision and communal needs, it maintains some dynamism and "... has room for scores of models which are compatible with the natural growth of a society and the new needs of the contemporary age as long as the total Islamic idea dominates these models in its expansive external perimeter.?"

[13] These models were labelled as Western secularism, Marxist secularism and positive secularism.

works on the topic. Nevertheless, it is noted that the study's focus is primarily on the political aspect of the issue, and it does not explore the constitutional frameworks of the Federal Constitution through the lens of Islamic constitutional law.

There have also been works proposing against Malaysia being an Islamic state and instead viewing Malaysia as a secular one. Some of these works, which will be explored in this review, are "The Discourse of the Islamic State and Islamic Law in Malaysia"[14] by Kamaruzzaman Bustamam-Ahmad[15] and "Malaysia: Religious Pluralism and the Constitution in a Contested Polity"[16] by Andrew Harding.[17]

In Kamaruzzaman's work, he began by briefly stating a few views on the relationship between Islam and a state from the eyes of what he labels as the conservatives, modernists and secularists. In the heart of his work, Kamaruzzaman tackled the discourse on the notion of Malaysia as an Islamic state based on the perspectives of a few common folk Malaysians, comments made by or political stances of the Government and the views of a few non-Muslims, as well as the *jamāʿah al-tablīgh* movement in Malaysia. However, a notable flaw in this study is that the pool

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[14] Kamaruzzaman Bustamam-Ahmad, "The Discourse of the Islamic State and Islamic Law in Malaysia," in *Asian Transformations in Action: The Work of the 2006/2007 API Fellows*, ed. Kamaruzzaman Bustamam-Ahmad et al. (The Nippon Foundation, 2009), 16–25.

[15] Kamaruzzaman Bustamam-Ahmad is a Lecturer at the State Institute for Islam (IAIN) Ar-Raniry in Banda Aceh, Indonesia. He completed his PhD in anthropology at La Trobe University, Australia.

[16] Andrew Harding, "Malaysia: Religious Pluralism and the Constitution in a Contested Polity," *Middle East Law and Governance* 4 (2–3) (2012): 356–385. https://doi.org/10.1163/18763375-00403007.

[17] Andrew Harding is a Visiting Research Professor at the National University of Singapore, with a focus on Asian legal studies.

of perspectives used is narrow and it fails to reflect the actual state of Malaysia. For instance, the perspectives of a small pool of people on what it means to be or not to be an Islamic state bring no meaning to whether or not Malaysia is built on Islamic principles. Similarly, by basing his arguments on several political statements made by the Government, Kamaruzzaman fails to appreciate the essence of the foundations of Malaysia and whether this aligns with the principles of an Islamic state.

Concluding his study, Kamaruzzaman found that Malaysia is a secular state. He also alludes to a certain correct interpretation of what constitutes an Islamic state by stating that "the debate on an Islamic state has led different groups of Malaysians to form their own interpretation of this concept."[18] Be that as it may, Kamaruzzaman made such conclusions without defining the characteristics of an Islamic state or even a secular state. Such failure leads to a lack of clarity in his work and creates confusion on the matter.

It was also highlighted in his introduction that the study shall begin with an examination of the Federal Constitution, including its formation. Yet, Kamaruzzaman failed to highlight how the backdrop of the Constitution or even its provisions are or are not in alignment with the *shariah* and have or lack elements necessary for an Islamic state; that is, safe for a brief mention of how the White Paper on the Constitutional Proposals for the Federation of Malaya provided that, "…there has been included in the proposed Federal Constitution that Islam is the religion of the Federation. his will [gnaw] away the present position of the Federation as a secular state." This sentence was included to proof that Malaysia was never intended to be an Islamic state. However, Kamaruzzaman fails to provide any context for the

[18] Bustamam-Ahmad, "The Discourse of the Islamic State and Islamic Law in Malaysia," p. 23.

statement, and neither did he look beyond this single statement in the White Paper. Additionally, he simply dismissed any implications Article 3(1) of the Federal Constitution may have, stating that "this article does not imply that the Federation is an Islamic State,"[19] without providing any rationale for why this Article was included if not to enshrine Islam as the religion of the Federation as what it states.

Harding took a different approach in tackling the question by drawing his conclusions from analysing the history of law and religion in Malaysia, the position of Islam under the Federal Constitution, and religious freedom in Malaysia. In his view, Malaysia is not an Islamic state for it had always been the intention of the author of the Constitution and the founders of the country to place Islam as a state matter and not a federal matter.[20] Here it is apparent that there is a confusion between Islam as a religion of the Federation and the jurisdiction of the administration of Islamic matters. What is placed under the jurisdiction of the states is only the administration of Islamic matters which is separate from the practice of the religion itself. In fact, a constitutional guarantee of the government's involvement in the administration of Islamic matters necessarily means that Malaysia cannot be but an Islamic state and would not fit into the model of a secular state.

There also seems to be an implied argument or idea that a state which guarantees freedom of religion may not simultaneously be an Islamic state. If this was indeed what Harding intended to propound, then this is a grave misunderstanding. Not only are there multiple verses in the *Quran* which provides that there shall not be any compulsion in religion, the Madinah Constitution itself guarantees freedom for non-Muslims to practice their own

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[19] Bustamam-Ahmad, "The Discourse of the Islamic State," p. 19.

[20] As reflected in the Ninth Schedule of the Federal Constitution.

religion while in Madinah.[21]

In short, despite the diverse works on Islam as an Islamic state, these works rarely delve into the constitutional framework of Malaysia and the integral principles which should form an Islamic state. This is the critical aspect that the authors of the present work seek to tackle, aiming to provide a much-needed analytical study on the Federal Constitution through the foreground of Islamic constitutional law.

5.0 THE ISLAMIC CONCEPT OF STATE AND ITS APPLICATION IN MALAYSIA

The Islamic concept of state covers a wide array of matters. To limit the scope of this paper, we will examine the Islamic concept of state in two areas, namely, the purpose of the establishment of a state, and the main principles of a state.

5.1 The Purpose of the Establishment of a State

As generally understood, a state is a territory of one political community under one authoritative power. Thus, when understanding the purpose of the establishment of a state in Islam, it is important to look into what Islam says about power and politics.

In Islam, supreme power belongs to Allah and Himself only, as evident in multiple verses in the *Quran*, including Surah *ash-Shura* verse 49-50:

[21] The concept of freedom of religion in an Islamic state shall be explored further throughout this study.

لِّلَّهِ مُلْكُ ٱلسَّمَٰوَٰتِ وَٱلْأَرْضِ ۚ يَخْلُقُ مَا يَشَآءُ ۚ يَهَبُ لِمَن يَشَآءُ إِنَٰثًا وَيَهَبُ لِمَن يَشَآءُ ٱلذُّكُورَ ﴿٤٩﴾ أَوْ يُزَوِّجُهُمْ ذُكْرَانًا وَإِنَٰثًا ۖ وَيَجْعَلُ مَن يَشَآءُ عَقِيمًا ۚ إِنَّهُۥ عَلِيمٌ قَدِيرٌ ﴿٥٠﴾

"*To Allah belongs the dominion of the heavens and the earth. He creates what He wills (and plans). He bestows (children) male or female according to His Will (and Plan), Or He bestows both males and females, and He leaves barren whom He will: for He is full of Knowledge and Power*."[22]

This power, however, has been delegated to be exercised by mankind among mankind in accordance with the principles and commandments of the religion. This has been explained in Surah *as-Sajdah* in verse 24:

وَجَعَلْنَا مِنْهُمْ أَئِمَّةً يَهْدُونَ بِأَمْرِنَا لَمَّا صَبَرُوا ۖ وَكَانُوا بِـَٔايَٰتِنَا يُوقِنُونَ

"*And We appointed, from among them, leaders, giving guidance under Our command, so long as they persevered with patience and continued to have faith in Our Signs*."[23]

Al-Juwaynī explains in his book, *Ghiyāth al-Umam Fī Iltiyāth al-Ẓulam*, on the importance of establishing a state in order to establish and preserve the foundations of religion, which includes *daʿwah* and *shariah*.[24]

From the three principles above, we can conclude that although Allah possesses the utmost supreme power, however, as part of His commandments, it is compulsory for mankind to establish His religion on earth. For that, Allah has delegated mankind to

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[22] *Quran* 42:49-50.

[23] *Quran* 32:24.

[24] Al-Juwaynī. "Ghiyāth al-Umam Fī Iltiyāth al-Ẓulam," in *Al-Juwayni's Doctrine of the Imamate*, PhD diss. by Zaid bin Mohamad (University of Edinburgh, 1995).

establish authority and rule the human population as per His religion and to fulfil the goals of the religion.

In short, this is the purpose of the establishment of a state, i.e., to establish power in order to establish the foundations of the religion. This is why many scholars including Al-Māwardī consider it compulsory for a Muslim community to establish power. In *al-Aḥkām al-Sulṭāniyyah*, Al-Māwardī explains the necessity of establishing an Imamate in ensuring the continuance of the prevalence of *shariah* among mankind.[25] This further solidifies the stance of Islam in the context of power and governance, which serves as the basis of Islamic politics. Islam requires that *shariah* is established among the people, and for that a certain form of power or authority is required, which is why it is considered necessary to establish an Islamic state.

The role of the authority, or more specifically the Imām as the head of state, is also laid out carefully by the Muslim political thinkers. Among those listed are to be the central power figure of the state,[26] to safeguard and maintain established principles of Islam, execute justice, maintain law and order, and others.[27] Islamic states also must practise a form of governance that takes into consideration the perception and needs of the people, and to consult others in decision making.[28] This is to ensure not only that the authority does not go beyond its boundaries, but more importantly to serve its purpose of establishment itself, which is to safeguard the priorities of the people.

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[25] Adil Hussain Bhat, "Apprehending Al-Mawardi's Theory of Imamate," *International Journal of Humanities & Social Science Studies* IX, no. II (2023), 42–52, https://doi.org/10.29032/ijhsss.v9.i2.2023.42-52.

[26] Kamali, "Characteristics of the Islamic State."

[27] Bhat, "Apprehending Al-Mawardi's Theory of Imamate."

[28] Kamali, "Characteristics of the Islamic State."

When speaking on the topic of Islamic states, we can see a lot of examples and reflection of its principles in the very first constitution itself, the Madīnah constitution, which demonstrates a lot of the aforementioned matters. The Madīnah Constitution truly shows, as an example to later states, what kind of establishing principles a state should have. These core principles are actually the reason as to why the state was even established.

The very first article in the Madīnah Constitution highlights that non-believers are considered as part of the ummah, which reflects Islam's tolerance of other beliefs, and that Islam does not forcefully impose itself upon others.[29] Despite this, Article 12 still outlines the principle whereby the believers, without discriminating against the non-believers, maintain a higher status of protection which was introduced to maintain the unity of believers.[30] It later also reflects the principle of *ʿuruf* whereby Islam does not reject existing culture or practices so long as they do not contradict with the *shariah*.[31] Provisions such as Article 27 also acknowledge and provide the fundamental rights of the people, something which was not commonly seen in other states at that time.[32]

The question to be addressed by this paper is whether Malaysia reflects or shares these elements in its establishment, in order to understand more on its status. One of the documents which reflect the purpose of establishment of Malaysia would be the Report of the Federation of Malaya Constitutional Commission

[29] Madīnah Constitution, Art. 1. "Constitution of Medina," WovenTeaching.org, accessed July 21, 2025, https://static1.squarespace.com/static/5097fe39e4b0c49016e4c58b/t/6584e5b8a185e83d5249fe0c/1703208378025/Constitution-Medina_2022.pdf.

[30] Madīnah Constitution, Art. 12.

[31] Madīnah Constitution, Art. 2.

[32] Madīnah Constitution, Art. 27.

1957, otherwise known as The Reid Commission Report 1957. The terms of reference[33] of the Commission, as outlined under Paragraph 3 of the Report, provides that the purpose of the Commission is to examine the present constitutional arrangements throughout the Federation of Malaya and make recommendations for a federal form of constitution for the whole country for the whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature.[34] Particularly, it provides five key points which shall be included in the recommendation for the constitution as an indicator of the very reasons that the country was established, and how the constitution should be constructed. The points are, the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy (federalism), the safeguarding of the position and prestige of Their Highnesses as the constitutional Rulers, a constitutional head of state chosen from among the Rulers, a common nationality, and the safeguarding of the special position of the Malays and the legitimate interests of other communities.[35]

We may also find some points on the purpose of the establishment of Malaysia laid down in the preamble to the Rukun Negara, which are to achieve and foster better unity, preserve a democratic way of life, creating a just society,

[33] "Terms of reference" are the limits set on what an official committee or report has been tasked. (See: Oxford University Press. "Definition of terms of reference noun from the Oxford Advanced Learner's Dictionary," Oxford Learner's Dictionary, accessed July 23, 2025, https://www.oxfordlearnersdictionaries.com/definition/english/terms-of-reference.)

[34] Colonial Office, *Report of the Federation of Malaya Constitutional Committee 1957 (Colonial No. 330)*, February 21, 1957.

[35] *Report of the Federation of Malaya Constitutional Committee 1957*.

ensuring liberal approach towards diversity, and building a progressive society by making use of science and technology.[36]

Interestingly, a lot of these points actually line up well with that of the Islamic establishing principles of the state. Firstly, the establishment of a strong central government in Malaysia can be related to the concept of the Imamate being a form of a centralised administration which sub-delegates the powers to its offices. We could also see a form of divisional autonomy in the former Islamic caliphates as the caliphate began to expand, as each territory often had their own leader to execute tasks and make decisions for the place, and this is similar to Malaysia's form of federalism which allows for each state to have their own autonomy to a certain extent. The safeguarding of the position of the Malay Rulers are both a part of preserving cultural norms and also preserving the Islamic institution of the state, as religious matters fall under the Rulers as it has been since the early days. We can also relate the concept of a common nationality with the first provision of the Madīnah Constitution that describes the *ummah* as encompassing both believers and non-believers, so long as the non-believers are cooperative and loyal.[37] Similarly, when the Federation of Malaya was formed, they did not reject the non-Malays from being citizens, so long as they cooperated and were loyal to the country. The safeguarding of the special position of the Malays could also be related to the Madīnah Constitution's 12th provision, which gives a similar position to the believers while not disregarding the non-believers.

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[36] "National Principles (Rukun Negara)," MyGovernment, accessed April 26, 2024, https://www.malaysia.gov.my/portal/content/30110.

[37] Madīnah Constitution, Art 1. "Constitution of Medina," WovenTeaching.org, accessed July 21, 2025, https://static1.squarespace.com/static/5097fe39e4b0c49016e4c58b/t/6584e5b8a185e83d5249fe0c/17032083780.

We can also find these reflections in the preamble to the Rukun Negara,[38] whereby unity being the first point is also something that is highly emphasised by the Madīnah Constitution, especially with the diversity of tribes in Madīnah at that time. Preserving a democratic way of life can be related to the concept of seeking validity from the people, which is part of the element of consultation or *shūrā*. The establishment of a just society is also something highly emphasised in Islam, especially as the purpose of establishment of a state is in the first place to establish and uphold the *shariah*, which, on its own, centres around the establishment of justice. Further on, the liberal approach towards diversity can be seen not only from the aspect of Islam's openness towards other cultures by the principle of *ʿuruf*, but also from the concept of there being no compulsion for non-believers to convert to Islam.

From the comparison above, it is clear that a lot of Malaysia's purpose of establishment actually lines up fairly well with the purpose of establishment of an Islamic state.

5.2 The Main Principles of an Islamic State

As has been mentioned, Islam does not set a rigid set of rules which must be followed. However, it does set some principles which must be incorporated into the governance of a state. Amongst these principles are three immutable principles which must be applied in an Islamic state, namely; surrender to Allah,

[38] The Rukun Negara are the National Principles introduced following the tragic May 13 incident in 1969, which saw Malaysia at the precipice of a full-fledged racial war between the different races in the country. It was formed to heal the broken bonds and forge a strong unity between Malaysians of different races. Today, it is sown and nurtured in the hearts of the Malaysians as a pledge to ensure harmony and unity for the sake of achieving the success and stability of the country.

sovereignty of Allah and supremacy of the *shariah*. Here we will examine each of these principles, based mostly on the views of Imam al-Juwayni, and its application in Malaysia.

Surrender to Allah

The general meaning of surrender to Allah is captured in our *shahadah*,

أَشْهَدُ أَنْ لَا إِلَٰهَ إِلَّا ٱللَّهُ وَأَشْهَدُ أَنَّ مُحَمَّدًا رَسُولُ ٱللَّهِ

"*I bear witness that there is no god but Allah, and I bear witness that Muhammad is the messenger of Allah.*"

To be precise, to surrender to Allah means to recite the *shahādah* with the tongue, to have faith that Allah is the one and only god in the heart, and to manifest this faith through actions by observing His commands. In light of governance, surrender to Allah means that Islam must be acknowledged as the one true religion in the state and manifested through the objectives of the state, the responsibilities of the head of state and *shariah* compliance in the running of the state. In fact, the principle of surrender to Allah can be seen as the prime principle out of the three immutable principles, for the sovereignty of Allah and supremacy of the *shariah* is practised as a manifestation of the state's surrender to Allah.

Regarding the responsibilities of the head of state, the principle of surrender to Allah can be seen in how the head of state shoulders the task of preserving and establishing the *shariah*. In light of the responsibilities laid out by Imam al-Juwayni,[39] this principle can be overtly seen in responsibilities such as

[39] Zaid bin Mohamad, "Al-Juwayni's Doctrine of the Imamate," PhD diss., (University of Edinburgh, 1995).

performing *da'wah* and preventing deviation. Covertly, this principle also underlies other responsibilities which may be seen as general responsibilities, such as the responsibility to protect the country and take care of the subjects. This is because as a Muslim, the head of state in fulfilling every one of his responsibilities, fulfils it as it is an *amanah* from Allah. In fact, one of the main purposes of electing a head of state is to unite the people towards the true way, i.e., towards Islam, or the way Allah has ordained, and to prohibit them from evil.[40] Thus, the existence of a head of state itself and him fulfilling his responsibilities is a form of surrender to Allah.

In Malaysia, the principle of surrender to Allah is evident in the Federal Constitution itself. When Article 3(1) of the Federal Constitution[41] states that Islam is the religion of the Federation, it is not a mere statement in reference to the predominant religion practised in Malaysia. Rather, it is an acknowledgement that Islam is the one true religion, and its position in Malaysia is sovereign, aloft, higher than any other practices or beliefs which may only be practised on the condition that it is practised in peace and harmony according to Islam.[42] Article 3(1) can be seen as a

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[40] Mohamad, "Al-Juwayni's Doctrine of the Imamate."

[41] Federal Constitution, Art. 3(1): "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation."

[42] Attention must be given to the usage of the conjunction "but" and not "and" in Article 3(1). The usage of the word "but" means that the practice of other religions is subjected to the condition that the position of Islam as the religion of the Federation remains untouched. It places Islam on a higher pedestal and not at par with other religions. See also, Justice Datuk Mohd Noor Abdullah in *Meor Atiqulrahman Bin Ishak dan Lain-lain lwn Fatimah Bte Sihi dan Lain-lain* [2000] 5 MLJ 375, p. 382: "Pada pendapat saya, 'Islam ialah ugama bagi Persekutuan tetapi ugama-ugama lain boleh diamalkan dengan aman dan damai' bermakna Islam adalah ugama utama di antara ugama-ugama lain yang dianuti di negara ini seperti Kristian, Buddha, Hindu dan selainnya. Islam bukan setaraf dengan ugama lain, bukan duduk

declaration of faith of the Federation, entrenched in its constitution itself.

The principle of surrender to Allah can also be seen in the Fourth Schedule of the Federal Constitution.[43] The Fourth Schedule contains the Oath of Office of the Yang di-Pertuan Agong which begins with the words, "*Wallahi; Wabillahi; Watallahi,*" i.e., the oath of office is taken or made in the name of Allah. This shows how the Yang di-Pertuan Agong assumes his office in the name of Allah and thus, every duty he exercises is done in the name of Allah. Additionally, in the oath of office, the Yang di-Pertuan Agong pledges to protect at all times the religion of Islam. This means that in everything that His Majesty does as the Yang di-Pertuan Agong, he must ensure that it is done in pursuit of protecting the sanctity and position of Islam as the religion of the Federation.

Evidently, the principle of surrender to Allah is applied in Malaysia.

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berganding bahu atau berdiri sama tegak. Ia duduk di atas, ia berjalan dahulu, terletak di tempat medan dan suaranya lantang kedengaran. Islam ibarat pokok jati — tinggi, teguh dan terampil. Jika bukan sedemikian Islam bukanlah ugama bagi Persekutuan tetapi adalah salah satu di antara beberapa ugama yang dianuti di negara ini dan setiap orang sama-sama bebas mengamalkan mana-mana ugama yang dianutinya, tiada lebih satu dari yang lain."

[43] Federal Constitution, Fourth Schedule: "Kami … ibni … Yang di-Pertuan Agong bagi Malaysia bersumpah dengan melafazkan: Wallahi; Wabillahi; Watallahi; maka dengan lafaz ini berikrarlah Kami dengan sesungguh dan dengan sebenarnya mengaku akan taat setia pada menjalankan dengan adilnya pemerintahan bagi Malaysia dengan mengikut sebagaimana undang-undang dan Perlembagaan yang telah disah dan dimasyhurkan dan yang akan disah dan dimasyhurkan di masa hadapan ini. Dan lagi Kami berikrar mengaku dengan sesungguh dan dengan sebenarnya memeliharakan pada setiap masa Agama Islam dan berdiri tetap di atas pemerintahan yang adil dan aman di dalam Negeri."

Sovereignty of Allah

Literally, "sovereignty" means supreme power[44] or authority.[45] In light of governance, it refers to the entity which acts as the source of power.[46] In other words, all other entities which have any form of authority or jurisdiction over any subject matter are granted or conferred the authority or jurisdiction by the prime source of power or the sovereign entity.[47] The principle of sovereignty of Allah is closely related to the concept of '*khalifatullah*' or vicegerency. This concept is better illustrated through understanding the verse in Surah *al-An'am*, verse 165:

وَهُوَ ٱلَّذِى جَعَلَكُمْ خَلَٰٓئِفَ ٱلْأَرْضِ وَرَفَعَ بَعْضَكُمْ فَوْقَ بَعْضٍ دَرَجَٰتٍ لِّيَبْلُوَكُمْ فِى مَآ ءَاتَىٰكُمْ

[44] Britannica. "Sovereignty | Politics." *Encyclopædia Britannica*, accessed January 19, 2025. https://www.britannica.com/topic/sovereignty.

[45] Philpott, Daniel. "Sovereignty." *Stanford Encyclopedia of Philosophy*, accessed January 19, 2025, https://plato.stanford.edu/entries/sovereignty/.

[46] According to the Encyclopaedia Britannica, sovereignty is "the ultimate overseer, or authority, in the decision-making process of the state and in the maintenance of order." (See Britannica. "Sovereignty | Politics." *Encyclopædia Britannica*, accessed January 19, 2025. https://www.britannica.com/topic/sovereignty.) Similarly, the Legal Information Institute at Cornell Law School defines sovereignty as "a political concept that refers to a dominant power or supreme authority." (See Cornell Law School. "Sovereignty." *LII / Legal Information Institute. Cornell Law School*, accessed January 19, 2025. https://www.law.cornell.edu/wex/sovereignty.) These definitions underscore that sovereignty denotes the supreme authority responsible for governance and the source of power within a political entity.

[47] For example, in the UK, the sovereignty of Parliament means that the Parliament is the source of law, and all other bodies of the government, including the King or Queen themselves, are conferred power by the Parliament.

"*It is He Who hath made you (His) agents, inheritors of the earth: He hath raised you in ranks, some above others: that He may try you in the gifts He hath given you (...).*"[48]

In light of the concept of head of state in Islam or imamate,[49] the verse emphasises how everyone's place on earth and dominance over or occupation of a certain territory is only by the will of Allah.[50] Thus, in reality, no one truly owns any domain except as an agent or vicegerent of Allah to exercise the will of Allah. Generally, one's duty as a vicegerent of Allah is captured in Surah *Ali Imran*, verse 110:

كُنتُمْ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ تَأْمُرُونَ بِٱلْمَعْرُوفِ وَتَنْهَوْنَ عَنِ ٱلْمُنكَرِ وَتُؤْمِنُونَ بِٱللَّهِ

"*Ye are the best of peoples, evolved for mankind, enjoining what is right, forbidding what is wrong, and believing in Allah*."[51]

Every Muslim must always enjoin what is right and forbid what is wrong in everything that they do. However, as leaders of the state, this responsibility comes at a higher stake with the task of ensuring that the foundations of the *shariah* are established and preserved throughout the state and that its affairs do not transgress what is forbidden by Allah.[52]

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[48] *Quran* 6:165.

[49] The concept of '*khalifatullah*' may refer to the general concept of vicegerency of man as trustee of Allah on the earth, or to the more specific role of the head of state in establishing *sharīʿah* on a larger scale. See Kamali. "Characteristics of the Islamic State."

[50] "Tafsir Surah Al-An'am – 165," Quran.com, accessed June 15, 2024, https://quran.com/6:165/tafsirs/ en-tafsir-maarif-ul-quran.

[51] *Quran* 3:110.

[52] Sulaiman, "The Objectives and Principles of Islamic Governance: Perspective of Imam Al-Juwaynī."

In essence, what can be understood is that in Islam, sovereignty belongs to Allah, and whatever power or jurisdiction a head of state holds is as has been conferred to them by Allah. Thus, the sovereignty of a ruler in Islam refers only to executive sovereignty–not absolute sovereignty, as he executes the sovereignty or will of Allah. The difference between executive and absolute sovereignty can be better understood by comparing the concept of the sovereignty of rulers in an Islamic and in a theocratic state. In a theocratic state, the priests or religious leaders—including the king as in Medieval England, hold absolute sovereignty where every word, action or decision they make becomes the law.[53] They act as 'godly men' as it is believed that they are divinely guided, and thus their every wish is binding onto the people. In a theocratic state, the heads of state hold absolute sovereignty. On the other hand, the head of an Islamic state is not afforded such immunity or sanctity. Although the heads of state must be respected and obeyed,[54] this privilege is only granted to them on the condition that they abide by the *shariah*. In other words, their sovereignty is only bestowed for the purpose of executing the will of Allah. Thus, if their governance turns harmful to the establishment and preservation of the *shariah* or the position of Islam in the state, then they lose their sovereignty. This is executive sovereignty, i.e., neither sacred nor divine.[55]

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[53] Britannica. "theocracy." *Encyclopedia Britannica*, accessed April 25, 2024. https://www.britannica.com/topic/theocracy.

[54] *Quran* 4:59. Translation by Abdullah Yusuf Ali: "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you."

[55] Kamali, "Characteristics of the Islamic State."

In Malaysia, the principle of sovereignty of Allah can be inferred from the Fourth Schedule of the Federal Constitution.[56] The Oath of Office of the Yang di-Pertuan Agong, as has been elaborated, is taken or made in the name of Allah. By swearing-in in the name of Allah, it is understood that the Yang di-Pertuan Agong is assuming the office in Allah's name and binds himself to Allah's will. Through the oath, His Majesty makes an acknowledgement that Allah is of a higher position than His Majesty himself. Additionally, the very fact that the Oath of Office contains a pledge that His Majesty will at all times protect the religion of Islam also proves that the office is held on the condition that he exercises the will of Allah. The Yang di-Pertuan Agong also does not have absolute rights to hold office for a full term. Article 38(6)(a) of the Federal Constitution confers the Conference of Rulers discretionary power to remove from office the Yang di-Pertuan Agong.[57] This proves that his sovereignty is not an absolute sovereignty. These concepts are in line with the notion of executive sovereignty as found in the concept of '*khalifatullah*.'

Supremacy of *Shariah*

"Supremacy" literally refers to the state of being above or superior to all others. In the context of governance, the supremacy of *shariah* refers to how the *shariah* must be the supreme law of the land, i.e., all laws and all people of the state are subject to the *shariah* and its commandments. In other words, the supremacy of the *shariah* means that the provisions of the

[56] Federal Constitution, Fourth Schedule.

[57] Federal Constitution, Art. 38(6)(a): "The members of the Conference of Rulers may act in their discretion in any proceedings relating to the following functions, that is to say: (a) the election or removal from office of the Yang di-Pertuan Agong or the election of the Timbalan Yang di-Pertuan Agong;"

shariah, i.e., the *Quran* and Sunnah, are immutable. In the words of Imam al-Juwayni, it is the idea that everyone, the ruler and the citizens alike, is subject to the laws of the *shariah* as dictated by the *Quran* and Sunnah.[58]

In the Madīnah Constitution, Article 28 clearly provides for the supremacy of the *shariah*:

"*When you differ on anything (regarding this Document) the matter shall be referred to Allah and Muhammad s.a.w.*"[59]

A similar provision appears in Article 47:

"*In case of any dispute or controversy, which may result in trouble the matter must be referred to Allah and Muhammed s.a.w., The Prophet s.a.w. will accept anything in this document, which is for (bringing about) piety and goodness.*"[60]

In comparison, there are no express provisions providing for the supremacy of the *shariah* in the Federal Constitution. In fact, without careful analysis, it may seem that Malaysia does not practise supremacy of the *shariah* as Article 4 of the Federal Constitution places the Federal Constitution as the supreme law of the land, and any law against it is void to the extent of its inconsistency.[61] In practice, however, elements of the *shariah*

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[58] Sulaiman, "The Objectives and Principles of Islamic Governance: Perspective of Imam Al-Juwaynī."

[59] Madīnah Constitution, Art 28. "Constitution of Medina," WovenTeaching.org, accessed July 21, 2025, https://static1.squarespace.com/static/5097fe39e4b0c49016e4c58b/t/6584e5b8a185e83d5249fe0c/17032083780.

[60] Madīnah Constitution, Art.47.

[61] Federal Constitution, Art. 4(1): "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

have been incorporated with the provisions of the Federal Constitution itself. A prime example will be Article 3(1),[62] which has already placed Islam as the religion of the Federation. This provision, read together with Part I of the Fourth Schedule,[63] means that the religion of Malaysia is Islam, and the Yang di-Pertuan Agong must at all times ensure that it remains so through the carrying out of every function of every organ of the government. Likewise, every member of every organ of the government must, in carrying out their duties, interpret the Constitution towards the implementation, establishment and preservation of the *shariah*. Thus, the supremacy of the Federal Constitution does not defeat the supremacy of the *shariah* since it upholds the sanctity of the *shariah* in all aspects of the law and government policy—be it legislation, enforcement or interpretation.

The integration of *shariah* elements with the Federal Constitution can also be seen through its provisions which protect and promote the *maqaṣid al-shariah*. The *maqaṣid al-shariah* or purposes of the *shariah* are five; protection of religion, life, intellect, dignity, and property. The protection of religion or '*al-dīn*' is clearly preserved in the aforementioned Article 3 as it

[62] Federal Constitution, Art. 3(1): Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

[63] Part I of the Fourth Schedule prescribes the oath of office of the Yang di-Pertuan Agong. In its original text: "*Kami (...) ibni (...) Yang di-Pertuan Agong bagi Malaysia bersumpah dengan melafazkan: Wallahi; Wabillahi; Watallahi; maka dengan lafaz ini berikrarlah Kami dengan sesungguh dan dengan sebenarnya mengaku akan taat setia pada menjalankan dengan adilnya pemerintahan bagi Malaysia dengan mengikut sebagaimana undang-undang dan Perlembagaan yang telah disah dan dimasyhurkan dan yang akan disah dan dimasyhurkan di masa hadapan ini. Dan lagi Kami berikrar mengaku dengan sesungguh dan dengan sebenarnya memeliharakan pada setiap masa Agama Islam dan berdiri tetap di atas pemerintahan yang adil dan aman di dalam Negeri.*"

places Islam as the religion of the Federation. Additionally, Article 11(4) of the Federal Constitution also protects and promotes the *maqaṣid al-shariah* by authorising the State government, or Parliament in respect of the Federal Territories, to enact laws controlling or restricting the propagation of other doctrines among Muslims.[64] These provisions are only to name a few;[65] there are many other Articles which embody the *maqaṣid al-shariah*, including the other four *maqaṣid* as well.[66] Such integration proves that the supremacy of the *shariah* is upheld through the supremacy of the Constitution.

At the same time, the supremacy of the *shariah* may also be inferred from the various provisions which provide special procedures, requirements or limitations when it comes to legislating on matters concerning Islam. For example, Article 76(1) of the Federal Constitution grants the power to the Parliament to legislate for States in certain cases.[67] However, this

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[64] Federal Constitution, Art. 11(4): State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

[65] Careful analysis will show many other Articles which relate—directly or indirectly—to the *maqaṣid al-sharīʿah*. To name another example, Article 12(2) also promotes the first *maqṣūd*, the protection of religion. Regarding the other *maqaṣid*, Articles 5, 12 and 13 clearly relate to the protection of life, intellect and property respectively. The protection of lineage or dignity can be seen through the provisions relating citizenship and the First Item of List II of the Ninth Schedule. Again, these examples are only to name a few.

[66] A more in-depth study of the relation between the Articles of the Federal Constitution with the *maqaṣid al-sharīʿah* is highly relevant in studying whether Malaysia upholds the supremacy of the *sharīʿah*.

[67] Federal Constitution, Art. 76(1): "Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say: (a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member; or (b) for the

power shall not extend to matters concerning Islamic law.[68] Similarly, Article 150 of the Federal Constitution grants power to the Yang di-Pertuan Agong to promulgate and the Parliament to make laws on any matter, including those under the States' jurisdiction, if it seems pertinent during a state of emergency.[69] However, Article 150(6A) restricts this power to exclude any matter of Islamic law.[70] All matters relating to Islam are protected by the Yang di-Pertuan Agong in the Federal Territories[71] and states without Rulers,[72] and by the Malay Rulers in their own

purpose of promoting uniformity of the laws of two or more States; or (c) if so requested by the Legislative Assembly of any State."

[68] Federal Constitution, Art. 76(2): "No law shall be made in pursuance of paragraph (a) of Clause (1) with respect to any matters of Islamic law (…)"

[69] Federal Constitution, Arts 150(2b), (2c), (5):

"(2b) If at any time while a Proclamation of Emergency is in operation, (...) the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require."

"(2C) (...) the power of the Yang di-Pertuan Agong to promulgate ordinances under Clause (2b) may be exercised in relation to any matter with respect to which Parliament has power to make laws."

"(5) Subject to Clause (6a), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; (...)"

[70] Federal Constitution, Art. 150(6A): "Clause (5) shall not extend the powers of Parliament with respect to any matter of Islamic law (...)"

[71] Federal Constitution, Art. 3(5): "Notwithstanding anything in this Constitution the Yang di-Pertuan Agong shall be the Head of the religion of Islam in the Federal Territories of Kuala Lumpur and Labuan;"

[72] Federal Constitution, 3(3): "The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the Yang di-Pertuan Agong shall be Head of the religion of Islam in that State."

states[73] who have sworn to protect Islam at all times. Thus, read harmoniously, it brings the meaning that laws relating to Islam have a certain degree of immunity.

Unfortunately, it is undeniable that the Federal Constitution is silent if a situation arises where the Constitution is inconsistent with the Islamic law and which one of the two shall prevail. Thus why the makers of the law, the interpreters of the law and the Rulers must, as Muslims, always read the law through the lens of *uṣūl al-fiqh* in pursuance of upholding the supremacy of the *shariah*, even if it is not mentioned explicitly in the Federal Constitution.

6.0 RECOMMENDATIONS ON MOVING FORWARD

When it comes to an Islamic state, it should be noted that one does not necessarily need to expressly indicate itself to have Islamic law or to have Islam in its name. Madīnah, for example, never expressly cited itself as being an Islamic state despite being under the rule of Prophet Muhammad S.A.W himself. This is partly because Islam is supposed to be part of all aspects of life, and it should be understood that what we do should be part of Islam.

What matters is in the implementation, i.e., whether we follow Islamic principles and abide by the Islamic commandments in the execution of our actions. This means that in order for a state to be called an Islamic state, it must meet the purpose of an Islamic state, and uphold Islamically aligned principles. Islam also does

[73] Federal Constitution, Art. 3(2): "In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; (...)"

not negate, but instead recognises local customs. This means that it is not integral to completely shape a country's law entirely based on the Constitution of Madīnah or any other pre-existing reference. Instead, a state can have its laws based on its own customs, but imbue the elements required in Islamic states in order to be deemed Islamic.

Looking into this matter for Malaysia, as a multicultural country with people of diverse beliefs and practices, it may not be ideal to overtly enact laws under the label of *shariah* onto the masses. The usage of the term "Islam" in national policy can be seen as a process of imposing Islam onto non-Muslim citizens, especially when these laws are applied to everyone at large.

This can actually be seen in effect already, with multiple civil laws being shaped based on Islamic principles or local customary principles that align with the *shariah*. Even during the times of the Malaccan Sultanate during the 15th century, Islamic law was imposed on everyone irrespective of their religion, but it was not labelled as a religious law but instead as a state law. In fact, giving the impression that we are to impose Islam on non-Muslims may go against the Islamic principle of not imposing Islam onto non-believers, even if we do not impose the religion itself.

Therefore, it is not necessary to put anywhere within our priority to change our laws so that they seem more Islamic from the outside through the usage of Islamic terms such as *ḥudūd*. What we should strive to improve is the implementation of the *shariah* elements in Malaysia through its content rather than its name. This does not necessarily require the "Islamic label," but instead should look more into the imbuement of the principles in a law that applies to all, as Islam is not limited to being applicable to Muslims only.

Given the circumstances, Malaysia is already on the right track in being an Islamic state. Although several provisions are yet to be perfected, lawmakers should keep with the current structure of the constitution but only amend certain elements to strengthen the position of Islam, as well as make sure that the practice of universal Islamic principles is well-embedded into the system. This includes the further application of offences within the *shariah* law into civil law so that it applies not only to Muslims but to all persons.

7.0 CONCLUSION

In retrospect, we can understand a few key takeaways from the issue we have posed. First, it is clear that there are a few immutable principles which an Islamic state must hold on to, including the surrender to Allah, the sovereignty of Allah and the supremacy of *shariah*.

At the same time, however, Islam is holistic or '*shumūl*', whereby it does not only contain elements to improve religious and spiritual quality, but also the general quality of life within human society. This makes Islam not only a mere theological belief, but a way of life that applies to all of mankind. This is, in fact, the reason why the establishment of *shariah* is highly prioritised, as it is meant to serve justice in general. Thus, it is clear that Islam must be universal and applied to all beings without imposing itself onto the non-believers by forcing them to accept Islam as their religion. It is crucial to understand that although '*daʿwah*' is still an integral part of the religion and a huge responsibility of its believers, it is not to be forcefully imposed onto others, as mentioned in Surah Al-Baqarah verse 256:

لَآ إِكۡرَاهَ فِي ٱلدِّينِۖ قَد تَّبَيَّنَ ٱلرُّشۡدُ مِنَ ٱلۡغَيِّۚ فَمَن يَكۡفُرۡ بِٱلطَّٰغُوتِ
وَيُؤۡمِنۢ بِٱللَّهِ فَقَدِ ٱسۡتَمۡسَكَ بِٱلۡعُرۡوَةِ ٱلۡوُثۡقَىٰ لَا ٱنفِصَامَ لَهَاۗ

"*Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks.*"

Thus, an Islamic state must also meet these conditions, which is to serve peace and justice to all mankind and become a mercy to all the worlds, or '*raḥmatan li al-ʿālamīn*' as commonly cited. This is prevalent when we look into the concept of Islamic states as mentioned by Muslim scholars and jurists, where the goal of an Islamic state is not only to establish the foundations of the religion for the mere purpose of its widespread, but also to serve the people, as such is the purpose of a state. The responsibility of the leader or '*imām*' is not only tied to his religious deeds and to establishing the religion, but also to meet the needs of the people irrespective of their beliefs. This is not only seen in post-prophetic states, but also during the time of Prophet Muhammad S.A.W himself, as evident in the administration of the state of Madīnah.

When we analyse the foundational elements upon which Malaysia was built, we can see that the foundational principles of the country align well with that of an Islamic state as laid down by the *Quran*, the Sunnah, as well as the Muslim jurists. This means that it is clear to see that Malaysia fits the requirements to be cited as an Islamic state, especially with there being express declarations of such matters within the Federal Constitution itself.

In essence, it can be said that Malaysia is an Islamic state at its core as it does not contradict the principles of an Islamic state, rather it is in alignment with it. The remaining question is how Malaysia should move forward to further enhance the Islamic

elements and fulfil its goals to properly implement Islamic laws and commandments.

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