

The *Wadiah* and *Wakalah* Approach for Missing Person's Property

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ABSTRACT

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Missing Person's property issues in Malaysia have become increasingly complicated since the MH370 tragedy. When a person is missing and cannot be traced, the Islamic law of Al-Mafqud dictates that their property is managed in a specific way. By 2021, the estimated value of the missing person's

property was estimated to be in the billions of ringgit, indicating the need for an efficient property management system. To ensure a smooth operation, there is a need for effective management and efficient estate planning towards the missing person's property. Document analysis was employed to allow for a comprehensive examination of the data. This paper presents the results of secondary data collected from various sources such as policy documents, legislative acts, research papers, articles, and newspapers about previous cases. In general, it is proposed that the principles of Wadiah and Wakalah in Islam are suitable approaches for solving the issue of missing person's property in Malaysia. Wadiah is a principle where a Trustee can manage a property, and any profit from the property can be shared. Wakalah is a contract where a person authorizes another to do a particular well-defined legal action on their behalf. Thus, Wadiah and Wakalah could be potential solutions to the issue of missing person's property in Malaysia.

Keywords: Missing Person, Property, Al-Mafqud, Wakalah, Wadiah.

INTRODUCTION

One of the more contentious topics in Malaysia today is missing person's property. The missing person's property concerns, also known as *Al-Mafqud* in Islamic law, arise when the owner of a piece of property cannot be found or is reported missing (Ahmad, 2021; Yusoff & Sulaiman, 2021). The missing person's property is considered worth billions of Ringgits up until 2021, which is a huge amount. As a result, a strategy for planning and managing the assets must be understood. These problems have a harmful impact on the heirs, the religion, the nation, and society, but most people ignore them (Hamidon et al., 2022). In 2013, Malaysia's Shariah Judiciary Department began looking for a way to handle the unclaimed property. According to Lembut (2013), Muslims' assets and riches should be used to advance their communities and the nation (Hassan et al., 2022). Rahman et al (2021) The missing person issue also has a big impact on the management and distribution of property (Mohamad & Sulaiman, 2018), particularly on matrimonial property claims (Manswab, 2021). Thus, it is anticipated to address the concerns and challenges relating to frozen private properties totalling billions of Ringgits. These priceless assets have a great potential to create cash for the advancement of the Muslim community and raise Malaysians' standard of living.

This topic has been discussed since the tragedy surrounding the Malaysian flight MH370. The Malaysian Government declared MH370 an accident on January 29, 2015, and all crew members and passengers were assumed dead. The MH370 controversy is merely a driving force behind the necessity of *Al-Mafqud's* management. Even though the problem appears little, it has a significant impact. The unclear status impacts the missing people's belongings. The issue is that *Al-Mafqud* estate's assets will

get frozen. The freeze period ends when *Al-Mafqud* or their heirs come to claim. However, in some cases, heirs are unaware of these issues. The situation worsens when there is a family dispute because no one knows *Al-Mafqud's* history. Currently, the Government has no authority in Malaysia to liquidate the unclaimed property for a set time. In addition to the restrictions imposed by civil law, Shariah Law prohibits the unfreezing of property without a compelling reason.

However, Lembut (2013) also brought up the 1982 National Fatwa Committee ruling that the Government has the authority to buy or use any property for the public's good. However, The Decision cannot be regarded as the law that would apply in the given circumstance. Therefore, the issue should be resolved by the Government. This essay will analyze property management-related issues from the viewpoint of *Al-Mafqud* in Islamic philosophy. The concept of property in Islam should be understood as providing the best solution suited to the nature of Muslims, as it is a blessing to all humankind. Awang and Ridzuan (2006) explained that the inheritance of *Al-Mafqud* may be related to the Islamic Law of Inheritance, which is considered part of the estate or (*al-tariqah*) left by the deceased, something that is not unanimously agreed upon by all jurists of Islamic jurists. Salleh and Mahamood (2019) give an opinion the legal binding should revise to solve this issue correctly.

This paper aims to review the existing Islamic Finance instrument that can be adapted to manage and solving this *Al-Mafqud* real estate issue. In the Islamic financial system, known as *Muamalat*, various approaches can provide benefits and good returns to property owners.

LITERATURE REVIEW

Wahbah Al-Zuhaili (1984) said that different categories are given to wealth in Islam. It which is *Mutaqawwan* (valuable things), *Ghair Mutaqayyam* (unuseful things), *Mithy* (same value at any place), *Qimmi* (different value with different location and situation), *Manqul* (mobile asset), *Ghair Manqul* (immobile asset). The immovable property is *Ghair Manqul*, also known as *A'qar* (intangible asset). Khatib (1976) mentions that the concept of *A'qar* covers all the things that exist on the earth's surface, such as buildings, water, vegetation, and mineral resources that exist under it. Therefore Aprianto (2017) signifies that wealth in the Islamic view has an important position include activities of business economy and worship rituals, the wealth is so noticed that it becomes one of the important points in *Maqashid Shariah*, which is to maintain or protect said wealth (Auda, 2022). Property in Islam has its unique concept contributed by various scholars of Islam, which may be treated as opinions and estimates. However, despite the different aspects of assessment, goal, and purpose, all are still the same. There are two critical features in determining property in Islam:

- An object that can be stored and collected can be used as a right.
- Objects that can be taken advantage of and derive benefit from there.

Freezing property or monopoly by certain parties is a condition that Islam rejects because it can cause various harmful effects on society and the country. Property is an essential aspect of Muslim life, and Islam encourages its believers to seek and manage property wisely (Abdullah et al., 2019). According to Islam, with reasonable care of the property administration system, the circulation of wealth will occur healthily and harmoniously. Nevertheless, by itself, the property's inherent value can be maximized through direct use or investments. This situation certainly can improve the lives of Muslims in the country. Ashur and Al-Tahir (2006) said the existence and application of this law affected sentiment and understanding, customs, religion, culture, and many others. It begins in a relatively simple form and grows to be a complex one.

Ashur and Al-Tahir (2006) also elaborates on the *Maqasid Shariah*. It has generally been a chain of five basic principles of Islam as stated by Imam Al-Ghazali, which are the legal objectives of Shariah, which is the Protection of wealth (*hifz al-mal*). It is one of the requirements of human life, and human beings cannot be separated from it. Islam does not prevent the human search for treasure as much as possible, provided one can do it and does not violate Islamic law. It is consistent with the human desire

to maintain property to increase the world's degree and pleasures. However, all wealth belongs to Allah, but Islam also recognizes the right of a private person. Therefore, man is obsessed with wealth and working through the various roads set by Islam to avoid chaos within each other.

Legislative for Missing Persons

Article 121 (1A) of the Malaysia Federal Constitution states that the Civil Court has no jurisdiction over matters falling within the powers of the Shariah Court. Amendment of Article 121 of the Constitution in 1988 showed that the Federal Constitution had recognized the existence and integrity of Shariah law. The Shariah Courts now has the absolute power to decide and resolve cases or some things under its jurisdiction. The civil court can no longer discuss a case under the Shariah Court's jurisdiction. The purpose of this change is because there are some cases in which the civil courts had previously discussed certain matters; even the essential thing, in this case, was under the jurisdiction of the Shariah Court. Thus, these changes are expected to resolve disagreements and clarify the division of jurisdiction between the two courts. The amendments have given special status to the Shariah Court. This change's most significant theoretical effect would be preventing a conflict between Shariah court decisions and that of the civil court.

As happened in some previous cases involving custody of children, matrimonial property, and illegitimacy of children, the Civil High Court did not decide according to Islamic law. This upset the Muslim parties, who felt it was harmful. On the other hand, the Civil High Court's decision in favor of the law contradicts Islamic law. Civil courts have also made decisions on matters within the jurisdiction of the Shariah Court and sometimes must change a decision made by the Shariah court. With this amendment, the difference between the Civil Court and Shariah Court should not occur again because the matter can only be brought to the Shariah Court, and Civil courts no longer have jurisdiction. Therefore, this problem can be solved. The two courts' jurisdiction ought to run as track as in the constitution and should not exercise powers that the constitution does not give them.

According to Noor et al. (2018), this situation really contradicts with the laws of England and Wales where the disappearance of an individual does not alter the ownership or management of their assets and affairs. Noor et al. (2018) further added that consequently, it can be challenging, or even impossible, for those left behind to procure a death certificate if they presume the missing individual must have passed away. In the absence of a death certificate, the missing person is typically assumed to be alive for the purposes of the law (Noor et al., 2018).

The legal system in Malaysia is divided into two, namely Shariah and Civil law. Each law has a different period for presumed death and has different functions. For the Civil law, regarding section 108, Evident Act 1950, the period for *Al-Mafqud* to be presumed dead is seven years and can be declared by the Civil High Court and above. The heirs can use only the presumption of death or the Death Declaration from the Civil court in claiming inheritance. Meanwhile Shariah Law is the legislative jurisdiction of the state government. All states in Malaysia (except Terengganu) insert in their Shariah law that the waiting period for the presumption of death is four years. For example, the period of 4 years has been mentioned under Section 53(1) of Islamic Family Law (Federal Territory) Act 1984 and applicable for all federal territories in Malaysia. However, the function of presumption of death from the perspective of Shariah Court in matters relating to the dissolution of marriage and not valid for property claims. In accordance with Islamic law, a court order is required before an heir's inheritance can be distributed (LaOde, 2022).

The Issues of Missing Person's Property

On the issue of ownership, before somebody is *Al-Mafqud* or property acquired during his disappearance, the property cannot be distributed among the heir or nominated until there is death confirmation such as a death certificate produced or after court declaration after a certain period. The

period is not fixed but will depend on the judge to confirm his death. Before the grant of probate, a transaction in any property is illegal because the *Al-Mafqud* is still assumed alive.

Based on the previous study, the causes of the freezing of property of *Al-Mafqud* in Malaysia are the two sides of the heirs and the authorities. Although the legal aspects are seen as the main factor, there is still some chance that can be used by both parties to avoid freezing property. The study also found that courts can still order the liquidation of the real estate of *Al-Mafqud*. However, ambiguity in the context of specific legislation is a significant consideration. The court order is just an opportunity to explain why such property is withdrawn, not an exceptional warranty. In the current situation, the risks are very high that a conflict of jurisdiction may arise on the issue of *Al-Mafqud* status.

Thus, a new law may be required in the United States, Canada, Australia, Ireland, and Uganda to solve such issues. The factors such as sentimentality and family relation must be addressed wisely among the heirs. However, they have the right to the properties. The next of kin ought not to figure out these family issues within narrow personal interests. The more significant issue should be viewed as a waste of resources that would occur without a solution. Then, on the issue of ownership, before a person goes missing or property acquired during his disappearance, such property cannot be distributed until after his death is confirmed or the disappearance takes place over such a period where usually the missing person cannot be presumed to be living beyond that period.

Duration of time is not automatic rather; an order of the court is still needed to confirm the death of the missing person. Before the judgment, the missing persons are still presumed alive, and the property cannot be. Besides, there is the issue of weakness of agencies and the lack of service delivery to society. For the agencies to resolve the problem, it is proposed that they need more authority to improve their service. Although each agency involved does not have a special responsibility for matters relating to *Al-Mafqud*, they should take the initiative to serve society by campaigning and educating the public. Furthermore, a special agency to administer the property of *Al-Mafqud* is very important to set up, and the authorities should look at this matter seriously to avoid the worst for society and the country.

Islamic Finance System

Islamic financial system has achieved a large-scale growth and arriving at a new level of experience in the Muslim countries and around the globe (Muhammad & Ximei, 2020). The main basis of the Islamic economy consists of three sectors, namely the *siasah* (public) sector, the *tijarah* (private) sector, and the *ijtimak* (social welfare) sector. The political sector is a sector responsible for maintaining law and order, justice, and defense. This sector is responsible for the dissemination and implementation of economic policy. The *tijarah* sector is a sector related to wealth creation. In that matter, anyone will be involved in the financial activities of production, consumption, distribution, and so on. Next, the *ijtimak* (social) sector provides Islamic social security such as *al-takaful al-ijtimai*. These institutions can be public sector entities such as *Bait al-Maal* and *Bai al-zakat* and private sector entities, such as charitable organizations and individuals.

METHODOLOGY

This study employed a qualitative research approach as outlined by Creswell & Guetterman (2019) which aims to understand social issues through an extensive investigation process that is informed by observations and real-life situations. Qualitative research methods particularly a document analysis allow researchers to explore topics in greater depth, giving researchers the ability to uncover and understand the motivations and values behind crucial aspects of subject studied. This type of research is particularly useful in exploring topics that cannot be quantified or measured in a traditional manner (Bryman, 2016).

This study adopts document analysis by examining previous secondary materials ranging from policy reports, acts, previous research papers, journal articles, and newspapers about the *Al-Mafqud*

cases are also used in this paper. These materials are obtained from the library. Some sources are accessible online such as from Libraries e-Resources, which supplies many online databases such as Science Direct and SAGE Publications. The main advantages of secondary data are the availability of the data itself and its easy to access. This approach is through reviews and reading all the accessible literature related to this paper. This study focuses on the Islamic finance approach related to asset and property management. Document analysis allows for an in-depth exploration of the material through an interpretive lens, allowing the researcher to gain a better understanding of the context, meaning, and implications of the document. In addition, document analysis can be used to uncover hidden meanings or previously unknown facts that may have been overlooked.

Table 1. Document Analysis

No	Data Analysed	Title of Documents	Author / Sources	Types of Documents
1	Definition of <i>Wadiah</i> & <i>Wakalah</i> Concepts of <i>Wadiah</i> & <i>Wakalah</i>	Wadiah: BNM Policy Document 2016	Bank Negara Malaysia (2016a)	Policy Document
		Wakalah: BNM Policy Document 2016	Bank Negara Malaysia (2016b)	Policy Document
		The Concept of Wadiah and its application in Islamic Banking. Al-Mafqud Property Ownership and Transactions Before Presumptive Death Orders.	Qaed and Qaed (2014) Saadan et al. (2019)	Journal Article Journal Article
2	<i>Wadiah</i> & <i>Wakalah</i> application in Muamalat system	Construction: Islamic Financial System: A Brief Introduction from the Literature	Muhammad and Ximei (2020)	Journal Article
		Does 'Wadi'ah' Follow Islamic Principles in Islamic Banks	Mahbub and Shammo (2016)	Journal Article
3	Application of <i>Wadiah</i> & <i>Wakalah</i> in relation to property management.	Islamic Perspectives on the Implementation of Wadiah Products at Islamic Banks in Indonesia	Ruslan (2021)	Journal Article
4	Implementation of the <i>Wadiah</i> & <i>Wakalah</i> in legal system in Malaysia	Evident Act 1950 (Revised 1971)	Government of Malaysia (1971)	Legislative Act
		Federal Constitution	Government of Malaysia (1963)	Legislative Act
		Islamic Family Law (Federal Territory) Act 1984	Government of Malaysia (1984)	Legislative Act
		<i>Al-Mafqud</i> Real Problems according to Shariah law in the Malaysian Perspective.	Lembut (2013)	PhD Thesis

DISCUSSION

Wadiah

The term *Wadiah* comes from *wada'asy syai-a*, which means leaving something. Literally, *alwadi'ah* can be interpreted as a pure deposit from one party to another, both individuals and legal entities, which must be guarded and returned whenever the custodian wants it (Mahbub & Shammo, 2016). In the context of Islamic financial business, Bank Negara Malaysia (2016a) defined *Wadiah* as a Custodian. *Wadiah* is a contract between the owner of a property and a caretaker to keep the goods to guarantee its safety from theft, damage, and loss (Saadan et al., 2019). According to Qaed and Qaed (2014), there are some basic rules of *Wadiah*: the contracting parties must consist of the depositor and the caretaker. Both parties must reach the age of maturity.

Secondly, the depositor can also take back the property whenever he wishes. Next, offer (*ijab*), and acceptance (*qabul*) must be present in the contract to validate *Wadiyah*. Lastly, the deposited property must be owned by the depositor. There are two types of *Wadiyah* which are *Wadiyah yad Amanah* and *Wadiyah yad Dhamanah* (Qaed & Qaed, 2014).

Wadiyah yad Amanah is also known as safe custody based on trust where the caretaker will maintain the property like his own property. However, if there is any damage on the property, the caretaker is not responsible unless the damage occurs due to his negligence. The caretaker also will not gain any profit from this contract. Ruslan (2021) said, *wadiyah* means representing the protection of a special property or certain value in a certain way.

Wadiyah yad Dhamanah on the other hand, is guaranteed safe custody. This type of *Wadiyah* is a combination of safe-keeping (*Al-Wadiyah*) and assurance (*Daman*). Most of the Islamic banks in Malaysia apply in their system where the deposit as the funds source for the bank. Based on Qaed and Qaed (2014), the caretaker has the rights to use the property for any purpose, and he also has the right to receive some profit from it. Muslim scholars have put some guidelines and conditions for safeguarding the property of *Al-Mafqud*. Table 1 shows the comparison the *Wadiyah yad Amanah* and *Wadiyah yad Dhamanah*.

The caretaker shall perform the responsibility of safeguarding the property during the absence of *Al-Mafqud* as agreed in the agreement. Any transaction and use of the property are subject to the terms agreed in the contract. The trustee may not sell or pass the property to another person during the waiting period. But after the Government issued the Presumption of Death, all the property must be given to *Al-Mafqud* heirs (Saadan et al., 2019).

If the caretaker is unable to carry out the trust because of serious illness and is feared to cause more harm if he continues to keep it or the property is a perishable type, Imam Syafie views that the property should be handed over to the Government. While Imam Maliki and Imam Hanbali stated that the property could be sold or donated to Muslims because this act gives more benefits than continuing to keep it.

Table 2: Comparison *Wadiyah yad Amanah* and *Wadiyah yad Dhamanah*

Comparisons	<i>Wadiyah yad Amanah</i>	<i>Wadiyah yad Dhamanah</i>
Custody	Pure Safe Custody	Guaranteed safe custody
Contract	Original contract of <i>Wadiyah</i>	Modification of original contract combines <i>Wadiyah</i> with contract guarantee
Liability on Custodian	No liability on custodian in case of loss or damages (except in negligent)	Custodian liable for any loss and damage
Deposited Property	Custodian not allowed to use benefit from deposited item	Deposited property can be used for trade
Profit Entitlement	Not entitled to any profit gained	Profit gained from use of deposited property exclusively right of custodian
Separation of Deposited Properties	Deposited property must be kept separately, no pooling of funds	Deposit properties need not be segregated
Reversionary of Assets' Ownership	Owner of asset can take back the asset at any time	
Fees	Custodian is allowed to charge a fee for custodianship but traditionally <i>Wadiyah</i> is a charitable	

Wakalah

According to Saadan et al. (2019), *Wakalah* is the concept of appointing a person to be a representative in carrying out a job or business on the condition which cover many aspects that can be delegated in business, law, marriage, or daily affairs. In the context of Islamic financial institution, *Wakalah* is defined as an agency contract (Bank Negara Malaysia, 2016b). *Wakalah* or *Wakilah* is known as preservation. According to Imam Maliki, Shafi'e and Hambali, *Wakalah* is an act of delegating to others any task, and they can represent it in their lifetime. While Imam Hanafi said that *Wakalah* is to delegate to others to perform work required by *syarak* or to represent someone to hand over and take care of something to the representative. This includes all operations such as property management. The contract of *Wakalah* must consist of several elements, which is the contracting parties which involve agent and principal, offer (*ijab*), and acceptance (*qabul*) to validate the contract and subject matter of *Wakalah*. In the context of *Al-Mafqud's* property management, a representative has the right to carry out his job as agreed in their agreement. The agreement between the two parties must comply with the legal requirement of *Wakalah* (Saadan et al., 2019). The terms depend on the owner to the representative and the matters represented.

Wakalah is a contract that involves a relationship between the owner and representative depending on the time, place, and circumstances. This contract is also temporary and will be terminated if the representatives complete the delegated matter. There are several reasons for the termination of *Wakalah*, which is if the representative has implemented the contract and the owner revokes the representative or the representative itself withdraws the responsibility due to specific reasons. In a situation that involves a missing person, the representative is entitled to carry out all the roles as agreed in the contract until the death declaration issue (Saadan et al., 2019). In the context of better and systematic *Al-Mafqud* property management, freezing of property are something to be avoided because, during the absence of *Al-Mafqud*, there are no cash flow exits. At the same time, there are many opportunities and ways to expand the property. Figure 1 show how *Wakalah* its work.

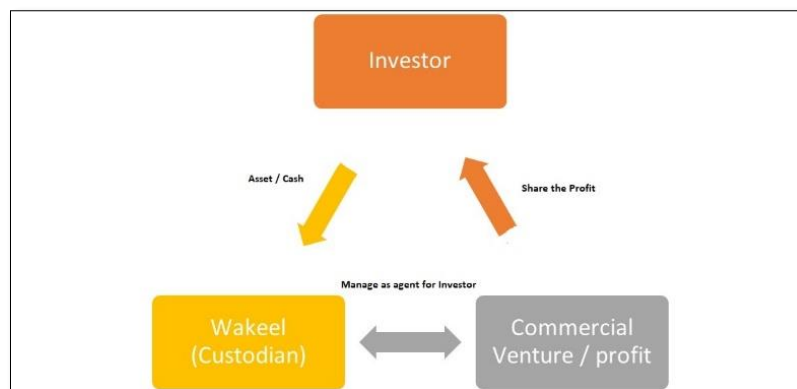


Figure 1: Wakalah transaction process

CONCLUSION

In conclusion, *Wadiah* and *Wakalah* approaches have features capable of reviving frozen asset of missing persons. However, further research needs to consider existing legislation and other issues related to the *muamalat* system. Although both methods are commonly used in Malaysia's *muamalat* system, The missing person's property has widely covered finance, human resource, governance, and stresses on its legal issues similar with the *muamalat* system. Researchers are optimistic real potential still unexplored, and this approach can be the basis for a comprehensive solution to freezing property.

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Author Nur Nadirah Akmar Mokhtar wrote the manuscript in consultation and supervision with author Muhammad Azwan Sulaiman who conceived the original idea. Meanwhile, authors Nurul Nadiah Zainol, Wan Zahari Wan Yusoff helped supervise the study. All authors discussed the results and contributed to the final manuscript by providing critical feedback and helping shape the research, analysis, and manuscript. Finally, the authors declare that there is no conflict of interest.

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