

THE INVESTMENT OF WAQF LAND AS AN INSTRUMENT OF MUSLIMS' ECONOMIC DEVELOPMENT IN MALAYSIA*

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ABSTRACT

The investment of waqf properties especially land is fundamentally aimed at generating more income to waqf institution that could be benefited by the beneficiaries. In the context of Malaysia with a population of close to 26 million people, it is reported that there are over 32,000 acres of waqf lands in which may be invested to benefit the Muslims society. One of the recent large scale investments of waqf land in Malaysia was initiated by the Federal Territories' Islamic Religious Council together with Tabung Haji, TH Technologies Sdn. Bhd. and Bank Islam Malaysia Berhad involving a project for the construction of a 34-storey building at a cost of RM151 million. Regardless of this development, it is observed however that the utilization of waqf lands is still not being optimized and in fact there are a lot undeveloped waqf lands which have potential to be invested through various instruments. This paper hence is intended to provide an overview on the investment of waqf land as an instrument of Muslims' economic development in Malaysia.

1.0 Introduction

Waqf is one of the underlying instruments in Islam with a purpose *inter alia* to eradicate poverty and to improve the socio-economy of the Muslims ummah. The famous *waqf* in the holy city of Mecca¹ and Cairo's endowment have contributed significantly to the Muslims society at large in various forms and sectors. From economic point of view, *waqf* is a powerful mechanism in developing the nation in form of charitable instruments which is very unique and beneficial.

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¹ *Waqf* in the holy city of Mecca may be categorized into the religious, charitable and family *waqf*. Some of the *waqf* properties are endowed for *al-Masjid al-Haram* and other mosques in Mecca, while others are for charitable purposes like religious education, assistance of the poor and destitute, lodging and facilitation of *Hajj* and *Umrah*. See *Abrar Ahmad Shareef, Awqaf in Makkah Mukarramah: Problems and Prospects*, International Waqf Conference Southern Africa, Cape Town, 17th- 18th August 2007 organized by Islamic Development Bank, the Islamic Research and Training Institute, the Kuwait Awqaf Public Foundation and Awqaf South Africa.

Unquestionably, *waqf* can be in the form of immovable and movable property but the writer opined that *waqf* institution may emphasize on the development of *waqf* of fixed assets besides concentrating other types of *waqf*. The investment in real estates sectors has a very high potential to be developed as its represent the most preferable mode of investment. In case of 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* lands². Below is the statistic of the registered *waqf* lands for the whole states in Malaysia³.

No.	State	Specific Waqf (Acres)	General Waqf (Acres)	Total (Acres)
1	Kelantan	171.54	133.12	304.66
2	Federal Territory	5.47	22.07	27.54
3	Terengganu	204.43	43.01	247.44
4	Sarawak	236.929	-	236.929
5	Pahang	3985	-	3985
6	Sabah	4.178	25.42	29.598
7	Johor	1951	3976	5928
8	Perlis	218.69	8.75	227.44
9	Melaka	773.39	69.97	843.34
10	Kedah	420	423.34	843.34
11	Negeri Sembilan	1727.35	61.25	1788.60
12	Selangor	621.10	442.15	1063.25
13	Perak	4474	647	5122
14	Pulau Pinang	22.21	67.05	89.26
	TOTAL	14,815.787	5919.83	20,735.61

The figures show that state of Johor represents the widest registered *waqf* lands of 5928 acres while Federal Territory only cover a small portion of 27.54 acres with 26 lots. In

² n.a. *Entiti Waqf Kebangsaan Cari Jalan Bangun Tanah Waqf*. 26 March 2006. Berita Minggu.

³ Zulkifli Hasan. *The Effectiveness of the Administration of Waqf Land in Malaysia*. International Waqf Conference Southern Africa, Cape Town, 17th- 18th August 2007 organized by Islamic Development Bank, the Islamic Research and Training Institute, the Kuwait Awqaf Public Foundation and Awqaf South Africa.

term of value, it is found that *waqf* lands in Pulau Pinang, Federal Territory and certain part of Johor particularly within the area of Johor Bahru are considered as the most strategic and valuable property in comparison with other areas.

From the above figures, the study attempts to discuss the approaches taken by Malaysian *waqf* institution in developing all of these *waqf* lands. This paper explores the Malaysian model of investment of *waqf* land and its implementation. Scope of the discussion will consist of a general background of the administration of *waqf*, various investment's model and instruments of *waqf*, support infrastructure and challenges in developing the *waqf* with reference to the existing and future several *waqf* land's development.

2.0 The Administration of Waqf in Malaysia

In Malaysia, *waqf* affairs are the responsibility of the Islamic Religious Council of each state. The Islamic Religious Councils are empowered to administer and manage *waqf* properties in accordance with *hukum syarak*. There are 14 State Islamic Religious Councils, one for each of the 13 states and one for the Federal Territory. Beside the Islamic Religious Council, the government of Malaysia has formed a department for *zakat*, *waqf* and *hajj* under the Prime Minister's Department 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* matter⁴.

In term of court's jurisdiction, *waqf* lies within the jurisdiction of the syariah court as provided in List II (1) of the Ninth Schedule of the Federal Constitution which provides that except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic Law and personal ... *waqf* ... the determination of matters of Islamic Law. Thus, *waqf* is one of the subject matters which are under the states jurisdiction⁵. For example, in Selangor the jurisdiction for the Syariah High Court to hear and determine *waqf* is

⁴ n.a. *Speech by Abdullah B. Md Zin during State Islamic Council Pelancaran Jabatan Waqf, Zakat dan Haji*. Putrajaya. 8th October 2004.

⁵ See *Md. Hakim Lee v. State Islamic Council Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419, *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5 and *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708.

founded in the Administration of the Religion of Islam (State of Selangor) Enactment 2003, in Pulau Pinang, it is provided in the Administration of Islamic Religious Affairs (State of Pulau Pinang) Enactment 1993 and in Federal Territory, the Administration of Islamic Law (Federal Territories) Act 1993.

In Selangor and Malacca, the provisions of law on *waqf* are provided under the Enactment of Wakaf (State of Selangor) 1999 (hereinafter referred to as the Enactment) and the Enactment of Wakaf (state of Malacca) 2005 and the other states that do not have such enactment are governed by the states administration of Islamic law. Section 2 of the Enactment defined *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, but does not include a trust which is defined under the Trustee Act 1949⁶.

It is a requirement for every *waqf khas* to be declared and validated by Sultan⁷ and the Islamic Religious Councils are the sole trustees of the waqf property or *al-mutawalli*. Section 32 of the Enactment provides that notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it, the Islamic Religious Council shall be the sole trustee of all *waqf*, whether *waqf am* or *waqf khas*⁸. Section 91 (2) (b) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 states that private *waqf* made by certain person during death illness must be in writing before a witness and any *waqf* more than one third shall be invalid⁹.

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

⁶ Under the states administration of the Islamic law enactment, *waqf* is divided into Public *Waqf* and Private *Waqf* and the income of *waqf am* goes to *baitul mal* while for *waqf khas* is applied to objects specified by the dedicator.

⁷ Section 91 (2) (a) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

⁸ Similar provision in section 61 of the Administration of the Religion of Islam (Federal Territories) Act 1993.

⁹ Section 91 (1) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. 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.

the National Land Code 1965¹⁰. With this requirement, the Islamic Religious Council will be able to record and possess a complete database of all of its *waqf* properties. In fact, *waqf* documents need to be certified by *syarie* judge or witnessed by two persons qualified by syariah principles to be such witnesses. Section 95 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 provides the Islamic Religious Council shall prepare, issue and publish in the gazette a list of all properties, investments and assets and not forming part of the *baitulmal*.

Section 21 of the Enactment requires the Islamic Religious Council to establish *Waqf* Management Committee to administer all matters pertaining to *waqf*. The committee has authority to frame any policy, to supervise, to administer, to manage, to develop and to improve any matters related with *waqf* administration¹¹. Every state Islamic council has its own management committee and it is the burden of the committee to administer all of the *waqf* properties and this includes the investment of *waqf* land¹².

3.0 Various Instruments of Investment of *Waqf* Land

There are various model of investments of *waqf* land could be adopted by the *waqf* authority either they are depending on funding from the federal or state government¹³ 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. This paper discusses only the selected model and

¹⁰ Section 6 of the Enactment.

¹¹ Section 24 of the Enactment

¹² In Federal Territory, the *Waqf* and General Resources Division manages all *waqf* properties and the investment matter is handled by the Development and Investment Division.

¹³ For example the federal government has allocated RM250 million to develop *waqf* land all over Malaysia for purpose of building mosques, religious and charitable purposes and commercial projects. Reported In Anis Ibrahim. 9th June 2007. *RM250m Shot In The Arm For Wakaf Land Projects*. New Straits Times. 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 Lebuah Acheh 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. Reported in Wan Najib Wan Daud. 13th August 2007. *36,000 Hektar Tanah Wakaf Berpotensi Dibangunkan*. Utusan Malaysia.

instruments of investment of *waqf* land namely debt-based instrument, equity-based instruments, self-finance instrument and Islamic securities instruments¹⁴.

(a) Debt-Based Instrument

(i) Built, Operate and Transfer

This model can be in two forms namely build occupy and sale and build, lease and transfer. The former refers to a contract based on the long-term lease of the *waqf* land. The developer cum leaseholder will construct a building on the land with an understanding that the *waqf* authority will buy the building and the cost of construction at the end of the lease period. The *waqf* institution then may lease the building for a longer period based on annual rate of rental to pay the total cost of the building. Practically, the rental payment will be payable directly to the developer's account¹⁵. The latter refers to a financial lease which is similar with hire-purchase. The *waqf* institution issues a permit to a financier to construct a building on *waqf* land. The financier authorizes certain developer to erect such building. When the building is completed, the *waqf* institution leases the building for certain period which is owned by the financier. The building after the expiry of the lease would be transferred to the *waqf* institution through sale.

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. Another build, operate and transfer model is a MARA's building at lebuah Buckingham whereby the lease period is 30 years¹⁶.

¹⁴ Mohamad Tahir Sabit Mohammad. *Innovative Modes of Financing: The Development of Waqf Property*. Konvensyen Wakaf Kebangsaan organized by the Department of Awqaf, Zakat and Hajj. Kuala Lumpur. 12-14 September 2006. This paper discusses various innovative methods of financing for a purpose of the development of *waqf* properties but it does not refer to any particular existing investment project.

¹⁵ This model is preferable where the cost of construction is not high.

¹⁶ Fakhruddin bin Abd Rahman, Head of *Waqf* Division of the Islamic Religious Council of Pulau Pinang, Interview, 18th October 2007, Pulau Pinang.

The build, operate and transfer scheme could also be applied with a combination of other instruments such as *al-iththna*¹⁷, *al-ijarah* (leasing) and *al-wakalah* (agency). This RM151 million project is considered as the first large-scale commercial development on *waqf* land in Malaysia¹⁸. The Islamic Religious Council of Federal Territory adopted this model for the construction of a 34-storey building at a 0.484-ha site on Lot 168/169, Jalan Perak, Kuala Lumpur. The council entered into an agreement with Lembaga Tabung Haji (hereinafter referred to as the LTH), whereby the council offered its land and the LTH with its own fund will develop the land. The LTH then assigns the project to its subsidiaries namely TH Technologies Sdn Bhd. to construct the building within 48 months based on based on the principles of *al-iththna* and *al-wakalah*. As a consideration of the said arrangement the LTH will enjoy the right to utilize the building and the land for a period of 25 years¹⁹. At the same time the council will receive RM56.6 million from the LTH as a rental payment for the lease of the land based on the principle of *al-ijarah*. At the end of the lease period the LTH will handover the building and the land to the council²⁰.

(b) Equity-Based Instrument

The equity-based 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. Usually, joint venture scheme between the

¹⁷ *Al-istithna* is a contract whereby a party undertakes to produce specific goods, building and services, and made according to certain agreed-upon specifications at a determined price and for a fixed date of delivery.

¹⁸ Fauzi Jaafar and Nizam Yatim. 9th June 2007. *Bangunan Tanah Wakaf – PM*. Utusan Malaysia. See also Saifulizam Mohamad. 29th May 2007. *Tabung Haji bina Menara RM151j*. Utusan Malaysia.

¹⁹ *Ibid*. Bank Islam Malaysia Berhad also agreed in advance to rent the building from the LTH.

²⁰ The *waqf* land was dedicated by Ahmad Dawjee Dadabhoy an Indian Muslim businessman. The current value of the said land is RM31.915 million and it is estimated that its value will achieve at RM300 million at the end of the 25-year lease period. He has also dedicated his other properties such as a business premise at Pertama Complex, 2 units of double storey terrace houses at Taman Melawati, 1 unit of apartment at Malayan Mansion, Jalan Masjid India, cash in the sum of 2003.28 pound sterling and shares in the amount of RM4 million. The council opened a special account for his *waqf* known as *Al-Waqfu Islamiyul A'lamee*. Mohd. Haniff Salim, Assistant Director, Development Land Unit, Development and Investment Division, the Islamic Religious Council of Federal Territory, Interview, 26th October 2007, Kuala Lumpur.

waqf institution and the financier or developer is based on the principles of *mudharabah* or *musharakah*.

Mudharabah refers to a kind of partnership made between a capital provider (*rab al-mal*) and the fund manager (*amil*), to enable the parties to carry out business projects, based on a profit sharing basis of a pre-agreed ratio. In the case of losses, the losses are borne by the provider of the funds. On the basis of a contract of *mudharabah*, the *waqf* institution offers its land for development and the developer can construct a building on the said land. After completion, the *waqf* institution can rent the building to a third party. The *waqf* institution and the developer will share the profit through rental payment.

Musyarakah refers to a partnership or joint venture, whereby the distribution of profits will be apportioned according to an agreed ratio. In the event of losses, both parties will share the losses on the basis of their equity participation. The *waqf* institution offers its land to a developer to construct a building. The price of the land and the building will be determined at the time of the contract. The price of the land and the building will be considered as jointly contributed capital and the *waqf* institution and the developer will be the joint owners. The land and building then will be rented to a third party and such rental payment will be shared between both parties.

To illustrate this point, we may refer the joint venture scheme between JKP Sdn. Bhd. one of the government link companies as a developer with the Islamic Religious Council of Pulau Pinang as capital provider to construct 36 units of houses. The council offered its *waqf* land to JKP Sdn. Bhd. and the developer constructed the said 36 units of houses. The profit from the sale transaction of those houses would be shared between the council and the developer²¹.

(c) Self-Finance Instrument

Self-finance instrument means the cash or land contributed to the cost of investment by the *waqf* institution. There are several ways where the *waqf* institution can generate its

²¹ Supra note 16.

own income to finance its investment project such as *al-ijarah*, cash *waqf* and *waqf* shares and *istibdal*.

(i) Lease or *al-Ijarah*

Al-ijarah refers to an arrangement under which the *waqf* institution leases *waqf* land to another party at a certain rate of rental as agreed by both parties. This is straightforward *al-ijarah* whereby the *waqf* institution generates income from rental payment. Another possible way of *al-ijarah* is lump sum rentals obtain through long lease (*al-hikr*)²². The developer has an exclusive right over the property for a long period by selling a right for a long lease for a large lump sum payment. The developer then can develop the *waqf* land using its own resources at its own risk. At the end of the lease tenure the *waqf* land will be handover to the *waqf* institution after the developer enjoyed an exclusive right of developing and utilizing the said land.

The Islamic Religious Council mainly practiced the straightforward *al-ijarah* rather than *al-hikr*. 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 purpose²³. The Islamic Religious Council of Federal Territory leased an apartment at Bandar Baru Sentul, Kuala Lumpur, *waqf* property which was dedicated by Sheikh Mohamad Ali Sheikh Daud²⁴. These projects generate income to the council and this money would be utilized for another social and welfare activities including financing another investment project.

(ii) Cash *Waqf* and *Waqf* Shares

A cash *waqf* is another avenue for the Islamic Religious Council to gain financial resources. A general public may dedicate a sum of money to the council and this money will be put into a special *waqf* fund. The fund can be used for a social and welfare

²² Mohamad Tahir Sabit Mohammad. *Innovative Modes of Financing: The Development of Waqf Property*. Konvensyen Wakaf Kebangsaan organized by the Department of Awqaf, Zakat and Hajj. Kuala Lumpur. 12-14 September 2006.

²³ Supra note 16.

²⁴ Mohd. Haniff Salim, Assistant Director, Development Land Unit, Development and Investment Division, the Islamic Religious Council of Federal Territory, Interview, 26th October 2007, Kuala Lumpur.

activities including investment. To encourage people to dedicate property for a charitable purpose, the government has provided a 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)²⁵. Cash *waqf* is now becoming popular mode of *waqf* not only in Malaysia but also in other countries such as Syria, Turkey, South Africa, Singapore, Pakistan and Egypt.

Another way to raise income for a purpose of funding the investment of *waqf* land is through *waqf* shares scheme. Some states have initiated a scheme of *waqf* shares. *Waqf* share is a scheme where individual or organization purchase a few units of shares with the minimum value for example of RM10.00 per unite offered by the Islamic Religious Council. *Waqf* shares in form of certificate with the necessary value will be offered to the general public. The purchased *waqf* shares will be dedicated in perpetuity for the purpose of charity and hence the purchaser will not be given any dividend or profit.

Several states such as Johor, Melaka and Selangor have already issued *waqf* shares. This is in line with the resolution of *Majma' Fiqh Islami* on 24th november 2005. The successful of this scheme can be evidenced by referring to Johor *Waqf* Shares Scheme which has been launched in 2005. It is reported that the scheme has contributed to several economic and educational developments in Johor such as 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' accommodation²⁶.

(iii) Substitution of *Waqf* Land or *Istibdal*.

The concept of *istibdal* enables the *waqf* institution to gain money to finance the investment project through substitution of less beneficial *waqf* land. Section 2 of the the Enactment defined *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

²⁵ For example, the Islamic Religious Council of Selangor has purchased 5 units of shop-houses at Bandar Bukit Puchong by using Cash *Waqf* Fund in the sum of RM1.05 million and a project of Center for Cyber and Knowledge Community at Wisma MAIS, Shah Alam in the amount of RM350,000.00 for social and commercial purposes. In <http://www.mais.gov.my>.

²⁶ Supra note 3.

principles. Substitution can be divided into two forms ie substitution of one *waqf* with a similar and the substitution of land with its cash value²⁷.

The Islamic Religious Council has an authority to deal with the matter related with *istibdal*. Section 20 of the Enactment provides that the Islamic Religious Council 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*. In practice, 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 is distributed on all sold *waqf* according to their value or dividing the purchased property on original *waqf* according to their value²⁸.

The concept of *istibdal* has already been practiced by the Islamic Religious Council of Pulau Pinang²⁹, Federal Territory, Selangor, Perak and Melaka³⁰. In Federal Territory, *waqf* of Norchaya Majid is one of the examples of *istibdal*. Norchaya Majid 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 Lumpur³¹. The rental payment of these properties will be used for maintenance of the properties and its surplus may be utilized for other purposes.

²⁷ See Monzer Kahf. 1998. *Financing the Development of Awqaf Property*. Seminar on Development of Awqaf. IRTI. Kuala Lumpur. 2-4 March 1998. Kahf defined *Istibdal* as the sale of all or part of a *waqf* land and to purchase with its proceeds another piece of land dedicated as *waqf* for similar purposes. This practice is acceptable by majority of muslims jurists such as some of Shafi'is, Malikies, and Hanbalis provided that it fulfils certain requirements. See further Al-Zarqa'. Mustafa Ahmad. 1997. *Ahkam al-Awqaf*. Amman: Dar `Ammar . p. 74.

²⁸ Mohamad Tahir Sabit Mohammad. *Innovative Modes of Financing: The Development of Waqf Property*. Konvensyen Wakaf Kebangsaan organized by the Department of Awqaf, Zakat and Hajj. Kuala Lumpur. 12-14 September 2006.

²⁹ See Isa Abdul Rahman and Anor v. Islamic Religious Council Agama Islam Pulau Pinang [1995] 10 JH 222. In this case the Islamic Religious Council of Pulau Pinang proposed to pull down the mosque and build five-storey building on the *waqf* land. The plaintiffs disagreed with the proposal and brought an action to ask for an injunction to prevent the council from pulling down the mosque. The court suggested that the question of validity of the proposal should be considered by the fatwa committee.

³⁰ Supra note 3.

³¹ Supra note 24.

(d) Islamic Securities Instrument

Securitization is a process transforming an illiquid asset into a tradable security that renders the illiquid asset the liquidity features by deployment or creation of some market mechanism. The *waqf* institution may liquidate its asset ie *waqf* land through securitization in the form of Islamic debt securities or asset-backed securities to finance its investment project. Securitization of the investment project is permissible when the *waqf* institution is ready to be in charge of the project management or jointly in charge with a third party. As to the best of the writer's knowledge, none of the Islamic Religious Council in this country has utilized the Islamic securities instrument as one of its investment portfolio. It is expected that Malaysia will introduce an Islamic capital market product of securitization of *waqf* property through *sukuk* instrument as stated in the Capital Market Master Plan issued by the Securities Commission³².

4.0 Support Infrastructure

The success of the investment of *waqf* land will become futile without having strong support infrastructures. In Malaysia, the administration of *waqf* is supported by various infrastructures and these include legal framework, the implementation of the ICT system, manual of management *waqf* land and fatwa committee. These infrastructures are of the essence to complement the investment planning and provide support to the administration of *waqf*.

(a) Legal Infrastructure

It is really important to have a clear legislative framework of the administration of *waqf* not only for a purpose of gaining confidence of the public but much more essential is to provide regulatory framework of *waqf*. Without such legislative framework, the Islamic

³² Refer to the issuance of USD390 million *Sukuk al-Intifaa* by Munshaat Real Estate Projects KSC. The King Abdul Aziz *Waqf* has leased the *waqf* land to Binladin Group to build shopping complex, four towers and a hotel. The Binladin Group in turn has leased the Zam Zam Tower project to Munshaat Real Estate Projects KSC. The Munshaat will finance the project, operate and transfer it to the Binladin Group at the end of the 28-year lease period. To raise fund for the project, the Munshaat issued USD390 million *Sukuk al-Intifaa* for 24 years. In Habib Ahmad. Ed. *The Role of Zakah and Awqaf in Poverty Alleviation*. Jeddah, Saudi Arabia: Islamic Development Bank, Islamic Research and Training Institute. p. 128.

Religious Council has no authority to deal with any *waqf* properties and it may create a lot of administrative problems. The states administration of Islamic law enactment grants a power to the Islamic Religious Council as a sole trustee to manage all *waqf* properties.

Beside that, 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* and grant power to the Islamic Religious Council as a sole trustee to administer and manage *waqf* property.

(b) The Implementation of the ICT System

With the advance of technology in the era of globalization, the *waqf* institution could utilize the ICT infrastructure to enhance its *waqf* management and investment planning. Pulau Pinang, Selangor and Federal Territories are the states that already implemented the information communication technology system in their *waqf* administration³³. 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. This system is developed by Science University of Malaysia in collaboration with the Department of Town and Country Planning. The implementation of this GIS system in *waqf* administration provides an effective management and planning. Such information system offers various benefits in term of data, record, figures and enables efficient *waqf* property's management and administration.

³³ Abdul Hamid Mariman et al. 2006. *Perlaksanaan Sistem Teknologi Maklumat Dalam Pengurusan Harta Waqf*. Konvensyen Wakaf Kebangsaan organized by the Department of Awqaf, Zakat and Hajj. Kuala Lumpur. 12-14 September 2006.

(c) **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 (hereinafter referred to as the Manual) in 2006. The issuance of the Manual is 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. The Manual comprises of three chapters. Chapter one consists of introduction, background, scope, justification, procedures, definition, concept and principles and syariah aspects of *waqf* lands. This chapter states the advantageous and benefits of *waqf* and also provides explanation on conditions, pillars, *istibdal* including provisions of *waqf* under the National Land Code 1965. Chapter two presents 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 three imparts the administration of *waqf* lands and it consists of procedures for payment of *waqf* duty, leasing, monitoring and enforcement, insurance and *istibdal*.

In general, the Manual provides very comprehensive guidelines to the wholes states in Malaysia almost in all aspects of the administration of *waqf* lands. This initiative taken by the Department of *Wakaf, Zakat and Hajj* may solve a lot of administrative problems such as procedures and substantives provisions on *waqf*. The effectiveness of this Manual however has not been proven yet since it still in the early period of its implementation³⁴.

(d) **Fatwa Committee**

The investment of *waqf* land also adheres to the roles play by the National Fatwa Committee³⁵ and the State Fatwa Committee³⁶. Any issues involved in the investment

³⁴ Supra note 3.

³⁵ Jurnal Hukum, Vol 1, 1980, Bahagian Ugama Jabatan Perdana Menteri, Kuala Lumpur, Bahagian I-II page 47-48. The National Fatwa Consultative Committee (Jawatankuasa Fatwa State Islamic Council Kebangsaan) for Islamic affairs was established in 1970 under the administration of the Secretariat of the

plan project shall be referred to the respected fatwa committee for determination. 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 and State Fatwa Committee act as the prime referral bodies in religious matters including matters pertaining *waqf*. They share one common task that is exercising reasoning in interpreting the Islamic source of jurisprudence but have different functions as to jurisdiction and position of their fatwa issuance.

The functions of the National Fatwa Committee are to determine any issue at national level and eventually issue a fatwa on any matter related with the Islamic law that being referred to by *State Islamic Council Raja-raja*. It also has a duty to unify or standardize contradicting *fatwa* in Malaysia and to advise Yang Dipertuan Agong in all matters regarding syariah principles. Meanwhile, the functions of the State Fatwa Committee are to develop the Islamic law within the jurisdiction involving Muslim only. It has to advise the Ruler in all matters of Syariah and *Mufti* will be the chief authority in Islamic law matters in that state. For instance, In Selangor, *Jawatankuasa Perunding Hukum Syarak* or *Hukum Syarak* Consultative Committee consists of *Mufti*, Deputy *Mufti*, State Legal Advisor, and Islamic Religious Department officer knowledgeable in Shariah and not less than five persons knowledgeable in Shariah.

As an illustration, we may refer to fatwa on the practice of *istibdal* on *waqf* land. The principle of *istibdal* enables *waqf* land which is not economical to be substituted or sold, the proceeds of which can be used to purchase another piece of land which is more beneficial. 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

National Council Islamic Affairs, Malaysia as provided under Article 11 Peraturan State Islamic Council Kebangsaan Hal Ehwal Agama Islam di Malaysia. It was later placed under the Administration of the Islamic Affairs division, Prime Minister's Department in 1984 subsequently under the administration of Islamic Advancement, Prime Minister's Department in 1997 until now.

³⁶ The State List of the Federal Constitution provides an exclusive jurisdiction to states to administer Islamic law including establishing a State Fatwa Committee.

land. Similarly, the Selangor State Fatwa Committee has issued the same fatwa in 2000 and 2003 on the permissibility of *istibdal*³⁷.

It is important to note that a fatwa of National Fatwa Committee and State Fatwa Committee is not binding and enforceable unless and until it is published in the state's gazette³⁸. A fatwa that is not gazzetted shall have no statutory force in law. Even though representatives of all states attend the National Fatwa Committee such states may not necessarily adopt its fatwa. The only enforceable fatwa is fatwa which has been published in the state's gazette with consent of the Ruler.

5.0 Issues and Challenges

Besides having positive development of *waqf* land, it could not be denied that there are various obstacles and challenges in the investment of *waqf* land and these include lack of financial resources, undeveloped and unproductive *waqf* land, loopholes in the legal framework, unregistered *waqf* land and *waqf* on leasehold land.

(a) Lack of Financial Resources

It is observed that some of the institution of *waqf* faced a predicament of lack of financial resources for the investment of *waqf* land. 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, 745³⁹. If there is no effort to overcome the problem of lack of financial resources, it may negate and disrupt the development of *waqf* land. Due to lack of capital and funds, large scale investment project can not be undertaken.

³⁷ The Selangor State Fatwa Committee has approved It involved two pieces of lands located at Lot 6684, Telok Gadong, Klang and GM 6303, Lot 4944, Mukim Kapar. Minutes of the Meeting of Jawatankuasa Perunding Hukum Syarak State of Selangor 2000 and 2003.

³⁸ Section 34 of the Administration of Islamic Law Federal Territories Act 1993.

³⁹ Habib Ahmad. Ed. *The Role of Zakah and Awqaf in Poverty Alleviation*. Jeddah, Saudi Arabia: Islamic Development Bank, Islamic Research and Training Institute. p. 90-91.

The Islamic Religious Council needs funding for its investment from government, statutory bodies and by seeking development financing from private sector. As the government and statutory bodies have a lot of other commitments, financing from financial institutions is the most preferable alternative for the *waqf* authority to finance its investment project. Nevertheless, seeking development capital from financial sectors may incur additional cost to the *waqf* authority as a financial institution acts as financier is surely expecting return for any of its financing project.

Considering to the above issues, the *waqf* authority may consider various financial schemes and instruments appropriate to *waqf* real estate development. For instance, joint ventures scheme in the form of *mudharabah* or *musharakah* with financial institution as well as investment expert's entity may be put into practice. Here, the Islamic Religious Council provides *waqf* land instead of cash, the financier on the other hand disburses financing money, both act as capital provider and the investment project will be managed by expert managers. The profit and loss of this project will be shared according to the predetermined ratio.

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 corporation⁴⁰. A corporation is constituted under the Companies Act 1965 (Act 125) and governed by its own Memorandum and Articles of Association. 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 problems with the existing administration would play a fraction of the numerous responsibilities and functions and therefore it may not be able give it necessary attention and focus. With this *waqf* investment arm through

⁴⁰ See Syed Khalid Rashid, *Issues Inherent In The Development Of Waqf Properties*, International Waqf Conference Southern Africa, Cape Town, 17th- 18th August 2007 organized by Islamic Development Bank, the Islamic Research and Training Institute, the Kuwait Awqaf Public Foundation and Awqaf South Africa.

the *waqf* holdings as a subsidiary of the Islamic Religious Council will certainly indoctrinate professionalism and ensure effective management of *waqf* land⁴¹.

(b) Undeveloped and Unproductive *Waqf* Land

The writer admitted that it is difficult to find a data on the developed and undeveloped *waqf* land for the whole states in Malaysia. As a general observation, it is found that there are a lot of undeveloped *waqf* lands throughout the country. As an illustration, reference will be made to the case in Johor and Perak.

Table 1: Utilisation of *Waqf* Land in Johor until March 2004

District	Mosque	Musolla	School	Cemetery	General	Total
Johor Bahru	109	240	129	40	38	556
Muar	75	244	76	77	37	509
Batu Pahat	85	185	91	88	50	499
Kluang	34	61	43	31	14	183
Segamat	56	51	38	63	14	222
Kota Tinggi	36	33	40	39	12	160
Pontian	52	95	58	51	12	268
Mersing	15	10	23	16	16	80
Total	462	919	498	405	193	2,477

The figure provides that there are 2,477 *waqf* lands being utilized which majority consist of *waqf* for religious activities namely mosque and *musolla*. It shows that even Johor owned the largest *wafq* land in Malaysia, the above figures only represent small percentage of 2,477 out of 5928 acres, the total registered *waqf* land. In fact, it is reported that 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 purposes⁴². This figure further proves that the utilization of *waqf* land in Johor is not being optimized and there are a lot of other areas of *waqf* lands have potential to be

⁴¹ The *waqf* corporate entity should be allowed to perform certain contracts and legal actions relating to asset investment and to income and usufruct distribution. It should not be allowed to perform other contracts and legal actions that infringe on the principles of perpetuity, continuous growth and accumulation of *waqf* properties. See Monzer Kahf. *Fiqhi Issues in the Revival of Awqaf*, The Harvard Forum on Islamic Finance and Economics, 1 October 1999, Harvard University.

⁴² *Supra* note 39. pp. 90-91.

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 undeveloped⁴³.

One of the main reasons of undeveloped *waqf* land is due to its locality whereby a lot of *waqf* lands are located at rural area, scattered and lack of potential to be developed. These features cause *waqf* land undeveloped, under utilized and there were cases where *waqf* properties which have been trespassed due to weak monitoring and enforcement by the authorities⁴⁴. A way to solve this problem is to revive unproductive *waqf* land by optimizing the concept of *Istibdal*. Undeniably, there are states that have already implemented the practice of *istibdal* such as Pulau Pinang, Federal Territories, Selangor, Perak and Melaka, it is observed however that the application of *istibdal* is not being optimized by the *waqf* authority. For this reason, there must be continuous efforts in doing research and identifying potential *waqf* lands to be substituted with another valuable and beneficial piece of lands⁴⁵.

The above issues further prove that the desirability to establish a *waqf* development corporation for managing *waqf* properties. Such corporate entity with clear objectives will deal more effectively with technical matters like market study, quality surveying, project supervision, financial arrangement and etc. In addition, the *waqf* authority also needs to apply efficient corporate governance and to conduct standard auditing to all matter pertaining to the administration of *waqf*.

(c) Loopholes in the Legal Framework

Amongst the issues that concern the effective administration of *waqf* are related to law and regulations. From Malaysian legal perspective, *waqf* administration is regulated

⁴³ Salleh Buang. *Managing Wakaf Land* in <http://www.nst.com.my/Weekly/PropertyTimes/>.

⁴⁴ Nik Mohd Zin Nik Mohd Yusof and Azimuddin Bahari. *Kedudukan dan Potensi Pembangunan Harta Waqf di Malaysia: Satu Penilaian*. In Nik Mustapha Nik Hassan (ed.). *Konsep dan Perlaksanaan Harta Waqf di Malaysia*. Kuala Lumpur: Institut Kefahaman Islam Malaysia.

⁴⁵ Supra note 3.

through various states law or enactment as *waqf* matter falls under the purview of Islamic law as embedded in Schedule 9 List II of the Federal Constitution. As law on *waqf* is governed by different states law, such position may cause different interpretation, procedural of promulgating fatwa or legal rulings. In fact, 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. These enactments provide comprehensive and systematic legislative powers to State Islamic Council in managing *waqf* land and absence of such enactment may lead to ambiguity of the states *waqf* administration. Another aspect to be taken into consideration is that to enhance and improve the procedural law on *waqf*⁴⁶. There are a lot of administrative problems raised by the existing procedures such as improper forms and etc.

With the existing legal framework, there is still a need to have further appropriate legal and regulatory structure for *waqf* institutions. The new or amended laws and regulations shall facilitate efficient management of *waqf* through strengthening the corporate governance, substantive provision, procedural matters and enforcement framework. Therefore, the law making body needs to immediately enact the relevant laws for a purpose of better and clear legal position on *waqf*. It is even better in the context of Malaysia to have a single legislation on the administration of *waqf* for the whole states in Malaysia.

(d) Unregistered *Waqf* Land

Another observation is that the Islamic Religious Council as *waqf* administrator faced problem in the registration of *waqf* land title and therefore it could not be identified and registered. In order to preserve *waqf* property in accordance with the law, all *waqf* lands should be registered in the name of the Islamic Religious Council. Without the land title, it is hard to the Islamic Religious Council to develop *waqf* land. In fact, regardless of information system that implemented by some states, it is found that the Islamic

⁴⁶ Megat Mohd Razali Megat Abd Rahman et al. *Pembangunan Tanah Waqf: Isu, Prospek dan Strategi*. Konvensyen Wakaf Kebangsaan organized by the Department of Awqaf, Zakat and Hajj. Kuala Lumpur. 12-14 September 2006.

Religious Council does not have comprehensive and reliable data on *waqf* land which cause some of unregistered *waqf* lands undeveloped. The problem of unregistered *waqf* land could be settled with the implementation of the GIS system in *waqf* administration. This sophisticated computerized system provides an effective management in term of data, record, location, figures and etc.

(e) *Waqf* on Leasehold Land and Property Classified as National Heritage.

In the context of Malaysia, generally land can be classified into freehold and leasehold (lease for 99 years). There is no issue on the freehold type of land but 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, *waqf* Haji Musa Ibrahim at Lorong Keramat Hujung, Kampung Datuk Keramat, 6th March 2075 and *waqf* UDA Holdings Sdn. Bhd. at Lot 81, Bangsar Utama, 3rd December 2085. Beside that, the *waqf* authority is also facing a problem to develop *waqf* property which is classified as national heritage. This type of property will be put under the auspices of the local authority and the museum's department.

Based on the above issues, the Islamic Religious Council can not simply implement any investment plan without taking into consideration of these factors especially if it involves long-term investment. Even though the state authority may grant freehold title to leasehold land on application but there is no specific provision mentioning the power to do so in the case of *waqf* land. Therefore, it is recommended to amend section 76(aa) of the National Land Code 1965 to insert new clause of section 76(aa)(iv) in order to give power to the state authority to grant freehold title to any leasehold land that be dedicated as *waqf*⁴⁷.

⁴⁷ Siti Mashitoh Mahamood, *Perundangan Wakaf dan Isu Berbangkit*, Konvensyen Wakaf Kebangsaan 2006 organised by Jabatan Wakaf, Zakat dan Haji, Jabatan Perdana Menteri, The Legend Hotel, Kuala Lumpur, 12-14 September 2006.

6.0 Concluding Remarks

As a conclusion therefore, it is concluded that the existing frameworks and approaches taken by the *waqf* institution contributed positively to the investment and development of *waqf* land in Malaysia. This positive development is undeniably supported by various infrastructures such as the legal framework, the implementation of the ICT system, the manual of management *waqf* land and the fatwa committee.

In term of administration, *waqf* affairs are the responsibility of the Islamic Religious Council of each state and coordinated and observed by the Department for *Wakaf, Zakat, and Hajj*. From the investment aspect, the *waqf* institution has adopted various instruments such as debt-based instrument, equity-based instruments, self-finance instrument and Islamic securities instruments. In practice, the *waqf* institution only executed the most viable and profitable methods of financial schemes for its investment project.

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. It is a responsibility of the *waqf* institution and any party related with *waqf* administration to overcome the said problems and to provide remedies to the existing predicaments.

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