



UNIVERSITI SAINS ISLAM MALAYSIA

جَامِعَةُ الْعُلُومِ الْإِسْلَامِيَّةِ الْمَالِيزِيَّةِ

ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

# Islamic Law of Property

LAB2033

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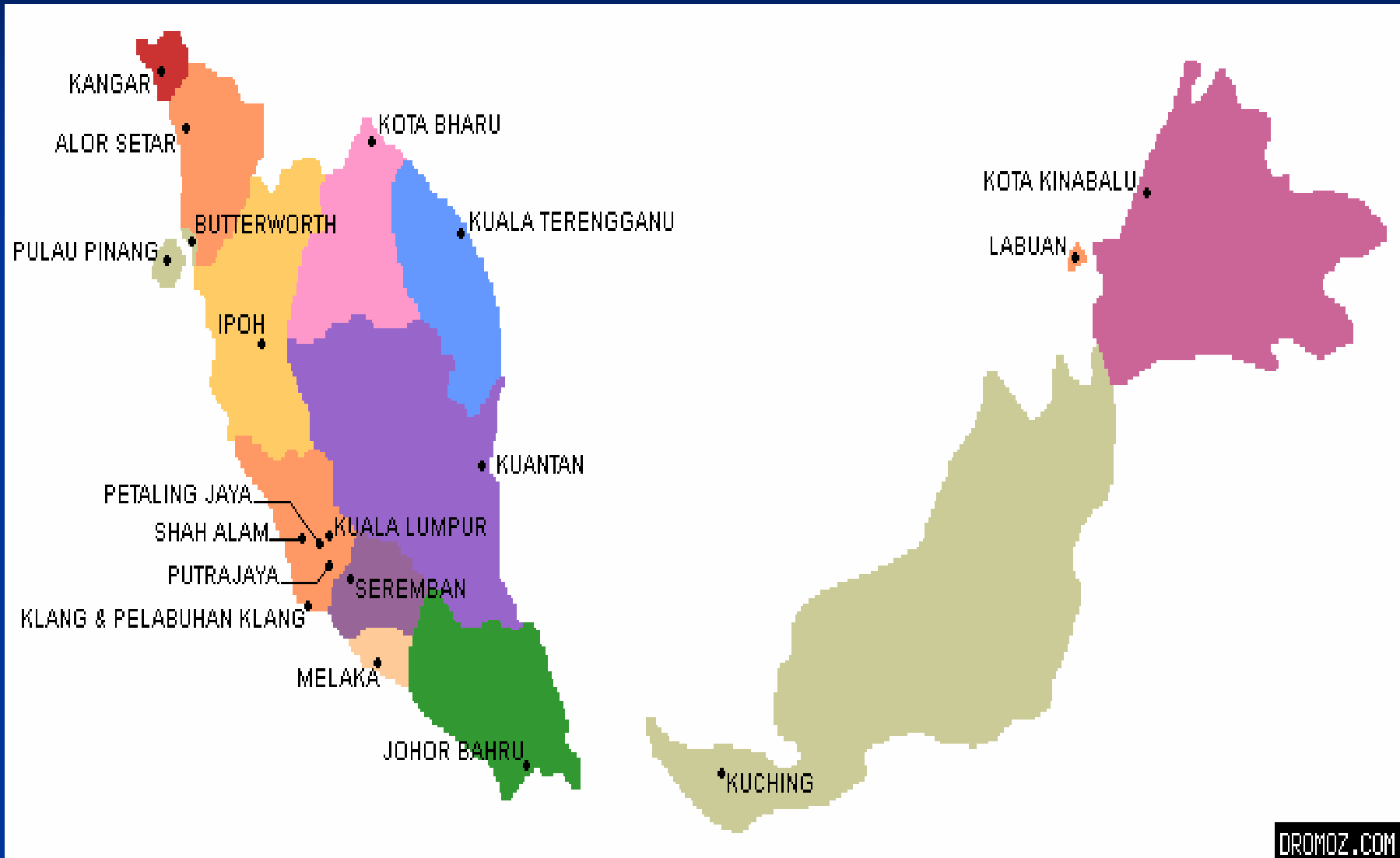
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# Introduction

- In Malaysia, it is estimated that over 35,727 hectares of *waqf* land all over Malaysia and a research done by JAKIM in 2000 recorded that there are 20,735.61 acres of registered *waqf* lands.

# 336,700 square kilometres



# Waqf lands in Malaysia

State	Specific Waqf (Acres)	General Waqf (Acres)	Total (Acres)
Kelantan	171.54	133.12	304.66
Federal Territories	5.47	22.07	27.54
Terengganu	204.43	43.01	247.44
Sarawak	236.929	-	236.929
Pahang	3985	-	3985
Sabah	4.178	25.42	29.598
Johor	1951	3976	5928
Perlis	218.69	8.75	227.44
Melaka	773.39	69.97	843.34
Kedah	420	423.34	843.34
Negeri Sembilan	1727.35	61.25	1788.60
Selangor	621.10	442.15	1063.25
Perak	4474	647	5122
Pulau Pinang	22.21	67.05	89.26
<b>TOTAL</b>	<b>14,815.787</b>	<b>5919.83</b>	<b>20,735.61</b>

# The Administration of *Waqf* in Malaysia

- *Waqf* affairs are the responsibility of the Islamic Religious Council of each state. the courts recognized shariah as the governing law of property for Muslims including *waqf*.
- Section 25 of the Civil Law Act 1956 stated that the administration of Muslim's property shall in accordance with the Islamic law. There are 14 State Islamic Religious Councils, one for each of the 13 states and one for the Federal Territory.
- The government of Malaysia has formed a department for *zakat*, *waqf* and *hajj* on the 27th March 2004 with the aim of making the administration systematic and effective. This department however does not have an authority to administer and manage *waqf* properties but rather plays a role as a planning coordinator and observes the *waqf* matter.

# Majlis as the Sole Trustee

- section 89 of the Administration of the Religion of Islam (State of Johor) Enactment 2003 states that notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it, the Majlis shall be the sole trustee of all *waqf*.

# Approach in Developing Waqf

- The government has allocated RM250 million to develop waqf land all over Malaysia for purpose of building mosques and surau, utilizing wakaf land, or land donated for religious or charitable purposes and using for commercial
- JAWHAR formed *Yayasan Waqaf Malaysia* (Malaysian Waqf Foundation) for the sole purpose of identifying the underutilised assets of awqaf and planning for their development in coordination with the SIRC of each state.
- Selangor has established Lembaga *Waqf* or *Waqf* Board with objective to manage, administer *waqf* property



# Jurisdiction

- Jurisdiction over *waqf* lies within the jurisdiction of the syariah court List II (1) of the Ninth Schedule of the Federal Constitution.
- the Enactment of Wakaf (State of Selangor) 1999 and the Enactment of Wakaf (state of Malacca) 2005 and the Enactment of Wakaf (Negeri Sembilan) 2005
- One of the important characteristics of *waqf* in Malaysia is that every *waqf* shall be registered in the name of the Islamic Religious Council as proprietor in accordance with the National Land Code 1965
- *Waqf* Management Committee to administer all matters pertaining to *waqf*.

# Definition

- Section 2 of the Administration of Islamic Law (State of Selangor) Enactment 2003:
- *waqf* as any property from which its benefits or interest may be enjoyed for any charitable purpose whether as *waqf am* or *waqf khas* in accordance with syariah principles,

# Types of Waqf

- the administration of the Majlis, *waqf* is divided into
- 1. Public *Waqf*: the income of *waqf am* goes to *baitul mal*
- 2. Private *Waqf*: *waqf khas* is applied to objects specified by the dedicator

## Cont...

- Public *Waqf* is *statutorily defined* as a dedication in perpetuity of the capital and income of property for religious or charitable purposes recognized by Islamic Law
- Private *Waqf* in other words refer to a dedication in perpetuity of the capital of property for religious or charitable purposes recognized by Islamic law and the property so dedicated, the income of the property being paid to persons or for purposes prescribed in the *waqf*

## Cont..

- Section 91 (2) (a) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003:
- Every *waqf khas* must be declared and validated by Sultan.
- Majlis is the sole trustee of the waqf property.

## Cont...

- Section 8 (a) of the Enactment:
- Provides that notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it, the Majlis shall be the sole trustee of all *waqf*, whether *waqf am* or *waqf khas*

## Cont...

- Section 91 (2) (b) of the Enactment states that private *waqf* made by certain person during death illness must be in writing before a witness. Any *waqf* more than one third shall be invalid.
  - Pahang, Malacca, Pulau Pinang, Kedah and Perlis have the same application except Kelantan and Terengganu where ruler can validate it and the beneficiaries expressly sanction it.
- When someone wants to create a *waqf*, he is required to transfer his land to the Majlis. The Majlis then become the administrator of all *waqf* property.

## Cont..

- S90: Every *waqf* then shall be registered in the name of the Majlis as proprietor in accordance with the National Land Code 1965
- S 95: the Majlis shall prepare, issue and publish in the gazette a list of all properties, investments and assets and not forming part of the *baitulmal*.
- S 43: All of the *mawquf* and *waqf* property must be declared in the gazette under the administration of the Majlis.
- S 47: *waqf* to be certified by syarie judge or witnessed by two persons qualified by syariah principles to be such witnesses".



# Istibdal

- The practice of *istibdal* is regulated under the states enactment and the Majlis has an authority to deal with the matter
- 1. the selling of the awqaf assets and replacing them with other assets in other
- places;
- b) the exchange of the existing awqaf assets with other types of construction in the same places;

# Practices in Malaysia

- The concept of *istibdal* is utilized in several forms such as
- selling part of the *waqf* property to develop the remaining of the same property,
- selling bundle of *waqf* properties and buying new one in exchange to be used for the same purposes of the sold properties,
- selling one *waqf* and buying another having common purpose and
- selling a handful properties belonging to various *waqf* and buying a new property which has higher income and the same revenue

## Cont..

- *S 2: istibdal* as a substitution of *waqf* property with another property or cash either through substitution, purchase, sale or any other way that approved by syariah principles. Substitution can be divided into two forms ie substitution of one *waqf* with a similar and the substitution of land with its cash value.
- S20 the Majlis may substitute any *waqf* property, when it is no longer beneficial as intended by the dedicator and in the event that the usage of *waqf* property does not meet the actual purpose of *waqf*.

## Cont...

- the 4th Meeting of the National Fatwa Negotiation Committee which was held on 14 April, 1982 had agreed that the application of istibdal was permissible, in accordance with the opinion of Imam Abu Hanifah
- Fatwa: FT, Perak, Kelantan, Terengganu, Johor and Melaka

# Isa Abdul Rahman and Anor v. Majlis AQama Islam Pulau Pinang. (1995) 10 JH 222

- Waqf: Masjid Jamek Simpang Enam. waqf deed was completed on 26 September 1900.
- Waqf khas which was created as a place for public worship. In this waqf deed, the founder stipulated that his lands should be used as a place of Mohammedan public worship and for no other purpose
- The MUIPP had planned to demolish the above mosque of Simpang Enam and put up a five storey building, of which the first to the third storeys would be used for the offices of an Islamic Bank, while the remaining two storeys above would be dedicated as a mosque

## Cont...

- 2 fatwas: the Syariah Committee of Penang.
- 1. invalidated the proposal, 2. validated it on the grounds that such a new erection could provide more space
- the Mufti of Penang: both of the fatwas can be accepted he seemed to incline towards accepting the latter.
- Judge, Abdul Hamid Mohamed on 13 October, 1995, a new fatwa should be issued on this matter.

# Condition for Istibdal

- In cases of necessity,
- To accommodate the interests of the public or its beneficiaries provided that its replacement is ensured, whether of a similar value, or even higher,
- It is not repugnant to the principles of the Shari ah.
- A replacement which could provide better investment to the waqf concerned should be given priority. An istibdal which is to be applied for mere development of the waqf concerned should not be considered, as this is not regarded as a necessity

# Manual for Management of *Waqf* Land

- The objectives: provide standard guidelines, precise and transparent data of *waqf* lands and to inculcate professionalism in the management of *waqf* lands
- Chapter 1: introduction, background, scope, justification, procedures, definition, concept and principles and syariah aspects of *waqf* lands. the advantageous and benefits of *waqf* and also provides explanation on conditions, pillars, *istibdal* including provisions of *waqf* under the National Land Code 1965.



## Cont...

- Chapter 2: the procedures for registration of waqf land and these involve of application either from individual or the States Islamic Religious Council, caveat, cancellation and etc.
- Chapter 3: the administration of *waqf* lands and procedures for payment of *waqf* duty, leasing, monitoring and enforcement, insurance and *istibdal*.

# Various Instruments of Investment

- The investment of *waqf* land could be supported by the federal or state government or statutory bodies or financial institutions.
- The utmost important is that the ability of the *waqf* institution to choose the most appropriate and suitable methods of financial schemes for any of its investment project.
- For example the development plan of the Islamic Religious Council of Pulau Pinang is supported by the Federal Government with RM40 million advanced consists of a construction of 165 low-cost houses, shops, Islamic medical centre, conversion of Lebuh Aceh into a new centre for designing and printing holy Quran, including an educational centre in the cost of RM70 million as well as RM5 million's cost integrated training centre.

# Built, Operate and Transfer

- This model can be in two forms namely build occupy and sale and build, lease and transfer
- The Islamic Religious Council of Pulau Pinang followed this model in constructing 21-storey of UMNO Tower's building in Georgetown. This building was erected on *waqf* land and the council leased the building from the developer for a period of 99 years. At the end of the lease period the council will own the building through sale transaction

## Equity-Based Instrument

- This instrument can be in the form of joint ventures. The call for joint ventures scheme arises where the *waqf* institution lack of expertise and financial resources. The *waqf* institution plays a role as landowner and enters into venture with a financier with or without capital contribution.
- JV scheme of the Islamic Religious Council of Federal Territory with Tabung Haji, TH Technologies Sdn. Bhd. and Bank Islam Malaysia Berhad for the construction of a 34-storey building at a 0.484-ha site on Lot 168/169, Jalan Perak, Kuala Lumpur. This RM151 million project is considered as the first large-scale commercial development on *waqf* land in Malaysia

# Self-Finance Instrument

- Self-finance instrument means the cash or land contributed to the cost of investment by the *waqf* institutions where they can generate its own income to finance its investment project such as *ijarah*, cash *waqf* or *waqf* shares and *istibdal*.
- Lease or *Ijarah*- In *waqf* Syah Wali at Pulau Pinang, the Islamic Religious Council constructed 56 units of apartments and 4 unit of shop-house for rental. In *waqf* Wisma Syeikh Abdullah Fahim the council erected a commercial center for the same purpose

## Cont....

- Cash Waqf and Waqf Shares- Building of Johor *Waqf* Shares at cost of RM4 million, plantation project of 3800 acres land and purchase of six-storey hostels at Cairo, Egypt for students' accommodation
- Substitution of Waqf Land or Istibdal -In Federal Territory, *waqf* of Norcahaya Majid. She dedicated a piece of vacant land which is less economical. The council agreed to substitute this land with 2 units of terrace houses at Taman Pelangi Jaya, Sentul, Kuala Lumpur



# Support Infrastructure

- Legal Infrastructure
- The states authorities have taken several measures in improving the law on *waqf* by introducing few provisions in the administration of Islamic law enactment and specific enactment of *waqf* such as the Enactment of Wakaf (State of Selangor) 1999 and the Enactment of Wakaf (State of Malacca) 2005.
- These legislations provide both substantive provisions and procedural aspects of *waqf*
- Tax incentive for any donation given including a cash *waqf* in section 44(6) the Income Tax Act 1967 (Reference no. LHDN.01/35/42/51/179-6.5621 Government Gazette No. 14369 dated 27.07.2004

## Cont.....

- The Implementation of the ICT System
- A computerized *waqf* system can be a key to the *waqf* institution to have its own a comprehensive database of all matters related with the *waqf*.
- Information system of *Waqf* land of the Islamic Religious Council of Pulau Pinang consists of four main applications namely *waqf* information management system, comprehensive building information system, information system based on geographic information system (GIS) and Pulau Pinang Geographic Information System.



## Cont....

- Manual for Management on *Waqf* Land
- The Department of Wakaf, Zakat and Hajj has issued a *Manual Pengurusan Tanah Wakaf* or Manual for Management of *Waqf* Land due to several administrative and procedural problems incurred to the existing framework such as lack of database and record of *waqf* properties and unclear procedures amongst the states.
- The objectives of the Manual are to provide standard guidelines, precise and transparent data of *waqf* lands and to inculcate professionalism in the management of *waqf* lands.

## Cont....

- Fatwa Committee
- The investment of *waqf* land also adheres to the roles play by the National Fatwa Committee and the State Fatwa Committee.
- Issues involved in the investment plan project shall be referred to the respected fatwa committee. Without this fatwa making body infrastructure, it may lead to the disruption of the investment plan and create hurdles to the *waqf* authority in developing certain *waqf* land.
- The National Fatwa Committee on 22nd April 1999 has issued a fatwa that the practice of *istibdal* is permissible provided that the acquired or transferred *waqf* land by the government shall be compensated with the same value or be substituted with another land

# To What Extent the Approach Works?

- The existing approaches taken by the authority positively contributed to the development of *waqf* lands.
- Eg. *Waqf* shares scheme. Johor Building of *Waqf* shares and joint venture project with Oil Palm Estate to develop 3,900 acres land for purpose of cultivating oil palm trees. These two projects involved more than RM5 million capitals and it creates many employment opportunities.

# Issues and Challenges

- Lack of Financial Resources
- Most of *waqf* properties are mosques, religious places, Islamic school and cemeteries and very few of *waqf* lands generate income to the Islamic Religious Council.
- For example, the income derived from monthly rental of *waqf* properties managed by the Islamic Religious Council of Federal Territory only contributed a sum of RM15, 745
- The *waqf* authority may consider various financial schemes and instruments appropriate to *waqf* real estate development

## Cont...

- It is also strongly proposed that the Islamic Religious Council to set up its *waqf* corporate entity in the form of *waqf* holding or a *waqf* development corporation
- The establishment of the *waqf* development corporation may enable the Islamic Religious Council to arrange various finance schemes for the investment of *waqf* land and in fact the Council will not be exposed with liabilities arising from a particular development.
- The *waqf* holdings as a subsidiary of the Islamic Religious Council will certainly indoctrinate professionalism and ensure effective management of *waqf* land



## Cont....

- Undeveloped and Unproductive *Waqf* Land
- As a general observation, it is found that there are a lot of undeveloped *waqf* lands throughout the country
- In Johor, 926.6 acres or 71 percent of the total *waqf* land are reserved for cemetery, 246.8 acres or 19 percent for mosques, 90 acres or 6.9 percent for *suraus* and 1 acre for other purposes. There are a lot of other areas of *waqf* lands have potential to be developed for commercial activities for the benefits of community at large.
- In case of state of Perak, there are 1,233 lots of *waqf* land totaling of approximately 5122 acres but only 56 shop-houses and residential units have been built on them and the rest has been left undeveloped

Cont....

- Loopholes in the Legal Framework
- *Waqf* administration is regulated through various states law or enactment
- There is no specific statute on management and administration of *waqf* except the Enactment of *Wakaf* (State of Selangor) 1999 and the Enactment of *Wakaf* (state of Malacca) 2005.
- There are a lot of administrative problems raised by the existing procedures such as improper forms and etc.

## Cont....

- Unregistered *Waqf* Land
- The Islamic Religious Council does not have comprehensive and reliable data on *waqf* land which causes some of unregistered *waqf* lands undeveloped.
- *Waqf* on Leasehold Land and Land Classified as Heritage
- the *waqf* authority may face problems in developing leasehold land due to its temporary features. For instance, *waqf* Ahmad Dawjee Dadabhoy at Lot 2420, Jalan Masjid India will be ended on 30th September 2024.
- The *waqf* authority is also facing a problem to develop *waqf* land classified as heritage. This type of land will be put under the auspices of the local authority and the museum's department.



## Cont...

- The Majlis faced problem on the registration of *waqf* land title and therefore it could not be identified and registered. Without the land title, it is hard to the Majlis to develop *waqf* land.
- The Majlis does not have comprehensive and reliable data on *waqf* land which cause a lot of unregistered *waqf* lands undeveloped and even unidentified.

## Cont...

- It is observed that a lot of *waqf* lands are located at rural area, scattered and lack of potential to be developed.
- These features cause *waqf* land undeveloped and under utilized. In addition, there were cases where *waqf* land which has been trespassed due to weak monitoring and enforcement by the authorities

# The Way Forward

- *Waqf Financing*
- The Federal Territories' Islamic Religious Council together with Tabung Haji, TH Technologies Sdn Bhd and Bank Islam launched a RM151 million project for the construction of a 34-storey building at Kuala Lumpur.
- *Exchange of Expertise amongst Waqf Institution*
- It may provide exchange of efficient *waqf* administrative process, technical cooperation and exchange of experience

## Cont....

- **Revive Unproductive Waqf Land by Optimizing the Concept of *Istibdal***
- The practice of *istibdal* is regulated under the state enactment and the Majlis has an authority to substitute any *waqf* property, when it is no longer beneficial as intended by the dedicator and in the event that the usage of waqf property does not meet the actual purpose of *waqf*.
- *Istibdal* adheres to the decision or views of the state fatwa committee
- There must be continuous efforts in doing research and identifying potential *waqf* lands to be substituted with another valuable and beneficial piece of lands.

## Cont....

- Legal Framework
- States need to immediately enact specific statute on waqf. It is even better if we could have a single legislation on the administration of *waqf* for the whole Malaysia.
- To enhance and improve the procedural law on *waqf*
- Waqf Bank

# Concluding Remarks

- The existing frameworks and various instruments of investment approaches taken by the *waqf* institution contributed positively to development of *waqf* land. This is undeniably supported by various support infrastructures.
- Inevitably, the development of *waqf* land also involved problems and challenges such as lack of financial resources, undeveloped and unproductive *waqf* land, loopholes in the legal framework, unregistered *waqf* land and *waqf* on leasehold land.
- Due to these obstacles, it is submitted that Malaysia still really need further measures, more effective and comprehensive approaches in order to improve its future investment on the *waqf* lands.