

FINANCING SOCIAL NEEDS FACILITIES ON WAQF LANDS

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Waqf is the counterpart of the charitable trusts for Muslims and its assets include immoveable property, movable property, cash, and so on. This historical research explores legal theories for private investment in social facilities built by Waqf institutions in jurisdictions where Islamic law is complied with. The data sources are Arabic and English, ranging from academic views to legal documents, such as legislation, fatwas and draft or enacted regulatory guidelines. In its literature review, the paper explores the development of ideas on which the legal framework for private finance and investment in the construction of social facilities could be founded. The methods applied are partly deductive and partly inductive in the sense of legal reasoning in Islamic law. The author uses trade-based Islamic finance and investment principles and their authoritativeness in Islamic law to be modified if needed according to the nature of Waqf properties. Accordingly, financial institutions' classic and contemporary financial and investment tools are discussed because they would be the foundation for new investment tools suitable for funding Waqf social facilities. The writer offers legal reasoning, or the permissibility of a given financial instrument in its classic and contemporary forms first, according to one of the legal sources of Islamic law as accepted (or ought to be) by one or the majority of four schools of law. These opinions are followed by the proposition of an investment model for financing Waqf social need facilities. These views may be debated if necessary, or when there are gaps, they will be filled by our opinions. The gaps and weaknesses are determined from the perspective of authoritativeness in the classic sense, suitability of the investment tool to the nature of Waqf or protection of Waqf assets, optimisation of its utility, safeguarding investment capital, and the return of investment capital with profits to investors.

INTRODUCTION

Waqf is the counterpart of charitable trusts for Muslims. Its assets include fixed, movables and cash. Because *Waqf* is in perpetuity, its assets are predominantly immovable and at least capable of recurrent enjoyment. *Waqf* institutions, in Malaysia, are the sole

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trustees of *Waqf* assets who disburse them for religious needs of the society, financial assistance, and welfare, shelter (housing), education, kitchens, and healthcare. To provide these services, *Waqf* institutions use both their consumptive and income-generating assets.

The provision of the above services requires high capital and assets. *Waqf* institutions, therefore, need constant and sustainable commitment from donors to enable *Waqf* foundations to raise funds and assets. Besides, an army of volunteer professionals and others is needed to keep cost low. While the needs are high, the availability of finance by different *Waqf* entities, corporations, and individual investors through crowdfunding is equally essential for social needs projects. With current assets and funds, *Waqf* foundations need finance for their projects and the investment of their funds in social projects. Cash poor but rich in fixed assets, *Waqf* institutions depend on inadequate and less sustainable public funds and private donation, which have limited impact. Therefore, alternative financing for the social needs project is needed, but private financial institutions are too shy to finance social projects for lack of collateral, and *Waqf* institutions, due to restrictive relevant laws, are unwilling to charge *Waqf* lands to safeguard and preserve *Waqf* assets.

Relative success in the development of *Waqf* lands, for social needs facilities, or their institutional financing models, is achieved thus far for economic purposes, except for some forms of *sukuk* and crowd funding. Among the issues regarding the development of social needs facilities, such as community halls, clinics, educational centres, meeting rooms and the like, built on *Waqf* land or those adjacent to and on mosques compounds, are the attraction of institutional finance, the strict legal framework, and mindset of the administrators of *Waqf* funds.

Cash poor but rich in fixed asset, *Waqf* institutions depend on inadequate public funds and private donations, which have limited impact and, after all, dependence on such funds makes the Muslim welfare organisation less sustainable. Alternative financing for social projects is needed, but private financial institutions are too shy to

finance social projects for lack of collateral. In the case of *Waqf* institutions, this is even worse. They have fixed assets, but the laws are strict, thus preventing collateralisation of *Waqf* assets, as they are intended to safeguard and preserve *Waqf* assets.

Solutions to development financing issues for *Waqf* lands proposed in the last two decades are generic, less restrictive for income creating assets. The recent discussion on BOT contracts seems to be more for commercial purposes rather than social. Social facilities development on *Waqf* land is not mentioned. In some jurisdictions, the prevailing laws and regulations are not designed to cover *Waqf* project financing, not to mention social facilities. These projects may be thought to be generating no income.

This paper, therefore, examines views and proposals for the financing of social facilities on *Waqf* lands. The discussion focuses on attracting investment in such facilities in compliance with the existing *Waqf*, banking and other laws, protection of the *Waqf* land and how the *Waqf* institutions can repay the invested capital, considering the peculiar nature of *Waqf*, i.e., *Waqf* land cannot be transferred and transmitted to anyone. Attention is also paid to some possible assurance forms that the invested capital will be paid in full and with a fair return on their investment. The discussion is divided into the nature of projects where reference to the financial model is briefly made and suitable contracts for the target financing.

SOCIAL NEEDS FACILITIES PROJECTS

A social project refers to the development of premises wholly dedicated to the social needs of the public, regardless of whether they could be leased and generate income after completion. Two types of them are observed: first, premises that cannot be rented out, such as religious needs premises that include Mosques, Musallas, and Graveyards. Second, premises that may be rented, such as social needs premises, may include schools and clinics outside the mosques' compounds.

Religious Premises

Religious premises projects can be financed through in-house

funding. In-house funding refers to the capital accumulated from various sources under different names. After accumulation, if the asset is validly donated, the *Waqf* institution has no obligation to return it to its sources, for it becomes the *Waqf* institution's asset. This capital may comprise *Waqf* donations by Muslim individuals in cash, land, and others, under whatever name. It could be in the form of cash or other *Waqfs*, and government grants called *Waqf irsod*, charitable donations by corporate entities and grants by international agencies for social projects. These funds may also include those contributed by *baitulmal*, funds approved by Muslim scholars for religious matters. *Waqf* funds may come from a single *Waqf* fund or a pool of them (*Waqf mushtarak*), under the supervision of one *Waqf* institution or several of them, State-to-State or federal to State.

Appropriate Construction Contract

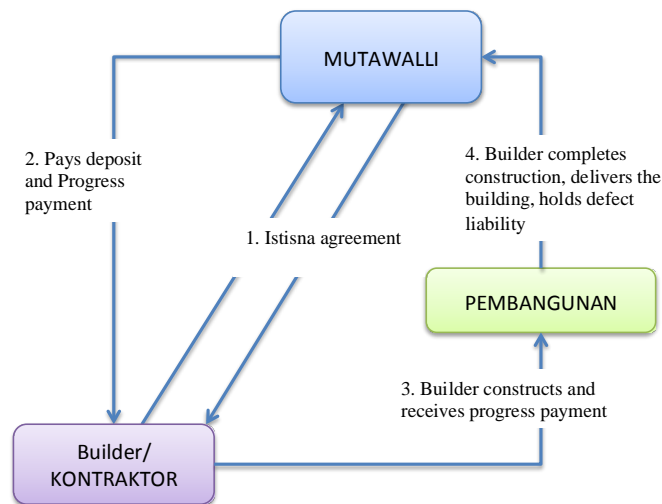
The financial model whereby the project's cost can be financed would be a simple *istisna*, a classic manufacturing contract.¹ This contract is one where no other contract is signed to support it. Where the project is religious, short term, medium or long term, small or large, there could be no choice but to use *Waqf* land and *Waqf* funds. The land would be for the religious site the fund would finance the cost of materials and expertise. If the *Waqf* institutions have the expertise, then only the cost of material would need financing. Otherwise, a simple *istisna* contract in Islamic law similar to a conventional turnkey contract could be used. Progress payment would be made for cost reimbursement and a fair mark up. To our knowledge, there is no discussion on the application of *istisna* in construction projects involving mosques and other religious buildings. In our view, simple *istisna* in its basic form is suitable because mosques and other religious buildings have no market value and commercial utility. Therefore, all that could be done is to pay for the work done in the different predetermined construction phases.

The basic principles of the contract must be derived from the classic form of *istisna*, and current juristic opinions as reflected in

the local and international standards for *istisna* contracts. It requires only highlighting what could not be applicable for *Waqf* projects. *Istisna* is said to have been introduced by Hanafi jurists based on the *hadith* of the Prophet Muhammad (*s.a.w.*) and juristic preference (*istihsan*). It is now agreed that the jurists in all schools unanimously recognise it, including that used for financing of goods and buildings.² A simple and single³ *istisna* without forward lease (*ijarah mausufah fi al dhimmah*), between the *Waqf* institution and the builder⁴ can be used.

Simple *istisna* is the traditional Islamic financing contract where one orders the manufacturing and construction of goods and building⁵ and the other promises the delivery of such product. *Istisna* contract is binding if the subject matter and its attributes are adequately specified though its subject does not exist yet.⁶ Accordingly, for building a mosque and other such building, the following basics are required: (1) (a) *istisna* agreements between *Waqf* institutions and builders are signed whereby the *Waqf* institution orders the builder to construct a mosque, surau, or other, on *Waqf* land within a period of one to three years. (b) Undertaking (*wa'd*) by both parties to perform their part of bargain (c) takaful contract between the builder and third party, and (d) agency contract. (2) The *Waqf* institution pays down-payment (*'urbun*), security deposit, or third party guarantee to the builder followed by progress payment. (3) The builder begins to construct the building and receives progress payments according to a pre-agreed formula. (4) The builder then completes the constructions, delivers the building to the *Waqf* institution, and holds defects liability (see figure 1).

Figure 1: Simple *Istisna*.



Sumber: Based on Mufti Mohammad Taqi Usmani, Forward Sales and Manufacturing Contracts: Salam and Istisna.

The *istisna* agreement must specify the genus and type, size and other attributes of the building, cost and expenses, work schedule, the time frame for completion, delivery time and payment modes,⁷ defect liability, and maintenance⁸ have to be specified. The builder⁹ would be bound to deliver the building as specified and free from relevant defects.¹⁰ The building would belong to the builder before delivery, partial or in whole. Similarly, the construction materials belong to the builder, unless these materials are purchased with cash advanced by the *Waqf* institution.¹¹ The price could be fixed after considering warranty, after-sale service, and delivery period, which may be varied by mutual consent. It could be paid in cash or in-kind, including contribution to the costs and discounted profit.¹² If not according to the contract's terms and conditions, the building's delivery may be rejected outright or accepted with or without compromise in terms of the discounted purchase price.¹³

The builder's liability will end with delivery, after which the *Waqf* institution would bear losses if any and not due to the

builder's negligence. The *Waqf* institution should have an option to accept the delivery with varied terms of the contract or reject the delivery. The institution can revoke the contract if the building is not delivered according to its terms and conditions. Delay by *Waqf* institution to accept delivery would not affect its liability. The builder becomes the trustee and would not be liable for any damage to the building caused not by the builder's negligence or misappropriation.¹⁴ Where the *Waqf* institution refuses for no good reason to accept delivery of possession, the builder may dispose of the asset,¹⁵ but this has to be avoided in mosques and other such buildings with no commercial market value.

Failure of the builder to deliver may entitle the *Waqf* institution to purchase assets or terminate the agreement, and in either case, could be entitled to compensations.¹⁶ Late and ineffective delivery would entitle the *Waqf* institution to compensation.¹⁷ The builder would have defect liability. While, if consented at the time of delivery, the *Waqf* institution would have no defect option. However, where it is discovered after delivery of possession of the building, a defect liability option is available to the *Waqf* institution. It could terminate the contract or continue with the contract, with or without altering the contract's terms.¹⁸

The *Waqf* institution may be required to pay a deposit (*urbun*) to mitigate various related risks, which may be part of the purchase price, if the contract is performed, or as compensation, if it terminates the contract, or to compensate the actual cost of damage.¹⁹ Both parties are entitled to require third party guarantees (*kafalah*) for the performance of their obligations: against the *Waqf* institution to pay the price and accept delivery, and against the builder to deliver the specified asset on time.²⁰ Relevant terms and conditions for the above purpose may be inserted in the *istisna* agreement. These conditions could not result in the sale and purchase or lease of the facility. Both the builder and *Waqf* institution could require one another to subscribe for a takaful coverage.²¹ A guarantee by assignment of rights and collateral of the mosque is not thinkable, but collateral on other assets and deposits can be used to assure the builder receives the constructed

building's price.²² Additional documents may include *wakalah* (trust and agency) and *wa'd* (undertaking) by a builder to complete and deliver the building on time as specified and *Waqf* institution to accept the delivery and pay the purchase prices.

Rentable Premises

The second type, i.e., Non-religious or social needs projects such as clinics, hostels, community halls and schools, can be financed through public and private partnership schemes. This type of finance is plausible because *Waqf* institutions could lease such buildings from the investors for a specified period and a fixed rent. The building is considered the builder's property before delivering its title. A variety of *Shari'ah* compliant contracts such as *istisna*, *ijarah* and *musharakah mutanaqisah* could be explored similar to Public-Private Partnership (PPP) contracts.

BOT, Islamic Financial Contracts, and the Development of Waqf Lands

Typically BOT, which has several sub-variants,²³ is a development financial contract used for development projects where PPP is suggested. Under this concept, the government gives concession to a private investor who invests, controls and has the right to cash flow for a specified period. The government does not share profit and loss with private investors and does not make any cash transfer to the investor. The cost and profit are paid from the income generated by the project during the specified time.²⁴ *Waqf* assets are not public assets in the sense of PPP, but the concept can apply whereby private entity invests in the development of *Waqf* land and controls and the right to the development income for a time not exceeding 30 years. On the expiry of such period, it then could transfer the project to a *Waqf* institution. The Equate project of Kuwait and the Kuala Lumpur Light Rail Transit 2 Project on non-*Waqf* projects, financed according to *Shari'ah* principles, were the early ones that were based on *ijarah* and *istisna* and then *ijarah*, respectively.²⁵ Ruzian *et al.* has listed among others 96 Malaysian projects valued at US\$5060 million debt, equity, and lease-based BOT securities.²⁶

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In conventional Islamic finance, the funding of infrastructure through private and public partnership mechanism is viewed as permissible based on religious duty, needs and necessities that form *Shari'ah* general objectives and public interest. Al Hasani cites Imam Abu Yusuf on the *Shari'ah* permissibility of the state to finance infrastructure projects.²⁷ The Barakah resolution 2/13 in its 13th summit, 1997 suggested *istisna*, *iqta'* and *musharakah mutanaqisah* and advised the details must be discussed further.²⁸ The Shariah Advisory Council of Malaysian Securities Commission has allowed it based on *iqta'*s (government grant) concept, but this view is contested by Taqi Othmani, as *iqta'* in Islam is granted for no premium or consideration. The Council of International Islamic Fiqh Academy 2009 regards it as a new contract and considers it permissible. Following this view, Abu Sulaiman considers it a complex contract that needs different supplementary contracts for construction, operation, maintenance and surrender of the project to the government. The agreement for the above four aspects is entered between the government and the JV consortium whereby the consortium undertakes construction, financing it, operating it, maintaining it, and surrendering it back to the government. Each of the above tasks needs detailed contracts and different parties such as financial institutions, contractors, and property and facilities managers. The significant issues are security for the recovery of the invested capital and its profits, security provisions to that effect, identification of risks, their mitigating elements and diversification.

Mohammed Obaidullah opined that the concession agreement could be modelled on diminishing *musharaka* or *mudaraba*, *Istisna*, *bay' bi thman ajil*, *ijâra* for the construction phase, the use of contracts of *ijâra*, *joala*, *damân*, and *bay-istijrar* for operations stage while risk management through *kafala*, *takaful*, and *khiyar al-shart*. For the liquidity and asset-liability mismatch, Islamic securitisation was proposed to be used by Islamic banks participating in the financing process.²⁹ Qaradaghi listed banking financing and securitisation as the main methods. He included *istisna*, BOT (as a new type of contract), al *murabahah*, forward *ijarah*, *ijarah*

muntahiyah bi al Tamlik, *Musharakah* and *mudarabah*. Among securities, he included *sukuk ijarah*, *istisna*, and *musharakah*, the object of which could be tangible things, usufruct and services.³⁰ Sudairi and Nethercott, in the context of Saudi Arabia, spoke about the use of the *ijarah* model³¹ and Schoon mentioned *mudarabah* and *musharakah*, diminishing *musharaka* and *istisna* and also *murabahah* instead of the former two as an alternative to conventional infrastructure financing.³² However, *mudarabah* based BOT may have a securitisation issue because it involves the sale of debt that is universally not permitted by *Shari'ah* scholars.

The above works may have some reference to *Waqf* cases, but generally, neither the scholarly works nor the fatwas or regulatory frameworks have explicit details that can be used in the structure of BOT contracts for purposes of development projects on *Waqf* land. Islambuli, nevertheless, compared Islamic and western BOT contracts and considered the latter to have been derived from the Islamic modes of *hikr*, *ijaratain*, and *mursad* developed by Muslim jurists for the development of *Waqf* lands. However, BOT is a complex transaction. Can *Waqf* institutions in their current complex form use the BOT/BOOT variants or other PPP based models for their development project, which have a commercial and social utility such as markets, shops, industrial complexes, schools, and community halls.

Muslim jurists have recognised the BOT contracts as modified by terms of other Islamic contracts or treated as an independent new contract to develop *Waqf* assets. For this, they invoked the use of the classic concept of *ijarah*, *hukr* and *ijaratain*, and *qarar* concepts that allow developers to enjoy the usufruct of the projects. Other mechanisms that are proposed are *istisna*, *ijarah* and *musharakah mutanaqisah*, apparently for small projects and *sukuk istisna*, *ijarah muntahiyah bi tamlik al Waqf*³³ for big projects. These authors do not provide details on the structure of these contracts or how they could be used to construct social buildings adjacent to the Mosques, such as schools and community halls. Hence, the following discussion is focused on the details of *istisna*, *musharakah*, and *ijarah* modes of Islamic contracts that could facilitate BOT

and BOOT for the development of *Waqf* assets.

While the contract for religious projects could be only in the form of simple *istisna*, it may also be used for rentable social premises projects³⁴ if the *Waqf* institution has the means to pay for the costs of the project. Otherwise, where the social need project needs institutional financing, various *Shari'ah* compliant BOT facilitating contracts could be signed. They include *istisna* with forward *ijarah* or *musharakah mutanaqisah* with forward *ijarah* and *ijarah mu'ayyinah* plus forward *ijarah*.

Special Istisna Based BOT Contract

According to Taqi Othmani, under BOT format simple *istisna* agreement may be entered between the government and developer. The developer may finance the project through *musharakah*, *murabahah* (for purchase of raw material) and *ijarah*.

Istisna is considered the basis of BOT contracts for *Waqf* land development projects.³⁵ Abu Ghuddah, *Qararat wa Tawsiyat Nadwat al Barakah li al Iqtisad al Islami*, pp 298-299;

Abu Ghadah, 2009. *Aqd al Bina wa Tashghil wa al I'adah (BOT) wa Tatbiqih fi Ta'mir al Awqaf wa al Marafiq al Ammah*, al Dawrah al Tasi'ah Ashrah, *Majma al Fiqh al Islami al Dawli*, *Munazammah al Mu'tamar al Islami*, al Shariqah, *Dawalah al Amarat al Arabiyyah al Mutahiddah*, p 10. Under Shariah, the lessee pays his rent in kind (i.e., the constructed building). The lease is permitted to realise his costs through the usufruct of the building within the lease's specified term.

It is, however, to be considered special *istisna* as it is a slightly modified version of a simple *istisna* contract, signed between the *Waqf* institution and the developer or investor.³⁶ The building's price under normal *istisna* could be tangible objects, including real estate, services, and usufruct of the building itself. The price may be paid in a lump sum, on instalment, forward or deferred and according to a specified period or based on work progress as agreed between parties.³⁷ Thus, unlike conventional *istisna* (where delivery of possession may occur before or after full payment is made, cash or in-kind, lump sum or on instalment), in BOT

arrangements, the usufruct of the building is the price of the *istisna*.³⁸ Moreover, the actual delivery of possession is delayed. Only constructive possession is required³⁹ to enable the seller to use the building's usufruct or operate it. In normal *istisna* the builder has no right to operate the building even though it belongs to him till he is paid for his work. Under the BOT model, the builder is paid with the usufruct of the building first.

According to most jurists, this payment is permissible. However, the Hanafis do not consider usufruct as consideration, for it is non-existing at the time of conclusion of the contract, as it could only exist as time passes, but Taqi Usmani and Ahmad replies that the Hanafi principle is true in case of sale and *ijarah* contracts but not in *istisna*. Since in *istisna*' the object is non-existent during the contract's conclusion, there is no harm if the consideration or price of it is non-existent. Ahmad also preferred the view of a group of jurists from various schools that allowed the sale of goods and services in consideration for a price to be determined according to market value, as nothing is contradicting such opinion in primary sources of Islamic law. After all, where both parties determine the consideration in a given transaction freely, the Quranic verse's objective is achieved. One may explain Ahmad's reasoning on whether the consideration must exist at the time of conclusion of the contract and its deliverability and relative certainty. Can usufruct be valued, and can the parties determine its value? The answer to both is in the affirmative, which is possible according to the market rate. Therefore for the sake of ease, deliverability of the consideration with relative certainty is sufficient. The *istisna* standards allow the use of usufruct as the price for the construction covering costs and profits of the seller. Three explanations for the BOT *istisna* contract in case of projects are offered (see figure 2).

First, no other contract is signed. Only an order for a building is made. Under this single agreement, the building is completed, and its constructive possession is delivered to the *Waqf* institution. The *Waqf* institution allows the builder to operate it until he recovers his building costs and profits. Under this scenario, it is

not clear why jurists consider it a BOT contract. The project is legally transferred to the *Waqf* institution, and the title to the land and building should remain in the name of the *Waqf* institution. The seller can secure his rights in the building after the delivery through the agreement of *istisna* if it expressly outlines three points: that the project's price is its usufruct; constructive (not actual) delivery is acceptable, and the operation would commence after delivery of possession. In this format, the builder may use it for his own needs, for under civil law, transfer of such rights may be difficult to another party. After recovering costs and profit, the investor will transfer the actual possession of the project to the *Waqf* body so that the *istisna* agreement would be fully performed.

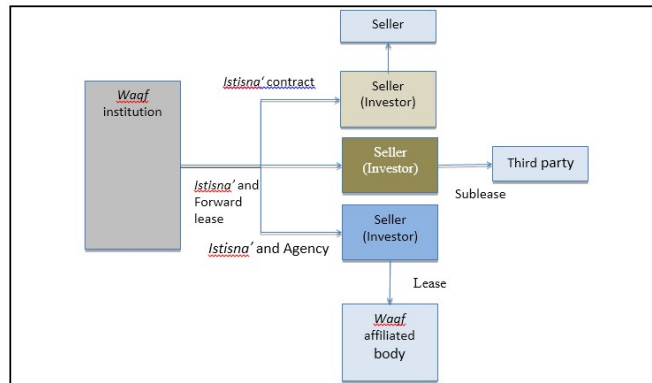
Second, two agreements have to be signed: one for *istisna* where the payment of the price is to be deferred, and another agreement has to be signed for forward *ijarah* (*ijarah maususufah fi dhimmah*) whereby the purchaser rents the premises to the builder, with a fixed rate of rent mirroring the cost of the project under *istisna*. Under these two agreements, the rent should offset the project's cost under *istisna*. For Taqi Uthmani, the government lets the project for a fixed amount and term to the seller. The seller may then let it to others and charge more, which he calls *ijarah mina al batin*. Following this form, either way, the *Waqf* institution may be the legal owner of the land and building, but the usufruct would belong to the builder, and hence one may consider this contract literally to be a BLT (build, lease, transfer) contract. The seller, to protect his rights and enable him to sublease it to another party, may register the lease. The sublease may enable lessee organisations in charge of the social facility, which could be a party other than *Waqf* institution. Under this method, financial institutions can invest in developing social facilities on *Waqf* lands and be operated as above by organisations affiliated to or associated with *Waqf* institutions.

Third, two agreements: an agreement for *istisna* and another for an agency. After the project's delivery, the *Waqf* institution can appoint the builder as its agent to operate the project until it

recovers the costs and profits. This model would be build transfer and operate (BTO).

Throughout the operation period, the project can be utilised by the seller or transferred by him to a third party. The last two need a forward lease (*ijarah mawsufah fi al dhimah*) of the constructed building, which can be registered under the law, and hence more secure. Thus, after completion and after constructive possession, a *Waqf* institution's affiliated bodies may rent the premises under second and third scenarios. The rental will be paid to the investor until the cost and services fees are fully paid. *Waqf* institutions may use this for rentable social projects such as hospitals and clinics, schools, welfare-houses, and welfare- kitchens.

Figure 2: *Istisna* (BOT)



Though it is advisable to lease the *Waqf* land for 99 years to its subsidiary body or corporation, under *istisna*, it is not necessary. Where the subsidiary body or corporation leases the land, it shall pay a nominal rent to a *Waqf* institution. The *Waqf* institution or its subsidiary body or corporation may enter into an *istisna* agreement specifying the type of building, price, work schedule, delivery, and payment modes mentioned under simple *istisna*. The agreement has to specify the usufruct or operation of the project as the price of the project. When the investor prefers the building for his use, the agreement would not be needed, for the *istisna* agreement may cover this matter. For the building, a forward lease

agreement between the investor and *Waqf* institution granting operational rights to the investor needs to be concluded at this time if the former is interested in letting the project to third parties, including the *Waqf* affiliated body. Otherwise, an agreement appointing the investor as the *Waqf* institution agent must be signed by the purchaser under *istisna*.

There could be another agreement between the investor and the third party for forward *ijarah* too. These agreements after the registration process will serve as security, for effective control would be given to the investor, replacing mortgage or charge (floating on all project assets), assignment of rights under different contracts, cash and bank accounts and cash flow or accounts receivables. Of course, banks may not be interested in the operation, which is not within their business scope. However, if appointed as an agent, the bank would have a power of attorney and control the operation and may terminate the forward lease with the existing tenant and enter with another. Nevertheless, since the *Waqf* affiliated body would be the tenant, the *Waqf* corporation may provide government /third-party guarantees or security deposits (proceeds of cash *Waqf*, *Waqf* saham, *Waqf* kaki, government grants, *qard hasan* proceeds, and others).

Where the investor lacks the expertise to construct the building on its own, it can enter into a second contract of simple *istisna* with a third party, a contractor or builder. The investor must be liable for construction defects visible or otherwise.⁴⁰ The builder, when he completes the construction of the building, he shall deliver it to the investor. The investor pays progressively for cost reimbursement plus a fee covering the builder's overheads and profits during and after completing the project.

The investor delivers the building constructively to the *Waqf* institution or the *Waqf*-affiliated body. The investor then commences operation of the building in either of the ways mentioned above. The investor recovers his costs and profits through its operation or receiving rents from the affiliated body. On the expiry of the lease term and after the final instalment, the investor transfers the building to the subsidiary body or *Waqf* institution's corporation.

The rights and obligations of the parties have to be spelt clearly. They will include those mentioned above under simple *istisna*. An additional contract may include takaful coverage against force majeure, *kafallah*/daman document (against payment default) including government guarantee, security deposit, deed of assignment in favour of the investor, and *wakalah* as and when the investor sees it fit.

This finance model will enable *Waqf* institutions to finance their land development projects, equipment and projects, trade financing, thereby providing working capital that is not possible under *ijarah* and instalment sale. For banks and investors, it will be a niche market. Since some securities may require possession of the asset, this writer suggests constructive possession through a deposit of title or registration of the transaction suffices.

Musharakah mutanaqisah Based BOT

Musharakah means a partnership formed through a contract or mere circumstances. If there is a contract for a partnership to make profits jointly, it is called *shirkah al-aqd*, but if the partnership is not intended to make joint profits out of the partnership, it is *shirkah al-milk*. The former is a true joint venture, while the latter is nothing more than a co-ownership or joint proprietorship. To avoid confusion with the former, this writer tries to avoid the use of partnership in *shirkah al-milk*. Either way, *musharakah* can be terminated at once or gradually by selling it to one of the parties to *musharakah*. Current scholarship called it *musharakah mutanaqisah* (diminishing partnership, equity sharing or co-ownership).

Shirkah in its classic form is permissible according to Quran,⁴¹ though no consensus exists on all forms of it. Yet, *musharakah mutanaqisah* is a contemporary method the ulama have proposed for Islamic banking.⁴² Under this method, co-ownership (*shirkah al-milk*) of an asset is acquired jointly by a bank and its client, first; then the client purchases the share units of the bank, at a fixed rate during the conclusion of the contract, from time to time, while renting the unsold share units of the bank till the bank has no share in the asset.⁴³

The asset would be shared between the parties according to the amount, as purchase price, they paid for. An independent agreement for the gradual sale of the asset between the two parties would be needed to make the co-ownership diminish. The third contract for leasing would also be needed whereby the purchaser would rent the vendor's share units. The amount of rental would decrease as the vendor's share units diminish from one time to the next. The sale agreement ends when the vendee purchases all shares of the vendors. With this, the lease also expires.⁴⁴ Several other subsidiary contracts need to be signed to effect this structure. They would include an agency agreement for management and maintenance of assets, given to the vendee, and an undertaking by the vendee or purchaser, as well as a trust, appointing the vendor as trustee and others.

Shirkah mutanaqisah is so far used for a variety of banking and financing products. It is considered suited for all ventures.⁴⁵ They include commercial, residential and public utilities projects in term of real estates, auto and industrial goods, and venture financing, including micro-financing. *Musharakah mutanaqisah* was suggested for BOT contracts in resolution 2/13 of the 13th Summit of Barakah on Islamic economics, 1997.

Generally, according to Qaradagh, contractual partnership (*shirkah al-aqd*) on fixed assets of *Waqf* is not permissible, for it involves the transfer of complete ownership to the partner. Nevertheless, cash *Waqf* contributed to the partnership's capital, if used for investment and used to purchase fixed assets, is permissible. Qaradaghi also recognises another exception to the prohibition of partnership on fixed assets: in case of need and necessity. Few conditions have to be fulfilled: there is a sale or the transfer of *Waqf* asset to the partnership; (a) it is needed or necessary: it is for construction and renewal of *Waqf* asset; the partner is willing to sell back the asset to the *Waqf* institution after some time; (b) the partners agree that the right of enjoyment (*haq al-intifa'*) is the purchase price of partnership, and (c) the *Waqf* institution adds part of its revenue or other cash to the capital of partnership for investment. Al-Sayyid and Hammad propose a

hybrid *musharakah* (contractual and co-ownership) for the development of awqaf assets: land come from *Waqf* and cost come from the partner whereby the building belongs to the partner and land to *Waqf*. After completion, the building is rented, and the revenue is shared between *Waqf* and the partner.

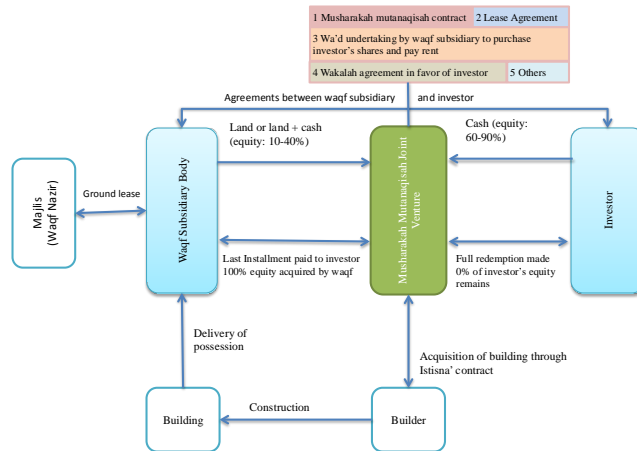
In the context of developing social facilities on *Waqf* lands, *musharakah* would mean co-ownership between *Waqf* institution and another party (investor) in a specified project. The *Waqf* institution may use *Waqf* land alone where there is no cash fund and seen appropriate. The investor may come with cash for the construction of the facility. The land would be the property of *Waqf*, and the building would be the investor's property. If the *Waqf* institution contributes to the project by providing land and cash or just cash, then *Waqf* will have a share in the building. Each would have a share in the equity according to what he paid or its value. Risks and liabilities concerning the asset have to be shared between the *Waqf* institution and the investor, according to their equity ratio. The terms of the *musharakah mutanaqisah* should specify the building, price, work schedule, delivery and payment modes.

The parties' rights and obligations have to be mentioned, including the right of *Waqf* subsidiary to damages for any loss arising from force majeure, defect, negligence, and non-compliance with specifications of the building a third party. The risks and costs have to be shared proportionately. The investor should have the right to *intifa'* of the building until all construction costs and fees are met. Under this mode of financing, the investor could promise to sell his shares to *Waqf* gradually.⁴⁶ The land, building and liability for damages, if any, have to be transferred to *Waqf* on the agreement's expiry. The *Waqf* institution then has to undertake or promise to purchase the said share units accordingly. A third necessary contract is the forward *ijarah*. Under a separate contract, the *Waqf* institution or its subsidiary body may agree to rent, and the investor agrees to let it to *Waqf* for the use of the *Waqf* institution or its affiliated body for an amount representing the profits of the investor. The *Waqf* institution then has to pay the purchase price of investor shares and rent on instalments as agreed between the

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parties till the share of the investor is fully purchased by the *Waqf* institution. A simple procedure would involve:

- (1) the leasing of *Waqf* land from the *Waqf* institution by its subsidiary in return for a nominal rent.
- (2) Signing various agreements:
 - (a) An agreement of diminishing *musharakah* between the subsidiary of *Waqf* institution and an investor for a term not exceeding 30 years for a building on a *Waqf* land;
 - (b) Lease of the investor's unsold share units in the building by the subsidiary of the *Waqf* institution;
 - (c) *wa'd* or undertaking by *Waqf* subsidiary to purchase the shares of investor and undertaking by the investor to sell his shares to *Waqf* subsidiary. This transaction may also involve the investor's appointment as trustee of the asset until his proportionate share in the asset is fully satisfied;
 - (d) *Wakalah* for *Waqf* subsidiary to act on behalf of the investor as supervisor of construction and maintenance of the asset;
 - (e) A *trust* declaration that the *Waqf* subsidiary holds proportionate shares for the investor's benefit if the property is registered in the *Waqf* subsidiary's name;
 - (f) power of attorney to the bank to sell the asset as and when the need arises, if seen fit; and
 - (g) *kafalah* agreements (guarantee, *takaful*, assignment of rights as the case may be).
- (3) *Urbun* or cash payment, if any.
- (4) On behalf of the partnership, the investor may enter into an *istisna* agreement for the construction of the building with a third party (the builder or construction contractor).
- (5) Progress payment to the Contractor and the delivery of completed building to the *Waqf* institution's subsidiary.
- (6) The *Waqf* institution's subsidiary periodically pays rent and purchase price to the investor to increase its equity in the building. The rent may be paid in advance and before the delivery of possession.

Figure 3. *Musharakah mutanaqisah* structure.

Despite the recent popularity of this contract, there are specific issues yet to be settled. There are unresolved issues about registration of rights as understood in Islamic law, registration and co-ownership of rights, trust, charge, and partnership under civil law. The investor may behave like a creditor rather than a landlord or partner. Even though the transaction is a partnership, there is high possibility investors may pass most risks and costs to the *Waqf* subsidiary. It is suggested that proportionate cost and risk-sharing may be possible in simple cases if banks and financiers could forego overzealous protection against risks and compensate themselves from CSR funds to make the transaction more *Shari'ah* compliant. The other issues mentioned above have to wait till the local contract and land law catch up with market realities and banks lose their conventional banking mindset.

The effect of *wa'd* or promise by *Waqf* institutions may be contested. This view may be accurate about the global application of a single model. However, where the predominant schools of Muslim juristic thought do not object to the binding nature of *wa'd*, or if any fatwa council or any authority whose opinions are conclusive and final in law has accepted *wa'd* to be binding, it then should override dissenting views of any scholar or court. In Malaysia, the highest authority on the validity of Islamic banking

contracts is the Shariah Advisory Council of Bank Negara, and therefore, its view leaves no room for controversy and uncertainty.

Ijarah Based BOT

A modified model of *ijarah* may finance a *Waqf* project. However, before we explain *Waqf* financing, the classic form of *ijarah* needs to be explained. Traditionally, *ijarah* refers to a contract on the usufruct of something specific or specified, existing or otherwise, or employment, for a specified sum and specified period.⁴⁷ This contract may include the hiring of individuals, goods and rental or leasing of real estate. In the case of individuals, it is a contract for the services' employment in consideration for specified wages. In the cases of goods, it is for utilising the usufruct in consideration for a specified value, cash or in kind. The leasing and rental contract is for the utility of a specified real estate in return for a specified sum for a term agreed between parties. Contract for hiring individuals is permissible according to Quran⁴⁸ and al *Sunnah*.⁴⁹ A real estate leasing contract is permissible according to the *Sunnah* of the Prophet Muhammad (*s.a.w.*)⁵⁰ and the hiring of the goods is based on *qiyas*,⁵¹ *ijma*,⁵² need and interest of the Muslim community.⁵³

The Shafi'i and Hanbali jurists have divided *ijarah* into two types: *ijarah mu'ayyinah* and *ijarah mawsufah fi al-dimmah*. The Hanafi scholars did not recognise the classification as such, neither they acknowledge it, but they have permitted cases that amount to *ijarah mawsufah fi al-dhimmah*.⁵⁴ The Maliki School though not classified *ijarah* on this line, but they do acknowledge *ijarah mawsufah fi al-dhimmah*.⁵⁵ *Ijarah mu'ayyinah* refers to a contract where one agrees to let, and another agrees to rent a specific premise. The subject matter is the usufruct of the specific premises⁵⁶ at the contract's conclusion. *Ijarah mawsufah fi al-dimmah* refers to a contract where one agrees to let and agrees to rent specified premises that are yet to be in the potential landlord's possession. One accepts the obligation to deliver the specified subject matter (a usufruct) of specific attributes in future⁵⁷ and the other party accepts the obligation to rent such specified premises. The subject premises

are described by their class and attributes that are yet to be in the lessor's hand.⁵⁸

All these classic concepts are now referred to as operational *ijarah*. This *ijarah* is different from financial *ijarah*, which Muslim scholars have recently introduced in banking and finance for a variety of their products.⁵⁹ It is commonly used for residential and commercial real estates as well as goods. Few terms are used: *ijarah muntabiyah bi al tamlik*,⁶⁰ *ijarah wa iqtina*, *ijarah thumma al bai'* and *ijarah al mawsufah fi al dhimmah*.⁶¹ Under the *Shari'ah* contract structure, the renter acts on behalf of the financier when purchasing goods or real estate. The lessor owns the corpus (reversionary right) and usufruct (possessory right) of the asset originally, but then he transfers the usufruct to the lessee while the corpus (title) belongs to the lessor. Once the lessor performs the terms of the contract, he promises to sell the property to the lessee or donates it.

Some of the above *ijarah* forms may be used for BOT based *Waqf* project financing. Few solutions are offered below. Abu Ghadah justified BOT based on the concept of *ijarah* where the rent is in the form of the usufruct of the land according to Ibn Abi Shibah's views and a Maliki school scholar Ibn Qassar. Abu Ghadah and Ahmad have proposed an *ijarah* BOT concession contract for public project financing. The state land is the subject matter of *ijarah*. The state would let its land, and the investor would rent it from the state. The deferred price of the *ijarah* would be the usufruct of the project enjoyed by the investor for a specified period. Taqi Othmani, following the Hanafi School, did not accept the rental of land, as discussed above, though he allowed the project's rental after *istisna*.

According to al Qaradaghi can be used to develop *Waqf* land. Under this structure, the *Waqf* institution rents *Waqf* land to the investor in its operational form. The investor acquires the usufruct of *Waqf* land through lease for a specific period. The *Waqf* institution allows the investor to construct a building on the land. The investor may be allowed to benefit from the building for a specified period.⁶² The investor later returns the building to *Waqf* provided there is a

clause in the agreement making the investor bound to donate the building to *Waqf* institution or an undertaking or promise to sell the building to *Waqf*. Once the term of rent expires, the building is sold through a new agreement to *Waqf* institution. There could be provisions for a nominal rent paid by the lessee during the term of the lease.⁶³

The above instrument suggested by the above author sounds similar to the typical product of Islamic banks where the building is constructed. However, it seems the proposed method for *Waqf* projects is different. In a typical banking model, the bank is the owner of land and building (the asset); it leases the asset to the client; on the expiry of the lease term, the bank sells it or donates it to the client under similar or different contracts respectively. However, Qaradaghi suggests a lease of *Waqf* land to the investor in consideration for the nominal rent. Note it is not in consideration for the usufruct as he suggests payment of nominal rent regularly. Instead, he suggests the investor be allowed to build on the *Waqf* land through a licence or permission. He does not clarify whether the rental is for the land or the usufruct. Since the building is the investor's property as Qaradaghi speaks about, we, therefore, may presume that *ijarah* refers to the lease of the barren land and *tamlík* refers to the transfer of ownership of the building to *Waqf*. The land would return to *Waqf* when the lease expires and the building through according to the investor's promise to donate. This rule may apply to Zamam tower and Tabaung Haji cases.

Nevertheless, the above author is silent on whether or not the investor can rent it back to the *Waqf* institution or its affiliated body. We propose no *Shari'ah* impediment to a leaseback transaction, for the investor will rent the building, which belongs to him. It can be used for social purposes projects if the *Waqf* institution needs the building.⁶⁴ What needs clarification in the above model is that there must be two contracts: one for the lease of the land (*ijarah mu'ayyinah* or lease of a specific object) and another for the lease of the building after it is constructed. The *Waqf* institution can pay rental after delivery of the building the same as under *ijarah muntahiyah bi al-tamlík*. The *ijarah muntahiyah*

bi al-tamlik will make sense as, under the *Shari'ah*, the building's lease to *Waqf* institution or its affiliated body may end up with ownership of the building by the *Waqf* institution.

It is possible to agree under which the subject matter is specified usufructs of the building that yet to be constructed. Here forward, *ijarah* would apply. The contract could be between the investor and the subsidiary of the *Waqf* institution for a period not exceeding the ground lease. The investor may choose *ijarah mausufah fi al-dhimmah*⁶⁵ *ijarah* with advanced rental payment,⁶⁶ if he needs liquidity. Under this arrangement, the *Waqf* subsidiary may pay rental even before the delivery of the building.

Under the above scenario, the result would be similar to a BOT contract. The conventional term is own, build, leaseback and transfer (OBLBT), but if one follows the nature of Islamic transaction, it is a lease, build, leaseback and transfer (LBLBT), both subspecies of BOT. under the Islamic version, the investor owns the usufruct of the land under the lease. The first lease would be based on *ijarah mu'ayynah* or ain (corpus), where the contract subject exists at the time of contract, and the second lease would be based on *ijarah mausufah fi al-zimmah* where the usufruct or the subject matter is yet to exist. The first contract would be a mere agreement for the leasing of the land for a specified term, rent, and its mode of payment. The second lease should have additional terms relating to the type of the building, its price, work schedule, delivery and payment modes whereby the *Waqf* institution could require damages for any loss arising from defect, negligence, and non-compliance with the specification of the building. There may also be a need for an agency instrument, enabling the *Waqf* institution to manage the building as an investor agent.

The application of this model could be facilitated through a lease coupled with equity under Malaysian. The land can be leased to the investor and a lease back to the investor's subsidiary of the *Waqf* institution. *Waqf* institution may use this model to use the constructed building for its use or its subsidiary.

Taqi Usmani, perhaps from the Hanafi school perspective, has

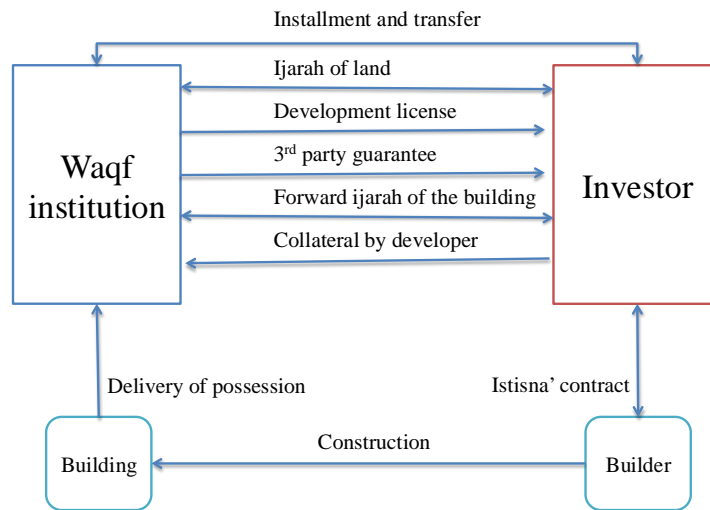
criticised the payment of rent in advance before delivering the building to the lessee. Despite this criticism, the practice is that the lessee pays the rent in advance according to the view of those who allowed *ijarah mawsufah fi al-dimmah* on the analogy of *salam*. However, according to the International fatwa council of OIC (2013) fatwa, the rental should be paid after the lessee receives the usufruct of the object. What Taqi Usmani has raised is that what if the lessor is unable to deliver the product. This view, however, should not be an issue as *ijarah* is a consensual contract; if the parties agree on the payment in advance, it is their right. The lessee cannot be said to be in a disadvantageous position if he paid in advance as in case the lessor is unable to deliver, the lessor could refund the advance rental.

The advantages of this model are: it is perhaps easy to implement it under civil law, as the model involves contracts specifically recognised under civil land law, and there is no default risk, for the lease agreement may enable the investor to terminate the forward lease and lease the building to a third party. Additional terms may be inserted to protect the investor from loss of profits and cost. Under these terms, *Waqf* may not lose *Waqf* land, for it would be for a specified period for which the rent is paid in advance. The disadvantage of the leasing is that *Waqf* institution may not effectively determine the building's specification except through the terms of its licence, which may be weaker than that under *istisna*.

To apply the model, it must do the following: (1) The *Waqf* institution enters into a lease contract with the investor for the land specified in the agreement for a term preferably 20-25 years for a rent equivalent to the price of the building and paid in a lump sum; and (2) the *Waqf* institution also signs another lease agreement with an investor for the would-be constructed building for the same period). This agreement should contain terms requiring collateral guaranteeing the completion of the building, (3) The *Waqf* institution authorises the investor to construct a building on the leased *Waqf* land. (4) The *Waqf* institution provides a government guarantee or other form of security for payment of

rent on time. (5) The investor, if needed, appoints a builder to construct the building on the *Waqf* land (using *istisna* agreement). (6) The builder completes the construction of the building and delivers its keys to the *Waqf* institution. (7) The *Waqf* institution pays the investor rents till the expiry of the term of the lease. (8) The title and possession of the land with the building will revert to the *Waqf* institution when the lease expires (see Figure 4).

Figure 4: *Ijarah* based BOT with a leaseback to *Waqf* institution.



Under this structure, the following documents are needed: an agreement for the lease of land between the *Waqf* institution and the investor, licence or authorisation of the investor to construct a building on the land, *istisna* agreement between the investor and builder, an agreement for the forward lease of the building by the *Waqf* institution from the investor, collateral by the investor to complete the project, an undertaking by the investor to transfer the land and building after the expiry of the leases, an undertaking by *Waqf* subsidiary to pay rent on time and compensation for late payment and other in case the agreement is terminated. *Kafalah* and *takaful* agreements may be needed for recovery of invested capital, profits, and damages.

The *ijarah* model has some weaknesses under Malaysian law. They are the registration of asset in the name of the client and the application of the Hire Purchase Act 1955. In practice, the asset may be registered in the name of the client. If it is registered in the name of the client, the lessee is the legal owner under Malaysia National Land Code, 1965. The Malaysian September 25, 2002, Fatwa SAC of BNM states its basis on the *Shari'ah* recognition of legal ownership and beneficial ownership.⁶⁷ It further stated that in 'the context of *ijarah*, the lessor has the beneficial ownership although the asset is not registered under his name'. In other words, the lessee would be a bare trustee and would have no rights in the assets whatsoever under civil law. This makes compliance to both Islamic and civil law at the same time complicated. It offers security to the lessor but not the lessee. In Islamic law, the lessee would have the right to the benefit of the asset, i.e., the client is entitled to its possessory rights, and the financier is entitled to its corpus (reversionary rights). The registration of title to the asset in the lessee's name resulting in the bare trust would imply he has no rights under the *ijarah* contract following the civil law. Such rights must be protected by the registration of the lease, which is not available to the lessee, for he cannot be a titleholder and leaseholder at the same time. There is, therefore, an awkward situation of mismatched concepts and the efficacy of the two concepts. This legal position will remain if the Contracts Act and NLC are not revised to facilitate these concepts.

CONCLUSION

The development of *Waqf* land for social purposes does not seem attractive for private investment. Maybe the mindset plays a role. Thus, the lack of literature on private investment in the development of social premises does not mean that there is no opportunity for it. The above discussion established that it is permissible in Islamic law following the different contractual structures such as *istisna*, *musharakah mutanaqisah* and *ijarah*. The investors could recover their invested capital, make decent profits under these contracts, and forward *ijarah*, which could fall

recoverable even before the construction is completed. The contracts and undertakings secure the investment as they enable the investors to recover their investment from a third party or take possession of the facility so that it could be orderly managed by the investors.

Notes

- 1 For juristic opinions on the validity of istisna; see Abdul Hamid Mar Iman and Mohammad Tahir Sabit Haji Mohammad (2014).
- 2 AAAFOIFI (2002) Shariaah Standard No. (11): Istisna and Parallel Istisna (Al Mi'yar al Shar'i Raqam (11): al Istisna' wa al Istisna' al Muwazi; Bank Negara Malaysia (2010) Draft Shariah Parameter Reference 5: Istisna' Contract (SPR5); also BNM, Draft Standards of Istisna, 2014.
- 3 A Single means one between waqf institution and developer. It is used against parallel istisnat which refers to two simultaneous istisna' contracts, one between waqf institution and investor and another between investor and third party (e.g. construction contractor).
- 4 A contractor or third party to whom construction contract is awarded by investors or developers. Investors include Islamic financial institutions (Private equity fund managers, banks and others), high net worth individuals (philanthropic and ethical investors).
- 5 S 3.1.8, AAAFOIFI (2002) Shariaah Standard No. (11): Istisna and Parallel Istisna (Al Mi'yar al Shar'i Raqam (11): al Istisna' wa al Istisna' al Muwazi); SPR5 (2010), s 3.
- 6 Nevertheless, it shall not be about a specific existing object known to the parties e.g. this car or a house. It is important to know that istisna' is a promise and undertaking to make and deliver something (see Standard 3.1.1 Shariaah Standard No. (11)). The contract should be in such a format even though latter existing manufactured goods are delivered (S. 3.1.5 AAAFOIFI (2002)) .
- 7 AAAFOIFI (2002) Shariaah Standard No. (11) s 2.2.1. Note these type of restriction are new permitted by AAAFOIFI (2002) rulings.
- 8 AAAFOIFI (2002) Shariaah Standard No. (11) s 3.1.7.
- 9 In normal contracts builder would be one appointed by financier or developer under second parallel istisna' contract. In the construction of mosques and other similar building financiers and developers are practical to have any role.

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- 10 SPR5 (2010), s 5.2.
- 11 See generally 2.1, and 2.2, AAAFOIFI (2002) Shariah Standard No. (11). Also see standards 4.2. 2, 4.2.3, 4.2.4 on the rights and obligations of the parties pertaining to abandoned buildings projects and the right of developer to the value of the partially completed buildings.
- 12 AAAFOIFI (2002) Shariah Standard No. (11), s 2.2; 1SPR5 (2010), s 5.3; BNM, Draft Standards, 2014.
- 13 See guideline 13.13, BNM, Draft Standards on Istisna', 2014.
- 14 Guideline 13.24-26, BNM, Draft Standards on Istisna', 2014.
- 15 Guideline 13.27-28, BNM, Draft Standards on Istisna', 2014.
- 16 See s 6.6 and 6.7 AAAFOIFI (2002) Shariah Standard No. (11); guideline 13.14; standards 13.14, 16, BNM, Draft Standards on Istisna', 2014.
- 17 Standards 13.11, BNM, Draft Standards on Istisna', 2014.
- 18 s 2.2.1 AAAFOIFI (2002) Shariah Standard No. (11); Standard 13. 20-22, BNM, Draft Standards of Istisna, 2014.
- 19 s 3.3.1 AAAFOIFI (2002) Shariah Standard No. (11).
- 20 Guideline 12.2, BNM, Draft Standards on Istisna', 2014.
- 21 Guideline 14.3-4, BNM, Draft Standards on Istisna', 2014.
- 22 Guideline 14.12 BNM, Draft Standards on Istisna', 2014.
- 23 The World Bank (nd). On the details of this type of development projects including the types of PPPs, see United Nations, Economic and Social Commission for Asia and the Pacific (2011). A Guidebook on Public-Private Partnership in Infrastructure, Bangkok: UNESCAP.
- 24 Menheere SCM and Plalis SP (1996). Case Studies on Build Operate Transfer. Netherland: Delft University of Technology, p 5, <http://www.gsd.harvard.edu/images/content/5/3/538865/fac-pub-pollalis-bot-part-1.pdf>; Auriol, E. and Picard P.M. (2011). A Theory of BOT Concession Contracts, p. 8. At <http://idei.fr/doc/wp/2011/theoryea.pdf> accessed on 2/8/2014; The World Bank (nd). Concessions, Build-Operate-Transfer (BOT) and Design-Build-Operate (DBO) Projects. at <http://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos> accessed on 2/8/2014. Also, al Qaradaghi, Ali Muhiyyuddin, (2009) al Tamwil al Islami li Mashari' al Bunyah al Tahtiyah, http://www.qaradaghi.com/portal/index.php?option=com_

- content&view=article&id=473:2009-07-12-08-51-09&catid=68:2009-07-12-08-06-07&Itemid=13retrieved on 5/8/2014.
- 25 Benjamin C Esty, (2000) The Equate project: An introduction to Islamic Project Finance, *Journal of Project Finance*. 5 (4) <http://www.kantakji.com/media/8586/n237.htm> retrieved on 5/8/2014.
 - 26 Ruzian Markom, Engku Rabbiah Adawiah Engku Ali and Aznan Hasan (2012) The Current Practices of Islamic Build Operate Transfer (BOT) Financing Contracts: A Legal Analysis, *Pertanika Journal of Social Sciences and Humanity* 20(S) pp 73-85, at p 74.
 - 27 Ahmad Hasan Ahmad al Hasani, (nd) Dirasah Shar'iyah Iqtisadiyyah li Khaskhasah Mashari' al Buniyyah al Tahtiyah bi Uslub al Bina wa Tashghil thum al I'adah (BOT), p 21. <http://www.kantakji.com/international-finance.aspx> retrieved on 5/8/2014.
 - 28 al Amanah al Ammah lil Haiat al Shar'iyah (2001). Aqd al Imtiyaz wa Takyifih al Shar'i. In: Abdul Satar Abu Ghudah and Izz al Din Muhammad Khojah (Ed.) *Qararat wa Tawsiyat Nadwat al Barakah li al Iqtisad al Islami*.
 - 29 Mohammed Obaidullah (2011) Designing Islamic Contracts for Financing Infrastructure Development. *Proceedings of the Third Harvard University Forum on Islamic Finance: Local Challenges, Global Opportunities* Cambridge, Massachusetts. Center for Middle Eastern Studies, Harvard University. 1999. pp. 163-176.
 - 30 al Qaradaghi, Ali Muhiyyuddin, (2009) al Tamwil al Islami li Mashari' al Bunyah al Tahtiyah.
 - 31 Salman al Sudairi and Craig Nethercott (2011), Social Infrastructure-Islamic Finance Opportunities. *Islamic Finance News* 13th April 2011, p 20-21. www.islamicfiancenew.com retrieved on 5/8/2014.
 - 32 Natalie Schoon (2012) Infrastructure Investment: Islamic Alternative, *Quantum Finance in Perspective* 17, 21-22.
 - 33 Qaradaghi, Ali Muhiyyuddin, (2011). Wasa'il I'mar a'yan al Awqaf: Dirasah fiqhiyyah muqarinah. Paper presented at Waqf Conference on Wasail al I'mar A'yan al Awqaf, Istanbul Turkey, 2011. http://www.qaradaghi.com/portal/index.php?option=com_content&view=article&id=1913:2011-05-17-06-10-28&catid=9:2009-04-11-15-09-29&Itemid=7 retrieved on 5/8/2014.
 - 34 Simple istisna (single or parallel) is not followed by ijarah mawsufah fi

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dhimmah (forward lease). It is used, if waqf institution has adequate financing funds. In Law, waqf institution must authorise the bank or developer (lessee) to improve the land, and the lessee must undertake to do so according to the building's agreed-upon specifications.

- 36 The developer or investor (e.g., banks) may sign another *istisna'* contract with a builder for the construction on the land. This *istisna* contract however is not within the focus of this paper.
- 37 s 3.2.3 AAAFOIFI (2002) Shariaah Standard No. (11); 1SPR5 (2010), s 5.3.
- 38 s 3.2.1 AAAFOIFI (2002) Shariaah Standard No. (11); 1SPR5 (2010), s 5.3.
- 39 Standards 13. 8-10, BNM, Draft Standards on *Istisna'*, 2014.
- 40 Shariah Board Fatwa No 33 of Qatar Islamic Bank Barakah compilation of *istisna* fatwas.
- 41 Al-Quran, 4: 12; The given verse is about the share of beneficiaries in the estate of a deceased Muslim. Before the division of the estate each beneficiary is a co-owner of the estate.
- 42 See AAOIFI, *Sharī a Standards* May 2002, p. 214; First Islamic Banking Conference Dubai, 22-24 May 1979, held at Dubai Islamic Bank, *Fatâwâ Shar iyyah fi al-A mâl al- Masrafiyyah* , p. 22; The Recommendations of the First Conference for Islamic Banks- Dubai (1399/1979), *Fatwas on financial transactions*, page 21, Dubai Islamic Bank Publications, 1985; International Fiqh Academy of OIC, 2004; Fatwa issued by Shariah Advisory Council (SAC), Central Bank of Malaysia, 56th meeting, 6th February 2006 / 7th Muharram 1427.
- 43 Muhammad Taqi Usmani, (2000AD) *An Introduction to Islamic Finance*, Karachi, Idaratul Ma'arif, , p. 91; Abd al-Sattar Abu Ghuddah (1425AH) "al-Musharakat al-Mutanaqisah wa Dawabituha al-Shar iyyah", in *al-Iqtisad al-Islami*, vol. 24, No. 277, p. 217; AAOIFI, *Sharī ah Standards* May 2002, p. 214; M Abdurrahman Sadique: *Financing MMEs through Decreasing Partnership* p 55.
- 44 See AAOIFI, *Sharī a Standards* May 2002, p. 214; First Islamic Banking Conference Dubai, 22-24 May 1979, held at Dubai Islamic Bank, *Fatâwâ Shar iyyah fi al-A mâl al- Masrafiyyah* , p. 22; The Recommendations of the First Conference for Islamic Banks- Dubai (1399/1979), *Fatwas on financial transactions*, page 21, Dubai Islamic Bank Publications, 1985;

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- International Fiqh Academy of OIC, 2004; Muhsin Ahmad al-Khudayri, *al-Bunûk al-Islâmiyyah*, Al-Qâ hirah, Iytrak li al-Nashr, 1995, p. 133; Abd al-Sattâr Abû Ghuddah, “al-Mushâ rakât al-Mutanâ qisah wa Dawâ bituhâ al-Shar’iyyah”, in *al-Iqtisâd al-Islâmi*, No. 277, Rabî al-Akhir 1425H, vol. 24, p. 217.
- 45 Abd al-Sattâr Abû Ghuddah, p. 24.
- 46 Qaradaghi, *Istithmar*, p 7.
- 47 See al Marghinani, *al Hidayah*, vol 3, Egypt: maktabah wa matba’ah Mustafa al Babi al Halabi, p 231; Qalyubi, Shahab al Din Ahmad, *Hashiyah ala Minhaj al Talibin*, vol 3, Egypt: Dar al Fikr, p 67; al Bahuti *Muntaha al Iradat*, vol 2, p 350.
- 48 Al-Quran, 28: 267.
- 49 Ibn Majah, *Sunan*, Baihaqi, *Sunan al Kubra*.
- 50 Bukhari, *Sahih*.
- 51 Originally, the sale of goods is permissible; therefore, its usufruct should have the same hukm.
- 52 Abdul Rahma al Assam is reported to have ruled on its non-permissibility due to gharar in its subject matter: Ibn Qudamah al Mughni vol 8 p 6 .
- 53 See Kasani, *bada’i* vol 4 174; al Qurtabi, Muhammad bin Ahmad al Ansari, *al Jami’ li Ahkam al Quran*, Beirut: Dar Turath al Arabi, 1972 vol 13, p 271.
- 54 It is asserted that the Hanafi jurists did not recognise *ijarah mawsufah fi al-dhimmah*: Muhammad Ahmad Mahmud Nasar, 2009. *Dawabit al Ijarah al Mawsufah fi al Dhimmah wa Tatbiqatiha fi Tamwil al Khudamat fi al Mu’assasat al Maliyah al Islamiyah*, A paper presented at 30th Barakah Conference on Islamic Economics, p 4. www.kantakji.com/media/7276/494.doc; Al-amm.d, Naz’eh. (2007). *Fî Fêqh al-MuñÉmalÉt al-MÉliyyah wa al-Ma’rafiyyah al-MuñÉlârah: QirÉ’h JadÉdah*. Dimashq: DÉR al-Qalam. Nevertheless, they did recognise payment of rent in advance whether the term of contract requires it: al Sarakhsi al Mabsut vol 15, p 108. They also allowed it where the subject matter is the usufruct of certain things to be delivered in future: al-SamarqandÉ, Mu’ammad bin Al’mad bin AbÉ Al’mad AbÉ Bakr ‘AlÉ’ al -DÉn. (1984). BayrÉt: DÉR al-Kutub al-Ñilmiiyyah. 2/361; al-KÉsÉnÉ, ‘AlÉ’ al-DÉn. (1982). BadÉ’iÑ al-ØanÉ’ÉÑ fÉ TartÉb al-SharÉ’iÑ. BayrÉt: DÉR al-KitÉb alÑArabÉ. 4/233; Majallat. MÉddah. MÉddah. Article 538, 540, 541, 466. Hanafis

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- do not define ijarah by its types and in fact expressly deny any need for it.
- 55 See generally: al Bahuti, *Sharah Muntaha al Iradat*; Ibn Qudamah, *al Kafi fi Fiqh Ibn Hanbal*, vol 2:169.
- 56 See Ibn al-NajjĒr, *Taqiyy al-DĒn MuĒammad bin AĒmad bin ĒAbd al-ĒAzĒz al-FatĒĒĒ*. (2000). BayrĒt: Mu'assasĒt al-RisĒlah. 4/5.
- 57 See Abdul Satar Abu Ghaddah (n.d.) *Practical Application of Ijarah Mawsufah fi al dhimmah (Forward Ijarah)*. <http://www.iefpedia.com/english/wp-content/uploads/2009/10/Practical-Application-of-al-Ijarah-al-Mawsufah-fi-al-Dhimmah-Forward-Ijarah.pdf> retrieved on 5/8/2014.
- 58 The Maliki, Shafi'i, and Hanbali schools allowed this lease analogically considering ijarah mu'ayyinah and salam's permissibility. It is the forward purchase of usufruct. The rent should be paid in advance in Malikis' opinion, while according to Shafi'is and Hanbalis it could be in advance or later. See generally: al Bahuti, *Sharah Muntaha al Iradat*; Ibn Qudamah, *al Kafi fi Fiqh Ibn Hanbal*, vol 2:169; *Tuhfah al Muhtaj*, vol 6, 24:259; *al Manthur fi al Qawaid*, vol 2, 442; *Asna al Matalib* 12:162; Ibn Rushd, *Bidayah al Mujtahid* 2:182; *al Dasuqi, Sharh al Dasuqi ala Sharh al Kabir*, 12: 336. Contemporary scholars differed too: advance rentals: al Buti, *Muhammad Sa'id Ramadan*, 2007. *al Ijarah al Mawsufah fi al Dhimmah*, Bahrain : Bahrain International Bank, p 8; late payment of rental is permissible: Abdul Satar Abu Ghadah, 2007. *Dawabit Ijarah Khudamat wa Tatbiqat Ijarah Mawsufah fi al Dhimmah*, Jiddah: al Barakah, p 98; late payment is permissible if no reference to forward contract is made: Ali Qaradaghi, 2008. *Al Ijarah ala Manafi' al Ashkhas*, Paris: European Ifra Council; Nazih Hamad, 330.
- 59 AbĒ Ghuddah, ĒAbd al-SattĒr. (2007). *al-TaĒbĒqĒt al-ĒAmaliyyah li al-IjĒrah al-MawĒĒfah fĒ al-Dhimmah* . Paper presented at the 28th al-Barakah Symposium on Islamic Economics, Jiddah. P. 73; al-Qurah dĒgĒ, Aliyy MuĒyĒ al-DĒn. (2008, July). *al-IjĒrah ĒalĒ ManĒfiĒ al-AshkhĒĒ: DirĒsah Fiqhiyyah MuqĒranah fĒ al-Fiqh al-IslĒmĒ wa QĒnĒn al-ĒAmal*. Paper presented at 18th session of European Council for FatwĒ and Research, Paris. P. 14; AĒmad, MuĒammad MaĒmĒd NaĒĒr. (2009 June). *Fiqh al-IjĒrah al-MawĒĒfah fĒ al-Dhimmah wa TaĒbĒqĒtuhĒ fĒ al-MuntajĒt al-MĒliyyah al-IslĒmiyyah li TamwĒl al-KhidmĒt*. Paper presented at the conference on Islamic Banking between Reality and Expectation organized by the Division of Islamic affairs and welfare work in Dubai, Bahrain. P. 102; Federation of Malaysia, *Edicts of Government, Shariah 7 (2003) (English): Shariah Contracts*, pp 15-17, (SAC May 3

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- resolution, 2007), <https://law.resource.org/pub/my/ibr/ms.bnm.shariah.07.01.2003.pdf> retrieved on 5/8/2014.
- 60 Note that this form of contract might be found similar to the hire purchase contract, which is, in fact, a sale rather than a rental. There should not be sale and rental contracts in the same agreement, or the rental cannot be considered purchase price at the same time. Where there is a promise to sell or donate and the sale is concluded through another contract after the lease ends, the transaction is valid, regardless of whatever name is given (see Fahd bin Ali al Hassun, 1324 AH. *Al Ijarah al Muntahiyah bi Atamlik fi al Fiqh al Islami*. www.said.net/book/9/2471.doc) retrieved on 5/8/2014.
- 61 Federation of Malaysia, Edicts of Government, Shariah 7 (2003) (English): Shariah Contracts, p 3, (SAC September 25 resolution, 2002), <https://law.resource.org/pub/my/ibr/ms.bnm.shariah.07.01.2003.pdf> retrieved on 5/8/2014; Note the resolution mentions ijarah in general terms. Some resolution also uses ijarah muntahiyah bi al tamlik and ijarah thumma al bai' at the same time. Thus the general term (ijarah) is taken to mean ijarah thumma al bai' and ijarah muntahiyah bi al tamlik. Also see Bank Negara Malaysia, Ijarah Concept Paper, 2014, where reference is made to ijarah muntahiyah bi tamlik, ijarah al mawsufah fi zimmah, and others.
- 62 One way would be to use financial ijarah for the transfer of the building to the customer or waqf institution.
- 63 Ali Muhyi al din al Qaradaghi (n.d) *Ithtismar al waqf wa turquh al qadimah wa al hadithah*.
- 64 Compare the ijarah of waqf land for Zamzam Tower. Two contracts: a) Classic form of ijarah between waqf institution and the developer; 2) Forward ijarah between the developer and the end-users (sukuk holders). The Zamzam tower case does not apply to the present discussion.
- 65 This is to follow the three main Sunni schools of law.
- 66 This is to follow the Hanafi school of law, where the second ijarah would be normal ijarah.
- 67 SAC relied on the fatwa of OIC Fiqh academy: OIC Fiqh Academy, *Majallah Majma' Fiqh al Islami*, 1991, no. 6, vol 1, p 771.



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